No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO AND
STATE OF COLORADO

ON EXCEPTION TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

SUR-REPLY BRIEF FOR THE UNITED STATES

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In 2018, this Court permitted the United States, as an intervenor, to pursue the claims that it has pleaded against New Mexico under the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785. In the years since, the United States has neither obtained an adjudication on the merits of those claims nor agreed to settle them. The States nevertheless ask (Reply 10) this Court to enter a proposed "Consent Decree" that extinguishes the United States' Compact claims, imposes obligations on the United States, and purports to establish binding interpretations of the Compact—all over the United States' objection. Because the proposed decree cannot be reconciled with the Court's 2018 decision, the Court's precedents governing consent decrees, or the Compact itself, the Court should deny the States' request.

I. THE PROPOSED CONSENT DECREE WOULD DISPOSE OF THE UNITED STATES' COMPACT CLAIMS WITHOUT ITS CONSENT

A "consent decree between some of the parties * * * cannot dispose of the valid claims of nonconsenting intervenors." *Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986). The States' proposed consent decree should be rejected because it would violate that principle, depriving the United States of the right to litigate the Compact claims that it has "properly raised." *Ibid.*

A. The States Cannot Justify Depriving The United States Of Its Right To Pursue Its Compact Claims

The States do not dispute that their proposed consent decree would extinguish the United States' Compact claims without the United States' consent. Instead, the States attempt to justify that result by arguing (Reply 28) that the United States' Compact claims are not "*valid*." This Court, however, has already upheld the United States' right to pursue those claims, see *Texas* v. *New Mexico*, 138 S. Ct. 954, 958-960 (2018), and there is no reason to revisit that decision.

1. This Court's 2018 decision upheld the validity of the United States' Compact claims

This Court already considered the validity of the United States' Compact claims six Terms ago. In his First Report, the Special Master took the view that those claims were not "cognizable" and recommended their dismissal. First Interim Report of the Special Master (First Report) 229. The United States took exception, arguing that the federal government "may properly seek to enjoin New Mexico's interference with [Rio Grande] Project operations, in violation of its Compact obliga-

tions." U.S. Exception Br. 29-30 (June 9, 2017) (U.S. First Exception Br.).

This Court agreed with the United States. 138 S. Ct. at 960. The Court recognized that in apportioning the Rio Grande, the Compact does not "requir[e] New Mexico to deliver a specified amount of water annually to the Texas state line," as one might expect. *Id.* at 957. Instead, "the Compact direct[s] New Mexico to deliver water to [Elephant Butte] Reservoir," "more than 100 miles inside New Mexico." *Ibid.* At that point, the water enters "Project Storage" under the Compact and becomes "Usable Water," "which is available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(k) and (*l*), 53 Stat. 786. The federal Bureau of Reclamation, which operates the Project, then allocates the water pursuant to a treaty with Mexico and contracts with two downstream irrigation districts—one in southern New Mexico (EBID) and the other in Texas (EP1). 138 S. Ct. at 957; see Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes (1906 Treaty) arts. I-II, May 21, 1906, 34 Stat. 2953-2954. In fulfilling its responsibilities under those agreements, Reclamation effectuates the apportionment of the Rio Grande below Elephant Butte that the Compact provides for through operation of the Project. 138 S. Ct. at 959.

Given the integral role of the Project (and therefore of the United States) under the Compact, the Court recognized that the United States has "distinctively federal interests" in enforcing the Compact's terms, particularly Article IV. 138 S. Ct. at 958 (citation omitted); see *id.* at 959. Article IV imposes on New Mexico the "obligation" to "deliver" a certain amount of water to Ele-

phant Butte Reservoir. 53 Stat. 788. As all parties now agree, that obligation encompasses a corresponding "Compact-level duty" of New Mexico to avoid interfering with the Project's delivery of water below Elephant Butte. States Reply 30, 40 (citation omitted). The Court recognized that the United States has an interest in enforcing both sides of that obligation—in "seeing that water is deposited in the Reservoir consistent with the Compact's terms," as well as in ensuring that New Mexico does not interfere with the United States' fulfillment of its responsibilities under the downstream contracts and the 1906 Treaty. 138 S. Ct. at 959.

In light of the United States' distinctively federal interests, the Court permitted the United States to "pursue claims for violations of the Compact itself"—claims that seek to enforce New Mexico's Compact-level duty of non-interference. 138 S. Ct. at 958. Of course, the Court's 2018 decision did not resolve the ultimate merits of those claims. But it did recognize them as claims that the United States has a right to pursue. Those claims are thus "valid," "properly raised" claims, which the proposed consent decree cannot extinguish without the United States' consent. *Firefighters*, 478 U.S. at 529.

2. The States' attempts to relitigate the Court's 2018 decision should be rejected

The States argue (Reply 28-36) that the United States' Compact claims are not valid in light of (a) the United States' lack of an apportionment under the Compact, (b) the relationship between the Compact and Reclamation, and (c) "law of the case" assertedly established by the Special Master's First Report. This Court should reject those attempts to relitigate its 2018 decision.

a. The States first contend (Reply 29-31) that the United States has no right to pursue any Compact claims because the United States has no apportionment under the Compact. The same argument was made six Terms ago. See First Report 231; N.M. Reply 6 (July 28, 2017); Colo. Reply 11 (July 28, 2017). The Court necessarily rejected it, and for good reason. Although the Compact does not apportion water to the United States, it effectuates the apportionment below Elephant Butte through the Project's delivery of water. See p. 3, *supra*. Indeed, an important goal in Compact negotiations was "protecting water for the Project area" by "securing a supply of water for the Project." Third Interim Report of the Special Master (Third Report) 73. Accordingly, as this Court has observed, "the Compact could be thought implicitly to incorporate the Downstream Contracts [between Reclamation and the irrigation districts] by reference." 138 S. Ct. at 959. The United States therefore has distinctively federal interests in seeing that New Mexico complies with its duties under the Compact to deliver water to, and avoid interfering with, the Project. See *id.* at 959-960; p. 4, *supra*.

b. The States next contend (Reply 31) that the United States has no right to pursue its Compact claims because "it is the Compact, and not Reclamation, that sets the apportionment." But that is a false dichotomy. As this Court explained in 2018, "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts." 138 S. Ct. at 959. Thus, while the "Compact indicates that its purpose is to 'effect an equitable apportionment' of 'the waters of the Rio Grande,'" "it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Down-

stream Contracts, in which it assumed a legal responsibility to deliver" water below Elephant Butte. *Ibid.* (brackets and citation omitted).

Indeed, it is precisely because the Compact achieves its purpose through the Project that New Mexico has a "Compact-level duty" to avoid interfering with the Project's delivery of water below Elephant Butte. States Reply 30, 40 (citation omitted). It is that Compact-level duty that the United States and Texas have alleged New Mexico is violating "by allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate." 138 S. Ct. at 958.

The States' reliance (Reply 32-35) on *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), and Section 8 of the Reclamation Act, ch. 1093, 32 Stat. 390 (43 U.S.C. 383), is therefore misplaced. The States cite each for the proposition that the Compact "is the paramount authority on the division of water, and Project operations must conform to it." States Reply 35; see *id.* at 32. But if the Compact "is the paramount authority on the division of water," *id.* at 35, the States must conform to it, too. As the United States and Texas explained six Terms ago, neither *Hinderlider* nor Section 8 excuses New Mexico from complying with its Compact-level duty of non-interference—let alone precludes the United States from seeking to enforce that duty. See U.S. Reply 7-9, 15-16 (July 28, 2017); Tex. Reply 27-33 (July 28, 2017).

c. The States' reliance (Reply 35-36) on an asserted "law of the case" is also misplaced. Contrary to the States' assertion (Reply 35), the United States' understanding of the Compact is not at all "similar" to the view that New Mexico expressed in its "motion to dis-

miss that precipitated the First Report." In that motion, New Mexico argued that "under the plain language of the Compact, New Mexico's Compact obligations ended at Elephant Butte, so that remedies for any dispute below the reservoir arise under reclamation and state law." N.M. Exception Br. 16 n.7 (June 9, 2017). The Special Master's First Report rejected that argument and determined that the Compact itself requires New Mexico to "refrain from post-Compact depletions of water below Elephant Butte." First Report 197-198. What the States describe as the "law of the case" therefore supports, rather than undermines, the validity of the United States' Compact claims.[1]

3. Since the Court's 2018 decision, nothing has changed except the States' litigating positions

The States argue (Reply 38) that the considerations that drove this Court's 2018 decision have "shifted." But since 2018, only the States' litigating positions have changed: (a) New Mexico has acknowledged that it has a "Compact-level duty" of non-interference, States Reply 30, 40 (citation omitted); (b) Texas is now willing to compromise; and (c) the States have proposed a consent decree without the United States' consent. None of those developments undermines the United States' right to pursue its Compact claims; in fact, New Mexico's concession affirmatively supports the United States' claims.

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[1] The States are wrong (Reply 1) that the United States has "never properly invoked" this Court's jurisdiction under 28 U.S.C. 1251(b)(2) over the United States' Compact claims. The United States has specifically invoked that provision, see U.S. First Exception Br. 1-2, 31; U.S. Br. in Opp. to N.M. Mot. to Dismiss 51-52 (June 16, 2014); First Report 233 n.59, and New Mexico has "accept[ed]" the Court's jurisdiction under it, N.M. Exception Br. 56 n.15 (June 9, 2017).

a. Since the Court's 2018 decision, New Mexico's own understanding of its Compact obligations has changed. The Court's decision identified, as one of several considerations supporting the United States' right to pursue its Compact claims, New Mexico's concession that "the United States plays an integral role in the Compact's operation." 138 S. Ct. at 959. At the time, however, New Mexico still denied that it had any duty of non-interference under the Compact. See N.M. Reply 15-18 (July 28, 2017); p. 7, *supra*.

New Mexico now acknowledges that it has such a "Compact-level duty." States Reply 30, 40 (citation omitted). And if, as all parties now agree, the Compact protects the Project's deliveries from interference, the United States naturally has an interest in enforcing that protection. See 138 S. Ct. at 959 (recognizing the United States' related "interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms").

b. Since the Court's 2018 decision, Texas has decided to compromise its position. According to the States (Reply 41), the Court's 2018 decision left open whether the United States could continue to pursue its Compact claims if Texas decided to settle. But the States misunderstand the issue on which the Court reserved judgment. What the Court left open was whether the United States would have been permitted to pursue a compact claim in a case where the government would have been "initiat[ing] litigation" or "expand[ing] the scope of an existing controversy" by raising such a claim in the first place. 138 S. Ct. at 960. The Court nowhere suggested that once the United States was permitted to pursue its Compact claims in this case, those claims would be treated differently than any other intervenor's claims—

let alone that the United States, in pursuing its own claims, would be bound by another party's litigating decisions.

The States assert (Reply 42) that it is "hard to imagine" that the Court in 2018 contemplated the possibility that its decision would allow the United States to object to a consent decree agreed to by the States. But New Mexico, Colorado, and the United States all told the Court that permitting the United States to pursue its Compact claims could result in its taking positions at odds with positions taken by the States. See N.M. Reply 25 (July 28, 2017) (emphasizing that "[g]ranting the United States the ability to raise compact claims * * * could result in the United States taking positions or asserting theories at odds with the positions" of the States); *id.* at 30 n.7 (similar); Colo. Exception Br. 8 (June 9, 2017) (similar); U.S. Reply 18 (July 28, 2017) (noting the "possibility of such a difference in legal positions" while arguing that it was "not a valid reason to limit the United States' role as a party-plaintiff in this original action"). The Court was thus well aware of that possibility when it allowed the United States to pursue its own Compact claims.

c. The only other development that the States identify is the proposed consent decree itself. At various points, the States suggest (Reply 30, 31, 33, 35-36) that the proposed decree would deprive the United States of any valid Compact claims because the United States cannot seek relief contrary to the proposed decree. The States' theory appears to be the following: The United States cannot seek relief contrary to the Compact. The proposed decree, the argument continues, would "define" the meaning of the Compact. States Reply 30. Therefore, the argument concludes, the United States

cannot seek relief contrary to the proposed decree. See, *e.g.*, *id.* at 31 (reasoning that "[b]ecause it is the Compact * * * that sets the apportionment, the Consent Decree does not dispose of any valid claim of the United States"); *id.* at 33 (reasoning that because the apportionment is "established by the Compact," "the United States cannot complain that the Consent Decree would affect the rights of any Project beneficiary"); *id.* at 36 (similar).

That reasoning suffers from a basic flaw: It equates the proposed consent decree with the Compact. The Court in *Firefighters*, however, rejected any such equivalence. As the Court explained, the force of a consent decree derives not from "the law upon which the complaint was originally based," but rather from "the agreement of the parties." 478 U.S. at 522. The States therefore may not reach a settlement and then force a nonconsenting party to treat that settlement as the Compact. As *Firefighters* held, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party, * * * without that party's agreement." *Id.* at 529.[2]

At other points, the States suggest (Reply 30, 36-37, 39-40) that their proposed consent decree would deprive

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[2] To the extent the States contend (Reply 34-35 & n.5) that the proposed consent decree would constitute "the law[] of a[] State" under Section 8 of the Reclamation Act, 43 U.S.C. 383, that contention is incorrect. Neither a settlement between the States nor one entered as a consent decree would constitute state law. The former would be simply an agreement, while the latter would be an agreement enforceable as a federal-court judgment. See *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992). In any event, the Compact-level duty that the United States seeks to enforce would trump any inconsistent state law. See U.S. Const. Art. VI, Cl. 2; *California* v. *United States*, 438 U.S. 645, 679 (1978).

the United States of any valid Compact claims because the proposed decree would provide all the relief that those claims seek. But as our exception brief explains (at 21-23), the United States' Compact claims seek recognition of New Mexico's duty not to interfere with the Project, establishment of a 1938 baseline for assessing New Mexico's interference, and an injunction prohibiting such interference. The proposed decree would provide none of those things.

The States contend (Reply 39-40) that the proposed consent decree would "facilitate[] compliance" with a duty of non-interference. But the States cannot point to any provision in their proposed decree that would impose such a duty, let alone enjoin New Mexico from violating it. U.S. Exception Br. 22. And far from facilitating non-interference, the proposed decree would give the States a *right* to interfere with the Project by, for example, dictating water transfers and changes to Project operations. *Id.* at 22, 39-40, 45. In any event, it is not up to the States to decide (Reply 40) what would be sufficient to "address[] the United States' concern" about interference; only the United States may decide to compromise its Compact claims, see *United States* v. *Ward Baking Co.*, 376 U.S. 327, 334 (1964).[3]

The States also contend (Reply 36-37) that the United States did not plead a 1938 baseline. But the

[3] It is likewise not for the States to decide (Reply 40) what would be sufficient to satisfy the United States' interest in preventing interference with its treaty obligations. The Court has already rejected reliance on a disclaimer like the one that appears in the proposed consent decree. 138 S. Ct. at 960. And no one presented "evidence during the first phase of trial" on the "impact[]" of the proposed decree on the United States' treaty obligations, States Reply 40, because the proposed decree did not exist at that time.

United States alleged that New Mexico was violating the Compact by "permit[ting] water users who do not have contracts with [Reclamation] to intercept or interfere with delivery of Project water." U.S. Compl. 5; see *id.* ¶¶ 13-14. That allegation fairly encompassed a baseline of 1938—the year of the Compact's signing—for assessing the degree of interference. After all, everyone understood the United States to be raising "essentially the same claims" as Texas, which undisputedly pleaded a 1938 baseline. 138 S. Ct. at 956; see Tex. Compl. ¶ 18; N.M. Reply 40 (July 28, 2017) ("[T]he United States' claims are 'nearly identical' to Texas's claims.") (citation omitted). And no one questioned the United States' right to pursue a 1938 baseline at either summary judgment or trial, part of which has already concluded. See, *e.g.*, Doc. 207, at 9; Doc. 414, at 25; Doc. 600, at 3-5. In any event, a 1938 baseline is only one aspect of what the United States' Compact claims seek. U.S. Exception Br. 21-23.

B. Other Claims Cannot Make Up For The United States' Loss Of Its Compact Claims

The States acknowledge that their proposed consent decree would "resolve[] the Compact dispute," States Reply 12, such that "the only remaining" claims that the United States could pursue "would relate to reclamation law or 'intramural disputes' over the distribution of water within New Mexico," *id.* at 42 (brackets and citation omitted). The States accordingly do not dispute that even if the United States were to pursue such claims in other fora, it would be unable to obtain what its Compact claims seek here. U.S. Exception Br. 28. The possibility of such other claims therefore cannot justify extinguishing the United States' Compact clams.

II. THE PROPOSED CONSENT DECREE WOULD IMPOSE OBLIGATIONS ON THE UNITED STATES WITHOUT ITS CONSENT

The proposed consent decree should also be rejected because it would violate the principle that parties who choose to settle "may not impose duties or obligations on a third party, without that party's agreement." *Firefighters*, 478 U.S. at 529.

A. The Proposed Consent Decree Would Impose Obligations On The United States

Under *Firefighters*, the question is not whether a consent decree would have some "effect" on a nonconsenting party. States Reply 46. It is whether a consent decree would "impose[] obligations" on a nonconsenting party, *Firefighters*, 478 U.S. at 529—that is, "bind" that party "to do or not to do" something, *id.* at 530.

As our exception brief explains (at 30-34), the proposed consent decree is full of provisions that would bind the United States in precisely that manner. One set of provisions would require the United States to make Project operations and accounting "consistent with" the decree so that the United States "does not interfere with New Mexico's or Texas's rights and entitlements" under the decree's Effective El Paso Index (EEPI). Third Report Add. 20; see *id.* at 8. A second set of provisions would require the United States to "effectuate" the apportionment set forth in the decree by, for example, "transferring water" from EBID to EP1. *Id.* at 10, 15. And a third set of provisions would require the United States to "operate[] and maintain[]" the El Paso Gage in accordance with rules promulgated by the Rio Grande Compact Commission. *Id.* at 10.

The States do not dispute that their proposed consent decree would bind the United States in those ways.

In fact, they acknowledge that their proposed decree would define "the contours" of the United States' "obligations." States Reply 30; see *id.* at 50 (characterizing the proposed decree as "defin[ing] in more detail" the United States' "obligations"). Because the proposed decree would do what *Firefighters* forbids, it should be rejected.

B. The Obligations Imposed On The United States Would Necessarily Be New

The States argue (Reply 47) that their proposed consent decree would not impose any "new" obligations on the United States. But as our exception brief explains (at 38-39), all of the United States' obligations in the proposed consent decree would be new because the decree itself would create them. See *Firefighters*, 478 U.S. at 518, 523, 530 (explaining that obligations embodied in a consent decree are created by the parties' agreement and enforceable by contempt of court). That is particularly obvious here, where all of the United States' obligations would relate to something that never existed before—the EEPI.

The States nevertheless contend (Reply 47) that the United States' obligations should not be considered "new" because the United States has "a preexisting duty to operate the Project in compliance with the Compact." But regardless of what preexisting duties the United States may (or may not) have under the Compact, the *Compact* would not be the source of the United States' obligations under the proposed *consent decree*. U.S. Exception Br. 39-40. After all, "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Firefighters*, 478 U.S. at 522.

The States never grapple with that principle. Instead, they repeatedly conflate their proposed consent decree with the Compact. See, *e.g.*, States Reply 49-51, 54. In their view, the States can agree among themselves what the Compact means and then force the United States to treat that agreement as "part of the constellation of laws the United States must follow when operating the Project." *Id.* at 15; see *id.* at 16-19. But *Firefighters* makes clear that the States, merely by agreeing among themselves, cannot convert their views of the Compact into any sort of law binding on nonconsenting parties. 478 U.S. at 529. If the States wish to see their views become "part of the constellation of laws the United States must follow," States Reply 15, they must seek an adjudication on the merits of this Compact dispute or congressional approval of their agreement.

C. The Obligations Imposed On The United States Cannot Be Justified As Merely De Minimis

The States contend (Reply 52) that the obligations imposed on the United States would be merely de minimis. But without the United States' consent, there can be no agreement that creates *any* obligations, de minimis or not, on the United States. *Firefighters*, 478 U.S. at 522; see U.S. Exception Br. 29-30, 40. The States observe (Reply 52-53) that this case arises under the Court's original jurisdiction. But that is no reason to disregard the fundamental principle that a consent decree may not "impose[] obligations on a party that did not consent to the decree." *Firefighters*, 478 U.S. at 529.

Disregarding that principle would be particularly unwarranted here, given the United States' sovereign immunity. U.S. Exception Br. 40-41. Contrary to the States' assertion (Reply 53), that immunity serves not as a "sword," but rather as an additional "shield," against

obligations imposed on the United States without its consent. The States also err in suggesting (Reply 54) that the United States has waived its immunity. The United States intervened as a plaintiff to assert Compact claims and will be bound by the Court's adjudication of those claims on the merits. But the United States is not a defendant and has never agreed to be bound by, or waived its immunity to, the remedial terms of a consent decree to which it has not consented. See Doc. 338, at 14-22.

In any event, as our exception brief explains (at 30-34, 41-43), the obligations imposed on the United States would hardly be de minimis. The States suggest (Reply 50) that the United States would have some discretion in deciding how to make Project operations "conform to" the decree. But all agree that the United States could not simply maintain its current operations. U.S. Exception Br. 34. According to the States' own experts, the United States would need to make a host of changes—including to the equation used in allocating water to the Districts—to avoid interfering with the decree's apportionment. See, *e.g.*, Barroll 2d Decl. ¶¶ 11-14, Doc. 755-E; Brandes 2d Decl. ¶¶ 20, 28, 33, Doc. 755-B; G. Sullivan Decl. ¶¶ 21-22, Doc. 720-7; Barroll Decl. ¶¶ 40-42, Doc. 720-6.

The States also assert (Reply 51) that requiring the United States to transfer water at the States' direction would be consistent with the downstream contracts and historical practice. Since even before the Compact was signed, however, the downstream contracts have reserved to the United States the right to control releases from Project reservoirs and allocate Project water between the Districts, while requiring the Districts to reimburse the United States for the costs of delivering

water. See, *e.g.*, Doc. 88, at 13-14, 19, 27-28, 32 (1937 contracts arts. 9, 10, 21); Doc. 414-7, at 125-127, 129-130, 145-148, 150-151 (1979 and 1980 contracts arts. 3, 4, 6); Doc. 414-4, at 168 (2008 Operating Agreement § 1.7). Because the United States would be forced to release and reallocate water out of proportion to the payments made by the Districts, the proposed decree would be contrary to the downstream contracts and historical Project operations.

III. THE PROPOSED CONSENT DECREE WOULD BE CONTRARY TO THE COMPACT

As the Director of New Mexico's Interstate Stream Commission has acknowledged, the proposed consent decree would be akin to a "new compact."[4] The proposed decree would redefine New Mexico's delivery obligation, refashion the federal government's and the States' respective roles, and replace the relevant baseline—all without Congress's approval. U.S. Exception Br. 43-47. Because those changes would be contrary to the Compact, the proposed decree should be rejected.

A. The Compact Precludes Redefining New Mexico's Obligation As A State-Line Delivery Requirement

As our exception brief explains (at 43-44), the proposed consent decree would do exactly what the Compact's authors chose not to do: define New Mexico's Article IV obligation as a requirement "to deliver a speci-

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[4] Hannah Grover, *Climate Change, Compact Compliance Pose Challenges to Irrigation Districts on the Rio Grande*, N.M. Political Report, Oct. 4, 2023, https://nmpoliticalreport.com/news/climate-change-compact-compliance-poise-challenges-to-irrigation-districts-on-the-rio-grande. The Interstate Stream Commission is the state agency "responsible for understanding New Mexico's rights and obligations" under interstate compacts. Lopez Decl. ¶ 7, Doc. 755-D.

fied amount of water annually to the Texas state line." 138 S. Ct. at 957. The States contend (Reply 22) that there is no "express provision" in the Compact that precludes defining New Mexico's obligation in that way. But Article IV expressly requires New Mexico to deliver water to Elephant Butte Reservoir, not the state line. 53 Stat. at 788; see 138 S. Ct. at 957 n.*. By converting New Mexico's obligation into a state-line delivery requirement, the proposed decree would essentially rewrite Article IV, with the effect of allowing New Mexico's compliance with that new state-line requirement to excuse its depletion of "water below the Reservoir in ways the Downstream Contracts do not anticipate." 138 S. Ct. at 958.

The States argue (Reply 21-23) that Articles II and XII of the Compact allow them to redefine New Mexico's delivery obligation. But Article II merely permits new gages "for the securing of records required for the carrying out of the Compact," 53 Stat. 786, while Article XII merely grants the Rio Grande Compact Commission jurisdiction over "the maintenance of records having a bearing upon the administration of th[e] Compact," *id.* at 791. Those provisions allow new gages to be used to assess a State's compliance with its existing obligations under the Compact. They do not permit the States to modify those obligations or create new ones. Indeed, Article V expressly provides that new gages may be substituted for existing ones only if they "will result in substantially the same results, so far as the rights and obligations to deliver water are concerned." *Id.* at 789.[5]

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[5] Contrary to the States' suggestion, the United States has not conceded that the Compact allows the States to define Texas's ap-

The States also contend (Reply 21) that if New Mexico's obligation cannot be treated as a state-line delivery requirement, there will be "no defined apportionment at all," and the division of water will be subject to the United States' "unilateral actions." But the apportionment will be accomplished in the same way it has always been—by "the Downstream Contracts" that "the Compact could be thought implicitly to incorporate." 138 S. Ct. at 959. And far from acting unilaterally, the United States administers the Project pursuant to the downstream contracts, the 1906 Treaty, and federal reclamation law. The States thus err in suggesting (Reply 33) that the United States has "unchecked discretion to change the division of water."

B. The Compact Precludes The States From Making The United States Their Agent

As our exception brief explains (at 44-46), the proposed consent decree would also turn the United States into an agent of the States by allowing the States to dictate interdistrict water transfers and changes to Project operations and accounting. See EBID Amicus Br. 19-21; EP1 Amicus Br. 20-30. The States contend (Reply 25) that there is no "specific Compact language" preventing the States from assuming such power. But the Compact makes clear that the apportionment below Elephant Butte is to be accomplished pursuant to the downstream contracts with the Districts, not dictated by the States. 138 S. Ct. at 959. The Compact thus de-

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portionment as "a measurable sum" at the El Paso Gage. States Reply 22-23 (citation omitted). The United States stated only that an index methodology could be included as a "validating measure" in a remedial decree that would recognize, and require New Mexico to comply with, its Compact-level duty to prevent interference with the Project. Doc. 754, at 51.

fines "Project Storage" to include Elephant Butte Reservoir, Art. I(k), 53 Stat. 786; requires New Mexico to deliver water to the Reservoir and therefore to the Project, Art. IV, 53 Stat. 788; and relies on the Project's delivery of water "in accordance with irrigation demands" to EBID, EP1, and Mexico to accomplish the apportionment, Art. I(*l*), 53 Stat. 786.

The States make much (Reply 24) of the Court's statement that "the United States might be said to serve, through the Downstream Contracts, as a sort of '"agent" of *the Compact*.'" 138 S. Ct. at 959 (emphasis added; citation omitted). But that analogy simply reinforces that "the Downstream Contracts" are "essential to the fulfillment of the Compact's expressly stated purpose." *Ibid.* It does not suggest that the States may interfere with those contracts—let alone make the United States an agent of *the States*.

C. The Compact Forecloses A D2 Baseline

As our exception brief explains (at 46-47), the only plausible baseline for assessing New Mexico's compliance with its duty of non-interference is the baseline that existed when the Compact was signed in 1938. The States accept (Reply 30) that New Mexico has a Compact-level duty to avoid interference beyond a particular baseline. But they argue (Reply 26) that the relevant baseline is one drawn from the D2 Period (1951-1978) given the United States' alleged "course of performance." That argument fails.

First, even assuming that the actions of the United States, which is not a party to the Compact, could establish a relevant "course of performance," they would not do so here. Contrary to the States' assertion (Reply 26), the evidence does not show that the United States engaged in a course of "actively *encourag*[*ing*]" ground-

water pumping after the Compact was signed. For example, the States cite a Project manager's request in 1954 that "[f]armers with good irrigation wells" "use them" during a particularly severe drought. States Reply Add. 2. But that request took the wells as given and asked farmers to use them only to "meet the exigencies of the moment." 10/18/21 Trial Tr. 231, Doc. 701-8. Such "ad hoc" requests are insufficient to establish a course of conduct. *Ibid.*; see Restatement (Second) of Contracts § 202 cmt. g (1981) (Restatement).

The States also cite (Reply 27) the 2008 Operating Agreement between the United States and the Districts. But as our exception brief explains (at 42), that agreement uses the D2 Curve only descriptively and takes no position on whether any particular level of interference by groundwater pumping is consistent with the Compact. The expert witness referenced by the States (Reply 27) likewise expressed no opinion on that question.

Second, a "course of performance" is "merely" a "guide[]" to interpreting the meaning of a contract "at the time the contract was made." Restatement § 202(4) & cmts. a and b. "Conduct must be weighed in the light of the terms of the agreement and their possible meanings." *Id.* § 202 cmt. g. Here, it is simply implausible that when the Compact was signed in 1938, it incorporated a baseline that did not yet exist and would not exist for decades.

IV. REJECTING THE PROPOSED DECREE WOULD NOT DISCOURAGE LEGITIMATE SETTLEMENTS

Finally, the States contend (Reply 55) that rejecting their proposed consent decree would "have a chilling effect on future interstate water settlements." But there is nothing new about the principles articulated in *Firefighters*. 478 U.S. at 525-526, 529. Those principles have

long governed consent decrees without discouraging settlements. Allowing the States to disregard those well-established principles would only encourage illegitimate consent decrees like the one here—consent decrees in name only, which bind other parties and dispose of their claims without their actual consent.

The Special Master found it "difficult to envision a resolution to this matter that might be superior to the Consent Decree." Third Report 15. But a better resolution would be one that is consistent with this Court's precedents and the Compact. That resolution may be an adjudication or a settlement of each party's claims. But it cannot be a "Consent Decree" that binds the United States without the government's consent.

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For the foregoing reasons and those stated in our exception brief, the States' joint motion to enter a consent decree should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

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