No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
AND
STATE OF COLORADO,

Defendants.

On Exception To The Third Interim Report Of The Special Master

BRIEF OF EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 AS *AMICUS CURIAE* IN SUPPORT OF THE UNITED STATES

MARIA O'BRIEN
SARAH M. STEVENSON
MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.
500 Fourth Street, N.W.
Suite 1000
Albuquerque, New Mexico 87102
(505) 848-1800

RENEA HICKS
Counsel of Record
LAW OFFICE OF MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703
(512) 480-8231
rhicks@renea-hicks.com

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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INTEREST OF *AMICUS CURIAE*[1]

The El Paso County Water Improvement District No. 1 ("EP1" or "District") is a Texas political subdivision situated in the far western corner of Texas where the Rio Grande enters from New Mexico. For the 106 years of its existence, its role—its only role and the very reason for its creation—has been to serve as the Texas component of a bi-state federal reclamation project known as the Rio Grande Project ("Project"). Along with its New Mexico counterpart to the immediate north, the Elephant Butte Irrigation District ("EBID"), EP1 has worked pursuant to congressional directive and contracts with the United States Department of Interior's Bureau of Reclamation ("Reclamation") to ensure that the Rio Grande water Reclamation manages and delivers under Project auspices gets to the District's Project farmers so they can irrigate their crops. EP1 opposes the proposed decree because it would subvert that purpose, while failing to confront the core problem that precipitated this lawsuit: New Mexico's diversion of the Project's water supply by extensive non-Project groundwater pumping. The United States proposes rejection of the states' misdirected effort so that it can pursue the lawsuit's original aims, and EP1 supports the United States' effort.

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[1] *Amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* and its counsel made a monetary contribution to its preparation or submission.

The Rio Grande Compact gives Texas no water right of its own[2] and no rights to Project supply. Rather, *all* of the Rio Grande water entering Texas from New Mexico is EP1's, to receive, manage, and distribute. This basic fact rests on three propositions. First, the United States, through Reclamation, manages all deliveries of Rio Grande water to Texas. Second, all of this Reclamation-managed water is committed to the Project. Third, by both federal contract and a Texas-adjudicated water right, EP1 is legally entitled to all of this Rio Grande water for distribution to District farmers to irrigate their crops, as well as to the City of El Paso for its municipal water supply.[3]

The settlement proposal sponsored by Texas and its two companion states imperils the interests EP1

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[2] *United States v. City of Las Cruces*, 289 F.3d 1170, 1185 (10th Cir. 2002). "Compact" means the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, reproduced in the Exception of the United States and Brief for the United States in Support of Exception ("U.S. Brief") App. A at 1a-17a.

[3] For the first proposition, *see Texas v. New Mexico*, 138 S.Ct. 954, 959 (2018); the second, *El Paso County Water Improv. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907 (W.D. Tex.), *aff'd as reformed*, 243 F.2d 927 (5th Cir. 1955), *cert. denied*, 355 U.S. 820 (1957); the third, *Bean v. United States*, 163 F. Supp. 838, 843 (Ct. Cl.), *cert. denied*, 358 U.S. 906 (1958), Tex. Comm'n on Env. Qual. Cert. of Adjudic. No. 23-5940 (March 7, 2007) (giving right to Project water stored upstream in New Mexico to EP1 and the United States jointly), *and* Trial Test. of M. Estrada-Lopez, Oct. 4, 2021, Tr. at 143-146, SM Doc. 701 (some EP1 Project water for El Paso). EP1's Reclamation-approved contracts with El Paso to provide some of the District's Rio Grande allocation for municipal use is pursuant to a 1920 amendment to the Reclamation Act known as the Miscellaneous Purposes Act, 43 U.S.C. § 521.

was created to serve. It targets the very reach of the Rio Grande most consequential to EP1: the 105 miles running from Elephant Butte Dam through southern New Mexico to Texas—the "southern New Mexico reach."

Conversely, the interests of the District and the Project would be served by allowing the United States to pursue its litigation claims, which seek to insulate the Project from New Mexico siphoning away Project water. These interests would be still further advanced if the states' ploy to bypass Congress by settlement is rebuffed. They should be barred from using their newly-minted sub-compact for the Rio Grande's southern New Mexico reach to arrogate to themselves intrusive and disruptive management authority over Project operations, usurping authority from those charged with actually operating the Project, day-to-day, month-to-month, year-to-year.

Over their long history, neither the Project generally nor EP1 specifically has ever been a tool of the Compact. Rather, EP1's origins and history show an unbroken chain of operation and control of the Rio Grande's southern New Mexico reach by federal reclamation law, free of regulatory incursions by Compact Commission operatives. There is, in fact, no evidence showing otherwise over the 84-year period since the Compact was adopted to protect the Project by ensuring New Mexico delivers sufficient Rio Grande water into Elephant Butte Reservoir to enable unimpeded fulfilment of United States' Project delivery duties

downstream. *See Texas v. New Mexico*, *supra*, 138 S.Ct. at 959.

The precipitating event for EP1's creation was Congress's 1905 authorization of the Rio Grande Project. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814 (reproduced in U.S. Brief App. B at 24a). The Project Act extended the Reclamation Act to "the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam" to be constructed in New Mexico. *Id*. This dam—Elephant Butte—was completed in 1916.

Early the next year, the Texas Legislature authorized creation of local water districts for (among other things) "co-operation with the United States under the Federal reclamation laws," 1917 Tex. Gen. Laws 172, 173-74 § 1. This legislation (now codified as Tex. Water Code § 55.364) further instructed that a district's distribution of contracted-for reclamation water was to be under federal reclamation law. *Id*. at 204 § 97. Two months later, EP1 was established. El Paso County Comm'rs Ct. Order of May 22, 1917. Since then, EP1 has been the federally-designated Project beneficiary in Texas.[4]

EP1 has operated in this role for the last century under a series of contracts with Reclamation which,

[4] For the first three years, EP1 served jointly with a local private water users group, but the group was dissolved at the beginning of 1920.

along with matters of cost and repayment,[5] govern Reclamation's allocation of Project water to EP1 for delivery to users within its boundaries. Initially, Reclamation itself made the deliveries to individual farmers. Since 1980, though, Reclamation hands off the water from its upstream releases, as well as return flows, to EP1, which is tasked with delivery to District farmers. *See*, *e.g.*, *Elephant Butte Irrig. Dist. v. U.S. Dep't of Interior*, 269 F.3d 1158, 1162 (10th Cir. 2001) (noting that EP1 and EBID "took over the operation and maintenance of their irrigation facilities" in 1979 and 1980). On the heels of a string of similar contracts, and before the Compact's 1939 approval, Reclamation, EBID, and EP1 entered into reclamation repayment contracts in 1937 and 1938. *See* Interior Dep't Approp. Act of 1938, 50 Stat. 564 (approving 1937 contract). These confirmed Reclamation's obligation to deliver Project water from Elephant Butte to EP1 and EBID for irrigation, setting EP1's entitlement at 67/155th (about 43%) of Project supply, based on the congressionally authorized acreage for the Project. *See* U.S. Brief App. C at 26a.

By 1977, EP1 had repaid its share of Project construction costs to Reclamation, to the tune of over $8 million. In 1980, through another Reclamation contract, EP1 took title to most Project works within its

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[5] Under the federal reclamation program, Reclamation "contracts with state irrigation districts to deliver water and to receive reimbursement for the costs of constructing, operating, and maintaining the works." *Orff v. United States*, 545 U.S. 596, 598 (2005).

boundaries. See Act of Oct. 30, 1972, 106 Stat. 4600, 4705-4706 (confirming title transfer). The 1980 contract required Reclamation, EP1, and EBID to come up with an operational plan for the Project under the new arrangement.[6]

There then ensued, even as Project operations continued unabated, three decades of differences among Reclamation, EP1, and EBID including litigation, over how the new arrangement was supposed to work, culminating in an agreement to resolve the lawsuits and settle on a detailed operational plan governing Project operations (such as allocations and deliveries). This compromise agreement among the three Project participants is known as the 2008 Operating Agreement, U.S. Trial Exh. 290, and it has governed Project operations ever since.[7]

The proposed decree would undermine over a century of Reclamation-District contracts and force changes to Project operations and the Operating Agreement without the consent, and over the objections, of Project participants and contract signatories.

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[6] EP1 continues to pay the United States hundreds of thousands of dollars annually in Project operation and maintenance costs associated with upstream infrastructure maintained and operated by Reclamation—namely, Elephant Butte Dam and Reservoir. Blair Decl. ¶ 7 (SM Doc. 754-1). This is on top of the costs that EP1 has to cover for maintaining and operating Project facilities within its boundaries.

[7] Before Texas filed this case, New Mexico sued the United States, EP1, and EBID, alleging that their 2008 agreement violates the Compact. *New Mexico v. United States*, No. 11-CV-00691 (D.N.M.). That case is stayed.

The proposal would turn the Compact on its head, repurposing it to subvert rather than protect the Project.

STATEMENT

In 2013, Texas sued New Mexico for "siphon[ing] off water below" the New Mexico reservoir—Elephant Butte—into which New Mexico was obligated under the Compact to deliver Rio Grande water into storage for the Project, whence the United States is to deliver it downstream to EP1's New Mexican counterpart and on to EP1 in Texas. *Texas v. New Mexico*, 138 S.Ct. at 958.

After allowing the United States to intervene to pursue "essentially the same claims" pursued by Texas, the Court returned the case to the Special Master, *id*. at 956, 960, who convened a two-stage trial. But between the first and second stages, and over the United States' strenuous objections (echoed by EP1 as *amicus curiae*), Texas entered into an agreement with New Mexico and Colorado to resolve the states' dispute about New Mexico's Compact delivery obligations to Texas. The agreement is contingent on the Court's adoption of a consent decree proposed by the states, as recommended by the Special Master. Third Rep. 115.[8] To protect its interests and the continued viability of

[8] "Third Rep." refers to the Third Interim Report. The proposed decree is the addendum to the report, which is in two parts: the proposed decree's text, SM Add. 1-22; and the "Effective El Paso Index" ("EEPI" or "Index"), *id*. at 23-45.

the Rio Grande Project, EP1 joins the United States in opposing the Special Master's recommendation that the Court adopt the states' proposal.

EP1 well understands that there is an agreement among the three state parties, but the agreement excludes another party, the United States, which actively opposes it. The United States has provided the Court persuasive reasons for rejecting the Special Master's recommendation that it bless the states' proposed agreement and enter the consent decree they have crafted. The first two United States arguments opposing the proposed decree are that the agreement would dispose of the United States' claims over its objection and that it would impose obligations on the United States without its consent. U.S. Brief at 17-43. The third is that the proposed decree is contrary to the Compact. *Id*. at 43-47.

EP1 unreservedly concurs in the United States' arguments, but its focus is on changes to Project operations forced by modification of contractual rights and obligations and on new obligations that would be imposed on not just the United States, but EP1 as well. These forced changes and how they injure EP1 are at the center of the third issue raised by the United States and of EP1's argument here—that the proposed decree is at odds with the Compact.

SUMMARY OF THE ARGUMENT

In 1939, Congress approved the Compact, an agreement among three states apportioning the waters of the Rio Grande. All these years later, the same three states want to change that apportionment for part of the river, but they want to forego seeking congressional approval for this change. Instead, they ask permission to skip that step by obtaining the Court's approval of a litigation settlement, a settlement that not only excludes a plaintiff in the lawsuit—the United States—but requires it to take instruction from them in the future to implement their settlement through Project operations. From this perspective alone, the states' scheme is riddled enough with legal infirmities. But the legal infirmities are compounded by other aspects of the scheme.

For one thing, the states' proposal turns the Compact upside down for delivery of Rio Grande water from Elephant Butte Reservoir southward to Texas. The Compact itself ends New Mexico's affirmative Compact obligations at the reservoir where it must deliver Rio Grande water in indexed amounts so that the United States can assume control to perform its delivery duties to the Rio Grande Project in southern New Mexico and Texas. In contrast, the proposed decree would move New Mexico's delivery duty 105 miles south to the New Mexico-Texas state line. And the congressionally-adopted Compact imposes a duty on New Mexico of non-interference with Project operations between Elephant Butte and EP1 in Texas. But the proposed decree would authorize New Mexico, sometimes in league

with Texas and Colorado, to interfere with Project operations in the same reach.

For another thing, the states' proposal would force unconsented-to changes in longstanding arrangements under federal reclamation contracts and deprive the signatories to those contracts, most particularly EP1, the benefits of their bargain. For EP1, that bargain was that, if it ultimately footed the bill for the extensive Reclamation Act infrastructure necessary to Project viability (as it did), it would be able to manage getting Project water to its farmers consistently with federal reclamation law. Topping off the impositions forced by the states' proposal is the fact that it would compel substantial, damaging changes to the operating agreement among Reclamation, EP1, and EBID that has guided Project operations for the last fifteen years.

All this is questionable enough as water policy, but its illegality is a problem the states cannot avoid.

First, the addition of a new state line delivery obligation violates the Compact. It is not authorized or countenanced by either the Compact's terms or its structure. It clashes with both. The Court may not add provisions to a congressionally-approved compact because doing so would violate constitutional separation of powers principles. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010). The new state line delivery obligation is invalid because it is designed for no other purpose than to become a new addition to the Compact.

Second, the authority of commissions charged with compact duties and responsibilities cannot be enhanced or modified by judicial decree. The Court does not use its original jurisdiction authority over interstate compact disputes to modify a compact's allocation of compact commission powers, even in circumstances where the modification arguably might be beneficial to compact operations. *Texas v. New Mexico*, 462 U.S. 554, 564-565 (1983). The Rio Grande Compact Commission's authority is strictly confined in the Compact, largely restricted to data-gathering and reporting in the reach of the river at issue here. The proposed decree is invalid because it would greatly expand the Commission's authority, including into riding herd on operations of the Rio Grande Project, something never done before, disallowed under federal reclamation law, and not even hinted at in the Compact.

Finally, the states cannot take refuge in state *parens patriae* power to justify their proposed decree. That *parens patriae* authority does not run against the federal government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 n.14 (1982). Nor is it an open-ended authority unconstrained by a state's own laws. The proposed decree would impose duties on the United States, as well as EP1, in operation of a federal law-sanctioned federal project. As far as Texas is concerned, it also would operate in disregard of the Texas Legislature's longstanding rule that EP1 is to operate under federal reclamation law. That is a state

legislative limitation on whatever *parens patriae* powers Texas might otherwise have.

ARGUMENT

I. The Proposed Consent Decree Is Invalid Because It Is Inconsistent With The Compact

A. A Settlement Decree In An Interstate Compact Dispute Must Be Consistent With The Compact's Terms And May Not Add Provisions To It

The Rio Grande Compact is more than simply an agreement among three states about how to divvy up the interstate flows of the Rio Grande. The Compact is a product of the 1939 affirmative congressional consent that breathed life into the states' original agreement—and that makes it a federal statute. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010); *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). It is Congress's job, not the states', to revise federal statutes, meaning that the federal separation of powers doctrine prevents rewriting an interstate compact by judicial decree. *Alabama v. North Carolina*, 560 U.S. at 352. Judicial relief in a compact dispute has to be consistent with the compact's terms. *Texas v. New Mexico*, 462 U.S. at 564. The Court may not "add provisions" to a compact. *Alabama v. North Carolina*, 560 U.S. at 352.

These principles apply with unaltered force even when states propose to settle their compact dispute and seek the Court's imprimatur through issuance of

their agreed consent decree. The proffered settlement still has to be consistent with the Compact itself. "To enter into a settlement contrary to [a] Compact is to violate a federal statute." *Kansas v. Nebraska*, 574 U.S. 445, 475 (2015). Whatever the extent of the Court's equitable powers, they are bounded by the requirement that they go no further than ensuring that any proposed agreed resolution is consistent with a compact's terms. *Id*. at 455 & n.4. This one fails the test, even were the Court free to disregard the United States' first two objections to it. *See* U.S. Brief at 17-43.

B. The Proposed Decree Illegally Modifies The Compact

1. The Proposed Decree Adds A New State Line Delivery Obligation And Assigns Rio Grande Compact Commissioners New Powers And Duties

The proposed decree changes the Compact in two major ways. First, it adds a new delivery obligation for New Mexico, denominated the "Index Obligation," SM Add. 5, measured near the New Mexico-Texas state line, *id*. at 4, which would serve as "the Texas apportionment of the Rio Grande below Caballo Dam," *id*. at 24.

Second—and only if charitably read[9]—it assigns new duties and powers to the Rio Grande Compact

[9] The assignment of final responsibilities for ensuring implementation of the proposed decree's intricate calculations and commands is remarkably murky. Index accounting is at the heart of

Commissioners ("RGCC" or "Commissioners") for implementation of the proposed decree. They would be empowered to require Reclamation to undertake a host of heretofore non-existent tasks, including: use a new equation to calculate Project allocations to EP1; move the location for measuring Project deliveries to EP1; revise the calculation of "carryover" for Project allocation purposes and limit its use in certain circumstances; and transfer allocated water between EP1 and EBID—from state-created, on-paper-only "escrow accounts"—for violations of the proposed decree. *See* U.S.

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determinations about whether an obligation has been met and the consequence if it has not. A group of engineer advisors performs the initial accounting work and reports annually to the RGCC for their review, who in turn are required to then "act as provided for in Article XII of the Compact." SM Add. 20 (¶ II.F.2.d). But RGCC authority under Article XII is confined "only to the collection, correlation, and presentation of factual data and the maintenance of records," and "making . . . recommendations" to "the States." The officials responsible for state actions, individually or collectively, on decree matters is left unaddressed in the proposed decree. Compounding the confusion is that Article XII specifies that the RGCC's "findings . . . *shall not be conclusive* in any court or tribunal which may be called upon to interpret or *enforce*" the Compact (emphases added), thus begging the question of how determinations expressly deemed inconclusive are enforceable at all. EP1's working hypothesis here—that it is the RGCC to which the proposed decree assigns implementation powers and duties—rests on the assumption that the states do not intend to create an enforcement vacuum. Doing that would render the proposed decree invalid for lack of enforceability. *See United States v. Armour & Co.*, 402 U.S. 673, 682 (1971) (commands of consent decree must be found in its four corners). Further support for EP1's hypothesis is that it comports with the Special Master's treatment of RGCC. He suggests that the EEPI is "effected, in part, through an exercise of authority" granted the RGCC under Article XII of the Compact. Third Rep. 69.

Brief at 31-33 (recounting impositions). The Commissioners would even be allowed to require retroactive changes to delivery calculations, SM Add. 44, which could entail retroactive Project allocation adjustments.

Neither of these two revisions to the Compact is permitted under governing law.

2. The New Delivery Requirement Is An Illegal Addition To The Compact, Injurious To EP1's Interests

a. The Index for measuring Rio Grande deliveries at the New Mexico-Texas state line is the proposed decree's "centerpiece." States' Mem. In Support of Joint Motion, SM Doc. 720 at 29. It would be the measure of Texas' Compact apportionment below Elephant Butte Reservoir, SM Add. 24, a new concoction superimposed on the existing Compact. That cannot be done.

The Compact establishes only two quantifiable delivery obligations, both indexed to river flows. One is Colorado's Article III obligation to deliver Rio Grande water to New Mexico, gauged at the Colorado-New Mexico state line. 53 Stat. 787. The other is New Mexico's Article IV obligation to deliver Rio Grande water to Elephant Butte Reservoir at the San Marcial gauge. *Id*. 788.[10] The latter is New Mexico's only affirmative delivery obligation in the Compact. The Compact

[10] The San Marcial gauge is immediately upstream from the Elephant Butte Reservoir, Blair Decl. ¶ 8, although the measuring point was later moved to the reservoir itself. *Texas v. New Mexico*, 138 S.Ct. at 957 n.*.

specifies no affirmative duties for New Mexico from that point downstream to Texas. As the Court has said, "the Compact directed New Mexico to deliver water to the Reservoir," *instead* of requiring it to deliver a "specified"—which in this context is to say "indexed"—amount to the Texas state line. *Texas v. New Mexico*, 138 S.Ct. at 957.

The Rio Grande water New Mexico delivers into Elephant Butte Reservoir becomes "*Project* Storage," available as "Usable Water" for release downstream for the Project. Compact Article I(k)-(l), 53 Stat. 786 (emphasis added). The Compact does not give New Mexico—or Texas either—any further control over water in the Rio Grande from the reservoir on down to its arrival in EP1. In short, Article IV is the states' agreement that the United States as operator of the Project takes over control and distribution of Rio Grande waters as soon as they are deposited into Elephant Butte Reservoir. The states and Congress approached the Compact acutely aware of the pre-existing Project, and the federal mandate that Reclamation was to operate the Project for and with Project beneficiaries. So they left in place the longstanding arrangement whereby the United States had the obligation under federal reclamation law and the downstream contracts of ensuring deliveries to the Rio Grande's southern New Mexico reach and Texas by delivering Project supply to EBID and EP1. From Elephant Butte onward, the Compact is best described as making a programmatic apportionment

instead of a quantified one, Project-based under reclamation law instead of state-controlled.[11]

A Compact's meaning and reach are best discerned by the terms it uses and its structure. *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (terms); *Tarrant Regional Water Dist. v. Herrmann*, 569 U.S. 614, 628, 631 (2013) (structure). The terms and structure of the Compact leave no room for serious debate about whether it includes or even contemplates a state line delivery obligation for New Mexico deliveries of Rio Grande water to Texas. It does not. It is not mentioned in the Compact—and the Compact's designation of a state line delivery obligation for Colorado shows its framers knew how to impose such an obligation. *Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 452 (2002) (presumption that omission of particular language in one section of an act that is included in another is purposeful legislative choice). A delivery obligation for getting water to Texas, as well as to the southern New Mexico reach, is already written into the Compact. That is the programmatic apportionment that puts it into

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[11] In past presentations to this Court, Texas and New Mexico have made the same characterization. "New Mexico's obligation under the Compact is to deliver water at Elephant Butte Reservoir." *Texas v. New Mexico*, No. 9, Orig., Texas Reply to Return of Defendants to Rule to Show Cause (Feb. 1952) at 18. "[W]hen New Mexico deposits water at Elephant Butte Reservoir, they must relinquish control . . . to the federal government." *Texas v. New Mexico*, No. 141, Orig., Transcript of Oral Argument (Jan. 8, 2018) at 22 (Texas counsel). "[T]he Compact does not obligate New Mexico to deliver any water at the New Mexico-Texas state line." *Texas v. New Mexico*, No. 9, Orig., New Mexico Brief in Support of Return to Rule to Show Cause (Oct. Term 1951) at 8.

Reclamation's hands to use the Project to get Rio Grande water to those places. The Compact is not ambiguous on this point, and it leaves no gap to fill to ensure that there are rules governing distribution of Rio Grande water below Elephant Butte.

Adopting a state line delivery obligation as the key measure of Compact compliance in the Rio Grande's southern New Mexico reach would add a new feature to the Compact. Even assuming that could be done without impairing existing contractual rights and obligations, whether adding that kind of feature would be good water policy might be subject to debate. At least theoretically, Congress might accede to it were the states to propose it. But neither a proposal nor congressional accession has happened since the Compact's 1939 adoption.

The Special Master's recommended way around this barrier is unpersuasive. He accepts that in 1939 the "states . . . conceded continued operational control of the river below the Reservoir through the preexisting Project." Third Rep. 73-74. But his justification for replacing the formally adopted approach with a newly-contrived indexed state line delivery obligation is misplaced. Without identified support in the historical record, he posits that technical impediments were the only reason for the choice the states made in 1939 and that technological advancements since then permit measurements that improve the accuracy of index

calculations. *Id*. at 74.[12] But even if correct, this is not a valid legal justification. The judiciary does not have a license to "update" federal statutes. *See Bostock v. Clayton County*, 140 S.Ct. 1731, 1738 (2020).

EP1 joins the argument of the United States, *see* U.S. Brief at 43-44, that the proposed decree should be rejected because it is inconsistent with the Compact.

b. The ramifications of the proposed decree's addition of a new, indexed state line delivery obligation for New Mexico deliveries below Elephant Butte Reservoir deepens its illegality and harms EP1.

Although the Index calculation is broadly painted as the one that determines the water Texas is to receive, SM Add. 9, it does not establish the actual legal entitlement. *See*, *e.g.*, SM Add. at 10 (Index delivery "*should*" equal Index obligation) (emphasis added). Instead, the Index delivery obligation is nothing more than a "target" for New Mexico's delivery, *id*. at 25, only one step in a multi-year measure of compliance under the regime of the proposed decree. New Mexico would not be in violation of the proposed decree unless it

[12] The historic basis for the premise is questionable. Shortly after Compact negotiations concluded, Texas' Rio Grande Compact Commissioner wrote the Chair of the Texas Board of Water Engineers that it was "not necessary, *even if it were manageable*, to make . . . provision . . . for the amount of water to pass the Texas-New Mexico state line." Letter from F. Clayton to C.S. Clark (Oct. 16, 1938) at 7 (emphasis added) (cited Third Rep. 73). Texas' history expert opined that "[d]evelopment of the Project rendered a state line delivery to Texas by New Mexico impossible." Miltenberger Decl. (Nov. 5, 2020) at 4 ¶ 5.c (SM Doc. 413; index No. 52).

exceeds limits set for "accrued" under deliveries (denominated "negative index departures"). *Id*. at 11-12. The proposal establishes an interlocking set of requirements and rules for accrual of these index departures, essentially designed to avoid excessive accrual and to set "triggers" for delivery adjustments. *Id*. at 14-17. In short, the proposed decree would establish a state-managed system for New Mexico delivery of EP1's Project water. But these deliveries are no longer keyed to water deliveries to EP1 to meet Project irrigation demands. They are under the formulaic hegemony of a post-Compact contrivance.

To make the new scheme work, the proposed decree constructs a bridge between the decree's ostensible compact regime and Project operations. Across that bridge, managers on the compact side would send commands to operators on the Project side to make changes to Project operations. But the operational changes would be to force the Project into alignment with the new compact, not to meet irrigation demands.

These proposed decree-based compact commands from the states *via* the RGCC to Project operators flow by design from the new so-called state line delivery regime. And they undermine EP1's interests.

First, they impinge on the EP1 federal reclamation contracts, referred to as the "downstream contracts." Under these federal contracts, EP1 has paid millions of dollars to Reclamation for its initial infrastructure costs and continues to pay hundreds of thousands of dollars for continued operation and

maintenance. But without paying a dime, the states propose that they be moved into Project management as their proposed consent decree deems fit, thus effectively undermining those contracts.

The reclamation contracts preclude any such role for the states in operation and management of the Project. Storage, release, allocation, and delivery in a federal reclamation project are limited to the water irrigation districts contractually participating in the project for irrigation of authorized acreage within the project. *See*, *e.g.*, 43 U.S.C. §§ 423d, 423e, and 485h(d). The states are not allowed to be participants, as a matter of congressional mandate.[13]

Faced with this law, the states propose to use their decree as an end-run around the longstanding rules of federal reclamation law, and in that end-run they would trample EP1's reclamation contracts. EP1 has put nearly a century of work and money into this federal reclamation project, backed by a faith in the rules set by Congress for reclamation law. The Compact was specifically fashioned to accommodate all of that work, money, and faith. The proposed decree is designed to wreck all of it.

Second, the states would use the proposed decree to force unconsented-to modifications to the 2008

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[13] *See*, *e.g.*, Cong. Rec. 6676 (June 12, 1902) (stating that there are "many reasons why the States are not so well equipped to carry on" federal reclamation work, in comparison to the United States and that the task "can only be undertaken and accomplished by the National Government").

Operating Agreement, remolding it to fit the decree. This would upend the delicate balance for Project operations achieved by the Operating Agreement. That agreement, itself part and parcel of the downstream contracts package, was the byproduct of the two districts' repayment of Project construction costs and the ensuing transfer of delivery obligations, so that Reclamation's deliveries were to the districts, not the farmers.

The states' scheme would compel changes to Project operations under the Operating Agreement. EP1's engineer, Dr. Blair, recited a list of some of these operational changes. The measurement location for allocation charges for EP1 diversions from canal headings are moved. Blair Decl. ¶ 16. The main equation governing allocations (known as the D2 curve) is modified. *Id*. ¶ 17. This equation directly conflicts with an equation in the agreement that addresses the problem of multiyear droughts, which if not eliminated by force of the proposed decree would significantly reduce EP1's allocation during times of drought. *Id*. The proposed decree would also force changes to the Operating Agreement's provisions for "carryover," a calculation of end-of-year allocation balances, harming conservation efforts by EP1, *id*. ¶ 21, and uncoupling carryover accounting from the Operating Agreement. These, as well as other forced changes buried in the proposed decree, would deprive EP1 of the water supply to which it is entitled in amounts and at the times it may most need it, and adversely interfere with the efficiency of EP1

operations, which demand hour-to-hour attention to "on the ground, real-time conditions." *Id*. ¶ 14.

The proposed decree also would redefine the crucial concept of "Project supply." Project supply is a fundamental reclamation law concept. *See*, *e.g.*, *Ide v. United States*, 263 U.S. 497, 505-506 (1924) (explaining that return flows and seepage are an inseparable part of project supply). It is off limits to appropriation under state law. *See id.*; *Nebraska v. Wyoming*, 325 U.S. 589, 635 (1945).

The decree would flout this law by changing it to a state law-based legal concept. SM Add. 6 (project supply is water supply for the . . . Project as *defined and administered by applicable State law*") (emphasis added). This would pose a huge threat to the Project and could be used to countenance the very target of this lawsuit: groundwater pumping in New Mexico that siphons water from the Project.

Embedded in the proposed decree are a host of other threats to the Project and EP1 not immediately obvious to the unpracticed eye. These changes would disrupt the already complex process requiring on-the-ground judgment calls about water release schedules and amounts. The forced transfers in the proposed decree would interfere in unpredictable ways having little or nothing to do with meeting irrigation demands.

Taken as a totality, the proposed decree would cast a pall of uncertainty over the long term viability of the Project. Shifting it from an endeavor operating under federal reclamation law to one ultimately under the

states' thumb strikes at its foundation in protecting and enhancing irrigation in Texas' El Paso Valley and the southern reach of New Mexico. Water supply is always a worry and source of uncertainty for farmers. Reclamation projects such as this one have long been Congress's main way of alleviating this constantly-looming uncertainty as much as reasonably possible. Using the proposed decree to change the Project to a state-based regulatory system with objectives often at odds with furthering agriculture would be a major misstep, one easily avoided since it would also be at odds with governing law.

3. The Assignment Of New Powers To The Rio Grande Compact Commissioners Invalidates The Proposed Consent Decree

The powers assigned the RGCC by the proposed decree are beyond those the Compact gives it. The Commission was created for administration of the Compact, not addendums to it and not the Project. Compact Art. I(b), 53 Stat. 785. It is authorized to periodically review Compact provisions which are "not substantive" and do not affect its "basic principles." Art. XIII, 53 Stat. 791. Even in that limited situation, no RGCC-recommended changes take effect until they are ratified by the legislatures of the three states and receive congressional consent. *Id*.

As is, the Compact assigns the RGCC only two other sets of powers. One set is limited to areas

upstream of the Elephant Butte Reservoir and thus does not directly reach matters concerning the southern New Mexico reach. Compact Art. V, VI, and VIII, 53 Stat. 789-790. The other set does touch on the southern New Mexico reach, but provides only a quite limited range of powers. Articles II and V permit the Commission to maintain, operate, and move stream gauging stations to secure and improve record-keeping. *Id*. 786-787, 789.[14] Article XII, mentioned *supra* at 13 n.9, limits the Commission's jurisdiction to "*only* . . . the collection, correlation, and presentation of factual data and the maintenance of records" dealing with Compact administration. *Id*. 791 (emphasis added).[15] It also allows the RGCC to adopt rules for their proceedings.

None of these Compact-granted powers gives the RGCC authority over any aspect of the Project or Reclamation's management and operation of it.[16] Yet, the proposed decree would empower the Commissioners to require changes to Project operations, management,

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[14] Contrary to the Special Master's suggestion, Third Rep. 69-70, moving a gauging station and establishing a new measuring point for a delivery obligation are two very different things. Moving a gauge is merely substitutive; using a new measuring point for a delivery obligation affects the outcome of index calculations that determine to what degree the obligation is met or not.

[15] Even these findings have a limited reach, because they are "not . . . conclusive in any court or tribunal" addressing Compact meaning or enforceability. Art. XII (last para.), 53 Stat. 791.

[16] The United States makes essentially the same point from another direction in Part III.B of its brief. U.S. Br. at 44-46 (proposed decree cannot turn United States into the states' agent).

and accounting and dictate transfers of water allocations between EP1 and EBID.[17]

The Court has said before that it cannot approve modifications to a compact's allocation of board powers. In the 1983 *Texas v. New Mexico* decision, the Court unanimously rejected the Special Master's recommendation that it exercise its equitable powers to give the non-voting United States member of the Pecos River Compact Commission a tiebreaking vote to reduce the potential for a structural impasse on commission actions. 462 U.S. at 564-566. In *Alabama v. North Carolina*, the Court again refused to allow a compact to be rewritten to give additional powers to the commission administering it. The Court was again unanimous (on this particular point), this time adopting the special master's recommendation that the 8-state interstate compact for low level radioactive waste management did not give the compact commission the power to impose monetary sanctions and that such powers could not be added by judicial decree. 560 U.S. at 339-342.

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[17] Under this arrangement, which not clearly but presumably continues the Compact's unanimity requirement for RGCC action, the three states together would move into the Project management and operations realm, which is walled off to them by the actual Compact and federal reclamation law. One state—for example, Colorado, which has no stake at all in the Rio Grande's southern New Mexico reach—would be given veto power over RGCC implementation of the proposed decree, rendering it administratively unenforceable and potentially confronting the Court with relief requests on a yearly basis. SM Add. 22.

The proposed decree is invalid. It violates these firm principles.

II. State *Parens Patriae* Power Does Not Support The Proposed Decree's Override Of Federal Reclamation Law

The Special Master adopts an insupportable expansion of state *parens patriae* authority, recommending its use to allow the three settling states to exercise dominion over a federal agency (Reclamation), a federally-authorized reclamation project (the Project), and federal contracts in furtherance of the federal Project (Reclamation's downstream contracts with EP1 and EBID). *See* Third Rep. 40, 79-80, 94, 105.

States cannot use their *parens patriae* powers to sue the federal government. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 n.14 (1982); *see also Haaland v. Brackeen*, 143 S.Ct. 1609, 1640 (2023) (citing *Snapp*). Here, the states have skipped the formal filing of suit against the United States and gone straight to the relief stage, agreeing among themselves to ask the Court to enjoin the Unites States based on their *parens patriae* power. The limits on state *parens patriae* powers as against the federal government are not so easily evaded.

States may use their *parens patriae* powers to enforce interstate compacts such as the one at issue in this case, but they may not use those powers to modify the compacts and extend their authority over the federal government and one of its projects. It is the latter,

not the former, *parens patriae* effort in play here. To permit such a use of the power would be tantamount to a rule that quasi-sovereign state powers automatically override federal law, but the Court has rejected this principle, holding that the Constitution's Supremacy Clause, U.S. Const. Art. VI, cl. 2, does not recognize a "reverse preemption" constitutional principle. *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 648 (1990).

Nor is there any basis for this use of the *parens patriae* doctrine to force modification of contracts governed by federal law. The states' proposal would significantly impinge on the downstream contracts that the Court has already understood to be the means by which the *United States* is able to carry out its duties of delivering Project water downstream from Elephant Butte Reservoir. *Texas v. New Mexico*, 138 S.Ct. at 959. And the states' proposal would also dictate modifications to the 2008 Operating Agreement for management and allocation of Project water to the federal reclamation project. The rights and duties of the United States under contracts such as these are "are matters of federal law." *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 289 (1958). Nothing in a state's *parens patriae* power allows its use to modify federal contracts—precisely the use the states propose.

As to EP1, Texas certainly has some *parens patriae* authority, but it is hardly absolute. The source of a state's *parens patriae* power is its "sovereign lawmaking powers." *Snapp*, 458 U.S. at 607. If the *parens patriae* power it seeks to exercise rests on state lawmaking powers, it follows that the actual exercise of

those lawmaking powers may set limits on the state itself. Texas' *parens patriae* power as to EP1 has been legislatively limited. State law requires EP1 to distribute and apportion the District's Project water "in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364. The states' proposal would override this state law requirement and subject EP1's Project water to control by the RGCC. That is beyond the Texas' *parens patriae* power, as delimited by the Texas Legislature itself. This point is further driven home by another state legislative provision that expressly authorizes the United States Secretary of Interior "to conduct any activities in [Texas] necessary to perform his duties under the federal reclamation act." Tex. Water Code § 11.052. Again, the Texas Legislature has denied the state free rein to block Reclamation's exercise of its Reclamation Act duties.

Despite their invocation, Third Rep. 54-66, 105, neither *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), nor *California v. United States*, 438 U.S. 645 (1978), supports the over-expansive *parens patriae* doctrine the Special Master espouses. Their inapplicability is ably addressed by the United States, U.S. Brief at 34-38, and therefore only summarized here. *Hinderlider* held that obligations imposed by a compact justified state limits on water rights in its jurisdiction. The proposed decree presents a new sub-compact; it does not impose obligations found in the Compact itself. *California v. United States* upheld

state-imposed conditions on a water right permit granted the United States.[18] Here, the proposed decree would commandeer the United States (along with EP1 and EBID) to help implement their separate agreement.

CONCLUSION

The Court should sustain the United States' exception; reject the Special Master's recommendation that the consent decree proposed by Texas, New Mexico, and Colorado be adopted and the related recommendation that the claims of the United States be dismissed without prejudice; and return the case to the Special Master to resume trial, consistent with the Court's opinion.

Respectfully submitted,

RENEA HICKS
Counsel of Record
LAW OFFICE OF MAX RENEA HICKS
P.O. Box 303187
Austin, Texas 78703
(512) 480-8231
rhicks@renea-hicks.com

[18] Texas has already issued the United States (jointly with EP1) a water right *without* the limitations included in the proposed decree. *Supra* at 2 n.3. That right is to water in Elephant Butte Reservoir, not such water as arrives in Texas, and stays there, under management by the RGCC.

MARIA O'BRIEN
SARAH M. STEVENSON
MODRALL, SPERLING, ROEHL,
HARRIS & SISK, P.A.
500 Fourth Street, N.W.
Suite 1000
Albuquerque, New Mexico 87102
(505) 848-1800

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