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

---

# ELEPHANT BUTTE IRRIGATION DISTRICT'S BRIEF REGARDING APPORTIONMENT OF WATER BELOW ELEPHANT BUTTE RESERVOIR

SAMANTHA R. BARNCASTLE*
BARNCASTLE LAW FIRM, LLC
1100 SOUTH MAIN, SUITE 20 (88005)
P.O. BOX 1556
LAS CRUCES, NM 88004
(575) 636-2377
samantha@h2o-legal.com
**Counsel of Record*

Attorney for Elephant Butte Irrigation District

January 6, 2021

## TABLE OF CONTENTS

TABLE OF CONTENTS . . . . . i

TABLE OF AUTHORITIES . . . . . iii

ARGUMENT . . . . . 1

I. Summary of New Mexico's Request . . . . . 2

A. New Mexico requests a legal determination that it has an apportionment below Elephant Butte Reservoir and that the apportionment should be quantified by dividing the waters of the Rio Grande, 57% to New Mexico and 43% to Texas . . . . . 2

B. The reason for New Mexico's request for a determination that it has an apportionment below the Elephant Butte Reservoir is further explained by its expert, Estevan Lopez, in his expert report dated October 31, 2019 . . . . . 2

II. Legal authority of the New Mexico State Engineer within geographic New Mexico below the Reservoir . . . . . 4

A. The State Engineer lacks legal authority to deal with Project water under state and federal law . . . . . 4

1. Under New Mexico law, the State Engineer has general supervision authority over the waters of the State of New Mexico, but this authority does not extend to the Rio Grande Project . . . . . 4

2. The State Engineer also lacks authority over the Rio Grande Project under federal law . . . . . 6

3. The Elephant Butte Irrigation District is the only entity in New Mexico with authority to deal in Project operations . . . . . 9

B. No provision of state or federal law gives New Mexico the control it seeks and nothing in the 2018 Supreme Court decision in this case modifies the above to give New Mexico any oversight over Project operations, and this is true even if it is determined that New Mexico has an apportionment below the Reservoir . . . . . 10

III. There is no legal basis for holding the Project to historical allocations as the basis for the apportionment New Mexico claims for itself ............ 11

A. New Mexico incorrectly, and without a legal basis, asserts that the "course of performance" throughout history must dictate what the future holds for Project operations ................ 11

B. New Mexico is incorrect that Project acreage cannot change ......... 12

C. The term "normal annual release" as used in the Compact is not a cap on the Project's water use ............................ 12

D. New Mexico's argument improperly places limits on the Project that are not otherwise found in the law .................... 16

IV. New Mexico's lack of participation in the Project historically is an important feature of the "course of performance" to be considered by the Special Master ............................................. 17

A. Throughout history EBID has always understood that it is located in Geographic New Mexico, but Compact Texas ........... 18

B. New Mexico's lack of participation has translated to a lack of protection for the Project, except where EBID has assumed the task ... 19

V. That New Mexico has no apportionment below the Reservoir does not mean its citizens are not entitled to water from the Project; conversely, that New Mexico has an apportionment below the Reservoir does not give it oversight over Project operations ............................. 24

VI. CONCLUSION ................................................ 26

## TABLE OF AUTHORITIES

**Page(s)**

**Federal Cases**

*City of El Paso v. Reynolds,* 563 F.Supp. 379 (1983) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 19

*Elephant Butte Irr. Dist. v. United States, et al.,* Docket 2:00-cv-01309-RB-KBM . . . . . . . . . . 22

*El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907-08 (W.D. Tex. 1955) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9, 18, 19, 26

*El Paso County Water Improvement Dist. No. 1 v. Elephant Butte Irr. Dist., et al.,* Docket 3:07-cv-00027-PRM . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 22

*Ide v. United States,* 263 U.S. 497 (1924) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 23

*Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938) . . . . . . . . . . . . . 23

*Texas v. New Mexico*, 138 S.Ct. 954, 957, 959 (2018) . . . . . . . . . . . . . . . . . . . . . . . 8, 10, 11,18

**State Cases**

*Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, 954 P.2d 763, 770-71 . . . . . . . . 13, 14

*City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984) . . . . . . . . . 5

*Elephant Butte Irrig. Dist. v. Regents of N.M. State. Univ.,* 115 N.M. 229, 849 P.2d 372 (Ct. App. 1993) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

*New Mexico ex rel. Office of the State Engineer v. EBID*, No. CV-96-888 (N.M. 3d Judicial Dist., Feb. 17, 2014) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 14

*New Mexico ex rel. Office of the State Engineer v. EBID*, No. CV-96-888 (N.M. 3d Judicial Dist., Aug. 22, 2011) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 15

**Constitutions**

Act of June 20, 1910, § 1 *et seq.*, 36 Stat. 557; N.M. Const. art. XXI, § 7 (New Mexico's "Enabling Act") . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5, 17

**Federal Statutes**

43 U.S.C. 485g(a), Aug. 4, 1939, ch. 418 § 8, 53 Stat. 1192 . . . . . . . . . . . . . . . . . . . . . . . . . . 12

Carrey Act of August 18, 1894, 28 Stat. 372 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

Fact Finders' Act of 1924, Dec. 5, 1924, sch. 4 §4, 43 Stat. 701 . . . . . . . . . . . . . . . . . . . . . . . . . 6

Omnibus Adjustment Act of 1926, May 25, 1926, ch. 383, § 45, 44 Stat. 649 . . . . . . . . . . . . . . . 7

Omnibus Adjustment Act of 1926, May 25, 1926, ch. 383, § 46, 44 Stat. 649 . . . . . . . . . . . . . 6, 7

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 . . . . . . . . . . . . . . . . . . . . . . 7, 8

Water Supply Act of 1958, Pub. L. 85-500, title III, § 301, July 3, 1958, 72 Stat. 319 . . . . . . . . . 7

**State Statutes**

NMSA 1978 § 19-7-26 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

NMSA 1978 §§ 72-2-1 et seq. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

NMSA 1978 § 72-2-9 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

NMSA 1978 § 72-2-9.1 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

NMSA 1978 §§ 72-5-1 et. seq. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4, 5

NMSA 1978 § 72-5-33 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

NMSA 1978 § 72-9-4 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 5

NMSA 1978 §§ 72-12-1 et. seq. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 4

NMSA 1978 §§ 73-10-1 et seq. . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 9

NMSA 1978 § 73-10-16 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 10

NMSA 1978 § 73-10-24 . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 13

**Regulations**

19.27.49.8 NMAC . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

19.27.27.8 NMAC . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 20

**Other**

1902 Act, 35 Congr. Rec. 6676 (1902) . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . . 6

**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**

---

# ELEPHANT BUTTE IRRIGATION DISTRICT'S BRIEF REGARDING APPORTIONMENT OF WATER BELOW ELEPHANT BUTTE RESERVOIR

COMES NOW *Amicus Curiae* Elephant Butte Irrigation District (EBID) and hereby responds to all pending Motions for Partial Summary Judgment and Responses thereto regarding the matter of whether New Mexico has an apportionment below Elephant Butte Reservoir (Reservoir) and, if so, what that apportionment is quantified as. For the reasons stated below, EBID does not support New Mexico's view of its claimed entitlement to an apportionment below the Reservoir. EBID does not take a position on any issues raised in the Motions or Responses beyond the matters expressed in this Brief.

## I. Summary of New Mexico's Request

### A. New Mexico requests a legal determination that it has an apportionment below Elephant Butte Reservoir and that the apportionment should be quantified by dividing the waters of the Rio Grande, 57% to New Mexico and 43% to Texas.

New Mexico asks the Special Master to "declare that both New Mexico and Texas have Compact apportionments of the waters of the Rio Grande below Elephant Butte Reservoir and that the apportionment is 57% of Rio Grande Project supply to New Mexico and 43% of Rio Grande Project supply to Texas." State of N.M. Mot. for Partial Summ. J. on Apportionment, at Page 26. New Mexico points to the 2018 Supreme Court decision in this case and contracts entered into between and among the United States (Bureau of Reclamation) and the two water districts, EBID and the El Paso County Water Improvement District No. 1 ("EP1"), which New Mexico argues sets the stage for determining the apportionment under the Rio Grande Compact (Compact) below Elephant Butte Reservoir (Reservoir). New Mexico also relies heavily on the "course of performance" of the parties to the Rio Grande Project contracts as the basis for determining that the apportionment should be 57% to New Mexico and 43% to Texas.

### B. The reason for New Mexico's request for a determination that it has an apportionment below the Elephant Butte Reservoir is further explained by its expert, Estevan Lopez, in his expert report dated October 31, 2019.

New Mexico's goal in advocating for an apportionment below the Reservoir is to then give control over that apportionment to it's Rio Grande Compact Commissioner, who is also the State Engineer for New Mexico. In his expert report dated October 31, 2019, one of New Mexico's experts, Estevan Lopez, discusses what New Mexico believes is necessary related to Rio Grande Project (Project) operations in view of New Mexico's position that it has an apportionment below

the Reservoir. He states: "Complete transparency is necessary going forward so that the States can evaluate whether they are receiving their share of Compact water. At a minimum, this must include:....Consultation and approval between the States regarding future Project operations agreements and operating manuals." NM-EX 107, Expert Report: Estevan Lopez, Dated 10/31/2019, Page 73, Section 9(4)(f). While it remains unclear exactly what role New Mexico would play in Project operations since, as discussed below, it has historically had no role in the Project's business, what is clear is that New Mexico would seek to use its new-found role to sit as a veto authority over operations or agreements among the Project parties that it does not approve of.

This authority would not necessarily be limited to being exercised over actions taken within geographic New Mexico, but rather, it also appears New Mexico would attempt to use its authority over its claimed Compact apportionment to reach into the downstream state of Texas in an effort to dictate water use in that state. NM-EX 107, Expert Report: Estevan Lopez, Dated 10/31/2019, Page 73, Section 9(4). While the actual logistics of how this might work are unclear, what is abundantly clear based on New Mexico's position in this case (and others) is that, as a starting point, New Mexico would use its role in administering its Compact apportionment below the Reservoir to veto the 2008 Rio Grande Project Operating Agreement[1] and possibly other Project contracts such as those related to the conversion of water for municipal use by the City of El Paso within Texas.

---

[1]New Mexico's true intentions show through in its Footnote 4 on Page 46 of its Brief in Support of Partial Summary Judgment on Compact Apportionment in which it discusses its frustration with the 2008 Operating Agreement.

## II. Legal authority of the New Mexico State Engineer within geographic New Mexico below the Reservoir.

### A. The State Engineer lacks legal authority to deal with Project water under state and federal law.

#### 1. Under New Mexico law, the State Engineer has general supervision authority over the waters of the State of New Mexico, but this authority does not extend to the Rio Grande Project.

Similar to EBID, the State Engineer for New Mexico is also a creature of statute. The statute creating the position of the State Engineer provides that the State Engineer shall be a "technically qualified and registered professional engineer" who is selected by the Governor of New Mexico and confirmed by the Senate. NMSA 1978 § 72-2-1. The State Engineer is authorized by § 72-2-1 and other statutes to supervise the administration of water and water rights in New Mexico. *See Generally* NMSA 1978 §§ 72-2-1 et seq., 72-5-1 et. seq., and 72-12-1 et. seq.

Until 2003, the State Engineer was limited in his ability to administer because he was only allowed to supervise "the apportionment of water in [New Mexico] according to the licenses issued by him and his predecessors and the adjudications of the courts." NMSA 1978 § 72-2-9. In 2003, the New Mexico Legislature expanded the State Engineer's ability to administer by passing an amendment to § 72-2-9, which is codified as § 72-2-9.1. That provision opens by declaring: "The legislature recognizes that the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer." N.M. Stat. Ann. § 72-2-9.1. This statute directed the State Engineer to promulgate rules for the administration of water rights, which rules were directed to meet certain criteria and were intended to require the State Engineer to actively seek to administer

water uses. This initiative became known as "Active Water Resource Management" or "AWRM."

The State Engineer, even though he is generally responsible for administration of use of water in New Mexico, does not have the authority under state law to deal with any aspect of the water associated with the Project. First, the Enabling Act for New Mexico provided "[t]hat there be and are reserved to the United States, with full acquiescence of the State all rights and powers for the carrying out of the provisions by the United States of the [Reclamation Act], and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory." Act of June 20, 1910, § 1 *et seq.*, 36 Stat. 557; N.M. Const. art. XXI, § 7 (New Mexico's "Enabling Act"). New Mexico Statutes governing application of the New Mexico Water Code recognize that "[e]xcept as provided in Sections 15 and 22 [72-5-33 and 19-7-26 NMSA 1978][2] of this act nothing herein shall be construed as applying to or in any way affecting any federal reclamation project heretofore or hereafter constructed pursuant to the act of congress approved June 17, 1902, known as the Federal Reclamation Act, or acts amendatory thereof or supplementary thereto." NMSA 1978 § 72-9-4, *See also City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984). That statute effectively removes the authority of the Office of the State Engineer from any dealings with Project water and is consistent with the New Mexico Enabling Act requiring deference to Federal Reclamation Law for Reclamation Projects.

[2] The Legislature logically did not exempt a federal reclamation project from Section 72-5-33 of the Water Code because this provision allows the initial step toward securing the water for such a project. Similarly, Section 19-7-26 deals with state lands "within areas to be irrigated from works constructed or controlled by the United States," so the Legislature excluded it from the general exemption found in Section 72-9-4.

### 2. The State Engineer also lacks authority over the Rio Grande Project under federal law.

Likewise, under federal law, EBID is the only entity authorized to deal with Project water as it is the only entity that holds rights via Project contracts with the United States. New Mexico does not have any rights to Project water because it (via the State itself or the State Engineer) is not a party to any of the downstream contracts. The reason New Mexico does not point to any interest in the contracts of the Project is because Reclamation was not authorized by federal law to contract with states. Reclamation was only authorized to contract with water users because attempts to deal with states on water projects earlier on in the late 1800s had proved such a dismal failure[3]. After that, Congress decided to fund water projects out of public land sales under the 1902 Act, because only the federal government could afford it[4].

The Fact Finders' Act of 1924 also showed that contracting with individual farmers was a disaster. The Fact Finders' Act wrote off the repayment for hundreds of thousands of acres of unproductive land within Reclamation Projects because the individual petitioners were not making their payments. Eventually Congress passed the Omnibus Adjustment Act of 1926, which only

---

[3] Congress tried financing water projects with States in the Carrey Act of August 18, 1894, 28 Stat. 372. The states were too poor causing the whole attempt to fail.

[4] The Legislative history for the 1902 Act says: "It has been suggested that if private enterprise can not properly develop large irrigation systems the work might be undertaken by the respective states. There are many reasons why the States are not so well equipped to carry on this work as the Federal Government. In the first place, were the work carried on by the States, the disposition would be to utilize all the waters flowing through a State within the State, provided there was no prior appropriation lower down on the stream, regardless of the most beneficial and economical development of the irrigation possibilities of the entire region....and even were the States the proper agency through which to carry on this development, none of the States in the arid region are financially able to do so. It should be remembered that in the arid region the Government is the owner at this time of from 60 to 92 percent of all the lands, and it is from the proceeds of the sales of these lands that it is proposed by the bill under consideration to provide for the reclamation of the irrigable portion thereof, and the National government as the owner of the lands has a source of revenue the States do not possess." 35 Congr. Rec. 6676 (1902).

allowed the Secretary to contract with irrigation districts. May 25, 1926, ch. 383, § 46, 44 Stat. 649. While the Project's first contracts were with the water users associations, Section 45 of the Omnibus Adjustment Act of 1926 authorized amendment of existing contracts to allow the water users to take over the repayment obligations. May 25, 1926, ch. 383, § 45, 44 Stat. 649. That is one reason why there was a July 16, 1928 contract with the districts specifying that the districts were the repayment entities. It was not until much later in the Water Supply Act of 1958, and long after the Project was constructed and operating, that there was an authorization for a state to act as a repayment entity. Pub. L. 85–500, title III, § 301, July 3, 1958, 72 Stat. 319. By that time, the Rio Grande Project, the Rio Grande Compact, and New Mexico's own state law had long been settled without leaving a role for New Mexico, beyond the role that was carved out for EBID, in the Project.

Finally, the Compact also does not create a role for the State Engineer in the administration of the Project. The Compact is set up in a way that it only discusses the upstream state's delivery obligation to the downstream state. Upstream states deliver water to downstream states at discrete delivery points: Colorado to New Mexico at Lobatos Gauge, and New Mexico to Texas at Elephant Butte Dam (changed from San Marcial). For both Colorado and New Mexico, the Compact language regarding delivery obligation begins the same: Article 3: "The obligation of Colorado to deliver water in the Rio Grande at the Colorado-New Mexico state line" and Article 4: "The obligation of New Mexico to deliver water in the Rio Grande at San Marcial". There is no language to that effect regarding Texas or the Project, and thereby no language creating any role for New Mexico in delivery of water at the New Mexico-Texas state line. Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785.

Article XII of the Compact provides that the State Engineer shall be the Compact Commissioner for New Mexico. Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785. Article XII also sets the powers and duties of the commission: "In addition to the powers and duties hereinbefore specifically conferred upon such commission, and the members thereof, the jurisdiction of such commission shall extend only to the collection, correlation and presentation of factual data and the maintenance of records having a bearing upon the administration of this compact, and, by unanimous action, to the making of recommendations to the respective states upon matters connected with the administration of this compact." *Id.* Even though the Supreme Court has determined that the Project and the "downstream contracts" are "inextricably intertwined" with the Compact, that relationship does not create a new, or different, role for the State Engineer or the State of New Mexico than what has historically existed, and nothing in the language of the Compact creates any role for New Mexico within the Project. *See Texas v. New Mexico*, 138 S.Ct. at 959 and Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785.

More than a half century ago, a Texas federal district court rejected the City of El Paso's argument that the Rio Grande water entering Texas, even though it is handled by the United States for the Project, becomes subject to the laws of Texas once it crosses into Texas.

> "This Compact has a number of peculiar provisions. For example, the water New Mexico must pass to Texas is delivered not where the two States meet, but at San Marcial, New Mexico, more than 100 miles above the point where the Rio Grande leaves New Mexico. This delivery is made into the reservoir of the Elephant Butte Dam, the principal structure of the Rio Grande Project. Some of this water eventually goes to Mexico. The Compact, instead of leaving the Texas share of the water open for disposition under the general water statutes of Texas, plainly directs same for irrigation in the Project. A large part of the Project lands are in New Mexico and, consequently, this water delivered to Texas goes to irrigate not only Texas lands, but also New Mexico lands in the Project. The apparent reason for all this is that when the Compact was negotiated, the Rio Grande Project, in all of its far flung works and physical properties was, and for some time had been, superimposed

on the Rio Grande and its adjoining valleys all the way from the Elephant Butte Reservoir in New Mexico, to a point below Fabens in Texas and that fait accompli colored the whole Compact as between New Mexico and Texas. Perhaps the problem was handled in the only practicable way.

In any event, an analysis of the Compact shows convincingly that the water belonging to Texas is definitely committed to the service of the Rio Grande Project. This Compact is binding on Texas and the defendant City and, for that matter, is binding on the inhabitants and citizens of Texas."

*El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907-08 (W.D. Tex. 1955). This same logic is true on the New Mexico side of the state line, leaving no role for New Mexico in administration of the Project or the use of Project water. The State Engineer, and the State of New Mexico, are not beneficiaries of the Project and are in no way authorized, by statute or contract, to deal with Project operations.

### 3. The Elephant Butte Irrigation District is the only entity in New Mexico with authority to deal in Project operations.

New Mexico correctly points out that EBID is the only Project beneficiary in New Mexico and is also a creature of statute[5]. State of N.M. Mot. for Partial Summ. J. on Apportionment, Proposed Undisp. Mat. Facts, Page 9, Proposed Fact No. 50. EBID is an irrigation district created pursuant to a New Mexico statute authorizing organization of an irrigation district to cooperate with the United States under federal reclamation laws in providing water supplies from the Project for irrigation of lands in southern New Mexico. NMSA 1978 § 73-10-1 et. seq. The creation of EBID by the New Mexico Legislature not only created the authority of the District to levy taxes against the lands benefitting from the Project sufficient to repay the United States for construction and

[5] New Mexico acknowledges in its Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortages that it is not involved in Project operations and never has been. NM's Notice Motion, Page 5, Paragraphs 28-30.

maintenance obligations, but also placed the responsibility for management and operation of the Project within the authority of the District. *See* NMSA 1978 § 73-10-16 ("Said board may also enter into any obligation or contract with the United States for the construction, operation and maintenance of the necessary work for the delivery and distribution of water therefrom.").

**B. No provision of state or federal law gives New Mexico the control it seeks and nothing in the 2018 Supreme Court decision in this case modifies the above to give New Mexico any oversight over Project operations, and this is true even if it is determined that New Mexico has an apportionment below the Reservoir.**

As discussed at length above, nothing in the law gives New Mexico any role in the Project. Yet, New Mexico insists that the 2018 Supreme Court decision carved out a role for it by using reference to discrete language that the Project is the vehicle "charged with assuring that the Compact's equitable apportionment to Texas *and part of New Mexico* is in fact made." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018)(emphasis added). To arrive at its conclusion, in addition to relying solely on dictum, New Mexico glosses over the 2018 decision's language that does not find a role for New Mexico below the Reservoir, instead relying on the downstream contracts to effectuate the necessary division of water. *Id.* That the Supreme Court agreed the purpose of the Compact was to "effect an equitable apportionment of the waters of the Rio Grande...to Texas and part of New Mexico" does not necessarily mean that New Mexico is entitled to an apportionment that it can exercise a new-found control over below the Reservoir. *Id.*

The Supreme Court did not determine the apportionment in its 2018 decision but, rather, only determined whether the United States had enough of an interest in the pending action that it should be allowed to intervene. New Mexico's use of the subject sentence, that is very clearly dictum, to attempt to establish the apportionment when that issue was not the issue before the Supreme Court,

is a clear misappropriation of the cited language. Further, New Mexico conveniently ignores other language of the 2018 Supreme Court decision that is inconsistent with its position, such as language referring to EBID and EP1 as "the Texas water districts". *Id* at 957. The Supreme Court language relied upon by New Mexico could just as much be used to accomplish the understanding EBID has held for over 100 years -- that EBID resides in Compact Texas but geographic New Mexico, rather than the drastic change that New Mexico advocates for. Contrary to New Mexico's view, the Supreme Court did not upset over 100 years of operation of the Project through dictum.

## III. There is no legal basis for holding the Project to historical allocations as the basis for the apportionment New Mexico claims for itself.

### A. New Mexico incorrectly, and without a legal basis, asserts that the "course of performance" throughout history must dictate what the future holds for Project operations.

New Mexico puts great weight on the "course of performance" in advocating for an interpretation of the Compact that benefits New Mexico. Specifically, New Mexico points to historical Project allocations to conclude that the allocation <u>is</u> the apportionment. New Mexico asserts that "the Downstream Contracts *froze* the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte Reservoir at 57% for lands in New Mexico and 43% for lands in Texas." State of N.M. Mot. for Partial Summ. J. on Apportionment at Page 30. New Mexico then uses that assertion to conclude that delivery of water to Project lands is likewise frozen at 57/43%. New Mexico also points out that the Compact provides that irrigation demands drive the release of "usable water" and that a *normal* annual release is considered to be 790,000 acre feet per year. State of N.M. Mot. for Partial Summ. J. on Apportionment at Page 31.

### B. New Mexico is incorrect that Project acreage cannot change.

While New Mexico is generally correct that Project lands are approximately 57% in New Mexico and 43% in Texas, New Mexico is incorrect that the Project can never allocate anything different than those percentages to the lands in either irrigation district. Instead, Reclamation law specifically allows the Secretary to re-appraise lands to determine if a change in Project lands is warranted. 43 U.S.C. 485g(a) provides that "The Secretary is authorized and directed in the manner hereinafter provided to classify or to reclassify, from time to time but not more often than at five-year intervals, as to irrigability and productivity those lands which have been, are, or may be included within any project." Aug. 4, 1939, ch. 418, § 8, 53 Stat. 1192. Likewise, the Compact does not rely on specific acreage within the Project and, in fact, it does not even mention Project acreages anywhere in the document. Instead, it relies on a "normal annual release" figure to protect the Project's water supply. In other words, nothing in Reclamation or Compact law prevents the acreages within the Project from changing.

### C. The term "normal annual release" as used in the Compact is not a cap on the Project's water use.

New Mexico is also correct that a normal annual release is considered to be 790,000 acre feet, however, New Mexico incorrectly reads this figure as a limit to be placed upon the Project. Nothing in the Compact suggests that this is a cap on the Project allocation. Like the ability to change Project acreage, there is no limit to the amount of water the Project can release and use in a given year. If the Project beneficiaries want to release 2 million acre feet in a single year, and they can beneficially use it, then they can do so. As another example, Project beneficiaries could also agree to let EBID use all of the water released from the Reservoir, and EP1 use none of the water available to the

Project, if that's what they want to do – nothing prohibits such a deal among the parties responsible for the Project.

Alternatively, the Project could release no water if it chose to do so, and New Mexico, regardless of what effect that would have on the northern New Mexico/Middle Rio Grande, could not be heard to complain. Case law in New Mexico has held that EBID has no obligation to make an allocation in any given year, despite demands by farmers. *See Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, 954 P.2d 763. In that case, involving another Federal Reclamation Project in New Mexico, the New Mexico Court of Appeals construed the express language in § 73–10–24 by saying it "suggests that an irrigation district's duty to distribute available water is discretionary rather than mandatory and therefore not subject to mandamus." *Id.* at 770. The Court went on to say that:

> "[E]ven if the District's Board of Directors, in the exercise of its discretion, had determined that water was insufficient to meet the continual wants of the entire district and had declared water to be available for distribution, Section 73–10–24 does not mandate that the District distribute the water to members simply upon request by some members. Instead, Section 73–10–24 expressly invests the Board with discretion to decide how to respond under those given facts, stating that it shall be the duty of the [B]oard of [D]irectors to distribute all available water upon certain or alternate days to different localities, as they may in their judgment think best for the interests of all parties concerned. This provision allows the Board to act as it, in the exercise of its discretion and judgment, believes best for all members of the District; it does not require the Board to automatically distribute water upon the request of a minority of its members who, for whatever reason, have exhausted their allotment of water for a given year."

*Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, 954 P.2d 763, 770–71 (internal quotations omitted). Remembering that EBID, not New Mexico, sets the allocation to the New Mexico portion of the Project, and EBID can, in its discretion, fail or refuse to allocate water pursuant to New Mexico law as discussed above, it is clear that New Mexico's argument that the historical

Project operations set the course for the future must fail[6]. To decide otherwise would be to allow New Mexico to improperly usurp the authority of the United States and the Irrigation Districts in the operation of the Project.

Further, the New Mexico Adjudication Court has also determined that, although the Project is entitled to a "normal annual release of 790,000 acre-feet per year", the United States has "the right to divert Project water from the Rio Grande, *without limitation on the diversion amounts*." *See* NM-EX 527, *New Mexico ex rel. office of the State Engineer v. EBID,* No. CV-96-888 (N.M. 3d Judicial Dist. Feb. 17, 2014). This is important because it clarifies that the Project is not capped at any particular amount of water it may use in any given year. To find that the Project is capped, and may be limited by upstream New Mexico if it is allowed to weigh in on Project operations, would be contrary to law and contrary to over 100 years of "course of performance."

New Mexico also alludes to the 3.024 acre feet per acre figure adjudicated pursuant to Final Judgment from the Lower Rio Grande Adjudication to lands in New Mexico below the Reservoir as though it is somehow a limit on what the Project lands are entitled to receive. In fact, there is no limit to what the Project can release and deliver to Project lands in a given year, so long as the release is based upon irrigation demand. This fact was memorialized in the Lower Rio Grande Adjudication when the Court entered its Order regarding Stream System Issue Number 101 on the

---

[6] *Brantley Farms v. Carlsbad Irr. Dist,* 954 P.2d 763 leaves the authority to set the allocation squarely within the province of the irrigation district cooperating with the United States. This year, it is looking as though there will not be a sufficient amount of water in Elephant Butte Reservoir for more than a 3 or 4 acre inch allocation to EBID farmers. Because of the lack of water, it is entirely likely that the EBID Board of Directors will choose not to allocate water to EBID lands at all, instead reserving that water in its carryover account for next year. While this will inevitably lead to evaporation losses borne by New Mexico under the Compact, and potentially other Compact implications borne by New Mexico upstream of the reservoir, New Mexico cannot complain about this action by the EBID Board, as this is within the limits of both State law and the Compact. Further, it is important to note that this action by EBID would be possible both with, and without, the 2008 Operating Agreement.

Farm Delivery Requirement. New Mexico refers to this decision in its Fact Number 104 of its Proposed Undisputed Material Facts when it suggests that the 3.024 acre feet number is a "limit" on what Project acreage is entitled to receive. State of N.M. Mot. for Partial Summ. J. on Apportionment at Page 21.

In that Adjudication Court decision, which is based upon a settlement agreement the State of New Mexico is a signatory to, the Court determined that the Farm Delivery Requirement (FDR) for surface water only acreage (Project acreage) would be 3.024, with the caveat that "In those years the EBID annual allotment exceeds the FDR of 3.024 afay, the FDR may be exceeded to allow the full annual allotment to be delivered to lands within EBID irrigated with surface water only." *See* NM-EX 541, *New Mexico ex rel. Office of the State Engineer v. EBID,* No. CV-96-888 (N.M. 3d Judicial Dist. Aug. 22, 2011). This same language is used to describe the EBID allocation that exceeds the farm delivery requirement for acreage served by both surface water and groundwater (as opposed to surface water only). This is important because it is, yet again, another recognition, this time by the Adjudication Court, that the lands within the Project are only limited by the allocation that is set by EBID, and that the EBID allocation may exceed the normal farm delivery requirement. In other words, the limit is on the groundwater use that is used to make up the normal farm delivery requirement, but if the EBID allocation exceeds that normal amount, the State Engineer cannot prevent EBID lands from using the higher allocation. This is yet another example of the State Engineer lacking administrative control over the Project, and New Mexico lacking control over the allocation. It is also further evidence that there is no cap on the amount of water the Project may allocate and use on Project lands, contrary to New Mexico's assertion.

### D. New Mexico's argument improperly places limits on the Project that are not otherwise found in the law.

NM conflates the terms allocation and apportionment to argue that because nobody objected to the historical allocation of the Project supply, that, thereby, nobody was objecting to the allocation being considered an apportionment. State of N.M. Mot. for Partial Summ. J. on Apportionment at Pages 45-47. In doing so, New Mexico inadvertently (or possibly deliberately) limits Project operations in a manner that has never before existed. New Mexico seeks to remove the flexibility provided to the Project by over a hundred years of state and federal law. It does so to advance its own agenda and to gain control over Project operations by allowing it to sit as a veto authority to monitor operations of the Project in a manner that is inconsistent with the law and history of performance of the parties to the Compact and the parties to the Project.

New Mexico cannot point to anything in the law that would operate to limit the Project operations as it now seeks to limit them. There is no limit to what the Project may release in a given year, or how much may be allocated and used on Project lands. There is also nothing preventing the Project from changing the amount of acreage included in the Project. Likewise, there is nothing that prevents the Project beneficiaries from making deals with one another that change the distribution of water within the Project. The Compact does not place such limits on the Project despite New Mexico's argument that the course of performance must somehow now be converted into a requirement governing future performance. New Mexico's argument is contrary to the plain language of the Compact and multiple of its own state court's decisions and laws.

When New Mexico law is properly factored into the equation, it is clear that New Mexico is not entitled to an apportionment below the reservoir, and instead, if there is an apportionment

below the reservoir, it is EBID that controls said apportionment under the downstream contracts and the legal authority granted to it by state and federal law.

## IV. New Mexico's lack of participation in the Project historically is an important feature of the "course of performance" to be considered by the Special Master.

Equally important to the Rio Grande Project contracting parties' course of performance is the performance, or lack thereof, by New Mexico in relation to Project operations. As New Mexico points out (discussed above), never in the history of the Project has New Mexico participated in operation or maintenance of the Project. New Mexico was not in any way associated with the creation or funding of the Project, and for over 100 years it has not been involved in operations whether on a day-to-day level or at a higher policy and contracting level. The legal framework set up to govern the Project has never contemplated a role for New Mexico, whether under state law, Reclamation law, or Compact law. To carve out a new role for New Mexico consistent with its view of what the apportionment should be is unnecessary, contrary to the law, and contrary to the course of dealing New Mexico has so heavily relied upon for its position.

EBID agrees with New Mexico that the purpose of the Compact was to protect the Project. However, it appears EBID disagrees with New Mexico on what the Project needed protection from. The Compact was set up so that New Mexico, through its State Engineer who also serves as the New Mexico Compact Commissioner, could not interfere with Project operations and the use of water New Mexico delivers to the Reservoir. Consistent with the Enabling Act for New Mexico, New Mexico law recognizes the autonomy of EBID in governing Project operations for the purpose of protecting the Project. New Mexico's request that the Special Master find an apportionment for New Mexico below the Reservoir so that it may now seek to gain control over that apportionment

that it has never had before is contrary to the law and contrary to the course of dealing by the parties to the Compact and the Project.

### A. Throughout history EBID has always understood that it is located in geographic New Mexico, but Compact Texas.

EBID's course of performance and understanding of the roles of the parties and the Project beneficiaries, as the only New Mexico beneficiary of the Project, is important if the Special Master is going to consider the course of performance as an indication of what the Compact dictates. Historically, EBID has taken the legal framework together with New Mexico's lack of interest in the Project as signals that it is not part of New Mexico under the Compact. EBID's understanding has been that it is an "island" that lies in Compact Texas but geographic New Mexico. Declaration of Gehrig Esslinger in Support of EBID Brief Regarding Apportionment of Water Below Elephant Butte Reservoir, Dated January 6, 2021, attached hereto as **EBID Exhibit 1**.

EBID has always believed that it was in geographic New Mexico, but Compact Texas, meaning EBID's water supply comes from the Texas apportionment. EBID's view has been particularly informed by a convoluted history of dealings dating all the way back to prior to the Compact negotiation. Because of the course of history as understood by EBID, EBID has historically relied upon the Texas Commissioner to represent its interest before the Compact Commission, all while believing that the New Mexico Compact Commissioner's objective was to protect Northern New Mexico/Middle Rio Grande. EBID's understanding has not only been based on the historic dealings with the State Engineer regarding the Project, it is also consistent with precedent, including the 2018 Supreme Court decision. *See Texas v. New Mexico*, 138 S.Ct. 954 (2018), *El Paso County*

*Water Imp. Dist. No. 1 v. City of El Paso*, 133 F.Supp. 894 (W.D. Tex. 1955), *City of El Paso v. Reynolds*, 563 F.Supp. 379 (1983).

**B. New Mexico's lack of participation has translated to a lack of protection for the Project, except where EBID has assumed the task.**

Not only has New Mexico historically not played a role in the Project operations, as discussed at length above, it has also historically failed to protect the Project despite repeated attempts by EBID to force necessary protections. Throughout history New Mexico has actively sought to deprive the Project of protections it is entitled to, at times leading to a situation where the Project has required protection <u>from</u> New Mexico to preserve its rights. Such failure to protect the Project is yet another reason why New Mexico's view of the apportionment cannot prevail. If New Mexico were to gain control over the Project allocation by calling it an "apportionment under the Compact", the Project would be at the mercy of the State Engineer. Such an outcome would be contrary to law and contrary to the intent of the Compact.

Over a century worth of actions and inactions by both EBID and the State Engineer are available to the Special Master through the briefing of the parties on the issue of Summary Judgment. An overview of those actions, or inactions, by the State Engineer on which EBID has based its understanding of the relationship with the State Engineer include failure to take jurisdiction over the groundwater or to properly exercise his jurisdiction over the groundwater within the Lower Rio Grande and its legal position in cases involving the Project water right.

EBID's view of the ability of the State Engineer to properly oversee the Project are informed by multiple events in history. While what is included here is not an exhaustive list, it is a starting point for understanding EBID's view of the world. First, there was the failure of past State Engineers

to declare the Lower Rio Grande underground water basin until 1980, when other basins throughout New Mexico were declared as early as the 1940s and 1950s[7]. Such failure allowed for the unfettered development of groundwater in the Lower Rio Grande. The State Engineer lacks jurisdiction over groundwater until he declares an underground water basin and acts to take jurisdiction. In the Lower Rio Grande this did not happen until long after the bulk of the groundwater uses were developed. To date, the State Engineer has not entered an order closing the basin to new appropriations.

As a result of the failure to take action regarding groundwater use, and the State's position that it was limited in its ability to administer until it had issued licenses for water rights, or otherwise adjudicated the basin, EBID was forced to file the lawsuit that began the Lower Rio Grande Adjudication itself. Only after nearly ten years of protracted litigation with the State Engineer fighting the adjudication and seeking dismissal of the lawsuit, and finally losing on appeal, did he finally agree to pursue the adjudication. *See Elephant Butte Irrig. Dist. v. Regents of N.M. State. Univ.*, 115 N.M. 229, 849 P.2d 372 (Ct. App. 1993).

Upon finally acknowledging its authority and responsibility to administer groundwater to ensure impacts from pumping do not detrimentally impact the Project supply, which occurred less than twenty years ago now (despite the Project existing for over 100 years), the State Engineer promulgated draft Active Water Resource Management district specific regulations that would have been applicable to the Project. These draft regulations, unsurprisingly, were problematic for EBID because they focused on reducing EBID member groundwater pumping to make surface water deliveries to Texas, while still allowing impacts to the surface supply by municipal and industrial

[7] By contrast, other basins effecting interstate compacts were declared much earlier: the Rio Grande Basin was declared in 1956 (19.27.49.8 NMAC) and the Carlsbad Underground Water Basin was declared beginning in 1947 (19.27.27.8 NMAC).

groundwater pumping to continue unhindered. New Mexico apparently had a change of heart regarding how to protect the Project because it never finalized AWRM district specific regulations, despite the fact that it argued so vehemently for the ability to do so as a mechanism for answering what it commonly referred to as 'the Texas threat' in the early 2000s. *See* New Mexico's Brief in Chief on Appeal to the New Mexico Court of Appeals seeking to uphold the AWRM statute in *Tri-State Generation and Transmission Ass'n v. D'Antonio,* 249 P.3d 394 (N.M. Ct. App. 2012), attached as **EBID Exhibit 2.**

Eventually New Mexico moved it's strategy of working against the Project to the Adjudication Court where it offered the City of Las Cruces a water right priority date that pre-dates the Project in an attempt to subordinate the Project to the City of Las Cruces. This issue was ultimately sorted out through years of litigation in the Adjudication Court whereby the Project prevailed with a more senior priority date, with New Mexico advocating against the Project during said litigation and at trial.

Throughout the litigation over AWRM and in the Adjudication Court, the New Mexico State Engineer was also taking positions contrary to the Project in other administrative actions. The State Engineer's failure to completely close the Lower Rio Grande to new appropriations has caused consistent issues for EBID in challenging permitting of new appropriations, allowance of expansion through issuance of permits for appropriations that occurred prior to declaration of the Lower Rio Grande Underground Water Basin, and permits issued by the State Engineer that do not adequately protect the Project. EBID has been involved in years of litigation within individual administrative proceedings before the State Engineer in an attempt to force the State Engineer to include permit

conditions in groundwater use permits that protect the Project. EBID is presently protesting approximately[8] ten separate permitting actions that fall into this category.

When presented with an opportunity to assist EBID in protection of the New Mexico interests in the litigation that led to the 2008 Operating Agreement, New Mexico instead took the position that it did not have an interest in the outcome therefore it had no reason to assist EBID in its defense. Declaration of Gehrig Esslinger in Support of EBID Brief Regarding Apportionment of Water Below Elephant Butte Reservoir, Dated January 6, 2021, attached hereto as **EBID Exhibit 1**. Ultimately, EBID was solely responsible for protecting its interests in those cases[9], with New Mexico purposely sitting on the sideline. Now New Mexico is unhappy with the outcome of those cases, and the 2008 Operating Agreement, and it is seeking to void the agreement despite EBID's approval of the same. It is worth noting that New Mexico did not regard the Operating Agreement cases as cases involving the Compact apportionment, because historically New Mexico has taken a "hands off" approach to Project operations, including division of water among the beneficiaries – it was not until the 2018 Supreme Court decision in this case that New Mexico changed its mind and its litigation strategy in this regard.

Finally, New Mexico's position in this case subordinates the Project to other water rights within New Mexico under a twisted reading of New Mexico law. In its Motion for Partial Summary Judgment regarding Lack of Notice, at Paragraph 36, New Mexico explains that it has allowed

---

[8] The exact number of protests is difficult to determine because of the way permitting actions are sometimes grouped together under a single case number despite being technically separate.

[9] There were two cases that led to the 2008 Operating Agreement, they were: *Elephant Butte Irr. Dist. v. United States, et al.*, Docket 2:00-cv-01309-RB-KBM (filed in New Mexico Federal District Court by EBID against the United States and EP1), and *El Paso County Water Improvement Dist. No. 1 v. Elephant Butte Irr. Dist., et al.*, Docket 3:07-cv-00027-PRM (filed in Texas Federal District Court by EP1 against the United States and EBID).

pumping to interfere with Project supply because it views certain rights as "senior" to the Project. State of N.M. Mot. for Partial Summ. J. to Exclude Damages in Years Texas Failed to Provide Notice to New Mexico of its Alleged Shortages, at Page 6. While it does not explain how a state-based right could be "senior" to the Project under *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), this is yet another example of New Mexico's constant searching for ways to subordinate the Project to other water uses/users in an effort to allow continued interference with water supply of the Project. EBID disagrees that there are any senior uses to the Project[10], however, even more troubling is the idea that New Mexico may have an apportionment under the Compact, but then choose to let other uses be exercised in a manner that is detrimental to that apportionment in violation of the Compact. That New Mexico has apparently convinced itself that other water uses are allowed to improperly impact the Project is extremely troubling to EBID[11].

Contrary to the above view of New Mexico's numerous failures to protect the Project, New Mexico takes the position in this case that it has administrative jurisdiction over the Lower Rio Grande and has exercised that jurisdiction to protect against interference with the Project supply. In all of the above instances, EBID has been forced into costly litigation, paid for by the EBID farmers, in an effort to protect their investment in the Project from interference allowed by, and

---

[10] *See Ide v. United States*, 263 U.S. 497 (1924) and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

[11] It is worth noting that New Mexico places a large amount of emphasis on the fact that neither the State of Texas, nor the United States, has ever made a "call on the river," an action that New Mexico claims is a necessary first step to setting in motion administrative actions by the New Mexico State Engineer to administer within the Lower Rio Grande in a way that protects the Project. The problem with this argument is that prior to passage of the AWRM statute, New Mexico took the position that it could not administer until an adjudication was complete, so such a call on the river prior to 2003 would have been futile since there has been no adjudication. Following passage of the AWRM statute, a call on the river would have been suicide for the Project because of New Mexico's draft AWRM regulations that placed the onus on the Project to stop groundwater use, since New Mexico viewed the Project as "junior" to the other Domestic, Commercial, Municipal and Industrial groundwater uses it sought to protect ahead of the Project.

sometimes caused by, New Mexico. In each of these instances, if EBID had not acted to protect its members' interests, the State of New Mexico would have incrementally chipped away at the Project until it was no longer viable. New Mexico's actions, or inaction, throughout history are evidence that New Mexico's State Engineer, also it's Rio Grande Compact Commissioner, has a conflict of interests preventing him from properly protecting the Project. New Mexico cannot now be placed in a position to oversee the Project by virtue of its claim that it has an apportionment in the Lower Rio Grande under the Compact because, even in the areas New Mexico actually has jurisdiction to oversee and manage against interference with the Project supply, it has not properly exercised such jurisdiction. To allow New Mexico to now take control over the Project via its claim that it has an apportionment below the Reservoir would be akin to allowing the fox to guard the hen-house and would not only be contrary to the law, but would also be contrary to the historical course of performance of the parties.

## V. That New Mexico has no apportionment below the Reservoir does not mean its citizens are not entitled to water from the Project; conversely, that New Mexico has an apportionment below the Reservoir does not give it oversight over Project operations.

New Mexico argues that it must have been given a Compact apportionment below the Reservoir because otherwise it would be hard to understand why it would have assented to the Compact in the first place. State of N.M. Mot. for Partial Summ. J. on Apportionment, at Page 34. It assumes that without a Compact apportionment, the New Mexico portion of the Project would not have any right to use water. Importantly, New Mexico correctly claims there is no language in the Compact depriving it of authority over waters within its own borders. State of N.M. Mot. for Partial Summ. J. on Apportionment, at Page 35. New Mexico, however, improperly believes that its State

Engineer is the person, as the Compact Commissioner for New Mexico, who would retain control over the water at issue. Instead, it is EBID's Board of Directors who have been given authority over the Project water in the New Mexico portion of the Project.

New Mexico is also correct that the Compact intended to protect existing rights below Elephant Butte Reservoir. State of N.M. Mot. for Partial Summ. J. on Apportionment, at Page 38. The intention was that water uses within the Project would be protected from interference by New Mexico. The Compact was intended to prevent against Colorado and New Mexico depleting the flows of the Rio Grande before they could reach the downstream Reservoir (and thereby the Project). New Mexico seemingly forgets that during the Compact negotiations, New Mexico bargained for the ability of the Middle Rio Grande to continue to deplete the flows of the Rio Grande to the detriment of the Project. Declaration of Scott A. Miltenberger, Ph.D. In Support of the State of Texas's Motion for Partial Summary Judgment, dated Nov. 2, 2020, Paragraphs 8 and 37. It was the Texas Commissioner who advocated for the Project and the protections the Project needed to remain viable. New Mexico's assent to the Compact was not because it "got something" below the Reservoir as it now argues, but instead because it bargained for and received the ability to continue developing its water dependency *above* the Reservoir, provided certain protections for the Project were met (hence the delivery obligation to the Reservoir and not the New Mexico-Texas state line).

New Mexico erroneously believes that New Mexico itself must have a Compact apportionment below the Reservoir to allow New Mexico citizens to exercise valid rights via the Project. Such a view ignores the history of the Compact negotiations and all of the law protecting the Project from interference by New Mexico. Rather, EBID takes a less constrained view of the situation. EBID water users are entitled to use Project supply by virtue of EBID's contracts, the

Downstream Contracts, which are incorporated into the Compact. The Compact apportionment that protects water use by EBID members within the Project is the apportionment to Texas. New Mexico's argument lends itself just as much to EBID's view as to its own – New Mexico's argument is compelling that EBID water users, as a part of the Project, are entitled to use water. In other words, that the Project serves as the vehicle for delivery of water below the Reservoir does not necessarily mean that there is an apportionment to New Mexico.

EBID has always viewed itself as being within Compact Texas and geographic New Mexico. Such a view is not inconsistent with the Compact and, instead, is more consistent with the 2018 Supreme Court decision where the Supreme Court referred to EBID as one of the two "Texas water districts." Such a view also does not mean that New Mexico water users would not be entitled to use water that is protected by the Compact, instead, it would simply mean that New Mexico is not entitled to interfere with the delivery and use of such water. If the New Mexico view were accepted by the Special Master, it would amount to a situation where the State of New Mexico is allowed to deliver water to the Reservoir for the Project, then, through the supervision and veto authority it claims for itself, it would be allowed to retain jurisdiction over the very water it was required to relinquish control over upon delivery and, further, to interfere with the use of that water by the Project. *El Paso County Water Imp. Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907-08 (W.D. Tex. 1955) and all of the law and history discussed above prohibits such a twisted reading of the Compact.

## VI. Conclusion

What New Mexico does not say is more important than what it does say. What it does not say is that it does not have any rights to the Project water and it is not a party to any of the

Downstream Contracts. The real reason New Mexico wants an apportionment in the Lower Rio Grande is so it can invalidate the 2008 Operating Agreement and any other Project operations it does not approve of. Those decisions would most likely be made by determining whether the operation negatively affects northern New Mexico, and not whether they are in the best interests of Project irrigators. The New Mexico view is that if it has an apportionment, it will have some oversight over the Project (that it has never before had) and, in turn, it can use that oversight to invalidate Project contracts that it does not like. The reality is, New Mexico law already sets up a New Mexico entity with oversight over the New Mexico portion of the Project, and that entity is EBID, not "the State of New Mexico" through its State Engineer or Compact Commissioner. New Mexico's attempt to call the Project allocation an apportionment is an attack on EBID's autonomy as provided by New Mexico law and is, thereby, an example of New Mexico ignoring its own law in an attempt to obtain control over the Project that it has never had before.

For those reasons, what New Mexico does not say is more important than what New Mexico says in its motions and responses. As EBID points out in this brief, it is EBID that is in control of the New Mexico portion of the Project, not "New Mexico" through it's State Engineer. New Mexico's goal is to dictate Project operations through a twisted reading of the Compact that would give it a sort of "veto authority" over the Project that it does not otherwise have under state or federal law. A ruling that apportions particular quantities of water is not only inconsistent with the plain language of the Compact, but is also inconsistent with New Mexico law that gives EBID legal authority over the Project allocation. The use of Compact water below the Reservoir is limited to irrigation demand as administered by EBID pursuant to its contracts with the Secretary, and New Mexico law authorizing EBID to control said water. As such, New Mexico's Motion must be denied.

Respectfully submitted this 6th day of January, 2021

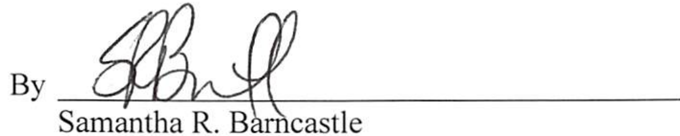
BARNCASTLE LAW FIRM, LLC

By ______________________

SAMANTHA R. BARNCASTLE
Attorney for Elephant Butte Irrigation District
P.O. Box 1556
Las Cruces, NM 88004
Ph: (575) 636-2377
samantha@h2o-legal.com

**CERTIFICATE OF SERVICE**

On the 6th day of January, 2021, I hereby certify that a true and correct copy of the foregoing was served via electronic mail, as indicated, upon those individuals listed on the service list attached hereto.



By ______________________
Samantha R. Barncastle

**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**

---

**DECLARATION OF GEHRIG "GARY" LEE ESSLINGER IN SUPPORT OF ELEPHANT BUTTE IRRIGATION DISTRICT'S BRIEF REGARDING APPORTIONMENT OF WATER BELOW ELEPHANT BUTTE RESERVOIR**

SAMANTHA R. BARNCASTLE*
BARNCASTLE LAW FIRM, LLC
1100 SOUTH MAIN, SUITE 20 (88005)
P.O. BOX 1556
LAS CRUCES, NM 88004
(575) 636-2377
samantha@h2o-legal.com
**Counsel of Record*

Attorney for Elephant Butte Irrigation District

January 6, 2021

I, Gehrig "Gary" L. Esslinger, declare as follows:

1. My name is Gehrig Lee Esslinger, but I am commonly known as Gary. I am over the age of 18, have personal knowledge of the facts set forth in this Declaration, and if called as a witness would testify competently under oath to such facts.

2. I have been employed by the Elephant Butte Irrigation District (EBID) since 1978 in various capacities and currently serve as the General Manager of EBID. I was appointed Treasurer-Manager in 1988 by the EBID Board of Directors, and each year since then they have renewed my appointment to that position.

3. As General Manager, my duties include supervision of the general day-to-day operation of EBID. I oversee all departments within EBID, including tax, maintenance, engineering, information technology, human resources, and groundwater resources. I have further detailed my General Manager duties regarding operations of EBID in a prior Declaration also filed in this case, dated March 3, 2015, a copy of which is attached to this Declaration for ease of reference. See Attachment 1.

4. In addition to overseeing the activities of all of the operations departments, I am also responsible for overseeing policy issues, including carrying out implementation of policy set by the EBID Board of Directors and directing EBID's operations to remain consistent with said policies of the Board.

5. As part of my Manager's duties in overseeing policy, I also keep track of policies of other state and federal entities that may affect EBID and, with the assistance of EBID's General Counsel, I advise the Board of Directors on such policies of other entities.

6. In all of my time with EBID, I have always had the same view of how the Rio Grande Compact operates in the area below the Elephant Butte Reservoir but above the New Mexico-Texas state line, and my understanding is the same as that of the District as a whole.

7. EBID's understanding has been that it is an "island" or "no man's land" that lies in geographic New Mexico but legal (Compact) Texas, where no one state wholly and adequately represents EBID's interests.

8. This is because we are located in geographic New Mexico, but Compact Texas.

9. Because of where EBID is located, it is not represented by the New Mexico Compact Commissioner, who also serves as the State Engineer for New Mexico. The Compact Commissioner makes decisions under the Compact based on what benefits Northern New Mexico, also known as the Middle Rio Grande (the area above Elephant Butte Reservoir), rather than weighing decisions based on what benefits the Lower Rio Grande area (geographic New Mexico below the Reservoir). This make sense to EBID because EBID has always held the view that New Mexico's obligations end when it delivers water to Elephant Butte Reservoir (aside from its obligation to protect against interference with the delivery by groundwater depletions) and, after that, the Rio Grande Project takes over and New Mexico does not play a role in the Project operations beyond the role set aside for EBID.

10. It is only logical that the New Mexico Compact Commissioner would not be able to look out for the interests of both the Northern and Southern areas of New Mexico at the same time because any water that must be delivered to Elephant Butte Reservoir for the benefit of the Southern part of the state must come directly from, and be conserved by, the Northern part

of the State. Such a legal set-up puts the New Mexico Compact Commissioner in a situation where he has an unavoidable conflict of interests. To avoid a reading of the Compact that creates an unavoidable conflict of interests, EBID has always understood that the Texas Commissioner represents the area known as "Compact Texas", even though that area includes some of "geographic New Mexico".

11. When presented with an opportunity to assist EBID in protection of the New Mexico interests in the litigation that led to the 2008 Operating Agreement, New Mexico instead took the position that it did not have an interest in the outcome therefore it had no reason to assist EBID in its defense. EBID did not receive any money or other resources from the State of New Mexico to put toward its defense in the cases that led to the 2008 Operating Agreement. This is consistent with the views espoused by New Mexico Expert Estevan Lopez in his deposition, which I personally attended, in which he stated that New Mexico did not appropriate any money to assist EBID in its defense because it did not view the litigation among the Project contracting parties (United States, EBID and EP1) over the allocation of Project supply as a "Compact" based dispute. See Attachment 2.

12. It has always been our understanding that the Texas Commissioner represents EBID, and it is the Texas Commissioner that we must go to if we have a need for something to transpire under the Compact, such as a request for relinquishment of credit water.

13. Because of the course of history as understood by EBID, EBID has historically relied upon the Texas Commissioner to represent its interest before the Compact Commission, all while believing that the New Mexico Compact Commissioner's objective was to protect Northern New Mexico/Middle Rio Grande.

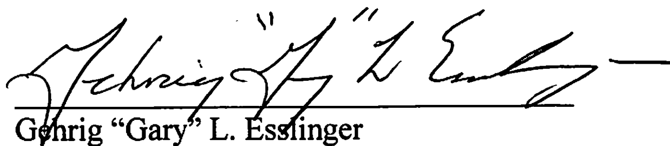
14. It has always been EBID's view that EBID's water supply, i.e. the Rio Grande Project's water supply, comes from the Texas apportionment.

15. EBID's view has been particularly informed by a convoluted history of dealings dating all the way back to prior to the Compact negotiation, including our dealings with the State of New Mexico in litigation detailed in EBID's Brief filed on the same date as this Declaration was made, as well as our general understanding of which Compact Commissioner represents our interests under the Compact.

16. EBID often gives public presentations or otherwise makes public statements, and in all of my time with EBID, my message, as well as the message of all of EBID's consultants and legal counsel, has been consistent – EBID resides in Geographic New Mexico, but Compact Texas, and our water comes from the Texas apportionment. This understanding is consistent with over a hundred years of performance of the Rio Grande Project as I know it and as it was taught to me by my predecessor General Managers.

17. I declare under penalty of perjury that the foregoing is true and correct.

Executed this 6th day of January, 2021.



Gehrig "Gary" L. Esslinger

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.*

**DECLARATION OF GEHRIG "GARY" LEE ESSLINGER**

1. The undersigned, hereby makes the following unsworn declaration, under penalty of perjury, pertinent to the above styled and numbered cause:

2. My family settled in La Mesa, NM in 1912 as members of Elephant Butte Irrigation District (EBID) and has continuously farmed within the district since that time.

3. I have been employed by EBID, the Proposed Intervener, since 1978 in various capacities and currently serve as the General Manager of EBID. I was appointed Treasurer-Manager in 1988 by the EBID Board of Directors.

4. As General Manager, my duties include supervision of the general day to day operation of EBID. I oversee the departments of tax, maintenance, hydrology, operations, engineering, information technology, human resources and ground water resources.

5. With respect to the Rio Grande Project (Project), I am responsible for the interaction with the United States Bureau of Reclamation, the International Boundary and Water Commission and El Paso County Water Improvement District #1 with respect to carrying out EBID's contractual obligations with these parties.

6. I began employment with EBID in November 1978 as an inventory clerk. My main function was to implement the February 15, 1979 Transfer of the Operation and Maintenance of Project Works contract with the United States.

7. The 1979 Contract basically turned operation and maintenance of the entire drainage and distribution system on the Rio Grande Project (Project) located in New Mexico over to EBID. The only other structures remaining in the New Mexico portion of the Project which the United States was still conducting Operation and Maintenance on were the three diversion dams (Percha, Leasburg, and Mesilla) and Elephant Butte and Caballo dams and reservoirs.

8. With the 1979 Contract, United States personnel working on the drainage and distribution system were given notice that their job had been terminated. They were given the option of transferring, taking a job with EBID or retiring. Approximately 80 employees were terminated, reassigned or retired and all of those function formerly performed

by the United States to deliver water were turned over to EBID.

9. As a result of maintenance issues involving the 3 Project diversion dams in New Mexico, the United States and EBID entered into the May 31, 1989 contract where the United States transferred operation and maintenance responsibilities for the 3 diversion dams in the New Mexico portion of the Project to EBID. This included Percha, Leasburg and Mesilla dams. As a result of this contract, EBID now operated diversion dam gates which diverted water from the Rio Grande into the EBID canal system for El Paso County Water Improvement District #1 (Texas District) and Mexico. The United States role was reduced to just monitoring the releases and diversions made by EBID.

10. EBID's role in delivering Texas irrigation district water from the Rio Grande, at Mesilla dam, can be illustrated by example. Water diverted at Mesilla dam bound for the Texas irrigation district, once diverted by EBID at Mesilla dam, travels approximately 22 miles within NM in EBID canals until it reaches the headings of the Texas irrigation district in a part of their district they call the "Upper Valley". Part of that water is also placed into the East Side canal for use in Texas. Historically, part of that water was diverted for use at the Texas Federal Correctional Facility known as "La Tuna". The remainder of the Texas and Mexico order remains in the Rio Grande.

11. Title XXXIII of the Act of October 19, 1996, was historic in that it was the first time Congress had instructed the Secretary to deed back to an irrigation district the drainage and distribution system that it had paid for in its repayment contract. I personally testified in front of congressional committees as part of the process. The final deed conveying the drainage and distribution system to EBID was signed on January 19, 1996. Since that time, other irrigation districts in the West have now followed in EBID's footsteps. The United States still owns and operates Elephant Butte and Caballo dams and reservoirs that store Project water and release it for downstream use under the 2008 Operating Agreement Settlement described below.
12. Also in 1996, EBID begin the installation of monitoring stations in the canals, laterals and drains to provide data to monitor Project surface water that was to be delivered to EBID members, Texas irrigation district members and Mexico.
13. Paragraph 6d of the 1979 Transfer of O&M for Project Contract provided, "A detailed operation plan will be concluded between the United States and the District setting forth procedures for water delivery and accounting. No agreement was concluded until a settlement was reached in litigation with the United States and the Texas irrigation district.

14. On February 14, 2008 the United States and the two irrigation districts signed the Operating Agreement Settlement. The Operating Agreement Settlement is the procedure used by the districts and the United States to divide the Project water supply between the two districts.

15. Under the Operating Agreement Settlement, an Allocation Committee made up of representatives from the two districts and the United States meet and agrees on the allocation, to the two districts. Thereafter, the districts determine the release from Caballo reservoir for the orders from EBID, the Texas District and Mexico and specify the gate opening at Caballo reservoir to achieve the desired flow. EBID is solely responsible for determining the allocation that each of its members will receive.

16. The water, once released, flows downstream until it is diverted by EBID at one of the 3 diversion dams on the Rio Grande. EBID operates and maintains Percha, Leasburg and Mesilla diversion Dams under the 1989 Contract. Project water diverted by EBID at the diversion dams, flows thorough EBID laterals and canals to farmers in New Mexico, where the water is used for irrigation; EBID owns and operates the laterals, canals and drains, and makes all decisions concerning timing and amounts of water diversions and deliveries through the laterals and canals. EBID also makes the diversions at these

dams for delivery of water to the Texas district, Texas district farmers and Mexico.

17. A portion of Project water once used by the farmers within EBID is captured by drainage facilities that are owned and operated by EBID as it delivers to its upstream farmers. These drain return flows are then rediverted into the Rio Grande and become part of Project supply that is used by other farmers within EBID as well as by the Texas irrigation district. This process repeats itself until water is delivered in Texas. In a full allotment year, historically, a release of 790,000 acre feet has yielded a diversion of 960,000 acre feet due to the capture of return flows.

18. All water diverted at Percha and Leasburg dams is for delivery to EBID farmers. Diversions at Mesilla Dam are to make delivery to EBID farmers, direct delivery to Texas farmers that cannot be reached by the Texas district canal system, and delivery to the Texas district for distribution to its farmers and some EBID farmers who cannot be reached by EBID's canal system.

19. On August 9, 1995, EBID and the Texas irrigation district entered into a Joint Powers Agreement which set forth how EBID would deliver water to Texas irrigation district members in Texas. As required by the Joint Powers Agreement Act, the Agreement was also approved by the State of New Mexico on August 18, 1995. This Agreement has been

referred to as the 1995 6A/6B Contract. Under this contract, EBID employees drive across the state line in EBID vehicles and operate turnouts that deliver water to 2400 acres in Unit 6B and 1400 acres in Unit 6C in Texas. EBID also performs maintenance functions on canals, drains, laterals and diversion structures in Texas.

20. A diagram illustrating the release, diversion, delivery and management functions of EBID in the Project in New Mexico and Texas is attached to this Declaration.

21. An example of how EBID delivers water for use in Texas can be illustrated by an example. If the Texas irrigation district wanted an order of 1,000 cfs for use in Texas, the two districts agree on a setting of the gate height for the opening of the gates at Caballo Reservoir that will meet the orders of EBID, Texas, and Mexico. The United States is given the gate settings which they carry out. Once the release of water is made, EBID has to monitor and divert water though Percha and Leasburg diversion dams as well as account for its own orders, and those of Texas and Mexico. When this 1000 cfs reaches Mesilla dam, based upon the Texas orders and Mexican orders, diversions of 150 cfs is made by EBID into the West Side canal system and 40 cfs into East Side canal system. A total of 190 cfs is in EBID's canal system that will be used in Texas. The remainder of the 1,000 cfs which is 810 cfs continues downstream in the Rio Grande for diversion in

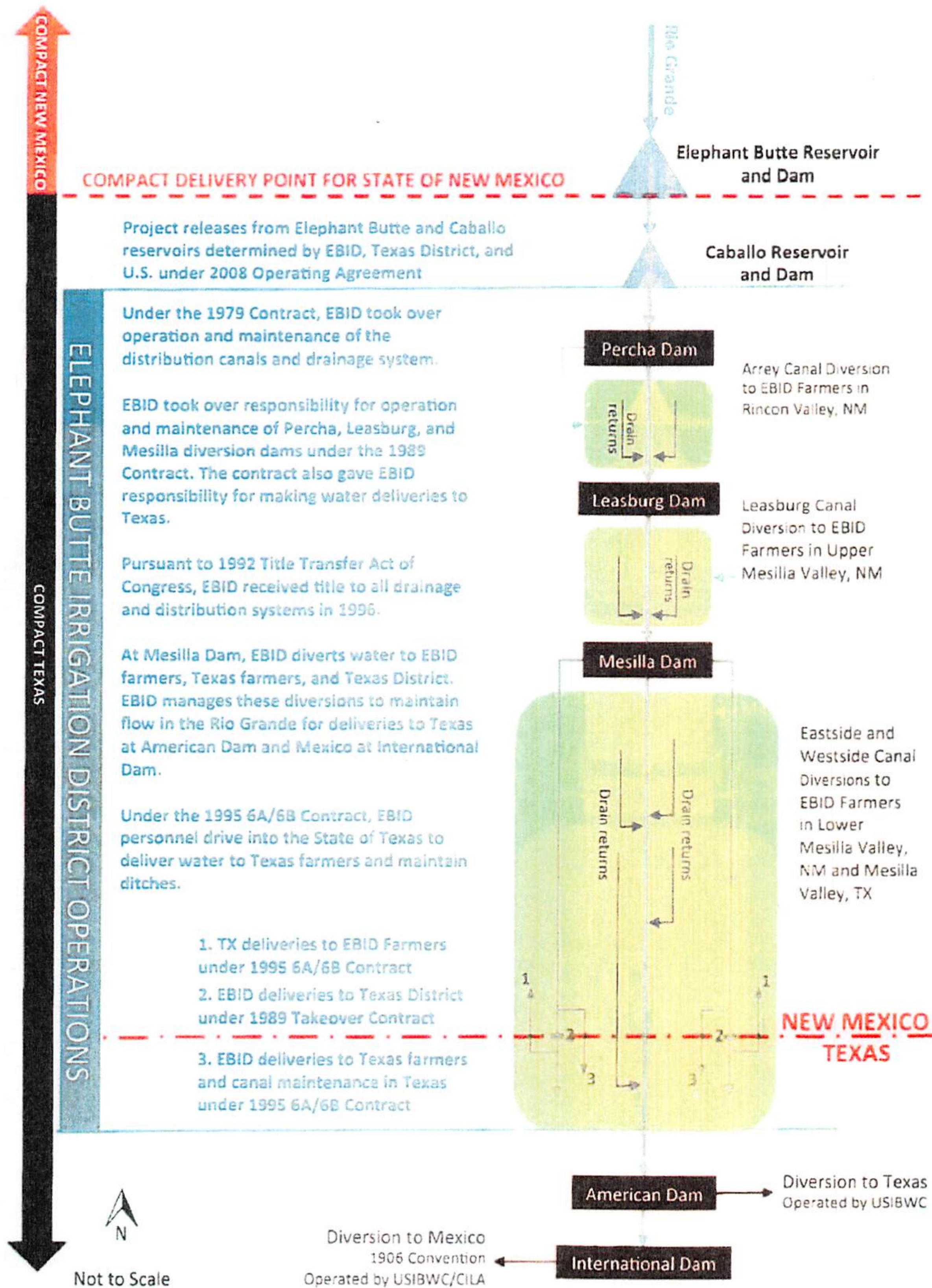
> what the Texas district calls the Lower Valley, along with the water for delivery to Mexico.

I, Gehrig "Gary" Lee Esslinger, declare under penalty of perjury that the foregoing is true and correct to the best of my information and belief.

Executed this 3 day of March 2015.

/s/ Gehrig Lee Esslinger
Gehrig "Gary" Lee Esslinger

---


COMPACT NEW MEXICO
Rio Grande
Elephant Butte Reservoir
and Dam
COMPACT DELIVERY POINT FOR STATE OF NEW MEXICO
Project releases from Elephant Butte and Caballo reservoirs determined by EBID, Texas District, and U.S. under 2008 Operating Agreement
Caballo Reservoir
and Dam
ELEPHANT BUTTE IRRIGATION DISTRICT OPERATIONS
Under the 1979 Contract, EBID took over operation and maintenance of the distribution canals and drainage system.
EBID took over responsibility for operation and maintenance of Percha, Leasburg, and Mesilla diversion dams under the 1989 Contract. The contract also gave EBID responsibility for making water deliveries to Texas.
Pursuant to 1992 Title Transfer Act of Congress, EBID received title to all drainage and distribution systems in 1996.
At Mesilla Dam, EBID diverts water to EBID farmers, Texas farmers, and Texas District. EBID manages these diversions to maintain flow in the Rio Grande for deliveries to Texas at American Dam and Mexico at International Dam.
Under the 1995 6A/6B Contract, EBID personnel drive into the State of Texas to deliver water to Texas farmers and maintain ditches.
1. TX deliveries to EBID Farmers under 1995 6A/6B Contract
2. EBID deliveries to Texas District under 1989 Takeover Contract
3. EBID deliveries to Texas farmers and canal maintenance in Texas under 1995 6A/6B Contract
COMPACT TEXAS
Percha Dam
Drain returns
Arrey Canal Diversion to EBID Farmers in Rincon Valley, NM
Leasburg Dam
Drain returns
Leasburg Canal Diversion to EBID Farmers in Upper Mesilla Valley, NM
Mesilla Dam
Drain returns
Drain returns
Eastside and Westside Canal Diversions to EBID Farmers in Lower Mesilla Valley, NM and Mesilla Valley, TX
1
2
3
NEW MEXICO
TEXAS
American Dam
Diversion to Texas
Operated by USIBWC
International Dam
Diversion to Mexico
1906 Convention
Operated by USIBWC/CILA
N
Not to Scale

IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

STATE OF TEXAS )
)
Plaintiff, )
) Original Action Case
VS. ) No. 220141
) (Original 141)
STATE OF NEW MEXICO, )
and STATE OF COLORADO, )
)
Defendants. )

*****************************************************
REMOTE ORAL AND VIDEOTAPED DEPOSITION OF
ESTEVAN LOPEZ
JULY 7, 2020
VOLUME 2
*****************************************************

REMOTE ORAL AND VIDEOTAPED DEPOSITION of ESTEVAN LOPEZ, produced as a witness at the instance of the Plaintiff State of Texas, and duly sworn, was taken in the above-styled and numbered cause on July 7, 2020, from 9:00 a.m. to 4:17 p.m., before Heather L. Garza, CSR, RPR, in and for the State of Texas, recorded by machine shorthand, at the offices of HEATHER L. GARZA, CSR, RPR, The Woodlands, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto; that the deposition shall be read and signed.

1 R E M O T E   A P P E A R A N C E S
2
3 FOR THE PLAINTIFF STATE OF TEXAS:
4 Mr. Stuart L. Somach
SOMACH SIMMONS & DUNN
5 500 Capitol Mall, Suite 1000
Sacramento, California 95814
6 (916) 446-7979
ssomach@somachlaw.com
7
8 FOR THE DEFENDANT STATE OF NEW MEXICO:
9 Mr. Jeffrey Wechsler
MONTGOMERY & ANDREWS
10 325 Paseo De Peralta
Santa Fe, New Mexico 87501
11 (505) 986-2637
jwechsler@montand.com
12
-and-
13
Mr. Luis Robles
14 ROBLES, RAEL & ANAYA, P.C.
500 Marquette Avenue NW, Suite 700
15 Albuquerque, New Mexico 87102
(505) 242-2228
16 luis@roblesrael.com
17
FOR THE DEFENDANT STATE OF COLORADO:
18
Mr. Chad Wallace
19 Mr. Preston V. Hartman
COLORADO DEPARTMENT OF LAW
20 1300 Broadway, 7th Floor
Denver, Colorado 80203
21 (720) 508-6281
chad.wallace@coag.gov
22 preston.hartman@coag.gov
23
24
25

1 FOR THE UNITED STATES:
2 Mr. David W. Gehlert
U.S. DEPARTMENT OF JUSTICE
3 999 18th Street, South Terrace, Suite 370
Denver, Colorado 80202
4 (303) 844-1386
david.gehlert@usdoj.gov
5
-and-
6
Ms. Shelly Randel
7 U.S. DEPARTMENT OF THE INTERIOR
1849 C Street NW
8 Washington, DC 20240
(202) 208-5432
9 shelly.randel@sol.doi.gov
10 -and-
11 Mr. Christopher B. Rich
U.S. DEPARTMENT OF THE INTERIOR
12 125 South State Street, Suite 6201
Salt Lake City, Utah 84138
13 (801) 524-5677
14
FOR THE EL PASO COUNTY WATER AND IMPROVEMENT DISTRICT
15 NO. 1:
16 Ms. Maria O'Brien
MODRALL SPERLING ROEHL HARRIS & SISK, P.A.
17 500 Fourth Street N.W.
Albuquerque, New Mexico 87103
18 (505) 848-1800
mobrien@modrall.com
19
20 FOR THE ELEPHANT BUTTE IRRIGATION DISTRICT:
21 Ms. Samantha R. Barncastle
BARNCASTLE LAW FIRM, LLC
22 1100 South Main, Suite 20
Las Cruces, New Mexico 88005
23 (575) 636-2377
samantha@h2o-legal.com
24
25

1 FOR THE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND THE CITY OF LAS CRUCES:

2

Mr. James C. Brockmann
3 STEIN & BROCKMANN, P.A.
Post Office Box 2067
4 Santa Fe, New Mexico 87504
(505) 983-3880
5 jcbrockmann@newmexicowaterlaw.com
6
FOR THE NEW MEXICO PECAN GROWERS:
7
Ms. Tessa T. Davidson
8 DAVIDSON LAW FIRM, LLC
4206 Corrales Road
9 Post Office Box 2240
Corrales, New Mexico 87048
10 (505) 792-3636
ttd@tessadavidson.com
11
12
VIDEOGRAPHER:
13
Ms. Kayla Brown
14
15 ALSO PRESENT:
16 Ian Ferguson
Michelle Estrada-Lopez
17 Arianne Singer
Peggy Barroll
18 Shelly Dalrymple
Susan Barela
19 Lela Hunt
Rolf Schmidt-Petersen
20 Erek Fuchs
Gary Esslinger
21
22
23
24
25

1 **question is basically you have listed some projects**
2 **and activities that can be generally categorized as,**
3 **and this is reading from your report, "1, river and**
4 **drain maintenance; 2, water management; and, 3, water**
5 **rights administration." And so what I'm asking here**
6 **is what of those three enumerated issues has New**
7 **Mexico engaged in, in the LRG?**
8 A. I believe that we participated at least in a
9 cost share regard, I think. I think we've done some
10 river and drain maintenance with IBWC. I'm not
11 actually certain to tell you the truth. Someone like
12 Rolf Schmidt-Petersen would know -- know for sure, I
13 think. Water management, I think, for the most part
14 goes to EBID, but certainly the state engineer has
15 administration and management through responsibilities
16 over surface water that certainly can affect -- excuse
17 me -- on groundwater that can affect surface water
18 supplies. So both 2 and 3, there is some involvement
19 in those regards, as well.
20 **Q. Okay. And has the Interstate Stream**
21 **Commission engaged in any activity in the Lower Rio**
22 **Grande regarding Compact administration?**
23 A. I don't believe so other than trying to
24 gather information.
25 **Q. Did the State of New Mexico, in any way, seek**

1 to assist EBID with its defense when it was sued in
2 both federal district court in Texas and when it sued
3 in federal district court in New Mexico in the cases
4 that led to the operating agreement?
5 MR. WECHSLER: Object to form.
6 A. I don't know.
7 Q. (BY MS. BARNCASTLE) Do you know if New Mexico
8 sought to appropriate money to assist EBID with its
9 legal or technical defense in those cases?
10 A. I don't know. I don't think that the -- I
11 don't think that the Interstate Stream Commission did.
12 Q. What was your role in the 2006 to 2008 time
13 frame when those cases were ongoing? Where were you
14 employed, I should say?
15 A. I was the director for the Interstate Stream
16 Commission.
17 Q. Okay. So if ISC did appropriate money to
18 EBID to assist with its defense, do you think you
19 would have known that?
20 A. I think I probably would. I'm not sure that
21 I would have remembered it now. There -- we -- we
22 served as a conduit for a lot of state money and a lot
23 of individual entities. I -- I don't recall all of
24 them, I am certain of that.
25 Q. Okay. Did New Mexico and -- and particularly

1 **you as the ISC director at that time view those cases**
2 **as a Compact dispute at that time?**
3 A. No, I don't think that we did.
4 **Q. Why not?**
5 A. I think that a Compact -- Compact dispute
6 would have been a dispute between Texas and New
7 Mexico. I think --
8 **Q. Even --**
9 A. I think that Texas would not have let us out
10 of a Compact dispute.
11 **Q. Even where the situation was where the**
12 **dispute was regarding who should get what amount of**
13 **project water, that could, in your opinion, lead to a**
14 **change of the -- the Compact allocation, as you've**
15 **said in your deposition here, even in that situation,**
16 **New Mexico would not have viewed that as a Compact**
17 **dispute?**
18 **MR. WECHSLER:** Form and foundation.
19 A. You know, I don't know that I would have
20 recognized it back then as -- as I've formulated it
21 right now. You know, frankly, when the operating
22 agreement came out in 2008, we didn't know the full
23 implications of that for some time. We had to -- we
24 had to watch how it worked and see what -- see what
25 it -- see what it meant and see what all the

# IN THE COURT OF APPEALS OF THE STATE OF NEW MEXICO

COURT OF APPEALS OF NEW MEXICO
FILED
MAR 04 2008

**TRI-STATE GENERATION AND TRANSMISSION ASSOCIATION, INC.,**

**Petitioner-Appellee,**

**v.**

**No. 27802**
**Socorro County**
**D-0725-CV-05-03**

**JOHN D'ANTONIO, JR., STATE ENGINEER OF NEW MEXICO**

**Respondent-Appellant.**

---

NEW MEXICO STATE ENGINEER'S BRIEF IN CHIEF
(CORRECTED)

---

APPEAL FROM THE SEVENTH JUDICIAL DISTRICT COURT
SOCORRO COUNTY, NEW MEXICO
HONORABLE MATTHEW G. REYNOLDS, Presiding

---

By:

NEW MEXICO ATTORNEY GENERAL
GARY K. KING, Attorney General
Stephen R. Farris, Asst. Attorney General
Frances C. Bassett, Asst. Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6778 / (505) 827-4440 (fax)

NEW MEXICO STATE ENGNEER
JOHN D'ANTONIO, JR., State Engineer
DL Sanders
Special Asst. Attorney General
P.O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150 / (505) 827-3887 (fax)

SUTIN, THAYER & BROWNE
Paul Bardacke
Peter S. Kierst
J. Katherine Girard
Special Assistant Attorneys General
P. O. Box 1945
Albuquerque, NM 87103
(505) 883-2500 / (505) 888-6565 (fax)

Attorneys for the Respondent-Appellant

## TABLE OF CONTENTS

TABLE OF AUTHORITIES ..... iv

I. SUMMARY OF PROCEEDINGS ..... 1

A. Nature of the Case ..... 1

B. Statement of Facts and Course of Proceedings ..... 1

1. Pertinent Legislative Facts -- the "Urgent" and "Imperative" Needs That Led the Legislature to Enact Section 72.2.9.1 ..... 3

2. Problems on the Rio Grande ..... 5

3. Continuing Problems on the Pecos River ..... 6

4. Lessons for New Mexico from *Kansas v. Colorado* ..... 9

II. LEGAL ARGUMENT ..... 12

A. Summary of the Argument ..... 12

B. Standard of Review ..... 13

C. The AWRM Regulations Do Not Violate Separation of Powers ..... 13

1. The District Court Erred In Finding That the State Engineer Cannot Determine the Elements of Water Rights for Administrative Purposes; Since 1907 the Legislature Has Required Him to Do So and That Authority Has Been Upheld by the Courts. ..... 15

a. The administrative determination of water rights has been part of the State Engineer's statutory mandate since his office was created in 1907. ..... 15

b. New Mexico courts have consistently upheld the State Engineer's authority to determine the elements of water rights for administrative purposes ..... 20

c. The district court's opinion would undo a century of administrative practice and the statutes and cases that uphold it; such a result is constitutionally impermissible. ..... 22

2. The District Court Erred in Confusing Administration and Adjudication; They are Different, Independent and Complementary Functions Under New Mexico Water Law. .... 24

3. The District Court Erred in Finding a Conflict Between 72-2-9.1, AWRM and the Separation of Powers Doctrine .... 29

a. The Constitution does not say that only courts can determine the elements of water rights .... 29

b. The separation of powers doctrine is not violated by the State Engineer's exercise of legislatively mandated "quasi-judicial" functions .... 36

c. The Constitution permits the legislature to authorize the courts to determinate the elements of water rights for adjudication, and the State Engineer to do so for administration .... 38

d. The district court misapplied the *Lewis* case; *Lewis* supports the State Engineer. .... 40

D. Section 72-2-9.1 Is Not an Excessive Delegation of Power; It is Constitutional and Should Not Have Been "Rewritten" by the Court .... 42

E. The District Court Violated Separation of Powers By Substituting Its Policy Judgments for the Legislature's .... 47

F. The AWRM Regulations Do Not Violate Substantive Due Process .... 50

III. CONCLUSION .... 54

All citations to the Record Proper are cited as "R.P. xxx"

State of Compliance pursuant to Rule 12-213 (G) NMRA

I hereby certify that, according to the word count provided in Microsoft Word 2003, the foregoing corrected brief contains 12,480 words, exclusive of those parts excepted by 12-213 (F)(1) NMRA, in compliance with this Court's order of February 5, 2008, granting the State's motion to file an oversized brief-in-

chief of no more than 12,500 words. The text of the brief is composed in a 14-point proportionally spaced typeface that includes serifs (Times New Roman).

## TABLE OF AUTHORITIES

### Federal Cases


*Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) .......... 53

*Hinderlider v. La Plata River and Cherry Creek Irrigation Co.*, 304 U.S. 92 (1938) .......... 11, 53

*Hodel v. Indiana*, 452 U.S. 314 (1981) .......... 53

*Jicarilla Apache Tribe v. United States*, 657 F.2d 1126 (10th Cir. 1981) .......... 52

*Kansas v. Colorado*, 185 U.S. 125 (1902) .......... 11

*Kansas v. Colorado*, 514 U.S. 673 (1995) .......... 9, 10, 11

*Kansas v. Colorado*, 533 U.S. 1 (2001) .......... 9

*Mistretta v. United States*, 488 U.S. 361 (1989) .......... 43

*Reno v. Flores*, 507 U.S. 292 (1993) .......... 54

*Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222 (D.N.M. 2002), *aff'd Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004) .......... 5

*Silvery Minnow v. Rinne*, Tenth Circuit Case Nos. 05-2399, 06-2020 & 06-2021 (consolidated) .......... 5

*State ex rel. Dyer v. Sims*, 341 U.S. 22 (1951) .......... 11, 37

*Texas v. New Mexico*, 462 U.S. 554 (1983) .......... 11

*Texas v. New Mexico*, 485 U.S. 388 (1988) .......... 7, 8, 11

*United States v. Curtiss-Wright Exports*, 299 US 304 (1936) .......... 23


### New Mexico Cases


*Board of Education of Carlsbad v. Harrell*, 118 N.M. 470; 882 P.2d 511 (1994). 31

*Carillo v Compusys*, 1997-NMCA-003, 930 P. 2d 1172 .......... 37, 38

*Casillas v. S.W.I.G.*, 96 N.M. 84, 628 P.2d 329 (Ct. App. 1981) .......... 53

*City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, 79 P.3d 297 .......... 47

*City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1962) .......... 20, 33

*City of Hobbs v. State ex rel. Reynolds*, 82 N.M. 102, 476 P.2d 500 (1970) .......... 48

*City of Roswell v. Berry*, 80 N.M. 110, 452 P.2d 179 (1969) .......... 33

*City of Roswell v. Reynolds*, 86 N.M. 249, 522 P.2d 796 (1974) .......... 20

*Clodfelter v. Reynolds*, 68 N.M. 61, 358 P.2d 626 (1961) .......... 14

*Cobb v. State Canvassing Bd.*, 2006-NMSC-034, 140 P.3d 498 .......... 44, 45, 46

*Cooper v. Albuquerque City Comm'n*, 85 N.M. 786, 518 P.2d 275 (1974) .......... 13, 48

*Dickson v. Saiz*, 62 N.M. 227, 308 P.2d 205 (1957) .......... 36

*Duke City Lumber v. N.M. Environmental Improvement Board*, 101 N.M. 291, 681 P.2d 717 (1984), .......... 36, 38

*El Paso & R. I. Ry. v. District Court*, 36 N.M. 94, 8 P.2d 1064 (1931) .......... 25, 27

*Eldorado Utilities v. State ex rel. D'Antonio*, 2005-NMCA-041, 119 P.3d 76 25, 35
*Fellows v. Shultz*, 81 N.M. 496, 469 P.2d 141 (1970) .................................... 33, 48
*Garbagni v. Metropolitan Inv.. Inc.*, 110 N.M. 436, 796 P.2d 1132 (Ct. App. 1990) .................................................................................................. 20
*Hanson v. Turney* 2004-NMCA-069, 94 P.3d 1 .................................................. 28
*Herrington v. State*, 2006-NMSC-014, 133 P.3d 258............................................ 21
*Howell v. Hein*, 118 N.M. 500, 882 P.2d 541 (1994) ............................................ 44
*Kaiser Steel Corp. v. W.S. Ranch*, 81 N.M. 414, 467 P.2d 986 (1970) ................. 48
*Klinksiek v. Klinksiek*, 2005-NMCA-008, 104 P.3d 559 ...................................... 51
*Lovelace Medical Center v. Mendez*, 111 N.M. 336, 805 P.2d 603 (1991).............. 38
*McBee v. Reynolds*, 74 N.M. 783, 399 P.2d 110.................................................... 21
*Montgomery v. Lomos Altos*, 2007-NMSC-002, 150 P.3d 971 ....................... 21, 35
*Morningstar Water Users v. Public Utility*, 120 N.M. 579, 904 P.2d 28 (1995) ... 46
*N.M. Petroleum Marketers Assn v. N.M. Environmental Impr. Bd.*, 2007-NMCA-060, 160 P.3d 587 ............................................................................. 13, 44
*Old Abe Co. v. New Mexico Mining Comm'n*, 1995-NMCA-180, 908 P.2d 776... 13
*Ortiz v. Taxation and Revenue Dep't.*, 1998-NMCA-027, P.2d 109 ...................... 13
*Public Service Co. v. Reynolds*, 68 N.M. 54, 358 P.2d 621 (1960) ................. 15, 39
*Rio Grande Chapter of Sierra Club v. New Mexico Mining Commission*, 2003-NMSC-005, 61 P.3d 806......................................................................... 46, 47
*Schaefer v. Whitson*, 32 N.M. 481, 259 P. 618, (1927).......................................... 54
*State ex rel. Harvey v. Medler*, 19 N.M. 252, 142 P. 376 (1914) ........................... 30
*State ex rel. Erickson v. McLean*, 62 N.M. 264, 308 P.2d 983 (1957) ............ 26, 52
*State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, 150 P.3d 375. passim
*State ex rel. Quintana v. Schnedar*, 115 N.M. 573, P.2d 562 (1993) .................... 28
State ex rel. *Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 663 P.2d 358 (1983)........................................................................ 34, 35, 41
*State ex rel. Sandel v. NMPUC*, 127 N.M. 272, 980 P.2d 55 (1999)...................... 46
*State ex rel. State Highway Dep't v. Yurcic*, 85 N.M. 220, 511 P.2d 546 (1973) .. 51
*State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth.*, 76 N.M. 1, 411 P.2d 984 (1966)............................................................................... 43
*State ex rel. Taylor v. Johnson*, 1998-NMSC-015, 961 P.2d 768.......................... 49
*State v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961)........................................ 22
*State v. Orzen*, 83 N.M. 458, 493 P.2d 768 (1972)................................................ 46
*State v. Smith*, 136 N.M. 372, 98 P. 3d 1022 (2004)......................................... 28, 47
*Templeton v. Artesian Conservancy Pecos Valley District*, 65 N.M. 59, 332 P.2d 465 (1958)........................................................................................... 20, 25
*Tri-State Generation and Transmission Ass'n. Inc. v. D'Antonio*, COA Case No. 27, 802, 2007-NMCA-___, __ P.3d __............................................................ 2
*Trujillo v. City of Albuquerque*, 110 N.M. 621, 798 P.2d 571 (1990).................... 4

**Cases Other Jurisdictions**

*Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (Colo. 1968)....10
*Kuiper v. Atchison, Topeka and Santa Fe Railway Co.*, 195 Colo. 557, 581 P.2d (Colo. 1978)....10
*Mosby Irrigation Co. v. Criddle*, 11 Utah 2d 41, 354 P.2d 848 (1960)....52

**Federal Constitutional Provisions**

U.S. Const. amend. V....3
U.S. Const. amend. XIV....3
U.S. Const., art. III, § 2, cl. 1....6

**State Constitutional Provisions**

N.M. Const. art. II, § 18....3
N.M. Const. art. III, § 1....30
N.M. Const. art. XVI, § 1....51
N.M. Const. art. XVI, § 2....33, 48, 51, 52
N.M. Const. art. XVI, § 3....17, 51, 52
N.M. Const. art. XVI, §§ 2-3....13, 16, 30
N.M. Const. art. XVI, § 5....32, 34, 51

**New Mexico Statutes**

NMSA 1978, § 52-1-1, *et seq*....44
NMSA 1978, § 72-1-1 (1907)....52
NMSA 1978, § 72-1-2.4 (2002)....7, 8, 40
NMSA 1978, § 72-1-3 (1961)....3
NMSA 1978, § 72-1-4 (1959)....3
NMSA 1978, § 72-2-1 (1907)....8, 14, 27, 45
NMSA 1978, § 72-2-8 (1967)....30
NMSA 1978, § 72-2-8 (A) (1967)....14
NMSA 1978, § 72-2-9.1 (2003)....passim
NMSA 1978, § 72-2-9.1 (A)....1, 27
NMSA 1978, § 72-2-9.1 (B)....1
NMSA 1978, § 72-2-9.1 (D)....27
NMSA 1978, § 72-2-16 (1965)....50, 53, 54
NMSA 1978, § 72-3-1, *et seq*....18
NMSA 1978, § 72-3-3 (1935)....51, 53
NMSA 1978, § 72-4-15 (1907)....26
NMSA 1978, § 72-4-16 (1953)....3
NMSA 1978, § 72-4-16 (1965)....3
NMSA 1978, § 72-4-17 (1907)....24, 25
NMSA 1978, § 72-4-19 (1907)....16, 40

NMSA 1978, § 72-5-1 through 72-5-39 .......... 3
NMSA 1978, § 72-5-4 (1907) .......... 33
NMSA 1978, § 72-5-5 (1985) .......... 17
NMSA 1978, § 72-5-13 (1953) .......... 17, 18, 19, 26
NMSA 1978, § 72-5-15 (1907) .......... 27
NMSA 1978, § 72-5-23 (1985) .......... 17, 18
NMSA 1978, § 72-5-25 (1971) .......... 18
NMSA 1978, § 72-5-28 (2002) .......... 18
NMSA 1978, § 72-7-1 (1971) .......... 32
NMSA 1978, § 72-12-1 (1931) .......... 3, 21, 52
NMSA 1978, § 72-12-3 (1943) .......... 17
NMSA 1978, § 72-12-3 (D) (2001) .......... 33
NMSA 1978, § 72-12-5(1931) .......... 3
NMSA 1978, § 72-12-7 (1985) .......... 17
NMSA 1978, § 72-12-28 (1967) .......... 3
NMSA 1978, § 72-15-23 (1939) .......... 5

**New Mexico Rules and Regulations**

NMAC 19.25 .......... 44
NMAC 19.25.13.1 through 50 .......... passim
NMAC 19.25.13.21 .......... 19
NMAC 19.25.13.27 (D) .......... 2, 54
NMAC 19.25.13.27 (F) .......... 2, 54
NMAC 19.25.13.27 (G) .......... 2, 54
NMAC 19.25.13.28 .......... 28
NMAC 19.25.13.30 .......... passim
NMAC 19.26 .......... 44
NMAC 19.27 .......... 44
NMRA Rule 1-075 .......... 2

**New Mexico Session Laws**

N.M. Laws 2001, Second Extraordinary Session, Ch. 1, §1(A)(1) .......... 6
N.M. Laws 2002, First Extraordinary Session, Ch. 4, §5(8) and (9) .......... 6

**Texas Session Laws**

2001 Tex. Gen. Laws, p. 1515 .......... 6
2007 Tex. Gen. Laws, p. 4938-40 .......... 6

**Treatises**

2 R. Rotunda and J. Nowak, *Treatise on Constitutional Law*, § 15.4(e) (2007) .... 53

## Other Authorities

1 Special Master's Fifth Report, (2008) (not yet posted on the Supreme Court's website) .......... 9
1 Special Master's First Report, (1994) .......... 11
2 Special Master's First Report, (1994) .......... 10
*2002-2003 Annual Report of the New Mexico Office of the State Engineer-Interstate Stream Commission* .......... 4, 7
2003 New Mexico Drought Plan .......... 4
Charles T. Dumars, *Endangered Species that Eat Prior Appropriation: Integrating the Endangered Species Act into State Water Law*, 6 New Mexico Natural Resources Law Reporter 38 (1991) .......... 5
Cooleys Const. Lim. (7th ed.) 126) .......... 30
G. Emlen Hall, *High and Dry: The Texas-New Mexico Struggle for the Pecos River* (2002) .......... 7, 8
Robert Emmet Clark, *New Mexico Water Law Since 1955*, 2 Nat. Res. J. 484 (December, 1962) .......... 39
Kenneth Culp David, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955) .......... 4

# I. SUMMARY OF PROCEEDINGS

## A. Nature of the Case

This is an appeal by the New Mexico State Engineer, John D'Antonio, Jr., from an order of the district court striking down as unconstitutional portions of the New Mexico Active Water Resource Management regulations, NMAC 19.25.13.1 through 50 ("AWRM regulations").

## B. Statement of Facts and Course of Proceedings

In 2003, the New Mexico legislature enacted NMSA 1978, Section 72-2-9.1 (2003), finding it "urgent" and "imperative" that the State Engineer exercise his authority to administer water rights. The statute states in pertinent part:

> . . . the adjudication process is slow, the need for water administration is urgent, compliance with interstate compacts is imperative and the state engineer has authority to administer allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.

§ 72-2-9.1 (A). The statute directed the State Engineer to "adopt rules for priority administration to ensure that [his] authority is exercised." § 72-2-9.1 (B).

In compliance with the statute, the State Engineer promulgated the AWRM regulations. (R.P. 1614-31) The State Engineer conducted a review and comment period, including two public hearings on the proposed regulations. (R.P. 1078, 1888-91) The regulations were revised based on the public input (R.P.1550-63),

and were formally adopted by the State Engineer on December 3, 2004. (R.P. 1565-67) The regulations became effective on December 30, 2004, and were published on that date in their final form in the *New Mexico Register*. (R.P. 1595-1604)

Four days later the constitutionality of the regulations was challenged in the Seventh Judicial District, in Socorro County. (R.P. 1, 49-79) The case was mistakenly litigated in the district court under Rule 1-075 NMRA, but this Court has allowed the appeal to proceed as a matter of right. *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, COA Case No. 27, 802, 2007-NMCA-___, __ P.3d __.

Although the district court conducted no evidentiary hearing, the court allowed the parties to file 75-page legal briefs and to argue the case orally. (R.P. 644-706, 723-811) The New Mexico Cattle Growers Association participated as amicus curiae. (R.P. 707, 813-27) Following oral argument, the district court issued a memorandum decision (R.P. 954-996), and a final judgment on May 16, 2007. (R.P. 1009-10)

The district court struck down NMAC 19.25.13.27 (D), (F) and (G), as unconstitutional under the separation of powers clause in the New Mexico Constitution. (R.P. 982-88) The court's ruling prohibits the State Engineer from administering water rights on the basis of the permits that have been issued and

administered by his office since 1907 under the surface water code, NMSA 1978, Sections 72-5-1 through 72-5-39, and since 1931 under the groundwater code, NMSA 1978, Sections 72-12-1 through 72-12-28. In addition, the court's ruling prohibits the State Engineer from administering water rights on the basis of hydrographic surveys conducted under NMSA 1978, Sections 72-4-16 (1953) and (1965). Finally, the district court's ruling prohibits the State Engineer from administering water rights on the basis of other evidence available to him. This prohibition will include, *inter alia*, administration based on verified declarations of pre-1907 water rights that have been filed by water right claimants under NMSA 1978, Sections 72-1-3 (1961), 72-1-4 (1959) and 72-12-5(1931), notwithstanding that such declarations are by law "prima facie evidence of the truth of their contents." § 72-1-3; §72-12-5.

In addition to invalidating the regulations on these grounds, the district court struck down the hearing procedures under 19.25.13.27 NMAC and 19.25.13.30 NMAC on the ground that these provisions violate the due process guarantees of the Fifth and the Fourteenth Amendments to the U.S. Constitution and Article II, Section 18 of the New Mexico Constitution. (R.P. 988-93)

1. <u>Pertinent Legislative Facts -- the "Urgent" and "Imperative" Needs That Led the Legislature to Enact Section 72.2.9.1</u>

For this Court to properly evaluate 72-2-9.1 and its implementing regulations, it is crucial for the Court to understand the urgent and imperative

needs that led the New Mexico legislature to enact 72-2-9.1. In this section of the brief the State Engineer asks the Court to take judicial notice of various public records and government reports that contain legislative facts, as distinguished from adjudicative facts. "Legislative facts are those which help the tribunal to determine the content of law and policy and to exercise its judgment or discretion in determining what course of action to take." *Trujillo v. City of Albuquerque*, 110 N.M. 621, 635, 798 P.2d 571, 585 (1990) (Montgomery, J., concurring in part, dissenting in part) (quoting Kenneth Culp David, *Judicial Notice*, 55 Colum. L. Rev. 945, 952 (1955)).).

Section 72-2-9.1 was enacted by the legislature in 2003. In that year New Mexico was entering the fourth year of a severe drought and a deepening water crisis. Some climate measures were showing the worst drought conditions in New Mexico in 100 years. *2002-2003 Annual Report of the New Mexico Office of the State Engineer-Interstate Stream Commission*, pp. 8-9.[1] The State's increased population had "dramatically increased" the State's vulnerability to drought. <u>2003 New Mexico Drought Plan</u>, p.4.[2] There were water emergencies across the State, and litigation, or threats of litigation, in almost every major river basin.

---

[1] http://www.ose.state.nm.us/PDF/Publications/AnnualReports/02-03-annual-report.pdf.
[2] http://www.seo.state.nm.us/DroughtTaskForce/droughtplans.html.

## 2. Problems on the Rio Grande

On the State's largest river, the Rio Grande, a federal district court ruled in 2002 that federal authorities could seize water belonging to New Mexico farmers and municipalities in the Middle Rio Grande in order to maintain stream flows for the endangered silvery minnow. *Rio Grande Silvery Minnow v. Keys*, 356 F. Supp. 2d 1222 (D.N.M. 2002), *aff'd Rio Grande Silvery Minnow v. Keys*, 333 F.3d 1109 (10th Cir. 2003), *vacated as moot*, 355 F.3d 1215 (10th Cir. 2004). The silvery minnow suit exemplifies the new demands placed on New Mexico's already over-appropriated waters. *See, e.g.*, Charles T. DuMars, *Endangered Species that Eat Prior Appropriation: Integrating the Endangered Species Act into State Water Law*, 6 New Mexico Natural Resources Law Reporter 38 (1991). Although the silvery minnow litigation has receded from headlines, the lawsuit remains active, with a third appeal by defendants and defendant-intervenors, including the State of New Mexico, pending before the Tenth Circuit Court of Appeals. *Silvery Minnow v. Rinne*, Tenth Circuit Case Nos. 05-2399, 06-2020 & 06-2021 (consolidated).

In the Lower Rio Grande, the State of Texas was threatening New Mexico with litigation over alleged violations of the Rio Grande Compact. The 1938 Compact apportions the Rio Grande's waters between Texas, New Mexico and Colorado, NMSA 1978, § 72-15-23 (1939), and any dispute between the compact

states would be litigated as an original action in the United States Supreme Court. U.S. Const., art. III, § 2, cl. 1.

The gravity of the Texas threat became clear in May, 2001, when the Texas legislature approved appropriations of up to $10.1 million for the Texas Attorney General to "vigorously" litigate any water disputes with the State of New Mexico "including but not limited to issues relating to the Elephant Butte Reservoir." 2001 Tex. Gen. Laws, p. 1515.[3] Since 2001, the Texas legislature has routinely reauthorized the appropriation, most recently in August 2007. 2007 Tex. Gen. Laws, p. 4938-40.[4]

The New Mexico legislature responded to the Texas threat with a 2001 emergency $1.3 million authorization to allow New Mexico to prepare its defense. N.M. Laws 2001, Second Extraordinary Session, Ch. 1, §1(A)(1). In 2002, the New Mexico legislature approved a $4.9 million appropriation and a $3 million contingent appropriation, both to address the Texas threat. N.M. Laws 2002, First Extraordinary Session, Ch. 4, §5(8) and (9).

3. Continuing Problems on the Pecos River

In the Pecos River Basin, water managers continued to grapple with the challenge of making compact deliveries to Texas under the Pecos River Compact. *See generally* G. Emlen Hall, *High and Dry: The Texas-New Mexico Struggle for*

[3] *See* Article I-14, No. 17. http://www.lbb.state.tx.us/Bill_77/5_Final/Bill-77_Final_0501.pdf.
[4] *See* Article I-9, No. 7 and I-11, No. 15. http://www.lbb.state.tx.us/Bill_80/8_FSU/80-8_FSU_1007_Art1_thru_Art2.pdf.

*the Pecos River* (2002) [hereinafter Hall, *High and Dry*]. New Mexico was still attempting to devise a plan for complying with the amended decree and mandatory injunction entered by the U.S. Supreme Court in *Texas v. New Mexico*, 485 U.S. 388 (1988).[5] In 2001, the Interstate Stream Commission formed an ad hoc committee consisting of all the major stakeholders in the Lower Pecos River Basin to assist the State in developing a consensus plan for achieving permanent compliance with the *Texas v. New Mexico* ruling. The stakeholder committee's compliance plan was presented to the 2002 New Mexico legislature and enacted into law. NMSA 1978, § 72-1-2.4 (2002).

The consensus plan required New Mexico to spend millions of dollars in acquiring and permanently retiring from production an additional 18,000 acres of irrigated farmland in the Lower Pecos River Basin.[6] The economic loss to New Mexico from fallowing so much irrigated farmland was obvious. But, in addition, to fully implement the consensus plan, the State would have to spend additional millions in acquiring the acreage for, and constructing, an augmentation well field that would enable the State to pump groundwater into the Pecos River when necessary to deliver water to Texas. *See* Hall, *High and Dry*, pp. 198-99.

[5] New Mexico's water delivery to Texas under the Pecos River Compact was short by 3,000 acre feet in 2002, reducing New Mexico's delivery credit. 2002-2003 Annual Report of the New Mexico Office of the State Engineer-Interstate Stream Commission, pp. 51-51. *See also* http://www.ose.state.nm.us/PDF/ISC/ISC-Compacts/Pecos/adhoc_res2_fv01.pdf.

[6] *See* http://www.ose.state.nm.us/PDF/ISC/ISC-Compacts/Pecos/adhoc_res3_fv01.pdf.

The costs of attempting to comply with the *Texas v. New Mexico*, 485 U.S. 388 (1988) ruling were enormous. From 1988 through 1999, the New Mexico legislature had appropriated (*i*) $14 million to satisfy the damage award in *Texas v. New Mexico*, and (*ii*) $40,727,000 for the acquisition of water rights in the Lower Pecos Basin. Hall, *High and Dry*, pp. 201, 214. Now, with the enactment of Section 72-1-2.4, the State would have to spend millions more to implement the consensus plan devised by the Lower Pecos River Basin Committee.

And if the Pecos River expenditures were not daunting enough, the State of Texas was again threatening to sue New Mexico over interstate waters, this time on the Rio Grande, where the stakes were exponentially higher. It was at this juncture--against a backdrop of seemingly endless appropriations to defend New Mexico from interstate water litigation, threats of litigation, and the costs of such litigation—that the New Mexico legislature concluded in 2003 that it was "urgent" and "imperative" for the legislature to enact 72-2-9.1.

Section 72-2-9.1 directs the State Engineer to begin administering "water allocations in accordance with the water right priorities recorded with or declared or otherwise available to him." Since the 1907 adoption of the New Mexico Water Code, the State Engineer has been empowered with general supervisory control over the "measurement, appropriation, [and] distribution of the State's waters." NMSA 1978, § 72-2-1 (1907). For the most part, successive State Engineers had

postponed priority administration until the completion of massive basin-wide water right adjudication suits. However, the severe drought of the early 2000s convinced legislators that New Mexico could no longer wait for completed adjudications to undertake the increasingly essential work of administering state waters. If there was any doubt on this question, New Mexico legislators had only to consider the fate of our neighbor to the north, the state of Colorado.

4. Lessons for New Mexico from *Kansas v. Colorado*

In June 2001--one month after Texas appropriated $10.1 million to "vigorously" litigate water disputes with New Mexico--the United States Supreme Court approved a special master's recommendation that the state of Kansas be awarded damages in its long-running litigation against Colorado over the Arkansas River. *Kansas v. Colorado*, 533 U.S. 1 (2001). In an earlier decision, *Kansas v. Colorado*, 514 U.S. 673 (1995), the Court had adopted the special master's finding that groundwater pumping in Colorado had "materially depleted" the surface flow of the Arkansas River in violation of the Arkansas River Compact. The Special Master's Fifth and Final Report, submitted to the Supreme Court on January 31, 2008, awards the state of Kansas damages of $34,615,146.00 and costs of $1,109,946.73. 1 Special Master's Fifth Report, pp. 3, 5 (2008) (not yet posted on the Supreme Court's website). The monetary damages, though quite large, were not Colorado's biggest loss; instead, the State's biggest loss was the compliance

restrictions imposed by the Supreme Court going forward. Along the full stretch of the Arkansas River Basin from Pueblo, Colorado to the Kansas stateline, Colorado groundwater pumping was cut-back from an average of 150, 256 acre-feet per year in post-compact years, to its 1948 pre-compact pumping level of 15,000 acre-feet per year—a staggering loss of 135,265 acre-feet of groundwater pumping per year. *Kansas v. Colorado*, 514 U.S. at 690; 2 Special Master's First Report, pp. 202-03, 210-15, 219 (1994).[7] Any groundwater pumping above 15,000 acre-feet per year must be offset with replacement water. *Id.* For all practical purposes, Colorado lost its ability to draw on the groundwater aquifer as a drought reserve.

In the years preceding the *Kansas v. Colorado* litigation, Colorado state courts had twice overturned the Colorado State Engineer's attempts to curtail and administer groundwater pumping in the Arkansas River Basin. *Kuiper v. Atchison, Topeka and Santa Fe Railway Co.*, 581 P.2d 293 (Colo. 1978); *Fellhauer v. People*, 167 Colo. 320, 447 P.2d 986 (Colo. 1968). In retrospect, the decisions in *Kuiper* and *Fellhauer*, restricting the State Engineer's authority, left the state of Colorado vulnerable to the adverse judgment and severe limitations imposed by the

[7] Available at http://www.supremecourtus.gov-SpecMastRpt/ORG105V2_071994.pdf.

U.S. Supreme Court in *Kansas v. Colorado*. *See* 1 Special Master's First Report, pp. 117-40 (1994)..[8]

Since 1902, when the U.S. Supreme Court announced its power to equitably apportion the waters of interstate rivers, *Kansas v. Colorado*, 185 U.S. 125, 145 (1902), the Court has developed a common law governing interstate water allocations, interstate compacts, and the enforcement of such compacts. Several basic tenets govern this common law: (1) a State may not allow its in-state water users to appropriate water that belongs to a downstream state, *Hinderlider v. La Plata River and Cherry Creek Irrigation Co.*, 304 U.S. 92, 101-11 (1938) (reversing the Colorado Supreme Court's contrary holding in an appeal brought by the Colorado State Engineer); (2) compacts are binding allocations, *Texas v. New Mexico*, 462 U.S. 554 (1983); (3) the Supreme Court will enforce compacts with injunctive relief and monetary damages, *Texas v. New Mexico*, 485 U.S. 388 (1988); and (4) it is no excuse for a State to claim that its state constitution or statutory law prohibits its compliance with an interstate compact. *State ex rel. Dyer v. Sims*, 341 U.S. 22, 27-32 (1951) (reversing the West Virginia Supreme Court's interpretation of the West Virginia State Constitution).

Consequently, it would be untenable for New Mexico to assert, in the original jurisdiction of the U.S. Supreme Court, that it should be excused from its

---

[8] Available at http://www.supremecourtus.gov/SpecMastRpt/ORG105V1_071994.pdf.

compact obligations because separation of powers, as understood under the New Mexico Constitution, forbids the administration necessary to achieve compact compliance. *Kansas v. Colorado* made clear that if New Mexico is to maintain its compliance with the Rio Grande and Pecos River Compacts, and the six other interstate stream compacts to which New Mexico is a party, it is essential that our State Engineer begin exercising his statutory authority to administer water allocations. And that is what the legislature directed him to do when it enacted Section 72-2-9.1.

## II. LEGAL ARGUMENT

### A. Summary of the Argument

There is no violation of separation of powers, either in the legislature's enactment of NMSA 1978, § 72-2-9.1 or in the AWRM regulations that were adopted by the State Engineer in compliance with Section 72-2-9.1. There also is no violation of constitutional due process by the hearing process that is provided in the AWRM regulations under 19.25.13.27 and 19.25.13.30 NMAC. By invalidating the AWRM regulations on these grounds, the district court improperly questioned the wisdom and policy of the legislature, and improperly substituted its judgment for that of the legislature and the State Engineer.

### B. Standard of Review

The constitutionality of the AWRM regulations is reviewed de novo. *See, e.g., New Mexico Petroleum Marketers Ass'n v. New Mexico Environmental Improvement Board*, 2007-NMCA-060, 160 P.3d 587. Statutes and administrative regulations are entitled to a "strong presumption" of constitutionality. *Old Abe Co. v. New Mexico Mining Comm'n*, 1995-NMCA-180, ¶ 43, 908 P.2d 776. Thus, a party challenging the constitutionality of a statute or regulation bears the burden of overcoming the presumption of constitutionality beyond a reasonable doubt. *Ortiz v. Taxation and Revenue Dep't.*, 1998-NMCA-027, ¶ 5, 954 P.2d 109. In deciding the issue, a reviewing court does not question the wisdom, policy or justness of the enactment. *See State ex rel. Office of State Eng'r v. Lewis*, 2007-NMCA-008, ¶ 37, 150 P.3d 375.

### C. The AWRM Regulations Do Not Violate Separation of Powers

"The Legislature has plenary legislative authority limited only by the State and Federal constitutions." *Cooper v. Albuquerque City Comm'n*, 85 N.M. 786, 792, 518 P.2d 275, 281 (1974). This of course includes the power to make water law. N.M. Const. art XVI, §§ 2-3. The legislature exercised this authority, creating the State Engineer and empowering him to administer New Mexico's

water. *E.g.*, NMSA 1978, Section 72-2-1 (1907) and NMSA 1978, Section 72-2-8 (A) (1967) which provides:

> The State Engineer may adopt regulations and codes to implement and enforce any provision of any law administered by him and may issue orders necessary to implement his decisions and to aid him in the accomplishment of his duties. In order to accomplish its purpose, this provision is to be liberally construed.

This administration, including the issuance of licenses and permits, obligates the State Engineer to determine the elements of water rights. He has exercised that authority for 101 years, and the courts of New Mexico have consistently upheld his authority to do so. *E.g.*, *Clodfelter v. Reynolds*, 68 N.M. 61, 68, 358 P.2d 626, 631 (1961) (recognizing State Engineer's duty to "regulate and supervise the appropriation, measurement and distribution" of state waters).

The district court below, contrary to this established New Mexico law, ruled that courts alone can determine the elements of water rights. It found that the legislature's enactment of 72-2-9.1 invaded this exclusive judicial province by requiring the State Engineer to promulgate regulations to administer water priorities. (Mem. Op. p. 30, R.P. 984) While admitting that the State Engineer could administer water priorities by reference to court orders or licenses he had previously issued, it ruled that any other determination of the elements of water rights by the State Engineer violated the doctrine of separation of powers.

This ruling is completely erroneous. It is premised on a conflict between the authority of the courts and the authority of the State Engineer that does not exist, and it defeated the legislature's mandate that the State Engineer respond to the "urgent need" for priority administration by promulgating regulations. If upheld, the district court's ruling undoes over a century of New Mexico water law, and the legislature's carefully constructed scheme for regulating the state's most precious natural resource.

The issue is not who adjudicates water rights. The State Engineer has always agreed that the courts, not he, adjudicate water rights. *Public Service Co. v. Reynolds*, 68 N.M. 54, 59, 358 P.2d 621, 625 (1960). Neither 72-2-9.1 nor the AWRM regulations permit the State Engineer to adjudicate water rights. The issue is whether the State Engineer can determine the elements of water rights in the course of carrying out his statutory administrative duties. The answer is that he can, and always has.

1. <u>The District Court Erred In Finding That the State Engineer Cannot Determine the Elements of Water Rights for Administrative Purposes; Since 1907 the Legislature Has Required Him to Do So and That Authority Has Been Upheld Consistently by the Courts.</u>

   a). <u>The administrative determination of water rights has been part of the State Engineer's statutory mandate since the office was created in 1907.</u>

The heart of the district court's error is the holding, made without analysis and without citation, that courts alone hold the power to determine the elements of

water rights. (Mem. Op. p. 25, R.P. 979) On that basis, it held that the legislature could not have intended the State Engineer to determine the elements of water rights, and so it limited the State Engineer's administrative power to those things it believed would not require him to do so. (Mem. Op. pp. 25-26, R.P. 979-80). But in fact the State Engineer has been determining elements of water rights for 101 years, and could not carry out his administrative responsibilities under the law without doing so. The fundamental elements of water rights in New Mexico pre-date our Constitution and were permanently established within it: "Priority of appropriation shall give the better right" and "Beneficial use shall be the basis, the measure and the limit of a water right." N.M. Const. art XVI, §§ 2-3. These are further articulated in the 1907 Water Code and include, *inter alia*, "priority, amount, purpose, periods and place of use..." NMSA 1978 § 72-4-19 (1907). Since 1907, the legislature has required the State Engineer to administer water by making determinations of these elements, and to enforce his determinations through administrative action.

The determination of elements of water rights is essential to every permit and license the State Engineer has issued since his office was created in 1907. As noted, Section 72-2-9, passed as part of the Water Code in 1907, directs the State Engineer to administer water in accordance with "the licenses issued by him and his predecessors" and the adjudications of the courts. "Licenses" are

administrative determinations of the elements of water rights. For example, NMSA 1978, § 72-5-13 (1907) requires the State Engineer to issue licenses upon inspection to ensure beneficial use, which is, of course, "the basis, the measure and the limit" of a water right in New Mexico. N.M. Const. art XVI, § 3.

The State Engineer's duty to administratively determine the elements of water rights is set out in numerous other statutes. For example, NMSA 1978, § 72-5-23 (1985) states that surface water rights may be changed or transferred if the State Engineer determines that "such changes can be made without detriment to existing water rights." Likewise, NMSA 1978, § 72-12-7 (1985) provides that groundwater rights may be changed if the State Engineer accepts a "showing that the change will not impair existing rights." A determination regarding detriment or impairment to existing rights requires the State Engineer to determine the elements of water rights for both the transfer applicant and of the "existing water rights" to which there might be detriment or impairment.

The State Engineer's authority to make administrative determinations of the elements of water rights is exercised both inside and outside of the permitting process. By statute, the State Engineer issues permits allowing water appropriation on the basis of his determinations as to the amount of unappropriated water available, i.e., the amount of existing water rights compared to available supply. *See. e.g.*, NMSA 1978, § 72-5-5 (1985), NMSA 1978, § 72-12-3 (1943). When

necessary, he is statutorily authorized to issue an emergency permit without following the procedural requirements set out in NMSA 1978, § 72-5-23. NMSA 1978, § 72-5-25 (1971). The State Engineer issues licenses on the basis of a permit, which he can modify after his inspection to determine the extent of beneficial use. NMSA 1978, § 72-5-13; *see also* NMSA 1978, § 72-5-28 (2002) (the State Engineer has the authority to determine non-use of water, and may give a notice of non-use which, if not cured, results in water right forfeiture); NMSA 1978, § 72-3-1, *et seq.* (State Engineer may declare a water district and appoint a water master on the basis of his determinations as to drainage boundaries, or his determination that public safety requires such an appointment).

Taken together, these statutes expressly provide that the State Engineer cannot issue a permit without first determining the elements of water rights, including the availability of unappropriated water, the impact or impairment on prior water rights, whether the water will be used beneficially, and whether the water will be put to use in manners not adverse to the state's public welfare or the state's conservation of water. Thus, the legislature has historically directed the State Engineer to undertake administration that requires the determination of the elements of water rights.

To determine the elements of water rights administratively, the State Engineer examines his records, including hydrographic surveys, which constitute a

virtual water rights map of New Mexico. The State Engineer also considers the degree of actual beneficial use associated with the existing water rights. This is the precise procedure contemplated in the AWRM regulations. 19.25.13.27 NMAC (Administrable Water Rights are determined from evidence available to the State Engineer, with adjudication as the strongest evidence); 19.25.13.21 NMAC (Beneficial use limits the amount of water delivery). Thus, in making administrative determinations of the elements of water rights pursuant to 72-2-9.1's statutory directive, the State Engineer employs exactly the same administrative authority as he has always employed. The district court's assertion that the State Engineer cannot determine the elements of water rights for administration, and that the legislature cannot have intended him to do so, is utterly at odds with a century of legislative practice, and the reality of the State Engineer's work.

Not only is the district court's opinion at odds with the law, it is at odds with itself. While holding that the State Engineer may not determine the elements of water rights, the district court held that he may administer water priorities by reference to court orders or licenses he has issued. But the State Engineer's licenses are dependent upon the permits he must first issue. NMSA 1978, §§ 72-5-13 and 72-12-3. These permits are in turn dependent on the State Engineer's determination of the elements of water rights. By the district court's logic, if the

State Engineer cannot determine elements of water rights, he cannot administer water on the basis of his licenses.

b). New Mexico courts have consistently upheld the State Engineer's authority to determine the elements of water rights for administrative purposes.

The district court's opinion is also at odds with settled New Mexico caselaw. Fifty years ago in *Templeton v. Artesian Conservancy Pecos Valley District*, 65 N.M. 59, 69, 332 P.2d 465, 471 (1958) the Supreme Court said "it is true that the State Engineer cannot conduct a proceeding to adjudicate the priorities of water rights. However, each time a permit is granted, the State Engineer has to consider all prior appropriations to determine whether or not there are any unappropriated waters." Likewise, the Supreme Court has held that the State Engineer's authority to determine the elements of water rights does not conflict with the court's jurisdiction to adjudicate water rights. In *City of Albuquerque v. Reynolds*, 71 N.M. 428, 443, 379 P.2d 73, 83 (1962), the Supreme Court held that the State Engineer's administrative exercise of his statutory authority to extinguish water rights on the basis of his determination that the water is not being put to beneficial use is proper and does not infringe on adjudicative functions. *See also Garbagni v. Metropolitan Inv., Inc.*, 110 N.M. 436, 441, 796 P.2d 1132, 1137 (Ct. App. 1990).

Further, in *City of Roswell v. Reynolds*, 86 N.M. 249, 251, 522 P.2d 796, 798 (1974) the Supreme Court upheld the State Engineer's authority to deny or

impose conditions on a well transfer permit on the basis of impairment of existing water rights. In *McBee v. Reynolds*, 74 N.M. 783, 399 P.2d 110 (1965), the Court held that the proper administration of underground basins requires the State Engineer to determine relative priorities, to include those with rights that pre-date his administrative declaration of an underground basin. *Id.* (citing NMSA 1978, § 72-12-1 (1931). These holdings reflect the courts' unwavering understanding that administration of water necessarily includes determining and applying the elements of water rights. *See also Herrington v. State*, 2006-NMSC-014, ¶¶ 47-48, 133 P.3d 258 (refusing to impose standards that would "unduly restrict" the State Engineer's "administrative discretion," and "administrative authority").

Thus, the district court erred in holding that the legislature could not have intended the State Engineer to determine the elements of water rights. Not only do statutes going back to 1907 manifest that intent, but our courts have consistently held that the State Engineer's authority to determine and administer those elements is absolutely necessary and must remain unimpeded. While the courts do not always agree with how the State Engineer has exercised his authority, they have never reversed an administrative decision of the State Engineer because he lacks authority to determine the elements of water rights. *See, e.g., Montgomery v. Lomos Altos*, 2007-NMSC-002, ¶ 3, 150 P.3d 971 (remanding for further findings the State Engineer's transfer permit grant, as he failed to consider fully "all

existing water rights..."); *State ex rel. Reynolds v. Mendenhall*, 68 N.M. 467, 470-71, 362 P.2d 998,1001-02 (1961) (holding that in administering and permitting an underground basin's water rights, the State Engineer's impairment analysis must include consideration of those water rights that pre-date the State Engineer's declaration of the basin.). Far from supporting the district court's holding, these opinions, which order the State Engineer to determine water rights more completely, reaffirm his authority to determine the elements of water rights and the courts' understanding of that authority.

c). <u>The district court's opinion would undo a century of administrative practice and the statutes and cases that uphold it; such a result is constitutionally impermissible.</u>

The district court's opinion is contrary to a century of statutes, cases and its own conclusion. But even more significantly, the district court is most certainly wrong because if correct, all permits and licenses ever issued by the State Engineer, and all the statutes that authorize him to do so, are unconstitutional. All are grounded on his ability to make administrative determinations of the elements of water rights, and if he cannot do that, he is powerless to undertake most of the administrative duties with which the legislature has charged him over the years.

Constitutional doctrine holds that the courts should hesitate to invalidate on constitutional grounds a persistent and pervasive legislative practice that encompasses many statutes over many years. *United States v. Curtiss-Wright*

*Exports*, 299 U.S. 304, 327-29 (1936). In *Curtiss-Wright*, the United States Supreme Court was faced with a statute authorizing the president to declare certain conduct a crime when Americans were dealing with foreign, belligerent powers. Defendant claimed this statute was an unconstitutional delegation of legislative power. *Id.* at 314. The Court found that there were many such statutes that had been passed by Congress for over a century, and thus the Court was extremely reluctant to accept any interpretation that would declare all such statutes void. *Id.* at 322-23. Unconstitutional practices do not become acceptable over time, but the courts must conclude that a long standing legislative practice which reflects the collective judgment of many legislators and executives is a practice in keeping with their constitutional obligations. *Id.* at 327-29.

The district court, of course, swept aside any such conclusion and instead determined that multiple New Mexico legislatures, executives and judges have persistently engaged in unconstitutional behavior since 1907. This astounding result is, of course, not only inconsistent with the *Curtiss-Wright* doctrine but with the axiom that statutes are to be read to avoid constitutional questions. *See State v. Lewis*, 2007-NMCA-008, ¶ 36.

2. <u>The District Court Erred in Confusing Administration and Adjudication; They are Different, Independent and Complementary Functions Under New Mexico Water Law.</u>

The district court was led into this error by the confusion that permeated the petitioners' argument below: the persistent conflation of the distinction between administration and adjudication. *See, e.g.*, Mem. Op. pp 27, 28, 30, 34; R.P. 981-82, 984, 988. Out of this confusion, the district court erroneously discovered a conflict between the administration and adjudication of water, which led the court to limit the State Engineer's administrative authority. But the law does not share this confusion. Neither the statute granting the district courts jurisdiction over adjudications nor the caselaw stemming from either adjudication or administration have held that the two are in conflict. Rather, the law recognizes that both require the determination of the elements of water rights.

The statute granting courts jurisdiction over adjudication, NMSA 1978, Section 72-4-17, does not speak in terms of the court's authority to determine the elements of water rights, and certainly does not suggest that such authority rests exclusively in the courts. Rather, the statute speaks of a court's authority to complete adjudications without interference. It says that if a suit is brought to adjudicate water rights, all parties who can be should be made parties and that the court before which the suit is pending "shall have exclusive jurisdiction to hear and

determine all questions necessary for the adjudication of all water rights within the stream system involved." NMSA 1978, § 72-4-17 (1907).

This neither addresses nor determines the State Engineer's authority to determine the elements of water rights for administrative purposes. The point of the "exclusive jurisdiction" language is not to pre-empt the State Engineer's administrative determinations, but to ensure that no court besides the adjudication court has jurisdiction to make decrees that will destroy the unitary nature of an adjudication. *El Paso & R. I. Ry. v. District Court*, 36 N.M. 94, 99-101, 8 P.2d 1064, 1067-68 (1931). No case construing the jurisdiction statute has suggested or held that the State Engineer's administrative authority is in any way affected by it.

Instead, the courts of New Mexico have repeatedly recognized that the State Engineer's administrative determinations of the elements of water rights complements the adjudication process. For example, in *Eldorado Utilities v. State ex rel. D'Antonio*, 2005-NMCA-041, 119 P.3d 76, Eldorado argued that in refusing to allow amendments to declarations, because of a lack of evidence of beneficial use, the State Engineer was in effect adjudicating their rights. *Id.* at ¶ 2. This Court rejected the suggestion that the State Engineer's administrative determination was tantamount to adjudication, and distinguished the two on the grounds of the extensive judicial procedures related to adjudication. *Id.* at ¶ 19; *see also Templeton*, 65 N.M. at 69, 332 P.2d at 471 (administration does not

with adjudication).

The State Engineer's authority to administer and the courts' authority to adjudicate are distinct and have been exercised in conjunction with each other for over 100 years as part of the legislature's ongoing, comprehensive plan to exercise its "police power [over water] not only to ascertain rights, but also to regulate and protect them." *State ex rel. Erickson v. McLean*, 62 N.M. 264, 272, 308 P.2d 983, 988 (1957). When a water rights suit is begun, either by private parties or the attorney general, the State Engineer is required to complete a hydrographic survey of the stream system to be adjudicated, which forms the evidentiary basis for the adjudication. NMSA 1978, § 72-4-15 (1907). The State Engineer's task and the adjudication that follows involve the same legal principles and facts, but are different and complementary. Water administration deals with the water supply's physical distribution under the constitutionally established doctrines. Administering water in priority means that in a water short year the allocation to water right owners with late priority dates must be curtailed in order to protect the allocation to water right owners with earlier priority dates. 72-2-9.1. The doctrine of beneficial use means that the State Engineer must also administer water so as to ensure that, whatever paper water rights a user has, adjudicated or not, the supply delivered is no greater than the actual beneficial use that is made of it. *See* NMSA 1978, § 72-5-13. Thus, the State Engineer's administrative duties are concerned with the on-the-

ground realities of the "measurement, appropriation and distribution" of water supply. NMSA 1978, § 72-2-1.

Water rights adjudication assigned to the courts by statute addresses legal rights in water. At least originally, it was intended to be done "in order that the amount of unappropriated water subject to disposition by the state under the terms of this chapter may become known." NMSA 1978, § 72-5-15 (1907). Toward this end, the adjudication statutes contemplate massive, comprehensive cases where whole stream systems are surveyed, all claimants are parties, and all rights are adjudicated. *El Paso v. District Court*, 36 N.M. at 102, 8 P.2d at 1070. Thus, the two processes have different but compatible goals, and work in different but compatible time frames.

However, experience taught the legislature that adjudications can take many decades. *See, e.g., Lewis*, 2007-NMCA-008, ¶¶ 11. Because, as it found in 72-2-9.1 (A), "adjudication is slow and the need for administration is urgent," the legislature directed the State Engineer not to wait until adjudications are completed, but to use his authority to administer water priorities pending orders from adjudication courts. *See* 72-2-9.1(B) and (D). The AWRM regulations complied, stating, "[a]ny determinations made by the state engineer for administration purposes within any district ... shall be subject to any decrees

issued by an adjudication court of competent jurisdiction or any court of competent jurisdiction." 19.25.13.28 NMAC.

The legislature's careful direction to the State Engineer to conform his administration to court orders highlights its intention that its separate grants of authority to the State Engineer and to the courts are to work in concert with each other. The district court's finding that 72-2-9.1 conflicts with the power of the courts defied this plain intention, and the cardinal principle of statutory construction that statutes are to be read to avoid conflicts with one another. *State v. Smith*, 136 N.M. 372, 375, 98 P. 3d 1022, 1025 (2004). This is particularly true where, as here, the statutes are *in pari materia*. In such cases, courts should presume the legislature acted with full knowledge of relevant statutory and common law and did not intend to enact a law inconsistent with that law. *Hanson v. Turney*-2004-NMCA-069, ¶ 12, 94 P.3d 1; *State ex rel. Quintana v. Schnedar*, 115 N.M. 573, 855 P.2d 562 (1993) (statutes that form a comprehensive legislative scheme in which courts and administrators work together to accomplish an objective should be given effect together). The district court erred in not recognizing 72-2-9.1 and AWRM's part in this overall legislative policy, and in defeating the legislature's intention that there be effective water administration while adjudications are pending.

3. <u>The District Court Erred in Finding a Conflict Between 72-2-9.1, AWRM and the Separation of Powers Doctrine</u>

a). <u>The Constitution does not say that only courts can determine the elements of water rights</u>

Even without regard to the *in pari materia* doctrine, the district court was wrong to find that 72-2-9.1 violated the constitutional separation of powers. The district court assumed without analysis that the determination of the elements of water rights is somehow so inherent within the authority constitutionally committed to the courts that any legislative or executive incursion into that authority necessarily invades judicial power. But this is simply untrue, and unsupported by any law. The New Mexico Constitution states: "The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, *in accordance with the laws of the state* (emphasis supplied)." That the legislature makes law is axiomatic. That its authority to do is "plenary…limited only by the State and Federal constitutions" is likewise beyond question. *Cooper*, 85 N.M. at 792, 518 P2d at 281.

"Plenary" means that

> In creating a legislative department, and conferring upon it the legislative power, the people must be understood to have conferred full and complete power as it rests in, and may be exercised by, the sovereign power of any country, subject only to such restrictions as they may have seen fit

> to impose ... legislative power is, therefore, plenary in its scope, except as limited by constitutional provision.

*State ex rel. Harvey v. Medler*, 19 N.M. 252, 142 P. 376, 379 (1914) (citing Cooleys Const. Lim. (7th ed.) 126).

Nothing in the New Mexico Constitution even remotely suggests that the determination of the elements of water rights is an exclusively judicial power, or limits the legislature's plenary authority to commit that power to both the courts and to the State Engineer. The Constitution instructs us that unappropriated water belongs to the public, that it is to be regulated by the legislature, and that the legislature's regulations of water must conform to the fundamental principles of beneficial use, and priority of use, N.M. Const. art. XVI, §§ 2-3. Within those limitations, the legislature has plenary authority to legislate regarding water in the best interests of the people of New Mexico.

Certainly the Constitution also says that the branches of government are not to exercise one another's powers. NM Const. art. III § 1. But the State Engineer's power to determine elements of water rights for administrative purposes is not the exercise of judicial power; it is the exercise of the legislature's power to make necessary regulations for administering New Mexico's waters through the mechanism of the State Engineer and the regulations he is authorized to promulgate. NMSA 1978, § 72-2-8 (1967).

The Supreme Court has definitively construed Article III as intended to ensure that each branch of government is able to perform its assigned functions "free from the control or coercive influence of the other branches." *Board of Education of Carlsbad v. Harrell*, 118 N.M. 470, 484, 882 P.2d 511, 525 (1994). Section 72-2-9.1 manifestly complies with this requirement. Because the State Engineer's administrative determinations of the elements of water rights must conform to court orders, he cannot possibly exercise any coercive influence over an adjudication court. To assert that the existence of administratively determined priorities will exert coercive influence over the adjudicatory process is simply wrong and cannot, as a matter of law, form a basis for concluding that either the statute or the regulations are unconstitutional.

But the district court never engaged in any analysis of whether the administrative process would exert coercive influence over the adjudication process. It could have found none, since both 72-2-9.1 and AWRM require the administrative process to conform to any relevant court orders. Rather, the district court based its separation of powers analysis on the demonstrably baseless conclusion that only courts can determine the elements of water rights.

In particular, the district court stressed that it would violate separation of powers for the State Engineer to hear objections on relative priority dates from water right owners in the course of his administration. According to the district

court, this would result in the State Engineer's "adjudicating relative priority of persons whose priority dates are established by licenses or court decrees." (Mem. Op. pp. 40-41, R.P. 994-95).

This conclusion is unsupported by the law. It proceeds from the same confusion that is at the heart of the district court's opinion: the conflation of administration and adjudication. The State Engineer's administrative determination of priority dates adjudicates nothing, and certainly is not in conflict with court orders or the State Engineer's own licenses or permits. There simply is no constitutional reason, stated by the district court or apparent in the Constitution itself, why the legislature cannot require the State Engineer to hear and decide objections about priority dates in the course of administering water priorities.

The State Engineer's determination of the elements of a water right, made upon factual verification of a water right holder's objections to another's priority date, is still only a determination for administrative purposes, not an adjudication of the water right. This determination, like all State Engineer administrative determinations, may be appealed de novo to the district court under the New Mexico Constitution, art. XVI, § 5 and NMSA 1978, Section 72-7-1 (1971), and the administration process must, by law, conform to extant orders of any court of competent jurisdiction. Thus, the constitutional power of the courts to decide questions committed to their jurisdiction without interference from the other

branches is completely protected by the statutory scheme the legislature has created and the State Engineer implemented in AWRM. It was error to find otherwise. *Fellows v. Shultz*, 81 N.M. 496, 500-01, 469 P.2d 141, 145 (1970) (although required by statute to determine facts upon which he administers and regulates State waters, the State Engineer acts only in an administrative capacity; his findings are not judicial determinations).

Holding that the State Engineer cannot make administrative determinations about relative priorities would make it impossible for him to carry out the legislative mandate of § 72-2-9.1 When water supplies are short, priority administration requires that water right owners with junior priority dates be curtailed so that senior appropriators may continue to receive their water. The backbone of this administrative procedure is the constitutionally mandated doctrine of prior appropriation. N.M. Const. art. XVI, § 2. For a century, the State Engineer's administration under this prior appropriation doctrine has necessarily included hearing objections. *See e.g.*, NMSA 1978, § 72-5-4 (1907); NMSA 1978, § 72-12-3 (D) (2001). The courts have never found that the State Engineer violates the separation of powers by hearing objections in the administrative process. *See e.g.*, *City of Roswell v. Berry*, 80 N.M. 110, 452 P.2d 179 (1969) (noting that the purpose of allowing for public objection is to ensure that a permit, if issued, will not impair existing water rights); *City of Albuquerque*, 71 N.M. at 431, 379 P.2d at

87 (before a permit hearing, the State Engineer must ensure that public notice is provided to those potentially affected by the permit's issuance so they can object).

The district court not only erroneously concluded that administration equals adjudication, but that the law supports this conclusion. It does not. The district court cited for its support a line from *State ex rel. Reynolds v. Pecos Valley Artesian Conservancy District*, 99 N.M. 699, 701, 663 P.2d 358, 360 (1983) (hereinafter "Reynolds v. PVACD"), "[T]here can be no administration ... until the parties have had an opportunity to contest priorities inter se." But this holding is confined to the *inter se* process in the adjudication context, in which water right owners may object to the adjudicated elements of others' water rights before the final adjudication decree is issued. It is, therefore, irrelevant to the State Engineer's consideration of objections to others' priority dates. His administrative determinations regarding relative priorities are subject, like all his administrative decisions, to conform to any extant court orders, and are subject to revision by courts after they are made. N.M. Const. art. XVI, § 5. In the recent *Lewis* case, this Court held that the above-referenced statement in *Reynolds v. PVACD* was limited to the determination of whether, in an adjudication, the court follows proper statutory procedure. *Lewis*, 2007-NMCA-008, ¶¶ 30, 39. As such, *Reynolds v. PVACD* is inapplicable to the issue of whether the State Engineer's hearing of objections violates separation of powers. *Id.* at ¶ 39. "Cases are not

authority for propositions not considered." *Eldorado v. D'Antonio*, 2005-NMCA-041, ¶ 11.

The same defect destroys the district court's reliance on *Montgomery v. Lomos Altos, Inc.*, 2007-NMSC-002, 150 P.3d 971, a case involving an application for transfer of water rights. *Montgomery* holds that the State Engineer's impairment analysis must include all potentially impaired water rights, or the State Engineer must formally extinguish those rights. *Id.* at ¶¶ 3, 31. Contrary to the district court's analysis of the case, *Montgomery* does not remotely stand for the proposition that the State Engineer's hearing of objections to his administration of priorities violates separation of powers. It cannot, for in fact, the State Engineer's administration of priorities is not adjudicatory, does not exert coercive control over adjudications and, in general, is not dependent upon an adjudication of water rights. *Reynolds v. PVACD*, 99 N.M. at 701, 663 P2d at 360 ("There is nothing ... which precludes the administration of water rights prior to the filing of the final decree in the office of the State Engineer").

The effect of the district court's misreading of both *Montgomery* and *Reynolds v. PVACD* is the further undoing of 72-2-9.1, of the AWRM regulations, and of 101 years of water administration, which demands that before issuing a permit, the State Engineer conduct an impairment analysis and allow for objection.

If the district court is upheld, every permit and license ever issued by the State Engineer violates separation of powers. This untenable result is forbidden by law.

b). The separation of powers doctrine is not violated by the State Engineer's exercise of legislatively mandated "quasi-judicial" functions.

It is constitutionally irrelevant that to carry out 72-2-9.1's mandates the State Engineer is required to make determinations that resemble a court's adjudicative determinations. In *Duke City Lumber v. N.M. Environmental Improvement Board*, 101 N.M. 291, 681 P.2d 717 (1984), the court stated that the separation of powers doctrine affirmatively required administrative agencies to exercise whatever power necessary to implement their authorizing legislation:

> The separation of powers doctrine directs administrative agencies to their duty of implementing legislation. The Legislature grants agencies the discretion of promulgating rules and regulations that have the force of law. The agencies must also determine whether there has been compliance with administrative decisions, and this is an adjudication. Therefore, agencies exercise in part functions of all three branches of government.

*Id.* at 292-93, 681 P.2d at 718-19. *See also Dickson v. Saiz*, 62 N.M. 227, 236, 308 P.2d 205, 214 (1957) (affirming an executive veto of legislation, the court stated: "Our Constitution does not, necessarily, foreclose the exercise by one department of the state of powers of another, but contemplates in unmistakable language that there are certain instances where the overlapping of power exists.").

In *Carillo v Compusys*, 1997-NMCA-003, ¶ 9, 930 P. 2d 1172, this Court held that that administrative authority to make "quasi-judicial" decisions "runs parallel to, and does not conflict with" the authority of Art. VI courts. *See also State ex rel. Dyer v. Simms*, 341 U.S. at 30 ("That a legislature may delegate to an administrative body the power to make rules and decide particular cases is one of the axioms of modern government.").

Thus, there is no conflict here between the jurisdiction of the courts and the authority the legislature directed the State Engineer to use. His decisions must necessarily resemble court adjudications because he works from the same legal framework and facts. But since his decisions are necessary to the administrative duties conferred by the legislature and are merely interim until there is an order from an adjudication court, the conflict in power that concerned the district court never arises.

The district court erred further in its analysis by asserting that the State Engineer violated the Constitution by assuming "historically judicial functions" in determining the elements of water rights. (Mem. Op. pp. 27-30, R.P. 981-84). But there is no such doctrine in our law. The State Engineer is not aware of any caselaw which analyzes separation of powers in terms of "historically judicial functions." New Mexico courts have carefully articulated the standards for analyzing the three species of constitutional power, and they have to do with the

"coercive influence" discussed above. No New Mexico case analyzes a separation of powers question in terms of whether another branch has undertaken "historically judicial functions." Indeed, such amorphous standards lead to the kind of result rejected in *Duke City* and *Carillo*. Because the AWRM regulations were carefully crafted to avoid a conflict with the adjudication courts, both branches of government can pursue their statutory duties without interference from the other.

The district court's erroneous constitutional analysis was compounded by its neglect of the rule that "statutes should be construed, if possible, to avoid constitutional questions". *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 340, 805 P.2d 603, 606 (1991). Here, it takes a concerted effort to find a constitutional conflict--it takes confusing administration and adjudication, and ignoring the legislature's instruction, with which the regulations complied, that administrative decisions must conform to adjudicatory decisions.

c). <u>The Constitution permits the legislature to authorize the courts to determinate the elements of water rights for adjudication, and the State Engineer to do so for administration.</u>

The exercise of the legislature's police power over water permits it to commit the determination of the elements of water rights to the executive branch for administrative purposes, and to the courts for adjudication. To date, no court has found this system inconsistent with the Constitution. In fact, a highly respected commentator on New Mexico water law summarized the state of the law

as follows:

> As stated in *Public Service Co. v. Reynolds* [68 N.M. 54, 358 P.2d 621(1960)] . . . the adjudication of water rights in New Mexico; *i.e.* rights vis-à-vis individuals, is a function of the courts. This has always been the rule. However, since New Mexico enacted water legislation in 1907 and charged the State Engineer with administrative responsibility, he has been empowered to make initial determinations of rights as against the state; *i.e.* vis-à-vis the public. . . .

Robert Emmet Clark, *New Mexico Water Law Since 1955*, 2 Nat. Res. J. 484, 540 (December, 1962).

Thus, there is simply no support for the district court's assertion that the State Engineer's administration by use of evidence other than court orders and his own licenses is in derogation of judicial power. As the State Engineer explained to the district court, 72-2-9.1 did not grant the State Engineer any new power. He has always granted licenses and permits by determining the elements of water rights based on evidence he adduced. But in light of pressing public needs, the legislature directed him to exercise his power in a new way: promulgating and enforcing regulations that administer priorities in a given area. That grant does not interfere with the adjudication jurisdiction of the courts. There is no separation of powers issue in this case; the district court erred in finding one and erred in rewriting the statute and the regulations on the basis of it.

d). The district court misapplied the *Lewis* case; *Lewis* supports the State Engineer.

*State ex rel. State Eng'r v. Lewis*, 2007-NMCA-008, relied on by the district court, supports this understanding of the law. In *Lewis*, this Court reviewed the constitutionality of the Pecos River settlement. In its review of the settlement, the Court considered the significance of NMSA 1978, § 72-1-2.4 (2002), which directed the Interstate Stream Commission to acquire land with appurtenant water rights, and to retire those to ensure New Mexico's compliance with its interstate compact obligations. *Id.* at ¶ 12. The Court found that "[b]y enacting Section 72-1-2.4, the Legislature has shown an intent that the water resource management approach, as implemented in this case" is consistent with the adjudicatory authority of the courts to enter final decrees, as set out in NMSA 1978, § 72-4-19. *Id.* at ¶ 57.

The Court found further support for its decision in the statute at issue here, Section 72-2-9.1. *Id.* at ¶ 58. The Court noted that 72-2-9.1 "expressly provided, under the title of 'priority administration,' for the State Engineer to address in certain specified ways the urgent need for water administration outside of the adjudication process" so long as that authority was not used to interfere with the settlement of the Pecos River case.

Thus, *Lewis* recognized several things vital to the determination of this case: that the legislature has manifested an intention that there be active water resource

management (from whence the AWRM regulations get their name); that such management is consistent with the adjudicatory power of the courts; and that the limitations on the State Engineer's authority in 72-2-9.1 are effective to confine him to the proper sphere of that authority—administration subject to court orders. *Id.*

The Court relied upon an earlier *Lewis* decision in support of both the statute and the settlement: "Where a procedure that was not required or prohibited by statute was challenged, this Court has previously held that such procedure could be adopted by the state engineer because it was in substantial compliance with the requirements of the adjudication statutes, and a reasonable and practical way to accomplish the desired purposes." *Id.* at ¶ 58 (*citing Reynolds v. PVACD*, 99 N.M. at 701, 663 P.2d at 360). Since that is the law, the procedures adopted by the State Engineer here are even more appropriate. These regulations are not merely permitted but required by the statute, are in substantial compliance with the adjudication statutes (because they must apply the same legal principles and comply with adjudication court orders), and are reasonably and practically required to achieve the legislature's water resource management goals.

The district court acknowledged that *Lewis* "could be read to support the State Engineer's claim that his administrative decisions determining the elements of water rights will not interfere with the adjudication of the courts..." (Mem. Op.

p. 29, R.P. 983) Indeed, the district court said it was a "close call" whether 72-2-9.1 intruded into the judicial power. (Mem. Op. p. 29, R.P. 954-996). That means, of course, that the district court should have presumed the constitutionality of the statute and the regulations, and made that call in favor of furthering the legislative intent, as the Court did in *Lewis*.

In fact, it is not a "close call." The law is plain. The State Engineer can make administrative determinations of the elements of water rights when directed by the legislature. The district court's finding to the contrary undoes 101 years of settled New Mexico statutes and caselaw and, if left undisturbed, would wreak havoc on the legislature's ability to use the State Engineer to manage New Mexico's water.

**D. <u>Section 72-2-9.1 Is Not an Excessive Delegation of Power; It is Constitutional and Should Not Have Been "Rewritten" by the Court</u>**

The district court reasoned that if the legislature intended the State Engineer to have the authority he claimed under 72-2-9.1 to administer priorities based on evidence he adduced other than his own licenses or court orders, this was an unconstitutional "excessive delegation" of legislative power because it was "standardless" and left the State Engineer with "unbridled discretion." (Mem. Op. p. 31, R.P. 985).

This finding ignores the legal principles controlling "excessive delegation" claims, which claims are adjudicated on whether the legislature impermissibly

delegated its lawmaking authority to an administrative agency. *Mistretta v. United States*, 488 U.S. 361, 379 (1989). The rule in New Mexico is that although the legislature "cannot abdicate its general lawmaking powers, it may authorize others to do things which it might properly do, but which it cannot conveniently or advantageously perform." *State ex rel. State Park & Recreation Comm'n v. New Mexico State Auth.*, 76 N.M. 1, 11, 411 P.2d 984, 991 (1966) (citation omitted). Obviously the legislature cannot "conveniently or advantageously" administer water priorities in a given basin. It can, however, direct the State Engineer to do so and require him to comply with New Mexico water law principles. That is not the delegation of law-making authority to him. He is not making water law, he is administering it. The State Engineer is required to do that which an executive must do and what a legislative body cannot do: enforce the law by making case-by-case assessments. This is precisely how a government based on separation of powers is supposed to operate, and it was error for the district court to find otherwise.

Claims of "excessive delegation" are often evaluated on the basis of whether there is an "intelligible principle" found in the authorizing statute to control the administrator's discretion. *Mistretta*, 488 U.S. at 379. The need for an intelligible principle requires only an outline of the policies behind the statute, and directives that tell the agency what it "should do and how it should do it." *Id.* (citation omitted). As required, 72-2-9.1's standards tell the State Engineer what he is

supposed to do, why he is supposed to do it, and the ways in which he can accomplish it. *N.M. Petroleum Marketers Assn v. N.M. Environmental Impr. Bd.*, 2007-NMCA-060, ¶ 14, 160 P.3d 587 (finding the intelligible principle satisfied when the statute specifies to the administrative agency "the end to be accomplished," the means to accomplishment of that end, and the "specific criteria to be considered by the [agency] in adopting regulations" to meet that end.). The district court's analysis failed to recognize 72-2-9.1's standards, including the standards imposed upon the State Engineer by "existing water law," which incorporates the constitution's mandates, the Water Code and 101 years of caselaw, and administrative code. *See, e.g.*, NMAC 19.25; NMAC 19.26; NMAC 19.27. Contrary to the district court's belief, this body of law provides even greater standards than the Workers' Compensation Act, NMSA 1978, § 52-1-1, *et seq.* (Mem. Op. p. 32, R.P. 986). By these standards, the legislature clearly delegated to the State Engineer the powers that support his promulgation of AWRM. By ruling otherwise, the district court erroneously substituted its judgment for both the legislature and the State Engineer's. *Howell v. Hein*, 118 N.M. 500, 505, 882 P.2d 541 (1994) ("we will not substitute our judgment for that of the administrative body administering a legislatively created program").

The district court relied heavily on *Cobb v. State Canvassing Bd.*, 2006-NMSC-034, 140 P.3d 498, in which the court found that the legislature failed to

provide meaningful standards in its delegation of authority to the State Canvassing Board. *Id.* at ¶¶ 15-16. But the delegation under 72-2-9.1 meets every factor the *Cobb* court used to evaluate that claim of excessive delegation. *Id.* at ¶¶ 40-47.

*Cobb* said that those delegations that "carr[y] out a legislative scheme, policy, and purpose by its own terms" are not excessive. *Id.* at ¶ 40-41. Section 72-2-9.1 expressly states these three things: the legislature's policy and purpose to ensure the State Engineer's full authority to administer the state's water so that, pending adjudication, it is used in compliance with the law, including interstate compacts. *Cobb* next questions the clarity of the statutory guidelines. *Id.* at ¶ 41. Because the guidelines under 72-2-9.1 are both explicit and aligned with the policy it expressly intends the State Engineer to fulfill, they adequately ensure the State Engineer knows exactly what he can and cannot do. Third, *Cobb* stated that it is less likely to find excessive delegation when the delegation is made to a person or board with expertise specific to delegation. *Id.* at ¶ 44. Section 72-2-9.1 is a delegation to the State Engineer, the state's appointed expert in water law, who, by statute, must be "a technically qualified and registered professional engineer." NMSA 1978, § 72-2-1. Moreover, as the record and caselaw make clear, the Office of the State Engineer has collectively an extraordinary amount of knowledge and expertise about the law and science of water in New Mexico and the complex interweaving of those two things. *Rio Grande Chapter of Sierra Club v. New Mexico*

*Mining Commission*, 2003-NMSC-005, ¶ 25, 61 P.3d 806. ("[t]he court will confer a heightened degree of deference to legal questions that 'implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function") (quoting *Morningstar Water Users v. Public Utility*, 120 N.M. 579, 583, 904 P.2d 28, 32 (1995)).

As *Cobb* makes clear, the court finds excessive delegation when, as a result of either vague or meaningless legislative guidelines or administrative interpretation of those standards, the executive branch assumes powers the legislature never intended to confer. *Cobb*, 2006-NMSC-034, ¶¶ 45-46. A statute is vague when "persons of common intelligence must necessarily guess" as to the meaning of its terms. *State v. Orzen*, 83 N.M. 458, 461, 493 P.2d 768, 771 (1972). Section 72-2-9.1 is neither indefinite nor vague. It mandates the State Engineer to use his authority to administer the state's water, an area of critical state concern, in accordance with established New Mexico water law principles. As this directive is explicit and clear, the district court was wrong to find that the State Engineer acted in excess of his delegated authority by his promulgation of the AWRM regulations. (Mem. Op. at p. 33, R.P. 987) (citing *State ex rel. Sandel v. NMPUC*, 127 N.M. 272, 980 P.2d 55 (1999) (finding an agency exceeded it authority by creating new law, by which it acted against, rather than in conformance with legislative mandate). As the State Engineer's promulgation of the AWRM regulations

reasonably and consistently aligns with both legislative purpose and the legislature's authoritative delegation, the court's contrary determination was error. *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶16, 79 P.3d 297 ("it is presumed, in the context of administrative matters... that the Legislature intended for the agency to interpret legislative language in a reasonable manner, consistent with the legislative intent"); *Rio Grande Chapter of the Sierra Club*, 2003-NMSC-005, ¶ 17 ("in resolving ambiguities in the statute or regulations which an agency is charged with administering, the Court will generally defer to the agency's interpretation if it implicates agency expertise") (citations omitted). As a result of these errors, the State Engineer cannot effectively administer water priorities until a court enters an order, a result that obliterates both the legislature's intent and mandate. *State v. Smith*, 2004-NMSC-032, ¶¶ 8-10, 98 P.3d 1022 (statutes should be read in a manner that effectuates legislative intent).

### E. The District Court Violated Separation of Powers By Substituting Its Policy Judgments for the Legislature's

In holding that either the legislature exceeded its authority or the State Engineer exceeded his, the district court was substituting its prerogative for the policy prerogative of the legislature. Our courts have long recognized that "water was placed in a unique category in our Constitution . . . . Our entire state has only

enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival." *Kaiser Steel Corp. v. W.S. Ranch*, 81 N.M. 414, 417, 467 P.2d 986, 989 (1970).

The district court forgot that it was to the legislature, not the courts, that the Constitution committed the plenary authority to create a system for the management of our water for our survival. N.M. Const. art. XVI, § 2; *Cooper*. The Supreme Court has held, on at least two occasions, that judicial control of the State Engineer's administrative functions violates separation of powers and that the judiciary may not interfere with the State Engineer's coherent, expert exercise of his administrative authority. *See Fellows v. Shultz*, 81 N.M. 496, 499-500, 469 P.2d 141, 144-45 (1970) (overturning statute that placed original jurisdiction in the district courts for hearings on applications to change well use or well location); *City of Hobbs v. State ex rel. Reynolds*, 82 N.M. 102, 103-04, 476 P.2d 500, 501-02 (1970) (overturning statute, which allowed for hearings on underground water permits to be removed to the district court).

The district court's decision that only courts can determine the elements of water rights violates this doctrine. But it does more, it destroys the carefully constructed system of adjudication and administration that the legislature has created over the last century based upon its experience with both processes and

adjusting the respective authorities of the courts and the executive according to its best judgment.

Under the district court's scheme, the courts would make all the administrative and adjudicatory decisions, and the State Engineer would be relegated to enforcing court orders. Doubtless the legislature could create such an administrative system, but it has not. It has carefully constructed a system of conjoint administration and adjudication. Its authority to do so is unquestionable under our constitutional system and has been repeatedly upheld by the courts.

For the district court to decide that the legislature's system is unconstitutional and that, instead, all administrative and adjudicative determinations must now be made by the judicial branch is a violation of the doctrine of separation of powers. It is the very kind of interference with the functions of one branch by another that the doctrine was designed to prevent. As the Supreme Court held in *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶23, 961 P.2d 768, "one branch of government cannot unduly encroach or interfere with the authority of another branch ... Such an infringement occurs when the action by one branch prevents another branch from accomplishing its constitutionally assigned functions." The district court seriously over-reached its authority by imposing its view of the proper role of the courts and administrators in the water management process. It did so based on a complete misreading of the statutory

and caselaw surrounding the determination of the elements of water rights. Its opinion, if left alone, would utterly defeat the legislative intent and wreak havoc on New Mexico's efforts to preserve its water and meet its legal obligations. The district court's opinion must be reversed.

### F. The AWRM Regulations Do Not Violate Substantive Due Process

Apart from separation of powers, the petitioners challenged the validity of the AWRM regulations on grounds of procedural due process, and the State Engineer defended the regulations on that basis. (R.P. 58-62, 683-98, 784-806) However, the district court's memorandum decision--issued after the close of briefing and oral argument--appears to have confused procedural and substantive due process. Although the court said it was "determining whether AWRM violates procedural process" (Mem. Op. p. 36, R.P. 990), the court's analysis employed the strict scrutiny standard of review which applies to questions of substantive due process. (Mem. Op. pp. 36-37, 40, R.P. 990-91) As argued below, the district court erred in applying a strict scrutiny standard of review. Nonetheless, the actual due process ruling is quite narrow. After evaluating the hearing procedure under NMSA 1978, Section 72-2-16 (1965), as provided for in 19.25.13.27 and 19.25.13.30, the court ruled that "AWRM's employment of Section 72-2-16 for hearings on objections violates due process under the U.S. and New Mexico constitutions." The court held that "[f]ormal hearings on objections must be

conducted under Section 72-3-3 or some other procedure providing similar guarantees of prompt resolution. To satisfy due process, persons must have their objections heard and decided upon promptly as to priority dates and the State Engineer's establishment of the administration date." (Mem. Op. p. 40, R.P. 994)

Although the district court, in dicta, was critical of the lack of an administrative stay mechanism in the regulations (Mem. Op. p. 35, R.P. 989), the court did not invalidate the regulations on this basis and the petitioners have not appealed the district court's ruling. Under these circumstances the question of the necessity of an administrative stay is not an issue before the court on this appeal. *Klinksiek v. Klinksiek*, 2005-NMCA-008, ¶ 26, 104 P.3d 559 (where no cross appeal was filed, the issue was waived); *State ex rel. State Highway Dep't v. Yurcic*, 85 N.M. 220, 224, 511 P.2d 546, 550 (1973).

The State Engineer agrees with the district court that individuals who object to the establishment of priority dates and administration dates under the AWRM regulations must be heard and must have their objections "acted on promptly." However, the State Engineer objects to the district court's use of a strict scrutiny standard to invalidate the regulations.

In holding that water rights are fundamental rights "explicitly guaranteed" by art. XVI, Sections 1, 2, 3 and 5 of the New Mexico Constitution (Mem. Op. p. 36, R.P. 990), the district court erred in inferring a legal guarantee that does not

exist either in the text of the Constitution or in the historical treatment of water rights under New Mexico law. Conceptually, the implication of a legal guarantee is antithetical to the conditional nature of water rights in a prior appropriation system where water rights are subject to, *inter alia*, the availability of physical supply and continuous beneficial use, ranked by priority, which forms the "basis, the measure and the limit of the right." N.M. Const. art. XVI, § 3.

The State's waters belong to the public, N.M. Const. art. XVI, § 2; NMSA 1978, § 72-1-1 (1907); NMSA 1978, § 72-12-1 (1931), and persons appropriating water do so subject to the legislature's plenary authority under art. XVI, § 2, and the comprehensive regulatory framework under the New Mexico Water Code. *See, e.g., Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) ("The state controls the use of water because it does not part with ownership; it only allows a usufructuary right to water.").

In light of these constitutional and statutory limitations, no one in New Mexico has a constitutionally protected right to make excessive or wasteful appropriations, water being "too scarce, and consequently too precious, to admit waste." *State ex rel. Erickson*, 308, P.2d at 987. Similarly, there is no constitutionally protected interest in appropriating water out of priority, *e.g., Mosby Irrigation Co. v. Criddle*, 354 P.2d 848, 852 (Utah 1960) (an appropriative water right is subject to priority regulation), or in appropriating water that

equitably belongs to a downstream state. *Hinderlider*, 304 U.S. at 101 (rejecting Colorado ditch company's argument that it was unconstitutionally deprived of water diverted for delivery to New Mexico on the La Plata River).

Further, when a court rules on substantive due process, it is not the court's function to "sit as a superlegislature [and] weigh the wisdom of legislation," *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 124 (1978) (citation omitted), or to substitute the court's "policy judgments" for those of the legislative or executive branches, *Hodel v. Indiana*, 452 U.S. 314, 331 (1981), especially in matters of economic or social welfare. *See generally* 2 R. Rotunda and J. Nowak, *Treatise on Constitutional Law*, § 15.4(e) (2007).

If a statute or regulation has a proper legislative purpose and is neither arbitrary nor discriminatory, there is no violation of substantive due process. *See, e.g., Casillas v. S.W.I.G.*, 96 N.M. 84, 86, 628 P.2d 329, 331 (Ct. App. 1981). In this case, there is nothing unreasonable, arbitrary or discriminatory in the provision in the AWRM regulations, 19.25.13.27 and 19.25.13.30, that administrative hearings will be conducted under Section 72-2-16. In ruling that the hearings must be conducted under Section 72-3-3 (1935), instead of Section 72-2-16, the district court was simply substituting its judgment for that of the State Engineer—and effectively rewriting the AWRM regulations—based solely on the court's assumption that hearings can be conducted more quickly under 72-3-3 than under

72-2-16. In doing so, the district court breached the doctrine of judicial self-restraint which obligates courts "to exercise the utmost care" in "break[ing] new ground" on questions of substantive due process. *Reno v. Flores*, 507 U.S. 292, 300-02 (1993); *Schaefer v. Whitson*, 32 N.M. 481, 483-84, 259 P. 618, 619 (1927) ("our inherent power to protect fundamental rights is discretionary and to be guardedly used.")

The issue of substantive due process was not litigated below and should not have been decided by the district court *sua sponte*. The court compounded its error by invoking a strict scrutiny standard of review and invalidating 19.25.13.27 and 19.25.13.30 on that basis. Because of these errors, the district court's due process ruling should be reversed.

## III. CONCLUSION

Based on the arguments and the authorities cited herein, the district court's memorandum decision and order invalidating 19.25.13.27 (D) (F) and (G) NMAC, and 19.25.13.27 and 19.25.13.30 NMAC should be reversed.

Respectfully Submitted,

THE NEW MEXICO ATTORNEY GENERAL
GARY K. KING, Attorney General

By: F. C. Bassett
Stephen R. Farris, Assistant Attorney General
Frances C. Bassett, Assistant Attorney General
P.O. Drawer 1508
Santa Fe, NM 87504-1508
(505) 827-6010 / (505) 827-4440 (fax)

NEW MEXICO OFFICE OF THE STATE ENGINEER
JOHN D'ANTONIO, JR., State Engineer

By: F. C. Bassett
jcv DL Sanders, Special Assistant Attorney General
P. O. Box 25102
Santa Fe, NM 87504-5102
(505) 827-6150 / (505) 827-3887 (fax)

SUTIN, THAYER & BROWNE

By: F. C. Bassett
jcv Paul Bardacke
Peter S. Kierst
J. Katherine Girard
Special Assistant Attorneys General
P. O. Box 1945
Albuquerque, NM 87103
(505) 883-2500 / (505) 888-6565 (fax)
Attorneys for the Respondent-Appellant

## CERTIFICATE OF SERVICE

I certify that a true and correct copy of the State Engineer's Corrected Brief in Chief was served via email and first-class mail on the 4th day of March 2008 upon the following:

Sunny J. Nixon, Esq.
James P. Bieg, Esq.
Rodey, Dickason, Sloan, Akin & Robb, P.A.
Post Office Box 1357
Santa Fe, NM 87504
(505) 954-3900 / (505) 954-3942 (fax)

Counsel for Petitioner-Appellee Tri-State Generation and Transmission Association, Inc.

Mark K. Adams, Esq.
Rodey, Dickason, Sloan, Akin
& Robb, P.A.
Post Office Box 1357
Santa Fe, New Mexico 87504
(505) 954-3900 / (505) 954-3942 (fax)

Counsel for Petitioner New Mexico Mining Association

Frances C. Bassett

SERVICE LIST FOR ALL PARTIES

In The Supreme Court of the United States, Original No. 141
STATE OF TEXAS v. STATE OF NEW MEXICO and STATE OF COLORADO

# PARTIES[1]

| STATE | ATTORNEY & ADDRESS | PHONE & EMAIL |
|---|---|---|
| **Texas** | **STUART L. SOMACH***<br>**ANDREW M. HITCHINGS**<br>**ROBERT B. HOFFMAN**<br>**FRANCIS M. GOLDSBERRY II**<br>**THERESA C. BARFIELD**<br>**SARAH A. KLAHN**<br>**BRITTANY K. JOHNSON**<br>**RICHARD S. DEITCHMAN**<br>SOMACH SIMMONS & DUNN, PC<br>500 Capitol Mall, Suite 1000<br>Sacramento, CA 95814-2403 | (916) 446-7979<br>ssomach@somachlaw.com<br>ahitchings@somachlaw.com<br>rhoffman@somachlaw.com<br>mgoldsberry@somachlaw.com<br>tbarfield@somachlaw.com<br>sklahn@somachlaw.com<br>bjohnson@somachlaw.com<br>rdeitchman@somachlaw.com<br><br>Secretary: Corene Rodder<br>crodder@somachlaw.com<br>Secretary: Crystal Rivera<br>crivera@somachlaw.com<br>Paralegal: Christina M. Garro<br>cgarro@somachlaw.com<br>Paralegal: Yolanda De La Cruz<br>ydelacruz@somachlaw.com |
| | **KEN PAXTON**<br>*Attorney General*<br>**JEFFREY C. MATEER**<br>*First Assistant Attorney General*<br>**DARREN L. McCARTY**<br>*Deputy Attorney General for Civil Litigation*<br>**PRISCILLA M. HUBENAK***<br>*Chief, Environmental Protection Div.*<br>OFFICE OF THE ATTORNEY GENERAL OF TEXAS<br>P.O. Box 12548<br>Austin, TX 78711-2548 | (512) 463-2012<br>(512) 457-4644 Fax<br><br>priscilla.hubenak@oag.texas.gov |
| | | |

[1] (*) = ***Counsel of Record***

| | | |
|---|---|---|
| **New Mexico** | **HECTOR H. BALDERAS**<br>New Mexico Attorney General<br>**TANIA MAESTAS**<br>Chief Deputy Attorney General<br>**CHOLLA KHOURY**<br>Assistant Attorney General<br>**ZACHARY E. OGAZ**<br>Assistant Attorney General<br>STATE OF NEW MEXICO<br>P.O. Drawer 1508<br>Santa Fe, NM 87501<br>**Patricia Salazar** – Assistant | hbalderas@nmag.gov<br>tmaestas@nmag.gov<br>ckhoury@nmag.gov<br>zogaz@nmag.gov<br>psalazar@nmag.gov<br>(505)239-4672 |
| | **MARCUS J. RAEL, JR. ***<br>**LUIS ROBLES**<br>**SUSAN BARELA**<br>Special Assistant Attorneys General<br>ROBLES, RAEL & ANAYA, P.C.<br>500 Marquette Ave. NW, Suite 700<br>Albuquerque, NM 87102<br>**Chelsea Sandoval** - Paralegal<br>**Pauline Wayland** – Paralegal<br>**Bonnie DeWitt** - Paralegal | marcus@roblesrael.com<br>luis@roblesrael.com<br>susan@roblesrael.com<br>chelsea@roblesrael.com<br>pauline@roblesrael.com<br>bonnie@roblesrael.com<br>(505) 242-2228 |
| | **BENNET W. RALEY**<br>**LISA M. THOMPSON**<br>**MICHAEL A. KOPP**<br>Special Assistant Attorneys General<br>TROUT RALEY<br>1120 Lincoln St., Suite 1600<br>Denver, CO 80203 | braley@troutlaw.com<br>lthompson@troutlaw.com<br>mkopp@troutlaw.com<br>(303) 861-1963 |
| | **JEFFREY WECHSLER**<br>Special Assistant Attorney General<br>MONTGOMERY & ANDREWS<br>325 Paseo De Peralta<br>Santa Fe, NM 87501<br>**Diana Luna** - Paralegal | jwechsler@montand.com<br>dluna@montand.com<br>(505)986-2637 |
| | **JOHN DRAPER**<br>Special Assistant Attorney General<br>DRAPER & DRAPER LLC<br>325 Paseo De Peralta<br>Santa Fe, NM 87501<br>**Donna Ormerod** - Paralegal | john.draper@draperllc.com<br>donna.ormerod@draperllc.com<br>(505)570-4591 |

| | | |
|---|---|---|
| **Colorado** | **PHILIP J. WEISER**<br>Colorado Attorney General<br>**ERIC R. OLSON**<br>Colorado Solicitor General<br>**LAIN LEONIAK**<br>Acting First Asst. Attorney General<br>**CHAD M. WALLACE***<br>Senior Assistant Attorney General<br>**PRESTON V. HARTMAN**<br>Assistant Attorney General<br><br>COLORADO DEPARTMENT OF LAW<br>Ralph Carr Judicial Center<br>7th Floor<br>1300 Broadway<br>Denver, CO 80203<br>**Nan Edwards** – Paralegal II | <br><br>eric.olson@coag.gov<br><br>chad.wallace@coag.gov<br>(720)508-6281 (direct)<br><br>preston.hartman@coag.gov<br>(720)508-6257 (direct)<br><br>nan.edwards@coag.gov |
| | | |

| | | |
|---|---|---|
| **United States** | **JEFFREY WALL ***<br>Acting Solicitor General<br>**JEAN E. WILLIAMS**<br>Deputy Assistant Attorney General<br>**FREDERICK LIU**<br>Assistant to the Solicitor General<br>U.S. DEPARTMENT OF JUSTICE<br>950 Pennsylvania Ave, NW<br>Washington, DC 20530-0001<br><br>**JAMES J. DUBOIS***<br>**R. LEE LEININGER**<br>U.S. DEPT. OF JUSTICE<br>Environment & Natural Resources Div<br>999 18th Street<br>South Terrace – Suite 370<br>Denver, CO 80202<br>**Seth Allison** - Paralegal<br><br>**JUDITH E. COLEMAN**<br>**JOHN P. TUSTIN**<br>**JENNIFER A. NAJJAR**<br>U.S. DEPARTMENT OF JUSTICE<br>Environment & Natural Resources Div<br>P. O. Box 7611<br>Washington, DC 20044-7611 | supremectbriefs@usdoj.gov<br>(202) 514-2217<br><br>james.dubois@usdoj.gov<br>(303) 844-1375<br>lee.leininger@usdoj.gov<br>(303) 844-1364<br><br>seth.allison@usdoj.gov<br>(303)844-7917<br><br>judith.coleman@usdoj.gov<br>(202) 514-3553<br>john.tustin@usdoj.gov<br>(202)305-3022<br>jennifer.najjar@usdoj.gov<br>(202)305-0476 |
| | | |

# AMICI

| AMICI | ATTORNEY AND ADDRESS | PHONE & EMAIL |
|---|---|---|
| **Albuquerque Bernalillo County Water Utility Authority** | **JAY F. STEIN**<br>**JAMES C. BROCKMANN***<br>STEIN & BROCKMANN, P.A.<br>P.O. Box 2067<br>Santa Fe, NM 87504<br>**Administrative Copy**<br><br>**PETER AUH**<br>Albuquerque Bernalillo County Water Utility Authority<br>P.O. Box 568<br>Albuquerque, NM 87103-0568 | (505) 983-3880<br>jfstein@newmexicowaterlaw.com<br>jcbrockmann@newmexicowaterlaw.com<br><br>administrator@newmexicowaterlaw.com<br><br>(505) 289-3092<br>pauh@abcwua.org |
| | | |
| **City of El Paso** | **DOUGLAS G. CAROOM***<br>**SUSAN M. MAXWELL**<br>BICKERSTAFF HEATH DELGADO ACOSTA LLP<br>3711 S. MoPac Expressway<br>Building One, Suite 300<br>Austin, TX 78746 | (512) 472-8021<br>dcaroom@bickerstaff.com<br>smaxwell@bickerstaff.com |
| | | |
| **City of Las Cruces** | **JAY F. STEIN***<br>**JAMES C. BROCKMANN**<br>STEIN & BROCKMANN, P.A.<br>P.O. Box 2067<br>Santa Fe, NM 87504<br>**Administrative Copy**<br><br>**JENNIFER VEGA-BROWN**<br>**MARCIA B. DRIGGERS**<br>LAS CRUCES CITY ATTORNEY'S OFFICE<br>P.O. Box 20000<br>Las Cruces, NM 88004 | (505) 983-3880<br>jfstein@newmexicowaterlaw.com<br>jcbrockmann@newmexicowaterlaw.com<br><br>administrator@newmexicowaterlaw.com<br><br>(575) 541-2128<br>jvega-brown@las-cruces.org<br>marcyd@las-cruces.org |
| | | |

| | | |
|---|---|---|
| **El Paso County Water Improvement District No. 1** | **MARIA O'BRIEN***<br>**SARAH STEVENSON**<br>MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A.<br>500 Fourth Street N.W., Suite 1000<br>Albuquerque, NM 87103-2168<br>**Shannon Gifford – Legal Assistant**<br><br>**RENEA HICKS**<br>LAW OFFICE OF MAX RENEA HICKS<br>P.O. Box 303187<br>Austin, TX 78703-0504 | (505) 848-1803 (direct)<br><br>mobrien@modrall.com<br>sarah.stevenson@modrall.com<br><br><br>shannong@modrall.com<br><br>(512)480-8231<br><br>rhicks@renea-hicks.com |
| | | |
| **Elephant Butte Irrigation District** | **SAMANTHA R. BARNCASTLE***<br>BARNCASTLE LAW FIRM, LLC<br>1100 South Main, Suite 20 (88005)<br>P.O. Box 1556<br>Las Cruces, NM 88004<br>**Janet Correll - Paralegal** | (575)636-2377<br>Fax: (575) 636-2688<br>samantha@h2o-legal.com<br><br><br>janet@h2o-legal.com |
| | | |
| **Hudspeth County Conservation and Reclamation District No. 1** | **ANDREW S. "DREW" MILLER***<br>KEMP SMITH LLP<br>919 Congress Ave., Suite 1305<br>Austin, TX 78701 | (512) 320-5466<br>dmiller@kempsmith.com |
| | | |
| **New Mexico Pecan Growers** | **TESSA T. DAVIDSON***<br>DAVIDSON LAW FIRM, LLC<br>4206 Corrales Rd.<br>P.O. Box 2240<br>Corrales, NM 87048<br>**Jo Harden - Paralegal** | (505) 792-3636<br>ttd@tessadavidson.com<br><br><br><br>jo@tessadavidson.com |
| | | |

| | | |
|---|---|---|
| **New Mexico State University** | **JOHN W. UTTON***<br>UTTON & KERY, P.A.<br>P.O. Box 2386<br>Santa Fe, NM 87504<br><br>General Counsel<br>Hadley Hall Room 132<br>2850 Weddell Road<br>Las Cruces, NM 88003 | (505) 699-1445<br>john@uttonkery.com<br><br><br><br>(575) 646-2446<br>gencounsel@nmsu.edu |
| | | |
| **State of Kansas** | **DEREK SCHMIDT**<br>Attorney General of Kansas<br>**JEFFREY A. CHANAY**<br>Chief Deputy Attorney General<br>**TOBY CROUSE***<br>Solicitor General of Kansas<br>**BRYAN C. CLARK**<br>Assistant Solicitor General<br>**DWIGHT R. CARSWELL**<br>Assistant Solicitor General<br>120 S.W. 10th Ave., 2nd Floor<br>Topeka, KS 66612 | (785) 296-2215<br><br><br><br>toby.crouse@ag.ks.gov<br>bryan.clark@ag.ks.gov |
| | | |

## MEDIATOR

| | | |
|---|---|---|
| **Mediator** | **Hon. Oliver W. Wanger (U.S.D.J. Ret.)**<br><br>WANGER JONES HELSLEY PC<br>265 E. River Park Circle<br>Suite 310<br>Fresno, CA 93720 | owanger@wjhattorneys.com<br>dpell@wjhattorneys.com |
| | | |

# SPECIAL MASTER

| | | |
|---|---|---|
| **Special Master** | **Honorable Michael J. Melloy**<br>*Special Master*<br>United States Circuit Judge<br>111 Seventh Avenue, S.E., Box 22<br>Cedar Rapids, IA 52401<br><br>Michael E. Gans, Clerk of Court<br>United States Court of Appeals – Eighth Circuit<br>Thomas F. Eagleton United States Courthouse<br>111 South 10th Street, Suite 24.329<br>St. Louis, MO 63102 | (319) 432-6080<br>TXvNM141@ca8.uscourts.gov<br><br><br><br><br>(314)244-2400<br>TxvNM141@ca8.uscourts.gov |
| | | |

****Updated 4/16/2018**

**Corrected the spelling of Pricilla M. Hubenak to Priscilla M. Hubenak and added her e-mail address Priscilla.Hubenak@oag.texas.gov to the Service list.**

****Updated 4/18/2018**

**Added Toby Crouse (toby.crouse@ag.ks.gov) as the Solicitor General for the State of Kansas and removed Stephen R. McAllister.**

****Updated 4/24/2018**

**Added Clerk of Court information and updated Special Master e-mail address.**

****Updated 11/16/18**

**Added Bryan Clark's e-mail address (bryan.clark@ag.ks.gov) for the State of Kansas**

****Updated 3/14/19**

**Updated Attorney General of Colorado to Philip J. Weiser**
**Added Solicitor General Eric R. Olson (eric.olson@coag.gov) for the State of Colorado**

****Update 3/19/19**

**Added legal assistants Shannon Gifford (shannong@modrall.com) and Leanne Martony (leannem@modrall.com) for El Paso County Water District No. 1**
**Added James M. Speer, Jr., information for El Paso County Water District No. 1**

****Update 5/6/19**

**Added Sarah A. Klahn (sklahn@somachlaw.com), Richard S. Deitchman (rdeitchman@somachlaw.com), Rena Wade (rwade@somachlaw.com) and Corene Rodder (crodder@somachlaw.com) for State of Texas. Removed Rhonda Stephenson.**

**Update 11/6/19

Added Lamai Howard (lamaih@modrall.com) for El Paso County Water District No. 1. Removed Leanne Martony.

**Update 11/21/19

Added Jo Harden (jo@tessadavidson.com) for New Mexico Pecan Growers. Removed Patricia McCann.

**Update 11/22/19

Removed Lizbeth Ellis and Clayton Bradley and added General Counsel (gencounsel@nmsu.edu) email for New Mexico State University.

**Update 1/7/20

Added David W. Gehlert (david.gehlert@usdoj.gov) for the United States. Updated Solicitor General information. Also added John P. Tustin (john.tustin@usdoj.gov) for the United States.

**Update 2/19/20

Added Renea Hicks for El Paso County Water Improvement District No. 1. Removed James M. Speer and Lamai Howard.

**Update 2/26/20

Added Darren L. McCarty for State of Texas. Removed Brantley Starr and James Davis. Also added Crystal Rivera and removed Rena Wade.

**Update 5/1/20

Added Cholla Khoury, Luis Robles, Jeffrey Wechsler and John Draper for the State of New Mexico. Removed David A. Roman. Also added Bonnie DeWitt, Pauline Wayland, Diana Luna and Donna Ormerod.

Added Preston Hartman for the State of Colorado. Removed Karen Kwon.

**Update 7/7/20

Added mediator information - Hon. Oliver W. Wanger.

**Update 10/1/20

Added Susan Barela (susan@roblesrael.com) for State of New Mexico.

**Update 10/2/20

Added Jennifer A. Najjar and removed Stephen M. MacFarlane, Thomas Snodgrass and David W. Gehlert for the United States.

**Update 12/14/20

Added Zachary E. Ogaz (zogaz@nmag.gov) for State of New Mexico.