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,

UNITED STATES OF AMERICA,

Intervenor.

On The Compacting States' Joint Motion To Enter Consent Decree

THIRD INTERIM REPORT OF THE SPECIAL MASTER

HON. MICHAEL J. MELLOY
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July 3, 2023

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I. Recommendation and Summary

Texas, New Mexico, and Colorado (Compacting States) have filed a joint motion to enter a consent decree compromising and settling "all claims among them arising from the 1938 Rio Grande Compact." *Joint Motion*, Sp. M. Dkt. 719; *Consent Decree*, Sp. M. Dkt. 720 Exh. 1 (Consent Decree, attached as the Addendum to this order); *see also Rio Grande Compact*, Act of May 31, 1939, 53 Stat. 785 (Compact). Over the United States's objection, I recommend the Court grant the Compacting States' motion.

I conclude the Consent Decree permissibly interprets ambiguities in the Compact by clarifying the Texas apportionment and the downstream portion of the New Mexico apportionment. It is fair, reasonable, consistent with the Compact, and consistent with the scope of the present action. I also conclude that, although the Court permitted the United States to intervene in this action to assert Compact claims against New Mexico, the United States should not be allowed to block the Consent Decree and force the Compacting States to continue litigating this original jurisdiction action against their jointly and clearly expressed wishes. The United States asserted no claims against Texas or Colorado, and the Court permitted the United States to intervene in part because the United States sought relief substantially similar to Texas. Texas and the United States are no longer aligned. Remaining disputes—disputes among the United States, New Mexico, and non-state entities—can be addressed in other fora without the participation of Texas, Colorado,

or the Court. Simply put, the Consent Decree resolves the dispute over the Texas and downstream New Mexico apportionments and protects the Texas apportionment as well as treaty water for Mexico as against New Mexican actions. Many of the factors the Court cited when allowing the United States to intervene, including the United States's alignment with Texas, have been altered or removed.

I discuss below the procedural history of this matter. In doing so, I identify the parties' claims and arguments as asserted at several different stages as well as the Special Masters' determinations and the Court's own determinations. In addressing some of this history, I provide occasionally detailed explanations of underlying undisputed facts and a description of certain United States Department of the Interior Bureau of Reclamation (Reclamation) practices as described in the summary judgment record and at a partial trial. But first, I provide an overview to place the rest of the discussion in context and frame the facts and issues relevant to the pending motion.

The Compact apportions the waters of the Rio Grande between the Compacting States starting at the Rio Grande's headwaters in Colorado and continuing downstream to Fort Quitman, Texas. The Compact requires Colorado to deliver to the New Mexico-Colorado border an indexed amount of Rio Grande water based on a table of relationships between certain river gauges. The Compact requires New Mexico to deliver an indexed amount of water into the Elephant Butte Reservoir (Reservoir) located entirely within New

Mexico approximately 105 miles north of the Texas-New Mexico border.

The Reservoir is the primary storage feature of the Elephant Butte Project (Project), a Reclamation project older than the Compact. The Project was created, in part, so the United States could satisfy an obligation to Mexico pursuant to a 1906 treaty. *See Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes*, Mex.-U.S., May 21, 1906, 34 Stat. 2953 (Treaty). Through the Project, Reclamation delivers Treaty water to Mexico and water for the use of federal contract holders who hold state-law water rights as defined by Texas and New Mexico. The Elephant Butte Irrigation District in southern New Mexico (EBID or New Mexico Water District) and El Paso County Water Improvement District No. 1 in Texas (EP1 or Texas Water District) (collectively Water Districts) represent these New Mexican and Texan water users.

The Compact does not expressly address the precise division of water downstream of the Reservoir as between Texas and New Mexico. Nor does it expressly reference irrigation return flows or groundwater. Other than reserving a fixed annual amount of Treaty water for Mexico, the Compact addresses the downstream water division indirectly through reference to several Project-related terms including a normal annual Reservoir release amount of 790,000 acre-feet. Over time, these omissions have served as a source of dispute between the Compacting States, the Water

Districts, and the United States, with occasionally shifting alliances between these actors.

While the Compact's omission of an express downstream division of water or a discussion of return flows or groundwater has led to disputes, the omission is the understandable product of several important historical facts. First, at the time of Compact negotiations, water users in southern New Mexico and western Texas were primarily concerned with protecting a supply of water for the Project. During those negotiations, water users in southern New Mexico were largely aligned with Texas in attempting to limit Rio Grande water capture above the Reservoir in Colorado and New Mexico. Second, water district repayment contracts with Reclamation (Downstream Contracts) and water users' individual contracts with Reclamation already provided some assurance as to the downstream division of water. Third, pumping technology, population conditions, farming practices, and industrial and municipal water uses were similar in the two downstream states in 1938, and non-Project water demands or pumping by Project contract holders did not substantially affect Project operations. Fourth, irrigation return flows were known to be an important component of Project operations and were an important consideration in Compact negotiations, but groundwater-surface water interactions in the Project area were not well understood at that time. And fifth, Project features such as delivery canals and return drains crossed and recrossed the New Mexico-Texas border in the Mesilla Valley near El Paso, making an express state-line

delivery obligation burdensome, with proper measurement impractical under the limits inherent in 1938 technology.

With the Compact's creation of a New Mexican duty to deliver water into the Reservoir, and with the Texas border 105 miles below the Reservoir, the United States serves as a "sort of 'agent of the Compact, charged with assuring that the Compact's equitable apportionment' to Texas and a part of New Mexico 'is, in fact, made.' " *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018) (citation omitted). As such, Reclamation delivers water to contract holders in New Mexico and Texas through EBID and EP1, but it is the states themselves, rather than these natural or corporate citizens, who are entitled to apportionments. The end users holding contracts with Reclamation hold rights to their state-defined shares of their respective state's apportionment. And it has long been settled that states, acting as *parens patriae*, represent all of their citizens in Compact apportionment matters. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). Accordingly, states may compromise citizens' existing or future rights when resolving interstate apportionment disputes. *Id.*

That is not to say holders of individual rights must be left without a remedy for any such compromise. Instead, any remedies they may have are best understood as claims against their own respective states. Such claims are ancillary matters between normal litigants that are important to the parties involved—including, potentially, the United States—but they do not

require Supreme Court adjudication in an original action.

Here, the United States is a party to many contracts with individual water users and with the Water Districts. In some capacities, therefore, the United States must deal with the Water Districts or other citizens within the Compacting States. At other times, however, the United States must deal with the Compacting States themselves. And when the interests of the Compacting States and some of their citizens diverge—for example, when New Mexico takes a position contrary to EBID—the United States is placed in a bind. Therein lies the rub. But this situation is not particularly unusual across the Desert West where Reclamation projects generally must be operated with deference to state-imposed conditions to deliver water in accordance with state-defined rights, at least when those conditions and rights are not contrary to federal statutes. *See California v. United States*, 438 U.S. 645, 676 (1978).

Given this background, the current questions of Compact rights, duties, and compliance are understandably bound together with questions regarding: the precise effects on Compact deliveries and Project operations caused by post-1938 groundwater capture below the Reservoir; other alleged Project interference in New Mexico and Texas; the United States's and Compacting States' potential long-term acquiescence in or encouragement of groundwater pumping along the Rio Grande in the Project area; an increasing

understanding of groundwater-surface water interactions; and disparate party positions as to the relative roles and authority of the Compacting States, on the one hand, and Reclamation and the Water Districts on the other.

The proposed Consent Decree for settling all of the Compacting States' claims clarifies Texas's apportionment and New Mexico's downstream apportionment but does not purport to answer all of these other questions. Rather, in broad strokes, the Consent Decree recognizes the new use of a gauging station near El Paso coupled with several other measurements to define an indexed downstream New Mexican delivery obligation consistent with the Downstream Contracts. The Consent Decree generally compromises Texas's litigation position from an initial demand for a 1938 condition as to New Mexican pumping and water capture below the Reservoir to a Consent Decree requirement that New Mexico abide by an aggregate level of pumping and water capture conditions that existed, on average, over the 1951–1978 timeframe. And New Mexico has generally compromised its claims to drop all challenges to pumping, water capture, and various previously challenged water credits occurring in Texas, all in exchange for a clarified and simplified state-line index obligation. In addition, the Consent Decree imposes an affirmative duty on New Mexico to manage its citizens' water use consistent with the 1951–1978 condition in order to meet the delivery requirement at the newly recognized gauging station. The Consent Decree,

however, does not specify how New Mexico must accomplish this internal water management goal.

Importantly, the Consent Decree also provides a strong, simple, and easily pulled lever in the event New Mexico in the future captures too much of Texas's apportionment: if New Mexico fails to reduce the effect of pumping on the Rio Grande, or otherwise continues to capture Texas's water in excess of the agreed-upon baseline, the Consent Decree calls for the temporary transfer of rights from EBID in New Mexico to EP1 in Texas. In this manner, Texas obtains what the Compacting States agree Texas is entitled to receive pursuant to the Compact (delivered to Texans through the Project and the Downstream Contracts) without Texas or this Court dictating New Mexico's ongoing internal affairs such as: the fallowing of particular acres, the settling of competing intrastate claims, the improvement and enforcement of a pumping regulatory regime, or other measures. In addition, in the event Texas receives more than its apportionment, a parallel provision of the Consent Decree calls for a similar transfer from EP1 to EBID. Finally, the Consent Decree includes accounting provisions with credit and debit accounts to track over- or under-deliveries and sets limits or tolerances for when such deviations merit corrective action.

The United States objects to the Consent Decree in part because it neither answers the several other questions identified above nor mandates specific water capture or use limitations within New Mexico. Rather, it leaves resolution of these matters for state or federal

political, administrative, or judicial fora within New Mexico. In essence, the United States does not trust New Mexico to fulfill its generally stated duty under the Consent Decree to manage water use within New Mexico in a manner that satisfies the delivery requirement. Rather, the United States argues New Mexico will rely solely on the default mechanism in the Consent Decree and allow the transfer of surface water deliveries from EBID to EP1. In this regard, the United States, whose alignment with Texas was an important factor in obtaining permission to intervene, is now opposed to Texas and aligned with EBID. The United States has shifted its alignment even though the United States at all times prior to the current motion resisted the Water Districts' intervention and consistently championed New Mexico and Texas's rights and authority over the Water Districts.

The United States also argues the Consent Decree impermissibly imposes new duties on the United States in violation of sovereign immunity; terminates the United States's claims without its consent; conflicts with federal law including the Compact itself; and otherwise fails as an unfair, inadequate, and unreasonable resolution of this Compact dispute largely because the United States asserts the Consent Decree will endanger the long-term financial viability of the Project.

I conclude the United States presents strong arguments but, at the end of the day, is wrong for several reasons. First, the Consent Decree does not impose material new duties on the United States. Rather, the

Consent Decree requires the United States to continue meeting its Compact-based duty to deliver Texas's apportionment through the Project—a duty long recognized to require some deference to state-imposed conditions. *California v. United States*, 438 U.S. at 675. It also requires the United States to continue operating the Project in a manner generally similar to how it has been operating the Project for approximately the last 40 years and highly similar to how it has been operating the Project for the last 15 years pursuant to a 2008 Operating Agreement between Reclamation, EBID, and EP1. *2008 Operating Agreement*, U.S. Trial Exh. 290.

In fact, the 2008 Operating Agreement already dictates operations that presume a 1951–1978 water capture condition and call for similar transfers between the Water Districts. This mode of operation arguably demonstrates the United States's view as to the feasibility and legality of such a procedure and its consistency with the Compact (at least when occurring pursuant to the Water Districts' consent). Now, the United States will have to respect new state-imposed limitations on Reclamation contract holders' underlying state-law water rights. This may require complying with state demands for interdistrict water transfers. And the United States will have to change some of its water accounting procedures. But accounting changes for Project management are neither uncommon nor unprecedented: they often occur as a result of the duty to comply with other state or federal laws. This is true generally and with specific reference to the recent

decades of Project operations. Moreover, any resolution of this matter, whether through settlement or adjudication, undoubtedly will require accounting changes.

Second, the United States has asserted no claims against Texas or Colorado, and the Consent Decree does not terminate the United States's claims against New Mexico. Rather, it is silent as to those claims, and I conclude such claims should be dismissed without prejudice to being asserted in other fora. Original jurisdiction over claims asserted by the United States against a state, after all, is not exclusive. *See* 28 U.S.C. § 1251(b)(2). In fact, some other fora currently host ongoing or stayed cases involving the United States and addressing underlying water rights in the Project area. Determinations from these other cases likely will guide future specific water capture and use restrictions within New Mexico. Many such cases involve neither Texas nor Colorado and address only internal New Mexican matters concerning New Mexicans' rights to their respective shares of New Mexico's overall Compact apportionment. Because the Consent Decree clarifies the Compact's apportionment and protects downstream Texas and Treaty water deliveries, the United States does not need an original jurisdiction forum to address its remaining concerns as to the details of water capture within New Mexico. This is true regardless of whether the United States bases its claims on Reclamation law, state law, the Compact, or some other source of authority.

In this regard, the United States's current briefing expressly identifies attempts to resolve *other* litigation

through the *current* proceedings when stating, "Over ten months of mediation, the parties negotiated regarding terms of a comprehensive agreement to resolve the Compact dispute *and potentially other pending litigation*." *U.S. Brief in Opp.*, Sp. M. Dkt. 754 at 16 (emphasis added). A desire to use negotiations surrounding an original jurisdiction action to settle other cases with parties to the original jurisdiction action (or with heavily involved amici) is understandable and likely wise. Such a desire, however, is necessarily tethered to non-Compact concerns and must fall short as a rationale for blocking a reasonable negotiated solution to an original jurisdiction action between the Compacting States.

Regarding claims in other fora, the parties believe a fighting issue on the present motion is whether the United States's current Compact claims (beyond the United States's interest in the Treaty)[1] are entirely derivative of Texas's claims, or whether the United States's Compact claims are independent. To the extent the United States's claims are wholly derivative, this case is relatively simple and could end with little additional analysis. If the Consent Decree protects the Treaty and Texas is satisfied that the Consent Decree adequately protects Texas's rights, the United States would seem ill-positioned to disagree. But to the extent the United States's Compact claims might not be entirely derivative—to the extent the United States holds Compact-based claims asserting New Mexico is

[1] The United States presents no meaningful arguments in opposition to the Consent Decree based on the Treaty.

violating Compact duties owed to the United States itself and without reference to Texas's receipt of its apportionment—the question becomes whether entry of the Consent Decree would actually cut off such claims, i.e., cause legal prejudice to the United States concerning such claims.

I conclude it would not. The Compact itself as well as the Consent Decree's recognition of New Mexico's general duty to manage water resources to meet the indexed delivery obligation should assuage the United States's concerns as to losing its claims. The Compact and the Consent Decree's generally stated New Mexican duty should permit the United States to maintain any "independent" Compact claims it might have against New Mexico in other fora under the Compact, if necessary, and not merely under Reclamation law, state law, or other sources of authority.

Third, the Consent Decree is consistent with the Compact and the Downstream Contracts and permissibly interprets ambiguities in the Compact. The Consent Decree enshrines a division of water recognized generally in the Downstream Contracts as referenced by the Court in 2018, *Texas v. New Mexico*, 138 S. Ct. at 957–59, and discussed at length in my summary judgment order. *Summary Judgment Order*, Sp. M. Dkt. 503 (SJO). It does so in a manner that gives the Compacting States themselves, rather than merely Reclamation and non-state entities, the ability to measure deliveries for Compact compliance and react to noncompliance. To the extent the United States argues the Consent Decree is inconsistent with

unidentified aspects of Reclamation law or other unnamed sources of authority, I conclude the shifting sands of Reclamation law or state law do not define the rights and duties within a superior source of authority that controls the relationships between the Compacting States: the Compact itself.

Finally, the claims of risk to the financial viability of the Project are better understood as risks to the financial viability of any Reclamation project in times of water scarcity. Nothing within the Consent Decree protects New Mexico or New Mexican water users against future claims from Reclamation or from other New Mexicans. Simply put, if usable water arrives in the Reservoir, is released for use downstream, and reaches Texas and Mexico in the proper amounts, fights over who in New Mexico is taking too much and paying too little (and whether New Mexico itself is doing enough to address and police the situation) can be resolved somewhere other than the Supreme Court. The Consent Decree properly recognizes these potentially detailed ancillary matters are better resolved in a different forum.

Regarding compromise and settlement, I note that in a case such as this, no solution will be perfect. No party's desired outcome, as expressed at various times throughout this litigation, is fully satisfied by the Consent Decree. For example, the United States advocates broad elimination of New Mexican pumping through a return to a 1938 condition. Texas previously sought a similar remedy in addition to past damages. And Texas previously challenged operations similar to

the Consent Decree—operations pursuant to the 2008 Operating Agreement and its 1951–1978 baseline condition—as permitting too much New Mexican pumping. For its part, New Mexico has partially denied that pumping within its borders interferes with Project operations and broadly attacked several different forms of water capture or accounting taking place within Texas. Most such claims and positions have shifted, but, as I stated in an earlier order, such is the nature of compromise and settlement. At the end of the day, a consent decree reflecting a reasonable and permissible settlement should not be rejected for falling short of perfection.

I also note that, at least to the undersigned, it is difficult to envision a resolution to this matter that might be superior to the Consent Decree. To the extent any party were to prove liability, any subsequent and finely crafted judicial remedy likely would involve the Court speaking with specificity as to who had to stop pumping when and where. No such order would be self-executing nor could it provide instant relief. Some immediate and temporary form of relief likely would be necessary as an interim remedy for a prevailing party: temporary Project delivery exchanges, some other exchange or importation of water, an exchange of money, etc. The present "lever" within the Consent Decree serves largely to provide nearly instant relief—or at least a form of annually trailing relief—while allowing an orderly long-term solution to arise within New Mexico through political processes or through the lower

courts where various non-state actors may have their voices heard.

New Mexico and Texas, as *parens patriae* in this action, speak for all of their citizens—water users, water districts, and municipalities included. Through the Consent Decree, New Mexico has made the hard and arguably political determination of which citizens will bear the initial pain of the settlement if New Mexico, as a whole and through its own laws and actions, does not act quickly enough to limit its citizens' water capture. Those citizens—EBID and its members—may bear the burden of participating in administrative, judicial, or political proceedings in New Mexico to otherwise limit and control water use. Failing success in such proceedings or general success in limiting water capture in New Mexico, those persons will be required to bear the cost of New Mexico's compliance with the Consent Decree and seek possible remedies for any losses from New Mexico in New Mexico's courts.

The choice New Mexico made in this regard is entirely understandable considering the undisputed fact that much of the allegedly improper pumping in southern New Mexico is being done by members of EBID and considering that a fighting issue in this case relates to the precise relationship between surface water and groundwater in the Project area.

This Order, if adopted by the Court, effectively ends this original jurisdiction action and dismisses the United States's claims without prejudice to raising those claims in lower courts to seek more specific

changes to water use and capture in southern New Mexico. The Consent Decree, if adopted, answers the outstanding question of downstream apportionments left ambiguous by the Compact itself and provides a mechanism for protecting Texas and the Treaty. In essence, targeted matters concerning water capture in New Mexico can be dealt with in the proper sphere.

II. Background

A. The Project, the Compact, and the Source of the Dispute

I discuss at length in my summary judgment order the undisputed facts concerning the history of the Project and the Compact, certain aspects of the state of knowledge regarding groundwater and surface water relationships in the Project area at the time of Compact negotiation and at times moving forward, operation of the Project under the Compact, and changes in water capture after 1938. *SJO*, Sp. M. Dkt. 503. I discuss here only those facts necessary to understand certain key features of Project operations as relevant to the challenged Consent Decree and its relationship to current Project operating procedures.

Texas and the United States have alleged New Mexican pumping captures Project return flows and groundwater hydrologically connected to the Rio Grande and acts as an impermissible draw on the Rio Grande in the Project area. Return flows from irrigated fields have been an important part of Project operations since prior to Compact formation. *SJO*, Sp. M.

Dkt. 503 at 25–39. In fact, consideration of such flows was important to negotiators when arriving at certain fixed water amounts in the Compact. *Id.* at 34. For example, negotiators arrived at the Compact's 790,000 acre-feet "normal annual release" amount from Elephant Butte Reservoir by considering the use of return flows to meet expected downstream irrigation needs in excess of 790,000 acre-feet per year. *Id.*; *see also Compact*, Art. VII & VIII. And, the Compact's upstream delivery obligations were determined, in part, based on the need for water to arrive at the Reservoir in amounts sufficient to allow this normal annual release amount. *SJO*, Sp. M. Dkt. 503 at 25–39; *see also Compact*, Art. III & IV.

Pumping in the Project area was unimportant in 1938 but increased during a drought in the 1950s. *SJO*, Sp. M. Dkt. 503 at 25–39. When pumping increased in New Mexico, pumping was not regulated or well documented. The current parties, however, largely advocated at least limited pumping as a means to smooth out the extremes in surface water availability caused by drought. *Id.* at 41–42. By the 1950s a scientific understanding of the relationship between groundwater and surface water in the Project area had developed to a point that many authors believed the groundwater was merely a reservoir of lost Rio Grande flows rather than water that might be replenished by a source other than the river itself. *Id.* at 40–41. Such authors indicated that pumping at certain times and in certain places likely could occur without materially affecting Rio Grande flows but that pumping

eventually would be depletive to the Project if not controlled. *Id.* And other authors described some beneficial effects from pumping rather than using surface water, such as potentially lower evaporative losses through the use of the ground and the return-flow capture system as a sort of Rio Grande reservoir. *Id.* at 41 & n.14.

At that time, Reclamation still delivered water to individual water users and controlled essentially all Project infrastructure. But by around 1980, the Water Districts had paid off certain loans and the United States transferred ownership and control of some Project infrastructure to the Water Districts. *Trial Test. Reclamation Eng'r Michelle Estrada Lopez*, Sp. M. Dkt. 701 Vol. I at 113–14, 132, 135–36, 150–51 (TT Estrada-Lopez). Reclamation then began delivering water to the Water Districts who placed aggregated orders for their members and, in turn, delivered water to their members. *Id.* at 151–53.

Using a regression analysis and data from 1951 through 1978, Reclamation developed an equation representing the historic relationship between surface water deliveries to the districts and water releases from Caballo Reservoir (a smaller control reservoir located near to and downstream from Elephant Butte Reservoir). *Id.* at 168–72. The parties refer to the 1951–1978 period as the D2 period and the resulting equation as the D2 equation or "D2 curve." *Id.* Since approximately 1980, Reclamation has been making annual predictions as to possible Project surface water deliveries to the Water Districts based on the D2 curve

and inputs such as Reservoir levels. *Id.* at 158–200. Initial conditions are updated throughout the irrigation season as new data, such as data concerning actual Reservoir inflows and evaporation, are received. *Id.* The initial and updated conditions and the D2 curve establish what water users may order from their districts and what the Water Districts may order from Reclamation. *Id.* By using data collected through the D2 period as the benchmark for defining the relationship between Caballo Reservoir releases and Project surface water deliveries to the Water Districts, this method of operation necessarily "grandfathers in" the effect of pumping on surface water availability as had occurred, on average, during the D2 period. Such effects are alleged to include the capture of irrigation return flows and the capture of hydrologically connected groundwater to the extent they served to reduce surface water availability within the Project during the D2 period.

To the extent New Mexico, Texas, the United States, and the Water Districts might have had misgivings as to this method of Project operation, a period of relative water abundance in the 1980s and 1990s temporarily ameliorated such concerns or forestalled suit. The Reservoir experienced spills in the late twentieth century, which not only indicates a time of abundance but triggers a sort of "clearing of the accounts" under the Compact through which certain debits and credits as between the Compacting States are wiped away. *See Declr. Eng'r William Hutchinson*, Sp. M. Dkt. 720 Exh. 4 at ¶ 100 (describing spill years); *see also Compact*

Art. VI ("[I]n a year of actual spill no annual credits nor annual debits shall be computed. . . . In any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled.").

The resulting period of an arguable but tenuous peace ended with the onset of extended drought conditions in the early twenty-first century. Reservoir releases and the amounts Reclamation allowed the Water Districts to order decreased over time. In at least two years, 2003 and 2004, water users in Texas did not receive even the reduced amounts they were permitted to order. *SJO*, Sp. M. Dkt. 503 at 44–45. Subsequently, with Texas's Rio Grande Compact Commissioner as an informal mediator but without Texas as a party, and without New Mexico's participation at all, Reclamation, EBID, and EP1 negotiated an attempted ad hoc solution to the issue of allegedly improper New Mexican pumping during a time of scarcity: the 2008 Operating Agreement. U.S. Trial Exh. 290; *Dep. Test. of Texas Compact Comm'r Pat Gordon*, N.M. Sum. Jmt. Exh. 212 at 42–43, Sp. M. Dkt. 418. Pursuant to the 2008 Operating Agreement, EP1 in Texas was allowed to order water pursuant to the D2 curve, but EBID in New Mexico was restricted to ordering only a portion of the D2 amount. *TT Estrada-Lopez*, Sp. M. Dkt. 701 Vol. I at 182–83.

In addition, the 2008 Operating Agreement created "carryover accounts" as a new form of Project

accounting not addressed in the Compact. *TT Estrada-Lopez*, Sp. M. Dkt. 701 Vol. II at 87–90. Through the carryover accounts, Reclamation earmarked certain accounting-based "pools" or "tranches" of water in the Reservoir as exclusively belonging to one water district based on that district's unused but permissible water orders. *Id.* at 130–40. Such pools were excluded generally from future D2 calculations and could be ordered in the future by the respective district. *Id.* For Texans, the carryover account became a sort of private reservoir account EP1 users could use to supplement D2-determined allocations in times of scarcity. In practice and by comparison, EBID did not carry over meaningful amounts. *See*, *e.g.*, *id*. Vol. II at 89.

New Mexico disapproved of the Operating Agreement for several reasons and filed suit against the United States and the Water Districts in federal district court in New Mexico alleging the 2008 Operating Agreement violated the Compact and other provisions of federal law. *New Mexico v. United States*, No. 11-CV-00691 (D.N.M. filed Aug. 8, 2011) (2008 Operating Agreement Litigation). New Mexico alleged generally that the 2008 Operating Agreement treated evaporative losses in a manner inconsistent with the Compact and taxed New Mexicans for all Project inefficiencies and indirect water capture even though New Mexico alleged the United States and Texas were responsible for some such inefficiencies. In general, New Mexico argued the system of D2 reductions and carryover accounts served as a form of double counting that improperly reduced Project surface water deliveries in

New Mexico. The United States defended the 2008 Operating Agreement as consistent with federal law, including the Compact.

The 2008 Operating Agreement is important to my discussion of the proposed Consent Decree in that it enshrined two of the key components of the Consent Decree. It formalized the already decades-old practice of using the D2 curve as the basis for determining the allocation of water to the respective districts. Secondly, it established the principle that under-delivery of Texas water would be compensated by transferring water from EBID to EP1.

B. Procedural History Leading up to *Texas v. New Mexico*, 138 S. Ct. 954 (2018)

In 2013, after New Mexico initiated the 2008 Operating Agreement Litigation, Texas brought this original jurisdiction action against New Mexico, identifying the dispute as a Compact dispute and not merely a matter concerning Reclamation and the Water Districts. In effect, by filing the present suit, Texas shared in New Mexico's rejection of the 2008 Operating Agreement but for different reasons. Whereas New Mexico's district court complaint targeted the 2008 Operating Agreement as unfair to New Mexico, Texas in this action has consistently characterized the 2008 Operating Agreement as a partial but insufficient remedy for New Mexican pumping. According to Texas, the agreement improperly "grandfathered in" too much New Mexican pumping.

In its complaint, Texas alleged New Mexico was intercepting Texas's Compact apportionment of the Rio Grande by appropriating water intended for Texas. Sp. M. Dkt. 63. Texas named Colorado, the other state signatory to the Compact, as a party to the suit but asserted no claims against Colorado. Texas sought as relief: (1) a declaration of Texas's rights "to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act"; (2) injunctive relief ordering New Mexico to permit the delivery of Texas's Rio Grande Compact apportionment to Texas in compliance with the Compact and the Rio Grande Project Act; (3) injunctive relief ordering New Mexico to cease and desist actions interfering with Project operations and the delivery of Texas's apportionment; and (4) damages for injury to Texas caused by New Mexico's past and continuing violations of the Rio Grande Compact and Rio Grande Project Act. *Id.* at 14–15.

The United States moved to intervene asserting distinctly federal interests due to: (1) its role as the operator of the Project responsible for setting allocations consistent with the Compact for the delivery of water to water users with Project contracts; (2) the need to limit pumping and other water capture in New Mexico to the extent such capture could reduce Project efficiency and ultimately interfere with Project deliveries to Texas even if EBID received no deliveries; and (3) the need to protect the United States's ability to satisfy its 1906 Treaty obligation to deliver 60,000 acre-feet of water per year through the Project to Mexico except in

years of "extraordinary drought." *U.S. Complaint in Intervention*, Sp. M. Dkt. 65 at 3–4. The United States's claims and demands for injunctive relief as articulated in its complaint in intervention largely mirrored those of Texas, and Texas conditionally supported the United States's Intervention on those terms. Specifically, the United States sought: (1) a declaration stating that New Mexico may not allow Project contract holders to capture Project water in excess of contractual amounts, cannot allow non-contract holders to capture any Project water, and must act affirmatively to prevent such capture; and (2) an injunction ordering New Mexico to prevent such interception. *Id.* at 5.

In addition, EBID and EP1 sought to intervene asserting claims based on their roles as the Water Districts in the Project area representing individual water users and controlling certain Project infrastructure. S. Ct. Dkt. 22O141, Dec. 3, 2014 & Apr. 22, 2015.

New Mexico moved to dismiss all claims. A first Special Master recommended: denying the Water Districts' motions to intervene, denying New Mexico's motion to dismiss Texas's claims, denying the United States's motion to intervene to the extent the United States purported to assert Compact claims, but expanding jurisdiction to permit the United States to assert claims based on Reclamation law. *First Interim Rep.*, Sp. M. Dkt. 54.

The Court denied the Water Districts' motions to intervene but elected to hear two exceptions to the recommendations concerning the United States's

intervention: first, a Colorado exception arguing that the United States's claims should be limited to claims based on the Treaty; and second, a United States exception arguing that the United States was asserting Compact claims and not merely claims arising under Reclamation law or some other legal authority. S. Ct. Dkt. 22O141, Oct. 10, 2017.

C. The Court's First Opinion in this Case

The Court issued its opinion on the exceptions in 2018. *Texas v. New Mexico*, 138 S. Ct. 954 (2018). The Court characterized the question before it as whether "the United States, as an intervenor, [may] assert essentially the same claims Texas already has?" *Id.* at 956. In answering this question, the Court noted the unique nature of its own role in compact cases where it acts as "a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *Id.* at 958 (citations omitted). Given this role, the Court emphasized the potential for departures from generally applicable norms of litigation and the flexible and practical ability to "regulate and mould the process it uses in such a manner as in its judgment will best promote the purposes of justice." *Id.* (quoting *Kansas v. Nebraska*, 574 U.S. 445, 454 (2015)). Finally, the Court noted that this flexibility had led the Court to allow the United States to intervene in some compact cases, but that such permissive intervention was not a "license" and conferred no "blanket authority." *Id.* at 959.

The Court ultimately allowed the United States to intervene to assert Compact-based claims for several reasons, recognizing: the "inextricably intertwined" nature of the Compact and Project; New Mexico's concession as to the United States's "integral role in the Compact's operation"; and the need to protect "the federal government's ability to satisfy its treaty obligations." *Id.* The Court did not suggest that the United States possessed *rights* under the Compact aside from its interest in the Treaty. Instead, the Court described the United States as a "sort of agent of the Compact, charged with assuring that the compact's equitable apportionment to Texas and a part of New Mexico is, in fact, made." *Id.* (citations omitted). In other words, the United States was entitled to intervene to protect its ability to carry out its Treaty and Compact *duties* even if the Compact did not apportion water to the United States itself. The Court concluded its analysis stating:

> [T]he United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States.
>
> Taken together, we are persuaded these [four] factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action. Nothing in our opinion should be taken to suggest whether a

> different result would obtain in the absence of any of the considerations we have outlined or in the presence of additional, countervailing considerations.

Id. at 960.

D. New Mexico's Counterclaims, the Motions to Dismiss, and the Motions for Clarification

Next, New Mexico filed its answer and counterclaims against the United States and Texas. Sp. M. Dkt. 93–95, 97–99. Some of New Mexico's counterclaims mirrored Texas's claims in that New Mexico asserted certain non-Project water capture or accounting practices in Texas—including pumping—had the overall and combined effect of reducing Project efficiency, thus requiring increased releases of water from Project storage to meet deliveries further downstream and ultimately reducing the water available for Project deliveries. Through these claims, New Mexico essentially admitted the *general* hydrological connections and effects as between groundwater pumping and Rio Grande flows in the area between the Reservoir and Fort Quitman, Texas. But the devil remained in the details, and New Mexico described a substantially different understanding of what was meant by "Project Water" or "Project Supply." New Mexico also resisted the other parties' specific claims including the United States's requests for injunctive relief.

The parties then filed motions to dismiss. I dismissed New Mexico's claims against the United States seeking injunctive relief or damages primarily due to the absence of any applicable Congressional waiver of sovereign immunity. *Order on Mtns. to Dismiss*, Sp. M. Dkt. 338 at 14–22. I reserved ruling as to the permissibility of declaratory relief against the United States in this unique context: where the United States voluntarily entered into a case concerning Compact interpretation and recognized the necessity of complying with the Court's ultimate Compact interpretation. *Id.* at 2. In fact, in seeking the dismissal of New Mexico's claims, the United States clearly articulated an understanding of the relationship between the Project, Project operating agreements, and the Compact. The United States described anticipated Project operating changes in response to clarification of the apportionments: "[O]nce we have a decree that defines what each state has, then we can look to project operations and determine whether those operations are consistent with that decree." *Apr. 2, 2019 Hr'g Transcript*, Sp. M. Dkt. 264 at 49.

I also dismissed several of New Mexico's counterclaims against Texas. *Order on Mtns. to Dismiss*, Sp. M. Dkt. 338 at 27–37. I allowed broad claims alleging Compact violations to proceed but denied New Mexico the opportunity to address, as discrete claims, myriad individually alleged violations of other water-related laws or narrowly defined instances of impermissible water capture. I emphasized that, as to the dismissed discrete claims, my rulings neither limited the

admissibility of any evidence nor precluded New Mexico from offering proof of particular discrete Compact-based water capture violations. I described the present case as not presenting the forum for addressing as separate claims every discrete grievance concerning numerous non-parties. I emphasized that this case is the vehicle for addressing the broad questions of Compact construction and overall compliance.

Finally, I reserved ruling on the motions to dismiss as to several equitable affirmative defenses. *Id.* at 39–40. It was too early in the case to address such issues; the absence of a developed record made it impossible to address equitable defenses in the abstract. Moreover, given the long history of performance under the Compact within an atmosphere of changes in population, development, farming practices, and hydrologic conditions, many of the same allegations and arguments that applied to equitable defenses also applied to course-of-performance arguments for resolving Compact ambiguities.

Subsequently, I addressed the parties' motions seeking resolution of outstanding questions as to the precise scope of what had and had not been decided through the earlier events in this case, in particular, the effect of the first Special Master's report and the absence of an express adoption of that report by the Court. *Misc. Order*, Sp. M. Dkt. 340. And, at the Court's request, I ruled on a motion by private parties seeking to intervene. *Second Interim Rep.*, Sp. M. Dkt. 302. In denying that motion, I set forth in considerable detail a history of select litigation preceding the Project and

the Compact as well as more recent (late twentieth century) or ongoing federal and state litigation continuing up through the present day and involving competing claims to water in the Project area in New Mexico. One of the cases I identified was part of a vast state court proceeding currently in progress to decide the priorities among thousands of water-right claimants in southern New Mexico. *See State of New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist. et al.*, No. D-307-CV-96-888 (3d Jud. Dist. Ct. Dona Ana County, N.M.) (Lower Rio Grande Adjudication); *see also United States v. Elephant Butte Irrigation Dist.*, No. 97-CV-0803 (D.N.M. Oct. 20, 2014) (describing the genesis of the Lower Rio Grande Adjudication).

E. Summary Judgment

After the parties conducted discovery—largely on a remote basis while facing COVID-19 challenges—they filed cross-motions for summary judgment. In those motions, the parties expressed substantially different positions as to the Compacting States' rights and apportionments under the Compact. The arguments spoke not only to the question of defining the states' Compact apportionments and duties; they spoke to the question of limiting and defining the body of laws and the priority among laws governing various issues at different points along the Rio Grande.

For example, Texas argued all water delivered into the Elephant Butte Reservoir represented Texas's Compact apportionment such that New Mexico as a

state held no Compact-level right as to water downstream of the Reservoir. Pursuant to this theory, southern New Mexico would be viewed as a part of "Compact Texas." And, based on the negotiating history of the Compact, such a theory was not without at least some support. The Compact, after all, imposes an intrastate delivery duty on New Mexico. According to Texas, New Mexicans with Reclamation contracts (and, by extension, EBID representing those persons) held contract-based claims against Texas's apportionment, but New Mexico itself had no Compact interest in water throughout the approximately 105 miles of river between the Reservoir and El Paso. Texas also asserted that New Mexico's water laws had no application as to the Rio Grande or hydrologically connected waters within this region of New Mexico.

New Mexico disagreed and went further, essentially arguing that New Mexican law alone governed its citizens' ability to draw groundwater below the Reservoir regardless of potential hydrologic connections to the Rio Grande. As another example, New Mexico sought to characterize Texas's Compact apportionment as a variable and annually determined amount limited to only that amount of water Texans actually ordered from Reclamation in a particular year. Through this theory, New Mexico sought to deflect as immaterial to the Compact any cumulative depletive effects caused by year-over-year off-contract water capture. New Mexico described Texas's Compact apportionment as, essentially, nothing more than a Reclamation determination concerning the division of a shrinking pool. In

short, even at summary judgment, the parties were far apart.

In a less extreme position, the United States argued New Mexico received a downstream apportionment through the Project but that protection of surface water supplies against indirect capture was a necessary feature of both states' Compact apportionment.

In ruling on the summary judgment motions, I set forth a textual analysis of the Compact explaining what I found to be unambiguous in reference to the parties' arguments. *SJO*, Sp. M. Dkt. 503 at 10–24. In doing so, I described in detail the many ways in which the Compact referenced and relied on the Project or Project-related terms to define all three Compacting States' rights and duties. I concluded it was necessary to characterize the water from the Project for delivery to downstream New Mexicans as a part of New Mexico's Compact apportionment. In so ruling, I necessarily recognized New Mexico's right as a Compacting State to represent all of its citizens in disputes concerning the downstream apportionment, effectively superseding EBID in its asserted ability to dictate matters as below the Reservoir. I also concluded New Mexico owed a Compact-level duty to Texas to apply its laws in a manner so as to protect the delivery of Texas's Compact apportionment.

Then, in discussing undisputed aspects of Project inception, pre-1938 Project operations, Compact negotiation, and evidence concerning post-1938 Project and Compact operations leading up to the present suit, I

reached additional conclusions. *Id.* at 24–46. The Compact apportioned water between downstream New Mexico and Texas pursuant to a rough baseline of 57% for New Mexico and 43% for Texas subject to the reservation of Treaty water for Mexico. Further, this apportionment was programmatic in nature in that: (1) Reclamation retained an as-yet-undetermined amount of flexibility in operation of the Project, but (2) several aspects of the Compact and negotiating history showed a presumption that an as-yet-undetermined baseline operating condition *akin to* a 1938 condition would need to be protected to ensure Mexico received its Treaty water and Texas received its apportionment. In reaching this conclusion, I noted that the evidence did not suggest Compact negotiators had intended farming operations or development in the Project area to remain static. Finally, I identified as remaining for trial several questions of fact including: the precise identification of the protected baseline operating condition and the precise definition of "Project Supply," that is, what the Compacting States had intended to divide roughly 57%/43% between New Mexico and Texas when considering Reservoir releases, return flows, potentially Project-related groundwater, and other matters. No party sought modification or further review of my order, and the parties prepared for trial.

F. Trial, Settlement Efforts, and Confidentiality Issues

In Fall 2021, the parties participated in the first phase of a multiphase trial. *Trial Transcripts Vols.*

I–XIX, Sp. M. Dkt. 701. I had already bifurcated the trial as between liability and damages. Then, in light of lingering COVID-19 concerns and requests for continuances, I further bifurcated the trial on liability issues to hear testimony from percipient fact witnesses and expert witness historians via a remote format. I reserved the important presentation of technical expert witnesses as to liability issues for a planned in-person trial phase scheduled to commence in March 2022. The remote initial phase of the trial ended in November 2021.

Before resuming the trial with the in-person second phase, the parties conducted extensive settlement negotiations with a skilled mediator, retired United States Magistrate Judge Arthur Boylan. I continued the March 2022 trial date to permit mediation, and in subsequent status reports, the parties expressed optimism at their progress and ability to reach settlement. *Jan. 24, 2022, May 3, 2022, June 24, 2022, July 26, 2022, and Aug. 24, 2022 Hr'g Transcripts*, Sp. M. Dkt. 760–64. During these negotiations, the parties agreed a fixed trial date would aid mediation by keeping the negotiators' "feet to the fire." As such, in May 2022, I set trial to resume on October 3, 2022, in the event settlement could not be achieved. *Misc. Order*, Sp. M. Dkt. 703.

In July 2022, over Texas's objection, I suspended the October trial date and granted what I described as a final continuance until September 27, 2022, to permit the finalization of a settlement. I based my decision in no small part on representations from the United

States that an acceptable compromise had been reached in principle and that what remained amounted to the processes of finalizing select figures, documenting the settlement, and obtaining formal approvals: the dotting of "i"s and crossing of "t"s. *June 24, 2022 Hr'g Transcript*, Sp. M. Dkt. 762 at 28–29 ("the United States is confident that we can reach a final settlement by the end of September" "we've had successful negotiations with all the parties in this case. So, no, we don't see any deal breakers"). In its objections to suspending the October trial date, Texas stated that remaining disputes in the path to settlement no longer required Texas's involvement. As such, it became clear to the undersigned that whatever was being negotiated no longer involved questions as to defining Texas's apportionment. Rather, remaining concerns likely related solely to questions between upstream actors as to how that apportionment might reach Texas.

Then, in a September status conference, the parties announced an impasse and a failure of settlement. *Sept. 27, 2022 Hr'g Transcript*, Sp. M. Dkt. 765 at 11. Having been repeatedly informed of the nearness of settlement and the general absence of Texas in ongoing settlement discussions, I asked if remaining disputes were still in the nature of interstate Compact-level disputes involving multiple states and meriting continued exercise of original jurisdiction or whether limited parties were engaged in the resolution of ancillary matters. *Id.* at 16. Shortly thereafter, the Compacting States filed the present motion along with briefing and supporting materials to announce the settlement of

their claims and urge adoption of the Consent Decree. *Joint Motion, etc.*, Sp. M. Dkt. 719–20.

The United States objected to entry of the Consent Decree, initially on procedural grounds, and later on substantive grounds. Procedurally, the United States alleged the proposed Consent Decree and accompanying motions, briefing, and supporting materials impermissibly disclosed confidential settlement information and confidential negotiating positions in violation of confidentiality agreements and Federal Rule of Evidence 408. I temporarily sealed several filings, invited briefing, and held arguments on confidentiality issues. Ultimately, I determined the Consent Decree and the accompanying motion and supporting materials did not, in and of themselves, impermissibly disclose confidential information or negotiating positions. *Order on the Mtns. to Unseal and Strike*, Sp. M. Dkt. 742. Rather, I concluded the Consent Decree and associated materials represented the work product of teams of engineers and technicians—including Reclamation employees—using publicly available data and widely known hydraulic and hydrological analytical techniques to derive a Project operating regime with an indexed state-line delivery consistent with the Downstream Contracts and my earlier rulings. *Id.* The Compacting States were careful in their filing, and nothing in the Consent Decree or accompanying materials disclosed negotiating positions beyond the final proposed settlement or beyond what had already been stated to me in status conferences.

The parties next briefed and argued their positions as to the substance of the Consent Decree, focusing on issues of their own choosing, but also addressing several questions I presented as to: (1) the propriety of entering the Consent Decree over an intervening party's objection; (2) the nature of the United States's unresolved claims and the availability of alternative fora to address such claims; (3) the anticipated future involvement of the Supreme Court if jurisdiction were to be retained as per a final section of the Consent Decree; and (4) the effect of the Supreme Court's statements in its 2018 opinion permitting the United States to intervene as a party in part because of its alignment with Texas and in part because it was not attempting to expand the issues being litigated beyond those issues raised by the States. *See Texas v. New Mexico*, 138 S. Ct. at 960.

G. The Consent Decree

The Consent Decree clarifies the Texas apportionment as measured through an indexed delivery requirement at a gauge near El Paso and imposes on New Mexico a general duty to manage and administer water within its own borders to ensure the indexed amount of water reaches Texas. In practice, the Consent Decree enables a backward-looking analysis of whether the Texas apportionment reached Texas. If deliveries fall too far short, the Consent decree permits, and in some circumstances requires, temporary adjustments to Water District deliveries on a forward-looking basis.

The Consent Decree refers to the index delivery requirement as the "Index Obligation" based on the "Effective El Paso Index" (EEPI). *Consent Decree* § I. As defined fully in the Consent Decree's Appendix, the EEPI represents generally a fraction of Caballo Reservoir releases. Specifically, the EEPI is measured as the Caballo Reservoir releases less: the Treaty delivery to Mexico, "Project Supply" depleted in the Mesilla Valley in Texas upstream of the El Paso Gauge, and "Excess Flows." The Texan Mesilla Valley depletions can be measured due to modern technology, including computer modeling, in a manner unavailable at the time of Compact negotiation. "Excess Flows" are flows passing the El Paso gauge viewed as unsuitable for beneficial use and unrelated to irrigation orders or Treaty deliveries. Such flows arise from events such as flood control releases, unusable flash flood flows, amounts released for Project maintenance such as sediment flushing, or amounts associated with upstream infrastructure failures. "Project Supply" is a defined term discussed below.

Additional important features include water accounting provisions and deviation thresholds for triggering responsive actions in the event deliveries passing the El Paso Gauge substantially exceed or fall short of the index delivery requirement. The Consent Decree's general obligation on New Mexico to manage its internal water use to meet the index delivery requirement exists independent of the duty to take corrective actions triggered by delivery shortfalls. The general duty does not speak as to the method for New

Mexico to satisfy the delivery requirement. Regarding triggers, however, the Consent Decree identifies a possible temporary transfer of a portion of the EBID Project allocation to EP1 in Texas for a specific under-delivery trigger, and mandatory transfers if a greater triggering under-delivery occurs.

Like the upstream provisions of the Compact itself, the Consent Decree tracks annual and cumulative deviations between the index delivery requirement and actual deliveries. Also like several Articles of the Compact, the Consent Decree treats extremely dry years (when total Reservoir releases are less than 200,000 acre-feet) or extremely wet years (when such releases are greater than 790,000 acre-feet or when the Reservoir experiences a spill of water) differently than typical years. When conditions are extreme, certain annual accounting features are not tracked or are capped regardless of actual measurements. And some cumulative accounting features are reset to zero.

I describe the Consent Decree in detail below. I note in general, however, that the Consent Decree leaves management of the Project in the hands of Reclamation with the States now empowered to monitor deliveries and, under certain conditions, exercise their *parens patriae* prerogative to limit or expand their Water Districts' ability to receive surface water deliveries. Reclamation operates Caballo Reservoir and Elephant Butte Reservoir and releases water not only for Compact and Treaty compliance but also for several practical purposes that require releases not connected directly to satisfying the Treaty or responding to calls

for water under Reclamation contracts. These releases are necessary components of safe and routine Project operations and maintenance. Given this fact, Reclamation and not the States decides how much water can be released from Elephant Butte Reservoir safely at any given time, including the important annual and continuously updated predictions of what might be made available for contract holders' use. The Consent Decree does not purport to take this control away from Reclamation. Rather, the Consent Decree provides as a contingent remedy the possible temporary shifting of some of that Reclamation-determined amount from one water district to the other.

This temporary shifting or transferring of water as between the Water Districts occurs on an annual trailing basis. Accounting pursuant to the Consent Decree largely will reflect year-end consideration of total water reaching Texas. The following year's D2 calculations and anticipated allowable water orders will reflect adjustments to correct for substantial prior-year deviations. Such year-end accounting already occurs in many respects and affects subsequent year allowable water-order estimates. Carryover accounting represents one such example.

As discussed below, the United States's objections largely relate to: (1) alleged interference and attempted control of the Project by the States and (2) the absence of detailed provisions or benchmarks related to New Mexico's general duty to manage water use below the Reservoir. As discussed previously, the United States asserts that, without specific and enforceable

water conservation measures, New Mexico will default to the "easy" option of transferring water from EBID to EP1.

Under the Decree, Reclamation will be required to continue operating pursuant to the D2 regression rubric that is not expressly called for in the Compact but that Reclamation voluntarily has employed as the means for carrying out its Compact duties for approximately the last 40 years. To ensure that actual water deliveries to Texas better match the newly articulated index delivery requirement, Reclamation *should* adjust its D2 regression analysis for annual delivery predictions to use two years' data (prior year and current year) rather than merely one year's data (current year). Even this adjustment to a two-year D2 analysis, however, is phrased in the Appendix to the Consent Decree as a suggestion to minimize over- and under-deliveries rather than strictly binding Reclamation's hands.

In addition, water transfers similar to those Reclamation has been imposing for the last 15 years, if necessary, will now occur not merely as a matter of Reclamation's agreement with the Water Districts, but also, potentially, in response to demands from a state for its district to forgo or accept transferred water. This transfer feature means Reclamation will have to amend its accounting procedures to track additional data, including a different type of credit and debit account. Finally, the non-Compact-based carryover accounts created by the United States and the Water Districts pursuant to the 2008 Operating Agreement

continue to exist, but the Consent Decree caps those accounts to prevent an ever-increasing balance that might distort the D2 analysis. It also requires that those accounts be charged for evaporative losses and requires that certain negative departures charged to New Mexico be cancelled if EP1 consistently maintains a large carryover account balance. With that introduction and highlighting of key features, the Consent Decree provides as follows.

Section I sets forth definitions. Two defined terms that speak directly to issues of contention throughout this case are "Annual Allocated Water" and "Project Supply." The Consent Decree defines "Annual Allocated Water" through reference to another defined term, "Project Supply," as "the quantity of Project Supply that is allocated each water year for delivery to the irrigation districts in New Mexico and Texas, and to the United States for delivery to Mexico (pursuant to the Convention of 1906). The Annual Allocated Water allocated to water users within the United States represents the equitable apportionment of Rio Grande water to Texas and New Mexico below Elephant Butte Reservoir consistent with this Decree." "Project Supply," in turn, is defined as:

> the water supply for the Rio Grande Project as defined and administered by applicable State law. Project Supply generally consists of:
>
> (i) Usable Water, as defined in Article I(*l*) of the Compact, which excludes Rio

> Grande credit water and imported waters such as San Juan Chama Project water;
>
> (ii) Usable Water released from Caballo Reservoir in accordance with irrigation demands, including deliveries to Mexico; and
>
> (iii) Inflows and Project return flows that reach the bed of the Rio Grande or Project conveyances, but excluding flows from imported water.

Consistent with Project operations since 2008, the Consent Decree defines "Project Carryover Water" as the "Annual Allocated Water allotment balance remaining at the end of a given calendar year." This refers generally to water that Reclamation allocated to a district that the district did not call for as a release to be physically delivered. Finally, the "New Mexico Escrow Account" and "Texas Escrow Account" are the new accounts "that track[] the volume of Project allocation transferred to the irrigation district in [the respective state] by the Bureau of Reclamation under the procedures for addressing [] departures as described in Section II.D." Essentially, the carryover accounts as created and accounted for by the Water Districts and Reclamation continue to exist and a separate accounting feature is added to track water transfers effected through the Consent Decree.

Section II, entitled "Injunction" includes "General Provisions" in subsection A., largely reciting undisputed aspects of the Compact or legal duties already recognized in this case. In addition, subsection II.A.4.

states, "The United States is responsible for operating the Project in a way that assures that the Compact's equitable apportionment to Texas and New Mexico below Elephant Butte Reservoir is achieved consistent with the terms of this Decree." Subsection II.A.5. references indirectly the Downstream Contracts discussed by the Court and in my summary judgment order by identifying the division of irrigable Project acres in each state as the rough division of water downstream of the Reservoir: "The division of Rio Grande water between New Mexico and Texas below Elephant Butte Reservoir is based upon the percentage of the total authorized irrigable acreage of the Rio Grande Project situated in each State at the time of the Compact, approximately 57% in New Mexico and 43% in Texas." And subsection II.A.7. provides, "Compliance with this Decree represents compliance with the Compact with respect to the division of Rio Grande water below Elephant Butte Reservoir."

Section II.B. entitled "Division of Water below Elephant Butte Reservoir" speaks to the heart of the new "Index Obligation" by defining the EEPI and the term for defining what is actually delivered, the "Index Delivery." Section II.B.ii.a. imposes on New Mexico a general duty—independent of any triggers for specific action or departure limits used to define compliance—to "manage and administer water in a manner that is consistent with this Decree, including satisfying the [EEPI] requirements." Section II.B. makes clear, generally, that the EEPI is defined with more detail in an appendix that incorporates the Downstream

Contracts' 57%/43% division into its equations and through use of the 1951–1978 D2 data set and presumes continued application of a D2 regression method for Project operations. This section also instructs that annual differences between the EEPI-based Index Obligation and the Index Delivery, i.e., the difference between the amount of water required to be delivered at the El Paso Gauge and the amount actually delivered, be used to adjust accrued Positive or Negative Departures for year-over-year tracking of Compact compliance.

Subsection II.C., entitled "Index Departure Limits" recognizes, like the Compact's upstream index provisions, that "Index Deliveries" are unlikely to exactly match the Index Obligation. This subsection defines New Mexico's downstream Compact and Consent Decree compliance through reference to negative limits on the permissible deviation between the Index Obligation and actual Index Deliveries. This subsection establishes one set of such numerical limits for the first five years of operation pursuant to the Consent Decree and a different set of limits for later years. In essence, New Mexico is afforded greater leeway to err in the first five years, thus buying some wiggle room for the execution of intrastate water management actions it believes necessary and appropriate to protect Texas's apportionment.

Subsection II.C.3.b. introduces the concept of inter-Water District transfers that lie at the heart of the United States's objections. For example, Subsection II.C.3.b.(i) states that if New Mexico exceeds the

accrued Negative Departure Limit for three consecutive years, New Mexico is required to provide to Texas a fixed amount of water in addition to the Index Obligation for each year New Mexico exceeded the limit. This subsection provides, "With the agreement of Texas, New Mexico shall have the option to transfer part of the water apportioned to New Mexico from the irrigation district in New Mexico to the irrigation district in Texas in order to satisfy this obligation."

And subsection II.C.3.c. cabins New Mexico's duty to remedy accrued Negative Departures if Texas maintains a "Carryover Water" balance that, measured on the basis of a three-year rolling average, exceeds a given amount. In this manner, Texas cannot maintain an ever-increasing Carryover Water balance that would distort the D2 calculations, increase potential remedial water transfer requirements on New Mexico, and create an endless feedback loop decreasing New Mexico Project deliveries. This provision is, in essence, a direct response to New Mexico's concerns that operations pursuant to the 2008 Operating Agreement were causing a sort of "double counting" against New Mexico.

Subsection II.D., "Triggers for Water Management Actions" provide for actions intended to keep Index Deliveries in line with the Index Obligation before potential Negative Departures grow too large. These provisions permit New Mexico to order the transfer of water from EBID to EP1 if certain triggers are exceeded and requires such transfers if greater triggers are exceeded. These triggers and responses, like the

possible responses if New Mexico actually exceeds Departure Limits, lie at the heart of the parties' present arguments.

III. Discussion

A. Applicable Standards

In describing the standards governing the entry of a consent decree over an intervenor's objections, the parties focus their attention on *Local No. 93, Int'l Ass'n of Firefighters v. Cleveland*, 478 U.S. 501 (1986) (*Local 93*). The Compacting States emphasize that *Local 93* is inherently flexible in all cases and requires the application of even more nuance in the context of an original jurisdiction action where the Court's "role significantly 'differ[s] from' the one the Court undertakes 'in suits between private parties.'" *Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 372–73 (1923)). The Court has repeatedly emphasized the importance of jurisdictional restraint in original jurisdiction cases and the Court's unique ability to "regulate and mould the process" in recognition of the quasi-diplomatic nature of such actions. *Id.* at 454 ("When the Court exercises its original jurisdiction over a controversy between two States, it serves 'as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force.'" (quoting *North Dakota v. Minnesota*, 263 U.S. at 372–73)). In other words, just as the Court maintains vast discretion in accepting petitions to initiate original jurisdiction proceedings and, seemingly, even

more discretion in permitting the United States to join such actions, the Court also maintains vast discretion in assessing whether changed circumstances should permit a consent decree to end a case where aspects of the United States's intervening claims are left partially unresolved to be addressed in other fora.

The United States, in contrast, argues that there is less flexibility in *Local 93* than the Compacting States contend and that original actions should not be treated differently than any other litigation. In asserting this position, the United States describes the Court's 2018 opinion as conclusively holding: (1) the United States holds Compact claims distinct and independent of the need to protect the Texas apportionment or Mexican Treaty water; (2) such claims necessarily must resolve the detailed matters of intrastate New Mexican water capture regardless of Texas's satisfaction with its Compact apportionment and protection mechanisms; (3) such claims are wholly nonjusticiable in other fora; and (4) the Court spoke with such clarity and completeness in addressing a motion to dismiss at the inception of the case that neither a Special Master nor the Court itself may revisit any of these determinations. I conclude the Compacting States have the better argument.

In general, "consent decrees bear some of the earmarks of judgments entered after litigation. At the same time, because their terms are arrived at through mutual agreement of the parties, consent decrees also closely resemble contracts." *Local 93*, 478 U.S. at 519; *see also United States v. ITT Cont'l Baking Co.*, 420 U.S.

223, 235–37 (1975) and *United States v. Armour & Co.*, 402 U.S. 673 (1971). "More accurately, . . . consent decrees 'have attributes both of contracts and of judicial decrees,' a dual character that has resulted in different treatment for different purposes." *Id.* (quoting *ITT Cont'l Baking Co.*, 420 U.S. at 235–37, and n.10). Given this dual character, "a consent decree must spring from and serve to resolve a dispute within the court's subject-matter jurisdiction . . . [and] 'com[e] within the general scope of the case made by the pleadings[.]'" *Id.* at 525 (quoting *Pacific R.R. v. Ketchum*, 101 U.S. 289, 297 (1879)). As such, a consent decree "must further the objectives of the law upon which the complaint was based." *Id.*

But, "in addition to the law which forms the basis of the claim, the parties' consent animates the legal force of a consent decree." *Id.* "Therefore, a federal court is not necessarily barred from entering a consent decree merely because the decree provides broader relief than the court could have awarded after a trial." *Id.* at 525. Still, a consent decree may not "conflict[] with or violate[] the statute upon which the complaint was based." *Id.* at 526.

So far so good. A consent decree must be consistent with the underlying law and general scope of the operative complaints in a case, but the relief negotiated by the parties may differ from, and be broader or more narrow in scope than, that which was requested in a complaint or which a court might have been able to provide through a post-litigation judgment.

Speaking directly to the question of an objecting intervenor's ability to block a settlement, the Court carefully set forth a flexible standard even for application generally in non-original jurisdiction litigation. The Court stated, "It has never been supposed that one party—whether an original party, a party that was joined later, or an intervenor—could preclude other parties from settling their own disputes and thereby withdrawing from litigation. Thus, while an intervenor is entitled to present evidence and have its objections heard at the hearings on whether to approve a consent decree, it does not have power to block the decree merely by withholding its consent." *Id.* 528–29; *see also Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 392, 400 (1982). The Court continued:

> Of course, parties who choose to resolve litigation through settlement may not *dispose of the claims* of a third party, and a fortiori may not *impose duties or obligations* on a third party, without that party's agreement. A court's approval of a consent decree between some of the parties therefore cannot *dispose of the valid claims* of nonconsenting intervenors; if properly raised, these claims remain and may be litigated by the intervenor. And, of course, a court may not enter a consent decree that imposes obligations on a party that did not consent to the decree.

Id. at 529 (emphases added) (citations omitted).

Adding to this baseline framework for assessing consent decrees in any litigation, analysis in an

original jurisdiction case should also include consideration of the jurisdictional restraint inherent to the forum. And analysis should consider the fact that compact interpretation occurs in the shadow of the Court's essentially equitable authority to apportion interstate streams. That authority not only "encourages States to enter into compacts with each other," *Kansas v. Nebraska*, 574 U.S. at 455, in the first instance, but empowers the Court, even when "declar[ing] rights under [a compact] and enforc[ing] its terms . . . [to] invoke equitable principles, so long as consistent with the compact itself, to devise 'fair . . . solution[s]' to the state-parties' disputes and provide effective relief for their violations." *Id.* (quoting *Texas v. New Mexico*, 482 U.S. 124, 134 (1987) (supplying an "additional enforcement mechanism" to ensure an upstream State's compliance with the Pecos River Compact)).

In the present case, therefore, where the Court permitted the United States to intervene in part due to its alignment with Texas, it is necessary to ask what is meant by a "valid claim" and what it means to "dispose of" such a claim where other fora exist and where the United States seeks no relief as against Texas or Colorado. *Local 93*, 478 U.S. at 529. Whatever the term "valid claim" might mean in non-original jurisdiction litigation, I conclude that here it must mean, at a minimum, a claim sufficient to justify the Court's continued exercise of its rarely exercised original jurisdiction against the expressed desires of the sovereign states.

It is also necessary to ask whether the Consent Decree impermissibly imposes new duties and

obligations on the United States or whether it merely affects the manner in which the United States will carry out its preexisting duties under the Compact and Downstream Contracts as "a sort of agent of the Compact." *Texas v. New Mexico*, 138 S. Ct. at 959.

Taken as a whole and applied in the original jurisdiction context, *Local 93* frames the analysis in this case. First, it is necessary to assess the Consent Decree's consistency with the Compact and other federal law. Second, in assessing potential legal prejudice to the United States, it is necessary to examine the scope and nature of the United States's interests and claims and ask what effect the Consent Decree has on those interests and claims. This inquiry also looks at whether those claims may be properly addressed elsewhere. Third, it is necessary to assess whether the Consent Decree imposes any new impermissible material duties on the United States when considering the United States's broad existing duties and the ever-present duty to recognize and honor state-law conditions not inconsistent with federal statutes and the state-defined rights of the underlying Reclamation contract holders. In effect, this last consideration forces inquiry into the scope of the United States's sovereign immunity in light of: (1) its duty to abide by the Court's interpretation of the Compact and (2) its existing duties under the Compact to assure the downstream states' apportionments arrive in those states.

Finally, it is necessary to address the procedural fairness of the Consent Decree and, to the extent not fully addressed through analysis of the preceding

issues, the overall substantive reasonableness and fairness of the Consent Decree.

Before conducting the analysis as dictated by *Local 93*, however, I find it necessary to comment on a general theme that permeates the United States's several arguments in this matter. As to most of the topics for analysis from *Local* 93 as outlined above, the United States's arguments reduce, essentially, to fundamental arguments regarding authority, control, and the priorities among the parties and amici in this case and among varying bodies of allegedly conflicting law. In particular, the United States frames most of its arguments in terms of the relative authority of the Water Districts and their respective states or the relative authority of Reclamation and the states. Rather than repeatedly addressing these arguments or addressing them in piecemeal fashion as they arise within each section below, I address them here to lay the groundwork for the balance of the discussion. It likely is not hyperbole to say that the Consent Decree largely must rise or fall based on this analysis of the Compacting States', Water Districts', and Reclamation's relative authority.

B. The Scope and Limits of *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) and *California v. United States*, 438 U.S. 645 (1978) as Applied in the Context of a Compact Enforcement Action Involving Reclamation

Since at least 1938, it has been clear that states, in resolving disputes with other sovereigns, act on

behalf of all of their citizens and may compromise their citizens' existing rights. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). The Court found this rule to flow naturally from the fact that certain matters rest inherently in the purview of a sovereign. As such, when settling or litigating an inherently sovereign matter, citizens' participation is unnecessary even though the consequences and costs of the sovereign's compromise may fall unequally on its own citizens. This may be true in apportionment matters, boundary disputes, or any other case where a state compromises its own rights relative to another state as a matter of pseudo-diplomacy within a federalist system.[2]

In *Hinderlider*, a Colorado irrigator sought to enjoin the consequences flowing from Colorado's division of an interstate stream with New Mexico as reflected in the La Plata River Compact. *See* Act of January 29, 1925, 43 Stat. 796. Pursuant to that compact, Colorado

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[2] For example, if the owners of a strip of land find themselves in one state prior to an interstate boundary settlement, and in another state afterwards, the consequences of the settlement rest far more heavily on those owners than on some other citizens living in the center of a state. The owners of the strip of land are suddenly subject to a different taxing authority and a different set of laws for defining the rights inherent in the concept of ownership. And the owners of the strip of land are essentially powerless to enjoin the states' act, although one or the other state may offer some alternative form of remedy. The same relationship between citizens' rights and states' actions exists in the context of sovereign settlements concerning the initial division of interstate streams or the later interpretation or execution of compacts concerning such streams.

and New Mexico agreed that, under certain dry conditions, New Mexico and Colorado's state engineers could jointly decide how to divide the river between the states using a cycling of alternate time periods: one state could divert from the river for period of time and the other state could divert for a subsequent similar period of time. *Hinderlider*, 304 U.S. at 97. In 1928, the two state engineers exercised their compact-delegated authority and determined conditions required successive and exclusive cycling of irrigation draws in the two states. *Id.* They jointly agreed to allow ten days of no draws in Colorado to be followed by ten days of essentially full river diversion in Colorado beginning on a set date in a summer month. *Id.* The plaintiff was affected by the cycling regime and sought an injunction. *Id.* at 95.

Ultimately, the Court held the compact—including the later-devised periodic-cycling regime as created through the delegated authority by two state engineers—served as a permissible sovereign act which the underlying citizen was unable to enjoin. The Court first discussed the general and long-standing rights of sovereigns to settle matters affecting their citizens in the context of boundary disputes. *Id.* at 106 ("It cannot be doubted, that it is a part of the general right of sovereignty, belonging to independent nations, to establish and fix the disputed boundaries between their respective territories; and the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights. . . . This is a doctrine universally

recognized in the law and practice of nations. It is a right equally belonging to the states of this Union. . . .") (citations omitted). In this regard, the Court compared compacts between states as "operating with the same effect as a treaty between sovereign powers." *Id.* at 107 ("That is, that the boundaries so established and fixed by compact between nations, become conclusive upon all the subjects and citizens thereof, and bind their rights; and are to be treated to all intents and purposes, as the true real boundaries." (quoting *Rhode Island v. Massachusetts*, 37 U.S. 657, 725 (1838))).

The Court then recognized that this feature of sovereignty had already been applied as to the apportionment of interstate streams in *Wyoming v. Colorado*, 286 U.S. 494, 508–09 (1932). There, the Court described the nature of an apportionment suit as "one between states, each acting as a quasi sovereign and representative of the interests and rights of her people in a controversy with the other," such that individual claimants were not necessary parties because they were represented by their respective states and were, as a result, "bound by the decree." *Hinderlider*, 304 U.S. at 107 (quoting *Wyoming v. Colorado*, 286 U.S. at 509). The Court ultimately recognized the authority of sovereigns to resolve an interstate stream matter and thereby compromise their respective citizens' rights, even where the rights predated the states' compromise. *Id.* at 106 ("Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the

apportionment is binding upon the citizens of each State and all water claimants, *even where the State had granted the water rights before it entered into the compact*." (emphasis added)).

Standing alone, *Hinderlider* serves as strong authority that private citizens, like the Water Districts and their members in the current dispute, generally should be excluded as actual parties from original jurisdiction cases. *Hinderlider* also serves as strong authority that, when sovereigns are settling matters concerning the creation, later execution, or interpretation of a compact, their respective citizens' underlying rights must be viewed as malleable. Such rights, even if predating a compact, are merely rights to a portion of their state's apportionment and are subject to curtailment by the state in the clarification or settlement of an apportionment matter. *Id.* at 108–09.

But *Hinderlider* establishes something more. The actual disputed act in *Hinderlider* was not the creation of the La Plata River Compact in and of itself, but rather, a mere act of delegated authority devised by two individuals serving as agents for their sovereign states subsequent to compact formation. As such, the general rule of *Hinderlider* is broad in scope. Rights granted by a sovereign as to its share of an interstate stream are subject to curtailment by that sovereign even later when acting to execute or interpret the Compact as an interstate apportionment exercise with another state. *See*, *e.g.*, *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995) ("[W]ater disputes among States may be resolved by compact *or decree* without the participation of

individual claimants, who nonetheless are bound by the result reached through representation by their respective States." (emphasis added)).

In the absence of the need to consider the interaction of this broad rule with Reclamation's authority to operate its projects, it is unlikely any party would seriously contest the breadth of *Hinderlider*. Here, however, the proposed Consent Decree as a compromise interpretation of the Rio Grande Compact involves underlying state rights held by the members of EBID and EP1 not only as granted by New Mexico and Texas, but as recognized in Reclamation contracts with those citizens and with the Water Districts. The Consent Decree's temporary transfers of rights between the Water Districts, in effect, allows New Mexico to require EBID (and Texas to require EP1) to relinquish or accept water contrary to the Water Districts' wishes and without their assent. At one level, this act of a state curtailing a citizen's state-granted right is analogous to the cycling regime imposed against a water user's wishes in *Hinderlider*. At another level, however, this act is more complicated because it asks Reclamation to honor the state-ordered expansion or curtailment of the citizens' rights—the expansion or curtailment of the water rights of Reclamation's contracting counterparties. This aspect of the Consent Decree, therefore, requires consideration of other Supreme Court authority: *California v. United States*, 438 U.S. 645 (1978).

At oral argument on the present motion, and at many times throughout the present case, the parties have had spirited exchanges concerning articulation of

the relative authority as between Reclamation, the Compacting States, the Compact, and the Project. Examples include sparring over whether Reclamation's role "as a sort of 'agent of the Compact,'" *Texas v. New Mexico*, 138 S. Ct. at 959, and the Compact negotiators' desire to protect a supply of water for the Project, mean that "the Compact serves the Project" or that "the Project serves the Compact."

In this regard, at the most recent arguments, counsel for the United States argued that the Compact serves the Project and that Reclamation, in operating the Project, need not respect any state-imposed conditions on the delivery of water to those states' citizens. Rather, according to the United States, Reclamation's only burden of compliance with state law was a burden related to the acquisition of water rights:

> It's the Project's role, not the Commission's role, to operate and distribute the water below Elephant Butte dam. There was an argument raised . . . regarding Section 8 of the . . . 1902 Reclamation Act, and that somehow abrogates our contractual duties because Section 8 has a reference to compliance with state law, but what—what is not cited to in their case is—is pretty much the preeminent Supreme Court case on Section 8, and that's *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275, and what it stands for is Section 8 does not compel the United States to deliver water on conditions—excuse me—imposed by the States. And the quote from the Supreme Court is, "But the acquisition of water rights

> must not be confused [with] the operations of federal projects." So what Section 8 does and what we are doing, what the United States is doing, is they are—they are participating in the state adjudication for determination of the state law based rights to water. That is all that—that is all that Section 8 mandates. Section 8 does not mandate that we must follow state mandates here in how we operate our Project.

Feb. 6, 2023 Hr'g Transcript, Sp. M. Dkt. 775 at 123–24.

In this regard, the United States overstates Reclamation's freedom to ignore state law. As explained below, I conclude Reclamation must comply with state law to the extent such law is not expressly contrary to the provisions of a federal statute. As such, I conclude Reclamation must respect the Compacting States' exercise of their sovereign authority to enter into a compromise that affects their citizens' underlying water rights pursuant to *Hinderlider*. *See California v. United States*, 438 U.S. 645 (1978) (interpreting Section 8 of the Reclamation Act to require Reclamation's broad compliance with state law when not otherwise statutorily excused and not limiting the duty of compliance merely to the acquisition of rights).

The Court in *Ivanhoe Irrigation District v. McCracken*, 357 U.S. 275 (1958), as cited above by the United States, was presented with the narrow question of whether an express limitation contained in Section 5 of the 1902 Reclamation Act had to yield

to a contrary state law condition that the State of California had attempted to impose. Namely, Section 5 limited Reclamation contracts for any individual irrigator to water for the irrigation of not more than 160 acres of land. California withheld approval for certain contracts asserting that California did not approve the 160-acre restriction. The Supreme Court of California sided with the state, and the United States Supreme Court reversed, stating, "Section 5 is a specific and mandatory prerequisite laid down by the Congress. . . . Without passing generally on the coverage of § 8 in the delicate area of federal-state relations in the irrigation field, we do not believe that the Congress intended § 8 to override the repeatedly reaffirmed national policy of § 5." *Ivanhoe*, 357 U.S. at 291–92.

The actual holding of *Ivanhoe* was limited in scope. The Court held merely that the general deference to state law mandated by Section 8 did not extend so far as to permit a state to override an express requirement as set forth in Section 5 of the same Act. The Court, however, made several other comments suggesting a high degree of Reclamation autonomy from state law. *Id.* And it is those other statements the United States asserts in the present case in its attempt to defeat the Consent Decree. In 1978, however, the Court rejected those other statements.

In *California v. United States*, the Court discussed *Ivanhoe*, cited its limited holding, and identified and rejected much of the rest of *Ivanhoe* as clear dicta. 438 U.S. at 672 ("in *Ivanhoe*, the Court went beyond the actual facts of that case"). The Court also cited and

rejected subsequent cases that had repeated, relied upon, or expanded the dicta from *Ivanhoe*. *Id.* at 673 (discussing *City of Fresno v. California*, 372 U.S. 627, 630 (1963) and *Arizona v. California*, 373 U.S. 546, 586–87 (1963)). In doing so, the Court unambiguously limited *Ivanhoe* and expressed a clear and broad interpretation of Section 8 that mandated deference to state laws that were not contrary to federal statutes. The Court stated:

> *[W]e disavow the dictum to the extent that it would prevent petitioners from imposing conditions on the permit granted to the United States which are not inconsistent with congressional provisions authorizing the project in question.* Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water." Nor, as the United States contends, does § 8 merely require the Secretary of the Interior to file a notice with the State of his intent to appropriate but to thereafter ignore the substantive provisions of state law. The legislative history of the Reclamation Act of 1902 makes it abundantly clear that Congress intended to defer to the substance, as well as the form, of state water law. The Government's

> interpretation would trivialize the broad language and purpose of § 8.

Id. at 674–75 (emphasis added).[3]

The Court clearly interprets Section 8 as requiring Reclamation to comply with state-law conditions not merely as to the appropriation of water, but as to the "control, appropriation, use, or distribution of water" when such conditions are not contrary to federal statutory authority. And, *Hinderlider* applied in the present context permits Texas and New Mexico to settle their Compact claims in a manner that results in compromises to some of their citizens' rights. As such, if the Consent Decree's permissive or forced inter-district transfers of water are understood as state-ordered curtailments or expansions of their citizens' rights akin to

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[3] Section 8 of the Reclamation Act of 1902, 32 Stat. 390 (codified at 43 U.S.C. §§ 372 & 383), provides, in full:

> *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 of the 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 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.

(Emphasis added).

the state engineers' determinations and curtailments of rights concerning water cycling in *Hinderlider*, it would seem that *California v. United States* should require Reclamation to respect the effect that these curtailments or expansions have on the Water Districts' orders and, relatedly, on the United States's claimed duties and interests. As such, Reclamation may assert neither a general ability to operate unaffected by state law nor a general interest in protecting the states' own citizens from their respective states. That is, Reclamation may not purport to represent the interests of the water users or the Water Districts as a means of opposing the Compacting States' actions.[4]

Understood in this manner, many of the United States's specific challenges as framed under *Local 93* fall away, and the Consent Decree should stand. The

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[4] Although the United States presently seeks to place the Project above the Compact, and seemingly deny the Compacting States the ability to speak for their own citizens and compromise those citizens' rights, the United States previously and repeatedly in this action has taken a position consistent with the above understanding of *Hinderlider* and *California v. United States*. *See*, *e.g.*, *U.S. Response to EBID Motion to Intervene*, S. Ct. Dkt. 22O141, Jan. 29, 2015 at 10 ("EBID's responsibility to manage Project deliveries within New Mexico after the Secretary determines EBID's share of the water has no effect on how the water is allocated among the States. EBID's motion confirms that its role in managing Project water within New Mexico concerns intrastate matters that arise only after the respective rights of the States under the Compact—the subject of the dispute in this suit—are satisfied."); *see also Apr. 2, 2019 Hr'g Transcript*, Sp. M. Dkt. 264 at 49 ("[O]nce we have a decree that defines what each state has, then we can look to project operations and determine whether those operations are consistent with the decree.").

relationships between Reclamation, Texas, New Mexico, those states' water users, and the Water Districts—as understood through these two cases—factor heavily into consideration of: (1) the consistency of the Compact and Consent Decree; (2) the nature of the United States's interests and claims; (3) the scope of the United States's existing duties; (4) and the question of whether the Consent Decree imposes any material new duties on the United States.

C. The Consent Decree Resolves the Interstate Apportionment Question in a Manner Consistent with the Compact and Other Federal Laws

1. The Consent Decree is Consistent with the Compact

The Consent Decree must be consistent with the Compact. *See Vermont v. New York*, 417 U.S. 270, 278 (1974); *accord Local No. 93*, 478 U.S. at 525 (a consent decree must "further the objectives of the law upon which the complaint was based"). Here, the Compact's express purpose is to equitably apportion the waters of the Rio Grande above Fort Quitman, Texas among the Compacting States. *See Compact* at 1 (Preamble); *Texas v. New Mexico*, 138 S. Ct. at 959; *Consent Decree* at II.A.1. Consistency with the Compact at this broad level must be the primary requirement for approval of the Consent Decree.

Consistency with the Compact at a more focused level of detail also matters, but additional reporting

requirements and remedies may be added to a compact without creating inconsistencies. *See*, *e.g.*, *Texas v. New Mexico*, 482 U.S. at 134 (appointing a River Master on the Pecos River as "an additional enforcement mechanism" even though such a role was not originally provided in the controlling compact). And many details may be left for another day, especially when such details address only one state's management of its own citizens' water use and when the Consent Decree's opponent directs claims exclusively against that one state. *See New Jersey v. New York*, 345 U.S. 369, 372–73 (1953) (recognizing that a state represents all of its water users in an original action and stating that the Court is reluctant to "be drawn into an intramural dispute over the distribution of water within" a single state); *see also California v. Nevada*, 447 U.S. 125, 133 (1980) ("[L]itigation in other forums seems an entirely appropriate means of resolving whatever questions remain."); *United States v. Nevada*, 412 U.S. 534, 538 (1973) ("We need not employ our original jurisdiction to settle competing claims to water within a single State.").

Here, the Consent Decree is consistent with the Compact in the broadest sense in that it interprets a core ambiguity in the Compact by articulating the downstream apportionment of water largely as reflected in the Downstream Contracts, to be delivered through the Project in southern New Mexico and Texas. In so doing, it protects the Treaty water and the Texas apportionment against New Mexican capture through express recognition of New Mexico's general

duty to manage water use for meeting the Index Obligation and through the exclusion of Treaty water from the downstream index calculation.

It further protects the Treaty water and the Texas apportionment through enforcement mechanisms in the form of potential or even forced interdistrict water transfers in the event New Mexico breaches its general duty. By enshrining the Downstream Contracts' 57%/43% division of water within the EEPI formulae and in the D2 curve (based on a data set from a period of time when the States now agree Project operations were in compliance with the 57%/43% division), adjusting for Texas water use above the gauge, and subtracting Treaty water and Excess Flows, the Consent Decree clarifies the Texas apportionment as a measurable sum. Coupled with the enforcement mechanisms, this clarified apportionment shields Texas from future disputes concerning the details of New Mexican water capture and the potentially lengthy process of New Mexico's final resolution of numerous intrastate matters. If New Mexico cannot quickly and effectively control water use within its borders, Texas as a sovereign may ensure that its citizens receive Texas's articulated apportionment through the forced water transfers. Nothing about the articulated index, New Mexico's general duty, or the specific remedies for substantial index deviations come close to violating any express terms of the Compact. They undeniably add to the Compact, but not in a manner that creates inconsistencies.

The Consent Decree is also consistent with the Compact in a more focused sense in that it mirrors several upstream provisions while preserving Reclamation's discretion and the programmatic nature of the Compact for achieving delivery of the downstream apportionment. Like Compact Articles III and IV, the Consent Decree employs an indexed delivery requirement with annual and accrued departure-limit thresholds, departure credit and debit accounts, potential responses based on exceedance of departure-limit thresholds, and separate provisions for adjustments to accounting or operations under extreme conditions. In this regard, the United States is in at least partial agreement. *See*, *e.g.*, *U.S. Brief in Opp.*, Sp. M. Dkt. 754 at 18 ("The [Consent Decree's] accrued Negative Departures are functionally equivalent to the 'Accrued Debits' that New Mexico may accrue in relation to its Article IV delivery obligation under the Compact.").

Further, the Consent Decree is consistent with the Compact in that the new index methodology is effected, in part, through an exercise of authority that the Compact expressly grants to the Rio Grande Compact Commission (Commission): the authority to add gauging stations. *See Compact*, Art. XII (creating the Commission with one voting member from each Compacting State and a non-voting United States representative); *see also id.*, Art. II (expressly authorizing the Commission to add or move gauges).[5] As already noted by the

[5] The Compact at Article II provides:

> The Commission shall cause to be maintained and operated a stream gaging station equipped with an

Court, the Commission previously moved an upstream gauging station from a location expressly listed in the Compact to a location the Commission found to be more practical. *See Texas v. New Mexico*, 138 S. Ct. at 957, n* (describing the Commission's relocation of the San Marcial, New Mexico gauge to the Reservoir itself). And here, the Commission has already approved the Consent Decree and use of the El Paso gauge as the means to measure the aggregate deliveries to Texans. *See Resolution of the Rio Grande Compact Commission Regarding the Proposed Consent Decree in Original Action 141, Texas v. New Mexico and Colorado, in the United States Supreme Court*, Sp. M. Dkt. 720 Exh. 2 (Texas Compact Comm'r Robert Skov Decl. Exh. A); *Resolution of the Rio Grande Compact Commission Regarding Administrative and Accounting of Compact*

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automatic water stage recorder at each of the following points, to-wit: (a) . . . (k) On the Rio Grande below Elephant Butte Reservoir; (l) On the Rio Grande below Caballo Reservoir.

Similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, *and at such other points as may be necessary for the securing of records required for the carrying out of the Compact*; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929. *Such gaging stations shall be equipped, maintained, and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method and frequency of measurement at such stations shall be such as to produce reliable records at all times*. (Emphases added).

Credit Water, Sp. M. Dkt. 720 Exh. 2 (Skov Decl. Exh. B).

Perhaps most importantly, the Consent Decree reflects a high degree of consistency with the United States's demonstrated understanding of the Compact: the Consent Decree expressly empowers Reclamation to continue operating the Project using the D2 method Reclamation has employed for over 40 years and inter-Water District transfers similar to what Reclamation has employed for the last 15 years, including continued use of the Reclamation-created carryover accounts. The Consent Decree's high level of consistency with several decades of Project operations illustrates consistency with the United States's long-demonstrated understanding of what the Compact requires and allows. This consistency also illustrates the Consent Decree's preservation of the "programmatic" nature of the Compact below the Reservoir.

Notwithstanding these several indicia of consistency and the absence of any express inconsistencies, the United States alleges several features of the Consent Decree present inherent inconsistencies that merit its rejection. The United States argues: (1) the volumetric index obligation and gauged measuring system near El Paso are inherently inconsistent with the Compact because the Compact below the Reservoir is programmatic in nature and contains no such volumetric delivery requirement (other than the reference to the fixed volumetric Treaty obligation); (2) the Consent Decree is inconsistent with a "1938 condition" regarding pumping downstream of the Reservoir; (3) the

Consent Decree is inconsistent with the programmatic nature of the Compact below the Reservoir in that the Water Districts, rather than New Mexico or Texas, must control or at least assent to any inter-district water transfers if New Mexico fails to meet the index obligation; and (4) the Consent Decree is inconsistent with my summary judgment ruling that New Mexico bears a Compact-level duty to protect the Texas apportionment and avoid Project interference. As to this final point, the United States asserts that the Consent Decree's lack of clear mandates and measurable benchmarks for downstream New Mexican water management actions will allow New Mexico to rely exclusively on water transfers to meet its index obligation, thus endangering the Project's overall viability.

None of these areas of alleged inconsistency with the Compact merit rejection of the Consent Decree. The addition of an indexed delivery requirement at a location where the Compact originally included no such feature appears superficially inconsistent with the Compact on cursory inspection. But the initial omission of a downstream indexed delivery obligation cannot be understood as the rejection of a requirement that the apportionment for Texas actually reach Texas, that the apportionment be measurable, or that the State of Texas itself—rather than just the water users or Water Districts—have some ability to monitor and enforce Texas's sovereign right to the apportionment. An understanding of why the Compact initially omitted an express state-line delivery index explains why

the Consent Decree's addition of the index delivery requirement is consistent with the Compact.

The initial omission of a state-line index quite clearly was the product of technical limitations, challenging boundary conditions, and complex negotiations that focused not only on protecting water for the Project area but determining upstream apportionments and protecting an international treaty. *See Letter from Frank B. Clayton to C.S. Clark (Oct. 16, 1938)*, Joint Trial Exh. JT-0458 at 7, Sp. M. Dkt. 681 (stating the omission was largely due to the infeasibility of such a feature in 1938 because of challenges posed by cross-border infrastructure configurations at the Texas–New Mexico border); *Oct. 18, 2021 Trial Test. Historian Scott Miltenberger*, Sp. M. Dkt. 701 Vol. VIII at 78 ("In fact, over time, diversions that satisfied lands in Texas actually were made in New Mexico."); *id.* at 180–82 (noting that the Project had developed "as a unit"). During Compact negotiations, Texas and interested stakeholders in southern New Mexico were essentially bargaining to get what they could from the negotiations relative to Colorado and northern New Mexico. At the time, given the primary importance of securing a supply of water for the Project and the seeming infeasibility of articulating a state-line delivery requirement under 1938 technology, Texas and downstream New Mexicans had few options available. They were left to rely on the limited protections inherent in the Project and the Downstream Contracts to ensure a rough downstream division of water. These states necessarily conceded continued operational control of the river

below the Reservoir to Reclamation through the preexisting Project. There is nothing in this history, however, to suggest the omission of a state-line delivery was due to New Mexico's or Texas's desire or intent to concede all authority concerning the protection of their sovereign apportionments.

Now, nearly a century after Compact formation, advancements in technology such as improvements in the collection and analysis of data permit the states to reasonably measure water use in the Texas Mesilla Valley above the El Paso Gauge. *See Consent Decree App'x* at §§ 3.3–3.4. Extensive data supporting an agreed-upon "baseline condition," as reflected in the D2 curve's underlying 1951–1978 data set, enabled the development of the EEPI and an inflow-outflow methodology designed to be consistent with Reclamation's longstanding operations under the Compact. In this manner, the Consent Decree effects the 57%/43% apportionment consistent with the Compact, Downstream Contracts, and prior orders in this case all within the framework of existing Project operations. *Decl. Eng'r Gregory Sullivan*, Sp. M. Dkt. 720 Exh. 7 at ¶¶ 24–28; *Decl. Hydrogeologist Margaret Barroll*, Sp. M. Dkt. 720 Exh. 6 at ¶¶ 23–28.

Although the United States argues the addition of an indexed delivery requirement at the El Paso gauge creates a general inconsistency, the United States does not seriously contend that there is any fundamental inconsistency between *some sort* of volumetric delivery requirement and the programmatic nature of the

downstream apportionment.[6] As such, the United States's arguments in this regard reduce, at their core, to arguments concerning authority below the Reservoir as addressed above pursuant to *Hinderlider* and *California v. United States*.

The United States next argues the Consent Decree is inconsistent with a "1938 Condition" of pumping throughout the Project area. Undisputedly, the Consent Decree's reliance on the D2 period seeks to limit pumping to an average amount as reflected in the 1951–1978 timeframe rather than a strict return to a pumping condition as existed in 1938. In arguing that the Consent Decree is inconsistent with a 1938 Condition, however, the United States does not point to any provisions of the Compact. Rather, the United States

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[6] Regarding consistency with the Compact, the United States asserts:

> The United States does not dispute that some index methodology could be a component of a remedy in this case, potentially as a validating measure in a decree that expressly states New Mexico's obligation to prevent interference with Project deliveries and the programmatic apportionment. But even putting the absence of the agreement of the United States to one side, it would be inconsistent with the Compact to impose upon the United States a volumetric delivery obligation to the Texas state line, as the proposed consent decree would do, see Decree II.A.4, in the absence of any corresponding definition of New Mexico's Compact obligations or injunctive provisions to ensure compliance with those obligations by requiring New Mexico to reduce groundwater pumping that intercepts Project deliveries.

U.S. Brief in Opp., Sp. M. Dkt. 754 at 51.

points to my summary judgment ruling in which I held that several aspects of the Compact were implicitly based on the presumption that return flows would be protected and available for reuse within the Project. *SJO*, Sp. M. Dkt. 503 at 34–35. In essence, the summary judgment ruling recognized a general New Mexican duty to limit Project interference between the Reservoir and Texas so as to protect *some level* of return flows. But in arguing the Consent Decree is inconsistent with a pure 1938 condition on pumping, the United States simply reads too much into my summary judgment ruling. In addition, the United States ignores the value of the Consent Decree's recognition of New Mexico's general duty of water management below the Reservoir.

I held that the Compacting States had intended the 57%/43% downstream division of water as a "rough protected baseline" to be accompanied with the protection of an operating condition "akin to" a 1938 condition (as then urged by Texas and now championed by the United States). *SJO*, Sp. M. Dkt. 503 at 6. I did not purport to define precisely what that baseline condition was, nor did I conclude that all post-1938 pumping had to be deemed inconsistent with the Compact. Rather, I stated that the detailed questions of defining *what* was to be divided 57%/43% and defining the protected baseline condition were unresolved questions remaining for trial. *Id.* at 7. I also indicated that nothing in the Compact or the evidence of negotiations and operations preceding the Compact suggested the Compacting States believed they were locking in farming

practices, population levels, or any particular condition of development in perpetuity. Further, I quoted extensively from the parties' history experts and underlying scientific studies that strongly suggested some downstream pumping could be tolerated without materially interfering with the Project but that there existed undetermined limits to such potential noninterference. *Id.* at 41 & n.14. I also acknowledged the presence of unresolved arguments concerning inducement and long-standing reliance based on decades of all parties' and amici's somewhat inconsistent and shifting promotion of, and objection to, Project-area pumping.

Finally, as a matter of undisputed fact on the summary judgment record, I concluded that New Mexico had interfered with Project operations and Compact deliveries in a general sense as well as in a specific manner that resulted in water shortages to Texas in 2003 and 2004. *Id.* at 42–44. I reached this conclusion relying to a large extent on New Mexico's own modelling. I also noted that the question of interference was not even close in that I found there to be an under-delivery to Texans based even on New Mexico's rejected theory of the Compact's apportionment. *SJO*, Sp. M. Dkt. 503 at 45–46. But I did not purport to tie these conclusions to an actual determination of the precise baseline condition, and I indicated neither that the need for an injunction had been established nor that the full scope of actionable New Mexican interference had been established.[7]

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[7] In the Summary Judgment Order, I stated:

In arguing that the Consent Decree is inconsistent with a 1938 condition, then, the United States is not truly arguing that the Consent Decree is inconsistent with any express provision of the Compact. Rather, the United States is arguing that the Consent Decree is inconsistent with its own litigation position, i.e., a return to a 1938 pumping condition. I find no authority to suggest that, in settling this Compact enforcement action and interpreting ambiguities in the Compact, the Compacting States may be blocked by an

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> Turning to the fact of actual New Mexican water capture and New Mexico's state of knowledge, no dispute of material fact exists at a general level: New Mexican pumping below the Reservoir has interfered with surface flows and Project deliveries to Texas. . . . Any purported dispute New Mexico asserts speaks to the details of the interference based on various factual issues such as the timing and location of the pumping.

Sp. M. Dkt. 503 at 42–43.

> New Mexico's apportionment theory, of course, speaks to the core outstanding questions not being decided on summary judgment: what are the details of New Mexico's downstream duty and what, exactly, did the compacting states intend to divide 57%/43%. Material factual disputes remain as to: the actual impact of pumping in different locations and at different times on surface water flows; what a course of performance and disputed evidence reveal as to acquiescence or as to the compacting states' intent regarding downstream apportionments; and the scope of the duty to protect Project operations. But, at a general level, certain matters are undisputed: the fact of a hydrological connection, the impact of New Mexico's pumping on surface flow, and the admission of Compact delivery interference as to certain years.

Id. at 46.

intervenor due to an alleged inconsistency with that party's litigation position concerning an undefined implicit presumption lying behind the Compact. *See*, *e.g.*, *United States v. Armour & Co.*, 402 U.S. 673, 681–82 (1971) ("[The] scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it [or by what] might have been written had the plaintiff established his factual claims and legal theories in litigation."). This is particularly true when, as now, the intervenor's particular claims are preserved for resolution in another forum and where the Consent Decree at issue expressly imposes a duty on the upstream state to curtail water capture to satisfy the newly articulated index.

The United States's third argument as to inconsistencies between the Compact and the Consent Decree focuses, again, on the programmatic nature of the Compact below the Reservoir. But rather than challenging the omission or addition of an indexed delivery requirement within the Project area, the United States challenges the Compacting States' assertion of *any role* in the process of determining Project allocations to the Water Districts. Essentially, the United States characterizes: (1) inter-Water District transfers as impermissible transfers to Texas or New Mexico as the actual water recipients and (2) any *parens patriae* effect on the rights of New Mexicans or Texans as contrary to the programmatic nature of the Compact below the Reservoir. This argument reduces, almost completely,

to concerns related to the interplay of *Hinderlider* and *California v. United States*.

Properly understood, Texas and New Mexico are settling their sovereign disputes with a compromise that curtails their own citizens' rights to order or receive water. Texas and New Mexico do not become impermissible water recipients and they do not dictate Reclamation's affairs. The Index Obligation based on the EEPI must be understood as a measurement, in the aggregate, of water passing the El Paso gauge for delivery to contract holders in Texas. The Consent Decree neither mandates the overall Reservoir release amounts nor calls for the delivery of water to persons or entities who lack Reclamation contracts. Texas as a state has an apportionment, but individual rights holders receive the water. *See Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) ("Appropriation was made not for the use of the government, but, under the Reclamation Act, for the use of the landowners; and by the terms of the law and of the contract already referred to, the water rights became the property of the landowners[.]"). Although settlement of interstate apportionment disputes may affect those individual rights, such effects create no inconsistency with the Compact. *Id.* at 616.

To the extent that the United States points to any particular provisions of the Consent Decree as being inconsistent with the United States's understanding of the placement of programmatic control in the hands of Reclamation and the Water Districts, the United States overstates the potential for interference. For

example, the United States identifies specifically the Consent Decree's reliance on a new two-year D2 regression analysis for Project allocation calculations rather than a one-year analysis as has been used in the past. But this contested feature appears in the Consent Decree's EEPI-defining appendix as a *recommendation* or *suggestion* rather than a mandate. *See Consent Decree* App'x § 8.1. Several experts assert convincingly that use of this improved regression analysis will result in a better match between the new Index Obligation and Index Delivery. *See*, *e.g.*, *Decl. Eng'r William Hutchinson*, Sp. M. Dkt. 720 Exh. 4 at ¶¶ 75–103. Reclamation, however, retains the discretion to accept or reject the expert opinions and Consent Decree recommendations in this regard. *Id.* at 103.

The United States's final argument regarding inconsistency asserts that the Consent Decree is inconsistent with New Mexico's Compact-based duty to protect the Texas apportionment and avoid interference with the Project as recognized at summary judgment. In particular, the United States complains that the general duty imposed on New Mexico lacks specific and measurable benchmarks aside from index-delivery compliance. This argument, however, reduces at its core to a general statement of skepticism or distrust that New Mexico will meet its Consent Decree-recognized duty to manage water capture below the Reservoir. As such, this argument fails to address any actual inconsistency with the Compact.

In any event, analysis and approval of the Consent Decree must not presume a generally stated duty

amounts to a nullity, will go unheeded by the party who bears the duty, or is otherwise unenforceable. *See Frew ex rel. Frew v. Hawkins*, 540 U.S. 431, 436–37 (2004) (finding no Eleventh Amendment bar to enforcement of a federal consent decree against a signatory state as to matters of federal law addressed in the decree); *Maness v. Meyers*, 419 U.S. 449, 458 (1975) ("We begin with the basic proposition that all orders and judgments of courts must be complied with promptly."); *see also United States v. An Undetermined Quantity*, 583 F.2d 942, 946–47 (7th Cir. 1978) ("Certainly it is not unreasonable for a party to assume that the Government, charged with the duty of enforcing the laws, will obey a court injunction[.]"). Such a presumption would amount to a presumption of future bad faith or a presumption of future noncompliance. That is not to suggest the Project will survive in good health if New Mexico acts in bad faith under the Consent Decree and fails to implement water capture restrictions pursuant to its general duty. But, if New Mexico fails to act and relies too heavily on inter-district water transfers, the United States may press its concerns in other fora.

To the extent the United States argues its position is not simply one of distrust towards New Mexico, but rather, reflects an interpretation of the Consent Decree under which New Mexico has no actual and enforceable duty to manage and reduce water capture within its borders, I reject such an interpretation.[8] I reject as

[8] In its Brief in Opposition to the Consent Decree, the United States argued, essentially, that New Mexico owed no general duty or could not be trusted to act on any such duty:

unreasonable an interpretation of the Consent Decree that seemingly would allow New Mexico to rely exclusively on inter-district water transfers to satisfy the EEPI Index Obligation and take no actions to reduce New Mexican water capture in the Project area. To adopt such an interpretation would be to assume that all three Compacting States are playing fast and loose with the United States and with the Court itself by inserting into the Consent Decree, in bad faith, a generally stated and unenforceable duty.

Textually, whether looking at the Consent Decree as a contract or looking at it through the lens of statutory interpretation, the general canons of construction in both settings prove clearly that New Mexico's duties moving forward do not permit sole reliance on

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> The Index, however, is silent as to how New Mexico is to ensure the delivery of the Index Obligation to Texas through the gauntlet of depletions caused by groundwater pumping in New Mexico. Instead, the Index forces changes to Project allocations and accounting methods that have been carefully developed over many years. *See* Blair Decl. ¶¶ 14-19. It also requires the United States to take even more of EBID's water away if the changes to annual Project allocations and accounting do not keep accrued Negative Departures below the applicable triggers and limits. *Meanwhile, non-Project users may continue to intercept the water that the Project releases, free of charge. See* King Decl. ¶ 27 ("*New Mexico is not required in the decree to take any administrative, regulatory, or management actions against non-Project water users*"). *The effect of the compulsory accounting changes is to prevent New Mexico from having to do anything to comply with the decree.*

Sp. M. Dkt. 754 at 58 (emphases added).

inter-district water transfers. *SJO*, Sp. M. Dkt. 503 at 10 ("The Compact is a contract, federal law, and state law." (citing Act of May 31, 1939, 53 Stat. 785 and N.M. Stat. Ann. § 72-15-23)). First, the general duty stated at subsection II.B.(ii)a. makes no reference to such transfers. Rather, Section II "INJUNCTION," Subsection B "Division of Water Below Elephant Butte Reservoir," Subsection B.(ii) "The Effective El Paso Index," at Subsection II.B.(ii)a. provides, "*The State of New Mexico shall manage and administer water in a manner that is consistent with this Decree, including satisfying the Effective El Paso Index Requirement*." (emphasis added). Neither subsection II.B.(ii)a. nor any other portion of subsection II.B. references inter-district transfers. The general duty stands alone and apart from other subsections of the Consent Decree, including all provisions that reference water transfers.

In Subsections II.C.3.b.(i)–(ii), D.2.a.–b., and D.3.a., the Consent Decree expressly references the permissive or mandatory inter-district water transfers for use as responses to specific identified triggering events as measured by annual or accrued departures between actual deliveries and the Index Obligation as defined by the EEPI. If the general duty of water administration unrelated to triggers and responsive actions were generally unenforceable or otherwise indistinguishable from the permissive or mandatory trigger-defined inter-district transfers, the generally stated duty would be surplusage. Such an interpretation should be avoided if possible. *See*, *e.g.*, *Duncan v. Walker*, 533 U.S. 167, 174 (2001) (noting the Court is

"'reluctan[t] to treat statutory terms as surplusage' in any setting" (quoting *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698 (1995))).[9]

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[9] Even if the Consent Decree were unclear in this respect, counsel for New Mexico put to rest any concern as to such a possible interpretation. When confronted with this exact concern at argument on the present motion, counsel for New Mexico responded that an affirmative duty exists:

> SPECIAL MASTER: Let me just make an observation . . . and I'll ask you to respond to it if you would. I don't want to put words in the mouth of the United States, but what I—the theme that I'm reading in their briefing is that the El Paso index in and of itself is probably not that difficult for them to accept, that they would probably go along with that. I think the—pretty hard for them to say with a straight face that the D2 curve can't be used, but what sort of animates their briefing, and also, I think, to some extent the two water districts is fundamental distrust of New Mexico to do what it says it's going to do. There seems to be this sense in the briefing that, well, you say you'll take action, but you might at the end of the day just take the easy way out and transfer water from EBID. You won't make the hard decisions. It's going to be a lot of accounting issues that are going to arise, and there will be lack of cooperation, future burden on the United States. I don't know. That's the sense I get from the briefing. Maybe I'm wrong. But how do you respond to, you know, can New Mexico be trusted to—to make the hard decisions, and what are you going to do about the non-EBID pumping that [counsel for EBID] has talked about extensively in her briefing.
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> NEW MEXICO: So, Your Honor, you're correct, they do raise that in their opposition brief. They argue that New Mexico is up to all manner of improper shenanigans. They claim that New Mexico doesn't intend to do any water administration, and I agree with you, it ultimately boils down to this issue is the United States

> and, to a certain extent, the districts don't trust the state of New Mexico. Let me first say that argument is unbefitting of the United States and well beneath the dignity of a dispute between sovereigns in the United States Supreme Court. We cite a number of cases in our briefing that indicates that there's a presumption that parties will follow a consent decree. That's particularly true here.
>
> *The idea that somehow New Mexico is not obligated to engage in any kind of water administration is simply untrue. Section 2B2A of the Consent Decree obligates the State of New Mexico—this is a quote—to manage and administer water in a manner that is consistent with this decree, including satisfying the effective El Paso index.*
>
> I want to emphasize that the real issue at the heart of this case was the apportionment itself, how do you define that apportionment, and you, yourself, Your Honor, identified that in one of your earlier orders. I'm going to read from your March 31st, 2020, order where you said, "Inherent in these allegations is a fundamental disagreement as to Compact interpretation regarding the underlying equitable apportionment between the states." Now, that inherent fundamental disagreement has been resolved, no less than—than the New Mexico state engineer, the chief water official has confirmed and articulated the State's commitment to be managing water consistent with the consent decree. I think that New Mexico has earned the right to a presumption that it's going to comply with that consent decree, and I think as we point out in the brief, I think as the New Mexico amici point out in their brief, as well, there are a number of forums existing today in which the United States can avail itself, in fact, it's directly involved in some of those in which it can both protect its project right from impairment or interference.

Feb. 6, 2023 Hr'g Transcript, Sp. M. Dkt. 775 at 71–73 (emphasis added)

Finally, the United States appears to argue that, even if New Mexico's general duty is not meaningless, the Consent Decree still should be rejected because the general duty does not match what the United States seeks as an enforceable injunction: the cessation of interference with the Project. But the United States's

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Counsel for the United States responded similarly, not suggesting that the subsection II.B.(ii)a. duty was a nullity, but indicating that the United States was dissatisfied with a generally stated duty and sought an "enforceable" injunction:

> UNITED STATES: This is not a matter of trust. It is a matter of having enforceable injunctions that are consistent and will provide relief, the relief that we are seeking in this case.

Id. at 97.

> SPECIAL MASTER: I mean, cutting away all the chaff in the briefing, it seems to me it really comes down to one issue from what I'm reading between the lines and even what you said specifically. You know, the accounting issues, you can work those out, and—and quite frankly, if we go through a settlement or a trial, you're going to have to change your accounting regardless, and, you know, who's going to pay $50,000 for a gage? I mean, let's face it, that's not the biggest issue in this case. And using the D2 curve, you've used it for 30 years. I can't believe that that's a big problem. Using an index I don't think is a big problem. The big problem, as I understand it here, is whether you call it trust, whether you call it enforceable conditions, is you want New Mexico to do more to guarantee that they'll do something, whether it's pumping or some other remedies within the State of New Mexico to address what you believe are problems with—I mean, that is the bottom line.
>
> UNITED STATES: Ultimately, that is the resolution, yes.

Id. at 111–12.

articulation of its own desired relief in this regard, in and of itself, speaks with no specificity. It is unclear to the undersigned how the articulation of an enforceable and general duty on New Mexico to manage water within its borders so as to comply with the EEPI-based Index Obligation somehow provides less in the way of an enforceable duty than the relief the United States ostensibly seeks: an injunction demanding a generalized cessation of pumping that interferes with the Project. At least the Consent Decree articulates a measuring stick in this regard: satisfaction of the EEPI-based Index Obligation.

2. The Consent Decree is Consistent with Other Federal Laws

The United States argues generally that the Consent Decree is inconsistent with Federal Reclamation law in that it requires the delivery of water to persons or entities without Reclamation contracts. Citing several Reclamation statutes preceding or contemporaneous with the Compact, the United States highlights the statutory requirement for a Reclamation contract as a prerequisite for obtaining water from a Reclamation project. *See*, *e.g.*, 43 U.S.C. §§ 423d, 423e, 431, 439, 461, 485h(d). According to the United States, the Consent Decree would be inconsistent with Reclamation law because it would treat Texas and New Mexico, rather than the Water Districts and their members, as the recipients of Project deliveries. *See U.S. Brief in Opp.*, Sp. M. Dkt. 754 at 52 ("For example, the decree would require the United States to change Project allocation

and accounting methods to fulfill New Mexico's new stipulated delivery obligation to Texas, which is different from the current statutory and contractual provisions applicable to Reclamation's delivery of water to EPCWID[.]").

To the extent the United States rests its argument on the general need for a project water recipient to hold a Reclamation contract and characterization of New Mexico and Texas themselves as the future Project water recipients, the United States misconstrues the Consent Decree. The contract holders are still the actual water recipients. As stated already, the transfer provisions must be understood as the states' curtailment or expansion of those persons' rights. In essence, this argument folds into the larger questions as to the scope of *Hinderlider* and *California v. United States*.

To the extent the United States argues more generally that "the degree of state authority and control over the Project contemplated in the proposed decree would be unprecedented," *U.S. Brief in Opp*., Sp. M. Dkt. 754 at 53, the United States seemingly exaggerates its loss of control and does not actually cite any conflicting provisions of federal law. Rather, the United States cites the affidavit of a Reclamation officer who opines as to the unworkability of the Consent Decree and anticipates that Texas and New Mexico will inject themselves into the day-to-day operations of the Project. *See id.* (citing *Decl. Reclamation Deputy Comm'r David Palumbo*, Sp. M. Dkt. 754 at ¶ 13–14). But, because most responsive actions based on the Consent Decree depend on year-end data or adjustments to

multiyear data based on year-end data, the Consent Decree gives rise to no day-to-day interference with Project operations. Year-end accounts must be adjusted and future-year allocations must be determined. But several such features are already inherent in Compact and Project accounting such as carryover accounting and the Compact's departure accounting as required by Articles III and IV. A review of the Consent Decree by no means suggests the Consent Decree "[a]llow[s] the States to twiddle the knobs of Project operations at their discretion[.]" *U.S. Brief in Opp.*, Sp. M. Dkt. 754 at 59; *see also*, *e.g.*, *Second Decl. Hydrogeologist Margaret Barroll*, Sp. M. Dkt. 755 Exh. E. at ¶ 5 ("The [EEPI] methodology provides a monitoring/measuring protocol that does not replace the 'efficient hour-by-hour operation of the Project.' Instead, the EEPI methodology is an end-of-year calculation that will function separately from Project operations."). At the end of the day, I find no inconsistencies with federal law that merit rejection of the Consent Decree.

D. The Consent Decree Causes No Legal Prejudice Sufficient for the Intervening United States to Block the Compacting States from Settling Their Claims in an Original Jurisdiction Case

1. The Nature of the United States's Interests and Claims

The United States's interests in this matter, and the nature and scope of its claims as set forth in its

complaint, must be examined through the lens of the Court's 2018 opinion. That opinion, in turn, must be understood with reference to the procedural posture of the case at that time and the Compacting States' positions and their intervention arguments as referenced and seemingly adopted by the Court. Properly understood, this case has always been limited in scope. It was never about Reclamation law or about the imposition of specific constraints on certain New Mexicans relative to other New Mexicans under state or federal law. Rather, this case has always been about articulating the downstream apportionment and finding a remedy to ensure the Texas apportionment and the Treaty water make their way out of New Mexico.

Texas filed its complaint in this action seeking articulation of its Compact apportionment, damages for past violations, and an injunction stopping New Mexican interference with Project operations. Texas clearly directed its complaints towards New Mexican actions that captured Texas's water and interfered with the Project's ability to deliver Texas's water. *Tx. Complaint*, Sp. M. Dkt. 63 at ¶¶ 18, 21. In articulating its desired injunctive relief, however, Texas sought a "Decree commanding . . . New Mexico . . . to . . . cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project[.]" *Id.* at ¶ 28. Although Texas's demand for relief did not specifically articulate a limitation on the desired injunction to interference associated solely with Texas's receipt of its apportionment, the Texas apportionment was the only right

Texas asserted and sought to vindicate. No fair reading of the Texas Complaint as a whole can lead to the conclusion that Texas was seeking to vindicate New Mexican rights generally, the specific rights of select New Mexicans, or the United States's interests somehow separate from the protection and delivery of the Texas apportionment.

Then, when the United States sought to enter the case, the United States directed claims solely against New Mexico and asked the Supreme Court to:

> (a) declare that New Mexico, as a party to the Compact:
>
> > (i) may not permit water users who do not have contracts with the Secretary of the Interior to intercept or interfere with the delivery of Project water to Project beneficiaries or to Mexico,
> >
> > (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and
> >
> > (iii) must affirmatively act to prohibit such interception or interference;
>
> (b) permanently enjoin and prohibit New Mexico from permitting such interception and interference;
>
> (c) mandate that New Mexico affirmatively prevent such interception and interference; and

> (d) grant such other relief as the Court may deem appropriate and necessary to protect the rights, duties, and obligations of the United States with respect to the waters of the Rio Grande.

U.S. Complaint in Intervention, Sp. M. Dkt. 65 at 5.

When Texas filed its brief with the Court on the exceptions to the First Report of the former Special Master, Texas urged recognition of the United States's claims, but only "to the extent they are Compact claims related to the equitable apportionment made thereunder." *Tx. Reply to Excpt'ns to First Interim Rpt.*, S. Ct. Dkt. 220141, July 28, 2017 at 39–40. Texas argued that because the United States acted as the "agent" of the Compact charged with assuring that the Compact's equitable apportionment is, in fact, made, the United States's claims under the Compact should be included in the Original Action so that appropriated water in the Reservoir could be delivered according to the terms of the Compact. *Id.*

Texas's support for the United States's intervention was limited. Texas specifically argued that "to the extent that the United States's Complaint can be read to include claims asserted under Reclamation Law that are distinct from the apportionment achieved by the 1938 Compact, those claims should not be allowed to detract from the claims stated under the Compact." *Id.* at 40. Then, when agreeing with Texas that Reclamation-based claims should not be addressed but that the United States could assert Compact-based claims parallel with Texas's claims, the Court quoted from

Texas's brief. In this regard, the Court referred to the United States as "a sort of '"agent" of the Compact, charged with assuring that the Compact's equitable apportionment' to Texas and part of New Mexico 'is, in fact, made.'" 138 S. Ct. at 959. The Court repeatedly emphasized that the United States's complaint contained "allegations that parallel Texas's." *Id.* at 958.

The Court also identified several factors in support of its ruling, none of which championed the United States's rights in a manner suggesting Project superiority over the Compact, a stand-alone United States interest in defining the apportionment, or an interest in having the United States replace the states as *parens patriae* for their citizens. Rather, the Court stated, "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts," *id.* at 959, "New Mexico has conceded that the United States plays an integral role in the Compact's operation," *id.*, and the United States asserted "Compact claims in an existing action brought by Texas, seeking substantially the same relief and without [Texas's] objection." *Id.* at 960.[10]

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[10] The Court also relied on the United States's need to protect its "ability to satisfy its treaty obligations." *Id.* at 959. But here, the United States does not seriously contend that the Consent Decree in any manner jeopardizes the United States's ability in this regard. And, at any rate, the EEPI and the Index Obligation expressly protect the Treaty water through its exclusion from the index obligation calculations. Further, like the Compact itself, the Consent Decree expressly disavows any interference with the United States's obligations to Mexico. *Consent Decree* § IV.B.

The Court then expressly narrowed its ruling by emphasizing that its ruling was limited to the exact situation presented: the United States was not attempting to initiate or expand an action, but rather was asserting claims parallel to Texas's in an existing action "seeking substantially the same relief and without [Texas's] objection." *Id.* Finally, the Court further cabined its ruling by prudently warning against presuming a different outcome would follow if circumstances were different. In essence, the Court was acting within an area involving unique discretion and guarding against the present parties (or parties in future cases) reading too much into its ruling or overstating the precedential value of its discretionary ruling.

Nothing in the Court's opinion suggested the Court believed it was opening the field of play to claims seeking to address detailed matters of Reclamation law, disputes as to the relative rights of persons within one state, or any other issue that could properly be addressed in a different forum. In fact, by rejecting the earlier Special Master's recommendation that the Court take up Reclamation claims, the Court acted consistently with its long-held practice of carefully guarding its exercise of original jurisdiction to matters that actually require an original jurisdiction forum for their resolution. *See South Carolina v. North Carolina*, 558 U.S. 256, 267 (2010) ("In order to ensure that original actions do not assume the 'dimensions of ordinary class actions,' we exercise our original jurisdiction 'sparingly' and retain 'substantial discretion' to decide whether a particular claim *requires* 'an original forum

in this Court.'" (emphasis added) (citations omitted)); *New Jersey v. New York*, 345 U.S. at 373 ("If we undertook to evaluate all the separate interests within Pennsylvania, we could, in effect, be drawn into an intramural dispute over the distribution of water within the Commonwealth.").

Later, when dismissing several New Mexican counterclaims, I similarly rejected attempts, even by a Compacting State, to assert claims that were based on ancillary sources of authority challenging particular focused practices apart from the overarching Compact issues. *See Order on Mtns. to Dismiss*, Sp. M. Dkt. 338 at 31, 34–36 (rejecting New Mexican counterclaims based on provisions of the Water Supply Act, 43 U.S.C. § 390b, and the Miscellaneous Purposes Act, 43 U.S.C. § 521).

Thus, I conclude the United States's interests as asserted in this matter must be understood as interests related to defining the Compact apportionment among New Mexico and Texas and protecting the delivery of the apportionments. The United States's interests in this original jurisdiction setting do not extend to defining who within each state receives the state's apportionment. Further concerns such as detailed questions of Reclamation law beyond the Compact apportionment—questions concerning the protection of particular water users relative to others within one state and whether select New Mexicans are effectively capturing other New Mexicans' Project allocations—are of great concern to the United States, New Mexico, many New Mexicans including EBID and

its members, and to a lesser extent EP1 in Texas. Such detailed concerns regarding the relative future rights and actions of individual New Mexicans, however, are not the proper focus in this Compact-level dispute between the Compacting States, and they by no means require continued exercise of the Court's original jurisdiction for their resolution.

2. The Effect of the Consent Decree on the United States's Claims and Interests and the Availability of Other Fora

The requirement from *Local No. 93* that a consent decree not "dispose" of a non-consenting party's "valid" claim must take on a different meaning here than in a mine-run case. 478 U.S. at 529. Here, dismissal of the case with preservation of the United States's claims to be pursued without prejudice in other fora should not be deemed the "disposal" of "valid" claims. I reach this conclusion because the concept of validity must in some manner relate to the ongoing prudence and necessity of the Court continuing to exercise its original jurisdiction. And the concept of "disposal" should not treat as meaningless the United States's ability to pursue claims in a lower court. Remaining disputes do not touch upon the type of pseudo-diplomatic concerns that typically motivate the Court to allow States themselves to address their conflicts under the Court's original jurisdiction. *See Kansas v. Nebraska*, 574 U.S. at 453 ("[T]he Court['s] original jurisdiction over a controversy between two states . . . serves 'as a substitute for

the diplomatic settlement of controversies between sovereigns and a possible resort to force.'" (quoting *North Dakota v. Minnesota*, 263 U.S. at 372–73)).

As such, the meaning of a claim's "validity" and a claim's "disposal," as referenced in *Local 93*, must recognize that in an original jurisdiction matter, the Court's "role significantly 'differ[s] from' the one the Court undertakes 'in suits between private parties.'" *Id.* (quoting *North Dakota v. Minnesota*, 263 U.S. at 372); *see also United States v. Nevada*, 412 U.S. at 538 (noting that the Court "seeks[s] to exercise [its] original jurisdiction sparingly and [is] particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim").

As a matter of Project operations, protecting payments from the Water Districts to the Project, and protecting the incentive and ability of the Water Districts to maintain those portions of the Project infrastructure they now own, the United States has an undeniably important interest in the welfare of its contracting partners and the long-term viability of the Project. It therefore holds a strong interest in the complete and rapid resolution of the disputes among New Mexicans and resolution of its own allegations that New Mexicans are interfering with the Project. The Consent Decree, however, relieves Texas and Colorado of having to wait for the resolution of such intrastate matters. Entry of the Consent Decree may promote settlement of intrastate claims with Texas and Colorado removed from negotiations and with the potential opportunity

for interested New Mexican stakeholders to participate more fully.

Viewed in this manner, I conclude that the dismissal of the United States's current claims without prejudice to asserting those claims in one of several ongoing or any new lower court actions comports with *Local No. 93*. The precise articulation of the nature of the United States's claims, including the source of authority underpinning those claims, matters less than what, as a practical matter, may happen to those claims moving forward. Moving forward, dismissal of the United States's claims in this action without prejudice means that the United States may assert the same Compact, Reclamation, or other claims against New Mexico in lower courts. *See* 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 nonexclusive). The Consent Decree neither extinguishes nor causes legal prejudice to the United States's claims.

In this regard, the Compacting States and amici identify "several available forums in which the United States may address intrastate water use, including several pending cases." *Joint Mem. in Support*, Sp. M. Dkt. 720 at 55. The Compacting States cite as one example the vast Lower Rio Grande Adjudication involving thousands of claims by thousands of rights holders with several aggregated "stream system adjudications" under consideration to resolve select issues that can be addressed together. *See generally, State of New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation*

Dist. et al., No. D-307-CV-96-888 (3d Jud. Dist. Ct. Dona Ana County, N.M.) (Lower Rio Grande Adjudication); *see also id., Stream System Issue No. 101*, No. SS-97-101 (Aug. 22, 2011) (final judgment with United States's participation defining combined groundwater and surface water beneficial-use limitations for irrigation but not resolving groundwater priority dates); *id., Stream System Issue No. 104*, No. SS-97-104 (currently stayed pending resolution of the present matter but providing a forum for resolution of competing New Mexican claims).

The Compacting States also cite the currently stayed 2008 Operating Agreement Litigation in the United States District Court for the District of New Mexico concerning New Mexico's challenge to the 2008 Operating Agreement. *New Mexico v. United States, et al.*, Case No. 11-cv-00691 (D.N.M. filed Aug. 8, 2011). The Water Districts are participating in that case as defendants along with the United States and as counterclaim plaintiffs. The City of Las Cruces, which supports the Consent Decree, has also asserted claims in that litigation. At oral argument, New Mexico indicated an intention to seek dismissal of that currently stayed district court case in light of the Consent Decree's clarification of the apportionment and its practical approval of the protocol as reflected in Reclamation's 2008 Operating Agreement. The United States cites this anticipated dismissal to argue, by way of example, that no alternative forum will be sufficient to address its remaining claims. But the United States does not assert that it has attempted to raise any

claims or counterclaims in the 2008 Operating Agreement litigation. As a practical matter, if the Court enters the present Consent Decree, the Court will be expressly recognizing the United States's continued ability to assert claims in new or existing lower court proceedings.

Finally, in 2000, EBID brought suit against the United States challenging various Project operations. *See Elephant Butte Irrigation Dist. v. United States*, No. 2:00-CV-01309 (D.N.M. filed Sept. 18, 2000). According to a joint filing by various New Mexico Amici in support of the Consent Decree:

> Initially dismissed, the case was reinstated when EBID persuaded the City of Las Cruces to intervene on the issue of whether the transfer of agricultural water rights within EBID to municipal and industrial ("Ag/MI") use in the City are required to be undertaken under the 1920 Miscellaneous Purposes Act, 43 U.S.C. § 521 ("MPA"), or could be undertaken under state law. The case remains a proper forum for resolving the United States' claims that only contract users within New Mexico can use water delivered from the Project. *See US Compl. Int.* at 5.

Response of New Mexico Amici in Support, Sp. M. Dkt. 750 at 22.

I do not intend to suggest that this list is exhaustive. The details as to where the United States and New Mexico may eventually proceed may be unimportant. New Mexico's state engineer is authorized to

implement water administration measures prior to full resolution of pending cases in the Lower Rio Grande adjudication. *See* N.M. Stat. Ann. § 72-2-9.1; *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 289 P.3d 1232, 1246 (N.M. 2012) (holding the state engineer could adopt Active Water Resource Management regulations prior to final adjudication of rights without running afoul of due process, vagueness, or separation-of-powers limitations). And if the United States cannot achieve what it seeks outside of court or through a pending action, it may assert its claims in New Mexico in a new action.

At the end of the day, the United States's arguments as to the insufficiency of available lower courts illustrate well why the Consent Decree should be entered. The United States argues it will suffer delay due to the scope and anticipated time required to fully resolve pending matters in the Lower Rio Grande Adjudication.[11] This argument, however, begs the question:

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[11] In its briefing, the United States asserts:

> In any event, the litigation relating to the 2008 Operating Agreement does not include any claim made by the United States, and the States have represented that the litigation would be dismissed as a consequence of their purported settlement. 10/25/22 Status Conf. 19. The state-court adjudication could take decades to complete. The United States would not be able to obtain timely or meaningful relief through the state-court adjudication until there is a final judgment defining the Project water rights *and* the United States has had the opportunity to litigate its objections to the many thousands of groundwater rights in the Lower Rio Grande Basin that New Mexico has recognized as preliminarily

why should one of the Compacting States with an actual apportionment be made to wait for protection of its own apportionment? The end result today may be a delay in final resolution of all of the United States's concerns. But as a matter of paramount importance to the Compact, the Texas apportionment and the Treaty water will be delivered. By default, the New Mexico apportionment will also be delivered. To the extent the New Mexico apportionment falls into the wrong hands within New Mexico's borders, those claims may be addressed elsewhere.

> valid, even though the exercise of those rights depletes the Project water supply or has the potential to do so. Vol. XVIII Trial Tr. 91-95 (testimony of Ryan Serrano); Vol. XIV Trial Tr. 77-81 (testimony of Jorge Garcia).
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> . . .
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> The New Mexico adjudication court has issued interlocutory orders addressing certain aspects of the Project water right in a preliminary "Stream System Issue" proceeding. See NM-2387; US-173; JT-472, at JT-0472-0007 (order deferring to the New Mexico State Engineer to determine "whether Project water retains its identity as Project water" as it returns to drains and the river through the ground). The adjudication of the United States' objections to thousands of junior groundwater rights will not occur until the "inter se" phase of the adjudication, which will not begin until the court has resolved all of the pending Stream System Issues. See Vol. XVII Trial Tr. 179:1-184:19 (testimony of John Longworth).

U.S. Brief in Opp., Sp. M. Dkt. 754 at 35–36 and n.13.

E. The Consent Decree Modifies and Clarifies but Does Not Impose New Legal Obligations on the United States

In general, a consent decree may not impose material new legal duties on a non-consenting party. *Local No. 93*, 478 U.S. at 529. Here, as recognized in the Order on the Motions to Dismiss, the United States enjoys sovereign immunity. Sp. M. Dkt. 338 at 22. But that is not to say the Consent Decree cannot have *some effect* on the United States, especially where the United States bears many existing duties and the Consent Decree is found to be consistent with the Compact, Reclamation law, and the 1906 Treaty.[12] *See Texas v. New Mexico*, 138 S. Ct. at 959 (recognizing that the United States "assumed a legal responsibility" under

[12] Here, as discussed at length in my summary judgment order, Texas and New Mexico may invoke certain Articles of the Compact to call for the release of certain stored water upstream of Elephant Butte Reservoir apart from any upstream index delivery requirements. Compact Art. VI–VIII. Such calls for water are Compact matters that have never been the prerogative of Reclamation but that can affect the Reservoir level and require adjustments and actions by Reclamation in determining appropriate and safe release amounts and permissible downstream water orders. The Consent Decree does not speak to these interactions between Reclamation and the Compacting States, but these interactions in and of themselves demonstrate the ongoing nature of shared duties and rights in Rio Grande management. And they illustrate Compact features in which Reclamation must respond and adjust to state actions. Reclamation clearly controls the Project and Reservoir releases, but Reclamation has never acted fully independently of the Compacting States' actions. Accordingly, contrary to the United States present arguments, the Consent Decree cannot be rejected merely because it has *some impact* on Reclamation's functioning.

the Downstream Contracts to "'assur[e] that the Compact's equitable apportionment' to Texas and part of New Mexico 'is, in fact, made'"). Moreover, *Local No. 93*'s general analysis of contested consent decrees does not purport to speak to *de minimis* concerns. Nor has the Court, in its exercise of unique discretion in the original jurisdiction context, ever expressed an interest or concern in allowing *de minimis* matters to derail settlements between states.

Almost completely, then, the United States's arguments as to the Consent Decree's alleged imposition of new duties fold into the above analysis of *Hinderlider* and *California v. United States*. If the Consent Decree reflects a permissible exercise of the Compacting States' *parens patriae* authority to settle a sovereign matter, then the United States should recognize the effect of that settlement on its contracting partners' rights and on its own general duty of apportionment delivery pursuant to the Compact. In this regard, as already quoted, the United States openly admits that it has always anticipated Project operating changes in response to clarification of the apportionments. Further, this understanding of a federal agency's general duty to abide by a Court's recognition of an apportionment is by no means unique.[13]

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[13] The Court recently explained a potentially substantial burden on the United States in reference to an original jurisdiction case where the United States had declined to waive its sovereign immunity even though the Army Corps of Engineers materially controlled the disputed river:

The United States has made clear that the Corps will work to accommodate any determinations or obligations the Court sets forth if a final decree equitably apportioning the Basin's waters proves justified in this case. It states in its brief here that if a decree results "in more water flowing to Florida . . . under existing Corps protocols, then the Corps would likely not need to change its operations." It has added that, in any event, a decree "would necessarily form part of the constellation of laws to be considered by the Corps when deciding how best to operate the federal projects." And in issuing its revised Master Manual, the Corps stated that it would "review any final decision from the U.S. Supreme Court and consider any operational adjustments that are appropriate in light of that decision, including modifications to the then-existing [Master Manual], if applicable." The United States has "continually asserted its preparedness to implement, in accordance with federal law, any [agreed-upon] comprehensive water allocation formula." And, of course, the Administrative Procedure Act requires the Corps to make decisions that are reasonable, i.e., not "arbitrary, capricious, an abuse of discretion" or "in excess of [the Corps'] statutory jurisdiction."

We recognize that the Corps must take account of a variety of circumstances and statutory obligations when it allocates water. New circumstances may require the Corps to revise its Master Manual or devote more water from the Chattahoochee River to other uses. But, given the considerations we have set forth, we cannot agree with the Special Master that the Corps' "inheren[t] discretio[n]" renders effective relief impermissibly "uncertain" or that meaningful relief is otherwise precluded. We cannot now say that Florida has "merely some technical right" without "a corresponding benefit," or that an effort to shape a decree will prove "a vain thing." Ordinarily "[u]ncertainties about the future" do not "provide a basis for declining to fashion a decree." And in this case, the record leads us to believe that, if necessary and with the help of the United States, the

Because the Consent Decree essentially adopts Reclamation's own method of operating under the Compact as demonstrated for the last 40 years, all of the assorted specific arguments the United States asserts regarding new duties are, at the end of the day, *de minimis* in nature. Changes to accounting practices, a potential discretionary change to a two-year rather than a one-year regression analysis, the recognition of limits on the Reclamation-created carryover accounts, and a new use for the El Paso Gauge amount to additional nuance on the pre-existing carryover accounting, annual D2 allocation determinations, and the 2008 Operating Agreement.

As an example of the nature of allegedly new duties, the United States takes issue with vagueness concerning who will pay for enhanced gauge maintenance expenses associated with the El Paso Gauge. The United States describes any increased expense as an impermissible new duty. But, through the International Boundary Water Commission, the United States already bears a burden for maintenance of that gauge. *Declr. Int'l Boundary and Water Commission Hydrologist William Finn*, Sp. M. Dkt. 754 ¶¶ 6–7. And the Compacting States represent that "[if] IBWC truly needs to upgrade the El Paso Gauge to meet USGS quality standards, the States will offset the additional costs incurred." *Joint Reply in Support*, Sp. M. Dkt. 755

> Special Master, and the parties, we should be able to fashion one.

Florida v. Georgia, 138 S. Ct. 2502, 2526 (2018) (citations omitted).

at 64; *see also 2nd Decl. Eng'r Robert Brandes*, Sp. M. Dkt. 755 Exh. B at ¶ 22; *2nd Decl. Eng'r Michael Hamman*, Sp. M. Dkt. 755 Exh. F at ¶¶ 21–25. At any rate, the Compact itself recognizes that precise division of gauge expenses is a matter beneath a level of concern that requires articulation in a Compact-level document. *See Compact* Art. II ("Such gauging stations shall be equipped, maintained, and operated by the Commission directly or in cooperation with an appropriate Federal or State agency, and the equipment, method, and frequency of measurement at such stations shall be such as to produce reliable records at all times.").

I conclude the Consent Decree imposes no impermissible and materially expanded duties on the United States sufficient to merit its rejection.

F. The Consent Decree is Adequate, Reasonable, and Substantively and Procedurally Fair

A hallmark of procedural fairness to an objecting party is the availability of process to present evidence and be heard on a consent decree. *See Local No. 93*, 478 U.S. at 529 (affirming the approval of a consent decree over an intervenor's objections noting that the objecting intervenor "took full advantage of its opportunity to participate in the . . . hearings on the consent decree. It was permitted to air its objections to the reasonableness of the decree and to introduce relevant evidence; the District Court carefully considered these

objections . . . explained why it was rejecting them . . . [and] 'gave the [intervenor] all the process that [it] was due.'" (citations omitted)); *see also*, *e.g.*, *United States v. Oregon*, 913 F.2d 576, 582 (9th Cir. 1990) ("Familiarity of the court with the lawsuit can be an important factor. Here the record, files and transcripts had been building for years, providing a solid base for intelligent approval of the plan."); *United States v. Cannons Eng'g Corp.*, 899 F.2d 79, 86 (1st Cir. 1990) ("To measure procedural fairness, a court should ordinarily look to the negotiation process and attempt to gauge its candor, openness, and bargaining balance.").

Here, the parties advised the court that the Compacting States' motion could be submitted on the basis of briefs, affidavits, and oral argument, subject to any party requesting an evidentiary hearing if a fact dispute became an issue at the February 2023 hearing. *See Joint Status Rep. for Jan. 12, 2023*, Sp. M. Dkt. 744 at 2; *U.S. Status Rep. for Jan. 12, 2023*, Sp. M. Dkt. 745 at 2; *Jan. 12, 2023 Hr'g Transcript*, Sp. M. Dkt. 775. At the hearing on the Consent Decree, no party requested an additional hearing or the opportunity to present further evidence. *See Feb. 6, 2023 Hr'g Transcript*, Sp. M. Dkt. 775. The in-person hearing on the Consent Decree took place approximately three months after the Compacting States filed their proposed decree and supporting materials. These most recent proceedings took place after approximately ten years of litigation involving the parties to this case with extensive involvement permitted for amici. The record available for consideration, therefore, includes not merely the most recent

filings and arguments, but the entire summary judgment record, including depositions and exhibits, as well as the record from the partial trial involving testimony from 27 witnesses and associated exhibits.

And, of course, the parties negotiated productively in good faith for approximately ten months with the most recent mediator. *See June 24, 2022 Hr'g Transcript*, Sp. M. Dkt. 762 at 29 (United States representative stating, "[W]e've had successful negotiations with all the parties in this case"); *see also Oct. 25, 2022 Hr'g Transcript*, Sp. M. Dkt. 766 at 42 (United States representative stating, "[I]n those negotiations, we were actively participating. We actively participated for ten months . . . that is exactly what we had negotiated and involved with for multiple settlement sessions, multiple negotiations"). Further, as already stated, the United States sought and obtained the continuance of trial dates based on the assertion of productive advances in negotiations throughout this lengthy final mediation. Finally, the parties and amici had negotiated at earlier stages without a mediator and with an earlier-appointed mediator. *See Joint Mem. in Support*, Sp. M. Dkt. 720 at 28–29.

There is no colorable claim in this matter as to the lack of opportunity to fully air out the parties' issues or concerns or present evidence as to the pending motion and proposed Consent Decree.

To the extent the United States argues entry of the Consent Decree would be procedurally unfair due to disagreement with my December 2022 ruling

regarding confidentiality matters, that earlier ruling must speak for itself. *See* Sp. M. Dkt. 742. But, to the extent my earlier order might be subject to review, and to the extent the Supreme Court may determine I erred in some regard, any such error does not necessarily equate with procedural unfairness sufficient to block the Consent Decree. Just as the Court is free to structure the format of an original jurisdiction proceeding to meet pseudo-diplomatic ends, the Court is free to judge the constraints required by confidentiality concerns and the consequences to be imposed if such constraints were violated in this unique context.

To the extent the United States argues generally that entry of the Consent Decree is unfair *at this stage*—mid-trial and prior to receiving testimony from the United States's expert witnesses—and improperly cuts this case off immediately before its end, the United States seemingly overstates the nearness of this litigation's finish line. The trial phase that we have already completed addressed background fact witnesses and the parties' history experts. The next phase is to address the parties' competing expert witnesses. Finally, even if one of the parties establishes liability, there would remain the anticipated remedies or damages phase. In all such phases, the parties' litigation positions will not match their present compromise positions. Simply put, in the absence of settlement, there remains a long way to go.

To the extent the United States means to suggest that its expert witnesses' testimony will change the landscape in a manner likely to substantially move the

parties in their litigation or settlement positions, I again conclude that a healthy dose of skepticism is appropriate. To my understanding, all expert witnesses have filed reports and have been extensively deposed. Given the lengthy history of this matter, the upcoming expert witnesses are not in the nature of surprise witnesses. All parties and the Special Master have a firm grasp of the likely scope of testimony and positions to be asserted. As such, we are not faced with a situation where the basic informational balance is unknown or likely to change dramatically in the near future.

Finally, the Supreme Court has seldom been as clear in its statements as when championing the preferability of settlement over litigation in the context of original jurisdiction proceedings. *See Colorado v. Kansas*, 320 U.S. 383, 392 (1943) (stating that the preferred approach for resolving interstate water disputes "should, if possible, be the medium of settlement, instead of invocation of [this Court's] adjudicatory power"); *accord Nebraska v. Wyoming*, 325 U.S. at 616. *See also Florida v. Georgia*, 138 S. Ct. at 2509 (citing cases). In this case, Texas, New Mexico, and Colorado have settled the question of the Compact's equitable apportionment of water below Elephant Butte Reservoir thus resolving, as between Texas and New Mexico, a "complicated and delicate question[]" of water requiring "expert administration[.]" *Colorado v. Kansas*, 320 U.S. at 392. Thus, even if there is not an actual *presumption* of validity surrounding thoroughly negotiated compromise solutions to lengthy original jurisdiction actions, such solutions are obviously desirable

and preferred to the ongoing litigation of ancillary matters that are susceptible to resolution in the lower courts.

At the end of the day, acceptance of the Consent Decree and dismissal of the United States's claims without prejudice will not cut off the United States's claims. It will simply exclude them from the current forum and force the United States to another forum in an existing or new action to pursue its interests in claims against New Mexico or select New Mexicans. The United States argues strenuously that resolution of its claims against New Mexico could take many years. As a matter of procedural and substantive fairness, then, it seems important to consider that the presently proposed solution provides instant relief to a plaintiff who, unlike the United States, is—and has been since 1938—entitled to an apportionment. There is nothing unreasonable or unfair in accepting the Consent Decree that protects the Texas apportionment and the Treaty water *today* leaving details concerning actions by New Mexico for future resolution.

In addition, I conclude the United States's remaining arguments concerning fairness (whether procedural or substantive) alleging infirmities with the Consent Decree on the basis of vagueness (or related to issues of control as per *Hinderlider* and *California v. United States*) raise no concerns sufficient to reject the Compacting States' proposed Consent Decree. In this regard, the United States directs particular focus on the Compacting States' ability to amend the Consent Decree's Appendix by unanimous agreement. I

find no impermissible vagueness in this regard. The Consent Decree expressly provides that any inconsistency between the Consent Decree itself and its Appendix must be resolved in favor of the Consent Decree. *See Consent Decree*, Section IV.C. As such, any potential future change to the Appendix or its definition of the EEPI is necessarily cabined by the Consent Decree's own provisions. *Id.* at Section I (definitions) & II.B(ii)e. (EEPI).

The United States also challenges the Supreme Court's retention of jurisdiction over this matter pursuant to Section VI of the Consent Decree as an impermissible expansion of the Court's original jurisdiction beyond an adjudicatory role. The Compacting States, in contrast, describe this provision as almost a *pro forma* component of original jurisdiction water matters. Undoubtedly, the Compacting States speak too broadly in this regard. But I find nothing objectionable about the Consent Decree provision regarding retained jurisdiction. The jurisdiction-retention provision does not create an impermissible supervisory role for the Court. *See Vermont v. New York*, 417 U.S. at 276–77 (rejecting a consent decree to the extent it required appointment of a special master and anticipated a future non-adjudicatory role for the Court). Rather, it mirrors language from consent decrees in other original jurisdiction matters and preserves an adjudicatory role in the same manner as for the Compact itself. *See Kansas v. Nebraska*, 575 U.S. 134, 135 (2015); *see also New Jersey v. New York*, 345 U.S. at 371. And, importantly, if no other alleged infirmities with the Consent Decree

merit its rejection, it seems unlikely the Court should reject it based on this final provision that, at the end of the day, still leaves any future Supreme Court involvement to the Court's own discretion.

Based on the descriptions already set forth, I conclude the Consent Decree is substantively and procedurally adequate, reasonable, and fair. The Consent Decree answers the apportionment question, imposes a general duty of internal water management on New Mexico to achieve the apportionment, and expressly protects the Treaty by excluding Treaty water from the index measurement. It includes specific enforcement mechanisms that add to, but do not create inconsistencies with, the Compact. And it preserves the programmatic nature of the downstream apportionment.

Accordingly, I recommend the Court enter the Compacting States' proposed Consent Decree. Upon entry of the proposed Consent Decree, the Compacting States' claims will be resolved, and the United States's claims will be dismissed without prejudice.

Respectfully submitted,

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