NO. 141, ORIGINAL

In the Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO AND STATE OF COLORADO,

Defendants.

On the Third Interim Report of the Special Master

BRIEF OF AMICI CURIAE WATER LAW PROFESSORS IN SUPPORT OF THE CONSENT DECREE PROPOSED BY THE STATES OF COLORADO, NEW MEXICO, AND TEXAS

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INTEREST OF THE AMICI CURIAE[1]

Amici are law professors who specialize in water law. Their work includes scholarship on interstate water litigation published since the Court accepted this case in 2013. *See* Heather Elliott, *Original Discrimination: How the Supreme Court Disadvantages Plaintiff States,* 108 IOWA L. REV. 175 (2022); Burke W. Griggs, *Interstate Water Litigation in the West: A Fifty-Year Retrospective*, 20 U. DENV. WATER L. REV. 153 (2018) (Griggs, 2018); Burke W. Griggs, *The Political Cultures of Irrigation and the Proxy Battles of Interstate Water Litigation,* 57 NAT. RESOURCES J. 1 (2017) (Griggs, 2017); Joseph Regalia & Noah D. Hall, *Waters of the State*, 59 NAT. RESOURCES J. 59 (2019); Noah D. Hall & Joseph Regalia, *Interstate Groundwater Law Revisited: Mississippi v. Tennessee*, 34 VIRGINIA ENVTL. L. J. 152 (2016); Rhett Larson, *Interstitial Federalism*, 62 U.C.L.A. L. REV. 908 (2015); and Jesse J. Richardson, Jr., *Slaying the Minotaur: Navigating the Equitable Apportionment Labyrinth to Create an Equitable Policy to Guide Water Management*, 39 J. ENVTL. LAW & LIT. ___ (2024). Amici include:

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[1] No party or its counsel, nor any other person or entity other than amici or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

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SUMMARY OF ARGUMENT

Wallace Stegner lamented that the "subject of water law in the West is so complex as to be utterly confusing to the layman." Wallace Stegner, BEYOND THE HUNDREDTH MERIDIAN 312 (1962). In their briefs before the Court and the Special Master, counsel for the United States, the States of Colorado, New Mexico, and Texas (States), as well as amici counsel for water rights holders across the Rio Grande Basin (Basin), make extensive arguments concerning whether the Court should approve the Consent Decree Supporting

the Rio Grande Compact, Doc. 720-1 (Consent Decree). The Consent Decree resolves the States' claims regarding the Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785 (Compact), by modifying the operation of the federal Rio Grande Project (Project), and by requiring the exercise of state power as necessary. Third Interim Report of the Special Master 38-48, Doc. 776 (Third Report). The United States, which is not a party to the Compact, opposes the Consent Decree, mostly because it has not consented to it. U.S. Br. 17-40. The dispute thus engages the long-fraught relationship between western water law and federalism, "a concoction of Byzantine politics and legalistic archaeology." B. Abbott Goldberg, *Interposition, Wild West Water Style*, 17 STAN. L. REV. 1, 36 (1964) (Goldberg, 1964).

Aware of this legal and bureaucratic history, Amici support the Court's approval of the Consent Decree. They submit this brief to emphasize the wider contexts of other recent interstate water litigation and the Court's relevant jurisprudence, which engage many of the same issues. Since 2015, the Court has resolved five interstate water cases: *Kansas v. Nebraska*, No. 126 Orig., 574 U.S. 445 (2015) (enforcing and interpreting the Republican River Compact); *Montana v. Wyoming*, No. 137 Orig., 538 U.S. 142 (2018) (enforcing and interpreting the Yellowstone River Compact); *Texas v. New Mexico*, No. 65 Orig., 592 U.S. 98 (2020) (upholding the Pecos River Master's application of the River Master's Manual pursuant to the Court's decree); *Mississippi v. Tennessee*, No 143 Orig., 595 U.S. 15 (2021) (declining to equitably apportion the interstate Memphis Sands Aquifer); *Florida v. Georgia*, No. 142 Orig., 141 S. Ct. 1175 (2021) (declining to equitably apportion the Apalachicola-Chattahoochee-Flint

River Basin). This case is the Court's sixth such case in less than a decade.

The dispute over the Consent Decree presents the Court with a rare opportunity to articulate three legal principles that apply across these six cases and their respective basins—and indeed, across all the nation's federalized waters.

First, the Consent Decree resolves the States' Compact claims consistent with the Compact, with other compact-based settlements that the Court has approved to incorporate the effects of post-compact groundwater pumping, and with the Reclamation Act of 1902, ch. 1093, 32 Stat. 388, as amended (Reclamation Act). The Court should take this opportunity to affirm that any compact compliance agreement or measure must comply with the Reclamation Act. Across many interstate basins, interstate compacts and Reclamation law are "inextricably intertwined." *Texas v New Mexico,* 583 U.S. 407, 413 (2018).

Second, the Consent Decree eliminates the claims that the United States has asserted in this original jurisdiction case. The United States intervened on behalf of Texas as a "sort of 'agent of the Compact, charged with assuring that the Compact's equitable apportionment . . . is, in fact, made.'" *Id.* (citation omitted). The United States then successfully asserted sovereign immunity against New Mexico. Third Report 29. The United States should not be allowed to eat its cake and have it too. The Court, which granted the intervention, should make clear that the United States must not abuse its superior power and resources to engage in asymmetrical interstate litigation among coequal states. The Court has emphasized the equality of the states across an interstate basin ever since its

first interstate water allocation case. *Kansas v. Colorado*, 206 U.S. 46, 97-98 (1907).

Third, the Consent Decree updates the administration of the Compact to account for the groundwater revolution, but there is a second revolution, the environmental revolution, which has also transformed the governance of the Basin. The Court should affirm that state and federal actions taken in compliance with the federal law concerning interstate compacts and decrees must also comply with the entire body of federal environmental law. States cannot use compliance with one federal law to justify ignoring or violating another.

These three principles are as uncontroversial as they are necessary to articulate and affirm. A clear statement by the Court affirming them will provide invaluable guidance to all states and federal agencies, which are regularly pressured to ignore them. A clear statement will also reduce costly, time-consuming litigation. As one Special Master has recommended, "if courts step forward more than they have over the past several decades and actually look to some of the lessons that prior cases provide, they can help us successfully attack some of the major water challenges that we face today." Barton H. Thompson, Jr., *The Role of the Courts in Water Law*, 66 S. C. L. REV. 581, 595 (2015).

ARGUMENT

I. THE CONSENT DECREE ESTABLISHES CLEAR LIMITS OVER THE STATES' COMPACT ALLOCATIONS AND WATER USE, CONSISTENT WITH THE COMPACT AND THE RECLAMATION ACT.

A. The Consent Decree Resolves the States' Claims Through Compliance Mechanisms Consistent with the Compact and Similar to Those Which the Court Has Approved Since the Emergence of the Groundwater Revolution.

The Compact has one purpose: that of "effectuating an equitable apportionment" of the waters of the Rio Grande, from its headwaters in the San Juan Mountains and the San Luis Valley of Colorado, throughout its course across New Mexico, and in Texas to above Fort Quitman. Compact, Preamble at 1, art. I(c); *Texas v. New Mexico,* 583 U.S. at 413. Such equitable apportionment is the fundamental purpose of most interstate water compacts. The Compact, approved by Congress in 1939, is contemporary with and analogous to other compacts in which federal agencies required the compacting states to bind themselves to quantifications of their respective water supplies as a necessary condition for the federal construction of interstate water irrigation and flood-control infrastructure. *See, e.g.,* Republican River Compact, art. I, ch. 104, 57 Stat. 86 (1943) (stating a fundamental purpose of the compact to be the joint action of the States and the United States in the efficient use and control of water); Arkansas River

Compact, art. II, ch. 155, 63 Stat. 145 (1949) (stating a fundamental purpose of the compact to be the administration of John Martin Reservoir, a federal reservoir located in Colorado to assist irrigation use in both Colorado and Kansas).

Yet the ink was barely dry on many New Deal compacts when they confronted a fundamental challenge to their administration: the groundwater revolution. Across the West, the disruptive technology of modern groundwater irrigation and the regional scale of its water consumption "began to erode the early promise" of interstate compacts. Report of Arthur L. Littleworth, Special Master, 55, Kansas v. Colorado, No. 105 Orig. (July 29, 1994), http://www.supremecourt.gov/SpecMastRpt/ORG105V1_071994.pdf. Because most aquifers are connected to surface waters, the pumping made possible by modern technology caused declines in rivers and reservoirs. By the 1970s, excessive groundwater pumping had reduced interstate stream flows, forcing downstream states to seek relief from the Court. Across these cases, the most pressing issue was "the extent to which the compact's water apportionment restrict[ed] ground-water pumping." First Report of Vincent L. McKusick, Special Master, (Subject: Nebraska's Motion to Dismiss), 37, Kansas v. Nebraska & Colorado, No. 126 Orig. (Jan. 28, 2000), https://www.supremecourt.gov/specmastrpt/orig126_012800.pdf. Special Masters consistently found that compacts did apportion groundwater within their respective basins, and the states which had argued otherwise did not take exceptions to their reports. *See, e.g.*, *id.*; First Interim Report of Barton H. Thompson, Jr., Special Master, at 43-53, Montana v. Wyoming & North Dakota, No. 137 Orig. (Feb. 10, 2010), https://

www.supremecourt.gov/specmastrpt/137Orig_020910.pdf; Griggs, 2018, 171-76.

The consistency of these findings motivated compacting states to integrate the effects of groundwater pumping and use within their respective compact allocations, by developing groundwater models and modern accounting procedures. These efforts took one of two forms—scorched-earth litigation and settlement—and the superiority of the latter is clear. Modeling disputes in litigation over the Pecos River and Arkansas River Compacts tried the patience of Special Masters, produced hundreds of days of trial, and triggered the mental breakdown of at least one expert witness. Griggs, 2018, 181-84. By contrast, in the Republican River litigation, cooperation among the compacting states, the United States Geological Survey, and the Bureau of Reclamation (Reclamation) produced a stipulated groundwater model which the Special Master praised as superior to one that might have otherwise emerged from a battle of the experts. Second Report of Vincent L. McKusick, Special Master (Subject: Final Settlement Stipulation), 73-77, Kansas v. Nebraska & Colorado, No. 126 Orig. (Apr. 16, 2003), http://www.supremecourt.gov/SpecMastRpt/ORG126_4162003.pdf.

The States know this history well and have heeded its lessons. The Consent Decree integrates the effects of groundwater pumping into the Compact, and it provides superior accounting consistent with the Compact and the States' Compact administration. Without belaboring its details, amici emphasize five aspects of the Consent Decree.

First, the Consent Decree clarifies Texas's Compact apportionment through the Effective El Paso Index (Index), which establishes an annual volumetric target

for New Mexico to deliver water to Texas. Consent Decree II.B-F, Appx. 1. The Index has two main parts: the Index Obligation, which establishes the New Mexico annual delivery target, and the Index Delivery, which is a measurement of the amount of water that New Mexico delivers to Texas, largely measured at the El Paso Gage. *Id.* II.B. The Consent Decree and the Index take advantage of improved surface water measurement technology, model-based estimates of groundwater depletions within New Mexico, and updated and improved water accounting provisions. *Id*. II.B-F. As the Special Master emphasized, these measurement capabilities take advantage of "modern technology, including computer modeling, in a manner unavailable at the time of Compact negotiation." Third Report 39. The Consent Decree thus achieves the fundamental purpose of the Compact, the "effectuation of an equitable apportionment" of the Basin's waters, Compact, Preamble at 1, specifically that between New Mexico and Texas below Elephant Butte Reservoir. This apportionment is the central dispute in this case. *Texas v. New Mexico,* 583 U.S. at 411.

Second, the Consent Decree recognizes and respects the United States' treaty obligations with other sovereigns. It explicitly provides for the fulfillment of treaty obligations to Mexico and to sovereign Indian tribes in the Basin. Consent Decree, IV.A-B. Regarding Mexico, it requires the States to fulfill these obligations by delivering water to the Acequia Madre, based on daily flow records determined by the United States and the International Boundary and Water Commission. *Id.* Appx. 1, Section 3.5, at 7. These requirements include the delivery of necessary water supplies to the Acequia Madre under the provisions

of the Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2954 (Convention). *Id.* Appx. 1, at 2, 4. The Consent Decree's Index Delivery Requirements explicitly protect Mexico's allocation by excluding the amounts required for delivery to the Acequia Madre under Section 3.5 from the Decree's Excess Flow calculations. *Id.* Appx. 1, Section 3.6, at 7-8.

Third, the Consent Decree and the Index are consistent with the delivery obligations of the Compact. The Consent Decree and the Index employ an indexed delivery requirement with annual and accrued departure-limit thresholds, departure credit and debit accounts, response mechanisms relative to exceedance of departure-limit thresholds, and provisions for adjustments to accounting and operations under extreme conditions. *Id.* II.B-F. These features are essentially similar to Articles III and IV of the Compact; even the United States agrees that the "Negative Departures" provisions of the Consent Decree are "functionally equivalent" to New Mexico's Article IV delivery obligation. Third Report 69 (quoting Doc. 754, 18).

The Consent Decree also improves the administration of the delivery requirements of the Compact consistent with earlier changes to Compact administration. In 1939, technological and infrastructural limitations made it impossible to locate a state-line gage on the Rio Grande, making it difficult to measure the States' respective allocations below Elephant Butte Reservoir. Third Report 73. Mindful of this and other limitations, the States agreed to provisions within the Compact to improve its administration.

Article XII establishes the Rio Grande Compact Commission (RGCA). Article II expressly allows the RGCA to add or move stream gages on the Rio Grande. The RGCA has previously moved an upstream gage at San Marcial, New Mexico from a location listed in the Compact to a better location—as the Court has recognized. *Texas v. New Mexico,* 583 U.S. at 410-11, n*. Article II specifically allows what the Consent Decree establishes—the Index and the El Paso Gage, which is below Elephant Butte Reservoir and Caballo Reservoir. Compact, art. II.(k)-(l). Pursuant to Article XII, the RGCA has approved the El Paso Gage as the superior means to measure total deliveries to Texas. Third Report 70.

Fourth, the Consent Decree improves the administration of the Compact by integrating the effects of groundwater pumping in the lower Basin—and in accordance with longstanding Reclamation operations. The Index employs the "D2 Period" of 1951-1978 to frame compliance with the Compact. Consent Decree I, at 3. The D2 Period is important for two reasons. It captures the three-decade expansion of groundwater pumping across the Basin, by accounting for the "depletions to the Rio Grande caused by surface and ground water use" upstream of the El Paso Gage. *Id.* II.B.ii.e., Appx. 1. Moreover, the use of the D2 Period formalizes the longstanding relationship between reservoir releases and El Paso Gage flows during the period when, on average, 57% of Project deliveries were used in New Mexico and 43% were used in Texas. This division is consistent with Project authorized acreage in each state and the normal operations of the Project. Reclamation has used the D2 Period for over forty years. Third Report 71.

Fifth, the Consent Decree accounts for the most serious hydrological threat to the Basin since the groundwater revolution: aridification caused by climate change. The Consent Decree contains an "aridity adjustment" mechanism for compliance with the Compact. Consent Decree II.E.3. This provision requires the annual adjustment of the Index according to estimated changes, since 1978, "in open water evaporation and riparian evapotranspiration" in the lower Basin. *Id.*

The Consent Decree clarifies the States' respective Compact apportionments through an integrated quantification of surface and groundwater, through cooperative groundwater modeling, through improved accounting procedures, and through improved methods of surface water measurement. Taken as whole, the Consent Decree resolves the ambiguities of Texas's Compact allocation—thus effectuating the fundamental purpose of the Compact. Compact, Preamble at 1, art. I(c); *Texas v. New Mexico,* 583 U.S. at 413.

These features are consistent with other interstate water decrees issued by the Court. The most apposite example is *Kansas v. Nebraska,* No. 126 Orig., in which Colorado, Kansas, and Nebraska negotiated the Final Settlement Stipulation of 2002 (FSS), which adopts updated accounting procedures for the Republican River Compact and employs a cooperatively developed groundwater model (RRCA Model). *Kansas v. Nebraska,* No. 126 Orig., Final Settlement Stipulation (Dec. 15, 2002), https://www.supremecourt.gov/specmastrpt/Orig%20126_041603_finalsettlestip_vol1.pdf.

The FSS, like the Consent Decree, clarifies compact commitments and modernizes compact administration to account for post-compact developments. The FSS adopts new management requirements for Harlan

County Lake, a U.S. Army Corps of Engineers reservoir that is operated by Reclamation during irrigation season. FSS I, Appx. K. It clarifies ambiguities in the Republican River Compact by defining "Unallocated Supply" and "Main Stem Allocation." *Id.* I.5-6. It implements definitions of "Beneficial Consumptive Use," "Combined Beneficial Consumptive Use," and "Computed Water Supply" to sum and integrate water supply and use from both surface and groundwater sources. *Id.* I.4, Appx. C1 § 2. It specifies the duties of the states to account for reservoir and canal operations below Harlan County Lake that the compact does not specify, *id.* I.5, 25-27, and to do so "in collaboration with the United States." *Id.* I.26. Across these and other details, it employs accounting procedures to incorporate the effects of groundwater pumping and reservoir operations, including those for water-short year administration. *Id.* I.17-18, Appx. C1, Appx. L1. In 2015, the Court reformed one aspect of the accounting procedures, which concerns water supplies imported from the Platte River Basin. *Kansas v. Nebraska,* 574 U.S. 445 at 467-74.

The RRCA Model was developed by all three states with the assistance of the United States Geological Survey and Reclamation. Final Report of Vincent L. McKusick, Special Master, with Certificate of Adoption of Republican River Compact Administration (RRCA) Groundwater Model 6, 10-52, Kansas v. Nebraska & Colorado, No. 126 Orig. (Sept. 17, 2003), https://www.supremecourt.gov/specmastrpt/Orig126_102003.pdf. The Court approved the FSS in 2003. *Kansas v. Nebraska,* 538 U.S. 720 (2003). The RRCA Model has succeeded in measuring the impacts of groundwater pumping on compact compliance across the Republican

River Basin. When *Kansas v. Nebraska* returned to the Court in 2010, the RRCA Model was not a subject of dispute. Griggs, 2018, 185.

The Arkansas River Compact Administration also employs a groundwater model to improve the administration of that compact. Although the model emerged from extensive litigation, Colorado and Kansas have revised it repeatedly. One set of revisions involve updated estimates of the consumptive use of groundwater. Agreement on H-I Model Changes to Address Increases in Irrigation Efficiency for Pumped Groundwater, Kansas v. Colorado, No. 105 Orig. (Sept. 2011, *amended* Aug. 2015), http://www.supremecourt.gov/SpecMastRpt/2011%20Agreement%20as%20Amended%20August%202015.pdf. Another set of revisions involves updates and changes to the model. Kansas v. Colorado, No. 105 Orig., Amended Appendix B1 (August 2015), https://www.supremecourt.gov/specmastrpt/Amended_Appendix_B-1_8_2015.pdf.

These examples reveal how states have successfully and iteratively updated the administration of interstate compacts that involve federal irrigation and flood-control reservoirs. By approving this Consent Decree, the Court would likewise be recognizing the careful work of the States – work consistent with that under other compacts – in crafting a solution to clarify and enforce the Compact's 1939 equitable apportionment.

B. The Consent Decree Is Consistent with Section 8 of the Reclamation Act.

The Consent Decree is also consistent with the Reclamation Act. This is important because the Compact and the Reclamation Act are "inextricably

intertwined", as the Court and the state parties have emphasized. *Texas v New Mexico*, 583 U.S. at 413; Consent Decree II.A.2. Two cardinal rules regarding water rights obtained for Reclamation projects are found in the original Section 8 of the Act. Its original version reads as follows:

> That nothing in this Act shall be Construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or Federal Government or of any landowner, appropriator, or user of water in to, or from any interstate stream or the water thereof; Provided, That the right to the use of the water acquired under the provisions of this act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Reclamation Act of 1902, 32 Stat. 390 (codified at 43 U.S.C. §§ 372 & 383).

The first rule of Section 8, codified at 43 U.S.C. § 383, requires water rights to be obtained and held pursuant to state law unless such state law is inconsistent with specific congressional directives. *California v. United States*, 438 U.S. 645, 665 n. 19, 668 n. 21, 670 (1978). This requirement continued the general rule of deference to state water law established by

the Mining Act of 1866, 14 Stat. 253, 30 U.S.C. § 51, the Placer Act of 1870, 16 Stat. 218, 30 U.S.C. § 52, and the Desert Land Act of 1877, 19 Stat. 377. Reclamation projects are federal projects, but they hold water rights based on state law.

Indeed, in its first equitable apportionment case, filed the same year as the Reclamation Act passed Congress, *Kansas v. Colorado*, 185 U.S. 125 (1902), the Court denied the United States' motion to intervene, finding no federal authority to overrule water rights based on state law for Reclamation. *Kansas v. Colorado,* 206 U.S. 46, 85-94 (1907). When the Court established the equitable apportionment process, it stressed the equal authority and individual sovereignty of the states: if the actions of one state infringed on the sovereignty of another, equitable apportionment is appropriate. *Id.* 97-98. Further, the Court held that the federal government lacks authority to overrule water rights based on state law outside of navigable waters. *Id.* 85-94.

Yet because many Reclamation projects are sited on land originally granted by the United States, they present the potential jurisdictional problem of a split estate—land titles derive originally from the federal government, but water rights derive from the states. If water rights could be held distinct from the land they irrigate, irrigation companies could speculate freely in water—a public resource—much to the concern of advocates of an increased federal role in western irrigation such as John Wesley Powell and Elwood Mead. This concern motivated a second, complementary rule of Section 8 of the Reclamation Act, codified at 43 U.S.C. § 372: water rights obtained for lands irrigated by Reclamation projects shall

always be "appurtenant," or connected, to these lands. The appurtenancy requirement of the Act likewise continued earlier federal irrigation law, the Carey Act of 1894, 28 Stat. 372, 422, 43 U.S.C. §§ 641-48. Powell, Mead, and others emphasized that the requirement would help to reduce the dangers of speculation and monopoly in water by tying water rights forever to Reclamation project lands. "The purpose of the appurtenancy provision is to make the water right 'inalienable' or 'inseparable' from the land." Goldberg, 1964, 28 (quoting the Congressional Record); Griggs, 2017, 17-18.

The appurtenancy requirement in Section 8 is notable in distinguishing water rights dedicated to Reclamation projects from other water rights in prior appropriation jurisdictions, which generally can be severed from the lands to which they were originally appurtenant, and whose use can be changed from irrigation use to a different beneficial use. *See, e.g.*, Kan. Stat. Ann. §§ 82a-701(g), 82a-708b (defining a water right as a real property right appurtenant to and severable from the land where it is used and setting forth requirements for changing the water right to a different tract of appurtenant land and/or a different type of beneficial use). Subsequent amendments to the Reclamation Act have affirmed the appurtenancy rule, including its application to Reclamation contracts. *See, e.g.*, 43 U.S.C. §§ 485h-4, 390b(d) .

In sum, Section 8 combines federal deference to state-law water rights regimes with an explicit and permanent federal law protection for project lands: states cannot allow the use of project water rights to be moved outside of project lands. To do so would

violate the Reclamation Act's specific congressional directive regarding appurtenancy, which is a supreme exception to the common rule of federal deference to state water law. *California v. United States,* 438 U.S. at 665 n. 19, 668 n. 21, 670, 676 (1978).

The Consent Decree complies with both of these Section 8 rules. Elephant Butte Irrigation District (EBID) and El Paso County Water Improvement District No. 1 (EPCWID) hold state-law water rights pursuant to the laws of New Mexico and Texas respectively. The New Mexico State Engineer has the power to administer EBID's state law water rights pursuant to New Mexico law and the first rule in Section 8. N.M. Const. art. XVI, § 3; N.M. Stat. Ann. § 72-4-14 *et seq.*; 43 U.S.C. § 383. When New Mexico owes Texas water supplies as calculated by the Consent Decree and the Index, the Consent Decree requires New Mexico and Texas to fulfill their respective Compact obligations by transferring water from EBID to EPCWID, and between escrow accounts for both districts, consistent with the second rule of Section 8, the appurtenancy requirement. Consent Decree II.C.3.b, II.D.2.a, II.D.2.c(i), II.D.3.b; 43 U.S.C. § 372.

Amici emphasize this aspect of the Consent Decree for two reasons. First, the United States appears to question whether the second rule of Section 8—the appurtenancy requirement—even applies to the Project. Doc. 107, 15, ¶ 100; Third Report 61 (quoting counsel for the United States stating that "all that Section 8 mandates" is federal participation in state water rights adjudications). The United States mentions the first rule of Section 8 but avoids the appurtenancy rule entirely. U.S. Br. 37. The

Court should require the United States to clarify its position.

Second, if uncorrected, this legal position could allow a compacting state or the United States to move project water dedicated to irrigation use on project lands to be shifted elsewhere, in clear contravention of 43 U.S.C. § 372. The states may curtail water rights recognized under state law to comply with the federal law of an interstate compact, *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), but they cannot disregard *federal* law to so comply.

This is not a hypothetical problem. It has occurred repeatedly in the Republican River Basin of Nebraska and Kansas, with Reclamation's tacit approval. Like the Project, the Bostwick Project is a Reclamation project developed in conjunction with an interstate compact, the Republican River Compact. Like Elephant Butte Reservoir, which supplies Reclamation project water to EBID in New Mexico and EPCWID in Texas, the Bostwick Project's principal reservoir, Harlan County Lake, is located in the upstream state of Nebraska and supplies project water to two irrigation districts in two states, the Nebraska-Bostwick Irrigation District ("NBID") and the Kansas-Bostwick Irrigation District ("KBID"). Between 2012 and 2014, the State of Nebraska, acting to comply with the Republican River Compact, ordered Reclamation to spill water out of federal reservoirs in the basin, including Harlan County Lake. Yet because KBID could not store or otherwise put the water to beneficial use, the spilled water was never used on Reclamation project lands, in violation of the appurtenancy requirement of 43 U.S.C. § 372. Kansas sought to prevent

the spills, but Reclamation allowed them at the insistence of Nebraska—which consistently argued that its powers to curtail water rights based on state law pursuant to *Hinderlider* allowed it to disregard the federal appurtenancy requirement. Griggs, 2017, 43, 51-63.

By contrast, the Consent Decree clearly forbids such disregard. The Court has stressed that a settlement agreement, even one previously approved by the Court's decree, cannot contradict the allocations of an interstate compact, because such a decree would violate the Constitution's separation of powers. *Kansas v. Nebraska,* 574 U.S. 445, 472 (2015). The Court should take this opportunity to make clear that a compacting state cannot comply with the federal law of an interstate compact by violating federal Reclamation law—especially when these bodies of federal law are "inextricably intertwined." *Texas v New Mexico*, 583 U.S. at 413. Irrigators who receive water from interstate Reclamation projects should receive the Reclamation Act's federal protections, regardless of the basin in which they farm.

II. THE COURT SHOULD NOT ALLOW THE UNITED STATES TO ENGAGE IN ASYMMETRICAL LITIGATION IN THIS ORIGINAL JURISDICTION CASE.

Amici generally support the Special Master's reasoning in finding that the United States should not be allowed to block the States from settling their claims through the Consent Decree. Third Report 90-103. He rests this conclusion on two findings.

First, the United States' claims in this case are essentially the same as those of Texas: now that Texas has committed to the Consent Decree, there is no

need for the United States to remain in this original jurisdiction case. When the United States intervened, it directed claims solely against New Mexico, and Texas recognized these claims only insofar as they were Compact claims. For its part, The United States does not really distinguish its claims from those of Texas. U.S. Br. 10-11, 19-21. Where it frames its claims as distinct, these plainly appear to be claims directed against New Mexico, seeking to establish certain protections for how New Mexico will administer groundwater rights below Elephant Butte Reservoir. *Id.* 21-23.

Yet the United States' assertion that it has "Compact claims" is illogical because the United States is not a party to the Compact. The Court has emphasized that the United States' role in this case is limited to that of a "a sort of 'agent' of the Compact," making allegations that "parallel Texas's" and seeking "substantially the same relief" as Texas. *Texas v. New Mexico*, 583 U.S. at 413, 411, 415. The Court's 2018 decision rejected the previous Special Master's recommendation that the Court entertain Reclamation claims, thus acting according to "its long-held practice of carefully guarding its exercise of original jurisdiction to matters that actually require an original jurisdiction forum for their resolution." Third Report 95 (citing *South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010), and *New Jersey v. New York*, 345 U.S. 369, 373 (1953)). Because the United States' interests in this case are limited to the equitable apportionment of the Basin below Elephant Butte Reservoir and protecting the delivery of those apportionments—issues fully resolved by the Consent Decree and the Index—there is no longer any need for the continued

exercise of the Court's original jurisdiction. Third Report 96-97.

Second, the Special Master properly found that the United States may pursue its claims in other judicial forums. Dismissal of the United States' claims without prejudice allows the United States to assert its claims against one or more of the States in lower federal courts. 28 U.S.C. § 1251(b)(2) (providing that, in contrast to actions between the states, original jurisdiction over actions between the United States and a state is not exclusive). As the Special Master wrote, "[t]he Consent Decree neither extinguishes nor causes legal prejudice to the United States' claims." Third Report 99. The United States may also pursue claims against New Mexico in that state's courts, which have jurisdiction over the United States in the Rio Grande adjudications pursuant to the McCarran Amendment, 43 U.S.C. § 666. *Id.* 99-100.

Amici support the Consent Decree because they believe that the United States should not be allowed to distort interstate litigation under the Court's original and exclusive jurisdiction. This is especially important given three structural realities about interstate water litigation.

First, interstate water litigation involves an inherent asymmetry. Plaintiff states face significant challenges in filing and winning judgment in the Court's original jurisdiction. Heather Elliott, *Original Discrimination: How the Supreme Court Disadvantages Plaintiff States,* 108 IOWA L. REV. 175 (2022). Plaintiff states are often denied leave even to file original jurisdiction cases, *id.* 202-213; they must meet an injury-in-fact test more demanding than that imposed on ordinary federal plaintiffs, *id.* 213-220; and they

cannot obtain a judgment without clearing hurdles not imposed on ordinary litigants, *id.* 221-223. Litigation would thus be a poor substitute for the adoption and enforcement of the Consent Decree, and yet that is precisely what the United States seeks by opposing it.

Second, the United States can pick and choose whether and how to engage in an original jurisdiction case. If the Court allows it to intervene, the United States can deploy vastly superior offensive resources to shape the litigation terrain of an interstate basin. Whether it intervenes or not, it can activate one of the most powerful defensive weapons in American law—federal sovereign immunity. Deployed singly or together, these advantages have produced "the legal equivalent of asymmetrical warfare." Griggs, 2018, 211.

The federal role in recent compact litigation has thus been inconsistent and unpredictable. The contrast between *Kansas v. Nebraska,* No. 126 Orig., and the present case illustrates the point well. As described *supra,* Argument III.A.2, the Bostwick Project of the Republican River Basin and the Project are structurally and operationally similar. They feature federal reservoirs sited in the upstream state that service Reclamation districts on either side of a state boundary, and they are both suffering depletions from excessive groundwater pumping. In *Kansas v. Nebraska*, the United States played a minor role. It recommended that the Court accept Kansas's motion for leave, but it did not intervene on behalf of its Reclamation projects in the Republican River Basin. Griggs, 2017, 62. In this case, the United States intervened aggressively to protect the Project. And, in what appears to be an unprecedented decision, the United States has asserted a cause of action against a state

under an interstate compact to which it is not a party, seeking injunctive relief against New Mexico to protect project irrigators in New Mexico and Texas, and then claimed and obtained sovereign immunity as a defense against New Mexico's counterclaims. Third Report 27-29. The United States of *Kansas v. Nebraska* is "unrecognizable" to the United States of *Texas v. New Mexico*. Griggs, 2018, 211.

The Court should not countenance such unfair and inconsistent behavior by the United States, especially given Reclamation's importance to western irrigation. *See, e.g., Nat'l City Bank v. Republic of China*, 348 U.S. 356, 361-62 (1955) (refusing to allow the Republic of China to use the federal courts as both a sword and a shield); *Lapides v. Bd. of Regents*, 535 U.S. 613, 619 (2002) (recognizing the unfairness of using sovereign immunity as a sword and shield).

Third, more modern interstate compacts, such as the Great Lakes–St. Lawrence River Basin Water Resources Compact, 122 Stat. 3739 (2008) (Great Lakes Compact), are fundamentally structured to protect the ecological health of the interstate water. Noah D. Hall, *Toward A New Horizontal Federalism: Interstate Water Management in the Great Lakes Region*, 77 U. COLO. L. REV. 405 (2006). To further these objectives, the Great Lakes Compact provides for citizen suit enforcement in the relevant state court against allegedly violating water users. Great Lakes Compact, § 7.3(3). Similarly, any person, including another state or province, can challenge a state action pursuant to the compact as a matter of state administrative law, with an express right of judicial review in state court. *Id.* § 7.3(1). Allowing the United States to take unilateral legal action would

disrupt and undermine the negotiated and congressionally approved role of both state and federal courts in compact enforcement.

III. THE STATES' COMPLIANCE WITH INTERSTATE WATER COMPACTS AND DECREES CANNOT VIOLATE FEDERAL ENVIRONMENTAL LAW.

This case presents opposing views of the relationship between the Compact and the Reclamation law of the Project. The United States objects to the Consent Decree in part because it subordinates the Project to the Compact, and allegedly disregards the Project's Reclamation contracts. U.S. Br. 14, 17. The States reply that the Compact is superior to Reclamation law in this dispute, and that even if the Court were to (allegedly mistakenly) conduct an ordinary conflicts of law analysis, the specific provisions of the Compact prevail over the earlier and general provisions of the Reclamation Act. States' Reply Br. 32, 34-35; Doc. 755 50-52. At a general level, the parties appear to agree that there exists some general hierarchy of federal law in the Basin—they just disagree over what that hierarchy should be.

Amici are concerned by this apparent agreement. As explained *supra*, Argument III.A.2, compacting states and the United States must comply with the requirements of both compacts and Reclamation law. The same command applies to compliance with federal environmental law. The management of Reclamation projects and other federal lands across interstate basins "reflects a highly complex interdependency between agricultural uses and environmental preservation." *Audubon Society of Portland v. Haaland*, 40 F.4th 967, 974 (9th Cir., 2022).

A prominent example is the National Wildlife Refuge (NWR) network across the Basin. NWRs provide critical and irreplaceable habitat as the seasonal or full-time home for many threatened and endangered species. The Basin supplies water to the Alamosa, Baca, and Monte Vista NWRs in Colorado and the Bosque del Apache, Sevilleta, and Valle do Oro NWRs in New Mexico. https://www.fws.gov/our-facilities?type=%5B%22National%20Wildlife%20Refuge%22%5D. Basin NWRs vary in the date of their establishment. Several of these refuges were established around the time the Compact was enacted in 1939, before the advent of modern environmental law. For example, the Bosque del Apache NWR was established by executive order, also in 1939. https://www.fws.gov/refuge/bosque-del-apache. Others are more recent.

Regardless of their age, they are all governed by modern environmental legislation, most notably the National Wildlife Refuge System Administration Act of 1966, as amended by the 1997 National Wildlife Refuge System Improvement Act, the organic statute for all NWRs. 16 U.S.C. § 668dd *et seq.* (NWRSIA). NWRSIA imposes certain duties upon the Department of Interior. *Id.* § 668dd(a)(4) (describing the duties to protect, *inter alia*, biological integrity, environmental health, adequate water quantity and quality, and the duty to acquire sufficient state-law water rights). The U.S. Fish and Wildlife Service (Service) has articulated NWRSIA's terms in regulations that provide robust protections for NWR water rights and water supplies. 66 Fed. Reg. 3,818 (Jan. 16, 2001); U.S. FWS Division of Natural Resources, U.S. Fish and Wildlife Manual, 601 FW 3, § 3.6 (2001) (as amended July 31, 2006).

NWRSIA and its regulations exemplify the specific mandates of modern environmental law. According to the former Interior Solicitor who shepherded the Act's passage through Congress, NWRSIA "requires the Service to manage refuges in accordance with cutting-edge ecological understanding, including the science of conservation biology." John D. Leshy, OUR COMMON GROUND 532 (2022). According to former Solicitor Leshy and the current Deputy Solicitor for Parks and Wildlife, Professor Sarah A. Krakoff, NWRSIA "remains the clearest congressional mandate for ecological sustainability on federal lands." John D. Leshy, Robert A. Fischman, and Sarah A. Krakoff, COGGINS AND WILKINSON'S FEDERAL PUBLIC LAND AND RESOURCES LAW 858 (8th ed., 2022).

Compliance with NWRSIA is neither optional nor discretionary. In this it is like older federal law requiring the states and the United States to recognize and include water rights held by the United States within their respective compact allocations. *See, e.g.*, *Arizona v. California*, 373 U.S. 546, 597-601 (1963) (recognizing water rights for Indian tribes and NWRs in the Colorado River Basin as part of the states' respective allocations); *Arizona v. California*, 460 U.S. 605, 614 (1983) (allowing federal intervention on behalf of the reserved water rights of Colorado River Basin Tribes). Such allocations are established under federal and state law because interstate compacts are both federal and state statutes. *E.g.,* N.M. Stat. Ann. § 72-15-23 (1978) (New Mexico enactment of the Compact). The McCarran Amendment waives the sovereign immunity of the United States to participate in state-law water rights adjudications (with the notable exception of cases within the original

jurisdiction of this Court, *see* 43 U.S.C. § 666(d)), so that water rights held by the United States may be included within allocation systems established under state law. *Id.* § 666(a).

Amici stress these long-established requirements because states and the Department of Interior have routinely neglected to enforce federal environmental law, largely due to political pressure. Again, the risk is not hypothetical. *See, e.g.*, *Audubon of Kansas, Inc. v. United States Dept. of Interior*, 67 F.4th 1093, 1096-1101 (10th Cir., 2023) (describing the decades-long impairment of the senior water right held by the Quivira NWR in the Arkansas River Basin of Kansas caused by the reticence of state and federal officials and the political influence of groundwater pumpers holding junior rights); *Audubon of Kansas, Inc. v. United States Dept. of Interior*, 568 F. Supp. 3d 1167, 1173 (2021) (describing a bargain struck between the Service and Senator Jerry Moran of Kansas to forestall the protection of the same impaired right).

Here, the risk of political and bureaucratic interference with the requirements of federal environmental law is potentially greater because the Rio Grande is allocated internationally by the Convention and nationally by the Compact. Given the conduct of state and federal actors in the *Audubon of Kansas* cases cited in the previous paragraph, one can easily imagine similar neglect of water rights held by NWRs across the Basin—even where their senior priorities are not contested. The Basin is no stranger to intensive litigation over endangered species and NWRs. As in Kansas, "[b]rinkmanship precipitated either through inadvertence or design best characterizes" much of it. *Rio Grande Silvery Minnow v. Keys*, 333. F.3d 1109,

1115 (10th Cir. 2003). The Special Master prudently noted that in certain of its stream adjudications, New Mexico has not resolved priority dates for irrigation rights. Third Report 100. As one veteran New Mexico judge has lamented, "[i]n theory, prior appropriation is alive and well in New Mexico, but in practice it is on life support." Matthew J. Reynolds, *Trial and Error: How Courts have Shaped Prior Appropriation in New Mexico*, 57 NAT. RESOURCES J. 263, 317 (2017).[2]

Amid these pressures, the Court should take this opportunity to reject the States' and the United States' opposing hierarchies of federal law. The Special Master has usefully pointed out that the Court's 2018 decision does not suggest that Reclamation law is superior to the Compact. Third Report 94 (citing *Texas v. New Mexico*, 583 U.S. at 413-14). The Court should affirm that the States and the United States must comply with all federal law: the law of the Convention, the law of the Compact, Reclamation law, and federal environmental law.

CONCLUSION

Texas and New Mexico entered the Union in dramatically different historical contexts, but constitutionally, they entered as equal sovereigns. Likewise, every interstate basin and compact are unique, *e.g.*,

[2] Before the Special Master, counsel for New Mexico "put to rest any concern" about New Mexico's commitment to enforce the terms of the Consent Decree, against the United States' arguments "that New Mexico is up to all manner of improper shenanigans." Third Report 84-87, n. 9.

Compact, art. XV, but the Court's interstate water jurisprudence has established a federal common law that applies to all compacts. *Hinderlider,* 304 U.S. at 110. Federal common law is constitutionally necessary because the drafting of an interstate compact that can avoid all disputes "is not within human gift." *State ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). The Court can resolve such disputes, but so can the states, through negotiation and settlement. Here, the Consent Decree fulfills part of the fundamental purpose of the Compact: the equitable apportionment of the lower Basin. It resolves previous ambiguities, Compact, art. IV, and it improves Compact administration to account for the hydrological, technological, legal, and environmental developments that have transformed the Basin since 1939. The Court should thus overrule the Exception of the United States, adopt the Report, and enter the Consent Decree. And for the benefit of all states, it should affirm the three principles set forth above.

Respectfully submitted,

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