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.

UNITED STATES OF AMERICA,

Intervenor.

OFFICE OF THE SPECIAL MASTER

ORDER ON THE MOTION TO UNSEAL AND THE MOTION TO STRIKE

December 30, 2022

SUMMARY

After motions for intervention and dismissal, a Supreme Court opinion, further motions to dismiss, discovery, a pandemic, motions for summary judgment, a partial trial, and extensive negotiations—with and without mediators, before and after the partial trial—the States have reached a proposed settlement in this nine-year-old original jurisdiction matter. The States have filed with the Special Master a proposed consent decree (Decree) with an accompanying motion, brief, and supporting affidavits.

The United States as intervenor opposes entry of the Decree.

A hearing on the substance of the motion and Decree is scheduled for early February 2023 and a briefing schedule is established. I anticipate that shortly after that hearing, either a party in support of the Decree or a party in opposition to the Decree will file exceptions with the Supreme Court to challenge my acceptance or rejection of the Decree on the actual merits. But, before addressing the merits of the settlement, it is necessary to address confidentiality concerns as raised by the United States.[1]

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[1] Because a hearing on the merits and the substance of the proposed settlement is scheduled to occur soon, the present order addresses only the currently pending confidentiality motions. Regardless, much of the current briefing focuses on matters immaterial to confidentiality and material only to the ultimate adoption or rejection of the proposed

Before the States filed their motion and Decree, the United States asserted confidentiality concerns. In response, I ordered the States to file their motion, Decree, and supporting materials under seal.

Presently, the United States has filed a Motion to Strike arguing the Decree discloses confidential settlement information in violation of Federal Rule of Evidence 408 and a 2016 confidentiality agreement (Confidentiality Agreement) between the current parties. The States have filed a Motion to Unseal. The parties have briefed their opposing motions on the issue of confidentiality, I heard arguments on the motions, and I rule as follows.

First, I deny the Motion to Strike, Sp. M. Doc. No. 729. Second, I grant the Motion to Unseal, Sp. M. Doc. No. 728. Third, I order that the currently sealed Decree, the Motion to Enter Consent Decree, and the accompanying brief and exhibits, Sp. M. Doc. No. 720, be unsealed and made publicly available at 4:00 p.m. CST on January 9, 2023, unless the Supreme Court orders the materials remain sealed. Finally, this Order will be filed on the Special Master's public docket. However, the pending Motion to Strike and accompanying documents filed by the United States, the States' response, and the United States' reply, Sp. M.

Decree. In short, this order is not intended to address the ability of the compacting States to settle the Compact dispute over the objection of the United States as an intervenor.

Doc. Nos. 729, 736, 737, will remain sealed. These documents do contain information concerning the parties' litigating positions.

Finally, in the parties' briefing in anticipation of the February hearing on the Motion to Enter Consent Decree, I direct the parties to address: (1) the propriety of entering the Decree over an intervening party's objection; (2) the nature of the United States' unresolved claims and the availability of alternative fora to address such claims; (3) the anticipated future involvement of the Supreme Court if jurisdiction is retained as per the Decree; and (4) the effect of the Supreme Court's statements in its 2018 opinion permitting the United States to intervene as a party in part because of its alignment with Texas and in part because it was not attempting to expand the issues being litigated beyond those issues raised by the States. See Texas v. New Mexico, 138 S. Ct. 954, 960 (2018). The parties may also brief any other matters they deem material to the States' pending Motion to Enter Consent Decree.

A status conference is scheduled to take place via Zoom on January 12 at 11:00 a.m. CST. The parties should be prepared to discuss their anticipated time requirements for the February hearing as well as evidence and testimony they anticipate presenting. I would request Worldwide Court Reporters set up the Zoom link. If Judge Boylan is available, I would also request he participate.

DISCUSSION

A few comments as to the Compact and this litigation as a whole are necessary to provide context for the current confidentiality dispute.

The Rio Grande Compact leaves much unsaid, particularly as to the area downstream from the Elephant Butte Reservoir. At the time of Compact negotiation, protection of the water supply for the Rio Grande Project was an important consideration for constituents in southern New Mexico and western Texas. However, technical challenges made tracking water below the reservoir difficult. For example, delivery canals repeatedly crossed state borders, and quantification of return flows proved challenging. Further, the Rio Grande Project already existed and delivered water to project acres within existing water districts in both states. As such, Compact negotiators did not expressly articulate a downstream division of water.

Agricultural and nonagricultural development, pumping technology, and hydrologic conditions have changed substantially since the time of Compact negotiation, giving rise to the current dispute. After the Supreme Court granted the United States' motion to intervene with a complaint asserting claims against New Mexico, New Mexico filed counterclaims against the United States. I dismissed the counterclaims seeking non-injunctive relief against the United States based largely on sovereign immunity. I stated that it was unclear how

injunctive relief would apply against the United States given its voluntary entry into the case and its stated willingness to accept the Court's ultimate rulings in this case. As such, I reserved ruling as to how any injunctive relief might apply as against the United States. I also indicated that it would remain necessary at different points throughout this matter to review the United States' position to ensure it asserted claims for relief consistent with what it sought when presenting arguments to the Supreme Court: relief substantially similar to the relief Texas sought.

The States, but not the United States, now have reached a proposed settlement of their pending claims against one another. The proposed settlement differs in many ways from the parties' litigation positions. Such is the nature of settlement and compromise. Texas, however, asserts that it is satisfied the Decree achieves its primary goal: ensuring delivery to Texas of Texas's share of Rio Grande water with well-defined methods to verify delivery and enforceable consequences for under- or over-delivery. New Mexico, similarly, asserts that it is satisfied the Decree achieves New Mexico's primary goals: ensuring delivery in New Mexico of the appropriate share of Rio Grande water without unduly infringing upon New Mexico's sovereignty to address water-related disputes between New Mexicans, between New Mexico and its citizens (including water districts), or between New Mexico and the United States. Colorado, whose interests are primarily upstream of the Elephant Butte Reservoir, agrees that

the Decree is consistent with the Compact and adequately protects Colorado's interests. Finally, the Decree does not amend the Compact. In fact, it expressly disavows any such amendment as well as any interference with the United States' duties towards Mexico and towards native citizens' tribes.

To achieve these goals, the proposed Decree employs several mechanisms found elsewhere in the Rio Grande Compact and in many other interstate compacts. For example, the Decree calls for a gauge to measure flow near El Paso and imposes a delivery requirement on New Mexico at that gauge. The delivery requirement is based on formulas that use many inputs including the flow leaving Caballo Reservoir just downstream of Elephant Butte Reservoir. Recognizing the likelihood that actual deliveries will vary from formula-required deliveries, the Decree establishes deviation limits and calls for responsive actions in the event deliveries exceed or fall short of requirements. In part, responsive actions are left for New Mexico to select in its sovereign prerogative. Ultimately water transfers through the Rio Grande Project and adjustments to water escrow accounts are required if any state fails to remedy deviations adequately or in a timely fashion.

Nothing I just described can reasonably be deemed confidential. In fact, short of the formulas themselves, the precise deviation limits, and the mechanics of the water or escrow account transfers, nothing stated or referenced above can reasonably be considered novel or unique

to the current dispute. Rather, these broadly defined methods exist in the Compact itself for other portions of the river. These methods also appear in countless other interstate compacts.

Teams of negotiators, including a technical committee of engineers, hydrologists, and others, worked collaboratively throughout much of 2022 to develop formulas, deviation limits, and potential remedial steps as possible paths to settlement of the current litigation. All parties concede that the underlying data used to derive the formulas and deviation limits were publicly available. All parties concede that the techniques used to derive the formulas and limits were commonly used modeling techniques including regression analysis based on historic data.

All parties concede that the technical committee worked, in part, based on specific instructions from negotiators. All parties also concede that the people who worked collaboratively in negotiations and on the technical committee came from all three compacting States, the United States, and the water districts in southern New Mexico and western Texas. Although the parties generally dispute one another's claims as to the relative importance of one another's technical experts, no party goes so far as to actually claim individual ownership of the work product as reflected in the Decree.

The States carefully drafted the Decree and supporting materials to reflect the proposed settlement of their Compact claims against one another and omitted reference to any party's settlement positions, negotiating statements, proposed concessions, particular demands, or other intermediate communications, positions, or drafts. The States do not indicate anything regarding the United States' disagreement with the Decree other than the United States' overall disapproval of the Decree as currently presented to the Court. The parties represent that the Decree as tendered to the Court is the result of final negotiations that did not involve the United States and that the Decree itself differs from what was last discussed with the United States' participation.

With those matters stated, I turn to the United States' allegations that the Decree itself violates the Confidentiality Agreement between the parties and/or Rule 408. Because the United States asserts the Confidentiality Agreement provides more robust protection than Rule 408, I address the Confidentiality Agreement first.

In an initial filing asserting confidentiality concerns, in two hearings, and in briefing on the confidentiality motions, the United States received ample opportunity to narrow its arguments and identify with particularity the protected information that it believes must be suppressed under the Confidentiality Agreement. The United States has not narrowed its arguments. Rather, the United States argues the Decree contains "concepts" the parties discussed, "ideas" the parties

shared, and work product the parties developed in a coordinated manner.

I expressed concern that, if I were to accept the United States' position as to the breadth of the Confidentiality Agreement, there would be no limiting principle to permit future trial or possible resolution. Any potential remedy would seemingly be off limits if it drew upon the broadly stated concepts, ideas, or work product that the United States claims as confidential. The United States agreed.[2]

Consistent with this statement of concern, the parties framed their arguments as to confidentiality in three broad categories: (1) the Confidentiality Agreement's text and Rule 408; (2) policy arguments generally; and (3) the existence or absence of a workable limiting principle moving forward if the United States' broad claims to confidentiality were correct. At the end of the day, although the

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[2] Special Master: "Are you telling me that nothing that was ever proposed as a potential resolution of this case can ever be used in trial as long as any one party objects to it being brought up?"
U.S. Counsel: "I think that's right."
Special Master: "Well, then how do we get to a resolution? You have to come up with something that nobody thought of before then, in other words."
U.S. Counsel: "I mean, that's the consequence. . . ."

Trans. of Nov. 29, 2022 Remote Hearing at 20.

absence of a limiting principle on the United States' position is highly problematic, and although there are competing policy concerns (e.g., the general need to maintain confidentiality to promote settlement, the need for disclosure to allow settlement, and the need for disclosure to permit constituents to understand their states' actions and provide informed feedback when the states act as *parens patriae* in this original jurisdiction action), I ultimately find it unnecessary to reach beyond the text of the Confidentiality Agreement and Rule 408. See CITGO Asphalt Refining Co. v. Frescati Shipping Co., 140 S. Ct. 1081, 1088 (2020) ("Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent." (quoting M&G Polymers USA, LLC v. Tackett, 574 U.S. 427, 435 (2015))).

The United States argues the text of the Confidentiality Agreement supports its position based in large part on an expansive definition of "Confidential Settlement Information" as contained in Paragraph 2 of the Confidentiality Agreement:

> **Confidential Settlement Information.** This Agreement applies to "confidential settlement information," which means any statement, conduct, document, map, electronic file, statement or nonverbal indication of position, mental impression or other information, including offers of compromise, in whatever form, including oral, written, visual or electronic, that is disclosed by a Party or Parties, to a Party or Parties, in the course of the pending or potential future settlement discussions. It does not include "Non-

> Covered Information" as defined in paragraph 8 below. All documents or electronic data containing confidential settlement information shall be marked "Confidential Settlement Information" and shall be protected under this Agreement unless a Party or Parties object at the time the document or data is disclosed in the context of these discussions; in the event of an objection, the Party proffering the objected-to document or data shall have the right to withdraw that document or data to the effect that the document or data shall have the same confidentiality status under this Agreement as it did prior to disclosure.

According to the United States, because "confidential settlement information" is broad enough to include "statement[s]," "nonverbal indication[s] of position," and "offers of compromise[] in whatever form," all communications between the parties, technical committee members, and/or settlement negotiators must remain confidential, including all ideas, work product, concepts, and broad structural outlines, not just the parties' articulations of position or offers in compromise.

The United States also cites Paragraph 13 of the Confidentiality Agreement which provides that the duty of confidentiality survives negotiations regardless of settlement. Paragraph 13 states:

> **Confidentiality survival.** Confidential settlement information shall remain subject to the provisions of this Agreement whether the settlement discussions end in settlement or not unless all Parties agree otherwise in writing, or unless a Party's applicable laws require disclosure.

According to the United States, the States cannot tender their Decree to the Court because Paragraph 13 anticipated both possible settlement and possible non-settlement and preserved confidentiality under both scenarios. In essence, the United States argues Paragraph 13 serves to provide an objecting party a veto over *partial* settlement by precluding disclosure of any such settlement.

The States, in contrast, stress the Confidentiality Agreement's express textual limitations on its otherwise broad definitions and the limited nature of how the Confidentiality Agreement actually prohibits the parties from using confidential settlement information. For example, the States point to the express limitation in Paragraph 2 that, for information to be considered confidential, it must be information "that is *disclosed* by a Party or Parties, to a Party or Parties, in the course of the pending or potential future settlement discussions." (Emphasis added). According to the States, confidentiality cannot extend to high-level concepts, ideas, and methods, even if collaboratively considered, because such matters simply weren't "disclosed" by a party. Rather, such concepts were publicly available and non-unique "tools" in the "toolbox" of water management commonly available and in use throughout the country. And, to the extent the United States seeks to suppress the equations, deviation limits, or other more specific information contained in the Decree, such matters also were not disclosed, but rather were collaboratively developed from public information.

Perhaps more importantly, the States emphasize that Paragraph 2 references Paragraph 8 as limiting the scope of protected information. Paragraph 8 provides:

> **Non-covered Information.** Information that is (1) otherwise discoverable; (2) produced in the ordinary course of business outside the context of these settlement discussions; or (3) known, already in the possession of, or potentially available to the Parties independently of these settlement discussions, including without limitation any documents or data which a Party has objected to being treated as confidential as provided for in paragraph 2, above, shall not be rendered confidential, non-discoverable, or inadmissible in any proceeding or litigation in any other forum, including without limitation the Original Action, *NM v. Jewell*, and *New Mexico v. EBID*, because of its disclosure in these settlement discussions.

According to the States, the formula and deviation limits in the proposed Decree were built from public data using common modeling techniques. As such, the Decree relies on information that was "otherwise discoverable" and contains information—the specific formulas and deviation limits—that was "potentially available to the Parties independently of the settlement negotiations."

Looking at uses of confidential settlement information that the Confidentiality Agreement expressly prohibits, Paragraph 4 provides, "A Party shall not disclose, or seek to admit another Party's confidential

settlement information into evidence, in any proceeding or litigation. . . ." And, Paragraph 6 provides, "Unless required by law, a Party shall not disclose another Party's confidential settlement information to persons or entities not a party to this Agreement (hereinafter, non-parties) . . . ." In these provisions, the limitations on use of the information relate to the "*disclosure*" "of *another Party's* confidential information." (Emphasis added). This limitation presumes a level of particularity and exclusiveness that permits claims of ownership and excludes claims of confidentiality at the broad level of structural solutions (delivery requirements, gauges, and deviation limits). It also prevents claims of confidentiality as to formulas and equations derived by skilled technical professionals from publicly available data using common modeling techniques. Here there is simply no colorable claim of ownership over the broad ideas, public data, and common techniques expressed in the Decree.

Regarding Paragraph 13 and the United States' survival-provision argument, I note that neither Paragraph 13 nor the underlying definition of "confidential settlement information" expressly make an actual settlement decree confidential. Paragraphs 2 and 13 could have, but did not, state that a complete or partial settlement decree must remain confidential to the extent otherwise permitted by public disclosure statutes. Such a position would effectively preclude partial settlement. If, in fact, the parties had intended the Confidentiality Agreement to serve as a prohibition on partial settlement, I have no

doubt such intent would have been expressed more clearly and more simply.

Therefore, on the text, the States have the better argument. Because the information the United States seeks to protect was "known, already in the possession of, or potentially available to the Parties independently of these settlement discussions," it was "not rendered confidential, non-discoverable, or inadmissible . . . because of its disclosure in these settlement discussions."

The less expansive protections of Rule 408 do not demand a different result. Rule 408 provides that "Evidence of . . . (2) conduct or a statement made during compromise negotiations about the claim" "is not admissible . . . either to prove or disprove the validity or amount of a disputed claim . . . ." Due to the States' careful crafting of the Decree, there is no revelation of any party's negotiation statements or offers of compromise. It is not possible to look at the Decree and know what the United States was or was not willing to admit, forgo, or compromise in an effort to settle claims. Rather, the Decree, at most, reflects the actual and final compromise between the States. Through its own filings in resistance to disclosure, the United States has revealed that its technical experts and negotiators worked with publicly available data and common modeling techniques in an effort to further the negotiations. The Decree, however, does not reveal the United States' negotiating position, offers in compromise, or general position other

than the United States' overall objection to the entire Decree as it currently exists. See Goodeagle v. United States, 145 Fed. Cl. 646, 652 (2019) ("while the settlement negotiations were and are confidential, it does not follow that the settlement itself should be").

In sum, the United States concedes all source data that went into computation of delivery requirements, gauge settings, and deviation limits were public data or disclosed in discovery. The concepts as reflected in the Decree are not unique to the Decree. Many of the concepts are already embodied in the Compact or commonly used in other interstate water compacts. Gauges and limits, for example, govern delivery requirements for Colorado to New Mexico and for New Mexico into the Elephant Butte Reservoir. In fact, the location of the measuring gauge for New Mexico's reservoir delivery obligation has been amended since Compact formation. As such, the practice of putting a new or existing gauge to different use cannot properly be characterized as confidential settlement information that is otherwise undiscoverable or unavailable. And finally, the formulas and deviation limits contained in the Decree are the result of common modeling techniques that could be, and were, applied by highly qualified hydrological engineers. As such, the inputs behind, and the end product reflected in, the Decree were "potentially available" and, in fact, *were actually available* to the qualified technical advisors separate from the settlement process.

Because I conclude disclosure of the Decree does not violate Rule 408 or the Confidentiality Agreement, I deny the Motion to Strike and grant the Motion to Unseal. The States' Motion to Enter Consent Decree, the Decree itself, and other accompanying filings currently under seal as Sp. M. Doc. No. 720 will be made publicly available on the Special Master's docket on January 9, 2023 at 4:00 p.m. CST unless otherwise ordered by the Court.

Honorable Michael J. Melloy
Special Master
United States Circuit Judge

Dated: December 30, 2022