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NO. 65, ORIGINAL

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

* * *

THE STATE OF TEXAS,

Plaintiff

V.

THE STATE OF NEW MEXICO,

Defendant

* * *

**TEXAS' REPLY TO NEW MEXICO'S OBJECTIONS
TO THE MASTER'S REPORT ON THE
OBLIGATION OF NEW MEXICO TO TEXAS
UNDER THE PECOS RIVER COMPACT**

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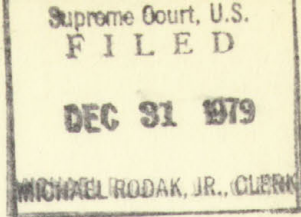


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New Mexico raises two objections to the Master's conclusions. First, New Mexico suggests that the cut-off date established by the Master for the 1947 Condition should be the end of the year 1947 rather than the beginning of that year. Second, New Mexico objects to the Master's conclusion that the 1947 Condition does not include depletions of the groundwater contribution to the river due to groundwater pumping going on in 1947 but not yet reflected in the flows of the Pecos River.

SUMMARY OF ARGUMENT

New Mexico discerns support for its objection to the Master's January 1, 1947, cut-off date from five sources: (a) statements by Mr. Tipton explaining the Compact; (b) the use of 1947 data in S.D. 109; (c) the administrative history of the Pecos River Commission; (d) Texas' failure to raise the precise date as a specific issue; and (e) excluded testimony of a New Mexico compact negotiator. None of these sources compel, or even support, New Mexico's assertion that the cut-off date should be December 31, 1947.

(a) Statements by Mr. Tipton, indeed even statements by Texas counsel, referring to "conditions in 1947" or using similar phrases are simply "loose references," as the Master has recognized. (Report of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact, p. 40; hereinafter referred to as the "Master's Report"). "That situation defined and described in the Report of the Engineering Advisory Committee" is a clumsy, awkward phrase. Rather than attempting such precision, all parties have fallen into the convenient shorthand, "conditions in 1947." Such loose references, as the Master has recognized, cannot take the place of the Compact's definitions and the actual engineering studies which underly the Compact.

(b) The use of 1947 data in S.D. 109 provides no support for a December 31, 1947, cut-off date. S.D. 109 contains 1947 data in only one place—the Inflow-Outflow Manual. Its use there is simply by way of example to demonstrate how administrative computations should be made in the future, using a year which was not involved in the 1947 Condition routing study. Similarly, 1947 data is used in the six tentatively submitted curves contained in the Inflow-Outflow Manual—curves which the manual's drafters expressly directed

should include data for several years after the Compact became effective. As the Master recognized, however, 1947 data played no part whatsoever in the engineering report defining the 1947 Condition. Thus, the inclusion of such data in the Inflow-Outflow Manual provides no support for New Mexico's contention.

(c) New Mexico urges two portions of the Commission's administrative history to support her December 31, 1947, cut-off date. First, she points to the inclusion of the year 1947 in the Review of Basic Data's revision of the 1947 Condition definition. Were this a valid action by the Commission, it might be a source of some support for the contention. The action was, however, beyond the authority of the Commission and the Master has ruled properly that Texas is not bound by it so far as the 1947 Condition question is concerned. (Master's Report, pp. 40-41). The second portion of the Commission's administrative history from which New Mexico discerns support is an early phase of Commission activity involving the collection of aerial photographs of the Pecos River Basin to aid in "more accurately defining the 1947 Condition." An examination of the Commission's records, however, discloses that this is yet another loose reference. The Commission's collection of these photographs was to observe the spread of salt cedars in the basin, not to "more accurately define" areas of irrigation in the year 1947.

(d) and (e) New Mexico's two final arguments on the cut-off date are equally weak. Texas' failure to raise the question of a specific cut-off date for the 1947 Condition provides no support for New Mexico's contention. Under Texas' view of the 1947 Condition the existence of a cut-off date is entirely immaterial. The condition is defined by the engineering study, in Texas' view; thus, looking to actual conditions on the river on January 1, December 31, or any other date is unnecessary. For this reason the issue was not raised. New Mexico's reliance upon the offered testimony of a New Mexico compact negotiator is similarly misplaced. The

testimony was entirely speculative and had no probative value. It was properly excluded by the Master.

New Mexico's second objection, that the 1947 Condition should include the right to deplete groundwater contributions to the river based upon groundwater pumping taking place in 1947, is completely baseless. While advanced with considerable ingenuity, it depends upon a completely disoriented view of the negotiating history, a novel, but mistaken, construction of the Compact's provisions, and a mass of irrelevant evidence that is outside the record of this case. Moreover, it totally ignores the clear and direct support for the Master's conclusions which is contained in the record of this case.

ARGUMENT AND AUTHORITIES

A. The Master Has Properly Ruled That January 1, 1947, Is The Cut-Off Date Under The 1947 Condition—If There Must Be A Cut-Off Date At All.

Prior to evaluating New Mexico's argument on the cut-off date, an initial point must be made. As explained in Texas' Objections to the Master's Report, Article II(g) of the Compact ties the 1947 Condition to the situation defined in the original Report of the Engineering Advisory Committee. If this Court adheres to the Compact's definition of the 1947 Condition the question of the cut-off date for the 1947 Condition does not arise. Only when one departs from the definition of the condition contained in that original report, concluding that the "real" 1947 Condition is a tangible situation existing on the river and that the report is simply an inept attempt to describe that situation, does the question of the cut-off date present itself. It is only then that one is forced to choose a particular day to cut-off some of New Mexico's ever-increasing irrigated agriculture from inclusion as part of the 1947 Condition.

Texas urges the Court to adhere to the Compact's express provisions, thus obviating the necessity of choosing a particular cut-off date.

New Mexico's first line of argument in support of the December 31, 1947, cut-off date consists of Mr. Royce J. Tipton's explanation of the Compact at the Commission's December 4, 1948, meeting in Santa Fe, New Mexico. Typical of his statements is the one appearing at page 114 of S.D. 109 concerning salvaged water:

... any water salvaged up to the *quantity that was being non-beneficially consumed in 1947* is termed "water salvaged."

(emphasis duplicated from p.43, New Mexico's Objections to the Report of the Master and Brief in Support Thereof; hereinafter referred to as "New Mexico's Objections")

Contrasted to Mr. Tipton's statement is the following excerpt from the Appendix to the Report of the Engineering Advisory Committee, describing how the water lost to salt cedars was actually calculated in the 1947 Condition routing study:

(b) Artesia to Carlsbad.—Channel losses in this section of the river result primarily from the depletion of river water by the salt cedars which cover an area of approximately 14,000 acres at the head of Lake McMillan. An analysis of such losses was made during the progress of the PRJI as described on pages 55-57 of that report. That study resulted in a series of curves showing the relation between losses and available river flow at the Artesia gage. The studies of the committee based on data which has become available since the PRJI confirm these results.

The average annual water consumption by the salt cedars, under present conditions, is estimated at 55,000 acre-feet.

In order to check the methods that were used, *a detailed study was made for the years September 1944-August 1945 and September 1945-August 1946*. This study involved an in-flow-outflow analysis, in which the losses that have occurred above McMillan due to consumptive use of river water by the salt cedars were isolated. This study covers that section of the river from the Artesia gage to dam site No. 3 and extends over the period from September 1944, when the gage at dam site No. 3 was established, through August 1946.

(S.D. 109, pp. 44-46)
(emphasis added)

Contrasting the two statements, it is clear that Mr. Tipton's statement at the Commission meeting is simply a convenient shorthand, a loose reference. The lay members of the Commission could not have appreciated the hydrologist's explanation contained in the engineering report. Moreover, it is simply more convenient to say "non-beneficially consumed in 1947" than "shown to be non-beneficially consumed in the 1947 Condition study contained in the Report of the Engineering Advisory Committee."¹

¹Based on similar loose references, New Mexico might as easily argue that the 1947 Condition also includes the year 1948. Another name for the 1947 Condition routing study was "present conditions." It was referred to as "present conditions" during the March and November meetings of the Commission in 1948—thus leading to the conclusion that the 1947 Condition includes 1948. While such an assertion is awkward in light of the name "1947 Condition," it is no more inconsistent with the express provisions of the Compact than New Mexico's assertion of the December 31, 1947, cut-off date.

As recognized by the Master, the 1947 Condition routing study, the study which provided a basis for the Compact, contains no data whatsoever collected during the year 1947. Texas witness Bell testified as follows:

Q (By Mr. Booth [of Texas]). My question, Mr. Bell, as used in the report of the Engineering Advisory Committee Summary on Page 1 of Exhibit 2, was the reference to "All conditions as of present" the same as a reference to conditions as of the year 1947?

A I am not sure I understand the question. The Engineering Advisory Committee considered the 1947 Condition to be the average of the conditions for the years 1940 to 1946 and that is what they called present conditions, and the study is labeled the 1947 Condition.

Q All right, sir. Then the question that I had asked when the objection was raised, was the 1947 Condition that you have just described, was that the actual conditions in the year 1947, or was that something different?

A Well, there was no 1947 data used in any of these operation studies.

SPECIAL MASTER: Say that over again. There was no actual data of 1947 in any of these studies?

THE WITNESS: No, sir. They stopped at the year 1946, Your Honor. (Tr. 410-411).

If a specific cut-off date must be chosen, clearly the Master's decision to choose January 1, 1947, is appropriate in light of the fact that data from the year 1947 was not considered in the 1947 Condition routing study. His decision represents an attempt to honor, to the ex-

tent permitted by the facts, the loose references of the compact negotiators. Extension beyond that date, however, cannot be justified.

New Mexico's brief lightly passes over her second basis for asserting the December 31, 1947, cut-off date, i.e., that 1947 data was used in S.D. 109. (See, New Mexico's Objections, p. 44). New Mexico notes that the Inflow-Outflow Manual utilized 1947 data for Plates No. 5-10. (S.D. 109, pp. 160-166). New Mexico, however, fails to note the purposes of these relationships or the drafters' instructions pertaining to them. Referring to Plates No. 5-10, the Inflow-Outflow Manual states:

The committee recommends that correlation curves and tables be prepared for the reaches of the river between Santa Rosa and Alamogordo Dam, Alamogordo Dam and Acme gaging station, Acme gaging station and Artesia gaging station, Artesia gaging station and Carlsbad gaging station, Carlsbad gaging station and the New Mexico-Texas State line, and Alamogordo Dam and Carlsbad gaging station. The committee is submitting as a part of this report for the above reaches of river the inflow-outflow relationship in the form of graphs for 3-year-successive means for the period 1938 through 1947. 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.

(S.D. 109, p. 151)

These relationships were to be used in determining departures in the various subreaches of the river. They

were submitted in tentative form, including 1947 data, with the recommendation that additional data from subsequent years be used to complete them and allow the establishment of curves. The inclusion of 1947 data in these plates is no more significant than the suggested inclusion of other post Compact data. It contributes nothing to New Mexico's argument on the cut-off date.

New Mexico suggests two pieces of the Commission's administrative history which, in her view, support the December 31, 1947, cut-off date—the Review of Basic Data and the Commission's decision to obtain aerial photographs of the basin in 1950. In the Review of Basic Data, at least, the Commission did give a straightforward indication that, in 1961, it thought the year 1947 was included in the 1947 Condition; it included the year 1947 in the Review of Basic Data's new 1947 Condition routing study. Due to its contradiction by other administrative and negotiating history (discussed *infra*, pp. 14-18), the significance of the Review of Basic Data on this point is dubious. The Review of Basic Data was approved by the Commission in 1961. It, essentially, re-worked the 1947 Condition routing study contained in the original Report of the Engineering Advisory Committee. Nevertheless, as the Master has earlier noted (Report of the Special Master on his Decision and Supplemental Decision Regarding the Affirmative Defenses of New Mexico to the Complaint of Texas, p. 26), the review was incomplete as adopted. Texas has since refused to complete it because it amounts to a redefinition of the 1947 Condition and is beyond the authority of the Commission. Moreover, the Master has properly ruled that Texas is not bound by the review. (Master's Report, p. 40-41).

In arguing her second administrative history point, the Commission decision to obtain aerial photographs of the basin in 1950, New Mexico embarks on her first

major excursion outside the record. New Mexico states that the engineers obtained these photographs, then interpolated with earlier 1946 photographs to determine the 1947 Condition. (New Mexico's Objections, pp. 44-45). Moreover, she intimates that the purpose of this interpolation was to determine irrigated acreage in the year 1947. So far as Texas can determine from its review of the record, the sole purpose of obtaining the 1950 photographs was to determine the extent that the salt cedar growth had spread since 1946. At its January 16, 1951, meeting the Commission's Engineering Advisory Committee accepted the photographs from the contractor. (Stip. Ex. 2, 1/16/51 Min., pp. 3-4). At its May 5, 1951, meeting the committee recommended that the Commission obtain a set of the 1946 photographs and "proceed with the determination of the extent and character of water-consuming areas of interest to the Commission." (Id., 5/17/51 Min., p. 3). At its October 30, 1951, meeting the committee reported that Mr. Lowry had visited several of the locations on the ground and was working on the project. (Id., 10/30/51 Min., p. 3). In its annual report to the Commission, in 1951, the engineering committee recommended that the Commission "cause to be made a ground survey of areas covered with water-loving vegetation." (Id., 1951 Report of EAC, p. 2). In that same report the committee stated that Mr. Lowry had been retained by the Commission "to determine the extent and classification of water consuming areas along the Pecos River." (Id., p. 7). A report by Mr. Lowry on the salt cedar acreage and density was apparently submitted at the January 17, 1952, meeting (Id., 1/17/52 Min., pp. 8-9), followed by maps of the 1946 and 1950 salt cedar conditions which were submitted and discussed at the committee's January 21, 1953, meeting. (Id., 1/21/53 Min., pp. 1-2).

At no instance in the record is there an indication that the aerial photographs served any other purpose than the documentation of the spread of salt cedars in

the basin. Such action has nothing to do with the 1947 Condition cut-off date; it is necessary to document the growth of salt cedars because the Compact requires Texas to assume the burden of such increased natural losses due to salt cedar growth.

Little more need be said concerning New Mexico's two remaining arguments for the December 31, 1947, cut-off date. The explanation for Texas' failure to raise the issue has been discussed above. (*supra*, p. 5-6). Counsel for Texas is certainly guilty of loose references to "conditions in 1947"; these references have no particular significance and make similar references by Mr. Tipton all the more understandable. The excluded testimony of New Mexico witness Erickson has been reproduced in New Mexico's Objections. (pp. 46-47). Its speculative nature is clear; the Master properly excluded it.

Significantly, while New Mexico asserts that the record is totally void of support for the Master's ruling, two significant portions of the record directly refute New Mexico's contention. The first comes from the history of negotiations of the Compact, from the same March 10, 1948, meeting which is extensively quoted in New Mexico's Objections. Although the proposal under discussion at that meeting was New Mexico's 1947A proposal, there is a clear indication that the New Mexico negotiators did not intend for even that proposal to include all uses of water going on in 1947. At the close of the meeting, the following exchange occurred:

MR. BLISS [New Mexico]: "Mr. Chairman, there is one point which I might touch on to make the record clear. Col. Spence, this morning, mentioned the present drilling of wells in the area north of Roswell which they saw as they passed through by car the other day. That

area was discovered outside of the declared Roswell basin last year [i.e., 1947] by three or four land owners who drilled pioneer holes and obtained shallow water. Since then there has been a scramble by the landowners to get as much development as possible initiated before the State Engineer could act to declare and close that basin. Just as soon as I conferred with the Geological Survey, with whom I consult in delimiting ground water basins and defining their boundaries, the basin was declared and closed. There are, however, a number of developments which were initiated prior to the closing of the basin, which, under New Mexico law, probably have the valid right to proceed to develop, and I am sure that those are the developments which they saw as they were passing through the area."

COL. SPENCE [Texas]: "I appreciate those remarks, because it is enlightening. I am wondering how many potential areas that were not closed in 1937² might want to get under the line before they are closed?"

MR. BLISS: "Last year [i.e., 1947] there was considerable development in the Carlsbad area involving the drilling of wells for supplemental use on lands with valid rights within the Carlsbad Irrigation District and also on new lands outside of the district. Last fall the basin was declared and closed to the development of wells for the irrigation of new lands. We do, however, permit additional drilling and pumping to supply supplementary water to those lands

²1937 is the year the New Mexico State Engineer closed the Roswell groundwater basin to further development pursuant to 1931 state statutory authority. (S.D. 109, pp. 3-4).

with valid rights. As far as I know, these are the only two areas where additional development is practicable in the Pecos Basin. If others do develop, they will have to be taken care of as they appear."

* * * *

MR. TAMM [Texas]: "I would like to ask Mr. Bliss if pumping from the new wells for supplemental supply in the Carlsbad area and new wells in the Roswell area is part of the right you are trying to establish?"

MR. BLISS: *"No, I would not say that, Mr. Tamm. I think that those new developments would have to be reflected as such in any schedule. I am not trying to say that they have established rights which could be recognized as present conditions."*

COL. SPENCE: "In other words, those would have to be accounted for?"

MR. BLISS: "Yes, that is my offhand opinion."

(Stip.Ex. 4(a), March 10-11, 1948, Min., pp. 64-66.)
(emphasis and bracketed materials supplied)

A more clear, direct indication of intent is hard to imagine. The New Mexico Commissioner is clearly saying that these irrigation wells, installed during 1947, are not included within his proposal of the 1947A Condition. Disregarding for the moment New Mexico's attempt to equate the 1947 Condition with the 1947A Condition, it seems obvious that uses not protected under the 1947A Condition would not be protected under the 1947 Condition. This refutes New Mexico's conten-

tion that all uses developed prior to December 31, 1947, should be protected by the 1947 Condition.

The second piece of evidence directly supporting the Master's ruling regarding the cut-off date comes from the administrative history of the Pecos River Commission. Part of the program adopted by the Pecos River Commission at its second meeting, December 9 and 10, 1948, was:

2. Proceed with inflow-outflow determinations in accordance with Article VI of the Compact and in conformity with the inflow-outflow manual. Inflow-outflow computations shall be made for the river sections listed in the inflow-outflow manual (p. 151 of the Senate Document 109) for three year periods commencing with the period 1947-1949.

(Stip.Ex. 4(b), Min. of
the PRC, p. 7)

It is significant that the Commission directed that the annual administrative computations begin with the three-year period, 1947-1949. It will be recalled that the annual computation involves the use of a three-year running average. This early action by the Commission places the year 1947 squarely within the post Compact administrative period.³ Such Commission action, again,

³New Mexico might be expected to respond that inclusion of the year 1947 in the post Compact administrative period is simply a happenstance resulting from the requirement of the three-year average. This, however, is not the case. Had the Commission directed that computations be prepared for the years 1945-1947 and 1946-1948, in addition to the 1947-1949 computations, it might appear that the action was simply designed to update the Inflow-Outflow Manual's incomplete relationships, or to carry forward the prior computations. The omission of these years from the Commission's direction, however, places the year 1947 in the same category as other post Compact years.

directly refutes New Mexico's argument that the cut-off date for the 1947 Condition should be December 31, 1947.

B. The Master Correctly Ruled That New Mexico Is Liable For Base Inflow Depletion.

The Master's ruling on the question of base flow, or base inflow, appears to be the only major feature of his decision which distinguishes his definition of the 1947 Condition from that advocated by New Mexico in her "use theory." New Mexico's argument in her groundwater objection is yet another attempt to resurrect the "use theory" in new clothing.

As best Texas understands New Mexico's new groundwater/use theory argument, it runs as follows: New Mexico never really gave up on its 1947A proposal; that proposal was embodied in the nine-point agreement reached at the November 8-13, 1948, meeting of the negotiating commission; it was incorporated in the nine-point agreement, and subsequently in the Compact, by means of using the word "equivalent" in connection with the 1947 Condition and by virtue of the salvaged water provisions in both the agreement and the Compact, moreover; the gradual groundwater depletion of the 1947A Condition was too cumbersome to adapt to the inflow-outflow method of accounting and was left to be resolved at a later date.

New Mexico is wrong on all counts. Beginning with the negotiating history, it is clear that the Master has accurately described the progress of negotiations. The 1947A proposal was advanced by New Mexico at the March 10-11, 1948, meeting. It was subsequently studied by the engineers and designated the "1947A Condition." It was expressly rejected by Texas at the November, 1948, meeting. (S.D. 109, p. 96). The only significant difference between the 1947 and 1947A Conditions is the treatment of groundwater contributions to the river

—the former showed groundwater contributions as they existed around 1947, while the latter showed groundwater contributions having ceased as a result of groundwater pumping going on during the negotiating period. In spite of the rejection of the 1947A Condition, New Mexico quotes extensively from the transcript of the March 10-11, 1948, meeting describing the New Mexico proposal. This Court should be aware that the statements attributed to Mr. Bliss and Mr. Tipton at pages 61-65 and 67-70 in New Mexico's Objections come from the March meeting and are describing the 1947A Condition proposal, advanced by New Mexico at that meeting.⁴

The difficulty with New Mexico's argument equating the 1947A Condition to the nine-point agreement is, perhaps, best demonstrated by the testimony of New Mexico negotiator/witness Erickson attempting to make the same point:

Q [Mr. Caroom] All right. So in terms of what is in Senate Document 109, we jump from the New Mexico November 11 counteroffer of the 1947-A Condition to the November 13 agreement on the 1947 Condition as recorded in Senate Document 109 or in the report of the Engineering Advisory Committee, is that correct?

A [Mr. Erickson] Yes, but —

Q I beg your pardon?

⁴At page 69 of her Objections, New Mexico incorrectly indicates that Mr. Tipton's statement on the "so-called '1947 Condition'" is from S.D. 109. This is undoubtedly an inadvertent clerical error, perhaps motivated by wishful thinking. The statement appears at pp. 49-50 of the March, 1948, negotiating transcript and is describing the 1947A Condition. These transcripts are contained in Stip. Ex. 4(a).

A I think you can't limit it to the 1947 Condition. You have to take all of the nine items together.

Q I am sorry, would you say that again and expand a little?

A The proposition that was offered that finally became a compact is on page 97 and includes nine different steps and you would have to look at those as — take it by the four corners, you have to get all of it, you can't take the '47 Condition out of that.

Q All right, Mr. Erickson. Within these nine items that appear on Page 97, the nine items which were agreed upon as the basis for the Compact, can you tell me what has happened to the groundwater depletion which was reflected by the 1947-A counteroffer?

A I think it is to be offset by the salvaged water.

Q Well, let's leave salvage water out for the moment.

A You can't. Can't be left out. They go together. Let me call your attention to — we talked about '47-A and the 1947 Condition — no, '47-B and the 1947 Condition, and you will find that the average flow crossing the State Line are almost identical. The dependable water supply from Red Bluff Reservoir is identical. The average shortages in Carlsbad are nearly the same.

Q Which of those two was accepted as the basis for the Compact, the 1947 Condition or the 1947-B?

A 1947 Condition, with the rest of the eight items in that Compact. You can't separate them.

Q Under the 1947 Condition, which state assumes the burden of groundwater depletion?

A Well, I'm not sure the burden is assumed, if the Compact works as it was intended to work.

Q Would you elaborate on that a little bit for me, please?

A Well, the groundwater depletion, as I indicated before, is a very slow process, a long, continuing thing, and the effort that was attempted here was complete cooperation between the states to salvage the groundwater, get rid of the salt cedars, bypass the salt cedars, build flood reservoirs, a cooperative effort. You can't separate them from the 1947 Condition.

Q Mr. Erickson, does the 1947 Condition, as it appears in the Engineering Advisory report, the Summary of Operations study, show a 1947 Condition groundwater contribution?

A Yes, it does.

Q And is that 1947 Condition groundwater contribution a component of a delivery or the equivalent amount of water due Texas under the 1947 Condition?

A Yes, but so is the salvage of water a component.

Q Does the 1947 Condition Summary of Operations study show any salvaged water in and of itself?

A Not in and of itself, no, sir.

Q So if we consider simply the 1947 Condition study, we see that groundwater contributions make up a part of water received by Texas, do we not?

A That's true, but the Compact doesn't say that. It doesn't limit the obligation to 1947 Condition. It includes, also, the obligation to salvage that water.

* * * *

Q Let me see if I understand your testimony, Mr. Erickson. As I understand what you have been saying, you say that New Mexico assumed the burden of the groundwater depletion and was going to make it up with the gain from the salvaged water?

A I think that's inferred here, yes, sir.

Q What would happen if after the salvage projects were all completed, not enough salvaged water was produced to make up for the groundwater depletion?

A I don't know.

(Tr. 947-952)

Similarly, Mr. Erickson subsequently testified:

Q Mr. Erickson, I would like to go back for just a second to the interrelation of base flow and salvaged water. As I understand your testimony, the engineers and negotiators realized that the base flow was declining in 1947 due to groundwater pumping.

A Yes, sir.

Q And they entered a compact based upon a 1947 Condition, which included in the 1947 Condition contribution of groundwater as part of the water due Texas under that condition.

A Yes, sir.

Q Now, you said that New Mexico wanted a compact which would protect all existing uses, and I understand your testimony to be that they apparently intended to protect all existing uses by making up for this base flow decline with salvaged water, is that correct?

A That was one way, yes, sir.

(Tr. 1004-1005)

After examination of these passages a clearer picture emerges. New Mexico did intend to protect existing uses; it did so by agreeing to the 1947 Condition and, at the same time, obtaining Texas' agreement to affirmatively work to salvage water in the Pecos River Basin. Nevertheless, it is clear that the Compact places on New Mexico the burden of delivering an equivalent amount of water to that available under the 1947 Condition.⁵ To be sure, the term "equivalent" allows New

⁵It is noteworthy that there also was considered a 1947B Condition. This condition was developed by the Engineering Advisory Committee and presented in its Supplement to the Report of the Engineering Advisory Committee. (S.D. 109, pp. 139 & 141). It presents the 1947 Condition with the groundwater contribution fully depleted and all possible water salvaged. It too was rejected as a basis for the Compact. Had the 1947B Condition been the basis for the Compact, New Mexico's discussion of an equitable allocation of the shortage brought about by the lack of salvaged water might make better sense. (See New Mexico's Objections, p. 79). With the 1947 Condition as a basis for the Compact, however, it is clear that New Mexico has assumed the risk that sufficient salvaged water might not become available.

(Continued on next page)

Mexico to utilize salvaged water to fulfill that obligation, but it does nothing to relieve the obligation in the absence of salvaged water.

Even though the Master gave little weight to it (Master's Report, pp. 24-26), Texas believes the agreement is well summarized by the letter of the Acting Secretary of the Interior, Oscar L. Chapman, to Senator O'Mahoney, Chairman of the Senate committee considering ratification of the Compact. The Secretary states:

The compact reflects compromise on some points of difference. On the one hand, New Mexico has agreed to settlement on the basis of "1947 conditions" although the depletion effects of present groundwater pumping in the Roswell area, because of the slow movement of percolating underground waters, will not be reflected in the stream flow until some future date. This is offset by the agreement of Texas that nonbeneficial consumptive use of water, due to non-man-made activities, would not be chargeable against New Mexico in determining her obligation to deliver water at the New Mexico-Texas State line. Both of these provisions are of concern to the Carlsbad project of the Bureau of Reclamation. The interest of that project is protected against the first provision in that article IX was included to insure that any adjustment for the future ef-

At page 66 of her Objections, New Mexico attempts to explain the inclusion, by Plate No. 2 and the Inflow-Outflow Manual, of the 1947 Condition groundwater contribution as a part of the stateline delivery obligation. She suggests that it would have unfairly penalized Texas to omit it prior to the actual depletion, and that Plate No. 2 could not have been constructed to reflect the gradual base inflow depletion. This is simply incorrect. If the groundwater contribution had been included as a part of Plate No. 2's index inflow, the size of the index inflow would get progressively smaller as the base inflow was depleted—resulting in a progressively smaller stateline delivery obligation.

fect of present depletions would be borne by appropriators junior to the Carlsbad project. Strict enforcement of article IX by the State of New Mexico will, of course, be necessary to protect the project. The non-man-made depletions, to which reference is made, are primarily uses by native vegetation principally salt cedars. The validity of the compact will not be adversely affected, even though the estimate of the quantity of water it may be possible to salvage by constructing a bypass canal around the salt cedar area at the head of McMillan Reservoir may not be fully realized.

(S.D. 109, p. xv)

Of particular note is the Secretary's statement that New Mexico agreed to the 1947 Condition even though groundwater depletion due to existing pumping had not yet manifested itself. Moreover, his concern with the protection afforded the Carlsbad Irrigation Project by Article IX of the Compact clearly demonstrates his understanding that "adjustments" (apparently taking the form of reduced water use by junior appropriators in New Mexico) would need to be made in New Mexico if sufficient water were not salvaged to make up for the groundwater depletion.

Finally, New Mexico notes that its 57% of the salvaged water is insufficient to make up for the loss of the groundwater contribution to the river. (New Mexico's Objections, pp. 77-79). When all the numbers are added up it appears that New Mexico would be unable to use any of the salvaged water for other purposes if the groundwater contribution had already been completely depleted. This assertion apparently played a role in the Master's rejection of Secretary Chapman's letter. (Master's Report, pp. 25-26).

The total amount of water lost by continued groundwater depletion roughly equals the amount gained by salvaging water lost to salt cedars under the 1947 Condition. (S.D. 109, p. 141). It is for this reason the 1947B Condition shows roughly the same stateline flows as the 1947 Condition. (Id.).⁶ Obviously, by agreeing to provide Texas 43% of salvaged water New Mexico reduced its ability to completely make up for declining groundwater contributions with salvaged water. Nevertheless, the testimony of New Mexico negotiator Erickson and the letter of Secretary Chapman clearly indicate that this was New Mexico's intent. Perhaps New Mexico negotiators thought that more water could be salvaged, or that the groundwater contribution would not go completely to zero, or that irrigation techniques would become more efficient in the future. Perhaps they simply overlooked the importance of the 43% due Texas; or, perhaps it was the price they paid for Texas' pledge of support in efforts to salvage water. In any case, such speculation is irrelevant.⁷ The Compact

⁶This circumstance demonstrates the ludicrousness of New Mexico's proposed construction of the Compact's definition of "salvaged water." (New Mexico's Objections, pp. 76-77). Article II(h) equates salvaged water with water lost to natural non-beneficial uses, primarily salt cedars, under the 1947 Condition. New Mexico's gloss on the "salvaged water" definition, i.e., no salvaged water exists until after the depletion of groundwater contribution has been balanced by what might otherwise be considered salvaged water, simply makes no sense. If one considers the fact that total salvaged water, as defined by the Compact, will only balance the loss of the groundwater contribution, it is evident that New Mexico's suggested construction removes the existence of salvaged water from the realm of possibility. The mere fact that the Compact negotiators bothered to define the term and provide for its allocation refutes New Mexico's proposed construction of the Article II(h) definition.

⁷The most likely explanation may be in Article III(d), which was overlooked by the Master's Report. (pp. 25-26). Only water which is salvaged through joint efforts of the states, or through action of the United States, is subject to the 43/57 apportionment. If New

clearly includes the existing groundwater contribution as part of the 1947 Condition. Likewise, the Compact clearly obligates New Mexico to deliver a quantity of water to the state line which is equivalent to that available under the 1947 Condition. Considering the fact that New Mexico was looking squarely at the possibility of a suit for equitable apportionment before this Court,⁸ and considering the fact that the Compact appeared to allow them to continue existing uses in the immediate future, New Mexico's agreement to these provisions is understandable.

In summary, the negotiating history of the Compact, its legislative history, and testimony adduced before the Master all compel the conclusion that in agreeing to the 1947 Condition New Mexico assumed the burden of supplying Texas water equivalent to that available under the 1947 Condition, including the groundwater contribution reflected by the 1947 Condition. While the Compact invites New Mexico to utilize salvaged water for this purpose, it does not excuse the failure to deliver that quantity of water if sufficient water is not salvaged.

Mexico unilaterally salvages water Article III(d) provides that this belongs entirely to New Mexico. In fact the Kaiser Channel construction, referenced at page 8 of the Master's Report, was such a unilateral action. A large channel was constructed through the McMillan delta so that low and normal flows could pass through the delta without being spread across the acres of salt cedar which make up the delta.

⁸Not only did the Texas legislature authorize suit against New Mexico in 1931, as noted at page 10 of the Master's Report, it again authorized suit by the Texas Attorney General in 1941. Moreover, the legislation authorizing the Texas Commissioner to negotiate this Compact in 1947 specifically provided that, in the event compact negotiations failed, the Texas Commissioner was to report this fact to the Governor and make information available to the Attorney General so that he might initiate legal action. (See, S.D. 109, pp. 5-7; See also, Stip. Ex. 4(a), Minutes of May 28 and 29, 1947, meeting, throughout, where the Texas Commissioner repeatedly emphasizes the alternative of litigation.).

C. Other Matters.

At this stage of the proceedings New Mexico has not given up its use theory argument. For this reason the jargon of the use theory continues to crop up in New Mexico's "Statement of the Case" and her "General Statement of Facts." For this reason Texas must alert the Court to the possibility of being misled by the jargon of the use theory. For example, at page 17 of New Mexico's Objections she refers to "increased depletions by man" and "man's activities undertaken after 1947." Neither of these are the phrases used by the Compact. Article III(a) holds New Mexico responsible for all of man's activities; once the protection afforded New Mexico by the determination of "a quantity of water equivalent to that available to Texas under the 1947 condition" has been exhausted none of man's activities in New Mexico are exempt. New Mexico's reference, at page 24 of her Objections, to "changes in depletion due to man's activities" is similarly suspect.

Another adjunct of New Mexico's use theory is her fixation upon a statement by Mr. Tipton's describing the Article III apportionment. New Mexico has cited his statement, appearing at page 115 of S.D. 109, no less than five times in her Objections.⁹ For the record, Mr. Tipton's explanation of the Article III apportionment is as follows:

There are three types of water that are apportioned. One is the water which is equivalent to that which was being received by Texas under the '1947 condition.' And on the other side of the picture, *by implication*, there is apportioned to New Mexico that which she was using under the '1947 condition.' There is apportioned salvaged water and there is apportioned unappropriated floodwater."

(emphasis added)

⁹See New Mexico's Objections, pp. 21, 54, 55, 63, & 70.

New Mexico would give its apportionment *by implication* preference over the Compact's express apportionment to Texas of water equivalent to that available under the 1947 Condition. As the Master's Report recognized, if New Mexico is apportioned sufficient water to satisfy 1947 uses, Texas cannot possibly receive the same protection because there is simply not enough water for all uses then existing. (Master's Report, p. 38). Moreover, protection of New Mexico's 1947 uses is tantamount to a compact based upon irrigated acreage—a concept which was expressly rejected. (Id., p. 39).

In her description of the administrative history of the Pecos River Commission, New Mexico attempts to paint the picture of immediate attempts to refine the Compact's definition of the 1947 Condition, beginning from the Commission's earliest meetings. (New Mexico's Objections, pp. 27-31). A careful reading of the 1956 Report of the Engineering Advisory Committee, reproduced at pages 28-29 of New Mexico's Objections, reveals: (a) there were problems performing annual administrative computations, especially regarding the calculation of flood inflow, according to the literal directions of the Inflow-Outflow Manual; (b) for this reason the engineering committee decided to examine the original computation of flood inflows in the 1947 Condition routing study; (c) if upon reexamination the original methods appeared satisfactory, annual administrative accounting would be done on that basis; and (d) revisions of the Inflow-Outflow Manual which appeared necessary after this work would be submitted. There is no discussion of revising the 1947 Condition routing study or the revising of the Compact's "description of the 1947 Condition."

Significantly, the reexamination of original computations was conducted by New Mexico engineer Erick-

son. It is appended to the Minutes of the January 18, 1957, meeting of the Inflow-Outflow Subcommittee of the Engineering Advisory Committee. (Stip. Ex. 6). Concerning the 1947 Condition, Mr. Erickson states:

The 1947 Condition

It is clearly shown from the above citations¹⁰ from the Compact that the 1947 condition is to be taken as defined in the Engineering Advisory Committee's report and appendices thereto and by the material found in the work sheets of that committee which were developed during the Compact negotiations.

Actually the conditions incorporated in those studies covered the period from the time of the Joint Investigation (1939-40) to about 1947. In other words some of the 1939-40 data which was gathered during the Investigation was used and other information developed from later records or collected during 1945 and 1946 was applied where deemed necessary. These various conditions (affecting gains and losses on the River) were incorporated into routing studies to define the condition being considered and to form a basis of comparison with other conditions.

(Id., 1/57 Memorandum, p.4)

On the subject of groundwater contribution to the river Mr. Erickson states:

(b) The base inflow to the river between Acme gaging station and the Artesia gaging station. (Although this is here listed with the natural conditions on the River, the base in-

¹⁰The "above citations" are Articles III(a), IV(a), II(f), and II(g). (Id., 1/57 Memorandum, pp. 2-3).

flow is the discharge into the River from the Artesia and shallow ground water basins in the Roswell-Artesia area. As determined by the Task Force it is the flow from the basins as of about 1947 (1939-46, see pp. 48-52, S.D. 109) and reflects the *effect* of the uses of ground water on the base flow as of that time. It does not reflect the *total* uses of ground water as of 1947. Derivation of the 1947 base inflow (average of 1939-46) is explained in a subsequent sub-section of this memorandum entitled "Guadalupe to Artesia Section," and extension of the condition to the period 1905-46 is explained at pp. 48-50 of Senate Document 109. Care must be taken to retain the 1947 base inflow in any reconstruction of or reference to the 1947 condition.

(Id., p.7; emphasis in original)

Moreover, Mr. Lowry, the Texas engineer/negotiator, certified that he had examined Mr. Erickson's report and concurred in it. (Id., p. 16). Thus, in early 1956 there was no dispute on the 1947 Condition or its need for refinement; in fact, there was even an agreement on the groundwater issue which is directly contrary to New Mexico's current position. The only problem then existing was the need to revise the directions for flood inflow computation contained in the Inflow-Outflow Manual.

Following this meeting, the new New Mexico engineer, Mr. Reynolds, refused to approve the annual computations which has been performed in accordance with Mr. Erickson's report. (Stip. Ex. 2, Min. of EAC, 4/2/57, p. 6). At its next meeting, July 29, 1957, the Engineering Advisory Committee requested the advice of the Legal Advisory Committee on two questions. The first, and only pertinent one for our purposes, is as follows:

While the 1947 condition is inviolate, can the inflow-outflow relationship curves shown on pages 153 and 154, Senate Document 109, be changed?

(Id., 7/29/57 Min., p. 1)

Thus, contrary to New Mexico's assertion (New Mexico's Objections, p. 31), the question presented to the legal committee was not whether the 1947 Condition, described in the original engineering report, might be modified. Rather, it was whether two plates in the Inflow-Outflow Manual might be modified. The answer of the legal committee was as follows:

The substantial evidence rule would apply to whether the index inflow vs. outflow curves could be changed. If there is substantial evidence of error or omission, either mutual or unilateral, then corrections could be made. He cautioned the Committee not to make any quick changes, but rather to document very thoroughly any possible changes that would be suggested.¹¹

(Stip. Ex.2, 7/29/57 Min., p.2)

As previously noted (Texas Objections, p. 19) the mutability of the Inflow-Outflow Manual is not contested. The definition of the 1947 Condition is contained in the original Report of the Engineering Advisory Committee, not the Inflow-Outflow Manual.

¹¹As previously, and fully, discussed in Texas' Brief on the 1947 Condition, filed before the Special Master, the Review of Basic Data engineers promptly ignored this advice. They re-worked the entire original 1947 Condition routing study, accepting its values for the various aspects of the 1947 Condition only when they could not come up with a reasonable alternative to replace them.

The liberties New Mexico takes in departing from the record compiled before the Master in this case are truly extraordinary.¹² At one point New Mexico goes so far as asserting, "It is not relevant that there is no evidence in the record. . . ." (New Mexico's Objections, p. 82, note 12). Much of the departure from the record takes the form of citation of the legislative history of 1956 and 1964 legislation pertaining to the Pecos River. (Id., pp. 73-77). While neither relevant nor admissible so far as the 1947 Condition question is concerned, the material lends no particular support to New Mexico's argument.

Two of the departures do, however, cause some concern. First, with no more basis in the record than oral argument of counsel (Id., p. 58), New Mexico repeatedly asserts that its legislature would never have approved a compact which required deliveries based on the existing groundwater contribution. Mr. Tipton's statement, quoted at pages 80-81 of New Mexico's Objections, provides no support for this assertion. Texas has repeatedly relied on this precise language in the past because Mr. Tipton states the nine-point agreement is, "a guaranty by New Mexico not to deplete the flow of the river below essentially present conditions."

Equally troublesome is New Mexico's assertion that the Master's decision will destroy the agricultural economy of the southeastern quarter of the state (Id., pp. 58 & 61) and the loose manner with which New Mexico tosses out large numbers of acres of land which must be taken out of production due to the Master's decision.

¹²An itemized discussion will not be attempted. (See, New Mexico's Objections, pp. 44-45, 49, 58, 61, 73-77, & 81-82.)

Finally, New Mexico faults the Master for excluding evidence of intent she offered through testimony of her compact negotiators while accepting certain documentary evidence offered by Texas as going to "either an offer or counter-offer." (New Mexico's Objections, pp. 82-84). Two points must be made to put this objection in the proper perspective. First, although the Master allowed Texas' documents into evidence, his decision indicates no reliance upon them. Second, the New Mexico intent testimony is in the record, if not admitted as evidence. Yet, rather than referring to the negotiators' testimony before the Master, New Mexico cites their deposition testimony. (Id., p.56).¹⁴ In light of New Mexico's other departures from the record, Texas would suggest that the testimony on intent contains nothing particularly helpful to New Mexico—otherwise it would surely have been brought to the Court's attention. Consequently, if any error exists in the Master's ruling on the New Mexico intent testimony, a contention which Texas denies, it must be harmless error.

¹³Texas might as easily assert that by 1956 only 6,000 acres of its 45,000 acres normally irrigated from the Pecos River were still under irrigation. (Hearing before the Subcommittee on Irrigation and Reclamation of the Committee on Interior and Insular Affairs, United States Senate, 84th Cong., 2d Sess., on S.J. Res. 155, May 10, 1956, p. 34). Or, Texas might bemoan the loss of the Pecos Valley Cantaloupe from the market places of our country, and the resulting incremental decrease in the quality of life for our country as a whole.

¹⁴These depositions were taken by Texas for discovery purposes prior to the witnesses' testimony before the Master. They were neither offered, nor received, into evidence.)

In concluding, Texas would suggest to the Court that the Master's decision on groundwater is sound:

- (a) It recognizes that the Compact was intended to provide Texas protection against depletion of the Pecos River by New Mexico groundwater uses;
- (b) It recognizes that the River could not support both existing ground and surface water uses on a sustained basis; and
- (c) It honors the negotiating history of the Compact, effectuating the agreement of the parties.

Texas would go one step further and suggest that the rationale and negotiating history which form the basis for the Master's groundwater decision buttress the view contained in Texas' Objections to the Master's 1947 Condition decision. Like groundwater depletions, surface water depletions in Texas and New Mexico already exceeded available water supplies in 1947. Like groundwater depletions, the Compact intended to provide Texas some protection against uses in New Mexico. And, as with groundwater depletions, the negotiating history of the Compact—indeed, the Compact's express provisions—indicate that New Mexico's obligation was to be fixed by the original Report of the Engineering Advisory Committee.

All arguments advanced by New Mexico in its groundwater obligation are essentially arguments for the New Mexico use theory. They have all been properly rejected. Yet, rather than adopting the straightforward resolution to the 1947 Condition question suggested by the language of the Compact, the Master concludes that the 1947 Condition refers to a stage of development which is, at least in part, a tangible reality.

The basis for the Master's conviction that the 1947 Condition must refer to a tangible reality is unclear. The Master, himself, in light of the Compact's provisions and negotiating history was unable to be entirely consistent with his notion that the 1947 Condition referred to a tangible reality, i.e., even his definition included the 1947 Condition groundwater contribution and the augmented acreage of the Ft. Sumner and Carlsbad Projects.

Texas suggests that complete consistency can easily be achieved by literal adherence to the Article II(g) definition of the 1947 Condition. Moreover, that definition avoids a major deficiency inherent in the Master's definition of the 1947 Condition. It does not lend itself to further refinement and redefinition that will only result in additional controversy and delay at the administrative level of the Pecos River Commission.

CONCLUSION

Texas respectfully urges the Court to overrule New Mexico's Objections to the Master's ruling on the January 1, 1947, cut-off date and to his ruling on New Mexico's liability for groundwater depletion. Texas further urges the Court to reject the Master's Report insofar as it defines the 1947 Condition as something other than the 1947 Condition routing study contained in the original Report of the Engineering Advisory Committee, and to remand the cause to the Master for an accounting of deliveries under the standard provided by that routing study and a determination of whether any delivery deficiencies are due to man's activities in New Mexico.

Respectfully submitted,

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PROOF OF SERVICE

I, DOUGLAS G. CAROOM, Assistant Attorney General of the State of Texas, one of the Attorneys for the Plaintiff herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the _____ day of _____, 1979, I served copies by First Class Mail, Postage Prepaid, to counsel for the State of New Mexico and the United States.

DOUGLAS G. CAROOM

