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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST NEW MEXICO'S COUNTERCLAIMS 2, 3, 5, 6, 7, 8, AND 9.

NOEL J. FRANCISCO,
Solicitor General
JEAN E. WILLIAMS
Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL ADAMS
Assistant to the Solicitor General
JAMES J. DuBOIS
R. LEE LEININGER
THOMAS K. SNODGRASS
STEPHEN M. MACFARLANE
JUDITH E. COLEMAN
Attorneys, Environment and Natural Resources Division
U.S. Department of Justice

Counsel for the United States

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutions

Statutes

Rules

Other Authorities

I. INTRODUCTION

In this original action, the United States and the State of Texas ("Texas") have alleged that the State of New Mexico ("New Mexico") has violated the Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 79-96, 53 Stat. 785 ("Compact"). In response, New Mexico has asserted nine counterclaims to the claims asserted by Texas and the United States. Seven of those nine counterclaims are directed, in whole or in part, against the United States. *See* N.M. Countercls. Nos. 2, 3, 5, 6, 7, 8, 9. These counterclaims should be dismissed for lack of jurisdiction because, first, New Mexico has failed to identify any waiver of the sovereign immunity of the United States applicable to these counterclaims and, second, because New Mexico lacks standing to bring claims against the United States based solely in a *parens patriae* capacity. Not only are New Mexico's counterclaims against the United States jurisdictionally defective, counterclaims Nos. 2, 5, 6, 7, 8, and 9 fail to state claims against the United States for which this Court can grant relief. Thus, these six counterclaims should also be dismissed under the standards applicable to motions brought pursuant to Fed. R. Civ. P. 12(b)(6).

Through its counterclaims, New Mexico proposes to sweep into this original action counterclaims challenging the operations of the Bureau of Reclamation's ("Reclamation") Rio Grande Project ("Project"), various (and partly unspecified) provisions of the federal reclamation law, the United States' enforcement of the 1906 Convention with Mexico, as well as under the 2008 Operating Agreement, an Agreement to which New Mexico is not a party. Thus, New Mexico's counterclaims, if allowed to stand, would dramatically expand the scope of this litigation and impose substantial additional burdens of discovery on the parties beyond what is necessary to litigate the claims brought by the United States and Texas. This Court should not

increase the scope of discovery over claims for which jurisdiction is lacking and which fail to state claims for relief.

II. PROCEDURAL BACKGROUND

A. The Claims of Texas and the United States.

In this original action, Texas alleges that New Mexico is violating the Compact by authorizing the diversion of surface water and hydrologically connected groundwater downstream of Elephant Butte Reservoir. Texas Compl. ¶ 18. Texas contends that once New Mexico delivers water to Elephant Butte Reservoir, as required by Article IV of the Compact, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. *Id.* ¶ 4. Texas alleges that the deliveries to which it is entitled under the Compact cannot be assured if New Mexico water users are allowed to intercept surface water and groundwater hydrologically connected to the Rio Grande below Elephant Butte Reservoir in excess of Project allocations. *Id.* ¶ 11.

Texas further contends that such use has diminished Project return flows and decreased water available to Project beneficiaries, to Texas's detriment. Texas Compl. ¶¶ 18, 19. In particular, Texas alleges that the surface water and groundwater depletions allowed by New Mexico "have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually." *Id.* ¶ 18. Those depletions, Texas maintains, "create deficits in tributary underground water which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water," which in turn requires additional releases from Elephant Butte Reservoir and thereby decreases the amount of water stored in the reservoir for future delivery to Project users. *Id.* Texas alleges that New Mexico's

actions have resulted in "ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas state line, causing substantial and irreparable injury to Texas." *Id.* ¶ 19.

Texas requests declaratory relief, a decree requiring New Mexico to deliver water to Texas in accordance with the Compact, and damages. Texas Compl. 14-15.

After the Court granted Texas leave to file its complaint, the United States filed a motion for leave to intervene in this action as a plaintiff, a proposed complaint in intervention, and a memorandum in support of the motion. The Court granted the United States leave to intervene. *Texas v. New* Mexico, 572 U.S. 1032 (2014).

The United States agrees with Texas that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir" in excess of the Project allocations that secure Texas's Compact apportionment. U.S. Compl. ¶ 13. The United States further alleges that the diversions in New Mexico violate federal reclamation law to the extent that water users are intercepting Project deliveries in the absence of a contract with the United States, or in excess of contractually authorized amounts. *Id.* ¶¶ 12-13.

The United States contends that the unlawful depletion of surface water and groundwater in New Mexico below Elephant Butte "affects surface water deliveries" to downstream Project beneficiaries. U.S. Compl. ¶ 14. The United States agrees with Texas that, as a consequence, the United States may have to release additional water from storage to offset the anticipated depletions, reducing the water available in storage for future deliveries. *Id.* The United States also alleges that the "[u]ncapped use of water" sanctioned by New Mexico below Elephant Butte Reservoir "could reduce [the Project's] efficiency to a point where 43% of the water could not be delivered to [the El Paso County Water

Improvement District ("EPCWID")], and 60,000 acre-feet per year could not be delivered to Mexico." U.S. Compl. ¶ 15.

The United States seeks declaratory and injunctive relief from New Mexico's interference with the operation of the Project. The United States asks the Court to declare that, "as a party to the Compact," New Mexico "(i) may not permit water users who do not have contracts with the Secretary of the Interior to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico, (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and (iii) must affirmatively act to prohibit or prevent such interception or interference." U.S. Compl. 5. The United States also requested prohibitory and mandatory injunctive relief to the same effect. *Id.* The United States' complaint does not seek monetary relief or an apportionment of water for the United States.

New Mexico filed a motion to dismiss the complaints filed by Texas and the United States, in the nature of a motion under Federal Rule of Civil Procedure 12(b)(6). New Mexico contended (Mot. to Dismiss 27-39) that the complaints fail to state a claim upon which relief can be granted because no Compact provision prohibits New Mexico from interfering with Project deliveries to Texas water users after New Mexico delivers water to Elephant Butte Reservoir. New Mexico contended that the Project's water rights below Elephant Butte Reservoir instead are controlled by state law (*id.* at 48-58), and that any remedy for interference with Project deliveries on the part of New Mexico water users therefore must be left to a state-law suit brought by the United States against any offending water users (*id.* at 37-39, 59-61). In its reply brief, New Mexico argued that if the Court

dismissed Texas's claims, the United States' claims should also be dismissed because the United States "is not a party to the Compact." N.M. Reply in Supp. of Mot. to Dismiss 28.

B. The Special Master's First Interim Report and Recommendation.

Following the filing of New Mexico's motion to dismiss, the Court appointed A. Gregory Grimsal, Esq., of New Orleans, Louisiana, as Special Master. Order, Nov. 3, 2014 (Special Master's Docket #1). On August 29, 2015, the Special Master heard argument on New Mexico's motion to dismiss. The hearing also addressed motions to intervene filed by Elephant Butte Irrigation District ("EBID") and EPCWID. On February 9, 2017, the Master issued the First Interim Report. On March 20, 2017, the Court ordered the report filed and allowed the parties to file exceptions. *Texas x. New* Mexico, 137 S. Ct. 1363 (2017).

The Master recommended that the Court deny New Mexico's motion to dismiss the complaint filed by Texas. Rep. 187-217. The Master concluded that the plain text of Article IV of the Compact, which establishes an "obligation" of New Mexico to "deliver" a quantity of water to Elephant Butte Reservoir, "requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir." Rep. 197; *see id.* at 195-197. The Master rejected New Mexico's contention that nothing in the Compact prohibits New Mexico from allowing or authorizing diversions of water downstream of Elephant Butte Reservoir. The Master explained that New Mexico's interpretation "disregards the text of Article IV" and renders the terms "obligation" and "delivery" void. *Id.* The Master next concluded that the structure of the Compact supports Texas's claim. Rep. 198-203. The Master explained that Article I, which defines "[u]sable water" as water in project storage that is "available for release in accordance with irrigation demands, including deliveries to Mexico," 53 Stat. 786, demonstrates that the Compact "protects the

water that is released from Elephant Butte in order for it to reach its intended destination." Rep. 200. The Master further explained that Article VIII, which permits Texas to demand that Colorado and New Mexico release water from storage in certain circumstances to bring the quantity of usable water in the Project to 600,000 acre feet, 53 Stat. 790, is designed to ensure that the Project can "meet [its] contractual irrigation demands." Rep. 200-201. Accordingly, the Master concluded, the Compact "do[es] not simply require New Mexico to make water deliveries to Elephant Butte Reservoir." Rep. 201. Rather, the Compact "is a comprehensive agreement, the text and structure of which equitably apportion water to Texas, as well as Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share." *Id.*

The Master further concluded that the purpose and history of the Compact confirm that the States intended to use the Project "as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream." Rep. 204; *see* Rep. 203-209. The Master explained that the Compact "was the culmination of years of national and international problem-solving, litigation, legislation, and negotiation by irrigators, engineers, and politicians to irrigate lands in the Elephant Butte-Fort Quitman section of the Upper Rio Grande Basin." Rep. 204. The Master reviewed the negotiating history and concluded it was "plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters." Rep. 209.

The Master rejected New Mexico's contention that state law governs the distribution of water delivered by the Project. Rep. 210-217. Based on this Court's pronouncement that an equitable apportionment in a compact "is binding upon the citizens of each State and all

water claimants," *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938), the Master concluded that New Mexico, by entering into the Compact, "relinquished its own rights to the water it delivers in Elephant Butte Reservoir," Rep. 216, including the right to allow for the appropriation of those waters by the inhabitants of New Mexico under state law. Rep. 211-217. Therefore, "any question of the rights of any signatory State to water apportioned by the 1938 Compact … must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court." Rep. 216 (citing *Hinderlider*, 304 U.S. at 110).

The Master recommended that the Court grant in part and deny in part New Mexico's motion to dismiss the complaint in intervention filed by the United States. Rep. 217-237. The Master concluded that the United States cannot state a claim under the Compact because the Compact is an agreement among Colorado, New Mexico, and Texas, and does not apportion water to the United States. Rep. 229-231. The Master concluded that, although the States used the Project "as the sole vehicle by which to apportion Rio Grande waters to Texas and New Mexico below Elephant Butte Reservoir," that choice by the States does not give the United States a "right of action under the … Compact." Rep. 230-231. According to the Master, that conclusion follows from *Nebraska* v. *Wyoming*, 515 U.S. 1 (1995), under which "the United States would have to assert 'violations [which] have the effect of undermining [its own] apportionment [of water]'" in order to state a claim. Rep. 231 (alterations in original) (quoting *Nebraska* v. *Wyoming*, 515 U.S. at 16). The Master further concluded, however, that the United States stated a plausible claim against New Mexico under federal reclamation law. Rep. 231-237. The Master assumed as true the United States' allegation that New Mexico has allowed the diversion of Project water by

users who do not have contracts with the United States or are using water in excess of contractual amounts. Rep. 232 (citing U.S. Compl. ¶ 13). The Master explained that "[f]ederal reclamation law has long established that only entities having contracts with the United States may receive deliveries of water from a reclamation project," and "th[e] requirement of a contract for project water extends to seepage and return flows." Rep. 232 (citing *Bean* v. *United* States, 163 F. Supp. 838 (Ct. Cl. 1958)). The Master recommended that the Court should exercise its original, non-exclusive jurisdiction over suits between the United States and a state, *see* 28 U.S.C. § 1251(b)(2), to consider and resolve a reclamation law claim by the United States against New Mexico "for purposes of judicial economy." Rep. 234.[1]

C. The Parties' Exceptions.

New Mexico, Colorado, and the United States each filed exceptions to the Master's Report. New Mexico's exception acceded to the Master's recommendation that New Mexico's motion to dismiss be denied, but excepted to the Master's reasoning in the Report. In its exceptions brief, New Mexico argued that the Master's interpretation of the word "deliver" as used in the Compact stripped New Mexico of its sovereignty over Rio Grande water after it had delivered that water to the Project. N.M. Brief at 17-25. New Mexico also argued that the Master's reasoning in the Report overlooked deference to state law under the Reclamation Act and the McCarran Amendment (*id*. at 25-41), and further argued that the law of equitable apportionment does not deprive New Mexico of jurisdiction over

[1] The Master recommended that the Court deny the motions to intervene filed by EBID and EPCWID. Rep. 237-278. The Master concluded that EBID's motion was procedurally deficient because it did not set forth any claims or defenses for which intervention was sought, nor did it seek any relief against either Texas or New Mexico. Rep. 247-251. The Master further concluded that EBID and EPCWID each failed to demonstrate "a compelling interest in its own right …which interest is not properly represented by" New Mexico or Texas, respectively. Rep. 244, 251 (quoting *South Carolina* v. *North Carolina*, 558 U.S. 256, 266 (2010)); *see* Rep. 251-264 (EBID); *id.* at 270-277 (EPCWID).

water apportioned by the Compact. *Id*. at 42-48. New Mexico also excepted to the Master's citation of extrinsic evidence in his discussion of the historical context and negotiating history of the Compact. *Id*. at 49-55.

Colorado excepted to the Report on two grounds. First, Colorado argued that the Court should limit the claims by the United States to its interests in the 1906 Convention with Mexico, and not allow the United States to bring claims on other grounds (such as under reclamation law, as the Report recommended). Colo. Brief at 5-9. Second, Colorado, like New Mexico, excepted to the Report's findings and recommendations that were based on the Master's independent investigation instead of evidence submitted by the parties. *Id.* at 9-12.

The United States excepted to the Master's recommendation that would limit the United States' claims to those arising under reclamation law. The United States argued that, consistent with prior participation in original actions to protect federal interests, it can obtain declaratory and injunctive relief to protect the federal interests that are harmed by New Mexico's violations of the Compact, including to protect the United States' ability to satisfy its treaty obligations to deliver water to Mexico under the 1906 Convention, to protect the United States' operation of the Project and its contractual obligations to deliver Project water to EBID and EPCWID. U.S. Brief at 31-44. Thus, the United States argued that, given the unique role of the Project in effectuating the Compact's equitable apportionment of the Rio Grande, as well as the delivery of water to Mexico under the 1906 Convention, the United States can assert a claim against New Mexico based on allegations that New Mexico is violating a federal statute that protects the United States' ability to

comply with its treaty obligations and is interfering with Project operations that are protected by the Compact. *Id*. at 29.

D. The Supreme Court's Opinion.

On October 10, 2017, the Supreme Court issued an Order denying New Mexico's motion to dismiss Texas's complaint, and also denying the intervention motions of EBID and EPCWID. *Texas v. New Mexico*, 138 S. Ct. 349 (2017). The Court heard oral argument on January 8, 2018, on Colorado's first exception and on the exception of the United States. On March 5, 2018, the Court issued a unanimous opinion sustaining the United States' exception and overruling all other exceptions. The Court held that the United States may pursue the Compact claims it pleaded in its complaint. *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). In reaching this holding, the Court cited four considerations it found persuasive: first, that the Compact is "inextricably intertwined" with the Project and Reclamation's contracts with EBID and EPCWID; second, that New Mexico had conceded that the United States plays an integral role in the Compact's operation; third, a breach of the Compact could jeopardize the United States' ability to satisfy its treaty obligations to Mexico under the 1906 Convention; and fourth, the United States has asserted its Compact claims in an existing action brought by Texas and seeks similar relief against New Mexico, without objection from Texas. *Id*. at 959-60.

E. Post-Opinion Proceedings.

Following the Court's March 5 Opinion, the Master established a schedule for the filing of the complaints of Texas and the United States on his docket, the filing of answers and any counterclaims by New Mexico and Colorado, and the filing of answers to any counterclaims. On April 2, 2018, the Court discharged Special Master Grimsal and

appointed the Hon. Michael J. Melloy as Special Master going forward. *Texas v. New* Mexico, 138 S. Ct. 1460 (2018).

Texas and the United States filed their respective complaints on the Master's docket on March 23, 2018. Dkt. # 63, 65. At the request of the Master, the parties filed statements of issues on April 13, 2018. Dkt. ## 72, 73, 75, 77. The parties also prepared and submitted to the Master a proposed case management plan. Dkt. # 79; *see* also Dkt. ## 76, 78 (letters by New Mexico and jointly by Texas and the United States, respectively, with regard to the proposed discovery schedule). The Master issued an initial case management plan on April 24. Dkt. # 86. New Mexico filed answers to the complaints of Texas and the United States, and filed counterclaims, on May 23, 2018. Dkt. ## 93-95. Texas answered New Mexico's counterclaims on July 20, and the United States answered on July 23. Dkt. ## 106-107. Following an in-person status conference in Denver on August 28, 2018, the Master issued an updated case management plan on September 6, 2018. Dkt. # 124. Fact discovery in the case commenced on September 1, 2018.

F. New Mexico's Counterclaims.

New Mexico's counterclaims assert nine claims for relief.[2] Two of these claims (the first and fourth) allege Compact violations by Texas, and will be addressed by Texas in a separate motion. A seventh counterclaim alleges Compact and other statutory violations by both Texas and the United States, and is summarized below. The remaining counterclaims

[2] New Mexico did not seek leave of this Court to file its counterclaims against the United States and Texas. As will appear in the discussion that follows, those counterclaims would greatly expand the scope of this original action, including discovery, to include, *inter alia*, the Project's operation under the 2008 Operating Agreement, the United States' compliance with provisions of reclamation law, and the United States' enforcement of the 1906 Convention with Mexico. In the past, this Court has stricken counterclaims for failure to move for leave to file counterclaims. *Delaware v. New York*, 510 U.S. 805 (1993). Texas will address in more detail in its motion in limine whether New Mexico has properly obtained leave of this Court before filing its counterclaims.

allege statutory and other Compact violations by the United States, and are summarized here for the Master's convenience:

> Second Claim for Relief: New Mexico alleges that the United States has violated the Compact by entering into a 2008 Operating Agreement with EBID and EPCWID, which, New Mexico claims, impermissibly changes the allocation of water between EBID and EPCWID to the detriment of New Mexico. New Mexico claims that it has sustained damages as a result of this alleged Compact violation. N.M. Countercls. ¶¶ 72-83.
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> Third Claim for Relief: New Mexico alleges that the United States, through Reclamation, impermissibly caused a reduction of New Mexico's Accrued Credit Water in Project storage in 2011 in the amount of approximately 64,000 acre feet without New Mexico's authorization. N.M. Countercls. ¶¶ 84-90.
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> Fifth Claim for Relief: New Mexico alleges that the United States has made "major operational changes to the Project" without Congressional authorization, in violation of the Water Supply Act of 1958, 43 U.S.C. § 390b(e). N.M. Countercls. ¶¶ 99-104.
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> Sixth Claim for Relief: New Mexico alleges that the United States has breached an alleged duty to conduct an annual Project accounting in a manner that is consistent with the Compact, in various respects. N.M. Countercls. ¶¶ 105-107.
>
> Seventh Claim for Relief: New Mexico alleges that Texas and the United States have violated the Compact and the Miscellaneous Purposes Act, 43 U.S.C. § 521, by making Project water available for non-irrigation uses, including for municipal and industrial uses in the City of El Paso. New Mexico claims it has sustained damages from the actions of the United States and Texas. N.M. Countercls. ¶¶ 108-115.
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> Eighth Claim for Relief: New Mexico alleges that the United States "retains the responsibility to operate and maintain the Project's storage reservoirs, diversion structures, and the main channel of the Rio Grande," and has failed to comply with this responsibility by allowing vegetation to grow in Project reservoirs and along the channel of the Rio Grande and by failing to remove silt from the Rio Grande. New Mexico claims that it has sustained damages from the actions of the United States. N.M. Countercls.¶¶ 116-122.
>
> Ninth Claim for Relief: New Mexico alleges that the United States has failed to enforce Article IV of the 1906 Convention with Mexico and has violated the Compact, including with regard to groundwater pumping and unauthorized surface water diversions in Mexico that New Mexico alleges results in depletions in the shallow alluvial aquifer, losses to Project efficiency, reduced return flows, and decreases in the amount of water in Project storage available for future use. New Mexico claims that it has sustained damages from the actions of the United States. N.M. Countercls. ¶¶ 123-132.

New Mexico seeks not only declaratory and injunctive relief for its claims against the United States, it also seeks damages. Paragraph K to the Prayer for Relief asks the Court to "[a]ward to the State of New Mexico all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of New Mexico as a result of the United States' past and continuing violations of the Compact." N.M. Countercls. 29.

At the August 28 in-person status conference in Denver before Special Master Melloy, the United States and Texas advised the Master that they wished to contest the legal sufficiency of some or all of New Mexico's counterclaims through a motion or motions. Aug. 28, 2018 Transcript (Dkt. # 157) at 50-51, 123-24. In an amendment to the case management plan, and at the request of Texas and the United States, the Master set December 24, 2018 as a deadline for the filing of legal motions. Dkt. # 145.

III. STATEMENT

New Mexico's counterclaims against the United States completely overlook jurisdictional prerequisites that must be satisfied before these counterclaims can be heard. Simply because the United States has been held to have stated claims against New Mexico for violation of the Compact does not relieve New Mexico of its obligation to establish a jurisdictional foundation for its counterclaims against the government. One jurisdictional requirement, applicable to any party seeking to assert a claim or counterclaim for relief against the United States, is the demonstration that the United States, as sovereign, has given its consent to be sued on the claim in question. Yet nowhere in its counterclaims has New Mexico cited any waiver of the sovereign immunity of the United States that would apply to any of its counterclaims against the government. Indeed, New Mexico has failed to cite any statute that waives the sovereign immunity of the United States to the claims for damages that New Mexico asserts in certain of its

counterclaims and in its Prayer for Relief. New Mexico's counterclaims are jurisdictionally defective and should be dismissed on this basis alone.

New Mexico's counterclaims against the United States are also jurisdictionally defective because they rely on allegations of injury to "New Mexico and its citizens" rather than to cognizable injuries to the State independent of harms to its citizens generally. New Mexico appears to base its standing on *parens patriae* grounds by asserting injuries to its citizens generally, but this Court's precedents show that such grounds alone do not afford a basis for standing to assert claims against the United States. Yet New Mexico fails to identify any injury attributable to the violations it alleges against the United States to a quasi-sovereign interest of the State distinct from the welfare of its citizens or to some proprietary interest. Accordingly, New Mexico's counterclaims against the United States should also be dismissed for lack of standing.

Finally, even if New Mexico could overcome these jurisdictional hurdles, six of its counterclaims (Nos. 2, 5, 6, 7, 8, and 9) still must be dismissed because each fails to state a claim against the United States for which this Court can provide relief.[3] New Mexico's allegations of the United States' violations of the Compact or various provisions of reclamation law, and New Mexico's allegations of the United States' failure to enforce Article IV of the 1906 Convention with Mexico rely on conclusory and unsupported allegations of legal duties that do not withstand scrutiny. Accordingly, New Mexico's Claims Two, Five, Six, Seven, Eight, and Nine each

[3] In this motion, the United States does not seek dismissal for failure to state a claim as to New Mexico's Claim Three because the violation alleged in that counterclaim may require factual development beyond the scope of the pleading standard used in deciding motions under Fed. R. Civ. P. 12(b)(6). By deferring consideration of Claim Three (assuming it survives the United States' jurisdictional challenge here) until summary judgment in no way implies that the United States concedes that it states a valid claim for relief.

should be dismissed at this stage in the litigation for failure to state claims against the United States upon which relief can be given.

IV. LEGAL STANDARD

Under Supreme Court Rule 17(2), which governs original actions, "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed," but, "[i]n other respects, those Rules … may be taken as guides," not strict requirements. Rule 12(c) of the Federal Rules of Civil Procedure provides that "a party may move for judgment on the pleadings" and may be employed as a vehicle for raising, after the close of the pleadings, a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(h)(2)(B); *see* 5 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 1367, at 216 (3d ed. 2004). "The same standards that govern motions to dismiss under Rule 12(b)(6) also govern motions for judgment on the pleadings under Rule 12(c)." *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1109 (8th Cir. 2017). A motion for judgment on the pleadings under Rule 12(c) may also be used to raise lack of subject matter jurisdiction. *See* 5 FEDERAL PRACTICE & PROCEDURE § 1367; *Innovative Sports Mgmt., Inc. v. Robles*, No. 13-cv-00660-LHK, 2014 WL 129308, at *2 (N.D. Cal. Jan. 14, 2014).

In considering a motion to dismiss for failure to state a claim, courts look to see whether the complaint, or in this case the counterclaim, "'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Wood v. Moss*, 572 U.S. 744, 757-58 (2014) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). The plausibility standard is met "'when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ellis*, 860 F.3d at 1110 (quoting *Iqbal*, 556 U.S. at 678). A court is not required to accept as true "[c]onclusory allegations or legal

conclusions masquerading as factual allegations." *Faber v. Metro. Life Ins. Co.*, 648 F.3d 98, 104 (2d Cir. 2011); *see also Papasan v. Allain*, 478 U.S. 265, 286 (1986) ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation."). "Because only well-pleaded facts are taken as true, we will not accept a complainant's unsupported conclusions or interpretations of law." *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 971 (1st Cir. 1993).

V. ARGUMENT

A. New Mexico Fails to Identify Any Waiver of Federal Sovereign Immunity That Would Allow This Court to Exercise Jurisdiction Over Counterclaims Against the United States.

Nowhere in its counterclaims does New Mexico identify any waiver of the government's sovereign immunity that would allow this Court to exercise jurisdiction over New Mexico's claims against the United States. New Mexico is not relieved of the obligation to plead an applicable waiver of sovereign immunity by the commencement of suit by the United States; the consent of the United States to suit applies no less to New Mexico's counterclaims than to claims originally asserted against the United States. New Mexico's failure to identify and plead an applicable waiver is thus a fatal, threshold defect, and requires dismissal of Claims 2-3, and 5-9 against the United States for lack of jurisdiction.

As a sovereign, the United States may only be sued when it has consented to suit. *United States v. Bormes*, 568 U.S. 6, 9 (2012) (citation omitted); *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003); *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). "It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *Navajo Nation*, 537 U.S. at 502 (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). "Absent a waiver, sovereign immunity shields the Federal Government and its agencies from suit." *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471,

475 (1994). "Sovereign immunity is by nature jurisdictional, and the terms of the United States' 'consent to be sued in any court define that court's jurisdiction to entertain the suit.'" *Henderson v. United States*, 517 U.S. 654, 675-76 (1996) (internal citations omitted) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). The terms of any waiver of federal sovereign immunity are for Congress to determine. *See United States v. Shaw*, 309 U.S. 495, 503 (1940). Thus, "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity …, together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citations omitted). The consent of the United States to suit applies even in original actions in this Court. *California v. Arizona*, 440 U.S. 59, 61-62 (1979) ("It is settled that the United States must give its consent to be sued even when one of the States invokes this Court's jurisdiction….") (citing *Kansas v. United States*, 204 U.S. 331, 342 (1907)).

These rules also apply to counterclaims against the United States. *See United States v. Shaw*, 309 U.S. at 503; Fed. R. Civ. P. 13(d). When the United States commences an action, sovereign immunity bars counterclaims against the United States absent a waiver applicable to each counterclaim, with one narrow exception that does not apply here. *Presidential Gardens Assocs v. United States*, 175 F.3d 132, 140 (2d Cir. 1999); 6 FEDERAL PRACTICE & PROCEDURE § 1427.[4] Thus, "there is no 'implied waiver' of sovereign immunity as to counterclaims based on the government's commencement of an action." *Presidential Gardens*, 175 F.3d at 140. Rule 13(d) of the Federal Rules of Civil Procedure, concerning counterclaims against the United

[4] A waiver of sovereign immunity will only be inferred for counterclaims seeking recoupment of a claim arising out of the same transaction or occurrence as the original claim. 6 FEDERAL PRACTICE & PROCEDURE § 1427. The claim sought by the United Sates and by the defendant in recoupment must, however, be monetary. *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017) (citing *Berrey v. Asarco, Inc*., 439 F.3d 636, 645 (10th Cir. 2006)), *aff'd* 138 S. Ct. 1832 (2018). In this action, the United States seeks only declaratory and injunctive relief against New Mexico, and accordingly New Mexico's counterclaims against the United States cannot be characterized as ones for recoupment.

States, reinforces this point by providing that neither compulsory nor permissive counterclaims enlarge "beyond the limits now fixed by law" the right to assert counterclaims against the United States. Fed. R. Civ. P. 13(d); *Frederick v. United States*, 386 F.2d 481, 488 (5th Cir. 1967). Accordingly, counterclaims that do not arise from the same transaction or occurrence of the original claim or are of a different form or nature than that brought by the United States require a waiver of sovereign immunity before they can be asserted against the United States. *Frederick*, 386 F.2d at 488. Here, New Mexico's counterclaims seek damages and other forms of monetary relief against the United States, and allege violations of federal statutes that have nothing in common with the Compact violations alleged by the United States. Thus, New Mexico must identify an applicable waiver of sovereign immunity as a jurisdictional prerequisite.

This Court has frequently held that waivers of sovereign immunity must be strictly construed in the government's favor, and must be unequivocally expressed in statutory text. *Fed. Aviation Admin. v. Cooper*, 566 U.S. 284, 290 (2012); *Orff v. United States*, 545 U.S. 596, 601-02 (2005); *Blue Fox*, 525 U.S. at 261 (citing cases). A waiver of sovereign immunity cannot be implied. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Because the consent to be sued defines the Court's jurisdiction to entertain counterclaims against the United States, a counterclaim against the United States must include a reference to the statute containing an applicable waiver of federal sovereign immunity. 5 FEDERAL PRACTICE & PROCEDURE § 1212; *see also Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (the party asserting jurisdiction bears the burden of showing that a cause lies within the Court's limited jurisdiction). Here, New Mexico has failed to allege *any* waiver of sovereign immunity that would provide jurisdiction over *any* of New Mexico's claims against the United States in this suit. Accordingly, the Court lacks jurisdiction over New Mexico's counterclaims seeking declaratory and injunctive relief

against the United States, and those claims against the United States must be dismissed for lack of jurisdiction.

1. New Mexico's counterclaims for damages fail to identify a waiver applicable to claims seeking monetary compensation from the United States

New Mexico's failure to establish jurisdiction is most readily demonstrated with respect to claims seeking monetary relief against the United States, such as damages. For New Mexico to seek monetary relief from the United States, it must identify a waiver of sovereign immunity applicable to suits for money damages. The Tucker Act is one such waiver, applicable *inter alia* to claims arising from a contract or from the Constitution. 28 U.S.C. § 1491. The Federal Tort Claims Act is another, applicable to claims for damages sounding in tort. 28 U.S.C. §§ 2671 *et seq*. Once a party identifies an applicable waiver, it must satisfy a further step. Because waivers of sovereign immunity such as the Tucker Act are purely jurisdictional and create no substantive right enforceable against the United States by a claim for money damages, a party must also identify a statute or other source of law that "creates a right capable of grounding a claim within the waiver of sovereign immunity if, but only if, it 'can fairly be interpreted as mandating compensation by the Federal Government for the damage sustained.'" *White Mt. Apache*, 537 U.S. at 472 (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)); *see also United States v. Navajo Nation*, 556 U.S. 287, 291 (2009). Statutes that fall into this latter category are often referred to as "money-mandating" statutes. *Jefferson v. United States*, 104 Fed. Cl. 81, 88 (2012). Applying these requirements to New Mexico's counterclaims, New Mexico comes up well short.

New Mexico's Second, Seventh, Eighth, and Ninth Claims against the United States all allege that New Mexico has suffered damages as a result of purported Compact violations and violations of other law by the United States. Yet New Mexico fails to identify any waiver of

sovereign immunity that would give this Court jurisdiction over the claims for damages against the United States asserted here. For example, New Mexico has not grounded any of its counterclaims on alleged breaches of contract that New Mexico has entered into with the United States, and accordingly the waiver under the Tucker Act would not apply here.

2. New Mexico also fails to identify any money-mandating statute or contract giving it a right to compensation against the United States

New Mexico also fails to identify any money-mandating statute or other source of law that mandates the payment of compensation by the United States within scope of an applicable waiver. With respect to all of its counterclaims alleging Compact violations, New Mexico fails to argue, let alone demonstrate, that the Compact mandates compensation from any non-party to the Compact for a Compact violation they precipitated, let alone by the United States. Consequently, New Mexico has failed to establish that the Compact is a money-mandating statute requiring that the United States pay compensation to New Mexico.

Nowhere in its Second Claim does New Mexico cite any source of law pertaining to Project operations that would mandate to payment of damages by the United States for a breach of any contract or statute. Even if the 2008 Operating Agreement provided for the payment of damages for a breach of its terms (which it does not), New Mexico is not a signatory to that Agreement; only EBID, EPCWID, and the United States are parties to it. Thus, New Mexico fails to identify any money-mandating statute that would entitle it to claim damages from the United States under its Second Claim.

The Seventh Claim alleges violations of the Miscellaneous Purposes Act by the United States and Texas. This statute authorized the Secretary of the Interior to enter into contracts for the sale of water for non-irrigation purposes provided that the local water-users' association approved of the contract and that the provision of water under the contract was not detrimental to

the water service for an irrigation project or to the rights of any prior appropriator. 43 U.S.C. § 521. Yet New Mexico does not identify any provision of the Miscellaneous Purposes Act itself, or any contract for the sale of water entered into pursuant to that Act (New Mexico does not claim to be a party to any Miscellaneous Purposes Act contract), that would mandate the payment of compensation by the United States to New Mexico for a breach of the statute or a contract. Here too, New Mexico fails to identify any money-mandating statute that would entitle it to claim damages from the United States.

In its Eighth Claim, alleging a failure by the United States to remove vegetation and silt from the Rio Grande channel, New Mexico does not identify *any* authority whatever that allegedly imposes mandatory channel maintenance obligations on the United States. The Eighth Claim cites no treaty, statute, contract, or other law that would give rise to a money-mandating obligation by the United States. The claim's allegation of a federal "responsibility" with regard to channel maintenance is wholly conclusory and its request for damages from the United States is unsupported. There is a complete absence of any authority cited in this claims that would entitle New Mexico to damages from the United States.

Finally, the Ninth Claim purports to seek damages from the United States for an alleged failure to enforce Article IV of the 1906 Convention with regard to alleged unauthorized diversions and groundwater pumping by Mexico. Setting aside for the moment whether New Mexico has standing to bring a claim against the United States for an alleged failure to enforce a treaty obligation owed to the United States by a foreign state, New Mexico fails to identify any provision of the 1906 Convention that would mandate the payment to New Mexico by the United States for damages to the state based on alleged violations of the treaty by Mexico. Thus, New Mexico has failed to identify a money-mandating statute that would allow it to receive damages

from the United States even if it could state a claim and establish its standing to challenge the United States' alleged failure to enforce Mexico's alleged breach of an obligation owed to the United States under the 1906 Convention.

New Mexico's failure to cite any applicable waiver of federal sovereign immunity mandates dismissal of all of its counterclaims against the United States for lack of jurisdiction.

B. New Mexico Lacks Standing to Assert Counterclaims 2, 5, 6, 7, 8, and 9 Against the United States.

The absence of an applicable waiver of sovereign immunity for its counterclaims against the United States is not the only jurisdictional defect here. New Mexico also lacks standing to assert its counterclaims against the United States because the State fails to allege injury to any concrete, particularized State interest distinct from the generalized interests of its citizens.

This Court may exercise its original jurisdiction over "controversies" between two or more states. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). For a controversy under this Court's original jurisdiction to exist, "'it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is asserting a right against the other State which is susceptible to judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (quoting *Maryland v. Louisiana*, 451 U.S. 725, 735-36 (1981)). For constitutional standing purposes, a state must also establish that the injury alleged is fairly traceable to the challenged action, and is not injury that results from the independent action of some third party not before the Court. *Maryland*, 451 U.S. at 736 (citing *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41-42 (1976)). The injuries that can support the standing of a state in an original action against another state include injuries to quasi-sovereign interests, such as alleged injuries to a state's citizens generally, which implicate a state's interest as *parens*

patriae, *id*. at 737, as well as direct injuries to the state itself. *Wyoming*, 502 U.S. at 448-49; *see also Massachusetts v. Mellon*, 262 U.S. 447, 482 (1923) (jurisdiction upheld where injury to a state's proprietary interests was alleged).

To establish its standing to assert claims against the United States, however, a state must allege a particularized, concrete injury-in-fact to an interest distinct from the interests of its citizens generally. A state may not base its standing to sue the United States solely as *parens patriae*, asserting the rights of its citizens, because it is the United States, not the state, that represents citizens as *parens patriae*. *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982); *Massachusetts*, 262 U.S. at 485-86; *Virginia ex rel. Cuccinelli v. Sebelius*, 656 F.3d 253, 268-69 (4th Cir. 2011); *Wyoming ex rel. Sullivan v. Lujan*, 969 F.2d 877, 883 (10th Cir. 1992); *Iowa v. Block*, 771 F.2d 347, 354-55 (8th Cir. 1985). While the Court has on occasion accorded states "special solicitude" in the standing analysis, *see Massachusetts v. EPA*, 549 U.S. 497, 520-23 (2007), it has done so when there was a quasi-sovereign interest at stake but a more attenuated causal connection and likelihood of redressability; in *Massachusetts v. EPA*, for example, Massachusetts alleged an imminent and concrete injury to state-owned coastal lands from rising sea levels. *Id*. at 523. Thus, state interests that would support a state's standing to assert claims against the United States include sovereign interests in the physical health and economic well-being of a state's residents when "the state is more than a nominal party," *Wyoming v. Lujan*, 969 F.2d at 883 (citing *Snapp*, 458 U.S. at 607-08), or proprietary interests such as a state's interest in land that the state owns or manages. *See Nevada v. Burford*, 918 F.2d 854 (9th Cir. 1990) (dismissing State's case against the United States Department of Energy for lack of standing because property claimed to be affected by the action was neither owned nor used by the State).

1. New Mexico lacks a particularized interest in the allocation by the Project of Rio Grande water New Mexico delivers to the Project under the Compact

New Mexico lacks standing to assert its counterclaims against the United States because it fails to identify any concrete, particularized injury to a cognizable State interest distinct from the interests of its citizens generally. For example, New Mexico's Second Claim alleges that the Operating Agreement violates the Compact, N.M. Countercls. ¶¶ 72-83, and the Operating Agreement also figures in the Fifth and Eighth Claims. *See id*. ¶¶ 102, 120. An examination of the Project's operations in relation to the Compact provides important context for the allegations of injury in New Mexico's counterclaims against the United States and shows why New Mexico has failed to establish its standing to assert its counterclaims against the United States.

Under Art. IV of the Compact, New Mexico agreed to deliver Rio Grande water to Texas at a river gage near San Marcial, N.M., at the mouth of Elephant Butte Reservoir, approximately 130 miles from the Texas-New Mexico state boundary. Compact Art. IV; *City of El Paso v. Reynolds*, 563 F. Supp. 379, 385 (D.N.M. 1983). Once New Mexico delivers Rio Grande water at San Marcial, that water is committed to the Project. Rep. 197 ("[T]he plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir.").

The Project, in turn, was authorized under the Reclamation Act of 1902, 43 U.S.C. §§ 391 *et seq*. Under this authority, the Project was constructed to provide water for irrigation to EBID in New Mexico and EPCWID in Texas, and to satisfy treaty obligations to Mexico. *See generally El Paso*, 563 F. Supp. at 383; *New Mexico v. Backer*, 199 F.2d 426, 427 (10th Cir. 1952). To achieve this undertaking, reclamation law governs, among other things, the government's acquisition of water rights, its construction of facilities such as dams and canals, and the delivery of irrigation water to water districts, which were formed by farmers therein and

organized under state law. In exchange, the districts were to repay all or a portion of capital construction costs of Project facilities, as well as operation and maintenance costs, pursuant to long-term contracts. 43 U.S.C. §§ 421, 423e, 485h(d), (e). After Reclamation delivers Project water to EBID and EPCWID, the districts have the responsibility, pursuant to reclamation law and contracts entered into under such laws (the "Downstream Contracts," 138 S. Ct. at 957), to deliver Project water to the irrigators within their districts. *See El Paso*, 563 F. Supp. at 380, 383; *see also* N.M. Stat. Ann. §§ 73-10-1 to 47 (1978) ("Irrigation Districts Cooperating with the United States Under Reclamation Laws; Formation and Management"). Thus, Reclamation stores and releases water from Elephant Butte Reservoir for Project beneficiaries in southern New Mexico and Texas and to meet United States' treaty obligations to Mexico.

2. Because New Mexico is not a Project beneficiary, it lacks a cognizable interest in how the Project allocates water to EBID and EPCWID under the Downstream Contracts

New Mexico is not entitled to water from the Project. The State, *qua* state, is not a Project beneficiary. The State paid nothing for construction of the Project, pays nothing for operation and maintenance of the Project, and receives no monetary remuneration from the Project. Indeed, in the Enabling Act under which New Mexico achieved statehood, New Mexico disclaimed any interference with the operation of federal reclamation projects in the State. *See* Act of June 20, 1910, Pub. L. No. 61-219, § 2, 36 Stat. 557, 559 ("That there be and are reserved to the United States, with full acquiescence of the State all rights and powers for the carrying out of the provisions by the United States of the [Reclamation Act], and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory."). The Enabling Act was subsequently incorporated into the New Mexico Constitution as Art. XXI, § 7. New Mexico is obligated, under Art. IV of the Compact, to deliver Rio Grande water to Elephant Butte Reservoir so that *Reclamation* can release and divert the stored water for Project purposes.

Compact Art. IV; Rep. 200. New Mexico agreed to this obligation when it signed the Compact and thereby agreed to the equitable apportionment of Rio Grande waters that the Compact effectuated as among the States of Colorado, New Mexico, and Texas. *See* Rep. 213 (citing *Hinderlider*, 304 U.S. at 106); Compact Art. IV; *see also United States v. City of Las Cruces*, 289 F.3d 1170, 1185 (10th Cir. 2002) ("[T]he Compact contains tables outlining the delivery obligations of each state to the next downstream state."). By entering into the Compact, New Mexico assumed an obligation to exercise its sovereignty over the water released by the Project in a manner that ensured that water delivered to the Project would be "[u]sable water" available for release by Reclamation for specific purposes under the Compact. Compact Art. I(*l*), 53 Stat. 786. Thus, "the Compact therefore limits New Mexico water users from interfering with Project deliveries to New Mexico and Texas to meet irrigation demands as a matter of state law" as well as federal law. U.S. Brief at 8; Rep. 200, 213.

Lower court rulings have held that Texas agreed in the Compact to have its equitable apportionment of Rio Grande water delivered at Elephant Butte Reservoir, that the Compact "plainly directs" that the water is for irrigation in the project, and that therefore Project water is not available for appropriation under Texas law for other purposes. *El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907 (D. Tex. 1955); *see also Holguin v. Elephant Butte Irr. Dist*., 575 P.2d 88, 93-94 (N.M. 1977), *overruled on other grounds by C.E. Alexander & Sons, Inc. v. DEC Int'l, Inc*., 811 P.2d 899 (N.M. 1991) (adopting the reasoning of *City of El Paso* and upholding the dismissal of a lawsuit brought by Project landowners against EBID for failure to join the United States).

The same reasoning applies to New Mexico here. *See EBID v. Regents of N.M. State Univ.*, 849 P.2d 372, 378 (N.M. 1993) (holding that a general adjudication of the Rio Grande

between Elephant Butte Reservoir and the Texas State line substantially complied with the McCarran Amendment because the Compact required a specific amount of water to be delivered into Elephant Butte Reservoir and "[Reclamation] Project contracts independently apportioned water below the dam for both New Mexico and Texas users…."). New Mexico does not have a free hand with the waters of the Rio Grande below the San Marcial river gage. Indeed, as the Master concluded in his Report, New Mexico's obligation to "deliver" water to the Project under Art. IV the Compact, in the context of the Compact's structure and equitable apportionment objective, requires New Mexico to protect Project water from unauthorized interference or capture once it has been released. Rep. 200, 213. The water stored by in Elephant Butte Reservoir and released by the Project is to be used for irrigation and to meet the United States' treaty obligations to Mexico, and may not be captured or interfered by others.

3. New Mexico's allegations of injury to its interests from the Operating Agreement fail

New Mexico complains that "[t]he 2008 Operating Agreement has reduced allocations of Project water *to New Mexico* compared to allocations under historic Project operations." N.M. Countercls. ¶ 77 (emphasis added). But New Mexico is not a party to the Operating Agreement, and is not entitled to allocations of Project water, under the Compact or any other authority. Once New Mexico delivers Rio Grande water to Texas and southern New Mexico by delivering that water to Elephant Butte Reservoir under Article IV of the Compact, the water becomes Project water and is released and delivered under the "Downstream Contracts" to serve Project purposes. Rep. 211 ("The equitable apportionment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte reservoir to the Rio Grande Project; that water is not subject to appropriation or distribution under New Mexico state law."). New Mexico thus

has articulated no interest in Rio Grande water delivered by *the Project* that would support its standing against the United States in this case.[5]

To be sure, EBID, a political subdivision of New Mexico, is a Project beneficiary under its Reclamation contract (one of the "Downstream Contracts" in this Court's March 5 Opinion, 138 S. Ct. at 957) and a signatory to the 2008 Operating Agreement. But EBID is not complaining of any injury to its interests and it does not challenge the Operating Agreement to which it is a signatory. To the extent New Mexico complains about alleged reductions in deliveries of Project water, it is alleging an injury to EBID, not to New Mexico itself. Establishing standing, however, requires a demonstration of a cognizable injury to the party invoking the court's jurisdiction. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 n.1 (1992) ("By particularized, we mean that the injury must affect the plaintiff in a personal and individual way."). Because New Mexico receives no allocation of Project water, it lacks an interest in how water is managed under the Operating Agreement that could form the basis of its standing for a claim against the United States.

4. New Mexico fails to assert cognizable injuries in its other counterclaims against the United States

Against this backdrop, New Mexico's counterclaims fall well short of the showing of injury required to establish standing. Instead of alleging injury to a concrete and particularized interest of the State, New Mexico attempts to bootstrap conclusory allegations of injury, or "grave and irreparable injury," to its citizens generally from particular alleged statutory, Compact, or treaty violations. *See, e.g.*, N.M. Countercls. ¶¶ 82 (Second Claim), 104 (Fifth

[5] Texas, in contrast, asserts that New Mexico's failure to protect the delivery of Project water from capture or other interference amounts to a breach of New Mexico's delivery obligations under Art. IV of the Compact, which asserts an injury to Texas and its citizens fairly traceable to New Mexico's actions. *E.g.*, Texas Compl. ¶ 4; *see also Maryland*, 451 U.S. at 737 (a state may assert injury to its citizens as *parens patriae* as a basis for standing against another state).

Claim), 114 (Seventh Claim), 121 (Eighth Claim), 129 (Ninth Claim). New Mexico relies on conclusory allegations of injury to "New Mexico and its citizens" without further explanation. New Mexico fails to allege any particularized and concrete State interests in the allocation of Project water between EBID and EPCWID under the Operating Agreement (Second Claim), the Water Supply Act (Fifth Claim), in Project accounting (Sixth Claim), in the Miscellaneous Purposes Act (Seventh Claim), in Rio Grande channel maintenance (Eighth Claim), or in the 1906 Convention with Mexico (Ninth Claim). In the absence of any allegations of harm to particular, concrete State interests which are cognizable to support standing against the United States, New Mexico's standing allegations in its Second and Fifth through Ninth Claims are nothing more than allegations of harm to its citizens generally, which is insufficient to establish the State's standing to assert these counterclaims against the United States.

Accordingly, New Mexico's counterclaims against the United States should be dismissed for lack of standing.

C. New Mexico Fails to State Claims for Relief Against the United States as to Counterclaims 2, 5, 6, 7, 8, and 9.

In addition to the jurisdictional infirmities discussed above, certain of New Mexico's counterclaims fail to state claims against the United States upon which relief can be given. In the discussion that follows, in keeping with plausibility standard elucidated by *Iqbal* for Rule 12(b)(6) motions, *Iqbal*, 556 U.S. at 678, we assume the truth of well-pleaded facts for the purposes of this motion, but are not required to accept as true New Mexico's "conclusory allegations or legal conclusions masquerading as factual conclusions." *Faber*, 648 F.3d at 104; *see also Papasan*, 478 U.S. at 286 ("[W]e are not bound to accept as true a legal conclusion couched as a factual allegation."). We address each of Counterclaims 2, 5, 6, 7, 8, and 9 in succession below.

1. The Second Claim

In its Second Claim, New Mexico alleges that the United States has taken actions, including but not limited to implementing the 2008 Operating Agreement, "that have materially altered the apportionment of water between New Mexico and Texas." N.M. Countercls. ¶ 75. This allegation rests on an unsupported legal conclusion that "the Compact requires the United States to allocate Project water on an equal basis to each Project acre, regardless of state or district boundaries," an assertion that New Mexico also characterizes as a failure to allocate Project water annually on a "pro-rata basis." *Id*. ¶¶ 73, 75. This is precisely the sort of unsupported and conclusory legal allegation, masquerading as a fact, that the Court should not accept as true.[6]

New Mexico cites no authority, in the Compact or anywhere else, for its claim that *the Compact* requires the United States, through Reclamation, to allocate Project water equally to each Project acre. *See id*. ¶ 73. The Compact requires no such thing. Article IV of the Compact requires New Mexico to deliver water to the Project at Elephant Butte Reservoir (originally measured at San Marcial) according to a schedule set forth therein. Compact Art. IV. Once delivered into "Project storage," as the term is defined in Art. I(k) of the Compact, the water delivered by New Mexico becomes "[u]sable water," which the Compact defines as "all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." *Id*. Art. I(*l*). The Compact

[6] This counterclaim is nearly identical to New Mexico's challenge to the Operating Agreement in its district court case, *New Mexico v. United States*, No. 11-cv-0691 (D.N.M.), which is currently stayed. The district court challenge to the Operating Agreement is brought under the Administrative Procedure Act, 5 U.S.C. §§ 701-706, which limits judicial review to the administrative record. 5 U.S.C. § 706 (in applying the deferential standard of review of agency actions, "the court shall review the whole record or those parts of it cited by a party…."); *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)). Here, however, New Mexico seeks discovery into the Operating Agreement that it would not be entitled to pursue in district court.

contains no provision (and New Mexico cites none) mandating that the United States deliver Project water on a pro-rata or equal-acre basis to lands in the Project.

As the Court noted, once water is delivered to the Project, it is the Project, under the "Downstream Contracts" with EBID and EPCWID, that delivers water to Texas and southern New Mexico to effectuate the Compact's equitable apportionment to those lands. *Texas*, 138 S. Ct. at 959. As New Mexico notes (factual allegations that we accept as true for the purposes of this motion), the two Project districts met their repayment obligations to the United States in approximately 1980, and Reclamation subsequently transferred the responsibility for operation and maintenance of most Project facilities to those districts; after that transfer, Reclamation delivered Project water to the districts rather than to individual landowners, and the districts then delivered Project water to their landowners. N.M. Countercls. ¶¶ 38-39. The annual allocation of Project water thus occurs pursuant to the Downstream Contracts and the 2008 Operating Agreement (to which Mexico is not a party), as well as reclamation law and the 1906 Convention with Mexico. Nothing in the Compact itself prescribes an equal per-acre allocation of usable water by the Project, and New Mexico fails to cite any authority for its claim that such a requirement exists.

Because New Mexico's Second Claim rests on a wholly unsupported, conclusory, and demonstrably erroneous legal claim – that the Compact requires the United States to allocate Project water on an equal-acre basis to all Project lands – it has failed to state a claim against the United States for a Compact violation for which this Court can grant relief. New Mexico's Second Claim should be dismissed.

2. The Fifth Claim

New Mexico's Fifth Claim alleges that the United States, through Reclamation, has made "major operational changes" (N.M. Countercls. ¶ 102) without the approval of Congress, in violation of the Water Supply Act of 1958, 43 U.S.C. § 390b(e). This claim fails because the Water Supply Act does not apply to the Rio Grande Project. The Water Supply Act is a statutory means to develop water supplies in connection with federal irrigation projects "so long as the costs of construction or modification are adequately shared by the [State and local interest] beneficiaries." *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1321 (D.C. Cir. 2008). As the Tenth Circuit put it,

> The Water Supply Act 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).

United States v. Oklahoma, 184 Fed. Appx. 701, 703 (10th Cir. 2006). The provisions of the Water Supply Act "insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Project Act of 1939 (53 Stat. 1187) relating to the same subject." 43 U.S.C. § 390b(b).

As noted *supra* at § B.1., the Rio Grande Project was authorized under the provisions of the Reclamation Act of 1902, as supplemented by provisions extending 1902 Act water deliveries to Texas under the Act of February 25, 1905, Pub. L. No. 58-104, 33 Stat. 814. However, both Rio Grande Project districts executed contracts to obtain new benefits and construction pursuant to the provisions of the Reclamation Project Act of 1939, 43 U.S.C. §§ 485 *et seq.*[7] *See Bean v. United States*, 163 F. Supp. 838, 844 (Ct. Cl. 1958) (referencing repayment

[7] Significantly, the Project was built forty-two years prior to the enactment of the Water Supply Act; therefore, Reclamation did not rely upon that authority to construct Elephant Butte Reservoir and Dam and it is not bound by the obligations attached to utilizing that authority.

contracts and amendatory contracts between the two Project districts and the United States). Section 3 of the 1939 Act provides a mechanism for pre-existing projects to be modified and receive new benefits subject to amendatory contracts with repayment entities. Thus, the Reclamation Act of 1902, the Act of February 25, 1905, and the Reclamation Project Act of 1939, and not the Water Supply Act, apply to the Project. As the court explained in *Bean* , 163 F. Supp. at 844 "[e]ach of these contracts [with EBID and EPCWID] calls 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), as amended (59 Stat. 75), 43 U.S.C. § 485 et seq.") (emphasis added).[8]

Because the Project was not authorized or constructed pursuant to the provisions of Section 390b(b) of the Water Supply Act, and because the Project is instead subject to the Reclamation Project Act of 1939, the Water Supply Act has no application to the Project. New Mexico's claim that congressional approval was required for implementation of alleged "major operational changes" is therefore erroneous and fails to state a claim against the United States upon which this Court can grant relief. New Mexico's Fifth Claim should be dismissed.

3. The Sixth Claim

New Mexico's Sixth Claim alleges that the United States has engaged in "improper accounting" in a variety of ways that are purportedly inconsistent with an alleged duty to conduct annual Project accounting in a manner that is consistent with the Compact. N.M. Countercls. ¶¶ 106, 107. Without identifying any discrete final agency action, this claim purports to target a

[8] While the Project was originally authorized under the provisions of the Reclamation Act of 1902, 32 Stat. 388-390, the Project became subject to the provisions of the Reclamation Project Act of 1939 through a series of contracts beginning with the contracts dated October 1, 1939 for both EBID and EPCWID.

laundry-list of day-to-day operations involving the Project. *See id.* ¶ 107. But day-to-day operations of a federal agency like Reclamation are not judicially reviewable in the absence of a statute that authorizes such a private right of action, and New Mexico identifies neither Compact provision nor other such statute. Thus, New Mexico's right to relief, if it has any, must go through the Administrative Procedure Act, 5 U.S.C. §§ 701-706 ("APA"); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 61-62 (2004) ("*Norton v. SUWA*").

The APA authorizes suit by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute." 5 U.S.C. § 702. In the absence of another statute providing a private right of action, the "agency action" must be "final agency action." *Id*. § 704. The APA defines "agency action" to include "the whole or a part of any agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." *Id.* § 551(13). Final agency action marks the consummation of the agency's decisionmaking process and constitutes action from which legal consequences will flow. *Bennett v. Spear*, 520 U.S. 154, 178 (1997) (citations omitted). Thus, under this Court's APA decisions, a party seeking judicial review of an agency's compliance with a statute "must direct its attack against some particular 'agency action' that causes it harm," in the absence of another statute authorizing a private right of action. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 891 (1990); *see also Norton v. SUWA*, 542 U.S. 55, 62 (2004) (summarizing the five categories of decisions that are defined in the APA as final agency action). Since no other statute provides a private right of action for review of Reclamation's project accounting under the Compact, New Mexico must seek review under the APA.

The Sixth Claim fails because it does not seek judicial review of any agency action, let alone final agency action, as defined under the APA. 5 U.S.C. §§ 704, 551(13). Instead, New

Mexico targets its claim on unspecified failures "to account for depletions to Project surface flow" purportedly caused by groundwater pumping and unauthorized surface diversions of water in Texas; groundwater pumping and surface diversions in Mexico in excess of Mexico's 60,000 acre-foot annual allocation under the 1906 Convention; numerous other unspecified accounting practices; and "various other [unspecified] improper and irregular means." N.M. Countercls. ¶ 107. Not one of these "actions" constitutes a final "rule, order, license, sanction, relief, or the equivalent or denial thereof" for which the APA authorizes judicial review. *See Norton v. SUWA*, 542 U.S. at 62 (citing § 551(13)). Instead, these "actions" appear to resemble routine or programmatic accounting and water management practices of the Project more akin to the programmatic "land withdrawal review program" that the Court held was unreviewable under the APA in *Lujan v. National Wildlife Federation* because it did not constitute a final agency action. *See* 497 U.S. at 891-93; *see also Wild Fish Conservancy v. Jewell*, 730 F.3d 791, 801-02 (9th Cir. 2013) (plaintiffs lacked standing to challenge routine actions by Reclamation in operating gates at a structure that diverted water to a fish hatchery). As such, New Mexico's Sixth Claim fails to state a claim against the United States for which relief can be given under the APA, and accordingly should be dismissed.

4. The Seventh Claim

New Mexico's Seventh Claim alleges violations of the Miscellaneous Purposes Act, 43 U.S.C. § 521, and the Compact by both Texas and the United States. It fails for similar reasons as the Sixth Claim in that it does not identify a single discrete final agency action that allegedly violates the provisions of the Miscellaneous Purposes Act, a statute that was enacted in 1920.[9]

[9] The Miscellaneous Purposes Act provides:

> 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 deliver, use, and payment as he may deem proper: *Provided*, That the approval of

Specifically, Claim Seven does not identify with particularity any Miscellaneous Purposes Act Contract to which the United States is a party and which New Mexico alleges violates the provisions of that Act and/or the Compact.[10] Instead, New Mexico complains generically that the United States "has entered into Miscellaneous Purposes Act contracts" or other unspecified agreements without New Mexico's approval and complains of "acts and conduct of the United States and Texas" without specifying which acts and which conduct it contends violate the Miscellaneous Purposes Act and the Compact. The failure to target its claim on a particular contract fails to satisfy the requirements of Section 704 of the APA. *See Norton v. SUWA*, 542 U.S. at 61-62. For this reason alone, the Seventh Claim fails to state a claim against the United States for which this Court can grant relief.

But New Mexico's Seventh Claim fails to state a claim for a further reason: it fails to cite any authority for its assertion, in paragraph 111, that New Mexico's approval is required before the United States or Texas may enter into any agreement under the Miscellaneous Purposes Act that would allow Project water to be used for non-Project purposes. Clearly such approval is not required under the Miscellaneous Purposes Act itself. That Act only requires the prior approval or approvals by the "water-users' association or associations" before entering into a contract authorized by the Act. 43 U.S.C. § 521. EBID and EPCWID are such associations. New Mexico is a state, not a water-users' association. Thus, New Mexico's assertion that its approval

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> 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 placed to the credit of the project from which such water is supplied.

Act of Feb. 25, 1920, Pub L. No. 66-147, 41 Stat. 451 (codified at 43 U.S.C. § 521).

[10] If New Mexico had cited a specific contract, the United States would likely have argued that the Seventh Claim was also time-barred under the six-year statute of limitation applicable to actions under the APA. *See* 28 U.S.C. § 2401(a). The United States reserves its right to raise a statute of limitations defense in the event that New Mexico seeks to amend its counterclaim to challenge a particular Miscellaneous Purposes Act contract.

is required is nothing more than "a legal conclusion couched as a factual allegation," *Papasan*, 478 U.S. at 286, which should not be accepted as true for the purposes of this motion, particularly when contradicted by plain statutory text. For this additional reason, the Seventh Claim fails to state a claim against the United States for which this Court can grant relief, and accordingly the Seventh Claim should be dismissed.

5. The Eighth Claim

New Mexico's Eighth Claim asserts that the United States, by allegedly failing to remove vegetation and silt from Project reservoirs and the Rio Grande channel (Countercls. ¶ 118), has failed "to comply with its responsibilities to properly maintain the Project…." *Id.* ¶ 120. Nowhere in its counterclaims does New Mexico identify any statute, regulation, contract, or other authority that imposes such "responsibilities" on the United States. Section 706(1) of the APA allows a court to "compel agency action unlawfully withheld or unreasonably delayed," but this Court has clarified that such "failure to act" claims under the APA can only be brought to compel an agency to perform an action that it is legally required to take, *i.e.*, to perform a ministerial or non-discretionary duty. *Norton v. SUWA*, 542 U.S. at 62-64. Here, New Mexico fails to identify any authority that imposes channel maintenance responsibilities on the United States, let alone requires the performance of such responsibilities. In the absence of any statute mandating the clearance of vegetation and removal of silt by the United States, the Eighth Claim is not cognizable under the APA. It is, rather, an unsupported conclusion or interpretation of law that this Court should not accept as true for the purpose of this motion. *See Wash. Legal Found.*, 993 F.2d at 971. The Eighth Claim fails to state a claim against the United States for which this Court may grant relief, and should be dismissed.

6. The Ninth Claim

New Mexico's Ninth Claim alleges that the United States has failed to enforce the 1906 Convention with Mexico, to stop the pumping of groundwater hydrologically connected to the Rio Grande and unauthorized surface diversions from the Rio Grande that allegedly have "greatly increased in Mexico above Fort Quitman, Texas, since 1906." N.M. Countercls. ¶ 126. New Mexico alleges that such groundwater pumping and unauthorized diversions in Mexico have exceed the 60,000 acre-feet of Rio Grande water to which Mexico is entitled annually under the 1906 Convention (*id.*) and have created "deficits in the shallow alluvial aquifer that have reduced Project efficiency, impacted Project releases, reduced return flows, and decreased the amount of water in Project Storage available for future use." *Id.* However, New Mexico's Prayer for Relief does not seek relief specific to the 1906 Convention and references the United States' alleged failure to enforce the Convention only insofar as the failure allegedly resulted in the United States' violation of the Compact. *See* N.M. Countercls., Prayer for Relief, ¶ J ("Declare that the United States, its officers, and its agencies have violated the Compact by failing to enforce the 1906 Convention"). Thus, it is unclear whether New Mexico intends to assert its Ninth Claim as a separate and distinct claim upon which relief may be granted or if the alleged failure to enforce the 1906 Convention is asserted only as part of New Mexico's claim that the United States has violated the Compact.

a. <u>New Mexico's Ninth Claim fails to state a claim for relief under the 1906 Convention</u>

Assuming New Mexico intends to challenge the United States' alleged failure to enforce Article IV of the 1906 Convention as a separate and distinct cause of action, the Ninth Claim fails to state a cognizable cause of action against the United States. The Ninth Claim is premised on New Mexico's allegation that Mexico has received "in excess of the 60,000 acre-fee annually guaranteed to" it under the Convention, which in turn has had a "negative effect on Project

deliveries." *Id*. ¶¶ 125, 127-29. New Mexico appears to allege that, by receiving the allegedly excess water, Mexico has violated Article IV of the Convention, in which it agreed to "waive[] any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexico Canal and Fort Quitman, Texas." *Id*. To the extent there is any allegation of a violation of the 1906 Convention, it is not against the United States but against Mexico.

Nonetheless, New Mexico's Ninth Claim includes assertions that the United States has "failed to enforce" Article IV of the Convention. *Id*. Even assuming Mexico's actions as alleged by New Mexico could support a finding that Mexico is in violation of Article IV of the 1906 Convention, New Mexico's attempt to challenge an alleged failure by the United States to take action against Mexico in response to any such violation fails to state a claim upon which relief may be granted. As observed by this Court, "[a] treaty is, of course, 'primarily a compact between independent nations.'" *Medellin v. Texas*, 552 U.S. 491, 505 (2008) (quoting *Head Money Cases*, 112 U.S. 580, 598 (1884)). A treaty will often "depend[] for the enforcement of its provisions on the interest and the honor of the governments which are parties to it." *Id.* Any alleged breach of a treaty obligation, then, "becomes the subject of international negotiations and reclamations … [and] … the judicial courts had nothing to do and can give no redress." *Id*. (citations and internal quotation marks omitted).

The authority to decide whether a foreign state has breached a treaty obligation in fact owed to the United States and, if so, what if any action to take in response lies exclusively with the President. U.S. Const. art. II, §§ 2, 3 (assigning the President powers over foreign affairs); *Goldwater v. Carter*, 617 F.2d 697, 706 (D.C. Cir. 1979) (acknowledging executive's power to terminate a treaty because of breach), *vacated on other grounds*, 444 U.S. 996 (1979); RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 cmt. (b)

(1987) ("Under United States law, the President has exclusive authority to determine the existence of a material breach by another party and to decide whether to invoke the breach as a ground for terminating or suspending the agreement."); *cf. Charlton v. Kelly*, 229 U.S. 447, 473 (1913) (If the U.S. treaty partner violated an "obligation of the treaty, which, in international law, would have justified the United States in denouncing the treaty as no longer obligatory, it did not automatically have that effect. If the United States elected not to declare its abrogation, or come to a rupture, the treaty would remain in force. It was only voidable, not void; and if the United States should prefer, it might waive any breach which, in its judgment, had occurred, and conform to its own obligation as if there had been no such breach."). Even assuming New Mexico has sufficiently alleged facts that would provide the United States with a legally sufficient basis upon which to find Mexico in breach of Article IV of the 1906 Convention, the decision to declare Mexico in violation of the treaty and to respond are committed to the President's sole authority and discretion.[11]

b. The 1906 Convention does not provide for a private right of action for which the Court can provide relief

That enforcement of Article IV of the 1906 Convention lies solely with the Executive is further underscored by the fact that the 1906 Convention does not provide a private right of action for which the Court can provide relief. Treaties are presumed not to create rights that are privately enforceable in the federal courts:

> [T]he background presumption is that international agreements, even those directly benefiting private persons, generally do not create private rights or provide for a private cause of action in domestic courts. Accordingly, a number of the [United States] Courts of Appeals have presumed that treaties do not create privately enforceable rights in the absence of express language to the contrary.

[11] New Mexico also briefly refers to "its rights" under the 1906 Convention. N.M. Countercls. ¶130. New Mexico does not further elaborate on this assertion, which is clearly without support.

Medellin v. Texas, 552 U.S. at 506 n.3 (2008) (citations and quotation marks omitted); *see, e.g.*, *Garza v. Lappin*, 253 F.3d 918, 924 (7th Cir. 2001) ("[A]s a general rule, international agreements, even those benefitting private parties, do not create private rights enforceable in domestic courts.").

Consistent with this presumption, at least one federal district court has held that the 1906 Convention "contains no 'specific provision permitting a private action, or one to be clearly inferred.'" *EPCWID v. Int'l Boundary & Water Comm'n*, 701 F. Supp. 121, 124 (W.D. Texas 1988) (quoting *Hanoch Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542, 546 (D.D.C. 1981), *aff'd*, 726 F.2d 774 (D.C. Cir. 1981)). In that case, the district court dismissed EPCWID's claim under the 1906 Convention, holding that the plaintiffs "failed to demonstrate that the [1906 Convention] under which it claims its rights arise does, indeed, confer rights upon it." *Id*. at 125.

New Mexico points to nothing to show to the contrary here. There is no indication that the Executive Branch contemplated that Article IV of the 1906 Convention granted any private individual rights or remedies at all, let alone a right of action to enforce Mexico's agreement to waive any additional claims to Rio Grande waters as consideration for the United States' agreement to deliver 60,000 acre-feet.

For the foregoing reasons, New Mexico's Ninth Claim fails to state a claim against the United States for which this Court can provide relief, and should be dismissed.

VI. CONCLUSION

For the reasons set forth above, Claims 2, 3, 5, 6, 7, 8, and 9 of New Mexico's counterclaims should be dismissed for lack of jurisdiction. Should the Court determine it has jurisdiction, Claims 2, 5, 6, 7, 8, and 9 should still be dismissed for failure to state claims against the United States upon which this Court can grant relief.

Respectfully submitted this 21st day of December, 2018, by

NOEL J. FRANCISCO,
Solicitor General
JEAN E. WILLIAMS
Deputy Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
ANN O'CONNELL ADAMS
Assistant to the Solicitor General

/s/ *Stephen M. Macfarlane*
JAMES J. DuBOIS
R. LEE LEININGER
THOMAS K. SNODGRASS
STEPHEN M. MACFARLANE
JUDITH E. COLEMAN
Attorneys, Environment and Natural Resources Division
U.S. Department of Justice

Counsel for the United States