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.

Before Special Master Michael J. Melloy

STATE OF NEW MEXICO'S ANSWER TO THE UNITED STATES' COMPLAINT IN INTERVENTION

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ANSWER

COMES NOW the State of New Mexico by and through counsel and submits this Answer to the United States' Complaint in Intervention ("U.S. Complaint").

1. Paragraph 1 of the U.S. Complaint states a legal conclusion to which no response is required. To the extent a response is required, New Mexico denies that jurisdiction is proper for the United States under 28 U.S.C. § 1251(a).

2. New Mexico admits the allegations in Paragraph 2 of the U.S. Complaint.

3. With regard to the first sentence in Paragraph 3 of the U.S. Complaint, New Mexico admits that the Rio Grande Reclamation Project Act was passed by Congress on February 25, 1905, ch. 798, 33 Stat. 814, and further admits that the Rio Grande Project was contemplated by the Rio Grande Reclamation Project Act, but denies that the Project was authorized by the Act as the Act required a finding of feasibility by the Secretary of the Interior and authorization by the Secretary of the Interior, and such finding and authorization did not occur until after passage of the Rio Grande Reclamation Project Act. New Mexico admits the remaining allegations in Paragraph 3 of the U.S. Complaint.

4. New Mexico admits the allegations in Paragraph 4 of the U.S. Complaint. New Mexico

affirmatively states that the United States is not a party to the Compact.

5. New Mexico admits the portions of the Compact's preamble quoted in Paragraph 5 of the U.S. Complaint are accurate. Beyond this, New Mexico asserts that the Compact's preamble, along with the rest of the Compact's terms, speaks for itself. New Mexico denies any allegations that are inconsistent with the express terms of the Compact.

6. New Mexico denies the United States' characterization of Article IV of the Compact because that provision speaks for itself. New Mexico admits that New Mexico's delivery obligation was changed in 1948 from San Marcial to Elephant Butte Reservoir. New Mexico affirmatively states that the Rio Grande Compact Commission's ("Commission") 1948 Resolution also adopted a new annual delivery schedule for New Mexico in Article IV of the Compact.

7. New Mexico denies the United States' characterization of Articles I(k) and I(l) of the Compact because those provisions speaks for themselves.

8. New Mexico admits the United States delivers water to Project beneficiaries in New Mexico and Texas pursuant to several contracts with EBID and EPCWID, that these contracts generally established the respective acreage included in each district as 88,000 acres for EBID and 67,000 acres for EPCWID, and that the ratio between Project acreage in New

Mexico and Texas is generally 57% and 43%, respectively, but asserts that beyond this, the contracts speak for themselves. New Mexico affirmatively states the contracts reflected the division of irrigable land at the time they were signed. New Mexico affirmatively states that the number of irrigated acres within the Project area has generally decreased over time, and that the Project no longer delivers water to 155,000 irrigated acres in the Project area or delivers an equal amount of water to each irrigable acre.

9. New Mexico denies the United States' characterization of the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 ("1906 Convention") because that document speaks for itself.

10. New Mexico denies the United States' characterization of Article II of the 1906 Convention because that provision speaks for itself.

11. New Mexico admits the allegations in the first and second sentence of Paragraph 11. In response to the third sentence of Paragraph 11, New Mexico admits that some portion of delivered water returns via drains as return flows to the Project, which is operated as a unit. New Mexico denies that all water that seeps into the ground becomes Project return flows. New Mexico admits the allegations in the fourth sentence of Paragraph 11 of the U.S. Complaint. New Mexico admits that

return flows have historically comprised a part of the Project's deliveries in both New Mexico and Texas, throughout the Project lands. Unless specifically admitted, the remaining allegations of Paragraph 11 are denied.

12. Paragraph 12 of the U.S. Complaint states legal conclusions to which no response is required. To the extent a response is required, New Mexico denies the allegations in Paragraph 12 of the U.S. Complaint. New Mexico affirmatively states that the right to use groundwater arises under State rather than Federal law.

13. New Mexico denies the allegations in Paragraph 13 of the U.S. Complaint.

14. New Mexico admits that extraction of hydrologically connected groundwater below Elephant Butte Reservoir in Texas, Mexico, and New Mexico has the potential to affect Project operations and deliveries. Unless specifically admitted, the remaining allegations in Paragraph 14 of the U.S. Complaint are denied.

15. New Mexico admits that use of water below Elephant Butte Reservoir in Texas, New Mexico, or Mexico has the potential to reduce Project efficiencies. Unless specifically admitted, the remaining allegations in Paragraph 15 of the U.S. Complaint are denied.

16. New Mexico admits the allegations in Paragraph 16 of the U.S. Complaint to the extent that "this action" refers to the Original Action

filed by Texas. New Mexico affirmatively states that the scope of the allegations in the U.S. Complaint must be limited to the allegations brought by Texas, as stated in the Supreme Court's opinion found at 138 S. Ct. 954 (2018).

17. New Mexico denies any allegations contained within the Prayer for Relief of the U.S. Complaint. Furthermore, even if the United States were to prove the allegations raised herein, New Mexico denies that the allegations raised herein would entitle the United States to the relief that it seeks.

AFFIRMATIVE DEFENSES

18. New Mexico incorporates each and every admission, denial, and allegation made by New Mexico in Paragraphs 1 through 17 as set forth herein. New Mexico asserts separately and/or alternatively the following affirmative defenses. In doing so, New Mexico does not assume any burden of pleading or proof that would otherwise rest on Plaintiff United States. New Mexico reserves the right to add defenses, or to supplement, amend, or withdraw any of these affirmative or other defenses.

FIRST AFFIRMATIVE DEFENSE (RIPENESS)

19. The United States alleges New Mexico's allowance of surface and groundwater diversions within the Project area in New Mexico in excess of contractual amounts "could," if "uncapped," reduce Project efficiency to the point that the United States cannot make its contractual deliveries to Project beneficiaries in Texas and its treaty deliveries to Mexico.

20. The United States has not alleged that water uses in southern New Mexico, whether authorized or not, have interfered with its ability to make deliveries to Texas or to Mexico in any specific instances, nor has the United States alleged facts tending to show that such interference is likely or imminent. Nor has the United States exercised its authority to provide notice to New Mexico water administration officials, notified the Commission, or placed an administrative call on the river setting forth the alleged reduction in Project deliveries in time, amount or location, to protect its contractual obligations.

21. Because the United States' claims are speculative, they are barred, in whole or in part, by the doctrine of ripeness.

SECOND AFFIRMATIVE DEFENSE (FAILURE TO PROVIDE NOTICE)

22. The United States acquired its water rights for the Project under New Mexico law, as required by Section 8 of the Reclamation Act, 43 U.S.C. § 343. Pursuant to Section 8, the water right for the Project is administered under New Mexico law.

23. In New Mexico, the mechanism by which an appropriator protects its rights from impairment by others is a priority call. *See Worley v. U.S. Borax & Chemical Co.*, 428 P.2d 651, 654-55 (N.M. 1967). A priority call consists of notice to offending appropriators that insufficient water is available to permit full enjoyment of the senior appropriator's right. In New Mexico, priority calls are administered by the Office of the State Engineer.

24. Although the United States acquired the Project's water right pursuant to New Mexico law and is required by Section 8 to comply with New Mexico law in the distribution of water from the Project, the United States has never sought to place a priority call to protect the Project right from alleged interference, either by placing a call with the State Engineer or by sending notice directly to individuals it believed to be diverting water entitled to the Project.

25. The United States also has failed to inform the Commission of its allegations that New Mexico's actions were interfering with the Project's delivery of water.

26. Because the United States failed to place a priority call, failed to inform the Commission, or otherwise failed to take action to protect the Project right from interference, the United States' claims are barred, in whole or in part, because the United States failed to provide notice of any claimed harm or injury.

THIRD AFFIRMATIVE DEFENSE (FAILURE TO MITIGATE)

27. Further, Project supply and Project efficiency have been impacted by pumping of groundwater hydrologically connected to the Rio Grande occurring in Texas and Mexico. The United States has an obligation to protect New Mexico from the effects of such pumping in Texas and Mexico, and has failed to do so.

28. The United States also has failed to properly maintain the Project, including failing to eliminate growth of phreatophytic vegetation in and along the bed of the Rio Grande and allowing the buildup of sediment in the bed of the Rio Grande in the Project area. Deficient maintenance of Project infrastructure and the river channel have increased delivery losses by increasing evapotranspiration of water and increasing seepage losses from the riverbed.

29. To the extent the United States seeks to blame New Mexico for all reductions in Project supply and efficiency, its claimed are barred, in whole or in part, because it has failed to mitigate the reductions caused by

pumping in Texas and Mexico and by the United States' own failure to properly maintain the Project.

FOURTH AFFIRMATIVE DEFENSE (FAILURE TO EXHAUST)

30. Because the United States failed to inform the Commission of its allegations that New Mexico's actions were interfering with the Project's delivery of water, protest any application to use groundwater or drill a new groundwater well in the Project area (even those on federal lands), place a priority call, or otherwise take action using existing administrative tools available pursuant to New Mexico law and the Compact to protect the Project right from interference, the United States' claims are barred, in whole or in part, by its failure to exhaust its administrative remedies.

FIFTH AFFIRMATIVE DEFENSE (UNCLEAN HANDS)

31. The Compact incorporates the Project and relies on Project operations to deliver water apportioned by the Compact to southern New Mexico and west Texas. Pursuant to contracts in force at the time the Compact was ratified, the United States is obligated to allocate equal amounts of Project water to each

irrigable acre of land included within the Project. For most of the Project's history, including at the time the Compact was ratified, the United States owned and operated all Project infrastructure and delivered Project water to the farm headgates for each farmer.

32. In derogation of its duties to deliver equal water to each Project acre, the United States has taken actions or allowed the implementation of practices that have caused or materially contributed to the very injury for which it now seeks to hold New Mexico liable.

33. Operational changes to the Project, including but not limited to adoption of the 2008 Operating Agreement for the Project, have interfered with the Compact apportionment by materially altering the historical equal allocation of Project water, forcing Project beneficiaries in New Mexico to rely far more heavily on groundwater extraction to meet their needs.

34. The United States has allowed or ignored widespread, high-volume groundwater extraction occurring in the Project area in Texas, and has ignored or failed to protest similar high-volume pumping in Mexico of ground water hydrologically connected to the Rio Grande and unauthorized surface diversions, in derogation of Article IV of the 1906 Convention, which provides in relevant part that "Mexico waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present

Mexico Canal and Fort Quitman, Texas." Groundwater pumping and unauthorized surface diversions in the Project area in Texas and Mexico cause or materially contribute to the United States' alleged injury regarding delivery of water to Texas and Mexico.

35. Further, improper accounting for Project return flows and deliveries, storage or release of Project water in excess of amounts needed to annually serve or deliver water to Project lands, and unauthorized release of Project water for purposes other than to deliver water to Project lands or Mexico have caused or materially contributed to the United States' alleged injury, for which it now seeks to hold New Mexico liable.

36. Finally, the United States has entered into agreements to transfer water from irrigation to municipal use, which were not authorized by the Compact signatories and which materially alter the allocation of Project water.

37. Because the United States is itself contributorily responsible for the injury it now asserts, the United States' equitable relief claims are barred, in whole or in part, by the doctrine of unclean hands.

SIXTH AFFIRMATIVE DEFENSE (ACCEPTANCE, WAIVER, ESTOPPEL)

38. In the 1950s, the number of high-capacity wells within the Project area in both New Mexico and Texas increased significantly, as did high-capacity wells in Mexico near the Project area. Project beneficiaries in both states used these wells to supplement surface water deliveries from the Project to meet crop demands, and municipalities in and near the Project area, including but not limited to the cities of El Paso, Texas and Juarez, Mexico, also installed a number of high-capacity wells for municipal and industrial supply. Rather than protesting this practice, the United States, via the Bureau of Reclamation and its officers, encouraged Project beneficiaries to drill wells, particularly during drought years with low surface water supplies.

39. In the case of *Mestas v. Elephant Butte Irrigation District*, No. 78-CV-138 (D.N.M.) ("*Mestas*"), the United States explained the position on groundwater extraction in the Project area that it held for decades: "the government simply has no property interest in any groundwater" in the Project area. United States' Memorandum in Support of Cross-Motion for Partial Summary Judgment at 4, *Mestas* (D.N.M. Nov. 22, 1978).

40. In *Mestas*, the United States also detailed the many efforts it took to facilitate groundwater development within the Project. For example, the United States represented that it had

"granted permission for the location of several hundred irrigation wells or [sic] Project lands over the past twenty-five years." *Id.* Further, the Bureau of Reclamation authorized the "use of the distribution system of the project for the sale of ground water as between member-users," Federal Defendants' Response to Plaintiffs' Request for Admissions of Fact at 2, *Mestas* (D.N.M. Jan 4, 1979), and gave Project beneficiaries permission "to take additional amounts of surface water delivered from the Reservoir, and offset such amounts by water pumped from [EBID] wells," Federal Defendants' Requested Findings of Fact and Conclusions of Law at 2, *Mestas* (D.N.M. Mar. 1, 1979). Reclamation's position on groundwater pumping at this time was that ground water pumping does not "constitute[] delivery of project water," that the United States recognized "the right, subject to applicable state law, of private pumpers to utilize ground water within" the Project area, and that ground water pumping "does not affect the treaty with Mexico . . . nor does it affect the annual allocation of project water." Brief in Support of Plaintiffs' Motion for Partial Summary Judgment at 3, *Mestas* (D.N.M. Nov. 1, 1978); United States' Memorandum in Support of Cross-Motion for Partial Summary Judgment at 1, *Mestas* (D.N.M. Nov. 22, 1978) ("The federal defendants herein agree with the statement of facts included in the plaintiffs' Brief in Support of their Motion for Partial Summary Judgment, at least insofar as those facts concern actions of federal officials.").

41. Acting in reliance on the United States' repeated representations in multiple contexts and its longstanding acquiescence to this practice, farmers and communities in southern New Mexico and Texas constructed numerous wells and relied on the ability to extract groundwater both as a supplement to surface water supplies and as a primary source of water to meet crop irrigation demands and other needs.

42. The United States has not filed any protests to applications to use groundwater or drill new wells within the Project area in New Mexico even though procedures to do so are available.

43. The United States has never taken advantage of its opportunities to initiate a priority call or otherwise enforce its rights under New Mexico law.

44. The United States has expressly incorporated groundwater pumping into its Project accounting.

45. If the United States is granted the relief it seeks, the economy and communities of southern New Mexico will be devastated.

46. Because for decades the United States authorized, encouraged, fostered, and failed to protest the very groundwater development it now seeks to enjoin, and because New Mexico and its citizens relied to their detriment on the United States' representations, the United States' claims are barred, in whole or in part,

by the doctrines of acceptance, waiver, and estoppel.

SEVENTH AFFIRMATIVE DEFENSE (LACHES)

47. Because for decades the United States was aware of groundwater development in the Project area in New Mexico and Texas but never complained or sought to prohibit these extractions, and in fact actively encouraged such development, and expressly accounted for Project deliveries with groundwater pumping incorporated, the United States' claims are barred, in whole or in part, by the doctrine of laches.

EIGHTH AFFIRMATIVE DEFENSE (FAILURE TO STATE A CLAIM)

48. Under New Mexico law, groundwater in the Lower Rio Grande Underground Water basin is public water of the State of New Mexico over which the state has plenary control and which is administered by State law. As recognized by the court adjudicating the United States' Project right, and previously admitted by the United States, groundwater is not part of Project supply. Instead, the Project right is a surface water right only. The United States has no right to groundwater below Elephant Butte Reservoir.

49. The United States has no authority to require individual groundwater users below Elephant Butte to obtain a federal contract to pump groundwater, nor does New Mexico have an obligation to require individual groundwater users below Elephant Butte to obtain a federal contract to pump groundwater.

50. To the extent the United States is alleging that New Mexico has an obligation to prevent individuals from pumping groundwater below Elephant Butte without a federal contract, it fails to state a claim on which relief can be granted because New Mexico has no such obligation under law and because the United States has no right to groundwater below Elephant Butte as part of Project supply.

PRAYER FOR RELIEF ON THE U.S. COMPLAINT

New Mexico denies the United States is entitled to relief and prays that judgment be entered:

A. Dismissing the United States' Complaint in Intervention with prejudice;

B. Rejecting all of the United States' requests for relief; and

C. Granting such further relief to New Mexico as this Court may deem just and proper.

Respectfully submitted,

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