

No. 65, ORIGINAL

Supreme Court, U. S.

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MICHAEL RUDAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1975

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

*MOTION FOR LEAVE TO INTERVENE AS PLAINTIFF,
COMPLAINT IN INTERVENTION, AND MEMORANDUM IN SUPPORT
OF MOTION FOR LEAVE TO INTERVENE AS PLAINTIFF*

ROBERT H. BORK,
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In the Supreme Court of the United States

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STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

MOTION FOR LEAVE TO INTERVENE AS PLAINTIFF

The United States, by the Solicitor General, moves for leave to intervene as a plaintiff in this action and to file the attached Complaint in Intervention on the ground that it has substantial rights to use the waters of the Pecos River system and duties and obligations with respect to these waters which can adequately be protected only if the United States is a party to the action.

The State of New Mexico and the United States have asserted that the United States is an indispensable party to this action and absent intervention by the United States, this suit cannot go forward. Granting the present motion for leave to intervene upon the attached complaint will eliminate that jurisdictional bar and permit a judicial resolution of the dispute in the event and to the extent it is not resolved by agreement and cooperation between the parties.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

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COMPLAINT IN INTERVENTION

I

The jurisdiction of this Court is invoked under Section 1251 of Title 28 of the United States Code.

II

The Pecos River is an interstate stream system which arises 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 runs through arid regions where the demand for irrigation water generally exceeds the available supply.

III

For the purpose of equitably apportioning the waters of the Pecos River system between the States of Texas and New Mexico, these states signed the Pecos River Compact on December 3, 1948. The Compact was ratified thereafter by the legislatures of both states and Congress gave its consent to the Compact on June 9, 1949, by Public Law 91, 81st Cong., 63 Stat. 159.

IV

Article XI of the Compact provides as follows:

Nothing in this Compact shall be construed as:

(a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);

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

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

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

V

Article XII of the Compact provides as follows:

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

VI

The United States, as a fiduciary, holds for the benefit of the Mescalero Apache Tribe and its members lands within the watershed of the Pecos River in the State of New Mexico that are part of the Mescalero Apache Reservation. The lands of the Mescalero Apache Reservation were a part of the aboriginal homelands of the Mescalero Apache Indians who have continuously occupied these lands from time immemorial.

VII

On July 1, 1852, a treaty was entered into between the United States and the Apache Nation of Indians wherein it was agreed, *inter alia*, that the Apache Nation would be exclusively under the laws, jurisdiction and government of the United States; and that the United States, at its earliest convenience, would "designate, settle, and adjust" the Apache's territorial boundaries. 10 Stat. 979. On May 29, 1873, the boundaries of the Mescalero Apache Reservation were designated, settled and adjusted by Executive Order.

VIII

In the establishment of the Mescalero Apache Reservation the waters in, on and adjacent to the Reservation lands were reserved for the benefit of the Mescalero Apache Tribe and its members and withdrawn from private appropriation as against the United States.

IX

The United States in its own right and as a fiduciary for the Mescalero Apache Tribe and its members claims rights in and to the use of so much of the waters in, on and adjacent to the Mescalero Apache Reservation as is or will become reasonably necessary for the present and future needs of the Mescalero Apache Tribe and its members in fulfillment of the purposes for which the

Reservation was created. Such purposes include municipal and domestic use, irrigation, stock watering and full utilization of the Reservation and its resources for the benefit of the Mescalero Apache Indians.

X

The United States owns lands within the watershed of the Pecos River in the State of New Mexico, that are parts of the Santa Fe, Cibola and Lincoln National Forests, having been withdrawn from the public domain by various Presidential proclamations and Executive orders and reserved for national forest purposes. When these lands were reserved for national forest purposes, the waters in, on and adjacent to said lands were withdrawn from private appropriation as against the United States and were reserved for use on said lands by the United States to the extent reasonably necessary for the requirements and purposes of said reservations.

XI

The United States claims rights in and to the use of so much of the waters of the Pecos River system in, on and adjacent to national forest lands as is or may become reasonably necessary for fulfillment of the purposes of the forest reservations with priority dates as of the dates these lands were withdrawn and reserved for forest purposes.

XII

The United States owns the Carlsbad Caverns National Park which is located within the watershed of the Pecos River in the State of New Mexico. Certain of the lands comprising this national park were originally reserved for national monument purposes as Carlsbad Cave National Monument by Presidential Proclamation of October 25, 1923, 43 Stat. 1929. Carlsbad Cave National Monument was designated Carlsbad Caverns National Park and its boundaries extended by the Act of May 14,

1930, 46 Stat. 279. When these lands were reserved for national monument and national park purposes the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for the use of the United States to the extent necessary for the requirements and purposes of the said reservation. In addition, the United States has acquired a right to the use of water at the rate of .05 cubic feet per second or a total of 105 acre-feet per year on Carlsbad Caverns National Park with an 1880 priority recognized by the State of New Mexico.

XIII

The United States owns Gran Quivira National Monument which is located within the watershed of the Pecos River in the State of New Mexico. Most of the lands comprising this national monument were reserved for national monument purposes by Presidential Proclamation of November 1, 1909, 36 Stat. 2503. When these lands were reserved the unappropriated waters in and on said lands were withdrawn from private appropriation as against the United States and were reserved for the use of the United States to the extent necessary for the requirements and purposes of said reservation. In addition, the United States has a right recognized by the State of New Mexico with a priority date of 1965, to the use on the Gran Quivira National Monument of 50 gallons of water per minute from a well drilled on acquired lands comprising a portion of the national monument.

XIV

The United States owns Fort Union National Monument which is located on acquired lands within the watershed of the Pecos River in the State of New Mexico.

The United States has a right recognized by the State of New Mexico with a priority date of June 8, 1960, to the use on Fort Union National Monument of 50 gallons of water per minute from a well on the national monument lands.

XV

The United States owns the Pecos National Monument which is located on acquired lands within the watershed of the Pecos River in the State of New Mexico. The United States claims the right to the use of waters in and on the lands of the Pecos National Monument which have heretofore been appropriated by their application to beneficial use with a priority date as of the date the uses were initiated.

XVI

The United States owns Guadalupe National Park which is located on acquired lands within the watershed of the Pecos River in the State of Texas. The United States claims the right to the use of the waters in and on these lands which may be derived from springs, wells and water holes.

XVII

The United States owns the Carlsbad and Fort Sumner Reclamation Projects in the watershed of the Pecos River within the State of New Mexico. These projects were built by the United States under authorization of the Reclamation Act of June 17, 1902, 32 Stat. 388, as amended. These projects are presently operated by local irrigation districts under contract with the Bureau of Reclamation and deliver water to water users within the irrigation districts. The rights to the use of the waters delivered by these projects are recognized by the State of New Mexico.

XVIII

The United States owns the Balmorhea Reclamation Project within the watershed of the Pecos River in the State of Texas. The project was constructed under authority of the Reclamation Act of June 17, 1902, 32 Stat. 388, as amended. This project is presently operated by a local irrigation district and delivers water to water users within the district. Their rights to the use of the water delivered by the Balmorhea Project are recognized by the State of Texas.

XIX

Public Law 92-514, 86 Stat. 966, authorizes the construction, operation and maintenance of the Brantley Project, Pecos River Basin, New Mexico "for the purposes of irrigation, flood control, fish and wildlife and recreation, and for the elimination of the hazards of failure of McMilland and Avalon Dams * * * ." Section 203 of this Act provides that "[n]othing in this Act shall be construed to alter, amend, repeal, modify or be in conflict with the provisions of the Pecos River Compact * * * ." The Bureau of Reclamation is presently in the final stages of planning and design in the construction of the Brantley Project. Without a judicial interpretation, however, of the Pecos River Compact the United States cannot properly carry out the mandate of Congress in the construction and operation of the Brantley Project.

XX

The United States owns certain rights to the use of waters of the Pecos River which have been adjudicated in the case of *United States v. Hope Community Ditch, et al.*, No. 712, Equity in the United States District Court for the District of New Mexico, by decree entered May 8, 1933.

XXI

The United States owns certain rights to the use of waters of the Pecos River stream system which have been adjudicated in the case of *State of New Mexico and Pecos Valley Artesian Conservancy District v. L.T. Lewis, et al.*, Civil No. 20294, in the District Court of Chaves County, State of New Mexico, by judgment entered November 27, 1973.

Wherefore, the United States prays that the Court grant such relief as is appropriate and necessary to protect the United States' rights with respect to the waters of the Pecos River stream system.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

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No. 65, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

**MEMORANDUM IN SUPPORT OF MOTION FOR
LEAVE TO INTERVENE AS PLAINTIFF**

In our supplemental memorandum of March 1975, we advised the Court that certain provisions of the Pecos River Compact required judicial construction before the dispute between the States of Texas and New Mexico could be resolved and that if Texas' motion for leave to file a complaint was granted, the United States would move to intervene in this case to assert the federal interests affected by the litigation. On April 21, 1975, the Court granted Texas' motion for leave to file a bill of complaint and allotted the defendant sixty days to answer.

The United States has substantial rights and obligations with respect to the waters of the Pecos River stream system - including an international responsibility to assure deliveries to the Republic of Mexico, a duty to protect the water rights of its Indian wards, and rights and duties appertaining to federal lands and facilities along the stream or within the watershed.

The Pecos River Compact does not purport to affect the water rights of the United States. This does not mean, however, that the rights and obligations of the United

States will be unaffected by the outcome of the litigation. If New Mexico should be required to deliver additional quantities of water to Texas, this could have an adverse affect on claims and obligations of the United States in New Mexico. On the other hand, if Texas does not receive the amount of water due to that State under the compact, this could adversely affect claims and obligations of the United States in Texas and could adversely affect the delivery by the United States of water to Mexico under its treaty obligations. In addition, in the construction and operation of the Brantley Project, authorized by Public Law 92-514, 86 Stat. 966, the Bureau of Reclamation is required by law to observe the provisions of the Pecos River Compact. Therefore, in light of the federal interests involved, intervention by the United States is necessary to permit the suit to go forward; and, in any event, intervention is appropriate to insure that the federal interests are fully protected.

CONCLUSION

For the reasons stated, the motion for leave to intervene as a plaintiff and to file the complaint in intervention should be granted.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

AUGUST 1975.

