

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 OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 TO
THE STATE OF TEXAS'S MOTION FOR CONTINUANCE OF TRIAL SETTING**

Maria O'Brien*
Sarah M. Stevenson
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
500 Fourth Street N.W., Suite 1000
P.O. Box 2168
Albuquerque, New Mexico 87103-2168
Telephone: 505-848-1803
mobrien@modrall.com
sarah.stevenson@modrall.com
Attorneys for El Paso County Water Improvement District No. 1
**Counsel of Record*

Renea Hicks
Law Office of Max Renea Hicks
P.O. Box 303187
Austin, TX 78703
(512) 480-8231
rhicks@renea-hicks.com

August 21, 2021

RESPONSE OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 TO THE STATE OF TEXAS'S MOTION FOR CONTINUANCE OF TRIAL SETTING

The El Paso County Water Improvement District No. 1 (“EP1”)¹ submits this response in support of Texas’s Motion for Continuance of Trial Setting (Doc. 562) and to propose an alternative, potentially time-and resource-saving path forward in this case.

The basis for the continuance motion is that, less than a month before the scheduled commencement of trial, the attorney who has served as Texas’s lead counsel for the last nine years is suddenly confronted with a serious and unexpected family health emergency. The emergency requires his personal attention at home and will prevent Mr. Somach’s in-person attendance in Cedar Rapids for the duration of the three-month trial. He is the key legal player on the Texas team, has headed the State of Texas’s case from its beginning, including legal briefing and argument; he directed the course of discovery and is instrumental in the necessary detailed planning for trial, including witness preparation and preparing for the myriad legal issues that inevitably arise in a trial’s course.

In EP1’s view, this circumstance alone suffices to justify the requested six-month continuance without need for elaborate argument. No doubt, a continuance would cause some disruption and inconvenience in rearranging schedules. But disruption and inconvenience are not, in themselves, cognizable harm in the form of prejudice to any party in this case. The plaintiff in the case, Texas, has plausibly said it would be prejudiced if the trial is not continued in these circumstances. Texas Mot. at 6. Of course, it will be up to the other affected parties in the case, New Mexico and the United States, to offer their position on Texas’s motion, but if it is in opposition, they should be required to demonstrate actual prejudice to their case, something beyond mere inconvenience.

¹ Adopting the consensus acronym, “EP1” is used here instead of the “EPCWID” reference typically used by this district.

The critical importance of lead counsel and the case schedule have been discussed in previous party filings. While not comparable in the degree of personal seriousness, New Mexico itself argued in March 2020 for a nine-month delay in proceedings. Six months of the delay was premised on the departure “for family and personal reasons” of the person New Mexico described as “lead counsel within the firm” *See* State of New Mexico’s Request for Emergency Hearing (Doc. 333) at 5-6.² In support of its request for delay, New Mexico closed this part of its argument by asserting: “every member of the team is critical and *none more so than the lead trial counsel.*” *Id.* at 6 (emphasis added). If this was a critical factor then, when the case was in its discovery phase, it is even more critical now, with the case on the verge of trial.

A nationwide surge of COVID-19 infections at the time pretermitted the necessity of directly grappling with the scheduling implications of an attorney’s departure. Still, case proceedings in fact were delayed in light of New Mexico’s request. Discovery was stayed, and New Mexico’s deadline for rebuttal expert reports was extended, with a final ruling on the length of any New Mexico extension deferred. Order of April 1, 2020 (Doc. 339) at 2; *see also* Order of May 5, 2020 (Doc. 351) Attachment A (amending trial management schedule to take into account extensions and delays).

Any concerns the Special Master may harbor about issues of delay of the September trial should not focus on the *bona fides* of Texas’s motion standing in isolation. COVID-19 has again reared its head, just as it did in March 2020 when proceedings had to be delayed and the normal course of litigation (at that time, depositions) had to be modified to take into

² Texas’s response, supporting a partial delay, pointed out that the designated lead counsel for New Mexico at the time actually was a different person. Doc. 334 at 2. It should be noted that, for its part, EP1 did not speak directly to the question of delay, but instead to what legal rulings could be made to advance the case, regardless of disposition of the delay request. Doc. 335 (urging ruling on New Mexico counterclaims).

account the unfortunate reality of the public health crisis confronting the country.³ These concerns are already affecting plans for in-person attendance at the trial. *See* S. Barncastle Letter to Special Master (Aug. 20, 2021).

There is at least the prospect the current surge will either halt plans to commence the trial in-person or interrupt in-person proceedings part way through. It is not simply that such a prospect of moving to an all-remote trial is not optimal. The real problem is that conducting a trial as important as this one is to two states of the Union and to the United States remotely for three months seems unacceptable if there are ways to avoid it. And there are ways to avoid it, or at least significantly reduce the likelihood a remote-trial approach would be needed.

One way would come with a grant of the requested continuance. A six-month delay would push the trial's commencement into early Spring, which would carry with it a greater possibility that the current surge will have subsided to a degree that makes the possibility of an in-person trial without disruption more likely.

The other way requires a more significant adjustment, but it could, in the long run, ultimately save time and resources that would have to be devoted to this case. That approach would be to bundle up the issues already addressed by the Special Master—further detailed below—and present a Special Master's Report and Recommendation to the Court within the next few months instead of proceeding to trial now. The time cycle for disposition of the first report presented to the Supreme Court, counting from the Supreme Court's receipt of the first

³ According to the latest update from the United States Centers for Disease Control and Prevention, “The current 7-day moving average of daily new cases (133,056) increased 14.0% compared with the previous 7-day moving average (116,740). The current 7-day moving average is 93.9% higher compared to the peak observed on July 20, 2020 (68,636).” *See* <https://www.cdc.gov/coronavirus/2019-ncov/covid-data/covidview/index.html> (site visited Aug. 20, 2021).

interim report on February 13, 2017, to the Supreme Court's ruling on exceptions to it on March 20, 2017, was thirteen months.

But comparing that thirteen month period (or something akin to it in a second round of report, exceptions, and decision) to the six-month continuance Texas requests is not a simple apples-to-apples comparison. It is likely that such an approach would ultimately lessen the time and resources needed for a trial following a second Supreme Court ruling.

Texas has suggested that it might make sense at this time to present the Court with the issue of whether Texas should be given leave to file its Supplemental Complaint. Texas Motion at 6. There is that, but there is much more that is ripe for Supreme Court review. The Special Master has issued an extensive ruling on summary judgment issues. Order of May 21, 2021 (Doc. 503). That ruling is based on extensive undisputed material facts and involves fundamental legal issues in the case that are ripe for Supreme Court disposition. The Order of April 14, 2020 (Doc. 340), also addresses basic legal principles to guide the case.⁴ Then, there is the Order of March 31, 2020 (Doc. 338), whose principal focus is the New Mexico counterclaims, along with affirmative defenses. The Supreme Court has never decided whether New Mexico should be allowed to proceed with its counterclaims and, if so, which ones. That is a particularly critical issue, especially at this juncture. While the March 31, 2020, order narrowed the counterclaims New Mexico can pursue as a legal matter, it is abundantly clear at this point that New Mexico intends to proceed with developing the full panoply of facts pertinent to not only the counterclaims that the Special Master allowed it to continue pursuing, but also the dismissed counterclaims. That is, the case is now proceeding with the understanding (mistaken in EP1's view) that the March 31 order may have

⁴ This includes issues about the role played by the First Interim Report of the Special Master of February 9, 2017 (Doc. 54).

constituted a legal ruling narrowing New Mexico’s counterclaims, but it had no effect whatever in narrowing the pertinent facts and is in no way shaped by the Special Master’s subsequent May 2021 summary judgment ruling narrowing the legal issues for trial. A Supreme Court ruling on the matters subject to both the Special Master’s March 2020 and May 2021 rulings sooner than later is likely to provide much needed clarity on what facts remain germane for a liability phase trial—a major issue at this point whose resolution seems indeterminate.

In short, even aside from the matter of the continuance or COVID-19’s impact, the case as it now stands would greatly benefit from a Supreme Court decision on a wide array of matters presenting primarily questions of law that will determine the way the case should go forward and will likely narrow the range of facts that need to be tried. The combined circumstance of the need for a continuance and the uncertainties created by the new COVID-19 surge make the time right for taking this step. Rather than slowing things down, it nearly certainly will lead to a more focused, more efficient, and better trial on liability issues and will ultimately accelerate the time for final disposition of this case.

Date: August 21, 2021

Respectfully Submitted,

/s/ Maria O’Brien
Maria O’Brien*
Sarah M. Stevenson
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
500 Fourth Street N.W., Suite 1000
Albuquerque, New Mexico 87102
mobrien@modrall.com
sarah.stevenson@modrall.com
**Counsel of Record*

Renea Hicks
Law Office of Max Renea Hicks
P.O. Box 30318
Austin, Texas 78703
(512) 480-8231
rhicks@renea-hicks.com

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

◆

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

This is to certify that on the 21st day of August, 2021, I caused a true and correct copy of the **Response of El Paso Water Improvement District No. 1 to the State of Texas's Motion for Continuance of Trial Setting** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted,

/s/ Maria O'Brien
Maria O'Brien

SPECIAL MASTER

HONORABLE MICHAEL J. MELLOY

Special Master
United States Circuit Judge
111 Seventh Avenue, S.E., Box22
Cedar Rapids, IA 52401-2101

TXvNM141@ca8.uscourts.gov
(319)432-6080

MICHAEL E. GANS

Clerk of the Court
United States Court of Appeals – Eighth Circuit
Thomas F. Eagleton United States Courthouse
111 Seventh Avenue, S.E., Box22
Cedar Rapids, IA 52401-2101

TXvNM141@ca8.uscourts.gov
(314) 244-2400

MEDIATOR

HON. OLIVER W. WANGER (USDJ RET.)

WANGER JONES HELSLEY PC
265 E. River Park Circle, Suite 310
Fresno, California 93270

owanger@wjhattorneys.com
dpell@wjhattorneys.com
(559) 233-4800 Ext. 203

UNITED STATES

JEFFREY WALL*

Acting Solicitor General

JEAN E. WILLIAMS

Deputy Assistant Attorney General

FREDERICK LIU

Assistant to the Solicitor General

U.S. DEPARTMENT OF JUSTICE

950 Pennsylvania Avenue, NW

Washington, DC 20530-0001

supremectbriefs@usdoj.gov

(202) 514-2217

JAMES J. DUBOIS*

R. LEE LEININGER

U.S. DEPARTMENT OF JUSTICE

Environment & Natural Resources Division

999 18th Street

South Terrace – Suite 370

Denver, Colorado 80202

james.dubois@usdoj.gov

(303) 844-1375

lee.leininger@usdoj.gov

(303)844-1364

Seth Allison, Paralegal

seth.allison@usdoj.gov

(303)844-

7917

JUDITH E. COLEMAN

JOHN P. TUSTIN

JENNIFER A. NAJJAR

U.S. DEPARTMENT OF JUSTICE

Environment & Natural Resources Division

P.O. Box 7611

Washington, D.C. 20044-7611

judith.coleman@usdoj.gov

(202) 514-3553

jennifer.najjar@usdoj.gov

(202) 305-

0476

STATE OF NEW MEXICO

HECTOR H. BALDERAS
New Mexico Attorney General
General

TANIA MAESTAS
P.C.

Deputy Attorney General

CHOLLA KHOURY
Assistant Attorney General

ZACHARY E. OGAZ
Assistant Attorney General
STATE OF NEW MEXICO

P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672

hbalderas@nmag.gov
tmnaestas@nmag.gov
ckhoury@nmag.gov
zogaz@nmag.gov
psalazar@nmag.gov

JOHN DRAPER
Special Assistant Attorney General
DRAPER AND DRAPER, LLC
Donna Ormerod - Paralegal

325 Paseo De Peralta
Santa Fe, NM 87501
505-570-4591 (Direct)

john.draper@draperllc.com
donna.ormerod@draperllc.com

Special Assistant Attorneys General

JEFFREY WECHSLER
Special Assistant Attorney General

Diana Luna - Paralegal
MONTGOMERY & ANDREWS
325 Paseo De Peralta
Santa Fe, NM 87501
505-986-2637

jwechsler@montand.com dluna@montand.com

MARCUS J. RAEL, JR.*
Special Assistant Attorneys

ROBLES, RAEL & ANAYA,

LUIS ROBLES
SUSAN BARELA
500 Marquette Avenue NW,
Suite 700
Albuquerque, NM 87102
505-242-2228

marcus@roblesrael.com
luis@roblesrael.com
susan@roblesrael.com

Bonnie DeWitt
bonnie@roblesrael.com

Chelsea Sandoval
chelsea@roblesrael.com

Pauline Wayland
pauline@roblesrael.com

BENNET W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP

TROUT RALEY
1120 Lincoln Street, St 1600

Denver, Colorado 80203
303-861-1963
braley@troutlaw.com
lthompson@troutlaw.com
mkopp@troutlaw.com

STATE OF COLORADO

CHAD M. WALLACE*
LAW
Senior Assistant Attorney General
PHILIP J. WEISER
Colorado Attorney General
ERIC R. OLSEN
Colorado Solicitor General
LAIN LEONIAK
Acting First Assistant Attorney General
PRESTON V. HARTMAN
Assistant Attorney General

chad.wallace@coag.gov
720-508-6281 (direct)

Preston.hartman@coag.gov
720-508-6257 (direct)

COLORADO DEPARTMENT OF
Ralph Carr Judicial Center
7th Floor
1300 Broadway
Denver, Colorado 80203
Tel. 720-508-6281

Nan Edwards, Paralegal II
nan.edwards@coag.gov

eric.olson@coag.gov

STATE OF TEXAS

STUART L. SOMACH* (916) 446-7979
ANDREW M. HITCHINGS (916) 803- 4561 (cell)
ROBERT B. HOFFMAN ssomach@somachlaw.com ahitchings@somachlaw.com
FRANCIS M. "MAC" rhoffman@somachlaw.com mgoldsberry@somachlaw.com
GOLDSBERRY II tbarfield@somachlaw.com bjohnson@somachlaw.com
sklahn@somachlaw.com
rdeitchman@somachlaw.com

THERESA C. BARFIELD
SARAH A. KLAHN
BRITTANY K. JOHNSON
RICHARD S. DEITCHMAN
SOMACH SIMMONS & DUNN, PC
500 Capital Mall, Suite 1000
Sacramento, CA 95814
Tel. 916-446-7979
Cell 916-803-4561

Corene Rodder – Secretary
crodder@somachlaw.com
Crystal Rivera – Secretary
crivera@somachlaw.com

Yolanda De La Cruz – Secretary
ydelacruz@somachlaw.com

KEN PAXTON
Attorney General
JEFFREY C. MATEER
First Assistant Attorney General
DARREN L. MCCARTY
Deputy Attorney General for Civil Litigation
PRICILLA M. HUBENAK
Chief, Environmental Protection Division

Priscilla.Hubenak@oag.texas.gov

P.O. Box 12548
Austin, TX 78711-2548

**AMICI / FOR INFORMATIONAL PURPOSES ONLY ALBUQUERQUE
BERNALILLO COUNTY WATER UTILITY AUTHORITY**

JAMES C. BROCKMANN*

(505) 983-3880

JAY F. STEIN

jcbrockmann@newmexicowaterlaw.com

STEIN & BROCKMANN, P.A.

jfstein@newmexicowaterlaw.com

P.O. Box 2067

administrator@newmexicowaterlaw.com

Santa Fe, New Mexico 87504

PETER AUH

(505) 289-3092

ALBUQUERQUE BERNALILLO COUNTY

pauh@abcwua.org

WATER UTILITY AUTHORITY

P.O. Box 568

Albuquerque, NM 87103-0568

CITY OF EL PASO

DOUGLAS G. CAROOM*

(512) 472-8021

SUSAN M. MAXWELL

dcaroom@bickerstaff.com

BICKERSTAFF HEATH DELGADO

smaxwell@bickerstaff.com

ACOSTA, LLP

2711 S. MoPac Expressway

Building One, Suite 300

Austin, TX 78746

CITY OF LAS CRUCES

JAY F. STEIN *

(505) 983-3880

JAMES C. BROCKMANN

jcbrockmann@newmexicowaterlaw.com

STEIN & BROCKMANN, P.A.

jfstein@newmexicowaterlaw.com

P.O. Box 2067

administrator@newmexicowaterlaw.com

Santé Fe, New Mexico 87504

JENNIFER VEGA-BROWN

(575) 541-2128

Robert Cabello

jvega-brown@las-cruces.org

LAW CRUCES CITY ATTORNEY'S OFFICE

rcabello@las-cruces.org

P.O. Box 20000

Las Cruces, New Mexico 88004

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCASTLE*

BARNCASTLE LAW FIRM, LLC

1100 South Main, Ste. 20

P.O. Box 1556

Las Cruces, NM 88004

Janet Correll – Paralegal

(575) 636-2377

(575) 636-2688 (fax)

samantha@h2o-legal.com

janet@h2o-legal.com

**SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS
ASSOCIATION**

Arnold J. Olsen

Hennighausen Olsen and McCrea, L.L.P.

P.O. Box 1415

Roswell, NM 88202-1415

Malina Kauai – Paralegal

Rochelle Bartlett – Legal Assistant

ajolsen@h2olawyers.com

mkauai@h2olawyers.com

rbartlett@h2olawyers.com

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT

ANDREW S. “DREW” MILLER*

KEMP SMITH LLP

919 Congress Avenue, Suite 1305

Austin, TX 78701

(512) 320-5466

dmiller@kempsmith.com

STATE OF KANSAS

TOBY CROUSE*

Solicitor General, State of Kansas

DEREK SCHMIDT

Attorney General, State of Kansas

JEFFREY A. CHANAY

Chief Deputy Attorney General

BRYAN C. CLARK

Assistant Solicitor General

DWIGHT R. CARSWELL

Assistant Attorney General

120 S. W. 10th Ave., 2nd Floor

Topeka, KS 66612

(785) 296-2215

toby.crouse@ag.ks.gov

bryan.clark@ag.ks.gov

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON*
DAVIDSON LAW FIRM, LLC
4206 Corrales Road
P.O. Box 2240
Corrales, NM 87048
(505) 792-3636

ttd@tessadavidson.com

Jo Harden – Paralegal

jo@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON*
UTTUN & KERY, P.A
P.O. Box 2386
Santa Fe, New Mexico 87504

(505) 699-1445
john@uttkery.com

General Counsel
New Mexico State University
Hadley Hall Room 132
2850 Weddell Road
Las Cruces, NM 88003

(575)646-2446
gencounsel@nmsu.edu