No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO AND
STATE OF COLORADO

ON BILL OF COMPLAINT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE MOTION FOR LEAVE TO INTERVENE OF THE NATHAN BOYD ESTATE, ET AL.

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Six years ago, the State of Texas filed a motion for leave to file a bill of complaint against the States of New Mexico and Colorado. Texas's complaint alleges violations of the Rio Grande Compact, Act of May 31, 1939 (Compact), ch. 155, 53 Stat. 785, which apportions the water of a portion of the Rio Grande River among Colorado, New Mexico, and Texas. Pmbl., 53 Stat. 785; see Tex. Compl. 15-16. A month after the Court granted Texas leave to file its complaint, 571 U.S. 1173, the United States filed a motion for leave to intervene as a plaintiff, likewise alleging violations of the Compact. See U.S. Compl. 5. The Court granted the United States' motion, 572 U.S. 1032, and in a decision last Term, held that the United States may "pursue the Compact claims it has pleaded in this original action," 138 S. Ct. 954, 960.

An estate and six individuals, referring to themselves collectively as "Pre-Federal Claimants," have now filed their own motion for leave to intervene as plaintiffs in this action. The Pre-Federal Claimants seek intervention (Mem. ¶¶ 37-109) mainly to challenge a 1903 decree that deemed certain water rights in New Mexico to have been forfeited. In the view of the United States, the Pre-Federal Claimants seek to raise claims unrelated to this Compact dispute; they have not shown any interest in the interpretation of the Compact that is not properly represented by New Mexico; and their request for intervention is untimely. Their motion for leave to intervene therefore should be denied.

STATEMENT

1. The Rio Grande River rises in Colorado, flows south into New Mexico, and then flows into Texas near El Paso. First Interim Report of the Special Master (Report) App. B1 (map). In 1938, Colorado, New Mexico, and Texas executed the Compact, and Congress approved the Compact the following year. Ch. 155, 53 Stat. 785. The Compact's preamble provides that the States entered into the Compact "to remove all causes of present and future controversy among [them] * * * with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas," and "for the purpose of effecting an equitable apportionment of such waters." Pmbl., 53 Stat. 785.

Under the Compact, Colorado is required to deliver a specified quantity of water to the New Mexico state line. Art. III, 53 Stat. 787-788; see 138 S. Ct. at 957. New Mexico is then required to deliver a specified quantity of water to Elephant Butte Reservoir on the Rio Grande in New Mexico, approximately 105 miles north

of the Texas state line. 138 S. Ct. at 957 & n.*; see Compact art. IV, 53 Stat. 788. Elephant Butte Reservoir is part of the Rio Grande Project (Project), a federal Bureau of Reclamation project that was authorized, constructed, and already delivering water pursuant to federal contracts with irrigation districts in southern New Mexico and western Texas before the States entered into the Compact. 138 S. Ct. at 957.

In 2013, Texas sought leave to file a bill of complaint against New Mexico to enforce its rights under the Compact. Tex. Mot. for Leave to File Compl. 1-2. In 2014, the Court granted Texas leave to file. 571 U.S. 1173. In its complaint, Texas claims that New Mexico is violating the Compact by authorizing the diversion of surface water and hydrologically connected groundwater downstream of Elephant Butte Reservoir. Tex. Compl. ¶ 18. Texas contends that once New Mexico delivers water to Elephant Butte Reservoir as the Compact requires, the water "is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas" and is to be distributed by the Project according to federal contracts. *Id.* ¶ 4. Texas alleges that the surface water and groundwater depletions allowed by New Mexico have materially diminished the amount of Rio Grande water that flows into Texas. *Id.* ¶ 19.

A month after the Court granted Texas leave to file, the United States moved to intervene as a plaintiff. The Court granted the United States' motion. 572 U.S. 1032. Like Texas, the United States claims that New Mexico is not fulfilling its Compact obligations to Texas. See U.S. Compl. ¶ 13. The United States further alleges that New Mexico has violated provisions of the Compact that protect the United States' interests, including its interest in the Project and its interest in compliance

with a treaty obligation of the United States to deliver water to Mexico. *Id.* ¶¶ 14-15.

New Mexico moved to dismiss the complaints filed by Texas and the United States. The Court appointed a Special Master to hear those motions and conduct further proceedings. 135 S. Ct. 474. Although the Special Master recommended that the Court deny the motion to dismiss Texas's complaint, Report 187-217, he recommended that the Court dismiss the United States' complaint to the extent that it asserts claims under the Compact, Report 217-237.

The Court sustained the United States' exception to the Special Master's latter recommendation. 138 S. Ct. at 960. The Court emphasized that its "role in compact cases differs from [its] role in ordinary litigation," *id.* at 958, because its role in compact cases is to serve "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force," *ibid.* (citations omitted). The Court explained that, as a result, it has a "special authority" to "'regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice.'" *Ibid.* (citations omitted). Bearing that "unique authority" in mind, the Court identified "several considerations" that favor allowing the United States to "pursue the particular claims it has pleaded in this case," *id.* at 959—namely, that "the Compact is inextricably intertwined with the Rio Grande Project" and federal contracts with downstream irrigation districts, *ibid.*; that "New Mexico has conceded that the United States plays an integral role in the Compact's operation," *ibid.*; that "a breach of the Compact could jeopardize the federal government's ability to satisfy" its obligations under its treaty with Mexico, *ibid.*; and that "the United States has 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. In light of those considerations, the Court concluded that the United States may "pursue the Compact claims it has pleaded in this original action," and it remanded the case to the Special Master for further proceedings. *Ibid.*

2. The Court in this case has previously denied motions for leave to intervene filed by the two irrigation districts—the Elephant Butte Irrigation District (EBID) and El Paso County Water Improvement District No. 1 (EPCWID)—that have federal contracts for delivery of Project water from Elephant Butte Reservoir. 138 S. Ct. 349. EBID is a quasi-governmental organization created under New Mexico law, and its boundaries lie wholly within New Mexico. Report 237. EPCWID is a political subdivision of the State of Texas. Report 267. Through their contracts with the United States, EBID and EPCWID deliver water from Project headings (*e.g.*, diversion dams on the Rio Grande) to users within their respective service areas. Report 237-238, 267-268.

EBID and EPCWID filed their motions for leave to intervene in December 2014 and April 2015, respectively. The Court referred their motions to the Special Master. 135 S. Ct. 1914; 136 S. Ct. 289. The Special Master recommended that the Court deny the motions. Report 237-278. The Special Master concluded that EBID's motion was procedurally deficient because it did not set forth any claims or defenses for which intervention was sought or seek any relief against either Texas or New Mexico. Report 247-251. The Special Master further concluded that EBID and EPCWID each failed to demonstrate a "compelling interest in [its] own right, * * * which interest is not properly represented by" New

Mexico or Texas, respectively. Report 251 (citation omitted; brackets in original); see Report 251-264, 270-277. Neither EBID nor EPCWID filed exceptions to the Special Master's recommendation, and the Court denied their motions for leave to intervene. 138 S. Ct. 349.

ARGUMENT

This Court has held that "[a]n intervenor whose state is already a party * * * ha[s] the burden of showing some compelling interest in [its] own right, apart from [its] interest in a class with all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey* v. *New York*, 345 U.S. 369, 373 (1953) (per curiam). The standard for intervention in original cases by nonstate entities "is high—and appropriately so"—because original actions "tax the limited resources of this Court by requiring [it] 'awkwardly to play the role of factfinder,'" and because "respect for sovereign dignity" of the States, which "represent[] the interests of [their] citizens in an original action," "counsels in favor of restraint" in allowing nonstate entities to intervene. *South Carolina* v. *North Carolina*, 558 U.S. 256, 267 (2010) (citation omitted).

The Court has previously denied intervention by nonstate entities in this Compact dispute, 138 S. Ct. 349, and the same result is warranted here. The Pre-Federal Claimants have identified no compelling interest in the subject of this original action. Nor have they shown any interest in the interpretation of the Compact that is not properly represented by New Mexico. Their motion—filed six years after this litigation began—is also untimely. The Pre-Federal Claimants therefore should not be permitted to intervene.

1. The Pre-Federal Claimants have not shown that that they have a compelling interest in the subject of

this action, because the claims they seek to raise as plaintiffs fall well beyond the scope of this Compact dispute.

This action concerns the interpretation of the Rio Grande Compact, which apportions the water of a portion of the Rio Grande River among Colorado, New Mexico, and Texas. Pmbl., 53 Stat. 785. The Compact requires Colorado to deliver a specified amount of water annually to the New Mexico state line, and it requires New Mexico to deliver a specified amount of water annually to Elephant Butte Reservoir, north of the Texas state line. 138 S. Ct. at 957. Texas claims that "New Mexico is effectively breaching its Compact duty to deliver water to the Reservoir by allowing downstream New Mexico users to siphon off water below the Reservoir." *Id.* at 958. The United States, as an intervenor, asserts "substantially the same" "Compact claims" against New Mexico. *Id.* at 960.

The Pre-Federal Claimants do not seek to raise any Compact claims. Rather, they seek to vindicate (Mem. ¶ 1) their own alleged rights to water in New Mexico. The Pre-Federal Claimants trace their water rights (Compl. ¶¶ 2-4) to the efforts of the Rio Grande Dam and Irrigation Company (Company) to construct an irrigation project along the Rio Grande in New Mexico in the 1890s. In 1903, however, the United States alleged in a proceeding pending in the New Mexico territorial district court that the Company had forfeited its rights under federal law to construct the proposed project. *Rio Grande Dam & Irrigation Co.* v. *United States*, 215 U.S. 266, 268 (1909) (statement of the case). When the company failed to respond to the allegation, the territorial district court entered a default judgment—referred to as the "1903 Decree"—declaring the Company's rights to have been forfeited. Pre-Federal Claimants Mem.

¶¶ 37, 58. This Court affirmed the New Mexico territorial supreme court's decision upholding that decree. *Rio Grande Dam & Irrigation Co.*, 215 U.S. at 274-278; see *United States* v. *Rio Grande Dam & Irrigation Co.*, 85 P. 393 (N.M. 1906).

The Pre-Federal Claimants seek to challenge (Mem. ¶¶ 37-120) the validity of the 1903 Decree and the conduct of the United States in the years after that decree was entered. They contend (Mem. ¶ 4(b)) that the 1903 Decree "was an invalid judgment based upon a sham proceeding, and a fraud upon the judicial system." They also contend (Mem. ¶¶ 110-120) that, in the ensuing years, the United States proceeded to create the Project through unlawful means.

Those claims fall well beyond the scope of this Compact dispute. They relate not to the obligations of any State under the Compact, but to the forfeiture of the Company's purported water rights and the alleged actions of the United States surrounding that forfeiture and the creation of the Project. Allowing the Pre-Federal Claimants to intervene would vastly expand and complicate this litigation, which has already been ongoing for six years. See, *e.g.*, Pre-Federal Claimants Compl. ¶ 10 (listing "several federal questions and issues" that intervention by the Pre-Federal Claimants would inject into this case); *id.* at 12 (asking this Court to "[o]rder a full due process trial * * * to determine all [lower Rio Grande] pre-federal rights").

This original action therefore is not a proper forum for the Pre-Federal Claimants' claims. A more appropriate forum for their claims lies elsewhere—in New Mexico state court. Indeed, a New Mexico state court is currently determining the rights to the water of the Rio Grande between Elephant Butte Reservoir and the

New Mexico-Texas state line. See *New Mexico ex rel. Office of the State Eng'r* v. *Elephant Butte Irrigation Dist.*, No. CV-96-888 (N.M. 3d Dist. filed Sept. 24, 1996) (*Lower Rio Grande Adjudication*). And the Pre-Federal Claimants have raised the same claims they seek to raise here in the *Lower Rio Grande Adjudication*. See Pre-Federal Claimants Mem. ¶ 1 (asserting that this original action raises the same questions as the *Lower Rio Grande Adjudication*); *id.* ¶ 74 (acknowledging that "[t]he issue in the [*Lower Rio Grande Adjudication*] is whether Claimants own Rights derived from pre-federal appropriations and completion of irrigation works"); Pre-Federal Claimants Compl. ¶ 12 (acknowledging that "pre-federal claims" are "pending" in the *Lower Rio Grande Adjudication*).

While some of the Pre-Federal Claimants' claims in the *Lower Rio Grande Adjudication* remain pending, see Pre-Federal Claimants Compl. ¶ 12, the New Mexico state courts have already rejected claims asserted by two of the claimants—the Nathan Boyd Estate and James Boyd (together, Boyd). See *Dr. Nathan E. Boyd Estate ex rel. Boyd* v. *United States*, 344 P.3d 1013 (N.M. Ct. App. 2014), cert. denied, 345 P.3d 341 (N.M. 2015). In particular, the New Mexico Court of Appeals held that "Boyd's claims, which are based on the Company's initial work on the irrigation project in 1896, cannot serve as the basis for existing water rights," *id.* at 1017; that "Boyd's claims of conspiracy and fraud" by the United States in procuring the 1903 Decree "are irrelevant and are unsupported by the record," *id.* at 1018; and that the doctrine of res judicata precludes Boyd from challenging the validity of the 1903 Decree, *id.* at 1018-1019.[*]

[*] Boyd has pursued claims in other forums as well. For example, in 1989, Boyd sued the United States in the Court of Federal Claims,

This Court "exercise[s] [its] original jurisdiction 'sparingly' and retain[s] 'substantial discretion' to decide whether a particular claim requires 'an original forum in this Court.'" *South Carolina*, 558 U.S. at 267 (citation omitted). Exercising its original jurisdiction sparingly here, the Court should conclude that the particular claims the Pre-Federal Claimants seek to raise —which have nothing to do with the interpretation of the Compact and which have already been raised in other forums—have no place in this original action.

2. With respect to the actual subject of this action—namely, the interpretation of the Compact—the Pre-Federal Claimants have no interest distinct from that of "all other citizens and creatures of the state, which interest is not properly represented by the state." *New Jersey*, 345 U.S. at 373.

As noted, the issue at the heart of this original action is whether the Compact permits New Mexico to "allow[] downstream New Mexico users to siphon off water below the Reservoir." 138 S. Ct. at 958. With respect to that issue, the Pre-Federal Claimants' interest is no different "in kind" from that of any other downstream New Mexico user. *South Carolina*, 558 U.S. at 274. To be sure, the Pre-Federal Claimants assert (Mot. 7) that they have water rights superior to those of other New Mexico users. But that is merely "an intramural dispute over the distribution of water within [New Mexico],"

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seeking compensation for the alleged taking of the Company's property and water rights by the 1903 Decree. See *Boyd* v. *United States*, No. 96-cv-476 (Fed. Cl. Apr. 21, 1997), slip op. 4-5. The court dismissed the takings claim as barred by the six-year statute of limitations, concluding that the claim accrued, at the latest, in 1909, when this Court affirmed the decision upholding the 1903 Decree. *Id.* at 10.

which should be resolved within that State. *New Jersey*, 345 U.S. at 373. If the Pre-Federal Claimants were permitted to air that intramural dispute here, "there would be no practical limitation on the number of [other downstream users] who would be entitled to be made parties." *Ibid.*

Moreover, the Pre-Federal Claimants' interest in the issue of Compact interpretation in this case is properly represented by New Mexico. "[T]he state, when a party to a suit involving a matter of sovereign interest, 'must be deemed to represent all its citizens.'" *New Jersey*, 345 U.S. at 372 (citation omitted). New Mexico undisputedly has a sovereign interest in whether it is violating the Compact by "allowing downstream New Mexico users to siphon off water below the Reservoir." 138 S. Ct. at 958. Thus, to the extent that the Pre-Federal Claimants likewise have an interest in that issue, their interest "falls squarely within the category of interests with respect to which a State must be deemed to represent all of its citizens." *South Carolina*, 558 U.S. at 274.

At certain points, the Pre-Federal Claimants suggest (*e.g.*, Mot. 6) that their interests are adverse to those of New Mexico. But those suggestions are made with respect only to their "pre-federal claims" unrelated to the Compact, *ibid.*—not to the issue of Compact interpretation that is the subject of this original action. In any event, a State "'must be deemed to represent all its citizens'" in a case such as this precisely because a State may not "be judicially impeached on matters of policy by its own subjects." *New Jersey*, 345 U.S. at 372-373 (citation omitted). Thus, even if the Pre-Federal Claimants disagreed with New Mexico's position on the interpretation of the Compact, New Mexico would still

properly represent their interests in this original action, "the disposition of which binds [its] citizens." *South Carolina*, 558 U.S. at 267; see *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) ("Whether the apportionment of the water of an interstate stream be made by compact * * * or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact.").

3. Finally, the Pre-Federal Claimants' motion for leave to intervene is untimely. See *Arizona* v. *California*, 460 U.S. 605, 615 (1983) (addressing whether motions to intervene were "sufficiently timely" with respect to a particular "phase of the litigation"); cf. *NAACP* v. *New York*, 413 U.S. 345, 365 (1973) (explaining that a motion to intervene must be "timely" under Federal Rule of Civil Procedure 24).

The Pre-Federal Claimants filed their motion in March 2019—six years after Texas filed its motion for leave to file a bill of complaint, five years after the United States filed its motion for leave to intervene, two years after the Special Master filed his First Interim Report, and one year after this Court sustained the United States' exception to that Report. The Special Master's First Interim Report also included a recommendation to deny the motions for intervention by EBID and EPCWID, and the Court denied those motions. See pp. 5-6, *supra*. The Pre-Federal Claimants provide no explanation for their delay in filing their own motions to intervene.

Since this Court's decision in this case last Term, moreover, the Special Master has issued a case management plan, New Mexico has filed counterclaims, Texas

and the United States have filed motions to dismiss those counterclaims, and the parties have engaged in discovery. Allowing the Pre-Federal Claimants to intervene at this juncture would not only vastly expand the scope of this litigation, but also disrupt the progress that the parties have made thus far. The intervention of new plaintiffs should not be permitted at this late date.

CONCLUSION

The Pre-Federal Claimants' motion for leave to intervene should be denied.

Respectfully submitted.

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