

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 RESPONSE TO AND IN SUPPORT OF  
THE UNITED STATES OF AMERICA'S MOTION  
FOR PARTIAL SUMMARY JUDGMENT

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## I. INTRODUCTION

The State of Texas (Texas) supports the United States of America’s Motion for Partial Summary Judgment (US MSJ) and joins the United States in requesting summary judgment declaring the State of New Mexico’s (New Mexico) obligations under the 1938 Rio Grande Compact<sup>1</sup> (“1938 Compact” or “Compact”), that New Mexico failed to meet those obligations, and that an injunctive remedy is warranted consistent with requests for relief found in the United States’ Complaint in Intervention,<sup>2</sup> as well as with requests for relief found in the Texas Complaint.<sup>3</sup>

Notwithstanding Texas’s support for the US MSJ, there are three points made in the United States’ motion with which Texas does not agree.

## II. ARGUMENT

### A. Texas’s Support of the US MSJ

#### 1. **Delivery means that New Mexico cannot interfere with Project and Compact deliveries below Elephant Butte Reservoir**

In essence, the US MSJ asks for the same relief as does Texas in its Motion for Partial Summary Judgment (TX MSJ). At a fundamental level, this means that in order to comply with its Article IV Compact obligation to “deliver” water to Texas at Elephant Butte Reservoir, New Mexico may not intercept or interfere with the water that it has “delivered” to Elephant Butte Reservoir. US MSJ at 21-22, 27-28; TX MSJ at 65-68; US Complaint at ¶¶ 16(a)(i)-(ii); TX Complaint at ¶¶ 4, 18. New Mexico’s obligation is not a passive one but

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<sup>1</sup> Act of May 31, 1939, Pub. L. No. 79-79, ch. 155, 53 Stat. 785.

<sup>2</sup> United States’ Complaint in Intervention (US Complaint) is lodged with the Special Master as Docket No. 65.

<sup>3</sup> Texas’s Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint (TX Complaint) is lodged with the Special Master as Docket No. 63.

is an active obligation to prevent interference with the Elephant Butte Irrigation District's (EBID) Project allocation and Texas's Compact apportionment. This means not just the development of regulatory and statutory mechanisms under New Mexico state law, but also implementation of any such mechanisms in a manner that regulates groundwater pumping to avoid interference with these entitlements. US MSJ at 30-32, 34; TX MSJ at 100. The Compact is unambiguous and summary judgment should be granted on this issue.

**2. New Mexico's groundwater pumping interferes with Project and Compact deliveries below Elephant Butte Reservoir**

A fundamental aspect of both the United States' motion and that of Texas is that groundwater pumping intercepts and interferes with Rio Grande Project deliveries thereby depriving Texas of water apportioned to it. TX MSJ at 8, 27, 33, 85; Declaration of Scott A. Miltenberger at TX\_MSJ\_001612; Declaration of William R. Hutchison (Hutchison Decl.) at TX\_MSJ\_000657-000661; Declaration of Robert J. Brandes (Brandes Decl.) at TX\_MSJ\_000012-000013; Declaration of Staffan W. Schorr at TX\_MSJ\_000697-000699; US MSJ at 33-34. Both motions also focus on the importance of return flows to the Compact apportionment including providing Texas with the water apportioned to it and that New Mexico groundwater pumping takes these return flows for uses in New Mexico. TX MSJ at 8, 16, 25; Brandes Decl. at TX\_MSJ\_000006; US MSJ at 24-26. There appears to be no dispute as to these facts and summary judgment should be granted on this issue.

**3. New Mexico state law must be exercised to protect Compact deliveries**

Both the United States' motion and that of Texas assert that to the extent that New Mexico state law has any relevance below Elephant Butte Reservoir it is to protect Compact deliveries and that New Mexico state law cannot be utilized in a manner inconsistent with the Compact. TX MSJ at 93-94; US MSJ at 25-32. There are no exceptions to this rule that

would somehow sanction New Mexico's depletive groundwater pumping. TX MSJ at 94; US MSJ at 28-29. Summary judgment on this issue should be granted as a matter of law.

**4. New Mexico has admitted that its groundwater pumping depletes Project flows, including Texas's apportionment**

Finally, the United States and Texas both note the clear and unambiguous admission made by New Mexico and its experts that its groundwater pumping has, in fact, depleted Project flows, including return flows, thereby adversely affecting Texas's apportionment. US MSJ at 33; TX MSJ at 89-91; Rule 30(b)(6) Deposition of Estevan Lopez (Lopez Rule 30(b)(6) Depo.), 9/18/2020, at TX\_MSJ\_001153, 31:8-20; *see also* Deposition of Jorge Garcia Depo., 2/6/2019, at TX\_MSJ\_001056, 001066-001068, 6:10-16, 43:17-25, 44:1-5, 45:11-19 ("city of Las Cruces Director of Utilities agrees that wells are connected to the same aquifer as the Rio Grande and that pumping causes an impact on the river"); Hutchison Decl. at TX\_MSJ\_000664-000669. Because New Mexico has admitted this fact, summary judgment is appropriate.

**B. Texas Does Not Agree with Three Points Made by the United States**

**1. New Mexico does not receive a Compact apportionment below Elephant Butte Reservoir**

Texas does not agree with the United States' assertion that New Mexico has an apportionment below Elephant Butte Reservoir. *See* US MSJ at 22-23. Texas has fully briefed this issue in the TX MSJ and because the United States does not provide any support for this contention, Texas will not repeat the arguments made in its motion. *See* TX MSJ at 68-73.

Texas does note that the question of whether water received and used in New Mexico through the Project is an apportionment or something else is of little relevance to the United States. In either case, New Mexico cannot interfere with these Compact and Project

deliveries. How one characterizes the use of Project water, however, is important to Texas. Since New Mexico does not have an apportionment below Elephant Butte Reservoir, it has no standing to sustain its misplaced Compact counterclaims against Texas.

As a practical matter, however, regardless how one characterizes New Mexico's use of water below Elephant Butte Reservoir, the United States and Texas agree that there are limitations placed on the use of that water. New Mexico's water use below Elephant Butte Reservoir is absolutely limited by the terms of EBID's Downstream Contract with the United States. TX MSJ at 69-70; Lopez 30(b)(6) Depo., TX\_MSJ\_001142-001148, 20:4-23:16, 25:17-26:10; Deposition of John D'Antonio, 8/14/2020, at TX\_MSJ\_000875, 000879-000880, 145:13-18, 149:6-150:2; US MSJ at 23, 30-31. EBID is the only entity in New Mexico that has a contract with the United States to receive irrigation water from the Project below Elephant Butte Reservoir (US MSJ, Statement of Fact No. 17, at 6) and there is no action that New Mexico can take that can alter the rights provided to EBID under that contract. Because there is no dispute that New Mexico's use of water below Elephant Butte Reservoir is limited to Downstream Contract uses in EBID, summary judgment on this issue is appropriate.

**2. The proper baseline for Compact compliance is the 1938 depletion condition and not the 1951-1978 D2 Curve**

Texas acknowledges that the "D2 Curve" is a linear regression equation based on Project operational data from 1951 to 1978. To the extent that the United States believes that this is the proper Compact baseline to judge New Mexico's compliance with the Compact or the Texas apportionment, Texas disagrees. As demonstrated in the TX MSJ at 77-84, the proper measure for New Mexico's compliance and the Texas apportionment is the 1938 depletion condition. Utilizing the 1951-1978 period as the baseline grandfathers extensive

New Mexico groundwater pumping into the baseline and institutionalizes harm to Texas. With that said, the use of the D2 Curve for purposes of the Operating Agreement was appropriate and served to temporarily mitigate harm that was being caused by New Mexico's pumping. Texas also believes that the concepts embedded in the Operating Agreement may be the foundation of a remedy in this case, assuming the 1951-1978 period-baseline is replaced with the 1938 depletion condition. Texas has fully briefed this issue in the TX MSJ and because the United States does not provide any support for the use of the D2 Curve, Texas will not repeat the arguments regarding the 1938 depletion condition made in its motion. *See* TX MSJ at 77-84.

**3. The Article IV Compact delivery is to Texas, not to the United States**

The United States contends that the New Mexico, Article IV "delivery" is to the Project. US MSJ at 22, 27. This is not correct. The *Compact delivery* is to Texas, not to the United States. The United States is not a party to the Compact and is not an entity which was equitably apportioned any waters of the Rio Grande. Indeed, the Compact makes no reference at all to the United States receiving any water under the Compact.<sup>4</sup>

Pursuant to Article IV of the Compact, New Mexico delivers water into Elephant Butter Reservoir. That delivery is to Texas as the downstream state that is apportioned water under the Compact. Once placed into the reservoir, that water becomes "useable water" which is not "Project Water" but rather is "all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands[.]"

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<sup>4</sup> Section 2.1 of the Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation, included in the 2001 Report of the Rio Grande Compact Commission, confirms that the Compact accounting data includes "deliveries by New Mexico to Texas at Elephant Butte Reservoir." TX\_MSJ\_000613.

Compact, art. I(l). As has been noted in the TX MSJ, it is Texas, not New Mexico and not the United States, that controls and can agree to or make demands for certain deliveries into Elephant Butte Reservoir. TX MSJ at 64-65; Compact, arts. VII and VIII.

There is simply no support in any reading of the Compact that would lead to the notion that the United States somehow is apportioned water that is delivered to Elephant Butte Reservoir. While the Compact clearly envisions that the United States, as a sort of agent of the Compact, will operate the Project to satisfy the Texas apportionment, the EBID contract entitlement and the obligations to Mexico, that is quite different from saying that the delivery is to the Project or to the United States.

### **III. CONCLUSION**

Based upon the foregoing, the US MSJ, and the TX MSJ, Texas respectfully requests that the Special Master recommend, and the Court grant, its motion and the United States' motion (as limited by Texas's discussions herein).

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Respectfully submitted,

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