No. 65, Original

In the Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND SUPPORTING MEMORANDUM

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 65, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES

The United States respectfully excepts to the Report and Recommendations of the Special Master dated September 10, 1982, insofar as the Report and Recommendations propose that the United States' representative on the Pecos River Commission be vested with power to vote to resolve any impasse created by the failure of the state representatives to agree.

REX E. LEE
Solicitor General

DECEMBER 1982

TABLE OF CONTENTS

	Page
Statement	1
Argument	6
I. The terms of an interstate compact cannot be modified by judicial action	6
II. The judicial power extends to the interpretation of compact terms, and determination of compliance with its requirements, where the Commission has failed to act	8
Conclusion	17

TABLE OF AUTHORITIES

Cases:

Arizona v. *California*, 373 U.S. 546	9, 15
Colorado v. *Kansas*, 320 U.S. 383	9
Cuyler v. *Adams*, 449 U.S. 433	6, 10
Far East Conference v. *United States*, 342 U.S. 570	10, 11
Federal Radio Commission v. *General Electric Co.*, 281 U.S. 464	4
Green v. *Biddle*, 21 U.S. (8 Wheat.) 1	11, 12, 13
James I. Barnes Construction Co. v. *Washington Township*, 134 Ind. App. 461, 184 N.E.2d 763	13
Lake County Estates v. *Tahoe Planning Agency*, 440 U.S. 391	10
Neale Construction Co. v. *Topeka Township Sewage District*, 178 Kan. 359, 285 P.2d 1086	8
Nebraska v. *Wyoming*, 325 U.S. 589	8, 15
New Jersey v. *New York*, 347 U.S. 995	15
Peacock Construction Co. v. *West*, 111 Ga. App. 604, 142 S.E.2d 332	13
Plantation Foods, Inc. v. *R.J. Reagan Co.*, 520 S.W.2d 432	13
Ricci v. *Chicago Mercantile Exchange*, 409 U.S. 289	11
Rosado v. *Wyman*, 397 U.S. 397	11
United States v. *Grace & Sons, Inc.*, 384 U.S. 424	11
United States v. *RCA*, 358 U.S. 334	11

Cases—Continued Page

Vermont v. *New York*, 417 U.S. 270 ..... 7, 15
Virginia v. *West Virginia*, 246 U.S. 565 15
Walker v. *Southern Ry.*, 385 U.S. 196 11
West Virginia ex rel. Dyer v. *Sims*, 341 U.S. 22 9
Wyoming v. *Colorado*, 259 U.S. 419; 260 U.S. 1; 286 U.S. 494; 298 U.S. 573; 309 U.S. 572; 353 U.S. 953 15

Constitution and statutes:

United States Constitution
Article I, Section 10 (Contract Clause) 13
Pecos River Compact, ch. 184, 63 Stat. 159 1
Art. II(g), 63 Stat. 160 2
Art. III(a), 63 Stat. 161 1-2
Art. V(a), 63 Stat. 162 ..... 3, 6
Art. V(d), VI 63 Stat. 162-164 ..... 3, 9
Art. V(f), 63 Stat. 163 9-10
Art. VI(b), 63 Stat. 163 ..... 7, 9
Art. VI(c), 63 Stat. 163 ..... 7, 9
Art. VIII, 63 Stat. 164 11
Art. XIV, 63 Stat. 165 ..... 6, 16

Miscellaneous:

3A A. Corbin, *Corbin on Contracts* (1960) 13, 14
17A C.J.S. *Contracts* (1963) 13
Restatement of Contracts (1932) 14
F. Zimmerman & M. Wendell, *The Interstate Compact Since 1925* (1951) 12

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 65, Original

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO

ON THE REPORT AND RECOMMENDATIONS OF THE SPECIAL MASTER

MEMORANDUM FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

STATEMENT

1. Texas was granted leave to file this action in 1975, 421 U.S. 927; it alleged that New Mexico had violated the Pecos River Compact, ratified by the states and consented to by Congress in 1949. Ch. 184, 63 Stat. 159. The purpose of the Compact is to apportion the water of the Pecos River between the two states. The terms of the apportionment provide that New Mexico shall not deplete the flow of the river at the state line below the amount available to Texas under the "1947 condition." Art.

III(a), 63 Stat. 161. The Special Master concluded that the phrase "1947 condition" meant "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 of Special Master on Obligation of New Mexico to Texas Under the Pecos River Compact* 52 (Aug. 13, 1979).[1] That definition was approved by this Court. *Texas* v. *New Mexico*, 446 U.S. 540 (1980).

Although the standard for compliance by New Mexico with its obligations under the Compact is now fixed, there remain several issues to be resolved before it can be determined whether Texas is entitled to relief in this action. First, the definition of the 1947 condition approved by this Court must be translated into water quantities so that there is a numerical standard against which compliance in subsequent years can effectively be measured. Second, depletions in subsequent years must be determined and measured against that standard. Both the quantification of the 1947 condition and the measurement of depletions in subsequent years will necessarily involve the exercise of some judgment. The amount of water in the Pecos River varies with the annual precipitation; it also depends upon such phenomena as flood inflows to the river, channel and reservoir losses of water through evaporation and bank storage, absorption of water by phreatophytes (vegetation such as willows and salt cedars), and returns of water to the river

---

[1] The phrase "1947 condition" is defined in the Compact as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee." Art. II(g), 63 Stat. 160.

after diversions. There is no generally accepted method for measurement of the effects of those phenomena, though there are a number of engineering techniques available (Report and Recommendations 13-14).

When the Pecos River Compact was adopted it was contemplated that a determination of compliance with the water delivery obligations it imposed would be made in the first instance by the Pecos River Commission. Art. V(d), VI, 63 Stat. 162-164. The Compact provides for the appointment of one Commissioner representing each of the compacting states and, if designated by the President, a third Commissioner representing the United States. "[T]he Commissioner representing the United States shall be the presiding officer of the Commission, but shall not have the right to vote in any of the deliberations of the Commission." Art. V(a), 63 Stat. 162. Since 1962 administration of the Compact has been frustrated by the failure of the two state Commissioners to agree on the interpretation of the Compact's requirement.

2. The Master's Report and Recommendations were made in response to motions by the two states. New Mexico moved for a final decree and dismissal, arguing that "the Court is without power to interfere with the * * * Commission in the execution of its statutory duties, particularly the exercise of its discretion in resolving abstruse and judgmental engineering problems." Motion To Recommend Final Decree And To Dismiss And Other Motions, Memoranda, And Documents In Response To The Master's Order Of December 29, 1981, at 3. Texas moved instead that the Court adopt a new proposal for measurement of the 1947 condition. Motion To Use The Double Mass Inflow-Outflow Method To Account For Stream Flows

In The Determination Of The 1947 Condition Base Relationship. The Master recommended that

> (1) The New Mexico motion to dismiss the action be denied.
>
> (2) The Texas motion to substitute double mass analysis for river routing be denied without prejudice to consideration and action thereon by the Pecos River Commission.
>
> (3) The United States representative on the Pecos River Commission, or a third party, be vested with power to participate and act in all Commission deliberations and to vote to resolve any impasse created by failure of the representatives of Texas and New Mexico to agree.
>
> (4) Texas and New Mexico be ordered to return forthwith to the Pecos River Commission for performance by it of the duties, and exercise by it of the powers, delegated to it by the Compact.
>
> (5) The Court retain jurisdiction of the case.

Report and Recommendations 2-3.

The Master concluded that to dismiss the action could leave Texas without a remedy, and prolong delay to the advantage of New Mexico. He found, however, that because the Commission had made no findings for him to review, further proceedings would require him to " 'exercise * * * functions which are essentially legislative or administrative,' " and beyond the judicial power. Report and Recommendations 22, quoting *Federal Radio Commission* v. *General Electric Co.*, 281 U.S. 464, 469 (1930). The Master also decided that, even if it were in his power to proceed with the case, the intransigence of the states would frustrate the implementation by the Pecos River Commission of any decree he might recommend (Report

and Recommendations 23-24). The Master concluded that the proper action under these circumstances would be to exercise his equitable power by appointing a 'tie-breaker" if the states were unable, within 90 days, to agree on a tie-breaking procedure of their own (*id.* at 26).[2] "[T]he decision of the tie-breaker [would be] final, subject only to appropriate review by the Court. Upon the selection of a tie-breaker, the States should be ordered to return to the Commission for determination of this long-standing controversy." (*ibid.*).

ARGUMENT

We believe the Master erred in recommending the appointment of a tie-breaker to the Pecos River Commission, since the Compact denies the United States representative a vote, and the Compact has the force of statutory law. We also believe that translating the 1947 condition into quantities of water and proposing a method for measurement of depletions in subsequent years are proper judicial functions. Finally (though an answer to this question rests ultimately with the states), we believe that disagreement between the states need not frustrate future compliance with any decree the Master might recommend and the Court approve.[3]

---

[2] The Master gave the states "a reasonable time, say ninety days," within which to agree on such a procedure (*ibid.*). The ninety-day period will expire on December 9, 1982.

[3] Although the United States initially intervened in this matter to protect certain federal and Indian water rights (see 423 U.S. 1085 (1976)), 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 never-

I. THE TERMS OF AN INTERSTATE COMPACT CANNOT BE MODIFIED BY JUDICIAL ACTION

Article V(a) of the Pecos River Compact provides that "the Commissioner representing the United States * * * shall not have the right to vote in any of the deliberations of the Commission." 63 Stat. 162. That section makes explicit the intent of the compacting states, approved by Congress, that only the state Commissioners should have the right to vote on matters within the Commission's jurisdiction. This Court recently held that "congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States * * *." *Cuyler* v. *Adams*, 449 U.S 433, 438 (1981). Through that device "the Framers sought to ensure that *Congress* would maintain ultimate supervisory power over cooperative state action * * *." *Id.* at 440 (emphasis added). In this case the Compact itself also provides for termination by legislative action in each of the signatory states, Art. XIV, 63 Stat. 165, but does not contemplate judicial modification. As events have demonstrated, it would have been preferable had the Compact included a method for resolution of deadlocks between the state Commissioners. But that defect cannot be judicially corrected. The Court can no more vary the terms of the Compact than it can amend any other statute enacted by Congress. Even if, in extraordinary circumstances, the Court might be constrained to disregard an interstate compact as unenforceable and invoke principles of equitable apportionment in dividing the waters of an interstate stream, it

---

theless submitted this Exception and Supporting Memorandum because of the Master's recommendation that the Commissioner representing the United States be empowered to vote on matters before the Pecos River Commission.

does not follow that rewriting the terms of the compact is a permissible alternative.

At all events, there are independent objections to the judicial appointment of an impartial third party to resolve the states' differences. So long as such an individual was empowered to act he would of necessity be subject to control by this Court, which has frequently noted the undesirability of "continuing Court supervision over decrees of equitable apportionment of waters * * *." *Vermont* v. *New York*, 417 U.S. 270, 275 (1974). Moreover, although (as we argue in the following section) much that the Commissioners do is the appropriate subject of judicial action, the Compact also gives the Commission functions which are discretionary and inapt for judicial review by any manageable standards. Article VI(b), 63 Stat. 163, for example, declares that "[u]nless otherwise determined by the Commission," measurements shall be made on the basis of three-year periods. And Article VI(c), 63 Stat. 163, states that "[u]nless and until a more feasible method is devised and adopted by the Commission the inflow-outflow method" shall be used to make measurements of stream flows. Insofar as the tie-breaker is permitted to participate in such decisions, he "would be acting more in an arbitral rather than a judicial manner," and his action would not be subject to review "according to principles of law * * *." *Vermont* v. *New York*, *supra*, 417 U.S. at 277.

II. THE JUDICIAL POWER EXTENDS TO THE INTERPRETATION OF COMPACT TERMS, AND DETERMINATION OF COMPLIANCE WITH ITS REQUIREMENTS, WHERE THE COMMISSION HAS FAILED TO ACT

1. The Master concluded that appointment of a tie-breaker to the Pecos River Commission was necessary in part because the choice among methods for stream-flow measurement required the application of judgment and scientific expertise which are not the usual preserve of the judiciary (Report and Recommendations 21). While that is unhappily true, suits involving the apportionment of interstate waters have always presented this Court with the necessity of making such choices. As the Court stated in *Nebraska* v. *Wyoming*, 325 U.S. 589, 618 (1945):

> Apportionment calls for the exercise of an informed judgment on a consideration of many factors. Priority of appropriation is the guiding principle. But physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and the rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former—these are all relevant factors. They are merely an illustrative, not an exhaustive catalogue.

Compared to such a welter of considerations, each measured only against the Chancellor's foot, the requirement that New Mexico deliver water according to the 1947 condition is relatively straightforward.

Aware of the difficulties inherent in equitable apportionment, this Court has in the past stressed its

preference for resolving disputes over interstate streams through compacts, rather than through the elaboration of federal common law. *West Virginia ex rel. Dyer* v. *Sims*, 341 U.S. 22, 26-27 (1951); *Colorado* v. *Kansas*, 320 U.S. 383, 392 (1943). But the effectiveness of interstate compacts depends in the last instance on their enforceability. "It requires no elaborate argument to reject the suggestion that an agreement solemnly entered into between States by those who alone have political authority to speak for a State can be unilaterally nullified, or given final meaning by an organ of one of the contracting States." *West Virginia ex rel. Dyer* v. *Sims*, *supra*, 341 U.S. at 28. Cf. *Arizona* v. *California*, 373 U.S. 546, 564 (1963).

2. Apart from the difficulty of making scientific judgments, the Master concluded that judicial enforcement of the Compact was also inappropriate at this point because the choice of methodology and values "should be made in the first instance by the administrative agency and then be subjected to judicial review" (Report and Recommendations 22). But the Compact's grant of factfinding power to the Pecos River Commission does not preclude the judicial power to make similar determinations. The Compact grants the Commission power to collect data and make factual findings concerning New Mexico's compliance with its delivery obligations. Art. V(d), VI, 63 Stat. 162-164. That power, however, is nowhere made exclusive.[4] Moreover, it is clear that the Compact contemplates judicial enforcement, since the Commission is given no enforcement power, and Article

[4] Those decisions which *were* to be the sole province of the Commission were explicitly identified. See, e.g., Art. VI(b) and (c), *supra*, page 7.

V(f), 63 Stat. 163, states that "[f]indings of fact made by the Commission shall not be conclusive in any court, * * * but shall constitute prima facie evidence of the facts found."

It is probable that those who drafted the Compact envisioned a two-stage enforcement procedure, with measurement of depletion being made in the first instance by the Commission. But it would be unrealistic to suppose that that approach was intended to be exclusive. The compact is, after all, "a law of the United States," *Cuyler* v. *Adams, supra,* 449 U.S. at 438, and as such creates federal rights in the compacting states. See *Delaware River Commission* v. *Colburn,* 310 U.S. 419, 427 (1940). On the other hand, "[i]n discharging their duties as officials of [the Commission], the state * * * appointees necessarily have also served the interests of the political units that appointed them." *Lake Country Estates* v. *Tahoe Planning Agency,* 440 U.S. 391, 399 (1979). Because the Compact gives each state one of the Commission's two votes, making Commission action an absolute prerequisite to judicial relief would permit a partisan state appointee to frustrate the enforcement of a federal right. Though the problem presented by this case is in some respects unique, it has obvious parallels in both public and private law.

a. The argument that the Master should refer decision on measurement of the 1947 condition and of depletion changes to the Commission is similar to the doctrine of primary jurisdiction applied in *Far East Conference* v. *United States,* 342 U.S. 570 (1952). The Court there held that in cases raising factual issues not within the usual experience of the judiciary, agencies established to make such determinations should first decide those issues. That pro-

cedure is favored even though the agency is not capable of granting the relief sought in court, and its factual determinations will only serve as a predicate for judicial action. *Id.* at 574-575. See also *Ricci* v. *Chicago Mercantile Exchange*, 409 U.S. 289 (1973). But the doctrine is not an inflexible requirement even where the agency to which a court defers is federal in composition and implements federal statutory policy. For example, where there are "no pervasive regulatory scheme, and no rate structures to throw out of balance," this Court has declined to require remand to an agency. *United States* v. *RCA*, 358 U.S. 334, 350 (1959). Moreover, "[s]ince * * * the doctrine of primary jurisdiction rests in part upon the need for the skill of a 'body of experts,' it would be odd to impose the doctrine when the experts deny the relevance of their skill." *Ibid.*, n.18. But it would be equally quixotic to impose the doctrine when the experts are deadlocked and unable to exercise their skill. See *United States* v. *Grace & Sons, Inc.*, 384 U.S. 424, 430 (1966); *Walker* v. *Southern Ry.*, 385 U.S. 196, 198 (1966); cf. *Rosado* v. *Wyman*, 397 U.S. 397, 405-407 (1970).

The question is similar to that presented in *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1 (1823). There Virginia and Kentucky had provided by compact that—upon the separation of Kentucky from Virginia and its admission to statehood—pre-existing private rights in lands within Kentucky should be determined by the law of Virginia. Article VIII of the compact provided for the constitution of a special tribunal for the resolution of disputes about the interpretation and execution of the compact. 21 U.S. (8 Wheat.) at 38, 46-48. To the argument that the provision for such a tribunal prevented this Court from exercising its ju-

risdiction over a dispute arising under the compact, the Court answered (*id.* at 90-91):

> How, then, are those controversies * * * to be settled? The answer, we presume, would be, by commissioners, to be appointed by those states. But none such have been appointed; what then? Suppose, either of those states, Virginia, for example, should refuse to appoint commissioners? Are the occupants of lands, to which they have no title, to retain their possessions, until this tribunal is appointed, and to enrich themselves in the mean time, by the profits of them, not only to the injury of non-residents, but of the citizens of Kentucky? The supposition of such a state of things is too monstrous to be for a moment entertained.

There is little difference between the refusal to appoint commissioners, and the appointment of commissioners who refuse to find facts about the extent of compliance. Whether such a deadlock will persist in the Commission's deliberations now that the 1947 condition has been defined (though not quantified) is a matter which the United States is not qualified to assess. The Court should consider that question in light of the submissions of Texas and New Mexico. If such an impasse is perceived as inevitable, however, there is no lack of judicial power to proceed with interpretation and enforcement of the Compact.

b. Still another perspective on the same problem may be gained from the standpoint of private law. Although congressional approval renders a compact a federal law, the underlying transaction is still an agreement between two states which is in form and substance a contract. F. Zimmerman & M. Wendell, *The Interstate Compact Since 1925* at 32, 42 (1951). Indeed, in *Green* v. *Biddle*, *supra*, this Court found

that "[i]f we attend to the definition of a contract, which is the agreement of two or more parties, to do, or not to do, certain acts, it must be obvious, that the propositions offered, and agreed to by Virginia, being accepted and ratified by Kentucky, is a contract. In fact, the terms compact and contract are synonymous * * *." 21 U.S. (8 Wheat.) at 92. The Court went on to hold that statutes enacted by Kentucky interfering with the rights created by the compact were "Law[s] impairing the Obligation of Contracts" in violation of the Contract Clause, United States Constitution, Article I, Section 10. 21 U.S. (8 Wheat.) at 92-93.

In many ways the provision in the Compact for determination of compliance by the Commission is similar to the provision typically found in construction contracts that performance be assessed and certified by an architect or engineer. In such cases the courts frequently hold that an action to enforce the obligation of payment is demurrable unless the complaint alleges the execution of the certificate of performance. See, e.g., *Peacock Construction Co.* v. *West*, 111 Ga. App. 604, 606-607, 142 S.E.2d 332, 333-334 (Ct. App. 1965); *Neale Construction Co.* v. *Topeka Township Sewage District*, 178 Kan. 359, 362-366, 285 P.2d 1086, 1089-1092 (1955); 3A A. Corbin, *Corbin on Contracts* § 650, at 115-116 (1960).[5] Nevertheless, the duty to obtain an initial determination of com-

[5] That is so even though, as here, the architect's assessment of compliance with the contract is only prima facie evidence that the work has been performed as required. See, e.g., *Plantation Foods, Inc.* v. *R.J. Reagan Co.*, 520 S.W.2d 432 (Tex. Civ. App. 1975); *James I. Barnes Construction Co.* v. *Washington Township*, 134 Ind. App. 461, 466-467, 184 N.E.2d 763, 764-765 (Ct. App. 1962); 17A C.J.S. *Contracts* § 498, at 744 (1963).

pliance with the contract can be excused, and judicial enforcement sought directly, under circumstances similar to those which may obtain in this case:

> Where a certificate of an architect, surveyor or engineer is a condition precedent to a duty of immediate payment for work, the condition is excused if the architect, surveyor or engineer
>
> (a) dies or becomes incapacitated, or
>
> (b) refuses to give a certificate because of collusion with the promisor, or
>
> (c) refuses to give a certificate after making examination of the work and finding it adequate, or
>
> (d) fails to make proper examination of the work or
>
> (e) fails to exercise an honest judgment * * *.

Restatement of Contracts § 303 (1932). In such situations, even though "[j]udges and juries may not be competent architects or skilled in determining conformity with plans and specifications," 3A *Corbin on Contracts* § 651, at 118, factual questions about performance fall to them of necessity. *Id.* at 120.

In this case the Compact provision for Commission factfinding plays the same role as an architect's certificate. When functioning properly the Commission is able to provide an expert assessment of performance in accordance with the Compact's 1947 condition which would materially assist the Master and this Court in deciding whether New Mexico has performed her obligations. The inability of the Commission to act, however, does not render the Compact unenforceable. Rather, it is properly viewed as

a condition precedent to contractual enforcement which may in proper cases be excused.

3. Issuance of a decree in this action would be proper even though its enforcement may be attended by some administrative difficulty. Once again it is worth emphasizing that enforcement of the Compact's provisions may be a less difficult undertaking than, for example, enforcement of a decree of equitable apportionment. Such decrees have historically required frequent judicial intervention to make them effective. See, e.g., *Wyoming* v. *Colorado*, 259 U.S. 419 (1922); 260 U.S. 1 (1922); 286 U.S. 494 (1932); 298 U.S. 573 (1936); 309 U.S. 572 (1940); 353 U.S. 953 (1957). Cf. *New Jersey* v. *New York*, 347 U.S. 995, 1002-1003 (1954) (appointment of River Master to administer provisions of decree regarding the yields, diversions, and releases on Delaware River). Moreover, this Court has emphasized, in the context of interstate compacts, "[t]hat judicial power essentially involves the right to enforce the results of its exertion * * * [, and] that this applies to the exertion of such power in controversies between States as the result of the exercise of original jurisdiction conferred upon this court by the Constitution * * *." *Virginia* v. *West Virginia*, 246 U.S. 565, 591 (1918).

Of course such continuing supervision is undesirable. See *Vermont* v. *New York*, *supra*, 417 U.S. at 274-275; *Nebraska* v. *Wyoming*, *supra*, 325 U.S. at 616. But there is good reason to hope that it will also be unnecessary. In the first place, this Court has generally entertained the expectation that states will resolve their differences through "mutual accommodation and agreement," *Arizona* v. *California*, 373 U.S. 546, 564 (1963); *Vermont* v. *New York*, *supra*, 417 U.S. at 274, and its confidence has proven justified. Equally important in this case, the Court has already

sustained the Master's definition of the 1947 condition, so the ground which separates the states is not as wide as it once was. The Master could, we think, properly specify the accounting techniques to be used and the assumptions to be made about stream flows in determining future compliance, so that the findings to be made by the Commission would be confined largely to matters of empirical fact. Such a decree would not necessarily undermine the role assigned to the Commission by the Compact, since the Commission could be left free—whenever it was able to agree—to make different judgments of value (as well as fact), to devise an alternative to the inflow-outflow method, and to exercise its other powers. The decree would simply provide a modus vivendi while the Commission was deadlocked.

* * * * *

We emphasize that the United States is not well situated to assess the prospects of future agreement between the states or their Commissioners. If the main parties should convince the Court that their differences have been narrowed sufficiently for the Commission to operate with unanimity, it may be proper to enforce the Master's fourth recommendation notwithstanding the fact that a tie-breaker cannot be appointed. If, on the other hand, the states have concluded that they cannot abide by the terms of the Compact, they remain free to terminate it "by appropriate action of the legislatures of both of the signatory states." Art. XIV, 63 Stat. 165. If neither of those resolutions proves possible or desirable, however, the judicial power extends to resolution of the factual and policy disputes delegated to the Commission, and may be exercised to remedy the impasse

arising from the Compact's requirements of unanimous action by the compacting states.

CONCLUSION

The Exception of the United States should be sustained. In other respects, the Court should act on the recommendations of the Special Master as it deems appropriate in light of the submissions of the compacting states.

Respectfully submitted.

REX E. LEE
Solicitor General

LOUIS F. CLAIBORNE
Deputy Solicitor General

JOHN H. GARVEY
Assistant to the Solicitor General

DECEMBER 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 393463 1188