
**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 BY THE NEW MEXICO *AMICI* TO THE UNITED STATES
OF AMERICA’S MOTION FOR LEAVE TO FILE UNDER SEAL**

The New Mexico *amici*¹ hereby respond to the United States of America’s Motion for Leave to File Under Seal filed on November 18, 2022, Docket No. ____.

First, the New Mexico *amici* take no position on whether the Special Master should grant the United States’ Motion for Leave to File under Seal (“Motion”). The Consent Decree, its Appendices, and the supporting Declarations filed on November 14, 2022, reflect a settlement among New Mexico, Texas, and Colorado to an original action involving the interpretation and

¹ New Mexico *amici* include the City of Las Cruces (“Las Cruces”), the New Mexico Pecan Growers (“New Mexico Pecan Growers”), the Southern Rio Grande Diversified Crop Farmers Association (“Row Croppers”), New Mexico State University (“NMSU”), and the Albuquerque Bernalillo County Water Utility Authority (“Water Authority”).

enforcement of the Rio Grande Compact. Nothing in those documents discloses the settlement positions of the United States and the Compacting States are not purporting that they do. The only way in which the United States' settlement positions will be revealed is if the United States elects to disclose them.

Second, the United States alleges that its settlement positions are so sensitive that its filing on November 23rd must be under seal and "limited to the Court and the States." However, it also suggests that Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EP#1") be served with the filing, but not the other *amici*. See Motion at 1-3.

The United States appears to misunderstand the purpose and scope of this original action. It is an interstate water compact interpretation and enforcement action, not an intellectual exercise. Contrary to the United States' characterization, the non-district *amici* are not merely "curious non-parties to the litigation." See Motion at 2-3. The non-district New Mexico *amici* are the real parties-in-interest, the water right owners in southern New Mexico whose livelihoods will be affected by the outcome of this matter. Collectively, they represent almost 90% of the groundwater users in the Lower Rio Grande.

Las Cruces, the Water Authority, and NMSU supply domestic, commercial, municipal, and industrial water ("DCMI") to nearly one million people. The settlement among the three states will directly affect their ability to supply DCMI water for decades to come. This is an essential interest supported by numerous federal and state laws, administrative regulations and practices, and municipal ordinances – not mere inquisitiveness.

The New Mexico Pecan Growers and Row Croppers represent the actual irrigation water right owners in the Lower Rio Grande below Elephant Butte Reservoir. These are the farmers

who, as a result of the settlement, stand to gain or lose their surface water and groundwater to grow crops that support important agricultural economies in southern New Mexico.

Because of what is at stake, Las Cruces, the Water Authority, NMSU, the Pecan Growers, and the Row Croppers have spent millions of dollars in legal and consulting fees supporting New Mexico's efforts in the litigation and mediation. They are much more than curious bystanders.

Contrary to the United States' attempt to carve out EBID and EP#1 as preferred *amici*, the only function of EBID and EP#1 is to distribute the surface water owned by the farmers who paid for the Rio Grande Project. As a matter of record in this case, EBID's and EP#1's motions to intervene in the original action were denied. As Special Master Grimsal stated in analyzing EBID's motion to intervene: "Quite possibly, EBID actually has less of an interest in this case, if any interest at all, than any other affected Rio Grande water user or claimant in New Mexico." *See* First Interim Report of the Special Master, dated February 9, 2017, at 254 (Docket No. 54). He recognized:

EBID holds no beneficial-use interests; as EBID acknowledges in its papers, the individual entrymen who purchased the land under the Reclamation Act and repaid the United States for the construction and maintenance costs of the irrigation works and the right to use water hold the beneficial-use water rights.

Id. The same is true of EP#1.

To be clear, the New Mexico *amici* have already participated in mediation sessions and reviewed confidential settlement drafts pursuant to previous Orders. *See* Order dated August 26, 2022, Docket No. 706 and Order dated September 14, 2022, Docket No. 709. In addition, as recognized in the Motion, New Mexico has already discussed various settlement proposals with the New Mexico *amici* to "receive feedback from [its] constituents before entering into a settlement." *See* Motion at 2. The United States can't un-ring the bell.

It is essential for the New Mexico *amici*, including their client and technical representatives, to continue to be fully informed of matters at this stage of the proceedings to be able to participate fully and inform the Special Master of issues they are most conversant in and affected by.

The Special Master ordered that “to the extent that the United States feels that provisions of Federal Rule of Evidence 408, the confidentiality agreement entered into between the parties, or settlement confidentiality Orders . . . have been violated, it shall file a motion indicating what violations it believes have occurred and the relief it seeks by no later than Wednesday, November 23, 2022.” *See* Order dated November 9, 2022, Docket No. 717. Accordingly, if the United States complies with the Special Master’s Order, it must disclose *any* violations of the Confidentiality Agreement by both parties and *amici*. Thus, each *amicus* has a particular interest in knowing if the United States alleges their breach of the Confidentiality Agreement and, if so, in responding to such allegation.

In sum, if the Special Master grants the United States’ Motion, all *amici* should have access to the sealed documents under the same terms as the Special Master’s previous orders. There is no justification for treating the actual water users in New Mexico as second-class *amici*.

Finally, the New Mexico *amici* support making the settlement public. The documents filed under seal with the Notice of Joint Motion and Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact at 6, November 14, 2022, Docket No. 717, reflect a settlement among the three states that resolves litigation over the interpretation and enforcement of the Rio Grande Compact. Resolution of this litigation is of great public importance and interest, as it will affect all those who rely on a

municipal water supply and an agricultural economy in New Mexico worth hundreds of millions of dollars.

Respectfully submitted this 21st day of November 2022.

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**NEW MEXICO *AMICI'S*
CERTIFICATE OF SERVICE**

This is to certify that on the 21st day of November 2022, I caused a true and correct copy of the *Response by the New Mexico Amici to the United States of America's Motion for Leave to File Under Seal* to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 21st day of November 2022.

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