

FILED
DISTRIBUTED
FEB 4 1980

No. 65, Original

Supreme Court, U.S.
FILED

FEB 2 1980

MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM OF THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 65, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT OF THE SPECIAL MASTER

MEMORANDUM OF THE UNITED STATES

1. This case involves the respective rights of New Mexico and Texas to the waters of the Pecos River, which rises in New Mexico and flows into Texas. In 1948, Texas and New Mexico entered into the Pecos River Compact, and the following year the legislatures of the two states and Congress ratified this interstate agreement. See Pub. L. No. 91, ch. 184, 63 Stat. 159. The Compact is designed "to provide for the equitable division and apportionment of the use of the waters of the Pecos River * * * [and] to make secure and protect present development within the states" (Art. I, 63 Stat. 160). Toward these ends, the Compact attempts to allocate water rights to New Mexico and Texas and encourages the mutual cooperation of those states through the offices of the Pecos River Commission. See Arts. III-V, 63 Stat. 161-163.

In particular, Article III(a) of the Compact provides that "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." 63 Stat. 161. Article II(g), in turn, defines the "1947 condition" as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." 63 Stat. 160. Although the Report of the Engineering Advisory Committee states that "[t]he 1947 condition represents present conditions on the river" (S. Doc. No. 109, 81st Cong., 1st Sess. XXVI (1949)), the parties to the Compact have never agreed on precisely what is the "present condition," and the Pecos River Commission, which is composed of one voting commissioner representing each of the two states, has never been able to resolve this dispute.

2. In 1975, Texas filed this suit for injunctive and declaratory relief, claiming that New Mexico was not complying with Art. III(a) of the Compact. 421 U.S. 927. On November 11, 1975, the Court appointed the Honorable Jean S. Breitenstein as Special Master and directed him "to submit such reports as he may deem appropriate." 423 U.S. 942-943.¹ Pursuant to this mandate and following extensive proceedings, the Special Master compiled a report setting forth his views of New Mexico's obligations under the Compact. See *Report of Special Master on Obligation of New Mexico to Texas*

¹We note that the Special Master assisted the Pecos River Compact Commission at the time of its inception and is thus particularly familiar with the circumstances of this suit. See S. Doc. No. 109, *supra*, at 111.

Under the Pecos River Compact (August 13, 1979).² The Special Master concluded that "the 1947 condition is that situation in the Pecos River Basin which produced in New Mexico the man-made depletions resulting from the stage of development existing at the beginning of the year 1947 and from the augmented Fort Sumner and Carlsbad acreage" (Report, *supra*, at 3, 41). Accordingly, the "New Mexico diversions and uses [of the Pecos River], taken as a whole, may not deplete the state line flow below what it was at the beginning of 1947." *Id.* at 43.³

The Special Master rejected Texas' contention that the situation or flow in 1947 is conclusively established by the river routing study captioned "Summary of Operations 1947" which was printed as an appendix to the Report of the Engineering Advisory Committee, S. Doc. No. 109, *supra*, at 144 App. The Special Master

²Although the United States initially intervened in this matter to protect certain federal and Indian water rights (see 423 U.S. 1085), it has now been determined that the resolution of this dispute will not substantially affect the interests of the United States. Accordingly, the United States has generally acted as an observer in the proceedings before the Special Master and has actively participated only to the extent requested by the Special Master. We have nevertheless submitted this memorandum as an aid to the Court and in response to the Court's order of October 15, 1979.

³We do not understand the Special Master to hold that New Mexico must deliver to the stateline the same flow of water that existed in 1947 regardless of the inflow of the Pecos River at the Alamogordo Dam (see Spec. Mast. Rep., *supra*, at 6-7) or other natural conditions. Rather, New Mexico's man-made depletions may not reduce the flow below the 1947 condition. That is, if the actual flow of water and other natural conditions in a particular year replicated the natural conditions in 1947, New Mexico's man-made depletions could not reduce the flow at the stateline below that which actually existed in 1947. See *id.* at 21-22; Art. II(e); S. Doc. No. 109, *supra*, at 112-116.

pointed out that this study was admittedly flawed and that it did not accurately describe the real situation that existed in 1947, as intended by Articles III(a) and II(g) of the Compact (Spec. Mast. Rep., *supra*, at 2, 42). He further noted that “[t]he failure of the routing study as a definition or description is emphasized by the 30 years of controversy which have produced no more than this litigation” (*id.* at 42).

The Special Master also overruled New Mexico’s objections to his construction of the Compact. He first observed that the course of proceedings at the time of the enactment of the Compact demonstrated that the 1947 condition referred to the situation at the beginning of that year and not the end, as contended by New Mexico (*id.* at 43). In addition, he declined to construe the Compact as protecting all New Mexico uses of water and developments in existence in 1947. According to the Special Master, New Mexico’s contention is refuted both by the language of the Compact and by the fact that “[t]he New Mexico contention, if carried to its ultimate, would mean that in time of drought New Mexico could use all the water if that were needed to service New Mexico uses” (*id.* at 2).⁴

3. In our view, the Special Master has correctly defined the “1947 condition” as that term is used in Articles II(g) and III(a) of the Compact. As detailed in the Special Master’s report, the language, legislative history, and purposes of the Compact demonstrate that

⁴We support the Special Master’s request that the Court rule on his report even though he has not finally adjudicated whether New Mexico is in fact overly depleting the Pecos River. The definition of the 1947 condition contained in the report will serve as the basis for extensive engineering studies and all further proceedings in this litigation, and it therefore seems appropriate that the Court resolve this question at this time.

it was intended to place a limit on New Mexico's man-made depletions roughly equivalent to the level of depletions existing on January 1, 1947.⁵ This interpretation of the Compact assures that both states will always have a share of the waters of the Pecos River, although the actual quantity of water available for consumptive use in either state will vary from year to year depending upon natural conditions. See S. Doc. No. 109, *supra*, at 112-118. In contrast, the alternative interpretations of the Compact offered by Texas⁶ and New Mexico⁷ would

⁵The parties do not appear to challenge the Master's conclusion regarding the "augmented Fort Sumner and Carlsband acreage" (Spec. Mast. Rep., *supra*, at 3).

⁶Texas primarily contends that the 1947 condition is immutably described in an appendix to the Report of the Engineering Advisory Committee, captioned Summary of Operations 1947. See S. Doc. No. 109, *supra*, at 144 App. Even Texas recognizes, however, that this study is an artificial construct based on erroneous assumptions and methodologies. It does not constitute an accurate description of the conditions on the river in 1947—the basis for the Compact. See *id.* at XXVI, 112-118. Moreover, the Compact specifically provides that the determination of New Mexico's obligations is governed by "The Report of the Engineering Advisory Committee, *supplemented by additional data hereafter accumulated.*" Art. VI(a), 63 Stat. 163 (emphasis supplied). And the history of the Compact demonstrates that neither the states nor the Commission considered the Summary of Operations as an immutable basis for apportioning the waters of the Pecos River. See, e.g., S. Doc. No. 109, *supra*, at 150-152.

⁷New Mexico urges that Article III(a) entitles it to use as much water as its developments required in 1947. But Article III(a) expressly constitutes a limit on New Mexico's depletions and not a guarantee of New Mexico's water use. New Mexico's position is further refuted by the contemporaneous explanation of the Commission's engineer advisor. See S. Doc. No. 109, *supra*, at 112-116 (remarks of R.J. Tipton). In addition, New Mexico's construction of the Compact would deprive Texas of all waters in times of low flow, thus defeating the express purpose of the

simply not "provide for the equitable division and apportionment of the use of the waters of the Pecos River." Art. I, 63 Stat. 160.

It is therefore respectfully submitted that the exceptions of Texas and New Mexico to the Special Master's Report be overruled and the Report confirmed.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

Compact to apportion the waters of the Pecos River equitably and to protect the developments in *both* states. See Art. I, 63 Stat. 160.

Similarly, the Special Master correctly rejected New Mexico's claim that the 1947 condition refers to the situation at the end rather than the beginning of 1947. Article II(g) states that the 1947 condition reflects the circumstances described in the Report of the Engineering Advisory Committee, and that report is derived from data compiled through the end of 1946 and does not include 1947 statistics. See also Tex. Rep. Br. at 11-15.



