

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 IN LIMINE**

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August 5th, 2021

ARGUMENT.

The Special Master should deny Texas' Motion in Limine No. 1 because it seeks to exclude evidence that may be relevant to the division of Project water supply between New Mexico and Texas.

The special master has reserved three substantive issues for trial. These are, generally, identification of the Rio Grande Project's baseline condition, division of Project water supply on a 57% - 43% basis, and the impact of actions by New Mexico and Texas on Project water supply. See, Order May 21, 2021 p. 25, 44. Texas' Motion in Limine No. 1 seeks to exclude evidence of water use, operations, and impacts in Texas that may be relevant to these issues. Texas calls this evidence of Texas' intra-district operations.

As part of those three issues for trial, the Special Master specifically recognized Texan pumping and capture of return flows were relevant to Project deliveries in Texas. *Id.* at 44. Further, the Special Master has recognized that "the states intended Texas

and southern New Mexico to share the balance [of Project water supply] as adjusted for system losses, return flow reuse, and natural but unreliable intermittent arroyo inflows below the Reservoir.” *Id.* at 17. Facts related to the American Canal Extension, municipal effluent discharge, drain flows, and discharge of Project water all directly relate to these issues the Special Master has identified as relevant. See, Texas’ *Motions in Limine* p. 4. defining these as “Texas intra-district operations.” Texas wants to limit evidence to only New Mexico’s portion of the Project water supply, ignoring the programmatic operations of the Project and whether either New Mexico or Texas have received its share of water. Texas does not explain how, without defining Project water supply or the baseline condition throughout the Project area, the Special Master can look only at uses within New Mexico to determine whether either New Mexico or Texas are exceeding their apportioned Project water supply.

How the Texas water district delivers Project water, intercepts return flows and drain flows, and takes actions that are credited for or not counted against Texas' 43% of Project water supply may impact how much water the Project releases or how much it can carry over in storage for multiple years. The amount the Project releases or keeps in storage directly relates to Colorado's Compact rights and obligations. It impacts how often a spill might occur, Article VI, Colorado's ability to store in its own reservoirs, Article VII, and whether Colorado must release its stored debit water, Article VIII.

Texas' view of the relevant issues for trial is too narrow. Texas argues that the U.S. Bureau of Reclamation "takes over the job of delivering the apportioned water to the Project beneficiaries" and that accounting of Project water is "purely a matter of [Reclamation] law and not the Compact." Texas' *Motions in Limine* pp. 3, 12. Yet, even if controlled by Reclamation law, impacts on the distribution of Project water supply may be relevant to this dispute. *Sprint/United Mgmt. Co.*

v. Mendelsohn, 552 U.S. 379, 387 (2008) (“ Relevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case . . .”). Without clearly defining the Project water supply and its distribution, New Mexico and Texas risk enlarging the amount released from Project Storage. Rather than limiting each state to its appropriate share of the Project water supply, enlarging any share could cause harm to upstream Colorado by increasing Project releases, keeping Project Storage low, and reducing the number of spills. See, Order May 21, 2021 pp. 18-19 (“downstream water use might affect all three states”). To avoid harming Colorado’s rights under the Compact, the Special Master should allow evidence of Project water distributions and impacts thereon caused by both New Mexico and Texas.

CONCLUSION.

The Special Master should deny Texas' Motion in Limine No. 1 that seeks to exclude evidence relating to Texas intra-district operations.

Respectfully submitted this 5th day of August 2021,

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This is to certify that on the 5th day of August 2021, I caused a true and correct copy of the **State of Colorado's Response to State of Texas's Motion in Limine** 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 5th day of August 2021,

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