No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

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

Hearing: February 19, 2019; 9:00 a.m.

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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

The State of Texas (Texas) moves to strike all of the State of New Mexico's (New Mexico) Counterclaims because they were filed without leave of the United States Supreme Court. The claims are not properly before the Supreme Court unless and until the Supreme Court determines that the claims satisfy the requisite criteria to justify the exercise of its discretionary and limited jurisdiction over the asserted claims.

In the alternative, Texas moves for judgment on the pleadings on New Mexico's Seventh Counterclaim for Violation of the Miscellaneous Purposes Act, its Second Counterclaim for Interference with Compact Apportionment, and its Fifth Counterclaim for Violation of the Water Supply Act. Each of these counterclaims fails as a matter of law.

Texas further requests judgment on New Mexico's Third (Unclean Hands), Fourth (Acceptance/Waiver/Estoppel), Fifth (Laches), and Seventh (Failure to Exhaust Remedies) affirmative defenses asserted in New Mexico's Answer to Texas's Complaint, because these defenses fail as a matter of law.

BRIEF IN SUPPORT OF 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

I. INTRODUCTION

New Mexico's Answer to Texas's Complaint and its Counterclaims were filed over five years after the initiation of this litigation. In that time, the Special Master and the United States Supreme Court ("Supreme Court" or "Court") have made various rulings and determinations that directly bear on the matters that New Mexico attempts to

put at issue in its pleadings, but which New Mexico ignores. New Mexico ignores both prior substantive rulings in this case as well as procedural requirements that are a predicate to its ability to proceed as it wishes. Some of these defects are the subject of the State of Texas's Request for a Judicial Declaration to Confirm the Scope of Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon, filed concurrently herewith. Texas hereby incorporates the argument made in that motion here. Texas addresses the remaining issues in this Motion, in three parts, as are summarized immediately below:

(a) New Mexico's Counterclaims are Procedurally Defective Because the Court has Not Extended its Original Jurisdiction to Hear the Claims: New Mexico did not precede its nine counterclaims with a motion for leave to file those claims. The Court, and Special Master, should not be expected to resolve new claims in this original jurisdiction action, nor should Texas be subjected to such claims, without the important procedural predicate of considering whether the claims meet threshold jurisdictional standards established by the Court. Texas requests that all nine of New Mexico's counterclaims be stricken for failure to seek leave to file its counterclaims before their filing.

(b) In the Alternative, New Mexico's Seventh Counterclaim Against Texas and the United States, and Second and Fifth Counterclaims Against the United States Fail as a Matter of Law (Federal Rules of Civil Procedure, Rule 12(c)): New Mexico's counterclaims constitute nine new claims against Texas and the United States that New Mexico asks the Court to resolve pursuant to the Court's original jurisdiction. The nine

counterclaims include three claims directly against Texas and six claims that, while against the United States, directly affect Texas.

New Mexico's Seventh Counterclaim ("Violation of the Miscellaneous Purposes Act and the Compact Against Texas and the United States") fails as a matter of law. The Miscellaneous Purposes Act (MPA), 43 U.S.C. § 521, does not create any right for a state, like New Mexico, to challenge water supply contracts entered into by the United States and approved by water user's associations. Moreover, it creates no right against Texas. Thus, New Mexico fails to state a valid claim for relief.

New Mexico's Second Counterclaim ("Interference with Compact Apportionment Against the United States") and Fifth Counterclaim ("Violation of the Water Supply Act by the United States") both also fail as a matter of law. New Mexico's claim regarding interference with 1938 Compact apportionment by the United States fails on several grounds, including lack of standing to bring the claim and the lack of a waiver of sovereign immunity that would enable New Mexico to sue the United States. Further, the claim is subject to judgment based on a facial review of the 2008 Operating Agreement. New Mexico's Water Supply Act of 1958, Pub. L. 85-500, tit. III, § 301, 72 Stat. 297, 43 U.S.C. § 390b (WSA), claim fails simply because the WSA does not apply to the Rio Grande Project. Texas requests dismissal of New Mexico's Seventh Counterclaim against Texas and the United States, and Second and Fifth Counterclaims against the United States.

(c) Four of New Mexico's Affirmative Defenses to Texas's Complaint Fail as a Matter of Law (Federal Rules of Civil Procedure, Rule 56): New Mexico answered Texas's Complaint on May 22, 2018, and included nine affirmative defenses, several of

which fail as a matter of law and are appropriate for early resolution. Texas moves for judgment on the following New Mexico affirmative defenses: (a) third affirmative defense (unclean hands), (b) fourth affirmative defense (acceptance/waiver/estoppel), (c) fifth affirmative defense (laches), and (d) seventh affirmative defense (failure to exhaust remedies). Each of the four affirmative defenses can be decided now as a matter of law, without the need for time consuming and costly discovery. Equitable defenses, including unclean hands, acceptance/waiver/estoppel, and laches are not available in an action, like this, seeking enforcement of an interstate compact. Interstate compacts are federal law, and a court may not use equity to contravene the words of Congress. Further, each of the equitable affirmative defenses fails on their merits, as a matter of law. The failure to exhaust remedies affirmative defense has already been decided by the Court in this matter and should be confirmed now as a matter of law.

II. BACKGROUND AND STATEMENT OF PLEADINGS

A. New Mexico's Counterclaims

New Mexico filed its counterclaims, including nine claims for relief, with the Special Master on May 22, 2018. Three of the new claims are directly against Texas and/or Texas and the United States, and six of the new claims are against the United States only. New Mexico did not seek leave of the Court to file its counterclaims prior to doing so. In addition to this jurisdictional defect which applies to the entire counter-complaint, at least three of the nine counterclaims fail as a matter of law and are appropriate for resolution at this stage of the proceeding. The following provides background relating to these three counterclaims.

1. Seventh Counterclaim Against Texas and the United States

New Mexico's seventh counterclaim alleges that the United States and Texas have entered into agreements for the use of Rio Grande Project (Project) water for non-irrigation or non-Project uses, contrary to the MPA. The MPA permits the United States Secretary of the Interior to enter into contracts to supply water from a federal project for purposes other than irrigation, so long as no other practicable source of water is available and so long as the delivery of such water is not detrimental to the project nor the rights of any prior appropriator. 43 U.S.C. § 521. New Mexico claims that the United States and Texas, without New Mexico's approval, determined that Project water is available for non-irrigation and that such use is not detrimental to the Project, despite the availability of alternative water supplies. New Mexico's Counterclaims, at 24.

2. Second and Fifth Counterclaims Against the United States

New Mexico's second counterclaim alleges that the United States has, by adopting and implementing the 2008 Operating Agreement, interfered with and violated the terms of the 1938 Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (1938 Compact). The 2008 Operating Agreement—formally, the Operating Agreement for the Rio Grande Project (March 10, 2008)—was entered into between the United States and New Mexico water users Elephant Butte Irrigation District (EBID) and El Paso County Water Improvement District No. 1 (EPCWID) in order to identify and address unsanctioned use of Project water within southern New Mexico and debit such water use from EBID's 1938 Compact allocations.[1] Moreover, the agreement provided

[1] A copy of the 2008 Operating Agreement is attached as Exhibit A to the Declaration of Stuart L. Somach in Support of Texas's Motion to Dismiss New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(c) and Rule 56.

an accounting mechanism that would allow both EBID and EPCWID to carry-over water in Elephant Butte Reservoir thereby preventing the waste of water.

Parroting arguments raised in its challenge to the 2008 Operating Agreement in federal district court, New Mexico alleges in its second counterclaim that the agreement interferes with 1938 Compact apportionment. *See* New Mexico's Complaint for Declaratory and Injunctive Relief, *State of New Mexico v. United States, et al.*, United States District Court for the District of New Mexico, Case No. 1:11-cv-00691-JD-WDS, ¶¶ 47-56 ("First Claim for Relief: Declaratory Judgment and Injunction Against BOR"). New Mexico alleges that, by changing the water allocation methodology for Project water, the 2008 Operating Agreement results in the over-allocation of Project water to Texas and a significant decrease in amounts of Project water delivered to New Mexico, which, in turn, has resulted in increased irrigation well pumping by New Mexico. New Mexico's Counterclaims, at 12-13.

New Mexico's fifth counterclaim alleges that the United States has violated the WSA. The WSA seeks to prevent modifications to reservoir projects authorized prior to July 3, 1958, without congressional approval, where such modifications would seriously affect purposes for which projects were authorized or involve major structural or operational changes. 43 U.S.C. § 390b. New Mexico alleges that the United States, by approving the 2008 Operating Agreement, has materially altered Project operations and allocations without prior approval from Congress, thereby violating the WSA. New Mexico's Counterclaims, at 22.

B. New Mexico's Affirmative Defenses Raised in its Answer to Texas's Complaint

New Mexico answered Texas's Complaint on May 22, 2018, and plead nine affirmative defenses. Four of those affirmative defenses are addressed herein:

- New Mexico's third affirmative defense asserts that Texas's claims are barred by the doctrine of unclean hands due to its inequitable conduct, including allowing ground water development in the Project area in Texas, failing to correctly account for Project return flows, improperly transferring Project water to non-irrigation uses, and, generally, interfering with the 1938 Compact's apportionment.
- New Mexico's fourth affirmative defense states that Texas's claims are barred in whole or in part by "the related doctrines of acceptance, acquiescence, waiver, and estoppel" by acquiescing to Project and 1938 Compact accounting from 1938 to 2010 and, as of 2011, failing to disapprove 1938 Compact accounting on the grounds of improper water use in the New Mexico Project area.
- New Mexico's fifth affirmative defense, laches, alleges that Texas failed to protest New Mexico's groundwater development in preceding litigation and so unreasonably delayed asserting claims on such grounds.
- New Mexico's seventh affirmative defense alleges that Texas failed to exhaust its administrative remedies, because it was required to bring its alleged injury before the Compact Commission prior to seeking judicial relief.

III. ARGUMENT

A. New Mexico's Counterclaims are Procedurally Defective Because the Court has Not Extended its Original Jurisdiction to Hear the Claims

New Mexico has ignored the jurisdictional requirement that it precede proposed original jurisdiction claims with a motion to the Court for leave to file those claims. The Special Master does not have authority to make recommendations on any of New Mexico's proposed counterclaims, because the Court has not granted New Mexico leave to file any of them. New Mexico's counterclaims should, therefore, be stricken in their entirety.[2]

1. New Mexico Ignored the Threshold Requirement of a Motion for Leave to File its Counterclaims

The Supreme Court has original, exclusive, and discretionary jurisdiction over cases and controversies between two or more states. *See* U.S. Const., art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). The jurisdiction "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico,* 462 U.S. 554, 567 (1983) (citations omitted). The Supreme Court's original jurisdiction is limited and the Court has stated that it should be used only "sparingly." *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (citations omitted). The Court examines two factors in deciding whether to grant leave to file a complaint in an original action: (1) "nature of the interest of the complaining State," with a focus on the "seriousness and dignity of the claim" and (2) "the availability of an alternative forum in which the issues tendered can be resolved." *Mississippi,* 506 U.S. at 77. In *Mississippi v. Louisiana*, Chief Justice

[2] Assuming New Mexico remains interested in pursuing its counterclaims, and properly moves the Court for leave to file those counterclaims, Texas requests that litigation pertaining to Texas's Complaint proceed according to schedule set forth in the Case Management Plan, while the Court is reviewing New Mexico's request.

Rehnquist, in a unanimous opinion stated: "Indeed, Chief Justice Fuller wrote nearly a century ago that our original 'jurisdiction is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.' *Louisiana v. Texas*, 176 U.S. 1, 15 [parallel citations omitted] (1900)." *Mississippi*, 506 U.S. at 76.

The same principles that apply to the filing of an original jurisdiction complaint should apply to the filing of a counterclaim in a case, as this one, where another state has been granted leave to file a complaint. The Supreme Court's original jurisdiction is limited, and 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. New Mexico's action in filing its nine counterclaims without even attempting to meet the Court's threshold standards is improper.

The Court has previously indicated its unwillingness to allow original jurisdiction cases to be expanded without leave of court. *See, e.g., Delaware v. New York*, 510 U.S. 805 (1993) ("The counterclaims of New York are stricken without prejudice to move for leave to file such counterclaims in this Court."). The case of *Nebraska v. Wyoming*, 515 U.S. 1 (1995), is instructive. There, the Court carefully evaluated the special master's recommendations[3] on the states' motions for leave to amend their pleadings, including counterclaims:

> We have found that the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure, Rule 15(a); does not suit cases within this Court's original jurisdiction. The need for a less complaisant standard follows from our traditional reluctance to exercise original jurisdiction in any but the most serious circumstances, even where,

[3] Here, the Special Master has not been given the opportunity to provide a recommendation to the Court, because New Mexico has not bothered to file a motion for leave to file its counterclaims.

> as in cases between two or more States, our jurisdiction is exclusive . . . . Our requirement that leave be obtained before a complaint may be filed in an original action, see this Court's rule 17.3, *serves an important gatekeeping function*, and proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what we reasonably anticipated when we granted leave to file the initial pleadings.
>
> 515 U.S. at 8 (citations omitted, emphasis added).

Motions for leave to file complaints or counterclaims 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. In this case, the Supreme Court, very recently and specifically recognized the need to consider whether adding claims would unnecessarily expand the scope of this litigation. *See Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). The Court stated:

> [T]he United States has asserted its [1938] Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the [1938] Compact or *expand the scope of an existing controversy between States*.
>
> *Id.* at 960 (emphasis added).

New Mexico is required to seek leave of Court prior to filing a counterclaim in a petition or motion that presents argument in support of the Court exercising its "sparing" original jurisdiction; and other parties are provided the opportunity to respond to these arguments and inform the Court of their views on whether new claims are appropriate for the exercise of original jurisdiction.[4] Allowing New Mexico to file counterclaims,

[4] New Mexico should have been placed on notice that the existence of this case did not obviate the need to follow correct procedures. In the First Report, the Special Master, as an alternative ground for denying EBID's motion to intervene, relied on the procedural finding that EBID failed to file a pleading that set forth the claim or defense for which intervention was sought. *See* First Report, at 251. In making this recommendation, the

without leave to do so, forces Texas to file a motion to dismiss or motion for summary judgment, thus reversing the burden that is properly placed upon New Mexico to justify the counterclaims in the first instance. In this case, Texas filed a motion in support of leave to file its complaint, New Mexico opposed the motion, and the parties waited to address issues raised in Texas's Complaint until after the Court evaluated the propriety of Texas's Complaint and granted Texas leave to file it. Here, New Mexico simply filed nine separate claims and avoided the necessary predicate to its doing so. New Mexico's approach does not meet the Supreme Court's requirement that it be allowed to scrutinize a complaint or counterclaim before it decides to exercise its "delicate" original jurisdiction.

2. The Court has Issued Numerous Orders on Motions for Leave to File Counterclaims

New Mexico has ignored the Court's well-established procedure for exercising its original jurisdiction, and it has done so in the face of clear Court case law on this topic. In past original jurisdiction cases, the Court has required a motion for leave to file any counterclaims. For example, the Court issued the following orders on motions for leave to file counterclaims: *United States v. Florida* (No. 54, Orig.), 430 U.S. 140 (1977) (overruling exceptions and denying motion for leave to file a counterclaim); *California v. Nevada* (No. 73, Orig.), 438 U.S. 913 (1978) (granting motion of Nevada for leave to file an amended answer setting forth a counterclaim); *United States v. Alaska* (No. 84, Orig.), 445 U.S. 914 (1980) (referring motion for leave to file a counterclaim to a special master); *Arkansas v. Mississippi* (No. 92, Orig.), 458 U.S. 1122 (1982) (referring motion

Special Master rejected EBID's argument that procedural arguments did not apply. That finding, likewise, should apply to New Mexico's failure to seek leave to file its counterclaims.

for leave to file a counterclaim to a special master); *Nebraska v. Wyoming* (No. 108, Orig.), 481 U.S. 1011 (1987) (granting motion of Wyoming for leave to file a counterclaim); *Delaware v. New York* (No. 111, Orig.), 510 U.S. 1022 (1993) (referring New York's motion for leave to file a counterclaim to special master); *Louisiana v. Mississippi* (No. 121, Orig.), 510 U.S. 1036 (1994) (granting motion of Mississippi for leave to file counterclaim); *Virginia v. Maryland* (No. 129, Orig.), 532 U.S. 969 (2001) (granting motion of Maryland for leave to file amended answer and counterclaim); *Arkansas v. Delaware* (No. 145, Orig.), 137 S. Ct. 266, 2016 U.S. LEXIS 4849 (2016); and *Delaware v. Pennsylvania* (No. 146, Orig.), 137 S. Ct. 266, 2016 U.S. LEXIS 4610 (2016) (both granting motions for leave to file bills of complaint and to file counterclaims).

New Mexico filed its nine counterclaims without leave of the Court to do so, and in contravention of this longstanding Supreme Court precedent. Most importantly, New Mexico has the burden to persuade the Court that its counterclaims are appropriate for the exercise of the Court's original jurisdiction. By failing to file a motion for leave to file its counterclaims, New Mexico has ignored the threshold requirement.[5] Therefore, the Special Master lacks jurisdiction and the entirety of New Mexico's counterclaims should be stricken for failure to seek leave to file them.

[5] Texas filed its Answer to the Counterclaims of the State of New Mexico on July 20, 2018. By answering, Texas did not waive its right to challenge the filing of those counterclaims. The question of whether New Mexico's counterclaims are proper is a jurisdictional question. Jurisdictional issues, like New Mexico's failure to seek leave, cannot be waived. *See*, *e.g., United States v. Cotton*, 535 U.S. 625, 630 (2002). Further, Texas explicitly reserved its right to challenge the propriety of New Mexico's counterclaims. *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.

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

In the alternative to an order striking New Mexico's counterclaims for failure to seek leave of the Court to file them, Texas moves, pursuant to Federal Rule of Civil Procedure, Rule 12(c), for judgment on the pleadings on New Mexico's Seventh Counterclaim against Texas and the United States, and the Second and Fifth Counterclaims against the United States.[6]

1. Standard of Review for judgment on the pleadings

A party may move for judgment on the pleadings in accordance with Federal Rule of Civil Procedure, Rule 12(c), "[a]fter the pleadings are closed – but early enough not to delay trial . . . ." The motion is designed to dispose of a claim or defense where the material facts contained in the pleading are not in dispute and the movant is entitled to judgment as a matter of law. *See, e.g., Herbert Abstract Co. v. Touchstone Properties*, 914 F.2d 74, 76 (5th Cir. 1990); *SEC v. Wolfson*, 539 F.3d 1249, 1264 (10th Cir. 2008); *Sanders v. Mountain Am. Fed. Credit Union*, 689 F.3d 1138, 1141 (10th Cir. 2012). The standard for dismissal under Rule 12(c) is the same as that for dismissal for failure to state a claim under Rule 12(b)(6). *See, e.g., Chauvin v. State Farm Fire & Cas. Co.*, 495 F.3d 232, 237 (5th Cir. 2007); *Doe v. MySpace Inc.*, 528 F.3d 413, 418 (5th Cir. 2008); *Corder v. Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1223-24 (10th Cir. 2009). In order to survive either motion, a minimally adequate pleading must allege facts

[6] Certain counterclaims, such as the Second and Fifth Counterclaims, only involve allegations against the United States. Nonetheless, these claims affect Texas. Rather than asserting and repeating arguments made by the United States regarding these matters, Texas hereby adopts the arguments made by the United States subject to clarifications that it may make in its reply brief.

that "raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[N]aked assertion[s] devoid of further factual enhancement" are not sufficient. *Id.* at 557. Rather, a plaintiff must plead "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,' " meaning that a plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009), quoting *Twombly*, 550 U.S. at 556, 570. However, a court "need not accept as true unwarranted inferences, unreasonable conclusions, or arguments." *Eastern Shore Mkts., Inc. v. J.D. Assocs., Ltd.*, 213 F.3d 175, 180 (4th Cir. 2000).

2. New Mexico's Counterclaim against Texas and the United States relating to the miscellaneous purposes act fails as a matter of law

New Mexico's Seventh Counterclaim, against both Texas and the United States, alleges that "[t]he acts and conduct of the United States and Texas in failing to comply with the Miscellaneous Purposes Act and the [1938] Compact . . ." have caused injury to New Mexico. New Mexico's Counterclaims ¶ 113. In other words, New Mexico seeks to assert a cause of action under the MPA against Texas and the United States. No such right exists. Moreover, New Mexico fails to even state a proper MPA claim against Texas.

The MPA, in its entirety, is as follows:

> The Secretary of the Interior in connection with the operations under the reclamation law is authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided,* That the approval of such contract by the water-users' association or associations shall have first been obtained: *Provided*, That no such contract shall be entered into except upon a showing that there is no other practicable

> source of water supply for the purpose: *Provided further*, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further*, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.
>
> 43 U.S.C. § 521.

The MPA operates to provide the Secretary of the Interior, "in connection with the operations under the reclamation law," with legal authority to contract to supply water for purposes other than irrigation subject to certain conditions, enumerated under each proviso. 43 U.S.C. § 521. The first condition requires "[t]hat the approval of such contract by the water-users' association or associations shall have first been obtained." *Id.* (emphasis added).

The State of New Mexico is not a water user's association and does not have a right to enforce the MPA. The MPA requires that the Secretary enter a contract with water users, and the first proviso requires the approval of a water user's association in the event that the United States enters a reclamation contract for water for a purpose other than irrigation. The MPA does not include a requirement to confer with a state, and does not provide any right for a state to veto a MPA contract. New Mexico is not a water user's association and its assertion of a right of action under the MPA because its permission was not sought fails as a matter of law.

New Mexico also fails to, and cannot, state any MPA claim against the State of Texas. New Mexico alleges that "[t]he United States, with the participation of Texas and its political subdivisions, has entered into [MPA] contracts in violation of the [MPA] and [1938] Compact . . . ." New Mexico Counterclaims ¶ 111. Texas is not a party to any of the contracts referenced in New Mexico's counterclaim, and therefore, New Mexico

cannot assert a contractual claim or any other claim under the MPA against Texas.[7] New Mexico's Seventh Counterclaim (Violation of the Miscellaneous Purposes Act and the [1938] Compact Against Texas and the United States) fails on its face.

3. New Mexico's Second Counterclaim against the United States fails on multiple legal grounds

New Mexico's Second Counterclaim, which deals with the 2008 Operating Agreement among the United States and the two Project districts, EBID and EPCWID, is subject to judgment on the pleadings on several grounds including a lack of standing and the lack of a waiver of sovereign immunity that would enable it to sue the United States. As noted, these grounds for judgment are addressed more specifically by the United States in its parallel Rule 12(c) motion for judgment on the pleadings and will not be repeated here. The Second Counterclaim is also subject to judgment on the pleadings based upon a facial review of the 2008 Operating Agreement itself.

First, New Mexico alleges that the 1938 Compact requires that the United States allocate Project water on an equal basis to each Project acre, regardless of state or district boundaries. New Mexico's Counterclaims ¶ 73. However, no provision of the 1938 Compact and, indeed, no provision of reclamation law contains such a requirement. While factual allegations in a complaint are taken as true, the same is not true of legal assertions and New Mexico cites absolutely nothing that supports this bare legal conclusion. Since the Second Counterclaim hinges on the truth of this legal assertion and

[7] Neither New Mexico nor Texas are parties to MPA contracts associated with the Project. There is no privity of contract authorizing New Mexico to assert a cause of action under the MPA against the State of Texas. *See German Alliance Ins. Co. v. Home Water Supply Co.*, 226 U.S. 220, 234 (1912) (". . . a third person cannot sue for the breach of contract to which he is a stranger unless he is in privity with the parties and is therein given a direct interest.").

there is no support for the legal assertion, judgment on the pleadings is appropriate on the claim.

Second, New Mexico conflates two distinct aspects of how the waters of the Rio Grande are distributed. The first deals with the "allocation of water" under reclamation law. Under reclamation law, EBID and EPCWID are "allocated" water pursuant to their contracts with the Bureau of Reclamation. The second, dealing with the "apportionment of water," derives from the 1938 Compact's equitable apportionment of the waters of the Rio Grande among Texas, New Mexico, and Colorado. It is the latter distribution of water that is at the heart of this original action, not the former. Questions of "allocations" are dealt with as a matter of reclamation law and are not the proper subject of compact law. The 2008 Operating Agreement deals with how water is "allocated" between the two districts, it does not deal with how water is "apportioned" among the states and, in fact, the language of the 2008 Operating Agreement itself is clear, on its face, about what it affects.

The only direct reference in the 2008 Operating Agreement to the 1938 Compact is in section 6.12 which provides that "[n]othing herein is intended to alter, amend, repeal, modify, or be in conflict with the provisions of the Rio Grande Compact." Indeed, if it did, Texas would have grave problems with the 2008 Operating Agreement because it allocates water based upon a curve (the D-2 Curve) that is based upon water deliveries during the 1951-1978 period. The D-2 Curve, consequently, includes the adverse effect that groundwater and other illegal diversions within New Mexico has had on Texas's 1938 Compact apportionment. What the 2008 Operating Agreement does is take the amount of water available to the Project after all of New Mexico's unlawful

diversions and attempts to "allocate" that water to the two districts according to their respective contracts. It does not purport to address 1938 Compact apportionment shortages. Rather, it brings some allocation order to a bad situation.

Had New Mexico adhered to its obligations under the 1938 Compact it is likely that Reclamation's "allocation" of water to the districts would have been equal to the respective distribution of "apportioned water" below Elephant Butte Reservoir to Texas and to Project lands in southern New Mexico. But New Mexico's actions have caused the apportionment to Texas to be shorted. That reality caused the United States and the two districts to develop the 2008 Operating Agreement as a means of allocation that accounted for these shortages. The 2008 Operating Agreement does not conflict with the 1938 Compact. Rather, it is a means of allocating water that accepts and addresses, as a practical matter, the reality that is created by New Mexico's unlawful depletions of Project and 1938 Compact water.

Whether the 2008 Operating Agreement's allocation methodology, to the extent that it relies upon the D-2 Curve, would continue once this litigation is concluded, is not ripe for determination. If, for example, the Court would determine that injury caused to Texas by New Mexico during the 1951-1978 period should been enjoined, as Texas requests, then adherence to the D-2 Curve, at that point, would not be justified. However, there is nothing to suggest that this would occur and that the 2008 Operating Agreement would not be amended to replace the decree of this Court for the D-2 Curve. In any event, the current facts and the current use of the 2008 Operating Agreement on its face, do not conflict with the 1938 Compact.

New Mexico's Second Counterclaim, pertaining to the 2008 Operating Agreement, fails as a matter of law.

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

New Mexico's Fifth Counterclaim alleges that the United States violated the WSA, but the WSA does not even apply to the Project. The Fifth Counterclaim should be dismissed because it fails as a matter of law. Among other provisions, the WSA requires congressional approval for "[m]odifications of a reservoir project heretofore authorized, surveyed, planned, or constructed to include storage as provided [herein] which would seriously affect the purposes for which the project was authorized . . . or which would involve major structural or operational changes." 43 U.S.C. § 390b(e). The WSA was enacted in 1958. Pub. L. No. 85-500, title III, § 301, 72 Stat. 297, 319 (July 3, 1958).

The WSA addresses funding for water supplies in connection with federal irrigation projects.

> The [WSA] recognizes that it is the states' primary responsibility to develop their own water supplies, but that the federal government should participate and cooperate in developing such supplies. *See* 43 U.S.C. § 390b(a). These laws provide that the state or non-federal interest must pay for the cost of any water resources project and must enter into a written contract reflecting such agreement. *See id.* at 390b(b); 42 U.S.C. § 1962d-5b(a).
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> *United States v. Oklahoma*, 184 Fed.Appx. 701, 703 (10th Cir. 2006).

The provisions of the WSA "insofar as they relate to the Bureau of Reclamation and Secretary of the Interior shall be alternative to and not a substitute for provisions of the Reclamation Project Act of 1939 (53 Stat. 1187) relating to the same subject." 43 U.S.C. § 390b(b).

The Project is also subject to the provisions of the Reclamation Project Act of 1939, 43 U.S.C. § 485 et seq.[8] The Project, and Elephant Butte Reservoir, were built long before the 1958 WSA. As such, Reclamation did not, and could not have, relied on WSA authority to construct the Project. The Project was not authorized or constructed pursuant to the WSA, rather it is subject to the Reclamation Project Act of 1939. The WSA has no application to the Rio Grande Project and therefore, New Mexico's Fifth Counterclaim fails as a matter of law and is subject to judgment on the pleadings.

C. New Mexico's Third, Fourth, Fifth, and Seventh Affirmative Defenses Asserted in its Answer to Texas's Complaint Fail as a Matter of Law

Four of New Mexico's nine affirmative defenses asserted in its Answer to Texas's Complaint fail as a matter of law and are appropriate for dismissal on partial summary judgment. This includes both the equitable defenses (unclean hands, acceptance/waiver/ estoppel, laches) which are not available in an action seeking enforcement of an interstate water compact, and the failure to exhaust remedies, an issue previously decided in this action when Texas sought leave to file its Complaint. Judgment on the four improper affirmative defenses is appropriate at this time.

[8] The Court of Claims described the authorities applicable to the Project in *Bean v. United States*, 163 F.Supp. 838, 844 (Ct. Cl. 1958): ". . . the[] contracts [with EBID and EPCWID] call[] for assessments and levies against the landowners in the districts in order to repay to the United States the cost of the project, as required by the Reclamation Act of 1902, and by the Act of February 25, 1905, . . . and by the Reclamation Project Act of 1939 (53 Stat. 1193) . . . ." Although the Project was originally authorized under the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, the Project became subject to the Reclamation Project Act of 1939 based on a series of contracts, including the October 1, 1939 contracts for EBID and EPCWID.

1. Standard of Review for partial summary judgment

A motion for partial summary judgment is proper to challenge any claim or defense in an action. Fed. R. Civ. P. 56(a). "The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.* Entry of summary judgment is required "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," because "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). The moving party is, therefore, entitled to a judgment as a matter of law. *Id.* at 323.

2. The "Unclean Hands" defense is not available in this proceeding

As a matter of law, the equitable doctrine of unclean hands is not a defense available to New Mexico in an action requesting enforcement of the 1938 Compact. Traditionally, equitable considerations have played no role in determining violations in compact enforcement proceedings. *See, e.g.*, *Texas v. New Mexico*, 462 U.S. at 554; *Texas v. New Mexico*, 482 U.S. 124 (1987). In *Nebraska v. Wyoming*, 504 U.S. 587 (1993), the Court said:

> The two types of proceeding [enforcement action versus modification of a prior equitable apportionment decree] are markedly different. In an enforcement action, the plaintiff need not show injury. When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree. To be sure, the right need not be stated explicitly in the decree . . . . But the underlying issue primarily remains one of interpretation. In a modification proceeding, by contrast, there is by definition no pre-existing right to interpret or enforce. At least where the case concerns the impact of new development [requiring a new or modified equitable apportionment], the inquiry may well entail the same sort of

> balancing of equities that occurs in an initial proceeding to establish an equitable apportionment.
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> *Nebraska v. Wyoming*, 504 U.S. at 592 (citations omitted).

Even though the equitable apportionment of the waters of the Rio Grande River was already established in the 1938 Compact, by raising equitable defenses, like unclean hands, New Mexico is requesting that the Court once again "balance the equities" when it asks that violations of the 1938 Compact be overlooked for reasons outside the 1938 Compact. In other words, New Mexico is asking the Court to consider matters outside the 1938 Compact to defeat the 1938 Compact's apportionment, which was approved by the New Mexico Legislature and the Congress of the United States. The Court has determined that it does not have the authority to order such equitable relief. In *Texas v. New Mexico*, 462 U.S. 554, the Court stated:

> Under the [1938] Compact Clause, two [s]tates may not conclude an agreement . . . without the consent of the United States Congress. However, once given, congressional consent transforms an interstate compact . . . into a law of the United States. One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.
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> *Texas v. New Mexico*, 462 U.S. at 564 (citations omitted).

By raising equitable affirmative defenses, including "unclean hands," New Mexico is requesting that the Court order relief inconsistent with express terms of the 1938 Compact, and thus inconsistent with federal law. The Court has ruled that such defenses are not available in an action, as this, relating to interpretation of an interstate compact.

Additionally, if it were even available, New Mexico's allegations fall well short of constituting "unclean hands." Generally, unclean hands "closes the doors of a court of

equity to one tainted with inequitableness or bad faith . . . however improper may been the behavior of the defendant." *Precision Instrument Mfg. Co. v. Automotive Maint. Mach. Co.*, 324 U.S. 806, 814 (1945). The conduct component of unclean hands is broad, including actions which "violated conscience, or good faith, or equitable principle." *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933). New Mexico generally alleges that: (1) Texas allowed water users to develop groundwater resources in the Project area, (2) Texas failed to correctly account for historic Project return flows, (3) Texas improperly transferred Project water uses from irrigation to other uses, and (4) Texas otherwise interfered with the 1938 Compact's apportionment. New Mexico's Answer ¶ 35. New Mexico has not alleged any behavior on the part of Texas to amount to a viable "unclean hands" defense. There is no allegation that Texas engaged in activities or behavior with even a hint of bad faith, fraud, or deceit. New Mexico's affirmative defense of "unclean hands" fails on its face.

Finally, the Special Master in *Kansas v. Nebraska and Colorado,* No. 126 Orig., observed that introduction of the doctrine of "unclean hands" into an interstate water compact dispute is against the public interest. Special Master Vincent McKusick stated as follows:

> [I]njection into this case of the affirmative defense of unclean hands based on one State's water overuse would disrupt the symmetry of that outcome and destroy the certainty of the [1938] Compact's water allocations. It would distort the water allocation system carefully worked out over several years by the State and federal negotiators and duly legislated by Congress and the three State legislatures. Recognition of the equitable defense of unclean hands as asserted by Nebraska would undermine the important public interests served by the [1938] Compact.
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> *Kansas v. Nebraska and Colorado*, No. 126, Orig., Special Master Memorandum of Decision No. 3 (Oct. 19, 2001), at 9.

Partial summary judgment is appropriate on New Mexico's third affirmative defense because equitable defenses, like unclean hands, are not available in this interstate compact interpretation case; New Mexico's allegations do not amount to bad faith, fraud, or deceit which is required in order to apply the doctrine of unclean hands; and, recognition of unclean hands in this matter would be against the public interest embodied in interstate compact law.

3. The Equitable Defenses of Acceptance, Waiver, and Estoppel Fail as a Matter of Law

New Mexico's fourth affirmative defense, titled "Acceptance/Waiver/Estoppel," fails as a matter of law on partial summary judgment. First, the equitable defenses of acceptance, waiver, and estoppel are not available in interstate water compact interpretation cases, like this one. *See* part III.C.2, *supra*. Second, New Mexico does not allege the required elements of acceptance (i.e., consent), waiver, or estoppel. Finally, estoppel is typically not available against a sovereign, like the State of Texas.

New Mexico alleges that "[f]or each year following adoption of the [1938] Compact through 2010, Texas accepted and acquiesced to Project and Compact accounting . . . ." New Mexico's Answer ¶ 36. New Mexico appears to believe that this constitutes an affirmative defense of "acceptance." The affirmative defense of acceptance (or consent), is not available in this case. Texas seeks relief for breach of the 1938 Compact, an agreement that is both a contract between the signatory states, and also the "law of the United States." *Texas v. New Mexico*, 462 U.S. at 564 (citation omitted). As a result, no party to the 1938 Compact can "accept," "acquiesce," or "consent" to the modification of the parties' obligations under the 1938 Compact's express terms. *See id.*

Given the nature of the 1938 Compact as federal law, the affirmative defense of acceptance is not available.

Waiver is also not an available affirmative defense. Waiver requires an intent to release known rights. *United States v. Olano*, 507 U.S. 725, 733 (1993) ("[W]aiver is the 'intentional relinquishment or abandonment of a known right.' "). Even implied waiver requires "clear, decisive, and unequivocal conduct sufficient to evidence an intention to waiver a right. New Mexico's Answer does not point to any such conduct. Moreover, recognition of waiver of compact obligations would entertain the possibility of changing the terms and apportionments within the interstate compact. This is not permitted for the reasons described in part III.C.2, *supra*. New Mexico's "waiver" affirmative defense fails as a matter of law.

Finally, estoppel is not an available affirmative defense, and New Mexico's allegations do not even plead the elements of estoppel. Estoppel requires reliance on a misrepresentation of fact. *Heckler v. Community Health Services*, 467 U.S. 51, 59 (1984), *citing* Restatement (Second) of Torts, § 894(1) (1979). One party must prove that the other party was responsible for the misrepresentation of fact and that the party relied on that misrepresentation to its detriment.

As with the other equitable defenses, estoppel is not available to excuse violations of an interstate water compact, because it would result in a reallocation of the waters of the Rio Grande River without the consent of Congress. *See* part III.C.2, *supra*. Furthermore, New Mexico does not even allege that it relied to its detriment on representations by Texas. *See* New Mexico's Answer ¶¶ 36-38. By accepting Project and 1938 Compact accounting, Texas did not or could not have "misrepresented"

anything about its position. Alleged acceptance of water by Texas, even if true, is not a "representation" that Texas would not bring any claim for water overuse either revealed, or not revealed, by the Project and Compact accounting. In sum, estoppel is not a recognized affirmative defense in interstate water compact litigation, and even if it was, New Mexico's allegations do not amount to estoppel.

New Mexico's fourth affirmative defense, which combined together the three separate equitable defenses of acceptance, waiver, and estoppel, fails as a matter of law.

4. New Mexico is not entitled to pursue the equitable defense of Laches

New Mexico's fifth affirmative defense of laches asks the Court to excuse any breach of the 1938 Compact on its part on account of Texas's alleged "unreasonably delayed claims." New Mexico's Answer ¶¶ 39-42. Like several of the affirmative defenses described herein, laches is an equitable defense not available in interstate water compact litigation. *See* part III.C.2, *supra*.

New Mexico's reliance on laches essentially asks the Court to deny Texas any remedy for past breaches of the 1938 Compact by New Mexico. In *Texas v. New Mexico*, 482 U.S. 124, the Court rejected an argument made by New Mexico that it could not provide relief for past 1938 Compact violations:

> We find no merit in [New Mexico's] submission that we may order only prospective relief, that is, requiring future performance of compact obligations without a remedy for past breaches. If that were the case, New Mexico's defaults could never be remedied . . . . There is nothing in the nature of compacts generally or of this [1938] Compact in particular that counsels against rectifying a failure to perform in the past as well as ordering future performance called for by the [1938] Compact.
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> *Texas v. New Mexico*, 482 U.S. at 128.

Laches is also generally unavailable against a sovereign. *Costello v. United States*, 365 U.S. 265, 281 (1961); *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991) (upholding a determination by the Special Master that the laches defense is generally inapplicable against a state). The Special Mater should dismiss the laches defense because it is not available against Texas, a sovereign state. Because laches is not available against Texas, a sovereign state, the Special Master should dismiss the defense.

New Mexico's affirmative defense of laches is not available in interstate water compact litigation, it is not available against a sovereign, like Texas, and the defense fails as a matter of law.

5. New Mexico's Seventh Affirmative Defense – "Failure to Exhaust Remedies" fails as a matter of law

Partial summary judgment on New Mexico's seventh affirmative defense, "failure to exhaust remedies," is appropriate because the defense fails as a matter of law. The "failure to exhaust" affirmative defense is not available in a case, like this one, in which the Court exercises its original jurisdiction by granting leave to file a complaint. The defense raises issues that were previously decided at the initiation of this original jurisdiction proceeding, as part of the Court's consideration of Texas's motion for leave to file its Complaint. The Court examined two factors in deciding to grant Texas's leave to file its complaint: (1) "nature of the interest of the complaining State," with a focus on the "seriousness and dignity of the claim," and (2) "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77 (citation omitted). In granting Texas's motion for leave, the Court concluded that Texas has no adequate alterative forum for which its complaint may be resolved.

New Mexico's affirmative defense would relegate Texas's Complaint to the Rio Grande Compact Commission. As Texas explained to the Court in briefing on the motion for leave in 2013, the Rio Grande Compact Commission is not an adequate alternative forum for resolution of the dispute that gives rise to this lawsuit. *See* Texas's Brief in Support of Motion for Leave to File Complaint (Jan. 2013) at 22-25. While article XII of the 1938 Compact provides the Commission with powers to "administer" the provisions of the 1938 Compact, it does not endow the Commission with the power to provide a remedy for breach of the 1938 Compact. Moreover, the 1938 Compact does not create an adequate mechanism for resolving the issues concerning 1938 Compact application and violations raised in Texas's Complaint. Instead, article XI of the 1938 Compact recognizes that the states retain their rights to seek adjudication of allegations of breach of the 1938 Compact.

Additionally, the 1938 Compact Commission is not capable of resolving the present dispute. Article XII of the 1938 Compact requires that the actions of the Commission be unanimous. Further, article XII states, in part: "[t]he findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this [1938] Compact." Texas's complaint arises from the Commission's inability to reach unanimous consent on important issues. The complaint is beyond the scope of the Commission's administration of the 1938 Compact because it seeks a declaration, enforcement, and protection of Texas's rights, for which a less than unanimous Commission can provide no remedy. Moreover, the 1938 Compact explicitly provides that the findings of the Commission are not binding in litigation, meaning that

an exhaustion requirement would be ineffective to conclusively resolve 1938 Compact claims.

By granting Texas leave to file its Complaint, the Court determined that there was no adequate alternative forum for Texas's claims – that would include the Commission. New Mexico's seventh affirmative defense "failure to exhaust remedies" fails as a matter of law because it is an improper affirmative defense in an original jurisdiction action, and the Commission is not an appropriate forum to consider Texas's Complaint, as has already in any event been decided by the Court when it granted Texas leave to file its Complaint.

IV. CONCLUSION

Texas respectfully requests relief consistent with the following:

- New Mexico has asserts nine new claims without leave of the Court. New Mexico's failure to file a motion for leave ignores the Court's well-established policy of threshold review for new claims in its original jurisdiction cases. The entirety of New Mexico's counterclaims should be stricken for failure to seek leave of the Court.
- In the alternative, 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 each fail as a matter of law and are subject to judgment on the pleadings.

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- Finally, partial summary judgment is appropriate 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.

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Respectfully submitted,

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