No. 22O141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Motion For Leave To File Complaint

NEW MEXICO'S BRIEF IN OPPOSITION TO TEXAS' MOTION FOR LEAVE TO FILE COMPLAINT

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STATEMENT

A. Summary of Argument

Texas seeks to invoke this Court's original jurisdiction, asserting that New Mexico has breached its "obligations and responsibilities under" the Rio Grande Compact ("Compact"), and that New Mexico is raising "novel" arguments in two pending cases to which Texas is not a party. Complaint at ¶¶ 19-21. Texas does not allege and cannot establish, however, that New Mexico has violated an express Compact term. Nor has Texas alleged that New Mexico has violated its obligation under the delivery requirement that the Compact imposes, i.e., to deliver an amount of water to Elephant Butte Reservoir.[1] There is no requirement under the Compact that New Mexico deliver a specified quantity of water to the New Mexico-Texas state line, a location about 105 miles downstream from Elephant Butte Dam. *See* App. A. In fact, Texas concedes that the Compact does not grant a specific quantity of water to Texas or require that New Mexico deliver a specific quantity of water

[1] The Rio Grande Compact, Act of May 31, 1939, ch. 155, Art. IV, 53 Stat. 785, 788, identifies San Marcial as New Mexico's delivery point. In 1948, the Compact Commission changed that gaging/delivery point to Elephant Butte because changed physical conditions at the San Marcial gage rendered that gage unusable. *See* Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico.

to the New Mexico-Texas state line. Complaint at ¶ 10.

Recognizing that there is no violation of the express terms of the Compact, Texas alleges instead that New Mexico has violated the "purpose and intent" of the Compact by allowing and authorizing the interception and use of Rio Grande Project ("Project") water below Elephant Butte Reservoir and before arriving at the Texas-New Mexico state line. Complaint at ¶ 4. The Project is a federal reclamation project owned and operated by the United States. The United States has allocated all of the Project water pursuant to Reclamation law. The water is allocated by reclamation contracts to Project beneficiaries for uses in Texas and New Mexico.[2] The State of Texas does not have a contract for water from the Project. The Compact does not express a "purpose and intent" to protect a certain amount of Project water for delivery to the Texas-New Mexico state line, nor any provision prohibiting New Mexico from allowing its water users to make additional depletions between Elephant Butte and the Texas-New Mexico state line.

Texas' Motion for Leave should be denied. First, Texas' claims are not based on the express terms of the Compact and are not of the nature of a dispute between sovereign states. Second, there are alternative fora for resolution of the issues raised in Texas'

[2] By Treaty, the United States also delivers an amount of Rio Grande water to Mexico, but that water is not at issue herein.

Complaint. Whether the United States' recent changes to operations of the Project violate various federal laws is currently being litigated in the Federal District Court. *See New Mexico v. United States*, No. 11-cv-00691 (D.N.M. Mar. 1, 2013). The United States' claims to rights for the Project are before a New Mexico adjudication court pursuant to 43 U.S.C. § 666. *See New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (N.M. Third Judicial Dist. Ct. Aug. 16, 2012), https://lrgadjudication.nmcourts.gov/ (the "Lower Rio Grande Adjudication"). Should the parties in those cases succeed in their claims, Texas' issues will be vindicated. If they fail, this court may take up those issues in the ordinary course of judicial review. Original jurisdiction is a right to a special review, and is a delicate and grave matter only sparingly granted by this Court. Third, as was held in an earlier case raising claims under the Compact, the United States is an indispensable party and has not consented to joinder in this action. Each of these bases is independently sufficient to deny the motion for leave.[3]

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[3] The Motion and Complaint are not submitted by the Texas Attorney General or any attorney specially commissioned by the Attorney General, or on behalf of the Governor. The pleadings appear to be filed on behalf of the Texas Commission on Environmental Quality and the Texas Rio Grande Compact Commissioner. Texas Motion for Leave at fn.1. For determining whether this Court should exercise its original jurisdiction, a case brought by a political subdivision and a political appointee of Texas is not a case brought by the Texas *qua state*. *See Illinois v. City of Milwaukee*, 406 U.S. 91, 98 (1972) (holding that "the term

(Continued on following page)

B. Facts

1. Rio Grande Compact

The Rio Grande rises in Colorado and in New Mexico and flows through those states into Texas, where it forms a boundary with the Republic of Mexico. *See* App. A. The river rises in the Colorado and New Mexico mountains and flows for the majority of its length through arid or semi-arid lands for which irrigation is required to cultivate the land and produce crops. Controversies over Rio Grande water commenced during the latter part of the nineteenth century and continued for many years. In 1929, the states of Colorado, New Mexico, and Texas entered into a temporary interstate compact to maintain the status quo in the basin pending adoption of a permanent compact. In 1938, the states entered into the existing permanent Compact, which replaced the temporary one, and it was approved and enacted into federal law in 1939.[4] The 1938 Compact expressly states its purpose and intent as: "[d]esiring 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

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'States' as used in 28 U.S.C. § 1251(a)(1) should not be read to include their political subdivisions").

[4] The 1938 Compact was signed at Santa Fe, New Mexico, March 18, 1938, ratified and approved by Colorado (1939 Colo. Sess. Laws 489), New Mexico (1939 N.M. Laws 59), and Texas (1939 Tex. Gen. & Spec. Laws 531). It was enacted into federal law by Public Law No. 96, ch. 155, 53 Stat. 785 (May 31, 1939).

respect to the use of the waters of the Rio Grande above Fort Quitman, Texas. . . .” Compact first paragraph. Water of the Rio Grande for uses in southern New Mexico and western Texas is stored in Elephant Butte and Caballo reservoirs, located in the southern portion of New Mexico. *See* App. A.

The Compact creates specific rights and obligations of the signatory states. Article III of the Compact establishes a schedule of deliveries from Colorado to the Colorado-New Mexico state line. New Mexico’s delivery obligation to Elephant Butte Reservoir is created and defined by Article IV of the Compact, as amended in 1949: “[t]he obligation of New Mexico to deliver water in the Rio Grande *at Elephant Butte Reservoir* during each calendar year shall be measured by that quantity set forth in the following tabulation of relationship which corresponds to the quantity at the upper index station . . . ” (emphasis added) and by portions of Article VI of the Compact (permitting New Mexico the flexibility to accrue credits and debits for deliveries that are over or under the annual quantity determined by Article IV, as amended, within certain limits. “In the case of New Mexico, the accrued debit shall not exceed 200,000 acre-feet at any time. . . .”). Compact Art. VI.

Article VII prevents Colorado and New Mexico from storing water in reservoirs constructed after 1929 when Rio Grande Project Usable Water in storage

drops below 400,000 acre-feet.[5] Article VIII grants to Texas certain rights regarding the release of accrued debits from upstream storage in Colorado and New Mexico. Thus, the Compact governs certain Colorado and New Mexico releases, deliveries, and storage of Rio Grande water, all with a view to maximizing its use.

2. Rio Grande Project

Construction of the Project was authorized by the United States Congress pursuant to the Act of Congress on February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act"), enacted as a part of the existing federal reclamation program.[6] Section 8 of the Reclamation Act is a cornerstone of reclamation law and applicable to the Project. Reclamation Act of 1902, ch. 1093, § 8, 32 Stat. 388, 390 (codified as amended at 43 U.S.C. § 383). Section 8 mandates that the United States acquire rights for reclamation projects pursuant to state or territorial law of the area in

[5] *Usable Water* is defined in the Compact at Article I(*l*) as "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."

[6] The reclamation program has continuously evolved throughout history, and serves as an historic record of the socioeconomic development of irrigation and farming in America. *See California v. United States,* 438 U.S. 645, 648-70 (1978).

which the project is built,[7] and operate those projects in compliance with such laws except and unless they conflict with the Reclamation Act.[8] *See* 43 U.S.C. § 383:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . . ;

see also California v. United States, 438 U.S. 645, 665-70 (1978). Texas has wrongly referred to the Project rights as a "set aside" (Complaint at ¶ 7) or "reservations." *See* Texas Brief in Support at 8. These terms are incorrect. Rather, the rights were filed as appropriative rights in accordance with applicable Territorial New Mexico laws and Reclamation law. As an appropriative right, it is protected from injury under state law.

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[7] There may be exceptions to this rule in other parts of the West. No exceptions apply here. *See Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1138 (10th Cir. 1981).

[8] Texas, for example, has a right to capture for groundwater. Tex. Water Code Ann. § 11.202. New Mexico follows the prior appropriation doctrine which is consistent with Reclamation requirements. *See* N.M. Stat. Ann. § 72-1-2, 43 U.S.C. § 372.

> In the western states, where the public waters are held subject to use by prior appropriators, it has always been the law that a prior appropriator from a stream may enjoin one from obstructing or taking waters from an underground source which would otherwise reach the stream and which are necessary to serve the stream appropriators' prior right.

City of Albuquerque v. Reynolds, 379 P.2d 73, 79 (N.M. 1962).

In 1906, the United States Reclamation Service (precursor to the Bureau of Reclamation ("Reclamation")), filed its required territorial water appropriation notice with the territory of New Mexico seeking a right to appropriate and store Rio Grande water in Elephant Butte Reservoir. The United States filed a supplemental notice in 1908 asserting an additional claim for all the unappropriated surface water of the Rio Grande and its tributaries. As is discussed in section II.C. below, the United States' Project rights[9] in New Mexico are currently being adjudicated in a Lower Rio Grande Adjudication pursuant to the McCarran Amendment. 43 U.S.C. § 666.

Pursuant to federal reclamation law, the United States allocates Rio Grande Project water ("Project water") for use by reclamation contract holders in

[9] The United States' rights are to store and distribute water for beneficial uses.

New Mexico and Texas, including the two main irrigation districts for the Project, Elephant Butte Irrigation District ("EBID") for lands in New Mexico, and El Paso County Water Improvement District No. 1 ("EPCWID") in Texas. The Rio Grande Project Act and other federal reclamation laws and contracts require that Project water be delivered by the United States for beneficial use during the irrigation season of each calendar year based on authorized acreage within the Project ("Project lands") in New Mexico and Texas, and to assure delivery of an equal amount of water for each acre in the Project. Fifty-seven percent of the Project lands are located in the EBID in New Mexico and 43% in the EPCWID in Texas. The Compact does not allocate Project water between the New Mexico and Texas project beneficiaries, and Texas does not have an allocation of or contract for Project water from the United States.

ARGUMENT

I. TEXAS' CLAIMS ARE NOT APPROPRIATE FOR THE EXERCISE OF ORIGINAL JURISDICTION.

A. Texas' claims are not based on the express terms of the Compact.

This Court has original jurisdiction over all controversies between two or more states. 28 U.S.C. § 1251(a); U.S. Const. art. III, § 2, cl. 2. In cases invoking this Court's original jurisdiction, this Court

has construed its jurisdiction as obligatory "only in appropriate cases." *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (internal quotation omitted). This Court's original jurisdiction "is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute and the matter in itself properly justiciable." *Louisiana v. Texas*, 176 U.S. 1, 15 (1900). This Court has declined to exercise its original jurisdiction in actions between two States. *See Arizona v. New Mexico*, 425 U.S. 794 (1976); *California v. West Virginia*, 454 U.S. 1027 (1981); *Louisiana v. Mississippi*, 488 U.S. 990 (1988). This Court considers two factors when weighing whether to grant leave to file an original complaint: first, "the nature of the interest of the complaining state, focusing on the seriousness and dignity of the claim," and second, "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (internal quotations and citations omitted). This Court has also held it has "substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court." *Texas v. New Mexico*, 462 U.S. 554, 570 (1983).

This Court's original jurisdiction is reserved for those exceptional circumstances where there is a direct controversy between two states regarding assertion of their sovereign interests. *See Pennsylvania v. New Jersey*, 426 U.S. 660, 665 (1976) (per curiam). This Court also guards its original docket against proposed complaints that fail to articulate a legally

sufficient cause of action. *See Florida v. Mellon*, 273 U.S. 12, 16, 18 (1927) (State of Florida's motion for leave to file complaint in this Court's original jurisdiction was denied because Florida failed to allege sufficient injury). "Under our rules, the requirement of a motion for leave to file a complaint, and the requirement of a brief in opposition, permit and enable us to dispose of matters at a preliminary stage." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973) (denying State of Ohio leave to amend its complaint because "the proposed amendment, in any view of its factual allegations, fails as a matter of law to state a cause of action"). The nature of Texas' claims is important to the decision by this Court as to whether Texas' claims meet the high standards that are required to invoke this Court's original jurisdiction. *See Mississippi v. Louisiana*, 506 U.S. at 77. Texas does not meet this high standard because its claims fail to articulate a legally sufficient cause of action under the Compact. Instead, Texas' claims arise from the Project, not the Compact.[10]

[10] "A State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer the personal claims of its citizens." *Pennsylvania v. New Jersey*, 426 U.S. at 665.

B. New Mexico's Compact delivery obligation is to Elephant Butte Reservoir and not to the New Mexico-Texas state line.

New Mexico is in full compliance with all provisions of the Compact. New Mexico's delivery obligation to Elephant Butte Reservoir is created and defined by Article IV, as amended, and by portions of Article VI of the Compact that permit New Mexico to accrue credits and debits for deliveries within certain limits. *See* more detailed description above in Section B.1.

The Compact drafters knew how to craft a state line delivery obligation, and did so for Colorado. "The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos. . . ." is clear. Compact, Art. III. In contrast, New Mexico does not have a state line delivery obligation; rather, New Mexico's delivery point under Article IV, as amended, is to Elephant Butte Reservoir, which is located approximately 105 miles north of the state line.

The plain language of the Compact describes the injuries the States agreed were reserved to raise in the future. Article XI provides in relevant part:

> 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*.

Compact, Art. XI (emphasis added). Thus, by agreement of the parties and enacted into federal law, the Compact describes the elements of a valid Compact-based cause of action in this Court: that one state has changed the "character or quality of the water, at the point of delivery . . . to the injury of another." *Id*. Texas has not pled such a case.

Texas concedes that the Compact does not create an obligation of the State of New Mexico to deliver water to the State of Texas: "The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation." Complaint at ¶ 10. However, Texas' Complaint then goes on to state that Texas seeks to invoke the original jurisdiction of this Court based on an interstate compact dispute. Texas' claims are not based on the terms of the *Compact*. Rather, Texas' Complaint asserts claims to *Project* water from a federal reclamation Project owned and controlled by the United States, not New Mexico.

C. Texas asks this Court to insert new terms into the Rio Grande Compact.

1. Texas asks this Court to rewrite the Rio Grande Compact.

The Compact lacks any requirement for New Mexico to deliver water to Texas below Elephant Butte Reservoir, and as this Court in *Texas v. New Mexico*, 462 U.S. 554 (1983), makes clear, a State cannot unilaterally interpret a Compact in a way that gives itself rights beyond the express terms of the Compact. For example, in *Texas v. New Mexico*, the Special Master recommended that the United States be authorized to cast a tie-breaking vote in the event of a 1:1 vote by the States of Texas and New Mexico, even though the Compact contained no such provision. *Id*. at 563. The Court rejected this recommendation to rewrite the Pecos River Compact, holding that:

> Other interstate compacts, approved by Congress contemporaneously with the Pecos River Compact, allow federal representatives a vote on compact-created commissions, or expressly provide for arbitration by federal officials of commission disputes. *E.g.,* Upper Colorado Basin Compact, 63 Stat. 31, 35-37 (1949); Arkansas River Compact, 63 Stat. 145, 149-151 (1949); Yellowstone River Compact, 65 Stat. 663, 665-666 (1951). *The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it*.

Id. at 565 (emphasis added).

Texas cannot insert into the Compact additional obligations for New Mexico below Elephant Butte Reservoir and then seek leave to file a Complaint as an "interstate water compact" claim. Motion for Leave at 2. This Court has consistently held that Compacts are state and federal law that the Court cannot rewrite.

> We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented. As we have said before, *we will not* "'*order relief inconsistent with [the] express terms*'" *of a compact*, "no matter what the equities of the circumstances might otherwise invite."

Alabama v. N. Carolina, 130 S. Ct. 2295, 2312-13 (2010) (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998) (quoting *Texas v. New Mexico*, 462 U.S. at 564)) (emphasis added).

2. The plain language of the Rio Grande Compact simply does not include any protection of 1938 conditions.

Unable to show that New Mexico has failed to meet its delivery obligations under the Compact, and apparently having second thoughts about the bargain it struck, Texas has unilaterally invented new requirements not contained in the plain language of the Compact. Texas claims that "[a] fundamental purpose

of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact was executed." Complaint at ¶ 10. As noted above, the Compact contains many specific provisions but none requiring the parties to assure maintenance of a 1938 condition at the Texas-New Mexico state line.

In 1929, Colorado, New Mexico, and Texas entered into a temporary Compact. Act of June 17, 1930, ch. 506, 46 Stat. 767. The 1929 Compact was replaced in its entirety by the 1938 Compact. Article III(d) of the 1929 temporary Compact explicitly references flows "between Elephant Butte Reservoir and the lower end of the Rio Grande Project. . . ." *Id*. at 770. However, the 1938 Compact contains no such reference. Article VII(b) of the 1929 temporary Compact also contains a broad and general protection of the status quo in each state. *Id*. at 771 ("The commission . . . shall equitably apportion the waters of the Rio Grande *as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of this compact*. . . .") (emphasis added). There is no comparable provision in the 1938 Compact.

3. The Rio Grande Compact does not require New Mexico to guarantee that water delivered to Elephant Butte Reservoir flow unimpeded to the New Mexico-Texas state line.

Texas also claims that the "purpose and intent" of the Compact is to require New Mexico to guarantee

that Project water flow "unimpeded" to the New Mexico-Texas state line. Complaint at ¶ 4. The Compact contains no such provision. Texas' claims are internally inconsistent. Texas first admits that the water delivered to Elephant Butte pursuant to Article IV of the Compact, as amended, is allocated to "Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements." *Id*. Texas then claims New Mexico must assure that same water flows unimpeded to the Texas state line even though it admits that "[o]nce delivered" it is allocated to Project beneficiaries in both states based not on the Compact but under the Project authorization and relevant contractual arrangements. *Id*.

There is no express requirement, nor could there be, that New Mexico assure unimpeded flows below Elephant Butte Reservoir to Texas, because water released from Elephant Butte Reservoir is delivered for uses in both southern New Mexico and western Texas. This Compact does have provisions adjusting New Mexico's delivery to Elephant Butte Reservoir depending on additional depletions *above* New Mexico's upstream index gage (Otowi), but those are not relevant here. *See* Compact, Art. IV. There is no adjustment for depletions below Elephant Butte Reservoir.

The drafters of the Compact knew how to craft a prohibition on a state causing additional depletions in a certain stretch of river in a compact, but they

did not here. *See* Compact, Art. IV. The doctrine of *inclusio unius est exclusio alterius* compels the conclusion that the omitted terms were not intended to be included in the Compact. *See Kucana v. Holder*, 558 U.S. 233, 130 S. Ct. 827, 838 (2010) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (internal quotation omitted)). *See also Barnhart v. Peabody Coal Co.*, 537 U.S. 149, 180 (2003) (Scalia, J., dissenting) (referring to the doctrine as an accepted principal of construction).

Texas may not now rewrite the Compact to include a provision requiring unimpeded deliveries to the New Mexico-Texas State line.

> [C]ongressional consent transforms an interstate compact . . . into a law of the United States. One consequence of this metamorphosis is that, unless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.

Texas v. New Mexico, 462 U.S. at 564 (internal quotation and citations omitted).

The 1929 temporary Compact among Colorado, New Mexico and Texas was replaced by the current 1938 Compact. A comparison of the earlier compact with the current one also establishes that the 1938 Compact does not require New Mexico to protect

certain flows in the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line.

Article XII of the 1929 temporary Compact explicitly provided that:

> New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir shall never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return.

46 Stat. at 772. Articles XII, III(d), and VII(b) of the 1929 temporary Compact establish that in 1929, Texas bargained for and obtained explicit protections for the water supply of the Rio Grande in New Mexico below Elephant Butte Reservoir. The 1938 Compact, however, does not include these requirements below Elephant Butte Reservoir. Texas cannot simply rewrite the Compact to include provisions the states did not agree upon at the time.

This Court has relied on a comparison of related compacts to determine what is and what is not included in a subsequent compact. In *New Jersey v. Delaware*, the Court explained that

> Interstate compacts, like treaties, are presumed to be "the subject of careful consideration

> before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties." Accordingly, the Special Master found informative a comparison of language in the 1905 Compact with language contained in an 1834 compact between New Jersey and New York.
>
> . . . .
>
> "Comparable language [conferring exclusive authority]," the Special Master observed, "is noticeably absent in the [1905] Compact." The Master found this disparity "conspicuous," for "[s]everal provisions in the two interstate compacts [contain] strikingly similar language."

552 U.S. 597, 615-16 (2008) (citations omitted).

Comparing the Compact with other compacts also compels the conclusion that the Compact does not require New Mexico to avoid additional depletions below Elephant Butte Reservoir. The Pecos River Compact expressly provides that "[e]xcept as stated in paragraph (f) of this Article, New Mexico *shall not deplete* by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition." Pecos River Compact of 1949, ch. 184, Art. III(a), 63 Stat. 159, 161 (emphasis added). *See also* Arkansas River Compact of 1949, ch. 155, Art. IV(D),

63 Stat. 145, 147 ("[T]he waters of the Arkansas river . . . shall not be materially depleted in usable quantity or availability. . . ."). The plain language of the Compact simply does not include a similar provision. This Court should reject Texas' attempt to rewrite the Compact to include terms Texas wishes were there. *See Texas v. New Mexico*, 462 U.S. at 571 ("[R]ecourse to this Court when one State has second thoughts is hardly necessary for the State's protection." (Internal quotation omitted)).

Texas further claims that "New Mexico asserts that so long as it has made Compact deliveries into Elephant Butte Reservoir, New Mexico may intercept and take this same water for use in New Mexico once it is released from Elephant Butte Reservoir." Complaint at ¶ 21. Texas misstates New Mexico's position. Groundwater has been developed and used in both New Mexico and Texas.

As noted above, and as required by reclamation law, adjudicated Project water rights are administered in priority. *See Nebraska v. Wyoming*, 295 U.S. 40, 43 (1935). Similarly, New Mexico law protects the United States' Project water rights from injury by junior water rights users. N.M. Stat. Ann. § 72-1-2 (2012); N.M. Const. art. XVI, § 2. New Mexico law has never varied on this point, and continues to protect senior rights from impairment by junior water rights users. *City of Albuquerque*, 379 P.2d at 79.

II. THE ISSUES RAISED BY TEXAS ARE BEING LITIGATED IN ALTERNATIVE FORA.

A. Texas' interests may be vindicated in ongoing cases in the Federal District Court and in the Lower Rio Grande Adjudication.

Texas asserts that New Mexico has "allowed and authorized Rio Grande *Project* water intended for use in Texas to be intercepted and used in New Mexico." Complaint at ¶ 4 (emphasis added). One of the factors that this Court considers in deciding whether to exercise its original jurisdiction is "the availability of an alternative forum in which the issue tendered can be resolved." *Mississippi v. Louisiana*, 506 U.S. at 77. Here, ongoing litigation in both federal district court and the Lower Rio Grande Adjudication provide alternate fora for resolution of the issues Texas seeks to raise in its Complaint.

Texas argues neither forum can serve as an alternative to an original action before this Court because it is not a party to either action, and neither court has jurisdiction over it. Texas Brief in Support at 26-27. But that is not the test. Although this Court has sometimes stated that an alternative forum must have jurisdiction over the parties to the dispute, *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), it has since clarified that the more pertinent inquiry is whether the other forum has jurisdiction over the issues involved. *See Mississippi*, 506 U.S. at 77 (citing *Arizona v. New Mexico*, 425 U.S. at 797). Thus, if the

issues posed in an original complaint "can be resolved effectively by other litigation in other courts, *if need be by other parties* . . . , discretionary denials of original jurisdiction seem appropriate." 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4053 (3d ed. 2008) (emphasis added).

This Court's decision in *Arizona v. New Mexico* illustrates this point. In that case, the Court denied Arizona leave to file an original complaint against New Mexico to challenge a tax New Mexico imposed on electricity generated in state but sold to out-of-state customers. 425 U.S. at 794-95. Arizona asserted an interest as a direct consumer of electricity subject to the tax, and as *parens patriae* on behalf of its citizens who purchased this electricity. *Id*. at 796. In denying Arizona leave to file, the Court observed that three Arizona utilities had filed an action in New Mexico state court challenging the tax's constitutionality. *Id*. The Court was "persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." *Id.* at 797 (emphasis in original). The Court reasoned that if the utilities prevailed, Arizona's interest would be vindicated. *Id*. If not, the utilities could petition for *certiorari*. *Id*. Either way, Arizona's interests would be protected. *Id*. Similarly, the issues Texas seeks to raise before this Court have been raised by other parties in other fora with jurisdiction over those issues. This Court should deny the motion for leave to protect the integrity of the judicial system. *Texas*, 462 U.S. at 570.

B. The United States' distribution of Rio Grande Project water is currently being litigated in Federal District Court.

Texas' Complaint concedes that New Mexico's delivery obligation under the Compact is to Elephant Butte Reservoir. Complaint at ¶ 4. Texas then goes on to plead a cause of action arising from what happens to that water after it is delivered to Elephant Butte and before it gets to the state line. This issue does not arise from the Compact, it arises from the Project.

In *New Mexico v. United States*, No. 11-cv-00691 (D.N.M. Mar. 1, 2013), the State of New Mexico has brought an action against the United States relating, *inter alia*, to a 2008 Operating Agreement between it, EBID and EPCWID regarding the allocation and delivery of Project water to the Project lands. New Mexico contends that the "2008 Operating Agreement" for the Project materially changes the historic allocation and delivery of Project water to Project beneficiaries without Congressional approval and that violates relevant provisions of Reclamation Law. Texas is not a Project beneficiary. EPCWID, the only Project beneficiary in Texas, is a party to *New Mexico v. United States*. EPCWID is a political subdivision of the State of Texas. *El Paso County Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified on other issues*, 243 F.2d 927 (5th Cir.), *cert. denied*, 355 U.S. 820 (1957).

Like the utilities in *Arizona v. New Mexico*, EPCWID and the United States represent the interests of Texas irrigators in the delivery or allocation of Project water by the United States. EPCWID has every incentive and ability fully to assert and defend the rights of the Texas water users that could be affected by any alleged misappropriation of Project water in New Mexico. Texas' Complaint does not assert any right or interest that could result in the delivery of water to any entity or person other than EPCWID. As in *Arizona v. New Mexico*, if EPCWID prevails in lower court, any interest Texas might have in the delivery of water from the Project will be vindicated. *See* 425 U.S. at 797.

Texas' Complaint further asserts that *New Mexico v. United States* is an attempt to "control" the Project "in contravention of the Rio Grande Project Act and the Rio Grande Compact" and that New Mexico has asked the Court to "interpret the Rio Grande Compact incorrectly. . . ." Complaint at ¶ 20. As noted above, in *New Mexico v. United States*, New Mexico is challenging the validity of the 2008 Operating Agreement for the Project based on the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321 *et seq*., the Reclamation Act 43 U.S.C. §§ 371 *et seq*., and the Administrative Procedure Act ("APA") 5 U.S.C. §§ 701-706. These challenges are not based on the Compact. None of these claims are against Texas and none fall within this Court's original jurisdiction. New Mexico also alleges in *New Mexico v. United States* that the United States' accounting for

and release of New Mexico's Compact Credit water is ultra vires and violates the Compact. This claim is a claim against the United States, not a claim against Texas.

New Mexico v. United States does not include an assertion by New Mexico that it has the authority to "control" the federally owned Project. New Mexico is not trying to "control" the Project. A decree granting the relief New Mexico seeks in *New Mexico v. United States* would only invalidate the 2008 Operating Agreement, at which time the United States could either revise the Operating Agreement or, return to its historic practice of annual accounting and equal distributions of water per project acre, that is, the operations method the United States followed between 1916 and 2007. William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. Denv. Water L. Rev. 1, 39-41 (2001).

Texas' allegations are not claims within this Court's original jurisdiction reserved for disputes between states. These claims are simply an attempt to interrupt New Mexico's federal district court case against the United States. This Court should permit the ongoing litigation to proceed, thereby allowing the legitimate processes of decision and appeal. This Court seeks to avoid interference with normal judicial function. *Texas v. New Mexico,* 462 U.S. at 570. That is why original jurisdiction is not available when there is an alternate forum.

Further, Texas' assertion of "novel" interpretations of law by a state in a court is not a matter of such seriousness and dignity, a "casus belli," that is a claim between States sufficient to invoke this Court's original jurisdiction. If that were so, any difference of opinion between states in any case as to the correct law would be a legitimate basis for requesting this Court to exercise its original jurisdiction.

C. The United States' claims to Rio Grande Project water are properly before the Lower Rio Grande Adjudication Court pursuant to 43 U.S.C. § 666.

Texas claims that New Mexico has "allowed and authorized Rio Grande *Project* water intended for use in Texas to be intercepted and used in New Mexico" to the detriment of the Project. Complaint at ¶ 4 (emphasis added). This is a *Project* claim and not a claim under the *Compact*. As a claimant to rights to the use of water in the state court adjudication, the United States has adequate state law remedies for any harm to the Project that groundwater pumping by junior appropriators in New Mexico might cause. The scope of the United States Project right, and its right to redress for any injury thereto, are among the issues currently before the Lower Rio Grande Adjudication Court having jurisdiction over the claims of the United States to water for the Project pursuant to the McCarran Amendment, 43 U.S.C. § 666.

The long and complex history of the adjudication of state and federal water rights in the Lower Rio Grande is set forth in *United States v. City of Las Cruces*, 289 F.3d 1170, 1177-79 (10th Cir. 2002). After *City of Las Cruces*, the United States filed its "Statement of Claim" in the Lower Rio Grande Adjudication:

> Defendant United States, on behalf of the U.S. Department of Interior, Bureau of Reclamation, claims a right to water to meet the needs of the [Rio Grande] Project. . . . Pursuant to these authorities, the United States is entitled to divert to storage, impound, and store the surface waters of the Rio Grande. The surface waters are stored behind Elephant Butte Dam. . . . Additionally, based on its releases [of water from Elephant Butte Dam] the United States is entitled to a delivery of water at downstream canal headings and diversion points to meet Project purposes. The delivered water consists of water released from storage in Elephant Butte and Caballo reservoirs and all water entering the Rio Grande within the Project whether from return flows of water used for irrigation or municipal and industrial purposes (or any other purpose authorized under Reclamation Law), or tributary waters such that, for example, a release of 790,000 acre-feet of stored water shall result in a delivery of 958,055 acre-feet of usable water. The return flows or tributary waters may be from surface or groundwater sources.

United States' Statement of Claim for Water for the Rio Grande Project at 1-2, *New Mexico ex rel. State Engineer*, No. CV-96-888 (Sept. 15, 2010), https://lrg adjudication.nmcourts.gov/index.php/court-documents-ss-97-104.html.

The McCarran Amendment, 43 U.S.C. § 666 provides that: "Consent is given to join the United States as a defendant in any suit (1) for the adjudication of rights to the use of water of a river system or other source. . . ." The McCarran Amendment was intended to address potentially conflicting claims to the use of water under state and federal law. As explained by the Senate Judiciary Committee, a McCarran Amendment adjudication was "intended to be universal and to result in a complete ascertainment of all existing rights, to the end, first, that the waters may be distributed, under public supervision, among the lawful claimants according to their respective rights. . . ." S. Rep. No. 755, 82d Cong., 1st Sess. 5 (1951). This Court has held that the McCarran Amendment is "an all-inclusive statute concerning 'the adjudication of rights to the use of water of a river system' which in § 666(a)(1) has no exceptions and which, as we read it, includes appropriate rights, riparian rights, and reserved rights." *United States v. Dist. Court ex rel. Eagle County, Colo.*, 401 U.S. 520, 524 (1971).

Congress in the 1902 Reclamation Act intended that the United States follow state law for the appropriation of water and the operation of Reclamation projects. *See California v. United States*, 438 U.S. at

668 n.21, 675 (explaining and affirming the consistent thread of deference to state water laws in the Reclamation Act). Therefore, the Lower Rio Grande Adjudication will determine the elements of the right of the United States for the Project from Elephant Butte Dam to the New Mexico-Texas state line, including any Project rights to intervening surface or groundwater. Decisions by the Lower Rio Grande Adjudication Court will be subject to appeal to the Court of Appeals of New Mexico, the New Mexico Supreme Court, and ultimately subject to review by this Court on certiorari. *See Arizona v. New Mexico*, 425 U.S. at 797; *see also Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 570-71 (1983) (holding that federal courts should defer to McCarran adjudications of Indian water rights, but cautioning that state court decisions are still subject to review by the Supreme Court).

The Lower Rio Grande Adjudication Court has considered the United States' claim that state law is inadequate to protect the Project from injurious groundwater pumping. However, the adjudication court held that the United States could not identify any actual conflict between reclamation law and state law remedies, and it has adequate remedies for any claimed injury to Project rights from junior groundwater pumpers. *See* Order Granting the States' Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 2-4, *New Mexico ex rel. State Engineer*, No. CV-96-888 (Aug. 16, 2012) (Order

Dismissing Groundwater Claims), https://lrgadjudication.nmcourts.gov/index.php/court-documents-ss-97-104.html. Furthermore, a subsequent New Mexico Supreme Court decision upheld New Mexico's ability to enforce priority administration prior to a final adjudication. *Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio,* 289 P.3d 1232, 1240-41 (N.M. 2012). Therefore, the United States has state law remedies for any harm it may allege that junior water right holders are causing to the Project.

Texas' motion is an attempt to circumvent the Lower Rio Grande Adjudication for the purpose of asserting before this Court the United States' claim to water for the Project. This Court has stated, however, that it grants original jurisdiction only sparingly and "with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas v. New Mexico*, 462 U.S. at 570. Denying Texas' motion will protect the integrity of the McCarran Amendment adjudication and will promote the most effective functioning of the overall federal system.

III. TEXAS' MOTION FOR LEAVE MUST BE DENIED BECAUSE THE UNITED STATES IS AN INDISPENSABLE PARTY AND HAS NOT CONSENTED TO JOINDER IN THIS ACTION.

The State of Texas has not attempted to join the United States in the present action, and even if it had, the United States has not consented to joinder.

"A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party." *Arizona v. California*, 298 U.S. 558, 572 (1936). The United States is not subject to suit without its consent, even by a state. *Id*. at 568. Moreover, even if the United States chose to attempt to intervene, the Motion should be denied for the other reasons stated herein.

Failure to join the United States requires the dismissal of the complaint in an original jurisdiction case where (1) the United States has been active in exercising authority over matters at issue in the case and (2) failure to join the United States would result in prejudice to its interests. *See Idaho v. Oregon and Washington*, 444 U.S. 380, 390-91 (1980) (case later dismissed for lack of proof of injury, 462 U.S. 1017, 1028 (1983)) (citing *Arizona v. California*, 298 U.S. at 570 and *Texas v. New Mexico*, 352 U.S. 991 (1957)). If a decree will "necessarily affect[ ] adversely and immediately the United States," the United States is indispensable and the case should be dismissed. *Id*. at 391 (citing Green, J., Report of Special Master: Respecting Indispensability of the United States and of Elephant Butte Irrigation District, as Parties, *Texas v. New Mexico*, No. 9, Orig., at 41 (1953)).

In a prior *Texas v. New Mexico* dispute involving Rio Grande Compact claims, this Court dismissed the Complaint because the United States was an indispensable party in its role as trustee for tribal interests. 352 U.S. 991 (1957). The Special Master concluded that to grant Texas the relief sought would

"necessarily affect adversely and immediately the United States. . . ." Green, J., Report of Special Master: Respecting Indispensability of the United States and of Elephant Butte Irrigation District, as Parties, *Texas v. New Mexico* No. 9 Orig., at 41 (1953). Here, Texas pleads specifically for relief based on "the authority of the United States to operate the Rio Grande Project." Complaint at ¶¶ 15-16. This question pertains to the scope of the United States' claimed Project rights currently before the Lower Rio Grande Adjudication Court. As noted above, if and when the United States asserts its Project rights are injured by groundwater pumping, it has adequate remedies for those injuries under state law. *See* Order Dismissing Groundwater Claims at 4, *New Mexico ex rel. State Engineer*, No. CV-96-888 (Aug. 16, 2012), https://lrgadjudication.nmcourts.gov/index.php/court-documents-ss-97-104.html; *see also City of Albuquerque*, 379 P.2d at 79.

Texas' Motion for Leave should be denied because the entry of a Decree in accordance with Texas' Prayer for Relief would necessarily affect the United States' interests in the Project. These interests include the water rights for the Project and the delivery of Project water pursuant to the contracts between the United States and the water districts in New Mexico and Texas. *See Arizona v. California*, 298 U.S. at 564, 571-72. The United States is ultimately responsible for release and delivery of Project water to specific diversion and delivery points in both New Mexico and Texas. Any decree entered in the absence

of the United States would not be binding on the United States or be determinative as to the delivery of Project water below Elephant Butte Reservoir. *See Shields v. Barrow*, 58 U.S. (17 How.) 130, 142 (1854); *Arizona v. California*, 298 U.S. at 571-72. This Court should deny Texas' Motion for Leave because the United States is not a party to this case.

IV. TEXAS' FULL FAITH AND CREDIT AND GOOD FAITH AND FAIR DEALING ARGUMENTS HAVE NO MERIT.

Texas' full faith and credit claim, that Texas' state water adjudication should be enforced by New Mexico in New Mexico, has no merit. Complaint at ¶ 22. While the Full Faith and Credit Clause of Article IV, Section 1 of the Constitution is exacting where it applies, one state's court may not "reach into" another state's courtroom to determine a matter in the "exclusive province of the other State" or to interfere with litigation over which the first state has no authority. *Baker v. General Motors Corp.*, 522 U.S. 222, 233, 235, 238 (1998). The full faith and credit effect of one state's judgment "cannot reach beyond [the controversy in that state] to control proceedings . . . in other States" when the controversy in another state involves differing parties, different claims and merits not considered in the first state. *Id*. at 238. The first state "has no power over those parties." *Id*.

Further, pursuant to the Reclamation Act and a series of federal laws, Congress has exhibited a "consistent purpose to avoid disturbance of state authority"

over water rights within each state's boundaries. *El Paso County Water Improvement Dist. No. 1*, 133 F.Supp. at 904. As such, New Mexico and Texas have not "subordinated [their] laws governing water rights to the irrigation program of the Project." *Id*. at 903-05. Moreover, state water adjudications have no "extra-territorial force"; one state cannot control the use of water in the next state by virtue of a state adjudication. *Id.* at 924. Water rights adjudicated and granted pursuant to one state's laws cannot "supplant" the law of the next state. *Id*.

Texas also alleges New Mexico's legal positions in the Lower Rio Grande Adjudication proceeding "constitute a breach of New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing implicit in the Rio Grande Compact." Complaint at ¶ 21. Texas misapprehends the law applicable to interstate compacts. Recently this Court noted:

> We have never held that an interstate compact approved by Congress includes an implied duty of good faith and fair dealing. . . . We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented. As we have said before, we will not "'order relief inconsistent with the express terms'" of a compact, "no matter what the equities of the circumstances might otherwise invite."

Alabama v. North Carolina, 130 S.Ct. 2295, 2312-13 (2010) (quoting *New Jersey v. New York,* 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. at 564)).

CONCLUSION

The lower courts are alternative fora for consideration of the issues Texas seeks to raise herein. The issues are not a dispute between states. The United States has not consented to joinder. This Court should deny the motion for leave. Alternatively, if the Court grants the Motion, New Mexico requests the opportunity to file a motion to dismiss at the outset of further proceedings.

Respectfully submitted,

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