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

UNITED STATES OF AMERICA'S MOTION IN LIMINE REGARDING MATTERS DECIDED ON SUMMARY JUDGMENT

ELIZABETH B. PRELOGAR
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEAN E. WILLIAMS
Acting Assistant Attorney General
FREDERICK LIU
Assistant to the Solicitor General
JAMES J. DuBOIS
R. LEE LEININGER
JUDITH E. COLEMAN
JENNIFER A. NAJJAR
Attorneys, Environment and Natural Resources Division
U.S. Department of Justice

Counsel for the United States

UNITED STATES OF AMERICA'S MOTION IN LIMINE REGARDING MATTERS DECIDED ON SUMMARY JUDGMENT

So that it may appropriately allocate its trial time, the United States respectfully requests a pre-trial ruling that evidence will not be admitted for the purpose of contesting the summary judgments entered for the United States and Texas and certain determinations made in connection with those judgments. *See* Order of May 21, 2021, Sp. M. Docket No. 503 ("Order"). In particular, the United States seeks to preclude evidence offered to contest the Special Master's ruling that New Mexico has a "Compact-level duty" to prevent the capture of Rio Grande Project return flows and "hydrologically connected groundwater," *id.* at 5. The United States respectfully submits that the presentation of evidence to reopen matters decided at summary judgment would be cumulative and wasteful because the existing record is sufficient to facilitate the Supreme Court's review of the Special Master's Order.

DISCUSSION

The Special Master made his rulings on summary judgment based on extensive briefing, a voluminous record, and a full day of oral argument. Broadly speaking, the Order declares certain matters of fact and law to be established or undisputed "at a general level" and lays the foundation for trial on the "details." *See*, *e.g.*, Order at 24. Within that framing, the Special Master granted, in part, Texas's motion for summary judgment and summary resolution of certain issues, *see id.* at 46-51, and granted, in part, the United States' motion for summary judgment to the extent it sought a declaration of New Mexico's Compact obligations, *see id.* at 52-53. The Special Master held that the Compact protects a "baseline condition" of Project operations and water supply, *id.* at 49, and that New Mexico has a duty to prevent interference with the Project deliveries to Texas and Mexico, *id.* at 52. The "details of New Mexico's downstream duty" were reserved for determination at trial. *Id.* at 46.

The Special Master's Order also implicitly rejects New Mexico's affirmative defenses to liability on the United States' claim for declaratory relief. At summary judgment, New Mexico invoked only one affirmative defense, "acquiescence," in its opposition to the United States' motion. *See* Sp. M. Docket No. 437, at 31-35. Although acquiescence was not pleaded as an affirmative defense in New Mexico's Answer, Sp. M. Docket No. 97, New Mexico's acquiescence argument in its opposition brief included the allegations it had pleaded in its other affirmative defenses.[1] The Special Master necessarily rejected those defenses in granting the United States partial summary judgment on its claim for declaratory relief. That conclusion is supported by the Order's other references to acquiescence, which are made in relation to the States' claims against each other. *See*, *e.g.*, Order at 39 ("it remains to be shown the extent to which *any state* knowingly acquiesced in another state's actions" (emphasis added)).[2]

In original actions, motions in limine are assessed in relation to the Supreme Court's interest in developing a complete record for its review as the ultimate finder of fact. Consequently, such motions are often denied, leaving any objections to be made at trial. Where

[1] New Mexico pleaded the defenses of (1) ripeness; (2) failure to provide notice; (3) failure to mitigate; (4) failure to exhaust; (5) unclean hands; (6) acceptance, waiver, and estoppel; (7) laches; and (8) failure to state a claim. Sp. M. Docket No. 97, at 6-16. In general, New Mexico's affirmative defenses alleged that the inaction of Project managers (or alleged "encouragement" of those managers) as to New Mexico groundwater pumping precludes the United States' claims for relief. *See id.*.

As noted in the United States' reply (Sp. M. Docket No. 472, at 18), the Supreme Court rejected a similar defense in *United States v. California*, 332 U.S. 19 (1947), supplemented by 332 U.S. 804 (1947); *see id.* at 39. New Mexico also failed to plead an affirmative act of prescription and cited a period of acquiescence shorter than any period previously accepted by the Court. *See* Sp. M. Docket No. 472, at 19-23.

[2] *See also*, *e.g.*, Order at 41 (New Mexico "point[ed] to evidence" that "Texas acquiesced"); *id.* at 53 (denying United States' motion as to injunctive relief pending a determination of "proof of damages taking into account . . . acquiescence" and other defenses pleaded against Texas).

a complete record has been developed to facilitate review, however, the basis for denying the motion is reduced. In *Montana v. Wyoming*, for example, the Special Master granted Wyoming's motion in limine to exclude evidence offered to establish liability in years excluded by the Special Master's previous ruling on summary judgment. *See*, *e.g.*, Tr. of Final Pretrial Hr'g Conf. at 32-33, *Montana v. Wyoming* (No. 137, Orig.).[3] Here, in light of the extensive record before the Special Master at summary judgment, it is difficult to imagine what additional evidence or argument could be presented at trial that is not already reflected in the record supporting his Order.

The United States respectfully submits that the matters below were determined in the Special Master's ruling granting, in part, the motions for summary judgment filed by Texas and the United States, and should not be subject to the presentation of conflicting evidence at trial:

(1) "New Mexico has a Compact-level duty to avoid material interference with Reclamation's delivery of Compact water to Texas: to avoid and prevent the capture of Rio Grande surface water, drain return flows, and hydrologically connected groundwater to the extent that the overall impact of such capture is inconsistent with Compact water deliveries to Texas or interferes with long-term operation of the Project." Order at 5.

(2) The Compact protects a "baseline operating condition" for the Project and its water supply, and the baseline condition of Project water supply includes return flows. *Id.* at 49.[4]

[3] *Available at* http://web.stanford.edu/dept/law/mvn/pdf/1-Final_Pretrial.pdf (last visited July 18, 2021)

[4] *See* Order at 49 ("The Compact protects the Project, its water supply, and a baseline operating condition. The baseline condition requires, at a minimum, New Mexican protection of surface water and return flows against direct and indirect capture beyond limits that are subject to material dispute.").

(3) Under the Compact, New Mexico has a duty to administer state law to protect Compact deliveries to Texas and treaty deliveries to Mexico, and not to interfere with those deliveries. *Id.* at 52.[5]

(4) New Mexico may not allow non-EBID water users to deplete the surface water supply of the Project, to the extent such depletions interfere with deliveries to Texas or Mexico. *Id.* at 53.[6]

(5) New Mexico may not allow EBID water users to deplete the surface water supply in excess of the amount allocated to EBID under its contract, to the extent such depletions interfere with deliveries to Texas or Mexico. *Id.* at 53.[7]

(6) New Mexico has "a duty to prevent groundwater pumping that adversely affects surface water and Project return flows to an extent that interferes with Project delivery of Mexican treaty water or Texas's Compact apportionment." *Id.* at 50.

(7) There are "hydrological connections between groundwater, return flows, and surface water in the Project area." *Id.* at 25.

(8) "Return flow provided by the drains was known to be an established and substantial component of Project deliveries prior to Compact ratification." *Id.* at 27.

---

[5] *See* Order at 46-47 ("New Mexico owes Texas a duty to not interfere with the Project's delivery of Texas's Compact apportionment."); *id.* at 48 ("The Compact imposes on New Mexico a duty to employ its laws to protect Compact deliveries to Texas and treaty deliveries to Mexico."); *id.* at 50 ("New Mexico must administer its state laws . . . to protect Texas's apportionment."); *id.* at 52 ("New Mexico's duty exists in the aggregate to not interfere with Project delivery of Mexican treaty water or the Compact apportionment to Texas . . . .").

[6] *Id.* at 53 (granting United States' request for a declaration that "New Mexico may not allow water users other than those within the EBID to deplete the surface water supply of the Project[,]" "to the extent such depletions interfere with Compact delivery to Texas or Treaty delivery to Mexico.").

[7] *See id*. at 53 (granting United States' request for a declaration that "New Mexico may not allow water users within EBID to deplete the surface water supply in excess of the amount allocated to EBID from the Project pursuant to EBID's contract with the Secretary of the Interior," "to the extent such depletions interfere with Compact delivery to Texas or Treaty delivery to Mexico.").

(9) Return flows from the drains "were fundamental to the determination of the Compact's normal annual release amount and to the determination of upstream delivery schedules based on the release amount." *Id.* at 38-39. *See also id.* at 35 (similar statement as to return flows generally).

(10) In "the decade that preceded Compact ratification":

[1] Crops in the Project area generally were annual, not permanent, and they consisted primarily of cotton, alfalfa, and row crops.

[2] Some groundwater well development for irrigation had occurred, but such use was not substantial, and it trailed off following the arrival of Project irrigation.

[3] Substantial urban and industrial development around the two primary Project population centers, Las Cruces, New Mexico, and El Paso, Texas, had, to a large extent, not yet occurred.

[4] Water use for villages, cities, and other non-irrigation purposes served as a minor component of overall Project area water use. *Id.* at 29 (reformatted).

(11) "[T]he compacting states understood at the time of Compact formation that the drains, the river, and the groundwater at shallow depths were hydrologically connected." *Id.* at 38.

(12) The Compacting States knew "the importance of drains below the reservoir in providing return flows" and the "existence of a general relationship between the groundwater and the return flows" was "well understood." *Id.*

(13) "New Mexican pumping below the Reservoir has interfered with surface flows and Project deliveries to Texas." *Id.* at 42 (stated at a "general level").[8]

[8] *See* Order at 7 ("New Mexico's groundwater pumping downstream of the Reservoir has affected Project return flows, surface water flows, and the Project's delivery of Texas's Compact

(14) "New Mexico has long been aware" of the effects of groundwater pumping on Project return flows, surface water flows, and the delivery of Texas's Compact apportionment. *Id.* at 7.

(15) New Mexican pumping interfered with the Project's delivery of Texas's Compact apportionment in 2003 and 2004. *Id.* at 44-46.

In addition, as noted, the United States respectfully submits that the Special Master's Order implies two determinations relating to New Mexico's affirmative defenses. First, New Mexico's affirmative defenses in the nature of acquiescence are not available against the claims of the United States. Second, New Mexico's remaining affirmative defenses, if any, apply only to the United States' claim for an injunction or remedies other than declaratory relief.

The United States requests that New Mexico be precluded from offering evidence inconsistent with those determinations. In particular, New Mexico should be barred from offering evidence about the actions of federal employees not authorized to bind the United States for the purpose of arguing that the United States forfeited any interest in the Project, the 1906 Convention, or the fulfilment of the Compact apportionment. *United States v. California*, 332 U.S. at 39.

CONCLUSION

The ruling requested by this Motion would give force to the Special Master's Order and aid the United States in making efficient use of the trial time it shares with Texas. Accordingly, the United States requests that the Special Master declare that

---

apportionment."); *id.* at 10 (it is "established as a general matter" that "New Mexico's groundwater pumping has affected Project operations and Texas's Compact water deliveries.").

evidence may not be offered at trial for the purpose of contesting the matters determined on the motions for summary judgment by the United States and Texas, as set forth above.

Respectfully submitted this 20th day of July 2021.

ELIZABETH B. PRELOGAR
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEAN E. WILLIAMS
Acting Assistant Attorney General

/s/ James J. DuBois
JAMES J. DuBOIS
R. LEE LEININGER
Trial Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street, South Terrace – Suite 370
Denver, CO 80202

JUDITH E. COLEMAN
JENNIFER A. NAJJAR
Trial Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20004

FREDERICK LIU
Assistant to the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001