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

THE STATE OF TEXAS'S RESPONSE TO THE STATE OF COLORADO AND AMICI'S BRIEFS REGARDING THE PARTIES' MOTIONS FOR PARTIAL SUMMARY JUDGMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

TABLE OF AUTHORITIES (Continued)

Page(s)

Court Rules

Other Authorities

I. INTRODUCTION

A great deal of what is found in the briefs filed by the State of Colorado (Colorado) and the State of New Mexico (New Mexico) amici are either repetitive of arguments made by New Mexico, which are separately responded to or repetitive of each other. The State of Texas (Texas) replies here only to the few following points that appear to necessitate a specific response.

A. The State of Colorado

Colorado apparently feels compelled to explain to the Court and the Special Master why all of the parties to the litigation are wrong and that only Colorado has the correct interpretation of the 1938 Rio Grande Compact ("1938 Compact" or "Compact"). It does this despite its admission that no parties have asserted claims against it, and it faces no adverse impact from this dispute. *See* Colorado's Response to the Motions for Partial Summary Judgment of Texas, the United States, and New Mexico (Colorado Brief) at 1. Colorado's polemic is not helpful and distracts from the litigation of this case. Moreover, much of the Colorado Brief is merely a recitation of concepts which, as concepts, are not in dispute.

Some of Colorado's editorial comments about those concepts are, however, not correct. *See, e.g.*, Colorado Brief at 1-4, 8-16. It should also be noted that Colorado is an upstream state just like New Mexico. Concepts advanced by Colorado that allow New Mexico to avoid Compact compliance serve, in Colorado's words, to protect Colorado with respect to *other* compacts that have nothing to do with the 1938 Compact. Colorado Brief at 1-4. In any event, Texas will respond here only to specific arguments made by Colorado that have relevance to the 1938 Compact and that relate to Texas's Motion for Partial Summary Judgment ("Texas Motion" or "TX Motion").

B. New Mexico Amici

As noted above, various amici filed briefs in support of the parties' positions. Of the four briefs filed by adherents of New Mexico's position, two were in response to the United States of America's Memorandum in Support of Motion for Partial Summary Judgment (US MSJ) and only two directly address issues raised in the Texas Motion. For the most part, Texas responds to arguments raised by the New Mexico amici in the body of its reply to the New Mexico arguments. *See* Texas's Reply Brief in Support of Texas's Motion for Partial Summary Judgment (TX Reply Brief). Nonetheless, a few themes emerge from these briefs and are addressed below.

II. TEXAS'S RESPONSE TO COLORADO

A. Colorado's Compact Interpretation Arguments are at Odds with the Compact

At several points, Colorado asserts that the apportionment made under the Compact relies solely on the measurement of water at designated gages and therefore Texas receives no specific Compact apportionment *below* San Marcial (later Elephant Butte Reservoir). Colorado Brief at 6, 17, 30, 45. As Texas has shown, however, the Compact's delivery obligation by New Mexico was, in fact, to the gage at Elephant Butte Reservoir, and all of the water delivered to the Reservoir is consequently apportioned to Texas, subject to the United States' Treaty obligation with Mexico and the contract with Elephant Butte Irrigation District (EBID). There is no need to determine the allocation of water individually to either New Mexico or Texas *below* Elephant Butte Reservoir, as Colorado erroneously postulates (Colorado Brief at 6), because the Texas apportionment is measured at the Elephant Butte gage and New Mexico was apportioned no water below Elephant Butte Reservoir. As noted, EBID is in "Compact Texas" for purposes of how it receives its contract supply and takes its

water from the Texas apportionment. EBID Brief Regarding Apportionment of Water Below Elephant Butte Reservoir (Jan. 6, 2021) (EBID Brief on Apportionment) at 18.

Colorado claims that Texas relies on extrinsic evidence in arguing that delivery to Elephant Butte Reservoir is delivery to Texas. *See* Colorado Brief at 29. But Texas relies on the plain language of Article IV of the Compact as well as the total structure of the Compact, including Articles VII and VIII, which require New Mexico to deliver water into Elephant Butte Reservoir. Texas does not rely on extrinsic evidence. The notion that there is no means to measure by Compact gages any flows "divided between Texas and New Mexico" begs the question and assumes that New Mexico had an apportionment below Elephant Butte Reservoir. There is absolutely no ambiguity or need for extrinsic evidence if one properly interprets the Compact as providing Texas's apportionment at Elephant Butte Reservoir.

Colorado additionally says, "[b]ut it is a mistake to try to find an apportionment made by the Compact to either New Mexico or Texas of a specific volume of water below San Marcial because the Compact does not apportion water that way." Colorado Brief at 30. The reason that the Compact does not apportion water in this manner is because the Compact apportions water to Texas at San Marcial (Elephant Butte Reservoir), not below that gage. However, Colorado's arguments on this point appear to be in line with Texas's views: the Elephant Butte Reservoir deliveries (inflows) are Texas's apportionment, and therefore the releases from Elephant Butte Reservoir (outflows) belong to Texas subject to the Mexico Treaty and EBID's contract with the United States Bureau of Reclamation (BOR). Whether intended or not, Colorado's "gage" argument supports the Texas position and is at odds with the New Mexico position.

Colorado states that the Compact's alleged silence with respect to the allocation of water between New Mexico and Texas below Elephant Butte Reservoir was a conscious decision among sovereigns to leave the matter to other sources of law. Colorado Brief at 17. Colorado's suggestion is not helpful. Colorado neither explains what the other source of law one should look to is, or how looking to another source of law would actually work. To the extent it argues that New Mexico state law should apply, that assertion has already been directly dealt with by the Court and has been rejected. *See* the Special Master's April 14, 2020 Order[1] at 14-15; *see also Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); Texas's Opposition to New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortages (TX Opposition to NM MSJ on Notice) at 5-9; TX Reply Brief at 29-30.

B. Colorado's Reliance on *City of El Paso* is for the Wrong Proposition

Colorado cites *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) as "current legal authority" which confirms the erroneous contention that the Compact does not answer the question of apportionment below Elephant Butte Reservoir. Colorado Brief at 16-17. It is plain, however, that *Reynolds* is not "current legal authority." Texas was not a party to the *Reynolds* litigation and its sovereign rights were not implicated by the decision. Discussion of the Compact by the district court was *dicta* related to jurisdictional defenses posed by New Mexico. With that said, on the fundamental issue in the instant case, the district court stated that nothing in its opinion meant that New Mexico, having made its delivery to Elephant Butte Reservoir could undermine that delivery by pumping down the

[1] April 14, 2020 Order lodged with the Special Master as Docket No. 340 (April 14, 2020 Order).

surface flows of the river below the point of delivery. *Reynolds*, 563 F. Supp. at 386. While this language is itself *dicta,* it certainly supports the basic claim asserted by Texas in this case.

C. No State Has an Unlimited Ability to Consume Water Under the Compact Because of the 1938 Condition

Colorado says Texas has mischaracterized Colorado's obligation under the Compact. Colorado Brief at 22. However, it is Colorado that mischaracterizes the Texas position. Colorado can do anything it wants with Rio Grande water in Colorado (including groundwater tributary to the Rio Grande surface stream) as long as it delivers water pursuant to Article III of the Compact. Colorado frames the argument, in part, by arguing that it has an unlimited ability to consume water because the Compact does not have language imposing specific limits. This is an odd way to read the Compact. If Colorado consumes water without limits, it will fail to meet its Article III delivery obligation which will lead to a violation of the Compact as well as the stipulation it entered into in 1967 to stay the case brought by Texas and New Mexico involving Colorado's massive debit in Compact deliveries. So, "increased consumption," contrary to the Colorado position (and as history demonstrates, *see, e.g.*, *Texas and New Mexico v. Colorado,* 389 U.S. 1000 (1967)), *can* violate the Compact. Uses and consumption are limited by the Compact.

Colorado's interpretation of the Compact to allow for unlimited consumption of water is also inconsistent with Article IV. The New Mexico delivery obligation under Article IV is based upon conditions that existed in 1938, at the time of Compact execution (1938 Condition). TX Motion at 15 n.16. This is the same 1938 Condition that is imposed upon Colorado by Article III of the Compact. Because New Mexico's delivery to Texas takes place at Elephant Butte Reservoir, all of Colorado's concerns expressed about the

1938 Condition are addressed so long as New Mexico's interference with the releases from Elephant Butte Reservoir is enjoined.

D. Colorado's Coy Musings on the Compact are Not Helpful to Resolving Issues in this Litigation and Should be Rejected

Colorado takes 45 pages to explain the Compact, but at no point explains what Texas received as a Compact apportionment. On the most fundamental question in the litigation: What constraints are there on New Mexico's ability to interfere with water flowing to Texas, Colorado says this: "This is not to say that there are not restraints on New Mexico below Elephant Butte Reservoir that protect Texas, only that those restraints are not found in the Compact as a 1938 Condition." Colorado Brief at 23. Colorado, like New Mexico, never explains what the limits on New Mexico's actions are or where they can be found. Colorado's view on this issue should be ignored as unhelpful.

E. The Compact is Superior to All State-Based Water Rights and Does not Have a Prior Appropriative "Priority Date"

Colorado argues that the Compact does not provide a "priority date." In making its argument, Colorado's proposition is that the Compact does not have a "priority" date, unlike other compacts to which Colorado is a party, and therefore a reference to the Project *water right* priority is irrelevant. Embedded in the Colorado argument is the concept that a Compact priority is somehow the same as a priority under the doctrine of prior appropriation. Under the doctrine of prior appropriation, a priority is given to the one who is "first in time," a prior right. Compact priority is something quite different. It denotes a superior right, notwithstanding the date that the Compact established each state's apportionment. Here, the 1938 Compact apportionments are superior to any state granted water rights under the prior appropriation doctrine and must be protected from interference and depletion by state-based

appropriative rights even if the state rights vested before the Compact's adoption in 1938. *Hinderlider*, 304 U.S. 92.

Notwithstanding its arguments, Colorado appears to agree with this concept. It cites *Alamosa-La Jara Water Users Prot. Ass'n v. Gould* (*In re Rules & Regulations Governing Use, Control, & Prot. of Water Rights, etc.*), 674 P.2d 914 (Colo. 1983) (*ALJ*) for the proposition that Colorado administers the Compact without regard to a priority date, by establishing separate schedules that require the more senior water rights on the Conejos to be curtailed before junior mainstem water rights. While Texas has not argued that the Compact had a "priority" date, Colorado's response demonstrates that administration of the Compact in a manner that recognizes its superior role is necessary. By contrast, New Mexico by its own admission does nothing to administer the Compact and ignores its obligation to protect Texas's apportionment from depletion by New Mexico groundwater pumping. Excerpts of Deposition of Peggy Barroll, 10/21/2020 (Barroll 30(b)(6) Depo., 10/21/2020), at TX_MSJ_007667-007668, 52:24-53:4; excerpts of Deposition of Ryan Serrano, 4/17/2020 (Serrano Depo., 4/17/2020), at TX_MSJ_001284-001, 268:10-11.

F. Colorado Misses the Point of Texas's Demands that New Mexico Groundwater Pumping be Curtailed to Protect Texas's Apportionment

Colorado misconstrues Texas's arguments that New Mexico has an obligation to protect Texas's apportionment from depletion by New Mexico groundwater pumping as an attempt to impose additional Compact terms on New Mexico in the form of intrastate regulation. Nothing could be further from the truth. Texas has said time and time again that the method by which New Mexico protects Texas's apportionment from depletion is up to New Mexico (or the Court, to the extent an injunction is imposed). Nonetheless, New Mexico has a legal obligation as a compacting party to the Compact to ensure that the regulation it

implements is effective. New Mexico, as admitted by New Mexico by way of its Rule 30(b)(6) witnesses Margaret Barroll and the Lower Rio Grande Water Master, has done nothing to protect Texas's apportionment from depletion to date. Barroll 30(b)(6) Depo., 10/21/2020, at TX_MSJ_000960, 000982-000984, 52:24-53:4; Serrano Depo., 4/17/2020, at TX_MSJ_001284-001, 268:10-11.

In this regard, Colorado's reliance on *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013) is inapposite. Unlike *Tarrant*, Texas is not invading New Mexico to appropriate water. Quite the contrary: what Texas seeks is to receive its apportionment undepleted. Colorado, however, simply parrots New Mexico's simplistic and erroneous view of *Tarrant* (if it is not expressly in the compact, state law is not preempted) and says the Compact "contains very detailed terms that determine the delivery obligation at each river reach, and it left the states to determine how to meet those delivery obligations." Colorado Brief at 26. While this may be correct as far as it goes, Colorado begs the actual question: What occurs when the downstream state does not meet its compact obligations?

Colorado also objects to Texas's reliance on *ALJ*, although the basis of Colorado's objection is not clear. In the Texas Motion, Texas explains that the *ALJ* case gives life to the *Hinderlider* proposition that states have an obligation to ensure Compact apportionments are satisfied, even if the Compact is satisfied at the expense of state-based water rights. TX Motion at 93-96. Colorado argues in response that the Court should avoid adopting an interpretation of the Compact that "imposes requirements for intrastate regulation that do not appear in the Compact" because in the absence of specific Compact terms, "states are free to regulate water use within their borders as they see fit, *as long as they meet their compact obligations*." Colorado Brief at 25 (emphasis added). Given the italicized qualifier Colorado

includes at the end of that sentence, Texas has no real problem with this statement. Colorado appears to be manufacturing disputes where none exists.

To the extent clarification is helpful, Texas has asserted that *ALJ* supports the proposition that "state granted water rights must defer to the federal law of equitable apportionment to ensure compact obligations are satisfied." TX Motion at 94. This is what *Hinderlider* provides and, moreover, it is also what Colorado's own Engineer Advisor says in his affidavit. Craig Cotton Affidavit in support of the Colorado Brief at para. 16. Colorado, unlike New Mexico, has a plan in place to protect New Mexico's apportionment. Texas wants similar protection for its apportionment. Texas's Complaint seeks a permanent injunction on New Mexico groundwater pumping in order to insure this protection.

Ignoring Texas's main point that New Mexico is not meeting is Compact obligations, Colorado finds support for its argument that "states are free to regulate . . . as they see fit," in *ALJ,* but ignores entirely the context in which *ALJ* was decided. Historically, pre-Compact, the Conejos River was administered separately from the Rio Grande mainstem and, therefore, was not administered relative to the Compact. Colorado, citing *ALJ*, asserts that in upholding the State Engineer's Office (SEO) rules with respect to the Conejos River, the Colorado Supreme Court upheld "the manner of administration of water rights in Colorado that was in place before the [Rio Grande] Compact." Colorado Brief at 26. Colorado concludes that "the Compact does not impose a method of water rights administration on Colorado that conflicts with Colorado state law; the Compact simply mirrors how Colorado was already administering water rights" as of 1938. *Id.* at 27. The thrust of this argument is flawed for several reasons.

First, as far as the court's holding in *ALJ*, while the practical effect may have been to "uphold the manner of administration of water rights in Colorado . . . from before the Compact," that was not the basis for the decision and ignores the fundamental point relevant to the instant argument. The *ALJ* court makes clear that once previously appropriated water is made subject to equitable apportionment by compact, "the streams must be administered as mandated by compact, or if the compact is deficient in providing for administration, according to section 37-80-104" which is the state statute authorizing the SEO to adopt regulations to administer compacts. *ALJ*, 674 P.2d at 923.

Second, the idea that the case stands for the proposition that "states are free to regulate . . . as they see fit," is at best circular. It is *not* Colorado state law that makes administration of water rights under the Compact lawful but rather it is because state administration is consistent with the Compact that makes the state administration lawful. In the instant case, New Mexico administration, to the extent it exists at all, is not consistent with the Compact and is therefore unlawful.

Further, Colorado's efforts to "regulate . . . as they see fit" in the Rio Grande basin in Colorado (Division 3) have been driven by the 1966 original action brought against it by New Mexico and Texas. TX Motion at 44-45; Declaration of Scott Miltenberger (Miltenberger Decl.) at TX_MSJ_001595, and stipulation (*see ALJ*, 674 P.2d at 923 n.15 for purposes of the rules challenged there). Over 54 years after the 1966 action was filed, Colorado's water rights regulatory system in the Rio Grande basin has been designed to satisfy Compact obligations—and offers water users different routes to secure legal supplies of water that are unavailable in the rest of the state. The point of the subdistrict management plan model, and the groundwater model that supports it, is to ensure Colorado's Compact obligations are met.

Simpson v. Cotton Creek Circles, LLC, 181 P.2d 252 (Colo. 2008); *In re Office of the State Engineer's Approval of the Plan of Water Mgmt. v. Special Improvement Dist. No. 1 of the Rio Grande Water Conservation Dist*., 270 P.3d 927, 934 (Colo. 2011). By contrast, in the instant matter we have only New Mexico's stillborn regulatory efforts in the 2005-2006 time frame. *See* EBID Brief on Apportionment at 19-21 and EBID's Ex. 2 in support thereof. New Mexico is not free to "regulate . . . as they see fit" unless that regulation results in real protections to Texas's apportionment.

Finally, Colorado says: "Without compact terms that govern intrastate water regulation, states are free to regulate water use within their borders as they see fit, as long as *they meet their compact obligations*, because states enjoy sovereign control over their own natural resources." Colorado Brief at 25 (emphasis added). By the same token, if a state *does not* meet its Compact obligations, Colorado's argument properly applied, a state's "sovereign control over their own natural resources" must give way and the Court can impose a remedy—even if it is wholesale curtailment. Under Colorado's odd view, however, Texas's Compact apportionment is unenforceable and unless Texas can force New Mexico to adopt something to properly administer the Compact in New Mexico (such as Colorado was compelled to adopt the 1969 Act), New Mexico can do whatever it wants. That argument, however, would turn the Compact on its head and limit the Court's powers to enforce the agreement, rather than recognize that as an interstate agreement approved by Congress, the Court not only can but must enforce the Compact. And of course, Texas has never argued for the Court to impose New Mexico law on New Mexico. Texas here argues for an injunction because New Mexico has not, and apparently cannot, adopt means to administer its water use consistent with the Compact. The fact that the Compact does not explicitly prohibit New

Mexico from intercepting Texas's apportionment does not mean New Mexico can allow unregulated groundwater pumping.

G. The Colorado River Compact Does Not Inform Interpretation of the Rio Grande Compact in the Manner Suggested by Colorado

Colorado takes several pages to discuss the Colorado River and the Colorado River Compact. *See* Colorado Brief at 41-44. It is difficult to ascertain the purpose of this argument, other than to offer very generic observations about the Compact that apportions the Colorado River between the Upper Basin and Lower Basin states, and then the further apportionment of Colorado River water among the states within each basin according to additional authorities. While these authorities may apply to the Colorado River, they have little relevance to the Rio Grande Basin.

The Colorado River Basin is the subject of a Supreme Court decree, two compacts, and governed by an extensive body of federal statutory and regulatory provisions. It is correct that at various points in the history of the Colorado River Basin, states did go to the Supreme Court to obtain seminal rulings on the extent of each state's entitlement to the interstate water. For example, *Arizona v. California*, 373 U.S. 546 (1963), cited by Colorado, represents the culmination of decades of disagreement between Arizona and California on the meaning of the Colorado River Compact and the Boulder Canyon Project Act of 1928, Pub. L. No. 70-642, 45 Stat. 1057, which provided the comprehensive, statutory apportionment scheme between the Lower Basin States. Included in this statutory apportionment scheme is the basis of the requirement that in the Lower Basin of the Colorado River that one cannot have any right to water without a "Section 5 Contract" with the Secretary of the Interior. *See Arizona v. California*, 373 U.S. at 565 (discussing contracts executed by the Secretary under section 5 of the Boulder Canyon Project Act). These

contracts not only apply to the diversion of surface water, but also to the right to pump groundwater from with the Colorado River alluvial basins.[2]

In any event, it was only *after* the Court decided *Arizona v. California* and issued its decree that the Lower Basin states could build on that common understanding and negotiate the resolution of other pressing issues, such as the authorization of additional Reclamation works in the Colorado River Basin Project Act of 1968, Pub. L. No. 90-537, 82 Stat. 885, or current operations on the Colorado River which are governed by agreed upon regulations that incorporate common operating principles. *See* Dep't of Interior, Record of Decision: Colorado River Interim Guidelines for Lower Basin Shortages and the Coordinated Operations for Lake Power and Lake Mead, 24-25 (Dec. 2007), https://www.usbr.gov/lc/region/programs/strategies/RecordofDecision.pdf.

In sum, one would be hard pressed to find a river system and corresponding legal system that is more unlike what exists on the Rio Grande.

III. RESPONSE TO AMICI ARGUMENTS

A. The Status of the Rio Grande Reclamation Project in this Litigation

The instant litigation is a compact case framed, in the first instance, by the Texas Complaint. The amicus brief of New Mexico State University (NMSU) spends a great deal of time arguing that the United States motion should be denied because its claims are Reclamation law claims that should be addressed through the application of section 8 of the Reclamation Act of 1902, Pub. L. No. 57-161, 32 Stat. 388, and New Mexico state law. *See* NMSU's Amicus Curiae Response Brief in Opposition to the United States' Motion or Partial

[2] Certainly, a ruling that New Mexico was required to obtain contracts from BOR for the pumping of groundwater, as is required in the Colorado River example advocated by Colorado, would go a long way to remedy the harm being caused by New Mexico's unregulated groundwater pumping.

Summary Judgment (Jan. 6, 2021) (NMSU Brief). It then proceeds with an extensive discussion of Reclamation law and New Mexico state law almost entirely ignoring the Compact. While the distinction NMSU makes between Reclamation law and the Compact is certainly valid, the brief itself ignores the distinction by arguing that the issues raised by the United States are part of an intrastate dispute that should be resolved solely through New Mexico state law.

The foundational problem with this position is that the Rio Grande Project is not an intrastate Project. It is an interstate Project and always has been. Act of February 25, 1905, Pub. L. No. 58-104, 33 Stat. 814, 58 Cong. ch. 798. It also ignores the fact that the Project was made an instrumentality of the Compact, further confirming the interstate nature of the Project. Because of its interstate nature, the Project cannot be governed by the rules of any one state, and rather must be governed, in this case, by the Compact or non-conflicting Reclamation law.

NMSU's arguments ignore the Texas position, which is joined by EBID and EP#1, that the Compact apportions Texas all the water New Mexico delivers into Elephant Butte Reservoir, subject to the United States Treaty with Mexico and the United States Downstream Contract with EBID. EBID Brief on Apportionment at 18 (characterizing EBID's contract right to water as arising from the Texas apportionment); EP#1's Amicus Brief in Response to Summary Judgment Motions on Apportionment Issues (EP#1 Brief on Apportionment) at 10.

The Texas position is the only one that recognizes the interstate nature of the Project and avoids the chaos that will ensue if the New Mexico apportionment argument is accepted. As the NSMU Brief clearly demonstrates, proceeding as New Mexico advocates will lead to two separate systems of law applying to the same water. In one, New Mexico will apply its

own priority system to groundwater and surface water rights adjudicating the right to water in a vacuum, devoid of any Compact considerations, including considerations of the unified nature of the Project in carrying out the provisions of the Compact. In the other, the Compact superiority will prevail, and New Mexico state priority law will not play a role. Application of a dual system in the manner articulated in the NMSU Brief only serves to sustain, not to resolve, the conflicts that this litigation, as an original action, should decide.

Moreover, proceeding as NMSU suggests will lend itself to the foolishness that permeates 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 (Pecan/Crop Farmers Brief) in which they argue that they have established groundwater rights that they want to exercise in accordance with New Mexico law and that they are entitled to water to satisfy their senior-priority rights. Pecan/Crop Farmers Brief at 1-2. Either the Compact is *superior* to any New Mexico state generated rights or it is not; that question cannot be open to any doubt. The law is clear that the Compact is superior.

The NMSU and the Pecan/Crop Farmers Briefs both deal with the Project as if the Compact does not exist. In their world, the legal principles applicable to the water delivered to Elephant Butte Reservoir the day before the Compact was effective and the day after are the same. However, the Compact changed the legal construct of the Project and created in Texas superior rights to Project water under federal law, by comparison with what might have previously existed under New Mexico state law. New Mexico could have bargained for grandfathering of so-called pre-existing water rights as has been done in other compacts, but it did not. While NMSU and the Pecan/Crop Farmers may well have grievances, those

grievances are with New Mexico and not with the United States or Texas. *See Hinderlider*, 304 U.S. 92.

While the United States does not hold a Compact right, its Downstream Contracts with EBID and EP#1 provide the means by which the Compact is effectuated, and the water that is under contract with EBID and EP#1 cannot be subject to another and different adjudication pursuant to New Mexico state law. Those contracts and the right to water under them have been finally resolved and determined as falling under the protection of the Compact, and that protection mandates that the area below Elephant Butte Reservoir be dealt with as a unity. EBID has referred to this as "Compact Texas." EBID Brief on Apportionment at 25-26. It is only in this way that the Project can adequately serve all Project lands in New Mexico and also serve Texas.

Not treating the Project area as a unity lends itself to the type of mischief that has in fact occurred and which is advocated by New Mexico and its amici. The Project is dependent on return flows and arroyo flows, but not treating the Project as a unity has allowed New Mexico to authorize groundwater pumping which has depleted these critical sources of surface water flow and Project supply. Not treating the area as a unity has allowed non-Project water users to seek New Mexico state law priorities senior to the Project and, according to New Mexico amici, would force the Project (and presumably Texas) to make a priority call under New Mexico state law in order to vindicate Compact rights. *See* EBID Brief on Apportionment at 19-24 and n.11. The arguments of NMSU and the Pecan/Crop Farmers effectively seek a finding that the Compact is subservient to New Mexico state law, which is contrary to the law of preemption, applicable when state law conflicts with the Compact. *Tarrant*, 569 U.S. at 627, n.8 & n.10; *see also* Texas's arguments regarding

Compact preemption of New Mexico state law in the TX Motion at 93-99; TX Opposition to NM MSJ on Notice at 5-9; TX Reply Brief at 24-31.

B. New Mexico Amici Parroting of New Mexico Positions

Almost all of the New Mexico amici's briefs on various issues articulate an argument and then state that New Mexico has effectively refuted the position of the United States or of Texas. These conclusory statements require no response and Texas's Opposition to the New Mexico partial summary judgment motions, as well as the Texas Reply Brief, in any event, adequately address these issues. Interestingly, at various times the New Mexico amici argue that the facts relied upon by the United States or Texas are material and in dispute and therefore summary judgment based upon these facts cannot be granted. With respect to New Mexico's purported "undisputed facts,' New Mexico amici claim that those facts are beyond dispute, apparently based solely on the assertion that they are undisputed because New Mexico says they are undisputed. Again, these assertions by New Mexico amici need no response and New Mexico's "undisputed facts" are directly addressed by Texas elsewhere.

C. Recycled State Law Primacy Arguments

The New Mexico amici's arguments regarding section 8 of the Reclamation Act of 1902 and the McCarran Amendment, 43 U.S.C. § 666 (1952), merely rehash ground that has been covered in addressing Texas's Petition for Leave to file its Complaint, the New Mexico Motion to Dismiss, and the briefing associated with Exceptions to the First Interim Report of the Special Master. *See* NMSU Brief at 12-19; Pecan/Crop Farmers Brief at 16-22. In each of those fora, New Mexico and its amici have argued that Texas is barred from proceeding in this action because the issues raised are a matter of New Mexico state law pursuant to the cited doctrines. Each of those arguments have been dismissed by the Court and/or Special

Master. NMSU argues that the United States should not be allowed to "take a second bite of the apple," but NMSU's arguments, as well as parallel arguments made by New Mexico and other amici supporting New Mexico, represent at least a "third bite of the apple," returning to arguments that have been rejected on at least that many occasions.

D. Depletions

New Mexico amici, like New Mexico and Colorado, reject the concept of the 1938 Condition. *See, e.g.*, Pecan/Crop Farmers Brief at 7-12. They argue, among other things, that the Rio Grande Joint Investigation cannot be used to collaterally attack the results of the New Mexico state court adjudication of water rights under New Mexico state law. This position is an extension of the state law primacy argument addressed above with an important difference. Here, they argue that one cannot "collaterally attack" a New Mexico state law determination by reference to contrary positions based upon the provisions of an interstate compact. In other words, a determination by a state court applying state law trumps contrary provisions of a compact. That is simply an incorrect proposition. The Compact is superior, and inconsistent state court determinations based upon the application of New Mexico state law must fail. Moreover, Texas was not a party to the New Mexico state determinations and as a sovereign it cannot be estopped in the manner that is suggested by New Mexico amici.

The New Mexico amici, Colorado, and New Mexico depletion arguments also fail. No depletion limit argument, if accepted, would lead to New Mexico's continued taking of water apportioned to Texas until no water would be available to flow to Texas. Indeed, if New Mexico farmers became 100 percent efficient, as suggested they should be allowed to become, then all return flow, all arroyo flow, and much of the surface water flow of the Rio Grande would be used in New Mexico as a result of this efficiency and no water would be

available for Texas. New Mexico's "efficiency" amounts to a use of water in New Mexico otherwise apportioned to Texas.

E. Pumping Texas Groundwater

Texas does not object to groundwater pumping in New Mexico in and of itself. Texas's objection is based upon the harm that the groundwater pumping in New Mexico is having on Texas. New Mexico amici (and New Mexico) seem to justify their groundwater pumping based upon the assertion that the use of groundwater wells to provide supplemental irrigation water is practiced in both New Mexico and Texas. *See, e.g.*, Pecan/Crop Farmers Brief at 1-2. The bulk of Texas groundwater pumping that is the subject of the amici and New Mexico assertions takes place in the Hueco Groundwater Basin.[3] This basin is geologically separate from groundwater basins in New Mexico and cannot have a direct upstream impact on New Mexico. New Mexico experts have admitted this. Barroll Depo., 7/9/2020, at 69:1-70:20. While Texas does not dispute that it pumps groundwater in the Hueco Groundwater Basin, there is absolutely no evidence that Texas groundwater pumping in the Hueco Groundwater Basin is having any adverse effect on New Mexico. In fact, the evidence so far introduced in this litigation by New Mexico itself proves that there has been no harm to New Mexico through groundwater pumping in Texas. Excerpts of Deposition of Shane Coors, 6/22/2020, at TX_MSJ_007596-007597, 228:24-229:20. This is in stark contrast to the New Mexico expert testimony that its groundwater pumping in New Mexico depletes surface water apportioned to Texas, thereby injuring Texas. Excerpts of

[3] Texas pumps groundwater in one Texas location relevant to the Compact. This location is in the Mesilla Bolson, an aquifer which underlies both the Rincon and Mesilla Valleys of New Mexico, as well as a small portion of the El Paso Valley. Texas has acknowledged its pumping in the Mesilla Bolson impacts EBID and has taken steps to exclude that impact from its damages claims; moreover, Texas has told New Mexico on numerous occasions that it will take responsibility for this pumping. In any event, these are matters best dealt with at trial.

Rule 30(b)(6) Deposition of Estevan Lopez, 9/18/2020, at TX_MSJ_001139-001141, 17:21-19:1; excerpts of Deposition of Jorge Garcia, 2/6/2019, at TX_MSJ 001056, 001066-001068, 6:10-16, 43:17-25, 44:1-5, 45:11-19; Declaration of William R. Hutchison at TX_MSJ_000667, para. 53.

Aside from the New Mexico admissions that its groundwater pumping depletes Texas's apportionment, no evidence is cited to support the New Mexico amici contentions that somehow Texas is doing the same thing with regards to unregulated groundwater pumping that it attacks New Mexico for doing. But even if Texas were doing the same thing as New Mexico, that is no bar to Texas's relief. In *Nebraska v. Wyoming*, the Supreme Court considered a related argument by Wyoming, the upstream state—effectively, that pumping in Nebraska was impacting Wyoming. Wyoming made this argument as a basis for its exceptions to Nebraska's requests to amend pleadings. The Supreme Court rejected Wyoming's argument:

> We fail to see how the mere fact of unregulated pumping within Nebraska can serve to bar Nebraska's claim. Nebraska is the downstream State and claims that Wyoming's pumping hurts it; Wyoming is upstream and has yet to make a showing that Nebraska's pumping hurts it or anyone else. If Wyoming ultimately makes such a showing, it could well affect the relief to which Nebraska is entitled, but that is a question for trial, and does not stop Nebraska from amending its claims at this stage.

Nebraska v. Wyoming, 515 U.S. 1, 14 (1995). As elaborated in the Texas Reply Brief at 36-38, New Mexico has produced no evidence that Texas's activities with regard to either groundwater pumping or groundwater regulation in the Hueco Bolson are impacting New Mexico. Discovery is over and the time for any such showing is long past. New Mexico amici undoubtedly know this but have made this argument here to deflect the Special Master's attention from the Texas and United States motions. The amici's arguments on this point should be disregarded.

F. The Middle Rio Grande

The Albuquerque Bernalillo County Water Utility Authority (ABCWUA) in its amicus brief spends a few pages describing water administration in the Middle Rio Grande. ABCWUA Amicus Curiae Brief in Support of New Mexico's Motions for Summary Judgment and in Opposition to Texas's and the United States' Motions for Summary Judgment at 6-8. It is unclear the reason for this, but it does underscore a point supporting the positions of Texas and the United States. Texas does not dispute the generally effective management that is undertaken by New Mexico in the Middle Rio Grande. That administration is for the purpose of managing and regulating New Mexico's Rio Grande apportionment and ensuring that it meets its Compact Article IV delivery obligation. This is in stark contrast to what occurs below Elephant Butte Reservoir. There, because it has never considered EBID's contractual rights a New Mexico "apportionment" and because by its own admissions it does not administer rights in the Lower Rio Grande to comply with the Compact, New Mexico has done virtually nothing to protect those contractual rights and nothing to ensure its Compact compliance. Serrano Depo., 4/17/2020, at TX_MSJ_001284-001, 268:10-11.

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IV. CONCLUSION

The briefs of Colorado and New Mexico amici provide no basis upon which the Court should grant the New Mexico motions or to deny the Texas and United States motions. Accordingly, Texas respectfully requests that the New Mexico motions be denied, and the motions of Texas and the United States be granted.

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Respectfully submitted,

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