

SUMMARY OF SPECIAL MASTER FIRST INTERIM REPORT

Texas v. New Mexico

Texas filed its motion to file its complaint against New Mexico and Colorado in July 2013.¹ (Colorado was named in the complaint because it is a signatory to the 1938 Compact. Texas is not seeking any relief from Colorado.) New Mexico opposed this motion. The Texas complaint alleges that New Mexico had violated and was violating the 1938 Rio Grande Compact. The Court asked the United States for its views with respect to Texas' motion and the United States responded that the Court should grant Texas' motion, but that it could provide New Mexico leave of court to file a motion to dismiss the Texas complaint.

In January 2014, the Court granted Texas' motion for leave to file its complaint against New Mexico. The Court also allowed New Mexico to file a motion, in the nature of a Rule 12(b)(6) Motion to Dismiss (failure to state a cause of action upon which relief could be granted). The United States moved to intervene in the action on the side of Texas. The United States motion was granted over New Mexico's objection. The United States, in its complaint in intervention, raised 1938 Compact claims, Reclamation law claims and claims emanating from the 1906 Treaty with Mexico.

New Mexico filed motions to dismiss both the Texas complaint as well as the complaint filed by the United States.

¹ The Supreme Court of the United States (Court or SCOTUS) has exclusive and original jurisdiction over actions among or between states. The exercise of that jurisdiction, however, is discretionary. As a consequence, a state must petition the Court for permission to file a complaint against another state. If the Court grants the motion, it will appoint a Special Master to act as a Trial Court. The Special Master provides recommendations to the Court on how it believes matters before it should be resolved. The parties then file "exceptions" to the report (assuming parties disagree with all or part of the report). The Court then reviews those exceptions and issues its Order. The Court may, but does not always, hold oral arguments on the exceptions prior to ruling.

The Court appointed Gregory Grimsal, a Louisiana lawyer, to act as Special Master and to provide it with a recommendation on how to resolve the motions to dismiss and to hear all other trial related aspects of the case and to make recommendation to the Court on the disposition of the case.

Subsequent to the Special Master appointment, the Elephant Butte Irrigation District (EBID) and the El Paso County Water Conservation District No. 1 (EP#1), the two districts with contracts for water from the Rio Grande Reclamation Project moved to intervene in the litigation. Texas, New Mexico, Colorado and the United States all opposed these intervention motions. These motions were also referred to the Special Master for his recommendation.

All of the motions were fully briefed and oral arguments were held in New Orleans in August 2015. The Special Master issued a Draft Report in August 2016, and the Final First Interim Report of Special Master, dated February 9, 2017, was docketed with SCOTUS on February 13, 2017. The Report was 278 pages long and included appendices and a DVD that contained extensive documentary materials.

The Special Master's Recommendations:

- Deny New Mexico's Motion to Dismiss the Texas Complaint.
- Grant, in part, New Mexico's Motion to Dismiss the United States' Complaint, but recommend that the Court exercise its discretionary jurisdiction pursuant to 28 U.S.C. §1251(b)(2) to hear the dismissed claims.
- Deny both EBID and EP#1's motions to intervene.

Texas Complaint:

As characterized by the Special Master, Texas alleged that New Mexico has, in violation of the 1938 Compact, allowed the diversion of surface water and pumping of groundwater within

New Mexico that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir, thereby diminishing the amount of water that reaches Texas. Texas seeks declaratory relief, an order compelling New Mexico to deliver waters of the Rio Grande in accordance with the 1938 Rio Grande Compact, an order compelling New Mexico to stop interfering with the United States' operation of the Rio Grande Reclamation Project and damages, both past and prospective.

New Mexico Motion to Dismiss:

As characterized by the Special Master, New Mexico's argument is that the Texas complaint should be dismissed because it fails to state a claim upon which relief can be granted under the terms of the 1938 Compact.

- Because the 1938 Compact does not require New Mexico to deliver or guarantee deliverance of water to the New Mexico-Texas state line or “to prevent diversions of water after New Mexico has delivered water into Elephant Butte Reservoir,” *New Mexico consequently, argues that its sole duty is to deliver water into Elephant Butte Reservoir and that it has no duty to limit post-1938 development below Elephant Butte Reservoir.*

- *New Mexico also argues that its own State law, not the 1938 Compact, governs distribution of water for Elephant Butte Reservoir within New Mexico. In this context, it focuses on its sovereign rights, Section 8 of the 1902 Reclamation Act and that the proper forum to resolve Texas' claims is within the New Mexico State Court adjudication of the Rio Grande.*

The Special Master Analysis:

The manner in which New Mexico argued its motion required the Special Master to interpret the Compact at this early stage of the litigation. The Special Master stated that he was required to interpret the plain text and structure of the 1938 Compact as well as consider the

effect of the 1938 Compact's equitable apportionment on State law appropriations granted by New Mexico. "New Mexico's Motion to Dismiss presents major legal issues that are critical to the ultimate resolution of this matter; its outcome will immediately shape the scope of discovery moving forward."

- The Special Master found, as a matter of law, that the text of the 1938 Compact requires New Mexico to relinquish control of water delivered by it into the Elephant Butte Reservoir. He indicated that in addition to the text and structure of the 1938 Compact the purpose and history of the Compact also confirms this.

- He also found that the total acreage to be served under the 1938 Compact was frozen as of 1938.

- He also found that the doctrine of equitable apportionment also bars New Mexico from interfering with waters released for Elephant Butte Reservoir. "New Mexico through its agents or subdivisions may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir after that water is released from the Reservoir by Reclamation for delivery pursuant to the administration of the Rio Grande Project. That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico and lower New Mexico and that dedication takes priority over all appropriations granted by New Mexico."

- With respect to New Mexico's argument that its State law controls allocation of water below Elephant Butte Reservoir, the Special Master found that "New Mexico itself as a quasi-sovereign relinquished its own right to water it delivers to Elephant Butte Reservoir, allocating the right to water instead to the Rio Grande Project to irrigate lands in Texas and

Lower New Mexico... New Mexico State law does not govern the distribution of the water apportioned by Compact.”

Conclusion:

It would be hard to understate what Texas will have gained if the Court adopts the Special Master’s recommendations. Among other things, major legal issues will have been decided in Texas’ favor.

SCOTUS will shortly provide a briefing schedule for exceptions to the Special Master’s Report. The Court will likely hear and/or decide the matter either by June or October 2017. After the Court has ruled, assuming the Special Master’s recommendations are adopted, discovery will commence.