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 NEW MEXICO'S REPLY TO THE EXCEPTIONS OF THE UNITED STATES AND COLORADO

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PROCEDURAL BACKGROUND

The United States has filed an exception to the recommendation in the First Interim Report ("Report") of the Special Master that the United States' Complaint in Intervention ("U.S. Compl.") be dismissed to the extent that it asserts claims under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact"). Exception of the United States and Brief for the United States in Support of Exception ("U.S. Br."). The State of New Mexico opposes the United States' exception.

The State of Colorado has also filed two exceptions to the Report. State of Colorado's Exceptions to the First Interim Report of the Special Master ("Colo. Br."). Colorado argues the Court should limit the claims by the United States to those arising from its interest in the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention") and that the Court should not adopt the findings and conclusions within the First Interim Report as the law of the case. The State of New Mexico does not oppose Colorado's first exception and supports Colorado's second exception.

The State of New Mexico has filed exceptions to statements and implications in the Report that contravene New Mexico's sovereignty and jurisdiction with respect to the adjudication and administration of water within its borders. State of New Mexico's Exceptions to the First Interim Report of the Special

Master and Brief in Support ("N.M. Br."). New Mexico also took exception to any statement or implication in the Report that the United States may litigate in this Court Rio Grande Project ("Project") water rights that have already been or should be determined by the state adjudication court. In addition, New Mexico took exception to the extensive discussion of historical events and reliance on numerous pieces of extrinsic evidence in the Report as premature and unfairly prejudicial at this early stage of the proceedings.

The State of Texas filed no exceptions to the Report. The Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1 did not file amicus briefs or exceptions to the Report. The City of Las Cruces, Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"), New Mexico State University ("NMSU"), and New Mexico Pecan Growers each filed an amicus brief.

ARGUMENT

The United States filed a Complaint in Intervention asking the Court to declare that New Mexico, as a party to the Compact, may not permit water users that do not hold a contract with the United States Bureau of Reclamation ("Reclamation") to pump groundwater in the Lower Rio Grande. The United States alleges that such pumping intercepts or interferes with the delivery of water from the Project and seeks an injunction against New Mexico. Report at 218 (citing U.S. Compl. at 5). The Special Master summarized the position of the United States as follows:

> [T]he crux of the United States' claims against New Mexico in these proceedings is to assert its own Project water rights, obtained pursuant to the 1902 Reclamation Act (which requires compliance with state law to appropriate water for irrigation purposes), against unauthorized uses and to protect its ability to deliver Project water to its consumers as required by contract or by convention.

Report at 219-20. The Special Master then described his first task:

> As an initial matter, in evaluating whether the United States has stated a plausible claim under the 1938 Compact, I must determine whether the 1938 Compact confers upon the United States the right to assert federal reclamation law claims against quasi-sovereign New Mexico, as the United States itself is not a signatory to that compact and received no apportionment of Rio Grande water through the compact.

Id. at 220. After reviewing the role of the United States in previous interstate actions in the Court's original jurisdiction, *id.* at 220-28, and observing that this was the first time the United States had intervened to allege that it "has a *right protected by [a] Compact*," *id.* at 229 (emphasis in original), the Special Master concluded that the "1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the compact against New Mexico." *Id.* at 231.

The United States filed its exception to the recommendation of the Special Master, arguing that the recommendation should be rejected based on (1) its treaty obligations to Mexico, (2) its contract obligations under the Rio Grande Project, (3) the history of the United States' participation in original jurisdiction interstate water cases, and (4) its view that the United States is a "third-party beneficiary of the Compact insofar as the Compact is viewed as a contract." U.S. Br. at 28-31.

The United States' exception should be overruled. With no constitutional support, the United States seeks to assert for itself an unprecedented role in litigation among states over interstate compacts. Nothing cited by the United States supports its novel position that operating a federal reclamation project gives the United States the ability to bring claims under a compact to which it is not a signatory. The position asserted by the United States in its exception threatens to massively expand the United States' authority over interstate compacts, to the detriment of the States. It also misinterprets the Compact's plain language.

I. The Special Master Correctly Concluded that the United States Cannot State a Compact Claim Against New Mexico.

The United States takes exception to the Special Master's recommendation that the Court dismiss the United States' Complaint in Intervention "to the extent that the United States cannot state a plausible claim under the 1938 Compact." U.S. Br. at 32 (quoting

Report at 237). Although the Special Master also recommends that the Court allow the United States to press its reclamation law claims in this proceeding pursuant to the Court's nonexclusive original jurisdiction under 28 U.S.C. § 1251(b)(2), Report at 234, the United States contends it has a right of action under the Compact "because the Compact protects federal interests that are harmed by New Mexico's violations of the Compact." U.S. Br. at 34.

While the United States has federal interests in the Lower Rio Grande in New Mexico, namely treaty compliance under the 1906 Convention and operation of a federal reclamation project, the rights of the United States to protect these interests existed independently for decades prior to the ratification of the Compact and do not arise from the Compact. Nothing in the plain language of the Compact, or in any implication from its construction, suggests its negotiators intended for the Compact to add to the preexisting remedies the United States could invoke to protect its federal interests. In arguing that the Compact creates new causes of action for the United States, the United States loses sight of the Compact's fundamental purpose of apportioning the Rio Grande's waters *among the three signatory States*. *See* Compact Preamble.

A. As a non-signatory to the Compact and an entity to which no water was allocated by the Compact, the United States lacks the authority to bring suit under the Compact.

The Special Master recommended that the United States' Complaint in Intervention be dismissed to the extent it asserts claims under the Compact because, as a non-signatory to the Compact and an entity to which no water was apportioned by the Compact, it has no authority to state a claim seeking to enforce the Compact's provisions. Report at 229-31. None of the arguments advanced by the United States in its exception brief refute this logic. Simply put, the Compact does not explicitly create a cause of action on the part of the United States to enforce its terms, nor does the fact that the Compact was initially subject to approval by Congress implicitly create a right in the United States to enforce its terms.

The United States suggests that, because an interstate compact must be approved by Congress and is therefore a federal statute in addition to a contract, the United States necessarily has the authority to seek declaratory and injunctive relief under the Compact with respect to its federal interests that are allegedly harmed by Compact violations. U.S. Br. at 33-34. In support of this argument, the United States references the Compact Clause of the United States Constitution and cites *Cuyler v. Adams*, 449 U.S. 433, 439-40 (1981), for the proposition that the "constitutional requirement that Congress must approve interstate compacts

ensures that agreements between States do not infringe on federal interests." U.S. Br. at 34. However, neither the Compact Clause nor *Cuyler* support the argument that Congressional ratification of an interstate compact creates a cause of action that the United States may assert against a signatory State.

The Compact Clause of the United States Constitution, Art. I, § 10, cl. 3, provides in relevant part that "No State shall, without the consent of Congress, . . . enter into any Agreement or Compact with another State. . . ." As explained by this Court in *Cuyler*, "[t]he requirement of congressional consent is at the heart of the Compact Clause." 449 U.S. at 439. Indeed, "[b]y vesting in Congress the power to grant or withhold consent, or to condition consent on the States' compliance with specified conditions, the Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority." *Id*. at 439-40 (citation omitted). As noted by Justice White, dissenting in *United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 485 (1978) (footnote omitted): "the requirement that Congress approve a compact is to obtain its political judgment: Is the agreement likely to interfere with federal activity in the area, is it likely to disadvantage other States to an important extent, is it a matter that would be better left untouched by state and federal regulation?"

Cuyler makes it clear that the Compact Clause is aimed solely at congressional supervision and approval of interstate compacts *prior* to the time they

become effective. This supervisory power ensures the contents of a proposed agreement between or among States will not infringe upon existing federal interests. However, this power is distinct from an ongoing ability to supervise compact compliance *after* enactment. Nothing in the explicit language of the Compact Clause or the case law interpreting it suggests it was intended to authorize a cause of action by the federal government against compacting States to enforce the terms of the approved compact. The practical effect of the power now claimed by the United States to enforce provisions of compacts to which it is not a signatory would be to enable it to attack provisions or applications of compacts after ratification, even in the absence of any disagreement among the compacting States, and even over the opposition of the compacting States.

The United States cites no precedent for what would amount to such a vast expansion of its powers other than *Cuyler*, but this citation is unavailing. While *Cuyler* confirms that congressional consent necessarily transforms an interstate compact approved subject to the provisions of the Compact Clause into a federal statute, it says nothing about that consent creating an implied authorization for the federal government to bring a claim to enforce provisions of an approved compact. The relevant section of *Cuyler* simply examined whether the compact at issue (the Interstate Agreement on Detainers) is an interstate compact approved by Congress, and thus a federal law subject to federal rather than state construction by the courts. *Cuyler*, 449 U.S. at 438-42. Therefore, the

relevant portion of the case was about whether federal question jurisdiction existed, and had nothing to do with whether the United States could bring a claim pursuant to that compact. Indeed, the plaintiff in *Cuyler* seeking to enforce the provisions of the relevant compact was a prisoner asserting that he had the right to a hearing prior to being transferred to another State's jurisdiction; the United States was not even a party to the case. *Id*. at 437. *Cuyler* does not provide an example of the federal government suing to enforce the provisions of a compact, nor has the United States provided any case law supporting this novel theory.

The United States also implies that, because Congress predicated its consent for the States to negotiate the Compact on the condition that a federal representative participate in the negotiations, it may sue under the Compact to enforce its provisions. U.S. Br. at 34, 47 (citing Act of March 2, 1929, ch. 520, 45 Stat. 1502 ("1929 Act")). The United States contends that "Congress required a federal representative to participate in compact negotiations specifically to ensure that the Compact would protect the United States' obligation to deliver water to Mexico and its investment in and operation of the Rio Grande Project." U.S. Br. at 47 (citing 1929 Act). This is an unwarranted leap of logic without support in the language authorizing the Compact's negotiation, the plain language of the Compact itself, or the governing case law.

The legislation authorizing Colorado and New Mexico to negotiate a compact made no mention of any

specific interests that the United States representative was to ensure were protected. Instead, the authorizing legislation predicated such authorization solely on the "condition that a representative . . . of the United States Government, to be appointed by the President, shall participate in the negotiations and shall make report to Congress of the proceedings and of any compact or agreement entered into." 1929 Act § 2.[1] This language strongly suggests that the purpose of the inclusion of a United States representative was that Congress wished that representative to provide a federal report to Congress on the negotiations, most likely as part of Congress's deliberations on whether to ratify the Compact. Nothing in this language implies an intent to establish a new federal enforcement mechanism *after* the Compact was ratified.

The United States' argument is even more unpersuasive when the Rio Grande Compact is compared

[1] In support of its assertion that Congress required a federal representative to participate in compact negotiations specifically to protect the United States' ability to deliver water to Mexico and the Project, the United States also cites page 120 of the Report. U.S. Br. at 34, 47. This page of the Report quotes a statement of the United States representative at the Rio Grande Compact Conference in 1934 confirming his understanding of his role as a nonvoting member of the Compact Commission. Not only does this statement not support the United States' position, but the United States' citation to this evidence, which the Special Master collected *sua sponte*, demonstrates the ineffectiveness of the Special Master's disclaimer that nothing in the Report should be "construed as fact finding." Report at 193. As discussed extensively in New Mexico's exceptions, N.M. Br. at 49-55, the Court should reject the Report's historical discussion and use of evidence gathered outside the normal course of litigation and discovery.

to other compacts, such as the Delaware River Basin Compact, where the United States is an express party and signatory, Act of September 27, 1961, Art. 1.2(h), Pub. L. No. 87-328, 75 Stat. 688 ("Delaware River Basin Compact"). Under that compact, the United States is entitled to appoint a voting member to the Delaware River Basin Commission. *Id*. Arts. 2.2, 2.5. Perhaps most importantly, the compact sets out in detail a number of terms governing the United States' participation in the agreement, *id*. Art. 15, a feature notably absent from the Rio Grande Compact. The Susquehanna River Basin Compact, to which the United States is also a party, has provisions very similar to the Delaware River Basin Compact. Act of December 24, 1970, Pub. L. No. 91-575, 84 Stat. 1509. These agreements sharply contrast with the Rio Grande Compact, demonstrating that where States intend the United States to be a party to a compact or to receive rights protected by a compact, they provide this explicitly. The lack of terms establishing such a role for the United States in the Compact confirms the Compact was not intended to confer any rights or protections on the United States.

B. The United States' right to protect compliance with international treaties existed prior to the Compact and does not arise from the Compact.

Neither the plain language of the Compact nor its framework suggest that the negotiators of the Compact intended for it to add to the preexisting remedies

the United States could invoke to protect the 1906 Convention, which had existed for thirty-two years at the time of the Compact's ratification. The United States has always been able to assert independent causes of action to protect its ability to comply with its treaty obligations, and the Compact created no new remedies or causes of action on behalf of the United States.

The United States nevertheless seeks to create an affirmative cause of action out of Article XVI of the Compact by contending "[t]he Compact . . . expressly protects the United States' obligation to deliver water to Mexico pursuant to the 1906 Treaty, Art. XVI, 53 Stat. 792." U.S. Br. at 47-48. This characterization of Article XVI ignores its plain language. Article XVI states that "[n]othing in this Compact shall be construed as *affecting* the obligations of the United States of America to Mexico under existing treaties" (emphasis added). This article does not create a cause of action regarding the treaty or in any way purport to protect the United States' ability to meet its obligations under the treaty; it merely recognizes that the Compact does not impose any new obligations on the United States with regard to existing treaties or in any way relieve the United States of its obligations with regard to existing treaties. *See also* Compact Art. XIV (providing that the Compact's delivery schedules "shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico").

The United States also cites *Sanitary District of Chicago v. United States*, 266 U.S. 405 (1925)

("*Sanitary District*"), and *United States v. County of Arlington*, 669 F.2d 925 (4th Cir. 1982) ("*Arlington*"), to support its argument that it has a right of action under the Compact to protect its ability to meet its treaty obligations to Mexico. U.S. Br. at 34-35. Neither case involved an interstate compact or the exercise of this Court's original jurisdiction. *Sanitary District* involved a claim for injunction by the United States, alleging that the amount of water being withdrawn from Lake Michigan by a public corporation exceeded the amount that it had been authorized to withdraw pursuant to a permit issued by the Secretary of War. 266 U.S. at 423-24. A withdrawal in such excess amount therefore violated a federal statute that prohibited obstruction to the navigable capacity of any waters of the United States except under the conditions explicitly authorized by the Secretary of War. *Id.* at 428-31. Thus, the United States was not suing to enjoin an alleged violation of an agreement among States to which it was not a party, but rather for a violation of a permit whose terms had been set by the Secretary of War pursuant to authorization by Congress. Although the case touches on the United States' obligation to comply with a 1909 treaty establishing its border with Canada, *id.* at 425-26, the focus of the Court's analysis was the alleged permit violation, as well as the United States' authority to "remove obstructions to interstate and foreign commerce," *id.* at 426-32. The case does not hold that the United States must allege a violation of another federal statute, let alone an interstate compact, to protect its treaty obligations. In fact, Justice Holmes, speaking for the unanimous Court, stated, "The [U.S.] Attorney General by virtue of his office may

bring this proceeding, and no statute is necessary to authorize the suit." *Id.* at 426.

Arlington also did not involve an interstate compact, but instead concerned a dispute over whether a county could tax a building owned by a foreign government to house diplomatic staff. 669 F.2d at 927. The primary issue in the case was whether the United States had standing to sue for an injunction against the county without joining the foreign government. *Id.* at 928. The court ruled the United States "can sue to enforce its policies and laws," which includes "its treaty obligations to a foreign state," "even when it has no pecuniary interest in the controversy." *Id.* at 929. Rather than holding that the United States must allege a violation of some other statute to enforce its treaty obligations, *Arlington* suggests that the United States has an independent right of action to protect treaties like the 1906 Convention because it has standing "to enforce its laws and policies." *Id*. It in no way suggests that the existence of a treaty obligation confers standing on the United States to sue to enforce laws, including compacts, under which it otherwise would have no right of action.

To be clear, New Mexico does not contend that the United States has no ability to raise a claim based on the 1906 Convention. If the United States believes the actions of any water users are impairing its treaty obligations, it may assert claims based on the 1906 Convention. However, these claims are not Compact claims and should not be treated as such.

C. The United States' right to protect Project operations and its contract obligations existed prior to the Compact and does not arise from the Compact.

Just as the Compact does not protect the United States' ability to meet its treaty obligations to Mexico, it also contains no provisions suggesting the negotiators intended the Compact to add to the United States' reclamation law remedies that had existed for over twenty years at the time of the Compact's ratification. These reclamation law remedies form the basis for the Special Master's recommendation to exercise jurisdiction, to which New Mexico has not objected. The United States has always had remedies to protect Project operations under reclamation law. The Compact did not silently add new remedies, and remedies should not be imputed by this Court from the Compact's silence.

The United States claims "Project operations . . . are protected by the Compact." U.S. Br. at 39. Because the Special Master concluded New Mexico "relinquish[es] control of the water" by delivering water to Elephant Butte, the United States argues the "Compact protects the United States' ability to" operate the Project and therefore, the United States can raise not just reclamation law claims, but also Compact claims. *Id.* at 34 (citing Report at 195-97). This is incorrect. As more fully explained in New Mexico's exceptions, this delivery obligation does not strip New Mexico of the

ability to adjudicate and administer water within its borders. *See* N.M. Br. at 16-42.

Further, the United States misinterprets the purpose of Compact provisions requiring delivery of water to Elephant Butte.[2] These delivery provisions are intended simply to implement the equitable apportionment among the States. As the Special Master appropriately recognized, the States relied on the Project for their own ends, not to benefit the United States. Report at 230-31. The Compact's purpose is to "effect[] an equitable apportionment" and "remove all causes of present and future controversy among [the compacting] States." Compact Preamble. The Compact is silent

[2] The United States also wrongly describes certain Articles of the Compact. For example, the United States claims that Article VI of the Compact "establishes limits on the total amount of credits and debits that an upstream State may accrue," U.S. Br. at 15, but in fact the Compact does not limit the amount of accrued credits. Further, the United States' description of Article VIII is incomplete. U.S. Br. at 16. The United States indicates that Colorado and New Mexico are required, upon demand from Texas, to release water up to their respective accrued debit(s) to Elephant Butte Reservoir to provide for a Project release of 790,000 acre-feet that year. This is not the Compact requirement. Under Article VIII the upstream States, if called on by Texas *or New Mexico* in January, are required to release water from storage in post-1929 reservoirs upstream of Elephant Butte, but only to the extent of their accrued debit (as defined in Article I), and only in an amount sufficient, with any other natural inflow, to bring project storage to 600,000 acre-feet by March 1 and keep it at that level until April 30.

regarding the United States' operations of the Project after delivery into Elephant Butte Reservoir.

Specifically, New Mexico's delivery obligation in Article IV ensures specified quantities of water reach Elephant Butte Reservoir, subject to allowed debits and credits in Article VI. Article IV does not require New Mexico "to deliver water into 'project storage,'" as the United States asserts, U.S. Br. at 39 (alterations omitted), but instead requires New Mexico "to deliver water in the Rio Grande into Elephant Butte Reservoir," Compact Art. IV.[3] Article IV says nothing about Project operations, or specific uses of water below Elephant Butte. Nor does the Compact, in Article IV, Article I(k), or anywhere else, designate all water delivered to Elephant Butte as "usable water," as defined in Article I(l). Article I(l) excludes credit water, and further states that "usable water" includes only water "available for release in accordance with irrigation demands including deliveries to Mexico." Water delivered to Elephant Butte can, therefore, be usable water allocated under the Project, credit water subject to relinquishment by upstream states, or even New Mexico's San Juan-Chama Project water. Additionally, Article I(l) confers no rights on the United States and says nothing about the United States assuming sole jurisdiction over usable water, let alone all Rio Grande water below

[3] As amended by the Resolution Adopted by Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

Elephant Butte. These Compact terms create no protections for the United States and do not give it the ability to raise a Compact claim.

Nor do other Compact provisions address Project operations. Article II establishes no gaging stations downstream of the river gage below Caballo Dam. Articles VII and VIII help ensure water reaches Elephant Butte under certain specified conditions but say nothing about the uses or disposition of water below the reservoir. Article XII, which establishes the Rio Grande Compact Commission ("Commission"), specifically states that, while the United States may designate a representative to sit on the Commission, any federal representative shall be "without vote." If the Compact had been intended to be an avenue by which the United States could bring suit to affirmatively protect federal interests, it is likely that the United States would have been granted a vote on the Commission. The fact it was not confirms that the Compact does not protect the United States' operation of the Project or any other federal interest.

Again, the Project had been in operation for twenty-two years (since 1916) by the time the Compact was adopted. Nothing in the Compact's plain language suggests the drafters intended the Compact to add to the remedies already available to the United States under existing reclamation law. Had they intended to do so, the drafters would have added the United States' compact enforcement explicitly, but they did not. The Court should not impute such remedies from the Compact's silence.

1. The United States' participation in other original actions does not support its right to raise Compact claims in this case.

The original action cases cited by the United States where it has participated as a plaintiff do not demonstrate that the United States has been allowed to raise compact enforcement claims in other cases. As noted by the Special Master, the United States frequently participates in original actions before this Court, but it typically does so as an *amicus curiae*. Report at 220 (citing *Kansas v. Nebraska*, 562 U.S. 820 (2010); *Montana v. Wyoming*, 550 U.S. 932 (2007); *Wyoming v. Colorado*, 259 U.S. 419, 465 (1922)). This includes cases where the United States operates bi-state federal reclamation projects that present equities similar to the present dispute.

For example, in the Republican River Compact litigation, No. 126, Original, Kansas sued Nebraska and Colorado alleging violations of that compact in a basin with nine federal reservoirs operated by Reclamation and the U.S. Army Corps of Engineers ("Corps"). *Kansas v. Nebraska*, 135 S. Ct. 1042, 1049 (2015). These federal projects included the Bostwick Division of Reclamation's Missouri River Basin Project ("Bostwick Project"), an interstate project delivering water allocated by the Republican River Compact. Water stored in the Bostwick Project's Harlan County Reservoir is released to meet irrigation demands in both Nebraska and Kansas. *See* Second Report of the Special Master (Subject: Final Settlement Stipulation) at 4-10 and Apps.

C1, C2 (Maps), *Kansas v. Nebraska & Colorado*, No. 126, Original (filed Apr. 16, 2003). The United States supported Kansas' Motion for Leave to File, but, despite the presence of numerous federal projects, including a major project for implementing that compact by delivering irrigation water to the lower part of the upstream State and to the downstream State, the United States did not intervene, but participated as *amicus curiae* only. *See* Brief for the United States as Amicus Curiae on Mot. for Leave to File Bill of Compl. 11-16, *Kansas v. Nebraska & Colorado*, No. 126, Original (filed Dec. 18, 1998). Significantly, the United States did not assert a compact claim against the upstream State alleged to be depleting the federal reservoir project water essential for the delivery of compact allocations. This is so, even though the central Reclamation project distributing the compact waters was alleged to be suffering significant depletions of project inflows. *See* Kansas' Reply to Nebraska's Br. in Opp. to Mot. for Leave to File, App. A, *Kansas v. Nebraska & Colorado*, No. 126, Original (filed Aug. 7, 1998) (Graph showing Projected vs. Actual Harlan County Reservoir Inflows, based on Reclamation sources).

Yet in the present case concerning enforcement of the Rio Grande Compact, which also involves a bi-state Reclamation project delivering water apportioned between the states, the United States is asserting a compact claim for the first time. There is no distinction between the two compacts that would produce a compact claim under the Rio Grande Compact and not

under the Republican River Compact. In short, although the United States was previously involved in a dispute with very similar circumstances, it never asserted the authority to bring independent compact claims, or even intimated that it believed it had a compact cause of action.

Even when the United States has intervened as a *party*, whether it is aligned as a plaintiff or a defendant, it has done so simply to protect other federal interests, not to assert a new cause of action arising from a compact. *E.g.*, *Kansas v. Colorado*, 533 U.S. 1, 6 (2001). For example, in its Complaint in Intervention in a dispute over the Pecos River Compact, after describing its existing rights and obligations regarding tribes, national forests, parks and monuments, Reclamation projects and other federal water rights, the United States simply requested "such relief as is appropriate and necessary to protect the United States' rights with respect to the waters of the Pecos River stream system." U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. in Support at 9, *Texas v. New Mexico*, No. 65, Original (filed Aug. 25, 1975). The memorandum in support of the motion to intervene concluded, "intervention is appropriate to insure that the federal interests are fully protected." *Id.* at 11. It is clear that the United States did not

assert any cause of action arising out of the Pecos River Compact, but merely intervened to protect federal interests in the basin.[4]

A further example is the intervention of the United States in the Arkansas River litigation, *Kansas v. Colorado*, No. 105, Original. In that case, Kansas alleged violation of the Arkansas River Compact by Colorado. The Arkansas Basin encompassed by that compact includes the U.S. Army Corps of Engineers' John Martin Reservoir Project, which delivers irrigation water to lands in both States. Reclamation operates two projects wholly within Colorado as part of this interstate river system, the Fryingpan-Arkansas Project and the Trinidad Project. The United States moved to intervene as a party defendant "to defend the federal interests raised by the Complaint filed by the State of Kansas and the Answer and Counterclaim filed by the State of Colorado." Mot. of the U.S. for Leave to Intervene as Party Def. at 1, *Kansas v. Colorado*, No. 105, Original (filed Jan. 30, 1989). The United States' Motion to Intervene was accompanied by a Stipulation for

[4] The United States also argues it was allowed to intervene in *Texas v. New Mexico*, No. 65, Original, to protect its obligations under a separate treaty with Mexico, but this case does not support its position. The United States asserted in its motion to intervene in that case that its "international responsibility to assure deliveries to the Republic of Mexico" supported its intervention. U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. at 10, *Texas v. New Mexico*, No. 65, Original (filed Aug. 1975). This demonstrates only that the United States had an interest in protecting its treaty obligation, not that it had or asserted claims under the Pecos River Compact based on its treaty obligation.

Intervention signed by the two States, stating that the "federal interests appear to be limited to and involve the Fryingpan-Arkansas Project (Pueblo Dam and Reservoir) and the Trinidad Project." *Id.* at 3. The special master granted the Motion to allow the "United States to represent the federal interests raised by the Kansas complaint and the answer and counterclaim filed by Colorado." 1 Report of the Special Master at 24, *Kansas v. Colorado*, No. 105, Original (filed July 29, 1994). The United States did not file a counterclaim, but requested "that the Court issue an order protecting the rights of the United States in the Trinidad Project and the Fryingpan-Arkansas Project, and for such other and further relief as the Court may deem just and proper." Ans. of U.S. at 4, *Kansas v. Colorado*, No. 105, Original (filed Jan. 30, 1989). The United States was defending against the claim by Kansas that Colorado had been causing two federal projects to be operated in violation of the Arkansas River Compact. There was no suggestion that the United States might have an independent cause of action against either State under the Arkansas River Compact.

In previous litigation involving the Rio Grande Compact itself, the United States has not suggested that the Compact gave it an independent cause of action. The United States intervened in *Texas v. Colorado*, No. 29, Original, "to protect its rights in the Rio Grande stream system." U.S. Mot. for Leave to Intervene as Pl., Compl. in Intervention, and Mem. in Support at 4, *Texas v. Colorado*, No. 29, Original (filed

Apr. 19, 1968). The United States did not assert a right of action under the Compact but merely requested that "its rights with respect to the waters of the Rio Grande stream system be fully recognized and protected by the Court." *Id.* at 5. Nor need it assert a right of action under the Compact here. Intervening to protect federal interests under other laws is a very different matter from intervening to assert a cause of action for declaratory and injunctive relief against a compacting State as a compact claim. By attempting this latter novel and radical procedure, it appears the United States seeks to claim for itself a central role in the administration and enforcement of the Compact, as well as the apportionment of water between New Mexico and Texas.[5] The Compact does not contemplate such a role for the United States.

While the United States has been allowed to defend its interests in original jurisdiction lawsuits involving allegations of compact violations, it cites no precedent for its present position that it may raise

[5] Contrary to the United States' assertion, it is not empowered to make unilateral allocations of water between the States. *See* U.S. Br. at 40 ("The Compact relies on the United States to allocate water downstream of Elephant Butte Reservoir between water users in southern New Mexico and western Texas, and thus between the states of New Mexico and Texas, and the United States has a right and obligation protected by the Compact to deliver Project water to contract holders in both States in accordance with irrigation demands."). The Compact assigns no role to the United States to "allocate water . . . between the states of New Mexico and Texas." The Compact's assumption that Project operations would continue as they had prior to its adoption does not confer on the United States any "rights and obligations" under the Compact.

independent claims under a compact, apart from the state signatories to the compact. Allowing the United States to raise independent Compact claims would upset the bargain reached by the compacting States. States appropriately and vehemently guard their compact interests and will seek to vindicate their rights if they feel they are being denied the benefits they bargained for. Granting the United States the ability to raise compact claims as a non-party could result in the United States taking positions or asserting theories at odds with the positions and claims of the actual compacting parties. Nothing in the Compact indicates that the States considered this expansion of federal power as part of their argeement.

2. *Nebraska v. Wyoming* does not support the conclusion that the United States may sue for Compact violations.

The United States argues its participation in various disputes over water administration in the North Platte River Basin confirms that it "may enforce an equitable apportionment decree (and, by analogy, an interstate compact) to protect Reclamation project characteristics that are a necessary predicate to the apportionment of an interstate stream." U.S. Br. at 44 (internal quotation omitted). The United States has misread this case, which is different at its core from the present case.

First, the United States points to a decision the Court entered in 1993, wherein the Court "granted

summary judgment to the United States and Nebraska" on claims related to Reclamation's operation of reservoirs "necessary to ensure the delivery" of water to Nebraska. U.S. Br. at 44 (citing *Nebraska v. Wyoming*, 507 U.S. 584, 587 (1993)). The United States' summary judgment motion in that case was for a determination of the priority date for certain federal reservoirs, the Inland Lakes, which Wyoming argued had not been granted a valid priority under Wyoming law. *Nebraska v. Wyoming*, 507 U.S. at 593-94; Second Interim Report of the Special Master at 16, 22, *Nebraska v. Wyoming*, No. 108, Original (filed Apr. 9, 1992) ("Second *Nebraska* Report").

While the Court characterized the United States' and Nebraska's claims regarding the Inland Lakes as an "enforcement issue," *Nebraska v. Wyoming*, 507 U.S. at 592, this does not demonstrate the United States has free-roving authority to enforce apportionment decrees and interstate compacts as it sees fit. On the contrary, the special master and Court in *Nebraska v. Wyoming* found Wyoming could not challenge the United States' claimed priority date for the Inland Lakes because "the Inland Lakes' priority was determined in the original proceedings." *Id*. at 594. In other words, the United States was able to move for summary judgment in that case because it had a right determined and protected by that decree.

There is no indication in *Nebraska v. Wyoming* that the United States raised any claims under the North Platte Decree that did not implicate rights and protections it was granted by the decree, or that it

raised any other claims at all. *See* Second *Nebraska* Report at 4-8 (summarizing the claims raised). Therefore, the 1993 *Nebraska v. Wyoming* decision does not support the conclusion that the United States may sue to enforce an apportionment decree even where it has no specific rights or protections granted by the decree.

Second, because *Nebraska v. Wyoming* was an equitable apportionment case, the Court had considerably more flexibility to broadly interpret or even modify a prior judicial decision than it does when reviewing an interstate compact. *Compare Nebraska v. Wyoming*, 507 U.S. at 591 (asserting the Court's jurisdiction "to modify the [North Platte] decree to answer unresolved questions and to accommodate changes in conditions" (quotation and alterations omitted)) *with 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."). Given this difference, the Court's allowance of the United States' summary judgment motion in *Nebraska v. Wyoming* is not relevant to this dispute.

The United States also points out that in a later 1995 decision in the *Nebraska* case, the Court allowed Wyoming to assert a cross-claim against the United States alleging that federal management of reservoirs violated state and federal law and undermined Wyoming's apportionment. U.S. Br. at 44-45 (citing *Nebraska v. Wyoming*, 515 U.S. 1 (1995)). The United States argues that if "a State can bring claims against

the United States under an interstate compact to which the United States is not a party" alleging the United States' actions violate that compact, "then the United States should be permitted to state a claim arising under the Compact where a State undermines the operation of the Compact's equitable apportionment scheme to the detriment of a project owned and operated by the United States." U.S. Br. at 45.

In doing so, the United States again conflates a claim raised under an equitable apportionment decree with a claim raised under a compact. But regardless of whether a decree or compact is at issue, the United States presents no reason to believe it has or should have a reciprocal right to sue a state for violating a compact or decree just because that state can sue the United States for improper operations resulting in a compact or decree violation. *Nebraska v. Wyoming*, 515 U.S. at 16.

Where the United States has no rights protected by compact, as here, it has no basis for raising compact claims. If a State's action or inaction "undermines the operation of the Compact's equitable apportionment scheme," U.S. Br. at 45, the affected States will seek to vindicate their rights, as Texas has done here. If the State's action or inaction harms a federal reclamation project, the United States can protect its interests by bringing claims for violations of reclamation law or other pertinent authorities, as the United States can do here. The United States should not be allowed to raise claims under the Compact, and its exception should be overruled.

II. The United States Is Not a Third-Party Beneficiary of the Compact.

The United States fares no better with its argument that it should be permitted to bring a claim to enforce the Compact because it is an intended third-party beneficiary of the Compact. Third-party beneficiary status is an "exceptional privilege." *Glass v. United States*, 258 F.3d 1349, 1354, *opinion modified on reh'g*, 273 F.3d 1072 (Fed. Cir. 2001) (quoting *German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 230 (1912)). As the United States correctly recognizes, in order to meet its burden to establish that it is an intended third-party beneficiary with rights to enforce a contract, a non-party to a contract must demonstrate "that the contract reflects the express or implied intention of the parties to the contract to benefit the third party." U.S. Br. at 46 (quoting *Smith v. Central Ariz. Water Conservation Dist.*, 418 F.3d 1028, 1035 (9th Cir. 2005) (additional citation omitted)).[6] The non-party must also make the showing that the contract in question "reflects an intention to benefit the party directly." *Id*. (quoting *Klamath Irrigation Dist. v. United States*, 67 Fed. Cl. 504, 533 (2005) (additional citations omitted)). While recognizing this burden, however, the United States fails to meet it.

The Compact does not reflect any express or implied intention of the compacting States to benefit the

[6] New Mexico does not dispute that the Compact should be construed as a contract and evaluated under the principles of contract law. *See Tarrant Reg'l Water Dist. v. Hermann*, 133 S. Ct. 2120, 2130 (2013).

United States. In fact, the opposite is true as the Compact language addressing the United States simply says there is no intention to alter or affect the United States' preexisting obligations at all. Even if the Compact relies on water stored and delivered under the Project as the mechanism for deliveries to Southern New Mexico and Texas, this does not indicate that the States intended to confer a benefit on the United States that it did not already have. While the Compact ensures that water reaches Elephant Butte Reservoir, this is to benefit New Mexico and Texas, not the United States.[7] The Compact does no more than reflect the *status quo* with respect to the United States, relying on the Project, which had been operating for two decades prior to ratification of the Compact. With respect to the United States, the Compact merely recognizes the existing treaty obligation to Mexico in Article XVI. Article XVI expressly precludes anything in the Compact from being "construed as affecting the obligations of the United States of America to Mexico," making it

[7] *Cf. Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1212, *opinion amended on denial of reh'g*, 203 F.3d 1175 (9th Cir. 2000) (although contract between Bureau of Reclamation and the operator of a dam benefits irrigators by impounding irrigation water and was undoubtedly entered into with the irrigators in mind, the irrigators are not third-party beneficiaries of the contract because that would open the door to them achieving the same status as the contracting parties, a result not intended by the contract). Similarly, in this instance, allowing the United States to assert Compact claims would enable it to achieve a similar status to the compacting States and open the door to it potentially taking inconsistent positions to those parties, a result not contemplated by the Compact.

clear that the Compact confers no benefit on the United States.

The United States has cited no cases where it asserted it was a third-party beneficiary of an interstate compact, let alone where the Court recognized it as one. Nor do the cases cited by the United States for the unremarkable position that the United States may be a third-party beneficiary to an agreement between other parties help demonstrate that it should qualify as a third-party beneficiary under these particular circumstances. If anything, the cases actually undermine the United States' position because they illustrate instances in which the United States was clearly contemplated as a beneficiary of an agreement, unlike the compact at issue. For instance, one of the cases cited by the United States, U.S. Br. at 47, *West Chelsea Buildings v. United States*, 109 Fed. Cl. 5, 16 (2013), involved a Covenant Not to Sue Agreement, as part of the settlement of a dispute between property owners and the City of New York, which explicitly provided that the property owners would not "sue or join any action seeking compensation from . . . the City *or the United States of America*." *Id.* at 12 (emphasis added). The court found that the plain language of the agreement naming the United States and the surrounding circumstances of the settlement demonstrated that the parties intended that the United States would benefit from the promise not to sue. *Id.* at 23-25. The Rio Grande Compact contains no such language.

The United States' citation to *United States v. State Farm Mut. Auto Ins. Co.*, 936 F.2d 206, 207 (5th

Cir. 1991), U.S. Br. at 47, is similarly unavailing. *State Farm* involved the issuance of standard boating and automobile accident insurance policies to military members. *Id.* The court recognized that State Farm was bound under the relevant state law by the policies' terms to reimburse the full costs of medical expenses reasonably incurred in treating its insureds. *Id.* at 210. The court held that, because Congress had legislatively authorized the federal government to recover its costs of medical care provided to military dependents from third-party insurers, the United States was an intended third-party beneficiary of such policies, the same as other medical providers, and that it was simply enforcing rights accruing to it under the terms of the policy and state law. *Id.* at 209-10. This cited case reflects a situation in which the United States is part of a class of clearly intended beneficiaries and stands in direct contrast to the circumstances of the Compact. The Compact's plain language reflects no intention to benefit the United States. Thus, the United States has provided no support for its novel theory that it is an intended third-party beneficiary of the Compact.

III. The United States' Exception Is an Improper Effort to Circumvent State Law.

The United States' insistence on its ability to raise Compact claims, even though this is unnecessary to protect its interests in the Project and its obligations to Mexico under the 1906 Convention, suggests the United States may seek to circumvent New Mexico law

and the rulings of the court in *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District*, No. 96-CV-888 (3rd Judicial Dist. Doña Ana County, NM) ("LRG Adjudication"). Moreover, the unprecedented theory that the United States seeks to establish in this case will have significant related consequences in other states. If the United States were to succeed in establishing an independent right to sue under interstate compacts, it could circumvent the state law processes to which the United States is properly subject under the Reclamation Act and other federal law. *See*, *e.g.*, 43 U.S.C. § 383 (Section 8 of the Reclamation Act of 1902); § 666 (McCarran Amendment). Although this Court has repeatedly held that the United States' water rights are properly determined under state law, *e.g.*, *California v. United States*, 438 U.S. 645 (1978); *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800 (1976), the United States has repeatedly sought to evade this clear requirement in the Lower Rio Grande. *See*, *e.g.*, *United States v. City of Las Cruces*, 289 F.3d 1170, 1189-90 (10th Cir. 2002).[8] The United States seems poised for another attempt to evade New Mexico's consistently recognized jurisdiction over the New Mexico portion of the Project.

[8] The United States may not now seek a redetermination of the Tenth Circuit's ruling in *City of Las Cruces* upholding the district court's decision to abstain from hearing the United States' quiet title claims in favor of the LRG Adjudication.

The United States should not be allowed to invent a Compact claim in order to avoid state law determinations with which it may be discontented.[9] *See* U.S. Br. at 17-20 (summarizing rulings of the LRG Adjudication court). If the United States is dissatisfied with the LRG Adjudication court's determinations, it can challenge them in the ordinary course of appeal, including, ultimately, a petition for certiorari to this Court.

The LRG Adjudication court's rulings are based on state law and were made after extensive litigation involving the United States and numerous other water rights claimants in the Lower Rio Grande. If the United States were to persuade this Court to review and change those rulings in an original jurisdiction

[9] As New Mexico explained in its exceptions, N.M. Br. at 40-41, the LRG Adjudication court's ruling on groundwater was based on the United States' failure to ever claim or withdraw groundwater for the Project's use. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, LRG Adjudication (Aug. 16, 2012). The LRG Adjudication court further explained in its order how the United States could protect its surface appropriation from groundwater-induced losses under New Mexico law, *id.* at 4, belying the United States' suggestion that it has no recourse under New Mexico law to protect itself against pumping-induced seepage of surface water into groundwater aquifers. *See* U.S. Br. at 19. As for the LRG Adjudication court declining to rule that the United States has the right to deliver a specified quantity of water to users in Texas, the LRG Adjudication court agreed the United States has the right to deliver water to Texas users, but declined to rule on a specific amount, as calculation of the amount of water available depended on return flows in Texas, a matter outside the court's jurisdiction. Order, LRG Adjudication Court (Feb. 17, 2014).

case under a Compact claim, the interests of these other parties will be affected. This Court would, in effect, need to step into the LRG Adjudication court's role to determine the scope of the Project rights and their relationship to the roughly 16,000 other parties involved in the LRG Adjudication. This Court would also need to apply New Mexico law to determine the scope of those rights.[10] This is a role the Court has historically declined to play. *E.g.*, *United States v. Nevada and California*, 412 U.S. 534, 538 (1973) ("We need not employ our original jurisdiction to settle competing claims to water within a single State.").

Alternatively, removing the Project rights from the LRG Adjudication without assuming jurisdiction over all other claimants would hamstring the LRG Adjudication court, preventing it from effectively and efficiently resolving the remaining claims to water in the Lower Rio Grande. Allowing the United States to relitigate the rulings of the LRG Adjudication court would also call into question the rulings of the Texas state court adjudication of water rights, which would likewise need to be addressed by this Court.

The amicus briefs filed by New Mexico State University and the City of Las Cruces give some sense of the complexity of the LRG Adjudication as well as the

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[10] The Project rights were appropriated "under New Mexico law," as required by Section 8 of the Reclamation Act, 43 U.S.C. § 383, and as the United States admits. U.S. Br. at 7. It follows therefrom that New Mexico law should determine the scope of the rights so acquired, as Section 8 also requires, regardless of the forum in which this determination is made.

enormous amount of work it has accomplished to date. NMSU Br. at 19-20; Las Cruces Br. at 30-31. The United States presents no compelling reason for the Court to disregard this effort and undertake the arduous task of making these determinations anew. Instead, the Court should overrule the United States' exception to the first Special Master's Report.

IV. The United States' Arguments Regarding Federal Control and the Application of State Law Illustrate the Prejudice Resulting from the Special Master's Premature Findings and Inappropriate Use of Extrinsic Evidence.

New Mexico's exceptions explained how the Special Master's extensive factual discussions and premature determinations based on independent research were likely to prejudice the issues in this case. N.M. Br. at 49-55. Colorado raised similar concerns in its brief, noting that "the parties could be prejudiced by premature statements, based on incomplete information, that may define the States' rights and obligations under the Compact." Colo. Br. at 4-5. The United States' exception, which relies on the premature conclusions from the Special Master, now takes that prejudice out of the theoretical realm and illustrates exactly the problems New Mexico and Colorado anticipated.

For example, the United States relies extensively on the Special Master's flawed interpretation of the Compact to mean that New Mexico silently

"relinquish[ed] control and dominion" of its waters below Elephant Butte Reservoir. U.S. Br. at 23 (quoting Report at 197); *see also* U.S. Br. at 26, 29, 34, 36-37. As discussed in New Mexico's exceptions, to the extent that the Special Master's Report finds that New Mexico relinquished sovereignty over waters within its state boundaries without explicitly agreeing to do so, the Report errs. The United States, however, goes further. It not only relies on the incorrect proposition that New Mexico has been deprived of sovereignty over its waters, but asserts that the United States has then assumed that control. U.S. Br. at 36-37. The United States goes so far as to claim that New Mexico relinquished "the right to allow for the appropriation of [water in the Lower Rio Grande] by the inhabitants of New Mexico under state law." *Id*. at 26. This directly contradicts a significant number of prior rulings by this Court. *See*, *e.g.*, N.M. Br. at 30-41.

The United States then asserts that New Mexico water users, including groundwater pumpers, must obtain contracts with the United States for any use of water below Elephant Butte. U.S. Br. at 21. The argument amounts, as amicus ABCWUA characterizes it, to a "federalization" of the Lower Rio Grande, ABCWUA Br. at 15-16, something this Court has always unequivocally rejected. *See*, *e.g.*, *California v. United States*, 438 U.S. at 667 (mandating federal compliance with state water laws in the distribution of water from reclamation projects); *Nebraska v. Wyoming*, 325 U.S. 589, 611-16 (1945) (rejecting federal claim to waters of the North Platte River independent of state

law). The United States has taken advantage of the Special Master's overbroad, untested, and unnecessary historical statements to argue for an unprecedented expansion of federal power that has no basis in the Compact.

The United States has also taken advantage of the omissions in the Report's discussion. For example, the Special Master makes no mention of the effect of Texas pumping on the Project, a factual matter that has not yet been subject to discovery. If groundwater pumping in New Mexico impacts Project supply in the manner the United States claims, then Texas pumping must also have an impact. That impact has yet to be determined in this litigation, and is a prime example of the risks associated with premature fact finding without the benefit of an adversarial vetting of the facts. The Special Master and the United States also make no mention of the fact that, if New Mexico water users are required to obtain federal contracts for any use of water below Elephant Butte within the Project area, then Texas water users must necessarily be subject to the same requirement.

The Special Master's Report also omitted any mention of New Mexico's long-established legal scheme of conjunctive management of ground and surface water. *City of Albuquerque v. Reynolds*, 379 P.2d 73 (N.M. 1962). This omission enabled the United States to imply that New Mexico law *disregards* the physical connection between ground and surface water. U.S. Br. at 18 (claiming the LRG Adjudication court

"acknowledged that there is an interactive relationship between groundwater and surface water" but "nevertheless recognize[d] surface water and groundwater as distinct entities with distinct administrative schemes" under New Mexico law). The United States goes on to infer from these misleading assertions that, absent the LRG Adjudication court's alleged separation of ground and surface water administration, the United States would, based on its ownership of return flows and seepage, have a claim to all groundwater in the LRG and could require contracts for any groundwater use. This argument misrepresents the ruling of the LRG Adjudication court and conflates surface and groundwater in a way that is unsupported by New Mexico statutes, state and federal case law, and the Compact's express terms.

V. New Mexico Supports Colorado's Exception Recommending that the Court Refrain from Adopting in Totality the Special Master's Report.

Colorado is correct that the Court may exercise jurisdiction under 28 U.S.C. § 1251(b)(2) to consider any claims the United States might wish to raise based on the 1906 Convention. Colo. Br. at 5. New Mexico would not object to that exercise of jurisdiction, although the United States has not sought it so far in this litigation. The Court should reject, however, the United States' effort to characterize claims based on alleged interference with its obligation to deliver water

to Mexico as Compact claims for the reasons given above.

As for Colorado's argument that the United States should be precluded from raising claims other than those arising from the 1906 Convention, Colo. Br. at 5, New Mexico does not oppose this exception. New Mexico has not taken exception to the Special Master's recommendation that, for purposes of judicial economy, the Court extend its nonexclusive original jurisdiction under 28 U.S.C. § 1251(b)(2) to allow the United States to raise federal reclamation law claims in this proceeding. Report at 234. However, if the Court sustains Colorado's exception, New Mexico agrees with Colorado that resolution of Texas's claims will likely moot the United States' complaint, both because the United States' claims are "nearly identical" to Texas's claims, Colo. Br. at 5, and because the United States seeks only injunctive relief against New Mexico.[11] *See* U.S. Compl. at 5.

For the reasons given in its exceptions, N.M. Br. at 49-55, New Mexico supports Colorado's second exception, requesting that this Court refrain from adopting the findings and conclusions in the Report to permit the parties an opportunity to answer Texas's and the United States' complaints, conduct discovery, present

[11] To the extent the United States seeks to raise any claims that are unrelated to Texas's claims, granting the United States leave to do so would not promote judicial economy, and the Court should deny any such requests.

evidence, and offer additional arguments. Colo. Br. at 9-10.

CONCLUSION

The Court should overrule the United States' exception.

Respectfully submitted,

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