

No. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF NOVEMBER 29, 2017
ORAL ARGUMENT BEFORE
A. GREGORY GRIMSAL, ESQ.
SPECIAL MASTER

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PROCEEDINGS

(November 29, 2017)

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3 **THE SPECIAL MASTER:** Good afternoon, Counsel. This
4 is Greg Grimsal in New Orleans. We are on the record. I have
5 with me my law clerk, Alex Rothenberg, and our court reporter,
6 Toni Tusa, who has worked with us before.

7 Let me begin by taking the roll, please, and see
8 who we have on the line for us. Let me begin with the State of
9 Texas.

10 **MR. SOMACH:** Yes, Your Honor. This is Stuart Somach.
11 With me in my office is Mac Goldsberry and Brittany Johnson.
12 I'm not sure if Mr. Hoffman is on the telephone.

13 **MR. HOFFMAN:** I'm on the telephone.

14 **THE SPECIAL MASTER:** Hello, Mr. Hoffman.

15 **MR. SOMACH:** It's Robert Hoffman.

16 **THE SPECIAL MASTER:** Yes, sir.

17 Is anyone from the Texas attorney general office
18 on?

19 **MR. SOMACH:** No. It will just be this office.

20 **THE SPECIAL MASTER:** Thank you, Mr. Somach.

21 State of New Mexico, please.

22 **MR. RAEL:** Hello, Special Master Grimsal. This is
23 Marcus Rael. With me in my office I have Deputy Attorney
24 General Tania Maestas and David Roman from my office.

25 **THE SPECIAL MASTER:** Thank you, Mr. Rael. That's it

03:31

1 for New Mexico?

2 **MR. RAEL:** Yes, Your Honor.

3 **MR. BLAINE:** This is Tom Blaine, New Mexico state
4 engineer. With me I have Kim Bannerman.

5 **THE SPECIAL MASTER:** Anyone else for New Mexico?

6 **MS. THOMPSON:** Yes, Your Honor. It's Lisa Thompson
7 and Michael Kopp with the State of New Mexico.

8 **THE SPECIAL MASTER:** Thank you, Ms. Thompson.

9 Anyone else for the State of New Mexico?

10 **MS. FRANKS:** Yes. My name is Martha Franks. I'm
11 advising the New Mexico Office of the State Engineer.

12 **THE SPECIAL MASTER:** Thank you, Ms. Franks.

13 Anybody else for the State of New Mexico?

14 State of Colorado, please.

15 **MR. WALLACE:** Yes, Your Honor. Chad Wallace.

16 **THE SPECIAL MASTER:** Hello, Mr. Wallace. How are you
17 this afternoon?

18 **MR. WALLACE:** I'm doing very well. Thank you.

19 **THE SPECIAL MASTER:** Good. Anybody else for
20 Colorado, sir?

21 **MR. WALLACE:** No, I don't believe so.

22 **THE SPECIAL MASTER:** Thank you.

23 United States, please.

24 **MR. DUBOIS:** Good afternoon, Your Honor. This is
25 Jim Dubois. Also on the line are Steve Macfarlane,

03:32

1 Lee Leininger, and Judy Coleman.

2 **THE SPECIAL MASTER:** Thank you, Mr. Dubois. Anybody
3 else for the United States?

4 **MR. DUBOIS:** No, Your Honor.

5 **THE SPECIAL MASTER:** Thank you.

6 Mr. Caroom, are you on the line?

7 **MR. CAROOM:** Yes, Your Honor, with Susan Maxwell,
8 amicus for the City of El Paso.

9 **THE SPECIAL MASTER:** Thank you, sir. Anyone else for
10 the City of El Paso?

11 **MR. CAROOM:** No.

12 **THE SPECIAL MASTER:** If there is anyone else on the
13 line, please identify yourself and the entity you represent.

14 **MS. O'BRIEN:** Good afternoon, Special Master. This
15 is Maria O'Brien for El Paso County Water Improvement District
16 No. 1.

17 **THE SPECIAL MASTER:** Ms. O'Brien, anyone else on the
18 line?

19 **MR. STEIN:** Good afternoon, Your Honor. This is
20 Jay Stein representing the City of Las Cruces, New Mexico, an
21 amicus curiae. With me on the line is Christina Mulcahy of our
22 office.

23 **THE SPECIAL MASTER:** Thank you.

24 **MR. BROCKMANN:** Special Master, this is Jim Brockmann
25 for the Albuquerque Bernalillo County Utility Authority, an

03:34

1 amicus.

2 **MS. BARNCASTLE:** Good afternoon, Your Honor. This is
3 Samantha Barncastle for the Elephant Butte Irrigation District.

4 **THE SPECIAL MASTER:** Thank you, Ms. Barncastle.
5 Anyone else for Elephant Butte Irrigation District?

6 **MS. BARNCASTLE:** Not today, Your Honor.

7 **THE SPECIAL MASTER:** Anybody else on the line?

8 **MS. DAVIDSON:** Good afternoon, Your Honor. This is
9 Tessa Davidson on behalf of New Mexico Pecan Growers.

10 **THE SPECIAL MASTER:** Yes, Ms. Davidson.

11 Anyone else?

12 **MR. UTTON:** Good afternoon, Your Honor. This is
13 John Utton representing New Mexico State University, an amicus.

14 **THE SPECIAL MASTER:** Yes, sir.

15 Anyone else?

16 **MR. MILLER:** Yes. Good afternoon, Your Honor. This
17 is Drew Miller representing amicus Hudspeth County Conservation
18 and Reclamation District No. 1.

19 **THE SPECIAL MASTER:** Yes, sir, Mr. Miller.

20 Anyone else?

21 Okay. Counsel, let me begin by reminding the
22 nonparties of Case Management Order No. 2 whereby we request
23 24-hour notice by email of your desire to participate. I would
24 like to thank Mr. Caroom for complying with that. We have
25 asked for that for my benefit and for the benefit of the court

03:35

1 reporter. A gentle reminder going forward: Please have a look
2 at Case Management Order No. 2, and let us have some notice in
3 advance of your desire to participate in such a phone
4 conference.

5 I set this conference, Counsel, as you know, as
6 requested by Mr. Somach. In his letter of October 23, he asked
7 for a telephone conference. Let me mention out the gate that
8 it's important to me that you know that I will always try to
9 accommodate such a request, subject to everybody's schedules.

10 So getting to the meat of what this is about,
11 Mr. Somach requests that I order Texas' complaint to be filed
12 of record before me; and, further, that I require New Mexico
13 and Colorado to answer that complaint within 30 days or a
14 reasonable time after that. New Mexico and Colorado have
15 submitted letters in response. I wanted to give those parties
16 an opportunity to express any other ideas they may have had
17 other than what's in the four corners of their letters, and let
18 me begin with Mr. Somach.

19 Let me ask you this question, Mr. Somach: In
20 light of the Supreme Court's setting the United States' and
21 Colorado's exceptions for hearing on January 8, does that
22 change any views expressed in your letter?

23 **MR. SOMACH:** No, it doesn't. The Supreme Court order
24 was pretty unequivocal with respect to New Mexico's motion to
25 dismiss the Texas complaint. It just denied it. It didn't set

03:37

1 it for oral argument. It didn't place any conditions on it.
2 There's nothing left for the Court to do with respect to the
3 Texas complaint.

4 Referring back to the federal rules, the
5 rules -- and I recognize that those are guidelines in cases
6 like this. In that context the rule provides that a responsive
7 pleading must be served within 14 days after the notice of the
8 Court's action. Here the Court denied again unequivocally
9 New Mexico's motion on October 10 of this year.

10 What we are looking for is not all that
11 remarkable. It's just to finally have an answer from
12 New Mexico on a complaint that we filed back in 2013; and if
13 there's going to be a cross-complaint, to go ahead and file
14 that. It seems like we are entitled to know how New Mexico is
15 going to respond to that complaint so that we can start getting
16 ourselves ready in order to litigate the case.

17 The Texas complaint isn't dependent in any way
18 on the United States complaint. How one answers or responds to
19 the Texas complaint is in no way affected by what happens with
20 the United States complaint. It will be exactly the same; that
21 is, the Texas complaint will be exactly the same the day after
22 the Court rules as it is today.

23 I did note that New Mexico in its letter talked
24 about this being a de facto request for bifurcation, but I
25 haven't asked for any bifurcation in this whatsoever. In fact,

03:39

1 my letter recognizes that about as far as we can go is to get
2 an answer in a cross-complaint -- assuming they are going to
3 file a cross-complaint -- so that we can respond to anything
4 that they put in their pleadings, so that we will be ready to
5 move forward with this case after the Court rules on the
6 United States complaint and after the last responsive pleadings
7 to whatever the United States complaint looks like. In other
8 words, I'm not looking for discovery. I'm not looking to move
9 forward. I am looking to get ourselves as close to being ready
10 to finally litigate this case as we can.

11 There's nothing in my letter that suggests
12 bifurcation. Most of what was in the New Mexico and Colorado
13 letter is really focused on that concept or on the fact that
14 they won't know what the Court will do with the United States
15 complaint so they can't respond to the United States complaint,
16 which I would agree, but has nothing to do with the Texas
17 complaint, which again will look tomorrow exactly like it looks
18 today.

19 So it really is nothing in terms of setting the
20 argument for January 8 because nothing will change after that
21 with respect to the Texas complaint. Nothing about the Texas
22 complaint is the subject of the oral argument. As a
23 consequence, we believe that it's appropriate to have
24 New Mexico and -- if Colorado wants to answer -- Colorado
25 answer so that we can know what we are looking for as this case

03:41

1 moves forward.

2 That was an overly long response, I think, to
3 the simple question that you posed, but that certainly is our
4 view.

5 **THE SPECIAL MASTER:** Thank you, Mr. Somach.

6 May I ask counsel for New Mexico if there's
7 anything else they would like to add other than what's in their
8 letter?

9 **MR. RAEL:** Your Honor, there's a few things I would
10 like to add. I guess I would like to focus on a couple of
11 things.

12 While I appreciate Mr. Somach saying that he is
13 not asking for a bifurcation, I think that it will serve to
14 basically be a de facto bifurcation of the case if you were to
15 grant Texas' request. It's not going to materially benefit the
16 case in any practical matter.

17 A couple other points, Your Honor. The
18 Supreme Court's opinion on the exceptions is going to affect
19 the future proceedings in this case. The decision is likely
20 going to provide guidance in the parties and to yourself as
21 well.

22 Just one example, Your Honor, is that the U.S.
23 is arguing that the compact's incorporation of the project
24 gives it the ability to raise compact claims against
25 New Mexico, and therefore the Court's ruling on the U.S.

03:42

1 exceptions -- it will help define and/or clarify the
2 relationship between the incorporated project and the compact
3 in this case. Because Texas' claims against New Mexico are
4 based on the relationship between the compact and the project,
5 our answers, defenses, and counterclaims are going to be
6 affected by the Court's opinions as well.

7 A couple other quick points, Your Honor. We
8 will be prejudiced if we are forced to answer Texas' complaint
9 before we have to respond to the United States' complaint
10 depending on whether or not we have to. The State of Texas'
11 complaint is really closely linked to the United States'
12 complaint. It will unduly prejudice New Mexico to have to
13 respond to one and not the other, and it will provide more time
14 for the United States to be able to prepare because they are so
15 closely linked.

16 The other points that I would add are that if
17 the United States is allowed to come into the case, it's going
18 to become a much, much broader case. It's going to become a
19 case of basically three states fighting over a water claim, it
20 will now take on -- depending on what the Supreme Court says,
21 it's going to take on a bigger national and even, with the
22 Mexico treaty, international implications, and the whole
23 character of the case is going to change.

24 Depending upon what the Supreme Court says,
25 Your Honor, it's going to change the way New Mexico is going to

03:44

1 respond. In answering Texas' complaint, if we are forced to do
2 so, we are going to have to decide whether or not we are going
3 to file any counterclaims against the United States and
4 Colorado. We are going to have to basically show our hand, so
5 we will be unduly prejudiced in having to do so.

6 Then the only other point is -- and this goes to
7 something Mr. Somach said -- the Supreme Court has not
8 expressly remanded the case back down to you, which is
9 something we did talk about in our letter. I would just like
10 to point out there's been cases -- including *Montana v.*
11 *Wyoming*, which I cited in my letter to Your Honor -- where the
12 Supreme Court has expressly said: We are going to deny one
13 motion. We are going to send an exception down, but we are
14 going to keep this exception for oral argument.

15 In this case they haven't done that because I
16 think they realize that the United States exceptions and
17 Colorado exceptions that we are going to have oral argument on
18 in about a month have implications on the entirety of the case.
19 Therefore, we would just respectfully request that you deny
20 Texas' request to you.

21 **THE SPECIAL MASTER:** Thank you, Mr. Rael.

22 Mr. Wallace, do you have anything you would like
23 to add?

24 **MR. WALLACE:** Just briefly, Your Honor. I think that
25 in light of the Court's setting arguments for early January

03:45

1 takes some of the mystery out of how this case might proceed as
2 far as the dates. I think it gives us some guidance. It's not
3 going to take forever to get done. I would again recommend
4 that you hold off proceeding in this case until that's done.

5 Colorado does believe the Court thinks that its
6 first exception is an item of some importance, and it would
7 like to see the Court resolve that issue in this case as a
8 whole before proceeding any further. Besides that, we believe
9 we have explained our reasoning fairly well in the letter that
10 we sent out.

11 **THE SPECIAL MASTER:** Thank you, Mr. Wallace.

12 Mr. Somach, I will let you have the last word.

13 **MR. SOMACH:** This notion that somehow they have to
14 answer our complaint before the United States complaint will
15 prejudice them, that's the way the rules are now. The
16 United States has 60 days to answer. That's the normal way of
17 proceeding. I'm not certain that that affects anything.

18 Again, the Texas complaint isn't going to
19 change. This case has always been of some broad significance.
20 The fact that the Court is taking oral arguments is no more or
21 less significant than the fact that it's taking arguments in
22 *Florida v. Georgia* or any other case that it takes arguments
23 on. This is a significant case. No one is denying it. It's
24 not going to become more significant or less significant
25 because of the fact the Court is going to rule. The Court has

03:47

1 to rule on everything ultimately in this case, so I certainly
2 don't understand that.

3 I do understand one thing. The State of Kansas,
4 in its amicus brief to the Court in support of Texas, made this
5 statement. It said, you know, if you are an upstream state,
6 you are always about delay.

7 **THE SPECIAL MASTER:** I read it, sir.

8 **MR. SOMACH:** I think that's all we are getting here,
9 is more of the same. There is absolutely no reason why
10 New Mexico and Colorado can't finally answer. How many times
11 do they have to be told they are wrong, the complaint is going
12 to move forward, and this case is going to go forward?

13 **THE SPECIAL MASTER:** Thank you, Mr. Somach.

14 I appreciate the argument submitted by
15 everybody, your letter briefs.

16 Mr. Somach, I want to compliment you on your
17 zealous advocacy of advancing your client's interest. However,
18 at this time I'm going to decline your request. I'm persuaded
19 that way for three reasons.

20 I don't see where any time would really be
21 saved, particularly in light of the limited things you're
22 asking to be able to do. My understanding is in the letter
23 itself you say there's only a limited few steps you are asking
24 for. It doesn't seem to me we are going to save a vast amount
25 of time.

03:48

1 I also think the wait is not significant as
2 balanced against the advantage to me, let alone the advantage
3 of the other parties, of having the Court's guidance in this
4 matter.

5 Finally, the point that New Mexico made, that
6 Mr. Rael made, that the case has not been recommitted to me is
7 something I have taken note of.

8 So for those reasons, Mr. Somach, with my
9 compliments on your aggressive and zealous advocacy for your
10 client, I'm going to decline your request. I'm going to enter
11 an appropriate case management order in that regard.

12 I would like to address one more point before we
13 sign off. A couple of you mentioned you would be willing to
14 work on a case management plan with or without an answer. I
15 have no objection to that, but that's completely a matter among
16 the parties if you would like to meet and talk about that and
17 see if you can't put something together in advance. It seems
18 to me one way or the other this will come back. That's
19 something constructive that could be done with this time to get
20 this thing in a better position to move forward when it does
21 come back.

22 That's all I have at this time with respect to
23 this matter. Let me ask if there's any other issue for the
24 good of the order?

25 **MR. SOMACH:** I have nothing further, Your Honor. I

03:50

1 do appreciate your taking the time to consider my request.

2 **THE SPECIAL MASTER:** I'm happy to do so, Mr. Somach.

3 Let me emphasize to the parties once again:

4 Please don't ever hesitate to request such a conference. I'm
5 happy to accommodate you and to consider any matters you need
6 me to bring up for the good of the order.

7 Other than that, our status conference will
8 stand adjourned. I want to wish everyone a happy holiday
9 season. I suspect we will be talking again in the new year.
10 Thank you very much. The hearing is over.

11 (Proceedings adjourned.)

12 * * *

13 **CERTIFICATE**

14 I, Toni Doyle Tusa, CCR, FCRR, Official Court
15 Reporter for the United States District Court, Eastern District
16 of Louisiana, certify that the foregoing is a true and correct
17 transcript, to the best of my ability and understanding, from
18 the record of proceedings in the above-entitled matter.

19

20

21

s/ Toni Doyle Tusa
Toni Doyle Tusa, CCR, FCRR
Official Court Reporter

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23

24

25