No. 65, Original

In the Supreme Court of the United States

OCTOBER TERM, 1974

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT

MEMORANDUM FOR THE UNITED STATES

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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In opposing the motion for leave to file a complaint submitted by Texas, New Mexico alleges that the United States is an indispensable party. For the reasons outlined below, we agree.[1] It does not

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[1] In light of our view that the United States is an indispensable party which cannot be joined without its consent, we do not at this time address New Mexico's other objections —that the complaint presents no justiciable question, that the plaintiff has failed to exhaust available administrative remedies, and that the suit is barred by estoppel and laches. It will be time enough to consider those issues if and when

follow, however, that the Court should now resolve the question of indispensability. Instead, we urge that action on the plaintiff's motion be postponed for six months (until mid-April, 1975), so as to encourage an administrative solution to the controversy. In that event, the United States would devote its best efforts to achieving such an amicable resolution of the dispute, and, if, at the end of that period, no substantial progress had been made toward such a solution, the Solicitor General would advise the Court whether the United States proposed to intervene as a party, thus permitting the suit to go forward.[2]

We note that this course was followed in *Texas and New Mexico* v. *Colorado*. See 387 U.S. 939. To be sure, there, progress was slow and we ultimately urged the Court to grant the plaintiffs' motion for leave to file a complaint (see 389 U.S. 1000)[3] and

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the United States decides to interevene, thereby removing the threshold jurisdictional obstacle.

[2] To be sure, the Court might grant leave to file without resolving the question of the indispensability of the United States, as it did in *Texas* v. *New Mexico,* 343 U.S. 932, 352 U.S. 991. In our view, however, the more orderly course would be to postpone action on the motion until the issue of indispensability is mooted by our intervention or squarely presented by our refusal to do so. That procedure would also postpone—and if an amicable settlement is reached, obviate —the need to resolve the other objections to suit interposed by New Mexico. See note 1, *supra.*

[3] The Court granted the motion for leave to file on the representation of the Solicitor General that the United States would intervene, which it did five months later. See Memorandum for the United States of November, 1967, No. 29, Original.

subsequently intervened. See 391 U.S. 901.[4] But the delays proved useful, so that, to this day, the plaintiffs have not pressed their suit and the Court has not been required to adjudicate the merits.[5] In the present case, we would hope for a swifter resolution, but, at all events, the outcome in No. 29, Original, suggests the appropriateness of a course which encourages amicable settlement.

1. The background and nature of the controversy may be described briefly. The Pecos River is an interstate stream which rises in north-central New Mexico and flows in a southerly direction through New Mexico and Texas and joins the Rio Grande near the town of Langtry, Texas. For most of its course, the stream flows through arid regions where the demand for irrigation water generally exceeds the available supply. Accordingly, consumption must be strictly curtailed if users downstream are to be assured a fair share of the resource, and, to that end, Texas and New Mexico executed the Pecos River Compact in 1948, which was duly approved by Congress the following year. Pub. L. 91, 81st Cong., 63 Stat. 159.

Under the provisions of the Compact, New Mexico agreed not to deplete "by man's activities" the flow

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[4] In the interim, the Court granted the plaintiffs' motion for leave to reply to the defendant's counterclaim and to plead otherwise. See 390 U.S. 933.

[5] The only further step taken in the case was the perpetuation of testimony pursuant to a Stipulation and Agreement filed with the Court on June 3, 1968.

of the Pecos River at the New Mexico-Texas state line below an amount that would give to Texas a quantity of water "equivalent to that available to Texas under the 1947 condition." Art. III, Motion 11. The complexities of that formula need not be explored here. Suffice it to say that it has given rise to differing interpretations and that, in any event, measuring the actual flow at the interstate line at any given time and determining what are man-made diversions present unusual difficulties. This is, in large part, because, during dry periods, most or all of the flow is underground, moving at a slower pace than the surface flow, and sometimes along a different and variable course.

Negotiations have been proceeding between representatives of Texas and New Mexico for the determination of more precise methods of measurement of the stream flow and the effect of man's activities upon it. Apparently, this suit was precipitated by the failure to reach agreement on procedures which would result in more accurate measurements of the stream flow.

2. In Article XI (Motion 20-21), it is stipulated that the Compact shall not be construed as:

> a. Affecting the obligations of the United States under the treaty with the United Mexican States (Treaty Series 994);
>
> b. Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters.

Unfortunately, however, these provisions do not assure that the rights and obligations of the United States will be unaffected by the outcome of the proposed litigation.

First, the United States, on its own behalf or on behalf of Indian Tribes, has substantial claims on the waters of the Pecos River in New Mexico which may be prejudiced if that State is required to make additional deliveries to Texas. There are also federal reclamation projects which require water in Texas. And, again, because the Pecos is a major tributary of the Rio Grande River, the obligation of the United States to assure water deliveries to Mexico might be affected if Texas were not to receive what is due to that State.

In addition, the federal government is importantly involved in efforts to improve the quality of the water of the Pecos [6] or to increase its volume. One of these

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[6] Under the provisions of Pub. L. 88-594, 78 Stat. 942, the United States began a project for the removal of phreatophytes (plants such as willows, salt cedar, etc., consuming large amounts of water) along the Pecos River approximately ten years ago. This project was interrupted by a suit entitled *Central New Mexico Audubon Society* v. *Morton, et al.*, Civil No. 10118, in the United States District Court for the District of New Mexico. By agreement, the phreatophyte control program has been limited to the maintenance of the cleared areas pending completion and review of an environmental impact statement and resolution of this lawsuit.

The Bureau of Reclamation has also been conducting studies and experiments on the improvement of the quality of the water in the Pecos River by intercepting saline water which seeps from the underground and finds its way into the river.

is the so-called Brantly Project, authorized by Congress in 1972 (Pub. L. 92-514, 86 Stat. 966) with the express requirement that the Bureau of Reclamation observe the provisions of the Pecos River Compact. This unavoidably implicates the United States in construing that agreement.

These considerations, we believe, render the United States an indispensable party to the suit. Indeed, on very similar facts, this Court so ruled in *Texas* v. *New Mexico*, 352 U.S. 991. That decision governs here.

3. Here, as in *Texas and New Mexico* v. *Colorado*, No. 29, Original, there appears to be a strong possibility of achieving a non-judicial settlement if litigation is postponed. The Brantly Project, the desalinization studies and the phreatophyte removal program all are expected to alleviate the water shortages which are the cause of this controversy. In *Texas and New Mexico* v. *Colorado*, the participation of officials of the United States in the negotiations contributed substantially to the settlement of that case. We indulge the hope that our mediation could prove useful here too.

For these reasons, we urge the Court to adopt the course outlined at the beginning of this paper: to withhold action on the pending motion for leave to file a complaint for six months, with the understanding that the Solicitor General will then advise the

Court whether the United States deems it appropriate to intervene.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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