No. 65, Original

In the Supreme Court of the United States

OCTOBER TERM, 1975

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

RESPONSE OF THE UNITED STATES TO THE STATE OF NEW MEXICO'S OBJECTIONS TO THE COMPLAINT IN INTERVENTION

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

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 65, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

RESPONSE OF THE UNITED STATES TO THE STATE OF NEW MEXICO'S OBJECTIONS TO THE COMPLAINT IN INTERVENTION

This action was commenced by the State of Texas, which seeks enforcement of its rights against the State of New Mexico to the use of water from the Pecos River, an interstate stream, under the provisions of the Pecos River Compact, 63 Stat. 159 (the Compact).

The State of New Mexico opposed the motion of the State of Texas for leave to file a complaint. New Mexico contended, among other things, that the United States is an indispensable party to this action. New Mexico pointed out (Br. 26-27):

> 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 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.

In a memorandum of October 1974 the United States agreed it was an indispensable party. After negotiations between the States did not produce a settlement, we filed a supplemental memorandum in March 1975, advising the Court that if it granted Texas' motion for leave to file a complaint, the United States would move to intervene in order to protect the federal interests affected by the litigation.

On April 21, 1975, this Court granted the motion of the State of Texas for leave to file a bill of complaint (421 U.S. 927). The State of New Mexico answered in June 1975, once more contending that the Court is without jurisdiction because of the absence of the United States, an indispensable party. In August 1975 the United States filed a motion for leave to intervene as a plaintiff and to file an attached complaint in intervention. The complaint of the United States alleges its various interests and obligations with respect to the waters of the Pecos River and requests the Court to "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" (Complaint at 9). The State of New Mexico has responded by opposing our motion for leave to intervene and to file a complaint, contending that our intervention and complaint would unduly enlarge the issues to be adjudicated.

Putting aside the apparent inconsistency between New Mexico's argument that the United States is an indispensable party and its objection to the United States' attempt to protect its interests by filing a complaint in intervention, we submit that New Mexico's arguments against our complaint in intervention are insubstantial. This case is identical in all material respects to *Arizona* v. *California*, in which the United States intervened.

There Arizona filed a petition for leave to file a complaint seeking a determination of its rights under the provisions of the Colorado River Compact and

the Boulder Canyon Project Act, 45 Stat. 1057. California contended that the United States was an indispensable party. The Court granted Arizona's petition for leave to file a complaint and the United States' petition to intervene. 344 U.S. 919. The United States then filed a complaint in intervention, alleging its rights and duties with respect to the use of waters of the Colorado River. These rights and duties, all of which were subject to adjudication, included treaty obligations to deliver water to Mexico, contracts for the delivery of water from reclamation projects, claims of Indians and Indian Tribes, and other federal interests including fish and wildlife projects and national forests. The United States asked the Court to resolve the conflicts that had arisen among the parties and "[t]o quiet the title of the United States of America in and to each and every right to the use of water claimed and exercised by it, all as asserted in this Petition, including but not limited to those of its Indian wards, against the adverse claims of the State of Arizona and the above-named defendants." [1] The previously unadjudicated claims alleged by the United States were referred to a Special Master, whose findings were approved by the Court. 373 U.S. 546, 595-601.

In the instant case Texas has sought a determination and enforcement of its rights under the Compact. The United States, an indispensable party, has filed a petition to intervene and to file a complaint in in-

[1] Petition and Complaint in Intervention of the United States in *Arizona* v. *California*, No. 10, Original (later redesignated No. 8, Original), October Term, 1953, at p. 42.

tervention. This Court should pass upon the claims of the United States, as it did in *Arizona* v. *California*, to the extent that those claims need to be determined in order to grant appropriate relief to the States involved.

We do not seek an order adjudicating all of the rights of the United States to Pecos River water; our complaint in intervention was designed only to permit the adjudication of those rights, to the extent such adjudication is necessary to adjudicate the rights of, and afford relief to, Texas and New Mexico. Because we cannot predict what relief may be necessary and appropriate, we cannot now say what, if any, rights of the United States should be determined by the Court and its Special Master if one is appointed.

The United States has not asked for adjudication of all water rights alleged in its complaint. Obviously it will not be necessary to readjudicate rights that already have been finally decreed. They are alleged so that the Court will be aware of them. It is unlikely that there would be any serious challenge to the rights involved in the small uses alleged for the various national monuments in New Mexico; indeed, most of these rights already have been recognized by that State. The only important controversy with respect to the rights of the United States to the use of the waters of the Pecos River system in the State of New Mexico would appear to be those pertaining to the Mescalero Apache Reservation.

New Mexico has indicated that the claims with

respect to the Mescalero Apache Reservation and the Lincoln National Forest in the basin of the Hondo River (a tributary to the Pecos) are being adjudicated in a state court (Response at 3, n. 2). That court, however, dismissed the action as to the water rights of the Mescalero Apaches on the ground that it did not have jurisdiction to adjudicate Indian water rights.[2] An appeal of that decision is pending in the Supreme Court of New Mexico. That controversy, however, would be mooted if this Court decided that adjudication of the water rights of the Mescalero Apache Reservation is properly a part of this action.

New Mexico also has suggested that the judicial recognition of any water rights of the United States in this action "would necessitate the joinder of a great number of political subdivisions, corporations and individual water users affected by those claims" (Response at 2). This argument, however, overlooks the doctrine of *parens patriae*, under which the State may represent the interests of its citizens and subdivisions in original jurisdiction suits. See *Pennsylvania* v. *West Virginia*, 262 U.S. 553; *Georgia* v. *Tennessee Copper Co.*, 206 U.S. 230. Although certain public agencies in the State of California were joined as parties defendant in *Arizona* v. *California*,

---

[2] That decision is correct. Federal courts alone have jurisdiction over claims for determination of Indian water rights. See our brief in *Colorado River Water Conservation District* v. *United States*, No. 74-940, at 52-62. Copies of that brief are being furnished to the parties.

supra, the interests of most of the individuals and corporations of the various States that were parties to that action were represented by the States. We see no reason why New Mexico cannot represent her citizens, agencies and municipal corporations in this case with respect to the claims of the United States; indeed, she is already doing so with respect to the claims of Texas.

For the foregoing reasons, and those set out in our Memorandum in Support of Motion to Intervene as Plaintiff, the United States should be allowed to file its Complaint in Intervention.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

OCTOBER 1975.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1975 594795 73