No. 141, Original

In The Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

On Motion For Leave To File Complaint

NEW MEXICO'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF AND SUPPLEMENTAL BRIEF IN RESPONSE TO THE UNITED STATES

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MOTION FOR LEAVE TO FILE SUPPLEMENTAL BRIEF

The State of New Mexico moves for leave to file the attached Supplemental Brief in response to the Brief for the United States as Amicus Curiae ("U.S. Brief").

As grounds therefor, New Mexico states as follows:

1. The Court's consideration of the pending Motion for Leave to File Complaint by the State of Texas may benefit from clarification of certain issues discussed in the U.S. Brief, submitted after New Mexico's last filing; and

2. Allowing New Mexico to file a Supplemental Brief will not delay consideration by the Court of the Texas Motion for Leave to File Complaint.

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The State of New Mexico files this Supplemental Brief in response to the Brief for the United States as Amicus Curiae ("U.S. Br."). The Court should deny Texas' Motion for Leave to File because a preferable alternative forum exists in which the issues Texas raises can be resolved.

SUMMARY OF ARGUMENT

The central issue raised in Texas' Complaint is whether Texas is receiving its share of water from the Rio Grande. Texas alleges that New Mexico water users are improperly intercepting (i.e., diverting or pumping) surface water and groundwater within New Mexico that reduces Rio Grande Project allocations to the Texas Project beneficiary, El Paso County Water Improvement District No. 1 ("EPCWID"). In accordance with the longstanding principle that the Court's original jurisdiction is sparingly granted, Texas' Motion for Leave should be denied because there is an alternative forum to resolve the issues Texas' Complaint presents. Denying the motion would promote the proper functioning of the federal judicial system, allow the issues to be resolved in the courts best suited to trials, and preserve this Court's customary appellate jurisdiction.

ARGUMENT

I. THIS CASE IS NOT APPROPRIATE FOR THE COURT'S ORIGINAL JURISDICTION BECAUSE A PREFERABLE ALTERNATIVE FORUM EXISTS

The Court has repeatedly affirmed a longstanding "philosophy" that its original jurisdiction "should be invoked sparingly" and is "obligatory only in appropriate cases." *Illinois v. City of Milwaukee, Wis.*, 406 U.S. 91, 93 (1972); see also *Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). This philosophy has guided the Court's exercise of discretion not to accept original actions in cases within both the Court's nonexclusive original jurisdiction, as well as its exclusive original jurisdiction in actions between two States. See*, e.g., Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992). Accordingly, the Court's evaluation of whether a given case is appropriate for original jurisdiction inquires as to the "availability of an alternative forum in which the issue[s] tendered can be resolved." *Id*. The inquiry is not whether there is another *case* in which the same issues are being litigated, though there is such a case here, see*, e.g.*, *Arizona v. New Mexico*, 425 U.S. at 796-97; rather, it asks whether there is another *forum* in which those issues *can be* raised and resolved. Thus, if the issues posed in an original complaint "can be resolved effectively by other litigation in other courts, *if need be by other parties* . . ., discretionary denials of original jurisdiction seem appropriate." 17 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure: Jurisdiction* § 4053 (3d ed. 2008)

(emphasis added). In this case, the United States district courts provide an alternative forum.

A. The Nature Of Texas' Claim

Texas claims it has not received its share of Compact water because of increased surface water diversions and groundwater pumping by New Mexico water users below Elephant Butte Reservoir. See Complaint at ¶¶ 18, 21. Both Texas and the United States view the water New Mexico is obligated to deliver under the Compact as Rio Grande Project Water delivered to the Texas Project beneficiary, EPCWID, pursuant to contracts with Reclamation.[1]

> Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements.

Complaint ¶ 4.

> When New Mexico "delivers" water to Elephant Butte under the Compact, it relinquishes control of the water to the Project.

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[1] All of the water to which Texas is entitled is stored in the Project, but not all water in the Project is dedicated for Texas. The Project Storage also contains water for Elephant Butte Irrigation District ("EBID"), imported water from the Colorado River basin, Compact credit water, and water dedicated by treaty for Mexico.

> The *Project* then is to release the water "in accordance with irrigation demands" for Project beneficiaries. . . .

U.S. Br. 15 (emphasis in original).

It follows that the interest asserted by Texas in such water is coextensive with the interest of EPCWID under contracts with Reclamation. That is, all of the water Texas is entitled to under the Compact is destined for delivery to EPCWID. As New Mexico explained in its earlier brief, "Texas' Complaint does not assert any right or interest that could result in the delivery of water to any entity or person other than EPCWID." N.M. Br. 25; see also U.S. Br. 14 (noting "Texas' understanding at the time the Compact was signed [was] that its apportionment of Rio Grande water was defined by the existing contracts with the Project"); Complaint ¶ 8 ("[EPCWID], a political subdivision of the State of Texas, is the Rio Grande Project beneficiary of the water from the Rio Grande Project").

In sum, the essential issue Texas' Complaint raises is whether EPCWID, a political subdivision of Texas, and by extension the State of Texas, is receiving its share of Project water.

B. The United States District Courts Provide An Alternative Forum Warranting Denial Of Texas' Motion For Leave

The United States focuses exclusively on the two existing suits, arguing they are not currently

presented in a way that fully addresses the issues raised in Texas' Complaint. U.S. Br. 19. But that is not the question; rather, as noted above, the Court considers the availability of another *forum* in which the issues *can be* raised. *E.g.*, *Arizona v. New Mexico*, 425 U.S. at 797.

Given the issues Texas raises in its Complaint, the United States district courts provide an alternative forum warranting denial of Texas' motion for leave. Pursuant to the Reclamation Act, 43 U.S.C. § 390uu, EPCWID, as a contract holder, can bring an action in federal district court against Reclamation and EBID asserting it is not receiving its allocation of Project water. In fact, EPCWID filed just such a case in 2007. See *EPCWID v. EBID and the United States of America*, Case No. 07-CV-00027 (W.D. Tex., filed Jan. 22, 2007) ("*EPCWID v. EBID*"). In that case, EPCWID sued EBID and the United States claiming, *inter alia*, EPCWID was entitled to additional Project water deliveries as an offset for groundwater pumping in New Mexico:[2]

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[2] EPCWID's contract with the United States provides the enforceable delivery obligations:

> The United States shall allocate legally available stored project water among Elephant Butte Irrigation District, El Paso County Water Improvement District No. 1 and the Republic of Mexico in accordance with the Rio Grande Project Act of 1905, all applicable Federal Reclamation Laws, the Convention with Mexico for the Upper Rio Grande proclaimed in 1907, all

(Continued on following page)

> By its failure to limit or account for such groundwater depletions, the United States, through the Bureau of Reclamation, has failed to act in accordance with its duties to EPCWID under the EPCWID Contract and the Stipulated Contract . . . . Consequently, the water users of EPCWID suffer the loss of use of Project water to which they are entitled. Under the EPCWID Contract, the Stipulated Contract, and Federal Reclamation Law, the United States has an affirmative duty to take such action as necessary to assure that depletions of Project water by groundwater withdrawal in EBID is accounted for as Project water delivered to EBID.

EPCWID v. EBID, Complaint ¶ 32. The case was dismissed after execution of a 2008 Operating Agreement by EBID, EPCWID and Reclamation. The 2007 case illustrates that the federal district courts provide a forum in which the issues presented in Texas' Complaint can be resolved outside of this Court's original jurisdiction.

The presence of an alternative forum is further demonstrated by the pending litigation in federal district court over distribution of Rio Grande Project water. See *New Mexico v. United States*, Case No. 11-cv-00691 (D.N.M., filed August 8, 2011); N.M. Br.

> vested rights of the District under all applicable State and Federal law, court decisions, and this contract.

EPCWID v. EBID, Complaint ¶ 17.

24-27. That suit concerns the 2008 Operating Agreement for the Rio Grande Project.[3] Like the case Texas proposes in this Court, the issues raised in the existing district court case require a determination of the amount of water to which EPCWID, and by extension, Texas, is entitled. To the extent the United States or EPCWID believe the existing case may not squarely present the issues asserted in Texas' Complaint, additional claims against either the U.S. or New Mexico could be asserted.

The pending case illustrates an additional reason the federal district court is a preferable forum. An action in federal district court is better suited to a more complete resolution of the myriad complex issues surrounding the allocation of Project waters. The United States and its interests and obligations under various contracts and federal laws are central in any case concerning Project allocations. The United States recognizes as much by agreeing that it may be a required party to this case. U.S. Br. 21. Since jurisdiction in an original action cannot be exercised over the United States without its consent, the federal district court provides a preferable forum in that it allows for the resolution of all relevant and interrelated issues. See 43 U.S.C. § 390uu and 5 U.S.C. § 702 (waiving sovereign immunity for a suit in federal district court under the Reclamation Act and

[3] New Mexico has challenged the 2008 Operating Agreement as over-allocating water to Texas and authorizing new Project operations that violate federal laws.

Administrative Procedure Act); see also Section II, *infra*.[4]

Although overlooked by the United States, *Arizona v. New Mexico*, 425 U.S. 794 is squarely on point. In that case, Arizona sought leave to file an original action against New Mexico challenging the constitutionality of a New Mexico tax imposed on electricity generated in New Mexico but sold to customers in Arizona. *Id.* at 794-95. Arizona's complaint asserted interests both as a direct consumer of electricity subject to the tax, and in its capacity as *parens patriae* on behalf of its citizens who purchased this electricity. *Id.* at 796. The Court denied Arizona's motion for leave based on the existence of an alternative forum. *Id.* at 797. Specifically, three Arizona utilities that operated facilities in New Mexico and retailed energy through interstate lines to customers in Arizona declined to pay the New Mexico tax and filed a declaratory judgment suit in New Mexico state district court. *Id.* at 796. The Court found that the New Mexico state district court "provide[d] an appropriate forum in which the issues tendered [by Arizona] may be litigated." *Id.* at 797. The Court explained that

> [i]f on appeal the New Mexico Supreme Court should hold the electrical energy tax unconstitutional, Arizona will have been vindicated. If, on the other hand, the tax is

[4] New Mexico reserves the right to seek leave to file a counterclaim in this action to raise appropriate issues under federal law should the Court grant Texas' Motion for Leave.

> held to be constitutional, the issues raised now may be brought to this Court by way of direct appeal under 28 U.S.C. § 1257(2).

Id.

For the same reasons the state district court provided an alternative forum warranting denial of Arizona's motion for leave, the federal district courts provide an alternative forum warranting denial of Texas' motion for leave in this case. Like the utilities in *Arizona v. New Mexico*, EPCWID can assert the issues presented in Texas' Complaint in an action in federal district court. Reclamation and EBID could be joined in such a case. See *New Mexico v. United States*, No. 11-cv-00691. If necessary, that action can ultimately reach the Court on certiorari and thereby fully vindicate Texas' interests under the Compact.

Furthermore, the existence of a compact claim does not require exercise of original jurisdiction. Congressionally-recognized interstate compacts are federal law. *Cuyler v. Adams*, 449 U.S. 433, 442 (1981). Federal district courts can interpret and apply interstate compacts. See *Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30 (1994) (whether a corporation formed by interstate compact was entitled to Eleventh Amendment immunity), *U.S. Steel Corp. v. Multistate Tax Comm'n*, 434 U.S. 452 (1978) (whether a lack of formal Congressional approval invalidated an interstate compact); *NYSA-ILA Vacation and Holiday Fund v. Waterfront Comm'n of New York*

Harbor, 732 F.2d 292 (2d Cir. 1984) (whether the procedures of a commission formed by interstate compact were preempted by ERISA). Nor does the fact that Texas may not be a party in a federal district court action require exercise of the Court's original jurisdiction. See *United States v. Nevada and California*, 412 U.S. 534, 538 (1973) (absence of one state in federal district court proceeding was "not [a] determinative consideration[ ]"); Wright & Miller, § 4053.

Finally, Texas' and the United States' concerns, regarding the possible need to address groundwater pumping effects on the Project, can be addressed by the federal district court, if necessary. Surface water and groundwater are managed conjunctively in New Mexico under the prior appropriation doctrine. See N.M. Const. art. XVI; N.M.S.A. 1978, §§ 72-5-1 *et seq*., 72-12-1 *et seq*.; *City of Albuquerque v. Reynolds*, 379 P.2d 73 (N.M. 1963) (groundwater will be administered like surface water except as required by the subterranean nature of groundwater); 19.25.13.1 to .50 NMAC (State Engineer may regulate water rights without waiting for full adjudication by the courts); *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 289 P.3d 1232 (N.M. 2012) (same). Consequently, Reclamation can require administration of groundwater pumping to protect senior surface water

rights.[5] If necessary, EPCWID can require Reclamation to deliver the water to which it is entitled.

II. IF THE COURT GRANTS TEXAS' MOTION, NEW MEXICO REQUESTS THE OPPORTUNITY TO FILE A MOTION TO DISMISS

Before referring the matter to a Special Master, this Court should resolve the threshold legal issue of whether the United States is an indispensable party. The United States acknowledges it "may, in fact, be determined to be a required party" to the case Texas proposes. U.S. Br. 21. Nonetheless, the United States argues "[i]t would be premature at this stage to reject Texas's complaint based on the United States'

[5] A separate remedy exists to address Texas' claims that groundwater pumping in New Mexico is preventing Texas from receiving its share of Compact water. As explained in New Mexico's opening brief, the United States holds a New Mexico water right for the Project, the elements of which are being determined in the ongoing stream system adjudication in New Mexico state court. 43 U.S.C. § 666 (McCarran Amendment) (giving consent to join the U.S. as a defendant in any suit for adjudication of rights to the use of water **and for the administration of such rights**). If other New Mexico water users are depleting or impairing the Project's water right, there are remedies under New Mexico law, incorporated into Section 8 of the Reclamation Act (codified at 43 U.S.C. §§ 372, 383) that protect the U.S.'s Project water right. *Nebraska v. Wyoming*, 325 U.S. 589, 639-40 (1945) (administration of water in federal reservoir is subject to Wyoming law under Section 8 of the Reclamation Act). Those mechanisms, in turn, would keep Texas and EPCWID whole without the need to invoke this Court's original jurisdiction.

possible status as a required party." *Id*. According to the United States, this is so because "the United States may elect to intervene if the case goes forward." *Id*.

"[I]n original cases," the Court will, "where feasible . . . dispose of issues that would only serve to delay adjudication on the merits and needlessly add to the expense that the litigants must bear." *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973). The United States has previously recognized that "[i]nterstate water disputes pose complex trial-management problems once they proceed past the pleading stage." Brief for the United States as Amicus Curiae, *Montana v. Wyoming & North Dakota*, No. 137 Orig., at 19 (Jan. 1, 2008), available at www.stanford.edu/dept/law/mvn ("Montana Invitation Brief"). For that reason, the United States has argued that "an interstate water dispute . . . is particularly likely to benefit from an early judicial determination narrowing or even resolving the contested legal issues before the parties engage in fact development." Montana Invitation Br. 21.

In this case, the United States recommends that the Court resolve threshold issues before referring the matter to a Special Master. If the case proceeds, one of the issues that should be determined at the initial stage is the indispensability of the United States. *Arizona v. California*, 298 U.S. 558, 572 (1936) ("A bill of complaint will not be entertained which, if filed, could only be dismissed because of the absence of the United States as a party."). If the Court is inclined to grant Texas' Motion for Leave to File, New

Mexico requests that the Court set a schedule for resolution of this issue, including whether the United States intends to intervene. Resolution of this issue prior to lengthy proceedings before a Special Master will promote judicial efficiency and prevent wasted resources associated with litigating a case that may ultimately be dismissed for failure to join the United States.[6]

[6] In addition to briefing the issue of indispensability, if the Court grants Texas' Motion for Leave, New Mexico welcomes the U.S.'s suggestion that it be permitted to file a motion to dismiss to address threshold legal issues.

CONCLUSION

Texas' Motion for Leave to File Complaint should be denied.

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