No. 65, Original

IN THE

Supreme Court of the United States

October Term, 1975

STATE OF TEXAS, *Plaintiff*

v.

STATE OF NEW MEXICO, *Defendant*

UNITED STATES OF AMERICA, *Intervenor*

MOTION TO STRIKE OR FOR LEAVE TO FILE RESPONSE AND NEW MEXICO'S RESPONSE TO THE MEMORANDUM OF THE UNITED STATES

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February 8, 1980

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MOTION TO STRIKE OR FOR LEAVE TO FILE RESPONSE

Comes now the defendant, the State of New Mexico, and hereby moves to strike the Memorandum of the United States filed on February 2, 1980, or alternatively for leave to respond thereto, and in support hereof states:

1. On August 20, 1975, the United States moved to intervene and tendered its complaint in intervention, asserting the

need to protect the rights of certain Indian wards in New Mexico, as well as certain interests in federal lands and facilities situated within the Pecos River watershed.

2. On January 26, 1976, the Court adopted the Special Master's recommendations respecting the United States' intervention, effectively ordering that "(a)ll matters going to the relief, if any, to which the United States is entitled and to the impact of such relief on the rights of the two States, or either of them, [are] expressly reserved for later action by the Special Master and recommendation to the Supreme Court."

3. Since December 30, 1975, when the Special Master filed his report respecting the United States' intervention, the United States has not made an appearance or participated in the litigation.

4. Following four years of litigation between the state parties, the Special Master filed his report of September 7, 1979, making his findings respecting the "1947 condition" as that term is used in the Pecos River Compact.

5. The United States did not attend the pre-trial, trial, or post-trial proceedings and is not privy to the evidence adduced by Texas and New Mexico.

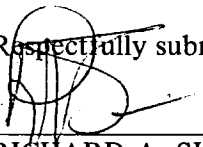
6. The Court's order of October 15, 1979, provided for the filing of exceptions to the Master's report, together with supporting briefs, by November 29, 1979; reply briefs were to have been filed by December 29, 1979.

7. The United States' memorandum of February 2, 1980, disregards the Court's order of January 26, 1976, asserts no exceptions pursuant to the Court's order of October 15, 1979, and is, in any event, untimely.

8. The memorandum is factually incorrect, tending to prejudice the State of New Mexico.

Wherefore, the State of New Mexico prays that the United States' memorandum be stricken or that New Mexico be granted leave to file her response.

Respectfully submitted,



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NEW MEXICO'S RESPONSE TO THE MEMORANDUM OF THE UNITED STATES

Apparently, the United States' memorandum is based upon the Special Master's report, the briefs of Texas and New Mexico, and Senate Document 109, one of the many exhibits introduced by the state parties. The United States did not appear at or monitor trial, has not reviewed the exhibits, and has not otherwise availed itself of the evidence. Notwithstanding the Court's order of January 26, 1976, which segregated the interests of the United States "for later action by the Special Master and recommendation to the Supreme Court," the United States is now urging that the exceptions

of Texas and New Mexico be overruled and the Master's report confirmed.[1]

Perhaps because the United States' vantage point is rather remote, its analysis of "the alternative interpretations of the Compact offered by Texas and New Mexico" is essentially unfounded and wrong. (Memorandum, p. 5). Coincidentally, the United States' memorandum tends to prejudice New Mexico.

Ignorant of the administrative history of the Pecos River Commission, the United States explains:

> 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

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1. Somewhat anomalously the United States explains that it now has no interest in the lawsuit, but that it feels compelled to express its views on the merits of the dispute between the states:

> Although 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. (Memorandum, p. 2).

Aside from the questionable propriety of the United States' gratuitous opinion, we should point out that the United States has been a very distant observer. It has done nothing in this litigation except respond to the Master's inquiry respecting whether he might file an interlocutory report.

> 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.* (Memorandum, p. 2, emphasis added).

The fact of the matter is that the Pecos River Commission did resolve this dispute after twelve years of continuing, cooperative investigation into the 1947 condition. On January 31, 1961, the commission formally adopted the product of the states' mutual effort, i.e., the Review of Basic Data, as "findings of fact of the Commission" pursuant to Art. V(d) 5-8. Based upon the Review, the State of Texas fully concurred again on November 9, 1962, in the formal commission finding that the gross indicated departure potentially chargeable to New Mexico for the years 1950 through 1961 was only 5,300 acre feet. The amount was so small that Texas never sought to establish how much, if any, of the indicated departure was chargeable to New Mexico as having been caused by the activities of man. *See,* Art. III(a) and New Mexico's Objections to the Report of the Special Master and Brief in Support Thereof, pp. 16-17.

In the process of reanalyzing the 1947 condition in order to eliminate the engineering and arithmetical errors that distorted it in the original engineering studies, the Pecos River Commission necessarily construed Art. III(a), Art. II(g), and Art. VI(a) as they relate to the responsibilities of the commission and the

apportionment of Pecos River water. As in the interpretation of a contract, the meaning the parties attribute to the words and provisions of a compact governs the obligations assumed in the agreement. *Petty v. Tennessee-Missouri Bridge Commission,* 359 U.S. 275 (1959). Most recently, the Ninth Circuit Court of Appeals applied this view in *California ex rel. Younger v. Tahoe Regional Planning Agency,* 516 F.2d 215 (9th Cir. 1975), cert. den. 423 U.S. 868 (1975). In that case, California, one of the two states that had by compact established the interstate Lake Tahoe Planning Agency, sued the interstate agency of which the state itself was a part, claiming that the agency had not followed the interstate compact pursuant to which it operated. Substantively, the case involved a potentially ambiguous compact provision respecting the majority vote necessary for the agency to take "action." The court held that mutually adopted compact agency rules and regulations cured whatever ambiguity there might have been in the authorizing compact. The court said:

> This regulation evidences TRPA's own construction of the disputed statutory provisions and we should follow the construction by those charged with the statute's execution unless there are compelling indications that it is wrong. (516 F.2d, at 219).

In sum, the United States' memorandum is incorrect in asserting that the Pecos River Commission "has never been able to resolve this dispute." (Op. cit., p. 2). Not only did the commission resolve the dispute engineeringly, but also as regards the meaning of the compact. Despite the holding of this Court that an individual state cannot take it upon itself to define its obligations under a compact (*Dyer v. Sims,* 341 U.S. 22 (1950)), Texas attempted in 1974 to unilaterally repudiate the mutual construction of the compact to which it had agreed for 26 years. It is bad enough that Texas seeks to avoid the legal consequences of the administrative history of the Pecos River

Commission; the United States should not now be permitted to fuel that fire with unfounded statements of fact.

The United States is also incorrect in its assertion that "New Mexico's construction of the Compact would deprive Texas of all waters in times of low flow. . . ." (Memorandum, p. 5, f. 7). Again siding with Texas, the United States argues that "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.*, p. 4, citing the Master's Report of September 7, 1979, p. 2).

It is clear that the language of the compact supports New Mexico rather than refuting her position. *See,* New Mexico's Objections to the Report of the Special Master and Brief in Support Thereof, pp. 41-83, and New Mexico's Reply to Texas's Objection, pp. 5-25. It is Texas's contention that is not supported, either by the express terms of the compact, its explanation by Mr. Tipton, or by its administrative history. The United States is simply not familiar with the evidence.

The notion that New Mexico is effectively contending that she can rightfully dry up the river at the stateline is naive as well. As noted in our brief in support of our objections, the compact does not explicitly address the situation in which water salvage is not effected to offset the projected post-1947 base inflow depletion, but there can be no question that it was contemplated that the supply in both states would suffer, as in fact it has. Texas would lose the estimated 47 per cent of the base inflow as measured at Avalon that reached the state line before that depletion occurred. While New Mexico is entitled to continue operation of the works constituting the 1947 condition stage of development in New Mexico, she would not be able to increase storage capacity or change the source of

supply of uses from surface water to ground water if such modifications would result in a depletion at the state line greater than would have resulted from continued operation of the works constituting the 1947 condition stage of development. Consequently, when the base inflow is completely depleted, and if water salvage has not been effected to offset that depletion, New Mexico's supply would be decreased by 53 per cent of the post-1947 base inflow depletion, assuming all other things would remain unchanged, as we must to intelligibly discuss the matter. The fact is that *both* states suffer, and the compact, unfortunately, offers no solution except to mandate water salvage in New Mexico by *both* states. (*See*, S.D. 109, p. 120 and New Mexico's Objections to the Report of the Special Master and Brief in Support Thereof, pp. 71-80.)

In conclusion, the United States' memorandum is not only uncalled for and untimely, it is wrong and prejudicial. It comments on the Special Master's report without the benefit of the evidence adduced by the parties, and in view of the United States' own statement that it has virtually no interest in this lawsuit, the memorandum is unwarranted and completely disregards the Court's orders of January 26, 1976 and October 15, 1979.

Respectfully submitted,

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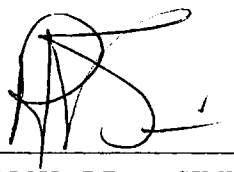
CERTIFICATE OF SERVICE

Pursuant to Rules 42(5) and 33 of the Supreme Court Rules, I certify that three copies of the foregoing motion and response were served upon counsel of record on February 8, 1980.



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