

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



**EXPEDITED MOTION OF THE COMPACTING STATES
TO CLARIFY PROCEDURES FOR THE HEARING ON THE CONSENT DECREE**



November 18, 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 the Special Master to clarify the procedures for the hearing to consider 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* (Nov. 14, 2022) (“Joint Motion”). The Compacting States submit that it may be prudent to allow an evidentiary hearing to present the proposed Consent Decree to the Special Master and for the United States to be afforded the opportunity to present evidence in opposition to entry of the Consent Decree. The Compacting States conferred with the United States regarding this motion. The United States opposes this motion as premature and will file a response in due course.

In further support of the motion, the Compacting States state:

1. As described during the October 25th Status Conference and in the Joint Motion, the Compacting States have reached a settlement to resolve the complex interstate issues presented in this case that will provide a sound framework for future Compact compliance. The Consent Decree that embodies the Compacting States’ agreement involves technical components that will benefit from explanation.

2. In considering whether to enter a consent decree over the objection of a party, due process requires an opportunity to present evidence so that the Court can consider any objections on their merits. *See, e.g., Lawyer v. Dept. of Justice*, 521 U.S. 567, 579 (1997) (“appellant was entitled to present evidence and have his objections heard at the hearing to consider approval of the agreement”); *Local No. 93 v. City of Cleveland*, 478 U.S. 501, 525 (1989) (holding that the objecting party received appropriate process because “[i]t was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence”); *Zipes v. Trans World Airlines*,

Inc., 455 U.S. 385, 400-01 (1982) (“the District Court gave the union all the process that was due . . . [because the court] heard its objections, made appropriate findings, and determined that retroactive seniority should be awarded”); *Sierra Club v. North Dakota*, 868 F.3d 1062, 1066 (9th Cir. 2017) (“an intervenor must be heard on whether to approve a consent decree, but it cannot stop other litigants from resolving their dispute by withholding its consent to a decree”); *Johnson v. Lodge #93 of Fraternal Order of Police*, 393 F.3d 1096, 1107 (10th Cir. 2004) (same).

3. It is particularly appropriate to hold an evidentiary hearing in this case, where the Special Master is tasked with creating a complete record for the Court. *See Florida v. Georgia*, 138 S. Ct. 2502, 2515 (2018) (“Without the full range of factual findings, we have said, the Court may lack an adequate basis on which to make ‘the delicate adjustment of interests’ that the law requires.”) (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)); *Colorado v. New Mexico*, 467 U.S. 310, 314 (1984) (“On this matter, we found the Master's report unclear and determined that a remand would be appropriate.”); *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840) (“And in a case like the present, the most liberal principles of practice and pleading ought unquestionably to be adopted, in order to enable both parties to present their respective claims in their full strength.”); 3 A. Kelley, *Water and Water Rights* § 45.02(c), p. 45–14 (3d ed. 2018) (“If the factual findings in the report are insufficient for the Court to decide whether the master correctly applied the doctrine of equitable apportionment, the Court may refer the case back to the master for additional findings”).

4. At the same time, the scope of the hearing should be strictly limited to the issues relevant to the Joint Motion. This means that the hearing should be focused only on the Joint Motion and evidence relevant to resolution of the interstate Compact dispute through the proposed Consent Decree, and not on the broader questions that may arise in the trial on the merits.

5. In accord with that limitation, the Compacting States will have the burden to show that the proposed Consent Decree “spring[s] from and serve[s] to resolve a dispute within the court’s subject matter jurisdiction,” comes within “the general scope of the of the case made by the pleadings,” and “furthers objectives of the law upon which the complaint was based.” *Local No. 93 v. City of Cleveland*, 748 U.S. 501, 525 (1989) (quoting *Pacific R. Co. v. Ketchum*, 101 U.S. 289, 297 (1880)).

6. Conversely, the United States will have the burden of proof on any objections, should it choose to oppose the Consent Decree. *See United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). The principal issue in this regard is whether the proposed Consent Decree would unreasonably affect the United States’ existing legal rights and obligations related to the Compact. *Johnson*, 393 F.3d at 1107 (“[A] nonconsenting intervenor may block approval of a consent decree only if the decree adversely affects its legal rights or interests.”); *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998) (“[A] consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree.”). Put differently, the relevant question is whether the United States would face any “legal prejudice” from entry of the proposed Consent Decree related to its charge to assure that the Compact’s equitable apportionment to Texas and New Mexico is made. *New Mexico ex. rel. State Engineer v. Carson*, 908 F.3d 659, 665 (10th Cir. 2018); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir.1983); *see also, Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). The question is analogous to a standing analysis. *See Fla. Wildlife Federation, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1303-04 (11th Cir. 2011) (applying a standing analysis to conclude that regulated entities, as intervenors, could not challenge consent decree requiring EPA to promulgate numeric water quality standards for certain

pollutants). *Cf. Horne v. Flores*, 557 U.S. 433, 446 (2009) (“To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent.”).

7. The Joint Motion was supported by the declarations of technical experts sufficient to justify a recommendation to the Court for entry of the Consent Decree. The Compacting States anticipate that any United States opposition to the Joint Motion should be similarly accompanied by declarations. Nonetheless, an evidentiary hearing would bolster the record and allow for a more comprehensive presentation of the Consent Decree and possible objections.

8. If the Special Master determines that it would be beneficial, the Compacting States believe that an evidentiary hearing on the Consent Decree, in accord with the burdens and limits discussed herein, could be completed in approximately 5 days. Given the limited scope of such hearing, that would allow ample time for witnesses to present the Consent Decree, witnesses (if any) in opposition, questions from the Special Master, and oral argument.

WHEREFORE, the Compacting States respectfully request that the Special Master grant the following relief:

- A. Clarify whether the hearing currently set for January 24, 2023 will allow for the presentation of evidence or whether evidence will be limited to written declarations;
and
- B. If the hearing will include the presentation of evidence, extend the hearing to allow appropriate time, not more than five days, for that presentation.

Dated: November 18, 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

JEFFREY J. WECHSLER
Special Assistant Attorney General
SHELLY DALRYMPLE
KALEB W. BROOKS
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

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
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

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
—◆—

CERTIFICATE OF SERVICE
—◆—

This is to certify that on this 18th day of November, 2022, I caused a true and correct copy of the **EXPEDITED MOTION OF THE COMPACTING STATES TO CLARIFY PROCEDURES FOR THE HEARING ON THE CONSENT DECREE** to be served upon all parties and *amici curiae*, 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 18, 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
P.O. Box 7611
Washington, D.C. 20044-7611

(202) 305-0476

STATE OF NEW MEXICO

HECTOR H. BALDERAS

New Mexico Attorney General

TANIA MAESTAS

Chief Deputy Attorney General

CHOLLA KHOURY

Assistant Attorney General

ZACHARY E. OGAZ

Assistant Attorney General

STATE OF NEW MEXICO

P.O. Drawer 1508

Santa Fe, New Mexico 87501

JENNIFER VAN WIEL – Paralegal

hbaldaras@nmag.gov

tmaestas@nmag.gov

ckhoury@nmag.gov

zogaz@nmag.gov

jvanwiel@nmag.gov

(505) 239-4672

NATHANIEL CHAKERES

Deputy General Counsel

RICHARD A. ALLEN

Special Assistant Attorney General

NEW MEXICO OFFICE OF THE STATE ENGINEER

P.O. Box 25102

Santa Fe, NM 87504

nathaniel.chakeres@state.nm.us

(505)231-4459

rick.allen@state.nm.us

(505)570-7754

JONAS ARMSTRONG

NEW MEXICO INTERSTATE STREAM COMMISSION

P.O. Box 25102

Santa Fe, NM 87504

jonas.armstrong@state.nm.us

(505)470-6843

MARCUS J. RAEL, JR.*

LUIS ROBLES

Special Assistant Attorneys General

ROBLES, RAEL & ANAYA, P.C.

500 Marquette Avenue NW, Suite 700

Albuquerque, New Mexico 87102

CHELSEA SANDOVAL - Paralegal

PAULINE WAYLAND – Paralegal

BONNIE DEWITT – Paralegal

marcus@roblesrael.com

luis@roblesrael.com

chelsea@roblesrael.com

pauline@roblesrael.com

bonnie@roblesrael.com

(505) 242-2228

BENNETT W. RALEY

LISA M. THOMPSON

MICHAEL A. KOPP

Special Assistant Attorneys General

braley@troutlaw.com

lthompson@troutlaw.com

mkopp@troutlaw.com

(303) 861-1963

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

JEFFREY WECHSLER
SHELLY L. DALRYMPLE
KALEB W. BROOKS
Special Assistant Attorneys General
MONTGOMERY & ANDREWS
325 Paseo De Peralta
Santa Fe, NM 87501
DIANA LUNA – Paralegal

jwechsler@montand.com
sdalrymple@montand.com
kwbrooks@montand.com
(505) 986-2637

dluna@montand.com

JOHN DRAPER
CORINNE ATTON
Special Assistant Attorneys General
DRAPER & DRAPER LLC
325 Paseo De Peralta
Santa Fe, NM 87501
DONNA ORMEROD – Paralegal

john.draper@draperllc.com
corinne.atton@draperllc.com
(505) 570-4591

donna.ormerod@draperllc.com

STATE OF COLORADO

PHILIP J. WEISER
Attorney General of Colorado
ERIC R. OLSON
Solicitor General
LAIN LEONIAK
Acting First Assistant Attorney General
CHAD M. WALLACE*
Senior Assistant Attorney General
PRESTON V. HARTMAN
Assistant Attorney General
COLORADO DEPARTMENT OF LAW
Ralph Carr Judicial Center
7th Floor
1300 Broadway
Denver, CO 80203
NAN EDWARDS, Paralegal II

eric.olson@coag.gov

chad.wallace@coag.gov
(720) 508-6281 (direct)
preston.hartman@coag.gov
(720) 508-6257 (direct)

nan.edwards@coag.gov

STATE OF TEXAS

STUART SOMACH*
ANDREW M. HITCHINGS
ROBERT B. HOFFMAN
FRANCIS M. GOLDSBERRY II

ssomach@somachlaw.com
ahitchings@somachlaw.com
rhoffman@somachlaw.com
mgoldsberry@somachlaw.com

THERESA C. BARFIELD
SARAH A. KLAHN
BRITTANY K. JOHNSON
RICHARD S. DEITCHMAN
SOMACH SIMMONS & DUNN, PC
500 Capital Mall, Suite 1000
Sacramento, CA 95814-2403
CORENE RODDER - Secretary
CRYSTAL RIVERA - Secretary
YOLANDA DE LA CRUZ - Paralegal

tbarfield@somachlaw.com
sklahn@somachlaw.com
bjohnson@somachlaw.com
rdeitchman@somachlaw.com
(916) 446-7979
(916) 803- 4561 (cell)
crodder@somachlaw.com
crivera@somachlaw.com
ydelacruz@somachlaw.com

KEN PAXTON
Attorney General of Texas
BRENT WEBSTER
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
Chief, Environmental Protection Division
OFFICE OF ATTORNEY GENERAL
OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548

(512) 463-2012
(512) 457-4644 Fax

Priscilla.Hubenak@oag.texas.gov

AMICI / FOR INFORMATIONAL PURPOSES ONLY

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

JAMES C. BROCKMANN*
JAY F. STEIN
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santé Fe, New Mexico 87504
Administrative Copy

(505) 983-3880
jcbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

CHARLES W. KOLBERT
ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY
P.O. Box 568
Albuquerque, NM 87103-0568

(505) 289-3051
ckolberg@abcwua.org

CITY OF EL PASO

DOUGLAS G. CAROOM*
SUSAN M. MAXWELL
BICKERSTAFF HEATH DELGADO
ACOSTA, LLP
2711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746

(512) 472-8021
dcaroom@bickerstaff.com
smaxwell@bickerstaff.com

CITY OF LAS CRUCES

JAY F. STEIN *
JAMES C. BROCKMANN
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santé Fe, New Mexico 87504
Administrative Copy

(505) 983-3880
jbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

JENNIFER VEGA-BROWN
ROBERT CABELLO
LAW CRUCES CITY ATTORNEY'S OFFICE
P.O. Box 20000
Las Cruces, New Mexico 88004

(575) 541-2128
jvega-brown@las-cruces.org
rcabello@las-cruces.org

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCastle*
BARNCastle LAW FIRM, LLC
1100 South Main, Suite 20 (88005)
P.O. Box 1556
Las Cruces, NM 88004
JANET CORRELL – Paralegal

(575) 636-2377
(575) 636-2688 (fax)
samantha@h2o-legal.com
janet@h2o-legal.com

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

MARIA O'BRIEN*
SARAH M. STEVENSON
MODRALL, SPERLING, ROEHL, HARRIS
& SISK, PA
500 Fourth Street N.W., Suite 1000
Albuquerque, New Mexico 87103-2168
CHARLIE PADILLA – Legal Assistant

(505) 848-1803 (direct)
mobrien@modrall.com
sarah.stevenson@modrall.com
charliep@modrall.com

RENEA HICKS

rhicks@renea-hicks.com

LAW OFFICE OF MAX RENE HICKS
P.O.Box 303187
Austin, TX 78703-0504

(512)480-8231

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1

ANDREW S. "DREW" MILLER*
KEMP SMITH LLP
919 Congress Avenue, Suite 1305
Austin, TX 78701

(512) 320-5466
dmiller@kempsmith.com

STATE OF KANSAS

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
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

(785) 296-2215
toby.crouse@ag.ks.gov
bryan.clark@ag.ks.gov

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON*
DAVIDSON LAW FIRM, LLC
4206 Corrales Road
P.O. Box 2240
Corrales, NM 87048
JO HARDEN – Paralegal

ttd@tessadavidson.com
(505) 792-3636

jo@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON*
UTTUN & KERY, P.A.
P.O. Box 2386
Santa Fe, New Mexico 87504

(505) 699-1445
john@uttonkery.com

General Counsel
New Mexico State University
Hadley Hall Room 132

gencounsel@nmsu.edu
(575) 646-2446

2850 Weddell Road
Las Cruces, NM 88003

SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION

ARNOLD J. OLSEN*
HENNIGHAUSEN OLSEN & MCCREA, L.L.P.
P.O. Box 1415
Roswell, NM 88202-1415
Malina Kauai, Paralegal
Rochelle Bartlett, Legal Assistant

(575) 624-2463
ajolsen@h2olawyers.com

mkauai@h2olawyers.com
rbartlett@h2olawyers.com