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.

OFFICE OF THE SPECIAL MASTER

THE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY'S COMMENTS ON THE PROPOSED SETTLEMENT IN *TEXAS V. NEW MEXICO & COLORADO*, NO. 141, ORIGINAL

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INTEREST OF AMICUS CURIAE WATER AUTHORITY

The Albuquerque Bernalillo County Water Utility Authority ("Water Authority") is a quasi-state agency responsible for providing drinking water to more than 675,000 residents in Albuquerque and Bernalillo County, which are generally located within the Middle Rio Grande Valley, and its surroundings. It is the largest municipal water provider in New Mexico. The Water Authority conjunctively manages its groundwater and surface water rights to provide potable drinking water. Its groundwater wells are located within the Middle Rio Grande ("MRG") Underground Water Basin, authorized by the New Mexico State Engineer and administered by Permit Nos. RG-960 *et al*. and RG-4462 *et al.* The MRG Underground Water Basin is hydrologically connected to the Rio Grande.

The Water Authority also owns native Rio Grande surface water rights and 48,200 acre-feet per year ("afy") of imported Colorado River water from the San Juan-Chama Project ("SJCP") which is a federal Reclamation Project. *See* P.L. 87-483, 76 Stat. 96, 43 U.S.C. §620a. The Water Authority diverts and utilizes SJCP water under State Engineer Permit Nos. SP-4819 and SP-4830. The Water Authority uses its renewable surface water and saves groundwater whenever possible to preserve the groundwater as a drought reserve. However, pursuant to Permit No. SP-4830, the Water Authority can only divert its SJCP surface water when native

flows in the Rio Grande are 122 cubic feet per second or more at the Central Avenue Gage in Albuquerque.

The Water Authority's primary surface water storage occurs at Abiquiu Reservoir approximately 100 miles upstream from Albuquerque, but it also has a contract to store up to 50,000 acre-feet of SJCP water in Elephant Butte Reservoir. It utilizes that space to store SJCP water that is exchanged to offset the diversions of native Rio Grande water during periods when no SJCP water can be released from Abiquiu Reservoir.

Accordingly, given that the Water Authority's water sources are all dependent on the Rio Grande in some form, its ability to exercise its water rights is heavily dependent on how New Mexico administers the Rio Grande Compact ("Compact") in the MRG, particularly Article IV of the Compact.[1]

INTRODUCTION

The Water Authority submits these comments pursuant to the Special Master's Order dated July 25, 2025, because aspects of the settlement affect water use by the Water Authority in the MRG above Elephant Butte Reservoir.

[1] For Rio Grande Compact purposes, in New Mexico, the MRG is between Otowi Gage in Northern New Mexico and Elephant Butte Reservoir.

The Water Authority supports the consent decree implementing the Rio Grande Compact ("Compact Decree") among the three Compacting States. The Compact Decree appropriately articulates a division of surface water between New Mexico and Texas below Elephant Butte Reservoir, including allowing for variability in deliveries to account for changes in the natural water supply, and a gaging station to measure it. Texas and Colorado correctly leave it to New Mexico to administer water rights in New Mexico to make Compact deliveries. The Compact Decree is consistent with the Rio Grande Compact and properly resolves an interstate water dispute among Compacting States.

However, the Water Authority is concerned that certain Rio Grande Compact issues have not been addressed, including, without limitation: 1) the Project Operations Agreement allows Carryover Storage Water in Elephant Butte Reservoir for Elephant Butte Irrigation District ("EBID") and the El Paso County Water Improvement District No. 1 ("EP No. 1") which is not authorized by the Rio Grande Compact or federal law; and 2) reservoir operational rules and how Carryover Water in Elephant Butte Reservoir is accounted for within the Rio Grande Compact. Carryover Water could have negative impacts on the Water Authority. The Water Authority is concerned that these unresolved issues and ambiguities will increase the likelihood that this will not be a lasting settlement or worse, result in additional litigation.

The Water Authority does not support the Groundwater Agreement between New Mexico and the United States. The Water Authority believes the United States' "unique federal interests" are limited to its claims about ensuring compliance with its international treaty delivery obligations to Mexico and does not extend to intrastate water administration in New Mexico.[2] Conceptually, the Water Authority supports the use of the D2 Period baseline for Rio Grande Compact compliance and New Mexico's depletion reduction commitment in the Lower Rio Grande ("LRG"), although as a matter of intrastate administration to meet interstate CCompact delivery obligations, New Mexico's depletion reduction should be a matter solely within New Mexico's discretion without involvement by the United States.[3]

The Water Authority takes no position on the Projects Operation Agreement, other than to note that, importantly, it contains provisions that change Rio Grande Project operations to ensure that New Mexico and Texas can transfer water to each other to meet Rio Grande Compact apportionment delivery requirements between the two States. Within this particular agreement, the Water Authority is specifically

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[2] *See Texas v. New Mexico and Colorado,* 583 U.S. 407, 413-15.

[3] The D2 Period baseline is the hydrologic condition between 1951 and 1978, that includes the impact of groundwater pumping in Texas and New Mexico on the surface flows of the Rio Grande. For Rio Grande Compact purposes, in New Mexico, the LRG is between Elephant Butte Reservoir and the New Mexico-Texas state line.

concerned about the creation of the Carryover Storage accounts and its effects on it and the MRG.

The Water Authority also takes no position on the Miscellaneous Purposes Act Contract or the Third-Party Implementing Contract. The two contracts are important steps to facilitate the conversion of Rio Grande Project irrigation water to non-irrigation uses in the Lower Rio Grande as a potential source of surface water offsets for groundwater diversions, where needed for New Mexico State Engineer permit compliance, and also potentially as a source of "replacement water" when temporary cessation of water use may be necessary for intrastate administration in New Mexico to meet Compact delivery obligations.

LEGAL BACKGROUND

Rio Grande Compact

The timing and availability of native Rio Grande water for water users in the MRG is governed by Article IV of the Rio Grande Compact. Article IV of the Rio Grande Compact apportions a variable amount of native Rio Grande water to water users within the MRG based on an inflow-outflow index. The MRG is required to deliver an amount of water into Elephant Butte Reservoir based on the amount of water flowing past the upstream Otowi Gage, with adjustments for native Rio Grande water stored in upstream reservoirs. With the accounting modification in

1949, the delivery point for compliance with Article IV changed from the San Marcial Gage to Elephant Butte Reservoir. Thus, Article IV of the Rio Grande Compact establishes an amount of native Rio Grande that can be consumed in the MRG each year.

A defining feature of the Rio Grande Compact is the use of "credits" and "debits" in managing delivery obligations from the states of Colorado and New Mexico. Under Article III, Colorado is obligated to deliver a percentage of the inflow measured at a gaging station near Lobatos, Colorado, to the Colorado-New Mexico state line. Under Article IV, New Mexico is obligated to deliver a percentage of the inflow measured at Otowi Gage into Elephant Butte Reservoir. However, Article VI provides that Colorado may accrue debits up to 100,000 acre-feet in its delivery obligation. New Mexico may accrue up to 200,000 acre-feet. Neither state is penalized for short falls under these amounts in a given year. In fact, the Compact operated under debit status between 1942 and the actual spill in 1988. Both States are limited to annual over deliveries of 150,000 acre-feet.

Nothing in the settlement documents purports to change Article IV, but some settlement terms will negatively affect the amount of water that can be consumed in the MRG.

Water Authority Contract for Storage of SJCP Water in Elephant Butte Reservoir.

The Water Authority has a contract with the United States Bureau of Reclamation ("BOR") for the storage of SJCP water in Elephant Butte Reservoir. The ability to store SJCP water in Elephant Butte was authorized by Congress in 1981. *See* Public Law 97-140, § 5, 95 Stat. 1717. The authorizing legislation specifically required that the "amount of evaporation loss and spill chargeable to SJCP stored pursuant to subsections (b) and (c) of this section shall be accounted as required by the Rio Grande Compact and the procedures established by the Rio Grande Compact Commission." *Ibid.* It was recognized that storage of SJCP water in Elephant Butte Reservoir would affect the operations of Elephant Butte Reservoir, including the amount of evaporation and the potential for spills, and thus required that these issues be addressed by the Rio Grande Compact Commission ("RGCC").

WATER AUTHORITY COMMENTS

POINT I

The Storage of Carryover Water in Elephant Butte Reservoir is not Authorized by the Rio Grande Compact or Federal Law

In the 2008 Operating Agreement among the United States, EBID and EP No. 1, the two irrigation districts, with only the blessing of the BOR, gave themselves accounts for Carryover Storage Water. *See* 2008 Operating Agreement. Tr. Ex.

NM-2373. "Carryover Water" is defined as the "Annual Allocated Water allotment balance remaining on the water account for each district at the end of a given Water Year." *Id.* at Section 1.8. "Actual Carryover Water" is defined as "the increase in a district's allocation due to applying Carryover Water amounts for each district in the allocation calculations." *Id.* at Section 1.9. Each district is allowed to accumulate Actual Carryover Water in an account up to 60% of each district's full year allocation." *Id.* at Section 1.1.

In Section III of the Project Operations Agreement, the United States, New Mexico, EBID, and EP No. 1 mutually agreed to drop any claims regarding the 2008 Operating Agreement. *See* Anderson Decl., ¶¶ 35-36. Thus, the provisions of the 2008 Operating Agreement not modified by the Project Operations Agreement, including the creation of Carryover Storage accounts, are agreed to as among those parties.

The Rio Grande Compact does not authorize the storage of Carryover Water in Elephant Butte Reservoir. Nor is Carryover Storage authorized by any other federal statutes, or by any Resolution of the Rio Grande Compact Commission. The Rio Grande Compact provides for the allocation of Usable Water to the two districts and Mexico. Usable water specifically excludes credit water stored by New Mexico and Colorado, and does not include the amount of Actual Carryover Water, meaning

the districts each have two "pots" of water in Elephant Butte Reservoir, with one account not being considered in determining annual water use.

In addition to Carryover Storage not being in the Rio Grande Compact, the states have not developed reservoir operation rules as to how Carryover Storage will be accounted, *viz-a-viz* other waters in Elephant Butte Reservoir. In contrast, in *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981), amendments to federal law were required to enable the City of Albuquerque, now the Water Authority as its successor, to store unused SJCP water in Elephant Butte Reservoir. That case involved "imported" water from the SJCP *i.e.,* the "recreational" use of stored water – a use not contemplated in the SJCP authorizing legislation. Because it was a new category of stored water in Elephant Butte Reservoir, the federal legislation explicitly required that evaporation loss and spill chargeable to storage be accounted as required by the Rio Grande Compact and procedures established by the RGCC.

The Water Authority was required to secure the passage of federal legislation and enter into a contract with BOR to obtain a new storage account in Elephant Butte Reservoir in *Jicarilla Apache, supra,* at 6. The federal legislation was required to ensure compliance with the Rio Grande Compact and importantly, called for the RGCC to address how the storage of SJCP water relates to spills and evaporation. Carryover Storage accounts in Elephant Butte Reservoir should also be required to

comply with the Rio Grande Compact, either legislatively or by Resolution of the RGCC, including rules for accounting for spills and evaporation, to eliminate any potential negative impacts to the Water Authority and the MRG.

POINT II

The Rio Grande Compact does not account for Carryover Water in Elephant Butte Reservoir and it can negatively affect the Water Authority and MRG

The Rio Grande Compact is administered by the RGCC, whose powers and duties include Compact accounting on an annual basis. *See* Art. XII. As stated above, Carryover Water was not contemplated by or defined in the Rio Grande Compact. In addition, Carryover Storage Water is not accounted for by the RGCC, leading to great uncertainty in terms of reservoir operations and evaporative losses, which impact the Water Authority and other water users.

Pursuant to Article V, and the unanimous Resolution of the Rio Grande Compact Commission adopted on February 24, 1948, New Mexico is obligated to deliver Rio Grande water into, and measured at, Elephant Butte Reservoir based on the flows measured at the Otowi Gage. The Resolution also provided that "(6) Elephant Butte Effective Index Supply is the recorded flow of the Rio Grande at the gaging station below Elephant Butte Dam during the calendar year plus the net gain in storage in Elephant Butte Reservoir during the same year minus the net loss in storage in said reservoir, as the case may be."

Under the amended Art. IV, the quantity of water delivered into Elephant Butte Reservoir takes into account the net change in storage in the reservoir including the annual amount of water that evaporates. Under the current accounting procedures, Usable Water, credit water, and SJCP water stored in Elephant Butte reservoir suffer evaporative losses in proportion to the total amount stored in the reservoir. Actual Carryover Water is not accounted for by the RGCC and therefore does not suffer evaporative losses. Any increase in evaporation due to the storage of Actual Carryover Water will be accounted against the net change in storage of MRG deliveries, credit water, and Water Authority SJCP water. Thus, not accounting for Actual Carryover Water could increase the amount of debits owed by New Mexico or reduce the amount of credit water available to New Mexico. It would also reduce the amount of Water Authority SJCP water stored. Nothing in the Compact Decree nor the Project Operations Agreement addresses the effects of Carryover Storage Water on the MRG and how that storage affects the operation of Elephant Butte Reservoir. Compact

Another issue is that the operation of Elephant Butte Reservoir is a key component of the Rio Grande Compact. When the reservoir is full and excess water spills, the amount of credits and debits owed by New Mexico and Colorado are erased. *See* Art. I, ¶¶ (p) and (q). Actual Carryover Water will increase the amount of storage in the reservoir, thereby reducing the unfilled capacity potentially leading

to additional spills. Furthermore, how and when Actual Carryover Water is accounted for in the event of a spill is not known. For example, SJCP water stored in Elephant Butte Reservoir currently spills first so that the storage does not interfere with the operations of the reservoir. As a newly created account, Actual Carryover Water should spill before SJCP, but that issue has not been addressed. Finally, storage of Actual Carryover Water may impede the ability of the Water Authority to store SJCP under certain conditions requiring increased groundwater use thereby increasing the Water Authority's obligation to offset depletions on the Rio Grande.

In addition, the increase of Actual Carryover Water will change the amount of annual evaporation. Any change in evaporation or the potential for spills related to Carryover Water in Elephant Butte has not been addressed. Nor are there any procedures for the effect of this storage on the water available to the MRG under Article IV or on the Water Authority's SJCP water stored in Elephant Butte Reservoir.

The practical effect of Actual Carryover Storage is that the increase of water in the Elephant Butte Reservoir will affect how and when the reservoir spills and the amount of evaporation in the Reservoir. Increases in evaporation from Carryover Storage are not authorized or accounted for in the Rio Grande Compact and will affect the amount of stored Water Authority SJCP water and the amount available for use under Art. IV of the Rio Grande Compact.

In sum, effects on the Water Authority and MRG from Carryover Storage Water is as follows: 1) Evaporation in Elephant Butte Reservoir is charged proportionally to the water stored based on a percentage of the amount stored divided by the total amount stored. This requires increased deliveries into Elephant Butte Reservoir from the MRG under Art. IV, causing less native Rio Grande surface water to be available in the MRG (potentially affecting the Water Authority's ability to use its SJCP water under Permit No. SP-4830). It also affects SJCP water and credit water assuming they were all being stored; 2) Less unfilled capacity in Elephant Butte Reservoir which could reduce the amount available for storage of SJCP water; 3) Less unfilled capacity could lead to a spill because there is no space available. Carryover Storage is not accounted for, and the Water Authority is not sure how and when it spills. SJCP water currently spills first. Carryover Water should now spill first; 4) Increased evaporation means more delivery requirements for the MRG - equals more debits. If credit water is in the reservoir, it means more evaporation charged and less credit water for New Mexico.

POINT III

The Water Authority does not Support New Mexico's Groundwater Agreement with the United States

The Groundwater Agreement sets forth New Mexico's commitment to depletion reduction in the LRG and then describes two "enforceable hydrologic

conditions" in which New Mexico agreed to maintain the Upper Valley Diversion Ratio above 0.79 and to ensure aquifer levels were not being reduced when releases from Caballo Reservoir exceed 400,000 acre-feet over a three-year running average. The basis for this agreement lies in the United States' claim that it has a "Compact right" to prevent Project interference in New Mexico by other New Mexico water users. How New Mexico administers water rights intrastate should be solely within New Mexico's discretion, but the Groundwater Agreement avoids judicial resolution of that issue at the present time.

Since the 1860s, Congress has stated and the courts have held that States have exclusive administration and control over their water resources, with limited exception. *See* Homestead Act of July 9, 1870, 16 Stat. 217 (1870)*;* Desert Land Act of 1877, 19 Stat. 377 (1877); 43 U.S.C. §321 *et seq*.; *California Oregon Power Company v. Beaver Portland Cement Co.*, 297 U.S. 142 (1937); *United States v. California*, 436 U.S. 645 (1978). New Mexico has long been at the forefront of preventing or limiting federal control or involvement in intrastate water administration. *See United States v. New Mexico,* 438 U.S. 696 (1978). The Water Authority understands that New Mexico must reduce depletions in the LRG to make interstate Compact deliveries to Texas. However, it should be a matter solely within New Mexico's discretion to take the administrative actions necessary to achieve Compact compliance.

The Water Authority is concerned that there is ambiguity and could be litigation related to the extent of the New Mexico' enforceable obligations to the United States in the Groundwater Agreement. Is New Mexico's commitment on the two "enforceable hydrologic conditions" satisfied with consultation with the United States? The Groundwater Agreement allows the United States to sue New Mexico in federal court to enforce the Agreement. Can the United States sue New Mexico if the conditions are not met? There is also ambiguity in the criteria of "Project Viability" as well as how to measure aquifer declines and against what baseline.

The Water Authority will strenuously object if the United States attempts to have any role in intrastate water administration in the MRG.

POINT IV

The Settlement is not Complete

Critically, the settlement is not complete. There were two ways in which this case could have been resolved. The first would have involved a resolution of the interstate dispute between New Mexico and Texas leaving completely untouched any intrastate administration issues in New Mexico. The second should involve a resolution of the interstate dispute between New Mexico and Texas, and resolving all intrastate administration issues in New Mexico. Instead, the settlement package to date omits important LRG Adjudication issues and intrastate administration issues

which, if unresolved, have the potential to contradict parts of the settlement, make New Mexico's compliance extremely difficult, and result in more litigation.

While New Mexico may have agreed to support an adjudication of 3.024 afy/acre for combined surface water and supplemental groundwater for farmers within EBID that already have groundwater wells drilled, none of the LRG water users have agreed to those terms, which appear to be based on a dubious legal theory. The LRG Adjudication Court and appellate court may also not agree with such terms. Likewise, while New Mexico may have agreed to support a United States 1903 Project priority date, that issue is still disputed and is being litigated in New Mexico. Many of the LRG *Amicus* in this case have supported the duty of 3.024 afy/acre for combined rights and the 1903 priority, but it was in the context of settlement negotiations and with concessions on issues of importance to them. The Water Authority, not being among them, remains interested in ensuring that such water duty and priority determinations are grounded in the law and facts because of their real-world implications on all other water users and the precedential effect on a MRG Adjudication.

New Mexico also anticipates it will need intrastate administration beyond the stated depletion reduction to make its Compact deliveries to Texas. If New Mexico attempts strict priority administration in the LRG, litigation with dozens of users will last for decades. Instead, New Mexico and its water users are discussing "alternative

administration agreements" which would assist New Mexico in making its Compact deliveries through voluntary agreements among New Mexico water users that result in reducing depletions to a sufficient level for the State to meet its Compact delivery obligation.

Currently the settlement is incomplete because there are still outstanding LRG Adjudication issues and intrastate administration issues that must be resolved for the settlement to work. The parties' agreement to negotiate these issues in the future is a nod in the right direction, but it hardly guarantees that these issues will be resolved. It is regrettable that the LRG *Amici's* interest were pushed off until the end and remain unresolved.

CONCLUSION

As stated above, the Water Authority has disagreements and concerns with the settlement package and believes the other settlements should not become final until the remaining LRG Adjudication issues and LRG intrastate administration issues are resolved. It is also concerned about tensions in the settlement documents regarding the primacy issue, *viz.*, the Rio Grande Compact having primacy over the Rio Grande Project, and whether the United States had any viable "Compact level claims" that would have allowed it to dictate intrastate water administration in New

Mexico. Those unresolved issues increase the likelihood that this will not be a lasting settlement.

Because the Water Authority believes the settlement is a *fait accompli*, it does not oppose the granting of the two motions before the Special Master: 1) the joint motion of the three Compacting States to enter the Compact Decree and 2) a motion to dismiss with prejudice the United States' claims in the original action.

Respectfully submitted this 14th day of October,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served on this 14th day of October 2025, through the CM/ECF system, which caused the parties or counsel of record to be served by electronic means.

STEIN & BROCKMANN, P.A.

/s/James C. Brockmann
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