

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

STATE OF COLORADO'S RESPONSE TO THE STATE OF TEXAS'
REQUEST FOR A JUDICIAL DECLARATION TO CONFIRM THE LEGAL
ISSUES PREVIOUSLY DECIDED AND MOTION IN LIMINE TO EXCLUDE
THE INTRODUCTION OF EVIDENCE THEREON AND STATE OF NEW
MEXICO'S MOTION FOR PARTIAL JUDGMENT ON MATTERS
PREVIOUSLY DECIDED

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STATEMENT OF THE CASE

Texas brought this original action complaining that New Mexico violated the Rio Grande Compact, ch. 155, 53 Stat. 785 (1939), by allowing downstream New Mexico well users to consume water below Elephant Butte Reservoir. The United States intervened and filed a complaint with parallel allegations. The first Special Master filed a First Interim Report (“Report”) recommending that the United States’ complaint be dismissed in part because the Compact does not confer on the United States the power to enforce the terms of the Compact and that the motion to dismiss Texas’ complaint be denied. The United States, Colorado, and New Mexico filed exceptions to the recommendations.

The Court agreed to hear only the United States’ and Colorado’s exceptions concerning the scope of the claims the United States can assert: The United States argued it may pursue claims for Compact violations; Colorado argued the United States can pursue claims only to the extent they arise under the 1906 treaty with Mexico. Convention between the United States and Mexico for the Equitable Distribution for the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S. – Mex. 34 Stat. 2953 (“1906 Convention”).

The Supreme Court sustained the United States’ exception, holding that the United States may pursue the Compact claims it pled. *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018)(“ March 5th Opinion”). The Court overruled all other exceptions.

Id. at 960. Although the Court previously received the Special Master's Report and ordered it filed, *Texas v. New Mexico*, 137 S. Ct. 1363 (2017), the March 5th Opinion did not adopt the Report or affirm any of the findings contained therein. Instead, the Court remanded the case to the new Special Master for further proceedings consistent with its opinion. *Texas v. New Mexico*, 138 S. Ct. at 960.

Texas and New Mexico now ask the Special Master to find that the March 5th Opinion contains numerous legal conclusions, beyond the Court's express holding sustaining the exception of the United States. Texas goes a step further and asks the Special Master to limit evidence on remand based on the legal conclusions it argues were decided in the March 5th Opinion.

New Mexico asserts the Court made the following legal determinations in its March 5th Opinion:

1. Assuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaints are true, both Texas and the United States have pled valid claims arising under the Compact.
2. The Compact applies below Elephant Butte.
3. The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.
4. The Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas. EBID and EPCWID agreed to pay charges in proportion to the amount of land in each district, and in turn 57% of the water was allocated to New Mexico and 43% of the water was allocated to Texas.
5. The Compact incorporates the Downstream Contracts and the Project to the extent not inconsistent with the express language of the Compact. The

- Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte to Fort Quitman.
6. The apportionment is based on the Downstream Contracts and the operation of the Project.
 7. The United States has obligations that arise under the Compact. Those obligations include the duty to deliver a certain amount of water through the Project to assure that the Compact's equitable apportionment to Texas and part of New Mexico is made.
 8. New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir.
 9. A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico.
 10. The claims asserted by the United States do not and may not expand the scope of this litigation beyond what was alleged in Texas's Complaint.

Texas asserts the Court made following legal determinations in its March 5th Opinion:

1. The Rio Grande Project was fully integrated into the 1938 Compact
2. The text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir
3. New Mexico through its agents or subdivisions may not divert or intercept water it is required to deliver to Elephant Butte Reservoir pursuant to the 1938 Compact after the water is released from Elephant Butte Reservoir
4. New Mexico must refrain from post- 1938 depletion of water (i.e., depletions that are greater than what occurred in 1938) below Elephant Butte Reservoir
5. New Mexico state law plays no role in an interstate dispute

SUMMARY OF ARGUMENT

The Special Master should deny Texas' and New Mexico's Motions. The Court's decision is specific and narrow and does not include the legal conclusions that Texas or New Mexico now claim. First, the Supreme Court's Opinion is limited to deciding the one issue that the Court said it was resolving, namely, "the narrow question

whether the United States may, as an intervenor, assert essentially the same claims as Texas already has.” *Texas v. New Mexico*, 138 S. Ct. at 956. The Court overruled all remaining exceptions, including requests for the additional legal conclusions Texas and New Mexico now seek. Second, because the Court was deciding a motion to dismiss, it did not make any factual determinations or additional judgments. Instead, it accepted the case as alleged in the complaints. Third, having accepted the allegations as true, the Court explained the four reasons why it allowed the United States to pursue its claims. Fourth, the findings and legal reasoning in the Report are not findings and conclusions of the Court because the Court did not adopt them. The Special Master should reject the requests to read additional legal conclusions into the Court’s decision. Texas’ motion in limine is similarly based on arguments about legal issues that have yet to be decided, and should be denied for the same reasons.

One of Colorado’s primary concerns remains the unwarranted and unnecessary effort to expand precedent regarding the Río Grande Compact. New Mexico’s and Texas’ motions exemplify the reason for that concern. The Court issued the March 5th Opinion before any answers or discovery. As such, the proceedings all focused on the narrow issue of who could bring claims in this action. Judicial resolution of this issue should remain narrow and focused. Otherwise, the

parties risk having legal and factual issues prematurely determined on an advisory level, without an opportunity to develop and present a case.

The holdings in this case should not be extended to disputed issues at this time for two reasons. First, doing so would lead to an incomplete or inaccurate interpretation of the Río Grande Compact. Even limiting itself to purely legal issues, the Court answered only the question of whether Texas and the United States stated a claim under the Compact. It did not attempt to define the obligations the States agreed to impose on themselves by the Compact. Allowing a claim to proceed as a plausible legal theory is not the same as defining carefully negotiated obligations that limit the sovereign claims States may have over their natural resources.

Colorado has a concrete interest in this issue. The amount of water released from Elephant Butte Reservoir affects Colorado's ability to store water under the terms of the Compact. The Supreme Court's ruling on how the Compact affects Elephant Butte Reservoir may impact Colorado's ability to store water, irrigate during droughts, and achieve its Compact delivery obligations.

Second, allowing a process that would provide, as an advisory matter, a full legal interpretation of an interstate compact before any responsive pleadings would set a dangerous precedent for future original actions. As a party to nine interstate

compacts and equitable apportionment decrees, if a party to a compact or a decree could get complete relief based on allegations alone, Colorado expects an increase in future interstate compact disputes. If a preliminary motion to dismiss could, by implication, define the obligations of any State in an interstate compact dispute, Colorado would need to preemptively litigate potential legal controversies regarding a compact before the case was even at issue. It would also put the Court in a position of issuing advisory rulings on a wide array of issues in an interstate agreement before the States have framed the actual dispute. Accordingly, the Texas and New Mexico Motions should be denied.

ARGUMENT

I. The March 5th Opinion was limited to the single, narrow question of whether the United States may, as an intervenor, assert essentially the same claims as Texas already has.

The Court explicitly states the single question decided in its March 5th Opinion: whether the United States alleged sufficient interests to allow it to bring claims against New Mexico that are the same as those already raised by Texas. To assert that the Court resolved other legal issues ignores the clear statement of scope at the beginning of the March 5th Opinion. The Court began its opinion with the explanation that its role in compact cases differed from that in ordinary litigation because it serves as a substitute for diplomatic settlement and the possible use of force. “Using that special authority, we have sometimes permitted the federal

government to participate in compact suits to defend ‘distinctively federal interests’ that a normal litigant might not be permitted to pursue in traditional litigation.” *Texas v. New Mexico*, 138 S. Ct. at 958. This served to frame the question regarding the circumstances in which the United States could assert claims arising under the Compact. This explanation distinguished these proceedings from ordinary litigation and provided the context for the Court’s ruling. “[S]everal considerations taken collectively persuade us that the United States may pursue the particular claims it has pleaded in this case . . .” *Texas v. New Mexico*, 138 S. Ct. at 959. It then provided a recitation of its considerations. Thus, the legal conclusions in the March 5th Opinion focus entirely on the explanation of the basis for why the Court permitted the United States to bring claims in this proceeding, not on the resolution of those disputed claims.

The scope of the March 5th Opinion derives from the question that the Supreme Court requested for oral argument. The Court requested argument, and issued its ruling, in response to two exceptions. “We agreed to hear two of these exceptions – one by the United States and one by Colorado – concerning the scope of the claims the United States can assert in this original action.” *Texas v. New Mexico*, 138 S. Ct. at 958. The United States’ only exception was to the recommendation that the United States could not bring a claim against New Mexico for a violation of the Río Grande Compact. Colorado’s first exception raised a countervailing position, that

the United States could only bring a claim under the 1906 Convention with Mexico. These exceptions required resolution of the same issue, whether the United States could bring a compact claim against New Mexico.

The Court concluded that the United States could bring a claim for violation of the Río Grande Compact under the particular circumstances alleged here. This was the only issue decided. The Court carefully explained the limited application of its holding. “[B]earing in mind our unique authority to mold original actions, several considerations taken collectively persuade us that the United States may pursue the particular claims it has pleaded in this case . . .” *Texas v. New Mexico*, 138 S. Ct. at 960.

In the remaining exceptions, the parties presented only procedural issues. Colorado requested that the Court “affirmatively abstain” from adopting the Report. New Mexico asserted no exception to any recommendation in the Report, but it asked the Court to enunciate reasons for denying its motion to dismiss Texas’ complaint that differed from those in the Report. Texas did not file an exception brief but did request that the “Court accept and adopt the major legal resolutions that are critical to the ultimate resolution of the case that were affirmatively addressed by the Special Master as support for the recommendation that the New Mexico Motion to Dismiss the Texas Complaint be denied.” *Texas Reply to Exceptions* at p. 15.

Rather than address these concerns, the Court stated that all remaining exceptions were overruled. *Texas v. New Mexico*, 138 S. Ct. at 960. Yet in overruling them, the Court did not resolve the merits of those disputes. In fact, the Court's action may be seen as recognizing the conflicting concerns in these exceptions and fashioning a result that diffused the issue. The Court received the Report for filing, but did not adopt it. The Court has specifically adopted reports of Special Masters in the past. See, *Texas v. New Mexico*, 446 U.S. 540 (1980); *Louisiana v. Mississippi*, 516 U.S. 22, 28 (1995). In other instances, the Court has discussed reasoning in a report and the exceptions when it rules on them. Conversely, the Court's March 5th Opinion has only taken up the question of whether the United States can state a claim against New Mexico under the Compact. The result in this proceeding is that the Court has not expressed an opinion on the Report itself. The Court abstained, without any comment, from adopting the Report and did not provide any reasoning for denying the motion to dismiss Texas' complaint. This is not the exact result requested by either Colorado, New Mexico, or Texas. The Court did not affirmatively reject the Report, did not examine New Mexico's legal reasoning for dismissing its motion to dismiss, and did not adopt the reasoning in the Report. This leaves the parties to argue about the provisions of the Compact as the litigation progresses.

The Court's March 5th Opinion cannot be seen as resolving Texas' claims on the merits. The Court's order denying the motion to dismiss Texas' complaint states only, "The motion of New Mexico to dismiss Texas's complaint is denied." *Texas v. New Mexico*, 138 S. Ct. 349 (2017). Thus, the Court made no findings of fact or conclusions of law regarding Texas' claims. It contained no discussion of "major legal resolutions" that Texas asserts were decided in the Report. In the March 5th Opinion, the Court limits its legal conclusions to the federal interests allowing the United States to assert a compact claim. Although the Court acknowledges that the United States' claims are substantially the same as those already brought by Texas, it provided no conclusions regarding Texas' claims in the order denying the motion to dismiss them. What the March 5th Opinion provides is only an analysis of the similarity of those claims, not an analysis of the legal boundaries of the Compact. Because the Court did not discuss the reasons for its denial of the motion to dismiss, it is impossible to determine any reasons why the Court allowed Texas to proceed with its claims.

II. The Court accepted the allegations as true for the purposes of deciding a motion to dismiss.

The Court provided background explanations as dicta in its opinion for context. In fact, the Court simply provided some of the same background contained in the First Interim Report for the same reasons as the Report, to provide context for its decision. *Hernandez v. Mesa*, 137 S. Ct. 2003, 2005 (2017) (stating Court accepts

allegations in the complaint as true for purposes of resolving motion to dismiss). The Special Master never converted New Mexico's motion to dismiss into one for summary judgment. Therefore, it accepted all of Texas' pleaded allegations as true. Report at p. 191. Indeed, it presumed the main premise alleged by Texas,

that New Mexico, through its officers, agents, and political subdivisions, is diverting or intercepting water that belongs to Texas after Reclamation releases it from Elephant Butte Reservoir to irrigate lands of the Río Grande Project.

Report at p. 201. The Court likewise recited the allegations when describing the context of its decision. Importantly, the Court indicated when it was providing context at the beginning of its opinion and when it transitioned into an explanation of its ruling stating, "our analysis begins with the Constitution." *Texas v. New Mexico*, 138 S. Ct. at 958. What follows is a discussion of the Court's role in compact cases and the four considerations for allowing the United States to pursue its claim.

III. Having accepted the allegations, the Court explained the four reasons why it allowed the United States to pursue its claim.

Consistent with the limits of its decision, the Court enumerated four considerations unique to this case. All of these elements describe the federal government's interest in the litigation that factored into the Court fashioning the proceeding to include the United States. Notably, they are not a description of the

Compact, but of the alleged federal interests. Nor do they resolve the disputes on the merits.

First, the Court accepted that the Río Grande Compact is inextricably intertwined with the Río Grande Project and the Downstream Contracts. Importantly, the Court did not determine the nature, extent, or result of that relationship because it needed only to determine that the federal interest existed. The language in the opinion does not set out clear legal determinations, but evaluations of a subjective level of interest. For example, it uses language like “might be said to serve . . . as a sort of ‘agent’” and in “another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference” when describing that relationship. The qualifiers “sort of,” “might be,” “could be,” and “rough analogy,” do not establish a conclusion about the connection between the Compact and the Río Grande Project. By describing the alleged federal interest, the Court is not supplying terms that do not exist in the Compact. That would ignore the requirement to a compact must first be interpreted by its explicit terms. *Tarrant Reg. Water Auth. v. Hermann*, 569 U.S. 614, 632 (2013). Instead, these phrases simply illustrate a type of interest asserted by the United States that justifies its participation in this action.

Second, the Court noted that New Mexico has conceded on several occasions that the United States played an integral role in the Compact’s operation. In opposition

to Texas' motion for leave to file a complaint, New Mexico had argued that the United States was an indispensable party. It also stated at argument that it could sue the United States for interfering with the Compact. The Court observed that this showed New Mexico's willingness to involve the United States in this compact dispute. Colorado does not agree with all of New Mexico's assertions, but that concern was irrelevant to the Court's determination that the United States had an interest in litigating the Compact in this proceeding.

Third, the Court recognized that a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations. Interestingly, Colorado had argued that the 1906 Convention independently justified federal involvement. The Court accepted the United States' complaint on its face that New Mexico's actions have a hypothetical potential for causing a violation of the 1906 Convention. Allowing the United States to proceed confirms its interest in protecting treaty obligations.

Fourth, the Court allowed the United States to bring its Compact claim because Texas had already asserted substantially the same claims in an existing action. This meant that the United States did not bring any new issues in its claim against New Mexico. Importantly, the Court did not opine on the nature of Texas' claims. In denying New Mexico's motion to dismiss Texas' claims, the Court issued a terse statement, "The motion of New Mexico to dismiss Texas's complaint is denied."

Texas v. New Mexico, 138 S. Ct. at 349. It did not explain the nature of the Compact or what obligations the signatory States had thereunder. Indeed, it was not necessary for the Court to do so, either for the claims by Texas or the United States. The Court was not making a determination about the Compact, only deciding that the plaintiffs could proceed with their litigation.

The Court listed these four reasons as the federal interests that justified allowing the United States to bring a claim against New Mexico under the Compact in this proceeding. Given the effort the Court took to limit the reach of the single issue it decided, it is incorrect to infer that the Court ruled on other issues as well.

IV. Because the Court did not affirmatively adopt the Report of the Special Master, none of the background or reasoning of that Report became the law of the case.

A Special Master is appointed to make recommendations to the Supreme Court. Often, these recommendations are accompanied by a report describing the reasoning or facts supporting a recommendation. These recommendations do not have the same effect as an order of a court. Texas has acknowledged the role of a Special Master in its prior briefing, despite the arguments it now advances. “In original actions . . . the master’s recommendations are advisory only. . . .” Texas Reply to Exceptions at p. 9, citing *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). Further, the Court retains final authority in all findings and conclusions. “The findings, conclusions, and recommended decree of the master shall be subject to

consideration, revision, or approval by the Court.” Texas Reply to Exceptions at p. 9, quoting *Mississippi v. Louisiana*, 346 U.S. 862, 862-863 (1953). All recommendations of a Special Master are subject to exceptions by the parties, and rejection, modification, or approval by the Supreme Court. See, *Mississippi v. Arkansas*, 415 U.S. 289, 291 (1974). Therefore, the recommendations and reasoning in the First Interim Report are not a binding Court order.

Texas now asserts the background information and reasoning in the First Interim Report is a binding legal order of the Court. See, Texas’ Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon at p. 16. This argument is not supported by the Court’s opinion. It is also contrary to the legal authority cited above, and relied on in Texas’ own briefing to the Supreme Court. Further, in directing the Report to be filed, the Court has neither adopted the Report, nor endorsed the “major legal resolutions” Texas asserts are in the Report. The United States agreed with Colorado when it stated, “The merits of the complaints are not yet before the Court, nor has there been any factual development of the claims brought by Texas and the United States.” U.S. Reply to Exceptions at p. 14. Nonetheless, Texas refers to findings and conclusions by the Special Master throughout its motion as though it was a legal determination by the Court. This is

wrong. Accordingly, the Special Master should reject Texas' argument that the First Interim Report should serve as the law of the case.

CONCLUSION

The Special Master should deny the motions by Texas and New Mexico asking for determinations of previously decided legal issues and deny Texas' motion in limine.

Respectfully submitted this 28th day of February, 2019 by



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OFFICE OF THE SPECIAL MASTER

STATE OF COLORADO'S CERTIFICATE OF SERVICE

This is to certify that on the 28th day of February, 2019, I caused a true and correct copy of the **State of Colorado's Response to the State of Texas' Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon and State of New Mexico's Motion for Partial Judgment on Matters Previously Decided** to be served by e-mail upon all counsel of record and counsel for interested parties and mail courier upon the Special Master and Clerk of the 8th Circuit Michael Gans.

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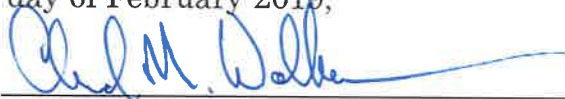
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