

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.

**RESPONSE OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 TO
NEW MEXICO'S REQUEST FOR EMERGENCY HEARING**

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March 15, 2020

The El Paso County Water Improvement District No. 1 (“EPCWID”) responds as follows to the State of New Mexico’s Request for Emergency Hearing (“Emergency Request”).

I. The Proposed Delays In Discovery And Briefing Make Prompt Disposition Of The Pending Counterclaim Dismissal Motions Both More Important And More Practically Possible.

The discovery, briefing and related delays and extensions to the case schedule proposed this past Friday, March 13, 2020, throw into stark relief the importance for disposition, as soon as reasonably possible, of the pending motions to dismiss New Mexico’s Counterclaims 2, 4, 5, 6, and 7.¹ New Mexico requests a six-month stay in the case. Emergency Request at 6-7. Texas opposes the stay but, proposes a two-month extension of both the discovery and briefing and hearing on dispositive motions. Tex. Ltr. Resp. ¶¶ 2, 7.

Importantly, the pending scheduling proposals provide the Special Master the opportunity to rule on the counterclaim dismissal motions in a way that furthers two objectives related to management of this complex litigation. First, disposition of the pending motions as they relate to counterclaims 2, 4, 5, 6 and 7, now can be accomplished without any disruption of the schedule for whatever issues remain in the case after the ruling. Second, such disposition may actually speed completion of the discovery process by narrowing the scope of discovery.

A. The Proposed Delays Open A Window Of Time For Ruling On Dismissal Of The Counterclaims Without Disrupting The Case Schedule.

EPCWID believes the unique circumstances presented by the COVID-19 virus warrants consideration of some extension of discovery, briefing and deadlines in this litigation. Regardless of the amount of time deadlines are extended or whether such extensions are deemed a “stay” of

¹As set forth in EPCWID’s request for agenda item at the March 31st Status Conference filed with the Special Master on February 24, 2020, while motions to dismiss the other counterclaims also are pending, the denoted counterclaims directly affect the legal rights and interests of EPCWID.

the case, EPCWID also believes extension of deadlines should and would allow for critical guidance from the Special Master as to whether certain counterclaims will remain part of the case.

If the case is stayed six months as New Mexico requests, the Special Master has more than ample time to issue a ruling on the pending counterclaim dismissal motions, at least with regard to counterclaims 2, 4, 5, 6 and 7, make any adjustments to the governing scheduling order occasioned by the ruling, and even address matters concerning interim review by the Court of exceptions to such ruling.

The dismissal motions have been briefed, argued, and under submission for almost a year. They are ripe for disposition without further argument or briefing by the parties and *amici*. Even were the Special Master to consider it advisable to hear further discussion of the counterclaim issues, there is time—more than two weeks—to have such a discussion before New Mexico’s lead trial counsel withdraws from the case on April 3, 2020. Emergency Request at 5. Waiting until after that counsel’s departure risks additional delay, given New Mexico’s argument that it is going to take new counsel months to get up to speed.

These same arguments—that the Special Master has been presented with a feasible window of opportunity to rule on the pending counterclaim motions without disrupting the progress of the case—apply with equal force if Texas’s suggested two-month delay carries the day. These two additional months provide a cushion of time for any adjustments precipitated by a ruling on the counterclaims.

B. The Scope Of Discovery And The Time Needed To Conduct It May Be Condensed By A Counterclaim Ruling Soon.

While EPCWID has not analyzed the point with mathematical precision, a significant part of New Mexico’s expert opinions and discovery efforts thus far, as well as those it has projected for

the future, is focused on its counterclaims. A significant focus of discovery by the United States and Texas has also necessarily been to defend against New Mexico's counterclaims. In particular the focus has been on Rio Grande Project operations and the 2008 Operating Agreement. But whether these counterclaims are legitimately maintained as elements of the case is in legal limbo.

If some or all of the counterclaims are dismissed from the case, in particular those claims challenging the 2008 Operating Agreement, the scope of discovery will inevitably be narrowed considerably. And the consequence of such a narrowing is obvious: discovery will not take as long or be as costly. In other words, a ruling now on the counterclaim dismissal motions has the potential to effectively counterbalance any delays—be that two months, six months, or more—ensuing from the present situation.

The counterclaim dismissal issue is the single component of this case ready for disposition. And determination of the issues raised in the dismissal motions relating to counterclaims 2, 4, 5, 6 and 7 does not in any way hinder the Special Master from providing some relief to all the parties and *amici* due to travel and other restrictions stemming from the COVID-19 virus, as well as other problems New Mexico's Emergency Request says New Mexico currently faces. It also is the single component of this case that carries the present potential to streamline future proceedings and allow a timely full and final decision on the merits of any remaining claims.

II. EPCWID's Key Interest At This Point Is More In Disposition Of New Mexico's Counterclaims Than In The Case Schedule.

As more fully explained in its February 24, 2020 request for an agenda item for the upcoming status conference to address the status of New Mexico's counterclaims 2, 4, 5, 6, and 7, EPCWID's paramount concern is having the counterclaim dismissal issue resolved as soon as possible. If the counterclaims relating to EPCWID's contracts are dismissed, EPCWID's role as an enhanced *amicus* rather than a party becomes less precarious and less legally problematic. If

those counterclaims remain, EPCWID is of the view that the need for its recognition as a party in the dispute for purposes of defense against counterclaims which challenge EPCWID's contractual rights, becomes obvious. Either way, the path forward is clarified.

But in the current situation, with the status of the disputed counterclaims under submission, EPCWID is stranded in a no-man's-land. Facts and expert opinions directly relevant to its contracts and legal rights are front and center in the discovery process, but EPCWID lacks the party status necessary to fully protect its challenged interests.

As a consequence of this situation, EPCWID focuses here on the need, coupled with the opportunity created by the requested scheduling breathing space, for disposition of the counterclaim dismissal motions. EPCWID has no interest in delaying any aspect or phase of the case beyond those necessitated, as the Special Master sees fit, by the current situation as laid out in the filings of New Mexico and Texas.

III. Conclusion

EPCWID supports New Mexico's emergency request for a telephonic conference. In connection with such conference, EPCWID urges the Special Master to set a schedule that will lead to disposition of the counterclaim dismissal motions as soon as reasonably possible.

Respectfully submitted,

/s/ Maria O'Brien

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◆
OFFICE OF THE SPECIAL MASTER
◆

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

This is to certify that on the 15th of March, 2020, I caused a true and correct copy of **Response of El Paso County Water Improvement District No. 1 to New Mexico's Request for Emergency Hearing** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 15th day of March, 2020.

/s/ Maria O'Brien

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