

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.

Before Special Master Honorable D. Brooks Smith

**MEMORANDUM OF THE NEW MEXICO *AMICI CURIAE* IN SUPPORT
OF JOINT STATUS REPORT OF THE COMPACTING STATES AND THE
INDEX DECREE**

This Memorandum is submitted by the New Mexico *amici curiae* in support of the Joint Status Report of the Compacting States and the Index Decree referenced therein. The New Mexico *amici* consist of the Albuquerque Bernalillo County Water Utility Authority, the New Mexico Pecan Growers, the City of Las Cruces, New Mexico State University (“NMSU”), TXNM Energy, Inc. (“TXNM”) (formerly Public Service Co. of New Mexico), the Camino Real Regional Utility

Authority (“CRRUA”), and the Southern Rio Grande Diversified Crop Farmers Association. Together they represent New Mexico’s municipal, agricultural, and utility interests affected by Original, No. 141, and have assisted New Mexico in representing their interests under the *parens patriae* doctrine governing original actions in the United States Supreme Court. The New Mexico *amici* have actively participated in this matter to support New Mexico at trial, and in all settlement negotiations. They fully support the Joint Status Report filed by the Compacting States and the proposals contained therein for future proceedings in this matter.

BACKGROUND

Rio Grande Compact

The Rio Grande 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”). Pursuant to Article III of the Rio Grande Compact, Colorado is obligated to deliver a percentage of the recorded upstream inflows from a gaging station near Lobatos, Colorado, to the Colorado-New Mexico state line. Article IV, as amended, specifies New Mexico’s delivery obligation into Elephant Butte Reservoir and is determined from a percentage of the inflow at a gaging station at Otowi, New Mexico, located between Taos and Santa Fe. The apportioned surface water is stored in Elephant Butte Reservoir before being released to irrigators in southern New Mexico.

Surface water apportioned by the Compact is divided between the two irrigation districts in the Rio Grande Project (“Project”): 57% to Elephant Butte Irrigation District (“EBID”) in New Mexico and 43% to El Paso Water Improvement Dist. No. 1 (“EP No. 1”) in Texas. The two constituent groups that are comprised of members of EBID, the New Mexico Pecan Growers and the Southern Rio Grande Diversified Crop Farmers Association, are New Mexico *amici* and are the owners of the majority of irrigated acreage within EBID and the appurtenant water rights used to irrigate it.¹

The Rio Grande bisects the State of New Mexico from the northern border with Colorado, emptying into Elephant Butte Reservoir 150 miles north of the Texas state line. Bordering the Rio Grande are many of the state’s municipalities including Taos, Santa Fe, Albuquerque, and Las Cruces. Their municipal water rights are largely based on diversions from aquifers hydrologically connected to the Rio Grande.

The apportionment set forth in Articles III, IV, and VI provides significant flexibility in Compact operations. The Compact does not impose specific, fixed delivery obligations independent of river conditions and the two upstream states are not penalized by shortfalls in individual years. Instead, Article IV provides a highly

¹ It is important to emphasize that the members of these farmer groups do not believe EBID represents their interests in this matter.

flexible apportionment that reflects inflow in any given year in New Mexico, and sets its delivery obligation accordingly. Article VI permits the upstream states of New Mexico and Colorado to accrue debits instead of being charged for a yearly underdelivery. The Compact has operated successfully under long periods of debits, *i.e.*, between 1942 and 1985. *See generally S.E. Reynolds, Phillip B. Mutz, Water Deliveries Under the Rio Grande Compact*, 14 N.R.J. 201 (1974).

Water Administration on the Rio Grande

The New Mexico State Engineer has jurisdiction over all surface water in New Mexico, by virtue of the Surface Water Code of 1907. *See* NMSA 1978, § 72-1-1 (1907); NMSA 1978 §§ 72-5-1 *et seq.* (1907). Prior to the adoption of the surface water code, acquisition and use of surface water was governed by the common law of prior appropriation utilized by the western states.

Pursuant to the groundwater code of 1931, the New Mexico State Engineer acquires jurisdiction over groundwater only when the State Engineer has “declared” an underground water basin having reasonably ascertainable boundaries. *See* NMSA 1978, §§ 72-12-1 *et seq.* (1931). The Rio Grande Underground Water Basin, extending from Taos to Elephant Butte Reservoir, was declared by the New Mexico State Engineer on November 29, 1956. The Lower Rio Grande Underground Water Basin was declared on September 11, 1980.

Beginning with the drought of the 1950s, surface water users on the Rio Grande, including irrigators within EBID, sought to alleviate surface water shortages with supplemental wells drilled into the aquifers in hydrologic communication with the Rio Grande. Municipal supply, principally by the cities of Albuquerque and Las Cruces, had relied on municipal well fields tapping the deep aquifers. The consequence of this groundwater development was that wells in close hydrologic connection with the Rio Grande could deplete surface flows apportioned by the Compact in dry years. The depletive effects of the groundwater pumping might not be manifest in one accounting year. Wells, drilled into the deepest layers of the artesian aquifers, had delayed effects on the Rio Grande. The City of Albuquerque's wells which expanded to the Sandia mountains east of the City have similarly delayed effects on the Rio Grande. State administration, whose first priority was Compact compliance, accounted for this by grandfathering rights from supplemental wells and pre-Basin primary groundwater use, considered to be vested rights, to deplete the Rio Grande. Depletions caused by post-Basin rights are required to be "offset" by an amount of water that compensates for the depletive effect of the pumping. *See Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 379 P. 2d 73. In the Lower Rio Grande, Rio Grande Project operations undertaken by the Bureau of Reclamation pursuant to the "D-2" equation, recognized New Mexico's groundwater use through 1978.

INTERESTS OF NEW MEXICO *AMICI CURIAE*

Interest of the Albuquerque Bernalillo County Utility Water Authority

The Albuquerque Bernalillo County Water Utility Authority (“Water Authority”) is the largest provider of municipal water in New Mexico. Located in the Middle Rio Grande, 150 miles upstream of Elephant Butte Reservoir, the Water Authority is responsible for providing a potable water supply to more than 675,000 people in Albuquerque and Bernalillo County. The Water Authority’s drinking water supply comes from two sources. First, it has groundwater wells located in the Middle Rio Grande Underground Water Basin, authorized and administered by the New Mexico State Engineer under Permit No. RG- 960 *et al.* Second, it has a perpetual contract for 48,200 acre-feet per year of imported Colorado River water from the San Juan-Chama Project (“SJCP”), a federal Reclamation project, administered under State Engineer Permit No. SP-4830. The use of imported SJCP water reduces the stress on native surface water, assisting New Mexico’s compliance with the Rio Grande Compact. The Water Authority conjunctively manages its imported SJCP surface water with its groundwater. The volume and timing of both sources of supply are dependent on native water supplies available to New Mexico under the Rio Grande Compact, including river operations of the Middle Rio Grande Project for

irrigation of lands within the Middle Rio Grande Conservancy District² The Water Authority's drinking water supply is dependent on continued Rio Grande Compact accounting as it has occurred historically. The United States' effort to federalize groundwater administration in the Lower Rio Grande ("LRG") must not be imported into the Middle Rio Grande.

Interest of the New Mexico Pecan Growers and Southern Rio Grande Diversified Crop Farmers Association

Amicus curiae New Mexico Pecan Growers and *amicus curiae* Southern Rio Grande Diversified Crop Farmers Association are nonprofit trade organizations within EBID formed in New Mexico in 2002 and 2009, respectively, to promote and protect the interests of farmers in New Mexico's southern Rio Grande valley. Their several hundred members collectively irrigate approximately 60,000 acres of croplands and orchards within EBID using surface water released from the storage reservoirs of the Rio Grande Project. They have used Project water to grow the largest producing pecan crop in the United States, world famous Hatch green chile, vegetables, and various other crops.³ Like their neighbors in Texas, and with the

² The Middle Rio Grande Project is a Bureau of Reclamation project that includes storage in El Vado Reservoir on the Rio Chama that provides water for irrigation of approximately 60,000 acres in the Middle Rio Grande.

³ Pecan and chile farming industries make up almost 10% of New Mexico's gross domestic product. *See* N.M. Attorney General H. Balderas Op. Stmt., Special Master Docket (at <https://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original>, hereinafter "Doc.") 701, Vol. I, Tr. 47:14-17.

encouragement of their irrigation districts and the United States, they have also pumped supplemental groundwater from wells to meet their irrigation needs. Generally speaking, the farmers' use of wells for irrigation began in the early 1940s but increased during the drought in the 1950s – several years after they first irrigated with surface water delivered from the Project. *See, e.g.*, S. Stahmann Test., Doc. 701, Vol. XIX, Tr. 77:9-16; M. Barroll Rpt., Doc. 418, Vol. 1 at 80, NM EX-100.

The farmers' interests in this matter are twofold. First, as irrigators within EBID who have established water rights in Rio Grande water delivered from the Project, they have an interest in ensuring that their entitlement to use Project supply is protected under the Rio Grande Compact. Second, as irrigators who have established water rights to use groundwater under New Mexico's prior appropriation doctrine, they also have an interest in ensuring those rights remain exercisable within New Mexico's apportionment under the Compact. *See* N.M. Stat. Ann. § 72-12-1, *et seq.* (1978) (New Mexico's groundwater code); and N.M. Const. Art. XVI, §§ 2, 3 (“[p]riority of appropriation shall give the better right”). The Compacting States' Index Decree is consistent with the farmers' investment-backed expectations that their vested water rights in the Project and in groundwater will be administered under New Mexico's prior appropriation doctrine and in compliance with the Rio Grande Compact.

Interest of the City of Las Cruces

Las Cruces is the second largest city in New Mexico and is located south of Elephant Butte Reservoir in the Lower Rio Grande. The Las Cruces community was formed 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) (“Joint Investigation”)*. Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a municipal water supply from surface water for an emerging community from the Acequia Madre de Las Cruces. Las Cruces is the oldest continuous water user in the Lower Rio Grande. Las Cruces transitioned to groundwater wells more than a century ago. The City’s LRG-430 *et al.* rights are senior, pre-Project and pre-Compact rights with a priority date of 1905 which are the basis of the City’s municipal supply. The City’s service area includes some 125,000 customers. The City employs “imported water” from the Jornada del Muerto sub-basin (“East Mesa”) which is disconnected from the Rio Grande by geologic barrier known as the “horst.” The result is that pumping from the City’s LRG-3200 *et al.* permit on the East Mesa has no depletive effect on the Rio Grande, and treated sewage returned to the Rio under the City’s NPDES Permit No. NM0023311, augments the supply of the native water. The Compacting States’ Index Decree maintains the City’s ability to supply its customers and their related

municipal purposes of domestic supply to homes, school districts, regional medical centers, and commercial and industrial uses and is essential for those purposes.

Interest of the New Mexico State University (“NMSU”), TXNM Energy (formerly Public Service Company of New Mexico), and the Camino Real Regional Utility Authority (“CRRUA”)

Since its founding in 1890, NMSU has served as the State of New Mexico’s land grant university. It relies on both groundwater from its own wells and surface water supplied by the Rio Grande Project for irrigation of the University’s agricultural lands, especially at its experimental and educational facilities. NMSU’s main campus is located in Las Cruces and has continuously used groundwater for higher educational purposes for over 130 years. NMSU is a member of EBID.

TXNM Energy is the largest provider of electricity in New Mexico and owns and operates the Afton Power Plant located within the lower Rio Grande of New Mexico, which produces 230 Megawatts of electricity, enough to power the demand of over 100,000 households. The plant uses groundwater for cooling and relies on seven groundwater rights purchased and permitted for that purpose with priority dates ranging from 1949 to 1972. After TXNM Energy gave public notice of transfer of these existing water rights to the plant, the United States did not protest the transfer, the State Engineer issued the permits and TXNM Energy constructed and opened the plant at a cost of 240 million dollars. If the United States prevails in

claiming a 1938 condition, all of the Afton Power Plant's water rights are in jeopardy.

CRRUA is a regional water and wastewater utility created by a joint powers agreement between Doña Ana County and the City of Sunland Park to provide service to the City and the Santa Teresa border area of New Mexico, consisting of approximately 22,000 residents. CRRUA relies on groundwater to provide municipal and industrial supply in accordance with water right permits issued by the New Mexico State Engineer. All of CRRUA's water rights have a post-1938 priority and are in jeopardy if the United States claims are recognized.

TEXAS V. NEW MEXICO & COLORADO

Texas v. New Mexico & Colorado was initiated with the granting of Texas' Motion for Leave to File Complaint on January 27, 2014. Texas alleged that New Mexico had failed to comply with its delivery obligations to Texas under the Rio Grande Compact because water released from Elephant Butte Reservoir was intercepted by groundwater pumpers in New Mexico prior to reaching its delivery point at the state line. Texas sought declaratory and injunctive relief defining its rights and enjoining New Mexico from interfering with the delivery of Texas' apportioned water. Texas sought damages for the under-deliveries. Among other issues, Texas contended that the proper baseline for assessing New Mexico's pre-Compact entitlement was the "1938 Condition" of the Rio Grande.

The United States moved to intervene on February 27, 2014. Its Complaint in Intervention mirrored Texas' Complaint. The United States sought intervention on the grounds that "distinctively federal interests, best presented by the United States itself, are at stake," citing *Maryland v. Louisiana*, 451 U.S. 725, 745 n.21 (1981). See Motion of the United States for Leave to Intervene as a Plaintiff, Feb. 2014 at 1-2. The United States summarized its interests as concerning "water released by the Rio Grande Project (Project), a Bureau of Reclamation project that the Department of the Interior operates, including by setting the diversion allocations for water users who have contracts for delivery of Project water." *Id.* at 2. The United States asserted that its "interest in how the Project is operated is a distinctively federal interest that is best presented by the United States." *Id.* The United States framed its interest under the Rio Grande Compact by stating: "[t]he Court's interpretation of the parties' rights and obligations under the Compact would affect how the Bureau of Reclamation calculates those diversion allocations." *Id.*

The United States further claimed "a distinct interest in ensuring that water users who either do not have contracts with the Secretary of the Interior under the Project, or who use water in excess of contractual amounts, do not intercept or interfere with release and delivery of Project water that is intended for Project beneficiaries. . . ." *Id.*

In *Texas v. New Mexico & Colorado*, 583 U.S. 407, 408 (2018), the Court denied New Mexico’s Motion to Dismiss and allowed the United States to intervene, but holding that “[t]his 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.”

An initial trial segment on Texas’ claims of liability was held in October of 2021 focusing on intrastate administration of water rights in New Mexico. A second trial segment on liability was set but was vacated when settlement negotiations began.

The settlement negotiations interrupted the trial proceedings, resulting in the proposed Index Decree.

***AMICI* STATEMENT OF POSITION**

All New Mexico *amici* actively participated in settlement negotiations of this matter and supported entry of the proposed Index Decree. By adopting fair and reasonable terms and by incorporating the D-2 period’s grandfathering of uses prior to 1978, the Consent Decree (now termed the “Index Decree”) would have resolved the interstate dispute while minimizing disruption to existing water users in both New Mexico and Texas. The United States’ assertion of a 1938 condition and attempt to expand the case to include intrastate claims in New Mexico would, if granted, needlessly delay and complicate resolution of this matter and throw post-

1938 users into turmoil. By contrast, adoption of the D-2 curve would embody historic use of water on which the New Mexico *amici* and other groundwater users have long relied.

Although the Court declined to enter the proposed Consent Decree, the New Mexico *amici* continue to support entry of an Index Decree based on the D-2 curve with a delivery point at the El Paso Gage that closely tracks the terms of the previously proposed Consent Decree. The Index Decree would establish an annual, volumetric target for New Mexico to deliver water to Texas. The index approach is similar to Arts. III and IV of the Compact.⁴ It would be a new index under which the annual release from Caballo Dam will be used to determine New Mexico's obligation to deliver water to Texas at the El Paso Gage (USGS 08364000), a stream gage near the New Mexico-Texas state line. Project operations and Project Accounting must not interfere with the Compacting States' rights and entitlements under the Compact and the Court's decree issued in this matter.

New Mexico has exercised administration over water use in New Mexico and will continue to do so to comply with its Compact obligations as set forth in the Index Decree. The Water Authority can speak directly to the past and current rigorous New Mexico State Engineer administration in the Middle Rio Grande as its groundwater rights and SJCP permits are conditioned to protect Compact deliveries.

⁴ See the proposed Index Decree at II.B-F.

The Water Authority's groundwater permit, Permit No. RG-960 *et al.*, required offsets for surface water depletions that result from groundwater pumping after 1963 in excess of its vested rights. Similarly, Permit No. SP-4830 is conditioned to protect native flows of the Rio Grande with respect to other New Mexico water users and to ensure Compact compliance. *See* 11/5/2021 Trial Tr. Vol. XVI, 37-38, Doc. 701. In *Carangelo v. Albuquerque Bernalillo County Water Utility Authority*, 2014-NMCA-032, ¶¶ 78, 79, 320 P.3d 492, the New Mexico Court of Appeals affirmed that the State Engineer, and district court on appeal “fulfilled [their] duties and sufficiently analyzed the issue of the Rio Grande Compact compliance.”

Entry of the Index Decree would resolve the interstate issues between New Mexico and Texas and allow for dismissal of this case. After the Special Master has heard additional evidence at trial, the New Mexico *amici* will ask the Special Master to recommend entry of the Index Decree. The New Mexico *amici* will also ask the Special Master to refuse to entertain intra-state claims by the United States of project interference solely within New Mexico. Such claims properly belong before the New Mexico adjudication court and under the administration of the New Mexico State Engineer. The adjudication court has already joined over 16,000 claimants, including the United States, and its intra-state claims should not be decided here in the absence of those other parties, who have a right to fully participate in

determination of all other parties' interrelated claims *inter se*, including those of the United States.

CONCLUSION

The New Mexico *amici* propose to participate in the proceedings and in mediation as allowed by the Special Master. There are no grounds for EBID and EP No. 1 to claim “special roles” entitling them to share oral argument with the actual parties. *See* Joint Status Report of *Amici Curiae* El Paso County Water Improvement District No. 1 and Elephant Butte Irrigation District and Request for Opportunity to Make Oral Presentation at Status Conference at 7. Their roles are merely to release and distribute water to the actual owners of the resource, *i.e.*, in EBID, the New Mexico Pecan Growers and the Southern Diversified Crop Farmers Association. Together with New Mexico's two *amici* municipalities, with a combined service area of nearly 1,000,000 people, all *amici* should be treated equally.

Entry of the Index Decree will resolve the interstate dispute, and preserve New Mexico's administration of its citizens rights and Compact delivery obligations consistent with the law established in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

Respectfully submitted,

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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 4th day of October, 2024, through the CM/ECF system, which caused the parties or counsel of record to be served by electronic means.

I FURTHER CERTIFY that two true and correct copies of the foregoing were sent by Federal Express to the Honorable D. Brooks Smith at the following address:

Honorable D. Brooks Smith
Special Master
Senior United States Circuit Judge
1798 Plank Road, Suite 203
Duncansville, PA 16635

STEIN & BROCKMANN, P.A.

/s/Jay F. Stein
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