No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Exceptions To The First Interim Report of the Special Master

STATE OF COLORADO'S REPLY TO EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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INTRODUCTION

In this brief, the State of Colorado replies only to one set of issues raised in the United States' Exception to the Special Master's First Interim Report and recommendation. Specifically, Colorado addresses the United States' arguments supporting its assertion that it may bring claims under the Río Grande Compact, ch. 155, 53 Stat. 785 (1939); Colo. Rev. Stat. § 37-66-101 ("Río Grande Compact" or "Compact"), to enforce rights that the Compact purportedly grants to the federal government. By focusing on those select issues, Colorado does not imply agreement with other arguments raised by other parties or amici.

SUMMARY OF ARGUMENT

The United States excepted to the Report's recommendation to dismiss its Compact claims. The United States argues this recommendation of dismissal was incorrect because the Compact grants enforceable rights to the United States and obligates the States to protect them. That argument is incorrect for four independent reasons.

First, the rights the United States seeks to vindicate here are based on the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Río Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention"). The Río Grande Compact, however,

strictly disavows having any impact on the 1906 Convention. The United States cannot use the Compact as a means of enforcing the 1906 Convention. The two are legally separate.

Second, although the United States seeks to address through this litigation specific operations of the federal Río Grande Project ("Project") below Elephant Butte Reservoir by the United States Bureau of Reclamation ("Reclamation"), the Compact itself does not contain terms addressing those operations. Instead, the Compact terms regarding the Project relate strictly to and address the relationships among the States of Colorado, New Mexico, and Texas.

Third, no prior decisions of this Court counsel against the Report's recommendation to dismiss the Compact claims of the United States.

And fourth, the United States is not a third party beneficiary to the Compact.

ARGUMENT

The Report correctly recommended the dismissal of the United States' Compact claims. Compacts are agreements among States, negotiated as sovereigns, and subject to the consent of Congress. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 106-107 (1938). The mere fact that Congress consented to the Río Grande Compact does not allow the United States to claim an inferred protected status

under it. To the contrary, the United States may claim rights under a compact only if those rights appear expressly in the compact's text. Because the Compact here grants no such rights, the United States has no claim to enforce.

I. The Compact does not grant the United States a right of action against the States to enforce deliveries to Mexico under the 1906 Convention.

The United States argues that it has a right of action under the Compact to enforce the delivery provisions of the 1906 Convention. Yet that argument contradicts the plain language of the Compact. Instead of conferring affirmative protective terms on the United States, the Compact specifically *disavows* having any impact on the federal government's international interests.

> Nothing in this compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian tribes, or as impairing the rights of the Indian tribes.

Compact, Art. XVI. Indeed, the Reclamation Act uses similar language to expressly *disavow* federal rights and defer to state water law:

> Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use

> or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream of the waters thereof.

Reclamation Act, 43 U.S.C. § 383 (2012). This Court has previously interpreted those provisions to give deference to the separate State water law systems rather than create a new federal obligation to affirmatively protect or enforce them. *California v. United States*, 438 U.S. 645, 665 (1978). So too, the Compact should be read to defer to the separate 1906 Convention, rather than create an affirmative obligation to protect a treaty beyond the States' ability to implement.

The plain language of the Compact, measured against the United States' allegations, makes clear that the claims by the United States pertaining to the 1906 Convention are not based on the Compact itself. The allegations in the United States' Complaint concern delivery of water downstream of Elephant Butte Reservoir. Yet the Compact has nothing to say on the subject. It contains *no terms* implementing the 1906 Convention's delivery of water *from* Elephant Butte Reservoir. Instead, the Compact's provisions keep the 1906 Convention deliveries and Compact allocations independent of one another: "The schedules herein contained and the quantities of water herein allocated

shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico." Compact, Art. XIV. Thus, the quantity of the Compact's allocations among the States are not affected by the implementation of the 1906 Convention's delivery to Mexico.

A separate portion of the Compact emphasizes this point. It defines usable water in the Project as "all water, exclusive of credit water, which is *in project storage* and which is available for release in accordance with irrigation demands, *including deliveries to Mexico*." Compact, Art. I (l) (emphasis added). In other words, the Project water stored in Elephant Butte Reservoir includes the amount necessary for delivery to Mexico and no language in the Compact controls the supply of water available for delivery under the 1906 Convention. These terms, along with the affirmation in Article XVI that the Compact does not affect the 1906 Convention, show that the water allocated by the Compact does not affect deliveries to Mexico, and that the deliveries to Mexico do not alter Compact allocations. Thus the United States' claims regarding delivery obligations to Mexico and Compact allocations among the States remain distinct and separate.

While the United States might be empowered to bring a claim in this Court to enforce the 1906 Convention itself, such an action would arise under the 1906 Convention and not the Compact. *See Sanitary Dist. of Chicago v. United States*, 266 U.S. 405 (1925). The United States incorrectly interprets *Sanitary District of Chicago* as permitting it to bring a Compact claim.

That case, however, held that the United States had standing to enforce an international treaty without resort to any other laws. *Id*. at 425-26. This is consistent with Colorado's briefing on its exceptions to the Report – the United States' claim under the 1906 Convention might be redressable in this Court, but not through a Compact claim. State of Colorado's Exceptions to the First Interim Report of the Special Master at p. 5. The United States' argument that the Compact is the legal basis to enforce its treaty delivery obligations is contrary to existing law.

II. The Compact does not protect the United States' Project operations or give it a right of action against the compacting States.

While the Compact does define the relationship between Project conditions and obligations upstream, its terms are designed to implement the apportionments among the States, not to create separately enforceable federal rights. For example, pursuant to Compact Article VI, a spill from Elephant Butte Reservoir erases debits accrued *by Colorado and New Mexico*. Compact Article VII triggers storage limitations *in Colorado and New Mexico* above Elephant Butte Reservoir when project storage falls below 400,000 acre-feet, unless other conditions exist. Under Compact Article VIII, *Texas* may request release of some storage waters to bring Project storage up to a volume of 600,000 acre-feet by March first.

These portions of the Compact define the *States*' upstream obligations, and relief therefrom, based on volumes of water stored in and released from the Project. To this extent, the conditions within the Project do impact how the States operate under the Compact. But the Compact does not provide protection to the Project itself, for the benefit of the United States. It provides protection to the compacting States in maintaining their apportionment of the Río Grande under the Compact. Nothing in the Compact creates rights enforceable by the United States itself.

III. The cases relied on by the United States do not show that the Report erroneously recommended dismissing its Compact claims.

The interstate compact and equitable apportionment cases cited by the United States do not establish that it has a cause of action to enforce the Río Grande Compact. Instead, those cases show the United States can have separate interests affected by a compact or decree among States. In none of them, however, was the United States seeking relief based on a compact or decree.

For example, in *Texas v. New Mexico*, No. 65, Original, the parties were adjudicating a dispute under the Pecos River Compact. That compact was finalized just a few years after the Río Grande Compact and, like the Río Grande Compact, it expressly did not affect the United States' treaty obligations:

> Nothing in this Compact shall be construed as:
>
> (a) Affecting the obligations of the United States under the Treaty with the United Mexican States (Treaty Series 994);
>
> (b) Affecting any rights or powers of the United States, its agencies or instrumentalities, in or to the waters of the Pecos River, or its capacity to acquire rights in and to the use of said waters. . . .

Pecos River Compact, ch. 184, 63 Stat. 159, 164-165 (1949), Art. XI. Therefore, just like with the Río Grande, a treaty with Mexico provided grounds apart from the Pecos River Compact for the United States to participate.

This is why the United States' participation in the case was based on its treaty with Mexico, water rights of Indian tribes, and federal lands and facilities. Report of Special Master on Motion of United States for Leave to Intervene as Plaintiff at p. 1, *Texas v. New Mexico*, No. 65, Original (Dec. 30, 1975). The United States did not assert a claim, and the Special Master did not recommend intervention, based on relief afforded under the Pecos River Compact. And this Court did not hold that the compact's language provided the United States with a cause of action. Thus, *Texas v. New Mexico*, No. 65, Original, does not support the United States bringing a compact claim as plaintiff in intervention. It proves the opposite.

The Platte River equitable apportionment litigation presented similar circumstances. In that dispute,

the United States did not bring claims against the States for any apportionment for itself. The Platte River equitable apportionment decree did not allocate water held in storage by Reclamation projects. *Nebraska v. Wyoming*, 325 U.S. 589, 629-630 (1945). However, the combination of federal projects and Court apportionment to the States effectively used the entire river system for irrigation in that area. *Id*. at 651. The United States participated as a defendant in the Platte River apportionment litigation, defending its rights which were not subject to the apportionment decree. *Id*. at 629-630; *Nebraska v. Wyoming*, 304 U.S. 545 (1938). Wyoming's subsequent cross-claim against the United States was not permitted based on Reclamation contracts, but on allegations that the actions of the United States adversely impacted Wyoming's apportionment. *Nebraska v. Wyoming*, 515 U.S. 1, 19 (1995). The Court kept that matter confined to interpretation of the apportionment decree, and the United States did not bring a claim based on it.

Here, the Río Grande Compact allocates the waters of the Río Grande above Ft. Quitman, Texas among the States. Texas makes varying arguments regarding the Compact, but none of them allow for the United States to bring a Compact claim. If the Compact made specific apportionments to Texas and New Mexico below Elephant Butte Reservoir, resolution of the Compact dispute among the States will also dictate the limits of what each of the irrigation districts may receive by contract from the Project. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92,

106-108 (1938); *see also*, Texas Complaint at ¶ 10 ("[The Compact] relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Río Grande Project irrigable lands in southern New Mexico and Texas, to provide the bases of the allocation of the Río Grande waters. . . ."). Conversely, if the contracted deliveries within each State are not controlled by the Compact, Reclamation must follow the water laws of each State in which it operates. Reclamation Act, 43 U.S.C. § 383 (2012); *see also Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976); *California v. United States*, 438 U.S. 645, 665 (1978); *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935); *see also* Texas Complaint at ¶ 10 ("The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas. . . ."). Either way, it leaves the United States with no claim of its own under the Río Grande Compact.

IV. The United States does not state a claim as a third party beneficiary to the Río Grande Compact.

The United States claims that it is a third party beneficiary to the Compact.[1] Yet the Compact contains no express or implied provisions making the United States a third party beneficiary. To support this claim,

[1] This claim was not raised in the United States' complaint, and should be dismissed for that reason.

the United States would have to demonstrate that the States intended to directly, and not only incidentally, benefit it. *See Glass v. United States*, 258 F.3d 1349, 1354 (Fed. Cir. 2001), modified on reh'g, 273 F.3d 1072 (Fed. Cir. 2001); *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912). The States did not do so. *Glass* provides the standard for interpreting third party beneficiary status for contracts with the United States. Similar standards exist for each of the Compact States, requiring a third party beneficiary to show the parties to the contract intended to benefit the third party and that the benefit is direct and not an incidental benefit of the contract. *SK Peightal Engineers, Ltd. v. Mid Valley Real Estate Solutions V, LLC*, 342 P.3d 868, 872 (Colo. 2015); *McKinney v. Davis*, 503 P.2d 332, 353 (N.M. 1972); *First Bank v. Brumitt*, No. 15-0844, 2017 WL 1968830 at *3 (Tex. 2017). The Project was already in operation and the delivery contracts in place before the States finalized the Compact. The States had no intent to create a direct benefit to the United States through the Compact. The United States' Complaint did not allege otherwise. Therefore, the United States is not a third party beneficiary to the Compact with standing to bring its own claims.

The direct benefit of the Compact is to equitably apportion the waters of the Río Grande above Ft. Quitman, Texas among the compacting States. The benefits of the Compact accrue to the water users in each compacting State. As the Report indicates, the United States is not apportioned any water by the Compact. Report at p. 220. In fact, the beneficiaries of the Project, not the United States, put the water to beneficial

use. *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945), citing *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937); *see also*, United States' Complaint at ¶ 14 (alleging effects on amount of water available for delivery to irrigation districts and Mexico), and Texas Complaint at ¶ 8 (alleging the irrigation districts are Project beneficiaries because they have delivery contracts with Reclamation). The operation of the Project is meant to deliver water to the beneficiaries; they would incur any harm caused by a water shortfall, not the United States. The allegations of the United States are based on either violation of its delivery contracts or taking water without a contract. United States Complaint at ¶ 13. It alleges that these actions cause harm to its ability to deliver water within the Project. "Consequently, extraction of water that is hydrologically connected to the Río Grande below Elephant Butte Reservoir has an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico." United States Complaint at ¶ 14. The Project beneficiaries would incur the true injuries. The beneficiaries, however, are adequately represented by their respective States with regard to allocations made under the Compact. *Hinderlider v. La Plata River and Cherry Creek Ditch Co.*, 304 U.S. 92, 108 (1938); Report at p. 223. Therefore, the United States is not a beneficiary of the Compact.

The Court should not interpret the Compact to provide an implied right to sue any of the States as a third party beneficiary. A compact cannot be re-written by courts to add terms. *Texas v. New Mexico*, 462 U.S.

554, 565 (1983). This Court rejected the recommendation to give the United States, a non-party to the compact, a vote when that provision was not included in the Pecos River compact. *Texas v. New Mexico*, 462 U.S. 554, 565 (1983) ("The Pecos River compact clearly lacks the features of these other compacts, and we are not free to rewrite it"). This reasoning was later followed in *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2133 (2013), when the Court declined to read absent terms into a compact. This same reasoning applies here. To read into the Compact absent terms subjecting the States to suit based on implied protections is contrary to the line of cases interpreting interstate compacts.

CONCLUSION

The Compact contains no terms reflecting protection of the United States' operation of the Río Grande Project or deliveries under the 1906 Convention. Therefore, the Court should uphold the recommendation of the Report to dismiss the Compact claims of the United States.

Respectfully submitted,

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