**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**

# NEW MEXICO STATE UNIVERSITY'S *AMICUS CURIAE* RESPONSE BRIEF IN OPPOSITION TO THE UNITED STATES' MOTION FOR PARTIAL SUMMARY JUDGMENT


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## INTRODUCTION

New Mexico State University ("NMSU") responds in opposition to the United States of America's Motion for Partial Summary Judgment and Memorandum in Support of Motion for Partial Summary Judgment (Nov. 5, 2020) ("U.S. Br.") and in support of the State of New Mexico's Response (Dec. 22, 2020) ("N.M. Resp.").[1] For the reasons stated herein, the motion should be denied. In particular, by seeking relief regarding Project supply used solely within New Mexico, the United States' Motion would improperly expand this case.

NMSU holds perhaps the oldest combined groundwater and surface water rights in the lower Rio Grande of New Mexico. Shortly after its founding in 1890, the University installed a pulsometer steam-powered pumping plant to supply groundwater to its main campus located in Las Cruces and has continually used groundwater for higher educational purposes for 130 years. After the Rio Grande Project was completed, NMSU became a member of Elephant Butte Irrigation District relying on both groundwater from its own wells and Project surface water supplied for irrigation of university agricultural lands, especially at its experimental and educational facilities. NMSU is the State of New Mexico's land grant university.

[1] NMSU also agrees with and supports the State of New Mexico's Response to Texas's Motion for Partial Summary Judgment (Dec. 22, 2020). This *amicus* brief is limited, however, to responding to the United States' request to expand the scope of this original action to include matters beyond the Compact dispute.

For three decades NMSU has litigated in the state court that is adjudicating all water rights of the lower Rio Grande in New Mexico. NMSU participated in appeals to the New Mexico Court of Appeals and later to the Tenth Circuit Court of Appeals, in which each court held the state court is the appropriate forum to adjudicate water rights in the lower Rio Grande of New Mexico. In *Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, the New Mexico Court of Appeals held the state court proceedings encompass a comprehensive stream system in compliance with both state law and the federal McCarran Amendment. 849 P.2d 372, 378-379 (N.M. Ct. App. 1993) cert. denied, 849 P.2d 372 (N.M. 1993). Similarly, the Tenth Circuit upheld abstention by the federal district court of New Mexico from hearing the United States' separate suit filed to quiet title to its water rights in the Project. *United States v. City of Las Cruces, et al.*, 289 F.3d 1170 (10th Cir. 2002). Both appellate courts applied this Court's holding in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 819 (1976), in favor of state jurisdiction over water.

NMSU appears as *amicus curiae* in this original action to assert the validity of its and other water rights vested under New Mexico law and the concomitant state jurisdiction over such rights, both surface and ground.

## SUMMARY OF ARGUMENT

NMSU asks the Special Master and the Court to refrain from hearing claims of the United States that duplicate its claims already lodged before the New Mexico state court adjudicating all claims to waters of the lower Rio Grande in New Mexico,

*New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (N.M. 3rd Judic. Dist) ("LRG Adjudication") or from granting relief already within the administrative authority of the State of New Mexico.

**I.** The United States' Motion asks the Special Master to delve into purely intrastate matters. By seeking to "to effectuate the Compact apportionment to … the part of New Mexico below Elephant Butte", U.S. Br. 30, the United States seeks relief not necessary to resolve the interstate dispute. Moreover, the United States seeks relief on behalf of Project water users in New Mexico, thereby challenging New Mexico's *parens patriae* authority to represent its citizens. NMSU agrees with the State of New Mexico's Response that the United States oversteps its role in this case by seeking to dictate "how New Mexico utilizes its apportionment within New Mexico….." N.M. Resp. 16.

**II.** The United States' intrastate claims and requests for relief are a repackaging of claims the United States has made, is making or should be making in the state forum. In 2002, the Tenth Circuit roundly criticized the United States for its repeated attempts to circumvent the authority of the LRG Adjudication: "The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction." *U.S. v. City of Las Cruces,* 289 F.3d at 1189-90. This Court should not allow re-litigation of the same claims that the Tenth Circuit in *Las Cruces* decided two decades ago should be determined in the state court, and which the state court has now determined.

**III.** Both the McCarran Amendment and New Mexico's adjudication statutes require unified adjudication and administration of all water uses within a stream system, so that every water claimant may participate and be bound in one proceeding. The LRG Adjudication court has joined more 16,000 claimants and has made considerable progress, including adjudicating the United States' claims to waters for the Rio Grande Project in New Mexico. Although the New Mexico adjudication court ruled against the United States' claim that it owns groundwater as part of the Project, the court made clear that the United States has an administrative remedy under state law to protect senior surface water of the Project. Nevertheless, the United States' Motion seeks relief based on a renewed claim to Project groundwater. Permitting another bite at the apple would cause the very piecemeal litigation the Court warned against in *Colorado River,* 424 U.S. at 819, and would deny thousands of other claimants not joined in this case the opportunity to contest a competing right.

## ARGUMENT

### I. The United States' Motion improperly seeks to expand this case by seeking purely intrastate relief.

The United States' Motion asks the Special Master to delve into wholly intrastate matters. After repeating Texas's claim that "New Mexico must deliver the water apportioned to Texas…", the United States then demands that New Mexico must also make delivery to "the Project lands in New Mexico." U.S. Br. 21. According to the United States, New Mexico has a Compact obligation not only to deliver water to Texas but also "to effectuate the Compact apportionment to … the part of New Mexico below Elephant Butte…." Id. 30. It claims any interference with Project

supply is a violation of the Compact. Id. 30-31; U.S. Resp. 1 ("groundwater pumping in New Mexico that interferes with the operation of the Project violates the Compact"). Unlike Texas, the United States does not distinguish between claimed interference with Project supplies apportioned to Texas and those used solely in and apportioned to New Mexico. The United States' Motion specifically seeks relief on behalf of Project water users in New Mexico, asserting "New Mexico may not allow water users other than those within the Elephant Butte Irrigation District ('EBID') to deplete the surface water supply of the Project". U.S. Not. of Mot. 2.

The Court agreed to hear Texas's interstate claims as an original action and then allowed the United States to pursue its claims because they are "essentially the same as claims that Texas had asserted" and "seeking substantially the same relief." *Texas v. New Mexico*, 138 S. Ct. 954, 956 & 960 (2018). The Special Master's April 14, 2020 Order noted: "One of several important reasons the Court allowed the United States to remain in the case was the fact that the United States's claims were generally commensurate in scope with Texas's claims." Order of the Special Master, April 14, 2020 at 16 (Sp. M. Docket No. 340). The Order then forewarns: "As the case plays out and facts are developed, it will remain necessary to determine whether and how the parties' claims diverge and whether any such divergence improperly expands the case." Id. 16-17. The United States' Motion goes well beyond the relief that Texas seeks or that is necessary to resolve issues under the Compact. NMSU agrees with New Mexico's Response that the United States oversteps its role by seeking to dictate "how New Mexico utilizes its apportionment within New Mexico….." N.M. Resp. 16.

The Compact apportions water to New Mexico, not to the United States. A compact apportionment action is "one between States, each acting as a quasi-sovereign and representative of the interests and rights of her people". *Wyoming v. Colorado*, 286 U.S. 494, 508-509 (1932). Compact apportionment actions involve the "unique interests" belonging to sovereign States, *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984), unique interests, such as the shared use of an interstate stream, that "would be settled by treaty or by force" if the states were sovereign nations. *Kansas v. Colorado*, 206 U.S. 46, 98 (1907). Because compact apportionment actions consider the interests of the States as sovereigns, the result binds not only the States but their water users as well, without the need for the water users to be separately represented. *Hinderlider v. La Plata River & Cherry Creek Ditch Co*., 304 U.S. 92, 106 (1938) ("Whether the apportionment of the water of an interstate stream be made by compact between the upper and lower States with the consent of Congress or by a decree of this Court, the apportionment is binding upon the citizens of each State and all water claimants, even where the State had granted the water rights before it entered into the compact."). Under *Hinderlider,* it is incumbent on New Mexico, as the upstream state, to assure that water uses within its jurisdiction are administered to assure compliance with compact obligations.

The United States holds no Compact right that it can enforce against New Mexico for deliveries of Project water within New Mexico.[2] Moreover, the United

[2] Texas agrees that "[the Compact] does not apportion water to the Project. Nor does it provide the United States[,] as the owner and operator of the Project[,] any ability

States does not represent water users in New Mexico because each State represents it water users *parens patriae*. *South Carolina v. North Carolina*, 558 U.S. 256, 275 (2010) ("a State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens").

How New Mexico uses and administers its own compacted water is not an issue before the Court. As New Mexico points out: "The question therefore to be resolved in this case is whether New Mexico and Texas are receiving their Compact apportionments, not intrastate issues as to how that apportionment gets used." N.M. Resp. 16. As discussed below, the protection of Project water for use solely within New Mexico is already before the LRG Adjudication court and subject to state law administration. Any intrastate claims or rights the United States desires to assert must be made in the LRG Adjudication or through New Mexico state engineer administration.

## II. The United States has repeatedly sought to avoid state authority over its water claims in the lower Rio Grande of New Mexico and should not be permitted to make claims or seek relief in this Court that properly belong in the state forum.

The United States' intrastate claims and requests for relief are a repackaging of claims the United States has made, is making or should be making in the state forum. This is not the first time the United States has sought to circumvent the

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to protect the volume of water that is 'delivered' in Elephant Butte Reservoir." TX MSJ 64.

proper adjudicatory and administrative jurisdiction of the State of New Mexico. The state court and the parties to the adjudication have worked for nearly 30 years to position the LRG Adjudication to determine stream system issues, in particular the United States' interests in the Project in New Mexico. The United States, however, has repeatedly resisted the state court's authority. From the inception of the LRG Adjudication in 1986, the United States has fought the state court's jurisdiction, first by filing a motion to dismiss for lack of jurisdiction under the McCarran Amendment and then later by filing a second motion contending the lower Rio Grande in New Mexico does not constitute a "river system," as required by McCarran. The state district court denied the motions and the United States appealed. The New Mexico Court of Appeals upheld the district court's decision in *Regents of New Mexico State University,* 849 P.2d 372 (Ct. App. 1993).

Following the *Regents* decision, in 1996 the State Engineer undertook a comprehensive hydrographic survey of the basin, mapping and describing all water uses, in order to move forward with adjudication of all water rights claims. In 1997, the United States sued seven parties, including NMSU, in the U.S. District Court of New Mexico seeking to quiet title in itself to virtually all waters of the Project. *See United States v. Elephant Butte Irrigation District, et al.*, Cause No. 97-0803 JP/RLP (D.N.M.), Complaint filed June 12, 1997. The federal suit resulted in a five-year delay of the state proceedings. NMSU and other defendants succeeded in moving the federal district court to abstain from hearing the United States' claims, in deference

to the state court proceedings, under the federal abstention doctrine. In applying the doctrine's factor-test, the federal district judge observed:

> I am concerned that the United States may be using this case for 'procedural fencing.' Since the inception of the state adjudication, the United States has attempted to avoid the jurisdiction of the state court on several occasions . . . I find it significant that the United States filed this federal court action shortly after losing on the issue of jurisdiction the last time in state court.

Memorandum, Opinion and Order, dated August 22, 2000, at 24-25. Upon appeal by the United States to the Tenth Circuit Court of Appeals, NMSU and other defendants prevailed when the court sustained the federal district court's holding. *City of Las Cruces,* 289 F.3d 1170. The Tenth Circuit firmly rebuffed the United States' attempt to evade the authority of the state court, similarly observing:

> The United States has attempted at every juncture in the New Mexico adjudication to resist jurisdiction…. After an extended period of pleadings and dismissal motions in the New Mexico proceedings and after realignment, the New Mexico stream adjudication is progressing rapidly. In the three years since the realignment and the denial of the State Engineer's last motion to dismiss, the parties have been cooperating; none have questioned the state court's jurisdiction. Only the United States and Texas parties still resist the stream adjudication.

*Id.* at 1189-90.

After the Tenth Circuit's rejection of the federal quiet title suit in 2002, the state court developed exhaustive case management orders and directed the State to join and serve with offers of judgment the many thousands of claimants. When it became clear that the process of serving individual offers of judgment would take many years, the court ordered the State to join all claimants, even if separate offers of judgment would have to be served separately later. The State spent two years and

significant resources to join over 16,000 claimants as parties to the LRG Adjudication so that binding proceedings on basin-wide or stream system issues could go forward. The court then began designating a number of Stream System Issues for resolution. By Order entered January 8, 2010, the Court designated the interests of the United States in the Project as Stream System Issue No. 104, to be adjudicated by expedited *inter se* proceeding, and requiring notice be given to other claimants. Order Designating Stream System Issue / Expedited *Inter Se* Proceeding No. 104 (Jan. 8, 2010). After ruling against the United States and holding that the source of supply for the Project does not include groundwater, Stream System Issue No. SS-97-104, Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment (Aug. 16, 2012) (2012 LRG Order), the court ruled in favor of the United States' claimed priority date of 1903. Order (February 17, 2014) and Findings of Fact and Conclusions of Law (April 17, 2017) ("2017 LRG Order"). The LRG Adjudication has now completed determination of the United States' interests in the Project within New Mexico.

In spite of completion of adjudication of the United States' claims, it appears the United States' expansive motion in this case seeks to take advantage of the instant proceeding to avoid the State of New Mexico's jurisdiction once again. As Special Master Grimsal observed:

> … the crux of the United States' claims against New Mexico in these proceedings is to assert its own Project water rights, obtained pursuant to the 1902 Reclamation Act (which requires compliance with state law to appropriate water for irrigation purposes), against unauthorized uses

> and to protect its ability to deliver Project water to its consumers as required by contract or by convention.

First Interim Report of the Special Master 219-220 (Feb. 9, 2017) ("First Interim Report") (citing U.S. Complaint in Intervention, ¶¶ 13-15). As the Report noted: "… resolution of an entirely intrastate issue was appropriately resolved under that State's law by the State Engineer." *Id.* at 235 (making comparison to Klamath Project). The Report then recommended the Court hear those intrastate claims "for purposes of judicial economy", noting "Compact claims made by Texas and the federal reclamation law claim made by the United States involve the same parties, discovery of the same facts, and examination of similar, if not identical, issues." *Id.* at 234. NMSU did not oppose the First Interim Report's recommendation to hear the United States' claims, "so long as those claims are necessary for resolution of the compact claims in this case." NMSU Amicus Brief (June 9, 2017) 31.

In its 2018 Opinion the Court granted intervention to the extent the United States' claims are "essentially the same" and seek "substantially the same relief" as Texas. *Texas v. New Mexico*, 138 S. Ct. at 956 & 960. The Court listed four factors favoring allowing the United States to intervene, all related to Treaty or Compact obligations. Id. 959-60. None of these factors encompass claims against New Mexico water users on behalf of the portion of the Project located in New Mexico. The Court concluded: "Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." Id. at 960 (emphasis added). The United States now ignores this holding and through its Motion for Summary Judgment persists in making non-Compact claims in this

original action, claiming groundwater for itself in the form of return flows and targeting water uses solely affecting the State of New Mexico. Consistent with the 2018 Opinion, the Special Master and the Court should limit the United States to interstate matters and should defer or abstain from hearing wholly internal New Mexico water issues that are the proper subject of the ongoing judicial proceedings and existing administrative procedures in New Mexico. The Court should be "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum." *Maryland v. Louisiana*, 451 U.S. 725, 744 (1981).

## III. Determination of the United States' intrastate claims in the absence of other claimants is contrary to the McCarran Amendment's and state law's purposes of comprehensive adjudication and administration and would violate the due process rights of excluded claimants.

By enactment of the McCarran Amendment, 43 U.S.C. § 666(a), Congress sought to avoid the very piecemeal determinations the United States is now seeking. The McCarran Amendment expressly waives the United States' sovereign immunity to be joined as a party in comprehensive stream system adjudication suits and for the administration of such rights:

> Consent is given to join the United States as a defendant in any suit (1) for the *adjudication* of rights to the use of water of a river system or other source, or (2) for the *administration* of such rights, where it appears that the United States is the owner of or is in the process of acquiring water rights by appropriation under State law… and the United States is a necessary party to such suit….

Id. (emphasis added). In interpreting the McCarran Amendment to require deference to state court adjudication of federal water claims in the San Juan Basin of Colorado, this Court explained:

> The clear federal policy evinced by that legislation is the avoidance of piecemeal adjudication of water rights in a river system. This policy is akin to that underlying the rule requiring that jurisdiction be yielded to the court first acquiring control of property, for the concern in such instances is with avoiding the generation of additional litigation through permitting inconsistent dispositions of property. This concern is heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings.

*Colorado River,* 424 U.S. at 819 (citation omitted).

Two years later, the Court upheld the State of California's imposition of conditions on its approval of an appropriation to the United States from the Stanislaus River for impoundment in the New Melones Dam, part of the federal reclamation irrigation project serving California's central valley. *California v. United States*, 438 U.S. 645 (1978). In considering the United States' challenge to the State's conditions, the Court reviewed the long history of deference by federal statutes to state control over water resources: beginning with the Homestead Act of 1862, the Mining Act of 1866 and the Desert Land Act of 1877, *id*. at 655-658; continuing to the Reclamation Act of 1902, *id.* at 663-674; and culminating with the McCarran Amendment in 1952, *id*. at 678. The Court summed up the federal-state relationship: "The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state

water law by Congress." *Id.* at 653. *See United States v. Rio Grande Dam & Irrig. Co.,* 174 U.S. 690, 702-703 (1899) (territory of New Mexico's authority to adopt a prior appropriation system of water rights for the Rio Grande upheld; the "Court unhesitatingly held that 'as to every stream within its dominion a State may change [the] common law rule and permit the appropriation of the flowing waters for such purposes as it deems wise.'" (quoted in *California v. United States*, 438 U.S. at 662)).

In emphasizing federal deference to state authority over water, the Court in *California v United States* adopted the rationale behind the McCarran Amendment. "Perhaps the most eloquent expression of the need to observe state water law is found in the Senate Report on the McCarran Amendment, 43 U.S.C. § 666, which subjects the United States to state-court jurisdiction for general stream adjudications:"

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
> . . .
> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

*Id.* at 678-79 (quoting S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951)). *See also United States v. New Mexico*, 438 U.S. 696, 702 (1978) (where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to state law).

New Mexico's constitution and statutes assert control by the State over its waters. N.M. Const. art. XVI, § 3; N.M. Stat. Ann. 1978, Chapter 72. *See State ex*

*rel. Erickson v. McLean*, 308 P.2d 983, 987 (N.M. 1957) ("All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use.... The state as owner of water has the right to prescribe how it may be used."). In particular, the state water code confers supervision of the State's water on the State Engineer, N.M. Stat. Ann, Chapter 72, Article 2, and authorizes and mandates adjudication of state waters under state law, *id*. N.M. Stat. Ann. §§ 72-4-14 through -19 (1907). Consistent with the McCarran Amendment, the State's adjudication statutes require a comprehensive and unified proceeding:

> In any suit for the determination of a right to use the waters of any stream system, all those whose claim to the use of such waters are of record and all other claimants, so far as they can be ascertained, with reasonable diligence, shall be made parties…. The court in which any suit involving the adjudication of water rights may be properly brought shall have exclusive jurisdiction to hear and determine all questions necessary for the adjudication of all water rights within the stream system involved….

N.M. Stat. Ann, § 72-4-17 (1907). *See United States v. Bluewater-Toltec Irrig. Dist*, 580 F.Supp. 1434, 1438 (D.N.M 1984), affirmed 806 F.2d 986 (10th Cir. 1986) (suit under New Mexico adjudication statutes satisfied McCarran Amendment's comprehensiveness requirement); *Colorado River*, 424 U.S. at 804 n. 2 (in the context of satisfying McCarran Amendment requirement, specifically noting that New Mexico statutes and other southwestern states have "elaborate procedures for allocation of water and adjudication of conflicting claims to that resource").

In rejecting the United States' challenges to the state court's jurisdiction in the LRG Adjudication, both the New Mexico Court of Appeals and the Tenth Circuit Court of Appeals emphasized the necessity of a unified proceeding that includes all water users. In *Regents of New Mexico State University*, the New Mexico Court of Appeals found that the McCarran Amendment and the state adjudication "are intended to avoid piecemeal litigation by including all claimants to the water source." 849 P.2d at 379 (citing *Colorado River*, 424 U.S. at 819 and *State ex rel. Reynolds v. Lewis*, 545 P.2d 1014 (N.M. 1976)). In *City of Las Cruces*, the Tenth Circuit explained:

> There are thousands of water users in New Mexico who may assert a right to Project water just as New Mexico State University and Stahmann Farms have in this case. Their claims will be adjudicated in the comprehensive New Mexico stream adjudication. By declining jurisdiction, the district court avoided a piecemeal approach to adjudicating the rights of the United States vis-a-vis innumerable water users in New Mexico. The district court acted within its discretion in determining that the United States' claims against the named defendants and other water users would be better settled in a unified proceeding.

289 F.3d 1170 at 1187. Noting the purpose of the McCarran Amendment to "adjudicate the interlocking rights of all users" in the state court, the Tenth Circuit warned "chaos could result in this case if the United States is permitted to litigate its claim in federal court." *Id.* at 1191. This is exactly what will happen in this original action if the United States is allowed to seek relief and assert claims, including its claims to groundwater, that belong (and have already been decided) in the LRG Adjudication.

The Third Judicial court of New Mexico has entered its fourth decade adjudicating all water rights in New Mexico's lower Rio Grande: completing a basin-

wide hydrographic survey of all water uses; joining over 16,000 claimants; entering individual subfile orders; entering subfile orders of rights of public water users NMSU[3] and the City of Las Cruces; and resolving major stream system issues, including a final decision on the United States' claims to the Rio Grande Project within New Mexico. 2012 LRG Order and 2017 LRG Order.

Although the LRG Adjudication court ruled against the United States' claim that it owns groundwater as part of the Project, the court made clear that the United States has an administrative remedy under state law to protect senior surface water of the Project: "the United States may pursue any administrative action available under New Mexico law to protect its right from other appropriations, pending or existing, that encroach upon its right." 2012 LRG Order at 4. In *City of El Paso v. Reynolds*, 563 F. Supp. 379, 387 (D.N.M. 1983), the U.S. District Court observed that, although Reclamation "has never counted ground water used by irrigators within the EBID as part of the Project's water supply," this did not preclude the New Mexico State Engineer from "conjunctively manag[ing] the surface and ground water in the Lower Rio Grande System."

[3] In 2007 the court in the LRG Adjudication entered a consent order between NMSU and the State confirming a priority date of 1890 for the University's main campus groundwater right. Subfile Order, LRG Adjudication, Subfile No. LRN-28-014-0001 (Nov. 9, 2007). NMSU believes this right to be valid and not subject to curtailment because of shortages to subsequent surface water uses or because of any provision of the Compact. By the time Elephant Butte dam was constructed in 1916, NMSU had been using groundwater for a quarter century, and nearly a half century by 1938 when the Compact was adopted. This preexisting right should be protected. *See Colorado v. New Mexico*, 459 U.S. 176, 188 (1982) (finding in equitable apportionment context "equities supporting the protection of established, senior uses are substantial").

Disregarding this history, the United States stubbornly continues to claim the Project's right to groundwater, here in the absence of groundwater users. The United States' Motion asserts that "groundwater is just Project surface water diverted by other means[,]" U.S. Br. 37, and surface return flows still belong to the Project even after they have seeped into the ground. Id. 24-25; U.S. Resp. 13-14. Not only do those contentions lack merit, N.M. Resp. 42-46, but they also conflict with the LRG Adjudication's holding, 2012 LRG Order, and ignore available state administrative remedies. Id. ("United States may pursue any administrative action available under New Mexico law to protect its right").

Sovereign states, as *parens patriae*, may bind their citizens by interstate compact or apportionment litigation, *Hinderlider*, 304 U.S. at 106, but the United States as an intrastate claimant on behalf of the Rio Grande Project has no such power in this proceeding, in the absence of thousands of claimants to the same waters. The United States must make those claims in the proper state forum where other parties will be given notice and an opportunity to respond. Permitting the United States to make purely intrastate claims in this original action, including to groundwater claimed by others not present, would contravene federal and state law requiring unified adjudication and administration of a shared resource and would create an unworkable regulatory scheme. In addition to depriving due process to thousands of parties, it would trample on the State's rights, contrary to the "cooperative federalism" afforded to all Western States. *California v. United States*, 438 U.S. 645, 650-651 (1978) (citing Section 8 of the Reclamation Act of 1902).

## CONCLUSION

NMSU respectfully asks the Special Master to deny both the United States' and the State of Texas's respective Motions for Partial Summary Judgment, for the reasons set forth in the State of New Mexico's Responses. In particular, NMSU asks the Special Master to reject the United States' attempt to expand the scope of these proceedings beyond what is necessary for resolution of Texas's and New Mexico's Compact claims, and refuse the United States' invitation to displace the jurisdiction and authority of the state forum.

Respectfully submitted,

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**OFFICE OF THE SPECIAL MASTER**

**NEW MEXICO STATE UNIVERSITY'S CERTIFICATE OF SERVICE**

This is to certify that on January 6, 2021, I caused a true and correct copy of NEW MEXICO STATE UNIVERSITY'S *AMICUS CURIAE* RESPONSE BRIEF IN OPPOSITION TO THE UNITED STATES' 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 of January, 2021.

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