

**NO. 141, ORIGINAL**  
**IN THE SUPREME COURT OF THE UNITED STATES**

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**STATE OF TEXAS, PLAINTIFF,**

**v.**

**STATE OF NEW MEXICO**

**AND**

**STATE OF COLORADO,**

**DEFENDANTS.**

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**OFFICE OF THE SPECIAL MASTER**

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**RESPONSE BRIEF OF *AMICUS CURIAE* CITY OF EL PASO  
TO THE STATE OF NEW MEXICO'S MOTIONS FOR PARTIAL SUMMARY  
JUDGMENT**

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January 6, 2021

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## TABLE OF CONTENTS

I.	Introduction.....	1
II.	Argument .....	2
	A.    Response to New Mexico’s Full Supply Motion.....	2
	B.    Response to New Mexico’s Apportionment Motion .....	5
III.	Conclusion .....	12

**RESPONSE BRIEF OF AMICUS CURIAE CITY OF EL PASO TO THE  
STATE OF NEW MEXICO’S MOTIONS FOR PARTIAL SUMMARY JUDGMENT**

**I. INTRODUCTION**

*Amicus curiae* the City of El Paso (El Paso) generally supports the Motions for Partial Summary Judgment by the United States and Texas for the reasons stated therein.<sup>1</sup> It shares Texas’s reservations with three specific positions taken by the United States.<sup>2</sup> Not surprisingly, El Paso opposes New Mexico’s three motions for partial summary judgment and files this response brief in order to address two of those motions.<sup>3</sup>

El Paso is not without sympathy for the positions taken in Colorado’s response to the motions for partial summary judgment by the United States, Texas and New Mexico, arguing that the Rio Grande Project (Project) is not impliedly incorporated into the Rio Grande Compact (Compact) and does not impose Compact obligations.<sup>4</sup> New Mexico, particularly in its Full Supply Motion and Apportionment Motion, has repeatedly elevated the Rio Grande Project and its operational history to a position that would define and modify the parties’ obligations under the Rio Grande Compact. Nevertheless, El Paso cannot support the Colorado position of drawing such

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<sup>1</sup> The State of Texas’s Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support Thereof Federal Rule of Civil Procedure 56; United States of America’s Memorandum in Support of Motion for Partial Summary Judgment.

<sup>2</sup> The State of Texas’s Response to and in Support of the United States of America’s Motion for Partial Summary Judgment, at 3-6.

<sup>3</sup> *See* State of New Mexico’s Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support (referred to herein as the “Apportionment Motion”); State of New Mexico’s Motion for Partial Summary Judgment to Exclude Texas’s Claim for Damages in Certain Years and Brief in Support (referred to herein as the “Full Supply Motion”); *see also* State of New Mexico’s 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.

<sup>4</sup> State of Colorado’s Response to the Motions for Partial Summary Judgment of Texas, the United States, and New Mexico (referred to herein as “Colorado’s Response”).

a sharp separation between the Compact and the Project, where the U.S. Supreme Court considers the Project to be “inextricably intertwined” with the Compact.

In its response herein, El Paso will endeavor to avoid repeating arguments, authorities, and summary judgment evidence already presented by the United States and Texas. Instead, it will present the perspective of one of Texas’s largest and growing municipalities, which relies upon water from Texas’s equitable apportionment under the Compact for roughly 50% of its municipal supply and desires to rely on this source even more in the future.<sup>5</sup>

## **II. ARGUMENT**

### **A. RESPONSE TO NEW MEXICO’S FULL SUPPLY MOTION**

New Mexico argues that for years in which the El Paso County Water Improvement District No. 1 (EPCWID) was allotted a “full supply” by the United States Bureau of Reclamation (USBR) from the Project, Texas’s equitable apportionment under the Compact has been satisfied. The argument fails because a full supply year from the Project does not equate with the Compact’s apportionment to Texas, either legally or mathematically.

New Mexico’s Full Supply Motion is based on the premise that a full supply from the Project equates with the year’s equitable apportionment under the Compact.<sup>6</sup> Two bases for this proposition are identified by New Mexico’s brief: the Declarations by New Mexico expert

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<sup>5</sup> New Mexico’s emphasis on “irrigation demands” in the Compact’s “Usable Water” definition should not be considered a limitation on use of Compact-apportioned water for other purposes. *Cf.* Colorado’s Response, Affidavit of Craig W. Cotten, P.E., ¶ 11. Under Reclamation law, water from an irrigation project such as the Rio Grande Project may be contracted for use for other purposes, such as municipal and industrial, if that use is not detrimental to the project achieving its irrigation function. *See* 43 U.S.C. 521, 41 Stat. 451. All of El Paso’s Project water supply contracts with EPCWID and USBR have been validly authorized pursuant to federal law. *See also* Cortez 30(b)(6) Deposition of USBR, at 68:1-69:18.

<sup>6</sup> Full Supply Motion, at 13.

witnesses Estevan Lopez and Margaret Barroll, and the U.S. Supreme Court's statement that the Compact and the Project are "inextricably intertwined." Neither basis stands up.

Examining the Lopez and Barroll Declarations, very little support is provided for New Mexico's "Full Supply = Compact Apportionment" thesis. Dr. Barroll's Declaration does not address the Compact's equitable apportionment; considerable testimony is provided regarding Project allocations and full supply years, but it is not connected to the Compact's equitable apportionment at all. Mr. Lopez's Declaration provides a limited opinion on the issue:

32. Based on my experience as New Mexico's Engineer Adviser . . . it is my understanding that in full supply years Texas is not entitled to any water under the Compact beyond EPCWID's annual full supply Project Allocation.

Clearly, this is simply a legal conclusion from New Mexico's expert witness, subject to dispute by other engineer advisors from Texas and Colorado, and a very weak reed upon which to base New Mexico's Full Supply Motion.

The second basis proposed by New Mexico to support its "Full Supply = Compact Apportionment" thesis is the Supreme Court's "inextricably intertwined" reference to the relationship between the Compact and the Project. In El Paso's view, New Mexico is stretching the Court's language further than it was ever intended to go. Article VII of the Compact provides that a normal release from Project storage is 790,000 acre-feet per year. That is the water supply that is apportioned to Texas and should normally be available for the Project. Yet, New Mexico would substitute 763,842 acre-feet per year, the amount that USBR has determined is sufficient to provide a full supply.<sup>7</sup> New Mexico's approach goes further than referencing Project operations to supplement or explain Compact provisions; it actually uses them to trump inconvenient

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<sup>7</sup> Full Supply Motion, at 4-5, ¶¶ 11-12.

Compact provisions. The Project may be intertwined with the Compact, but it cannot prevail over the Compact's express provisions.

The New Mexico "Full Supply = Compact Apportionment" thesis also fails the test of simple arithmetic. The 763,842 acre-feet release required to support a full supply from the Project does not equal the Compact's Article VII 790,000 acre-feet normal release. Moreover, EPCWID's 376,842 acre-feet per year allocation under the "full supply" conditions proposed by New Mexico does not equate with EPCWID's allocation of 388,192 acre-feet per year, developed by the 2008 Operating Agreement's computations based on a 790,000 acre-feet annual release.<sup>8</sup>

From a practical point of view, New Mexico is attempting to avoid Compact liability by using the annual full supply determination by USBR to do something it was never intended to do. USBR's annual determination of the Project's anticipated supply is essential because it determines whether Mexico will receive 60,000 acre-feet under the terms of the 1906 Treaty, or a lesser amount. It is a conservative analysis, setting a low bar in terms of the water supply that might be produced by Project reservoirs in a particular year; it normally allows Mexico to receive its full treaty allocation and leaves water in Project reservoirs unused.<sup>9</sup> This, again, confirms that USBR's annual determination of a full supply from the Project is often significantly less than the Compact's normal release of 790,000 acre-feet from Project storage.

Further, as pointed out by both the United States and Texas, the annual determination of Project water supply by USBR reflects the supply that could be produced at the time, given the

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<sup>8</sup> Full Supply Motion, at 6, ¶ 13. This is one of several reasons that the 2008 Operating Agreement represents a significant improvement over conditions prior to its implementation.

<sup>9</sup> See Deposition of Filiberto Cortez ("Cortez Depo."), vol. 1, 166:12-167:18; Cortez Depo. Exh. 20, "Evaluation of Annual Operational Allocations and Deliveries, Rio Grande Project and the Republic of Mexico," 1951-1978, at 20-21. As documented in that report, from 1951-1978 U.S. users of Project water left 1.4 million acre-feet of water unused.

impact of New Mexico's then existing level of groundwater production. Thus, the Project full supply is lower each year than the Compact negotiators would have intended in 1938.<sup>10</sup>

Finally, El Paso would point out that the difference between the Project's "full supply," based upon a 763,482 acre-feet annual release, and the Compact's 790,000 acre-feet normal release is very significant. The 26,518 acre-feet difference might be valued at over \$7,700,000, based on the \$290.99 per acre-foot that El Paso currently pays EPCWID for Project water under their 2001 Implementing Contract. Using the 1.22 delivery efficiency (based on the D-2 formula) this would amount to over \$9,414,000 per year, 43% of which would mean over \$4,000,000 annually for EPCWID, under normal conditions.

This difference between the Compact's normal release and the USBR's full supply allocation represents a renewable water supply that the City of El Paso could put to beneficial use, instead of pursuing more expensive alternatives such as importing groundwater from Hudspeth County or desalination.

## **B. RESPONSE TO NEW MEXICO'S APPORTIONMENT MOTION**

New Mexico's Apportionment Motion argues that New Mexico is entitled to 57% of the "Project Supply" below Elephant Butte Reservoir and Texas is entitled to the remaining 43%. The primary authority New Mexico cites to support its additional Compact apportionment below Elephant Butte is the Supreme Court's reference to "the Compact's equitable apportionment to Texas and part of New Mexico."<sup>11</sup> In this regard, El Paso concurs with the State of Texas: The

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<sup>10</sup> See United States of America's Memorandum in Response to the State of New Mexico's Motions for Summary Judgment, at 22; The State of Texas's Opposition to the State of New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Certain Years, at 7-8.

<sup>11</sup> *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018).

Supreme Court's reference to an equitable apportionment for "part of New Mexico" is dicta, as there was no contested issue involving this apportionment then before the Court.<sup>12</sup>

New Mexico additionally argues that the "plain language" of the Compact demonstrates that New Mexico has an additional apportionment below Elephant Butte Reservoir.<sup>13</sup> Ironically, New Mexico cites no specific Compact provision to support its plain language argument. Instead, New Mexico argues that the Compact's definition of "Usable Water" in combination with the Project water supply contracts with the two irrigation districts results in an equitable apportionment of 57% of the Project supply, not to the entity contracted to receive and use that water, the Elephant Butte Irrigation District (EBID), but to the State of New Mexico.<sup>14</sup> In this specific regard, in El Paso's opinion, Colorado's Response raises a legitimate concern over incorporation of the Project and its operation into the Compact.

Reduced to its essence, New Mexico's argument is that because the Project serves irrigated acreage in New Mexico, New Mexico must have a Compact apportionment below Elephant Butte. In El Paso's view, this is a large, unjustified logical and legal leap. The "Project irrigated land" in New Mexico, within EBID, as well as the "Project irrigated land" in Texas, within EPCWID, can be served by Texas's equitable apportionment pursuant to both districts' existing contractual rights with the United States for a Project water supply. In fact, this has been the position historically taken by USBR and others.

Historically, it is evident that all involved parties (USBR, EBID, EPCWID, Texas and New Mexico) have taken the position that New Mexico's deliveries to Elephant Butte Reservoir are

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<sup>12</sup> The State of Texas's Opposition to the State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support, at 8-10.

<sup>13</sup> Apportionment Motion, at 28-31.

<sup>14</sup> *Id.*



Texas's equitable apportionment under the Compact and those deliveries are committed to the Project. Numerous documents, authored or approved by the affected parties, reflect this understanding:

- The 1985 Operating Agreement,<sup>15</sup> approved by USBR, EBID, EPCWID and copied to New Mexico, states:

“Texas” for Compact purposes includes Sierra and Dona Ana Counties in New Mexico, as well as El Paso and Hudspeth Counties in Texas. This unique feature of the Rio Grande Compact was dictated by the logic of New Mexico making its deliveries to Elephant Butte Reservoir and treating the Rio Grande Project as a unit rather than dividing Texas and New Mexico at their stateline.

- The 2002 Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation, which was approved by compact commissioners for all three states and by USBR's area manager,<sup>16</sup> provides that the purpose of the MOU is:

To formally describe the duties, roles and responsibilities of each agency in the water accounting, reporting and documentation of the waters of the Rio Grande Basin above Fort Quitman, Texas, in accordance with the Rio Grande Compact.

And, the 2002 MOU's definition of “Accounting Data” provides a significant insight for the present Compact apportionment issue:

Accounting data is information describing and quantifying the delivery, use, movement, transfer, and storage of water within the Rio Grande Basin. Examples of accounting data include deliveries of San Juan-Chama (SJC) water from Heron Reservoir to a downstream storage pool, deliveries by Colorado to New Mexico at the Colorado-New Mexico state line, and *deliveries by New Mexico to Texas at Elephant Butte Reservoir. . .*<sup>17</sup>

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<sup>15</sup> Cortez Depo., vol. 1, 169:23-170:20; Cortez Depo. Exh. 21, 1985 Operating Agreement, at 7.

<sup>16</sup> Deposition of Herman Settemeyer, Exh. 13, Report of the Rio Grande Compact Commission, 2001, TX\_MSJ\_000612-000615.

<sup>17</sup> *Id.* at 13 (emphasis added).

A good description of the relationship between the Compact's apportionment and the Project is provided by the 1998 Statement of Garry Rowe, Area Manager for USBR, to the New Mexico Section of the American Society of Agricultural Engineers.<sup>18</sup> In this paper, intended to address the then pending "quiet title" lawsuit filed by the United States regarding Project water rights, Mr. Rowe provides background information on the Project. As part of that background, he poses the question "How did the Compact treat the Texas portion?," and answers that question as follows:

The State of New Mexico is obligated to deliver water to the State of Texas following a complex formula set forth in the Compact. Rather than taking delivery of its allocation of the Rio Grande's waters at the New Mexico/Texas state line, the State of Texas takes delivery at Elephant Butte Reservoir in New Mexico. Thus, the Compact, instead of leaving the Texas share of the water open for disposition under the general water statutes of Texas, directs that the Rio Grande Project water be used to serve lands both in Texas and New Mexico. *The water belonging to Texas is definitely committed to the service of the Rio Grande Project.*<sup>19</sup>

Although attorneys for the United States now take a different position, from reviewing the record, especially the multiple depositions of Filiberto Cortez<sup>20</sup> and related exhibits, it is apparent that USBR has maintained the position described by Mr. Rowe consistently in the past. Several additional excerpts from Mr. Cortez's testimony demonstrate this:

- Asked to describe the relationship between the Compact and the Project, like Mr. Rowe, Mr. Cortez states that "the Rio Grande Project [is] receiving the Texas apportionment under the Compact."<sup>21</sup> Further, when provided Mr. Rowe's description set forth above, Mr. Cortez expressly agrees with it.<sup>22</sup>

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<sup>18</sup> See Cortez Depo. Exh. 7.

<sup>19</sup> *Id.* at 9 (emphasis added).

<sup>20</sup> Mr. Cortez is a long-time employee of USBR, serving as head of the El Paso Field Division (the office responsible for operating the Rio Grande Project) from 1997-2012 or 2013. Cortez Depo., vol. 1, 24:5-26:17.

<sup>21</sup> Cortez Depo., vol. 1, 46:13-20.

<sup>22</sup> *Id.* at 100:7-101:6.

- Similarly, in responding to an inquiry from lawyers in Denver regarding Project operations, Mr. Cortez described USBR’s balancing of its obligation to meet yearly demands from Project users within the “Texas portion” of the Compact, while complying with the Compact’s intent to recognize a yearly average release from the Project of 790,000 acre-feet.<sup>23</sup>

Much like USBR, EBID often refers to itself as being in “geographic New Mexico,” but in “Compact Texas,” downstream of New Mexico’s Compact delivery point.<sup>24</sup> Indeed, the fact that EBID has aligned itself with Texas in this Compact dispute<sup>25</sup> reflects the shared interests of EBID in protecting its Rio Grande Project allocation as part of New Mexico’s Compact obligations to Texas. EBID’s “Compact Texas” framework, however, is not a creation of or for this litigation; it is the lens through which EBID, like other Project stakeholders, evaluates many events and activities affecting EBID’s interests. For example, in 2011 correspondence addressed to the Texas Rio Grande Compact Commissioner, EBID weighed in on pending proposals regarding the relinquishment of Rio Grande Compact credit water. Questioning the OSE’s proposal to relinquish credit water for the benefit of only one [EBID] of “the two irrigation districts in Compact Texas,” the District frankly stated: “Once the water is relinquished, the State of New Mexico has no say regarding how it is used within Compact Texas.”<sup>26</sup>

Texas’s Rio Grande Compact Commissioner, Patrick Gordon, understands and performs his Commissioner role in a manner consistent with this “Compact Texas” framework that protects

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<sup>23</sup> Cortez Depo., vol. 2, 268:9-270:5; Cortez Depo. Exh. 40, 2002 letter from Mr. Cortez to William A. Paddock, at 2-3.

<sup>24</sup> Deposition of Gary Esslinger, vol. 1, 66:1-16; Deposition of Phillip King, vol. 1, 98:5-16; *EBID: Litigation on the Lower Rio Grande*, Presented to the House Agriculture & Natural Resources Committee (PowerPoint presentation), Feb. 5, 2014, EBID175717, at 2, 5.

<sup>25</sup> See Elephant Butte Irrigation District’s Amicus Curiae Brief in Support of the State of Texas, On Exceptions to the First Interim Report of the Special Master [addressing New Mexico’s Motion to Dismiss], July 28, 2017.

<sup>26</sup> Letter from James Salopek, EBID Board President, to Pat Gordon, April 29, 2011, EBID159477, at 1.

the interests of both irrigation districts that are contractually the water users of the Rio Grande Project. From the beginning of his appointment in 2006, he met with both irrigation districts in order to learn relevant operational background for his duties.<sup>27</sup> He describes his fundamental role to assure that the Compact delivery by New Mexico into Elephant Butte Reservoir is thereafter delivered by the Rio Grande Project to both of its downstream districts without interference.<sup>28</sup> He explains how the Compact's Article IV supports the conclusion that all the Project water delivered under contract to EBID is part of the Texas apportionment,<sup>29</sup> and relies on his authority as Texas Commissioner under Compact Article VIII to call for relinquishment of water that would then go to both districts as contract users of Project allocations.<sup>30</sup> He summarizes the relief sought by Texas in this case, based on New Mexico's Article IV obligations under the Compact, and based on diversions allowed by New Mexico that diminish Project water for both EBID and EPCWID.<sup>31</sup>

Even beyond Commissioner Gordon's testimony regarding Texas's Compact apportionment approach as it relates to this case, he applies that approach encompassing EBID's contractual Project allocation interests as part of his overall performance as Texas's Compact Commissioner. For example, he relies on information from EBID when determining under what circumstances to protest, as Texas's Rio Grande Compact Commissioner, permit applications before New Mexico agencies for projects located below Elephant Butte that may have potential adverse impacts to Project water.<sup>32</sup> Importantly, this broader approach (termed "Compact Texas"

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<sup>27</sup> Gordon Depo., vol. 1, 27:19-28:13.

<sup>28</sup> Gordon Depo., vol. 2, 13:1-21; 43:25-44:8; 45:23-46:20; 47:13-48:1; 65:2-8.

<sup>29</sup> Gordon Depo., vol. 1, 161:17-167:11; *see also* Gordon Decl. in Opp. to NM at TX\_MSJ\_007269-007274, ¶8.

<sup>30</sup> Gordon Depo., vol. 1, 174:17-175:10; *see also* Gordon Decl. in Opp. to NM at TX\_MSJ\_007269-007274, ¶8.

<sup>31</sup> Gordon Depo., vol. 2, 119:20-120:10; Gordon Depo., vol. 1, 186:9-187:6.

<sup>32</sup> Gordon Depo., vol. 2, 137:8-23; 138:25-139:7.

by EBID) is not personal to Commissioner Gordon but has been demonstrated historically by his predecessors from Texas. For example, in a 1950's statement presented to a congressional committee considering legislation for the San Juan-Chama transmountain diversion, then Commissioner Louis A. Scott introduced himself and the Compact interests as follows:

Under the Rio Grande Compact the Commissioner for New Mexico represents all interests above Elephant Butte reservoir in that state, while the Commissioner for Texas represents all interests below the reservoir. The area so represented by the Texas Commissioner includes the entire Rio Grande Federal Reclamation Project, which consists of Elephant Butte dam and reservoir, Caballo dam and reservoir, Elephant Butte Irrigation District in Sierra and Dona Ana counties, New Mexico, and El Paso County Water Improvement District No. One in El Paso County, Texas.<sup>33</sup>

Not surprisingly, in recent years since adoption of the 2008 Operating Agreement and the beginning of Texas's original action under the Rio Grande Compact, New Mexico's state officials have rejected the "Compact Texas" framework by which Texas's Compact apportionment delivered at Elephant Butte encompasses EBID's contractual rights to its Project allocation.<sup>34</sup> However, New Mexico's current theory, which would transform EBID's Project allocation into an additional Compact apportionment to the State of New Mexico below Elephant Butte, is a line of defense that has been previously rejected by the courts.

New Mexico attempted to argue that it had an equitable apportionment under the Compact below Elephant Butte Reservoir in *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983). Similar to its position in the Apportionment Motion, New Mexico argued that its apportionment was based on the Downstream Contracts, allowing 57% of the Project Supply to New Mexico and

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<sup>33</sup> Statement of Louis A. Scott, Rio Grande Compact Commissioner for Texas, Rio Grande Compact Commission Records, C.L. Sonnichsen Special Collections Department, University of Texas at El Paso, TCEQ 170385, at 2.

<sup>34</sup> See, e.g., Office of New Mexico Attorney General Hector Balderas, statement summarizing legislative update on Compact litigation, US0104447, at 2 ("There is no such thing as 'Compact Texas.'").

43% to Texas. The *El Paso v. Reynolds* court rejected both arguments, ruling that the Compact did not apportion water below Elephant Butte between Texas and New Mexico, and that no equitable apportionment could be based on the Downstream Contracts between USBR and the irrigation districts. *Id.* at 384, 387. El Paso submits that, as the court did in *El Paso v. Reynolds*, New Mexico's Compact apportionment theory should be rejected by the Special Master.

### III. CONCLUSION

El Paso urges the Special Master to reject New Mexico's three motions for partial summary judgment. All three motions rely on disputed material facts, and all three are inconsistent with the Compact and thus should be overruled as a matter of law.

Respectfully submitted,

*/s/ Douglas G. Caroom* \_\_\_\_\_

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OFFICE OF THE SPECIAL MASTER

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CITY OF EL PASO'S CERTIFICATE OF SERVICE

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This is to certify that on the 6<sup>th</sup> day of January, 2021, I caused a true and correct copy of the **Response Brief of Amicus Curiae City of El Paso to the State of New Mexico's Motions for Partial Summary Judgment** and of the accompanying **Appendix of Evidence** to be served by e-mail upon all counsel of record and interested parties on the Service List in this matter, attached hereto.

Respectfully submitted,

*/s/ Susan M. Maxwell*

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## SPECIAL MASTER

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

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