

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,

UNITED STATES OF AMERICA,

Intervenor.

O R D E R

In anticipation of the Status Conference scheduled for Wednesday, October 23, 2024, at 10:00 A.M. to be held in courtroom A201 of the Alfred A. Arraj United States Courthouse, 901 19th Street, Denver, Colorado, 80294, and in an effort to provide focus to the “conversation” that will ensue between the Special Master and

all of counsel, the Special Master hereby provides the attached list of inquiries, appended to this order as Exhibit “A.” The Special Master requests that counsel for the parties address in their respective presentations the questions set out in the attached list, along with any matters counsel consider to be material to the instant controversy, and any measures counsel believe might further its prompt and efficient resolution.

Counsel for the parties should take note of the anticipated order of the proceeding.

By order dated this 15th day of October, 2024:

s/D. Brooks Smith

Honorable D. Brooks Smith

Special Master

United States Circuit Judge

1798 Plank Road, Suite 203

Duncansville, PA 16635

Tel: 814-693-0570

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EXHIBIT A

Global Questions for All Parties

1. To what extent are equitable principles applicable throughout this litigation, and especially with respect to shaping any ultimate relief?
2. Throughout this case, the Special Master(s) has referred to “ambiguities” in the Compact. What is the specific language or portion of the Compact that is subject to ambiguity?
3. Just to be clear, no party appears to advocate for a “re-do” of the trial phase already conducted before then-Special Master Melloy? The parties diverge as to what a resumed trial should look like, but you all seem to agree that we should pick up where the previous Special Master left off?
4. Both Status Reports highlight that I must determine the applicable baseline the Compact requires. It seems that the possibly applicable baselines are either the 1938 baseline or a D2 baseline. But are these the only possible baselines in play? And what baseline is each party advocating for?
5. Am I correct that the 57/43 split is NOT in the Compact? From what or where does it derive?
6. Are all the rulings made by previous Special Masters (which have not been challenged) “law of the case” such that we are bound by them now?
7. I have on the record the transcripts for nineteen days of trial, and I have boxes of trial exhibits in my chambers. What am I to do with them if we pick up trial where we left off? Is any party contending that I am not in a position to make factual determinations based on those materials?
8. You have all mentioned resuming trial in your Status Reports. But you note that it would not resume for some time. What do you believe our *immediate* next step(s) should be?

9. What individual or individuals within your agency are you reporting to in relation to this litigation?

Questions for All Compacting States (Texas, New Mexico, and Colorado)

1. Your Status Report indicates that you anticipate filing “stipulations in the near future.” Are they different than the proposal at page 22 of your Status Report to provide a list of undisputed facts?
2. Your Status Report indicates that you “anticipate filing stipulations in the near future” that would “include a voluntary dismissal by both New Mexico and Texas of claims for damages against each other.” (ECF No. 9 at 18). But that of course leaves us with the declaratory and injunctive relief the United States seeks against New Mexico. Would the states still pursue the declaratory and/or injunctive relief they seek against each other? Would those claims for relief still be live?
3. Your Status Report says you will “jointly advocate for entry of a Proposed Index Decree that closely tracks the proposed Consent Decree.” (pg. 18). Please explain what you mean by that.
4. You focus on entering the “Index Decree” as a judgment. Is it your position that any continuation of trial would necessarily have to address the validity of the United States’ Compact claims? In other words, would I first need to reach conclusions about New Mexico’s obligations under the Compact and its compliance with those obligations before I can move to considering a remedy?
5. If I need to reach conclusions about the Compact’s construction, New Mexico’s obligations under the Compact, and its compliance with those obligations, do the Compacting States agree on those points?

6. Your Status Report calls for further discovery on the proposed Index Decree. Why is that necessary, and how would discovery be narrowly tailored to advance this case efficiently?
7. You suggest on page 23 of your Status Report that I take a tour of the Basin in the Spring of 2025. Spring encompasses a few months, and I continue to maintain an active appellate docket. Do you have a specific month in mind?

Questions for Texas

1. The Compact defines “actual spill” and “hypothetical spill.” Please explain in laymen’s terms a “hypothetical spill.”
2. What does “deliver” mean in the Compact? Is it a term of art that refers to the flow of water downstream to the next Sovereign?
3. Is your 2013 complaint still the operative complaint in this case?
4. Is your complaint essentially a one count complaint: New Mexico has breached and continues to breach its obligations under the Compact by depleting Project water below Elephant Butte Reservoir?
5. What are the elements of the claim that you are asserting? Is it as simple as the Compact obligates New Mexico to do X, Y, and Z, New Mexico breached that duty, and relief is due? If so, did the Special Master’s summary judgment ruling resolve the “duty” part of the inquiry so that the focus is now on the second element—has New Mexico breached the Compact?

Questions for the United States

1. It’s been six years since the Supreme Court allowed you to intervene. Can you explain to me succinctly what your interest in this litigation is as of now?
2. Is your complaint essentially a one-count complaint: New Mexico’s diversion of surface water and pumping of groundwater violates the Compact?

3. Can you explain to me, factually, what your theory of New Mexico's alleged Compact breach is? I understand you claim they are diverting Project water through excessive groundwater pumping. But how does that actually occur? (Put differently, what is your factual theory of New Mexico's breach?)
4. Your complaint states that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande[.]" What does "hydrologically connected" mean when referring to the Rio Grande?
5. What am I to make of the language you use in your complaint that New Mexico's use of water "could" reduce Project efficiency to a point where 43% of the available water could not be delivered to EP1, and 60,000 acre-feet per year could not be delivered to Mexico? How *might* that occur?
6. After reading page 10 of your Status Report, I have the sense that it is very important to the United States to obtain a declaration that New Mexico has breached its duty of non-interference and that New Mexico has violated the Compact. Is my sense correct?
7. If all parties were to agree with the United States' wish list, would the United States still want a declaration?
8. What is your position on the trial schedule the Compacting States have proposed in their Joint Status Report?
9. The Compacting States, in their Status Report, call for limited discovery on the proposed Index Decree. Do you agree? Do you think any further discovery is necessary?
10. On page 11 of your Status Report, you assert that the Index Decree "would be contrary to the Compact because it would transform New Mexico's Article IV obligation into a state-line delivery requirement." If Texas is getting the amount of water required, why is this objectionable?

11. You also assert on page 11 that the Index Decree “would impose obligations on the United States in contravention of the United States’ sovereign immunity.” How would it do this? Are the United States’ current obligations those carried out by Reclamation?
12. EBID and EP1 contend on page 5 of their Joint Status Report that they “are aligned with the United States. In fact, they are signatories, as the United States is, to the Downstream Contracts and the 2008 Operating Agreement.” Do you agree that these two irrigation districts are aligned with the United States?
13. The Compacting States’ Status Report contemplates the filing of Stipulations and a list of undisputed facts. Would this be something that the United States would see as a beneficial exercise to streamline future proceedings?
14. The Compacting States also contemplate additional summary judgment motions. Does the United States think this would be beneficial?
15. The parties required the assistance of a mediator to draft the Consent Decree. And prior to the Consent Decree, the parties were unable to reach a workable solution on their own. Given the length and history of this case, plus the appointment of a new Special Master so “late in the game,” how can the United States believe a mediator is unnecessary?

Questions for New Mexico

1. In Article IV, what language requires delivery by New Mexico to Texas below Elephant Butte Reservoir?
2. Page 8 of your Joint Status Report states that “Special Master Melloy dismissed” New Mexico’s counterclaims “for damages but left open the possibility that New Mexico is entitled to declaratory relief against the United

States.” Is it your position that you still have live counterclaims against the United States for declaratory relief? If so, which claim(s)?

3. Am I correct in my understanding that you have, at least for the years 2003 and 2004, admitted to breaching the Compact by groundwater pumping to an extent that reduced Texas’s share of Project water?
4. You launched numerous affirmative defenses to Texas’s and the United States’ complaints. But that was six years ago. And if you file the stipulations mentioned in your Status Report, no party will be seeking damages against any other. Are you still standing on all the affirmative defenses you raised in 2018, save the one the Special Master dismissed?

Question for Colorado

1. What role, if any, will Colorado play in this litigation moving forward?

Question for EBID

1. If you have not yet retained alternative counsel, what is your plan for doing so? Do you have information regarding the timing of this transition?

Questions for *both* EBID and EP1

1. Your Status Report states that EBID and EP1 “have always been the instrumentalities for delivering Project water,” and the 1979 and 1980 title transfers made the districts the recipients of Project water. (Status Report at 1 n.2). Can you explain to me, generally, how this works in practice?
2. Your Status Report alludes to your interest in participating in certain aspects of this litigation including questioning witnesses and participating in depositions. What specific roles are EP1 and EBID seeking in this litigation beyond that of active *amici*?

3. In your Status report, you cited a potential renewed Motion to Intervene based on the results of this status conference. Recognizing that your previous motion was denied by the Special Master and the Supreme Court upheld that denial, are you able to give a preview of your position as to what the basis would be for a renewed Motion to Intervene?
4. If the Special Master affords you active participation going forward in all procedural steps of this litigation—as I have today and as my predecessor afforded you in the past—what would you expect you would gain through Intervenor status?
5. At page 5 of your Joint Status Report, you say you are aligned with the United States, and you point out on page 2 that you are signatories, along with the United States, to the Downstream Contracts and the 2008 Operating Agreement. But you say that the United States' interests are not merely a stand-in for your interests. Why?