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

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S *AMICUS* BRIEF IN RESPONSE TO SUMMARY JUDGMENT MOTIONS ON APPORTIONMENT ISSUES

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TABLE OF CONTENTS

Table of Contents………………………………………………………………………... i

Table of Authorities………..……………………………………………………….……... ii

Summary Of EPCWID'S Position.. 1

I. Essential Provisions and Basic Terms of the Compact, and Summary Judgment Issues Arising From Them... 2

A. The States Equitably Apportioned All of the "Waters of the Rio Grande" From the River's Headwaters In Colorado to Fort Quitman 2

1. Compact Apportionment Above San Marcial at Headwaters of Elephant Butte Reservoir……………………………………………………………………………... 3

2. Compact Apportionment After San Marcial at Elephant Butte………………….…... 3

B. New Mexico Is Obligated To Deliver Rio Grande Water Into Project Storage At Elephant Butte Reservoir, Where the United States Holds It For Release Downstream........ 4

C. EPCWID Sides With The United States And Texas On The Two Key Areas Of Summary Judgment Dispute 5

II. Article IV Of The Compact Prohibits New Mexico From Interfering With Project Deliveries 7

A. New Mexico Relinquishes Possession and Control Of Rio Grande Waters Upon Its Article IV Delivery Into Elephant Butte Reservoir 7

B. The Compact And Federal Reclamation Law Do Not Leave New Mexico Free To Allow Indirect Diversions Of Rio Grande Waters Under New Mexico Law 9

1. A Disgression on Whether Article IV of the Compact Includes Southern New Mexico In Its Downstream Apportionment……………………………………….....11

2. Neither The Compact Nor Federal Reclamation Law Allow New Mexico To Sit By And Allow Non-Project Depletions Of Project Deliveries…………15

a. New Mexico State Law Is Preempted By The Compact……………………16

b. New Mexico State Law Is Preempted By Federal Reclamation Law.........20

C. Basic Contract Law Principles Reinforce The Conclusion That The Compact Bars New Mexico From Interfering With Deliveries to EPCWID 22

III. What The Compact Does *Not* Give New Mexico: A Quantifiable Apportionment, Nothing For Non-EBID Users And Uses, And No Rights To Or In Project Operations 23

A. The Compact Provides New Mexico No Quantified Apportionment Downstream Of Elephant Butte Reservoir 23

B. New Mexico Cannot Claim Reclamation Contract Rights Belonging To EPCWID And EBID In Support Of Its Claim Of A Quantified Apportionment Or Otherwise Insinuate Itself Into Project Operations 25

C. New Mexico Bargained For And Accepted The Pre-Existing Project And Cannot Interfere With The Rights Of EBID And EPCWID To Water From The Project 27

TABLE OF AUTHORITIES

Cases **Page(s)**

Bean v. United States,
163 F.Supp. 838 (Ct.Cl. 1958) 5

California v. FERC,
495 U.S. 490 (1990) 20

California v. United States,
438 U.S. 645 (1978) 20, 21

City of Fresno v. California,
372 U.S. 627 (1963) 20

EBID v. Regents of NMSU,
849 P.2d 372 (N.M. App.) 17

Florida v. Georgia,
138 S.Ct. 2502 (2018) 19

Hinderlider v. La Plata River & Cherry Creek Ditch Co.,
304 U.S. 92 (1938) 17, 18

Hines v. Davidowitz,
312 U.S. 52 (1941) 19

Ide v. United States,
263 U.S. 497 (1924) 16

Israel v. Morton,
549 F.2d 128 (9th Cir. 1977) 21

Ivanhoe Irrig. Dist v. McCracken,
357 U.S. 275 (1958) 20

Kansas v. Colorado,
574 U.S. 445 (2015) 19

Nebraska v. Wyoming,
325 U.S. 589 (1945) 16

Nebraska v. Wyoming,
515 U.S. 1 (1995) 19

New Hampshire v. Maine,
532 U.S. 742 (2001) 14

PLIVA, Inc. v. Mensing,
564 U.S. 604 (2011) 18

State ex rel. Dyer v. Sims,
341 U.S. 22 (1951) 17

Strawberry Water Users Ass'n v. United States,
576 F.3d 1133 (10th Cir. 2009) 21

Tarrant Regional Water Dist. v. Herrmann,
569 U.S. 614 (2013) 2, 8, 17, 18

Texas v. New Mexico,
138 S.Ct. 954 (2018) ..... passim

Texas v. New Mexico,
352 U.S. 991 (1957) 14

Texas v. New Mexico,
482 U.S. 124 (1987) 2, 8
Texas v. New Mexico,
462 U.S. 554 (1983) 19, 24
United States v. Sandoval,
231 U.S. 28 (1913) 21

Statutes

43 U.S.C. § 383 20
N.M. Const. Art. XXI § 7 21
NMSA 1978, § 72-15-23 10

Rules

Federal Rule of Evidence 201 14

Other Authorities

13 WILLISTON ON CONTRACTS § 39:12 (4th ed.) 22
CORBIN ON CONTRACTS § 53.5 (1993) 22
Pub. Law No. 58-108 ch. 798, 33 Stat. 814 8
Restatement (First) of Contracts § 315 22
Restatement (Second) of Contracts § 102 8
Restatement (Second) of Contracts § 205 22
The Federal Role in Managing the Nation's Groundwater,
J. Leshy, 11 Hastings W.N.W. J. Envtl. L. & Pol'y 1 (2004) 16

The El Paso County Water Improvement District No. 1 ("EPCWID" or the "District") submits this *amicus* brief, focusing on the two overarching issues raised in the summary judgment motions, which are appropriate for disposition as a matter of law.

SUMMARY OF EPCWID'S POSITION

For its position on the two essential issues presented by the motions, the District endorses the United States' succinct summaries, which are directed at the apportionment in Article IV of the Compact:

Depletions From Groundwater Pumping In New Mexico

> The Rio Grande Compact apportions all of the waters of the Rio Grande above Fort Quitman, . . . and . . . incorporates the federal Rio Grande Project . . . as the mechanism for effectuating the Compact apportionment. . . . New Mexico has an obligation to exercise its regulatory authority over water use within its borders . . . and may not permit New Mexico water users to interfere with the Project's delivery of the Compact apportionment.

U.S. Mem. in Support of Motion for Partial Summary Judgment 1. And:

No Quantification Of Apportionments

> [T]he Compact does not specify amounts of water "apportioned" to each state. . . . The Compacting States believed that the operation of the Project under existing conditions resulted in an apportionment that was equitable, and they chose not to quantify it. New Mexico's proposal to divide up the water on a simple percentage basis is inconsistent with that decision.
>
> . . . .
>
> New Mexico is not entitled to judgment as a matter of law that the Compact apportions each State a percentage share of "Project supply" because that judgment would not be consistent with the text of the Compact that Congress approved or the equitable apportionment the Compacting States intended to effect.

U.S. Mem. in Resp. to NM MSJ 2-3, 5.[1]

[1] The quoted reference about the Compact "incorporat[ing] the federal Rio Grande Project" does not mean New Mexico gained rights in the Project. It did not.

I. ESSENTIAL PROVISIONS AND BASIC TERMS OF THE COMPACT, AND SUMMARY JUDGMENT ISSUES ARISING FROM THEM

The starting place is, of course, the Compact itself. Compacts are to be construed and applied according to their terms. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). Because the Rio Grande Compact is the touchstone of this case, and because the pending summary judgment motions require the Special Master to construe it, the District begins with an overview of the Compact's terms and structure. Its express terms are the best indicators of the signatory states' intent, and the structure of the Compact, properly understood, informs understanding of its terms. *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 628, 631 (2013). To the extent they fail to jibe with the terms and structure of the Compact itself, the summary judgment arguments should be rejected.

A. The States Equitably Apportioned All Of The "Waters Of The Rio Grande" From The River's Headwaters In Colorado To Fort Quitman

The Rio Grande Compact's preamble contains the agreement's core premise: the signatory states reached an accord on "use of the waters of the Rio Grande" from the river's headwaters to a point (Fort Quitman, Texas) nearly 1,200 miles downstream. The states agreed to an "equitable apportionment" to divide "such waters" among themselves, setting out the definitions, rules, and obligations governing the apportionment in seventeen articles.[2]

Articles III and IV contain the delivery obligations for Colorado and New Mexico. The same two articles also establish the three states' apportionments. All Rio Grande water is apportioned, but all of the apportionments, while clearly made, are established indirectly. They follow as the residual, and ineluctable, result of the delivery obligations.

[2] One of these articles, Article XVI, removes the United States' treaty obligations to Mexico from the Compact's apportionment among the three states.

1. Compact Apportionment Above San Marcial at Headwaters of Elephant Butte Reservoir

The apportionments to Colorado and New Mexico above Elephant Butte Reservoir are determined as a logical consequence of the delivery obligations specified for two points, the Colorado-New Mexico state line and San Marcial at the headwaters of Elephant Butte Reservoir. Article III obligates Colorado to make an annual delivery of Rio Grande water in quantifiable, indexed amounts at the New Mexico state line. Inferentially then, Colorado's annual apportionment is the amount of Rio Grande water in excess of its Article III delivery obligation.

Under the combined operation of Articles III and IV, the annual New Mexico apportionment above Elephant Butte Reservoir works in a similar fashion. It is the difference between Colorado's state line delivery amount (plus inflows upstream of the Otowi Bridge gauge) and the amount New Mexico has to deliver under Article IV.

2. Compact Apportionment After San Marcial At Elephant Butte

Unlike the apportionments to Colorado and to New Mexico above Elephant Butte Reservoir, the apportionment to Texas, and possibly to New Mexico downstream of Elephant Butte,[3] are not in specifically quantifiable, indexed amounts. But like those Colorado and New Mexico apportionments, the Texas and southern New Mexico apportionments are determined indirectly, not by the specific terms of the Compact. In the Supreme Court's analysis, the apportionment to Texas is inferred from New Mexico's obligation to deliver Rio Grande water to Elephant Butte

[3] New Mexico already has an apportionment above San Marcial, so to lessen confusion, the area of the *disputed* New Mexico apportionment will usually be referred to as "southern New Mexico." The parties dispute whether there is a Compact apportionment of Rio Grande waters to New Mexico in southern New Mexico. The United States argues there is such an apportionment but limited to the Project lands starting at the headwaters of Elephant Butte Reservoir. Texas argues there is not. New Mexico currently argues there is such an apportionment, although in past Supreme Court disputes over the Rio Grande Compact it has argued the opposite, insisting that it does *not* have a Compact apportionment in southern New Mexico. These disputes are addressed in Part II.B.1, *infra*. In part because the effect of a summary judgment ruling should be the same regardless of the resolution of that particular dispute, EPCWID does not stake out a specific position on the question. Occasional references in the text of this brief to a southern New Mexico apportionment are not intended to implicitly adopt the position that the Compact actually makes such an apportionment.

Reservoir, in combination with the contemporaneous promise to deliver water to Texas by means of the Project. *Texas v. New Mexico*, 138 S.Ct. 954, 957, 959 (2018).[4] The Supreme Court further recited that, drawing the same inference from the same Project arrangement, New Mexico also received an apportionment to southern New Mexico. *Id*.

B. New Mexico Is Obligated To Deliver Rio Grande Water Into Project Storage At Elephant Butte Reservoir, Where the United States Holds It For Release Downstream

Article IV is at the center of this case, rendering its precise words all the more important. It imposes on New Mexico an annual "obligation . . . to deliver water in the Rio Grande at San Marcial[.]" This delivery obligation is an indexed amount, quantifiable and determinable. The delivery is made at the San Marcial gauge and, since a 1948 resolution of the Rio Grande Compact Commission, is measured by a substitute calculation.[5]

It is important to the Texas apportionment issue to understand that Article IV does more than just specify the *amount* of water New Mexico must deliver. It also specifies *where* the delivery must be made: into Elephant Butte Reservoir. San Marcial is at the head of the reservoir. *See* Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-37 (1938) at 20. Consequently, Article IV's specification of the point of delivery means that New Mexico's delivery duty under the Compact is completed by putting the requisite amount of Rio Grande waters into the reservoir. And since Article I(k) defines "Project Storage" as the

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[4] Debate over whether the Court's clearly stated conclusions, such as the one referenced in the text, are holdings or dicta seems immaterial in the current remand phase. The Court remanded the case to the Special Master "for further proceedings consistent with *this opinion*." 138 S.Ct. at 960 (emphasis added).

[5] This new calculation is based, according to the Commission resolution, on the "recorded flow of the Rio Grande at the gaging station below Elephant Butte Dam during the calendar year plus the net gain in storage in Elephant Butte Reservoir during the same year or minus the net loss in storage in said reservoir, as the case may be." The 1948 resolution was adopted under Article V of the Compact. It changed the Article IV indexing by substituting the Article II(k) gauge just below Elephant Butte Reservoir for the Article II(j) gauge at San Marcial. This change moved the point for measuring New Mexico's delivery obligation, but it did not change the point at which the delivery is actually made. That point remains San Marcial, about 8 miles upstream from the upper end of the mouth of the Elephant Butte Reservoir.

combined capacity of Elephant Butte and "other reservoirs" available for storage of "usable water"—which Article I(l) defines to be non-credit water available for "release" in accordance with irrigation demands—this means that New Mexico's delivery is to the Rio Grande Project at Elephant Butte.[6]

Aside from deliveries to meet treaty obligations to Mexico, the Compact imposes only two delivery obligations on the compacting states with respect to the waters of the Rio Grande: (i) Colorado's state line delivery obligation into New Mexico; and (ii) New Mexico's delivery obligation into Elephant Butte Reservoir. Upon completion of the latter obligation, New Mexico's management and control of the water ends, and the delivered water at that point becomes part of *Project* storage—in a reservoir owned by the United States, operated by the Bureau of Reclamation, and paid for by the United States and, in even larger amounts, by EBID and EPCWID. It is at this point that the water becomes available for release as usable water for Project beneficiaries. EPCWID is the only Texas entity entitled to receive releases from this category; EBID the only New Mexico entity so entitled. The deliveries are made by the Bureau of Reclamation through the Rio Grande Project.[7]

C. EPCWID Sides With The United States And Texas On The Two Key Areas Of Summary Judgment Dispute

The summary judgment issues focus on the import of Article IV and what is entailed in New Mexico's obligation to deliver Rio Grande waters into Elephant Butte. As the only direct Texas beneficiary of the releases contemplated by Article IV of the Compact, EPCWID has an acute

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[6] The only other Project storage reservoir is Caballo Reservoir, about 10 miles downstream from the gauge that measures releases from Elephant Butte Reservoir.

[7] *See generally Bean v. United States*, 163 F.Supp. 838, 843 (Ct.Cl. 1958) (identifying EPCWID's as the only Reclamation Act contract covering Project lands in Texas), *cert. denied*, 358 U.S. 906 (1958). EPCWID's Texas certificate of adjudication of Rio Grande water rights identifies the source of such water to be Rio Grande Project water impounded and released in New Mexico by the United States, as well as waters entering Texas from New Mexico *via* the Rio Grande, including return flows. Texas Comm'n on Environmental Quality Certificate of Adjudication No. 23-5940 (March 7, 2007).

interest in resolution of these legal issues and is able to provide the Special Master what is hoped to be useful insight from that unique perspective.

To repeat, the obligations imposed by Article IV of the Compact are at the center of the summary judgment motions. Despite their many differences, the three moving parties agree on a key feature of Article IV: its apportionment relies on the Project to distribute the waters.[8] Such reliance on the Project was an obvious and practical choice. By the time of the Compact's execution in 1938, the Bureau of Reclamation had been operating the Project pursuant to congressional directive and delivering water to EBID and EPCWID pursuant to their respective contractual rights for more than twenty years.[9]

The parties' dispute is about the interplay of the Compact with the compacting states' acknowledged reliance on the Project for distributing the waters. This boils down to two areas of dispute. First, does the Compact leave New Mexico free to allow depletions in New Mexico of the waters of the Rio Grande below Elephant Butte that divert Rio Grande Project deliveries to Texas (which is to say, to EPCWID)? Second, does the Compact establish a quantifiable amount, or determinable proportion, of Rio Grande Project waters that must be delivered to Texas through EPCWID? These two disputed areas are addressed in turn in Parts II and III, below. EPCWID supports the result urged in the motions by Texas and the United States on both matters, and opposes New Mexico's position on them.[10]

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[8] *See, e.g.*, U.S. Mem. in Support of Motion for Partial Summary Judgment 1 (Compact incorporates Project as "mechanism for effectuating Compact apportionment"); Tex. Mem. of Points and Authorities in Support of Partial Summary Judgment 23; N.M. Motion for Partial Summary Judgment on Compact Apportionment 29.

[9] U.S. Resp. to NM Statements of Undisputed Material Facts 17 (#54).

[10] Because they are not directly pertinent to the District's concerns, this brief does not directly address New Mexico's summary judgment motions on the Rio Grande Compact Commission notice matter and whether certain years are off limits for determining Texas's damages.

The end-point of New Mexico's Compact delivery is unaffected by whether there is an Article IV compact apportionment to Project-authorized irrigable acreage (Project lands) in southern New Mexico. Its Compact delivery is complete upon deposit into Elephant Butte Reservoir, and its authority to control Rio Grande waters ends at that point. By the Compact's terms, the states agreed that the Article IV apportionment—whether just to Texas or to both Texas and New Mexico in southern New Mexico—is placed into the care of the United States (as owner of the storage reservoirs, the diversion dams on the Rio Grande, and conveyance channels within the Rio Grande) and its agency, the Bureau of Reclamation (as operator of the Project). New Mexico relinquished its authority to interfere with deliveries from the point of delivery forward. *See* Part II, below. It has no contractual rights in the Project, coupled, however, with a contractual obligation under the Compact not to impede Project operations. It has no contractual rights or obligations under the contracts governing Project operations.

Further—and still regardless of whether there is an Article IV compact apportionment to Project lands in southern New Mexico—Article IV does not establish a quantifiable annual measure, by quantity or proportion, of the amount of water to be delivered downstream from Project storage in Elephant Butte Reservoir. The delivered amounts are a function of Project operations and accounting under federal reclamation law, and beyond turning the matter over to such reclamation law-controlled operations and accounting, the Compact contains no numerical specifications. *See* Part III, below.

II. ARTICLE IV OF THE COMPACT PROHIBITS NEW MEXICO FROM INTERFERING WITH PROJECT DELIVERIES

A. New Mexico Relinquishes Possession and Control Of Rio Grande Waters Upon Its Article IV Delivery Into Elephant Butte Reservoir

Article IV of the Compact imposes only one affirmative duty on New Mexico. It must deliver a quantifiable amount of water each year into Elephant Butte Reservoir. *See* 138 S.Ct. at 959

("Compact obliges New Mexico to deliver a specified amount of water to the [reservoir] facility"). Once the water is in the reservoir, it becomes "Project storage" and falls under the control of the United States, which owns and operates it through the Bureau of Reclamation. This delivery completes New Mexico's affirmative Article IV obligation and marks the end of New Mexico's right to possess the water. Basic contract law reinforces this conclusion about the terminus of New Mexico's right of possession of Rio Grande water:

> A written promise is delivered unconditionally when the promisor puts it out of his possession and manifests an intention that it is to take effect at once according to its terms.

Restatement (Second) of Contracts § 102.[11]

By the Compact's design, New Mexico has no further control over the water from that point forward. Instead, as New Mexico already has conceded, the Compact is deliberately structured so that, from the moment of storage in Elephant Butte Reservoir, the United States is responsible for delivery of Rio Grande water, operating under contracts—the "downstream contracts"—to fulfill the Compact's purpose. 138 S.Ct. at 959. In short, Article IV is New Mexico's agreement that the Rio Grande Project takes over control and distribution of Rio Grande waters starting at their deposit into Elephant Butte Reservoir. The reservoir is owned by the United States, and has been congressionally designated as part of the Rio Grande Project since 1905. *See* Pub. Law No. 58-108 ch. 798, 33 Stat. 814. EBID and EPCWID paid for most of the costs of reservoir land acquisition and construction of Elephant Butte Dam and related infrastructure, with the United States covering the balance. In addition, ever since 1906, EBID and EPCWID, but not New Mexico and Texas, pay for a portion of the operation and maintenance costs of Project facilities.

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[11] The Supreme Court often relies on the Restatement as an aid to construction of interstate compacts, as long as it does not conflict with a compact's plain words. *See, e.g., Texas v. New Mexico, supra*, 482 U.S. at 129 (citing Restatement (Second) of Contracts as authority for interpretation of Pecos River Compact); *Tarrant Regional*, *supra*, 569 U.S. at 628 (using Restatement (Second) of Contracts to interpret Red River Compact).

New Mexico is unable to identify any Compact provision giving it any role in reservoir operation or distribution downstream of Elephant Butte Reservoir. Rather, New Mexico simply delivers the contractually agreed-upon package (a given amount of water) to the agreed recipient (the United States), which is designated by agreement to then use its own vehicle (the Project) to deliver the contents of the package (water) to the agreed beneficiaries with legal entitlement to the goods (EBID and EPCWID) in proper proportions. The Compact does not authorize New Mexico to ride along as a back-seat driver while the deliveries are being made, nor to loot goods from the vehicle *en route* to their delivery point.

B. The Compact And Federal Reclamation Law Do Not Leave New Mexico Free To Allow Indirect Diversions Of Rio Grande Waters Under New Mexico Law

The Rio Grande deliveries to Texas and New Mexico downstream of Elephant Butte Reservoir, then, are handled through Project operations, governed by federal reclamation law, and circumscribed by the contractual rights of EBID and EPCWID. There is no legal authorization for New Mexico to participate in or direct those deliveries. That is the bailiwick of the United States, EBID, and EPCWID working in concert, not New Mexico.

But a question still lingers. May New Mexico interfere with those deliveries below Elephant Butte Reservoir by other means? The Compact has no provision authorizing interference, and New Mexico is not part of the Project, so neither the Compact nor federal reclamation law affirmatively allows New Mexico to interfere with Project deliveries. And, as further explained below, New Mexico's own state constitution places the Project off-limits to New Mexico by expressly relinquishing "all rights and powers" concerning the Project.

The only place New Mexico suggests looking for a right to interfere with Project deliveries is New Mexico state law. Its argument—that it can take indirectly what it has agreed it cannot take directly—is audacious, if not downright outlandish. It is that, while they may not contain

affirmative authorization, neither the Compact nor federal reclamation law governing the Project actually *prohibits* New Mexico from using its own laws to allow interference or refusing to use its own laws to stop such interference. It is from this angle that New Mexico asserts that it retains the right to allow diversions of Rio Grande water through massive groundwater pumping in southern New Mexico that directly depletes the river flow by underground draws on it and reduces or eliminates return flows and seepage back to the river as it runs its course from Elephant Butte Reservoir to the first Texas diversion point at the American Dam in El Paso. Bluntly stated, New Mexico's argument is that it remains legally unimpeded as a state from allowing its residents to divert water from the Project and reduce what would otherwise be the level of Rio Grande flows into EPCWID—as long as these diversions are indirect. Stated another way, New Mexico is arguing that its residents are free to pump as much groundwater as *New Mexico* law allows, regardless of the degree of the pumping's adverse impact on Rio Grande flows and return flows and seepage back into the Project conveyance system for irrigation and drainage.[12]

This is not a mere theoretical point of debate, of course. It is about real water. While reasonably precise quantification of the actual amounts of these kinds of diversions may be a subject of continuing factual dispute, it is undisputed that: such diversions are happening; they have been for many years with New Mexico's acquiescence and even blessing; and New Mexico does essentially nothing to offset these diversions to eliminate net depletions. As the United States recounts, relying on only *New Mexico* sources:

- Groundwater pumping in southern New Mexico interferes with Project deliveries by depleting surface flows in the river, canals, and drains, forcing compensatory Project releases from Elephant Butte;
- When surface supply is low, pumping in southern New Mexico reduces Project deliveries to Texas (that is, to EPCWID);

[12] In addition to being substantively wrong, there is a disabling circularity in New Mexico's argument. The Compact is not only federal law; it also is New Mexico statutory law. *See* NMSA 1978, § 72-15-23 (enacting Rio Grande Compact). The Compact not only overrides conflicting state law; it *is* state law.

- Groundwater pumping in southern New Mexico reduced Project diversions by more than 60,000 acre-feet a year on average between 1951 and 2017;
- In the 2003-2005 period, groundwater pumping in southern New Mexico depleted surface supply for Project delivery to EBID and EPCWID by more than 200,000 acre-feet, whereas without the pumping the Districts would have received their full Project allocation; and
- New Mexico does not exert anything more than inconsequential regulatory authority to curtail groundwater pumping in southern New Mexico.

U.S. Mem. in Support of Motion for Partial Summary Judgment 4, 13-14 (## 6, 7, 65-66, & 68).[13]

1. A Digression On Whether Article IV Of The Compact Includes Southern New Mexico In Its Downstream Apportionment

New Mexico's assertion that it remains free to allow diversion of Rio Grande flows and Project water by groundwater pumping or other indirect devices is wrong. The reasons are detailed in Part II.B.2 below. But before turning to that discussion, it is necessary to address the two different approaches to New Mexico's audacious position. The approaches traverse slightly different analytical paths but arrive at the same result.

This discussion addresses the question whether Article IV's apportionment, besides making an apportionment to Texas, also includes an apportionment to southern New Mexico. The United States says it does. Texas says it does not.[14]

To get at the issue of what the Compact apportions downstream, and who receives the water to meet the apportionment, first recall how the Article IV apportionment is determined. No state is specifically identified in the Article IV apportionment. Instead, the states agreed that the apportioned water is what New Mexico delivers into Elephant Butte Reservoir, thus relinquishing

[13] Groundwater pumping for non-irrigation uses in southern New Mexico is also significant, doubling since 1980. *See* U.S. Mem. in Support of Motion for Partial Summary Judgment 12 (#58).

[14] *Compare* U.S. Mem. in Support of Motion for Partial Summary Judgment 21 & 23 n.98, *and* U.S. Mem. in Resp. to NM MSJ 10 n.6 *with* Tex. Mem. of Points and Authorities in Support of Partial Summary Judgment 68-73, and Tex. Resp. to U.S. MPSJ 3.

control over it. By the Compact's plain terms, the water delivered into the reservoir passes from New Mexico and is dedicated to the Project. From there, it is conveyed downstream by the United States as part of the Project to the legally entitled Project beneficiaries, EPCWID and EBID.

There is no doubt that Texas receives its Compact apportionment this way. After all, the Compact apportions *all* Rio Grande water among the three states, and the only locus for Texas's share is Article IV's requirement of delivery of Rio Grande water to the Project at Elephant Butte Reservoir. That is the Supreme Court's conclusion:

> [I]nstead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line, *the Compact directed New Mexico to deliver water to the Reservoir*. . . . In isolation, this might have seemed a curious choice, for a promise to deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas. But the choice 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*.

138 S.Ct. at 957 (emphasis added).[15] The debate between the United States and Texas—and with New Mexico, though for different reasons—really is over whether this same logic supports a conclusion that New Mexico receives a southern New apportionment in the same way.

The United States' position that, under Article IV, New Mexico receives a Compact apportionment to southern New Mexico is undoubtedly logical and finds support in the Compact. Just as Article IV does not specifically name Texas as the state receiving the apportionment through New Mexico's delivery to the Project at Elephant Butte, it likewise does not specifically name New Mexico—specifically, its southern part—either. So at this analytical juncture, the two states are in the same situation, neither specifically named as an apportionee. On the surface anyway, this equivalency suggests that they are treated the same insofar as receiving a downstream apportionment is concerned. And each state has only one entity—a political subdivision—serving

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[15] The last sentence of the quoted Supreme Court text uses a reference in the plural ("districts"), but since the early 1920s, there has been only one such district, EPCWID.

as the legal beneficiary of Project deliveries, EBID in New Mexico and EPCWID in Texas. U.S. Resp. to NM Statements of Undisputed Material Facts 16 (## 50-51).

The Supreme Court has stated that this part of the Compact makes an equitable apportionment "to Texas *and part of New Mexico*." 138 S.Ct. at 959 (emphasis added).[16] This seems consistent with the principle that the Compact integrates the Project as the mechanism for delivering the Article IV apportionment. Article IV-apportioned water is delivered from Elephant Butte Reservoir to its downstream destinations by the Project, in New Mexico to EBID and in Texas to EPCWID.

Texas's position about the southern New Mexico apportionment issue should be understood from a critical fact easily overlooked when the legal focus is on Article IV's downstream apportionment. The Compact expressly gives New Mexico an apportionment—a comparatively large amount of water compared to any downstream volumes—upstream of Elephant Butte Reservoir. It is not a bit unreasonable to draw the inference that New Mexico's share of the Compact's Rio Grande apportionment is what the Compact explicitly provides for, not supplemented by an additional, unstated apportionment for a different part of the state.

But, in EPCWID's view, the strongest support for Texas's position that the Article IV apportionment downstream from Elephant Butte Reservoir is made only to Texas comes from New Mexico itself. In 1952, Texas took an earlier dispute with New Mexico over the Rio Grande Compact to the Supreme Court in an original action, *Texas v. New Mexico*, No. 9, Orig. The dispute dealt with what the Compact had to say about storage in post-1929 New Mexico reservoirs above San Marcial. There, contradicting the position it now espouses, New Mexico told the Supreme Court that the Compact "does *not* attempt to make any apportionment between the New Mexico

[16] This statement was made in the course of deciding whether the United States should be allowed to intervene. Texas views this statement as dictum to which the Special Master is not bound, correctly pointing out that it was quoting from briefing. Tex. Mem. of Points and Authorities in Support of Partial Summary Judgment 72-73. It is not clear that its status as dictum matters in a proceeding before a Special Master serving the Supreme Court. *See* fn. 4, *supra*.

area and the Texas area below Elephant Butte." New Mexico's Return of Defendants to Rule to Show Cause at 3 (emphasis added).[17] Even in this case, New Mexico argued early on that "the allocation of water below Elephant Butte" rested entirely on the downstream reclamation contracts to which it is not a party. NM Mot. to Dismiss at 21-22 (April 2014) (arguing that "the allocation of Project water below Elephant Butte Reservoir was accomplished entirely by the contracts between the irrigation district and the Bureau of Reclamation . . . . [and] the Court's non-exclusive original jurisdiction should not be burdened with a suit to enforce contract deliveries").[18] New Mexico ultimately prevailed in that earlier case when the Supreme Court dismissed Texas's suit for failure to join the United States as an indispensable party. *Texas v. New Mexico*, 352 U.S. 991 (1957).

New Mexico's mutually contradictory positions on the issue of whether Article IV includes an apportionment to southern New Mexico implicates the doctrine of judicial estoppel. Under the doctrine, a party in later litigation should not be able to stake out a position clearly contradictory to a position it took in previous litigation. The doctrine applies in original jurisdiction disputes between states. *See New Hampshire v. Maine*, 532 U.S. 742 (2001) (involving boundary dispute). There, the Supreme Court unanimously applied the rule of judicial estoppel to force New Hampshire to "live with" a position about the boundary's location it had taken in earlier litigation

[17] Texas also discusses the 1951 litigation in its response to New Mexico's dispositive motions. Tex. Resp. to New Mexico's MPSJ at 16-17. EPCWID has obtained several of the earlier case's pleadings and can supply them as requested. They may be judicially noticed under Federal Rule of Evidence 201. It should be noted that, in contrast to New Mexico, Texas's position appears to be consistent between the earlier case and this one. "New Mexico's obligation under the Compact is to deliver water at Elephant Butte Reservoir. . . . The rights of Texas under the Compact are entirely independent of the rights of the citizens of New Mexico below Elephant Butte." Texas Reply to Return of Defendants to Rule to Show Cause at 18-19.

[18] New Mexico's reference to "allocation of Project water below" the reservoir overlooks the fact that EBID and EPCWID have reclamation contract rights not only to water released from the reservoir but also to water in storage there.

between the two states instead of the opposite position it was taking in the case then before the Court. This principle applies here.

While rejecting any implication that, should there be a southern New Mexico apportionment to New Mexico, New Mexico gains any rights in or to the Project, EPCWID does not urge a particular resolution of this "southern New Mexico apportionment" issue on the Special Master. In fact, it is not clear that the Special Master has to choose between the positions of the United States and Texas on the question. As already indicated, the result is the same either way: New Mexico may not interfere with Rio Grande deliveries to Texas (that is, to EPCWID). Rather, as Texas puts it, New Mexico's obligation "is not a passive one but is an active obligation to prevent interference with" deliveries to EBID and EPCWID. Tex. Resp. to U.S. MPSJ 1-2. As explained more fully in Part III, what matters is that, "apportionment" or not, the Compact did not give New Mexico any rights in Project operations or the allocation of Project water supply pursuant to reclamation contracts. New Mexico's duty of non-interference with deliveries to EBID and EPCWID includes non-interference with EBID and EPCWID's pre-Compact statutory and contractual rights to Project water supply and the obligation of the United States to deliver it.

2. Neither The Compact Nor Federal Reclamation Law Allow New Mexico To Sit By And Allow Non-Project Depletions Of Project Deliveries

In addressing issues about New Mexico's authorization of unlawful diversions of Rio Grande Project water, it is important to first identify with a little more precision what the law has placed off limits to such diversions. That Project storage available for release as surface flows in the river are off limits is obvious. But there is another component that is central to operation of the Project and its fulfillment of Compact requirements delivered through Project operations. That is return flows and seepage. As the Joint Investigative Report recounts, it was clear to the compacting parties that return flows from Project irrigation was a critical component of Project water supply,

and that deliveries to Texas were dependent on them. *See, e.g.*, U.S. Mem. in Support of Motion for Partial Summary Judgment 7 (## 22-23). Before 1979, the Bureau of Reclamation determined allocations of Project supply to EBID and EPCWID based on water in Project storage plus these return flows. U.S. Resp. to NM Statements of Undisputed Material Facts 22 (# 67).

New Mexico cannot separate these return flows and seepage from Project water supply. They are an integral part of the supply. The Supreme Court made that clear nearly a century ago. In *Ide v. United States*, 263 U.S. 497 (1924), the Court held that seepage and percolation into ditches in a project after having been used for irrigation remain part of the project. *Id*. at 503. Under *Ide*, the United States is authorized to "recapture water which resulted from seepage from irrigated lands under a reclamation project," free from private appropriation under state law. *Nebraska v. Wyoming*, 325 U.S. 589, 635 (1945).[19]

a. New Mexico State Law Is Preempted By The Compact

It is well-settled compact law that the Compact preempts New Mexico law inconsistent with compact duties—and allowing state law-authorized groundwater pumping is in direct conflict with compact duties. Whether New Mexico receives its Compact apportionment solely upstream of Elephant Butte Reservoir or, in addition, also in southern New Mexico, New Mexico is a party to the Compact which apportions all of the waters of the Rio Grande. Whether New Mexico is apportioned water from one or two parts of the river is of no import to its Compact obligations. It cannot take more water than allowed under the Compact to the detriment of the downstream state, in this case, Texas.

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[19] In reaching its conclusion that return flows and seepage from irrigation are an inseparable part of a federal reclamation project, *Ide* explains that state-issued permits in this context are really nothing more than "*mere licenses* to appropriate in accordance with the law of the state, *if the water is available*." 263 U.S. at 507 (emphasis added). Relatedly, Professor Leshy, a former Solicitor for the Interior Department, has explained that the principles of *Ide* and *Nebraska v. Wyoming* extend to cover groundwater itself. J. Leshy, *The Federal Role in Managing the Nation's Groundwater*, 11 Hastings W.N.W. J. Envtl. L. & Pol'y 1, 6 n.49 (2004).

The fundamental impact of interstate compacts on state law is well summarized in a seminal opinion by Justice Frankfurter: "A State cannot be its own ultimate judge in a controversy with a sister State." *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). This, though, is what New Mexico seeks, urging the position that its state law rules on water remain inviolate, continuing to lurk behind the Compact's curtain to allow New Mexico pumpers to drain the water from the Project and the Compact of meaning.

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938), is the bellwether case for applying this principle in interstate compact disputes about apportionment of river water. The Supreme Court in *Hinderlider* addressed the impact of the La Plata River Compact between Colorado and New Mexico on the rights of a Colorado company whose rights to the La Plata had been adjudicated under Colorado water law. The Court accepted the Colorado adjudication but said it could not confer any rights in "excess of Colorado's share of the water of the stream." *Id.* at 102. This is because a compact's equitable apportionment of an interstate stream "is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the Compact." *Id.* at 106.[20] Federal law—even federal *common* law—controls over statutes and decisions of the compacting states. *Id.* at 110. The compact's preemptive power over state law is so extensive that it even allows—indeed, requires—a state engineer adjudicating state-law water rights for appropriations pre-dating a compact to apply the compact's rules to the adjudication. *Id.* at 106.

The Court recently reiterated this principle. "[A] congressionally approved compact . . . pre-empts any state law that conflicts with the Compact." *Tarrant Regional*, 569 U.S. at 627 n.8. And it added an important rule for assessing whether the law of a compacting state is preempted by a

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[20] This principle is acknowledged in New Mexico law. *See EBID v. Regents of NMSU*, 849 P.2d 372, 378 (N.M. App.), *cert. denied*, 851 P.2d 481 (N.M. 1993) (concerning private claimants to Rio Grande water above Elephant Butte).

compact provision, a rule that arises from the fact that compacts are willingly formed by the states themselves, not imposed from on high by federal legislation. Whereas there is normally a "presumption against pre-emption" of state laws by federal law, that presumption evaporates when the "State themselves have drafted and agreed to the terms of the compact." *Id.* at 631 n.10. That is because the states themselves form compacts instead of having federal laws forced upon them.

That is the situation here. Colorado has things backwards on this point. So does New Mexico, when it proclaims that "a depletion limit must be clearly stated in a compact." N.M. Resp. to US MPSJ 37. That is the opposite of the way compact law operates.

Such arguments run counter to *Tarrant Regional* because, unspoken, they depend on the presumption against preemption the Supreme Court rejected in compact construction cases. *See* Colo. Resp. to MPSJ 25-26 (arguing that a compact only preempts state law through express compact terms). That is *not* what *Tarrant Regional* says. State law is preempted if giving it effect would conflict with compact rules and operations. Even when state-granted water rights were given before a state's entry into a compact—and here any groundwater pumping rights of significance came well *after* the Compact's execution—those state-created rights must give way to the compact and the holders of those rights are bound by the compact. *Hinderlider*, 304 U.S. at 106-07. *Hinderlider* did not look for a compact term stating this principle. Instead, *Hinderlider* determined that the inevitable result of the compact was to override any conflicting state law. This is consistent with *Tarrant Regional*. A compact does not have to contain a specific provision detailing its intention to preempt inconsistent or conflicting state laws. To the extent they interfere with or frustrate the objectives and operation of the compact, state laws are preempted by the very nature of compacts and operation of the Supremacy Clause.[21] This is classic conflict preemption,

[21] The Supremacy Clause "contemplates conflict pre-emption by describing federal law as effectively repealing state law." *PLIVA, Inc. v. Mensing*, 564 U.S. 604, 621 (2011). If state law stands as an "obstacle to the accomplishment and

but in more potent form in the compact context because it is undiluted by a presumption against conflict.

The Supreme Court obviously understands the Compact Clause to operate this way. The Court has held that upstream states are in violation of interstate river compacts when their groundwater pumping depletes flows they are obligated to make under the compact—even in the absence of express compact language about groundwater flows and regulation. *See Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995). Overruling exceptions to a special master recommendation, the Court held that groundwater pumping which diminishes stream flows from an upstream state to a downstream one violates a compact, even if the compact says nothing about groundwater. *Kansas v. Colorado*, 574 U.S. 445, 450 (2015), citing 530 U.S. 1272 (2000); *see also Texas v. New Mexico,* 462 U.S. 554, 557 & n.2 (1983) (accepting without quibble that New Mexico groundwater pumping that depletes river flows would be a compact violation even though compact said nothing specific about groundwater).

There is no question that, to the extent New Mexico is using its laws to authorize and continue allowing pumping that diverts Project water and lessens Rio Grande flows into Texas, New Mexico law is an "obstacle to the accomplishment and execution" of the Compact's purposes and objectives. And there is no question that this is happening and has been happening for many years. It is thus clear that the Compact preempts New Mexico law from continuing to allow a continuation of such diversions and that the United States is correct that an injunction is appropriate at this point. The undisputed evidence establishes that depletions of Project water by New Mexico's pumping are of a "serious magnitude," *Florida v. Georgia*, 138 S.Ct. 2502, 2514 (2018), regardless of whether their full magnitude remains subject to factual dispute.

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execution of the full purpose and objectives" of a congressional enactment, it is preempted. *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

b. New Mexico State Law Is Preempted By Federal Reclamation Law

In addition to being constrained by the Compact, and irrespective of whether New Mexico has an apportionment both upstream and downstream of Elephant Butte, New Mexico state law is also preempted by the federal Reclamation Act of 1902, as amended and supplemented, and Supreme Court authority interpreting it.

In a misguided effort, New Mexico tries to use the principle in Section 8 of the Reclamation Act, codified as 43 U.S.C. § 383, as an escape hatch from the Compact. N.M. MPSJ To Exclude Claims For Damages 9 (arguing Compact does not "expressly override[]" Section 8 deference to state law).[22] This provision says that the Reclamation Act is not to be construed as interfering with state laws on the "use[] or distribution of water used in irrigation" and that the Interior Department is to administer the Act in conformity with state laws. But this is nothing more than a general default principle, and it is displaced in this situation.

The Supreme Court has held that, under post-1902 Reclamation Act amendments, federal reclamation projects are not rigidly bound by Section 8's proviso. "[S]pecific congressional directives . . . contrary to state law [and] regulating distribution of [project] water . . . override state law." *California v. United States*, 438 U.S. 645, 672 n. 25 (1978).[23] As the Court later explained, this decision held "simply that § 8 requires the Secretary of the Interior to comply with state laws, *not inconsistent with congressional directives*, governing use of water employed in federal reclamation projects." *California v. FERC*, 495 U.S. 490, 504 (1990) (emphasis added).

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[22] This repeats New Mexico's mistaken understanding of the way compacts preempt conflicting state law. The Compact does not have to expressly override such laws. If the state laws stand as an obstacle to achieving the objectives of the Compact—as New Mexico's surely do here—then the state laws must give way.

[23] Two earlier Supreme Court decisions—*City of Fresno v. California*, 372 U.S. 627 (1963), and *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958)—had construed the original 1902 Act "as evidencing Congress' intent that specific congressional directives which were contrary to state law regulating distribution of water would override that law." *California v. U.S.*, 438 U.S. at 372 n.25 (1978). The 1978 Supreme Court decision said that, even though the precise issue was not in the case then before it, the Court considered those previous interpretations correct, too. *Id*.

In the same vein, and only the year before the *California v. United States* decision, an appeals court decision had said that "project water" is not for the taking by landowners under state law but instead "for the giving by the United States." *Israel v. Morton*, 549 F.2d 128, 132 (9th Cir. 1977). Federal reclamation law, not state law, governs control and distribution of reclamation project water. *Strawberry Water Users Ass'n v. United States*, 576 F.3d 1133, 1148 (10th Cir. 2009). And here, the state law imprimatur that New Mexico confers on groundwater pumping thwarts Project operations and deliveries, contrary to the directions of Congress and contractual undertakings implementing those directions.

Even more tellingly, New Mexico's effort to squirm out of Compact obligations and evade federal reclamation law directives is blocked by the conditions it accepted for being admitted to the Union and by its own constitution. The seventh clause of Section 2 of the Arizona-New Mexico Enabling Act, ch. 310, 36 Stat. 557 (June 20, 1910), which admitted New Mexico to statehood, establishes an "irrevocable" rule (absent consent of the United States itself and the people of New Mexico) that New Mexico "acquiesce[s]" to the reservation to the United States of "all rights and powers" for carrying out the Reclamation Act (as it might be subsequently amended and supplemented).[24] This clause of the federal statute is also incorporated *verbatim* into New Mexico's own fundamental law, N.M. Const. Art. XXI § 7, where "with full acquiescence of the people of [New Mexico]," New Mexico agreed that it reserved to the United States "all rights and powers" under the Reclamation Act of 1902, as amended.

The effect of this express reservation from the powers that New Mexico may exercise with respect to reclamation projects—which here would include the Project itself, which predates New Mexico's statehood, not to mention the Compact—is that from the beginning New Mexico relinquished state law authority over Project water in obeisance to, in this instance, the United

[24] *United States v. Sandoval*, 231 U.S. 28 (1913), upheld the 1910 enabling act's constitutionality.

States in carrying out its duties under federal reclamation law. The relinquished state law authority has never been restored. And there is no end-run around this problem by invoking Section 8 of the Reclamation Act.

C. Basic Contract Law Principles Reinforce The Conclusion That The Compact Bars New Mexico From Interfering With Deliveries to EPCWID

Principles of contract law guide the Supreme Court's construction of the meaning of compacts. *See, e.g.*, fn. 11. Here, contract law principles reinforce the analysis in Part II.B.2 that under the Compact New Mexico is barred from interfering with Rio Grande Project deliveries to EPCWID.

Under the Restatement (Second) of Contracts § 205, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." And "subterfuges and evasions," whether overt or through inaction, violate the duty of good faith. *Id.* comm. d. "Interference" with performance is an example of bad faith that constitutes a breach of contractual duty. *Id.* Contracts incorporate "an implied promise not to prevent or hinder" performance of the contract. CORBIN ON CONTRACTS § 53.5 (1993).[25] Another leading commentary on contract law explains:

> Prevention of performance is a material breach of contract[] . . . The breach generally consists of the violation of the implied promise of cooperation present in all contracts[.]

13 WILLISTON ON CONTRACTS § 39:12 (4th ed.).[26]

Applying these background principles of contract law to the situation in this case highlights the basic flaw in New Mexico's argument that, notwithstanding its entry into the Compact, it nonetheless remains free to interfere with Project deliveries if acting under color of New Mexico

[25] Restatement (First) of Contracts § 315, which was absorbed into the Second Restatement's Section 205, includes the equivalent rule and explains in its comment b that "[i]t is immaterial whether the wrongdoer prevents some performance by the other party or by a third person in the performance is an express or constructive condition."

[26] The Supreme Court's 2018 analysis in this case used this treatise. *See* 138 S.Ct. at 959.

law. New Mexico's contract (that is, the Compact) with Texas is that New Mexico is to deliver Rio Grande water to the United States, which then holds it in Elephant Butte Reservoir as Project storage for delivery downstream to EPCWID as part of the Rio Grande Project. Under contract law, New Mexico commits a material breach of the Compact if it prevents or hinders performance of the agreement through either overt action or inaction. That is precisely what New Mexico is doing, and claiming the right to continue doing, by allowing groundwater pumping in southern New Mexico to continue depleting Project water. The Compact is its promise to Texas *not* to do that, and the Compact should be enforced to hold New Mexico to its promise.

III. WHAT THE COMPACT DOES *NOT* GIVE NEW MEXICO: A QUANTIFIABLE APPORTIONMENT, NOTHING FOR NON-EBID USERS AND USES, AND NO RIGHTS TO OR IN PROJECT OPERATIONS

A. The Compact Provides New Mexico No Quantified Apportionment Downstream Of Elephant Butte Reservoir

The language and structure of the Compact are a stark refutation of New Mexico's argument that Article IV quantifies the apportionments downstream of Elephant Butte Reservoir. One searches in vain to find a quantification of these downstream apportionments in Article IV itself (or, for that matter, anywhere else in the Compact). This is in distinct contrast to Compact apportionments upstream of San Marcial. Colorado's apportionment is quantifiable. So is New Mexico's between the Colorado-New Mexico state line and San Marcial. The compacting states were thus well aware of the fact that apportionments can be quantified, and they quantified the ones they wanted to quantify. On its face, the Compact shows that they chose not to quantify the Article IV downstream apportionments.

The Compact cannot be rewritten to reverse this choice. *Texas v. New Mexico, supra,* 462 U.S. at 565 (Court "not free to rewrite" compact). Rather, the judicial task is to decide "such disputes as are amenable to judicial resolution." *Id*. Forcing through judicial fiat the quantification of the

downstream apportionments into Article IV would run counter to fundamental tenets of compact law. So, New Mexico is not entitled to a ruling that the Compact quantifies the downstream apportionment. To the contrary, the only ruling consistent with the terms of the Compact, and the principles of compact law, is that downstream apportionments are not quantified in Article IV or anywhere else in the Compact. That is a pure question of law, and the Special Master should make that determination.

New Mexico, though, resorts to another ploy to try to tie down a quantification. It argues that the Compact "apportion[s] the waters below Elephant Butte 57% to New Mexico and 43% to Texas." N.M. MPSJ 3 (¶6). It is not entirely clear what New Mexico means in this sentence by the word "waters," but in context it appears (as far as New Mexico is concerned) to refer to "Rio Grande Project water supply below Elephant Butte Reservoir." *Id*. 2. While New Mexico purports to provide a definition of this term through one of its non-lawyer experts, Dr. Barroll,[27] the term appears nowhere in the Compact itself.

This is a disabling failure. The Compact does not use either phrase anywhere. New Mexico's claimed apportionment is a phantom, based on a percentage division found nowhere in the Compact of a category of water likewise found nowhere in the Compact.

So the Compact is not the source for the putative apportionment of "Project supply," much less for the respective percentages New Mexico assigns to itself and Texas (by way of EBID and EPCWID). There simply is no quantifiable Article IV apportionment downstream, whether stated in terms of "waters of the Rio Grande," "Project water supply," or "Project supply."

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[27] Dr. Barroll defines "Project Supply" as "the annual release of Usable Water from Project Storage, as defined in the Compact, along with return flows and tributary inflows below Elephant Butte, which the Project recaptures and delivers downstream water users." Decl. of Barroll at 4.

B. New Mexico Cannot Claim Reclamation Contract Rights Belonging To EPCWID And EBID In Support Of Its Claim Of A Quantified Apportionment Or Otherwise Insinuate Itself Into Project Operations

As an expedient workaround to avoid the fundamental flaw in its argument about quantifiable downstream apportionments, New Mexico points to the relation between the Project and the Compact. And there is a relation, just not in the way New Mexico characterizes it. As the Supreme Court has said, the United States, working pursuant to the downstream contracts, *delivers* the downstream "equitable apportionment" through the Project. 138 S.Ct. at 959. In this way, the Compact may be seen as "implicitly incorporating" the downstream contracts. *Id*. But Reclamation's conveyance of an apportionment pursuant to its reclamation law obligations, after New Mexico completes its Article IV delivery obligation to the Project at Elephant Butte Reservoir, is a far cry from providing New Mexico any Compact right *in* the reclamation contracts or any other aspect of the Project. Rather, what New Mexico got downstream of San Marcial is rights belonging to the Project beneficiary in New Mexico, EBID, and the concomitant obligation not to interfere with deliveries through the Project to EBID and EPCWID.

The so-called downstream contracts are creatures of reclamation law, not the Compact, and they are with the only two entities, EBID and EPCWID, entitled to the water supply defined and allocated in those contracts. The contracts are not with New Mexico (or Texas either). New Mexico is not part of the Project, and it is not a party to the contracts. The only water deliverable downstream of Elephant Butte Reservoir in New Mexico is to a single entity, EBID, and it is only for irrigation uses that are part of the New Mexico district. None of it is available to non-EBID uses or users.

This means, then, that any apportionment to New Mexico in southern New Mexico is quite specific in terms of *who* is to receive any apportionment and quite unspecific in terms of *how much* is to be delivered or *how*. In southern New Mexico, only EBID gets the water, and the amount is

determined annually as part of Project operations. New Mexico as a state benefits, but the right to a specific allocation of Project water supply is EBID's, not New Mexico's. The allocation determination is the domain of Reclamation and the Districts, not New Mexico's or even Texas's. The Compact plainly left the specific allocation of Project water supply to reclamation law and the only entities legally entitled to the water supply under that law—the two Districts. New Mexico gets this completely backwards, stating that "EPCWID and EBID have Project allocations derived solely from those Compact apportionments." NM Resp. to U.S. MPSJ at 16. Not so. EPCWID and EBID had and have Project allocations (which each has now fully paid for) independent of the Compact. This holds true for the operation of the Project as well. The Compact turns the water over to the Project, and the operation of the Project over to the Districts and Reclamation—the existing state of affairs at the Compact's formation. The Compact gave neither Texas nor New Mexico operational rights in or to the Project, or rights in or to the contracts governing such operations.[28]

New Mexico has no role to play there, and that is not because it has been squeezed out by bureaucratic contrivance or the connivance of the Project members. It is because New Mexico specifically agreed to this arrangement when it entered into the Compact. *It* agreed to deliver the water destined for deliveries downstream of Elephant Butte Reservoir into Project storage, and *it* agreed to let the United States take over distribution at that point through Project operations for Project participants. The Project, the operation of the Project, and the Districts' respective rights to Project supply pre-existed any Compact entitlements, and the Compact did not usurp or replace them.

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[28] For these same reasons, any New Mexico challenge to the 2008 Operating Agreement in this case as a violation of the Compact must fail as a matter of law. *See also* Tex. MPSJ at 74-76 (New Mexico challenges to reclamation contracts to which it is not a party have no place in this case).

C. New Mexico Bargained For And Accepted The Pre-Existing Project And Cannot Interfere With The Rights Of EBID And EPCWID To Water From The Project

What this all boils down to is that the Article IV downstream apportionment is to the Project in unquantified amounts in Elephant Butte Reservoir. There, under subsections (k) and (l) of Article I of the Compact, the Compact-apportioned water is classified—with New Mexico's acquiescence as a signatory—as "Project water," and is held there as "usable water" for release downstream based on irrigation demands by the two Districts. Whatever water is apportioned to New Mexico in southern New Mexico is apportioned solely for EBID and Project uses. New Mexico gets none of it outside these confines. Even then, the duty it accepted as part of the guarantee to the state by way of EBID is to not interfere with deliveries to EBID. The divisions of water quantities are based on Project demands and operations as determined among the Districts and Reclamation, not on a fixed numerical split. New Mexico cannot tell EBID how, when, or whether to take or manage EBID's Project allocation, just as Texas cannot tell EPCWID how, when, or whether to take or manage EPCWID's allocation. The Compact left the rights of the Districts intact under reclamation law and left operation of the Project to the United States and the Districts. Indeed, this is done by the Compact's very words and structure. And it was the reason the states at long last were able to reach an accord about the Rio Grande.

This provides the answer to the question that the Special Master has puzzled over, when asking "how do we get to that issue" (referring to what the apportionment of water is), and "how do we even decide how much water is apportioned to Texas, how much water is apportioned to New Mexico, if any." Transcript of Hearing of May 29, 2020 at 56. The apportionment to Texas, and to New Mexico if there is any downstream, is the amount of water delivered into Elephant Butte Reservoir by New Mexico, then available for distribution through the Project to EBID and EPCWID. The answer to the Special Master's question is not a number or a percentage. It is that

the Project gets the water and decides the downstream distribution based on irrigation needs, and the respective contractual rights and obligations of the Districts and Reclamation under federal reclamation law. And as a necessary corollary, any apportionment downstream of Elephant Butte is legally off-limits to New Mexico.

In contrast to the numerically-derivable amounts of water apportioned to Colorado and New Mexico upstream of San Marcial, the agreement in the Compact's Article IV downstream apportionment is that there will *not* be an amount derivable from Compact terms and specifications. Instead, the agreement was that this apportionment was programmatic instead of numerical, Project-based instead of state-controlled. New Mexico cannot have the Compact rewritten to do otherwise.

CONCLUSION

The Compact did not, as New Mexico would have it, leave the backdoor open for New Mexico to use state law to take for its own uses as much of the water as it can of the water it agreed that Texas was entitled to receive. Allowing that to happen would turn the pact into an empty vessel as far as Texas is concerned. No downstream state would ever agree to an interstate river compact with a condition (implicit or explicit) that the upstream state remains legally free to divert as much of the promised water as it can get away with diverting, as long as the diversions are indirect and consistent with the upstream state's laws.

Longstanding principles of compact law reject such an effort. So does commonsense. And so do the terms of the Rio Grande Compact. The Special Master should grant summary judgment as prayed for by the United States and stop New Mexico's actions to evade he agreement it made in 1938.

The Special Master also should deny New Mexico's request for a summary judgment that its Article IV split of Rio Grande water is determined in strict proportions by contracts outside the

Compact under a set of laws separate from the Compact, even though the Compact is silent about any such proportionate apportionment. New Mexico acceded to Article IV's unquantified downstream apportionment which was put into effect and operation by the Rio Grande Project. If it had a sovereign right to refuse to enter into such an arrangement in 1938, that was the time to assert it. The state certainly does not have such a right now. Its effort to back out of the arrangement should be rejected.

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Respectfully Submitted,

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No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S CERTIFICATE OF SERVICE

This is to certify that on the 6th of January, 2021, I caused true and correct copies of **EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S AMICUS BRIEF IN RESPONSE TO SUMMARY JUDGMENT MOTIONS ON APPORTIONMENT ISSUES** to be served by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 6th day of January, 2021.

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