

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



**RESPONSE BY *AMICUS* EL PASO COUNTY WATER IMPROVEMENT
DISTRICT NO. 1 ON PROCEDURE FOR DISPOSITION OF TEXAS'S
MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT**

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The Special Master has authorized parties and *amici* to respond to Texas’s Motion for Leave to File Supplemental Complaint, limited to the issue of how the proposed supplemental complaint “would affect the current lawsuit.” Order (Doc. 521) at 6. The El Paso County Water Improvement District No. 1 (“EPCWID”) submits this response. Part I provides context for Part II’s discussion of EPCWID’s suggested course of proceeding on Texas’s motion and supplemental complaint.

I. The Pertinent Requirements of Compact Articles VI-VIII Are Closely Linked To Article IV, Project Storage, And Project Deliveries.

Texas’s motion seeks to supplement its complaint that New Mexico is in violation of the Rio Grande Compact by adding claims arising under Articles VI, VII, and VIII of the Compact. The parts of these provisions that Texas would bring into play in this litigation focus on the role of storage of Rio Grande waters upstream of the San Marcial gauge and Elephant Butte Reservoir. The Special Master already has taken note of these provisions and their interplay with the Rio Grande Project. Order of May 21, 2021 (Doc. 503) at 12-17. The rights and duties in Articles VI-VIII “are defined through reference to Project storage or operating conditions that are *a direct function of downstream water deliveries.*” *Id.* at 13 (emphasis added).

The parts of Articles VI-VIII pertinent to Texas’s new claim bear out the Special Master’s assessment. The second sentence of Article VI’s third paragraph imposes a requirement that, assuming there is physical capacity to do so, New Mexico “shall retain water in storage [in post-1929 reservoirs upstream from Elephant Butte Reservoir] at all times to the extent of its accrued debit.” Especially when read in harmony with Articles VII and VIII, this provision demonstrates “the intertwined nature of the Project and the Compact,” and the way it “balanc[es] upstream and downstream rights” in reference to Project storage. *Id.* at 15-16.

Article VII supplements Article VI’s upstream storage rules for the limited purpose of passing Rio Grande water through to Elephant Butte to replenish Project storage whenever usable water there is below 400,000 acre-feet. Article VIII is similarly designed to enhance the level of usable water stored in Elephant Butte by allowing Texas’s Compact Commissioner to call for release of water stored upstream, not to exceed the limit of New Mexico’s accrued debit.

II. The Upstream Storage Issues Texas Seeks To Raise Should Be Made Part Of This Case, But Not This Phase of the Case and Not Until After The Upcoming Trial.

EPCWID’s position is that bringing this new Compact-based claim into the original jurisdiction case is important and justified. The factual allegations pertain to requirements imposed by Articles VI-VIII. EPCWID’s position is that ultimately, the motion for leave to file should be granted and the supplemental claim allowed to be filed in this case. But EPCWID does not believe the new factual and legal issues

Texas raises in the claim (which were not at issue at the time Texas filed its original complaint) need to or should be litigated *now*, in the phase of the case whose trial is set to commence in mid-September. Doing that would be unwise and, in any event, is unnecessary.

EPCWID's suggestion is that the Special Master take the motion for leave to file the supplemental complaint under advisement and establish a briefing schedule on the motion that does not commence until after conclusion of the impending trial. The briefing schedule could coincide to a large extent with the post-trial briefing schedule for trial issues. Then, the Special Master's report and recommendation to the Court could include a section with recommendations about the motion for leave to file and whether the supplemental complaint should be filed.

The upstream storage Compact issues Texas seeks to raise relate to issues already in the case, but are best framed *after* the upcoming trial, which will help provide context and clarify the rights and obligations of the compacting states. The new issues are not a necessary part of the upcoming trial. After the report and recommendation of the Special Master following trial, and after Court disposition of any exceptions raised as to that report and recommendation, and assuming the Court orders the supplemental claims be filed, the way to move forward on those issues can be addressed, more clearly framed by the Court's ultimate ruling in this phase. The two important things are that: (i) the claims belong in this case; but (ii) they do not have to be resolved now. There is no necessity at this moment to decide

precisely how they should be handled in the future. All those matters can be addressed, with briefing submitted, recommendations made, and Court decisions issued, after the trial that is about to commence.

Conclusion

EPCWID recommends the Special Master take Texas's motion under advisement at this point and, after trial, set a schedule for briefing and disposition of the motion.

Respectfully submitted this 15th day July, 2021

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

This is to certify that on the 15th day of July, 2021, I caused a true and correct copy of the **Response by Amicus El Paso County Water Improvement District No. 1 on Procedure for Disposition of Texas's Motion for Leave to File Supplemental Complaint** 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 July, 2021.

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