No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave To Intervene

STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE MOTION OF THE PRE-FEDERAL CLAIMANTS FOR LEAVE TO INTERVENE

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STATEMENT OF THE CASE

In this original action, Texas seeks enforcement of the Rio Grande Compact ("Compact") against New Mexico. The United States has intervened as a plaintiff, and New Mexico's Motion to Dismiss the claims of Texas and the United States has been denied. Following this denial, New Mexico filed counterclaims against both Texas and the United States. The Court appointed the Honorable Michael J. Melloy, United States Circuit Judge for the Eighth Circuit Court of Appeals, as Special Master on April 2, 2018. The Parties are currently engaged in discovery. On March 20, 2019, the Nathan Boyd Estate, James Boyd, Oscar V. Butler, Rose Marie Arispe Butler, Margie Garcia, Sammie Singh, and Sammie Holguin Singh Jr. (collectively, the "Claimants") moved to intervene in this matter. *See* Motion of Pre-Federal Claimants for Leave to Intervene as Plaintiffs in This Original Jurisdiction Case ("Claimants' Mot."), Complaint in Intervention ("Claimants' Compl."), and Memorandum in Support of Motion to Intervene ("Claimants' Mem."). This matter is currently before the Court.

SUMMARY OF ARGUMENT

The Claimants seek to intervene on the basis of their alleged ownership of water rights for the Rio Grande Project ("Project"), the federal reclamation Project that distributes water apportioned by the Compact to lands in southern New Mexico and Texas that

is at the heart of this case. The Claimants' claims and arguments have been litigated in multiple forums over the course of more than a century without success. The Court should not permit the Claimants to relitigate these failed arguments in this forum.

Even taking the Claimants' assertions at face value, their claims do not support their right to intervene in this case. They claim rights arising solely under state law, and their interests are properly represented by New Mexico in this litigation. The Claimants assert no compelling interests that distinguish them from all other water users and claimants in New Mexico, nor do they assert any interests that are not capable of representation by New Mexico. The Claimants do not meet the standard for intervention herein.

ARGUMENT

I. THE CLAIMANTS' CLAIMS HAVE ALREADY BEEN CONSIDERED AND REJECTED BY MULTIPLE COURTS

The Claimants seek to intervene in this original action pertaining to the equitable apportionment of the Rio Grande made by the states of Colorado, New Mexico and Texas under the Compact. As grounds for intervention, Claimants allege "evidence of malfeasance by agents of the U.S. in the creation of the U.S.' Rio Grande Project and the [Rio Grande] Compact . . . by which the U.S. gained control over the Claimants'

predecessors' prior appropriated Rights without a due process trial or just compensation." Claimants' Mot. at 3. These claims, based upon activities of the Rio Grande Dam and Irrigation Company in the 1890s, have been litigated and adjudicated in multiple forums over the course of more than a century. The Movants now seek to relitigate them as Plaintiffs in Intervention in this case.

In the 1890s, the Rio Grande Dam and Irrigation Company proposed to build a water diversion project on the Rio Grande in New Mexico and applied for a right of way for this purpose pursuant to federal law. In 1903, the territorial district court entered a default judgment that the right to construct the proposed project had been forfeited. *See* IRA G. CLARK, WATER IN NEW MEXICO, 92 – 97 (UNM Press 1997). On appeal, the New Mexico Supreme Court affirmed this ruling. *Rio Grande Dam & Irr. Co. v. United States*, 85 P. 393 (N.M. 1906). On certiorari, that judgment was affirmed by this Court in *Rio Grande Dam & Irr. Co. v. United States*, 215 U.S. 266 (1909).

In 2008, James Scott Boyd and assorted other claimants sought to relitigate the Rio Grande Dam and Irrigation Company claims in the ongoing state-court adjudication of water rights in the Lower Rio Grande Basin in New Mexico. Motion for Hearing the Paramount Global Stream Issue in The Adjudication of Pre-1905 Project Delivery and Water Rights, August 4, 2008, *New Mexico ex rel. State Engineer v. Elephant Butte Irr. Dist.*, No. CV 96-888, (3d Judicial Dist. Ct.,

Doña Ana Cnty.) ("LRG Adjudication"), https://lrgadjudication.nmcourts.gov/rn-97-2413-claims-of-the-estate-of-nathan-boyd.aspx. On February 1, 2011, the adjudication court agreed to hear the claims of the Nathan Boyd Estate in an expedited *inter se* proceeding. Order Commencing Expedited *Inter Se* Proceeding to Determine the Claims of The Estate of Nathan Boyd, LRG Adjudication. On February 24, 2012, following briefing and a hearing, the adjudication court entered an order dismissing the Boyd Estate's claims "pursuant to Rule 1-012(B)(6) and principles of *res judicata*." Order Granting (1) The United States' and EBID's and (2) The City Of Las Cruces' Motion to Dismiss The Claims Of The Estate Of Nathan Boyd at p. 2, LRG Adjudication. On appeal, the New Mexico Court of Appeals affirmed the judgment of the adjudication court. *Boyd Estate ex rel. Boyd v. United States*, 344 P.3d 1013 (N.M. Ct. App. 2014). The New Mexico Supreme Court denied certiorari, *Boyd v. United States*, 345 P.3d 341 (N.M. 2015), and the Claimants did not seek certiorari in this Court. It serves no purpose to relitigate the Claimants' claims yet again in this forum.[1]

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[1] In addition to the 1909 Supreme Court and the 2012 state water adjudication rulings, James Scott Boyd has unsuccessfully sought to litigate the claims of the Boyd Estate in at least two other forums: (1) *James Scott Boyd v. United States*, No. 96-4761 (Fed. Cl. April 21, 1997), and (2) *United States v. Elephant Butte Irrigation District et al.*, No. 97-CV-0803, Memorandum Opinion and Order Denying James Scott Boyd's Renewed Motion to Intervene (D.N.M. October 20, 2014), *aff'd*, Order and Judgment, No. 15-2002 (10th Cir. Dec. 7, 2015).

II. THE CLAIMANTS FAIL TO MEET THE HIGH STANDARD FOR INTERVENTION IN INTERSTATE COMPACT DISPUTES

"Respect for state sovereignty . . . calls for a high threshold to intervention" by nonstate entities and individuals, such as the Claimants, to guard against the use of the Court's original jurisdiction "as a forum in which 'a state might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). A controversy between States implicates matters of state sovereignty that rise "above a mere question of local private right." *Kansas v. Colorado*, 206 U.S. 46, 99 (1907). The States alone possess the "core state prerogative to control water within their own boundaries." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 632 (2013). Thus, a State in its sovereign capacity "represents the interests of its citizens in an original action, the disposition of which binds the citizens." *South Carolina v. North Carolina*, 558 U.S. at 267; *see Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) ("Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State 'must be deemed to represent all its citizens.' A State is presumed to speak in the best interests of those citizens. . . .") (quoting *Kentucky v. Indiana*, 281 U.S. 163, 173 (1930)).

Therefore "the standard for intervention in original actions by nonstate entities is high—and appropriately so." *South Carolina v. North Carolina*, 558 U.S. at

267. States, in negotiating interstate Compacts and in resolving disputes that arise from them, must consider their state needs in their entirety. Intrastate entities and individuals may disagree with their states on certain positions, but they are necessarily bound by their states whose interests, not those of intrastate entities, are in issue in a compact case. Thus, an intervenor whose state is already a party bears "'the burden of showing some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state.'" *Id.* at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). This standard "serves the twin purposes of ensuring that due respect is given to 'sovereign dignity' and providing 'a working rule for good judicial administration.'" *Id.* (quoting *New Jersey v. New York*, 345 U.S. at 373). Unless a prospective intervenor can meet this high standard, its motion to intervene "will be denied." *Nebraska v. Wyoming*, 515 U.S. at 21-22; *see South Carolina v. North Carolina*, 558 U.S. at 266; *see also* Memorandum Opinion of the Special Master on the Motion of Anadarko Petroleum Corporation for Leave to Intervene at 3-6, *Montana v. Wyoming*, No. 137, Original (Dec. 18, 2009).

Moreover, a high standard for intervention is necessary to ensure that original actions, which already "tax the limited resources" of the Court, "do not assume the 'dimensions of ordinary class actions.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373). If a group of citizens could intervene merely on the basis of a difference

of opinion with their sovereign, "there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *New Jersey v. New York*, 345 U.S. at 373.

As explained below, the Claimants cannot meet either of the prerequisites for intervention. First, they fail to show a compelling and unique interest that sets them apart from the class of all other citizens and creatures of New Mexico who claim a right to use the waters of the Rio Grande. Second, they cannot show that their interest in this action is not already properly represented. As they admit, any specific interests they may have in the water rights for the Project derive from state law, not the Compact at the center of this case. As such, their interest with regards to this litigation is the same as any other state law claimant of a right to the waters of the Rio Grande, and that interest is properly represented by New Mexico.

III. THE CLAIMANTS' INTEREST IS NEITHER COMPELLING NOR UNIQUE

The Claimants fail to show they have a "'compelling interest'" in their own right, "'apart from [their] interest in a class with all other citizens and creatures of the state.'" *See South Carolina v. North Carolina*, 558 U.S. at 266 (quoting *New Jersey v. New York*, 345 U.S. at 373). The Claimants maintain that they meet this standard, Claimants' Mot. at 6, but they fail to offer any argument in support of this assertion. Instead, their argument is that they are indispensable parties

under Federal Rules of Civil Procedure 19(a) and 24(a) and must be allowed to intervene because they "claim an interest relating to the property or transaction that is the subject of [this] action" and disposition of this action may impair that interest. Claimants' Mot. at 2; *see also* Claimants' Mem. at 1.

Leaving aside whether the Claimants' underlying claims have merit, their argument fails for multiple reasons. First, the Claimants fundamentally misconstrue the nature of this proceeding. The subject matter of this case concerns the interpretation of the Compact and whether the Parties have complied with that interstate agreement. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018). Yet, the Claimants characterize the "central unanswered question[] in . . . this case" as "Who owns the senior project and water rights within the New Mexico . . . service area of the U.S. Rio Grande Project . . . and how should those water rights be administered?" Claimants' Mem. at 1. Contrary to the Claimants' argument, this is not a case to adjudicate or quiet title to water rights for the Project, or any other water rights in the Rio Grande. Water rights in the Rio Grande in New Mexico, including the United States' water rights for the Project, are currently being adjudicated in New Mexico state court in the LRG Adjudication. Water rights in the Rio Grande in Texas above Fort Quitman have already been adjudicated. Final Decree, *In re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin*, No. 2006-3291 (327th Judicial Dist. Ct. of El Paso Cnty., Tex.,

Oct. 30, 2006) ("Texas Adjudication Decree"). Either of these other cases would be a more appropriate forum to hear the Claimants' claims than this case, and, as discussed, the LRG Adjudication court has already considered and rejected the Claimants' claims. Because the question of the ownership or control of the Project's water rights is not before this Court, the Claimants do not meet the definition of an indispensable party established in Rules 19(a) and 24(a) because the "property or transaction" in which they claim an interest is not "the subject of [this] action." Fed. R. Civ. P. 24(a)(2).

Second, Rules 19 and 24 do not govern the joinder or intervention of parties in original actions between States. Supreme Court Rule 17.2 provides that, while the "form of pleadings and motions" prescribed by the Federal Rules applies to original actions, "[i]n other respects, those Rules . . . may be taken as guides" only. When considering the intervention of individuals and non-state entities in original actions between States, the Court has consistently applied the rule announced in *New Jersey v. New York*, 345 U.S. at 373, rather than the standard in Rules 19 and 24, and has required a non-state intervenor to show "some compelling interest in his own right, apart from his interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state" before it will grant leave to intervene. *South Carolina v. North Carolina*, 558 U.S. at 266. Non-state intervenors are routinely denied leave to intervene in original actions between states if they cannot meet this standard,

even if they would otherwise qualify as indispensable parties under Rules 19(a) and 24(a). *See New Jersey v. New York*, 345 U.S. at 373-374 & n.* (denying the City of Philadelphia leave to intervene because it failed to show a compelling interest, despite representing half of all Pennsylvania citizens in the Delaware River watershed).

If Rules 19(a) and 24(a) did govern the intervention by individuals in original actions between States, numerous individuals and entities would be entitled to intervene as of right in these cases. In water cases in particular, where the state-law water rights of numerous water users can be affected by the outcome of the case, *see Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938), thousands if not tens of thousands of water users and claimants in each State could plausibly claim an interest relating to any interstate stream "that is the subject of the action" that could, "as a practical matter," be "impair[ed] or impede[d]" by the resolution of the case, Fed. R. Civ. P. 19(a)(1)(B).

This raises the third flaw in the Claimants' position, which is that they claim rights arising under state law, which differ, at most, in degree rather than kind from the rights of tens of thousands of other water users and claimants in New Mexico. The Claimants acknowledge that their water rights claims arise under state law. Claimants' Mem. at 7-8. Therefore, their assertion of an interest in a water right that may be affected by the outcome of this case, even a water right to a reclamation project used to distribute water

apportioned by the Compact, does not demonstrate that they have a "compelling interest in [their] own right, apart from [their] interest in a class with all other citizens and creatures of the state." *New Jersey v. New York*, 345 U.S. at 373. On the contrary, the Claimants' asserted interest is "dependent upon the rights of state parties." *South Carolina v. North Carolina*, 558 U.S. at 282 n.1 (Roberts, C.J., concurring in the judgment in part and dissenting in part). It is dependent on the rights of New Mexico, in particular, because "[t]he interests of a State's citizens in the use of water derive entirely from the State's sovereign interest in the waterway."[2] *Id.* at 279. "An interest in water is an interest shared with other citizens, and *is properly pressed or defended by the State*." *Id.* (emphasis added).

The Claimants are concededly claiming rights arising solely under state law. Claimants' Mem. at 7-8. To the extent the Claimants have any interests arising under New Mexico law, they are properly represented

[2] While the Claimants allege the Rio Grande Dam & Irrigation Company, the entity whose interests they claim to have assumed, appropriated water in both New Mexico and Texas, Claimants' Mem. at 7-8, they do not appear to claim any interest based on Texas water rights now. It would be difficult for the Claimants to assert any rights acquired under Texas law, since the Texas Adjudication Decree, which was entered and became final over a decade ago, neither recognized any of their claims nor awarded them any rights. Moreover, while the Claimants argue their predecessor perfected at least a portion of its New Mexico water rights claims by completing certain irrigation works in New Mexico, Claimants' Mem. at 8, they make no similar arguments regarding the alleged Texas appropriation.

by New Mexico. The magnitude of their claims—all water rights for the Project—"do[es] not distinguish [them] in kind from other members" of the "class of affected [New Mexico] users of water." *See South Carolina v. North Carolina*, 558 U.S. at 274-275 (City of Charlotte failed to show a compelling interest because it occupied "a class of affected North Carolina users of water," and "the magnitude of Charlotte's authorized transfer d[id] not distinguish it in kind from other members of the class").

One additional flaw in the Claimants' position is their failure to acknowledge the existence or effect of the Compact. Although this case is concerned entirely with claims arising under the Compact, the Claimants barely mention the Compact in their Motion, Proposed Complaint, or Memorandum in Support. The Claimants assert that jurisdiction over their claims is proper under the Compact, Claimants' Compl. Para. 6, but they fail to explain how. They otherwise mention the Compact only to argue that their alleged rights in the Project pre-date the Compact, Claimants' Mem. at 2, that the Compact is somehow the product of federal "malfeasance," Claimants' Mot. at 3, and that the Compact "was adopted to avoid recognition of pre-federal Rights in NM's LRG," Claimants' Mot. at 7.

From the foregoing, it is clear the Claimants are not seeking to raise or defend Compact claims but to assert claims to water that are somehow superior to the Compact's apportionment. Contrary to the Claimants' arguments, this Court has consistently held that state-law rights in an interstate stream, even rights

that predate a compact, are subject to a compact's apportionment: "Whether the apportionment of the water of an interstate stream be made by compact . . . or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, *even where the State had granted the water rights before it entered into the compact*." *Hinderlider*, 304 U.S. at 106 (emphasis added). Water claimants in those states are "represented by their respective states and are bound" by the apportionment. *Id*. at 108. Nor does the fact that a compact or decree affects the use of preexisting water rights demonstrate that it is infirm: a state possesses "the right only to an equitable share of the water in [an interstate] stream," and therefore cannot award "any right greater than [its] equitable share." *Id*.

In short, the Claimants' suggestion that their rights are superior to the Compact's apportionment is without merit. On the contrary, the Compact's apportionment controls the exercise of state-law water rights. As water claimants in New Mexico, the Claimants are represented in Compact litigation by New Mexico. *Id*. at 107. The Claimants fail to demonstrate a compelling interest in this litigation that is separate from an interest shared with a large class of water claimants in New Mexico and should not be permitted to intervene.

IV. THE CLAIMANTS' INTERESTS ARE REPRESENTED BY NEW MEXICO

The Claimants also fail to show that their asserted interests in this original action are "not properly represented" by New Mexico. *New Jersey v. New York*, 345 U.S. at 373. The Court presumes that a State in its sovereign capacity represents the interests of all of its citizens and creatures. *South Carolina v. North Carolina*, 558 U.S at 267; *Nebraska v. Wyoming*, 515 U.S. at 21-22. New Mexico's sovereign interests in this action derive not only from the amorphous "judicial construct" of the *parens patriae* doctrine, *Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel. Barez*, 458 U.S. 592, 601 (1982), but directly from its retained sovereignty as acknowledged in the Constitution, U.S. Const. amend. X, and its status as a party to the Compact. Each State party to this case, as a signatory to the Compact, "unquestionably" has "a direct interest of its own" and properly takes "full control" of the litigation on behalf of its citizens where the Compact's meaning and application are at issue. *Kansas v. Colorado*, 533 U.S. 1, 8 (2001).

The Claimants argue their interests are not adequately represented by New Mexico or any other current party because, so far as New Mexico can discern from their Motion and Memorandum in Support, New Mexico and the United States do not support the Claimants' claims to ownership of the Project's water rights. *E.g.*, Claimants' Mot. at 3. But questions concerning which of New Mexico's citizens have valid claims to New Mexico's apportionment of Rio Grande water are not being litigated here, and have no bearing

on the questions concerning the rights and duties the Compact creates in the Parties, which are. In fact, the Claimants demonstrate why individuals and other entities typically are not allowed to intervene in original actions between States: because if the Court undertook to evaluate "all the separate interests within [a state]," it "could, in effect, be drawn into an intramural dispute over the distribution of water" within a state. *New Jersey v. New York*, 345 U.S. at 373. This is exactly what the Claimants are asking the Court to do: evaluate "the separate interests" within New Mexico and adjudicate "an intramural dispute over the distribution of water." *Id*. An individual or group's interest in a State's share of an interstate river's water falls "squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *South Carolina v. North Carolina*, 558 U.S. at 274 ("[A] State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens."). Therefore, New Mexico's view of the merits of the Claimants' underlying claims does not overcome the presumption that New Mexico, as the signatory to the Compact, properly represents the interests of all of its citizens in this case. *See New Jersey v. New York*, 345 U.S. at 372.

To whatever extent the Claimants have different views from New Mexico on particular issues, even Compact issues, those differences are not relevant to this Court's determination of the Parties' rights and obligations under the Compact. Disagreements between and among the citizens of a State are a fact of

life in a pluralistic society. The Court's concern that it not be "drawn into an intramural dispute over the distribution of water" presupposes that disputes within a State can and do exist. *New Jersey v. New York*, 345 U.S. at 373. Intramural disagreements will not justify a nonstate entity's intervention for the precise reason that, if they did, the State "'might be judicially impeached on matters of policy by its own subjects.'" *South Carolina v. North Carolina*, 558 U.S. at 267 (quoting *New Jersey v. New York*, 345 U.S. at 373); *see id.* at 280 (Roberts, C.J., concurring in the judgment in part and dissenting in part) ("The State 'must be deemed to represent *all* its citizens,' not just those who subscribe to the State's position before this Court. The directive that a State cannot be 'judicially impeached on matters of policy by its own subjects' obviously applies to the case in which a subject disagrees with the position of the State.") (quoting *New Jersey v. New York*, 345 U.S. at 372, 373) (additional citation and internal quotation marks omitted). The States properly represent the interests of their citizens in this Court whether or not they agree on all issues.[3]

[3] New Mexico also opposes any request that the Claimants be allowed to participate in this action as amici. For the reasons articulated herein, the Claimants are unlikely to present any useful evidence or argument to the Court on the Compact questions at issue in this case, and instead will use their platform solely to present arguments concerning their claims to water under state law, and which go to the intramural dispute over their claims to water in New Mexico that have already been considered and rejected in other forums.

CONCLUSION

The Claimants' Motion to Intervene should be denied.

Respectfully submitted,

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Defendants.

AFFIDAVIT OF SERVICE

I, Andrew Cockle, of lawful age, being duly sworn, upon my oath state that I did, on the 19th day of April, 2019, send out from Omaha, NE 5 package(s) containing 3 copies of the STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE MOTION OF THE PRE-FEDERAL CLAIMANTS FOR LEAVE TO INTERVENE in the above entitled case. All parties required to be served have been served by Priority Mail. Packages were plainly addressed to the following:

SEE ATTACHED

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Subscribed and sworn to before me this 19th day of April, 2019.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
General Notary
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My Commission Expires Nov 24, 2020

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CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the STATE OF NEW MEXICO'S RESPONSE IN OPPOSITION TO THE MOTION OF THE PRE-FEDERAL CLAIMANTS FOR LEAVE TO INTERVENE in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), being prepared in New Century Schoolbook 12 point for the text and 10 point for the footnotes, and this brief contains 4271 words, excluding the parts that are exempted by Supreme Court Rule 33.1(d), as needed.

Subscribed and sworn to before me this 19th day of April, 2019.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
General Notary
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My Commission Expires Nov 24, 2020

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