

No. 141, Original

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IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO AND  
STATE OF COLORADO,

*Defendants.*

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**OFFICE OF THE SPECIAL MASTER**

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**THE STATE OF TEXAS'S TRIAL BRIEF**

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September 27, 2021

## I. INTRODUCTION

This case is about the adverse impacts of the State of New Mexico's (New Mexico) groundwater pumping on the State of Texas's (Texas) apportionment. The Texas case in chief will focus on New Mexico actions or inactions that have resulted in the interception and use, in New Mexico, of Rio Grande water apportioned to Texas. Texas will show that New Mexico groundwater pumping reduces Texas's apportionment on an annual average basis by approximately 73,000-78,000 acre-feet of water.

New Mexico has admitted as much, and its own modeling confirms this. New Mexico state law could be utilized to avoid this impact to Texas's apportionment through regulation of groundwater pumping to either limit or reduce pumping, to replace (offset) depletions effecting Texas's apportionment, or to require fallowing of lands. Rather than exercising these State law remedies, New Mexico, in practice, has done the opposite and sanctioned irrigation deliveries in the Lower Rio Grande at a rate of 4.5 acre-feet per acre to 5.5 acre-feet per acre.

This case is not, as New Mexico contends, about invalidating the 2008 Operating Agreement, micro-managing Reclamation Project accounting, or criticizing Project operations and maintenance. With limited exceptions, the New Mexico counter-claims, even if they could be proven, focus on extraneous, Project-specific actions by third Parties under Reclamation Law (the United States, Elephant Butte Irrigation District (EBID) and the El Paso County Water Improvement District #1 (EP1)) over which Texas has no control and if not meritless, at least should be addressed in other judicial forums. In an attempt to breathe life into these extraneous claims regarding the 2008 Operating Agreement and Project accounting debits and credits that should be excluded from this

case, New Mexico has argued that it has experienced 94,000 acre-feet of shortage on an annual average basis since 2008. Texas's witnesses will show that the allegation of a 94,000 acre-foot average annual shortfall ignores the fact that since 2008, New Mexico has in fact received all of that 94,000 acre-feet of water *and more*, through a combination of surface water made available to EBID under the 2008 Operating Agreement and groundwater pumping, also blessed by the 2008 Operating Agreement. While New Mexico uses this case to manufacture opposition to the 2008 Operating Agreement, in fact, New Mexico farmers are experiencing a windfall in irrigation water supply.

Texas will not only support its claims of adverse impact from New Mexico groundwater pumping, but also, during the stage of the trial currently planned to begin on March 14, 2022 (2022 Spring stage), Texas will refute New Mexico's arguments that it is allegedly experiencing adverse impacts from the 2008 Operating Agreement. Because the scope of the 2021 Fall portion of the trial is essentially limited to factual issues and percipient witnesses (with the exception of the historians), the scope of the evidence offered will similarly be limited. In this regard, while Texas intends to cross-examine the New Mexico witnesses during the 2021 Fall stage of the trial, most of Texas's "pre-rebuttal" of the New Mexico case will take place in the 2022 Spring stage.

To aid the Special Master in the 2021 Fall stage of the trial, Texas offers this trial brief regarding testimony expected from the Texas and United States witnesses on the following disputed or background facts: (1) Rio Grande Project (Project), and EBID and EP1 operations both historically and currently; (2) farming practices, including the use of ground water on Project acres and physical impacts to surface water supplies; (3) the

facts surrounding the negotiation and operation of the 2008 Operating Agreement; (4) the 1938 “baseline” condition.

## II. PROJECT/DISTRICT OPERATIONS

Texas’s apportionment is first stored in Elephant Butte Reservoir (Reservoir) along with water attributable to EBID’s contract entitlements<sup>1</sup> and certain transmountain water, including San Juan Chama flows.<sup>2</sup> However, below the Reservoir the Compact does not divide releases based on schedules of gaged flows or other numerical measures; instead, Texas’s apportionment is made available “programmatically” via the Project.<sup>3</sup> And, as the Special Master has found, it is undisputed that New Mexico ground water pumping has “affected Project return flows, surface water flows, and the Project’s delivery of Texas’s Compact Apportionment.”<sup>4</sup>

In the course of this trial, the Special Master will be called upon to evaluate evidence related to Project operations—both empirical data reflecting Project allocations, deliveries, and District water orders, as well as modeling evidence submitted through

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<sup>1</sup>While Texas acknowledges that the Special Master’s Order, (No. 141 Orig. (S. Ct. May 21, 2021) (May 21, 2021 Order) found that EBID’s contract entitlement to storage in Elephant Butte Reservoir was also an apportionment to New Mexico, Texas does not concede the propriety of this finding and reserves all remedies related to seeking modification of the finding.

<sup>2</sup> See, Act of May 31, 1939, 53 Stat 785 (Compact) Art. IV(6)(d): “any transmountain diversions into the Rio Grande between Lobatos and San Marcial.”

<sup>3</sup>“Downstream from the Reservoir, the Compact relies on the Rio Grande Project for water delivery and is *programmatic* in its apportionment of water as between Texas and New Mexico.” May 21, 2021 Order at 3 (emphasis in original)

<sup>4</sup>“[R]elying on New Mexico’s own witnesses, computer models, and admissions, all taken in the light most favorable to New Mexico, it is undisputed that New Mexico’s groundwater pumping downstream of the Reservoir has affected Project return flows, surface water flows, and the Project’s delivery of Texas’s Compact Apportionment.” May 21, 2021 Order at 7.

New Mexico's experts purportedly forecasting Project operations.<sup>5</sup> In the 2021 Fall stage, Michelle Estrada-Lopez and Bert Cortez (current and former Bureau of Reclamation employees, respectively, responsible for Project operations) will testify about Project allocation decisions, including the origins and significance of the D2 curve and the so-called "57%/43% split" of usable water between EBID and EP1. Texas will also present testimony from the EBID and EP1 District Managers, Mr. Gary Esslinger and Mr. Jesus Reyes, and the EP1 Watermaster, Robert Rios, regarding operations in the respective districts. Further, Texas will present testimony from the two district engineers, Dr. Phil King and Dr. Al Blair, regarding the Districts' role in Project water allocation decisions, and how the allocation decision-making relates to water orders by individual farmers. Finally, Texas will present evidence from individuals who farm under the District systems (Mr. Bobby Sloan from EBID and Mr. Art Ivey from EP1) about water ordering decisions, crop changes over time, and the relative importance (or not) of ground water to their operations.

The evidence presented will demonstrate that Project operations are dynamic and multi-faceted and, consistent with the Special Master's use of the adjective "programmatically," require on-the-ground decision-making to facilitate both effective water delivery and operations that are consistent with principles of public safety.

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<sup>5</sup>"The usable water actually released from the Reservoir for Project delivery to Mexico, New Mexico, and Texas directly affects Project storage and all three states' rights and duties." May 21, 2021 Order at 19. While the context of this quote relates to the Special Master's determination that New Mexico is entitled to consider EBID's contract amount a Compact apportionment, the language more broadly suggests that New Mexico's entitlement has limitations and is not a windfall to be had at Texas's expense.

Evidence related to Project and District operations will also demonstrate that New Mexico is not involved and has never been involved with Reservoir releases for use in EBID. Nor has New Mexico ever been involved with the allocation and use of that water within EBID. This evidence will be presented through the testimony of Mr. Gary Esslinger, EBID's Manager, Dr. King, Mr. Sloan, and Bureau of Reclamation witnesses, as well as through cross-examination testimony of New Mexico's witnesses Mr. Ryan Serrano and various Office of the State of New Mexico Engineer (State Engineer) staff.

The foregoing testimony is critically important because the two districts have control over water available from the Project, and of particular importance with respect to the EBID contract supply. It is without dispute that EBID is the only entity in New Mexico that has a contract for Rio Grande Project water, and which has legal authority over that supply. The State Engineer has no authority over EBID's contract water notwithstanding the Special Masters determination that that water may also be a portion of New Mexico's apportionment. Under federal and New Mexico state law, EBID is the sole entity authorized to deal with Project water because only it is a party to a contract with the United States. Exhibit TX\_0507 (Nov. 9, 1937 Contract Between United States and EBID (EBID Reclamation Contract)). New Mexico is not a party to the EBID Reclamation Contract and does not even have standing to bring an action under the contract.<sup>6</sup>

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<sup>6</sup> See Omnibus Adjustment Act of 1926, May 25, 1926, ch. 3 83, § 46, 44 Stat. 649 (Secretary authorized to contract only with irrigation districts). The Water Supply Act of 1958 (Pub. L. 85-500, title III, § 301, July 3, 1958, 72 Stat. 319) did extend the Secretary's authority to contract with states as repayment entities. By 1958, New Mexico law was settled, and the Project had been in operation for decades with EBID as the contract holder.

Assuming the water used in New Mexico below the Reservoir is a New Mexico apportionment, it is indistinguishable from EBID's contract water, and the authority to control that water is vested, pursuant to New Mexico state law, in EBID. Indeed, New Mexico's apportionment below the Reservoir is coterminous with EBID's Reclamation Contract for Project water. May 21, 2021 Order at 49. Pursuant to New Mexico law, the legislature has given the exclusive authority over this water to EBID.<sup>7</sup> No such authority is granted under New Mexico state law to any other New Mexico entity, including the State Engineer.<sup>8</sup> EBID is the sole entity in New Mexico that is authorized to make decisions and agreements with respect to its contracted Project supply, notwithstanding that that supply may also be an apportionment to New Mexico. It is simply that the New Mexico legislature has granted to EBID, not the State Engineer or any other entity, the right to protect that sovereign interest in Rio Grande water.

Additionally, the Compact itself does not change any of this. The Compact did not grant New Mexico any role in the Project because the Compact addresses the delivery of water across the Colorado-New Mexico state line, and the delivery of water by New Mexico into the Reservoir. Unlike the language concerning the Colorado-New Mexico state line in Article III, there is no language creating any role for New Mexico once it

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<sup>7</sup> See N.M. Stat. Ann. § 73-10-1 *et seq.* (1978) (authorizing generally the organization of an irrigation district to cooperate with the United States to supply irrigation water from a federal project to lands within the District; *id.* at subsection 16 (“[EBID] board may also enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary work for the delivery and distribution of water therefrom.”)).

<sup>8</sup> The State Engineer, like EBID, is created by state statute, and its statutory authority is limited. Although in 2003 the New Mexico legislature expanded the State Engineer's ability to administer the use of water in the state (N.M. Stat. Ann. § 72-2-9.1), the State Engineer was not given the authority under state law to deal with any aspect of the water associated with the Project.

delivers water pursuant to Article IV into the Reservoir. New Mexico's sole role below the Reservoir is to ensure that the flow of water to Texas is not interfered with as it flows through New Mexico. May 21, 2021 Order at 23.

Further, although the State Engineer is the Compact Commissioner for New Mexico, the Supreme Court in this case has already determined that "the Project and the 'downstream contracts' are 'inextricably intertwined' with the Compact," (*Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018)). The State Engineer did not acquire a new role in the Project by virtue of the Compact. Simply put, the Compact itself does not provide any role for New Mexico within the Project. May 21, 2021 Order.

New Mexico has nothing to do with the programmatic distribution of water below the Reservoir - and that is true whether or not New Mexico has an apportionment co-extensive with EBID's contract amount or not. Consequently, the testimony and evidence of the EBID and EP1 witnesses and the testimony of the United States witnesses are of critical importance in understanding the programmatic nature of Project operations and the inextricably intertwined workings of the Compact.

### **III. THE 2008 OPERATING AGREEMENT AND UNREGULATED NEW MEXICO GROUND WATER PUMPING**

New Mexico has repeatedly suggested that to the extent it is entitled to 57% of "usable" water in Project storage, it is entitled to that amount of surface water regardless of the volume of New Mexico ground water pumping depleting the Rio Grande below the Reservoir.<sup>9</sup> From this platform, New Mexico attacks the 2008 Operating Agreement

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<sup>9</sup>" . . . [T]he Compact and the closely related Downstream Contracts together establish the 57%/43% split as a rough protected baseline division of Project deliveries as between New Mexico and Texas downstream of the Reservoir, at least in "water short" years . . . . [T]his determination, however, begs the question: division of what? . . . .In



asserting that it re-allocates inappropriately to EP1 surface water that would otherwise have been available to EBID, as a contract holder.<sup>10</sup>

Texas will demonstrate that the 2008 Operating Agreement falls well within the authority of the United States and the Districts to execute. Texas will present testimony from Dr. Al Blair and Dr. Phil King that the 2008 Operating Agreement represents a compromise that allowed New Mexico farmers to receive their Project entitlement in part through the pumping of interconnected ground water, while at the same time ensuring that EP1 was kept whole by receiving increased Project surface water deliveries sufficient to compensate for the depletions of surface water caused by groundwater pumping in New Mexico.<sup>11</sup>

The impacts to Texas from unregulated New Mexico pumping are undisputed but are also largely technical in nature and the subject of expert testimony during the 2022 Spring stage of this trial. Nonetheless, during the 2021 Fall stage, Texas will present testimony from a Project operation perspective from Dr. King and Dr. Blair on the impacts from New Mexico's unregulated ground water pumping on surface water supplies, Project deliveries and Texas's apportionment. The remaining technical details

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fact, the question of what the states intended to divide 57%/43% is inseparable from the triable issue of the baseline condition.” May 21, 2021 Order at 6, 7.

<sup>10</sup> See, e.g., August 27 Transcript, pages 26:7 and 48:2, comments of Mr. Weschler during the July 27, 2021 Status Conference alleging 94,000 acre-feet of “injury” to New Mexico as a result of the 2008 Operating Agreement.

<sup>11</sup> The Operating Agreement uses a D2 Baseline that reflects the effect of groundwater pumping during the 1950-1978 period. This baseline was appropriate because this was the quantity of water available to the Project as a result of the unlawful groundwater pumping sanctioned by New Mexico. In this regard, at a minimum, it has served to mitigate damage otherwise caused by New Mexico's violation of the Compact. Presumably, the Operating Agreement baseline will be adjusted to the 1938 Depletion Condition to be determined as part of the determinations made in this Compact litigation.

amplify the fallacies in New Mexico’s position that (1) it should be entitled to 57% of Project surface water for use in EBID; and (2) the Court should also authorize New Mexico to continue to allow ground water pumping in EBID and in other municipal and industrial capacities such that Texas’s apportionments are depleted and unavailable for delivery. Dr. King and Dr. Blair will also address other aspects of Project accounting that begin to deal with the non-Compact related operational and accounting issues raised in the New Mexico counter claims.

Lastly, testimony will also come through the adverse testimony of Mr. Ryan Serrano and Ms. Cheryl Thacker, both employees of the New Mexico Office of the State Engineer, that the current New Mexico state regulatory regime is devoid of requirements to ensure that New Mexico pumping does not interfere with Texas’s receipt of its apportionment.<sup>12</sup>

#### **IV. 1938 “BASELINE” CONDITION**

In addition to the general historical record that supports the Texas claims regarding the Compact in its case in chief, the substance of the 1938 Baseline Condition can be determined through evaluation of historical documents. (This is in addition to the technical investigations and expert testimony that will be offered during the 2022 Spring stage of the trial.) During the 2021 Fall stage of the trial, Texas will present Dr. Scott Miltenberger, an historian with JRP Historical Consulting LLC, who issued an expert report in this case as well as two declarations in support of Texas’s briefing on summary judgment. Dr. Miltenberger’s testimony will describe his conclusions that the Compact

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<sup>12</sup> “[C]onsistent with the programmatic nature of the Compact’s downstream apportionment, New Mexico has a Compact-level duty to avoid material interference with Reclamation’s delivery of Compact water to Texas.” May 21, 2021 Order at 5.

was premised on apportionments that accounted for existing *uses* of water. In other words, the Compact's underlying assumptions are that (1) depletions in Rio Grande flow in the upstream states including New Mexico would not exceed those occurring prior to 1938 or compromise downstream uses as of 1938, and (2) Texas would be entitled to the same baseline with respect to its apportionment as was Colorado, and New Mexico. Thus, the Rio Grande water available to Texas as of 1938 – i.e., Reservoir releases, return flows, drainage water, and tributary groundwater captured in drains – would continue to be available to Texas without further depletion by new and additional uses in New Mexico.

Dr. Miltenberger will also testify explaining why this “baseline” condition should properly be considered a “depletion” condition that controls and protects Texas’s apportionment. Drawing from his evaluation of contemporaneous historical documents, including reports from Texas’s engineering advisor Raymond Hill, and correspondence between the engineering advisors for Texas, Colorado and New Mexico, Dr. Miltenberger will testify that the states had “freedom of development” of their waters – provided depletions did not exceed those permitted by the Compact’s credits-and-debits system. The 1938 depletion condition does not interfere with New Mexico’s ability to develop its water resources in the manner it chooses, including the time and type of diversions (surface water or connected ground water), or the uses to which its water users might choose to put Rio Grande water; however, New Mexico is responsible for protecting the 1938 depletion condition, and replacing depletions associated with post-Compact water development to avoid injury to Texas.

In this regard, the nature and timing of New Mexico's understanding of the impacts to Rio Grande surface flows from ground water pumping is paramount. Dr. Miltenberger will explain the historical evidence supporting New Mexico's early pre-Project knowledge and awareness of an interconnection between Rio Grande surface flow and groundwater within the basin. Many of these documents will be familiar to the Court from the summary judgment briefing but, among others, include: (1) the 1938 study by the New Mexico engineering advisor John Bliss that identified a "direct connection" between Rio Grande surface water and ground water (TX\_0630); (2) the 1950s era United States Geological Survey study by Clyde Conover initially made available to the NM State Engineer in preliminary form in the late 1940s before being publicly released by the USGS in 1954 (TX\_1954); and (3) studies in the 1960s by Guanaji and Leggett et al. (TX\_0610). These studies suggested that some groundwater could be developed without impacting surface deliveries, but all acknowledged the possible impacts. Dr. Miltenberger will conclude that no later than the early 1980s New Mexico had specific knowledge of the depletive effect of groundwater pumping in the Rincon and Mesilla valleys on the surface waters of the Rio Grande.

## **V. CASE OVERVIEW MATRIX**

As noted by the Special Master, the issues that will be tried have already received a great deal of briefing. As is the case with many complex pieces of litigation, issues and witnesses relate and interrelate to each other in a non-linear fashion. Nonetheless, one can only proceed to trial in a linear fashion, and the staging in this case may further exacerbate this presentation concern. In order to assist the Special Master in better

understanding the nature of the testimony offered by Texas, we provide this testimony outline in matrix form.

<b>Fall Trial Setting, Texas Direct Witnesses</b>		
<b>Topic</b>	<b>Issue</b>	<b>Witness(es) and testimony</b>
<b>Project/District operations</b>	1. Project operations and water allocation decisions are dynamic.	Michelle Estrada-Lopez Gary Esslinger Phil King Jesus Reyes Al Blair Robert Rios Bert Cortez
	2. District operations generally.	Gary Esslinger Phil King Jesus Reyes Al Blair Robert Rios
	3. 57%/43%.	See above
	4. The “every acre an equivalent amount of water” fallacy.	Al Blair Phil King Michelle Estrada-Lopez Bert Cortez

<b>Fall Trial Setting, Texas Direct Witnesses</b>		
<b>Topic</b>	<b>Issue</b>	<b>Witness(es) and testimony</b>
	5. "Full supply."	Michelle-Estrada-Lopez Al Blair Phil King Bert Cortez Gary Esslinger Scott Miltenberger
	6. 2008 Operating Agreement.	Michelle-Estrada-Lopez Al Blair Phil King Bert Cortez Gary Esslinger
<b>Farming practices</b>	1. Use of ground water.	Art Ivey Bobby Sloan Robert Rios Al Blair Phil King
	2. Salinity.	Art Ivey Bobby Sloan Robert Rios
	3. Crop types.	Art Ivey Bobby Sloan

<b>1938 “baseline” condition</b>	1. “Uses” of water rather than “rights” to water.  2. States’ understanding of groundwater relationships.	Scott Miltenberger
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Dated: September 27, 2021

Respectfully submitted,

s/ Stuart L. Somach

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**OFFICE OF THE SPECIAL MASTER**

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**CERTIFICATE OF SERVICE**

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This is to certify that on this 27th day of September, 2021, I caused a true and correct copy of **The State of Texas's Trial Brief** to be served upon all parties and *amici curiae*, by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was effected by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Respectfully submitted,

Dated: September 27, 2021

  
Corene E. Rodder



**SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE**

**SPECIAL MASTER**

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