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

UNITED STATES OF AMERICA'S PARTIAL JOINDER IN TEXAS'S MOTION TO STRIKE OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES, FEDERAL RULES OF CIVIL PROCEDURE, RULE 12(C) AND RULE 56

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The United States respectfully submits this Partial Joinder in Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(c) and Rule 56 ("Motion to Strike" or "Tex. Mot."), filed on December 26, 2018.

New Mexico filed nine Counterclaims in this original action on May 22, 2018. Of those nine Counterclaims, six were asserted against the United States only, and three were asserted against Texas and/or the United States. On July 23, 2018, the United States answered New Mexico's Counterclaims, and on December 21, 2018, the United States filed a Motion for Judgment on the Pleadings on seven of the Counterclaims that asserted claims against the United States. The United States argued that those seven Counterclaims (Nos. 2, 4, 5, 6, 7, 8, and 9) should be dismissed (1) because New Mexico failed to establish the existence of a waiver of the government's sovereign immunity that would provide the consent of the United States to suit on any of those claims; (2) New Mexico failed to establish its standing to assert those seven claims against the United States; and (3) six of the seven claims failed to state claims for relief against the United States. On December 26, 2018, Texas filed its Motion to Strike, as well as a separate Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon. New Mexico also filed a Motion for Partial Judgment on Matters Previously Decided that same day.[1] At a telephonic status conference on January 30, 2019, the Special Master set a schedule for the filing of responses and replies, and a hearing date.

A. TEXAS'S MOTION TO STRIKE

The United States' Motion for Judgment on the Pleadings assumed that New Mexico's Counterclaims were properly before the Special Master. *See Texas v. New Mexico*, 138 S. Ct. 1460 (2018) (appointing the Hon. Michael J. Melloy Special Master in this case "with authority to fix the

[1] The United States is filing concurrently a separate response to Texas's Request for a Judicial Declaration and New Mexico's Motion for Partial Judgment.

time and conditions for the filing of additional pleadings . . ."). Texas's Motion to Strike, however, makes a serious argument that they are not, based on New Mexico's failure to seek leave of the Supreme Court to file those Counterclaims. The United States concurs with Texas that New Mexico's Counterclaims would significantly expand the issues to be decided in this action beyond those set forth in the complaints by Texas and the United States, which the Supreme Court granted leave to file. Notably, New Mexico's Counterclaims challenge contracts between the United States and water districts and other entities that are not parties to this action. These contracts include the 2008 Operating Agreement, to which the United States, the Elephant Butte Irrigation District ("EBID"), and the El Paso County Water Improvement District No. 1 ("EPCWID") are the only parties, and contracts between the United States and the City of El Paso to provide Rio Grande Project ("Project") water for municipal purposes. *See* N.M. Countercl. Nos. 2, 3, & 7. The challenged contracts were entered into under provisions of reclamation law that pertain to Project operations and the allocation of Project water. New Mexico is not a party to any of those contracts. Counterclaims 8 and 9 concern allegations regarding Rio Grande channel maintenance and the Republic of Mexico's compliance with the 1906 Convention. New Mexico has not pled a sovereign interest in Counterclaim 8 that is cognizable against the United States, and New Mexico is not a party to the 1906 Convention with Mexico. Moreover, New Mexico's Counterclaims could expand not only the issues for decision but the number of parties in the litigation. Although the Supreme Court denied EBID's and EPCWID's motions to intervene, those districts, as well as amicus curiae City of El Paso, would likely be deemed to be indispensable parties to claims challenging the validity of contracts to which they are parties. *See Lomayaktewa v. Hathaway*, 520 F.2d 1324, 1325 (9th Cir. 1975).

Thus, in the view of the United States, Texas makes a strong argument that, given the Supreme Court's oft-repeated statements that its original jurisdiction is to be exercised "sparingly," *see, e.g.*, *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *Mississippi v. Louisiana*, 506

U.S. 73, 76 (1992)), and the Court's unwillingness to allow its original jurisdiction to be expanded without leave of court, New Mexico was required to seek and obtain leave of the Court before filing any Counterclaims. As Texas notes in its Motion to Strike, the requirement that litigants obtain leave of the Court before filing claims or counterclaims performs an "'important gatekeeping function'" to ensure that its original jurisdiction is not expanded beyond the scope of a controversy truly meriting the exercise of that jurisdiction. Tex. Mot. to Strike 10 (quoting *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995)). Without repeating Texas's brief, Texas cites instances in which the Supreme Court required litigants to obtain leave before filing counterclaims. *See id*. at 10-12. New Mexico's failure to obtain such leave suggests that New Mexico's Counterclaims may not be properly before the Special Master and that the Counterclaims should be stricken, at the very least, until New Mexico cures this procedural defect.

Accordingly, the United States respectfully suggests that the Special Master, as a threshold matter, determine whether New Mexico's Counterclaims are properly before him. If he concludes that those Counterclaims expand the scope of this litigation beyond the issues presented with leave of Court in the complaints by Texas and the United States, then the United States concurs with Texas that the Counterclaims should be stricken and joins the Motion to Strike on that basis. If he concludes that the Counterclaims are properly before him, then the United States respectfully requests that the Special Master proceed to rule on the motions seeking judgment on the pleadings as to those Counterclaims.

B. TEXAS'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO NEW MEXICO COUNTERCLAIMS 2, 5, AND 7

If the Special Master concludes that New Mexico's Counterclaims are properly before him, then the United States joins in that part of Texas's Motion to Strike that seeks judgment on the pleadings as to Counterclaims 2, 5, and 7. Texas's arguments for judgment on the pleadings as to

these Counterclaims overlap almost entirely with the United States' arguments in its Motion for Judgment on the Pleadings, and the United States concurs with Texas that Counterclaims 2, 5, and 7 fail as a matter of law. The United States reiterates its position that it is entitled to judgment on the pleadings on Counterclaims 3, 6, 8, and 9 as well.[2]

Respectfully submitted, this 28th day of February, 2019.

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[2] The United States takes no position on Texas's motion for judgment on the pleadings as to New Mexico's affirmative defenses to Texas's complaint.

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CERTIFICATE OF SERVICE

This is to certify that on the 28th day of February, 2019, the **UNITED STATES OF AMERICA'S PARTIAL JOINDER IN TEXAS'S MOTION TO STRIKE OR FOR PARTIAL JUDGMENT REGARDING NEW MEXICO'S COUNTERCLAIMS AND AFFIRMATIVE DEFENSES, FEDERAL RULES OF CIVIL PROCEDURE, RULE 12(C) AND RULE 56** was served via electronic mail and/or U.S. mail as indicated, upon the Special Master and those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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