

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

ORDER

March 2, 2021

ORDER

For the purposes of the proceedings before the Special Master, IT IS HEREBY ORDERED:

1. Briefing Schedule for Pending Motions/Requests for Relief

The undersigned adopts the agreed-upon schedule for the filing of briefs that respond to the various pending motions to strike and requests to file sur-reply briefs.

Responses due: March 23, 2021

Replies due: April 6, 2021

2. Procedure for March 9, 2021, Hearing on Motions for Partial Summary Judgment and Associated Pleadings

The undersigned agrees and adopts the procedure and order of presentation as outlined in the joint letter dated February 24, 2021. In response to the request for some guidance as to particular questions or issues in advance of the hearing, the undersigned will state the following.

1. The undersigned anticipates spending little, if any, time on the pending evidentiary objections.
2. An overarching issue in this case appears to be the questions relating to entitlement and accounting for return flows and groundwater pumping. I would anticipate those issues would consume a significant amount of the argument time. Among the sub-issues relating to those questions, I would include the following.
 - A. What historic documents, if any, help inform the decision on those issues. In particular, I would direct the parties to the Rio Grande Joint Investigation Report and the ultimate decision to express in the Compact that 790,000 acre-feet/year would be a normal release figure. This report and ultimate determination of the normal release amount would seem to indicate some Compact-level recognition that return flows are important for both quantity and quality of the water that ultimately flows into Texas.

- B. Course of performance and acquiescence. It would appear that in the 1950's and '60's a number of wells were drilled in southern New Mexico without objection from either Texas or the United States. In fact, New Mexico takes the position that the wells were drilled with the active encouragement of the United States. What effect, if any, does the lack of objection and/or acquiescence have on New Mexico's entitlement to subsurface water.
 - C. It is my understanding that for approximately 40 years Reclamation administered the project using the D1/D2 curve. It is also my understanding that the D1/D2 curve was developed with a recognition of some level of groundwater pumping in southern New Mexico. Is my understanding of the D1/D2 curve correct? Did either Texas or New Mexico object to use of the D1/D2 curve? What does acquiescence in that formula mean concerning Compact interpretation?
 - D. What is the relevance, if any, of groundwater pumping in Texas.
 - E. What is the practical effect, if any, if we say that New Mexico loses dominion and control over the water it delivers to the Elephant Butte Reservoir but then also find that New Mexico has some apportionment in the waters released from the reservoir.
 - F. Must groundwater pumping be curtailed and/or does Texas sustain any damages in what are referred to as "full supply" years.
3. Is the request by the United States for an injunction premature? What would such an injunction look like? The courts generally avoid injunctions that essentially say, "obey the law (in this case, the Compact)." What would be the interrelationship between any injunction and the 2008 Operating Agreement?
4. Texas takes the position that New Mexico has no apportionment below the Elephant Butte Reservoir. How does that position square with the statement by the Supreme Court in its opinion in which the court stated that the United States was serving as an "agent" of the Compact

charged with ensuring the Compact's equitable apportionment to Texas and part of New Mexico is in fact made. In the Court's opinion, it then cites to Texas's reply to the exceptions to the First Interim Report of the Special Master as support for that statement. Does that statement by Texas in its reply to the exceptions to the first Special Master's report constitute an admission? Does that statement by the Supreme Court become the law of the case?

I do not intend by these suggestions to limit the argument and there may be other issues the parties feel are as important as those outlined.

3. Scheduling Conference

The parties shall submit a joint status conference statement in advance of the March 9, 2021, hearing. That statement shall be filed by no later than the close of business on Friday, March 5, 2021. The undersigned does not anticipate discussing any of the trial management issues at the March 9 hearing but will use that hearing as an opportunity to set a date for a trial management/status conference.

Dated: March 2, 2021



Honorable Michael J. Melloy
Special Master
United States Circuit Judge
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