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.

OFFICE OF THE SPECIAL MASTER

JOINT REPLY OF THE COMPACTING STATES IN SUPPORT OF JOINT MOTION TO ENTER CONSENT DECREE SUPPORTING THE RIO GRANDE COMPACT

February 3, 2023

STUART L. SOMACH, ESQ.* FRANCIS M. GOLDSBERRY II, ESQ. THERESA C. BARFIELD, ESQ. SARAH A. KLAHN, ESQ. RICHARD S. DEITCHMAN, ESQ. SOMACH SIMMONS & DUNN, PC 500 Capitol Mall, Suite 1000 Sacramento, CA 95814 Telephone: 916-446-7979 ssomach@somachlaw.com **Counsel of Record* KEN PAXTON Attorney General of Texas BRENT WEBSTER First Assistant Attorney General GRANT DORFMAN Deputy First Assistant Attorney General SHAWN COWLES Deputy Attorney General for Civil Litigation WILLIAM F. COLE Assistant Solicitor General BEAU CARTER Assistant Solicitor General PRISCILLA M. HUBENAK Chief, Environmental Protection Div. OFFICE OF THE ATTORNEY GENERAL OF TEXAS P.O. Box 12548 Austin, TX 78711-2548 *Counsel for the State of Texas*	RAÚL TORREZ New Mexico Attorney General JAMES GRAYSON Chief Deputy Attorney General ZACHARY E. OGAZ Assistant Attorney General STATE OF NEW MEXICO BENNETT W. RALEY LISA M. THOMPSON MICHAEL A. KOPP Special Assistant Attorneys GENERAL TROUT RALEY 1120 Lincoln St., Suite 1600 Denver, CO 80203 JOHN B. DRAPER General Special Assistant Attorney CORINNE E. ATTON DRAPER & DRAPER LLC 325 Paseo De Peralta Santa Fe, NM 87501 JEFFREY J. WECHSLER* Special Assistant Attorney General SHELLY DALRYMPLE KALEB W. BROOKS MONTGOMERY & ANDREWS, P.A. 325 Paseo de Peralta Santa Fe, NM 87501 505-986-2637 jwechsler@montand.com **Counsel of Record* *Counsel for the State of New Mexico*

PHILIP J. WEISER
Attorney General of Colorado
LAIN LEONIAK
First Assistant Attorney General
CHAD M. WALLACE*
Senior Assistant Attorney General II
PRESTON V. HARTMAN
Assistant Attorney General

COLORADO DEPARTMENT OF LAW
1300 Broadway, 7th Floor
Denver, CO 80203
Telephone: 720-508-6281 (Mr. Wallace)
chad.wallace@coag.gov
**Counsel of Record*

Counsel for the State of Colorado

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The State of Texas (Texas), State of New Mexico (New Mexico), and State of Colorado (Colorado) (collectively, the "Compacting States"), through undersigned counsel, reply to the United States' Memorandum in Opposition to the Compacting States' Joint Motion to Enter Consent Decree (Jan. 20, 2023) ("U.S. Opp'n" or "Opposition") and in further support of the Memorandum of Points and Authorities in Support of the Joint Motion of Texas, New Mexico, and Colorado to Enter Consent Decree Supporting the Rio Grande Compact (Nov. 14, 2022) (hereinafter "States Joint Motion" or "Joint Motion") as follows:

I. STANDARD OF DECISION

There is no dispute concerning the appropriate standard of decision. The Compacting States have the burden to show that the proposed Consent Decree "spring[s] from and serve[s] to resolve a dispute within the court's subject matter jurisdiction[,]" comes within "the general scope of the case made by the pleadings," and "must further the objectives of the law upon which the complaint was based." *Local No. 93, Int'l Asso. of Firefighters, etc. v. City of Cleveland*, 478 U.S. 501, 525 (1986) (*Local No. 93*) (quoting *Pac. R.R. v. Ketchum*, 101 U.S. 289, 297 (1880)). This burden includes demonstrating that the Consent Decree is "fundamentally fair, adequate and reasonable." *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990); *see also City of Bangor v. Citizens Communs. Co.*, 532 F.3d 70, 93 (1st Cir. 2008). After the Compacting States make their prima facie case, the burden shifts to the United States on any objections. *See United States v. Oregon*, 913 F.2d 576, 581 (9th Cir. 1990). To defeat the Consent Decree, the United States must show that its entry would result in legal prejudice to the United States' interests. *See Johnson v. Lodge of the FOP # 93,* 393 F.3d 1096, 1107 (10th Cir. 2004) (*Johnson v. Lodge # 93*); *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998) ("[A] consent decree requires the consent of all parties whose legal rights would be adversely affected by the decree.").

II. SUMMARY OF RESPONSE TO QUESTIONS PRESENTED

The Compacting States provide the following summary of their response to the four questions that the Special Master identified in his Order on the Motion to Unseal and the Motion to Strike (Dec. 30, 2022 Order, Dkt.[1] 742). The Special Master's questions are also answered through the States' argument that follows.

A. The United States, as an Intervening Party, has not Demonstrated Legal Prejudice Sufficient to Block Entry of the Consent Decree

The first issue that the Special Master requested the parties address is "the propriety of entering the Decree over an intervening party's objection." (Dec. 30, 2022 Order, Dkt. 742 at 4). *Johnson v. Lodge # 93* supplies the standard to determine whether an intervenor's objection prevents the entry of a consent decree. Generally, "a nonconsenting intervenor may block approval of a consent decree only if the decree adversely affects its legal rights or interests." *Johnson v. Lodge # 93,* 393 F.3d at 1107.

The United States alleges that the Consent Decree fails this test in two respects: First, the United States claims that the Consent Decree improperly disposes of its "Compact claims." *See* U.S. Opp'n §§ I-II. Second, the United States alleges that the Consent Decree would improperly "impose obligations" on it. *See id.* § III. Both arguments fail when measured against the standard in *Johnson v. Lodge # 93.*

First, the Consent Decree does not dispose of any Compact claims of the United States. *See* Argument § III.A., *infra.* The United States contends it has a "Compact claim" against New Mexico for violation of a "Compact-level" duty to protect the Rio Grande Project. U.S. Opp'n at 19. However, interference with the Project is only a Compact claim to the extent New Mexico

[1] All further references to the Special Master Docket number, unless otherwise indicated are defined as "Dkt. No."

impedes the ability of the United States to deliver to Texas its apportionment or to Mexico its due under the 1906 Treaty. Special Master's May 21, 2021 Order on the motions for summary judgment (MSJ), Dkt. 503 at 48 ("The Compact imposes on New Mexico a duty to employ its laws to protect Compact deliveries to Texas and treaty deliveries to Mexico."). The United States has no valid claim with respect to the amount of the delivery to Texas because it has not demonstrated that it has a legal right to demand that Texas receive a greater apportionment than what the Consent Decree would provide. Whatever "Compact claim" the United States could articulate with respect to deliveries to Texas is wholly derivative of Texas's claim.

Likewise, the United States has not articulated any argument or adduced any evidence demonstrating that the Consent Decree would affect its deliveries to Mexico in any adverse manner. All that remains, then, is interference that may affect deliveries within New Mexico. The United States' claims in that respect do not arise under the Compact. Instead, they arise under New Mexico state law. *See* MSJ Order at 48 ("New Mexico's sovereign laws apply to define the relative rights between New Mexicans as to their respective share of New Mexico's overall Compact apportionment."). The Consent Decree does not prejudice the United States' right to seek remedies for interference with deliveries within New Mexico under state law or Reclamation law.

Second, the Consent Decree does not "impose obligations" on the United States. *See* Argument § III.C., *infra*. As a formal matter, the Consent Decree does not enjoin the United States or seek any relief against the United States. Rather, the Court and the Special Master have already ruled, and the United States has conceded, that the United States has an *existing* obligation to administer the Project in a manner that is consistent with the Compact, including effectuating the apportionment under the Compact. The Consent Decree merely establishes a

mechanism to precisely measure compliance and to ensure that both Texas and New Mexico receive their respective apportionments. If the United States exercises its discretion to operate the Project in a manner inconsistent with the Consent Decree, then an action may lie under the Administrative Procedures Act or another statute to enjoin the United States to perform its obligations in a manner consistent with the apportionment, but that question is not before the Court in this proceeding. *See* March 31, 2020 Order, Dkt. 338 at 15.

B. The United States has Adequate Alternative Forums for its Remaining Claims

The second issue that the Special Master requested the parties address is "the nature of the United States' unresolved claims and the availability of alternative forums to address such claims." Dec. 30, 2022, Dkt. 742 Order at 4. As discussed above, the only potentially unresolved claim of the United States following entry of the Consent Decree concerns New Mexico's intrastate water administration and the distribution of New Mexico's apportionment among users within its jurisdiction. These are not interstate issues. Numerous alternative forums are available to resolve these disputes, including the Lower Rio Grande Adjudication and administrative actions before New Mexico's Office of the State Engineer. The United States has not demonstrated that these forums would be inadequate for any reason. *See* Argument § III.A.5.b, *infra*.

There is no further need to litigate "interference" claims related to Texas's apportionment because the Consent Decree ensures that Texas will receive 43% of Project supply under a D2 Condition. The United States does not dispute this, and its argument even implicitly endorses this conclusion when it argues instead that the Consent Decree is *unlawful* under the Compact because it ensures delivery of 43% of Project supply under the D2 Condition to Texas. *See* U.S. Opp'n § IV.

C. The Supreme Court Regularly Retains Jurisdiction to Enforce Interstate Decrees in its Original Jurisdiction

The third issue the Special Master requested for briefing was "the anticipated future involvement of the Supreme Court if jurisdiction is retained as per the Decree." (Dec. 30, 2022 Order, Dkt. 742 at 4.). The Supreme Court has entered similar provisions in other original actions. See Argument § III.D.3., *infra*. The Consent Decree does not, as the United States suggests, envisage the Court's taking a role with oversight of routine and ministerial functions. Instead, the provision preserves the Court's adjudicatory role with original and exclusive jurisdiction over a dispute between the Compacting States or a violation of the Decree.

D. The 2018 Supreme Court Opinion Prevents the United States from Expanding the Scope of This Litigation

The fourth issue on which the Special Master requested briefing was "the effect of the Supreme Court's statements in its 2018 opinion permitting the United States to intervene as a party in part because of its alignment with Texas and in part because it was not attempting to expand the issues being litigated beyond those raised by the States." (Dec. 30, 2022 Order, Dkt. 742 at 4.) (citing *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018)).

The Supreme Court's opinion precludes the United States' attempt, through its opposition to the Consent Decree, to expand the claims at issue in this litigation beyond the narrow Compact apportionment claims that Texas brought against New Mexico. *See* Argument § III.A.6., *infra*. The 2018 Supreme Court opinion limits the United States' intervention to claims that "parallel" Texas's claims and those that do not expand the litigation. *See Texas v. New Mexico*, 138 S. Ct. at 960 ("This case does not present the question of whether the United States could initiate litigation to force a State to perform its obligations under the Compact *or* expand the scope of an existing controversy between the States.") (emphasis added). Thus, the scope of the United States' claims in this case has always been limited to issues related to

interference with Texas's Compact apportionment. As described in the Texas Brief on this point, filed separately,[2] Texas may settle its claims with respect to that interest irrespective of the United States' objections. The United States has not identified any other "distinctly federal interest" associated with the Compact, and the resolution of this dispute via the Consent Decree will not extinguish any Compact claims of the United States.

III. ARGUMENT

In its Opposition, the United States presents, in effect, four arguments against entry of the Consent Decree: (1) the Consent Decree would improperly dispose of the United States' "Compact claims" (U.S. Opp'n §§ I-II); (2) the Consent Decree is inconsistent with the Compact and federal law (*id.* § IV); (3) the Consent Decree impermissibly establishes legal obligations for the United States without its consent (*id.* § III); and (4) the Consent Decree is unreasonable and unfair (*id.* § V). The United States is wrong on each point.

A. The Consent Decree Would Not Dispose of any "Compact Claims" of The United States

The first and most fundamental objection that the United States raises to the Consent Decree is that the Compacting States' agreement would somehow dispose of the United States' separate "Compact claims." *See* U.S. Opp'n, §§ I-II. This argument is fundamentally misconceived. The United States has not pled, and has not sought leave to file, any "Compact claim" that it may independently maintain separate and apart from Texas's claims. Any independent claims the United States has articulated in the opposition would survive the Consent Decree and may be litigated in other forums.

[2] "The State of Texas's Response to Question Number 4 in the Special Master's December 30, 2022 Order, Supporting the Compacting States' Joint Motion to Enter Consent Decree" (Texas Brief), filed contemporaneously with this Joint Reply.

1. The United States Has Not Articulated Any Relief to Which it is Entitled Under the Compact that the Consent Decree Would Not Supply

In the Joint Motion, the Compacting States describe at length the legal relationship between the United States and the Compact and show that upon entry of the Consent Decree, the United States will have no remaining Compact claims and that any remaining claims are *intrastate* in nature. Joint Motion at 47-55. In its opposition, the United States resists this characterization (U.S. Opp'n at 20-24), but remarkably, it never articulates relief to which it claims to be entitled as a matter of Compact law that the Consent Decree does not supply. The United States is entitled to *no* specific relief under the Compact. Rather, the role of the United States is to ensure that the equitable apportionment is delivered.

2. The Only Claim for Which the United States Was Granted Leave to Intervene is that New Mexico Interferes with its Ability to Deliver the Texas Apportionment

As the United States recognizes, the Supreme Court found that the allegations in its complaint "parallel Texas's" that New Mexico interfered in the delivery of Texas's apportionment. *See, e.g.,* Texas's Complaint, Dkt. 63, ¶¶10, 11, 18, 19, 21, 22, 23. These allegations were pled both by specific reference to New Mexico's activities and the resulting effect on Texas's apportionment (*e.g., id.* ¶¶ 18, 19) as well as by reference to New Mexico's interference with Project deliveries to Texas beneficiaries (*e.g.*, *id.* ¶¶ 20, 21). By invoking Project operation-related issues that might affect Texas's apportionment, the Texas Complaint did not seek relief for any under delivery to New Mexican water users (and indeed, it is hard to imagine how Texas—in an original action to protect its equitable apportionment—would have standing to bring claims concerning injury to New Mexican interests). Texas's allegations are aimed at supporting a purely *interstate* cause of action, and the United States' involvement is similarly limited.

The "parallel" interstate relief the Court permitted the United States to seek was the Project's ability to deliver of Texas's apportionment and Mexico's treaty water, without interference from New Mexico. The crux of the United States' claim is summarized in paragraph 15 of the Complaint in Intervention in which it claims that groundwater use in New Mexico "could reduce Project efficiency to a point where 43% of the available water could not be delivered to El Paso County Water Improvement County District No. 1 (EPCWID), and 60,00 acre-feet per year could not be delivered to Mexico." Motion of the United States for Leave to Intervene as a Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as a Plaintiff (Feb. 27, 2014). These two types of relief—avoiding interference with delivery of Texas's apportionment and deliveries to Mexico under the Treaty—are the "distinctively federal interests" that the Supreme Court identified as supporting intervention in its 2018 Order. *Texas v. New Mexico*, 138 S. Ct. at 959 (recognizing that the federal government is "'charged with assuring that the Compact's equitable apportionment[]' to Texas and part of New Mexico 'is, in fact, made'" and that "breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations").

Ignoring the Court-imposed limitation that the term "parallel" requires, the United States confounds the Court's characterization of the relationship between the Project and the Compact[3] as an invitation to seek otherwise *intrastate* relief under the guise of an original action. As discussed in more detail in Section III.A.5.b., *infra,* examples of such intrastate relief include claims related to its Project water right (pending before the Lower Rio Grande adjudication

[3] "First, the Compact is inextricably intertwined with the Rio Grande Project and Downstream Contracts . . . . the United States might be said to serve, through the Downstream Contracts, as a sort of 'agent' of the Compact, charged with ensuring that the Compact's equitable apportionment is, in fact made . . . . the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *Texas v. New Mexico*, 138 S. Ct. at 959.

court) or to demand certain types of New Mexico state-law administration on behalf of Elephant Butte Irrigation District (EBID). That was not the intent of the Supreme Court, which cautioned: "[O]ur permission [for the United States to intervene] should not be confused for license." *Texas v. New Mexico*, 138 S. Ct. at 959; *see also id.* at 960 ("This case does not present the question of whether the United States could initiate litigation to force a State to perform its obligations under the Compact ***or*** expand the scope of an existing controversy between the States.") (emphasis added).

3. The United States' "Interference" Claim is Derivative of Texas's Claim

The United States has no interest in the apportionment of water as between Texas and New Mexico, independent of the Compacting States' interests. The United States nonetheless asserts that its claims are "not 'derivative' of any interest or claim of Texas." U.S. Opp'n at 27. It does so without any attempt to reconcile the legal authority set forth in the Joint Brief that is manifestly contrary to that assertion. *See* States Joint Motion at 40-51. The United States does not have any separate apportionment of water under the Compact, it does not represent the interests of individual water users, and its role, as expressly confirmed by this Court, is limited to a quasi-agent to ensure that the equitable apportionment is, in fact, made. *See id*; *see also Texas v. New Mexico*, 138 S. Ct. at 959.

a. The United States Has No Independent Interest in the Equitable Apportionment Below Elephant Butte Under the Compact

The United States largely ignores the analysis presented in the States' Joint Motion establishing that it has no interest in defining the apportionment of water between Texas and New Mexico. *See* States Joint Motion at 40-51. Because the Court approved the United States' intervention to protect "distinctively federal interests," the United States makes a sweeping conclusion that its presence in the lawsuit is not derivative of the Texas claims and that its role

was somehow elevated to having an "interest" in the actual apportionment of water between the Compacting States, as if the United States itself were a compacting party. U.S. Opp'n at 26-28. The argument is insupportable and, indeed, the United States fails to factually or legally defend this position that is contrary to the express terms of the Compact and the pronouncements of the Court.

i. The Compact Does Not Apportion Water to the United States

The Preamble of the Compact states that the apportionment of Rio Grande water is to the Compacting States—not to the United States and not to EBID or EPCWID (collectively the "Districts"). Rio Grande Compact[4] (declaring that the compacting States' purpose for entering into the Compact was to "effect an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas").

The United States is not a party to the Compact, nor does it have the right to any water under the States' agreement. 53 Stat. 785; *see also* First Report, Dkt. 54 at 229-30 ("The United States is not a signatory to the 1938 Compact – indeed, it received no apportionment of Rio Grande water through the compact."). The existence of the Downstream Contracts does not create a legal basis for the United States to dictate the equitable apportionment. In order to effect an equitable apportionment, the Compact must define the *rights of the Compacting States* and allow each State to understand how much water it is entitled to use. A specific division among the States is necessary because water users in New Mexico and Texas—that is, the individual beneficiaries of the Project in EBID and EPCWID—receive their State-based water rights directly from the States' apportionments. *See Hinderlider v. La Plata River & Cherry Creek*

[4] 76 P.L. 96, 53 Stat. 785, 76 Cong. Ch. 155.

Ditch Co., 304 U.S.92, 106 (1938) (*Hinderlider*); *Nebraska v. Wyoming*, 325 U.S. 589, 627-29 (1945) (*Nebraska v. Wyoming II)*; *Wyoming v. Colorado*, 309 U.S. 572, 579 (1940).

Although the United States argues, without analysis, that the Court rejected this position in its 2018 Decision (U.S. Opp'n at 34), nothing in Justice Gorsuch's opinion or the Special Master's March 31, 2020 Order undermines or contradicts the fundamental principle that the Compacting States, not the United States, are the only parties to, and beneficiaries of, the Compact. *See Texas v. New Mexico*, 138 S. Ct. at 958 (warning that the admission of the United States into this action should not be confused with "license" to intervene in any compact enforcement action); April 14, 2020 Order, Dkt. 340 at 3-4.

The United States' implicit argument is that the Compacting States cannot claim *any specific* apportionment of water below Elephant Butte Reservoir. Rather, according to the United States, only Reclamation and the Districts have the power and discretion to adjust the division of water pursuant to the Downstream Contracts, limited only by Reclamation law. This erroneous argument is made explicit in the EPCWID amicus brief. Brief of Amicus El Paso County Water Improvement District No. 1 in Opposition to the Joint Motion to Enter Proposed Consent Decree (Jan. 20, 2023), Dkt. 752 (EPCWID Amici Opp'n) at 15 ("The apportionment was to the Project."). Moreover, this argument is foreclosed by the decision to deny New Mexico's Motion to Dismiss. In that motion, New Mexico argued as EPCWID does here, that Reclamation Law, rather than the Compact, defines the division of water below Elephant Butte Reservoir. The Court denied New Mexico's Motion to Dismiss on this theory, thus establishing that the Compact, rather than Reclamation law, defines the specific apportionment as between Texas and New Mexico. *See Texas v. New Mexico*, 138 S. Ct. 349 (Mem.) (2017); *see also,* MSJ Order, Dkt. 503 at 18-19 (reasoning that the Compact did not merely "require the delivery of

water into the Reservoir without further concern for, or reference to, how downstream water use might affect all three states").

ii. The Compacting States, Not the United States, Represent the Interests of Water Users in Their Respective Jurisdictions

In dividing the flow of interstate waters through equitable apportionment, it is the states that represent the interests of the water users in their respective jurisdictions in a quasi-sovereign capacity, *not the United States*. *See Hinderlider*, 304 U.S. at 107; *see also* MSJ Order, Dkt. 503 at 51 ("New Mexico represents the interests of all New Mexicans (fictional or natural, including EBID) as *parens patriae* in this Compact action"). There is a "high" threshold to permit intervention by non-state entities into an original jurisdiction action out of "respect for sovereign dignity" *of the States* in representing the interests of their citizens. *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010).

The United States has no interest in the "allocation" of water as between water users in New Mexico and Texas. The right to use water in the Project inures to the benefit of the individual farmers, and the Compacting States represent the water users in their respective jurisdictions *parens patriae*. *See Nevada v. United States*, 463 U.S. 110, 123 (1983) ("The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator."); *see also* Second Declaration of Michael A. Hamman, P.E. in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado for Entry of Consent Decree Supporting the Rio Grande Compact (Hamman 2d Decl.) at Ex., ¶¶ 6-7; Declaration of Estevan R. Lopez, P.E., in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado for Entry of Consent Decree Supporting the Rio Grande Compact (Lopez

Decl.) at Exh., ¶ 17.[5] The United States' only interest in the operation of the Project is to deliver water to individual Project beneficiaries, subject to the appropriation rights of each state. As the United States stated, the "contractual rights and obligations" running between the Project beneficiaries and the United States "are considered only after the respective rights of the States under the Compact—the subject of this original action—are defined." Brief for the United States in Opposition to El Paso County Water Improvement District No. 1's Motion for Leave to Intervene (Jun. 10, 2015)[6] (U.S. Resp. to EPCWID Mot. to Intervene) at 10.

The same point applies to the irrigation districts that receive water from the Project: EBID and EPCWID do not have any interest separate and apart from the Compacting States that may impede this settlement. Their rights may "rise no higher" than their parent States' apportionments. *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935) (*Nebraska v. Wyoming I*).

iii. The United States' Interest in the Apportionment Is Limited to Its Role as an "Agent" of the Compact

In the States' Joint Motion, the States discussed the Court's 2018 Decision regarding the United States' intervention and the express language of the Court as it expressly defined the United States' role as a quasi-agent. Joint Motion at 47-51. The United States attempts to distance itself from the Court's express language by claiming the Court was not actually discussing an agency relationship between the United States and the States. U.S. Opp'n at 29. Rather, according to the United States, the Court was confirming its view that the Downstream Contracts "are the source of the United States' authority and legal obligations with respect to the

[5] The Declarations attached to this Response are directly responsive to the arguments and Declarations appended to the United States' Opposition. They raise no new issues. In the normal course of briefing, the Compacting States object to the United States' request to supplement the record with additional Declarations.

[6] Pleadings filed with the Supreme Court but not lodged with the Special master do not include docket number references.

delivery of water." U.S. Opp'n at 30. From there, the United States concludes that it has a federal interest in "protecting Project deliveries under the Downstream Contracts." *Id.* In effect, the United States claims the right to control the Compact apportionment through its operation of the Project, regardless of its responsibility under the Downstream Contracts to *deliver* the water.

The Court was clear that the United States' interest is that of a quasi-agent under the Compact. *Texas v. New Mexico*, 138 S. Ct. at 959. To effect an equitable apportionment, the Compact must define the rights of the States so that each State understands how much water it is entitled to use. *E.g.*, Connor B. Egan, *Shaping Interstate Water Compacts to Meet the Realities of the Twenty-First Century*, 6 Ky. J. Equine, Agric. & Nat. Resources L. 327, 331 (2014) (apportionment "establish[es] a permanent distribution of the interstate water"). The United States' theory is inconsistent with this bedrock principle because it would allow Reclamation and the Districts to adjust the division of water without limitation. Its limited role as the putative agent cannot conceivably give the United States, an interest in *defining* the division of water to the Compacting States, as the principals, under the Compact.

As explained in detail in the States' Memorandum, Texas has determined that deliveries in accordance with the proposed Index are sufficient to satisfy its apportionment under the Compact. The United States has no interest to assert that some greater amount must be delivered to lands in Texas under the Compact; its interest and its Compact role is limited to ensuring that the Index delivery "is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959.[7]

[7] Further, if New Mexico's obligation is a non-discretionary duty to avoid interference with Texas's apportionment arises from the use of the term "deliver" in the Compact (*see,* MSJ Order, Dkt. 503 at 5), the Project's role to deliver Texas's apportionment is similarly non-discretionary.

iv. The United States Has Not Articulated Any Colorable Interest in a 1938 Condition Apart from Texas's Apportionment Claim

Nonetheless, throughout its opposition brief, the United States argues that a 1938 Condition is the required baseline condition to protect Project operations, and that, absent this condition, the United States would be unable to fulfill its contractual obligations. *See, e.g.,* U.S. Opp'n at 27-28 (claiming that the United States' obligations under the Downstream Contracts grant it an interest in the "precise division of water" as between Texas and New Mexico and give it a distinct interest in a "1938 baseline"). This argument fails for two reasons: (1) the United States has not identified a single contractual obligation to make deliveries to Project beneficiaries pursuant to a 1938 Condition, and (2) it presented no evidence at the first phase of trial substantiating its alleged interest in a 1938 Condition.

(a) The United States Has No Interest in the 1938 Condition Under the Downstream Contracts

The United States argues it has an interest, distinct from Texas's, in litigating the 1938 Condition to ensure it can satisfy its downstream, Project-level duties. *See* U.S. Opp'n at 2 (arguing the proposed consent decree would not be a "fair, adequate, or reasonable resolution of this Compact dispute [because] [t]the proposed consent decree would adopt a 'D2 condition' rather than something akin to a '1938 condition'"). According to the United States, such a "substantial compromise [i.e., using a D2 Condition] . . . would authorize New Mexico to take even more of the Project's water away . . . in derogation of the need for enduring protection of the Project and the United States' contractual obligations." *Id.*; *see also id.*, 47-48.

Conspicuously absent from these arguments is any explanation of where the United States' interest in delivering a specific *amount* of Project supply to Texas is derived, outside of Texas' Compact apportionment. The United States' only source for its claim to a 1938 Condition is the Downstream Contracts. The United States, however, fails to provide any

argument as to how the Downstream Contracts obligate the United States to deliver Project supply consistent with a 1938 Condition. The reason for this omission is obvious—the Downstream Contracts do not provide for a specific amount of Project delivery.

The Downstream Contracts do not dictate any specific amount of water at all. At most, the Downstream Contracts provide that "distribution of the available supply . . . shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID]." JT-0426 at JT-0426-0001.[8] Given that the Downstream Contracts do not expressly require anything analogous to the 1938 Condition, it is unsurprising the United States presented no evidence at trial whatsoever in support of a 1938 Condition in support of its independent Project interests. In fact, the evidence that the United States disclosed expressly supports the D2 Condition.

(b) The United States Has Not Marshalled Any Evidence in This Litigation in Support of the 1938 Condition

The United States adopted the D2 Condition for Project operations back in the early 1980s and has used the D2 Condition as its "baseline" for Project allocations ever since. The United States outlined its history of using the D2 Condition to establish a 57:43 division in the

[8] To the extent the United States argues that the Consent Decree requires Reclamation to take actions contrary to its obligations under the Downstream Contracts (see, e.g., Palumbo Decl. ¶¶ 7, 14), the United States has not articulated how the Consent Decree has this effect. Further, this contention is incorrect. The Downstream Contracts specify a 57:43 division of water (in the case of water shortage), and this division is what the Consent Decree ensures. *See* Ex. D, Lopez Decl. ¶ 14; States Joint Motion Ex. 6, Barroll Decl., ¶ 25.

"Q (Mr. Somach): Does this contract [JT-426] provide for how payment -- repayment of the project is to be done vis-a-vis what--what repayment by the Elephant Butte Irrigation District is to do vis-a-vis what the Texas District is supposed to do? A (Mr. Esslinger). That's correct. Q. Okay. And is that where the 57/43 percent division derives from? A. Yes, sir." Trial Tr. Vol. III, October 6, 2021.

statement of material facts in its memorandum in support of motion for partial summary judgment briefing as follows:

- ¶ 48. Since the 1980s, Reclamation has used the *D2 Curve* to estimate the amount of Project water that will be available for diversion at Project headings for a given amount of Project release from Caballo Dam, in order to determine the annual diversion allocations to the Districts.
- ¶ 49. The "*D2 Curve*" is a linear regression equation based on project operational data from 1951 to 1978 and is intended to reflect the relationship between the total annual release from Project storage and the total annual project delivery to canal headings on the Rio Grande during that period.
- ¶ 69. Reclamation continues to calculate diversion allocations of Project water based on the split of 57% for EBID and 43% for EPCWID (after subtraction of Mexico's share of the water), which corresponds to the proportion of irrigable acreage in each district.
- ¶ 70. In 2008, Reclamation, EBID, and EPCWID entered into an agreement ("the 2008 Operating Agreement") that defines the procedure for making the Project allocation: (1) Reclamation uses the *D2 Curve* to estimate how much water would be available for delivery, including return flows, from a given volume of water released from the Project under 1951-1978 hydrological conditions.

United States of America's Memorandum in Support of Motion for Partial Summary Judgment, U.S. MSJ, Dkt. 414 at 11-14 (emphasis added).[9]

Contrary to the United States' current claim that the D2 Condition is inconsistent with the Compact, the United States signed the 2008 Operating Agreement utilizing the D2 Condition and confirmed by signing the agreement that it was consistent with the provisions of the Compact. *See* NM-2373[10] 2008 Operating Agreement, § 6.12 ("Nothing herein is intended to alter, amend, repeal, modify, or be in conflict with the provisions of the Rio Grande Compact").

[9] The United States' Statement of Material Facts was slightly amended in its reply in support of its motion for partial summary judgment (filed February 5, 2021), but the cited paragraphs did not change.

[10] The parties' trial exhibits are cited as the party abbreviation (TX, NM, CO, US, or JT) followed by the exhibit number.

After signing the 2008 Operating Agreement, the United States further studied and confirmed use of a D2 Condition as its preferred alternative in its Final Environmental Impact Statement (FEIS) supporting the adoption of the Agreement. NM-0210, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement*, September 30, 2016. The FEIS evaluated implementation of the 2008 Operating Agreement through 2050 and compared the 2008 Operating Agreement preferred alternative to four other alternatives. Notably, the FEIS did not even include operating under a "1938 Condition" in the list of alternatives. The FEIS re-confirms that the D2 Curve was developed by Reclamation and used from 1980-2007, and then Reclamation's 2008 OA adopted operating procedures "largely consistent with prior operating practices during the period 1980-2007" including use of the D2 Curve. *Technical Memorandum* attached to FEIS, *Simulation of Rio Grande Project Operations in the Rincon and Mesilla Basins*, at NM-00210-0222-0223. The FEIS also confirms that in Reclamation's opinion the D2 Condition was consistent with Compact requirements. NM-0210-0043, Section 3.2. Reclamation did note however that "[t]he Rio Grande Compact Commission administers the Compact waters to ensure equitable distribution, *not Reclamation*." NM-0210-0304 (emphasis added). Taken as a whole, Reclamation steadfastly, until its current objection to the Consent Decree, held that utilizing a D2 Condition is consistent with the Compact.

Nor do the United States' expert witnesses support a 1938 Condition theory that it now espouses. Contrary to his declaration appended to the opposition brief, Dr. Ferguson opined in support of the D2 Condition in his expert disclosures:

> Dr. Ferguson concludes that use of the D1 and *D2 Curves is an appropriate basis to determine Project allocations* . . .because the Curves are based on historical Project operations during the period 1951-1978 and were subsequently used as the basis for determining Project allocations during the period from approximately

> 1981-2007. . . Dr. Ferguson concludes that the D1 Curve, as used in the Project allocation procedure, ensures that annual allocations to Mexico under the Operating Agreement are consistent with historical Project operations during the period 1951-1978. . . . Dr. Ferguson concludes that the *D2 Curve reflects* historical gains and losses to the Rio Grande between Caballo Dam and Project diversion headings. Historical gains and losses were influenced by numerous factors, including operation and maintenance of Project facilities, farming and irrigation practices within the Project and surrounding areas, *and groundwater pumping in New Mexico and Texas*.

United States of America's Supplemental Disclosure of Expert Witness Ian M. Ferguson, Sept. 16, 2019, at 5 (emphasis added). Similarly, Mr. Filiberto Cortez, former manager of the El Paso Field Division of Reclamation, confirmed in his declaration signed in 2007 (and re-confirmed in his deposition taken July 30, 2020) that "[t]he actual allocation at the delivery points is calculated from an empirical formula, called the D2 curve, that relates the amount of water released from storage in the reservoirs to the amount of water delivered to the headgate downstream. This calculation is based on actual data derived from over 29 years of observation and record keeping." JT-0443, Affidavit of Filiberto Cortez, (Apr. 20, 2007), ¶ 18.

The United States' sudden admiration for a 1938 Condition to form the States' equitable distribution astounds the Compacting States, as described by Texas's counsel at the December 15, 2022 hearing before the Special Master:

> **MR. SOMACH:** It was the Districts and the United States and the operating agreement that adopted D2 and abrogated the notion of the 1938 Condition. And so it galls me, you know, that there's somehow a notion that Texas has conceded something in the decree when what Texas has done is adopted, in terms of its settlement position, the exact position of the Districts and the United States.

12/15/2022 Hr'g Tr. at 48:15-22. The fact is that the United States' challenge to the Consent Decree is the first time that the United States has articulated, independent of Texas's claims, any federal interest in the concept of a 1938 Condition. By its own conduct, with particular emphasis on its execution of the 2008 Operating Agreement, the United States has consistently approved Reclamation's use of the D2 curve for purposes of Project operations.

In sum, the United States has not marshalled any evidence from any fact or expert witness to support its claims the Downstream Contracts require a 1938 Condition delivery to the Project water users in New Mexico and Texas.

b. The Consent Decree Ensures Texas Will Receive Its Apportionment, Obviating the Need to Further Litigate the "Interference" Claim with Respect to Deliveries to Texas

As discussed above, the United States' only competent Compact claim concerns New Mexico interference with delivery of Texas's apportionment, whether through interference with Project operations or direct interference through New Mexico water users' depletion of Texas's deliveries. There is no further need to litigate this "interference" claim related to Texas's apportionment, however, because the Consent Decree ensures Texas will receive 43% of a D2 Condition. The United States does not dispute this fact. To the contrary, the United States implicitly accepts that the Consent Decree would result in a 57:43 division using a D2 Condition when it argues for a different baseline condition.[11]

Instead, the United States argues that claims regarding New Mexico's interference with any Project operations—including "Project interference" relating to the treatment of EBID in the context of state law water rights administration—should be considered "Compact claims." As shown above, the Supreme Court's 2018 decision may have allowed the United States to intervene due to "distinct federal interests," but as discussed below, there is no interpretation of the 2018 Decision that suggests the phrase "distinct federal interests" authorized the United States to make Compact claims against New Mexico arising out of its intrastate water administration. The Special Master made a similar conclusion in the Order on Summary Judgment: "Although a remedy in this case may impose specific requirements on how a state

[11] The Compacting States further respond to the United States; arguments regarding the lawfulness of the Consent Decree at Argument, § III.B., *infra.*

treats its own citizens, a state's citizens do not enjoy the right to assert Compact claims against their own state, and the United States admission into this action as a party was based, in part on the United States' pursuit of relief substantially similar to the relief sought by Texas." MSJ Order, Dkt. 503 at 52. In the context of this Original Action, if Texas's apportionment is guaranteed by the Consent Decree, no other "interference" with Project operations rises to the level of a Compact concern.

4. The United States Does Not Argue that the Consent Decree Will Impact Deliveries to Mexico

The only colorable "Compact claim" by the United States that is not derivative of the Texas claims is its interest in meeting treaty obligations to Mexico. *See Texas v. New Mexico*, 138 S. Ct. at 959-60. As discussed by the States in the States' Memorandum, the Consent Decree does not implicate this interest. Importantly, the United States does not make any argument that the Consent Decree will impact deliveries to Mexico in its opposition and supporting declarations. As such, the only distinctive federal interest that is not derivative of Texas's claims is not implicated by the Consent Decree and therefore is not a subject of dispute.

5. Setting Aside Deliveries to Texas and Mexico, the Only Remaining Interference Claims Concern Intrastate Water Administration Within New Mexico that Should Be Resolved in Other Forums

Having established that the Consent Decree ensures delivery to Texas its apportionment and does not affect delivery to Mexico, the only remaining claim for Project interference that the United States could articulate concerns deliveries to water users within New Mexico. The United States argues this claim is a "Compact claim" and that the Compacting States have somehow mischaracterized it as "intrastate." *See, e.g.,* U.S. Opposition, § I(B). The United States is fundamentally mistaken. A claim for interference with deliveries *within New Mexico* does not arise under the Compact, and neither the Court nor the Special Master have ever held

otherwise. In the same vein, the United States' claims that there is no adequate alternative forum for its remaining claims. *See id.*, § II(C). This argument fails for much the same reason: the United States' claims concerning deliveries within New Mexico can and should be considered in other forums more suited to resolve disputes over intrastate water use within New Mexico.

a. If the United States Has a Claim for Project "Interference" Preventing Adequate Delivery to Project Beneficiaries Within New Mexico, It Is Not a Claim that Arises Under the Compact

The Compacting States do not dispute that interference by New Mexico with the Project's delivery to water users in Texas rises to a Compact-level concern. *See* MSJ Order, Dkt. 503 at 48 ("The Compact imposes on New Mexico a duty to employ its laws to protect Compact deliveries to Texas and treaty deliveries to Mexico."). The delivery to EBID, however, is fundamentally different. Presuming that the water necessary to deliver the Texas apportionment crosses the state line, the diversion of surface and groundwater within New Mexico is a matter of dividing and distributing New Mexico's apportionment among New Mexico water users. At a basic level, the Compact defines New Mexico's obligations to Texas, not to its own citizens. Those citizens (including EBID) are protected by the laws of the State of New Mexico, and their remedies under state law are separate and apart from the Compact.

An equitable apportionment, whether established by a compact or by the Court's decree, concerns the *inter*state distribution of water among the states, not the intrastate distribution of water among users within a single state. This principle is evident in the Court's steadfast refusal, including in this case, to expand the dispute over an equitable apportionment to consider "intramural" disputes within a single state. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953); *see also United States v. Nevada*, 412 U.S. 534, 538 (1973). The participation of individual water users is unnecessary in an equitable apportionment action because the states represent all their water users *parens patriae*. *See, e.g., New Jersey v. New York*, 345 U.S. at 373

(warning that, if the rule were otherwise, then "a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties); *see also* § III.A.3.a.ii, *supra* (arguing that the Compacting States, not the United States, represent the beneficiaries of the Project). The same principle applies to compacts: the Court has "said on many occasions that water disputes among States may be resolved by compact or decree *without* the participation of individual claimants, who nonetheless are bound by the result reached through representation by their respective States." *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995) (emphasis added) (*Nebraska v. Wyoming III*); *see also Hinderlider,* 304 U.S. at 106-08 (1938); *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

Thus, the resolution of an *inter*state dispute over the equitable apportionment of water need not resolve any *intra*state disputes over distribution within a single state. This is so because the rights of water users within a state, including those benefiting from a Reclamation project, "can rise no higher than those of [their state], and an adjudication of the [state's] right will necessarily bind them." *Nebraska v. Wyoming I*, 295 U.S. at 43. As discussed in the States' Joint Motion (*see* § II(C)), *United States v. Nevada*, 412 U.S. at 536, is particularly instructive in this regard. Nevada and California disputed their respective rights to the Truckee River. The United States sued both states to preserve water levels at Pyramid Lake—a lake within Nevada fed by the Truckee River—in support of a Reclamation Project. *Id.* at 536-37. By the time the Court considered the United States' motion for leave to file its complaint, the two states had settled their dispute by compact. *Id*. at 537. Accordingly, the Court denied the United States' motion. *See id.* The Court reasoned that "Nevada has the right, *parens patriae*, to represent all the nonfederal users in its own State insofar as the share allocated to the other State is

concerned[,]" so the proposed compact between Nevada and California resolved the entire *interstate* dispute concerning equitable apportionment notwithstanding the United States' remaining claims. *Id.* at 539. The United States could pursue those claims in Nevada district court without requiring the involvement of California. *See id.* The result in *United States v. Nevada* accords with the Court's general treatment of settlements in original jurisdiction actions: following resolution of the interstate dispute, any remaining intrastate disputes should be resolved in other forums in the first instance. *See California v. Nevada*, 447 U.S. 125, 133 (1980) (reasoning that, following resolution of a boundary dispute between the states, "litigation in other forums seems an entirely appropriate means of resolving whatever questions remain").

Applying these principles here, the United States' claim concerning the intrastate distribution of water—as between Project and non-Project uses within New Mexico—does not arise under the Compact and need not be resolved in this proceeding. The express purpose of the Compact was to establish an "equitable apportionment" among the Compacting States. 53 Stat. 785.

The United States makes no compelling rebuttal to this point in its Opposition. Indeed, it does not even attempt to distinguish *New Jersey v. New York*, *United States v. Nevada*, *California v. Nevada*, or any of the other cases that the Compacting States discuss in the States' Memorandum for the proposition that the Court need not resolve purely intrastate disputes in this action.

Instead, the United States simply asserts, with no support or analysis, that its claims concerning deliveries to EBID are not intrastate in scope. To this end, the United States misconstrues the Special Master's conclusion that New Mexico has a "Compact-level" duty to prevent interference with a "baseline level of project operations" in Section I(B)(2) of the

Opposition, U.S. Opp'n at 23 ("The duty that the Special Master recognized in his summary judgment order is not an intrastate duty; it is a 'Compact-level duty.'"), to mean that "the *United States' claims* are Compact-level, interstate claims" even if they only concern "'intrastate' impacts." *Id.* at 23 (emphasis in original).

The United States' reasoning on this issue is difficult to understand and fails under scrutiny.[12] Although the Special Master left open the question whether "intrastate impact on New Mexicans of water capture by other New Mexicans violates a Compact duty independent of impacts on another state." MSJ Order, Dkt. 503 at 52, the answer is clear. Allowing the United States to transform intrastate New Mexico water administration questions into interstate Compact claims would be directly contrary to the Court's longstanding precedent, evident in cases like *Nebraska v. Wyoming*, holding that the rights of individual water users, *including Reclamation*, "can rise no higher than" the apportionment of the state in which they reside. *Nebraska v. Wyoming I,* 295 U.S. at 43.

Elsewhere, the United States attempts to shoehorn its claims concerning intrastate water use within New Mexico into its "Compact claim" through the Downstream Contracts. *See, e.g.,* U.S. Opposition at 27-28. According to the United States, it has an independent interest in the relative division of water—as between Texas and New Mexico below Elephant Butte Reservoir—under the Compact because the Downstream Contracts are "inextricably

[12] The United States quotes from page 5 of the MSJ Order; in its reliance on this holding the United States conveniently ignores the Special Master's conclusion later in the MSJ Order at 52. After reserving judgment with respect to whether the Compact protects intrastate deliveries in New Mexico "independent of impacts on another state[,]" the Special Master remarked that "the United States' admission into this action as a party was based, in part, on the United States' pursuit of relief substantially similar to the relief sought by Texas." MSJ Order, Dkt. 503 at 52. Plainly, Texas would have no interest in how New Mexico's apportionment is distributed among New Mexicans. For that reason, claims concerning intrastate water distribution in New Mexico are beyond the scope of this proceeding.

intertwined" with the "programmatic apportionment" under the Compact and any interference that prevents the United States from making a delivery to EBID in satisfaction of its rights under those contracts is an *ipso facto* Compact violation. *See id.*

Not only is this argument contrary to the intrastate nature of its claim as discussed above, but it also ignores that the definition and distribution of federal and Reclamation water is governed by New Mexico state law. As discussed in greater detail in Argument Section III.B.2., *infra*, Section 8 of the Reclamation Act governs the relationship between state law and water rights within federal Reclamation projects. 43 U.S.C. § 383. Pursuant to this provision, New Mexico law generally governs the control, appropriation, use, and distribution of water within the Rio Grande Project within the state, and New Mexico may "impose any condition not inconsistent with congressional directive." *California v. United States*, 438 U.S. 645, 676 (1978).

Here, the United States has not, whether in the opposition or elsewhere in this case, identified any congressional directive (e.g., a specific provision of the Compact, the Desert Land Act, or any other federal law) that exempts its intrastate operation of the Project within New Mexico from the state's substantive water law and administrative process. Indeed, the United States has litigated, in multiple forums, its theory that it may avoid adjudication of its rights in New Mexico under state law and lost every time. *See, e.g., United States v. City of Las Cruces,* 289 F.3d 1170 (10th Cir. 2002); *Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.,* 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372. *See also* Ex. F, Hamman 2d Decl. ¶ 18.

Based on this legal framework, there should be no doubt that the United States' rights and obligations with respect to intrastate deliveries to EBID are subject to New Mexico's water law. That law, rather than the Compact, controls the distribution of New Mexico's apportionment

among New Mexico water users. *See* MSJ Order, Dkt. 503 at 48 ("New Mexico's sovereign laws apply to define the relative rights between New Mexicans as to their respective share of New Mexico's overall Compact apportionment."). The United States, therefore, has no "Compact claim" for interference with intrastate deliveries within New Mexico; that claim sounds, if at all, as a claim for impairment of the United States' (or EBID's or its constituent farmers') rights under New Mexico's water law. In short, this is not the correct forum to litigate water right impairment claims under New Mexico law.

b. The Consent Decree Does Not Prejudice the United States' Remaining Claims, and It May Pursue Those Claims in Alternative Forums

In Section II(C) of the Opposition, the United States claims there are not adequate alternative forums for resolving its claims in this litigation. Its argument comprises two central contentions: (1) the United States' claims are "Compact claims" that may not be litigated in any other forum, and (2) the alternative forums available to it, such as the "state court adjudication could take decades to complete." U.S. Opp'n at 35.

Both contentions fail. The first contention fails for the reasons described in the immediately preceding sections of this brief. The second contention also fails for several additional reasons.

As an initial matter, in the opening States' Joint Motion, the Compacting States explained that "[a]ny remaining grievances regarding . . . water use in New Mexico are unrelated to Texas's equitable apportionment and involve matters entirely within New Mexico." States' Joint Motion at 55. The Compacting States identified "available forums in which the United States may address intrastate water use, including several pending cases." *Id*. The New Mexico *Amici*, likewise, point to no less than four possible forums for the United States to raise intrastate claims. Response of the New Mexico Amici in Support of Joint Motion to Enter Consent Decree

Supporting the Rio Grande Compact (Jan. 1, 2023), Dkt. 750 (NM *Amici* Br.) at 18-23. *See also* Ex. F, Hamman 2d Decl. ¶¶ 15-20. The United States does not dispute that those legal settings are available and appropriate to resolve claims involving the relative rights of New Mexico water users.

Instead, the United States argues that the complexity of the New Mexico stream adjudication renders it an inadequate forum to pursue their impairment claims because it would take too long to achieve "meaningful relief." *See* U.S. Opp'n at 35. The United States cites no authority for the proposition that the Supreme Court should exercise discretionary original jurisdiction to resolve purely intrastate claims because alternative forums are too slow or too complex. That conclusion would be contrary to the weight of authority discussed in Section II(C) of the States' Joint Motion. *See, e.g., New Jersey v. New York*, 345 U.S. at 373 (refusing to exercise original jurisdiction to resolve "intramural" disputes within a single state). Nor does the United States offer a reason why the Supreme Court should allow this case to occupy its original jurisdiction for a decade or more to take on intrastate issues that would supplant the adjudication court's ongoing work.

Moreover, the United States' "No alternative forum" argument fails because it misrepresents the nature of the remedies available to the United States under New Mexico law. The United States' assertion that it could not attain "meaningful relief" until the "final judgment" in the Lower Rio Grande adjudication (U.S. Opp'n at 35) is incorrect and misconstrues the cited evidence. New Mexico's statutes and Active Water Resources Management regulations expressly permit the State Engineer to administer water rights prior to the final judgment in an adjudication on the basis of the best available evidence. *See* N.M. Stat. Ann. § 72-2-9.1 (2003); N.M. Code R. §§ 19.25.13.1–19.25.13.50 (2004); *Tri-State Generation & Transmission Ass'n,*

v. D'Antonio, 2012-NMSC-039, 56, 289 P.3d 1232; *see also* Ex. F, Hamman 2d Decl., ¶ 6. The United States presents no reasons why these provisions are inadequate to provide it "meaningful relief" on whatever claims intrastate interference claims it thinks would remain following entry of the Consent Decree.

6. The Court Should Not Expand This Original Jurisdiction Action to Resolve Intrastate Disputes Unrelated to the Apportionment

As discussed above, the United States fails to articulate an independent interest in the equitable apportionment below Elephant Butte and fails to identify a standalone claim that is not connected to its obligation to deliver water to Texas consistent with the Compact. *See Texas v. New Mexico*, 138 S. Ct. at 959. Rather than detail a separate federal claim that it believes survives the settlement, the United States waves obliquely at the Court's 2018 Decision to claim that it can prevent the Compacting States' settlement because it is entitled to "pursue its own Compact claims." U.S. Opp'n at 29. But the Special Master should not allow the United States to expand this original jurisdiction action beyond what was originally contemplated by the Court. *See* April 15, 2020 Order, Dkt 340 at 16-17 (Apr. 14, 2020) ("As the case plays out and facts are developed, it will remain necessary to determine whether and how the parties' claims diverge and whether any such divergence improperly expands the case.").

In cases invoking the original jurisdiction, the Supreme Court has construed its jurisdiction as obligatory "only in appropriate cases." *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (internal quotation omitted). To serve its "gatekeeping function" in original actions, *Nebraska v. Wyoming III*, 515 U.S. at 8 , the Court has required states to file a motion for leave to file a complaint addressing both "the nature of *the interest* of the complaining State . . . focusing on the 'seriousness and dignity of *the claim*,'" as well as the "availability of an alternative forum in which *the issue* tendered can be resolved." *Mississippi v. Louisiana,*

506 U.S. 73, 77 (citations omitted) (emphasis added). Thus, the Court undertakes a particularized inquiry, focusing on the specific interests, claims, and issues presented in a complaint before accepting an original action.

In evaluating these interests, claims, and issues, the Court has repeatedly affirmed a long-standing "philosophy" that its original jurisdiction "should be invoked sparingly." *Illinois v. City of Milwaukee,*406 U.S. 91, 93 (1972); *see also Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). Indeed, Chief Justice Rehnquist explained that the original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute." *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)). This philosophy has guided the Court's exercise of discretion to refuse to entertain claims within the original jurisdiction. *See e.g., Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *Arizona v. New Mexico*, 425 U.S. 794 (1976).

In view of the Court's careful inquiry and sparing exercise of its original jurisdiction, the Court has limited the scope of the theories advanced in litigation to the original representations that are made in persuading the Court to allow the claims in the first instance. For example, in evaluating amendments to pleadings, the Court has explained that "the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure, Rule 15(a) does not suit cases within th[e] Court's original jurisdiction." *Nebraska v. Wyoming III*, 515 U.S. at 8 (citations omitted). Because the Court performs an "important gatekeeping function" when it scrutinizes the initial claims, potential changes in the case must likewise "be scrutinized closely in the first instance to see whether they would take the litigation beyond what [the Court] reasonably anticipated when [it] granted leave to file the initial pleadings." *Id.*

Accordingly, at this critical stage, where the United States is asserting that it is entitled to litigate claims that are different and contrary to Texas's interests in its own equitable apportionment, it is necessary for the Special Master to evaluate whether the United States is attempting to take the litigation beyond what was contemplated by the Court. April 14, 2020 Order at 16-17. In evaluating whether to allow the United States to raise its own claims, the Court emphasized that its "role in compact cases differs from [its] role in ordinary litigation," *Texas v. New Mexico*, 138 S. Ct. at 958, because its role in compact cases is to serve "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *Id.* (citations omitted). The Court explained that, as a result, it has a "unique authority" to "'regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.'" *Id.* (citations omitted).

Bearing that "unique authority" in mind, the Court identified four considerations that favored allowing the United States to pursue its interference claim. *Texas v. New Mexico*, 138 S. Ct. at 958-60 (quoting *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981)). Of these considerations, the United States relies primarily on its duty to deliver the "equitable apportionment of the waters of the Rio Grande [to] the States." U.S. Opp'n at 28; *see generally id*. at 26-34. As discussed above, however, the Consent Decree resolves this concern by addressing the Compact's division of water, identifying the applicable baseline, and providing a mechanism by which Texas will receive its share of Rio Grande water.

More importantly, "the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection." *Texas v. New Mexico*, 138 S. Ct. at 958 . In this regard, the United States is like the Commission that was allowed to intervene in *Alabama v. North Carolina*, 560 U.S. 330 (2010).

In that case, as here, the Court allowed an entity that was responsible for Compact administration to raise claims "alongside the plaintiff States" that were "wholly derivative" of the compacting states' claims. *Id*. at 357.

In a footnote, the United States seeks to distinguish *Alabama v. North Carolina* on the ground that the potential bar to participation for the Commission in that case, and in *Arizona v. California*, 460 U.S. 605, 614 (1983), was the Eleventh Amendment. U.S. Opposition at 27, n.10. That is a false distinction; it makes no difference whether the potential bar to participation was the Eleventh Amendment, as in *Alabama v. North Carolina* and *Arizona v. California*, or the absence of a direct interest in the water divided by an interstate compact, as in the present case. In all three cases, a "normal litigant" would "not [have] be[en] permitted" to pursue its claims. *Texas v. New Mexico*, 138 S. Ct. at 958. Nonetheless, in all three cases, the Court exercised its "unique authority to mold original actions," *id*. at 959, and "allowed the parties to intervene because they "assert[ed] the same claims and s[ought] the same relief as the other plaintiffs," *Alabama v. North Carolina*, 560 U.S. at 355. It follows that the United States' claim must "rise or fall with the claims of the States." *Id*. at 357. And given the Court's careful supervision of its original jurisdiction, the Special Master must now consider whether allowing the United States to block a settlement over the equitable apportionment, in which the United States is entitled to no water, improperly "expand[s] the scope of [the] existing controversy between the States." *Texas v. New Mexico*, 138 S. Ct. at 960; *see also Alabama v. North Carolina*, 560 U.S. at 355-56 (explaining that the Commission "asserts the same claims and seeks the same relief"); *Arizona v. California*, 460 U.S. at 614 (allowing intervention because the Tribes did "not seek to bring new claims or issues" and did "not enlarge[]" the controversy).

The United States' opposition to the Compacting States' resolution of the equitable apportionment would "expand[s] the scope of [the] existing controversy" in two significant ways. First, in allowing the United States to pursue the same claims as Texas, the Court relied, in part, on the fact that the United States' intervention was "without [Texas's] objection."[13] *Texas v. New Mexico*, 138 S. Ct. at 960. The clear implication was that the United States did "not seek to bring new claims or issues," *Alabama v. North Carolina*, 560 U.S. at 355, and Texas and the United States were aligned given that the United States was responsible for "assuring that the Compact's equitable apportionment to Texas . . . [was], in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959. But now, the United States is no longer aligned with Texas. Instead, it wrongly asserts that "the proposed decree gives Texas hardly anything in return" for its compromises, U.S. Opp'n at 32, and argues for a different resolution of the equitable apportionment claims than one to which the Compacting States have agreed Effectuates the Compact. It is hard to imagine that the Court contemplated that the United States would use its participation to prevent a settlement of Compact issues that do not directly affect the United States.

Second, in Section II(C) of the Joint Motion (pages 10-13), the Compacting States cite several cases that stand for the proposition that following resolution of the equitable apportionment claims among the states in the original jurisdiction, any remaining claims should be litigated in other forums. *E.g. California v. Nevada*, 447 U.S. at 133 ("litigation in other forums seems an entirely appropriate means of resolving whatever questions remain"); *United States v. Nevada*, 412 U.S. at 538 ("We need not employ our original jurisdiction to settle

[13] As noted in the Texas Brief, the terms of the State of Texas's non-opposition to the United States intervention was qualified and spelled out to the Court. The Court's Opinion contemplates and reflects the Texas position.

competing claims to water within a single State."); *id*. at 539-40 ("[a]ny possible dispute with California with respect to United States water uses in that State can be settled in the lower federal courts in California"). The United States offers no response. Given the interstate focus of the claims, there is no indication that the Court contemplated resolving claims of interference with purely intrastate New Mexico water rights.

7. The United States' Resistance to the Consent Decree Is Grounded in Its Improper Concern that New Mexico Will Not Comply with the Consent Decree

At base, the differences between Texas's and New Mexico's litigation positions, after the Special Master clarified the issues at summary judgment, were grounded in a disagreement over the baseline and the amount of water that Texas was entitled to receive each year. There is no indication that New Mexico, as the upstream State, was unwilling or unable to comply with the Compact once the baseline and measurement of equitable apportionment were determined.

New Mexico negotiated the Consent Decree in good faith, is confident that it is a fair resolution of this longstanding conflict and stands ready to fulfill its obligations. Mike Hamman, the New Mexico State Engineer and chief water official, recognized that "the Consent Decree is premised on New Mexico fulfilling [its] obligations," and explained that "New Mexico will administer water rights in the Lower Rio Grande to ensure compliance with the Rio Grande Compact and the Consent Decree." States Joint Motion Ex. 5, Hamman Decl. ¶¶ 10, 13; Ex. F, Hamman 2d Decl. ¶ 6-11; Ex. D, Lopez 2nd Decl., ¶¶ 20-22.

Unfortunately, New Mexico's avowed commitment to fulfill its obligations pursuant to the Consent Decree is not enough for the United States. Animating the United States' resistance to the Consent Decree is a palpable skepticism that New Mexico will comply with its obligations. For example, the United States alternatively asserts that the Consent Decree "prevent[s] New Mexico from having to do *anything* to comply with the decree, U.S. Opp'n at

58 (emphasis in original), "requires the United States and the Districts . . . to shoulder New Mexico's burden of compliance," *id*. at 57, and "would not provide any concrete or specific assurances that New Mexico will actually reduce groundwater pumping or be able to meet its delivery requirement," *id*. at 2.[14] Put simply, the United States does not trust New Mexico.

For its part, regardless of the outcome of this litigation, New Mexico still plans to work together with the United States, the *Amici*, and other stakeholders in the lower Rio Grande to ensure that its groundwater management actions are transparent, equitable, and effective.

In any event, the United States' unfair and unfounded cynicism should have no bearing on the outcome of this motion. New Mexico is a sovereign state that has earned the right to a presumption that it will comply with the Consent Decree. *See, e.g., Gen. Shoe Corp. v. Rosen*, 112 F.2d 561 (4th Cir. 1940) (per curium) ("We assume the appellee will obey the injunction"); *United States v. Undetermined Quantity of an Article of Drug Labeled as Benylin Cough Syrup*, 583 F.2d 942, 946–47 (7th Cir. 1978) ("Certainly it is not unreasonable for a party to assume that the Government, charged with the duty of enforcing the laws, will obey a court injunction").

B. <u>The Consent Decree is Consistent with the Compact and Governing Federal Law</u>

The Compacting States satisfied their obligation to demonstrate that the Consent Decree is consistent with the Rio Grande Compact in their opening Memorandum. *See* States' Joint Motion, §§ V(A), (D). Having established that the Consent Decree is consistent with the

[14] The United States does not argue that New Mexico's enforcement of current water regulations is inadequate. The United States proffered no evidence or testimony disputing the comprehensive and effective enforcement activities and results in the Lower Rio Grande. *See* Transcript of Proceedings, Vol. XVIII (November 9, 2021), testimony of Ryan Serrano at 19:20-20:9; 22:25-23:20; 34:3-17; 41:25-144:11. New Mexico will continue its robust efforts in the implementation and enforcement of measures required under the Consent Decree. States' Joint Motion. Ex. 5, Hamman Decl. ¶¶ 12-13; Ex. F, Hamman 2d Decl. ¶¶ 6-10.

Compact, the burden shifts to the United States to prove otherwise. The United States has failed to do so.

1. The Consent Decree Is Consistent with the Compact

The United States argues that the Decree should be rejected because it is inconsistent with federal law, including the Compact.[15] This argument fails because the Consent Decree merely provides interpretations and direction, consistent with the Compact, with respect to the apportionments to the States below Elephant Butte Reservoir. The Court has already validated these apportionments, noting that the water delivered to Elephant Butte Reservoir is the water apportioned to "Texas and part of New Mexico." *Texas v. New Mexico*, 138 S. Ct. at 959. The Consent Decree effectuates this apportionment by using the methodologies imbedded in the Compact, such as indices and debits and credits (negative and positive departures), to ensure Compact compliance. The Court has already found that the United States, as a sort of agent of the Compact, has undertaken the obligation to operate the Project to effectuate the Compact apportionment.[16] *Id*. That apportionment is defined by a 57:43 "division" between New Mexico and Texas. MSJ Order, Dkt 503 at 6. The Consent Decree does little more than establish a

[15] The United States (Palumbo Decl.) expresses this concern but in the end only asserts the Compact is inconsistent with the Consent Decree. The United States cited no other laws that are inconsistent with the Consent Decree because there are none. *See* Ex. D, Lopez Decl. ¶¶ 15-16. The United States does not explain how the Consent Decree is inconsistent with the Compact. It is not. It ensures compliance with the Compact. This has been explicitly recognized by the Rio Grande Compact Commission, which passed a resolution endorsing the Consent Decree. Ex. D, Lopez Decl. ¶ 15, and its attached Ex. A.

[16] The United States makes much ado about the Court's use of the words "sort of agent" as opposed to an "actual" agent. U.S. Opp'n at 29. But the Court's intent is clear that the United States had undertaken an obligation to ensure that the Compact's equitable apportionment was in fact made. The United States role was not to ignore the Compacts equitable apportionment and operate the Project as if the Compact did not exist.

mechanism to measure compliance with the 57:43 division.[17] See Ex. D. Lopez Decl. ¶¶ 14, 16, 18, 23-25; Second Declaration of Margaret Barroll, Ph.D. in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado for Entry of Consent Decree Supporting the Rio Grande Compact (Barroll 2d Decl.) at Exh. E, ¶¶ 3-10, 27.

In attempting to manufacture a conflict between the Consent Decree and the Compact where none exists, the United States focuses on a few points, none of which, in fact or law, create the conflict that the United States postulates.

a. The Court Should Honor the Reasonable Baseline Condition Adopted by the Compacting States

The United States argues that the utilization of the D2 Condition in the Consent Decree as an apportionment baseline instead of a 1938 Condition[18] is contrary to the Compact as construed by the Court and the Special Master. As discussed above, given the fact that the United States has never advocated for a 1938 Condition and has instead operated the Project since 1951 consistent with the D2 Condition, including by formally adopted the D2 curve for all Project operations, this cannot be a serious argument, and it should be rejected out of hand. But even if the Special Master considers the argument, the United States' position should be rejected because the Compacting States have settled upon a reasonable baseline condition.

[17]The statement by EPCWID in its *amici* brief at page 15 that the apportionments below Elephant Butte Reservoir were not to Texas or to New Mexico but rather "the apportionment was to the Project" flies in the face of the actual language of the Compact, the findings of both Special Masters and the ruling of the Supreme Court. *See e.g.*, First Interim Report of Special Master at pages 246-247, 249-250 where these contentions as they were made by EBID were discussed and dismissed by the First Special Master. No Exceptions were made to the First Special Master's findings in this regard.

[18] The Compacting States also discuss the 1938 Condition in Argument, Section III.A.3.a.iv., *supra*, in response to a parallel argument made by the United States.

Initially, the United States' position is premised on the false predicate that the Special Master has already decided the baseline condition. That is not the case. At the summary judgment stage, the Parties presented competing theories on the baseline condition. Texas argued for a 1938 Condition based on the prevailing conditions at the time of the Compact.[19] New Mexico, in contrast, argued that the baseline condition was informed by the course of performance, and should be set at a D2 Condition. The Special Master acknowledged that it was necessary to determine what the States intended at the time of the Compact, which he described as "akin to a '1938 condition.'" MSJ Order, Dkt. 503, at 6. However, he also recognized that "the post-1938 course of performance . . . evidence speaks to questions such as the details of what a protected baseline condition might have been." *Id*. at 25.

Ultimately, the Special Master concluded that the Compact is ambiguous with respect to the precise definition of the protected baseline condition. *See Id*. MSJ Order, Dkt. 503 at 24 (concluding that there are "two areas of ambiguity" in the Compact that must be addressed through extrinsic evidence: "downstream water division and baseline operations"). This Court has consistently honored litigating States' interpretation of ambiguous provisions in a settlement agreement.

[19] If the Compacting States are forced by the United States to return to trial, Texas will continue to advocate for a 1938 Condition. This might prove problematic, however, because to the extent that the United States now seeks to take up Texas's litigation position, its articulation of the 1938 Condition would substantially change Texas's claim. While the United States cites the Texas historian for an articulation of the 1938 Condition, the United States' view of what the 1938 Condition entails is strikingly different from Texas's theory. Indeed, in the United States Reply to New Mexico's Opposition to the United States' Motion for Summary Judgment, the United States goes to lengths to explain that New Mexico incorrectly characterized the United States' position as seeking the same "1938 Condition" as Texas. *See* U.S Reply to NM MSJ, Dkt. 472 at 16, n.8.

For example, in *New Hampshire v. Maine*, 426 U.S. 363 (1976), the Court considered a boundary dispute in which the boundary had been fixed based on a 1740 decree of King George II of England. *Id*. at 367. In that case, the attorneys general, prior to trial, "agreed upon a settlement and jointly filed a . . . proposed consent decree." *Id*. at 365-66 (internal quotation marks omitted). The New Hampshire legislature opposed the settlement, and both States filed exceptions. *Id.* at 364, 365 n.3. The Special Master submitted the proposed consent decree to the Court for its consideration, "but expressed the view that rejection of the decree must be recommended as not permissible under the principle of *Vermont v. New York*, that mere settlements by the parties acting under compulsions and motives that have no relation to performance of [the Court's] Art. III functions do not relieve the Court of its constitutional duty to decide the merits of the controversy between the States." *Id.* at 365 (citation and internal quotes omitted). The Court disagreed, however, finding that the entry of the consent decree was consistent with its Article III function. *Id.* at 365-66. In so holding, the Court stated that "there is nothing to suggest that the location of the 1740 boundary agreed upon by the States is wholly contrary to relevant evidence, and we therefore see no reason not to give it effect, even if we would reach a different conclusion upon the same evidence." *Id.* at 369. It further explained that *Vermont v. New York*, 417 U.S. 270 (1974), "does not proscribe the acceptance of settlements between the States that merely have the effect, as here, of reasonably investing imprecise terms with definitions that give effect." 426 U.S. at 369.

As in *New Hampshire v. Maine*, the States' adoption of the D2 Condition is a reasonable interpretation of the Compact that is "not wholly contrary to relevant evidence." *New Hampshire v. Maine*, 426 U.S. at 369. It is reasonable for the Compacting States to resolve the ambiguity in the baseline condition identified by the Special Master by compromising on a D2

Condition, particularly when that compromise encompasses a pattern and practice that has been in place since 1951 and has been formally adopted by the United States.[20] The Consent Decree "merely ha[s] the effect . . . of reasonably investing imprecise terms with definitions that give effect to" the Compact. *Id*. It follows that, like the settlement in *New Hampshire v. Maine,* the Court should honor the settlement between the Compacting States "even if [the Court] would reach a different conclusion upon the same evidence." *Id*.

b. The Index Is Consistent with the Programmatic Apportionment

The United States also argues the Consent Decree is inconsistent with the Compact's programmatic apportionment. *See* U.S. Opposition at 49. The United States premises this critique on an objection to the Index, arguing that "the Compact reflects a decision by the States to forgo a state-line delivery." *Id.* Thus, "a required delivery to the Texas state line, according to the Index, irrespective of the United States' contracts and protections needed for the Project" is necessarily inconsistent with the Compact. *See id.* at 49-50. This argument misunderstands both the meaning of the "programmatic apportionment" established in the Compact, as interpreted by the Special Master's summary judgment Order, and the function of the Index within the Consent Decree.

At summary judgment, the Special Master concluded that the Compact unambiguously establishes several principles that define the "programmatic" apportionment as between Texas and New Mexico below Elephant Butte Reservoir. These may be summarized, in relevant part, as follows. First, the "Compact demonstrates the compacting states' intentions that normal operation of the Project will entail the annual release of 790,000 acre feet." MSJ Order, Dkt. 503

[20] Indeed, in this context it is impossible to reconcile the United States' position with respect to the "inconsistency" of using the D2 Curve as the Compact baseline and its insistence on the sanctity of the 2008 Operating Agreement.

at 16. Second, "the compacting states intended Texas and southern New Mexico to share the balance [of that release, after subtracting the delivery to Mexico] as adjusted for system losses, return flow reuse, and natural but unreliable intermittent arroyo inflows." *Id.* at 16-17. Third, Texas and New Mexico share the releases from Elephant Butte according to "the 57%/43% split as a rough protected baseline division of Project deliveries." *Id.* at 6. Fourth, that ratio is a "benchmark for assessing . . . the downstream apportionment." *Id.* at 6-7. Fifth, "the Compact conclusively and unambiguously establishes a level of integration between the Compact and Project" that is "fundamental to the operation of the Compact." *Id.* at 18.

The Consent Decree ably establishes a system modeled on these requirements. *See,* Ex. B., Brandes 2d Decl. at ¶ 12. Initially, the Index establishes a specific, calculable apportionment due to Texas as a function of the amount released from Elephant Butte Reservoir on the basis of (1) the required 57:43 benchmark and (2) the conditions in an agreed upon "baseline" condition, including system losses, return flows, and arroyo inflows. In other words, the Index does nothing more than mathematically describe a function to calculate Texas's apportionment under the required 57:43 "division" of the Project supply for a given annual release using a D2 "baseline" condition. States' Joint Motion Ex. 6, Barroll Decl. ¶¶ 25, 28; Ex. B Brandes 2d Decl. ¶¶ 13-14. However, the Consent Decree does not strictly require that in-year deliveries match the Index. Recognizing that the programmatic apportionment allows the Project significant operational leeway to meet variable irrigation demands in the two districts, the Consent Decree establishes departure limits from the Index, as well as a credit and debit system to account for the margin between actual Project deliveries and the Index requirement in any given year. States' Joint Motion Ex. 6, Barroll Decl. ¶¶ 29-36; Ex. B, Brandes 2d Decl. ¶¶ 16-23;*see also* Ex. E, Barroll 2nd Decl., ¶¶ 3-14.

Thus, the Index does not create a strict "delivery obligation" (U.S. Opp'n at 51) that the Project must satisfy. Rather, the Index establishes a mechanism to test compliance with the programmatic "division" of water established in the Special Master's summary judgment Order, using an agreed baseline condition. The departure limits only trigger if the year-over-year discrepancy between the benchmark "division" of water and actual deliveries becomes significant. States' Joint Motion Ex. 6, Barroll Decl. ¶¶ 33-36. The mere fact that no inflow-outflow model for deliveries below Elephant Butte appears in the plain text of the Compact does not make the inclusion of the Index in the Consent Decree somehow inconsistent with the required "programmatic" apportionment.

In effect, then, the United States' argument is an attack on the existence of any apportionment of water between Texas and New Mexico. While it does not "dispute that some index methodology" could be appropriately used to measure "New Mexico's obligation to prevent interference with the Project[,]" it argues that any measurement designed to gauge whether Project deliveries accord with the apportionment between the states would somehow "run afoul of the Compact Clause" by "'encroach[ing] upon the full and free exercise of federal authority'" in operation of the Project. *See* U.S. Opp'n at 50 (quoting *New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976)). This cannot be the case.

The unambiguous terms of the Compact foreclose this argument. The Special Master concluded that "there exists no other benchmark," other than the 57:43 ratio, "for assessing the intent of the Compacting States as to the downstream apportionment or the general framework of the bargain they sought and achieved through Compact formation." *See* MSJ Order, Dkt. 503 at 6. The Index is nothing more than a mathematical means of describing that "benchmark" division. Thus, the United States may only object to the Index if it can prove that it does not

accurately capture the required division. It cannot do so. Even the text of the Downstream Contracts and the considerable course of performance do not support the United States' argument of its need to make deliveries pursuant to a 1938 condition. *See* Argument, § III.A.3.a.iv., *supra*.

Last, the United States faults the Consent Decree because it allegedly does not require New Mexico to reduce groundwater pumping that "intercepts Project deliveries." *See* U.S. Opp'n at 51. As discussed at length in other portions of this brief (*see, e.g.,* Argument, § III.A.5., *supra*), this argument misunderstands the scope of New Mexico's "Compact obligations" (U.S. Opp'n at 51). First, it improperly presumes that New Mexico lacks discretion to determine how to meet its Compact obligations. "The Compact [] establishes generally the existence of New Mexico's duty to safeguard Texas's Compact apportionment and the states' intention to protect a baseline Project operation condition." MSJ Order, Dkt. 503 at 22. How New Mexico meets that requirement is up to its sovereign discretion. *See id.* at 23 (reasoning that the Art. IV obligation to "deliver" water requires New Mexico "to apply its own laws to protect Texas's Compact apportionment"); *see also* Ex. D, Lopez Decl., ¶¶ 20-22. In other words, how New Mexico satisfies its Compact duty (e.g., importing water to offset groundwater pumping; curtailing groundwater use; fallowing) is up to New Mexico. These options are set forth in the Declaration of Michael A. Hamman, P.E., attached as Exhibit 5 to the States' Joint Motion, at paragraphs 12-14. *See also* Ex. F, Hamman 2d Decl., ¶¶ 6-10.

Second, the United States improperly concludes that all colorable "interference" with the Project is tantamount to a Compact violation. The distribution of New Mexico's apportionment within New Mexico is subject to New Mexico's sovereign discretion. *See id.*, 48 ("New Mexico's sovereign laws apply to define the relative rights between New Mexicans as to their

respective share of New Mexico's overall Compact apportionment."). So long as the indexed flows arrive at the El Paso Gage, Texas has received its apportionment and the Compact is satisfied. Any remaining questions arise under New Mexico state law, except as limited or precluded by Reclamation law, not the Compact.

2. Reclamation Law is Not Relevant to the Resolution of a Compact Dispute

The United States claims that the Consent Decree is "inconsistent with federal reclamation law because it would effectively treat the States as the recipients of Project water when the States do not (and, absent express statutory authorization, cannot) have contracts with [Reclamation]." U.S. Opp'n at 52. This argument lacks support and fundamentally misunderstands the relationship between the Compacting States' apportionment and the Project allocations based on that apportionment.

To begin with, the United States has long recognized the distinction between the apportionment assigned to the Compacting States, and the allocation (or division) of water between the Districts that is done by Reclamation. For example, in 2019, the United States pointed out the difference between "the *apportionment* of water, which is what the Compact does, [and] the *allocation* of Project water, which is what Reclamation does pursuant to the Downstream Contracts and federal reclamation law." United States of America's Response to Legal Motions of Texas and New Mexico Regarding Issues Decided in this Action (Feb. 28, 2019), Dkt 207 (U.S. Resp. to Legal Motions) at 19 (emphasis in original). From early in the case, the United States recognized that the "contractual rights and obligations" between the Districts and Reclamation "are considered only after the respective rights of the States under the Compact – the subject of this original action – are defined." U.S. Resp. to EPCWID Mot. to Intervene at 10.

In short, apportionments, whether by Compact or Decree represent a State's entitlement to water in its sovereign capacity, and that entitlement is established by the Compact, not "Reclamation law, or Reclamation's contracts with the Districts." U.S. Opp'n at 37; *see also Nebraska v. Wyoming I*, 295 U.S. at 43 (water rights of water users, including Reclamation, "can rise no higher than those of [their state]"); *see also* Ex. D, Lopez Decl., ¶¶ 13-17. The Project then allocates and distributes each State's apportionment to the water users in each State. Thus, EBID is entitled to no more water than New Mexico's Compact apportionment, and EPCWID is entitled to no more water than Texas's apportionment. *Nebraska v. Wyoming I*, 295 U.S. at 43

Further, the United States' argument that the Consent Decree is inconsistent with Reclamation law and the Downstream Contracts is belied by the statutory scheme which reinforces that the rights of Reclamation and the Districts are derived from the States' apportionment and governed by State law. Under the Reclamation Act of 1902, 32 Stat. 388 (1902), codified at 43 U.S.C. §§ 372 *et seq.,* Congress established a federal program to "provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid lands in many Western States." *Orff v. United States* 545 U.S. 596, 598 (2005). When Congress enacted the Reclamation Act, it included purposeful and continued deference to state water law, which was to govern the ownership and distribution of all water rights absent a clear Congressional directive to the contrary. *See California v. United States,* 438 U.S. at 653-70, 678–89; *United States v. New Mexico,* 438 U.S. 696, 702 & n.5 (1978). Section 8 of the Reclamation Act left little room for doubt:

> 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 . . . relating to the *control, appropriation, use, or distribution of water* . . . 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 (emphasis added). Section 8 of the Reclamation Act thereby requires that the federal government, in operating reclamation projects, comply with state water laws. Specifically, Section 8 provides that Reclamation, in operating the projects, must "proceed in conformity with" state laws relating to the "control, appropriation, use, or distribution" of water used in "irrigation." *Id.*; *see also* Ex. D, Lopez Decl., ¶ 13.

In *California v. United States*, this Court confirmed that Section 8 of the Reclamation Act requires the federal government to comply with state water laws in operating its federal Reclamation projects. *California v. United States,* 438 U.S. at 665, 667; *see also Nevada v. United States,* 463 U.S. 110, 122 (1983). As the Court explained, the federal government must, first, "appropriate, purchase, or condemn necessary water rights in strict conformity with state law," and, second, "once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law." *California v. United States,* 438 U.S. at 665, 667. In enacting Section 8, Congress "intended to defer to the substance, as well as the form, of state water law." *Id.* at 675. Summarizing Congress' reclamation laws, this Court stated:

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

California v. United States, 438 U.S at 653; *see also Nebraska v. Wyoming II*, 325 U.S. at 613-14 ("All of these steps make plain that [reclamation] projects were designed, constructed, and completed according to the pattern of state law as provided in the Reclamation Act.").

These principles apply to the Rio Grande Project. In *United States v. City of Las Cruces*, the United States sued to quiet title to water rights in the lower Rio Grande to define the Project water right. *United States v. City of Las Cruces*, 289 F.3d 1170, 1179 (10th Cir. 2002). In

finding that the district court did not abuse its discretion by refusing to hear the case, the Tenth Circuit Court of Appeals held that New Mexico law applies to the scope and administration of the Project water right. *Id*. at 1184, 1191-92.

Thus, far from the conflict suggested by the United States, the very water rights on which the Project relies, as well as those of EBID and its members, arise under New Mexico law. *See* NM-1055-0003 RFA 3 (United States admitting that "its water rights for the Project are generally governed by New Mexico law").[21] Even today, the United States is involved in the adjudication of those rights in the Lower Rio Grande adjudication. Ex. F, Hamman 2d Decl. ¶ 20. Ultimately, the New Mexico-based water rights of EBID and its members form part of the New Mexico apportionment, and the division, distribution, and enforcement of that apportionment is pursuant to New Mexico law. *See Hinderlider*, 304 U.S. at 106 ("the

[21] For its part, EPCWID oddly complains that the Decree would "subordinate the Project and its participants to them [the States] and their Compact organ, the RGCC." Brief of Amicus EPCWID in Opposition to the Joint Motion to Enter Proposed Consent Decree (EPCWID Amici Br.), Dkt. 752 at 8. Complain as it may, EPCWID, EBID and the Project *are* subordinate to the Compact and the sovereign interest of the States. Project rights and the rights of EBID and EPCWID emanate from the Compact's apportionment and the grant of rights to use that water by the respective States. The EPCWID position found in its *amici* brief, attempting to elevate individual contractual rights over the sovereign Compact rights of the States and the Compact itself, flies in the face of basic and fundamental constitutional provisions and countless court decisions. EPCWID Amici Br., Dkt. 752 at 22-26. In the First Interim Report of the Special Master, the Special Master concluded with respect to the claims of EPCWID and EBID that "[t]he 1938 Compact apportionment is binding upon all citizens of each state and all water claimants, even where the State has granted the water rights before it entered into the compact[,]" citing *Hinderlider,*304 U.S. 92, 106 (1938); First Report at 260. While this case is not about the validity of the Operating Agreement, the Operating Agreement must be consistent with the provisions of the Compact because the Compact is binding on the Districts and on the United States and is superior to the Operating Agreement, not the other way around. The United States and the Districts explicitly recognized this in the 2008 Operating Agreement ¶ 6.12: "Nothing herein is entered to . . . be in conflict with the provisions of the Rio Grande Compact."

apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact").

Nor is any contract with Reclamation needed for a State's apportionment to be effective, and the United States cites no authority to the contrary. *See* U.S. Resp. to EPCWID Mot. to Intervene at 10 ("EPCWID's receipt and delivery of Project water within its service area has no effect on how the water is allocated among the States under the Compact."). Nonetheless, the United States argues that a Reclamation contract is required to use water from a Reclamation project and "the only entities that have contracts with the Secretary for the delivery of Project water are EBID and EPCWID." U.S. Opp'n at 51-52. In addition to ignoring the principles of equitable apportionment and the deference to State law inherent in the Reclamation Act that are discussed above, this argument fails to recognize that States, in their sovereign capacity, do not "use" water and therefore there is no requirement that they contract with Reclamation.[22] Instead,

[22] The citation to the Boulder Canyon Project Act in the Declaration of David Palumbo has no relevance to the Rio Grande Project. Palumbo Decl. ¶ 13. The Boulder Canyon Project Act contains several express provisions that establish a "statutory apportionment" to California and authorizing the Lower Basin States to enter into an agreement for the remainder of the water from the Lower Basin of the Colorado River. *Arizona v. California*, 373 U.S. 546, 565, 579-80 (1963) (describing a "comprehensive scheme for the apportionment among California, Arizona, and Nevada of the Lower Basin's share of the mainstream waters of the Colorado River" and indicating that Congress intended, in the absence of the states reaching the authorized agreement, the "Secretary of the Interior, through his § 5 contracts, both to carry out the allocation of the waters of the main Colorado River among the Lower Basin States and to decide which users within each State would get water."). Here, none of the authorizing legislation for the Rio Grande Project contains language similar to Section 4(a) of the Boulder Canyon Project Act, 43 U.S.C. § 617c(a) that establishes a "statutory apportionment." *Cf.*, *e.g.,* An Act Relating to the construction of a dam and reservoir on the Rio Grande, in New Mexico, for the impounding of the flood waters of said river for the purposes of irrigation, Pub. L. No. 58-104, Ch. 798, 33 Stat. 814 (1905) (authorizing the construction of the Elephant Butte dam); An Act making appropriations for the Department of the Interior for the fiscal year ending June 30, 1938, and for other purposes, Pub. L. No. 75-249, Ch. 570, 50 Stat. 564, 593 (1937) (authorizing Reclamation to enter into the Downstream Contracts). Nor does this authorizing legislation contain any language, as also appears in the Boulder Canyon Project Act, 43 U.S.C. § 617p, guaranteeing the priority of United States claims over other claimants. In the absence of any specific

the States in their sovereign capacity grant the right to use the apportioned water to end users such as EBID and EPCWID, as well as the United States. *California v. United States,* 438 U.S. at 665, 667. Absent those State grants of authority, neither the Districts nor the United States have any right to use water in either New Mexico or Texas. The requirement that entities that use Reclamation Project water, such as EBID and EPCWID, need a Reclamation contract *in addition to* their State-based authorization does not alter this bedrock principle.

In the end, the United States' claim that the Consent Decree is inconsistent with Reclamation law is disposed of by the Court's treatment of the analogous claims the United States brought in *Nebraska v. Wyoming*. Like the present case, that dispute involved an equitable apportionment of the North Platte River, which contains a Reclamation project located between Nebraska and Wyoming that was at the heart of the dispute. As the Compacting States explained in their opening Joint Motion, in that case, the United States sought leave to bring a claim to protect its rights under Reclamation law and associated Reclamation contracts. Joint Motion at 44-45 (citing *Nebraska v. Wyoming II*, 325 U.S. at 611, 614-15, 629). The Court rejected that claim, explained that the "government was . . . simply a carrier and distributer of the water," and held that the Reclamation rights were subordinate to the apportionment set forth in the decree. *Nebraska v. Wyoming II* 325 U.S. at 614, 615 (apportioning water to the States and not Reclamation "in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities"). In 1995, when the Court again considered the dispute, it held that joinder of individual Reclamation contractees was unnecessary, despite Wyoming raising claims implicating their contracts, because Wyoming was asserting claims

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congressional directive otherwise, the general rule, as articulated in *California v. United States,* applies, and the United States' water rights within New Mexico are subject to New Mexico's substantive water law.

based on the State's apportionment under the North Platte Decree, and not the contracts. *Nebraska v. Wyoming III*, 515 U.S. at 21-22. Given the clear relevance of *Nebraska v. Wyoming II & III*, it is telling that the United States does not address the Compacting States' argument, and never even cites to these cases.

3. To the Extent There Is a Conflict, the Compact Is the Superior Law Defining the Division of Water as Between Texas and New Mexico Below Elephant Butte Reservoir

Assuming *arguendo* that the United States is correct, and the Consent Decree "would be inconsistent with federal Reclamation law," U.S. Opp'n at 51, the Compact is nonetheless the superior law that governs the apportionment among the States for two related reasons.

First, the Court and Special Master have previously held that Project operations and accounting must be in "conformity" with the Compact and any decree of the Court. *E.g.,* March 31, 2020 Order, Dkt. 338 at 29; *Texas v. New Mexico*, 138 S. Ct. at 959. Prior to the current round of briefing, the United States agreed. *See* 4/2/19 Hr'g Tr., Dkt 264 at 49:9-12 ("once we have a decree that defines what each state has, then we can look to project operations and determine whether those operations are consistent with the decree.").

Second, compacts occupy a unique place in the United States Constitution. EPCWID suggests that a compact is federal law with no special significance, EPCWID Amici Br., Dkt. 752 at 18; but that is not the case. Interstate compacts have existed since the earliest days of the colonial period and are intricately intertwined with the founding of the United States. *See* Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution--A Study in Interstate Adjustments*, 34 Yale L.J. 685, 730-32 (1925) (listing nine agreements between the colonies). Compacts embody political compromises between the "constituent elements of the Union" and serve as tools to address "interests and problems that do not coincide nicely either with national boundaries or with State lines." *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S.

30, 40 (1994); *see KMOV TV, Inc. v. Bi-State Dev. Agency of the Mo.-Illinois Metro. Dist.*, 625 F. Supp. 2d 808, 811 (E.D. Mo. 2008) (internal quotes omitted) (noting that an interstate compact "represents a political compromise between states, not a commercial transaction"). Interstate compacts also "perform[] high functions in our federalism," as one of "two methods under our Constitution of settling controversies between States," the other being lawsuits in the Supreme Court. *Petty v. Tenn. Missouri Bridge Comm'n,* 359 U.S. 275, 279 & n.5 (1959); *accord Hinderlider*, 304 U.S. at 104. As the Eighth Circuit observed:

> While a common law contract directly affects only the rights and obligations of the individual parties to it, an interstate compact may directly impact the population, the economy, and the physical environment in the whole of the compact area. A suit alleging that a state has breached an obligation owed to its sister states under a congressionally approved interstate compact also raises delicate questions bearing upon the relationship among separate sovereign polities with respect to matters of both regional and national import.

Entergy Arkansas, Inc. v. Nebraska, 358 F.3d 528, 542 (8th Cir. 2004).

Unlike a garden variety statute, the Compact is both federal and state law. *E.g.* N.M. Stat. Ann. § 72-15-23 (1978) (New Mexico enactment of the Rio Grande Compact). Similarly, unlike the Reclamation Act, the Compact is both an agreement and a statute. *See Kansas v. Nebraska*, 574 U.S. 445, 454 (2015). Given the "unique features and functions of . . . a compact," if there is a conflict with Reclamation law, the Compact governs the apportionments. *Entergy Arkansas, Inc. v. Nebraska*, 358 F.3d at 542 (citation omitted).[23]

[23] An ordinary conflicts of law analysis is not the correct standard for compacts and the Compacting States do not admit that the Compact, or any other duly adopted interstate compact, is subject to such an analysis. Compacts may not be amended, repealed, or modified by implication by statute. However, in the unlikely event that the Special Master or Court opts to analyze the Compact using this disputed and incorrect premise, the Compacting States would nonetheless prevail because normal rules of statutory construction would also support the primacy of the Compact over general Reclamation law. It is black letter law that "a specific statute controls over a general one." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961). The Court's decision in *Morton v. Mancari*, 417 U.S. 535, 551 (1974) is instructive.

C. The Proposed Consent Decree Does Not Establish Legal Obligations for The United States

Local No. 93 establishes that "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Local No. 93,* 478 U.S. at 529; *see also Johnson v. Lodge # 93,* 393 F.3d at 1106-07; *United States v. City of Hialeah*, 140 F.3d at 981. This is the case because "*it is the agreement of the parties*, rather than the force of the law upon which the complaint was originally based, *that creates the obligations embodied in a consent decree*." *Johnson v. Local # 93*, 478 U.S. at 522 (emphasis added). Recognizing that this reasoning centers the "creation" of an obligation, the Compacting States focused the Joint Motion on whether the Consent Decree entails any "new" obligations. *See* States' Joint Motion § II(A), V(C).

That case concerned the Indian Reorganization Act, which included a preference for qualified Native Americans at the Bureau of Indian Affairs. *Id*. at 537. Congress later passed the Equal Employment Act, which prohibited racial discrimination in federal employment. *Id.* Non-Indian employees challenged the preference, claiming that the later enacted statute impliedly repealed the earlier one. *Id.* at 539. The Court rejected that claim, recognizing that where "the Indian preference statute is a specific provision applying to a very specific situation," the Equal Employment Act, "is of general application." *Id.* at 550. Without an explicit intention to do so, the general statute does not repeal the specific one, "regardless of the priority of enactment." *Id.* at 551. The United States cites *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 175 (2009), for the proposition that repeals by implication are disfavored. U.S. Opp'n at 53. But the Compacting States are not suggesting that the Compact repealed, or is even in conflict with, the Reclamation Act. Quite the contrary, the Compact relies on the Project to accomplish the equitable apportionment. *See Texas v. New Mexico*, 138 S. Ct. at 959. But "the implications of a statute may be altered by the implications of a later statute. This is particularly so where the scope of the earlier statute is broad, but the subsequent statutes more specifically address the topic at hand." *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 143 (2000). Here, there can be no doubt that the later-enacted Compact "more specifically address[es] the topic" of the equitable apportionment since it is express that it was entered into to "for the purpose of effecting an equitable apportionment." Compact at Preamble. In sum, the Compact is both the more specific and the later-enacted provision. It follows that normal rules of statutory construction (if applied) support reliance on the Compact for understanding the equitable apportionment of the Rio Grande over the earlier and more general Reclamation Act.

The United States rejects this formulation of the rule, arguing instead that the United States consent is required to implement any Consent Decree term affecting *any* United States obligations related to Project operations--including existing United States obligations. *See* U.S. Opp'n. § III(B). This argument is a misleading and incomplete statement of the operative standard of decision. It is also premised on a flawed and inaccurate reading of the Consent Decree. For these reasons, the Special Master should reject the United States' objection that the Consent Decree impermissibly imposes legal obligations on the federal government without its consent.

1. The United States Misapplies the Applicable Standard of Decision

Several federal courts have considered the standard in *Local No. 93*, and the decisions construing the rule make it clear that a court should carefully distinguish between a consent decree that directly imposes a new legal obligation on a nonconsenting party and a consent decree that indirectly affects preexisting obligations. *See Martin v. Wilks*, 490 U.S. 755, 771 (1989) (Stevens, J., dissenting) (noting that, "as a practical matter," a consent decree "may have a serious effect" on the interests of an objecting party without requiring his consent); *United States v. Bd. of Educ.* 11 F.3d 668, 672 (7th Cir. 1993) ("A consent decree entered by a federal court, like any other injunction, can have adverse consequences on third parties without thereby being rendered invalid."). Of the decisions in this lineage, three are informative. *See Sierra Club v. North Dakota*, 868 F.3d 1062, 1067 (9th Cir. 2017) (*Sierra Club*); *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1305 (11th Cir. 2011); *Tenn. Ass'n of Health Maint. Orgs. Inc. v. Grier*, 262 F.3d 559, 565 (6th Cir. 2001). Although the Compacting States cited each of these cases in their Joint Motion, the United States again failed to address any of them. Because they show the United States is mistaken, these cases warrant further extended discussion.

First, in *Sierra Club*, the Sierra Club brought an action under the Clean Air Act to compel the Environmental Protection Agency to promulgate regional designations to test compliance with the national ambient air quality standards (NAAQS) for sulfur dioxide. *Sierra Club*, 868 F.3d at 1065. Several states intervened, citing their "significant protectable interest[s]" as the parties responsible for State Implementation Plans to satisfy the NAAQS. *See id.*; *see also* 42 U.S.C. § 7407(a). Following entry of a summary judgment order adjudging that the agency failed to meet a statutory deadline to promulgate the standards, the Sierra Club and EPA reached an agreement by which "the EPA must roll out designations in three phases, with the final promulgation of designations no later than December 31, 2020." *See Sierra Club*, 868 F.3d at 1066. The intervening states objected to the consent decree and appealed its entry. Specifically, the states argued that "the Consent Decree forces indirect duties and obligations on them," because they were required to comply with the agency's Data Requirements Rule to implement their State Implementation Plans. *See Id.* at 1067. The Ninth Circuit upheld the consent decree because "a careful look at the briefing reveals that the States' objection is with the obligations imposed by the Data Requirements Rule, not the Consent Decree." *Id.* The court continued, "*the terms of the Consent Decree operate independently*: the Consent Decree's deadlines would remain in effect even if the Data Requirements Rule had not been promulgated, and *the Data Requirements Rule would still obligate the States to submit additional emissions data in absence of the Consent Decree*." *Id.* at 1068 (emphasis added). On that basis, the Court concluded that the States' attack on the Consent Decree was little more than a "backdoor challenge against this duly promulgated agency rule," which gave rise to the allegedly objectionable obligations. *See id.* at 1068.

Second, in *Florida Wildlife Federation v. South Florida Water Management District*, the Eleventh Circuit employed a standing analysis to affirm the lower court's approval of a consent decree between the Environmental Protection Agency and a group of environmental organizations over the objections of Florida government agencies. *Fla. Wildlife Fed'n, Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d at 1299. The organizations had sued the Florida agency alleging that it had failed to promulgate required numeric water quality standards for the State of Florida. Following a settlement, the organizations and Florida agency entered into a consent decree that "would require the EPA to implement two separate phases of rulemaking" to define the standards. *Id.* at 1300-01. A number of intervening parties appealed, including certain water utilities that would be required to implement any new standards. The Eleventh Circuit held that the intervenors' objections to the consent decree were not justiciable, partly because they were unable to demonstrate a wrong traceable to the consent decree. *Id*. at 1305. The Eleventh Circuit explained that the state-intervenors were not ultimately challenging the consent decree, but a prior administrative action in which the "Administrator made an explicit and unequivocal determination . . . that the Florida narrative nutrient standard was inadequate and that a revised or new standard was necessary to meet the Clean Water Act's requirements." *Id.* at 1300. That determination "triggered the agency's statutory obligation" to promulgate numeric standards notwithstanding the consent decree. *See id.* The consent decree merely clarified the process by which the agency would satisfy that obligation. Thus, the Eleventh Circuit reasoned that the intervenors had no standing to challenge the "a consent decree *which did not impose any* <u>*new duty or condition*</u> *upon the EPA's existing obligations* to promptly promulgate numeric water criteria for Florida's waters." *Id*. at 1305 (emphasis added).

Third, *Tennessee Association of Health Maintenance Organizations, Inc. v. Grier* concerned a lawsuit by a class of Medicaid enrollees challenging state Medicaid program procedures. *Tenn. Ass'n of Health Maint. Orgs. Inc. v. Grier,* 262 F.3d at 561. The district court approved a consent decree that "required defendants to give Medicaid recipients" an "administrative hearing[] to review" adverse coverage decisions. *Id.* at 561-62. Then, in a later enforcement action, a group of enrollees sought to hold the state in contempt for failure to abide by the requirements of the agreed order, resulting in a revised consent decree between the state defendants and plaintiffs. *See id.* at 562-63. The revised consent decree explicitly applied both to the state defendants and also the "managed care contractors" who operated the Medicaid program. *See id.* Several managed care organizations moved to intervene and challenged the revised consent decree; the district court entered the revised decree over their objection; and they appealed. *See id.* at 564. On appeal, the Sixth Circuit ultimately reversed, finding that the fairness hearing before the district court was procedurally inadequate. *See id.* at 567. But, in relevant part, the Sixth Circuit rejected the managed care organizations' argument that "since they were not parties to the consent decree, they cannot be bound by it." *Id.* at 564. The court reasoned that "the intervenors, through their contract with the State of Tennessee, agreed to be bound" to certain requirements, including requirements to develop an appeals process. *See id.* at 565. Because the intervenors were "contractually bound to follow whatever appeals and grievance procedures the State deems appropriate," they were not permitted to challenge the state's agreement to adopt rules clarifying the required procedures through the revised consent decree. *See id.*

Taken together, these cases provide guidance on the impact a consent decree can have on a non-settling party. Consistent with the *Local No. 93* standard, a consent decree is not

objectionable merely because it affects a third party's existing duties and obligations. Rather, to object to the entry of a consent decree, a party must demonstrate that compliance with the terms of the decree would violate its substantive rights in some new way beyond the objector's normal obligations. The intervenors in *Sierra Club* could not bear this burden because they were obligated, irrespective of the decree, to follow the Data Requirements Rule. Likewise, the intervenors in *Florida Wildlife Federation* could show no impermissible "new obligation" because the to-be-promulgated water standards were required by statute, irrespective of the decree. Finally, the intervenors in *Grier* could not complain because the obligation to implement the appeals process arose from their preexisting contractual commitments, not the decree.

Applying these principles to the case at bar, the proposed Consent Decree does not improperly create new legal duties or obligations that offend the United States' rights. The United States' duties and obligations emanate from the Compact and Reclamation law, not the Consent Decree. *See* April 14, 2020 Order, Dkt. 340 at 15. Stated another way, the United States must operate the Project to deliver the equitable apportionment, and that obligation exists independent of the Consent Decree. Indeed, the Court has already recognized as much, concluding that the United States has, through the Compact, assumed a "legal responsibility" to ensure that the equitable apportionment "is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959.

In this light, the United States' position is fundamentally a challenge to its pre-existing obligations imposed by the Compact—that is, a challenge to its duty to effectuate the equitable apportionment. It claims that terms in the Consent decree that require it "to do things[,] like preventing exceedances, changing Project allocations, and so on," are impermissible obligations

arising under the Consent Decree. U.S. Opp'n at 43.[24] Of course, this argument begs the question: did the United States have discretion, prior to the Consent Decree, to operate the Project in a manner that is inconsistent with the equitable apportionment? For instance, does Reclamation have the authority to make allocations to EPCWID that exceed Texas's apportionment? The answer to these questions is unequivocally "no." Reclamation has a legal responsibility to effectuate the apportionment; and EPCWID's allocation rights can "rise no higher" than the apportionment rights of Texas, *Nebraska v. Wyoming I*, 295 U.S. at 43.

2. The Consent Decree Does Not Result in Any Legal Prejudice to the United States

To legally prejudice the United States via entry of the Consent Decree over the United States' objection, the Consent Decree would have to impose *new*, non-consensual obligations on the United States. Argument § III.C.1., *supra*. It does not. As set forth below, any obligations of the United States related to the Consent Decree are directly to the United States' duty to deliver Project water to effectuate the 57:43 apportionment, a duty which has been repeatedly established throughout the course of this litigation as an *existing* obligation of the United States.

a. The Court and Special Master Have Already Ruled, and the United States Has Conceded, that the Project Must Be Administered to Effectuate the Apportionment

It is no longer at issue in this case whether the United States has a duty to deliver Project water to effectuate a 57:43 Compact apportionment. It does. The Court and the Special Master have held, and the United States itself has admitted, that the United States is bound by the Compact apportionment. *See* States' Joint Motion at 56-62. Consistent with the Special Master's MSJ Order, Dkt. 503, the Consent Decree establishes a 57:43 division of water between

[24] Note that this argument is also technically incorrect because the Consent Decree does not require the United States to do anything. The Consent Decree contains no formal injunction against the United States. Section III.C.3. of this brief, *infra*, discusses this issue in detail.

New Mexico and Texas, establishes a baseline for the division of this water, and establishes a mechanism, the EEPI, to calculate and measure the volumes of water that go to each State based on releases from Caballo. States' Joint Motion at 66-69. The United States, in line with its recognized duty to operate the Project to effectuate the apportionment, must now "look to project operations and determine whether those operations are consistent" with the Consent Decree. Hr'g Tr. at 49, Dkt. 264.

b. Project Accounting and Allocation Procedures Must Be Consistent with the Compact Apportionment

Despite its previous acknowledgement that it must operate the Project in compliance with the Compact, including the final decree of the Court in this case, the United States asserts that the Consent Decree should not be entered because it "would impose a series of obligations on the United States" without its consent. U.S. Opp'n at 36. The Consent Decree does not actually establish any new obligations with which the United States must comply. It simply defines in more detail the obligations of the States, and by extension the United States, to ensure that the 57:43 apportionment required by the Compact—the same division of water required by the Downstream Contracts—is in fact made.

Specifically, the United States complains the Consent Decree would force it to deprive the Districts of water allocations to which they are legally entitled, would mandate changes to Project accounting and allocation procedures, would impose new obligations concerning the El Paso Gage, and would establish a "new" Index requirement. The States respond to each of these points in turn.

i. The Consent Decree Does Not Deprive the Districts of Any Lawful Entitlement to Water

The United States argues at multiple points in its opposition that the Consent Decree is insufficient because it does not require New Mexico to undertake specific water management

actions to meet its Index obligations, which the United States takes to mean that New Mexico apparently will not attempt to comply with the Consent Decree and will simply "require Reclamation to supply the water to remedy violations of the decree on New Mexico's behalf." U.S. Opp'n at 38; *see also id.* at 57 (Consent Decree "requires the United States and the Districts . . . to shoulder New Mexico's burden of compliance"). If this occurs, the United States asserts it will "deprive one of the Districts of water to which it is contractually entitled." *Id*. at 37. This is incorrect.

New Mexico is already taking concrete steps to robustly manage water use in the Lower Rio Grande to ensure its Index obligations are met. These actions, coupled with careful monitoring of Index deliveries by the States, are meant to ensure the Index departure triggers are not activated. But even if they are, the reallocation of water will not deprive either District of any water to which it is lawfully entitled.

As the Special Master recognized and ruled, the Compact apportions water in the Lower Rio Grande 57% to New Mexico and 43% to Texas. MSJ Order, Dkt. 503 at 51. The Compact does not require specific allocations of water to the States beyond this general 57:43 division, nor do the Downstream Contracts require any different allocation of water to the Districts. If there is a significant negative or positive Accrued Index Departure, this indicates that one or the other of New Mexico or Texas has received more water than it was apportioned under the Compact, and that water has not been delivered in accordance with the 57:43 division required by the Compact. *See* Ex. E, Barroll 2d Decl., ¶¶ 5, 15-24; Ex. D, Lopez Decl., ¶ 18; Ex. A, Hutchison 2d Decl. ¶¶26-28.

By extension, if there is a significant Accrued Index Departure, this also means that if there is a significant Accrued Index Departure, one or the other District has received more water

than it is entitled to receive under the Downstream Contracts. Under these circumstances, transferring part of the water away from that District to the other District will not deprive either District of water to which it is contractually entitled. Instead, it will ensure Reclamation is operating the Project to effectuate the Compact's apportionment and that the allocations match the apportionment, as the United States has acknowledged it is required to do. In this way, the transfers will also ensure the Districts receive their contractual entitlements.

ii. The Consent Decree's Suggested Changes to Project Accounting Do Not Impair Any Legal Obligations of the United States

The United States next complains that the Consent Decree would "mandate immediate and permanent changes to the Project allocation and accounting methods that are documented in the 2008 Operating Agreement and Project Operations Manual."[25] U.S. Opp'n at 38. Such changes will, the United States asserts, allow the States to "twiddle the knobs" of the Project. *Id*. at 59.

Initially, this argument is premised on a misreading of the Consent Decree. The Consent Decree does not, as a formal matter, impose any new obligations on the United States. *See* Argument § III.C.4. *infra* (distinguishing the injunctive and non-injunctive terms of the Consent Decree). Rather, to the extent that the Consent Decree contains provisions touching upon Project accounting requirements, it does little more than memorialize the rule that Project operations and Project Accounting must be consistent with the equitable apportionment. *See, e.g.,* Ex. E, Barroll 2d Decl. ¶¶ 4-6, 11-24, 28-32, 35-37; Ex. B, Brandes 2d Decl. ¶ 25. As long as

[25] The Compacting States note that the Project Operations Manual is not a contract, but merely a technical document that specifies procedures for implementing the 2008 Operating Agreement. Trial Tr. Vol. I, Dkt. 701 at 193: 25-194:11. It has been modified several times by the Allocation Committee since the 2008 Operating Agreement was adopted. Ex. E, Barroll 2d Decl., ¶ 18.

Reclamation is allocating and distributing water consistent with the Compact, the Consent Decree does not otherwise constrain Reclamation's discretion. Consent Decree ¶ III.A; *see also* Ex. E, Barrol 2d Decl., ¶¶3-10, 22; Ex. B, Brandes 2d Decl. ¶¶ 18-25.

The United States acknowledges that changes to Project operations and accounting would be necessary to achieve the division of water established in the Compact and Index. The United States identifies, in its opposition, three changes to Project operations and accounting that it alleges the Consent Decree requires it to make: modifying the D2 regression equation to incorporate prior-year releases, changing the accounting point for EPCWID's deliveries to the El Paso Gage, and modifying Project carryover accounting to account for evaporation and conveyance losses.[26] U.S. Opp'n at 38-39. The United States never explains how any of these changes are new obligations (rather than manifestations of its existing obligation to effectuate the equitable apportionment under the Compact), let alone how they are prejudicial to the United States.

(a) Two-year Regression

To evaluate compliance with the Index Methodology, the Consent Decree uses a two-year regression equation which includes both current-year and prior-year Caballo releases, as this improves consistency with the Index Methodology. States' Joint Motion, Dkt. 720 at 63-64; *see also* Ex. E, Barroll 2d Decl., ¶¶ 11, 27.

[26] The United States also asserts that the Consent Decree will require it to make additional changes to Project allocations and accounting but that it is too "vague, indefinite, and incomplete" for the United States to determine what changes will be needed. U.S. Opp'n at 60. The Compacting States address the United States' arguments concerning the alleged vagueness of the Consent Decree in Section III.C.4., *infra.*

To allocate Project water under the D2 condition under the 2008 Operating Agreement, the United States uses a one-year regression equation ("original D2 equation"). *See* States' Joint Motion, Hutchison Decl., Dkt. 720 at Ex. 4 ¶¶ 24, 75-82.

Appendix, Section 8.1 of the Consent Decree describes the use of a two-year D2 equation for purposes of allocation as a means to ensure consistency between Project operations and the Compact. *See also*, States' Joint Motion, Hutchison Decl., Ex. A, ¶¶ 79-82. The United States already allocates Project water using a one-year D2 equation; making Project allocations based on a two-year D2 equation does not impose a new obligation on the United States and it is the simplest way for the United States to ensure it satisfies its duty to deliver water in accordance with the Compact's apportionment.

While it would be no more burdensome for the United States to use the modified D2 equation than the original D2 equation, but it is not, as a technical matter, required to do so. *See* Ex. E, Barroll 2d Decl., ¶ 11. However, if the United States declines to adopt the two-year D2 regression, Project allocations will deviate from the Index obligation, increasing the likelihood and frequency of Index departures. States Joint Motion, Dkt. 720 at 64; Ex. B, Brandes 2d Decl, ¶¶ 28, 36. This will increase the likelihood that the Index departure limits in the Consent Decree will be reached, and is inconsistent with the equitable apportionment required by the Compact. Accordingly, it would be prudent to adopt the modified D2 equation for allocation purposes to track the regression used in the Index so that Project accounting is consistent with the Compact apportionment.

(b) Use of the El Paso Gage

The United States raises two concerns regarding the use of the El Paso Gage to measure the Index Obligation and Index Delivery. First, the United States points out that the El Paso Gage is operated by the International Boundary and Water Commission (IBWC) and asserts that

using this gage as a Compact compliance point would impose new obligations on the IBWC to meet the Rules and Regulations for Rio Grande Compact Administration (Compact Rules) concerning gaging stations and to maintain the Gage to meet certain USGS accuracy standards. U.S. Opp'n at 39-40. Second, United States complains that the Compact does not require accounting at the El Paso gage, nor has the Rio Grande Compact Commission (Commission) formally adopted the El Paso Gage as a Compact gaging station. *Id*. at 40.

Regarding the first point, IBWC is already obligated to maintain the El Paso gage. Declaration of William Finn in Support of the United States' Opposition to Proposed Decree (Jan. 20, 2023) (Finn Decl.), to U.S. Opp'n, Dkt. 754 ¶¶ 6-7; s*ee also,* Second Declaration of Sullivan in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado for Entry of Consent Decree Supporting the Rio Grande Compact (Sullivan Decl.), Ex. H, Sullivan Decl., ¶ 21. The United States does not explain how meeting the Compact Rules as regards the El Paso Gage would impose any burden on the IBWC or impair any of its existing legal obligations other than noting they would require IBWC to maintain the gage to obtain "good" accuracy as defined by the USGS. Finn Decl. ¶ 9. To meet this standard, the United States suggests IBWC will need to pay for upgrades to the El Paso Gage to meet USGS standards, which "may" cost tens of thousands of dollars per year. *Id*. ¶¶ 9-10. The United States does not assert that the El Paso Gage does not currently meet USGS accuracy criteria or that any upgrades actually are necessary. If IBWC truly needs to upgrade the El Paso Gage to meet USGS quality standards, the States will offset the additional costs incurred. Ex. B, Brandes 2d Decl ¶ 22; Ex. F, Hamman 2d Decl., ¶¶ 21-25. Such a *de minimis* cost is insufficient to demonstrate any impairment to the United States' existing legal obligations as regards the El Paso gage.

Regarding the second point, Article II of the Compact authorizes the Commission to maintain gaging stations at specified points and "at such other points as may be necessary for the securing of records to carry out the Compact"; it does not limit Compact gaging stations to those listed in Article II. *See* Ex. H, Sullivan Decl. ¶¶15-16. The Commission has already enacted a resolution supporting entry of the Consent Decree, including its reliance on the El Paso Gage. Resolution of the Rio Grande Compact Commission re Proposed Consent Decree in Original Action No. 141, *Texas v. New Mexico and Colorado*, in the United States Supreme Court (Nov. 10, 2022). Ex. D, Lopez Decl., ¶ 15.

Further, Article V of the Compact allows the Commission to determine that, if "reliable records are not obtainable, or cannot be obtained, at any of the stream gaging stations herein referred to," for any reason, these stations may be abandoned and "another station, or other stations, shall be established and new measurements shall be substituted" that, in the Commission's unanimous opinion, "result in substantially the same results so far as the rights and obligations to deliver water are concerned." Pursuant to Article V, the Commission has already modified the Compact gaging stations to measure deliveries of water at Elephant Butte Reservoir, and in the process modified the Article IV delivery schedule for New Mexico to incorporate the months of July, August and September, which were not included in the Article IV delivery schedule when the Compact was originally ratified. 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 (1948 Resolution).

The 1948 Resolution not only changed the gaging stations used to measure New Mexico's Article IV delivery, it also altered the delivery schedule. Even though this affected the

United States' existing Project obligations, it was permissible under the Compact. Similarly, the Commission and, by extension, the Compacting States, have the authority to mandate the El Paso Gage be used to measure Compact deliveries to Texas. Ex. F, Hamman 2d Decl., ¶¶ 21-25. Like summer flows between Otowi gage and Elephant Butte Reservoir, flows at the Texas-New Mexico state line were initially excluded from the Compact due to technical reasons. States' Joint Motion, Dkt. 720 at 65-66. When the Commission, in 1948, overcame the technical issues with measuring summer flows, it incorporated them into the Article IV delivery schedule. Similarly, now that the States have developed a method to accurately measure state-line flows to Texas, they are proposing a method to measure those deliveries to ensure the Compact's apportionment is met. The United States identifies no reason the El Paso Gage cannot be used to make these measurements.

(c) Change of EPCWID's Accounting Point

The United States also notes that the Consent Decree uses the El Paso Gage as the accounting point for Texas deliveries. U.S. Opp'n at 38-39. Again, the United States is already obligated to distribute water in accordance with the Compact's apportionment and to account for this distribution. The Consent Decree does not impose this obligation on the United States but simply clarifies how Compact deliveries to Texas are measured. Failing to adjust the EPCWID charge point would increase the variance between the allocation and Texas's apportionment in a way that is inconsistent with the Compact. *See* Ex. E, Barroll 2d Decl., ¶¶ 12, 27-29.

In addition, the United States never explains why accounting for deliveries at the El Paso Gage is burdensome. The United States currently accounts for EPCWID deliveries at multiple downstream points using multiple gages and complicated accounting. Accounting for deliveries at the El Paso Gage will greatly simplify the accounting procedures the United States uses to calculate EPCWID's deliveries and will harmonize the United States' Project and Compact

delivery obligations. Ex. E, Barroll 2d Decl., ¶ 12. This will decrease, not increase, the burden on the United States.

Similarly, the United States is a party, along with EPCWID, to a 2001 contract with the El Paso Water Utility (EPWU) for volumes of water to which EPCWID would otherwise be entitled. The Consent Decree does not impact the contract delivery rights of EPWU in any way. That issue is a matter internal to water distribution in Texas. Ex. E, Barroll 2d Decl., ¶¶ 31-32.

(d) Carryover

The 2008 Operating Agreement formalized the Districts' reliance on carryover and the United States has accounted for Project carryover since at least 2007. The United States also notes that the Consent Decree requires Project carryover accounting to incorporate evaporation and conveyance losses, U.S. Opp'n at 39, but again fails to explain how these changes are burdensome or new, let alone how they conflict with any of its legal obligations. Accounting for evaporation and conveyance losses from Project carryover merely ensures a balance between the amounts of water physically available for release and the allocations available to the Districts. Ex. E, Barroll 2d Decl., ¶¶ 33-37; Ex. D, Lopez Decl., ¶ 19.

The United States also complains that Project carryover will be impacted because the Consent Decree provides that any accrued Negative Departures are eliminated if EPCWID carries over an average of 180,000 acre-feet or more in three consecutive years. U.S. Opp'n. at 60-61. However, this does not affect any legal obligation of the United States. The Consent Decree does not prohibit EPCWID from carrying over water, nor does it prohibit the United States from allowing such carryover. Even if the carryover limit in Section II.C.3.c of the Consent Decree is triggered, EPCWID is not deprived of any carryover allocation or the ability to carry over additional allocation, subject to the contractual limits in the 2008 Operating Agreement. This provision merely reflects the States' determination that, if EPCWID has

consistently large volumes of carryover allocation over multiple years, it will impact the apportionment and Index and New Mexico should not be penalized if it has an accrued Negative Departure in these circumstances.

iii. The Index

Finally, the United States claims that the "Index is [] necessarily imposing something 'new'" because the Compact does not adopt an inflow-outflow methodology. U.S. Opp'n at 43-44. This argument misunderstands the issue. The issue is not whether the Index is a "new" methodology for measuring compliance with the apportionment; it undoubtedly is. But the Index does not directly impose any obligations on the United States. Rather, the United States' implicit argument is that the Index is offensive because it restricts Reclamation's discretion to impose a specific division of water as between the New Mexico and Texas Districts. This argument fails because the United States' obligation to abide by the apportionment in operating the Project, arises from the Compact, not the Consent Decree. *See* March 31, 2020 Order, Dkt. 338 at 29 ("To the extent current operations are inconsistent with the Court's ultimate decree on apportionment, any operating agreement will have to be brought into conformity with the decree."). Thus, the issue is whether the Index, as a method of mathematically describing compliance with the apportionment, is consistent with the Compact. As discussed in Argument Section III.B.1.b., *supra*, the United States has not demonstrated any inconsistency.

3. Sovereign Immunity Does Not Bar the Consent Decree

Next, the United States argues that the Consent Decree impermissibly restricts the discretion of Reclamation in a manner that violates its sovereign immunity. *See* U.S. Opp'n § III(C). This argument fails because its predicate is false: the Consent Decree does not remove or impermissibly restrict Reclamation's discretion in its operation of the Project. The United

States' argument also fails because the Consent Decree does not create any obligation that would offend its sovereign immunity.

The only parties enjoined under the Consent Decree are the Compacting States, their officers and agents, and, by representation, the water users in each of their respective jurisdictions (e.g., EBID, EPCWID). *Compare* Consent Decree § II (establishing injunctive terms) *with* § III (concerning Project operations); *see also Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945) (discussing "the commonlaw doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control"). The Consent Decree operates on the understanding that the United States has committed itself to operate the Project in a manner consistent with its obligation to effectuate the apportionment. *See, e.g.,* U.S. Resp. to EPCWID Mot. to Intervene at 10 (arguing that the "contractual rights and obligations" within the Project "are considered only after the respective rights of the States under the Compact—the subject of this original action—are defined"). *Cf. Florida v. Georgia*, 138 S. Ct. 2502, 2526 (2018) (remarking, despite the Corps of Engineer's refusal to waive its sovereign immunity, that "[t]he United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin's waters proves justified in this case"); Ex. H, Sullivan Decl., ¶¶ 6-14 (describing historical instances in which the United States has, at the request of a state, operated diversion and storage works to satisfy equitable apportionment requirements).

As the Special Master has noted, the question of whether the United States may be enjoined to implement specific changes to the Project to effectuate the apportionment is not before the Court in this action.

> The Court's ultimate interpretation of the Compact will inform future administrative decisions and Project operations. The United States has agreed it will be bound by any determination of the Supreme Court as to its obligations under the Compact and Project administration. In fact, a failure to abide by the Court's interpretation in the future would likely factor largely into any challenges to the United States's administration of the Project that might arise under the Administrative Procedures Act or other sources of authority where Congressional waivers of immunity can be found.

March 31, 2020 Order, Dkt. 338 at 15. For that reason, the United States may not use its sovereign immunity in this Compact enforcement proceeding as a shield to block a settlement among the Compacting States to clarify the equitable apportionment among them.

4. The Proposed Consent Decree and Its Appendices Are Sufficiently Specific

The United States next makes an abbreviated argument that the Consent Decree is not sufficiently specific. According to the United States, "[i]n addition to impermissibly granting injunctive relief against the federal government to which it has not agreed in a settlement, those provisions are vague and indefinite and fail to state the content or limitations of the prohibitions they would entail." U.S. Opp'n at 41-42.

This argument is incorrect. Section II is the only part of the Consent Decree that contains an injunction. Neither that Section nor any part of the Consent Decree directly applies to the United States. The Supreme Court has emphasized that injunctions must be specific "to prevent uncertainty and confusion *on the part of those faced with injunctive orders*, and to avoid the possible founding of a contempt citation on a decree too vague to be understood." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (citing *Longshoremen's Assn. v. Philadelphia Marine Trade Assn.*, 389 U.S. 64, 74-76 (1967)) (emphasis added). But the Consent Decree is not directly applicable to the United States, and there is no danger of a contempt citation against the United

States. Thus, it is of no import that the United States considers the provisions to be insufficiently specific.[27]

Even so, the United States points to three explanatory provisions of the Consent Decree for its vagueness argument. First, the United States points to Paragraph II.A.4, which provides that "[t]he United States is responsible for operating the Project in a way that assures that the Compact's equitable apportionment to Texas and New Mexico below Elephant Butte Reservoir is achieved consistent with the terms of this Decree." *See* U.S. Opp'n at 41. As the United States acknowledges, however, Rule 65(d) requires an injunction to "state the reasons why it issued," Fed. R. Civ. P. 65(d)(1)(A), and this statement is little more than a recitation of the law as identified by the Court in its 2018 Decision. *See Texas v. New Mexico*, 138 S. Ct. at 959 (United States is "charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made") (internal quotes omitted).

[27] Even on that score, however, the United States' argument fails. Rule 65, though not strictly applicable, provides that an injunction must "describe in reasonable detail – and not by referring to the complaint or other document – the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). This standard has been described as requiring "that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *United States Steel Corp. v. United Mine Workers*,519 F.2d 1236, 1246 n.20 (5th Cir. 1975). The Consent Decree more than satisfies that standard.

The Consent Decree "specifies procedures to ensure the proper apportionment of Rio Grande Water between Texas and New Mexico below Elephant Butte Reservoir." Consent Decree § II.A.6. It contains a detailed formula and calculations for calculating the water to be delivered to Texas at the El Paso Gage. *See id.* § II.B.(i) and Appendix 1. Appendix 1 also contains specific information on how to determine the Index Obligation, Index Delivery, and Annual Index Departure. The Consent Decree specifies the departure limits, what happens if those departure limits are exceeded, when it applies, and what actions the Compacting States are obligated to undertake. There is no reasonable argument that the Consent Decree lacks specificity on the EEPI and method for determining the equitable apportionment below Elephant Butte. *See* Ex. I, Longworth Decl., ¶¶ 15, 17; Ex. E, Barroll 2d Decl., ¶¶ 38-40; Ex. D, Lopez Decl., ¶ 23.

Next, the United States objects to recognition of the law in Paragraph III.A that "Project operations and Project Accounting must be consistent with this Decree." *See* U.S. Opp'n at 38. According to the United States, these provisions "fail to state the content or limitations of the prohibitions they would entail." U.S. Opp'n at 41-42. But the United States grossly overstates the complexity of this provision. As discussed, the Consent Decree provides a detailed description of the Index and the amount of water that each State is apportioned as measured at the El Paso Gage. When the United States conducts its Project Accounting, if the amount of water allocated to each District is the same as the Index Obligation, the Project Accounting is consistent with the Compact and Consent Decree. Ex. B, Hutchison 2d Decl. ¶¶ 20-23. Other than that, the Consent Decree "does not otherwise alter the discretion of the United States to operate the Project." Consent Decree at III.A.; *see also* Ex. I, Longworth Decl., ¶¶ 9-17.

Last, the United States complains about Section V of the Consent Decree which allows the Appendix to be adjusted by unanimous agreement of the Compacting States. The purpose of that provision is to allow the Compacting States to correct errors or make improvements to the formulas and technical provisions of the Appendix and other supporting documents without troubling the Court with each minor change. Such provisions are not uncommon in Compacts and Decrees. For example, in its Decree resolving the last dispute between Texas and New Mexico over the Pecos River, the Court provided that the River Manual, which governs Compact accounting, could be changed "in accordance with any written agreement" of the States. *Texas v. New Mexico*, 485 U.S. 388, 392 (1988) (per curiam). The United States again overstates the significance of Section V in arguing that it provides "the States the continuing authority to mandate changes to Project operations." U.S. Opp'n at 39. That is not the intent of Paragraph

V, but in the unlikely event that there are future Project operations that all three Compacting States agree violates the Compact, that should be cause for concern for the United States.

D. The Proposed Consent Decree is Fair, Adequate, and Reasonable

The United States recites the standard for entry of a consent decree (U.S. Opp'n at 54), namely that it must be "at least fundamentally fair, adequate and reasonable." *United States v. Oregon,* 913 F.2d at 580. However, the United States' "unfairness" arguments amount to mischaracterizations of the substance of the Consent Decree and arguments about the merits of the United States' litigation positions. But a consent decree "is not a decision on the merits or the achievement of the optimal outcome for all parties, but is the product of negotiation and compromise." *Id.* (quoting *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971)). Courts look at both procedural and substantive fairness when evaluating a consent decree. *United States v. Chevron U.S.A. Inc.,* 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005). The United States' arguments do not provide a basis to reject the consent decree on any fairness grounds.

1. The Proposed Consent Decree is Substantively Fair

The Consent Decree can be evaluated for substantive fairness by reference to the "best-case scenario" for relief to Texas in this case. *United States v. Chevron U.S.A. Inc.,* 380 F. Supp. 2d at 1114. However, contrary to the United States' arguments, this does not require a demonstration that the Consent Decree granted the precise relief Texas sought, but rather by comparison with Texas's claims is the Consent Decree a reasonable compromise. *Id.*[28]

[28]"Moreover, by proposing such a best-case scenario benchmark, the Court has not registered any expectation that EPA would have secured anything similar to, or even nearing, that level of emissions reductions. Instead, it is to be expected that the actual relief secured under the Consent Decree will fall short of the best-case scenario. Such a result may be [a] reasonable result of the compromise inherent in any settlement." *United States v. Chevron U.S.A. Inc.,* 380 F. Supp. 2d at 1114.

a. The Consent Decree Represents a Fair Compromise by Both Texas and New Mexico

Under the Consent Decree, Texas gets its water and New Mexico commits to delivering Texas's apportionment using the D2 Condition, which has been used by the Project for allocating deliveries to the Districts since 1985. In turn, the D2 Condition is based on Project operations from 1951-1979. The Index imposed under the Consent Decree will ensure distribution of the states' apportionment 57:43. Ex. A, 2d Hutchison Decl. ¶¶26-28. By any measure, this is a reasonable compromise.

Rather than assess the Consent Decree based on the appropriate legal standard, the United States accuses of Texas of "capitulation"—an offensive characterization of the negotiated Consent Decree that will conclude over 10 years of litigation between the Compacting States, including disputes pre-dating the filing of the Original Action—and suggests that New Mexico will "continue [to] authorize[] its water users to intercept and interfere with Project deliveries." U.S. Opp'n at 54. Texas has responded separately to the United States' hyperbole.

The United States' arguments in its Section V(C) of the opposition are exaggerated mischaracterizations of the Consent Decree that originate with the United States' declarants. For example, the United States erroneously suggests that the United States and EBID will shoulder the burden of New Mexico's compliance with the Consent Decree because the Consent Decree is "silent as to how New Mexico is to ensure delivery of the Index Obligation to Texas through a gauntlet of depletions caused by groundwater pumping in New Mexico." U.S. Opp'n at 58. Yet the Consent Decree specifically requires that New Mexico engage in water administration if Negative Departures exceed 80,000 acre feet. Because the Consent Decree relies on the D2 Condition, the pumping that was happening during the period 1951-1979 (primarily EBID's agricultural pumping) is "grandfathered" into the Index. As described in the declaration of State

Engineer Michael Hamman (November 14, 2022), New Mexico is prepared to take on water administration as necessary to make the Consent Decree work. Ex. F, Hamman 2d Decl., ¶¶ 6-10.

The United States' argument that the Consent Decree will "take water away" from EBID "by compromising to a permanent D2 condition that accepts significant depletions from non-Project water users" is puzzling. U.S. Opp'n at 55. As a starting point, the Consent Decree does not "accept significant depletions" from any specific water users. *See,* Consent Decree § II.B. Further, EBID has received water under D2 conditions since 1951—and has made many, arguments in this Original Action that the 2008 Operating Agreement, which also uses D2 as a basis for allocations, must be maintained. As Dr. Hutchison's declaration describes, the 2008 Operating Agreement can continue to form the basis for Project operations, and the Consent Decree will better ensure that deliveries consistent with the D2 condition are realized. Ex. A, Hutchison 2d Decl. ¶ 24; *see also* Ex. E, Barroll 2d Decl., ¶¶ 3-13, 16-19, 25-27, 30.

b. Comprehensive Water Management Will Facilitate the Delivery Obligation Under the Consent Decree

In Section V(C) of its opposition, the United States identifies a "parade of horribles." U.S. Opp'n at 57-62. If the United States is to be believed, entry of the Consent Decree will "undermine the Compact's intended apportionment," *id,* at 58, create a "severely damaged irrigation project," *id*. at 62, and ultimately "cause EBID to fail," *id*. at 62.

Setting aside the hyperbole, the majority of the "horribles" identified by the United States fall into the category of Project operations. While it is true that "Project operations and Project Accounting" must be consistent with the Compact, Consent Decree Section III.A, that is, and always has been, the law. *E.g.,* NM-1061-0003, RFA No. 79 (RFA in which the United States "admits that Reclamation implements the Compact through its operation of the Rio Grande

Project"); Trial Tr. Vol. 2, 12:10-24 (United States' witness acknowledging that in operating the Project, "it's important to follow the Rio Grande Compact."). More importantly, there is no reason to believe that the Consent Decree will have any negative impact on Project operations whatsoever.

Instead, the only issue the Consent Decree bears upon is the proper division of water between the States. So long as the apportionment is not disturbed by Reclamation in its allocation process, the Consent Decree "does not otherwise alter the discretion of the United States to operate the Project." Consent Decree § III.A. That means that Reclamation and the Districts are free to apply a diversion ratio;

- *compare* U.S. Opp'n at 58 *with* Ex. E, Barroll 2d Decl. ¶ 30; estimate allocations at the beginning of the year;
- *compare* U.S. Opp'n at 59 *with* Ex. E, Barroll 2d Decl. ¶¶ 4-6, 9; place, charge and account for deliveries to "account [for] real time conditions;"
- *compare* U.S. Opp'n at 59 *with* Ex. E, Barroll 2d Decl. ¶¶ 4-5, 9; monitor and account for river losses,
- *compare* U.S. Opp'n at 59 *with* Ex. E, Barroll 2d Decl. ¶¶ 17, 20, 26¶; and continue carryover accounting consistent with the Compact; and
- *compare* U.S. Opp'n at 60-61 *with* Ex. E, Barroll 2d Decl. ¶¶ 7-9, 13, 33-37.

As Dr. Barroll explains, "the Index is congruent with the current Project operations," and the Consent Decree is anticipated to have very little impact on "the day-to-day operation of the Project." Ex. E, Barroll 2d Decl. ¶¶ ¶¶ 3, 7, 9, 27.

The only other issue raised by the United States is its complaint that New Mexico "'is not required . . . to take any administrative, regulatory, or management actions' . . . to comply with

the decree." U.S. Opp'n at 58 (quoting King Decl. ¶ 27). This is incorrect. Section II.B. of the Consent Decree provides, in no uncertain terms, that "[t]he State of New Mexico shall manage and administer water in a manner that is consistent with this Decree." And to the extent that the United States is concerned that "non-Project users may continue to intercept" Project water, U.S. Opp'n at 58, as described above in Section II.B., and in the Response of the New Mexico *Amici* (at 15-23), there are robust laws and remedies available to the United States to protect and vindicate its intrastate water rights. *See, e.g. United States v. Nevada*, 412 U.S. at 539-40 ("[a]ny possible dispute with California with respect to United States; water uses in that State can be settled in the lower federal courts in California").

2. The United States Has Not Identified Any Procedural Unfairness

As an initial matter, procedural fairness is satisfied because the United States is allowed to present evidence on whether its interests may be impaired by the Consent Decree. *Local No. 93,* 478 U.S. at 529 (objecting party received appropriate process when allowed to present evidence on reasonableness of decree). The United States cannot stop resolution of the dispute and force a trial by withholding its consent. *Sierra Club v. North Dakota*, 868 F.3d at 1066 ("an intervenor must be heard on whether to approve a consent decree, but it cannot stop other litigants from resolving their dispute by withholding its consent to a decree"). Because the United States has submitted briefs and declarations, and will have oral argument on the Consent Decree, it has failed to establish any procedural unfairness.

None of the United States' counterarguments are persuasive. First, the United States reasserts its same arguments about the confidentiality of the Consent Decree. The Special Master has already considered and rejected these arguments. *See* (Dec. 30, 2022 Order, Dkt. 742). Second, the United States asserts that a consent decree cannot be entered before a

complete trial, in part because it needs to present its "distinctively federal interests." As discussed fully in Argument Section III.A. of this brief, *supra,* the United States has not identified any claim, based upon these interests, that would require a trial in this action. Put simply, the United States has no interest in requiring a trial after the Compact apportionment dispute is resolved because it has no interest in seeking an apportionment to New Mexico and Texas different from that already agreed upon in the Compact. The United States' other potential claims are not extinguished by the Consent Decree. Any interest in Project operations in relation to water use in New Mexico is not a Compact claim and other courts are a more appropriate to try those claims.

3. The Reservation of Continuing Jurisdiction in the Consent Decree Is Common and Does Not Foreshadow Unusual Future Involvement by the Court in Water Administration Below Elephant Butte

The United States challenges Section VI of the Consent Decree which provides for retained jurisdiction by the Court. The relevant provision of the Consent Decree states:

> Any Compacting State may file a motion with the Court for amendment of the Decree or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to this Decree or an action by the Compacting States for the enforcement of the Decree.

The United States' concern with this provision is based on two assumptions: first, that the Consent Decree operates as an injunction on the United States creating new liabilities for which the Compacting States may seek continual advice from the Court; and second, that the provision of retained jurisdiction is improper in resolving an apportionment dispute among states. Both contentions are incorrect.

First, the Consent Decree does not enjoin the United States. Indeed, the Consent Decree does not contemplate any new legal obligations on the United States. See Argument § III.C., *supra*. To the extent that the United States exercises its discretion in a manner inconsistent with

the apportionment under the Compact, the Compacting States may have recourse to the Administrative Procedure Act to challenge any final action by the United States that they believe violates the Compact. *See,* 5 U.S.C. § 701 et seq. Therefore, resort to the Supreme Court is unnecessary.

Second, the United States' assertion that the language of Section VI is impermissibly broad or ambiguous is unfounded. There is no requirement to set out a detailed procedural roadmap for a future dispute. The Court retains authority to fashion the procedures. Since the Court serves as a substitute for the diplomatic resolution of controversies between sovereigns, the Court may "'regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.'" *Texas v. New Mexico*, 138 S. Ct. at 958 citing *Kansas v. Nebraska*, 574 U.S. at 454) (quoting *Kentucky v. Dennison*, 65 U.S. 66, 98 (1861)), (internal quotes omitted. The language in the Consent Decree is similar to that found in other original action decrees of the Court.

> Any of the parties hereto, complainant, defendants or intervenors may apply at the foot of this decree for other or further action or relief and this Court retains jurisdiction of the suit for the purpose of any order or direction of modification of this decree or any supplemental decree that it may deem at any time to be proper in relation to the subject matter in controversy….

New Jersey v. New York, 345 U.S. at 371.

> The Court retains jurisdiction to entertain such further proceedings, enter such orders, and issue such writs as it may from time to time deem necessary or desirable to give proper force and effect to this Decree.

Kansas v. Nebraska, 575 U.S. 134, 135 (2015). The retained jurisdiction provision in the consent decree is very similar to other provisions approved by the Court.

Moreover, the United States imagines that the retained jurisdiction provision creates an impermissible supervisory role for the Court similar to *Vermont v. New York*, 417 U.S. 270 (1974). This is incorrect. *Vermont v. New York* placed the Court in an arbitral role and did not

involve any legal or factual resolution of claims. *Id.* at 276-77. Rather than impose constant supervision over the administration of the Compact, the retained jurisdiction provision maintains the Court's role of deciding discrete legal challenges to a final judgment, consistent with its Article III role. The inclusion of retained jurisdiction language does not create a continual administrative role for the Court. *New Jersey v. New York* did include appointment of a special master. It along with *Texas v. New Mexico*, 482 U.S. 124 (1987), are the only original actions about water apportionment to do so. However, *Kansas v. Nebraska* used similar retained jurisdiction language and did not establish a river master or impose continued ministerial supervision on the Court. Therefore, retained jurisdiction language, by itself, does not set up a river master or involve the Court in non-adjudicatory duties.

Instead, the retained jurisdiction provision ensures that the Court retains its role in adjudicating legal disputes. The Compacting States' ability to alter the provisions of the Consent Decree, once entered by the Court, is limited. The Court has exclusive jurisdiction over Compact disputes among the Compacting States that involve enforcement of or changes to its decree. The retained jurisdiction provision reflects the agreement among the Compacting States that an allegation requiring enforcement or modification of the Consent Decree terms are properly within the subject matter jurisdiction of the Court and agreement that they may move the Court for leave to seek relief. Indeed, the States are not able to alter the Court's decree on their own and the Court retains exclusive jurisdiction over disputes among the States. The "Court exercises 'original and exclusive' jurisdiction to resolve controversies between States that, if arising among independent nations, 'would be settled by treaty or by force.'" *South Carolina v. North Carolina*, 558 U.S. at 267, *quoting Kansas v. Colorado*, 206 U.S. 46, 98 (1907). The retained jurisdiction provision recognizes the Court's exclusive role.

IV. CONCLUSION

On the basis of the Compacting States' Joint Motion, this Reply, and all supporting documents, the Compacting States' respectfully request that the Special Master recommend entry of the Consent Decree to the Supreme Court as a final resolution of this original action.

Respectfully submitted,

By: _____

STUART L. SOMACH, ESQ.*
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
RICHARD S. DEITCHMAN, ESQ.
**Counsel of Record*

KEN PAXTON
Attorney General of Texas
BRENT WEBSTER
First Assistant Attorney General
GRANT DORFMAN
Deputy First Assistant Attorney General
SHAWN COWLES
Deputy Attorney General for Civil Litigation
WILLIAM F. COLE
Assistant Solicitor General
BEAU CARTER
Assistant Solicitor General
PRISCILLA M. HUBENAK
Chief, Environmental Protection Div.
OFFICE OF THE ATTORNEY GENERAL OF TEXAS
P.O. Box 12548
Austin, TX 78711-2548

Counsel for the State of Texas

By:_ 

PHILIP J. WEISER
Attorney General of Colorado
LAIN LEONIAK
First Assistant Attorney General
CHAD M. WALLACE*
Senior Assistant Attorney General II
PRESTON V. HARTMAN
Assistant Attorney General

Colorado Department of Law
1300 Broadway, 7th Floor
Denver, CO 80203
* *Counsel of Record*

Counsel for the State of Colorado

By:_____ 

RAÚL TORREZ
New Mexico Attorney General
JAMES GRAYSON
Chief Deputy Attorney General
ZACHARY E. OGAZ
Assistant Attorney General
STATE OF NEW MEXICO

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys GENERAL
TROUT RALEY
1120 Lincoln St., Suite 1600
Denver, CO 80203

JOHN B. DRAPER
General Special Assistant Attorney
CORINNE E. ATTON
DRAPER & DRAPER LLC
325 Paseo De Peralta
Santa Fe, NM 87501

JEFFREY J. WECHSLER*
Special Assistant Attorney General
SHELLY DALRYMPLE
KALEB W. BROOKS
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501
505-986-2637
jwechsler@montand.com
**Counsel of Record*

Counsel for the State of New Mexico