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

THE STATE OF TEXAS'S OPPOSITION TO THE STATE OF NEW MEXICO'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO EXCLUDE TEXAS'S CLAIM FOR DAMAGES IN CERTAIN YEARS

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I. INTRODUCTION

The State of New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claims for Damages in Certain Years (NM MSJ on Damages) seeks partial summary judgment on two points: first, that the State of Texas (Texas) should be foreclosed from seeking damages prior to 1985; second, that Texas should be foreclosed from obtaining damages for the years 1985-2002, 2005, 2007-2010 because these were so-called "full Project supply years." NM MSJ on Damages at 3.

On the State of New Mexico's (New Mexico) first point, Texas has chosen not to seek money damages for impacts to Texas's apportionment pre-dating 1985. Nonetheless, this does not mean that evidence of injury prior to 1985 is not admissible or relevant to the resolution of this litigation. In any event, summary judgment is not the appropriate vehicle for addressing New Mexico's apparent concern.

On New Mexico's second point, summary judgment should be denied. New Mexico's motion fails first because the facts it asserts are in dispute.[1] The Declaration of Robert J. Brandes, P.E., Ph.D. in Support of the State of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Dec. 22, 2020) (Brandes Decl.), demonstrates that the water apportioned to Texas has been diminished due to New Mexico's groundwater pumping in the Rincon and Mesilla basins. Texas has not received a "full supply" in any year since 1985 due to the depletions to its apportionment associated with New Mexico's groundwater pumping. New Mexico's motion also fails

[1] In Texas's July 24, 2020 Objections and Responses to the State of New Mexico's First Set of Requests for Admission, Texas specifically put the claims in New Mexico's motion regarding the years 1985-2002, 2005, 2007-2010 at issue. *See* Declaration of Theresa Barfield, TX_MSJ_007368-007370.

because it has selected the wrong legal standard. Texas's apportionment is not based on "full Project supply," as New Mexico postulates, but rather it is based upon its Compact apportionment. That standard spelled out in the 1938 Rio Grande Compact[2] (Compact), has been neither litigated in this matter nor decided by the United States Supreme Court, notwithstanding New Mexico's citation in its motion to snippets of the 2018 opinion in *New Mexico v. Texas*, 138 S. Ct. 954. Whatever Texas's Compact apportionment is, it cannot be evaluated based on the historical "full Project supply" which relies on the D2 Curve and incorporates the effects of groundwater pumping between 1951-1978. In contrast and as detailed in *The State of Texas's Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support Thereof Federal Rule of Civil Procedure 56* (sections V.A-C) and *Texas's Response to New Mexico's Motion for Partial Summary Judgment on Compact Apportionment*, Texas's apportionment is based on the groundwater depletion condition as of 1938, when it entered the Compact.

II. ARGUMENT

A. New Mexico is Not Entitled to Summary Judgment for Years Prior to 1985

On New Mexico's first point, Texas has chosen not to seek money damages for impacts to Texas's apportionment pre-dating 1985. New Mexico knows this because, as it noted, Texas's expert report on damages was limited to the post-1980 period and Texas so informed New Mexico of this during discovery. That does not mean that injury and damages prior to 1985 did not occur or that injury and damages prior to 1985 is not important to Texas's claims, just that Texas has not sought money damages for those years. There is no

[2] Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.

relevant reason to exclude evidence of injury to Texas prior to 1985. Injury, in fact, occurred and Texas will provide evidence of this injury at the time of trial.

In any event, summary judgment is not the appropriate way to address New Mexico's apparent concern that Texas will change its mind and surprise it at trial with pre-1985 claims for damages. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (reiterating the standard under Fed. R. Civ. P. 56(c), which mandates the entry of summary judgment where a party fails to establish *the existence of an element essential to that party's case*). The appropriate way to preclude evidence at trial and the consequent award of damages associated with pre-1985 claims is a motion in limine requesting the Special Master preclude introduction of the evidence that New Mexico is afraid of. *See Luce v. United States*, 469 U.S. 38, 41, n.4 (1984) (noting the use of rulings in limine as a tool to manage the course of trials by addressing evidentiary questions in a pretrial motion). Summary judgment, indeed, a judgment of any type is not the appropriate procedural mechanism for addressing the first issue in the Damages motion.

B. Summary Judgment is Not Appropriate With Regard to "Full Project Supply" Years Because of Disputed Issues of Material Fact, Rendering Summary Judgment Improper as a Matter of Law

1. The Summary Judgment standard of review

This Court is not bound by the Federal Rules of Civil Procedure but may use Rule 56 as a guide. Sup. Ct. R. 17.2; *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Summary judgment should only be granted if the record and affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex*, 477 U.S. at 322. The parties may support their positions by citing to the record, including documents, affidavits, or declarations, or by showing that the

materials cited by the other party do or do not establish the absence of a genuine dispute. Fed. R. Civ. P. 56(c). An issue is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003). A fact is material if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Thus, "the substantive law will identify which facts are material." *Id.* Facts that are "critical" under the substantive law are material, while facts that are "irrelevant or unnecessary" are not. *Id.*

The moving party shoulders the initial burden of setting out the basis of its motion and showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met this burden, the nonmoving party must go beyond the pleadings and by depositions, affidavits, or otherwise, designate specific facts showing that there is a genuine issue for trial. *Mosley v. City of Northwoods*, 415 F.3d 908, 910 (8th Cir. 2005). However, "because we view the facts in the light most favorable to the nonmoving party, we do not weigh the evidence or attempt to determine the credibility of the witnesses." *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004). Instead, "the court's function is to determine whether a dispute about a material fact is genuine." *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996).

2. Texas disputes critical aspects of New Mexico's purported "undisputed material facts"

New Mexico enumerates 17 paragraphs that it declares to be "undisputed material facts," upon which its motion relies. NM MSJ on Damages at 1-9. These 17 enumerated paragraphs constitute a mixed bag of information: some are factual in nature, some legal, and some are mixed presentations of fact and law. *Id.* New Mexico purports to support these 17 enumerated paragraphs with "evidence." *Id.* However, New Mexico seeks to support

these "facts" with evidence that is largely inadmissible, fails to lend support for the intended "facts," or is simply not evidence at all.

Texas addresses each of the 17 enumerated paragraphs, and the evidence New Mexico proffers in support thereof, in a separate pleading filed concurrently herewith, entitled *The State of Texas's Evidentiary Objections and Responses to New Mexico's Facts.* Texas incorporates its objections and responses to New Mexico's purported evidence and facts herein by reference, but, with the exception of a few areas, does not repeat the objections and responses here.[3]

3. Even in so-called "full Project supply" years, Texas did not receive its full Project allocation

It is undisputed that New Mexico's groundwater pumping intercepted Rio Grande surface flows and thus interfered with delivery of Texas's Project allocation (and also interfered with receipt of Texas's Compact apportionment) during full Project supply years. Brandes Decl., TX_MSJ_007312-007316, 007322-007326.

Further, as Dr. Brandes' Declaration details, *New Mexico's* model results show that without groundwater pumping from 1980-2017 El Paso County Water Improvement District No. 1 (EP#1) would have had available to it an increased annual allocation. Brandes Decl., TX_MSJ_007312-007317, 007322-007324. This includes the "full supply years" that New Mexico seeks to have the Special Master exclude from the damages calculation. NM MSJ on Damages at 8. As a result, the amounts of water that would have been available historically to EP#1 during "full Project supply" years were more than the D2 Curve provided. Brandes Decl., TX_MSJ_007312, 007323. New Mexico's admissions are consistent with Texas's own

[3] The December 22, 2020, Declaration of Robert J. Brandes, P.E., Ph.D., filed contemporaneously also specifically disputes facts related to NM MSJ on Damages. Brandes Decl., TX_MSJ_007312-007329.

investigations. Brandes Decl., TX_MSJ_007328. In short, the facts do not support New Mexico's assertion that Texas received a "full Project supply" during the Subject Years.

4. Even if it had not been shorted during "full Project supply" years, New Mexico has articulated the wrong standard because its "full Project supply" is based on the D2 Curve not 1938 depletion conditions

a. Proper standard for apportionment is the Compact apportionment, not the Bureau of Reclamation's D2 Curve

New Mexico erroneously asserts that Project allocations to EP#1 reflect the volume of Texas's Compact apportionment on an annual basis and, thus, when the Project allocated a "full Project supply," Texas received its full apportionment. New Mexico bases its assertion on a tortured reading of the Compact involving definitions of Project Storage; definitions of Usable Water; and an incomplete quote of the language of Compact Article VIII. NM MSJ on Damages at 3. Under New Mexico's theory, when the Project makes a "full supply" available to the districts, Texas is satisfied.

New Mexico's Compact interpretative contortions are unnecessary. What the Compact actually provides is that Texas is entitled to 790,000 acre-feet per year of release from Elephant Butte Reservoir.[4] That entitlement is subject to the 60,000 acre-feet per year

[4] We know that 790,000 acre-feet was the agreed upon apportionment for Texas because of historical documents (Declaration of Scott Miltenberger, Ph.D. at TX_MSJ_001585-001620 in Texas Appendix of Evidence in Support of TX MSJ on November 5, 2020.); this agreement is also reflected in Article VIII of the Compact, to wit:

> During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage of reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their actual debits sufficient to bring the quantity of usable water in project storage to 600,000 acre-feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre-feet may be made from project storage in that year.

which Mexico receives under its treaty with the United States and the Elephant Butte Irrigation District's (EBID) contract with the Bureau of Reclamation (BOR). After satisfying those obligations, what is left is Texas's apportionment, including but not limited to the amount to which EP#1 is entitled under its contract with the BOR. The details of Texas's arguments related to its apportionment can be found in *The State of Texas's Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support Thereof Federal Rule of Civil Procedure 56* (sections V.A-C) and *Texas's Response to New Mexico's Motion for Partial Summary Judgment on Compact Apportionment.*

b. "Full Project supply" is based on the D2 Curve which incorporates groundwater depletions from 1951-1978; Texas's Compact apportionment is based on 1938 depletion conditions

The "full Project supply" which is the basis for NM MSJ on Damages is based on the D2 Curve, which reflects and incorporates depletions from groundwater pumping during the years 1951-1978. Brandes Decl., TX_MSJ_007312-007329, 007323. In contrast, Texas's apportionment is based on the depletion conditions as of 1938 (the "1938 condition" or "1938 depletion condition"). The difference between the D2 Curve condition, incorporating depletions from 1951-1978, and the 1938 depletion condition, is shown in Figure 4 of the Brandes Declaration. Brandes Decl., TX_MSJ_007323. The D2 Curve incorporates and "grandfathers in," as Texas explained in its motion for summary judgment, depletions from New Mexico groundwater pumping between 1951-1978, and cannot form the basis of Texas's apportionment agreed to in 1938. *See also* Brandes Decl., TX_MSJ_007315-007316.

Thus, even if "full Project supply" were the correct measure of Texas's apportionment, full Project supply would have to be based on 1938 depletion conditions rather than the D2 Curve. As a result, the "full Project supply" available to the districts in

1985-2002, 2005, 2007-2010, could not have resulted in Texas receiving the entirety of its apportionment because the "full Project supply" was reduced by depletions from 1951-1978 groundwater pumping, and so was less than the volume of water that would have been made available under 1938 depletion conditions. Brandes Decl., TX_MSJ_007312-007329.

c. Impacts from groundwater depletions – and Texas's damages – accrue over time

New Mexico's reliance on "full Project supply" based on the D2 Curve is the wrong metric to assess Texas's damages. In addition, NM MSJ on Damages uses the wrong time-step to evaluate Texas's damages. An annual time-step misperceives the nature of the damage New Mexico groundwater pumping has caused to Texas's apportionment. Brandes Decl., TX_MSJ_007312-007318, 007327-007328. Groundwater pumping withdrawals beginning in the 1950s in the Rincon and Mesilla basins caused groundwater levels to fall from conditions in 1938 at the time of the Compact. *Id.* Depletions associated with that pumping and associated damage accumulates over time.

When Texas entered into the Compact, it anticipated adequate drain flows to satisfy its apportionment. The expectation, as shown in the National Resources Committee, Regional Planning: Part VI-The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico and Texas 1936-7 report from 1938, was that availability of drain flows would increase based on the distance downstream from Elephant Butte Reservoir. Brandes Decl., TX_MSJ_007312-007318, 007327. New Mexico's pumping has caused lower groundwater levels that have resulted in increased depletions from the river and drains, which have reduced the amount of surface water available to satisfy both Project deliveries and Texas's apportionment.

III. CONCLUSION

New Mexico already has conceded that there is a dispute of fact for the years 2003-2004, 2006, 2011-2016; Texas submits that it was also damaged during the supposedly "full Project supply" years. The Special Master should reject NM MSJ on Damages as being based on the wrong legal standard and also because it raises a disputed question of material fact.

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Respectfully submitted,

s/ Stuart L. Somach

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