**No. 141, Original**

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**In the**

**SUPREME COURT OF THE UNITED STATES**

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**STATE OF TEXAS,**

**Plaintiff,**

**v.**

**STATE OF NEW MEXICO and**
**STATE OF COLORADO,**

**Defendants.**

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**OFFICE OF THE SPECIAL MASTER**

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# THE STATE OF TEXAS'S REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES, FEDERAL RULES OF CIVIL PROCEDURE, RULE 12(C) AND RULE 56

**Hearing: April 2, 2019; 9:00 a.m.**

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## I. INTRODUCTION

The State of Texas (Texas) respectfully submits the following reply (Texas Reply Brief) in support of its Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(c), and Rule 56 (Texas Motion). The Texas Reply Brief responds to the State of New Mexico's (New Mexico) Response in Opposition to the Texas Motion (New Mexico Response or N.M. Response), the State of Colorado's (Colorado) Response to United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9, and the Texas Motion (Colorado Response), and pertinent portions of the various *amicus curiae* briefs, each filed in this matter on February 28, 2019.

For the reasons set forth in the Texas Motion, and below, the Texas Motion should be granted in its entirety.

## II. THE NEW MEXICO COUNTERCLAIMS

### A. New Mexico's Counterclaims Should Be Stricken Because They Were Filed Without Leave of Court

New Mexico agrees with Texas that "the granting of leave to file a complaint is not an open ticket to expand the scope of an original action to all conceivable claims among and between the state litigants." *See* N.M. Response, at 7, quoting Texas Motion, at 9. Nonetheless, New Mexico ignores the threshold requirement that a defendant state must obtain leave to introduce counterclaims into an action arising under the United States Supreme Court's (Supreme Court or Court) original jurisdiction.

New Mexico argues that its nine counterclaims "arise[] directly from the subject matter of Texas's complaint and involve[] solely allegations of violations of New Mexico's rights under the Rio Grande Compact[1]." N.M. Response, at 7. That assertion, while not accurate, seeks to attach a "compulsory counterclaim" rule to original

[1] 1938 Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (1938 Compact or Compact).

jurisdiction cases. No such rule exists, and no precedent supports New Mexico's request to inject nine new claims into this existing litigation, without leave of court. New Mexico bears the burden to demonstrate that each of its proposed counterclaims are of a seriousness and dignity appropriate for the Court's original jurisdiction. *See Mississippi v. Louisiana*, 506 U.S. 73, 75-77 (1992). New Mexico has not even attempted to do so, and the nine counterclaims should be stricken in their entirety.

**1. New Mexico's Counterclaims, filed without leave of the Court, strips the Court of its critical gatekeeping function**

The appropriate mechanism to introduce a counterclaim into an original action is through a motion for leave, in which the proposed counterclaimant bears the burden to demonstrate the appropriateness of all claims. As explained in the Texas Motion, motions for leave allow the Court to exercise its "important gatekeeping function and to ensure that new or additional pleadings do not expand the scope of an existing controversy." Texas Motion, at 10 (citing *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995)). New Mexico's failure to seek the Court's leave to file its counterclaims effectively strips the Court of this critical gatekeeping function, and places New Mexico in the position of unilaterally declaring the scope of the Court's jurisdiction.

New Mexico's twelve-page response to the motion to strike is largely a series of conclusions arguing that its nine counterclaims merit consideration under the Court's original jurisdiction. For example, New Mexico creates a new rule that "a counterclaim implicating the same transaction or subject matter as the original complaint would, practically by definition, merit the exercise of the same jurisdiction." N.M. Response, at 7. New Mexico here, asks the Special Master, and the parties, to take its word that the nine counterclaims are close enough to the subject matter of Texas's Complaint, that they are befitting of the Court's original jurisdiction. There is no precedent to support New Mexico's approach. Texas's motion for leave to file its complaint in this action took over

one year to resolve (January 2013 - January 2014), including an invitation to the United States to submit its views on the merits of the Court accepting the case.

The Texas Motion, as well as the United States of America's Partial Joinder in Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(c) and Rule 56 (Feb. 28, 2019) (U.S. Joinder), underscore the problem created by New Mexico's failure to seek leave. The United States correctly explains that New Mexico's counterclaims could expand not only the issues for decision in this litigation, but also the number of parties to this litigation, including parties that have previously been denied intervention. *See* U.S. Joinder, at 2.

**2. New Mexico ignores that the Court has issued at least ten decisions on motions for leave to file counterclaims in original jurisdiction actions**

New Mexico's response overlooks both the well-established procedure for exercising the Court's original jurisdiction, and the series of decisions cited in Texas's Motion addressing motions for leave to file counterclaims in original jurisdiction actions since 1977. *See* Texas Motion, at 11-12. The decisions include the following:

- *United States v. Florida*, 430 U.S. 140 (1977) (No. 54, Orig.) (overruling exceptions and denying motion for leave to file a counterclaim);
- (*California v. Nevada*, 438 U.S. 913 (1978) (No. 73, Orig.) (granting motion of Nevada for leave to file an amended answer setting forth a counterclaim);
- *United States v. Alaska*, 445 U.S. 914 (1980) (No. 84, Orig.) (referring motion for leave to file counterclaim to a special master);
- *Arkansas v. Mississippi*, 458 U.S. 1122 (1982) (No. 92, Orig.) (referring motion for leave to file a counterclaim to a special master);
- *Nebraska v. Wyoming*, 481 U.S. 1011 (1987) (No. 108, Orig.) (granting motion of Wyoming for leave to file a counterclaim);

- *Delaware v. New York*, 510 U.S. 1022 (1993) (No. 111, Orig.) (referring New York's motion for leave to file a counterclaim to a special master);
- *Louisiana v. Mississippi*, 510 U.S. 1036 (1994) (No. 121, Orig.) (granting motion of Mississippi for leave to file a counterclaim);
- *Virginia v. Maryland*, 532 U.S. 969 (2001) (No. 129, Orig.) (granting motion of Maryland for leave to file amended answer and counterclaim); and
- *Arkansas v. Delaware*, 137 S. Ct. 266, 2016 U.S. LEXIS 4849 (2016) (No. 145, Orig.) and *Delaware v. Pennsylvania*, 137 S. Ct. 266, 2016 U.S. LEXIS 4610 (2016) (No. 146, Orig.) (both granting motions for leave to file bills of complaint and to file counterclaims).

**3. New Mexico cannot waive its obligation to seek leave to file counterclaims**

New Mexico requests that the Special Master ignore the procedural and jurisdictional requirement that it seek leave to file counterclaims in this original action because "[t]he parties anticipated that New Mexico would file counterclaims." N.M. Response, at 11. Texas did not (and cannot) acquiesce to New Mexico ignoring the law regarding how a litigant proceeds to introduce a new claim to the Court's original jurisdiction. In fact, and as explained in the Texas Motion, at 12, Texas explicitly reserved its right to challenge the propriety of New Mexico's counterclaims by pleading this issue as an affirmative defense. *See, e.g.*, Texas's Fourth Affirmative Defense: "New Mexico's Counterclaims are in excess of the original jurisdiction exercised over Texas's suit under Article III, Section 2 of the United States Constitution, and section 1251(a) of Title 28 of the United States Code," State of Texas's Answer to the Counterclaims of the State of New Mexico, filed July 20, 2018, at 21. Texas Motion, at 12 n.5. The parties cannot stipulate to the Court's original jurisdiction. By failing to properly file a motion for leave, New Mexico ignored the threshold requirement to request that the Court invoke

original jurisdiction, and as such, the Special Master lacks jurisdiction to consider each and all of New Mexico's nine counterclaims.

## B. New Mexico's Seventh Counterclaim Against Texas/United States and its Second and Fifth Counterclaims Against the United States Each Fails as a Matter of Law

Alternative to an order striking New Mexico's counterclaims in their entirety for failure to seek leave of the Court to file, Texas moves for judgment on the pleadings pursuant to Federal Rules of Civil Procedure, Rule 12(c), on New Mexico's Seventh Counterclaim against Texas and the United States, and the Second and Fifth Counterclaims against the United States. New Mexico's Second, Fifth, and Seventh counterclaims simply amount to collateral attacks on the 2008 Operating Agreement,[2] which is subject to ongoing litigation initiated by New Mexico in federal district court, and therefore outside the scope of the Compact disputes at issue in this case.

### 1. New Mexico's Seventh Counterclaim against Texas/United States relating to the Miscellaneous Purposes Act fails as a matter of law

New Mexico lacks standing and cannot state a cognizable claim under the Sale of Water for Miscellaneous Purposes Act of 1920, Pub L. No. 66-147, ch. 86, 41 Stat. 451 (codified at 43 U.S.C. § 521) (MPA), against either the United States or Texas. The MPA provides the Secretary of the Interior with the authority to contract for, or supply water for, non-irrigation purposes, subject to conditions including the requirement for approval of water user associations. *See* Texas Motion, at 15[3]; MPA, 43 U.S.C. § 521. Plainly, New Mexico is not a water user association, and thus has no right to enforce the MPA contracts. The MPA neither provides a state with the authority to veto MPA contracts, nor does it require any consultation with a state government.

[2] The full title of the 2008 Operating Agreement is the "Operating Agreement for the Rio Grande Project" (Mar. 10, 2008).

[3] The entire text of the MPA is provided in the Texas Motion, at 14-15.

New Mexico asks the Special Master to ignore basic principles of contract law in order to allow it to proceed with its MPA claim. New Mexico's argument would require the Special Master to allow a non-party to the MPA contracts (*i.e.*, New Mexico) to enforce contract law rights against a fellow non-party (*i.e.*, Texas) to the contracts. That argument, and therefore New Mexico's entire MPA counterclaim, fails as a matter of law.

New Mexico admits that neither it nor Texas are parties to any MPA contract associated with the Rio Grande Project (Project). *See* N.M. Response, at 30. Further, New Mexico cites *Texas v. New Mexico*, 482 U.S. 124 (1987) for the proposition that ". . . good-faith differences about the scope of contractual undertaking do not relieve either *party* from performance." *Texas v. New Mexico*, 482 U.S. at 129 (emphasis added). Any consideration of the MPA counterclaim should end with the commonsense observation that neither New Mexico nor Texas are parties to MPA contracts. Furthermore, New Mexico's citation to *Texas v. New Mexico*, 482 U.S. at 124, confirms that you must be a "party" to enforce a contract.[4]

Finally, New Mexico jumps to the conclusion that "[j]ust as New Mexico will be liable if its citizens are found to have intercepted Compact water meant for Texas . . . Texas is also liable if its citizens and political subdivisions have taken Compact water meant for New Mexico," based on a right arising under the MPA. *See* N.M. Response, at 30. New Mexico improperly equates the potential compact liability to signatory states with liability to a state arising from the MPA contracts. Once again, Texas is both not a party to the MPA contracts and has no direct interest in the MPA contracts.[5] New Mexico's Seventh Counterclaim (Violation of the Miscellaneous Purposes Act) fails on its face.

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[4] As explained in the Texas Motion, at 16 n.7, there is no privity of contract authorizing New Mexico to assert a cause of action under the MPA against Texas.

[5] There is no privity of contract between either New Mexico or Texas and the parties to the MPA contracts associated with the Project. *See German All. Ins. Co. v. Home Water*

### 2. New Mexico's Second Counterclaim against the United States regarding the 2008 Operating Agreement fails as a matter of law

New Mexico's Second Counterclaim, which relates to the 2008 Operating Agreement, is subject to judgment on the pleadings on several grounds including lack of standing and lack of waiver of sovereign immunity that would enable New Mexico to sue the United States. Texas joins in the reply of the United States as it relates to those issues. Additionally, as explained in the Texas Motion, at 16-19, the Second Counterclaim also fails based on a facial review of the 2008 Operating Agreement itself.

New Mexico's response blurs the legal distinction between the "allocation" of water provided in existing reclamation contracts between the United States and Elephant Butte Irrigation District (EBID), and the United States and El Paso County Water Improvement District No. 1 (EPCWID), and the "apportionment" of water to Texas, New Mexico, and Colorado, established in the Compact. *See, e.g.*, N.M. Response, at 19.[6] It is true that the Supreme Court found that the Compact is "inextricably intertwined with the Rio Grande Project and the Downstream Contracts." *Texas v. New Mexico*, 138 S. Ct. at 959. Nonetheless, the 2008 Operating Agreement, to which neither New Mexico nor Texas are parties, does not (and cannot) alter the equitable apportionment of the Rio Grande agreed to by the Compact's state signatories (*i.e.*, Texas, New Mexico, and Colorado).

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*Supply Co.*, 226 U.S. 220, 234 (1912) (". . . a third person cannot sue for the breach of a contract to which he is a stranger unless he is in privity with the parties and therein given a direct interest.").

[6] New Mexico argues that its 2008 Operating Agreement counterclaim presents ". . . a factual question that is the subject of complex modeling and whose answer can only come through evidence, testimony, and rigorous cross-examination." N.M. Response, at 18. Although factual allegations are accepted as true for purposes of a Federal Rule of Civil Procedure, Rule 12(c) motion, the same does not apply to legal assertions. New Mexico's Second Counterclaim, and its response in opposition to dismissal of the claim, hinge on the truth of the mere legal assertion that the 2008 Operating Agreement constitutes the apportionment provided in the Compact. The Special Master can address this threshold legal question without factual considerations.

As explained in the Texas Motion, at 17, the 2008 Operating Agreement deals with how water is "allocated" by the United States between two irrigation districts, and it does not address how water is "apportioned" to the states. In fact, the 2008 Operating Agreement cannot alter how the Compact apportions water between its signatories. *See, e.g.*, *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838) (discussing the status of interstate compacts as federal law and conclusive as to the rights of the signatory states). The 2008 Operating Agreement recognizes this legal limitation and it expressly provides that "[n]othing herein is intended to alter, amend, repeal, modify, or be in conflict with provisions of the [Compact]." 2008 Operating Agreement, Section 6.12. The 2008 Operating Agreement does not conflict with the Compact. Rather, it is a means for the United States to allocate water to the irrigation districts, and works to mitigate the practical reality created by New Mexico's unlawful depletions of Project and Compact water. Although the EBID and EPCWID reclamation contracts provide for the allocation of Project water, they do not create or modify the obligations of New Mexico or Texas arising under the Compact. The apportionment of water under the Compact is the basis for this original jurisdiction action. The allocation of Project water under the 2008 Operating Agreement is plainly an issue for the United States and the two irrigation districts. It is also an issue addressed in the litigation initiated by New Mexico in federal district court. *See* Complaint for Declaratory and Injunctive Relief, *State of New Mexico v. United States, et al.*, No. 1:11-cv-00691-JB-WDS (D.N.M. Aug. 8, 2011).

New Mexico's Second Counterclaim fails as a matter of law and should be dismissed because the 2008 Operating Agreement cannot alter the Compact apportionment, and because the 2008 Operating Agreement also explicitly disclaims any adverse impact on Compact apportionment.

### 3. New Mexico's Fifth Counterclaim alleging a violation of the Water Supply Act by the United States fails as a matter of law

As explained in the Texas Motion, at 19, New Mexico's Fifth Counterclaim alleges that the United States violated the Water Supply Act of 1958, Pub. L. No. 85-500, tit. III, § 301, 72 Stat. 297 (codified at 43 U.S.C. § 390b) (WSA), but the WSA does not apply to the Project. As a result, the Fifth Counterclaim must be dismissed because it fails as a matter of law.

The Project was originally authorized under the Reclamation Act of 1902[7], and became subject to the Reclamation Project Act of 1939[8] based on a series of contracts, including the 1939 contracts for EBID and EPCWID. *See* Texas Motion, at 20 n.8. The WSA provides that its provisions "insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for provisions of the Reclamation Project Act of 1939. . . relating to the same subject." 43 U.S.C. § 390b(b) (citation omitted). The WSA does not apply because the Project is subject to the Reclamation Project Act of 1939. Moreover, the Project and Elephant Butte Reservoir (Reservoir) were constructed long before the WSA, thus Reclamation did not, and could not have, relied on the WSA for construction of the Project. New Mexico's Fifth Counterclaim fails as a matter of law and should be dismissed because the WSA lacks application to the Project.

## C. Texas's Response to Colorado Regarding the New Mexico Counterclaims

At page 3 of Colorado's Response, Colorado states that it does not take a position with respect to the substance of the New Mexico claims or defenses, but then proceeds to dive in and explain why New Mexico is correct and the United States and Texas are wrong.

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[7] Act of June 17, 1902, Pub. L. No. 57-161, ch. 1093, 32 Stat. 388 (Reclamation Act of 1902).

[8] Act of August 4, 1939, Pub. L. No. 76-260, ch. 418, 53 Stat. 1187 (codified at 43 U.S.C. §§ 485-485k) (Reclamation Project Act of 1939).

For the most part, Texas addresses Colorado's substantive arguments in Texas's response to New Mexico herein above, but a few points unique to Colorado's Response are necessary. First, Colorado argues that the United States has not alleged in its complaint a distinction between claims based on the Compact and claims based on Project operations. Whether this is an accurate characterization of what the United States pled, however, is irrelevant. Texas never pled any claims that could be characterized as a Project operation claim. It only pled Compact claims and the Supreme Court stated, as a grounds for allowing the United States to continue in the litigation as a Party, that "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 960. The Court further stated that "[t]his case does not present the question whether the United States could initiate litigation to . . . expand the scope of an existing controversy between States." *Id.* It is New Mexico, and now apparently Colorado, that seeks to expand the litigation beyond the four corners of the Texas complaint and beyond issues of the Compact, and launch into inappropriate litigation of Project issues.

Colorado further seeks to cause confusion where none otherwise exists. Colorado alleges that Texas has been inconsistent with its articulation of whether water released from the Reservoir is being released through Compact or Project operations. Texas has always been clear that water released from the Reservoir *for Texas* is released pursuant to the Compact. Water released for Project water users is released as part of Project operations. The fact that these may be the same thing physically does not negate the fact that they are legally distinct. In this regard, Colorado's assertion that "[t]hese statements [by Texas] indicate that the water leaving Elephant Butte Reservoir is not an apportionment among States governed by the Compact" has no basis in anything stated

by Texas, nor is it consistent with anything in the First Report[9] or with the Supreme Court's grant of the Texas petition to file its Complaint. *See* Colorado Response, at 11. Try as it may, Colorado's attempt to confuse the matter with it specious arguments and artificial distinctions between what constitutes a Project release and what constitutes a Compact release, is not helpful.

## III. THE NEW MEXICO AFFIRMATIVE DEFENSES

### A. Texas's Motion for Partial Summary Judgment is Procedurally Proper

Texas challenges New Mexico's Third, Fourth, Fifth, and Seventh Affirmative Defenses by way of a motion for partial summary judgment under Federal Rule of Civil Procedure 56, arguing that each defense fails as a matter of law. New Mexico argues that Texas's procedural approach of challenging the New Mexico affirmative defenses by way of a motion for partial summary judgment is improper. Importantly, New Mexico's procedural challenge is without any citation whatsoever to legal authority to support its position. N.M. Response, at 3-4, 31-32.

Contrary to New Mexico's assertion, Texas properly challenges the affirmative defenses by way of a motion for partial summary judgment, arguing that the defenses fail as a matter of law. Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought."). It is well established that a court may address a legal question and issue a dispositive ruling in the context of a motion for summary judgment. *Bell Lumber & Pole Co. v. U.S. Fire Ins. Co*., 60 F.3d 437, 441 (8th Cir. 1995) (citing *Crain v. Bd. of Police Comm'rs of Metro, Police Dep't*, 920 F.2d 1402, 1405-06 (8th Cir. 1990) ("Where the unresolved issues are primarily legal rather than factual, summary judgment is particularly appropriate.")); *Schwartz v. Compagnie Gen. Transatlantique*,

[9] The First Interim Report of the Special Master on New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention and Motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 for Leave to Intervene (Feb. 9, 2017) (First Report).

405 F.2d 270, 274 (2nd Cir. 1968) ("Summary judgment procedure may be properly invoked for determination of a legal question.")

New Mexico also argues, without citing to any supporting authority, that the Texas motion for partial summary judgment is procedurally improper for not submitting a separate record of evidence (*i.e.*, separate statement) to address "disputed issues of material fact." N.M. Response, at 31. However, the Texas motion addresses legal challenges to the affirmative defenses, not factual challenges, rendering New Mexico's argument nonsensical. At any rate, Texas is not required to submit any separate evidence. *FDIC v. Giammettei*, 34 F.3d 51, 54 (2d Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) ("[T]here is 'no express or implied requirement in [Fed. R. Civ. P. 56] that the moving party support its motion with affidavits or other similar materials *negating* the opponent's claim.'")). *Moreno v. Univ. of Md.*, 420 F. Supp. 541, 561 (D. Md. 1976), *aff'd*, 556 F.2d 573 (4th Cir. 1977) (citing *Schwartz*, 405 F.2d at 270 ("Of course, under [Fed. R. Civ. P. 56(c)] plaintiffs may rely solely on the pleadings and do not have to file any supporting data if they choose not to do so.")); *Jackson v. Widnall*, 99 F.3d 710, 714 (5th Cir. 1996) (Summary judgment standard (*i.e.* absence of genuine issue of material fact) may be satisfied by establishing dispositive legal defenses.)[10]

[10] The City of Las Cruces' Consolidated *Amicus Curiae* Brief in Response to Dispositive Motions Filed by the State of Texas and the United States (Las Cruces Response) also asserts that the Texas Motion is procedurally defective for failing to identify "undisputed material facts" and producing supporting evidence. Las Cruces Response, at 9. In so arguing, it improperly ignores (as did New Mexico) that Texas is making a *legal* challenge to the affirmative defenses, not a factual defense. Las Cruces goes a step further than New Mexico and attempts to demonstrate "disputed issues of fact" by attaching a "subfile order for its LRG-430 *et al.* water rights" to its Response as an Exhibit. *Id.* at 10, Ex. A. Texas is not arguing the adequacy of facts in the Texas Motion. Texas presents questions of law and, as such, no "evidence" is required. Moreover, even if "evidence" were at issue in the Texas Motion, Las Cruces must *prove* the facts it asserts by way of admissible evidence, which it has not done.

## B. Equitable Defenses Should Not Be Permitted to Excuse a Compact Violation

New Mexico should not be excused from Compact violations based on allegations of inequitable conduct by Texas.[11] As such, its affirmative defenses of unclean hands, acceptance/waiver/estoppel, and laches fail as a matter of law.[12] The Supreme Court, in *New Jersey v. New York*, stated,

> As we explained long ago, once a compact between States has been approved, it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had been never contested. Indeed, congressional consent transforms an interstate compact within [the Compact] Clause into a law of the United States . . . . [T]he first and last order of business of a court addressing an approved interstate compact is interpreting the compact. Unless the compact to which Congress has consented is somehow unconstitutional, *no court may order relief inconsistent with its express terms, no matter what the equities of the circumstances might otherwise invite*.

*New Jersey v. New York*, 523 U.S. 767, 810, 811 (1998) (emphasis added) (citations and quotations omitted) (citing *Texas v. New Mexico,* 462 U.S. 554 (1983); *Arizona v. California*, 373 U.S. 546 (1963); *Washington v. Oregon,* 211 U.S. 127 (1908); *New Jersey v. Delaware,* 291 U.S. 361 (1934); *Maryland v. West Virginia,* 217 U.S. 1 (1910).)

The Court will not change an equitable apportionment approved by Congress. New Mexico's equitable affirmative defenses assert that its own Compact violations are excused by virtue of the alleged equitable violations by Texas. This argument effectively asks the Court to reallocate the waters of the Rio Grande. This cannot be done without

[11] It is important to reiterate that the Texas Motion challenges *equitable affirmative defenses*, asserted for the purpose of excusing a Compact violation. The Texas Motion does not challenge equitable considerations generally, or whether this Court can and has applied equitable remedies in interstate compact cases.

[12] New Mexico also failed to adequately plead its unclean hands and acceptance/waiver/estoppel affirmative defenses, as discussed in Texas's Motion at pages 22-23 (unclean hands) and 24-26 (acceptance/waiver/estoppel).

the consent of Congress and, as such, all of the equitable defenses fail as a matter of law in the context of this litigation.

Notably, New Mexico cites no case where the Court has denied enforcement of a compact based on any of the equitable defenses raised by New Mexico. Instead, New Mexico inappropriately attempts to rely upon cases that involved some equitable considerations, but certainly not to deny compact enforcement as New Mexico seeks to accomplish here. For example, New Mexico discusses *Kansas v. Nebraska*, 135 S. Ct. 1042 (2015), which involved disgorgement (an equitable remedy) enforced against the defendant State of Nebraska. N.M. Response, at 32 (citing *Kansas v. Nebraska*, 135 S. Ct. at 1052). However, using disgorgement to address inequitable water taken by a defendant state found to have breached a compact does not support the notion that an equitable affirmative defense is permissible in a compact case *to excuse the violation in the first place*. To the contrary, the disgorgement remedy in *Kansas v. Nebraska* acted to restore the rights guaranteed by the compact, not modify or extinguish the compact rights.

New Mexico seeks to excuse its own Compact violations. It does so by using equitable defenses to argue that Texas' alleged actions are "unfair." However, as the Court stated in *New Jersey v. New York,* "*no court may order relief inconsistent with its* [*the Compact's*] *express terms, no matter what the equities of the circumstances might otherwise invite.*" *New Jersey v. New York*, 523 U.S. at 811 (emphasis added). All of New Mexico's equitable affirmative defenses fail as a matter of law because they seek relief inconsistent with the express terms of the 1938 Compact and in violation of federal law. New Mexico has not offered any case law to support the imposition of equitable defenses to excuse a violation of an interstate compact – nor can it – because none exists.[13]

[13] New Mexico also discusses *Kansas v. Colorado,* and admits that the Court "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an

## C. New Mexico Fails to Offer any Legal Authority to Support Application of its Third, Fourth, Fifth, and Seventh Affirmative Defenses Herein

As set forth in the Texas Motion, at 20-29, New Mexico's Third, Fourth, Fifth and Seventh Affirmative Defenses fail as a matter of law, and New Mexico's Response fails to offer any legal support to the contrary.

### 1. Unclean hands (Third Affirmative Defense)

New Mexico does not make any legal argument in opposition to Texas's Motion on the *legal* issue of whether the affirmative defense of unclean hands is appropriate. N.M. Motion, at 34-35. New Mexico only addresses whether it adequately pled the cause of action, previously addressed by Texas in its moving papers. Texas Motion, at 22-23. *Id.* The Court has never applied the defense in interstate water compact litigation and the defense fails as a matter of law. Texas Motion, at 20-24.

### 2. Acceptance/waiver/estoppel (Fourth Affirmative Defense)

New Mexico cites *Georgia v. South Carolina*, 497 U.S. 376 (1990) in an attempt to support its proposition that the affirmative defense of "acquiescence" is appropriate in this case. N.M. Response, at 36 (citing *Georgia v. South Carolina*, 497 U.S. at 389, 393). However, that case did not involve an interstate compact, approved by an act of Congress. Thus, the case is inapplicable.

New Mexico engages in a lengthy discussion regarding a Special Master Memorandum of Decision in *Kansas v. Nebraska*, arguing that the equitable defense of "acceptance" is available to New Mexico. N.M. Response, at 37-38 (citing *Kansas v. Nebraska*, No. 126, Orig., Special Master Memorandum of Decision No. 1 (Feb. 12, 2001) (*Kansas v. Nebraska* SM Decision 1), at 3-6, 11-13). There, the Special Master was *not* considering whether the equitable affirmative defense of "acceptance" was legally viable, as suggested by New Mexico. In fact, the Special Master was not

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interstate compact." N.M. Response, at 33 (quoting *Kansas v. Colorado*, 514 U.S. 673, 687-88 (1995)).

considering the appropriateness of any affirmative defense at all. Rather, the Special Master was only considering a limited factual dispute, identified and agreed upon by the parties at a status conference, and specially set for briefing and resolution by the Special Master. *Kansas v. Nebraska* SM Decision 1, at 1. Additionally, that limited decision was based upon the presentation of water computation evidence. *Id.* at 1-2. Although New Mexico may at some point desire to submit evidence and assert factual arguments involving water computations in support of its affirmative defenses that are not based in equity, it is *not* at issue now in the context of the legal decision of whether New Mexico is entitled to assert equitable affirmative defenses.

New Mexico also attempts to rely upon the Supreme Court's decision in *Texas v. New Mexico,* 462 U.S. 554 (1983), as the Special Master did in *Kansas v. Nebraska* SM Decision 1, in its attempt to support the appropriateness of an "acceptance" defense. N.M. Response, at 37. However, the Supreme Court did *not* consider the application of any equitable affirmative defense in *Texas v. New Mexico,* 462 U.S. 554 (1983). There, the Court addressed exceptions arising from the Special Master's recommendation regarding designation of a third party to participate in commission deliberations to cast tie breaking votes, and adoption of certain methodology to determine the extent of shortfalls in state-line water deliveries. *Texas v. New Mexico,* 462 U.S. at 564, 571. As in the *Kansas v. Nebraska* SM Decision 1, the Special Master in *Texas v. New Mexico,* 462 U.S. 554 (1983), heard evidence and made recommendations. New Mexico now argues that the "situation here could not be more similar." N.M. Response, at 37. In so arguing, New Mexico ignores the subject of the motion at issue: whether the equitable defenses must fail as a matter of law. The Court, in *Texas v. New Mexico,* 462 U.S. 554 (1983), did not consider equitable defenses and did not reach any decision applicable to

the matter currently before this Special Master on Texas's motion for partial summary judgment on the New Mexico affirmative defenses.[14]

Regarding waiver and estoppel, New Mexico does not make any legal argument in opposition to the Texas Motion on the *legal* issue of whether the affirmative defenses are appropriate. N.M. Response, at 38-39. New Mexico only addresses whether it adequately pled the causes of action (*id.*), previously addressed by Texas in its moving papers. Texas Motion, at 22-23. In sum, New Mexico fails to cite any legal authority to support its position that the equitable affirmative defenses of acceptance/waiver/estoppel (improperly plead as *one* collective affirmative defense) are not precluded as a matter of law.

**3. Laches (Fifth Affirmative Defense)**

New Mexico does not cite any authority to support the viability of the equitable defense of laches in an interstate compact action against a sovereign. As set forth in Texas's Motion, at 26-27, the Court has never applied the defense in an interstate water compact litigation and it is not available against a sovereign. The defense fails as a matter of law and, as such, New Mexico's argument that it properly pled the defense from a factual perspective is irrelevant.[15]

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[14] Las Cruces also argues that the *Texas v. New Mexico,* 462 U.S. 554 (1983) case "[does] not preclude New Mexico from raising equitable defenses. Las Cruces Response, at 11. In support, it cites generally to the head notes of the Supreme Court case, not to the actual opinion. *Id.* The *Texas v. New Mexico,* 462 U.S. 554 (1983) case did not consider equitable affirmative defenses and cannot be construed as supporting the assertion that such defenses are permissible. Las Cruces makes the same argument regarding *Texas v. New Mexico,* 482 U.S. 124 (1987). *Id.* The Court likewise did not address the appropriateness of an equitable defense in that action, let alone hold that such a defense was permissible. *Texas v. New Mexico,* 482 U.S. 124 (1987).

[15] Las Cruces makes a protracted factual argument that challenges to its water rights are precluded under New Mexico's affirmative defense of laches. Las Cruces Response, at 12-15. This factual argument is irrelevant to the legal issues regarding laches set forth in the Texas Motion. As addressed above at footnote 10, even if "evidence" were at issue in the Texas Motion, Las Cruces would need to prove any facts it asserts by way of admissible evidence. It has not done so.

#### 4. Failure to Exhaust Remedies (Seventh Affirmative Defense)

As set forth in the Texas Motion, at pages 27-29, the "failure to exhaust" affirmative defense fails as a matter of law because it is an improper affirmative defense in an original jurisdiction action where the Court has already accepted jurisdiction over the claims. Further, New Mexico admits that it is "not seeking a remand of Texas's claims to the [Rio Grande Compact Commission] for consideration in that forum," and that it only raised the defense in the context of its allegation that Texas did not provide notice to New Mexico of its claims. N.M. Response, at 41. As such, the failure to exhaust remedies defense is nothing more than a repackaging of New Mexico's second affirmative defense for failure to provide notice, is superfluous, and should be dismissed.

### D. Texas's Response to Colorado Regarding the New Mexico Affirmative Defenses

In addressing the Texas Motion regarding equitable defenses, Colorado notes that the first step in looking at the issue is Compact interpretation and that one does this, in the first instance, by looking at the Compact's express terms. Colorado then launches into an irrelevant and unhelpful discussion about course of conduct as a means to understand the Compact. The Colorado arguments, of course, ignore the fact that in looking at the plain language and structure of the Compact, the first Special Master and ultimately the Court were able to determine what the Compact means. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 615 (2013) (citing *Texas v. New Mexico*, 482 U.S. at 128 ("[I]nterstate compacts are construed under contract-law principles.)) So, as with any contract, we begin by examining the express terms of the Compact as the best indication of the intent of the parties, *see also Montana v. Wyoming*, 563 U.S. 368, 375, n.4, 386-87 (2011); Restatement (Second) of Contracts § 203(b) (Am. Law Inst. 1981). Once that is done, no further inquiry is necessary, nor is it appropriate. *See Kansas v. Colorado*, 514 U.S. at 690 (citing *Texas v. New Mexico*, 462 U.S. at 564 ("Unless the

compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms")).

## IV. CONCLUSION

Based on the foregoing, Texas respectfully requests that the Special Master grant Texas's motion to strike the entirety of New Mexico's counterclaims for failure to seek leave of the Court or, in the alternative, grant Texas's motion for judgment on the pleadings as to New Mexico's Second (Interference with Compact Apportionment Against the United States), Fifth (Violation of the Water Supply Act by the United States), and Seventh (Violation of the Miscellaneous Purposes Act and the Compact Against Texas and the United States) Counterclaims.

Texas further respectfully requests that the Special Master grant Texas's motion for partial summary judgment on four of the affirmative defenses raised in New Mexico's May 22, 2018 Answer to the State of Texas's Complaint: (a) unclean hands, (b) acceptance/waiver/estoppel, (c) laches and (d) failure to exhaust remedies, because each fails as a matter of law.

Dated: March 15, 2019

Respectfully submitted,

s/ Stuart L. Somach

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**No. 141, Original**

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**In the**

**SUPREME COURT OF THE UNITED STATES**

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**STATE OF TEXAS,**

**Plaintiff,**

**v.**

**STATE OF NEW MEXICO and**
**STATE OF COLORADO,**

**Defendants.**

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**OFFICE OF THE SPECIAL MASTER**

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**CERTIFICATE OF SERVICE**

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This is to certify that on the 15th day of March 2019, I caused a true and correct copy of **THE STATE OF TEXAS'S REPLY BRIEF IN SUPPORT OF MOTION TO STRIKE OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES, FEDERAL RULES OF CIVIL PROCEDURE, RULE 12(C) AND RULE 56** to be served upon all counsel for all parties to this action and amici, via electronic mail, as indicated in the Service List attached hereto.

Respectfully submitted,

Dated: March 15, 2019

Yolanda De La Cruz

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