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.

On Exceptions To The First Interim Report Of The Special Master

STATE OF COLORADO'S SUR-REPLY

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INTRODUCTION

All of the Parties filed reply briefs, addressing some aspect of the exceptions by Colorado, New Mexico, and the United States to the First Interim Report of the Special Master ("Report"). In addition, the City of El Paso, El Paso County Water Improvement District No. 1 ("El Paso District"), Elephant Butte Irrigation District ("Elephant Butte District"), and the State of Kansas filed briefs as amici curiae.

In this sur-reply brief, the State of Colorado disputes the following arguments that appear in the reply and amici briefs:

(1) That the Court should adopt the presumptions and historical context in the Report as factual findings and legal conclusions. (Texas Reply pp. 11-21, City of El Paso Brief pp. 6-7, Elephant Butte District Brief pp. 24-30, El Paso District Brief p. 12.);

(2) That a State cannot administer water to meet its Compact obligations. (El Paso District Brief pp. 15-17, Elephant Butte District Brief pp. 17-21.);

(3) That the United States asserts a claim under the Compact. (Texas Reply pp. 39-40, United States Reply pp. 16-20, El Paso District Brief pp. 15-17.); and

(4) That the Court should adopt a presumption that all interstate water compacts regulate ground water. (Kansas Brief pp. 7-13.)

By responding only to the four issues stated above, Colorado does not imply agreement with other arguments raised in the briefs.

SUMMARY OF ARGUMENT

First, the Report is limited in scope and the Court should not adopt its numerous presumptions and historical context as factual findings and legal conclusions. Although it includes descriptions of Río Grande Compact history and Río Grande Project operations, the Report limits its ultimate recommendations to: (a) denying the motion to dismiss Texas' Complaint; (b) dismissing the United States' claims that asserted rights under the Río Grande Compact, ch. 155, 53 Stat. 785 (1939); Colo. Rev. Stat. § 37-66-101 ("Compact"); (c) extending the Court's non-exclusive jurisdiction to hear the United States' non-Compact claims; and (d) denying motions to intervene filed by the El Paso District and Elephant Butte District. Consistent with Fed. R. Civ. P. 12, in deciding these motions, the Report assumes the allegations in the Complaints are true. The recommendations do not rely upon the Report's additional discussions of material beyond the four corners of the Compact. It is inappropriate for the Parties to misuse this contextual material to advance arguments beyond the Report's ultimate recommendations on the pending motions. The Court should, therefore, affirm the limited scope of the Report and confirm that

the Report does not make findings and conclusions beyond the ultimate recommendations on dismissal and intervention.

Second, the Court should reject the argument that a State cannot administer water to meet its Compact obligations. The Report did not reach the merits of the case, but presumed the allegations in the Complaints were true in considering whether to dismiss the claims. It did not determine how the States might administer water consistent with the terms of the Compact. Therefore, the Report did not recommend eliminating State roles in administering water subject to Compact apportionment.

Third, the Court should uphold the recommendation to dismiss the United States' claims made under the Compact. The United States bases its injury on delivery obligations from the Río Grande Project, not on the Compact itself.

Fourth, the Court should deny the request to adopt a presumption that all interstate water compacts regulate ground water. Such a presumption is contrary to the law on compact interpretation.

ARGUMENT

I. This Court should affirmatively limit the scope of the Report and confirm that the Report does not make findings and conclusions beyond the ultimate recommendations on dismissal and intervention.

The Court should limit the scope of the Report to the recommendations for deciding the pending motions. Contrary to some of the assertions in the briefs, the Report's determinations focused solely on whether to dismiss the Complaints of Texas and the United States, and whether to allow intervention by the El Paso District and Elephant Butte District. In setting forth its recommendations, the Report explained that it presumed the allegations in the Complaints were true pursuant to Fed. R. Civ. P. 12.

> I am required to assume as true, under Rule 12(b)(6), Texas' factual allegation that New Mexico, through its officers, agents, and political subdivisions, is diverting or intercepting water that belongs to Texas after Reclamation releases it from Elephant Butte Reservoir to irrigate lands of the Rio Grande Project.

Report p. 201; *see also* Report p. 191. The Report also expressly confirmed that the additional recitation of contextual materials was not dispositive of the final recommendations. Report pp. 193, 203. Thus the Report simply assumed New Mexico is allowing diversions of water released from the Río Grande Project, and released Project water belongs to Texas, without

further evaluation. Although the Report's recommendations are narrow, some Parties and amici, as described below, have tried to expand its reach to include conclusions on the merits of several issues that were not yet before the Special Master and are not now before the Court. The Court should reject those attempts and affirmatively limit the scope of the Report to its ultimate recommendations on the pending motions and nothing more.

Some briefs misinterpret the Report as equating Project operations with Compact obligations. For example, many of the briefs emphasize the need for the Project to be able to make contract deliveries. Texas Reply pp. 12, 19, 24, 30, 31, 33, 40; United States Reply p. 8; Elephant Butte District Brief pp. 4, 8; El Paso District Brief pp. 2, 6, 9, 12, 16-18, 28, 29. However, this litigation is about the Compact, not the Project. Report p. 272. Discussing the Project, Texas and the El Paso District mention that the Project relies on return flows of water in its calculation of deliveries to El Paso District. Texas Reply p. 26; El Paso District Brief p. 29. Return flows require an initial use upstream, with residual, unconsumed water flowing downstream for subsequent delivery. Understanding the limits of water available for use within New Mexico downstream from Elephant Butte Reservoir and what exact administrative measures are needed for Compact compliance in New Mexico will require evaluation of apportionment made by the Compact. Indeed, the question presented by Texas' Complaint is not whether Project water deliveries are accomplished as contemplated,

but whether New Mexico is interfering with the Compact's apportionment among the States. Therefore, arguments about Project operations presume as fact what actually requires further development in this Compact litigation.

For purposes of the motions considered, the Report presumes that the Project releases a certain volume of water that comprises Texas' Compact allocation, and that New Mexico is taking it. Report p. 201. Upon examination of the Compact language, it is evident that the presumptions used to resolve the motions are not fully informed by the four corners of the Compact. The Compact contains tables of stream flow relationships that set downstream delivery obligations based on upstream inflow measurements, subject to the remaining provisions of the Compact. Compact, Arts. III and IV. These describe Colorado's delivery obligations at the Colorado-New Mexico state line measured at or near Lobatos and New Mexico's at San Marcial, now measured at Elephant Butte Reservoir. However, there is no corresponding table for deliveries of Project water. Therefore, the Compact itself does not contain any express division of Project water deliveries between lower New Mexico and Texas. Further, while the Compact requires measurement gages at the inflow and outflow points for scheduled deliveries of Colorado in Article III and New Mexico in Article IV, it prescribes no gages to measure the delivery of Project water to lands in New Mexico and Texas after it is released from Project storage. Compact, Art. II. Therefore, the Report presumed that the Compact intended a specific volume

of Project water to make up Texas' Compact allocation. Report p. 200. However, it never identifies what volume that may be or how the Compact measures that allocation. Of course, the Report did not need to when deciding the motions for dismissal or intervention.

Overall, "[t]he merits of the complaints are not yet before the Court. . . ." United States Reply p. 14. The Parties may establish that the presumptions are correct in further proceedings, but cannot rely upon them as the law of the case at this stage of the litigation. The Report acknowledges that the express terms of the Compact are the best indication of the intent of the States. Report p. 193. Yet, the Compact lacks express terms for many of the presumptions that the Report uses. Findings and conclusions not based on the language in the Compact require resort to outside materials and are beyond the scope of the ultimate recommendations of the Report.

II. The Report does not conclude that Compact apportionment divests a State of its water administration authority.

The Court should reject the argument that a State lacks authority to administer water to meet Compact obligations. *See* El Paso District Brief pp. 15-17, Elephant Butte District Brief pp. 17-21. Compact apportionment and State administration of water are not mutually exclusive. Rather, a State's administration cannot be contrary to specific Compact obligations. "The Master's discussion of the effect of the equitable

apportionment (Rep. 210-217) is best understood as requiring New Mexico to respect the Compact in its administration of state law." United States Reply p. 15-16. Although the United States argued New Mexico has to deliver water at Elephant Butte Reservoir, it does not argue that such delivery divests New Mexico of jurisdiction over water within its borders. Rather, it intended only that New Mexico has committed to operate consistent with the requirements of the Compact with regard to water it has delivered. The Report should be understood accordingly.

III. The United States does not bring Compact claims because its allegations of injury are based on the Project, not the Compact.

The Court should reject the argument that the United States asserts a claim under the Compact. *See* Texas Reply pp. 39-40, United States Reply pp. 16-20, El Paso District Brief pp. 15-17. The United States' interests are based in the Project. Report p. 219; United States Reply p. 17. It asserts no rights under the Compact itself. That point is proven by the United States' claims of injury – none relate to any right under the Compact. Its alleged claims of injury relate to its obligations to deliver water from the Project. United States Complaint p. 4. Further, to the extent the Project is a vehicle for delivering Compact water, the Compact interests are represented by the States among whom the water is apportioned.

The United States' assertion that it may not be entirely aligned with the Compact interests of Texas does not rebut the Report's recommendation to dismiss its Compact claims. The Project delivers water to irrigation districts in two States: New Mexico and Texas. Both States are Parties to this litigation. Together, Texas and New Mexico will adequately represent their respective Compact interests.

A theory of agency does not support providing the United States a right of action under the Compact. *See* Texas Reply p. 40. Even if the United States were an agent to deliver Compact apportionments to the States, alleged Compact injuries are to the States, not to the United States. Report p. 231 (stating the Compact makes no apportionment of water to the United States). Furthermore, the United States lacks standing to sue as an agent for the States. "The general rule for both contract and tort suits is that an agent has no standing to sue, in his own name, a third party who has allegedly perpetrated some actionable wrong against the principal." *Moorer v. Hartz Feed Co.*, 120 F. Supp. 2d 1283, 1289 (M.D. Ala. 2000) (citing Restatement (Second) Agency § 374(2)). In the context of a Compact action, the injury is to compacting States. Report pp. 220, 229-230. The United States cannot bring a claim as an agent for the injury suffered by the principal.

IV. The Court should reject the request to adopt a legal presumption that ground water is regulated by all interstate water compacts.

Each interstate water compact is a unique reflection of the water resource and agreement of the compacting States apportioning it. The Court reviews a compact under principles of contract law. *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013). When reviewing a complaint brought under a compact, the Court does not add new terms to the compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983). The Court has also recognized States only give up their sovereign interests to natural resources through explicit statements. *Tarrant Regional Water Dist.*, 133 S. Ct. at 2132. Therefore, because each is unique, whether and how ground water is part of a compact depends upon the terms of the compact and the intent of the compacting States. It is improper to impose blanket presumptions, not otherwise supported by the intent of the compacting States, and contrary to the law regarding interpretation of compacts.

CONCLUSION

The Court should affirmatively limit the scope of the Report to its narrow recommendations on the pending motions. The Court should not adopt the Report's numerous presumptions and historical context as factual findings and legal conclusions. It should also

accept the Report's recommendation to dismiss the United States' Compact claims.

Respectfully submitted,

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