

No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

**STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE STATE OF
TEXAS'S MOTION FOR CONTINUANCE OF TRIAL SETTING**

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The State of New Mexico hereby responds in opposition to the State of Texas’s Motion for Continuance of Trial Setting and Memorandum in Support (Aug. 19, 2021) (“Motion”).

ARGUMENT

A motion to continue and postpone trial is within the Special Master’s discretion. *See, e.g., Valdes v. Cent. Altagracia, Inc.*, 225 U.S. 58, 73 (1912); 9 Fed. Prac. & Proc. Civ. § 2352 (4th ed.). As discussed below, in view of the full circumstances, there is not a sufficient reason to delay trial. New Mexico respectfully requests that the Special Master exercise his discretion to deny the Motion and proceed to trial as scheduled.

I. TEXAS IS REPRESENTED BY ABLE COUNSEL

Texas’s principal argument for a continuance is that Mr. Somach, one of its attorneys, will be unavailable due to a personal health issue of one of his immediate family members. *See, e.g.,* Motion at 3. New Mexico is sympathetic to the difficult personal circumstances facing Mr. Somach and his family, and sincerely wishes all of them good health and a speedy recovery. New Mexico agrees with Texas that Mr. Somach is an excellent lawyer and worthy adversary. But, he is not the only member of the Texas litigation team that fits this description. Seven other attorneys from the Somach, Simmons & Dunn law firm are listed on each pleading, and several others have been working behind the scenes. Each of those other lawyers is capable and has been deeply involved in the case. All told, even without Mr. Somach, Texas will be represented by lawyers with collectively over 200 years of experience. *See* People, <https://somalaw.com/people/> (last visited Aug. 23, 2021). In fact, even before this month, Mr. Somach has taken a reduced role in the case. For instance, of the approximately 159 depositions taken in this case, Mr. Somach only took the lead for Texas, (whether to take or defend) on 31 occasions—i.e., less than 20% of the total. Nor did Mr. Somach argue the substance of the recent summary judgment motions on behalf of Texas.

In addition, as the Court acknowledged in its 2018 Decision, Texas and the United States brought essentially the same claims in this case and have been closely aligned throughout. For that reason, Texas and the United States intend to present a joint case. *See* Order, ¶ E (July 7, 2021). Counsel for the United States are experienced water and trial lawyers who have substantial experience in interstate compact litigation. This serves as additional assurance that Texas’s interests will be well represented at trial.

Last, although Mr. Somach will not be physically present in the courtroom, there is no reason that he cannot participate in the proceedings virtually. The last 18 months have taught us that participation in legal proceedings is possible through virtual platforms. While New Mexico recognizes that virtual participation is not optimal, reasonable accommodations can be made.

II. DELAYING TRIAL WILL DEPRIVE NEW MEXICO FARMERS OF A SIGNIFICANT AMOUNT OF WATER

The Supreme Court has long recognized the “danger of denying justice by delay,” *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 171 (1974), and this case presents a textbook example. New Mexico first brought suit in federal district court in 2011 because it was not receiving its share of Project water. Over ten years have now elapsed, and New Mexico has yet to receive any relief. New Mexico’s experts have shown that since 2006 New Mexico farmers have been deprived of an average of 94,000 acre-feet of Project water *per year*. *See* State of New Mexico’s Notice of Filing of New Mexico Supplemental Exhibit Compendium, NM-EX_006, 2d Barroll Decl., ¶ 69. This means that from 2006 to 2017, New Mexico received significantly less than 57% percent of Project supply as required by the Compact, totaling losses to New Mexico of over 1,131,000 acre-feet. *Id.* And because water continues to be distributed according to the 2008 Operating Agreement, New Mexico continues to receive less than its equitable Compact apportionment each year.

Every acre-foot of water below Elephant Butte is critical for the New Mexico agricultural community. Granting Texas's request for a delay of the trial will mean at least another year of New Mexico farmers being denied their fair share of water, another year of harm to the New Mexico aquifer, and another year of economic losses. The health issues faced by Mr. Somach's family are serious and unfortunate, but it is not fair for New Mexico to bear the burden of a delay by being deprived of approximately 94,000 acre-feet of water per year.

III. DELAYING TRIAL WILL BE COSTLY AND DISRUPTIVE

For at least fifteen months, the legal teams, experts, witnesses, and support staffs of all four Parties have been planning for trial this fall. *See* Order and Amendment to Trial Management Schedule (May 5, 2020). These preparations involved finding accommodations, planning travel, and working on logistics. If Texas's eleventh-hour request is granted, and the trial is delayed, it will result in significant cost and disruption.

It is professionally and personally difficult to reserve three full months for trial. Notices of unavailability have been filed, and other hearings and issues have been postponed – many until the spring. As an illustration, one of New Mexico's lawyers has a 6-week water hearing scheduled for the spring of 2022. That matter had been rescheduled from the fall of 2021, in part to accommodate trial in this case. If Texas's request is granted, that lawyer will be in the uncomfortable position of returning to his client and the hearing examiner assigned to the case, and asking for a new schedule. That process will be multiplied many times over for each team member for hearings, meetings, weddings, vacations, and other matters that have been postponed for this trial.

IV. THERE ARE NO PROCEDURAL BENEFITS FROM DELAYING THE TRIAL

Texas and EPCWID also argue in favor of delaying trial for miscellaneous procedural reasons. Apparently dissatisfied with the present posture of the case, *amicus* EPCWID suggests

the possibility that the Special Master should file a Third Interim Report so that Texas and the United States can take exceptions. *See* Response of El Paso County Water Improvement District No. 1 to the State of Texas’s Motion for Continuance of Trial Setting, 5-6 (Aug. 21, 2021). There are three problems with this suggestion. First, that action would delay the case by an additional 12-18 months. As described above, the status quo is that Texas is receiving significantly more Project supply than it is entitled to under the Compact, at the expense of New Mexico. Such a delay would therefore cause a severe hardship for New Mexico by perpetuating this inequity. Second, as an *amicus*, EPCWID is not entitled to bring exceptions, and no Party has expressed the same concern as EPCWID. Third, an additional interim report at this juncture might not result in a more efficient process. For example, in *Kansas v. Colorado*, No. 105, Orig., the special master prepared an interim report on several legal rulings—analogueous to the report that EPCWID requests—prior to trial on those issues. *See* Second Report of the Special Master, *Kansas v. Colorado*, No. 105, Orig. (filed Sept. 9, 1997). The State of Colorado filed exceptions, but the Court returned the case to the Special Master after briefing on the exceptions, without any oral argument or decision. *Kansas v. Colorado*, 522 U.S. 1073 (1998) (“The exceptions of Colorado to the Second Report of the Special Master are overruled without prejudice to Colorado’s right to renew those exceptions at the conclusion of the Special Master’s remedial proceedings.”). A similar outcome in this case is probable. The Special Master and the Parties have prepared this matter for trial, and the Court is unlikely to hear any interlocutory matters before receiving the evidence at trial.

Next, Texas submits that delaying the trial would allow the Parties to reengage in settlement discussions. Motion at 6. While New Mexico has made clear its position that trial should proceed in September, it does not disagree with Texas that “should this Court exercise its

discretion and grant this continuance, the parties can utilize this temporary delay to continue in settlement negotiations.” *Id.*

Finally, Texas and EPCWID have posed the question of whether the trial should be postponed until spring in the hopes that the COVID pandemic conditions will improve. It is not clear whether conditions will be better or worse by the spring, however, and New Mexico is confident that through reasonable protocols such as masks, social distancing, and vaccinations, the Special Master can conduct a safe trial this fall as planned.

CONCLUSION

The Special Master should deny Texas’s Motion for a continuance, and trial should commence as scheduled on September 13, 2021 in Cedar Rapids, Iowa.

Respectfully submitted,

By: /s/ Jeffrey J. Wechsler
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STATE OF NEW MEXICO’S CERTIFICATE OF SERVICE
◆

This is to certify that on August 26, 2021, I caused a true and correct copy of the **State of New Mexico’s Response in Opposition to the State of Texas’s Motion for a Continuance of Trial Setting** to be served by e-mail and U.S. Mail upon the Special Master and by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 26th day of August, 2021.

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