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

_____♦_____

JOINT MOTION OF THE COMPACTING STATES TO UNSEAL THE JOINT MOTION, PROPOSED CONSENT DECREE, AND SUPPORTING DECLARATIONS

_____♦_____

November 23, 2022

The State of Texas, State of New Mexico, and State of Colorado (collectively, "Compacting States"), each through their respective and undersigned counsel, jointly move to unseal the following documents filed under seal at the direction of the Special Master:

1. Materials Filed Under Seal in Support of the Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Docket No. ("Dkt.") 720]

2. Certificate of Service Under Seal [Dkt. 720];

3. Memorandum of Points and Authorities in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Dkt. 720] ("Joint Motion");

4. Exhibit 1 – Consent Decree Supporting the Rio Grande Compact [Dkt. 720] ("Consent Decree");

5. Exhibit 2 – Declaration of Texas Rio Grande Compact Commissioner Robert Scott Skov in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Dkt. 720];

6. Exhibit 3 – Declaration of Robert J. Brandes, Ph.D., in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Dkt. 720];

7. Exhibit 4 – Declaration of William R. Hutchison, Ph.D., in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Dkt. 720];

8. Exhibit 5 – Declaration of Michael A. Hamman, P.E. in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Dkt. 720];

9. Exhibit 6 – Declaration of Margaret Barroll, Ph.D. in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Dkt. 720];

10. Exhibit 7 – Declaration of Gregory K. Sullivan, P.E. in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact [Dkt. 720];

(These documents are collectively referred to as the "Sealed Documents".)[1] In support of this Motion to Unseal, the Compacting States state as follows:

INTRODUCTION

After almost a decade of litigation, and over ten months of negotiations, the Compacting States have agreed to settle this interstate compact dispute. The terms of the Compacting States' agreement are set forth in the Consent Decree and explained in detail in the Joint Motion and accompanying declarations. Although the Consent Decree and Sealed Documents were initially sealed as a precautionary measure, the Parties have not yet had the opportunity to brief whether the high standard for overcoming the presumption of public access to judicial documents has been satisfied.

As discussed below, the Consent Decree and Sealed Documents should be unsealed.[2] The Consent Decree represents the agreement of the Compacting States, the need for public access to the Consent Decree and Sealed Documents significantly outweighs any interest in maintaining secrecy, and the United States has not met the high burden of showing that the documents should be shielded from the public.

PROCEDURAL BACKGROUND

The Compacting States informed the Special Master that they had settled the dispute over the equitable apportionment under the Rio Grande Compact during the Status Conference held on October 25, 2022. During that hearing, the United States argued that a settlement without its

[1] This Motion to Unseal would not impact the pleading that the United States plans to file on November 23, 2022. *See* Special Master Order on Motion to Seal [Dkt. 724].

[2] It is anticipated that the United States will file a pleading alleging violations of confidentiality. *See* [Dkt. 717]; [Dkt. 721]. The Compacting States will respond to that pleading if directed to do so by the Special Master. Rather than waiting to respond to that anticipated pleading, however, this Motion to Unseal seeks an affirmative ruling that the Sealed Documents should be public.

participation was not possible, in large part because, according to the United States, the proposed Consent Decree constituted the federal government's confidential settlement material. The Special Master rejected that argument. *See* Hearing Transcript ("Tr.") of October 25, 2022 Status Conference at 39:17 – 40:7 ("I don't know how a motion that asks for approval of a specific decree would violate confidentiality"). Nevertheless, because he had not yet viewed the Consent Decree or the United States' objections, and out of an abundance of caution, the Special Master ordered that the Consent Decree, but not the supporting briefing, should be filed under seal. *See* Order of October 26, 2022 at ¶ 2.

Undeterred, the United States again sought to prevent the Compacting States from filing the Consent Decree and Joint Motion. On November 8, 2022, the United States filed its Motion to Amend Briefing Schedule [Dkt. 716]. In that Motion, the United States requested the remarkable relief of requiring the Compacting States to serve their Joint Motion on the United States before filing it with the Court. Under that proposal, the Compacting States would only have been entitled to file their Joint Motion if the United States did not object.

Without waiting for a response, the Special Master denied the relief requested in the Motion to Amend Briefing Schedule. *See* Order of November 9, 2022 [Dkt. 718]. At that juncture, the Special Master still had not reviewed the Consent Decree or Sealed Documents, so it was difficult to address the United States claims of confidentiality. Out of an abundance of caution, the Special Master ordered that both the Consent Decree and the Sealed Documents should be filed under seal.

On November 14, 2022, pursuant to the direction of the Special Master, the Compacting States filed their Joint Motion, including the Consent Decree, under seal. This was the first time that the Special Master had the opportunity to review those documents.

LEGAL STANDARD FOR SEALING AND UNSEALING JUDICIAL RECORDS

I. PRESUMPTION IN FAVOR OF PUBLIC ACCESS TO JUDICIAL DOCUMENTS

"Judicial records belong to the American people; they are public, not private, documents." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021). The seminal case regarding the common law right to access public records is *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978)—a case that was litigated in the fallout to the Watergate scandal. In *Nixon*, the United States Supreme Court confirmed "that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *Id.* at 597. The Court continued:

> American decisions generally do not condition enforcement of this right on a proprietary interest in the document or upon a need for it as evidence in a lawsuit. The interest necessary to support the issuance of a writ compelling access has been found, for example, in the citizen's desire to keep a watchful eye on the workings of public agencies ….

Id. at 597-599 (internal citations omitted). There is, therefore, a "presumption … in favor of public access to judicial documents." *Id.* at 582; *see also United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013) (a "strong presumption … particularly … where the … court can make use of the sealed documents to determine litigants' substantive legal rights.") (internal quotations and citations omitted); *FTC v. Standard Financial Management Corp.*, 830 F.2d 404, 413 (1st Cir. 1987) (This presumption is "basic to the maintenance of a fair and open judicial system and to fulfilling the public's right to know"); *id.* at 413 ("justice is better served by sunshine than by darkness."). This "common law right of access … predates the Constitution itself," *Belo Broadcasting Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981) (internal quotation and citation omitted), and "is fundamental to the democratic state," *United States v Bacon*, 950 F.3d 1286, 1297 (10th Cir. 2020) (internal quotation and citation omitted). *See also e.g. Murphy v. Schaible, Russo &*

Co., 2020 WL 12719864 at *1 (D. Colo. Sep. 18, 2020) ("Judges have a responsibility to avoid secrecy in court proceedings because secret court proceedings are anathema to a free society.") (internal quotation and citation omitted).

A "court's discretion to seal the record of judicial proceedings is to be exercised charily." *SEC v. Van Waeyenberghe*, 990 F. 2d 845, 848 (5th Cir. 1993) (internal quotation and citation omitted). "Public access to judicial records serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." *Id.* at 849-850 (internal quotation and citation omitted); *see also Wilson v. American Motors Corp*., 759 F.2d 1568, 1571 (11th Cir.1985) ("the real focus of our inquiry is on the rights of the public in maintaining open records and the check on the integrity of the system insured by that public access.") (internal quotation and citation omitted). As the seventh circuit explained in *Union Oil Co. v. Leavell*, 220 F.3d 562 (7th Cir. 2000):

> What happens in the halls of government is presumptively public business. … Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Id. at 567 (internal citations omitted).

This common law right of access includes access to consent decrees filed as part of a settlement agreement. *See e.g., Bradley ex rel. AJW v. Ackal*, 954 F. 3d 216, 225 (5th Cir. 2020) ("The presumption in favor of the public's common law right of access to court records . . . applies to *settlement agreements* that are filed and submitted to the . . . court for approval." (emphasis added)); *SEC*, 990 F. 2d at 849 ("Once a settlement is filed in district court, it becomes a judicial record. The presumption in favor of the public's common law right of access to court records therefore applies to settlement agreements that are filed and submitted to the district court for

approval. … including the final order and transcript."); *Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs*. 800 F.2d 339, 343 (3rd Cir. 1986) ("the common law presumption of access applies to motions filed in court proceedings and to the settlement agreement between [parties] which they filed and submitted to the district court for approval."); *id.* at 345 ("Once a settlement is filed in the district court, it becomes a judicial record, and subject to the access accorded such records."); *EEOC v. Erection Co.* 900 F.2d 168 (9th Cir. 1990) ("[a] consent decree is a matter of public business not only because it is a judgment approved by a court which retains continuing jurisdiction, but also because it constitutes an effective mechanism for the public to monitor a public agency's performance of a vital public task."). As the Eleventh Circuit explained in *Brown v. Advantage Engineering, Inc*., 960 F.2d 1013 (11th Cir. 1992):

> It is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes with the court's active encouragement. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case. Absent a showing of extraordinary circumstances … the court file must remain accessible to the public.

Id. at 1016 (11th Cir. 1992).

II. PUBLIC ACCESS IS CRITICAL IN CASES OF HIGH PUBLIC IMPORTANCE

"[T]he rationale for public access is even greater" where, as here, the case "involve[s] matters of particularly public interest." *Bradley*, 954 F.3d at 233 (internal quotation and citation omitted); *see also Shane Grp. v. Blue Cross Blue Shield*, 825 F.3d 299, 305 (6th Cir. 2016) ("[T]he greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access."). "Where the government is involved in the litigation, there is an undeniable public interest in the records of the proceedings." *Under Seal v. Under Seal*, 1994 WL 283977 at *3 (4th Cir. 1994). "When a court orders confidentiality in a suit involving a

governmental entity … there arises a troublesome conflict between the governmental entity's interest as a litigant and its public disclosure obligations." *Pansy v. Borough of Stroudsburg,* 23 F.3d 772, 791 (3rd Cir. 1994)." Indeed, the Third Circuit Court of Appeals has cautioned that:

> Where a governmental entity is a party to litigation, no protective, sealing or other confidentiality order shall be entered without consideration of its effect on disclosure of government records to the public under state and federal freedom of information laws. An order binding governmental entities shall be narrowly drawn to avoid interference with the rights of the public to obtain disclosure of government records and shall provide an explanation of the extent to which the order is intended to alter those rights.

Id. (internal quotation and citation omitted); *see also id.* at 788 ("where it is likely that information is accessible under a relevant freedom of information law, a strong presumption exists against granting or maintaining an order of confidentiality.").

III. PROPONENTS OF SEALING JUDICIAL DOCUMENTS BEAR A HEAVY BURDEN

In order to overcome this presumption of openness, a party seeking to seal judicial documents must demonstrate that "countervailing interests heavily outweigh the public interests in access to the judicial record." *Bacon,* 950 F.3d at 1293; *see also e.g., JetAway Aviation, LLC v. Bd. of County Comm'rs*, 754 F.3d 824, 826 (10th Cir. 2014) ("a real and substantial interest that justifies depriving the public of access to the records that inform [the court's] decision-making process.") (internal quotation and citation omitted); *Helm v. Kansas,* 656 F.3d 1277, 1292 (10th Cir. 2011) ("The party seeking to overcome the presumption of public access to the documents bears the burden of showing some significant interest that outweighs the presumption.") (internal quotation marks omitted); *United States v. Thayer,* 2017 U.S. Dist. LEXIS 47927 (D.N.M. Mar. 29, 2017) ("a party must articulate compelling reasons supported by specific factual findings."). The proponent of sealing must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations. … Motions that simply assert a conclusion without the

required reasoning … have no prospect of success." *Baxter Int'l, Inc. v. Abbott Labs*., 297 F.3d 544, 548 (7th Cir. 2002).

In exercising its discretion, a court should "weigh the interests of the public, which are presumptively paramount, against those advanced" by the party seeking to seal judicial documents. *Helm*, 656 F.3d at 1292 (internal quotation and citation omitted); *see also e.g. Bacon*, 950 F.3d at 1293 (same); *United States v. Dillard*, 795 F.3d 1191, 1205 (10th Cir. 2015) (same) (internal quotation and citation omitted). Even when it is the government who is opposing disclosure, it must "articulate a sufficiently significant interest that will justify continuing to override the presumption of public access." *Bacon*, 950 F.3d at 1293 (internal quotations and citations omitted). Indeed, "[t]he appropriateness of making court files accessible is accentuated in cases where the government is a party: in such circumstances, the public's right to know what the executive branch is about coalesces with the concomitant right of the citizenry to appraise the judicial branch. … The citizen's right to know is not lightly to be deflected … only the most compelling reasons can justify non-disclosure of judicial records." *FTC*, 830 F.2d at 410 (internal quotation and citations omitted). A "generalized allusion to confidential information is woefully inadequate to meet [this] heavy burden." *JetAway*, 754 F.3d at 827.

ARGUMENT

THE NEED FOR THE PUBLIC TO ACCESS THE CONSENT DECREE AND SEALED DOCUMENTS SIGNIFICANTLY OUTWEIGHS ANY INTEREST IN SECRECY CLAIMED BY THE UNITED STATES

The United States bears the burden of establishing a legal and factual justification to overcome the "strong presumption in favor of public access to judicial proceedings." *In re L.A. Times Comms. LLC*, 28 F.4th 292, 296-97 (D.C. Cir. 2022). This requires the Court to weigh the competing factors, and ""[o]nly the most compelling reasons can justify non-disclosure of judicial

records." *Shane Grp.*, 825 F.3d at 305. Factors considered by Circuit Courts in deciding whether to seal or unseal judicial records include:

> (1) the need for public access to the documents at issue; (2) the extent of previous public access to the documents; (3) the fact that someone has objected to disclosure, and the identity of that person; (4) the strength of any property and privacy interests asserted; (5) the possibility of prejudice to those opposing disclosure; and (6) the purposes for which the documents were introduced during the judicial proceedings.

In re L.A. Times, 28 F.4th at 297. When the relevant factors are properly weighed, the need for public access to the Consent Decree and Sealed Documents significantly outweighs any interest claimed by the United States in maintaining secrecy.

A. The Consent Decree Represents the Agreement of the Compacting States

To begin with, the grounds for this Motion to Unseal are straightforward. There is simply no legal or factual basis for sealing the relevant documents from the public. The Consent Decree represents the agreement of the Compacting States on the remaining disputed issues. If entered, it would resolve all interstate Compact claims between Texas and New Mexico. Likewise, the Joint Motion provides the factual and legal bases for entry of the Consent Decree and is intended to persuade the Special Master to recommend its entry to the Court.

"Judicial records" are characterized as "documents intended to 'influence a judge's decisionmaking.'" *In re L.A. Times Comms. LLC*, 28 F.4th 292, 296 (D.C. Cir. 2022) (quoting *CNN v. FBI*, 984 F.3d 114 (D.C. Cir. 2021)). It necessarily follows that the Sealed Documents are quintessential "judicial records" to which the public's common law right of access firmly attaches.

B. There Is an Undeniable Need for Public Access to the Consent Decree and Sealed Documents

"[I]n exercising discretion to *seal or unseal* judicial records, [a court] must weigh the interests of the public, which are presumptively paramount, against those advanced by the parties"

who support keeping the records secret. *United States v. Bacon*, 950 F.3d 1286, 1293 (10th Cir. 2020) (emphasis added) (internal quotations and citations omitted). And as explained above, "the rationale for public access is even greater" where, as here, the case "involve[s] matters of particularly public interest." *Bradley*, 954 F.3d at 233 (internal quotation and citation omitted).

The Court has acknowledged that original actions such as the present case involve "controversies between sovereigns which involve issues of high public importance." *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases); *see also Virginia v. West Virginia*, 234 U.S. 117, 121 (1914) (describing original actions as matters of "great public controversy"). In accepting the case in the first instance, the Court signaled that this matter represents "a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 534, 571 n. 18 (1983). And as the Special Master has recognized, each of the Compacting States represents the interests of all its water users. MSJ Order at 51 (May 21, 2021) [Dkt. 503].

Ultimately, resolution of this case will impact how water is divided between the States below Elephant Butte Reservoir. If entered, the Consent Decree will therefore impact tens of thousands of water users in both States, including two large municipalities, for generations to come. Specifically, the need for public access to the Consent Decree and Sealed Documents is critical for water users in all three Compacting States as discussed below.

1. Need for Public Access for New Mexico Water Users

Without addressing the details that are currently filed under seal, the Consent Decree will impact the amount of water available to all water users in the Lower Rio Grande in any given year. New Mexico's compliance with the Consent Decree may require water rights administration that imposes restrictions on water users under certain conditions described in the Consent Decree.

Planning for that possibility will require officials with the State Engineer to review and understand the Consent Decree. Similarly, it is absolutely critical for water users to be able to evaluate and plan for how the Consent Decree may impact their water rights and future water supplies. None of that is possible until the Sealed Documents are made public.

Furthermore, New Mexico anticipates that certain legislative measures may be introduced in the coming months to facilitate compliance with the Consent Decree. But New Mexico will be unable to explain the full reasons for those measures to individual legislators unless the seal is lifted. Nor will it be possible for New Mexico water users to evaluate whether or not to support those measures if they are unable to review the Consent Decree.

2. Need for Public Access for Texas Water Users

Texas initiated this litigation to protect Texas's equitable apportionment of the Rio Grande under the Rio Grande Compact and to prevent further injury to Texas and its citizens who are entitled to receive and use the water apportioned to Texas. Texas has now joined with Colorado and New Mexico to move for the entry of the Consent Decree to settle the litigation. Pursuant to Texas state law, the citizens of Texas are entitled to know the terms of the Consent Decree. Texas may withhold governmental information from the public if that information is confidential by law. Because no element of the Consent Decree, its appendices, or related documents are confidential under Texas law, the Sealed Documents should be available to the public.

The Texas Public Information Act (the "Texas Act") gives the public the right to request access to government information to ensure the people's control "over the instruments [of government] they have created" because the "government is the servant and not the master of the people." Tex. Gov't Code 552.001(a). The Texas Act further explains the need for an informed

citizenry in the context of our "American constitutional form of representative government", to wit:

> The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created. *Id.*

The Texas Act requires the attorney general to construe the Act liberally in favor of open government. Tex. Gov't Code § 552.001(b); *see also A & T Consultants v. Sharp*, 904 S.W.2d 668, 675 (Tex. 1995). However, no liberal construction is necessary here, because the Texas Act specifically provides that "a settlement agreement to which a governmental unit is a party" is a category of public information expressly not exempted from required disclosure unless made confidential under [the Act] or other law. Tex. Gov't Code § 552.022(18). No law makes the Decree confidential and Texas has a legal obligation to make the Decree, and its supporting appendices and related documents, available to its citizens.[3]

3. Need for Public Access for Colorado Water Users

Colorado has interpreted the Special Master's order to file the Joint Motion and supporting documents under seal to prevent public distribution of those documents. This leaves Colorado unable to adequately discuss with its constituents the proposed resolution of this interstate apportionment dispute. Several water-user groups in Colorado have been following this litigation. They include entities such as the Rio Grande Water Conservation District, the Conejos Water Conservancy District, the Rio Grande Water Users Association, and numerous smaller groups and individuals. The first two are created by statute to promote development, use, and conservation of

[3] New Mexico law is in accord. *See, e.g.*, NMSA 1978, §§ 14-2-5, -6 ("It is the further intent of the legislature, and it is declared to be the public policy of this state, that to provide persons with such information is an essential function of a representative government and an integral part of the routine duties of public officers and employees."); *Republican Party of New Mexico v. New Mexico Taxation and Revenue Dept.*, 2012-NMSC-026, ¶ 51 ("Transparency is an essential feature of the relationship between the people and their government.").

the State's water resources. Further, water rights within the Rio Grande Basin in Colorado are subject to curtailment to meet the State's Compact obligations. These entities are concerned how final disposition of the dispute over Rio Grande Compact apportionments among the Compacting States may impact how they are able to make use of Colorado's apportionment. Thus, they have interests very similar to the irrigation districts, farmer organizations, and municipalities in both New Mexico and Texas.

Rather than seek amicus status, these entities have followed the litigation and relied on their close and productive relationship with the State of Colorado to keep them informed. This has worked well throughout nearly a decade of litigation. Colorado has been able to effectively communicate developments of the compact dispute through litigation. However, filing the Joint Motion and supporting documents under seal prevents these groups from adequately understanding the status of the case. Because the Consent Decree represents the agreement of Colorado in resolution of this dispute, it should be able to show its constituents what its agreement is and to discuss in detail how it will be implemented. Keeping the filing sealed is detrimental to Colorado's practice of working with its constituents without requiring amicus status.

C. The Consent Decree Is Not Protected by Rule 408 or the Confidentiality Agreement

Finally, the United States claims that the Consent Decree represents the confidential settlement material of the federal government that is protected by Rule 408 and the Confidentiality Agreement. *See* Motion to Amend Briefing Schedule at 4-5 [Dkt. 716]. This far-fetched concept that the actual terms of a proposed settlement among some parties represents the confidential settlement material of another party finds no support in the law.

As described in the Compacting States Response in Partial Opposition to the United States' Motion for Leave to File Under Seal [Dkt. 727], Rule 408 bars settlement offers and conduct or

statements made during compromise that is offered as evidence "either to prove or disprove . . . a disputed claim." Similarly, the Confidentiality Agreement defines "confidential settlement information" as:

> [A]ny statement, conduct, document, map, electronic file, statement or nonverbal indication of position, mental impression or other information, including offers of compromise, in whatever form, including oral, written, visual or electronic, that is disclosed by a Party or Parties, to a Party or Parties, in the course of the pending or potential future settlement discussions.

See [Dkt. 716] at Exhibit 1, 2-3, ¶ 2. Rule 408 and the Confidentiality Agreement are thus "designed to encourage settlements by fostering free and full discussion of the issues." *Ramada Dev. Co. v. Rauch*, 644 F.2d 1097, 1106 (5th Cir. 1981). Consequently, they extend protection to "legal conclusions, factual statements, internal memoranda, and the work of non-lawyers and lawyers alike so long as the communications were intended to be part of . . . *negotiations toward compromise*." *Lyondell Chem. Co. v. Occidental Chem. Corp.*, 608 F.3d 284, 294 (5th Cir. 2010) (emphasis added) (internal quotation omitted). It is black letter law, however, that protection for confidential settlement communications extends only to discussions made during settlement negotiations and not to the terms of the settlement agreement itself. *See e.g.*, *Bradley*, 954 F.3d at 225 ("The presumption in favor of the public's common law right of access to court records therefore applies to settlement agreements that are filed and submitted to the district court for approval."); *DIRECTV, Inc. v. Puccinelli*, 224 F.R.D. 677, 685 (D. Kan. 2004) (determining that confidentiality protections extend only to "discussions made during negotiations" but not to "the terms of the settlement or the settlement agreement itself").

Here, the Consent Decree represents the agreement of the Compacting States – no more and no less. The Compacting States have made no representations about the participation or communications of the United States whatsoever. Nor have the Compacting States identified the

positions of the United States during the negotiations or characterized those positions in any way. Simply put, there is no basis for sealing the Consent Decree or Sealed Documents.[4]

CONCLUSION

WHEREFORE, the Compacting States respectfully request that the Special Master unseal the Consent Decree and Sealed Documents.

Dated: November 23, 2022

Respectfully submitted,

By: *//s// Jeffrey J. Wechsler*

HECTOR H. BALDERAS
New Mexico Attorney General
Deputy Attorney General
CHOLLA KHOURY
Deputy Attorney General
ZACHARY E. OGAZ
Assistant Attorney General

MARCUS J. RAEL, JR.*
LUIS ROBLES
Special Assistant Attorneys General
ROBLES RAEL & ANAYA
*Counsel of Record

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY

JOHN B. DRAPER
Special Assistant Attorney General
CORINNE E. ATTON
DRAPER & DRAPER LLC

By: *//s// Stuart L. Somach*

Stuart L. Somach, Esq.*
Francis M. Goldsberry II, Esq.
Theresa C. Barfield, Esq.
Sarah A. Klahn, Esq.
Richard S. Deitchman, Esq.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
**Counsel of Record*

Counsel for the State of Texas

By: *//s// Chad M. Wallace*

PHILIP J. WEISER
Attorney General of Colorado
LAIN LEONIAK
First Assistant Attorney General
CHAD M. WALLACE*
Senior Assistant Attorney General II
PRESTON V. HARTMAN

[4] The Compacting States reserve all rights to elaborate upon these positions in response to the United States motion due to be filed today, Wednesday, November 23, 2022. *See generally*, [Dkt.] 717.

JEFFREY J. WECHSLER
Special Assistant Attorney General
SHELLY DALRYMPLE
KALEB W. BROOKS
DANIEL B. GOLDBERG
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501
505-986-2637
jwechsler@montand.com

Counsel for the State of New Mexico

Assistant Attorney General

Colorado Department of Law
1300 Broadway, 7th Floor
Denver, CO 80203
Telephone: 720-508-6281 (Mr. Wallace)
Email: chad.wallace@coag.gov
Email: preston.hartman@coag.gov
* Counsel of Record

Counsel for the State of Colorado

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STATE OF TEXAS,

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v.

STATE OF NEW MEXICO and
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Defendants.

OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on this 23rd day of November, 2022, I caused a true and correct copy of the **JOINT MOTION OF THE COMPACTING STATES TO UNSEAL THE JOINT MOTION, PROPOSED CONSENT DECREE, AND SUPPORTING DECLARATIONS** to be served upon all parties and *amici curaie,* by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was accomplished by electronic mail to those individuals listed on the attached service list, which reflects all updates through the current date.

Respectfully submitted,

Dated: November 23, 2022

/s/ Michael A. Kopp
Michael Kopp
Special Assistant Attorney General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
(303) 861-1963

SPECIAL MASTER

HONORABLE MICHAEL J. MELLOY
Special Master
United States Circuit Judge
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401-2101
TXvNM141@ca8.uscourts.gov
(319) 432-6080
(service via email and U.S. Mail)

MICHAEL E. GANS
Clerk of the 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
TXvNM141@ca8.uscourts.gov
(314) 244-2400

UNITED STATES

ELIZABETH B. PRELOGAR*
Solicitor General
TODD KIM
Assistant Attorney General
EDWIN S KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
supremectbriefs@usdoj.gov
(202)514-2217

R. LEE LEININGER *
JEFFREY N. CANDRIAN
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
999 18th Street
South Terrace – Suite 370
Denver, Colorado 80202
SETH C. ALLISON, Paralegal
lee.leininger@usdoj.gov
(303) 844-1364
jeffery.candrian@usdoj.gov
(303) 844-1382
Seth.allison@usdoj.gov
(303)844-7917

JUDITH E. COLEMAN
JENNIFER A. NAJJAR
U.S. DEPARTMENT OF JUSTICE
Judith.coleman@usdoj.gov
(202) 514-3553
jennifer.najjar@usdoj.gov

Environment & Natural Resources Division (202) 305-0476
P.O. Box 7611
Washington, D.C. 20044-7611

STATE OF NEW MEXICO

HECTOR H. BALDERAS hbalderas@nmag.gov
New Mexico Attorney General tmaestas@nmag.gov
TANIA MAESTAS ckhoury@nmag.gov
Chief Deputy Attorney General zogaz@nmag.gov
CHOLLA KHOURY jvanwiel@nmag.gov
Assistant Attorney General (505) 239-4672
ZACHARY E. OGAZ
Assistant Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
JENNIFER VAN WIEL – Paralegal

NATHANIEL CHAKERES nathaniel.chakeres@state.nm.us
Deputy General Counsel (505)231-4459
RICHARD A. ALLEN rick.allen@state.nm.us
Special Assistant Attorney General (505)570-7754
NEW MEXICO OFFICE OF THE STATE ENGINEER
P.O. Box 25102
Santa Fe, NM 87504

JONAS ARMSTRONG jonas.armstrong@state.nm.us
NEW MEXICO INTERSTATE STREAM COMMISSION (505)470-6843
P.O. Box 25102
Santa Fe, NM 87504

MARCUS J. RAEL, JR.* marcus@roblesrael.com
LUIS ROBLES luis@roblesrael.com
Special Assistant Attorneys General chelsea@roblesrael.com
ROBLES, RAEL & ANAYA, P.C. pauline@roblesrael.com
500 Marquette Avenue NW, Suite 700 bonnie@roblesrael.com
Albuquerque, New Mexico 87102 (505) 242-2228
CHELSEA SANDOVAL - Paralegal
PAULINE WAYLAND – Paralegal
BONNIE DEWITT – Paralegal

BENNETT W. RALEY braley@troutlaw.com
LISA M. THOMPSON lthompson@troutlaw.com
MICHAEL A. KOPP mkopp@troutlaw.com
Special Assistant Attorneys General (303) 861-1963

TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203

JEFFREY WECHSLER jwechsler@montand.com
SHELLY L. DALRYMPLE sdalrymple@montand.com
KALEB W. BROOKS kwbrooks@montand.com
*Special Assistant Attorneys Genera*l (505) 986-2637
MONTGOMERY & ANDREWS
325 Paseo De Peralta
Santa Fe, NM 87501
DIANA LUNA – Paralegal dluna@montand.com

JOHN DRAPER john.draper@draperllc.com
CORINNE ATTON corinne.atton@draperllc.com
Special Assistant Attorneys General (505) 570-4591
DRAPER & DRAPER LLC
325 Paseo De Peralta
Santa Fe, NM 87501
DONNA ORMEROD – Paralegal donna.ormerod@draperllc.com

STATE OF COLORADO

PHILIP J. WEISER
Attorney General of Colorado
ERIC R. OLSON eric.olson@coag.gov
Solicitor General
LAIN LEONIAK
Acting First Assistant Attorney General
CHAD M. WALLACE* chad.wallace@coag.gov
Senior Assistant Attorney General (720) 508-6281 (direct)
PRESTON V. HARTMAN preston.hartman@coag.gov
Assistant Attorney General (720) 508-6257 (direct)
COLORADO DEPARTMENT OF LAW
Ralph Carr Judicial Center
7th Floor
1300 Broadway
Denver, CO 80203
NAN EDWARDS, Paralegal II nan.edwards@coag.gov

STATE OF TEXAS

STUART SOMACH* ssomach@somachlaw.com
ANDREW M. HITCHINGS ahitchings@somachlaw.com
ROBERT B. HOFFMAN rhoffman@somachlaw.com
FRANCIS M. GOLDSBERRY II mgoldsberry@somachlaw.com

THERESA C. BARFIELD tbarfield@somachlaw.com
SARAH A. KLAHN sklahn@somachlaw.com
BRITTANY K. JOHNSON bjohnson@somachlaw.com
RICHARD S. DEITCHMAN rdeitchman@somachlaw.com
SOMACH SIMMONS & DUNN, PC (916) 446-7979
500 Capital Mall, Suite 1000 (916) 803- 4561 (cell)
Sacramento, CA 95814-2403
CORENE RODDER - Secretary crodder@somachlaw.com
CRYSTAL RIVERA - Secretary crivera@somachlaw.com
YOLANDA DE LA CRUZ - Paralegal ydelacruz@somachlaw.com

KEN PAXTON
Attorney General of Texas (512) 463-2012
BRENT WEBSTER (512) 457-4644 Fax
First Assistant Attorney General
GRANT DORFMAN
Deputy First Assistant Attorney General
SHAWN COWLES
Deputy Attorney General for Civil Litigation
WILLIAM F. COLE
Assistant Solicitor General
BEAU CARTER
Assistant Solicitor General
PRISCILLA M. HUBENAK Priscilla.Hubenak@oag.texas.gov
Chief, Environmental Protection Division
OFFICE OF ATTORNEY GENERAL
OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548

AMICI / FOR INFORMATIONAL PURPOSES ONLY

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

JAMES C. BROCKMANN* (505) 983-3880
JAY F. STEIN jcbrockmann@newmexicowaterlaw.com
STEIN & BROCKMANN, P.A. jfstein@newmexicowaterlaw.com
P.O. Box 2067 administrator@newmexicowaterlaw.com
Santé Fe, New Mexico 87504
Administrative Copy

CHARLES W. KOLBERT (505) 289-3051
ALBUQUERQUE BERNALILLO COUNTY ckolberg@abcwua.org
WATER UTILITY AUTHORITY
P.O. Box 568
Albuquerque, NM 87103-0568

CITY OF EL PASO

DOUGLAS G. CAROOM* (512) 472-8021
SUSAN M. MAXWELL dcaroom@bickerstaff.com
BICKERSTAFF HEATH DELGADO smaxwell@bickerstaff.com
ACOSTA, LLP
2711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746

CITY OF LAS CRUCES

JAY F. STEIN * (505) 983-3880
JAMES C. BROCKMANN jcbrockmann@newmexicowaterlaw.com
STEIN & BROCKMANN, P.A. jfstein@newmexicowaterlaw.com
P.O. Box 2067 administrator@newmexicowaterlaw.com
Santé Fe, New Mexico 87504
Administrative Copy

JENNIFER VEGA-BROWN (575) 541-2128
ROBERT CABELLO
LAW CRUCES CITY ATTORNEY'S OFFICE jvega-brown@las-cruces.org
P.O. Box 20000 rcabello@las-cruces.org
Las Cruces, New Mexico 88004

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCASTLE* (575) 636-2377
BARNCASTLE LAW FIRM, LLC (575) 636-2688 (fax)
1100 South Main, Suite 20 (88005) samantha@h2o-legal.com
P.O. Box 1556
Las Cruces, NM 88004
JANET CORRELL – Paralegal janet@h2o-legal.com

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

MARIA O'BRIEN* (505) 848-1803 (direct)
SARAH M. STEVENSON mobrien@modrall.com
MODRALL, SPERLING, ROEHL, HARRIS & SISK, PA sarah.stevenson@modrall.com
500 Fourth Street N.W., Suite 1000
Albuquerque, New Mexico 87103-2168
CHARLIE PADILLA – Legal Assistant charliep@modrall.com

RENEA HICKS rhicks@renea-hicks.com

LAW OFFICE OF MAX RENEA HICKS (512)480-8231
P.O.Box 303187
Austin, TX 78703-0504

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1

ANDREW S. "DREW" MILLER* (512) 320-5466
KEMP SMITH LLP dmiller@kempsmith.com
919 Congress Avenue, Suite 1305
Austin, TX 78701

STATE OF KANSAS

DEREK SCHMIDT (785) 296-2215
Attorney General of Kansas toby.crouse@ag.ks.gov
JEFFREY A. CHANAY bryan.clark@ag.ks.gov
Chief Deputy Attorney General
TOBY CROUSE*
Solicitor General of Kansas
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Attorney General
120 S. W. 10th Ave., 2nd Floor
Topeka, KS 66612

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON* ttd@tessadavidson.com
DAVIDSON LAW FIRM, LLC (505) 792-3636
4206 Corrales Road
P.O. Box 2240
Corrales, NM 87048
JO HARDEN – Paralegal jo@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON* (505) 699-1445
UTTON & KERY, P.A. john@uttonkery.com
P.O. Box 2386
Santa Fe, New Mexico 87504

General Counsel gencounsel@nmsu.edu
New Mexico State University (575) 646-2446
Hadley Hall Room 132

2850 Weddell Road
Las Cruces, NM 88003

SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION

ARNOLD J. OLSEN* (575) 624-2463
HENNIGHAUSEN OLSEN & MCCREA, L.L.P. ajolsen@h2olawyers.com
P.O. Box 1415
Roswell, NM 88202-1415
Malina Kauai, Paralegal mkauai@h2olawyers.com
Rochelle Bartlett, Legal Assistant rbartlett@h2olawyers.com