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.

SPECIAL MASTER THIRD CIRCUIT DKT. NO. 24-141

JOINT STATUS REPORT OF *AMICI CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT No. 1 AND ELEPHANT BUTTE IRRIGATION DISTRICT AND REQUEST FOR OPPORTUNITY TO MAKE ORAL PRESENTATIONS AT STATUS CONFERENCE

The El Paso County Water Improvement District No. 1 ("EP1") and the Elephant Butte Irrigation District ("EBID") jointly submit this request that they each be allowed 15 minutes to make oral presentations to the Special Master at the Denver status conference on October 23rd. Each has already participated extensively as an active *amicus* in this case and is represented by participating counsel in the case. Case Mgmt. Notice (Dkt. 3-1) at ¶ C.

1. EP1 in Texas and EBID in New Mexico are irrigation districts and the only beneficiary-districts forming the more-than-a-century-old bi-state federal reclamation project known as the Rio Grande Project ("Project"). EP1 is situated in El Paso County in the far western corner of Texas where the Rio Grande enters from New Mexico. EBID straddles the Rio Grande in the 105-mile southern reach of the river between the Project release point at Elephant Butte Reservoir and the water's delivery to EP1—the *only* Texas delivery because all of "the [Rio Grande] water belonging to Texas is … committed to the service of the Rio Grande Project."[1] The role of the districts is to serve as the governmental conduits for delivering Project water to the farms in their territory.[2]

[1] *El Paso County Water Improv. Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894, 907 (W.D. Tex.), *aff'd as ref'd*, 243 F.2d 927 (5th Cir. 1955), *cert. denied*, 355 U.S. 820 (1957).

[2] The districts have always been the instrumentalities for delivering Project water, but United States' title transfers in 1979 and 1980 made the districts, not the farmers, the recipients of Project water from the United States. EP1 also delivers water—a

2. The two districts are central to this case, and their interests are different from those of other *amici* in crucial ways. The districts are co-signatories, along with the United States, to two sets of contracts that have factored into this dispute in one way or another. First, there are the "Downstream Contracts" that are a central focus of both the Supreme Court's 2018 ruling approving the United States' intervention, *Texas v. New Mexico*, 583 U.S. 407 (2018), and its 2024 decision sustaining the United States' exception to the former Special Master's Third Interim Report and rejecting the States' proposed consent decree, *Texas v. New Mexico*, 144 S.Ct. 1756 (2024) ("*Texas II*"). Second is the three-party 2008 agreement—the "2008 Operating Agreement"—that implements the rights and obligations of the Downstream Contracts and has governed Project operations and annual allocations of Project supply to the two districts for the last sixteen years. Both sets of contracts have played roles—appropriately for the Downstream Contracts, inappropriately for the 2008 Operating Agreement—in this dispute. They are briefly addressed in turn below.

3. The Downstream Contracts are pre-1939 Rio Grande Compact agreements for the United States' delivery of "*apportionments* of [Rio Grande] water to" EBID and EP1. *Texas II* at 1762 (emphasis added). Entered into over a period of decades up to 1937, they preceded the Compact which, bowing to history and reality, "relied

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modest amount compared to the agricultural deliveries—to the City of El Paso under a 1920 Reclamation Act amendment known as the Miscellaneous Purposes Act, 43 U.S.C. § 521.

on Reclamation to *apportion* water" through these Downstream Contracts. *Id*. at 1763 (emphasis added):

> Reclamation's operation of the Project, and the United States' obligations to EBID and EP1 under the Downstream Contracts, are the means by which the States chose to effectuate the apportionment of water in the Compact.

Id. at 1768-69. In other words, the Compact's apportionments, delivered by the United States, are to EP1 and EBID. The Downstream Contracts are at the heart of the Compact, and we the districts are at the heart of the Downstream Contracts.

4. The 2008 Operating Agreement has been effective and was being implemented starting before, and continuing during the full course of, this litigation. It has no legitimate role to play in the trial as it resumes in the wake of the *Texas II* decision—but that does not mean the States will not still try to drag it into the dispute anyway. New Mexico tried injecting the agreement's validity into this case in at least one specific counterclaim—denominated Counterclaim 2—against the United States, arguing it violates the Compact, Special Master Order of March 31, 2020 (Doc. 338) at 28.[3] But the Special Master, finding this dispute presents "neither the time nor the forum to address the [Agreement's] validity," rejected the counterclaim

[3] New Mexico has a still-pending counterclaim against Texas—Counterclaim 4—that mirrors the rejected one against the United States. Order of March 31, 2020, *supra* at 30. New Mexico has sued the United States, EP1, and EBID in another forum, alleging that the 2008 agreement violates the Compact. *New Mexico v. United States*, No. 11-CV-00691 (D.N.M.). That case is stayed.

and held the 2008 agreement "beyond the scope of the litigation." *Id*. at 29-30. In the face of this ruling, Texas and New Mexico persisted nevertheless and yet again inappropriately re-injected the Operating Agreement into the case through their ill-fated settlement. In their proposed consent decree, they tried changing significant elements of the 2008 agreement[4] without affording the two districts here and the United States—the agreement's actual signatories—any say. The States' effort found momentary validation, transmuting the 2008 Operating Agreement from being beyond the litigation's scope (as the Special Master had determined in 2020) into an "important" analytical element in the Special Master's recommendation that the Court approve the States' proposed consent decree. Special Master Third Interim Report at 23 (Doc. 776).

5. Their effort, of course, failed. The Supreme Court sustained the United States' exception and denied the States' motion to enter the consent decree. *Texas II* at 1772. The Court focused on the main contention in this case: that groundwater pumping in New Mexico is excessive and depletes Project water supply otherwise destined for the districts in violation of Compact requirements. This was Texas's

[4] The States' proposed decree "would require the United States to take actions outside the bounds of the 2008 Operating Agreement, including conducting "forced interdistrict water transfers." [internal cite omitted]. And the proposed decree would require the United States to make changes to the heart of Project operations, including to the equation that it uses in allocating water to the Districts." U.S. Exception and Brief at 42.

initial claim in 2013, which targeted "excessive groundwater pumping in New Mexico." *Id*. at 1761. The United States raised the same claim when it intervened. *Id*. But in the States' settlement and at the Supreme Court, Texas beat a substantial retreat and was "willing to accept a greater degree of groundwater pumping," while trying to foreclose "the United States' independent stake in pursuing claims against New Mexico" about groundwater pumping levels that led to the lawsuit in the first place. *Id*. at 1768. A prediction about Texas's position, or New Mexico's for that matter, going forward in the wake of this past summer's Supreme Court ruling is not assayed here. All indications thus far, though, are that the case is now propelled by the United States' core claim: that New Mexico groundwater pumping at and above D2 levels[5] violates the Compact. *Id*. at 1770.

6. EP1 and EBID are aligned with the United States. Both irrigation districts filed *amicus curiae* briefs with the Supreme Court in support of the United States' exception and in opposition to the proposed consent decree.[6] Still, however close the alignment, the United States' interests are not "merely a stand-in for the interests of the water districts." *Id*. at 1768.

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[5] "D2"—deeply embedded in this case's lexicon—refers to a graphic curve developed by the Bureau of Reclamation using Project data for the 1951-1978 period to predict how much Project water would be delivered to EP1 and EBID for a given amount of releases from the Elephant Butte Reservoir. *Id*. at 1763.

[6] https://tinyurl.com/2j3fs7c9 (EP1 brief); https://tinyurl.com/zf87bm7r (EBID brief)

7. The States are even more remote stand-ins for the irrigation districts' interests. In contrast to the relationship of the districts with the United States, the districts and the States have no contractual agreements governing Rio Grande water and Project operations. And the States can neither represent nor interfere with the districts' federal contract rights. It is unsurprising, therefore, that the Supreme Court rejected Texas and New Mexico's argument that "they alone represent EBID's and EP1's interests in an allocation of Compact water." *Id*. Starting as early at least as November 2022, when Texas and New Mexico gave notice that they intended to settle the case based on the proposed consent decree, *see* States' Notice (Doc. 719), any alignment between EP1 and EBID and the States was broken. Nothing has changed in the interim up to now.

8. The water supply for the irrigation districts, ensuring its protection, is what is at stake in this case. Yet, the districts have not been allowed into the case *as parties*. The Supreme Court denied their motions to intervene in October 2017. But that was when Texas was actively pursuing its claims, claims which at bottom were supportive of, and supported by, EP1 and EBID. Things have drastically changed. And the change has given rise to the two districts contemplating whether the time has come to renew their efforts to intervene as parties. The districts would take this step to protect their own State-threatened contractual rights, including those implicated by any renewed attack on the Operating Agreement—something that is not even

supposed to be part of this case. And more consequentially, the districts would renew the pursuit of protection of our Project supply from over-pumping by New Mexico that Texas has abandoned since 2022 and up to now. Any decision on whether to undertake such an effort awaits what is said at, and decided after, the upcoming October 23rd status conference.

9. In the meantime, the two districts at the heart of this case are left to seek at least some opportunity, beyond just written submissions, to make presentations to the Special Master in the upcoming status conference. It is anticipated that such presentations would help inform the Special Master in the "tutorial," and it is hoped they will be "punctuated by questions" from the Special Master, Mem. Order of Sept. 9, 2024 (Dkt. 5) at 3—all to further elucidate the basis of this dispute and the special roles and interests of the two districts.

10. The immediate-predecessor Special Master recognized that EP1 and EBID had a heightened order of interest and involvement in this case. They were "actually contract parties which the Supreme Court says have been incorporated into the Compact. And that would seem that they have an interest that would be different or *more enhanced*" than other *amici*. Tr. of Scheduling Conf. (Aug. 28, 2018) at 82 (emphasis added). He carried through on this understanding by regularly and routinely allowing the districts' counsel to make oral presentations at hearings in the case. In a related

recognition of the districts' special status, he expressly allowed the districts to question witnesses and participate in the depositions when the Operating Agreement was the subject. Special Master Case Mgmt. Plan (Sept. 2018) (Doc. 124) at 4 (¶3.5).

The two districts urge the Special Master to carry forward with the same approach, at least at the initial hearing, as the case resumes in hugely changed circumstances. That is why we request 15 minutes each for the opportunity to orally present matters from our perspective at the status conference.

CONCLUSION

Based on the foregoing matters, EP1 and EBID urge that their request be granted.

Respectfully submitted,

/s/ Maria O'Brien
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served on this 2nd day of October, 2024, through the CM/ECF system, which caused the parties or counsel of record to be served by electronic means.

I FURTHER CERTIFY that two true and correct copies of the foregoing were sent by Federal Express to the Honorable D. Brooks Smith at the following address:

Honorable D. Brooks Smith
Special Master
Senior United States Circuit Judge
1798 Plank Road, Suite 203
Duncansville, PA 16635

MODRALL SPERLING ROEHL HARRIS & SISK, P.A.

/s/ Maria O'Brien
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