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

STATE OF COLORADO'S RESPONSE TO TEXAS' MOTION TO FILE SUPPLEMENTAL COMPLAINT

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July 15, 2021

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I. Summary of Argument.

This case currently deals with water released from the Rio Grande Project intended for use in Texas. Texas now seeks to significantly expand this case, adding a claim that deals with other water and could involve additional rights of Colorado and other parties not currently in this suit. Colorado would take a much more proactive role any litigation of the added claim. This added claim would require discovery, expert analysis, and legal briefings that amount to an entirely new lawsuit.

The added claim is beyond the scope of the suit originally allowed by the Supreme Court. The added claim asserts actions by New Mexico and others regarding operation of other reservoirs upstream of the Rio Grande Project, interpretation of different articles of the Rio Grande Compact, 53 Stat. 785, and events unrelated to use of Rio Grande Project water. The Special Master should not skip the Court's gatekeeping function to decide whether it even wants to accept this new lawsuit.

For these reasons, the Special Master should require Texas to file its motion for leave with the Supreme Court, so that the appropriate process can be followed to determine whether Texas satisfies the legal and factual bases for bringing what is in effect a new lawsuit.

II. Argument.

A. Texas' proposed added claim implicates the rights of Colorado and other parties.

1. Colorado would be very involved litigating Texas' added claim.

Texas's added claim alleges that New Mexico violated Article VI of the Compact by failing to put into storage in reservoirs above the Rio Grande Project an amount of water equal to its accrued debits, State of Texas' Supplemental Complaint p. 7, violated the Compact by not prioritizing Article VI over the Article VII prohibition on increasing amounts in storage in those upstream reservoirs under certain conditions, *Id.* p. 8., and will violate Article VIII by not releasing water from those upstream reservoirs to Elephant Butte should Texas call for it next year, *Id.* p. 9.

These allegations directly relate to Colorado's rights and actions under the Rio Grande Compact. Therefore, Colorado would need to conduct discovery, retain experts, and actively litigate the added claim. Colorado intends to present substantive arguments to the Court in opposition to Texas' motion for leave to file its added claim and contest that Texas has met the threshold to bring an original action. Further, several water user organizations in Colorado would be directly and adversely impacted by the Compact interpretation Texas seeks. See Exhibit A. These groups may seek *amici* status if Texas' added claim is litigated. Regardless of whether Texas actually seeks relief from Colorado, adopting Texas' interpretation of the Compact, with which Colorado strongly disagrees, could potentially impact operation of reservoirs and administration of water rights in Colorado.

Colorado's rights to accrue debits under the Compact could be adversely impacted by Texas' interpretation by imposition of a cap on debits based on post-1937 reservoir storage. Under Article VI Colorado may accrue up to 100,000 acre-feet of debits against its Article III

delivery obligation. This is designed to allow for the natural variations in hydrology. In addition, the Compact accounts for storage in post-1937 reservoirs by allowing increased accrued debit amounts above Colorado's 100,000 acre-foot limit so long as the increased debits caused by such reservoirs are retained in storage.

Texas ignores this provision and instead argues that all accrued debits must be in storage. Texas' interpretation of Article VI could eliminate Colorado's ability to accrue debits resulting from natural variations in hydrology and replace it with a cap based on the storage capacity of post-1937 reservoirs. This change in obligations could have several negative impacts. It could eliminate the Compact's recognition of hydrologic variability with its allowed accrued debit amounts. It could severely reduce the utility of Colorado's post-1937 reservoirs by requiring they store the entirety of its accrued debit amounts. It could also cap Colorado's accrued debits by the storage space in reservoirs constructed after the Compact, instead of allowing the 100,000 acre-feet

stated in the Compact. Colorado did not agree to any of these limitations.

As several Colorado irrigation entities explain in the attached letter, their irrigators could face even greater loss of water if Texas' interpretation of the Compact were adopted. It appears that Texas seeks to require increased storage of debits and prioritize Article VI storage over Article VII's prohibition on increasing stored amounts in these same reservoirs in certain low water years. This approach would harm Colorado's irrigators by forcing water into storage and depriving them of the ability to use this water, even when Colorado complies with its delivery requirements.

2. Texas' added claim implicates the rights of other parties, such as the Pueblos in New Mexico and may shift the alignment of the United States.

The major New Mexico reservoirs that would be the subject of Texas' added claim are owned by the United States. One of these, El Vado Reservoir, stores water for the United States' Middle Rio Grande Project, including water for several Pueblos. Adopting the

interpretation that Texas now proposes in its added claim could substantially restrict storage in El Vado Reservoir for the Middle Rio Grande Project, including the Pueblos. The nature of these storage rights and their relationship to the Compact may also need to be litigated with Texas' added claim. This likely introduces potential new parties or *amici*.

Texas' added claim may also shift party alignment in the current lawsuit. The United States operates both the Middle Rio Grande Project and the Rio Grande Project. Pitting the use of reservoirs for irrigation in the United States' Middle Rio Grande Project against storage for later delivery at the United States' Rio Grande Project at Elephant Butte puts the United States in a different litigation position than in the current lawsuit. The United States would be forced to balance the competing interests of its two projects. The United States may no longer be aligned with Texas if it needs to represent irrigators in the Middle Rio Grande Project, including the Pueblos, against the adverse claims of Texas.

B. Texas' proposed added claim expands this dispute beyond the scope of the original complaint.

1. The Supreme Court must decide whether to allow an added claim.

A party must obtain leave from the Supreme Court before filing a complaint in an original action. *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). This requirement "serves an important gatekeeping function." *Id.* The Court is "traditional[ly] reluct[ant] to exercise original jurisdiction in any but the most serious of circumstances, even where, as in cases between two or more States, [the Court's] jurisdiction is exclusive." *Id.* Demonstrating the importance of its gatekeeping function, the Court recently denied leave to file complaints in two original actions. *Montana and Wyoming v. Washington*, No. 152 Orig., 2021 WL 2637830 (June 28, 2021); *New Hampshire v. Massachusetts*, No. 154 Orig., 2021 WL 2637831 (June 28, 2021).

Similarly, a party must obtain leave from the Court before filing an amended complaint in an original action. *Nebraska v. Wyoming*, 515 U.S. at 6; *Ohio v. Kentucky*, 410 U.S. 641, 643-644 (1973). If a party

moves for leave to file an amended complaint, the Court may refer the motion to the Special Master for a recommendation. *Nebraska v. Wyoming*, 515 U.S. at 6 ("Nebraska and Wyoming then sought leave to amend their pleadings, and we referred those requests to the Master."). The Court will then hear arguments on any exceptions to the Special Master's recommendation and determine whether leave should be granted. *Ohio v. Kentucky*, 410 U.S. at 644 ("Upon the filing of Ohio's exceptions and Kentucky's reply, we set the matter for argument.").

Liberal amendment of pleadings is disfavored in an original action. *Nebraska v. Wyoming*, 515 U.S. at 8 ("The need for a less complaisant standard follows from [the Court's] traditional reluctance to exercise original jurisdiction."). "[P]roposed pleading amendments must be scrutinized closely . . . to see whether they would take the litigation beyond what [the Court] reasonably anticipated when [it] granted leave to file the initial pleadings." *Id.*

2. Because Texas is seeking to expand the scope of an original action, it must obtain leave from the Supreme Court.

The parties have spent years conducting discovery and drafting legal motions on the issues in the 2013 complaint and are now preparing for a trial set to begin this September. The current dispute is limited to addressing the relationship between the Rio Grande Compact and the delivery of water from the Rio Grande Project under the Downstream Contracts. *See Texas v. New Mexico*, 138 S.Ct. 954, 958 (2018) ("According to Texas, New Mexico is effectively breaching its Compact duty to deliver water to the Reservoir by allowing *downstream* New Mexico users to siphon off water *below the Reservoir* in ways the *Downstream Contracts* do not anticipate.") (emphasis added). Thus, the geographic scope of the dispute is limited to the reach below Elephant Butte Reservoir. And the legal scope is limited to the relationship between use of Rio Grande Project water and the Rio Grande Compact.

Texas' added claim expands the scope of the lawsuit. The added claim is not about downstream uses below Elephant Butte Reservoir

and is not limited to the relationship between the Rio Grande Project and the Compact. Instead, the added claim focuses on water use and administration above Elephant Butte Reservoir, the operation of several upstream reservoirs, and requires the Court to interpret new articles of the Compact. For example, Texas' added complaint alleges that New Mexico violated Articles VI, VII, and VIII of the Compact. The original complaint does not make any allegations about conduct or Compact requirements above Elephant Butte Reservoir, nor does it allege violations of Articles VI, VII, or VIII. Texas recognizes that its added claim is beyond the scope of the original complaint and is not necessary for the resolution of the original dispute. Texas' Brief in Support of Motion for Leave to File Supplemental Complaint p. 13. (recognizing that its added claim "could be tried in a subsequent phase after the completion of the first phase of trial.").

To maintain the Court's gatekeeping function, Texas should file its motion to amend with the Court, not the Special Master. This allows Colorado to present its arguments to the Court in opposition to

Texas' effort to start a new lawsuit. The Court can then decide whether to refer the motion to the Master for a recommendation and follow the normal process to determine whether the Court should exercise its discretionary original jurisdiction.

III. Conclusion.

The Special Master should require Texas to file a motion for leave to amend its complaint with the United States Supreme Court because the added claim would implicate the rights of Colorado and other parties not active in this suit and is beyond the scope of the dispute that the Court agreed to hear.

Respectfully submitted this 15th day of July 2021,

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Re: Original No. 141, State of Texas v. State of New Mexico and State of Colorado

Dear Attorney General Weiser:

This letter is being written to you on behalf of the Rio Grande Water Conservation District, the Conejos Water Conservancy District, and the Rio Grande Water Users Association to express our collective concern about the June 24, 2021, Motion For Leave To File Supplemental Complaint ("Supplemental Complaint") filed by the State of Texas in Original 141.

The Rio Grande Water Conservation District is a political subdivision of the state of Colorado established in 1967 pursuant to C.R.S. 37-48-101 et seq. It was established and given such powers as needed for the conservation, use, and development of the water resources of the Rio Grande and its tributaries and to safeguard for Colorado all waters to which the state of Colorado is equitably entitled. Its territory included the entire Rio Grande Basin in Colorado except Costilla County. It is the leading water resources conservation, use and development agency in the Rio Grande Basin and works closely with the State Engineer and Division Engineer to protect and preserve water supplies of the Rio Grande Basin available for use in Colorado.

The Conejos Water Conservancy District ("Conejos District") is also a political subdivision of the state of Colorado created pursuant to the Water Conservancy District Act, C.R.S. § 37-45-101 et seq. The Conejos District includes over 80,000 acres of irrigated land within the Conejos River basin. The Conejos District has the exclusive responsibility for all operation and maintenance functions of Platoro Reservoir located in the headwaters of the Conejos River with a decreed storage capacity of 53,571 acre-feet. Platoro Reservoir is the only large reservoir built in the Rio Grande Basin in Colorado after 1937 (post-compact reservoir) and is therefore subject to operation in accordance with the limitations of Articles VI, VII and

EXHIBIT A

VIII of the Rio Grande Compact. The Conejos District is the principal water resources conservation and development agency in the Conejos River Basin in Colorado.

The Rio Grande Water Users Association ("Water Users") is a nonprofit corporation whose member includes the major irrigation ditch companies that divert water from the Rio Grande upstream from Alamosa, the San Luis Valley Irrigation District, and the Santa Maria Reservoir Company. The latter two entities own the only three large reservoirs on the Rio Grande, each of which pre-date the Rio Grande Compact. The Water Users members provide irrigation water supplies to more than 300,000 acres of land. The Water Uses have been the principal entity representing the irrigation interests on the Rio Grande since its original formation in 1923. Through their legal counsel, the Water Uses were fully engaged with the state of Colorado during the negotiations of the Rio Grande Compact. The Water Users continue to be the chief spokesman for irrigation interest on the Rio Grande.

As you know, the current litigation in *Texas v. New Mexico* is a dispute over the allocation and delivery of water from Rio Grande Project Storage (Elephant Butte and Caballo Reservoirs) and Texas's claims that groundwater use in New Mexico below Elephant Butte Reservoir , among other things, is depriving Texas of water to which it is entitled under the Rio Grande Compact (the "Compact"). The original complaint filed by Texas did not assert any claims against Colorado; Colorado was joined simply because it was a signatory to the Compact. Colorado has asserted no claims in the litigation against any other party and entered into a "standstill agreement" with Texas, New Mexico, and the United States assuring it did not have to file an answer and would not be prejudiced by the resolution of the claims between Texas, New Mexico and the United States. Thus, under the current complaint Colorado has not needed to play an active role in the litigation. Likewise, because there have been no claims by or against Colorado, our clients have not found it necessary to seek amicus status to monitor and participate in the current litigation. That will entirely change if Texas is granted leave to file the Supplemental Complaint.

The Supplemental Complaint alleges that New Mexico has violated Art. VI of the Compact by not storing in reservoirs constructed after 1929 a quantity of water equal to its accrued debit, and that New Mexico will violate Arts. VII and VIII in 2022 because it will be unable to deliver to Project Storage from such reservoirs in an amount equal to its accrued debit when demanded by Texas. The Supplemental Complaint fundamentally alters the scope of the litigation; while the original complaint focused solely on water use practices at and below Elephant Butte Reservoir, the Supplemental Complaint challenges longstanding water use practices in the entire Rio Grande Basin upstream from Elephant Butte Reservoir. This is a radical expansion of the litigation that directly threatens water users in both northern New

Mexico (above Elephant Butte Reservoir) and in Colorado. Colorado water users are threatened because Art. VI of the Compact subjects reservoirs constructed in Colorado after 1937 to substantially the same restrictions as reservoirs constructed in New Mexico after 1929, except that Colorado has a much lower accrued debit limit than New Mexico.

It is important to know, Texas's allegations to the contrary notwithstanding, that the interpretation of Art. VI limitations on storage in reservoirs constructed after 1929 in New Mexico and after 1937 in Colorado has been disputed by Texas, New Mexico, and Colorado almost since the inception of the Compact. In 1951 Texas sought leave of the United States Supreme Court to sue New Mexico for its alleged violation of Arts. VI, VII, and VIII due to its manner of operation of post-1929 reservoirs. That suit, Original No. 9, was dismissed for the failure to join indispensable parties. Thereafter, throughout the early 1970s, the 1980s and the 1990s the Compact Commissioner for Texas frequently argued that New Mexico and/or Colorado were in violation of the Compact due to the alleged failure to comply with the requirements of Arts. VI, VII, and VIII for reservoirs constructed after 1929 in New Mexico and after 1937 in Colorado.[1] New Mexico took the same position then as it takes now concerning the interpretation of the requirements of Arts. VI.[2] Colorado likewise disagrees with Texas's interpretation of Art. VI.

The Supplemental Complaint directly threatens water rights administration in Colorado and the viability of Platoro Reservoir, the only reservoir constructed of the several large capacity reservoirs that the Compact drafters contemplated would be constructed in Colorado after 1937 to better manage stream flows[3]. Platoro Reservoir can only store 53,571 acre-feet, which is only about half of Colorado's allowed accrued debit of 100,000 acre-feet. The Supplemental Complaint asserts that New Mexico must store water to the extent of its accrued debit in reservoirs constructed after 1929. If that same standard were to apply to Colorado under Art. VI, then because Colorado does not have 100,000 acre-feet of storage constructed after 1937, it would lose nearly half of the debit allocated to Colorado under Art. VI the Compact. That debit is necessary and was intended to allow Colorado to use the water apportioned to it by the Compact, knowing that annual variations in stream flow would not permit annual strict compliance with Colorado's Art. III compact delivery schedules.[4] While we do not think such an interpretation is supported by the language of Art. VI, the state of Texas appears to claim otherwise. The state of Colorado must resist any interpretation of Art

[1] E.g. Rio Grande Compact Commission 33rd Annual Meeting, April 20 & 21, 1972.
[2] E.g. Rio Grande Compact Commission 51st Annual Meeting, March 22, 1990.
[3] E.g. Colorado Water Conservation Board, San Luis Valley Project report, March 1939.
[4] Report of Committee of Engineer to the Rio Grande Compact Commissioners, December 27, 1937, at pp. 8, 10.

VI of the Compact that deprives Colorado of its right to accrue debits of up to 100,000 acre-feet.

Texas's interpretation of Arts. VI, VII, and VIII, if successful, would upset the longstanding method of Compact administration in Colorado. The Rio Grande and the Conejos River have separate Compact delivery obligations determined by their respective delivery schedules in Art. III of the Compact.[5] In 1991 the State Engineer, the Conejos District, and the Water Users reached an agreement on intrastate administration of water rights for Compact purposes, including the allocation of the 10,000 acre-foot annual credit in the Colorado Compact delivery calculation, the intrastate allocation of debits and credits, and the right of the respective river systems to separately incur debits or credits without impacting the rights of the other stream system. This manner of administration is predicated to a material degree on Colorado's interpretation of Art. VI and its right to incur debits of 100,000 acre-feet notwithstanding the fact that it does not have post-1937 reservoirs capable of storing 100,000 acre-feet.

If Texas were to prevail on its claimed interpretation of Arts. VI - VIII, Platoro Reservoir would be rendered effectively useless to the Conejos District because it would be the only reservoir where Colorado could store debit water. Using Platoro Reservoir to store water to secure debits incurred by the Rio Grande (exclusive of the Conejos River) is fundamentally inconsistent with the two separate schedules of deliveries in the Compact and Colorado's required manner of compact administration. The only alternative to using Platoro Reservoir to store debit water for the Rio Grande and Conejos is for Colorado, or at least the Rio Grande exclusive of the Conejos River, to permanently forego its right under the Compact to accrue debits. Such strict Compact administration imposes severe and often unnecessary limitations on diversions by pre-compact water rights in Colorado and means the loss of an important right Colorado secured under the Compact.

We believe that the Supplemental Complaint is untimely, fundamentally inconsistent with the Compact, and poses a substantial threat to Colorado's rights under the Compact. We request that your office vigorously oppose the Supplemental Complaint. Should it be allowed, then we request you fully involve our clients in the defense against the Supplemental Complaint. We plan to seek amicus status for each of our clients from the Special Master should the Supplemental Complaint be filed and will fully assist your office in its efforts to defeat the Supplemental Complaint.

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[5] *Alamosa-La Jara Water Users Protection Assn v. Gould*, 674 P.2d 914 (Colo. 1983)

Yours very truly,

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**Indicates Counsel of Record*

This is to certify that on the 15th day of July 2021, I caused a true and correct copy of the **State of Colorado's Response to State of Texas's Motion to file Supplemental Complaint** to be served upon Special Master Michael Melloy, Clerk of the 8th Circuit Michael Gans, Judge Oliver W. Wanger and upon all counsel of record and counsel for interested parties by email as indicated above.

Respectfully submitted this 15th day of July 2021,

/s/Chad M. Wallace

CHAD M. WALLACE*
Senior Assistant Attorney General
**Counsel of Record*