

No. 141, Original
In the Supreme Court of the United States

STATE OF TEXAS,
Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,
Defendant.

◆
OFFICE OF THE SPECIAL MASTER
◆

**REQUEST OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 FOR
MARCH 31, 2020 STATUS CONFERENCE AGENDA ITEM RELATING TO STATUS
OF PENDING MOTIONS ON NEW MEXICO'S COUNTERCLAIMS**

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February 24, 2020

I. Request That Status of New Mexico Counterclaims Be On Agenda For Status Conference

The Special Master's February 5, 2020 Notice to Counsel anticipates establishing an agenda for the Status Conference now scheduled for March 31, 2020. El Paso County Water Improvement District No. 1 ("EPCWID") requests the Special Master include an agenda item on the status of certain New Mexico counterclaims. Specifically, EPCWID requests the following matter be included on the agenda for March 31st:

- Status of pending motions relating to New Mexico's counterclaims 2, 4, 5, 6 and 7. *See* United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9 (Dec. 21, 2018); Texas's Motion to Strike or for Partial Summary Judgment (Dec. 26, 2018).

New Mexico's counterclaims, specifically, 2, 4, 5, 6 and 7 directly challenge contracts to which EPCWID is a party. As long as these counterclaims continue as part of the case, EPCWID's rights are placed directly at issue. EPCWID is an indispensable party to litigation of those counterclaims but the claims are being litigated without EPCWID being a party to the case. EPCWID requires guidance as soon as possible on whether the counterclaims will be dismissed. If the counterclaims remain, EPCWID could expeditiously move to intervene as to the specific counterclaims, conduct any necessary supplemental discovery, and prepare for dispositive motion practice and participation at trial on the counterclaims and any other claims arising from them. Such party participation by EPCWID would be contingent on the resolution of the pending motions to dismiss the counterclaims.

EPCWID requests the above-stated agenda item to allow discussion of this critical issue at the March 31st Status Conference.

II. Background

Texas filed this original action in 2013 seeking to cure violations of the Rio Grande Compact by New Mexico. *See* Complaint of the State of Texas, filed by leave of Court, January 27, 2014

(“Texas Complaint”). EPCWID receives Rio Grande water apportioned to Texas under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, for irrigation and municipal uses. EPCWID’s water is delivered to EPCWID through the Rio Grande Reclamation Project, an interstate project operated by the United States Bureau of Reclamation with, and for the benefit of, Elephant Butte Irrigation District (“EBID”) in New Mexico and EPCWID in Texas (collectively “the Districts”). *See Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). The United States was granted leave to intervene in this action to protect its interests in the Rio Grande Project and its obligation to deliver water to the Districts. *See id.* (allowing “U.S. Complaint in Intervention”).

On May 22, 2018, New Mexico answered the Texas Complaint and the U.S. Complaint in Intervention. New Mexico also filed nine counterclaims. Five of those counterclaims directly challenge, and seek to void, contracts entered into under reclamation law relating to Project water supply and Project operations. EPCWID is a party to the contracts that are the subject of counterclaims 2, 4, 5, 6 and 7. The contracts—a 2008 Operating Agreement among the United States, EPCWID and EBID, and various contracts entered into under the Miscellaneous Purposes Act among the United States, EPCWID and the City of El Paso—are critical to Project operations and EPCWID’s water supply from the Project. Among other counterclaims, collectively, and supported by EPCWID, the United States and Texas moved to dismiss counterclaims 2, 4, 5, 6 and 7.

The Special Master held a hearing on April 2, 2019, on all pending motions, including the motions of the United States and Texas to dismiss New Mexico’s counterclaims 2, 4, 5, 6 and 7. In briefing and at oral argument, EPCWID and EBID asserted that if the counterclaims challenging the Districts’ contracts remained in the case, the Districts would be indispensable parties to this action. *See* Brief of EPCWID in Support of United States Motion for Judgment on

the Pleadings Against New Mexico’s Counterclaims, at 13 (Feb. 28, 2019) (parties to a contract are indispensable to a suit challenging that contract); *see also* United States of America Partial Joinder in Texas’s Motion to Strike or for Partial Judgment Regarding New Mexico’s Counterclaims and Affirmative Defenses, Federal Rule Civil Procedure 12(c) and Rule 56, at 2 (if New Mexico is allowed to pursue its counterclaims, EPCWID and EBID “would likely be deemed to be indispensable parties to claims challenging the validity of contracts to which they are parties,” citing *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975)).

III. Basis for Request

New Mexico’s counterclaims 2, 4, 5, 6 and 7 present a direct challenge to the contractual rights and interests of EPCWID. The primary challenge includes an effort to void the 2008 Operating Agreement without all the parties to the agreement before the Court. The 2008 Operating Agreement is the foundational and operative agreement among the United States, EPCWID and EBID to ensure appropriate allocation of Rio Grande Project water supply to the Project beneficiaries – EPCWID and EBID.

The challenge to EPCWID’s rights is underscored by New Mexico’s expert disclosures. On October 31, 2019, New Mexico disclosed its expert witnesses and produced eleven expert reports. Three of those expert reports are direct attacks on the 2008 Operating Agreement. Several more do so by implication. These reports remove any doubt about New Mexico’s intentions to pursue its claims to void the 2008 Operating Agreement to which EPCWID is a party. It does—and it is actively doing so during the discovery that is continuing while awaiting a ruling on the counterclaims.

Even though EPCWID has been given somewhat of a special status as amicus, that status is insufficient for EPCWID to protect its significant rights and interests if counterclaims 2, 4, 5, 6 and 7 are not dismissed. If the counterclaims remain in the case, EPCWID would be an

indispensable party and must be able to participate with party status with regard to the counterclaims challenging its contractual rights. That participation must include full participation in discovery, dispositive motion practice, and trial as necessary to protect its rights as a party to challenged contracts. EPCWID is evaluating what supplemental discovery, if any, it may require if the counterclaims are not dismissed. And if the counterclaims remain and EPCWID is thereby an indispensable party, EPCWID will need to file a motion to intervene, attendant answers, and potential cross-claims to New Mexico's counterclaims directed at EPCWID. EPCWID's participation with party status would be commensurate with the counterclaims. While awaiting a ruling on the motions to dismiss and for summary judgment that are under submission to the Special Master, those counterclaims are only contingent claims in the case. But the case is proceeding through the discovery phase as though the claims actually are part of the case, yet EPCWID has not been afforded contingent party status commensurate with the *de facto* treatment of the counterclaims that so directly implicate EPCWID's legal rights.

The need for clarity now as to the status of the counterclaims is critical. Discovery is currently scheduled to conclude in approximately two months. EPCWID is prepared to proceed quickly, as necessary to protect its interests, once it has further guidance regarding whether the counterclaims will be dismissed or remain in the case.

IV. Conclusion

EPCWID respectfully requests the Special Master place an item on the agenda for the March 31st Status Conference regarding the status of the United States and Texas motions requesting dismissal of New Mexico's counterclaims.

Respectfully submitted,

/s/ Maria O'Brien

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**EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S
CERTIFICATE OF SERVICE**

This is to certify that on the 24th of February, 2020, I caused a true and correct copy of **Request of El Paso County Water Improvement District No. 1 for March 31, 2020 Status Conference Agenda Item Relating to Pending Motions on New Mexico's Counterclaims** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 24th day of February, 2020.

/s/ Maria O'Brien

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