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

REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST NEW MEXICO'S COUNTERCLAIMS 2, 3, 5, 6, 7, 8, AND 9.

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Intervenor-Plaintiff, the United States of America, by and through its counsel, respectfully submits its Reply Memorandum in support of its Motion for Judgment on the Pleadings, and states as follows:

I. SOVEREIGN IMMUNITY

In its Motion for Judgment on the Pleadings, the United States argued that New Mexico failed to establish a waiver of sovereign immunity applicable to the State's counterclaims against the United States. New Mexico's Response in Opposition to United States' Motion for Judgment on the Pleadings ("N.M. Resp.") is inadequate to establish that such a waiver exists.

The fundamental concept at issue in the United States' Motion for Judgment on the Pleadings is that the United States, as sovereign, is immune from suit unless it has expressly consented to be sued. *See United States v. Bormes*, 568 U.S. 6, 9 (2012) (citation omitted); *United States v. Navajo Nation*, 537 U.S. 488, 502 (2003); *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 260 (1999). "When sovereign immunity is at issue, the government is immune from a suit, whether couched as an original claim or as a counter claim, unless it has waived its immunity." *United States v. $277,000 U.S. Currency*, 69 F.3d 1491, 1493 (9th Cir. 1995) (citing *United States v. Lockheed L–188 Aircraft*, 656 F.2d 390 (9th Cir. 1979)).

As the United States established in its Memorandum in Support of its Motion for Judgment ("U.S. Mem."), the existence of consent is a prerequisite for jurisdiction. *Navajo Nation,* 537 U.S. at 502 (quoting *United States v. Mitchell*, 463 U.S. 206, 212 (1983)). Thus, "[j]urisdiction over any suit against the Government requires a clear statement from the United States waiving sovereign immunity . . . , together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citations omitted). The consent of the United States to suit also applies in original actions in this Court.

California v. Arizona, 440 U.S. 59, 61-62 (1979) ("It is settled that the United States must give its consent to be sued even when one of the States invokes this Court's original jurisdiction . . . ." (citing *Kansas v. United States*, 204 U.S. 331, 342 (1907))).

The requirement of a waiver of immunity applies to counterclaims against the United States. *See United States v. Shaw*, 309 U.S. 495, 503 (1940); FED. R. CIV. P. 13(d). When the United States commences an action, sovereign immunity bars counterclaims against the United States absent a waiver applicable to each counterclaim. *Presidential Gardens Assocs. v. U.S. ex rel. Sec'y of Hous. & Urban Dev.*, 175 F.3d 132, 140 (2d Cir. 1999); 6 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *Federal Practice & Procedure* § 1427 (3d ed. 2004). Thus, "there is no 'implied waiver' of sovereign immunity as to counterclaims based on the government's commencement of an action." *Presidential Gardens*, 175 F.3d at 140.

Neither New Mexico nor Colorado addresses the case law cited by the United States in its opening memorandum. Instead, New Mexico simply asserts that because the United States sued New Mexico over specific actions that violate the Rio Grande Compact ("Compact"), and because the United States will be bound by the rulings of this Court in this case, the United States has waived immunity for the counterclaims against it brought by New Mexico.

The United States' statement that, by intervening as a plaintiff in this action, it would be bound by the judgment of the Court, *see* U.S. Sur-Reply on Exceptions at 14, was made before New Mexico filed its counterclaims. It thus only expressed a willingness to be bound by a judgment on the claims asserted by the United States and Texas in their respective complaints. The statement did not imply consent to suit initiated against the United States by counterclaims, nor could it, because only Congress can waive the sovereign immunity of the United States. *Shaw*, 309 U.S. at 503; *see also Mitchell*, 463 U.S. at 215–16 ("no contracting officer or other

official is empowered to consent to suit against the United States"). And the notion that the United States consents to suit on counterclaims merely by commencing suit as a plaintiff is merely a variation on an implied waiver theory, which the Supreme Court has rejected. *Lane v. Pena*, 518 U.S. 187, 192 (1996).

Shaw also disposes of one of New Mexico's arguments in support of a waiver based on *Nebraska v. Wyoming*, 325 U.S. 589 (1945). *See* N.M. Resp. at 8. In its Response, New Mexico references an argument by Wyoming in that original action based on *United States v. The Thekla*, 266 U.S. 328 (1924), to the effect that when the United States voluntarily joins an action it "takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter." *Id.* at 339-40. The Court in *Shaw* addressed a similar argument based on *The Thekla* and limited the scope of the quoted language to the specific context of admiralty jurisdiction, stating that "[i]t is not our right to extend the waiver of sovereign immunity more broadly than has been directed by Congress." *Shaw*, 309 U.S. at 502. Thus, the language relied upon by New Mexico does not overcome the requirement that a state asserting a claim against the United States must identify an applicable waiver of sovereign immunity.

Moreover, in the context of this case, the United States, though not waiving its immunity to New Mexico's counterclaims, will be bound by any order or decree interpreting the Compact in connection with the claims by Texas and the United States. Texas's claim that New Mexico is exceeding its rights under the Compact will require the Court to determine the relative apportionments of Texas and New Mexico under the Compact, at least with respect to waters below Elephant Butte Reservoir. A declaration of the States' relative rights may inform other litigation where New Mexico has raised the same issues it raises in its counterclaims here, as discussed further below. *See* p. 7, *infra*.

But although the United States will be bound by the Court's determinations regarding interpretation of the Compact, New Mexico misses the mark on the issue of waiver of immunity for counterclaims for two reasons. First, New Mexico's attempt to conflate general jurisdiction over the case with sovereign immunity fails to recognize that subject-matter jurisdiction and sovereign immunity are "wholly distinct." *Blatchford v. Native Vill. of Noatak*, 501 U.S. 775, 786–7 n.4 (1991). The Court has subject matter jurisdiction over the claims brought by the United States as a party to this proceeding, just as courts do whenever the United States files a claim against a defendant. However, a waiver of sovereign immunity for *counterclaims* is a distinct and separate issue, and a waiver must be demonstrated for each specific counterclaim. *Presidential Gardens*, 175 F.3d at 140. Nothing about an original action changes these fundamentals of law. *See California v. Arizona*, 440 U.S. at 61-62. New Mexico has not shown a waiver of immunity applicable to challenge each of the actions alleged in its counterclaims against the United States. New Mexico's failure is particularly glaring regarding its claims for monetary damages, where it again fails to make even a colorable showing of a clear waiver, relying instead on an argument for an implied waiver of immunity from the mere existence of the Compact.

Second, New Mexico's reliance on Congressional approval of the Compact as an implicit waiver of immunity for suit, N.M. Resp. at 19, is also misplaced for the same reason. Waivers of sovereign immunity must be unequivocally expressed in statutory text and must be strictly construed in the government's favor. *FAA v. Cooper*, 566 U.S. 284, 290 (2012). There is no waiver of immunity unequivocally expressed in the Compact or its authorizing federal legislation. Congressional approval of the Compact cannot be read as a general waiver of

immunity for matters related to the Compact absent express terms of waiver, which neither the Compact nor its authorizing legislation contain.

There is no inconsistency between the United States' assertion of immunity with regard to New Mexico's counterclaims and the United States' agreement to be bound by the Court's ruling in this case regarding the rights and obligations of the United States with respect to the Compact insofar as such issues are addressed in the resolution of Texas's and the United States' claims against New Mexico or counterclaims by New Mexico against Texas that are allowed to proceed. Moreover, the Court's holding that the United States, through the Project, is intimately involved in managing Project water to fulfill the purposes of the Compact, and that the United States has the ability to bring claims to protect the Project water supply, *see Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018), does not constitute an implicit determination that the United States has waived immunity for counterclaims for damages or declarations of violations of other statutes or breaches of duties unrelated to the determination of the two States' respective rights and whether any apportionment is being met. New Mexico's counterclaims against the United States assert discrete claims under or with respect to various statutes and contracts. New Mexico attempts to cure the jurisdictional shortcomings in its counterclaims against the United States in its response brief to the Motion for Judgment on the Pleadings, but that effort is unavailing. It is axiomatic that a party cannot amend or cure its pleading through its response briefs. *See Morgan Distrib. Co. Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989). For these reasons, the Court's general statements regarding the United States' role in operating the Project do not establish a waiver of the sovereign immunity of the United States. New Mexico is required to demonstrate a waiver of immunity for each of the claims it asserts against the United States under the identified statutes. It has failed to do so in Counterclaims 2, 3, 5, 6, 7, 8, and 9.

Rule 13 of the Federal Rules of Civil Procedure, relied upon by the State of Colorado, does not exempt New Mexico from the requirement to identify a waiver of sovereign immunity for each counterclaim against the United States. Colorado argues that no waiver of immunity is needed because New Mexico's claims are compulsory counterclaims under FED. R. CIV. P. 13(a). Colo. Resp. at 4-6. This analysis is incorrect. Colorado's argument rests on the district court decision in *United States v. Iron Mountain Mines, Inc.*, 812 F. Supp. 1528 (E.D. Cal. 1992), but that case concerned merely whether the defendants had properly pled a claim for recoupment, for which no waiver of immunity is required, or set-off in a cost-recovery action under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980. *See id.* at 1551. The district court did not hold that *any* compulsory counterclaim could be asserted against the United States absent a waiver. *See id*.

Moreover, even if the reasoning in *United States v. Iron Mountain* were extended beyond the context of recoupment of money to certain counterclaims in original actions, a counterclaim is compulsory under Rule 13(a) only if it arises from the "same transaction or occurrence that is the subject matter of the opposing party's claim," FED. R. CIV. P. 13(a)(1)(A), and is not "the subject of another pending action," FED. R. CIV. P. 13(a)(2)(A). New Mexico's counterclaims do not arise from the same actions as the United States' claims against New Mexico, and New Mexico concedes that these same claims are currently pending in federal district court. *See* N.M. Resp. at 2, 13-14; *New Mexico v. United States*, No. 11-cv-00691 (D.N.M. Mar. 15, 2013). Moreover, Rule 13(d) makes clear that "[t]hese rules do not expand the right to assert a counterclaim—or to claim a credit—against the United States . . . ." The right to assert a

counterclaim against the United States requires a demonstration of a waiver of sovereign immunity for that counterclaim. Rule 13 by its terms leaves that requirement in place.[1]

New Mexico asserts that the proceedings in *Nebraska v Wyoming*, 515 U.S. 1 (1995), support the proposition that simply participating as a party in an original action constitutes a waiver of immunity for any and all counterclaims. Although the United States in that case excepted to the Special Master's recommendation that the Court exercise jurisdiction over Wyoming's Fourth Cross-Claim against the United States, the United States did not raise a sovereign immunity defense to that cross-claim in its exceptions brief.[2] *See* Exception of the United States & Brief in Support of the Exception of the United States, *Nebraska v. Wyoming*, No. 108, Orig. (filed Nov. 1994), attached hereto as Appendix 1. And although the Court allowed Wyoming's cross-claim to proceed, the Court did not address or find a waiver of sovereign immunity. *See Nebraska*, 515 U.S. at 15-17. The Court's silence on the issue of sovereign immunity should not be interpreted as a determination that a waiver was unnecessary, much less that such a waiver is unnecessary in any case in which the United States has intervened.

[1] As noted, there is a narrow exception from the waiver requirement for recoupment claims. *See United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017), *cert granted,* 138 S. Ct. 735 (2018), but none of New Mexico's claims qualifies as recoupment. Further, while a number of New Mexico's counterclaims against the United States do seek damages or other forms of monetary relief, as the United States pointed out in its opening memorandum, U.S. Mem. at 20-21, New Mexico has not pled a waiver that would allow it to seek monetary relief against the United States. New Mexico appears to acknowledge that defect in its response brief, N.M. Resp. at 17-18, and attempts a rescue by citing to opinions in original actions that held that monetary relief was available for compact violations. *See id*. at 18 (citing *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052-53 (2015), and *Texas,* 138 S. Ct. at 959). None of the original actions cited by New Mexico for that proposition is apposite, however, because none of those actions involved claims against the United States.

[2] The United States excepted to the Special Master's recommendation regarding the cross-claim on three other grounds: (1) that the United States' operation of storage reservoirs fell outside the scope of the North Platte Decree; (2) that Wyoming was not a proper party to seek enforcement of legal and contractual rights with respect to those reservoirs; and (3) that an alternative forum was available in federal district court to hear Wyoming's claim against the United States. U.S. Exceptions Br. at 8-29.

Doing so would cut against the long line of Supreme Court opinions holding that the government's sovereign immunity can only be waived by Congress, and that "no contracting officer or other official is empowered to consent to suit against the United States." *Mitchell,* 463 U.S. at 215–16; *accord Shaw,* 309 U.S. at 500–01; *United States v. U.S. Fid. & Guar. Co.,* 309 U.S. 506, 513 (1940); *Millares Guiraldes de Tineo v. United States,* 137 F.3d 715, 719 (2d Cir. 1998). Moreover, in *Nebraska v. Wyoming*, the United States had intervened in the case after it was first initiated in 1934, and was a party to and bound by the decision and decree issued in that case in 1945. *See Nebraska*, 325 U.S. at 591. The cross-claims against the United States in the later proceedings to enforce that decree thus sought to require the United States to comply with requirements that the Court had already imposed in its prior decision. *See Nebraska*, 515 U.S. at 15-19. In this case, in contrast, no decree has been entered that could in turn give rise to obligations enforceable in a cross-claim or counterclaim against the United States in the same case.

Thus, the United States' participation in an original action as a plaintiff does not, and cannot, constitute a waiver of immunity. New Mexico's counterclaims should be dismissed for failure to identify a specific waiver of sovereign immunity applicable to each claim. *See California,* 440 U.S. at 61-62.

II. INJURY AND STANDING

New Mexico errs, in light of past rulings of this Court, in arguing that it is not required to demonstrate injury to assert its counterclaims against the United States. N.M. Resp. at 21-23.

To establish the existence of a cognizable controversy within the Court's original jurisdiction even as between two states, "'it must appear that the complaining State has suffered a wrong through the action of the other State, furnishing ground for judicial redress, or is

asserting a right against the other State which is susceptible to judicial enforcement according to the accepted principles of the common law or equity systems of jurisprudence.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 447 (1992) (quoting *Louisiana*, 451 U.S. 725, 735-36 (1981)). The State "suffer[ing] a wrong," *id.*, must demonstrate injury. *See New York v. New Jersey*, 256 U.S. 296, 309 (1921) ("Before this court can be moved to exercise its extraordinary power under the Constitution to control the conduct of one State at the suit of another, the threatened invasion of rights must be of serious magnitude and it must be established by clear and convincing evidence" (quoted in *Louisiana*, 451 U.S. at 736 n.11)). New Mexico does not discuss the cases or the principle underlying them.

Rather, New Mexico contends that it is not "required to demonstrate that it has suffered any injury at all" to assert its counterclaims because they are "claims to enforce to the Compact." N.M. Resp. at 22. New Mexico maintains that it need only "demonstrate a violation" of the Compact in order to "obtain relief from the violation." *Id.* For this principle, New Mexico relies upon *Wyoming v. Colorado*, 309 U.S. 572 (1940), and *Nebraska v. Wyoming*, 507 U.S. 584 (1993), but that reliance is misplaced. Those cases involved actions brought to enforce specific terms in an equitable apportionment decree previously entered by the Court, and the claims were not analogous to the claims New Mexico seeks to assert against the United States here.

In *Wyoming v. Colorado*, Wyoming sued to enforce an equitable apportionment decree that limited Colorado's withdrawals from the Laramie River: the decree capped withdrawals from the river at 39,750 acre-feet, and Colorado was alleged to have diverted (or permitted the diversion of) nearly 13,000 acre-feet above that amount. *Wyoming*, 309 U.S. at 574. Colorado argued that Wyoming had not been injured by the over-diversion of the water. The Court held that further proof of injury was not required because Colorado was alleged to have violated the

terms of a decree to which it was bound and that decree represented the apportionment that the Court had deemed to be equitable. *Id.* at 581.

Wyoming v. Colorado does not support New Mexico's position. First, that case involved enforcement of a decree, not an alleged violation of a compact at the outset of a case. Second, assuming for the sake of the argument that the Court's holding extends beyond actions to enforce judicial decrees to actions relating to interstate compacts, New Mexico does not allege that the United States has violated any specific term or obligation imposed upon it by the Compact, as Wyoming had alleged of Colorado. In contrast to *Wyoming*, the extent to which New Mexico has an apportionment of water below Elephant Butte Reservoir and in what amount or proportion, and under what terms, just like the apportionment to Texas, is undefined at this time. The Compact does not contain the sort of clear definition of rights present in *Wyoming v. Colorado*. New Mexico argues not that the United States violated any clear duty under the Compact, but rather that the United States has a duty to manage the Project consistent with apportionments that have not yet been defined by the Compact or this Court.

In *Nebraska v. Wyoming*, 507 U.S. 584, Nebraska contended that Wyoming had engaged in conduct relating to the Inland Lakes storage reservoirs and had permitted development on certain tributaries to the North Platte River that violated the terms of a prior equitable apportionment decree. *See Nebraska v. Wyoming*, 325 U.S. 589. The Court held that, with respect to the claims about the Inland Lakes, Nebraska did not need to show injury because Nebraska had alleged a violation of the plain terms of the decree. *Nebraska*, 507 U.S. at 592. As noted above, this is not analogous to the instant case, in which the States' respective Compact rights below Elephant Butte Reservoir have not been defined, and which is in fact a principal issue of this case. This case is more analogous to Nebraska's claims regarding tributary

development, for which the Court held that Nebraska was required to "make a showing of substantial injury" because Nebraska was "essentially seeking a reweighing of the equities and an injunction declaring new rights and responsibilities." *Id*. at 593. In contrast to Texas, which is seeking a decree that defines its apportionment under the Compact, New Mexico presents counterclaims alleging that various actions by the United States – such as the execution of the 2008 Operating Agreement, entry into certain contracts with the City of El Paso, alleged failure to enforce a treaty obligation owed to it by Mexico under the 1906 Convention, and alleged negligence relating to maintenance of the Rio Grande channel – *interfere* with New Mexico's rights under the Compact. But the contours of those rights have not yet been defined, particularly as they might apply *against the United States* in the context of Project operations, alleged failure to enforce a treaty obligation, and navigation. Thus, New Mexico's claims are not like Wyoming's in *Wyoming v. Colorado* and are not like Nebraska's claims regarding the Inland Lakes in *Nebraska v. Wyoming.* They are claims, essentially to "declare new rights and responsibilities" on behalf of the United States, and therefore, like Nebraska's claims relating to the tributary drainages, require a showing of "substantial injury." *Nebraska*, 507 U.S. at 593. *Wyoming v. Colorado* and *Nebraska v. Wyoming* do not exempt New Mexico from its burden to demonstrate injury.

New Mexico in the alternative alleges three theories of injury, none of which is sufficient. First, New Mexico contends that it has "alleged injury to at least two of its sovereign interests," namely its "sovereignty over water in the Lower Rio Grande," and "a sovereign interest in protecting the rights it acquired under the Compact." N.M. Resp. at 24-25. New Mexico's citation to *Massachusetts v. EPA*, 549 U.S. 497 (2007), does not support standing to protect vague allegations of "sovereignty." Although the Court alluded in that opinion to quasi-

sovereign interests of the state in certain natural resources, and recognition of some solicitude to states with respect to standing, the Court stressed that Massachusetts had been afforded particular procedural rights by statute and owned substantial portions of the coastline that it claimed was threatened with injury by the alleged actions of the United States. Moreover, Massachusetts had alleged in concrete terms how its interests in its territory would be injured, and specified potential remediation costs "in the hundreds of millions of dollars." *Id*. at 521-23. New Mexico has not made allegations regarding any property interest in water or water rights below Elephant Butte Reservoir to bolster claimed impacts to "sovereignty" in its counterclaims. Nor has it alleged *injury* to any sovereign interest in natural resources. New Mexico alleges only an "*interest*" in "ensuring that the United States complies with the Compact and state and federal law in its distribution of water in the Lower Rio Grande." N.M. Resp. at 24.[3] New Mexico's bare allegation that it "has standing to vindicate that interest" in the water does not in itself demonstrate distinct injury to that interest of concrete and sufficient magnitude to warrant entertaining New Mexico's counterclaims. *Id*.

New Mexico appears to argue that, as a signatory to the Compact, it may proceed on that basis alone to raise any claim relating to its implementation. *See* N.M. Resp. at 24. But this is simply a restatement of New Mexico's initial contention that it need not demonstrate injury "at all." N.M. Resp. at 22. As noted, for claims alleging violations of the terms of an equitable

[3] New Mexico argues that suits by a state to enforce a compact are suits in a proprietary capacity (N.M. Resp. at 25), citing to *Connecticut v. Cahill*, 217 F.3d 93, 97 (2d Cir. 2000). But *Cahill* made no such general statement. Rather, the Second Circuit discussed three capacities in which states have standing to bring suits in federal court, and cited the opinion in *Texas v. New Mexico*, 482 U.S. 124, 126 (1987), concerning the Pecos River Compact, as one example of a suit by a state acting in a proprietary capacity. *Cahill*, 217 F.3d at 97. The court of appeals did not state that all suits to enforce interstate compacts are *ipso facto* brought in a proprietary capacity. In the litigation over the Pecos River Compact, Texas alleged that New Mexico depleted the flow of the Pecos River at the New Mexico-Texas state line below an amount that Texas was entitled to receive under Article III(a) of that Compact, based upon a "1947 condition." *Texas v. New Mexico*, 482 U.S. at 126. In other words, Texas alleged injury to a specific interest under the Pecos River Compact which the Second Circuit in *Cahill* viewed as proprietary in nature.

apportionment decree, no further proof of injury may be required, but a demonstration of "substantial injury" remains a prerequisite for other claims relating to implementation of a decree. *Nebraska*, 507 U.S. at 593. New Mexico's reference to the 1995 decision in *Nebraska v. Wyoming*, 515 U.S. 1, is also unavailing. N.M. Resp. at 24. In that case, Wyoming's claim against the United States was based upon the terms of the apportionment decree, which allocated to Wyoming 25% of the water in the North Platte River. *Id.* at 20. Wyoming asserted that certain beneficial use limitations in federal storage contracts were "a predicate" to the decree's apportionment, that the United States was no longer adhering to those particular limitations, and the change had "caused or permitted significant injury to Wyoming interests." *Id*. at 19. The Court held that, in making those assertions, Wyoming had "said enough to state a serious claim that ought to be allowed to go forward." *Id*. New Mexico, by contrast, has not alleged the existence of any practice by the United States that was "a predicate" to the Compact, the cession or change in such a practice, or any resulting "significant injury." *Id.* New Mexico argues only that it has a "quasi-sovereign interest" that lies behind the interests of individual contractors in how the United States administers the Project. N.M. Resp. at 24. That vague assertion is not enough in itself "to state a serious claim." *Id.* at 19, 22.[4]

New Mexico next contends that it has standing as *parens patriae* on behalf of its citizens. N.M. Resp. at 25-26. While a state may sue another state based on its interest as *parens patriae*, *see Louisiana*, 451 U.S. at 737-38, it is well established that a state may not base its standing to sue the United States solely as *parens patriae*, asserting the rights of its citizens, because it is the

[4] New Mexico attempts to miscast the United States' argument as an argument that "the Project is not integral to the Compact." N.M. Resp. at 25. Not so. The United States has consistently taken the position that the Project is fully incorporated into the Compact. *See, e.g*., U.S. Response to Legal Motions of Tex. & N.M. Re Issues Decided in this Action at 5. But that does not mean that every action taken by the United States in the operation of the Project, including entering into various contracts under the Reclamation laws or other statutes, affects New Mexico's rights under the Compact or otherwise results in substantial injury to New Mexico. *See Nebraska v. Wyoming*, 515 U.S. at 22. New Mexico's burden is to make that showing to support its counterclaims, and it has not done so.

United States, not the state, that represents citizens as *parens patriae*. *Alfred L. Snapp & Sons, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 610 n.16 (1982). New Mexico, apparently recognizing this principle, cites a footnote from *Massachusetts v. EPA* where the Court majority distinguished between "allowing a State 'to protect her citizens from the operation of federal law' . . . and 'allowing a State to assert its rights under federal law (which it has standing to do)." N.M. Resp. at 25 (quoting *Massachusetts,* 549 U.S. at 520 n.17 (quoting in turn *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 447 (1945))). The majority clarified that Massachusetts was seeking to "assert its rights under [the Clean Air] Act." *Massachusetts,* 549 U.S. at 520 n.17. But *Massachusetts v. EPA* was not an action under the Court's original jurisdiction, where it is well established that a State must show a substantial injury warranting resolution of a dispute by the Supreme Court. *See Wyoming*, 502 U.S. at 447; *Maryland*, 451 U.S. at 735-36. New Mexico may not simply rely on bare allusions to its interests as *parens patriae*. *See Massachusetts*, 549 U.S. at 522-23.

New Mexico's third and final theory of injury is its claim is that the Compact "apportions water to New Mexico in the Lower Rio Grande." N.M. Resp. at 26.[5] But the bare allegation of a Compact apportionment does not on its own demonstrate a basis for New Mexico to bring interference-type claims against the United States without a plausible allegation of substantial injury. *See Nebraska*, 507 U.S. at 593. As an initial matter, there are no plain terms in the Compact defining the contours of any apportionment to New Mexico below Elephant Butte Reservoir. In fact, the extent of any apportionment to Texas and New Mexico is the basic question to be determined through the Court's resolution of *Texas*'s claims against New Mexico,

[5] New Mexico's assertion of an apportionment of water under the Compact below Elephant Butte Reservoir is contested by Texas, as well as several amici. The existence, as well as the amount, of any apportionment will be resolved in the further proceedings in this case.

and New Mexico's counterclaim against Texas (to the extent it is permitted to proceed). *A fortiori*, the Compact contains no plain terms defining the rights of the States *as against the United States* with respect to any specific implementation of whatever may be found to be the Compact's apportionment between the two States. Thus, New Mexico's allegation of injury is at present necessarily abstract and undefined, and its claim of standing is necessarily premature.

In this regard, adjudication of New Mexico's First Counterclaim against Texas (alleging unauthorized depletions) and its Fourth Counterclaim against Texas (alleging a Compact violation and unjust enrichment by Texas) will necessarily involve legal and factual issues relevant to a determination of each State's Compact apportionment below Elephant Butte Reservoir, including the potential effects of Project operations on those apportionments. Indeed, given its First and Fouth Counterclaims against Texas, it is unclear that there would be any occasion to address New Mexico's Second Counterclaim against the United States in order to resolve the Compact apportionment issues in this action, even if that counterclaim were otherwise proper. Although Texas argues, in its Motion to Strike or For Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, that New Mexico's counterclaims should be stricken for failure to first seek leave of the Court before filing them, Texas has not otherwise moved for dismissal or judgment on New Mexico's First and Fourth Counterclaims, So the issues raised in those counterclaims presumably will be adjudicated if the Special Master determines that New Mexico's counterclaims are properly before him at this time.

III. NEW MEXICO'S COUNTERCLAIMS DO NOT ASSERT CLAIMS UNDER THE COMPACT

In its opening memorandum, the United State demonstrated that New Mexico's Counterclaims 2, 5, 6, 7, 8, and 9 fail to state claims upon which relief can be granted under the

standard in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). Under *Iqbal*, New Mexico's counterclaims must meet a "plausibility" standard by pleading factual content that allows the court "'to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Ellis v. City of Minneapolis*, 860 F.3d 1106, 1109 (8th Cir. 2017) (quoting *Iqbal*, 556 U.S. at 678). The United States showed that New Mexico failed to meet this standard because it omitted references to authority for the duties it claims the United States has breached (*see* U.S. Mem. at 30, 36-37), by resting on vague and conclusory statements characterized as factual allegations (*see id*. at 35, 37, 39-41), and by erroneously asserting violations of statutes (*see id*. at 32-33, 35-37).

In its response brief, New Mexico now attempts to cure these defects, and even expand its claims, to shore up the legal inadequacy of the counterclaims it actually filed. Its attempt fails for two principal reasons. First, as a threshold matter, New Mexico may not use its response to a motion for judgment on the pleadings to amend its counterclaims. *See Morgan Distrib.*, 868 F.2d at 995 ("'[I]t is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss.'" (quoting *Car Carriers, Inc. v. Ford Motor Co*., 745 F.2d 1101, 1107 (7th Cir. 1984))); *Hawkins v. Wash. Metro. Transit. Auth.*, 311 F. Supp. 3d 94, 109 (D.D.C. 2018) (*accord*, and also citing *Iqbal*, 556 U.S. at 678). Thus, New Mexico's addition of facts, explanation, and citations to additional authority in its brief cannot cure the defective pleading in the counterclaims themselves.[6] In response to the United States' demonstration of deficiencies in

[6] *See, e.g*., N.M. Resp. at 33 ("An accurate reading of New Mexico's second counterclaim clearly demonstrates it is not premised solely on the theory that the Compact requires water to be distributed equally to each Project acre."); *id*. at 34 (citing to Compact provisions alleged to support its Second Counterclaim that were not cited in the counterclaim itself); *id*. at 35 (citing to extraneous filings from a district court case); *id*. at 40-41 (quoting language from the Water Supply Act and the Reclamation Project Act omitted from its Fifth Counterclaim); *id*. at 48-49 (citing statutes alleged to require the United States to maintain the Rio Grande channel, which were not pled in the Eighth Counterclaim); and *id*. at 51 (with regard to the Ninth Counterclaim, "New Mexico will clear up any misunderstanding by affirmatively stating that it asserts its ninth counterclaim under the Compact").

New Mexico's counterclaims as pled, New Mexico could have moved to amend its counterclaims, but it did not.

We turn now to further respond to the specific arguments New Mexico makes in its attempt to salvage Counterclaims 2, 5, 6, 7, 8, and 9.

1. Second Claim for Relief – 2008 Operating Agreement

In its Second Counterclaim, New Mexico alleges that the United States violated the Compact by entering into the 2008 Operating Agreement with the Elephant Butte Irrigation District and El Paso County Water Improvement District #1. New Mexico's primary factual allegation in its Second Counterclaim is that the Compact requires the United States to allocate water on an equal basis for each Project acre. N.M. Counterclaims ¶¶ 73, 77. But neither the Second Counterclaim nor the preceding allegations cite any legal obligation in the Compact to support this conclusion. Article IV of the Compact requires New Mexico to deliver water to the Project at Elephant Butte Reservoir according to a schedule set forth therein. Compact Art. IV. Once delivered into "Project storage," as the term is defined in Article I(k) of the Compact, the water delivered by New Mexico becomes "[u]sable water," which the Compact defines as "all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico," *id*. Art. I(*l*). That water is to be "available for release in accordance with irrigation demands." *Id*. Nothing in the text of the Compact itself mandates a particular means of operation or specific allocation. Nor does New Mexico's counterclaim reference any provision of the Downstream Contracts that supports its claim of a categorical requirement of an equal per-acre allocation. No such contract provision exists. Although the Court will have to arrive at an apportionment in resolving what each State is entitled to receive under the Compact below Elephant Butte Reservoir, New Mexico's theory

in its Second Counterclaim is not correct. Once the Court more clearly defines the States' respective rights, the United States would need to review the Operating Agreement and Project operations for consistency with the Court's ruling.

New Mexico attempts to salvage its defective pleading – if not expand its Second Counterclaim outright – by citing matters well beyond the pleadings, and relies on allegations and statements well beyond its filed counterclaims. However, New Mexico's counterclaims must be analyzed on the pleading filed, as the sufficiency of the counterclaims cannot be amended or cured by New Mexico's briefing in opposition to the United States' Motion. *Morgan Distrib.*, 868 F.2d at 995. Because New Mexico's counterclaims fail to plead the legal authority that is the basis for the claim, the Second Counterclaim must be dismissed.

2. Fifth Claim for Relief – Water Supply Act

New Mexico asserts as the basis for its Fifth Counterclaim a violation of the Water Supply Act, 43 U.S.C. § 390b. In its opening memorandum, the United States demonstrated that the contracts with El Paso for municipal and industrial ("M&I") water were authorized under the Reclamation Project Act of 1939. U.S. Mem. 32-33. Although New Mexico acknowledges that the Water Supply Act is only an "alternative to and not a substitute for the provisions of the Reclamation Project Act of 1939 . . . relating to the same subject," 43 U.S.C. § 390b(b). New Mexico continues to argue, incorrectly, that the Water Supply Act governs any changes in operation of the Rio Grande Project. N.M. Resp. at 40.

New Mexico asserts that "[n]othing in the [Reclamation Project Act] either (1) provides for the inclusion of storage in reservoir projects for municipal and industrial water or (2) directly governs modifications to reservoir projects." *Id*. Not so. Section 7(b) of the Reclamation Project Act provides:

> For any project, division of a project, development unit of a project, or supplemental works on a project, now under construction or for which appropriations have been made, and in connection with which a repayment contract has not been executed, allocation of costs may be made in accordance with the provisions of section 9 of this Act and a repayment contract may be negotiated, in the discretion of the Secretary . . . .

43 U.S.C. § 485f. Thus, for storage projects which were already under construction as of 1939 (the year of enactment), storage could be provided for any of the purposes set out in section 9 of the Act, which include specifically, "*municipal water supply* or other miscellaneous purposes, found by the Secretary to be proper." *Id.*, § 485h(a) (emphasis added).[7] Thus, the Reclamation Project Act clearly authorized construction of facilities to provide a municipal water supply, and approval by Congress under the Water Supply Act is not required.

The construction authority in section 9(a) for M&I supply is implemented through the contracting requirement of section 9(c). Congress granted authority to the Secretary of the Interior to contract for M&I water under section 9(c) because the construction of projects for M&I purposes, and the modification of projects already constructed, is authorized under 9(a). Thus, the Reclamation Project Act falls within the scope of the "relating to the same subject" language in the Water Supply Act, § 390b(b), and Congressional approval for the delivery of water from Elephant Butte Reservoir (a project authorized only for irrigation) for M&I purposes is not required.

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[7] Section 9(a) provides in pertinent part:

> No expenditures for the construction of any new project, new division of a project, or new supplemental works on a project shall be made, nor shall estimates be submitted therefore, by the Secretary until after he has made an investigation thereof and has submitted to the President and to the Congress his report and findings on-- . . . 5) the part of the estimated costs which can properly be allocated to municipal water supply or other miscellaneous purposes and properly returned to the United States. If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply or other miscellaneous purposes found by the Secretary to be proper… then the new project, new division of a project, or supplemental works on a project, covered by his findings shall be deemed authorized and maybe undertaken by the Secretary.

In fact, the Reclamation Project Act is only one example of Reclamation's statutory authority to construct facilities to provide M&I water supplies, or to modify existing facilities to provide a water supply for M&I purposes. As early as 1906 Congress provided that, "the Secretary of the Interior shall, in accordance with the provisions of the reclamation act, provide for water rights in amount he may deem necessary for the towns established as herein provided and may enter into contract with the proper authorities of such projects." Townsites and Power Development Act of April 16, 1906, § 4, 43 U.S.C. § 567. Further, the Miscellaneous Purposes Act of February 25, 1920, states that "the Secretary of the Interior in connection with the operations under the reclamation law is hereby authorized to enter into contract to supply water from any project irrigation system for other purpose than irrigation." 41 Stat. 451; 43 U.S.C. § 521 ("MPA"). Thus, the Reclamation Project Act is only one in a long line of Reclamation authorities to construct projects to supply M&I water supplies.

The two cases New Mexico cites for the proposition that the Water Supply Act *must* apply to changes to the operation of the Rio Grande Project, which do not involve any physical change to facilities or any guarantee from a "State or local interest" to pay for cost of construction, do not support New Mexico's Fifth Counterclaim. First, New Mexico relies upon *Se. Fed. Power Customers, Inc. v. Geren*, 514 F.3d 1316, 1324 (D.C. Cir. 2008). The case is inapposite. The reservoir in *Geren* was a Corps of Engineers project. By its own terms, the terms of the Water Supply Act "insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Act of 1939 (53 Stat. 1187) relating to the same subject." 43 U.S.C. § 390b(b). The Water Supply Act does not recognize an alternative authority for the Corps of Engineers as it does for Reclamation. *See id*. Although reallocation of reservoir storage space for local

consumption may require the Corps of Engineers to proceed under the Water Supply Act, New Mexico has failed to demonstrate that such an outcome is required for an operational change by the Secretary of the Interior or Reclamation where Reclamation has alternative authority for its actions. For this reason, New Mexico's application of *Geren* to the facts of the Rio Grande Project is misplaced.

In addition, here, unlike in *Geren*, the change of use to M&I use in the Rio Grande Project was authorized under the MPA, 43 U.S.C. § 521. The longstanding use of the MPA on the Rio Grande Project is alternative to both the Water Supply Act as well as the Reclamation Project Act of 1939.

New Mexico's reliance on *In re Application of City and County of Denver, Acting By and Through Its Board of Water Commissioners*, Case Nos. 2782, 5016, 5017, 1989 WL 128576 (D. Colo. Oct. 23, 1989), is also misplaced. There, Denver, without the authorization or cooperation of the United States, sought to change the place of storage for an entire federal reservoir. *Id* at *2. This change in the point of diversion was a physical change requiring construction based on an application by the City of Denver, not a mere administrative change proposed by the Secretary of the Interior. More importantly, the *Denver* decision concerned who has the authority to make changes in the water rights owned by the United States, not the legality of administrative changes in a Reclamation project implemented by the Secretary of the Interior under existing federal statutes. *Id*. The court ruled that Denver's attempt to change the place of storage of the federal water right violated the United States' ownership right governed by the Property Clause of the United States Constitution, Article IV, Section 3, Clause 2. *Id.*

Finally, New Mexico's Response makes clear that any argument about compliance with the Water Supply Act would introduce irrelevant legal issues into this action. Under New

Mexico's current theory, the claim apparently is that the changes to M&I use constitute a violation of the Compact. *See* N.M. Resp. at 44. The United States' compliance with the Water Supply Act in making the changes is irrelevant to the assertion that New Mexico seeks to pursue.

3. Sixth Claim for Relief – Accounting

New Mexico's Sixth Counterclaim challenges the United States' accounting for the Project water rights. Despite acknowledging that the Compact does not address accounting, *see* N.M. Resp. at 44, New Mexico tries to insert particular accounting obligations and methods of Project operation into the Compact based on (1) the incorporation of the Project into the Compact, and (2) the Compact's provision that water in Project storage be available for release "in accordance with irrigation demands." Art. I(*l*). That language does not define what amount must be released, or how it is to be managed within the Project. As the United States points out in its Memorandum, there is no basis established for a challenge to the United States' accounting, and the allegations fail to state a claim for which relief can be granted. New Mexico, in attempting to cure the failure of its pleadings, now asserts that the Sixth Counterclaim is a claim for breach of Compact. N.M. Resp. at 45. The claim, however, fails to identify any provision of the Compact that establishes an accounting obligation or requirement on the United States, or mandates a particular means of operation of the Project.

New Mexico's attempt to rehabilitate its counterclaim in its Response brief is another improper attempt to cure its pleading defects through briefing. Even viewing New Mexico's pleadings in the light most favorable to New Mexico, the pleadings fail to allege or establish the existence of any provision in the Compact that is breached by the United States' Project accounting. New Mexico fails to point to any obligation in the Compact to support its claim, and its claim should be dismissed.

4. Seventh Claim for Relief – Miscellaneous Purposes Act

New Mexico's Seventh Counterclaim alleges violations of the MPA, 43 U.S.C. § 521, and the Compact, by both Texas and the United States. Faced with the shortcomings of its pleadings as a challenge under the Miscellaneous Purposes Act, New Mexico again attempts to assert that, its pleadings notwithstanding, the Seventh Counterclaim is just another claim for breach of the Compact. N.M. Resp. at 47. Again New Mexico grounds its reframing of the claim on the United States' alleged interference with New Mexico's asserted apportionment below Elephant Butte Reservoir. But the claim actually alleged is not a violation of the Compact, but in fact a challenge to the legality of contracts entered into under the MPA, without identifying the contract or action complained of, and in addition asserting, without authority, that under the MPA New Mexico's approval is necessary for such contracts. Simply put, the Seventh Counterclaim, as pleaded, asserts a right to sue under the MPA, and, for the reasons set forth in the United States' Memorandum, fails to state a claim as set forth in New Mexico's complaint. *See* U.S. Mem. at 35-37.

In addition, as with the New Mexico's claims under the Water Supply Act, its claims of violation of the MPA appear to be irrelevant to its new current theory that entry into some unspecified contract – whether legally or not – violated New Mexico's apportionment. Again, the claim as pleaded and structured, attempts to introduce irrelevant legal issues into this action beyond the scope of Compact apportionment.

5. Eighth Claim for Relief – Channel Maintenance

New Mexico's Eighth Counterclaim asserts that the United States, by alleged failure to remove vegetation and silt from Project reservoirs and the Rio Grande channel (N.M. Countercls. ¶ 118), has failed "to comply with its responsibilities to properly maintain the Project." *Id*. ¶ 120.

Nowhere in its counterclaim does New Mexico identify any provision of the Compact that imposes such "responsibilities" on the United States. Indeed, nowhere in the counterclaim does New Mexico identify any statute, regulation, contract, or other authority that imposes such "responsibilities." New Mexico now attempts to point to acts merely authorizing, not mandating, the United States Section of the International Boundary and Water Commission ("IBWC") to construct and maintain projects and works provided for in a treaty with Mexico, not mandating channel maintenance in the Rio Grande. 22 U.S.C. § 277b(a). Similarly under the 1936 Act cited by New Mexico, the IBWC is authorized, not statutorily required, to construct, operate and maintain "works for the canalization of the Rio Grande." Pub. L. No. 74-648, 49 Stat. 1463 (1936). With respect to obligations of Reclamation, New Mexico attempts to create a Compact obligation to maintain the entire Rio Grande based on contracts to which the State is not a party. Moreover, these contractual obligations apply only to "project or works so constructed," rather than a broad duty of channel maintenance. Both the legal standards and the factual allegations are simply inadequate to support a reasonable inference that the United States is responsible for channel maintenance or liable for any failure to maintain it. *Iqbal,* 556 U.S. at 678. Even assuming that the language of the claim can be stretched to assert a breach of Compact, New Mexico's failure to establish such a Compact duty in its claim is grounds for dismissal.

6. Ninth Claim for Relief – 1906 Convention

The authority to decide whether a foreign state has breached a treaty obligation owed to the United States and, if so, what if any action to take in response lies exclusively with the Executive Branch. U.S. Const. art. II, §§ 2, 3 (assigning the President powers over foreign affairs); *Goldwater v. Carter*, 617 F.2d 697, 706 (D.C. Cir. 1979) (acknowledging executive's power to terminate a treaty because of breach), *vacated on other grounds*, 444 U.S. 996 (1979);

RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 335 cmt. (b) (1987) ("Under United States law, the President has exclusive authority to determine the existence of a material breach by another party and to decide whether to invoke the breach as a ground for terminating or suspending the agreement."). Thus, New Mexico has no legal basis to bring a claim challenging either the United States' alleged failure to find Mexico in violation of the 1906 Convention or its alleged failure to take action in response to any such alleged violation.

New Mexico now asserts that contrary to the apparent structure of its Ninth Claim for Relief as a distinct cause of action, the claim is not an independent action, but yet another claim for breach of the Compact. New Mexico now contends that despite the allegations specifically alleging a failure to enforce the treaty, the counterclaim should be read as alleging a failure to account for depletions caused by Mexican diversions in Project accounting. However, New Mexico fails to allege any facts to support an assertion that any action by the United States has diminished the quantities of water allocated in the Compact. And nothing in the Ninth Claim alleges or asserts facts that would support that the allocations of water provided for in Articles III and IV of the Compact have been diminished.

New Mexico has alleged no facts supporting an inference that diversions by Mexico have resulted in a diminution of any allocation to New Mexico specifically made in the Compact. And in any event because any decision to declare Mexico in violation of the treaty and to respond are committed to the Executive Branch's sole authority and discretion, the Ninth Claim fails to state a claim against the United States for which relief can be granted.

IV. CONCLUSION

For the reasons set forth above and in the United States' Memorandum of Points and Authorities in Support of its Motion for Judgment on the Pleadings, Claims 2, 3, 5, 6, 7, 8, and 9 of New Mexico's counterclaims should be dismissed for lack of a waiver of sovereign immunity and cognizable injury. Should the Court determine otherwise, Claims 2, 5, 6, 7, 8, and 9 should still be dismissed for failure to state claims against the United States upon which this Court can grant relief.

Dated this 22nd day of March, 2019.

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No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,
v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants

OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of March, 2019, the **REPLY MEMORANDUM IN SUPPORT OF THE UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS AGAINST NEW MEXICO'S COUNTERCLAIMS 2, 3, 5, 6, 7, 8, AND 9.** was served via electronic mail and/or U.S. mail as indicated, upon the individuals listed on the Service List, attached hereto.

Respectfully submitted,

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