The Water Report™
Water Rights, Water Quality & Water Solutions in the West

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Texas v. New Mexico and Colorado

AN UPDATE FROM YEAR SIX IN THE ORIGINAL ACTION

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Introduction

After one year of waiting for the Supreme Court to accept the case, and four years of arguing an ultimately unsuccessful motion to dismiss, the litigation in Original Action No. 141, *Texas v. New Mexico & Colorado*, has picked up the pace. Three states, the federal government, two irrigation districts, and cadre of amici curiae are engaged in written discovery, depositions, and significant motions practice. This article summarizes the litigation to date, including the consequential report from the first Special Master, the parties' positions throughout the briefing, the opinion from the Supreme Court (Court), and the current posture of the case before the second Special Master.

Somach Simmons and Dunn serves as counsel to the State of Texas in *Texas v. New Mexico & Colorado*, No. 141 Original. Accordingly, this article is limited to the public record, and to the extent it offers any commentary on the case, the article represents the personal opinions of the authors.

Background on the Rio Grande

The Rio Grande is an interstate and international river that flows from Colorado, into New Mexico, and then into Texas before reaching the Gulf of New Mexico. Following the enactment of the 1902 Reclamation Act, Congress authorized the construction of a federal reclamation project. The Rio Grande Project (Project) began operating in 1916, storing waters of the Rio Grande in Elephant Butte Reservoir near Engle, New Mexico, approximately 105 miles upstream from the New Mexico-Texas border.

The Project delivers water to irrigable lands in both New Mexico and Texas, and water deliveries from the Project are made based on the ratio of irrigable lands, which historically has been 57% in New Mexico and 43% in Texas. Elephant Butte Irrigation District (EBID), a political subdivision of the State of New Mexico, is the beneficiary of Project water in southern New Mexico. El Paso County Water Improvement District No. 1 (EPCWID), a political subdivision in the State of Texas, is the beneficiary of Project water in Texas. Each district executed contracts with the United States for the delivery of water and repayment of the Project.

Disputes over the Rio Grande between the three states in which it flows, and between the US and Mexico, existed before, during, and after the construction of the Project. These disputes resulted in commissions to study the water supply, which in turn led a number of compromises that control the distribution of the river between the three states as well as the two countries. Under the Convention between the United States and Mexico for the Equitable Distribution of the Water of the Rio Grande (1906 Treaty), the United States must deliver up to 60,000 acre-feet of water annually from the Rio Grande Project to Mexico. The three states negotiated and executed a temporary interstate compact in 1929 to allow for the collection of accurate data and investigation before a final apportionment of the river was reached.

Rio Grande Litigation

1938 Compact Provisions

Original Jurisdiction

Compact

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In 1938, Colorado, New Mexico, and Texas executed the final compact (1938 Compact or Compact) that equitably apportioned the waters of the Rio Grande above Fort Quitman, Texas. The 1938 Compact provided for delivery of water based upon flows of water that are measured at various index stations. Colorado must deliver water in the Rio Grande at the Colorado-New Mexico state line according to the schedule of quantities provided in Article III of the 1938 Compact. New Mexico must deliver water in the Rio Grande according to the schedule of quantities provided in Article IV of the 1938 Compact. 1938 Compact, art. IV ("The obligation of New Mexico to deliver water in the Rio Grande at San Marcial... shall be that quantity set forth in the following tabulation of relationship... ."). In 1948, the Rio Grande Compact Commission changed the location of measurement of New Mexico's deliveries from San Marcial to Elephant Butte Reservoir. The 1938 Compact did not identify quantities of water below Elephant Butte apportioned to southern New Mexico and Texas.

The 1938 Compact also details a system of credits and debits in the case of over- or under-delivery at the index locations. 1938 Compact, art. VI. Article VII of the Compact protects Texas against the effects of upstream development and prohibits storage in reservoirs construction after 1929 in New Mexico and Colorado when there is less than 400,000 acre-feet of "usable water" in "project storage." Similarly, under Article VIII, Texas can demand of Colorado and New Mexico the release of water from storage in reservoirs constructed after 1929 under certain conditions.

Texas's Complaint and Allegations

The Supreme Court of the United States has exclusive and original jurisdiction over actions among or between states. U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). 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. *See* Sup. Ct. R. 17. Texas filed its motion for leave to file its Complaint against New Mexico and Colorado in January 2013. (Colorado was named in the Complaint because it is a signatory to the 1938 Compact. Texas is not seeking any relief from Colorado.) The Texas Complaint allegations are summarized as follows.

The Rio Grande Compact did not provide for a specific stateline delivery obligation between New Mexico and Texas. Instead, the 1938 Compact relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande irrigable lands in southern New Mexico and in Texas to provide the basis of the apportionment to Texas. A fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938.

In the intervening decades, New Mexico has increasingly allowed the diversion of surface water and the extraction of hydrologically connected groundwater thereby modifying the conditions that existed in 1938. The excess diversion of surface water and hydrologically connected groundwater *downstream* of Elephant Butte Reservoir intercepts tens of thousands of acre-feet that would otherwise have crossed the state line and been available for use in Texas. These extractions create deficits in the tributary underground water, which must be replaced in order for the Project to deliver Rio Grande Project water efficiently. These extractions also result in the depletion of storage at Elephant Butte Reservoir by requiring additional releases in order to allow the Project to operate at the intended efficiency and meet Project demands.

Texas alleges that New Mexico's actions have changed the conditions occurring in 1938 when the Rio Grande was equitably apportioned by Compact. The Compact is predicated on the understanding that water released from Elephant Butte would not be subject to depletion in excess of what existed in 1938. New Mexico's actions have thus reduced Texas's water supplies and the apportionment of water it is entitled to under the Compact.

Texas further alleges that New Mexico has attempted to unilaterally control the operation of the Compact and the Rio Grande Project to the detriment of Texas. Through various legal arguments in pending litigation, New Mexico has taken positions that: (1) Section 8 of the 1902 Reclamation Act requires New Mexico state law to control the apportionment of water to Texas; and (2) New Mexico state court adjudications are the sole means by which Texas can vindicate its rights.

New Mexico opposed Texas's Motion for Leave to File a Complaint. During the briefing, the Court asked the US for its views with respect to Texas's motion. The US responded that the Court should grant Texas' motion, but that it could provide New Mexico leave to file a motion to dismiss the Texas Complaint.

On January 27, 2014, the Court granted Texas's Motion for Leave to File a Complaint and allowed New Mexico to "file a motion to dismiss, in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure."

Thereafter, in February 2014, the US filed a motion for leave to intervene as a plaintiff and a complaint in intervention. The US also alleges that New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande below Elephant Butte by water users that do not have contracts with the US or in excess of contract amounts. The US asserts that the uncapped diversions have had a detrimental effect on Project efficiency, Project storage, and the US' ability to satisfy delivery of water to Mexico. The Court granted the US' motion, over New Mexico's objection, on March 31, 2014.

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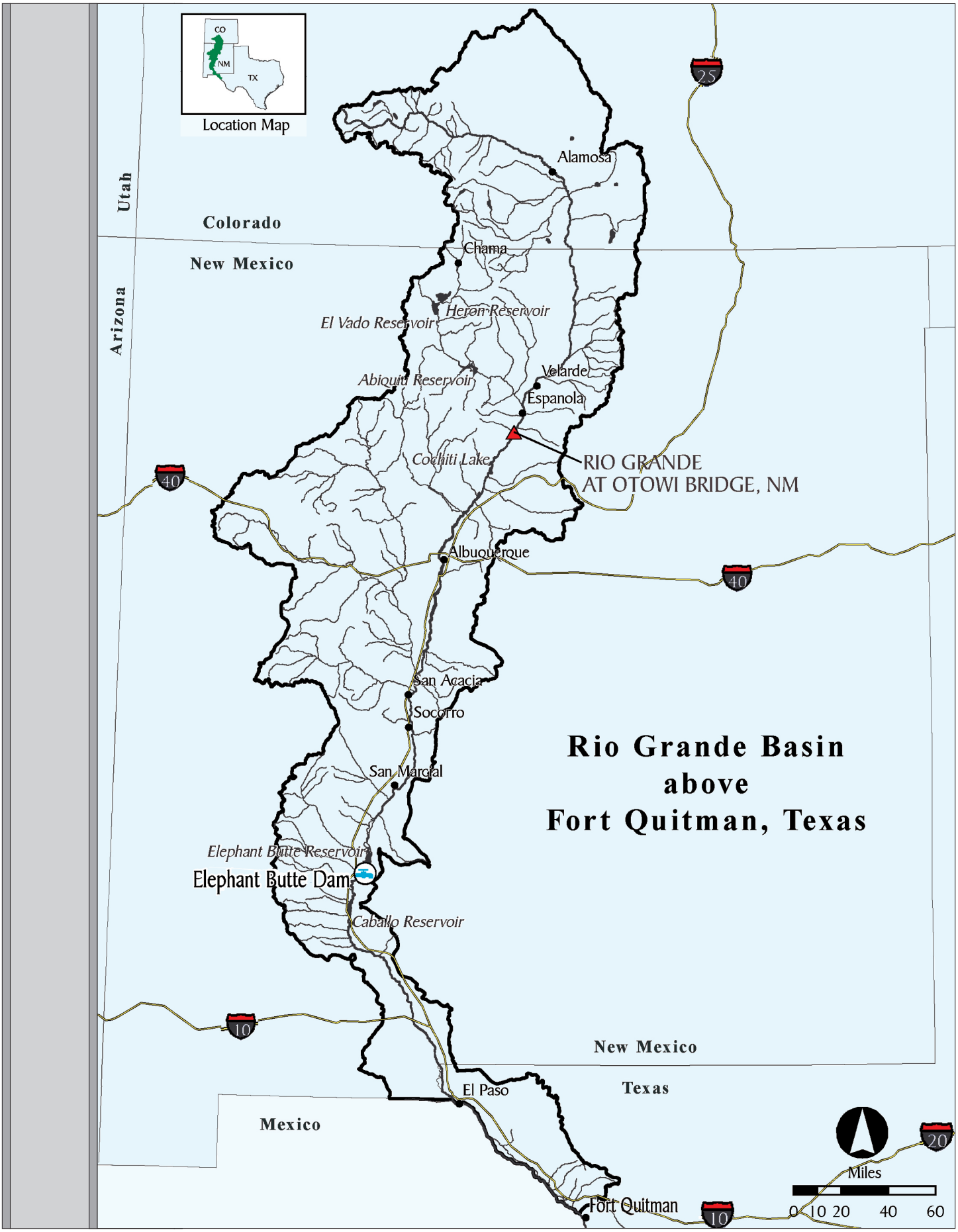

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Rio Grande Litigation

Compact Protections

Reclamation Law

Irrigation Districts

Special Master

Special Master's Report

Legal Standard

"Obligation" to Deliver Water

Conclusions

New Mexico's Motion to Dismiss and Districts' Motions to Intervene

Pursuant to the Court's order, New Mexico filed motions to dismiss both the Texas Complaint and the United States' Complaint in Intervention. New Mexico responded to the Texas allegations by asserting that the 1938 Compact does not impose a stateline delivery obligation on New Mexico and does not impose a duty to protect Project deliveries to the stateline. New Mexico argued that nothing in the 1938 Compact required New Mexico to preserve the 1938 conditions below Elephant Butte Reservoir. Similarly, New Mexico argued that nothing in the 1938 Compact imposes an affirmative duty on New Mexico to prevent interference with Project deliveries.

Finally, New Mexico contended that Texas's and the United States' claims for interference with Project water should be considered in accordance with reclamation law. Under Section 8 of the 1902 Reclamation Act, New Mexico state law governs the enforcement of the Project's water rights, and Reclamation has the ability to seek remedies for interference by junior appropriators in New Mexico state court and specifically in the ongoing adjudication of the Lower Rio Grande.

Subsequent to the filing of the motion to dismiss, the two districts with contracts for water from the Project — EBID and EPCWID — moved to intervene in the litigation. Texas, New Mexico, Colorado, and the US all opposed these intervention motions.

Special Master's Findings and Recommendations

Generally, once the Court grants a motion for leave to file a complaint, 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 A. 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, to hear all other trial related aspects of the case, and to make recommendations to the Court on the disposition of the case. The Court also referred the motions to intervene to Special Master Grimsal.

Oral argument on the motion to dismiss and motions to intervene was held in New Orleans in August 2015. Special Master Grimsal issued a Draft Report in August 2016, and the final First Interim Report of Special Master, dated February 9, 2017 (First Report), was docketed with the Court on February 13, 2017. The Report was 278 pages long and included appendices and a DVD that contained extensive documentary materials.

Recommendations on the Motion to Dismiss the Texas Complaint

Special Master Grimsal included a lengthy and comprehensive recitation of background information on all aspects of the history of the Rio Grande from the Treaty of Guadalupe Hildalgo in 1848 through the construction of the Project, the development of the different valleys along the river, and ultimately the execution of the 1938 Compact. First Report 32-187. The Special Master also summarized the doctrines of prior appropriation and equitable apportionment. First Report 9-31.

With respect to New Mexico's argument that the Texas Complaint should be dismissed, the Special Master set forth the legal standard for compact interpretation, which draws both from case law on statutory interpretation and contract interpretation. The Special Master also provided the legal standard for motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Special Master explained that the First Report and recommendation "recounts the relevant legislative and negotiating history in order to give the Compact context. However, nothing detailed [in the First Report] should be construed as fact finding violative of Fed. R. Civ. P. 12, as nothing in the historical record was dispositive regarding the ultimate recommendations of the report." First Report 193. Ultimately, the Special Master recommended that New Mexico's motion to dismiss the Texas Complaint be denied based on the plain language and structure of the 1938 Compact.

The Special Master pointed to the preamble of the 1938 Compact, the definitions found in Article I of the 1938 Compact, the articles creating the accounting system for administration of the river, and the "obligation" to "deliver" water in the plain text of Articles III and IV to support the following conclusions regarding the interpretation of the Compact:

- The Rio Grande Project is wholly incorporated throughout the 1938 Compact.
- "The plain text of Article IV of the Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte." First Report 197.
- Based on the "structure and interplay of the articles of the 1938 Compact," the 1938 Compact relies upon the Project, protects water deliveries to the Project, and "also protects the water that is released from Elephant Butte in order for it to reach it intended destination." First Report 200.

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Rio Grande Litigation

Compact Interpretation

- Accepting New Mexico's reading of the 1938 Compact would violate principles of statutory construction. The articles requiring New Mexico to deliver water to the Project according to fixed delivery schedules, measure river flow, calculate debits and credits — as well as the articles protecting Texas's access to flood waters below Elephant Butte and allowing Texas to demand the release of water from upstream reservoir — "are all void if New Mexico delivers water to the Rio Grande Project at Elephant Butte Reservoir and then immediately grabs it back upon release from the Reservoir." First Report 201-202. Accepting New Mexico's reading would also leave Texas's equitable apportionment unresolved and a source of controversy, defeating the purpose of the Compact.
- "The equitable apportionment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir; that water is not subject to appropriation or distribution under New Mexico state law." First Report 211.
- New Mexico "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 Reservoir by Reclamation for deliveries 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 other appropriations granted by New Mexico." First Report 213.

The Special Master recommended that the Court deny New Mexico's motion to dismiss: "Texas has stated plausible claims for New Mexico's violation of the 1938 Compact." First Report 217.

Recommendations on the Motion to Dismiss the United States Complaint

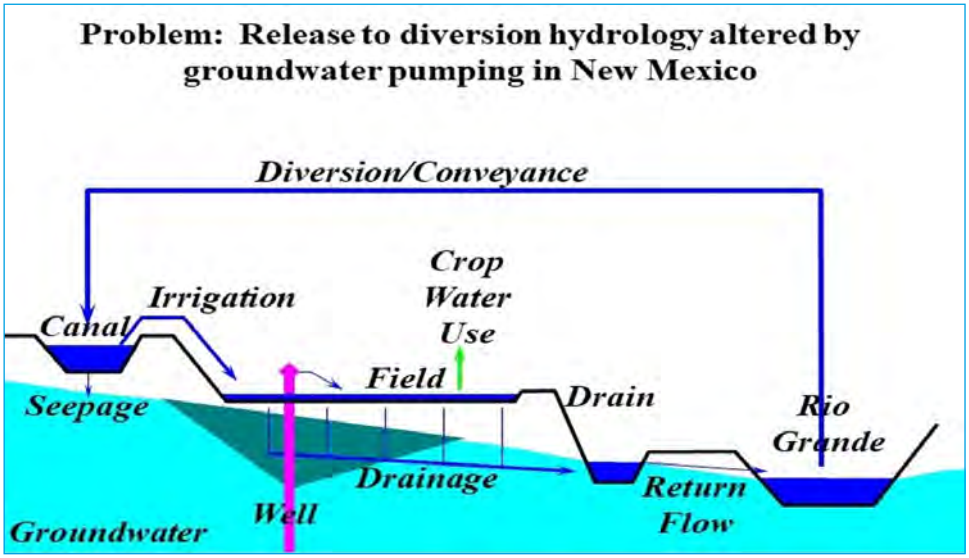
US' Standing

New Mexico also moved to dismiss the US Complaint for failure to state a claim under the terms of the 1938 Compact. New Mexico had argued that the US did not have standing to sue New Mexico for Compact violations. Special Master Grimsal recommended that the Court grant, in part, New Mexico's motion to dismiss the US Complaint. The Special Master concluded that the US could not bring a Compact claim independent of Texas's Complaint because it was not a party to the 1938 Compact. Despite the Compact's incorporation of the federal reclamation Project, the Special Master found that the 1938 Compact does not transform the United States' claims under reclamation law into claims under the Compact.

Discretionary Jurisdiction

The Special Master did, however, recommend that the Court exercise its discretionary jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) to hear the dismissed claims for purposes of judicial economy. Those claims focus on the Rio Grande Project and the law that governs its operations and water rights, including issues associated with an operating agreement for the Project in 2008 executed by the US, EBID, and EPCWID. Further, the Special Master noted that it was "desirable" for the Court to resolve the United States' claims given the interstate nature of the Project and the United States' international obligation to deliver Project water to Mexico. First Report 234-236. "Because other sovereigns have significant interests in the resolution of the United States' Project claims, it would be inappropriate to allow the New Mexico State Engineer to resolve those claims." First Report 236.

The Special Master also recommended that the Court deny the motions to intervene filed by EBID and EPCWID.



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Rio Grande Litigation

Exceptions to the Special Master's First Report

Exceptions Related to the Motion to Dismiss the Texas Complaint

Texas filed no exceptions to the Special Master's First Report. New Mexico "acceded" to the Special Master's recommendations that its motion to dismiss the Texas Complaint be denied and that its motion to dismiss the US be denied but to allow resolution of the US' claims under reclamation law. However, New Mexico argued that the Special Master's reasoning supporting his recommendations was flawed and unnecessary to resolve the motions to dismiss. New Mexico took exception to the different conclusions in the First Report and requested the Court to "disavow" the conclusions and reasoning supporting them, expressly refrain from adopting the Report, affirmatively state that the finding and conclusions are not law of the case, and recommit this case to the Special Master for a complete evaluation of the issues.

Request to "Disavow" Conclusions

Factual Findings

Both Colorado and New Mexico took issue with the Special Master's account of Rio Grande history and background, arguing that the Special Master went beyond the scope necessary to decide a motion to dismiss and made inappropriate factual findings. Colorado also requested that the Court affirmatively abstain from adopting the findings and conclusions on the history of the Rio Grande basin and Compact until the parties could introduce evidence and brief the relevant historical issues.

Amicus Curiae City of Las Cruces filed a brief arguing that the Special Master's recommendation should be denied in its entirety but went beyond New Mexico's position, arguing that the motion to dismiss should be granted. Amici New Mexico Pecan Growers, Albuquerque Bernalillo County Utility, and New Mexico State University repeated the substance of New Mexico's argument in their respective briefs.

Texas Position

In its Reply and Sur-Reply, Texas responded by noting that one could not understand the rationale behind the Special Master's recommendations unless one understood the Special Master's analysis, and thus the reasoning supporting the recommendation must be accepted if the recommendation itself was accepted. Texas argued that the Special Master's analysis was thorough and well-reasoned, that the Court should not "disavow" the Report, and that it should form the basis of future action by the Special Master and the Court.

The City of El Paso, EPCWID, and EBID all supported the Texas position. The State of Kansas also filed an amicus brief in support of the Texas position.

Exceptions Related to the Motion to Dismiss the United States Complaint

Scope of US Complaint

The United States filed exceptions to the Special Master's recommendation that its Complaint be dismissed to the extent that it attempted to state a claim under the Compact independent of the Texas Complaint.

New Mexico and Colorado argued that the recommendation should be accepted by the Court and that the US should not be able to sustain a Compact claim independent of Texas. However, they also sought qualifications to the Special Master's recommendation that the case be expanded to deal with Reclamation claims. Colorado added, in its exceptions, that the US should only be able to protect the 1906 Treaty with Mexico in the Supreme Court and nothing else.

Texas supported the position of the US, but also attacked directly the New Mexico contention that Section 8 of the 1902 Reclamation Act had any application in this case. Texas also argued that if the Court did expand the case to deal with Reclamation law issues, those issues should only be addressed after the Compact issues raised by Texas had been resolved.

No Party filed exceptions to the denial of the motions to intervene.

The Court's Orders and Opinion

Motions Order

On October 10, 2017, the Supreme Court Order issued the following order:

> Motion of New Mexico to dismiss Texas's complaint is denied. Motion of Elephant Butte Irrigation District for leave to intervene is denied. Motion of El Paso County Water Improvement District No. 1 for leave to intervene is denied...The exception of the United States and the first exception of Colorado to the First Interim Report of the Special Master (Feb. 13, 2017) are set for oral argument in due course.

Texas v. New Mexico, __ U.S. __, 138 S.Ct. 349, 349-50 (2017).

The Court heard oral arguments on the United States exceptions and the first exception of Colorado on January 8, 2018. The Court issued a unanimous opinion authored by Justice Gorsuch on March 5, 2018. *Texas v. New Mexico*, __ U.S. __, 128 S.Ct. 954 (2018).

Compact Claims

In analyzing the United States' exception that it be allowed to assert Compact claims and Colorado's exception that the United States be permitted to pursue only claims that arise under the 1906 Treaty, the Court explained its unique role in disputes in original jurisdiction cases. The Court may in "this singular sphere, ...regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice." *Id*. at 958 (quotations and citations omitted). Noting this "special" and "unique authority to mold original actions," the Court was persuaded that the US may pursue claims under the Compact in this particular case. *Id*. at 958-59.

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Rio Grande Litigation

Project "Intertwined"

Treaty Obligations

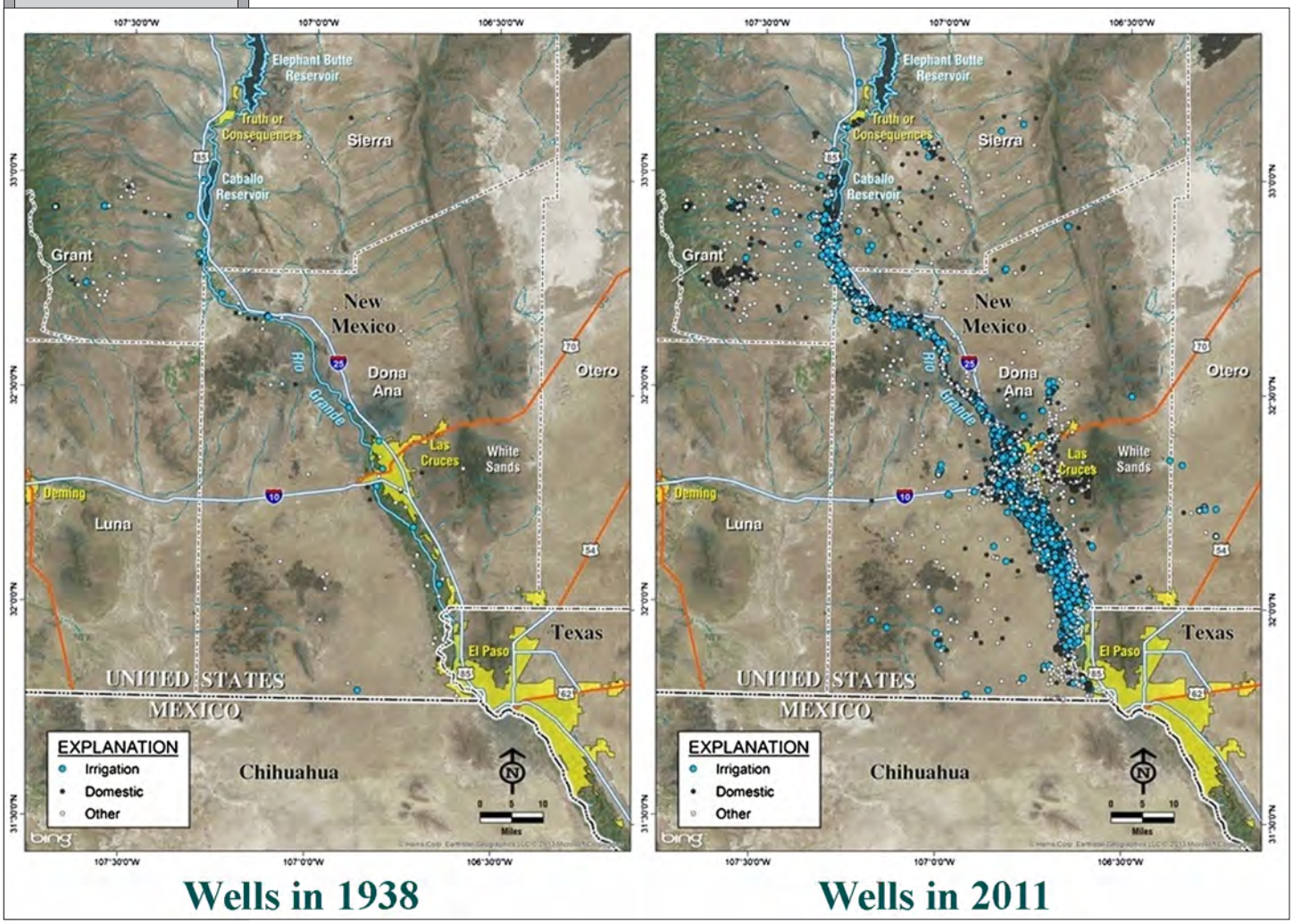
Ruling Limited

The Court explained that the Compact is "inextricably intertwined" with the Project and the contracts with EPCWID and EBID (which the Court labeled "Downstream Contracts") and that the equitable apportionment intended by the Compact can only be achieved through the operation of the Project and the Downstream Contracts. "In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of 'agent' of the Compact, charged with assuring that the Compact's equitable apportionment' to Texas and part of New Mexico 'is, in fact, made.'" *Id*. at 959 (quoting Texas's Reply to Exceptions to the First Interim Report of the Special Master 40). The Court credited the United States' interest in the delivery of water into Elephant Butte, which allows the United States to meet its contractual obligations. The Court also cited New Mexico's admission that "the United States plays an integral role in the Compact's operation." *Id*.

Next, the Court recognized the US' interest in its ability to satisfy treaty obligations, which require the federal government to deliver 60,000 acre-feet each year from Elephant Butte Reservoir to Mexico. New Mexico's failure to perform under the Compact "directly impair[s]" the United States' ability to perform under the 1906 Treaty with Mexico. *Id*. "Permitting the United States to proceed here will allow it to ensure that those obligations are, in fact, honored." *Id*. at 960.

The Court was also persuaded by the fact that the US asserted its Compact claims in an existing action, is seeking the same relief, and is proceeding without Texas's objection. Accordingly, the case "does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States." *Id*. at 960. Given the unique nature of the federal interest in the case, the Court ruled to allow the US to pursue its claims under the 1938 Compact but cautioned that "nothing in [the] opinion should be taken to suggest whether a different result would obtain in the absence of any of the considerations [the Court has] outlined or in the presence of additional, countervailing considerations." *Id*. at 960.

The Court concluded the opinion as follows: "The United States's exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion." *Id*. at 960.



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Rio Grande Litigation

New Special Master

New Mexico Allegations

Affirmative Defenses

Counterclaims

Basis for Ruling

"Law of the Case"

Recent Oral Argument

Legal Determinations

New Special Master Appointed

On April 2, 2018, the Supreme Court issued an order discharging Special Master Grimsal, and appointing the Honorable Michael J. Melloy of Cedar Rapids, Iowa as Special Master. Judge Melloy is presently a Senior United States Circuit Court Judge of the United States Court of Appeals for the Eighth Circuit. The Special Master's docket, which includes all filings with the Special Master since inception of the case, is available at: www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original.

New Mexico's Answer and Counterclaims

In May 2018, New Mexico filed answers to both Texas's Complaint and the United States' Complaint In Intervention. The answers put the case at issue just under five-and-a-half years after Texas sought leave to file its complaint in January 2013. In addition, New Mexico filed counterclaims, including nine of its own claims for relief. Three of the new claims are directed against Texas and/or Texas and the US, and six of the new claims are against the US only. New Mexico filed its counterclaims with the Special Master, and did not seek leave of the Supreme Court to invoke its original jurisdiction, which Texas has asserted renders the counterclaims procedurally improper.

New Mexico's answer to Texas's complaint pleads various affirmative defenses, including: (a) no damages; (b) failure to provide notice; (c) unclean hands; (d) acceptance/waiver/estoppel; (e) laches; (f) failure to mitigate damages; (g) failure to exhaust remedies; (h) set-off; and (i) spill. Several of the affirmative defenses are equitable, and Texas has argued that the Supreme Court generally does not consider such defenses in interstate compact litigation for the reason that compacts are federal law and courts cannot use equitable remedies to contravene the intent of Congress. *See New Jersey v. New York*, 523 U.S. 767, 810, 811 (1998).

New Mexico's counterclaims include alleged Compact violations against both Texas and the US as well as several claims that go beyond Compact issues. The counterclaims include: (a) Compact violation caused by Texas due to unauthorized depletions; (b) interference with the 1938 Compact apportionment against the US; (c) improper release of Compact credit water against the US; (d) Compact violation and unjust enrichment against Texas; (e) violation of the Water Supply Act against the US; (f) improper Compact and Project accounting against the US; (g) violation of the Miscellaneous Purposes of Act against Texas and the US; (h) improper Project maintenance against the US; and (i) failure to enforce the 1906 Treaty with Mexico and Rio Grande Compact violation against the US.

Recent Motions

Special Master Melloy set a late 2018 deadline to file motions on the pleadings and also to file motions relating to the doctrine of law of the case or matters previously decided. As to the latter, and as explained above, Special Master Grimsal's First Report included an exhaustive summary of context regarding western water law, the history of the Rio Grande Project, and the 1938 Compact. But in recommending the denial of New Mexico's motion to dismiss, Special Master Grimsal relied on only the text and structure of 1938 Compact. Following the Supreme Court's denial of exceptions to the First Report in March 2018, New Mexico held the position that many of the issues addressed in the First Report were not law of the case, or at least were not decided for purposes of subsequent proceedings. On the other hand, Texas asserted that New Mexico's exceptions to the First Report were denied, and thus the report constitutes law of the case, or at least includes matters decided for purposes of subsequent proceedings.

Generally, a court relies upon "law of the case" principles when its initial decision continues to guide later proceedings in the same case. As the Supreme Court noted in *Arizona v. California*, 460 U.S. 605, 618 (1983), "the doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." The law of the case doctrine gives a court discretion to follow prior decision-making, but "does not limit the tribunal's power." *Id*. "In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912).

In order to resolve this dispute and to guide ongoing discovery, Special Master Melloy set a briefing schedule for motions on these issues, which culminated with an April 2, 2019 oral argument in Denver, Colorado. The following briefly describes the parties' motions and positions on these issues.

Law of the Case or Matters Previously Decided

Texas and New Mexico both filed motions regarding issues previously decided and/or the law of the case doctrine. Texas's motion asserted that five legal determinations included in the First Report, and undisturbed by the Supreme Court's consideration of exceptions, constitute law of the case. These include: (1) the Rio Grande Project was fully integrated into the 1938 Compact; (2) the text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir; (3) New Mexico through its agents or subdivisions may not divert or intercept water it is required to deliver to Elephant Butte Reservoir pursuant to the 1938 Compact after the water is released from Elephant Butte Reservoir; (4) New Mexico must refrain from post-1938 depletions of

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water (i.e., depletions that are greater than what occurred in 1938) below Elephant Butte Reservoir; and (5) New Mexico state law plays no role in an interstate dispute. The United States agreed with Texas that the five determinations constitute law of the case. New Mexico's response in opposition to Texas's motion primarily argued that the summary denial of its exceptions to the First Report did not constitute an affirmative act on the part of the Supreme Court to adopt the Special Master's reasoning, and thus the five legal determinations outlined in Texas's motion do not constitute law of the case, or matters previously decided.

New Mexico Position

New Mexico filed its own motion on law of the case or matters previously decided and requested that the Special Master affirm eleven determinations. Texas opposed New Mexico's motion on the grounds that the eleven determinations mostly included factual issues, but the law of the case doctrine applies only to legal issues previously decided. Ultimately, Texas asserted that the meaning of the 1938 Compact is a legal issue and there has been substantial litigation on that legal issue since the filing of the Texas Complaint in 2013. The Special Master and the Supreme Court have decided that the 1938 Compact is not ambiguous.

Compact Interpretation Decided?

Specifically, the Special Master, and ultimately the Supreme Court "discussed and decided" legal questions relating to the interpretation of the 1938 Compact as part of the Special Master's First Report and in the Supreme Court's two actions related to New Mexico's motions. New Mexico's position on law of the case essentially asks that it may continue to address interpretation of the 1938 Compact, which Texas and the US assert has already been decided. As to several of the factual determinations requested for law of the case consideration in New Mexico's motion, several might be susceptible for consideration as stipulated facts prior to trial, but the law of the case doctrine applies only to legal determinations, and not factual determinations.

The law of the case motions are presently under submission with Special Master Melloy.

Motions on the Pleadings

Pleading Issues

Texas and the US both filed motions on the pleadings. Texas filed a three-part motion that included: (a) a motion to strike New Mexico's counterclaims for failure to seek leave to file them with the Supreme Court; (b) a motion for judgment on the pleadings as to several of New Mexico's counterclaims because they fail as a matter of law; and (c) a motion for partial summary judgment as to several of New Mexico's affirmative defenses because they also fail as a matter of law. In the motion to strike, Texas argued that by failing to properly file a motion for leave with its counterclaims, New Mexico ignored the threshold requirement to request that the Court invoke original jurisdiction, and as such, the Special Master lacked jurisdiction to consider each and all of New Mexico's nine counterclaims. In short, Texas argued that motions for leave allow the Court to exercise its "important gatekeeping function and to ensure that new or additional pleadings do not expand the scope of an existing controversy." *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995). Texas explained that New Mexico's failure to seek the Court's leave to file its counterclaims effectively stripped the Court of this critical gatekeeping function and placed New Mexico in the position of unilaterally declaring the scope of the Court's jurisdiction. New Mexico opposed the motion to strike by arguing that the motion for leave to invoke the Court's original jurisdiction is only required for a complaint and is not required for counterclaims. The consequence of such a rule, however, would be that a defendant state could expand the scope of any original action far beyond the bounds of the original complaint. The motion to strike is presently under submission with Special Master Melloy.

Original Jurisdiction

New Mexico Counterclaims

Alternative to an order striking New Mexico's counterclaims in their entirety for failure to seek leave of the Court to file, Texas moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure12(c), on New Mexico's Miscellaneous Purposes Act, Water Supply Act, and 2008 Operating Agreement Counterclaims against Texas and the US. Texas argued that the substance of those counterclaims is subject to ongoing litigation initiated by New Mexico in federal district court and therefore outside the scope of the Compact disputes at issue in this case. In addition, Texas asserted that there is no possible cause of action against Texas under the Miscellaneous Purposes Act because Texas is not a party to any Miscellaneous Purpose Act contracts. New Mexico opposed Texas's motion on the ground that the asserted violations of the Miscellaneous Purposes Act, Water Supply Act, and the 2008 Operating Agreement, impact the Rio Grande Compact apportionment, thus implicating the compact issues.

Affirmative Defenses Challenged

Finally, Texas challenged several of the affirmative defenses (raised in New Mexico's answer to Texas's complaint) by way of a motion for partial summary judgment. Texas argued that the following legal bases dispose of three of New Mexico's equitable affirmative defenses — unclean hands, the trio of acceptance/waiver/estoppel, and laches — and the affirmative defense of failure to exhaust administrative remedies. First, the equitable defenses are not available in interstate compact litigation. In *New Jersey v. New York*, 523 U.S. 767, 810-11 (1998), the Court stated: "...no court may order relief inconsistent with [a compact's] express terms, no matter what the equities of the circumstances might otherwise invite." Texas asserted that the Court cannot change an equitable apportionment approved by Congress. Second, Texas argued that New Mexico failed to make any legal argument in opposition to dismissal of the three equitable defenses and does not acknowledge that, for example, the defense of laches has never been applied in interstate water compact litigation and is not available against a sovereign. Finally, Texas argued that the failure to exhaust administrative remedies defense is improper in an original jurisdiction

Equitable Defenses

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Rio Grande Litigation

Discovery

Scope of Action

action where the Court has already accepted jurisdiction over the claims. Texas explained that the Court decided the exhaustion issue when it granted Texas's motion for leave to file the complaint. New Mexico's affirmative defenses: (1) unclean hands; (2) acceptance/waiver/estoppel; (3) laches; and (4) failure to exhaust administrative remedies each fail as a matter of law. New Mexico's response largely indicated that discovery might reveal facts that give rise to the challenged affirmative defenses. The Special Master's decision on the motion for partial summary judgment will determine whether such discovery is needed and/or will be allowed.

The United States filed a motion for judgment on the pleadings in the nature of a Rule 12(c) motion. The United States' motion generally asserted the following grounds to justify dismissal of New Mexico's counterclaims: (a) New Mexico failed to identify any waiver of sovereign immunity that would allow the Court to exercise jurisdiction over New Mexico's claim against the US; (b) New Mexico lacks standing to raise several of its counterclaims, particularly those related to the Rio Grande Project, because it is not itself a beneficiary of the Rio Grande Project; and (c) New Mexico's counterclaims fail to state a claim for relief against the US. Overall, Texas and the US asserted that New Mexico's counterclaims, which expand the scope of the action beyond the Compact issues, are not appropriate for the Supreme Court's original jurisdiction, and should be stricken and/or denied. Special Master Melloy has taken these issues under submission.

Case Management Going Forward

In September 2018, after considering the input from all parties and amici, Special Master Melloy issued a Case Management Plan (CMP). The CMP outlines the procedures for written discovery, depositions, disclosure of experts, deadlines for dispositive motions, and a preliminary window of dates for trial. The Federal Rules of Civil Procedure do not apply in original jurisdiction cases, but may be taken as a guide. Sup. Ct. R. 17.2. The CMP adopts procedures from the Federal Rules of Civil Procedure, with several important modifications to account for the number of parties and amici involved, and phasing of expert report disclosure in order to more efficiently deal with the vast number of experts and issues anticipated by the parties. Subsequent developments, including the recent partial shutdown of the federal government, resulted in the issuance of several amendments to the CMP. Important deadlines set forth in the CMP and the most recent amendments include:

Deadlines

- September 1, 2018: Opening of fact discovery and deadline for initial disclosures (in the nature of FRCP 26 disclosures). This process is complete. This included the parties' initial disclosure of documents, and subsequent service of those documents to an electronic, shared vault.
- May 31, 2019: Disclosure of Plaintiffs' Expert Witnesses and Expert Witness Reports and commencement of depositions of Plaintiffs' Expert witnesses
- October 31, 2019: Disclosure of Defendant's Expert Witnesses and Expert Reports and commencement of depositions of Defendant's Expert witnesses
- December 30, 2019: Disclosure of Plaintiff's Rebuttal Reports
- March 27, 2020: Disclosure of Defendant's Rebuttal Reports
- May 1, 2020: Deadline for completion of discovery
- June 30, 2020: Deadline to file dispositive motions
- March/April 2021: Anticipated trial date

As of April 5, 2019, Texas has noticed and completed over ten depositions of fact witnesses, including representatives of EBID, EPCWID, the State of New Mexico, and others. Many more depositions are set for April and May 2019.

Conclusion

The case remains exceedingly complex. With the upcoming deadlines for expert disclosures, the case will soon involve dozens of expert witnesses. Anticipated rulings from the Special Master may also affect the scope of discovery and issues to be decided during the next phases of litigation. Interstate water disputes are no stranger to a break-neck trial pace (e.g., *Florida v. Georgia*, Original No. 142), or decades-long negotiations (e.g., *Kansas v. Nebraska & Colorado*, Original No. 126). Original No. 141 is gearing up and set for a similar trajectory.

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