

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



**RESPONSE OF *AMICUS CURIAE* NEW MEXICO PECAN GROWERS,
SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION
AND NEW MEXICO STATE UNIVERSITY TO THE STATE OF TEXAS'S
MOTION FOR CONTINUANCE OF TRIAL SETTING**



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**RESPONSE OF *AMICUS CURIAE* NEW MEXICO PECAN GROWERS,
SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION
AND NEW MEXICO STATE UNIVERSITY TO THE STATE OF TEXAS’S
MOTION FOR CONTINUANCE OF TRIAL SETTING**

Pursuant to the Special Master’s order entered on August 19, 2021 granting “New Mexico and any other interested party the opportunity to file their response to Texas Motion for Continuance of Trial Setting”, *amici curiae* New Mexico Pecan Growers (“NMPG”), Southern Rio Grande Diversified Crop Farmers Association (“SRGDCFA”) and New Mexico State University (“NMSU”) (together “Respondents”) respectfully submit their response in opposition to Texas’s Motion for Continuance of Trial Setting.

The NMPG, SRGDCFA and NMSU do not dispute nor in any way seek to minimize the basis of Texas’s motion for the continuance of the trial setting. Instead, Respondents submit that the absence of Mr. Somach for the trial does not prejudice Texas in the presentation of its case. A review of the attorneys of record for Texas identify eight attorneys from the law firm of Somach Simmons and Dunn, PC, and seven attorneys associated with the Texas Attorney

General's office and the Texas Solicitor General's office. Furthermore, it is important to note that Mr. Somach has played a minimal role in the conducting of depositions, and as of late, Mr. Somach has deferred to his co-counsel during arguments on motions.

Our opposition to Texas's motion should not be viewed as being unsympathetic to Mr. Somach. Instead, we recognize the vast experience of all of the attorneys representing Texas. Each of the attorneys has been actively involved, and it is clear that each of them is well-qualified to litigate the claims which have been pending before this Court.

In considering Texas's motion for the continuance of trial, the Special Master must consider the prejudice to all parties, not limited just to the adverse claims raised by the party seeking the continuance. Respondents respectfully submit that a continuance of the trial will have a severe economic impact on all farming operations in the Lower Rio Grande of New Mexico. As the Special Master could readily observe on the recent Basin Tour, under current operations most of the available project supply is allocated to El Paso County Water Improvement District No. 1, leaving members of Elephant Butte Irrigation District with a paltry surface water allocation and requiring them to pump large amounts of groundwater. This has been the practice for 12 years and will continue absent a corrective ruling in this matter. While significant flows of surface water are bypassed down to the Texas district, members of EBID must pay substantial energy and equipment costs to produce irrigation water and in many instances have had to fallow land that is no longer feasible to irrigate. In addition, well and pumping equipment that was once sufficient to provide supplemental supply is no longer adequate and must be upgraded. In many instances, the additional strain on well equipment has caused older wells to collapse or cease to function.

As presently scheduled, the trial will take place while most farming operations do not involve the irrigation of the various crops. The trial is scheduled to be completed by mid-December, 2021, and it is possible that the Special Master could enter his findings and conclusions by the beginning of the irrigation season in 2022. The Special Master in determining that the allocation of 57% to New Mexico and 43% to Texas of Project water provides the farmers a degree of certainty in the delivery of water for the upcoming irrigation year, and for the years to come. However, as long as current project operations are allowed to continue to the detriment of EBID members, a delay of the trial will continue to harm their farming operations and interrupt the opportunity for the farming community to plan for the future based upon the Special Master's finding on the allocation percentages.

It has been suggested by Texas that the extension will allow the parties to further participate in settlement negotiations. Although Respondents have provided New Mexico input in the settlement discussions, it is abundantly clear that Texas has not been serious about reaching a negotiated resolution. As an example, in June, 2021 New Mexico submitted a detailed settlement proposal to Texas. At the time Texas filed its motion to continue, it had yet to respond to the proposal.

In addition, Texas has also argued that the continuance will allow the Special Master sufficient time to seek the Supreme Court's opinion regarding Texas's motion to file a supplemental complaint. This proposition by Texas is another position that is without merit. The Special Master has indicated that he will not grant the request to file a supplemental complaint given the present scheduling. Regardless, a six-month continuance would be insufficient time to incorporate this additional claim.

For the reasons stated above, NMPG, SRGDCFA and NMSU respectfully request the Special Master to deny Texas's motion and to go forward with conducting the trial commencing on September 13, 2021, and for such other and further relief which the Special Master deems just and proper.

Respectfully submitted this 26th day of August, 2021 by:

/s/ A.J. Olsen

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/s/ Tessa T. Davidson

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/s/ John W. Utton

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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



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This is to certify that on August 26, 2021, I caused a true and correct copy of the **Response Of Amicus Curiae New Mexico Pecan Growers, Southern Rio Grande Diversified Crop Farmers Association And New Mexico State University To The State Of Texas's Motion For Continuance Of Trial Setting** to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.



_____◆_____

Respectfully submitted this 26th day of August, 2021.

/s/ A.J. Olsen

Arnold J. Olsen*

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SERVICE LIST FOR ALL PARTIES

**In The Supreme Court of the United States, Original No. 141
STATE OF TEXAS v. STATE OF NEW MEXICO and STATE OF COLORADO**

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SPECIAL MASTER

Special Master	Honorable Michael J. Melloy <i>Special Master</i> United States Circuit Judge 111 Seventh Avenue, S.E., Box 22 Cedar Rapids, IA 52401 Michael E. Gans, Clerk of Court United States Court of Appeals – Eighth Circuit Thomas F. Eagleton United States Courthouse 111 South 10th Street, Suite 24.329 St. Louis, MO 63102	(319) 432-6080 TXvNM141@ca8.uscourts.gov (314)244-2400 TxvNM141@ca8.uscourts.gov
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****Updated 4/16/2018**

Corrected the spelling of Pricilla M. Hubenak to Priscilla M. Hubenak and added her e-mail address Priscilla.Hubenak@oag.texas.gov to the Service list.

****Updated 4/18/2018**

Added Toby Crouse (toby.crouse@ag.ks.gov) as the Solicitor General for the State of Kansas and removed Stephen R. McAllister.

****Updated 4/24/2018**

Added Clerk of Court information and updated Special Master e-mail address.

****Updated 11/16/18**

Added Bryan Clark's e-mail address (bryan.clark@ag.ks.gov) for the State of Kansas

****Updated 3/14/19**

Updated Attorney General of Colorado to Philip J. Weiser
 Added Solicitor General Eric R. Olson (eric.olson@coag.gov) for the State of Colorado

****Update 3/19/19**

Added legal assistants Shannon Gifford (shannong@modrall.com) and Leanne Martony (leannem@modrall.com) for El Paso County Water District No. 1
 Added James M. Speer, Jr., information for El Paso County Water District No. 1

****Update 5/6/19**

Added Sarah A. Klahn (sklahn@somachlaw.com), Richard S. Deitchman (rdeitchman@somachlaw.com), Rena Wade (rwade@somachlaw.com) and Corene Rodder (crodder@somachlaw.com) for State of Texas. Removed Rhonda Stephenson.

****Update 11/6/19**

Added Lamai Howard (lamaih@modrall.com) for El Paso County Water District No. 1.
 Removed Leanne Martony.

****Update 11/21/19**

Added Jo Harden (jo@tessadavidson.com) for New Mexico Pecan Growers. Removed Patricia McCann.

****Update 11/22/19**

Removed Lizbeth Ellis and Clayton Bradley and added General Counsel (gencounsel@nmsu.edu) email for New Mexico State University.

- **Update 1/7/20**
Added David W. Gehlert (david.gehlert@usdoj.gov) for the United States. Updated Solicitor General information. Also added John P. Tustin (john.tustin@usdoj.gov) for the United States.
- **Update 2/19/20**
Added Renea Hicks for El Paso County Water Improvement District No. 1. Removed James M. Speer and Lamai Howard.
- **Update 2/26/20**
Added Darren L. McCarty for State of Texas. Removed Brantley Starr and James Davis. Also added Crystal Rivera and removed Rena Wade.
- **Update 5/1/20**
Added Cholla Khoury, Luis Robles, Jeffrey Wechsler and John Draper for the State of New Mexico. Removed David A. Roman. Also added Bonnie DeWitt, Pauline Wayland, Diana Luna and Donna Ormerod.
Added Preston Hartman for the State of Colorado. Removed Karen Kwon.
- **Update 7/7/20**
Added mediator information - Hon. Oliver W. Wanger.
- **Update 10/1/20**
Added Susan Barela (susan@roblesrael.com) for State of New Mexico.
- **Update 10/2/20**
Added Jennifer A. Najjar and removed Stephen M. MacFarlane, Thomas Snodgrass and David W. Gehlert for the United States.
- **Update 12/14/20**
Added Zachary E. Ogaz (zogaz@nmag.gov) for State of New Mexico.
- **Update 1/26/21**
Added Southern Rio Grande Diversified Crop Farmers Association information.
- **Update 2/1/21**
Added Robert Cabello and removed Marcia Driggers for City of Las Cruces.
- **Update 2/23/21**
Updated Solicitor General information and removed John P. Tustin for the United States.
- **Update 7/1/21**
Added Charlie Padilla (CharlieP@modrall.com) and removed Shannon Gifford for EPCWID.
- **Update 7/21/21**
Updated Attorney General/Solicitor General information and removed Christina Garro for State of Texas.