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.

UNITED STATES' STATUS REPORT

ELIZABETH B. PRELOGAR
Solicitor General

TODD KIM
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
THOMAS K. SNODGRASS
JUDITH E. COLEMAN
JENNIFER A. NAJJAR
JEFFREY N. CANDRIAN
Attorneys, Environment and Natural Resources Division
U.S. Department of Justice

Counsel for the United States

I. Introduction

The United States' Compact claims in this case are straightforward: The Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, imposes on New Mexico a duty not to interfere with the Rio Grande Project's delivery of water below Elephant Butte Reservoir. U.S. Compl. 5. New Mexico has breached that duty by allowing interference with Project deliveries from groundwater pumping far beyond what took place when the Compact was signed by the States in 1938. *Id.* The United States is entitled to an injunction prohibiting such interference. *Id.*; *see Texas v. New Mexico*, 144 S. Ct. 1756, 1763-1764, 1765, 1767, 1770 (2024) (*Texas II*) (summarizing claims).

Yet a full decade has passed since the Court granted the United States leave to file its complaint, and the United States has still not obtained an adjudication of its Compact claims. That is because much of the past decade has been spent on the States' attempts to avoid such an adjudication. In 2018, the Court denied New Mexico's motion to dismiss, recognizing the United States' right to "pursue the Compact claims it has pleaded." *Texas v. New Mexico*, 583 U.S. 407, 415 (2018) (*Texas I*). And six years later, the Court rejected a proposed "consent decree" that would have "dispose[d] of" the United States' claims without its consent, *Texas II*, 144 S. Ct. at 1771, reiterating that the United States "has its own, uniquely federal claims under the Compact," *id.* at 1767. Given that the Court has twice affirmed

the United States' right to pursue its Compact claims, trial on the merits of those claims should resume. The United States, however, remains open to settling this Compact dispute on appropriate terms that are agreeable to all concerned parties.

II. Background

The Rio Grande begins in Colorado and flows through New Mexico into Texas. The Compact apportions the waters of the Rio Grande among those three States. It requires Colorado to "deliver" a certain amount of water each year to the New Mexico state line. Compact art. III, 53 Stat. 787. "But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line," *Texas I*, 583 U.S. at 410, Article IV of the Compact requires New Mexico to "deliver" a certain amount of water to Elephant Butte Reservoir ("Elephant Butte"), 53 Stat. 788—a federal reservoir located within New Mexico, about 100 miles north of the Texas state line, *Texas I*, 583 U.S. at 411 & n.*. Elephant Butte is operated by the federal Bureau of Reclamation ("Reclamation") and is the primary storage reservoir for the Rio Grande Project ("the Project").#

At Elephant Butte, the water enters what the Compact refers to as "Project Storage" and becomes "Usable Water," "which is available for release in accordance with irrigation demands, including deliveries to Mexico." Art. I(k) and (*l*), 53 Stat. 786. Reclamation then allocates the water pursuant to a treaty with Mexico and contracts with two irrigation districts—Elephant Butte Irrigation

District in New Mexico and El Paso County Water Improvement District No. 1 in Texas ("the Districts")—as intended when the Compact was approved. *Texas II*, 144 S. Ct. at 1762. Thus, in fulfilling its responsibilities under those contracts, Reclamation "effectuate[s] the [Compact's] apportionment" of the Rio Grande below Elephant Butte. *Id.* at 1769.

In 2013, Texas filed this original action, alleging that "New Mexico is effectively breaching its Compact duty to deliver water to the Reservoir by allowing downstream New Mexico water users to siphon off water below the Reservoir in ways the [United States' contracts with the Districts] do not anticipate." *Texas I*, 583 U.S. at 411; *see* Tex. Compl. ¶ 4. Specifically, Texas alleges that New Mexico is allowing more groundwater pumping below Elephant Butte than existed "in 1938" when the Compact was signed. Tex. Compl. ¶ 18.[1]

The United States intervened and filed a complaint asserting "essentially the same claims" as Texas. *Texas II*, 144 S. Ct. at 1767 (citation omitted). Like Texas, the United States alleges that groundwater pumping in New Mexico below

[1] It is undisputed that groundwater pumping below Elephant Butte reduces the amount of water that returns to the Rio Grande through the Project drains, thereby reducing the surface flows that are available to complete Project deliveries at downstream diversion points. *See Texas II*, 144 S. Ct. at 1763 ("[T]he more groundwater pumping between the Elephant Butte Reservoir and Texas, the more water Reclamation has to release from the reservoir to comply with its delivery obligations."). The Project was designed to deliver more water than it releases from storage in a given year through the use of these return flows.

Elephant Butte intercepts and interferes with Project deliveries to the Districts and Mexico, thereby reducing "the amount of water stored in the Project that is available for delivery" in the future. U.S. Compl. ¶ 14. The United States seeks declaratory and injunctive relief to compel New Mexico to prevent such interception and interference. U.S. Compl. 5.

In 2018, the Court held that the United States may "pursue the Compact claims it has pleaded." *Texas I*, 583 U.S. at 415. On remand, the previous Special Master declined to grant summary judgment to any party in full, so the case proceeded to trial. Doc. 503.[2] The Special Master bifurcated the trial into a liability phase and a remedy phase. Doc. 501 at 8; *see also* Doc. 508 at ¶ 3; Vol. XVII Trial Tr. 3-13. The liability phase, in turn, was divided into two parts. Doc. 592 at 2. After the first part concluded in November 2021, the second part was postponed so that the parties could engage in confidential settlement negotiations. Docs. 698, 700.

In November 2022, the States attempted to settle the case without the United States' agreement. Doc. 720. They moved for entry of a consent decree that would "settle all parties' Compact claims and, in the process, cut off the United States' requested relief[.]" *Texas II*, 144 S. Ct. at 1761. The Court denied the

[2] "Doc." references are to the docket numbers on the docket prepared by the previous Special Master.

motion, holding that the States could not dispose of the United States' "own, uniquely federal claims" without the United States' consent. *Id.* at 1767.

III. The United States' Compact Claims

The United States "still advances the same claims" as it did when it filed its complaint, *Texas II*, 144 S. Ct. at 1761, but the issues have substantially narrowed.

A. Liability

With respect to liability, the United States' Compact claims raise four issues.

First, does New Mexico have a "duty under the Compact not to interfere with" the Project's delivery of water below Elephant Butte? *Texas II*, 144 S. Ct. at 1770. Although New Mexico once took the position that it lacked such a duty, *see* N.M. Exception Br. 16 n.7 (June 9, 2017), it now acknowledges that its Article IV obligation to deliver a certain amount of water to Elephant Butte encompasses a corresponding "Compact-level duty" not to interfere with the Project's delivery of water below Elephant Butte. States' Joint Reply to U.S. Exception 30, 40 (Dec. 4, 2023) ("States' Reply") (quoting Doc. 503 at 5).

Second, how should New Mexico's compliance with its duty of non-interference be measured? All parties agree that measuring New Mexico's compliance requires specifying a "[b]aseline" level of groundwater pumping or other diversions beyond which New Mexico would be in breach. States' Reply 30.

Third, what is the applicable baseline? In the United States' view, the

baseline is that which existed when the Compact was signed in 1938, *Texas II*, 144 S. Ct. at 1767, when groundwater use for irrigation was "not substantial" and when "water use for . . . non-irrigation purposes served as a minor component of overall Project area water use," Doc. 503 at 29. Texas has likewise advocated a 1938 baseline, *see* Tex. Compl. ¶ 18; Doc. 602 at 10-12, and it has represented that if this case were to return to trial, its "position will be that the 1938 condition should be the proper baseline," Doc. 756 at 8. New Mexico, in contrast, has argued that the relevant baseline should be based on Project deliveries during the "D2 Period" of 1951 to 1978, *see* Doc. 603 at 17, "when New Mexico was actively depleting return flows through groundwater pumping," *Texas II*, 144 S. Ct. at 1764.

Fourth, is New Mexico violating its duty of non-interference by allowing siphoning of Project water through groundwater pumping beyond what existed under the applicable baseline? It is undisputed that New Mexico is allowing groundwater pumping beyond not only a 1938 baseline, but beyond even the D2 baseline that the State has urged the Court to adopt. *See, e.g.*, Doc. 755, Ex. B, at 12 (experts for both New Mexico and Texas "have determined that groundwater depletions in New Mexico since [2008] have been somewhat greater than those during the D2 period"); *id.*, Ex. F, at 3 (stating that New Mexico would "make major investments to bring the state's groundwater depletions in line with D2 levels"); *id.*, Ex. G, at 6 (asserting New Mexico's "commit[ment]" to "enactment

of actions to reduce New Mexico's groundwater depletions to the level that existed during the D2 Period"). Thus, there can be no genuine dispute that New Mexico is in breach of its duty of non-interference, however the baseline is defined.

In short, the parties agree that New Mexico has a Compact-level duty to avoid interference beyond a particular baseline. The main issues to be resolved in the liability phase are what the applicable baseline is—1938 or D2—and New Mexico's breach thereof, to the extent disputed.

B. Remedy

If New Mexico is violating its duty of non-interference, the question becomes what is the proper remedy. The United States seeks declaratory relief and an injunction prohibiting interference with the Project's delivery of water below Elephant Butte. U.S. Compl. 5. New Mexico has already identified certain measures it could undertake to prevent interference, including "curtail[ing] groundwater pumping by priority," acquiring water rights and "permanent[ly] retir[ing]" them, instituting a "temporary fallowing" program, employing "conservation measures," and "import[ing] water." Doc. 720, Ex. 5, at 5-6.

IV. Next Steps

Now that the Court has reaffirmed the United States' right to pursue its Compact claims, trial on the merits of those claims should resume, beginning with completion of the liability phase. The States' alternative proposal to conduct a trial

on the merits of their proposed decree should be rejected.

A. Trial on the United States' Compact Claims

The previous Special Master bifurcated the trial into a liability phase and a remedy phase. Doc. 501 at 8. That bifurcation makes sense. There is no point in having a remedy phase before liability is established. After all, the extent of any appropriate remedy will depend on the key issue to be resolved in the liability phase: the applicable baseline for measuring New Mexico's compliance.

Before trial, the prior Special Master issued a summary judgment order recognizing that New Mexico has a "Compact-level duty" to prevent interference with Project deliveries to Texas and the Project's "long-term operation." Doc. 503 at 5. The Special Master also ruled that New Mexico's duty includes an obligation to protect Project return flows and hydrologically connected groundwater to an extent "akin to" those that existed under Project operations in 1938. *Id.* at 5-6, 49.

Following this summary judgment order, the parties completed the first part of the trial's liability phase, hearing testimony from 27 fact witnesses and expert historians, while deferring testimony from expert witnesses on modeling and other technical matters until the second part of the liability phase. These 27 witnesses addressed several topics, including project operations (Vols. I-II Trial Tr.), the United States' treaty obligations to Mexico (Vols. II-III), the history of the Project and the Compact (Vols. VIII-X, XII), and administration of groundwater use in

New Mexico (Vol. XVIII). The evidence showed that the States intended to protect a baseline operating condition for the Project that includes the reuse of return flows, undiminished by new or additional water-resource development (*see*, *e.g.*, Vol. VIII Trial Tr. 130-133, 173, 186); that current levels of groundwater pumping are hundreds of thousands of acre-feet greater than what existed in 1938, (*see*, *e.g.*, Vol. XVIII Trial Tr. 33); and that New Mexico has failed to implement a system of water administration to prevent that inference and to ensure compliance with its Compact obligations (*see*, *e.g.*, Vol. XVIII Trial Tr. 169, 175-181, 206-08).

The United States agrees that this case should proceed "in as timely and efficient a manner as possible." ECF No. 1 at 2. Accordingly, the United States does not seek to redo the first part of the liability phase. Instead, the testimony from the first part should remain part of the trial record, and the parties should pick up where they left off, with the second part of the liability phase.

The United States anticipates that the remaining testimony during the liability phase will primarily consist of expert testimony concerning the amount and effects of New Mexico groundwater pumping on Project operations and deliveries. In order to complete the next part of the liability phase in an orderly fashion, the United States believes the parties should be given up to 90 days to confer further regarding potential stipulations and the admissibility of evidence (including evidence previously presented on summary judgment and in connection

with the States' proposed consent decree), and to try to reach agreement on supplemental expert disclosures, the potential designation of additional experts, and expert discovery. Depending on the outcome of these discussions and any potential motion practice if the parties are unable to agree, the United States anticipates trial could potentially resume in late 2025.

B. The States' Alternative Proposal

The States have indicated that they intend to propose a trial on the United States' objections to their proposed decree—the same decree that the Court declined to enter as a "consent decree." *Texas II*, 144 S. Ct. at 1761. That proposal should be rejected, as it would, once again, deny the United States a trial on the merits of its Compact claims. The Court has twice rejected attempts to deny the United States such an adjudication, *see Texas II*, 144 S. Ct. at 1761; *Texas I*, 583 U.S. at 415, and there is no reason to go down that path again.

The proposed decree is not an adjudication on the merits of the United States' Compact claims because the decree does not determine New Mexico's liability for breaching its duty of non-interference under the Compact; it simply jumps to a remedy without determining whether or how New Mexico has violated the Compact. This is contrary to logic and the course of proceedings in this case.

Moreover, the proposed decree should be a non-starter for reasons the United States has explained in prior briefing:

- The proposed decree would be contrary to the Compact because it would transform New Mexico's Article IV obligation into a state-line delivery requirement, permanently enjoin the federal government to operate the Project in a manner consistent with this new requirement instead of its contracts with the Districts on which the Compact was based, and codify a baseline that would permit interference through a level of groundwater pumping that did not exist when the Compact was signed. U.S. Exception Br. 43-47 (Oct. 6, 2023) ("U.S. Br."); U.S. Sur-Reply 17-21 (Jan. 3, 2024).
- The proposed decree would be inconsistent with the United States' requested relief because it would "neither impose[] the duty of noninterference the United States seeks nor enjoin[] New Mexico from allowing [interference] beyond 1938 levels." *Texas II*, 144 S. Ct. at 1770; *see* U.S. Br. 21-23.
- The proposed decree would impose obligations on the United States in contravention of the United States' sovereign immunity. U.S. Br. 40-41.

Rather than devote time and resources to addressing, for a second time, the proposed decree's many flaws, the Court and the parties should complete the liability phase of the trial that is already in progress. Completing that phase is the most efficient path toward bringing this decade-long litigation to a close.

V. Settlement Negotiations

Although the United States remains open to settling this Compact dispute on

appropriate terms that are agreeable to all concerned parties, previous attempts at settlement have failed because the other parties questioned "the United States' independent stake in pursuing claims against New Mexico." *Texas II*, 144 S. Ct. at 1768. In particular, the States characterized the United States' interests as "entirely derivative of the States' interests," *id.*, and they characterized the United States' claims as involving only "an *intrastate* dispute between the United States and New Mexico," *id.* at 1771 (quoting States' Reply 43-45). The Court has since rejected those characterizations. *Id.* at 1768, 1771. The initiation and success of any settlement negotiations will depend on whether the States take seriously "the United States' distinct federal interests" in pursuing its "uniquely federal claims under the Compact," *id.* at 1767, 1771, as described above.

If the States are prepared to engage in settlement discussions in that light, a stay of litigation would, in the United States' view, be necessary to facilitate meaningful discussions. In recent conferrals, however, at least one of the States has indicated that it would oppose such a stay. If new settlement discussions were to commence, the United States does not agree that a mediator is necessary or appropriate at this time. The parties are more than capable of negotiating among themselves. If, however, all concerned parties agree at some point in the future that a mediator would be helpful, the United States believes that a fresh start before a mediator who is new to the case would be warranted.

Respectfully submitted this 4th day of October, 2024,

ELIZABETH B. PRELOGAR
Solicitor General

TODD KIM
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General

/s/ Thomas K. Snodgrass
THOMAS K. SNODGRASS
JUDITH E. COLEMAN
JENNIFER A. NAJJAR
JEFFREY N. CANDRIAN
Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20004

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.

CERTIFICATE OF SERVICE

This is to certify that on the 4th day of October, 2024, I caused a true and correct copy of the foregoing **UNITED STATES' STATUS REPORT** to be served on the parties and filed with the Special Master through Third Circuit Case Management and Electronic Case Filing (CM/ECF) System.

/s/ *Judith Coleman*
Judith Coleman, Senior Attorney