No. 141, Original
In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF,

UNITED STATES OF AMERICA, PLAINTIFF-IN-INTERVENTION,

V.
STATE OF NEW MEXICO

AND

STATE OF COLORADO,
DEFENDANTS.

BRIEF OF AMICUS CURIAE EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN RESPONSE TO TEXAS'S MOTION TO STRIKE OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES, FEDERAL RULES OF CIVIL PROCEDURE, RULE 12(C) AND RULE 56

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February 28, 2019

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Amicus curiae El Paso County Water Improvement District No. 1 ("EPCWID") files this brief in response to Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(C) and Rule 56 (Dec. 26, 2018) ("Texas Motion to Strike"). The Texas Motion to Strike should be granted. EPCWID files this response in support of the arguments and relief requested therein.

I. Background.

EPCWID is one of two beneficiaries of the Rio Grande Reclamation Project ("Rio Grande Project" or "the Project"), a federal interstate reclamation project which serves as the vehicle for delivery of the water apportioned to Texas under the Rio Grande Compact. Act of May 31, 1939, ch. 155, 53 Stat. 785. EPCWID incorporates in full the Background section set forth in its response to the United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7 8 and 9 (Dec. 21, 2018) ("U.S. Motion") and Memorandum of Points and Authorities in Support of the U.S. Motion (Dec. 21, 2018) ("Memorandum in Support of U.S. Motion"), filed this same date ("EPCWID Response to U.S. Motion").

II. EPCWID supports Texas's argument that New Mexico's counterclaims are procedurally defective.

EPCWID supports the Texas Motion to Strike because New Mexico's counterclaims were filed without leave of the Court, *see* Texas Motion to Strike, 8-12, and the claims impermissibly seek to expand the limited issues in this case regarding New Mexico's violations of its obligations under the Rio Grande Compact. Additionally, to the extent the counterclaims challenge contracts relating to the Rio Grande Project, all the parties to those contracts are not parties before the Court in this original action and the counterclaims challenging such contracts cannot proceed in their absence.

New Mexico's counterclaims seek to expand the Court's original jurisdiction, which the Court has long stated "should be invoked sparingly," *Utah v. United States*, 394 U.S. 89, 95 (1969), and be made "obligatory only in appropriate cases," *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972). New Mexico's counterclaims, which the Court did not grant leave to file or otherwise determine the Court had or would exercise jurisdiction over the counterclaims, challenge a number of contracts between the United States and entities that are not parties to this action. These contracts include the 2008 Operating Agreement, to which the United States, EPCWID, and Elephant Butte Irrigation District ("EBID") are the only parties; and contracts between the United States, EPCWID, and the City of El Paso, to provide Project water to the City of El Paso for municipal purposes, to which the United States, EPCWID and the City of El Paso are the only parties. *See* New Mexico's Second, Fifth, and Seventh Counterclaims. All challenged contracts were entered into under various provisions and requirements of reclamation law which governs Project operations and allocation of water supply thereunder. New Mexico is not a party to any of the challenged contracts and these challenges improperly seek to expand the Court's limited jurisdiction in this matter.[1]

New Mexico's Counterclaims 2, 4, 5 and 7 cannot be considered in the absence of all parties to the challenged contracts. The Court has long recognized parties to a contract are indispensable to a lawsuit challenging that contract. *See Shields v. Barrow*, 58 U.S. 130, 140 (1854); *see also U.S. ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996) (where suit sought to invalidate contract with tribe, tribe a necessary party to the suit, despite the presence

[1] As set forth fully in the Memorandum in Support of U.S. Motion and EPCWID's Response to U.S. Motion, New Mexico lacks standing to challenge any of the contracts it challenges pursuant to its counterclaims. *See* Memorandum in Support of U.S. Motion, 22-29; EPCWID Response to U.S. Motion, 7-10. Regardless, even if New Mexico had standing, the counterclaims fail for lack of jurisdiction and otherwise fail to state claims upon which relief can be granted.

of the United States, as the interests of the United States and the tribe were not necessarily aligned); *Nat'l Union Fire Ins. Co. of Pittsburg, PA v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 252 (4th Cir. 2000) ("[A] contracting party is the paradigm of an indispensable party.") (quotation marks and citations omitted); *Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975) ("No procedural principle is more deeply imbedded in the common law than that, in an action to set aside a lease or a contract, all parties who may be affected by the determination of the action are indispensable.").[2]

The Court may consider whether it should exercise jurisdiction over the counterclaims challenging contracts in the absence of all contracting parties even though no party has raised the issue. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 861 (2008) ("A court with proper jurisdiction may also consider *sua sponte* the absence of a required person and dismiss for failure to join."). In addition to the procedural errors identified by the Texas Motion to Strike, the Special Master should consider the absence of non-State parties as reason to strike the Second, Fifth, and Seventh Counterclaims.[3]

III. EPCWID supports Texas's argument that New Mexico's Second, Fifth, and Seventh Counterclaims fail as a matter of law.

EPCWID also supports the Texas Motion to Strike to the extent it seeks judgment under Federal Rule of Civil Procedure 12(c) on New Mexico's Second, Fifth, and Seventh Counterclaims. *See* Texas Motion to Strike, 13-20.

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[2] This case is not like *Arkansas v. Texas*, in which the Court determined a suit alleging tortious interference with a contract did not require the joinder of a non-state third party to the contract. 346 U.S. 368, 369-70 (1953). That case, unlike New Mexico's Second Counterclaim, did not seek to invalidate a contract.

[3] EPCWID's motion to intervene was filed and ruled upon prior to the filing of New Mexico's counterclaims which challenge EPCWID's contracts. While EPCWID believes intervention was proper even absent the now filed counterclaims, if the claims challenging the 2008 Operating Agreement and other contracts to which EPCWID is a party are allowed to proceed, EPCWID may be compelled to renew its motion for intervention to protect its contractual rights and interests in the Rio Grande Project.

New Mexico's Second Counterclaim, asserted against the United States, alleges the 2008 Operating Agreement violates the Compact. EPCWID agrees with Texas's argument that the plain language of the 2008 Operating Agreement demonstrates it does not violate the Compact. As Texas explains, the Compact apportions water to the signatory States; the Operating Agreement allocates Project water to EPCWID and EBID. *See* Texas Motion to Strike, 17. The Supreme Court noted, it "might have seemed a curious choice" of the parties to the Compact to require New Mexico to deliver water apportioned to Texas under the Compact into Elephant Butte Reservoir instead of the State line,[4] "[b]ut the choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources." *Texas v. New Mexico*, 583 U.S. ___, 138 S. Ct. 954, 957 (2018).

New Mexico cannot challenge the 2008 Operating Agreement. The 2008 Operating Agreement is entered into and controlled by reclamation law. The Compact did nothing to modify the applicability of reclamation law to the Project. Reclamation and the Project beneficiaries can (and indeed must) enter into contracts necessary to facilitate Project operations and allocation of Project water supply pursuant to reclamation law; and those contracts are subject to modification by the parties consistent with reclamation law. The compacting states, be it New Mexico, Texas or Colorado, are not, by law, parties to those reclamation contracts relating to Project operations and allocation of Project supply. Moreover, New Mexico acceded to the operation of the Rio Grande Project by Reclamation and the Project beneficiaries pursuant to reclamation law when it became a State and otherwise disclaimed all interest in Project water supply. *See* Act of June 20,

[4] The Compact provides that the obligation of New Mexico to deliver water in the Rio Grande is at San Marcial, *See* Rio Grande Compact, Art. IV. For the purposes of this brief, New Mexico's Compact delivery obligation at San Marcial will be referenced as delivery into Elephant Butte Reservoir.

1910, § 1 *et seq.*, 36 Stat. 557; N.M. Const. art. XXI, § 7 ("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."). New Mexico cannot now disregard its own Constitution and the Enabling Act under which it became a state to challenge a contract which allocates reclamation Project water to which New Mexico, as a state, has no claim. *See* Memorandum in Support of U.S. Motion, 2-29; EPCWID Response to U.S. Motion filed this same date.

In addition, New Mexico's Second, Fifth, and Seventh Counterclaims cannot proceed without the joinder of additional parties as counterdefendants. *See, e.g.*, *Shields*, 58 U.S. at 140.

IV. EPCWID supports Texas's arguments regarding New Mexico's affirmative defenses.

EPCWID supports Texas's arguments that New Mexico's third, fourth, fifth, and seventh affirmative defenses fail as a matter of law. *See* Texas Motion to Strike, 20-29.

V. Conclusion.

Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(C) and Rule 56, should be granted, either by entry of an order striking New Mexico's counterclaims from the record in their entirety, or by dismissing the Second, Fifth, and Seventh Counterclaims, and by granting partial summary judgment on four of New Mexico's affirmative defenses.

Respectfully submitted,

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OFFICE OF THE SPECIAL MASTER

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EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S CERTIFICATE OF SERVICE

This is to certify that on the 28th of February, 2019, I caused true and correct copies of the **Brief of Amicus Curiae El Paso County Water Improvement District No. 1 in Response to Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(C) and Rule 56** to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 28th day of February, 2019.

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