

No. 141, Original

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**IN THE  
SUPREME COURT OF THE UNITED STATES**

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STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO, *Defendants.*

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**OFFICE OF THE SPECIAL MASTER**

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**STATE OF COLORADO'S TRIAL BRIEF**

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September 27, 2021

This trial will present a limited number of issues among Texas, New Mexico, and the United States. The claims remaining all involve the disposition of the United States Bureau of Reclamation's Rio Grande Project water supply between Texas and New Mexico. Therefore, Colorado will not be presenting a case in chief regarding the liability of any other party. However, Colorado reserves the right to present a rebuttal case and to cross examine witnesses to clarify that its own Rio Grande Compact rights and obligations are not implicated and that nothing in this litigation establishes principles applicable to the interpretation of other interstate water compacts.

**I. The trial is properly limited to the Rio Grande Project water supply.**

Relevant issues include identifying the Project water supply, impacts to that water supply, and its division between New Mexico and Texas. Texas initiated this action with its claims against New Mexico for taking or permitting diversion of surface water in excess of Project contracts and taking or permitting the diversion of hydrologically

connected groundwater that interfered with the delivery of Project water supply, which was historically divided to beneficiaries in irrigation districts in New Mexico and Texas on a 57% and 43% basis. Texas Complaint ¶¶ 4, 8. The United States intervened with allegations that parallel Texas'. United States Complaint ¶13; *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). New Mexico filed several counterclaims. The Special Master dismissed most as either outside the scope of the suit allowed by the Supreme Court or barred by the United States' assertion of sovereign immunity. Order, March 31, 2020. Only two of New Mexico's claims remain for trial: New Mexico's First Claim, asserting a Compact violation by Texas for unauthorized depletions of Project water supply, and New Mexico's Fourth Claim, asserting a Compact violation and unjust enrichment against Texas.

The Special Master's order on motions for summary judgment further narrowed the issues for trial. The Special Master concluded that the Rio Grande Compact apportions water to New Mexico and Texas below Elephant Butte Reservoir:

Downstream from the Reservoir, the Compact relies on the Rio Grande Project for water delivery and is *programmatic* in its apportionment of water as between Texas and New Mexico, with a fixed annual quantity of treaty water expressly reserved for Project delivery to Mexico.

Order, May 21, 2021, p. 3 (original emphasis). The order further held that the water that was apportioned was the Rio Grande Project water supply, and that the supply was divided roughly 57% to New Mexico and 43% to Texas. *Id.* at 6, 7. However, this left some issues for trial.

The seminal issue for trial is defining what constitutes the Rio Grande Project water supply. The parties have also referred to this as the baseline condition. Another issue for trial is the determination of how much of that water supply each of New Mexico and Texas have received, and by what amount, if any, each state has reduced the other state's entitlement to that water supply. These issues all have to deal with water released by the Rio Grande Project. Therefore, they are limited in geographic scope to the area below Elephant Butte Reservoir. The parties remaining claims have not implicated any provisions of the

Rio Grande Compact that would impact rights or obligations above Elephant Butte Reservoir.

**II. The parties do not present any issues for trial intended to impact Colorado's Compact rights and obligations.**

Colorado anticipates that this litigation will have no impact on Colorado's rights and obligations under the Rio Grande Compact. No party asserts any claims against or otherwise seeks relief from Colorado. Further, the parties entered into an agreement allowing Colorado to not file a responsive pleading and concluded that this action would not resolve any potential actions by or against Colorado, including potential counterclaims. The Special Master approved this agreement. Order Granting Motion of the State of Colorado to Approve Non-Waiver Agreement, September 6, 2018. As part of that agreement the parties stated, "The parties also agree that Colorado is not required to file an answer in this action at this time because the complaints assert no claims for relief against it." Therefore, Colorado anticipates that nothing in this

litigation will result in a ruling that has any impact on Colorado's Compact rights and obligations.

However, Colorado reserves the right to present a rebuttal case and to cross examine witnesses to clarify that its own Rio Grande Compact rights and obligations are not implicated. By way of example, Colorado identifies a non-exhaustive list of Compact issues that could impact its rights and obligations: Article III delivery obligations for Colorado; Article VI annual and accrued debit or credit accounting; Article VI requirement to hold water in storage; Article VI actual and hypothetical spills from Project Storage; Article VII storage limitations on certain Colorado reservoirs; and Article VIII requirements to make releases from storage.

In addition, imposing a requirement for the Compact Commission to do more work or incur additional expenses would adversely impact Colorado by increasing its in-kind contributions or payments. Colorado contributes to the work of the Rio Grande Compact Commission through funding and contributions in kind. Because the remaining claims for

relief are made only against either New Mexico or Texas, the Court should not obligate the Compact Commission as a whole.

**III. This litigation will not establish any principles of compact interpretation applicable to Colorado's other interstate water compacts.**

Colorado had raised a concern that interpretation of the Rio Grande Compact to provide specific apportionments to New Mexico and Texas below Elephant Butte Reservoir may unintentionally establish an interpretive method for other compacts. The Special Master responded directly to this concern, citing Rio Grande Compact Article XV, "Article XV should provide some protection against any such adverse consequences." Order, May 21, 2021 p. 18. Article XV provides that, "none of the signatory states admit that any provisions herein contained established any general principle or precedent applicable to other interstate streams." *Id.* Colorado understands that, as a result, this litigation is limited to interpretation of the unique facts and history of the Rio Grande Compact. However, Colorado reserves the right to

present a rebuttal case and to cross examine witnesses to clarify that that nothing in this litigation establishes principles applicable to the interpretation of other interstate water compacts.

Respectfully submitted this 27<sup>th</sup> day of September 2021,

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This is to certify that on the 27<sup>th</sup> day of September 2021, I caused a true and correct copy of the **State of Colorado’s Trial Brief** to be served upon Special Master Michael Melloy, Clerk of the 8<sup>th</sup> Circuit Michael Gans, Judge Oliver W. Wanger and upon all counsel of record and counsel for interested parties by email as indicated above.

Respectfully submitted this 27<sup>th</sup> day of September 2021,

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