No. 141, Original

In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF

v.

STATE OF NEW MEXICO AND
STATE OF COLORADO

ON EXCEPTION TO THE THIRD INTERIM REPORT OF THE SPECIAL MASTER

EXCEPTION OF THE UNITED STATES AND BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

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EXCEPTION OF THE UNITED STATES

The United States excepts to the Special Master's recommendation that the States' joint motion to enter a consent decree be granted.

Respectfully submitted.

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Solicitor General

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BRIEF FOR THE UNITED STATES IN SUPPORT OF EXCEPTION

JURISDICTION

On July 3, 2023, the Court received the third interim report of the Special Master. On July 24, 2023, the Court ordered the report filed and allowed the parties to file exceptions to the report. The jurisdiction of this Court rests on Article III, Section 2, Clause 2 of the Constitution and 28 U.S.C. 1251(a) and (b)(2).

COMPACT, STATUTORY, AND CONTRACTUAL PROVISIONS INVOLVED

The Rio Grande Compact and pertinent statutory and contractual provisions are reproduced in an appendix to this brief. App., *infra*, 1a-41a.

STATEMENT

This case concerns the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, which apportions the upper part of the Rio Grande among

Texas, New Mexico, and Colorado. In 2014, this Court allowed Texas to file an original action against New Mexico alleging breach of the Compact. In a subsequent decision, a unanimous Court allowed the United States, as an intervenor, to pursue its own Compact claims against New Mexico. On remand before the Special Master, Texas, New Mexico, and Colorado moved for entry of a "Consent Decree" that would "resolve[] all of the Compact claims stated by any party." Doc. 720, at 33 (States S.M. Mem.). Over the United States' objection, the Special Master recommended granting the motion. The United States now takes exception to that recommendation.

A. The Rio Grande Project

The Rio Grande rises in Colorado and flows south into New Mexico and then into Texas, near El Paso. See Third Interim Report of the Special Master (Third Report) Add. 46. After crossing the Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico. See First Interim Report of the Special Master (First Report) App. B1.

In the 1890s, Mexico complained that increasing diversions from the river in Colorado and New Mexico were causing water shortages south of the international border. National Resources Comm., *Regional Planning: Part VI—The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*, at 8 (Feb. 1938) (*Joint Investigation*), Doc. 413-4, at 641-1232. The United States identified part of the problem as the Rio Grande's "irregular" flow: "While the floods on the river are enormous, they do not come with any regularity," leading to periods "when [the river's] bed [i]s dry or carrie[s] an insig-

nificant amount of water along certain parts of its course." U.S. Geological Survey, U.S. Dep't of the Interior, *Third Annual Report of the Reclamation Service 1903-4*, H.R. Doc. No. 28, 58th Cong., 3d Sess. 395, 398, 419 (2d ed. 1905) (*Reclamation Report*). To make the most of the floods, and to "equalize" the yearly flow, the United States proposed constructing a new dam and reservoir on the Rio Grande, which would impound the flood waters and store them for later delivery downstream. *Id.* at 398.

The United States considered two possible sites for the new dam and reservoir: one near El Paso, Texas, and the other near Engle, New Mexico, at Elephant Butte. *Reclamation Report* 396-419. The government ultimately recommended the Elephant Butte site, about 105 miles north of the Texas state line, because a reservoir there would waste less water and irrigate more land, including land in southern New Mexico. *Id.* at 419; see *Texas* v. *New Mexico*, 138 S. Ct. 954, 957 (2018).

After Mexico and the affected States approved the government's recommendation, 138 S. Ct. at 957, Congress authorized construction of the new dam and reservoir as part of the Rio Grande Project, see Act of Feb. 25, 1905, ch. 798, 33 Stat. 814—one of the earliest irrigation projects authorized under the Reclamation Act of 1902, ch. 1093, 32 Stat. 388. The United States then acquired the necessary water rights under New Mexico law, including the right to all unappropriated water of the Rio Grande. First Report 102-106. That made nearly all of the water stored at Elephant Butte or diverted downstream water belonging to the Project—*i.e.*, Project water.

The United States determined the allocation of Project water by entering into a treaty with Mexico and

contracts with two irrigation districts downstream of Elephant Butte: Elephant Butte Irrigation District (EBID) in southern New Mexico and the El Paso County Water Improvement District No. 1 (EP1) in Texas. In the treaty, the United States agreed to "deliver to Mexico a total of 60,000 acre-feet of water annually," except in cases of "extraordinary drought or serious accident to the irrigation system in the United States." Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes (1906 Treaty) arts. I-II, May 21, 1906, 34 Stat. 2953-2954.

In the downstream contracts, the federal Bureau of Reclamation (Reclamation), which operates Elephant Butte Reservoir, agreed to deliver water to 155,000 irrigable acres within the two Districts: 88,000 acres (57%) within EBID and 67,000 acres (43%) within EP1. See, *e.g.*, Doc. 88, at 8-21, 22-35 (1937 contracts); *Joint Investigation* 83.[1] The Districts agreed to pay charges in proportion to their irrigable acreage to reimburse the government for the construction, operation, and maintenance of Project facilities. 138 S. Ct. at 957. The Districts also agreed that "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within [EP1], and 88/155 to the lands within [EBID]." Doc. 88, at 36 (1938 contract).[2]

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[1] Reclamation originally contracted with the Districts' predecessors, the Elephant Butte Water Users Association and the El Paso Valley Water Users Association. Doc. 413-2, at 907-913 (1906 contract).

[2] To this day, EBID and EP1 are the only entities that have contracts with Reclamation that allow them to call for delivery of Pro-

To deliver water to EBID or EP1, Reclamation releases water from Elephant Butte Reservoir (or Caballo Reservoir, a secondary reservoir 25 miles south) into the bed of the Rio Grande, where the water is conveyed to diversion points downstream. Doc. 701-1, at 93-98. At those diversion points, the water flows into canals, which convey the water to laterals and ditches, which connect to the irrigated farms. *Id.* at 103-115, 125-126. Some of the water that is not consumed by the crops runs off the fields or percolates into the ground. When that water returns to the river through drains or seepage, it can be diverted for use further downstream. *Id.* at 128-130; *Joint Investigation* 47-49, 446; C. S. Conover, U.S. Dep't of the Interior, *Ground-Water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico* 77 (1954) (Conover), Doc. 430, at 33-238.

Such return flows have historically been a significant part of the Project's deliveries in New Mexico, Texas, and Mexico, allowing Reclamation to deliver more water than it releases from its reservoirs. *Joint Investigation* 13, 47-49, 55-56, 100 Tbl.90. For example, in 1931, Reclamation released around 751,000 acre-feet from Elephant Butte Reservoir, but delivered more than 1,000,000 acre-feet to downstream diversion points. See Reclamation, U.S. Dep't of the Interior, *Reconnaissance Report on Water Conservation Plans for Rio Grande Project* A-5 Tbl.2 (July 1956) (*Recon Report*), Doc. 414-7, at 72-106; 10/31/19 Barroll Report A-9 Fig.A.3, Doc. 418-1, at 49-409.

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ject water. Blair Decl. ¶ 7, Doc. 754-1. Contrary to the Special Master's report, no "individual water user[]" has or ever had such a contract. Third Report 6; see *id.* at 4, 5, 10, 24, 32, 89.

B. The Rio Grande Compact

In 1938, Texas, New Mexico, and Colorado signed the Rio Grande Compact "for the purpose of effecting an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas," about 80 miles southeast of El Paso. Compact pmbl., 53 Stat. 785. Congress approved the Compact the following year. 53 Stat. 792; see U.S. Const. Art. I, § 10, Cl. 3.

The Compact imposes on Colorado the "obligation" to "deliver" annually to the New Mexico state line an amount of water determined by schedules that correspond to water quantities at various gaging stations. Art. III, 53 Stat. 787. "But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line," 138 S. Ct. at 957, the Compact imposes on New Mexico the "obligation" to "deliver" a certain amount of water, determined by a schedule, to Elephant Butte Reservoir, Art. IV, 53 Stat. 788.[3]

Although "a promise to deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas," that promise "made all the sense in the world" in light of the downstream contracts, which provided for delivery of Project water to the two Districts, one in New Mexico and the other in Texas. 138 S. Ct. at 957. The combined capacity of Elephant Butte Reservoir and Caballo Reservoir thus is referred to in the Compact as "Project Storage." Art.

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[3] The Compact requires New Mexico to deliver water according to an index of flows measured at the San Marcial gaging station, upstream of Elephant Butte Reservoir. Art. IV, 53 Stat. 788. But in 1948, the Rio Grande Compact Commission relocated the spot for measuring the delivery obligation from the gaging station to the Reservoir itself. 138 S. Ct. at 957 n.*; see Compact art. V, 53 Stat. 789.

I(k), 53 Stat. 786. And the Compact defines "Usable Water" as water "in project storage" that "is available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(*l*), 53 Stat. 786.

C. Post-1938 Developments

When the Compact was signed in 1938, the United States owned and operated the Project's canals, laterals, ditches, and drains, so Reclamation handled the delivery of Project water to individual farms within EBID and EP1. 10/31/19 Barroll Report 9. Water was relatively plentiful, and Reclamation generally did not cap the amount of water that farmers within the two Districts could order. *Id.* at A-3. Groundwater pumping in New Mexico below Elephant Butte was minimal. *Joint Investigation* 55-56; Ferguson Decl. ¶ 16, Doc. 754-3.

Around the late 1940s and early 1950s, conditions changed. The Rio Grande Basin experienced a drought. Ferguson Decl. ¶ 20. Reclamation began enforcing limits on the amount of water that each farmer could order in a given year. 10/31/19 Barroll Report A-4 Fig.A.1; *Recon Report* A-4. And groundwater pumping in southern New Mexico for both irrigation and non-irrigation uses increased significantly. Ferguson Decl. ¶¶ 22-23; 12/22/20 Brandes Decl. Fig.5, Doc. 430, at 825-842; *Recon Report* A-7. Such groundwater pumping depleted—and continues to deplete—the supply of Project water in two ways: (1) by drawing water away from the Rio Grande itself, and (2) by intercepting, or drawing water away from, return flows. See Ferguson Decl. ¶¶ 27, 30 & Tbl.1; 11/5/20 Brandes Decl. ¶ 33 & Fig.11, Doc. 413-1, at 19; Conover 114-121, 132; *Recon Report* A-8 (explaining that pumping does not obtain water from "an additional supply or new source," but rather "represents only a change

in the method, location, and time of diversion of supplies already available").

By 1980, EBID and EP1 had completed their repayment of Project construction charges, and they entered into new downstream contracts with Reclamation. Doc. 414-7, at 122-138, 140-161. The new contracts, signed in 1979 and 1980, transferred operation and maintenance of the Project's canals, laterals, ditches, and drains to the Districts, which assumed responsibility for the delivery of water to individual farms. *Id.* at 124-125, 130, 144, 151. Reclamation accordingly agreed to allocate and deliver water to the Districts themselves at their respective points of diversion and to conclude a "detailed operational plan" with the Districts "setting forth procedures for water delivery and accounting." *Id.* at 129-130, 150-151.

To fulfill its responsibilities under the contracts, Reclamation developed an allocation method using Project release and diversion records from 1951 to 1978, the so-called "D2 Period." See Doc. 414-7, at 56-61. From those data, Reclamation derived a linear regression equation (known as the "D2 Curve") to predict the total amount of water that would be available for diversion by the Districts based on a given annual release from Project reservoirs. See *id.* at 57. Reclamation would then subtract Mexico's share and allocate 57% of the remainder to EBID and 43% to EP1. See, *e.g.*, *id.* at 59. Because the D2 Curve is based on the D2 Period, it reflects the depletion of Project water supply caused by groundwater pumping during that period. 12/22/20 Brandes Decl. ¶¶ 14-17 & Fig.4.

Although the period from 1979 to 2002 "was characterized by persistently wet conditions," Ferguson Decl. ¶ 32, the period since 2003 has been characterized by "persistent[ly] dry conditions similar to—and by some

measures, worse than—those during the D2 Period," *id.* ¶ 38. At the same time, groundwater pumping in southern New Mexico, especially for non-irrigation use, has increased. *Ibid.* The increased pumping, together with the drought, has reduced the supply of Project water below even D2 levels. 10/31/19 Barroll Report 27 Fig.5.1.

In 2008, Reclamation and the two Districts entered into an Operating Agreement that sets forth the procedures for water allocation, delivery, and accounting required by the 1979 and 1980 contracts. Doc. 414-4, at 167-189. Under the 2008 Operating Agreement, Reclamation uses the D2 Curve to estimate how much water would have been delivered to the Districts from a given release under D2 conditions, subtracts Mexico's share of the water, and allocates 57% of the rest to EBID and 43% to EP1. *Id.* at 171, 174 Tbl.4 (lines 22, 23, and 29). EBID then forgoes a portion of its allocation to account for any depletion of Project water beyond D2 levels caused by groundwater pumping in southern New Mexico. *Id.* at 57; Barroll 2d Decl. ¶ 8, Doc. 755-E.[4] The 2008 Operating Agreement expires on December 31, 2050. Doc. 414-4, at 180.

D. The Present Controversy

In 2013, Texas moved for leave to file an original action alleging breach of the Compact, and this Court granted Texas's motion. 571 U.S. 1173.

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[4] The Districts' allocations are estimated and updated throughout the year but are not finalized until all irrigation releases have ended. The 2008 Operating Agreement also permits each District to "carry over" its unused allocation balance for use in a future year. Doc. 414-4, at 168. Carryover is limited to 60% of a full annual allocation. *Id.* at 169. Both Districts have used water from carryover allocations. See, *e.g.*, Doc. 418-3, at 1127 (lines 13-14); Blair Decl. ¶ 21.

1. Texas's and the United States' Compact claims

Texas's complaint names both New Mexico and Colorado as defendants, but asserts claims only against New Mexico. Tex. Compl. ¶ 4; see *id.* ¶ 5 (naming Colorado only because "it is a signatory to the [Compact]"). Those claims consist of the following allegations.

First, the complaint alleges that New Mexico has an obligation under the Compact to deliver water "to Elephant Butte Reservoir, and thus to the Rio Grande Project." Tex. Compl. ¶ 13. That obligation, the complaint alleges, encompasses a duty not to "intercept and take th[at] same water for use in New Mexico once it is released from [the] Reservoir." *Id.* ¶ 21. As the complaint observes, the Compact "relie[s] upon the Rio Grande Project" to "provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas." *Id.* ¶ 10. "Unless the United States' operation of the Rio Grande Project is protected," the complaint asserts, "Rio Grande Project deliveries of water to southern New Mexico, Texas and Mexico cannot be assured." *Id.* ¶ 11.

Second, the complaint alleges that New Mexico is violating its duty not to interfere with the Project by "allow[ing] and authoriz[ing] Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico." Tex. Compl. ¶ 4. Specifically, the complaint asserts that New Mexico is allowing "individuals or entities" below Elephant Butte to engage in groundwater pumping beyond what existed "in 1938" when the Compact was signed. *Id.* ¶ 18. According to the complaint, such groundwater pumping is "intercept[ing] water that in 1938 would have been available for use in Texas" and "requir[ing] more water to be released from

Elephant Butte Reservoir," thereby "depleting Rio Grande Project storage." *Ibid.*

Third, the complaint alleges that Texas is entitled to declaratory, injunctive, and monetary relief, including an injunction "commanding" New Mexico to "deliver the waters of the Rio Grande in accordance with" the Compact and to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project." Tex. Compl. 15-16.

After the Court granted Texas leave to file, the United States moved to intervene as a plaintiff, and the Court granted the United States' motion. 572 U.S. 1032. The United States filed its own complaint "with allegations that parallel Texas's." 138 S. Ct. at 958. First, the United States alleges that New Mexico has a duty under the Compact to "prohibit or prevent [the] interception or interference" of the "delivery of Project water to Project beneficiaries or to Mexico." U.S. Compl. 5; see *id.* ¶ 6. Second, the United States alleges that New Mexico is violating that duty by allowing "the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir." *Id.* ¶ 13. Third, the United States alleges that it is entitled to declaratory and injunctive relief, including an injunction requiring New Mexico to "prevent such interception and interference." *Id.* at 5.

2. This Court's 2018 decision

New Mexico moved to dismiss the complaints, and the Court appointed a Special Master to conduct further proceedings. 574 U.S. 972. The Special Master recommended denying the motion to dismiss Texas's complaint, First Report 187-217, but recommended granting the motion to dismiss the United States' complaint

insofar as the United States sought to pursue claims under the Compact, *id.* at 217-237.[5]

In a unanimous decision, the Court sustained the United States' exception to the Special Master's recommendation to dismiss its Compact claims. 138 S. Ct. at 960. The Court observed that it has "sometimes" exercised its "special authority" in "compact suits" to "permit[] the federal government" to "defend 'distinctively federal interests' that a normal litigant might not be permitted to pursue in traditional litigation." *Id.* at 958 (citation omitted). "[B]earing in mind" that "unique authority," the Court identified "several considerations" that favored permitting the United States to "pursue the particular claims it has pleaded in this case": (1) "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts"; (2) "New Mexico has conceded that the United States plays an integral role in the Compact's operation"; (3) "a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations" to Mexico; and (4) "the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection." *Id.* at 959-960. Having determined that the United States may "pursue the Compact claims it has pleaded in this original action," the Court remanded the case to the Special Master for further proceedings. *Id.* at 960.

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[5] The Special Master also recommended denying motions to intervene filed by EBID and EP1. First Report 237-278. The Districts did not file exceptions to that recommendation, and the Court denied their motions. 138 S. Ct. 349.

3. The States' proposed consent decree

On remand before a different Special Master, 138 S. Ct. 1460, New Mexico filed counterclaims against Texas and the United States, Doc. 93. The Special Master dismissed all of the counterclaims against the United States as barred by sovereign immunity. Doc. 338, at 14-22. The Special Master thereafter declined to grant summary judgment to any party in full, so the case proceeded to trial. Doc. 503. The liability phase was divided into two parts. Doc. 592, at 2. After the first part concluded in November 2021, the second part was postponed so that the parties could engage in confidential settlement negotiations with a mediator. Doc. 698; Doc. 700. When the parties were unable to reach an agreement, the Special Master raised the possibility of a settlement agreement "between New Mexico and Texas." 9/27/22 Tr. 16.

Shortly thereafter, the States moved for entry of a proposed consent decree without the United States' consent. States S.M. Mem. 1. The proposed decree would make "[c]ompliance with th[e] Decree" sufficient to establish "compliance with the Compact with respect to the division of Rio Grande water below Elephant Butte Reservoir." Third Report Add. 8. Accordingly, the decree that the States proposed would "resolve[] all of the Compact claims stated by any party," including the United States. States S.M. Mem. 33; see *id.* at 33-56.

The "centerpiece" of the proposed consent decree is the Effective El Paso Index (EEPI). States S.M. Mem. 29. The EEPI would establish "an annual, volumetric target for New Mexico to deliver water to Texas" at the El Paso Gage, "a stream gage very near the New Mexico-Texas state line." *Id.* at 29-30. The EEPI would consist of "two basic parts: the Index Obligation, which estab-

lishes the New Mexico annual delivery target; and the Index Delivery, which is a measurement of amount of water that New Mexico actually delivers to Texas, largely measured at the El Paso Gage." *Id.* at 30. The calculation of the Index Obligation would be based on a regression equation that reflects the conditions that existed during the D2 Period, including the depletion of Project water supply caused by groundwater pumping. *Ibid.*; see Third Report Add. 25-27.

Under the EEPI, annual differences between the Index Delivery and the Index Obligation would accrue on a continuing basis with "Positive Departure[s]" (over-deliveries) offsetting "Negative Departure[s]" (under-deliveries). Third Report Add. 10-11. New Mexico would remain "in compliance with th[e] Decree" so long as it stayed within specified "accrued Negative Departure Limits." *Id.* at 11. "Exceedance of accrued Negative Departure Limits," however, would "mean[] New Mexico is in violation of th[e] Decree." *Ibid.*

The proposed consent decree would make the United States "responsible for operating the Project in a way that assures that the Compact's equitable apportionment" is "achieved consistent with the terms of th[e] Decree." Third Report Add. 8. For example, the proposed decree would require the United States to ensure that "Project operations and Project Accounting" are "consistent" with, and do "not interfere with," the EEPI. *Id.* at 20. The proposed decree would require the United States to transfer water between Districts to "avoid excessive Accrued Index Departures," *id.* at 14; see *id.* at 14-17, and to remedy "exceedances of the Negative Departure limit," *id.* at 12; see *id.* at 12-13. And the proposed decree would require the United States to "operate[] and maintain[]" the El Paso Gage

in accordance with rules promulgated by the Rio Grande Compact Commission. *Id.* at 10.

4. The Special Master's report

The United States opposed the proposed consent decree. The United States argued, among other things, that the proposed decree would dispose of the United States' Compact claims and impose obligations on the United States without its consent. Doc. 754, at 19-46. The United States also argued that the proposed decree would be contrary to the Compact. *Id.* at 46-54.

The Special Master issued a report recommending entry of the proposed consent decree. Third Report 1-115. The Special Mater acknowledged that the proposed decree would "resolve[] the dispute over the Texas and downstream New Mexico apportionments," *id.* at 2, but suggested that the United States' claims were "wholly derivative" of Texas's, *id.* at 12, and could be dismissed "without prejudice" to the United States' ability to pursue "its remaining concerns as to the details of water capture within New Mexico" in "other fora," *id.* at 11; see *id.* at 90-103. The Special Master further concluded that the proposed decree would "not impose material new duties on the United States," on the view that the United States already has a "Compact-based duty to deliver Texas's apportionment through the Project." *Id.* at 9-10; see *id.* at 54-66, 104-108. Finally, the Special Master concluded that the proposed decree would "permissibly" resolve "ambiguities" in the Compact and therefore be "consistent with" it. *Id.* at 13; see *id.* at 66-88.

SUMMARY OF ARGUMENT

In 2018, this Court permitted "the United States to pursue the Compact claims it has pleaded in this origi-

nal action." *Texas* v. *New Mexico*, 138 S. Ct. 954, 960 (2018). Since then, the United States has not obtained an adjudication on the merits of its Compact claims; nor has it agreed to settle them. Texas, New Mexico, and Colorado have nevertheless moved for entry of a proposed "Consent Decree" that would resolve this Compact dispute without the United States' consent. States S.M. Mem. 33. This Court should deny the States' motion for three independent reasons.

First, "[a] court's approval of a consent decree between some of the parties * * * cannot dispose of the valid claims of nonconsenting intervenors." *Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986). In violation of that rule, the proposed consent decree would resolve not just Texas's Compact claims, but also the United States'. The proposed decree may not do so without the United States' actual consent.

Second, a "court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Firefighters*, 478 U.S. at 529. Yet the proposed consent decree would impose a host of obligations on the United States, including obligations to operate the Project in a particular manner and to transfer water at the States' direction. Because the United States has not consented to any of those obligations, the proposed decree may not be entered.

Third, a court may not enter a consent decree that would be "contrary to the Compact." *Kansas* v. *Nebraska*, 574 U.S. 445, 472 (2015). The proposed consent decree, however, would define Compact compliance in terms of a Texas-state-line delivery requirement, even though the Compact directs New Mexico to deliver water to Elephant Butte Reservoir, 105 miles north of the state line. The proposed decree would also allow the

States to dictate the terms of the Compact's apportionment, in disregard of the United States' downstream contracts—contracts that "the Compact could be thought implicitly to incorporate." 138 S. Ct. at 959. And the proposed decree would approve interference with the Project by groundwater pumping in New Mexico at levels that existed during the D2 Period, from 1951 to 1978, even though that pumping far exceeded what existed in 1938, when the Compact was signed. The proposed decree should therefore be rejected.

ARGUMENT

The Special Master has recommended granting the States' motion for entry of a proposed consent decree to which the United States has not consented. Conducting "an independent review of the record," and assuming "the ultimate responsibility for deciding all matters," *Mississippi* v. *Tennessee*, 142 S. Ct. 31, 39 (2021) (citation omitted), this Court should reject the Special Master's recommendation for three independent reasons. First, the decree that the States propose would dispose of the United States' Compact claims without its consent. Second, the proposed decree would impose obligations on the United States without its consent. And third, the proposed decree would be contrary to the Compact itself.

I. THE PROPOSED CONSENT DECREE SHOULD BE REJECTED BECAUSE IT WOULD DISPOSE OF THE UNITED STATES' COMPACT CLAIMS WITHOUT THE UNITED STATES' CONSENT

The States do not seek to settle only their own claims. Rather, their proposed consent decree would "resolve[] all of the Compact claims stated by any party," including the United States. States S.M. Mem.

33; see *id.* at 33-56. A "court's approval of a consent decree between some of the parties," however, "cannot dispose of the valid claims of nonconsenting intervenors." *Firefighters* v. *Cleveland*, 478 U.S. 501, 529 (1986). For that reason alone, the proposed decree should be rejected.

A. A Consent Decree Between Some Of The Parties May Not Dispose Of A Nonconsenting Intervenor's Claims

"Consent decrees have elements of both contracts and judicial decrees." *Frew ex rel. Frew* v. *Hawkins*, 540 U.S. 431, 437 (2004). While a consent decree is an "agreement" between parties to settle a dispute, it is also "an agreement that the parties desire and expect will be reflected in, and be enforceable as, a judicial decree." *Rufo* v. *Inmates of Suffolk County Jail*, 502 U.S. 367, 378 (1992).

In *Firefighters*, this Court addressed when a consent decree between some of the parties may be entered over the objection of a nonconsenting intervenor. 478 U.S. at 528-530. The Court explained that when the parties to a consent decree seek to "settl[e] their own disputes and thereby withdraw[] from litigation," an intervenor "does not have power to block the decree merely by withholding its consent." *Id.* at 529. The Court recognized, however, that a different rule applies when a proposed consent decree purports to settle the intervenor's claims as well. As the Court explained, "parties who choose to resolve litigation through settlement may not dispose of the claims of a third party * * * without that party's agreement." *Ibid.* "A court's approval of a consent decree between some of the parties therefore cannot dispose of the valid claims of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor." *Ibid.*

That rule reflects the "deep-rooted historic tradition that everyone should have his own day in court." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989)). It also reflects "the voluntary nature of a consent decree." *Firefighters*, 478 U.S. at 521. After all, a decree could hardly be called a "consent" decree if it disposed of a party's claims without that party's "actual consent." *United States* v. *Ward Baking Co.*, 376 U.S. 327, 334 (1964).

B. The Proposed Consent Decree Would Dispose Of The United States' Compact Claims Without The United States' Consent

Six Terms ago, this Court permitted the United States, as an intervenor, to "pursue the Compact claims it has pleaded in this original action." *Texas* v. *New Mexico*, 138 S. Ct. 954, 960 (2018). Those claims are thus "valid claims" of the United States. *Firefighters*, 478 U.S. at 529. As such, they may be resolved in one of only two ways: (1) by "an adjudication on the merits," or (2) by the United States' "actual consent" to settle them. *Ward Baking*, 376 U.S. at 334.

The United States has not consented to the "Consent Decree" that the States have proposed. States S.M. Mem. 2. That decree therefore "cannot dispose of the valid claims" of the United States. *Firefighters*, 478 U.S. at 529. But the proposed decree would do just that. Under the States' proposal, "[c]ompliance with th[e] Decree" would be sufficient to establish "compliance with the Compact with respect to the division of Rio Grande water below Elephant Butte Reservoir." Third Report Add. 8. Once entered, the decree would thus foreclose any further litigation regarding what New Mexico must do to "compl[y] with the Compact with respect to the division of Rio Grande water below [the]

Reservoir." *Ibid.* That is the very subject of the United States' Compact claims—which, after all, "parallel Texas's." 138 S. Ct. at 958; see pp. 10-11, *supra.*

Before the Special Master, the States acknowledged that their proposed consent decree would dispose of the United States' Compact claims. In their memorandum in support of their motion, for example, the States represented that the decree would "resolve[] all of the Compact claims stated by any party in this litigation." States S.M. Mem. 33; see, *e.g.*, *id.* at 2 ("[T]he Consent Decree resolves the fundamental question of the equitable division of water."); *id.* at 55 ("No continuing controversy will exist."). And in reply to the United States' opposition, the States maintained that "upon entry of the Consent Decree, the United States will have no remaining Compact claims." Doc. 755, at 7 (States S.M. Reply); see *id.* at 20 (asserting that the "Consent Decree" would obviate any "further need to litigate" "the United States' only competent Compact claim").

The Special Master similarly understood that the proposed consent decree would "resolve[] the dispute over the Texas and downstream New Mexico apportionments." Third Report 2. He therefore recognized that the United States would "los[e] its claims" on that subject. *Id.* at 13. The Special Master nevertheless suggested that the United States' claims could be dismissed "without prejudice," but only because, in his view, the proposed decree would not prejudice the United States' ability to pursue, in "other fora," claims outside the subject matter of the decree—claims that he characterized as relating to "the details of water capture within New Mexico." *Id.* at 11; see *id.* at 96-97. The Special Master did not suggest that in litigating what he described as such "remaining concerns," the United States would be

free to ignore what the decree would have already resolved. *Id.* at 11. To the contrary, he made clear that "[t]he Consent Decree, if adopted, [would] answer[] the outstanding question of downstream apportionments." *Id.* at 17.

The proposed consent decree would thus resolve not only Texas's Compact claims, but also the United States'. And because a "consent" decree may not dispose of the United States' claims "without the actual consent of the Government," the proposed decree should be rejected. *Ward Baking*, 376 U.S. at 334.

C. There Is No Valid Basis For Disposing Of The United States' Compact Claims Without The United States' Consent

The States and the Special Master attempt to justify the proposed consent decree's resolution of the United States' Compact claims without the United States' consent. None of their arguments has merit.

1. The United States' loss of its Compact claims cannot be justified by what the proposed consent decree would provide

The States assert that the United States cannot complain about losing its Compact claims because the proposed consent decree would provide "precisely th[e] relief" that the United States seeks. States S.M. Mem. 53. In fact, the proposed decree would fail to provide what the United States seeks to establish with respect to each element of the United States' Compact claims: duty, breach, and remedy.

With respect to duty, the United States seeks to establish that New Mexico's obligation under the Compact to deliver water to Elephant Butte Reservoir (and thus to the Project) encompasses a duty not to interfere

with the operation of the Project below Elephant Butte by allowing groundwater pumping or other diversions of that Project water. See pp. 10-11, *supra*. But the proposed decree would impose on New Mexico only a duty to "manage and administer water in a manner that is consistent with th[e] Decree." Third Report Add. 8-9. And far from prohibiting interference with the Project, the decree would give New Mexico a *right* to interfere—by, for instance, forcing the transfer of water from one District to another in ways not permitted by the downstream contracts, which are central to the Project and thus to the Compact. *Id.* at 12-17.

With respect to breach, the United States seeks to establish that New Mexico is violating its duty of non-interference by allowing groundwater pumping downstream of Elephant Butte beyond the levels that existed when the Compact was signed in 1938. See pp. 10-11, *supra*. The proposed decree, however, would measure New Mexico's "compliance with the Compact" according to a state-line delivery index based on conditions during the D2 Period, from 1951 to 1978. Third Report Add. 8; see pp. 13-14, *supra*. Given that groundwater pumping exploded during that period, Ferguson Decl. ¶¶ 22-23, the proposed decree would approve a level of groundwater pumping far beyond the 1938 baseline.

With respect to remedy, the United States seeks an injunction prohibiting New Mexico from interfering with the Project and thus with the Compact's allocation. See U.S. Compl. 5; p. 11, *supra*. As noted, the proposed consent decree would not impose on New Mexico any duty not to interfere with the Project—let alone enjoin New Mexico from doing so. Instead, the decree would make *the United States* responsible for keeping New Mexico in compliance with the proposed decree by, for

example, transferring water from EBID to EP1. See Third Report Add. 12-15.

Contrary to the Special Master's suggestion (Third Report 81), the fundamental problem is not that New Mexico might not comply with the proposed consent decree; it is that even if New Mexico does comply, the result would be inconsistent with the relief the United States seeks. The substance of the proposed decree therefore cannot justify disposing of the United States' Compact claims without the United States' consent. See *Ward Baking*, 376 U.S. at 334 ("[W]here the Government seeks an item of relief to which evidence adduced at trial may show that it is entitled, the District Court may not enter a 'consent' judgment without the actual consent of the Government.").

2. The United States' loss of its Compact claims cannot be justified by Texas's willingness to settle

a. The States contend that even if their proposed consent decree would not provide all of the relief the United States seeks, the United States has no basis to continue litigating after Texas has agreed to settle with the other States. States S.M. Mem. 41-51. But the United States' role in this case is not that of a mere amicus supporting Texas. The Court granted the United States' intervention as a plaintiff. 572 U.S. 1032. The Court then permitted the United States to pursue its own Compact claims. 138 S. Ct. at 960. Because those claims are the United States' claims—not Texas's—only the United States may choose to resolve those claims through settlement. *Firefighters*, 478 U.S. at 529.

Of course, Texas may decide to "settl[e] [its] own disputes and thereby withdraw[] from [this] litigation." *Firefighters*, 478 U.S. at 529. Texas could, for example, agree to dismiss its own Compact claims in exchange for

New Mexico's promise to reduce groundwater pumping below a certain level. See Hamman Decl. ¶ 14(a), Doc. 720-5 (acknowledging that New Mexico could "curtail groundwater pumping"). Such a settlement would not preclude the United States from continuing to press its own Compact claims. Instead of agreeing to such a settlement, however, the States have proposed a consent decree that would dispose of the United States' Compact claims as well.

b. The States contend that they may dispose of the United States' Compact claims on the theory that the United States' interests in this Compact dispute are merely "derivative" of Texas's. States S.M. Mem. 49; see Third Report 12. In the States' view, there is no independent federal interest in the Compact's apportionment of water below Elephant Butte because "the United States does not have any separate apportionment of water under the Compact" and because "the States, not the United States, represent the interests of individual water users." States S.M. Mem. 41.

But New Mexico and Colorado made those same arguments six Terms ago, and the Court did not accept them. See, *e.g.*, N.M. Reply to Exceptions 6 (July 28, 2017) ("As a non-signatory to the Compact and an entity to which no water was allocated by the Compact, the United States lacks the authority to bring suit under the Compact.") (emphasis omitted); Colo. Reply to Exceptions 12 (July 28, 2017) ("The [Project] beneficiaries * * * are adequately represented by their respective States with regard to allocations made under the Compact."); Colo Exceptions Br. 7 (June 9, 2017) ("[I]t is the States, and not the United States, that represent the water users, including water from the Rio Grande Project, under the Compact.").

Instead, the Court explained that it is sometimes appropriate to "permit[] the federal government to participate in compact suits to defend 'distinctively federal interests' that a normal litigant might not be permitted to pursue in traditional litigation." 138 S. Ct. at 958 (citation omitted). The Court then recognized this as one of those suits, identifying several considerations in favor of "allowing the United States to pursue the Compact claims it has pleaded in this original action." *Id.* at 960. Those considerations included the federal government's interests in "seeing that water is deposited in [Elephant Butte] Reservoir consistent with the Compact's terms," in effectuating the "'delivery of . . . water' as required by the Downstream Contracts and anticipated by the Compact," and in "preventing interference with [the United States'] treaty obligations." *Id.* at 959 (citation omitted). The United States' Compact claims thus seek to vindicate "distinctively federal interests," not interests merely derivative of Texas's. *Id.* at 958 (citation omitted).

c. Contrary to the Special Master's suggestion (Third Report 2), the United States' interests are the same today as they were when the Court permitted the United States to bring its own Compact claims against New Mexico in 2018. In fact, nothing about the considerations on which the Court relied has changed, other than Texas's willingness to compromise its own litigating position.

The first consideration cited by the Court in 2018 was that "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts." 138 S. Ct. at 959. In the years since the Court's decision, nothing about that relationship has changed. The Compact still relies on the Project, via the down-

stream contracts, to accomplish the apportionment of the Rio Grande below Elephant Butte. *Ibid.* And the United States still cannot "meet its duties under the Downstream Contracts" unless New Mexico complies with its delivery obligation and concomitant duty of non-interference under the Compact. *Ibid.*; see Compact art. IV, 53 Stat. 788. What was true at the time of the Court's decision thus remains true today: "the federal government has an interest in seeing that water is deposited in [Elephant Butte] Reservoir consistent with the Compact's terms." 138 S. Ct. at 959.

The second consideration identified by the Court was New Mexico's concession that "the United States plays an integral role in the Compact's operation." 138 S. Ct. at 959. In the intervening years, that role has remained the same—as has the United States' interest in effectuating the "'delivery of . . . water' as required by the Downstream Contracts and anticipated by the Compact." *Ibid.* (citation omitted). The proposed consent decree, moreover, only reinforces New Mexico's concession about the United States' integral role; after all, the proposed decree itself relies on the United States to "assure[] that the Compact's equitable apportionment * * * is achieved consistent with the terms of th[e] Decree." Third Report Add. 8.

The third consideration cited by the Court was that "a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations." 138 S. Ct. at 959. That is still the case. Then as now, the 1906 Treaty "requires the federal government to deliver 60,000 acre-feet of water annually" to Mexico, and "a failure by New Mexico to meet its Compact obligations could directly impair the federal government's ability to perform its obligations under the treaty." *Id.*

at 959-960. What the Court said in 2018 is thus still true today: "Permitting the United States to proceed [with its Compact claims] will allow it to ensure that [its treaty] obligations are, in fact, honored." *Id.* at 960.

The fourth and final consideration identified by the Court was that "the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection." 138 S. Ct. at 960. Since the Court's decision, nothing about the United States' Compact claims has changed. The United States is still pursuing the same allegations—"allegations that parallel Texas's." *Id.* at 958. And it is still seeking the same relief—relief "substantially the same" as in Texas's complaint. *Id.* at 960; see pp. 10-11, *supra*. The "scope of [the] existing controversy" thus remains the same as in 2018. 138 S. Ct. at 960.

To be sure, one thing has changed since the Court's decision: Texas's willingness to compromise its own litigating position. See Third Report 7 ("The Consent Decree generally compromises Texas's litigation position."); G. Sullivan 2d Decl. ¶ 22, Doc. 755-G ("Texas concessions included * * * allowing New Mexico pumping at the D2 level."). Nothing in the Court's decision, however, suggests that Texas's litigating decisions should bind the United States. To the contrary, the whole point of the Court's decision was to permit the United States to pursue its own Compact claims for the purpose of vindicating "distinctively federal interests." 138 S. Ct. at 958 (citation omitted). It would be strange indeed if Texas could then compromise those federal interests over the United States' objection. The same considerations that led this Court to allow the United States to bring its Compact claims in the first place thus

continue to support allowing the United States to pursue them today.

3. The United States' loss of its Compact claims cannot be justified by the possibility of other claims in other litigation

Attempting to minimize the prejudice to the United States from the loss of its Compact claims, the States and the Special Master assert that the United States would still be able to pursue other claims against New Mexico in "other fora." Third Report 11; see States S.M. Mem. 53-56. But the pursuit of other claims elsewhere cannot make up for the loss of the United States' Compact claims here. That is because the "Consent Decree, if adopted, [would] answer[] the outstanding question of downstream apportionments." Third Report 17. The decree would thus preclude the United States from arguing that New Mexico's "compliance with the Compact with respect to the division of Rio Grande water below Elephant Butte Reservoir" should be measured by something other than "[c]ompliance with th[e] Decree." Third Report Add. 8. In particular, the decree would foreclose the argument that New Mexico's compliance with the Compact's apportionment should instead be measured by a duty of non-interference, defined in light of conditions that existed when the Compact was signed in 1938. See pp. 21-22, *supra*.

As a result, even if the United States were to pursue other claims in other fora, it would be unable to obtain what its Compact claims seek here. The proposed consent decree's resolution of those claims without the United States' consent would thus cause the United States "plain legal prejudice." *In re Integra Realty Res., Inc.*, 262 F.3d 1089, 1102 (10th Cir. 2001) (citation omitted).

II. THE PROPOSED CONSENT DECREE SHOULD BE REJECTED BECAUSE IT WOULD IMPOSE OBLIGATIONS ON THE UNITED STATES WITHOUT THE UNITED STATES' CONSENT

Even if the proposed consent decree resolved only the States' own disputes—and did not dispose of the United States' Compact claims as well—it should still be rejected. A "court may not enter a consent decree that imposes obligations on a party that did not consent to the decree." *Firefighters*, 478 U.S. at 529. Yet that is what the proposed decree would do: impose a host of obligations on the United States without the United States' consent. For that reason as well, the States' motion should be denied.

A. A Consent Decree May Not Impose Obligations On A Party Without That Party's Consent

In *Firefighters*, this Court recognized that "parties who choose to resolve litigation through settlement * * * may not impose duties or obligations on a third party, without that party's agreement." 478 U.S. at 529. That rule reflects fundamental principles of contract law. When parties enter into a contract, they may agree to impose obligations on themselves—including obligations for the *benefit* of a third party. See 13 Richard A. Lord, *Williston on Contracts* § 37.1 (4th ed. 2013) (*Williston*) (discussing "the doctrine of third party beneficiaries"). But they may not impose *obligations* on a third party without that party's assent. See 1 *Williston* § 1:8 (4th ed. 2022) ("To be enforceable, a contract requires mutual assent.").

Consent decrees resemble contracts in that respect. As the Court has explained, "the voluntary nature of a consent decree is its most fundamental characteristic." *Firefighters*, 478 U.S. at 521-522. Indeed, "it is the

agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Id.* at 522. Therefore, just as a contract may not impose obligations on a party that did not agree to the contract, a consent decree may not "impose obligations on a party that did not consent to the decree." *Id.* at 529.

B. The Proposed Consent Decree Would Impose Obligations On The United States Without The United States' Consent

The proposed consent decree would make the United States "responsible for operating the Project in a way that assures that the Compact's equitable apportionment" is "achieved consistent with the terms of th[e] Decree." Third Report Add. 8. As is clear from the face of the decree, that responsibility would come with various obligations imposed on the United States without its consent.

1. One set of obligations imposed on the United States appears under the heading "Project Operations to Enable Compact Compliance." Third Report Add. 20 (emphasis omitted; capitalization altered). That set includes an obligation to make "Project operations and Project Accounting" "consistent with th[e] Decree." *Ibid.*; see *id.* at 5 (defining "Project Accounting" by reference to calculations made by "the Bureau of Reclamation") (emphasis omitted). It also includes an obligation to ensure that "Project operations and Project Accounting" are "undertaken in a manner that does not interfere with New Mexico's or Texas's rights and entitlements defined in the Compact and th[e] Decree, including by causing Negative Departures or causing a Trigger to be exceeded." *Id.* at 20; see *ibid.* ("Project oper-

ations and Project Accounting must not interfere with Compact administration.").

"Examples of procedures that are necessary to maintain consistency between the Consent Decree and Project operations" are set forth in the appendix to the decree. States S.M. Mem. 32-33; see Third Report Add. 20 (cross-referencing the "[e]xamples"). One example concerns the equation that the United States uses in allocating water to the Districts. Third Report Add. 44. In calculating the amount of water allocated to EP1, the United States currently uses the D2 Curve, which reflects a *one*-year regression analysis. Hutchison Decl. ¶¶ 73, 102-103, Doc. 720-4. By contrast, in calculating the amount of water allocated to Texas, the proposed decree would use an equation that reflects a *two*-year regression analysis. States S.M. Mem. 30. According to the States, "[t]here will be large Index Departures that relate solely to the discrepancies between the [two] methodologies unless the Project Allocation is modified to comport with the [decree]." Barroll Decl. ¶ 40(a), Doc. 720-6; see States S.M. Mem. 63-64. The States thus view modification of the United States' existing equation as "necessary" to avoid interfering with the EEPI. States S.M. Mem. 32; see Barroll 2d Decl. ¶ 11 (acknowledging that some modification is "required").

The appendix identifies two other "examples of procedures to ensure that Texas and New Mexico receive their equitable apportionment below Elephant Butte Reservoir as contemplated in the Decree": (i) moving the location where the United States "determine[s] and account[s] for" deliveries of Project water to EP1, and (ii) modifying the United States' calculation of "Project Carryover Water" to account for evaporation and conveyance losses. Third Report Add. 44-45; see Blair

Decl. ¶ 16. According to the States (see S.M. Mem. 62-64), those "adjustments" to "Project allocation and accounting" would likewise be "necessary," G. Sullivan Decl. ¶ 21, Doc. 720-7, in order to avoid "substantially increas[ing]" Index Departures and interfering with "the EEPI," *id.* ¶ 22.

The appendix, moreover, describes the above "procedures" as merely "[e]xamples" of what would be "necessary to maintain consistency [with] the Consent Decree." States S.M. Mem. 32. The proposed decree thus raises the prospect of other steps that the United States would be obligated to take to "maintain [such] consistency." Third Report Add. 20; see *id.* at 44 (describing the specified examples as "a minimum"). The proposed decree would also allow the States to "modif[y]" the appendix at any time, *id.* at 22, and thus "alter the discretion of the United States to operate the Project" in additional ways, *id.* at 20.

2. A second set of obligations imposed on the United States appears in a part of the proposed consent decree entitled "Injunction," Third Report Add. 7 (emphasis omitted; capitalization altered), which contains "provisions for ensuring that Project operations effectuate the equitable apportionment of water" set forth in the proposed decree, *id.* at 10. Those provisions include an obligation on the United States to transfer water between Districts for the purpose of "avoid[ing] excessive Accrued Index Departures." *Id.* at 14. The provisions also include an obligation to transfer water from EBID to EP1 to remedy violations of the decree (*i.e.*, "exceedances of the Negative Departure limit") on New Mexico's behalf. *Id.* at 12.

The proposed decree provides, for example, that if "accrued Negative Departures" reach a certain amount—

called the "Negative Departure Trigger"—New Mexico shall either take unspecified "water management actions" or exercise "the option to transfer" water from EBID to EP1. Third Report Add. 14. If New Mexico chooses the latter (and Texas consents), the United States would be "require[d]" to conduct the transfer. *Ibid.* The proposed decree further provides that if "the accrued Negative Departures have not been reduced" to a certain level after three years, "then part of the water apportioned to New Mexico shall be transferred to Texas," and the United States "will implement" the transfer. *Id.* at 14-15; see *id.* at 16 (similarly providing that "Reclamation will implement" transfers of water from EP1 to EBID if "accrued Positive Departures" reach a certain amount). And "if New Mexico exceeds the accrued Negative Departure limit" (and is thus in violation of the decree) for three or more years, New Mexico "shall provide" a specified amount of water "in excess of its Index Obligation" and "shall have the option" of doing so by transferring water from EBID to EP1. *Id.* at 12-13. Once again, the United States would be required to conduct the transfer. See Barroll 2d Decl. ¶ 16 ("Reclamation will make Transfers when called for by the Consent Decree.").

3. A third set of obligations, also found in the "Injunction" part of the proposed consent decree, Third Report Add. 7 (emphasis omitted; capitalization altered), would require the "United States" to "operate[] and maintain[]" the El Paso Gage in accordance with rules promulgated by the Rio Grande Compact Commission, *id.* at 10. The gage is not currently subject to those rules, which can be amended by the Commission at any time. See Compact art. XII, 53 Stat. 791; Estrada-Lopez Decl., Ex. A, at 15-19, Doc. 754-2. Ensuring that

the gage "continually meet[s]" the Commission's standards would thus require additional funding and resources. Third Report Add. 10; see Finn Decl. ¶¶ 9-10, Doc. 754-4.

C. There Is No Valid Basis For Imposing Obligations On The United States Without The United States' Consent

The States and the Special Master acknowledge that the proposed consent decree would impose obligations on the United States. See, *e.g.*, Third Report 42 (acknowledging that "Reclamation will be required to continue operating pursuant to the D2 regression rubric" and that "Reclamation will have to amend its accounting procedures"); States S.M. Mem. 32-33 (referencing "[e]xamples of procedures that are necessary to maintain consistency between the Consent Decree and Project operations"); Brandes 2d Decl. ¶ 20, Doc. 755-B ("[I]mplementation of the provisions of the Consent Decree will require certain changes to current Project operations and accounting procedures."); Hamman Decl. ¶ 11 ("The EEPI will require adjustments to Rio Grande Project operations and accounting."). That should be dispositive. A "court may not enter a consent decree that imposes obligations on a party that did not consent to the decree," *Firefighters*, 478 U.S. at 529, and there is no valid basis here for departing from that principle.

1. The obligations that would be imposed on the United States cannot be justified by this Court's precedents

Throughout his report, the Special Master invokes this Court's decisions in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), and *California* v. *United States*, 438 U.S. 645 (1978). See Third Report 54-66, 105. Neither decision, however, lends any support to the notion that the proposed consent decree

may impose obligations on the United States without the United States' consent.

a. *Hinderlider* involved the La Plata River Compact, which apportioned the waters of the La Plata River between Colorado and New Mexico. 304 U.S. at 95-97. By its terms, that compact permitted the use of "all" of the river's waters to be "rotated between the two States" during periods of low flow, and authorized "the State engineers of the States" to "jointly determine" how long such a rotation should "continue." *Id.* at 97 (citation omitted). Exercising that authority, the "State Engineers agreed that, in order to put the water to its most efficient use in the hot summer months of 1928," "each State should be permitted to enjoy the entire flow of the river during alternating ten-day periods." *Ibid.* When Colorado denied its citizens the use of the river's waters during New Mexico's turn in the rotation, a Colorado ditch company sued, alleging that it had a state-law right to use the waters. *Id.* at 95, 98. Colorado defended on the ground that the compact authorized the denial. *Id.* at 95. The lower courts rejected that defense, and this Court reversed. *Id.* at 100-101, 111.

The Court held that each State "possessed the right only to an equitable share of the stream," *Hinderlider*, 304 U.S. at 108; that the compact had, consistent with the Constitution, determined each State's equitable share, *id.* at 104; and that the compact's apportionment was "binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact," *id.* at 106. The Court also upheld the constitutionality of the compact's "delegation to the State Engineers of the authority to determine" when use of the stream should be "rotated" between the States. *Id.* at 108. The Court there-

fore rejected the contention that the ditch company had been unlawfully deprived of "any vested right." *Ibid.*

Nothing in the Court's decision suggests that a consent decree may impose obligations on a party that has not consented to the decree. After all, *Hinderlider* did not involve a consent decree or even an attempt to resolve a dispute through settlement. Rather, *Hinderlider* involved a compact that delegated to Colorado and New Mexico the authority to determine when the use of a river's waters should be rotated between them. 304 U.S. at 97. Thus, when Colorado denied its citizens the use of those waters during New Mexico's turn in the rotation, Colorado was exercising authority conferred by the compact itself. *Id.* at 108.

Here, by contrast, the States do not purport to be exercising authority granted to them under the Compact. Instead, what they ask this Court to do is enter a "Consent Decree." States S.M. Mem. 1. And "it is the agreement of the parties, rather than the force of the law upon which the complaint was originally based, that creates the obligations embodied in a consent decree." *Firefighters*, 478 U.S. at 522. Because *Hinderlider* does not speak to the obligations that such an agreement may impose on others, that decision is inapposite here.

b. *California* v. *United States* is likewise inapposite. In that case, the United States sought to impound water from the Stanislaus River in California as part of a federal reclamation project authorized under the Reclamation Act. 438 U.S. at 651-652. The United States applied for a permit from California to "appropriate the water that would be impounded." *Id.* at 652. The relevant state agency ruled, however, that "the water could not be allocated to the [federal government] under state law unless [the government] agreed to and complied with

various conditions," *id.* at 647—among them, that it "show firm commitments, or at least a specific plan, for the use of the water," *id.* at 652. The court of appeals held that the State "could not impose any conditions whatever on the United States' appropriation permit," and this Court reversed. *Id.* at 679.

The Court observed that Section 8 of the Reclamation Act requires the federal government, "in carrying out the provisions of th[e] Act," to "proceed in conformity with" state laws "relating to the control, appropriation, use, or distribution of water used in irrigation." *California* v. *United States*, 438 U.S. at 650 (emphasis omitted) (quoting 32 Stat. 390). The Court interpreted that provision to allow the State to "impos[e] conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question." *Id.* at 674. Noting that the lower courts had not addressed whether "the conditions actually imposed [we]re inconsistent with congressional directives," this Court remanded for further proceedings. *Id.* at 679.

The Court's decision in *California* v. *United States* says nothing about whether a consent decree may impose obligations on a party that has not consented. The case did not even involve such obligations; it involved "conditions." 438 U.S. at 674. Those are not the same thing. When a State specifies conditions on a permit to the United States, the United States may either accept the conditions or walk away, without taking on any obligations. Under the proposed consent decree, by contrast, the United States would have no such choice; the proposed decree would force the United States to take on obligations that it has never accepted. *California* v.

United States therefore lends no support to the proposed decree.[6]

2. The obligations that would be imposed on the United States cannot be justified as obligations that already exist

a. The States and the Special Master also assert that the United States has "no basis to object" to its obligations under the proposed consent decree because those obligations would not be "new." States S.M. Mem. 56; see Third Report 9. But the "obligations embodied in a consent decree" are "create[d]" by "the agreement of the parties," not by "the law upon which the complaint was originally based." *Firefighters*, 478 U.S. at 522. Therefore, *any* obligation imposed in a consent decree would necessarily be a new obligation, created by the decree itself. That is why the word "new" does not appear in the test articulated in *Firefighters*. Because any obligation would be a new one, the relevant question is simply whether the proposed consent decree would impose on a nonconsenting party any "obligations" at all. *Id.* at 529. Obviously, it would.

In any event, the States acknowledge, as they must, that the "centerpiece of the Consent Decree"—measuring Compact compliance by the EEPI—is "new." States S.M. Mem. 29, 30; see States S.M. Reply 68 (acknowledging that the EEPI is "undoubtedly" "a 'new' methodology"); Third Report 42, 79 (referencing "the newly articulated" index). It follows that the United States'

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[6] To the extent that the Special Master may have relied on *Hinderlider* and *California* v. *United States* to justify the dismissal of the United States' Compact claims, see pp. 17-28, *supra*, that reliance was also misplaced. Neither case involved a consent decree, let alone an attempt to settle the claims of a nonconsenting party.

obligations to make Project operations and accounting "consistent with" the EEPI, to avoid "interfer[ing] with" the EEPI, to "implement" interdistrict water transfers in accordance with the EEPI, and to "operate[] and maintain[]" the El Paso Gage for the EEPI are all new, too. Third Report Add. 10, 15-16, 20, 44-45.

b. The States and the Special Master nevertheless contend that the United States' obligations under the proposed consent decree would be mere "manifestations" of the United States' "existing obligation to effectuate the equitable apportionment under the Compact" and therefore should not be considered "new." States S.M. Reply 62; see Third Report 104. But as explained above, the "obligations embodied in a consent decree" are "create[d]" by "the agreement of the parties," not by "the law upon which the complaint was originally based." *Firefighters*, 478 U.S. at 522. The obligations that a consent decree would impose on a nonconsenting party therefore cannot be justified as mere manifestations of that law—here, the Compact. Regardless of what that law may (or may not) require, the "legal force of a consent decree" still rests on "the parties' consent," *id.* at 525, which cannot be the basis for imposing obligations on a party that has not actually consented, *id.* at 529.

In any event, the United States' obligations under the proposed consent decree are not mere "manifestations" of an "existing obligation." States S.M. Reply 62. It is true that the United States has "assumed a legal responsibility to deliver a certain amount of water to Texas." 138 S. Ct. at 959. But as this Court has recognized, that is a legal responsibility that the United States assumed in "the Downstream Contracts." *Ibid.* And far from honoring the United States' contracts with

the downstream Districts, the proposed decree would undermine them. For example, the proposed decree would force the United States to transfer water from one District to another in ways that the contracts do not allow and require the United States to modify the formula that it uses in allocating water downstream. See pp. 30-33, *supra*. Because the United States' obligations under the proposed decree would be contrary to, rather than consistent with, the United States' existing responsibilities, the States' and the Special Master's attempt to justify those obligations fails even on its own terms.

3. The obligations that would be imposed on the United States cannot be justified as merely de minimis

a. The Special Master also expressed the view that the United States' obligations under the proposed consent decree would be "*de minimis*." Third Report 105. But there is no de minimis exception to the rule that a consent decree "may not impose duties or obligations on a third party, without that party's agreement." *Firefighters*, 478 U.S. at 529. As explained above, that rule reflects fundamental principles of contract law. See pp. 29-30, *supra*. And those principles preclude contracting parties from imposing on a nonconsenting third party *any* obligation, de minimis or not.

The Special Master suggests that this Court should exercise its "unique discretion in the original jurisdiction context" to recognize a de minimis exception here. Third Report 105. But the differences between this case and "ordinary litigation" cut in the other direction. 138 S. Ct. at 958. Unlike a "normal litigant," *ibid.*, the United States enjoys sovereign immunity, "even when one of the States invokes this Court's jurisdiction," *California* v. *Arizona*, 440 U.S. 59, 61 (1979). And the United States has not waived its sovereign immunity in this case. See

Doc. 338, at 14-22 (dismissing New Mexico's proposed counterclaims for that reason). That immunity makes a de minimis exception to the usual rule against imposing obligations on nonconsenting parties particularly unwarranted here.

To the extent that the Special Master sought to justify a de minimis exception on the ground that States should be encouraged to settle disputes between them, see Third Report 112-113, that suggestion was also misguided. There are many ways in which the States could settle their own claims in this case without imposing any obligations on the United States. As noted, Texas could agree to dismiss its own claims in exchange for New Mexico's undertaking to reduce groundwater pumping below a certain level. See pp. 23-24, *supra*. Not only would such a settlement be consistent with the principles articulated in *Firefighters*, it would also mirror the relief sought in Texas's complaint. See Tex. Compl. 16 (seeking an injunction against "all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project").

b. In any event, the obligations that would be imposed on the United States would hardly be de minimis. As explained above, the proposed consent decree would force the United States to operate the Project in a particular manner, require the United States to transfer water at the States' direction, and undermine the United States' contractual relationships with the Districts. See pp. 30-34, 39-40, *supra*. The proposed decree would also subject the United States to additional, unspecified changes to Project operations in the future. See p. 32, *supra*.

In attempting to minimize the obligations that would be imposed, the Special Master suggested that the pro-

posed consent decree would "essentially adopt[] Reclamation's own method of operating" under the 2008 Operating Agreement. Third Report 107. But the proposed decree would require the United States to take actions outside the bounds of the 2008 Operating Agreement, including conducting "forced interdistrict water transfers." *Id.* at 68. And the proposed decree would require the United States to make changes to the heart of Project operations, including to the equation that it uses in allocating water to the Districts. See p. 31, *supra*.

Moreover, neither the 2008 Operating Agreement nor the D2 Curve that it uses was ever intended to represent a legal standard for New Mexico's compliance with the Compact. The applicable legal standard is defined by conditions in 1938, not during the D2 Period. See p. 47, *infra*. Under the 2008 Operating Agreement, the United States uses the D2 Curve only descriptively, to capture the effects of groundwater pumping on deliveries downstream. See p. 9, *supra*. And the Operating Agreement itself is set to expire in 2050. See *ibid.* Under the proposed decree, by contrast, the United States would have a permanent legal obligation to use a "[m]odified" version of the D2 Curve "[t]o maintain consistency with the EEPI." Third Report Add. 44.

The Special Master also relied on a statement that counsel for the United States made during a hearing on New Mexico's counterclaims: "once we have a decree that defines what each state has, then we can look to project operations and determine whether those operation are consistent with that decree." 4/2/19 Tr. 49; see Third Report 105. The "decree" to which that statement refers, however, is not a consent decree, but a decree following an adjudication of the United States' Compact claims *on the merits*. Nothing in that statement suggests

that the States could enter into a consent decree that disposes of the United States' claims and imposes obligations on the United States without the United States' consent.

III. THE PROPOSED CONSENT DECREE SHOULD BE REJECTED BECAUSE IT WOULD BE CONTRARY TO THE COMPACT

A congressionally approved interstate compact has the status of "federal law, which binds the States unless and until Congress says otherwise." *Kansas* v. *Nebraska*, 574 U.S. 445, 472 (2015). For States to "enter into a settlement contrary to the Compact" would thus be "to violate a federal statute." *Ibid.* The States' proposed consent decree would be contrary to the Compact in three ways.

A. The Proposed Consent Decree Would Define Compact Compliance In Terms Of A Texas-State-Line Delivery Requirement

The Compact "require[s] Colorado to deliver a specified amount of water annually to New Mexico at the state line." 138 S. Ct. at 957. "But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line, the Compact direct[s] New Mexico to deliver water to [Elephant Butte] Reservoir." *Ibid.*; see *id.* at 957 n.*. As this Court has explained, that "choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts," which provided for delivery of Project water to both southern New Mexico and Texas. *Id.* at 957.

The proposed consent decree cannot be squared with that choice made by the States and approved by Congress. As the States acknowledge, the proposed decree

would "define[] a new Index under which the annual release from Caballo Dam will be used to determine New Mexico's obligation to deliver water to Texas at the El Paso Gage," "a stream gage very near the New Mexico-Texas state line." States S.M. Mem. 30. The proposed decree would thus do exactly what the authors of the Compact chose not to do: define New Mexico's Compact obligation as one "to deliver a specified amount of water annually to the Texas state line." 138 S. Ct. at 957; see Third Report Add. 8 (equating "compliance with th[e] Decree" with "compliance with the Compact").

The Special Master suggested that "advancements in technology" have rendered a Texas-state-line delivery requirement more feasible today than when the Compact was signed. Third Report 74. But there was already a gage at El Paso when the Compact was signed. See *Joint Investigation* 170, Doc. 413-4, at 828 (table showing flows at the gage); Doc. 701-8, at 180. The States and Congress declined to make an index at that gage the standard for New Mexico's compliance with the Compact. The States cannot unilaterally rewrite the Compact to undo that decision. If the Compact warrants updating, Congress must consent. See Compact art. XIII, 53 Stat. 791-792.

B. The Proposed Consent Decree Would Turn The United States Into An Agent Of The States

As this Court has recognized, "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts." 138 S. Ct. at 959. When New Mexico delivers water to Elephant Butte Reservoir, the water becomes part of "Project Storage." Compact art. I(k), 53 Stat. 786. From there, the United States releases the water "in accordance with irrigation demands," Compact art. I(*l*), 53 Stat. 786, "to meet its

duties under the Downstream Contracts," 138 S. Ct. at 959. "In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of '"agent" of the Compact.'" *Ibid.* (citation omitted). "Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *Ibid.* Either way, the bottom line is the same: The Compact relies on the United States' operation of the Project, pursuant to its "duties under the Downstream Contracts," to accomplish the apportionment of the Rio Grande below Elephant Butte. *Ibid.*

Under the proposed consent decree, however, the United States' "duties under the Downstream Contracts" would no longer be what determines the downstream apportionment and compliance with the Compact. 138 S. Ct. at 959. Rather, the States themselves would dictate the terms of the apportionment and the use of procedures that they can modify at any time. See pp. 30-34, *supra.* Instead of protecting the downstream contracts (and thus the Project and the Compact) from interference, the proposed decree would give the States a right to interfere—by, for example, prescribing interdistrict water transfers and changes to Project operations and accounting. See pp. 39-40, *supra.*

The Special Master purported to find support for the States' role under the proposed consent decree in *Hinderlider* and *California* v. *United States*. Third Report 79-80. But *Hinderlider* involved a compact that expressly delegated to the States the power to determine when use of the river should be rotated. 304 U.S. at 108. There is no similar delegation of authority to the States here; to the contrary, the Compact entrusts the allocation of water below Elephant Butte to the Project. See 138 S. Ct. at 959. *California* v. *United States*, moreover,

recognized that States may not ignore relevant "congressional directives." 438 U.S. at 679. Here, the relevant congressional directive is the Compact itself, which precludes the States from assuming the role that the proposed decree would give them.

C. The Proposed Consent Decree Would Define Compact Compliance To Permit Interference Beyond The 1938 Baseline

When the Compact was signed in 1938, groundwater pumping in New Mexico below Elephant Butte was minimal. During the D2 Period, however, groundwater pumping increased dramatically—and since then, has continued to climb, in part because of rising groundwater use for non-irrigation purposes. Such pumping interferes with the Project by drawing water away from the river and return flows. See pp. 7-9, *supra*.

As noted, Compact compliance under the proposed consent decree would be defined in terms of a delivery requirement at the Texas state line. See pp. 43-44, *supra*. That requirement, in turn, would be calculated according to a regression equation that reflects the conditions that existed during the D2 Period, including the effects of groundwater pumping on Project water supply. See p. 14, *supra*. By accepting such interference with the Project as a given without requiring any offsetting measures, see, *e.g.*, Hamman Decl. ¶ 14 (acknowledging that New Mexico could reduce overall depletions through various measures, such as "the acquisition of water rights," "temporary fallowing," and "importation"), the proposed decree would define Compact compliance to allow such interference to continue at D2 levels.

But the baseline on which the Compact was predicated was the baseline that existed when the Compact was signed—not decades later, after groundwater pump-

ing in New Mexico had greatly increased and drawn water away from the Project. As Texas put it in its complaint, the Compact was "predicated on the understanding 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." Tex. Compl. ¶ 18. The Special Master recognized as much in his summary-judgment ruling. See Doc. 503, at 6 (concluding that the Compact requires "protection of a baseline level of Project operations" that "can be viewed as akin to a '1938 condition' as urged generally by Texas"). And Texas represents that if this case were to return to trial, its "position will be that the 1938 condition should be the proper baseline." Doc. 756, at 8. Because the proposed consent decree would define Compact compliance to permit interference with the Project beyond that baseline, the proposed decree would be contrary to the Compact.

CONCLUSION

The States' joint motion to enter a consent decree should be denied.

Respectfully submitted.

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APPENDIX

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APPENDIX A

The Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, provides:

AN ACT

Giving the consent and approval of Congress to the Rio Grande compact signed at Santa Fe, New Mexico, on March 18, 1938.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the consent and approval of Congress is hereby given to the compact signed by the commissioners for the States of Colorado, New Mexico, and Texas at Santa Fe, New Mexico, on March 18, 1938, and thereafter approved by the legislatures of the States of Colorado, New Mexico, and Texas, which compact reads as follows:

RIO GRANDE COMPACT

The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes, and to that end, through their respective Governors, have named as their respective Commissioners:

For the State of Colorado—M. C. Hinderlider

For the State of New Mexico—Thomas M. McClure

For the State of Texas—Frank B. Clayton who, after negotiations participated in by S.O. Harper, appointed by the President as the representative of the United States of America, have agreed upon the following articles, to-wit:

ARTICLE I.

(a) The State of Colorado, the State of New Mexico, the State of Texas, and the United States of America, are hereinafter designated "Colorado," "New Mexico," "Texas," and the "United States," respectively.

(b) "The Commission" means the agency created by this Compact for the administration thereof.

(c) The term "Rio Grande Basin" means all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman, including the Closed Basin in Colorado.

(d) The "Closed Basin" means that part of the Rio Grande Basin in Colorado where the streams drain into the San Luis Lakes and adjacent territory, and do not normally contribute to the flow of the Rio Grande.

(e) The term "tributary" means any stream which naturally contributes to the flow of the Rio Grande.

(f) "Transmountain Diversion" is water imported into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, exclusive of the Closed Basin.

(g) "Annual Debits" are the amounts by which actual deliveries in any calendar year fall below scheduled deliveries.

(h) "Annual Credits" are the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.

(i) "Accrued Debits" are the amounts by which the sum of all annual debits exceeds the sum of all annual credits over any common period of time.

(j) "Accrued Credits" are the amounts by which the sum of all annual credits exceeds the sum of all annual debits over any common period of time.

(k) "Project Storage" is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre-feet.

(*l*) "Usable Water" is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.

(m) "Credit Water" is that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.

(n) "Unfilled Capacity" is the difference between the total physical capacity of project storage and the amount of usable water then in storage.

(o) "Actual Release" is the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.

(p) "Actual Spill" is all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current de-

mand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.

(q) "Hypothetical Spill" is the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet had been released therefrom at rates proportional to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs; in computing hypothetical spill the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following the effective date of this Compact, and thereafter the initial condition shall be the amount of usable water in project storage at the beginning of the calendar year following each actual spill.

ARTICLE II.

The Commission shall cause to be maintained and operated a stream gaging station equipped with an automatic water stage recorder at each of the following points, to-wit:

(a) On the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley;

(b) On the Conejos River near Mogote;

(c) On the Los Pinos River near Ortiz;

(d) On the San Antonio River at Ortiz;

(e) On the Conejos River at its mouths near Los Sauces;

(f) On the Rio Grande near Lobatos;

(g) On the Rio Chama below El Vado Reservoir;

(h) On the Rio Grande at Otowi Bridge near San Ildefonso;

(i) On the Rio Grande near San Acacia;

(j) On the Rio Grande at San Marcial;

(k) On the Rio Grande below Elephant Butte Reservoir;

(*l*) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the Compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929.

Such gaging stations shall be equipped, maintained, and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to produce reliable records at all times.

ARTICLE III.

The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year, shall be ten thousand acre feet less than the sum of those quantities set forth in the two following tabulations of relationship, which correspond to the quantities at the upper index stations:

DISCHARGE OF CONEJOS RIVER

Quantities in Thousands of Acre Feet

Conejos Index Supply (1)	Conejos River at Mouths (2)	Conejos Index Supply (1)	Conejos River at Mouths (2)
100	0	450	232
150	20	500	278
200	45	550	326
250	75	600	376
300	109	650	426
350	147	700	476
400	188		

Intermediate quantities shall be computed by proportional parts.

(1) Conejos Index Supply is the natural flow of Conejos River at the U. S. G. S. gaging station near Mogote during the calendar year, plus the natural flow of Los Pinos River at the U. S. G. S. gaging station near Ortiz and the natural flow of San Antonio River at the U. S. G. S. gaging station at Ortiz, both during the months of April to October, inclusive.

(2) Conejos River at Mouths is the combined discharge of branches of this river at the U. S. G. S. gaging stations near Los Sauces during the calendar year.

DISCHARGE OF RIO GRANDE EXCLUSIVE OF CONEJOS RIVER

Quantities in Thousands of Acre Feet

Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)	Rio Grande at Del Norte (3)	Rio Grande at Lobatos less Conejos at Mouths (4)
200	60	750	229
250	65	800	257
300	75	850	292
350	86	900	335
400	98	950	380
450	112	1000	430
500	127	1100	540
550	144	1200	640
600	162	1300	740
650	182	1400	840
700	204		

Intermediate quantities shall be computed by proportional parts.

(3) Rio Grande at Del Norte is the recorded flow of the Rio Grande at the U. S. G. S. gaging station near Del Norte during the calendar year (measured above all principal points of diversion to San Luis Valley) corrected for the operation of reservoirs constructed after 1937.

(4) Rio Grande at Lobatos less Conejos at Mouths is the total flow of the Rio Grande at the U. S. G. S. gaging stations near Lobatos, less the discharge of Conejos River at its Mouths, during the Calendar year.

The application of those schedules shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) any new or increased depletion of the runoff above inflow index gaging stations; and (c) any transmountain diversions into the drainage basin of the Rio Grande above Lobatos.

In event any works are constructed after 1937 for the purpose of delivering water into the Rio Grande from the Closed Basin, Colorado shall not be credited with the amount of such water delivered, unless the proportion of sodium ions shall be less than forty-five percent of the total positive ions in that water when the total dissolved solids in such water exceeds three hundred fifty parts per million.

ARTICLE IV.

The obligation of New Mexico to deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August and September, shall be that quantity set forth in the following tabulation of relationship, which corresponds to the quantity at the upper index station:

DISCHARGE OF RIO GRANDE AT OTOWI BRIDGE AND AT SAN MARCIAL EXCLUSIVE OF JULY, AUGUST AND SEPTEMBER

Quantities in Thousands of Acre Feet

Otowi Index Supply (5)	San Marcial Index Supply (6)	Otowi Index Supply (5)	San Marcial Index Supply (6)
100	0	1300	1042
200	65	1400	1148
300	141	1500	1257
400	219	1600	1370

500	300	1700	1489
600	383	1800	1608
700	469	1900	1730
800	557	2000	1856
900	648	2100	1985
1000	742	2200	2117
1100	839	230	2253
1200	939		

Intermediate quantities shall be computed by proportional parts.

(5) The Otowi Index Supply is the recorded flow of the Rio Grande at the U. S. G. S. gaging station at Otowi Bridge near San Ildefonso (formerly station near Buckman) during the calendar year, exclusive of the flow during the months of July, August and September, corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge.

(6) San Marcial Index Supply is the recorded flow of the Rio Grande at the gaging station at San Marcial during the calendar year exclusive of the flow during the months of July, August and September.

The application of this schedule shall be subject to the provisions hereinafter set forth and appropriate adjustments shall be made for (a) any change in location of gaging stations; (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff at Otowi Bridge; (c) depletion of the runoff during July, August and September of tributaries between Otowi Bridge and San Marcial, by works constructed after 1937; and (d) any transmountain diversions into the Rio Grande between Lobatos and San Marcial.

Concurrent records shall be kept of the flow of the Rio Grande at San Marcial, near San Acacia, and of the release from Elephant Butte Reservoir, to the end that the records at these three stations may be correlated.

ARTICLE V.

If at any time it should be the unanimous finding and determination of the Commission that because of changed physical conditions, or for any other reason, reliable records are not obtainable or cannot be obtained, at any of the stream-gaging stations herein referred to, such stations may, with the unanimous approval of the Commission, be abandoned, and with such approval another station, or other stations, shall be established and new measurements shall be substituted which, in the unanimous opinion of the Commission, will result in substantially the same results, so far as the rights and obligations to deliver water are concerned, as would have existed if such substitution of stations and measurements had not been so made.

ARTICLE VI.

Commencing with the year following the effective date of this Compact, all credits and debits of Colorado and New Mexico shall be computed for each calendar year; provided, that in a year of actual spill no annual credits nor annual debits shall be computed for that year.

In the case of Colorado, no annual debit nor accrued debit shall exceed 100,000 acre feet, except as either or both may be caused by holdover storage of water in revervoirs constructed after 1937 in the drainage basin of the Rio Grande above Lobatos. Within the physical limitations of storage capacity in such reservoirs, Colo-

rado shall retain water in storage at all times to the extent of its accrued debit.

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit. In computing the magnitude of accrued credits or debits, New Mexico shall not be charged with any greater debit in any one year than the sum of 150,000 acre feet and all gains in the quantity of water in storage in such year.

The Commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.

In computing the amount of accrued credits and accrued debits of Colorado or New Mexico, any annual credits in excess of 150,000 acre feet shall be taken as equal to that amount.

In any year in which actual spill occurs, the accrued credits of Colorado, or New Mexico, or both, at the beginning of the year shall be reduced in proportion to their respective credits by the amount of such actual spill; provided, that the amount of actual spill shall be deemed to be increased by the aggregate gain in the amount of water in storage, prior to the time of spill, in reservoirs above San Marcial constructed after 1929; provided, further, that if the Commissioners for the

States having accrued credits authorize the release of part, or all, of such credits in advance of spill, the amount so released shall be deemed to constitute actual spill.

In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled.

In any year in which the aggregate of accrued debits of Colorado and New Mexico exceeds the minimum unfilled capacity of project storage, such debits shall be reduced proportionally to an aggregate amount equal to such minimum unfilled capacity.

To the extent that accrued credits are impounded in reservoirs between San Marcial and Courchesne, and to the extent that accrued debits are impounded in reservoirs above San Marcial, such credits and debits shall be reduced annually to compensate for evaporation losses in the proportion that such credits or debits bore to the total amount of water in such reservoirs during the year.

ARTICLE VII.

Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage; provided, that if the actual releases of usable water from the beginning of the calendar year following the effective date of this Compact, or from the beginning of the calendar year following actual spill, have aggregated more than an average of 790,000 acre feet per annum, the time at which such minimum stage is reached shall be adjusted to compensate for the difference between the total actual release

and releases at such average rate; provided, further, that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.

ARTICLE VIII.

During the month of January of any year the Commissioner for Texas may demand of Colorado and New Mexico, and the Commissioner for New Mexico may demand of Colorado, the release of water from storage reservoirs constructed after 1929 to the amount of the accrued debits of Colorado and New Mexico, respectively, and such releases shall be made by each at the greatest rate practicable under the conditions then prevailing, and in proportion to the total debit of each, and in amounts, limited by their accrued debits, sufficient to bring the quantity of usable water in project storage to 600,000 acre-feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal release of 790,000 acre feet may be made from project storage in that year.

ARTICLE IX.

Colorado agrees with New Mexico that in event the United States or the State of New Mexico decides to construct the necessary works for diverting the waters of the San Juan River, or any of its tributaries, into the Rio Grande, Colorado hereby consents to the construction of said works and the diversion of waters from the San Juan River, or the tributaries thereof, into the Rio Grande in New Mexico, provided the present and prospective uses of water in Colorado by other diversions

from the San Juan River, or its tributaries, are protected.

ARTICLE X.

In the event water from another drainage basin shall be imported into the Rio Grande Basin by the United States or Colorado or New Mexico, or any of them jointly, the State having the right to the use of such water shall be given proper credit therefor in the application of the schedules.

ARTICLE XI.

New Mexico and Texas agree that upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled; however, nothing herein shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another. Nothing herein shall be construed as an admission by any signatory state that the use of water for irrigation causes increase of salinity for which the user is responsible in law.

ARTICLE XII.

To administer the provisions of this Compact there shall be constituted a Commission composed of one representative from each state, to be known as the Rio Grande Compact Commission. The State Engineer of Colorado shall be ex-officio the Rio Grande Compact Commissioner for Colorado. The State Engineer of New Mexico shall be ex officio the Rio Grande Compact Commissioner for New Mexico. The Rio Grande Compact Commissioner for Texas shall be appointed by the

Governor of Texas. The President of the United States shall be requested to designate a representative of United States to sit with such Commission, and such representative of the United States, if so designated by the President, shall act as Chairman of the Commission without vote.

The salaries and personal expenses of the Rio Grande Compact Commissioners for the three States shall be paid by their respective States, and all other expenses incident to the administration of this Compact, not borne by the United States, shall be borne equally by the three States.

In addition to the powers and duties hereinbefore specifically conferred upon such Commission, and the members thereof, the jurisdiction of such Commission shall extend only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of this Compact, and, by unanimous action, to the making of recommendations to the respective States upon matters connected with the administration of this Compact. In connection therewith, the Commission may employ such engineering and clerical aid as may be reasonably necessary within the limit of funds provided for that purpose by the respective States. Annual reports compiled for each calendar year shall be made by the Commission and transmitted to the Governors of the signatory States on or before March first following the year covered by the report. The Commission may, by unanimous action, adopt rules and regulations consistent with the provisions of this Compact to govern their proceedings.

The findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact.

ARTICLE XIII.

At the expiration of every five-year period after the effective date of this Compact, the Commission may, by unanimous consent, review any provisions hereof which are not substantive in character and which do not affect the basic principles upon which the Compact is founded, and shall meet for the consideration of such questions on the request of any member of the Commission; provided, however, that the provisions hereof shall remain in full force and effect until changed and amended within the intent of the Compact by unanimous action of the Commissioners and until any changes in this Compact are ratified by the legislatures of the respective states and consented to by the Congress, in the same manner as this Compact is required to be ratified to become effective.

ARTICLE XIV.

The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increases or diminution in the delivery or loss of water to Mexico.

ARTICLE XV.

The physical and other conditions characteristic of the Rio Grande and peculiar to the territory drained and served thereby, and to the development thereof, have actuated this Compact and none of the signatory states admits that any provisions herein contained establishes any general principle or precedent applicable to other interstate streams.

ARTICLE XVI.

Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to the Indian tribes, or as impairing the rights of the Indian tribes.

ARTICLE XVII.

This Compact shall become effective when ratified by the legislatures of each of the signatory States and consented to by the Congress of the United States. Notice of ratification shall be given by the Governor of each State to the Governors of the other States and to the President of the United States, and the President of the United States is requested to give notice to the Governors of each of the signatory States of the consent of the Congress of the United States.

IN WITNESS WHEREOF, the Commissioners have signed this Compact in quadruplicate original, one of which shall be deposited in the archives of the Department of State of the United States of America and shall be deemed the authoritative original, and of which a duly certified copy shall be forwarded to the Governor of each of the signatory States.

Done at the City of Santa Fe, in the State of New Mexico, on the 18th day of March, in the year of our Lord, One Thousand Nine Hundred and Thirty-eight.

M. C. HINDERLIDER.
THOMAS M. MCCLURE.
FRANK B. CLAYTON.

Approved:

S. O. HARPER.

Approved, May 31, 1939.

APPENDIX B

1. The Reclamation Act of 1902, ch. 1093, 32 Stat. 388, provides:

CHAP. 1093.—An Act Appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one, including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: *Provided*, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agri-

cultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an Act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated.

SEC. 2. That the Secretary of the Interior is hereby authorized and directed to make examinations and Surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed.

SEC. 3. That the Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the sur-

veys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: *Provided*, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: *Provided*, That the commutation provisions of the homestead laws shall not apply to entries made. under this Act.

SEC. 4. That upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in ques-

tion; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: *Provided*, That in all construction work eight hours shall constitute a day's work, and no Mongolian labor shall be employed thereon.

SEC. 5. That the entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be al-

lowed the usual commissions on all moneys paid for lands entered under this Act.

SEC. 6. That the Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: *Provided*, That when the payments required by this Act Ownership are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: *Provided*, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress.

SEC. 7. That where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice.

SEC. 8. That nothing in this Act shall be construed as affecting or not 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: *Provided*, 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.

SEC. 9. That it is hereby declared to be the duty of the Secretary of the Interior in carrying out the provisions of this Act, so far as the same may be practicable and subject to the existence of feasible irrigation projects, to expend the major portion of the funds arising from the sale of public lands within each State and Territory hereinbefore named for the benefit of arid and semiarid lands within the limits of such State or Territory: *Provided*, That the Secretary may temporarily use such portion of said funds for the benefit of arid or semiarid lands in any particular State or Territory hereinbefore named as he may deem advisable, but when so used the excess shall be restored to the fund as soon as practicable, to the end that ultimately, and in any event, within each ten-year period after the passage of this Act, the expenditures for the benefit of the said States and Territories shall be equalized according to the proportions and subject to the conditions as to practicability and feasibility aforesaid.

SEC. 10. That the Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect.

Approved, June 17, 1902.

2. Act of Feb. 25, 1905, ch. 798, 33 Stat. 814, provides:

CHAP. 798—An Act Relating to the construction of a dam and reservoir on the Rio Grande, in New Mexico, for the impounding of the flood waters of said river for purposes of irrigation.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the provisions of the reclamation Act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this Act to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory.

Approved, February 25, 1905.

APPENDIX C

CONTRACT

This contract made and entered into by and between the Elephant Butte Irrigation District of New Mexico and El Paso County Water Improvement District No. 1 of Texas, pursuant to resolutions of the Board of Directors of the respective Districts, authorizing the same, WITNESSETH THAT:

WHEREAS, it is expedient that the acreage within each irrigation District which is to be irrigated should be cushioned by allowing the distribution of water to a small excess of acreage over and above that allotted to the two Districts under the Rio Grande New Mexico-Texas Reclamation Project, to the end that annual variations, within narrow limits, shall be permitted, and so that, each year, there will be within the Elephant Butte Irrigation District 88,000 acres of land, and within El Paso County Water Improvement District No. 1, 67,000 acres upon which construction and operation and maintenance charges may be levied;

THEREFORE, it is mutually agreed that either District may increase the acreage to be irrigated and to be subject to construction charges, not to exceed three (3%) per cent of the present authorized acreage in each District, that is to say, Elephant Butte Irrigation District, having authorized acreage of 88,000 acres, may increase such acreage to the extent of three (3%) per cent thereof, amounting to not to exceed 2,640 acres; that El Paso County Water Improvement District No. 1, having a present authorized acreage of 67,000 acres, may increase such acreage to three (3%) per cent thereof, that

is, not to exceed 2,010 acres, said additional lands, in any case, to be within the limits of the present irrigation Districts or any future extensions thereof.

It is further agreed and understood that in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within El Paso County Water Improvement District No. 1, and 88/155 to the lands within the Elephant Butte Irrigation District.

It is further agreed and understood that the operation and maintenance costs of the project works (exclusive of the storage and power development) for the calendar year of 1938 and thereafter shall be distributed between the two districts in the same manner as similar costs were distributed for the calendar year 1937, and that the same ratios for the two Districts, respectively, that were applied to said costs for that year common to both Districts shall be used in 1938 and subsequent years.

This contract to be effective only during the period when the proposed contracts under Public No. 249, Seventy-fifth Congress, 1st Session, between, (1) the United States and Elephant Butte Irrigation District and (2) the United States and El Paso County Water Improvement District No. 1 are in force, and if either or both of said contracts should terminate after both have become effective, this contract is also to terminate.

IN TESTIMONY THEREOF, the parties hereunto have caused the same to be signed by the Presidents of their respective Boards of Directors, and attested by the Secretary with the seal of said corporation, this 16th day of February A. D. 1938.

THE ELEPHANT BUTTE
IRRIGATION DISTRICT
OF NEW MEXICO.

By (Signed) Arthur Starr
President

(SEAL)

ATTEST: (Signed) Jose R. Lucero
Secretary, Elephant Butte
Irrigation District.

EL PASO COUNTY
WATER IMPROVEMENT
DISTRICT
DISTRICT NO. 1 OF
TEXAS

By (Signed) T.D. Porcher
President

(SEAL)

ATTEST: (Signed) Idus T. Gillett
Secretary, El Paso County Water
Improvement District No. 1

APPROVED this 11th DAY OF APRIL, A. D. 1938

(Signed) Oscar L. Chapman
ASSISTANT SECRETARY
OF THE INTERIOR

APPENDIX D

Contract No. 9-07-53-X0554

RIO GRANDE PROJECT
NEW MEXICO

CONTRACT BETWEEN THE

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
BUREAU OF RECLAMATION

and the

ELEPHANT BUTTE IRRIGATION DISTRICT

for the

Transfer of the Operation and
Maintenance of Project Works

THIS CONTRACT is made this 15th date of February 1979, in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto and particularly the Reclamation Project Act of 1939 and Acts of Congress of June 30, 1948 (62 Stat, 1171, 1179); of May 17, 1950 (64 Stat. 163, 176); of September 21, 1959 (73 Stat. 584); of July 14, 1960 (74 Stat, 480, 492); of March 26, 1964 (78 Stat. 171, 172); and of July 27, 1965 (79 Stat. 285), all herein styled the "Federal Reclamation Law," between the UNITED STATES OF AMERICA, herein styled the "United States," acting for this purpose through the Regional Director, Southwest Region, Bureau of Reclamation, herein referred to as "Contracting Officer," and the ELEPHANT BUTTE IRRIGATION DISTRICT, herein

styled the "District," a quasi-municipal corporation organized and existing under the laws of the State of New Mexico having its principal office in the city of Las Cruces, New Mexico.

WITNESSETH THAT:

EXPLANATORY RECITALS

WHEREAS the United States and the District have entered into a series of contracts commencing in 1906 relating to the construction, operation, and maintenance of the Rio Grande Project, New Mexico and Texas, and this contract continues that program, and

WHEREAS, the series of contracts between the United States and the District includes contracts with the Elephant Butte Irrigation District dated November 9, 1937, amended October 1, 1939, which contracts cover the care, operation, and maintenance of the project and payment of the adjusted construction obligation allocated to irrigation, and are herein collectively referred to as the "basic repayment contract," and

WHEREAS, an interim agreement dated December 27, 1978 provided for the temporary operation and maintenance of the transferred District Works by the District, starting January 1, 1979, and

WHEREAS the interim agreement dated December 27, 1978, is terminated upon execution of this contract, and

WHEREAS, the parties desire that the District assume permanent responsibility for operation and maintenance of the works of the District except certain components thereof as hereinafter more particularly described, and

NOW THEREFORE, the parties agree as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed or manifestly incompatable with the intent hereof, the term:

a. "Secretary" or "Contracting Officer" shall mean the Secretary of the Interior of the United States, or his duly authorized representative.

b. "District" shall mean the Elephant Butte Irrigation District. In some standard articles the District is referred to as the "Contractor."

c. "Power and storage reserved works" shall mean the Elephant Butte Dam, Reservoir and Power System and the Caballo Dam and Reservoir.

d. "Water control and conveyance reserved works" shall mean the Percha, Leasburg, Mesilla, and Riverside diversion dams and appurtenances.

e. "Transferred District works" shall mean the remainder of the distribution system to be turned over to the district for operation and maintenance, more specifically identified on Exhibit "A" attached hereto and by this reference made a part of this contract.

f. "Calendar year" shall mean January 1 through December 31 of each year.

TRANSFER OF DISTRICT WORKS

2. Upon execution of this contract, the United States shall transfer to the Elephant Butte Irrigation District and the District shall assume the operation and maintenance of the transferred District works as identified in paragraph 1.e. above and as shown on Exhibit

"A." The United States reserves the right to establish, operate, and maintain hydrological and climatological monitoring devices on or in the transferred District works. Transfer of operation and maintenance of the "transferred District works" to the District shall be accomplished without expense to the United States.

* * * * *

WATER CONTROL

6. a. The United States; will make allocation of available stored project water among Elephant Butte Irrigation District, El Paso County Water Improvement District No. 1, and the Republic of Mexico.

b. The United States will ensure delivery of allocated irrigation water at district canal headings and at other diversion points to be specified by the Contracting Officer and at State line crossings and will make a prompt accounting of said water to the District.

c. In interstate canals, laterals, and drains, (those physically crossing State lines) the United States reserves the right to direct inter-canal diversions, deliveries, and maintenance of waterways and structures by the District to assure the delivery of water and protection of lands of the other involved entities outside District boundaries.

d. In case of extraordinary climatic conditions or major accident to the District's distribution facilities, the United States, at its discretion, may adjust spills of allocated water from the District works. The United States will designate the respective facilities to be used for spill of such water. A detailed operational plan will be concluded between the United States and the District

setting forth procedures for water delivery and accounting.

OPERATION AND MAINTENANCE OF TRANSFERRED WORKS

7. a. The District, without expense to the United States, shall care for, operate, and maintain the transferred District works in full compliance with the terms of this contract, and in such manner that said transferred District works will remain in good and efficient condition to perform the carriage and distribution of water as well and effectively as on the date of such transfer to the District.

b. The District shall promptly make any and all repairs to the Federal project works being operated by it which are necessary for proper care, operation, and maintenance in accordance with paragraph a above. In case of neglect or failure of the District to commence such repairs within 30 days following written notification, and to complete such repairs within a reasonable time, the Contracting Officer may cause the repairs to be made, and the cost thereof shall be paid by the District as prescribed by the Contracting Officer.

c. No substantial change shall be made by the District in any of the major transferred District works without first obtaining the written consent of the Contracting Officer. The request for said change shall be made in writing and include a detailed design of the contemplated work. If the Contracting Officer does not reject such change within 60 days, the District may proceed with the work. Substantial change is defined herein as major relocations or changes in structures and facilities or changes in irrigation service areas.

d. The District shall hold the United States, its officers, agents, and employees harmless as to any and all damages which may in any manner grow out of the care, operation, and maintenance of any of the project works transferred to the District.

* * * * *

IN WITNESS WHEREOF, this contract has been executed as of the day and year first herein above written.

THE UNITED STATES OF AMERICA

By /s/ ROBERT H. WEIMER
Contracting Officer

ELEPHANT BUTTE IRRIGATION DISTRICT of New Mexico

By /s/ [ILLEGIBLE]
President

ATTEST:

/s/ O. E. ANDERSON

February 26, 1979
Secretary of the Elephant Butte Irrigation District of New Mexico

APPENDIX E

* * * * *

Contract No. 0-07-54-X0904

RIO GRANDE PROJECT
TEXAS—NEW MEXICO

CONTRACT BETWEEN THE

UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR
WATER AND POWER RESOURCES SERVICE

and the

EL PASO COUNTY WATER IMPROVEMENT
DISTRICT NO. 1

for the

Transfer of the Operation and Maintenance of
Project Works

THIS CONTRACT is made this 14th day of March 1980, in pursuance of the Act of Congress of June 17, 1902 (32 Stat. 388), and acts amendatory thereof or supplementary thereto and particularly the Reclamation Project Act of 1939 and Acts of Congress of June 30, 1948 (62 Stat. 1171, 1179); of May 17, 1950 (64 Stat. 163, 176); of September 21, 1959 (73 Stat. 584); of July 14, 1960 (74 Stat. 480, 492); of March 26, 1964 (78 Stat. 171, 172); and of July 27, 1965 (79 Stat. 285), all herein styled the "Federal Reclamation Law," between the UNITED STATES OF AMERICA, herein styled the "United States," acting for this purpose through the Regional Director, Southwest Region, Water and Power Resources Service (formerly Bureau of Reclamation),

herein referred to as "Contracting Officer," and the EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1, herein styled the "District," (a Water Improvement District existing under and by virtue of Article XVI, Section 59, of the Constitution of the State of Texas),

WITNESSETH THAT:

EXPLANATORY RECITALS

WHEREAS, the Rio Grande Project was authorized by Act of Congress in 1905 and subsequent thereto the United States, the District, and the Elephant Butte Irrigation District have entered into a series of contracts relating to the construction, operation and maintenance, and repayment of the costs allocated to the irrigation function of the Rio Grande Project, and

WHEREAS, the series of contracts between the United States and the District includes contracts with the El Paso County Water Improvement District No. 1 dated November 10, 1937, amended October 1, 1939, which contracts cover the care, operation, and maintenance of the project and payment of the adjusted construction obligation allocated to irrigation, and are herein collectively referred to as the "basic repayment contract;" and

WHEREAS, the District has entered into certain contracts for rehabilitation and betterment of the District works, which contracts are dated May 15, 1959; (extended November 16, 1966); and February 12 1971; and

WHEREAS, full repayment to the United States by the District has been made of all construction costs

other than those covered by said rehabilitation contracts; and

WHEREAS, the parties desire that the District assume permanent responsibility for operation and maintenance of the District works in the District except certain components thereof as hereinafter more particularly described.

NOW THEREFORE, the parties agree as follows:

DEFINITIONS

1. When used herein, unless otherwise distinctly expressed or manifestly incompatible with the intent hereof, the term:

a. "Secretary" or "Contracting Officer" shall mean the Secretary of the Interior of the United States or his duly authorized representative.

b. "District" shall mean the El Paso County Water Improvement District No. 1. In some standard articles, the District is referred to as the "Contractor."

c. "Power and storage reserved works" shall mean the Elephant Butte Dam, Reservoir, and Power System and the Caballo Dam and Reservoir.

d. "Water control and conveyance reserved works" shall mean the Percha, Leasburg, Mesilla, and Riverside Diversion Dams and appurtenances.

e. "Transferred District works" shall mean the remainder of the distribution and drainage system to be turned over to the district for operation and maintenance, more specifically identified on Exhibit "A," attached hereto and by this reference made a part of this contract.

f. "Calendar year" shall mean January 1 through December 31 of each year.

g. "Project Water Supply" shall mean stored water legally available for release in the Elephant Butte and Caballo Reservoirs and including the legally appropriated waters reaching the bed of the Rio Grande River between Caballo Dam and Riverside Diversion Dam.

TRANSFER OF DISTRICT WORKS

2. Effective October 1, 1980, the United States shall transfer to the El Paso County Water Improvement District No. 1 and the District shall assume the operation and maintenance of the transferred District works as identified in paragraph 1.e. above and as shown on Exhibit "A." The United States reserves the right to establish, operate, and maintain hydrological and climatological monitoring devices on or in the transferred District works. Transfer of operation and maintenance of the "transferred District works" to the District shall be accomplished without expense to the United States. It is understood that the District may contest any expenses incident to such transfer that it feels are inappropriate in nature or amount or inconsistent with the relation of the parties over this agreement or their other existing contracts.

* * * * *

WATER CONTROL

6. a. The United States shall allocate legally available stored project water among Elephant Butte Irrigation District, El Paso County Water Improvement District No. 1, and the Republic of Mexico in accordance

with the Rio Grande Project Act of 1905, all applicable Federal Reclamation Laws, the Convention with Mexico For The Upper Rio Grande proclaimed in 1907, all vested rights of the District under all applicable State and Federal law, court decisions, and this contract.

b. The United States will insure delivery of project water supply allocated to the District at District canal headings and other diversion points to be specified by the Contracting Officer, and at State line crossings and will make a prompt accounting of said water deliveries to the District.

c. In interstate canals, laterals, and drains (those physically crossing State lines), the United States reserves the right to direct inter-canal diversions, deliveries, and maintenance of waterways and structures by the District to assure the delivery of water and protection of lands of the other involved entities outside District boundaries.

d. In case of extraordinary climatic conditions or major accident to the District's distribution facilities, the United States, at its discretion, may adjust spills of allotted water from the District works. The United States will designate respective facilities to be used for spill of such water. A detailed operational plan will be concluded between the United States and the District setting forth procedures for water delivery and accounting.

OPERATION AND MAINTENANCE OF TRANSFERRED WORKS

7. a. The District, without expense to the United States shall care for, operate, and maintain the trans-

ferred District works in full compliance with the terms of this contract, and in such manner that said transferred District works will remain in good and efficient condition to perform the carriage, distribution, and drainage of water as well and efficiently as on the date of such transfer to the District.

b. The District shall promptly commence and diligently prosecute any and all repairs to the Federal project works being operated and maintained by the District which are necessary for the proper care, operation, and maintenance in accordance with paragraph a. immediately above. In case of neglect or failure of the District to commence such repairs within 45 days following written notification and to complete such repairs within a reasonable time, the Contracting Officer may cause the repairs to be made, and the cost thereof shall be paid by the District as prescribed by the Contracting Officer.

c. No substantial change shall be made by the District in any of the major transferred District works without first obtaining written consent of the Contracting Officer. The request for said change shall be made in writing and include a detailed design of the contemplated work. If the Contracting Officer does not reject such change within 60 days, the District may proceed with the work. Substantial change is defined herein as major relocations or major changes in structures and facilities.

d. The District shall hold the United States, its officers, agents, and employees harmless as to any and all damages which may in any manner grow out of the

care, operation, and maintenance by the District of any of the project works transferred to the District.

e. If, during the period of any District indebtedness to the United States for construction or rehabilitation of the project or District works, should the District become more than 60 days delinquent in the payment of any amount due on said indebtedness, then at election of the Contracting Officer, the United States may take over from the District the care, operation, and maintenance of such transferred works by giving written notice to the District of such election any of the effective date thereof and retain the same until such indebtedness is brought current by the District.

* * * * *

IN WITNESS WHEREOF, this contract has been executed as of the day and year first hereinabove written.

THE UNITED STATES OF AMERICA
WATER AND POWER RESOURCES SERVICE

By: /s/ ROBERT H. WEIMER
ROBERT H. WEIMER
Contracting Officer

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

By: /s/ JACK H. STALLINGS
JACK H. STALLINGS
President

ATTEST:

/s/ JOHNNY STUBBS
JOHNNY STUBBS
Secretary of the El Paso
County Water Improvement
District No. 1