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

THE STATE OF TEXAS'S RESPONSE TO QUESTION NUMBER 4 IN THE SPECIAL MASTER'S DECEMBER 30, 2022 ORDER, SUPPORTING THE COMPACTING STATES' JOINT MOTION TO ENTER CONSENT DECREE

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I. INTRODUCTION

The State of Texas (Texas) submits this brief separately from the Compacting States' Reply to the United States' Memorandum in Opposition to Compacting States' Joint Motion to Enter Consent Decree (United States Opposition) to emphasize points that are distinctly to Texas. These points are in response to the fourth issue that the Special Master requested to be briefed and which is related to the "effect of the Supreme Court's statements in its 2018 opinion permitting the United States to intervene . . . [.]" December 30, 2022 Order on the Motion to Unseal and the Motion to Strike (December 30 Order) at 4. This brief is also a response to statements made in the United States Opposition that are specifically directed at Texas.

II. RESPONDING TO THE FOURTH QUESTION POSED IN THE SPECIAL MASTER'S DECEMBER 30, 2022 ORDER

In the December 30, 2022 Order, the Special Master asked the Parties to brief the following question: "[T]he 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." December 30 Order at 4. Texas has clearly articulated its position on the scope of the United States' intervention at every opportunity, and the Compacting States addressed this issue in their Memorandum of Points and Authorities in Support of the Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to Enter Consent Decree Supporting the Rio Grande Compact (Compacting States Motion) at 47-50. However, given the importance of this issue at this juncture, a brief reprise of the arguments Texas has made previously is in order.

A. Texas's Position Before the Supreme Court Regarding the United States' Intervention

The First Interim Report of the Special Master recommended that the United States claims be dismissed as Compact claims. The United States filed exceptions to the Special Master's First Interim Report and, in the course of that briefing, Texas made its position regarding the United States' intervention clear: "*Texas supports the claims asserted by the United States to the extent they are Compact claims related to the equitable apportionment made thereunder*." Texas's Reply to Exceptions to First Interim Report of Special Master (Texas Reply to Exceptions) at 39-40 (emphasis added). Noting that the Rio Grande Project, operated by the United States, is the single vehicle by which the apportionment of Rio Grande water to Texas and New Mexico is effectuated. Texas stated that the United States as the "agent" of the Compact was charged with assuring that the Compact's equitable apportionment is, in fact, made.[1] *Id.* at 40. Texas further stated that it would be appropriate for the United States *Compact claims* to be heard in the Original Action because of the United States' obligation to ensure that Texas's apportionment is delivered below Elephant Butte Reservoir according to the terms of the Compact. *Id.*

Significantly, Texas also argued that the ongoing *intrastate* water disputes between the United States and New Mexico were irrelevant to Texas's Compact claims

[1] During the December 15, 2022 hearing on the United States' motion to strike the Consent, Texas characterized the dispute between the United States and the States as: was the Project the servant of the Compact or was the Compact the servant of the Project. December 15, 2022 Special Master Hearing Transcript at 47:20-22. The United States quickly responded, that "[t]he United States is not the servant" of no one. *Id.* at 57:5-6. The use of the word "servant" to pose the question was a poor choice. A better way of posing the question would have been, "is the Project the agent of the Compact or is the Compact the agent of the Project." That question has been decided by the Court itself. In describing the relationship of the United States and the Project to the Compact, the Court, quoting the Texas's brief stated: "the United States might be said to serve . . . as a sort of "'agent' of the Compact . . . [and that its role as an agent of the Compact was] 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. 954, 959 (2018); Texas Reply to Exceptions at 40.

(as well as the Compact claims made by the United States) and should be excluded from litigation in this matter. Similarly, Texas argued that to the extent the United States Complaint can be read to include Reclamation law claims, those claims should also be excluded from litigation in this Original Action. In this regard, Texas agreed with the First Interim Report of the Special Master, noting that the doctrine of equitable apportionment governs disputes between states concerning their rights to the use of interstate streams and, therefore, Reclamation law claims, either by New Mexico or the United States, addressing Reclamation contracts has no place in the resolution of Compact disputes. Texas Reply to Exceptions at 41. Residual claims, distinct from the United States' Compact claims, can be addressed after resolution of Texas's Compact claims.

In sur-reply, Texas again stated that its complaint sought resolution of claims under the 1938 Rio Grande Compact. The Texas Complaint focuses on the depletion of Project water as a depletion of the amount of Compact apportionment delivered to Texas because it is the Project that is the vehicle the Compact uses to deliver Compact apportionments, not because of any intrastate entitlement that the United States may have to Project water within New Mexico. Texas noted that any formulation of the issues raised in the Texas Complaint that put the interests or operation of the Rio Grande Project before the Compact improperly and unlawfully interferes with Texas's ability to litigate its Compact injury. Texas's Sur Reply at 1. These formulations are also just plain wrong. "The signatory States intended to *use* the Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's apportionment . . . and the water . . . *leaving* Elephant Butte belongs to either New Mexico or Texas *by compact* . . .[.]" Texas

Sur Reply at 1-2 (emphasis added). Texas asked the Court to determine what was required for Compact compliance and not to be waylaid by what the Project, Reclamation law, or state water law requires.

B. The Court's Decision

The Court's decision regarding the United States' intervention cannot be read in isolation and without reference to the Texas Complaint and the arguments made by Texas in its briefing on the Exceptions. The Court noted the United States Complaint in Intervention contained "allegations that parallel Texas's." *Texas v. New Mexico* 138 S. Ct. at 958. As is described above, the Texas Complaint dealt with depletions effecting its apportionment under the Compact *not* with intrastate Reclamation issues involving New Mexico and the United States.[2]

The Court cited four reasons why the United States Complaint should be allowed to proceed. The first was based on the interrelationship between the Compact and the Project, a relationship it characterized in three ways: first, that the Compact is "inextricably intertwined with the Rio Grande Project and the Downstream Contracts"; second, because the apportionment below Elephant Butte could only be accomplished through the Project, that the United States through the "Downstream Contracts [could be viewed] as a sort of 'agent' of the Compact" charged with ensuring Texas and New Mexico's apportionments are made; and third, "by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *Texas v. New Mexico*, 138 S. Ct. at 959; Compacting States Motion at 57-58.

[2] Indeed, in initially addressing the issue, the Court states up front that allowing the United States to intervene is an exercise of its "special authority" to allow the federal government to participate in compact suits to defend "distinctly federal interests" that a normal litigant might not be permitted to pursue in traditional litigation. The United States' interstate New Mexico concerns are not those types of interests. They are Reclamation issues that can be litigated in alternative forums.

These relationships, and specifically the Downstream Contracts provided the basis of the division of the 57%/43% apportionment of water released from Elephant Butte Reservoir. *Id*. The Court further explained that the United States had "assumed a legal responsibility to deliver a certain amount of water to Texas." *Texas v. New Mexico*, 138 S. Ct. at 959; Compacting States Motion at 49 (internal quotes omitted). The "second reason that the Court allowed the United States' intervention is that the United States plays an integral role in the Compact's operation." *Texas v. New Mexico*, 138 S. Ct. at 960; Compacting States Motion at Compacting States Motion at 49. Yet, this recognition is nothing more than a recognition of the first point the Court made related to the agency role played by the United States.

The third reason the Court allowed the United States' intervention is related to the Treaty obligations of the United States.

The fourth reason the Court allowed the United States' intervention relates directly to its statement that the United States Complaint parallels that of the State of Texas. The Court stated "the United States has asserted its Compact claims in the existing action brought by Texas, seeking substantially the same relief and without that State's objection. *The case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States." Texas v. New Mexico*, 138 S. Ct. at 960; Compacting States Motion at 49 (emphasis added).

Texas has been clear, as described above, that its complaint was limited to ensuring that its apportioned water was delivered to it without impairment by New Mexico. The Decree, without question, accomplishes this. Texas was also clear in its

briefing before the Court that it did not want the Reclamation law dispute between New Mexico and the United States, a purely interstate dispute, to become a part of this Compact case. The United States assured the Court that its claims were substantially the same as the relief sought by Texas and for that reason, Texas did not object to the United States' intervention. Texas was also clear that the United States' intervention should not be allowed to expand the litigation beyond the Compact claims and issues that it had raised. The Court specifically found that because the United States Complaint was limited to the issues raised by Texas that it could not, in this action, *expand the scope of the existing controversy between States.*

III. TEXAS-CENTRIC ISSUES RAISED BY THE UNITED STATES IN ITS OPPOSITION TO THE MOTION TO ENTER THE CONSENT DECREE

Texas will join New Mexico and Colorado in addressing and responding to the United States Opposition brief. As noted above, however, there are certain issues raised by the United States in its opposition that are unique to Texas and which a Texas response is necessary.

A. The Allegation that Texas has Entirely Capitulated

The United States asserts that "[t]he proposed decree represents a nearly total capitulation of the Texas's . . . litigation position[,]" by compromising its 1938 condition for a D2 condition. United States Opposition at 54. If the United States forces the Compacting states to trial, Texas's position will be that the 1938 condition should be the proper baseline, but as the Special Master has noted "[t]he proposed settlement differs in many ways from the parties' litigation positions. Such is the nature of settlement and compromise." December 30 Order at 6. Ignored by the United States is the fundamental

focus of the Texas Complaint which was to ensure that Texas received its apportioned water. The Consent Decree guarantees that with an indexed delivery at Texas's Stateline. This provides Texas with the fundamental relief Texas's prayed for in its complaint. The United States cannot complain that Texas "capitulated" its litigation position and that of the United States by accepting the D2 curve as the baseline. If accepting D2 is a capitulation, then the United States and El Paso County Water Improvement District (EPCWID #1) and Elephant Butte Irrigation District (EBID) capitulated a long time ago when they entered into the 2008 Operating Agreement, which they even now champion and an immutable icon of Project operational perfection.

The 2008 Operating Agreement uses the D2 curve as its baseline and that Agreement is an admission by the United States and the Districts that the D2 is consistent with the Compact. The 2008 Operating Agreement states that "[t]he terms of this Agreement are subject to applicable federal law. All Parties will cooperate to comply with all federal law prior to and during implementation of this Agreement." 2008 Operating Agreement, Article 6.1. The 1938 Compact is, of course, a federal law. Article 6.12 of the 2008 Operating Agreement provides: "Nothing herein is intended to alter amend repeal modify, or be in conflict with the provisions of the Rio Grande Compact." The D2 curve is defined by the United States, EBID and EPCWID #1 in Article 2.5 of the Operating Agreement.

Simply stated, the United States and Districts cannot have it both ways. Either the D2 curve is consistent with the Compact or it is not. If it is not, then the 2008 Operating Agreement is invalid because it does not comply with the Compact.

B. The Texas Complaint

The United States spends several pages characterizing the Texas Complaint, but it is Texas that is in the best position to do that, not the United States. In any event, the complaint allegations boil down to the prayer for relief that the United States quotes in its opposition. United States Opposition at 11. The United States focuses on two elements of the prayer. The first is to have New Mexico "deliver the waters of the Rio Grande in accordance with the provisions of the Rio Grande Compact and the [1905] Act . . .[.]" *Id*. The Consent Decree does this by guaranteeing the indexed amounts of waters pass the El Paso gauge for use in Texas.

The second is that New Mexico "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project." United States Opposition at 11. The Rio Grande Project is the mechanism the Compact utilizes to effectuate its apportionment. By guaranteeing the indexed flows to Texas at the El Paso gauge, the Consent Decree ensures that New Mexico does not and cannot impede or impair the operation of the Project. The fact that the Compact or the Decree compels a certain constraint on Project operations is not at all New Mexico "impairing or impeding the operation of the Project." The Consent Decree provides Texas the relief it prayed for, and it also resolves the United States *Compact disputes* that parallel and do not expand the litigation that Texas initiated. That the United States may have residual disputes with New Mexico over the allocation of New Mexico's apportioned water is not a Texas claim, and it is not a Compact claim, notwithstanding the United States arguments to the contrary.

IV. CONCLUSION

As noted, this brief is intended as a limited response to specific issues relevant to Texas and which Texas is in the best position to address. These issues, of course, relate and interrelate to other issues within the United States Opposition brief which Texas will jointly address and respond to in the Joint Compacting States Reply brief.

Respectfully submitted,

Dated: February 3, 2023

s/ Stuart L. Somach

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