IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

* * *

No. 65, Original

STATE OF TEXAS,
Plaintiff

V.

STATE OF NEW MEXICO,
Defendant

* * *

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

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The State of Texas on June 26, 1974, filed its Motion for Leave to File Complaint in the above-styled action, complaining of New Mexico's violation of the Pecos River Compact. New Mexico, in its Brief in Opposition, filed August 30, 1974, asserts two grounds for denying leave to file complaint. First, New Mexico argues that the complaint does not present a justiciable controversy because (a) it is premature, (b) administrative remedies have not been exhausted, and (c) the doctrines of laches and estoppel bar assertion of the cause of action at this time. Second, New Mexico asserts that the United States is an indispensable party and, because

they are not present, the action must be dismissed. In its Memorandum of October 4, 1974, the United States agrees with the State of New Mexico that it is an indispensable party, but the United States has declined, at this time, to inform the Court whether or not it intends to intervene in this action. In the alternative, the United States has suggested that the Court hold proceedings in abeyance for six months so that it might attempt to arbitrate a negotiated settlement between the states.

Texas asserts, in response to New Mexico's Brief in Opposition, that this case clearly presents a justiciable controversy. The complaint is not premature. The "review of basic data," that New Mexico argues must be completed before this action can be resolved, has been underway since 1957 and shows no sign of completion.[1] The people of Texas, since 1950, have been deprived of badly needed water by the State of New Mexico's violation of the Pecos River Compact. This complaint states a concrete, specific cause of action. It does not fall within the authorities cited by New Mexico in its Brief in Opposition. It is not an attempt to obtain an abstract determination of a statute's validity, Texas v. Interstate Com. Comm., 258 U.S. 158 (1922); Liberty Warehouse Co. v. Grannis, 273 U.S. 70 (1927); nor is it a hypothetical question involving the meaning of a lease, Willing v. Chicago Auditorium Assoc., 277 U.S. 274 (1928). The claim

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[1] Even if it is completed and agreed upon, under the terms of the Compact it serves as no more than prima facie evidence of the facts found. PECOS RIVER COMPACT, Art. V.

asserted by Texas in this case is not analogous to those asserted in New Jersey v. Sargent, 269 U.S. 328 (1926), and New York v. Illinois, 274 U.S. 488 (1927), wherein the states protested actions that might interfere with indefinite plans to use the waterways in question for hydroelectric power generation at some time in the future. Texas in this case presents an actual well-founded claim that it has been deprived of water of the Pecos River by New Mexico's disregard of obligations under the Compact.

The doctrine of administrative exhaustion is likewise inapplicable to this action. The Pecos River Commission takes no action unless both states are in agreement. Deadlocked as it is over the current dispute, the Commission cannot provide any sort of administrative remedy. New Mexico understandably cites no authority for the application of the doctrine requiring exhaustion of administrative remedies to an administrative body such as the Pecos River Commission. It is established that, after attempts to settle differences by interstate compact fail, resort to the Supreme Court's original jurisdiction is appropriate. Nebraska v. Wyoming, 325 U.S. 589, 608 (1945).

Finally, the doctrines of estoppel and laches cannot be applied to this action. New Mexico properly notes that these doctrines may be applied in an action involving a water rights dispute between states. But, such application is only proper when the claims are stale and have not been preserved by diligence and good faith. Washington v. Oregon, 297 U.S. 517, 527 (1936). In the instant case, Texas has

continuously and actively pursued a resolution of the dispute -- first on an administrative level, and now through legal action. Thus the claim is not stale. Nor has New Mexico suffered any harm because Texas delayed filing this action until now. Quite the contrary, during the entire time Texas pursued an administrative remedy, New Mexico benefitted by appropriating more water than its apportioned share under the Pecos River Compact.

Significantly, none of the cases dealing with interstate water rights disputes cited in New Mexico's Brief in Opposition were dismissed at this preliminary jurisdictional stage. In each case a hearing on the merits was necessary to determine whether estoppel or other defenses were applicable.[2] The Court might well have been speaking of the current dispute over the Pecos River when, in response to a motion to dismiss, it stated:

> A genuine controversy exists. The States have not been able to settle their differences by compact. The areas involved are arid or semi-arid. Water in dependable amounts is essential to the maintenance of the vast agricultural enterprises established on the various sections of the river. The dry cycle . . . has precipitated a clash of interests which between sovereign powers could be traditionally settled only by diplo-

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[2] See, e.g., Colorado v. Kansas, 320 U.S. 383 (1943); Nebraska v. Wyoming, 325 U.S. 589 (1945).

> macy or war. The original jurisdiction of this Court is one of the alternative methods provided by the Framers of our Constitution.
>
> Nebraska v. Wyoming, 325 U.S. 589, 608 (1945)

The State of Texas denies that the United States is an indispensable party to this action. While the interests asserted by the United States, and by New Mexico on its behalf, might qualify the United States as a "person to be joined if feasible,"[3] equity and good conscience require that the action be allowed to proceed between Texas and New Mexico if the United States refuses to intervene.[4] The United States may join and represent its interests if it so desires. Should it fail to do so, this Court, as the only forum available, can fashion a remedy to the Pecos River dispute that will protect the interests of the United States and not unduly prejudice the

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[3] FED. R. CIV. P. 19a. Rule 9 of the Rules of this Court make the Federal Rules of Civil Procedure applicable to original jurisdiction actions when appropriate. Rule 19 is clearly applicable to an indispensability question.

[4] FED. R. CIV. P. 19b. For decisions that the United States was not an indispensable party in similar situations, see Nebraska v. Wyoming, 295 U.S. 40, 43 (1935), and Nebraska v. Wyoming, 325 U.S. 589, 616 (1945). See also, Texas v. New Mexico, Original No. 9, Report of the Special Master, February 28, 1954, and Report of the Special Master, January 31, 1955.

rights of either of the present parties to this action.

Nevertheless, Texas accepts the proposal of the United States and will, in good faith, pursue an amicable negotiated settlement for the next six months. This course of action will, hopefully, resolve the controversy without further proceedings in this Court. Because of the position Texas takes, in accepting the offer of the United States, an extensive brief on indispensability and New Mexico's other objections is not presented at this time. Texas will, with the Court's permission, file such a brief when the United States announces its decision on whether or not it intends to intervene.

For these reasons, Texas joins the United States and New Mexico in urging the Court to withhold action on its Motion for Leave to File Complaint until the United States announces its decision with regard to intervention, but not to exceed a six month period.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, PHILIP K. MAXWELL, one of the Attorneys for the State of Texas, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 2 day of January 1975, I served copies of the foregoing Response of the State of Texas to New Mexico's Brief in Opposition and to the Memorandum of the United States by first class mail, postage prepaid, to the Office of the Governor and Attorney General, respectively, of the State of New Mexico, and the Solicitor General of the United States.

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Texas