No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

Order

March 31, 2020

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I. Summary

The parties allege generally that there has been a breach of the Rio Grande Compact (the "Compact") and that they have suffered damages for several possible reasons, including: the past and present operation of the Rio Grande Project (the "Project"); the maintenance or lack of maintenance of Project infrastructure; and the excessive diversion of hydrologically connected surface water, ground water, and return flows downstream of the Elephant Butte Reservoir (the "Reservoir") in New Mexico, Texas, and Mexico. Inherent in these allegations is a fundamental disagreement as to Compact interpretation regarding the underlying equitable apportionment between the states and the duties imposed on New Mexico and Texas downstream of the Reservoir. The counterclaims dismissed with the present order carve out individual theories of causation or harm—often based at least in part on sources of law outside the Compact or on contracts between entities not party to this action—and attempt to present them as independent claims.

Today's ruling reflects the view that the present action is not a forum for aggregating several individual claims addressing particular, potentially narrow errors in the management of the Rio Grande or attacking particular contracts for the delivery of water. A great deal of historic and scientific evidence may be material to proving (and defending against) the broad, pending Compact claims which ask fundamental questions such as where the waters of the Rio Grande have been going, where they should have been going, and where they should go in the future. It is important to note, however, that this ruling does not address the issue of the admissibility of any evidence. The dismissal of certain claims does not necessarily mean evidence relevant to those claims may not be admissible on the larger issues of Compact interpretation and performance. Those are all issues left for another day.

First, the United States's motion to dismiss New Mexico's counterclaims 2,3,and 5–9 based on sovereign immunity is granted. The United States has agreed, as an intervening plaintiff, it will be bound by the Court's ruling on the broad pending claims. But there is no Congressional waiver of immunity to permit counterclaims against the United States, particularly any claims seeking damages or injunctive relief. It is somewhat less clear to me whether sovereign immunity bars declaratory relief as to the United States's obligations under the Compact and as Project manager. I am not prepared at this time to determine the full extent of sovereign immunity as to declaratory relief, including as to counterclaims that essentially mirror claims the United States has asserted. However, to the extent the Court ultimately determines sovereign immunity does bar such declaratory relief, it is my belief that nothing the United States has done waives that immunity.

Second, the joint motion to dismiss New Mexico's counterclaims based on a failure to seek leave from the Supreme Court itself is denied.

Third, the motion to dismiss New Mexico's counterclaims 2 and 5–9 for failure to state a claim is granted.

Fourth, Texas's motion to dismiss New Mexico's affirmative defense of failure to exhaust remedies is granted.

Fifth, I reserve ruling on Texas's motion to dismiss New Mexico's affirmative defenses of unclean hands, acceptance, waiver, estoppel, and laches.

Finally, New Mexico's motion for leave to amend its pleadings is denied.

II. Background

Congress approved the Compact in 1939 after its ratification by Texas, New Mexico, and Colorado. Act of May 31, 1939, 53 Stat. 785. According to the Compact's preamble, these states entered into the Compact to "remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and . . . for the purpose of effecting an equitable apportionment of such waters." *Id.* at 785. Among other things, the Compact: imposed water delivery obligations on Colorado and New Mexico, *id.* at 787–88 (Articles III–IV); expressly disavowed the impairment of "obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes," *id.* at 792 (Article XVI); provided an accounting system to track water debits and credits for Colorado and New Mexico, *id.* at 789 (Article VI); restricted the amount of water Colorado and New Mexico could hold in certain storage reservoirs at certain times and restricted the building of additional reservoirs, *id.* at 790 (Article VII); empowered Texas to call for releases of water stored by New Mexico and Colorado, *id.* at 790 (Article VIII); empowered New Mexico to call for releases of water stored by Colorado, *id.*; and referenced a pre-existing federal reclamation project that included several infrastructure features, including a primary dam and reservoir: the Rio Grande Project (including the Elephant Butte Dam (the "Dam") and the Reservoir), *id.* at 786 (Article I(k) & *passim*).

The Compact requires Colorado to meet its water delivery obligation at the Colorado–New Mexico border. *Id.* at 787 (Article III). The Compact currently requires New Mexico to deliver water at the Reservoir, a location approximately 105 miles upstream from the Texas border. *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). The United States, through the Department of Reclamation, delivers Project water to the Elephant Butte Irrigation District ("EBID") which, in turn,

delivers water to New Mexican water users downstream from the Dam who have contracts with the Secretary of the Interior. Similarly, the United States delivers project water to the El Paso County Irrigation District Number 1 ("EPCID"), which in turn delivers water to Texan water users who have contracts with the Secretary of the Interior. These water districts are successors to water user associations that predate the Compact, and they entered into contracts ("Downstream Contracts") with each other and the United States nearly simultaneously with Compact formation.

Through the Downstream Contracts, "the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State—roughly 57% for New Mexico and 43% for Texas." *Texas v. New Mexico*, 138 S. Ct. at 957. The existence of the Project and the Downstream Contracts in large part explains why Texas, in 1938, agreed to a New Mexico delivery location within New Mexico rather than at the Texas border. Through the Downstream Contracts, the United States "assumed a legal responsibility to deliver a certain amount of water to Texas," such that "the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Id.* at 959 (internal quotation marks omitted). This unusual situation, however, has given rise to many disagreements.

In particular, Texas and New Mexico disagree as to their respective Compact duties and rights downstream of the Reservoir. In broad strokes, Texas asserts the Compact itself imposes restrictions on New Mexico's water use between the Reservoir and Texas. According to Texas, the requirement that New Mexico "deliver" water into the Reservoir carries with it a downstream duty to not interfere with the United States's delivery of Project water to Texas. Texas also asserts the

United States, as operator of the Project, may adjust water deliveries from the Project to New Mexico and Texas water users to offset allegedly impermissible and expanded water use in New Mexico. New Mexico contests these assertions.

Inherent in this disagreement is a fundamental question of whether and to what extent New Mexico's equitable apportionment of the Rio Grande pursuant to the Compact includes Project water deliveries and/or other hydrologically connected waters downstream of the Reservoir.

To settle these disagreements, Texas petitioned the Supreme Court in January 2013 seeking to initiate an original jurisdiction action alleging New Mexico was violating the Compact. Texas alleged New Mexico was allowing water users to capture certain Project irrigation return flows, Rio Grande surface water, and hydrologically connected groundwater downstream of the Reservoir. According to Texas, this violated the Compact, interfered with Project water deliveries in Texas, and interfered with Texas's receipt of its Compact-defined equitable apportionment. In January 2014, the Court granted the petition.

Subsequently, the United States and the water districts moved to intervene. New Mexico resisted the intervention and moved to dismiss Texas's complaint. In February 2017, the First Special Master issued a First Interim Report recommending the Supreme Court deny New Mexico's motion to dismiss, deny the water districts' motions to intervene, deny the United States' motion to intervene to assert Compact violations, but allow the United States to enter as a plaintiff asserting claims against New Mexico under Reclamation law and pursuant to the Court's non-exclusive jurisdiction.

New Mexico filed exceptions with the Supreme Court challenging certain aspects of the analysis and conclusions contained in the First Interim Report, including the historical analysis, but did not file an exception regarding the

ultimate denial of its motion to dismiss. The United States and Colorado also filed exceptions, and all parties and several amici filed briefs regarding the exceptions. In October 2017, the Supreme Court agreed to hear two exceptions: the United States exception seeking to intervene to assert Compact claims, and the Colorado exception seeking to limit the scope of any United States claims to those arising from the 1906 Treaty with Mexico. The Court also entered orders expressly but summarily denying New Mexico's motion to dismiss and the water districts' motions to intervene. *Texas v. New* Mexico, 138 S. Ct. 349 (2017) (Mem.). In March 2018, the Supreme Court granted the United States's exception, permitting the United States to intervene to assert Compact claims. *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). The Court concluded: "The United States's exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion." *Id.* The Court did not expressly adopt the First Interim Report.

The Supreme Court summarized several seemingly undisputed historical facts and listed several "considerations" that "taken collectively" supported the conclusion that the United States could pursue its proposed claims. *Id.* at 959. The four considerations that, taken collectively, the Court found persuasive were as follows:

> *First*, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. . . .
>
> *Second*, New Mexico has conceded that the United States plays an integral role in the Compact's operation. . . .
>
> *Third*, a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations. . . .
>
> *Fourth*, the United States . . . asserted its Compact claims in [the present case] brought by Texas, seeking substantially the same relief and without [Texas's] objection.

Id. at 959–60.

Following remand and appointment of the current, undersigned Special Master, New Mexico filed with the office of the Special Master its answer and nine affirmative defenses along with two counterclaims against Texas (counterclaims 1 and 4), six counterclaims against the United States (counterclaims 2, 3, 5, 6, 8, and 9), and one counterclaim against Texas and the United States (counterclaim 7). New Mexico did not seek leave from the Court itself prior to filing its counterclaims with the Special Master.

Now pending before the Special Master are several contested motions. Texas and the United States filed motions to dismiss or motions for partial judgment as to New Mexico's counterclaims and affirmative defenses. The United States, joined by Texas, argues the United States has not waived sovereign immunity to expose itself to any counterclaims, whether for damages or for declaratory or injunctive relief. Texas, joined by the United States, argues New Mexico cannot file counterclaims with the Special Master without first seeking leave of the Court. In addition, Texas asserts as an affirmative defense to New Mexico's counterclaims that the subject matter of the counterclaims exceeds the scope of the Court's initial grant of leave to file this original jurisdiction action. Texas and the United States also argue various discrete counterclaims and affirmative defenses fail under the standards applicable to Federal Rules of Civil Procedure 12(b)(6), 12(c), and 56. Colorado resists these motions, in part. New Mexico resists these motions and also moves for leave to amend its pleadings. Several amici have filed briefs material to the pending motions.

In addition, all parties seek a declaration of matters previously decided, taking into account all previous filings in this case but focusing primarily on: the First Interim Report of the Special Master dated February 9, 2017, the exceptions to that report, and the Supreme Court's March 2018 opinion. Through these motions and arguments, the parties address various legal issues including but not

limited to the law of the case doctrine as applied to original jurisdiction actions, the consequences of unsuccessfully excepting to a special master's determinations, and the consequences of failing to file exceptions to a special master's determinations. Further, Texas seeks the exclusion of evidence as to certain issues it deems resolved.[1]

Analysis of the motions to dismiss depends in part on a comparison between the pending claims and New Mexico's counterclaims. *See, e.g.*, *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) ("[A]n understanding of the scope of this litigation as envisioned under the initial pleadings is the critical first step in . . . consideration of the motions to amend."). I therefore describe the key allegations and demands for relief as brought by Texas and the United States and compare these items to New Mexico's counterclaims.

In its complaint, Texas asserts:

> New Mexico, through the actions of its officers, agents and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by . . . entities within New Mexico for use within New Mexico. The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas. . . . . These unlawful . . . diversions and extractions . . . intercept water that in 1938 would have been available for use in Texas, and convert that water for use in New Mexico . . . . requir[ing] more water to be released from Elephant Butte Reservoir depleting Rio Grande Project storage. These extractions also create deficits in tributary underground water, which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water. [¶18]

[1] I will address the pending motions concerning the law of the case, matters previously decided, and the related motion in limine in a separate order.

Texas also asserts that

> New Mexico has attempted and continues to attempt to control the operation of the Rio Grande Project in contravention of the Rio Grande Project Act and the Rio Grande Compact, through novel interpretations of the Rio Grande Compact [in federal district court] and in Rio Grande Compact Commission meetings. [¶ 20]
>
> [I]n New Mexico state court[, New Mexico has also] advance[d] novel views of the 1902 Reclamation Act . . . adverse to Texas' rights under the Rio Grande Compact and the Rio Grande Project Act. [¶ 21]

Texas concludes:

> In essence, New Mexico asserts that so long as it has made Rio Grande Compact deliveries into Elephant Butte Reservoir, New Mexico may intercept and take this same water for use in New Mexico once it is released from Elephant Butte Reservoir. Thus, water allocated to Texas from the Rio Grande Project and the Rio Grande Compact would never leave New Mexico. These actions constitute a breach of New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing implicit in the Rio Grande Compact. [¶ 21]

Texas's ultimate demands for relief are broad in scope but limited in detail. Texas asks that the Court:

> 1. Declare the rights of the State of Texas to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act;
>
> 2. Issue its Decree commanding the State of New Mexico, its officers, citizens and political subdivisions, to: (a) deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act; and (b) cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project;
>
> 3. Award to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the States of Texas as a result of the State of New Mexico's past and continuing

> violations of the Rio Grande Compact and the Rio Grande Project Act; and
>
> 4. Grant all such other costs and relief in law or in equity, that the Court deems just and proper.

The United States's complaint in intervention contains claims consistent in scope with Texas's claims. The United States explains its interests in the dispute as the operator of the Project and as a party to the 1906 Treaty with the duty to deliver water to Mexico. The United States asserts factual allegations concerning the relationship between Project water deliveries and groundwater. Finally, the United States sets forth demands for relief that are similar to Texas's demands. The United States asks that the Court:

> (a) declare that New Mexico, as a party to the Compact:
>
> (i) may not permit water users who do not have contracts with the Secretary of the Interior to intercept or interfere with the delivery of Project water to Project beneficiaries or to Mexico,
>
> (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and
>
> (iii) must affirmatively act to prohibit such interception or interference;
>
> (b) permanently enjoin and prohibit New Mexico from permitting such interception and interference;
>
> (c) mandate that New Mexico affirmatively prevent such interception and interference; and
>
> (d) grant such other relief as the Court may deem appropriate and necessary to protect the rights, duties, and obligations of the United States with respect to the waters of the Rio Grande.

New Mexico asserts nine counterclaims. Counterclaim 1 alleges Texas has violated the Compact by allowing diversions of surface water and hydrologically

connected groundwater and by failing to properly account for return flows. According to New Mexico, this alleged excess water consumption in Texas interferes with Project water deliveries to (1) New Mexico water users near the Texas border and (2) Texas water users farther downstream, thus resulting in Texas calling for greater Project water releases than would otherwise be necessary. To a large extent, New Mexico's Counterclaim 1 is a mirror image of Texas's own claims.[2]

Counterclaim 2 alleges the United States has interfered with and violated the Compact by "implement[ing] changes to Project operations that have materially altered the apportionment of water between New Mexico and Texas." Counterclaim 2 focuses broadly on changes to Project operations, with primary focus on Project operational changes pursuant to a 2008 operating agreement (the "2008 Operating Agreement") between the United States and the two water districts that receive and further distribute water from the Project. Counterclaim 2 asserts that Texas's equitable apportionment of water pursuant to the Compact is limited to that amount of water needed to deliver an equal amount of Project water per acre to irrigated Project lands in Texas and in New Mexico but that the 2008 Operating Agreement and other operational changes result in an unequal per-acre delivery of Project water to Project lands in Texas and New Mexico.

Counterclaim 3 alleges the United States violated the Compact by failing to obtain New Mexico's consent before releasing certain water from the Elephant Butte Reservoir that was stored "Credit Water" under New Mexico's understanding of the Compact's water accounting system.

[2] Other than challenging the propriety of filing a counterclaim with the Special Master without first obtaining leave of the Court, Texas does not move for dismissal of Counterclaims 1 and 4.

Counterclaim 4 alleges Texas has violated the Compact and has been unjustly enriched based on Project operations since at least 2008. Counterclaim 4 against Texas largely mirrors Counterclaim 2 against the United States.

Counterclaim 5 alleges the United States has violated the Water Supply Act, codified in part at 43 U.S.C. § 390b, by making major operational changes in the Project without obtaining approval from Congress.

Counterclaim 6 alleges the United States has failed "to conduct annual Project accounting in a manner that is consistent with the Compact." New Mexico focuses primarily upon a failure to account for groundwater pumping and surface water diversions in Texas and Mexico.

Counterclaim 7 alleges Texas and the United States have violated the Compact and the Miscellaneous Purposes Act, codified in part at 43 U.S.C. § 521, by diverting water for non-Compact and non-irrigation purposes. Counterclaim 7 focuses on the diversion of Project water for municipal and industrial use pursuant to Miscellaneous Purposes Act contracts between the Secretary of the Interior and water users.

Counterclaim 8 alleges the United States has improperly maintained project infrastructure by, among other things, allowing silt to fill reservoirs and allowing water-consuming vegetation to grow, leading to Project inefficiencies that waste Project water and harm New Mexico by requiring greater releases of Project water for Texas.

Finally, Counterclaim 9 alleges the United States has failed to enforce the 1906 Treaty with Mexico by failing to stop the diversion of surface water and the pumping of hydrologically connected groundwater in Mexico.

In its ultimate demands for relief, New Mexico asks that the Court:

A. Declare the rights of the State of New Mexico to the waters of the Rio Grande pursuant to and consistent with the Compact.

B. Issue its Decree commanding the State of Texas, its officers, citizens and political subdivisions to cease and desist all actions which violate the Compact;

C. Issue its Decree commanding the United States, its officers, and agencies to cease and desist all actions which violate the Compact;

D. Award to the State of New Mexico all damages and other relief, including pre-and post-judgment interest, for the injury suffered by the State of New Mexico as a result of the State of Texas's unjust enrichment and its past and continuing violations of the Compact;

E. Find and declare that the 2008 Operating Agreement violates the Compact and the Water Supply Act and is void as a matter of law, and enjoin the United States, its officers, and its agencies from implementing the 2008 Operating Agreement;

F. Declare that [Miscellaneous Purposes Act] contracts the United States has executed with the City of El Paso and others violate the Compact and the [Miscellaneous Purposes Act] and enjoin the United States, its officers, and its agencies from releasing and delivering Project water for non-irrigation purposes until the United States complies with the [Miscellaneous Purposes Act] and the Compact;

G. Declare that the United States, its officers, and its agencies are not authorized to reduce or release New Mexico's Compact Credit Water from Project Storage for any purpose without the express authorization of New Mexico or the Commission and enjoin the United States, its officers, and its agencies from reducing or releasing Compact Credit Water except as directed by New Mexico or the Commission;

H. Declare that the United States, its officers, and its agencies have violated the Compact by failing to properly account for Project operations and order the United States, its officers, and its agencies to properly account for Project operations, including in Texas and Mexico;

I. Declare that the United States, its officers, and its agencies have violated the Compact by failing to maintain the Project and order the

United States, its officers, and its agencies to properly maintain Project infrastructure under the United States' control;

J. Declare that the United States, its officers, and its agencies have violated the Compact by failing to enforce the 1906 Convention and order the United States, its officers, and its agencies to prevent Project water allocations from being diminished by the loss of water to Mexico;

K. Award to the State of New Mexico all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of New Mexico as a result of the United States' past and continuing violations of the Compact;

L. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

III. Discussion

A. Sovereign Immunity

The United States, joined by Texas, moves to dismiss all counterclaims against the United States (counterclaims 2,3, and 5–9) based on sovereign immunity. The United States intervened as a plaintiff asserting claims and seeking declaratory and injunctive relief largely phrased in terms of compelling New Mexico's non-interference with Project water deliveries. Texas seeks the same relief and also seeks damages and an express declaration of rights under the Compact. The precise relationship between the Compact's equitable apportionment and Project water deliveries is an issue lying at the heart of this case, and the Supreme Court described the United States's complaint as "seeking substantially the same relief" as Texas.

The United States agrees that it will be bound by the Court's ruling on its own and Texas's claims. To the extent the United States's motion to dismiss challenges counterclaims for damages (e.g., New Mexico's demand for relief "K") or

specific injunctive relief (e.g., New Mexico's demand for relief "I" requesting the Court to "order the United States to properly maintain Project infrastructure"), the motion is easy to understand. The United States entered this action to obtain clarity as to what the Compact requires for the purpose of Project operations, to protect its ability to perform under the 1906 Treaty, and to obtain an order preventing New Mexico from interfering with Project operations. Nothing about the act of entering into a lawsuit on those terms suggests the United States demonstrated an intent to expose itself to claims for damages or injunctive relief (or suggests the attorneys filing the complaint believed they possessed the power to waive the United States's immunity).

To the extent the United States moves to dismiss counterclaims for declaratory relief commensurate in scope with, but opposite in result to, what the United States itself seeks, the motion is less than clear and, arguably, a matter of semantics. The Court's ultimate interpretation of the Compact will inform future administrative decisions and Project operations. The United States has agreed it will be bound by any determination of the Supreme Court as to its obligations under the Compact and Project administration. In fact, a failure to abide by the Court's interpretation in the future would likely factor largely into any challenges to the United States's administration of the Project that might arise under the Administrative Procedures Act or other sources of authority where Congressional waivers of immunity can be found. With the understanding that there may still be issues relating to the scope of any potential declaratory relief, I will grant the United States's motion asserting sovereign immunity for the reasons that follow.

"Jurisdiction over any suit against the [United States] requires a clear statement from the United States waiving sovereign immunity together with a claim falling within the terms of the waiver." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 472 (2003) (citation omitted); *see also United States v. Bormes*, 568 U.S. 6, 9 (2012) (stating that such consent must be "unequivocally

expressed" (quoting *United States v. Nordic Vill., Inc.*, 503 U.S. 30, 33–34 (1992))). Generally, any such clear and unequivocal statement must come from Congress. *Lane v. Peña*, 518 U.S. 187, 192 (1996) ("A waiver of the Federal Government's sovereign immunity must be unequivocally expressed in statutory text and will not be implied." (citation omitted)). And, although the Court enjoys uniquely broad and flexible authority to consider issues and fashion remedies in original jurisdiction actions, "[i]t is settled that the United States must give its consent to be sued even when one of the States invokes this Court's original jurisdiction." *California v. Arizona*, 440 U.S. 59, 61 (1979); *see also Florida v. Georgia*, 138 S. Ct. 2502, 2511 (2018) (noting in an original jurisdiction water dispute involving a river controlled by the Army Corps of Engineers that "the United States declined to waive its sovereign immunity from suit" and that a motion to dismiss was denied even though a party characterized the United States as a necessary party who could not be forced to intervene); *id.* at 2531 (Thomas, J., dissenting) ("The United States could not be joined as a party because it declined to waive its sovereign immunity."). Finally, the requirement of consent applies to counterclaims. *United States v. Shaw*, 309 U.S. 495, 503 (1940).

Here, New Mexico cites no express statutory waiver of immunity in relation to any of its counterclaims against the United States. New Mexico suggests the Act ratifying the Compact provides an implicit waiver of sovereign immunity. Act of May 31, 1939, 53 Stat. 785. Neither the language nor general structure of the Compact nor its ratifying statute lend support to the theory of implied waiver. The United States approved the Compact, thus according it the status of law, but the United States is not a party to the Compact. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1053 (2015) ("[T]he Compact, having received Congress's blessing, counts as federal law.").

A compact, in general represent a means of resolving a conflict between sovereigns without the use of force. *Texas v. New Mexico*, 138 S. Ct. at 958;

Louisiana v. Texas, 176 U.S. 1, 17 (1900) ("Controversies between them arising out of public relations and intercourse cannot be settled either by war or diplomacy, though, with the consent of Congress, they may be composed by agreement."). As such, Congressional approval of a compact is a supervisory act over other parties' disputes or agreements; such approval generally does not involve a settlement or sacrifice of the United States's own rights or immunities. Rather, the Compact Clause requires ratification by Congress so that the entire Union of states, including all states not party to the Compact, may approve of agreements between participating states. U.S. Const. art. I, § 10, cl. 3 ("No State shall, without the Consent of the Congress, . . . enter into any Agreement or Compact with another state . . . ."). Through the Compact clause, the United States itself enjoys supervisory authority to ensure one state is not taking advantage of another, prevent prejudice to non-participating states, and avoid the creation of formal political subunits among states. *Texas v. New Mexico*, 138 S. Ct. at 958 ("Congress's approval serves to 'prevent any compact or agreement between any two States, which might affect injuriously the interests of the others.'" (quoting *Florida v. Georgia*, 58 U.S. (17 How.) 478, 494 (1855))); *Cuyler v. Adams*, 449 U.S. 433, 440 (1981) ("[T]he Framers sought to ensure that Congress would maintain ultimate supervisory power over cooperative state action that might otherwise interfere with the full and free exercise of federal authority."); *Virginia v. Tennessee*, 148 U.S. 503, 519 (1893) ("[T]he prohibition is directed to the formation of any combination tending to the increase of political power in the states, which may encroach upon or interfere with the just supremacy of the United States."). New Mexico cites no authority for the proposition that this important Congressional function related to the structure and nature of our federal system of dual sovereignty somehow serves to implicitly waive the United States's own sovereign immunity in relation to the subject matter of any particular compact.

Arguably, the current Compact is different from many others in that the United States, through the Secretary of the Interior and the "inextricably

intertwined" Project and Downstream Contracts, plays a key role in water delivery. After all, the Court in its first opinion in this case characterized the United States as something akin to an "agent" of the Compact. *Texas v. New Mexico*, 138 S. Ct. at 959.

Serving a role in the delivery scheme under a Compact, however, does little to imply a general waiver of sovereign immunity as to broader Compact claims. The Project operates pursuant to Reclamation law, which includes a limited and specific waiver of sovereign immunity for the joinder of the United States in cases to enforce Reclamation contracts brought by contract holders. 43 U.S.C. § 390uu. Even that waiver, however, is strictly construed such that alleged third party beneficiaries of Reclamation contracts have been denied the ability to sue the United States directly. *Orff v. United States*, 545 U.S. 596, 602–04 (2005). In *Orff*, the Court concluded that this limited and targeted waiver of immunity applies "when the action requires construction of a reclamation contract and joinder of the United States is necessary." *Id.* at 602. Here, intervention has already been denied to the water districts who are parties to the Downstream Contracts, and, like the plaintiffs in *Orff*, New Mexico is not a direct party to the Downstream Contracts. Although the Downstream Contracts are "intertwined" with the Compact, they are not, in fact, contracts between New Mexico and the United States.

More importantly, this is not an action to enforce a Reclamation contract where a waiver of immunity might be found in a Reclamation statute. This original jurisdiction action, as accepted by the Court, is an action to interpret and enforce a Compact. Any waiver of sovereign immunity in this action, therefore, needs to be express, Congressional, and directed towards the Compact itself. *Bormes*, 586 U.S. at 9; *Orff*, 545 U.S. at 601–02 (""[A] waiver of sovereign immunity must be strictly construed in favor of the sovereign."). In the absence of some exception to this general rule, then, sovereign immunity applies.

To counter this result, New Mexico argues the United States submitted to the jurisdiction of the Court by entering into this action as a plaintiff and by expressly stating to the Court that it agreed to be bound by final judgment in this case. To a limited extent, Colorado joins New Mexico in this argument.[3] Jurisdiction over the initial suit and jurisdiction to entertain particular counterclaims against the United States, however, are not the same. *See, e.g.*, *Shaw*, 309 U.S. at 503. Further, given the general requirement for express and unequivocal Congressional consent, it follows that an election by the executive branch of the United States to enter into an original jurisdiction action as a plaintiff cannot, in and of itself, effect a waiver of sovereign immunity. *United States v. Mitchell*, 463 U.S. 206, 215–16 (1983) ("The source of consent for such suits unmistakably lies in [an act of Congress]. Otherwise, it is doubtful that *any* consent would exist, for no contracting officer or other official is empowered to consent to suit against the United States."); *Minnesota v. United States*, 305 U.S. 382, 388–89 (1939) ("Where jurisdiction has not been conferred by Congress, no officer of the United States has power to give to any court jurisdiction of a suit against the United States."); *Kansas v. United States*, 204 U.S. 331, 342 (1907) ("It does not follow that because a state may be sued by the

[3] Colorado relies upon Federal Rule of Civil Procedure 13 and lower court authority to argue the United States's filing of a complaint necessarily serves a waiver of immunity as against compulsory counterclaims—counterclaims based on the same transaction or occurrence. The Rules of Civil Procedure are merely instructive in original jurisdiction actions, they are not binding. Moreover, strict compliance with the Rule 13 framework for compulsory counterclaims as a means of analyzing the United States's waiver of immunity is generally inconsistent with the Court's flexibility in framing original jurisdiction actions. It is also inconsistent with the Court's admonition in a similar context that, "the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure . . . does not suit cases within [the] Court's original jurisdiction. The need for a less complaisant standard follows from [the Court's] traditional reluctance to exercise original jurisdiction in any but the most serious of circumstances, even where, as in cases between two or more States, [the Court's] jurisdiction is exclusive." *Nebraska v. Wyoming*, 515 U.S. at 8 (citations omitted). In short, I am hesitant to imply a waiver of sovereign immunity based upon implications arising from the non-controlling Federal Rules of Civil Procedure.

United States without its consent, therefore the United States may be sued by a state without its consent. Public policy forbids that conclusion.").

New Mexico presents several other arguments regarding sovereign immunity. These arguments do not show that the United States lacks or has waived sovereign immunity in the present case. Rather, they show merely that the United States has not always asserted sovereign immunity as a defense in original jurisdiction cases and that the Court itself has not always appeared eager to raise this issue *sua sponte*.

New Mexico relies heavily on *Nebraska v. Wyoming*, 515 U.S. 1 (1995), an original jurisdiction action between states in which the Court allowed Wyoming to assert counterclaims for injunctive relief against the United States. There, however, the Court did not discuss sovereign immunity, and it does not appear the United States asserted sovereign immunity. That case involved enforcement of an earlier judicial decree from a decades-old action in which the United States had intervened as a party. *See Nebraska v. Wyoming*, 325 U.S. 589 (1945). A review of the 1945 opinion shows that, like in the related 1995 opinion, the Court did not address sovereign immunity. *See generally id.* Whatever merits a sovereign immunity argument might have held in either of those cases, it would seem unwise to read away the general requirement of Congressional waiver based on the Court's silence in the face of the unique facts of the *Nebraska v. Wyoming* cases.

In other contexts, the Court has refused to interpret the United States's failure to assert sovereign immunity as fatal even to a later assertion of immunity when examining the *res judicata* effect of an earlier judgment. *See, e.g.*, *United States v. U.S. Fidelity & Guar. Co.*, 309 U.S. 506, 513–15 (1940) (stating that, where United States officials had failed to assert sovereign immunity, an otherwise final judgment was, nevertheless, void and carried no preclusive effect due to the absence of an underlying Congressional waiver of immunity). Rather than imply some sort

of non-statutory waiver of immunity based on implication and silence from the Court's cases, then, it appears the doctrine even when asserted later, must command respect.

New Mexico also points to cases involving counterclaims or claims against the United States in cases that draw upon the unique settings of maritime *in rem* actions or in contract-type actions in the Court of Claims under the Tucker Act. *See, e.g.*, *United States v. The Thekla*, 266 U.S. 328, 339–40 (1924) (maritime action involving a ship owned by the United States); *Guar. Tr. Co. v. United States*, 304 U.S. 126, 134 (1938) (Tucker Act). Citing *The Thekla*, New Mexico advocates a broad waiver of immunity based upon the United States's voluntary entry into a suit as a plaintiff. *The Thekla*, 266 U.S. at 339–40 ("When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it."). The unique aspects of *in rem* maritime actions, however, are wholly absent from the present case.

Regarding Tucker Act cases, New Mexico appears to suggest that the contract-like nature of a Compact lends strength to the argument that a waiver may be found in the United States's current intervention. As has been explained repeatedly by the Court, however, the Tucker Act serves as a waiver of sovereign immunity to subject the United States to suit specifically for the orderly processing of claims that, in earlier times would have been presented directly to Congress itself (and that, without the Court of Claims, would presently clog Congress's docket).[4]

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[4] The Court stated:

> The existence of a waiver is readily apparent in claims founded upon "any express or implied contract with the United States." 28 U.S.C. § 1491. The Court of Claims' jurisdiction over contract claims against the government has long been recognized, and government liability in

The Tucker Act simply does not apply to Compact claims in original jurisdiction actions.

The absence of an express and unequivocal Congressional waiver is, therefore, fatal to New Mexico's counterclaims against the United States.

B. Leave-of-the-Court to File Counterclaims

Texas, joined by the United States, argues New Mexico's counterclaims fail due to New Mexico's failure to seek leave from the Court itself prior to filing the counterclaims with the Special Master. This argument calls into question the Court's original-jurisdiction gatekeeping function as to counterclaims and the Special Master's role in that function. I deny the broadly presented motion to dismiss. I conclude, however, that certain counterclaims will be dismissed as not appropriate for consideration in this existing original jurisdiction action and that others (in addition or in the alternative) are dismissed for failure to state a claim.

The Court's gatekeeping function in original jurisdiction actions is not limited to initial complaints. Whether a party is seeking to file proposed counterclaims or amendments, the "proposed pleading amendments must be scrutinized closely in the first instance to see whether they would take the litigation beyond what [was] reasonably anticipated when [the Court] granted leave to file the initial pleadings." *Nebraska*, 515 U.S. at 8; *see also id.* at 9 ("Accordingly, an understanding of the

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> contract is viewed as perhaps "the widest and most unequivocal waiver of federal immunity from suit." The source of consent for such suits unmistakably lies in the Tucker Act. Otherwise, it is doubtful that any consent would exist, for no contracting officer or other official is empowered to consent to suit against the United States.

Mitchell, 463 U.S. at 215–17 (citations omitted).

scope of [the] litigation as envisioned under the initial pleadings is the critical first step in [the Court's] consideration of [subsequent pleadings]."). The purpose of this initial and ongoing gatekeeping function is, largely, to limit original jurisdiction actions to matters worthy of the Court's "extraordinary power under the Constitution to control the conduct of one State at the suit of another." *New York v. New Jersey*, 256 U.S. 296, 309 (1921). Because the Court's original jurisdiction should be used only "sparingly," *Wyoming v. Oklahoma*, 502 U.S. 437, 450 (1992), when it is used, it should not be expanded to encompass tangential issues and theories that can be presented in other fora or that can be resolved outside of litigation upon resolution of the key issues that animated the Court's initial grant of jurisdiction. After all, if original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute," *Louisiana*, 176 U.S. at 15, a grant of jurisdiction does not serve to throw open the courthouse doors to all counterclaims bearing some relation to the dispute.

The gatekeeping function, then, is discretionary and should reflect continued restraint. Importantly, it is not strictly governed by standards for the inclusion or joinder of claims as applied in normal civil actions. *Kansas v. Nebraska*, 135 S. Ct. at 1051 (noting that the Court's role in original jurisdiction matters "differ[s] from the one the Court undertakes in suits between private parties" (alteration in original, citation omitted)). Rather, "[i]n this singular sphere, the court may regulate and mould the process it uses in such manner as in its judgment will best promote the purposes of justice." *Id.* at 1052 (internal quotation marks omitted).

As such, flexibility should exist as to: the particular order and forum in which amendments or counterclaims are filed; the question of when the gatekeeping function is exercised; and the question of when more substantive motions to dismiss are considered. The governing Supreme Court Rule references neither amendments nor counterclaims; it references merely the "initial pleading." *See* S. Ct. Rule 17.3 ("The initial pleading shall be preceded by a motion for leave to file, and may be

accompanied by a brief in support of the motion."). And, although the Court has held leave may be required for additional filings, neither the Court nor its rules specify a particular form, forum (with the Court itself or first with a special master), or order for such filings. Nor would specificity in this context make sense in light of the Court's broad discretion. Depending on the status of the proceedings on the initial pleading, there may or may not be a special master appointed and there may or may not be other motions pending for the Court's or a special master's consideration. Adherence to a need for leave from the Court itself in the first instance, therefore, would make little sense in many cases. Flexibility in how such matters are handled in no way diminishes the importance of the gatekeeping function.

The Court's prior cases demonstrate this flexibility. In *Nebraska v. Wyoming*, for example, the parties sought leave to amend their pleadings, in part to assert counterclaims. 515 U.S. at 6. The Court referred the matter to a special master. *Id.* Ultimately, the Court reviewed the special master's recommendations and allowed some but not all counterclaims. *Id.* at 8–22. The practice of referring the question of leave for counterclaims to special masters, in fact, is not unusual. *See California v. Nevada*, 436 U.S. 916 (1978) (Mem.) (referring motions for leave to file counterclaims and amendments to special master); *United States v. Florida*, 423 U.S. 1011 (1975) (Mem.) (referring motion for leave to file counterclaims to special master).

Moreover, the Court has not indicated a particular concern with the details of how or when the gatekeeping function is carried out. In *Kansas v. Nebraska*, Orig. 126, 1999 WL 332707 (May 21, 1999), for example, Nebraska filed counterclaims directly with the Court without seeking leave of the Court. Kansas moved to strike the counterclaims on this basis, but the Court simply denied the motion without comment. *Kansas v. Nebraska*, 527 U.S. 1020 (1999) (Mem.). There, Nebraska had filed its counterclaims prior to the appointment of a special master. Still, the Court

chose to simply deny the motion to strike without comment. *See also California v. Nevada*, 438 U.S. 913 (1978) (Mem.) (adopting without comment the report of the special master granting leave to file counterclaims and an amended complaint).

It would seem prudent, therefore, to avoid reading too much into the Court's jurisprudence concerning the details of who files what, when they file it, and where it must be filed. What matters is that the Court itself be given the opportunity to rule upon the threshold question of the gravity and propriety of claims or counterclaims and that the parties receive an opportunity to be heard. If a special master who has already been appointed and has become familiar with the case addresses the question in the first instance, the parties are free to ask for Supreme Court review or to raise the issue in opposition to any report filed by the special master.

In general, it would seem that once the Court grants leave for the filing of an initial complaint, and once the Court appoints a special master to provide assistance to the Court, that special master and the parties should strive to make matters run upon a single track without a disjointed string of intermediate trips to the Court itself. *See, e.g.*, *Nebraska v. Wyoming*, 515 U.S. at 28 (Thomas, J., concurring in part and dissenting in part) ("Indeed, the present round of litigation has dragged on for almost *nine years*, but we are not even beyond the stage of considering amendments to the pleadings."). Here, upon issuance of its opinion on exceptions to the First Report, the Supreme Court remanded the case "to the Special Master for further proceedings consistent with [the Court's] opinion." And in appointing the current Special Master, the Court appointed the undersigned "with authority to fix the time and conditions for the filing of additional pleadings, to direct subsequent proceedings, to summon witnesses; to issue subpoenas, and to take such evidence as may be introduced." *Texas v. New Mexico*, 138 S. Ct. 1460 (2018) (Mem.). It therefore seems consistent with this appointment and grant of

authority to consider the permissibility of a party's counterclaims absent express leave from the Court.

Finally, the parties and the prior special master clearly anticipated New Mexico would file its counterclaims with its answer, and no party objected to this procedure. By letter to the first special master, Texas noted that the exceptions to the first report then-pending in the Supreme Court did not address Texas's complaint. As such Texas asked the first special master to require New Mexico "to answer the Texas Complaint within 30 days or within a reasonable time" and indicated that "[p]roceeding in this manner will allow Texas to review counterclaims, if any, that New Mexico may file along with its Answer, and enable Texas to promptly respond to any claims made by New Mexico." Letter from Stuart Somach to Special Master Grimsal dated October 23, 2017 (Sp. M. Docket No. 55). Subsequently both the first Special Master and the undersigned second Special Master referenced anticipated procedures for the filing of counterclaims with answers. The parties represented agreed-upon timelines for such filings, but no party suggested that New Mexico was required to first obtain leave from the Court. Transcript of March 23, 2018 Status Conference (Sp. M. Docket No. 68); Case Mgmt. Order No. 16 (Sp. M. Docket No. 67); Transcript of April 23, 2018 Status Conference (Sp. M. Docket No. 137). Consistent with these expressed positions, and for the reasons set forth above, I conclude New Mexico was not required to seek leave prior to filing such counterclaims.

C. Motions to Dismiss or Leave to File Various Counterclaims

Pursuant to the gatekeeping function, it remains necessary to ensure the matters brought before the Court are commensurate in scope with the subject matter over which the Court has chosen to exercise its original jurisdiction. Accordingly, I interpret the arguments of Texas and the United States as

encompassing not only a general challenge to any counterclaims not preceded by leave from the Court, but also as the assertion of the need for at least an initial level of gatekeeping review. In its affirmative defenses, in fact, Texas expressly calls jurisdiction into question by challenging New Mexico's counterclaims as being "in excess of the original jurisdiction exercised over Texas's suit." I therefore describe the allowance or disallowance of counterclaims as part of the gatekeeping function along with a discussion of the parties' substantive motions to dismiss. To the extent I address counterclaims against the United States otherwise subject to dismissal due to sovereign immunity, my dismissal of those claims are alternative rulings.

1. Counterclaim 1

Counterclaim 1 alleges Texas has violated the Compact by allowing diversions of surface water and hydrologically connected groundwater and by failing to properly account for return flows. According to New Mexico, this alleged excess water consumption in Texas interferes with Project water deliveries to (1) New Mexico water users near the Texas border and (2) Texas water users farther downstream, thus resulting in Texas calling for greater Project water releases than otherwise might be necessary. To a large extent, New Mexico's Counterclaim 1 is a mirror image of Texas's own claims.

Texas does not challenge Counterclaim 1 other than arguing that leave was required prior to filing. Accordingly, Counterclaim 1 will remain in the case. Just as the uses of surface water and hydrologically connected groundwater in New Mexico downstream of the Elephant Butte Reservoir might affect Project deliveries in Texas, the use of hydrologically connected water in Texas (by Project beneficiaries and by non-Project beneficiaries alike) or in Mexico might affect Project deliveries or demands for Project water farther downstream in Texas. At

this stage of the proceedings, it would seem that any New Mexico counterclaims calling attention to the uses of surface water and groundwater by Texas entities above Fort Quitman would not materially expand the litigation other than the geographic footprint within which data is deemed relevant. And, to the extent New Mexico alleges expanded water use in Mexico is affecting Texas's receipt of its Compact apportionment, the fact of such water use in Mexico is likely material to the question of whether and to what extent New Mexico or some other party is responsible for Texas's currently alleged shortfall.

Just as the Supreme Court relied in part on the similarity between the claims brought by the United States and Texas when deciding to allow the United States to intervene, *Texas v. New Mexico*, 138 S. Ct. at 960, I will allow New Mexico's "mirror image" Counterclaim 1.

2. Counterclaim 2

Counterclaim 2 against the United States alleges that general changes to Project operations, including operations pursuant to the 2008 Operating Agreement between the two water districts and the United States, violate the Compact. This claim depends upon New Mexico's legal theory that the Compact itself requires the United States to operate the Project so as to deliver equal amounts of Project water per acre to irrigated lands in New Mexico and Texas. The United States (joined by Texas) argues New Mexico lacks standing to assert this claim because New Mexico is neither a party to the 2008 Operating Agreement nor a Project water beneficiary. Rather, EBID and EPCWID are the Project water recipients and the parties to the 2008 Operating Agreement. The United States also argues New Mexico's equal-water-per-acre theory is an unsupported legal conclusion that does not enjoy textual support in the Compact, does not merit deference, and fails to state a claim pursuant to a standard akin to Federal Rule of Procedure 12(b)(6).

The relationship between Project operations and the Compact's equitable apportionment of the Rio Grande's waters remains a fundamental matter to be determined in this case However, it is my view that this is neither the time nor the forum to address the validity of the 2008 Operating Agreement. However, that is not to say the Operating Agreement may not be relevant on the issue of whether each state is receiving the water to which it is entitled under the Compact. The United States conceded as much at the hearing on the pending motions when it stated that when "we have a decree that defines what each state has, we can then look to project operations and determine whether those operation are consistent with the decree." Hr'g Tr. at 49 (Sp. M. Docket No. 264).

The United States went on to indicate that the 2008 Operating Agreement defines how the project is currently being operated. To the extent current operations are inconsistent with the Court's ultimate decree on apportionment, any operating agreement will have to be brought into conformity with the decree.

The 2008 Operating Agreement may thus be relevant to the issue of current operations. However, validity of the agreement itself, and the ability of the contracting parties to enter into the agreement are at best premature. As the United States stated at the hearing, once we determine apportionment and whether the project is being operated in accordance with that apportionment, the question of the 2008 Operating Agreement will be answered.

Finally, if New Mexico or Texas has been deprived of its equitable apportionment under the Compact, it is very possible that any such shortfall may be the result of a combination of factors, including: the United States's Project operations; New Mexican, Texan, or Mexican surface or groundwater diversions; or the United States's alleged maintenance failures. The interplay of all of these factors necessarily will be examined en route to proving and defending against

pending claims. New Mexico's allowed Counterclaim 4 against Texas (see below) provides more than ample opportunity for the parties to flesh out their theories regarding the impact of Project operations on the states' receipt of their Compact apportionments. Therefore, in addition to being barred by sovereign immunity, I will dismiss Counterclaim 2 against the United States as beyond the scope of the current litigation.

3. Counterclaim 3

Counterclaim 3 alleges the United States violated the Compact by failing to obtain New Mexico's consent before releasing certain water from the Elephant Butte Reservoir that was stored "Credit Water" under New Mexico's understanding of the Compact's water accounting system. The United States asserts sovereign immunity as to this claim but does not otherwise move for its dismissal. For the reasons previously stated as to sovereign immunity, this claim will be dismissed.

4. Counterclaim 4

Counterclaim 4 alleges Texas has violated the Compact and has been unjustly enriched based on Project operations since at least 2008. To an extent, Counterclaim 4 against Texas largely mirrors Counterclaim 2 against the United States. Other than the general argument concerning the need for leave prior to filing counterclaims, however, Texas does not individually challenge this counterclaim as inconsistent with the scope of the currently allowed claims. Therefore, this claim will remain in the case.

5. Counterclaim 5

Counterclaim 5 alleges the United States has violated the Water Supply Act, codified in part at 43 U.S.C. § 390b, by making major operational changes in the Project without obtaining approval from Congress. The Water Supply Act is concerned with state and local participation in the funding of water supply programs within the context of federal irrigation projects. *See* 43 U.S.C. § 390b(a); *see also, e.g.*, *In Re: MDL–1824 Tri–State Water Rights Litig.*, 644 F.3d 1160, 1170–71 (11th Cir. 2011). It includes a requirement for Congressional approval of certain changes at covered projects. *See* 43 U.S.C. § 390b(e).

The United States and Texas argue the Water Supply Act does not apply to the Project. *See, e.g.*, 43 U.S.C. § 390b(b) ("The provisions of this subsection insofar as they relate to the Bureau of Reclamation and the Secretary of the Interior shall be alternative to and not a substitute for the provisions of the Reclamation Projects Act of 1939 relating to the same subject." (citation omitted)). The Project was constructed in large part 40–50 years prior to passage of the Water Supply Act. Funding for the Project was addressed in the Downstream Contracts entered into approximately 20 years prior to passage of the Water Supply Act. Pub. L. No. 85-500, 72 Stat. 297, 319 (July 3, 1958). And it appears undisputed that the water districts have satisfied certain payment requirements and taken control of aspects of Project infrastructure previously controlled by the United States.

In any event, New Mexico's pleading does not tie its claim alleging a Water Supply Act violation to its allegations of a Compact violation. Counterclaim 5, therefore, is outside the scope of the action as allowed by the Court, and the subject matter of the allegations in Counterclaim 5 are largely immaterial to the current action. Counterclaim 5 will be dismissed for the reasons stated in addition to being barred by sovereign immunity.

6. Counterclaim 6

Counterclaim 6 alleges the United States has failed "to conduct annual Project accounting in a manner that is consistent with the Compact." New Mexico focuses primarily upon a failure to "account" for groundwater pumping and surface water diversions in Texas and Mexico, but includes in its counterclaim references to "various other improper and irregular means" of accounting such as:

> adopting accounting practices that artificially inflate the amount of Project water allocated to Texas, including[:] . . . monthly evaporation accounting for Credit Water; improperly allocating credits to Texas in Project accounting; failing to allocate water saved by efficiency improvements equally to all Project lands; not accounting for all usable Project water in Texas; allowing EPCWID to call for additional water from Project Storage when Project return flows are already available to supply EPCWID lands; [and] not accounting for or obtaining Commission approval for municipal transfers.

In addition to asserting sovereign immunity, the United States argues New Mexico lacks standing to assert this claim and also argues this claim should be dismissed because it is in the nature of an Administrative Procedures Act claim (albeit one attacking several discrete alleged infirmities with agency "accounting" rather than challenging one final agency action). The United States also argues the Compact lacks any express provisions concerning these alleged accounting duties.

The questions of where Rio Grande water has gone, should have gone, and should go in the future will require broad examination of the uses of hydrologically connected waters downstream of the Dam. To the extent the United States, as operator of the Project, has various day-to-day accounting or other duties arising under Reclamation law, such duties do not necessarily become separately enforceable Compact duties. Although the Compact references and is "inextricably intertwined" with the Project and the Downstream Contracts, it cannot be the case

that every implicit duty inherent in daily Project administration rises to the level of a separately enforceable Compact right. Nor is it the case that such implicit duties might merit separate consideration in an original jurisdiction action. And, again, disallowance of this counterclaim does not deprive the parties of necessary evidence or the opportunity to prove or defend against this action's broader claims. To the extent the United States or the water districts possess data relevant to purported accounting infirmities, such information is discoverable and may be relevant to the broader claims.

Whether technically correct, the United States's characterization of New Mexico's Counterclaim 6 as appropriate fodder for an Administrative Procedure Act claim demonstrates why the counterclaim should not be allowed in this case. The Court enjoys broad authority to fashion relief consistent with the Compact, but the Court has not, in the past, shown an inclination to micromanage the United States's execution of the Court's broad pronouncements in Compact or equitable apportionment cases, nor to expand an otherwise-allowed original jurisdiction case into the weeds of daily water project administration. *See, e.g.*, *Nebraska v. Wyoming*, 515 U.S. at 22 ("[T]he parties should not take our allowance of the . . . Cross–Claim as an opportunity to enquire into every detail of the United States's administration of storage water contracts. The United States's contractual compliance is not, of itself, an appropriate subject of the Special Master's attention, which is properly confined to the effects of contract administration on the operation of the [earlier equitable apportionment] decree."). Accordingly, Counterclaim 6 will be dismissed for the reasons stated in addition to being barred by sovereign immunity.

7. Counterclaim 7

Counterclaim 7 alleges Texas and the United States have violated the Compact and the Miscellaneous Purposes Act by delivering Project water for non-irrigation purposes pursuant to Miscellaneous Purposes Act contracts.[5] New Mexico identifies the City of El Paso as one such non-irrigation recipient, but does not identify any such contract with specificity and does not allege that New Mexico or Texas are parties to any challenged contract.

Texas and the United States move for dismissal, emphasizing that New Mexico does not allege Texas or New Mexico are parties to a Miscellaneous Purposes Act contract. Texas and the United States argue New Mexico lacks standing to assert a claim for violation of the Miscellaneous Purposes Act because that Act creates no right of action for a non-party to sue on a contract under the Act. In reply, New Mexico does not seriously defend its Miscellaneous Purposes Act claim as being based on a statutory right of action. Rather, New Mexico argues

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[5] The Miscellaneous Purposes Act states:

> The Secretary of the Interior in connection with the operations under the reclamation law is authorized to enter into contract to supply water from any project irrigation system for other purposes than irrigation, upon such conditions of delivery, use, and payment as he may deem proper: *Provided*, That the approval of such contract by the water-users' association or associations shall have first been obtained: *Provided*, That no such contract shall be entered into except upon a showing that there is no other practicable source of water supply for the purpose: *Provided further*, That no water shall be furnished for the uses aforesaid if the delivery of such water shall be detrimental to the water service for such irrigation project, nor to the rights of any prior appropriator: *Provided further*, That the moneys derived from such contracts shall be covered into the reclamation fund and be placed to the credit of the project from which such water is supplied.

43 U.S.C. § 521.

Texas misconstrues its Counterclaim 7. New Mexico emphasizes that Counterclaim 7 also alleges the non-irrigation water deliveries of Project water violate the Compact itself.

Thus framed, New Mexico's Counterclaim 7 appears as a redundant and unnecessary restatement of New Mexico's much broader Counterclaim 1, with Counterclaim 7 focused on one particular type of Texas water user rather than being focused more generally on all of the Texas water use alleged to be in violation of the Compact. In Counterclaim 1, without elaborating as to who in Texas owns and operates wells, who appropriates surface water, or who captures project return flows, New Mexico asserts Texas itself is responsible for water use in excess of the Compact apportionment within Texas by Texas entities and persons because Texas itself failed to control such actions. Counterclaim 1 serves, in essence as a mirror image of Texas's own claims against New Mexico. In Counterclaim 7, New Mexico has merely elected to identify one particular type of Texas water user and lodge a counterclaim against Texas based on that one type of water user's receipt of Project water.

To the extent New Mexico has standing to assert such a claim, that standing does not arise from the Miscellaneous Purposes Act or a related contract. Rather, standing arises from the same source of authority Texas and the United States rely upon to assert claims generally against New Mexico: the Compact itself. The Compact is between New Mexico, Texas, and Colorado. If those states in and of themselves fail to enforce laws or control individual water users within their states, then the other Compact signatory states may sue the non-compliant state generally for redress and leave to the offending state the problem of administering the relative rights of its own citizens. Any relief that might be tied to Counterclaim 7 against Texas is wholly subsumed within Counterclaim 1, and any measure of damages related to the factual underpinnings of Counterclaim 7 cannot be viewed or analyzed independently of other alleged breaches within the Compact area.

Finally, this original jurisdiction action is not an appropriate venue for individual, piecemeal attacks upon possibly thousands of individual water users' participation in Compact breaches. Nor should the case play out with claims tethered specifically to individual water users. This case will address rights and obligations as between the states looking at the river system, the Compact, the Project, and the overall uses of water affecting the Compact area. Accordingly Counterclaim 7 will be dismissed as not appropriate for the exercise of original jurisdiction separate and apart from the same subject matter being addressed more fully within Counterclaim 1. As to the United States, the counterclaim is dismissed for these reasons as well as sovereign immunity.

8. Counterclaim 8

Counterclaim 8 alleges the United States has improperly maintained project infrastructure by, among other things, allowing silt to fill reservoirs and allowing water-consuming vegetation to grow, leading to Project inefficiencies that waste Project water and harm New Mexico by requiring greater releases of Project water for Texas. New Mexico does not suggest a source of legal authority for an enforceable, generalized maintenance duty. To the extent New Mexico argues the United States has a duty of maintenance under the Compact, the United States is not a party to the Compact. Presumably, any such duty would arise under the United States's role in Project administration.

The United States speculates that New Mexico may be attempting to assert an Administrative Procedures Act-type claim based upon a purported failure to act. 5 U.S.C. § 706(1). The APA permits suits to "compel agency action unlawfully withheld or unreasonably delayed." *Id.* The Court has made clear, however, that APA suits based upon the government's alleged failure to act must assert an

independent duty to act ("action *unlawfully* withheld") and must articulate a discrete act, rather than a general policy or programmatic omission. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 62–64 (2004). Here, New Mexico alleges no source of a legal duty and identifies a generalized failure at a programmatic operational level rather than a discrete failure to act.

In the present suit, proof of maintenance shortcomings as a source of Project inefficiency may be relevant to pending claims. The end result of the present suit, however, will not a be detailed guide to infrastructure maintenance fashioned by a court. Counterclaim 8 will be dismissed.

9. Counterclaim 9

Finally, Counterclaim 9 alleges the United States has failed to enforce the 1906 Treaty with Mexico by failing to stop the diversion of surface water and the pumping of hydrologically connected groundwater in Mexico. New Mexico plainly lacks standing to assert a claim based on the United States's alleged failure to police or ensure Mexico's treaty compliance. In any event, such a claim is non-justiciable in that the executive branch rather than the judicial branch determines treaty compliance. *See* U.S. Const. art. II, §§ 2–3; *Charlton v. Kelly*, 229 U.S. 447, 476 (1913) (holding that the executive branch has discretion to waive breach by other party); *accord* Restatement (Third) of the Foreign Relations of the United States § 339 reporters' notes 1–2 (Am. Law Inst. 1987).

New Mexico counters that its claim is actually a claim asserting a Compact violation based on the United States's failure to account for Mexican water use in operation of the Project. To the extent that Mexican water use, as a factual matter, may be a cause of Texas's alleged Compact water shortages, such use may be

relevant evidence. As with the several other discrete counterclaims, however, Counterclaim 9 will be dismissed.

D. Motion to Dismiss Affirmative Defenses

1. Failure to Exhaust

Texas also moves to dismiss New Mexico's affirmative defense of failure to exhaust remedies. This motion is granted. Through this defense, New Mexico does not seek remand to the Rio Grande Compact Commission, but rather, dismissal of Texas's claims. N.M. Reply Br. at 41 ("To be clear, in raising this defense, New Mexico is not seeking a remand of Texas's claims to the [Rio Grande Compact Commission] for consideration in that forum."); N.M. Answers and Counterclaims ¶ 46 ("Texas's claims are barred in whole or in part, because Texas failed to exhaust administrative remedies.").

New Mexico's affirmative defense appears to focus primarily upon Texas's failure to ask the Compact Commission for relief. In particular, New Mexico points to the Commission's express ability to adopt rules and regulations for Compact administration, recommend revisions to the Compact, and establish new and additional gauging stations to monitor Compact compliance. 53 Stat. at 790–91 (Compact), Art. XII. Resort to the Commission to exercise its authority and provide assistance might well have helped paint a more complete picture of water use in the Compact area. In fact, it might have caused the parties to avoid the present impasse entirely or to come to the impasse at an earlier date.

When the Court granted leave for Texas to file its complaint, however, the Court accepted jurisdiction over the broad subject matter of Compact interpretation, breach, and damages. Any defenses to the Court accepting this original action

should have been raised, or were asserted and rejected, before the Court granted leave to file this case. Accordingly, the case is properly before the Court and the affirmative defense of failure to exhaust is stricken.

2. Equitable Affirmative Defenses

I reserve ruling on Texas's motion to dismiss New Mexico's equitable affirmative defenses of unclean hands, acceptance, waiver, estoppel, and laches. These several defenses appear relevant to questions of damages and may be relevant to questions of liability. Until the case is further developed, and decisions are made as to several matters, including possible bifurcation of liability, damages, and remedy, it would be premature to rule on this motion.

Texas argues that the equitable defenses of "unclean hands, acceptance/waiver/estoppel, [and] laches" are unavailable as a matter of law in a case seeking enforcement of an interstate water compact.[6] In making this argument, Texas distinguishes between the underlying equitable nature of the processes that can lead to formation of a compact or to the Court's equitable apportionment of an interstate stream, on the one hand, and a later action to interpret or enforce a Compact or decree, on the other. Texas's briefing, therefore, appears to set forth an absolutist position that would draw a hard line and preclude any consideration of equitable defenses in an enforcement action.

The inapplicability of these defenses to the underlying question of liability, however, is less clear than Texas suggests. *See, e.g.*, *Kansas v. Colorado*, 514 U.S. 673, 687–88 (1995) (stating that the Court "has yet to decide whether the doctrine of laches applies in a case involving the enforcement of an interstate compact"). Such

[6] Texas itself, nevertheless, raises the equitable affirmative defense of unclean hands as against New Mexico's counterclaims. *See* Sp. M. Docket No. 106.

defenses may factor into the liability stage to the extent Compact ambiguities exist and it becomes necessary to examine the states' course of performance to understand how the parties have interpreted the Compact during the many decades of experience the parties have gained.

Regarding the applicability of such defenses to possible remedies, this case involves more than seventy-five years of performance under the Compact. Given the substantial timeframes at issue, it requires little imagination to infer that some equitable doctrine may serve to cabin the years for which damages may be awarded. The Court, of course, cannot order relief inconsistent with the Compact. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010) ("As we have said before, we will not 'order relief inconsistent with [the] express terms' of a compact, 'no matter what the equities of the circumstances might otherwise invite.'" (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998))). But equitable considerations very well may guide the Court as to the choice among possible remedies that are consistent with the Compact. *See Kansas v. Nebraska*, 135 S. Ct. at 1052 (applying equitable principles in the fashioning of a remedy for violations of a settlement in a Compact dispute).

At the end of the day, the Court's discretionary original jurisdiction remains "basically equitable in nature." *Id.* at 1051 (quoting *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973)). And here, the Compact is unusual in several respects in that it leaves a great deal unsaid, depends heavily on the performance of Project operators in the distribution of water, and places on New Mexico an intrastate water delivery obligation. Even if the application of equitable defenses in a more traditional Compact case might be strictly limited, it is not clear such limitations would apply in the same manner in this case. Accordingly, I defer ruling as to dismissal of the challenged equitable affirmative defenses until a later stage of this case.

E. New Mexico's Motion to Amend Pleadings

For the reasons already stated, New Mexico largely will be allowed to present the theories and evidence it seeks to present. It may do so as part of its overall defense to all claims and as part of its two broad counterclaims against Texas. It may not do so as a series of individual counterclaims seeking damages or detailed specific injunctive relief against the United States. Although New Mexico may not pursue claims for damages against the United States, the United States will be subject to a declaratory ruling on its own claims, and the Court is capable of fashioning declaratory relief in this developing matter in a manner consistent with the limits of sovereign immunity.

In its response in opposition to the United States's motion to dismiss, New Mexico asks in the alternative for leave to amend its pleadings. New Mexico argues it *could have* asserted claims against the United States pursuant to the APA or reclamation law, or that it could have asserted claims against certain Bureau of Reclamation officials under *Ex Parte Young*, 209 U.S. 123 (1908), and that such claims would not be barred by sovereign immunity. For the reasons stated repeatedly above, however, any such attempted amendments would be futile as "piecemeal" claims inconsistent with the scope of the pending action. Therefore, leave is denied. This case is not a vehicle for each and every individual claim bearing some relationship to the Compact or administration of the Project. Evidence associated with such claims may be relevant to the broad pending claims, and for that precise reason, I do not at this time purport to exclude evidence from the case. Individual claims brought under various sources of law other than the Compact may play out in the future informed by the Court's ultimate interpretation and application of the Compact.

IV. Conclusions

In conclusion: New Mexico's counterclaims 2,3, and 5-9 are dismissed; the affirmative defense of "failure to exhaust" is dismissed; and the motion to amend pleadings is denied.

HON. MICHAEL J. MELLOY
United States Circuit Judge
Special Master
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March 31, 2020