

LITIGATION

Texas v. New Mexico

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Special Report No. 2456

On May 21, the Special Master issued a ruling on several summary judgment issues in *Texas v. New Mexico and Colorado* (#220141, U.S. Supreme Court), leaving the remaining issues for a trial scheduled to begin on September 13. Texas filed the lawsuit in 2013 alleging violations of the 1938 Rio Grande Compact. The primary issue is the impact of groundwater pumping on return flows to the Rio Grande. The Supreme Court allowed the United States to intervene due to the impact on the Bureau of Reclamation's Rio Grande Project. The Special Master noted that, while a fair amount of evidence appears to be undisputed, the different reasonable inferences that can be drawn from the evidence about Compact interpretation and course of performance abound, due to the States and Reclamation operating with incomplete information about one another's practices, requiring a trial to sort through many of those matters.

The Special Master ruled that the 1938 Compact unambiguously establishes that New Mexico receives part of its apportionment above and part below the Elephant Butte Reservoir, with the downstream portion delivered exclusively by Reclamation's Rio Grande Project. He ruled that the groundwater and surface water downstream of the Reservoir are hydrologically interconnected to a sufficient degree that groundwater pumping generally reduces return flows and affects Rio Grande surface water flows, resulting in indirect capture of Rio Grande Compact water. New Mexico has a Compact-level duty to avoid material interference with Reclamation's delivery of Compact water to Texas, including groundwater pumping that captures Rio Grande surface water "to the extent that the overall impact of such capture is inconsistent with Compact water deliveries to Texas or interferes with long-term operation of the Project."

The Compact protects the Rio Grande Project, its water supply, and the baseline operating condition – however, there are "material factual disputes concerning the baseline condition and the full scope of the effect of New Mexican pumping on Project operations." New Mexico admits that groundwater pumping beyond disputed limits affects surface water supplies, but disputes the extent of the interference and the extent to which interference rises to the level of a Compact violation.

Several other nuanced Compact interpretation details were partially addressed and left for trial. The Special Master denied the United States' request for injunctive relief against New Mexico, noting that the propriety of that relief "remains to be determined based on the detailed resolution of issues identified above and based on proof of damages taking into account as of yet unresolved issues including: acquiescence, equitable defenses, and any offsetting harm a state's own actions have caused. It is anticipated any such relief, if proven necessary, will be directed against a state as a whole but hopefully will include sufficiently specific requirements to ensure immediate and practical relief to the prevailing party." (See WSW #2201, 2436)

Montana and Wyoming v. Washington

On May 25, the United States filed a brief in opposition to the bill of complaint filed by Montana and Wyoming against Washington (#220152, U.S. Supreme Court). The Supreme Court invited the Acting Solicitor General to express the views of the U.S. last October. The U.S. brief noted that the complaint challenges Washington's denial of the Millennium Bulk Terminal application for Clean Water Act §401 Certification, a prerequisite to building a new coal-export terminal on the Columbia River. Millennium has since filed for bankruptcy and divested itself of any interest in the property in question. The U.S. argued: "Accordingly, this suit would not redress Montana and Wyoming's asserted injury from the denial of certification under Section 401. Because no Article III case or controversy exists, the motion for leave to file a complaint should be denied."

On June 7, Montana and Wyoming submitted a supplemental brief, arguing that the case is not moot merely "...because Washington successfully bankrupted one terminal developer," nor is the issue "solely whether Washington must grant a specific terminal developer a permit." The two plaintiff States noted that their interests are broader: "Montana and Wyoming are challenging Washington's longstanding discrimination against two landlocked States' sovereign interests in getting one of their most important commodities to market. Montana and Wyoming still have an abundance of low-sulfur, cleaner burning coal, and foreign markets want it. The terminal in Longview remains an ideal site to export that coal to Asian and other foreign markets. And Montana and Wyoming still have no other export option, besides an already over-burdened Canadian port. Washington's hostility to coal exports also remains unchanged. This is not a case where a party voluntarily ends an unconstitutional policy to avoid review. Washington has changed nothing and will continue to block Powder River Basin coal exports based on coal's end use in foreign markets and to protect Washington's own agricultural interests." Montana and Wyoming concluded with the argument that only the Supreme Court can decide whether Washington's policy violates the Commerce Clause, and the states have raised an important issue that goes directly to their sovereign interests. The Supreme Court has scheduled a conference to consider the matter on June 24. (See WSW #2389, 2408)