

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 PRETRIAL CONFERENCE STATEMENT

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Pursuant to the Special Master’s Trial Management Order of April 9, 2021, as modified by the Special Master’s Order of August 19, 2021, the United States provides the following Pretrial Conference Statement.

GENERAL NATURE OF THE CASE

The United States intervened in this original-jurisdiction action because groundwater pumping by New Mexico water users reduces the surface-water supply available to the Rio Grande Project and interferes with Project deliveries that effectuate the apportionment contemplated in the Rio Grande Compact. On summary judgment, the Special Master ruled that the Compact protects a “baseline operating condition” for the Project and that New Mexico has a corresponding “Compact-level duty” to prevent the capture of “surface water, drain return flows, and hydrologically connected groundwater” to an extent that is “inconsistent with Compact deliveries to Texas or interferes with the long-term operation of the Project.” Order of May 21, 2021, Sp. M. Docket No. 503, at 49; *id.* at 5.

The evidence presented at trial will show that New Mexico has not fulfilled that duty. The evidence will demonstrate that the Compacting States intended to protect a baseline operating condition for the Project that includes the reuse of return flows, undiminished by new or additional water-resource development. The evidence will demonstrate that, contrary to that intent, New Mexico has allowed groundwater development to an extent that depletes Project return flows and water supply. As a consequence, the current operating condition for the Project is substantially diminished from the baseline condition that the Compacting States intended to protect. The 2008 Operating Agreement was developed by the irrigation districts and the United States in the absence of remedial action by New Mexico. It results in deliveries to Texas

consistent with those in the period 1951-1978, thereby addressing some of the impacts of New Mexico pumping, but not all.

The evidence will also show that New Mexico pumping is interfering with the long-term operation of the Project. New Mexico cannot deny, and its witnesses do not dispute, that groundwater pumping diminishes Project supply, Project deliveries, and Project efficiency, even in years when the Project is able to release sufficient water to make deliveries to Texas and Mexico. The evidence will show that New Mexico has disregarded these known and admitted impacts and that it has failed to implement a system for ensuring compliance with its Compact obligations.

The United States respectfully requests that the Special Master issue a report and recommendation declaring that New Mexico has failed to meet its obligations under the Compact and that remedies are warranted consistent with requests for relief in the Complaint in Intervention, with the scope of the remedy to be determined by trial at a later date.

STIPULATED AND ESTABLISHED FACTS

As of this filing, the United States has not stipulated to any facts. The United States refers to its Motion in Limine regarding Summary Judgment Rulings, Sp. M. Docket No. 553, as a statement of the facts that the United States believes have been established for purposes of trial.

THE UNITED STATES' FACTUAL CONTENTIONS

The United States intends to support the following contentions through the evidence at trial:

1. The baseline operating condition for the Project in 1938 involved irrigation with surface water, the return of water to the Rio Grande after application to irrigation, and carriage of Project releases and return flows by the river, undiminished by groundwater pumping, such that

the Project could provide a supply of water for irrigation of 88,000 acres in New Mexico, and 67,000 acres in Texas.

2. The water supply available to the Project in 1938 included Rio Grande storage, water released from storage, all tributary inflows to the Rio Grande below Elephant Butte, and the return of water to the river (and carriage by the river) after application to irrigation, undiminished by groundwater pumping developed after 1938.

3. The Compacting States intended for the apportionment of the Rio Grande below Elephant Butte to be accomplished programmatically through deliveries by the Project, consistent with the baseline condition of Project operations and water supply, undiminished by new or additional development such as groundwater pumping.

4. Groundwater pumping in the Rincon and Mesilla basins in New Mexico depletes and diminishes the Rio Grande surface water flows available to the Rio Grande Project, materially interfering with deliveries to Texas and interfering with the long-term operation of the Project.

5. The 2008 Operating Agreement does not deprive New Mexico of water to which it is entitled under the Compact.

6. The United States has not acquiesced in, consented to, or otherwise forfeited its ability to protect the Project water supply from depletions caused by post-1938 development, including groundwater pumping.

7. After the adoption of the 2008 Operating Agreement, groundwater pumping in New Mexico continues to materially interfere with the long-term operation of the Project.

8. New Mexico has failed to administer state law to prevent post-1938 water resource development from interfering with deliveries to Texas and Mexico and with the long-term operation of the Project.

WITNESSES

Attachment A lists the witnesses who may or will be called by the United States to offer testimony at the trial. The United States reserves the right to call any of the witnesses identified by any other party, including expert witnesses who have been listed either in other parties' expert disclosures, their disclosures pursuant to Rule 26(a), their discovery responses, or their pretrial statements. The United States also reserves the right to call any additional witnesses necessary for impeachment and rebuttal as they may become known or as may be required by the evidence introduced at trial.

The United States incorporates herein its disclosures of expert witnesses, the expert reports of those witnesses if applicable, and all related materials, as notice to the other Parties about the testimony expected to be elicited from each of those experts at trial. The United States has not designated the custodians of any records, but reserves the right to do so as necessary to establish the authenticity and foundation of any record.

EXHIBITS

Attachment B lists the exhibits the United States intends to introduce into evidence. These exhibits have been made available for inspection by counsel for all Parties prior to the pretrial conference. The United States reserves the right to use at trial any exhibits designated by any other party during trial. The United States further reserves the right to designate additional exhibits as may become necessary for impeachment or rebuttal during trial.

MATTERS TO BE ADDRESSED AT THE PRETRIAL CONFERENCE

1. The United States requests the opportunity to present a brief opening statement at trial.
2. The United States requests clarification as to the extent of the case Colorado may present. Colorado identified over 1,600 exhibits in the lists it exchanged earlier this summer.

Many of the listed exhibits appear to pertain to credit water accounting, which is the subject of New Mexico counterclaims to which Colorado is not a party.

3. The United States requests that the Special Master and/or the parties develop a protocol for addressing potential COVID-19 exposures if/when they occur among persons present live in the courtroom.

Respectfully submitted this 25th day of August 2021,

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CERTIFICATE OF SERVICE

This is to certify that on the 25th day of August, 2021, I caused a true and correct copy of the **UNITED STATES OF AMERICA’S PRETRIAL CONFERENCE STATEMENT** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ Seth C. Allison
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Special Master

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