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

♦

CONSOLIDATED REPLY BRIEF IN SUPPORT OF THE STATE OF NEW MEXICO'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO EXCLUDE CLAIMS FOR DAMAGES IN YEARS THAT TEXAS FAILED TO PROVIDE NOTICE TO NEW MEXICO OF ITS ALLEGED SHORTAGE

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This consolidated reply brief is in response to Texas's Opposition to New Mexico's Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortage ("Tex. Notice Resp." and "Texas's Response Brief"), and in response to the United States' Memorandum in Response to New Mexico's same motion ("U.S. Resp.").[1]

I. INTRODUCTION

Texas seeks damages on the basis that New Mexico allegedly interfered with, and prevented Texas from receiving its Compact apportionment. The questions presented in this motion are whether Texas must provide notice to New Mexico of shortages in a given year, under the Compact, to preserve a right to claim damages under the Compact, and whether Texas provided such notice, in any year for which it now claims damages. The evidentiary burden as to notice is on Texas, and Texas has failed to discharge this burden. Texas is required to give notice, and it failed to do so in all years prior to filing this case.

Contrary to statements made in section II.A. of Texas's Response Brief, New Mexico's Motion is well-taken. New Mexico is not arguing that Texas's "Compact entitlement is . . . subject to state law, in this case, New Mexico state law." Tex. Notice Resp., 1. Rather, New Mexico is arguing that "the Compact is inextricably intertwined with the Rio Grande Project," as the Court has said (*Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018)), and that the Compact therefore incorporates the law governing the Project—Reclamation law—and the law governing the water right acquired by Reclamation. N.M. Notice Mot., 8. This law requires that notice be given of

[1] In this Reply Brief, New Mexico adopts the abbreviation for briefs contained in New Mexico's Consolidated Reply to Parties in Support of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment (N.M. App. Reply). All exhibits designated "NM-EX __" in this Reply Brief are contained in New Mexico's Final Exhibit Compendium dated February 5, 2021, filed with New Mexico's Reply Briefs.

alleged shortages of water caused by New Mexico. This requirement is "inextricably intertwined" with, and is thus part of, the Compact. Further, Texas's argument that the adoption of the Compact itself put New Mexico on notice of a shortage in Texas caused by New Mexico, is just as wrongheaded as it would have been in the *Montana* case.

There is no issue of material fact critical to this motion that is in dispute.[2] New Mexico and Texas have both adopted the doctrine of prior appropriation, and the Court has found that this doctrine can be given interstate effect. A fundamental element of the doctrine is that senior water users must issue a "priority call" notifying upstream junior water users of shortages and demanding that they cease diverting water, until the senior user receives the water to which he is entitled. This call requirement is procedural and is a form of self-help. Akin to the mitigation of damages doctrine, this call requirement aims to avoid and mitigate injury. This call requirement applied to and attaches to the water right acquired by Reclamation for the Project.

Texas has never made a priority call on New Mexico relating to activities below Elephant Butte Reservoir. Instead of issuing a priority call or otherwise notifying New Mexico of alleged water shortages under the Compact, Texas, together with the two water districts (EBID and EPCWID) negotiated a tripartite agreement with Reclamation, which changed the operating procedure for the Project. New Mexico was not a party to these negotiations. Starting in 2006, the effect of these negotiations has been to increase Project allocations to EPCWID and decrease allocations to EBID in New Mexico. As a result, Texas has received far more than the share due its 67,000 of 155,000 Project irrigable acres (43%). This prompted New Mexico to file suit in

[2] New Mexico responds to Texas's Evidentiary Objections and Responses to New Mexico's Facts (Tex. Evid. Resp.) and to The United States of America's Response to New Mexico's Statements of Undisputed Material Facts (U.S. Resp. UMF) in the simultaneously-filed New Mexico Response to Texas Objections, and N.M. Fact Reply.

federal district court in 2011. Texas responded by filing the Complaint that initiated this litigation in the Supreme Court.

Under the doctrine of prior appropriation, Texas is precluded from claiming damages in every year in which Texas failed to notify New Mexico of alleged water shortages. This case is analogous to *Montana v. Wyoming*. In *Montana*, the Court found that, to pursue damages, downstream state Montana "must place a call." *Montana v. Wyoming,* 138 S. Ct. 758, 759 (2018). The Yellowstone River Compact, at issue in that case, contained no explicit notice requirement. Nonetheless, the Special Master found that absent notice, upstream state Wyoming was "not liable" under that compact. *Montana v. Wyoming*, Second Interim Report (Dec. 29, 2014), at 47. The same finding is appropriate here—by providing no detailed procedures governing the administration and distribution of water below Elephant Butte Reservoir, the Compact incorporated the Project, Reclamation and other background law, including, in this instance, the doctrine of prior appropriation and its notice requirement. This background law, that is inherent in the water right of the Project, continues to be part of Texas's and New Mexico's Compact apportionment rights below Elephant Butte.

For all of the foregoing reasons and for the reasons set out more fully below, partial summary judgment is appropriate—Texas should be precluded from claiming damages in every year in which Texas failed to give New Mexico notice of its alleged shortages.[3]

[3] Texas has confirmed that "Texas has chosen not to seek money damages for [any] impacts to Texas's apportionment pre-dating 1985." Tex. Full Supply Resp., 1, 2. This Reply will, therefore, focus on Texas's alleged entitlement to relief as a result of activity by New Mexico, *post-dating* 1984, and Texas's claim that it provided "notice" to New Mexico concerning the same sufficient to preserve its right to claim damages.

II. REPLY TO TEXAS

A. Texas Has Failed to Identify Any Disputed Issue of Material Fact Critical to this Motion

Texas alleges in its Response Brief that this motion "is based upon disputed issues of material fact, rendering summary judgment improper." Tex. Notice Resp., 3. Beyond this soundbite, in its Response Brief, Texas identifies only its position that New Mexico did receive "notice that its groundwater pumping was depleting Texas's apportionment" and that "New Mexico had either constructive or actual notice of the impact its groundwater was having on Texas's apportionment." *Id.* at 4-5. Texas then identifies no particular issue of material fact, critical to this notice motion, that Texas alleges is in dispute. Instead Texas defers to, and incorporates its Evidentiary Objections and Responses to New Mexico's partial summary judgment motions. *Id.* at 4-5. In those Evidentiary objections, Texas devotes pages 94-114 to specific objections relating to this notice motion. The facts New Mexico set out, that are repeated in those pages, provide background to this motion. This background is informative and necessary to understand the context and terminology used in this motion, including the history to this motion, but none of these facts is material to the critical questions presented in this motion: whether Texas must make a priority call under the Compact, or otherwise provide notice to New Mexico, to preserve a right to claim damages, and whether Texas in fact made a priority call, or provided notice of a shortage, in any year for which it now claims damages. The evidentiary burden as to the latter—whether Texas did, in fact, provide notice in any year—is on Texas. For the reasons set out below, Texas has not discharged this burden. Had Texas been able to identify any other issue of material fact critical to this motion that Texas claimed was in dispute, Texas would surely have identified and addressed that fact directly in its Response Brief—but Texas did not.

In short, Texas's allegations as to disputed material facts have no teeth. Texas has failed

to discharge its evidentiary burden to prove notice and, for the reasons that follow, New Mexico is entitled to judgment on the issue of notice, as a matter of law.

B. Texas's Claim to Damages Is Precluded in All Years in Which Texas Failed to Notify New Mexico of its Alleged Shortages

1. Texas and New Mexico Have Both Adopted the Doctrine of Prior Appropriation and its Notice Requirement

The States of New Mexico and Texas have both adopted the doctrine of prior appropriation. *Walker v. United States*, 142 N.M. 45, 51 (NM 2007) ("The prior appropriation doctrine governs water law in New Mexico. *See* N.M. Const. Art. XVI, § 2.") (other citations omitted); Tex. Notice Resp., 11; Tex. Water Code Ann. § 11.027 ("As between appropriators, the first in time is the first in right."); *Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau*, 460 S.W.3d 264, 266 (Tx. Ct. App. 2015) ("One of the primary concepts of Texas water law is the doctrine of prior appropriation."); *see also United States v. City of Las Cruces*, 289 F.3d 1170, 1177 (10th Cir., May 7, 2002) ("Texas has statutorily adopted a prior appropriation scheme.") (internal citation omitted).

Fundamental elements of the prior appropriation doctrine are that senior water users have priority rights over junior water uses, and if the right of the senior appropriator is not satisfied, he must issue a "senior call" (also known as a "priority call" or "call on the river") demanding that junior uses cease "so that the senior holder may exercise its right" and receive the water to which he is entitled. *Tex. Comm'n on Envtl. Quality*, 460 S.W.3d at 267; *Arizona v. California*, 373 U.S. 546, 556 (1963) (the doctrine is "'first in time' … 'first in right'."); *Worley v. United States Borax & Chem. Corp*., 78 N.M. 112, 115 (1967) ("[W]here one has the first priority on a stream … The senior appropriator may lawfully demand that he have at his headgate sufficient water … if the water is not reaching his diversion point, he must make his needs known."); A. Dan Tarlock, *Law of Water Rights and Resources*, §5:32 (2020) ("Appropriative rights are ranked according to

seniority … prior in time, prior in right"); *see also id*. *at* §5:35 ("A senior appropriator's right must be enforced by a call against a junior appropriator's.").

"[T]he general contours of the prior appropriation system are the same in all western states." *Montana v. Wyoming*, Second Interim Report (Dec. 29, 2014), at 20.[4] The "notice or call requirement … is procedural, not substantive." *Montana v. Wyoming*, Mem. on Motion for Partial Summary Judgment (Notice Requirement for Damages) (Sep. 28, 2012),[5] at 15. A "call" is a form of "self-help": "[i]f a senior appropriator found he was not receiving his full appropriation … he [i]s allowed some measure of self-help in the form of making a call upon a junior appropriator to cease diversions until the senior's appropriation was maximized … a junior appropriator, who is said to have taken notice of prior conditions upon his subsequent appropriation, must heed the senior's call." Tarlock, at §5:32 n.30 (quotation and citations omitted); *see also Montana v. Wyoming*, Second Interim Report (Dec. 29, 2014), at 19 ("Junior appropriators must reduce or even cease their water diversions to the degree necessary to ensure that there is enough water to meet senior water rights."); *id.* at 50 ("once the river is called … juniors must reduce their diversions."). "A call is effective upon receipt ... and continues in effect until [the downstream senior appropriator] notifies [the junior water user] that [he] is lifting the call." *Montana v. Wyoming,* 138 S. Ct. 758, 759 (2018). Akin to the mitigation of damages doctrine, this "call requirement … helps avoid and mitigate injury." *Montana*, Second Interim Report (Dec. 29, 2014), at 53.

[4] *Montana v. Wyoming*, Second Interim Report (Dec. 29, 2014) is available at http://web.stanford.edu/dept/law/mvn/pdf/No_137_Original_Report_Dec_2014.pdf.
[5] *Montana v. Wyoming*, Mem. on Motion for Partial Summary Judgment (Notice Requirement for Damages) (Sep. 28, 2012) is available at http://web.stanford.edu/dept/law/mvn/pdf/MT_v_WY_Renewed_Motion_for_PSJ_9_2012.pdf.

"Calls" are "central to the prior appropriation doctrine." *Montana*, Second Interim Report (Dec. 29, 2014) at 49. They "ensure that water is not wasted." *Id.* Calls are also relevant to liability: upstream junior water users "cannot be held liable for a downstream senior's 'shortage of water unless [the senior appropriator] has demanded that water, to the extent of his needs and within his senior appropriation … The absence of such a demand [is] decisive." *Id.* at 51 (quoting *Worley*, 78 N.M. at 115-16); *see also id.* at 50 ("*Absent a call, a senior appropriator cannot maintain an action for damages* against a junior appropriator for failing to reduce his or her diversion.") (citing *Worley*, 78 N.M. at 115-16) (emphasis added).

The Court has found that the doctrine of prior appropriation "c[an] be given interstate effect." *Arizona*, 373 U.S. at 555 (citing *Wyoming v. Colorado*, 259 U.S. 419 (1922)). When—as here—two adjacent states have both adopted the doctrine of prior appropriation, and an interstate river runs through these two states, the doctrine may apply both intra- and inter-state. *See e.g.*, *Wyoming*, 259 U.S. at 465 ("the [case] now before us presents a controversy over the waters of an interstate stream … the controversy is between States both of which [have] adopted the doctrine of appropriation."). The Court expressed this principle succinctly in *Wyoming*:

> The cardinal rule of the doctrine is that priority of appropriation gives superiority of right … The principle on which it proceeds is not less applicable to interstate streams and controversies than to others. Both States pronounce the rule just and reasonable as applied to the natural conditions in that region.
> …
> In suits between appropriators from the same stream, but in different States recognizing the doctrine of appropriation, the question whether rights under such appropriations should be judged by the rule of priority has been considered by several courts, state and federal, and has been uniformly answered in the affirmative.… These decisions, although given in suits between individuals, tend strongly to support our conclusion, for they show that by common usage, as also by judicial pronouncement, the rule of priority is regarded in such States as having the same application to a stream

> flowing from one of them to another that it has to streams wholly within one of them.

Wyoming, 259 U.S. at 470 (citations omitted).

For the reasons explained below, New Mexico and Texas are senior appropriators, of equal status, of Rio Grande surface water within the Project. New Mexico and Texas have both adopted the doctrine of prior appropriation. This doctrine is part of the legal background to the Compact. EBID beneficiaries benefit from the appropriation right New Mexico is afforded under the Compact. And EPCWID beneficiaries benefit from the appropriation right Texas is afforded under the Compact. With these equal-status senior appropriation rights come the priority right to issue a "call on the river"—the right (and requirement) to notify upstream junior water users that their junior uses must cease until the senior appropriator receives his entitlement.

Thus, Texas is incorrect—Texas *is* "required to give notice to New Mexico that New Mexico's groundwater pumping is interfering with Texas's receipt of its apportionment," in order to claim damages. Tex. Notice Resp., 2-3.

2. The Doctrine of Prior Appropriation, with its Notice Requirement, is Part of the Background Law Inherent in the Compact

"On June 17, 1902, c. 1093, 32 Stat. 388, the National Reclamation Act was passed, under which the United States entered upon the construction of extensive irrigation works to be used in the reclamation of large bodies of arid public lands in the western States." *Wyoming*, 259 U.S. at 463. Section eight of this act declared:

> *Nothing in this act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder*, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and *nothing herein shall in any way affect any right of any State* or of the Federal Government *or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof*: Provided,

> That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.

Id. (emphasis added). The Court confirmed in *California v. United States*, 438 U.S. 645 (1978) that in enacting the Reclamation Act, "Congress intended to defer to the substance, as well as the form, of state water law." *Id.* at 675. In *California*, the Court found that:

> From the legislative history of the Reclamation Act of 1902, it is clear that state law was expected to control in two important respects. First, … the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law.… Second, *once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law*.… As Representative Sutherland, later to be a Justice of this Court, succinctly put it, 'if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail.'

Id. at 665, 667 (citation omitted, emphasis added); *see also id.* at 664 ("the [Reclamation] Act clearly provided that state water law would control in the appropriation and later distribution of the water."); *id*. at 675-76 ("The Reclamation Act recognizes the interests and rights of the States in the utilization and control of their water resources and requires the Bureau, in carrying out provisions of the Act, to proceed in conformity with State water laws."). The Court explained that:

> 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.

Id. at 653.

As regards to the Rio Grande Project and the subsequent Rio Grande Compact, the Court of Appeals for the Tenth Circuit explained that:

> Several legal regimes govern the use of Project water. The Rio Grande Compact … is an attempt to equitably apportion Rio Grande water among the three states.… Federal reclamation law provides

> that the United States must act in accordance with state law to acquire title to water used in reclamation projects.… State law also governs the rights of individual water users in both New Mexico and Texas.

City of Las Cruces, 289 F.3d at 1176 (internal citations omitted). There is no basis for Texas's allegation that the doctrine of prior appropriation, as applied in New Mexico and Texas, "conflicts with federal law." Tex. Notice Resp., 6. Texas also concedes that after enactment of the Reclamation Act but at least "[p]rior to the Compact," "what happened in New Mexico below Elephant Butte Reservoir was … probably governed … by New Mexico law." Tex. Notice Resp., 1-2.

Empowered by the Reclamation Act, the United States (Reclamation) acquired the water right in New Mexico that was required to operate the Project. Once acquired, this right (to which the principles of the doctrine of prior appropriation attach, including the notice requirement) was a single, unitary Project right. Both Project beneficiaries—EBID and EPCWID pursuant to their contracts with Reclamation—then had a right of equal seniority in the water of the Rio Grande.

As to New Mexico's claim that Texas is required to notify New Mexico, if Texas had reason to believe that it would not receive its Compact apportionment in any given year, Texas alleges that "[t]here is no 'notice requirement' inherent in Reclamation law." Tex. Notice Resp., 1. This misses the point. Not only is the call requirement part of New Mexico and Texas state law—and the Court has found that this requirement, as part of the doctrine of prior appropriation "c[an] be given interstate effect," *Arizona*, 373 U.S. at 555—but that call requirement applied to and attaches to the water right acquired by Reclamation for the Project. *Wyoming*, 259 U.S. at 470 (quoting section 8 of the Reclamation Act); *California*, 438 U.S. at 675 ("Congress intended to defer to the substance, as well as the form, of state water law."); *see also id.* at 665 ("if the

appropriation and use were not under the provisions of the State law the utmost confusion would prevail.") (internal quotation omitted).

Texas's reliance on *United States v. Cal., State Water. Res. Control Bd.,* 694 F.2d 1171, 1176 (9th Cir. 1982) is misplaced. The court there stated that:

> Section 8 [of the Reclamation Act] requires only that state law will apply unless the contrary is intended by Congress … the United States [must] follow state water law absent a pre-empting federal statute. The question … is whether state law, otherwise applicable by virtue of section 8, is displaced by subsequent congressional action. … in deciding whether later federal law overrides inconsistent state law, [] we may not seek out conflicts between state and federal regulation where none clearly exists.

Id. (internal quotation and citations omitted). Texas appears to rely on the *California, State Water* case to argue that the doctrine of prior appropriation and its notice requirement are somehow "inconsistent with the Compact" and are thus "preempted." Tex. Notice Resp., 6-7. However, Texas has identified no inconsistency, no contrary intent by Congress, and no pre-emption. As the court counsels in *California, State Water*—"we may not seek out conflicts … where none clearly exists." *Cal., State Water. Res. Control Bd.,* 694 F.2d at 1176.

3. The Compact Granted New Mexico and Texas Equal Senior Appropriation Rights to the Water of the Rio Grande

The Court has found that:

> the Compact is inextricably intertwined with the Rio Grande Project, and the Downstream Contracts. The Compact indicates that its purpose is to effect an equitable apportionment of the waters of the Rio Grande between the affected States. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of 'agent' of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made.

Texas, 138 S. Ct. at 959 (internal citation and quotations omitted). Further, that the United States' "duties under the Downstream Contracts … are themselves essential to the fulfillment of the Compact's expressly stated purpose." *Id*. Texas argues that "[t]he Compact changed things," that once the Compact entered into law, "legally, things were not the same." Tex. Notice Resp., 2. Texas is right, although not for the reasons Texas advocates. Creation of the Project led to the creation of a single, unitary Project right—both Project beneficiaries (EBID and EPCWID) having a right of equal seniority in the water of the Rio Grande. The Compact converted this single unitary right into two rights of equal seniority, to which the doctrine of prior appropriation with its notice requirement attaches—a New Mexico right and a Texas right. *See*, *e.g.*, NM-EX 330 Compact, Preamble ("The State of Colorado, the State of New Mexico, and the State of Texas … with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas … for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes…"). Subsequent to the creation of these two senior rights, junior rights have been established, and junior water uses have occurred. It is these junior water uses that Texas complains about in this case. Texas complains that:

> The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas.

Texas's Complaint, 9. To the extent that any such "diversion" or "extractions" are occurring, and the extent of any impact or effect of these, is a matter in dispute in this case. In any event, any such diversions or extractions would be junior uses to the senior priority rights of New Mexico and Texas created by the Compact. Under the doctrine of prior appropriation, Texas is obliged to issue a "call on the river" notifying New Mexico to cease junior uses until Texas's priority right is

satisfied. A failure to do so is a failure to exercise Texas's self-help right, and the cost is the loss of the ability to claim damages in every year where no call was made.

Texas argues that "[t]he fact that Texas and New Mexico also rely on the doctrine of prior appropriation for intrastate determinations of water rights is irrelevant to the administration of the Compact," and the fact that both states rely on this doctrine also "does not convert the Rio Grande Compact into a "prior appropriation" compact." Tex. Notice Resp., 11. Texas misses the point. The issue is whether the doctrine of prior appropriation is part of the background law inherent in the Compact, and whether pursuant to the notice requirement of that doctrine, Texas was required to notify New Mexico that Texas had reasonable grounds to believe that it would not receive its Compact apportionment that year. The answer is yes—Texas was required to make that call, and Texas cannot now claim damages for any year in which it did not issue such notification.

New Mexico does not claim that the Rio Grande Compact is a "prior appropriation compact," or that the fact that the states of New Mexico and Texas have adopted the doctrine of prior appropriation converts the Compact to a "prior appropriation compact." The purpose of the Compact is to "effec[t] an equitable apportionment" of "the waters of the Rio Grande." NM-EX 330 Compact, Preamble; *see also Texas*, 138 S. Ct. at 959. The facts of this case are unique—the Rio Grande Compact is "inextricably interwined" with the pre-existing Rio Grande Project, *Texas*, 138 S. Ct. at 959; the water right acquired by Reclamation was a right to the waters of the Rio Grande, of singular priority; the Compact then converted this right into a New Mexico and a Texas right of equal priority. The doctrine of prior appropriation with its notice requirement, attached to this Project right when it was acquired by Reclamation; and the doctrine with its notice requirement continued to attach when this Project right was converted by the Compact into a New Mexico and a Texas priority right. In addition, both Texas and New Mexico have long adopted this same

doctrine with its notice obligation, and the Court has found that this doctrine "c[an] be given interstate effect." *Arizona*, 373 U.S. at 555.

Texas is correct that "adoption of the Compact interposed federal law to protect Texas's apportionment." Tex. Notice Resp., 6. But there is no basis for any allegation by Texas that the doctrine of prior appropriation "conflicts with the Compact," and Texas has not articulated any such conflict. *Id*. Texas argues that "[t]he Compact is devoid of language requiring Texas to give notice to New Mexico that New Mexico's pumping is depleting Texas's apportionment," and that "there is no notice requirement express or implied in the Compact." *Id*. at 8. The same was true in *Montana v. Wyoming*. In any event, the Court has found that:

> if any inference at all is to be drawn from silence in compacts touching on the States' authority to control their waters, it is that each State was left to regulate the activities of her own citizens.

Tarrant Reg'l Water Dist. v. Herrmann, 569 U.S. 614, 615 (2013) (internal quotations omitted). The Court has further held that there is a "presumption against pre-emption," and this "presumption … is rooted in respect for the States as independent sovereigns in our federal system and assumes that Congress does not cavalierly pre-empt state laws." *Id*. at 631 n.10 (internal quotations omitted).

In any event, Texas attempts to side-step the call requirement under the doctrine, by turning the notice requirement on its head. Texas argues in its Response Brief that "since" the "effective date" of the Compact, it is New Mexico that has "been on notice … that it must take steps to ensure that the[] volumes [of water delivered to Elephant Butte Reservoir] are not interfered with once they are released from the Reservoir." Tex. Notice Resp., 2. Texas has identified no basis for such "notice," and there is none. Texas then argues that it has no "responsibility [to] ensur[e] that it receives its [Compact] apportionment without interference from New Mexico groundwater

pumping." *Id*. at 1. This misses the point. The issue in this motion is not whether one state is responsible to ensure that the other receives its Compact apportionment, but rather whether Texas is obliged under the doctrine of prior appropriation—to preserve its claim for damages—to notify New Mexico of its water shortages and request that New Mexico cease junior water uses until Texas's priority right is satisfied. The answer is yes.

Pursuant to the Compact, Texas is entitled to its Compact apportionment. But that is a separate issue from whether Texas has a self-help right and an obligation—with damages consequences—to notify New Mexico of its water shortages and request that upstream junior water uses cease until Texas's priority right is satisfied. A call affords New Mexico the opportunity to cease junior uses, and otherwise mitigate any harm or injury. Akin to the mitigation of damages doctrine, Texas cannot claim damages when it has failed to mitigate its alleged injury.

Texas argues that it has "no way to know the exact effect of New Mexico groundwater pumping on its apportionment until the harm has already occurred." *Id*., at 9. This again misses the point. There is no obligation to "know the exact effect" before issuing a call. The Court found in *Montana,* 138 S. Ct. 758 (2018) that where a downstream state "reasonably believes" that it will not receive its entitlement "before the end of the water year," that state "must place a call." *Id*. at 759. That "call need not take any particular form, use any specific language, or be delivered by or to any particular official, but should be sufficient to place [the upstream state] on clear notice that [the downstream state] needs additional water to satisfy its … rights." *Id.*

4. This Case is Analogous to *Montana v. Wyoming*

Montana v. Wyoming was a dispute concerning the Yellowstone River Compact. *Montana v. Wyoming*, 563 U.S. 368 (2011). The Yellowstone River Compact divided the surface water of the Yellowstone river "into three tiers of priority." *Id.* at 372. The first, and most senior of the

priority rights were "rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950." *Id*. The Yellowstone River Compact expressly stated that these senior rights "shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." *Id.* (citing Act of Oct. 30, 1951, 65 Stat. 666).

There are a number of noteworthy similarities between the facts of the *Montana* case and the facts of this case. First, the Yellowstone River Compact "assigned the same seniority level to all pre-1950 water users in" each of the two states. *Id.* at 376; *see also Montana,* 138 S. Ct. at 759. As a result of the Compact, New Mexico and Texas have water rights of equal priority to the waters of the Rio Grande. Second, in *Montana*, the downstream state (Montana) claimed that the upstream state (Wyoming) "was appropriating water for a number of new, post-1950 uses," including "conducting new groundwater pumping." *Montana*, 563 U.S. at 373. Texas makes a similar allegation here. Third, the Yellowstone River Compact did "not explicitly set out any specific procedure for enforcement of its provisions," specifically "[n]o provision of the Compact explicitly requires one state to notify another state of its water needs." *Montana v. Wyoming*, Second Interim Report (Dec. 29, 2014), 48. Similarly here, the Rio Grande Compact does not explicitly require Texas to notify New Mexico of its water needs. Fourth, in *Montana*, the Special Master found that "each state enjoys continued authority to manage its own [] rights, subject only to the explicit protections and obligations established by the Compact." *Id.* at 46. The same is also true here—New Mexico and Texas each enjoy continued authority to manage water rights within their respective state lines, subject only to the explicit protections and obligations established by the Compact, and Reclamation law.

Despite these similarities, Texas argues that the facts of *Montana v Wyoming* and the facts of this case are different, first in that "[i]n finding that the Yellowstone Compact required Montana to give notice to Wyoming, the Special Master also relied on pattern of practice … No such pattern or practice exists here." Tex. Notice Resp., 11. And second, in that the Special Master, in the *Montana* case, in ruling on Wyoming's motion for partial summary judgment on the notice requirement for damages, opined that the notice requirement was "not absolute," and "there were several potential exceptions to the general notice rule that could exclude Montana from providing notice[,]" including circumstances in which "Wyoming had *other sufficient reason* to believe or know that Montana was receiving insufficient water to satisfy its [Compact] rights . . . ." Tex. Notice Resp., 11 (quoting *Montana*, Mem. on MPSJ (Notice) (Sep. 28, 2012), at 2).

As to the first alleged difference, the Special Master found that certain "previous practice of Montana and Wyoming *further supports* the conclusion that [the Yellowstone River Compact] requires Montana to give notice." *Montana*, Second Interim Report (Dec. 29, 2014), at 54 (emphasis added). Specifically, the Special Master there found that the states had "previously agreed that Montana should provide notice to Wyoming when Montana is short of pre-1950 water, and Montana provided such notice to Wyoming in the two most recent years when water flows were inadequate." *Id.* at 55. The Special Master noted the 1983 report of the Yellowstone River Compact Commission, and 2004 and 2006 communications between Montana's Compact Commissioner and Wyoming's State Engineer. *Id*. at 55-56. The fact that Montana recognized the significance of giving notice and did so on at least three occasions, does not negate the application of the doctrine, and its notice requirement, here. Similarly, Texas's failure to provide notice in previous years does not negate its obligation to give notice.

The one other alleged difference Texas identifies is based on the opinion of the Special Master in *Montana* that there may be "exceptions to the general notice rule," potentially opening the door to a constructive notice argument." *Id*. (quoting *Montana*, Mem. on MPSJ (Notice) (Sep. 28, 2012), at 2. In his 2012 opinion, the Special Master found that on the facts of *Montana*—as is also true here—that prior to the Complaint being filed in that case, "there is not adequate evidence to conclude that Wyoming had other sufficient information reason to believe or know that insufficient water was reaching Montana to satisfy Montana's pre-1950 appropriate rights." *Montana*, Mem. on MPSJ (Notice) (Sep. 28, 2012), at 39. Specifically, the Special Master found that absent "notice from [downstream state] Montana of shortages facing pre-1950 appropriators" (the downstream senior priority appropriators), upstream state Wyoming did not have "sufficient information to know when it needed to reduce post-1950 water uses in order to comply with [the Compact]." *Id.* at 39-40. Further, that "even detailed information about pre-1950 uses would have been inadequate without additional information such as the availability of water downstream of the state line." *Id.* at 40. The Court then subsequently found that "[t]o protect pre-1950 appropriative rights under Article V(A) of the [Yellowstone River] Compact, Montana *must place a call*." *Montana,* 138 S. Ct. at 759 (emphasis added). Further, that downstream state Montana may place that call "whenever (a) a pre-1950 direct flow right in Montana is not receiving the water to which it is entitled, or (b) Montana reasonably believes, based on substantial evidence, that the Tongue River Reservoir might not fill before the end of the water year." *Id.* In short, the Special Master found that despite the fact that the Yellowstone River Compact was silent on the issue of notice, downstream state Montana was obliged under the Compact to notify upstream state Wyoming of its water shortages, requesting that Wyoming cease junior water uses until its priority right was satisfied. *See*, *e.g.*, *Montana v. Wyoming*, Second Interim Report (Dec. 29, 2014), at 28

("in order to pursue damages for any given year, Montana must have given Wyoming notice of any [] shortage in that year"), 36 ("Montana must provide notice. Any post-1950 storage or use that takes place in Wyoming prior to notice does not violate the Compact. Such notice … must alert Wyoming to Montana's need for additional water."), 47 ("Montana must notify Wyoming that it needs additional water for its pre-1950 appropriative rights, unless the states or the Compact Commission establish an alternative procedure. Absent notice, Wyoming is not liable under [the Compact] if it fails to reduce or eliminate post-1950 diversions or storage when Montana is short of water for its pre-1950 uses."). It is correct that as regards pre-1950 rights, the Yellowstone Compact expressly refers to "[a]ppropriative rights … under the doctrine of appropriation," Yellowstone River Compact, art. V(A),[6] but the same finding is also appropriate here because Texas's priority Compact right is a right to which the doctrine of prior appropriation with its notice obligation attached when it was first acquired by Reclamation for the Project. The conversion of this right, by the Compact, into a New Mexico right and a Texas right, did not alter this fact. In any event, and in addition, both Texas and New Mexico abide by the doctrine of prior appropriation with its notice requirement, and that doctrine and notice obligation attach to their priority rights under the Compact.

C. Texas is Now Precluded from Claiming Damages Under the Compact in All Years When No Notice Was Given

In support its alleged notice arguments, Texas points to 400 pages of documents Texas disclosed at TX_MSJ006492-891. Tex. Notice Resp., 4 n.3, 12. In Texas's Evidentiary Objections and Responses to New Mexico's Undisputed Facts, Texas also identifies the June 29, 2020 deposition transcript of Mr. Schmidt-Petersen, and a December 22, 2020 declaration filed by

[6] *See e.g.*, *Montana v. Wyoming*, Second Interim Report (Dec. 29, 2014) at 2, 14 (available http://web.stanford.edu/dept/law/mvn/pdf/No_137_Original_Report_Dec_2014.pdf).

Texas's expert Scott A. Miltenberger, Ph.D. Tex. Evidentiary Obj. 107-14. Yet, in all of these documents, Texas fails to identify any evidence that Texas issued a priority call, or otherwise provided notice of a water shortage, under the Compact, to New Mexico. In fact, Patrick R. Gordon, the Texas Rio Grande Compact Commissioner conceded in his deposition that Texas has never made a priority call in the New Mexico Lower Rio Grande, and that he is not aware of EPCWID ever issuing a call. NM-EX 258, Gordon Dep. (Jul. 14, 2020), 12:21-22, 192:20-24.

Further, evidence of a call or notice is only relevant if it occurred during a year for which Texas claims damages, *i.e.* from 1985 to 2016. Texas's alleged notice in the 1950s, does not support its claims to damages in 1985, or any year after 1985. As the Special Master found in *Montana*, "[i]n determining [the upstream state's] liability, if any, under the Compact, the date that [the downstream state] provides notice is critical." *Montana*, Second Interim Report (Dec. 29, 2014), at 62. "The date of any notice is … essential" because absent notice, it is not possible to determine whether the upstream state "diverted water for [junior] use in violation of [the Compact] and, if it did, by what amount." *Id.* at 63. "For example, notice in October, after the irrigation season has ended, does not entitle [a downstream state] to damages for [junior] uses or storage during the irrigation season." *Id.* But provided the downstream state acts "diligently" and notifies the upstream state "as soon as possible," it may be "reasonable to hold [the upstream state] liable for the period of time that it reasonably takes [the downstream state] to investigate a shortage and notify [the upstream state]." *Id.* at 64.

Of Texas's 400 pages of alleged notice evidence, plus Mr. Schmidt-Petersen's deposition transcript, plus Dr. Miltenberger's declaration, only the following *postdate* 1984:

(i) TX_MSJ006746-758 is minutes from the Rio Grande Compact Commission 53rd annual meeting on March 26, 1992.

(ii) TX_MSJ006759-760 is a news article dated April 11, 2001, titled "Texas Itching for a Fight Over Rio Grande Water."

(iii) TX_MSJ006761-762 is a letter from John Baker, Commissioner at the Texas Natural Resource Conservation Commission, to Thomas C. Turney, New Mexico State Engineer, dated April 27, 2001.

(iv) TX_MSJ006763-767 is the publication of Comments made by Thomas C. Turney before the U.S. Senate Committee of Energy and Natural Resources Field Hearing on Water Issues, dated August 14, 2001.

(v) TX_MSJ006768-770 is a news article dated January 23, 2002, titled "State is bracing for water dispute.

(vi) TX_MSJ006771-801 is a January 14, 2003 deposition transcript of Thomas C. Turney.

(vii) TX_MSJ006802-817 is a Memorandum of the Office of the State Engineer, District 4, dated May 15, 2003, from Erek H. Fuchs, Lower Rio Grande Basin Supervisor to John R. D'Antonio Jr., New Mexico State Engineer and others, titled "Emergency Application for Permit for Supplemental Wells. Local impairment analysis and issues for consideration."

(viii) TX_MSJ006818-822 is a January 5, 2004 letter signed on behalf of Douglas G. Caroom of the law firm Delgado, Acosta & Bickerstaff, Heath P.L.L.C. to Joe D. Hanson, Rio Grande Compact Commissioner for Texas and others, copying John D'Antonio, New Mexico State Engineer, titled "Groundwater Pumping Within Elephant Butte Irrigation District (EBID)." This letter attaches a letter of the same date from attorneys for the EPCWID and the El Paso Water Utilities Public Service Board to Mr. Filiberto Cortez, El Paso Field Division Manager at the U.S. Bureau of Reclamation.

(ix) TX-MSJ_006823-825 is a fax dated March 24, 2006 containing an email exchange dated March 23, 2006 between Susanne Dooley at the New Mexico Office of the State of Engineer and Lee Leininger of Reclamation, copying various others, titled "Request for Meeting."

(x) TX-MSJ_006826-829 is a letter from Rebecca Dempsey of the law firm White, Koch, Kelly & McCarthy to John R. D'Antonio, dated August 30, 2007, titled "Comments on the Second Draft of Rules and Regulations for Active Water Resources Administration of the Waters of the Lower Rio Grande Water Master District."

(xi) TX-MSJ_006830-891 is the transcript of the June 25, 2020 deposition of John D'Antonio with Exhibit 3 thereto.

(xii) Transcript of the June 29, 2020 deposition of Rolf Schmidt-Petersen (NM-EX 224).

Even in this subset of post-1984 documents, Texas has failed to identify any evidence showing that Texas issued a priority call, or otherwise notified New Mexico of water shortages, under the Compact, in any year.

1. Texas Has Failed to Show that New Mexico had Actual or Constructive Notice Prior to Filing its Complaint that Texas Was Not Receiving its Compact Apportionment

Instead, Texas turns the notice requirement on its head, alleging that "since" the "effective date" of the Compact, New Mexico has "been on notice … that it must take steps to ensure that the[] volumes [of water delivered to Elephant Butte Reservoir] are not interfered with once they are released from the Reservoir." Tex. Notice Resp., 2. Texas has identified no basis for such "notice," and there is none. Ignoring or overlooking the notice requirement under the doctrine of prior appropriation, Texas argues in its Response Brief that New Mexico "had either actual or constructive notice" that groundwater pumping in New Mexico was impacting "releases from Caballo" and thus an "effect on Texas's apportionment" under the Compact. *Id.* at 11.

In support of this allegation, Texas relies on the 400 pages of documents identified above—including those pre-dating 1985—plus the above-identified deposition transcripts. However, as explained above, only documents within the claimed damages years are relevant to whether any call or notice occurred. The only post-1984 documents that Texas relies upon are the documents listed above at (i)-(xii). Texas identifies nothing in any of these documents that supports its position that notice of a shortage in Project deliveries was given in any year between 1985 and 2016.

In the document at (iv) above, Texas identifies two passages, both of which concern statements made in 2001, by Mr. Turney, the then New Mexico State Engineer, with no indication that anything said was in any way prompted by anything said by, or communicated by Texas. Texas also relies on these short statements by Mr. Turney, taken out of context. Mr. Turney states, *inter alia*, that "[t]he State of New Mexico must by necessity begin to actively manage its water resources," and that "[i]n the Lower Rio Grande Basin, the state will have to curtail junior rights in times of shortage, or as required to satisfy interstate obligations." TX_MSJ_006765-766. This is responsible water management by New Mexico. There is nothing in the statements quoted by Texas that shows that Texas issued a priority call or other sufficient notice under the doctrine, or that New Mexico had constructive notice of any shortage by Texas. In short, everything stated by Mr. Turney in this document is entirely consistent with New Mexico's position as set out in this motion, and in this case.

The second document identified by Texas for which Texas points to specific passages—the document at (viii) above—is, in fact, two letters dated January 5, 2004. The first is from attorneys for the EPCWID and the El Paso Water Utilities Public Service (EPWUPS) Board to Mr. Filiberto Cortez, El Paso Field Division Manager at the U.S. Bureau of Reclamation. This letter is then forwarded by an attorney for the City of El Paso to Joe D. Hanson, Rio Grande Compact Commissioner for Texas and others, copying John D'Antonio, New Mexico State Engineer. TX_MSJ006818-822. Texas again takes three sentences of this forwarded letter, out of context. In this forwarded letter, the attorneys for EPCWID and EPWUPS inform Mr. Cortez that a "drought" is underway, that "Texas users of Project water face increasingly short supplies," and expresses concern that "the pumping of groundwater within [EBID] is contributing" to this shortage. These attorneys conclude their letter by requesting that:

> Reclamation investigate this situation and advise us: (a) whether current groundwater pumping within EBID is resulting in less Project water being available to Texas under our current drought conditions, or will subsequently cause an impact …; and (b) if so, Reclamation's best estimate of the magnitude of this impact on deliveries to Texas.
>
> … we would like to obtain this information prior to initiation of the coming irrigation season so that we will be in a position to work with Reclamation, EBID, New Mexico, and Rio Grande Compact Commissioners to address this issue on a timely basis.

TX_MSJ006820-822. There is no suggestion, and Texas has identified none, that following this request for an investigation and for data, that Texas then issued "a call on the river," notifying New Mexico that upstream junior water uses must cease until Texas senior appropriators received their (Compact) apportionment.

Texas also identifies: (a) the transcript from the June 25, 2020 deposition of New Mexico State Engineer John D'Antonio and Exhibit 3 thereto, which is a slide presentation presented by Mr. D'Antonio, titled "Tools for a New Era in Water Management," presented to the Lower Rio Grande Water Users Association, dated August 19, 2005; (b) the transcript from the June 29, 2020 deposition of Mr. Schmidt-Petersen, former Engineer Advisor to the New Mexico Rio Grande Compact Commissioner and current director of the New Mexico Interstate Stream Commission; and (c) a recently-filed declaration by Texas expert Dr. Miltenberger, which Texas alleges show that "New Mexico was aware" that Texas was not receiving its Compact apportionment, or show that New Mexico had "constructive or actual notice of the impact from its ground water pumping on Texas's apportionment." Tex. Notice Resp., 5, 12; *see supra at* (xi). In (a), Texas identifies no specific passage in this deposition transcript, or any particular statement made in Exhibit 3 thereto. This is plainly insufficient to constitute any kind of notice relevant to this motion.

In (b), Texas identifies page 41, lines 21-23 of Mr. Schmidt-Petersen's deposition transcript. Mr. Schmidt-Petersen was asked in this deposition when he first became aware of this

lawsuit, and was it after New Mexico had filed suit in Federal District Court in 2012, and Mr. Schmidt-Petersen responded that he could not recall, but that back in December 1999, when he first started at the New Mexico Interstate Stream Commission, "Joe G. Hanson, the then [Texas] Compact commissioner, stood up and said … deliver or we'll sue. And that's just kind of a constant refrain [from Texas] … no matter what the supply is." NM-EX 224 Deposition: Schmidt-Petersen, Rolf (Jun. 29, 2020), 40:17-41:25. Mr. Schmidt-Petersen's recollection of Mr. Hanson insisting that New Mexico "deliver" water to Texas says nothing about any alleged water shortage or any priority call made, or notice provided, by Texas. Rather, Mr. Hanson is merely insisting that the Project operate as it ought—that Project water is "deliver[ed]" via the Project to Texas. This is plainly insufficient to constitute any kind of notice relevant to this motion.

In (c), Texas identifies paragraphs 1-7 and 63-67. Paragraphs 1-7 contain no mention of any notice—whether given by Texas, or any notice which New Mexico is alleged to have had. Paragraphs 63-67 then refer to a 1947 U.S. Geological Survey study, a 1954 U.S. Geological Survey Water-Supply Paper, a 1956 Memorandum, and a memorandum that appears to have been written in 1982 (1982 is referred to therein as "the present," TX_MSJ_006740)—none of which is relevant to any specific shortage, or any notice *post*-1984.

2. Texas Elected Not to Issue a Priority Call and Instead Negotiated the 2008 Operating Agreement Which Over-Allocates Project Supply to Texas

Instead of issuing a priority call requesting that upstream junior water uses in New Mexico cease until Texas receives its Compact apportionment, Texas, together with the two water districts—EBID and EPCWID—negotiated a tripartite agreement with Reclamation, which changed the operating procedure for the Project. Starting in 2006, the effect of these tripartite negotiations has been to increase the full-supply year Project allocation to EPCWID (Texas) from

43% of the Project's annual allocations to an average of 56%—far more than the share due its 67,000 of 155,000 Project irrigable acres (43%). NM-EX 006, Barroll 2d Decl. ¶ 62. Even if Texas had legitimate concerns as whether it was receiving its Compact apportionment, this backdoor negotiation with Reclamation, culminating in the 2008 Operating Agreement was not only improper but a significant overreaction. Instead of going direct to New Mexico, as Texas was obliged to do under the notice obligation of the doctrine of prior appropriation, Texas side-stepped New Mexico and went straight to Reclamation to negotiate a new deal. Texas can elect not to issue a "call on the river," electing not to preserve a claim for damages, but New Mexico should not have been excluded from these negotiations, and a new operating agreement should not have been concluded absent New Mexico's participation and the proper procedure. It was this action by Texas that prompted New Mexico to file suit in District Court in 2011, which then led to this litigation. NM-EX 520 Complaint for Declaration and Injunctive Relief, *New Mexico v. United States*, No. 11-cv-691 (D.N.M. Aug. 8, 2011).

III. REPLY TO THE UNITED STATES

The United States makes three claims in response to this motion. First, the United States claims that the Compact does not require any party, or the United States "to give notice" of any Compact violation "before bringing a suit for breach," and the Compact does not "preclude[] liability for breaches in years when no notice was given." U.S. Resp., 23; *see also id.* at 4. Second, the United States claims that a notice requirement is "inconsistent with the Compact's plain text and the principles on which it was established." *Id.* at 24-25. And third, the United States claims that New Mexico's obligations under the Compact are not "contingent on notice." *Id.* at 23.

The United States also seeks to distinguish the *Montana* case on the grounds that the Yellowstone River Compact "was negotiated for the purpose of ensuring that "the doctrine of

appropriation" continue to govern "the appropriative rights … existing in each signatory State as of January 1, 1950"; that the doctrine was "expressly incorporated … into" that compact; and, therefore, "[t]he notice requirement imposed by the Court flowed directly from the text and structure of" that compact. *Id.* at 24-25 (internal quotation omitted). Whereas here, the United States claims, the Rio Grande Compact "does not expressly incorporate the doctrine of prior appropriation." *Id.* at 24. The United States also claims that even if there is a notice requirement "New Mexico has been aware of the potential breach of its Compact obligations for decades"—for example, the New Mexico State Engineer "clos[ed] the groundwater basin to new appropriations in 1980," and "promulgate[d] district-specific groundwater management regulations in 2004." *Id.* at 25

Responding to each of these claims in turn: First, the alleged absence of an explicit requirement in the language of the Compact "to give notice" of any Compact violation "before bringing a suit for breach," and the absence of explicit language precluding damages "in years when no notice was given." *Id.* at 23; *see also id.* at 4. As to the first point, New Mexico does not argue that notice is needed before a signatory state to the Compact may bring suit for a violation of the Compact. Rather, in order to claim damages, the doctrine of prior appropriation requires that Texas notify New Mexico each year that Texas has reasonable grounds to believe that it will be short of water and will not receive its Compact apportionment that year (or issue a call and not lift that call over a multi-year period, if applicable). It is New Mexico's position that if Texas fails to do this, under the doctrine of prior appropriation, which both New Mexico and Texas have adopted, Texas is precluded from claiming damages for any year in which Texas failed to provide this notice. Akin to the mitigation of damages doctrine, Texas is required, under the doctrine of prior appropriation, to "avoid and mitigate injury" by issuing a "call." *Montana*, Second Interim

Report (Dec. 29, 2014), at 53. For each year in which Texas fails to do so, it is precluded from claiming damages. The absence of express language in the Compact regarding this preclusive effect is not determinative. *See*, *e.g.*, *N.J. v. New York*, 523 U.S. 767, 813 (1998) ("silence [in a Compact] means that ordinary background law applies") (Breyer J., concurring).

Second, the United States claims that a notice requirement is "inconsistent with the Compact's plain text and the principles on which it was established." U.S. Resp. Br., 24-25. There is no basis for this argument. There is nothing in the plain language of the Compact which conflicts with any notice requirement *per se*, and the United States identifies none. As to any alleged conflict with "the principles on which" the Compact was established, the United States again offers no basis for this argument.

Third, the United States claims that New Mexico's obligations under the Compact are not "contingent on notice." *Id.* at 23. New Mexico does not disagree with this, but it is irrelevant—what is at issue here is not whether New Mexico's obligations are contingent on notice, but whether Texas's claim for damages is precluded in each year in which Texas failed to notify New Mexico of its alleged shortages. For all of the reasons set out herein, and in New Mexico's Opening Brief, Texas's claim for damages in each of these years is precluded.

The United States' attempt to distinguish the *Montana* case on the ground that the doctrine of prior appropriation was "expressly incorporated … into" the Yellowstone River Compact, and thus the notice requirement that was found in that case "flowed directly from the text and structure of" that compact, is also unavailing. *Id.* at 23. There was no express requirement of notice in the Yellowstone River Compact. Further, it is not necessary that the doctrine is expressly incorporated into the language of the Compact. The Court has found that "silence [in a Compact] means that ordinary background law applies." *N.J.*, 523 U.S. at 813 (Breyer J., concurring). Here, New

Mexico and Texas have both adopted the doctrine and its notice requirement; the Court has found that the doctrine "c[an] be given interstate effect," *Arizona*, 373 U.S. at 555; the call requirement applied to and attaches to the water right acquired by Reclamation for the Project; and the Compact converted this single unitary Project right into two rights of equal seniority—a New Mexico right and a Texas right. Further, there is nothing in the Compact that conflicts with the application of the doctrine of prior appropriation, or its notice requirement. There is, therefore, no reasoned basis why the holding in *Montana* should not also apply here.

Finally, the United States claims that "New Mexico has been aware of the potential breach of its Compact obligations for decades," pointing first to New Mexico's action in closing "the groundwater basin to new appropriations in 1980," and second, to the New Mexico "State Engineer's attempt to promulgate district-specific groundwater management regulations in 2004." U.S. Resp., 25. As regards this purported awareness, unilateral action by New Mexico to administer groundwater usage within the State, is not sufficient to satisfy the requirement that Texas notify New Mexico of a Project delivery (and, therefore, Compact apportionment) shortage in a particular year. The doctrine requires that Texas notify upstream junior appropriators (New Mexico) of its alleged shortage. Texas (and the United States) cannot circumvent that obligation by pointing to responsible water management by New Mexico.

In short, before the Complaint was filed in this case in 2013, there is no—or insufficient—evidence that Texas notified New Mexico of any alleged shortages in its Project deliveries for any given year. There is also no—or insufficient—evidence that regardless of the lack of notice by Texas, New Mexico nonetheless had constructive notice of Texas's alleged water shortages. In these circumstances, Texas's claim for damages in all years in which Texas failed to issue a "call" is precluded.

IV. CONCLUSION

For all of the foregoing reasons, the Special Master should grant partial summary judgment, and preclude Texas from claiming damages in every year in which Texas failed to give New Mexico notice of its alleged shortages.

Respectfully submitted,
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