

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 MOTION FOR LEAVE TO FILE UNDER SEAL

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UNITED STATES OF AMERICA’S MOTION FOR LEAVE TO FILE UNDER SEAL

The Special Master’s Order of November 9, 2022, directed the United States to file, by November 23, any motion asserting that the States’ recent filings violate of the parties’ confidentiality agreement, the Special Master’s Orders, or Federal Rule of Evidence 408. Sp. M. Docket No. 717. The United States moves for leave to file that motion and the supporting documentation under seal because they may disclose confidential settlement information exchanged by the parties, including the States.

Filing under seal is warranted because the United States’ motion will address sealed documents and disclose confidential settlement information. Although the parties’ confidentiality agreement bars the disclosure of a party’s confidential settlement information “in any proceeding,” “for any purpose,” or to any “non-party” to the agreement, Sp. M. Docket No. 716, Ex. 1, at 3-4, ¶¶ 4, 6, the States were allowed to file their memorandum and exhibits containing confidential settlement information under seal. *See* Sp. M. Docket No. 717. As directed by the Special Master, the United States intends to file a motion “indicating what portions” of those sealed documents “may violate Federal Rule of Evidence 408, the parties’ confidentiality agreement, or the Orders of the Special Master,” *id.* The United States maintains its objection to the disclosure of its confidential settlement information to any non-party for any purpose in this proceeding. Subject to, and without waiving that objection, the United States must include confidential settlement information in its motion so that it can comply with the Special Master’s direction to identify the specific information the States have improperly disclosed. The United States therefore respectfully requests leave to file its motion and supporting documentation under seal.

The United States further requests that access to any of its filings made under seal be

limited to the Court and the States. However, the United States believes that Elephant Butte Irrigation District and El Paso County Water Conservation and Improvement District No. 1 (together, “the Districts”) should be permitted to request access from the Court because the Districts’ confidential information and settlement communications may be disclosed, directly or indirectly, through the United States’ filings. The Districts’ role in settlement negotiations will be addressed in more detail in the United States’ proposed filings under seal.

Amici other than the Districts have no similarly compelling interest in access to the United States’ forthcoming motion. Although many amici were permitted access to the parties’ draft settlement documents after signing an addendum to the parties’ confidentiality agreement, *see* Sp. M. Docket No. 706, that addendum did not make them “parties” to the agreement. Moreover, access for the amici was requested and granted so that the States could receive feedback from their constituents before entering into a settlement. Now that the States have reached a purported settlement, there is no basis for ongoing disclosure of confidential material to the amici.¹ And, even if there were a basis for granting the amici access to some sealed documents, the United States has a compelling interest in protecting the content of the particular documents to be filed by November 23, which may disclose aspects of the negotiations that preceded the drafting of settlement documents and in which amici other than the Districts were not involved.

The United States would be severely prejudiced by the disclosure of its negotiating positions to the amici, in particular those who are adverse parties to the United States in the New Mexico stream adjudication and the pending matters in federal district court. The United States’

¹ The United States is informed that the States shared their sealed filings with some of the amici on November 14 and 15, on the basis of the Special Master’s Order of October 26, 2022.

interest in non-disclosure of its confidential settlement discussions greatly outweighs the interest or curiosity of non-parties to the litigation.

The United States also notes that the Camino Real Regional Utility Authority and Public Service Company of New Mexico do not have the Court's leave to participate as amici curiae in this case. These entities are New Mexico stakeholders represented by the same counsel as amicus New Mexico State University. *See* Sp. M. Docket No. 708. Although they were permitted to review the parties' settlement documents as "[n]on-Amici," on that basis, *see* Sp. M. Docket No. 709, there is no possible justification for the ongoing disclosure of the United States' confidential settlement information to entities that are effectively strangers to the case.

The United States conferred with the States regarding this Motion for Leave to File Under Seal. The States authorized the United States to include the following statement: "The Compacting States take no position on the Motion for Leave to File Under Seal at this time, but reserve the right to file an expedited response after reviewing the Motion."

For the foregoing reasons, the United States respectfully requests that it be permitted to file under seal its motion and supporting papers asserting violations of settlement confidentiality, with access limited to the Court and the States. If leave is granted, the United States will file a notice of motion on the public docket.

Respectfully submitted this 18th day of November 2022,

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CERTIFICATE OF SERVICE

This is to certify that on the 18th day of November, 2022, I caused a true and correct copy of the **UNITED STATES OF AMERICA’S MOTION FOR LEAVE TO FILE UNDER SEAL** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ Wade Gibson
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HONORABLE MICHAEL J. MELLOY

Special Master

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