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

CITY OF LAS CRUCES' COMMENTS ON PROPOSED SETTLEMENT IN *TEXAS V. NEW MEXICO & COLORADO*, NO. 141, ORIGINAL

JAY F. STEIN, Esq.*
JAMES C. BROCKMANN, Esq.
JOHN M. STOMP, III, Esq.
Stein & Brockmann, P.A.
P.O. Box 2067
Santa Fe, NM 87504-2067
(505) 983-3880
jfstein@newmexicowaterlaw.com
**Counsel of Record*

BRAD DOUGLAS Esq.
City of Las Cruces
City Attorney's Office
P.O. Box 20000
Las Cruces, NM 88004
bdouglas@las-cruces.org

Counsel for Amicus Curiae City of Las Cruces

Las Cruces ("City") is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a water supply for a growing community recognized as a municipality under the laws of the New Mexico Territory[1]. The City was founded in the mid-1800s, the first settlers having arrived in 1839, led by Don Jose Costales. *See Regional Planning Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas*, *1936-37* at 72 (1938). The emerging community received its first water supply from surface water in the Acequia Madre de Las Cruces around 1849.[2] Las Cruces transitioned to groundwater wells more than a century ago. Today the City is responsible for providing a potable water supply to more than 125,000 customers and essential public health and welfare services. Las Cruces is one of the fastest growing municipalities in the western United States and its population is expected to exceed 150,000 by 2050. The City's drinking water

[1] *See* An Act Providing for the Construction of an Acequia and Contra-Acequia to Supply with Water the Town of Las Cruces in the Count of Dona Ana (Approved January 9, 1869); An Act Providing for the Construction of an Acequia, and Branches of Acequias, to Supply the People of Las Cruces, in the County of Dona Ana, with water (Approved January 9, 1874).

[2] An *acequia* is an earthen irrigation ditch serving various water users, or *parcienties*, derived from Andalusia in southern Spain on the basis of Arabic precedent and use in North Africa and adopted in New Mexico under the law of the Spanish Crown.

supply comes from groundwater wells located in the Lower Rio Grande Underground Water Basin. Pursuant to state law, Las Cruces is entitled to a forty-year water supply. *See* NMSA1978, § 72-1-9 (1985).

Las Cruces submits these Comments to the settlement in *Texas v. New Mexico & Colorado*, No. 141, Original.[3] The City has participated as an *amicus* in the litigation since 2014 and in the settlement negotiations since 2022, and supported entry of the proposed "Consent Decree" rejected by the Court in 2024. *See Texas v. New Mexico & Colorado,* 602 U.S. ___ (2024). The settlement resolves the interstate dispute by providing Texas deliveries of water to the Effective El Paso Index ("EEPI"), along with mechanisms for addressing both negative and positive departures between the Elephant Butte Irrigation District and El Paso Water Improvement District No. 1 through "balance transfers" between the two irrigation districts. The City generally supports the Joint Motion to Dismiss with the qualification stated below and the Joint Motion to Enter Compact Decree Supporting the Rio Grande Compact (with Attachments). The Miscellaneous Purposes Act Contract and the Third-Party Implementing Contract will facilitate

[3] The settlement involves separate agreements and technical memoranda including; (i) a Groundwater Settlement Agreement for the Basin including a monitoring agreement for water levels in the aquifer; (ii) a Project Operations Settlement Agreement; (iii) Proposed Compact Decree and Decree of Dismissal dismissing the case: (iv) Miscellaneous Purposes Act Contract between the U.S. and EBID for transfers of water from EBID pursuant to Reclamation law; and (v) a Third-Party Implementing Contract between EBID and the NMISC.

the conversion of the Rio Grande Project agricultural water to DCMI users as replacement or "offset" water.

The Groundwater Settlement Agreement and Project Operations Settlement Agreement address post settlement administration. Positive elements include adoption of the "D-2" baseline for managing Compact deliveries to Texas, which recognizes groundwater use in New Mexico through 1978. However, these Agreements lack finality and affect the City's functions because its 1905 priority is not final, but rather is dependent on negotiations in Part II of the Project Operations Settlement Agreement.[4] Adoption of these two Agreements, referenced in the Joint Motion to Dismiss, should be deferred until a resolution of the City's sanitary, and domestic, and public health and welfare supply issues have been satisfactorily resolved through adoption of its 1905 priority date in upcoming negotiations.

[4] The same issue exists for other Domestic, Commercial, and Industrial users ("DCMI"), specifically the mutual domestics. Under New Mexico law, mutual domestic water consumers associations are providers of domestic water in rural communities pursuant to the Sanitary Projects Act of 1947, NMSA 1978, § 3-29-3 states: "The purpose of the Sanitary Projects Act is to improve the public health of rural communities in New Mexico by providing for the establishment and maintenance of a political subdivision of the state that is empowered by the state to receive public funds for acquisition, construction, and improvement of water supply, reuse, storm drainage, and wastewater facilities in communities, and to operate and maintain such facilities for the public good." Over the recent past, the United States has funded the water use of mutual domestics in Dona Ana County.

BACKGROUND

Rio Grande Compact

The Rio Grande rises in the San Luis Valley in Colorado, flows southward into New Mexico, and then into Texas. The river was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). In New Mexico, the Rio Grande flows through the state into Elephant Butte Reservoir located approximately 100 miles north of the New Mexico-Texas state line. Article IV of the Rio Grande Compact, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and is determined as a percentage of the inflow recorded at a gaging station at Otowi, New Mexico. A signal feature of the Compact is the use of "accrued credits" and "accrued debits" which allow Colorado to accrue debits in its delivery obligation to New Mexico of up to 100,000 acre-feet and New Mexico to accrue debits in its deliveries to Texas of 200,000 acre-feet. *See* Art. VI.

The Rio Grande experiences extreme variability in supply of surface water. The period from 1942-1985 was a period in which the two upstream states of Colorado and New Mexico amassed large accrued debits. Two lawsuits were filed in the United States Supreme Court: (i) *Texas v. New Mexico,* No. 9, Original, in which Texas claimed Compact violations against New Mexico based on New

Mexico's storage practices in El Vado Reservoir in the Middle Rio Grande, which Texas claimed were contrary to Articles VII and VIII of the Rio Grande Compact; and (ii) *New Mexico and Texas v. Colorado,* No. 29, Original, in which New Mexico and Colorado challenged Colorado's accrued debit as a violation of Article VI when it reached nearly 1,000,000 acre-feet. Because of the unreliability of surface supply, irrigators within EBID rely on supplemental groundwater diversions from the Lower Rio Grande Underground Water Basin. Some 85-88% of all groundwater diversions in the LRG are made by irrigators within EBID as contrasted with 12-15% from the DCMI community, some 7% of which is by the City.

Municipal Water Use by Las Cruces

The City serves four sectors with municipal water. They include the health sector consisting of three hospitals with 3,650 employees, including the regional medical center on Telshor Blvd. serving Dona Ana County with state of the art facilities. The City serves an educational sector with 18 elementary schools with 8,239 students, 4 middle schools with 3,344 students, 4 high schools with 6,546 students and 10 private/charter schools with 1,452 students. The schools provide nutritional programs to children. The economy of Las Cruces includes employing some 49,800 people including 7,891 in Education Services; 7,553 Health Care &

Social Assistance, and a retail and manufacturing sector employing 5,827 in Retail Trade; and 1,877 in Manufacturing.

The principal supply is to residential customers of 83,632 single family residences and 30,880 multiple family residences. This is water for sanitary and domestic use. Recreational supply is made available for parks, trails, and sport fields. Moreover, Las Cruces provides back-up water supply backup to the Town of Mesilla (approximate population 1,850) and residential customers from the Dona Ana Mutual Domestic Water Consumer Associations (approximately 5,700 customers). Underlying all supply to municipal buildings are state mandates requiring reservations of water for fire flow protection in buildings.

The City's water use presently relies primarily on two groundwater rights: the LRG-430 *et al.* "Valley rights" with a vested diversion amount of 21,869 acre-feet per[5] year, and the East Mesa or "Jornada del Muerto" water rights with a permitted diversion of 10,200 AFY under the LRG-3200 series of wells. The East Mesa rights are disconnected from the Rio Grande, *i.e.,* diversions from the

[5] In New Mexico, the State Engineer has jurisdiction over surface water by virtue of the Water Code of 1907. He has jurisdiction over groundwater only when he has "declared" an underground water basin with "reasonably ascertainable boundaries." *See* NMSA 1978, § 72-12-1 (1907). Rights initiated prior to the declaration of a basin and carried to completion with "reasonable diligence" are considered vested. *See State v. Mendenhall,* 1961-NMSC-083, 68 N.M. 467, 362 P. 2d 998; *State of New Mexico v. Rio Rancho Estates*, 1981-NMSC-017, 95 N.M. 560, 624 P. 2d 502. The Lower Rio Grande Underground Water Basin was declared on September 11, 1980. The City's LRG-430 *et al.* water rights are vested.

Jornada del Muerto do not have a significant depletive effect on the Rio Grande, and municipal effluent derived from these diversions and discharged in the Rio Grande through the Jacob Hands Sewage Treatment Plant is considered "imported water" because it is added to the Rio Grande system. The City has other rights, including 6,753 acre-feet per year ("AFY") purchased from the Jornada Water Co, and the West Mesa permit of 8,000 AFY under the LRG-3700 series slated to come online in the mid 2030s.

Lower Rio Grande Adjudication

The Lower Rio Grande Adjudication ("LRG Adjudication") was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico to quantify the water rights owned by water users in the Lower Rio Grande. *See State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996). The LRG Adjudication includes claimants of surface water and groundwater rights between Elephant Butte Reservoir and the New Mexico-Texas state line. All claimants to water rights within a stream system must be joined to ensure due process. The City seeks judicial recognition of its water rights to supply its municipal needs. Two decisions from the adjudication court are currently on appeal to the New Mexico Court of Appeals. First, the LRG Adjudication Court held that groundwater is not part of the Rio Grande Project water supply. The United States appealed this

decision on April 8, 2025. Second, the adjudication Court gave a 1903 priority date to the Rio Grande Project based on a different theory than that used for any other defendants including Las Cruces. Las Cruces appealed this decision on May 7, 2025. On June 11, 2025, the appeal was stayed for six months.

CITY OF LAS CRUCES' COMMENTS

The City's issues with the settlement concern unresolved post-settlement administration of City groundwater rights. The administration of vested City water rights under LRG-430 *et al.,* with its adjudicated 1905 priority date is essential to provide domestic, sanitary, and public health and welfare services to the City, other communities for which Las Cruces serves as emergency backup, Dona Ana County, as well to provide source water for the City's ASR "alternative administration" proposal.

The settlement focuses on "depletion reductions" consisting of the retirement of groundwater rights on some 9,000 acres of irrigated land in EBID to produce 18,200 acre-feet of water to bring the system back into balance with the 1978 condition of the river which was agreed to by the United States as the baseline (the "D-2 Period baseline"). It contains two "enforceable hydrologic conditions." The first is that the Upper Valley Diversion Ratio ("UVDR") must remain above 0.79, and an 'aquifer health' protocol designed to arrest declining water levels in the aquifer when releases from Caballo Reservoir exceed 400,000

acre-feet over a three-year running average. Aquifer level monitoring is to be done with selected groundwater monitoring wells called "Indicator" wells. Falling aquifer levels under the condition set out above triggers "consultation" with the Bureau of Reclamation and further "management actions" by the State. The State's goal is to engage the water users in a collaborative 'alternative administration' process - for which the City has proposed augmenting supply with an Aquifer Storage and Recovery (ASR) program to store effluent or other water underground for diversion and use when needed.[6]

Post-settlement administration of groundwater

The Groundwater Settlement Agreement creates "Enforceable Hydrologic Conditions" in Section IV which divide into two components: "(A) UVDR3" and "(B) Aquifer Storage Loss." (A) UVDR3 is intended to maintain a delivery efficiency from releases from Caballo Reservoir to diversion by farmers in Elephant Butte Irrigation District. Continued administration of the City's "declared" vested LRG-430 *et al.* rights, as historically undertaken, is essential for the City and would provide source water for the ASR program. The use of "offsets" to compensate for the depletive effects of groundwater pumping in other City permitted rights is already a feature of New Mexico water administration. *See Albuquerque v. Reynolds,* 1962-NMSC-173, 71 N.M. 428, 379 P.2d 73; *Carangelo*

[6] *See* NMSA 1978, § 72-5A-1 *et. seq.* (1999).

v. Albuquerque-Bernalillo County Water Utility Authority, 2014-NMSA-032, 320 P.3d 492. Other City water rights permits already have 'Conditions of Approval' requiring that depletive effects on the Rio Grande be offset to address the UVDR3 protocol.

"(B) Aquifer Storage Loss" is intended to stabilize water levels in the aquifer. It commits New Mexico to "take all reasonable actions to achieve stable or gaining Aquifer levels when CAB3 is greater than 400,000 acre-feet, while considering Project Viability. *See* Groundwater Settlement Agreement at Part B. When Caballo Reservoir releases exceed 400,000 acre-feet over a consecutive three-year period, and water levels in selected Indicator wells fall, "consultation" followed by other "management actions" are proposed. Future actions are subject to considerations of "Project Viability." As explained by the State's hydrologist at hearing in Philadelphia:

> [The] consultation process would involve analyzing and studying the data associated with the conditions that triggered it, looking at long-term trends and, if necessary, coming up with a remedial action that New Mexico could take to address the problem. That kind of -- those kind of recommendations are always going to take into account project viability in New Mexico, because we don't want to address Project interference by destabilizing the Project itself. Tr. Vol. I at 104.

There are two uncertainties with this. First, the State has recognized a combined surface and groundwater right of 3.024 AFY per acre within EBID. It is not clear to the City how "Project Viability" is realted to this. There is no way of

knowing what management of these rights will entail or how management actions could reverse falling water levels. Second, while the State has stated the City's 1905 priority date for the LRG-430 *et al.* right is unlikely to be implicated in a priority call, the City's priority date is subject to the negotiations in Part II of the Project Operations Settlement Agreement, "LRG Adjudication and Related Issues," which is intended to address outstanding adjudication issues in district court and the pending appeals at the New Mexico Court of Appeals through negotiations. Because the amount of water the City will have to supply residences, school districts, commercial users, and the health sector depends on the outcome of a future negotiation process in Part II of the Project Operations Agreement, the City's primary supply obligations summarized at p. 4 are at risk.

Alternative administration

The State's goal is to encourage the stakeholders in an "alternative administration" process to comply with the settlement. *See* Project Operations Settlement Agreement at Part II. B. The City will participate in this process with other *amici* and has proposed storing water underground in an ASR program for diversion and use by the City or others in negative departure years. Depending on the administration of the LRG-430 *et al.* right, Las Cruces has sufficient source water from treated effluent from the East Mesa and the City's vested right under RG-430 *et al.* together with what water can be salvaged from the yearly allocation

to City farms in EBID for a viable ASR program. The key component is LRG-430 *et al.* As set forth above, the availability of this water is dependent upon continuation of its historical administration with a priority date of 1905, including a vested right to deplete the Rio Grande, which can be diverted from the Rio Grande as wet water for storage underground. While the City has received a Consent Order for LRG-430 *et al.,* it is subject to negotiations in Part II. B of the Project Operations Agreement. Moreover, the implementation of an ASR program depends on construing the Order to allow diversion and storage of LRG-430 water underground.

CONCLUSION

For the reasons stated herein, adoption of the Groundwater Settlement Agreement and Project Operations Settlement Agreement should be deferred pending the outcome of negotiations on adjudication issues as set forth at p. 3, above.

Respectfully submitted this 14th day of October, 2025,

/s/ Jay F. Stein
JAY F. STEIN, Esq.*
JAMES C. BROCKMANN, Esq.
JOHN M. STOMP, III, Esq.
Stein & Brockmann, P.A.
P.O. Box 2067
Santa Fe, NM 87504-2067
(505) 983-3880
jfstein@newmexicowaterlaw.com
**Counsel of Record*

BRAD DOUGLAS Esq.
City of Las Cruces
City Attorney's Office
P.O. Box 20000
Las Cruces, NM 88004
bdouglas@las-cruces.org

Counsel for Amicus Curiae
City of Las Cruces

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/Jay F. Stein
Jay F. Stein