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.

On Exception To The Third Interim Report Of The Special Master

NEW MEXICO STATE UNIVERSITY, PUBLIC SERVICE COMPANY OF NEW MEXICO AND CAMINO REAL REGIONAL UTILITY AUTHORITY'S JOINT *AMICUS CURIAE* BRIEF IN SUPPORT OF THE JOINT REPLY BY THE STATES OF TEXAS, NEW MEXICO AND COLORADO

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INTEREST OF *AMICI CURIAE*[1]

New Mexico State University ("NMSU"), Public Service Company of New Mexico ("PNM") and the Camino Real Regional Utility Authority ("CRRUA") (together "*Amici*") respectfully submit this brief in support of the Joint Reply of the States of Colorado, New Mexico and Texas ("States' Brief"). NMSU has participated as an *amicus* in this case since 2017. All three *Amici* actively participated in settlement negotiations of this matter and support entry of the proposed Consent Decree. By adopting fair and reasonable terms and by incorporating the D2 Period's grandfathering of uses prior to 1978, the Consent Decree would resolve the interstate dispute while minimizing disruption to existing water users in both New Mexico and Texas. The United States' assertion of a 1938 condition and attempt to expand the case to include intrastate claims in New Mexico would, if granted, needlessly delay and complicate resolution of this matter and throw post-1938 users into turmoil. *Amici* respectfully request the Court adopt the Third Interim Report of the Special Master ("Report") and enter the proposed Consent Decree.

Since its founding in 1890, NMSU has served as the State of New Mexico's land grant university. It relies on both groundwater from its own wells and surface water supplied by the Rio Grande Project for

[1] No person or entity other than *Amici Curiae* authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief.

irrigation of the University's agricultural lands, especially at its experimental and educational facilities. NMSU's main campus is located in Las Cruces and has continuously used groundwater for higher educational purposes for over 130 years. NMSU supports the settlement because it embodies historic use of water on which NMSU and other groundwater users have long relied.

PNM is the largest provider of electricity in New Mexico and owns and operates the Afton Power Plant located south of the City of Las Cruces, which produces 230 Megawatts of electricity, enough to power the demand of over 100,000 households. The plant uses groundwater for cooling and relies on seven groundwater rights purchased and permitted for that purpose with priority dates ranging from 1949 to 1972. After PNM gave public notice of transfer of these existing water rights to the plant, the United States did not protest the transfer, the State Engineer issued the permits and PNM constructed and opened the plant at a cost of 240 million dollars. If the Court allows the United States to derail the settlement and assert a 1938 condition, all of the Afton Power Plant's water rights would be in jeopardy.

CRRUA is a regional water and wastewater utility created by joint powers agreement between Doña Ana County and the City of Sunland Park to provide service to the City and the Santa Teresa border area of New Mexico, consisting of approximately 22,000 residents. CRRUA relies on groundwater to provide municipal and industrial supply in accordance with water right

permits issued by the New Mexico State Engineer. All of CRRUA's water rights have a post-1938 priority and are in jeopardy if the proposed Consent Order is not entered.

Along with the United States and many other water right claimants, *Amici* are parties to the state adjudication, *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (3rd Judic. Dist. N.M.) ("New Mexico adjudication"). If the Court allows the United States to make its intrastate water rights claims in this original action, *Amici* will be deprived of the opportunity to contest those claims in the New Mexico adjudication.

SUMMARY OF ARGUMENT

The United States lacks authority to bar entry of the proposed Consent Decree. Because the settlement does not implicate the Treaty with Mexico, the United States' interest lies in its capacity as operator of the Rio Grande Project. That capacity does not give a right of consent to an interstate settlement among the States that is consistent with the Compact.

First, the States, not the U.S. Bureau of Reclamation, have authority on behalf of their respective citizens to settle the Compact dispute over delivery of water to Texas. Appropriators of water are bound by and must live within their state's apportionment. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). In its role as an agent

distributing water appropriated from New Mexico and Texas, the Bureau of Reclamation has no more right to block the States' settlement than any other appropriator or citizen. The Bureau of Reclamation must conform its use of water to comply with the Compact as does any other water user.

Second, since the inception of the New Mexico adjudication, the United States has contested jurisdiction of the state adjudication court. *See United States v. City of Las Cruces, et al.*, 289 F.3d 1170, 1189 (10th Cir. 2002) ("The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction. . . ."). The United States should not be allowed to expand the scope of this original action to assert claims that belong in the New Mexico adjudication. Its intrastate claim of "Project interference" is no more than a claim for adjudication and administration of senior water rights in New Mexico. The Court should not allow the United States to circumvent the orderly adjudication and administration of water rights through "piecemeal adjudication" of a river system. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976).

Third, the United States has failed to articulate an interest that rises above its appropriative status. Like the many other appropriators of water from the Rio Grande, the United States obtained, at most, a usufructuary right by appropriation of water held either by New Mexico or Texas. The Bureau of Reclamation's function as a distributor of water within the Project does not elevate it above the reach of state law, in the

face of "the consistent thread of purposeful and continued deference to state water law" recognized by the Court. *California v. United States*, 438 U.S. 645, 678 (1978).

ARGUMENT

The United States wears two important hats in this matter. It has a treaty obligation to deliver water to Mexico. It owns and operates, along with the two irrigation districts, the Rio Grande Project, for storage and delivery of water appropriated from the States of New Mexico and Texas. As the Special Master concluded, the Consent Decree "expressly protects the Treaty by excluding Treaty water from the index measurement." Report 115. The Special Master noted: " . . . the United States does not seriously contend that the Consent Decree in any manner jeopardizes the United States's ability in this regard." *Id.* n.10. (referring to its "ability to satisfy its treaty obligations"). The Exception does not raise treaty obligations as a basis for opposing entry of the proposed Consent Decree.

That leaves the United States' interest in the Project. As discussed below, the Project interest does not imbue the United States with veto authority over a lawful consent decree among the compacting States.

I. Apportionment of water among states does not require approval by appropriators, including irrigation projects.

The role of the federal government in apportionment of water between states manifests itself in acts of Congress and equitable apportionments by the Court. *See* John Benbow Draper, *et al., Gunboats on the Colorado: Interstate Water Controversies, Past and Present*, 55 ROCKY MT. MIN. L. INST. 18-1, § 18.03 (2009) (as between states, there are three methods recognized by the Supreme Court for allocating interstate waters: (1) suit in the original jurisdiction of the Supreme Court, (2) interstate compact with consent of Congress, and (3) act of Congress).

The operation of an irrigation project by the U.S. Bureau of Reclamation is none of these. Undoubtedly the Rio Grande Project is essential to delivery and distribution of water both in New Mexico and Texas, but that function does not bestow on Project operators the right to determine how water is apportioned between two compacting States.[2] Yet, the United States argues just that, contending operation of the Rio Grande Project trumps the Compact. According to the United States, "the Compact entrusts the allocation of water below Elephant Butte to the Project" and defers to the Project "pursuant to its 'duties under the Downstream Contracts,' to accomplish the apportionment of the Rio

[2] This is not the situation where the Court held on the Colorado River that Congress had intended a federal apportionment and administration of the river. *See Arizona v. California*, 373 U.S. 546, 565 (1963).

Grande below Elephant Butte." Exception 45. The United States opposes the proposed Consent Decree because, instead of Reclamation dictating the division of water, the States would "dictate the terms of the Compact's apportionment, in disregard of the United States' downstream contracts. . . ." *Id.* at 16-17.[3] Under this purported hierarchy the States' proposed settlement, by adding a delivery obligation at the state line, accounting methods and compliance mechanisms, impermissibly interferes with the Project. *Id.* at 21-22 & 45.

The Special Master addressed the hierarchical dispute head on, examining whether "'the Compact serves the Project' or that 'the Project serves the Compact'"? Report 60. Based on a careful and thorough analysis, the Special Master concluded the latter:

> Reclamation must comply with state law to the extent such law is not expressly contrary to the provisions of a federal statute. As such, I conclude Reclamation must respect the Compacting States' exercise of their sovereign authority to enter into a compromise that affects their citizens' underlying water rights pursuant to *Hinderlider*. *See California v.*

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[3] The two irrigation districts make similar arguments. *See* EBID Br. 20-21 ("The whole purpose of the Compact was to protect the Project's water supply." And further: "This Court must reinforce . . . the supremacy of Reclamation law."); EPCWID Br. 2 ("The Rio Grande Compact gives Texas no water right of its own and no rights to Project supply. Rather, *all* of the Rio Grande water entering Texas from New Mexico is EP1's, to receive, manage, and distribute.") (footnote omitted).

> *United States*, 438 U.S. 645 (1978) (interpreting Section 8 of the Reclamation Act to require Reclamation's broad compliance with state law when not otherwise statutorily excused and not limiting the duty of compliance merely to the acquisition of rights).

Report 61. Thus, the Special Master rejected the United States' contentions that Reclamation has "a general ability to operate unaffected by state law", *id.* at 65, and that this original action must address additional Reclamation claims, namely interference with the Project in New Mexico: "The United States's interests in this original jurisdiction setting do not extend to defining who within each state receives the state's apportionment." *Id.* at 96.

Amici ask the Court to adopt the Special Master's reasoning and conclusions and offer the following argument in support.

A. The States, not the Bureau of Reclamation, have authority to settle the interstate dispute consistent with the Compact.

In 2008, the U.S. Bureau of Reclamation and the two irrigation districts entered into an operating agreement that re-allocated a substantial quantity of water from the New Mexico district to the Texas district. Tr. Ex. NM-2373, States' App. 54. Neither State was a party to the agreement, and its implementation precipitated first a lawsuit by the New Mexico Attorney General to invalidate the agreement and then this

original action filed by the State of Texas. *See* States' Brief 6. Reclamation and the districts' purpose in attempting to reconcile the effects of groundwater pumping on Project surface supply was well-intentioned but lacked authority.

The Compact apportions water to the three States, not the United States. An apportionment action is "one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people". *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932). Apportionments involve the "unique interests" belonging to sovereign states. *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984). These include the shared use of an interstate stream, where disputes "would be settled by treaty or by force" if the states were sovereign nations. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). The balancing of those interests "rises, therefore, above a mere question of local private right." *Id.* at 99. Because compact apportionment actions consider the interests of the states as sovereigns, the result binds not only the states but their water users as well, without the need for the water users to be separately represented. *See Hinderlider*, 304 U.S. at 106 ("Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment 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.").

Because, as the Special Master concluded, operations of the Rio Grande Project are subordinate to the Compact, Reclamation lacked authority in 2008 to reallocate water from New Mexico to Texas and it lacks authority now to oppose resolution of the matter among the compacting States. "Since at least 1938, it has been clear that states, in resolving disputes with other sovereigns, act on behalf of all of their citizens and may compromise their citizens' existing rights." Report 54 (citing *Hinderlider*, 304 U.S. at 106). State citizens who have appropriated water are bound by and must live within their state's apportionment. See section I.B. below (a state represents its citizens *parens patriae*). The citizens have no right to participate in or block a settlement. "Standing alone, *Hinderlider* serves as strong authority that private citizens, like the Water Districts and their members in the current dispute, generally should be excluded as actual parties from original jurisdiction cases." Report 58.

Likewise, although the Court granted limited intervention in this case, the United States, in its role as an agent distributing water appropriated from New Mexico and Texas, has no more right to block the States' settlement than any other appropriator or citizen. The Exception leans heavily on *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986), but that case simply does not apply to the United States in its capacity as an appropriator or distributor of water. Although the United States has an essential duty to deliver water, it has no more right of consent than the thousands of other Rio Grande appropriators.

Certainly the federal government has authority over interstate allocation of water, in the form of acts of Congress and decisions of this Court. But the Bureau of Reclamation does not.

Both the Special Master and the three States take pains to show the proposed Consent Decree would not prejudice the United States. They apply the standard in *Local No. 93* to demonstrate the proposed Consent Decree would not dispose of claims of or impose material obligations on the United States. Report 52-55, 97-103; States' Brief 28, 29, 31 & 36. They show any effect would be *de minimis*, Report 105, 107; States' Brief 52-54, and impose no new obligations. Report 53; States' Brief 47-52. They are persuasive. But *Amici* believe they set the bar too high.

Wearing the hat of an appropriator, the United States' participation does not warrant such consideration. This case does not dispose of any claims of the United States as appropriator because those claims belong elsewhere. Any claim of Project interference amounts to a dressed-up claim for adjudication and administration of a senior priority water right vis-à-vis other claimants to water of the Rio Grande. *See* section II, below. If indeed, the terms of a Consent Order approved and entered by this Court impose requirements on an appropriator of water, such as the Rio Grande Project, then the hierarchy between Compact and Project compels that outcome. In the same fashion that the Colorado irrigator in *Hinderlider* had to conform its irrigation practice to the 10-day rotation mandated by the respective state engineers, Project operations must

conform to the Compact, including a Consent Decree entered by the Court.[4] As the Special Master explained: "*Hinderlider* also serves as strong authority that, when sovereigns are settling matters concerning the creation, later execution, or interpretation of a compact, their respective citizens' underlying rights must be viewed as malleable." Report 58. "Properly understood, Texas and New Mexico are settling their sovereign disputes with a compromise that curtails their own citizens' rights to order or receive water." Report 80 (also citing *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945) (although settlement of interstate apportionment disputes may affect individual water rights, such effects create no inconsistency with the Compact)). The proposed Consent Decree does not put any burden on the United States that is not otherwise required by the Compact. The Bureau of Reclamation must conform its use of water to comply with the Compact as does any other water user.

B. The United States does not represent water users in New Mexico.

Underlying its request to assert "Compact" claims, the United States advances an ill-conceived view that it, not the States, represents Project water users in resolution of the compact dispute. The Special Master rejected this idea, finding that Reclamation may not assert a general interest in protecting the States' own

[4] If the Rio Grande Project had been established and operated by a private irrigation company, no one would argue the company holds a right to bar a Compact settlement among the States. The federal status of the Bureau of Reclamation also does not afford it such a right. See sections II and III.

citizens: "That is, Reclamation may not purport to represent the interests of the water users or the Water Districts as a means of opposing the Compacting States' actions." Report 65. In challenging this conclusion, the Exception vaguely points to "distinctively federal interests" in delivery of water under downstream contracts, 25 & 27, and continues to reject the premise that "the States, not the United States, represent the interests of individual water users." Exception 24 (quoting States' Mem., Sp. M. Doc. 720, 41).

The United States does not represent water users in New Mexico. In original actions, each State represents its water users *parens patriae*. *South Carolina v. North Carolina*, 558 U.S. 256, 275 (2010) ("a State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens"). "The 'parens patriae' doctrine is a recognition of the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey v. New York*, 345 U.S. 369, 372 (1953) (citing *Kentucky v. Indiana*, 281 U.S. 163, 173-74 (1930) ("A state suing, or sued, in this Court by virtue of the original jurisdiction over controversies between states must be deemed to represent all its citizens"). When a state sues in *parens patriae*, the law presumes the state will seek to achieve the objectives of all its citizens. *New Jersey v. New York*, 345 U.S. at 373.

The Special Master applied this principle: " . . . it has long been settled that states, acting as *parens patriae*, represent all of their citizens in Compact

apportionment matters." Report 5 (citing *Hinderlide*r, 304 U.S. at 106). "New Mexico and Texas, as *parens patriae* in this action, speak for all of their citizens—water users, water districts, and municipalities included." *Id*. at 16.

The Exception takes issue with this view, arguing the factors applied in the Court's 2018 opinion gave the United States special status to represent Project beneficiaries, regardless of the States' settlement. Exception 24-27. The Special Master, however, correctly analyzed and disposed of this proposition: "The Court also identified several factors in support of its ruling, none of which championed the United States's . . . interest in having the United States replace the states as *parens patriae* for their citizens." Report 105.

II. The United States is seeking to avoid the regular adjudication of its rights in state court.

For over 30 years the United States has tried to sidestep the New Mexico adjudication court's jurisdiction over Rio Grande Project claims. The New Mexico Court of Appeals, the U.S. District Court and the Tenth Circuit rebuffed these dodges, holding that Project water right claims are properly lodged in the state court. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d 372, 378-79 (N.M. Ct. App. 1993), cert. denied, 849 P.2d 372 (N.M. 1993) (upholding denial of U.S. motion to dismiss); *United States v. Elephant Butte Irrigation District, et al.*, Cause No. 97-0803 JP/RLP (D.N.M.), Memorandum, Opinion

and Order, Aug. 22, 2000, at 24-25 ("I am concerned that the United States may be using this case for 'procedural fencing.' "); *United States v. City of Las Cruces, et al.*, 289 F.3d 1170, 1189 (10th Cir. 2002) ("The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction. . . .") NMSU's 2017 *amicus* brief filed in this case describes this history in detail. *See* Brief of *Amicus Curiae* New Mexico State University in Support of Defendant State of New Mexico (June 9, 2017) (*Amicus* NMSU 2017 Brief) 31-36.

In this original action, the United States again asserts its Project water right claims, cloaking them as "Compact" claims or "Project interference", but they amount to the same thing: claims of a superior water right against other water rights in New Mexico. The Court should not expand the scope of this original action to hear claims already before and being decided by the state court. The McCarran Amendment, 43 U.S.C. § 666 (1952), and New Mexico law require that all water right claims be determined in a single, comprehensive stream system adjudication. *See Amicus* NMSU 2017 Brief 5-24.

Consistent with the McCarran Amendment, New Mexico's adjudication statutes require a comprehensive and unified proceeding:

> In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties. . . . The court

> in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved. . . .

N.M. Stat. Ann. § 72-4-17 (1907). *See United States v. Bluewater-Toltec Irrig. Dist.*, 580 F.Supp. 1434, 1438 (D.N.M. 1984), *affirmed* 806 F.2d 986 (10th Cir. 1986) (suit under New Mexico adjudication statutes satisfied McCarran Amendment's comprehensiveness requirement).

The New Mexico adjudication is determining the water rights of over 16,000 claimants in the lower Rio Grande of New Mexico, including *Amici* and the United States. *See Amicus* NMSU 2017 Brief 9-20; Response of New Mexico *Amici* in Support, Sp. M. Doc. 750, 20-21. As an appropriator of water, the United States' claim of "Project interference" must be adjudicated and administered in the same forum as all other water users. The Tenth Circuit described this rationale in the *City of Las Cruces* case:

> There are thousands of water users in New Mexico who may assert a right to Project water just as New Mexico State University and Stahmann Farms have in this case. Their claims will be adjudicated in the comprehensive New Mexico stream adjudication. By declining jurisdiction, the district court avoided a piecemeal approach to adjudicating the rights of the United States vis-a-vis innumerable water users in New Mexico.

City of Las Cruces, 289 F.3d at 1187. *See Colorado River Water Conservation Dist.*, 424 U.S. at 819 ("The clear federal policy evinced by [the McCarran Amendment] is the avoidance of piecemeal adjudication of water rights in a river system"). Determination by this Court that Reclamation has some superior right, which is binding by injunction on all other water users, would deny them their right to contest Reclamation's water right claim and would create the very piecemeal litigation this Court warned against.

The Court's 2018 opinion granted intervention to the extent the United States' claims are "essentially the same" and seek "substantially the same relief" as Texas did. *Texas v. New Mexico*, 583 U.S. 407, 408 & 415 (2018). The Court listed four factors favoring United States' intervention, all related to Treaty or Compact obligations. *Id*. 959-60. None of these factors encompass claims against New Mexico water users on behalf of the portion of the Project located in New Mexico. The Court concluded: "Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." *Id*. at 960 (emphasis added).

The United States ignored the Court's 2018 opinion and filed a motion for summary judgment in 2020 before the Special Master, persisting in making non-Compact claims in this original action targeting water uses solely affecting the State of New Mexico. *See* United States of America's Motion for Partial Summary Judgment and Memorandum in Support of Motion for Partial Summary Judgment (Nov. 5, 2020),

Sp. M. Doc. 414. After repeating Texas's claim that "New Mexico must deliver the water apportioned to Texas . . . ", the United States then demanded that New Mexico must also make delivery to "the Project lands in New Mexico." *Id.* at 21. The United States argued New Mexico has an obligation not only to deliver water to Texas but also "to effectuate the Compact apportionment to . . . the part of New Mexico below Elephant Butte. . . ." *Id.* at 30.

In ruling on cross-motions for summary judgment filed by the States and the United States, the Special Master granted Texas's motion in part, holding: "The Compact imposes on New Mexico a duty to employ its laws to protect Compact deliveries to Texas and treaty deliveries to Mexico." Special Master's Order (May 21, 2021) Sp. M. Doc. 503, p. 48. However, after observing that the United States' claims go further than Texas's and seek "more specific limitations on New Mexico's internal affairs as to water capture[,]" *id.* at 9, the Special Master denied in part the United States' motion, concluding: "I am not prepared at this time to issue a ruling as to whether the intrastate impact on New Mexicans of water capture by other New Mexicans violates a Compact duty independent of impacts on another state." *Id*. at 52. The Special Master explained denial of the United States' motion:

> Although a remedy in this case may impose specific requirements on how a state treats its own citizens, a state's citizens do not enjoy the right to assert Compact claims against their own state, and the United States'

> admission into this action as a party was based, in part, on the United States' pursuit of relief substantially similar to the relief sought by Texas.

Id. Following a substantial trial segment and settlement by the three States, the Special Master conclusively articulated the rationale for not expanding the case to resolve the United States' remaining, purely intrastate claims:

> Further concerns such as detailed questions of Reclamation law beyond the Compact apportionment—questions concerning the protection of particular water users relative to others within one state and whether select New Mexicans are effectively capturing other New Mexicans' Project allocations—are of great concern to the United States, New Mexico, many New Mexicans including EBID and its members, and to a lesser extent EP1 in Texas. Such detailed concerns regarding the relative future rights and actions of individual New Mexicans, however, are not the proper focus in this Compact-level dispute between the Compacting States, and they by no means require continued exercise of the Court's original jurisdiction for their resolution.

Report 96-97; *see also id.* at 67 & 96 (quoting *New Jersey v. New York*, 345 U.S. 369, 372-73 (1953) (recognizing that a state represents all of its water users in an original action and stating that the Court is reluctant to "be drawn into an intramural dispute over the

distribution of water within" a single state)). These remaining intramural disputes can and should be resolved in other fora. *See* Report 99-104; Response of New Mexico *Amici* in Support, Sp. M. Doc. 750, 18-23.

The Exception offers no further basis for expanding this case to include the Project's intrastate claims against other New Mexico water users. The United States couches its argument in terms of Project interference: " . . . the United States seeks to establish that New Mexico's obligation under the Compact . . . encompasses a duty not to interfere with the operation of the Project below Elephant Butte by allowing groundwater pumping or other diversions of that Project water." Exception 21-22. With respect to the Project in Texas, the proposed Consent Decree requires delivery to the state line and thus resolves any "interference" with supply to Texas caused by groundwater pumping in New Mexico. What the decree does not address is potential effect of groundwater pumping in New Mexico on supply to the portion of the Project in New Mexico. Therefore, the United States seeks an injunction prohibiting New Mexico from interfering with Project supply not only in Texas but also in New Mexico. *Id.* at 22. Rather than directly seeking water rights administration by the State, the United States seeks to drag the Court into this fray. Water rights administration among New Mexico water users is a state function that does not require an original action in the U.S. Supreme Court. See section III, below. The Special Master put it simply: "To the extent the New Mexico apportionment falls into the wrong hands within New Mexico's

borders, those claims may be addressed elsewhere." Report 103.

III. The United States holds an appropriative right that is subordinate to the States' rights in their respective waters.

The United States does not accept its status as an appropriator of water. The Exception states: "the whole point of the Court's decision was to permit the United States to pursue its own Compact claims for the purpose of vindicating 'distinctively federal interests' ". *Id*. at 27 (quoting the 2018 opinion, 138 S. Ct. at 958). However, the United States has failed to articulate an interest that rises above its appropriative interest. As discussed above, it does not claim the proposed Consent Decree will inhibit deliveries to the Republic of Mexico as required by the Treaty. Its opposition boils down to two things. First, it disagrees with the terms of state-line delivery agreed to by Texas, disapproving of "Texas's willingness to compromise its own litigating position." *Id*. at 25. As discussed above in section I.A., however, it is the States' prerogative to settle their compact claims consistent with the Compact. Second, the United States objects that its claims for "Project interference" solely in New Mexico will not be heard in this original action. This objection too is without basis, as described in section II, above.

Like the many other appropriators of water from the Rio Grande, the United States obtained, at most, a usufructuary right by appropriation of water held

either by New Mexico or Texas.[5] In New Mexico, the United States Reclamation Service commenced appropriation of water for the Rio Grande Project by filing notices with the New Mexico Territorial Engineer in 1906 and 1908. *See* First Interim Report 102-03. While such an appropriation of water may serve to establish a water right, it does not divest the governing state of ownership of the water corpus.

As a result of the Public Land Acts of 1866 and 1870, and the Desert Land Act of 1877, ownership by the United States in non-navigable waters was severed from the public domain and vested in the western states and territories. *See United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 702-09 (1899). The principle was confirmed several years later by the Court:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the designated states*, including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in

[5] Because the United States is not the ultimate beneficial user of water, its usufructuary right is limited to impounding and delivering water for use by Project farmers, who hold water rights appurtenant to their lands. Using a common fruit analogy implied by the term's etymology, the State is the owner of the fruit tree and has allowed its citizens to eat fruit. An irrigation district is the picker that distributes the fruit. *See* Barry Nicholas, *An Introduction to Roman Law* 144 (1962) (under Roman law a usufruct was "the right to use and take the fruits and profits of another's property . . . without fundamentally altering its character").

> respect of riparian rights should obtain. For since "congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94, 27 S. Ct. 655, 666, 51 L.Ed. 956, the full power of choice must remain with the state.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935) (emphasis added).

New Mexico's constitution provides that ownership of water is vested in the public. N.M. Const. art. XVI, § 2. *See State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M. 1957) ("All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. . . . The state as owner of water has the right to prescribe how it may be used"). As the New Mexico Supreme Court "has repeatedly recognized, a water right is a limited, usufructuary right providing only 'a right to use a certain amount of water to which one has a claim via beneficial use.'" *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 289 P.3d 1232, 1242 (N.M. 2012) (citations omitted). "[New Mexico] controls the use of water because it does not part with ownership; it only allows a usufructuary right to water." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1132 (10th Cir. 1981) (citing *Holguin v. Elephant Butte Irrigation Dist.*, 575 P.2d 88 (N.M. 1977); *State ex rel. Bliss v. Dority*, 225 P.2d 1007 (N.M. 1950)); *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 605-06 (10th Cir. 1940) (applying New Mexico law).

The state water code confers supervision of the State's water on the State Engineer. *See* N.M. Stat. Ann., Chapter 72, Article 2 (1907).

In 1902 Congress adopted the Reclamation Act, requiring in Section 8 the newly created Reclamation Service to appropriate and distribute water under applicable state laws. 43 U.S.C. § 383. The Service complied by filing notices to appropriate water with the New Mexico Territorial Engineer. *See* First Interim Report 102-03. In constructing and operating the Rio Grande Project, Reclamation became "a carrier and distributor of the water". *Nebraska v. Wyoming*, 325 U.S. at 615-16. *See* States' Brief 30. Consequently, the United States is both a claimant in the New Mexico adjudication and is subject to administration of water by the New Mexico State Engineer.

In *California v. United States*, the Court reviewed the long history of deference by federal statutes to state control over water resources: beginning with the Homestead Act of 1862, the Mining Act of 1866 and the Desert Land Act of 1877, *id*. at 655-58; continuing to the Reclamation Act of 1902, *id.* at 663-74; and culminating with the McCarran Amendment in 1952, *id*. at 678. The Court summed up the federal-state relationship: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id*. at 653, s*ee United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. at 702-03 (territory

of New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande upheld; the "Court unhesitatingly held that 'as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.'" (quoted in *California v. United States*, 438 U.S. at 662)). The "power to control . . . public uses of water, 'is an essential attribute of sovereignty,'" and a "State does not easily cede its sovereignty." *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013) (quoting *United States v. Alaska*, 521 U.S. 1, 5 (1997)). *See New York v. New Jersey*, 598 U.S. 218, 225 (2023).

In emphasizing federal deference to state authority over water, the Court in *California v. United States* adopted the rationale behind the McCarran Amendment. "Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666, which subjects the United States to state-court jurisdiction for general stream adjudications:"

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> . . .
>
> Since it is clear that the States have the control of water within their boundaries, it is

> essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

Id. at 678-79 (quoting S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951)). *See also United States v. New Mexico*, 438 U.S. 696, 702 (1978) (where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to state law).

In the absence of a treaty interest or a compact dispute among the States, the United States' interest is relegated to that of a state water appropriator. The Bureau of Reclamation's function as a distributor of water within the Project is critical but does not elevate it above the reach of state law, in the face of "the consistent thread of purposeful and continued deference to state water law" recognized by the Court. *California v. United States*, 438 U.S. at 678.

CONCLUSION

The Exception of the United States should be overruled.

Respectfully submitted,

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