No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO 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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INTRODUCTION

Pursuant to the Case Management Plan ("CMP"), as amended on January 29, 2019, the State of New Mexico ("New Mexico") hereby submits this Response in Opposition to the United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9 ("Motion"). The United States' Motion seeks dismissal of the specified counterclaims on three broad grounds. First, the United States argues New Mexico failed to identify any waivers of sovereign immunity that authorize it to pursue claims against the United States. United States' 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 ("U.S. Br.") at 1. Second, the United States asserts New Mexico lacks standing to bring claims against the United States in its capacity as *parens patriae* for its citizens. *Id.* Finally, the United States argues all but one of New Mexico's counterclaims fail to state claims against the United States for which this Court can grant relief. *Id*. Additionally, the United States argues New Mexico's counterclaims threaten to "dramatically expand" the scope of this case and will "impose substantial additional burdens of discovery on the parties." *Id.*

The United States presents no valid basis for dismissing any of New Mexico's counterclaims. New Mexico did not plead any waivers of sovereign immunity in its counterclaims because the United States has clearly and repeatedly asserted that it is an indispensable party in this case, that it intervened to permit judicial resolution of the dispute, and that, by intervening in this case, it submitted itself to this Court's jurisdiction to hear claims involving the Rio Grande Compact ("Compact") and was willing to be bound by the Court's decree interpreting the same. The United States cannot retract those statements, and should not be permitted to walk back the

scope of its intervention at this late date solely to prevent New Mexico from asserting legitimate Compact claims.

New Mexico also has standing to assert its claims. New Mexico disputes that the injury-in-fact prong of standing analysis is even appropriate in the context of a compact enforcement case, where questions of injury are immaterial and the only pertinent question is whether the Compact has been violated. Even if New Mexico is required to demonstrate injury in fact, New Mexico can easily establish injury to its own interests as sovereign and Compact signatory as well as to the interests of its citizens. New Mexico has a sovereign interest in enforcing the Compact and protecting the apportionment of water it receives thereunder from the acts or omissions of the United States, and New Mexico is empowered to represent the interests of its citizens *parens patriae* against the United States when it seeks to vindicate their rights under a federal law, such as the Compact. New Mexico also has pled valid claims for relief on each of its counterclaims, as explained in more detail herein.

Finally, New Mexico's counterclaims will not expand the scope of this litigation because each counterclaim arises from the Compact and the parties' rights and duties thereunder. New Mexico's counterclaims "directly relate" to Texas's claims, as the United States has recognized. United States' Letter Brief at 2, *New Mexico v. United States*, No. 11-cv-00691 (D.N.M. Mar. 15, 2013) ("*New Mexico v. United States*"). This dispute did not begin when Texas suddenly decided, after decades of inaction, to bring claims related to the pumping of groundwater in the New Mexico portion of the Rio Grande basin south of Elephant Butte Reservoir ("Lower Rio Grande"). The genesis of this case was the United States' decision in 2008 to adopt an operating agreement ("2008 Operating Agreement") for the Rio Grande Project ("Project") that materially and adversely reduced New Mexico's Compact apportionment of water in the Lower Rio Grande. New Mexico

filed suit in federal district court in *New Mexico v. United States* to protect its interests and challenge the 2008 Operating Agreement. This, at least in part, is what prompted Texas, which disproportionately benefits from the 2008 Operating Agreement's changes to Project operations, to file the present suit. *See* Texas Complaint para. 20.

While the United States now seeks to downplay the clear relationship between New Mexico's counterclaims and the Compact issues in this case by focusing on the fact that New Mexico has pled violations of contracts or federal statutes in addition to the Compact, the fact is that the injuries New Mexico has suffered are to its Compact rights. The Court has previously allowed claims against the United States based on violations of state and federal statutes and contracts because these violations had the effect of interfering with a State's apportionment. The violations New Mexico alleges here have a similar effect on New Mexico's Compact apportionment, and New Mexico seeks relief on that basis.

The Compact imposes duties and confers rights on both New Mexico and Texas in the Lower Rio Grande through its incorporation of the Project. New Mexico is entitled to protect these rights, including by challenging changes to Project operations that result in changes in Compact apportionment. This Court cannot afford the Parties' complete relief or issue a decree that will resolve present Compact disputes and provide a clear standard for future compliance if it does not hear the legitimate claims of all Parties, including New Mexico, and provide clear direction regarding the scope of each Party's rights and duties under the Compact.

ARGUMENT

The United States fails to meet the burden imposed by Rule 12(c) and its motion for judgment on the pleadings should be denied because (1) the United States has waived its immunity on claims arising under the Compact, (2) New Mexico has standing to enforce the Compact and

assert claims arising thereunder, and (3) New Mexico has pled valid claims for relief on each of its counterclaims. In the alternative, and in the event the Court concludes New Mexico's counterclaims should be amended as described in section V below, in whole or in part, New Mexico will seek leave of Court to file an amended complaint to cure any jurisdictional defects in its pleadings.

I. LEGAL STANDARD

As the United States recognizes, Rule 12(c) motions for judgment on the pleadings are assessed under the same standards applicable to Rule 12(b)(6) motions to dismiss for failing to state a claim upon which relief can be granted. *E.g.*, *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1109 (8th Cir. 2017); *Bank of New York v. First Millennium, Inc.*, 607 F.3d 905, 922 (2d Cir. 2010). A court should not grant a Rule 12(c) motion "unless the moving party has clearly established that no material issue of fact remains to be resolved and the party is entitled to judgment as a matter of law." *United States v. Any & All Radio Station Transmission Equip.*, 207 F.3d 458, 462 (8th Cir. 2000); *see also Minch Family LLLP v. Buffalo-Red River Watershed Dist.*, 628 F.3d 960, 965 (8th Cir. 2010).

A court weighing a Rule 12(c) motion must accept all factual allegations in the non-movant's pleadings as true, *Wood v. Moss*, 572 U.S. 744, 755 n.5 (2004), must view the allegations in the light most favorable to the non-moving party, *Smith v. United States*, 561 F.3d 1090, 1098 (10th Cir. 2009), and must draw all reasonable inferences in favor of the non-movant, *Bank of New York*, 607 F.3d at 922. If the non-movant's pleadings "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face,'" then the court must deny the Rule 12(c) motion. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Ellis*, 860 F.3d at 1109-10.

To the extent a Rule 12(c) motion also moves for dismissal for lack of subject matter jurisdiction, as here, the motion is governed by the standard that applies to Rule 12(b)(1) motions. *See Cruz v. AAA Carting and Rubbish Removal, Inc.*, 116 F. Supp. 3d 232, 239 (S.D.N.Y. 2015). That standard is very similar to the standard for evaluating Rule 12(c) and Rule 12(b)(6) motions. Under a Rule 12(b)(1) motion, a court weighing a facial attack on its jurisdiction must take all pled facts as true and draw all reasonable inferences in favor of the non-movant. *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016); *Ohio Nat. Life Ins. Co. v. United States*, 922 F.2d 320, 325 (6th Cir. 1990).

A motion for judgment on the pleadings "only has utility when all material allegations of fact are admitted or not controverted in the pleadings and only questions of law remain to be decided by the district court." 5C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure Civ. § 1367 (3d ed. 2004) (citing *Stafford v. Jewelers Mut. Ins. Co.*, 554 Fed. App'x 360, 370 (6th Cir. 2014)). Where "the pleadings do not resolve all of the factual issues in the case, a trial on the merits would be more appropriate than an attempt at resolution of the case on a Rule 12(c) motion." *Id.* (citing *Roberts v. Robert V. Rohrman, Inc.*, 909 F. Supp. 545, 552 (N.D. Ill. 1995)).

II. THE UNITED STATES HAS WAIVED SOVEREIGN IMMUNITY TO SUIT ON NEW MEXICO'S COUNTERCLAIMS.

The United States first seeks dismissal of New Mexico's counterclaims on the basis of sovereign immunity, arguing New Mexico fails to 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." U.S. Br. 16. But here, the United States forgets or seeks to downplay one very important fact: the United States sought out the Court's jurisdiction in this case, intervening in a preexisting dispute not only to protect its own interests and press claims against

New Mexico, but also to permit resolution of the issues raised in this case, which cannot be decided in the United States' absence given its unique and intimate role in the Compact's apportionment via operation of the Project.

The United States has repeatedly asserted that, by intervening, it submitted itself to this Court's jurisdiction and would be bound by the Court's rulings in this case, so New Mexico is surprised the government now asserts it is not. While the United States may sometimes file claims without subjecting itself to counterclaims, even those arising from the same transaction or occurrence, this is not what the United States has done here. The United States freely submitted itself to this Court's jurisdiction, both to bring its own claims and to permit resolution of this case as an indispensable party, waiving its immunity as to the subject matter of this case pursuant to the statutory authority of the Attorney General. It is now bound by its actions and cannot seek to walk back its intervention now, merely because it is faced with the prospect of the Court entertaining arguments and evidence in support of Compact interpretations it dislikes and potentially assigning liability to it.

A. The United States Has Waived Immunity by Intervening in Other Original Actions.

The United States is correct that it generally may not be sued without its consent. *E.g.*, *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994). And, in general, the United States may not be joined to a case as a defendant absent a statutory waiver of immunity. U.S. Br. at 17 (citing *United States v. Shaw*, 309 U.S. 495, 503 (1940)). However, New Mexico is not seeking to join the United States involuntarily to this action as a defendant. The United States intervened in this case to assert claims against New Mexico; to protect federal interests in the waters of the Rio Grande, including but not limited to its interests in the Project and the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes,

May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention"); and to permit judicial resolution of the issues raised in this case, recognizing that it is an indispensable party to this litigation. *See generally* US Br. in Support of Mot. to Intervene. In other original actions where the United States intervened, the Court has allowed parties to assert counter- or cross-claims against the United States, or otherwise issued decrees binding the United States, its officers, and agencies. The United States presents no persuasive reason why the scope of its intervention here is narrower than in these other cases, particularly in light of numerous statements the United States made in this case regarding the scope of its waiver, both before and since it intervened.

The most pertinent example of the United States waiving its immunity on intervention is *Nebraska v. Wyoming*, where the Court allowed Wyoming to assert cross-claims against the United States based on the United States' intervention in that dispute. 515 U.S. 1 (1995). In *Nebraska v. Wyoming*, Nebraska alleged Wyoming was violating the North Platte Decree ("Decree"), which apportioned the waters of the North Platte River among Colorado, Wyoming, and Nebraska. *Id.* at 4. The United States intervened in the original equitable apportionment proceeding, *Nebraska v. Wyoming*, 325 U.S. 589 (1945), and remained a party to the case when Nebraska returned to the Court in 1986 alleging Wyoming's violation of the 1945 decree, 515 U.S. at 4-5.

After a number of developments in the case, Wyoming moved to amend its pleadings to add four counterclaims against Nebraska and five cross-claims against the United States. *Id.* at 7. Wyoming's cross-claims (1) sought to preclude the United States from releasing more water from federal reservoirs than Nebraska allegedly could use; (2) alleged the United States had violated Paragraph XVII of the Decree; (3) sought modification of Paragraph XVII; (4) alleged the United States had mismanaged federal reservoirs in contravention of state and federal law as well as contracts between the United States and individual water users, violating assumptions on which

the Decree was based and undermining Wyoming's apportionment; and (5) sought modification of Paragraph V of the Decree. Wyoming Amended Counterclaims and Crossclaims, *Nebraska v. Wyoming*, No. 108, Original (Feb. 18, 1994).

As a jurisdictional basis for these claims, Wyoming alleged the "United States was granted leave to intervene as a party to this case and, as a result, is bound by the Court's Decree and has consented to the full and complete adjudication of all matters and issues determined in the earlier litigation or reasonably incidental thereto." *Id.* para. 7. It further alleged its cross-claims against the United States were "for the purpose of carrying into effect the apportionment determined by the Court in 1945" and therefore were "assertable against the United States as a party." *Id*. para. 8. In its brief in support of its motion for leave to amend, Wyoming argued the United States, acting by and through its Attorney General, may file suit to assert and protect its interests. Wyoming Br. in Support of Mot. to File Amended Counterclaims and Cross-Claims at 23-24, *Nebraska v. Wyoming*, No. 108, Original (Feb. 18, 1994) (citing *Sanitary Dist. of Chicago v. United States*, 266 U.S. 405, 426 (1925)). It noted the statutory authority of the Attorney General and other principal officers of the Department of Justice to do so is found in Title 28, Part II, Chapter 31 of the United States Code, and particularly in 28 U.S.C. §§ 501, 516-19. *Id*.

Wyoming then asserted that, when the United States voluntarily joins an action, "it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *Id*. at 24 (quoting *United States v. The Thekla*, 266 U.S. 328, 339-40 (1924), and citing *Guaranty Trust Co. v. United States*, 304 U.S. 126, 134 (1938) ("Even the domestic sovereign by joining in suit accepts whatever liabilities the court may decide to be a reasonable incident of that act.")). Finally, Wyoming pointed out that, after the United States intervened in

Arizona v. California, the Court issued an opinion in that case enjoining the "United States, its officers, attorneys, agents, and employees." *Id*. at 24 (citing 376 U.S. 340, 341 (1964)).

The Court allowed Wyoming to pursue all but one of its cross-claims against the United States.[1] *Wyoming v. Nebraska*, 515 U.S. at 7, 15-22. The Court's decision to allow Wyoming's fourth cross-claim to proceed is particularly instructive here.[2] As stated above, Wyoming's fourth cross-claim alleged the United States was managing federal reservoirs in contravention of state and federal law, as well as federal water supply contracts between the United States and individual water users. *Id*. at 15. Wyoming argued the United States' violations "upset[] the equitable balance on which the apportionment [in the Decree] was based" and resulted "in the allocation of natural flow contrary to the provisions of the Decree." *Id*. (quotation omitted).

The Court allowed this claim to proceed, reasoning the "availability of storage water and its distribution under storage contracts was a predicate to the original apportionment decree." *Id*. at 16. The Decree declined to apportion storage water, apportioning only the natural flow of the North Platte River, because the Court assumed storage water would be distributed "in accordance with the contracts which govern it," "beneficial use limitations that govern federal contracts for storage water," "compliance with § 8 of the Reclamation Act of 1902," and the Warren Act. *Id*. at 17. The Court characterized Wyoming's claim as alleging that "a predicate to the [Decree]" was the United States' compliance with state and federal laws and storage water contracts, "that it no longer does so, and that this change has caused or permitted significant injury to Wyoming

[1] The Court denied Wyoming leave to amend its pleadings to add its first cross-claim because it found Wyoming's claim amounted to a request that the Court "relitigat[e] . . . the 'main controversy' of the 1945 litigation, the equitable apportionment of irrigation-season flows" but that Wyoming failed to allege any "change in conditions that might warrant reexamining the decree's apportionment scheme." 515 U.S. at 11. New Mexico is not requesting in any of its counterclaims or defenses that the Court relitigate the Compact's apportionment scheme, so this reasoning is inapplicable here.

[2] Nebraska and the United States chose not to except to the special master's recommendation that Wyoming be allowed to amend its pleadings to file its second, third, and fifth cross-claims against the United States. *See* 515 U.S. at 7. The reasons for this are not clear from the Court's opinion.

interests." *Id*. at 19. On this basis, the Court held Wyoming had "said enough to state a serious claim that ought to be allowed to go forward." *Id*.

New Mexico makes similar allegations here. The Court has recognized the Compact is "inextricably intertwined" with the Project, which the United States operates, and the Downstream Contracts, to which the United States is a party. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). Whether the United States is characterized as an "agent" of the Compact, or whether the Compact "implicitly . . . incorporate[s]" the Downstream Contracts, the Court has clearly held that "the United States . . . meet[ing] its duties under the Downstream Contracts" is "essential to the fulfillment of the Compact's expressly stated purpose." *Id*. New Mexico's counterclaims against the United States allege the United States is not "meet[ing] its duties," either because the United States has violated the Compact directly or has violated other statutes and, by so doing, interfered with New Mexico's Compact apportionment in the Lower Rio Grande. *Compare* State of New Mexico's Counterclaims at paras. 72-90, 99-132 *with* Wyoming Amended Counterclaims and Crossclaims at paras. 28-33, *Nebraska v. Wyoming*, No. 108, Original (Feb. 18, 1994) *and Nebraska v. Wyoming*, 515 U.S. at 15-22. Like Wyoming's cross-claims against the United States, New Mexico's counterclaims against the United States "state . . . serious claim[s]" regarding the United States' actions that impact the Compact's apportionment and "ought to be allowed to go forward." 515 U.S. at 19.

B. By Intervening, the United States Has Submitted to the Jurisdiction of This Court to Interpret and Enforce the Compact.

In *Nebraska v. Wyoming*, the Court allowed Wyoming to pursue cross-claims against the United States merely because the United States intervened in that case. Here, in addition to intervening in the existing controversy between Texas and New Mexico, the United States has represented that it is an indispensable party to this case and that it intervened to permit resolution

of the Parties' Compact dispute. The United States has also repeatedly stated that, by intervening, it submitted itself to this Court's jurisdiction. That waiver is binding on the United States in this action. The United States may not now assert its immunity from suit to bar the assertion of counterclaims arising from the Compact. This is consistent with the Court's treatment of the United States in *Nebraska v. Wyoming* and *Arizona v. California*, as well as the general principle that an intervenor submits itself to the jurisdiction of the court. 7C Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1920 (3d ed. 2004); *East v. Crowdus*, 302 F.2d 645, 647 (8th Cir. 1962).

When the United States intervened in this case, it did so as a party. It asserted it was intervening not just to protect federal interests, but because the United States is a necessary party to this litigation and had to submit to this Court's jurisdiction to allow for a full and final resolution of the issues raised herein. It also acknowledged it would be bound by the Court's rulings. In its brief in support of its Motion to Intervene, the United States recognized the dispute in this case "concerns water released from a federal project that the Bureau of Reclamation in the Department of the Interior operates, including by setting the diversion allocations for Project water users downstream. *The Court's interpretation of the parties' rights and obligations under the Compact will affect how Reclamation calculates those diversion allocations*." US Br. in Support of Mot. to Intervene at 5 (emphasis added); *see also id.* at 6 (admitting the Court's ruling in this case could affect the 2008 Operating Agreement and the United States' operation of the Project thereunder).

The United States' further admitted it was intervening in response to New Mexico's argument that the United States was an indispensable party in this action. Specifically, New Mexico argued that because the "United States is ultimately responsible for release and delivery of Project water," resolution of the case required a decree that would "be binding on the United

States" and "determinative as to the delivery of Project water below Elephant Butte Reservoir." New Mexico Resp. in Opp. to Mot. for Leave to File Compl. at 33-34. In response, the United States asserted it was intervening to "eliminate [the] question" raised by New Mexico's indispensable party argument and "permit a judicial resolution of the parties' dispute over the interpretation of the Compact." U.S. Br. in Support of Mot. to Intervene at 10. In other words, the United States acknowledged it was intervening in the case to allow the Court to issue a ruling that would be "binding on the United States" and "determinative as to the delivery of Project water." NM Resp. in Opp. to Mot. for Leave at 31-34.

Following its intervention, the United States has repeatedly acknowledged its waiver of immunity. For example, in its Sur-Reply on the Exception by the United States to the First Interim Report of the Special Master, the United States admitted it had waived its immunity by intervening, stating that it decided "*to subject itself to the Court's jurisdiction* by seeking leave to intervene, *so as to permit a full resolution of the dispute*." U.S. Sur-Reply on Exceptions at 10 (emphasis added). It also asserted it "agreed to *submit to this Court's jurisdiction* and participate in this suit as a party, and in so doing *it has agreed to be bound by the Court's interpretation of the Compact*." *Id*. at 14 (emphasis added).

At oral argument before the Court, the United States repeated these admissions, acknowledging it "intervened in this case because New Mexico asserted the United States is a required party," that "the Court . . . will be deciding what is Texas's Compact apportionment – what is . . . New Mexico's Compact apportionment," and that "you need the United States to be bound by that decree because we are the entity that releases the water." Oral Arg. Tr. Jan. 8, 2018 at 9:20-10:8. Further, the United States asserted "the United States needs to be bound by that

decree in order for . . . there to be complete relief . . . between the parties." *Id*. at 13:10-13. It then reiterated, "we are willing to be bound by that decree." *Id*. at 13:13-14.

And contrary to its present argument that New Mexico's counterclaims are unrelated or only tangentially related to the subject matter of this case and would "dramatically expand" the scope of this litigation, U.S. Br. at 1, the United States previously acknowledged that many of New Mexico's counterclaims are directly related to this litigation, not only because they arise from the Compact but because they are directly implicated by Texas's Complaint. In a brief the United States filed in federal district court in *New Mexico v. United States*, the United States argued that "Texas's claims [filed in the United States' Supreme Court] appear to directly relate to the claims New Mexico has raised in this District Court action." United States' Letter Brief at 2, *New Mexico v. United States*, No. 11-cv-691 (D.N.M. Mar. 15, 2013). Urging the district court to stay that case, the United States asserted that, by accepting Texas's then-proposed Complaint, this Court would "join many of the same issues presented in New Mexico's First Amended Complaint [in the district court case] including the interpretation and enforcement of the Rio Grande Compact and the Secretarial authority contained in the Rio Grande Project Act." *Id*.

Despite acknowledging that the Court's acceptance of Texas's Complaint would extend the Court's jurisdiction over "many of the same issues presented in New Mexico's First Amended Complaint" in *New Mexico v. United States*, *id*., and despite the fact that, by the time the United States intervened in this case, the Court had, in fact, granted Texas's Motion for Leave to File its Complaint, *compare* Order of Jan. 27, 2014, 571 U.S. 1173 (2014) (granting Texas leave to file) *with* United States' Motion for Leave to Intervene (Feb. 27, 2014), the United States nevertheless elected "to subject itself to the Court's jurisdiction by seeking leave to intervene, so as to permit a full resolution of the dispute," U.S. Sur-Reply on Exceptions at 10. The United States

acknowledges even now that many of New Mexico's counterclaims are similar to those raised in *New Mexico v. United States*. *See* U.S. Br. at 30 n.6; *compare* N.M. Counterclaims *with* New Mexico's First Amended Complaint, *New Mexico v. United States*, No. 11-CV-691 (Feb. 14, 2012). When it intervened in this case, the United States clearly was aware many if not all of the claims New Mexico had pressed against it in federal district court fell within the scope of this Court's jurisdiction following acceptance of Texas's complaint and that New Mexico was highly likely to raise these claims in this case following the stay in *New Mexico v. United States*, which the United States sought on the basis that those issues would be decided in this case.

Having intervened as a party and willingly subjected itself to the jurisdiction of this Court with full knowledge of the potential scope of this action, the United States should not be allowed to retroactively narrow the scope of its intervention and waiver of immunity solely to preclude the Court from hearing arguments or evidence relevant to Compact interpretations and claims the United States dislikes. This would undermine the ability of the Court to resolve this case by issuing a full and final interpretation of the Compact that is binding on all necessary parties, including the United States, and would undercut one of the chief arguments the United States asserted to support its intervention in this case.

The Court has described the United States' duties under the Downstream Contracts as "essential to the fulfillment of the Compact's expressly stated purpose" and acknowledged the "integral role" the United States plays "in the Compact's operation." *Texas v. New Mexico*, 138 S. Ct. at 959. The resolution of this case requires a decision that will be binding on all parties, including the United States, resolve the Compact disputes between the parties, and provide a comprehensive guide for future Compact compliance. The Court is empowered to render such a decision. *See Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) (When ruling on compact

disputes, the Court may "'mould each decree to the necessities of the particular case' and 'accord full justice' to all parties." (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946))).

New Mexico is not seeking in its counterclaims to raise every grievance it has with the United States. New Mexico is merely asking the Court to do what the United States said it intervened to permit: to issue a decree deciding "what is Texas's Compact apportionment – what is . . . New Mexico's Compact apportionment," and to make sure "the United States [is] bound by that decree because [they] are the entity that releases the water." Oral Arg. Tr. Jan. 8, 2018 at 9:20-10:8. Given the United States' unique, integral role in the Compact, the Court's ruling in this case must address the United States' duties to New Mexico and Texas, not just New Mexico's duties to Texas and the United States, and must bind the United States as well as the State parties to ensure the United States continues to "fulfill[] . . . the Compact's expressly stated purpose." *Texas v. New Mexico*, 138 S. Ct. at 959.

New Mexico's Counterclaims Arise under the Compact.

Because the United States cannot back away from its prior, repeated admissions that it submitted to this Court's jurisdiction and will be bound by the Court's decree, the United States seeks to characterize New Mexico's counterclaims as unrelated to the Compact or the issues presented by Texas's Complaint, and therefore outside the scope of the United States' waiver of immunity. U.S. Br. at 18-22. While it is true New Mexico has alleged violations of federal statutes other than the Compact, including the Water Supply Act, 43 U.S.C. § 390b(e) ("WSA"), and the Miscellaneous Purposes Act, 43 U.S.C. § 521 ("MPA"), New Mexico's chief allegation in each of its counterclaims is that the United States has violated the Compact and interfered with New Mexico's apportionment. Thus, every one of New Mexico's counterclaims is cognizable under the Compact, as explained in further detail in section IV, below.

Broadly speaking, New Mexico's second counterclaim alleges the United States has "significant[ly] change[d] . . . the apportionment of water between New Mexico and Texas," has "unilaterally changed the bargain on which the Compact was based," and has "reduced the amount of New Mexico's apportionment." New Mexico's Counterclaims para. 78. New Mexico's third counterclaim alleges the United States violated Articles VI and VII of the Compact by reducing New Mexico's Accrued Credit water in Project storage other than on an annual basis and releasing this water without New Mexico's consent. *Id*. paras. 85-90. New Mexico's fifth counterclaim alleges the United States "materially alter[ed] the historical allocation of water between New Mexico and Texas," a matter that clearly implicates the Compact's apportionment. *Id*. para. 102. New Mexico's sixth counterclaim alleges the United States violated the Compact's apportionment by adopting accounting practices for Project water allocations that increase the Project's delivery of water to Texas and decrease its delivery to New Mexico, and that these practices are not "consistent with the Compact." *Id*. paras. 106-07. New Mexico's seventh counterclaim alleges the United States, by entering MPA contracts with water providers in Texas, altered Project operations in a manner that "materially alter[s] the Compact's apportionment" and has "reduced New Mexico's water supplies and deprived New Mexico of the equities and protections it bargained for when it entered into the Compact." *Id*. paras. 109, 112. New Mexico's eighth counterclaim alleges the United States' deficient maintenance of the Project has caused or increased the loss of water from the Project, creating inefficiencies that are charged under the 2008 Operating Agreement to New Mexico's Compact apportionment. *Id*. para. 120. Finally, New Mexico's ninth counterclaim alleges the United States has violated Article XIV of the Compact by failing to ensure Project deliveries are not diminished by the loss of water to Mexico. *Id*. paras. 124, 127.

The gravamen of *all* of New Mexico's counterclaims is that the United States has violated the Compact through acts or omissions that diminish New Mexico's allocation of water from the Project and, therefore, New Mexico's apportionment of water under the Compact. The fact that certain of the duties New Mexico alleges the United States violated arise under other federal statutes or certain Downstream Contracts does not establish that these claims are unrelated to the Compact because New Mexico's counterclaims all include violations of the Compact itself through interference with the Compact's apportionment or other express provisions. This is the exact theory of liability the Court endorsed in *Nebraska v. Wyoming*, when it allowed Wyoming to pursue cross-claims against the United States alleging violations of "state and federal law as well as contracts governing water supply to individual users." *Nebraska v. Wyoming*, 515 U.S. at 15. Because Wyoming alleged these violations had the effect of reducing Wyoming's apportionment under the North Platte Decree, the Court found Wyoming had stated "a claim arising under the [North Platte] decree itself" and that Wyoming's was "a serious claim that ought to be allowed to go forward." *Id*. at 19-20. New Mexico has similarly alleged that the United States has duties arising under the Compact, including a duty to refrain from making operational changes to the Project that "materially alter the Compact allocation" of water between the states. State of New Mexico's Counterclaims para. 42. Therefore, even if the United States did not waive its immunity to suit on any claims other than those arising under the Compact, all of New Mexico's counterclaims should proceed because they allege violations of the Compact. *Cf. Nebraska v. Wyoming*, 515 U.S. at 19-20.

Lastly, the primary relief New Mexico seeks against the United States is declaratory and injunctive relief, not damages. N.M. Counterclaims Prayer for Relief paras. A, C, E, F, G, H, I, J. If this Court determines New Mexico cannot seek damages against the United States, New Mexico

should still be permitted to pursue its counterclaims for declaratory and injunctive relief. New Mexico has requested the Court consider awarding New Mexico damages as compensation for the injuries it *and* its citizens have suffered at the hands of the United States and its officers and agencies. New Mexico's Counterclaims Prayer for Relief para. K. The Court has previously held that it is empowered to award damages for compact violations even where the compact in question makes no provision for such an award. *See Kansas v. Nebraska*, 135 S. Ct. at 1052-53. Given the United States' "integral role in the Compact's operation," *Texas v. New Mexico*, 138 S. Ct. at 959, and this Court's precedent, it is clear the Compact "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Mitchell*, 463 U.S. 206, 216–17 (1983) (quoting *United States v. Testan*, 424 U.S. 392, 400 (1976)). Yet, again, if this Court determines New Mexico cannot seek damages against the United States, New Mexico must still be permitted to pursue its counterclaims to the extent they seek declaratory and injunctive relief

The United States has intervened in this case and submitted itself to this Court's jurisdiction. The Court may and should issue a decree enjoining the United States and its officers, attorneys, agents and employees from altering Project operations or taking any other actions that materially alter the Compact's apportionment, in the Lower Rio Grande or otherwise, without the consent of the Compacting States. *Cf. Arizona v. California*, 376 U.S. 340, 341 (1964).

C. The United States' Assertion of Sovereign Immunity Is Contrary to the Court's Opinion in This Case.

In its first and so far only opinion in this case, the Court recognized that, while the United States has interests protected by the Compact, it also has duties arising under the Compact, and the faithful execution of these duties is "essential to the fulfillment of the Compact's expressly stated purpose." *Texas v. New Mexico*, 138 S. Ct. at 959. The Compact can achieve its stated purpose

of apportioning the waters of the Rio Grande only because the United States "assumed a *legal responsibility*" to deliver water from the Project. *Id.* (emphasis added). The United States is "a sort of agent of the Compact, *charged* with assuring that the Compact's equitable apportionment to Texas *and part of New Mexico* is, in fact, made." *Id.* (quotation omitted) (emphasis added). The "United States plays an integral role in the Compact's operation." *Id.* As these quotations demonstrate, the Court clearly held the Compact imposes legal obligations on the United States that are necessary, even "essential" to the Compact's apportionment of the waters of the Rio Grande. In light of this holding, the Compact—and Congress's approval of the Compact—must be read to allow its State signatories to ensure the United States faithfully carries out its "legal responsibility," *id.*, including by waiving the United States' immunity to suit on claims arising out of the Compact.

This is not merely a necessary implication of the Court's holding. The Court expressly relied on New Mexico's contention that "the federal government is so integrally a part of the Compact's operation that a State could sue the United States under the Compact for interfering with its operation" to hold that the United States could pursue the Compact claims it pled in this case. *Id.* The Court's ruling that the United States has interests protected by the Compact and could pursue Compact claims, therefore, rested on the recognition that the United States also has Compact duties and can be held accountable in court for breaching those duties.

The simple fact is that if New Mexico is barred by sovereign immunity from pursuing claims against the United States for breaching "*legal responsibilit[ies]*" that are "*essential* to the fulfillment of the Compact's expressly stated purpose," *id.* (emphasis added), the United States may freely and willfully violate the Compact in the Lower Rio Grande, leaving New Mexico no means of protecting its apportionment from federal interference. Such a holding would also leave

Texas with no means of protecting its apportionment from the United States should federal officials one day decide, for any reason, to give New Mexico more Project water than it has historically received.[3]

The Court has recognized that States bargain for compact rights "in the shadow of [the Court's] equitable apportionment power—that is, [the Court's] capacity to prevent one State from taking advantage of another." *Kansas v. Nebraska*, 135 S. Ct. at 1052. "[I]t is difficult to conceive that a . . . State would trade away its right to an equitable apportionment if, under such an agreement, an upstream State could avoid its obligations." *Id*. This reasoning applies with equal force to the United States here, where the Compact's apportionment is predicated on the United States' operation of a federal reclamation project in compliance with state and federal law and federal contracts in existence at the time the Compact was executed. The Compact was also approved by Congress, Act of May 31, 1939, 53 Stat. 785, granting Congress's consent to the drafters' proposal to use the Project to apportion water in the Lower Rio Grande. In these circumstances, it is "difficult to conceive that [New Mexico] would trade away its right to an equitable apportionment [in the Lower Rio Grande] if, under [the Compact], [the United States] could avoid its obligations." *Kansas v. Nebraska*, 135 S. Ct. at 1052. Where this has occurred in other cases, most notably *Nebraska v. Wyoming*, the Court allowed a State to bring claims against the United States for interference with an apportionment. The United States presents no reason for the Court to reach a different outcome here.

[3] Colorado, too, can be impacted by the United States' operation of the Project if, for example, federal mismanagement of the Project's water imposes Article VII restrictions on upstream reservoirs more often than would otherwise have occurred. In addition, Colorado and New Mexico both gain important benefits from Article VI's provisions wiping out their accrued debits in case of an actual spill of water from the Project, which is less likely to occur when the United States has mismanaged the Project.

III. NEW MEXICO HAS STANDING TO ASSERT ITS RIGHTS UNDER THE COMPACT, INCLUDING THE RIGHT TO PROTECT ITS APPORTIONMENT FROM INTERFERENCE BY THE UNITED STATES.

The United States next argues that, even if it did waive its immunity to suit on New Mexico's counterclaims, New Mexico still lacks standing to assert all of its counterclaims except counterclaim 3, which seeks relief based on the United States' unlawful release of New Mexico's credit water from Project storage. U.S. Br. at 22. The United States argues New Mexico asserts no concrete, particularized State interest, distinct from the generalized interests of its citizens, to support its standing to bring these claims, and that New Mexico lacks standing to assert claims against the United States on the basis of its *parens patriae* representation of its citizens since the United States also represents those same citizens *parens patriae*. *Id*. at 23.

The United States' arguments are unavailing, and New Mexico possesses standing to assert each of its counterclaims. As an initial matter, New Mexico disputes that the United States' standing arguments are even appropriate in this context because a party to an interstate compact always has standing to enforce it. Even if New Mexico is required to establish injury in fact, New Mexico can easily make this showing. New Mexico is not only alleging that its citizens have been harmed by the federal acts or omissions New Mexico details in its counterclaims, but also seeks, through its counterclaims, to protect its own sovereign interest in defending the rights it acquired under the Compact and its sovereign interest in waters within its borders. Whether on the basis of its own sovereign interests or the interests of its citizens *parens patriae*, New Mexico has standing to assert these claims against the United States.

A. New Mexico Is Not Required to Show Injury to Enforce the Compact.

The doctrine of standing has evolved to implement and define the Constitutional limitation on federal court jurisdiction to "Cases" and "Controversies." *Massachusetts v. E.P.A.*, 549 U.S.

497, 516 (2007). "At bottom, 'the gist of the question of standing' is whether petitioners have 'such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination.'" *Id*. at 517 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). To establish standing, a litigant must demonstrate it has suffered a concrete, particularized injury that is actual or imminent, that the injury is fairly traceable to the defendant, and that it is likely a favorable outcome will redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The United States appears to challenge New Mexico's ability to satisfy the first prong, arguing New Mexico has not suffered a concrete, particularized injury to its own interests. *See* U.S. Br. at 22-29.

New Mexico disputes that it is required to demonstrate that it has suffered any injury at all before it may bring claims to enforce the Compact. The Court has clearly held that a State need not demonstrate injury before it may obtain relief for violation of a decree or compact; it merely needs to demonstrate a violation of the same. In *Colorado v. Wyoming*, 309 U.S. 572 (1940), the Court disallowed Colorado from defending against a claim of overuse under the Laramie River Decree by Wyoming on the basis that Wyoming had not been injured. The Court stated that "Colorado is bound by the decree not to permit a greater withdrawal and, if she does so, she violates the decree and is not entitled to raise any question as to the injury to Wyoming when the latter insists upon her adjudicated rights. If nothing further were shown, it would be our duty to grant the petition to Wyoming and to adjudge Colorado in contempt for her violation of the decree." *Id*. at 581. Similarly, in *Nebraska v. Wyoming*, the Court held that, "[i]n an enforcement action [for a compact or apportionment decree], the plaintiff need not show injury." 507 U.S. 584, 592 (1993)

(citing *Wyoming v. Colorado*, 309 U.S. at 581). "When the alleged conduct is admitted, the only question is whether that conduct violates a right established by the decree." *Id*.

For purposes of resolving a Rule 12(c) motion, the Court is required to accept New Mexico's factual allegations as true and to draw favorable inferences therefrom. *Bank of New York*, 607 F.3d at 922. Because New Mexico has alleged facts tending to show violations of the Compact, there should be no question whether New Mexico can demonstrate a concrete, particularized injury to its interests. "[T]he only question is whether that conduct violates a right established by the [Compact]." *Nebraska v. Wyoming*, 507 U.S. at 592.

B. New Mexico Has Alleged Injury to Its Sovereign Interests and Prerogatives.

If New Mexico is, nonetheless, required to establish injury in fact to show it possesses standing to bring its counterclaims, it can easily do so. The Court has recognized that "States are not normal litigants for the purposes of invoking federal jurisdiction." *Massachusetts v. E.P.A.*, 549 U.S. at 518. A State "has an interest independent of and behind the titles of its citizens in all the earth and air within its domain." *Id*. at 518-19 (quoting *Georgia v. Tennessee Copper Co.*, 206 U.S. 230, 237 (1907)). In *Massachusetts v. E.P.A.*, the Court found Massachusetts had standing to challenge the Environmental Protection Agency's failure to regulate greenhouse gas emissions under the Clean Air Act based on the State's "independent interest" in "preserv[ing] its sovereign territory," *id*. at 519, not, as the United States mistakenly asserts, based on Massachusetts's allegation that state-owned lands were threatened by rising sea levels, U.S. Br. at 23. The State's ownership of coastal lands "only reinforces the conclusion that its stake in the outcome of this case is sufficiently concrete to warrant the exercise of federal judicial power." *Massachusetts v. E.P.A.*, 549 U.S. at 519.

Here, New Mexico has alleged injury to at least two of its sovereign interests. First, just as the Court has recognized that States have a sovereign interest in "all the earth and air" within their domains independent from the interests of their citizens, *id*. at 518-19, it has also recognized that the power to "control navigation, fishing, and other public uses of water 'is an essential attribute of sovereignty.'" *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)). New Mexico acknowledges that its ratification of the Compact imposes obligations and restrictions on its sovereignty that would not otherwise exist, but, as the United States itself has argued, U.S. Reply on Exceptions at 3-14, the Compact merely modified, but did not extinguish, New Mexico's sovereignty over water in the Lower Rio Grande. As such, New Mexico has a sovereign interest in ensuring that the United States complies with the Compact and state and federal law in its distribution of water in the Lower Rio Grande, and New Mexico has standing to vindicate that interest.

Once again, the Court considered a similar situation in *Nebraska v. Wyoming*, where it succinctly explained why the United States is simply incorrect that New Mexico's only cognizable interest is as *parens patriae* on behalf of its citizens:

> Although [Wyoming's] claim may well require consideration of individual contracts and compliance with the Reclamation and Warren Acts, it does not follow (as Nebraska and the United States argue) that Wyoming is asserting the private contractors' rights proper, or (as the United States contends) that Wyoming brings suit in reality for the benefit of particular individuals. Wyoming argues only that the cumulative effect of the United States' failure to adhere to the law governing the contracts undermines the operation of the [D]ecree, and thereby states a claim arising under the [D]ecree itself, one by which it seeks to vindicate its *quasi-sovereign* interests which are independent of and behind the titles of its citizens . . . .
>
> 515 U.S. at 20 (internal quotations omitted) (emphasis in original).

Second, New Mexico—not its citizens, and not Elephant Butte Irrigation District ("EBID")—is a signatory to the Compact and has a sovereign interest in protecting the rights it

acquired under the Compact. When a state sues to enforce a compact, it sues in a proprietary capacity, "much like a private party suffering a direct, tangible injury." *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000) (citing *Texas v. New Mexico*, 482 U.S. 124, 126 (1987)). The United States' argument that New Mexico cannot show it has suffered injury distinct from the injuries suffered by its citizens because New Mexico is not a Project beneficiary, receives no Project allotment of water, and is not a party to the 2008 Operating Agreement, U.S. Br. at 22-29, is, at its core, not an argument about standing but an argument that the Project is not integral to the Compact, which is directly contradictory to this Court's opinion in *Texas v. New Mexico*, 138 S. Ct. at 959. The United States' argument is inconsistent with the Court's ruling in this case, fails as a matter of Compact interpretation, and should be rejected by the Court.

C. New Mexico Also Has Standing as *Parens Patriae* on Behalf of Its Citizens.

Although New Mexico has standing to pursue its counterclaims based on its own sovereign interests, New Mexico also has standing to sue the United States as *parens patriae*. The United States believes this is incorrect, arguing the Court's decisions in *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592 (1982) and *Massachusetts v. Mellon*, 262 U.S. 447 (1923) prohibit a State from suing the United States in its capacity as *parens patriae* because, as between those parties, the United States, not the State, represents citizens *parens patriae*. U.S. Br. at 23. The Court considered and rejected this exact argument in *Massachusetts v. E.P.A.*, where it held that *Mellon* and *Alfred L. Snapp & Sons* only prohibit States from suing the United States as *parens patriae* when the State is attempting "to protect her citizens from the operation of federal statutes," not when the State is attempting "to assert its rights under federal law (which it has standing to do)." 549 U.S. at 520 n.17 (citing *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945)). This is exactly what New Mexico seeks to do by its counterclaims. New Mexico "does not here

dispute that the [Compact] *applies* to its citizens; it rather seeks to assert its right under the [Compact]." *Id*. There is no basis for finding New Mexico lacks standing to assert its claims, either to protect its own interests or the interests of its citizens.

D. The Compact Apportions Water to New Mexico in the Lower Rio Grande and Protects New Mexico's Apportionment.

New Mexico has a concrete, particularized interest in the enforcement of the Compact not only because New Mexico is a signatory to the Compact, but also because the Compact affords benefits and protections to New Mexico in the Lower Rio Grande. The injury New Mexico has suffered here is a direct result of the United States' acts or omissions that collectively deprive New Mexico of these Compact benefits. This injury is more than sufficient to support New Mexico's standing to assert each of its counterclaims.

A great deal of briefing, time, and expense has already been expended in this case to secure a ruling from this Court that the Compact does, in fact, apply in the Lower Rio Grande, and that the mechanism of its application is the Compact's incorporation of, or reliance on, the Downstream Contracts and the Project. The United States' current position stands in stark opposition to the Court's ruling as it seeks, essentially, to argue the opposite position: that the Compact does not incorporate or rely on the Downstream Contracts and the Project in the Lower Rio Grande, at least not so far as New Mexico is concerned. In the United States' cramped reading of the Compact, it imposes only duties on, and confers no benefits to, New Mexico in the Lower Rio Grande. Specifically, the United States argues New Mexico has no interest in water in the Lower Rio Grande, and therefore no standing to protect such interest, because New Mexico is not a Project beneficiary and receives no allotment of Project water. U.S. Br. at 25. The United States seems to believe New Mexico's only possible interest in the disposition or use of water in the Lower Rio Grande is in authorizing its citizens to "interfer[e] with Project deliveries," which the United States

argues New Mexico agreed not to do when it ratified the Compact. *Id*. at 26-27. Consistent with this overly restrictive interpretation of the Compact, the United States argues New Mexico has no interest in the 2008 Operating Agreement because it is not a party to that agreement and receives no Project water. *Id*. at 27-28.

The United States' arguments entirely miss the point. New Mexico's counterclaims are not premised on some alleged interest in "captur[ing] or interfer[ing]" with the Project's water releases. U.S. Br. at 27. Nor does New Mexico argue that its interest is based on New Mexico's direct receipt of Project water. The United States forgets that this Court has ruled that the Compact apportions water in the Lower Rio Grande by relying on or incorporating the Downstream Contracts and the Project. *Texas v. New Mexico*, 138 S. Ct. at 959. While New Mexico does not hold contracts for the delivery of Project water or receive Project water for use on state-owned lands or facilities, New Mexico did receive an apportionment of water under the Compact, and has a concrete, cognizable interest in protecting that apportionment. New Mexico's counterclaims seek to protect its apportionment and to hold the United States accountable for its actions in the Lower Rio Grande that interfere with and undermine that interest. New Mexico has standing to assert these claims.

The Compact's preamble states that the purpose of the Compact is to "effect[] an equitable apportionment" of the "waters of the Rio Grande" from its headwaters to Fort Quitman among the signatory states of Colorado, New Mexico, and Texas. The Compact's apportionment of water to New Mexico is divided into two parts: first, that part of New Mexico's apportionment it receives above Elephant Butte Dam, and second, that part of New Mexico's apportionment that is received below Elephant Butte Reservoir from Rio Grande Project ("Project") deliveries. The Compact's delivery of a part of New Mexico's apportionment via the Project is unique, but this is still water

that, as the Court recognized, is apportioned to New Mexico. *Id*. The United States acknowledged at oral argument that New Mexico's "Compact apportionment [is] under the reservoir," Oral Arg. Tr. at 9:25 to 10:1, and it further admits it delivers Project water to "southern New Mexico," U.S. Br. at 25. This is tantamount to an admission that the United States delivers part of New Mexico's apportionment via the Project and owes duties to New Mexico related to this delivery. This water is part of New Mexico's Compact apportionment, and New Mexico has a sovereign interest in enforcing the Compact and protecting its apportionment of water in the Lower Rio Grande from interference by others, including the United States.

Moreover, if the United States were correct that, because New Mexico is not a direct beneficiary of the Project and does not itself take delivery of Compact water, the State has no standing to protect its Compact apportionment, U.S. Br. 25-26, then Texas, which also does not receive direct deliveries of Project water, also lacks standing to protect its apportionment, and its complaint should be dismissed. Clearly this is not the case, nor does the United States cite any cases where a State was found to have standing to enforce a compact only where it could show state lands or agencies received direct deliveries of apportioned water. On the contrary, in *Nebraska v. Wyoming*, the Court recognized that Wyoming was not a party to any contracts for storage water from federal reservoirs on the North Platte, and yet it allowed Wyoming to pursue its claims against the United States because "Wyoming's claim derives not from rights under individual contracts but from the [D]ecree." 515 U.S. at 21.

The United States cites no cases holding that States lack standing to enforce compacts or other agreements to which they are parties. The Court has recognized that "enforcement of [a] [c]ompact [is] of such a general public interest that the sovereign State [is] a proper plaintiff." *Texas v. New Mexico*, 482 U.S. 124, 132 n.7 (1987). Moreover, an interstate compact, though a

federal law, is also a contract. *Tarrant*, 569 U.S. at 628. "'[A] party to a breached contract has a judicially cognizable interest for standing purposes, regardless of the merits of the breach alleged.'" *Stuart v. State Farm Fire and Casualty Co.*, 910 F.3d 371, 377 (8th Cir. 2018) (quoting *Kuhns v. Scottrade, Inc.*, 868 F.3d 711, 716 (8th Cir. 2017) (internal quotation omitted)). New Mexico has standing to enforce the Compact.

EBID Does Not Represent the Interests of All New Mexico Water Users in the Lower Rio Grande.

The United States further argues that New Mexico has no interest arising from the 2008 Operating Agreement to support its standing to bring claims against the United States because, again, New Mexico receives no Project water, and because EBID, not New Mexico, is a party to the 2008 Operating Agreement. U.S. Br. at 27-28. The United States has this exactly backwards.

New Mexico does not claim an interest arising out of the 2008 Operating Agreement, but rather out of the Compact itself. The fact that New Mexico is not a party to the 2008 Operating Agreement does not demonstrate that New Mexico's counterclaim is defective, but that the 2008 Operating Agreement is. The United States executed an agreement that alters the historical distribution of water from the Project—water apportioned by the Compact—with two state political subdivisions who are not parties to the Compact, without the formal participation of any of the actual parties to the Compact, and when the United States itself is not a party to the Compact. EBID and El Paso County Water Improvement District No. 1 ("EPCWID") do not represent all water users in the Compact areas of their respective states below Elephant Butte Reservoir and lack the actual or apparent authority to modify the Compact's apportionment of water. The United States' execution and adoption of the 2008 Operating Agreement does just that and is a serious violation of the Compact and the United States' legal responsibilities thereunder. New Mexico absolutely has standing to assert claims against the United States on this basis.

New Mexico is also compelled to address the United States' insinuation that, because EBID "is not complaining of any injury to its interests and it does not challenge the Operating Agreement to which it is a signatory," *id*. at 28, that New Mexico's allegations of injury stemming from the 2008 Operating Agreement are fabricated or overblown. The Court, for purposes of this motion, is required to accept New Mexico's factual allegations as true, and New Mexico has adequately alleged that, by implementing the 2008 Operating Agreement, including its diversion ratio and carryover storage provisions, the United States has reduced New Mexico's apportionment of water under the Compact. New Mexico Counterclaims paras. 45, 48, 51, 77. This is sufficient to state a prima facie case of injury.

Even if EBID believes the injuries the 2008 Operating Agreement inflicts on its members and on New Mexico as a whole are outweighed by other purported benefits of the agreement, EBID does not represent the State of New Mexico or even all water users in the Lower Rio Grande. EBID represents only its members. EBID does not represent the municipal, industrial, or domestic water users in the Lower Rio Grande, including but not limited to water users in the City of Las Cruces, New Mexico's second largest municipality. As New Mexico has alleged, the 2008 Operating Agreement, by reducing deliveries of Project surface water to EBID lands, has forced EBID farmers to increase the pumping of groundwater to avoid losing their farms and livelihoods. *Id*. para. 52. This additional pumping has the potential to interfere with the groundwater supplies relied on by the non-farm businesses and communities in the Lower Rio Grande. Because EBID does not represent the interests of anyone other than its farmer members, it did not consider the impacts to municipal and business interests when signing the 2008 Operating Agreement. New Mexico, on the other hand, represents and balances the interests of all of its citizens in the Lower Rio Grande. For this reason, EBID's execution of the 2008 Operating Agreement and failure to

protest it in this or any other case should not be taken as proof that New Mexico's claims are exaggerated.

New Mexico's counterclaims allege the United States has violated the Compact either directly, by operating the Project in a manner inconsistent with the requirements of Articles VI or XIV, or by operating the Project in a manner that departs from the assumptions on which the Compact was based, namely the historical apportionment stated in the Downstream Contracts and implemented in the Project's historical operations. These violations harm New Mexico's own sovereign interests in receiving the benefits it bargained for in the Compact and ensuring the Compact operates as intended. As a party to the Compact, New Mexico has standing to assert its counterclaims against the United States to enforce the Compact and protect its apportionment.

IV. NEW MEXICO'S COUNTERCLAIMS ALL STATE VALID CLAIMS FOR RELIEF AGAINST THE UNITED STATES.

The United States argues that, even if New Mexico has standing to assert its claims and the Court has jurisdiction over those claims, all but one of New Mexico's counterclaims should still be dismissed because New Mexico has failed to allege claims for which relief could be granted. The United States' arguments are unavailing. Accepting New Mexico's factual allegations as true and drawing reasonable inferences therefrom, as the Court must, *Wood,* 572 U.S. at 755 n.5; *Bank of New York*, 607 F.3d at 922, it is clear New Mexico has stated plausible claims for relief in each of its counterclaims.

A. New Mexico's Second Counterclaim Should Proceed Because the Compact Apportions Water in the Lower Rio Grande by Incorporating the Project, and the United States Has Violated that Apportionment.

The United States argues New Mexico's second counterclaim should be dismissed because it is premised entirely on the allegedly mistaken legal conclusion that the Compact requires the United States to allocate equal water to each acre of land enrolled in the Project, regardless of the

state in which it is located. U.S. Br. at 30. Arguing the Compact requires "no such thing," the United States asserts the Compact's only requirement is that New Mexico deposit water in Elephant Butte Reservoir pursuant to Article IV, whereupon it becomes "usable water" in "project storage," as defined in Articles I(l) and I(k), respectively, and must be distributed accordingly. *Id*. Because, the United States argues, New Mexico's second counterclaim rests entirely on the "demonstrably erroneous" claim that the Compact requires the United States to allocate Project water on an equal basis to all Project lands, New Mexico has failed to state a claim for relief and its second counterclaim should be dismissed. *Id*. at 31. The United States misreads both New Mexico's second counterclaim and the Compact.

As an initial matter, the United States is simply incorrect that New Mexico's second counterclaim is premised solely on the theory that the Compact requires the United States to deliver equal water to each Project acre. Rather, New Mexico has alleged that the United States has duties imposed by the Compact, a conclusion the Court also reached in *Texas v. New Mexico*. 138 S. Ct. at 959. As just one example of these duties, New Mexico alleges "the Compact requires the United States to allocate Project water on an equal basis to each Project acre." New Mexico Counterclaims para. 73. This is not the only or even the primary duty New Mexico alleges the Compact imposes on the United States. New Mexico's chief allegation is that the United States "may not alter Project operations or accounting in a manner that materially changes the Compact's apportionment," *id*. para. 74, but that it has, in fact, done so, *id*. para. 75. Paragraphs 75 and 76 set out in detail the manner in which the United States has altered the Compact's apportionment by significantly changing Project operations. By adopting these changes, the United States has "reduced allocations of Project water to New Mexico compared to allocations under historic

Project operations," *id*. para. 77, has "unilaterally changed the bargain on which the Compact was based and has unilaterally reduced the amount of New Mexico's apportionment," *id*. para. 78.

An accurate reading of New Mexico's second counterclaim clearly demonstrates it is not premised solely on the theory that the Compact requires water to be distributed equally to each Project acre. It is instead based on the undeniable conclusion, which the Court has endorsed, that the Compact apportions the Rio Grande south of Elephant Butte Reservoir, *see Texas v. New Mexico*, 138 S. Ct. at 959, and the wholly unobjectionable premise that the United States, which is not a party to the Compact, may not alter the Compact's apportionment without the consent of the Compacting States. All other allegations in New Mexico's second counterclaim are factual and should be assumed to be true for purposes of resolving a motion for judgment on the pleadings. *Wood*, 572 U.S. at 755 n.5. New Mexico's second counterclaim states a plausible claim for relief and should be allowed to proceed.

The Compact Establishes the Apportionment of Water in the Lower Rio Grande.

In addition to misreading New Mexico's second counterclaim, the United States attempts to support its argument for the counterclaim's dismissal by pushing a cramped and unrealistic reading of the Compact and federal responsibilities thereunder that is foreclosed by the Court's decision in *Texas v. New Mexico* and the text of the Compact itself. The United States argues that all the Compact requires in the Lower Rio Grande is for New Mexico to deliver water to Project storage according to the schedule established in Article IV, whereupon that water becomes usable water to be distributed by the Project. U.S. Br. at 30. That water is then distributed pursuant to the Downstream Contracts and the 2008 Operating Agreement, and, according to the United States, "[n]othing in the Compact itself prescribes an equal per-acre allocation" of Project water, or

presumably any other method of allocation. *Id*. at 31. The United States' reading of the Compact ignores the text of the Compact and the Court's ruling in *Texas v. New Mexico*.

The Compact is not silent on the distribution of water in the Lower Rio Grande to New Mexico and Texas; in fact, the Compact addresses this issue in at least two places. First, the Compact's preamble states that the purpose of the Compact is to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." This makes it clear that *the Compact* apportions all the waters of the Rio Grande, including between Elephant Butte Dam and Fort Quitman, as the Court has recognized. *Texas v. New Mexico*, 138 S. Ct. at 959.

Second, the Compact addresses the method of this apportionment in the Lower Rio Grande in Article I(l). That provision defines the term "usable water" 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." Article I(l) provides that Project water is to be released for one of two purposes: either to meet irrigation demands, or to be delivered to Mexico pursuant to the 1906 Convention. The phrase "in accordance with irrigation demands" also describes how usable water is to be released and divided between Texas and New Mexico lands. Irrigation demands occur primarily during the irrigation season and based on the crop demands within the defined area. Simply based on the text of Article I(l) itself, it is clear that the United States can only release and deliver water to meet "irrigation demands" within the Project areas in New Mexico and Texas.

The Compact further describes a "normal release" from Project storage as 790,000 acre-feet per year. Compact Art. VIII. The calculation of this normal release will be provided in testimony at trial, but the historical context is clear: 790,000 acre-feet per year was derived, not surprisingly, from irrigation demands within the Project area. Contrary to its arguments in its brief,

the United States previously admitted in sworn testimony that "[t]he allocation has historically been *equally divided to all Project lands on an acre foot per acre basis*," and that during the time that the United States made direct deliveries to farms (prior to 1980) "*each acre of farm land received an equal amount of water* regardless of the source of the water or what district the land was located." Declaration of Filiberto Cortez, April 20, 2007, Exhibit to United States' Response in Opposition to Plaintiff's Application for Preliminary Injunction at 2, *El Paso County Water Improvement Dist. No. 1. v. Elephant Butte Irrigation Dist. and United States*, No. 07-CV-0027 (W.D. Tex. Apr. 23, 2007) (emphasis added). For the United States to now claim in its brief at page 31 that New Mexico's second counterclaim should be dismissed because it is "wholly unsupported" ignores the United States' own prior statements regarding the Project, the operation of which is incorporated into the Compact.

That the Compact requires the United States to release water in accordance with irrigation demands and make Project allocations based on each acre receiving an equal amount of water is also supported by the Court's holding that the Compact incorporates or relies on the Downstream Contracts to effectuate the apportionment in the Lower Rio Grande. Recognizing that the Compact apportions the waters in the Lower Rio Grande between Elephant Butte Reservoir and Fort Quitman, Texas, the Court held that the Compact "achieve[s] that purpose" via the Downstream Contracts, "in which [the United States] assumed a legal responsibility to deliver a certain amount of water" from the Project. *Texas v. New Mexico,* 138 S. Ct. at 959. According to the Court, the United States is "charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Id*. (quotation omitted). In other words, "the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *Id*. Regardless

of the precise legal theory of incorporation relied upon, it is clear the Court endorsed the view that the Compact's apportionment is further defined by the Downstream Contracts.

The Downstream Contract between EBID and EPCWID, and approved by the United States, that was executed February 16, 1938—just before the Compact's execution in March 1938 ("1938 Downstream Contract")[4]—contains the following provision:

> It is further agreed and understood that in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within El Paso County Water Improvement District No. 1, and 88/155 to the lands within the Elephant Butte Irrigation District.

From this, it is clear that, at least when the Project cannot deliver a full supply of irrigation water to all lands enrolled within the Project,[5] it is obligated to deliver water "in the proportion 67/155" to lands within EPCWID, and "88/155" to lands within EBID. These ratios are based upon the number of acres enrolled within the Project in each district (88,000 acres in EBID in New Mexico and 67,000 acres in EPCWID in Texas), and hence each State. This requires the Project to allocate water between the districts, and, therefore, the States, on the basis of irrigable Project acres in each State. This provision is consistent with the Compact's requirement in Article I(l) that the Project release and deliver water in accordance with "irrigation demands." It further defines the apportionment of water between New Mexico and Texas established by the Compact—the United States will deliver 88/155, or 57%, of Project water to lands in New Mexico, and 67/155, or 43%, to lands in Texas, less the water delivered to Mexico pursuant to the 1906 Convention.

This 57%/43% allocation of delivered Project water is the apportionment of Rio Grande water to southern New Mexico and Texas established by the Compact. The United States'

[4] This agreement is attached to the May 8, 2018 letter from Texas and the United States to the Special Master regarding the Downstream Contracts.

[5] When the Project does have sufficient water to deliver a full supply to all Project lands, there is no basis for delivering more water to any acre than can be used thereon.

fulfillment of this duty is, therefore, "essential to the fulfillment of the Compact's expressly stated purpose" of equitably apportioning the waters of the Rio Grande in the Lower Rio Grande. *Texas v. New Mexico,* 138 S. Ct. at 959. New Mexico alleges the United States has breached this duty, and has altered or interfered with the Compact's apportionment of water in the Lower Rio Grande, by adopting and operating the Project according to the 2008 Operating Agreement. New Mexico Counterclaims paras. 74-78.

That equal amounts of water is delivered to each Project acre is further confirmed by the United States' decades-long course of performance in operating the Project and implementing the Compact and the 1938 Downstream Contract. This Court has recognized that "course of performance under [a] Compact is highly significant" for purposes of determining compliance. *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010). Here, the United States' course of performance was confirmed in a brief it filed in the United States District Court for the Western District of Texas, whereby the United States asserted that, "before 1980, the districts were not allocated water at all. Reclamation operated the . . . Project in its entirety, combining storage and return flows so that *each acre of farm land received an equal amount of water regardless of the source of the water or what district the land was located*." United States' Response in Opposition to Plaintiff's Application for Preliminary Injunction at 9, *El Paso County Water Improvement Dist. No. 1. v. Elephant Butte Irrigation Dist. and United States*, No. 07-CV-0027 (W.D. Tex. Apr. 23, 2007). The Compact's drafters were intimately familiar with the Project's operations and factored this into their decision to rely on the Compact to distribute apportioned water to southern New Mexico and Texas. *See, e.g.*, Letter from Frank Clayton to Sawnie Smith (Oct. 4, 1938), N.M. Mot. to Dismiss at App. 32 (Apr. 30, 2014) ("[T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio

Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according to the areas involved in the two States.")

As the United States' brief in the Western District of Texas states, it continued to deliver equal water to each Project acre for decades following the Compact's adoption. Even following the irrigation districts' assumption of responsibility for delivering Project water from river headgates to Project lands in 1980, Reclamation still allocated water to each district in the proportion of 57% to lands in New Mexico and 43% to lands in Texas, as required by the 1938 Downstream Contract, with the irrigation districts assuming responsibility to deliver equal water to each acre within their respective jurisdictions. *See id*. at 10-11. Significant changes to Project operations began in 2006 (which lead to the 2008 Operating Agreement), and the United States noted in 2007 that these changes resulted in an allocation that was "almost an exact reversal of the 1938 contractual agreement between the districts awarding 67/155 (or 43%) to EPCWID and 88/155 (or 57%) to EBID." *Id*. at 13 (emphasis in original). Despite acknowledging its obligations under the 1938 Downstream Contract and the departure caused by carryover storage and the reallocation of Project water from EBID to EPCWID, the United States nonetheless elected to adopt the 2008 Operating Agreement and materially deviate from its historical, Compact-mandated process of allocating water between the States on the basis of Project acres in each State.

New Mexico's allegation is that the United States has interfered with and no longer abides by the Compact's apportionment in its distribution of water from the Project. This raises questions of fact that must be resolved in New Mexico's favor, not a question of law as the United States asserts. New Mexico's second counterclaim should be allowed to proceed.

B. The Water Supply Act Applies to the Project and Prohibits the Major Operational Changes the United States Has Made to Project Operations.

The United States argues New Mexico's fifth counterclaim fails to state a claim for relief because the WSA, 43 U.S.C. § 390b(e), does not apply to the Project. U.S. Br. at 32. The United States' chief theory in support of this position is that it executed contracts with the districts pursuant to the Reclamation Project Act of 1939, 43 U.S.C. § 485 *et seq*. ("RPA"), and the WSA, by its terms, "is an alternative to and not a substitute for the provisions of the [RPA]." U.S Br. at 32 (quoting 43 U.S.C. § 390b(b)). The United States also suggests the WSA does not apply to the Project because it was enacted well after the Project was constructed. *Id*. at 32 n.7. Contrary to the United States' argument, it is simply not the case that reservoir projects are governed either by the WSA or the RPA, but not both. A careful reading of the WSA and the RPA shows the WSA applies to any major operational changes to the Project to include storage for municipal and industrial water and precludes the United States from making any such changes without Congressional approval.

The WSA, 43 U.S.C § 390b(b), allows either the U.S. Army Corps of Engineers or Reclamation to include storage in reservoir projects "for present or anticipated future demand or need for municipal or industrial water." But when modifications to reservoir projects are made to include municipal and industrial storage as authorized by subsection (b), subsection (e) requires Congressional approval to the extent that those modifications "would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or . . . would involve major structural or operational changes." *Id*. The United States' adoption of the 2008 Operating Agreement, in particular its carryover storage provision, seriously affects the Project's purposes and involves major structural or operational changes.

The United States correctly points out that the WSA provides that its provisions "shall be alternative to and not a substitute for the provisions of the [RPA] relating to the same subject." *Id.* § 390b(b). What the United States' argument overlooks is the final five words of that provision—that the WSA does not apply, or rather is "alternative to," the RPA *only* to the extent the RPA contains provisions "relating to the same subject." *Id.* Nothing in the RPA either (1) provides for the inclusion of storage in reservoir projects for municipal or industrial water or (2) directly governs modifications to reservoir projects. Because the RPA contains no provisions "relating to the same subject" as 43 U.S.C. § 390b(e), that statute fully applies to the Project.

As Section 1 of the RPA states, the RPA provides for the revision or undertaking of "obligations to pay construction charges" for federal reclamation projects for the purposes of providing a "feasible and comprehensive plan for an economical and equitable treatment of repayment problems and for variable payments of constructions charges which can be met regularly and fully from year to year," as well as for adequately protecting "the financial interest of the United States in said projects." 43 U.S.C. § 485. This statement of purpose evinces a singular focus on the financing and repayment aspects of reclamation projects. The other provisions of the RPA are all similarly focused on financing and repayment of reclamation projects, not modifications to reservoir projects to include storage for municipal or other uses.

Section 3 of the RPA, 43 U.S.C. § 485b, concerns the "amendment of existing repayment contracts" and authorizes the Secretary of Interior to amend such contracts "so as to provide that the construction charges remaining unaccrued on the date of the amendment, or any later date agreed upon, shall be spread in definite annual installments on the basis of a longer definite period fixed in each case by the Secretary." This provision of the RPA does not conflict with the Congressional-approval provision of the WSA because it does not govern modifications to projects

to reallocate water to new uses or users or to make physical or operational changes to the project itself, as 43 U.S.C. § 390b(e) of the WSA does. It only applies to contract amendments relating to the payment of project construction charges. *See also* 43 U.S.C. § 485a (defining "construction charges" and "repayment contract," among other things). The RPA may occupy the field of repayment contract amendments related to the payment of construction charges and make the WSA inapplicable in that context, but by its terms it does not affect any other types of reservoir project modifications.

The RPA, at 43 U.S.C. § 485h(c)(1), similarly authorizes the Secretary to enter into repayment contracts to furnish water for municipal water supply "or miscellaneous purposes" so long as these agreements "require repayment to the United States" or otherwise charge rates sufficient to cover an appropriate portion of operation and maintenance and repayment costs, and are for a term of 40 years or less. That authorization does not conflict with the provisions in the WSA that authorize Reclamation to "include" storage in a reservoir project for municipal or industrial uses. Execution of repayment contracts does not necessarily include physical or operational modifications to existing projects to reallocate storage for municipal or industrial water. Nor can the 2008 Operating Agreement fairly be characterized as a repayment contract under § 485h(c)(1), since it requires no payments and has a term of 42 years, 2008 Operating Agreement § 6.6, and since the costs of the Project were fully repaid in approximately 1980.

Simply put, nothing in the RPA "relat[es] to the same subject" as the provisions of 43 U.S.C. § 390b of the WSA governing reservoir project modification. This is why the United States' citation to *Bean v. United States*, 163 F. Supp. 838, 844 (Ct. Cl. 1958), is misplaced. The United States implies *Bean* held the Project is subject to the RPA but not the WSA, U.S Br. at 32-33 (citing *Bean*, 163 F. Supp. at 844). The opinion in that case, issued just thirteen days after the

WSA was enacted, does not mention or otherwise apply the WSA because all of the facts at issue in the case predated the WSA's enactment. Also, the case concerned only the "limited question" of whether Hudspeth County Conservation and Reclamation District held any water rights in the Rio Grande by virtue of the United States' appropriations for the Rio Grande Project in 1906 and 1908. *Bean*, 163 F. Supp. at 839. The opinion's description of EBID's and EPCWID's contracts being executed pursuant to the RPA, while accurate, is not helpful to determining the extent to which the WSA supplements the RPA and the other statutes that apply to the Project. Therefore, *Bean* provides no basis to conclude, based on the exclusion in 43 U.S.C. § 390b(b), that 43 U.S.C. § 390b's provisions on reservoir project modification do not apply to the Project.

Nor does the fact that the Project was authorized and constructed prior to the WSA's enactment mean the WSA, ipso facto, does not apply to the Project. Applying the United States' logic, the fact that the Project was originally authorized under the provisions of the Reclamation Act of 1902 would preclude any subsequent enactment from affecting any aspect of the Project, including the RPA. But as the United States acknowledges, the RPA authorized changes to the districts' Project repayment obligations. The United States provides no rationale for why the WSA would not also apply to the Project. The WSA contains no language suggesting it extends only to reservoir projects originally constructed after its enactment in 1958. Indeed, other courts have heard claims arising under the WSA on projects authorized and constructed before, but modified to include storage for new uses after, enactment of the WSA. *See, e.g.*, *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1324 (D.C. Cir. 2008) (reallocation of 22% of storage in Corps of Engineers project authorized in 1946 and constructed in 1956 constituted a "major operational change" that required Congressional approval under the WSA); *In re Application of City and Cty. of Denver, Acting By and Through Its Bd. of Water Comm'rs*, Case Nos. 2782, 5016, 5017, 1989

WL 128576 (D. Colo. Oct. 23, 1989) (finding Denver's application to change the point of diversion for Green Mountain Reservoir, which was authorized in 1937 and constructed between 1938 and 1942, would constitute a "major operational change" that would require Congressional approval under the WSA).

Geren is particularly relevant here. In *Geren*, the States of Alabama and Florida intervened in a lawsuit between the United States Army Corps of Engineers ("Corps") and various private interests after the Corps agreed to a settlement that would have, among other things, reallocated to municipal and industrial uses between 210,858 and 240,858 acre-feet in Lake Lanier, Georgia, a Corps project authorized and constructed before enactment of the WSA. 514 F.3d at 1319-20. The *Geren* court agreed a reallocation of this magnitude was a major operational change under the WSA that required congressional approval, and found the Corps had failed to secure such approval. *Id*. at 1324. There are clear parallels between the situation in *Geren*, where a federal agency agreed to a municipal reallocation in a federal reservoir project in derogation of the rights of States to a shared river system absent congressional approval, and the present situation, where the Bureau of Reclamation executed a Project operating agreement that significantly changes annual accounting and releases from the reservoir based on annual irrigation demands and allocates hundreds of thousands of acre-feet of capacity to carryover storage in Project reservoirs (which benefits municipal water suppliers), in derogation of the Compact's apportionment and absent the approval of the States or Congress.

Because nothing in the RPA conflicts with 43 U.S.C. § 390b of the WSA with respect to modifications to reservoir projects to include storage for municipal and industrial use, the WSA applies to the Project. Accordingly, any modification that "would seriously affect the purposes for which the project was authorized, surveyed, planned, or constructed, or . . . would involve major

structural or operational changes," *id*. § 390b(e), requires Congressional approval. Permitting the use of Project water for non-irrigation uses, making changes to operations of the Project through the 2008 Operating Agreement, and performing accounting in ways that violate the Compact are major operational changes and seriously affect the purpose for which the Project was authorized—namely, irrigation. But more importantly, for purposes of this case, these changes materially alter the historical allocation of water between New Mexico and Texas, violating the apportionment established by the Compact and changing the bargain on which the Compact was based. For these reason, New Mexico's fifth counterclaim should be allowed to proceed.

C. New Mexico's Sixth Counterclaim Should Proceed Because New Mexico States a Claim Under the Compact, not the Administrative Procedure Act.

The United States argues New Mexico's sixth counterclaim fails to state a claim for relief because it fails to seek review of "any agency action, let alone final agency action" under the Administrative Procedure Act, 5 U.S.C. § 701 *et seq.* ("APA"), specifically 5 U.S.C. § 704, which, according to the United States, is the only possible basis for review of this claim. U.S. Br. at 34. The United States argues the actions alleged by New Mexico amount to "routine or programmatic accounting and water management practices" which are unreviewable under the APA. *Id*. at 35 (citing *Lujan v. National Wildlife Fed'n*, 497 U.S. 871 (1990)). The United States' argument is irrelevant because New Mexico does not assert its sixth counterclaim under the APA but under the Compact. *See* New Mexico Counterclaims para. 106.

While the Compact does not specifically address water accounting requirements for the Project, it incorporates the Project, requires the United States to distribute water "in accordance with irrigation demands," Art. I(l), and imposes a duty on the United States not to materially alter the Compact's apportionment of water in the Lower Rio Grande. Contrary to that duty, the United States has interfered with the Compact's apportionment through a variety of means, including but

not limited to its adoption of accounting practices that systematically harm New Mexico by reducing its apportionment of water from the Compact. New Mexico Counterclaims para. 107. Because New Mexico's sixth counterclaim concerns the United States' Compact duty to distribute apportioned water between New Mexico and Texas and whether the United States has breached that duty, it falls squarely within the scope of the waiver of immunity the United States made to questions concerning the interpretation and application of the Compact when it intervened in this case. Therefore, the United States' arguments concerning the APA are irrelevant, and New Mexico's sixth counterclaim should be allowed to proceed.

D. New Mexico's Seventh Counterclaim Also Arises under the Compact, not the APA, and Should Proceed.

The United States argues New Mexico's seventh counterclaim also cannot be brought under the APA because New Mexico fails to allege a discrete, final agency action in the form of a particular MPA contract or contracts that violate that statute. U.S. Br at 35-36. Further, the United States contends there is no requirement that New Mexico or any other Compact State must approve MPA contracts for water from the Project. *Id*. Once again, the United States' arguments are not on point.

Just as with New Mexico's sixth counterclaim, New Mexico's seventh counterclaim alleges the United States has a duty to operate the Project in a way that implements the Compact's apportionment, rather than impairing it. New Mexico Counterclaims para. 109 (alleging the United States "cannot take any actions or make any changes to Project operations that materially interfere with the Compact's apportionment"). Moreover, the Compact requires, in Article I(l), that usable water in Project storage be released "in accordance with irrigation demands." *See id*. para. 110. New Mexico's allegation is that the United States violated this duty, arising under the Compact, by making "unilateral determinations that Project water is available for non-irrigation

or non-Project uses," that providing water for such uses is not detrimental to the Compact's apportionment, *id*. para. 109, and that these contracts have, in fact, harmed New Mexico by reducing its apportionment, *id*. para. 112.

It is true that New Mexico has alleged that, in the process, the United States also violated the MPA. *Id*. para. 111. A necessary implication of the Compact's incorporation of, or reliance on, the Project to distribute apportioned water in the Lower Rio Grande is that the Project will be operated in accordance with applicable laws, including but not limited to the MPA. If the United States, which was operating the Project in compliance with applicable laws when the Compact was executed, begins to operate the Project in a manner that violates those laws and materially alters the Project's distribution of water in the process, it not only violates those laws but also upsets the bargain on which the Compact was based. However, the primary harm to New Mexico from the United States' actions—and, therefore, the principal allegation in New Mexico's seventh counterclaim—is that the United States' adoption of these agreements and distribution of water pursuant to them violates the Compact. *See id*. paras. 110, 111, 113, 114.

The United States also complains that New Mexico has, effectively, invented a legal requirement that the United States obtain New Mexico's approval prior to entering MPA contracts, which requirement appears nowhere in the MPA. U.S. Br. at 36-37. New Mexico concedes that this requirement does not appear in the MPA itself, but it is a necessary implication of the Compact's adoption that the United States cannot unilaterally modify it. *Cf. Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (because a compact is a federal law, "no court may order relief inconsistent with its express terms").

Here, New Mexico is alleging that, by executing MPA contracts with the City of El Paso and others to allow them to receive deliveries of Project water for non-Project uses, the United

States has effectively altered the Compact, changing the Project's distribution and therefore apportionment of water and distributing water for non-irrigation purposes in contravention of Article I(l) of the Compact, and that these actions have harmed New Mexico. N.M. Counterclaims at paras. 109-113. Because the Compact is an agreement among States, to which the United States is not a party, such modification of the Compact requires not only the consent of New Mexico, but also the consent of all Compact States. By failing to obtain such consent, the United States has violated the Compact, which it has no authority to modify.

Finally, the United States' argument that New Mexico failed to allege any final agency actions in the form of specific contracts the United States adopted is not relevant to New Mexico's seventh counterclaim because New Mexico is not pressing its claim under the APA but under the Compact. The United States presents no valid reason to dismiss New Mexico's seventh counterclaim.

E. New Mexico's Eighth Counterclaim Should Proceed Because the United States Has a Legal Duty to Maintain the Rio Grande in the Project Area.

New Mexico's eighth counterclaim alleges the United States has failed in its duties to maintain the mainstem of the Rio Grande by allowing accumulation of silt and other debris in the bed of the river and the growth of water consuming vegetation along its banks, and that these deficiencies have caused or increased the loss of water from the river, which losses are charged to New Mexico in contravention of the Compact. New Mexico's Counterclaims para. 117-120. The United States argues this counterclaim fails to state a claim for relief because New Mexico fails to identify any authority imposing responsibility for such maintenance on the United States. U.S. Br. at 37.

New Mexico's eighth counterclaim accurately alleged the nature and scope of the United States' duty to operate and maintain the Project. New Mexico's Counterclaims para. 117.

However, New Mexico acknowledges its eighth counterclaim could have set out in more detail the legal basis for this duty. New Mexico's eighth counterclaim nonetheless satisfies the *Iqbal* standard for sufficiency of the pleadings because New Mexico has pled "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This is particularly true on a Rule 12(c) motion, where the court is required to "draw[] all reasonable inferences in favor of the non-movant." *Wood*, 572 U.S. at 755 n.5. As discussed herein, the United States is legally required to maintain the Project, including the Rio Grande, and to ensure delivery of Project water to its intended recipients. But if the Court or Special Master finds the allegations in New Mexico's eighth counterclaim are insufficiently specific to allow the court to infer the United States has a legal duty to maintain the Project and is liable for the misconduct alleged, New Mexico requests that it be given leave to amend its pleadings to correct any such deficiency.

New Mexico's allegations in its eighth counterclaim rest on several separate sources of law requiring the United States to maintain the channel of the Rio Grande in the Project Area. Foremost among these is the Act of June 4, 1936, Pub. L. 74-648, 49 Stat. 1463 ("1936 Act"). The 1936 Act authorized the Rio Grande Canalization Project, which was designed to provide flood protection in the Lower Rio Grande and to help ensure the delivery of water to Mexico from the Project pursuant to the 1906 Convention. The 1936 Act directs the United States section of the International Boundary and Water Commission ("USIBWC") to "construct, operate, *and maintain*, in substantial accordance with the engineering plan contain in [a report to the U.S. Secretary of State], works for the canalization of the Rio Grande from the Caballo reservoir site in New Mexico to the international dam near El Paso Texas." *Id*. (emphasis added). The 1936 Act imposes a

specific legal obligation on the United States to maintain the channel of the Rio Grande between Caballo Reservoir and the International Dam.

In addition, 22 U.S.C. § 277b(a) authorizes the USIBWC to "construct any project or works which may be provided for in a treaty entered into with Mexico and to repair, protect, maintain, or complete works now existing" and to "operate and maintain any project or works so constructed." Subsection 277b(d) further authorizes the USIBWC to "make improvements to the Rio Grande Canalization Project."

The United States' primary legal obligations are found in the above authorities, but the Downstream Contracts also require the Bureau of Reclamation to maintain the Project, including the channel of the Rio Grande. The 1937 Downstream Contracts between the Districts and the United States[6] provide, in Article 9 thereof, that the "United States will continue the operation and maintenance of the [P]roject until otherwise provided." In 1980, the United States transferred ownership, as well as operational and maintenance responsibility for certain Project infrastructure, to the Districts. *E.g.*, Contract Between the United States of America Department of the Interior Water and Power Resources Service and El Paso County Water Improvement District No. 1 for the Transfer of the Operation and Maintenance of Project Works (Mar. 14, 1980). These contracts provide that responsibility for the maintenance of transferred works is also transferred to the Districts. *E.g.*, *id*. Art. 2. However, the United States retained legal responsibility for maintenance of the remainder of the Project, and specifically retained the duty to "insure delivery of [P]roject water supply allocated to the District[s] at District canal headings and other diversion points to be specified by the Contracting Officer, and at State line crossings." *Id*. Art. 6.b.

[6] These agreements are attached to the May 8, 2018 letter from Texas and the United States regarding the Downstream Contracts.

By failing to adequately maintain the Rio Grande and the Project's ability to deliver water via the Rio Grande, whether to the States or to Mexico, the United States breached its duty to "insure delivery of [P]roject water," *id*., and to "maintain . . . works for the canalization of the Rio Grande from the Caballo reservoir site in New Mexico to the international dam near El Paso Texas," 1936 Act. Because the Compact incorporates or relies on the Project to deliver apportioned water in in the Lower Rio Grande, this constitutes a breach of the Compact, not only because the United States is not delivering water to New Mexico that it should deliver, but also because the United States then further reduces its deliveries to New Mexico, under the 2008 Operating Agreement, to account for losses caused by the United States' own failure to maintain the Project. N.M. Counterclaims Para. 120.

Like New Mexico's other counterclaims, the eighth counterclaim alleges the United States has a duty under the Compact not to interfere with or impair New Mexico's apportionment of water; that the United States also has legal duties to maintain the Project and the Rio Grande and deliver water to Project beneficiaries; and that the United States breached both duties by failing to properly maintain the Project and reducing deliveries of water apportioned to New Mexico by the Compact as a result of its failures. New Mexico's allegations are plausible on their face and sufficient to survive a motion for judgment on the pleadings, and New Mexico's eighth counterclaim should be allowed to proceed.

F. New Mexico's Ninth Counterclaim States a Claim for Relief Under the Compact, Not the 1906 Convention, and Should Proceed on That Basis.

The United States argues New Mexico's ninth and final counterclaim fails to state a claim for relief, as well. The United States first admits to some confusion, asserting it is not clear whether New Mexico's ninth counterclaim is asserted directly under the 1906 Convention or whether New Mexico references the 1906 Convention "only insofar as the failure allegedly resulted in the United

States' violation of the Compact." U.S. Br. at 38. Apparently assuming the former interpretation is correct, the United States argues New Mexico's ninth counterclaim should be dismissed for one of two reasons. First, the United States argues this claim fails because enforcement of international treaties is committed to the President's discretion, and the courts lack jurisdiction to address this claim. *Id*. at 39-40. Second, the United States claims the 1906 Convention provides no private right of action to enforce its terms. U.S. Br. at 40-41. Again, the United States offers no persuasive reason to dismiss New Mexico's ninth counterclaim.

First, New Mexico will clear up any misunderstanding by affirmatively stating it asserts its ninth counterclaim under the Compact. New Mexico alleges the United States has violated the 1906 Convention because it has, in fact, failed to enforce the 1906 Convention and has failed to protest the withdrawal of millions of acre-feet of water in Mexico from aquifers hydrologically connected to the Rio Grande, rendering meaningless Mexico's commitment in the 1906 Convention to waive any claims to the waters of the Rio Grande above and beyond 60,000 acre-feet per year. N.M. Counterclaims paras. 125 (quoting 1906 Convention, Art. IV), 126, 127. However, the primary harm to New Mexico from the United States' failure to insist on its rights arises under the Compact.

Groundwater pumping and other unauthorized diversions in Mexico either directly intercept Project water before it can be used by its intended beneficiaries, or create deficits in groundwater aquifers that reduce Project delivery efficiencies and return flows. *Id*. para. 126. This harms New Mexico directly by reducing the amount of Project water it receives, and indirectly for two reasons: first, because it reduces the amount of Project water Texas receives, requiring additional releases from the common Project storage pool shared by both States to ensure Texas gets its required deliveries; and second, because under the 2008 Operating Agreement, New

Mexico is charged for all inefficiencies in the Project's delivery of water, including inefficiencies or losses caused by Mexico. *Id*. paras. 107, 126.

The United States' failure to protest Mexico's violations of the 1906 Convention or otherwise act to protect Project beneficiaries from the negative effects of these violations is, itself, a direct violation of the Compact, which provides that "the quantities of water herein allocated shall never be increased or diminished by reason of any increase or diminution in the delivery or loss of water to Mexico." Compact Art. XIV; *see also* N.M. Counterclaims paras. 124, 127. The Court recognized that the Compact protects the United States' ability to comply with the 1906 Convention, *Texas v. New Mexico*, 138 S. Ct. at 959-60, but the Compact, in Article XIV, also protects the State signatories from the United States' and Mexico's failure to enforce or adhere to the terms of the 1906 Convention.

Whether the 1906 Convention provides a private right of action or is otherwise enforceable against the United States is irrelevant. New Mexico can enforce the Compact and the United States' "legal responsibilit[ies]," *Texas v. New Mexico*, 138 S. Ct. at 959, thereunder. New Mexico states a claim for relief under the Compact on its ninth counterclaim, and the Court should allow that claim to proceed.

V. IN THE ALTERNATIVE, NEW MEXICO REQUESTS LEAVE OF THE COURT TO FILE AMENDED PLEADINGS.

New Mexico strongly asserts that its counterclaims are not barred by sovereign immunity, that it has standing to bring its claims, and that its counterclaims all state valid grounds for relief. However, to the extent the Court finds New Mexico's counterclaims are infirm on any of the grounds presented in the United States' Motion, New Mexico intends to request leave of the Court to amend its pleadings. On the question of the United States' sovereign immunity, for example, even if the Court finds the United States did not waive its immunity to suit on Compact claims by

intervening in this case, New Mexico may also bring its claims pursuant to other existing and well-accepted waivers of sovereign immunity.

For example, the APA, 5 U.S.C. § 701 et seq., waives the United States' immunity to allow the Court to review many if not all of the agency actions detailed in New Mexico's Counterclaims. In 5 U.S.C. § 702, the APA waives immunity to claims for declaratory and injunctive relief from administrative action, which need not be final. *See Navajo Nation v. Dep't of Interior*, 876 F.3d 1144, 1172 (9th Cir. 2018); *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 186 (D.C. Cir. 2006). A number of the acts alleged in New Mexico's counterclaims, such as adoption of the 2008 Operating Agreement, also constitute final agency action, for which 5 U.S.C. § 704 provides a further waiver of immunity.

Moreover, 43 U.S.C. § 390uu, grants consent "to join the United States as a necessary party defendant in any suit to adjudicate, confirm, validate, or decree the contractual rights [under a reclamation contract] of a contracting entity and the United States," subjecting the United States "to judgments, orders, and decrees of the court having jurisdiction." While the Court has held § 390uu "does not permit a plaintiff to sue the United States alone," it has also recognized that this statute "grant[s] consent to join the United States in an action between other parties . . . when the action requires construction of a reclamation contract and joinder of the United States is necessary." *Orff v. United States*, 545 U.S. 596, 602 (2005). Given the critical role the Downstream Contracts and Project play in the Compact's apportionment and, therefore, the Parties' disputes in this case, *Texas v. New Mexico*, 138 S. Ct. at 959, and the fact that this case already presents a dispute between New Mexico and Texas, New Mexico can obtain relief from the United States on its claims involving construction of the Downstream Contracts pursuant to this statute.

As a final example, the *ultra vires* doctrine of *Ex parte Young*, 209 U.S. 123 (1908), and its progeny creates an exception to the general rule requiring a specific waiver of sovereign immunity to review the *ultra vires* acts of individual federal officials. *See Larson v. Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 689 (1949) (superseded by statute only to the extent the *Ex Parte Young* doctrine was codified in 5 U.S.C. § 702). This would include Larry Walkoviak, the Bureau of Reclamation official who executed the 2008 Operating Agreement; Filiberto Cortez, the official who authorized the unlawful release of New Mexico's Compact credit water; and any other federal official who has authorized the operation of the Project in contravention of the Compact.

Because New Mexico brought none of its claims pursuant to these waivers, the United States' arguments that New Mexico has not or could not satisfy the requirements for such waivers, *see* U.S. Br. at 19-22 and 32-38, are, at best, premature. Similarly, the Court should not dismiss any of New Mexico's counterclaims on the basis that they fail to comply with the APA or any other authority that New Mexico has not, at this time, sought to invoke. New Mexico will seek leave of the Court to amend its counterclaims pursuant to these authorities if the Court so requires. Fed. R. Civ. P. 15(a)(2) (providing the "[C]ourt should freely give leave [to amend] when justice so requires").

CONCLUSION

For the foregoing reasons, the United States' Motion for Judgment on the Pleadings should be denied, and New Mexico's counterclaims should proceed.

Respectfully submitted,

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No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

♦

STATE OF TEXAS,
Plaintiff,
v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

♦

OFFICE OF THE SPECIAL MASTER

♦

STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

♦

This is to certify that on the 28th of February 2019, I caused true and correct copies of the

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST NEW MEXICO'S COUNTERCLAIMS 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.

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