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No. 65, Original

*In The Supreme Court of the United States*

OCTOBER TERM, 1975

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STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO, DEFENDANT

UNITED STATES OF AMERICA, INTERVENOR

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**REPORT OF SPECIAL MASTER ON HIS DECISION  
AND SUPPLEMENTAL DECISION REGARDING THE  
AFFIRMATIVE DEFENSES OF NEW MEXICO  
TO THE COMPLAINT OF TEXAS**

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Jean S. Breitenstein

Special Master  
United States Courthouse  
Denver, Colorado 80294

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## **REPORT OF SPECIAL MASTER**

On May 6, 1977, the Special Master made his decision with respect to certain affirmative defenses of New Mexico to the Texas complaint. After hearing arguments on objections to that decision, the Master on July 6, 1977, made a supplemental decision which, to the extent therein mentioned, modifies and supersedes the May 6 opinion. The attitude of the parties is such that the Special Master deems it appropriate that he report to the United States Supreme Court the actions which he has taken. The May 6 and July 6 decisions of the Special Master follow.



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THE COMPLAINT OF TEXAS

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FOR THE UNITED STATES

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## MAY 6, 1977 DECISION OF SPECIAL MASTER

The Special Master has for consideration the affirmative defenses of New Mexico to the complaint of Texas. The parties agree that the validity of these defenses must be determined before the case can go forward.

The Texas complaint charges that New Mexico has breached the 1948 Pecos River Compact, 63 Stat. 159, by failing to deliver to Texas the amount of water to which Texas is entitled. The action is within the original jurisdiction of the United States Supreme Court under the provisions of the United States Constitution, Art. III, § 2, Cl. 2, and of 28 U.S.C. § 1251(a)(1).

The Pecos River is an interstate stream which rises in north-central New Mexico and flows for about 900 miles in a southerly direction through New Mexico and Texas to join the Rio Grande near Langtry, Texas. For most of its course, the stream flows through semi-arid regions where the demand for irrigation water generally exceeds the available supply. Consumption must be curtailed if users downstream are to be assured a fair share of the resource.

Long-standing and recurring disputes between New Mexico and Texas over rights to the use of Pecos River water resulted in the creation of a compact negotiating commission which began its meetings in 1943. The commission was composed of one representative each for the United States, New Mexico, and Texas. The negotiators appointed an Engineering Advisory Committee under the chairmanship of Royce J. Tipton to study the river and make recommendations. The negotiators signed the Pecos River Compact on December 3, 1948. The Compact was ratified by the New Mexico legislature on February 9, 1949, Laws of N. Mex. 1949, p. 31, and by the Texas legislature on March 4, 1949, Gen. L. 1949, p. 51. The Congress of the United States gave its consent, as required by the United States Constitution, Art. I, § 10, Cl. 3, on June 9, 1949, 63 Stat. 159.



The basic responsibility of New Mexico to Texas is stated in Art. III(a) of the Compact:

“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 term “1947 condition” is defined thus by Art. II(g):

“The term ‘1947 condition’ means that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee. In determining any question of fact hereafter arising as to such situation, reference shall be made to, and decisions shall be based on, such report.”

Compact Art. V(a) creates an interstate administrative agency to be known as the “Pecos River Commission.” The Commission is composed of one commissioner representing each of the states of New Mexico and Texas and one representing the United States. The United States representative “shall not have the right to vote in any of the deliberations of the Commission.”

Art. V(f) says:

“Findings of fact made by the Commission shall not be conclusive in any court, or before an agency or tribunal, but shall constitute prima facie evidence of the facts found.”

Art. VI sets out the principles which “govern in regard to the apportionment made by Article III of this Compact.” Art. VI (a) provides:

“The Report of the Engineering Advisory Committee, supplemented by additional data hereafter accumulated, shall be used by the Commission in making administrative determinations.”

Art. VI(c) says:

“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, shall be used to:

(i) 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.” [And for other stated purposes.]

Consideration of the problem requires an understanding of two recurring terms. “1947 condition” is a situation on the river as described in the Report of the Engineering Committee. It does not relate to the water supply which occurred in the year 1947. See S. Doc. 109, 81st Cong. 1st Sess., pp. 113-114. The engineers determined the “1947 condition” by a number of river operation or routing studies. A routing study is a simple mathematical model of the river which numerically presents the flow of the river at given points.

The term “inflow-outflow method,” as defined by the engineers, S. Doc. 109, p. 149,

“involves the determination of the correlation between an index of the inflow to a basin as measured at certain gaging stations and the outflow from the basin. It is obviously impossible to measure all of the inflow. The gaging stations which are utilized to measure a part of the inflow are termed index inflow stations because the amount of water

measured at those stations is an acceptable index of the inflow to the basin. From the plotting by years of the sum of the index inflows against the outflow there is developed a correlation curve showing the relationship between inflow and outflow. Any changes thereafter in the basin which occur between the points of inflow and the point of outflow and which affect the water supply of the basin can be measured by the change in correlation between the inflow and outflow from that indicated by the correlation curve previously developed."

Compact Commissioners were promptly appointed by the United States, New Mexico, and Texas. Amicable operations under the Compact proceeded for a number of years. In 1957 the Commission authorized a subcommittee of the Engineering Committee, Min. p. 174, "to restudy under 1947 conditions the inflow-outflow relationships." The Engineering Committee reported, and the Commission adopted on January 31, 1961, a report of the Engineering Committee on "Review of Basic Data." The Commission recognized that the report was not complete and authorized its completion.

After the last mentioned meeting, the Commission made little if any progress. During the period 1963-1970 the meetings were unproductive. At the July 21, 1970, meeting the Texas Commissioner presented for the record a letter which, among other things, said, Min. p. 360:

"[T]here has not been a proper accounting of the division of the waters in the Pecos River between the states of New Mexico and Texas in approximately twenty years."

The Engineering Committee was directed to prepare additional computations.

After 1970 the Commission meetings continued to be futile and unproductive. At some of the meetings the engineers for the two states presented conflicting reports. The differences were not resolved. During the February 21, 1974, meeting the Texas Commissioner said, Min. p. 481:

“We have reached a point after 25 years of studying, that it is obvious that we are not going to get relief through the Pecos River Commission, due to the makeup and the two-member vote, so undoubtedly Texas will have to look elsewhere to obtain enforcement of its rights under the Pecos River Compact.”

The New Mexico Commissioner replied that New Mexico had not violated the Compact. The Texas motion for leave to file the complaint in this action was filed in the United States Supreme Court on June 27, 1974.

In its opposition to the motion for leave to file the complaint, New Mexico asserted that the United States was an indispensable party. The Solicitor General in a memorandum filed for the United States, agreed that the United States was an indispensable party. He suggested that action on the Texas motion be postponed for six months and assured that the United States “would devote its best efforts to achieving \* \* \* an amicable resolution of the dispute.” On March 12, 1975, the Solicitor General filed a supplemental memorandum in which he said:

“[W]e conclude that settlement of the dispute is not possible at the present time. It appears that there is a fundamental disagreement regarding the construction of certain provisions of the compact, and in the absence of a judicial determination of these issues, further attempts to resolve the dispute would not be fruitful.”

The Court granted leave to file, 421 U.S. 927, and New

Mexico presented its answer. Therein, after making admissions and denials, New Mexico asserted affirmative defenses. The United States moved for leave to intervene. The Special Master was appointed. 423 U.S. 942. After a hearing he recommended that the United States be permitted to intervene, and his recommendation was approved by the Court. 423 U.S. 1085.

The New Mexico answer asserts compliance with the Compact and several affirmative defenses. The basic controversy revolves around the obligation of New Mexico to deliver and the determination of the pertinent river flows. New Mexico relies on the 1961 "Review of Basic Data" adopted by the Commission to support its position. Texas says that the "Review of Basic Data" was an improper and unauthorized deviation from Compact terms.

The New Mexico affirmative defenses are (1) no justiciable controversy, (2) failure to exhaust administrative remedies, (3) the doctrine of primary jurisdiction, (4) equitable estoppel, and (5) laches. Texas denies that any of the defenses is well taken.

An interstate compact is a preferred procedure for the settlement of controversies among states of the Union. *Colorado v. Kansas*, 320 U.S. 383, 392, and *Arizona v. California*, 373 U.S. 546, 564. The construction of a compact sanctioned by Congress presents a federal question. *Petty v. Tennessee-Missouri Bridge Commission*, 359 U.S. 275, 278. See also *Hinderlider v. La Plata & Cherry Creek Ditch Co.*, 304 U.S. 92, 110, and *Delaware River Commission v. Colburn*, 310 U.S. 419, 427. The meaning of a compact is a question which the Supreme Court has final authority to determine. *Dyer v. Sims*, 341 U.S. 22, 28.

The instant suit is not one in equity for the apportionment of the flow of a stream between two states. Cf. *Wyoming v. Colorado*, 298 U.S. 573. Rather it is a suit for breach

of the Compact. An interstate compact is a contract between states with the sanction of Congress.

New Mexico asserts that the Texas refusal to cooperate in good faith in the review of basic data and the revision of the Manual of Inflow-Outflow Methods equitably estops it from asserting that New Mexico has violated the Compact by reason of its alleged failure to deliver water in accordance with the Compact. New Mexico Answer, ¶ XII.

“Estoppel in equity must rest on substantial grounds of prejudice or change of position, not on technicalities.” *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 323. New Mexico does not claim, except in general terms, that she relied to her detriment on any actions or representations of Texas. The action or nonaction of Texas was in its governmental capacity. The public interest should not suffer from the failure of its officers to act. See *United States v. California*, 332 U.S. 19, 39-40. The Master rejects the defense of equitable estoppel.

The New Mexico answer avers, ¶ XIII that:

“The claim of the State of Texas that the State of New Mexico has failed to deliver water in accordance with the Compact since 1950 is untimely and is barred by laches.”

As a general rule laches does not operate against either the United States or a state. *Guaranty Trust Co. v. United States*, 304 U.S. 126, 132. The reason is protection of the public from misconduct of its officers. *Ibid.* *Ohio v. Kentucky*, 410 U.S. 641, 648, says that original proceedings in the Supreme Court “are basically equitable in nature” and “a claim not technically precluded nonetheless may be foreclosed by acquiescence.” That was a boundary case in which Ohio had long acquiesced in the line.

*Colorado v. Kansas*, 320 U.S. 383, was a case relating to

the use in the contesting states of water of the Arkansas River. There was no compact pertaining to the river. The Court said, *Ibid.* at 394, that long acquiescence by Kansas in the Colorado uses "gravely add[s] to the burden which she would otherwise bear, and must be weighed in estimating the equities of the case." The case at bar is for breach of a compact, not for an equitable apportionment.

Inconsistently, New Mexico both asserts laches because of the participation by Texas in the administrative proceedings and contends that Texas should return to the administrative forum before presenting the controversy to the Court. Texas had asserted its claims in the administrative forum for many years before bringing this suit. The continued efforts of Texas to have the Commission adopt its position does not preclude it from bringing this action. Otherwise Supreme Court litigation would replace negotiation. The Master rejects the defense of laches.

The validity of the defenses of no justiciable controversy, failure to exhaust administrative remedies, and violation of the doctrine of primary jurisdiction depends on the resolution of the issue which has divided the states for years.

The Compact provides that New Mexico shall not deplete by man's activities the Pecos flow at the state line below an amount which will give Texas the equivalent of that received under the 1947 condition. To determine the New Mexico obligation for any year or series of years the equivalent amount under the 1947 condition must first be ascertained. If the deliveries do not equal the equivalent amount, then it is necessary to determine whether the depletion has resulted from man's activities. Complex measurements and computations must precede fact finding and decision making.

Texas claims that the 1961 "Review of Basic Data" adopted by the Commission violates the Compact and deprives Texas of water. The states take divergent positions on

the intent of the Compact. New Mexico asserts that oral testimony is admissible to show intent of the Compact negotiators. Texas objects that the testimony is not admissible. The Master determined that to assure the completeness of the record the testimony should be taken and that thereafter he would rule on its admissibility. New Mexico gave notice that its proposed witnesses were John H. Bliss, the New Mexico member of the negotiating commission, John R. Ericson, his engineering adviser, and Irwin S. Moise, his legal adviser. After Texas had taken the deposition of each, the Master held a hearing at which each appeared and testified. Their testimony is a matter of record in the case.

The pertinent intent is not that of the negotiators but rather that of the legislatures of the respective states when they ratified the Compact and that of Congress when it gave the consent of the United States to the Compact. The attorneys for each state profess that no report by the negotiating commissioner of either state to its legislature can be found. It is not known whether the minutes of the meetings of the Compact negotiators were made available to either state legislature.

When the Compact was before Congress for the grant of the consent of the United States, the report of the federal representative on the negotiating commission was presented and printed as Senate Document No. 109, 81st Cong., 1st Sess. The report contains, S. Doc. 109, p. X:

“Minutes of the meeting of the Pecos River Compact Commission held in Santa Fe, N. Mex., December 3, 1948. These minutes include statements of the intent of the several articles of the compact.

Report of the engineering advisory committee to the Pecos River Compact Commission, dated January 14, 1948.



Supplement to the report of January 14, 1948, by the engineering advisory committee to the Pecos River Compact Commission, dated August 1948, with further additions dated November 9, 1948.

Manual of Inflow-Outflow Methods of Measuring Changes in Streamflow Depletion for use in administration of the Pecos River compact, dated December 3, 1948."

Arizona v. California, 292 U.S. 341, was an effort by Arizona to perpetuate testimony in aid of future litigation. Arizona sought to invoke original Supreme Court jurisdiction. The testimony was that of persons who participated in the negotiation of the 1922 compact signed by the representatives of the seven states of the Colorado River Basin. Arizona had not ratified the compact. The Boulder Canyon Project Act of 1928, 45 Stat. 1057, had approved the compact upon ratification by six states, authorized the construction of what is now known as Hoover Dam and ostensibly made an apportionment of Lower Basin water among the states of Arizona, California and Nevada. Arizona sought to perpetuate the testimony in support of its position relating to the Lower Basin apportionment. In denying leave to file the Supreme Court said, *Ibid.* at 359-360:

"It has often been said that when the meaning of a treaty is not clear, recourse may be had to the negotiations, preparatory works, and diplomatic correspondence of the contracting parties to establish its meaning. [Citing cases.] But that rule has no application to oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body. There is no allegation that the alleg-

ed agreement between the negotiators made in 1922 was called to the attention of Congress in 1928 when enacting the Act; nor that it was called to the attention of the legislatures of the several States."

New Mexico does not claim that the views of the witnesses whom it called were ever put in writing or communicated to either state legislature or to Congress.

To rebut the testimony of the New Mexico negotiators, Texas offered memoranda prepared by Robert Lowry, the engineering adviser to the Texas compact negotiator. No showing is made that these memoranda were communicated to either state legislature or to the Congress. The Master holds that neither the testimony of the New Mexico negotiators nor the memoranda prepared by the Texas engineering adviser is admissible to show intent.

The parties have submitted, and the Master has received, a number of joint exhibits. These include:

Ex. No. 1—Senate Document No. 109;

Ex. No. 4—Minutes of meetings of the Pecos River Commission;

Ex. No. 5—Data Submitted to Engineering Advisory Committee, Pecos River Commission, on Jan. 30, 1961 by Subcommittee on Review of Basic Data;

Ex. No. 8—Report of Review of Basic Data to Engineering Advisory Committee, Pecos River Commission, 10/18/60.

The forementioned exhibits have been considered by the Master in his determinations which follow.

The Inflow-Outflow Manual says on its title page, S.

Doc. 109, p. 145: "For Use in Commencement of Administration of Pecos River Compact." The Manual states, *Ibid.* at 150-151:

"In the routing studies made by the engineering advisory committee such items as consumptive use and spring flow were taken as constants. The commission should make studies of such items in order to determine the extent to which they may fluctuate from year to year in accordance with the variation of meteorological factors which affect them. *In addition to refinement of such basic data, it may be that the refinement of estimating technique can be made of other data such as estimates of flood flow used in the routing studies, which are also used herein to develop inflow-outflow relationships. If this is done, necessarily there must be a refinement in the inflow-outflow correlations comparable to the refinement in the estimates of the basic data.*" (Italics supplied.)

The Commission minutes disclose that the Engineering Committee engaged in inflow-outflow studies during the period 1949-1957. The minutes of the July 29, 1957, Commission meeting show, Min. at 173-175, the adoption of the following recommendation of the Engineering Committee:

"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 [Plates Nos. 1 and 2] of Senate Document 109, 81st Congress, 1st Session should be modified."

At the same meeting the Commission received and adopted a report of the Legal Committee, Min. at 173, that:

“[T]he 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.”

The Report of the Engineering Advisory Committee to the compact negotiators divides the Pecos River Basin into three parts: (1) the upper basin consisting of the New Mexico area above Alamogordo Reservoir, (2) the middle basin consisting of the New Mexico area between Alamogordo Reservoir and the New Mexico-Texas state line, and (3) the lower basin which comprises the area in Texas. S. Doc. 109 at 2. With the exception of the Storrie Project, of little if any significance to our present problem, “development in the upper basin has remained about the same as it was under the early Spanish occupation.” Ibid. The middle basin is of primary concern.

In the 1890's McMillan Reservoir was constructed to serve the Carlsbad, New Mexico, area. The original capacity of 80,000 acre feet had, by 1948, been depleted by sediment deposition to 38,000 acre feet. Ibid. at 3. The reservoir has leaked since the time when it was built. Ibid. at 3. Alamogordo Reservoir was constructed in 1937 to replace the lost capacity of McMillan. Ibid. at 3. With further reference to McMillan the Engineering Report says, Ibid. at 71, that: “Excessive leakage from McMillan has increased appreciably since 1940 and now make the reservoir largely ineffective.”

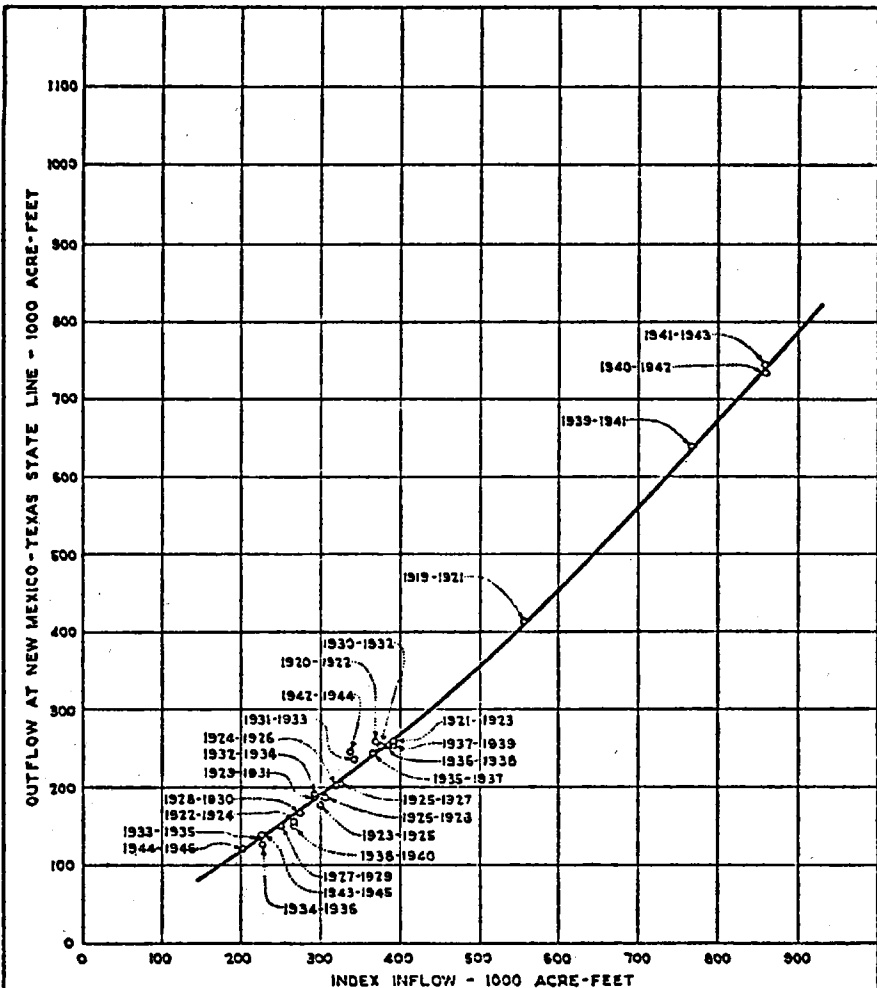
The Engineering Report says, Ibid. at 13:

“No expansion can take place in the irrigated area in either the middle or lower basins under present conditions because of the limited water supply. The requirements of the Carlsbad irrigation district has [sic] had the effect of being a deterrent to any expansion in the irrigated area above it. Overdevelopment of the artesian water and the shallow ground water in the Roswell artesian basin has been prevented by controls instituted by the State engineer of New Mexico under a ground water act passed by the New Mexico State Legislature. Controls imposed by the State engineer under this legislation limit the amount of water that can be pumped from the shallow ground water.”

The Inflow-Outflow Manual, which was prepared by the Engineering Committee and which was before the negotiators at the time of signing the Compact, states, S. Doc. 109 at 150, that the engineering studies “can be used as a basis for the development of inflow-outflow relationships for certain reaches of the river to permit the commencement of the administration of the compact.”

Plate No. 2, which shows the relationship between the inflow at Alamogordo Dam, plus flood inflow, and the outflow at state line, is of prime importance and is reproduced on the following page. With reference to Plate 2 the Manual says, Ibid. at 152:

“Plate No. 2 shows the relation between inflow at Alamogordo Dam plus flood inflow, and the outflow at the State line. The inflow is made up of the routed flow past Alamogordo Dam under the 1947 condition and the estimated flood inflow. The outflow consists of the routed flow past the State line under the 1947 condition and includes



ALAMOGORDO DAM  
TO  
NEW MEXICO - TEXAS STATE LINE

Plate No.2

the estimated flow of the Delaware River. Following the curve are tables showing in tabular form the relation between inflow and outflow and the departures estimated for each year used in developing the relationship under 1947 conditions. The accumulated departure is also shown. The curve and the tables are to be utilized to indicate any change in depletion for this stretch of the river."

The second table which follows Plate No. 2 shows departures in terms of 1,000 acre feet. For individual years the range is from -14.2 to +28.3. Accumulated by years the range is from -20.7 to +30.1.

The Manual presents two correlation curves and six graphs. Plate No. 1, at 153, is such a curve for the reach of the river above Santa Rosa, New Mexico. Plate No. 2, Ibid. at 154, is the mentioned curve "based on the period of stream-flow records 1919-1946 for the reach of the river from Alamogordo Dam to the New Mexico-Texas State line." Ibid. at 151. The Manual also presents six other inflow-outflow graphs of other sections of the basin. These are:

Plate No. 5, Ibid. at 160, Santa Rosa to Alamogordo Dam.

Plate No. 6, Ibid. at 161, Alamogordo Dam to Acme.

Plate No. 7, Ibid. at 163, Acme to Artesia.

Plate No. 8, Ibid. at 164, Artesia to Carlsbad.

Plate No. 9, Ibid. at 165, Carlsbad to New Mexico-Texas State line.

Plate No. 10, Ibid. at 166, Alamogordo Dam to Carlsbad.

The last six plates are based on the period 1938-1947. With reference to them the Manual says, Ibid. at 151:

“While in general the correlation of the points on these graphs is sufficiently good to permit the establishment of correlation curves, yet the committee believes that more years of streamflow record should be available before such curves are established.”

At the January 31, 1961 Commission meeting further consideration was given to the review of basic data. Included in the minutes of that meeting is a “Joint Memorandum” of the two State Commissioners. It includes the following statement, Min., p. 234:

“After the Compact went into effect and the Commission through its Engineering Advisory Committee attempted to make findings of fact based on inflow-outflow relationships indicated in the inflow-outflow Manual, it became increasingly apparent that restudies should be made of a number of items, such as base inflow reaching the river between Alamogordo and McMillan, principally in the reach of river along the eastern side of the Roswell-Artesia area, channel losses, and other items.”

The Joint Memorandum of the Commissioners mentions several specific items. One is the relationship of “the recorded flow at Carlsbad plus the diversions by the Carlsbad Irrigation District to the so-called state line outflow minus intervening flood flows.” The discussion of this item is so obscure to the Master that he can make nothing out of it but to note the concluding phrase “this problem would take care of itself.”

Another item related to “the extent of pumping along the river in the Roswell-Artesia area under 1947 conditions.” The Joint Memorandum says:



“The Commissioners have been informed that the best evidence indicates that approximately 7100 acres are being supplied with water by pumpers under the 1947 conditions. The Commissioners therefore recommend that the subcommittee use that acreage with such depletion as may be attributed thereto.”

The Master understands this to mean that a mistake was made in the acreage. If such be the case, a correction was in order.

The discussion in the Joint Memorandum of the McMillan leakage loss is somewhat ambivalent. It is noted that unprecedented flood flows in 1941 and 1942 resulted in “materially increasing the seepage from the reservoir.” After recognizing that “morally New Mexico should not be penalized for an unusual act of nature such as occurred in 1941,” the Commissioners said that the problem could be treated in one of two ways. The first was to treat the dikes constructed by New Mexico in the 1950’s as a replacement of loss of effective reservoir capacity. The second was to treat the decreased flows resulting from plugging the leaks as depletions not caused by the activities of man. The recommendation of the Joint Memorandum was that the subcommittee “employ the same curve or relationship for McMillan leakage as that appearing in the Engineering Advisory Committee report contained in Senate Document 109.” The Master takes this to mean that depletions resulting from the plugging of the leaks were not chargeable to New Mexico as depletions caused by the activities of man.

At the November 9, 1962 Commission meeting an Engineering Advisory Committee Report showed accumulated state line departures from the New Mexico delivery obligation for the period 1950-1961 inclusive amounting to 53,000 acre feet. Of this total 48,000 was not due to the activities of

man. With reference to the 48,000 acre feet, the statement was, p. 257:

"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 man's activities. The Engineering Advisory Committee has made no determination of what part, if any, of the remainder of the amount shown in Column 7 is so chargeable."

The Commission approved the report and directed the committee to proceed with a draft of a new inflow-outflow manual.

The subcommittee to draft a new inflow-outflow manual has never completed its task. The minutes of Commission meetings for the years following 1963 show meaningless progress reports. On December 5, 1969, the Attorney General of Texas in a letter to the Executive Director of the Texas Water Rights Commission said:

"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." See opinion of the Attorney General of Texas, No. M-535. (The parties agree judicial notice can be taken of this opinion.)

Things continued to drift along. At a February 21, 1974, Commission meeting, the Texas Commissioner presented a statement which included the following, Min. at 472:

"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.”

Texas says that the Plate 2 curve immutably establishes the New Mexico obligation. The Master does not agree for the following reasons:

1 – The effect of the Texas position is to establish a schedule. It means that when you have a certain inflow, a reading of the curve fixes the state line delivery obligation.

2 – In his explanation to the compact negotiators at the meeting which resulted in the execution of the Compact, Mr. Tipton said, S. Doc. 109, p. 117, that it would have been unwise for the Compact to set out a schedule and that:

“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).”

See also Synopsis of Engineering Committee report to Pecos River Commission, S. Doc. 109, pp. XXXIII - XXXIV.

3 – Art. VI(c) of the Compact provides that unless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method described in the Engineering Committee report shall be used to determine the effect on state line flow of any change in depletions by man’s activities or otherwise. The Master takes this to mean that the Compact authorizes the Commission to devise and adopt a method other than that described in the inflow-outflow manual.

4 – The inflow-outflow manual presented to the compact negotiators by the Engineering Committee states, S. Doc. 109, p. 145, that it is for use in the commencement of the administration of the Compact. That statement, plus the discussion found at pp. 150-152, convinces the Master that refinements were contemplated.

New Mexico says that the 1961 “Review of Basic Data” must be used to determine whether New Mexico has complied with its delivery obligation under Compact Art. III(a). The Master does not agree because:

1 – The “Review of Basic Data” study has never been completed.

2 – The study ended with the year 1961 and contains no statement that the data considered and the results reached would be applicable to determinations for future years.

3 – The Engineering Report adopted at the November 9, 1962, meeting, Min., pp. 256-258, shows that the departures caused by the stoppage of McMillan Reservoir leaks are not depletions caused by the activities of man. This action was taken pursuant to a Commission direction given at a January 31, 1961 meeting. See Min., p. 239. Although the minutes lack clarity the Commission apparently declined to modify the 1947 condition to take care of the result of the leak stoppage. When the leaks are plugged more water is stored for the New Mexico users and less goes directly downstream to the state line. Workability of the Compact requires an answer to the problem.

4 – The 1962 Engineering Report and Commission action fails to account or determine liability for a departure of 5,300 acre feet from the amount of water which Texas was entitled to receive at the state line.

The states have reached an impasse. For all practical purposes they have accomplished nothing in the administra-

tion of the Compact since 1962. Exploration of fault for the failure would be unproductive. The failure exists and has continued for 15 years.

Ordinarily when an impasse is reached the affected parties may act unilaterally. In the situation presented only the upstream state, New Mexico, can act unilaterally. No action in Texas can affect the state line flow.

The Texas complaint does not charge New Mexico, its officers, or its representatives with bad faith. The New Mexico answer says that Texas refused "to cooperate in good faith in the review of basic data and the revision of the Manual of Inflow-Outflow Methods, \* \* \*." For all that appears Texas did not cooperate because of its view of the inviolability of Plate No. 2. Reliance on that position is not an act in bad faith.

At the final argument before the Master on the New Mexico affirmative defenses, counsel for each party made positive statements of the good faith of his client. The Master has some hope that good faith, if it does not solve the controversy, will identify the issues and furnish specific support for each party's position and specific objections to the position of the other party.

The positions taken by the States bother the Master. Texas says that the administration of the Compact by the Commission has deprived Texas of water. In so doing it relies on generalities rather than on specifics. New Mexico says that the Commission's adoption of the 1961 report is a permissible refinement of the Compact binding on Texas because of its acceptance of the report. Texas did not approve the report for application after the year 1961. The report leaves several issues open. New Mexico does not detail the issues which it deems concluded and those which remain open.

The Commission has primary responsibility for administration of the Compact. It should perform its duties. With reference to the Arkansas River controversy the Court said, *Colorado v. Kansas*, 320 U.S. 383, 392, that such disputes “present complicated and delicate questions and, \* \* \* necessitate expert administration rather than judicial imposition of a hard and fast rule.” The Court went on to say, *Ibid.*, that “mutual accommodation and agreement should, if possible, be the medium of settlement, instead of the invocation of our adjudicatory power.”

The Master concludes:

1 – The language in Compact Art. VI(a) “supplemented by additional data hereafter accumulated” does not change the obligation imposed on New Mexico by Art. III(a).

2 – The reference in Art. VI(c) to “a more feasible method” includes both a more accurate method and a more workable method.

3 – Although the Art. III(a) obligation may not be changed the obligation depends on (1) the water available under the 1947 condition and (2) depletions by man’s activities. In determining the facts pertaining to the two mentioned items the Commission shall act on the Engineering Report and additional data accumulated since Compact ratification. The inflow-outflow manual shall be used unless the Commission devises and adopts a more feasible method.

The Master has three alternatives:

1 – Sustain the defense of lack of justiciable controversy on the ground that lack of final administrative action renders any decision that the Master might make as nothing more than an impermissible advisory opinion. Dismissal of the lawsuit accomplishes nothing if the impasse continues, and there is no indication that it will not continue.

2 – Overrule all affirmative defenses and permit the case to go to hearings on the merits for determination of whether Texas has received the water to which it is entitled under the Compact. The Master estimates that this would probably take 1-3 years and result in a judicial answer to questions that essentially involve engineering expertise. Those questions are: (1) what water has been available to Texas under the 1947 condition and (2) if Texas has received less than its entitlement, how much of the departure has been due to man's activities.

3 – Order the parties (1) to return to the Commission and, in the light of this opinion, make a good faith effort to resolve their differences, (2) to report to the Court on or before January 1, 1979, the result obtained together with a precise statement of the issues considered and of the specific differences, if any, which preclude agreement, and (3) hold the case in abeyance until the report is made.

The Master adopts the third alternative. All parties have until June 7, 1977, to file objections to this order. Those objections may be accompanied by appropriate supporting argument. If any objections are filed, oral arguments thereon will be heard by the Master in Denver, Colorado on June 28, 1977.

Jean S. Breitenstein  
Special Master

United States Courthouse  
Denver, Colorado  
May 6, 1977





No. 65, ORIGINAL  
IN THE  
SUPREME COURT OF THE UNITED STATES  
OCTOBER TERM, 1976

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STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO, DEFENDANT  
UNITED STATES OF AMERICA, INTERVENOR

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SUPPLEMENTAL DECISION OF SPECIAL MASTER  
ON THE  
AFFIRMATIVE DEFENSES OF NEW MEXICO  
TO THE  
COMPLAINT OF TEXAS

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Appearances as noted on May 6, 1977 decision.

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The May 6, 1977, decision of the Special Master on the New Mexico affirmative defenses to the Texas complaint gave the parties time for objections to that decision. Texas presented formal objections saying that (1) the Master's decision leaves certain issues unresolved, (2) the Master misinterprets the Texas position, (3) no remand to the Commission is necessary, and (4) the proposed time schedule is unacceptable. By letter dated June 10, 1977, New Mexico reserves its right to continue to insist on its affirmative defenses, asks for clarification of certain items, and states its willingness to carry "out the decision of the Master." On June 28, 1977, the Master heard arguments of counsel pertaining to his decision.

Before the arguments the Master received copies of the minutes of meetings of the Pecos River Commission on February 17 and June 16, 1977. These minutes have been considered by the Master in making this supplemental decision.

The May 6 decision left unresolved the New Mexico affirmative defenses of failure to exhaust administrative remedies, violation of the doctrine of primary jurisdiction, and lack of a justiciable controversy. The good faith assurances of the parties led the Master to believe that, in spite of the failure of the Pecos River Commission to make any progress in the resolution of the disputes which have divided the parties, a rapprochement was possible.

The Master is now convinced that he was wrong. In reaching this conclusion the Master is influenced by two matters which have occurred since his May 6 decision. In its objections to the decision, p. 9, Texas mentions three items which have been in dispute and says:

“Each of these items, treated by the Joint Memorandum, and currently disputed, provides a good example of the fruitlessness of a remand back to the Commission. These items will not be resolved; they involve basically legal questions. The engineers cannot accumulate any additional data that will resolve these disputes. The lawyers and commissioners cannot give up the rights they, in good faith, believe they have under the Compact.

\* \* \* \*

Texas strongly believes that no useful purpose will be served by a remand to the Commission.”

Meetings of the Commission were held on February 17 and June 16. At the first meeting reference was made to the Brantley Project of the Bureau of Reclamation. Texas proposed that the Commission make findings concerning the

Brantley Dam. The proposal contained 8 items, the first of which, in the opinion of the Master, was non-controversial. At the June 16 meeting the Texas Commissioner moved the adoption of the 8 items. The New Mexico Commissioner declined to second the motion. After a brief discussion, the following exchange occurred:

“COMMISSIONER BABCOCK [United States]: Well, do I gather that both the Commissioners are in agreement that No. 1 is the way the operation should be? I mean, that it is compatible with the Compact?

COMMISSIONER CATHEY [New Mexico]: Now, Mr. Chairman, I want to make it quite clear I did not, and am not intending to, second the motion, and, as far as I’m concerned, Article III, Section A of the Compact sets forth any position as to Item 1, and I do not feel that there’s any way I can be forced, and I’m not going to be forced to make such statement, Mr. Chairman.

COMMISSIONER McGOWEN [Texas]: Considering the attitude on the part of the state of New Mexico, Commissioner McGowen moves that we adjourn.

COMMISSIONER CATHEY [New Mexico]: I second the motion.

COMMISSIONER BABCOCK [United States]: Since the motion has been made and seconded that we adjourn, the meeting is adjourned.”

[The meeting, which began at 9:32 a.m. and adjourned at 9:50 a.m., lasted 18 minutes.]

The Master finds that the representatives of each state have taken intransigent, uncompromising positions which preclude the possibility of useful Commission deliberation and action. The Master realizes that the two voting members of the Commission are appointees and representatives of their respective states and may be replaced. The Master has considered the possibility that the states might appoint new Commissioners whose attitudes might favor reconciliation. The difficulty is that the controversies have continued since 1962 with numerous personnel changes. The likelihood of a new Commission with a more conciliatory attitude is so remote and speculative that it is beyond reasonable possibility.

No doubt each state, acting through its representative has taken a position in which it has a good faith belief. Those beliefs are inconsequential if they result in a stalemate. The Commission has been deadlocked for 15 years. The determination of an impasse requires the reasonable exercise of judgment. See *National Labor Relations Board v. John Zink Co.*, 10 Cir., 551 F.2d 799, 803. For the reasons noted the Master holds that an impasse exists and that there is no reasonable probability of its ending within the foreseeable future. A remand to the Commission would be futile.

The exhaustion doctrine allows an administrative agency to perform functions within its competence, to apply its expertise, to make a factual record, and to correct its own mistakes. *Parisi v. Davidson*, 405 U.S. 34, 37, and *McKart v. United States*, 395 U.S. 185, 193-195. The Pecos River Commission can perform none of these functions because it is deadlocked. The exhaustion doctrine does not apply when the administrative agency either will not, or cannot, act. *Order of Railway Conductors of America v. Swan*, 329 U.S. 520, 529; see also *Weinberger v. Salfi*, 422 U.S. 749, 765-766, and *Weinberger v. Wiesenfeld*, 420 U.S. 636, 641 n. 8. The Master rejects the defense of failure to exhaust administrative remedies.

The doctrine of primary jurisdiction promotes proper relationship between courts and administrative agencies and uniformity of regulation. *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 304. In the instant case we have no pervasive regulatory scheme. Applicability of the doctrine of primary jurisdiction is accordingly diminished. See *United States v. Radio Corporation of America*, 358 U.S. 334, 350, and *Denver Union Stockyards Co. v. Denver Livestock Comm'n Co.*, 10 Cir., 404 F.2d 1055, 1056. The Commission has failed to exercise whatever expertise it may have. The issues are cognizable by, and within the competence of, the courts. See *Far East Conference v. United States*, 342 U.S. 570, 574, and *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 64. Judicial action is not foreclosed by the primary jurisdiction of an administrative agency which will not accept its responsibilities or perform its duties. The defense of primary jurisdiction is denied.

The remaining affirmative defense is lack of a justiciable controversy. To the extent that this defense is based on exhaustion and primary jurisdiction it has no merit. The Texas complaint alleges that New Mexico has breached the Compact by depriving Texas of water to which it is entitled. New Mexico denies the breach. We have a justiciable controversy which the United States Supreme Court has authority to decide. *Dyer v. Sims*, 341 U.S. 22, 28. The defense is rejected.

The case must go forward on the merits. Expeditious procedure requires definition of the issues of fact and law. The complaint and the answer speak in generalities. Texas has tendered an amended complaint but has asked the Master to take no action with regard thereto at this time. Counsel for each state have said that they will participate in a pre-trial conference to formulate legal and factual issues.

IT IS ORDERED:

1 — The requirement of the May 6, 1977 decision of the

Special Master on the Affirmative Defenses of New Mexico to the Texas Complaint that the parties return to the Pecos River Commission and make a good faith effort to resolve their differences is vacated as is also the time schedule for such action. In all other respects the May 6, 1977, decision remains in effect.

2 — Each and every affirmative defense of New Mexico is denied.

3 — Within 45 days from June 28, 1977, Texas and New Mexico will exchange written statements of the factual and legal issues which must be determined in the case.

4 — Within 75 days from June 28, 1977, each state will respond to the statement of the other state on the factual and legal issues.

5 — Thereafter the States will promptly meet and attempt to formulate a pre-trial order.

6 — On or before October 1, 1977, the parties will present a proposed pre-trial order to the Master.

7 — At 9:30 a.m., Wednesday, October 19, 1977, a hearing will be held in Denver for the determination and entry of a pre-trial order.

Jean S. Breitenstein  
Special Master

United States Courthouse  
Denver, Colorado  
July 6, 1977



