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.

BEFORE THE SPECIAL MASTER

BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS RESPONSE TO MOTIONS FOR PARTIAL JUDGMENT ON THE PLEADINGS

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BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS
RESPONSE TO MOTIONS FOR PARTIAL JUDGMENT ON THE PLEADINGS

INTRODUCTION

Amicus curiae the City of El Paso, Texas supports the State of Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, as well as Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon. El Paso also supports the United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9. Each is well briefed and argued; El Paso endorses, but will not duplicate those arguments.

El Paso briefly addresses two matters presented through these pleadings: the scope of legal issues previously decided, and New Mexico's Counterclaims. Regarding the legal issues already decided, El Paso would put the matter in perspective to demonstrate that the basic issues of compact construction have been resolved, in spite of New Mexico's efforts to muddy the water by "acceding" to denial of its Motion to Dismiss.

Regarding New Mexico's Counterclaims, particularly Counterclaim No. 7 (Violation of the Miscellaneous Purposes Act and the Compact by Texas and the United States), El Paso would point out that roughly 750,000 people depend upon El Paso for their water supply and up to 50% of this water is Rio Grande Project water purchased by El Paso under the City's Miscellaneous Purposes Act contracts with the El Paso County Water Improvement District No. 1 and the United States Bureau of Reclamation. From El Paso's perspective, New Mexico's Counterclaim No. 7 is baseless, unrelated to the Rio Grande Compact, and should not be part of this litigation.

I. LEGAL ISSUES PREVIOUSLY DECIDED

To put in perspective the legal significance of the Supreme Court's denial of New Mexico's Motion to Dismiss, it is worthwhile to examine the genesis of that motion. It derives from the Brief of the United States as Amicus Curiae on Motion for Leave to File a Complaint. In order to facilitate resolution of compact construction issues, the Solicitor General suggested:

> [T]he Court may wish to grant Texas leave to file its complaint and simultaneously grant New Mexico leave to file a motion, in the nature of a motion under Rule 12(b)(6), with respect to *the issues of compact interpretation that New Mexico deems dispositive.*

Br. for the United States as Amicus Curiae, at 22 (December 2013) (emphasis added). And that is exactly what the Supreme Court did by its Order of January 27, 2014. On April 30, 2014 New Mexico filed its Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention.

New Mexico's motion presented the following three legal grounds for dismissal of the Texas and United States Complaints:

> 1. The plain language of the Compact provides that New Mexico's obligation to Texas is to deliver water to Elephant Butte Reservoir, not to the Texas-New Mexico stateline. . . .
>
> 2. The Compact does not require New Mexico to maintain depletions within the Rio Grande Basin in New Mexico below Elephant Butte at levels existing as of 1938. . . .
>
> 3. The Compact imposes no affirmative duty on New Mexico to prevent interference with deliveries of Rio Grande Project (Project) water by the United States. . . .

New Mexico Mot. Dismiss, at 1. These are the issues New Mexico considered dispositive – legal issues of compact construction, not fact issues or issues upon which evidence was required. Neither the Special Master nor the Supreme Court agreed with New Mexico. The Special Master's First Interim Report considered those arguments in detail, rejected them, and

recommended denial of New Mexico's motion. First Interim Report of the Special Master, at 217 (Feb. 9, 2017). The Supreme Court accepted that recommendation and ordered denial of New Mexico's motion. *Texas v. New Mexico and Colorado*, 138 S. Ct. 349 (Oct. 10, 2017).

These three compact construction issues have all been resolved against New Mexico – otherwise Texas's Complaint should have been dismissed. Therefore, the established law of the case is that: (1) New Mexico's Compact delivery obligations do not end at Elephant Butte Reservoir; (2) New Mexico has obligations to maintain depletions below Elephant Butte at 1938 levels; and (3) New Mexico has an affirmative obligation to prevent interference with deliveries of Rio Grande Project water. Fact issues certainly remain, but these legal and compact construction issues have been resolved.

The Supreme Court's subsequent Opinion confirms this conclusion.[1] The Court recognized that a Compact delivery obligation 100 miles inside New Mexico, instead of at the state line, actually "made all the sense in the world" because Texas's deliveries from the Project were required by Downstream Contracts between the United States and both irrigation districts for Project water. 138 S. Ct. at 957. Additionally, the Court recognized that the Rio Grande Project and those Downstream Contracts are incorporated into the Compact and essential to accomplishing the equitable apportionment of the Compact. *Id.* at 959. Further, the Court recognized the role of the United States, as an "agent" of the Compact, to assure deliveries of Project water to Texas and part of New Mexico. *Id.*

New Mexico reluctantly agrees, stating that "New Mexico accepts that a necessary implication of the denial of the Motion to Dismiss is that the Compact *may* provide constraints on New Mexico's authority below Elephant Butte." New Mexico Mot. Partial Judgment, at 20 (emphasis added). El Paso agrees that denial of New Mexico's Motion to Dismiss necessarily

[1] *See Texas v. New Mexico and Colorado*, 138 S. Ct. 954 (March 5, 2018).

implies limitations on the exercise of New Mexico's authority below Elephant Butte. However, there is no uncertainty regarding this conclusion. New Mexico's authority is subject to the Compact's equitable apportionment and must be exercised in furtherance of achieving that apportionment. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 110 (1938).

El Paso would also point out that these law of the case conclusions are consistent with the Supreme Court's treatment of other comparable original actions involving interstate water disputes. Professor Burke W. Griggs' recently published article, *Interstate Water Litigation in the West: A Fifty-Year Retrospective*,[2] provides a comprehensive analysis of interstate water litigation, presenting conclusions consistent with this case. The common pattern observed by Professor Griggs in recent litigation involving interstate compacts is:

- Most cases involve interstate compacts, negotiated and entered into prior to "the groundwater revolution." 20 U. Denv. Water L. Rev. at 171.
- The groundwater revolution occurred, with development of massive groundwater production for irrigation and consequent depletion of the surface flows of interstate rivers. *Id.* at 158, 165-170.
- Western states failed to integrate groundwater within the legal structures of interstate compact administration and often their own water laws. *Id.*
- Interstate litigation over compact compliance results, with upstream states taking the position, for various reasons, that groundwater production is not subject to compact limitations. *Id.* at 159, 170-180.

As Professor Griggs notes, the Supreme Court has consistently found that the interstate compacts litigated include groundwater, and the difficult issues of these cases focus upon quantifying the impacts of groundwater production on the states' compact allocations and development of appropriate remedies. *Id.* 159-160, 179-180, and 180-194.

[2] 20 U. Denv. Water L. Rev. 153 (2017).

That is essentially the posture of this case. Denial of New Mexico's Motion to Dismiss, as well as the Court's Opinion on the United States' Exceptions, effectively establish that impacts of New Mexico's groundwater production are covered by the Rio Grande Compact. Now the questions are what those impacts have been, and what is the appropriate remedy.

II. NEW MEXICO'S COUNTERCLAIMS

El Paso supports the arguments of both the United States and Texas addressing general defects with New Mexico's Counterclaims. Each of those arguments provides a basis to dismiss or strike most or all of New Mexico's nine separately pleaded counterclaims. First, on the threshold issue of subject matter jurisdiction, the United States moves to dismiss each of New Mexico's seven counterclaims pleaded solely or partially against the United States, because the United States has not waived its sovereign immunity as to any of these claims. Second, and affecting all of New Mexico's Counterclaims, Texas correctly asserts that New Mexico failed to seek the required leave of the Supreme Court to file any of these claims. The first problem is substantive and insurmountable. The second problem, though procedural, is a valid basis to strike New Mexico's Counterclaims as presented.[3]

El Paso's interests are directly affected by several of New Mexico's Counterclaims; thus the City also provides its own perspective on whether those counterclaims should be allowed to remain part of the scope of this original action. Even beyond the jurisdictional issues raised by Texas's and the United States' pleadings, El Paso submits that the critical test is whether New

[3] El Paso concurs with Texas's request that, should New Mexico properly move for leave from the Court to file some or all of its counterclaims, the litigation regarding Texas's Complaint proceed according to the schedule set forth in the Case Management Plan. Proceedings revolving around New Mexico's Motion to Dismiss have already consumed several years in this litigation, and New Mexico successfully insisted that it not be required to answer the complaints of Texas and the United States until the Supreme Court itself had ruled on that motion to dismiss and referred the case back to the Special Master for pre-trial proceedings. The other parties and recognized *amici* in this case should not now all be held in limbo while New Mexico seeks authorization to plead counterclaims in this original action.

Mexico's Counterclaims have the effect of expanding the scope of this litigation beyond the claims asserted by Plaintiff the State of Texas (and Intervenor-Plaintiff the United States). New Mexico's own current pleading, in setting out what it considers to be the 'principles unambiguously decided by the Court that constitute the law of the case,' cites the Court's recognition that "[t]he claims asserted by the United States do not and may not expand the scope of this litigation beyond what was alleged in Texas's Complaint." New Mexico Mot. Partial Judgment, at 14 (citing 138 S. Ct. at 960). On those same principles, to the extent New Mexico's Counterclaims raise issues that relate to Texas's claims, and do not expand the scope of the litigation, New Mexico will be able to present evidence on those issues in defending against Texas's claims, and a counterclaim is unnecessary. Squarely within this category is New Mexico's Counterclaim No. 1, pleaded against Texas and raising issues regarding the impact of groundwater pumping in Texas on Rio Grande Compact/Project deliveries. El Paso acknowledges that these issues are relevant, have certainly been a focal point of New Mexico's written discovery to date, and will be fully litigated in this original action, regardless of whether New Mexico is allowed to challenge activities by and within the State of Texas as a counterclaim.

New Mexico's Counterclaim No. 7, on the other hand, seeks to expand Texas's litigation beyond what has been authorized by the Court. El Paso endorses the arguments of Texas and the United States addressing New Mexico's Counterclaim No. 7, which is asserted against both Texas and the United States and challenges the validity of contracts allowing for non-irrigation uses of some Project water, entered into by the United States Bureau of Reclamation (USBR) and various political subdivisions of Texas pursuant to the Miscellaneous Purposes Act (MPA), 43 U.S.C. § 521. Although New Mexico does not specify which contracts it complains of,

Counterclaim No. 7 clearly encompasses such contracts to which the City of El Paso is a party. *See* New Mexico's Counterclaims, ¶¶ 109-112. El Paso agrees with Texas's and the United States' arguments regarding New Mexico's lack of standing and failure to state a legal claim under the MPA for which relief can be granted. Additionally, El Paso offers some crucial context regarding the contracts challenged by New Mexico, which illustrates just how far Counterclaim No. 7 would extend beyond the scope of the authorized litigation.

The Rio Grande Project is El Paso's sole source of surface water supply, a vital resource providing up to 70,000 acre-feet of water during years of full supply, and providing 50% or more of El Paso's total water supply.[4] Over the decades of development of the Project, dating back to the early 1940's, El Paso has contracted with USBR and the El Paso County Water Improvement District No. 1 (EPCWID) to purchase its supply of Project water. As one component of El Paso's overall water development and management strategies, this source of Project water allows the City to reduce groundwater demand and avoid depleting the local aquifers. El Paso has described the provisions of its various MPA-based contracts more fully in its prior amicus brief addressing exceptions to the Special Master's First Interim Report. *See* Brief of *Amicus Curiae* City of El Paso, Texas in Support of the State of Texas' Reply to Exceptions to the First Interim Report of the Special Master (July 2017).

Those contracts use several different mechanisms to make available Project water for municipal and industrial uses within El Paso's service area; however, the essential prerequisite, as for all MPA-based federal contracts, is that the water sold to El Paso is not needed by EPCWID for irrigation of Project water right lands, and does not interfere with Project water supply. As El Paso has grown, its service area and city limits have taken in acreage that has been

[4] A description of El Paso's water resources, as well as past, current and planned water use, is available at: https://www.epwater.org/our_water/water_resources.

historically irrigated with Project water. With those shifts in land use and water needs, Project water sold to El Paso and "converted" to municipal use comes from several sources: 1) the City's ownership of a limited quantity of larger tracts of land located within EPCWID and the City that are entitled to receive irrigation water; 2) assignments of water supply rights from owners of small tracts (less than two acres) within EPCWID and also within El Paso's city limits that are entitled to a Project water supply; and 3) purchase of excess Project water that is not required for irrigation of Project lands within EPCWID.

It bears repeating that El Paso pays for all of this water supply, made available in varying quantities from year to year, and thus appropriate compensation is recovered to the Rio Grande Project. Even beyond those payment requirements, however, there are other benefits to the Project as a whole from El Paso's MPA-based contracts. First and foremost, these contracts work to balance the impact of El Paso's groundwater pumping, as that may affect Project water supply. Under El Paso's 2001 Contract in particular, that impact is balanced by a requirement for El Paso (through El Paso Water Utilities) to discharge a fixed amount of treated wastewater effluent from one of its wastewater treatment plants during irrigation season, which water supply is then used by EPCWID for irrigation. If insufficient effluent is discharged, the deficit is paid for as if it were Project water.[5] Overall, this is El Paso's most expensive water source, other than desalination, but it is an important component that also helps support the operations of EPCWID, and thus benefits the Rio Grande Project in Texas. El Paso further submits that New Mexico

[5] As addressed in El Paso's prior brief when addressing its MPA-based contracts, the 2001 Contract also treats underflow of the Rio Grande intercepted by El Paso's Mesilla Valley well fields as Project water delivered to the City, for which El Paso must pay the same rates charged for other Project water delivered under that contract, unless the City discharges other usable sewage effluent equal to 1.6 times the amount of underflow pumped. The 2001 Contract also provides a specific procedure by which the amount of underflow captured by El Paso's wells is determined. El Paso Br. (July 2017), at 15.

and Project water right land owners within New Mexico also actually benefit from El Paso's MPA-based contracts for conversion of some Project water in Texas.

Finally, by its Counterclaim No. 7 New Mexico (itself not a party to the MPA-based contracts) has asserted claims against an entity (the State of Texas) that is also not a party to the MPA-based contracts which New Mexico seeks to invalidate. The converse problem is that New Mexico seeks to enjoin performance under contracts for which the other contracting parties are *not* parties in this litigation (the City of El Paso, EPCWID, and perhaps others). *See* New Mexico's Counterclaims, Prayer ¶ F. El Paso has not sought intervention in this litigation, and EPCWID's motion to intervene has been denied. 138 S. Ct. 349 (Oct. 10, 2017). New Mexico should not be allowed to bring counterclaims that attack the legal rights and obligations of non-parties. For this additional reason Counterclaim No. 7 should be dismissed. New Mexico has provided no theory to support its allegation that the MPA-based contracts violate the Compact, and has failed to plead a viable cause of action under the MPA itself. Because New Mexico's Counterclaim No. 7 would expand the scope of Texas's litigation beyond what has been authorized by the Court, in terms of both issues and parties, it should be dismissed.

CONCLUSION

The City of El Paso submits that all essential issues of Compact construction have been resolved by the Court's denial of New Mexico's Motion to Dismiss. Formal adoption of the First Report of the Special Master is not essential to resolution of those issues.

New Mexico's Counterclaims either add nothing to the Texas and United States claims that cannot be raised as a defensive matter by New Mexico, or they impermissibly expand the scope of those claims, and should be stricken.

Respectfully submitted,

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AMICUS CURIAE CITY OF EL PASO, TEXAS CERTIFICATE OF SERVICE

This is to certify that on the 28th of February, 2019, I caused a true and correct copy of the **Brief of Amicus Curiae City of El Paso, Texas Response to Motions for Partial Judgment on the Pleadings** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 28th day of February, 2019.

/s/ Douglas G. Caroom

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