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 TEXAS'S MOTION TO STRIKE OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES

♦

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672

MARCUS J. RAEL, JR.*
DAVID A. ROMAN
Special Assistant Attorneys General
ROBLES, RAEL & ANAYA, P.C.
500 Marquette Avenue NW, Suite 700
Albuquerque, New Mexico 87102
505-242-2228
marcus@roblesrael.com

**Counsel of Record*

BENNET W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

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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 State of Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses ("Texas's Motion" or "Tx. Mot.").

Texas's Motion first seeks the wholesale dismissal of all of New Mexico's counterclaims on the basis that New Mexico did not first seek leave of the Court prior to filing its counterclaims in conjunction with its Answers. However, in doing so, Texas attempts to create a requirement that is not mandated by a procedural rule or controlling case law. Indeed, the Court has not only allowed counterclaims arising from the same subject matter as the initial complaint to be filed contemporaneously with an Answer in an original action without first seeking leave of the Court, it has denied a similar attempt to have counterclaims stricken under nearly identical circumstances. In addition, the course of dealing among the Parties and Case Management Orders in place prior to the filing of the counterclaims clearly contemplated that New Mexico's counterclaims would be filed in conjunction with its Answers. Finally, because New Mexico's counterclaims all arise from the Compact and implicate an interpretation of Compact rights and responsibilities, just as do the complaints of Texas and the United States, litigating the counterclaims on a separate track from the underlying claims would be practically unworkable and result in a tremendous waste of judicial resources with no benefit to the litigation. Simply put, the Court cannot fully resolve the present Compact disputes or provide a clear standard for future compliance if it does not hear the Compact-related claims of all Parties, including New Mexico.

Texas's Motion also seeks dismissal of New Mexico's second counterclaim, regarding the effect of the 2008 Operating Agreement on Compact apportionment between New Mexico and

Texas, despite the fact that the counterclaim is directed only against the United States. In doing so, Texas attempts to create an artificial distinction between the terms "apportionment" and "allocation" to argue that the 2008 Operating Agreement does not affect Compact apportionment, but merely the division of water between the two irrigation districts. However, because the Court has found that the Compact's equitable apportionment is predicated on the delivery of water from the Project pursuant to the Downstream Contracts and that the United States is charged with ensuring that the Compact's equitable apportionment is, in fact, made, Texas cannot escape the interconnected nature of the Project and the Compact and the fact that a significant change in Project allocation necessarily results in a change in Compact apportionment.

Texas also seeks dismissal of New Mexico's fifth and seventh counterclaims, regarding alleged violations of the Water Supply Act by the United States and the Miscellaneous Purposes Act by the United States and political subdivisions of Texas respectively. Although these counterclaims allege violations of federal statutes other than the Compact, New Mexico's chief allegation in raising these counterclaims is that, through their actions that resulted in a violation of these statutes, Texas and/or the United States violated the Compact or otherwise interfered with New Mexico's Compact apportionment. In similar circumstances, the Court has previously allowed a defendant to raise allegations that the United States violated state and federal law as well as contracts governing water supply to individual users because those violations had the alleged effect of reducing that State's apportionment under a decree. The primary issue in these claims is that these violations upset the assumptions on which the Compact's apportionment of water is based, and they thus arise under the Compact itself.

Finally, Texas seeks judgment on New Mexico's third, fourth, fifth, and seventh affirmative defenses. Although pled as a motion for partial summary judgment rather than a

judgment on the pleadings, Texas does not lay out any undisputed material facts relative to these defenses, relies solely on the pleadings for its arguments as opposed to submitting any record evidence, and fails to say which, if any disputed issues of material fact are admitted for purposes of the motion. Instead, Texas contends that equitable affirmative defenses such as unclean hands, acceptance, waiver, estoppel, and laches are all unavailable in compact enforcement proceedings as a matter of law, and that failure to exhaust remedies is not an available defense in an original action. This is incorrect, and the actions of Texas such as allowing the untrammeled development of groundwater resources in its portion of the Project, failure to properly account for return flows in Texas, and failure to raise alleged underdeliveries for decades despite having multiple fora in which to do so may all be taken into consideration when evaluating Texas's allegations. As a result New Mexico should be allowed to pursue all of its counterclaims and affirmative defenses in order that all of the Compact issues raised in this litigation may be fully and finally resolved.

ARGUMENT

Texas fails to meet the burden imposed by Rule 12(c) and its Motion should be denied because: (1) New Mexico's counterclaims, all of which raise Compact compliance issues and which were filed in conjunction with New Mexico's Answers, are properly before the Court; (2) New Mexico's second counterclaim, regarding the effect of the 2008 Operating Agreement on its Compact apportionment, states a valid claim for relief against the United States; (3) New Mexico's fifth counterclaim, regarding a violation of the Water Supply Act by the United States, and its seventh counterclaim, regarding the entry of contracts by the United States and political subdivisions of Texas for Project water used for non-irrigation purposes that violate the Miscellaneous Purposes Act, are valid because they are based on allegations of interference with New Mexico's Compact apportionment; and (4) New Mexico has sufficiently pled its third, fourth,

fifth, and seventh affirmative defenses, and such defenses are available in Compact enforcement actions.

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); *Morrison v. Nat'l Australia Bank Ltd.*, 547 F.3d 167, 170 (2d Cir. 2008); *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 (D.C. Ill. 1995)).

II. NEW MEXICO'S COUNTERCLAIMS, FILED IN CONJUNCTION WITH ITS ANSWERS, ARE PROPERLY BEFORE THE COURT.

Texas argues that leave of the Court is a prerequisite to any party to an original action being allowed to file a counterclaim with its answer. (Tx. Mot. at 8). In fact, Texas refers to the need to seek leave as a "jurisdictional requirement." *Id.* In doing so, Texas attempts to invent an iron-clad requirement that simply does not exist. Texas cites no procedural rule nor controlling case law that imposes this requirement. Simply put, the Court has not required a party in an original action to obtain leave before filing, in conjunction with its answer, counterclaims arising from the same transaction or subject matter as the operative complaint. Indeed, it has not only allowed such counterclaims to be filed without leave, but has also flatly denied an almost identical attempt to strike such counterclaims on the basis that leave was not sought prior to filing. Moreover, although

Texas now seeks to contend that the filing of New Mexico's counterclaims without seeking leave of the Court was improper, the course of dealing among the parties and Case Management Orders issued by the Special Master clearly contemplated that New Mexico's counterclaims would be filed in the manner they were. Finally, Texas's proposal that the case should proceed on parallel tracks, with only its claims going forward for now if New Mexico is required to seek leave to file its counterclaims, is unworkable as a practical matter and would result in a significant waste of judicial resources. As such, Texas's motion to strike New Mexico's counterclaims on this basis should be denied.

A. Texas Attempts to Create a Rule Governing Counterclaims in Original Actions That Does Not Exist.

Texas's argument conflates the requirement that a prospective original action plaintiff obtain leave of the Court to file a complaint in the first instance with a parallel rule for counterclaims that simply does not exist. Original actions before the Court are governed by Supreme Court Rule 17. Rule 17.3 requires that a prospective plaintiff in an original action seek leave of the Court before filing a Bill of Complaint. Sup. Ct. R. 17.3 ("The initial pleading shall be preceded by a motion for leave to file…"). Significantly, neither Rule 17 nor any other Supreme Court rule contains a similar requirement for any pleading, including a counterclaim, filed in response to the Bill of Complaint. Indeed, Texas writes that "the same principles that apply to the filing of an original jurisdiction complaint *should* apply to the filing of a counterclaim in a case, as this one, where another state has been granted leave to file a complaint." Tx. Mot. at 9 (emphasis added). However, it cannot properly say that such a requirement *does* apply.

That counterclaims would be treated differently from an initial complaint only makes sense. Requiring that a prospective plaintiff move for leave to file a complaint enables the Court

to perform its gatekeeping function to ensure its original jurisdiction is used only "sparingly," *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992), and only when "the necessity is absolute," *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)). However, where the Court has already made the determination that the subject matter of the prospective plaintiff state's claim against another state is so grave and substantial as to warrant the Court's grant of its exclusive original jurisdiction, a counterclaim implicating the same transaction or subject matter as the original complaint would, practically by definition, merit the exercise of the same jurisdiction.

Texas contends that "the granting of leave to file a complaint is not an open ticket to expand the scope of an original action to all conceivable claims among and between the state litigants." (Tx. Mot. at 9). New Mexico does not dispute this. Certainly New Mexico could not use the occasion of Texas obtaining leave to file suit alleging violations of the Rio Grande Compact to bring its own claims against Texas arising from, for instance, a land dispute, or even allegations that Texas was violating a different interstate water compact. However, that is far from what is happening in this instance. As discussed more fully in New Mexico's Response in Opposition to the United States' Motion for Judgment on the Pleadings ("N.M. Resp. in Opp. to U.S.A.") at 15-17, every one of the counterclaims filed by New Mexico arises directly from the subject matter of Texas's complaint and involves solely allegations of violations of New Mexico's rights under the Rio Grande Compact. As such, they fit well within the scope of the action filed by Texas and the United States. It is understandable as a strategic matter that Texas would want to keep this litigation as narrow as possible to avoid having to answer for its own Compact violations or the Compact violations by the United States that negatively impact New Mexico. However, the Court cannot look only at Texas's claims in a vacuum because the Project is designed to operate as a

unit, without regard to State boundaries, to deliver equal water per acre to Project irrigable lands, regardless of location.

B. Precedent Supports New Mexico Being Able to File its Counterclaims in Conjunction with its Answers.

The argument Texas is making here has been made before, in almost precisely the same manner and under almost exactly the same circumstances, and it was rejected by the Court. *See Kansas v. Nebraska and Colorado*, No. 126, Original, 527 U.S. 1020 (1999). On January 19, 1999, the Court granted Kansas's motion for leave to file a bill of complaint and gave Nebraska 60 days in which to file an answer. *Id.*, 525 U.S. 1101. In a claim that likely sounds familiar, Kansas's complaint against Nebraska essentially contended that groundwater pumping in Nebraska by wells hydrologically connected to the Republican River resulted in a violation of the Republican River Compact to the extent that it resulted in a depleted stream flow in the Republican River basin. *Id.*, 574 U.S. ___, 135 S.Ct. 1042, 1049-50 (2015). Nebraska timely filed its Answer together with three counterclaims without having sought leave of the Court to file such counterclaims. *See* Answer and Counterclaim of the State of Nebraska, filed April 19, 1999. These counterclaims arose directly from the Republican River Compact and required an interpretation of the parties' rights and responsibilities under the Compact, covered the same time period as Kansas's claims, and sought the same type of relief as Kansas sought in its original complaint. *Id.* at 6-13.

Kansas moved to strike these counterclaims on the basis that Nebraska had not sought the Court's leave prior to filing them. *See* Kansas's Motion to Strike Counterclaims, 1999 WL 332707 (May 21, 1999). In this case, it is almost as if Texas used Kansas's motion as a template, as the arguments and most of the case citations are essentially the same. Kansas teed up this precise issue before the Court, writing "Kansas' motion to strike Nebraska's counterclaims raises the question

whether a defendant state in an original action may file counterclaims without first obtaining this Court's determination that the proposed counterclaims are of a seriousness and dignity befitting this Court's original jurisdiction." Kansas's Reply in Support of Motion to Strike, 1999 WL 35639276 (June 9, 1999) at *1. The Court summarily denied Kansas's motion to strike without an opinion, very clearly answering this question in the positive, permitting Nebraska to file its counterclaims in conjunction with its Answer without seeking leave of the Court. 527 U.S. 1020.[1] No decision since that time has been to the contrary.

Moreover, as pointed out by Nebraska in its Response to Kansas's Motion to Strike, precedent already existed at that time for such a result:, as Colorado filed a counterclaim without seeking leave of the Court which the Court decided on the merits in *Kansas v. Colorado*, 475 U.S. 1079 (1986), and Louisiana similarly filed a counterclaim without seeking leave in *Texas v. Louisiana*, 397 U.S. 931 (1970). *See* Nebraska's Response to Kansas's Motion to Strike, 1999 WL 35639275 (June 2, 1999) at *3. Texas's attempt to resurrect the same argument in this instance should fail, and that should end the matter here.

Texas cites *Delaware v. New York*, 510 U.S. 805 (1993) in support of its contention that a hard and fast rule precludes filing of a counterclaim without seeking leave of the Court because the Court in that instance, without an opinion, struck New York's counterclaims without prejudice to move the Court for leave to file them. Tx. Mot. at 9. As an initial matter, the ruling in *Delaware v. New York* was made years prior to the Court's ruling in *Kansas v. Nebraska*, and thus cannot constitute the controlling law on this issue. In addition, the Court's basis for this procedural ruling

[1] In *Kansas v. Nebraska*, the question of whether leave to file a counterclaim was required was directly before the Court rather than a Special Master, because a Special Master had not yet been appointed in that case.

is unclear and the circumstances involved were vastly different than *Kansas v. Nebraska* or the instant case. *Delaware v. New York* involved an allegation by Delaware that New York had wrongfully escheated certain unclaimed securities distributions. *Id.*, 507 U.S. 490, 495-97 (1993). Five years after New York had answered Delaware's complaint, and *after Delaware and New York had reached a settlement on Delaware's underlying claims*, New York sought to assert claims solely against all of the other states that had intervened in the action, challenging their various escheat practices. *See Delaware v. New York*, No. 111, Original, Report and Recommended Disposition of Motions with Respect to Complaints, filed by Special Master Thomas H. Jackson on March 15, 1994 at 2-3, *available at* https://www.supremecourt.gov/specmastrpt/ORG%20111%20031594.pdf. These claims did not arise from the same transactions being litigated in the initial aspects of the case, were not directly related to the resolution of the primary issue that led to the litigation, and were not even raised against the initial plaintiff in the original action. *Id.* at 7-8. In contrast, in both *Kansas v. Nebraska* and the instant case, the counterclaims were filed contemporaneously with the initial answers and were directly related to the primary issue that led to the litigation in the first place, namely interpretation of the parties' rights and responsibilities under an interstate water compact. As such, *Delaware v. New York* is inapposite.

Texas's citation to *Nebraska v. Wyoming*, 515 U.S. 1 (1995), in the context of the question of whether counterclaims arising directly from the same subject matter as the original complaint and filed in conjunction with the defendant's initial answer must be stricken if the defendant had not first moved for leave to file them, is also unavailing. Texas cites a passage from this case in which the Court indicated that the general concept that leave to amend pleadings pursuant to Fed. R. Civ. P. 15(a) should be liberally granted does not apply to cases within the Court's original

jurisdiction and that proposed pleading amendments must be scrutinized closely. Tx. Mot. at 9-10 (citing *Nebraska v. Wyoming*, 515 U.S. at 8). This case and the cited passage do not address the issue currently before the Court regarding the filing of compulsory counterclaims with the initial answer. Instead, in this iteration of *Nebraska v. Wyoming*, Nebraska sought to amend its pleadings to include four additional counts eight years after filing its Bill of Complaint, and Wyoming similarly sought to amend its pleadings to include four new counts in a counterclaim and five new counts in a cross-claim, again eight years after filing its initial answer. Both parties sought to amend their pleadings pursuant to Fed. R. Civ. P. 15(a), which requires leave of the Court in the absence of written consent of the adverse party, and it was solely in this context that the Court addressed these requests. Therefore, this case is inapposite as well. Texas has simply failed to present any procedural rule or controlling case law to support its position that New Mexico's counterclaims must be stricken in their entirety.

C. The Parties Anticipated That New Mexico Would File Counterclaims in Conjunction With its Answers, and it is Disingenuous to Now Suggest That it Was First Required to Seek Leave to File Them.

Further, it is disingenuous for Texas or the United States to now suggest that moving for leave to file related counterclaims is a legal requirement. Clearly, the filing of counterclaims in conjunction with New Mexico's answer was anticipated by the Parties and, it would appear, the Special Master. On October 23, 2017, following the Supreme Court's adoption of the Special Master's recommendation that New Mexico's Motion to Dismiss be denied, counsel for Texas wrote a letter to the previous Special Master, A. Gregory Grimsal, requesting that New Mexico and Colorado be ordered to answer Texas's complaint within 30 days. The letter stated that "[p]roceeding in this manner will allow Texas to review counterclaims, if any, *that New Mexico may file along with its Answer*, and enable Texas to promptly respond to any claims made by New

Mexico." Letter from Stuart L. Somach to Special Master Grimsal, dates October 23, 2017 (emphasis added).

The Special Master did not grant this request due to a pending oral argument before the Court on exceptions to his Report raised by Colorado and the United States. Following a ruling by the Court on these exceptions, Special Master Grimsal issued a Case Management Order in which he set a telephone conference at which, among the topics to be discussed was setting a date "by which Texas and the United States will file their complaints of record herein and a date by which New Mexico will and Colorado may file answers thereto and any counterclaims." Revised Case Management Order No. 15, dated March 14, 2018. On this telephone conference, held on March 23, 2018, once he set a date by which Texas and the United States would formally file their Complaint and Complaint in Intervention, Special Master Grimsal asked counsel for New Mexico how long New Mexico would need to file an answer and any counterclaim it might have to the Complaint and the Complaint in Intervention. *See* Transcript of March 23, 2018 Proceedings at 9:10-12. Counsel for New Mexico informed Special Master Grimsal that the Parties had conferred, and agreed that New Mexico would have sixty days from the day of the conference to file answers and any counterclaims, and the other parties would have 60 days to file responses to any counterclaims. *Id.* at 9:13-19. At no point did Texas or the United States challenge that representation of the informal agreement among the Parties or suggest that New Mexico would need to seek leave to file counterclaims.

Following that conference, Special Master Grimsal issued a new Case Management Order that, *inter alia*, ordered that "New Mexico and Colorado shall file answers [to the complaints of Texas and the United States] *together with any counterclaims*…on or before May 22, 2018," and that "responses to any counterclaims shall be filed…on or before July 23, 2018." Case

Management Order No. 16, dated March 27, 2018. After Special Master Michael J. Melloy replaced Special Master Grimsal several days after the entry of Case Management Order No. 16, nothing occurred to change these expectations. Indeed, in an initial telephonic status conference with Special Master Melloy on April 23, 2018, Special Master Melloy indicated that "[o]nce New Mexico files its response, which I believe is due May 22nd, *and files its counterclaims*, I think we'll know at that point pretty much what the issues are. I don't think we need to wait until Texas and the United States file answers to those counterclaims. I think at that point we're going to know what the issues are." Transcript of April 23, 2018 Proceedings at 20:7-13. Special Master Melloy then proposed setting the "at issue" date as June 1, 2018, rather than waiting for Texas and the U.S. to respond to New Mexico's counterclaims. *Id.* at 20:14-17. When asked if that raised any questions or problems, counsel for Texas replied that it did not, and agreed that the parties would know by June 1 (just after New Mexico was scheduled to file its answers and counterclaims) what the issues in the case are. *Id.* at 21:6-10.

Again, no party challenged the assumption that New Mexico would be filing counterclaims along with its answers as a matter of course, even when given the opportunity to raise this issue. As a logical matter, if any Party believed it was a requirement that New Mexico seek leave to file counterclaims first, it would not have been able to say, at that point, that all of the issues in the case would be known by June 1. Operating on the aforementioned precedent that permitted it and what appeared to be the common expectation of the Parties and Special Master, New Mexico filed its counterclaims in conjunction with its Answer. Texas has provided no basis on which they should now be stricken.

D. Because New Mexico's Counterclaims Implicate Compact Rights and Responsibilities Just as do the Complaints of Texas and the United States, It

Would Be Unworkable and a Waste of Judicial Resources to Litigate the Claims on Parallel Tracks.

Texas suggests, in the event New Mexico's counterclaims are all summarily stricken and it consequently moves the Court for leave to file those counterclaims, that litigation pertaining to Texas's Complaint proceed apace while litigation on New Mexico's counterclaims remains stayed pending the Court's determination on whether they may be filed. Tx. Mot. at 8 n.2. This is essentially a request that this case proceed on parallel tracks. While New Mexico would certainly request the opportunity to seek leave to file its counterclaims in the event that they are summarily stricken, this proposed methodology is utterly unworkable and would lead to substantial inefficiencies and a colossal waste of judicial resources.

As previously discussed, all of New Mexico's counterclaims concern whether the rights and responsibilities of the Parties under the Compact are being met; the same question implicated by Texas's Complaint and the United States' Complaint in Intervention. While Texas would seek to artificially constrain the analysis to actions on the New Mexico side of the border, the Compact concerns actions in Texas as well, and the Project which forms the basis upon which the Compact apportionments are made operates as a unit on both sides of the Texas/New Mexico border. This case cannot be fully adjudicated without addressing the issues raised in New Mexico's counterclaims, as they arise directly from the same Compact issues raised in the complaints of Texas and the United States, and are, at heart, essentially the flip-side of the claims raised by Texas and the United States. Resolution of this case will require the full interpretation of Compact rights and responsibilities of each Party, and whether any Party has breached their obligations. To adjudicate Texas's claims about its rights under the Compact at a different time from New Mexico's claims about its Compact rights would result in an incoherent and inefficient proceeding.

Moreover, many of the same issues raised in New Mexico's counterclaims are already raised in some of New Mexico's affirmative defenses, and would therefore need to be addressed even in simply litigating the complaints of Texas and the United States. For instance, New Mexico has raised the affirmative defense of set-off, contending that any damages Texas is seeking should be offset by the amount of additional Project water Texas has unjustly received as a result of the implementation of the 2008 Operating Agreement and by damages Texas has inflicted on New Mexico through its own groundwater development and other actions that resulted in a reduction in useable water in Project storage, as well as by factors that reduce Project efficiency but that are outside of New Mexico's control. *See* State of New Mexico's Answer to the State of Texas's Complaint at 16-17 ¶¶ 47-49. Similarly, New Mexico has also raised the affirmative defense of failure to mitigate, contending that Texas's injuries, if any, were caused in part by Texas's failure to properly regulate or manage surface or groundwater resources within the Project area in Texas, failure to prevent groundwater development in Texas, and failure to properly account for Project water. *Id*. at 15 ¶ 43.[2] Thus, these issues are already before the Court and must be resolved as part of this action, whether or not New Mexico has the opportunity to move forward with its counterclaims at this time.

Because these issues will already need to be litigated as Texas's claims go forward, a stay of New Mexico's related claims would be remarkably inefficient. Indeed, it is not even clear how separating New Mexico's counterclaims regarding Compact rights and responsibilities from the same issues being adjudicated as part of Texas's and the United States' claims would work. Would two different discovery phases be required? How would a determination be made regarding whether a discovery request pertained to a counterclaim as opposed to an affirmative defense

[2] Texas has not sought to dismiss either of these affirmative defenses.

raising the same issue and requiring the same proof? Would one trial be necessary on the underlying claims and a second on New Mexico's counterclaims, even if the vast majority of the issues had already been addressed at the first trial? Even attempting to answer these questions demonstrates why proceeding on parallel tracks would be unworkable.

Texas has indicated that it would not support a stay of the litigation while the question of whether New Mexico may bring its counterclaims is briefed, argued, and decided. Tx. Mot. at 8 n.2. The only alternative that would avoid the judicial inefficiency that would come from litigating this case on parallel tracks would be to allow New Mexico's counterclaims to proceed as they have been filed. At this point, not only have Texas and the United States already answered the counterclaims, but they have already brought the validity of New Mexico's counterclaims before the Court through their motions on the pleadings. Thus, there would be no loss of judicial efficiency and no prejudice to the parties from adjudicating the validity of the counterclaims now rather than waiting to address the same issue in the context of a later motion for leave to file counterclaims.

III. NEW MEXICO'S SECOND COUNTERCLAIM REGARDING THE EFFECT OF THE 2008 OPERATING AGREEMENT ON ITS COMPACT APPORTIONMENT STATES A VALID CLAIM FOR RELIEF AGAINST THE UNITED STATES.

New Mexico's second counterclaim implicates the 2008 Operating Agreement entered into among the United States and the two Project irrigation districts, EBID and EPCWID. Broadly speaking, New Mexico's second counterclaim alleges that, by entering into and operating the Project in accordance with the strictures of the 2008 Operating Agreement, the United States has "significant[ly] change[d] . . . the [Compact] 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 [Compact] apportionment." N.M. Counterclaims ¶ 78. Despite the fact that New Mexico has pressed its counterclaim related to the Operating Agreement against the United States rather than Texas, Texas nonetheless seeks judgment on the pleadings and dismissal of this particular counterclaim.

In its Motion to Strike or for Partial Judgment, Texas accuses New Mexico of ignoring prior substantive rulings in this case in pursuing its counterclaims. Tx. Mot. at 2. In a bit of supreme irony, Texas's argument that New Mexico's counterclaim regarding the 2008 Operating Agreement is invalid on its face blatantly ignores one of the Court's central rulings thus far in this case, namely that the Compact's apportionment is predicated on the United States' operation of the Project in compliance with state and federal law and the federal contracts with the irrigation districts ("Downstream Contracts") in existence at the time the Compact was executed.[3] *Texas v. New Mexico*, 138 S.Ct. 959 (2018).

The Court recognized that the Compact is "inextricably intertwined with the Rio Grande Project and the Downstream Contracts." *Id.* It found that the Compact can achieve its stated purpose of "effect[ing] an equitable apportionment" of "the waters of the Rio Grande" only because the United States "assumed a legal responsibility" to deliver water from the Project pursuant to the Downstream Contracts. *Id.* In this manner, the United States is "a sort of 'agent' of the Compact, charged with ensuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Id.* (citation omitted). The "United States plays an integral

[3] While the Parties disagree about the full scope of prior rulings in this case and what issues remain to be decided, *see* The State of New Mexico's Motion for Partial Judgment on Matters Previously Decided, filed December 26, 2018, and The State of Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon, also filed December 26, 2018, no Party contends that the Court's finding that the Compact's apportionment relies on the Project and the Downstream Contracts is not a settled issue in this case.

role in the Compact's operation" because of its duties to deliver water under the Downstream Contracts, which govern the allocation of water between the two irrigation districts, and "which are themselves essential to the fulfillment of the Compact's expressly stated purpose." *Id.*

From this, it follows inescapably that a material change in Project allocation between the two districts must necessarily result in a change in Compact apportionment between the two States. And yet Texas seeks to create an artificial distinction between the terms "apportionment" and "allocation" to argue the 2008 Operating Agreement does not affect the Compact's apportionment, merely the allocation of water between EBID and EPCWID. Tex. Mot. at 17. Citing no cases, treatises, or other authorities to support its argument, Texas posits that an "allocation" refers solely to the division of water between EBID and EPCWID, whereas an "apportionment" addresses the division of water between the States. *Id*. Texas contends that, because the 2008 Operating Agreement deals only with the "allocation" of Project water between EBID and EPCWID, it does not affect the Compact's apportionment. *Id*. In light of the Court's ruling that the Compact's equitable apportionment is achieved through the allocation between the districts called for by the Downstream Contracts in place at the time of the Compact's execution, this argument defies logic.

Moreover, Texas is simply incorrect regarding the purported legal distinction between the terms "allocation" and "apportionment." "Apportionment" is a term of art referring to the method for dividing or "allocating" water between States. "[E]quitable *apportionment* [is] an appropriate mechanism for resolving *allocative* disputes." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1024 (1983) (emphasis added); *see also Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013) ("Absent an agreement among the States, disputes over the *allocation* of water are subject to equitable *apportionment* by the courts. . . ." (emphasis added)); *Nebraska v. Wyoming*, 515 U.S. at 4 ([W]e *apportioned* the natural irrigation-season flows . . ., *allocating* 75 percent of those flows

to Nebraska and 25 percent to Wyoming." (emphasis added)). Far from referring to distinct legal concepts, the terms "apportionment" and "allocation" are intimately related in general, and even more so in this case, where ensuring that the appropriate allocation between the districts is met is necessary to effectuate the apportionment between the States.

This is precisely why the 2008 Operating Agreement is such a significant problem. Although Texas characterizes it as affecting only the "allocation" of water between EBID and EPCWID, Tx. Mot. at 17-18, because the Compact relies upon and incorporates this allocation as the method of apportionment between Texas and New Mexico in the Lower Rio Grande, *Texas v. New Mexico*, 138 S. Ct. at 959, changes to the method for allocating water between EBID and EPCWID necessarily changes the apportionment of water between Texas and New Mexico.

It is, therefore, irrelevant that the 2008 Operating Agreement purports not to "alter, amend, repeal, modify, or be in conflict with the provisions of the Rio Grande Compact," 2008 Operating Agreement § 6.12, because it *does* alter, amend, modify, and conflict with the Compact as a practical matter. Indeed, in prior briefing in a related case involving EPCWID and EBID, the United States acknowledged that the ad-hoc adjustments to Project operations that ultimately became memorialized in the 2008 Operating Agreement 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" and that if EPCWID were granted the ability to carry over water in storage from one year to the next, "the Project as a whole will suffer" and '[s]uch harm disserves the public interest and outweighs any benefit to the irrigation district." United States' Response in Opposition to Plaintiff's Application for Preliminary Injunction at 13, *El Paso County Water Improvement Dist. No. 1. v. Elephant Butte Irrigation Dist. and United States*, No. 07-CA-0027 (W.D. Tex. Apr. 23, 2007) (emphasis in original). It is this significant

change to allocation and Project operations that New Mexico contends results in a diminution of its Compact apportionment in violation of its Compact rights.

The Court, for purposes of this Rule 12(c) motion, is required to accept New Mexico's factual allegations of harm from the implementation of 2008 Operating Agreement as true. *Wood v. Moss*, 572 U.S. at 755 n.5. New Mexico has adequately alleged that, by implementing the 2008 Operating Agreement, including its diversion ratio and carryover storage provisions, the Project has reduced its deliveries to Project lands in New Mexico and hence impaired New Mexico's apportionment of water under the Compact. N.M. Counterclaims ¶¶ 45, 48, 51, 77. This is sufficient to state a prima facie case of injury and a Compact violation given the interaction of Project allocation and Compact apportionment.

Texas contends that the United States and the two irrigation districts developed the 2008 Operating Agreement as a means of allocation to account for alleged shortages to Texas's Compact apportionment caused by actions occurring in New Mexico. Tx. Mot. at 18. As an initial matter, the purpose behind the 2008 Operating Agreement and the manner in which it was intended to operate are factual questions, dependent on records and testimony to establish, rather than on the statements and characterization of Texas's counsel. Moreover, the purpose behind the Operating Agreement is arguably less important in this case than its effect. Even if one assumes that a purpose behind the Operating Agreement was to reduce the amount of surface water delivered by the Project to EBID to account for the effects on Project efficiency of groundwater pumping in New Mexico, whether it has done so accurately or instead in a manner that overstates New Mexico's effect on system efficiency, thereby materially altering the Compact's apportionment between the two states, is a factual question that is the subject of complex modeling and whose answer can only come through evidence, testimony, and rigorous cross-examination.

The issue of what, specifically, is the Compact's apportionment between Texas and New Mexico below Elephant Butte Reservoir is a mixed question of law and fact, which must be answered before it can be determined whether Texas has received less water than it is entitled or whether New Mexico is being unfairly shorted. Similarly, the issue of whether the United States has ceased distributing Project water in accordance with the Compact apportionment since the implementation of the 2008 Operating Agreement is a question of fact that must be resolved in New Mexico's favor for purposes of this motion, not a question of law as asserted by Texas.[4] Therefore, New Mexico's second counterclaim should be allowed to proceed.

Texas also argues that New Mexico's counterclaim related to the Operating Agreement "hinges" on the premise that the Compact requires the Project to distribute water equally to each Project acre.[5] Tex. Mot. at 16. It contends that, because no provision of the Compact contains such a requirement, failure to abide by this distribution cannot be a Compact violation and judgment on the pleadings is appropriate. *Id.* This, of course, once again ignores the Court's ruling that Project operations are integrated into the Compact as a means of achieving delivery of Compact apportionment. Further, as New Mexico explains more fully in its Response in Opposition to the United States' Motion for Judgment on the Pleadings, this reading of its second counterclaim is simply incorrect.

[4] Texas states that "the current facts and the current use of the 2008 Operating Agreement on its face, do not conflict with the 1938 Compact." Tx. Mot. at 18. This begs the question of what are the "current facts" and what is "the current use of the 2008 Operating Agreement," issues which must be developed through full factual development as part of this case.

[5] Texas also seeks to incorporate by reference the United States' arguments regarding sovereign immunity and standing. Tex. Mot. at 16. In response, New Mexico hereby incorporates by reference its arguments responding to the United States' Motion for Judgment on the Pleadings regarding sovereign immunity, standing, and any other argument Texas incorporates from the United States' Motion. *See* N.M. Resp. in Opp. to U.S. at 5-20.

New Mexico has alleged that the United States has not only rights, but duties imposed by the Compact, a conclusion reached by the Court in *Texas v. New Mexico*, 138 S.Ct. at 959. New Mexico certainly has alleged that one of these duties imposed on the United States through incorporation of the Project into the Compact is the duty to distribute an equal amount of Project water to each acre within the Project, N.M. Counterclaims ¶ 73, and it explains the ample basis for this conclusion in its response to the United States, N.M. Resp. in Opp. to U.S. at 33-38. However, this is not the only duty, or even the chief duty, that New Mexico alleges the Compact imposes on the United States. Indeed, New Mexico's second counterclaim does not rest solely on the United States' violation of this specific duty, but rather on its allegation that the United States has violated its more general duty not to alter Project operations or accounting in a manner that materially alters the Compact's apportionment. N.M. Counterclaims ¶¶ 74, 75. New Mexico alleges that the Project has historically delivered Project water on an equal basis to each Project acre, which is a question of fact susceptible to proof. Although, more important at this early juncture in the case is the fact that, by implementing the 2008 Operating Agreement and adopting the changes set forth in Paragraphs 75 and 76 of New Mexico's counterclaims, the United States has "reduced allocations of Project water to New Mexico compared to allocations under historic Project operations" and has therefore "unilaterally changed the bargain on which the Compact was based and has unilaterally reduced the amount of New Mexico's apportionment." *Id.* ¶¶ 77 and 78. As such, rather than the narrow basis alleged by Texas, this counterclaim is based on these facts and the common-sense theory that the United States may not impose what amounts to a change in Compact apportionment without the consent of the Compacting States, and Texas has provided no plausible reason that it should be dismissed.

IV. NEW MEXICO'S FIFTH AND SEVENTH COUNTERCLAIMS SUFFICIENTLY ALLEGE COMPACT VIOLATIONS AND STATE VALID CLAIMS FOR RELIEF.

A. New Mexico's Fifth and Seventh Counterclaims State Compact Violations, Not Simply Violations of Federal Statutes.

New Mexico's fifth counterclaim alleges that the United States violated the Water Supply Act of 1958, 43 U.S.C. § 390b(e) ("WSA") in the manner in which it has operated the Project. The WSA requires congressional approval for modification of certain reservoir projects if that modification would seriously affect the purposes for which the project was authorized or if it would involve major structural or operational changes. *Id.* New Mexico contends that, by executing contracts allowing significant amounts of Project water to be used by the City of El Paso for municipal and industrial purposes and by incorporating major operational changes into the 2008 Operating Agreement such as carryover storage and allocations that differ significantly from historical allocations, the United States has materially changed historical operations, affected the purpose of the Project, and altered the historical allocation of water between districts in New Mexico and Texas, a matter that clearly implicates the Compact's apportionment.

New Mexico's seventh counterclaim alleges that the United States, with the participation of Texas and its political subdivisions, has entered into contracts pursuant to the Miscellaneous Purposes Act, 43 U.S.C. § 521 ("MPA"), which violate both the MPA and the Compact. N.M. Counterclaims ¶ 111. The MPA allows for the sale of surplus water from a federal irrigation project for non-irrigation purposes, but only upon a showing that there is no other practicable source of water supply for that purpose, and that the delivery of that water is not detrimental to the project, the rights of project beneficiaries, or prior rights holders. 43 U.S.C. § 521. New Mexico contends that contracts entered into between the United States and political subdivisions of Texas

to supply Project water for non-irrigation purposes violated the MPA because they were executed despite the facts that available alternative water supplies existed, that delivery of such Project water is detrimental to the Project, and that it materially alters New Mexico's Compact apportionment. N.M. Counterclaims ¶¶ 111-112.

While it is true that these counterclaims have alleged violations of federal statutes other than the Compact, New Mexico's chief allegation in these counterclaims is that, through their actions which violated these federal statutes, Texas or the United States has violated the Compact or otherwise interfered with New Mexico's apportionment. 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 WSA and 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, it not only violates those laws but also upsets the bargain on which the Compact was based. The primary harm to New Mexico from the United States' and Texas' actions, and, therefore, the principal basis behind New Mexico's fifth and seventh counterclaim, is that the United States' adoption of these agreements and distribution of water pursuant to them reduces New Mexico's Project water supplies, thereby reducing its Compact apportionment and violating the Compact.

The fact that certain of the duties that New Mexico alleges were violated arise under other federal statutes does not establish that these claims are unrelated to the Compact, and New Mexico clearly plead violations of the Compact itself through interference with the Compact's apportionment and other express provisions. This is the precise 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. N.M. Counterclaims ¶ 42. This is tantamount to alleging the United States' violations upset assumptions on which the Compact's apportionment of water is based, and reinforces that these counterclaims "aris[e] under the [Compact] itself" and are "serious claim[s] that ought to be allowed to go forward." *Cf. Nebraska v. Wyoming* at 19-20.

B. The Water Supply Act Applies to the Project.

Texas argues that New Mexico's fifth counterclaim fails to state a claim because the WSA does not apply to the Project. Tx. Mot. at 19. In doing so, Texas relies on the primary argument that the Project is subject to the Reclamation Project Act of 1939, 43 U.S.C. § 485 et seq. ("RPA"), and that the provisions of the WSA are "alternative to and not a substitute for provisions of the [RPA] relating to the same subject." Tx. Mot. at 19-20 (quoting 43 U.S.C. § 390b(b). The United States makes the same contention in seeking to dismiss this counterclaim, and New Mexico's extensive argument demonstrating that the RPA does not preclude the applicability of the WSA to this Project, as set forth in its response to the United States, N.M. Resp. in Opp. to U.S. at 39-44, is incorporated herein by reference. In summary, what Texas's argument fails to acknowledge is

that the WSA provides that it 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), the WSA is not precluded by the RPA and fully applies to the Project.

Just as the United States does, Texas also argues that the WSA, enacted in 1958, could not apply because the Project and Elephant Butte Reservoir were built long before its enactment. Tx. Mot. at 20. However, The WSA contains no language suggesting it extends only to reservoir projects constructed after its enactment in 1958, and Texas has cited no cases that hold or even suggest as much. Indeed, other courts have found that the WSA applies to projects authorized and constructed before its enactment, and have invalidated attempts to impose major operational changes to projects in the absence of Congressional approval. For instance, *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1324 (D.C. Cir. 2008) concerned a federal reservoir project in Georgia authorized by Congress in 1946 and completed in the mid-1950s, prior to the enactment of the WSA. *Id.* at 1318. Although the primary purpose of the reservoir project was hydroelectric power generation, pressure grew over time to increase the amount of space in the reservoir devoted to storage of local water supply, which would have a detrimental effect on the project's ability to generate power. *Id.* at 1318-19.

Following the initiation of a series of lawsuits over whether more storage space in the reservoir could or should be made available for local water supply, a settlement agreement was reached among a coalition of power providers, a group of Georgia water supply providers, the U.S. Army Corps of Engineers (the operator of the project) and the State of Georgia. *Id*. at 1319-20.

This settlement agreement called for reallocation of approximately 20% of the reservoir's storage to local municipal uses, with some compensation being paid to hydroelectric producers. *Id*. Alabama and Florida, states downstream of the project who feared that the proposed reallocation of storage purpose to local water supply would diminish the flow of water reaching them, sought to invalidate the settlement agreement on the ground, *inter alia*, that such a reallocation would constitute a major operational change requiring Congressional approval pursuant to the WSA. As relevant in this context, the D.C. Circuit agreed, ruling that the proposed changes to water storage use constituted a major operational change to a project falling within the scope of the WSA, thereby invalidating the settlement agreement in the absence of Congressional approval. *Id.* at 1322-25.

Thus, the Court is clearly not precluded from assessing whether the United States has violated the WSA by allowing significant amounts of Project water to be used by the City of El Paso for municipal and industrial purposes rather than irrigation and by incorporating major operational changes into the 2008 Operating Agreement in the absence of Congressional approval simply because the Project was constructed prior to the enactment of the WSA. *See also 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).

Because nothing in the RPA relates to the same subjects as 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 purposes 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 is Entitled to Relief for Violations of the MPA That Reduce its Compact Apportionment.

Texas contends the Court should dismiss this counterclaim as against Texas because New Mexico does not have a right to enforce the MPA, and because Texas is not a party to any MPA contracts referenced in New Mexico's counterclaim. Tx. Mot. at 14–16. However, in advocating for dismissal of New Mexico's seventh counterclaim, Texas misconstrues the counterclaim and ignores the Compact's limitations on contracts executed under the Miscellaneous Purposes Act.

Texas fails to note that New Mexico's seventh counterclaim alleges the United States' MPA contracts with Texas municipalities and other users violate *both* the Compact and the MPA. *See* Tx . Mot. at 14 ("In other words, New Mexico seeks to assert a cause of action under the MPA against Texas and the United States."). And, particularly as to Texas, this counterclaim's roots in New Mexico's rights and Texas's obligations arising under the Compact demonstrate that New Mexico has stated a well-pled claim of relief arising under the Compact against Texas.

Subject to enumerated limitations, the MPA authorized the Secretary of the Interior to enter into contracts to supply reclamation-project water to non-irrigation uses. 43 U.S.C. § 521. What the MPA did not do (and could not have done) is authorize the Secretary to enter into non-irrigation contracts that violate the terms of the Compact or allocate Project water to users in a manner that infringes upon New Mexico's Compact entitlement. Because the Compact is inextricably intertwined with the Project and the associated Downstream Contracts, 138 S. Ct.at 959, Project operations cannot be altered under applicable reclamation law in a manner that conflicts with the Compact and the apportionment it effects between New Mexico and Texas.

New Mexico's Counterclaim alleges the 2008 Operating Agreement, in conjunction with MPA contracts have, among other things, allowed carryover storage and implemented accounting methods that have materially altered the historical and Compact-mandated allocation of Project supply between New Mexico and Texas. N.M. Counterclaims ¶¶102, 108, 110–15. Based on the legal principles described above, New Mexico has alleged facts—which the Court must accept as true for purposes of Texas's motion, *Wood v. Moss*, 572 U.S. at 755 n.5—that support an inference that by entering into MPA contracts authorizing non-irrigation uses in the City of El Paso and elsewhere in Texas, the United States has altered Project allocations and operations in a way that has violated the Compact and adversely affected New Mexico's apportionment thereunder.

Texas argues in its motion that New Mexico's seventh counterclaim fails in part because the MPA does not, as a procedural matter, require New Mexico's prior approval of contracts executed pursuant to the statute. *See* Tx. Mot. at 15. However, New Mexico's argument does not stand on any such contention. Rather, New Mexico's argument is that the substance of the contracts the United States entered into with non-irrigation users within Texas violate the Compact and New

Mexico's apportionment thereunder and are void under the MPA, thus entitling New Mexico to relief for the decreases in its apportionment that it suffered.

New Mexico acknowledges Texas is not a party to any of the United States' MPA contracts to supply non-irrigation water to users within the Project area. But that does not mean Texas is not liable for harms suffered by New Mexico to its Compact rights as the result of Project deliveries to the parties to those contracts. Whether Texas encouraged the execution of these contracts or simply allowed its citizens or political subdivisions to enter them through its inaction, Texas failed to enforce the Compact and abdicated its responsibility to prevent its citizens from interfering with New Mexico's Compact rights and apportionment. Even if Texas had a good-faith belief that the MPA contracts did not violate the Compact, it can still be held liable if it is found that they do. *See Texas v. New Mexico*, 482 U.S. 124, 129 (1987) ("good-faith differences about the scope of contractual undertakings do not relieve either party from performance."). Just as New Mexico will be liable if its citizens are found to have intercepted Compact water meant for Texas, even if New Mexico did not encourage or was unaware of their actions, Texas is also liable if its citizens and political subdivisions have taken Compact water meant for New Mexico or otherwise interfered with New Mexico's Compact rights.

In sum, while Texas admittedly is not a party to any of the MPA contracts with the United States, it is a direct beneficiary of deliveries of Project water to the contractees within Texas and receives a Compact windfall as a result of those contracts. By realizing those benefits, and by failing to enforce the Compact, Texas has offended New Mexico's Compact entitlement in a manner that warrants relief against it. For these reasons, New Mexico has stated a claim for relief in its seventh counterclaim and this counterclaim should be allowed to proceed.

V. NEW MEXICO HAS SUFFICIENTLY PLED ITS THIRD, FOURTH, FIFTH AND SEVENTH AFFIRMATIVE DEFENSES, AND SUCH DEFENSES ARE AVAILABLE IN COMPACT ENFORCEMENT PROCEEDINGS.

As an initial matter, although Texas pled its challenges to these specific affirmative defenses as a motion for partial summary judgment rather than a judgment on the pleadings, it did not lay out any undisputed material facts relative to these defenses, it relies solely on the pleadings for its arguments as opposed to submitting any record evidence, and it fails to say which, if any disputed issues of material fact are admitted for purposes of the motion. Instead, Texas contends that equitable affirmative defenses such as unclean hands, acceptance, waiver, estoppel, and laches are all unavailable in compact enforcement proceedings as a matter of law, and that failure to exhaust remedies is not an available defense in an original action. Simply by means of example, New Mexico has alleged in its affirmative defenses that, *inter alia*, Texas has allowed unregulated development of groundwater resources in the Project area of Texas that have interfered with New Mexico's ability to receive its Compact apportionment and that has resulted in more water being released from Project storage than otherwise would have occurred, that Texas has improperly accounted for return flows in its portion of the Project which has again had the effect of interfering with New Mexico's Compact apportionment, and that Texas officially accepted Compact and Project accounting for decades without ever raising allegations of underdelivery. These are all complex issues of law and fact that must be developed through the litigation process. Texas does not actually address these allegations or indicate whether it agrees with them or disputes them; instead it rests its arguments on whether these affirmative defenses are available in this context. This is not a proper basis for summary judgment, but rather is more in the nature of a motion for judgment on the pleadings. Because, for the reasons detailed below, each of these affirmative defenses is available in this context and has been

sufficiently pled, Texas's motion to dismiss them, regardless of the standard under which it is evaluated, should be denied.

A. Texas is Incorrect That Equitable Defenses are Categorically Unavailable in Compact Enforcement Proceedings.

Contrary to Texas's motion, the Court's compact jurisprudence provides no basis to conclude equitable affirmative defenses are unavailable in compact enforcement proceedings. As the Court recently stated in *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015), in a compact enforcement proceeding the Court "may invoke equitable principles, so long as consistent with the compact itself, to devise 'fair . . . solution[s]' to the state-parties' disputes." That is so in part because compacts count as federal law and "the public interest is involved," meaning the Court's "equitable powers assume an even broader and more flexible character than when only a private controversy is at stake." *Id.* at 1053 (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). The Court in *Kansas* fashioned an equitable remedy (disgorgement) against the defendant State in that case, but the Court's role in preventing a State's "inequitable takings of water," *id.* at 1057, could also apply to bar or limit a plaintiff State's claims on account of its own inequitable acts.

Here, New Mexico's affirmative defenses (as well as counterclaims) allege that Texas has acted in an inequitable manner in the context of the Compact's administration and in bringing its claims to this Court, and that any remedy crafted in the case without those violations in mind would be inequitable to New Mexico. New Mexico is *not*, through its affirmative defenses, asking the Court to "balance the equities" of the Rio Grande Compact apportionment or craft a new apportionment, as Texas asserts. Tx. Mot. at 22. Rather, New Mexico takes the position that, for several equitable reasons such as unclean hands due to its own actions in impairing New Mexico's receipt of its Compact appropriation, acceptance of Compact accounting, and inexcusable delay in

putting New Mexico on notice of its alleged underdeliveries, Texas should be barred from asserting certain specific violations of the Compact and/or gaining relief from those specific injuries.

Kansas v. Colorado, 514 U.S. 673, 687–88 (1995), also exposes the error of Texas's argument that equitable defenses are simply not available to compact-enforcement defendants. In that case, Colorado raised the equitable defense of laches against Kansas's claim that well-pumping in Colorado had violated the Arkansas River Compact. *Id.* at 687. The special master ruled that Colorado had failed to show inexcusable delay on the part of Kansas, as well as prejudice to Colorado, sufficient to support its laches defense. *Id.* On Colorado's exception to the special master's report, the Court acknowledged that it "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact." *Id.* (citing *Illinois v. Kentucky*, 500 U.S. 380, 388 (1991); *Block v. North Dakota ex rel. Bd. of Univ. and School Lands*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting); *Colorado v. Kansas*, 320 U.S. 383, 394 (1943)). The Court again declined to "foreclose the applicability of laches in such cases," concluding that Colorado had failed to prove an element of the laches defense.[6] *Id.* at 687–88. The Court's decision to leave for another day the issue of whether laches may be invoked in a compact enforcement case clearly undermines Texas's argument that, as a matter of law, *no* equitable defense, laches included, can be asserted in such a case.

Kansas v. Nebraska and *Kansas v. Colorado* provide the clearest evidence that equitable defenses may still be available in compact enforcement cases to the extent that those defenses are consistent with the compact at issue, but other cases also show that the Court often proceeds in equity when crafting remedies or assessing defenses aimed at sovereigns. *See, e.g.*, *Texas v. New*

[6] Even if delay in filling a compact enforcement could not preclude relief on the claims by laches, that delay "gravely add[s] to the burden [the plaintiff] would otherwise bear" in proving its case. *Id.* at 687–88 (quoting *Colorado v. Kansas*, 320 U.S. at 294).

Mexico, 482, U.S. at 134 (holding that appointment of a river master would be a "fair and equitable solution that is consistent with the Compact terms"); *see also Heckler v. Cmty. Health Servs of Crawford Cty., Inc.*, 467 U.S. 51, 60 (1984) (leaving open the possibility of equitably estopping the Government under certain circumstances). Holding that equitable *defenses* are unavailable in any and all compact-enforcement cases, even while equitable *remedies* are possible, would unduly curtail the Court's equitable powers in the realm of interstate compact disputes. To the extent that equitable defenses lead to results that are consistent with a compact's terms, they should be available to a defendant subject to the weighty accusation of having violated a compact term.

B. New Mexico has Sufficiently Pled its Rhird (Unclean Hands), Fourth (Acceptance/Waiver/Estoppel), Fifth (Laches), and Seventh (Failure to Exhaust Remedies) Affirmative Defenses to Texas's Complaint.

New Mexico has also alleged sufficient facts, accepted as true for purposes of Texas's motion, that support each of its equitable defenses and its failure-to-exhaust defense.

1. Unclean Hands.

Texas overstates the test for unclean hands as requiring bad faith, fraud, or deceit and argues that New Mexico has not alleged any such behavior. Tx. Mot. at 23. Yet, Texas also acknowledges that "[t]he conduct component of unclean hands is broad" and can include conduct that "violated conscience, or good faith, or equitable principle." *Id.* (quoting *Keystone Driller Co. v. General Excavator Co.*, 290 U.S. 240, 245 (1933)). The unclean hands doctrine "is not a rigid formula which 'trammels the free and just exercise of discretion.'" *Johnson v. Yellow Cab Transit Co.*, 321 U.S. 383, 387 (1944) (quoting *Keystone Driller Co.*, 290 U.S. at 246). Rather, "[a]ny willful act concerning the cause of action which rightfully can be said to transgress equitable standards of conduct is sufficient cause for the invocation of the maxim [of unclean hands] by the chancellor." *Precision Instrument Mfg. Co. v. Auto. Maint. Mach. Co.*, 324 U.S. 806, 815 (1945). Evidence of bad faith, fraud or deceit may well increase the justification for

applying the unclean hands doctrine, but other inequitable behavior can also support a Court's determination to do so.

In its Answer and Counterclaims, New Mexico has alleged numerous facts that illustrate Texas's unclean hands with respect to enforcement of the Compact's apportionment among the States. Among other things, New Mexico has alleged that Texas allowed water users within its portion of the Project area to develop groundwater resources, failed to properly account for return flows within Texas, improperly converted Project water to municipal uses, and otherwise interfered with New Mexico's Compact apportionment. *See* New Mexico's Answer to Texas's Complaint ¶¶ 19, 35; N.M. Counterclaims ¶¶ 33, 35–36, 64–67, 107. These actions are directly analogous to New Mexico's alleged actions that Texas argues violate the Compact and must be taken into consideration when evaluating Texas's allegations against New Mexico. New Mexico has also alleged that Texas previously accepted the Compact and Project accounting that governs calculation and delivery of the States' apportionment rights, and only now claims harm from those past deliveries. New Mexico's Answer to Texas's Complaint ¶ 36. Even if this change in position was not made in bad faith, it is relevant to show that Texas is not seeking relief from the Court with clean hands.

2. Acceptance/Waiver/Estoppel.

In arguing that New Mexico's related defenses of acceptance, waiver, and estoppel fail as a matter of law, Texas misconstrues New Mexico's position and discounts its own past conduct that contributed to the alleged harms that it now claims.

Acceptance. New Mexico's defense of acceptance/consent does not seek to modify the parties' obligations under the 1938 Compact's express terms, as Texas claims. Tx. Mot. at 24. The States' apportionments and obligations under the Compact are fixed. Instead, New Mexico's defense seeks to bar certain claims of past injury where Texas consented to the Compact and

Project accounting and operations that governed Texas's Compact rights and are relevant to Texas's alleged injuries. Had Texas raised its concerns throughout the past several decades of Compact administration, the parties could have worked to resolve their differences, and New Mexico could have attempted to mitigate any potential future disputes or injuries to Texas. Instead, Texas sat on its rights and chose not to enforce them during those decades and only now sees it advantageous to press its claims and seek damages on decades-old facts. The Court should not condone this "wait and see" approach, particularly after Texas accepted the past Compact and Project accounting that either expressly or implicitly included the water uses and Project operations of which Texas now complains. The Court has found acquiescence and "silence in the face of circumstances that warrant a response" relevant in cases dealing with the weighty issue of State land ownership and the permanent settlement of interstate boundaries, *see Georgia v. South Carolina*, 497 U.S. 376, 389, 393 (1990), and should similarly factor Texas's "silence in the face of circumstances that warrant a response" into whether it may bring a claim for relief from its discrete past harms.

The reason for this is clear. Imagine a situation involving a contract other than a Compact in which the party raising an alleged breach waits 75 years to raise the alleged breach and then seeks damages for the entire time. In this situation, the circumstances are even more egregious because it is comparable to a situation involving a contract in which the contracting parties met every year for the *sole purpose* of discussing how the contract was working out, and the allegedly aggrieved party *still* failed to raise the issue for 75 years, despite having every opportunity to do so. At some point, raising claims for alleged past damages after having appeared for years to acquiesce in the terms of dealing becomes an ambush.

The defense of acceptance has also been allowed in other compact enforcement cases under very similar circumstances. For instance, in *Kansas v. Nebraska*, Nebraska asserted this defense on the basis of Kansas's acceptance of the calculations of annual virgin water supply and allowable consumptive use via its representative to the Republican River Compact Administration ("RRCA"). *Kansas v. Nebraska*, No. 126, Orig., Special Master Memorandum of Decision No. 1 (Feb. 12, 2001), at 3. The Special Master agreed with Nebraska, finding the Republican River Compact imposed a duty on the signatory States to administer the agreement and gather data necessary for its administration, that the States had chosen to accomplish this by forming the RRCA, and that all three States, including Kansas, had accepted the RRCA's annual calculations of water supply and consumption for decades. *Id*. at 4-6. "Given these facts, the unanimous acceptance by the RRCA of the Engineering Committee's water computations must be held final and binding on the States." *Id*. at 6. Noting that the Court in *Texas v. New Mexico* held Texas's acceptance of the Pecos River Compact Commission's determination of Texas's shortfall under that compact for a certain period was binding on Texas, even though the Pecos River Compact expressly provided that the Commission's factual determinations would not be conclusive in any court, *Texas v. New Mexico*, 462 U.S. 554, 570-71, 575 (1983), the special master ruled the RRCA's computations were binding, and precluded Kansas from claiming more water should have been available in any year in which it accepted the RRCA's computations. *Kansas v. Nebraska*, No. 126, Orig., Special Master Memorandum of Decision No. 1 (Feb. 12, 2001), at 11-13.

The situation here could not be more similar. As New Mexico has alleged, Texas approved annual Compact and Project accounting for decades. N.M. Answer to Texas's Complaint ¶ 36. Texas was aware of groundwater pumping in New Mexico and Texas during this period, and was aware of its potential to impact surface water supplies. *Id*. ¶ 40. And yet at no time until 2011 did

Texas decline to approve either Project or Compact accounting or protest that such accounting should have reflected the availability of additional water for the Project or for Texas were it not for New Mexico's alleged illegal water uses. There is no basis to conclude the defense of acceptance is unavailable to New Mexico in these circumstances.

Waiver. Waiver is the "intentional relinquishment or abandonment of a known right." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Waiver can also be implied where there is "clear, decisive and unequivocal conduct which indicates a purpose to waive the legal rights involved." *Arizona v. Tohono O'oodham Nation*, 818 F.3d 549, 559 (9th Cir. 2016) (quoting *United States v. Amwest Sur. Ins. Co.*, 54 F.3d 601, 602–03 (9th Cir. 1995)). Whether an action gives rise to waiver is dependent on the facts of each case and the right subject to possible waiver. *United States v. Olano*, 507 U.S. 725, 733 (1993). In this instance, New Mexico has alleged facts showing that Texas waived its legal rights to apportioned water it claims it was denied in the past as a result of New Mexico's actions. Since Congressional approval of the Compact, Texas has been involved in the accounting of Compact and Project water contents and deliveries and, until 2011, chose not object to (and, indeed, approved) that accounting and its effect on Texas's apportioned water. Texas thereby waived its claims of past harms to its Compact apportionment occurring within those accounting years. *See* New Mexico's Answer to Texas's Complaint ¶ 36.

Estoppel. Finally, equitable estoppel requires (1) a misrepresentation of fact to a person reasonably likely to rely upon the fact and (2) reasonable reliance upon the fact by the other party. *Heckler*, 467 U.S. at 59. Here, New Mexico reasonably relied on Texas's consistent (until 2011) representations that it was satisfied with the Compact and Project accounting that governs the States' Compact apportionment rights. Given Texas's present position that it has suffered harm as a result of that accounting, its past representations that it had no issue with how its Compact rights

were being administered and delivered under the accounting were, in hindsight, misleading and potentially duplicitous.

In sum, New Mexico's fourth affirmative defense of acceptance/waiver/estoppel states a valid defense and is supported by ample evidence to survive Texas's motion to dismiss it.

3. Laches

As mentioned above, the Court has left open the possibility that laches is an available defense in the context of a compact enforcement action such as this one. *Kansas v. Colorado*, 514 U.S. at 687. While generally the laches defense and statutes of limitations have been held inapplicable against a State, *Illinois v. Kentucky*, 500 U.S. at 388, there are instances in which courts have held that a plaintiff sovereign may be barred from pursuing an unreasonably delayed claim. *See Block*, 461 U.S. at 293 (remanding case to determine whether State's action is barred by Quiet Title Act's statute of limitations); *cf. Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1339 n.11 (10th Cir. 1982) (holding that laches can apply against a Tribe).

New Mexico is not, as Texas contends, alleging the Court should "deny Texas any remedy for past breaches of the 1938 Compact by New Mexico." Tx. Mot. at 26. Instead, if New Mexico demonstrates that Texas lacked diligence in asserting its specific claims at issue in this proceeding, and that New Mexico was prejudiced by that delay, *see Kansas v. Colorado*, 514 U.S. at 687, then the Court should bar Texas's pursuit of those particular claims for relief. In this instance, Texas complains of injuries that it allegedly has experienced in the indeterminate past, possibly extending as far back as Congress's approval of the Compact in 1939. But during that period, as New Mexico states in its Answer, Texas was aware of groundwater pumping and other water use within New Mexico that it now complains of. *See* New Mexico's Answer to Texas's Complaint, ¶ 40; *see also Kansas v. Colorado*, 514 U.S. at 688 (suggesting that the plaintiff State's awareness of pumping and use in the other State is relevant to the laches analysis). Reclamation also developed the

"D1/D2 Curves" in 1980 in an attempt to replicate the historic deliveries to each Project acre once responsibility for delivering water to the farm headgates was assumed by the irrigation districts following the repayment of Project costs to Reclamation. These curves had the effect of reflecting the hydrological effects of groundwater diversions in both States (and in Mexico). Texas did not at the time object to Reclamation's methodology for accounting for these groundwater diversions. N.M. Counterclaims ¶¶ 40–41. Also, in the past several decades, Texas brought two prior original actions against New Mexico that were related to the Rio Grande Compact, yet neglected to include in those actions claims stemming from known groundwater pumping below Elephant Butte Reservoir. New Mexico's Answer to Texas's Complaint, ¶ 40. Texas neglected to assert its rights until this proceeding, amply supporting New Mexico's laches defense and providing the Court with compelling reasons to apply laches with respect to all or some of Texas's claims of past injury.

As New Mexico has properly alleged facts to support its laches defense, the Court should reject Texas's attempt to dismiss it.

4. Exhaustion

Texas finally argues New Mexico's defense of failure to exhaust administrative remedies should be dismissed because it is unavailable in original actions. Texas rests its argument on the Court's acceptance of its complaint, arguing the Court determined the Rio Grande Compact Commission ("RGCC") is an inadequate forum to resolve Texas's claims when it granted Texas leave to file its Complaint. Tex. Mot. at 27-29. Because the Court made this determination, Texas argues, New Mexico's failure to exhaust defense fails as a matter of law. *Id*. at 29.

New Mexico disputes the proposition that a failure to exhaust defense is inappropriate, per se, in all original actions once a complaint has been accepted. The failure to exhaust defense was raised in *Kansas v. Colorado* following acceptance of Kansas's complaint. In that case, Colorado argued certain of Kansas's claims should be remanded to the Arkansas River Compact

Administration. Report of the Special Master at 156, *Kansas v. Colorado*, No. 108, Original (July 1994). The special master disagreed, but not because the defense was unavailable. Instead, he concluded that the defense was viable in theory, but that Colorado's defense failed on the merits because "Kansas had indeed made the requisite effort before the Compact Administration." *Id*. at 184 (noting Kansas had alleged it attempted to resolve its grievances via the Compact Administration for five years before filing its complaint). In this case, Texas made no attempts whatsoever to raise its concerns with the RGCC before filing the present lawsuit.

To be clear, in raising this defense, New Mexico is not seeking a remand of Texas's claims to the RGCC for consideration in that forum. Instead, New Mexico raises this defense in the context of its allegation that, for decades, Texas failed to alert New Mexico to its contention that it was not receiving its Compact apportionment, despite having available a forum in which it was not only able, but obligated to do so. Because it failed to utilize the RGCC process to at least raise the issues now before the Court and to put New Mexico on notice of its current allegation that it had not been receiving its Compact apportionment for decades, Texas should not now be allowed to claim damages for the time period that it remained silent in that forum.

CONCLUSION

For the foregoing reasons, Texas's Motion to Strike of for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses should be denied, and New Mexico's counterclaims and affirmative defenses should be allowed to proceed in their entirety.

Respectfully submitted,

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
MARCUS J. RAEL, JR.*
Special Assistant Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672
marcus@roblesrael.com
**Counsel of Record*

MARCUS J. RAEL, JR.
DAVID A. ROMAN
Special Assistant Attorneys General
ROBLES, RAEL & ANAYA, P.C.
500 Marquette Avenue NW,
Suite 700
Albuquerque, New Mexico 87102
505-242-2228

BENNET W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

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

NEW MEXICO'S RESPONSE TO TEXAS'S MOTION TO STRIKE OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES

to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 28th day of February, 2019.

/s/ Michael A. Kopp
Michael A. Kopp
Special Assistant Attorney General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
(303) 861-1963

SPECIAL MASTER

HONORABLE MICHAEL J. MELLOY
Special Master
United States Circuit Judge
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401-2101
TXvNM141@ca8.uscourts.gov
(319) 432-6080
(service via email and U.S. Mail)

MICHAEL E. GANS, CLERK OF THE COURT
United States Court of Appeals
- Eighth Circuit
Thomas F. Eagleton United
States Courthouse
111 South 10th Street, Suite 24.329
St. Louis, MO 63102
(314) 244-2400
TXvNM141@ca8.uscourts.gov

UNITED STATES

JAMES J. DUBOIS*
R. LEE LEININGER
THOMAS K. SNODGRASS
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
999 18th Street
South Terrace – Suite 370
Denver, Colorado 80202
james.dubois@usdoj.gov
(303) 844-1375
Lee.leininger@usdoj.gov
(303)844-1364
Thomas.snodgrass@usdoj.gov
(303)844-7233

Seth Allison, Paralegal
Seth.allison@usdoj.gov
(303)844-7917

NOEL J. FRANCISCO*
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
ANN O'CONNELL
Assistant to the Solicitor General
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001
supremectbriefs@usdoj.gov
(202)514-2217

STEPHEN M. MACFARLANE
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
501 I Street, Suite 9-700
Sacramento, CA 95814
stephen.macfarlane@usdoj.gov
(916) 930-2204

JUDITH E. COLEMAN
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611
Judith.coleman@usdoj.gov
(202) 514-3553

STATE OF NEW MEXICO

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672
hbalderas@nmag.gov
tmnaestas@nmag.gov

MARCUS J. RAEL, JR.*
DAVID A. ROMAN
Special Assistant Attorneys General
ROBLES, RAEL & ANAYA, P.C.
500 Marquette Avenue NW,
Suite 700
Albuquerque, New Mexico 87102
505-242-2228
marcus@roblesrael.com

**Counsel of Record*

BENNET W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963
braley@troutlaw.com
lthompson@troutlaw.com
mkopp@troutlaw.com

STATE OF COLORADO

CHAD M. WALLACE*
Senior Assistant Attorney General
COLORADO DEPARTMENT OF LAW
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
chad.wallace@coag.gov
Paralegal: Nan B. Edwards
nan.edwards@coag.gov

CYNTHIA H. COFFMAN
Attorney General of Colorado
KAREN M. KWON
First Assistant Attorney General
Colorado Department of Law
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
cynthia.coffman@coag.gov
karen.kwon@coag.gov

STATE OF TEXAS

STUART SOMACH* (916) 446-7979
ANDREW M. HITCHINGS (916) 803- 4561 (cell)
ROBERT B. HOFFMAN ssomach@somachlaw.com
FRANCIS M. "MAC" ahitchings@somachlaw.com
GOLDSBERRY II rhoffman@somachlaw.com
THERESA C. BARFIELD mgoldsberry@somachlaw.com
BRITTANY K. JOHNSON tbarfield@somachlaw.com
SOMACH SIMMONS & DUNN, PC bjohnson@somachlaw.com
500 Capital Mall, Suite 1000 cgarro@somachlaw.com
Sacramento, CA 95814 rstephenson@somachlaw.com
Rhonda Stephenson - Secretary ydelacruz@somachlaw.com
Christina Garro – Paralegal
Yolanda De La Cruz - Secretary

KEN PAXTON, Attorney General
JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS, Deputy
Attorney General
PRISCILLA M. HUBENAK Priscilla.Hubenak@oag.texas.gov
Chief, Environmental Protection Division
P.O. Box 12548
Austin, TX 78711-2548

AMICI / FOR INFORMATIONAL PURPOSES ONLY

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

JAMES C. BROCKMANN* (505) 983-3880
JAY F. STEIN jcbrockmann@newmexicowaterlaw.com
STEIN & BROCKMANN, P.A. jfstein@newmexicowaterlaw.com
P.O. Box 2067 administrator@newmexicowaterlaw.com
Santé Fe, New Mexico 87504

PETER AUH (505) 289-3092
ALBUQUERQUE BERNALILLO COUNTY pauh@abcwua.org
WATER UTILITY AUTHORITY
P.O. Box 568
Albuquerque, NM 87103-0568

CITY OF EL PASO

DOUGLAS G. CAROOM* (512) 472-8021

SUSAN M. MAXWELL dcaroom@bickerstaff.com
BICKERSTAFF HEATH DELGADO smaxwell@bickerstaff.com
ACOSTA, LLP
2711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746

CITY OF LAS CRUCES

JAY F. STEIN * (505) 983-3880
JAMES C. BROCKMANN jcbrockmann@newmexicowaterlaw.com
STEIN & BROCKMANN, P.A. jfstein@newmexicowaterlaw.com
P.O. Box 2067 administrator@newmexicowaterlaw.com
Santé Fe, New Mexico 87504

JENNIFER VEGA-BROWN (575) 541-2128
MARCIA B. DRIGGERS jvega-brown@las-cruces.org
LAW CRUCES CITY ATTORNEY'S OFFICE marcyd@las-cruces.org
P.O. Box 20000
Las Cruces, New Mexico 88004

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCASTLE* (575) 636-2377
BARNCASTLE LAW FIRM, LLC (575) 636-2688 (fax)
1100 South Main, Ste. 20 samantha@h2o-legal.com
P.O. Box 1556
Las Cruces, NM 88004
Janet Correll – Paralegal janet@h2o-legal.com

EL PASO COUNTY WATER AND IMPROVEMENT DISTRICT

MARIA O'BRIEN* (505) 848-1800 (main)
SARAH M. STEVENSON (505) 848-1803 (direct)
MODRALL, SPERLING, ROEHL, HARRIS (505) 848-9710 (fax)
& SISK, PA mobrien@modrall.com
Suite 1000
500 Fourth Street N.W. sarah.stevenson@modrall.com
P.O. Box 2168
Albuquerque, New Mexico 87103-2168

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT

ANDREW S. "DREW" MILLER* (512) 320-5466
KEMP SMITH LLP dmiller@kempsmith.com
816 Congress Avenue, Suite 1305

Austin, TX 78701

STATE OF KANSAS

TOBY CROUSE* (785) 296-2215
Solicitor General, State of Kansas toby.crouse@ag.ks.gov
DEREK SCHMIDT
Attorney General, State of Kansas bryan.clark@ag.ks.gov
JEFFREY A. CHANAY
Chief Deputy Attorney General
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Attorney General
120 S. W. 10th Ave., 2nd Floor
Topeka, KS 66612

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON* ttd@tessadavidson.com
DAVIDSON LAW FIRM, LLC
4206 Corrales Road
P.O. Box 2240
Corrales, NM 87048
(505) 792-3636

Patricia McCan – Paralegal patricia@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON* (505) 699-1445
UTTON & KERY, P.A. john@uttonkery.com
P.O. Box 2386
Santa Fe, New Mexico 87504

LIZBETH ELLIS (575) 646-2446
General Counsel lellis@ad.nmsu.edu
CLAYTON BRADLEY bradleyc@ad.nmsu.edu
Counsel
New Mexico State University
Hadley Hall Room 132
2850 Weddell Road
Las Cruces, NM 88003