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 to Dismiss

TEXAS' BRIEF IN RESPONSE TO NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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INTRODUCTION AND SUMMARY OF ARGUMENT

The State of Texas' Complaint seeks the Court's interpretation and enforcement of the 1938 Rio Grande Compact (Rio Grande Compact or Compact). New Mexico is violating the Rio Grande Compact by authorizing and permitting the interception, depletion and diversion of, and interference with, waters of the Rio Grande including Rio Grande Reclamation Project (Rio Grande Project) return flows, that were equitably apportioned to Texas by the Compact

New Mexico's Motion to Dismiss asserts that Texas' Complaint does not state a claim for relief because Texas has failed to identify any express term of the Compact requiring New Mexico to ensure that water apportioned to Texas pursuant to the Compact reaches the Texas state line, and that New Mexico's sole responsibility under the Compact is to deliver water into Elephant Butte Reservoir. New Mexico further contends that Texas' apportionment of Rio Grande water is solely governed by and dependent upon New Mexico state water law, and that the only way Texas can vindicate its Compact rights is pursuant to a New Mexico state court adjudication and a "priority call" to the New Mexico State Engineer. New Mexico's assertions lack merit, and its Motion to Dismiss should be denied for at least four reasons.

First, New Mexico has failed to meet the burden for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure (hereinafter referred to as Rule 12(b)(6)). A motion to dismiss assumes that all of Texas' factual allegations are true, and it is not a vehicle for resolving factual disputes. New Mexico's Motion to Dismiss, however, is almost entirely devoted to arguing disputed factual issues.

Second, New Mexico mischaracterizes the Texas Complaint. Texas does not allege that New Mexico must ensure deliveries of Texas' apportioned Rio Grande water to the Texas state line. Texas alleges that New Mexico has breached its delivery obligation under Article IV of the Compact by authorizing and permitting New Mexico users to divert, deplete and otherwise interfere with water apportioned to Texas under the Compact. Texas' Complaint (Compl.) at ¶¶ 18-20, 24-25. New Mexico never addresses Texas' actual allegations, but instead focuses its Motion to Dismiss on issues not alleged in Texas' Complaint.

Third, New Mexico uses its Motion to Dismiss as a vehicle to reargue its opposition to allowing Texas to file its Complaint, alleging that alternative forums are available for Texas to address its dispute with New Mexico. These arguments have already been rejected by the Court. Moreover, these arguments are not relevant to deciding the discrete legal issue properly raised in a Rule 12(b)(6) motion to dismiss.

Finally, assuming *arguendo* that New Mexico's Motion to Dismiss is not otherwise defective, New Mexico's arguments would lead to an implausible, impractical and anomalous result. According to New Mexico, it could authorize and permit, pursuant to New Mexico state law, the interception and depletion of *all* of the waters of the Rio Grande below Elephant Butte Reservoir for use within New Mexico, thereby preventing any of the water equitably apportioned to Texas from ever reaching irrigable lands in Texas.[1] It is simply implausible that Texas would bargain for such a deprivation of its equitable apportionment under the Compact.

STATEMENT

Texas has previously provided a detailed description and history of the Rio Grande Basin, the Rio Grande Project, the Rio Grande Compact, and Post-Compact events in the Rio Grande Basin in Southern New Mexico. *See* Compl. at ¶¶ 2-16, and Brief in Support of Motion For Leave to File Bill of Complaint (Texas Mot. For Leave) at 5-18. In the United States' Amicus Curiae Brief (U.S. Amicus

[1] In addition, none of the water allocated to Mexico pursuant to the Convention Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mexico, May 21, 1906, 34 Stat. 2953, T.S. No. 455 (Mexico Treaty) would be available to Mexico.

Br.) at 3-8, the United States also provided detail on the history of the Rio Grande Project and the Compact. Below is an abbreviated description of the Rio Grande Compact and Rio Grande Project relevant to New Mexico's Motion to Dismiss.

I. The Rio Grande Project

Shortly after enactment of the Reclamation Act of 1902, Congress authorized the construction of a dam near Engle, in the territory of New Mexico, to irrigate lands in New Mexico and Texas, subject to cost and other feasibility considerations. Act of February 25, 1905, Pub. L. No. 58-104, ch. 798, 33 Stat. 814. Pursuant to this authority, the Secretary of Interior approved the construction of Elephant Butte Dam in 1910. Construction of the dam was completed in 1916, creating a reservoir with 2,639,000 acre feet of capacity. *Part VI-The Rio Grand Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* at 73 (1938) (Joint Investigation).[2]

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[2] Texas (as well as New Mexico) cites to the Joint Investigation for background information and other facts not in dispute. *See Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007) ("courts must consider the complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule 12(b)(6) motions to dismiss, in particular, documents incorporated by reference, and matters of which a court may take judicial notice"). In a letter to the Clerk of the Court dated April 30, 2014, New Mexico offered to lodge with the Court the Joint Investigation pursuant to Supreme Court Rule 32.3.

Footnote continued on following page.

By 1938, when the Joint Investigation was completed, Rio Grande Project water stored and released from Elephant Butte Reservoir was distributed through more than 630 miles of main canals and laterals, which were taken over by the Rio Grande Project and reconstructed, enlarged, extended, and incorporated into the Rio Grande Project distribution system. Joint Investigation at 83. There were also six diversion dams and permanent diversion works constructed by this time:

> Percha Dam at the head of Rincon Valley, diverting to the Arrey canal; Leasburg Dam at the head of Mesilla Valley, diverting to the Leasburg canal; Mesilla Dam southwest of Las Cruces, diverting to the east side and west side canals; the International Diversion Dam opposite El Paso, diverting to the Mexican Acequia Madres on the west side and to the Franklin canal on the east side; Riverside Heading about 15 miles below El Paso, diverting to the Riverside canal and Franklin feeder; and Tornillo Heading near the town of Fabens, diverting to the Tornillo canal.

Subject to the Court's determination regarding the role of extrinsic evidence on a Rule 12(b)(6) motion to dismiss, Texas does not oppose the lodging of the Joint Investigation.

Joint Investigation at 83-84. The drainage system for the Rio Grande Project was substantially complete and comprised more than 450 miles of deep open drains. Joint Investigation at 84. The Hudspeth County Conservation and Reclamation District, below and southeast of the Rio Grande Project, also had an irrigation and drainage system, diverting drainage and return water from the terminus of the Tornillo canal under its Warren Act contract. Joint Investigation at 85-86.

To allow for power generation at Elephant Butte Dam and additional flood control and river regulation, Caballo Dam and Reservoir was sited about 25 miles below Elephant Butte Dam. Joint Investigation at 84-85. At the time, it was anticipated that Caballo Dam would provide a reservoir of about 350,000 acre feet capacity. Joint Investigation at 85. In 1936, Congress had also appropriated funds for and authorized "works for the canalization of the Rio Grande from the Caballo Reservoir site in New Mexico to the international dam near El Paso, Texas." Act of June 4, 1936, Pub. L. No. 74-648, ch. 500, 49 Stat. 1463.

II. The Rio Grande Compact

The Compact's preamble provides that Colorado, New Mexico, and Texas entered into the Compact "to remove all causes of present and future controversy among these States . . . with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas" and "*for the purpose of effecting an*

equitable apportionment of such waters." Compact, 53 Stat. 785 (1939) (emphasis added); Appendix to Complaint (App. to Compl.) at App. 1.

The Compact's terms cannot be understood without an understanding of the Rio Grande Project. The Rio Grande Project is referred to directly in Article I(k) of the Compact in the definition of Project Storage and indirectly over 50 times in the Compact by the use of that definition in other defined terms.[3] Article I(l) then defines Usable Water as "all water, exclusive of credit water, which is in [Rio Grande] project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." Project Storage and Usable Water are used throughout the Compact, and are also incorporated into other defined terms used in the Compact, including Credit Water, Actual Release, and Actual Spill. App. to Compl. at App. 3. All of these terms reflect the interconnected nature of the Rio Grande Project and the Rio Grande Compact, because these terms have no meaning absent the existence of the Rio Grande Project, and its operation by the United States. The interrelationships between the Compact and the Rio

[3] Project Storage is defined in Article I(k) of the Compact as "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte Reservoir and above the first diversion point to lands of the *Rio Grande Project*, but not more than a total of 2,638,860 acre-feet." App. to Compl. at App. 3 (emphasis added).

Grande Project are a critical aspect of how the Compact is implemented. The delivery of Texas' apportioned water under the Compact cannot occur without the Rio Grande Project.

Article III of the Rio Grande Compact requires that Colorado deliver water in the Rio Grande at the Colorado–New Mexico state line in established quantities, based upon flows of water that are measured at various index stations. App. to Compl. at App. 5-8.

Article IV obligates New Mexico to deliver water in the Rio Grande at San Marcial, New Mexico, which is just upstream of Elephant Butte Reservoir. App. to Compl. at App. 9-11.[4] These deliveries to Elephant Butte Reservoir, and thus to the Rio Grande Project, are based upon a tabulation of relationships that correspond to the quantity of water at specified indices in New Mexico. These index flows are to be further adjusted to establish New Mexico's delivery obligation based upon the water that would have been available for Rio Grande Project operations absent upstream development

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[4] In 1948, a Resolution adopted by the Rio Grande Compact Commission, in accordance with its powers afforded under Article XII of the Compact, changed the location of the gage for the measurement of New Mexico's deliveries to Elephant Butte Reservoir. Resolution Adopted by Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, Feb. 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico (Feb. 24, 1948).

that took place after 1929 (the date of the Temporary Compact) and 1937 (the date that the 1938 Compact negotiations concluded). Water is delivered to Elephant Butte Reservoir because it was the primary water storage location for the Rio Grande Project when the Rio Grande Compact was adopted.

Article VII of the Rio Grande Compact precludes Colorado and New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of Usable Water stored in Rio Grande Project facilities. This is subject to exceptions associated with releases from Elephant Butte Reservoir that are, on average, greater than 790,000 acre feet per annum, or where there are relinquishments of Accrued Credits available. App. to Compl. at App. 14. Credits are prescribed in Article VI of the Rio Grande Compact. *Id*. at 11-14. Under specified circumstances, Article VIII of the Rio Grande Compact allows the Commissioner of Texas to demand that Colorado and/or New Mexico release water from storage in reservoirs constructed after 1929 to the amount of Accrued Debits sufficient to bring the quantity of Usable Water in Rio Grande Project Storage to 600,000 acre feet. *Id*. at 14-15.

The waters equitably apportioned under the Compact are those waters of the Rio Grande Basin

as defined in Article I(c) of the Compact.[5] Water apportioned to Colorado under the Compact is the water in the Basin above the New Mexico border in excess of its delivery obligation at Lobatos. Depletions in Colorado that reduce these deliveries create debits that must be replenished by Colorado through (1) release of water stored in Colorado, (2) reduced diversions and use in Colorado, (3) importation of water from outside the Rio Grande Basin, or (4) the release, in wet years, of water that is in excess of normal delivery requirements.

The water apportioned to New Mexico by the Compact is the water in the Basin *above* Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. Depletion in New Mexico above Elephant Butte that reduces these deliveries creates debits that must be replenished by New Mexico through (1) release of water stored upstream in New Mexico, (2) reduced diversions and use in New Mexico, (3) importation from outside of the Rio Grande Basin, or (4) the release, in wet years, of water that is in excess of normal delivery requirements. No water below Elephant Butte is apportioned to New Mexico.[6]

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[5] Article I(c) defines Rio Grande Basin as "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." App. to Compl at App. 2.

[6] Rio Grande Project water is, of course, delivered from the Rio Grande Project to lands within New Mexico, pursuant to Elephant Butte Irrigation District's contract with the United

Footnote continued on following page.

The water apportioned to Texas under the Compact is the water New Mexico delivers to Elephant Butte, less the water provided to Rio Grande Project lands in New Mexico by the Rio Grande Project. Under Articles I(k), (l) and (o) and Article IV of the Compact, the water in Elephant Butte is Usable Water in Project Storage of the Rio Grande Project. App. to Compl. at Apps. 3 and 9-11. This plain language assumes that water equitably apportioned to Texas will actually reach Texas' irrigable lands unencumbered by the actions of New Mexico. Nothing in the Compact allows New Mexico to deliver water into Elephant Butte and then take it back once that water is released from Elephant Butte.[7]

States. Joint Investigation at 73-74; *see also* App. to U.S. Amicus Br. at 1a-4a. In order to ensure that Texas receives water apportioned to it under the Compact, which includes return flows from Rio Grande Project lands in New Mexico, the Rio Grande Project needs to be operated as a single unit. *See infra* pp. 54-55, discussion of statement by Berkeley Johnson, U.S. Representative to the Rio Grande Compact Commission, *Function, Organization, and Procedure of the Rio Grande Compact Commission in Proceedings – First Meeting of the Upper Rio Grande Drainage Basin Committee of the National Resources Planning Board* (Jan. 27, 1940) (Berkeley Johnson Statement), reprinted in the Appendix to this Brief at App. 1-5.

[7] The ability of Rio Grande Project lands within New Mexico to benefit from storage in Elephant Butte is based solely on federal contracts issued under the authority of the Rio Grande Project. *Israel v. Morton*, 549 F.2d 128 (9th Cir. 1977).

New Mexico's obligation to deliver water into Elephant Butte Reservoir, which would provide for a normal release of 790,000 acre feet from Elephant Butte, is predicated on this quantity of water being used and reused within the Rio Grande Project, so that approximately 950,000 acre feet (including Rio Grande Project return flows) would be available to divert for the irrigation of all Rio Grande Project lands. *See* Joint Investigation at 88, Table 72 (setting forth gross diversions by canal systems in the Rio Grande Basin in 1936, and specifically the Rio Grande Project); *Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27 to October 1, 1937* at 9 (1937 Commission Proceedings) (explanation by Mr. Harlowe Stafford, engineer in charge of the Joint Investigation, that the diversion demand for the Elephant Butte-Fort Quitman section is 953,000 acre feet).[8] If Rio Grande Project releases and return flows are intercepted for use in New Mexico, then 950,000 acre feet is no longer available to divert for use on Rio Grande Project lands in New Mexico and Texas, and, as a consequence, Texas will not receive the water that it was apportioned by the Compact.

[8] In its April 30, 2014 letter to the Clerk of the Court, New Mexico also offered to lodge the 1937 and 1938 Commission Proceedings with the Court. Subject to the Court's determination regarding the role of extrinsic evidence on a Rule 12(b)(6) motion to dismiss, Texas does not oppose the lodging of the 1937 and 1938 Commission Proceedings.

III. Texas' Bill of Complaint and New Mexico's Motion to Dismiss

Texas submitted its Motion for Leave to file a Bill of Complaint against New Mexico and Colorado in January 2013.[9] This Court granted Texas' Motion for Leave to File Complaint on January 27, 2014, and granted New Mexico leave to file a motion in the nature of a Rule 12(b)(6) motion to dismiss under the Federal Rules of Civil Procedure Rule 12(b)(6). *Texas v. New Mexico & Colorado*, 134 S. Ct. 1050 (2014). The United States filed a Motion for Leave to Intervene on February 27, 2014. This Court granted the United States' Motion for Leave to Intervene on March 31, 2014. New Mexico filed its Motion to Dismiss (N.M. Br.) on April 30, 2014. New Mexico appended numerous excerpts from pre-Compact correspondence and reports to its Motion to Dismiss, or otherwise offered documents for lodging with the Court.

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[9] Texas named Colorado because it is a party to the Compact, but sought no relief against that State. Compl. at ¶ 5. Colorado filed an opposition to the motion for leave in March 2013 but did not file a motion to dismiss.

ARGUMENT

I. New Mexico's Motion to Dismiss Should Be Denied Because It Does Not Meet Threshold Federal Rule of Civil Procedure 12(b)(6) Standards

A. Standard for Motion to Dismiss

Rule 12(b)(6) provides that a claim may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). This Court's Rule 12(b)(6) jurisprudence serves as a guide in this case. *See* Sup. Ct R. 17.2.

Rule 12(b)(6) allows for streamlining a case, and "authorizes a court to dismiss a claim on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326 (1989). In evaluating a Rule 12(b)(6) motion to dismiss, a court assumes that the factual allegations in the Complaint are true, and draws inferences from those allegations in the light most favorable to plaintiff. A court also construes the complaint liberally. *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 572 (2006); *Rescuecom Corp. v. Google, Inc.*, 562 F.3d 123, 127 (2d Cir. 2009). The Complaint "should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see also Jenkins v. McKeithen*, 395 U.S. 411, 421 (1969) (holding that

the court must construe the complaint in favor of the plaintiff).

This Court has ruled on dispositive motions in original jurisdiction actions only in rare circumstances where the facts are not in dispute. *United States v. Alaska*, 501 U.S. 1248 (1991) (permitting the briefing of a legal issue in an original action based on stipulated facts). Moreover, this Court has taken a cautious approach toward critical public issues where the facts are not clear. The Court has stated, "[S]ummary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated legislation, contracting and practice." *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-257 (1948).

This Court liberally allows full development of facts in original actions. *United States v. Texas*, 339 U.S. 707, 715 (1950) (". . . in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, [this Court] has always been liberal in allowing full development of the facts."); *Kansas v. Colorado*, 185 U.S. 125, 145 (1902) (holding that because of the "intricate questions arising on the record [of the original case, the Court is] constrained to forbear proceeding until all the facts are before us on the evidence."); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894) ("In the exercise of original jurisdiction in the determination of the boundary line between

sovereign States, this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded."); *Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995) (affording "fair opportunity" for a State to present its case).

B. Standard for Interstate Compact Interpretation

As it does with contracts, this Court interprets interstate compacts "according to the intent of the parties." *Montana v. Wyoming*, __ U.S. __, 131 S. Ct. 1765, 1771 n.4 (2011). The Court begins "by examining the express terms of the Compact as the best indication of the intent of the parties." *Tarrant Reg'l Water Dist. v. Herrmann*, __ U.S. __, 133 S. Ct. 2120, 2130 (2013). A plain reading of the Compact should "make[ ] sense in light of the circumstances existing in the signatory States when the Compact was drafted." *Montana*, 131 S. Ct. at 1778 (noting that the Yellowstone River Compact "would have been written to protect the irrigation uses that were legislatively favored . . . .").

The terms of the Compact should not be interpreted to produce "anomalous results," *Tarrant*, 133 S. Ct at 2131, or "an extremely implausible reading," *Oklahoma v. New Mexico*, 501 U.S. 221, 232 (1991). An interpretation of a compact term that produces impractical results suggests that the term is ambiguous, *id.* at 232-33, and an ambiguous term should be harmonized with the intent of the drafters,

id. at 237. When a compact term is ambiguous, it is appropriate to "turn to other interpretive tools to shed light on the intent of the Compact's drafters." *Tarrant*, 133 S. Ct. at 2132; *Oklahoma*, 501 U.S. at 234-35 & n.5 ("a congressionally approved compact is both a contract and a statute . . . and we have repeatedly looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous").

In its Motion to Dismiss, New Mexico suggests that when an interstate water compact is silent on a matter, the Court automatically invokes the presumption that States intend to retain sovereignty over waters in their jurisdiction. N.M. Br. at 23-24 (citing *Tarrant*, 133 S. Ct. at 2132). This is incorrect. Rather, when a compact's silence causes ambiguity about rights under the Compact, the Court "turn[s] to other interpretive tools to shed light on the intent of the Compact's drafters." *Tarrant*, 133 S. Ct. at 2132.[10]

[10] For example in *Tarrant*, the Court considered two additional interpretive tools to "shed light" on the Red River Compact's silence regarding state borders in section 5.05(b)(1) of that compact. First, the Court looked to other interstate water compacts that have addressed cross-border rights. Second, the Court considered the parties' course of dealing. *Id.* These issues require the development and consideration of detailed factual information that cannot be resolved within the scope of a Rule 12(b)(6) motion.

Moreover, a compact's silence on a matter is not synonymous with ambiguity; the drafters may simply have intended for commonly understood facts and settled law to apply. In *New Jersey v. New York*, 523 U.S. 767 (1998), the Court interpreted an 1834 compact (which set the boundaries between New Jersey and New York) to determine which state has jurisdiction over the filled land on Ellis Island. As part of its analysis, the Court considered the conclusions that could reasonably be drawn from the compact's silence on landfilling, and explained that "[t]here would have been no reason to [address the consequences of landfilling], simply for the reason that the legal consequences were sufficiently clear under the common law as it was understood in 1834." *Id.* at 783. The common law governing avulsion "speaks in the silence of the Compact, and we follow it to conclude that the lands surrounding the original Island remained the sovereign property of New Jersey when the United States added landfill to them." *Id.* at 784. On this point, the majority cautioned against converting silence on an issue into a contractual ambiguity. "[N]o such translation is possible here, for the silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify." *Id.* at 783 n.6.[11]

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[11] *See also Tarrant*, 133 S. Ct. at 2133 ("We think that the better understanding of [the Red River Compact section] 5.05(b)(1)'s silence is that the parties drafted the Compact with this legal background in mind . . . .").

In any event, the presumption discussed in *Tarrant*—that States do not easily cede regulatory authority to control their waters— is inapplicable, in this case, because New Mexico admits that the Compact requires it to cede control of the water delivered to Elephant Butte Reservoir. New Mexico admits that it must "relinquish[ ] control over the water by delivering it into Elephant Butte Reservoir." N.M. Br. at 37-38; *see also* N.M. Br. at 39-40 (acknowledging New Mexico's "duty to deliver Rio Grande Compact water to the possession and control of Reclamation").

The Compact requires New Mexico to deliver water into Elephant Butte Reservoir and to thereby relinquish control of the water for storage and distribution by the Rio Grande Project. New Mexico's jurisdiction over the waters in the Lower Rio Grande is limited by both the express requirements of the Compact and the operation of the Rio Grande Project. New Mexico has ceded regulatory authority over this portion of the Rio Grande. The Commissioner negotiating the Compact for New Mexico recognized this cession of control when he stated: "[f]or purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas." City of Las Cruces Amicus Curiae Brief in Support of State of New Mexico's Motion to Dismiss Texas'

Complaint and the United States' Complaint in Intervention (Las Cruces Amicus Br.) at 16.[12]

C. New Mexico Has Not Met Its Burden Under Federal Rule of Civil Procedure 12(b)(6)

New Mexico has not met the burden imposed by Rule 12(b)(6) and its Motion to Dismiss should be denied because: (1) Texas states a claim for relief under the Rio Grande Compact; (2) New Mexico's characterization of Texas' Complaint is mistaken;

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[12] The Las Cruces Amicus Brief generally tracks the points made by New Mexico in its Motion to Dismiss. As such, Texas' response to New Mexico's Motion to Dismiss applies equally to the points made by Las Cruces. Las Cruces also complains, however, that the Compact fails to consider equities of water users in New Mexico below Elephant Butte Reservoir (Las Cruces Amicus Br. at 16) and it would have been "absurd" for New Mexico to enter a compact "which limited water rights below Elephant Butte Reservoir to the irrigation interests of the Rio Grande Project . . . ." Las Cruces Amicus Br. at 16-17. In making this argument, Las Cruces ignores that in the negotiations leading to the Compact, New Mexico users below the Dam were aligned with Texas. *See City of El Paso ex. rel. Pub. Serv. Bd. v. Reynolds,* 563 F. Supp. 379, 385 (D. N.M. 1983), *aff'd on reh'g,* 597 F. Supp. 694 (D. N.M. 1984). Moreover, Las Cruces ignores the fact that New Mexico traded off additional benefits to lands below Elephant Butte in New Mexico in return for the substantial benefits it obtained for lands in the Middle Rio Grande in New Mexico. Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163, 172-73 (1974)*; see supra* section II.C. at pp. 50-51.

and (3) New Mexico relies on documents and facts beyond the scope of a Rule 12(b)(6) motion.

1. Texas States a Claim for Relief Under the Rio Grande Compact

To succeed on its Motion, New Mexico must establish "beyond doubt that [Texas] can prove no set of facts in support of [its] claim which would entitle [it] to relief." *Conley v. Gibson*, 355 U.S. at 45-46. Here, the factual allegations in Texas' Complaint are assumed as true for purposes of New Mexico's Rule 12(b)(6) motion. *See, e.g.*, Compl. at ¶¶ 8, 10, 11, 13, 18, 19, 24 and 25. For the purposes of New Mexico's Motion, the Court assumes that New Mexico has caused injury to Texas by intercepting, depleting and interfering with Texas' apportionment of the waters of the Rio Grande under the Compact in the manner specified in the above referenced Complaint paragraphs. *Bell Atl. Corp. v. Twombly*, 550 U.S. at 556 For the purposes of this Motion to Dismiss, therefore, the Court assumes that New Mexico's actions injure Texas. The legal question posed by the Motion to Dismiss is whether these actions violate the Rio Grande Compact.

2. New Mexico Misstates Texas' Allegations

New Mexico has mischaracterized the allegations made in the Texas Complaint. New Mexico claims that the Texas Complaint asserts that

the Compact imposes a delivery obligation at the New Mexico-Texas state line, and that the Compact imposes a duty on New Mexico to protect Rio Grande Project deliveries to the state line. N.M. Br. at 20, 28-30.

Texas, however, does not allege that the Compact includes a state line delivery obligation. Compl. at ¶ 10. Rather, Texas asserts that the Compact requires New Mexico to deliver a scheduled amount of Rio Grande water into Elephant Butte Reservoir, to relinquish control of that water for storage and distribution by the Rio Grande Project, and not to intercept, deplete or otherwise interfere with water released by the Rio Grande Project for the benefit of Rio Grande Project lands in Texas. Compl. at ¶¶ 10-11, 13, 18-19. New Mexico violates the Compact, including its delivery obligation in Article IV, when it allows water users to intercept, deplete or otherwise divert flows of the Rio Grande below Elephant Butte, which adversely affects Rio Grande Project operations including the amount of water that flows to irrigable lands in Texas. Compl. at ¶¶ 18-19. The Compact's express terms support this interpretation of New Mexico's delivery obligation.

New Mexico also argues that the Compact does not impose an obligation on New Mexico to "protect Rio Grande Project deliveries to the stateline." N.M. Br. at 20. However, Texas has never alleged that New Mexico has an obligation to "protect" Rio Grande Project or other flows to the

state line. Texas alleges that New Mexico violates the Compact when it permits and allows actions that interfere with Rio Grande Project deliveries to Texas of waters apportioned to Texas in the Compact. Texas alleges that New Mexico has done this by authorizing and permitting for use in New Mexico, the diversion of Rio Grande water, including return flows from Rio Grande Project lands in New Mexico, all of which have been apportioned to Texas. Compl. at ¶ 18.

New Mexico's Motion to Dismiss must be denied because it is based upon claims that have not been made by Texas, and which have nothing to do with the actual Complaint allegations made by Texas.[13]

3. New Mexico Relies on Documents and Facts Beyond the Scope of a Rule 12(b)(6) Motion

Rather than presenting a discrete legal issue as required by Rule 12(b)(6), New Mexico cites to 44 pages appended to its Motion to Dismiss, offers to

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[13] At various places New Mexico alleges that the "principal allegation" of Texas' Complaint is that New Mexico has breached an implied obligation of good faith and fair dealings. *See, e.g.,* N.M. Br. at 24-28. While Texas has alleged that New Mexico has acted in bad faith, the gravamen of its claim is that New Mexico's actions have breached the purpose and intent of the Compact. *See* Compl. at ¶¶ 18-20, 22, 25-28.

lodge 898 pages of additional mixed factual and legal materials[14] and relies on factual assertions in a cited law review article. New Mexico also relies on correspondence and unsubstantiated claims concerning the alleged intent of the Rio Grande Compact negotiators, and selectively provides and cites to a small sampling of documents that purportedly supports its novel Rio Grande Compact interpretation. *See, e.g.,* N.M. Br. at 13-14, 35-36 (providing New Mexico's interpretation of the implications of a 1938 letter drafted by Texas' Compact Commissioner). These documents do not represent the full universe of historical materials relating to the Compact and its negotiations.[15]

The Court should not consider extrinsic materials in its review of a Rule 12(b)(6) motion, and should accept as true all material factual allegations within the Complaint. *See Bell Atl. Corp. v. Twombly*, 550 U.S. at 556; *Arpin v. Santa Clara*

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[14] Pursuant to the instructions of the Clerk of the Court, Texas has also submitted a letter dated June 13, 2014, to the Clerk objecting to the lodging of one of the documents offered by New Mexico, based on both procedural and evidentiary grounds.

[15] A final determination of the issues in this case will undoubtedly involve an evaluation of numerous historic documents, but the review of these materials at this stage of the litigation is inappropriate. A Rule 12(b)(6) motion is based upon factual allegations in the complaint, not on extrinsic evidence. *Conley v. Gibson*, 355 U.S. at 45-46; *Arpin*, 261 F.3d at 925.

Valley Transp. Agency, 261 F.3d 912, 925 (9th Cir. 2001). In its original jurisdiction, the Supreme Court retains "ultimate responsibility" for both findings of fact and conclusions of law. *See United States v. Maine*, 475 U.S. 89, 98 (1986); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). New Mexico's reliance on these extrinsic documents, and on factual allegations outside the pleadings, requires that its Motion to Dismiss be denied as improperly outside the scope of a Rule 12(b)(6) motion.

II. The Compact Prohibits New Mexico and Its Citizens from Intercepting, Depleting or Interfering with Waters Equitably Apportioned to Texas

A. The Express Terms of the Compact Support Texas' Interpretation of New Mexico's Delivery Obligation

1. The Compact Apportions Waters of the Rio Grande Basin Above Fort Quitman, Texas

The Rio Grande Compact apportions waters of the Rio Grande above Fort Quitman, Texas. The preamble of the Compact states the intent of Compact drafters to "remove all causes of present and future controversy among the States . . . to the use of the waters of the Rio Grande above Fort Quitman, Texas," and to "effect[ ] an equitable apportionment of such waters." App. to Compl.

at App. 1. The definition of "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 . . . ." *Id.* at 2. These preliminary assertions of the signatory States' purpose and intent provide the relevant context for interpreting the remaining Compact terms. *See Alabama v. North Carolina*, 560 U.S. 330, 359 (2010) (Kennedy, J., concurring) (explaining that compacts, like treaties, "are to be interpreted upon the principles which govern the interpretation of contracts . . . with a view to making effective the purposes of the high contracting parties" (quoting *Sullivan v. Kidd*, 254 U.S. 433, 439 (1921))); *New York State Dep't of Soc. Servs. v. Dublino*, 413 U.S. 405, 419-20 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.").

2. The Compact Requires New Mexico to Cede Control of Rio Grande Water at Elephant Butte Reservoir

New Mexico has permitted and allowed individuals and entities in New Mexico below Elephant Butte Reservoir to divert the waters of the Rio Grande, including return flows from Rio Grande Project lands in New Mexico, for use within New Mexico. Compl. at ¶¶ 18-19. New Mexico maintains that these actions do not violate the Compact because the Compact does not impose a state line delivery obligation and does not impose a duty to ensure flows below Elephant Butte Reservoir to

Texas. N.M. Br. at 20-21. This position ignores the plain meaning of the word "deliver."

A congressionally approved compact is both a contract and a statute. *Virginia v. Maryland*, 540 U.S. 56, 66 (2003); *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5. Compacts, like all statutes, must be read to give effect to every word. *See Duncan v. Walker*, 533 U.S. 167, 174 (2001) (describing the cardinal rule of statutory interpretation). In this case, the Court must interpret the Compact to give effect to the critical term "deliver" as it is used in Article IV, and avoid an interpretation that renders the term void or insignificant. *See id.*

"Delivery" means "[t]he formal act of transferring something" or "the giving or yielding possession or control of something to another." *Black's Law Dictionary* 494 (9th ed. 2009); *see also Black's Law Dictionary* 349 (2d ed. 1910) (defining "delivering" in the context of "conveyancing" as "[t]he final and absolution transfer of a deed . . . in such manner that it cannot be recalled by the grantor"). Article IV of the Compact requires New Mexico to "deliver" water into Elephant Butte Reservoir, which means transfer control of Rio Grande water for storage and distribution by the Rio Grande Project. When New Mexico authorizes and permits water users below Elephant Butte to divert and intercept the waters of the Rio Grande, including return flows from Rio Grande Project lands in New Mexico, for use in New Mexico, it is asserting, not relinquishing,

control over that water contrary to the law of equitable apportionments. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) (*Hinderlider*) (state law rights pre-existing a compact were held to be subordinate to an equitable apportionment under the compact), and discussion *infra* at 59-60. Moreover, an obligation to "deliver" water would be meaningless if New Mexico could simply deliver water into Elephant Butte Reservoir only to recapture the same water at any point before it reaches irrigable land in Texas. Such an interpretation cannot be correct. *See Texas v. New Mexico*, 462 U.S. 554, 569 (1983) ("It is difficult to conceive that Texas would trade away its right to seek an equitable apportionment of the river in return for a promise that New Mexico could, for all practical purposes, avoid at will.").

The Compact recognizes that water delivered into Elephant Butte Reservoir becomes subject to the control and distribution by the Rio Grande Project as Usable Water in Project Storage. *See supra* discussion at p. 7 and note 3. Indeed, the Compact utilized the Rio Grande Project to ensure that Texas receives the water that was apportioned to it. Usable Water is available for release to meet irrigation demands on Rio Grande Project lands in New Mexico and in Texas, as well as for delivery to Mexico to satisfy treaty obligations. App. to Compl. at App. 3. It is not available for use and appropriation in New Mexico pursuant to New Mexico state law.

New Mexico misses the point when it argues that "Texas has failed to identify any term of the Compact . . . requiring New Mexico to control diversions of either Rio Grande Project or non-Rio Grande Project water after it has relinquished control over the water by delivering it into Elephant Butte Reservoir." N.M. Br. at 37-38. Texas alleges in its Complaint that New Mexico has breached its delivery obligation of Article IV of the Compact because it has *not* "relinquished" control over the water purportedly "delivered" by it into Elephant Butte Reservoir, by authorizing and permitting the diversion of Rio Grande water, including Rio Grande Project return flows, for use in New Mexico. Compl. at ¶¶ 18-19. These Texas allegations are taken as true for purposes of the Motion to Dismiss.

In fact, New Mexico admits that it has not relinquished control of water equitably apportioned to Texas under the Compact. New Mexico explains, in great detail, the steps it has taken to assert control over Rio Grande Project water below Elephant Butte Reservoir and above the Texas state line. In the ongoing adjudication of the Lower Rio Grande in New Mexico state court, the adjudication court has made various rulings regarding Rio Grande Project water, including erroneous determinations of when Rio Grande Project water "loses its identity as surface water" and becomes "subject to appropriation in accordance with applicable [New Mexico] statutes." N.M. Br. at 55 (internal citations and quotations omitted). Asserting jurisdiction in a state adjudication

proceeding over Rio Grande Project water governed by the Compact, in the manner that New Mexico describes in its Motion to Dismiss, is the diametric opposite of "relinquish[ing] control over the water by delivering it into Elephant Butte Reservoir." This, in itself, violates New Mexico's delivery obligation under Article IV of the Compact.

3. New Mexico's Interpretation of "Deliver" Ignores the Other Provisions of the Compact

New Mexico's interpretation of its Compact delivery obligation also renders the Compact's scheduled delivery amounts completely arbitrary. This impractical result is another reason to reject New Mexico's argument. The Compact drafters in 1938 negotiated a delivery schedule that is fixed; the flow of water measured at the upper index station at Otowi Bridge determines the required delivery amount at the lower index station at Elephant Butte Reservoir. Depletions by water users between Otowi and the Elephant Butte Reservoir (such as by the Middle Rio Grande Conservancy District) cannot be increased beyond the 1938 conditions unless accounted for by debits and credits under the Compact. If New Mexico users below Elephant Butte Reservoir are permitted to deplete the waters released from the Reservoir, the carefully crafted Article IV fixed delivery schedule would make no sense. The debit/credit provisions of the Compact were intended to protect Texas from depletions in Colorado and New Mexico. If it were intended that

depletions in New Mexico below Elephant Butte are permitted, then the Compact would have been structured to include a debit/credit provision similar to Article VI of the Compact to address depletions in New Mexico below Elephant Butte.

Further, New Mexico's interpretation of Article IV's delivery obligation cannot be reconciled with the basic accounting structure of the Compact. New Mexico must deliver water into Elephant Butte Reservoir in quantities determined by the schedule provided in Article IV. Once delivered into Elephant Butte Reservoir, Rio Grande water becomes Usable Water in Project Storage. These terms are relevant to provisions of the Compact that limit storage and account for shortages in deliveries. For example, Article VII limits storage in New Mexico and Colorado based on the levels of Project Storage. Whenever there is less than 400,000 acre feet of Usable Water in Project Storage, then New Mexico (and Colorado) shall not increase the amount of water in storage in reservoirs constructed after 1929, i.e., reservoirs above Elephant Butte Reservoir. App. to Compl. at App. 14. This limitation is adjusted when actual releases of Usable Water exceed 790,000 acre feet per annum. *Id.*[16]

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[16] Allowing these depletions by New Mexico water users below Elephant Butte not only deprives Texas of water apportioned to it by the Compact, but also adversely affects water users in the Middle Rio Grande in New Mexico and in Colorado by requiring more water to be bypassed upstream of Elephant Butte to

Footnote continued on following page.

The Compact also uses a system of debits and credits to account for delivery obligations. If the actual delivery of water is less than the scheduled delivery, then there is an Annual Debit for the year. App. to Compl. at App. 2. Similarly, an Annual Credit equals the amount by which an actual delivery in a calendar year exceeds the scheduled delivery. *Id.* Over time, the sum of the Annual Debits and Annual Credits become Accrued Debits or Accrued Credits. *Id.*

Under Article VI of the Compact, the Accrued Debit of New Mexico may not exceed 200,000 acre feet (with one exception). If it does, then New Mexico must retain water in post-1929 storage reservoirs at all times to the extent of its Accrued Debit. Under Article VII of the Compact, the Commissioner for Texas may then demand that New Mexico release this water. App. to Compl. at App. 14-15. If these releases were not intended to benefit Texas, then there would be no reason to give Texas the sole ability to demand these releases.

New Mexico's reading of the Compact completely contravenes the logic of the Accrued Debit provision. Texas' right to demand the release of Accrued Debit water stored in New Mexico is only beneficial to Texas if it actually receives water. This

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ensure that Elephant Butte Reservoir storage is maintained above 400,000 acre feet. S*ee* App. to Compl. at App. 14.

right would be meaningless if individuals and entities in New Mexico may intercept below Elephant Butte the same water that Texas demanded be released from storage. The Accrued Debit water must be able to flow into Elephant Butte Reservoir, to be released based on the normal operations of the Rio Grande Project, and then flow unimpeded by New Mexico's actions so as to benefit the State of Texas.

New Mexico's interpretation of the Compact contradicts these provisions of the Compact and this accounting structure. New Mexico focuses on the location of the delivery obligation, but in so doing, New Mexico ignores the proper understanding of the term *deliver*, and how it is used in the Compact to effect an equitable apportionment.

4. Article XI of the Compact Does Not Limit Texas' Recourse Against New Mexico

In its Motion to Dismiss, New Mexico resurrects its failed argument first made in its Opposition to Texas' Motion for Leave to File Complaint (Opp. Br.), that Article XI of the Compact limits Texas' recourse against New Mexico only for a failure to perform "at the point of delivery." *See* Opp. Br. at 12-13; N.M. Br. at 39-40. This argument is no better now than it was then. Article XI confirms that the Compact settles all controversies between New Mexico and Texas "relative to the quantity or quality of the water of the Rio Grande." Article XI

further provides, in a savings clause, that "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." App. to Compl. at App. 16. A plain reading of this provision indicates that it does not prevent a state from stating a claim for relief based on another state's failure to comply with any of its obligations under the Compact, including Texas' claim that New Mexico is intercepting, depleting and interfering with Texas' equitable apportionment under the Compact.[17] Consistent with its granting Texas' Motion for Leave to File Complaint, this

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[17] In addition, and as previously pointed out by the United States (*see* U.S. Amicus Br. at 16-17), the Compact does not define "character"; however, by using the disjunctive "or" in the phrase "character or quality of the water," the term "character" arguably refers to something other than water quality. In this regard, the term "character" could have been used by the drafters of the Compact to refer to the possessory status of the water. New Mexico arguably changes the character of the water at the place of delivery by not, in fact, relinquishing complete control of the water, and instead, maintaining control by intercepting and interfering with the water after it is released from Elephant Butte Reservoir. This issue requires consideration of detailed factual information, which is beyond the scope of a Rule 12(b)(6) motion. *See Texas v. New Mexico*, 462 U.S. at 569-70 ("In the absence of an explicit provision or other clear indications that a bargain to that effect was made, we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights.").

Court should not afford any weight to New Mexico's strained reading of Article XI.

B. The Compact Governs the Rio Grande Below Elephant Butte and Limits Depletions That Deprive Texas of Its Equitable Apportionment Under Conditions That Existed in 1938

The Compact protects the Rio Grande Project and its operations under the conditions that existed in 1938, and relies on the Rio Grande Project, as it operated in 1938, as the means to provide Texas its apportionment of Rio Grande water. Compl. at ¶¶ 10-11. Confronted with these allegations, New Mexico claims that its actions do not violate the Compact because there is no language in the Compact that requires New Mexico to maintain the 1938 condition on the Rio Grande below Elephant Butte. N.M. Br. at 40-48. New Mexico interprets the Compact's silence on depletions of Rio Grande water below Elephant Butte Reservoir to mean simply there is no limitation at all on such depletions. This is contrary to the Compact's stated intent to effect an "equitable apportionment" of the waters of the Rio Grande above Fort Quitman.

A compact is interpreted consistent with the drafters' background understanding of the law and the circumstances at the time the Compact was executed. *Tarrant*, 133 S. Ct. at 2133; *New Jersey*, 523 U.S. at 783-84 & n.6. In this case, the

"background understanding" is the existence and operation of the Rio Grande Project with contracts in place for delivery of Rio Grande Project water, and reclamation law governing federal reclamation projects.

1. The Compact Assumes the Existence of the Rio Grande Project and Protects the Normal Operation of the Rio Grande Project

New Mexico's argument with respect to the 1938 condition disregards all the provisions of the Compact that protect the 1938 operating conditions of the Rio Grande Project. The express terms of the Compact demonstrate that the drafters were aware of the Rio Grande Project and included terms to protect its normal operations as of 1938 conditions, so that the Rio Grande Project is used as the means to provide Texas its equitable apportionment of the Rio Grande.

The drafters' acknowledgement of the relationship between the Compact and the Rio Grande Project is apparent in the first Article of the Compact by the inclusion of the reference to the Rio Grande Project in the definitions of Project Storage and Usable Water. App. to Compl. at App. 3. The drafters were clearly aware of the Rio Grande Project's role in delivering water to irrigated lands in the Rio Grande basin, and to Mexico to meet the United States' treaty obligations.

The United States representative at the meeting of the Rio Grande Compact Commission in 1938 stated that the intent [of the Compact] was an "equitable division of the water of the Rio Grande" and that "[i]t is my belief that the interests of the United States are fully safeguarded by (a) inclusion, in the State allocations, of all water to which Federal irrigation projects are entitled . . . ." *Proceedings of the Meeting of the Rio Grande Commission, Held in Santa Fe, New Mexico, March 3 – March 18, 1938* (1938 Commission Proceedings), Letter from S.O. Harper, Chairman, Rio Grande Compact Commission, App. No. 12, at 84 (*see supra* note 8). Such a statement could not have been made without the clear understanding that the Compact recognized and relies on the Rio Grande Project for the delivery of the water apportioned to Texas.

Other provisions demonstrate the drafters' intent to protect the normal operation of the Rio Grande Project, i.e., a "normal release of 790,000 acre feet," from further development[18] of the river. For example, Article IV requires adjustments to be made to the scheduled amounts based on depletion of tributary runoff between Otowi Bridge and San

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[18] As of 1938 when the drafters signed the Compact, three storage reservoirs had been constructed: Elephant Butte (completed in 1916); El Vado (completed in 1935); and Caballo (completed in 1938). The development status is apparent from the location of the stream gaging stations originally required in Article II. *See* App. to Compl. at App. 4-5.

Marcial during July, August, and September by works constructed after 1937.[19] App. to Compl. at App. 10. This protects Texas's apportionment from upstream development by ensuring an agreed upon level of flow into Elephant Butte Reservoir and normal releases from the Rio Grande Project. The drafters provided for the necessary adjustments to deliveries into Elephant Butte Reservoir if New Mexico were to deplete river flow by building storage works above San Marcial. The drafters did not need to provide similar adjustments to river flows below Elephant Butte Reservoir because Rio Grande Project releases regulated river flow for this portion of the Rio Grande.

In fact, the Rio Grande Project was fully developed at the time the Compact was negotiated and approved. *See supra* Statement, section I pp. 4-6. New Mexico claims that the adjustment to the delivery schedule for depletions at Otowi Bridge compared to the absence of a similar adjustment for depletions below Elephant Butte supports its argument that the Compact does not limit post-1938 development below Elephant Butte. N.M. Br. at 41-43. The more reasonable interpretation of the different treatment of depletions above and below Elephant Butte is that the drafters simply

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[19] The 1948 Resolution (*see supra* note 4) did not retain this adjustment to the measurements when it substituted the gaging station below Elephant Butte Reservoir for the gaging station at San Marcial.

understood the operations of the Rio Grande Project in 1938 and intended them to continue.

The Compact also protects Project Storage to allow for "a normal release" from the Rio Grande Project. If Colorado or New Mexico have Accrued Debits stored in reservoirs constructed after 1929, then Texas may demand the release of that water to maintain the quantity of Usable Water in Project Storage at levels sufficient to allow "a normal release" of 790,000 acre feet from Project Storage in that year. App. to Compl. at App. 14-15. Thus, the drafters protected the quantity of water flowing into Elephant Butte Reservoir during dry years, or years when New Mexico and Colorado are filling reservoirs constructed after 1929.

At the same time, the drafters provided for forgiveness of these Accrued Debits in a wet year with an Actual Spill.[20] Based on the definition of Actual Spill, Elephant Butte Reservoir would be at capacity, and deliveries of Rio Grande Project water would be easily met. The drafters took great care to ensure that New Mexico delivers sufficient water into Elephant Butte Reservoir to maintain normal

[20] The Compact defines Actual Spill to mean "all water which is actually spilled from Elephant Butte Reservoir or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir." App. to Compl. at App. 3. An Actual Spill cannot occur until all credit water has been spilled. *Id*.

releases of Rio Grande Project water for irrigation demands in Texas, Rio Grande Project lands in New Mexico, and delivery to Mexico.

Texas' interpretation of the Compact reflects these agreed upon operations of the Rio Grande Project. Texas receives its equitable apportionment under the Compact when (1) New Mexico delivers a scheduled amount of water into Elephant Butte Reservoir with the appropriate adjustments, (2) control of that water is transferred to the Rio Grande Project, (3) normal releases of Rio Grande Project water are made to satisfy irrigation demands and delivery to Mexico, and (4) the released water and Rio Grande Project return flows are allowed to flow to the intended delivery point. If New Mexico water users were permitted to intercept Rio Grande Project water, then protecting a normal Rio Grande Project release of 790,000 acre feet would have been a futile exercise. Under New Mexico's theory, the drafters would have ensured flows into Elephant Butte Reservoir, without knowing how much water would be removed from the river system below Elephant Butte Reservoir. The ability to satisfy deliveries of Rio Grande Project water to irrigation lands in the Rio Grande Basin and to Mexico would then be jeopardized based on the amount of flow depleted below Elephant Butte Reservoir. New Mexico's implausible interpretation defeats the stated intent of the Compact to effect an "equitable apportionment" of the waters of the Rio Grande above Fort Quitman by depriving Texas of any apportionment of those waters.

2. New Mexico's Obligations Below Elephant Butte Dam Are, in Part, Defined by Reclamation Law

New Mexico's understanding of its Compact obligations below Elephant Butte Reservoir discounts a critical aspect of the drafters' background understanding: the role of federal reclamation law. There would have been no reason for the drafters to address depletions below Elephant Butte Reservoir because the legal framework applicable to this portion of the Rio Grande was sufficiently clear in 1938. *See New Jersey v. New York*, 523 U.S. at 783-84 & n.6 (explaining that when silence is on the subject of settled law, background law applies).

In order to receive delivery of water stored in a federal reclamation project and distributed by project works, a user must enter into a contract with the United States to effect repayment of the project's construction costs. The practice of contracting for project water dates back to the original Reclamation Act of 1902, which authorized the Secretary of the Interior to enter into "contracts for the construction" work of projects, and to give "public notice of the lands irrigable under the project," the charges per acre upon the entries, and the number of installments in which the charges shall be paid. Act of June 17, 1902, Pub. L. No. 161, ch. 1093, § 4, 32 Stat. 389 (codified as 43 U.S.C. § 419); *see also*

Payette-Bose Water Users' Ass'n v. Bond, 269 F. 159, 177-78 (D. Idaho 1920) (describing the contract expectations of entrymen and reclamation officials, respectively, to stored waters and construction cost charges). Following the enactment of the 1902 Act and before the Compact was approved in 1938, Congress amended the requirements for different types of water service and associated contracts several times.[21] *See, e.g.*, Warren Act of Feb. 21, 1911, Pub. L. No. 61-406, ch. 141, § 1, 36 Stat. 925 (contracts for water in excess of the requirements of the lands to be irrigated by any project); Reclamation Extension Act of Aug. 13, 1914, Pub. L. No. 63-170, ch. 247, § 5, 38 Stat. 687 (authorizing charges to water right applicant, entryman, or landowner of operation and maintenance costs of the project).

Significantly, the 1926 amendments and supplements to the Reclamation Act unequivocally made a repayment contract a prerequisite to water service from a federal reclamation project:

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[21] Congress also enacted legislation specific to the Rio Grande Project in this time period. Act of June 4, 1936, Pub. L. No. 74-648, ch. 500, 49 Stat. 1463 (authorizing the canalization of the Rio Grande from the Caballo Reservoir site in New Mexico to the American Diversion Dam near El Paso, Texas); Act of Aug. 29, 1935, Pub. L. No. 74-392, ch. 805, 49 Stat. 961 (authorizing construction of the American Diversion Dam in the Rio Grande and appropriate $1 million); Act of May 28, 1928, Pub. L. No. 70-556, ch. 815, 45 Stat. 785 (amending construction payments due from Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1).

> No water shall be delivered upon the completion of any [new water] project or new division of a project until a contract or contracts in form approved by the Secretary of the Interior shall have been made with an irrigation district . . . providing for payment by the district or districts of the cost of constructing, operating, and maintaining the works . . . .

Omnibus Adjustment Act of May 25, 1926, Pub. L. No. 69-284, ch. 383, § 46, 44 Stat. 649 (codified as 43 U.S.C. § 423e). Thus, by the time the drafters negotiated and the signatory States approved the Compact, the requirement for a contract with Reclamation to receive Rio Grande Project water was firmly settled. The drafters had no reason to address diversions from the Rio Grande below Elephant Butte Reservoir because the legal framework for the storage and distribution of this water was clear. Reclamation law applies, and only entities that have executed repayment contracts with the United States may receive Rio Grande Project water.

Consistent with this established legal framework, the irrigation districts that receive water from the Rio Grande Project (El Paso County Water Improvement District No. 1 (EPCWID) and Elephant Butte Irrigation District (EBID)) entered into a contract with Reclamation on February 16, 1938 (1938 Contract), a month before the Compact was

signed. App. to U.S. Amicus Br. at 1a-4a. In the contract, EPCWID and EBID agreed to the authorized irrigable acreage in each district, and the distribution of available water supply in proportion to the irrigable acreage: 67/155 to lands in EPWID and 88/155 to lands in EBID. *Id.*

As the statements made by Texas Commissioner Clayton, and offered by New Mexico, confirm, the 1938 Contract governs the allocation of water released from Elephant Butte Reservoir. The Commissioner's statements, and the 1938 Contract, partially explain the Compact's silence on depletions below Elephant Butte Reservoir. *See* N.M. Br. at 43-44. New Mexico cannot divorce the 1938 Contract from the reclamation laws that govern the contract and all deliveries or diversions of Rio Grande Project water. These legal requirements also further explain the silence on depletions below Elephant Butte Dam. As the Compact drafters were aware, water users must have a contract with Reclamation before they may divert or receive delivery of Rio Grande Project water. Thus, the drafters did not need to address depletions below Elephant Butte Dam because depletions could not occur absent an allocation of and contract for Rio Grande Project water.

To reach the contrary result advocated by New Mexico, the Compact drafters would have had to deviate from settled law. It would have been necessary for the Compact to state affirmatively that New Mexico water users are *not* required to enter into a contract to divert Rio Grande Project water

stored by and released from Elephant Butte Reservoir or use return flows. The Compact drafters, however, showed no intent to modify settled reclamation law. *See New Jersey*, 523 U.S. at 783 n.6 ("the silence of the Compact was on the subject of settled law governing avulsion, which the parties' silence showed no intent to modify"). The contract requirement for Rio Grande Project water "speaks in the silence of the Compact," and further explains the absence of a provision addressing depletions below Elephant Butte Reservoir and above the New Mexico-Texas state line. *See id.* at 784.

New Mexico asserts as partial justification for its actions, and as an explanation of why the 1938 condition has no relevance to what occurs downstream from Elephant Butte, that the Rules and Regulations for Administration of the Rio Grande Compact "permits each State to develop *its* water resources at will subject only to its obligations to *deliver* water in accordance with the schedule set forth in the Compact." N.M. Br. at 46 (emphasis in original). This argument fails because New Mexico ignores that water "delivered" into Elephant Butte ceases to be "its" water. Rather, it becomes water apportioned to Texas under the Compact to be distributed by the Rio Grande Project pursuant to Reclamation law.[22]

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[22] New Mexico admits that since 1938 it has developed extensive water resources, i.e., "hundreds of wells" south of Elephant Butte and that development, post 1938, has affected

Footnote continued on following page.

3. The 1929 Temporary Compact Is Not an Appropriate Tool for Interpreting the 1938 Compact

New Mexico also cites the 1929 Temporary Compact, and offers Article XII of that compact as an example of an "explicit protection[ ] for conditions existing as of a specific date," which New Mexico argues is absent from the 1938 Compact. N.M. Br. at 44. New Mexico presents this one provision of the 1929 Temporary Compact in isolation, and claims it supports the proposition that Texas bargained for explicit protection of conditions below Elephant Butte in 1929, but did not do so in 1938. When read in harmony with the other terms of the 1929 Temporary Compact, Article XII is merely one example of several provisions included in that

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the regional water supply. N.M. Brief at 47. The "regional water supply" that New Mexico discusses is the water supply otherwise apportioned to Texas by the Compact. New Mexico also claims that wells developed in Texas somehow deplete water apportioned by the Compact. N.M. Brief at 46-47. Texas disputes this factual allegation and will be prepared to demonstrate, at trial, why this allegation by New Mexico is not true. New Mexico also makes reference to the City of El Paso's Canutillo well field. Texas will treat the effect of this well field, if any, the same as depletions by New Mexico. To the extent that those wells, in fact, intercept Rio Grande water apportioned to Texas, the quantity of water intercepted should be counted against Texas' apportionment. These determinations, however, will require extensive factual inquiry.

temporary compact to maintain the status quo on the Rio Grande until its equitable apportionment was finalized.

Article VII of the 1929 Temporary Compact provides that no advantage or right will accrue based on change in condition, construction of storage, or use of water in the years between the signing of the temporary compact and the final compact. Act of June 17, 1930, Pub. L. No. 370, ch. 506, 46 Stat. 767, 771. Consistent with the intent to maintain the existing "rights and equities of each State," Colorado agreed that it would not "cause or suffer the water supply at the interstate gauging station to be impaired by new or increased diversions or storage within the limits of Colorado unless and until such depletion is offset by increase of drainage return." Art. V, 46 Stat. 770. This pledge from Colorado in Article V mirrors exactly the pledge from New Mexico in Article XII, which provides that "New Mexico . . . 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. 772.

Furthermore, all three signatory States stressed their intent as to the extremely limited application of the 1929 Temporary Compact by

including Article XVI in that compact.[23] 46 Stat 773. By offering Article XII as an interpretive tool, New Mexico ignores the directive from the drafters of the 1929 Temporary Compact not to attach any meaning to its provisions.

The express terms of the 1938 Compact, informed by the drafters' background understanding of legal and factual circumstances at the time, support Texas' interpretation that the Compact protects the operations of the Rio Grande Project under conditions existing in 1938. To the extent the Court believes extrinsic evidence is necessary to

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[23] It would be difficult to construct a provision more limiting than Article XVI:

> Nothing in this compact shall be considered or construed as recognizing, establishing, or fixing any status of the river . . . or the rights or equities of any of the signatories or . . . hereafter construed as in any manner establishing any principle or precedent as regards future equitable apportionment of the waters of the Rio Grande. The signatories agree that the plan herein adopted for administration of the waters of the Rio Grande is merely a temporary expedient to be applied during the period of time in this compact specified, is a compromise temporary in nature and shall have no other force or interpretation, and that the plan adopted as a basis therefor is not to be construed as in any manner establishing, acknowledging, or defining any status, condition, or principle at this or any other time.

Art. XVI, 46 Stat 773.

interpret New Mexico's Compact obligations below Elephant Butte, the 1929 Temporary Compact is not an appropriate tool to shed light on the intent of the drafters of the final Compact.

C. New Mexico's Interpretation Suggests the Compact Is Ambiguous, Which Would Warrant Consideration of Extrinsic Evidence at the Appropriate Stage of This Case

As explained above, New Mexico's proposed reading of the Compact produces anomalous results. At the very least, New Mexico's interpretation of the Compact suggests that the Compact is ambiguous, and the Court should, at the appropriate stage of this case, "turn to other interpretive tools to shed light on the intent of the Compact's drafters."[24] *See Tarrant*, 133 S. Ct. at 2132.

The 1938 Compact was negotiated upon a legal and factual foundation that extended in excess

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[24] Texas maintains that a determination of the drafters' intent based on extrinsic evidence is not appropriate at this stage of the litigation. *See supra* note 15. The materials lodged with the Court do not represent the full universe of historical documents relevant to such a determination. If the Court decides to consider the materials at this stage, Texas has offered discussion and evidence of the Compact negotiation history, which confirms that Texas' interpretation of the Compact is consistent with the drafters' intent.

of 50 years prior to execution of the Compact. That factual and legal background included, among many other things, the authorization, construction and operation of the Rio Grande Reclamation Project, a Treaty with the Nation of Mexico, the desire for and actions associated with more extensive water development on the middle Rio Grande in New Mexico and the upper Rio Grande in Colorado, a Temporary Compact, and then existing Supreme Court litigation between Texas and New Mexico. All of this is relevant to an interpretation of the Rio Grande Compact. *New Jersey v. New York*, 523 U.S. at 783-84. New Mexico's arguments, including its selective "factual" assertions and selective citation and quotation ignore all of this.

At the time the Compact was negotiated, New Mexico's focus was on protecting the middle Rio Grande, and in facilitating development in that portion of the River. Joint Investigation at 12-13 (describing the difficulty for the Middle section of the Rio Grande as to "the maintenance of an adequate water supply for irrigation of the lands of the Middle Rio Grande Conservancy District" versus the maintenance of the water supply for the Rio Grande Project and Hudspeth in the Elephant Butte-Fort Quitman section). *See* Hill, *Development of the Rio Grande Compact of 1938*, *supra,* at 172-73; 1938 Commission Proceedings at 18 (*see supra* note 8) (describing New Mexico's focus on Middle Rio Grande interests). In order to do so, it needed to ensure that Colorado delivered enough water at the New Mexico state line, and that its obligations to

Texas would be facilitated through the use of the then existing Rio Grande Project. This strategy is evident from the negotiating principles submitted by the New Mexico Commissioner, which emphasized (1) the protection of rights of New Mexico water users from increased storage in Colorado, (2) a willingness to negotiate with Texas "as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled," and (3) the preservation of the right of New Mexico and the Middle Rio Grande Conservancy District to develop the Middle Rio Grande and irrigate approximately 123,000 acres from the waters of the Rio Grande. *See Statement Submitted by Thomas M. McClure, Commissioner for New Mexico* (Sept. 28, 1937) in 1937 Commission Proceedings, Exh. No. 2, at 59 (*see supra* note 8). New Mexico, therefore, bargained to tie its obligations to Texas to the Rio Grande Reclamation Project, relying on that Project to ensure deliveries to Texas. Hill, *Development of the Rio Grande Compact of 1938*, *supra,* at 172-73.

By doing this, New Mexico would be benefitted by return flows from the use of Rio Grande Project waters on lands within southern New Mexico, thus reducing the quantity of water that it otherwise would have been obligated to deliver for the benefit of Texas. *See* Joint Investigation at 49 (explaining that in the Elephant Butte-Fort Quitman section, "the return water of each subvalley becomes available to that next lower as far as the Tornillo

heading"); *see also id.* at 47-55 (measuring the return water for the three sections of the Rio Grande). The amount of direct flows that would need to be bypassed in the middle Rio Grande in order to meet the Texas obligation was reduced by the amount of return flows from seepage, drainage and the underflow of the Rio Grande. A review of the full historic record establishes that the Compact's drafters understood that, absent the Compact accounting for Rio Grande Project return flows as part of Texas' apportionment, there would need to be greater releases from upstream sources, including the middle Rio Grande.[25] Joint Investigation at 49.

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[25] New Mexico suggests that state law governs return flows and seepage from Reclamation projects. N.M. Br. at 51 n.6. This is not accurate, and the Reclamation Policy on the Reuse of Project Water cited by New Mexico does not support this proposition. The Policy defines Rio Grande Project Water to include return flows, and further states: "Reclamation will assert and protect its interest in return flows under state law or as Federal property . . . That Reclamation may control reuse of project water is inherent in principles of property law and has been upheld in Federal case law." App. to N.M. Br. at 2. The case law to which the Policy refers includes the Supreme Court case, *Ide v. United States*, 263 U.S. 497 (1924). In *Ide*, the Supreme Court held that an appropriative right of federal reclamation project includes the right to use seepage and return flows. *Id.* at 505-06 (an irrigation project "is intended to cover, and does cover, the reclamation and cultivation of all the lands within the project. A second use in accomplishing that object is as much within the scope of the appropriation as a first use is."); *see also Bean v. United States*, 143 Ct. Cl. 363, 374 (1958) ("There can be no doubt under the authorities that the Reclamation Bureau, under its appropriation of 1906 and 1908,

Footnote continued on following page.

In order to facilitate the United States' ability to provide Texas with its apportioned water, as well as make delivery to Texas, the Compact was developed in a manner that protected the Rio Grande Project. New Mexico, in fact, admits this to be true. "New Mexico agrees that one of the purposes of the Compact was to protect deliveries to the Project." N.M. Br. at 40. The fact that the Compact used the Rio Grande Project to facilitate Texas obtaining the waters apportioned to it does not transmute Texas' Compact entitlement to a mere Rio Grande Project entitlement, and somehow make Texas' apportionment subject to New Mexico State laws, as is alleged by New Mexico.

The statements made by Frank B. Clayton, Commissioner from Texas, and quoted by New Mexico, were made with this background in mind. *See* N.M. Br. at 43-44. Mr. Clayton would have assumed the commonly known facts and law as they existed in 1938, including that by delivering water to Elephant Butte, New Mexico and Texas could take advantage of the storage capacity of the reservoir, flows in the river channel, and underflow to the river, canals, laterals and drains that were all part of the Rio Grande Project. In addition, Mr. Clayton, as

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had the control and the right to prescribe the use of the seepage from lands within the project, as well as the original use of the waters.") (citing *Ide*, 263 U.S. 497) (discussing the Rio Grande Project).

well as the New Mexico negotiators, understood that the Rio Grande Project existed, and that it was under the control of the Bureau of Reclamation, therefore ensuring that flows in the river channel, and underflow to the river, canals, laterals and drains would not be interfered with and that Texas' apportionment would, in fact, reach Texas.

Mr. Clayton's statements are in perfect harmony with the factual allegations made in the Texas Complaint. This same point, in fact, was echoed in 1940 by Berkeley Johnson, the United States representative to the Rio Grande Compact Commission, when he stated that Compact water is delivered at the head of Elephant Butte Reservoir, rather than El Paso, Texas, "because the Rio Grande Project must be operated as a unit. Deliveries are made in accordance with schedules based upon discharge of the Rio Grande at key stations in each State." Berkeley Johnson Statement, *supra*, at App. 1. Operating the Rio Grande Project as a unit allows return flows from Rio Grande Project lands in New Mexico to be delivered to Texas as part of its apportionment. *Id.*; Joint Investigation at 49, 55. Indeed, this is the very point that amicus City of Las Cruces makes when it quotes the New Mexico Commissioner, at the time the Compact was negotiated, as saying that "for the purpose of the Compact, Elephant Butte Dam should be deemed the

dividing line between New Mexico and Texas."[26] Las Cruces Amicus Br. at 16.

Preservation of the 1938 conditions below Elephant Butte Reservoir was also embedded into the Compact. It was understood at the time of the Compact that there was only enough water within the lower Rio Grande to serve the existing lands within southern New Mexico and Texas, and that any additional lands would have to be served through augmentation from outside of the Rio Grande Basin. *See, e.g.*, 1938 Commission Proceedings, App. No. 7, at 58-62 (The Engineering Advisors found that "present uses of water in each of the three States must be protected in the formulation of a Compact . . . because the useable water supply is no more than sufficient to satisfy such needs."). Increased irrigation or use in New Mexico (as has occurred) would, therefore, deprive Texas of some or all of its Compact apportionment.

III. Texas' Compact Apportionment Is Not Subject to New Mexico State Law

New Mexico offers the novel theory that water equitably apportioned to Texas by the Compact is entirely dependent on an application of New Mexico's

[26] It is telling that the Joint Investigation refers to the lower section of the Rio Grande as the "Elephant Butte-Fort Quitman Section" throughout the report. *See, e.g.*, Joint Investigation at 19-23 (describing the three sections of the Rio Grande Basin).

state water law. N.M. Br. at 49. New Mexico then describes the New Mexico state adjudication court process, arguing that because the Rio Grande Project is interconnected with the Compact, Texas (or the United States) should rely upon that process to vindicate its Compact rights. N.M. Br. at 52-58.

A. New Mexico's Reliance on *California v. United States* Is Misplaced

New Mexico's assertion that Texas' apportioned rights to Rio Grande water are entirely dependent on the administration of state water law relies on a body of law that is not at all relevant to this case. None of the cases cited by New Mexico deals with interstate rivers or with interstate compacts.

New Mexico cites *California v. United States*, 438 U.S. 645 (1978) as controlling the instant situation. In that case, this Court found that Section 8 of the 1902 Reclamation Act compelled the United States to defer to state water law and that, to the contrary, state water law governed the acquisition, administration and ownership of all water rights associated with a Reclamation Project, absent a clear congressional directive to the contrary. 438 U.S. at 678-79. New Mexico's reliance on *California v. United States*, in the instant case, is misplaced. Here, the question is not what rights the United States possesses pursuant to Reclamation Law, but rather what rights were apportioned to Texas in the

Compact. The fact that the Compact utilizes the Rio Grande Project to ensure that Texas receives the benefit of what was apportioned to it in the Compact does not transmute Texas' apportionment to a Reclamation contract supply. Indeed, Texas does not even have a contract with the United States, and is not a party to the contracts that New Mexico references within its Motion to Dismiss.

In addition, *California v. United States* did not involve an interstate river; nor did it involve an interstate compact. The reclamation project at issue there was wholly within the State of California and only served lands and individuals in California. In contrast, numerous Original Actions in this Court involving interstate water compacts have also involved Reclamation Project facilities. *Kansas v. Colorado*, 514 U.S. 673, 677-78 (1995) (Arkansas River Compact; John Martin, Pueblo, and Trinidad Reservoirs); *Oklahoma v. New Mexico*, 501 U.S. 221 (Canadian River Compact; Tucumcari and Sanford Projects); *Texas v. New Mexico*, 462 U.S. at 556 n.1 & 558-59 (Pecos River Compact; Carlsbad and Fort Sumner Projects); *Arizona v. California*, 373 U.S. 546, 555-62 (1963) (Colorado River Compact; Boulder Canyon Project). In none of those cases has it ever been suggested that state law in one state would control the compact apportionment of water in another state.

For example, the Upper Colorado River Basin Compact, Pub. L. No. 81-37, ch. 48, 63 Stat. 31 (1949), apportions water in the Upper Basin of the

Colorado River among the Upper Basin states: Arizona, Colorado, New Mexico, Utah, and Wyoming. Congress later authorized the Colorado River Storage Project to develop the water resources of the Upper Basin, authorizing the construction of Glen Canyon Dam among other dams and reservoirs and making it possible for the Upper Basin states to utilize their apportionments under the compact. Colorado River Storage Project Act of 1956, 43 U.S.C. § 620; *Friends of the Earth v. Armstrong*, 485 F.2d 1, 4-6 (10th Cir. 1973) (describing the compact and the role of the project, particularly Lake Powell, to provide storage basic storage necessary to meet delivery requirements to downstream states and Mexico). The rights to water from Lake Powell and other reservoirs in the Colorado River Storage Project are based upon the apportionment found in the Upper Colorado River Basin Compact, not on the state water law of any of the Upper Basin states.

Even if *California v. United States* were relevant, this Court specifically found that state water law did not govern if there were congressional directives to the contrary. 438 U.S. at 668 n.21; *see also* N.M. Br. at 50. The Compact is a federal law (Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785) and, thus, a "congressional directive." *See Virginia v. Maryland*, 540 U.S. at 66; *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5. As such, the

Compact, not New Mexico state water law, controls how water is apportioned to Texas.[27]

B. The Compact, Not New Mexico State Water Law, Governs the Apportionment of Water to Texas

In *Hinderlider*, 304 U.S. 92, the Colorado State Engineer appealed from an adverse judgment of the Colorado Supreme Court, in which that Court had held, in effect, that the State Engineer could not curtail water rights in Colorado for the purposes of complying with the obligations of the State of Colorado under the La Plata River Compact. The ditch company asserted that the La Plata River Compact violated the vested water right granted to it by the January 12, 1898 adjudication decree, and that the vested water right so awarded could not be modified or diminished except by condemnation and payment of just compensation. Since no condemnation proceeding had been commenced, the company had successfully argued that the state was without power to curtail its water right in order to comply with the La Plata River Compact. *La Plata & Cherry Creek Ditch Co. v. Hinderlider*, 93 Colo. 128, 25 P.2d 187 (1933); *Hinderlider v. La Plata*

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[27] New Mexico cites other cases in support of its position, but each relies upon *California v. United States* and, thus, none is relevant to this Original Action concerning an interstate compact that equitably apportions an interstate river.

River & Cherry Creek Ditch Co., 101 Colo. 73, 70 P.2d 849 (1937).

On appeal, the United States Supreme Court assumed that the water right adjudicated under the decree awarded the ditch company a property right that was indefeasible insofar as Colorado and its citizens and any other person claiming water in Colorado were concerned. The Court went on to hold, however, that the Colorado water right decree could not confer upon the ditch company rights in excess of Colorado's share of the waters of the stream, and Colorado's share was only an equitable portion thereof. *Hinderlider*, 304 U.S. at 106-07. In other words, state-created water rights only attach to that portion of an interstate stream that is equitably apportioned to the state, and the state court decree is not binding on citizens of another state who claim the right to divert water from the stream under that state's equitable share of the interstate stream. When an apportionment of the waters of the interstate stream is made by compact, the apportionment is binding on the citizens of each state and all water claimants, including water right owners whose rights predate the compact. *Id.* at 106; *see also Elephant Butte Irr. Dist. v. Regents of N.M. State Univ.*, 115 N.M. 229, 235-36, 849 P.2d 372 (1993) (citing *Hinderlider*, 304 U.S. 92) (stating that "[t]he apportionment of water under state compacts is binding on private water claimants"). No court can order relief inconsistent with an interstate compact. *Texas v. New Mexico*, 462 U.S. at 564.

The State of New Mexico, in signing the Rio Grande Compact in 1938, recognized that the storage and delivery of water by the Rio Grande Project was an essential element of the equitable apportionment agreed to in the Compact, and obligated itself to deliver water to the Rio Grande Project, that would be stored, released and delivered to Reclamation's contractors in New Mexico and Texas, and by treaty to Mexico. New Mexico agreed not to interfere with Rio Grande Project operations that existed when the Compact was executed in 1938. The Rio Grande Compact is federal law and the Rio Grande Project right encompassed in the Compact cannot be undermined by New Mexico state law, nor the New Mexico state court adjudication.[28] Arguing that New Mexico state law controls what Texas is entitled to under the Compact ignores the effect of the Compact

[28] New Mexico describes what has occurred or what is occurring in the state court adjudication. N.M. Br. at 16-19, 52-56; *see also* Las Cruces Amicus Br. at 20-27. This discussion is not relevant to a Rule 12(b)(6) motion and, in any event, is premised upon the faulty presumption that New Mexico state water law determines what was apportioned to Texas under the Compact. Moreover, the discussion itself is merely a more detailed re-argument of New Mexico's position that the state adjudication court is an appropriate alternative forum in which Texas can litigate its claims. The New Mexico state court adjudication, far from vindicating any position asserted by New Mexico, demonstrates that New Mexico is preventing the Rio Grande Project from being operated as is contemplated in the Compact, and preventing Texas from receiving water equitably apportioned to it under the Compact.

(indeed, it ignores the Compact) on New Mexico's responsibility to ensure its Compact obligations are satisfied. Those Compact obligations are superior to the rights of other New Mexico appropriators of water in the Lower Rio Grande, regardless of the rights and priorities adjudicated through application of New Mexico state laws. In addition, proceeding as New Mexico contends would lead to the implausible result of requiring Texas to have its sovereign rights determined by a New Mexico official.

New Mexico state law, in whatever form it takes, cannot be used to deny Texas water apportioned to it pursuant to the Compact, or the United States the ability to meet its treaty obligations to Mexico. Any application of New Mexico state law to the Rio Grande Project and its delivery to Texas must fail as inconsistent with the Compact.

CONCLUSION

Based upon the foregoing, the State of Texas respectfully requests that New Mexico's Motion to Dismiss be denied.

Respectfully submitted,

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FUNCTION, ORGANIZATION, AND PROCEDURE OF THE RIO GRANDE COMPACT COMMISSION

by Berkeley Johnson, Chairman.

The Rio Grande Compact was signed on March 18, 1938 by the Commissioners for the States of Colorado, New Mexico, and Texas and approved by the Chairman of the Commission, Mr. S.O. Harper, for the United States. The State representatives were H.C. Hinderlider for Colorado, Thomas M. McClure for New Mexico, and Frank B. Clayton for Texas. During the early part of 1939 the Compact was ratified by the Legislatures of the three States and approved by Congress, and on May 31, 1939 was signed by the President of the United States.

The object of the Compact is to apportion the waters of the Rio Grande equitably among the States of Colorado, New Mexico, and Texas. Water is delivered by Colorado at the Colorado-New Mexico State Line and by New Mexico at San Marcial, New Mexico, at the head of Elephant Butte reservoir, this point being chosen rather than El Paso, Texas, because the Rio Grande Project must be operated as a unit. Deliveries are made in accordance with schedules based upon discharge of the Rio Grande at key stations in each State.

In this short paper it would be impossible to give in detail the terms of an agreement which is the culmination of nine years of deliberations. In

general, it may be said that the Compact attempts to provide for the equitable use of the water supply by a system of water debits and credits and storage of the surplus waters of the Rio Grande. Water which is stored in upstream reservoirs is always available to reservoirs or lands lower on the stream system; on the other hand, surplus water arriving at the lowest reservoirs, Elephant Butte and Caballo, will spill and be lost to the entire basin. For this reason the storage of "debit" water in upstream reservoirs is permitted, provided that it shall be available at all times to downstream users should their supplies become deficient. Upstream users are also protected against excessive uses by the lower States. In effect, the system of schedule deliveries limits the depletion of the stream in each State based upon the water supply available. It is believed that such a plan will do much to eliminate wasteful and non-beneficial uses and to encourage beneficial consumption of the available supplies.

The function of the Commission is to collect, correlate, and present factual data; to preserve all records having a bearing upon the administration of the Compact; and, by unanimous action, to make recommendations to the respective States upon matters connected with such administration. Should any State fall behind in its water delivery schedule or in any way fail to live up to the terms of the Compact, it shall be the duty of the Commission to report the same to the proper administrative officials of such State and to recommend that they take suitable action to remedy the situation. The

Commission shall prepare an annual report for transmission to the three Governors, reviewing the administration of the Compact during the preceding year.

The Commission shall see that suitable and proper stream gaging stations, reservoir-stage recorders, rainfall and evaporation stations and other installations necessary to a proper collection of factual data are maintained.

In general, the Commission is merely a fact-finding body whose duty is to report its findings to the proper administrative officials of the three States for suitable action.

The Rio Grande Compact Commission is composed of one representative from each State. The State Engineers of Colorado and New Mexico are ex-officio Commissioners for their respective States, and the Texas Commissioner is appointed by the Governor of Texas. Upon the resignation of Frank B. Clayton the Governor appointed Julian P. Harrison as Commissioner for Texas. In addition, the President of the United States was requested to designate a representative of the United States to sit with the Commission and act as Chairman without vote. On August 6, 1939 I had the honor of being designated by the President as representative of the United States to the Compact Commission.

In connection with its duties the Commission "may employ such engineering and clerical aid as

may be reasonably necessary" for the proper administration of the terms of the Compact. At a meeting in December, 1939, the Commission employed a secretary, Paul H. Berg, to serve for the year 1940. His duties, subject always to the authority of the Commission, are to keep the records and correspondence of the Commission and to tabulate and correlate the basic data. His work commenced January 1st of this year and so far has consisted in looking over the Rio Grande Basin and meeting the various officials and others with whom he will have future dealings. As the hydrographic data gradually become available he will assume his regular duties.

Since August 4, 1939, four Commission meetings have been held to agree upon and draft the terms of a set of rules and regulations for the administration of the Compact. A form was drawn and was finally approved and signed by the three Commissioners at the El Paso meeting December 19, 1939.

The Rules and Regulations cover the subject of installation, maintenance, and operation of necessary stream gaging and reservoir stations mentioned in Article 2 of the Compact, plus certain necessary evaporation stations. They contemplate the need, from time to time, of rechecking the areas and capacities of Compact reservoirs which may be affected by silting. They provide for the investigation of new projects which, if constructed and operated, might affect the index inflows in

Colorado or New Mexico and necessitate adjustment in the application of the schedules. They recognize the need for quality of water studies in the event drains are built from the Closed Basin in Colorado, and for determinations of amounts of water brought into the Rio Grande basin by possible transmountain diversions. The duties of a Secretary to the Commission and the terms of his employment are covered by the Rules and Regulations. Included also is the matter of payment of costs incident to the administration of the Compact, and the provision for the annual meetings and other meetings that may prove necessary.

The Rules and Regulations of procedure are not immutable, hence they may be changed or amended from time to time as conditions and experience may prove necessary.

Berkeley Johnson.

January 7, 1940.