

No. 141, Original
In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF,
UNITED STATES OF AMERICA, PLAINTIFF-IN-INTERVENTION,

v.
STATE OF NEW MEXICO

AND

STATE OF COLORADO,
DEFENDANTS.

BRIEF OF AMICUS CURIAE EL PASO COUNTY WATER IMPROVEMENT DISTRICT
NO. 1 IN RESPONSE TO THE STATE OF TEXAS'S REQUEST FOR A JUDICIAL
DECLARATION TO CONFIRM THE LEGAL ISSUES PREVIOUSLY DECIDED AND
MOTION IN LIMINE TO EXCLUDE THE INTRODUCTION OF EVIDENCE THEREON

Maria O'Brien*
Sarah M. Stevenson
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
500 Fourth Street N.W., Suite 1000
Albuquerque, New Mexico 87102
mobrien@modrall.com
**Counsel of Record*

Attorneys for El Paso County Water Improvement District No. 1

February 28, 2019

TABLE OF CONTENTS

I. Background..... 1

II. EPCWID agrees with Texas that the First Special Master Report decided certain legal issues that should not be relitigated..... 1

III. The law of the case doctrine or the rule of mandate, and New Mexico’s specific concessions, prevent relitigation of issues decided by the Supreme Court or conceded by New Mexico... 1

IV. Conclusion. 1

TABLE OF AUTHORITIES

	Page(s)
<u>Cases</u>	
<i>Nat’l Aeronautics & Space Admin. v. Nelson</i> , 562 U.S. 134 (2011).....	2
<i>Texas v. New Mexico</i> , 583 U.S. ____, 138 S. Ct. 954 (2018).....	1
<u>Statutes</u>	
Act of May 31, 1939 ch. 155, 53 Stat. 785.....	1
<u>Other Authorities</u>	
First Interim Report of the Special Master (Feb. 9, 2017).....	1

Amicus curiae El Paso County Water Improvement District No. 1 (“EPCWID”) files this brief in response to the State of Texas’s Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon (Dec. 26, 2018) (“Texas Law of the Case Motion”). The Texas Law of the Case Motion should be granted. EPCWID files this response in support of the arguments and relief requested therein.

I. Background.

EPCWID is one of two beneficiaries of the Rio Grande Reclamation Project (“Rio Grande Project” or “the Project”), a federal interstate reclamation project which serves as the vehicle for delivery of the water apportioned to Texas under the Rio Grande Compact. Act of May 31, 1939, ch. 155, 53 Stat. 785. EPCWID incorporates in full the Background section set forth in its response to the United States’ Motion for Judgment on the Pleadings Against New Mexico’s Counterclaims 2, 3, 5, 6, 7 8 and 9 (Dec. 21, 2018) (“U.S. Motion”) and Memorandum of Points and Authorities in Support of the U.S. Motion (Dec. 21, 2018) (“Memorandum in Support of U.S. Motion”), filed this same date (“EPCWID Response to U.S. Motion”).

II. EPCWID agrees with Texas that the First Special Master Report decided certain legal issues that should not be relitigated.

Texas identifies five legal issues that were decided in the First Interim Report of the Special Master (Feb. 9, 2017) (“First Special Master Report”) and should not be subject to re-litigation. *See* Texas Law of the Case Motion, 7-12. EPCWID agrees these legal issues were decided by the Special Master and ultimately adopted by the Court. The Supreme Court expressly agreed with the first of these legal determinations in *Texas v. New Mexico*, 583 U.S. ____, 138 S. Ct. 954 (2018). The First Special Master Report concluded “that the structure of the 1938 Compact integrates the Project wholly and completely.” Texas Law of the Case Motion, 7. The Supreme Court found that “the Compact is inextricably intertwined with the Rio Grande Project and the

Downstream Contracts.” *Texas v. New Mexico*, 138 S. Ct. at 959. Texas’s proposed first legal determination must be considered law of the case based on both the First Special Master Report and the Supreme Court’s opinion. The remaining issues identified in the Texas Law of the Case Motion also were determined by the Supreme Court in its rulings on New Mexico’s motions to dismiss, are law of the case for purposes of this action, and should not be subject to further litigation.

III. The law of the case doctrine or the rule of mandate, and New Mexico’s specific concessions, prevent relitigation of issues decided by the Supreme Court or conceded by New Mexico.

Legal issues that have been decided by the Supreme Court, factual findings made by the Court or by the Special Master and adopted by the Court, and statements by the parties that resolve any legal dispute, should not be relitigated. The Supreme Court’s opinion is binding on the parties and the Special Master, and issues decided thereon constitute the law of the case. *See* Texas Law of the Case Motion, 16-22. The Court overruled New Mexico’s exception that the legal rationale and factual conclusions of the Special Master be rejected. *See id.* at 25-26. The First Special Master Report’s legal rationale and factual conclusions cannot be separated from his recommendation that New Mexico’s motion to dismiss the Texas Complaint be denied. To the extent there are any questions regarding the specifics or import of any of the Special Master’s conclusions such questions should be addressed by the Special Master as this matter proceeds.

As the Texas Law of the Case Motion correctly argues, New Mexico has made a number of concessions in briefing and/or oral argument to both the Supreme Court and the Special Master. *See* Texas Law of the Case Motion, 24-27. EPCWID underscores that New Mexico has made factual concessions, to which it should be bound. *Cf. Nat’l Aeronautics & Space Admin. v. Nelson*, 562 U.S. 134, 163 (2011) (Scalia, J., concurring) (“We are not bound by a litigant’s concession on an issue of law.”).

EPCWID agrees with the Texas Law of the Case Motion that the introduction of evidence on the issues already decided by the Court or party concession should be prohibited. *See* Texas Law of the Case Motion, 27-29 (motion in limine).

IV. Conclusion.

The State of Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon should be granted in full.

Respectfully submitted,

/s/ Maria O'Brien

Maria O'Brien*

Sarah M. Stevenson

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

500 Fourth Street N.W., Suite 1000

Albuquerque, New Mexico 87102

mobrien@modrall.com

**Counsel of Record*

February 28, 2019

No. 141, Original

In the
Supreme Court of the United States



STATE OF TEXAS, PLAINTIFF,

UNITED STATES OF AMERICA, PLAINTIFF-IN-INTERVENTION,

v.

STATE OF NEW MEXICO

AND

STATE OF COLORADO,
DEFENDANTS.



OFFICE OF THE SPECIAL MASTER



**EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S
CERTIFICATE OF SERVICE**

This is to certify that on the 28th of February, 2019, I caused true and correct copies of the **Brief of Amicus Curiae El Paso County Water Improvement District No. 1 in Response to the State of Texas's Request for Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon** to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 28th day of February, 2019.

/s/ Maria O'Brien

Maria O'Brien*

Sarah M. Stevenson

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

500 Fourth Street N.W., Suite 1000

Albuquerque, New Mexico 87102

mobrien@modrall.com

**Counsel of Record*

UNITED STATES

JAMES J. DUBOIS*
R. LEE LEININGER
THOMAS K. SNODGRASS
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
999 18th Street
South Terrace – Suite 370
Denver, Colorado 80202
Seth Allison, Paralegal

james.dubois@usdoj.gov
(303) 844-1375
lee.leininger@usdoj.gov
(303)844-1364
thomas.snodgrass@usdoj.gov
(303)844-7233

seth.allison@usdoj.gov
(303)844-7917

NOEL J. FRANCISCO*
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
ANN O'CONNELL
Assistant to the Solicitor General
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

supremectbriefs@usdoj.gov
(202)514-2217

STEPHEN M. MACFARLANE
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
501 I Street, Suite 9-700
Sacramento, CA 95814

stephen.macfarlane@usdoj.gov
(916) 930-2204

JUDITH E. COLEMAN
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

judith.coleman@usdoj.gov
(202) 514-3553

STATE OF NEW MEXICO

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672
hbalderas@nmag.gov
tmnaestas@nmag.gov

MARCUS J. RAEL, JR.*
DAVID A. ROMAN
Special Assistant Attorneys General
ROBLES, RAEL & ANAYA, P.C.
500 Marquette Avenue NW,
Suite 700
Albuquerque, New Mexico 87102
505-242-2228
marcus@roblesrael.com

**Counsel of Record*
BENNET W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203 303-
861-1963
braley@troutlaw.com
lthompson@troutlaw.com
mkopp@troutlaw.com

STATE OF COLORADO

CHAD M. WALLACE*
Senior Assistant Attorney General
COLORADO DEPARTMENT OF LAW
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
chad.wallace@coag.gov
Paralegal: Nan B. Edwards
nan.edwards@coag.gov

CYNTHIA H. COFFMAN
Attorney General of Colorado
KAREN M. KWON
First Assistant Attorney General
Colorado Department of Law
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
cynthia.coffman@coag.gov
karen.kwon@coag.gov

STATE OF TEXAS

STUART L. SOMACH*
ANDREW M. HITCHINGS
ROBERT B. HOFFMAN
FRANCIS M. "MAC"
GOLDSBERRY II

(916) 446-7979
(916) 803- 4561 (cell)
ssomach@somachlaw.com ahitchings@somachlaw.com
rhoffman@somachlaw.com mgoldsberry@somachlaw.com
tbarfield@somachlaw.com bjohnson@somachlaw.com

THERESA C. BARFIELD
BRITTANY K. JOHNSON
SOMACH SIMMONS & DUNN, PC
500 Capital Mall, Suite 1000
Sacramento, CA 95814
Tel. 916-446-7979
Cell 916-803-4561

Rhonda Stephenson – Secretary
Christina Garro – Paralegal
Yolanda De La Cruz – Secretary

rstephenson@somachlaw.com
cgarro@somachlaw.com
ydelacruz@somachlaw.com

KEN PAXTON, Attorney General
JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS, Deputy
Attorney General
PRICILLA M. HUBENAK
Chief, Environmental Protection Division
P.O. Box 12548
Austin, TX 78711-2548

Priscilla.Hubenak@oag.texas.gov

AMICI / FOR INFORMATIONAL PURPOSES ONLY

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

JAMES C. BROCKMANN*
JAY F. STEIN
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santé Fe, New Mexico 87504

(505) 983-3880
jcbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

PETER AUH
ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY
P.O. Box 568
Albuquerque, NM 87103-0568

(505) 289-3092
pauh@abcwua.org

CITY OF EL PASO

DOUGLAS G. CAROOM*
SUSAN M. MAXWELL
BICKERSTAFF HEATH DELGADO
ACOSTA, LLP
2711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746

(512) 472-8021
dcaroom@bickerstaff.com
smaxwell@bickerstaff.com

CITY OF LAS CRUCES

JAY F. STEIN *
JAMES C. BROCKMANN
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santé Fe, New Mexico 87504

(505) 983-3880
jcbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

JENNIFER VEGA-BROWN
MARCIA B. DRIGGERS
LAW CRUCES CITY ATTORNEY'S OFFICE
P.O. Box 20000
Las Cruces, New Mexico 88004

(575) 541-2128
jvega-brown@las-cruces.org
marcyd@las-cruces.org

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCastle*
BARNCastle LAW FIRM, LLC
1100 South Main, Ste. 20
P.O. Box 1556
Las Cruces, NM 88004
Janet Correll – Paralegal

(575) 636-2377
(575) 636-2688 (fax)
samantha@h2o-legal.com

janet@h2o-legal.com

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT

ANDREW S. "DREW" MILLER*
KEMP SMITH LLP
816 Congress Avenue, Suite 1305
Austin, TX 78701

(512) 320-5466
dmiller@kempsmith.com

STATE OF KANSAS

TOBY CROUSE*

Solicitor General, State of Kansas

DEREK SCHMIDT

Attorney General, State of Kansas

JEFFREY A. CHANAY

Chief Deputy Attorney General

BRYAN C. CLARK

Assistant Solicitor General

DWIGHT R. CARSWELL

Assistant Attorney General

120 S. W. 10th Ave., 2nd Floor

Topeka, KS 66612

(785) 296-2215

toby.crouse@ag.ks.gov

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON*

DAVIDSON LAW FIRM, LLC

4206 Corrales Road

P.O. Box 2240

Corrales, NM 87048

(505) 792-3636

ttd@tessadavidson.com

Patricia McCan – Paralegal

patricia@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON*

UTTUN & KERY, P.A

P.O. Box 2386

Santa Fe, New Mexico 87504

(505) 699-1445

john@uttonkery.com

LIZBETH ELLIS

General Counsel

CLAYTON BRADLEY

Counsel

New Mexico State University

Hadley Hall Room 132

2850 Weddell Road

Las Cruces, NM 88003

(575) 646-2446

lellis@ad.nmsu.edu

bradleyc@ad.nmsu.edu