NO. 65, Original

IN THE

Supreme Court of the United States

October Term, 1974

THE STATE OF TEXAS, *PLAINTIFF*

V.

THE STATE OF NEW MEXICO, *DEFENDANT*

BRIEF OF THE STATE OF NEW MEXICO IN OPPOSITION TO THE MOTION OF THE STATE OF TEXAS FOR LEAVE TO FILE COMPLAINT

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SUBJECT INDEX

CASES CITED

STATUTES AND COMPACTS CITED

MISCELLANEOUS

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STATEMENT OF THE CASE AND ISSUES

By letter of June 26, 1974, counsel for the State of Texas submitted to the Clerk of this Court the State of Texas' Motion for Leave to File Complaint against the State of New Mexico, with a proposed Complaint and a Brief in Support of Motion attached. Service of these documents was made upon the State of New Mexico on or about July 1, 1974.

The proposed Complaint of the State of Texas asserts that the State of New Mexico has, over a period of years extending from 1950 through 1972, violated her duties and obligations under the Pecos River Compact and thereby injured the State of Texas and her citizens. The relief prayed for is a decree of the Court commanding the State of New Mexico "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 for such other relief as may be appropriate.

The purpose of this Brief in Opposition to the Motion of the State of Texas is to express New Mexico's belief 1) that the proposed Complaint of the State of Texas does not set forth a justiciable case or controversy, and 2) that the relief sought by Texas cannot be granted or effectuated in the absence of the United States of America, an indispensable party. For these reasons, the Motion for Leave should be denied.

REVIEW OF THE PECOS RIVER COMPACT AND ITS ADMINISTRATIVE HISTORY

Because the proposed Complaint alleges a violation of the Pecos River Compact on the part of New Mexico, it is necessary to review the obligations imposed by that interstate agreement and to recite in some detail the administrative history that has grown out of Pecos River Commission actions since the Compact's approval by Congress in 1949 (63 Stat. 159).

The Pecos River is the principal tributary of the Rio Grande in the United States. It rises in the Sangre de Cristo Mountains in north central New Mexico and flows southwesterly some nine hundred miles to join the Rio Grande. It drains approximately 25,000 square miles in New Mexico and 19,000 square miles in Texas. Most of its drainage basin is semi-arid and its surface and underground waters are extensively used in irrigated agriculture.

The Pecos River Compact was negotiated by representatives of Texas and New Mexico over a period of years, concluding in 1948. Its critical operative provision governing the interstate allocation of the River's water is found in Article III, subparagraph (a), which is as follows:

> "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."

The Compact creates an interstate administrative agency known as the Pecos River Commission, composed of one commissioner representing each of the States, and makes provision for a commissioner representing the United States. One of the specified powers of this Commission is, as stated in Article V(d), to:

> "5. Make findings as to any change in depletion by man's activities in New Mexico, ..."

Article VI of the Compact, sub-paragraph (a), states that one of the principles that shall govern in regard to the apportionment made by Article III (a) is

> "The Report of the Engineering Advisory Committee,[1] supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations."

Article VI, sub-paragraph (c) provides that

> "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, . . ."

will be used, among other purposes, to

> "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."

The Article III (a) term, "1947 condition," is defined in Article II, sub-paragraph (g) as meaning

> "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory

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1. The Report of the Engineering Advisory Committee, to which the Compact refers, contains the factual assumptions and engineering procedures used in the Compact negotiations. The entire Report is contained in Senate Document 109, 81st Congress, 1st Session, 1949.

> Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decision shall be based on, such report."

The Pecos River Compact is unique in that it does not allocate fixed amounts or percentages of a measured flow of water.[2] The Pecos River Compact makes its apportionment by limiting man-made depletions at the New Mexico-Texas state line to an amount equivalent to the depletions caused by man's activities under the 1947 condition as described in the Report of the Engineering Advisory Committee. The Compact provides, as noted above, that the inflow-outflow method will be employed by the Pecos River Commission in its administrative determinations, and it is clear that the Compact contemplates and requires a very extensive body of hydrologic data, and an elaborate and sophisticated system of engineering methods in order to complete and use correlation curves for the reaches of the River in New Mexico to make a determination whether New Mexico's deliveries depart from those curves. It must then be determined whether any net departure is chargeable to New Mexico under the Compact, i.e., whether the increased depletion, if any, is due to man's activities.

Senate Document 109 contains certain essential interpretations of Compact provisions, in the form of explanations by Mr. Royce J. Tipton, the Engineering Advisor to the federal representative during Compact negotiations. It is clear from the record of the Compact negotiation that the Compact was approved, article by article, "as explained" by Mr. Tipton. (Senate Document 109, p. 111, et seq.).

Mr. Tipton's explanation of the term "1947 condition," at pages 113 and 114, Senate Document 109, illustrates the technical complexity of the allocation formula of Article III, subparagraph (a). In explanation of the Compact definition of the "1947 condition," Mr. Tipton said:

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2. See pages 11 and 12, Interstate Water Compacts, National Water Commission Legal Study Fourteen, Jerome C. Muys.

> "I don't believe much explanation is needed of item '(g)'. [Article II]. I will give a short one in order that there shall not be confusion. "1947 condition" relates to a condition on the stream and does not relate to the water supply that occurred in the year 1947. There may be some confusion about that. There were certain conditions that existed on the river, such as the diversion requirements of the Carlsbad project, which the engineering advisory committee assumed; the salt cedar consumption; the reservoir capacities that existed in 1947; the operation of the Fort Sumner project up to 6,500 acres; and the operation of all other projects on the stream as they actually existed in 1947. It must be understood that the term "1947 condition" relates to the condition described in the report *and does not relate to the water supply that occurred in the year 1947. . . .*" [Emphasis added]

Unfortunately, it has been clear since the earliest days of Compact administration, and acknowledged by both States, that a significant number of the factual assumptions and engineering procedures set forth in the Report of the Engineering Advisors are erroneous or incomplete. Indeed, it is clearly established in the language of the Compact itself, (e.g., Article VI, sub-paragraph (a)) and the interpretive statements of Mr. Tipton in Senate Document 109, that the Compact contemplates a continuous process of Commission action to discover and adopt correcting and perfecting amendments and supplements to the body of basic data reported by the Engineering Advisors.

The Engineering Advisors to the Compact negotiators transmitted a "Manual of Inflow-Outflow Methods of Measuring Changes in Streamflow Depletion" which expresses the engineering techniques recommended for use in Compact administration for so long as the Compact Commission might wish to employ the inflow-outflow method of administration. This Manual contained inflow-outflow correlation curves for some, but not all, River reaches in New Mexico.

The letter of transmittal from Mr. Tipton, the chairman of

the Engineering Committee, to the Commission, at page 147 of Senate Document 109, states that the Manual

> *"has been prepared at the direction of the commission to assist the administrative body created by the Pecos River Compact in commencing the administration of the compact. It will be noted in the text of the manual that it is suggested that as additional basic data become available, the technique described in the manual may gradually become more effective."* [Emphasis added]

At page 117, Senate Document 109, Mr. Tipton further clarifies this important point:

> "In my opinion, it would be very unwise for the commission to have set out in this compact what might be called a schedule. It would have been unwise for several reasons. The commission may devise, as time goes on, a better means to determine this than by the inflow-outflow method. It may perfect more nearly the curves which appear in the engineering advisory committee report. . . . *The way the Pecos compact is written the commission has full authority to change the method or to perfect the technique, so long as what is done by the commission is something directed at the determination of the obligation under (a).*" [Emphasis added]

ARGUMENT

POINT I.

THE PROPOSED COMPLAINT IS NOT JUSTICIABLE

A. THE MOTION OF THE STATE OF TEXAS FOR LEAVE TO FILE COMPLAINT IS PREMATURE AND DOES NOT PRESENT AN ACTUAL EXISTING CASE OR CONTROVERSY.

As will be documented below, the Pecos River Commission, with the full concurrence of both States, has already undertaken

and partially completed a review of the basic data in Senate Document 109, and has formally adopted a substantial number of specific supplements and amendments. The State of New Mexico respectfully submits that the Pecos River Compact makes the completion of this process of supplement and correction of basic data a legal and practical prerequisite to any determination whether New Mexico's deliveries have departed from indicated deliveries, which determination is indispensable in turn to any possible finding of violation of Article III (a) of the Compact. The exclusive workable means to make the administrative determination necessary before the Compact Commission (or the Court) can decide the question whether the State of New Mexico has or has not complied with Article III (a) is thus contained in the Compact.

It is indisputable that, although a review of the basic data has been underway at least since 1957, and although a partial modification of the basic data has been approved and adopted by the Commission, the work necessary to complete the review contemplated and required by the Compact is not yet finished. It is also clear that the failure of the Commission to finish the same is not due in any manner to the negligence, failure, or noncoöperation of the State of New Mexico and its representatives.

The proposed Complaint of the State of Texas acknowledges in paragraph VI, at page 5, that the Compact Commission has accumulated such data over a period of more than 20 years and has conducted studies for the purpose of revising the basic data. This acknowledgement recognizes the continuing understanding on the part of the Compact commissioners of both States, over the same period of more than 20 years, that the completion of this task of revising basic data was, and is, an essential preliminary to administrative determinations of Compact deliveries. Because this Compact uniquely requires extensive and sophisticated engineering procedures before adminstrative determinations of New Mexico's deliveries can be made, *the Compact contains its own administrative solution to the problem posed*

by the proposed Complaint of the State of Texas. Texas, while recognizing the process underway leading toward the completion of the review of basic data and the perfecting of the engineering methods by which they are used, is now asking the Court to take jurisdiction of this case on the strength of the absolutely unsupported allegation that New Mexico has violated the Compact. It is a simple matter of undisputed Compact history that the Commission has never found, and has never even been asked to find, that it has before it the data and engineering reports necessary to support a conclusion that New Mexico is in violation of the Compact.

The decisions of the Court are clear on its refusal to entertain premature requests for relief. It has often held non-justiciable proposed Complaints found to be seeking "declaratory judgments," *Texas v. Interstate Commerce Commission,* 258 U.S. 158, 162; *Liberty Warehouse Co. v. Grannis,* 273 U.S. 70, 74; *Willing v. Chicago Auditorium Assn.,* 277 U.S. 274, 289-90; or presenting "abstract questions", *New Jersey v. Sargent,* 269 U.S. 328; *New York v. Illinois,* 274 U.S. 488.

New Mexico does not assert the need to complete the review of basic data and the inflow-outflow manual out of a pedantic desire to spend the time of both States' Engineering Advisors in abstruse technical details. These tasks are absolutely essential to the method of administration agreed upon by the negotiators of both States and they form, therefore, an important element in the interstate bargain made by the States. This bargain was predicated upon a continuing, searching and technically expert reappraisal of data and techniques by both States,[3] and a careful application of the results to the deliveries at the state line and upstream in order to determine whether possible departures might be due to man's activities or to natural causes. Texas now believes that it can obtain the benefits of this bargain without

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3. Senate Document 109, p. 150 (last paragraph).

enduring its burdens. It professes to desire a judicial review of New Mexico's Compact performance, but by its delays and noncoöperation, and most recently by its purported "repudiation"[4] of the Compact's administrative history, it has made an administrative determination impossible at this time. It is submitted that the State of Texas is now really seeking a means to "repudiate" those parts of the Compact it finds burdensome or disadvantageous, under the guise of Compact enforcement.

The Compact contains unique and time-consuming procedures for determination of New Mexico's Compact performance. Surely the State of Texas cannot be permitted, after twenty-five years of Compact history, to renounce that history and induce the Court to substitute its judgment for that of the Compact Commission.

B. THE STATE OF TEXAS HAS ACKNOWLEDGED THAT THE PROCESS OF ENGINEERING REVIEW AND REVISION IS THE EXCLUSIVE MEANS OF PROCEEDING TO A COMPACT DETERMINATION OF NEW MEXICO'S PERFORMANCE AND THE PROPOSED COMPLAINT IS NON-JUSTICIABLE BECAUSE THE COMMISSION'S PRIOR ACTIONS CONSTITUTE AN ADMINISTRATIVE INTERPRETATION OF THE COMPACT INCONSISTENT WITH TEXAS' CLAIM.

As will be shown, the State of Texas fully joined in the official Pecos River Commission action mandating the completion of the engineering review and analysis now underway. It

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4. See p. 19, *infra*.

also joined in the adoption and approval of a partial report of the Engineering Advisors including many specific amendments to the basic data and engineering methods.

As indicated in the minutes of the second meeting of the Pecos River Commission on December 9 and 10, 1949, the Commission adopted a program to

> "Study and investigate the items recommended in the inflow-outflow manual directed toward a more accurate determination of inflow-outflow relationships"

and to

> "Determine more accurately the '1947 Condition' as defined in the Compact."

At the Compact Commission meeting of July 29, 1957, the Commission unanimously resolved to create a special subcommittee

> "to restudy under the 1947 conditions the inflow-outflow relationships for the reach of the river above Alamogordo Dam and the reach of the river from Alamogordo Dam to the New Mexico–Texas State line. *The purpose of the restudy is to determine whether the relationship depicted by the curves appearing in pages 153 and 154 of Senate Document 109, 81st Congress, 1st Session should be modified."* [Emphasis added]

The Commission also instructed that

> "The last draft of the Inflow-Outflow Manual be reviewed by the Subcommittee. . . and, if necessary, the subcommittee make recommendations for additional revisions which may be disclosed necessary by its work." (Minutes, July 29, 1957, p. 174).

These assignments constitute an express statement by the Compact Commission of its need to have such work completed before it could proceed to make the administrative determinations contemplated by the Compact. It should be noted that

the Commission received and accepted the opinion of its legal committee that it had the authority

> "to correct any mistakes in the inflow-outflow computations and criteria" in Senate Document 109. (Minutes, July 29, 1957, p. 173).

The special sub-committee created by the July 29, 1957 Compact Commission action was created with representation from both States and participation of an engineer consultant retained by the Commission. It was known as the "Inflow-Outflow Subcommittee." It undertook forthwith work necessary to perform the tasks assigned by the Commission. At the Commission meeting of February 14, 1958, by unanimous action, a contract was authorized with Mr. Royce Tipton's firm of engineering consultants for a study forming a part of the review of basic data and engineering methods assigned to the inflow-outflow subcommittee by the 1957 Commission action.

At its meeting of October 27, 1960, the Commission, after receiving a report of the progress of the inflow-outflow subcommittee, further instructed the sub-committee to make studies to develop inflow-outflow correlation curves, to revise the inflow-outflow manual, and to compute departures, if any, at the state line from the state line deliveries indicated by the curves. The obvious purpose of these further instructions was to make it possible for the Commission to determine if there were departures at the state line, and if so, to make an analysis thereof as a prerequisite to determining whether New Mexico's deliveries complied with the Compact.

At the next Commission meeting, on January 31, 1961, the Commission unanimously adopted the report of its Engineering Advisory Committee, including its recommendations, and certain appendices to that report. One of these appendices contains a letter of September 12, 1958 from Mr. Royce J. Tipton, reporting on the above-mentioned study he had contracted to

perform as a part of the assignment to the inflow-outflow sub-committee. The concluding paragraph of his letter is as follows:

> "It is obvious that revisions should be made in the basic inflow-outflow relationships presented in the 1948 Inflow-Outflow Manual to reflect where indicated more accurate determinations of 1947 conditions, ..."

The report of the Engineering Advisory Committee adopted at this meeting contained the sub-committee's first and partial report in response to its 1957 assignment. *It contained many specific revisions and amendments to data, assumptions, and methods contained in Senate Document 109.* The resolution of the Commission adopting the report described these changes as

> "amendments, refinements and additions to the basic data of the Commission. . . considered as such in all actions and findings of the Commission, and as representing the present best information on the subjects covered thereby." (Minutes, January 31, 1961, p. 247).

This Commission action formally approving necessary revisions in Senate Document 109 modified the inflow-outflow correlation curve for the reach of the River between Alamogordo Dam and the state line as set out in Senate Document 109. *The State of Texas through its Compact commissioner fully concurred in this Commission action.* The inflow-outflow sub-committee report adopted by the Commission in its 1961 meeting did not purport to be a complete and final response to the 1957 assignment, but rather constituted a first stage report limited to the necessary revisions in Senate Document 109 data and procedures related to the reach between Alamogordo Dam and the state line.

Pursuant to its 1961 action adopting the first stage report of the inflow-outflow sub-committee, the Commission at its next meeting, November 9, 1962, adopted the following formal findings of fact, for the period 1950 through 1961, limited to the reach of the river between Alamogordo Dam and the state

line: 1) that there was an aggregate negative departure at the state line of 53,300 acre-feet; 2) that 48,000 acre-feet of this negative departure was not chargeable to New Mexico under the Compact as a result of man's activities. The Commission made no determination whether the remaining 5,300 acre-feet of aggregate negative departure for the period 1950 through 1961 was or was not chargeable under the Compact as a result of man's activities, and no such finding could have been made until curves and procedures for the reaches of the River above Alamogordo Dam had been adopted.

New Mexico submits that it is particularly significant, in light of the allegations contained in the proposed Complaint, that the State of Texas, on November 9, 1962, fully concurred in a formal Compact Commission Finding that the entire amount of the aggregate negative departure at the state line *potentially* chargeable to New Mexico for the years 1950 through 1961 was only the minute figure of 5,300 acre-feet, and that Texas made no effort at that time to seek a Commission determination that even this very small quantity constituted a violation of the Compact. (Minutes, November 9, 1962, pp. 256–258).

The continued failure of the inflow-outflow sub-committee to complete the 1957 assignment during the period 1963–1969 was due to the failure of Texas' representatives to participate effectively in the remaining work throughout that period.

At the Compact Commission meeting of February 10, 1972, the Commission *once again* unanimously assigned to the inflow-outflow sub-committee the duty of completing the review of basic data and the inflow-outflow manual, and of making a reach-by-reach analysis of any departure that might be shown in the final report of the inflow-outflow sub-committee so as to determine its cause.

In all of the official Commission actions recited above, the State of Texas repeatedly acknowledged, over a period extending from 1949 through 1972, the necessity of completing the

review of basic data and revision of engineering procedures necessary to make possible a definitive administrative finding in respect to New Mexico's deliveries under the Compact. This is unmistakably clear both in the 1957 assignment, and in the 1961 Commission action formally adopting a first stage of the sub-committee report containing a substantial number of modifications in the basic data and engineering procedures contained in Senate Document 109. Furthermore, the explicit Commission findings of 1962, in reliance on its earlier adoption of the partial report of the inflow-outflow sub-committee, not only recognize the necessity for such revisions, but also contradict the claim of the State of Texas in its proposed Complaint that the State of New Mexico has been in violation of the Pecos River Compact from 1950 through 1972.

Although the proposed Complaint gives the Court no hint of the theory of Texas' claim, New Mexico has been exposed in recent years to a series of increasingly threatening statements by Texas' representatives at annual Compact Commission meetings, and these statements have set forth the "new" post-1969 Texas position in some detail. Probably the most explicit of these statements was presented by the Texas Compact Commissioner at the February 21, 1974 meeting. (Draft Minutes, February 21, 1974).

New Mexico believes that the Texas Commissioner's statement attests so fully to the history of unanimous Commission actions to which New Mexico has invited the Court's attention, and illustrates so clearly the opportunism of Texas' "repudiation" of that history, that it is appropriate to lay the statement before the Court in full, as Appendix D attached.

The Texas Commissioner's statement acknowledges without reservation every one of the official Commission actions on which New Mexico has relied in arguing that Texas has bound itself to the completion of the administrative procedures required by the Compact and prior Commission actions before a determination of New Mexico's performance can be made; the Texas Commissioner's statement also confirms New Mexico's

contention that the "new" Texas position is based on nothing more substantial than a distaste for the results of the review of basic data. New Mexico submits that it is instructive to note that the Texas Commissioner's statement, for all its special pleading, does not even suggest that New Mexico has done anything more blameworthy than to persevere in the same course of action that both States made their official policy many years ago. Indeed, the Texas Commissioner removes any possible doubt that the Texas "repudiation" is simply an attempt to renounce the long list of Commission actions inconsistent with the claim that New Mexico has violated the Compact, in order to substitute a "Texas computation" based on a tendentious use of discredited data. New Mexico submits that the Texas Commissioner's attached statement demonstrates that Texas is seeking to use the Court not to enforce but rather to rewrite the Compact.

The State of New Mexico is unable to comprehend how the State of Texas, in logic, law or equity, could join in the tedious Commission efforts that produced the 1962 findings that the entire adjusted state line departure from 1950 through 1961 totaled only 5,300 acre-feet (for which departure New Mexico was not held chargeable under the Compact); neglect or frustrate further Commission findings for later years; and then lay before the Court a completely gratuitous and undocumented charge that New Mexico has violated the Compact since 1950 in the amount of 1,200,000 acre-feet. It would seem that Texas has decided to repudiate not only Compact history but also some of the principles of interstate comity that govern the relations of sister states.

The principle that a state may not repudiate its formal agreements with a sister state was given its classic expression in the separate concurring opinion of Mr. Justice Jackson in *Dyer v. Sims,* 341 U.S. 22 (1951):

> "Estoppel is not often to be invoked against a government. But West Virginia assumed a contractual obligation with equals by permission of another government that is

> sovereign in the field. After Congress and sister states have been induced to alter their positions and bind themselves to terms of a covenant, West Virginia should be estopped from repudiating her act."

The State of New Mexico contends that the only permissible and practicable means, consistent with established Commission practice, of enabling the Commission to make a determination as to New Mexico's performance, was and is to complete the 1957 assignment. New Mexico has demonstrated its willingness to coöperate fully in the prompt completion of that work. (Minutes, January 28, 1971, p. 398 and July 21, 1970, p.371). New Mexico contends that Texas is bound by prior Commission actions making the 1957 assignment, adopting a first report in response to that assignment (1961), making findings for the 1950 through 1961 period in the state line reach of the River (1962), and reaffirming the need to complete the 1957 assignment (1969 and 1972), and that the present Texas claims are inconsistent with the administrative interpretation of the Compact established by these actions.

New Mexico also contends that Texas' present claims are non-justiciable because of its failure to exhaust the administrative procedure provided by the Compact.

C. THE STATE OF TEXAS HAS FRUSTRATED THE MAKING OF COMPACT DETERMINATIONS AND IS EQUITABLY ESTOPPED, AND BARRED BY LACHES, TO ASSERT THAT NEW MEXICO IS IN VIOLATION OF THE COMPACT.

The Texas Compact Commissioner has repeatedly joined in Commission actions acknowledging the need to complete the review of basic data. However, the record of the administrative history of the Compact establishes that official representatives of the State of Texas, through inaction over many years, and

more recently through the attempted "repudiation" by the Texas commissioner of prior Commission actions, have frustrated the completion of that review and the making of the Findings required by the Compact.

One of many possible illustrations of this pattern of non-coöperation was the failure of Texas to respond to New Mexico's transmittal of preliminary computations relating to departures for the years 1962-1968.

At the meeting of January 28, 1969, the Commission accepted a report of the Engineering Advisory Committee advising that the Committee had renewed the instruction to the inflow-outflow sub-committee to complete the 1957 assignment. (Minutes, January 23, 1969, pp. 341-3).

By letter of August 21, 1969, the Texas member on the inflow-outflow sub-committee advised that he was deferring action or recommendations on the proposed inflow-outflow manual (transmitted July 17, 1969 by New Mexico to Texas) until he had reviewed a proposed Bureau of Reclamation project report.

By letter of October 23, 1969, the Texas engineering representative stated that the Texas commissioner had requested legal and engineering studies on New Mexico's deliveries using Senate Document 109 *in its original form,* and comparing the results of those computations with results derived from the use of the Report on Review of Basic Data previously adopted by the Commission.

On November 17, 1969, New Mexico transmitted to Texas computations of inflows and outflows between Alamogordo and the state line for the period 1962-1968. (Minutes, July 21, 1970, p. 369). Texas's review and acceptance of these computations is essential before the Commission can make formal findings of departures, if any, for the period 1962-1968. However, Texas has never responded to this transmittal and consequently the Commission has never made such findings for the years 1962-1968.

The minutes of the meeting of January 29, 1970 document the fact that New Mexico's representatives had transmitted their draft inflow-outflow manual to Texas representatives for review. At a special Commission meeting of July 21, 1970, the Texas Engineering Advisor announced that the Texas representatives had spent about 500 man-days performing computations based exclusively on Senate Document 109 in its original form. At the same meeting, the Texas commissioner read a letter charging that the State of New Mexico's deliveries were "delinquent" in the amount of 1,100,000 acre-feet.

The 1969 letters and the 1970 statement of the Texas commissioner represent a radical departure in Texas' position in regard to Compact administration. Through 1969, Texas representatives, while notably failing to carry their share of the burden of completing the 1957 assignment to the inflow-outflow sub-committee, had always officially recognized the imperative to complete that assignment. As noted above, Texas had even joined in the 1961 Commission action modifying Senate Document 109 in a great number of particulars.

On February 10, 1972, the Commission unanimously gave instructions to the Engineering Advisors to make administrative computations under the Report on Review of Basic Data as approved in 1961, and for this purpose to use the draft inflow-outflow manual. The Commission also instructed the Engineering Advisors to review and update a report that had been made in January, 1971 at Texas' request, using only Senate Document 109 in its original form and noting disagreements between the respective States' Engineering Advisors.[5] The committee was also instructed to complete the review of basic data and the inflow-outflow manual (that is, to complete the 1957 assignment), and to make a reach-by-reach analysis of the River in New Mexico to determine the cause of any departures from the 1947 condition. (Minutes, February 10, 1972, p. 413).

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5. The Commission's 1970 resolution giving this instruction provided that the instruction was without prejudice to the validity of prior Commission actions. (Minutes July 21, 1970, p. 361).

At the February 8, 1973 Commission meeting, the Commission received a report of the inflow-outflow sub-committee describing the status of the work allotted to the representatives of both states. The Commission then reaffirmed its instruction of the previous year to the Engineering Advisors. (Minutes, February 8, 1973, p. 432).

After September, 1972, the State of Texas had no member on, and took no initiative in, the inflow-outflow sub-committee. At the February 21, 1974 Commission meeting, the Texas commissioner formally announced his "repudiation of the review of basic data" and stated that Texas was repudiating its prior agreements and actions because, in his opinion, the review of basic data had "operated to deprive Texas of water." (Draft Minutes, February 1, 1974, p. 472).

It is clear from the record recited above that, commencing in the latter portion of 1969, Texas' representatives, as a result of dissatisfaction with the already-accepted first stage report, and the draft reports of the sub-committee, or because of other reasons unknown to the State of New Mexico, began to espouse and act upon a theory of Compact administration clearly inconsistent with the entire previous administrative history of the Commission.

Notwithstanding the fact that the Commission had, as noted above, obtained the unanimous favorable opinion of its legal committee before adopting and approving the partial report of the inflow-outflow sub-committee in 1961, an official opinion of the Attorney General of Texas was requested on the same question in 1969. Under date of December 5, 1969, the Attorney General of Texas issued an Opinion (No. M-535) addressed to the Executive Director of the Texas Water Rights Commission. The first question asked was:

> "Did the Pecos River Commission in adopting the Report on Review of Basic Data to Engineering Advisory Committee, dated October 18, 1960, act within its prescribed powers?"

The "Summary" appearing on the last two pages of the Opinion contains the Attorney General's answer:

> *"The Pecos River Commission had the authority to authorize and adopt the Report on Review of Basic Data to Engineering Advisory Commission [sic] dated October 18, 1960; however, it was incomplete and should be concluded."* [Emphasis added]

Thus, the highest legal officer of the State of Texas has unequivocally confirmed the past and present view of the State of New Mexico, which was also the view of the State of Texas throughout most of the Commission's history, that the assignment to complete the Review of Basic Data was lawful and that the Commission should see to its completion.

Notwithstanding the Opinion of the Texas Attorney General in 1969, the Texas commissioner attempted in 1974 to "repudiate" all of Texas' previous agreements and all of the Commission's previous actions regarding the Review of Basic Data, and the State of Texas is now seeking judicial review in this Court on the naked allegation that New Mexico has violated the Compact. Presumably, Texas' claim arises out of its unilateral determination of New Mexico's performance entirely on its own interpretation of Senate Document 109 *in its original form.* New Mexico submits that Texas cannot be allowed to profit from its own failures and inactions in respect to the completion of the review of basic data by obtaining the judicial review sought by the pending Motion. New Mexico also submits that it would be inequitable in the extreme to allow Texas to repudiate its solemn agreements of the past in order to prosecute its unsubstantiated claims in the Court at this time.

The Court has recognized that laches may be raised as a bar against a state's claim in an original action involving interstate waters. In *Washington v. Oregon,* 297 U.S. 517 (1936), a suit for equitable apportionment of the Walla Walla River, the Court barred certain claims of the State of Washington by reason of laches and abandonment.

In *Colorado v. Kansas,* 320 U.S. 383 (1943), the Court, rejecting Kansas' counterclaim, said:

> "Even if Kansas' claims of increased depletion and ensuing damage are taken at face value, *it is nevertheless evident that while improvements based upon irrigation went forward in Colorado for twenty-one years, Kansas took no action* until Colorado filed the instant Complaint in 1928.
>
> *"These facts might well preclude the award of the relief Kansas asks. But, in any event, they gravely add to the burden she would otherwise bear,* and must be weighed in estimating the equities of the case." [Emphasis added]

This application of laches to bar a tardy claim, or at least "gravely add to the burden" to be borne by a State seeking such relief in an original action, should control, *a fortiori,* the disposition of the pending Motion. Here, the Pecos River Compact, in effect since 1949, defines Texas' rights in the contested interstate stream. Texas, having failed to bring suit to enforce the Compact between 1949 and 1974, now claims, without any explanation for its delay, that New Mexico has been in continuous violation of the Compact since 1950.

Because of the wide-spread acceptance of an interstate compact as a form of contract between quasi-sovereigns, it should not be necessary to argue at length the proposition that the conventional rules of law applying to interpretation and enforcement of contracts, including the various doctrines of estoppel, apply to interstate compacts. The basic contractual nature of an interstate compact is well described by Wendell and Zimmermann, at page 32 of their respected work, "The Interstate Compact Since 1925":

> "Nevertheless it is submitted that interstate compacts are classified properly as contracts. Indeed, were it not for the classic usages of international law and for the rights of sovereign nations as distinguished from those applied to private individuals, it might even be appropriate to consider treaties as contracts. Both are agreements between two or more legally recognizable parties. Moreover, in both, consideration is to be found, by way of exchange either of objects of value or of mutual promises. The interstate

> compact contains all the elements just mentioned; in addition, the method of enforcement by suit between states in the United States Supreme Court makes it possible for litigation over a compact to resemble litigation over ordinary contract provisions."

Justice Frankfurter made the same point more succinctly in *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275: "A Compact is, after all, a contract." The same point is recognized and more extensively discussed in *Dyer v. Sims, supra.*

The Court has encouraged the resolution of interstate water disputes by the device of interstate compacts. To this end it has withheld jurisdiction in interstate water disputes for the purpose of encouraging the negotiation of interstate stream compacts, *Nebraska v. Wyoming,* 325 U.S. 589, 616 (1945).

The rule is perhaps best expressed in *Colorado v. Kansas,* 320 U.S. 383, 392 (1943):

> "The reason for judicial caution in adjudicating the relative rights of States in such cases is that, while we have jurisdiction of such disputes, they involve the rights of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future changes of condition, necessitate expert administration rather than judicial imposition of a hard and fast rule. . . ."

The State of New Mexico respectfully submits that the same considerations of public policy that moved the Supreme Court in *Colorado v. Kansas, supra,* should move it in this case to deny the pending motion, and thus leave the States of Texas and New Mexico to resolve their "complicated and delicate" problems in the framework of the "expert administration" provided by the Pecos River Compact.

The necessity, and the wisdom, of the sort of continuing administrative authority vested by the Pecos River Compact in the Pecos River Commission were recognized by Professors Frankfurter and Landis in their landmark 1925 study of interstate compacts:

> "Moreover, there can not be a definitive settlement. Populations, engineering, irrigation conditions constantly change; they can not be cast into a stable mould by adjudication or isolated acts of administration. *The whole economic region must be the unit of adjustment; continuity of supervision the technique. Agreement among the affected states and the United States, with an administrative agency for continuous study and continuing action, is the legal institution alone adequate and adapted to the task.*" [Emphasis added] Frankfurter and Landis, "The Compact Clause of the Constitution," 34 Yale L. J. 685 (1925).

The decisions of the Court have firmly established the rule that the Court will not take original jurisdiction of interstate disputes except where it is shown to be "an absolute necessity," (*Alabama vs. Arizona,* 291 U.S. 286), and only where the state seeking relief has alleged "sufficient facts calling for a decree in its favor," (*Alabama vs. Arizona, supra*). Here, far from showing an "absolute necessity," or alleging sufficient facts to call for a decree in its favor, Texas has not even alleged that the administrative procedures of the Pecos River Compact itself have been exhausted or that New Mexico has refused to coöperate in the same. Indeed, as pointed out above, it is the State of Texas which has consistently failed to give such coöperation. The *Alabama* case holds that the burden is on a State seeking original jurisdiction "fully and clearly to establish all essential elements of its case"; Texas' proposed complaint in the case at bar establishes nothing except that it has recently persuaded itself that New Mexico has been violating the Compact almost since its inception. Surely such an allegation, in the nature of an ultimate conclusion, urged on the Court without any supporting Commission findings, or even computations by Texas, cannot be construed as meeting the burden necessary to invoke original jurisdiction.

In *Washington vs. Oregon, supra,* the Court held that, in order to invoke original jurisdiction a State seeking relief must plead clear and convincing evidence of the injury alleged and that it must establish that such injury is of a "serious magnitude" sufficient to justify adjudication by the Court. As recited above,

the only findings the Compact Commission has ever made in respect to New Mexico's deliveries under the Compact were the 1962 findings concluding that only 5,300 acre-feet of aggregate departure from indicated Compact deliveries in the Alamogordo-state line reach had occurred in the years 1950 through 1961, and even this minuscule quantity was not held chargeable against New Mexico. In the absence of a later Commission finding, or even an allegation that New Mexico was refusing to coöperate in making further Compact determinations, this 5,300 acre-feet total represents the *maximum extent of contingent liability on the record* in respect to New Mexico's deliveries since 1950, and this quantity is obviously a great deal less than a problem of "serious magnitude."

The case of *Colorado vs. Kansas, supra,* reaffirms the rule that a state seeking relief must "clearly prove" an injury of "serious magnitude" before successfully invoking original jurisdiction. Also in support of this proposition are *Missouri vs. Illinois and The Sanitary District of Chicago,* 200 U.S. 496 (1906), and *Kansas vs. Colorado,* 185 U.S. 125.

In the case at bar, Texas has not only failed to allege, let alone "prove," the facts necessary to carry the burden imposed by the decisions of this Court on a State seeking original jurisdiction, but is is clear that its claim is patently inconsistent with the prior factual determinations made by the Pecos River Commission itself. In view of the failure of the proposed Complaint to meet these standards, and in view of the lack of justiciability documented in Point I, the Motion for Leave to File Complaint should be denied.

POINT II

THE UNITED STATES OF AMERICA IS AN INDISPENSABLE PARTY TO THIS ACTION AND THE MOTION FOR LEAVE TO FILE SHOULD BE DENIED FOR WANT OF AN INDISPENSABLE PARTY.

In 1854, the Court defined indispensable parties as follows:

"Persons who not only have an interest in the controversy, but an interest of such a nature that a final decree cannot be made without either affecting that interest, or leaving the controversy in such a condition that its final termination may be wholly inconsistent with equity and good conscience." *Shields vs. Barrow,* 17 How. 129, 139.

In *Barney vs. Baltimore,* 6 Wall. 280 (1867), the Court said:

"There is a class of persons having such relations to the matter in controversy, merely formal or otherwise, that while they may be called proper parties, the court will take no account of the omission to make them parties. There is another class of persons whose relations to the suit are such, that if their interest and their absence are formally brought to the attention of the court, it will require them to be made parties if within its jurisdiction, before deciding the case. But if this cannot be done, it will proceed to administer such relief as may be in its power, between the parties before it. *And there is a third class, 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. In such cases the court refuses to entertain the suit, when these parties cannot be subjected to its jurisdiction."* [Emphasis added]

The Court has applied this test to the United States as an indispensable party in original actions on several occasions. In one of these, *Arizona v. California,* 298, U.S. 558 (1936), the rule was stated as follows:

"Although no decree rendered in its absence can bind or affect the United States, that fact is not an inducement for this Court to decide the rights of the states which are before it by a decree which, because of the absence of the United States, could have no finality. *California v. Southern Pacific Co.,* 157 U.S. 226, 251, 257; *Minnesota v. Northern Securities Co.,* 184 U.S. 199, 235, 245-247; *International Postal Supply Co. v. Bruce,* 194 U.S. 601, 606; *Texas v. Interstate Commerce Comm'n.,* 258 U.S. 158, 163. A bill

> of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party. *Louisiana v. McAdoo,* 234 U.S. 627."

See also *Texas v. New Mexico,* 352 U.S. 991 (1957) and *Kansas v. United States,* 204 U.S. 331, 343 (1907).

It is understood that, where the specific Rules of the Court do not apply, the Federal Rules of Civil Procedure are applied in original actions. Rule 19 (b) of the Federal Rules of Civil Procedure places an increased emphasis on "equity and good conscience" in determining whether a case should proceed or be dismissed because of the indispensability of an absent party. In its simplest terms, Rule 19 (b) seems to turn upon the resolution of two questions:

> 1. To what extent might a judgment rendered in a party's absence be prejudicial to him or those already parties?
>
> 2. Can a judgment be entered with such protective measures as to lessen or avoid prejudicial effect on the absent party or those already parties?

These questions must be asked in the situation created by the proposed Complaint of the State of Texas. The State of New Mexico believes the United States of America is an indispensable party immune from suit, and that because no meaningful relief can be rendered in favor of Texas in the absence of the United States, as will be shown below, it would be contrary to equity and good conscience to allow the case to go forward. New Mexico also believes it would be inequitable to go forward in the absence of the United States because, even if a meaningful decree could be entered in the absence of the United States, New Mexico would be placed in an intolerable and prejudicial position in attempting to comply with the Compact-required means of making state line deliveries unless the United States were fully bound by a decree herein.

It is clear that the force of any decree that might be entered in favor of the State of Texas could fall heavily on the United States. The United States has, of course, a great range of

interests in the Pecos River drainage in New Mexico. It is not suggested that each and every federal interest automatically makes the United States an indispensable party in an action such as that contemplated by the proposed Complaint of the State of Texas. However, it is important to note that the major existing reservoirs within the Pecos River drainage in New Mexico, as well as two additional reservoirs[6] authorized by acts of Congress for construction in the near future, are, or will be, owned by the United States, and in the opinion of the State of New Mexico, this ownership interest could subject the United States to a real and immediate adverse effect resulting from any judgment that might be entered herein favorable to the State of Texas, or in the alternative, could render such a decree substantially unenforceable.

The principal involvements of the United States of America in the Pecos River in New Mexico are the Fort Sumner Project, the Carlsbad Project, and the Mescalero Apache Indian Reservation.

The Fort Sumner Irrigation District, a political subdivision of the State of New Mexico, has entered into a reclamation reimbursement contract with the United States Bureau of Reclamation for the repayment of allocable federal costs, under the Reclamation Act of 1902, as amended, of the Fort Sumner Project, and the District now owes the Bureau about two million dollars.

This project involves approximately 6,500 acres irrigated by a canal diverting direct flows of the Pecos River main stream approximately 290 river miles above the state line. The repayment obligation of the Fort Sumner District is secured by the district's power and duty to levy taxes on irrigated lands served by project works. In the event that the proposed Complaint of the State of Texas is allowed to be filed and the relief sought by the State of Texas is granted, it would necessarily follow that under Article IX of the Pecos River Compact, certain uses

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6. Los Esteros Dam and Reservoir, 68 Stat. 1260 and Brantley Dam and Reservoir, 86 Stat. 964.

of Pecos River water in New Mexico would have to be restricted or possibly terminated in order to conform with that decree. Article IX of the Compact provides: "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." Because New Mexico must *in all instances* apply prior appropriation, it is very possible, although it cannot be predicted with certainty, that the diversions for the Fort Sumner Irrigation Project would have to be subject to restriction in part or in whole. Such a restriction of irrigation diversions would: 1) require control of the diversion and delivery works of the Fort Sumner Project, which are owned by the United States Bureau of Reclamation, and 2) thus translate itself into an immediate negative effect on the beneficiaries of the project, that is, those land-owners who depend on the delivery of irrigation water through government works in order to earn the income and pay the taxes from which payments are made to the Bureau of Reclamation under the repayment contract discussed above.

In connection with the first point, the necessity of obtaining control over the diversion and delivery works owned by the United States Bureau of Reclamation, it is essential to note that Article XI of the Compact recites: "Nothing in this Compact shall be construed as: . . . (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." It is not necessary to predict with specificity the details of a judgment that might be entered in favor of the State of Texas in order to state that its impact could fall on the United States-owned works of the Fort Sumner Project. Obviously, any degree of success by Texas on its proposed Complaint would result in that same degree of reduction of water use in New Mexico under the principle of prior appropriation.

Likewise, even if it be assumed, *arguendo,* that the State of New Mexico will be able to administer priorities of water users within the Fort Sumner Project without joinder of the United

States in this case, the problem of substantial adverse effect on an absent party will only be aggravated. Such priority enforcement would quickly result in a serious impairment of the ability of those water users to pay the taxes necessary to allow the Fort Sumner District to make its annual repayments to the United States Treasury. Indeed, there would arise a real question of the legal obligation of those water users to make such payments during a period of time in which the United States was not diverting and delivering to the irrigation district's members the waters the United States has contracted to deliver. In either event, the result would be the same — a loss of payments to the Treasury of the United States.

The United States of America is even more clearly an indispensable party in regard to its ownership of the Alamogordo Dam and Reservoir and the other storage, diversion and delivery works of the Carlsbad Project. The Carlsbad Project, consisting of an authorized 25,055 acres (about 21,000 acres now irrigated), uses waters stored and released from Alamogordo reservoir and reregulated for farm delivery and use by McMillan and Avalon Dams downstream. The Carlsbad Project dates from 1906 and represents one of the earliest reclamation projects in the West. Because of an extension of its original repayment contract with the United States Bureau of Reclamation, the Carlsbad Irrigation District, a political subdivision of the State of New Mexico, is still indebted in the amount of about four million dollars to the United States Bureau of Reclamation, and the United States retains title to the project works, including Alamogordo, McMillan and Avalon Dams and the delivery canals.

Alamogordo Reservoir is by far the dominant water storage and regulation facility in the Pecos River drainage in New Mexico. It has a capacity of more than 100,000 acre-feet.

Because of the significance of Alamogordo Dam in the regimen of the Pecos River in New Mexico, it is difficult to see how any meaningful relief could be effectuated in favor of Texas under the proposed Complaint, unless the United States of America, as its owner, is made a party to the case. As noted

above, the Compact requires in substance that, if and when New Mexico must restrict uses in order to make Compact deliveries at the state line, this must be accomplished *strictly* according to priority of appropriations. Obviously, it will be impossible to give effect to this Compact provision if such a major storage facility as Alamogordo Dam, owned and operated by the United States, is immune by reason of sovereignty and non-joinder of the United States, from priority administration undertaken either by New Mexico or the Court. The United States will probably argue that it is outside the power of the State of New Mexico to restrict or otherwise control impoundment of Pecos River waters in Alamogordo Reservoir, in conformity with the water right priorities owned by the beneficiaries of that project, unless the United States had been made subject to the orders of this Court. The United States will probably also argue that it is an indispensable party, and immune from suit under the doctrine of *Backer* and *Dugan.*[7] Certainly, the Compact alone does not subject federally-owned works to such priority administration.

The State of New Mexico respectfully invites the Court's attention to the Court's action in dismissing a Complaint filed by the State of Texas against the State of New Mexico in connection with the Rio Grande Compact (*Texas v. New Mexico, supra*). This suit was filed in 1951, and the Special Master recommended that Texas' Complaint be dismissed because the relief it sought would inevitably involve physical control over El Vado Dam and Reservoir, a major Rio Grande Stream System water resource facility owned by the United States, an indispensable party.

While it is true that a part of the basis for the Special Master's recommendations was the unadjudicated claims of the United States for the Pueblo Indian Tribes in the Middle Rio Grande area (particularly their claims of right to use El Vado Reservoir for irrigation storage in a manner inconsistent with the requested

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7. *New Mexico v. Backer,* 199 F2d 426, (10th Circuit, 1952), and *Dugan v. Rank,* 372 U.S. 609 (1963).

relief for the State of Texas), the State of New Mexico submits that there is a clear and direct analogy between the situation of the federally-owned El Vado Reservoir on the Rio Grande and the Alamogordo Reservoir on the Pecos. Because the Rio Grande Compact, by its terms, limits and controls the use of El Vado Reservoir[8] for storage under specific stated conditions, the Special Master recommended that the unadjudicated United States claims on behalf of the Pueblo Indians for storage in El Vado outside the provisions of the Rio Grande Compact made the United States an indispensable party. The Pecos River Compact does *not* provide for the administration of Alamogordo Reservoir or other federal reservoirs in New Mexico except by implication in the provision requiring New Mexico to maintain Compact deliveries by controlling uses according to the doctrine of prior appropriation (Article IX). Thus, in the case at bar, the Court is faced with the same situation as existed in respect to the United States' claims for the Pueblos for storage rights in El Vado Reservoir outside the Rio Grande Compact. That is, any decree entered in favor of Texas in this case, to be meaningful, must be based upon the duty and power of the State of New Mexico, or the Court by its orders, to control all of New Mexico's Pecos River uses in accordance with their water right priorities. If the United States is not made a party, New Mexico and the Court could be faced, in the event of a decision in favor of Texas, with the impossibility of subjecting the single most significant water resource facility in the drainage to priority administration, and it is clear that this would render an adjudication in favor of Texas unenforceable.

The Court adopted the recommendation of its Special Master in the case of *Texas v. New Mexico, supra,* after approximately six years of fruitless search for a means to allow Texas its day in court on the merits of its Complaint. Because the United States was clearly indispensable, and did not elect to intervene, the amended Complaint was dismissed, and it is submitted that the same result would, in all probability, transpire if the Court

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8. El Vado Reservoir was constructed after 1929 and is governed by Article VI of the Rio Grande Compact, 53 Stat. 785.

were to take jurisdiction of the pending Motion for Leave to File Complaint.

New Mexico also wishes to point out, by way of an interesting parenthesis, that the dismissal of Texas' Complaint in 1957 did not, in fact, leave Texas at the mercy of an upstream State bent on violation of the Rio Grande Compact. On the contrary, the State of New Mexico effectively eliminated its entire Compact debit to the State of Texas under the Rio Grande Compact, and as of January 1, 1973, was acknowledged to be in credit status. In respect to the Pecos River Compact, the State of New Mexico gives its unequivocal assurance to the Court that it will continue to work diligently in the administration of the Pecos River Compact whether or not the pending Motion is granted and the case results in adjudication.

In the case of the Carlsbad Project, like that of the Fort Sumner Project, a further significant effect of an adjudication in favor of Texas could easily result. The Carlsbad Irrigation District owes the United States about four million dollars under a series of reclamation reimbursement contracts (including reimbursement for the construction of Alamogordo Dam and Reservoir). Thus, even if it be assumed *arguendo* that the storage of water in Alamogordo Reservoir and its delivery for irrigation purposes could be restricted in a program of New Mexico priority administration under the Compact without the joinder of the United States as a party, it would again follow that the water users of the Carlsbad District would be deprived of the farm income they rely upon to pay the taxes from which annual contract payments to the United States are made. Likewise, so long as the United States was unable to use the Project works for storage and delivery of irrigation water the water users of the Project might be held to be relieved of their payment obligations. Here again, an important and negative financial impact would in either case fall upon the Treasury of the United States.

It is basic law that the United States is an indispensable party in any action in which control of property owned by the United

States is sought and/or the burden of a possible decree will expend itself upon the public treasury. *Land v. Dollar,* 330 U.S. 731, 738 (1947); *Larson v. Domestic and Foreign Corp.,* 337 U.S. 682 (1949).

It is clear that unless the United States of America is a party to this action, if and when the proposed Complaint is allowed to be filed, then a decree entered in favor of the State of Texas might be rendered meaningless by the inability of the State of New Mexico to apply diversion restrictions against diversion works owned by the United States of America. This is because, under the rule of such cases as *New Mexico v. Backer* and *Dugan v. Rank, supra,* it is clear that the State of New Mexico is and will be unable to use the courts to enforce priority administration as to United States-owned facilities like the works of the Fort Sumner and Carlsbad Projects. Although Article XI (d) expressly eliminates any implication that the Compact subjected the property of the United States generally to the laws of the State of New Mexico, the State would have to seek to perform its Compact obligation, under a Supreme Court decree, by attempting to compel federally-owned as well as privately-owned diversions to restrict uses consistent with their respective priorities. As the *Backer* and *Dugan* cases provide, however, the United States would claim to be immune from suit under such circumstances. Thus, in respect to the Fort Sumner and Carlsbad Project diversions from the Pecos River, New Mexico and the Court would be unable to fashion reasonable and effective relief of the kind contemplated by the Compact, unless the United States had been made fully subject to the orders of the Court by joinder in the case.

Another critically important federal interest in the Pecos River Basin in New Mexico is that arising out of the presence of a large portion of the Mescalero Apache Indian Reservation. More than three hundred thousand acres of the Mescalero Apache Reservation lie in the headwaters of important Pecos River tributaries, including the Rio Hondo and the Rio Peñasco, and the legal title to the reservation lands is acknowledged to

be in the United States of America, which holds the same for the benefit of the Indians of the Mescalero Apache Tribe.

New Mexico would respectfully invite the Court's attention to Article XII of the Pecos River Compact, which declares the extent to which water uses by the United States are chargeable to the State of New Mexico:

> "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 or conveyance of water in one state for use in another state shall be charged to such latter state." [Emphasis added]

The reference to "wards" of the United States is an unmistakable reference to the Indians of the Mescalero Apache Tribe. In the case of this Reservation, the Court is faced with a situation that clearly makes indispensable the presence of the United States as a party.

The claims of the United States for water rights on behalf of its wards, the Mescalero Apache Indians, can be presumed to be very extensive (*Winters v. United States,* 207 U.S. 564 (1908) and *Arizona v. California,* 373 U.S. 546 (1936)), but these claims have never been adjudicated in any Court. There is now pending in the District Court of Chaves County, State of New Mexico, a suit seeking a general water rights adjudication of the Rio Hondo Stream System, a principal Pecos River tributary in the headwaters of which the United States owns many thousands of acres within the Mescalero Apache Reservation. In this action (No. 20294 and No. 22600, *Chaves County, State of New Mexico v. L. T. Lewis, et al*), the United States of America formally moved to dismiss the State of New Mexico's Complaint on the grounds that the Court does not have jurisdiction over the claims of the United States on behalf of its Mescalero Apache Indian wards, and this Motion has been granted by the District Court. The State of New Mexico strongly disagrees with this position, and is seeking review of the decision in the Supreme Court of the State of New Mexico.

This pending litigation over the unknown nature, extent and priority of the United States' claims for the Mescalero Apache Indians illustrates the extremely difficult problems that necessarily arise in the event of a decree that might be rendered in this case in favor of the State of Texas.

It will be recalled that the Compact itself obligates New Mexico to maintain deliveries at the state line "in all instances" by enforcing priorities upstream. It further expressly makes consumptive uses of water in New Mexico by "wards" of the United States chargeable against New Mexico. However, as the water rights incident to the Mescalero Reservation lands with the Pecos River drainage have never been adjudicated, and the United States as guardian of the Indian is actively and, thus far, successfully, frustrating New Mexico's attempt to obtain an adjudication of those rights, it is manifest that the State of New Mexico and this Court would lack the ability to administer the water rights held by the United States on behalf of the Mescalero Apache Indians.

New Mexico submits that even the joinder of the United States in this action would not fully resolve the difficulties arising out of the collision between the Compact provisions recited above and the present posture of the United States' claims for the Mescalero Apaches. This is because the United States' claims for the Mescalero Apaches are unadjudicated, and this Court would presumably either have to undertake the adjudication of those and perhaps other unadjudicated federal claims in the Pecos River drainage before a meaningful decree could be entered, or this Court would have to withhold its decree or at least enforcement thereof until such unadjudicated claims had been settled in some other court of competent jurisdiction.

Making these problems even more vexing is the circumstance that the rights the United States is known to claim for the Mescalero Apaches do not even arise under the Constitution and laws of the State of New Mexico, but rather on the authority of the decisions of this Court under the so-called "Winters" or

"Reservation" doctrine, and it is therefore impossible to guess to what extent such rights, even when adjudicated, might be held to be subject to the kind of priority administration imposed on the State of New Mexico by Article IX of the Compact.

The question of the necessity of determining the nature, extent and priority of the United States' water rights for the Mescalero Apaches is not an academic or abstract argument raised in order to abort the proposed litigation on legalistic grounds; it is made critical not only by the size of the unadjudicated United States' claims and the actions already taken by the United States to frustrate adjudication, but by the circumstance that in the Spring of 1974, the Mescalero Apache Tribe, with the full knowledge and support of the United States, initiated significant new water uses within the Mescalero Apache Reservation in the Pecos River drainage. That is to say, notwithstanding the Compact's implicit prohibition of depletions caused by man's activities in New Mexico beyond the 1947 condition, the United States has given financial aid and approval to a major new recreation complex within the said Reservation. The United States has sought to legally protect these new and unprecedented diversions of Pecos River stream system water on the Reservation, made without any notice to, or approval of, officers of the State of New Mexico. A new and extensive surface water pumping system has been put into use on the Reservation for the filling of a new federally-owned recreation reservoir, and the United States of America has opposed, and has thus far successfully frustrated, attempts by the State of New Mexico to restrain these new diversions. Because of the substantial portion of the headwaters of important Pecos River tributaries lying within the Mescalero Reservation, the United States obviously is in a position to countenance and create many similar new and significant water uses on that Reservation outside the control of, and without the approval of, the State of New Mexico.

For these reasons, the United States of America is clearly an indispensable party to this action. Unless it is joined and made

fully subject to the orders of the Court, and further unless its unadjudicated claims for the Mescalero Apache Tribe are determined, any decree rendered hereafter in favor of the State of Texas would present the State of New Mexico and the Court with insoluble problems that could render such a decree meaningless. If the United States remains free to increase depletions by new uses in New Mexico beyond the 1947 condition, any effort to restrict uses according to priority in New Mexico, in order to maintain state line deliveries, would be frustrated.

CONCLUSION

For the reasons stated above, the State of New Mexico submits that the Motion for Leave to File Complaint should be denied.

Respectfully submitted,

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APPENDIX A

[Excerpt from Commission Minutes, July 30, 1957]

The meeting was recessed at 11:45 a.m. and reconvened at 9:05 a.m. July 30, 1957.

Mr. Tipton reported that the Engineering Advisory Committee had met with the Legal Committee and obtained the legal opinion it needed. Mr. Rassman made a report for the Legal Committee concerning the questions raised. He reported that the legal committee feels that unappropriated flood waters which might be impounded in Los Esteros reservoir would be divided 50-50 between the states of New Mexico and Texas, in accordance with the provisions of the Compact.

He also reported that the Legal Committee is of the opinion that the Commission has the authority to correct any mistakes in the inflow-outflow computations and criteria. The Committee observed, however, that the inflow-outflow curves, graphs and plates in Senate Document 109, 81st Congress, 1st Session, are more or less sacred, and suggested that the Commission should be slow to make any changes in the curves, graphs and plates, and then only after careful consideration with clear and convincing evidence to support the changes.

Commissioner Bliss moved that the report of the Legal Committee be received and adopted. The motion was seconded and duly passed.

Mr. Tipton resumed his report, during which he presented copies of the minutes of the Engineering Advisory Committee meeting of April 2-3, 1957. At Mr. Tipton's request, Mr. Vandertulip read the "Report of the Engineering Advisory Committee to the Pecos River Commission", dated July 30, 1957.

In the report the Committee made the following recommendations to the Commission:

1. The Commission adopt the findings of the Committee with respect to the Los Esteros-Alamogordo Reservoirs Project.
2. The Commission assign the Committee the task of develop-

ing principles for the Compact administration with the Los Esteros-Alamogordo Reservoirs Project in operation.

3. A special subcommittee be created to restudy under 1947 conditions the inflow-outflow relationships for the reach of river above Alamogordo Dam and the reach of river from Alamogordo Dam to the New Mexico-Texas State line. The purpose of the restudy is to determine whether the relationship depicted by the curves appearing in pages 153 and 154 of Senate Document 109, 81st Congress, 1st Session should be modified.

4. The last draft of the Inflow-outflow Manual be reviewed by the subcommittee recommended under item 3 and, if necessary, the subcommittee make recommendations for additional revisions which may be disclosed necessary by its work.

5. Retaining of Mr. Erickson to participate in the work of the subcommittee recommended in item 3 be authorized by the Commission.

Mr. Tipton then discussed the report. He recommended that No. 5 be amended by adding the phrase "and that Mr. Erickson participate in the work of recommendation No. 2."

He also made a sixth recommendation, which had been overlooked when the report was prepared:

6. The Commission authorize microfilming of certain work sheets in the Pecos River Joint Investigation report, said sheets being in four of the volumes of the Report.

Mr. Tipton stated that one volume is now in the hands of the committee and the other three are in the National Archives. The estimated cost of microfilming the four volumes is $75. The microfilming of the data is required to have it available for the use of the special subcommittee under item 3. The microfilms would be kept in the permanent files of the Commission in Carlsbad, New Mexico.

Mr. Tipton indicated he had a 3-man committee in mind to

work on item 3, and suggested that it be composed of Mr. Erickson, Chairman, and Mr. Hale and Mr. Vandertulip. At the same time he discharged the old inflow-outflow committee.

Commissioner Bliss moved that the report of the Engineering Advisory Committee be received, and that the Commission adopt the six recommendations of the Committee. The motion was seconded and duly passed.

Commissioner Bliss reviewed the present status of Commission legislation now before Congress. He stated that the McMillan delta channelization and Malaga Bend salinity alleviation bill had passed the Senate substantially as prepared by the Commission, but that the bill had been amended in the House to provide for periodic review of repayment abilities of users benefiting by the works. This bill is still being held in the House Rules Committee and final action at this session of Congress is not likely.

APPENDIX B

[Excerpt Commission Minutes, January 31, 1961]

Provided further that it is understood that studies referred to herein above were made using all existing data that are relevant to the subject. It is to be understood, however, that in the future further appraisal or consideration of certain factors or changed conditions might result in some modification of conclusions or modifications of techniques."

Mr. Tipton stated that this motion had been seconded by Mr. Vandertulip and unanimously adopted.

Mr. Tipton proceeded to explain in detail the results shown on the various summary sheets, and summed up his discussion by stating that the most pertinent item for consideration was the showing up of negative departures for the last successive three year periods. He stated further that the purpose and meaning of the Compact was to determine trends, and that these negative departures may be the lagging effect of the long-time drought, or increased effects of phreatophytes in some reaches of the river; that some of the loss is noted above Artesia, but most of it is noted between Artesia and Avalon Dam, and the Engineering Advisory Committee will take steps to find out if there is some obvious reason for the negative departures and report back to the Commission.

Commissioner Reese moved that the report of the Engineering Advisory Committee be accepted and that said report with the Appendices and other documents mentioned therein, be adopted by the Commission as amendments, refinements and additions to the basic data of the Commission and considered as such in all actions and findings of the Commission, and as representing the present best information on the subjects covered thereby. Mr. Tipton inquired if the relevant documents would be accepted as findings of fact through 1959. Mr. Vandertulip asked if he meant both sets of documents and Mr. Tipton replied in the affirmative. Whereupon Commissioner Reese amended his motion to include the aforementioned documents and further to show that the findings of fact as contained in said documents

are adopted as findings of fact of the Commission. The motion was seconded by Commissioner Wilson and unanimously carried.

Mr. Tipton stated that the Subcommittee on Review of Basic Data, proceeding under its original instructions, has the task of determining inflow-outflow relationships above Alamogordo Dam, preparing a revised inflow-outflow manual; and that the Engineering Advisory Committee would continue to make studies to determine the relationship between the actual State line outflow for successive 3-year periods and what would have been under 1947 conditions with the index inflows as found for those years. He further stated that the Engineering Advisory Committee had the additional obligation of keeping in touch with the activities of the relevant Federal Agencies.

Mr. Vandertulip advised the Commission that a complete set of the approved minutes of the meetings held by the Subcommittee on Review of Basic Data would be prepared and filed in the office of the Commission.

Mr. Fred Gray, field solicitor for the Bureau of Reclamation said that in regard to the discussion pertaining to the Malaga Bend Contract between the United States, the Interstate Stream Commission and the Red Bluff Water Power Control District, he felt that the Commission did have an interest and a definite responsibility and should go on record as being obligated to discontinue the operation of the Salinity Alleviation Project in the event it is determined damage will result.

Commissioner Wilson moved that the Commission go on record as assuming that responsibility. Motion seconded by Commissioner Reese and carried.

Mr. Ralph Charles of the Bureau of Reclamation stated he had made a detailed report on the Malaga Bend Project to the Engineering Advisory Committee at their meeting January 30, 1961, but he would like to report on one detail not covered at that time. He said that both the Carlsbad

APPENDIX C

[Excerpt from Commission Minutes, November 9, 1962]

Upon motion of Commissioner Hale and seconded by Commissioner Wilson, the recommendation was approved.

Mr. Fife of the Bureau of Reclamation reported on that agency's activities. He stated that the Malaga Bend Project was well on its way and that an award of a contract for the compaction of the disposal area would be made early in December. He stated that the Salinity Alleviation Project should be ready for operation early in the spring of 1963. He also outlined the progress being made on the feasibility report on Brantley Dam. It was requested that the Bureau of Reclamation give the Commission the approximate date of completion of the Malaga Project for scheduling a dedication.

Mr. Mann stated that the Legal Committee had no report to make at this meeting.

Mr. Tipton referred to an item on the Engineering Advisory Committee's Agenda: "Review and discuss inflow-outflow calculations which have been made by Messrs. Carl Slingerland and Lewis Seward to determine departures from the '1947 condition' ". Mr. Tipton further stated that he had just circulated the following tabulation of calculations that had been prepared jointly by the Engineering Advisers of the two states:

Exhibit #1

Values in 1,000 A.F.

Year	Inflow		Outflow				
						1947 Condition	
	Annual Inflow	3-year Average	Recorded State Line	3-year Average	State Line Outflow	Departure	Accumulated Departure
1	2	3	4	5	6	7	8
1950	296.1		176.6				
1951	185.2		72.9				
1952	168.4	216.6	52.4	100.6	86.3	+14.3	+14.3
1953	135.3	163.0	36.3	53.9	61.2	- 7.3	+ 7.0
1954	364.0	222.6	227.1	105.3	89.3	+16.0	+23.0
1955	336.6	278.6	146.5	136.6	119.2	+17.4	+40.4
1956	169.9	290.0	36.8	136.8	126.0	+10.8	+51.2

1957	182.8	229.7	48.7	77.3	92.9	-15.6	+35.6
1958	379.2	243.9	148.7	78.1	100.0*	-21.9*	+13.7
1959	191.6	251.2	54.6	84.0	103.6*	-19.6*	- 5.9
1960	310.3	293.7	108.6	104.0	128.2	-24.2	-30.1
1961	211.6	237.8	57.9	73.7	96.9	-23.2	-53.3

* The values in Columns 6 and 7 for the years 1958 and 1959 deviate slightly from those submitted to the Commission at its January 31, 1961 meeting. These small changes were brought about by minor arithmetic changes made in reviewing the flood inflow computation in these two years. It is recommended the above values be adopted as the official Commission values and replace those previously submitted.

The above table does not reflect adjustments for depletion, if any, which might have been caused below Carlsbad by pumping from the alluvium, with pumps constructed in 1947 or prior thereto.

The amounts set forth in the table below are departures caused by the training dike completed at McMillan Reservoir in 1954. In accordance with the action of the Pecos River Commission at its January 1961 meeting, these departures are not chargeable as a result of mans activities. The Engineering Advisory Committee has made no determination of what part, if any, of the amount shown in Column 7 is so chargeable.

	3-year Mean	Accumulation
1955	2.7	2.7
1956	5.3	8.0
1957	8.0	16.0
1958	8.0	24.0
1959	8.0	32.0
1960	8.0	40.0
1961	8.0	48.0

Following a discussion concerning the second paragraph of the tabulation (which was to be referred to as Exhibit #1), it was agreed by the Engineering Advisory Committee that the paragraph should be deleted and the following inserted as the last sentence of the first paragraph, "Otherwise the above findings are arrived at in the same manner as described in the

January 1961 report of the Engineering Advisory Committee.

Mr. Tipton recommended that Exhibit #1 as amended be accepted, considered and adopted by the Commission as to findings of fact of the departures of the 1947 condition, State Line Outflow, period 1950 through 1961.

Upon motion of Commissioner Hale, seconded by Commissioner Wilson, the findings of the Engineering Advisory Committee as amended (Exhibit #1) were adopted.

Mr. Tipton remarked that the question of salvage had arisen, as well as how to ascertain accretions to the river resulting from constructing water salvage programs. He stated that the Committee concluded that by inflow-outflow methods net accretions to the river by river improvement projects above the State line could be determined. He stated, however, that at that point an issue will be joined, representing the two States, as to interpretation of 1947 conditions.

Mr. Tipton further stated that Mr. Reynolds had set forth New Mexico's position in the matter by letter of August 29, 1962 to Mr. Vandertulip; that Mr. Vandertulip has agreed to answer Mr. Reynolds' letter; and, that when that is done, the matter will be turned over to the Commission.

Reporting on the status of the Inflow-Outflow Manual, Mr. Tipton requested that Mr. Erickson meet with the members of the sub-committee and review the work already accomplished and proceed with a draft of a new Inflow-Outflow Manual. He stated further that correlation of the reach above Alamogordo Dam and the determination of the 1947 condition in Texas would have to be completed by the sub-committee.

Upon motion of Commissioner Hale, seconded by Commissioner Wilson, and passed, the Sub-Committee, under Mr. Erickson, was instructed to proceed with the studies and work as recommended by the Engineering Advisory Committee.

An item that was raised for discussion and upon which no action was taken, was the closing off of the Rio Hondo Reservoir. Mr. Reynolds stated that he had met in Pecos, Texas, earlier this year to discuss

APPENDIX D

PECOS RIVER COMMISSION

STATEMENT OF R. B. McGOWEN, JR., PECOS RIVER COMMISSIONER FOR TEXAS TO THE ANNUAL MEETING OF THE PECOS RIVER COMMISSION ON FEBRUARY 21, 1974, IN CARLSBAD, NEW MEXICO.

While you are familiar with the history of the Pecos River Compact and the past actions of the Pecos River Commission, it is necessary to discuss a portion of the historical background in order to clearly define the issues involved in this statement.

The Pecos River Compact was finalized and signed by the Commissioners representing Texas, New Mexico, and the United States at a meeting in Santa Fe, New Mexico, on December 4, 1948. The Compact was ratified by the Legislatures of Texas and New Mexico and the United States Congress in 1949. Senate Document 109, 81st Congress, 1st Session (1949).

In May of 1947, prior to the finalization of the Compact, the Commissioners appointed an Engineering Advisory Committee to develop the engineering and hydrologic data necessary for the proper administration of the Compact. A Report of a Decade of Progress, 1950-1960, by Robert T. Lingle and Dee Linford, p. 137.

The Engineering Advisory Committee submitted the results of its studies to the Commission prior to the Commission's December, 1948, meeting. The results of the Engineering Advisory Committee's studies were incorporated into the Compact as "The Report of the Engineering Advisory Committee" by action of the Commission on December 4, 1948. Senate Document 109, pp. 108-110.

The Report of the Engineering Advisory Committee became an official part of the Pecos River Compact at the time it was adopted and the data included in the Report was established as the basis for apportionment of Pecos River water between Texas and New Mexico.

The Compact provided that the apportionment of the Pecos River water should be on the basis of the 1947 Condition of the Pecos River. The Report of the Engineering Advisory Committee, as adopted, contained the basic data which attempted to define the 1947 Condition.

On December 10, 1949, the Commission adopted a program of action for the Pecos River Commission. The program required proceeding with inflow-outflow computations as required by the Compact for the apportionment of water for the years 1947-1949. The program also called for a "more accurate determination of the '1947 Condition' as defined in the compact. . . ." Minutes, Second Meeting, Pecos River Commission, December 9, 10, 1949.

On January 18, 1951, the Commission adopted a report of the Engineering Advisory Committee which included "inflow-outflow computations" for the three-year period "1947 through 1949." The same report noted that:

> ". . . the inflow-outflow relationship for the three-year period 1946-1948 for the reach of the river from Alamogordo Dam to the New Mexico-Texas state line shown on Plate No. 2, page 154, Senate Document 109, falls below the limit of the relationship as defined by previously existing data. As more data becomes available in the future, this point may be important to define more accurately the lower limit of the relationship as shown on the Plate." Minutes, Sixth (Second Annual) Meeting, Pecos River Commission, January 18, 1951.

On June 27, 1952, the Commission adopted a recommendation of the Engineering Advisory Committee which called for a "review of the inflow-outflow studies and computations heretofore made. . . ." Minutes, Ninth Meeting, Pecos River Commission, June 27, 1952. This recommendation apparently refers to the computations adopted at the Second Annual Meeting of the Commission on January 18, 1951.

On February 15, 1954, the Commission adopted a report of the

Engineering Advisory Committee which called for a complete review of the historical inflow-outflow relationship reflected in the Report of the Engineering Advisory Committee adopted at the time the Compact was ratified. The recommendation for review was stated as follows:

> "After some discussion of the problem [computing inflow-outflow relationships] by the Committee it became apparent that the entire matter of inflow-outflow relationships should be reviewed by the subcommittee [on inflow-outflow relationships]. Several years of stream flow records are now available to the Committee which were not available at the time the inflow-outflow manual was prepared. Also, more knowledge is available with respect to salt cedar coverage in the key year 1947. The subcommittee, therefore, was instructed to determine as accurately as possible the inflow-outflow relationships under the 1947 Condition and report back to the Engineering Advisory Committee at the earliest possible date in order that it may make recommendations to the Commission." Minutes, Thirteenth (Fifth Annual) Meeting, Pecos River, Commission, January 21, 1954, recessed to February 15, 1954.

On July 30, 1957, the Commission adopted a recommendation of the Engineering Advisory Committee that:

> "A special subcommittee be created to restudy under 1947 Conditions the inflow-outflow relationships for the reach of the River from Alamogordo Dam to the New Mexico-Texas state line. The purpose of the restudy is to determine whether the relationship depicted by the curves appearing in pages 153 and 154 of Senate Document 109, 81st Congress, 1st Session, should be modified."

The Commission also adopted a recommendation calling for a review by the subcommittee of the Inflow-Outflow Manual [adopted by the Commission at the time the Compact was signed]. At the same meeting, the Commission, by official action, accepted an opinion of the Legal Committee which

stated that the Commission had authority to correct any mistakes in inflow-outflow computations and criteria.

> "The Committee observed, however, that the inflow-outflow curves, graphs and plates in Senate Document 109, 81st Congress, 1st Session, are more or less sacred, and suggested that the Commission should be slow to make any changes in the curves, graphs, and plates, and then only after careful consideration with clear and convincing evidence to support the changes." Minutes, Twenty-Second (Eighth Annual) Meeting, Pecos River Commission, January 17, 1957, recessed to July 29, 1957.

On January 31, 1961, the Commission adopted the Review of Basic Data and all appendices as "findings of fact of the Commission." Minutes of the Twenty-Seventh (Twelfth Annual) Meeting, Pecos, River Commission, January 19, 1961, recessed to January 31, 1961.

On November 9, 1962, the Commission adopted as "findings of fact" a report of the Engineering Advisory Committee which specifically spelled out the "departure of the 1947 Condition, State Line Outflow, period 1950 through 1961." The departures included in the report were computed by using the analyses contained in the Review of Basic Data adopted by the Commission on January 31, 1961, and showed an accumulated departure of 53,300 acre-feet. The Report of the Engineering Advisory Committee spelling out the "departure of the 1947 Condition" also showed accumulated departures of 48,000 acre-feet from 1955 through 1961 resulting from the training dike at McMillan Reservoir and stated that "these departures are not chargeable [as a depletion] as a result of man's activities." Minutes, Twenty-Eighth (Thirteenth Annual) Meeting, Pecos River Commission, January 18, 1962, recessed to November 9, 1962.

On July 1, 1970, the Texas members of the Engineering Advisory Committee, assisted by the Texas Water Rights Commission, completed a full accounting report of the Pecos River water. The computations were performed in accordance with

the basic data included in Senate Document 109. The report showed an accumulative departure from the 1947 Condition of 1,213,600 acre-feet and concluded that "about 1,100,000 acre-feet of the total departure of state-line flow from 1947 Conditions is chargeable to New Mexico as being man-made depletions." Accounting Pecos River Waters, 1950-1969 Under The Pecos River Compact, Technical Services Division, Texas Water Rights Commission, July 1, 1970.

On January 28, 1971, the Texas Engineer Advisors and the New Mexico Engineer Advisors submitted separate reports to the Pecos River Compact Commission. The Texas report described the computation methods and data used in the July 1, 1970, accounting report as being in conformity with the basic data and methods described in Senate Document 109. The Texas report contended that the methods and data described were the only ones which could be used under the Compact.

The use of the basic data and computation methods contained in Senate Document 109 results in an allocation to Texas of approximately 39,000 acre-feet of water per year more than is allocated by using the data and computation methods contained in the Review of Basic Data. (Letter to R. B. McGowen, Jr., Pecos River Commissioner, from James A. Luscombe, Sr., Texas Interstate Compacts Coordinator, dated June 10, 1969).

Attached with this statement is an Addendum to the Report of the Texas Engineer Advisors to the Pecos River Commission updating the same through 1972. The Addendum shows that Texas continues to receive less water at state line than it is entitled to under the Pecos River Compact.

For more than 20 years Texas has participated in the Pecos River Commission and all it has to show for it is a substantial annual expenditure, continuing studies by the Engineering Advisory Committees and less water with each passing year. By our calculations, during the 22-year period from 1950 to 1972, New Mexico has retained more than one million acre-feet of water to which Texas was entitled under the Pecos River

Compact. Above state line, in New Mexico, the Pecos River Valley is lush with irrigated crops. Below state line, in Texas, the Pecos River Valley is dry, desolate and unproductive.

Retention of water by New Mexico to which Texas is entitled under the Pecos River Compact has cost the citizens of Texas untold millions of dollars in lost production from its farm and ranch lands. This is a situation which will no longer be tolerated by Texas.

We ask New Mexico and the Pecos River Commission to begin now to honor the Pecos River Compact as the same is set forth in Senate Document 109, 81st Congress, 1st Session (1949), and as ratified by the States of New Mexico and Texas and the United States.

We hold that the Review of Basic Data adopted by the Pecos River Commission at its Twelfth Annual Meeting on January 31, 1961, is not effective for use in determining the water to which Texas is entitled under the Pecos River Compact, because the same is incomplete without a revised inflow-outflow manual and other items pertinent to completion of the full review of the operating details of the Pecos River Compact as the same was directed to be done at the Fifth and Eighth Annual Meetings of the Pecos River Commission.

We repudiate the Review of Basic Data as a basis for Commission action in determining the amount of water to be apportioned to Texas under the Pecos River Compact, because the same has operated to deprive Texas of the water to which it is entitled under the Compact and has served to delay and obstruct the Pecos River Commission from performing its primary duty.

The Compact provides that the accounting for Texas' share of the Pecos River Water is to be based on the 1947 Condition of the River. Article III, Section (a), reads in part:

> ". . . 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."

The Compact further provides at Article VI, Subsection (c) (iv), that any ". . . water impounded to the credit of Texas shall be released by New Mexico on the demand of Texas." Article V, Section (d), empowers the Pecos River Commission to make findings of fact as to the amount of water which should be apportioned to Texas. It is implicit in these provisions and the overall tenor of the Compact that the Compact Commission has the duty to make proper findings of fact and that Texas can compel the Commission to do so and can compel New Mexico to release and make up water due to Texas under the Compact.

AFFIDAVIT

S. E. Reynolds, being duly sworn, deposes and says: that since August, 1955 he has been and he is now the duly appointed State Engineer of the State of New Mexico and Secretary of the New Mexico Interstate Stream Commission; that since approximately January, 1956 he has continuously served to the present date as Engineering Advisor to the Pecos River Compact Commissioner of the State of New Mexico; and that he is personally familiar with the administrative history and records of the Pecos River Commission. Further, that he has carefully reviewed the Brief of the State of New Mexico in Opposition to the Motion of the State of Texas for Leave to File Complaint and, that he can and does attest that each and every of the facts asserted therein are true and correct to the best of his knowledge and belief.

Affiant further deposes and says that as Secretary of the New Mexico Interstate Stream Commission he is custodian of a complete set of the minutes of the meetings of the Pecos River Commission, and that he can and does attest that each and every quotation in the New Mexico Brief from the minutes of various meetings of the Commission is true and correct.

S. E. Reynolds, State Engineer
and Secretary, Interstate Stream
Commission

Mary S. Stone
Notary Public
My Commission expires 3-21-78

PROOF OF SERVICE

I, PAUL L. BLOOM, one of the Attorneys for the Defendant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the ____ day of_____, 1974 I served copies of the foregoing Brief in Opposition 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 Texas.

Paul L. Bloom