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

♦

THE COMPACTING STATES' JOINT SUPPLEMENTAL STATUS REPORT ON OUTSTANDING CLAIMS AND ISSUES

♦

Pursuant to the Order of October 7, 2024, the States of Colorado, New Mexico, and Texas ("Compacting States") jointly submit this Joint Supplemental Status Report on Outstanding Claims and Issues. *See* [Doc. 10] at ¶ 3. This Supplemental Status Report identifies the remaining claims, summarizes the remaining substantive issues, and comments on the remaining procedural issues.

I. REMAINING CLAIMS

A. Claims of the Compacting States

The claims of the Compacting States are summarized in the Joint Status Report of the Compacting States for the October 23, 2024 Status Conference [Doc. 9] ("States Report") at Section III.B.1 on pages 7-9. Texas's Compact claim remains, as do New Mexico's Counterclaims 1 and 4. *See* March 31, 2020 Order at 27-28, 30 [8th Cir. Dkt. 338]. In addition, Special Master Melloy left open the possibility that New Mexico is entitled to declaratory relief against the United States. *E.g., id*. at 15. Thus, the declaratory relief sought in Prayer Paragraphs A, E, H, I, J, and L of New Mexico's Counterclaims remain. *See* New Mexico's Counterclaims at 32-34, ¶¶ A, E, H, I, and J [8th Cir. Dkt. 99].

As described in the States Report, Texas and New Mexico are no longer seeking damages against each other. Instead, both are advocating for entry of the Proposed Index Decree that will provide complete declaratory and injunctive relief consistent with the Rio Grande Compact ("Compact").

B. Claims of the United States

The claims of the United States are similarly summarized in the States Report at Section III.B.2 on page 9. While the United States did not include allegations regarding a 1938 baseline condition in either its Complaint in Intervention or its accompanying brief, the Court has determined that it will allow the United States to

attempt to prove a claim under a 1938 baseline condition. *Texas v. New Mexico*, 144 S. Ct. 1756, 1770 (2024).

II. REMAINING SUBSTANTIVE ISSUES TO BE RESOLVED

The issues that were previously decided, as well as the remaining issues to be decided at trial, are summarized in the States Report at Section IV.A & B on pages 10 to 13. As the Compacting States explained, New Mexico has conceded, and Special Master Melloy concluded, that New Mexico interfered with delivery of Compact water to Texas in 2003 and 2004.[1] *See, e.g.* Third Report at 77. Based on this finding, the Compacting States believe that all liability issues framed by the Compacting States' respective pleadings have been sufficiently addressed. The States contend that the remaining litigation issue on the States' claims is the appropriate remedy and whether that remedy is consistent with the Compact.

As discussed in the States Report, the specific remedy proposed by the Compacting States is the Proposed Index Decree. Based on the United States' opposition and the Court's 2024 decision, the Compacting States understand that entry of the Proposed Index Decree presents the following issues for decision:

1. Issue No. 1: Special Master Melloy determined that some groundwater pumping was allowable "without materially interfering" with Compact deliveries to Texas. *E.g.* Third Report at 77. What level of groundwater pumping causes interference with deliveries of the Texas

[1] As requested, New Mexico will be prepared to discuss the details of this concession during the Status Conference.

apportionment to Texas? (*I.e.*, is the D2 baseline employed by the Proposed Index Decree consistent with the Compact?)

2. Issue No. 2: Does the plain language of the Compact forbid measuring Texas's receipt of its apportionment at the Texas state line? *See, e.g.,* Third Report at 72-75.

3. Issue No. 3: Does the Proposed Index Decree harm the "distinctively federal interests" of the United States? If so, what specific interests are harmed?

4. Issue No. 4: The Court has held that the United States serves as a "sort of agent" charged with a "legal responsibility" to ensure that the States' equitable apportionment is "in fact" delivered. *Texas v. New Mexico*, 583 U.S. 407, 413-14 (2018). Are the provisions of the Proposed Index Decree consistent with the United States' "legal responsibility?"

Separately, the Court held that the United States is free to pursue the claim that it pled, including that it is injured by the Project's adherence to a D2 baseline condition, as opposed to a 1938 baseline condition. Trial on this claim significantly overlaps with trial on the States' Proposed Index Decree. Outstanding issues related to the United States' claim include the following:

5. Issue No. 5: It is undisputed that the United States encouraged groundwater pumping in the Project area, developed the D2 baseline, employed the D2 baseline to divide Project water for over 40 years, and incorporated the D2 baseline into a federal Reclamation contract (the 2008 Operating Agreement). What impact does that evidence have on the ability of the United States to now claim injury based on a 1938 baseline condition?

6. Issue No. 6: What is the United States' "distinctively federal interest" arising under the Compact?

7. Issue No. 7: How is the "distinctively federal interest" of the United States' injured by the adoption of ***any*** specific baseline condition? How does the United States quantify its injury?

8. Issue No. 8: Given that the Compact apportions no water to the United States and identifies no substantive federal rights, does New Mexico owe a duty *to the United States* under the Compact?[2] If so, what is the scope of that duty?

9. Issue No. 9: The United States has not disclosed an expert to explain or support a 1938 baseline condition. How does the United States define its 1938 baseline condition?

10. Issue No. 10: What is the proposed remedy of the United States?

11. Issue No. 11: There has been no expert disclosures related to the United States obligations under the 1906 Treaty with Mexico. Is the United States pursuing a Treaty claim?

III. PROCEDURAL ISSUES RELATED TO THE OUTSTANDING CLAIMS

In the States Report, the Compacting States provided the Court with their views with respect to how the Parties should proceed. Specifically, the Compacting States urge the Special Master to recombine the liability and remedies trials for the reasons outlined in the States Report.

In the event that the Special Master adopts this "single trial" approach, the Compacting States proposed limited supplemental disclosures, and a short discovery period strictly limited to the Proposed Index Decree. To be clear, the Compacting States made that proposal as an allowance to accommodate the United States if the

[2] New Mexico accepts that it owes a duty *to Texas* under the Compact.

United States thought it was necessary. The Compacting States are prepared to present their remedies case on the Proposed Index Decree with or without additional supplemental disclosures and discovery. In support and opposition to the Compacting States' Motion for Entry of a Consent Decree, a total of 23 expert declarations were filed, 15 by the Compacting States and 8 by the United States. These declarations were both affirmative and responsive in nature and act as a disclosure of experts that provide ample notice of what the respective witnesses intend on testifying to. The proposal for a limited discovery period on the Proposed Index Decree was intended as a courtesy to the United States if it believes additional disclosures are needed on the Proposed Index Decree (beyond the declarations).

On the other hand, if the Special Master rejects the proposed "single trial" approach and proceeds with the separate liability trial over the Compacting States' objection, there should be no additional discovery or disclosures. The "next step" after the denial of the Compacting States' Motion to Enter the Consent Decree is the completion of the liability Phase II trial as early as possible. As the Special Master recognizes, no party is seeking a "do-over," so under those circumstances, there is no need for the 90-day period suggested by the United States to meet and confer on "supplemental expert disclosures, the potential designation of additional experts, and expert discovery." United States' Status Report at 9-10 [Doc. 8].

Finally, the Compacting States believe that if the liability Phase II trial is conducted without remedies it could be completed in 10 days of trial time. The Compacting States are prepared to begin that trial prior to the end of 2024. Proceeding in this manner would allow the Parties to proceed to the remedies trial by July of 2025 as the States previously proposed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this October 21, 2024, I caused a true and correct copy of the foregoing **The Compacting States' Joint Supplemental Status Report on Outstanding Claims and Issues** 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 made by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Respectfully submitted,

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