

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 NEW MEXICO'S RESPONSE TO THE UNITED STATES OF AMERICA'S
MOTION *IN LIMINE* REGARDING MATTERS DECIDED ON SUMMARY
JUDGMENT**

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
CHOLLA KHOURY
Assistant Attorney General
ZACHARY E. OGAZ
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672

MARCUS J. RAEL, JR.*
LUIS ROBLES
SUSAN BARELA
Special Assistant Attorneys General
Robles Rael & Anaya
500 Marquette Ave NW #700
Albuquerque, NM 87102
marcus@roblesrael.com
505-242-2228

**Counsel of Record*

August 5, 2021

TABLE OF CONTENTS

ARGUMENT 1

I. THE SPECIAL MASTER SHOULD DENY THE UNITED STATES’ MOTION
BECAUSE THE SUMMARY JUDGMENT ORDER IS CLEAR AND DOES
NOT IMPLIEDLY RULE ON NEW MEXICO’S AFFIRMATIVE DEFENSES. 1

A. The Special Master’s Summary Judgment Order Speaks for Itself and Does
Not Need to Be Clarified. 1

B. The Special Master’s Summary Judgment Order Did Not Impliedly Rule on
New Mexico’s Affirmative Defenses Against the United States..... 2

CONCLUSION..... 4

TABLE OF AUTHORITIES

Cases

E.E.O.C. v. Morgan Stanley & Co., 2004 WL 1542264 (S.D.N.Y. July 8, 2004) 1

Ohio v. Kentucky, 410 U.S. 641 (1973) 3

ARGUMENT

I. THE SPECIAL MASTER SHOULD DENY THE UNITED STATES' MOTION BECAUSE THE SUMMARY JUDGMENT ORDER IS CLEAR AND DOES NOT IMPLIEDLY RULE ON NEW MEXICO'S AFFIRMATIVE DEFENSES.

A. The Special Master's Summary Judgment Order Speaks for Itself and Does Not Need to Be Clarified.

The United States paraphrases, quotes, or partially quotes fifteen statements from the Special Master's summary judgment order and requests that the Special Master rule that evidence not be submitted at trial to contest them. To be sure, New Mexico does not intend to introduce evidence at trial for purposes of contesting issues decided on summary judgment, and New Mexico would expect the same from Texas and the United States. But New Mexico sees no benefit from a ruling clarifying or enforcing the Special Master's summary judgment order. The order speaks for itself and does not benefit from a fifteen-point gloss from the United States. *See E.E.O.C. v. Morgan Stanley & Co.*, 2004 WL 1542264, at *3 (S.D.N.Y. July 8, 2004) (ruling that plaintiff's bullet point list confirming areas of potential testimony “do not necessarily and/or accurately conform” to the court's prior order, which “speaks for itself”).

Although New Mexico will not introduce evidence contesting the summary judgment order, New Mexico expects latitude at trial to introduce evidence of what comprises any baseline as relevant to the Compact apportionments, including the course of performance of the parties since the execution of the Compact. The Special Master has ruled that the question of “what, exactly” is divided 57%:43% between New Mexico and Texas is one of the key issues to be determined at trial:

New Mexico's apportionment theory, of course, speaks to the core outstanding questions not being decided on summary judgment: what are the details of New Mexico's downstream duty and what, exactly, did the compacting states intend to divide 57%/43%.

Special Master’s Summary Judgment Order [Dkt. 503] [hereinafter “Summary Judgment Order”] at 46 (May 21, 2021). To this end, the Special Master identified several categories of evidence that would bring the details of the baseline to light, including post-Compact operations, and acknowledged that this condition may accommodate certain levels of groundwater pumping. *Id.* at 39. The United States should not now seek to encumber New Mexico’s ability to present evidence on the understanding of baseline Project conditions, including evidence that the compacting states understood and intended that baseline conditions include groundwater pumping and conjunctive use throughout the Project.

B. The Special Master’s Summary Judgment Order Did Not Impliedly Rule on New Mexico’s Affirmative Defenses Against the United States.

The United States also asserts that the Special Master’s summary judgment order impliedly ruled that (1) New Mexico’s acquiescence affirmative defense is not available against the United States; and that (2) New Mexico’s remaining affirmative defenses apply only to the United States’ claim for an injunction or remedies other than declaratory relief. The order does not contain these conclusions, explicitly or impliedly.

The summary judgment order itemizes each summary judgment request from the parties and specifically rules on each request. *See* Summary Judgment Order at 46-54. Nowhere does the order rule—or impliedly rule—on New Mexico’s affirmative defenses. This is evident from a plain and straightforward reading of the entire order, and the order clearly undercuts the United States’ argument. First, although the briefing between the United States and New Mexico touched on the issue of New Mexico’s affirmative defenses, the United States did not actually seek a ruling concerning New Mexico’s affirmative defenses. *See generally* United States’ Memorandum in Support of Motion for Partial Summary Judgment [Dkt. 414] (Nov. 5, 2020).

The only ruling the Special Master has made to date on New Mexico’s affirmative defenses came in his March 21, 2020 order addressing New Mexico’s counterclaims and affirmative defenses. Texas had sought dismissal of New Mexico’s affirmative defenses on the grounds that they were unavailable in this compact suit. The Special Master reserved any specific ruling on this issue and instead acknowledged that, given the “unusual” nature of the Rio Grande Compact, equitable considerations may play a part in this compact suit even if such considerations would be more limited in other interstate disputes:

At the end of the day, the Court’s discretionary original jurisdiction remains “basically equitable in nature.” *Id.* at 1051 (quoting *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973)). And here, the Compact is unusual in several respects in that it leaves a great deal unsaid, depends heavily on the performance of Project operators in the distribution of water, and places on New Mexico an intrastate water delivery obligation. Even if the application of equitable defenses in a more traditional Compact case might be strictly limited, it is not clear such limitations would apply in the same manner in this case. Accordingly, I defer ruling as to dismissal of the challenged equitable affirmative defenses until a later stage of this case.

Order of the Special Master at 40 (March 31, 2020).

Contrary to the United States’ interpretation, the Special Master’s summary judgment order did not revisit the issue of New Mexico’s equitable defenses but rather confirmed multiple times that equitable considerations such as acquiescence may affect the states’ Compact compliance. *See* Summary Judgment Order at 39 (“it remains to be shown the extent to which any state knowingly acquiesced in another state’s actions”); *id.* at 41 (acknowledging New Mexico’s evidence of Texas’s acquiescence). The United States takes these same examples as the basis for its assertion that the Special Master “impliedly” ruled that New Mexico’s acquiescence defense does not apply to the United States. This is apparently because the Special Master used language focusing on potential Texas, not United States, acquiescence. Such a reading only attempts to inject hidden meaning into a few unassuming phrases from the Special Master.

Additionally, this line of argument overlooks that the summary judgment order acknowledges that New Mexico has advanced its equitable defenses against the United States as well. In the proceeding sentence after the order notes New Mexico’s acquiescence defense against Texas, the order states: “New Mexico also points to actions by the United States during this time that New Mexico describes as promoting pumping as a solution to surface water shortfalls.” *Id.* at 42. The order is clearly referencing New Mexico’s acquiescence defense against the United States. *Compare with* New Mexico’s Answer to the United States’ Complaint in Intervention [Dkt. 95] at 12 (May 22, 2018) (describing New Mexico’s acquiescence and equitable defenses against the United States: “Rather than protesting [groundwater pumping], the United States . . . encouraged Project beneficiaries to drill wells, particularly during drought years with low surface water supplies.”). In another instance, the order rules against the United States’ motion for injunctive relief, explaining:

The propriety and necessity of injunctive relief remains to be determined based on the detailed resolution of issues identified above and based on proof of damages taking into account as of yet unresolved issues including: acquiescence, equitable defenses, and any offsetting harm a state’s own actions have caused.

Summary Judgment Order at 53. These references do not suggest that New Mexico’s equitable defenses will not be available against the United States. Quite the contrary, they indicate that equitable considerations—and the details that could support such considerations—will be an important issue at trial. The United States’ request for a ruling that these defenses do not apply to the United States should be denied.

CONCLUSION

For the foregoing reasons, New Mexico respectfully requests that the Special Master deny the United States’ Motion *in Limine* Regarding Matters Decided on Summary Judgment.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
CHOLLA KHOURY
Assistant Attorney General
ZACHARY E. OGAZ
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672

MARCUS J. RAEL, JR.*
LUIS ROBLES
SUSAN BARELA
Special Assistant Attorneys General
Robles Rael & Anaya
500 Marquette Ave NW #700
Albuquerque, NM 87102
marcus@roblesrael.com
505-242-2228

**Counsel of Record*

JEFFREY J. WECHSLER
Special Assistant Attorney General
KALEB W. BROOKS
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501
jwechsler@montand.com

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

JOHN B. DRAPER
Special Assistant Attorney General
CORINNE E. ATTON
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, NM 87501
john.draper@draperllc.com
505-570-4591

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 NEW MEXICO'S CERTIFICATE OF SERVICE

◆

This is to certify that on August 5, 2021, I caused a true and correct copy of the **State of New Mexico's Response to the United States of America's Motion in Limine Regarding Matters Decided on Summary Judgment** to be served by e-mail and U.S. Mail upon the Special Master and by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 5th day of August, 2021.

/s/ Michael A. Kopp

Michael A. 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

MEDIATOR

HON. OLIVER W. WANGER (USDJ RET.)

WANGER JONES HELSLEY PC
265 E. River Park Circle, Suite 310
Fresno, California 93720

owanger@wjhattorneys.com
(559) 233-4800 Ext. 203

DEBORAH L. PELL (Paralegal)

dpell@whjattorneys.com

UNITED STATES

ELIZABETH B. PRELOGAR*

Acting Solicitor General

EDWIN S KNEEDLER

Deputy Solicitor General

JEAN E. WILLIAMS

Deputy Assistant Attorney 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

JAMES J. DUBOIS*

R. LEE LEININGER

U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
999 18th Street

South Terrace – Suite 370

Denver, Colorado 80202

SETH C. ALLISON, Paralegal

james.dubois@usdoj.gov
(303) 844-1375
lee.leininger@usdoj.gov
(303) 844-1364

Seth.allison@usdoj.gov
(303)844-7917

JUDITH E. COLEMAN
JENNIFER A. NAJJAR
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

Judith.coleman@usdoj.gov
(202) 514-3553
jennifer.najjar@usdoj.gov
(202) 305-0476

STATE OF NEW MEXICO

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Chief Deputy Attorney General

hbalderas@nmag.gov
tmaestas@nmag.gov
ckhoury@nmag.gov
zogaz@nmag.gov
psalazar@nmag.gov
(505) 239-4672

CHOLLA KHOURY
Assistant Attorney General
ZACHARY E. OGAZ

Assistant Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501

PATRICIA SALAZAR - Assistant

MARCUS J. RAEL, JR.*

LUIS ROBLES

SUSAN BARELA

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
susan@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
TROUT RALEY

1120 Lincoln Street, Suite 1600
Denver, Colorado 80203

braley@troutlaw.com
lthompson@troutlaw.com
mkopp@troutlaw.com
(303) 861-1963

JEFFREY WECHSLER

Special Assistant Attorney General
MONTGOMERY & ANDREWS

jwechsler@montand.com
(505) 986-2637

325 Paseo De Peralta
Santa Fe, NM 87501
DIANA LUNA – Paralegal

dluna@montand.com

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

john.draper@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

eric.olson@coag.gov

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

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
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
CHRISTINA GARRO – Paralegal

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

YOLANDA DE LA CRUZ - Paralegal

ydelacruz@somachlaw.com

KEN PAXTON

Attorney General

JEFFREY C. MATEER

First Assistant Attorney General

DARREN L. McCARTY

Deputy Attorney General for Civil Litigation

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*

(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

PETER AUH

(505) 289-3092

ALBUQUERQUE BERNALILLO COUNTY

pauh@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 *
JAMES C. BROCKMANN
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

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

rhicks@renea-hicks.com
(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

2850 Weddell Road

Las Cruces, NM 88003

gencounsel@nmsu.edu

(575) 646-2446

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