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 REPLY

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I. Summary of Argument.

The Special Master should construe the Rio Grande Compact ("Compact"), 53 Stat. 785 (1939), narrowly and according to its unambiguous and express terms. Because the Compact does not apportion water between Texas and New Mexico below the San Marcial gage, the Special Master should refuse to read in such an apportionment. Likewise, the Special Master should refuse to read in a conflict between the Compact and state laws governing administration of water below the San Marcial gage.

Amicus El Paso County Water Improvement District No. 1 ("El Paso District") makes two arguments to which Colorado replies. First, Colorado replies to the El Paso District's argument that a compact does not need to state expressly that it preempts state law. As Colorado explained in its Response brief, compacts must be construed narrowly and according to their express terms. And there is no conflict according to the express terms of the Compact. Second, Colorado replies to the El Paso District's argument that silence in a compact preempts conflicting

state law. That argument misconstrues existing Supreme Court precedent and should be rejected. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013) (holding silence in the Red River Compact could not be used to establish a compact term that preempted Oklahoma law) and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (holding the La Plata River Compact's terms established the amount of water available to a state and the means to apportion it).

II. Argument.

A. A compact must be interpreted consistent with its express terms.

The El Paso District misrepresents the preemption argument in two respects. First, it mischaracterizes Colorado's position when it states, "A compact does not have to contain a specific provision detailing its intention to preempt inconsistent or conflicting state laws." El Paso

District brief at 18. Second, it incorrectly assumes that the Compact controls the distribution of water below the San Marcial gage.[1]

In its brief, Colorado restated the five established principles of compact interpretation. Those are: (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. See, Colorado Response Brief at 10. All of them confirm that the express terms of a compact are the "best indication of the intent of the parties." *Tarrant Regional Water Dist.,* 569 U.S. at 628. Colorado did not argue that a compact must expressly state its intent to preempt conflicting state laws. Rather, it explained that states do not silently surrender administrative authority over their natural resources. *Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency*, 440 U.S. 391, 401 (1979); *Tarrant Regional Water Dist.,* 569 U.S. at 633. Thus, the

[1] 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.

principles of compact interpretation inform the terms of a compact, and then, only after they are determined, whether a conflict exists with state law.

The El Paso District is correct that the terms of a compact control over conflicting state laws.[2] In determining whether such a conflict exists, however, the court must rely on the principles of compact interpretation to determine the rights or obligations conferred on each state. The El Paso District errs because it presumes silence in the Rio Grande Compact establishes allocations within the lower reach, below the San Marcial gage.

As Colorado explained in its brief, the express terms of the Compact show that the Compact apportions water through measurements at inflow and outflow gages. Colorado Response Brief at 32-37. The location of these gages establishes three areas on the Rio Grande that Colorado terms the upper, middle, and lower reaches. Colorado Response Brief at 32. There are no terms in the Compact

[2] The Rio Grande Compact is also a New Mexico state law.

addressing the division of water between New Mexico and Texas in the lower reach, below the San Marcial gage.

The El Paso District admits that the Compact does not contain terms making specific apportionments between New Mexico and Texas below the San Marcial gage: "No state is specifically identified in the Article IV apportionment." El Paso District Brief at 11; "[T]he 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." *Id.* at 24;

> Article IV does not establish a quantifiable annual measure, by quantity or proportion, of the amount of water to be delivered downstream from [Rio Grande] 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.

Id. at 7. The El Paso District's own position demonstrates that the Rio Grande Project, not the Compact, is the source of any terms that may conflict with New Mexico laws.

If New Mexico law permits greater diversions than otherwise allowed under the Rio Grande Project, then that is conflict to be

resolved between state law and Reclamation law—not the Compact. And if the El Paso District is arguing that Reclamation law should be incorporated into the Compact such that it confers upon the United States the sole discretion to make continually variable Compact apportionments, that argument is contrary to the first principle of compact interpretation. The El Paso District does not cite any express term in the Compact that incorporates Reclamation law or delegates to the United States the authority to make apportionments to the states under the Compact. Because the El Paso District failed to show that the Compact divides the water between New Mexico and Texas below the San Marcial gage, its discussion about preemption has no basis in an actual Compact obligation.

B. The El Paso District misapplies *Tarrant* and *Hinderlider* when it argues that they support preemption of state law through silence.

The El Paso District argues that silence in the Compact about New Mexico's administration of water below the San Marcial gage creates a compact term that preempts New Mexico laws. El Paso District Brief at 9. This is contrary to the principles of compact

interpretation. *Tarrant* and *Hinderlider* do not support the argument that silence in a compact creates terms that preempt state laws.

Tarrant does not support an argument that the absence of terms in the Rio Grande Compact about division of water between New Mexico and Texas preempts other state laws. In fact, it stands for the opposite. *Tarrant* held that silence in the Red River Compact could not be used to establish a compact term that preempted Oklahoma water laws. *Tarrant Regional Water Dist.*, 569 U.S. at 638–39. Plaintiff Tarrant, a Texas water district, challenged an Oklahoma statute restricting export of water. The Supreme Court summarized the issue:

> If § 5.05(b)(1)'s silence means that state borders are irrelevant to the allocation of water in subbasin 5 of Reach II, then the Oklahoma water laws at issue conflict with the cross-border rights created by federal law in the form of the Compact and must be pre-empted. But if § 5.05(b)(1)'s silence instead reflects a background understanding on the part of the Compact's drafters that state borders were to be respected within the Compact's allocation, then the Oklahoma statutes do not conflict with the Compact's allocation of water.

Id. at 627–28. It then stated, "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Id.* at 632.

> Given these principles, when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that "[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens."

Id., quoting *Virginia v. Maryland,* 540 U.S. 56, 67 (2003). Therefore, that compact did nothing to preempt Oklahoma's laws governing water administration. *Id.* at 638–39. Similarly, silence in the Rio Grande Compact about the division of waters between New Mexico and Texas below the San Marcial gage does not create a term that preempts state laws on water administration.

Hinderlider likewise does not allow implied preemption from a compact's silence. Instead, it reinforced two rules: first, a state's compact apportionment defines what is available to that state's citizens and second, states have the power to negotiate terms in a compact that govern administration of water as between them. *Hinderlider*, 304 U.S. at 106. The La Plata River Compact expressly provided that the State Engineers of New Mexico and Colorado could rotate the entire supply of the river between the two states in times of shortage. *Id*. at 108. This allowed for more efficient delivery and useful application of the water

than would dividing insufficient flows. In accord with this provision, the Colorado State Engineer curtailed Colorado diversions when the entire flow was made available to New Mexico. The plaintiff ditch company challenged the constitutionality of the compact, arguing that the compact could not interfere with its adjudicated water right. The Supreme Court rejected this challenge, stating,

> As the States had power to bind by compact their respective appropriators by division of the flow of the stream, they had power to reach that end either by providing for a continuous equal division of the water from time to time in the stream, or by providing for alternate periods of flow to the one State and to the other of all the water in the stream.

Id. Thus, the case does not examine preemption of conflicting state laws. In fact, the Court found there was no conflict because the state adjudication only conferred what was part of the state's equitable apportionment. *Id*. at 106. Instead, the case is about how states have the power to use a compact's express terms to define their equitable apportionment. *Hinderlider's* discussion of the ability of states to determine their apportionments and how to administer them through a compact does not support preemption where no compact terms exist.

III. Conclusion.

The Special Master should construe the Compact narrowly and according to its unambiguous and express terms. Because the Compact does not apportion water between Texas and New Mexico below the San Marcial gage, the Special Master should refuse to read in such an apportionment and, therefore, need not resolve the conflicts created by the El Paso District's incorrect interpretation.

Respectfully submitted this 5th day of February 2021,

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This is to certify that on the 8th day of February 2021, I caused a true and correct copy of the **State of Colorado's Reply** to be served upon Special Master Michael Melloy, Clerk of the 8th Circuit Michael Gans, Judge Oliver W. Wanger and upon all counsel of record and counsel for interested parties by email as indicated above.

Respectfully submitted this 5th day of February 2021,

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