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

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE JOINT MOTION OF THE STATE OF TEXAS, STATE OF NEW MEXICO, AND STATE OF COLORADO TO ENTER CONSENT DECREE SUPPORTING THE RIO GRANDE COMPACT

November 14, 2022

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The State of Texas (Texas), State of New Mexico (New Mexico), and State of Colorado (Colorado) (collectively, "Compacting States"), each through their respective and undersigned counsel, jointly move the Special Master to approve and to recommend to the Supreme Court the Consent Decree Supporting the Rio Grande Compact ("Consent Decree" or "Decree"), which compromises and settles all claims among them arising from the Rio Grande Compact (Compact)[1] in this proceeding (Joint Motion).

Pursuant to the Special Master's Order of October 26, 2022, as modified on November 9, 2022, the Compacting States file this memorandum, along with the Consent Decree, Appendices to the Consent Decree, and declarations and exhibits supporting the Joint Motion under seal. The United States of America (United States) objects to the proposed Consent Decree and opposes this Joint Motion.

I. INTRODUCTION

The Consent Decree is the result of comprehensive and complex settlement negotiations among the Compacting States, reflecting resolution of all interstate claims, at the culmination of almost a decade of litigation and after the completion of the first phase of trial. The Consent Decree adopts an index-based approach, consistent with the Compact's existing structure and similar to that employed in other interstate equitable apportionment matters. This approach clearly defines the rights and obligations of New Mexico and Texas below Elephant Butte Reservoir. If entered by the Court, the Decree would resolve both Texas's claims and New Mexico's counterclaims in a way that is consistent with the Compact and the prior orders of the Court and Special Master. The Compacting States offer the Consent Decree as a fair and lasting solution to a complex and longstanding dispute over the division of Rio Grande water.

[1] 76 P.L. 96, 53 Stat. 785, 76 Cong. Ch. 155.

The United States signaled its intention to object to the Consent Decree. The Joint Motion presents two straightforward questions:

1. Can the United States block a settlement among the Compacting States over the equitable apportionment of water where it is not a party to the Compact and has no independent right to the amount of water that is apportioned to each State?

2. After the interstate claims are resolved, and considering the availability of alternative forums and existing cases, should any remaining *intrastate* claims continue to be litigated in this original jurisdiction suit?

The focus of this case is on the fundamental question of how the Compact divides the waters of the Rio Grande below Elephant Butte Reservoir. The United States, however, is not a party to the Compact and has no interest in the equitable apportionment between New Mexico and Texas. Moreover, the Court was clear that it allowed the United States to intervene with allegations that *parallel* Texas and would not expand the scope of the case beyond the equitable division of water. Because the Consent Decree resolves the fundamental question of the equitable division of water, its entry will leave no remaining interstate claims.

In prior interstate disputes arising under the Supreme Court's original jurisdiction, the Court has expressed a strong judicial interest in promoting settlement among the states.

> Time and again we have counseled States engaged in litigation with one another before this Court that their dispute "is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the States so vitally interested in it than by proceedings in any court however constituted."

Texas v. New Mexico, 462 U.S. 554, 576 (1983) (quoting *New York v. New Jersey*, 256 U.S. 296, 313 (1921)).

Approval of the Consent Decree achieves the ultimate goal of the Compact: ensuring that Texas and New Mexico both receive and are able to use their respective apportionments of the

waters of the Rio Grande. This settlement between the Compacting States is fair, reasonable, consistent with the Compact, and ends this lengthy and expensive litigation.

Accordingly, the Compacting States respectfully request that the Special Master grant the Joint Motion and recommend to the Court that it enter the Consent Decree.

II. STANDARD OF DECISION

The Compacting States have settled their dispute and request that the Special Master recommend the Consent Decree to the Supreme Court over the objection of the United States, and over any objections that may be put forth by amici. This request implicates three principal issues: (1) whether the Compacting States may enter into an agreement construing ambiguous provisions of the Compact; (2) whether the United States has a unique federal interest in the equitable apportionment of water sufficient to block the Consent Decree; and (3) whether a settlement among the Compacting States affects the Supreme Court's jurisdiction in this action by resolving all interstate issues.

A. Standard for Entry of a Consent Decree

"Consent decrees and orders have attributes of both contracts and of judicial decrees." *United States v. ITT Cont'l Baking Co.*, 420 U.S. 223, 236 n.10 (1975). "The entry of a consent decree is more than a matter of agreement among litigants. It is a 'judicial act.'" *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 845 (5th Cir. 1993) (*LULAC*) (quoting *United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) (en banc)). "[A] consent decree must spring from and serve to resolve a dispute within the court's subject matter jurisdiction[,]" must come within "the general scope of the case made by the pleadings," and "must further the objectives of the law upon which the complaint was based." *Local No. 93 Int'l Asso. of Firefighters, etc. v. City of Cleveland*, 478 U.S. 501, 525 (1986) (*Local No. 93*) (quoting *Pac. R. R. Co. v. Ketchum*, 101 U.S. 289, 297 (1880)). Ultimately, a consent decree

may not give judicial imprimatur to a remedy that conflicts with the law on which the complaint is based. *See White v. Alabama.*, 74 F.3d 1058, 1074 (11th Cir. 1996) (citing *Local No. 93*, 478 U.S. at 526). But, "a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after trial." *Local No. 93*, 478 U.S. at 525. Rather than a determination on the merits, "the parties' consent animates the legal force of a consent decree." *Id.*; *see also Kindred v. Duckworth*, 9 F.3d 638, 641 (7th Cir. 1993).

"Courts must exercise equitable discretion before accepting litigants' invitation to" enter a consent decree. *LULAC*, 999 F.2d at 845. The Court must make a "minimal determination of whether the agreement is appropriate to be accorded the status of a judicially enforceable decree." *Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986). "If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed." *United States v. Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (*City of Miami*).

Courts should approve a consent decree if "it is at least fundamentally *fair, adequate and reasonable*." *United States v. Oregon*, 913 F.2d 576, 580 (9th Cir. 1990) (emphasis added); *see also City of Bangor v. Citizens Communs. Co.*, 532 F.3d 70, 93 (1st Cir. 2008) (courts must also ensure "the Consent Decree will not violate the Constitution, a statute or other authority; [and] that it is consistent with the objectives of Congress" (internal citations omitted)). Approval can occur notwithstanding an objection to the consent decree by a non-settling third party. *See, e.g.*, *City of Bangor*, 532 F.3d at 94-101. When determining fairness, courts look to both procedural and substantive fairness. *United States v. Chevron U.S.A. Inc.*, 380 F. Supp. 2d 1104, 1111 (N.D. Cal. 2005). "[A]n intervenor . . . does not have power to block the decree merely by withholding its consent." *Local No. 93*, 478 U.S. at 529.

In reviewing a consent decree, the reviewing court is "not free to delete, modify, or substitute certain provisions of the settlement. The settlement must stand or fall as a whole." *Cotton v. Hinton*, 559 F.2d 1326, 1331-32 (5th Cir. 1977). "[T]he power to approve or reject a settlement negotiated by the parties before trial does not authorize the court to require the parties to accept a settlement to which they have not agreed." *Evans v. Jeff D.*, 475 U.S. 717, 726 (1986) (explaining limits of court's power under Fed. R. Civ. P. 23(e)).

Although a consent decree generally arises from the stipulation of the parties, "opposition to a proposed consent decree will not always operate as a bar to it." *United States v. City of Hialeah*, 140 F.3d 968, 975 (11th Cir. 1998) (*City of Haileah*). An objecting party is "entitled to present evidence and have his objections heard at the hearing to consider approval of the agreement." *Lawyer v. Dep't. of Justice*, 521 U.S. 567, 579 (1997) (*Lawyer*); *see also City of Miami*, 664 F.2d at 447 ("A party potentially prejudiced by a decree has a right to a judicial determination of the merits of his objection.").

The Supreme Court has articulated two principles governing the entry of a consent decree over the objection of a party. First, while a party "is entitled to present evidence and have its objections heard at the [fairness] hearings . . . on whether to approve the consent decree, it does not have the power to block [the] decree merely by withholding its consent." *Local No. 93*, 478 U.S. at 528-29. Second, a consent decree "may not dispose of the claims of a third party, and *a fortiori* may not impose duties or obligations on a third party, without that party's agreement." *Id.* at 529.

The first principle in *Local No. 93* is simple: one party cannot force the other parties to continue to litigate a dispute that they have settled among themselves.

> A consent decree is primarily a means by which parties settle their disputes without having to bear the financial and other costs of litigating. It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation.

Local No. 93, 478 U.S. at 528-29; *see also United States v. Carpenter*, 526 F.3d 1237, 1240 (9th Cir. 2008) ("We recognize that the intervenors whose claims are not the subject of a settlement cannot veto that settlement."); *S. Cal. Edison Co. v. Lynch*, 307 F.3d 794, 806-07 (9th Cir. 2002) ("An intervenor does not have the right to prevent other parties from entering into a settlement agreement"). "The Supreme Court adopted this approach for good reason; otherwise, one party could hold the other parties hostage in ongoing litigation, and a global settlement or judgment would be the only option." *Sierra Club v. North Dakota*, 868 F.3d 1062, 1066 (9th Cir. 2017) (*Sierra Club*).

The second principle in *Local No. 93* may also be summarized in simple terms: "a consent decree requires the consent of all parties whose ***legal rights*** would be adversely affected by the decree." *City of Hialeah*, 140 F.3d at 975 (emphasis added). "The rule is that 'those who seek affirmative remedial goals that would adversely affect other parties must demonstrate the propriety of such relief'" in a "trial on the merits." *Id.* at 976 (quoting *City of Miami*, 664 F.2d at 447). This principle comprises two issues: (1) whether a consent decree impermissibly disposes of the claims of nonconsenting parties without an adjudication on the merits; and (2) whether a consent decree improperly places new obligations or legal duties on a nonconsenting party.

Initially, the Court must determine whether the objector has a "valid" claim apart from the consenting parties. *See LULAC*, 999 F.2d at 925 (Politz, C.J., dissenting) (dissenting from denial of motion to remand for entry of consent decree resolving dispute over the conduct of judicial elections because Chairman of the Judicial Districts Board lacked authority to raise a

valid objection to the decree); *see also Johnson v. Lodge # 93 of the FOP*, 393 F.3d 1096 (10th Cir. 2004) (approving consent decree between plaintiffs and employer over union's objection in part because existing collective bargaining agreement contained management rights provision that precluded, as a matter of law, the union's claim that the employer had to bargain with union over promotion system terms in the decree). A consent decree may not "dispose[]" of an objector's claims "in the forbidden sense of cutting him off from a remedy to which he was entitled," but an objection will not preclude the entry of a consent decree that "grant[s] [the objector] an element of the very relief that he sought." *Lawyer*, 521 U.S. at 579, 580 (approving consent decree over objection in part because it granted part of the relief he had sought and his right to seek the remaining relief was "entirely unimpaired"). Simply put, "the consent judgment must not prevent Intervenor from litigating any possible *legitimate* claims." *Steiner v. Cnty. of Marshall*, 568 N.W. 2d 627, 630 (S.D. 1997) (emphasis added).

Moreover, a consent decree may not alter a nonconsenting party's substantive rights by creating new legal obligations in the absence of a judgment on the merits. *Local No. 93*, 478 U.S. at 529. In this regard, the Court must distinguish between the new obligations that a consent decree creates and existing obligations that may be affected. *See, e.g., Sierra Club*, 868 F.3d at 1067-68 (rejecting states' argument that a consent decree would "impermissibly saddle[] them with legal duties or obligations" where the referenced obligations arose under the Environmental Protection Agency's Data Requirements Rule, not the consent decree); *Fla. Wildlife Fed'n., Inc. v. S. Fla. Water Mgmt. Dist.*, 647 F.3d 1296, 1303-04 (11th Cir. 2011) (applying a standing analysis to conclude that regulated entities, as intervenors, could not challenge consent decree requiring Environmental Protection Agency to promulgate numeric water quality standards for certain pollutants); *Tenn. Ass'n of Health Maint. Orgs., Inc. v. Grier*,

262 F.3d 559, 565 (6th Cir. 2001) (concluding that managed care organizations could be obliged, as agents of the state under existing contracts, to implement grievance process required under consent decree between state and plaintiff class notwithstanding that care organizations were not parties to the consent decree).

"[A]s a practical matter," a consent decree "may have a serious effect" on the interests of an objecting party without requiring his consent, *Martin v. Wilks*, 490 U.S. 755, 771 (1989) (Stevens, J., dissenting); the question is whether the objector would face "legal prejudice" as a result of the consent judgment, *Wash. Metro. Area Transit Auth. v. Reid*, 666 A.2d 41, 45 (D.C. 1995).

B. <u>The Standard for Entry of a Consent Decree to Construe an Interstate Compact</u>

While the foregoing principles define the general standard for entry of a consent decree, settlement in an interstate compact case entails unique considerations. In *Kansas v. Nebraska*, 574 U.S. 445, 454-55 (2015), the Court, considering alleged violations of a settlement agreement involving the Republican River Compact, reasoned that there are "[t]wo particular features" of an interstate water dispute that "distinguish it from a run-of-the-mill private suit and highlight the essentially equitable . . . nature" of the Court's jurisdiction: (1) the subject matter of the suit involves "rights to an interstate waterway," and (2) a compact is "not just an agreement, but a federal law." *Id.* at 454-55.

In light of the first distinguishing feature, the Court should regard an interstate Compact and any related settlement agreements among the states as compromises struck "in the shadow of [the] equitable apportionment power" to accomplish essentially equitable goals. *Kansas v. Nebraska*, 574 U.S. at 455. On this basis, the Court has broad "authority to devise 'fair and equitable solutions' to interstate water disputes" that are . . . "align[ed] . . . with the compacting States' intended apportionment." *Id.* at 472 (quoting *Texas v. New Mexico*, 482 U.S. 124, 134

(1987)) (modifying accounting procedures in prior settlement agreement to "realize . . . the agreed-upon division of water").

In light of the second distinguishing feature, a consent decree among the compacting states must be consistent with the compact. *See Vermont v. New York*, 417 U.S. 270, 278 (1974) ("Once a consensus is reached there is no reason, *absent a conflict with an interstate compact*, why such a settlement would not be binding.") (emphasis added); *see also Kansas v. Nebraska*, 574 U.S. at 472. The court may not "order relief inconsistent with [a compact's] express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). "But within those limits, the Court may exercise its full authority to remedy violations of and promote compliance with the agreement, so as to give complete effect to public law." *Kansas v. Nebraska*, 574 U.S. at 456.

This power includes the discretion to resolve ambiguities in a compact by consent rather than resorting to a complete adjudication on the merits. For example, in *New Hampshire v. Maine*, 426 U.S. 363 (1976), the Court accepted, contrary to the Special Master's recommendation, a proposed consent decree resolving a state boundary dispute. The states, in settling their dispute, had interpreted a "middle of the river" boundary designation in a 1740 decree of King George II of England to mean, "the middle of the main channel of navigation." *New Hampshire v. Maine*, 426 U.S. at 370-71. The issue was whether the Court should defer to the States' compromise on this disputable question of fact and law. The Special Master found that acceptance of the settlement would violate the Court's Article III duty to decide, based on applicable legal principles, the precise boundary fixed by the 1740 document. The Court disagreed, ruling that Article III "does not proscribe the acceptance of settlements . . . that merely have the effect, as here, of reasonably investing imprecise terms with definitions that give effect to a decree that permanently fixed the boundary between the States." *Id.* at 369.

C. Effect of a Settlement Among the States in an Original Jurisdiction Action

The Supreme Court has original and exclusive original jurisdiction to resolve *interstate* disputes among the states. 28 U.S.C. § 1251(a). However, its original jurisdiction is concurrent, not exclusive, to resolve *intrastate* disputes between the United States and a state. *Id.* § 1251(b)(2).

Generally, the Court is reluctant to exercise concurrent original jurisdiction in cases in which the plaintiff has another adequate forum to settle its claim. *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) ("[W]e exercise our original jurisdiction 'sparingly' and retain 'substantial discretion' to decide whether a particular claim requires 'an original forum in this Court.' ") (quoting *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992)); *South Carolina v. Regan*, 465 U.S. 367, 402 n.18 (1984) (O'Connor, J., concurring) ("[W]here Congress expressly leaves open an alternative forum in which an original plaintiff can raise its claims, this Court will ordinarily presume that original jurisdiction is inappropriate").

Accordingly, a resolution of the claims among the states in an original action raises the question whether the Supreme Court remains the appropriate forum to resolve any additional *intrastate* disputes in the first instance. In *California v. Nevada*, 447 U.S. 125 (1980), California sought a determination of its boundary with Nevada. After the boundary dispute was resolved, the Court denied a request to enlarge the case to include ownership and title issues between the United States and one of the states on the grounds that "litigation in other forums seems an entirely appropriate means of resolving whatever questions remain." *Id.* at 133.

In this vein, the Court has cautioned against expanding *interstate* water disputes, over which it has exclusive jurisdiction, to resolve related *intrastate* issues, lest it be "drawn into an intramural dispute over the distribution of water within" a single state. *See New Jersey v. New York*, 345 U.S. 369, 373 (1953) (rejecting the claim of the City of Philadelphia to intervene). For

example, the exercise of original, concurrent jurisdiction was appropriate in *Maryland v. Louisiana* under 28 U.S.C § 1251(b)(2) because the United States represented the interests of several states under a common regulatory scheme. *Maryland v. Louisiana*, 451 U.S. 725, 744-45 (1981). Even then, Justice Rehnquist strongly dissented, noting the Court's consistent restraint in exercising its original jurisdiction unless necessary because "justice is far better served by trials in the lower courts, with appropriate review, than by trials before a Special Master." *Id.* at 762-63 (Rehnquist, J., dissenting) ("The Court has wisely insisted that original jurisdiction be sparingly invoked because it is not suited to functioning as a *nisi prius* tribunal.").

By contrast, the Court declined to exercise original jurisdiction in *United States v. Nevada*, 412 U.S. 534, 536 (1973). There, Nevada and California disputed their respective rights to the Truckee River that feeds into Pyramid Lake, part of the Paiute Indian Tribe reservation. In 1972, the United States sued both states to perfect water rights of the Paiute Indian Tribe and to preserve water levels at Pyramid Lake in support of a Bureau of Reclamation ("BOR" or "Reclamation") project. *United States v. Nevada*, 412 U.S. at 536-37. In June 1973, the Supreme Court denied the United States' motion for leave to file a complaint because the two states settled their dispute earlier that year. *Id.* at 537. The Court reasoned that the United States' inability to join California in an action in Nevada district court was not a compelling reason to exercise original jurisdiction:

> Under the proposed interstate compact, California and Nevada have agreed upon their respective shares of Truckee River water. Nevada has also agreed that any rights to the use of water in Nevada by the United States or its wards are to be charged against Nevada's share of Truckee water. For the purposes of dividing the waters of an interstate stream with another State, Nevada has the right, parens patriae, to represent all the nonfederal users in its own State insofar as the share allocated to the other State is concerned. It is therefore doubtful at best that there is now any dispute at all between California and the United States with respect to the latter's claim to water rights at Pyramid Lake

United States v. Nevada, 412 U.S. at 537 (emphasis omitted). In the absence of a live dispute between Nevada and California, there was simply no reason for the Court to exercise its original jurisdiction. The United States had alternative forums to assert its *intrastate* claims against Nevada in Nevada district court.

Similarly, the Court has indicated that the participation of the United States is not necessary to resolve an interstate water dispute, even where the outcome impacts the operations of a federal project. In *Florida v. Georgia*, 138 S. Ct. 2502 (2018), the Court considered whether it could redress Florida's claim for equitable apportionment against Georgia without the participation of the United States as a party. The case concerned equitable apportionment of the Apalachicola-Chattahoochee-Flint River Basin. The United States Army Corps of Engineers operated a number of reservoirs and dams on the Chattahoochee River and the Apalachicola River that controlled the amount of water from the basin that flowed from Georgia into Florida. *Florida v. Georgia*, 138 S. Ct. at 2508-09. When Florida brought its claim against Georgia, the United States declined to waive its sovereign immunity. *Id.* at 2511.

After extensive proceedings, the initial special master recommended to the Court that Florida's complaint be dismissed because "Florida has not proven that its injury can be remedied" without a decree that would "bind[]" the United States. *Florida v. Georgia*, 138 S. Ct. at 2511. The Court rejected this recommendation, reasoning that "it is likely to prove possible to fashion" a decree that afforded Florida relief absent a binding remedy against the United States. *Id.* at 2516. In part, that decision turned on the United States' assurances that it would, in operating the Apalachicola-Chattahoochee-Flint River Basin, follow a final resolution of the equitable apportionment as between Florida and Georgia:

> The United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin's waters proves justified in this case. . . . .We recognize that the Corps must take account of a variety of circumstances and statutory obligations when it allocates water. New circumstances may require the Corps to revise its Master Manual or devote more water from the Chattahoochee River to other uses. But, given the considerations we have set forth, we cannot agree with the Special Master that the Corps' "inheren[t] discretio[n]" renders effective relief impermissibly "uncertain" or that meaningful relief is otherwise precluded.

Florida v. Georgia, 138 S. Ct. at 2526. In effect, the Court's decision in *Florida v. Georgia* stands for the proposition that a resolution of the *sovereign interests* of the states to define an equitable apportionment does not require the participation of the United States as the party that administers the conveyance of water between the states. The United States' duty to manage water operations in a manner that fulfills the equitable apportionment is a matter distinct from the equitable apportionment itself.

III. PROCEDURAL HISTORY

To appropriately contextualize the Consent Decree and the compromise achieved, the Compacting States offer the following summary of the pertinent procedural history.

A. Texas's Complaint

1. The Scope of Texas's Claims

In 2013, Texas sought leave to file its Complaint against New Mexico, alleging that New Mexico violated its Compact obligations by permitting groundwater pumping and other diversions in New Mexico below Elephant Butte Reservoir depleting Rio Grande Project (Project) water intended for use in Texas. TX Complaint, Dkt. No.[2] 63 ¶ 4. Texas filed its

[2] All further references to the Special Master Docket number, unless otherwise indicated are defined as "Dkt. No."

Motion for Leave to file Bill of Complaint on January 8, 2013. The Supreme Court granted Texas leave to file its Complaint on January 27, 2014.[3]

The Texas Complaint alleges that the Compact was intended to equitably apportion the water of the Rio Grande above Fort Quitman, Texas, among the states of Colorado, New Mexico, and Texas. TX Complaint, Dkt. No. 63 ¶¶ 3, 18. The Texas Complaint alleges that the Project was the vehicle chosen by the Compact to ensure delivery of Texas's apportionment. Thus, the Compact must also protect Project operations related to Texas's apportionment. *Id.* ¶¶ 10-12. The Texas Complaint further alleges that New Mexico, contrary to the Compact, allowed and authorized Project water apportioned to Texas to be depleted through surface diversions and groundwater pumping in New Mexico. *Id.* ¶ 19.

Texas further alleges that, in practice, New Mexico granted rights, and otherwise authorized and permitted water users within New Mexico, to intercept return flows and tributary flows below Elephant Butte Reservoir for use in New Mexico, thereby depriving Texas of water that was apportioned to it. TX Complaint, Dkt. No. 63 ¶ 19. Texas alleges that these actions violate New Mexico's obligations under the Compact, causing injury to Texas and its citizens. *Id.* ¶ 25.

2. The Relief Sought by Texas

Texas's Complaint seeks three forms of relief:

(i) A declaration of Texas's rights "to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act";

(ii) A Decree commanding New Mexico (a) to deliver the waters of the Rio Grande to Texas in accordance with the provisions of the Compact and the Rio Grande Project Act; and

[3] Pleadings filed with the Supreme Court but not lodged with the Special Master do not include docket number references.

(b) to cease and desist actions which interfere with the operation of the Project to ensure delivery of Texas's apportionment; and

(iii) An award of damages to Texas for injury suffered as a result of New Mexico's past and continuing violations of the Rio Grande Compact and Rio Grande Project Act. Texas. TX Complaint, Dkt. No. 63 at 14-15.

B. The United States' Complaint in Intervention

On February 27, 2014, the United States moved to intervene as a plaintiff. In the United States Complaint in Intervention (U.S. Complaint), the United States, like Texas, alleges that groundwater diversions in the Lower Rio Grande intercept Project water, reduce Project efficiency, violate provisions of Reclamation law, and violate the Compact. U.S. Complaint, Dkt. 65 ¶¶ 4-7, 12-14. The Court granted the United States leave to file its Complaint in Intervention on March 31, 2014.

1. The United States' Interests

In its Motion to Intervene, the United States asserted three "distinct interests" as follows:

First: The United States alleges that the dispute concerns water released by the Project operated by the Department of the Interior, through the Reclamation, by "setting the diversion allocations for water users who have contracts for delivery of Project water." Motion of the United States for Leave to Intervene as a Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff ("U.S. Motion to Intervene" and "U.S. Memo in Support of Complaint") at 2. The Court's interpretation of rights and obligations under the Compact will affect how Reclamation calculates diversion allocations. U.S. Motion to Intervene at 2, 5.

Similar to Texas, the United States argues that, particularly under drought conditions, there would "likely come a point at which uncapped groundwater pumping in New Mexico

would reduce Project efficiency to an extent that 43% of the available water could not be delivered to Texas, even if EBID forwent all Project deliveries." U.S. Memo in Support of Complaint at 6.

Second: The United States alleges that it has "a distinct interest in ensuring that water users who either do not have contracts with the Secretary of the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries or for delivery to Mexico. U.S. Motion to Intervene at 2; U.S. Memo in Support of Complaint at 7-8.

As framed by the United States, these interests are "directly implicated in this dispute because the limitations on Project water use are incorporated into the Compact and made binding on New Mexico under the Compact." U.S. Memo in Support of Complaint at 8. Upon New Mexico's compliance with its Article IV Compact obligation to deliver water to Elephant Butte Reservoir (Project storage), "the water becomes 'usable water' under the Compact, to be released by the Project 'in accordance with irrigation demands, including deliveries to Mexico.' " Compact, Art. I(*l*); U.S. Memo in Support of Complaint at 8. "New Mexico's view that it may continue to allow depletions of Project water supply below Elephant Butte Reservoir is inconsistent with the requirement that New Mexico 'deliver' a specific quantity of water into project storage. U.S. Memo in Support of Complaint at 9; *see also* Compact, Art. IV.

Third: The United States asserts a distinct federal interest in ensuring that treaty obligations concerning the delivery of Project water to Mexico are satisfied. U.S. Memo in Support of Complaint at 8-9.

2. The Relief Sought by the United States

The United States' Complaint in Intervention seeks the following of relief:

(i) A declaration that New Mexico (a) may not permit water users who do not have contracts with the Secretary of the Interior to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico; (b) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts; and (c) must affirmatively act to prohibit or prevent such interception or interference.

(ii) An injunction to prohibit New Mexico from permitting such interception and interference; and a mandate that New Mexico affirmatively prevent such interception and interference. U.S. Complaint, Dkt. 65 at 5.

C. New Mexico's Motion to Dismiss

New Mexico moved to dismiss both the Texas and United States' Complaints on April 30, 2014. New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention filed April 30, 2014 (N.M. Motion to Dismiss). After briefing on the Motion to Dismiss was complete, the Court, pursuant to its order of November 3, 2014, referred New Mexico's Motion to Dismiss to the Special Master. The Special Master heard oral arguments on New Mexico's Motion to Dismiss and the Motions to Intervene on August 19 and 20, 2015.

1. The First Interim Report of the Special Master

Following briefing and argument on New Mexico's Motion to Dismiss, Special Master Grimsal issued his First Interim Report of the Special Master on February 9, 2017 (First Report, Dkt. No. 54), recommending that the Supreme Court deny New Mexico's Motion to Dismiss the Texas Complaint as "Texas has stated plausible claims for New Mexico's violation of the 1938 Compact." First Report, Dkt. No. 54 at 217. In evaluating New Mexico's Motion to Dismiss, the Special Master emphasized that the Compact is an agreement among "three quasi-sovereign States to apportion the Rio Grande – to which each has an equitable right – among themselves," and that "the United States is not a signatory" to the Compact and did not receive

an apportionment of water through the Compact. *Id.* at 229-30. Because no water is apportioned to the United States, the Special Master concluded that it cannot state claims against New Mexico under the Compact. *Id.* at 230-31. The Special Master therefore considered the United States' claims as arising under Reclamation law and recommended that the Supreme Court exercise its discretionary jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' Project claims against New Mexico for judicial economy. *Id.* at 231, 234.

2. The Exceptions to the First Report of the Special Master

The United States filed exceptions to the recommendations in the First Report related to New Mexico's Motion to Dismiss the United States' Complaint on June 9, 2017 (U.S. Exceptions). There, the United States argued that it may obtain declaratory and injunctive relief based upon New Mexico's violations of the Compact, because the Compact is a federal law protecting federal interests, and because the United States is an intended third-party beneficiary of the Compact. U.S. Exceptions at 28. The United States argued that to effectuate an equitable apportionment among the three Compacting States, the Compact incorporates and relies upon the Project to deliver water to Mexico and the irrigation districts. *Id.* at 28. Specifically, the United States argued that it may obtain declaratory and injunctive relief against New Mexico to enjoin conduct that "violates the Compact to the detriment of the United States' ability to comply with its treaty obligation." *Id.* at 29. The United States further argued an entitlement to declaratory and injunctive relief against New Mexico for interference with Project operations that are protected by the Compact. *Id.*

D. <u>The Supreme Court's Opinion Regarding the United States' Intervention</u>

The Court heard oral argument on the United States' Exceptions and the Exceptions of Colorado related to the Motion to Dismiss the United States' Complaint in Intervention on January 8, 2018, and issued its final ruling on March 5, 2018. In authorizing the United States to

intervene as a plaintiff in this matter, the Court observed: "we have sometimes permitted the federal government to participate in compact suits to defend 'distinctively federal interests' that a normal litigant might not be permitted to pursue in traditional litigation. . . . [a]t the same time, our permission should not be confused with license." *Texas v. New Mexico*, 138 S. Ct. 954, 958-59 (2018).

1. The United States Acts as an "Agent" of the Compact to Deliver Compact Apportionments

In considering the scope of the United States' intervention, the Court first set the stage by explaining the relationship between the Compact, Reclamation and the Project.

To that end, the Court recognized agreements where the United States promised to deliver water from Caballo Reservoir to downstream water districts in both New Mexico and Texas, in proportion to percentages of acres in each state, roughly 57% for New Mexico and 43% for Texas. *Texas v. New Mexico*, 138 S. Ct. at 957. The Court defined these agreements as the "Downstream Contracts." *Id.*

The Court noted that the Compact relied upon the division of water established in the Downstream Contracts. *Texas v. New Mexico*, 138 S. Ct. at 957. The Court thereafter explained that Texas filed the original action claiming that New Mexico breached its Compact duty by "allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate." *Id.* at 958. After the Court "permitted the United States to intervene, it also filed a complaint with allegations that *parallel* Texas's." *Id.* (emphasis added).

After summarizing the role of the Downstream Contracts, the Court stated that the "Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts." *Texas v. New Mexico*, 138 S. Ct. at 959. The Compact's purpose, to effect an

equitable apportionment of the waters of the Rio Grande between the Compacting States, is only achieved because the United States assumed a legal responsibility to "deliver a certain amount of water to Texas." *Id.* at 959. "In this way, 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.* The Court further found that "the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms," which is "what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose." *Id.*

2. The United States' Claims Are Derivative of Texas's Claims

The Court further framed the United States' intervention in the following manner: "[T]he United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief[.]" *Texas v. New Mexico*, 138 S. Ct. at 960. "This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States." *Id.*.

Therefore, the Court permitted the United States to proceed with its Compact claims in light of its obligation, to act as an agent of the Compact to deliver water apportioned by the Compact, because it did not expand the scope of the litigation as defined by the Texas claims.

E. <u>New Mexico's Counterclaims</u>

After the United States was admitted as an intervenor, New Mexico filed counterclaims against both Texas and the United States on May 22, 2018. NM Counterclaims, Dkt. 93. Both sets of counterclaims centered around New Mexico's claim that since 2006, Reclamation's new

method for allocating Project water unfairly charges New Mexico for actions occurring in Texas, thereby depriving New Mexico of its Compact equitable apportionment of 57% of Project Supply.

1. New Mexico's Claims Against Texas

New Mexico's counterclaims against Texas generally allege that Texas is violating the Compact:

(i) by allowing unauthorized diversions of Rio Grande water and by allowing groundwater pumping, both of which adversely impact the equitable apportionment of Rio Grande water below Elephant Butte Reservoir; and

(ii) by receiving from the U.S. (Reclamation) more than Texas' Compact equitable apportionment of Rio Grande water by way of Project allocations to EPCWID.

See NM Counterclaims, Dkt. 93 at 17-19 (First Claim for Relief: Compact Violation by Texas Caused by Unauthorized Depletions); *id.* at 24-25 (Fourth Claim for Relief: Compact Violation and Unjust Enrichment Against Texas); *see also id.* at 27-29 (Seventh Claim for Relief: Violation of the Miscellaneous Purposes Act and the Compact Against Texas).[4]

New Mexico alleges that those violations have:

(i) caused New Mexico (EBID) to receive less Project water than the Compact requires; and

[4] The Special Master in his March 31, 2020 Order, Dkt. 338 dismissed New Mexico's Seventh Counterclaim, but clarified that that dismissal only related to "the exercise of original jurisdiction separate and apart from the same subject matter being addressed more fully within Counterclaim 1," which was directed against Texas. March 31, 2020 Order, Dkt. 338 at 36. It is noteworthy that the Special Master dismissed New Mexico's claims concerning the Miscellaneous Purposes Act and related contracts, clarifying that the Parties' standing in this case "arises from . . . the Compact itself," a Compact that is "between New Mexico, Texas, and Colorado." *Id.* at 35.

(ii) reduced the amount of Usable Water in Project Storage, adversely impacting Project efficiency, lowering the water table, and adversely impacting the aquifer. NM Counterclaims, Dkt. 93 at 17-19 (First Claim for Relief).

New Mexico also alleges that the 2008 Operating Agreement and various other Project operations and accounting changes and actions implemented since 2006 have meant that Texas and El Paso County Water Irrigation District (EPCWID) has received and is continuing to receive, more Rio Grande water through Project allocations than they are entitled to under the Compact. NM Counterclaims, Dkt. 93 at 24-25 (Fourth Claim for Relief).

2. New Mexico's Claims Against the United States

New Mexico also filed seven counterclaims against the United States. *See* NM Counterclaims, Dkt. 93 at 19-23, 25-32. Those counterclaims concerned, *inter alia*, interference with Compact apportionment (Second Claim for Relief); improper release, by the United States of Compact Credit Water (Third Claim for Relief); violation of the Water Supply Act (Fifth Claim for Relief); improper Compact and Project Accounting (Sixth Claim for Relief); violation of the Miscellaneous Purposes Act (Seventh Claim for Relief); improper Project Maintenance (Eighth Claim for Relief); and failure to enforce the 1906 Convention (Ninth Claim for Relief). *Id.* The United States moved to dismiss each of those counterclaims, and the Special Master granted that relief, dismissing New Mexico's counterclaims 2, 3, 5, 6, 7 (as against the U.S.), 8 and 9 in his March 31, 2020 Order, Dkt. 338 at 2, 28-38, 42. In that March 31, 2020 Order, and as relevant to this Motion, the Special Master found that:

(i) The dismissed counterclaims were "inconsistent with the scope of the pending action." March 31, 2020 Order, Dkt. 338 at 41. Specifically, "this case is not a vehicle for each and every individual claim bearing some relationship to the Compact or administration of the Project." *Id.* While "[e]vidence associated with such claims may be relevant to the broad

pending claims," "[i]ndividual claims brought under various sources of law other than the Compact" are left to be resolved in the future "informed by the Court's ultimate interpretation and application of the Compact." *Id.*

(ii) "The Court enjoys broad authority to fashion relief consistent with the Compact." *Id*. at 33;

(iii) "The Court's ultimate interpretation of the Compact will inform future administrative decisions and Project operations." March 31, 2020 Order, Dkt. 338 at 15. Significantly, "[t]o 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." March 31, 2020 Order, Dkt. 338 at 29.

(iv) "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' 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." *Id.* at 15.

F. <u>The Irrigation Districts Are Not Parties to this Original Action</u>

Elephant Butte Irrigation District (EBID) and the El Paso County Water Improvement District No. 1 (EPCWID) each filed Motions to Intervene as Parties in the Original Action. All the Parties to the litigation opposed these interventions.

Significantly, the United States vigorously opposed the irrigation districts' intervention. Its opposition was based, among other reasons, on fundamental concepts of state sovereignty. Brief for the United States in Opposition to EPCWID No. 1's Motion for Leave to Intervene (U.S. Response to EBID Motion to Intervene) at 10, 11; Brief for the United States in Opposition

to EBID's Motion for Leave to Intervene (U.S. Response to EPCWID Motion to Intervene) at 10, 11. As relevant to this Motion, the United States argued that "EPCWID's receipt and delivery of Project water within its service area has no effect on how the water is allocated among the States under the Compact." U.S. Response to EPCWID Motion to Intervene at 10. This is so, it explained, because "[t]hose contractual rights and obligations are considered only after the respective rights of the States under the Compact – *the subject of this original action* – are defined." *Id.* (emphasis added).

The United States provided additional pragmatic arguments against intervention: "the expansion [of parties in the litigation] could make it significantly less likely that any of these cases of interstate sovereignty could be resolved through negotiation." U.S. Response to EPCWID Motion to Intervene at 16. It reminded the Court that "the preferred approach for resolving interstate water disputes 'should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudication power.'" *Id.* (quoting *Colorado v. Kansas*, 320 U.S. 383, 392 & n.4 (1943)). The United States further argued that state-created entities such as EBID and EPCWID cannot be allowed to impeach the decisions of their respective states and to allow them to do so, quoting the Supreme Court, would be "offensive to state sovereignty" and that intervention by wholly intrastate entities such as the respective districts could never be justified. U.S. Response to EBID Motion to Intervene at 11; U.S. Response to EPCWID Motion to Intervene at 11.

Special Master Grimsal fully analyzed the question of the district's proper role in this litigation and recommended that the motions to intervene be denied because the districts were not parties to the Compact and the respective states adequately represented their interests. First Report, Dkt. 54 at 3, 4. The main reasons for recommending that intervention be denied were

that the districts were not parties to the Compact and that their interests are adequately represented by their respective states. Neither the districts nor any of the Parties took exceptions to the Special Master's recommendation. The Supreme Court accepted the recommendation and denied the motions to intervene without further analysis. *Texas v. New Mexico*, 138 S. Ct. 349 (2017).

G. The Special Master's Order on the United States' Motion to Dismiss and the Law of the Case Briefing

After the 2018 Decision, Texas "moved for a judicial declaration to confirm legal issues previously decided and to exclude evidence related to these issues"; New Mexico "moved for partial judgment on matters previously decided"; and "[t]he United States, Colorado, and several amici . . . filed briefs setting forth their respective interpretations of prior rulings in this case and their positions as to the Texas and New Mexico motions." April 14, 2020 Order, Dkt. 340 at 1; *see also* Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence, Dkt. 162 *and* New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support, Dkt. 165.

In deciding those motions, the Special Master offered several valuable insights into this case that are relevant to this Motion, including that "[j]urisdictionally, the case now is before the Court as a Compact enforcement action." April 14, 2020 Order, Dkt. 340 at 2. And that "[p]ursuant to *Hinderlider v. La Plata River & Cherry Creek Ditch Co*., 304 U.S. 92 (1938), the Compact (along with the constitutionally superior 1906 Treaty) is the ultimate law of the land governing Colorado's, New Mexico's and Texas's actions as affecting the Rio Grande." *Id.* at 13-14.

H. The Special Master's Orders at Summary Judgment

In the fall of 2020, Texas, the United States, and New Mexico filed simultaneous motions for summary judgment. Texas moved for partial summary judgment seeking a ruling to define Texas's and New Mexico's apportionments of the Rio Grande pursuant to the Compact. Texas also sought rulings as to: New Mexico's Compact duties; the inapplicability of New Mexico state law to Rio Grande waters downstream of the Elephant Butte Reservoir (Reservoir); the Compacting States' intent to protect a "1938 condition"; and New Mexico's depletion of hydrologically connected Rio Grande water. Texas's Motion for Partial Summary Judgment, Dkt. 413.

New Mexico filed its own motion for partial summary judgment as to the Compact apportionment and filed additional motions seeking rulings on notice requirements, parameters on Texas's apportionment, and to limit Texas's claims for damages to certain years. *See, e.g.,* New Mexico's Motion for Partial Summary Judgment on Compact Apportionment, Dkt. 415; The United States also moved for partial summary judgment and for a preliminary injunction limiting all groundwater pumping in New Mexico. The United States' Motion for Partial Summary Judgment, Dkt. 414. Colorado and the several amici filed briefs in support of or against the various motions.

The Special Master's May 21, 2021 Order on the motions for summary judgment (MSJ Order, Dkt. 503) addressed the following:

(i) *Regarding Compact apportionments*: The "Compact unambiguously establishes that: 1) New Mexico receives part of its apportionment above the Reservoir and part below; (2) New Mexico's downstream apportionment is delivered by the Project; and (3) New Mexico owes Texas a duty to not interfere with the Project's delivery of Texas's Compact Apportionment." MSJ Order, Dkt. 503 at 46. "The Compact and the inextricably intertwined

Project and Downstream Contracts provide for [a] 57/43 split" of Project supply. *Id.* at 51. "New Mexico owes a duty to prevent groundwater pumping that adversely affects surface water and Project Return flows to an extent that interferes with Project delivery of . . . Texas's Compact apportionment." *Id.* at 50.; New Mexico state law does not control Texas's apportionment. *Id.*; New Mexico must administer its state laws so as to project Texas's apportionment. *Id.*

(ii) *Regarding the relationship between the Compact and the Project:* "The Compact protects the Project, its water supply, and a baseline operating condition" In order to prevent interference with the "Project delivery of Mexican treaty water or Texas's Compact apportionment." MSJ Order, Dkt. 503 at 49-50. At a minimum, the baseline condition requires "New Mexico protection of surface water and return flows against direct and indirect capture beyond limits that are subject to material dispute." *Id.* at 49.

(iii) *Regarding issues of state sovereignty:* "New Mexico enjoys sovereign rights to protect its downstream Compact apportionment through action against the other compacting states. The Compact imposes on New Mexico a duty to employ its laws to protect Compact deliveries to Texas and treaty deliveries to Mexico. On the other hand, New Mexico's laws apply to define the relative rights between New Mexicans as to their respective share of New Mexico's overall Compact apportionment." MSJ Order, Dkt. 503 at 48.

(iv) *Regarding the role of EBID:* "New Mexico is not a party to the Downstream Contracts. New Mexico law, however, governs EBID's existence and authority and the relative rights of individual New Mexicans to their share of New Mexico's apportionment. New Mexico represents the interests of all New Mexicans (fictional or natural, including EBID) as parens patriae in this Compact action." MSJ Order, Dkt. 503 at 51.

(v) *Regarding the United States' motion for summary judgment*: "New Mexico's duty exists in the aggregate to not interfere with Project delivery of Mexican treaty water or the Compact apportionment to Texas. I am not prepared at this time to issue a ruling as to whether the intrastate impact on New Mexicans of water capture by other New Mexicans violates a Compact duty independent of impacts on another state. Although a remedy in this case may impose specific requirements on how a state treats its own citizens, a state's citizens do not enjoy the right to assert Compact claims against their own state, **and the United States' admission into this action as a party was based, in part, on the United States' pursuit of relief substantially similar to the relief sought by Texas."** MSJ Order, Dkt. 503 at 53 (emphasis added); New Mexico may not allow water users other than those within the EBID to deplete the surface water supply of the Project "to the extent such depletions interfere with Compact delivery to Texas or Treaty delivery to Mexico." *Id.* at 53.

The Special Master also noted that certain issues would be reserved for trial. These included the nature of the "baseline condition," the respective obligations of the States, and the obligation of the United States concerning allocating and delivering the Compact equitable apportionment. MSJ Order, Dkt. 503 at 46 - 53.

I. Settlement Efforts

In the nine years since Texas filed its Complaint in this Original Action, the States and the United States have engaged in extensive settlement discussions. The earliest discussions took place in 2016 and 2017, and were largely unmediated. In December of 2020, following the filing of summary judgment motions, Judge Oliver Wanger (retired United States district judge of the United States District Court for the Eastern District of California) was engaged to mediate. Judge Wanger acted as mediator for a period of months and met individually and collectively with the parties.

During the early summer of 2021, the parties turned their attention to trial preparation and, due to the pandemic, a trial was held by Zoom in the fall of 2021. At the close of the trial, the Special Master again raised the possibility of mediation and the parties engaged Judge Arthur Boylan, retired Chief U.S. Magistrate judge of the United States District Court for the District of Minnesota. With the assistance of Judge Boylan, the parties met both live and by Zoom, over the course of December 2021 through October 2022. A technical committee comprised of technical experts, consultants and client representatives also met on numerous occasions. The technical committee, along with legal representatives and party principals, were involved in the negotiations.

No single entity or individual was responsible for the Consent Decree and supporting Appendix, and while the States, including the technical committee members, agree that the Consent Decree is the appropriate way to resolve the dispute between the States, individual technical committee members might differ in their reasoning.

IV. SUMMARY OF THE CONSENT DECREE

The Consent Decree specifies procedures to ensure the proper apportionment of Rio Grande water between Texas and New Mexico below Elephant Butte Reservoir and quantifies New Mexico's obligation to deliver water to Texas.

A. The Effective El Paso Index

The centerpiece of the Consent Decree is the Effective El Paso Index ("Index" or "EEPI") (Exhibit 1, Decree at II.B-F) which establishes an annual, volumetric target for New Mexico to deliver water to Texas. The Index approach described in the Consent Decree is similar to that found in many other interstate water compacts, in which indices are used to govern the division of water.

Generally, under an index-based compact, flow through an upstream stream gage determines a state's downstream delivery obligation. Any deviation from this obligation provides for credits (or positive departures) and debits (or negative departures) on an annual and accrued (accumulated) basis. Index-based compacts define limits for negative accrued index departures that cannot be exceeded. The Compact already has two index-based obligations upstream of Caballo Dam that function in this manner: Article III for delivery of water by Colorado to New Mexico, and Article IV for delivery by New Mexico to Elephant Butte Reservoir.

The Decree defines a new Index under which the annual release from Caballo Dam will be used to determine New Mexico's obligation to deliver water to Texas at the El Paso Gage (USGS 08364000), a stream gage very near the New Mexico-Texas state line. The Index is comprised of two basic parts: the Index Obligation, which establishes the New Mexico annual delivery target; and the Index Delivery, which is a measurement of amount of water that New Mexico actually delivers to Texas, largely measured at the El Paso Gage. Exhibit 1, Decree at II.B; *see*, Exhibit 6, Barroll Decl. at ¶¶ 23-39.

The formula used to calculate the Index Obligation is based on a 2-year regression analysis comparing historical releases at Caballo Dam with stream flows at the El Paso Gage during the years 1951 – 1978 ("D2 Period"). *See*, Exhibit 4, Hutchison Decl. ¶¶ 79-110; Exhibit 6, Barroll Decl. at ¶¶ 14-15. The Index Obligation will be calculated annually based on current-year and previous-year releases from Caballo Dam using this formula. The Index Delivery will be calculated annually based on annual stream flow measured at the El Paso Gage, adjusted for deliveries to Mexico, Texas water use above the El Paso Gage, and other factors. *See*, Exhibit 6, Barroll Decl. at ¶ 20; Exhibit 4, Hutchison Decl. at ¶¶ 23-28.

B. Measuring Compact Compliance

New Mexico's compliance with the Compact will be measured by comparing the Index Obligation with the Index Delivery. The difference between the Index Obligation and the Index Delivery is the Annual Index Departure. Ideally, the Index Delivery would equal the Index Obligation every year, but the Compacting States have acknowledged that this is unlikely due to a number of factors related to the conveyance of water between Caballo and the El Paso Gage, a distance of nearly 100 miles. *See* Exhibit 3, Brandes Decl. at ¶¶ 16-17; Exhibit 7, Sullivan Decl. at ¶ 16. The Consent Decree therefore allows New Mexico to accrue (accumulate) departures so long as specified Negative Departure limits are not exceeded. Exhibit 6, Barroll Decl. ¶¶ 29-32; 33-36 (describing "triggers" to avoid exceedances). This provision is comparable to provisions in Article VI of the Compact, which allow New Mexico and Colorado to accrue debits on their delivery obligations upstream of Elephant Butte Reservoir, within specified limits.

The Negative Departure limits set in the Consent Decree are 150,000 acre-feet for the first 5 years, and 120,000 acre-feet thereafter. Exhibit 1, Decree at II.C. If New Mexico reaches 150,000 (or 120,000) acre-feet of accrued Negative Departures from the Index Obligation, it is in violation of the Consent Decree. *See*, Exhibit 7, Sullivan Decl. ¶¶ 16-19.

To help prevent New Mexico from reaching the Negative Departure limit, the States also negotiated an intermediate negative "trigger" of 80,000 acre-feet, at which point additional water management actions will be initiated. Exhibit 1, Decree at II.D; Exhibit 6, Barroll Decl. ¶¶ 33-36. If New Mexico reaches the intermediate negative trigger, New Mexico must first impose additional water administration to reduce accrued Negative Departures to 16,000 acre-feet within 3 years. If that reduction has not occurred, New Mexico has agreed to transfer to Texas a part of its apportioned water during the next 3-year period until the Accrued Index

Departures are less than 16,000 acre-feet. This transfer is accompanied by an automatic adjustment to the accrued Negative Departure, with the Texas Escrow Account described in Section II.D.2 of the Consent Decree used to avoid double counting. Exhibit 6, Barroll Decl. ¶¶ 37-39; Brandes Decl. ¶ 32.

The Accrued Index Departures can also be positive if New Mexico over-delivers water to Texas. Exhibit 1, Decree at II.D.3. The Compacting States negotiated a similar positive "trigger" of 30,000 acre-feet. If accrued Positive Departures are greater than 30,000 acre-feet for two consecutive years, Texas is required to transfer a part of its apportioned water to New Mexico over a 3-year period until the Accrued Index Departures are less than 16,000 acre-feet. This transfer is to be accompanied by an automatic adjustment to the accrued Positive Departure, with the New Mexico Escrow Account used to avoid double counting. Escrow account waters must be used within 3 years of deposit. Exhibit 1, Decree at II.D.3. Together, the negative and positive triggers and related provisions provide guard rails that help ensure that New Mexico and Texas each receive their equitable apportionment.

During low water years, when Caballo Releases are less than 200,000 acre-feet, the Index does not apply. Likewise, when Caballo Releases are greater than 790,000, the Index Obligation is calculated as if the release were 790,000 acre-feet. Exhibit 1, Decree at II.E.1. The Compacting States have provided for certain adjustments to Index Departures, including extinguishing all Accrued Index Departures (positive and negative) during years when an "actual or hypothetical spill," as that phrase is used in the Compact, occurs. Exhibit 1, Decree at II.E.4.

Project operations and Project Accounting must be consistent with the Decree and must not interfere with the Compacting States' rights and entitlements under the Decree and Compact. Examples of procedures that are necessary to maintain consistency between the Consent Decree

and Project operations are provided in Appendix 1 and explained in the Barroll Decl. ¶¶ 40-41; Decree at III.A.

Based on the technical evaluations of the Index Methodology reflected in the Hutchison, Sullivan, Barroll, and Brandes Declarations, the Index methodology will resolve the Compact dispute. Exhibit 4, Hutchison Decl. ¶¶ 102-115; Exhibit 7, Sullivan Decl. ¶¶ 23-28; Exhibit 6, Barroll Decl. ¶ 43; Exhibit 3, Brandes Decl. ¶¶ 16-23, 33-39. The States are committed to satisfying their various obligations under the Index methodology. *See, e.g.,* Exhibit 5, Hamman Decl., New Mexico State Engineer.

V. ARGUMENT

The Consent Decree fully resolves this litigation, and the Special Master should enter it over the United States' objection. This is the case for four reasons: (1) the Consent Decree resolves all of the Compact claims stated by any party in this litigation, leaving only intrastate disputes that may be resolved in alternative forums; (2) the Consent Decree does not affect any substantive right or create any new legal obligations on the United States; (3) the Consent Decree is consistent with the prior orders of the Court and the Special Master interpreting the Compact; and (4) public policy and procedural fairness principles support entry of the Decree.

A. The Consent Decree Resolves the Interstate Dispute Concerning the Apportionment of Water Under the Compact

The Compact's express purpose is to effect the equitable apportionment of the waters of the Rio Grande above Fort Quitman, Texas among the States of Colorado, New Mexico, and Texas. Compact at 1; *Texas v. New Mexico*, 138 S. Ct. at 959; Exhibit 1, Decree at II.A.1. This case is fundamentally about the equitable apportionment between New Mexico and Texas below Elephant Butte Reservoir.

The first and foremost reason why the Special Master should recommend approval of the Consent Decree to the Supreme Court is that the Decree compromises and settles all interstate claims in this litigation arising out of the Compact. To the extent that the United States has any further claims that the Consent Decree leaves unresolved, they relate exclusively to intrastate disputes with New Mexico that can and should be resolved in alternative forums.

1. The Scope of this Case is Limited to the Interstate Apportionment of Water Under the Compact

This case is about the equitable apportionment of water as between Texas and New Mexico below Elephant Butte Reservoir under the Compact. *See, e.g.*, TX Complaint, Dkt. 63 at 18-19 (seeking relief under the Compact as against New Mexico); *Texas v. New Mexico*, 138 S. Ct. at 954, 956 ("Texas claims that New Mexico has defied the Compact."); March 31, 2020 Order, Dkt. 338 at 1 ("Inherent in these allegations is a fundamental disagreement as to Compact interpretation regarding the underlying equitable apportionment between the states."). The presence of the United States as a party in this case does not alter this limited focus. *See, e.g.*, *Texas v. New Mexico*, 138 S. Ct. at 960 ("This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States.").

The Court and Special Master have carefully restricted the claims in this action to a narrowly defined interstate dispute, reserving all additional intrastate disputes for other forums. For instance, in dismissing certain of New Mexico's counter claims against the United States regarding Project operations, the Special Master reasoned: "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 attaching particular contracts for delivery of water." March 31, 2020 Order, Dkt. 338 at 1; *see also, e.g.*, *id.* at 29-30

(dismissing New Mexico's counterclaim against the United States concerning the validity of the 2008 Operating Agreement as "beyond the scope of the current litigation"). *Id*. at 30.

The other issues that the parties have litigated in this case are ancillary to the fundamental dispute over the equitable apportionment and are relevant in this proceeding only to the extent that they affect the conveyance of water below Elephant Butte to deliver to Texas and New Mexico their respective shares. *See* March 31, 2020 Order, Dkt. at 338 at 1 ("A great deal of historic and scientific evidence may be material to providing (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.") (Emphasis added).

The United States has acknowledged that the equitable apportionment is the defining issue in this litigation. In opposing the Texas irrigation district's motions to intervene, the United States wrote:

> The complaints filed by Texas and the United States seek to establish the sovereign rights among the States, the nature of the apportionment of water agreed to by the States under the Compact, and the rights of the United States on behalf of the Project and under the treaty with Mexico. EPCWID is not a party to the Compact, and it acknowledges (Mem. In Supp. 4, 7-8, 26-27) that the United States operates the Project's dams and reservoirs and determines how much water is allocated to EBID and EPCWID, respectively, pursuant to the 1938 contract and the 2008 Operating Agreement. EPCWID's receipt and delivery of Project water within its service area has no effect on how the water is allocated among the States under the Compact. Those contractual rights and obligations are considered only after the respective rights of the States under the Compact—the subject of this original action—are defined.

U.S. Response to EPCWID Motion to Intervene Memo in Support at 10; *see also* United States Motion to Intervene EBID Memo in Support at 10 (similar).

Put simply, the United States recognizes that the division of water between the states must come first and that Project Operations must conform to that division. *See, e.g.*, April 2,

2019 Hearing Transcript (4/2/2019 Hr'g Tr.), Dkt. 264 at 49 (statement by counsel for the United States that "[when] we have a decree that defines what each state has, we can then look to project operations and determine whether those operation[s] are consistent with the decree").

2. The Consent Decree Resolves the Apportionment Issues

The Consent Decree specifies procedures to ensure that the equitable apportionment of Rio Grande water between Texas and New Mexico below Elephant Butte Reservoir, as established in the Compact, is attained. Compliance with the procedures set forth in the Decree resolves Texas's claims against New Mexico, as well as New Mexico's counterclaims against Texas. Both states' claims involve allegations that the other state took steps or failed to act to avoid interference with delivery or receipt of the equitable apportionment under the Compact. As described below, the Consent Decree resolves these claims by specifying methods and practices which will ensure delivery of each states' apportionment.

a. The Consent Decree Resolves Texas's Compact Claims

Texas seeks two types of Compact-related relief in its Complaint: (1) A declaration of its Compact apportionment and (2) avoidance of interference with Project operations linked with ensuring that the Texas Compact apportionment can be delivered. The Consent Decree resolves both claims. Texas's Complaint also includes a prayer for relief in the form of monetary damages. While the Consent Decree does not include a monetary damages award in Texas's favor, it does include accelerated delivery make-up provisions in the form of water that the New Mexico must supply in the event of excessive negative departures from the Index obligation. *See* Exhibit 1, Consent Decree at II(C).

The Consent Decree establishes the Index methodology, described at Section IV, *supra*, and in the declarations of Dr. Barroll, Dr. Hutchison, Mr. Sullivan, and Dr. Brandes. The Index methodology requires New Mexico to ensure Texas's apportionment of 43% of the water

released from Caballo Dam, after accounting for deliveries to Mexico and the Texas portion of the Mesilla Basin, is delivered to the El Paso Gage by satisfying the Index Obligation annually. *See* Exhibit 6, Barroll Decl. ¶¶ 23-28. The Index methodology establishes a "state line delivery requirement" which is analogous to the delivery mechanism that measures Colorado's compliance with the Compact under Article III. *Id.* ¶ 17. The Index methodology ensures compliance with the Compact, but also creates an operating framework for "departures" from the Index Obligation that allows New Mexico the latitude to make intrastate water administration decisions to ensure Texas receives its apportionment. Exhibit 6, Barroll Decl. ¶¶ 29-32; Brandes Decl. ¶¶ 16-23.

Texas's second claim, related to non-interference with Project operations, is directly linked to ensuring that Texas receives its apportionment. Texas's second claim is also resolved by the Consent Decree. Under the Consent Decree, New Mexico must undertake additional water administration activities if its departures from the Index Obligation reach certain thresholds. *See* Exhibit 3, Brandes Decl., ¶ 32; Exhibit 6, Barroll Decl. ¶¶ 33-36 (describing EEPI operational triggers). This provision reflects the States' agreement that the doctrine in *Hinderlider,* 304 U.S. at 92, applies and that delivery of Texas's Compact apportionment takes priority over the diversion and use of New Mexico's state-based water rights.

While the Consent Decree implements *Hinderlider* principles, it does so without interfering with state sovereignty. In other words, the Consent Decree directs New Mexico to undertake administration to meet the Index Obligation and cure Index Departures, but it does not reach into New Mexico's decision-making about how to ensure state-based water rights are administered to achieve the goals of the Consent Decree. Exhibit 5, Hamman Decl. ¶¶ 9-16. To the extent New Mexico's activities under the Consent Decree are insufficient to avoid

interference with Project operations *within* New Mexico, a concept suggested by the United States in its Complaint in Intervention, that is an *intrastate* issue that does not rise to the level of a Compact claim at all, and it is certainly not a Compact claim that Texas raised, or could have raised, in its Complaint.

Finally, New Mexico is obligated under the Consent Decree to annually deliver *additional* amounts of water to Texas to make up for past under deliveries when accrued Index departures exceed 150,000 acre-feet (for the first 5 years, and 120,000 acre-feet thereafter). While this is not money damages, Texas prefers New Mexico to guarantee delivery of water and in "real time" when it likely will be needed most. Exhibit 6, Barroll Decl. ¶ 32.

b. The Consent Decree Resolves New Mexico's Counterclaims

As set forth above, the Consent Decree specifies procedures to ensure that the Compact equitable apportionment of Rio Grande water between Texas and New Mexico below Elephant Butte Reservoir is attained. *See* Section IV, *supra.*

Compliance with the procedures set forth in the Consent Decree resolves New Mexico's counterclaims as against Texas because those counterclaims all concern actions taken by Texas, that have prevented New Mexico from receiving its Compact equitable apportionment below Elephant Butte Reservoir. Now that equitable apportionment has been clarified—and on the basis that the Court approves the Consent Decree as currently drafted—New Mexico's counterclaims will be fully addressed.

Specifically, New Mexico's counterclaims will be resolved for at least four reasons:

First, the Consent Decree, through the Index, clarifies the amount of Rio Grande water that Texas is entitled to by way of its Compact equitable apportionment. *See supra* at Section IV; *see also* Exhibit 6, Barroll Decl. ¶ 14; Exhibit 5, Hamman Decl. ¶¶ 9, 12. As explained above, the Consent Decree provides that Texas' equitable apportionment will be

determined by the Index. The Index is based on the D2 Equation, which Reclamation initially developed in the early 1980s using diversion data for the period between 1951 and 1978. Exhibit 4, Hutchison Decl. ¶¶ 72-82, 104-109. Using the D2 Period, the Index quantifies, on an annual basis, a specific amount of water that Texas is entitled to receive as a function of the amount of water released from Caballo Reservoir, after accounting for deliveries to Mexico. Exhibit 6, Barroll Decl. at ¶¶ 13, 20; *see also* Exhibit 4, Hutchison Decl. ¶¶ 72-82, 109.

Further, by defining a specific delivery obligation to Texas, the Index also establishes the amount of water to which New Mexico is entitled under the Compact. Analysis of the Index using the Integrated Lower Rio Grande Model indicates that release season diversions in New Mexico, over a 78-year projection period, would conform to a 57:43 apportionment of Project Supply as between New Mexico (below Elephant Butte Reservoir) and Texas. Exhibit 7, Sullivan Decl. ¶ 27. Cf. Exhibit 3, Brandes Decl. ¶ 38 ("New Mexico is protected from excessive over-deliveries of Project water to Texas."). Accordingly, New Mexico is satisfied that compliance with the Index will ensure that New Mexico also receives its Compact equitable apportionment of Rio Grande water below Elephant Butte Reservoir.

Second, because the Index is premised on hydrologic conditions and water use that were occurring during the D2 Period (*see* Exhibit 5, Hamman Decl. ¶ 11), it incorporates and protects the conjunctive use of surface water and groundwater in both New Mexico and Texas in a manner necessary to support the Project. *See* Exhibit 6, Barroll Decl. ¶¶ 23-28.

Third, by measuring deliveries to Texas at the El Paso Gage, after accounting for depletions in the Texas portion of the Mesilla basin, the Index methodology addresses New Mexico's concern that actions in Texas (including groundwater pumping) adversely impact Project performance in a manner that prevents New Mexico from receiving its Compact

equitable apportionment. Exhibit 7, Sullivan Decl. ¶ 21.b. The utilization of the state line El Paso Gage as the location at which Texas will receive and be charged for its equitable apportionment causes Texas to bear the impact of changes to Project efficiency in Texas (e.g., the impact of reduced return flows due to groundwater pumping in the Hueco Bolson). *See* Exhibit 4, Hutchison Decl. ¶ 115 (opining that the El Paso gage is "located in an ideal geographic, geologic, and hydrogeologic location to provide for a full accounting of all water delivered to Texas or used by Texas above the gage, and measure compliance with New Mexico's compliance with the EEPI Obligation").

Finally, as to monetary and other sought relief, New Mexico and Texas have both agreed, through the proposed Consent Decree, to forgo damages for past actions and to focus on prospectively ensuring that the Compact's equitable apportionment of Rio Grande water below Elephant Butte Reservoir is attained.

For all of the above reasons, New Mexico is satisfied that the agreement reached in the Consent Decree satisfies its claims.

B. <u>The Consent Decree Does Not Affect the United States' Substantive Rights</u>

As discussed above, the Compacting States have settled amongst themselves the fundamental issue in this litigation: the equitable apportionment of water below Elephant Butte Reservoir pursuant to the Compact. The United States may not "preclude [the Compacting States] from settling their own disputes and thereby withdrawing from litigation." *Local No. 93*, 478 U.S. at 528-29. It may only object to the proposed Consent Decree if and to the extent that it would suffer some "legal prejudice." *See Wash. Metro. Area Transit Auth*, 666 A.2d at 45; *accord N.M. ex. rel. State Eng'r v. Carson*, 908 F.3d 659, 665 (10th Cir. 2018); *Quad/Graphics, Inc. v. Fass*, 724 F.2d 1230, 1233 (7th Cir.1983). *Cf. Horne v. Flores*, 557 U.S. 433, 446 (2009)

("To establish standing, a plaintiff must present an injury that is concrete, particularized, and actual or imminent."). The United States cannot carry this burden.

1. The United States Has No Independent Interest in the Equitable Apportionment Between Texas and New Mexico Below Elephant Butte Reservoir

The United States intervened in this action to pursue its claim that groundwater pumping in New Mexico may interfere with Project operations to such a degree that the United States would be unable to deliver to Texas its apportionment of water under the Compact. U.S. Complaint, Dkt. 65 ¶¶ 13-15 (posing its claim against New Mexico in terms of interference that prevents adequate deliveries to Texas). The Compacting States have now agreed to terms in the proposed Consent Decree to precisely define the amount of water that must be delivered to the Texas state line to accomplish that apportionment, and New Mexico has agreed to injunctive terms to assure that its water use does not exceed that threshold. The question is whether the United States has any "legal right" to maintain a different division of water. *See City of Hialeah*, 140 F.3d at 975. The answer is unequivocally "no": the United States has no interest in the equitable apportionment between the states.

This is the case for three principal reasons: (1) the United States does not have any separate apportionment of water under the Compact; (2) the States, not the United States, represent the interests of individual water users; and (3) the United States' interest, under Compact, is limited to its role as a quasi-"agent" to ensure that the equitable apportionment is, in fact, made.

a. The United States Does Not Have an Apportionment of Water Under the Compact

"Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New*

Mexico, 459 U.S. 176, 183 (1982) (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931); *Kansas v. Colorado*, 206 U.S. 46, 98 (1907)). An "equitable apportionment" is a term of art that alternatively means the "division of water," *Kansas v. Nebraska*, 574 U.S. at 455, the "right of each [State] to receive benefit," *Kansas v. Colorado*, 206 U.S. at 117, the "just and equitable' allocation," *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945), or the "equitable share of the flow." *Colorado v. Kansas*, 320 U.S. at 392. An equitable apportionment action arises from the sovereign interests of the states in the use and enjoyment of the natural resources within their boundaries. *See Hudson Cnty. Water Co. v. McCarter*, 209 U.S. 349, 356 (1908) ("[F]ew public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished.").

The United States, by contrast, has no right or direct interest in the apportionment of water as between two states. *See* First Report, Dkt. 54 at 230 ("The United States has no claim itself to the natural flow of an interstate stream, as does a State through which the stream passes") (citing *New Jersey v. New York*, 283 U.S. 336, 342 (1931); *Wyoming v. Colorado*, 259 U.S. 419, 466 (1992)); *see also Arizona v. California*, 373 U.S. 546, 614 (1963) (noting Congress's "great reluctance to interfere with the division of water" out of "a deep and fundamental mistrust of federal intervention and a profound regard for state sovereignty"); *Nebraska v. Wyoming*, 325 U.S. at 615 (rejecting the United States' assertion of an a separate "appropriation" of water, in the equitable apportionment as between Nebraska and Wyoming, to support federal reclamation projects). Accordingly, where the United States is permitted to intervene as a party in an equitable apportionment dispute, the Court has emphasized its interest

to protect unique "federal interests" apart from the equitable apportionment itself. *See, e.g.*, *Texas v. New Mexico*, 138 S. Ct. at 958 (citing *Maryland v. Louisiana*, 451 U.S. at 745, n.21).

Here, the United States has no interest, under the Compact, in defining the precise division of water necessary to achieve the equitable apportionment as between Texas and New Mexico below Elephant Butte. The Compact apportions Rio Grande Project water supply to New Mexico and Texas. Rio Grande Compact, 53 Stat. 785 (1939) (declaring that the compacting States' purpose for entering into the Compact was to "effect[t] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas"). The United States is not a party to the Compact, nor does it have the right to any water under the States' agreement. *Id.*; *see also* First Report, Dkt. 54 at 229-230 ("The United States is not a signatory to the 1938 Compact – indeed, it received no apportionment of Rio Grande water through the compact."). This is not to say that the United States has no interests under the Compact. Plainly, the Court permitted the United States to intervene in this action on the basis of certain federal interests. *Texas v. New Mexico*, 138 S. Ct. at 960 (sustaining the United States' exceptions to the First Interim Report). As discussed in Section V.B.2, *infra*, the proposed Consent Decree does not adversely affect any of those interests.

The point here is that the United States does not have an interest the precise division of water as between Texas and New Mexico downstream of Elephant Butte Reservoir under the equitable apportionment established in the Compact. That is, the United States has no reason to complain that either Texas or New Mexico would receive less than its equitable apportionment under the proposed Consent Decree.

b. With Respect to the Equitable Apportionment of Water, the States Represent the Rights of Water Users

In dividing the flow of interstate waters through equitable apportionment, the states represent the interests of the water users in their respective jurisdictions in a quasi-sovereign capacity. *Hinderlider*, 304 U.S. at 107 (recognizing that each state acts "as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other"); *cf. South Carolina v. North Carolina*, 558 U.S. at 267 (citation omitted) (articulating a "high" threshold to permit intervention by non-state entities into an original jurisdiction action out of "respect for sovereign dignity" of the States in representing the interests of their citizens); *New Jersey v. New York*, 345 U.S. at 373 (per curiam) (similar).

The Court analyzed the relationship between the federal interest in operation of a Reclamation project and the sovereign interests of states, as *parens patriae* on behalf of their water users, in *Nebraska v. Wyoming*, 325 U.S. at 615. There, the United States asserted "that it owns all the unappropriated water" in the North Platte River because it "acquired water rights by appropriation for the North Platte Project and the Kendrick Project." *Id.* at 611. The Court rejected this assertion:

> Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the land owners, wholly distinct from the property right of the government in the irrigation works. . . . The government was and remained simply a carrier and distributor of the water with the right to receive the sums stipulated in the contracts as reimbursement for the cost of construction and annual charges for operation and maintenance of the works.'

Nebraska v. Wyoming, 325 U.S. at 614 (quoting *Ickes v. Fox*, 300 U.S. 82, 94, 95 (1937)). The United States argued that, if its right to the unappropriated water was not recognized, "its management of the federal projects will be jeopardized." *Id.* at 615. The Court again rejected

this argument, reasoning that a dispute concerning "a system of regulation for federal projects" was not before it in setting an equitable apportionment as between the states:

> We are dealing here only with an allocation, through the States, of water rights among appropriators. The rights of the United States in respect to the storage of water are recognized. So are the water rights of the landowners. To allocate those water rights to the United States would be to disregard the rights of the landowners. To allocate them to the States, who represent their citizens parens patriae in this proceeding, in no wise interferes with the ownership and operation by the United States of its storage and power plants, works, and facilities.

Nebraska v. Wyoming, 325 U.S. at 615; *see also id.* at 629 ("[W]e think it is not proper to analogize this case to one where the United States acquires property within a State and asserts its title against the State as well as others."). Under this rubric, the United States' rights, as the operator of the various reclamation projects, was positioned in the same "'manner as a private appropriator or an irrigation district formed under state law.'" *Id.* at 629 (quoting *Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935)). Its "'rights can rise no higher than those'" of the states, and each state in the apportionment "'will stand in judgment for [the United States] as for any other appropriator in that state.'" *Id.* (quoting *Nebraska v. Wyoming*, 295 U.S. at 43).

Applying this principle here, the United States has no interest in the "allocation" of water as between water users in New Mexico and Texas. The right to use water in the Project inures to the benefit of the individual Project beneficiaries, and the Compacting States represent the water users in their respective jurisdictions *parens patriae*. The United States has no interest or right to demand, whether on its own or as a representative of the Project beneficiaries, a different division between the states. Its interest in the operation of the Project to deliver water to individual Project beneficiaries is subject to the appropriation rights of each state. As the United States put it, the "contractual rights and obligations" running between the Project beneficiaries and the United States "are considered only after the respective rights of the States under the

Compact—the subject of this original action—are defined." U.S. Response to EPCWID Motion to Intervene at 10.

The same point applies to the irrigation districts that receive water from the Project: EBID and EPCWID do not have any interest separate and apart from the Compacting States that may impede this settlement. The two irrigation districts have been granted significant leeway to participate as amici in this Original Action. Taking full advantage of the Court's forbearance, they have consistently asserted, without legal authority, that there can be no settlement of this Original Action without their assent, advocating initially *for* the States to settle the case[5] and then *criticizing* the States for settling the litigation via the Consent Decree.[6]

This Districts' position is not far from that taken by the United States, with the significant distinction that the irrigation districts are not parties to this litigation. As explained above, the Court accepted the arguments of the United States and the other parties that the districts should be entitled to participate as amici, and not as parties. Their attempt to make more out of their participation than as amici has been specifically rejected by the Supreme Court. The districts' repeated assertion that the Compacting States cannot settle this Original Action without their assent has also been rejected and should be given no weight.

In sum, the States represent the interests of all water users within their jurisdictions, including the holders of project water rights, with respect to the equitable apportionment under

[5] *See* June 24, 2022 Hearing Transcript (6/24/2022 Hr'g Tr.) at 51:14-22 ("EP1 wholeheartedly supports the diligent and concentrated efforts of the parties to settle and resolve this litigation"); July 26, 2022 Hearing Transcript at 30:20-25 ("we certainly believe, as we've articulated previously, that settlement can achieve in this case what litigation could not"); August 24, 2022 Hearing Transcript at 43:9-12 ("EP1 supports fully a legally and technically sound settlement agreement"), 59:16-17 ("We want, again, to be a proactive and positive supporter of settlement"). The court reporter has filed these transcripts with but have not been lodged in the Special Master Docket.

[6] *See* October 25, 2022 Hearing Transcript (10/25/2022 Hr'g Tr). at 44:9-15; 46:18-19, 58:6-13. On November 9, 2022, the court reporter filed the transcript with the Special Master. The transcript has not been lodged in the Special Master Docket.

the Compact. No party claiming an interest in the Project may rely upon that interest to object to the Consent Decree.

c. The United States' Role, Vis-à-vis Equitable Apportionment, is Limited to Quasi-"Agent"

During the October 25, 2022, Status Conference, the United States asserted that the Supreme Court has already recognized distinct federal rights under the Compact that preclude a Consent Decree without its concurrence. This position stands upon a misreading of the Supreme Court's March 5, 2018 Decision. It also importantly ignores the context surrounding that decision, including Texas's position on exception to the First Report of the former Special Master, which the Court, for all intents and purposes, accepted.

(1) Texas's Position Regarding the United States' Intervention Emphasized that the United States' Claim Should be Limited in Scope

The First Report of the Special Master concluded that the United States did not have claims against New Mexico arising under the Compact. Instead, the former Special Master recommended that the Court should allow the United States to litigate claims arising under Reclamation law pursuant to 28 U.S.C. § 1251(b)(2). This was the basis of the Exceptions filed by the United States and the ultimate decision made by the Court.

Texas expressed its position regarding the United States' claims in briefing on the United States Exceptions to the First Interim Report of the Special Master. "Texas supports the claims asserted by the United States to the extent they are Compact claims related to the equitable apportionment made thereunder." Texas Reply to Exceptions to First Interim Report of Special Master (Texas Reply to Exceptions) filed July 28, 2017 at 39-40. Texas argued that the United States, acted as the "agent" of the Compact charged with assuring that the Compact's equitable apportionment is, in fact, made. *Id*. at 40. Texas further stated that it would be appropriate for

the United States' claims under the Compact to be included in the Original Action to ensure that appropriated water in Elephant Butte Reservoir is delivered according to the terms of the Compact. *Id.*

Significantly, however, Texas was also clear that "to the extent that the United States' Complaint can be read to include claims asserted under Reclamation Law that are distinct from the apportionment achieved by the 1938 Compact, those claims should not be allowed to detract from the claims stated under the Compact." Texas Reply to Exceptions at 40. Agreeing with the First Special Master, Texas noted that the doctrine of equitable apportionment governs disputes between states concerning their rights to the use of interstate streams and, therefore, Reclamation law claims, either by New Mexico or the United States, addressing Reclamation contracts have no place in the resolution of Compact disputes. *Id* at 40-41.

Accordingly, Texas asked the Court to determine what was required for Compact compliance and not to waylay the case with ancillary disputes concerning what the Project, Reclamation law, or state water law requires.

(2) The Court's 2018 Decision Effectively Adopted Texas's Reasoning

The Court's Decision regarding the United States intervention cannot be read in isolation and without reference to the Texas Complaint and the arguments made by Texas in briefing on the Exceptions. The Court said that after it allowed the United States to file a Complaint the United States did so with a "complaint with allegations that parallel Texas's." *Texas v. New Mexico*, 138 S. Ct. at 958. As described above, the Texas Complaint dealt with the Compact and did not and does not deal with intrastate Reclamation issues involving New Mexico and the United States.

The Court cited four reasons why the United States' Complaint should be allowed to go forward. Of these, three emphasize that the United States' claims under the Compact are essentially derivative of Texas's.[7] The first reason was the interrelationship between the Compact and the Project. The Court explained that the United States had "assumed a legal responsibility" to deliver a certain amount of water to Texas. *Texas v. New Mexico*, 138 S. Ct. at 959. Citing the Texas brief, the Court described this as "the United States might be said to serve, through the Downstream Contracts, as a sort of 'agent' of the Compat, charged with assuring that the Compact's equitable apportionment' to Texas and part of New Mexico 'is in fact made.'" *Id.*

The second reason that the Court allowed the United States' intervention is that the United States plays an integral role in the Compact's operation. This point is nothing more than a recognition of the first point: any remedy for Texas would require the involvement of the United States. Finally, the Court summarized its reasoning: "the United States has asserted its Compact claims in the existing action brought by Texas, seeking substantially the same relief and without that State's objection. The case does not present the question whether the United States could initiate litigation to force a state to perform its obligations under the Compact or expand the scope of an existing controversy between States." *Texas v. New Mexico*, 138 S. Ct. at 960.

In effect, the Court specifically held that United States' Complaint was, aside from the United States' claims related to treaty obligations, limited to the issues raised by Texas. *See Texas v. New Mexico*, 138 S. Ct. at 950 ("This case does not present the question whether the United States could . . . expand the scope of an existing controversy between States."). The United States' presence in the litigation did not expand the scope of the existing controversy

[7] The only reason that breaks from this mold is the United States' interest in preventing interference with treaty obligations. The proposed Consent Decree does not affect those obligations. *See* § II(B)(2), *infra*.

between States. Thus, to the extent that The United States' position in opposing the Decree is based on its desire to expand the existing controversy between the States beyond the issues raised by the Texas allegations that parallel the Complaint, the Court's 2018 Decision forecloses its argument.

(3) The United States' Limited Interest as a Quasi-"Agent" Affords it No Basis to Object to the Consent Decree

The Court's 2018 Decision narrowly circumscribes the United States' claim with respect to equitable apportionment under the Compact: the Court permitted the United States to intervene in light of its role as an "agent" to effectuate the equitable apportionment. *Texas v. New Mexico*, 138 S. Ct. at 959 (quotation marks omitted); *see also* March 31, 2020 Order, Dkt. 338 at 17-18 (describing the United States' "role in the delivery scheme" under the Compact).

In this capacity, the United States may be said to have "obligations" under the Compact (with which the states may not interfere), but it does not have distinct Compact "rights." *Alabama v. North Carolina*, 560 U.S. 330 (2010) presents an analogous case. In that case, the interstate commission brought claims arising out of the Compact against one of the compacting states. Considering whether it could bring claims in an original action between the compacting states, the Court reasoned as follows:

> The Commission's claims under those Compact-related Counts are wholly derivative of the States' claims. The Commission is "a legal entity separate and distinct from" the States that are parties to the Compact. Since it is not a party it has neither a contractual right to performance by the party States nor enforceable statutory rights under Article 5 of the Compact. The Compact does, however, authorize the Commission to "act or appear on behalf of any party [S]tate or [S]tates ... as an intervenor or party in interest before ... any court of law," and it is obviously in this capacity that the Commission seeks to vindicate the Plaintiff's States' statutory and contractual rights in Counts I and II. Its Count I and Count II claims therefore rise or fall with the claims of the States. While the Commission may not bring them in a stand-alone action under this Court's original jurisdiction, it may assert them in this Court alongside the plaintiff States.

Alabama v. North Carolina, 560 U.S. at 357 (internal citations omitted).

This case is similar in that the Court permitted the United States to intervene to pursue certain claims, such as the claim that water use in New Mexico interferes with its ability to deliver Texas's apportionment, that are "wholly derivative" of Texas's claims. *Alabama v. North Carolina*, 560 U.S. at 357; *accord Texas v. New Mexico*, 138 S. Ct. at 960 (indicating that United States claims in this action do not "expand the scope of an existing controversy between States"). In that sense, the United States' interest is limited to "vindicat[ing]" the equitable apportionment rights of Texas. *Alabama v. North Carolina*, 560 U.S. at 357. It follows that the United States' claims should, at least with respect to the division of water between the States, "rise or fall" with Texas's claims. *Id.*

The United States' interest as a quasi-"agent" under the Compact, *Texas v. New Mexico*, 138 S. Ct. at 959, does not give it an interest in *defining* the division of water under the equitable apportionment in the first instance. Texas has determined that deliveries in accordance with the Index are sufficient to satisfy its apportionment under the Compact, so the United States has no interest to assert that some greater amount must be delivered to lands in Texas under the Compact. Its interest is limited to ensuring that the Index delivery "is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959.

2. The Consent Decree Does Not Prevent the United States from Litigating Legitimate Claims

The United States cannot "hold the other parties hostage in ongoing litigation" by blocking the Consent Decree. *Sierra Club*, 868 F.3d at 1066. At the same time, a consent Decree "cannot dispose of the valid claims of nonconsenting intervenors." *Local No. 93*, 478 U.S. at 529. The inquiry therefore becomes whether the United States has raised any "valid" interstate claims for relief that would remain after entry of the Consent Decree. It has not.

The United States claims three distinctive federal interests: (1) protecting "the assumptions underlying" the 2008 Operating Agreement, U.S. Response to Motion to Dismiss (Jun. 14, 2014) at 19, (2) "ensuring that New Mexico water users who do not have contracts with the Secretary for delivery of Project water, or who use Project water in excess of the amounts in their contracts, do not intercept Project water or interfere with delivery of that water to other Project beneficiaries," *id*., and (3) "ensuring that New Mexico water users downstream . . . do not intercept or interfere with delivery of Project water to Mexico pursuant to the international treaty obligation of the United States," *id*. at 20. None of these alleged federal interests presents a reason to reject the Consent Decree and return to litigation.

As to the first alleged distinctive federal interest, the Special Master has determined, and the United States conceded, that Project operations, accounting, and deliveries must be consistent with the Compact. March 30, 2020 Order, Dkt. 338 at 29. Thus, "[t]o 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." *Id*. Since there can be no interest in operating the Project contrary to law, it follows that the assumptions underlying the 2008 Operating Agreement do not represent a distinct federal interest that requires further litigation on the apportionment.

As to the second alleged interest, the gravamen of the United States' Complaint in Intervention, like the Texas Complaint, is that:

> Uncapped use of water below Elephant Butte Reservoir in New Mexico could reduce Project efficiency to a point where 43% of the available water could not be delivered to EPCWID, and 60,000 acre-feet per year could not be delivered to Mexico.

U.S. Complaint, Dkt. 65 ¶ 15. To remedy that allegation, the "substantially" similar relief sought by the United States was to "mandate that New Mexico affirmatively

prevent" unauthorized "interception and interference" of Project Supply, and "protect the rights, duties, and obligations of the United States with respect to the waters of the Rio Grande." *Id*. at 5, ¶¶ (c), (d).

The United States' claims are properly understood as seeking relief to prevent New Mexico from interfering with the United States' "legal responsibility" to "deliver a certain amount of water to Texas" in a manner that "assur[es] that the Compact's equitable apportionment to Texas and part of New Mexico is in fact made." *Texas v. New Mexico*, 138 S. Ct. at 959. Put simply, the United States' "valid" claims in this case seek relief to allow them to satisfy its duty to deliver Texas's equitable apportionment.

The Consent Decree provides precisely that relief. The United States requested injunctive relief to prevent New Mexico from interfering with Project deliveries to Texas by using more than its share of Rio Grande water. The Consent Decree provides exactly that relief by utilizing the Index to define the State's apportionment, while enjoining New Mexico to deliver those amounts in compliance with the Index, even if it requires New Mexico to implement additional water administration. In that way, the Consent Decree addresses the United States' primary concern that "uncapped" use of groundwater would prevent Texas from receiving its apportionment. U.S. Complaint, Dkt. 63 ¶ 15. In short, the Consent Decree directly addresses the fundamental question of "where the waters of the Rio Grande . . . should go in the future." March 31, 2020 Order, Dkt. 338 at 1.

To the extent that the United States suggests its claims relate to *intrastate* deliveries within New Mexico, such claims are beyond the scope of this original action. Whether certain users in New Mexico are harming other users in New Mexico is not an interstate issue, and it follows that the Compact does not protect those interests. *Cf. New Jersey v. New York*, 345 U.S.

at 372-73 (recognizing that (1) a state represents all of its water users in an original action, and (2) the Court is reluctant to "be drawn into an intramural dispute over the distribution of water within" a single state); *see also California v. Nevada*, 447 U.S. at 133 ("[L]itigation in other forums seems an entirely appropriate means of resolving whatever questions remain."); *United States v. Nevada*, 412 U.S. at 538 ("We need not employ our original jurisdiction to settle competing claims to water within a single State.").

Finally, the third distinctive federal interest is the United States' recognized interest in meeting its treaty obligations to Mexico. *See Texas v. New Mexico*, 138 S. Ct. at 959-60. There are three reasons why entry of the Consent Decree does not implicate this interest. First, the Decree explicitly provides that it cannot impact this interest. Tracking the language of the Compact itself, the Decree states "[n]othing in this Decree shall be construed as affecting the 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." Decree at IV.B. Second, the operation of the Index does not impact the calculation for deliveries to Mexico because the Index methodology calculates the Index Delivery to Texas as a remainder ***after*** accounting for deliveries to Mexico. Exhibit 6, Barroll Decl. ¶ 22. As a result, the Decree does not alter or impact the amount of water delivered to Mexico, and Reclamation is free to continue to use the existing D1 method for calculating deliveries to Mexico, or not. Third, the United States has not pursued this claim in the litigation. It presented no evidence during the first phase of trial on this issue, disclosed no expert opinions, and generally has not identified exhibits that support the theory that New Mexico actions will impact its Treaty obligations.

3. Following Entry of the Consent Decree the United States Will Have No Remaining Interstate Claims

As shown, if the Court grants the Joint Motion and enters the Consent Decree, Texas's claims will be fully addressed. It is difficult to conceive of what additional relief would be warranted to address the "parallel" claims of the United States. *Cf. Lawyer*, 521 U.S. at 579 (approving consent decree over objection because the consent decree "grant[ed] [the objector] an element of the very relief he had sought"). No continuing controversy will exist. *See* U.S. Const. Art. III, § 2, cl.1. (limiting the exercise of federal judicial authority to "cases and controversies."); *Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010) ("an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed") (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997)); *Frulla v. CRA Holdings, Inc.*, 543 F.3d 1247, 1250-51 (11th Cir. 2008) (a case becomes moot "when it no longer presents a live controversy with respect to which the court can give meaningful relief.").

Any remaining grievances regarding Project interference, water use in New Mexico are unrelated to Texas's equitable apportionment and involve matters entirely within New Mexico. They fall into the category of "competing claims to water within a single State" that should be addressed in a different forum. *United States v. Nevada*, 412 U.S. at 538. Here, there are several available forums in which the United States may address intrastate water use, including several pending cases. *See, e.g.*, *New Mexico v. United States*, Case No. 11-cv-00691 (D.N.M., filed Aug. 8, 2011) (litigating the 2008 Operating Agreement and distribution of Rio Grande Project Supply);[8] *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District et al.*,

[8] The Operating Agreement lawsuit is currently stayed pending the outcome of the present Original Jurisdiction suit. *See* Memorandum Opinion and Order, *New Mexico v. United States*, No. 11-cv-00691 (Mar. 29, 2013).

No. D-307-CV-96-888 (the New Mexico LRG adjudication of water which has jurisdiction to define and enforce the Project water right). The Special Master should therefore recommend that the Court enter the Consent Decree resolving all interstate claims in this case. If it has any remaining claims, the United States can proceed to litigate them in the appropriate forums for resolution of *intrastate* matters.

C. The Consent Decree Does Not Create New Legal Obligations for the United States

A consent decree may not affect a nonconsenting party's substantive rights by creating new legal obligations in the absence of a judgment on the merits. *Local No. 93*, 478 U.S. at 529. The United States has no basis to object to the proposed Consent Decree on this ground because it does not bind the United States to any new legal duties or obligations. This is the case for two reasons: (1) the United States has an existing duty, irrespective of the proposed Consent Decree, to operate the Project in a manner that effectuates the equitable apportionment, and (2) the proposed Consent Decree operates within the bounds of that existing duty by defining specific provisions to ensure that Project operations and accounting do not interfere with the equitable apportionment.

1. The United States Has a Duty, Irrespective of the Decree, to Operate the Project to Effectuate the Equitable Apportionment

As discussed at length throughout this brief, the proposed Consent Decree settles a dispute among the Compacting States concerning the equitable apportionment under the Compact. The problem is that the Compacting States are unable to affect that apportionment themselves. Rather, the Rio Grande Project is the is the single vehicle by which the Compact effectuates the apportionment of Rio Grande water to Texas and New Mexico below Elephant Butte Reservoir. Thus, the question is whether injunctive relief or any other remedy *against the United States* is a necessary component of the proposed Consent Decree. If so, the United States

would have a colorable objection: it cannot be bound to a decree over its objection without a judgment on the merits.

No such judgment is necessary in this case because the proposed Consent Decree does not contemplate any relief against the United States. Rather, both the Court and the Special Master have recognized that the United States has an *existing duty* to operate the Rio Grande Project in a manner that effectuates the equitable apportionment. *See, e.g., Texas v. New Mexico*, 138 S. Ct. at 959 (reasoning that the United States "assumed a legal responsibility" under the Downstream Contracts to "assur[e] that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made") (internal quotation marks omitted). Accordingly, relief against the United States is unnecessary.

a. The Compact Incorporates the Project as the Means of Accomplishing the Equitable Apportionment

There is a relationship between the Compact and the Project. The Project is a federal reclamation project, authorized in the Reclamation Act of June 17, 1902, 32 Stat. 390 and the Rio Grande Project Act of February 25, 1905, 33 Stat. 814, operated by the United States through the Bureau of Reclamation and irrigation districts located in New Mexico and Texas. Exhibit 3, Brandes Decl. ¶ 10. The Project is the means by which Compact water stored in Elephant Butte Reservoir is delivered to users below the reservoir in New Mexico and Texas, and in Mexico. *Id.* The annual allocation of Project water reflects each state's apportionment. Decree at I (defining "Annual Project Allocation").

The Supreme Court in its March 2018 opinion, addressed and characterized the relationship between the Project and the Compact:

> [T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec[t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the

> Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, 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." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference.

Texas v. New Mexico, 138 S. Ct. at 959. Thereafter, in ruling on the parties' summary judgment motions on Compact apportionment issues, the Special Master addressed the relationship, stating that the Compact unambiguously establishes that New Mexico receives apportionments above and below the Reservoir, and that the downstream portion is delivered by the Project. MSJ Order, Dkt. 503 at 46. The Special Master further concluded that New Mexico owes Texas a duty not to interfere with the Project's delivery of Texas's Compact Apportionment. *Id.* at 46-47. To that end, the Compact "protects the Project, its water supply, and a baseline operating condition." *Id.* at 49. The Special Master further concluded that the "Compact and the inextricably intertwined Project and Downstream Contracts provide for the 57%/43% split." *Id.* at 51.

b. The United States Must Operate the Project Consistent with the Compact to Effectuate the Equitable Apportionment

The Compact is an interstate compact among the states of Colorado, New Mexico and Texas. Each Compacting State's legislature ratified it, and the United States consented to and approved it pursuant to an Act of Congress, Act of May 31, 1939, ch. 155, 53 Stat. 785. "[O]nce Congress gives its consent, a compact between States . . . becomes the law of the land." *Texas v. New Mexico*, 138 S. Ct. at 958, citing *Texas v. New Mexico*, 462 U. S. at 564; *see also* April 14, 2020 Order, Dkt. 340 at 13-14 ("Pursuant to *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), the Compact (along with the constitutionally superior 1906 Treaty) is

the ultimate law of the land governing Colorado's, New Mexico's and Texas's actions as affecting the Rio Grande."

On this basis, the United States "assumed a *legal responsibility*" under the Downstream Contracts that are "inextricably intertwined" with the Compact. *Texas v. New Mexico,* 138 S. Ct. at 959 (emphasis added). The United States acts as an "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; *see also* April 14, 2020 Order, Dkt. 340 at 15 (quoting *Texas v. New Mexico,* 138 S. Ct. at 959) (internal citations and emphasis omitted). Its obligations are both to follow Federal law and to act as an "agent" of the Compacting States. Accordingly, the United States must operate the Project consistent with the Compact to effectuate the equitable apportionment. *Texas v. New Mexico,* 138 S. Ct. at 959; Decree at II.A.4.

The United States has recognized its role as an agent to ensure the apportionment to Texas is delivered in various filings and oral arguments since the United States was allowed to intervene. S*ee, e.g., supra,* Section I.A, United States' statements reflected in Hr'g. Tr., Dkt. 264 at 49. It has argued also that its role is more than an "agent," and that instead, the *Compact* must serve the *Project* and the States must defer to the wishes of the United States - the agent. This is not correct.

The United States, at several points throughout this litigation, has argued that its obligation to operate the Project in a manner that is consistent with the Compact is discretionary. For instance, in the United States' briefing in support of its exceptions to the First Report, Dkt. No. 54, it argued that it has an "obligation protected by the Compact to deliver water to contract holders in Texas and lower New Mexico," that it is "Reclamation's responsibility [to deliver water] pursuant to contracts with irrigation districts," but that "the Compact incorporates and

relies upon [the Project] that is obligated to deliver water . . . to irrigation districts in Texas and lower New Mexico pursuant to contracts that preexisted the Compact." U.S. Exception at 28-33. The United States has also argued in support of a purported "ability *under the Compact* to satisfy its obligations to Project users . . . ." Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master (U.S. Reply on Exceptions) at 14 (emphasis added). The United States cites no legal basis for these assertions, and in fact the assertions are without legal basis.

Similarly, at oral argument on the motions for summary judgment, the United States, referencing the Court's 2018 Decision, *Texas v. New Mexico*,138 S. Ct. at 959, stated: "[T]he U.S. might be said to serve as sort of an agent of the Compact charged with showing that the apportionment to Texas and part of New Mexico is, in fact, made . . . [the] project effectuates the apportionment. . . . . the project determines the distribution of water in New Mexico consistent with the Compact . . . ." March 9, 2021 Hearing Transcript on MSJ's, Dkt. 522 at 93:4-19. Counsel for the United States also argued: "[T]he Compact . . . requires obviously delivery to the project and then the project . . . [is] the recipe about how that apportionment occurs." *Id.* at 95:12-16 (emphasis added). Under this rendition of the United States' obligations as agent, the United States, as agent, turns into the United States as Compact principal—determining how the apportionment to Texas (or if) it will occur.

Ultimately, *it is the Project that serves the Compact, not the Compact that serves the Project.* The United States' Project operational decisions must comply with the Compact. The Compact does not change because the United States makes an operational decision that is different than what is provided for in the Compact (but the United States is in violation of the Compact). The United States is an "agent" of the Compact and the Compacting States, not the

other way around. Moreover, it is the irrigation districts that are subservient to the Compacting States and not the other way around.

Because the proposed Consent Decree is consistent with the Compact – it merely clarifies, without changing, Texas's and New Mexico's respective apportionments and provides for measures to ensure that they each receive those amounts – the entering of the Consent Decree would not alter the United States' duty or impose an additional duty on the United States, even if it may require modifications to Project operations. Thus, the Court should enter the Consent Decree, notwithstanding the United States' objection, because doing so would not "impose duties or obligations on" the United States that it does not already have. *See Local No. 93*, 478 U.S. at 529.

c. Binding Relief Against the United States is Not Necessary to Enter the Decree

Binding relief against the United States is not necessary to resolve the dispute concerning the equitable apportionment or to redress New Mexico and Texas's cross claims arising under the Compact. This is the case because, although the United States enjoys considerable administrative discretion in operation of the Project, it does not have the right to operate the Project in a manner that is *contrary* to the equitable apportionment under the Compact. Accordingly, Project operations must conform to the equitable apportionment irrespective of any judgment or binding relief against the United States in this action.

The Special Master resolved this issue in dismissing New Mexico's Counterclaims for declaratory relief against the United States. In evaluating the United States claim of sovereign immunity to dismiss New Mexico's counterclaims against it, the Special Master agreed, as technical or "semantic" matter, that declaratory relief against the United States is not available in this action:

> 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 Motion asserting sovereign immunity . . . .

March 31, 2020 Order, Dkt. 338 at 15. But, as the forgoing passage indicates, the unavailability of declaratory relief against the United States on technical grounds does not, as a practical matter, change the tenor of this proceeding: resolution of the foundational dispute concerning equitable apportionment will necessarily have effects on Project operations irrespective of a binding judgment against the United States. As the Special Master put stated, "[t]o 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." *Id.* at 29.

2. The Consent Decree Includes Specific Provisions to Ensure that Project Operations and Accounting Do Not Interfere with the Equitable Apportionment

The Compact apportions the waters of the Rio Grande among the States, and it "achieve[s] that purpose" in southern New Mexico and Texas via water delivered from the Project. *See Texas v. New Mexico*, 138 S. Ct. at 959. Accordingly, the division of water between southern New Mexico and Texas "must be deemed a Compact apportionment[,]" notwithstanding that it is delivered via the Project. MSJ Order, Dkt. 503 at 18. The Consent Decree sets specific annual delivery obligations to Texas to ensure this apportionment and sets out the Project operations and accounting adjustments that are needed to ensure those delivery obligations are made.

The Appendix to the Consent Decree sets out three areas where adjustments to Project operations are incorporated to support (and not conflict with) the Index Obligation and Deliveries:

(i) El Paso gage as the delivery point: The Consent Decree provides that Texas's Compact apportionment is delivered at the at El Paso gage. The Index Obligation and Deliveries are measured at the El Paso gage. To ensure consistency with the Index Methodology, Project deliveries to EPCWID will no longer be measured at the canal headings of the Franklin and Riverside Canals and the El Paso Water municipal intakes. Rather, these Project deliveries will instead be measured at the El Paso gage. This simplifies the issue of Texas's entitlement and eliminates the need for controversial Project credit accounting practices that were previously employed to calculate water use within the El Paso Valley. Exhibit 7, Sullivan Decl. at ¶ 21.b.

(ii) Modified D2 Allocations: Historically, Reclamation has used a one-year D2 regression analysis derived from Project data during the D2 Period, 1951 to 1978, to calculate annual Project allocations as a function of reservoir releases. The one-year D2 regression analysis calculates annual Project allocations based on current-year Caballo Releases. Initially the States used a one-year regression analysis to calculate the annual Index Obligation based on the current-year Caballo Release. *See* Exhibit 4, Hutchison Decl. ¶¶ 72-82. However, subsequent analyses revealed that the accuracy of this regression was improved when both the current year and the prior year Caballo Releases were included in the regression analysis, thus improving the calculated Index Obligation based on defined releases. Exhibit 7, Sullivan Decl. ¶ 23; Exhibit 4, Hutchison Decl. 79-81. The use of the two-year regression for the Index Obligation will require the Project to modify the allocation procedure to also use a two-year D2

regression to maintain consistency with the Index Obligation. Exhibit 7, Sullivan Decl. ¶ 23; Exhibit 4, Hutchison Decl. ¶¶ 102-10; Exhibit 6, Barroll Decl. ¶ 40.a.

If Project allocations methods are not modified to match the two-year regression, the Index Obligations and Project allocations deviate from one another, and result in greater Index departures. *See* Exhibit 7, Sullivan Decl. ¶ 23; Exhibit 4, Hutchison Decl. ¶¶ 102-03.

(iii) Carryover: In the mid-2000s, Reclamation began allowing the irrigation districts to carry over unused allocation, first on an ad hoc basis and later as enshrined in the 2008 Operating Agreement. The Index methodology allows the irrigation districts to continue carrying over unused allocation. To protect the Compact equitable apportionments, any district that has carryover water must account for the losses associated with carrying over that water by reducing for carryover evaporation and adjusted for the difference in conveyance efficiency between the year in which the Project Carryover Water was accrued, and the year in which that water is ordered and delivered. *See* Exhibit 6, Barroll Decl. ¶¶ 41-42.

The Consent Decree ensures water is divided between Southern New Mexico and Texas consistent with the Compact's required apportionment, and that the apportioned water will be received by each State. The Project operations and accounting requirements detailed in the Appendix also ensure the Project is not operated in a way that interferes with the Compact's apportionment.

D. The Consent Decree is Consistent with the Compact and the Prior Orders of the Supreme Court and Special Master

A consent decree in a compact enforcement action must be consistent with the compact. *See Vermont v. New York*, 417 U.S. at 278; *accord Local No. 93*, 478 U.S. at 525 (a consent decree must "further the objectives of the law upon which the complaint was based"). Here, the proposed Consent Decree is consistent with and furthers the objectives of the Compact. This is

so for three reasons: (1) the Consent Decree uses the same methodology to apportion water beneath Elephant Butte Reservoir as above it; (2) the Consent Decree resolves the disputes in this action is a manner consistent with the prior orders of the Court and the Special Master; and (3) the Consent Decree has been endorsed and approved by the Rio Grande Compact Commission.

1. The Consent Decree Utilizes the Same Methodology as Articles III and IV of the Compact

Article III of the Compact "defines Colorado's state-line delivery obligation with reference to a schedule of relationships between flows at certain gages." MSJ Order, Dkt. 503 at 13; Compact, Art. III. Article IV is similar but defines New Mexico's obligation to deliver water measured at Elephant Butte Reservoir. *Id.* at 14; Compact, Art. IV. These articles create an "inflow-outflow regime" in the regions of the Rio Grande where they apply. *See id.* at 23. Downstream of Elephant Butte, the "Compact is programmatic in its division of water . . . referring simply to the Project." *Id*. at 24. As a result, the Compact does not "address expressly the full details of the Project's baseline operating conditions." *Id*.

The Compact drafters considered requiring New Mexico to deliver water at the Texas-New Mexico state line, as well, creating a similar inflow-outflow regime in the Project area in New Mexico, but rejected this idea at the time for two reasons. First, they believed that it was "practically impossible" to measure state line flows due to the "irregular contour of the boundary between the two states" and the various "canals, laterals, and drains" crisscrossing the state line in the area upstream of the El Paso gage. Letter from Frank B. Clayton to C.S. Clark (Oct. 16, 1938) at Trial Exhibit No. JT-0458-0007. Second, they felt that it would be unreasonable to expect New Mexico to guarantee specific amounts of water to pass the state line since Project

releases were controlled by Reclamation. *Id*. Those facts posed an obstacle to the administration of a delivery requirement below Elephant Butte at the time, but not today.

As to the complexity of measuring water deliveries at the border, proliferation of gaging stations as well as advanced computer modeling allow water uses in Texas above the gage to be accurately measured. This allows uses above the El Paso gage to be split with reasonable certainty between New Mexico and Texas, and the Texas portion of such use added to flows at the El Paso gage to determine the amount of water that is actually delivered to Texas. As a result, the States are now able to create an inflow-outflow methodology that provides certainty to the States' rights and obligations downstream of Elephant Butte Reservoir.

The Consent Decree adopts such an inflow-outflow methodology in Section II.B, the Index. While the Compact did not create an inflow-outflow methodology for this portion of the Rio Grande, the Index is not a new or different obligation. It merely effectuates the existing 57:43 apportionment between southern New Mexico and Texas and provides a clear way to determine whether Texas is receiving its apportionment. Most importantly, it establishes an agreed-upon baseline for determining the amount of water apportioned 57:43 and does so in a manner can be accomplished within normal Project operations and the prior orders of the Court and the Special Master. Exhibit 7, Sullivan Decl. ¶¶ 24-28; Exhibit 3, Brandes Decl. ¶¶ 33-37.

2. The Consent Decree Resolves the Remaining Issues in a Fair and Reasonable Manner Consistent with Prior Orders of the Court and Special Master

The Compact establishes the apportionment of water. As the Special Master recognized, however, the Compact "is ambiguous as to the detailed scope of the apportionments" to New Mexico and Texas below Elephant Butte Reservoir. MSJ Order, Dkt. 503 at 47. The Consent Decree resolves this ambiguity—within the bounds of the Compact's terms—and the existing controversy between the States. Most significantly, the Consent Decree settles the key issue

identified in the Summary Judgment Order: "the question of what the states intended to divide 57%:43% between Southern New Mexico and Texas." *Id.* at 7. Finally, the proposed Consent Decree resolves these questions while respecting, and not impairing, the rights of the United States, including its Downstream Contracts and treaty obligations to Mexico.

a. The Consent Decree Defines a "Baseline" Condition for Apportionment as Between New Mexico and Texas

The Special Master's Summary Judgment Order made several significant findings regarding the Compact's apportionment. *See* generally MSJ Order, Dkt. 503 at 2-7. As relevant here, the Special Master found in that Order that the "Compact and the closely related Downstream Contracts together establish the 57%/43% split as a rough *protected baseline division of Project deliveries as between New Mexico and Texas downstream of the Reservoir*." *Id*. at 6 (emphasis added). At the same time, the Special Master recognized that "[t]his determination, however, begs the question of what?" *Id*. The Compact does not "address expressly the full details of the Project's baseline operating conditions . . . ." *Id*. at 24.

Following lengthy settlement negotiations, the Compacting States have agreed to a Project baseline operating condition. As Dr. Hutchison describes in his Declaration, the Index Obligation was developed based on an analysis of historic data from 1951 to 1978 (the "D2 Period"). *See* Exhibit 4, Hutchison Decl. ¶¶ 24-25, 75-82. The analysis included the quantitative relationship between Caballo Releases and Rio Grande at El Paso flow using regression analysis, factoring in estimated and calculated Rio Grande depletions in the Texas portion of the Mesilla Basin. *Id*. Dr. Hutchison also explains that the D2 Period was chosen because this period represented a time when, on average, 57% of the Rio Grande Project deliveries were used in New Mexico and 43% of the Rio Grande Project deliveries were used in

Texas. *Id*. The D2 period was also the basis for the 2008 Operating Agreement, which has formed the basis for Rio Grande Project operations for the last nearly 15 years. *Id*.

The D2 baseline in the Decree thus preserves the 57:43 Compact apportionment between New Mexico and Texas below Elephant Butte Reservoir. Use of this same historical period and procedures also ensures that the United States' interests in Project operations and treaty water deliveries are unaffected by the proposed Consent Decree.

b. The Index Achieves a 57:43 Apportionment of Project Supply

In ruling on the motions for summary judgment on the apportionment issue, the Special Master concluded: the "Compact unambiguously establishes that: 1) New Mexico receives part of its apportionment above the Reservoir and part below; (2) New Mexico's downstream apportionment is delivered by the Project; and (3) New Mexico owes Texas a duty to not interfere with the Project's delivery of Texas's Compact Apportionment." MSJ Order, Dkt. 503 at 46. "The Compact and the inextricably intertwined Project and Downstream Contracts provide for the 57%/43% split." *Id.* at 51. The Index follows the Special Master's directive and establishes a delivery target at the New Mexico-Texas border that ensures the water is divided between the States in accordance with the 57:43 apportionment. *See* Exhibit 7, Sullivan Decl. ¶¶ 24-28.

As described above, the States developed the Index using the D2 Period relationship of reservoir releases to El Paso gage flows, when, on average, 57% of the Project deliveries were used in New Mexico and 43% were used in Texas. This division of water is consistent with the percentage of Project authorized acreage in each state, the normal operations of the Project that historically provided each Project acre with an equal entitlement to water, and with the Downstream Contracts. Accordingly, the Index quantifies the 43% of water to be delivered to

Texas, with the remaining 57% of water used in New Mexico. Exhibit 7, Sullivan Decl. ¶¶ 24-28.

c. The Rio Grande Compact Commission Endorses the Consent Decree

The Compact established the Rio Grande Compact Commission (Commission), which is composed of one representative from each Compacting State and a non-voting federal representative to act as chairman of the Commission. Compact, Art. XII. In addition to other powers conferred on the Commission, the jurisdiction of the Commission extends to the collection, correlation and presentation of factual data and the maintenance of records having a bearing on the administration of the Compact. *Id*. As described above, the Consent Decree establishes procedures for correlating Rio Grande flows measured at the Below Caballo Dam gage to the flows at the El Paso gage. These measurement records are used to ensure that the apportionments below Elephant Butte Reservoir among New Mexico and Texas are, in fact, made. *Texas v. New Mexico*, 138 S. Ct. at 959.

The Commission held a Special Meeting on November 10, 2022 at 9:00 a.m. (MST). The Commission carefully reviewed the Consent Decree and its appendices. Exhibit 2, Skov Decl. ¶¶ 14, 15. The Commission determined the Consent Decree is consistent with the Compact and resolves the outstanding claims and counterclaims of Texas and New Mexico. *Id.* ¶¶ 14-16. The Commission adopted two resolutions, which are attached to the declaration of Robert Skov the Rio Grande Compact Commissioner for Texas. *Id*. ¶¶ 16-18, Exhibits A and B.

In Resolution A, dated November 10, 2022, "Resolution of the Rio Grande Compact Commission Regarding the Proposed Consent Decree in Original Action 141, *Texas v. New Mexico and Colorado*, in the United States Supreme Court," the Commissioners confirmed that the Consent Decree and the incorporated Index methodology effectuates the Compact apportionments. Exhibit 2, Skov Decl. ¶¶ 15-16, Exhibit A. The second, Resolution B, was the

"Resolution of the Rio Grande Compact Commission Regarding Administrative and Accounting of Compact Credit Water" in which the Commission adopted the Compact Credit accounting procedures described in the resolution. *Id.* ¶¶ 15, 17, Exhibit B.

The Commission's recommended approval of the Consent Decree is within the powers specifically described by the Compact. Exhibit 2, Skov Decl. ¶ 19; Compact, Art. XII. The Commission may make recommendations to the respective States upon matters connected with the administration of the Compact. *Id*. In passing these resolutions, the Commission is acting under its congressionally approved powers as described in the Compact. *Id.* The Commission stated, "The Compacting States Consent Decree presents the collection, correlation, and presentation of factual data necessary for the administration of the Compact's apportionment of water among New Mexico and Texas below Elephant Butte Reservoir." *Id.* at 14. With that basis the Commission, as provided in Article XII, made a recommendation to the respective States to approve the Consent Decree.

E. Public Policy and Procedural Fairness Principles Support Entry of the Consent Decree

Finally, public policy and procedural fairness support entry of the Consent Decree. This argument comprises three parts: (1) there is a strong policy interest favoring settlement; (2) that interest is especially strong in the context of an interstate proceeding; and (3) the Consent Decree satisfies all requirements for procedural fairness.

1. There Is a Strong Public Policy Interest Favoring Voluntary Settlement

"Although entry of a consent decree is committed to the informed discretion of the trial court, strong policy considerations favor entry." *United States v. Atlas Minerals & Chems.*, 851 F. Supp. 639, 648 (E.D. Pa 1994) (*Atlas Minerals*); *United States v. Akzo Coatings*, 949 F.2d 1409, 1436 (5th Cir. 1991) ("[courts] are faced with a presumption in favor of voluntary

settlement"); *United States v. PG&E*, 776 F. Supp. 2d 1007, 1024 (N.D. Cal. 2011) ("The Court's review of the proposed consent decree is informed by the public policy favoring settlement"). While courts must carefully review proposed consent decrees, they must consider the "clear policy in favor of encouraging settlements," especially "where voluntary compliance by the parties . . . will contribute significantly toward ultimate achievement of statutory goals." *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 616 F.2d 1006, 1014 (7th Cir. 1980).

"Resolution of litigation by voluntary settlement is favored because the parties and the public avoid the time and expense of taking the case to trial." *Atlas Minerals*, 851 F. Supp. at 648. Public policy favors the voluntary settlement of disputes; because the public has a "strong interest in settlement" of complex and expensive cases. *FTC v. Actavis, Inc.*, 570 U.S. 136, 154 (2013) (citing *Joblove v. Barr Labs., Inc.*, 466 F.3d 187, 202 (2d Cir. 2006)). Accordingly, courts are highly deferential in their review of consent decrees. *Atlas Minerals*, 851 F. Supp. at 648; *see also United States v. Massachusetts*, 869 F. Supp. 2d, 189, 193 n.2 (D. Mass 2012) (underlying the court's "narrow" standard of review in approving consent decrees is the general policy favoring voluntary settlement).

Here, approval of the Consent Decree furthers the public policy in favor of voluntary settlement. It is fair, reasonable, consistent with the Compact, and ends this lengthy and expensive litigation. Therefore, notwithstanding the United States' objection thereto, the Court should approve the Consent Decree on the basis of public policy favoring voluntary settlement.

2. Rejecting the Consent Decree Would Discourage Settlement in Interstate Disputes

In prior interstate disputes arising under its original jurisdiction, the Supreme Court has expressed a strong judicial interest in promoting settlement among the states. This interest arises from the Court's recognition that interstate disputes often involve complex administrative

problems that are ill-suited to resolution by judicial fiat. In *New York v. New Jersey*, 256 U.S. 296, 313 (1921), the Court dismissed without prejudice a complaint concerning pollution in a portion of New York Harbor and expressly suggested that the parties engage in settlement discussions to deal with the "grave problem":

> We cannot withhold the suggestion, inspired by the consideration of this case, that the grave problem of sewage disposal presented by the large and growing populations living on the shores of New York Bay is one more likely to be wisely solved by co-operative study and by conference and mutual concession on the part of representatives of the states so vitally interested in it than by proceedings in any court however constituted.

The Court has expressed the same sentiment with respect the resolution of equitable apportionment disputes between states:

> The reason for judicial caution in adjudicating the relative rights of states in such cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution. We say of this case, as the court has said of interstate differences of like nature, that such mutual accommodation and agreement should, if possible, be the medium of settlement, instead of invocation of our adjudicatory power.

Colorado v. Kansas, 320 U.S. at 392; *accord Nebraska v. Wyoming*, 325 U.S. at 616. *See also Florida v. Georgia*, 138 S. Ct. at 2509 (citing cases). The Court has even suggested, in resolving original jurisdiction cases on the merits, that further negotiation and compromise among the states may be appropriate to finally put a dispute to rest. *See, e.g.*, *Washington v. Oregon*, 214 U.S. 205, 218 (1909) (denying petition for rehearing and remarking, "[w]e submit to the States of Washington and Oregon whether it will not be wise for them to [convene compact negotiations], and, with the consent of Congress, through the aid of commissioners, adjust, as afar as possible, the present appropriate boundaries between the two States"); *Minnesota v. Wisconsin*, 252 U.S. 273, 283 (1920) (similar).

The United States, too, has recognized the strong policy favoring settlement of interstate disputes, as it explained in opposing the intervention of EPCWID:

> [T]he expansion [of parties in the litigation] could make it significantly less likely that any of these cases of interstate sovereignty could be resolved through negotiation. This Court has repeatedly stated that the preferred approach for resolving interstate water disputes "should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudication power."

United States Response to EPCWID Motion to Intervene at 16 (quoting *Colorado v. Kansas*, 320 U.S. at 392 & n.4).

In this case, the strong judicial interest in promoting settlement in original jurisdiction actions weighs heavily in support of the proposed Consent Decree. Fundamentally, the Compacting States have reached an agreement concerning the Compact's equitable apportionment of water below Elephant Butte Reservoir. That agreement concerns "complicated and delicate questions" of water use in the Lower Rio Grande that require "expert administration." *Cf. Colorado v. Kansas,* 320 U.S. at 392. The proposed Consent Decree establishes an Index and other terms that are the result of intensive "co-operative study" and "mutual concession" of the states vitally interested. *Cf. New York v. New Jersey*, 256 U.S. at 313.

The Court's approval of the Consent Decree would vindicate this effort and incentivize states to attempt to resolve future disputes through mutual cooperation. Rejection of the Consent Decree, by contrast, would render the months of intensive negotiations and expert analysis in support of the agreement moot. In effect, New Mexico and Texas would each be forced to take back up their litigation positions and proceed to trial against their will. That outcome would severely discourage future settlement discussions in this case and in other interstate disputes in the future.

3. The Consent Decree is Procedurally Fair

In determining whether a consent decree satisfies procedural fairness, courts "look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance." *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990) (*Cannons*). Courts find procedural fairness when "the negotiation process was 'fair and full of adversarial vigor," *Turtle Island Restoration Network v. United States DOC*, 834 F. Supp. 2d 1004, 1016-17 (D. Haw. 2011) (internal citations omitted), or when "the proposed settlement is reached through arms-length negotiations in which all parties, including non-settlors, are afforded an opportunity to participate . . . " *United States v. City of Grand Rapids*, 166 F. Supp. 2d 1213, 1219 (W.D. Mich. 2000) (citing *Cannons*, 899 F.2d at 87). While courts have a duty to protect the interests of the public and third parties when reviewing consent decrees, "this requirement is intended to protect those who did not participate in negotiating the compromise . . ." *United States v. Oregon*, 913 F.2d at 581 (internal citations omitted).

"A lengthy litigation history and extensive negotiations weigh in favor of finding a proposed consent decree was developed in a procedurally fair manner." *United States v. Pioneer Nat. Res. Co.*, 452 F. Supp. 3d 1005, 1012 (D. Colo. 2020). A consent decree is presumptively valid if it "was the product of good faith, arms-length negotiations," leaving the objecting party with "a heavy burden of demonstrating that the decree is unreasonable." *United States v. Oregon*, 913 F.2d at 581 (internal citations omitted); *see also United States v. Massachusetts*, 869 F. Supp. 2d at 193 ("[t]here is a presumption in favor of the settlement '[i]f the parties negotiated at arm's length and conducted sufficient discovery'" (quoting *Howe v. Townsend* [*In re Pharmaceutical Indus. Average Wholesale Price Litig.*], 588 F.3d 24, 32-33 (1st Cir. 2009)). Moreover, "a finding of procedural fairness may also be an acceptable proxy for substantive fairness, when other circumstantial indicia of fairness are present." *United States v.*

Davis, 261 F.3d 1, 23 (1st Cir. 2001). "In sum, the standard of review applicable to the approval of the consent decree is a narrow one." *United States v. Massachusetts*, 869 F. Supp. 2d at 193.

Here, the Consent Decree satisfies the requirements of procedural fairness: Texas and New Mexico, the principal parties to this litigation, "conduct[ed] their negotiations forthrightly to achieve a bargained-for resolution to the suit." *Atlas Minerals*, 851 F. Supp. at 653. While the United States objects to the entry of the Consent Decree, this does not diminish the "fairness" of the Consent Decree – because the United States participated in the negotiations. Mediation commenced in summer 2021 and a United States official admitted that "we've had successful negotiations with all the parties in this case." 6/24/2022 Hr'g Tr.at p. 24; *see also* October 25, 2022 Hr'g Tr. at 34 ("[I]n those negotiations, we were actively participating. We actively participated for ten months . . . that is exactly what we had negotiated and involved with for multiple settlement sessions, multiple negotiations").

Because this litigation has persisted for nearly a decade, negotiations lasted over one year, and all interested parties participated in good faith, the Consent Decree is presumptively valid and the United States cannot meet its heavy burden in opposing the Decree. Therefore, this Court should approve the Consent Decree on the basis of its procedural fairness.

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VI. CONCLUSION

For the foregoing reasons, the State of Texas, the State of New Mexico, and the State of Colorado jointly request that the Special Master approve and recommend to the Supreme Court the entry of the Consent Decree.

Respectfully submitted,

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