

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,

UNITED STATES OF AMERICA,

Intervenor.

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OFFICE OF THE SPECIAL MASTER

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ORDER

August 26, 2021

## ORDER

Texas has submitted a motion for leave to file a supplemental complaint. For the reasons that follow, I instruct Texas to file its motion directly with the Supreme Court.

The original complaint alleges New Mexico violated and continues to violate the Rio Grande Compact (the Compact) by intercepting Rio Grande water intended for Texas after New Mexico delivers that water into the Elephant Butte Reservoir (the Reservoir), a feature of the Rio Grande Project (the Project). The Supreme Court allowed the original complaint. Later, the Court allowed a complaint in intervention from the United States. The United States operates the Project, including the Reservoir, and asserts claims similar in scope to those in the original Texas complaint.

After the undersigned was assigned to the case, New Mexico filed counterclaims against Texas and the United States, as expressly anticipated by all parties. I dismissed New Mexico's counterclaims against the United States largely based on the absence of a Congressional waiver of sovereign immunity. The surviving counterclaims allege generally that Texas's own actions in relation to the use of Project water and hydrologically connected groundwater directly or indirectly affect Project operations and the delivery of Compact water. Potential factual bases for New Mexico's counterclaims against Texas overlapped with New Mexico's anticipated defenses to Texas's own claims.

In ruling on these motions, the undersigned rejected arguments that New Mexico was required to obtain leave from the Court itself prior to filing the counterclaims against Texas. In so ruling, I noted: (1) the allowed claims were essentially "mirror images" of the Texas and United States claims; (2) all parties had expressly anticipated and discussed New Mexico's filing of counterclaims without reference to the need to seek leave of the Court; and (3) the parties could file exceptions and, to the extent I exceeded my authority or otherwise erred, my ruling could serve as a report to assist the Court. No party filed exceptions.

Subsequently, discovery progressed despite Covid-related delays. The parties moved for summary judgment. I ruled on those motions, and trial as to liability is imminent. A damages-phase trial, if necessary, will occur at a later time. The liability-phase trial currently is scheduled to begin on September 13, 2021.<sup>1</sup>

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<sup>1</sup> Texas has filed a motion for a continuance related to a family medical emergency affecting Texas's lead counsel. In addition, the Covid situation is rapidly

Texas’s proposed supplemental complaint directs new claims against New Mexico alleging violations of Compact water-storage duties in reservoirs *upstream* from the Elephant Butte Reservoir—reservoirs that are not part of the Rio Grande Project. The Compact addresses these upstream reservoirs in reference to New Mexico’s rights and duties to store water and Texas’s right to call for releases. Although all provisions of the Compact are interrelated, the proposed supplemental complaint focuses on Compact provisions different from the primary provisions at issue in the original complaint. The proposed supplemental complaint also focuses on a geographic region different from the area of focus in the original complaint.

Colorado, an originally named defendant, has a general interest in litigation of the original complaint. Colorado is a signatory to the Compact, and Colorado’s own Compact-based water release and storage duties and rights may be affected by Reservoir levels—levels that are at least partially a product of Project releases to southern New Mexico, Texas, and Mexico. By and large, however, the dispute at issue in the original complaint is a downstream dispute not directly involving Colorado. Given the nature of Colorado’s interests in litigation of the original complaint, Colorado’s role to date has been minor—no party directed claims against Colorado and the other parties agreed that Colorado need not file an answer. Colorado has participated in briefing, and to a limited extent, in discovery, but Colorado’s involvement generally has been neutral. The effect on Colorado of litigation concerning the original complaint will be indirect rather than direct.

As contrasted with the original complaint, the proposed supplemental complaint directly, rather than indirectly, affects Colorado. Colorado’s rights and duties in reference to storage in non-Project reservoirs mirror New Mexico’s rights and duties. Any interpretation of the Compact or analysis of past practices regarding the topics addressed in the proposed supplemental complaint appear to raise the stakes for Colorado and most likely will change the nature of Colorado’s participation.

I asked the parties to submit limited briefing describing and identifying the proposed supplemental complaint’s practical impact on the current litigation. In addition to changing Colorado’s role, it appears the proposed supplemental complaint may change the identity of amici with interests and information related to the case. These may include numerous cities and municipalities upriver of the reservoir in both New Mexico and Colorado. Further, non-Compact demands on the

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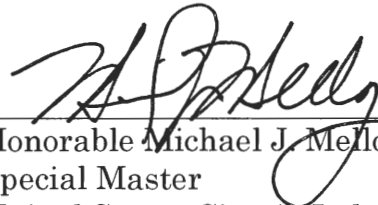
changing, and parties have identified potential Covid-related disruptions as a consideration.

river above the Reservoir appear to touch upon several tribal interests and potential federal statutory obligations not directly at issue with the original complaint, potentially giving rise to further requests for intervention. The parties disagree as to the need or scope for additional discovery and the potential for resolution of the claims in the proposed amended complaint via summary judgment. Finally, the United States' role in operation of the Project has caused the United States to be largely aligned with Texas in the current litigation. The interests and alignment of the United States as to the proposed amended complaint, if any, are unclear.

In short, the proposed supplemental complaint addresses issues distinct from the issues raised in the original complaint and has the potential to greatly expand the scope of the lawsuit. Accordingly, the undersigned believes it is appropriate and necessary to allow the Supreme Court itself to decide in the first instance how to exercise its gatekeeping function. To avoid acting in excess of my limited delegated authority, it seems prudent to permit the Court to consider whether the proposed supplemental complaint should be allowed and, if allowed, whether it should be a separate action or part of the present action.

To facilitate the Court's consideration of the motion, Texas is instructed to file directly with the Court.

Dated: August 26, 2021



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Honorable Michael J. Melloy  
Special Master  
United States Circuit Judge  
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