

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 TRIAL BRIEF

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UNITED STATES OF AMERICA'S TRIAL BRIEF

The United States' entitlement to prospective relief against New Mexico has been established to a significant extent by the Special Master's prior rulings, with limited issues remaining for trial. The Special Master has entered summary judgment that New Mexico has a "Compact-level duty" to prevent water uses that interfere with Rio Grande Project deliveries and the Project's "long-term operation." *See* Order of May 21, 2021, Sp. Master Docket No. 503, at 5 ("Summary Judgment Order"). The Special Master has also ruled that New Mexico's duty includes an obligation to protect the Project's return flows and hydrologically connected groundwater to an extent "akin to" the condition of Project operations that the Compacting States understood and anticipated in 1938. *Id.* at 5-6, 49. The United States' evidentiary burden to establish the need for additional relief is limited, and easily met. At trial, the United States will show that New Mexico is not fulfilling its duty under the Rio Grande Compact because it is not administering state law to protect Project return flows and hydrologically connected groundwater from the influence of groundwater pumping developed after 1938.

This brief provides a concise statement of the procedural posture of the United States' claims, the United States' statement of the case and principal factual contentions, and the anticipated order of proof as between the fall and spring sessions of trial.

I. PROCEDURAL POSTURE

The Supreme Court authorized the United States to intervene in this case as a plaintiff and has permitted the United States to pursue the claims for relief pleaded in its Complaint in Intervention. *Texas v. New Mexico*, 138 S. Ct. 954 (2018). On May 21, 2021, the Special Master issued an order that, among other things, granted in part the United States' Motion for Partial Summary Judgment on its claim for declaratory relief. *See* Summary Judgment Order at

52-53. The Special Master declared that, under the Compact, New Mexico has an obligation to administer state law to prevent and prohibit water uses that interfere with the Project's delivery of Compact water to Texas and treaty water to Mexico. *Id.* at 52. The precise contours of New Mexico's obligation and the extent of its non-compliance, however, present disputed factual issues to be resolved at trial. *See id.* at 46.

New Mexico filed Counterclaims against the United States, which the Special Master dismissed, except that the Special Master reserved a determination as to whether New Mexico may seek limited declaratory relief that "mirror[s]" the relief sought by the United States. *See* Order of Mar. 31, 2021, Sp. Master Docket No. 338, at 2 ("Dismissal Order"). The Special Master allowed New Mexico to pursue two counterclaims against Texas at trial.

The United States' motions in limine to confirm that the Summary Judgment Order and Dismissal Order limit the scope of trial are pending decision by the Special Master. *See* Order of Sept. 16, 2021, Sp. Master Docket No. 592, at 4.

II. STATEMENT OF THE CASE AND PRINCIPAL FACTUAL CONTENTIONS¹

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

¹ The discussion in Part II previously appeared in the United States' Pretrial Conference Statement, Sp. Master Docket No. 564. The United States is mindful that the Special Master encouraged the parties not to address issues that were previously briefed. Sp. Master Docket No. 501, at 8. Because Texas and New Mexico did not include substantive discussion in their pretrial statements, presumably deferring that discussion to their trial briefs, the United States repeats its statement of the case here for the Special Master's convenience.

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.” Summary Judgment Order 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.

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.

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CERTIFICATE OF SERVICE

This is to certify that on the 27th day of September, 2021, I caused a true and correct copy of the **UNITED STATES OF AMERICA’S TRIAL BRIEF** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ Seth C. Allison
Seth C. Allison
Paralegal Specialist