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.

TEXAS'S RESPONSE TO MOTION FOR LEAVE TO INTERVENE BY THE NATHAN BOYD ESTATE AND JAMES BOYD, INDIVIDUALLY, OSCAR V. BUTLER, ROSE MARIE ARISPE BUTLER, MARGIE GARCIA, SAMMIE SINGH, AND SAMMIE HOLGUIN SINGH JR.

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April 2019

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INTRODUCTION

The Nathan Boyd Estate and James Boyd, individually, Oscar V. Butler, Rose Marie Arispe Butler, Margie Garcia, Sammie Singh, and Sammie Holguin Singh Jr. (collectively, "Pre-Federal Claimants") seek to intervene in this Original Action. The standard for intervention in an Original Action among states is high because it is intended to respect state sovereignty and protect the Supreme Court's limited resources. Pre-Federal Claimants' Motion for Leave to Intervene as Plaintiffs (Motion for Leave), accompanying Memorandum in Support of Motion to Intervene (Memorandum in Support), and proposed Complaint in Intervention (Proposed Complaint) (collectively, "Motion to Intervene"), fail to meet this high standard and must be denied.

STATEMENT

In 2014, the State of Texas (Texas) was granted leave to file its Complaint in order to obtain a determination and enforcement of its rights, as against the State of New Mexico (New Mexico), to the waters of the Rio Grande pursuant to the 1938 Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785 (Rio Grande Compact or Compact)[1]. *See Texas v. New Mexico*, 571 U.S. 1173 (2014). The United States was allowed to

[1] The text of the Rio Grande Compact is reprinted in appendix 1 to the Complaint filed by Texas. *See* Texas's Motion for Leave to File Complaint, Complaint, and Brief in Support, at App. 1 (U.S. Jan. 8, 2013).

intervene in this action as a plaintiff because of the distinct federal interests involved in this case, which are best presented by the United States. *See Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018). On October 10, 2017, following the recommendation of the Special Master, the Court denied motions to intervene filed by Elephant Butte Irrigation District (EBID) and El Paso County Water Improvement District #1 (EPCWID). The high standard for intervention in original actions by non-state entities is set forth in *New Jersey v. New York,* 345 U.S. 369 (1953), and requires that the non-state entity (1) has "some compelling interest in [its] own right," (2) that interest is different from its interest "in a class with all other citizens and creatures of the state," and (3) that interest is "not properly represented by the state." *Id.* at 373. In recommending the denial of the motions to intervene, the Special Master found that (a) neither EBID nor EPCWID is party to the Rio Grande Compact, (b) their respective states can adequately represent their interests in the case, and (c) practical considerations, including a desire to avoid drawing the Court into an intramural dispute over state law issues, warranted denial of the motions to intervene. *See, e.g.*, First Interim Report of the Special Master (First Report) at 238, 241, 251, and 254, Texas v. New Mexico (U.S. filed Feb. 9, 2017), *exceptions argued* (U.S. Jan. 8, 2018), *and decided*, 138 S. Ct. 954 (2018) (No. 141, Orig.).

Pre-Federal Claimants lack any unique interest in this interstate compact litigation to warrant intervention. As with EBID and EPCWID, none of the Pre-Federal Claimants are parties to the Rio Grande Compact. Indeed, it is difficult to ascertain from Pre-Federal Claimants' Motion to Intervene, the precise nature of their asserted interest in this litigation. They attempt to justify intervention on the basis that "[t]heir joinder will avoid a judicial taking by the [New Mexico] courts in the [Lower Rio Grande Adjudication], and possibly by this Court, and will aid this Court in determining who owns the project and water rights." *See* Pre-Federal Claimants' Motion for Leave at 2. While the Pre-Federal Claimants may desire to litigate contract and takings issues against the United States or New Mexico, those issues are simply not the subjects of this litigation. In addition, Pre-Federal Claimants further assert that their intervention "will provide proven facts, including the factual background that led to the Compact, that will aid this Court in a more thorough decision on the merits in this case." *See* Pre-Federal Claimants' Motion for Leave at 2-3. A proposal to provide historical facts is far from a compelling and unique interest in the subject matter of this litigation sufficient to meet the Court's high intervention standard. Furthermore, New Mexico can adequately represent the interests of Pre-Federal Claimants, who are citizens of New Mexico. The Pre-Federal Claimants' Motion to Intervene should be denied.

Pre-Federal Claimants' Motion to Intervene is also untimely. This litigation has been underway for more than six years, yet Pre-Federal Claimants have only now decided to file the Motion to Intervene. In

May 2018, New Mexico filed answers to Texas's complaint and the United States' complaint in intervention. Pursuant to Special Master's Case Management Plan, discovery opened on September 1, 2018. The parties are presently engaged in both written discovery and percipient witness depositions. The deadline for Texas and the United States to disclose their experts is May 31, 2019, only six weeks from now. *See* Amendment to Case Management Plan at App. B (Revised Summary of Deadlines) and order of Special Master thereon (Jan. 31, 2019), SM Dkt. 179[2]. Intervention would prejudice the existing parties and present obstacles to maintaining the litigation schedule provided in the Case Management Plan. Pre-Federal Claimants' Motion to Intervene should be denied as untimely.

[2] Documents filed with Special Master, Hon. Michael J. Melloy in *Texas v New Mexico and Colorado* (No. 141, Orig.) are available on the Special Master's Online Docket (SM Dkt.) website: http://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original

ARGUMENT

I. Pre-Federal Claimants' Request For Intervention Should Be Denied

A. Standard for Intervention

The appropriate standard for intervention in original actions by non-state entities is set forth in *New Jersey v. New York*, 345 U.S. at 369. Under this standard, a non-state entity is permitted to intervene only where: (1) it has "some compelling interest in [its] own right," (2) that interest is different from its interest "in a class with all other citizens and creatures of the state," and (3) that interest is "not properly represented by the state." *Id.* at 373; *South Carolina v. North Carolina*, 558 U.S. 256, 266 (2010). The Court has acknowledged that this is a high standard, "and appropriately so," as it is intended to respect state sovereignty and protect the Supreme Court's limited resources. *Id*. at 267.

As the Court explained in *New Jersey*, "original jurisdiction against a state can only be invoked by another state acting in its sovereign capacity on behalf of its citizens." *New Jersey,* 345 U.S. at 372. The doctrine of *parens patriae* recognizes "the principle that the state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *Id*. This principle "is a necessary recognition of sovereign dignity, as well as a working rule for good judicial administration. Otherwise, a state might be judicially impeached on matters of policy by its own subjects, and there would be no practical limitation on the number of citizens, as such, who would be entitled to be made parties." *Id*. at 373.

Intervention in original actions has only been allowed in "compelling" circumstances. *New Jersey*, 345 U.S. at 373. The Court has a long history of rejecting attempts by non-sovereign entities to intervene in interstate water disputes. Until recently, in original actions involving interstate water disputes, the Supreme Court granted intervention only to the United States and Indian tribes. *South Carolina*, 558 U.S. at 277, 281-83. As Chief Justice Roberts explained in his dissent in *South Carolina*:

> The reason is straightforward: An interest in water is an interest shared with other citizens, and is properly pressed or defended by the State. And a private entity's interest in its particular share of the State's water once the water is allocated between the States, is an "intramural dispute" to be decided by each State on its own.

Id. at 279 (Roberts, C.J. dissenting in part).

The Supreme Court has granted intervention in an interstate water dispute to a party other than the United States or an Indian tribe in only a single case. The *South Carolina* case established a limited exception where a unique set of circumstances is present. In that case, the Court reaffirmed the rule for intervention enunciated in *New Jersey* but held that two of the three non-state parties were entitled to intervene under that high standard. *South Carolina*, 558 U.S. at 256. The Court allowed for the intervention of the Catawba River Water Supply Project (CRWSP), a bi-state entity that was jointly owned, regulated by, and provided water to one county in North Carolina and one county in South

Carolina. *Id.* at 261. The Court found that the CRWSP had a "compelling interest in protecting the viability of its operations, which are premised on a fine balance between the joint venture's two participating counties." *Id.* at 270. The Court also allowed Duke Energy to intervene. *Id.* at 271. Duke Energy operated eleven dams and reservoirs (six in North Carolina, four in South Carolina, and one on the border between the two states) that controlled river flow and provided hydroelectric power to the region. *Id.* at 261. The Court found that equitable apportionment of the Catawba River would need to take into account Duke Energy's water needs to power the region. *Id.* at 272. In addition, there was no other similarly situated entity on the river, setting Duke Energy's interests apart from all others. *Id.* The Court, however, denied the City of Charlotte's motion to intervene on the grounds that North Carolina, as the sovereign, would adequately protect the City's interests, and noted that Charlotte did not have interests on both sides (*i.e.*, in both states) of the dispute. *Id.* at 274-75.

This Court's decisions instruct that only the United States, Indian tribes, or other uniquely situated entities, such as those that have direct bi-state interests (*e.g.*, Duke Energy or the CRWSP), will be allowed to intervene in an Original Action, such as this one. Because interstate water disputes are cases "between States, each acting as a quasi-sovereign and representative of the interests and rights of her people," the states are presumed to speak in the best interests of their citizens as a whole, and intervention is not permitted where an entity wholly located and operating within a single

state seeks to inject itself into the interstate dispute. *Wyoming v. Colorado*, 286 U.S. 494, 508-09 (1932).

B. Pre-Federal Claimants Have Not Met the High Standard for Intervention

Pre-Federal Claimants allege that the United States "seized" the water rights of their predecessors in interest through a "sham proceeding" and decree from 1903 that was upheld by this Court in 1909. *See* Pre-Federal Claimants' Motion for Leave at 3. Claimants additionally contend that nationalization of the Rio Grande Project improperly coerced farmers to sign up for the project, in effect taking Claimants' predecessors' prior appropriated rights without due process. *See* Pre-Federal Claimants' Motion for Leave at 3-4.

Pre-Federal Claimants also contend that New Mexico's participation in the Rio Grande Compact has prevented adjudication of these rights, and this provides the "compelling interest" necessary for the Court to grant intervention. However, these rights arise either out of Pre-Federal Claimants' status as users of water in New Mexico, or as parties that contract for water from the United States. Such interests are not unique and are insufficient to support intervention in interstate compact litigation.

The Pre-Federal Claimants' Motion to Intervene is fundamentally flawed, as its focus is on various New Mexico state appropriative rights that predate the Rio Grande Project, rather than the Compact claims that Texas and the United States have pled in this Original Action. Texas brought this action against New Mexico to vindicate Texas's sovereign rights to the waters of the Rio Grande.

Texas did not sue the United States over the operation of the Rio Grande Project. While the Pre-Federal Claimants might wish to litigate these contract and takings issues against the United States or New Mexico, they are simply not the subject of this litigation, and do not arise under the Court's original jurisdiction. Moreover, these wishes are not sufficient to constitute a unique and compelling interest required for party status in this case.

1. *The Pre-Federal Claimants Lack a Compelling Interest Distinct From Their Interest in a Class with Other Citizens of New Mexico*

The nature of Pre-Federal Claimants' interest in this case is as users of water. This interest may derive from New Mexico state water law, from a contract with the United States to use water from the Rio Grande Project, or both. It does not arise from the Rio Grande Compact or from bi-state operations. The Pre-Federal Claimants are users of Rio Grande water as citizens in New Mexico, and therefore, their interest will be "properly pressed or defended by the State." *South Carolina*, 558 U.S. at 279. In denying EBID's intervention, the Special Master found ". . . no reason that New Mexico cannot represent EBID's interests in this *sovereign* dispute[,]" noting that EBID, like the Pre-Federal Claimants, is an entity made up of citizens of New Mexico. First Report at 264 (emphasis added). The Pre-Federal Claimants have no greater interest in this litigation than other New Mexicans.

2. *The Pre-Federal Claimants' Interests Are Adequately Represented by the State of New Mexico*

As the Special Master found with respect to EBID, the State of New Mexico will, and is presumed to, adequately represent the Pre-Federal Claimants in this litigation. The Pre-Federal Claimants cite *Nevada v. United States*, 463 U.S. 110 (1983) in support of their proposition that Pre-Federal Claimants are not bound by the water allocation obligations required of New Mexico under the Rio Grande Compact. *See* Pre-Federal Claimants' Memorandum in Support at 18. The holding of *Nevada*, however, is predicated on the assumption that the water rights at issue were obtained from, and based upon, state law. The obligations of the Compact arise under federal law and bind all water users within the subject jurisdictions. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). Texas has alleged that all of the water delivered into Elephant Butte Reservoir has been apportioned to Texas, subject to the Rio Grande Compact and New Mexico's delivery obligation to Texas, and the United States' treaty obligation with Mexico. *See* Texas's Complaint ¶ 11 at 6. The Pre-Federal Claimants' purported rights are solely based upon New Mexico's law of prior appropriation and are not within the scope of the Compact. State court is the proper forum to enforce these rights. To the extent the Pre-Federal Claimants allege rights to water that are subject to New Mexico state law, only New Mexico has standing in *this* Court to assert those rights. *See Hinderlider*, 304 U.S. at 106.

In *Hinderlider*, the Colorado State Engineer appealed from an adverse judgment of the Colorado Supreme Court in which that court held, in effect, that the State Engineer could not curtail water rights in Colorado for the purposes of complying with the obligations of the State of Colorado under the La Plata River Compact. The ditch company asserted that the La Plata River Compact violated the vested water right granted to it by the January 12, 1898 adjudication decree, which could not be modified or diminished except by condemnation and payment of just compensation. Because no condemnation proceeding had been commenced, the company successfully argued to the lower court that the state was without power to curtail its water right in order to comply with the La Plata River Compact. *La Plata River & Cherry Creek Ditch Co. v. Hinderlider*, 25 P.2d 187 (Colo. 1993); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 70 P.2d 849 (Colo. 1937).

On appeal, the United States Supreme Court assumed the decree awarded the ditch company a property right that was indefeasible insofar as Colorado, its citizens, and any other person claiming water in Colorado, were concerned. The Court held, however, that the Colorado water right decree could not confer upon the ditch company rights in excess of Colorado's share of the waters of the stream, and Colorado's share was only an equitable portion thereof. *Hinderlider*, 304 U.S. at 106-07. In other words, state-created water rights only attach to that portion of an interstate stream that is equitably apportioned to the state, and the state court decree is not binding on citizens of another state who claim the right to divert water from the stream under that

other state's equitable share of the interstate stream. When an apportionment of the waters of the interstate stream is made by compact, the apportionment is binding on the citizens of each state and all water claimants, including water right owners whose rights predate the Compact. *Id*. at 106; *see also Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.,* 849 P.2d 372, 378-79 (N.M. Ct. App. 1993) (citing *Hinderlider*, 304 U.S. 92) ("[t]he apportionment of water under state compacts is binding on private water claimants"). No court can order relief inconsistent with an interstate compact. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

The State of New Mexico, in signing the Rio Grande Compact in 1938, recognized that the storage and delivery of water by the Rio Grande Project was an essential element of the equitable apportionment agreed to in the Compact, and obligated itself to deliver water to Texas through the Rio Grande Project. *See* Texas's Complaint ¶ 10-11 at 5-6. Water would be stored, released, and delivered to Texas subject to Reclamation's contracts and the United States' treaty obligation to Mexico. *Id.* New Mexico agreed not to interfere with Rio Grande Project operations that existed when the Compact was executed in 1938. *Id.* The Rio Grande Compact is both federal law and New Mexico state law. As explained in *Hinderlider*, New Mexico's Rio Grande Compact apportionment is binding on all citizens of the state, including the Pre-Federal Claimants, and therefore, their interests are adequately represented by New Mexico.

3. *Pre-Federal Claimants' Arguments Relating to the Issues in This Case Are Not Grounds for Intervention*

Pre-Federal Claimants assert that they meet the high standard for intervention because their participation will aid this Court in determining who owns the project and water rights. Pre-Federal Claimants' Motion for Leave at 5. Pre-Federal Claimants "allege that [New Mexico] and the [United States] continue to prevent adjudication of Claimants' Rights in the [Lower Rio Grande Adjudication] to continue control of their water rights." *See* Pre-Federal Claimants' Memorandum in Support at 4. This argument ignores the fact that, as noted by the Special Master, this is not a water allocation case. First Report at 257-58. Equitable apportionment of the Rio Grande has already been achieved; the only water rights at issue here are those equitably apportioned to the quasi-sovereign states under the Compact.

The Pre-Federal Claimants' proffered assistance at this juncture is based upon the untenable proposition that although the Rio Grande Compact effects an equitable apportionment of the waters of the Rio Grande, and the States of Colorado, New Mexico and Texas entered into the Compact, the Pre-Federal Claimants' right to water is first in time and therefore supersedes the interstate compact. Pre-Federal Claimants' Memorandum in Support at 4. The Pre-Federal Claimants then argue that any forfeiture of the rights of their predecessors in interest is unenforceable due to a conspiracy between the United States and Rio Grande Dam & Irrigation Co. (RGD&IC) to strip them of their rights in order to facilitate the Rio Grande Project. Pre-Federal

Claimants' Memorandum in Support at 15, 18. Again, this alleged conspiracy is beyond the scope of this Rio Grande Compact litigation. Texas brought this action against New Mexico to vindicate Texas' sovereign rights to the waters of the Rio Grande. Texas did not bring suit against the United States over the operation of the Rio Grande Project – the subject of the Pre-Federal Claimants' Proposed Complaint's alleged conspiracy.

The Pre-Federal Claimants attempt to recast this litigation as predicated on a centuries-old "fraud upon the judicial system." Pre-Federal Claimants' Memorandum in Support at 2. While they may have vested water rights, these are state rights within New Mexico, and New Mexico's Lower Rio Grande Adjudication, or another New Mexico proceeding, is the forum with jurisdiction to consider such claims. This Original Action does not directly involve the rights of the Pre-Federal Claimants' predecessors, and there is no circumstance that would elevate these state water rights over the Rio Grande Compact. The plain language of the Compact confirms it was entered into "for the purpose of effecting an equitable apportionment of [the waters of the Rio Grande]" among the three signatories. Rio Grande Compact, Preamble, 53 Stat. at 785.

The simple fact is the Pre-Federal Claimants are not a sovereign party to the Rio Grande Compact, and are not proper parties to this litigation. The Pre-Federal Claimants appear, at best, to present "competing claims to water within a single State[,]" over which the Court does not exercise its original jurisdiction. *See United States v. Nevada and California*, 412 U.S. 534, 538 (1973). These claims

cannot be the basis for intervention in an original action.

II. Pre-Federal Claimants' Request For Intervention Is Untimely

Apparently aggrieved by actions of the New Mexico adjudicator in a state water rights adjudication, the Pre-Federal Claimants filed their Motion to Intervene more than five years after the Court granted Texas leave to file its complaint. Intervention, whether of right or permissive, must be timely. If untimely, it must be denied. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973); *Sierra Club v. Espy*, 18 F.3d 1202, 1205 (5th Cir. 1994) (citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977)[3]. The parties to this Original Action are presently engaged in discovery, the Special Master has set a schedule pursuant to a Case Management Plan, and expert discovery will commence later this spring. The introduction of a new party to this litigation at this stage will prejudice the existing parties and make it challenging to maintain the schedule contemplated

[3] "Determining the timeliness of a motion to intervene entails consideration of four factors: (1) The length of time during which the would-be intervenor actually knew or reasonably should have known of its interest in before it petitioned for leave to intervene; (2) the extent of the prejudice that the existing parties to the litigation may suffer as a result of the would-be intervenor's failure to apply for intervention as soon as it knew or reasonably should have known of its interest in the case; (3) the extent of the prejudice that the would-be intervenor may suffer if intervention is denied; and (4) the existence of unusual circumstances militating either for or against the determination that the application is timely.")

by the existing Case Management Plan. In contrast to the very real prejudice the existing parties would suffer, the Pre-Federal Claimants have not demonstrated any prejudice that would befall them if their Motion to Intervene were denied. The Motion to Intervene raises issues related only to grievances against New Mexico in the state adjudication process and is, at best, an untimely attempt to express views on issues addressed in the First Report. Accordingly, the Court should deny Pre-Federal Claimants' Motion to Intervene as untimely.

CONCLUSION

Based upon the foregoing, the State of Texas respectfully requests that the Pre-Federal Claimants' Motion for Leave to Intervene be denied.

Respectfully submitted,

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No. 141, Original

STATE OF TEXAS,
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v.
STATE OF NEW MEXICO
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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 18th day of April, 2019, send out from Omaha, NE 8 package(s) containing * copies of the TEXAS'S RESPONSE TO MOTION FOR LEAVE TO INTERVENE BY THE NATHAN BOYD ESTATE AND JAMES BOYD, INDIVIDUALLY, OSCAR V. BUTLER, ROSE MARIE ARISPE BUTLER, MARGIE GARCIA, SAMMIE SINGH, AND SAMMIE HOLGUIN SINGH JR. 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

To be filed for:

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Subscribed and sworn to before me this 18th day of April, 2019.
I am duly authorized under the laws of the State of Nebraska to administer oaths.

PATRICIA BILLOTTE
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My Commission Expires Nov 24, 2020

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No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

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STATE OF NEW MEXICO
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Defendants.

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the **TEXAS'S RESPONSE TO MOTION FOR LEAVE TO INTERVENE BY THE NATHAN BOYD ESTATE AND JAMES BOYD, INDIVIDUALLY, OSCAR V. BUTLER, ROSE MARIE ARISPE BUTLER, MARGIE GARCIA, SAMMIE SINGH, AND SAMMIE HOLGUIN SINGH JR.** in the above entitled case complies with the typeface requirement of Supreme Court Rule 33.1(b), having been prepared in Century Schoolbook, 12 point font for the text and 10 point font for the footnotes, if any, and that this document contains 3,885 words, excluding the parts which are exempted by Supreme Court Rule 33.1(d) as needed.

Executed on April 18, 2019

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