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 COLORADO'S RESPONSE TO THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF TEXAS, THE UNITED STATES, AND NEW MEXICO

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NATURE OF THE CASE

Texas claimed when it sued that "New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact." Texas Complaint at ¶ 18. The United States then intervened "seeking substantially the same relief." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). The United States operates the Rio Grande Project, providing water for irrigation purposes in southern New Mexico and west Texas. Texas named Colorado as a defendant because it also signed the Rio Grande Compact, 53 Stat. 785 (1939) ("Compact"); however, no parties have asserted claims against Colorado.

Colorado has two primary interests here. First, because no party has asserted claims against Colorado, Colorado wants to ensure that it faces no adverse impact from this dispute. Second, as a party to multiple compacts, Colorado requests that the Court continue to maintain and follow the principles of interstate compact interpretation.

As a party to the Compact, Colorado has an interest in any interpretation made about the Compact. While this dispute is limited to allegations of Compact violations by New Mexico and by Texas from Elephant Butte Reservoir to Fort

Quitman, the Court should not resolve the case in a way that harms Colorado's interests in the Rio Grande Compact when there are no claims against it. [1]

An interstate water compact is construed by its express terms. All the motions urge the Court to violate this basic rule by giving a federal water project some authority under the Compact. But such a reinterpretation to give a federal water project authority not set forth in the Compact would create uncertainty in the interplay of state, federal, and compact laws in several river basins. Under controlling law, the Court cannot imply terms into the Compact from Reclamation projects that the Compact does not contain. Federal water projects are common throughout the West. Colorado is party to many other compacts that have federal water projects within their basins. How the Court assesses the relationships between interstate compacts and these federal water projects is important to Colorado, as well as other Western states.

The provisions of the Rio Grande Compact itself are what achieve an equitable apportionment. The Court cannot expand the Compact's terms to something other than those to which the states originally agreed. An after-the-fact alteration conflicts with the laws governing interpretation of compacts because it undermines the negotiating powers that the compact clause of the United States

[1] The Special Master dismissed counterclaims by New Mexico against the United States. Order of Special Master, March 31, 2020 at p. 15. See also, Order Granting Motion of the State of Colorado to Approve Non-Waiver Agreement, Sept. 6, 2018. Colorado files this brief consistent with that agreement to ensure that any relief entered does not impact—or have the future potential to impact—Colorado's rights and obligations under the Compact and compact jurisprudence.

constitution grants to the states. U.S. Const., art. 1 § 10, cl. 3. The entire Compact resulted from years of careful negotiations. Adding new rights and obligations would rebalance the benefits that each state bargained for in the Rio Grande Compact. As they negotiated the Compact, the states each considered various provisions, impacts to contemporary water use within their states, impacts to future development, and water administration. Changes in the priorities of one or more states since the Rio Grande Compact became law cannot change the terms of the Compact.

Finally, because original actions on interstate water compacts are so infrequent, the course of this litigation may create a new standard of interpretation for interstate water compacts. It is important that the Court continue to follow the established principles of compact interpretation. And it is important that the Court make clear distinctions between relief provided under the Compact and relief guided by other legal mechanisms.

Colorado takes no position here about how to split the legally available water between New Mexico and Texas below the San Marcial gage ("San Marcial").[2] Instead, its involvement is limited to those issues of Compact interpretation that may impact Colorado's interests. New Mexico and the United States both argue that

[2] The Rio Grande Compact Commission moved the point of measurement from the gage at San Marcial to Elephant Butte reservoir in 1948. Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico. This brief will use the term "San Marcial gage" to refer to both the original gage and its designated replacement location at Elephant Butte Reservoir.

the Rio Grande Project and its contracts with downstream irrigation districts are silently incorporated into the Compact as apportionments to New Mexico and Texas. Texas argues that the Compact apportions all of the water below Elephant Butte Reservoir to it, subject to an implied reduction under the contract between the United States and the New Mexico irrigation district. Because those arguments put the meaning of the Compact at issue, Colorado is compelled to reiterate the principles of compact interpretation and to explain how those principles lead to the correct reading of the Compact.

Colorado requests that the Court deny the summary judgment motions to the extent they rely on efforts to incorporate the Rio Grande Project into the Compact and depend on disputed issues of material fact. Colorado has submitted an affidavit setting out disputed factual issues. Affidavit of Craig Cotten (Exhibit 1). Generally, these facts concern the absence of the Rio Grande Project in the Compact and the administration of the Compact in contrast to assertions in the motions. Colorado requests that the Court, in resolving these summary judgment motions, rule as a matter of law that the Rio Grande Project is not incorporated into the Compact and does not impose any Compact obligations, but rather that it remains a separate obligation that Texas and New Mexico can rely on to address concerns outside of the Compact.

SUMMARY OF ARGUMENT

I. The Court should follow the principles of compact interpretation.

Courts use five principles of compact interpretation to determine how a compact affects an equitable apportionment. Although these principles are distinct, they are all rooted in respect for the express terms of the compact and the compacting states' sovereignty.

II. The Compact does not silently incorporate the Rio Grande Project.

Consistent with the principles of compact interpretation, the Court should not accept the arguments in the motions for partial summary judgment that the Compact somehow incorporates as obligations the Bureau of Reclamation's Rio Grande Project and its operations. The motions present this position as an undisputed fact. But principles of compact interpretation forbid the silent addition of new terms that obligate the states. Even if such outside-the-compact terms could change the Compact's meaning, many facts show that the Compact does not silently incorporate the Project.

III. The Compact effects an equitable apportionment by using gages for prescribed flows within measured river reaches.

One key legal question is how the Compact effects an equitable apportionment through its terms. Staying within the principles for interpreting a compact, it is clear that the Rio Grande Compact apportions water using a series of gages to measure inflow and outflow within three distinct river reaches. It is these reaches that define the location and amount of the Compact's equitable

apportionment. It is inappropriate to abandon the principles of compact interpretation and to attempt to base a new apportionment within an ungaged portion of a river reach.

Texas, New Mexico, and the United States ask the Special Mater to apportion flows to New Mexico and Texas below San Marcial. Each makes different arguments that their preferred apportionment can be found in the Compact. Yet, the Compact makes no such apportionment. The Compact unambiguously does not allocate water individually to either New Mexico or Texas below the San Marcial gage. It did not need to. When the states negotiated the Compact, the United States had already contracted to deliver water to downstream water districts. *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018) (finding choice to not apportion specific amounts between Texas and New Mexico "made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources."). [3] Thus, the apportionment made under the Compact relies solely on the measurement of water at the designated gages within each river reach. Any attempt to create a specific compact apportionment below San Marcial is not based on the terms of the Compact, but on invented conditions.

[3] The Supreme Court mentioned, but did not identify, contracts variously among the United States, Elephant Butte Irrigation District, and El Paso County Water Improvement District No. 1. Colorado is not a party to these contracts. Affidavit of Craig Cotten para. 5 (Exhibit 1).

STANDARD OF REVIEW

Supreme Court Rule 17.2 turns to the Federal Rules of Civil Procedure for guidance in actions invoking the Court's original jurisdiction. Summary judgment pursuant to Fed. R. Civ. P. 56 is appropriate when the moving party is entitled to judgment as a matter of law and there are no disputed issues of material fact left for trial. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). Interpretation of contract language is matter of law and an appropriate subject for summary judgment. *P.W. Stephens Contractors, Inc. v. Mid American Indem. Ins. Co.*, 805 F.Supp. 854, 858 (D.Hawai'i 1992); *Hartford Acc. and Indem. Corp. v. U.S. Fidelity and Guar. Co.*, 765 F.Supp. 677, 679 (D.Utah 1991), *aff'd* 962 F.2d 1484, *cert. den.* 506 U.S. 955. The terms of a contract must be unambiguous for granting summary judgment based solely on a contract. *Ecology Services, Inc. v. GranTurk Equipment, Inc.*, 443 F.Supp.2d 756, 770 (D.Md. 2006). "A contract is ambiguous if susceptible of two reasonable interpretations." *Id*. (internal quotation omitted). However, if extrinsic materials used to resolve the ambiguity involve disputed issues of material fact, summary judgment is improper. *Id*.

The parties filed five motions for partial summary judgment. Because the motions all argue that the Compact silently incorporates terms in making its apportionments, Colorado responds in this brief, addressing interpretation of the Compact.

THE SUPREME COURT CONSISTENTLY APPLIES THE PRINCIPLES OF COMPACT INTERPRETATION

I. The Supreme Court interprets interstate compacts using both contract and statutory methods.

Interstate compacts naturally lend themselves to interpretative methods that courts apply to contracts and statutes. Regardless which of these methods the Court adopts in an interstate compact case, it looks first to the plain language of the compact.

Because compacts are negotiated agreements between or among states, the most direct path to their meaning follows familiar methods of contract interpretation. *See Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013) ("Interstate compacts are construed as contracts under the principles of contract law. . . [s]o, as with any contract, we begin by examining the express terms of the Compact as the best indication of the intent of the parties.")(citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *Montana v. Wyoming*, 563 U.S. 368, 375, n. 4). Even though an interstate compact becomes a federal statute once approved by Congress, a "[c]ompact is, after all, a contract." *Texas v. New Mexico*, 482 U.S. at 128 (citing *Petty v. Tennessee-Missouri Bridge Comm'n*, 359 U.S. 275, 285 (1959)). And a compact "must be construed and applied in accordance with its terms." *Id.* (citing *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)).

In limited circumstances the Court sometimes employs a statutory interpretation approach to interstate compacts. Yet, even under this statutory

interpretation approach, the Court most often aims to give effect to the compacting States' intent as manifested in the plain language of the compact. *See, e.g. Montana v. Wyoming*, 563 U.S. at 385–88 (applying textualist approach to determine meaning of "beneficial use"); *Kansas v. Colorado*, 514 U.S. 673, 690–91 (1995) ("clear language" of the compact prohibits improved and increased well pumping in upstream state); *Delaware River Joint Toll Bridge Comm'n, Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419, 428–29 (1940) (applying textualist approach to determine powers of a compact commission).

With one unusual compact, the Interstate Agreement on Detainers, the Court pays less attention to the text and emphasizes other tools of statutory interpretation. *See, e.g., Alabama v. Bozeman*, 533 U.S. 146, 152–57 (2001). 48 states, the District of Columbia, and the United States entered into this Compact. Unlike a river compact negotiated at arm's length by a few states at most, the Interstate Agreement on Detainers is an open-ended compact that Congress allowed any state to join when it decided to do so. The Interstate Agreement on Detainers is thus more like a typical federal statute and more amenable to familiar statutory interpretation methods for determining Congress' intent than is an interstate river compact.

II. The Supreme Court has articulated five principles of compact interpretation that apply regardless whether the compact is viewed as a contract or a statute.

Five principles of interpretation repeatedly surface in original actions concerning interstate compacts: (1) respect the express terms of the compact, (2) recognize that states do not cede their sovereignty lightly, (3) avoid reforming the compact, (4) examine other compacts, and (5) look to state law at the time of the compact to clarify a state's intent. Not only do these principles help the Court determine what a compact means, they also help the Court avoid determining that a compact means something that it does not say.

A. Respect the express terms of the compact.

The Court's respect for the express terms of interstate compacts runs through its application of the other principles of compact interpretation explained below. This is particularly true in river compact cases.

The interpretation of an interstate compact ultimately rests on the language of the compact itself. "[N]o court may order relief inconsistent with [a compact's] express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). As the Court has emphasized, it is "especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were [the Court] to rewrite an agreement among sovereign States, to which the political branches consented." *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010). When presented with an interstate compact that has been approved by Congress,

"[the Court's] effort is relatively simple and focuses upon 'declar[ing] rights under the Compact and enforc[ing] its terms.'" *Florida v. Georgia*, 138 S. Ct. 2502, 2525 (2018)(quoting *Kansas v. Nebraska*, 574 U.S. 445, at n. 4); see also *Delaware River Joint Toll Bridge Comm'n, Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419, 432 (1940) (refusing to read into the compact a strained and unnatural meaning).

Again and again, the Court roots its decisions in the express terms of interstate compacts. The Court is reluctant to read the compact to say something that it does not expressly state.

B. States do not cede their sovereignty lightly.

Interstate compacts are carefully negotiated agreements between coequal sovereigns. When courts interpret compacts, they must recognize that "[t]he states cannot make war, or enter into treaties," but the Constitution's Compact Clause provides them a vehicle for formally managing interstate affairs: "they may, with the consent of Congress, make compacts and agreements." *Louisiana v. Texas*, 176 U.S. 1, 22 (1900); see also U.S. Const., art. 1 § 10, cl. 3.

In our federal system, a state's ceding its sovereignty through the vehicle of an interstate compact provided the rare exception to state power and authority. This is particularly true of core sovereign concerns such as land use and natural resources. *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979)(power to regulate land use is not impliedly relinquished); *Tarrant*, 569 U.S. at 632 ("when confronted with silence in compacts . . . '[i]f any inference at

all is to be drawn . . . we think it is that each state was left to regulate the activities of her own citizens'")(quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)); *Alabama v. North Carolina*, 560 U.S. at 340-41 (applying a general compact provision preserving the "rights enjoyed by sovereign states" and ruling that because the compact at issue did not specifically authorize an interstate commission to impose monetary sanctions, none could be imposed on a compacting state).

As for natural resources (here, water), interstate compacts are the favored method for many states to determine how to apportion rights to interstate streams, which offer "a necessity of life that must be rationed among those who have power over it." *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 103 (1938)(quoting *New Jersey v. New York*, 283 U.S. 336, 342 (1931)).

Interstate compacts provide much-needed certainty about the water supply that will be available for each state to develop in perpetuity; this is particularly important because it can take years to plan and complete water infrastructure projects. *See, e.g.*, *People ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1249 (Colo. 1996)("The Compact was executed between the states and approved by Congress to ensure Colorado and Kansas a secure and lasting apportionment of the waters of the Arkansas River"). Moreover, when interstate water rights are clearly delineated, compacting States may negotiate in good faith against a clear legal framework. Uncertainty about the meaning and application of compact language because of the possibility of later reinterpretation hinders this cooperative process.

This backdrop counsels against reading terms into an interstate compact. Courts should hew as closely as possible to the terms that states negotiated as they ceded their sovereign control of the waters within their borders. *See Tarrant*, 569 U.S. at 631 ("The background notion that a state does not easily cede its sovereignty has informed our interpretation of interstate compacts"). When states cede their sovereignty in interstate compacts, they do so expressly.

C. Do not reform the compact.

Closely related to the Court's respect for state sovereignty and the express terms of an interstate compact is the Court's reluctance to reform a compact to address present day conditions in a manner that the states did not intend when they entered into the compact. *See Texas v. New Mexico*, 462 U.S. 554, 564-566 (refusing to reform the compact at state's request and honoring express terms of the compact). It is not up to the Court to cause the compact to function as a state might wish it to function today. Rather, the Court's job is to give effect to the intent of the parties as laid out in the express terms of the compact. As noted above, the Court avoids inserting terms into a compact that sovereign states and Congress have not approved. *Alabama* v. *North Carolina*, 130 S. Ct. 2295, 2312–13 (2010). This is true "no matter what the equities of the circumstances might otherwise invite." *Id*. at 2313 (quoting *New Jersey* v. *New York*, 523 U.S. 767, 811 (1998)).

D. Examine other compacts.

Those who drafted interstate river compacts were of course aware of existing river compacts. Thus, "[l]ooking to the customary practices employed in other interstate compacts also helps [the Court] to ascertain the intent of the parties to [the compact]." *Tarrant Reg'l Water Dist.*, 569 U.S. at 633–34 (citing *Oklahoma v. New Mexico,* 501 U.S. 221, 235, n.5 (1991); *Texas v. New Mexico*, 462 U.S. at 565).

Again, the Court applies this principle of compact interpretation not just to decipher compact terms, but also to identify what states intentionally left out of a compact. When states chose to leave out a term in one compact that another compact included, the Court does not insert such a term. Perhaps the best example of this principle is found in *Montana v. Wyoming*, in which the Court stated, "if Article V(A) were intended to guarantee Montana a set quantity of water, it could have done so as plainly as other compacts that do just that." *Montana v. Wyoming*, 563 U.S. 368, 388 (2011). The other compacts to which the Court referred are the Colorado River Compact of 1922, the Republican River Compact, and the Yellowstone River Compact. *See Id.*

Likewise, the Court declined to find an unwritten term in the Pecos River Compact that would accomplish something that the drafters of other compacts (here, the Upper Colorado River Basin, Arkansas River, and Yellowstone River Compacts) knew how to do expressly. *See Texas v. New Mexico*, 462 U.S. at 565 ("The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it"). Given the small universe of interstate river compacts,

a compact's inclusion or lack of a term that is included in another compact provides valuable insight into the intent of the compacting states.

E. State law when the compact was drafted informs the states' intent.

When confronted with a compact term susceptible to more than one interpretation, the Court sometimes looks to the law of compacting states at the time the states drafted the compact. This approach helps preserve the original intent of the states. *See Montana v. Wyoming*, 563 U.S. 368, 386–88 (2011)(In the Yellowstone River Compact, "beneficial use" was not understood in Wyoming to mean "consumption"); *Delaware River Joint Toll Bridge Comm'n, Pennsylvania-New Jersey v. Colburn*, 310 U.S. 419, 431–32 (1940)(drafters would not have impliedly adopted a rule of damages not generally applicable in the state).

This principle of compact interpretation guards against shifting interpretations of interstate compacts over time that favor one compacting state at the expense of another. States are entitled to and bound by the bargains that they strike in interstate compacts, regardless of intervening changes in the law that informed the original bargain.

III. The Court should adhere to the principles of compact interpretation for the Rio Grande Compact.

The principles of compact interpretation explained above provide the Court with a framework for interpreting the Rio Grande Compact. They all counsel

against reading the Compact in a way that provides a more specific apportionment to Texas and New Mexico than what the terms of the Compact command.

Above all else, the express terms of the Rio Grande Compact reflect the intent of Colorado, New Mexico, and Texas when they entered into the Compact. The states ceded their sovereignty over waters within their borders in exchange for certainty. Regardless of changes in technology and the economy along the Rio Grande since the states entered into the Compact, the Court should not reform the Compact by adding terms that the states did not bargain for. Other compacts, most notably the Colorado River Compact, do not contain terms that apportion a specific amount of water to each state. Colorado River Compact, 45 Stat. 1057 (1922). The states knew how to include different terms when they negotiated the Compact but chose not to. The Court should not insert them into the Compact now.

ALL THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT RELY ON THE ERRONEOUS ASSUMPTION THAT THE RIO GRANDE COMPACT SILENTLY INCORPORATES THE RIO GRAND PROJECT.

I. The Compact does not incorporate the Rio Grande Project.

Although they differ on specifics, Texas, New Mexico, and the United States all contend that the Compact incorporates the Rio Grande Project into its terms, so that the Project's historical operations define Texas' and New Mexico's apportionment in a way that the express terms of the Compact do not. They would have these new terms be just as enforceable as the express terms of the Compact, even though the states decided not to include them in the Compact. Colorado

acknowledges that the parties seek an answer to the volumetric division of water below San Marcial. But the Compact does not answer the question. Affidavit of Craig Cotten para. 4. Current legal authority on the topic confirms this. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 384 (D.N.M. 1983) ("Neither the history of the Compact negotiations, the ultimate terms of the Compact, nor the defendants' subsequent interpretation and actions support the conclusion that the parties to the agreement intended it to apportion either the surface water of the river or the related ground water below Elephant Butte between New Mexico and Texas.").

The states intended that the Compact facilitate operation of the Project. Yet they conspicuously declined to include terms in the Compact that govern water use as between Texas and New Mexico below Elephant Butte Reservoir. As discussed above, a court that interprets a compact should respect the express terms of the compact and the compacting states' sovereignty. The Supreme Court is "especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were [the Court] to rewrite an agreement among sovereign States, to which the political branches consented." *Alabama v. North Carolina*, 560 U.S. at 352. Here, the states' decision not to include terms that govern water use as between Texas and New Mexico below Elephant Butte Reservoir does not create a problem that the Compact must solve with implied terms eight decades later. Rather, it reflects a conscious decision among sovereigns to leave that matter to other sources of law.

Had the Compact's drafters wished to incorporate the Project into the Compact, they could have done so. They were of course very familiar with the Project. It is difficult to imagine that they included detailed gaging and delivery requirements for the Rio Grande above Elephant Butte Reservoir in Articles II-IV, yet silently included the Rio Grande Project and its attendant contracts in the Compact. States do not cede sovereign control of their natural resources in this way. *See Tarrant*, 569 U.S. at 631 ("[t]he background notion that a state does not easily cede its sovereignty has informed our interpretation of interstate compacts").

Moreover, the compacting states would not have ceded their sovereignty to a moving target. Reclamation law, the Project (including any operating agreement), and the contracts between the United States and the irrigation districts can and have changed over time. Affidavit of Craig Cotten, para. 8. Besides conflicting with principles of compact interpretation, the methods of allocation from the Project that movants seek to imply differ from the methods of apportionment used in the compact. Affidavit of Craig Cotten, para. 4, 7. Rather than rely on inflow and outflow gages, the Project has variably provided water on demand, for a farm delivery requirement, for expected delivery efficiencies, and according to a negotiated operation agreement. *See* Texas's Motion for Partial Summary Judgment, Sections D, G, H; New Mexico's Motion for Partial Summary Judgment, Section V; United States' Memorandum in Support, Sections B-G. None of these methods involved approval by the compacting states. Affidavit of Craig Cotten,

para. 5, 6. And as the advent of groundwater irrigated agriculture has shown, even physical limitations can change with technologies that did not exist in 1938. States bargain for a compact's terms to govern, not for an incorporation of a Reclamation project that will change over time. The latter view would undermine the long-term certainty that compacts provide and bind states to a deal that they never struck. *See, e.g. People ex rel. Simpson v. Highland Irrigation Co.*, 917 P.2d 1242, 1249 (Colo. 1996)(states intended the Arkansas River Compact to ensure a secure and lasting apportionment).

That the Project's contracted beneficiaries do not constitute all uses below Elephant Butte Reservoir further undercuts the assertion that it is incorporated into the Compact to effect the quantifiable apportionment to Texas and New Mexico. The Bonita Lateral, which is built into Caballo Dam, diverts water without a contract with the United States, for use on lands in New Mexico that are not in the Project. Affidavit of Craig Cotten, para. 12. And there may be other uses that likewise are not included in the Project. Affidavit of Craig Cotten, para. 9, 11, 12, 13, 15. None of these uses appear in the Compact, and they are no more incorporated by implication than the Project itself.

Furthermore, if the states had intended the Compact to incorporate the Project as a vehicle for making quantifiable apportionments below Elephant Butte Reservoir, they could have provided that water released from the reservoir may only be used on Project lands. Instead, they defined "Usable Water" in this way: "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." Compact, Article I(l) (emphasis added). Thus, non-Project lands also receive Usable Water released for irrigation demands. Affidavit of Craig Cotten para. 10. The arguments by New Mexico and the United States that the Project implements Compact apportionments or of Texas that its apportionment is reduced by Project contracts ignore these facts. Because there are lands outside the Project below the reservoir that receive water, the Project alone does not provide a quantifiable apportionment between Texas and New Mexico.

Finally, the other parties incorrectly presume the Supreme Court held the Compact implicitly incorporates the Rio Grande Project to either make or modify an apportionment under the Compact. The Court rejected the argument that this was the law of the case when it denied Texas' and New Mexico's motions for judgment on legal issues previously decided. Order, April 14, 2020. In that order the Court stated,

> Nothing decided to date supports broad conclusions as asserted by the parties as to: the wholesale inapplicability of state law in certain areas; entitlements to fixed percentages of water; a fixed state of groundwater development as of a determined date; or the *details* of what New Mexico can and cannot capture downstream of the Dam. It has been decided that the Court is the proper venue for addressing these complicated and important questions, and the Court has chosen to exercise its jurisdiction over this matter. But, at this time, the Court has not reached final answers as to these underlying questions.

Order, April 14, 2020 p. 3. And further,

> The Court did not purport to address the details of each parties' Compact apportionment, their individual duties under the Compact, or the details of the interplay of the Compact with state law, reclamation law, or state law as incorporated in reclamation law.

Order, April 14, 2020 p. 11. The parties cannot rely on the Court's March 5, 2018 Opinion, *Texas v. New Mexico*, 138 S. Ct. 954 (2018), to establish controlling legal principles on the relationship between the Compact and the Project. Moreover, implicit incorporation of the Project as a Compact obligation conflicts with the legal principles of compact interpretation.

Texas, New Mexico, and the United States assert the Rio Grande Compact incorporates the Rio Grande Project as a matter of fact. Colorado disputes this. Affidavit of Craig Cotten para. 4. Moreover, interpretation of the plain terms of a compact is a matter of law, not fact. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013)(concluding interstate compacts may be interpreted as contracts). The motions have not established undisputed facts, but merely asserted a legal conclusion as fact, largely based on an erroneous reading of the Court's March 5th Opinion.

II. The Compact has no implied 1938 condition.

Texas argues that the Compact prohibits New Mexico from consuming more water below Elephant Butte Reservoir than it did in 1938 in support of its theory that the Project contracts modify Texas' Compact apportionment. This argument

mirrors the incorporation arguments of Texas and the other parties in that it urges inserting terms into the Compact based on historical operations on the Rio Grande.

In order to construct a 1938 condition theory that applies below Elephant Butte Reservoir, Texas looks to the terms of the Compact that set out Colorado's and New Mexico's delivery obligations. Texas contends that the Compact contains a 1938 condition that governs consumption upstream of Elephant Butte Reservoir, so that an analogous implied term must govern consumption below the reservoir as well. Texas' theory not only mischaracterizes Colorado's obligations under the Compact, it alters the bargain that the states struck when they entered into the Compact.

The Compact does not limit consumption in Colorado to that which occurred in any period of time. The most obvious reason for this is that the Compact contains no such term. Affidavit of Craig Cotten, para. 17-21. It could, as does the Pecos River Compact, include a provision that limits consumption to that which existed in a particular year. *See* Pecos River Compact, Articles II(g)-(i), III(a), (d) (establishing a "1947 condition"). 68 Stat. 159 (1949). Yet, the Rio Grande Compact should not be read to include an unwritten term that appears expressly in other compacts. *See Texas v. New Mexico*, 462 U.S. at 565 ("The Pecos River Compact clearly lacks the features of these other compacts [Upper Colorado, Arkansas, and Yellowstone], and we are not free to rewrite it").

The states did set out to address the effect of Colorado's water use on downstream states. That downstream impact is one reason the states negotiated the Compact. But they did not limit Colorado's impact by choosing a date at which to freeze Colorado's consumption. Rather, they established a delivery requirement based on tables of relationship, another 10,000 acre-feet allowance over and above the figures in the table, and a system of credits and debits. *See* Compact Articles III, VI. They did much the same for New Mexico's obligations. *See* Compact Articles IV, VI. These express terms do not limit consumption to the same as in 1938 or even to the conditions found in the Joint Investigation Report. Affidavit of Craig Cotten, para. 17. Thus, the Compact does not fix Colorado's consumption at its 1938 level.

As long as they meet their delivery requirements, the Compact expressly allows future increases in consumption in Colorado and New Mexico. The Compact contemplates the Closed Basin Project in Colorado, which was authorized by Congress in 1972 and still operates today. *See* Compact Article IV. It also contemplates importation of water from the San Juan River into the Rio Grande in New Mexico, *see* Compact Article IX, which the San Juan Chama Project does. As for the Compact, there are no limits on consumption in Colorado and New Mexico other than those which they must impose on themselves to meet their delivery obligations in Articles III and IV of the Compact. This is not to say that there are no restraints on New Mexico below Elephant Butte Reservoir that protect Texas, only that those restraints are not found in the Compact as a 1938 condition.

Another failing of an implied 1938 consumptive use condition is that it relies on express terms governing flows above Elephant Butte Reservoir to imply a different term below the reservoir. This is contrary to the principles of compact interpretation. It makes little sense for the states to have imposed detailed obligations on Colorado and New Mexico in Articles III and IV incorporating inflow and outflow gages and then silently impose an obligation based on a 1938 condition below Elephant Butte Reservoir.

III. There is no priority date in the Compact.

Just as the Compact does not fix consumption as of 1938, it also does not establish a priority date for its administration. Affidavit of Craig Cotten, para. 16. The equitable apportionment established by a compact determines what is left for appropriation among a state's citizens. *See Tarrant*, 569 U.S. at 632. Unless a compact establishes a priority date, it need not be administered as a priority within a state. The South Platte River Compact, for example, did just this by establishing an 1897 priority date for curtailment obligations. 44 Stat. 195 (1926). But the Rio Grande Compact does not establish a date for administration of its obligations.

Therefore, the date of the Compact does not relate to administration within a state's prior appropriation water rights scheme. In Colorado, the state administers the Compact without reference to a priority date in relation to state water rights. But Colorado does establish separate schedules of delivery for the Conejos River and Rio Grande that result in the more senior Conejos Rights being curtailed before

more junior Rio Grande Rights to meet the flow schedule. *Matter of Rules & Regulations Governing Use, Control, & Prot. of Water Rights for both Surface & Underground Water Located in Rio Grande & Conejos River Basins & their Tributaries*, 674 P.2d 914 (Colo. 1983) ("*Alamosa-La Jara*"). Affidavit of Craig Cotten para. 16. This result conflicts with the arguments asserting the Compact is administered in priority along with state water rights. Therefore, reference to the Rio Grande Project's water right priority under New Mexico law is not relevant to how the Compact effects an equitable apportionment through the measurement of flows using compact gages in three reaches of the Rio Grande.

IV. Texas attempts to improperly expand the Compact to dictate how Colorado and New Mexico must regulate water use within their borders.

The Court should not adopt an interpretation of the Rio Grande Compact that imposes requirements for intrastate regulation that do not appear in the Compact. Without compact terms that govern intrastate water regulation, states are free to regulate water use within their borders as they see fit, as long as they meet their compact obligations, because states enjoy sovereign control over their own natural resources. *See Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979) (power to regulate land use is not impliedly relinquished); *Tarrant*, 569 U.S. at 632.

Texas mistakenly relies on *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013) and a Colorado Supreme Court case, *Alamosa-La Jara* ,674 P.2d 914

(Colo. 1983), to support its argument that the Compact preempts state law in Colorado and New Mexico without express terms.

Tarrant holds that state law is only preempted when such terms appear in the compact. In *Tarrant*, the Court found that Oklahoma state law prevailed because the Red River Compact had no term that preempted it. *See Tarrant*, 569 U.S. at 633 ("Adopting Tarrant's reading would necessarily entail assuming that Oklahoma and three other States silently surrendered substantial control over the water within their borders when they agreed to the Compact"). Here, the Rio Grande Compact does not contain implied terms that preempt state law in Colorado and New Mexico. Rather, it contains very detailed terms that determine the delivery obligation at each river reach, and it left the states to determine how to meet those delivery obligations.

Texas also misunderstands the *Alamosa-La Jara* case. The case does not hold that the Compact contains terms that preempt Colorado state law. Rather, the opinion upheld the manner of administration of water rights in Colorado that was in place before the Rio Grande Compact. As relevant here, *Alamosa-La Jara* concerned rules adopted by the Colorado State Engineer for administering water rights on the Rio Grande and Conejos River systems to help Colorado meet its delivery obligations under the Compact. *See Alamosa-La Jara*, 674 P.2d at 917, 925. The rules required curtailment of water rights by seniority on the Rio Grande and Conejos separately, rather than instituting a regime which would curtail water

rights by seniority on both rivers. *See Id.* at 921. Colorado has always administered water rights on these rivers separately. *See Id.* at 921-22.

Water users on the Conejos River favored an administrative scheme under which Colorado's state line Compact delivery obligation would be treated as a water right senior to all water rights on the Rio Grande and Conejos Rivers, and water rights would be curtailed for Compact compliance by priority date regardless of which river they diverted from. *See Id.* at 923-24. The Court determined that such an approach would "reshuffle" settled water rights and that the Compact's drafters did not intend that result. *See Id.* Thus, the Compact does not impose a method of water rights administration on Colorado that conflicts with Colorado law; the Compact simply mirrors how Colorado was already administering water rights on the Rio Grande and Conejos Rivers.

V. The law of judicial equitable apportionment of an interstate stream does not apply to interpreting a compact.

Although no party explicitly argues that this case concerns a judicial equitable apportionment as between the two states below San Marcial, Texas, New Mexico, and the United States employ principles of that doctrine and blur the line between judicial equitable apportionment and equitable apportionment by interstate compact. These parties want to describe Compact apportionments as a specific quantity of water to which each state is entitled. However, the Compact does not do that. The Court should be careful not to inadvertently effect a judicial equitable apportionment in the guise of interpreting the Compact.

Interstate water compacts apportion water in perpetuity; once an interstate compact becomes effective, the determination of whether an interstate stream is apportioned "equitably" has concluded. Future disputes are limited to the proper interpretation of the relevant compact, and "[C]ourts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress." *New Jersey v. New York*, 523 U.S. at 811 (quoting *Arizona v. California*, 373 U.S. 546, 565–66 (1963). A "free-form exploration of the practical consequences of the parties' agreement" and "reliance on evidence outside of the Compact to introduce ambiguity into Compact terms, is both contrary to [this Court's] precedents and unfair to the parties." *Oklahoma v. New Mexico*, 501 U.S. 221, 247 (1991) (Rehnquist, C.J., concurring in part and dissenting in part).

For example, New Mexico argues that, because the Project is incorporated into the Compact and Reclamation law governs the Project, Reclamation Law is incorporated into the Compact, and because Reclamation law contains background principles of prior appropriation, those principles are also incorporated into the Compact, so that Texas must provide notice to New Mexico of any shortfall in Project water deliveries. New Mexico's very attenuated connection between one aspect of the law of prior appropriation and the Rio Grande Compact does not support adding additional obligations to the Compact, particularly when the Compact sets out so many other states' obligations. The Court's designing a state's obligations on an interstate stream belongs in a judicial equitable apportionment

case, not an action to enforce the terms of a compact. *See State of Wyo. v. State of Colo.*, 259 U.S. 419, 470 (1922) (concluding in a judicial equitable apportionment case that it is equitable to apply the doctrine of prior appropriation where both states apply the doctrine intrastate).

For its part, Texas contends that it would be inequitable for the Compact to treat Colorado and New Mexico differently above Elephant Butte Reservoir than it treats Texas below the Reservoir. But the Compact provides detailed gaging and delivery requirements above Elephant Butte Reservoir with no means to measure by compact gages any flows divided between Texas and New Mexico. Affidavit of Craig Cotten, para. 7, 19, 20. That this is equitable has already been settled with the approval of the Compact.

In neither case do those states point to terms in the Compact, instead they rely on outside concepts of equity to add to what the Compact requires. In fact, for decades the parties have been addressing those issues under Reclamation law precisely because the Compact does not spell out what happens below Elephant Butte Reservoir. Rewriting the Compact will only undermine the integrity of interstate water compacts generally.

THE PRINCIPLES OF COMPACT INTERPRETATION SHOW HOW THE RIO GRANDE COMPACT MAKES AN EQUITABLE APPORTIONMENT

I. The Compact's express terms set out a comprehensive method for effecting an equitable apportionment.

The Compact makes clear how it apportions water. The preamble sets out its broad goal:

> The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes . . . .

The Compact's various articles describing river measurement gages, delivery amounts, and accounting methods accomplish this broad goal. However, it does not include terms that set out a specific quantity of water apportioned to each of the compacting states. Further, the Compact's apportionment method implements the apportionment of the entire area by measuring inflows and outflows at specified gages. But it is a mistake to try to find an apportionment made by the Compact to either New Mexico or Texas of a specific volume of water below San Marcial because the Compact does not apportion water in that way.

First, the Compact effects its apportionment to three river reaches through specified gages. The Compact identifies gages in Article II that it uses for accounting. These gages measure the inflow into river reaches and the outflow or

delivery to downstream river reaches. In between these points, and as long as the delivery requirements are met, the Compact does not otherwise restrict use by the states. The states could have chosen many different methods to apportion water or made more discrete apportionments among them. However, what this Compact does is establish inflow measurement gages and tables of relationship for outflow gages into downstream river reaches.

Second, the tables of relationship allow for variations in hydrology and consumptive uses without fixing a static delivery obligation. The inflow gages measure the variations in hydrology. At the upper stage of each river reach a gage measures the annual flows that form the basis for tabulating the required flows at the bottom end to the next section. These relationships are set forth in the tables in Articles III and IV, for the upper and middle reaches, respectively. This allows for a variation in delivery obligations based on the amount of water flowing in over the course of a year.

Third, an accounting system of credits and debits creates additional flexibility for the states. Compact Art. I (g)-(j). Colorado may accrue up to 100,000 acre-feet of debits and 150,000 acre-feet of credits. Compact Art. VI. The relationship between inflow and outflow gages provides the inputs for the accounting system. Likewise, New Mexico may accrue up to 200,000 acre-feet of debits and 150,000 acre-feet of credits, also measured by inflow and outflow gages. *Id*. The system of credits and debits accommodates the challenges presented by

administering water flows to match the flow tables for flow totals that are not known until the end of the year. *See* Affidavit of Craig Cotten para. 18. These terms show that the Compact's apportionment includes a variable delivery obligation based on variations in gaged inflows and allowing for a system of annual and accrued credits and debits.

II. The Compact establishes several of gages as the way to measure delivery obligations.

Examining the Compact terms establishing the gages and flow requirements shows that measurement of water within gaged river reaches are the means to apportion water under the Compact. The Compact identifies specific inflow and outflow gages in Article II to monitor the states' obligations under the Compact. Articles III and IV then use the data from these gages to calculate a delivery obligation from one reach of the Rio Grande to the next. Tables in Articles III and IV set out a relationship between flows at upstream gages corresponding to flows at downstream gages.

The Compact identifies the gages measuring inflows and outflows. The area between them is a measured reach of the river. This brief uses the terms upper, middle, and lower reaches as a simplified way to describe the three measured reaches defined by these gages. The inflow gages for the upper reach include Del Norte, where the Rio Grande enters the San Luis Valley in Colorado; Mogote, on the upper reaches of the Conejos River in Colorado; Los Pinos, near Ortiz, Colorado upstream of where the river joins the San Antonio River; San Antonio, near Ortiz

above its confluence with the Conejos River. The outflow gages for the upper reach are Los Sauces, at the confluence of the Conejos River and the Rio Grande; and Lobatos, on the Rio Grande near the Colorado state line. The inflow gage for the middle reach is at Otowi, on the Rio Grande above the Middle Rio Grande irrigation area in New Mexico. The outflow gage for the middle reach is San Marcial, above Elephant Butte reservoir. Gages measure inflows to the lower reach at Elephant Butte and Caballo Reservoirs, below the outlet of each dam. There are no outflow gages for the lower reach and there is no delivery table below San Marcial because it is the last area covered by the Compact with no further delivery obligations. Likewise, the lower reach has no system of credits or debits because there is no need to accommodate hydrological variability for a delivery obligation.

It is these measured flows that form the basis for apportionment. The map (Exhibit 2) shows the relative locations of these gages and the drainage areas they measure for reference. Consistent with contemporary understanding during the negotiations, these same river reaches also roughly correspond to the studies made for the Compact negotiations, which divided the Rio Grande into "three principal areas: the San Luis section in Colorado, the Middle section in New Mexico, and the Elephant Butte-Fort Quitman Section in New Mexico, Texas, and Mexico." *Part VI-The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* at 7 (1938).

Where uses across state lines could impact these measurements, the Compact placed gages. For example, the gages on the Los Pinos and San Antonio Rivers are both located in New Mexico near where they cross into Colorado. Thus, Colorado's obligation for the Conejos flows at Los Sauces does not include unmeasured flows above the Los Pinos and San Antonio gages. Similarly, New Mexico's obligation to deliver at San Marcial depends only on the flows at the Otowi gage, not flows that may exist further upstream. Of course, because reliability of gage locations could change, the states provided for moving them in Article V. This was the process used when moving the measuring point from the San Marcial gage to Elephant Butte Reservoir in 1948.

But when the Compact requires delivery within a state, it designates a gage for that purpose. For example, the Los Sauces gages are within Colorado, yet create a delivery obligation for the Conejos River at the Colorado – New Mexico state line as measured at Lobatos.[4] Compact Art. III; *Alamosa-La Jara,* 674 P.2d 914, 925 (Colo. 1983). New Mexico delivers at the San Marcial gage, while the Caballo gage measures inflows to the lower reach. Both of these gages are within New Mexico, but the area between the gages is largely occupied by the Rio Grande Project and its two reservoirs, Elephant Butte and Caballo Reservoirs, storing over two million acre-feet of water.[5] Water in Elephant Butte Reservoir, above Caballo gage,

[4] The Lobatos gage is about seven miles upstream of the Colorado – New Mexico state line.
[5] The Compact identifies the storage capacity of Elephant Butte and soon to be completed Caballo reservoir as up to 2,638,860 acre-feet in its definition of Project Storage. Compact Art. I (k). This amounts to over 859 billion gallons.

includes compact credit accounts. This is water not available for use downstream unless relinquished by Colorado or New Mexico. Evaporation and holding water in storage year over year also mean that deliveries measured at San Marcial do not reflect the amount of water actually reaching the lower reach; therefore, rather than only measure the inflows at San Marcial, the Compact also measures reservoir releases at the Caballo gage.

These lower reach gages are also used to gather measurements for Rio Grande Compact Articles VI and VII. These articles relate to inflows into the lower river reach and have corresponding impacts on the upper and middle reaches. The amount of flows at San Marcial that are eventually available for use downstream are represented by Usable Water in storage. Compact Art. I(k). In any year in which an actual or hypothetical spill occurs, all accrued debits from Colorado and New Mexico are cancelled. Compact, Art. VI. Also, the debits from the upper two reaches are reduced proportionally to an amount equal to the unfilled capacity of Project Storage. *Id*. Article VII requires that, with some exceptions, neither Colorado nor New Mexico may increase the amount in water stored in post 1929 reservoirs when there is less than 400,000 acre-feet of usable water in Project Storage, unless the releases, as measured at the Caballo gage, show that flows following an actual spill into the lower reach have averaged more than 790,000 acre-feet per year. These provisions rely on the relationship between measured flows at the San Marcial and Caballo gages.

The Downstream Contracts[6] of the Rio Grande Project are "inextricably intertwined" with the Rio Grande Compact only by the results that storage in and releases from Project Storage have as described in the Compact. A certain amount of water is promised to the Project beneficiaries in accord with the Downstream Contracts. *Texas v. New Mexico*, 138 S. Ct. at 957. The amount of usable water in storage and released influences debits held by Colorado and New Mexico. If the amount in Project Storage is below 600,000 acre-feet at the beginning of a year, Texas may ask for release of debit water stored in upstream post-compact reservoirs in order to get that amount into storage by March 1st. On the other end of the spectrum, if water is spilled from Project Storage, the debits of the upstream states from the upper two reaches are erased. Thus, the amount of water available to, and released for use within the lower river reach directly impacts the amount of water delivered by the upper and middle reaches. But even though water delivery under the Downstream Contracts impacts the Compact, it does not follow that the Compact incorporates the Downstream Contracts. Affidavit of Craig Cotten para. 5, 6, 8.

[6] The Supreme Court mentioned various contracts among the United States, Elephant Butte Irrigation District, and El Paso County Water Improvement District No. 1 without identifying them or analyzing their function. *Texas v. New Mexico*, 138 S. Ct. at 957.

III. Consistent with not ceding sovereignty absent express terms, the Compact contains no provisions for apportioning water within ungaged river reaches.

The Article II gages measure flows into and deliveries from specific points, with no mechanism in the Compact to further apportion water without the use of gages. Only one area within a reach is further subdivided by Compact gages - the measurement of delivery obligations between the Rio Grande mainstem and the Conejos River in the upper river reach. *Alamosa-La Jara,* 674 P.2d at 925 (confirming the Rio Grande Compact establishes a separate delivery obligation for the Conejos). Article III specifically measures inflows and outflows from the Conejos River and the Rio Grande and assigns a delivery portion from those measurements at the Lobatos gage. Inflows to the Rio Grande are measured at the Del Norte gage, with a corresponding delivery at the Lobatos gage. On the Conejos River, inflows are measured at the Mogote, Los Pinos, and San Antonio gages, with outflows at the confluence of the Conejos and Rio Grande as measured at the Los Sauces gages. These measurements are then used to determine the Article III contribution of the Conejos flows at Lobatos. This demonstrates that the states knew how to provide for gages when they wanted to create separate delivery obligations within a river reach.

The other river reaches do not have Compact mechanisms for dividing delivery obligations within them. This is consistent with prior Circuit Court interpretation of the Rio Grande Compact. *City of El Paso v. Reynolds*, 563 F. Supp.

379, 384 (D.N.M. 1983) ("Neither the history of the Compact negotiations, the ultimate terms of the Compact, nor the defendants' subsequent interpretation and actions support the conclusion that the parties to the agreement intended it to apportion either the surface water of the river or the related ground water below Elephant Butte between New Mexico and Texas."). Consistent with principles of compact interpretation, the Court should not invent a division of water within a river reach under a compact where none exists.

IV. Sources of law other than the Rio Grande Compact provide guidance on more detailed divisions of water.

Consistent with principles of compact interpretation, other legal vehicles address subdividing water within a river reach. These other vehicles show both the existing legal framework under which the Compact was negotiated and that the states retain sovereign authority over their water resources except where they expressly relinquished that authority.

The Rio Grande Project was the independent, pre-existing legal means for interstate division of water when the states negotiated the Compact, allowing the Compact to remain silent and not address the issue of dividing water below the last Compact gage. *See New Jersey v. New York*, 523 U.S. at 783 (silence of issue of avulsion in the New York and New Jersey boundary compact showed no intent to alter contemporary law on avulsion); *see also Texas v. New Mexico*, 138 S. Ct. at 957. Because there are no compact gages below Caballo, the Rio Grande Compact has no way to measure a further division of water between New Mexico and Texas.

Affidavit of Craig Cotten para. 7. The compacting states could have included additional gages, but they did not. They could have used a mechanism other than inflow and outflow gages, but they did not. Indeed, contemporary evidence acknowledges the use of the pre-existing means of division in this last river reach. Letter from Frank B. Clayton, Compact Commissioner for Texas, to C.S. Clark, Chairman of the Texas Board of Water Engineers (Oct. 16, 1938); Letter from Frank B. Clayton, Compact Commissioner for Texas, to Sawnie B. Smith, attorney for the Water Conservation Association of the Lower Rio Grande Valley (Oct. 4, 1938), Douglas R. Littlefield, *Conflict on the Rio Grande: Water and the Law, 1879-1939* (2008) (Congress apportioned water between New Mexico and Texas through the Rio Grande Project). Therefore, the compacting states did not need to devise a new method of dividing the water.

As the Supreme Court noted, the Compact included no terms for the division of waters between New Mexico and Texas because, "of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources." *Texas v. New Mexico*, 138 S. Ct. at 957. Thus, without other terms in the Compact, rather than invent new ones, the Court should apply existing Reclamation law at the time of the negotiations to determine how the states intended to divide water in the lower river reach.

If the States had intended the Compact to allocate water below the Project, they could have done so - just as New Mexico and Colorado did in the Amended Costilla Compact. That compact governs division of water between Colorado and New Mexico. 77 Stat. 353; Colo. Rev. Stat. § 37-68-101. Costilla Creek is fed by tributaries from both Colorado and New Mexico and meanders between both states before joining the Rio Grande in New Mexico. A reservoir in New Mexico serves irrigators in both states. That compact sets out terms for dividing the water among the irrigation ditches in both states and provides for administration by a Compact Commission. *Id*. Art. VIII. Although irrigators use water from Costilla Creek in both Colorado and New Mexico, the Rio Grande Compact did not establish any gaging system to apportion its waters. (The Compact likewise does not provide any gages dividing water between Colorado and New Mexico on the Chama River.) To address the fact that the Rio Grande Compact does not apportion waters between the states on Costilla Creek, Colorado and New Mexico entered into the Amended Costilla Creek Compact to govern apportionment of its water. It does not conflict with any of the express terms of the Rio Grande compact, yet takes care of important issues of water allocation between states that were otherwise left unaddressed. This subsequent compact with express terms for apportionment is consistent with the principle that the states do not implicitly give up rights to interstate waters. It also cautions against circumventing the states' compacting authority by reformation of a compact to cover issues beyond its express terms.

V. The Colorado River Compact shows a similar use of multi-state river basins to equitably apportion water.

One accepted principle of compact interpretation relies on comparison to other contemporary compacts. The Colorado River Compact, signed by both Colorado and New Mexico in 1922, shows that the states intended the Rio Grande Compact to apportion water based on gaged river reaches rather than political boundaries.

The Colorado River Compact apportions the waters of the Colorado River Basin between the Upper Basin and Lower Basin. Colorado River Compact Art. I. Importantly, the compact does not apportion water to the seven Colorado River basin states individually. This fact contributed to further litigation over the apportionment within the Lower Basin. *State of Ariz. v. State of Cal.*, 373 U.S. 546, 558, 83 S. Ct. 1468, 1476, 10 L. Ed. 2d 542 (1963), *judgment entered sub nom. State of Arizona v. State of California*, 376 U.S. 340, 84 S. Ct. 755, 11 L. Ed. 2d 757 (1964), *amended sub nom. Arizona v. California*, 383 U.S. 268, 86 S. Ct. 924, 15 L. Ed. 2d 743 (1966), and *amended sub nom. Arizona v. California*, 466 U.S. 144, 104 S. Ct. 1900, 80 L. Ed. 2d 194 (1984). A designated compact gage at Lee Ferry measures the flows of water from one compact basin to the next. The Upper Basin has the exclusive use of the waters in the Upper Basin, with an obligation to not cause the flows of the river at Lee Ferry to be depleted below seventy-five million acre-feet of water over a consecutive ten-year rolling average. Colorado River Compact Art. III(d), 70 Cong. Rec. 324 (1928). Some compacting states (New

Mexico, Utah, and Arizona) are located in both the Upper Basin and Lower Basin. Colorado River Compact Art. II (f)(g). For example, under the Upper Colorado River Compact, *infra,* Arizona is apportioned 50,000 acre-feet for use above Lee Ferry; however, this does not preclude Arizona's use of water in the Lower Basin. This situation is much like the Rio Grande Compact placing New Mexico in both the middle and lower river reaches. This, again, highlights how a compact may apportion water based on geography and not political boundaries.

Also similar to the Rio Grande basin, other legal mechanisms are used to handle further water divisions within the Upper Basin and Lower Basin on the Colorado River. On the mainstem of the Colorado River, the Boulder Canyon Project Act authorizes the storage and delivery of water by contracts between water users and the United States. The Boulder Canyon Project Act authorized the Lower Basin States of Arizona, California, and Nevada to contract for a specified amount of the 7.5 million acre-feet annually apportioned to the Lower Basin by the compact. 45 Stat. 1057; 43 U.S.C.A. § 617 et seq.; *see also* Boulder Canyon Project Adjustment Act 54 Stat. 774; 43 U.S.C.A. § 618 et seq. The Boulder Canyon Project effectively controls the storage and delivery of all flows from the Colorado mainstem in the Lower Basin. *State of Ariz. v. State of Cal.*, 373 U.S. 546. Notably, the Boulder Canyon Project Act controls the water's distribution specifically because no compact otherwise divided the Colorado mainstem waters below Lee Ferry. *Id.* at 565 (division of the water did not depend on the compact, because Congress gave the

Secretary of the Interior authority to make contracts for the delivery of water). The Rio Grande Project plays a similar role in storing and releasing flows in the lower river reach on the Rio Grande. The United States has entered into the Downstream Contracts for water delivery from its Rio Grande Project. *Texas v. New Mexico*, 138 S. Ct. at 957.

Different from the Lower Basin, the states of the Upper Basin negotiated the Upper Colorado River Compact in 1948 to apportion water among themselves. 63 Stat. 31 (1948). This compact fills in details about divisions of water among the states in the Upper Basin and their obligations to the Lower Basin, consistent with the Colorado River Compact. Colorado and New Mexico similarly use a compact of smaller geographic scope to handle the division of Costilla Creek within the Rio Grande Compact's middle river reach.

The states do not rely on only one device, the Colorado River Compact, to govern all divisions of water within the entire basin. Instead, they rely on the totality of these legal devices, often called the "Law of the River."[7] *State of Ariz. v. State of Cal.*, 373 U.S. 546, 566 ("Nor does the Colorado River Compact control this case. Nothing in that Compact purports to divide water among the Lower Basin

[7] Colorado uses the term "Law of the River" to refer to a body of law affecting interstate and international use, management, and allocation of water in the Colorado River system, including the Colorado River Compact, the 1944 Mexican Water Treaty, the 1948 Upper Colorado River Basin Compact, several United States Supreme Court decisions, and Supreme Court decrees in Arizona v. California, and many federal statutes and regulations.

States nor in any way to affect or control any future apportionment among those States or any distribution of water within a State.").

So too, the Court should not try to answer all questions about division of water within the Rio Grande Basin using only the Rio Grande Compact. The Rio Grande Compact uses designated gages to define the flows in three river reaches. Other mechanisms, such as the Amended Costilla Creek Compact, the Rio Grande Reclamation Project, and the 1906 Treaty, *Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes*, 34 Stat. 2953, provide more details about division of water within the Rio Grande Basin. Each interstate water compact stands on its own. However, reference to how some of the very same states apportioned water in other compacts using the same layered system of compacts, reclamation contracts, and treaties, confirms that the Rio Grande Compact makes its equitable apportionment among three river reaches using specified river gages, while other legal mechanisms may provide details on water divisions within those reaches.

VI. The Court should not invent terms for the Rio Grande Compact to effect an equitable apportionment different from the one established by the compacting states.

It would be an error of compact interpretation principles to try to reform the Rio Grande Compact. The Rio Grande Compact effects the equitable apportionment among the states by using several gages to measure flows among three river reaches. The Compact's apportionment does not answer the question about how

water is further divided among New Mexico and Texas. However, that is not a failure of the Compact. Rather, it is an acknowledgement of how the compacting states determined to apportion the waters of the Rio Grande basin. At the time, the three states were satisfied that the method using compact gages adequately effected an apportionment among them. Such an approach is not unique. An attempt to find a specific apportionment to New Mexico or Texas below the San Marcial gage cannot be done using the clear language of the Compact.

CONCLUSION

The Court should deny all the motions for partial summary judgment to the extent that they depend on an erroneous argument that the Compact implicitly incorporates the Rio Grande Project and rely on disputed factual issues. The Court should rule as a matter of law that the Rio Grande Compact does not create separate apportionments to either New Mexico or Texas below the San Marcial gage.

Respectfully submitted this 22nd day of December 2020,

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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 COLORADO'S CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of December 2020, I caused a true and correct copy of the **STATE OF COLORADO'S RESPONSE TO THE MOTIONS FOR PARTIAL SUMMARY JUDGMENT OF TEXAS, THE UNITED STATES, AND NEW MEXICO** to be served upon Special Master Michael Melloy, Clerk of the 8th Circuit Michael Gans and upon all counsel of record and counsel for interested parties by email and/or Fed Ex delivery as indicated below.

Respectfully submitted this 22nd day of December 2020,

/s/Chad M. Wallace
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I certify that the **State of Colorado's Response to the Motions for Partial Summary Judgment of Texas, the United States, and New Mexico** has on this day been served as indicated above.

/s/ Chad M. Wallace

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