

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 THE UNITED STATES' MOTION FOR JUDGMENT ON THE
PLEADINGS AGAINST NEW MEXICO'S COUNTERCLAIMS 2, 3, 5, 6, 7, 8 AND 9

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Amicus curiae El Paso County Water Improvement District No. 1 (“EPCWID”) files this brief in 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”). The U.S. Motion should be granted. EPCWID, as a beneficiary of the Rio Grande Project and a party to the contracts challenged by New Mexico’s counterclaims, files this response to provide supporting argument and additional background relevant to the U.S. Motion.

I. Background.

EPCWID, a political subdivision of the State of Texas, *see* Tex. Const. Art. XVI, § 59, is one of two beneficiaries of the Rio Grande Reclamation Project (“Rio Grande Project” or ‘the Project’). Authorized by Congress in 1905, the Rio Grande Project is an interstate federal reclamation project which commences at Elephant Butte Dam and Reservoir in New Mexico, approximately 100 miles north of the Texas state line, and extends south into Texas, through El Paso County to Fort Quitman, Texas. *See* Act of February 25, 1905, ch. 798, 33 Stat. 814 (extending the Reclamation Act of 1902, 32 Stat. 388 (1902) (codified as 43 U.S.C. §371, *et seq.*) (“Reclamation Act”) to Texas and authorizing the construction of what is now Elephant Butte Dam to provide water for irrigation in Texas and New Mexico) (“Rio Grande Project Act”). The Project was authorized to supply irrigation water to Elephant Butte Irrigation District (“EBID”) in southern New Mexico and EPCWID in western Texas (collectively “the Districts”), and pursuant to international treaty, to Mexico. *See* Rio Grande Project Act; Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (1906). The Court has found the Rio Grande Project and Rio Grande Compact are “inextricably intertwined” and that the Project and its operations are the linchpin which facilitates delivery of Texas’s apportionment of Rio Grande water. *See Texas v. New Mexico*, 583 U.S. ___, 138 S. Ct. 954, 956 (2018).

EPCWID's predecessor, the El Paso Valley Water Users' Association ("Association"), was created in 1905 to represent water users who would receive water from the Project. The Association entered into a number of contracts with the United States for construction of Project works and delivery of Project water. It ultimately converted into a water improvement district, EPCWID. *See* First Interim Report of the Special Master 107-110 (Feb. 9, 2017) ("First Special Master Report"); *El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957); Tex. Water Code Ann. § 55.161.

EPCWID receives Rio Grande water apportioned to Texas under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"), for irrigation and municipal uses. This water is delivered to EPCWID through the Rio Grande Project operated by the United States Bureau of Reclamation ("Reclamation") in cooperation with and for the benefit of EBID and EPCWID. *See Texas v. New Mexico*, 138 S. Ct. at 957. EPCWID provides irrigation water for 69,010 acres of Project lands within EPCWID's boundaries, and for other purposes pursuant to contracts entered into with the approval of the Secretary of Interior under reclamation law, in accordance with the Miscellaneous Purposes Act of 1920, 43 U.S.C. § 521, including the provision of a portion of the annual water supply for the City of El Paso.

The Rio Grande Project grew out of decades of efforts to address water allocation among farmers in Texas, New Mexico, and Mexico. *See Texas v. New Mexico*, 138 S. Ct. at 957; First Special Master Report 67-112. Pursuant to the Rio Grande Project Act and contracts entered into with the United States, Reclamation is obligated to deliver Project water to EPCWID and EBID. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1175-76 (10th Cir. 2002); *Bean v. United States*, 163 F. Supp. 838, 841-42 (Ct. Cl. 1958). These contracts include what the Court has termed

the “Downstream Contracts.” *Texas v. New Mexico*, 138 S. Ct. at 957; *see* Contract between the United States and El Paso County Water Improvement District No. 1 (Nov. 10, 1937); Contract between the United States and Elephant Butte Irrigation District (Nov. 9, 1937); Contract between El Paso County Water Improvement District No. 1 and Elephant Butte Irrigation District (Feb. 16, 1938), provided by Texas to the Special Master with letter dated May 8, 2018.¹ EPCWID has reimbursed the United States for EPCWID’s share of the reimbursable Project construction costs and now holds title to most of the Project works within its boundaries. *See* Act of Oct. 30, 1992, Pub. L. 102-575, § 3301, 106 Stat. 4600, 4705-06; *see also* *Texas v. New Mexico*, 138 S. Ct. at 957. Delivery of Project water and other Project operations commenced in late 1916. On February 16, 1938, EBID and EPCWID entered into a contract confirming the acreages in each state which could be irrigated from the Project; 67/155th of Rio Grande Project acreage lies within EPCWID, and 88/155th of the Project acreage lies within EBID (“1938 Contract”). *See* First Special Master Report, DVD Doc. 12.²

On March 18, 1938, Colorado, New Mexico and Texas entered into the Rio Grande Compact, which apportions the waters of the Rio Grande above Fort Quitman, Texas among Colorado, New Mexico, and Texas, with the purpose of “effecting an equitable apportionment” of “the waters of the Rio Grande” and to remove all “present and future controversies” between the

¹ New Mexico has posited that a June 27, 1906 contract between the Association, the United States, and the Elephant Butte Water Users’ Association for repayment of project costs, as well as dozens of other contracts between the United States and one or both of the associations and, later, irrigation districts, also comprise the Downstream Contracts. *See* May 10, 2018 Letter from Marcus Rael for the State of New Mexico to Special Master Melloy. The Court’s description of the Downstream Contracts as being those that were “nearly simultaneously” executed with the Compact, 138 S. Ct. at 957, suggests the Court was considering the contracts executed in late 1937 and early 1938, and not all contracts relevant to the Project and Project operations.

² New Mexico confuses the allocation of repayment costs as between EBID and EPCWID, the lands eligible in each District to receive Project water, and the operation of the Project by Reclamation, EPCWID and EBID, with Texas’s Compact apportionment and as limiting or dictating that apportionment. *See, e.g.*, New Mexico’s Motion for Partial Judgment on Matters Previously Decided and Brief in Support at 2, 13-14. While Texas’s apportionment is delivered through the Project and dependent on efficient functioning of the Project as contemplated under conditions existing at the time of Compact execution, Texas’ apportionment is not specifically defined or limited by the Downstream Contracts or any other Reclamation contract.

States. 53 Stat. 785; *see* First Special Master Report, 145 (discussing the intent of the Party states to negotiate a “permanent compact”). The Compact “is inextricably intertwined with the Rio Grande Project and the Downstream Contracts . . . because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas.” *Texas v. New Mexico*, 138 S. Ct. at 959.

New Mexico agrees “that Texas received an equitable apportionment of the Rio Grande waters through the 1938 Compact, and it concedes that the signatory states to the 1938 Compact allocated Texas’s equitable apportionment to the Rio Grande Project.” First Special Master Report, 210-211 (citations omitted). While the Compact apportioned water to Texas and the Rio Grande Project is the vehicle for delivery of that apportionment, the Compact did not apportion a specific amount of water to Texas from the Project, and did not allocate a specific amount of water as between Project users in New Mexico and Texas. The allocation of Project water as between EBID in New Mexico and EPCWID in Texas is within the sole purview of the United States and the Districts as the Project operators and beneficiaries. This “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*, 138 S. Ct. at 957. And, significantly, the Compact did not apportion any amount of water to the State of New Mexico below Elephant Butte. New Mexico’s apportionment of the waters of the Rio Grande ends at Elephant Butte. Thereafter, Compact deliveries by New Mexico become “usable water” for the Project for allocation to EBID and EPCWID and the effectuation of delivery of Texas’s apportionment. *See* Compact, Article I(1); First Special Master Report, 198. It is New Mexico’s improper claim to Project supply and a claim to use water it has delivered to the Project

under its Compact obligations that has brought Texas and the United States to this Court to protect Texas' Compact apportionment and the Project water supply. *See* State of Texas Complaint (Jan. 8, 2013), ¶ 18; U.S. Complaint in Intervention (Feb. 27, 2014), ¶¶ 13-15.

EPCWID has an adjudicated interest in Project water supply. *See In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Tex.) Segment of the Rio Grande Basin* (327th Judicial Dist. Ct., El Paso Cnty., Tex., No. 2006-3219, Oct. 30, 2006) (authorizing the United States and EPCWID to impound, divert, and use waters of the Rio Grande Project within Texas based on storage and releases in New Mexico) (“Texas decree”). The Texas Commission on Environmental Quality issued a Certificate of Adjudication pursuant to the Texas decree (Mar. 7, 2007) (“TCEQ Certificate”)³, which provides EPCWID the right to store and release water from Elephant Butte reservoir and dam in New Mexico, and to have such water delivered through the Rio Grande Project in New Mexico for diversion and use in Texas. TCEQ Certificate ¶¶ 1(b), 3.

As a beneficiary of the Rio Grande Project, EPCWID is party to the myriad contracts which govern operation of the Project including the contracts New Mexico improperly challenges in this original action pursuant to counterclaims 2, 4, 5, 6 and 7. In 1979 and 1980 respectively, for purposes of effectuating transfer to title of Project works and to address the change in operations necessitated by the Districts' assumption of ownership of Project facilities, EBID and EPCWID entered into separate, albeit almost identical contracts with the United States. “Contract for the Transfer of the Operation and Maintenance of Project Works” Contract No. 9-07-53-XO554, February 15, 1979 (EBID and United States) (“1979 Contract”); “Contract for the Transfer of the Operation and Maintenance of Project Works” Contract No. 0-07-54-XO90, March 14, 1980

³ The TCEQ Certificate is reprinted in the appendix the Brief Amicus Curiae El Paso County Water Improvement District No. 1 in Support of the State of Texas' Motion for Leave to File Complaint (March 11, 2013).

(EPCWID and United States) (“1980 Contract”). The 1979 Contract and the 1980 Contract each required the Districts and the United States to enter into an operating agreement for the Project regarding water delivery and accounting. However, no operating agreement was forthcoming despite concerted efforts by EPCWID. And, changing conditions upstream due to increased groundwater pumping and consumptive use of Project water in New Mexico was causing ever decreasing return flows and deliveries of Project water supply to EPCWID.

As a result of the failure to consummate an operating agreement for the Project and to otherwise address deficiencies in Project deliveries and accounting, in 2007, EPCWID filed suit against EBID and Reclamation to remedy the deficiencies. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation Dist., et al.*, No. EP07CA0027 (W.D. Tex. 2007). The litigation culminated in a settlement agreement which included an operating agreement for the Project (“2008 Operating Agreement” or “Operating Agreement”) among the United States, EBID and EPCWID.⁴ Storage, allocation, and release of water from Elephant Butte and Caballo Reservoirs are governed by the 2008 Operating Agreement. The 2008 Operating Agreement is the subject of New Mexico’s Counterclaims. *See* Counterclaims 2, 4, 5, and 7; Prayer for Relief ¶ E (asking the Court to declare the 2008 Operating Agreement “violates the Compact and the Water Supply Act and is void as a matter of law”).

The counterclaims are not New Mexico’s first attempt to challenge the 2008 Operating Agreement. EPCWID was joined as a defendant in a suit brought by New Mexico in the United States District Court for the District of New Mexico to void the 2008 Operating Agreement. *See New Mexico v. U.S. Bureau of Reclamation, et al.*, CIV-11-691-JB/ACT (D.N.M., filed Aug. 8,

⁴ The 2008 Operating Agreement was provided by the State of Texas through Declaration of Stuart Somach, Counsel of Record in support of Texas’s Motion to Strike or for Partial Summary Judgment Regarding New Mexico’s Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(c) and Rule 56.

2011). That case has been stayed to prevent interference with this original action. New Mexico now brings the claims it asserted against the United States, EBID, and EPCWID in federal district court in New Mexico to this Court. Those claims were deficient and failed to state a claim in the federal district court. For similar and additional reasons, those claims fail in this original action as a matter of law and should be dismissed.

II. The sovereign immunity of the United States and New Mexico's lack of standing bar all counterclaims against the United States.

New Mexico failed to identify how the United States has waived its immunity for any of the counterclaims asserted against it. *See* Memorandum in Support of U.S. Motion, 16-22. EPCWID agrees with the United States that this failure is fatal to New Mexico's counterclaims, and all claims asserted against the United States must be dismissed. EPCWID also agrees with the United States' arguments with respect to New Mexico's lack of standing. *See id.* 22-29.

With regard to New Mexico's lack of standing to challenge the 2008 Operating Agreement, the United States correctly and succinctly states that New Mexico lacks standing as it "is not a party to the Operating Agreement and is not entitled to allocations of Project water, under the Compact or any other authority." *Id.* at 26. The Operating Agreement is the settlement of litigation among the Districts and the United States in which EPCWID filed suit to require the United States to properly account for, allocate and deliver Project water to EPCWID, EBID, and, pursuant to the 1906 Treaty, Mexico. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation District*, EP07CA0027 (W.D. Tex. Jan. 22, 2007). The Operating Agreement has served since 2008 as the basis for Project operations and remains essential to the proper allocation of Project water and is a binding agreement as among the United States, EBID, and EPCWID.

One of the key provisions of the Operating Agreement is allocation procedures that compensate EPCWID for unauthorized diversion of Project water in New Mexico, including

groundwater pumping that captures Project water conveyed in the Rio Grande and the return flow of Project water conveyed by the Project drainage system. *See* Operating Agreement, § 2.5. The allocation procedures are based on a compromise of the Operating Agreement parties as an alternative to the curtailment of all pumping of post-1938 wells that capture Project water—Texas’s appropriate remedy in this original action under the Compact. The compromise of the Operating Agreement parties embodied in the allocation procedures provides that EPCWID’s Project water allocation is based on the Project conditions measured between 1951 and 1978. Any Project water captured by groundwater pumping or increased consumptive use in New Mexico in excess of the 1951-1978 conditions reduces EBID Project water allocations. This effectively allows New Mexico water users below Elephant Butte to enjoy the same combined amount of groundwater pumping and Project water use as occurred between 1951 and 1978. In effect, EBID repays EPCWID for its portion in excess of the 1951-1978 conditions of unauthorized Project water captured, diverted, and/or consumed by New Mexico water users. The Operating Agreement does not establish, nor could it, Texas’s apportionment or otherwise affect any Compact obligations or apportionments. Rather, the Operating Agreement addresses allocations as among the Rio Grande Project beneficiaries and Reclamation with regard to operation of the Project and allocation of Project water supply taking into account groundwater pumping in New Mexico which is affecting Project supply. The 2008 Operating Agreement specifically provides that it does not in any way affect the Rio Grande Compact. *See* Operating Agreement, § 6.12

The State of New Mexico is not a party to the 2008 Operating Agreement, has no interest in Project water as a sovereign or otherwise, and has no role to play in Project operations or the allocation process. *See* First Special Master Report, 267-68; *Texas v. New Mexico*, 138 S.Ct. at 959; and Operating Agreement, § 2. New Mexico’s only role below Elephant Butte with regard

to Project water is to ensure no New Mexico user takes or effects Project supply either through surface or groundwater diversions not otherwise authorized by the Project. The reason the parties are now before the Court is because New Mexico has failed at its obligation to ensure the water it delivers into Elephant Butte⁵ is not recaptured by non-Project beneficiaries in New Mexico. *See* State of Texas Complaint, ¶ 18; U.S. Complaint in Intervention, ¶¶ 13-15. The Compact requires New Mexico deliver water to Elephant Butte, *see* Compact Art. IV, but does not grant New Mexico any sovereignty over water or rights in water allocated to EBID (and then to EPCWID) pursuant to the Operating Agreement. *See Texas v. New Mexico*, 138 S. Ct. at 959. It is not a novel proposition that subsequent to apportionment of an interstate stream, one state does not determine, as an intrastate matter, what amount of water the downstream compacting state is permitted to receive. *See Kansas v. Nebraska*, 527 U.S. 1020 (1999) (compact can restrict intrastate consumptive use of state water resources); *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995) (compacting state can assert claim to restrict intrastate use of water); *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (rights of state water uses subordinated to Compact obligations). This principle and precedent applies with full force here although there is no specific state line delivery obligation as the Project serves as New Mexico's de facto state line delivery. New Mexico does not retain the right to exercise control over the waters of the Rio Grande after such waters have been delivered to Elephant Butte and committed to the Project. The water is then useable water, *see* Compact, Art. I(l) and (k), dedicated to the Project beneficiaries EBID and EPCWID, and only the Project beneficiaries. New Mexico does not get to determine through interference with the Project how much water Texas gets under the Compact.

⁵ The Compact provides that the obligation of New Mexico to deliver water in the Rio Grande is at San Marcial. *See* 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.

New Mexico misunderstands or misrepresents its interests in Project water and under the Operating Agreement—it has none. EPCWID agrees with the United States this is fatal to New Mexico’s standing to assert its counterclaims against the United States. *See* Memorandum in Support of U.S. Motion. 28.

Similarly, New Mexico’s Counterclaim 7, challenging contracts entered into under the Miscellaneous Purposes Act, 43 U.S.C. § 521, must fail for lack of standing. These contracts are among the United States, EPCWID and the City of El Paso, entered into under reclamation law allowing for the use of Project supply for municipal purposes. As the United States explains, under the Miscellaneous Purposes Act, enacted in 1920 as part of the body of reclamation law applicable to the Project, the Act requires approval of the United States and the relevant water district, but not the State of New Mexico (nor the State of Texas). *See* Memorandum in Support of U.S. Motion, 36-37. The Compact did not modify or supersede the body of reclamation law applicable to the Project, including the Miscellaneous Purposes Act and contracts entered into pursuant to the Act. New Mexico lacks standing to challenge reclamation contracts to which it is not a party and for which its approval was not required.

III. New Mexico’s second, fifth, sixth, seventh and ninth counterclaims must be dismissed for failure to state a claim and the second, fifth and seventh additionally because EPCWID, a party to the challenged contracts, is not a party in this original action.

EPCWID agrees with the United States’ basis for dismissal of New Mexico’s second, fifth, Sixth, Seventh and Ninth counterclaims for failure to state a claim. *See* Memorandum in Support of U.S. Motion, 29-41. New Mexico’s second, fifth and seventh claims also must be dismissed because they challenge and seek to void contract to which EPCWID is a party but EPCWID is not a party to this original action.

A. New Mexico's counterclaims 2, 5, 6, 7 and 9 must be dismissed for failure to state a claim.

EPCWID supports the arguments of the United States with respect to the necessity to dismiss New Mexico's counterclaims 2, 5, 6, 7 and 9. Additionally, EPCWID posits the following.

As a threshold matter, New Mexico confuses the allocation of Project water to EBID and EPCWID which is controlled by reclamation law and the contracts as among the Districts and the United States, with the apportionment of water to New Mexico and Texas under the Compact as a matter of Compact law. While the Project and the Compact are "inextricably interrelated", and the Project serves as the vehicle for Texas's apportionment, Project allocations and Compact apportionment are not identical concepts. *See* Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses (Dec. 26, 2018), 17 ("Texas's Motion to Strike or for Partial Judgment"). Moreover, in order to claim the 2008 Operating Agreement or other contracts entered into by the United States and EPCWID pursuant to reclamation law violate the Compact, New Mexico would have to show it has a Compact apportionment below Elephant Butte or otherwise has an interest in Project water. It does not. *See* Compact, Art. IV (New Mexico's delivery point at Elephant Butte); Art. I(l) and (k) (water delivered by New Mexico becomes usable water for the Project); Rio Grande Project Act. Indeed, in joining the Union, New Mexico agreed to relinquish control over any existing reclamation projects in the then territory of New Mexico. Act of June 20, 1910, Pub. L. No. 61-219, § 2, 36 Stat. 557, 559; *see* Memorandum in Support of U.S. Motion, 25. New Mexico fails to state a claim that any reclamation contract relating to Project operations or allocations violates the Compact as a matter of law.

With respect to the second counterclaim, New Mexico alleges the Compact "requires the United States to allocate Project water on an equal basis to each Project acre regardless of state or

district boundaries” New Mexico Counterclaims, ¶ 73. As the United States notes, the Compact does not require Project water to be allocated on a pro-rata or equal-acre basis. *See* Memorandum in Support of U.S. Motion, 31. Indeed, not only does the Compact not impose such a requirement, but no contractual document relevant to the Project imposes such a requirement. The 1938 Contract, which New Mexico appears to rely on as the basis for its “pro rata” Compact argument establishes the irrigable acreage in each District as a basis for those lands entitled to receive Project water; and the percentage therefore of the repayment costs each District would be required to pay for the Project – 57% EBID and 43% EPCWID. *See Texas v. New Mexico*, 138 S.Ct. at 957. While the repayment of construction costs and the eligible irrigable acreage pursuant to reclamation law is a specified 53-47% split, this does not equate to a pro-rata per acre allocation of Project water pursuant to the Compact or otherwise dictate Project operations pursuant to reclamation law. And while the 1938 contract between EBID and EPCWID provides that in times of drought the irrigable acreage may serve as a basis for distribution of water “as far as practicable”, that contract does not determine either Project allocations or dictate Texas’ Compact apportionment.

The Compact is silent on the amount of water apportioned to Texas to be used in southern New Mexico and the amount to be delivered to Texas. *See Texas v. New Mexico*, 138 S. Ct. at 959. The Compact also is silent on the amount of acreage to be served in either state, or the amount of water specifically allocated per acre. First Special Master Report, 179-182. While the Compact is “inextricably intertwined” with the Project, *Texas v. New Mexico*, 138 S. Ct. at 959, the Compact does not dictate or direct Project operations; and Project operations do not dictate or determine Texas’ apportionment.

B. New Mexico's second, fifth and seventh counterclaims must be dismissed for failure to join EPCWID, a party to the challenged contracts.

New Mexico's second, fifth, and seventh counterclaims all challenge contracts to which EPCWID and others are parties. These counterclaims cannot be considered in the absence of all parties to the challenged contracts and the claims must be dismissed. 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 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.”).⁶

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 to date. *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's Motion to Strike or

⁶ 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. *See* 346 U.S. 368, 369-70 (1953). That case, unlike New Mexico's Second Counterclaim, did not seek to invalidate a contract.

for Partial Judgment, 8-12, the Special Master should consider the absence of non-State parties as counter defendants as reason to dismiss the second, fifth, and seventh counterclaims.⁷

IV. Conclusion.

The United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9 and Memorandum of Points and Authorities in Support of the U.S. Motion should be granted.

Respectfully submitted,

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February 28, 2019

⁷ 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.

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.



OFFICE OF THE SPECIAL MASTER



**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 the United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaim 2, 3, 5, 6, 7, 8 and 9** 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.

/s/ Maria O'Brien

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