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

TEXAS'S SUR-REPLY

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August 2017

TEXAS'S SUR-REPLY

The State of Texas took no exception to the Special Master's First Interim Report (First Report). Texas supports both the Special Master's recommendation and his supporting analysis, and urges the Court to deny New Mexico's Motion to Dismiss.

The reply briefs of some Parties and *amici curiae*, however, attempt to trivialize this interstate compact litigation as one that is focused upon Reclamation law and all of its requirements and limitations. In so doing, they re-characterize the Texas Complaint and the nature of this interstate compact litigation. This case is about the 1938 Rio Grande Compact (1938 Compact or Compact). Any formulation of the issues raised in the Texas Complaint, the New Mexico Motion to Dismiss, or the discussion of the First Report that puts the Rio Grande Project (Project) before or separate from the 1938 Compact distracts from the litigation of Texas's Compact injury.

There is a relationship between the 1938 Compact and the Project. The Special Master properly addressed and accurately characterized that relationship in the First Report. The Special Master concluded that: the 1938 Compact integrates the Project "wholly and completely," First Report at 198; the signatory States intended to use the Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's apportionment, First Report at 204;

and the water delivered by New Mexico *into* Elephant Butte Reservoir "has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico . . . ," First Report at 213. "Therefore, the Project water *leaving* Elephant Butte belongs to either New Mexico or Texas *by compact*, or to Mexico by the Convention of 1906." First Report at 212-13 (emphasis added); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-08 (1938) (describing the effect of an equitable apportionment achieved by compact).

In short, the 1938 Compact uses the Project to deliver Compact water. Because the Compact uses the Project, the operation of the Project and the use of water in New Mexico necessarily implicates the amount of Compact water delivered to Texas. The unauthorized depletion of Project return flows and seepage in New Mexico necessarily diminishes the amount of Compact water delivered to Texas. This is the injury Texas alleges in its Complaint. *See* Tex. Compl. ¶¶ 18-19, 21. The Compact's use of the Project to make deliveries of water apportioned by Compact, however, does not render the case brought by Texas any less of a compact case.

In each reply brief filed by the Parties to the case and the *amicus curiae*, much is said of:

- the water rights for the Project held by the United States, *see* New Mexico's Reply to Exceptions of United States and Colorado (N.M. Reply) at 34-45; Br. of *Amicus Curiae*

El Paso County Water Improvement Dist. No. 1 In Supp. of Texas's Reply to Exceptions Regarding the First Report and In Supp. of Certain Exceptions of United States (EPCWID Reply) at 21-26; Elephant Butte Irrigation Dist.'s *Amicus Curiae* Br. In Supp. of Texas (EBID Reply) at 21-23;

- the state laws that apply to the Project, *see* N.M. Reply at 34 n.9, 38-39; EBID Reply at 14-18;

- and the ways in which irrigation districts with contracts for Project water have conceded to operating the Project, without regard to the States' apportionment under the Compact, Reply Br. for the United States at 20; EPCWID Reply at 28-32; EBID Reply at 4-5, 9-10.

These issues and arguments are not directly relevant to Texas's Compact claims. Texas's Compact litigation is not about the 2008 Operating Agreement, the reclamation contracts executed by the irrigation districts, the State water right adjudications, or the Project's water right. These matters have the potential of detracting from the fundamental issue raised by Texas in its Complaint: that New Mexico has violated the Compact. Texas asks this Court to first determine what the Compact requires of New Mexico—not what the Project, Reclamation law, or

state water law requires.[1] Tex. Compl., Prayer for Relief ¶¶ 1-2.

On this point, the Special Master correctly determined that as a matter of interstate compact, enacted into law by three States and the United States Congress,

> 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 . . . 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 other appropriations granted by New Mexico.

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[1] These issues may be relevant to the claims brought by the United States, and may be introduced into this litigation depending on the Court's ruling on the Special Master's recommendation on New Mexico's motion to dismiss the United States' Complaint. *See* Tex.'s Reply to Exceptions to First Interim Report of Special Master at 40-41.

First Report at 213. For the reasons explained in Texas's Reply to Exceptions to the First Report, the Special Master's Compact interpretation is sound, and the Court should adopt in full the Special Master's conclusions on New Mexico's obligations under the Compact.

The administration of the Lower Rio Grande has been disputed for decades, as evidenced by the multiple lawsuits brought by water users in each state and the intrastate adjudications conducted in both Texas and New Mexico. The specific relief Texas seeks from this Court is a determination of rights and duties under the Compact. *See* Tex. Compl., Prayer for Relief ¶¶ 1-2. The administration and operation of the Project and the consequences of bringing New Mexico into compliance with its Compact obligations for New Mexico water users need not be decided now on the Motion to Dismiss. Assuming the Court accepts the Special Master's recommendation to do so, the Special Master may address these contentions as the case moves forward and as appropriate, consistent with the direction issued by the Court.

The State of Texas respectfully requests that this Court accept the Special Master's recommendation and analysis and deny New Mexico's Motion to Dismiss.

Respectfully submitted,

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