

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

**UNITED STATES' STATUS REPORT FOR JANUARY 12, 2023 STATUS
CONFERENCE**

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UNITED STATES OF AMERICA'S STATUS REPORT

The United States provides the following status report for consideration at the status conference on January 12, 2023.

1. Hearing on Compacting States' Joint Motion for Entry of Consent Decree (Sp. M. Doc. No. 719). The United States' opposition memorandum is due on January 20, 2023. The memorandum is expected to be supported by declarations. The United States maintains that the proposed consent decree cannot be entered as a matter of law, for numerous reasons to be detailed in the forthcoming memorandum. Because those threshold legal objections to the proposed consent decree can be decided without testimony or findings of fact, the United States requests that the Court hear oral argument on the United States' legal objections at the in-person hearing in February and defer any evidentiary hearing on the matter.

2. Dates for In-Person Hearing on the Proposed Consent Decree. The in-person hearing is currently set for the week of February 6-10. The United States respectfully requests that the Court consider setting the hearing during the week of February 13 due to a personal scheduling conflict that has arisen for a member of the United States' trial team.

3. States' Burden for their Joint Motion for Entry of Consent Decree. On November 18, 2022, the States filed their Expedited Motion of the Compacting States to Clarify Procedures for the Hearing on the Consent Decree (Sp. M. Doc. No. 722), in which they made various contentions about the applicable legal standards. The States, as movants, bear the burden to show that their proposed consent decree is legally permissible and that it is fair, adequate, and reasonable. *See Durrett v. Housing Auth. of City of Providence*, 896 F.2d 600, 604 (1st Cir. 1990) (if a consent decree affects third parties, it must not be unreasonable or legally impermissible as to them); *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir.1981) (en

banc) (opinion of Rubin, J.) (“Even when it affects only the parties, the court should . . . ascertain not only that it is a fair settlement but also that it does not put the court’s sanction on and power behind a decree that violates Constitution, statute, or jurisprudence.”). The States’ claim that there is a required “showing” and substantive burden on the United States is unfounded. The United States will demonstrate in its memorandum in opposition that the proposed consent decree is legally untenable.

4. Clarification on Procedures for Any Evidentiary Hearing. Should the Special Master decide at the January 12, 2023, Status Conference that an evidentiary hearing is needed, the United States requests an opportunity to consult with the States’ counsel on deadlines for exchange of disclosure statements. Initially, the States should provide a list of their witnesses, and a statement of their witnesses’ expected testimony together with the exhibits the witnesses will rely upon at hearing. Once the States’ list of witnesses, exhibits, and expected testimony is disclosed, the United States will respond with its disclosure statement and reciprocal contents with rebuttal witnesses, exhibits, and expected testimony. The United States does not agree that the parties’ briefing constitutes adequate notice of the scope of the evidence to be presented at trial. Further, after receiving a statement of the States’ witnesses’ expected testimony, the United States may need to depose identified witnesses or witnesses designated to testify on behalf of each State pursuant to Federal Rule of Civil Procedure 30(b)(6), and the United States may also need to request any documents it does not have in its possession, including but not limited to any separate settlement agreement executed by the Compacting States in connection with the submission of the proposed consent decree. The United States requests sufficient time following the disclosures to take depositions and other discovery if necessary.

5. Hearing participation. The United States understands the Districts will file amicus briefs responding to the States' motion on or before January 20. Counsel for the Districts should be allowed to present argument on their briefing and answer the Court's questions at the February hearing.

Respectfully submitted this 11th day of January 2023,

ELIZABETH B. PRELOGAR
Solicitor General

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CERTIFICATE OF SERVICE

This is to certify that on the 11th day of January 2023, I caused a true and correct copy of the **UNITED STATES' STATUS REPORT FOR JANUARY 12, 2023 STATUS CONFERENCE** to be served via electronic mail upon those individuals listed on the Service List, attached hereto, and to be sent by overnight mail to the chambers of the Special Master.

Respectfully submitted,

/s/ R. Lee Leininger
R. Lee Leininger, Trial Attorney