NATURAL RESOURCES JOURNAL

Volume 28
Issue 4 *Fall 1988*

Fall 1988

Breach of an Interstate Water Compact: Texas v. New Mexico

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"BREACH" OF AN INTERSTATE WATER COMPACT: TEXAS V. NEW MEXICO

STATEMENT OF THE CASE

Texas v. New Mexico[1] [*Texas*] raises the question whether interstate water compacts are appropriately treated as contracts when the states' obligations and remedies are judicially determined.[2] In *Texas* the United States Supreme Court ruled that New Mexico had not met its water delivery obligation under the Pecos River Compact[3] for the years 1950–1983. The Court issued a decree enjoining New Mexico to deliver Pecos River water annually to Texas in accordance with a Special Master's calculation of the compact obligation.[4] The Court ordered that a River Master be appointed to calculate the obligation each year, and to monitor and enforce delivery at the New Mexico-Texas border.[5]

Justice White, writing for a unanimous court,[6] found that because an interstate compact is a contract, New Mexico had breached its bargain and Texas was due relief. Therefore, in addition to its annual delivery obligation, New Mexico must either deliver the water owed for the 1950–1983 shortfall or pay money damages. The Court remanded the remedy issue to the Special Master to determine whether the relief will be in water or money, and to calculate the terms of payment.

STATEMENT OF FACTS

The Pecos River flows southward from the Sangre de Cristo range in north-central New Mexico through eastern New Mexico and into west Texas. The Pecos River Compact [Compact] was drafted by the states in 1948 and approved by Congress in 1949.[7] The Compact attempted to divide the water of the Pecos between the states, but because the stream-flow is highly variable the agreement did not specify that a particular amount of water should reach Texas each year. Instead, the apportionment in the Compact is "an amount which will give to Texas a quantity of

1. 107 S. Ct. 2279 (1987).
2. Id.
3. 63 Stat. 159 (1949).
4. 107 S. Ct. at 2287.
5. Id. at 2286–87.
6. Justice Stevens took no part in the decision.
7. Act of June 9, 1949 63 Stat. 159 (1949).

water equivalent to that available to Texas under the 1947 condition."[8] The two states were unable to agree on how to calculate the "1947 condition."

In 1974, Texas filed an original action in the United States Supreme Court to resolve the dispute over the measure of the delivery obligation.[9] The Court appointed a Special Master to determine the method of calculating the obligation, and in 1979 and 1984 adopted his reports.[10] The Master calculated a shortfall in delivery for the years 1950–1983 of 340,100 acre-feet, and recommended that New Mexico be ordered to deliver the accumulated shortfall over ten years (expedited retrospective relief) in addition to its annual obligation under the new method for calculating delivery (prospective relief).[11]

Both states excepted to the Special Master's report. New Mexico argued that the Compact did not provide for retrospective remedies, and contemplated only prospective relief.[12] New Mexico also excepted to the Master's finding that all negative departures for the 34 years were chargeable to New Mexico, without expressly determining whether they were due to man's activities.[13] Finally, New Mexico objected to the appointment of a River Master because the function assigned him is one that the Compact gives to the Pecos River Commission.[14] New Mexico also argued that if liable for the past shortfall, the state should be allowed to pay in money rather than water. Texas excepted to the method of calculating New Mexico's delivery obligation.[15] The Supreme Court rejected both states' exceptions and adopted the Special Master's recommendations.[16]

The Supreme Court held that because a Compact is a contract, and the Special Master found that New Mexico had breached, the Court must provide Texas a remedy.[17] Because the Compact contains no provision for monetary relief, the Special Master concluded that the Compact contemplated delivery of water, and the Court could not order relief inconsistent with Compact terms. Texas agreed. However, consistent with its treatment of the Compact as a contract, the Supreme Court decided that "lack of a specific provision for a remedy in case of breach does not, in our view, mandate repayment in water and preclude damages."[18] The Court can thus grant relief to Texas in either form.

8. Id. at Art. III(a).
9. 421 U.S. 927 (1975).
10. 107 S. Ct. at 2283.
11. Id.
12. Id.
13. Brief for New Mexico at 3–11, Texas v. New Mexico, 107 S. Ct. 2279 (1986) (No. 65, Orig.) ["New Mexico Brief"].
14. Id. at App. A.
15. 107 S. Ct. at 2283.
16. Id.
17. Id. at 2284.
18. Id.

Texas sought the equitable remedy of specific performance, that is, delivery of Pecos River water in the amount of the calculated shortfall.[19] New Mexico preferred to pay money damages rather than retire long-standing rights of its own water users in southeast New Mexico.[20] New Mexico further argued on the basis of hardship that it should have the option of choosing to deliver the water or to compensate Texas after money damages have been calculated.[21] The Supreme Court therefore remanded the case to the Special Master to determine whether New Mexico "must perform today or pay damages for what a court decides they promised to do yesterday and did not."[22] The Court agreed with the Master that if monetary relief is ordered New Mexico will also have to pay postjudgment interest.[23]

In addition, because the apportionment formula is so difficult to apply, and because of the "natural propensity of these two States to disagree,"[24] the Court followed the Special Master's recommendation that a River Master be appointed to calculate the obligation annually and monitor delivery.[25] The River Master will determine departures from the delivery obligation and add any shortfalls to later deliveries. The Supreme Court retained jurisdiction of the suit in order to modify the decree or issue supplemental decrees.[26]

BACKGROUND

Interstate Water Compacts

Interstate water compacts are formed to allocate water between states, to provide for storage, flood control, pollution control, river basin planning, or combinations of these functions. Many of the compacts between eastern states, which use the riparian doctrine[27] to establish water rights, are formed for pollution control, interbasin transfer for municipalities, or combinations of purposes. Most compacts between western states, which use the prior appropriation doctrine[28] to establish water rights, are primarily water allocation agreements.

Interstate water allocations are created either by agreement between

19. Letter from Renea Hicks, Texas Asst. Attorney General, to Charles J. Meyers, Special Master, Suggested Amendments to Order of June 22, 1987 (July 6, 1987).

20. New Mexico Brief at 13 (cited in note 13).

21. Texas, 107 S. Ct. at 2284.

22. Id.

23. Id. at 2285–86, n. 8.

24. Id. at 2287.

25. Id.

26. Id.

27. The riparian doctrine allows landowners on watercourses to share the waters with other holders of lands appurtenant to the stream. See F. Trelease & G. Gould, Water Law (1986).

28. Prior appropriation is "first in time, first in right." The first to put water to beneficial use acquires a water right senior to subsequent users. In times of shortage, senior rights are fully satisfied before junior users can take water. See F. Trelease & G. Gould, Water Law, Ch. 2 (1986).

the states with the approval of Congress under the compact clause of the Constitution,[29] by Supreme Court decree,[30] or by an Act of Congress.[31]

Congress has approved 22 compacts which allocate the waters of interstate streams.[32] Shares of the river are usually specified in acre-feet deliverable annually,[33] a percentage or proportion of the annual streamflow,[34] or allowable diversions for particular time periods during the year.[35] The Pecos River Compact differs from most compacts in that it does not provide a definite share of water to each state.[36]

Equitable Apportionment

The Supreme Court bases its water allocation on the federal common law of equitable apportionment. In *Kansas v. Colorado* the Supreme Court announced its doctrine of equitable apportionment of interstate streams.[37] Apportionment was based on equality of right, not equal amounts. The goal is always to "achieve an equitable apportionment, without quibbling over formulas."[38] The Court said it would balance the equities, and protect established uses and the economies built on them.[39]

In *Nebraska v. Wyoming* the Court affirmed its commitment to equitable apportionment, reasoning that an established economy in the upper basin, based on existing uses of water, should be protected regardless of what the same water might produce in the lower basin.[40] The Court held that the basis of equitable apportionment is balancing the equities.[41] The factors to be considered include costs and benefits to upstream and downstream users.[42] The *Nebraska* Court also suggested that apportionment be based on the "dependable flow" of the stream, not a long-term average.[43]

29. See, for example, Pecos River Compact, 63 Stat. 159 (1949); Snake River Compact, 64 Stat. 29 (1950); La Plata River Compact, 43 Stat. 796 (1925); South Platte Compact, 44 Stat. 195 (1926). The Compact Clause is U.S. Const., art. III, § 2.

30. See Kansas v. Colorado, 206 U.S. 46 (1907); Nebraska v. Wyoming, 325 U.S. 589 (1945).

31. Boulder Canyon Project Act, 45 Stat. 1057 (Dec. 21, 1928), codified at 43 U.S.C. § 617; Arizona v. California, 283 U.S. 423 (1931); Colorado River Compact, 70th Cong., 2d Sess. in Cong. Rec. 324 (Dec. 10, 1928).

32. See J. Muys, Interstate Compacts and Regional Water Resources Planning and Management for a list of water allocation compacts as of date of publication.

33. See, for example, Nebraska v. Wyoming, 325 U.S. 589 (1945).

34. See, for example, Wyoming v. Colorado, 309 U.S. 572 (1940).

35. See, for example, Hinderlider v. LaPlata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938).

36. Pecos River Compact (cited in note 29).

37. Kansas v. Colorado, 206 U.S. 46 (1907).

38. New Jersey v. New York, 283 U.S. 336, 343 (1931).

39. 206 U.S. 46 (1907).

40. Nebraska v. Wyoming, 325 U.S. 589, 621 (1945).

41. Id. at 622.

42. 325 U.S. 589 (1945).

43. Id. at 620; Wyoming v. Colorado, 259 U.S. 419, 471, 476 (1922). "Crops cannot be grown on expectations of average flows which do not come, nor on recollections of unusual flows which have passed down the stream in prior years."

Litigation over Interstate Streams

Since the equitable apportionment doctrine was first announced in a dispute over the waters of the Arkansas River in *Kansas v. Colorado*,[44] many states sharing watercourses have taken their differences to the Supreme Court.[45] The Court granted relief in such cases three times before *Texas v. New Mexico*.[46] The relief granted in all three cases was prospective only, typically enjoining diversions of the upstream state that resulted in shortfalls to the downstream state.[47] In the other cases,[48] the Court granted the downstream state no relief because it had not shown sufficient evidence of injury.[49]

Thus in a dispute over the waters of tributaries of the Connecticut River, the Supreme Court found that Connecticut was not injured by upstream diversions and declined to enjoin the diversions.[50] Similarly, in *Washington v. Oregon*[51] the Court found that Washington was not injured by Oregon's diversion of the waters of the Walla Walla River, and was due no relief.[52] In *New Jersey v. New York*,[53] New Jersey sued to enjoin diversions from tributaries of the Delaware River for New York City's water supply. The Supreme Court found that New Jersey failed to show present injury, and denied relief.[54]

These cases suggest that the downstream state must show present injury, not speculative loss,[55] and that the complainant bears the burden of proof in showing damage or wrongdoing by the upstream state.[56] More recently, however, the litigation between Nebraska and Wyoming[57] suggests that, in the arid western states at least, where streams are often over-appropriated, there is a presumption that unauthorized diversions by the upstream state injure the downstream state, and evidence of injury need not be shown. "[D]eprivation of water for irrigation in arid or semi-arid regions cannot help but be injurious."[58] Granting or denying relief then

44. 206 U.S. 46 (1907).

45. See for example Colorado v. New Mexico, 459 U.S. 176 (1982); Arizona v. California, 373 U.S. 546 (1963); Colorado v. Kansas, 320 U.S. 383 (1943); Washington v. Oregon, 297 U.S. 517 (1936).

46. Nebraska v. Wyoming, 325 U.S. 589 (1945); New Jersey v. New York, 283 U.S. 336 (1931); Wyoming v. Colorado, 259 U.S. 419 (1922).

47. Wyoming v. Colorado, 259 U.S. 419 (1922); Nebraska v. Wyoming, 325 U.S. 589 (1945).

48. See for example Washington v. Oregon, 297 U.S. 517 (1936); Colorado v. Kansas, 320 U.S. 383 (1943).

49. Washington v. Oregon, 297 U.S. 517 (1936); Connecticut v. Massachusetts, 282 U.S. 660 (1931), Kansas v. Colorado, 206 U.S. 46 (1907).

50. 282 U.S. 660 (1931).

51. 297 U.S. 517 (1936).

52. Id. at 524, 529.

53. 283 U.S. 336 (1931).

54. Id. at 345.

55. Washington v. Oregon, 297 U.S. 517, 522 (1936).

56. Id.

57. 325 U.S. 589 (1945).

58. Id. at 610, citing Wyoming v. Colorado.

depends on the Court's balancing of the equities, or a cost/benefit analysis.[59]

Interstate Water Compacts as Contracts

The Supreme Court in *Texas v. New Mexico* treated the Pecos River Compact as a contract, citing Justice Frankfurter's dissent in *Petty v. Tennessee-Missouri Bridge Commission*.[60] In his dissent, Justice Frankfurter stated the proposition that "[a] compact is, after all, a contract."[61] The compact at issue in *Petty* was not a water allocation agreement, but a compact establishing an interstate commission to build a bridge and operate ferries across the Mississippi River.[62] The commission agreed in the compact "to contract, to sue and be sued in its own name."[63] When the commission was sued for wrongful death of an employee, both the district and appellate courts found that the commission, as a state agency, was immune from suit in tort.[64] The question for the Supreme Court was whether the "sue and be sued" clause in the compact constituted the commission's waiver of its Eleventh Amendment immunity from suit.[65] In this context it is easy to see why Justice Frankfurter observed "[a] compact is, after all, a contract."[66]

The compacts between eastern riparian states, which perform varied functions and establish commissions with a wide range of duties, are more readily construed as contracts than are water allocation agreements. In the former, the parties have mutual obligations. The water allocation compacts between western prior appropriations states, on the other hand, are more readily seen as federal laws,[67] than as contracts. Mutual obligations are not apparent, because the upstream state(s) promise not to divert more than its/their share and to deliver a share to the downstream state(s). The downstream state promises nothing, and has no obligation. The downstream state benefits from the agreement, but bears no burden. In this one-sided bargain, only the upstream party can breach because it is the only party which has obligated itself, and is bound by the terms of the agreement.

59. 325 U.S. at 618.

60. Texas v. New Mexico, 107 S. Ct. 2279, 2283 (1987), citing Petty v. Tennessee-Missouri Bridge Comm'n, 359 U.S. 275 (1959) (Frankfurter, J., dissenting).

61. Id. at 2283; Petty, 359 U.S. at 285.

62. 359 U.S. 275 (1959).

63. Tennessee-Missouri Bridge Commission Compact, 63 Stat. 930 (1949).

64. 359 U.S. at 277.

65. Id.

66. Petty, 359 U.S. at 285.

67. Texas v. New Mexico, 462 U.S. 554 (1983). See also Cuyler v. Adams, 449 U.S. 433, 440 (1981) (Congressional consent transforms interstate compacts into federal law); Intake Water Co. v. Yellowstone River Compact Commission, 590 F. Supp. 293, cert. denied 469 U.S. 925, 105 S. Ct. 316, 83 L.Ed. 2d 254 (1984).

In his dissent in *Petty,* Justice Frankfurter cited his majority opinion in *West Virginia ex rel. Dyer v. Sims*[68] for his view of contractual obligations assumed by the parties to the compact.[69] He was considering compacts of the multi-purpose kind, not water allocation compacts, which are much less similar to contracts.

In that case, West Virginia and seven other states had entered into a compact to control the pollution of the Ohio River.[70] West Virginia officials held conflicting views of the state's responsibilities under the compact.[71] In 1949 the state auditor refused to budget $12,250.00 for the commission because he thought the compact violated a state law and the state constitution.[72] A West Virginia court found the compact not binding on the state.[73]

Justice Frankfurter, writing for the majority of the Supreme Court, held that 1) the Court has the power to decide the meaning and validity of compacts, 2) a state cannot determine the meaning of its own compact, and 3) the state had authority to enter into the compact, which did not violate state law or the state constitution.[74] Through the supremacy clause, the Court's interpretation of a compact preempts the states' own interpretations.[75]

Justice Frankfurter's analysis in *Dyer v. Sims* began with the premise that the Supreme Court determines the nature and scope of obligations between states.[76] He found the question raised in *Dyer,* whether state officials are authorized to enter into a compact, analogous to the question whether the state has impaired the obligation of a contract.[77] When the question is raised whether the law of a state has impaired the obligation of a contract, in violation of the contract clause of the Constitution, it is for the Court to determine whether a contract exists, what its obligations are, and whether it is impaired by the state's legislation.[78] Justice Frankfurter in *Dyer* combined the contract clause and the compact clause, which led to his dissent in *Petty* that "a compact is, after all, a contract." Justice Reed's concurrence in *Dyer* also found that compacts operate as treaties between sovereigns,[79] and that the states assumed a contractual obligation and bound themselves to the terms of the covenant.[80]

68. West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951).
69. 359 U.S. at 284.
70. 341 U.S. at 24.
71. Id. at 25.
72. Id.
73. Id. at 26.
74. Id. at 30–32.
75. Id. at 28.
76. Id.
77. Id. at 29.
78. Id. at 29–30.
79. Id. at 35.
80. Id. at 34–35.

Following his contract clause approach to compacts in *Dyer*, Justice Frankfurter cited *Hinderlider et al. v. La Plata River and Cherry Creek Ditch Co.*[81] as another example of the question whether the state legislature had authority to enter into a compact affecting its citizens' rights.[82] He was apparently analogizing state-conferred water rights to contracts between individuals. *Hinderlider*, however, is far removed from the situation which led Justice Frankfurter to his view of compacts as contracts. In *Hinderlider*, a private irrigation company sued the Colorado state engineer for closing its headgates before it had diverted an amount of water granted it by the state.[83] The state engineer was acting in accordance with the La Plata River Compact,[84] which allocated the waters of the La Plata between Colorado and New Mexico. The Court found that a compact is an Act of Congress affecting the public interest, and that private water users, even holders of valid state water rights, cannot take water in excess of the state's equitable share.[85] The apportionment by compact is binding on the citizens of the state, and the state engineer acted within his authority in disallowing the diversion.[86]

The *Hinderlider* Court found that "[t]he compact . . . adapts to our union of sovereign states the age-old treaty-making power of independent sovereign nations."[87] It thus considered the water allocation compact to be more analogous to a treaty between sovereigns than a contract between individuals.

THE PECOS RIVER COMPACT

Terms of the Pecos River Compact

Article III(a) of the Pecos River Compact apportions the water in these terms: "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."[88] This article was a compromise. Texas got the "1947 condition" allocation and New Mexico tried to limit its obligation by the "man's activities" provision—depletions which it could control.[89]

81. Hinderlider, 304 U.S. 92 (1938).
82. Dyer v. Sims, 341 U.S. at 30.
83. Hinderlider, 304 U.S. at 95.
84. La Plata River Compact, 43 Stat. 796 (1925).
85. Hinderlider, 304 U.S. at 101–102.
86. Id. at 106.
87. Id. at 104. This idea is contrary to the purpose of the Compact Clause, which required Congress to ratify interstate compacts in order to enforce the sovereignty of the federal government against coalitions of states.
88. Pecos River Compact at Art. III(a) (cited in note 28).
89. New Mexico Brief at 3 (cited in note 13).

The Pecos was a particularly difficult river to apportion because its flow is so variable. The basic flow disappears and reappears repeatedly along the streambed.[90] The Pecos River Basin is geologically and hydrologically complex. It is subject to frequent flooding, drought, decreasing inflow from tributaries, low water quality including salinity, high sedimentation, and substantial water use by streamside plants, including salt cedars.[91] New Mexico did not want to be charged for depletions due to natural variation beyond its control.[92]

In 1974 Texas filed suit in the United States Supreme Court claiming that New Mexico had not met its delivery obligation since 1950.[93] Because the Pecos River Commission could not agree on the amount of water deliverable to Texas, Texas asked the Court to define the "1947 condition," determine the accumulated departures from that amount, and consider the extent to which the departures were caused by "man's activities" in New Mexico.[94] The Supreme Court appointed a Special Master to make these determinations.[95]

Calculating the "1947 Condition"

Article VI(c) of the Pecos River Compact provides that New Mexico's delivery obligation be calculated by the "inflow-outflow method."[96] This requires correlating inflow to the basin with expected outflow so that for any level of inflow, engineers can estimate the amount of water that should flow through and be available to Texas. Before the Compact was signed, engineers conducted a river routing study[97] to develop the necessary correlation for the Pecos. They calculated for each year from 1905 to 1946 what the outflow would have been at various points on the stream had New Mexico water uses of 1947 been in place in those years.[98] This study was to be the baseline in comparing future inflow and outflow to determine whether New Mexico was using a larger share of water than it had in 1947.[99] Both states disputed the application of the inflow-outflow method, and acknowledged that the routing study contained errors.[100]

90. Id. at 2.
91. Id. at 3.
92. Id.
93. Texas v. New Mexico, 421 U.S. 927 (1975).
94. Id.
95. Texas v. New Mexico, 423 U.S. 942 (1975).
96. Pecos River Compact at Art. VI(c) (cited in note 28).
97. A river routing study is a calculation of the amount of water leaving the river in various reaches of the drainage system, including all known diversions, and the inflow into the river, including estimated return flows. See Texas River Routing Study and Recomputation of 1947 Condition Inflow-Outflow Relationship, Texas Exhibit 68, Texas v. New Mexico, No. 65 Orig. (Nov. 1983).
98. Texas v. New Mexico, 446 U.S. 540 (1979) (Stevens, J., dissenting).
99. Id. at 541.
100. Id.

In 1979, during this litigation, the Special Master defined the "1947 condition" as "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."[101] He concluded that errors in the initial routing study must be corrected before it could be used to determine compliance.

However, Article II(g) of the Pecos River Compact defines the "1947 condition" as "that situation in the Pecos River Basin as described and defined in the Report of the Engineering Advisory Committee."[102] The routing study at issue was Appendix A to that report. On this basis Texas took exception to the Master's finding, arguing that the "1947 condition" was defined by the original routing study baseline *in the Compact* and therefore that study must continue to be used to determine New Mexico's compliance with compact terms.[103]

The Supreme Court attempted to end the dispute by issuing a decree that the Special Master's construction of the "1947 condition" be used, and a new routing study conducted.[104] However, as late as 1982 the Special Master reported that New Mexico's "obligation is still uncertain because the definition of the 1947 condition must be translated into water quantities to provide a numerical standard."[105] A method for translating the "1947 condition" into water quantities was developed in 1984.[106] It consists of a manual of formulae and equations for calculating inflow and outflow to approximate the 1947 condition. The Supreme Court adopted the Special Master's findings, and issued its opinion on June 8, 1987.[107] The Court retained jurisdiction of the suit for possible modification of its decree.[108]

The Amended Decree

On December 7, 1987, the Special Master filed his report, including an amended decree and the Pecos River Master's Manual, in the Supreme Court.[109] The report addresses the management of the Pecos River from 1987 forward.

Because the data necessary to calculate New Mexico's delivery obligation for a particular year are not available until the following year, the

101. Id. at 542, n. 2.
102. Pecos River Compact at Art. II(g) (cited in note 28).
103. New Mexico brief (cited in note 13).
104. Texas v. New Mexico, 446 U.S. at 542–43 (1979).
105. 1982 Report of Special Master 18, Texas v. New Mexico.
106. Texas v. New Mexico, 107 S. Ct. at 2284.
107. Id. at 2279.
108. Id. at 2287.
109. Special Master Report, State of Texas v. State of New Mexico, No. 65 Original (Nov. 1987).

River Master will calculate the obligation for a "water year" in the following "accounting year."[110] If New Mexico did not meet its annual obligation, it will have to make up the shortfall in the year after the accounting year. The Special Master rejected New Mexico's proposal for accumulating shortfalls and overages as debits and credits over a five-year period.[111]

The Master found that although the statistical curve used as a baseline to calculate departures from the 1947 condition is not "an exact representation," it is part of the agreement, and is now the law of the case.[112] "The 1947 condition, as defined in these proceedings, has to be translated into a water quantity to provide a numerical standard for measurement of compliance, and this necessarily involves a margin of error."[113]

When the River Master determines that there was a shortfall for the preceding year, New Mexico will submit a plan proposing a remedy. The plan will identify the source of make-up water, and specify a delivery schedule.[114] To insure that New Mexico meets its obligations, make-up water will be distinguished from Article III(a) obligation water by separately calculating amounts based on the Manual's equations, not by gauging the flow at the state line.[115]

The River Master will review and approve the plan for remedying any shortfall, and file a Compliance Report with the Supreme Court. The River Master's determination is subject to review by the Supreme Court only on a showing that it is clearly erroneous.[116] New Mexico filed exceptions to the Special Master's report.[117] The Supreme Court overruled those exceptions, and approved the report on March 28, 1988. The Court issued an amended decree, and appointed as River Master the person recommended in the report.

ANALYSIS

The opinion in *Texas v. New Mexico* raises the question whether interstate water compacts, especially those designed to allocate water, are appropriately treated as contracts when the Court is construing their terms, finding a "breach," and providing a remedy. Even if compacts are to be considered contracts for these purposes, the Pecos River Compact is not

110. Id. at 2.
111. Id. at 3.
112. Id. at 4.
113. Id. at 4–5.
114. Id. at 5.
115. Id. at 5–6.
116. Proposed Amended Decree, Attachment to Special Master Report at 5, Texas v. New Mexico (No. 65, Orig.) (Nov. 1987).
117. New Mexico's Exceptions to the Report of the Special Master and Brief in Support of Exceptions, No. 65, Original (January 26, 1988).

specific enough to find in its terms a breach under the Court's own standard.[118]

The Court in *Texas* mistakenly relied on two examples of Justice Frankfurter's unusual reasoning about compacts, *Dyer*[119] and *Petty*[120]. A literal (and better reasoned) reading of *Dyer* would lead to the conclusion that a compact is *analogous to* a contract, not *is* a contract. The *Texas* opinion cited *Dyer v. Sims* for the proposition that the compact is a legal document that "must be construed and applied in accordance with its terms."[121] The Court found that it "should provide a remedy if the parties intended to make a contract and the contract's terms provide a sufficiently certain basis for determining both that a breach has in fact occurred and the nature of the remedy called for."[122] The terms of the Pecos River Compact do not provide a "sufficiently certain basis" on which to find a breach and determine a remedy.

The "1947 condition," on which the allocation of Pecos River water is based, was not defined until 1984 in the course of this litigation.[123] The Court's decree thus orders New Mexico to comply with terms not in the Compact. While it might be acceptable to read enforcement terms into the compact, the delivery schedule is part of the basis of the bargain. To develop a delivery schedule outside the compact, and apply it retroactively, creates a new bargain not negotiated by the parties. It is difficult to see how the Court could find a breach of contract on the basis of terms decided *after* the state was sued for the breach.

Perhaps in questions of conflict between an interstate compact and state law the Court appropriately construes compact provisions as contract terms. However, in interpreting a compact which purports to allocate water, the Court should follow the principles of equitable apportionment, and base its decision on equities and not on the strict construction of terms imputed to the compact when the compact itself is not clear. A more flexible approach is required.

If the Supreme Court interprets interstate water compacts to "do equity," the function of equitable apportionment, the Court should look beyond compact terms, express or implied, to the current situation and identify present equities. Justice Frankfurter apparently saw the Court's role in *Dyer* and *Petty* as one of contract construction. The Court in *Texas* inexplicably applied that view to a water allocation compact, where the Court's role is surely to effect its own doctrine of equitable apportionment by resolving disputes with equity.

118. Texas v. New Mexico, 107 S. Ct. at 2284.
119. 341 U.S. 22 (1951).
120. 359 U.S. 275 (1959).
121. Texas v. New Mexico, 107 S. Ct. at 2283.
122. Id. at 2284.
123. Id.

The Supreme Court in *Texas v. New Mexico* did not balance the equities. Instead, it ordered retrospective relief to Texas while conceding that New Mexico acted in good faith and could not have determined under the "1947 condition" term whether its delivery obligation was being met.[124] The Court ignored the ambiguity in the Pecos River Compact, as well as the dispute over the meaning of its terms in finding a "breach." It changes the traditional remedy in disputes over interstate waters from prospective relief to both prospective and retrospective relief.[125] In addition, the Court seemed to penalize New Mexico for past shortfalls while agreeing with the Special Master that the state had acted in good faith.[126]

The Court agreed with the Special Master that if monetary relief is ordered, New Mexico will also have to pay post-judgment interest.[127] Depending on the measure of damages used to calculate the amount due, the interest could be substantial. The prospect of such payments could force New Mexico into a compressed payment schedule (to avoid interest), causing additional hardship. This consideration may be one of the reasons New Mexico argued it should have the option of choosing to pay in water or money after the measure of damages is determined.

The Court ordered that, because the apportionment formula is so difficult to apply, a River Master be appointed to calculate the obligation annually and monitor delivery.[128] In appointing a River Master to implement its decree, the Court took an extraordinary step. Only once in the history of interstate water compacts has the Supreme Court appointed a River Master to administer its decree.[129] "In exercising this power, we have taken a distinctly jaundiced view of appointing an agent or functionary to implement our decrees. But . . . that solution . . . has been employed when the occasion demands."[130] The Court found that the Texas-New Mexico dispute is such an occasion because:

> The natural propensity of these two States to disagree if an allocation formula leaves room to do so cannot be ignored. Absent some disinterested authority to make determinations binding on the parties, we could anticipate a series of original actions to determine the periodic division of water flowing in the Pecos.[131]

The Court thus dealt more harshly with New Mexico than with any state in the history of equitable apportionment, presumably as a lesson to other water-short western states to take their interstate compacts se-

124. Id.
125. Texas v. New Mexico, 107 S. Ct. at 2279.
126. Id. at 2284.
127. Id. at 2285–86, n.8.
128. Id. at 2286-87.
129. New Jersey v. New York, 347 U.S. 995 (1954).
130. Texas v. New Mexico, 107 S. Ct. at 2286–87.
131. Id. at 2287.

riously. The Court could have better taught the same lesson by balancing the equities instead of strictly interpreting flexible compact terms as though they were unambiguous terms of a contract. In so doing the Court could have remained true to its doctrine of equitable apportionment, and done justice at the same time. As the Court noted forty years earlier in *Colorado v. Kansas,* these controversies between states over the waters of interstate streams "due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule."[132]

CONCLUSION

The opinion in *Texas v. New Mexico* marks a radical departure in the evolution of the Supreme Court's doctrine of equitable apportionment. The Court moved from resolving interstate water disputes by balancing the equities to a strict legal view of contract damages. This approach undermines the doctrine of equitable apportionment and the flexibility of compacts drawn to effect fair allocation of water. The Court based its view of compacts as contracts on soft ground—*Dyer* and *Petty,* which are not water allocation compact cases. Interstate compacts that allocate water should be flexible enough to change with the times, and those unhappily drafted decades ago should not be construed as more rigid than they were designed to be.

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132. Colorado v. Kansas, 320 U.S. 383, 392 (1943).