No. 141, Original

# In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

*v.*

STATE OF NEW MEXICO
AND
STATE OF COLORADO

*ON EXCEPTIONS BY THE STATES OF NEW MEXICO AND COLORADO TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER*

**REPLY BRIEF FOR THE UNITED STATES**

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## QUESTIONS PRESENTED

The United States will address the following questions:

1. Whether the Special Master concluded that the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, requires New Mexico to totally surrender its sovereignty over water delivered to the Rio Grande Project. (New Mexico Exception No. 1).

2. Whether the Special Master's reasoning is inconsistent with Section 8 of the Reclamation Act, ch. 1093, 32 Stat. 390, which requires federal reclamation projects to comply with state water laws concerning irrigation that do not conflict with specific congressional directives, or the McCarran Amendment (Department of Justice Appropriation Act, 1953), 43 U.S.C. 666, which subjects the United States to the jurisdiction of state courts for the adjudication and administration of water rights. (New Mexico Exception No. 2).

3. Whether the Special Master concluded that the doctrine of equitable apportionment prohibits the application of New Mexico law to water released from the Rio Grande Project. (New Mexico Exception No. 3).

4. Whether the United States' participation should be limited to seeking relief based on the protection of its obligation to deliver water to Mexico under the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953. (Colorado Exception No. 1).

5. Whether the Special Master improperly relied upon documents outside the pleadings. (Colorado Exception No. 2; New Mexico Exception No. 4).

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## INTRODUCTION

In the First Interim Report of the Special Master (Report or Rep.), issued on February 9, 2017, Special Master A. Gregory Grimsal (Master) recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas in this original action seeking to enforce the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785. The Master further recommended that the Court grant New Mexico's motion to dismiss the United States' complaint in intervention to the extent the United States asserts claims under the Compact, but deny the motion to the extent the United States asserts claims under federal reclamation law. On June 9, 2017, the United States and the States of New Mexico and Colorado filed exceptions to the Master's Report. The United States submits this brief

in response to the exceptions filed by New Mexico and Colorado.

New Mexico generally accepts the Master's recommendation that its motion to dismiss the complaints filed by Texas and the United States should be denied. N.M. Exceptions 1; N.M. Exceptions Br. 56-57 & n.15. New Mexico contends, however, that the Master's Report "contains analytical errors that threaten to divest New Mexico of sovereignty over water within its borders." N.M. Exceptions Br. 16. New Mexico takes four exceptions to the Report. Specifically, New Mexico takes exception to what it characterizes as (1) the Master's "conclusion that the Compact requires New Mexico to relinquish all jurisdiction over Rio Grande water upon delivery to Elephant Butte Reservoir" (New Mexico Exception No. 1); (2) the Master's conclusion that the Compact "overrides" the requirement that federal reclamation projects must comply with state law under Section 8 of the Reclamation Act, ch. 1093, 32 Stat. 390 (New Mexico Exception No. 2); (3) the Master's conclusion that the doctrine of equitable apportionment "supersedes" New Mexico's sovereignty over Rio Grande water within its borders (New Mexico Exception No. 3); and (4) the Master's "determination of historical facts obtained independently * * * without affording the parties an opportunity to review, verify, object to, or present countervailing evidence" (New Mexico Exception No. 4). N.M. Exceptions 2.

Colorado takes two exceptions to the Master's Report. Colorado contends that the Court should permit the United States to proceed only on a theory that New Mexico's actions threaten an international treaty that requires the United States to provide Mexico with

60,000 acre-feet of water per year from storage in Elephant Butte Reservoir (Colorado Exception No. 1). Colo. Exceptions Br. 2-3; see Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes (1906 Treaty), May 21, 1906, U.S.-Mex., 34 Stat. 2953. Colorado also takes exception to the Master's independent research into historical documents and requests that the Court "affirmatively abstain from adopting the Report's extraneous findings and conclusions as the law of the case" (Colorado Exception No. 2). Colo. Exceptions Br. 3.

For the reasons set forth below, the exceptions filed by New Mexico and Colorado should be overruled.

## ARGUMENT

### I. THE SPECIAL MASTER'S REASONING WOULD NOT DEPRIVE NEW MEXICO OF SOVEREIGNTY OR JURISDICTION OVER WATER WITHIN ITS BORDERS BEYOND WHAT NEW MEXICO AGREED TO IN THE COMPACT

New Mexico accepts the Master's recommendation that its motion to dismiss the complaints filed by Texas and the United States should be denied. N.M. Exceptions 1; N.M. Exceptions Br. 56-57 & n.15. New Mexico contends, however, that the Master's reasoning is flawed in some respects. N.M. Exceptions Br. 16-48. The Master's basic conclusions are that New Mexico may not allow diversions of water downstream of Elephant Butte Reservoir in New Mexico in a way that interferes with Texas's equitable apportionment of Rio Grande water, and that disagreements about the characteristics and scope of Texas's equitable apportionment must be resolved by the Court in this original action. Rep. 195-203, 216. Those conclusions are correct.

New Mexico's first three exceptions are based on a considerable overreading of isolated statements in the Master's Report. Those exceptions should be overruled.

### A. The Special Master Did Not Conclude That New Mexico Totally Surrendered Its Authority Over Water Delivered To The Rio Grande Project

New Mexico contends (Exceptions Br. 16-30) that the Court should "reject the [Master's] finding that the Compact impaired New Mexico's sovereign administrative control over waters within its borders." *Id.* at 16-17. According to New Mexico, the Master incorrectly concluded that the Compact, by requiring New Mexico to "deliver" water into Elephant Butte Reservoir, Art. IV, 53 Stat. 788, requires "total surrender of New Mexico's sovereign authority to adjudicate and administer water rights" within the State. N.M. Exceptions Br. 19. In support of that exception, New Mexico focuses (*id.* at 18-19, 25) on statements in the Master's Report that New Mexico must "relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." Rep. 197 (interpreting New Mexico's obligation to "deliver" water to the Rio Grande Project (Project) under Article IV of the Compact). New Mexico is wrong to equate such statements to a finding that New Mexico "relinquish[ed] all jurisdiction" (N.M. Exceptions Br. 13) or "total[ly] surrender[ed] [its] sovereign authority" (*id.* at 19) over water delivered to the Project.

In its motion to dismiss, New Mexico took the position that it had no obligation to limit diversions or depletions of water by New Mexico water users below Elephant Butte Reservoir. N.M. Mot. to Dismiss 40-45. The United States pointed out that New Mexico's posi-

tion was inconsistent with the requirement under Article IV of the Compact that New Mexico "deliver[]" a specific quantity of water to Elephant Butte Reservoir, 53 Stat. 788—a term that is generally understood to mean "the giving or yielding possession or control of something to another." U.S. Br. in Opp. to N.M. Mot. to Dismiss 38 (quoting *Black's Law Dictionary* 494 (9th ed. 2009)). The United States argued that when New Mexico "delivers" water to the Project, "it relinquishes control of the water to the Project," which then releases the water in accordance with irrigation demands. *Ibid.* (citing Compact Art. I(*l*), 53 Stat. 786). The Master was persuaded by that argument. Rep. 195-198.

New Mexico criticizes (Exceptions Br. 19-22) the Master's reliance on dictionary definitions of "deliver" to conclude that Article IV of the Compact "requires New Mexico to relinquish control and dominion over the water it deposits" in the reservoir. Rep. 197; see Rep. 195-198. New Mexico contends (Exceptions Br. 20-25) that applying those definitions is problematic because, under the doctrine of prior appropriation, water rights are usufructuary rights and New Mexico therefore cannot cede "ownership" of water within its borders. That observation misses the point.

The Master did not conclude that New Mexico literally cedes ownership of Rio Grande water in New Mexico to the United States (or anyone else) when it delivers water to the Project. Indeed, the Master recognized that the United States did not receive an apportionment of water under the Compact, that it obtained water rights for the Project pursuant to New Mexico law, and that it acts as "the storer and the carrier" of water for individual landowners. Rep. 230 (quoting *Nebraska* v.

*Wyoming*, 325 U.S. 589, 615 (1945)). The Master acknowledged in his Report that "the Project water leaving Elephant Butte [Reservoir] belongs to either New Mexico or Texas by compact, or to Mexico by the Convention of 1906." Rep. 212-213.

Neither the Compact nor the Master's interpretation of it "require[s]," as New Mexico puts it, "abrogation of New Mexico's sovereign authority" over water that flows from Elephant Butte Reservoir to the New Mexico-Texas state line. N.M. Exceptions Br. 25. The Compact does, however, impose limitations on the ways in which New Mexico may exercise its authority over that water. New Mexico contends that it is the owner of the water within its borders and "has the right to prescribe how [that water] may be used." *Id.* at 24 (quoting *Erickson* v. *McLean*, 308 P.2d 983, 987 (N.M. 1957)). But New Mexico agreed to limitations on the exercise of its sovereignty when it ratified the Compact in 1939. See 1939 N.M. Laws 59.

By compact, New Mexico agreed that it would deliver water to the Project at Elephant Butte Reservoir, Compact Art. IV, 53 Stat. 788, at which point it becomes "[u]sable [w]ater" that must be available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico, Compact Art. I(*l*), 53 Stat. 786. New Mexico cannot administer water rights in the area of New Mexico below Elephant Butte Reservoir in a way that interferes with the Project's ability to make deliveries to satisfy those demands. As the Master explained, Texas therefore seeks "an order compelling New Mexico 'to deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act' and enjoining New Mexico from interfering with or usurping the United

States' authority to operate the Rio Grande Project." Rep. 188 (quoting Tex. Compl. pp. 15-16). The United States similarly seeks an order requiring New Mexico to administer state law in accordance with the Compact, as it has agreed to do. U.S. Compl. p. 5. No party seeks a limitation of state sovereignty to any extent beyond what New Mexico agreed to in the Compact.

### B. The Special Master's Reasoning Is Not Inconsistent With Section 8 Of The Reclamation Act Or The McCarran Amendment

New Mexico further contends (Exceptions Br. 30-42) that the Master erred in concluding that New Mexico state law "does not govern the distribution of the water apportioned by the Compact." Rep. 216. New Mexico contends that the Master's conclusion is inconsistent with Section 8 of the Reclamation Act, 32 Stat. 390, which requires federal reclamation projects to comply with state water laws concerning irrigation that do not conflict with specific congressional directives, and the McCarran Amendment (Department of Justice Appropriations Act, 1953), 43 U.S.C. 666, which subjects the United States to the jurisdiction of state courts for the adjudication and administration of water rights in comprehensive general stream adjudications. This exception by New Mexico is likewise based on statements from the Master's Report that, in context, are not objectionable.

1. New Mexico focuses (Exceptions Br. 30-31, 36, 38) on statements in the Report that water delivered to the Project "is not subject to appropriation or distribution under New Mexico state law," Rep. 211, and that "New Mexico state law does not govern the distribution of the water apportioned by the Compact," Rep. 216. New Mexico contends (Exceptions Br. 31-36) that those

statements conflict with Section 8 of the Reclamation Act, which provides in pertinent part:

> 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.

43 U.S.C. 383.

Although that provision required the United States to obtain water rights for the Project pursuant to New Mexico state law and subjects the Project to state water administration, this Court has held that Section 8 of the Reclamation Act does not override other specific directives of Congress. See, *e.g.*, *California* v. *United States*, 438 U.S. 645, 668 n.21, 670-679 (1978). The Compact, which was approved by Congress, 53 Stat. 785, is a federal law that must be respected by New Mexico regardless of the claims of its water users under New Mexico state law. See *Tarrant Reg'l Water Dist.* v. *Herrmann*, 133 S. Ct. 2120, 2125 (2013); *Cuyler* v. *Adams*, 449 U.S. 433, 440 (1981). And in any event, the New Mexico legislature enacted the Compact into law, see N.M. Stat. Ann. § 72-15-23 (LexisNexis 2016), and the Compact therefore limits New Mexico water users from interfering with Project deliveries to New Mexico and Texas to meet irrigation demands as a matter of state law as well.

A state may adjust the rights of its citizens by entering into an interstate compact with the consent of Congress. See *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). An interstate

compact "operat[es] with the same effect as a treaty between sovereign powers," with "each [State] acting as a quasi-sovereign and representative of the interests and rights of her people." *Id.* at 107 (quoting *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Pet.) 657, 725 (1838) and *Wyoming* v. *Colorado*, 286 U.S. 494, 508-509 (1932)). An apportionment of water in an interstate compact is thus "binding upon the citizens of each State and all water claimants." *Id.* at 106. By entering into the Compact, New Mexico assumed an obligation to exercise its sovereignty over the water released by the Project in a manner that ensured that water delivered to the Project would be "[u]sable [w]ater" available for release by Reclamation for specific purposes under the Project. Compact Art. I(*l*), 53 Stat. 786.

New Mexico expresses concern (Exceptions Br. 36) that the Master "appears to view the Project as independent of state jurisdiction." But when read in context, statements in the Report that water delivered to the Project "is not subject to appropriation or distribution under New Mexico state law," Rep. 211, or is "not govern[ed]" by state law, Rep. 216, should be read as references to the full reach of state law as it would apply in the absence of modification by the Compact. The Master referred to "state law," on the one hand, and "the Compact," on the other, to distinguish between New Mexico's general law of prior appropriation and the specific requirements of the Compact. State law, including the Compact, requires New Mexico to protect Project water deliveries (including to Texas and Mexico) from interference or impairment.

2. New Mexico further contends (Exceptions Br. 36-40) that deference to state water law and administration

for the Project is bolstered by the McCarran Amendment, 43 U.S.C. 666, which subjects the United States to the jurisdiction of state courts for the adjudication and administration of water rights in comprehensive adjudicatory proceedings. New Mexico contends (Exceptions Br. 37) that the McCarran Amendment "reinforces the conclusion that adjudication of the Project water right must occur in the pending state water adjudication." See N.M. Pecan Growers Amicus Br. 16-24; N.M. State Univ. Amicus Br. 15-24. Although the Project's state-law water right is being adjudicated in a state court proceeding, that does not eliminate the need for this Court's resolution of this dispute over the characteristics of Texas's equitable apportionment and New Mexico's obligations under the Compact not to allow interference with the Project's delivery of water in both States and to Mexico. The State's adjudication of water rights in New Mexico must respect Texas's apportionment and the protection of the Project under the Compact.

a. As described in the United States' brief in support of its exception (at 17-20), a New Mexico state court is currently determining the rights to the waters of the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line, including the United States' water rights for the Project. See *New Mexico* v. *Elephant Butte Irrigation Dist.*, CV-96-888 (N.M. 3d Jud. Dist. filed Sept. 24, 1996) (*Lower Rio Grande Adjudication*).[1] The United States initially resisted

[1] Docket entries for the state water adjudication are available at https://lrgadjudication.nmcourts.gov. For documents related to the adjudication of the United States' water right, see Lower Rio Grande Adjudication, *SS-97-104; US Interest (Reverse Chronological Order)*, https://lrgadjudication.nmcourts.gov/ss-97-104-us-interest-

that adjudication—and instead filed a quiet-title action in federal court—on the ground that the Project has interstate and international obligations to deliver water. See U.S. Exception Br. 17 n.8. That view was initially shared by the New Mexico State Engineer, who moved to dismiss the state water adjudication on the ground that the state court did not have jurisdiction over Project water users in Texas, who, he argued, were indispensable parties. See *United States* v. *City of Las Cruces*, 289 F.3d 1170, 1178 (10th Cir. 2002) (discussing motion to dismiss state-court proceedings). The State Engineer later realigned as a plaintiff and commenced the current general stream adjudication only after the state court denied that motion. *Ibid.*

In quantifying the Project's water right in the state-court proceeding, the United States requested that the Project's water right should include "a right to deliver to Mexico" and "a right to deliver to Project facilities in Texas" an amount of up to 376,000 acre-feet per year, as recognized by a Texas water-rights decree. U.S. Mem. in Supp. of Mot. for Summ. J. 2, 28, *Lower Rio Grande Adjudication*, *supra* (filed Apr. 24, 2013). The New Mexico court concluded, however, that "[a]djudicating the specific quantity of 376,000 acre-feet for delivery within Texas is outside the scope of the elements that can properly be determined in this proceeding," and it did not mention the Project's need to deliver water to Mexico. Order 4, *Lower Rio Grande Adjudication*, *supra* (filed Feb. 17, 2014). Those rulings in the state water adjudication highlight the need for this Court to define Texas's equitable apportionment under the Compact and the protection under the Compact for the United

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reverse-chronological-order.aspx (last visited July 28, 2017) (online docket).

States' treaty obligation to deliver water to Mexico. Once the characteristics of Texas's equitable apportionment and protection for the treaty obligation are determined in these proceedings, the New Mexico state court must respect those rulings as it adjudicates water rights in the New Mexico portion of the Rio Grande Basin. This original action will thus inform the state water adjudication, not usurp it.

Without this Court's protection of Texas's equitable apportionment, New Mexico would not be constrained by anything other than its own interpretation of state law and the Compact from allowing Texas's allocation of Project water from Elephant Butte Reservoir to be diminished based on asserted state-law rights of New Mexico water users to take surface water or pump hydrologically connected groundwater outside the framework of the Project. The Master correctly recognized that definitive resolution of questions about the respective rights (and protection of the rights) of signatory States to water apportioned by the Compact, including rights to the water that is mandated by compact to be delivered by the Project, "must be decided pursuant to the original and exclusive jurisdiction of th[is Court]" in a case in which all the affected States are parties—not by a New Mexico state court. Rep. 216.

b. As described in the United States' brief in support of its exception (at 18-19), the state water-adjudication court has concluded that the United States' water right for the Project is a surface right only, and that the Project is not entitled to "groundwater." See Order Granting the State's Mot. to Dismiss the U.S. Claims to Groundwater and Denying the U.S. Mot. for Summ. J., *Lower Rio Grande Adjudication*, *supra* (filed Aug. 16, 2012) (8/16/12 Order). The court acknowledged that

there is "an interactive relationship between groundwater and surface water" in the Rio Grande downstream of Elephant Butte Reservoir, but the court stated that New Mexico law "nevertheless recognizes surface water and groundwater as distinct entities with distinct administrative schemes." *Id.* at 4.

The state court further concluded that under New Mexico law, when surface water, "through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under [New Mexico law] and are subject to appropriation in accordance with applicable statutes." 8/16/12 Order 7 (quoting *Kelley* v. *Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966) (per curiam)). Thus, under the court's ruling, the protection of Project seepage and return flow in the ground from appropriation can only be had upon an administrative determination by the State Engineer that the water has not "lo[st] its identity as [Project] surface water." *Ibid.* (citation omitted).

New Mexico and its amici contend that this Court should "preclude the United States from attempting to use this forum to relitigate settled issues regarding the nature and scope of its Project right." N.M. Exceptions Br. 56; see City of Las Cruces Amicus Br. 29-37; N.M. State Univ. Amicus Br. 31-37.[2] But this Court is not be-

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[2] The issues in the state water adjudication are not in any event "settled," N.M. Exceptions Br. 56, because no final judgment has been entered in the New Mexico state water adjudication. Once a final judgment has been entered, the United States will have the right to appeal. See Order Granting Mot. to Temporarily Suspend Proceedings for Sixty Days, *Lower Rio Grande Adjudication*, *supra* (filed July 7, 2017).

ing asked to determine or redetermine the Project's water right under New Mexico state law without regard to the Compact, nor did the Master conclude that New Mexico is without authority to conduct its state water adjudication. The Court is being asked, however, to define Texas's equitable apportionment of Rio Grande water under the Compact and the United States' ability under the Compact to satisfy its obligations to Project users, including deliveries to Mexico. Absent the Compact, New Mexico state law—to the extent not inconsistent with other federal law applicable to the Project—might permit New Mexico water users to pump groundwater in the area below Elephant Butte Reservoir that is hydrologically connected to the Rio Grande, and several of New Mexico's amici pump groundwater in that area. See, *e.g.*, N.M. State Univ. Amicus Br. 6-14, 24-30. In its complaint in intervention, however, the United States alleged that such groundwater pumping downstream from Elephant Butte Reservoir has intercepted or interfered with groundwater hydrologically connected to the Rio Grande, including Project seepage and return flows, to the detriment of Project deliveries. See U.S. Compl. ¶¶ 11, 13-15. The Compact necessarily limits the extraction of hydrologically connected groundwater to the extent that the groundwater is necessary for the Project to make deliveries in response to irrigation demands. See Art. I(k) and (*l*), 53 Stat. 786.

The merits of the complaints are not yet before the Court, nor has there been any factual development of the claims brought by Texas and the United States. The Court need not, as New Mexico requests (Exceptions Br. 56-57), impose vague limitations on the United States' role in this case that would preclude it from litigating issues related to the Project's water right. It is

appropriate for this Court to define Texas's equitable apportionment under the Compact and the United States' rights under the Compact to satisfy the requirement of the Project, and those rulings must be respected in the New Mexico water adjudication.

### C. The Special Master Did Not Conclude That The Doctrine Of Equitable Apportionment Eliminates New Mexico's Authority To Administer Water Rights Below Elephant Butte Reservoir

New Mexico contends (Exceptions Br. 42-48) that the Master erred in concluding that an equitable apportionment of the Rio Grande "supersedes New Mexico's sovereignty over" Rio Grande water below Elephant Butte Reservoir. *Id.* at 2. New Mexico explains that under *Hinderlider* and *Alamosa-La Jara Water Users Protection Ass'n* v. *Gould*, 674 P.2d 914 (Colo. 1983) (en banc) (*Alamosa-La Jara*), the Rio Grande remains subject to New Mexico's authority to administer water rights within its borders, "both to ensure compliance with the [Compact's equitable] apportionment and to enforce state law and state appropriations where this does not directly conflict with the terms of the apportionment." N.M. Exceptions Br. 47.

The Master's decision should not be read to be inconsistent with *Hinderlider*, which the Master cites (along with *Alamosa-La Jara*) in the portion of his Report discussing equitable apportionment. See Rep. 211-213, 216. Nor should it be read to mean that New Mexico has no authority to administer water rights within New Mexico below Elephant Butte Reservoir. The Master's discussion of the effect of the equitable apportionment (Rep. 210-217) is best understood as requiring New Mexico to respect the Compact in its administration of

state law. Indeed, the Master noted that the New Mexico State Engineer has promulgated rules to ensure compliance with the Compact, and the Report explains that New Mexico, "like the Colorado State Engineer in [*Alamosa-La Jara*], is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir" that is incorporated into the Compact. Rep. 217.

In the context of the entire Report, the Master's statement that "state law applies only to the water which has not been committed to other states by the equitable apportionment" should be read to mean that New Mexico cannot administer water rights in a way that conflicts with the Compact's equitable apportionment. Rep. 216 (citations omitted). New Mexico is situated no differently from its upstream neighbor Colorado, which also has to act beyond the ordinary priority framework under state law to meet its obligations under the Compact. See *Hinderlider*, 304 U.S. at 106-107; *Alamosa-La Jara*, 674 P.2d at 921, 923. Although New Mexico, by entering into the Compact, has agreed to certain limits on how it may exercise its authority over water within the State, neither the Compact nor the Report deprive New Mexico of jurisdiction over Rio Grande water in New Mexico. The extent of the limitations imposed by the Compact will be determined in this proceeding.

## II. THE UNITED STATES IS NOT LIMITED TO SEEKING RELIEF BASED ON THE PROTECTION OF ITS TREATY OBLIGATIONS

A. Colorado contends (Exceptions Br. 5-9) that the United States should be allowed to proceed as a plaintiff only to protect its interest in complying with the 1906 Treaty with Mexico. See *id.* at 5 ("[C]onsideration of

the United States' claims based on the 1906 [Treaty] is necessary."). Colorado takes exception to the Master's Report "to the extent it recommends allowing the United States to bring other claims that are not based on the 1906 [Treaty]." *Ibid.* The United States opposes that exception.

Colorado contends (Exceptions Br. 5) that the United States' non-treaty claims are "based on contracts" between the Bureau of Reclamation and water districts in New Mexico and Texas for delivery of Project water. Characterizing the United States' allegations concerning New Mexico's interference with Project deliveries as "contract claims," Colorado asserts (*id.* at 8) that the Court may need to join the water districts as parties to resolve claims based on those contracts. The United States, however, is not seeking to enforce or interpret its contracts with the water districts through this litigation.

The United States described its contracts with the water districts in its complaint in intervention in order to explain the unique federal interest that is impaired by New Mexico's violation of the Compact and the nature of the problem being created for the Project, which is incorporated into the Compact, by the diversion of surface water and pumping of hydrologically connected groundwater downstream of Elephant Butte Reservoir. See U.S. Compl. ¶¶ 8, 12-15. New Mexico's Compact violations interfere with Project operations by which the United States makes deliveries pursuant to contract. But it is the Compact, not the contracts, that defines the state obligations at issue here. Thus, the Master correctly observed that "the contracts between the state water improvement districts and the United States for the management of the Project are not at issue here."

Rep. 272. "Rather," the Master explained, "this case centers squarely on the * * * rights and duties of the sovereign signatory States under the Compact." *Ibid.* The United States asserts that the actions of water users in New Mexico interfere with Project deliveries that are protected by the Compact. U.S. Compl. ¶¶ 13-15. The United States is entitled to present that issue and to seek appropriate relief to protect its sovereign interests in the Project's operation. See U.S. Exception Br. 39-40.

B. Colorado further contends (Exceptions Br. 8) that allowing the United States to proceed on claims that New Mexico's actions harm the Project "may risk allowing the United States to take a position contradictory to the signatory States regarding Rio Grande Compact obligations," which Colorado states would "undermin[e] the positions of the actual parties." The possibility of such a difference in legal positions is not a valid reason to limit the United States' role as a party-plaintiff in this original action.

To effectuate an equitable apportionment of the waters of the Rio Grande, the compacting States incorporated and relied upon an existing federal reclamation project "as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204. The United States agreed to that arrangement through congressional approval of the Compact. 53 Stat. 785. The United States' ability to protect the integrity of Project operations that are incorporated into the Compact's equitable apportionment framework is a distinctive federal interest that warranted the United States' intervention in this case. See *Maryland* v. *Louisiana*, 451 U.S. 725, 745 n.21 (1981).

Indeed, the Project's central role in effectuating the Compact's apportionment framework renders the United States' participation and willingness to be bound by any order in this case essential to the Court's ability to resolve the dispute among the compacting parties. In its brief opposing Texas's motion for leave to file a complaint, New Mexico explained that "[t]he United States is ultimately responsible for release and delivery of Project water * * * in both New Mexico and Texas," and that "[a]ny decree entered in the absence of the United States would not be binding on the United States or be determinative as to the delivery of Project water below Elephant Butte Reservoir." N.M. Br. in Opp. 33-34; see U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 5-6 (explaining that the Court's interpretation of the Compact in this case would affect the assumptions underlying Reclamation's calculation of diversion allocations between the water districts served by the Project). The United States has intervened and subjected itself to this Court's jurisdiction to permit a full resolution of the dispute among all parties over the interpretation of the Compact. U.S. Mem. in Supp. of Mot. for Leave to Intervene as Pl. 10. It is not required to stand on the sidelines while the States decide how the Project should operate.

C. Colorado further contends (Exceptions Br. 5-8) that the United States' intervention in this case beyond seeking protection of its obligations under the 1906 Treaty is unwarranted because its claims otherwise overlap with those of Texas and thus can be resolved among the States. That argument should be rejected.

Nothing in this Court's cases provides that the United States is prohibited from protecting distinct federal interests that are at stake in an original action to

the extent its claims overlap with those of a State. And in any event, it remains to be seen whether the interests of Texas and the United States are completely aligned. Texas seeks relief related to Project water deliveries to Texas, but the Project is an interstate operation that delivers water to irrigation districts in both Texas and New Mexico, and the federal interest therefore extends to protection of Project deliveries in both States. Furthermore, Texas contends that New Mexico's water use below Elephant Butte Reservoir cannot alter "the conditions that existed in 1938 when the Compact was executed," Tex. Compl. ¶ 18, while Reclamation currently calculates Project releases pursuant to a settlement agreement with the water districts using a regression analysis that shows how much water should be available for delivery, accounting for return flows, from a given volume of water released from Project storage based on 1951-1978 hydrological conditions. See U.S. Exception Br. 11-12 (citing Bureau of Reclamation, U.S. Dep't of the Interior, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement* 6-8 (Sept. 30, 2016)).[3] The United States, as a party-plaintiff in this case, is not required to rely on Texas to enforce the Compact's protection of the Project.

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[3] Available at https://www.usbr.gov/uc/envdocs/eis/pdf/2008OperatingAgreementRioGrandeEIS_Final.pdf.

## III. THE PLEADINGS ARE SUFFICIENT TO SUPPORT THE DENIAL OF NEW MEXICO'S MOTION TO DISMISS WITHOUT RELIANCE ON CONTEXTUAL DISCUSSION IN THE REPORT

New Mexico and Colorado, joined by amici, raise concerns that the Master conducted an independent investigation into the history of the Compact and made findings and conclusions based on documents that he located on his own, which the parties did not have an opportunity to analyze. See Colo. Exceptions Br. 9-12; N.M. Exceptions Br. 49-55; Albuquerque Bernalillo Cnty. Water Util. Auth. Amicus Br. 16-23; City of Las Cruces Amicus Br. 15-20; N.M. Pecan Growers Amicus Br. 8-16. As New Mexico and Colorado recognize (Colo. Exceptions Br. 3; N.M. Exceptions 1), the Master's recommendations may be adopted without reliance upon those materials.

In original actions, the Federal Rules of Civil Procedure "may be taken as guides." Sup. Ct. R. 17.2. This Court has stated that a court deciding a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), should consider the complaint, "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). Federal Rule of Civil Procedure Rule 12(d) provides that if, on a motion to dismiss under Rule 12(b)(6), matters outside the pleadings "are presented to and not excluded by the court," the motion must be treated as one for summary judgment and "[a]ll parties must be given a reasonable opportunity to present all the material that is pertinent to the motion." Fed. R. Civ. P. 12(d).

In the Report, the Master provided quite a substantial historical account of the events preceding the adoption of the Compact by the States and its approval by Congress. Rep. 31-187. The Master explained that he "recount[ed] the relevant legislative and negotiating history in order to give the Compact context." Rep. 193. He specifically stated, moreover, that "nothing detailed [in the Report] should be construed as fact finding violative of Fed. R. Civ. P. 12," because "nothing in the historical record was dispositive regarding the ultimate recommendations of the [R]eport." Rep. 193. The Master's reasoning supports that statement.

In the Report, the Master analyzed the text and structure of the Compact and concluded that Texas had stated a claim upon which relief can be granted based on those considerations alone. Rep. 194-203. The Master explained that "[b]ecause the text and structure of the 1938 Compact unambiguously protect the administration of the Rio Grande Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments of the stream, no need exists to rely upon the history of the 1938 Compact to interpret that language." Rep. 203. The historical materials were therefore not necessary to the Master's recommendation; they merely "confirm[ed] the reading that the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204; see Rep. 203-209.

Of course, it is not unusual for a court to recite the historical context for a dispute, including by reference to applicable statutes and treaties, relevant legislative history, and official government reports or other materials of which a court may take judicial notice. There is

no reason why such materials may not be considered here. But in any event, to resolve the motions to dismiss that are currently pending before this Court, the Court must determine whether the pleadings of Texas and the United States state a claim upon which relief can be granted. The Court need not rely on the full range of historical materials cited by the Master in his Report to decide that question. The documents cited by the Master can be analyzed and supplemented by the parties during further briefing or discovery as the case proceeds, which all parties agree that it should. By the same reasoning, the Court need not address the additional factual allegations and materials set forth in amicus briefs in support of New Mexico's exceptions. See City of Las Cruces Amicus Br. 21-29; N.M. Pecan Growers Amicus Br. 8-16. The parties will have an opportunity to present and analyze all of the relevant documents and other materials as the case proceeds.

## CONCLUSION

The exceptions of New Mexico and Colorado to the Special Master's First Interim Report should be overruled.

Respectfully submitted.

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