No. 141, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Plaintiff,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

vs.

STATES OF NEW MEXICO AND COLORADO,
Defendants.

OFFICE OF THE SPECIAL MASTER

BRIEF OF *AMICUS* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN OPPOSITION TO THE JOINT MOTION TO ENTER PROPOSED CONSENT DECREE

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Citations to other commonly referenced documents, decisions, and orders include the following:

Act Authorizing The Rio Grande Reclamation Project, 33 Stat. 314 (1905) – “Project Act”
Operating Agreement for the Rio Grande Project (March 10, 2008) – “Op. Agrmt.”
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Common shorthand textual references include:

“Compact Commission” or “RGCC” – Rio Grande Compact Commission
“EP1” or “District” – El Paso County Water Improvement District No. 1
“EBID” – Elephant Butte Irrigation District
“Elephant Butte” – Elephant Butte Reservoir
“Project” – Rio Grande Project
“Reclamation” – United States Bureau of Reclamation

OPPOSITION TO ENTRY OF PROPOSED CONSENT DECREE

The states would turn the Rio Grande Compact topsy-turvy for water deliveries from Elephant Butte Reservoir downstream to the El Paso County Water Improvement District No. 1. Where New Mexico's affirmative Compact duty of delivery is now to Elephant Butte at the top of the federal Rio Grande Project, with the United States assuming full Project delivery responsibilities to downstream New Mexico and Texas interests, the proposed decree would move the delivery obligation down to the bottom at a Texas state line spot, with the states dictating to the United States how to operate the Project. Where New Mexico's Compact duty now is *not to interfere* with Project operations downstream, the proposed decree goes the opposite direction, giving New Mexico the *right to interfere* with Project operations. And to what end? To upend a more than century old legal system for delivering Rio Grande water to farms in New Mexico and Texas and unravel an agreement bringing the Project up to date that has been working to the satisfaction of the Project participants for the last 15 years. All this damage, while also wresting crucial management decisions from the control of Reclamation and the statutory and contractual Project beneficiaries—is in service to an incoherent, jerry-rigged, unworkable new system worthy of Rube Goldberg.

If this topsy-turvydom were legally justified, and *if* the United States (a co-equal party to the Compact lawsuit) actually were joined in the proposal, the District's interests presumably would be protected because Reclamation still would have the duty to heed congressional mandates and not abrogate its contractual rights and obligations. This would be so even in the service of an unworkable scheme such as this one.

But that scenario is not what the states are offering up. Although it is a party to the case and by some lights to the Compact itself, *see Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S.

(18 How.) 421, 433 (1855), and although it is charged with the prime responsibility for distributing the disputed water, the United States has not only not joined the proposal, but actively opposes it.

The states' proposal should be rejected up-front and outright. This is not a viable way for Texas and New Mexico to extricate themselves from what they no doubt have come to view as a costly, lengthy, frustrating lawsuit. Nor is it the way that Colorado, the settling triumvirate's third leg with not a drop of water at stake, may ensconce new rules into the law to enhance its legal posture in wholly unrelated water battles it fears are on the horizon.

States must have express congressional approval to re-write interstate compacts, and courts may not bless compact revisions, even consensual ones among the states, absent a textual basis that Congress has already approved. Our District has an acute interest in protecting the continuing integrity of both the Compact *and* the Project and in maintaining the congressionally established balance between them. Hence, the District files this *amicus* brief, aligning itself with the United States and against the states on their joint motion.[1] Litigation exhaustion and policy exasperation are no excuse for what they are trying to do. "To enter into a settlement contrary to the Compact is to violate a federal statute." *Kansas v. Nebraska*, 574 U.S. 445, 472 (2015).

I. THE DISTRICT'S INTEREST AND THE DECREE'S PROPOSED RECONFIGURATION OF THE COMPACT

A. The District's Interest

All Rio Grande deliveries into Texas are by operation of the Rio Grande Project, delivered by the United States Bureau of Reclamation from Project storage in Elephant Butte Reservoir a

[1] The states' joint motion is Doc. 720. The proposed decree is Exhibit 1 to Doc. 720. The three states' memorandum of points of authority in support of the joint motion also is part of Doc. 720. Six declarations, none part of the proposed decree, are Exhibits 2-7 to the joint motion. All these were filed on November 14, 2022. The proposed decree itself is in two parts. The first part is the proposal's text, and the second is Appendix 1, the "Effective El Paso Index." A glossary of some shorthand terms and references is included here at v.

hundred miles upstream. It was held over a half century ago that the Compact "shows convincingly that the water belonging to Texas is definitely committed to the service of the Rio Grande Project," which makes the "paramount disposition" of appropriative rights to the river. *El Paso County Water Improv. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907 (W.D. Tex. 1955), *aff'd as reformed*, 243 F.2d 927 (5th Cir. 1955), *cert. denied*, 355 U.S. 820 (1957).

EP1 has the only Reclamation Act contract to receive the deliveries, *see generally Bean v. United States*, 163 F. Supp. 838, 843 (Ct. Cl. 1958), *cert. denied*, 358 U.S. 906 (1958), and is the only Texas entity entitled to contract for and receive Project supply under reclamation law. Texas has recognized the District as the state's only holder of the legal right to receive Rio Grande water as it enters Texas from New Mexico, entitling EP1 to Project water impounded in the upstream reservoirs in New Mexico and released there by the United States, as well as waters (including return flows) entering Texas from New Mexico by way of the Rio Grande.[2] The Texas Legislature has cemented the District's Rio Grande rights to the *federal* system for the Rio Grande, requiring EP1 to distribute all of the water delivered by Reclamation "in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364.

Because Texas, New Mexico, and Colorado now threaten to undermine this legal system to the detriment of the District and its farmers, EP1 joins the United States in opposing the states' effort. The legal issue is whether the Special Master should recommend Supreme Court entry of the proffered consent decree. The Special Master should not and, instead, should recommend denial of the joint motion and rejection of the proposed decree. It is riddled with patent legal

[2] Texas Comm'n on Environmental Quality Certificate of Adjudication No. 23-5940 (March 7, 2007). The District's state water right is held jointly with the United States but not with any other Texas entity, including the state itself. In fact, Texas has no water right of its own under the Compact. *United States v. City of Las Cruces*, 289 F.3d 1170, 1185 (10th Cir. 2002).

infirmities. Still more illegalities lurk in its administrative details, including whether it is even capable of administration by the parties, the affected Project entities, or the Supreme Court itself. An understanding of the reasons for these broad assertions has to start with an understanding of the structure and operation of the states' proposal.

B. The Decree's Proposed Reconfiguration Of The Compact

The decree is directed at "the division of Rio Grande water" between Texas and New Mexico "below Elephant Butte Reservoir." Prop. Dec. 6 (¶ II.A.7). So is the index. Prop. Index 1 (§ 1) (index purpose to "quantif[y] and assess[] Rio Grande water below Elephant Butte"). The state's proposal addresses neither Colorado's state line delivery obligation under Article III of the Compact nor New Mexico's obligation to deliver Rio Grande water into Project storage at a specified point—the Article II(j) gage at San Marcial—under Article IV of the Compact.[3] Rather, the decree reaches only Project storage and deliveries from it.

1. The Decree Is Designed To Be, And Would Become, The Compact's Apportionment Of Rio Grande Water To Texas And New Mexico

By its terms, the decree would supplant the Compact starting immediately after Rio Grande water passes the San Marcial gauge. From that point, "[c]ompliance with this Decree represents compliance with the Compact." Prop. Dec. 6 (¶ II.A.7). The decree becomes "the Texas apportionment." Prop. Index 1 (§ 1); *see also* Prop. Dec. 7 (¶ II.B.ii.b). And by force of logic, it also establishes New Mexico's apportionment. *Id.* (New Mexico entitled to use balance of Rio Grande water in the covered area, minus Texas's apportionment, consistent with rest of decree).

[3] In 1948, the Compact Commission moved the point of measurement of the Article IV delivery obligation, but the delivery point remains the same: the San Marcial gage.

Compliance with the decree constitutes compliance with the Compact. If the decree's terms are satisfied, then the deliveries of Rio Grande water to Texas cannot be Compact violations by New Mexico.

2. The Decree Subjects New Mexico To A Baseline Delivery Obligation Measured At The State Line

a. Annual State Line Delivery Obligation

Under the decree, Texas's apportionment is based on the index, which is the "calculation" of Rio Grande water Texas "is entitled to receive." Prop. Dec. 7 (¶ II.B.ii.b). But the calculation is not a one-step operation, and the actual legal *entitlement*, while originating with the index calculation, is not established by it. Rather, the entitlement referenced in ¶ II.B.ii.b is an aspirational objective and not a legally enforceable right under the decree. *See, e.g.*, *id*. at 8 (¶ II.B.ii.f) (index delivery "*should*" equal index obligation) (emphasis added).

Still, the index calculation is the first step in the decree's creation of a legal entitlement, and its calculation ramifies through the provisions that actually establish a legal entitlement, as well as related legal obligations. The index calculation is performed on a calendar year basis and compares the "index obligation" with the "index delivery," with the difference denominated the "index departure." Prop. Index 1 (¶ 1); *id.* 9 (§ 4). This calculation yields what the decree calls the "Annual Index Departure." Prop. Dec. 2-3 (¶ 1). If the delivery is less than the obligation, then there is an under-delivery (a "Negative Departure"), and if the delivery is more than the obligation, then there is an over-delivery (a "Positive Departure").

The key point for measuring and then calculating the index numbers (for both the index obligation and the index delivery) is the El Paso Gage, the point at which Rio Grande water is "to

be delivered to Texas." Prop. Dec. 3 (sub-part (i) of "Index Delivery definition); *id*. 6 (¶ II.B.i).[4] The gage is on the Rio Grande about two miles upstream from a spot where the river crosses the New Mexico-Texas state line. Blair Decl.¶ 16.[5]

Thus, the key calculation dictated by the decree is an annual volume of water at the Texas-New Mexico state line. It is subject to adjustments but remains the "target" for New Mexico's delivery. Prop. Index 2 (§ 2.1). In short, it provides a baseline delivery obligation measured at a state line point on the river near Texas.

b. Multi-Year Accumulated State Line Delivery Obligation

The decree does not mandate an *annual* baseline delivery obligation at the state line for New Mexico.[6] Instead, it establishes a multi-year measure of compliance derived from the annual state line delivery obligation. Under the decree—really, the "new Compact"—a New Mexico violation of the decree's injunction does not occur until it exceeds the limits set for "accrued Negative Departure[s]." Prop. Dec. 9 (¶ II.C.1). These limits are in ¶ II.C.3.a of the Decree and vary by time period.[7] Prop. Dec. 9-10.

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[4] The decree's text and the appendix include exclusions for very dry and very wet years and adjustments to the numerical calculation for evaporation and evapotranspiration, but they are not incorporated into this part of the discussion because they do not change the measuring point for the basic annual index calculation and thus are not pertinent to locating the point of measurement.

[5] The New Mexico-Texas state line crossing near the El Paso gage is the last one. The Rio Grande meanders back and forth between Texas and New Mexico several times in the 20-mile or so stretch above the El Paso Gage. Blair Decl. ¶16. Dr. Blair's declaration is an exhibit to the United States' response to the joint motion.

[6] Less clear, and thus legally troublesome, is whether it mandates *the United States* to ensure such annual deliveries. The decree subjects the United States to an injunction making it "responsible" for operating the Rio Grande Project to assure the decree's apportionment to Texas and New Mexico is "achieved consistent with" the decree. Prop. Dec. 6 (¶ II.A.4).

[7] New Mexico also would be required to deliver additional volumes of Rio Grande water for designated levels of exceedances of accrued under-deliveries, subject to a cap that would wipe the slate clean of all accrued under-deliveries. Prop. Dec. 10-11 (¶ II.C.3.b-c).

This multi-year obligation, enforceable as a violation of the injunction in contrast to the annual obligation, still serves as a state line delivery obligation.

3. The Decree Subordinates Reclamation And The Project To The States, Commandeering Reclamation To Implement Their Instructions

In conjunction with the accrued under-delivery limits, the decree imposes an intricate set of requirements designed to forestall excessive accrual of under-deliveries. These requirements establish accrual thresholds for both under- and over-deliveries. Prop. Dec. 12-13 (¶¶ II.D.2 and II.D.3). When and if New Mexico hits these thresholds, certain "water management actions"—undefined in scope or type—are triggered. *Id*. 11 (¶ II.D.1). The water management actions are within New Mexico's discretion in the early years, *id*. 12 (¶ II.D.2.a), but then become requirements. *Id*. (¶ II.D.2.b).

The impact of New Mexico's management actions extends beyond just itself and Texas. Reclamation and the Project's two member districts are conscripted into New Mexico's service and forced to bow to its demands.[8] Reclamation is enjoined to "implement" New Mexico's transfer by changing the diversion allocations for the two districts in *the Project*. *Id*. 13 (¶ II.D.2.c.i). It is similarly enjoined, under an over-delivery scenario, to take water to which EP1 is otherwise entitled through Project operations and shift it to EBID. *Id*. 14 (¶ II.D.3.b.1) ("Reclamation *will implement* Allocation Transfers") (emphasis added). Reclamation also will have to implement diversion allocations to which EBID otherwise would have been entitled in regular Project operations and re-allocate them to EP1, if New Mexico so instructs Reclamation. *Id*. 10-11 (¶¶

[8] The terminology in the decree's "trigger" provisions is especially murky. For example, one water management action mandated for New Mexico is the transfer to Texas of the "water apportioned" to New Mexico. Prop. Dec. 12 (¶ II.D.2.b). The very next paragraph makes an unexplained leap from this terminology to an "adjustment in *Project allocations.*" *Id*. (¶ II.D.2.c) (emphasis added). Apportioned water and allocated water are conflated without explanation of how the transition from one to the other is expected to happen. The discussion in the text above is based on EP1's best guess at what is intended and how it is to be accomplished.

II.C.b.i-ii); 12 (¶ II.D.2.a). EBID and EP1, too, would be likewise be subject to injunction, barred from disagreeing with, or resisting, allocations of water, changes to Project operations, and reductions in their Project supply mandated by the proposed decree. *Id*. 17 (¶ III.A-B).[9]

These controls over unconsenting governmental entities are not incidental nor are they mere drafting errors. The decree is replete with concrete provisions clarifying the states' decision—if they can get judicial sign-off—to subordinate the Project and its participants to them and their Compact organ, the RGCC. It references provisions in the decree for "*ensuring* that Project operations effectuate" the decree's state line apportionment. Prop. Dec. 8 (¶ II.B.ii.f) (emphasis added). In addition to the specific mandates outlined in the foregoing paragraph of this brief, the United States is enjoined to operate the Project to conform its operations to the requirements laid out in the decree. *Id*. 6 (¶ II.A.4). Project operations, including Project accounting, are placed in servitude to the decree's requirements, and the Project is barred from "interfer[ing]" with "Compact administration," whatever that eventually entails. *Id*. 17 (¶¶ III.A, III.B); *see also* Prop. Index 12 (§ 8) ("Project operations and Project accounting must be consistent with the Decree and the Compact").

And to whom are decree accounting and technical decisions assigned in the decree? To the RGCC and its chosen engineer advisors. The engineer advisors are to ingest then digest the index accounting data, regurgitate it to the RGCC, and then the RGCC is supposed to act on it. Prop. Dec. 16-17 (¶ II.F.2).[10]

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[9] This would contravene the Districts' rights under reclamation law, as well as under reclamation contracts precipitated by previous litigation. *See infra* at 22 (discussing origins of Operating Agreement).

[10] Nothing is specified about whether the Compact Commissioners remain bound by the Compact's unanimity requirement or what is to happen to the decree's annual and accrued delivery rules and water management action triggers if there is not unanimous approval of the accounting—or whether the Supreme Court will have to shoulder this duty should RGCC unanimity fail.

And the Compact Commissioners' powers under the decree don't stop there. They are given authority to modify the index pretty much as they see fit. Prop. Dec. 18 (¶ V). Upon a request from one or more of the states—but not from anyone else—the Compact Commissioners are given legal authority to implement changes to "data sources and/or method[s]" for any index input with respect to supposed errors, bias, discrepancy, or any "other issue." Prop. Index 11-12 (§ 7). They are even empowered to give these changes retroactive effect, somehow reaching back to change index deliveries and departures. *Id*.

II. THE DECREE'S INDEXED STATE LINE DELIVERY OBLIGATION IS ILLEGAL

The core of the states' proposed decree is an indexed state line delivery obligation imposed as a Compact requirement. Whether it would be a good idea, or one that the Compact signatories and Congress might have been better off adopting in the first place, is inconsequential. Adding it as a Compact mandate would illegally reform the Compact, violating the Constitution's Compact Clause[11] and transgressing judicial boundaries drawn by the constitutional separation of powers doctrine.[12]

With their effort, the states are fairly openly asking the Special Master to treat this as an equitable apportionment case. *See, e.g.*, States Mem. 38-39 (proposed decree "provides that Texas'

[11] "No State shall, without the Consent of Congress, . . . enter into any Agreement or Compact with another State[.]" U.S. Const. Art. I, § 10, cl. 3.

[12] To be clear, the District's argument in this section is about the indexed state line delivery requirement and the accompanying instructions for its application in the proposed decree. Whether there is a conceivably valid use for some other variant of an indexed measure of New Mexico deliveries of Rio Grande water to Texas is a speculative matter not pertinent to the current situation.

equitable apportionment will be determined by the Index").[13] But it isn't. It is a Compact enforcement case. The two types of cases differ in critical ways, and the judicial role differs correspondingly.

Equitable apportionment is a "judicial remedy" in interstate water disputes. *Mississippi v. Tennessee*, 142 S. Ct. 31, 37 (2021). But the judiciary comes to a case about a compact—*this* case—with circumscribed remedial powers. When there has been what the Supreme Court calls a "statutory apportionment" of interstate waters, equitable judicial apportionment authority recedes, and "courts have no power to substitute their own notions" of how to divvy up water for Congress's choice. *Arizona v. California*, 373 U.S. 546, 565 (1963); *see also Florida v. Georgia*, 138 S. Ct. 2502, 2525 (2018), and *Texas v. New Mexico*, 462 U.S. 554, 568 (1983). This is not to say that equitable principles have no role in the resolution of compact disputes. The Court may need to bring them to bear, but only if the resolution is consistent with the compact at issue. *Kansas v. Nebraska*, 574 U.S. at 455; *Texas v. New Mexico*, 462 U.S. at 564 (relief must be consistent with compact terms).[14] Reformation of a compact is not in the Court's equitable toolkit. *Id*. (refusing to break impasse in compact administration by giving tie-breaking vote to compact commissioner). The Supreme Court has forcefully expressed its extreme reluctance to read absent terms into a

[13] At the outset of their argument, the states come close to dropping the facade that their indexed state line delivery solution has anything to do with the actual Compact. Instead of calling the proposal a remedy under the Compact, they call it a "fair and lasting solution to a complex and longstanding dispute over the division of Rio Grande water." States Mem. 1. In the remaining seventy-five pages of argument, one is hard-pressed to find an assertion that the Compact actually includes a state line delivery requirement below Elephant Butte. The real argument being made is that it sure would be nice if there were one—a highly dubious proposition but regardless of its merits, an inappropriate one for resolution in this forum.

[14] "Far from claiming the power to alter a compact to fit our own views of fairness, we insist only upon broad remedial authority to *enforce the Compact's terms* and deter future violations." *Kansas v. Nebraska*, 574 U.S. at 455 n.4 (emphasis added).

compact. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) (refusing to re-write compact to give additional powers to compact commissioners).

The Court's insistence on limiting its remedial authority in compact cases stems from separation-of-powers constraints, which in turn flow from the fact that an interstate compact is, after all, not just a contract but also a congressional statute. *Id*.; *Texas v. New Mexico*, 462 U.S. at 564 (congressional consent makes compact "law of the land"). And as with other federal statutes, the actual terms of a compact are the first place to look to discern congressional intent. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *see also Montana v. Wyoming*, 563 U.S. 368, 388-89 (2011).

A. The Rio Grande Compact Does Not Include A State Line Delivery Requirement For Elephant Butte Releases

Nothing in the Compact at issue here establishes, or authorizes establishment of, a state line delivery obligation for getting Rio Grande water to Texas from Elephant Butte. It is not as though the concept is foreign to compacts, much less to those between Texas and New Mexico. The Pecos River Compact establishes an explicit state line delivery requirement, measured at the New Mexico-Texas border. Pecos River Compact, 63 Stat. 161, Art. III(a) (1949).[15] In telling contrast, there is no such language in the Rio Grande Compact for deliveries to Texas.

A compact's structure informs the understanding of its terms. *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 628 & 631 (2013). The structure of this Compact, with designated delivery points on the river *upstream* of Elephant Butte, speaks loudly against the proposal before the Special Master.

[15] "New Mexico shall not deplete by man's activities the flow of the Pecos River *at the New Mexico-Texas state line* below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." (emphasis added).

There is, in fact, an express state line delivery obligation imposed on Colorado in this very Compact. *See* Compact Art. III (1st sent.). The Compact also imposes an express obligation for New Mexico to deliver Rio Grande water at a specified location. Compact Art. IV (1st sent.). The states mistake these provisions as support for tacking on a new one for below-Elephant Butte deliveries. States Mem. 65. They instead refute it. That is what using structure to inform meaning is all about.

There is not even the whisper of a Compact-specified point or location for delivery from the latter mandated delivery point to areas downstream from Elephant Butte. Comparing the Compact's two provisions specifying delivery obligation points—one for Colorado into New Mexico and the other for New Mexico into Elephant Butte—with the absence of any such Compact specification of a delivery obligation point for New Mexico to deliver water from Elephant Butte to Texas yields an obvious answer. The Compact contains no such state line delivery requirement below Elephant Butte, and the absence of the requirement is intentional:

> Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.

Russello v. United States, 464 U.S. 16, 23 (1983).

Nothing elsewhere in the Compact offers an escape from this conclusion. In particular, the Compact Commissioners cannot vote, even unanimously, to add a state line delivery obligation below Elephant Butte. Their Article V powers are limited to changing gaging stations if "reliable records" are unobtainable at any of those stations, but only if the tabulating result is essentially the same. Their Article VI powers concern matters upstream of Elephant Butte. Beyond these tightly

restricted powers, the RGCC is only allowed a narrow range of technical powers concerning data presentation and records maintenance. *See* Compact Art. XII.[16]

The historical background of the Compact reinforces the conclusion the Compact's text compels: there is no state line delivery obligation, and imposing one would revise the Compact. In 1938, seven months after compact negotiations concluded, but months before congressional approval, Texas's Rio Grande Compact Commissioner wrote to the Chair of the Texas Board of Water Engineers, explaining that the Compact provides for the delivery below Elephant Butte to come from the reservoir's supply and "not what passed the New Mexico-Texas state line." Frank B. Clayton Letter of Oct. 16, 1938 ("Clayton Letter") at 7. This was because it was "not necessary, even if it were manageable,[17] to make . . . provision . . . for the amount of water to pass the Texas New Mexico state line." *Id*. Texas itself has said as much again in this litigation: "the Compact did not . . . articulate a specific state-line delivery allocation," relying instead on the Project for downstream deliveries from Elephant Butte. Tex. Compl. ¶ 10 (ordered filed Jan. 27, 2014). Texas's historical expert concurs. "Development of the Project rendered a state line delivery to Texas by New Mexico impossible." Miltenberger Decl. (Nov. 5, 2020) at 4 ¶ 5.c (Doc. 413) (Index No. 52, filed with Texas's partial summary judgment motion). "San Marcial was thus the de facto state line delivery to Texas." *Id*. at 19 ¶ 32. The Supreme Court concurs in the one decision it has rendered to date in this case—"instead of . . . requiring New Mexico to deliver a specified amount

[16] Thus, the two recent RGCC resolutions about the states' deal, *see* Skov Decl. Exhs. A and B, add nothing substantive to the states' position. The states say that the resolutions are Compact Article XII "recommendations to the . . . States connected with the administration of the Compact." States Mem. 70. It is correct that the RGCC is empowered to make recommendations to the states about Compact administration. That allows the Compact Commissioners to recommend changes to the Compact through renegotiation and congressional action. It doesn't allow them to unilaterally approve changes to the Compact.

[17] Manageability was a major problem. "[T]he irregular contour of the boundary . . . [makes] it practically impossible to measure the water passing the state line." Clayton Letter at 7.

of water annually to the Texas state line, the Compact directed New Mexico to deliver water to the Reservoir." *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018).[18]

B. The Rio Grande Compact Affirmatively Excludes The Concept Of A State Line Delivery Obligation For Water Released From Elephant Butte

Adding the decree's proposed state line delivery obligation as a new article of the Compact would not only be an illegal addition to, and reformation of, the Compact. It also would directly conflict with the apportionment the Compact already makes for Rio Grande water delivered into Elephant Butte.

Article IV of the Compact specifies more than just a determinable amount of water that New Mexico must deliver. It also specifies *where* the delivery has to be made: into Elephant Butte. The Compact subjects New Mexico to no other delivery directive. But it hardly follows that New Mexico therefore has no delivery obligation with respect to Texas. Texas would never have entered into the Compact were that so. New Mexico's Article IV delivery into Elephant Butte deposits the delivered water into Project storage. And the Compact's Article I(k) definition of "Project storage," in combination with Article I(l)'s definition of "usable water," means that New Mexico's Compact delivery obligation is to the Project at Elephant Butte—from whence comes Texas's share under Reclamation's auspices. This then means that, as the Supreme Court has already explained, the compacted-for water is delivered to Texas by means of the Project. *Texas v. New Mexico*, 138 at 957 & 959.

[18] The states implicitly give away the game when they justify their new stateline delivery ploy on the ground that the problems with that kind of delivery requirement in 1938 are not present "today." States Mem. 65-66. This kind of state line delivery concept was rejected in 1938 when the Compact was negotiated and in 1939 when Congress approved it. The Compact cannot be judicially rewritten just because things are different "today." Courts have no license to "update" statutes because things have changed. *Bostock v. Clayton County*, 140 S. Ct. 1731, 1738 (2020).

In other words, through the Compact, Texas and New Mexico agreed that from Elephant Butte on down the river, they would receive their Rio Grande apportionments in the form of the Project's performance of its delivery obligations under federal reclamation law. The apportionment was to the Project, and fulfillment of the apportionment was by Reclamation's deliveries to the two downstream reclamation districts, EBID in New Mexico and EP1 in Texas. It is for this reason that the Supreme Court found that Elephant Butte and the federal Project have a "central role" in the Compact, "integral" to its operation. 138 S. Ct. at 957.[19]

The Special Master has already reached this conclusion. "[T]he Compact relies on the Rio Grande Project for water delivery and is *programmatic* in its apportionment of water as between Texas and New Mexico[.]" 5/21/21 Order at 3 (emphasis in original); *see also id*. at 5 (referencing "programmatic nature" of Compact apportionment); *id*. at 11 ("programmatic division of water subject to federal storage and distribution . . . within the Project area downstream of the Reservoir"). The "program" in "programmatic," of course, is the Project.

From this, it follows that, by the states' own agreement, the water delivered into and stored in Elephant Butte is federal Project water subject to distribution according to federal reclamation law, including contracts made pursuant to that law.[20] Or, as the Special Master has put it, "[t]he Compact protects the Project, [and] its water supply[.]" 5/21/21 Order at 49.

No plausible reason is in the offing to revisit the conclusion already reached on this point in the 2021 summary judgment ruling. It was, and remains, correct. The decree's proposal to create

[19] This is not to say that the states' can use any apportionments they may have to seize control of the Districts' Project water supply allocations and run rough-shod over reclamation law and contracts in the name of using the Compact to diminish rather than protect the Project.

[20] Texas formalizes this legal arrangement in its water rights scheme. Its certificate of adjudication of EP1's Rio Grande water right recognizes the District's share of the water is in *Project* storage in Elephant Butte.

a state line delivery obligation cannot be squared with that conclusion and its underlying rationale about the programmatic apportionment embodied in Article IV of the Compact. Substituting the proposed new delivery obligation would entirely displace the one in the Compact—and governing law forbids that.

The proposed indexed state line delivery obligation is the foundation for the proposed decree. States Mem. 29 (calling it the "centerpiece"). Without it, the entire decree collapses, regardless of whether the states' specious arguments trying to relegate the United States to an irrelevancy in this case find unanticipated footing. *Id*. 5 (proposed decree stands or falls as a whole). The index gambit is illegal, and so is the proposed decree.

III. THERE IS NO CONFLICT BETWEEN THE COMPACT AND THE STATUTORY AUTHORITY FOR THE PROJECT, NOR IS THERE A DOCTRINE THAT GIVES COMPACTS SUPERIORITY OVER FEDERAL RECLAMATION LAW

To make the indexed delivery concept and its multi-year compliance schedules workable (and presumably, palatable, although still illegal), the states had to fabricate some kind of bridge between two structures: administration of the decree *qua* compact; and administration of the Project. Synching the two and simultaneously maintaining the requisite independence of each was impossible. So, unsurprisingly, the states decided to force themselves on the Project and subordinate the Project and its operation to the demands of the proposed decree and, in varying combinations, the states themselves. *See, e.g.*, States Mem. 60 (asserting that Project serves the Compact). Reclamation and the two district-members of the Project would be forced to take instruction from one or another or all of New Mexico, Texas, and the Compact Commissioners and implement their directives changing Project allocations—the water to which the respective Districts have contractual rights. The states' strawman decree sets up the scenario that a Project-level failure to submit to the states' demands would be an illegal interference with Compact administration and, consequently, violation of a Supreme Court injunction.

The Project being a federal program, created and controlled by federal statute, the upshot of this proposed arrangement is that the states would be asserting dominion over the United States, an innovative, if transparently unacceptable, inversion of the Constitution's Supremacy Clause, U.S. Const. Art. VI, cl. 2. "Reverse pre-emption" of precisely this sort has been found to have no constitutional footing. *See, e.g.*, *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990).

It is unnecessary to address the constitutionality of this upside-down scheme, however. The scheme devised by the states rests on a presumption of incompatibility between the statutory Compact and federal reclamation law, including the Rio Grande Project Act, which itself is a 1905 statutory amendment to the Reclamation Act of 1902, 32 Stat. 390. There is no such incompatibility. The Compact and the Project work in tandem, not at odds with each other. As demonstrated in the foregoing discussion about the programmatic apportionment in Article IV of the Compact, *supra* at 15, the Compact is specifically crafted to protect the Project. The impetus for it, its purpose and legal basis, are not to override or otherwise control Project operations, but to insulate them, particularly from New Mexico interference.[21]

The Compact itself neither says nor implies anything to the contrary. There is not a single provision authorizing states to instruct those operating the Project about what they should, may, or must do. Nor is any authorization given the RGCC to do something similar. In fact, the contrary is true. The Compact Commissioners' powers are tightly circumscribed—intentionally so given the role of the Project (not the Commission) below Elephant Butte. In the geographic area in question, they are limited to changing gaging stations to get more reliable records and to make narrow technical decisions about data presentation and records maintenance and to adopt rules and

[21] This jibes with what the Special Master has determined: "New Mexico has a Compact-level duty to avoid material interference with Reclamation's delivery of Compact water to Texas." 5/21/21 Order at 6.

regulations for their proceedings. *See* Compact Arts. V & XII. The Compact's drafters were prescient here, clearly anticipating the danger posed to the Project were Compact Commissioners allowed to exercise broad powers.

To evade the utter absence of statutory authority for the extensive powers assigned the states and the RGCC in their proposed decree, the states posit that a compact—particularly this one—broadly trumps reclamation law, apparently on the premise that the states' participation makes it some kind of super-statute. This is a baseless legal argument, at odds with well-established authority. A compact is a federal law "like any other." *Kansas v. Nebraska*, 574 U.S. at 456 n.5.

Two sets of federal statutes are at work here. One is the Compact; the other, federal reclamation law. The first order of legal business in such a situation is to harmonize them if that can be done without damage to the statutes' cores:

> The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intent to the contrary, to regard each as effective.

Morton v. Mancari, 417 U.S. 535, 551 (1974). There being no clear congressional intent to the contrary in this situation, the Compact and reclamation law have to be harmonized. Absent a "repugnancy"—and there is none here—the older statute and the newer one "stand together." *INS v. St. Cyr*, 533 U.S. 289, 299 (2001). Buttressing this conclusion is the well-settled principle that repeals by implication of federal statutes are disfavored, and that for a later-enacted statute to modify or repeal an earlier one in the same field its purpose in doing so must be "clear and manifest" and there must be an "express contradiction" between the two statutes. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 663 (2007). Nothing of the sort is present here. The opposite, in fact, happened. The Compact reaffirmed the Project, putting it front and center in the way Rio Grande water is supposed to be dispensed downstream of Elephant Butte.

One harmonious note is that a compact is supposed to be interpreted to avoid creation of overlapping jurisdiction. *D.C. Transit System, Inc. v. Wash. Metro. Area Transit Comm'n*, 420 F.2d 226, 229 (D.C. Cir. 1969), citing *Universal Interpretive Shuttle Corp. v. Wash. Metro. Area Transit Comm'n*, 393 U.S. 186, 189 (1968). It is already clear from the foregoing discussion that, fairly read, the Compact creates no situation where its jurisdiction overlaps with Project operations. In striking contrast, the proposed decree would do precisely the opposite: set administration of the Compact and administration of the Project at each other's throats.

Another note in this composition is that one of the states here, New Mexico, is legally disabled from challenging the United States' authority to implement the Reclamation Act, which means that it cannot claim, or instigate, a disharmony. In the seventh clause of Section 2 of the Arizona-New Mexico Enabling Act, Ch. 310, 36 Stat. 557 (June 20, 1910), by which New Mexico gained statehood, an "irrevocable" rule was established that New Mexico "acquiesce[s]" to the reservation to the United States of "all rights and powers" for carrying out the Reclamation Act—and recall that the Project is a creature of the Reclamation Act.[22]

New Mexico's effort to deprive the United States of its Reclamation Act authority over Project operations and arrogate such authority to itself and its compatriot states is irreconcilable with the rules for its admission to the Union. The only way to retain the requisite harmony is to rebuff New Mexico's effort.

Finally, in one of its major decisions about division of interstate river waters, the Supreme Court has already rejected the states' theory of compacts as some kind of super-statutes sweeping away all before them. In *Arizona v. California*, *supra*, the Supreme Court was confronted with an original jurisdiction dispute about division of the waters of the mainstream of the Colorado River.

[22] This is also part of New Mexico's foundational law. N.M. Const. Art. XXI, § 7. The federal enabling act's constitutionality was upheld in *United States v. Sandoval*, 231 U.S. 28 (1913).

There, as here, there was a federal statute (the Boulder Canyon Project Act) addressing river operations and said by some to be controlled by a compact (the Colorado River Compact). There, as here, that federal statute was part of the federal reclamation system of laws. The Court compared the two statutes, overrode neither, and held that the project act controlled over the compact in the division of the river's mainstream water. There was no suggestion that the compact had some kind of control over the reclamation statute. Rather, the converse rule applied. The reclamation statute controlled over the compact.

To sum up, the Compact (the enacted one, not its proposed decree replacement) and the Project are compatible and function as co-equals under federal statutory law. It requires no strained effort to make them so. They were designed for the very purpose of functioning together in order to make the Rio Grande Project viable and capable of delivering ample water downstream of Elephant Butte to both New Mexico and Texas users. The proposed decree, were it to become the "new compact" the states want to substitute for the present one, would make the Compact and the Project incompatible, without any statutory or other jurisprudential. The states' effort to manufacture a conflict, then install a self-serving mechanism for resolving it, should be rejected.

IV. THE STATES' PROPOSED CONSENT DECREE IMPERMISSIBLY IMPOSES LEGAL DUTIES ON UNCONSENTING THIRD PARTIES AND IMPAIRS THEIR CONTRACTUAL RIGHTS

The United States is not a party to the proposed consent decree. Neither are EBID and EP1. All three of these entities oppose the decree's entry. Yet, the decree expressly enjoins the United States to conduct its Project operations in certain specified ways—for example, modifying its allocations and forcing water transfers between the districts based on the consent decree's terms and instructions from the states and the Compact Commissioners following conclusion of annual accounting under the decree. Similarly, EBID and EP1 would be legally compelled to acquiesce

in Reclamation's Project actions under the compulsion of the decree's signatories and their agents and to yield in their operations to the new Compact overlords.

The decree's dictated impositions on the unconsenting Project participants reaches further still, forcing them to modify a contract—the 2008 operating agreement—among the Project participants to which the states are not even parties.[23]

These would-be impositions are legally invalid and cannot be recommended for Court approval.

A. The States May Not Use A Consent Decree To Impose Legal Obligations On Unconsenting Third Parties

When it comes to two parties forcing a settlement down an unconsenting party's throat and adding insult to injury by forcing the unconsenting third party to march to the settling parties' orders, common sense, fairness, and the law are in perfect alignment: it obviously cannot be done:

> *Of course*, parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, and a fortiori may not impose duties or obligations on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors[.] . . . *And, of course*, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.

Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986) (emphasis added; citations omitted); *see also Martin v. Wilks*, 490 U.S. 755, 768 (1989).[24] Because the terms of consent decrees are voluntarily subscribed to, not legally imposed as a result of litigating contested claims and issues, nonparties may not be subjected to the negotiated outcome. *Ass'n for Retarded Citizens of Conn., Inc. v. Thorne*, 30 F.3d 367, 370 (2d Cir. 1994), *cert. denied*, 512 U.S. 1079 (1995).

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[23] The 2008 Operating Agreement is in the record as United States Exhibit 290 (US-290).

[24] Unaccountably, the states cite only the *dissent* to *Wilks*. States Mem. 8. *Wilks*, though, remains good law, and the dissent remains relegated to the category of non-law.

There really is nothing to add to this elementary legal proposition. The states ask that the Special Master recommend adoption of a consent decree that includes an injunction against the United States and, effectively, EBID and EP1, but none of them consents. Even were the consent decree otherwise valid, and it's not, it founders on this point alone.

B. The Proposed Decree Unlawfully Interferes With Contractual Rights And Obligations Under The 2008 Operating Agreement

1. Project Operations Are Governed By The 2008 Operating Agreement

In 2008, the United States, EBID, and EP1 reached an agreement to resolve issues in litigation in two federal cases concerning operation of the Project and rights of water in and from the Project.[25] From this settlement came the 2008 operating agreement of the United States (through Reclamation), EBID, and EP1. As the preamble recites, in joining the agreement, the United States was "acting pursuant to the Reclamation Act." The Project has been operated ever since then pursuant to the Operating Agreement. Texas and New Mexico are not parties to the agreement.

It is a complex document, but suffice it to say for present purposes that it establishes the rules for Project operations, particularly how Project allocations, called "Annual Allocated Water," Op. Agrmt. ¶ 1.7, are to be made to EBID and EP1. The agreement assigns the water allocation task to the United States. *Id.* ¶ 2.3. An elaborate 35-step process is used to determine EBID and EP1's respective shares of the allocated Project water. *Id.* ¶ 2.5 and related tables. It was designed to not conflict with or alter the Compact. *Id.* ¶ 6.12. The allocations were to be guided, among other things, by an Operations Manual, which contains the "detailed information regarding the methods, equations, and procedures used by" the three signatories to account for all water charges and operating procedures for the Project. ¶ 1.12. A Project Allocation Committee, composed of

[25] The two cases were *EBID v. U.S. Dep't of Interior*, No. 2:00cv1309 (D. N.M.), and *EPCWID No. 1 v. EBID*, No. 3:07cv0027 (W.D. Tex.).

representatives of Reclamation, EBID, and EPCWID, operates under the auspices of EP1's contracts and federal reclamation law to coordinate "annual allocations of, and daily allocation charges for Project water." Blair Decl. ¶ 12.

The agreement, of course, is a contract, and it is governed by federal law. Federal law governs its interpretation because the United States is a party to it and it is a federal reclamation contract. *Mohave Valley Irrig. Dist. v. Norton*, 244 F.3d 1164, 1165 (9th Cir. 2001); *see generally Nebraska v. Wyoming*, 325 U.S. 589, 615 (1945).

2. The Validity Of The Operating Agreement Is Beyond The Scope Of This Case

The Special Master has confronted issues about the operating agreement before. In 2018, New Mexico sought—not yet granted—leave to file counterclaims against the United States and Texas. Doc. 99. Various counterclaims, notably counterclaim 2, challenged the validity of the operating agreement, *id*. at 19-22, and New Mexico requested that it be declared void and that an injunction be entered prohibiting its use, *id*. at 33.

Texas opposed New Mexico's effort in this regard. It said that Project allocations are reclamation law matters and "not the proper subject of compact law." Tex. Mot. to Strike (Doc. 160) at 17. It further asserted that the operating agreement "does not conflict with the 1938 Compact." *Id*. at 18. This echoes, and is consistent with, Texas's position when it opposed EP1's intervention in 2015. *See* Tex. Br. In Opp. to EP1 Int. (June 2015). There it assured the Supreme Court that the very thing it now proposes to do—impinge on Project operations—was not part of this case. "The Court will not be examining or determining the 'rights and obligations in and to the Rio Grande Project and the contracts relating to the Project.'" *Id*. at 6. "[T]he terms and implementation of the 2008 Operating Agreement are simply not a part of this litigation and detract from the actual focus of the litigation." *Id*. at 7. It is far too late for Texas, in alliance with New Mexico, to back away from its solemn assurances to the Court.

The Special Master determined that this is not "the forum to address the validity" of the agreement. 3/31/20 Order at 29. Then, it dismissed counterclaim 2 and others based on the United States' sovereign immunity and because it was "beyond the scope of the current litigation." *Id*. at 30. The states try to dodge the present import of this ruling by claiming that it only rejected New Mexico's counterclaim "on technical grounds." States Mem. 62. If sovereign immunity is a mere "technical" ground, so be it. It remains a rule of law. The Special Master's considered opinion that this is not the place to decide the *bona fides* of the operating agreement has been a through-line since his appointment. It is far from a mere technical quibble. Regardless, the states cannot form their own special club to settle New Mexico's counterclaims by revising the operating agreement over the objections of the agreement's signatories and without an adjudication with all parties present.

3. The Proposed Decree Would Force Extensive Changes To The Operating Agreement, Changes Inappropriate To Impose In This Forum

Despite the current posture of this case and the Special Master's prior ruling, the states propose using their consent decree to force modifications to the operating agreement. Dr. Blair details the wide-ranging changes that would be dictated under the consent decree and concludes that it is "unworkable." Blair Decl. ¶ 24. He itemizes examples of the far-reaching changes—or at least, the ones apparent on the face of the proposal—the states' proposal would force to the operating agreement and its incorporated manual. *Id*. ¶ 16. The so-called D2 equation that is the crux of operating agreement calculations, Op. Agrmt. ¶ 2.5, would have to be changed and that change in turn would force revision to other parts of the agreement, such as the "Multiyear Drought Correction Factor." The measurement location for EP1's diversion allocation charges would be shifted from District canal headings to a gauge upstream, and this would require significant modifications to the agreement's allocation charge accounting equations. The decree's proposed

definition of "Project water supply" would dictate a change in the agreement's definition of that supply. Decision-making on crucial matters concerning final Project allocations would be shifted to the RGCC, injecting uncertainty into the critical decisions that have to be made under the decree about allocations and rendering the current process essentially unworkable. The so-called American Canal Extension credit (or "ACE credit") might be threatened, leading to a reduction in EP1's allocation. EP1's allocations in drought years would drop.[26]

In short, the states' proposal would entail far-reaching changes in the operating agreement, an agreement Texas has said has nothing to do with the Compact and the Special Master has said is not at issue here. And it would do so through a virtual ukase from the states, blessed by the Court. The affected districts and the United States would have no say, and there would not have been an adjudication of its legality or the factual basis for what it would do. It is fundamental that an entity's rights cannot be determined without that entity's presence. *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 122 (1968). It is "deeply embedded in common law" that all parties who may be affected by a ruling setting aside or revising a contract to which they are a signatory are indispensable parties to the litigation where their contractual rights are at stake. *United States ex rel. Hall v. Tribal Dev. Corp.*, 100 F.3d 476, 479 (7th Cir. 1996). The states' proposed decree would render the operating agreement virtually unrecognizable. Two of the contracts signatories are not parties to this litigation, and none of the contract's signatories are party to the deal targeting the contract (while none of the parties targeting the contract are signatories to it). Whatever equitable powers the Supreme Court might have under its original jurisdiction over a compact enforcement dispute, they do not extend this far afield of bedrock law.

[26] The states concede that their deal would override important elements of the operation agreement. States Mem. 63-64 (mentioning the changed delivery point, the modified D2 equation, and changes to treatment of carryover).

What the states are proposing to do to the operating agreement is illegal, and the Special Master has already said as much. Surely, the already-recognized sovereign immunity of the United States cannot be circumvented by an agreement among the states that excludes the United States and directs it do exactly what New Mexico requested in its dismissed counterclaims. That would be a legal perversion, allowing the states to do by an agreement with themselves what they could not do even if they attempted to litigate it with the United States.

The Special Master was correct the first time: the validity, partial or otherwise, of the operating agreement is not in this case and doesn't belong here. The Supreme Court abjures the exercise of original jurisdiction over a claim that can be, or already is, raised in another forum, a rule so firmly grounded in original jurisdiction jurisprudence that the Court handles the matter per curiam. *Arizona v. New Mexico*, 425 U.S. 794, 796-97 (1976) (per curiam); *United States v. Nevada*, 412 U.S. 534, 538 (1973) (per curiam).[27] There is a forum for New Mexico's challenge, and New Mexico is already a party there. *See New Mexico v. United States*, No. 1:11cv00691 (D. N.M.).[28]

V. THE PROPOSED DECREE IS INCAPABLE OF REASONED ADMINISTRATION AND TOO VAGUE TO BE FAIRLY ENFORCEABLE

The Court expects decrees to be clear enough that they are reasonably enforceable and understandable. Court orders are not supposed to invite litigation as to their meaning. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 341 (1944). The Court is especially disdainful of being put in a position of

[27] The states acknowledge the principle, but try to use it to avoid New Mexico accountability to the United States for intrastate actions interfering with Rio Grande deliveries. States Mem. 10. But they fall silent when it comes to acknowledging the salience of this avoidance doctrine to their endeavor to mess with the operating agreement in the proposed decree.

[28] Honoring the aforementioned basic principle that the all the parties to a contract are indispensable to a lawsuit seeking to invalidate or revise it, that court has found that EBID and EP1 are necessary parties. *New Mexico v. United States*, *supra*, Doc. 39 (Jan. 24, 2012).

having to exercise "continuing supervision" over decrees about interstate waters. *Vermont v. New York*, 417 U.S. 270, 274-75 (1974).

And the parties are entitled to clear notice of what is required and what is prohibited by a decree. "[B]asic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (per curiam). This is the principle embodied in Federal Rule of Civil Procedure 65(d), which, though this dispute is not governed by it, Sup. Ct. R. 17.2 provides a ready touchstone for how clear a proposed decree needs to be.

The rule includes requirements that an injunctive decree must "state its terms specifically" and "describe in reasonable detail—and not by referring to . . . other documents—the act or acts restrained or required." Fed. R. Civ. Proc. 65(d)(1)(B)-(C). These specificity rules are not "mere technical requirements." *Schmidt v. Lessard*, 414 U.S. at 476. As the Fifth Circuit explained only recently, the rule's standard means that "an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed." *Louisiana v. Biden*, 45 F.4th 841, 846 (5th Cir. 2022).

The states' proposed decree falls well short of meeting the standards of clarity and enforceability that apply in this situation. And, though the proposal itself is far from clear on what is being required, it is clear that it sets the stage for virtually non-stop litigation about its meaning and reach.

Examples abound.

- Prop. Dec. ¶ II.B.3 gives the option of using an annual under-delivery to either reduce accrued over-deliveries pro tanto or be added to accrued under-deliveries at the beginning of the year. Who is to exercise the option is an open question.

- Prop. Dec. ¶¶ II.C.3.b.i-ii gives "New Mexico" a transfer option if "Texas" agrees. The decree never identifies who counts as speaking for "New Mexico" or for "Texas," nor does it identify to whom any such communication is to be made.

- Prop. Dec. ¶ II.D.1 "require[s]" certain "water management actions" but the officials obligated to undertake such actions are not identified, what an "action" consists of, or may consist of, is not described, and to whom or what the "action" may be directed and enforceable is open-ended.

- Prop. Dec ¶ II.F.2.d requires the RGCC to "act [on the engineer advisors' accounting report] as provided for in Article XII of the Compact." Assuming the unanimity rule continues to apply, the proposal leaves unaddressed what is supposed to happen with respect to the all-crucial accounting determination is there is not a unanimous vote. An annual accounting is a necessity under the proposal, so there *must* be a final accounting by someone. The proposal leaves unexplained and unspecified what the forum or decisionmaker is to be in the absence of unanimity. Presumably, since it would be a Supreme Court decree, and the accounting a necessity, the Supreme Court would have to decide the accounting question. In addition to this problem, the referenced and incorporated Article XII specifically provides that what the RGCC finds is not conclusive "in any court or tribunal" called upon to interpret or "enforce" the Compact. This indicates that neither Reclamation, nor EBID, nor EP1, do *not* have to accept the RGCC accounting in carrying through on their obligations under the proposed decree, despite the injunction that they have to succumb.

- Prop. Index 1, § 8, authorizes the RGCC to revise data sources and methods if it deems there to be "error, bias, discrepancy, or other issue." This opens the door, by its plain language, to wholesale revisions to the index, which thus renders the index and the decree open-ended and subject to unreviewable revision at any point. Moreover, by allowing these changes, whatever they might turn out to be, to be given retroactive effect as to index deliveries and departures, the decree would allow *post hoc* delivery and allocation adjustments that undo past breaches or make-up deliveries or who knows what else.

These uncertainties, as well as others both now apparent and gestating in the interstices of the proposal, would wreak havoc on the very entities the Project exists for—the two irrigation Districts. The Districts rely on certainty of process and supply to allow annual planning for hugely important and highly dependent agricultural economies. This uncertainty and open-endedness is not worthy of the Supreme Court's imprimatur being placed on it. It is, to borrow a phrase, not ready for prime time. It should be rejected.

CONCLUSION

The Special Master should recommend denial of the joint motion and against adoption of the proposed decree. The case should be put back on the track for the second phase of trial, leaving room for the parties to return if they wish and think it worthwhile to settlement efforts.

Dated: January 20, 2023

Respectfully Submitted,

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No. 141, Original

IN THE SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Plaintiff,

and

UNITED STATES OF AMERICA,
Plaintiff-Intervenor,

vs.

STATES OF NEW MEXICO AND 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 20th of January, 2023, I caused true and correct copies of **BRIEF OF *AMICUS* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN OPPOSITION TO JOINT MOTION TO ENTER PROPOSED CONSENT DECREE** to be served by e-mail to all counsel of record and interested parties on the Service List, attached hereto. True and correct copies have also been sent via Federal Express to the below address:

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Special Master
United States Circuit Judge
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