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 REPLY IN SUPPORT OF THE STATE OF TEXAS'S MOTIONS IN LIMINE

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
**Counsel of Record*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Statutes

Court Rules

I. INTRODUCTION

The State of Texas (Texas) submits the following reply in support of its Motions in Limine (Texas MILs). The Texas MILs are limited in nature and seek to (1) avoid the re-litigation of issues previously decided, (2) exclude testimony of proffered experts who are clearly unqualified to testify, and (3) exclude evidence that has never been disclosed. In particular, Texas seeks to exclude irrelevant evidence pertaining to the State of New Mexico's (New Mexico) claims that do not allege any action or inaction on the part of Texas, and instead improperly seek to ascribe to Texas liability for the actions or inaction of others. Such evidence is irrelevant to the 1938 Rio Grande Compact (Compact)[1] issues set for trial and should be excluded.

The Special Master's May 21, 2021 Order (Order) (Docket No. 503)[2] on the cross motions for summary judgment has rendered specific categories of evidence that New Mexico continues to insist it intends to proffer at trial irrelevant and, thus, subject to exclusion before trial. The Order provides that the Compact establishes the 57 percent/43 percent split (New Mexico/Texas) as the division of water between the states downstream of Elephant Butte Reservoir. Order at 6. The Order further explains that the determination, however, ". . . begs the question: division of what?" *Id.*

The question for trial is "what the compacting states intended to divide between southern New Mexico and Texas" as well as the "baseline condition" that the Compact was designed to protect. *Id.* at 7. In Texas's Complaint, and consistently throughout this

[1] Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.
[2] Docket 503 is lodged with the Special Master's Docket for *Texas v. New Mexico and Colorado*, No. 141 Original at https://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original.

litigation, Texas has argued that the subject water (i.e., the "division of what?") is the undepleted, 1938 hydrologic condition. New Mexico disputes the existence of a 1938 or "baseline" condition (*see* Texas Motion in Limine 2), and except for its allegations relating to pumping of groundwater in the Hueco Bolson in Texas, which Texas will dispute at trial, its remaining Counterclaim allegations assert that actions caused by other parties, not Texas itself, negatively impact its apportionment.

The end result of the upcoming trial will be the establishment of the volume of water that is the subject of the 57 percent/43 percent split. To the extent New Mexico believes that actions of the United States or others are depriving it of water that should be available (i.e., its 57 percent), New Mexico may file a separate action against whomever is the cause of the shortage. The causation issues alleged by New Mexico in its Counterclaims fail to address actions (or inaction) within the dominion or control of Texas. On the other hand, Texas's Complaint directly addresses actions by the State of New Mexico. Texas alleges that actions of New Mexico in authorizing and permitting groundwater pumping that interferes with surface water flows otherwise apportioned to Texas constitutes a Compact violation. New Mexico's Counterclaims address Rio Grande Project (Project)-related issues, actions by the United States Bureau of Reclamation (Reclamation), and/or actions by contractors of Reclamation, none of whom are Texas itself or are under the control of Texas. This background is essential for trial, sets forth the scope of potentially relevant evidence, and informs the subjects of the narrow Texas MILs which seek to exclude categories of evidence outside the proper scope of this Compact trial.

New Mexico's response to the Texas MILs further repeatedly resorts to the assertion that there is no need to exclude any evidence from the trial of this matter because the Special Master, unlike a jury, cannot be confused or misled. The State of New Mexico's Response to the State of Texas's Motions in Limine (NM Response) at 2. In addition, New Mexico emphasizes the notion that the Special Master has to provide the Supreme Court with a complete record and has no actual authority to control these proceedings. *Id.* Although the Supreme Court may review the record of this trial, the Special Master is not merely a passive observer. The fact that the Supreme Court requires or encourages a "complete record" does not mean that anything and everything may be introduced at trial notwithstanding relevance and other evidentiary limitations. Avoiding confusion or prejudice are not the only criteria for granting a motion in limine. The Special Master must consider fundamental concepts of evidence, including relevance, qualifications, and prior disclosures. *See, e.g.*, Fed. R. Evid. 401, 403, 702; Fed. R. Civ. Proc. Rule 26.

For the reasons explained in the Texas MILs, and below, the Special Master should grant all six of the Texas MILs, which will establish the proper boundaries for presentation of evidence at trial on the actual Compact issues for which the Supreme Court granted Texas's original motion for leave to file its Complaint.

II. TEXAS'S MOTIONS IN LIMINE

A. Motion in Limine 1: to exclude the introduction of evidence or argument at trial relating to factual issues finally adjudicated in the Special Master's May 21, 2021 Order, including intra-district operations in Texas

Texas's Motion in Limine 1 seeks an order excluding the introduction of evidence at trial that would go to issues on which the Special Master has already granted summary

judgment because the Order establishes as a matter of law that such evidence has no bearing on any issue in this phase of the case. New Mexico argues that Texas "misreads and ignores significant portions of the Order." NM Response at 2. The Order speaks for itself and New Mexico simply misreads what Texas has said about the Order. New Mexico further states that "[a]s a general matter, New Mexico agrees that any issues finally determined in the Summary Judgment Order will inform the upcoming trial." *Id.* Notwithstanding that apparent concession, New Mexico's significant qualification that it accepts the Order "[a]s a general matter" is noteworthy; New Mexico is not free to cherry pick portions of the Order that it will choose to abide by at trial, while ignoring those portions of the Order that are not favorable to its position.

Texas seeks to establish sideboards on New Mexico's clear intent, as evidenced by this latest response, to ignore the results of the Order, the prior order dismissing all but two of its counterclaims, and to put on whatever case New Mexico wants to regardless of the limits established to date by prior Special Master orders. For example, the NM Response includes a number of statements about what they will try to prove at trial, each of which ignore the outcome of the Order. For example, New Mexico states that "[a]t trial New Mexico will present evidence on Texas's injurious groundwater pumping and water operations in [El Paso County Water Improvement District #1 (EP#1)]." NM Response at 4. By virtue of the Order, however, EP#1's intra-district operations are not relevant to the trial. The Special Master established in that Order the Compact's Article IV apportionment to Texas and southern New Mexico is a programmatic apportionment, which means that New Mexico's affirmative Compact duty is complete when the Rio Grande water is delivered into Project storage at Elephant Butte Reservoir.

In addition, the Special Master ruled that, in the Project areas below Elephant Butte Reservoir, New Mexico has a Compact duty of non-interference with the Project's delivery of Texas's apportionment.

EP#1's operations have nothing to do with New Mexico's duty to deliver Rio Grande water into Project storage. That Compact delivery obligation remains the same, regardless of how EP#1 operates its part of the Project. Similarly, standing alone, EP#1's operations have nothing to do with the states' Compact-imposed duties of non-interference with Project deliveries to Elephant Butte Irrigation District (EBID) in southern New Mexico and EP#1 in Texas. The only situation in which intra-district operations may be relevant to the Compact duty of non-interference is if EP#1's operational actions have a hydrologic connection to New Mexico such that Project deliveries there might be adversely affected by how EP#1 operates its intra-district delivery system. Accordingly, evidence of EP#1 intra-district operations should be excluded unless it is accompanied by plausible testimony that such operations have a hydrologic connection to Project deliveries in New Mexico.

Contrary to what New Mexico says, Texas is not seeking to exclude "all evidence" of Texas intra-district operations, and Texas's argument is not based on the position that there can never be evidence of a hydrologic link between intra-district operations in Texas and Project deliveries in New Mexico. As to the latter, if New Mexico can proffer plausible evidence of a hydrologic connection between Texas intra-district operations and Project deliveries in New Mexico, evidence that Texas would dispute at trial, that particular evidence would not be subject to the in limine exclusion Texas seeks.

Based on the disclosures and evidence developed during discovery, New Mexico will be unable to proffer plausible evidence of that sort. No plausible evidence has come to light thus far of a hydrologic connection to Project deliveries in New Mexico with Texas intra-district operations involving operation of the American Canal Extension (ACE), use of effluent from City of El Paso wastewater treatment plants, usage related to drain flows in Texas, or discharge of water from EP1 downstream to Hudspeth County. These components of EP#1 operations in Texas have nothing to do with the Compact and New Mexico's obligations under it as determined in the summary judgment ruling. Moreover, EP#1's intra-district operations have nothing to do with the Compact issues set for trial because they do not implicate Texas in any way.

Neither Texas nor EP#1 delivers any Project water to New Mexico. The programmatic nature of the Compact apportionment, as determined in Docket No. 503, means that the Compact delivery task is essentially complete at the San Marcial gauge, subject only to New Mexico's duty of non-interference below Elephant Butte. As far as Article IV Compact obligations are concerned, from Elephant Butte onward, the program to which the apportionment is made—that is, the Rio Grande Project—takes over to do its job under federal reclamation laws.

EBID is the entity under New Mexico law that is charged with the administration and use of the New Mexico apportionment south of Elephant Butte Reservoir. The relevant agreements, accounting, and other issues New Mexico complains of have been agreed to by EBID. New Mexico's claims are not Rio Grande Compact acclaims for actions by Texas. To the extent New Mexico complains about "[o]perations in Texas," (NM Response at 4, 5, and 6) that is not an analog to operations by Texas, rather the

subject matter of New Mexico's claims are Reclamation and its contractors. Again, Texas has no control over that operation and has not sanctioned those operations in any way.

New Mexico's response obscures the difference between the two quite different legal regimes, one under the Compact, the other under federal reclamation law. Texas's Motion in Limine 1 seeks to clarify the difference and focus the trial on issues concerning the Compact instead of ongoing disputes about reclamation law. New Mexico's melding of the two is legally incorrect. It also highlights how important it is that the Special Master grant this motion. It is the only way that the record being made for the Supreme Court to review can provide useful clarity.

B. <u>Motion in Limine 2: to exclude the introduction of evidence or argument at trial by New Mexico of a 1938 or "baseline" condition</u>

Texas's Motion in Limine 2 requests that the Special Master exclude any evidence offering an alternate theory regarding the scope of the 1938 or "baseline condition," as defined in the Order, because New Mexico has not offered any facts in discovery relating to the 1938 or "baseline" condition, except outright denial of its existence. New Mexico cherry picks, mischaracterizes, and avoids the most relevant statement the Special Master made in the Order in an attempt to argue that the Special Master did not confirm the existence of a baseline condition. *See* NM Response at 11. But the Special Master explicitly determined that "the compacting states intended to protect not merely water deliveries in the Reservoir, but also a baseline level of Project operations generally reflected in Project operations prior to Compact formation," which includes "at a minimum, the protection of return flows to effectuate the Compact's apportionment. *See* Texas MIL at 6; Docket No. 503 at 5-6.

The fact remains that the only position stated by New Mexico is the Federal Rule of Civil Procedure Rule 30(b)(6) deposition of Estevan Lopez where he stated, on behalf of New Mexico, that there is no 1938 condition. *See*, e.g., Estevan Lopez 30(b)(6) Depo., 9/18/2020, 76:16-77:21 ("A. There is no constraint below Elephant Butte. There is no 1938 . . . depletion condition. There is no such condition placed in the Compact for the section below Elephant Butte."). Beyond that testimony and outright denial of the 1938 or "baseline" condition, New Mexico cannot point to any other disclosure of an alternative theory of the condition. New Mexico has stated that there is no 1938 or "baseline" condition, and never offered in discovery a theory or statement on an alternative to the condition. From an evidentiary perspective, it would be contrary to Rule 26 of the Federal Rules of Civil Procedure to allow New Mexico to present a new theory at trial. The Special Master affirmatively decided that there is a 1938 or "baseline" condition. New Mexico's denial of existence throughout discovery does not now allow it to create and present an alternate theory at the time of trial.

New Mexico's Response does not dispute that Mr. Lopez testified, on behalf of New Mexico, that there was no 1938 Condition. However, New Mexico states that "[i]n line with the robust body of evidence, New Mexico intends to present a comprehensive case at trial on the appropriate baseline condition." NM Response at 12. But, to date, in the years of discovery that has been conducted New Mexico has not yet provided anything related to a bassline condition whether it be the 1938 condition otherwise. New Mexico ignores that the Order says there is a "baseline" condition and refuses to concede that it lost on that issue in the summary judgement briefing.

Texas requests that the Special Master exclude any evidence offering an alternative theory regarding the scope of the 1938 or "baseline condition," as defined by the Special Master in the May 21, 2021 Order, because New Mexico has not offered any facts in discovery relating to the 1938 or "baseline" condition, except outright denial of its existence, which the Special Master affirmatively refuted in the May 21, 2021 Order.

C. Motion in Limine 3: to exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico

Texas's Motion in Limine 3 requests that the Special Master enter an order to exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico. Despite the fact that New Mexico included a claim for damages in its Counterclaims (*see* TX MIL at 7, citing Docket No. 99 at 33 (New Mexico's Prayer for Relief)), New Mexico cannot now escape that it did not disclose an expert to describe the alleged injury and, ultimately quantify, the damages allegedly sustained by New Mexico. Texas requests a simple ruling, in accord with Rule 26 of the Federal Rules of Civil Procedure, that arises from New Mexico's failure to disclose an expert or other witness to describe the injury or quantify damages claimed in its Counterclaims.

New Mexico suggests that the "States may quibble over the scope of Dr. Hoag's testimony," however the scope of any of potential testimony from Dr. Hoag is clear: it is limited to the subjects raised in his expert reports. NM Response at 14 and 15. New Mexico does not dispute that Dr. Hoag's reports are limited to a critique of Texas expert Dr. David Sunding's work. Dr. Hoag's reports speak for themselves, and Dr. Hoag offers

no evidence about any injury to New Mexico.[3] New Mexico's discussion of monetary damages and the next phase of this litigation dealing with remedies obfuscates the issue. Texas's motion in limine addressed injury and the fact is that New Mexico has never disclosed their case with respect to injury. Although it may be enough to show that a violation of the Rio Grande Compact is itself an injury, that is a legal issue and not a factual issue, which is the subject of Texas's motion in limine.

New Mexico does acknowledge that "Rule 26 will ensure that Dr. Hoag limits his testimony to the subjects he fairly disclosed." NM Response at 15. Thus, New Mexico actually concedes the crux of Texas's motion: Dr. Hoag cannot testify about injury because it was not fairly disclosed. None of the other witnesses disclosed by New Mexico were ever disclosed to prove injury to New Mexico. New Mexico also proposes to introduce percipient witnesses for the purpose of explaining injury to New Mexico. But none of those witnesses were disclosed for that purpose.[4] New Mexico failed to properly disclose injury witnesses and cannot now do so at the time of trial.

Finally, New Mexico argues that Estevan Lopez and Peggy Barroll may testify regarding New Mexico's alleged injuries. But they were not disclosed for that purpose. Dr. Barroll's reports focus almost exclusively on the 2008 Rio Grande Project Operating Agreement (OA), including what the OA does and its consequences. Texas has nothing to do with OA, and any alleged injury discussed by Dr. Barroll is injury caused by

[3] Excerpts from Dr. Dana Hoag's expert reports, including the tables of contents which summarize the scope of his opinions, are attached as Exhibit A to the Declaration of Richard S. Deitchman in Support of the State of Texas's Reply in Support of Motions in Limine (Deitchman Reply Decl.).

[4] New Mexico's Rule 26 disclosures, which do not include the disclosure of any witness for the purpose of proof of injury or damages, are attached as Exhibit B to the Deitchman Reply Decl.

Reclamation, EP1, and/or EBID, not Texas. To the extent New Mexico's focus is the OA, that is not the subject of this Compact litigation, and moreover, any allegations relating to the OA do not address Texas, which is not a party to the OA.

For all this reasons, Texas requests that the Special Master enter an order to exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico.

D. Motion in Limine 4: to exclude the introduction of evidence or argument at trial relating to New Mexico's Fourth Counterclaim

Texas's Motion in Limine 4 requests that the Special Master exclude evidence or argument at trial relating to New Mexico's Fourth Counterclaim. As explained in the Texas MILs, the gravamen of the Fourth Counterclaim is that Texas has been unjustly enriched by the implementation of the 2008 OA because Texas, through EP#1, received "more water than it is entitled to under the Compact." *See* Texas MILs at 9.

Motion in Limine 4 is not a dispositive motion in disguise. Notwithstanding that Texas does not believe that the elements of unjust enrichment may be proven, Texas acknowledges that New Mexico may address allegations of unjust enrichment in the remedies phase of the case. Motion in limine 4, however, addresses the commonsense conclusion that there cannot be liability on the part of Texas for New Mexico's Fourth Counterclaim because of the actions complained about are the actions of others, including EBID, EP#1, and Reclamation. As a matter of law, Texas can only be liable for its actions or actions that it sanctioned. There is no allegation against Texas except alleged groundwater pumping impact related to the Hueco Bolson. Evidence and testimony on that question is not a part of the Texas MILs. While Texas submits that New Mexico cannot prove any impact, New Mexico can attempt to prove that Hueco pumping has

caused them harm, but there is no way that Texas can be the cause of "changes in Project operations and accounting." NM Response at 5. Texas is a stranger to Project operations and accounting. Testimony about those issues is not relevant to a claim against Texas and should be excluded.

New Mexico's Response acknowledges that in order to prove harm caused by Texas, they must describe an action by Texas. New Mexico admits that "New Mexico is entitled to present evidence showing that *Texas's actions and inactions* have caused Texas to receive more than its share of Compact water." NM Response at 21 (emphasis added). Motion in limine 4 addresses New Mexico's admission: the actions complained of in the Fourth Counterclaim are not Texas's actions. Texas has no control over the operation of the Project. It is not a party to the OA any more than New Mexico. If Project operations violate the Compact, New Mexico's remedy is in another court and against other parties, not the State of Texas. On the other hand, the Texas complaint is directly focused on actions by New Mexico, not others, that authorized and permitted the pumping of groundwater that has intercepted and interfered with Texas getting its apportionment.

The Fourth Counterclaim ultimately seeks to attach liability to Texas for "relying on the United States" in its operation of the Project. This is not an actionable claim: Texas cannot be held liable for "receiving water" from the Project or "claiming a right to receive water" from the Project. New Mexico should be precluded from proffering evidence and testimony in the trial on its Fourth Counterclaim, including whether operations under the 2008 OA have unjustly benefitted Texas, an agreement to which neither Texas nor New Mexico are parties, and subjected Texas to some kind of monetary

offset for the damages Texas has suffered because of New Mexico's Compact violations over the years.

E. Motion in Limine 5: to exclude the introduction of evidence at trial of improper legal opinions

Texas's Motion in Limine 5 requests that the Special Master issue an order excluding the introduction of improper legal opinion evidence at trial. In particular, New Mexico expert Estevan Lopez, P.E., an engineer, has previously testified on topics admittedly outside the scope of his area of expertise, including legal conclusions on the meaning of Rio Grande Compact terms. *See* Texas MILs at 14-15. In response, New Mexico incorporates by reference arguments made in response to the United States' legal opinions motion in limine. Texas incorporates by this reference arguments raised in the United States' Legal Opinions Motion in Limine and its reply in support of that motion. Mr. Lopez assured the parties at his deposition that he is not "an expert on law or legal questions." *See* Texas MILs at 15. New Mexico cannot offer him as a witness to testify on the meaning of Compact terms, and the Special Master should exclude improper legal opinion evidence.

F. Motion in Limine 6: to exclude the introduction of evidence at trial of expert opinions outside the scope of the proffered expert's area of expertise

Texas's Motion in Limine 6 requests exclusion of expert opinions outside the proffered expert's area of expertise. New Mexico's response provides a vague assurance that "Texas can rest assured that none of New Mexico's witnesses will be offering opinions outside of their knowledge and expertise." NM Response at 22. The assurance, however, does not stand up to New Mexico's reports and disclosures which indicate that

they do intend to have witnesses testify outside of their expertise and this is the focus on Texas's motion.

Texas will certainly object to improper testimony offered at the time of trial, but some of the anticipated testimony is clearly objectionable now, and that is the subject of this motion in limine. As explained in the Texas MILs, Dr. Barroll testified at multiple depositions that references to and interpretation of the Compact is outside her expertise. *See* Texas MILs at 16 (citing Dr. Barroll's deposition testimony). Mr. Lopez testified that legal conclusions, historical information, and statements regarding the operation of the Rio Grande Project are all subjects that are outside the scope of his expertise. *See id.* at 17 (citing Mr. Lopez's deposition testimony). Evidence outside an expert's area of expertise is both unreliable and irrelevant to the matters set for trial. New Mexico's experts have drafted reports and provided deposition testimony on matters that they admit are outside their expertise and New Mexico's Response does not specifically address any of these areas of anticipated testimony. The Special Master should grant motion in limine 6 and limit expert testimony to the proffered experts' area of expertise.

III. CONCLUSION

For all these reasons, the Special Master should grant all the Texas MILs:

- Motion in Limine 1: exclude the introduction of evidence or argument at trial relating to factual issues finally adjudicated in the Special Master's May 21, 2021 Order, including intra-district operations in Texas;
- Motion in Limine 2: exclude the introduction of evidence or argument at trial by the State of New Mexico of a 1938 or "baseline" condition;
- Motion in Limine 3: exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico;
- Motion in Limine 4: exclude the introduction of evidence or argument at trial relating to New Mexico's Fourth Counterclaim;

- Motion in Limine 5: exclude the introduction of evidence at trial of improper legal opinions; and

- Motion in Limine 6: exclude the introduction of evidence at trial of expert opinions outside the scope of the proffered expert's area of expertise.

Dated: August 12, 2021

Respectfully submitted,

s/ Stuart L. Somach

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*

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CERTIFICATE OF SERVICE

This is to certify that on this 12th day of August, 2021, I caused a true and correct copy of The State of Texas's Reply in Support of The State of Texas's Motions in Limine to be served upon all parties and *amici curiae*, by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was effected by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Respectfully submitted,

Dated: August 12, 2021

Corene E. Rodder

SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE

SPECIAL MASTER

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

PARTIES
(Service via Electronic Mail)

PARTIES[5]

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

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

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

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

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

AMICI

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

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

New Mexico State University	**JOHN W. UTTON*** UTTON & KERY, P.A. P.O. Box 2386 Santa Fe, NM 87504 General Counsel Hadley Hall Room 132 2850 Weddell Road Las Cruces, NM 88003	john@uttonkery.com (505) 699-1445 gencounsel@nmsu.edu (575) 646-2446
State of Kansas	**DEREK SCHMIDT** Attorney General of Kansas **JEFFREY A. CHANAY** Chief Deputy Attorney General **TOBY CROUSE*** Solicitor General of Kansas **BRYAN C. CLARK** Assistant Solicitor General **DWIGHT R. CARSWELL** Assistant Solicitor General 120 S.W. 10th Ave., 2nd Floor Topeka, KS 66612	 toby.crouse@ag.ks.gov (785) 296-2215 bryan.clark@ag.ks.gov
Southern Rio Grande Diversified Crop Farmers Association	**ARNOLD J. OLSEN*** HENNIGHAUSEN OLSEN & McCREA, L.L.P. P. O. Box 1415 Roswell, NM 88202-1415 **Malina Kauai – Paralegal** **Rochelle Bartlett – Legal Assistant**	ajolsen@h2olawyers.com (575) 624-2463 mkauai@h2olawyers.com rbartlett@h2olawyers.com