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 Exceptions to the First Interim
Report of the Special Master

STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER AND BRIEF IN SUPPORT

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NEW MEXICO'S EXCEPTIONS

The Special Master recommends in his First Interim Report ("Report") that: (1) the State of New Mexico's Motion to Dismiss Texas's Complaint be denied; (2) the State of New Mexico's Motion to Dismiss the United States' Complaint in Intervention be granted to the extent that the United States cannot state a claim under the Rio Grande Compact ("Compact"); (3) the Court extend its original, but not exclusive, jurisdiction to allow for resolution of the United States' claims under federal reclamation law; and (4) the Motions for Leave to Intervene of Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EPCWID") be denied. The State of New Mexico accedes to the recommendations of the Special Master that its Motion to Dismiss Texas's Complaint be denied, that its Motion to Dismiss the United States' Complaint in Intervention be denied to the extent that the Court extends its original jurisdiction to allow resolution of the United States' claims under federal reclamation law, and that the Motions to Intervene of EBID and EPCWID be denied. Accordingly, the State of New Mexico recognizes that the case will move forward to resolve claims among Texas, New Mexico, and the United States.

Nevertheless, the reasoning articulated in the Report is flawed in several significant respects and far exceeds the scope properly considered in evaluating a Motion to Dismiss. To ensure that this flawed and unnecessary reasoning is not adopted by the Court, the State of New Mexico takes exception to the First

Interim Report of the Special Master with respect to the following:

1. The conclusion that the Compact requires New Mexico to relinquish all jurisdiction over Rio Grande water upon delivery to Elephant Butte Reservoir;

2. The conclusion that the Compact overrides Congress's command in the Reclamation Act for federal reclamation projects to comply with and defer to state water law, including state water adjudication and administration;

3. The conclusion that the doctrine of equitable apportionment supersedes New Mexico's sovereignty over the waters of the Lower Rio Grande within the boundaries of New Mexico; and

4. The reliance on facts unnecessary for the Report's recommendations on the pending motions and the determination of historical facts obtained independently by the Special Master without affording the parties an opportunity to review, verify, object to, or present countervailing evidence.

The Court should enter an order denying the Motion to Dismiss Texas's Complaint, granting the Motion to Dismiss the United States' Complaint in Intervention but also adopting the Special Master's recommendation to extend jurisdiction over the United States' claims under 28 U.S.C. § 1251(b)(2) while at the same time precluding the United States from relitigating its water rights for the Rio Grande Project

("Project") in these proceedings, denying the Motions to Intervene of EBID and EPCWID, and recommitting the case to the Special Master, stating affirmatively that any findings or conclusions specified in the Report are not the law of the case. The Court should expressly refrain from adopting the Report and reserve judgment on all issues that need not, and should not, be determined at this preliminary stage of the litigation.

Respectfully submitted,

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BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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STATEMENT

I. Factual Background

A. The Rio Grande Basin

The Rio Grande rises in Colorado and flows southward through New Mexico into Texas, where it forms the boundary between Texas and the Republic of Mexico.[1] National Resources Committee, Regional Planning, *Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* at 7 (1938) ("Joint Investigation"). The river contains two major basins: the Upper Basin, extending from the Rio Grande's headwaters in Colorado to a narrow gorge just below Fort Quitman, Texas, and the Lower Basin, extending from Fort Quitman to the Gulf of Mexico. *Id.* The Compact divides the waters of the Upper Basin among Colorado, New Mexico, and Texas.

B. The Rio Grande Project

Due to persistent and controversial water shortages in the portion of the Upper Basin between Elephant Butte Reservoir and Fort Quitman (the "Lower Rio Grande" or "LRG"), the United States Bureau of Reclamation ("Reclamation") determined to construct a dam and reservoir near Engle, New Mexico, roughly 100 miles north of the New Mexico-Texas state line.

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[1] In offering brief factual statements for context, New Mexico here relies on documents previously lodged with the Court or submitted by the parties.

Act of February 25, 1905, ch. 798, 33 Stat. 814. The United States filed notices of appropriation with the New Mexico Territorial Engineer in 1906 and 1908 seeking rights under New Mexico law to appropriate water for the planned reservoir.[2] Letter from B.M. Hall, Reclamation Service Supervising Engineer, to David L. White, Territorial Irrigation Engineer of New Mexico (Jan. 23, 1906) (Motion to Dismiss App. 8); Letter from Louis C. Hill, Reclamation Service Supervising Engineer, to Vernon L. Sullivan, Territorial Engineer of New Mexico (April 28, 1908) (Motion to Dismiss App. 11).

Construction of Elephant Butte Reservoir ("Elephant Butte") was completed in 1916. Joint Investigation at 8. Elephant Butte is the main storage feature for the Project, but the Project also includes a smaller reservoir (Caballo Reservoir), several diversion dams, and other infrastructure. United States Bureau of Reclamation, Rio Grande Project (last visited June 4, 2017), *available at* https://www.usbr.gov/projects/index.php?id=397. Since its completion, the Project has been operated as a cohesive unit despite its interstate nature. An agreement executed in 1938, prior to the Compact's adoption, confirmed that the farmers in New Mexico, represented by EBID, would receive 57 percent of Project water deliveries, while the farmers in Texas, represented by EPCWID, would receive 43 percent,

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[2] Filing notices of appropriation was in keeping with Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383, and the territorial code of New Mexico, 1905 N.M. Laws ch. 102, § 22 and 1907 N.M. Laws ch. 49, § 40.

based on the ratio of irrigable Project acres located in each State. U.S. Resp. App. 1a-4a.

C. The Rio Grande Compact

The States began negotiating a Compact to apportion the river in 1923. Joint Investigation at 8. While negotiations for a permanent compact were proceeding, the States executed a temporary compact in 1929 to govern the river. Act of June 17, 1930, ch. 506, 46 Stat. 767 (1929). In 1935, the United States Natural Resources Committee was directed to conduct a detailed hydrological survey of the Upper Rio Grande Basin, which resulted in the Joint Investigation. Joint Investigation at 10. The States began negotiations in earnest for a final compact in 1937, working from a draft copy of the Joint Investigation. *Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico* at 3 (Sept. 27 to Oct. 1, 1937).

The Compact was signed on March 18, 1938. The signatory States ratified it the following year, as did Congress. 1939 Colo. Sess. Laws 489; 1939 N.M. Laws 59; 1939 Tex. Gen. & Spec. Laws 531; Pub. L. No. 96, ch. 155, 53 Stat. 785 (May 31, 1939). The Compact contains sixteen articles that define and describe its scope.

Purporting to effect "an equitable apportionment" of the "waters of the Rio Grande above Fort Quitman, Texas," Compact Preamble, the Compact includes a series of gaging stations on the Rio Grande between Del Norte, Colorado in the north, and just below Caballo Reservoir in New Mexico in the south. Compact Art. II.

The Compact establishes two delivery schedules, one on the mainstem of the Rio Grande and another on the Conejos River, for Colorado to deliver the combined waters of these two rivers at the Lobatos gaging station, near the Colorado-New Mexico state line. *Id.* Art. III. Pursuant to Article IV, New Mexico is then obligated to deliver a portion of water measured at its upper index river gaging station at Otowi Bridge to Elephant Butte.[3] Article V authorizes the Rio Grande Compact Commission ("Commission") to abandon any of the gaging stations specified in Article II and establish new gaging stations if doing so will not substantially change the parties' rights and obligations to deliver water.

Article VI establishes a system of credits and debits for New Mexico and Colorado, and also describes the manner in which accrued debits and credits attributed to New Mexico and Colorado are addressed in an actual or hypothetical spill of water from Elephant Butte. Article VII prohibits either upstream State from increasing the amount of water it stores in reservoirs constructed after 1929 whenever there is less than 400,000 acre-feet of usable water in Project storage, except under certain specified conditions. Article VIII

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[3] In 1948, the Rio Grande Compact Commission resolved, pursuant to Article V, to change the point of New Mexico's delivery from San Marcial, as specified in Article IV of the Compact, to Elephant Butte, due to difficulties maintaining the gaging station at San Marcial. Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

allows Texas to demand of Colorado and New Mexico each January, and New Mexico to demand of Colorado, that the upstream State(s) release water from post-1929 reservoirs, but this right is limited to the lesser of the amount of the upstream State's accrued debits or the amount needed to bring the amount of usable water in Project storage to 600,000 acre-feet by March 1st and maintain this quantity in storage until April 30th. The remaining articles address imported water, the role of the Commission and other matters.

II. Legal Background

The prior appropriation doctrine governs the use of surface water in all three of the Compact's signatory States. COLO. CONST. art. XVI, §§ 5-6; N.M. CONST. art. XVI, §§ 2-3; Tex. Water Code Ann. §§ 11.021, 11.022, 11.027. Prior appropriation laws share certain fundamental characteristics. These include recognition that actual beneficial use of water vests a priority to continue that use which is superior to those whose uses began on a later date and is subordinate to those whose uses began earlier. *Walker v. United States*, 162 P.3d 882, 888 (N.M. 2007); N.M. CONST. art. XVI, § 3.

In New Mexico, the acquisition and use of both surface water and groundwater is subject to the doctrine of prior appropriation. *See Yeo v. Tweedy*, 286 P. 970, 974 (N.M. 1929). Although managed conjunctively, surface water and groundwater are treated as distinct sources of water under New Mexico law, as they are in most prior appropriation states, and separate rules

govern the appropriation of surface water and groundwater.[4]

State prior appropriation laws play a central role in the construction and operation of federal reclamation projects pursuant to the Reclamation Act of 1902, ch. 1093, 32 Stat. 388. For example, the Reclamation Act provides "beneficial use shall be the basis, the measure, and the limit of the right" to "the use of water acquired under the provisions of this Act." 43 U.S.C. § 372. The Reclamation Act also requires the United States to "proceed in conformity with" the laws "of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder." *Id.* § 383.

III. Previous and Ongoing Litigation

The signatory States have engaged in several prior original actions before this Court related to the Compact. *See Texas v. New Mexico*, No. 10, Original (1935) (dismissed upon ratification of the Compact); *Texas v. New Mexico*, No. 9, Original (1951) (dismissed for failure to join the United States); *Texas and New Mexico v. Colorado*, No. 29, Original (1967) (dismissed by stipulation of the parties following an actual spill

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[4] Separate legal regimes governing the appropriation of groundwater and surface water are common in Western states. Technology to utilize groundwater on a large scale was not developed until the 1920s and 1930s and was not widely employed until the 1950s, so "groundwater law developed separately from the law of surface water rights." A. Dan Tarlock, LAW OF WATER RIGHTS AND RESOURCES § 6.1 (2011).

from Elephant Butte in 1985 and associated cancellation of Colorado's accrued debits).

Two lower courts in New Mexico have also considered the Compact's terms. In *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), the court interpreted Article IV to mean that "New Mexico is not required to deliver anything at the New Mexico-Texas state line. New Mexico's only delivery obligation is set forth in Article IV of the Compact, which designates Elephant Butte Reservoir as the point of delivery." *Id.* at 385. The court also discussed the critical issue of groundwater pumping in the Lower Rio Grande, which is at the heart of Texas' Complaint in this case. The court observed that the Compact "makes no mention of ground water" and that Reclamation "has never counted ground water used by irrigators within the EBID as part of the Project's water supply." *Id.* at 387. The court concluded that "[i]ssues of impairment of prior water rights – surface or ground, within the Project or without – and measures for offsetting impairments should be addressed in administrative hearings. . . ." *Id.* at 388.

The New Mexico Court of Appeals in *Elephant Butte Irrigation District v. Regents of New Mexico State University*, 849 P.2d 372 (N.M. Ct. App. 1993) ("*Regents*"), interpreted the Compact in a similar fashion:

> The Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the

> state line. As a result, the compact does not apportion a specific quantity of water between the two states. Texas apparently believed that delivery at the dam was preferable because the Rio Grande Project contracts independently apportioned water below the dam for both New Mexico and Texas users.

Id. at 378 (internal citations omitted).

IV. Adjudication of Water Rights in Texas and New Mexico

Both New Mexico and Texas have adjudicated or are adjudicating water rights within the Project area in their respective jurisdictions. *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (3rd Judicial Dist. Doña Ana County, NM) ("LRG Adjudication");[5] *In re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin*, Final Decree (327th Judicial Dist. Court of El Paso County, Texas, Cause No. 2006-3291, Oct. 30, 2006) ("Texas Adjudication"); Texas Commission on Environmental Quality, Certificate of Adjudication

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[5] A water adjudication in New Mexico is a complex procedure, involving designation of a stream basin, joinder of all known water claimants in the basin, a hydrographic survey of the basin by the State Engineer, resolution of basinwide issues, determination of the characteristics – for example, validity and relative priority – of each claimant's right to water, and entry of a comprehensive decree describing the adjudicated rights. Brigette Buynak & Darcy Bushnell, *Adjudications*, Water Matters! (2014), *available at* http://uttoncenter.unm.edu/projects/water-matters.php.

No. 23-5940 (Mar. 7, 2007) (EPCWID Motion to Intervene App. 1-15). New Mexico's adjudication was initiated in 1986, but attempts by the United States to dismiss or evade the adjudication delayed progress in the case. The United States originally argued the LRG Adjudication did not meet the technical requirements of the McCarran Amendment, 43 U.S.C. § 666, but *Regents* affirmed the proposed adjudication could be considered a "river system" for purposes of the McCarran Amendment, and refused to dismiss the United States. 849 P.2d at 378-79. Rather than accept New Mexico's jurisdiction, the United States then sought to quiet title to the Project's water right in federal court. *See United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002). The district court abstained in favor of the LRG Adjudication, and the Tenth Circuit Court of Appeals affirmed the abstention.[6] *Id.*

Since then, New Mexico has invested substantial resources in the LRG Adjudication. The LRG Adjudication court recently determined the elements of the United States' Project rights. After extensive litigation, including detailed historical testimony, the LRG Adjudication court ruled on the sources of Project water, the amount of Project water, and the priority date for the Project. LRG Adjudication, Orders filed August 16, 2012; February 17, 2014; April 17, 2017.

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[6] By contrast, the United States has apparently acquiesced to Texas' adjudication of surface water rights without protest.

V. The Present Dispute

Since approximately 1950, hundreds of groundwater wells have been drilled in both the Texas and New Mexico portions of the Lower Rio Grande. Prior to 2008, the effects of this groundwater pumping were taken into consideration through a Project delivery calculation made by the United States. In 2008, Reclamation adopted a new operating agreement for the Project that, among other things, modified the method of accounting for changes in surface water delivery efficiencies related to groundwater pumping. U.S. Bureau of Reclamation, Dep't of the Interior, *Operating Agreement for the Rio Grande Project* (Mar. 10, 2008) ("2008 Operating Agreement"), *available at* https://www.usbr.gov/uc/albuq/rm/RGP/pdfs/Operating-Agreement 2008.pdf. The procedures in the 2008 Operating Agreement, however, inequitably assess all delivery efficiency reductions against New Mexico, despite the material effect that groundwater pumping in northern Texas has on delivery efficiencies in both States. This has resulted in a radical alteration of the historical 57/43 percent allocation of Project water among New Mexico and Texas beneficiaries.

To address these concerns, as well as Reclamation's unlawful release of a portion of New Mexico's Compact credit water to Texas, New Mexico challenged the 2008 Operating Agreement in federal district court. Complaint, *New Mexico v. United States*. No. 11-CV-0691 (D.N.M. Aug. 8, 2011). This action is currently stayed pending clarification of the scope of this case.

Memorandum Opinion and Order, *New Mexico v. United States*, No. 11-CV-0691 (D.N.M. Mar. 29, 2013).

In 2013, Texas sought leave to file a complaint against New Mexico, alleging groundwater pumping and other unspecified diversions in New Mexico south of Elephant Butte have intercepted Project water "intended for use in Texas." Tex. Compl. ¶ 4. Texas argues these diversions violate the "purpose and intent" of the Compact, *id.*, including the "fundamental purpose of the . . . Compact . . . to protect the Rio Grande Project and its operations under the conditions that existed in 1938," *id.* ¶ 10, and an unstated but binding obligation that "delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed." *Id.* ¶ 18. Texas further claims New Mexico's actions violate "New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing." *Id.* ¶ 21. New Mexico opposed Texas' Motion for Leave to File on the basis that, *inter alia*, Texas' claims were not based on the express terms of the Compact but were instead a request that this Court rewrite the Compact. The Court granted Texas leave to file, but also allowed New Mexico to file a motion to dismiss Texas' Complaint. Order of Jan. 27, 2014.

The United States moved to intervene as a plaintiff, alleging in its proposed complaint that New Mexico groundwater diversions in the Lower Rio Grande intercepted Project water, reducing Project efficiency

and violating provisions of reclamation law requiring a contract with the Secretary to receive deliveries of Project water. U.S. Compl. ¶¶ 12-14. The Court granted the United States leave to intervene. Order of Mar. 31, 2014.

New Mexico moved to dismiss both complaints, arguing the conduct alleged by Texas and the United States did not violate the Compact but instead had its proper remedies under reclamation and state law. Motion to Dismiss ¶¶ 1-3. After briefing on the Motion to Dismiss was complete, the Court referred New Mexico's Motion to Dismiss to the Special Master. Order of Nov. 3, 2014. The Court also referred the subsequently filed motions to intervene of EBID and EPCWID to the Special Master. Orders of Apr. 27, 2015; Oct. 5, 2015. On February 13, 2017, the Special Master submitted the Report to the Court addressing New Mexico's Motions to Dismiss and the motions of EBID and EPCWID to intervene.

SUMMARY OF ARGUMENT

While New Mexico accepts the Special Master's proposed disposition of the motions pending before the Court, it opposes any recognition or adoption by the Court of the unnecessary factual and legal statements contained in the Report. The Special Master's task at this preliminary stage is to determine whether Texas's and the United States' Complaints should be dismissed for failure to state a claim upon which relief

may be granted. In his Report, the Special Master rendered numerous determinations not required to decide that narrow question. The Report misapplies or contravenes relevant statutes and case law and exceeds the proper scope of factual findings on a motion to dismiss, and the case should be remanded to the Special Master for proceedings on the merits without adoption of the Report.

Section I demonstrates that the plain text and the structure of the Compact do not require New Mexico to relinquish all jurisdiction over water below Elephant Butte upon the delivery of water to the Project. In his discussion of the Compact, the Special Master finds that New Mexico's stated obligation to "deliver" water to Elephant Butte results in a complete abdication of control or authority over such water. Such a view misunderstands the nature of usufructuary water rights versus standard property rights. It improperly reads absent conditions into the Compact with the effect of depriving a State of sovereignty over its own resources in contravention of well-established principles of interstate compact interpretation.

Section II explains how the Report's conclusion contravenes the clear mandate of Section 8 of the Reclamation Act of 1902, which specifies that state law controls the appropriation and distribution of water for federal reclamation projects. Since the passage of this Act, this Court has consistently recognized Congress' purposeful and continued deference to state water law concerning federal reclamation projects to avoid the

confusion that would arise if federal law and state water law reigned side by side in the same locality. By incorporating the Project, the Compact incorporates the body of law governing the Project, namely the Reclamation Act, which provides that state law controls the appropriation and distribution of water from federal reclamation projects. The Report also ignores decades of federal law and policy by suggesting a federal determination of the nature and extent of the Project rights. Although New Mexico acquiesces in the Special Master's recommendation that the United States continue to participate in this case for the purpose of assessing whether its Project rights have been depleted, New Mexico strongly excepts to any suggestion that the work of the state adjudication court in determining the nature and extent of the United States' Project rights has been preempted. The McCarran Amendment, 43 U.S.C. § 666, expresses a clear federal policy that state courts are the appropriate forum for the adjudication of state water rights.

In Section III, New Mexico explains how the Report misinterprets this Court's jurisprudence on equitable apportionment by concluding that, because the Compact equitably apportioned the waters of the Rio Grande, New Mexico law cannot apply to the administration of Rio Grande water below Elephant Butte. Contrary to the Special Master's conclusion that the Compact effectively overrides state law, state engineers in Western states routinely administer water

rights to comply with both state law and compact obligations, and doing so is in keeping with a long line of precedent.

Section IV discusses the fact that the Special Master's historical analysis far exceeds the scope of what is proper in ruling on a motion to dismiss. The Special Master's use of untested extrinsic evidence deprived the parties of the ability to review, verify, object to, or present countervailing evidence. If the Report's historical discussion is adopted, it will prejudice the course of the litigation going forward. And finally, in Section V, New Mexico explains that while it accepts the Special Master's recommendation that the Court extend its nonexclusive original jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' claims, the United States should not be allowed to relitigate its settled water right for the Project in this forum.

In light of these issues, New Mexico respectfully requests that the Court decline to adopt the Report except for its ultimate recommendations regarding the motions pending before the Court, state affirmatively that any findings or conclusions in the Report are not law of the case, and return the case to the Special Master for full development and vetting of the historical record and the legal issues involved.

ARGUMENT

I. NEW MEXICO EXCEPTS TO THE SPECIAL MASTER'S FLAWED REASONING THAT THE COMPACT'S USE OF THE WORD "DELIVER" STRIPS NEW MEXICO OF ITS SOVEREIGN AUTHORITY OVER WATER WITHIN THE STATE.

New Mexico agrees with the proposition that the Compact relied on the Project as the mechanism through which Project waters below Elephant Butte were distributed.[7] However, the Report contains analytical errors that threaten to divest New Mexico of sovereignty over waters within its borders. New Mexico emphatically disagrees with any implication that it relinquished or impaired its sovereignty by entering into the Compact simply because the Project is implicitly incorporated in the Compact. The plain text of the Compact does not in any way support such a relinquishment. Moreover, this Court's precedent strongly disfavors reading in such an implied relinquishment, as does federal law generally. The Report's interpretations of the Compact and federal law suggesting otherwise are mistaken. This Court should reject the finding

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[7] The point of the Motion to Dismiss was not to object to the proposition that the Project was central to the Compact, or to assert that New Mexico had no obligation to curtail unauthorized water use that could affect the Project. Rather, it was to argue that, under the plain language of the Compact, New Mexico's Compact obligations ended at Elephant Butte, so that remedies for any dispute below the reservoir arise under reclamation and state law. *See City of El Paso v. Reynolds*, 563 F. Supp. at 379.

that the Compact impaired New Mexico's sovereign administrative control over waters within its borders.

A. The plain text of the Compact does not support the conclusion that New Mexico relinquishes all jurisdiction over water upon delivery to the Project.

Interstate compacts are construed under contract-law principles, and a compact's express terms are "the best indication of the intent of the parties." *Tarrant Reg'l Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) ("*Tarrant*"). The Court has recognized that interstate compacts are the products of careful negotiations between sovereign States. It is therefore reluctant to imply obligations or requirements that are not contained in the plain language. *See New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008).

The Court explained in *Alabama v. North Carolina*, 560 U.S. 330 (2010):

> We do not – we cannot – add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no different. We are especially reluctant to read absent terms into an interstate compact given the federalism and separation of powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented.

560 U.S. at 352 (internal citations omitted) (noting previous cases in which the Court refused to order relief

inconsistent with the express terms of a compact, regardless of the equities of the circumstances); *see also New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("'[N]o court may order relief inconsistent with [an interstate compact's] express terms' no matter what the equities of the circumstances might otherwise invite." (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). Thus, interpretation of the Compact must begin with its "express terms." *Texas v. New Mexico*, 462 U.S. at 564; *see Tarrant*, 133 S. Ct. at 2130.

If an interstate water compact is silent on a matter, the Court presumes that the signatory States intended to retain and protect their sovereignty over their water. *Tarrant*, 133 S. Ct. at 2132. As *Tarrant* recognizes: "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that if any inference at all is to be drawn from such silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens." *Id.* (internal quotations, citations, and alterations omitted). In construing the Compact here, however, the Special Master infers from the Compact that New Mexico has "relinquish[ed] control and dominion" over its waters. Report at 197. This inference flatly contradicts *Tarrant's* stated principle that State sovereignty is retained unless expressly disclaimed.

1. The Report misinterprets the term "deliver."

Article IV, as modified by the 1948 resolution, requires New Mexico "to deliver water in the Rio Grande" at Elephant Butte. Water delivered to Elephant Butte does not move directly into Texas. Instead, it flows through New Mexico for more than 100 miles before it reaches Texas. Project rights in New Mexico are, and always have been, acquired under and governed by New Mexico law. Rio Grande water within the Project continues to serve New Mexico citizens below Elephant Butte before arriving at the Texas state line, so an interpretation of "delivery" that requires total surrender of New Mexico's sovereign authority to adjudicate and administer water rights within the State cannot be reconciled with the Compact's language or its historical application. Nor would such surrender make sense as a practical matter, as New Mexico must retain jurisdiction in order to shepherd water to Texas.

In construing the word "deliver," the Special Master errs by relying on common dictionary definitions of the term, inappropriately treating water rights as simple property rights and failing to consider the implications of a "delivery" in a prior appropriation system. This leads the Special Master to the erroneous conclusion that New Mexico, by entering the Compact, must "relinquish control and dominion" over the water it delivers, and that "New Mexico state law does not govern the distribution of the water apportioned by the Compact." Report at 197, 216. This novel interpretation is inconsistent with both federal and

state precedent and would create a dangerous precedent if a State can be deemed to have truly ceded this level of sovereignty without explicitly agreeing to do so.

2. Applying common dictionary definitions to interpret the term "deliver" is inappropriate in this context.

In the absence of a Compact definition, the Report relies on a 1930s dictionary definition of "deliver": "'To deliver property to another means to surrender it to that person. To give with one hand and to take back with the other is no delivery.'" Report at 196 (quoting BALLENTINE'S LAW DICTIONARY 353 (1930)). Looking to another contemporary source, the Report notes that delivery was defined as "'[t]o give or transfer; to yield possession or control of; to part with (to); to make or hand over . . . to commit; to surrender.'" *Id.* (quoting WEBSTER'S SECOND NEW INTERNATIONAL DICTIONARY 963 (1934)). The Report then uses these definitions to suggest that New Mexico relinquishes all control of water in the Rio Grande after it arrives at Elephant Butte, a position that cannot stand in the greater context of the Compact or in the context of the prior appropriation doctrine.

The core problem with applying these dictionary definitions to the Compact, and interpreting the term "deliver" as requiring complete relinquishment of control, is that it treats the waters of the Rio Grande as tangible property the State is obligated to simply

deliver like a deed or convey like land. Instead, as federal courts have repeatedly recognized, water rights in the West are not simple property rights; they are usufructuary rights. "Under the prior appropriation doctrine, a water right is a usufructuary right, and is in no sense a right of ownership of the corpus of the water itself." *Pub. Serv. Co. of Colo. v. F.E.R.C.*, 754 F.2d 1555, 1566 (10th Cir. 1985) (citing Hutchins, 1 WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES at 151 (1971)); *see also Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 605-06 (10th Cir. 1940) (applying New Mexico law). The Special Master should have considered instead the contemporary definition of "usufruct," which is "the right of enjoying a thing, *the property of which is vested in another*." BLACK'S LAW DICTIONARY 1191 (2d ed. 1910) (emphasis added).

Water is owned by the States for public use, and water users obtain a right through beneficial use. "[New Mexico] controls the use of water because it does not part with ownership; it only allows a usufructuary right to water." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1132 (10th Cir. 1981) (citing *Holguin v. Elephant Butte Irrigation Dist.*, 575 P.2d 88 (N.M. 1977), overruled on other grounds by *C.E. Alexander & Sons, Inc. v. DEC Int'l, Inc.*, 811 P.2d 899 (N.M. 1991)). The United States obtained a Project surface water right in accordance with state law some thirty years before the Compact's adoption. New Mexico had already been "delivering" water to the Project for more than two decades when the Compact was adopted. The

only change effected by Article IV was to fix the manner in which the amount of water to be delivered to the Project was calculated. There is no indication in the plain language of the Compact that by agreeing to continue something it was already doing, New Mexico agreed to cede its ownership of the water it delivered but which was still located within its borders for more than 100 miles.

The principle that ownership of water is vested in the public is enshrined in New Mexico's constitution. N.M. CONST. art. XVI, § 2. This is in keeping with New Mexico's long history of water use and the scarcity of water in the State. Neither New Mexico's Compact negotiators nor its legislature would have ignored this bedrock principle by adopting a compact with the meaning suggested by the Special Master.

3. The Special Master's interpretation of the term "deliver" is inconsistent with the historical and practical operations of a federal reclamation project.

If the State has "relinquish[ed] control and dominion" over water within the New Mexico portion of the Project as concluded by the Special Master, Report at 197, the only alternative is for that control and dominion to have passed silently to the United States, as the Report suggests. *Id.* at 216-17. This would be a wholly unprecedented situation. Both state and federal law

make clear that water delivered to a Reclamation project is not surrendered to the United States, as the Special Master recognizes elsewhere in the Report. *See* Report at 230 (concluding the United States "received no apportionment of Rio Grande water through the Compact" and "obtained the water rights on which the Rio Grande Project rests in compliance with New Mexico state law pursuant to the 1902 Reclamation Act").

This Court has held in other interstate water disputes that the United States does not assume control or ownership of water from a State simply because the water runs into a Reclamation project. In *Nebraska v. Wyoming* the Court observed:

> Although the government diverted, stored, and distributed the water, the contention of petitioner that thereby ownership of the water or water rights became vested in the United States is not well founded. Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners, wholly distinct from the property right of the government in the irrigation works.

325 U.S. 589, 614 (1945) (citing *Ickes v. Fox*, 300 U.S. 82, 94-95 (1937)). The Court further explained that ownership of the water could not pass to the United States simply by virtue of running through a Reclamation project because "[Section] 8 of the Reclamation Act

provides as we have seen that 'the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.'" *Id.* That is, the water right belongs to the end user, the farmer or irrigator, rather than the United States because the right derives from beneficial use.

Instead, the government becomes a "carrier or trustee" for the landowners the project serves. *Holguin*, 575 P.2d at 91-92 ("The water was not appropriated for the use of the government but for the use of the landowners. The government was only a carrier or a trustee for the owners"). In New Mexico, "water belongs to the state which authorizes its use," *id.* at 92, and New Mexico, as the owner of the water, "has the right to prescribe how it may be used." *State ex rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M. 1957). This state administrative control and dominion over water was a foundation of the Project and is essential to the practical workings of the Project. The Special Master's finding that this authority was given up by entering into the Compact must be rejected.

New Mexico recognizes that, in entering the Compact, Texas bargained for an apportionment of Rio Grande water. New Mexico's argument has never been that it may simply deliver water to Elephant Butte and then recapture that water for use in New Mexico with no regard for Texas' Compact rights. Such an interpretation would be untenable. However, the Report's interpretation that New Mexico must relinquish its

sovereign authority and ability to administer the waters within its borders upon delivery to Elephant Butte produces an equally untenable result. No state would agree to silently relinquish its sovereignty in this manner, and such a conclusion flies in the face of the plain language of the Compact, the behavior of the parties, and this Court's precedent. To the extent the Report interprets "delivery" of water to Elephant Butte to require abrogation of New Mexico's sovereign authority over the water that is delivered to Elephant Butte and flows through southern New Mexico, New Mexico must respectfully take exception.

B. This Court's principles of compact interpretation preclude compact interpretations that silently limit state sovereignty.

The Special Master not only misapplies the term "deliver," but also fails to heed this Court's well-established principle that interstate compacts must be interpreted to preserve State sovereignty in the absence of any express terms to the contrary. *See Virginia v. Maryland*, 540 U.S. 56, 67 (2003); *New Jersey v. New York*, 523 U.S. at 783 n.6. This principle is explored in-depth in this Court's recent decision in *Tarrant*.

In *Tarrant*, the plaintiff Texas water district argued it had the right, under the Red River Compact, to appropriate Red River water within Oklahoma's borders for use in Texas, notwithstanding Oklahoma statutes restricting the export of water from the State. 133 S. Ct. at 2129-30. The Red River Compact created a

basin, Subbasin 5, partially located in each signatory State and gave each signatory "equal rights" to the use of water in Subbasin 5 above a certain amount. *Id.* The water district argued that, because the Red River Compact made no mention of state borders with respect to Subbasin 5, the compact authorized cross-border diversions within Subbasin 5 and superseded the Oklahoma statutes in question. *Id.*

The Court found the water district's arguments unpersuasive. *Id.* at 2132. First, the Court recognized that "a State does not easily cede its sovereignty," and "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.'" *Id.* (quoting *Virginia v. Maryland*, 540 U.S. at 67). *Tarrant*, accordingly, rejected the Texas water district's argument that the compact's silence regarding the effect of state borders in Subbasin 5 indicated the signatories had "dispensed with the *core state prerogative* to control water within their own boundaries." *Id.* at 2132-33 (emphasis added). "States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence." *Id.* at 2133.

Second, the Court observed that several other interstate compacts included terms creating cross-border relationships and defining how those relationships would operate. *Id.* at 2133-34. The Court reasoned that these compacts stood in stark contrast

to the Red River Compact, which included no such detailed terms, and found that "the absence of comparable provisions in the Red River Compact strongly suggests that cross-border rights were never intended to be part of the States' agreement." *Id.* at 2134. Third, no signatory had ever requested a cross-border diversion pursuant to the compact until the water district filed its lawsuit. *Id.* at 2135.

Similar circumstances are present in this case. First, the Compact contains no terms providing that New Mexico cedes its sovereign jurisdiction over water south of Elephant Butte or conferring such jurisdiction on another entity. Although it contains provisions protecting deliveries to Elephant Butte, it contains no terms even mentioning uses of water below Elephant Butte other than to note in the definition of "usable water" that this water is "available for release in accordance with irrigation demands, including deliveries to Mexico." Compact Art. I(l). In the face of the Compact's "inscrutable silence" regarding administration of Rio Grande water in New Mexico below Elephant Butte, the Special Master should have adopted an interpretation of the Compact that preserves New Mexico's sovereignty over its water resources, as the Court did in *Tarrant*.[8]

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[8] This includes groundwater. While New Mexico has not disputed the United States' right to include seepage and return flows as part of the Project's water supply, determining the interplay between New Mexico's sovereignty over groundwater and the United States' rights to seepage and return flows will require considerable further factual development and legal analysis.

Second, the Compact contains no terms establishing who has administrative authority over water in the Lower Rio Grande or what the contours of that authority are. If the signatories had intended to vest the United States or anyone else with regulatory authority over all water uses in the Project area (which includes the area within EPCWID in Texas), they would have included provisions "critical for managing the complexities," *id.* at 2134, of such a novel arrangement. "The absence of comparable provisions" in the Compact "strongly suggests" that devolution of state regulatory authority was "never intended to be part of the States' agreement."[9] *See id.*

Third, the parties have consistently treated each signatory State as retaining regulatory jurisdiction over water within its borders. The signatories to the Compact have adjudicated (or are in the process of adjudicating) water rights, granted well permits, developed groundwater resources, and administered diversions and priorities within their respective boundaries,

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Therefore, the Report should not be read as finding that any appropriator in the Lower Rio Grande with the right to divert groundwater under New Mexico law necessarily must obtain a permit from or contract with Reclamation. *See* Report at 232. This would be a novel theory of law that, if adopted, would radically change the administration of water in the Western States. Again, this case should be recommitted to the Special Master for full factual and legal development and to avoid unintended rulings with such far-reaching consequences as this.

[9] The Report also fails to identify any other interstate compacts that completely deprive a signatory of jurisdiction over water within its own borders, particularly in such an oblique manner, nor is New Mexico aware of any such compacts.

including within the Project area in Texas and New Mexico. Reclamation has also participated in state adjudications of its water rights in both Texas and New Mexico. The parties have never treated the Compact as requiring New Mexico or Texas to cede regulatory jurisdiction over Rio Grande water in the Project area.

Indeed, following the Report's reasoning to its logical conclusion would lead to the result that the Compact deprives Texas of jurisdiction over Project water in Texas, but none of the parties has ever treated Texas as lacking jurisdiction over its water resources. Texas may not have a Compact delivery requirement, but water apportioned to Texas is still "committed by compact to the Rio Grande Project." *See* Report at 213. According to the Special Master, "the 1938 Compact sufficiently dictates the method of its administration: the delivery of Texas's apportionment and lower New Mexico's apportionment must be made via Reclamation's administration of the Rio Grande Project." *Id.* at 216-17. If this conclusion would prohibit New Mexico from administering its water resources, then Texas also "is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir, as the 1938 Compact, by incorporating the Rio Grande Project, requires the water at that point to be controlled and delivered to its destinations by Reclamation." *Id.* at 217. Yet, Texas has continually administered its water resources in the Rio Grande above Fort Quitman. Neither the United States nor any Compact signatories have alleged Texas is without jurisdiction to do so.

As the Court did in *Tarrant*, the Special Master should have respected New Mexico's sovereignty over its water resources within its borders. Instead, the Report stretched Compact terms far beyond their intended and ordinary meanings and has impermissibly "read absent terms into an interstate compact."[10] *Alabama v. North Carolina*, 560 U.S. at 352.

II. THE SPECIAL MASTER'S COMPACT INTERPRETATION VIOLATES NEW MEXICO'S SOVEREIGNTY BY DISCOUNTING RECLAMATION LAW'S DEFERENCE TO STATE AUTHORITY OVER WATER IN SECTION 8 OF THE RECLAMATION ACT AND THE McCARRAN AMENDMENT.

Because the Special Master believes "New Mexico . . . relinquish[es] control and dominion over the water it deposits in Elephant Butte Reservoir," Report at 197, he also interprets the Compact as mandating that Rio Grande water below Elephant Butte and still within New Mexico's borders "is not subject to appropriation or distribution under New Mexico state law." *Id.* at 211.

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[10] The Special Master misinterprets several other Compact articles in addition to Article IV. For example, he mistakenly asserts that Article VII protects the signatories' access to floodwaters below Elephant Butte, despite the lack of any language to this effect in Article VII or elsewhere. Report at 199-200. The Special Master also wrongly describes Article VIII, Report at 200-201, because Colorado and New Mexico are only required to make upstream releases of stored water to the extent of the accrued debit during a particular time to attempt to raise Usable Water levels, not to ensure a certain Project release.

The Special Master concludes, "New Mexico state law does not govern the distribution of the water apportioned by Compact." *Id.* at 216. Rather, "New Mexico . . . relinquished its own rights to the water it delivers in Elephant Butte Reservoir." *Id.*

This conclusion violates the substantial body of law governing the administration of federal reclamation projects, particularly the deference to state water law required by Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 ("Section 8") and the McCarran Amendment, 43 U.S.C. § 666 ("McCarran Amendment"). New Mexico respectfully requests that the Court disavow this conclusion and recommit this case to the Special Master for a complete evaluation of the Compact and Project's interconnection.

A. State law controls the appropriation of water for and distribution of water from federal reclamation projects pursuant to Section 8 of the Reclamation Act of 1902.

This Court has recognized that where a compact is silent regarding a subject where the law is settled, that silence indicates the parties had "no intent to modify" this settled law. *New Jersey v. New York*, 523 U.S. at 784 n.6. Here, the Reclamation Act of 1902 clearly mandates that state law controls both appropriation and distribution of water from federal reclamation projects. 43 U.S.C. § 383. This principle was well known at the time the Compact was drafted. Given the Compact's silence regarding control of Rio

Grande water delivered to Elephant Butte, this clear principle "speaks in the silence of the Compact." *New Jersey v. New York*, 523 U.S. at 784. The Special Master's conclusion that New Mexico "state law does not govern the distribution of the water apportioned by Compact," Report at 216, as well as his finding that administration by the New Mexico State Engineer is inappropriate given the interstate nature of the Project, Report at 236, ignore Section 8 and the effect it should be given in the face of the Compact's silence.

Section 8 provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

43 U.S.C. § 383. This Court examined the history of Section 8 in some detail in *California v. United States*, 438 U.S. 645 (1978). *California v. United States* involved a dispute regarding whether California's State Water Resources Control Board could impose conditions upon a permit it granted the United States to

divert and impound water for Reclamation's Central Valley Project. *Id.* at 647. The United States disputed that California had the authority to impose these conditions and sought a declaration that it could impound whatever unappropriated water it wished without complying with state law. *Id.*

To resolve this dispute, the Court thoroughly examined the development of water law in the Western United States. It noted that its prior decisions had recognized the authority of each state to prescribe its own system for allocating and administering water rights. *Id.* at 655 (citing *Kansas v. Colorado*, 206 U.S. 46, 95 (1907)). It also observed that federal legislation leading up to the passage of the Reclamation Act had consistently deferred to local water rights. *Id.* at 656-63 (citing the Mining Act of 1866 § 9, ch. 262, 14 Stat. 251, 253 and the Desert Land Act of 1877, Ch. 10, 19 Stat. 377).

Examining this context, as well as the legislative history of the Reclamation Act, the Court concluded, "[I]t is clear that state law was expected to control in two important respects." *Id.* at 665. First, "the Secretary would have to appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *Id.* Second, "once the waters were released from the Dam, their distribution to individual landowners would again be controlled by state law." *Id.* at 667. As explained by Senator Clark of Wyoming, one of the bill's sponsors:

> Every one of these States and Territories has an accomplished and experienced corps of engineers who for years have devoted their energies and their learning to a solution of this problem of irrigation in their individual localities. They are the men qualified to deal with the question, the laws are written upon their statute books and read of all men, and in every one of these States and Territories the laws have been passed that most diligently regard the rights of the settler and of the farmer. . . .

Id. (quoting 35 Cong. Rec. 2222 (1902)). Were the situation otherwise, the Court explained, "[d]ifferent water rights in the same State would be governed by different laws and would frequently conflict." *Id.* at 667-68. "A principal motivating factor behind Congress' decision to defer to state law was thus the legal confusion that would arise if federal law and state water law reigned side by side in the same locality." *Id.* at 668-69.

The Court concluded, "Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights." *Id.* at 674. "The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law." *Id.* at 675. For these reasons, California could impose conditions upon the United States' appropriation of water for the Central Valley Project, so long as those conditions were not inconsistent with clear congressional directives applicable to that project or to reclamation projects in

general. *Id.* at 679; *see also Nevada v. United States*, 463 U.S. 110, 122 (1983); *Nebraska v. Wyoming*, 325 U.S. at 613-14.

It necessarily follows from the Special Master's conclusion that the Compact incorporated the Project, Report at 195, that authorities governing the Project, including Section 8's deference to state law, were also incorporated into the Compact. This is explicit in the original agreement between the Project water users' associations and Reclamation, which recognized that the rights of the Project water users "are to be defined, determined and enjoyed in accordance with" reclamation law and other federal law related to "the rights to use water; *and also by the laws of New Mexico and Texas*, where not inconsistent therewith." *See* Report at 108 (emphasis added). It follows that New Mexico retains its sovereign authority to ensure Reclamation's compliance with state water law.

Reclamation's actions confirm this understanding. Pursuant to Section 8, Reclamation submitted filings with the Territorial Engineer of New Mexico to appropriate water rights for the Project in 1906 and 1908. Reclamation then operated the Project without incident for more than twenty years before the Compact's adoption. After the Compact's adoption, Reclamation's operation of the Project did not change. And though Reclamation initially resisted adjudicating its water rights for the Project in New Mexico state court, it has since participated in the LRG Adjudication, and willingly participated in the Texas adjudication of Project water rights.

The Special Master's conclusion that New Mexico's "appropriation or distribution," Report at 211, is not applicable to water delivered to Elephant Butte because that water is committed to the Project by the Compact conflicts with his acknowledgement elsewhere in the Report that reclamation law governs the Project, Report at 230-31, and also disregards the long history of the parties' course of conduct. The Special Master's finding that "New Mexico state law does not govern the distribution of the water apportioned by Compact," Report at 216, also directly contravenes Section 8's directive that the United States "comply with state law in the control, appropriation, use, or distribution of water." *California v. United States*, 438 U.S. at 675 (quotation omitted). The Special Master appears to view the Project as independent of state jurisdiction, but as the foregoing shows, the Project always has been subject to state water law and administration.

B. The McCarran Amendment expresses a clear federal policy favoring state adjudication and administration of Project water.

The deference to state law and administration mandated by Section 8 is bolstered by the McCarran Amendment, which waives the United States' sovereign immunity to allow it to be joined to state water adjudications and to allow for state administration of its water rights. Although not enacted until 1952,[11]

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[11] *See* ch. 651, 66 Stat. 560 (1952).

the McCarran Amendment reinforces the conclusion that adjudication of the Project water right must occur in the pending state water adjudication. The Court has recognized that the McCarran Amendment expresses a strong federal policy in favor of state water rights adjudications. *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 819 (1976) ("*Colorado River*"). In keeping with this policy, this Court has repeatedly denied attempts by the United States to adjudicate its water rights in federal court.

In *Colorado River*, the Court held that suits brought by the United States to adjudicate water rights for Indian tribes should also be heard in state court pursuant to the McCarran Amendment. *Id.* at 820. The Court observed that "[t]he consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights." *Id.* at 819. The Court found this "clear federal policy," *id.*, so important that it announced a new form of abstention counseling federal courts to avoid hearing cases for reasons of "wise judicial administration," rather than allow the case to proceed in federal court, *id.* at 817-21; *see also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545 (1983); *United States v. District Court in and for Eagle Cnty., Colo.*, 401 U.S. 520 (1971).

The McCarran Amendment also gives state administrators authority to "execute [a decree], to enforce its provisions, to resolve conflicts as to its meaning, to construe and to interpret its language." *United States v. Hennen*, 300 F. Supp. 256, 263 (D. Nev. 1968). *Id.*

This allows each state to "administer its own water law system as efficiently and completely as possible." *Fed. Youth Ctr. v. Dist. Ct. in and for Jefferson Cnty.*, 575 P.2d 395, 399 (Colo. 1978). In short, the intent of the McCarran Amendment is to "ensure that the United States would be subject to suits seeking initial declaration or adjudication of water rights, as well as to subsequent proceedings further affecting or disposing of those rights." *Id.*

The Special Master ignores the McCarran Amendment and this precedent, concluding, "New Mexico state law does not govern the distribution of the water apportioned by Compact." Report at 216. From this conclusion, and the fact that the Compact contains no terms governing distribution of this water, he finds that routine administrative questions such as "times of delivery and source of supply" must be determined by "[e]quitable apportionment, a federal doctrine." *Id.* Questions regarding such matters, according to the Special Master, "must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court." *Id.* This strongly suggests that the Special Master believes the United States' water right for the Project should be adjudicated in this proceeding. However, the McCarran Amendment confirms New Mexico's authority to adjudicate water rights in the Lower Rio Grande, including for the Project, and its ability to administer those rights to ensure they comply with state law.

New Mexico and the United States have already invested substantial resources into adjudicating the Project right. And New Mexico's authority over the

Project right has been upheld in two separate decisions. *City of Las Cruces*, 289 F.3d at 1170; *Regents*, 849 P.2d at 372. Because the Project water right originates from New Mexico state law, it is appropriate for that right to be adjudicated and administered under New Mexico state law. The Project right can be properly adjudicated only in relation to all of the other holders of water rights in the Lower Rio Grande within the State of New Mexico. Application of fundamental principles of state water law must be consistent for all water users, and this is best accomplished by New Mexico under its sovereign authority over waters within its borders.

The Special Master further suggests administration by New Mexico "works best only to resolve intrastate water disputes," Report at 235, whereas the present dispute implicates "other sovereigns" with "significant interests in the resolution" of these claims. *Id.* at 236. Yet, the McCarran Amendment contains no interstate exceptions to its waiver of sovereign immunity for administration of federal water rights. Adopting the Special Master's view will not only prevent New Mexico from "administer[ing] its own water law system as efficiently and completely as possible," *Fed. Youth Ctr.*, 575 P.2d at 399, it will also make it impossible for New Mexico to comply with any decree this Court might enter to resolve this dispute. If New Mexico is found to have allowed any diversions that violate the Compact, its method of complying with this finding will be for the State Engineer to curtail diversions of water within New Mexico that interfere with the

Project's water rights – the same remedy the Special Master concludes is inappropriate. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108 (1938); N.M.S.A. § 72-2-9.1.

C. Pursuant to Section 8 and the McCarran Amendment, New Mexico law defines and protects the Project's water right.

The LRG Adjudication court recently confirmed the United States' priority date for its Project water right is March 1, 1903, based on surveys and other acts the United States undertook to initiate the appropriation at that time. Findings of Fact and Conclusions of Law, LRG Adjudication (Apr. 17, 2017). The LRG Adjudication court also found the United States appropriated surface water rights for the Project, not groundwater rights. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, LRG Adjudication (Aug. 16, 2012). Specifically, the LRG Adjudication court held that all points of diversion asserted and established by the United States, including Elephant Butte, Caballo Reservoir, and the downstream diversions, "capture and divert surface water." *Id.* at 5. Further, the court found the Notices of Intent to Appropriate the United States filed in 1906 and 1908 established a surface water right. *Id.* at 5-6.

"The points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to surface water under New Mexico law. . . . " *Id.* at 6. However, there is "no dispute that an interactive relationship between groundwater and surface water exists within . . . the Rio Grande reach downstream of Elephant Butte Dam" and "that reuse of Project water is an inherent component of the Project operation." *Id.* at 4, 6.

To be clear, New Mexico has never contended groundwater users in southern New Mexico may simply pump their wells without regard to the effects this may have on the Rio Grande or the Project, as the Special Master appears to have interpreted New Mexico's argument in its Motion to Dismiss. On the contrary, New Mexico law recognizes the authority of the New Mexico State Engineer to conjunctively manage hydrologically related ground and surface water and to regulate and curtail groundwater withdrawals in amount, time and location that are negatively impacting the use of senior surface water rights, and vice versa. *City of Albuquerque v. Reynolds*, 379 P.2d 73, 79 (N.M. 1962).

This principle was applied to the Project in *City of El Paso v. Reynolds*, where the federal district court noted that, although Reclamation "has never counted ground water used by irrigators within the EBID as part of the Project's water supply," this did not preclude the New Mexico State Engineer from "conjunctively manag[ing] the surface and ground

water in the Lower Rio Grande system." 563 F. Supp. at 387.

In sum, New Mexico law does not allow New Mexico or its citizens to injure the Project right, but instead protects the Project's water rights from any such pumping or diversion interference. The LRG Adjudication court has determined all significant aspects of the Project water right. The Special Master's Report identifies no instance in which New Mexico law is inconsistent with the Project allocation, which the Special Master concludes is incorporated into the Compact. The United States acquired its Project water rights under New Mexico law, which continues to govern the administration of both groundwater and surface water below Elephant Butte, consistent with the Compact.

III. THE LAW OF EQUITABLE APPORTIONMENT DOES NOT DEPRIVE NEW MEXICO OF JURISDICTION OVER WATER APPORTIONED BY COMPACT.

The Compact Preamble states it "effect[s] an equitable apportionment of" the waters of the Rio Grande above Fort Quitman, Texas. The Special Master appears to view this apportionment as precluding application of New Mexico law to Rio Grande water below Elephant Butte. This interpretation rests on a flawed reading of *Hinderlider*, 304 U.S. at 102, which holds that a state cannot confer rights to water in an interstate stream in excess of the state's own compact rights, and the Colorado Supreme Court's analysis of a

compact's effect on state law and administration in *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983) ("*Alamosa-La Jara*"). Because the Special Master interprets New Mexico's delivery obligation as depriving it of ownership and control over Rio Grande water once delivered to Elephant Butte, Report at 213, he concludes that "'state law applies only to the water which has not been committed to other states by the equitable apportionment.'"[12] Report at 216 (quoting *Alamosa-La Jara*, 674 P.2d at 922). Contrary to the Special Master's conclusion, but consistent with the holdings of *Hinderlider* and *Alamosa-La Jara*, state engineers in western states routinely administer water rights to comply with both state law and compact obligations. The New Mexico State Engineer has the authority to do the same here for water in the Lower Rio Grande.

Hinderlider addressed a dispute between a company, which owned a right acquired under Colorado law to withdraw water from the La Plata River, and the Colorado State Engineer ("Engineer"), the official charged with administering water rights within that State. 304 U.S. at 97. The plaintiff company's Colorado water right was awarded by court decree prior to adoption of an interstate compact apportioning the waters of the La Plata River. *Id.* at 98. In 1928, a shortage of

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[12] Water rights exist in the Rio Grande south of Elephant Butte in New Mexico with claimed priority dates that pre-date the Project, and groundwater rights that are not tributary to the Rio Grande.

water led the Engineer to curtail the company's diversions to allow water to flow into New Mexico, as required by the La Plata River Compact, even though the company's decree would otherwise have permitted it to continue diverting water. *Id.* at 97-98. The company argued the Engineer violated the terms of its water right decree and that the La Plata River Compact impaired vested property rights preexisting its adoption. *Id.* at 99.

This Court disagreed. It held the company's water right was "indefeasible so far as concerns the State of Colorado," but Colorado could not "confer upon the Ditch Company rights in excess of Colorado's share of the water of the stream, and its share was only an equitable portion thereof." *Id.* at 102. The Court held that apportionments are "binding upon the citizens of each State and all water claimants, even where the State had granted water rights before it entered into the compact." *Id.* at 106. "[T]he private rights of grantees of a State are determined by the adjustment by compact" because, when apportioning the water of an interstate stream, each state acts "as a quasi-sovereign and representative of the interests and rights of her people." *Id.* at 106-07 (quoting *Wyoming v. Colorado*, 286 U.S. 494, 508 (1932)). Because the states had the power to "bind by compact their respective appropriators," they "had the power to reach that end," that is, to enforce the apportionment. *Id.* at 108. "The delegation to the State Engineers of the authority to determine when the waters should be so rotated was a matter of detail clearly within the constitutional

power" to apportion the stream. *Id.* Because Colorado possessed only an equitable share of the stream even prior to the compact's adoption, the compact did not deprive the company of any vested interest. *Id.*

Hinderlider did not discuss whether the La Plata River Compact deprived Colorado of jurisdiction over water in the La Plata River. Instead, *Hinderlider* considered whether that compact's adoption *conferred* authority on Colorado to enforce its terms. *Id.* at 108. *Hinderlider* concluded a state's authority to enforce a compact is a necessary incident to its constitutional authority to enter the compact. *Id. Hinderlider* did not hold that Colorado relinquished its jurisdiction to administer La Plata River water, even water apportioned to New Mexico. On the contrary, state administration was the means by which Colorado enforced the compact and ensured New Mexico received its share of the river's water. Colorado's method of administering its water rights may have been modified by the La Plata River Compact, but its jurisdiction to administer water within its borders was not superseded. The lesson of *Hinderlider* is that a compact controls, but only where the compact cannot be reconciled with state law. Here, there is no conflict between New Mexico law and the Compact.

The Report similarly misapplies *Alamosa-La Jara*. In that case, the Colorado Supreme Court weighed a challenge to state rules on water use in the Rio Grande Basin in Colorado. 674 P.2d at 916-17. A lower court had approved a portion of the rules requiring separate administration of the Conejos River and the Rio

Grande, even though the former is a tributary of the latter, and water users on the Conejos River appealed. *Id.* at 920-21. They maintained separate administration of the rivers was inequitable because strict enforcement of the Conejos' Compact delivery schedule resulted in the Conejos River supplying 45 percent of Colorado's Compact deliveries, even though it contained only 30 percent of Colorado's Rio Grande Basin water. *Id.* at 921. Specifically, the water users argued the Compact could not control intrastate water distribution, and that enforcing the separate schedules violated the Colorado Constitution, which requires water to be administered on the basis of priority. *Id.* at 922 (citing COLO. CONST. art. XVI, §§ 5, 6).

The Colorado Supreme Court disagreed. It found separate management of the Conejos and Rio Grande was required by the Compact and was consistent with the historical administration of both rivers under Colorado law. *Id.* Development of water rights "occurred independently on the Rio Grande mainstem and the Conejos River," and diversions on one stream had never "been subject to curtailment by senior appropriators on the other." *Id.* The court found nothing in the Compact that would "re-sort[] settled water rights on both streams into a single system of priorities based solely on the dates of appropriation." *Id.*

The court explained that where compacts are "deficient in provision for intrastate administration," Colorado law requires they be implemented to "restore lawful use conditions as they were before the effective date of the compact insofar as possible." *Id.* (quoting

C.R.S. § 37-80-104). Accordingly, "a compact obligation should not be viewed as a senior water right which upsets historical development and reshuffles rights according to a chronological formula." *Id.*

In addition, the plain language of the Compact required separate administration because the separate delivery schedules were clear on their face. *Id.* at 925. Therefore, the Colorado State Engineer had authority to administer the Rio Grande within Colorado in a manner consistent with the Compact's express terms and could "use his water rule power to address the supply problems in the Conejos Basin." *Id.*

As relevant here, *Hinderlider* and *Alamosa-La Jara* stand for two clear principles: first, states must administer water rights within their boundaries to ensure compliance with an interstate compact, even when this administration varies from what state law would require absent the compact. *See Hinderlider*, 304 U.S. at 108; *Alamosa-La Jara*, 674 P.2d at 922-23. Second, even where an interstate stream has been equitably apportioned, states retain the authority to administer its waters within their borders, both to ensure compliance with the apportionment and to enforce state law and state appropriations where this does not directly conflict with the terms of the apportionment. *Hinderlider*, 304 U.S. at 108; *Alamosa-La Jara*, 674 P.2d at 925.

The Special Master focuses solely on the first principle, that state administration can be modified by an apportionment, and ignores the second, that state

administration is not only permissible but also necessary to ensure compact compliance. In doing so, his recommendation that the Compact's equitable apportionment of the Rio Grande deprives New Mexico of jurisdiction over water in the Rio Grande below Elephant Butte, Report at 211, is at odds with both cases. *Hinderlider* did not hold that ratification of the La Plata River Compact deprived Colorado of jurisdiction over water in the La Plata River that was apportioned to New Mexico, nor did *Alamosa-La Jara* hold that the Colorado State Engineer was similarly powerless to administer Rio Grande waters in Colorado. On the contrary, the question in both cases was the scope of the Colorado State Engineer's authority to enforce a compact, and both cases held that the Colorado State Engineer, and by extension, Colorado, have that authority. *Hinderlider*, 304 U.S. at 108; *Alamosa-La Jara*, 674 P.2d at 925.

Hinderlider and *Alamosa-La Jara* amply demonstrate that states have the authority and flexibility to administer waters that have been apportioned by compact in accordance with state laws and policies, so long as they also comply with the terms of the relevant compact. The Special Master's conclusion that New Mexico relinquished jurisdiction over the waters below Elephant Butte contravenes these cases. Therefore, the Court should expressly disavow this conclusion and the reasoning supporting it.

IV. THE SPECIAL MASTER'S USE OF UNTESTED EXTRINSIC EVIDENCE WAS IMPROPER IN THE CONTEXT OF A MOTION TO DISMISS AND DEPRIVED THE PARTIES OF THE ABILITY TO REVIEW, VERIFY, OBJECT TO, OR PRESENT COUNTERVAILING EVIDENCE.

Despite concluding the text and structure of the Compact unambiguously protect the Project and that "no need exists to rely upon the history of the 1938 Compact to interpret that language," Report at 203, the Report contains an extensive analysis of not only the historical background of the Project and Compact, but also the general history of the Rio Grande Basin above Fort Quitman. *Id.* at 31-187. This lengthy discussion far exceeds what is necessary or advisable at this early stage of the litigation. In the context of this discussion, the Report cites many extrinsic sources that were not submitted by any party to this case, and that are contravened by other, thus far unproffered, sources.

The Special Master states that this extensive historical discussion is merely to "give the Compact context" and insists that it should not be "construed as fact finding violative of Fed. R. Civ. P. 12," because nothing in the historical record was dispositive concerning the Report's ultimate recommendations. *Id.* at 193. This acknowledges that the historical discussion in the Report was unnecessary to the Report's recommendations. It could, however, do harm in other respects. Despite the Special Master's disclaimer, this extensive discussion still could be construed as making findings

of fact or, at the very least, as lending an official imprimatur to a specific version of events before the scope of this litigation is known and before the parties have fully vetted the sources cited or the conclusions drawn from those sources. Through errors of both omission and inclusion, the Special Master's historical discussion offers a narrative that is likely to prejudice future proceedings in this case. The Special Master's discussion of his selected material risks establishing facts and lending credence to theories that could prematurely direct the course of this litigation without providing the parties an opportunity to properly introduce evidence, contest its authenticity and contents, qualify experts and present their opinions, and rebut evidence with other relevant evidence.

In short, the Special Master should not rely on or even put forth extrinsic evidence unilaterally compiled. Accordingly, New Mexico requests that the Court reject the Special Master's current historical discussion (found at pages 31-187 of the Report) in its entirety and return the case to the Special Master for full development of the record.

The Special Master repeatedly refers to language in *Arizona v. California*, 373 U.S. 546, 552 (1963), which states that the "meaning and scope" of a compact "can be better understood when the [compact] is set against its background." *See* Report at 8, 32, 193. This language does not justify the extensive analysis and *sua sponte* research done by the Special Master in this case. To be sure, this Court has held that it can be

"appropriate to look to extrinsic evidence of the negotiation history" of the compact in question in order to interpret *ambiguous* terms. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). In this case, by contrast, the Special Master has explicitly stated his belief that the Compact is *not* ambiguous for purposes of evaluating the Motion to Dismiss, Report at 203, thereby rendering development of the negotiation and legislative history improper.

Moreover, the historical document discussion in *Arizona v. California* was based on information generated and tested through nearly a decade of litigation among the parties. *See* 373 U.S. at 551. Original jurisdiction cases do not undergo the levels of review required for cases taken by the Court under *certiorari* jurisdiction, so it is essential to enable development of a full record prior to making findings of fact. *See, e.g.*, *United States v. Texas*, 339 U.S. 707, 715 (1950) (the Court, "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.") (citing cases).

Even when resorting to the historical record is proper, the Court has imposed limits on what sorts of legislative history a court should consider when interpreting a federal statute, including a compact. The Court has suggested that, when interpreting a federal statute, courts should limit themselves to legislative history of more certain reliability, such as official Committee Reports on a bill, and "eschew[]" questionable sources such as "the passing comments of one Member"

or "casual statements from the floor debates." *Garcia v. United States*, 469 U.S. 70, 76 (1984). In *Exxon Mobil Corp. v. Allapattah Services, Inc.*, the Court held that "[e]xtrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." 545 U.S. 546, 568 (2005). Similarly, *Arizona v. California* denied the introduction of statements made by individuals negotiating the Colorado River Compact in 1922 because it was not proper to consider "oral statements made by those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body." 292 U.S. at 360.

The Report's extensive *sua sponte* research, discussion of, and citation to historical materials not submitted by the parties also stands in stark contrast to the more limited use of extrinsic historical materials in other recent original actions. Special masters in other cases have been careful to limit their review of legislative history to "primary sources *placed in the record by the parties or their experts during trial* or . . . congressional or state documents of accepted probative value." Report by Special Master Paul R. Verkuil at 31-32, *State of New Jersey v. State of New York*, No. 120, Original (Mar. 31, 1997) (emphasis added).

In keeping with this principle, the First Report of the Special Master in *Kansas v. Nebraska*, No. 126, Original, on Nebraska's motion to dismiss, contains

an abbreviated twelve-page discussion of the Republican River Compact's background. First Report of the Special Master at 6-18, *Kansas v. Nebraska*, No. 126, Original (Jan. 28, 2000). The special master in that case reiterated that indications of the parties' intent should only be taken into account in the event that the language of the Compact is ambiguous, and even then extrinsic sources should be limited to reliable public records such as minutes of Compact negotiations and records of subsequent Compact administration. *Id.* at 19. Therefore, while that report cites to a small number of extrinsic sources, they are limited to official reports from federal agencies, letters to and from compact commissioners, and reports and minutes of the Republican River Compact Commission. *Id.* at i, v-vii.

Similarly, while the First Interim Report of the Special Master in *Montana v. Wyoming* on Wyoming's motion to dismiss contains a discussion of the historical background of the Yellowstone River Compact, it is also comparatively brief at a mere ten pages. *See* First Interim Report of the Special Master at i, *Montana v. Wyoming*, No. 137, Original (Feb. 20, 2010). Although that report cites to and discusses some extrinsic sources, these are limited to prior drafts of the Yellowstone River Compact, official minutes of the Yellowstone River Compact Commission, a handful of letters from compact commissioners, official reports of federal agencies, and House and Senate reports. *Id.* at x-xi. Not only are these citations limited to those primary sources of the type deemed to be especially reliable, but

they are also taken from a Joint Appendix compiled by the parties. *See id.* at 3.[13]

The Special Master provides no explanation of the methodology he used to gather and evaluate the historical materials discussed in the Report, and much of the research appears to have been conducted *sua sponte*, with little or no input from the parties. In the absence of any explanation of how this research was conducted and why certain materials are discussed in the Report while others were excluded, or perhaps not reviewed at all, it is impossible for the parties to evaluate whether the Report reflects a balanced evaluation of the historical record or an incomplete and perhaps one-sided account of these events.

Furthermore, the Report relies upon a number of documents that are not primary sources and are inappropriate to consider in this context. For example, the Report cites numerous times to an article written by Raymond Hill, the engineering advisor for Texas during Compact negotiations, which was published 36 years after the Compact's negotiation and adoption. *E.g.*, Report at 151 (citing Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163 (1974) ("Hill Article")).[14]

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[13] If the historical documents cited in the Report or any other extrinsic sources are pertinent to the questions raised in this case, the parties will certainly submit these materials in the normal course of the litigation. They will then be subject to the normal evidentiary requirements of authentication, relevance, and reliability. *E.g.*, Fed. R. Evid. 401, 901.

[14] The Table of Authorities, Report at xlvii, lists only one citation to Mr. Hill's article, at page 151, but the Report cites this

Although Mr. Hill was involved in the negotiation of the Compact, the Hill Article was written and published well after the Compact's adoption and cannot be considered a contemporary account. There is no indication whether Mr. Hill's recollection of events many decades later is inaccurate or biased, but the Special Master repeatedly relies on the Hill Article not only for information on events that occurred during the negotiations, but also to explain the meaning of Compact terms. *E.g.*, *id.* at 199-200 & n.53. Sources such as the Hill Article do not "shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Exxon Mobil Corp.*, 545 U.S. at 568. Their use in the Report as an aid to interpreting purportedly unambiguous Compact terms is inappropriate without further vetting.

The Report's discussion of the Compact's history and context, and particularly its reliance on numerous extrinsic sources, is premature. It has the potential to establish facts and precedent in these proceedings before discovery has occurred. In light of these issues, New Mexico respectfully requests that the Court reject the Report's historical discussion, explicitly confirm that the Special Master's reliance on historical documents establishes no factual findings or precedent in these proceedings, and return the case to the Special Master for full development of the historical record.

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article a dozen times, including a three-page block quotation on pages 184-87. These citations appear on pages 147 n.41, 151, 157, 161, 163-64, 166 n.44, 168, 169, 170, 184-87, 194 n.50, and 200 n.53.

V. THE UNITED STATES SHOULD BE PRECLUDED FROM RELITIGATING ITS WATER RIGHT FOR THE PROJECT.

The Report recognizes the United States has no right of action under the Compact and cannot state a claim implicating this Court's exclusive original jurisdiction under 28 U.S.C. § 1251(a)(1) in this matter. Report at 231.[15] The Report recommends, however, that the Court exercise its nonexclusive original jurisdiction pursuant to 28 U.S.C. § 1251(b)(2) so that all claims related to the allegations New Mexico has tolerated improper surface and groundwater diversions in the LRG may be resolved in a single proceeding. *Id.* at 234.

New Mexico does not except to this recommendation. However, if the Court agrees to extend its original jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' claims, it should strictly limit the United States' participation in this case and preclude the United States from attempting to use this forum to relitigate settled issues regarding the nature and scope of its Project right.

Congress has clearly directed that the United States acquire water rights for its reclamation projects

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[15] Regardless of whether the United States' claims are properly construed to arise under the Compact or not, New Mexico maintains that the United States' participation is indispensable to resolution of this dispute, and accepts the Special Master's recommendation that the Court extend its jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' claim that New Mexico has interfered with its ability to deliver Project water.

pursuant to state law and participate in state court adjudications of these rights. Both state and federal courts have ruled that the United States must adjudicate its Project rights in state court. *City of Las Cruces*, 289 F.3d at 1170; *Regents*, 849 P.2d at 372.

Section 8 of the Reclamation Act and the McCarran Amendment require the United States to adjudicate its water rights in state court. The LRG Adjudication court has issued final orders determining the amount, source of supply, and priority date for the United States' water right for the Project. Orders filed August 16, 2012; February 17, 2014; April 17, 2017. If the United States disagrees with any aspect of these orders, it is free to appeal them. *See Colorado River*, 424 U.S. at 816.

New Mexico requests that the Court decline to extend its nonexclusive original jurisdiction to allow the United States to relitigate questions regarding the scope of its Project water right. The Court should limit the United States' participation in this case to resolving the narrow questions posed by its Complaint in Intervention related to reclamation law claims.

CONCLUSION

The Court should enter an order denying the Motion to Dismiss Texas's Complaint, granting the Motion to Dismiss the United States' Complaint to the extent it raises Compact claims but extending its jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United

States' claims, denying the Motions to Intervene, and recommitting the case to the Special Master. In doing so, it should state affirmatively that any findings or conclusions specified in the Report are not the law of the case. The Court should refrain from adopting the Report, and should reserve judgment on all issues that need not, and should not, be determined at this preliminary stage of the litigation. It is imperative for the fairness of these proceedings that the Court have the benefit of a fully developed record before it decides critical issues of compact interpretation and state sovereignty.

Respectfully submitted,

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