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

JOINT BRIEF OF *AMICI CURIAE* NEW MEXICO PECAN GROWERS AND THE SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION IN SUPPORT OF STATE OF NEW MEXICO AND IN RESPONSE TO THE UNITED STATES OF AMERICA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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INTRODUCTION

Amicus Curiae New Mexico Pecan Growers and the Southern Rio Grande Diversified Crop Farmers Association (collectively "*Amici*")[1] are New Mexico non-profit entities formed in 2002 and 2009, respectively, to promote and protect the interests of farmers in the Southern Rio Grande Valley of New Mexico. Their several hundred members collectively irrigate approximately 60,000 acres of croplands and orchards within the Elephant Butte Irrigation District ("EBID") using surface water released from the storage reservoirs of the Rio Grande Project ("Project"). Like farmers in the El Paso Valley in Texas, they have used groundwater wells to provide a supplemental irrigation water supply without interference or protest from their irrigation district, Texas, or the United States.

The farmer-members' interests in this matter are two pronged. First, as irrigators within EBID who have established water rights in surface water delivered from the Project, they have an interest in ensuring their entitlement to use Project supply to meet their irrigation demands is protected under the Rio Grande Compact ("Compact"), 53 Stat. 785 (May 31, 1939). Second, as irrigators who have also established rights to use groundwater, they have an interest in ensuring these rights remain exercisable to meet their irrigation demands in accordance with New Mexico law and within New Mexico's apportionment under the Compact. Although *Amici*'s members are legally entitled to use Project water delivered by EBID to satisfy their senior-priority surface water

[1] The Special Master's Case Management Plan entered on September 6, 2018, recognizes that the New Mexico Pecan Growers is an *amicus curiae* in this original action and may file briefs pertaining to its factual or legal interests in response to any motion pending before the Special Master. On December 9, 2020, the Southern Rio Grande Diversified Crop Farmers Association filed a Motion for Leave to Participate as *Amicus Curiae* in support of Defendant State of New Mexico. Responses to its motion are due on the same date as this brief. No other person or entity other than the *Amici* has authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief.

rights, they have had to rely more-heavily on their junior-priority wells because of changes to Project operations under the agreement between the United States Bureau of Reclamation ("Reclamation"), EBID, and the El Paso County Water Improvement District No.1 ("EPCWID") (March 10, 2008) ("Operating Agreement"). *Amici* view the dispositive motions filed by the United States and Texas as directly attacking their individual rights to use Project water that have been exercised for over a century. Further, the relief they demand in their motions would require the extinction of groundwater irrigation rights established with the encouragement of the United States for over 60 years.

Amici support New Mexico's motions for partial summary judgment and its responses in opposition to the motions filed by Texas and the United States. They offer this brief for the specific purpose of providing additional grounds for denying the United States' Motion for Partial Summary Judgment against New Mexico and its Memorandum in Support (Nov. 5, 2020) ("U.S. Mem."). As the owners of vested rights to use water released from Project storage and distributed through EBID's works, *Amici's* members are most troubled by the United States demanding that New Mexico enjoin irrigation pumping while completely ignoring the impacts of pumping in Texas. The United States' apparent view of the Compact is one that allows Texas' farmers to maximize all available water supplies to grow crops that meet market demands; permits El Paso's citizens and industries to consume groundwater from interstate aquifers at their pleasure; and requires farmers in New Mexico to use only surface water to inefficiently irrigate cotton so that ample return flows are generated for use on pecan orchards in Texas. Surely, the United States cannot realistically believe New Mexico would have intended such disparate treatment of its citizens when it agreed to the Compact's silent apportionment of water below Elephant Butte.

SUMMARY OF ARGUMENT

In seeking summary judgment, the United States has the burden to demonstrate there are no disputed issues of fact and the undisputed facts entitle it to judgment as a matter of law. *See Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) ("although not strictly applicable," Rule 56(c) of Federal Rules of Civil Procedure serves as a useful guide). However, the Court cannot order relief that is inconsistent with the Compact's express terms, unless it determines the Compact is somehow unconstitutional. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). Finally, to obtain an injunction against New Mexico, the United States must establish a compact violation and "a cognizable danger of recurrent violations." *See Kansas v. Nebraska*, 574 U.S. 445, 466 (2015). It must prove this danger by clear and convincing evidence. *See Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931).

In its response to the United States, New Mexico establishes genuine disputes as to the material facts on which the United States' motion relies and, for this reason alone, the motion should be denied. The United States fails to establish the Compact imposes an implied depletion limit below Elephant Butte, or an implied requirement that water be used only in accordance with conditions prevailing in 1938. Further, the United States does not clearly define the amount of water the Compact apportions to Texas and, thus, cannot support its request for permanent injunction against New Mexico.

The United States is not entitled to summary judgment that declares New Mexico has an obligation to "protect" the Project and mandates how New Mexico must do so. This is an impermissible effort to shift to New Mexico the United States' obligations under its contracts with the districts, and the United States' responsibility to ensure the apportionment below Elephant Butte is made. Finally, by characterizing the 2008 Operating Agreement as simply EBID

"voluntarily" agreeing to send a portion of its allocation downstream to Texas, the United States attempts to further minimize its role in implementing new operating procedures that harm EBID farmers and New Mexico.

While it tries to minimize its legal responsibilities under the Compact, the United States cannot dispute the Project was intended to provide equal footing when meeting the irrigation demands of the Project beneficiaries in the United States. It also cannot dispute that it was charged with operating the Project in accordance with its contracts and within the confines of state and reclamation law. In its contracts with the downstream irrigation districts, Reclamation confirmed that vested rights to use Project water were owned by the users and appurtenant to their lands. It further promised to never construe its contracts in a manner that would diminish or impair those rights. The Compacting States understood this, and relied on it, when agreeing to the Compact. The United States now attacks the very water rights it promised to uphold, and advocates for an implied apportionment that results in vast inequities to New Mexico in violation of the Compact's explicit purpose to "effect an *equitable* apportionment" of the Rio Grande. Its motion must be denied.

ARGUMENT

I. THE UNITED STATES FAILS TO ESTABLISH UNDISPUTED FACTS TO SUPPORT ITS REQUESTED DECLARATORY RELIEF AND PERMANENT INJUNCTION

The United States seeks a declaration that "New Mexico has an obligation to exercise its regulatory authority over water use within its borders consistent with the Compact," and an obligation to protect the Project as it "operated at the time of the Compact." U.S. Mem. 1; U.S. Rsp. to N.M. Mot. for Part. Sum. J. on Apportion. (Dec. 22, 2020) ("U.S. Rsp. N.M. Mem.") 3,

and 13. It further demands that New Mexico be required to enjoin water uses that do not comport with its view of the Compact's implied apportionment. U.S. Mem. 30-31.

The United States does not dispute that New Mexico receives part of its apportionment below Elephant Butte and that the Project effectuates the distribution of the apportioned water to New Mexico and Texas. However, it denies that the Compact apportions any specific amount of water to either state. U.S. Rsp. N.M. Mem. 2. Instead, it views the Compact as effecting an equitable apportionment below Elephant Butte by incorporating "the operation of the Project under existing conditions." *Id.* Further, it asserts the Compact does not "dictate" Project operations relating to the distribution of releases from project storage. *Id.* 6.

New Mexico establishes genuine disputes as to the material facts alleged by the United States in its motion and, for this reason alone, it should be denied. *See* N.M Rsp. to U.S. Mot. for Partial Sum. J. (Dec. 22, 2020) ("N.M. Rsp. U.S. Mem."); and N.M. Cons. Stmt. of Mat. Facts (Dec. 22, 2020) ("NM CSMF"). Further, an implied apportionment based on "existing conditions" would essentially impose a depletion limit below Elephant Butte, or a requirement to only allow uses of water under conditions prevailing in 1938, which New Mexico has effectively refuted in its Response to Texas' Motion for Partial Summary Judgment (Dec. 22, 2020) ("N.M. Rsp. TX Mem.") at 39-59.[2]

The United States cannot establish that any uses of water in New Mexico have contributed to violations of the Compact because it does not clearly define the amount of water the Compact apportions to Texas and for which it argues New Mexico cannot "intercept." It therefore cannot support its request for injunction against New Mexico. As the Special Master has noted, "*defining precisely* what each state and its citizens are entitled to receive below the Dam" is the first step in

[2] The State of Colorado also shows the Compact does not imply a 1938 condition. *See* Colorado's Rsp. To Mots. for Partial Sum J. of TX, U.S. and N.M. (Dec. 22, 2020) 21-24.

addressing claims that New Mexico is not protecting Texas' apportionment. *Texas v. New Mexico*, No. 141, Order of the Special Master (April 14, 2020) ("Order") at 19 (emphasis added).

Amici do not deny that New Mexico is bound to the apportionment to which it agreed.[3] However, in seeking a declaration that New Mexico must "protect the Project," the United States attempts to shift to New Mexico *its* obligations under contracts with the districts, and *its* legal responsibility to ensure the apportionment below Elephant Butte Reservoir is, in fact, made—which New Mexico cannot do. The United States does not dispute that New Mexico is not informed of daily Project operations and has no means to know, at any given time, what proportion of the water in the Rio Grande is destined for delivery to either downstream district or Mexico. *See* NM CSMF 264, 266-269 . Further, when it argues New Mexico must be held to a Compact apportionment based on how the Project operated "at the time of the Compact," it is asking the Special Master to ignore the last 80 years of actual Project operations during which *Reclamation* altered project infrastructure, agreed to the use of project water for municipal purposes, encouraged farmers and the districts to develop rights to use groundwater, and allocated water in Project storage based on a delivery curve that accounted for groundwater use during 1951-1978. *See* N.M. Rsp. TX Mem. 46-52.

The United States claims this case is "straightforward." U.S. Mem. 1. To the contrary, the Special Master has acknowledged that the interplay of reclamation law and state law is "complicated" under a Compact that "leaves many things unsaid." Order at 2 (citation omitted). The factual record reviewed under the lenses of reclamation and state law at the time of the Compact provides further support for denying the United States' motion. First, the United States

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[3] The Special Master has acknowledged that "it cannot be disputed that New Mexico will be required to administer its other laws in a manner consistent with and in support of the Compact" Order at 2-3, April 14, 2020.

overly emphasizes and mischaracterizes the import of data in the 1936-1937 Joint Investigation of the Rio Grande Basin[4] with the goal of imposing an implied limit on irrigation water use in New Mexico. In doing so, it discounts the full extent of water rights established for irrigation purposes by EBID farmers, and disregards that the United States is bound by the New Mexico district court's final determination of that issue in the Lower Rio Grande Water Rights Adjudication. Second, it ignores the legal obligations it had under the Downstream Contracts, Reclamation law and state law at the time of the Compact. And, finally, the United States' view of New Mexico's Compact apportionment results in nothing more than what the United States, and the districts, decide that it is. Such an empty promise does comport with the Compact's express purpose of "effecting an equitable apportionment" of the Rio Grande. *See* Compact, preamble, 53 Stat. at 785.

A. New Mexico's Compact Apportionment Below Elephant Butte is Not Quantified by the Data in the Joint Investigation

1. The Joint Investigation Confirms the Variability of Irrigation Demands

It is undisputed that the Compacting States relied upon 1936-1937 Joint Investigation of the Rio Grande Basin ("Joint Investigation") during Compact negotiations. US SOF 21.[5] However, there is no indication that they intended its data on diversions, crop types, irrigated acreages and return flows within the Project to establish an implied "1938 condition" as the basis for apportioning water below Elephant Butte. If they had intended to do so, it would not have been difficult to utilize the data to arrive at an express depletion limitation, or inflow-outflow

[4] *See* US_MSJ_00005026—5630 (TX_00000561—1019), National Resource Com., Regional Planning, Part VI – *The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico and Texas*. 1936-1937.

[5] Citations to "US SOF" are to the numerated list of "Statement of Material Facts" in the United States' Memorandum in Support of its Motion for Partial Summary Judgment (Nov. 5, 2020).

requirement, to describe the apportionment—which the Compact does not do. *See* N.M. Rsp. TX Mem. at 39-59.

It is further undisputed that the Joint Investigation included data describing the types of crops grown and acreage irrigated in both states from 1922-1936, and that cotton was the predominant crop being grown in the years leading up to the Compact.[6] US SOF 26. However, not all authorized acreage in the Project was being fully irrigated. For example, according to census records from 1934, only 67,543 acres had harvested crop lands in New Mexico below Elephant Butte.[7] From 1933 to 1935 tens of thousands of acres in the Project were enrolled in the United States' cotton reduction program and were not being irrigated.[8] Reclamation records also indicate that about 140,000 acres were being irrigated in the entire Project area in 1938, which is roughly 20,000 acres less than the full amount of authorized acreage. NM CSMF 113. Irrigated acreage did not reach its maximum of about 160,000 acres until the early 1950s. *Id.* Thus, the Joint Investigation cannot form the basis for quantifying the irrigation demands of all lands in the Project.

Additionally, information in the Joint Investigation reflected the day-to-day market realities that influence farmers' decisions on what type of crops to plant in any given year(s) and, accordingly, dictate irrigation demands. For example, it reported that cotton, which required 1.5 to 3.0 acre-feet of water per acre ("af/a") became an "important commercial crop" in about 1920.[9] When "much of the alfalfa land was replaced, the water requirements for the valley decreased" because alfalfa required 4.0 to 5.0 af/a.[10] Water requirements for vegetables "var[ied] considerably

[6] *See* US_MSJ_00005350, Table 15.
[7] *See* US_MSJ_00005349.
[8] *See* US_MSJ_00005350, Table 15, fns 1, 2, 3.
[9] *See* US_MSJ_00005359.
[10] *Id.*

in the amount of water used and frequency of irrigation."[11] The cotton reduction programs from 1933-1935 resulted in some lands not being returned to cotton, remaining "out of production entirely," or "planted to other crops."[12]

With knowledge of this information, the Compacting States would not have intended for the States' apportionment below Elephant Butte to be based on less than the authorized Project acreage or on the water requirements of any specific crop. Instead, they drafted a Compact that ensured New Mexico delivered water to project storage to be available for release to meet "irrigation demands." *See* Compact, 53 Stat. at 786, Art. I ¶ l. The Compacting States would have known that the demand for irrigation water would vary on an acre-by-acre basis in the future, like the past, and be dependent upon market and climatic conditions, as described in the Joint Investigation. And, because the Downstream Contracts were "simultaneously" executed with the Compact, they knew that the maximum authorized acreage in the Project would be the one constant regulator on irrigation demands. *See Texas v. New Mexico*, 138 S.Ct. at 957 .

Further, the United States over-reliance on the Joint Investigation as the basis for an apportionment that includes return flows "undiminished by new water resource development" after 1938 is similarly misplaced. *See* U.S. Memo 25. New Mexico shows that this is a thinly veiled attempt to claim that the Compact silently incorporates an inflow-outflow requirement. N.M. Rsp. U.S. Mem. 35. Alternatively, by insisting on certain amounts of return flows resulting from inefficient irrigation practices utilized in 1938, the United States essentially seeks an implied limit of how much Project water farmers in New Mexico can consume in proportion to the amount they divert for irrigation. The Compact expresses no such limits above, or below, Elephant Butte and there is no other legal impediment preventing EBID's farmers from increasing their irrigation

[11] *See* US_MSJ_00005360.
[12] *See* US_MSJ_00005448.

efficiencies. *See, e.g.*, *Montana v. Wyoming*, 563 U.S. 368, 385 (2011) (holding the doctrine of appropriation in both states allows irrigators to improve their irrigation efficiencies under the Yellowstone River Compact).

2. The Joint Investigation cannot be used to collaterally attack the LRG Adjudication court's final determination of irrigation water requirements

The United States also points to the types of crops being grown in the Joint Investigation to assert that New Mexico allows its farmers to utilize an "excessive" duty of water to irrigate their crops. U.S. Mem. 37. The water requirements for all crops grown in New Mexico below Elephant Butte were determined in a final judgment entered in a stream system issue proceeding in the Lower Rio Grande Water Rights Adjudication ("LRG Adjudication").[13] *See* NM-EX 541. The United States was joined as a defendant in the LRG Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952). It participated in the proceeding set to determine irrigation water requirements and did not appeal the final judgment entered by the court. It is therefore bound by it and cannot mount a collateral attack in this matter to challenge the validity of the court's determinations. *See,* 43 U.S.C. § 666 (the United States shall be subject to the judgments of adjudication suits to which they are a party and "may obtain review thereof, in the same manner and to the same extent as a private individual").

Further, the United States' aspersions as to the genesis of the final judgment are unfounded. The dispute that went to trial involved the determination of a proper scientific equation and methodology for measuring actual crop evapotranspiration.[14] The judgment was entered after

[13] New Mexico v. Elephant Butte Irr. Dist., No. CV-96-888 (Stream System Issue SS-97-101), N.M. 3d Jud. Dist. Ct.

[14] New Mexico proposed utilizing the Modified Blaney-Criddle equation which is generally known to conservatively underestimate irrigation water use. *Amici* and other parties proposed various other

several days of trial when a settlement agreement was reached between New Mexico, EBID and *Amici*. *See* NM-EX 541 at 4-5. The court heard expert testimony regarding the water requirements contained in the settlement and afforded all parties, including the United States, the opportunity to conduct cross-examination and submit comments to the proposed form of final judgment—which the United States did.[15] After considering all comments, the court found the farm delivery requirements in the settlement were based on beneficial use and "representative of historic agricultural practices in the lower Rio Grande" for those crops irrigated with surface water only (3.024 af/a), surface and groundwater combined and groundwater only (4.5 af/a).[16] *Id*. ¶¶ 20–23. *Amici* find the United States' concealment of these facts from the Special Master unfortunate.

The United States also attempts to cast New Mexico's irrigation requirements as a *per se* violation of the Compact, thereby avoiding the need to show that irrigation uses in New Mexico have interfered with Texas' apportionment. For example, it argues that permits approved by the New Mexico State Engineer allow water use up to 4.5–5.5 af/a, and these amounts "far exceed" the normal Project delivery of 3.024 af/a. U.S. Mem. 37. If an individual farmer's use of more than 3.024 af/a was a *per se* Compact violation, Texas farmers who routinely irrigate with 4.0 af/a of Project water would be violating the Compact. *See* NM CSMF 232. Rather, the proper inquiry is whether total irrigation uses within New Mexico have violated Texas' apportionment. New Mexico shows that data and measurement records indicate that only about 75,000 acres within EBID are being irrigated today at an averaged use of 4.0 af/a. Current use averaged over total

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methodologies such as the Penman-Monteith equation, which accounts for actual weather uncertainties and is sensitive to vegetation specific parameters.

[15] *See* United States' Brief Regarding Proposed Final Judgment in Stream System Issue/Expedited Inter Se Proceeding 101, New Mexico v. Elephant Butte Irr. Dist., No. CV-96-888 (Stream System Issue SS-97-101), N.M. 3d Jud. Dist. Ct., July 14, 2011 ("the United States is not objecting to the specific numbers which the Settling Parties have agreed to with regard to the CIR and FDR for all crops")

[16] The judgment also provided for an extension to allow individual claimants to provide additional evidence of beneficial use of up to 5.5 af/a.

authorized EBID acreage of approximately 90,000 acres is 3.4 af/a., which is consistent with New Mexico's irrigation demands in the 1940s and early 1950s. NM CSMF 113, 114, NM-EX 343 and 432. Thus, the United States cannot show that the irrigation water requirements determined by the LRG Adjudication court are a *per se* violation of the Compact. If they were, the United States should have objected to them in the LRG Adjudication. Further, if the United States believed permits incorporating the irrigation water requirements would impair Project supply, it should have filed protests to the applications for such permits. *See* NMSA 1978 § 72-12-3 (2019) (requiring published notice of applications for permits to for groundwater uses and opportunity to protest based on impairment).

The United States fails to establish undisputed facts that irrigators in New Mexico have violated the Compact. Its motion seeking to enjoin their use of water to supply their vested water rights should be denied.

B. The United States Cannot Deny the Downstream Contracts Informed the Compacting States

Noticeably absent from the United States' apportionment argument is the scope of *its* legal responsibilities under the Downstream Contracts.[17] Given that the United States does not dispute the Downstream Contracts "are essential to the fulfillment of the Compact's expressly stated purpose," US SOF 35, and the Court views it serving as a sort of "agent" of the Compact, its silence on this issue is deafening. Clearly, the United States is not free to completely ignore its

[17] At the time of the Compact, these contracts included, at a minimum, the: 1) Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association, June 27, 1906 ("1906 Contract") NM-EX 308; 2) Contract between the United States and the Elephant Butte Irrigation District Adjusting Construction Charges and for Other Purposes (Nov. 9, 1937) NM-EX 320, and Contract between the United States and the El Paso County Water Improvement District No. 1 Adjusting Construction Charges and for Other Purposes (Nov. 10, 1937) NM-EX 321, (together the "1937 Contracts"); and 3) Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938), NM-EX 324 (the "1938 Contract").

legal responsibilities under the Downstream Contracts. *See Texas v. New Mexico,* 138 S.Ct. at 959 (explaining "the United States had negotiated and approved Downstream Contracts in which it assumed a legal responsibility to deliver a certain amount of water to Texas").

There is no dispute that through the contracts it negotiated with EBID and EPCWID, the United States promised to supply water from Project storage to the districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the districts agreed to pay for the construction and operation costs of the Project in proportion to the percentage of the total irrigable acres lying in each state—approximately 57% for New Mexico and 43% for Texas. *See Id.* at 957.

The United States denies that the Project operated historically to provide *exactly* 43% of available supply to Texas and 57% to New Mexico. U.S. Rsp. N.M. Mem. 17-19. However, it cannot genuinely dispute that from its inception up to the Compact, the Project was intended to provide each irrigable acre in the United States equal footing to use water supplied by the Project. And, in times of shortage, water would be shared with Mexico in proportion to the irrigable acreage in the United States. *See* 1906 Treaty, NM-EX 307, Art II (during drought or emergency, deliveries to Mexico shall be diminished "*in the same proportion* as the water delivered to lands in the United States"); and NM-EX 551 at 4 ("New Mexico's allocation has always been based on the delivery to lands, which is the language in the 1906 Treaty.")

For example, the 1906 Contract between the United States and the two water user associations in Texas and New Mexico provided that the cost of the proposed irrigation works "shall be apportioned equally per acre." NM-EX 308 at 3 ¶ 4. It also recognized that their shareholders' existing water rights, and rights to be initiated from the proposed irrigation works, "shall be, and thereafter continue to be, forever appurtenant to designated lands owned by such

shareholders." *Id* at 2. It further provided that in "all relations" between the United States and the associations:

> the rights of the members of the associations to the use of water where the same have vested, are *to be defined, determined and enjoyed* in accordance with the provisions of the said [Reclamation Act of 1902] and of other Acts of Congress on the subject of the acquisition and enjoyment of the rights to use water; and also by the law of New Mexico . . . where not inconsistent therewith.

Id. ¶ 10 (emphasis added). Similarly, the 1937 Contracts between the United States and the districts provided:

> Nothing in this contract shall ever be construed or interpreted so as to alter, diminish, or impair the right of project land owners to such water rights as may be or become appurtenant to their lands under Federal Reclamation Laws and under the original contracts entered into between the original water users' association on this Project and the United States.

NM-EX 320 and 321 at 12. Thus, in addition to confirming its promises in the 1906 Contract, the United States additionally promised to never construe the 1937 Contracts in a manner that would diminish the right of irrigators to such water rights as "may be *or become* appurtenant to their lands" under Reclamation law. This was an express recognition of existing rights, and rights that could be developed by using Project water after 1938. Future water use was also confirmed in the 1938 Contract between EBID and EPCWID that specified an additional 3% of authorized acreage in each state, for a total of 4,650 acres, could be irrigated. NM-EX 324. The 1938 Contract further provided, "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within [EPCWID] and 88/155 to the lands within [EBID]," roughly equivalent to 43% and 57%, respectively. NM-EX 324 at 1.

The United States does not dispute that the 1938 Contract informs the apportionment the Compact was intended to effectuate. U.S. Mem. 16. However, the import of the 1906, 1937 and

1938 contracts is not only the degree to which they help quantify the apportionment, but also how they define the United States' legal responsibilities to the districts and their members at the time of the Compact. The contracts expressly acknowledged that the water rights established through beneficial use of Project water became appurtenant to the land upon which they were used under Reclamation law. The Supreme Court confirmed this contractual promise a year before the Compact, finding such appurtenant water rights were owned by the landowners. *See Ickes v. Fox*, 300 U.S. 82, 95 (1937) (facts involving a reclamation contract with verbatim terms as the 1906 Contract). Further, Reclamation promised that such water rights would "be defined, determined and enjoyed" in accordance with the Reclamation Act of 1902 and the laws of New Mexico "if not inconsistent therewith." NM-EX 308 at 6 ¶ 10. Finally, Reclamation pledged to *never* construe or interpret the 1937 Contracts "so as to alter, diminish, or impair the right of project land owners to such water rights as may be or become appurtenant to their lands." NM-EXs 320 and 321 at 12.

At the time of the Compact, the United States had a legal responsibility to uphold all if its promises in the Downstream Contracts.

1. The Downstream Contracts, Reclamation law and New Mexico law all work in harmony with the Compact

The Compact did not pre-empt the promises the United States made to the districts and the water users in the Downstream Contracts. Instead, as the Supreme Court noted, the Compact contains no express terms for the division of waters between New Mexico and Texas because "of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources." *Texas v. New Mexico*, 138 S. Ct. at 957. Unless expressly stated in a compact to the contrary, states enjoy sovereign control over the water within their borders. *Tarrant Reg. Water Dist. v. Hermann*, 569 U.S. 614, 633 (2013). And,

from the time the Project was initiated up until the Compact, there was no conflict between Reclamation law and New Mexico water law affecting Project operations.

For example, the Reclamation Act of 1902 provided the right to use water from a reclamation project "shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right." 43 U.S.C. §§ 372 and 383. The same language is employed in New Mexico's Constitution and its 1907 surface water code. *See*, N.M. Const. art. XVI, § 3; and NMSA 1978 §§ 75-1-2 (1953) and 72-5-23 (1985). The Reclamation Act also required deference to state laws relating to the "control, appropriation, use or distribution of water" within reclamation projects. 43 U.S.C. § 383.

The doctrine of prior appropriation has always been the law governing the appropriation and use of surface water and groundwater in New Mexico. *Yeo v. Tweedy*, 286 P. 970 (N.M. 1929). It generally provides that the state owns water subject to its citizens' use for beneficial purposes and is allocated based upon the fundamental rule that the first person to beneficially use water possesses the right to its future use as against all later users. *See Montana v. Wyoming*, 563 U.S. at 375-376. In New Mexico, the maximum amount of water beneficially used establishes the amount of a water right that can be exercised, subject to curtailment in accordance with its relative priority, if necessary, to satisfy the needs of senior users. *See* N.M. Rsp. U.S. Mem. 55. All claims to the use of water in a stream system are adjudicated by a New Mexico court through the issuance of a decree that defines the "the priority, amount, purpose, periods, and place of use" of each water right. NMSA 1978 § 72-4-19 (1953).

In 1919 New Mexico enacted state statutes that proscribe the powers and duties of irrigation districts that contract with the United States under reclamation laws. *See* NMSA 1978, §§ 73–10–1 to –50 (1919, as amended through 2020). Under these statutes EBID is required to

"establish equitable rules and regulations for the distribution and use of water among its members" and apportion water to each EBID member "pro rata" based on the assessed lands within the district. § 73-10-16 (1921). It cannot prescribe rules or regulations to rent, lease or contract for the use of water to others if it would "interfere with the vested rights of any water user or with the exercise of such rights of any such water user." *Id*. Further, water received under a contract with the United States is required to be distributed in accordance with acts of congress, rules and regulations of the secretary of the interior, and contract provisions. *Id*.

The Compact does not expressly provide for the administration of water rights within New Mexico and it did not need to. It is undisputed that the United States appropriated water for use in the Project in accordance with New Mexico territorial law. US SOF 13. At the time of the Compact, New Mexico's water users had been functioning under the State's prior appropriation doctrine for many years. Thus, the Compacting States would have been aware that pursuant to the Reclamation Act and the Downstream Contracts, New Mexico's prior appropriation doctrine would apply to the vested water rights established through the beneficial use of Project water within New Mexico. They also would have been aware that the Downstream Contracts expressly recognized vested water rights appurtenant to EBID members' lands, *see supra* 13-14, and that EBID members owned these water rights – not the United States or EBID. *See*, *Ickes,* 300 U.S. at 95*; Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (government does not own water rights but appropriated water for use of landowners who became the owners of water rights through beneficial use) (quoted citation omitted). Further, they would have known pursuant to the Downstream Contracts, EBID was entitled to use Project water to meet irrigation demands on approximately 57% of the authorized acreage in the United States; all Project water distributed within EBID was required to be apportioned "pro rata" to the lands assessed within the district; and EPCWID was entitled to

use Project water to meet irrigation demands on approximately 43% of the authorized acreage. And, if rights to use Project water were being deprived by other users, New Mexico had a comprehensive water code to enforce priorities to rectify the problem.

2. The 2008 Operating Agreement is Not in Harmony with the Downstream Contracts and the Compact

The United States' position that the Compact effected an apportionment based on the existing operation of the Project in 1938 does not comport with the operation of the Project under the Operating Agreement implemented in 2008. At the time of the Compact, the United States did not operate the Project to allow either downstream district to "carryover" its unused allocation in Project storage from one year to the next. Carryover was not an aspect of Project operations until 2006 and it is now expressly provided for in the Operating Agreement. NM CSMF 184, 186. Carryover accounting under the Operating Agreement has reduced the water available for allocation to EBID, while EPCWID has been able to carryover large amounts of allocation in many years. NM CSMF 184.

Also, at the time of the Compact, and many years thereafter, neither district's allocation of Project water was reduced for any changes they, or Reclamation, made that may have impacted deliveries water released from Project storage. Under the Operating Agreement, only EBID's allocation is charged for discrepancies in Project performance relative to a 1951-1978 period. NM CSMF 181. The new allocation and carryover procedures under the Operating Agreement significantly reduce available surface water to meet EBID farmers' irrigation demands and forces them to pump additional water at a higher operation cost. NM CSMF 226, 228. Those irrigators who do not have irrigation wells have suffered the most under the Operating Agreement because they have no access to groundwater to replace reduced surface supplies, and some have lost crops, subsistence gardens and orchards. NM CSMF 228, NM-EX 010, Serrano Decl. at ¶¶ 35, 36.

According to the United States, "the effect of the 2008 Operating Agreement is that EBID *voluntarily cedes* some of its surface water allocation to EPCWID to compensate for surface water depletion caused by groundwater pumping in New Mexico, including pumping by water users outside of EBID." US SOF 71. *Amici* dispute that EBID has the authority to "voluntarily cede" to EPCWID any water necessary to supply EBID members' senior water rights without their knowledge and without an opportunity to object. *See, e.g.,* § 73-10-16 (preventing EBID from contracting for the use of water with others if it would "interfere with the vested rights of any water user or with the exercise of such rights of any such water user.") Moreover, the Operating Agreement was the result of confidential settlement negotiations to resolve litigation between the United States and the two districts. EBID's farmers had no notice that EBID agreed to a reduced surface water supply in exchange for groundwater pumping until after the agreement was signed. Also, neither they, nor New Mexico, were provided an opportunity to object to the settlement of an essentially interstate dispute affecting the use of senior water rights in New Mexico. *Cf. State ex rel. Off. of State Engr. v. Lewis*, 150 P.3d 375 (N.M. App. 2006) (irrigators afforded opportunity in Pecos River Adjudication to object to agreement between New Mexico, United States and districts establishing river management plan to comply with New Mexico's obligations to Texas under Pecos River Compact). And, until recently, *Amici* were completely unaware that the United States had not assessed the *actual* degree to which New Mexico's groundwater pumping or other factors might be affecting Project deliveries of surface water before implementing the Operating Agreement.[18] NM CSMF 187.

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[18] Nor were they aware the Texas Compact Commissioner's law firm had been retained as legal counsel for EPCWID on August 15, 2007. The Texas Compact Commissioner facilitated settlement negotiations that resulted in the 2008 Operating Agreement between EPCWID, EBID and the United States. *See* Gordon Dep. (July 14, 2020) Vol. 1, 22:1-23:25; 48:21-49:2, Ex. PG-003 at pdf p. 44 (executed letter from Gordon & Mott P.C. to J. Stubbs, President of EPCWID, re: Professional Service Contract for Legal Services, August 12, 2007); Gordon Dep. (July 15, 2020) Vol. 2, 49:21-53:12.

New Mexico has shown that approximately 74,000 acre-feet of apparent reductions in project performance are simply the result of accounting changes in the Operating Agreement that are not attributable to any action or inaction of New Mexico or its water users. NM-EX 006, Barroll 2d Decl. ¶ 59. It has also shown that Project operations since 2006 have resulted in providing less Project water to EBID's members who paid their equal share of the construction and operation costs of the Project. *See* N.M. Rsp. U.S. Mem. 13-15. Further, forcing them to pump more junior groundwater to replace reduced senior surface supplies turns New Mexico's priority system on its head. If a priority call were to be made under present operating conditions, New Mexico's farmers would be in danger of having to completely shut off their wells with only inches of surface water available to grow their crops.

The Compacting States relied on the United States' promises in the Downstream Contracts, including its promises to provide each irrigable acre in the Project equal footing and to refrain from diminishing vested rights to Project water. The Operating Agreement breaks that promise. Further, United States' current advocacy for an implied Compact apportionment that allows only Texas to thrive in the Twenty-First Century presents obvious questions of equity not addressed by the plain text of the Compact. It also presents scenarios that the Compacting States' could never have imagined when agreeing to *not* specify the apportionment of water below Elephant Butte. The Special Master must reject the United States' view of an implied apportionment below Elephant Butte.

II. THE UNITED STATES FAILS TO ESTABLISH THE NEED FOR A PERMANENT INJUNCTION AGAINST NEW MEXICO

The United States' motion for "partial" summary judgment seeks permanent and complete resolution of essentially all the remedies for which it prays in its Complaint. *See* U.S. Compl. in Int. at 5 (March 23, 2018). It asks for too much too early. The fatal flaw in the United States'

request for injunctive relief is that fails to articulate the amount of water Texas is entitled to receive to satisfy its apportionment, or even a quantifiable basis for an apportionment. *See* U.S. Mem. 30 ("it is unnecessary for the United States to weigh in on precisely what Texas as a State is apportioned under the Compact"). Further, its position that the Compact effectuated an apportionment based on Project operations and conditions at the time of the Compact is inconsistent with its demands that New Mexico prevent EBID irrigators from using more water than is allocated to EBID today. The United States demands that "[b]ecause the apportionment to the part of New Mexico below Elephant Butte consists only of water released to meet EBID's "irrigation demands" in accordance with *its contract*, New Mexico may not allow water users within EBID to intercept or deplete the surface water supply below Elephant Butte for uses other than irrigation, or for irrigation in excess of *the EBID contractual allocation*." U.S. Mem. 30 (emphasis added). The United States seeks to limit EBID members' rights to use surface water under an unidentified "contract" and "EBID contractual allocation." Today water is allocated to EBID under the terms of the Operating Agreement. At the time of the Compact, however, Reclamation did not make allocations to EBID, it "made allotments of water to all Project lands in acre-feet-per-acre and delivered the water to individual farms (also called delivery to the farm headgates, or delivery to lands)" U.S. Rsp. N.M. Mem. 17 (emphasis added). As the United States explains:

> Reclamation uses the term "allotment" to refer to the maximum volume of water a farmer could order directly from the Project on a per-acre basis prior to 1978, and Reclamation uses the term "allocation" to refer to the division of water between the two irrigation districts from 1979 to present.

Id. 17, fn 11 (emphasis added). At the time of the Compact, all farmers could order up to a maximum amount of water allotted to each acre in the Project. Seeking to limit EBID members to present-day allocation amounts exposes that the United States really defines New Mexico's

implied apportionment under the 2008 Operating Agreement (or any future agreement), not on Project operations at the time of the Compact. Thus, it appears the United States is not recognizing a compact apportionment to New Mexico at all—but a moving target that only it, and the districts, get to fix.

Nonetheless, the United States has not established by clear and convincing evidence that water use in New Mexico has violated its version of the Compact, that Texas has been injured, or that a danger of a recurring violation exits. *See* N.M. Mem. Rsp. U.S. 46-51. It shows no injury to Texas because the Operating Agreement provides a disproportionate share of surface water to EPCWID.[19] NM CSMF 196. So long as Project operations occur pursuant to the Operating Agreement, there is no danger of any future violation by New Mexico. *See Kansas*, 547 U.S. at 466 ("a cognizable danger" of recurrent compact violations is required for injunctive relief). Indeed, New Mexico's analysis shows that if EBID had been allocated its Compact share of Project supply from 2006 to 2017, the combined effects of that allocation would have resulted in an increase of 94,000 acre feet on average and would have improved project efficiencies that benefit the Project as a whole. NM CSMF 254-256.

The facts on which the United States relies to claim that New Mexico cannot and does not administer water rights below Elephant Butte are not convincing and are disputed. The United States has a lot to complain about, but it does not employ the legal processes under New Mexico's water code available to object to applications for permits to use groundwater or make a call for priority administration. New Mexico provides overwhelming evidence of its robust measurement, administration, and enforcement activities below Elephant Butte. *See* NM CSMF 303-311. It

[19] Even Texas believes the Operating Agreement has served to temporarily mitigate harm it believes is caused by New Mexico's pumping. *See* Texas Response of and Aid in Support to United States Motion for Partial Summary Judgment (Dec. 22, 2020) at 5.

knows it cannot use more water than its apportionment under the Compact and it has shown, NM CSMF 299, that if called upon to address an imminent injury to Texas (or Mexico) it can implement necessary intrastate administration to avoid it. *See Kansas*, 574 U.S. at 467 (Kansas request for injunction rejected because Nebraska has compliance measures that if followed will keep it within its allotment). The United States is not entitled to simply complain about unsubstantiated violations and point fingers at New Mexico's "failings" while ignoring its legal responsibilities under the Compact. It has not shown it is entitled to a permanent injunction against New Mexico and its motion should be denied.

Respectfully submitted this 6th day of January 2021, by:

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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

***AMICI CURIAE* NEW MEXICO PECAN GROWERS AND THE SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION CERTIFICATE OF SERVICE**

This is to certify that on January 6, 2021, I caused a true and correct copy of the **Joint Brief of *Amici Curiae* New Mexico Pecan Growers and the Southern Rio Grande Diversified Crop Farmers Association in Support of State of New Mexico and in Response to the United States of America's Motion for Partial Summary Judgment** to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.

Respectfully submitted this 6th day of January, 2021.

/s/ Tessa T. Davidson

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STATE OF TEXAS v. STATE OF NEW MEXICO and STATE OF COLORADO

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**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
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**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.