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

UNITED STATES' MEMORANDUM IN OPPOSITION TO COMPACTING STATES' JOINT MOTION TO ENTER CONSENT DECREE

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INTRODUCTION

Five years ago, the Court held that the United States "may pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). Those claims, like Texas's, allege that New Mexico is violating Article IV of the Rio Grande Compact ("Compact")[1] by allowing water users in New Mexico to divert water that New Mexico is required to "deliver" to the federal Rio Grande Project ("Project"). In permitting the United States to proceed with its own Compact claims, the Court recognized that those claims were meant to vindicate "distinctively federal interests" in New Mexico's compliance with its obligation under Article IV. *Texas v. New Mexico*, 138 S. Ct. at 958 (citation omitted). The Court emphasized, for example, that New Mexico's delivery of water to the Project is "what allows the United States to meet its duties under the Downstream Contracts," in which the federal government has agreed to supply water to irrigation districts in southern New Mexico and Texas. *Id.* at 959.

The United States has not obtained an adjudication on the merits of its Compact claims; nor has it agreed to settle them. The States nevertheless contend that they may settle this Compact dispute without the United States, through entry of a proposed consent decree to which the United States has not consented but which nonetheless imposes obligations on the United States. The Special Master should reject the States' request for entry of their proposed consent decree.

As the Court has made clear, "parties who choose to resolve litigation through settlement 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." *Local No. 93, Int'l Ass'n of Firefighters, AFL-CIO C.L.C. v. City of Cleveland* ("*Firefighters*"), 478 U.S. 501, 529 (1986).

[1] *See* Act of May 31, 1939, Pub. L. No. 76-96, 53 Stat. 785.

The States' proposed consent decree, however, would do both: it would "dispose of" the Compact claims of the United States, a "nonconsenting intervenor[]"; and it would "impose duties and obligations" on the United States, without the United States' agreement. *Id.*

The Court has also made clear that a consent decree may not conflict with federal law. *Id.* at 526-28. Yet the proposed consent decree would impose obligations inconsistent with the Compact and the federal reclamation law principles that underlie the Compact's programmatic apportionment scheme. And even if the proposed consent decree could be reconciled with federal law, it would not be a fair, adequate, or reasonable resolution of this Compact dispute. The proposed consent decree would adopt a "D2 condition" rather than something akin to a "1938 condition." And in return for that substantial compromise on the baseline level of protection for Project operations, the proposed consent decree would not provide any concrete or specific assurances that New Mexico will actually reduce groundwater pumping or be able to meet its delivery requirement. To the contrary, the decree would authorize New Mexico to take even more of the Project's water away, or even require it to do so, in derogation of the need for enduring protection of the Project and the United States' contractual obligations. Entry of the decree would thus risk accelerating the deterioration of the Project and rendering it unsustainable in the long term.

None of this is to say that this Compact dispute cannot be resolved through settlement. But the purported settlement that the States have reached would extinguish the United States' Compact claims, impose obligations on the United States without its agreement, conflict with federal law, and undermine the objectives of the Compact. For each of those independent reasons, the States' motion to enter their proposed consent decree should be denied.

QUESTIONS PRESENTED BY THE SPECIAL MASTER

The Special Master has asked the parties to address four issues. *See* Dkt. 742, at 18.[2] We summarize our positions on those issues here and address those issues in more detail below.

1. The propriety of entering the Decree over an intervening party's objection.

In *Firefighters*, the Court articulated two principles that govern the propriety of entering a consent decree over an intervenor's objection. *First*, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party." *Firefighters*, 478 U.S. at 529. "A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Id.* *Second*, "parties who choose to resolve litigation through settlement . . . may not impose duties or obligations on a third party, without that party's agreement." *Id.* Thus, "a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Id.* Each of those principles precludes entry of the States' proposed consent decree. *See* Part II & Part III (pp. 24-46), *infra*.

In addition, a consent decree may not conflict with federal law. *Firefighters*, 478 U.S. at 526-28. A consent decree also must be "fair, adequate and reasonable." *United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (opinion of Rubin, J.) (citation omitted). That means, among other things, that the consent decree "must further the objectives of the law upon which the complaint was based." *Firefighters*, 478 U.S. at 525. Those principles likewise preclude entry of the States' proposed consent decree. *See* Part IV & Part V (pp. 46-65), *infra*.

[2] To be consistent with the States' memorandum, we will cite entries on the Special Master's docket as "Dkt."

2. The nature of the United States' unresolved claims and the availability of alternative fora to address such claims.

The United States has pleaded "Compact claims" in this original action. *Texas v. New Mexico*, 138 S. Ct. at 960. The United States' claims seek declaratory and injunctive relief for "violations of the Compact itself"—namely, New Mexico's breach of its "duty to deliver water" under Article IV of the Compact. *Id.* at 958. *See* U.S. Compl. ¶ 15. The Court has "allow[ed] the United States to pursue the Compact claims it has pleaded." *Texas v. New Mexico*, 138 S. Ct. at 960. And since the Court's decision, the United States has continued to pursue those same Compact claims. *See* Part I (pp. 19-24), *infra*.

The United States' Compact claims may be resolved in one of only two ways: (1) adjudication on the merits, or (2) the United States' agreement to settle those claims. *See Janus Films, Inc. v. Miller*, 801 F.2d 578, 581 (2d Cir. 1986) ("Lawsuits may terminate either by adjudication or by agreement of the parties."). The States' proposed consent decree is neither. Thus, although the proposed consent decree purports to dispose of the United States' Compact claims, it may not lawfully do so. *See* Part II (pp. 24-36), *infra*; *Firefighters*, 478 U.S. at 529 (explaining that "a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors").

There is no other adequate forum to resolve the United States' Compact claims, which parallel the Compact claims of Texas that are also before the Court. *See* Part II.C (pp. 34-36), *infra*. Consistency and respect for the Court's original jurisdiction requires resolution of both sets of claims by this Court. And by "permit[ting] the United States to proceed" with those claims here, the Court has already made clear that "this original action" is the proper forum for resolving them. *Texas v. New Mexico*, 138 S. Ct. at 960.

3. The anticipated future involvement of the Supreme Court if jurisdiction is retained as per the Decree.

The proposed consent decree contemplates that the Supreme Court would have jurisdiction to enforce or modify the decree, *see* Decree VI, and to issue orders modifying the appendices, Decree V. But most of the injunctions in the decree are directed, implicitly or explicitly, to the United States, *see generally* Decree II.C, II.D, III, including vague and indefinite obligations to operate the Project in a manner "consistent" with the decree and so as not to "interfere" with the rights and obligations the decree would create. *See, e.g.*, Decree III.A. The Court's continuing jurisdiction therefore would possibly encompass enforcement actions, brought by the States, that ask the Court to define what terms like "consistent" and "interfere" mean, to compel the United States to change Project allocations and accounting accordingly, or to impose additional requirements not contained within the decree's express terms. *See* Part V.D (pp. 62-65), *infra*.

4. The effect of the Supreme Court's statements in its 2018 opinion permitting the United States to intervene as a party in part because of its alignment with Texas and in part because it was not attempting to expand the issues being litigated beyond those issues raised by the States. *See Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

Since the Court's decision in 2018, the "scope of [this] existing controversy" has remained the same. *Texas v. New Mexico*, 138 S. Ct. at 960. The United States is still seeking relief on the same "Compact claims" that it "pleaded." *Id.* And as a comparison of the United States' and Texas's complaints shows, that relief is still "substantially the same" as the relief sought by Texas, *id.*—which includes an injunction prohibiting New Mexico from allowing interference with the Project. *See* Tex. Compl. 15-16; U.S. Compl. 5. Any suggestion that the United States has "expand[ed] the scope" of this controversy is therefore wrong. *Texas v. New Mexico*, 138 S. Ct. at 960. *See* Part I.A (pp. 25-26), *infra*.

What has changed since the Court's decision is not the scope of the United States' or Texas's claims, but only Texas's willingness to compromise its own litigating position. Nothing in the Court's decision, however, suggests that the United States can be bound by Texas's litigating decisions. To the contrary, the entire point of the Court's decision was to allow the United States to pursue its own Compact claims. And in permitting the United States to do so, the Court emphasized the "distinctively federal interests" that the United States seeks to defend. *Texas v. New Mexico*, 138 S. Ct. at 958 (citation omitted). The Court's decision provides no basis for allowing Texas to compromise those interests. *See* Part II.B.2 (pp. 29-33), *infra*.

STATEMENT

A. Background

The Rio Grande rises in Colorado and flows south into New Mexico and then into Texas, near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville, Texas.

In the 1890s, "Mexico complained to the United States that increasing demands on the river upstream left little for those below the border." *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). "The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water." *Id.* "Eventually, the government identified a potential dam site near Elephant Butte, New Mexico, about 105 miles north of the Texas state line." *Id.*

In 1905, Congress authorized construction of the dam and reservoir at Elephant Butte. Act of Feb. 25, 1905 ("1905 Act"), Pub. L. No. 58-104, 33 Stat. 814. The following year, the United States agreed by treaty to provide Mexico with 60,000 acre-feet of water per year from

the new reservoir. Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mex., May 21, 1906, 34 Stat. 2953. "After obtaining the necessary water rights," the United States completed construction of the reservoir in 1916 "as part of a broader infrastructure development known as the Rio Grande Project." *Texas v. New Mexico*, 138 S. Ct. at 957.

In the decades that followed, "the Rio Grande Project and its Elephant Butte Reservoir played a central role" in resolving "disputes among the various States" over the apportionment of the waters of the Rio Grande. *Id.* In 1937, "the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas." *Id.* In turn, the water districts—known today as Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EPCWID") (together, "the Districts")—"agreed to pay charges in proportion to the percentage of the total acres lying in each State." *Id.* Those agreements are the "Downstream Contracts." *Id.*

In 1938, Texas, New Mexico, and Colorado executed the Rio Grande Compact, and Congress approved the Compact the following year. Article III of the Compact requires Colorado to deliver water each year at the Colorado-New Mexico state line in an amount determined by schedules that correspond to water quantities at various gaging stations. *Id.* at 787-88. "But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line," *Texas v. New Mexico*, 138 S. Ct. at 957, Article IV of the Compact requires New Mexico to deliver water at San Marcial, New Mexico—a gaging station upstream of Elephant Butte Reservoir—in an amount that is similarly determined by a schedule. 53 Stat. at 788. In 1948, the Rio Grande Compact Commission, established under Article XII of the Compact, *id.* at 791, relocated the gage for measuring New Mexico's delivery obligation

from San Marcial to Elephant Butte Reservoir. *Texas v. New Mexico*, 138 S. Ct. at 957 n.*. Although "a promise to deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas," that promise "made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised [the Districts] a certain amount of water every year from the Reservoir's resources." *Id.* at 957.

In the early 2000s, the Rio Grande Basin entered an extremely dry period, and Project deliveries to EBID and EPCWID sharply declined. *See* NM-2463, at NM-2463-0137.[3] In 2003 and 2004, groundwater pumping by water users in New Mexico reduced the Project water available to Texas "to the tune of approximately 105,000 acre-feet." Order of May 21, 2021 ("5/21/21 Order"), Dkt. 503, at 42-43 (quoting 3/9/21 Hr'g Tr. 122)). *See* NM-1045, at NM-1045-0166, fig. 19-9.

In 2008, to resolve pending litigation with EBID and EPCWID, and to fulfill certain contractual requirements, the United States entered into an agreement with the Districts ("the 2008 Operating Agreement"), which specified the procedures to be used for Project operations, allocations, and accounting. *See* US-290. *See generally* Vols. I & II, Trial Tr. (testimony of Michelle Estrada-Lopez); Vol. IV Trial Tr. 49-55 (testimony of J. Phillip King). Under the 2008 Operating Agreement, Reclamation makes a diversion allocation to each District based on a regression equation known as the "D2 equation." US-290, at US-0290_0005. The D2 equation, in turn, is based on Project releases and diversions in the period 1951 to 1978, also known as the "D2 period." *See, e.g.*, NM-0168, at NM-0168-0004. Since 2008, Project deliveries to EPCWID have been roughly equivalent to the amounts diverted by that District during the D2 period. *See*

[3] The parties' trial exhibits are cited as the party abbreviation (TX, NM, CO, US, or JT), followed by the exhibit number.

US-282; Declaration of J. Phillip King ("King Decl."), ¶ 17. This is possible only because EBID forgoes some of the water it is allocated on the basis of its authorized irrigable acreage, and that water can instead be used to boost the deliveries to EPCWID through the New Mexico portion of the Project area. *See* Vol. I Trial Tr. 188:5-23; Vol. V. Trial Tr. 42:4-20. In 2011, New Mexico filed suit in federal district court seeking to invalidate the 2008 Operating Agreement and to restore Project operations as they were prior to 2006. NM-2386, at NM-2386-0033 (prayer for relief).

B. Texas's Compact Claims

In January 2014, the Court granted Texas leave to file a bill of complaint against New Mexico and Colorado, alleging that New Mexico is violating the Compact. 571 U.S. 1173.[4] Texas's Compact claims against New Mexico rest on three main premises.

First, Texas alleges that the Compact, rather than "specifically identify quantitative allocations of water below Elephant Butte Dam" or "articulate a specific state-line delivery allocation," "relie[s] upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas." Tex. Compl. ¶ 10. Those "Rio Grande Project beneficiar[ies]" are EBID and EPCWID, *id.*, ¶ 8, and, derivatively, the Districts' individual water users.

Second, Texas alleges that a "fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the

[4] Texas explained that it named Colorado as a defendant "on the basis that it is a signatory" to the Compact. Tex. Compl. ¶ 5.

time the Rio Grande Compact was executed." *Id.*, ¶ 10. See *id.*, ¶ 4 (alleging that the Compact "was entered into to protect the operation of the Rio Grande Reclamation Project"); *id.*, ¶ 11 (alleging that Texas entered into the Compact under the "fundamental premise[]" that "the operation of the Rio Grande Project by the United States, and the Rio Grande Project's allocations to Texas, were recognized and protected by the Rio Grande Compact"); *id.*, ¶ 12 ("Various provisions of the Rio Grande Compact reflect one of the Rio Grande Compact's fundamental purposes of protecting the Rio Grande Project."). Texas alleges that, in order to achieve that purpose, the Compact "requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir," where the water then "belongs to Rio Grande project beneficiaries." *Id.*, ¶ 4.

Third, Texas alleges that New Mexico is violating the Compact by "allow[ing] and authoriz[ing]" groundwater pumping "downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico," in excess of what was "occurring at the time the Rio Grande Compact was executed." *Id.*, ¶ 18. According to Texas, such "excess" pumping "intercept[s] water that in 1938 would have been available for use in Texas" and, in so doing, "requires additional releases of water from Elephant Butte Reservoir," depletes "the amount of water stored in [the] Reservoir," and "adverse[ly]" affects "future water supplies that should otherwise be available to the Rio Grande Project for delivery in southern New Mexico, Texas and Mexico." *Id.* Texas thus alleges that, "[u]nless the United States' operation of the Rio Grande Project is protected, as intended by the Rio Grande Compact and as authorized by the [1905] Act, Rio Grande Project deliveries of water to southern New Mexico, Texas and Mexico cannot be assured, and the rights of Texas under the Rio Grande Compact cannot be protected." *Id.* ¶ 11. Texas further alleges that "New Mexico has attempted and continues to

attempt to control the operation of the Rio Grande Project in contravention of the Rio Grande Project Act and the Rio Grande Compact, through novel interpretations of the Rio Grande Compact that New Mexico has offered" in its suit to invalidate the 2008 Operating Agreement and in Rio Grande Compact Commission proceedings. *Id.* ¶ 20.

In its prayer for relief, Texas seeks, among other things, a declaration of its rights "to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the [1905] Act." *Id.* at 15. Texas also seeks a "[d]ecree commanding the State of New Mexico, its officers, citizens and political subdivisions, to: (a) deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the [1905] Act; and (b) cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project." *Id.* at 15-16.

C. The United States' Compact Claims

In March 2014, the Court granted the United States leave to intervene as a plaintiff. 572 U.S. 1032. The United States' complaint in intervention makes "allegations that parallel Texas's." *Texas v. New Mexico*, 138 S. Ct. at 958. Like Texas, the United States alleges that "the Project delivers stored water" to EBID and EPCWID pursuant to the Downstream Contracts, U.S. Compl. ¶ 8; that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts," *id.*, ¶ 13; and that such excess depletions have "an effect on the amount of water stored in the Project that is available for delivery to EBID and EPCWID, as well as to Mexico," *id.*, ¶ 14. Thus, in "parallel" with Texas, the United States alleges that New Mexico is "breaching its Compact duty to deliver water to the Reservoir by

allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate." *Texas v. New Mexico*, 138 S. Ct. at 958.

The United States' requests for declaratory and injunctive relief also parallel Texas's requests. The United States seeks a declaration that New Mexico "(i) 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; (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts; and (iii) must affirmatively act to prohibit or prevent such interception or interference." U.S. Compl. 5. The United States also requests that the Court "permanently enjoin and prohibit New Mexico from permitting such interception and interference." *Id.*

In 2018, the Court held that the United States may "pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico*, 138 S. Ct. at 960. The Court explained that it has "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." *Id.* at 958 (citation omitted). The Court then cited four considerations that justified allowing the United States to "pursue the particular claims it has pleaded in this case," *id.* at 959: (1) "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts," *id.*; (2) "New Mexico has conceded that the United States plays an integral role in the Compact's operation," *id.*; (3) "a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations," *id.*[5]; and (4) "the United States has

[5] The United States' section of the International Boundary and Waters Commission ("U.S. IBWC") is responsible for ensuring that the United States' treaty obligation is met. *See generally* Vol. II Trial Tr. 193-204.

asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection," *id.* at 960.

The Court sustained the United States' exceptions and overruled all other exceptions, *id.*, including Colorado's exceptions, which sought to limit the United States' participation in the case to defending its treaty interest, *see id.* at 958, and New Mexico's exceptions, which sought to preclude the United States from litigating matters being addressed in a state-court adjudication, *see* N.M. Br. in Supp. of Exceptions at 56-57.

D. New Mexico's Counterclaims

After the Court's decision, New Mexico filed counterclaims against Texas and the United States, *see* Dkt. 93 ("Counterclaims"), and Texas and the United States filed motions in the nature of motions to dismiss those counterclaims, *see* Dkts. 158, 160.

The Special Master permitted New Mexico to pursue two counterclaims against Texas: Counterclaim 1, which alleged that groundwater pumping in Texas was interfering with Project deliveries, and was thus a "mirror image" of Texas's claims, Dkt. 338 ("3/31/20 Order"), at 27-28; and Counterclaim 4, which alleged that Texas had been unjustly enriched by the 2008 Operating Agreement and the alleged release of New Mexico's Compact Credit Water in 2011. *Id.* at 30.

The Special Master dismissed New Mexico's counterclaims against the United States for failure to plead an applicable waiver of sovereign immunity and, in the alternative, for failure to state a claim for relief in Counterclaims 2, 5, 6, 7, 8, and 9. *See id.* at 2, 27. The Special Master declined to decide whether sovereign immunity barred the entry of "declaratory relief as to the United States' obligations under the Compact as Project Manager" or "as to counterclaims that essentially mirror the claims the United States has asserted." *Id.* at 2. But the Special Master did

not characterize his reservation of that issue as an exception to his dismissal of the counterclaims to which the United States was the named defendant, *see id.*, and the States likewise have not characterized it that way. *See* States' Mem. 61 (describing the Order as "dismissing New Mexico's Counterclaims for declaratory relief against the United States" and conceding that "declaratory relief against the United States is not available in this action").[6]

E. Summary Judgment

On May 21, 2021, the Special Master entered a summary judgment order recognizing that the Compact requires "protection of a baseline level of Project operations" that "can be viewed as akin to a '1938 condition' as urged generally by Texas." 5/21/21 Order 6. See *id.* at 49 ("The Compact protects the Project, its water supply, and a baseline operating condition.").[7]

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[6] In his recent Order on the Motion to Unseal and Motion to Strike, the Special Master stated that he had "dismissed the counterclaims seeking non-injunctive relief against the United States based largely on sovereign immunity," but that he had "reserved ruling as to how any injunctive relief might apply as against the United States." Dkt. 742, at 5-6. The United States respectfully submits that this characterization of the Order of March 31, 2020, is incorrect in two respects. *First*, the earlier Order did not dismiss only those counterclaims "seeking non-injunctive relief" against the United States, *id.* at 5; rather, the Order granted the United States' motion to dismiss all of the counterclaims against it, in their entirety, based on sovereign immunity. *See* 3/31/20 Order 3 ("the United States' motion to dismiss [the seven counterclaims against the United States] based on sovereign immunity grounds is granted"); *id.* at 22 (concluding that "[t]he absence of an express and unequivocal Congressional waiver is . . . fatal to New Mexico's counterclaims against the United States"). *Second*, the earlier Order did not reserve judgment as to "how any injunctive relief might apply against the United States," Dkt. 742, at 6; rather, the Order reserved judgment as to the "scope of any potential declaratory relief." 3/31/20 Order 15. The Special Master thus deferred a decision as to the scope of any declaratory relief that might be awarded on claims *other than* New Mexico's counterclaims against the United States. But such a decision is no longer necessary because the parties are now in agreement that "declaratory relief against the United States is not available in this action." States' Mem. 61; *see also* Dkt. 560, at 6-7.

[7] The parties collectively filed five motions for summary judgment. The Special Master granted in part the motions of Texas and the United States as to their claims for declaratory relief, granted in part New Mexico's motion to preclude Texas's claims for damages in particular years, and granted in part New Mexico's motion to define the Compact apportionment as 57% to New Mexico and 43% to Texas. *See* 5/21/21 Order 9 n.6, 46-53.

As an initial matter, the Special Master held that the Compact's apportionment is "programmatic." 5/21/21 Order 3. Like the Court in its 2018 decision, *see Texas v. New Mexico*, 138 S. Ct. at 959, the Special Master recognized that "the Compact relies on the Rio Grande Project for water delivery and is *programmatic* in its apportionment of water as between Texas and New Mexico." 5/21/21 Order 3 (emphasis in original). Under the Compact, the Bureau of Reclamation "delivers New Mexico's downstream apportionment to EBID." *Id.* And, as Texas has acknowledged, Reclamation delivers Texas's apportionment to EPCWID, "the Rio Grande Project beneficiary" in Texas. Tex. Compl. ¶ 8. Thus, in contrast to the apportionment above Elephant Butte Reservoir, which is "articulated as a gauged and measurable inflow-outflow system," the apportionment below the Reservoir is "articulated as a programmatic division of water subject to federal storage and distribution." 5/21/21 Order 11. And the Compact articulates that apportionment by "referring simply to the Project." *Id.* at 24. The Project, and its implementation through the Downstream Contracts, is the program that makes the apportionment "programmatic."

The Special Master next ruled that, consistent with the "programmatic nature of the Compact's downstream apportionment," New Mexico has an obligation to protect the Project from interference. *Id.* at 5. The Special Master held that "New Mexico has a Compact-level duty to avoid material interference with Reclamation's delivery of Compact water to Texas," *i.e.*, a duty "to avoid and prevent the capture of Rio Grande surface water, drain return flows, and hydrologically connected groundwater to the extent that the overall impact of such capture is inconsistent with Compact water deliveries to Texas or interferes with long-term operation of the Project." *Id*. The Special Master emphasized that the Compact protected "a baseline level of Project operations generally as reflected in Project operations prior to Compact formation [in

1938]." *Id.* *See also id.* at 6 (characterizing that "baseline level of Project operations" "as akin to a '1938 condition' as urged generally by Texas").[8]

Having determined that New Mexico has a "Compact-level duty to avoid material interference" with Project deliveries to Texas, as measured against "Project operations prior to Compact formation," *id.* at 5, the Special Master found "no material dispute" that such interference was occurring, both at "a general level," *id.* at 42, and specifically as to "Texas's Compact apportionment" in 2003 and 2004, *id.* at 46. No party took exceptions to the Special Master's summary judgment order.

F. Trial

Trial on liability commenced on October 3, 2021. The Special Master heard the testimony of 27 witnesses, including the testimony of most of the fact witnesses and the testimony of the expert historian witnesses. Trial was adjourned in November 2021 and was expected to resume in early 2022, with the testimony of at least 30 additional witnesses, including the United States' four expert witnesses and the United States' only fact witness with personal knowledge of Project operations before 1980. During the adjournment, the parties resumed mediation efforts.

G. The Proposed Consent Decree

Over ten months of mediation, the parties negotiated regarding terms of a comprehensive agreement to resolve the Compact dispute and potentially other pending litigation. At a status

[8] Contrary to the States' suggestion, States' Mem. 26, the United States did not seek a preliminary injunction in connection with its summary judgment motion. Rather, the United States sought "a ruling that an injunction is warranted, with the scope to be determined at trial." U.S. Reply in Supp. of Mot. for Partial Summ. J., Dkt. 472, at 24. The Special Master denied the United States' motion to the extent it sought "a declaration that injunctive relief against New Mexico will eventually be required." 5/21/21 Order 9 n.6.

conference on September 27, 2022, the Special Master asked the parties to address the possibility of a "carve-out" agreement limited to resolving the dispute between Texas and New Mexico. Sept. 27, 2022 Hr'g Tr. 16:16-21. The States indicated that such a carve-out agreement had "not really been on the table" but might be possible. *Id.* at 16:25-17; *id.* at 17:11-13; *id.* at 19:2-4. Four weeks later, on October 25, the States informed the Special Master that they had reached a settlement in principle and would put forward a "carve-out decree," Oct. 25, 2022 Status Conf. Tr. 13:4-5, which they had carved out from the comprehensive settlement then under discussion and had revised on their own with the aid of the mediator.

On November 14, the States moved for entry of the proposed consent decree and submitted six declarations in support of it. Dkt. 719. Shortly thereafter, the United States moved to strike the proposed decree and related filings, alleging violations of the parties' settlement confidentiality agreement, the Special Master's orders on mediation confidentiality, and Federal Rule of Evidence 408. Dkt. 729 (under seal). The Special Master denied the motion on December 30, 2022. Dkt. 742.

The Effective El Paso Index (Index or "EEPI") is a central feature of the proposed consent decree. The Index would be used to define Texas's apportionment as a volumetric, state-line delivery ("Index Obligation") based on the amount of water that Reclamation has released from Caballo Reservoir in a given year.[9] *See* Decree II.B.ii(e); Decree at 4 (definition). New Mexico's apportionment would be "the balance" of the Caballo release that remains after subtracting the Index Obligation, subject to the limitations in other parts of the proposed decree.

[9] Caballo Reservoir is a Project reservoir downstream of Elephant Butte Reservoir. Caballo Reservoir is owned by the United States and operated and maintained by Reclamation.

Id. The Index Obligation is based on state-line flows during the D2 period of 1951 to 1978, not in 1938. Decree II.B.ii.c.

Under the proposed decree, New Mexico would be deemed "in compliance" with the decree (and thus its Compact obligation to Texas) so long as the "accrued Negative Departures" from the Index Obligation are below a specified limit (150,000 acre-feet in the first three years, and 120,000 acre-feet thereafter). Decree II.C.1, 3. The accrued Negative Departures are functionally equivalent to the "Accrued Debits" that New Mexico may accrue in relation to its Article IV delivery obligation under the Compact. *See* art. I(*i*), 53 Stat. at 785. If the limit on the accrued Negative Departures is exceeded, then New Mexico "shall provide" additional water to Texas, but it "shall have the option" to transfer part of EBID's Project allocation to EPCWID to satisfy that requirement. Decree II.C.1.3.a. The same is true when the accrued Negative Departures exceed certain intermediate limits ("triggers"). Decree II.D.2. If the trigger level is exceeded, New Mexico "shall take water management actions" (which are left unspecified) to reduce the exceedance, but New Mexico also "shall have the option" to transfer EBID's Project allocation to achieve the same end. Decree II.D.2.a. If accrued Negative Departures continue to exceed the trigger, then transfers of Project allocation from EBID to EPCWID are mandatory. Decree II.D.2.b.

Although the Index Obligation is framed as an obligation that New Mexico owes to Texas, the proposed decree would make the United States "responsible" for ensuring "that the Compact's equitable apportionment to Texas and New Mexico below Elephant Butte Reservoir is achieved consistent with the terms of this Decree." Decree II.B.4. Section III.A and Appendix 1, section 8, specify the changes to Project operations, allocation, and accounting that the States deem necessary to "maintain consistency" with the terms of the decree. The proposed

decree provides that the States may amend the Appendix at any time to require additional changes. Decree V.

The proposed consent decree contains no finding of liability on New Mexico's part and does not provide for the States to reimburse the United States' costs of operating and maintaining the Project to keep New Mexico in compliance with it.

ARGUMENT

I. THE UNITED STATES' CLAIMS ARE COMPACT CLAIMS.

Throughout their memorandum, the States attempt to distinguish "Compact claims" from "intrastate" claims and characterize the United States' claims as the latter. States' Mem. 33. *See, e.g., id*. at 2 (distinguishing "interstate claims" from "intrastate claims"); *id*. at 34 (characterizing the proposed consent decree as "settl[ing] all interstate claims in this litigation arising out of the Compact" while leaving the United States to pursue "intrastate" claims in "alternative forums"); *id.* at 55 (arguing that "there are several available forums in which the United States may address intrastate water use"). But the United States' claims are the same claims that it pleaded in its complaint in intervention. As the Court has recognized, those claims are "Compact claims," *Texas v. New Mexico*, 138 S. Ct. at 960—*i.e.*, "claims for violations of the Compact itself," *id.* at 958—and the Court specifically held that the United States may pursue those claims, *id.* at 960. The States thus err in characterizing the United States' claims as anything else.

A. The United States' Claims Are The Same Compact Claims Pleaded In Its Complaint In Intervention.

"After [the Court] permitted the United States to intervene," the United States "filed a complaint with allegations that parallel Texas's." *Texas v. New Mexico*, 138 S. Ct. at 958. Like Texas, the United States alleges that New Mexico has a "Compact duty" under Article IV "to

deliver water to the Reservoir." *Id.* *See* Tex. Compl. ¶ 4; U.S. Compl. ¶ 6. Like Texas, the United States alleges that New Mexico is "breaching" that duty "by allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate." *Texas v. New Mexico*, 138 S. Ct. at 958. *See* Tex. Compl. ¶ 18; U.S. Compl. ¶ 13. And like Texas, the United States seeks declaratory and injunctive relief, including an injunction "prohibit[ing] New Mexico from permitting such interception and interference." U.S. Compl. 5. *See* Tex. Compl. 16 (seeking an injunction commanding New Mexico to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project").

Since the United States filed its complaint nine years ago, its claims have not changed: the United States continues to pursue the same "Compact claims." *Texas v. New Mexico*, 138 S. Ct. at 960. Thus, at summary judgment, the United States argued—and the Special Master agreed—that "New Mexico has a Compact-level duty . . . to avoid and prevent the capture of Rio Grande surface water, drain return flows, and hydrologically connected groundwater to the extent that the overall impact of such capture is inconsistent with Compact water deliveries to Texas or interferes with long-term operation of the Project." 5/21/21 Order 5. And at trial, the United States has sought to "show that New Mexico has not fulfilled that duty," thereby causing "the current operating condition for the Project" to be "substantially diminished from the baseline condition that the Compacting States intended to protect." U.S. Trial Br., Dkt. 600, at 3.

B. The States Mischaracterize The United States' Claims As "Intrastate."

The States nevertheless characterize the United States' claims as "intrastate" claims outside the scope of this Compact dispute. States' Mem. 33, 34, 48, 55. *See id.* at 10, 38, 53, 56 (emphases omitted). That characterization cannot be reconciled with (1) the Court's

understanding of the United States' claims, and its holding that those claims may proceed; (2) the nature of New Mexico's "Compact-level duty" recognized in the Special Master's summary judgment order, 5/21/21 Order 5; or (3) Texas's characterization of its own, "parallel" claims, *Texas v. New Mexico*, 138 S. Ct. at 958.

1. The States' characterization of the United States' claims cannot be squared with the Court's decision.

When this case was last before the Court, the parties disputed "the scope of the claims the United States can assert in this original action." *Texas v. New Mexico*, 138 S. Ct. at 958. The United States argued that "it may pursue claims for violations of the Compact itself," *id.*, and the Court agreed, holding that the United States may "pursue the Compact claims it has pleaded in this original action," *id.* at 960. The States' characterization of the United States' claims as intrastate claims outside the scope of this Compact dispute cannot be squared with the Court's understanding of the United States' claims as "Compact claims." *Id.*

Indeed, far from describing the United States' claims as intrastate, the Court made clear that the claims are interstate and international. For instance, the Court recognized that, by pursuing its Compact claims, the United States would be defending the federal government's "interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms," which in turn is "essential to fulfillment of the Compact's expressly stated purpose" of "'effec[ting] an equitable apportionment' of the 'waters of the Rio Grande' between the affected States." *Id.* at 959 (quoting 53 Stat. at 785). The Court thus viewed protecting the United States' ability "to meet its duties under the Downstream Contracts" and effectuating the interstate apportionment intended by Article IV of the Compact as two sides of the same coin. *Id.*

The Court also recognized that, by pursuing its Compact claims, the United States would be protecting its "ability to satisfy its treaty obligations." *Texas v. New Mexico*, 138 S. Ct. at

959. The United States' "treaty with Mexico requires the federal government to deliver 60,000 acre-feet of water annually from the Elephant Butte Reservoir." *Id.* And the Court understood that "a failure by New Mexico to meet its Compact obligations could directly impair the federal government's ability to perform its obligations under the treaty." *Id.* at 959-60. The Court thus viewed "[p]ermitting the United States to proceed here" and "ensur[ing] that those obligations are, in fact, honored" as two sides of the same coin. *Id.* at 960.

2. The States' characterization of the United States' claims cannot be squared with the nature of New Mexico's "Compact-level duty" recognized in the Special Master's summary judgment order.

At the summary judgment stage, the Special Master concluded that the apportionment in the Compact is "programmatic," in that it depends on Reclamation's deliveries of water from the Project. 5/21/21 Order 5. The Special Master further recognized that, "consistent with the programmatic nature of the Compact's downstream apportionment, New Mexico has a Compact-level duty . . . to avoid and prevent the capture of Rio Grande surface water, drain return flows, and hydrologically connected groundwater to the extent that the overall impact of such capture is inconsistent with Compact water deliveries to Texas or interferes with long-term operation of the Project." *Id*. The Special Master explained that New Mexico's "duty" to prevent interference with the Project "is found throughout several interrelated provisions of the Compact," including, among others, "(1) the use of the term 'deliver' to describe . . . New Mexico's intrastate Reservoir input obligation [in Article IV]; (2) the necessary relinquishment of control inherent in the term "deliver"; [and] (3) the express designation [in Article VIII] of a normal annual release amount [of 790,000 acre-feet] that presumes the protection and reuse of Project return flows." *Id.* The Special Master thus concluded that "the compacting states intended to protect not merely water deliveries into the Reservoir, but also a baseline level of Project operations generally as

reflected in Project operations prior to Compact formation," "akin to a '1938 condition.'" *Id.* at 5-6.

The duty that the Special Master recognized in his summary judgment order is not an intrastate duty; it is a "Compact-level duty." *Id.* at 5. It is that very duty that the United States seeks to enforce. *See* U.S. Trial Br. 3 ("The evidence presented at trial will show that New Mexico has not fulfilled that duty."). The States' characterization of the United States' claims as intrastate claims therefore cannot be squared with the nature of the duty that the Special Master has recognized.

In response to the United States' position that "New Mexico has an obligation not to intercept or interfere with deliveries of water by the federal Rio Grande Project that effectuate the Compact apportionment to Texas and the part of New Mexico below Elephant Butte Reservoir," the Special Master stated that he was "not prepared at [that] 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." 5/21/21 Order 52. But regardless of whether "a state's citizens" could "assert Compact claims against their own state" on the basis of "intrastate" impacts, the *United States'* claims are Compact-level, interstate claims. The unauthorized capture of Project water that New Mexico is obligated to deliver and relinquish to the Project violates the Compact. Indeed, that is precisely what Texas told the Special Master: "the question of whether water received and used in New Mexico through the project is an apportionment or something else is of little relevance" because, "[i]n either case, New Mexico cannot interfere with these Compact and Project deliveries." Tex. Resp. to U.S. Summ. J. Mot., Dkt. 429, at 3-4. *See also* Tex. Reply to Exceptions at 40 (characterizing the United States' claims as "claims under the Compact").

3. The States' characterization of the United States' claims cannot be squared with Texas's characterization of its own claims.

The States' characterization of the United States' claims as "intrastate" is also contradicted by Texas's own complaint. Texas's prayer for relief seeks a decree "commanding the State of New Mexico . . . to: (a) deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act; and (b) *cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project*." Tex. Compl. 15-16 (emphasis added). Thus, Texas itself has recognized that preventing interference with the Project is a Compact-level, interstate obligation. The States acknowledge as much, recognizing in their memorandum that "Texas's second claim, related to non-interference with Project operations, is *directly linked* to ensuring that Texas receives its apportionment." States' Mem. 37 (emphasis added).

As the Court has observed, the United States' "Compact claims" seek "substantially the same relief" as Texas's complaint. *Texas v. New Mexico*, 138 S. Ct. at 960. Thus, just as Texas sought to protect the Project and thereby vindicate interstate interests, the United States seeks to do the same.

II. THE PROPOSED CONSENT DECREE SHOULD BE REJECTED BECAUSE IT WOULD EXTINGUISH THE UNITED STATES' COMPACT CLAIMS.

The States do not purport to settle only their own claims. Rather, their proposed consent decree purports to "resolve[] all of the Compact claims stated by any party in this litigation," including the United States' Compact claims. States' Mem. 33. *See id.* at 34 (stating that "the Decree compromises and settles all interstate claims in this litigation arising out of the Compact"). The Court has long recognized, however, that "parties who choose to resolve

litigation through settlement may not dispose of the claims of a third party." *Firefighters*, 478 U.S. at 529. For that reason alone, the States' motion should be denied.

A. A Consent Decree Among The States Cannot Dispose Of The United States' Compact Claims.

The issue before the Court five years ago was whether the United States could pursue the Compact claims that it has pleaded—or whether only Texas could seek to enforce New Mexico's Compact obligations in this case. The Court held that the United States may "pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico*, 138 S. Ct. at 960. *See id.* at 959 (holding that "the United States may pursue the particular claims it has pleaded in this case"). What that means is that the United States' Compact claims are its own, not Texas's.

Because the Court allowed the United States to pursue its own Compact claims, those claims may be resolved in one of only two ways: (1) adjudication on the merits, or (2) the United States' agreement to settle those claims. *See Janus Films, Inc. v. Miller*, 801 F.2d 578, 581 (2d Cir. 1986) ("Lawsuits may terminate either by adjudication or by agreement of the parties."). The States' proposed consent decree nevertheless purports to settle the United States' Compact claims without the United States' agreement.

As the Court has made clear, "[a] court's approval of a consent decree between some of the parties . . . cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Firefighters*, 478 U.S. at 529. *See Lawyer v. Department of Justice*, 521 U.S. 567, 579 (1997) (reiterating the same principle); *United States v. Ward Baking Co.*, 376 U.S. 327, 333 (1964) (holding that "where the Government seeks an item of relief to which evidence adduced at trial may show that it is entitled, the [trial court] may not enter a 'consent' judgment without the actual consent of the Government"). Here, the United States' Compact claims are properly raised; the Court itself

permitted the United States to intervene and pursue them. *Texas v. New Mexico*, 138 S. Ct. at 960. Approval of the States' proposed consent decree would thus cause the United States "plain legal prejudice" by "strip[ping] [the United States] of a legal claim or cause of action." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001) (citation omitted). *See id.* ("'[P]rejudice' in this context means 'plain legal prejudice,' as when 'the settlement strips the party of a legal claim or cause of action.'") (brackets in original; citation omitted). Accordingly, the States' proposed consent decree should be rejected as a matter of law.

B. The States' Counterarguments Lack Merit.

Despite acknowledging that "a consent decree 'may not dispose of the claims of a third party,'" States' Mem. 5 (quoting *Firefighters*, 478 U.S. at 529), the States contend that their proposed consent decree may validly extinguish the Compact claims of the United States. *See id.* at 33 ("The Consent Decree fully resolves this litigation, and the Special Master should enter it over the United States' objection."). That contention rests on the States' view that "the United States' claims are derivative of Texas's claims." *Id.* at 20 (capitalization altered; emphasis omitted). See *id.* at 51 (arguing that the United States has not "raised any 'valid' interstate claims for relief that would remain after entry of the Consent Decree"). That is incorrect.

1. The United States' claims are independent, not derivative, of Texas's claims.

The States contend that the United States has no valid Compact claims apart from Texas's because the United States has no "unique federal interest in the equitable apportionment of water." States' Mem. 3. That contention cannot be squared with the Court's decision five years ago.

In allowing the United States to pursue its own Compact claims, the Court recognized that the United States has "distinctively federal interests" to advance in this original action.

Texas v. New Mexico, 138 S. Ct. at 958 (citation omitted). *See Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981) (intervention of the United States is appropriate where "distinctively federal interests, best presented by the United States itself, are at stake").[10] Those interests include the distinctively federal interstate and international interests discussed above. *See* Part I.B.1, *supra*; *Texas v. New Mexico*, 138 S. Ct. at 959 (recognizing the United States' distinctively federal "interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms"); *id.* (noting New Mexico's concession that "the United States plays an integral role in the Compact's operation" and was "an indispensable party to this lawsuit"); *id.* at 960 (recognizing that "[p]ermitting the United States to proceed here will allow it to ensure that [its treaty] obligations are, in fact, honored"). By definition, the "distinctively federal interests" that the Court identified as the basis for the United States' claims, *id.* at 958 (citation omitted), are not "derivative" of any interest or claim of Texas.

The States nevertheless contend that "the United States does not have an interest [in] the precise division of water as between Texas and New Mexico." States' Mem. 43. That contention is likewise contrary to the Court's decision. As the Court recognized, "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts." *Texas*

[10] The Court's decision in *Alabama v. North Carolina*, 560 U.S. 330 (2010), is not "analogous," *contra* States' Mem. 51. The question in that case was whether the waste commission, as a "nonsovereign," could pursue claims against North Carolina, notwithstanding that State's sovereign immunity under the Eleventh Amendment. 560 U.S. at 355. *See id.* at 357 (holding that the commission's claims could proceed because they were "wholly derivative" of the States' claims and would not "expand the relief" the States had sought (citing *Arizona v. California*, 460 U.S. 605, 614 (1983)). The limitation suggested by the Court in *Alabama v. North Carolina* and *Arizona v. California* is inapplicable to the United States' claims in this case because "the States do not enjoy sovereign immunity against the United States," *Alabama v. North Carolina*, 560 U.S. at 354-55. *See Arizona v. California*, 460 U.S. at 614 ("Nothing in the Eleventh Amendment has ever been seriously supposed to prevent a state from being sued by the United States." (internal quotation marks and citation omitted)).

v. New Mexico, 138 S. Ct. at 959. And the federal government has an interest in ensuring that it can "meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose" of effecting, through the Project and the Downstream Contracts, an equitable apportionment of the waters of the Rio Grande between the States. *Id.* To say that the United States lacks an interest in the "precise division of water as between Texas and New Mexico," States' Mem. 43, is thus to ignore the programmatic nature of the apportionment downstream of Elephant Butte Reservoir.

The States argue that the proposed consent decree would provide "precisely th[e] relief" that the United States has sought in this case. States' Mem. 53. But as explained below, the "relief" provided by the proposed consent decree—which, *inter alia*, rests on a D2 (1951-1978) rather than a 1938 baseline, and lacks enforceable prohibitions or restrictions applicable to water uses in New Mexico to protect the Project—would fall far short of the relief that the United States has sought in this case. *See* Part II.B.2 & Part V, *infra*; *Ward Baking*, 376 U.S. at 334. The States also contend that the disclaimer in Part V of the proposed decree is sufficient to protect the United States' interests in fulfilling its treaty obligation. *See* States' Mem. 54; Decree IV.B ("Nothing in this Decree shall be construed as affecting" the United States' treaty obligations). But that disclaimer simply mirrors the disclaimer in Article XVI of the Compact itself. 53 Stat. at 792. And the Court "[p]ermit[ted] the United States to proceed" with its Compact claims, notwithstanding the disclaimer's existence. *See Texas v. New Mexico*, 138 S. Ct. at 960. As the Court explained, the disclaimer in the Compact "means only that the Compact seeks to avoid impairing the federal government's treaty obligations"; it does not, on its own, "ensure that those obligations are, in fact, honored." *Id.* The disclaimer in the proposed decree is no different.

Under the States' logic, the States could have settled this case without the United States at any point—including the day after the Court's decision in 2018. But the entire point of the Court's decision was that the United States could pursue its own Compact claims and not be reduced to a mere amicus supporting Texas's. Yet, on the States' view, that is all that the United States would be: a mere amicus subject to Texas's litigating decisions. Tellingly, that is exactly how the States treat the United States in their motion—arguing that the United States has no more right to object to the extinguishing of its claims than EBID or EPCWID. *See* States' Mem. 46 (comparing the United States with EBID and EPCWID).

2. The passages in the Court's decision upon which the States rely do not support their position.

In support of their view that the United States' claims are merely derivative of Texas's, the States principally rely on two passages of the Court's decision. *See* States' Mem. 49-50. Their reliance on those passages is misplaced.

First, the States rely on a sentence in which the Court stated that "the United States might be said to serve, through the Downstream Contracts, "as a sort of 'agent' of the Compact, charged with assuring that the Compact's equitable apportionment' to Texas and part of New Mexico 'is, in fact, made.'" *Texas v. New Mexico*, 138 S. Ct. at 959 (citation omitted). But the Court stated that the United States might be described as "a sort of 'agent' of the Compact," not an agent ("sort of" or actual) of the States. *Id.* And in the next sentence, the Court offered, "by way of another rough analogy," that the Compact "could be thought implicitly to incorporate the Downstream Contracts by reference." *Id.* As the Court's decision makes clear, the Court intended both analogies, while different, to illustrate the same point: that the Compact could "achieve [its] purpose" of effectuating an equitable apportionment "only because the United States had negotiated and approved the Downstream Contracts, in which the United States

assumed a legal responsibility to deliver a certain amount of water to Texas." *Id.* The Court's analogies thus serve only to confirm that the Court viewed the Downstream Contracts under the Project, not some agency relationship with the States, as the source of the United States' authority and legal obligations with respect to the delivery of water.[11] Far from suggesting that the United States' interests are derivative of Texas's, this passage underscores the United States' distinctively federal interests in protecting Project deliveries under the Downstream Contracts.

Second, the States rely on a passage in which the Court recognized that the United States has asserted "Compact claims" "seeking substantially the same relief" as Texas. *Texas v. New Mexico*, 138 S. Ct. at 960. But as explained above, neither the scope of the United States' Compact claims nor the relief that the United States is seeking has changed since the outset of this suit. *See* Part I.A, *supra*. The United States is still pursuing the same "Compact claims" that it "pleaded." *Texas v. New Mexico*, 138 S. Ct. at 960. And it is still "seeking substantially the same relief" as sought by Texas, *id.*, whose complaint requests a "[d]ecree commanding the State of New Mexico . . . to deliver the waters of the Rio Grande in accordance with the . . . Compact and the [1905] Act" and to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project." Tex. Compl. 15-16. The "scope of [the] existing controversy" thus remains the same; the United States has not "expand[ed]" it. *Texas v. New Mexico*, 138 S. Ct. at 960.

[11] The United States' 1937 contracts with EBID and EPCWID were specifically authorized by Congress in the Department of Interior Appropriations Act of 1937, ch. 570, 50 Stat. 593. The contracts relieved the Districts of the construction costs associated with power development at Elephant Butte dam and confirmed that water in Caballo Reservoir "shall not be released therefrom in excess of the amount estimated to be reasonably necessary to meet the requirements for irrigation purposes, for treaty allowances . . . and for flood control needs." US-458, at US-0458_0009 (EPCWID); US-367, at US-0367_0013 (EBID).

What has changed since the Court's decision is not the scope of the United States' or Texas's claims, but only Texas's willingness to compromise its own litigating position. Nothing in the Court's decision, however, suggests that the United States' ability to pursue its own independent Compact claims is contingent on Texas's litigating decisions. To the contrary, the Court recognized the "distinctively federal interests" that the United States seeks to defend. *Texas v. New Mexico*, 138 S. Ct. at 960 (citation omitted). There is no basis for allowing Texas to compromise those interests.

The proposed consent decree illustrates the point. Throughout this litigation, Texas has argued for "a 1938 condition," and the Special Master vindicated that argument on summary judgment, holding that the Compact protects a "baseline level of Project operations" "akin to a '1938 condition' as urged generally by Texas." 5/21/21 Order 5-6. The 1938 condition urged by Texas is very different from a "D2" condition. The 1937 Joint Investigation Report found that irrigation pumping was minimal to non-existent, CO-4, at CO-0004_0073, and that the limited groundwater pumping occurring in the towns and villages between San Marcial and the Texas state line was associated with 2,400 acre-feet of streamflow depletion annually. *Id.* at CO-0004-0123; Declaration of Ian Ferguson ("Ferguson Decl.") ¶¶ 16-17. *See also* 5/21/2021 Order 29 (finding that pumping was "minimal" and "minor" prior to the Compact). A D2 condition, by contrast, assumes significant depletion of return flows resulting from groundwater pumping, which "exploded" in the early 1950s. Ferguson Decl. ¶ 22. *See also* Declaration of Margaret Barroll ("Barroll Decl."), Dkt. 720, Ex. 6, ¶ 26. New Mexico's modeling indicates that, if groundwater pumping had been turned "off" during the D2 period, EPCWID could have diverted

an additional 34,639 acre-feet per year, on average. *See* Ferguson Decl. ¶¶ 30-31 & table 1.[12] And even during wetter years, turning New Mexico groundwater pumping "off," to a 1938 condition, would yield more water for EPCWID. *Id.*, ¶ 32-33. Thus, even using New Mexico's model, Texas is conceding away a significant amount of the water to which it would be entitled under a 1938 condition—and water to which the Project would also be entitled for delivery to Project irrigators in Texas and New Mexico.

Given Texas's significant compromise to a D2 baseline, one would have expected Texas to receive a meaningful concession or commitment from New Mexico in return—for example, concrete and specified assurances that New Mexico would actually reduce groundwater pumping that interferes with Project deliveries. *See* Tex. Compl. ¶ 20. Yet, despite Texas's substantial compromise to a D2-level delivery, the proposed decree gives Texas hardly anything in return. There is nothing in the proposed decree that requires New Mexico to account for the depletions of Project surface water supply associated with groundwater pumping, a requirement that the United States has said would be a necessary component of relief. *See* U.S. Summ. J. Mot., Dkt. 414, at 31. As the Special Master observed has observed, "[a]ll the reporting in the world doesn't do any good if you're pumping too much water." Vol. XVIII Trial Tr. 104:17-19. Without a method of accounting, any program that New Mexico might implement to retire groundwater pumping, facilitate fallowing, or arrange for water imports would have no concrete objectives. Such measures are not specified in the decree in any event, and would be merely "tools and options" that New Mexico "may" someday consider if state-ordered allocation

[12] The D2 period can be characterized as a "multidecadal drought period with a few wet years scattered throughout it." Vol. IV Trial Tr. 50:14-16. *See also* Ferguson Decl. ¶ 20.

transfers from EBID fail to achieve necessary reductions. Declaration of Michael Hamman ("Hamman Decl."), Dkt. 720, ¶ 14.

In fact, there is nothing in the decree to ensure that New Mexico will actually protect "Compact water deliveries to Texas" and the "long-term operation of the Project." 5/21/21 Order 5. *See also* Part III.E, *infra*. New Mexico's model estimates that if groundwater pumping had been turned "off" during the dry years of the D2 period (1951-78), the Project irrigation districts could together have diverted 86,843 acre-feet more per year. Ferguson Decl. ¶ 30. Therefore, if the Special Master were to enter a final judgment that the Compact protects a 1938 condition, the United States might be able to get that 86,843 acre-feet back to allocate to the Districts in future drought years. But Texas has instead agreed to allow the continuing depletion of Project return flows, Project deliveries, and Project storage, and has even agreed to limit the carryover accounting upon which EPCWID depends to mitigate the effects of drought. *See* Decree III.A (requiring that Project operations be "undertaken" such that Project carryover does not cause exceedances of the Negative Departure limit); *see also* Vol. IV Trial Tr. 208-210 (testimony of Art Ivey); Vol. V Trial Tr. 148 (testimony of Jesus Reyes) ("Without carryover, we probably . . . wouldn't have had an irrigation season" in 2021); Vol. V Trial Tr.19-22 (testimony of Allie W. Blair); Declaration of Allie W. Blair ("Blair Decl."), ¶ 21. The distinctively federal interests underlying the United States' pursuit of its own Compact claims should not be subject to Texas's decisions to compromise to a D2 condition for almost nothing in return.

3. The Court rejected the States' argument that the United States lacks standing to enforce the Compact.

The States' remaining arguments that the United States' claims are derivative of Texas's are (1) that the United States does not have an apportionment of water under the Compact, and (2) that the States, not the United States, represent the interests of individual water users. *See*

States' Mem. 41-47. Those are the same arguments that the previous Special Master accepted in recommending that the Court dismiss the United States' Compact claims. *See* First Interim Report 231, Dkt. 54 ("I find that, here, in order to state a claim under the 1938 Compact itself, the United States would have to assert 'violations which have the effect of undermining its own apportionment of water.' The 1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the compact against New Mexico.") (brackets and citation omitted). And they are the same arguments that New Mexico and Colorado made to the Court five years ago in supporting that recommendation. *See* N.M. Reply to U.S. Exceptions 6 (arguing that "[a]s a non-signatory to the Compact and an entity to which no water was allocated by the Compact, the United States lacks the authority to bring suit under the Compact") (emphasis omitted); *id.* at 25 ("Allowing the United States to raise independent Compact claims would upset the bargain reached by the compacting States."); Colo. Exceptions 7 ("it is the States, and not the United States, that represent the water users," and which "are parties to the Compact."). Those arguments were not persuasive then. They are no more persuasive, and are indeed foreclosed, now.

C. Other Forums Are Not Adequate For Resolving The United States' Compact Claims.

The States attempt to minimize the prejudice to the United States by asserting that, while their purported settlement would resolve all interstate claims, the United States could still pursue "intrastate" claims in other forums. States' Mem. 34, 53-54, 55. But as explained above, the United States' claims in this case are based on the Compact and are interstate claims, not intrastate ones. And it is the purported extinguishment of those interstate Compact claims, in the absence of any merits adjudication or settlement involving the United States, that would cause

the United States "plain legal prejudice." *Integra Realty Res.*, 262 F.3d at 1102 (citation omitted).

The States assert that there are "several available forums in which the United States may address intrastate water use, including several pending cases." States' Mem. 55. They cite the 2008 Operating Agreement litigation in federal district court in New Mexico and the state-court adjudication of the Lower Rio Grande Basin in New Mexico. *Id.* But again, that misses the point. The United States' claims are "Compact claims." *Texas v. New Mexico*, 138 S. Ct. at 960. By "permit[ting] the United States to proceed here" with those claims, the Court has already made clear that "this original action" is the proper forum for resolving them. *Id.*

In any event, the litigation relating to the 2008 Operating Agreement does not include any claim made by the United States, and the States have represented that the litigation would be dismissed as a consequence of their purported settlement. 10/25/22 Status Conf. 19. The state-court adjudication could take decades to complete.[13] The United States would not be able to obtain timely or meaningful relief through the state-court adjudication until there is a final judgment defining the Project water rights *and* the United States has had the opportunity to litigate its objections to the many thousands of groundwater rights in the Lower Rio Grande Basin that New Mexico has recognized as preliminarily valid, even though the exercise of those

[13] The New Mexico adjudication court has issued interlocutory orders addressing certain aspects of the Project water right in a preliminary "Stream System Issue" proceeding. *See* NM-2387; US-173; JT-472, at JT-0472-0007 (order deferring to the New Mexico State Engineer to determine "whether Project water retains its identity as Project water" as it returns to drains and the river through the ground). The adjudication of the United States' objections to thousands of junior groundwater rights will not occur until the "inter se" phase of the adjudication, which will not begin until the court has resolved all of the pending Stream System Issues. *See* Vol. XVII Trial Tr. 179:1-184:19 (testimony of John Longworth).

rights depletes the Project water supply or has the potential to do so. Vol. XVIII Trial Tr. 91-95 (testimony of Ryan Serrano); Vol. XIV Trial Tr. 77-81 (testimony of Jorge Garcia).

III. THE PROPOSED CONSENT DECREE SHOULD BE REJECTED BECAUSE IT WOULD IMPOSE OBLIGATIONS ON THE UNITED STATES WITHOUT THE UNITED STATES' CONSENT.

Even if the proposed consent decree did not purport to resolve the United States' Compact claims, it should still be rejected. A "court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Firefighters*, 478 U.S. at 529. Thus, even if a consent decree purported to resolve only the consenting parties' "own disputes"—without disposing of anyone else's claims—it would still be invalid if it "impose[d] duties or obligations on a third party, without that party's agreement." *Id.* Here, the States' proposed consent decree would impose obligations on the United States, without the United States' agreement. For that reason as well, the States' motion should be denied.

A. The Proposed Decree Would Impose Obligations On The United States Without The United States' Consent.

The proposed consent decree would impose a series of obligations on the United States without the United States' consent.

1. The proposed decree would mandate that Reclamation remedy and prevent exceedances of the Departure Limits by changing Project allocations to which the Districts are legally entitled.

Under the proposed consent decree, Index "Departures" accrue on a continuing basis, with Positive Departures (over-deliveries) offsetting the Negative Departures (under-deliveries), and vice-versa. Decree II.B.iii; *see id.* at 4 (defining "Index Departure"). When accrued Index Departures exceed specified "trigger" levels, the proposed decree would require Reclamation to reduce the exceedance by making "adjustments in Project operations" and "adjustments in

Project accounting" to deprive one of the Districts of water to which it is contractually entitled. Decree II.D.1.

For example, when there is an accrued Positive Departure of 30,000 acre-feet for two consecutive years, the proposed decree provides that "Reclamation *will* implement Allocation Transfers" by transferring water from EPCWID's current-year diversion allocation to EBID's current-year diversion allocation, to reduce the accrued Departure within three years. Decree II.D.3.b.i (emphasis added). The proposed decree would thus mandate that Reclamation change contractually determined water allocations in response to a "trigger" that is not itself mandated by the Compact, Reclamation law, or Reclamation's contracts with the Districts.

The proposed decree would also mandate action by Reclamation in response to the accrued Negative Departures. When those exceed 80,000 acre-feet, New Mexico "shall take water management actions" albeit without specifying what they may and instead leaving them to New Mexico's discretion. Decree II.D.2.a. But New Mexico also "shall have the option to transfer . . . water . . . from [EBID] to [EPCWID]," as long as Texas agrees. *Id.* New Mexico has no legal authority to set or modify Project allocations, and it has no legal or practical ability to release water to fulfill the allocations. *See* Declaration of Michelle Estrada-Lopez ("Estrada-Lopez Decl.") ¶ 11; Vol. I Trial Tr. 159-84. The "option" afforded to New Mexico thus operates as a mandate to Reclamation to change Project allocations at New Mexico's request, at the times and in the amounts that New Mexico determines. And if New Mexico fails to reduce the accrued Negative Departure within three years, "Reclamation *will* implement Allocation Transfers" from EBID to EPCWID for the next three years. Decree II.D.2.c (emphasis added). The proposed decree thus would require Reclamation to alter Project operations by depriving EBID of water to which that District is contractually entitled to keep New Mexico in compliance with the decree.

The proposed decree would similarly require Reclamation to supply the water to remedy violations of the decree on New Mexico's behalf. *See* Decree II.C.1 (New Mexico is "in violation of th[e] Decree" if accrued Negative Departures exceed the Departure Limit); Decree II.C.3 (setting Departure Limit of 150,000 acre-feet in the first five years and a Departure Limit of 120,000 acre-feet thereafter). If the Departure Limit is exceeded for three or more years, New Mexico "shall provide" additional water to Texas in excess of the Index Obligation in specified amounts. Decree II.C.3.b. But New Mexico again "shall have the option" to mandate an allocation transfer from EBID to EPCWID to satisfy these obligations. The decree would thus enjoin Reclamation, and EBID, to provide the remedy for New Mexico's violations of the decree.

2. The proposed decree would mandate changes to Project allocation and accounting procedures.

The proposed decree would also mandate immediate and permanent changes to the Project allocation and accounting methods that are documented in the 2008 Operating Agreement and Project Operations Manual. In Part III of the decree, entitled "Project Operations to Enable Compact Compliance," the decree states that "Project operations and Project Accounting must be consistent with this Decree" and refers to "[e]xamples of procedures to maintain consistency between Project operations, Project accounting and this Decree" in Section 8 of Appendix 1. Decree III.A.[14] Section 8 of Appendix 1 describes three changes that must be made to "maintain consistency" under this provision: modifying the D2 regression equation to incorporate prior-year releases, Appendix at 12; changing the accounting point for EPCWID to

[14] Citations to "Decree Appendix" are citations to Appendix 1.

the El Paso gage, *id.* at 13; and modifying Project carryover accounting to account for evaporation and conveyance losses, *id.*

Although it is unclear how such changes would be enforced, there can be no dispute that such changes would be mandatory. If Project operations and accounting "must be consistent" with the decree, Decree III.A, and each of the prescribed changes is necessary to "maintain consistency" with the decree, *id.*, then each of those changes must be implemented. The Appendix thus characterizes these changes as mandatory. *See id.* at 12 (repeating that Project operations and accounting "must be consistent" and, "[a]t a minimum," the three specified changes are needed "to ensure the delivery" of the required amounts of water). The States' declarants likewise characterize these changes as mandatory. *See, e.g.*, Hamman Decl. ¶ 11 (the Index "will require adjustments to Rio Grande Project operations and accounting"); Declaration of Gregory Sullivan ("Sullivan Decl."), Dkt. 720, ¶ 21 (characterizing these "adjustments" as necessary); Barroll Decl. ¶ 42b (carryover "must be adjusted" for evaporation).

The proposed decree also contemplates that the Appendix could be modified in the future by order of the Court or "by unanimous agreement of the Compacting States," Decree V, apparently meaning that the States could at any time prescribe additional changes to Project allocations and accounting. The decree does not set any limitations or standards for those potential changes, except that all three States must agree to them. The decree would thus grant the States the continuing authority to mandate changes to Project operations, and would impose on Reclamation a continuing obligation to implement the States' preferences.

3. The proposed consent decree would impose new obligations relating to the Rio Grande at El Paso gage.

Under the proposed decree, the Index Obligation and Index Delivery would be measured by flows at the Rio Grande at El Paso gage ("El Paso gage"), which is operated by the U.S.

IBWC. Decree II.B.ii.g; Appendix 4; Declaration of William Finn ("Finn Decl.") ¶ 6. The decree states that the El Paso gage "will continually meet the Rules and Regulations for Rio Grande Compact Administration [hereafter, 'Compact Rules'] regarding Gaging Stations." Decree II.B.ii.g. The Compact Rules are promulgated by the Rio Grande Compact Commission and may be amended by the Commission at any time without the vote of the United States. *See* Compact art. XII, 53 Stat. at 791. The Compact Rules currently state that "the equipment, method and frequency of measurements at each gaging station shall be sufficient to obtain records at least equal in accuracy to those classified as good by the U.S. Geological Survey." Estrada-Lopez Decl. Ex. A, ¶ 16(b).

Maintaining the El Paso gage to meet the Compact Rules would be a new obligation, and that obligation cannot be met by any State because the gage is located on federal land and operated by the U.S. IBWC. Finn Decl. ¶ 6. Although the El Paso gage predates the Compact, *see* Vol V. Trial Tr. 69 (Blair), the Compact does not require accounting at the El Paso gage, *see* art. II, 53 Stat. at 786, and the Compact Commission has not adopted it as a gage for accounting purposes. Estrada-Lopez Decl. ¶ 6 n.1. The U.S. IBWC likewise has no existing legal obligation to operate the El Paso gage to meet the standards in the Compact Rules, much less to a standard "sufficient to obtain records at least equal in accuracy to those classified as good by the U.S. Geological Survey." Decree II.B.ii.g. Finn Decl. ¶¶ 8-9.

Under the current USGS standard, a good classification requires that gage records be within 10% of the true value. Estrada-Lopez Decl. ¶ 16c. To meet that standard, the U.S. IBWC would need to pay for upgrades and ongoing maintenance, which may cost of tens of thousands of dollars per year. Finn Decl. ¶¶ 9-10. By way of comparison, to maintain a "good" classification for the Rio Grande at Caballo gage, which is identified in the Compact, 53 Stat.

786, and subject to the Compact Rules, Estrada-Lopez Decl. ¶ 16(a), Reclamation has paid between $40,000 and $80,00 per year for gage maintenance and upgrades. *Id.*, ¶ 16(c).[15] The proposed consent decree does not specify any mechanism by which any similar costs for the El Paso gage would be reimbursed, except that it specifies that Colorado "shall not be responsible" for them. Decree II.B.ii.g.

4. The proposed consent decree would impose upon Reclamation vague obligations to ensure "consistency" and prevent "interference."

In addition to the specific obligations discussed above, the proposed consent decree declares various general obligations that Reclamation must fulfill in its operation of the Project. A provision in the "Injunction" section of the decree provides that "[t]he United States is responsible for operating the Project in a way that assures that the Compact's equitable apportionment to Texas and New Mexico below Elephant Butte Reservoir is achieved consistent with the terms of this Decree." Decree II.A.4. And in the section titled "Project Operations to Ensure Compact Compliance," the decree provides that "Project operations and Project Accounting, including [carryover accounting], must be undertaken in a manner that does not interfere with New Mexico's or Texas's rights and entitlements defined in the Compact and this Decree." Decree III.A. The next provision declares that "Project operations and Project accounting must not interfere with Compact administration." Decree III.B.

In addition to impermissibly granting injunctive relief against the federal government to which it has not agreed in a settlement, those provisions are vague and indefinite and fail to state

[15] The Compact Rules state that the Rio Grande at Caballo gage "shall be equipped, maintained and operated by or on behalf of Texas through the agency of the U.S. Bureau of Reclamation." Estrada-Lopez Decl., ¶ 16(a). Reclamation does not act as an agent of Texas and is not reimbursed by Texas for its work on the gage. *Id.* It is unclear whether or how this provision would apply to the El Paso gage.

the content or limitations of the prohibitions they would entail. *Cf.* Fed. R. Civ. P. 65(d)(1)(C) (requiring any order granting an injunction to "describe in reasonable detail" the actions that are proscribed). To take one example: the mandate not to "interfere with Compact administration" does not define "interference" or "Compact administration." *See* Decree III.B. Nothing in this provision or any other provision in the decree or the Appendix supplies a standard by which to determine whether interference has occurred, or whether any particular instance of interference is caused by the United States' actions or by the actions of a States. In fact, because this mandate has no geographical limitation, it could be construed as encompassing *all* "Compact administration," including the administration of requirements that have no relationship to the matters that the Court accepted for resolution in this original action.

B. The States' Assertion That The United States' Obligations Under The Proposed Consent Decree Would Not Be New Is Both Irrelevant And Incorrect.

The States contend that the proposed consent decree would not impose "any new legal duties or obligations" because "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." States' Mem. 56. But the question is not whether the proposed consent decree would announce "any *new* legal duties or obligations." *Id.* (emphasis added). Rather, the question is simply whether the proposed consent decree's injunctive provisions would impose any "duties or obligations" on the United States, without the United States' agreement. *Firefighters*, 478 U.S. at 529. The answer is plainly yes. As explained above, the proposed consent decree would impose a host of duties and obligations on the United States, which has not consented to the decree. See Part III.A, *supra*. Indeed, the States do not dispute that the

proposed consent decree would impose such obligations on the United States; they dispute only whether those obligations are "new"—which is irrelevant.

Even if the States were correct that only "new" obligations mattered, the proposed consent decree would still be invalid. The States contend that the obligations in the proposed consent decree have a basis in "an existing duty" under the Compact. States' Mem. 56. But even if that were true—which the United States disputes—that would not establish that the specific obligations were not "new." The proposed consent decree would still require the United States to do things—like preventing exceedances, changing Project allocations, and so on—that the United States was not required to do before. Such obligations would thus be "new."

The States contend that the proposed consent decree merely "construe[es] ambiguous provisions of the Compact." States' Mem. 3. See *id.* at 56 (acknowledging that the proposed consent decree "defin[es] specific provisions to ensure that Project operations and accounting do not interfere with the equitable apportionment"). But that assertion only confirms that the proposed consent decree would impose "new legal duties or obligations." *Id.* at 56. After all, if the specific obligations in the proposed consent decree rest on the resolution of ambiguities in the Compact, then such obligations, by definition, did not exist in any enforceable manner before those ambiguities were resolved. Indeed, to the extent that there are unresolved questions about what the Compact requires of any party to this case, those are precisely the questions that a "judgment on the merits" was supposed to resolve. States' Mem. 57. Any answers that the decree purports to give to those questions are thus necessarily "new."

For example, the States assert that the Index is intended resolve various supposed "ambiguit[ies]" in the Compact, *id.* at 66, by inserting a methodology that the Compact used elsewhere but left out at the Texas-New Mexico line, *id.* at 65-66, and by implementing a

"Project baseline operating condition" based on the conditions in D2 period rather than the conditions that existed at the time the Compact was executed in 1938, *id.* at 67. But how Texas's apportionment should be determined and whether the relevant baseline condition is D2 or 1938 are questions that go to the very heart of this Compact dispute. The States' purported resolution of those questions by agreeing to the Index is thus necessarily imposing something "new." Indeed, Texas has acknowledged that a "1938 condition" would still be its litigation position if the case returned to trial. 12/15/22 Status Conf. Tr. 48. *See* Tex. Mot. for Partial Summ. 58 (arguing that "the text and structure of the Compact unambiguously impose upon New Mexico an obligation to deliver an indexed volume of Rio Grande water in Elephant Butte Reservoir and not to intercept, deplete, or otherwise interfere with water released by the Project for the benefit of Texas"). Texas therefore cannot say that requiring a state-line delivery obligation based on D2 conditions, much less the detailed accounting system and remedial scheme that constitutes the bulk of the decree's text, is imposing anything other than something "new."

Furthermore, even if the States could somehow establish that requiring Reclamation to ensure state-line deliveries to Texas based on D2 conditions was not "new," that showing would not support all of the *other* mandates that the decree would impose upon the United States. The States have not shown that the changes prescribed in Section 8 of the Appendix flow from any obligation imposed by the Compact. Even if the Compact had expressly prescribed an Index based on D2 conditions, the States would need to establish that the Compact specifically requires Reclamation to adopt all of their proposed "procedures" and would not have left those determinations to Reclamation's discretion.

Finally, nothing in the Compact requires the United States to transfer Project allocations to keep New Mexico in compliance. The mandatory allocation transfers required by the decree

are part of a settlement that the States designed to avoid future litigation over enforcement. The Compact itself does not prescribe them as an element of the apportionment it effectuates. Although the United States and the Districts could agree to make such transfers on a voluntary basis in connection with a comprehensive settlement agreement or any future adjudication on the merits of this case, they have no existing obligation to implement them.

C. Sovereign Immunity Bars Imposing Obligations Without The United States' Consent.

The principle that a consent decree cannot impose obligations on an intervenor without that party's consent, *Firefighters*, 478 U.S. at 529, applies with extra force in this case because the United States has not waived its sovereign immunity to permit an injunction to issue against it. *See* 3/21/20 Order 15 (holding that the United States had not waived its immunity to allow for "damages or specific injunctive relief").[16]

At a hearing on New Mexico's counterclaims, counsel for the United States stated that "once we have a decree that defines what each state has, we can then look to project operations and determine whether those operation are consistent with the decree." 4/2/19 Hr'g Tr. 49. But that statement was made in the context of arguing that New Mexico's counterclaim challenging the 2008 Operating Agreement was beyond the scope of this original action. *Id.* And the point was simply that if the Court issues a decree that further articulates the apportionment as between New Mexico and Texas, Reclamation would determine—in its discretion—whether any changes

[16] The Special Master's reservation of a decision on the scope of declaratory relief has no application here because the Special Master dismissed all of the counterclaims against the United States; the States do not purport to be resolving any potential counterclaim against the United States; none of the provisions in the decree that relate to the United States "mirror" a claim for relief in the United States' complaint, 3/31/20 Order 2; and the States agree that declaratory relief is not available against the United States in this action, States' Mem. 61. *See* pp. 13-14, *supra.*

to the operation of the Project would be warranted. *See* 3/31/20 Order 29 (noting that "if New Mexico or Texas has been deprived of its equitable apportionment under the Compact, it is very possible that any such shortfall may be the result of a combination of factors, including" not just "the United States's Project operations," but also "New Mexican, Texan, or Mexican surface or groundwater diversions").

The proposed decree would reserve no such discretion to the United States; to the contrary, the decree would expressly "alter[] the discretion of the United States" so that it must operate the Project in the ways that the States, in *their* discretion, deem "necessary to ensure compliance with the Compact." Decree III.A. The decree thus cannot be squared with the Special Master's definition of the relief available against the United States in this action.

In any event, a decree in this case could not bind the United States to begin with unless the United States agreed to the decree or a judgment was entered following adjudication of the United States' claims.

IV. THE PROPOSED CONSENT DECREE SHOULD BE REJECTED BECAUSE IT WOULD BE INCONSISTENT WITH FEDERAL LAW, INCLUDING THE COMPACT ITSELF.

As the Court has explained, "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Firefighters*, 478 U.S. at 522. The agreement must therefore be consistent with federal law. *See id.* at 526-28. Here, allowing the States, through an agreement among themselves, to impose obligations on the United States, without the United States' consent, would be inconsistent with the Compact and with federal reclamation law.

A. The Proposed Decree Would Be Inconsistent With The Compact.

An interstate compact is "a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). And, because a compact is approved by Congress, it is a federal statute, and "no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The proposed decree, to the extent it would itself impose (and be satisfied by) a permanent, volumetric D2 delivery obligation at the state line, irrespective of the potential for interference with the long-term operation of the Project and the United States' contracts with the Districts, would be contrary to the Compact as construed by the Court and by the Special Master's prior orders.

1. The 1938 condition

The Special Master concluded in his summary judgment order that the Compact protects a baseline "akin to a 1938 condition." 5/21/21 Order 6. *See also id.* at 5 (the States intended to protect "a baseline level of Project operations generally as reflected in Project operations prior to Compact formation"); *id.* at 29 (describing the condition of minimal groundwater use "in the decade that preceded Compact ratification"). Yet the proposed consent decree would adopt a "D2 condition" based on Project deliveries in the period 1951-1978, Decree at II.B.ii(e). The D2 condition incorporates the effects of groundwater pumping in New Mexico that developed after 1938 and reflects New Mexico's recapture of a significant amount of the water it was supposed to have delivered and relinquished to the Project under Article IV. The decree would thus provide less protection to the Project than what the Special Master concluded the Compact requires and provide an Index measuring state-line deliveries based on a D2 condition as the sole standard of protection of the Project and New Mexico's obligations.

Under the 1938 condition that has been advocated by the United States, the water apportioned by the Compact includes return flows that traveled through the ground, undiminished by new water resource development after the States approved the Compact in 1938. *See* U.S. Mem. in Supp. of Mot. for Partial Summ. J., Dkt. 414, at 25.[17] As discussed above, under a 1938 condition, groundwater pumping and any associated depletions of surface water were minimal, and return flows to the river were unimpeded. *See* Ferguson Decl. ¶¶ 16-18. In his summary judgment order, the Special Master recognized that this condition of return flows was "fundamental to the determination of the Compact's normal annual release amount and to the determination of upstream delivery schedules based on the release amount." 5/21/21 Order 38-39. And that condition of return flows required non-depletion of the groundwater hydrologically connected to those return flows. *See id.* at 38 (discussing the "undisputable state of knowledge [in 1938] as to the importance of drains below the reservoir in providing return flows and the well understood existence of a general relationship between the groundwater and the return flows"). *See also* TX-669, at 111 (report to Congress estimating that the Project could satisfy a duty of 3 af/acre based upon its reuse of "return seepage"); Vol. VIII Trial Tr. 73-74 (discussing exhibit).

The Special Master's conclusion that the Project's return flows and hydrologically connected groundwater were "fundamental" to the "upstream" apportionment between Colorado and New Mexico, *id.,* was reaffirmed many times by Texas's expert historian, Dr. Scott Miltenberger, in his trial testimony:

[17] This version of the 1938 condition requires no technical evidence at trial; it is based on the state of development in 1938, which is undisputed, *see* 5/21/21 Order 29. Post-1938 uses would have to be reduced, offset, or otherwise accounted for under the Compact.

- **Q**: [W]hat is the 1938 or baseline condition that Texas bargained for during negotiations for the Compact?

  > **A:** That is that the waters that were available to Texas as of 1938, return flows, reservoir releases, would continue to be available to Texas, that adherence to the schedules in the upstream states would ensure sufficient waters for those purposes down to Fort Quitman. Vol. VIII Trial Tr 186.

- **Q:** [W]hat did Texas obtain with the Compact?

  > **A:** Texas obtained the status quo, circa 1938. It achieved assurance through the delivery schedules [in Article III and Article IV] that would enable a 790,000 acre-feet average release for water that would serve needs down to Fort Quitman." *Id.* at 172:13-20:

- The schedules and the normal release figure "worked in tandem to inform and capture this condition circa 1938." Vol. IX Trial Tr. 25:25-26:1.

2. The programmatic apportionment

Article IV of the Compact reflects a decision by the States to forgo a state-line delivery requirement. Article IV requires New Mexico to deliver water to Elephant Butte Reservoir, where it becomes a part of "Project storage," art. I(k), 53 Stat. 786, and "Usable Water . . . available for release in accordance with irrigation demand" by the Project, art. I(*l*), *id*. The Court has recognized that this was a "choice," and that this choice "made all the sense in the world" because the United States had an existing "legal responsibility" under the Downstream Contracts to deliver water to EPCWID. *Texas* v. *New Mexico*, 138 S. Ct. at 958. The Special Master has likewise concluded that "the Compact relies on the Rio Grande Project for water delivery and is programmatic in its apportionment of water as between Texas and New Mexico." 5/21/21 Order 3. Both the Court and the Special Master have thus recognized that the United States' fulfillment of its contractual obligations to the Districts is what "effects," *i.e.*, "results in," an equitable apportionment below Elephant Butte. Yet the decree would dictate (and be satisfied by) a

required delivery to the Texas state line, according to the Index, irrespective of the United States' contracts and protections needed for the Project.

When the States assert that the Project is just an "agent," States' Mem. 57-59, they turn the relationship between the Project and the Compact on its head and rewrite the Compact's terms. *See* Part II.B.2, *supra*.[18] Given that the Compact Clause requires congressional approval to "ensur[e] that the Legislature can 'check any infringement of the rights of the national government," *Texas v. New Mexico*, 138 S. Ct. at 958 (citation omitted),[19] and the contractual rights and obligations of the United States are "inextricably intertwined" with the Rio Grande Compact, *id.* at 959, it would be ironic for the Compact to be enforced by a decree that lacks the United States' consent and impairs the United States' ability to fulfill its contractual obligations. *See United States Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452, 469 (1978) (holding that the Compact Clause requires congressional approval for an interstate agreement that would "enhance State power" relative to the federal government); *cf. New Hampshire v. Maine*, 426 U.S. 363, 369-70 (1976) (entering proposed consent decree after concluding that it would not "encroach upon the full and free exercise of federal authority" and run afoul of the Compact Clause (quoting *Virginia v. Tennessee*, 148 U.S. 503, 520 (1918)).

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[18] It is unclear what legal significance, if any, is to be attributed to the proposed decree's provision relating to the 57%/43% split, Decree II.A.5, and its inclusion of "Project Supply" as a defined term without any independent function, Decree 4. These provisions have the appearance of factual recitals, but the 57%/43% split appears in the "general provisions" of the proposed decree's "injunction" section, and the term "Project Supply," which appears nowhere in the Compact itself, is the subject of a material dispute that has not been resolved. *See* 5/21/21 Order 46; U.S. Resp. to N.M. Mots. For Partial Summ. J., Dkt. 433. *See also* Vol. IV. Trial Tr. 55 (New Mexico objection, characterizing the definition of "Project supply" as a "legal conclusion" because what "Project supply is" is "precisely what we're conducting this trial to understand"). The proposed decree's lack of clarity about which terms are meant to have legal significance also precludes any definite determination that the decree would be consistent with the Compact.

[19] U.S. Const., art. I, § 10, cl. 3.

The United States does not dispute that some index methodology could be a component of a remedy in this case, potentially as a validating measure in a decree that expressly states New Mexico's obligation to prevent interference with Project deliveries and the programmatic apportionment. But even putting the absence of the agreement of the United States to one side, it would be inconsistent with the Compact to impose upon the United States a volumetric delivery obligation to the Texas state line, as the proposed consent decree would do, *see* Decree II.A.4, in the absence of any corresponding definition of New Mexico's Compact obligations or injunctive provisions to ensure compliance with those obligations by requiring New Mexico to reduce groundwater pumping that intercepts Project deliveries.

B. The Proposed Decree Would Be Inconsistent With Federal Reclamation Law

In 1902, contracts for Reclamation water were required to be executed with individual water users. Through subsequent amendments and supplements to federal reclamation law, Congress has consistently required a contract with the Secretary by a water-user entity, such as an irrigation district, as a prerequisite for obtaining water from a Reclamation project. *See, e.g.*, Act of June 17, 1902 (Reclamation Act), ch. 1093, §§ 4-5, 32 Stat. 389 (43 U.S.C. §§ 431, 439, 461); Omnibus Adjustment Act of May 25, 1926, ch. 383, §§ 45-46, 44 Stat. 648-650 (43 U.S.C. §§ 423d, 423e); *see Israel v. Morton*, 549 F.2d 128, 132-133 (9th Cir. 1977) ("Project water . . . is not there for the taking (by the landowner subject to state law), but for the giving by the United States."); *Strawberry Water Users Ass'n v. United States*, 576 F.3d 1133, 1148 (10th Cir. 2009) (federal law requires federal consent to change the purpose of use for Reclamation project water). This statutory requirement for a contract with the Secretary was reaffirmed by Congress in the same year that it approved the Compact. *See* Reclamation Project Act of 1939, ch. 418, § 9(d), 53 Stat. 1195 (43 U.S.C. § 485h(d)).

Here, the only entities that have contracts with the Secretary for the delivery of Project water are EBID and EPCWID. Estrada-Lopez Decl. ¶ 12. The Districts' contracts with the Secretary provide for delivery to them of an annual allocation of water from the Project. In consideration for those deliveries, EBID and EPCWID each repaid a portion of the Project construction costs. *Id.*, ¶ 13. Specifically, EPCWID repaid a total of $8,069,247 and EBID repaid a total of $5,698,012. *Id.*, ¶ 13. Additionally, the Districts were required to take over the operation and maintenance of the Project, canals, drains and laterals and some diversion dams at their own expense until they obtained title to those facilities, at which point they assumed full responsibility for operation and maintenance. *Id.*, ¶ 14.[20] Finally, the Districts are responsible for some of the operation and maintenance costs of Elephant Butte Reservoir. These are substantial annual sums: Reclamation anticipates that EBID will be billed $354,343 and EPCWID will be billed $290,8923 to reimburse Reclamation's operation and maintenance costs for fiscal year 2023. *Id.*, ¶ 15.

The proposed decree would be inconsistent with federal reclamation law because it would effectively treat the States as the recipients of Project water when the States do not (and, absent express statutory authorization, cannot) have contracts with the Secretary. *See* Declaration of David Palumbo ("Palumbo Decl.") ¶¶ 13-14. For example, the decree would require the United States to change Project allocation and accounting methods to fulfill New Mexico's new stipulated delivery obligation to Texas, which is different from the current statutory and contractual provisions applicable to Reclamation's delivery of water to EPCWID. Such

[20] Pursuant to 43 U.S.C. § 498, as amended, the Districts pay all of the operating and maintenance costs of the Project canals, drains and laterals, which they now own pursuant to Title XXXIII of the Reclamation Projects Authorization and Adjustment Act of 1992, Pub. L. 102-575, 106 Stat. 4600, 4705-4706.

reallocation would effectively require the transfer of the allocation from EBID to Texas. And the proposed decree would require the Project to transfer that allocation, even if receiving district does not want it.

The proposed consent decree would also give the States ongoing oversight authority over Reclamation's operation of the Project, when Congress has delegated that authority to the Secretary and those to whom the Secretary may delegate that authority. As noted, the proposed decree would allow the States to amend the Appendices, and dictate additional changes to Project allocations and accounting, at any time by unanimous consent, without the approval of the United States or the Districts.[21] *See* Blair Decl. ¶ 19. The degree of state authority and control over the Project contemplated in the proposed decree would be unprecedented. *See* Palumbo Decl. ¶¶ 13-14.

The States may contend that the Compact supplanted the reclamation-law requirement for contracts as it applied to the Rio Grande Project. That contention cannot be sustained. The Court has "emphasized" that "repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal [is] clear and manifest." *Hawaii v. Off. Of Hawaiian Affs*., 556 U.S. 163, 175 (2009) (internal quotation marks and citation omitted). There is no clear statement of congressional intent to repeal reclamation law in the Compact. To the contrary, the Compact expressly incorporates the existing operation of the Project. *See* Art. I(k) (Project storage); Art. I(l) (releases from Project storage to meet irrigation demands); Art. IV (requiring delivery at San Marcial gage upstream of Elephant Butte Reservoir). And the Court has said that the Compact is "inextricably intertwined" with the Project and the Downstream

[21] The "unanimous consent" provision seems to invite the intervention of the Rio Grande Compact Commission, inconsistent with the limitations in Article XII of the Compact.

Contracts with EBID and EPCWID. *Texas v. New Mexico*, 138 S. Ct. at 959. The Compact thus assumes the continuing applicability of federal reclamation law.

V. THE PROPOSED CONSENT DECREE SHOULD BE REJECTED BECAUSE IT WOULD NOT BE A FAIR, ADEQUATE, OR REASONABLE RESOLUTION OF THIS COMPACT DISPUTE.

The States contend that the proposed decree would resolve this litigation in a fair and reasonable way. *See* States' Mem. 64-75. But even setting aside all of the legal problems above, the proposed decree would not be a fair, adequate, or reasonable resolution of this Compact dispute. *See United States v. City of Miami*, 664 F.2d 435, 441 (5th Cir. 1981) (opinion of Rubin, J.) (explaining that a consent decree must be "fair, adequate and reasonable" (citation omitted)). The proposed decree represents a nearly total capitulation of Texas's (and the United States') litigating position. It compromises Texas's claim from a 1938 condition to a D2 condition, and it contains hardly any assurances in return. Indeed, it would impose no obligation on New Mexico to remedy or prevent ongoing interference with the long-term operation of the Project. To the contrary, the proposed decree would allow New Mexico to continue authorizing its water users to intercept and interfere with Project deliveries, and mandates that the United States make up for those unauthorized uses by taking water away from EBID through allocation transfers. The decree is inadequate to protect the Project, and it would even end up affirmatively harming it in the long run.

This is not to say that Texas and the United States cannot agree to settle their claims on appropriate terms. But quite aside from the impermissibility of the proposed consent decree without the agreement of the United States, the proposed decree is not fair or equitable.

A. The Proposed Decree Does Not Further The Objectives Of The Compact.

A consent decree "must further the objectives of the law upon which the complaint is based." *Firefighters*, 478 U.S. at 525. The Compact is intended to effect an equitable apportionment among the three States. The Compact can serve its intended purpose only because the United States' legal obligations to deliver water were defined by the Downstream Contracts that had been negotiated and approved prior to the Compact's ratification. *See Texas v. New Mexico*, 138 S. Ct. at 959. The United States' fulfillment of its contractual obligations to EBID and EPCWID effectuates the intended apportionment.

The proposed decree would not further the Compact's objective of effectuating an equitable apportionment among the States because it would allow New Mexico to take water from both EPCWID and EBID in amounts and ways that conflict with the United States' contractual obligations and the intended apportionment those contracts fulfill. The proposed consent decree would take water away from EPCWID, contrary to its contracts with the United States, because it would compromise to a permanent D2 condition, limit EPCWID's ability to use carryover accounting to conserve water for extreme drought, and mandate transfers of water away from EPCWID in response to a Positive Departure trigger that has no foundation in that District's contracts, reclamation law, or the Compact. *See* Blair Decl. ¶¶ 20-21. The water taken away from EPCWID would go to New Mexico, as additional surface-water allocation to EBID, or in the form of surface-water depletions associated with groundwater pumping by New Mexico water users.

The proposed consent decree also takes water away from EBID, by compromising to a permanent D2 condition that accepts significant depletions from non-Project water users, and by requiring the United States to take additional water away from EBID, at New Mexico's direction

or automatically, in response to Negative Departure Limits and triggers that have no foundation in contracts, reclamation law, or the Compact. This water also goes to New Mexico, in the form of surface water depletions associated with groundwater pumping, or as a sort of payment of water to Texas on New Mexico's behalf.

Moreover, the proposed decree provides no concrete and practical solution to the problem that gave rise to this case: interference with the Project and interception of water that New Mexico was required to deliver and relinquish to the Project under Article IV of the Compact. At the summary judgment stage, the Special Master concluded that New Mexico groundwater pumping interfered with the operation of the Project "at a general level," 5/21/21 Order 42, and that pumping specifically interfered with the operation of the Project in 2003 and 2004, *id.* at 44-46. But the proposed decree does not require any remedial action by New Mexico to curtail groundwater pumping. The proposed decree would require in only general terms that New Mexico take unspecified "water management actions" if accrued under-deliveries reach 80,000 acre-feet, but New Mexico will at the same time "have the option" to force a transfer of EBID's allocation instead. Decree II.D.3.

Requiring EBID to shoulder New Mexico's compliance burden is an outcome squarely at odds with the Special Master's ruling that 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 the Compact delivery to Texas." 5/21/21 Order 53. The proposed decree does not represent a fair and equitable solution to this Compact dispute because it would only cause the Project further injury.

B. The Proposed Decree Is Not Procedurally Fair.

The States' proposed consent decree is not procedurally fair because the States submitted it to the Special Master in violation of the parties' Confidentiality Agreement, Federal Rule of Evidence 408, and the Special Master's Orders. *See* Dkts. 730, 737 (under seal). The United States reserves its right to take exception to the ruling, but even if it does not, or if the Court agrees with the Special Master that those restrictions were not violated, the States' use of settlement materials negotiated with the United States, in a mediation partly funded by the United States, in an attempt to dispose of the United States' claims, is nevertheless unfair and unworthy of the Court's blessing.

Nor can a proposed consent decree to be entered without the agreement of the United States in the middle of trial on the United States' claims be characterized as procedurally fair in the circumstances. The United States has still to present the testimony of its five remaining witnesses, four of whom are expert witnesses whose expected testimony includes the effect of groundwater pumping on Project operations. Therefore, even if the consent decree could lawfully dispose of an intervenor's claims over that party's objection (and it cannot), in the particular circumstances here, procedural fairness precludes entry of a decree mandating such dramatic changes to the Project without affording the United States an opportunity to proceed to trial and present testimony to vindicate its "distinctively federal interests" in the Project's continued operation. *Texas v. New Mexico*, 138 S. Ct. at 958 (citation omitted).

C. The Proposed Decree Is Not Substantively Fair.

The proposed consent decree also lacks substantive fairness because, even setting aside the other obstacles, the decree requires the United States and the Districts (EBID in particular) to shoulder New Mexico's burden of compliance. The proposed decree would undermine the

Compact's intended apportionment and the long-term resilience of the Project by making the United States and EBID the guarantors of New Mexico's obligations.

On its face, the Index is structurally similar to the 2008 Operating Agreement: the Operating Agreement allocates to EPCWID an amount of water based upon a regression analysis of Project releases and diversions during the D2 Period, and the Index Obligation represents a required delivery to the El Paso gage based upon a regression analysis of Project releases and flows at the El Paso gage during the D2 Period. But the Operating Agreement also uses a provision (the Diversion Ratio) to ensure that EPCWID's allocation can actually be delivered through the gauntlet of depletions caused by groundwater pumping in New Mexico. The Diversion Ratio is used to calculate the amount of surface water that EBID has agreed to forbear to make up for the depletions in New Mexico, including depletions that are caused by groundwater pumping outside of EBID.

The Index, however, is silent as to how New Mexico is to ensure the delivery of the Index Obligation to Texas through the gauntlet of depletions caused by groundwater pumping in New Mexico. Instead, the Index forces changes to Project allocations and accounting methods that have been carefully developed over many years. *See* Blair Decl. ¶¶ 14-19. It also requires the United States to take even more of EBID's water away if the changes to annual Project allocations and accounting do not keep accrued Negative Departures below the applicable triggers and limits. Meanwhile, non-Project users may continue intercept the water that the Project releases, free of charge. *See* King Decl. ¶ 27 ("New Mexico is not required in the decree to take any administrative, regulatory, or management actions against non-Project water users"). The effect of the compulsory accounting changes is to prevent New Mexico from having to do *anything* to comply with the decree.

Allowing the States to twiddle the knobs of Project operations at their discretion would create significant uncertainty and prevent the efficient operation of the Project. The Project operates programmatically through a system that was "painstakingly developed and implemented by the Districts and Reclamation based on nearly a century of experience in the detailed operation of the Project." King Decl., ¶ 19; *see also* Blair Decl. ¶ 11. The Districts' respective allocations are estimated at the beginning of the year and updated generally monthly thereafter. Vol. IV Trial Tr. 46-47, 59-69 (King); King_Demo-16; US-580. As the farmers begin irrigation, the Districts place water orders that are delivered and charged to the Districts against their allocations. The orders and accounting for the deliveries take into account real-time conditions, including river gains and losses, canal waste, drain flows, precipitation events, and other factors. King Decl. ¶ 19; Vol. IV Trial Tr. 80-88 (King); King_Demo-21. Of these factors, river losses due to the impacts of groundwater pumping are of particular importance. *See* Vol. V Trial Tr. 46-50 (Blair); Blair,Al_Demo_15. The Diversion Ratio represents those river losses and is carefully monitored to ensure individual irrigation orders are met and Project water is correctly allocated and efficiently delivered. *See* King Decl. ¶ 19 (describing accounting based on "sub-hourly measurements at thousands of points"); Vol. V Trial Tr. 61-63 (Blair) (describing "24/7" operation to assess river losses during the first Project release of the season); *see also* Vol. IV Trial Tr. 51-55 (King);

The proposed consent decree substitutes the States' discretion for that of the United States and the Districts in their administration of this carefully calibrated system. It requires changes and transfers of allocation based on factors other than irrigation needs in the irrigation Districts. It ignores that Project allocations and water deliveries have already been calibrated, through the application of the Diversion Ratio, to ensure that EBID forbears only the amount of

surface water allocation that it has agreed to forbear, and to ensure that deliveries to EPCWID arrive in the amounts and times to which that District has agreed. And it completely neglects the real-time monitoring and adjustment that are made throughout the year to match the allocations to deliveries and demand. *See* Blair Decl. ¶ 14 ("The proposed decree . . . is based on an artificial index contrived to facilitate post facto bookkeeping of water delivered to Texas and not the efficient hour-by-hour operation of the Project to deliver water to EBID and EPCWID based on the ground, real-time conditions.").

The proposed consent decree's provisions relating to Project allocations and accounting are also vague, indefinite, and incomplete, making it impossible to harmonize with existing Project operations. *See* Palumbo Decl. ¶¶ 17-18. For example, the proposed decree does not address what would happen if the States fail to reach agreement on Index accounting. The Appendix provides only that the disputes will be raised and "determine[d]" through the Rio Grande Compact Commission. *See* Decree Appendix 11-12. Nor does the decree address when, how, or by whom, compulsory allocation transfers will be made and implemented. This uncertainty would limit the Districts' ability to plan ahead for the irrigation season and would impair their farmers' ability to make cropping decisions accordingly. *See* King Decl. ¶ 28; Estrada-Lopez Decl. ¶ 21a.

The proposed decree also would affect EPCWID's ability to make use of carryover accounting, which is essential to its operation because it lacks the quantity and quality of groundwater supplies that EBID has. *See* Vol. IV Trial Tr. 208-10, 216-17; 223 (Ivey); *see id.* at 217:3-6 ("I consider my operation, of course, very well-managed, but . . . if we have to use [groundwater], it's going to be over with"). Carryover promotes conservation of water and facilitates good water planning by encouraging multi-year planning over wet and dry years. *Id.*

at 209; *see also* Vol. V. Trial Tr. 145-49 (Reyes). The decree would affect carryover in both specific and vague, undefined ways. Under the decree, accrued Negative Departures would be "erased" if EPCWID carries over a certain amount of water (180,000 acre-feet) based on a three-year rolling average. Decree II.C.3.c. Because the erasure of accrued Negative Departures means that New Mexico could continue to "accrue" more of those Negative Departures, and deliver less water to the state line, EPCWID has an interest in preventing that erasure from occurring. Blair Decl. ¶ 21. EPCWID might therefore be incentivized to reduce its carryover, and limit its ability to conserve water for the future, in order to keep the three-year rolling average below 180,000 acre-feet. *See id.*

Even more problematically, the decree instructs that "Project operations and Project Accounting, including Project Carryover Water, must be undertaken in a manner that does not interfere with New Mexico's rights and entitlements defined in the Compact and this Decree, including by causing Negative Departures or causing a Trigger to be exceeded." Decree III.A. It is not clear what it means for "Project Carryover Water" to be "undertaken" or how it would be determined whether "the manner" in which it is undertaken has "caus[ed]" the exceedances—as opposed to other potential causes, such as groundwater pumping in New Mexico, for example. Blair Decl. ¶ 21; Estrada-Lopez Decl ¶ 23. And it is unclear what right, if any, the United States would have to challenge those determinations of causation, or to whom such challenges should be presented, when those determinations will bear directly on how much water EPCWID can order and use for irrigation.

EPCWID would be affected in other ways too. EPCWID's allocations would increase in some years and decrease in others as compared to allocations pursuant to the Operating Agreement. Blair Decl. ¶ 20. Increases in allocations would be in "wet" years when EPCWID

has less need for the water, and in light of the consequences of excess carryover, this water might never be used by EPCWID. *Id.* In contrast, in drier years, when EPCWID has a great need for the water, EPCWID's allocations are projected to decrease, detrimentally affecting EPCWID's water supply to which it is entitled under reclamation law and contracts. *Id*.

The end result of the proposed consent decree could be a severely damaged irrigation project. As Ms. Estrada-Lopez states, the proposed decree allows for a non-contractor and non-party to the Operating Agreement to have decision authority over Project water. Estrada-Lopez Decl. ¶ 19. As Dr. Blair states, EPCWID could be allocated more water when it is not needed, and less water when it is. Blair Decl. ¶ 19. And New Mexico's experts have previously detailed the "vicious cycle" that would occur when EBID does not receive sufficient surface-water allocation and its farmers pump more water to make up for it. *See* NM-1039-0144; N.M. Summ. J. Ex. 118, Dkt. 439, at 150. But the consequences could be far more dire.

"The raiding of EBID's surface water allocation by New Mexico, combined with reduced surface water due to climate change and drought, could cause EBID to fail." King Decl. ¶ 28. That failure would have cascading effects, beginning with reduced tax revenues generated by EBID's farmers and stress on the agricultural support industries on which both EBID and EPCWID rely. King Decl. ¶¶ 28- 29. This inequitable result is precisely the opposite of the protected baseline level of Project operations that the Compacting States expected their agreement to secure for the future.

D. The Proposed Consent Decree Anticipates Continuing Jurisdiction To Supervise The Operation of the Project.

It is unclear from the text of the decree whether the Court's continuing jurisdiction would include enforcement actions against the United States, despite the absence of any waiver of sovereign immunity or agreement by the United States. *See* Decree VI ("The Court retains

jurisdiction of this suit for the purpose of any order, direction, or modification of the Decree, or any supplementary decree, that may at any time be deemed proper in relation to this Decree or an action by the Compacting States for the enforcement of the Decree."). It is not even clear if "an action by the Compacting States" must be initiated by all of them jointly, or whether any Compacting State may initiate such an action individually. This ambiguity makes it impossible to draw any firm conclusion about the scope of continuing jurisdiction that is contemplated. *See Hesselbein ex rel. Angela R. v. Clinton*, 999 F.2d 320, 325 (8th Cir. 1993) ("[U]nless [the enforcement] mechanism is clearly defined—in terms of who may bring an enforcement action, for what kinds of violations, and so forth—it is impossible to determine . . . the burden that approval of the decree will impose upon the federal judiciary"). *See, e.g.*, *United States v. New York City Hous. Auth*., 347 F. Supp. 3d 182, 202 (S.D.N.Y. 2018) (rejecting proposed consent decree that "offer[ed] scant precision on the provisions or obligations . . . that are enforceable, the types of violations that may be enforced, or the mechanisms by which noncompliance with the Proposed Consent Decree may be addressed").

Continuing jurisdiction to police the United States' "consistency" or 'interference" with the States' intended outcomes could raise concerns under the limitations the Court previously articulated in *Vermont v. New York*, 417 U.S. 270 (1974). In that case, the States proposed a consent decree that would have specified water quality standards and remedial actions to be taken to prevent pollution of Lake Champlain. *Id.* at 271-73. The decree would have called for the appointment of a special master to "police the execution of the settlement set forth in the [d]ecree and pass on to th[e] Court his proposed resolution of contested issues." *Id.* at 277. The Court declined to enter the proposed decree. *Id.* The Court explained that its original jurisdiction "has been deemed to extend to adjudications of controversies between States

according to principles of law," and that its "judicial power" entails the "application of principles of law and equity to facts." *Id.* But under the States' proposed decree in that case, the special master's proposals "might have no relation to law," and in reviewing those proposals, the Court "would be acting more in an arbitral rather than a judicial manner." *Id.*

Here, the States propose that the Court retain jurisdiction to modify the appendices, *see* Decree V, and to issue any "order, direction, modification, or supplementary decree" "deemed proper in relation to this Decree or an action by [a] Compacting State for the enforcement of the Decree." Decree VI. The Court may therefore be asked to determine whether particular Project operational decisions are "consistent with the terms of th[e] decree," Decree II.A.4. Moreover, the decree imposes express yet general mandates to the United States (to operate the Project "in a way that assures that the Compact's equitable apportionment is achieved consistent with the terms of this decree," *e.g.*), as well as implied mandates ("Examples of procedures to maintain consistency," *e.g.*) that are not fully specified, and provisions that would apparently give the States the power to issue future mandates to the United States ("New Mexico shall have the option to transfer part of the water apportioned to New Mexico from the irrigation district in New Mexico," *e.g.*). The problems with such provisions reflect and are exacerbated by the absence of any agreement by the United States to undertake such obligations.

The proposed consent decree is the result of a rushed negotiation by the States to complete a carve-out agreement prior to the October 25, 2022, status conference. *See* Joint Status Rep. of Oct. 24, 2022, Dkt. 714. That haste is evident in the vague, inconsistent, and ambiguous provisions that impose constraints on the United States' discretion to administer the Project. And, as the West experiences the dramatic effects of climate change and persistent drought, those constraints could not come at a worse time. Palumbo Decl. ¶ 20.

CONCLUSION

For the foregoing reasons, the Compacting States' Joint Motion for Entry of Consent Decree should be denied, and the case should be reset for trial.

Respectfully submitted this 20th day of January, 2023,

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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

CERTIFICATE OF SERVICE

This is to certify that on the 20th day of January, 2023, I caused a true and correct copy of the **UNITED STATES' MEMORANDUM IN OPPOSITION TO THE COMPACTING STATES' JOINT MOTION TO ENTER CONSENT DECREE; DECLARATION OF ALLIE W. BLAIR; DECLARATION OF MICHELLE ESTRADA-LOPEZ; DECLARATION OF IAN FERGUSON; DECLARATION OF WILLIAM FINN; DECLARATION OF J. PHILLIP KING;** and **DECLARATION OF DAVID PALUMBO** to be served via electronic mail upon those individuals listed on the Service List, attached hereto, and to be sent by overnight mail to the chambers of the Special Master.

Respectfully submitted,

/s/ *Judith E. Coleman*
Judith Coleman, Senior Attorney

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