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 MOTION TO DISMISS

NEW MEXICO'S REPLY BRIEF

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REPLY BRIEF OF THE STATE OF NEW MEXICO

The State of New Mexico files this Reply Brief in response to the briefs filed by the State of Texas and the United States ("Tex. Br." and "U.S. Br.") on New Mexico's Motion to Dismiss ("N.M. Br.").

INTRODUCTION

The Motion to Dismiss should be granted because there is no Rio Grande Compact ("Compact") claim either for Texas or the United States below the Elephant Butte Dam ("Elephant Butte"). In the response briefs, Texas and the United States deny they are claiming a stateline delivery, but their claims necessarily are based on this premise. While the Compact imposes a delivery obligation on New Mexico at Elephant Butte, it imposes no obligation on New Mexico below Elephant Butte. This is confirmed by the course of conduct of the parties through Compact accounting, which for the last 75 years has never extended into the irrigated areas of the Rio Grande Project ("Project"). The compacting States and Congress were well aware of the extant protections and corresponding obligations under federal and state law regarding the Project and chose not to add additional obligations. To add such obligations into the Compact, as Texas and the United States suggest,

would disregard the Court's rule that additional duties cannot be implied in interstate compacts.

The United States and Texas also inexplicably complain about two undisputed propositions: that the Project is entitled to reuse return flows and that only holders of Reclamation contracts may receive deliveries of Project water. As to the first proposition, in fact, New Mexico has long supported the United States' claim to reuse of return flows in the ongoing state adjudication, and the New Mexico Lower Rio Grande adjudication court ("LRG Adjudication Court") has already ruled that the United States may reuse its Project return flows. As to the second proposition, the United States and the Project irrigation districts control Project deliveries. However, Las Cruces, the second largest city in New Mexico, relies on groundwater for its primary municipal supply, and over one thousand farmers in New Mexico in the Lower Rio Grande have perfected supplemental groundwater rights from the public aquifer under New Mexico state law. These water rights owners cannot now be forced to obtain contracts from the United States simply to continue using their state-based water rights, as the United States implied in its Complaint. The United States filed its claims to water rights in the Project in 2010 and did not claim groundwater before it has returned to the river or a drain as a source of Project supply. It has no claim to and no jurisdiction over groundwater in New Mexico. If the uses of state groundwater rights are impairing delivery of Project water, the United States need avail itself of the remedies under the Reclamation Act and

the state law incorporated therein. The detailed technical process of restricting other water uses under the prior appropriation system, if needed to protect the Project water uses, is best addressed in the first instance by the state institutions charged with that responsibility. As the Court has previously ruled, it is preferable to rely on such state remedies in the first instance, subject to the Court's oversight.

Finally, upon dismissal of the Texas Complaint, the United States Complaint in Intervention should also be dismissed. There is no precedent allowing an Intervenor-Plaintiff to continue its own claims when the initial Complaint is dismissed. The United States is not a party to the Compact, and its Complaint is based solely on this Court's original exclusive jurisdiction over controversies between states. To allow an independent Compact claim by the United States against a State under an interstate water compact under these circumstances would be unprecedented and contrary to this Court's rulings regarding interstate water compacts and their enforceability.

ARGUMENT

I. New Mexico Recognizes and Meets Its Compact Obligations

New Mexico honors its Compact obligations. Neither Texas nor the United States allege that New Mexico has failed to comply with the explicit delivery obligations in Article IV of the Compact. Instead, they

suggest that the Compact contains an implied duty to restrict uses of non-Compact waters below the Compact delivery point. Tex. Br. 22-23.

New Mexico does not suggest that the Compact allows it to "simply deliver water into Elephant Butte Reservoir only to recapture the same water at any point before it reaches irrigable land in Texas," as Texas claims, Tex. Br. 28, and it does not argue that it is free from responsibility below Elephant Butte. Rather, as New Mexico explained in its opening brief, under Article IV of the Compact, New Mexico satisfies its obligations to Texas by delivering water to Elephant Butte. Once delivered there, New Mexico's obligations below Elephant Butte arise under Reclamation law and the doctrine of prior appropriation, and that doctrine provides the Project right protection from impairment. N.M. Br. 49-52. Because New Mexico does not contend that the Compact allows it to deplete Project flows below Elephant Butte, the arguments of Texas and the United States which seek to refute that position, including those that relate to Compact credits and debits, Tex. Br. 31-33, the Preamble, Tex. Br. 25-30, U.S. Br. 26-33, and Reclamation contracts, Tex. Br. 41-45, U.S. Br. 43-45, are of no import.

The responsive briefing makes clear that there is much on which New Mexico, Texas, and the United States agree. All three parties understand that the States "utilized the Rio Grande Project to ensure that Texas receives the water that was apportioned to it." Tex. Br. 28. The parties also agree that the Compact

does not impose a stateline delivery requirement, Tex. Br. 22, U.S. Br. 34, and does not ensure "that any particular amount of water reaches Texas." U.S. Br. 36.

The key difference between the two positions is the source of the protection afforded to Project deliveries: New Mexico asserts that the Compacting States relied on extant Reclamation law to protect the Project, and therefore Compact, deliveries; Texas and the United States argue that the Compact silently modified Reclamation law to impose an implied but affirmative duty on New Mexico to shepherd water from Elephant Butte to the Texas stateline. The distinction is important. The Compact requires New Mexico to deliver water *to* Elephant Butte – indeed it places Texas' right of enforcement there. But it does not include an implied duty for New Mexico to deliver water to the stateline. Therefore, the Texas Complaint and the United States Complaint in Intervention should be dismissed.

II. Deliveries From Elephant Butte to Texas Are Protected By Reclamation Law

A. The Compact Is Silent on Any New Mexico Obligation Below Elephant Butte

Both Texas and the United States now concede that the Compact imposes no stateline delivery requirement. *See* Tex. Br. 2, 22; U.S. Br. 22, 34. Nevertheless the United States asserts that "New Mexico

does have a duty under the Compact to prevent its water users from diverting Project water that Reclamation releases from the reservoir." U.S. Br. 22-23. This is, of course, just a different way of alleging a right to an amount certain at the stateline. In essence, the United States and Texas are seeking to impose a stateline obligation on New Mexico, contrary to the express wording of the Compact.

The Compact did not divide Project waters between New Mexico and Texas lands. That had already been done by the Project, which was in full operation at the time the Compact was executed. Rather, the Compact apportioned the waters of the Rio Grande Basin, from its headwaters to Fort Quitman, among Colorado, New Mexico and Texas by imposing delivery requirements at the Colorado-New Mexico stateline for Colorado and at Elephant Butte for New Mexico. Clearly, an important purpose of this apportionment was to protect inflows of Project water into Elephant Butte from upstream depletions by New Mexico and Colorado. *See* Compact, Arts. III, IV. But the Compact included no requirement of New Mexico below Elephant Butte because the parties understood that existing Reclamation law, which incorporated New Mexico state law, provided effective protection for Texas' water. *See* N.M. Br. App. 32.[1] The

[1] Texas' objection to New Mexico's reliance on extrinsic sources in its brief in support of its motion to dismiss is unfounded. As the Court explained in *Oklahoma v. New Mexico*, "it is appropriate to look to the extrinsic evidence of the negotiation history of [a] Compact" to interpret its provisions. 501 U.S. 221, 234 n.5

(Continued on following page)

most logical explanation for the silence is the parties' assumption that no additional protection of Project water was necessary beyond that already provided by federal and state law.

If additional remedies for injurious depletion of Project water destined for Texas lands had been considered necessary, the drafters could have expressly provided them. Or they could have been implicitly provided by imposing a stateline delivery obligation. The parties did neither. Other compacts expressly include such terms, including the 1929 Temporary Compact, so the drafters certainly knew how to craft them if that was their intent. The absence of such terms is significant.

The Court has said that it will not read into a compact terms that are not expressly included. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("We do not – we cannot – add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no different." (citations omitted)). Indeed, in *Texas v. New Mexico*, 462 U.S. 554 (1983), when the Special Master, with the support of

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(1991). Consistent with this principle, the Court has accepted motions to dismiss in other interstate compact cases that append and reference extrinsic sources. *E.g.,* Wyoming's Motion to Dismiss, *Montana v. Wyoming*, No. 137, Orig. (April 1, 2008) (appending 95 pages of extrinsic materials, including letters from compact commissioners). Moreover, Texas cites to a number of extrinsic sources in its response to New Mexico's Motion to Dismiss. Tex. Br. xi.

Texas, recommended that this Court add a provision to the Pecos River Compact, the Court rejected that proposal, saying that "unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms." *Id.* at 564. The Court should reject Texas' and the United States' position because it is inconsistent with that ruling and with the ruling of the Court in *Alabama v. North Carolina*.

B. Deliveries to Texas Beneficiaries Are Protected by Reclamation Law

1. All of the parties acknowledge the central role that the Project plays in delivering water to Texas. Texas has further recognized that "[t]he delivery of Texas' apportioned water under the Compact cannot occur without the Rio Grande Project." Tex. Br. 7-8. The United States has similarly recognized that Texas receives its apportionment of water under the Compact through deliveries from the Project. U.S. Br. 26-33. In its opening brief, New Mexico explained that it satisfies its Compact obligations upon delivering water to Elephant Butte, and that once water is delivered to the Project, Reclamation distributes it to downstream users in New Mexico and Texas pursuant to Reclamation law, which incorporates state law and administration. N.M. Br. 27-40, 59-63.

2. Texas and the United States improperly presume that the Compact overrides the mandate in the Reclamation Act of 1902 that Reclamation shall

"defer to the substance, as well as the form, of state water law" in the control, appropriation, *use, and distribution of* water. *California v. United States*, 438 U.S. 645, 674-75 (1978); *see also Kansas v. Colorado*, 206 U.S. 46 (1907) (explaining that Section 8 was key to passage of the Reclamation Act); Tex. Br. 58-59; U.S. Br. 41-46. That key mandate of the Reclamation Act was equally applicable to Congress' authorization of the Rio Grande Project only three years later. Act of February 25, 1905, Pub. L. No. 58-108, ch. 798, 33 Stat. 814 (extending the provisions of the Reclamation Act for purposes of building a federal project on the Rio Grande).

After initially conceding that Reclamation law applies to the operation of the Project, Tex. Br. 41, Texas takes the inconsistent position that the Compact overrides Reclamation law, Tex. Br. 58-59. Indeed, both Texas and the United States assume that the Compact irreconcilably displaces state law governing the delivery of water from the Project. Tex. Br. 58-59; U.S. Br. 47. But neither identifies a specific provision of the Compact that conflicts with Reclamation law. In effect, Texas and the United States argue that the Rio Grande Compact impliedly overrides Congress's command in the Reclamation Act to defer to state law. The Court has emphasized, however, that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citation and internal punctuation

omitted). "In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable." *Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976) (citation and internal quotation marks omitted); *accord United States v. Cal. Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982) ("[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme"). Texas and the United States make no effort to show that the Compact and the Reclamation Act's command to follow state law are "irreconcilable."[2]

Far from "irreconcilable," the Rio Grande Project Act and Rio Grande Compact are inextricably intertwined and interdependent, as Texas and the United

[2] The LRG Adjudication Court has ruled that state law and Reclamation law do not conflict. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist*., No. CV-96-888 (Aug. 16, 2012) (N.M. Dist. Ct.), *available at* https://lrgadjudication.nmcourts.gov/. The United States District Court for the Western District of Texas also found New Mexico law to be consistent with Reclamation law and, therefore, not prrempted in *El Paso County Water Improvement District No. 1 v. City of El Paso*, 133 F. Supp. 894, 903-08 (W.D. Tex. 1955), *affirmed as modified*, 243 F.2d 927 (5th Cir. 1957).

States have acknowledged. Tex. Br. 7-8, 41 (arguing that the "legal framework" below Elephant Butte is defined by Reclamation law); U.S. Br. 52 ("[T]he Compact incorporates the Project"); *accord Colo. River Water Conservation Dist.*, 424 U.S. at 809 (explaining that for federal water projects, "[t]here is no irreconcilability in the existence of concurrent state and federal judisdiction"). In Texas' words, the "existence and operation of the Rio Grande Project . . . and reclamation law governing federal reclamation projects" forms the "background understanding" on the basis of which the Compact was drafted and executed. Tex. Br. 35-36 (*citing Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013); *New Jersey v. New York*, 523 U.S. 767, 783-84 & n.6 (1998)). It is implausible to assume, as Texas and the United States do, that the Compact was intended to sweep aside the very "background understanding" on which it was based. In short, the Compact does not disturb the bedrock principle of Reclamation law that state law governs the scope and administration of the Project right.

3. As noted above, New Mexico does not argue that Reclamation law allows New Mexico to deplete Project flows, including water intended for Texas or Mexico, as Texas and the United States contend. Tex. Br. 11; U.S. Br. 46. Rather, Reclamation and New Mexico law, applicable to the Project, protect the Project water delivered to Texas under the doctrine

of prior appropriation.[3] *United States v. City of Las Cruces*, 289 F.3d 1170, 1176-77 (10th Cir. 2002); N.M. Br. 56-58. The *sine qua non* of the prior appropriation doctrine is the protection of existing rights. Once water is stored in the Project in amounts determined by the Compact, it becomes Project water, and no other user is legally permitted to impair that right. Reclamation law thereby provides protection for interstate delivery from impairment by other New Mexico water users.

a. As the United States acknowledges, "New Mexico does not control releases from the Project" and therefore "cannot be held responsible for ensuring that any particular amount of water reaches Texas." U.S. Br. 36. While this does not mean that New Mexico "is free of any duty," Congress has mandated that the United States follow the prior appropriation doctrine by informing New Mexico when deliveries are not reaching their intended beneficiaries. *See Worley v. U.S. Borax & Chem. Co.*, 428 P.2d 651, 654-55 (N.M. 1967).

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[3] New Mexico law and the Reclamation Act are in complete accord. *Compare* 43 U.S.C. § 372 ("The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right."), *with* N.M. Const., art. XVI, § 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.").

Reclamation follows this practice to protect Project rights in other western states that follow the doctrine of prior appropriation. For example, in the Klamath River Basin, a river that is subject to an interstate Compact between Oregon and California, Act of August 30, 1957, 71 Stat. 497, the United States recently made a priority call to the State of Oregon Water Resources Department to regulate other water users for the benefit of the Klamath Reclamation Project. *See* Or. Water Res. Dep't, *Klamath Regulation Update*, www.oregon.gov/OWRD/pages/Klamath_Regulation_Update.aspx (last visited June 26, 2014).

b. Texas and the United States do not dispute that the prior appropriation doctrine is effective at protecting properly defined existing rights from impairment. It is therefore significant that neither alleges that the United States made a priority call or otherwise requested that New Mexico take action. Had such a communication been made, it would have informed New Mexico of the problem and triggered New Mexico's obligation *under the prior appropriation doctrine* to protect the Project right. Whether or not such a communication was made, however, *the Compact* does not impose an affirmative duty on New Mexico to marshal Project water to the stateline. New Mexico's duty to Texas is to deliver water to Elephant Butte, and it is there that Texas' right of enforcing the Compact lies. Arts. IV, XI. Texas' and the United States' claims should be dismissed.

C. Texas' and the United States' Interpretation of the Compact Violates New Mexico's Sovereignty and the Court's Established Principles of Interstate Compact Interpretation

1. Texas and the United States argue that the presumption that states do not cede their sovereignty silently does not apply here because New Mexico agreed to "deliver" water to the Rio Grande Project for distribution thereafter by Reclamation. Tex. Br. 19. But delivering water for Project distribution is not a relinquishment of sovereignty.

Texas' and the United States' strained reading of the Compact assigns too much weight to the term "deliver," deriving therefrom meanings that conflict with the drafters' understanding of the legal and factual background existing when the Compact was signed. New Mexico agrees that Article IV requires it to "deliver" water to Elephant Butte according to the Compact terms, that is, New Mexico must ensure sufficient water reaches Elephant Butte according to Article IV's delivery schedule. New Mexico further agrees that, upon delivery at Elephant Butte, the United States may distribute or otherwise use Project water consistent with the scope of its water right, as defined by state and federal law, and its contracts with Project beneficiaries.

Texas' and the United States' reading of the Compact, however, transforms Article IV's requirement that New Mexico deliver water to Elephant Butte into a silent but sweeping relinquishment of

New Mexico's sovereign authority to regulate the use of state waters in southern New Mexico and a complete disavowal of this Court's long-standing recognition of the primacy of state water law under Section 8 of the Reclamation Act. As the parties to the Compact understood at the time of its ratification, Reclamation law provided the explanation for how the distribution of water would work after New Mexico met its obligations to deliver water to Elephant Butte. And Reclamation law has always incorporated state law remedies and the doctrine of prior appropriation as its means of operation. In *California v. United States*, this Court explained that Section 8 does not allow "the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law." 438 U.S. at 675. Rather, "once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law. . . . [T]he control of waters after leaving the reservoirs shall be vested in the States and Territories through which such waters flow.'" *Id*. at 667 (internal quotation marks and citation omitted). As explained in more detail above, nothing in the Compact or any Congressional directive overrides this bedrock principle of Reclamation law.

2. Texas' and the United States' reading of the Compact rests on a theory of compact interpretation this Court recently rejected in *Tarrant Regional Water District v. Herrmann*, 133 S. Ct. at 2133. In that case, the Court considered the argument that the Red River Compact implicitly allowed signatory

states to appropriate water without regard to state borders, preempting Oklahoma laws prohibiting the export of water out of state. *Id*. at 2130-31.

The Court disagreed, reasoning that the Red River Compact's silence on the effect of state borders at best created an ambiguity that was appropriately resolved by reference to other interpretive tools, in particular "the well-established principle that States do not easily cede their sovereign powers," the treatment of cross-border rights in other compacts, and the parties' course of dealing. *Id*. at 2132. Regarding the first principle, the Court noted that "we have held that ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, 'is an essential attribute of sovereignty.'" *Id*. (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)). Accordingly, "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.'" *Id*. (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)).

Given these principles, the Court refused to infer that the Red River Compact silently granted the signatory states the right to cross one another's borders to appropriate water. *Id*. at 2133. "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Id*. Instead, the

Court held that the Red River Compact's silence supported the understanding "that the parties drafted the [Red River] Compact with this legal background in mind, and therefore did not intend to grant each other cross-border rights under the [Red River] Compact." *Id*.

Just as was argued in *Tarrant Regional Water District*, Texas and the United States here assert an interpretation of the Compact that stretches the plain language far beyond its ordinary meaning to reach a result at odds with settled principles of compact interpretation. If the parties to the Compact had truly intended that New Mexico give up an "essential attribute of [its] sovereignty" over the public waters of southern New Mexico by agreeing to the Compact, the Compact would contain "a clear indication of such devolution, not inscrutable silence" or an agreement merely to "deliver" water. *Id.* at 2132-33.

3. The better reading of the Compact, and Article IV, is that the parties drafted the Compact with the understanding not only that states do not easily or implicitly cede their sovereignty, but also that New Mexico's Compact obligation is to deliver Texas' water to Elephant Butte, and distribution to project beneficiaries thereafter was satisfactorily regulated and protected by existing state and federal laws. *See id.* at 2133. At the time the Compact was signed, the Project had been operating as a unit for over twenty years. *See* Nat'l Res. Comm., *Regional Planning, Part VI-The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New*

Mexico, and Texas, 1936-1937 at 8 (1938) ("Joint Investigation"). During this time, the Project operated under and was protected by Reclamation law. Reclamation appropriated water for the Project under state law, consistent with Section 8 of the Reclamation Act and New Mexico territorial law. N.M. Br. 5-6. Reclamation then executed contracts with Project beneficiaries pursuant to Reclamation law and proceeded to distribute Project water to these beneficiaries in accordance with these laws and contracts. *See* Joint Investigation at 8.

The Project operated under this legal regime for many years prior to the Compact's execution. Where a Compact "is silent on the subject of settled law" governing a matter, as here, the Court presumes "the parties' silence showed no intent to modify" this existing law. *New Jersey v. New York*, 523 U.S. at 783 & n.6 (holding boundary compact's silence regarding expansion of Ellis Island by landfilling indicated the parties intended the common law of avulsion to determine jurisdiction over the new land). The legal regime governing the Project was well understood at the time the Compact was executed, and the Compact does not expressly or implicitly modify this regime.

The correspondence among the drafters confirms they had no intent to eliminate the preexisting legal regime and nullify New Mexico's prior and undisputed jurisdiction over the Lower Rio Grande in New Mexico. *See* Letter from Frank B. Clayton, Compact Commissioner for Texas, to Sawnie B. Smith, attorney for the Water Conservation Association of the Lower Rio Grande (Oct. 4, 1938), N.M. Br. App. 32

(explaining that "the question of the division of the water released from Elephant Butte Reservoir is taken care of by contracts between the districts . . . and the Bureau of Reclamation" and "it was felt neither necessary nor desirable that it be incorporated in the terms of the Compact"). As in *Tarrant Regional Water District* and *New Jersey v. New York*, the Compact's silence regarding the Lower Rio Grande, as well as its silence concerning New Mexico's jurisdiction over this area, shows that the drafters did not intend to alter the preexisting legal regime and instead relied on preexisting laws to protect Project water after the Compact's execution. The lack of any new obligations below Elephant Butte in the Compact confirms this intent.

4. The course of dealing of the signatories to the Compact and the United States also confirms that the parties understand the Compact to leave each state with the sovereign authority to regulate the use of the waters within its own borders. Texas, for example, regulates the Rio Grande including Project waters within its own borders to the extent its laws are consistent with Reclamation prior appropriation doctrine. *See In re: Adjudication of Water Rights in the Upper Rio Grande Segment of the Rio Grande Basin*, Cause No. 2006-3219 (327th Dist. Ct. El Paso Cnty., Tex. 2006), *decree issued* Oct. 30, 2006 (adjudicating the Project right for the Texas portion). Texas' behavior demonstrates its understanding that the Compact permits the signatories to regulate Project water within their borders to the extent

consistent with state and federal law. Likewise, the United States' long-standing policy and practice is to comply with state law. It filed its notices of appropriation with the Territory of New Mexico in 1906 and 1908 for the Project, and in 2010 it filed its statement of claim (which does not claim groundwater) in the current adjudication.[4]

It is hard to imagine that New Mexico would have assented to the Compact if the interpretation Texas and the United States assert – that the Compact deprives New Mexico of jurisdiction over the use of water in the Southern part of the state – were correct. This reading of the Compact conflicts with the express terms of the Compact, established principles of Compact interpretation, and the parties' course of dealing.

D. Texas and the United States Improperly Seek to Litigate the Scope of the Project Right in This Original Action

Texas and the United States incorrectly contend that the LRG Adjudication Court is not the proper forum to define the scope of the Project right. U.S. Br.

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[4] United States Statement of Claim for Water for the Rio Grande Project, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (Sept. 15, 2010) (N.M. Dist. Ct.), *available at* https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/14-us-statement-claim-for-water-for-the-rio-grande-project.pdf.

47. The adjudication is the process by which water rights in New Mexico are defined, and as previously explained, Congress deferred to state law for adjudicating the water rights of federal Reclamation projects. *See* 43 U.S.C. §§ 372, 666. According to Texas and the United States, this Court should ignore the LRG Adjudication Court and itself determine the contours of that state-based water right. Their argument is unpersuasive for three reasons.

1. In arguing that the LRG Adjudication Court is an improper forum to determine the scope of the Project right, Texas and the United States raise the specter of bias and unfair rulings. But there is no indication that the rulings of the LRG Adjudication Court are inconsistent with the Compact. For example, in a recent order, the LRG Adjudication Court confirmed the United States' right to a maximum storage capacity, annual release, and ability to divert as it has done historically, including full use of return flows (to which New Mexico agreed) in harmony with the Compact. Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference at 2-5, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (Feb. 17, 2014) (N.M. Dist. Ct.) ("LRG Adjudication Summary Judgment Order" at 2-5), *available at* https://lrgadjudication.nmcourts.gov/. Further, this Court has explained that judges should be presumed to have acted according to the law. *See*

generally Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 820 (1986) ("'the law will not suppose a possibility of bias or favor of a judge, who is already sworn to administer impartial justice, and whose authority greatly depends upon that presumption and idea.'" (quoting 3 W. Blackstone, Commentaries *361)).

Moreover, the United States incorrectly characterizes the rulings of the LRG Adjudication Court in making its bias argument. The United States suggests that the LRG Adjudication Court found that the Project right "does *not* include a right to deliver water to Texas under the Compact." U.S. Br. 47-48 (emphasis in original). This is incorrect. The LRG Adjudication Court's Order states that the "State's offer of judgment *appropriately recognizes Project deliveries to Texas as an essential element of the Project*." LRG Adjudication Summary Judgment Order at 4 (emphasis added). Similarly, the United States warns that the protections afforded by New Mexico law would be "futile" because the LRG Adjudication Court did not agree with the United States on the nature of the Project right, and "strip[ped] the Project of essential protection for seepage and return flows." U.S. Br. 49. Even if the United States correctly described the ruling, a disagreement over the decisions of the LRG Adjudication Court is not a valid reason to seek an alternative forum. *See* Tex. Br. 29 (describing the rulings of the LRG Adjudication Court as "erroneous"). But here again, the United States has not properly described the decision of the LRG Adjudication Court, which, in fact recently clarified that "*reuse*

of seepage and return flow was a necessary component of the Project," Order Denying Joint Motion to Stay Proceedings in Stream System Issue 104 at 7, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (N.M. Dist. Ct.) (June 19, 2014) (internal quotation marks omitted), *available at* https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/936-orderdenyjointmtnstay.pdf.[5]

In any event, as the *City of Las Cruces* court recognized, allowing the LRG Adjudication Court to determine the scope of the Project right "provide[s] a more effective remedy" than "a federal declaration" of the right. 289 F.3d at 1191-92. This is so because the LRG Adjudication Court will produce a "more comprehensive and cohesive remedy" by deciding the rights to all water users in the Lower Rio Grande Basin in New Mexico. *Id*. at 1191 (internal quotation omitted).

2. Texas' and the United States' position is that "[a]ny application of New Mexico state law to the Rio Grande Project . . . must fail as inconsistent with the Compact." Tex. Br. 62. As noted above, however, this contention is at odds with Texas' and the United States' own course of conduct. The United States

[5] The LRG Adjudication Court's ruling is consistent generally with prior appropriation law in other western states. *See* P.M. Dwyer, Annotation, *Right of Appropriator of Water to Recapture Water Which Has Escaped or Is Otherwise No Longer Within His Immediate Possession*, 89 A.L.R. 210 (1934).

adjudicated its Project right for the Texas portion of the Project in Texas, and in 2010 the United States filed its statement of claim in the New Mexico adjudication court (a claim which does not include groundwater). United States Statement of Claim for Water for the Rio Grande Project, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (Sept. 15, 2010) (N.M. Dist. Ct.), *available at* https://lrgadjudication.nmcourts.gov/index.php/stream-system-issues/doc_download/14-us-statement-claim-for-water-for-the-rio-grande-project.pdf.

3. Citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) and *West Virginia v. Sims*, 341 U.S. 22 (1951), Texas and the United States argue that "it defies common sense" for Texas' apportionment "to be defined by the *state* law of an upstream State." U.S. Br. 47 (emphasis in original); *see also* Tex. Br. 55-56. However, this Court has approved upstream state court determinations that affect compact rights and interstate delivery obligations, subject to this Court's oversight. *See*, *e.g.*, *Montana v. Wyoming*, 131 S. Ct. 1765, 1770-72 (2011) (holding that the amount of water to which the downstream state, Montana, is entitled depends in part on the scope of water rights adjudicated in the upstream state, Wyoming). Also, in *Kansas v. Colorado*, 543 U.S. 86 (2004), the Court upheld the Special Master's recommendation that the Court rely, in the first instance, on the Colorado water Court to quantify matters integral to computation of Colorado's compliance with the Arkansas River Compact. This Court

held that it was appropriate to allow the Colorado Water Court first to rule on replacement plans having a direct impact on Colorado's Arkansas River Compact obligations, noting that review in this Court would be available in the ordinary course if necessary. *Id*. at 103-04. That same reasoning should apply in the present case.

III. The Compact Does Not Prohibit Development or Require New Mexico to Maintain Depletions at 1938 Levels Below Elephant Butte

1. Texas' claim that the "Compact protects the Rio Grande Project and its operations under the conditions that existed in 1938," presumes a restriction prohibiting New Mexico from allowing additional development beyond the levels that existed in 1938. Tex. Br. 35. That implied restriction is nowhere in the Compact. New Mexico agrees that one of the Compact's purposes was to protect inflows to the Project. But the inclusion of explicit protections in the Compact for the supply of water *to* the Project does not give rise to implicit restrictions on water uses in the area below where water is released *from* the Project. Texas inexplicably leaps to the conclusion that the Compact's protection of supply *to* Elephant Butte must mean New Mexico is prohibited from allowing any development below Elephant Butte.[6]

[6] Texas post-1938 water use in the Rio Grande has not remained static. Between 2000 and 2013 alone, El Paso County's

(Continued on following page)

No such express provisions exist. N.M. Br. 41-43. The Compact is silent on this point because protection for Project deliveries was already provided by Reclamation law and the doctrine of prior appropriation.[7] As noted in New Mexico's earlier briefs, other compacts explicitly restrict future depletions or require maintenance of a particular year's depletion condition, and the lack of such a provision here is telling. N.M. Br. 33.

2. Contrary to Texas' argument, it is entirely appropriate for the Court to consider the 1929 Temporary Compact when construing the 1938 Compact.

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population grew by 25.5%. City of El Paso, Community Profile, July 2013 (*citing* U.S. Census data), *available at* https://home.elpasotexas.gov/city-development/documents/why-el-paso/Community%20Profile.pdf. This population is supplied by water from the Rio Grande and the aquifers that underlie it in Texas and New Mexico. Texas has repeatedly affirmed its legal regime of "right to capture" which prohibits any governmental regulation of groundwater development. *See* Eric Opiela, *The Rule of Capture in Texas: An Outdated Principle Beyond Its Time*, 6 U. Denv. Water L. Rev. 87 (2002); *see Edwards Aquifer Auth. v. Bragg*, 421 S.W.3d 118, 137-38 (Tex. App. 2013) (recognizing Texas' rule of capture). New Mexico, on the other hand, has long strictly limited new groundwater uses in the Lower Rio Grande. *See* http://www.ose.state.nm.us/doing-business/lrg-criteria/MesillaValleyGuidelines-2007-01-05.pdf.

[7] Consistent with this silence, the Rio Grande Compact Commission accounting ends with releases of Usable Water from Caballo Dam, as it has since 1940. Thus, the parties' course of conduct demonstrates their understanding that New Mexico's Compact obligation is satisfied by delivery of the appropriate amount at Elephant Butte.

Texas Br. 48 & n.23. New Mexico offers Article XII from the 1929 Temporary Compact not to establish precedent, but as a clear example of an express provision prohibiting development on the Rio Grande below Elephant Butte, a provision that is conspicuously absent from the 1938 Compact. In addition, the 1929 Temporary Compact is part of the negotiating history of the 1938 Compact. It is precisely this material the Court has held to be proper for interpreting ambiguous provisions or silence in an interstate compact. Nothing in Article XVI of the 1929 Temporary Compact prohibits consideration of the 1929 Temporary Compact when interpreting the final Compact. *See Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.5 (1991); *Tarrant Reg'l Water Dist.* at 2132.

As for the United States' claim that an express prohibition on development in the Lower Rio Grande, as appears in the 1929 Temporary Compact, was unnecessary in the final Compact because Article IV's delivery requirement accomplished the same result, U.S. Br. 39, Article IV simply does not deprive New Mexico of jurisdiction over the Lower Rio Grande. Because New Mexico law continues to apply to water rights in the Lower Rio Grande, the lack of an express prohibition on post-Compact development in this stretch of the river, as is found in the 1929 Temporary Compact, is relevant to any consideration of whether the Compact prohibits post-Compact development in the Lower Rio Grande.

3. The lack of express provisions in the Compact governing the Rio Grande between Elephant

Butte and Fort Quitman does not demonstrate a silent intent to freeze the conditions in this area as they existed in 1938. Rather, as discussed above, it demonstrates that the Compact drafters had no intention to modify the existing regime of state and federal laws that governed the delivery of Compact water through the Project. *See New Jersey v. New York*, 523 U.S. at 783 n.6 (compact silence understandable because parties knew the settled law). The Texas' and the United States' Complaints should be dismissed.

IV. The United States Has No Independent Cause of Action to Enforce the Compact

The United States incorrectly asserts that "[e]ven if the Court concludes that Texas does not have an enforceable right to water deliveries under the Compact that is distinct from the rights of the Project, the United States' Complaint in intervention should nevertheless go forward." U.S. Br. 51. To the contrary, upon dismissal of the Texas' Compact claim, then the United States' Complaint in Intervention must also be dismissed. The United States is not a party to the Compact. There is no precedent in a compact enforcement action for allowing a complaint in intervention to proceed if the primary State-Party's Complaint has been dismissed.

As New Mexico previously explained, *United States v. Nevada*, 412 U.S. 534, 538-40 (1973), requires dismissal of non-compact water rights claims

because, in the Court's non-exclusive original jurisdiction the Court is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle [its] claims." N.M. Br. 63 (*citing United States v. Nevada*, 412 U.S. at 538). The United States argues that its claims here are distinguishable because they concern water allocated between two States and delivered to Mexico, whereas the United States' claims in *United States v. Nevada* concerned "competing claims to water within a single state." U.S. Br. 52 (*quoting United States v. Nevada*, 412 U.S. at 538). But this is a false distinction. All of the water rights relevant to this dispute are located in a single state, New Mexico, just as all the disputed water rights in *United States v. Nevada* were located in Nevada. The fact that some of the water involved is ultimately consumed outside of New Mexico is irrelevant to the application of the rule set forth in *United States v. Nevada*.

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CONCLUSION

The State of New Mexico's Motion to Dismiss should be granted.

Respectfully submitted,

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