

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

**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY'S
BRIEF OPPOSING THE STATE OF TEXAS'S MOTION
FOR CONTINUANCE OF TRIAL SETTING**

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August 26, 2021

INTRODUCTION

The Albuquerque Bernalillo County Water Utility Authority (“Water Authority”) submits this response in opposition to the State of Texas’s Motion for Continuance of Trial Setting and Memorandum in Support (Texas’s Motion for Continuance”).¹ The Water Authority also supports and joins in the State of New Mexico’s Response in Opposition to the State of Texas’s Motion for Continuance of Trial Setting and also the responses of other New Mexico *amici* opposing Texas’s Motion for Continuance.

ARGUMENT

In addition to the points made by New Mexico in its Response in Opposition to Texas’s Motion for Continuance, the Water Authority raises four additional points, describes the prejudice to it if a continuance is granted, and addresses a trial management issue.

A. New Mexico’s request for a stay was denied due to a counsel change.

First, when New Mexico sought to delay the litigation by six months due to the loss of its lead litigation counsel, Texas responded:

- a. The New Mexico Request proposes a six-month stay of the case to secure new trial counsel, and an additional three-month discovery period thereafter, for a total extension of nine months. This requested extension is unreasonable and unwarranted.
- b. New Mexico is represented by two law firms (Robles, Rael & Anaya; Trout Raley), as well as the New Mexico Attorney General’s Office. Marcus Rael, with Robles, Rael & Anaya, has been the designated lead counsel for this matter since well before the inception of all discovery. Lisa Thompson, with the firm of Trout Raley, has taken the lead in the majority of the expert depositions involving the scientific modeling efforts by both New Mexico and Texas. Texas should not be subjected to further delay of these proceedings under the guise of New Mexico seeking new counsel when New Mexico has consistently had the same primary attorneys working on the case since at least 2016, well before discovery commenced, separate and aside from the issue of Mr. Roman’s departure. Adding another lawyer to the team does not justify a stay of the case to the detriment of Texas.

¹ The Water Authority wishes Mr. Somach and his family the best.

See State of New Mexico's Request for Emergency Hearing, March 13, 2020, and Texas's letter to the Special Master in response dated March 16, 2020. By Order dated April 1, 2020, the Special Master ruled:

3. New Mexico's emergency motion to stay all proceedings pending the retention of new trial counsel is denied. Whether New Mexico will be given some more limited extension will be discussed at a subsequent status conference in this case. Any extension will depend in a large extent to the length of any discovery stay that may be required as the result of the Covid-19 limitations on travel and social distancing.

Ibid.

When New Mexico made its request for a stay of the case, it was losing its lead litigation attorney altogether. In this case, Mr. Somach can still participate in the trial remotely. Texas's argument against New Mexico is equally applicable against itself. Because Texas remains well represented by the multitude of other attorneys it has working on the case, Texas's Motion for Continuance should be denied.

B. If a continuance is granted, the status quo must be maintained.

Second, Texas contends a continuance will not provide an advantage to any party but maintain the status quo. A review of pre-trial activities and motions shows that Texas has continued to "supplement" discovery, expert opinions, and exhibits after the deadlines. Recently, Texas struggled to properly produce its trial exhibits and as of August 24, 2021, is still producing documents to add to the Final Exhibit List attached to its Final Pretrial Conference Statement dated August 25, 2021. There is a very real concern that a continuance will not maintain the status quo. The temptation will be great to seek "corrections" to expert reports, and to designate additional exhibits. If the Special Master grants a continuance, there should be a prohibition against adding to or changing trial evidence during the continuance

C. Settlement negotiations have not proved to be productive.

Third, Texas suggests that the additional delay could be utilized by the parties to continue settlement negotiations. Despite a mediator and the time all parties set aside for settlement negotiations starting in December of 2020 and continuing through the spring of 2021, there has been no progress. Moreover, Texas and New Mexico have participated several times in intense settlement discussions since 2015, and there has been no forward movement. If settlement negotiations were not productive before Texas's Motion for Continuance, there is no reason to believe another six months will make a difference.

D. Texas's Motion for Leave to File Complaint cannot be significantly advanced or resolved in six months.

Fourth, Texas argues that if a continuance is granted and if the Special Master seeks the Court's advice on Texas's Motion for Leave to File Supplemental Complaint, a ruling could avoid complication of the case in the future.² Texas assumes that if the Court grants its motion for leave to file a new complaint to pursue a completely different case, the issues raised in the Supplemental Complaint will be resolved on summary judgment without discovery, and that those issues then would be folded into the remedies phase of the existing litigation. Texas's assumptions and timing are highly suspect. The process will take much longer than six months.

The most likely procedure is that the Special Master submits Texas's Motion for Leave to File Supplemental Complaint to the Court. Whether the Court refers the motion to the Special Master for a report and recommendation or whether the Court addresses the motion without the Special Master's input, there will have to be briefs on the merits, oral argument, and a decision

² See State of Texas's Motion for Leave to File Supplemental Complaint, the Supplemental Complaint, and the Brief in Support of Motion for Leave to File the Supplemental Complaint, filed with the Special Master on June 24, 2021.

which could take six to eighteen months. Because the issues raised in Texas's Supplemental Complaint are completely different from the existing issues in the case, it is questionable whether the Court would grant the motion for leave to file.³ If the Court grants the motion for leave to file, the new case will be referred to the Special Master and he will enter a new case management order. This will include a significant timeframe for discovery. While Texas contends that the issues in the Supplemental Complaint would be ripe for summary judgment, the more likely result is that trial would have to be held on the merits. This would require new expert reports, and further discovery prior to trial. In sum, a continuance of six months would not provide time to resolve Texas's Motion for Leave to File Supplemental Complaint, let alone begin to address the merits on dispositive motions.

E. The Water Authority will be prejudiced if a continuance is granted.

New Mexico described the prejudice to it and New Mexico *amici* if a continuance is granted. Specific to the Water Authority, Texas and the United States have argued for a new 1938 condition below and above Elephant Butte Reservoir. The United States continues to pursue its claim that all groundwater below the Reservoir is Project water and that all groundwater appropriators must get a federal contract from the U.S. Bureau of Reclamation to use groundwater, usurping New Mexico's jurisdiction and authority to regulate groundwater. If Texas and the United States are successful in these claims, it will have an adverse impact on the Water Authority's water rights when these principles are applied above Elephant Butte Reservoir to other

³ See Albuquerque Bernalillo County Water Utility Authority *Amicus Curiae* Brief Regarding Whether Texas's Proposed Supplemental Complaint Exceeds the Scope of the Original Complaint Accepted for Filing by the Court, State of New Mexico's Limited Response to Texas's Motion for Leave to File Supplemental Complaint, State of Colorado's Response to Texas' Motion to File Supplemental Complaint, and letter from the Lower Rio Grande *Amici* in response to Texas's Motion for Leave to File Supplemental Complaint, all dated July 15, 2021, and all detailing the significantly expanded scope of Texas's proposed Supplemental Complaint as compared to the existing litigation.

Reclamation projects in New Mexico.⁴ Moreover, Texas has now filed a Motion for Leave to File Supplemental Complaint that directly threatens water use and administration above Elephant Butte Reservoir through New Mexico and into Colorado. Until these claims are resolved, there is a cloud of uncertainty over the Water Authority's water rights and New Mexico's authority over groundwater and its administration of the Rio Grande Compact intrastate. Resolution of these issues should not be delayed.

Counsel, witnesses, and employees of the Water Authority have also planned their professional and personal schedules around trial in Cedar Rapids from September to December of 2021. This includes airline, hotel, and rental car reservations for the beginning of trial. A delay of trial will be disruptive and costly and constitute prejudice to the Water Authority.

F. If a continuance is granted, trial limits should be expanded or eliminated.

Finally, for quite some time, the Special Master has endeavored to squeeze trial into a timeframe that will conclude trial before Christmas of 2021. The effort has been made to try to ensure the Court will be able to act on the Special Master's next report and recommendation within a particular term of the Court. To keep that schedule, very restrictive time limits have been placed on the parties to present their cases. Texas now seeks to completely upend that schedule.

If Texas's Motion for Continuance is granted, the Special Master should also reconsider eliminating the restrictive time limits on case presentations. The Water Authority is concerned that artificial limits on trial time will not allow full presentation of the evidence and ultimately result in a denial of due process.⁵ In an original action of this magnitude involving an interstate

⁴ The ramifications are even greater if these principles were applied to Reclamation projects throughout the western United States.

⁵ The Water Authority is confident in the Special Master's ability to keep the trial moving at a reasonable pace even without specific hourly limits.

water compact, the resolution of the case will affect hundreds of thousands of municipal water users and thousands of agricultural users. The livelihoods of many are at stake and the economic value of the water is in the hundreds of millions of dollars. The results will be in perpetuity.

The Court's consistent philosophy in original actions has been in favor of full development of the facts. As the Court stated: "[I]n original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894) ("In the exercise of original jurisdiction . . . this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded."); *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840) ("[T]he most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength."). If the case is continued and the pressure is off to conclude trial before Christmas of 2021, the time limits should be considerably expanded or eliminated.

CONCLUSION

The prejudice and disruption to the other parties from delaying trial outweighs any inconvenience to Texas caused by Mr. Somach's unfortunate situation that prevents him from being able to attend trial in person. Texas and the United States are well represented, and Texas's Motion for Continuance should be denied.

Respectfully submitted,

/s/ James C. Brockmann

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**ALBUQUERQUE BERNALILLO
COUNTY WATER UTILITY AUTHORITY
CERTIFICATE OF SERVICE**

This is to certify that on the 26th day of August 2021, I caused a true and correct copy of the *Albuquerque Bernalillo County Water Utility Authority's Brief Opposing 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 this 26th day
of August, 2021.

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