

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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**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**

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HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
SUSAN BARELA  
Special Assistant Attorneys General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

**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**

COMES NOW the State of New Mexico (“New Mexico”) and moves for partial summary judgment excluding damages for the State of Texas (“Texas”) in any year in which notice was not provided to New Mexico that Texas was not receiving sufficient water to satisfy the demands of its water users.

There is no genuine dispute of material fact, and the State of New Mexico is entitled to judgment as a matter of law. As more fully stated in the accompanying brief in support, the grounds for this motion are as follows:

1. The Compact is “inextricably intertwined” with the Project and relies on the Project to divide Rio Grande waters between lands in New Mexico and Texas. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).
2. Because the Compact relies on an existing Reclamation project to apportion water, the rules and operations governing Reclamation projects form background principles that inform the meaning of the Compact.
3. One of the background principles of Reclamation project operations that was incorporated into the Compact is the requirement that downstream appropriators notify upstream appropriators when they are not receiving sufficient water. *Worley v. U.S. Borax & Chemical Co.*, 428 P.2d 651, 654 (N.M. 1967).
4. The notice requirement was found to apply to an interstate compact in *Montana v. Wyoming*. See 138 S. Ct. 758, 758 (2018) (mem.).
5. Without notice, New Mexico has no way of knowing whether Texas water users are receiving all of the water they ordered.

6. Texas has never provided New Mexico notice during the irrigation season that its water users were not receiving Project orders to meet demands.
7. The United States provided notice to New Mexico in only one year (2012) that a New Mexico water user was allegedly preventing Project orders from reaching Texas.

WHEREFORE, New Mexico requests partial summary judgment that Texas's claim for damages are precluded in any year when notice was not provided to New Mexico of Texas's alleged shortage of Project deliveries.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

JEFFREY J. WECHSLER  
Special Assistant Attorney General  
MONTGOMERY & ANDREWS, P.A.  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[jwechsler@montand.com](mailto:jwechsler@montand.com)

JOHN B. DRAPER  
Special Assistant Attorney General  
CORINNE E. ATTON  
DRAPER & DRAPER LLC  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[john.draper@draperllc.com](mailto:john.draper@draperllc.com)  
505-570-4591

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
SUSAN BARELA  
Special Assistant Attorneys General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

BENNETT W. RALEY  
LISA M. THOMPSON  
MICHAEL A. KOPP  
Special Assistant Attorneys General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
303-861-1963

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NEW MEXICO’S MOTION FOR PARTIAL SUMMARY JUDGMENT**

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All exhibits identified in this brief (“NM-EX \_\_”) are provided in the Exhibits Compendium submitted contemporaneously. They may also be downloaded from the following address: <https://ws.onehub.com/folders/prxrgg18>.

## **INTRODUCTION**

Texas complains in this case that New Mexico has violated the Rio Grande Compact (“Compact”) and that due to actions in New Mexico, Texas did not receive its full Compact apportionment through Rio Grande Project deliveries, thereby causing damages. However, New Mexico received no notice from Texas before this litigation that Texas water users were not receiving Project orders to meet demands. In fact, New Mexico has received only one communication notifying it of a concern regarding water diversions in New Mexico possibly reducing Project orders to Texas: a 2012 communication from Reclamation notifying New Mexico of possible surface diversions in New Mexico that were claimed to be reducing Project orders to Texas. The New Mexico Office of the State Engineer (“State Engineer”) subsequently investigated the concern of the United States, addressed the issue, and no further concerns were raised.

Other than this single, isolated communication, which was investigated and resolved by New Mexico, neither Texas nor the United States ever requested that New Mexico curtail any New Mexico water rights, whether surface or groundwater. Nor did Texas or the United States notify New Mexico that Reclamation was unable in any year to deliver Texas’s Compact apportionment to satisfy demands in Texas. In the absence of such notice, Texas is precluded from claiming damages.

## **STATEMENT OF UNDISPUTED FACTS**

### **I. Relationship between the Rio Grande Compact and the Rio Grande Project**

1. One purpose of the Rio Grande Compact, among others, was to protect the operation of the Rio Grande Project. *See* NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:8-17; NM-EX 204, D’Antonio Dep. (Vol. II) (June 25, 2020), 163:7-13; NM-EX 217, Lopez Dep. (Vol. I) (July 6, 2020), 137:20-138:3; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 66:14-15; NM-EX 005, Stevens Decl. ¶ 10.



2. Reclamation operates Elephant Butte Reservoir as part of the principal storage infrastructure for the Rio Grande Project. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 56:20-58:3.
3. Once delivered to the Elephant Butte Reservoir, Project water is allocated to the Rio Grande Project beneficiaries in southern New Mexico and in Texas. *See* NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:22-39:6. The Project water users are located in Elephant Butte Irrigation District (“EBID”) and El Paso County Water Improvement District No. 1 (“EPCWID”) (referred to jointly as “Districts”). *See* Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014); Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); NM-EX 112, Jennifer Stevens, Ph.D., *The History of Interstate Water Use on the Rio Grande: 1890-1955*, 18 (Oct. 28, 2019) (“Stevens Rep.”); NM-EX 111, Scott A. Miltenberger, *Expert Report of Scott A. Miltenberger, Ph. D.*, 9 (May 31, 2019) (“Miltenberger Rep.”).
4. Project Allocations are the amounts of Project Supply that each District is entitled to order each year from Project supply and the amount Mexico is entitled to receive by treaty. NM-EX 001, Barroll Decl., ¶ 18; NM-EX 307, Distribution of the Waters of the Rio Grande, Mex.-U.S., May 21, 1906, 34 Stat. 2953; NM-EX 529, Bureau of Reclamation, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 4 (Sept. 30, 2016).
5. On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts (EPCWID and EBID) entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938. NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (“1938 Downstream Contract”). The 1938 Downstream Contract states that in the event of a shortage of water “the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].” *Id.*; NM-EX 001, Barroll Decl., ¶ 19. The Court has found that the “Downstream Contracts,” including the 1938 Downstream Contract, are “inextricably intertwined with” the Project and the Compact. *Texas v. New Mexico*, 138 S. Ct. at 959.
6. The Rio Grande Compact incorporates the Rio Grande Project as the mechanism by which water users in Texas (EPCWID) receive the State’s equitable apportionment of the waters of the Rio Grande. *See* NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 14:22-16:10; Texas’s Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); *see also* First Interim Report of the Special Master, 194-95 (Feb. 9, 2017); Texas’s Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 18 (July 2017).

## **II. Relationship between Prior Appropriation Doctrine and the Rio Grande Project**

7. To support the Rio Grande Project, Reclamation notified the State Engineer for the Territory of New Mexico that it intended to appropriate all “unappropriated waters of the Rio

Grande” at Elephant Butte in 1908. *See* NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger Rep. 9-10.

8. From that point forward, the New Mexico State Engineer considered the surface waters of the Rio Grande below Elephant Butte Reservoir to be fully appropriated. *See* NM-EX 002, D’Antonio Decl. ¶ 9; NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 424:15-425:4, 426:13-18; NM-EX 106, Nicolai Kryloff, *Context of the 1938 Rio Grande Compact*, 26-27 (May 31, 2019) (“Kryloff Rep.”); NM-EX 205, D’Antonio Dep. (Vol. III) (June 26, 2020), 274:1-5.

9. The Rio Grande Project is a federal Reclamation Project, therefore neither Texas nor New Mexico have a direct role in the operation of the Project. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 63:18-69:2; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 89:4-11, 172:13-22.

10. Specifically, although New Mexico retains administrative jurisdiction over the surface water of the Rio Grande Project, the New Mexico State Engineer has no involvement in day-to-day Project operations, including orders and deliveries. NM-EX 206, D’Antonio Dep. (Vol. IV) (Aug. 14, 2020), 93:12-96:7.

### **III. Operation of the Rio Grande Project**

11. While Project construction was ongoing, the Reclamation Service began water deliveries through the Project in 1915. *See* NM-EX 404, Robert Autobee, United States Bureau of Reclamation, *Rio Grande Project*, at 12 (1994); NM-EX 311, United States Reclamation Service, *Project History Rio Grande Project Year 1915*, 137-141.

12. From inception of the Project until 1951, Reclamation administered the Rio Grande Project as a single unit to deliver water directly to farm turnouts in both States on the basis of individual farm orders. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 58:6-18; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 107, Estevan R. Lopez, *Expert Report of Estevan R. Lopez, P.E.*, 25 (Oct. 31, 2019) (“Lopez Rep.”).

13. The understanding of the compacting States was that Reclamation would continue to operate the Project in this manner. NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938) (“Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent agency.”); NM-EX 327, J.H. Bliss, *Provisions of the Rio Grande Compact*, 1 (Apr. 2, 1938) (“The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit.”); NM-EX 112, Stevens Rep.72.

14. Between 1951 and 1979, Reclamation would perform an annual assessment of available Project supply to determine whether a full or partial allocation would be made. Reclamation would announce the allocation figures to individual farmers through the irrigation districts. Then, individual farmers retained discretion to order Project deliveries up to the amount of their

respective allocations. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:19-59:11.

15. During this period, Reclamation operated the Project as a single unit and on an equal per-acre allocations to all beneficiaries of the Project. *See* NM-EX 100, Barroll Rep., 32; NM-EX 216, Lopez Dep. (Feb. 26, 2020), 29:1-9; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18.

16. Reclamation also maintained the Districts' annual allocation accounting. Reclamation tracked the amount of surface water delivered to individual farm turnouts and assessed these amounts against the farmers' respective allocations. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 42:15-43:4, 58:6-59:11; NM-EX 100, Barroll Rep. 32-33; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of Reclamation, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 5 (Sept. 30, 2016).

17. In 1979, Reclamation transferred ownership of the canals and laterals to the Districts (EBID and EPCWID). In the period thereafter, Reclamation made allocations to the District river diversions, rather than to individual farmers, and the Districts assumed responsibility for delivery of the Project water from their respective diversion points to individual farm turnouts. *See* NM-EX 001, Barroll Decl. ¶ 21; NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 100, Barroll Rep. 8, 33.

18. Reclamation retained, in the period after 1979, the responsibility to account for the total deliveries to each District (EBID and EPCWID) and to Mexico at their respective diversion headings in a given year. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 31:13-23, 49:3-11. From 1979 through 2005, Reclamation continued to operate the Project as a single unit on an equal amount of water per acre basis.

19. Reclamation relies on the Districts to monitor and report the actual diversions that each takes at its diversion points from the Rio Grande. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 49:20-50:12.

20. Reclamation compiles its accounting of the Districts' respective Project allocation and delivery charges on a monthly basis. *See* NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 215:23-216:16; NM-EX 221, Reyes Dep. (Nov. 16, 2018), 65:8-66:8.

21. In operation of the Rio Grande Project, Reclamation is responsible to control releases of Project supply from Elephant Butte and Caballo reservoirs to assure delivery of all ordered water to the canal diversions. This function includes monitoring the river to determine gains and losses throughout the river reaches between stream gages. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 34:12-35:5.

22. In order to calibrate releases of Project supply from Caballo and Elephant Butte reservoirs into the Rio Grande, Reclamation takes delivery orders from each District and makes appropriate reservoir release adjustments on a daily basis. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 64:3-15.

23. To facilitate this process, the Districts take water orders from their respective constituents and transmit total orders to Reclamation. *See* NM-EX 208, Esslinger Dep. (Vol. II), 57:4-58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20; NM-EX 001, Barroll Decl. ¶ 21.

24. Once Reclamation delivers water to a District's diversion point, the District administers the conveyance of that water to individual farm turnouts and accounts for delivery of the water in satisfaction of the farmers' respective orders. *See* NM-EX 208, Esslinger Dep. (Vol. II) (Aug. 18, 2020), 56:19-58:23, 60:22-62:7; NM-EX 223, Rios Dep., 31:4-6, 33:10-14.

25. Following the 2008 Operating Agreement, among other changes, the Districts assumed from Reclamation the responsibility to calculate the actual Project release as a function of their total daily orders. *See* NM-EX 207, Esslinger Dep. (Vol. I) (Aug. 17, 2020), 122:4-9; NM-EX 221, Reyes Dep. (Nov. 16, 2008), 23:20-24:18; NM-EX 001, Barroll Decl. ¶ 21.

#### **IV. Rio Grande Project Reporting**

26. Reclamation compiles an annual written report to the Rio Grande Compact Commission and gives an annual oral report at the Rio Grande Compact Commission meeting regarding operation of the Rio Grande Project. These reports contain general, annualized data concerning the operation of the Project, such as the total amount of release from Project Storage, the amount of water in Project Storage, and the annual allocations to each district. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 44:6-45:4, 102:21-103:6; NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 209:20-210:14. *E.g.*, NM-EX 516, Bureau of Reclamation, *Calendar Year 2009 Report to the Rio Grande Compact Commission*, 59-67 (Mar. 2010); NM-EX 003, Lopez Decl. ¶¶ 14-15.

27. Reclamation also provides to the State of New Mexico courtesy copies of periodic reports concerning Rio Grande Project operations, including reservoir elevations, flow readings, and storage transfers between reservoirs. *See* NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 220:2-222:4. *E.g.*, NM-EX 513, Letter from Filiberto Cortez, Manager El Paso Field Division, Bureau of Reclamation, to Water Accounting Division, U.S. Section, International Boundary Water Commission (Sept. 29, 2009); NM-EX 514, Letter from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Lieutenant Col. Kimberly Colloton, District Engineer, Army Corps of Engineers (Sept. 29, 2009).

28. New Mexico does not, however, receive daily operation information such as the daily release amount, the order amounts, or the timing of releases to satisfy orders. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 114:6-22; NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; NM-EX 100, Barroll Rep., 47; NM-EX 107, Lopez Rep. 73 ("Historically, Reclamation information and data about Project operations has not routinely been shared with the States.")

29. Likewise, New Mexico does not receive any routine notice that any specific water order, whether at the district or individual farmer level, has or has not been filled. NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.

30. Accordingly, New Mexico has no means to know, at any given time, what proportion of the water in the Rio Grande below Elephant Butte Reservoir is destined for delivery to EBID,

EPCWID, or Mexico. NM-EX 002, D’Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.

31. Further, New Mexico has no means to know, at any given time, whether the Rio Grande Project releases are in fact delivered to Texas in satisfaction of EPCWID orders. NM-EX 002, D’Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; *see also* NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 180:14-181:7.

32. Conversely, to the extent that any amount of water released from Project supply pursuant to a specific order is intercepted prior to delivery, New Mexico would have no basis to know of a shortage to either District without explicit notice. NM-EX 002, D’Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.

## **V. Absence of Shortage Notifications**

33. From 1938 through the inception of this litigation, New Mexico did not receive any notice, with the potential exception of one complaint concerning surface water diversions (discussed below), whether from Reclamation, Texas, EBID, or EPCWID, that the conduct of water users in New Mexico prevented the United States from making delivery of Project water called for by Texas (EPCWID). NM-EX 002, D’Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 16; *see* Ex 218, Lopez Dep. (Vol. II) (July 7, 2020), 140:13-141:13; Ex. 204, D’Antonio Dep. (Vol. II) (June 25, 2020), 169:1-7.

34. Filiberto Cortez, El Paso Field Division manager for Reclamation, testified that Reclamation has only made one communication to New Mexico that notified New Mexico of concerns regarding water use in New Mexico potentially impacting Project deliveries. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 111:13-112:10.

35. Specifically, in April 2012, Reclamation informed the New Mexico Office of the State Engineer that the Districts and Reclamation had identified a number of river pumps that were “impacting the deliveries” from the Rio Grande Project to EPCWID and Mexico. *See* NM-EX 521, Email from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Rolf Schmidt-Peterson, Rio Grande Bureau Basin Manager, N.M. Interstate Stream Comm’n (Apr. 11, 2012).

36. The New Mexico State Engineer performed an investigation of the water pumps at issue and responded on September 21, 2012. The investigation concluded that all but two of the sites were operating in compliance with adjudicated water rights that are senior to the Project’s or approved groundwater withdrawal permits. With regard to the remaining two sites, the investigation concluded that the pumps in question were no longer operable, and it was not possible to determine if any diversion occurred at either site. *See* NM-EX 523, Letter from Scott A. Verhines, State Engineer, State of N.M., to Ed Drusina, Comm’r, Int’l Boundary and Water Comm’n, and Mike Hamman, Albuquerque Area Manager, U.S. Bureau of Reclamation (Sept. 21, 2012).

37. The New Mexico State Engineer further invited Reclamation to “continue to notify” the State of any “potential unlawful diversions” so that the State Engineer could “initiate appropriate water administration actions, if necessary, to prevent the unlawful diversion of water.” *Id.*

38. Following this invitation, Reclamation made no further reports to the New Mexico State Engineer concerning improper surface water diversions. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 119:7-120:9.

39. Other than this surface pump investigation, Reclamation has not requested that New Mexico investigate or curtail any illegal water use, whether surface or groundwater. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 113:11-18.

40. Further, Reclamation has not informed New Mexico that it was unable in any year to deliver Project water that Texas (EPCWID) ordered due to the actions of New Mexico water users. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 114:23-115:7. NM-EX 002, D’Antonio Decl. ¶ 19.

41. Likewise, Texas has not, through the Rio Grande Compact Commission, provided any notification that Texas’s Project deliveries were shorted in any year. *See* NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020) 192:10-193:2. NM-EX 002, D’Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 17.

### **LEGAL STANDARD**

“Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993); *see also* Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). To put it another way, “summary judgment is warranted if the nonmovant fails to ‘make a showing sufficient to establish the existence of an element essential to [its] case.’” *Nebraska v. Wyoming*, 507 U.S. at 590 (quoting *Celotex Corp.*, 477 U.S. at 322 (alteration in original)). Federal Rule of Civil Procedure 56 and the Supreme Court’s precedents construing that Rule “serve as useful guides” in original actions. *Id.*; *see also* Sup. Ct. R. 17.2.

Where an interstate water compact requires the aggrieved state to provide notice to the offending state, but no such notice is provided in a given year, the offending state cannot be liable for damages accruing in such years. *See Montana v. Wyoming*, 138 S. Ct. at 759 (“Wyoming is not liable for flow or storage impacts that take place when a call is not in effect.”).

## ARGUMENT

### **I. THE COMPACT REQUIRES TEXAS OR THE UNITED STATES TO NOTIFY NEW MEXICO THAT TEXAS IS NOT RECEIVING PROJECT ORDERS TO SATISFY “IRRIGATION DEMANDS”**

The two questions of law presented in this brief are: (1) whether the Rio Grande Compact requires Texas to provide notice to New Mexico that Texas is not receiving Project orders to satisfy demands; and (2) whether Texas is entitled to damages in any year that Texas did not provide notice to New Mexico. As discussed below, the Court should grant partial summary judgment because the Compact incorporates background principles of Reclamation law, and these principles require the downstream state to notify the upstream state when it is not receiving its apportionment to meet “irrigation demands.”

#### **A. The Compact Incorporates Background Principles of Prior Appropriation**

The Court has held that that “[t]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts.” *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). This language was echoed by the Special Master when he expanded that “[t]he Project operates pursuant to reclamation law.” Order, 2 (Apr. 14, 2020) (Docket No. 340). Consistent with this guidance, the Parties have largely agreed that the Compact incorporates the Project as the vehicle for delivering water below Elephant Butte Reservoir. *See, e.g.*, Texas Complaint ¶¶ 4, 10 (Jan. 8, 2013); UMF ¶ 6.

Likewise, the Court may consider background principles of law in understanding compact terms. *See New Jersey v. New York*, 523 U.S. 767, 783 n.6 (1998) (“[T]he silence of the Compact was on the subject of settled law governing avulsion, which the parties’ silence showed no intent to modify”); *see also Montana v. Wyoming*, 563 U.S. 368, 375-80 (2011) (surveying development of the “no-injury rule as it exists in Montana and Wyoming,” to interpret compact language); *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 280-81 (1959) (reading “sue-and-be-sued”

clause of compact in context of the “federal climate of opinion which by that time had grown up around” the question of sovereign immunity). In light of the Compact’s reliance on the Project, the relevant background principles for the Rio Grande Compact include the laws and operations governing Reclamation and the Rio Grande Project.

Congress mandated in the Reclamation Act of 1902 that Reclamation shall “defer to the substance, as well as the form, of state water law” in the “control, appropriation, *use, or distribution of water.*” *California v. United States*, 438 U.S. 645, 674–75 (1978) (quoting Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383 (2018)) (emphasis added). That key mandate of the Reclamation Act was equally applicable to Congress’s authorization of the Rio Grande Project only three years later. *See An Act Relating to the Construction of a Dam and Reservoir on the Rio Grande, in New Mexico, for the Impounding of the Flood Waters of Said River for the Purposes of Irrigation*, Pub. L. No. 58-108, 33 Stat. 814 (extending the provisions of the Reclamation Act for purposes of building a federal project on the Rio Grande); *see also Kansas v. Colorado*, 206 U.S. 46, 94-96 (1907) (explaining that Section 8, requiring compliance with state law, was key to passage of the Reclamation Act).

Nothing in the Compact expressly overrides Congress’s command in the Reclamation Act to defer to the substance of state law. To the extent that an argument exists that the Compact impliedly displaced the substance of state law governing the delivery of Project water, the Court has emphasized that “repeals by implication are not favored and will not be presumed unless the intention of the legislature to repeal is clear and manifest.” *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 662 (2007) (citation, brackets, and quotation marks omitted). “In the absence of some affirmative showing of an intention to repeal, the only permissible justification for a repeal by implication is when the earlier and later statutes are irreconcilable.”



*Colo. River Water Conservation Dist. v. United States*, 424 U.S. 800, 808 (1976) (quoting *Morton v. Mancari*, 417 U.S. 535, 550 (1974)); accord *United States v. Cal. Water Res. Control Bd.*, 694 F.2d 1171, 1177 (9th Cir. 1982) (“[A] state limitation or condition on the federal management or control of a federally financed water project is valid unless it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme”).

Far from being irreconcilable, the Rio Grande Project Act and Rio Grande Compact are “inextricably intertwined” and interdependent. See *Texas v. New Mexico*, 138 S. Ct. at 959; see also Order, 2 (Apr. 14, 2020) (Docket No. 340); *Colo. River Water Conservation Dist.*, 424 U.S. at 809 (explaining that for federal water projects, “[t]here is no irreconcilability in the existence of concurrent state and federal jurisdiction”). The existence and operation of the Rio Grande Project and Reclamation law governing federal reclamation projects therefore forms the “background understanding” on the basis of which the Compact was drafted and executed. See *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013). It is implausible to assume the Compact was intended to sweep aside the very “background understanding” on which it was based. In short, the Compact does not disturb the bedrock principle of Reclamation that state law governs the administration of water below Elephant Butte, so long as that administration is in conformance with the Compact. Cf. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (apportionment agreed to by the state is binding on the citizens of that state).

**B. Downstream Water Users Are Required to Notify Upstream Water Users when They Are Receiving Insufficient Water**

New Mexico follows the prior appropriation doctrine, a doctrine enshrined in the State’s constitution and statutes. See *State ex rel. State Game Comm’n v. Red River Valley Co.*, 182 P.2d 421, 428 (N.M. 1945); N.M. Const. art. XVI, §§ 2, 3; NMSA 1978, §§ 72-1-1 to -12 (1876, as

amended through 2008). In that regard, New Mexico law and the Reclamation Act are in complete accord. *Compare* 43 U.S.C. § 372 (2018) (“The right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right.”) *with* NM Const. art. XVI § 2 (“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right.”) *and* § 3 (“Beneficial use shall be the basis, the measure and the limit of the right to the use of water.”).

Similarly, after its early recognition of riparian rights in surface waters, Texas began its transformation into a prior appropriation state beginning with the Irrigation Act of 1889. 1889 Tex. Gen. Laws 100. Texas’s Water Rights Adjudication Act of 1967, Tex. Water Code Ann. §§ 11.301-41 (West 2019), merged remaining riparian rights into appropriative rights and governs Texas’s surface water rights today through a prior appropriation permitting system. *See* G. Jarvis, *Essentials of Texas Water Resources* § 3.1 (2018) (recounting Texas’s early adoption of prior appropriation but long struggle to incorporate early riparian rights). Therefore, both States at the time the Compact was negotiated recognized the prior appropriation doctrine and its principles. It follows that with their reliance on the Project to deliver “the Compact’s equitable apportionment to Texas and part of New Mexico,” *Texas v. New Mexico*, 138 S. Ct. at 959, the States intended to rely upon the basic principles of the doctrine of appropriation.

The *sine qua non* of the prior appropriation doctrine is the protection of existing rights, and Reclamation law includes the background principles of prior appropriation and notice to other water users. *United States v. City of Las Cruces*, 289 F.3d 1170, 1176-77 (10th Cir. 2002). More specifically, in the water short Western United States, the doctrine of prior appropriation typically

requires senior appropriators to notify junior appropriators when they are short of water if they wish junior users to reduce their diversions. This notice may come in many forms, including a priority call, where the offending appropriator is notified that insufficient water is available to permit full enjoyment of a downstream senior appropriator's right. *See Worley v. U.S. Borax & Chem. Corp.*, 428 P.2d 651, 654-55 (N.M. 1967) (holding that downstream senior appropriator is entitled to use water within his appropriation and, if water is not reaching his diversion point, he must make his needs known . . . "the absence of such a demand [is] decisive."). The New Mexico Supreme Court in *Worley* determined the call requirement is not a mandate without a purpose, but serves the important function of avoiding the possibility that water will be wasted. *Id.* at 654. In that case, the plaintiff claimed his crop damages were caused by several junior diversions upstream that had caused shortages to the plaintiffs' diversions. *Id.* at 652-53. The court rejected plaintiff's claims on the grounds that downstream senior appropriators must "make [their] needs known" if water is not reaching their points of diversion. *Id.* (citing *Cook v. Hudson*, 103 P.2d 137, 146 (Mont. 1940); *Vogal v. Minn. Canal & Reservoir Co.*, 107 P. 1108 (Colo. 1910)). The court reasoned that basic principles of prior appropriation doctrine do not require a junior appropriator to let water flow by the point of diversion unless a downstream senior appropriator needs the water; otherwise water would be lost to beneficial use if it turned out that the downstream senior did not need it. *Id.* at 654.

The *Worley* decision is based on well-grounded principles of the prior appropriation doctrine. *See* David H. Getches, *Water Law in a Nutshell*, at 110 (2009) ("A senior cannot enforce a water right if a junior can prove that the senior would not put the water to a beneficial use . . . ."); *see also Cook v. Hudson*, 103 P.2d 137, 146 (Mont. 1940) (holding that a junior appropriator may use unused water subject to a priority right until "such time as the prior appropriator's needs

justify his demanding that the junior appropriator or appropriators give way to his superior claim”). Upon receiving notice, the junior appropriator must either reduce or cease use of his right and send the water downstream, or show why his use of the water is not the cause of the downstream senior appropriator’s deficiency. Before notice is provided, junior users have no means of knowing that a reduction in water diversions is necessary to protect the senior right.

### **C. Notice Has Been Required for an Interstate Compact**

The Supreme Court recently recognized that a compacting party alleging injury may be obligated to provide notice to the upstream state of the insufficient delivery in order to be liable for damages. *See Montana v. Wyoming*, 758, 758-59 (2018) (mem.) (“To protect pre-1950 appropriative rights under Article V(A) of the Compact, Montana must place a call. Wyoming is not liable for flow or storage impacts that take place when a call is not in effect.”) Such notice, according to the Court, “need not take any particular form, use any specific language, or be delivered by or to any particular official” but should be sufficient to place the upstream state on notice that the downstream state needs additional water. *Id.*

Much like the Yellowstone River Compact which requires Montana to provide notice to Wyoming when there is a shortage of Montana’s compact apportionment, the Rio Grande Compact requires Texas or the United States to provide similar notice to New Mexico. Not all interstate water compacts require notice, however. As Special Master Thompson remarked in *Montana v. Wyoming*, “Interstate compacts do not inherently require states to provide notice to each other when asserting their rights. States can be liable for failing to deliver water even when they are unaware of their compact obligation or disagree that they have an obligation.” Special Master’s

Second Interim Report, *Montana v. Wyoming*, No. 137 Original, at 47 (S. Ct., Dec. 29, 2014) (“*Montana* Second Report”).<sup>1</sup>

In *Montana v. Wyoming*, however, Special Master Thompson determined that Montana was required to notify Wyoming when it was experiencing a shortage under the Yellowstone River Compact (“Yellowstone Compact”). *Montana* Second Report at 58. In part, the Yellowstone Compact secures Montana’s apportionment by ensuring its pre-1950 water rights can “continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.” *See id.* at 14-15. This is not unlike the Rio Grande Compact, which incorporates the doctrine of appropriation through its reliance on the Rio Grande Project and the operations governing the Project.

Like the Rio Grande Compact, the Yellowstone Compact does not expressly contain a notice provision. Nonetheless, the notice requirement under the Yellowstone Compact flowed from the Compact’s incorporation of the doctrine of prior appropriation—which generally requires downstream seniors to place a “call” on upstream juniors before juniors may be liable for harm caused by their diversions—and on the pragmatic realities of the Yellowstone Compact’s allocation mechanism. *Id.* at 57. Absent notice, Special Master Thompson explained that the upstream state would have no way of knowing how much water the downstream state needed to satisfy its pre-1950 water rights. *Id.* at 53. Requiring the upstream states to guess when the downstream state needed additional water would have “invited substantial and unneeded waste.” *Id.* Providing notice gave the upstream state “the opportunity to provide additional water and thus reduce or avoid any injury.” *Id.*

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<sup>1</sup> Available at <https://www.supremecourt.gov/SpecMastRpt/SpecMastRpt.aspx>

Special Master Thompson also distinguished the Yellowstone Compact from those compacts where notice was not required. Those compacts “either specified set amounts of water to be delivered to the downstream state or guaranteed historical flows.” *Id.* at 58. For example, the Arkansas River Compact bars Colorado from materially depleting flows in “usable quantity or availability” at the state line, and the Pecos River Compact guarantees Texas “a quantity of water equivalent to that available to Texas under the 1947 condition.” Arkansas River Compact, 63 Stat. 145, art. IV-D (1949); Pecos River Compact, 68 Stat. 159, 160-165 (1949). Neither of those compacts require the downstream state to give notice of shortages. *See Montana Second Report* at 58. The Yellowstone Compact, by contrast, does not require the upstream state to deliver a specified amount to the state line but rather guarantees that the demands of the downstream state’s pre-1950 water rights will be fulfilled. *Id.* The Yellowstone Compact therefore requires some form of notice so the upstream state knows when the downstream state is not receiving enough water to fulfill those demands. *Id.*

In sum, notice may be required in an interstate compact where the compact delivers interstate waters based on demands of the downstream state, rather than a specific schedule of deliveries to the state line. Where delivery relies on the downstream state’s water demands, notice is necessary because the upstream state cannot otherwise assess its compact obligations or compliance, resulting in inefficiency, uncertainty, and waste.

The principles underlying the Yellowstone River Compact apply with equal force to the Rio Grande Compact. The Rio Grande Compact requires New Mexico to deliver into Elephant Butte Reservoir a portion of the annual measured Rio Grande streamflow at the Otowi Bridge. 53 Stat. 785, Art. IV. This component of New Mexico’s compact obligation does not require notice of shortages: New Mexico is readily able to determine its delivery obligation. But, this is distinct

from the area below Elephant Butte Reservoir where the Compact rights and obligations are created by water users in New Mexico and Texas ordering Project water in accordance with their demands. UMF ¶¶ 11-25. Indeed, the Compact dictates that water may only be released to satisfy “irrigation demands.” 53 Stat. 785, Art. I(l). New Mexico’s Compact obligations below Elephant Butte Reservoir are inherently determined by Texas’s varying demands for Project water—not a specific supply—and the operation of the Project is entrusted to and controlled by the United States. *Texas v. New Mexico*, 138 S. Ct. at 959; *see also* UMF ¶¶ 11-25. Thus, the same rationale articulated in *Montana v. Wyoming* applies to the Rio Grande Compact below Elephant Butte Reservoir.

**II. ABSENT NOTICE, NEW MEXICO HAS NO WAY OF UNDERSTANDING WHEN TEXAS WATER USERS ARE NOT RECEIVING SUFFICIENT WATER TO SATISFY “IRRIGATION DEMANDS”**

Given the Compact’s requirement to release water “in accordance with irrigation demands,” 53 Stat. 785, Art. I(l)), Reclamation has operated the Project based on demands for Project water. Prior to 1979, Reclamation would deliver Project water directly to farm headgates based on individual farmer orders; since 1979, Reclamation has delivered Project water to canal headings based on the District’s orders of water for the farmers. UMF ¶¶ 12, 14, 18-22. With the exception of water released for delivery to Mexico, Usable Water is not released from Elephant Butte or Caballo reservoirs unless ordered by the farmers, or now the Districts, and used to fulfill the needs of the irrigation Districts. UMF ¶¶ 12, 21.

New Mexico does not control these reservoir releases from the Project. UMF ¶¶ 9-10. The amount of water that Reclamation releases from the Project and delivered to Texas varies depending upon the demands and orders of EPCWID. UMF ¶¶ 23-24. When EPCWID needs Project water, it calls for that water from Reclamation, and if available, that water is released from the reservoirs. *Id.*

New Mexico does not have knowledge of the amount of water in the river committed to EBID or EPCWID at any given time. UMF ¶¶ 28- 29, 31. Nor does the Compact require that New Mexico be provided with real data regarding releases, as would be expected if New Mexico had a Compact obligation to monitor Project deliveries to EPCWID. UMF ¶¶ 26-28. In fact, although the Compact specifies the location of Compact gages, it does not require a Compact gage at the state line. 53 Stat. at 786-87. In sum, New Mexico has no way of knowing how much water should be delivered to Texas at any given time. UMF ¶¶ 28-32.

Project water deliveries are also subject to the control of the United States. UMF ¶¶ 22-25. At the time the Rio Grande Compact was negotiated and executed, the Project had been delivering water to the Lower Rio Grande basin in New Mexico and Texas for more than twenty years—a “fait accompli,” which “colored the whole Compact as between New Mexico and Texas.” *El Paso Cty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907 (D. Tex. 1955); *see also* UMF ¶¶ 11-12. The United States, not New Mexico, had day-to-day control over the Project’s operations, ensuring the proper delivery of Project water to irrigable lands in New Mexico and Texas pursuant to its contracts and federal Reclamation law. *See Ickes v. Fox*, 300 U.S. 82, 95 (1937) (clarifying the United States’ role pursuant to the Reclamation Act as responsible for the distribution of project water). As Texas’s Commissioner to the Compact explained in 1938:

Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent agency.

UMF ¶ 13; NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938).



For this reason, New Mexico and Texas have entrusted the United States with ensuring Compact delivery obligations are being met. UMF ¶ 9. The Court has already acknowledged this, describing the United States as “a sort of ‘agent’ of the Compact, charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico is, in fact, made.” *Texas v. New Mexico*, 138 S. Ct. at 959 (internal quotation marks omitted). According to the Court, “the United States had negotiated and approved the Downstream Contracts, in which it assumed a *legal responsibility* to deliver a certain amount of water to Texas.” *Id.* (emphasis added)

Furthermore, Project accounting details are not provided in a transparent manner to New Mexico and changes to accounting methods are not publicly documented. UMF ¶¶ 26-32. Therefore, absent notice, New Mexico would have no way of knowing if Texas was not receiving its apportionment.

In short, like the Yellowstone Compact in *Montana v. Wyoming*, a notice requirement for the Rio Grande Compact is a pragmatic necessity. Without a notice requirement, the Rio Grande Compact would invite inefficiency, uncertainty, and waste. Arguably, the United States, as the administrator in control of Project operations, is “in the best position to determine and know whether [Texas] was receiving enough water” to fulfill its irrigation demands on Project supply, and thus, its apportionment under the Compact. *See Montana* Second Report, at 53. In any event, New Mexico stands ready to respond to a notification that Texas water users are not receiving their Project orders to meet “irrigation demands.”

### **III. NEITHER TEXAS NOR THE UNITED STATES HAS PROVIDED NOTICE TO NEW MEXICO**

As discussed above, the United States informed New Mexico in 2012 that a New Mexico water user was impairing its ability to meet Project orders in 2012. New Mexico accepts that this

notice was sufficient to shift responsibility to New Mexico to investigate the claim and take action. A course that New Mexico diligently followed. UMF ¶¶ 36-37.

It is significant that the United States provided notice to New Mexico of potential water shortages to Texas in 2012. UMF ¶¶ 34-35. Yet, the United States has not informed New Mexico that it was unable in any other year to deliver water that was ordered by Texas. *See* UMF ¶¶ 38-40. Similarly, Texas has not, through the Rio Grande Compact Commission or otherwise, provided notice to New Mexico that it was not receiving Project orders to meet “irrigation demands.” *See* UMF ¶ 41. Had sufficient notice been given, New Mexico could have investigated and taken appropriate action to protect Project deliveries, as it did in 2012. UMF ¶¶ 36-37. In the absence of such notice, New Mexico cannot be liable for damages allegedly suffered by Texas. *Montana v. Wyoming*, 138 S. Ct. at 759 (“Wyoming is not liable for flow or storage impacts that take place when a call is not in effect.”); *See Worley*,<sup>2</sup> 428 P.2d at 654-55 (holding that junior appropriator cannot be held liable for senior appropriator’s shortage of water in the absence of a demand by the senior appropriator that sufficient water be allowed to reach his diversion point to satisfy his senior rights).

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<sup>2</sup> The Special Master in *Montana v. Wyoming* relied heavily on *Worley*. *See, e.g., Montana v. Wyoming*, Second Interim Report at 49-51.

**CONCLUSION**

For the reasons discussed above, the Special Master should grant partial summary judgment, and preclude Texas from claiming damages in any year in which Texas failed to give New Mexico adequate notice of its alleged shortages.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
Special Assistant Attorney General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

JEFFREY J. WECHSLER  
Special Assistant Attorney General  
MONTGOMERY & ANDREWS, P.A.  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[jwechsler@montand.com](mailto:jwechsler@montand.com)

BENNETT W. RALEY  
LISA M. THOMPSON  
MICHAEL A. KOPP  
Special Assistant Attorneys General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
303-861-1963

JOHN B. DRAPER  
Special Assistant Attorney General  
CORINNE E. ATTON  
DRAPER & DRAPER LLC  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[john.draper@draperllc.com](mailto:john.draper@draperllc.com)  
505-570-4590

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**

◆  
\_\_\_\_\_  
**STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE**

◆  
\_\_\_\_\_

This is to certify that on November 5th, 2020, I caused a true and correct copy of the **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** to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.

Respectfully submitted this 5th day of November 2020.

*/s/ Michael A. Kopp*  
\_\_\_\_\_  
Michael A. Kopp  
Special Assistant Attorney General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
(303) 861-1963

**SPECIAL MASTER**

**HONORABLE MICHAEL J. MELLOY**

*Special Master*

United States Circuit Judge  
111 Seventh Avenue, S.E., Box 22  
Cedar Rapids, IA 52401-2101

[TXvNM141@ca8.uscourts.gov](mailto:TXvNM141@ca8.uscourts.gov)  
(319) 432-6080  
(service via email and U.S. Mail)

**MICHAEL E. GANS**

*Clerk of the 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](mailto:TXvNM141@ca8.uscourts.gov)  
(314) 244-2400

**MEDIATOR**

**HON. OLIVER W. WANGER (USDJ RET.)**

WANGER JONES HELSLEY PC  
265 E. River Park Circle, Suite 310  
Fresno, California 93720

[owanger@wjhattorneys.com](mailto:owanger@wjhattorneys.com)  
(559) 233-4800 Ext. 203

**DEBORAH L. PELL (Paralegal)**

[dpell@whjattorneys.com](mailto:dpell@whjattorneys.com)

**UNITED STATES**

**JEFFERY WALL\***

*Acting Solicitor General*

**JEAN E. WILLIAMS**

*Deputy Assistant Attorney General*

**FREDERICK LIU**

*Assistant to the Solicitor General*

U.S. DEPARTMENT OF JUSTICE  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

[supremectbriefs@usdoj.gov](mailto:supremectbriefs@usdoj.gov)  
(202)514-2217

**JAMES J. DUBOIS\***

**R. LEE LEININGER**

U.S. DEPARTMENT OF JUSTICE  
Environment & Natural Resources Division  
999 18th Street  
South Terrace – Suite 370  
Denver, Colorado 80202

[james.dubois@usdoj.gov](mailto:james.dubois@usdoj.gov)  
(303) 844-1375  
[lee.leininger@usdoj.gov](mailto:lee.leininger@usdoj.gov)  
(303) 844-1364

**SETH C. ALLISON, Paralegal**

[Seth.allison@usdoj.gov](mailto:Seth.allison@usdoj.gov)  
(303)844-7917

**JUDITH E. COLEMAN**  
**JOHN P. TUSTIN**  
**JENNIFER A. NAJJAR**  
U.S. DEPARTMENT OF JUSTICE  
Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

[Judith.coleman@usdoj.gov](mailto:Judith.coleman@usdoj.gov)  
(202) 514-3553  
[john.tustin@usdoj.gov](mailto:john.tustin@usdoj.gov)  
(202) 305-3022  
[jennifer.najjar@usdoj.gov](mailto:jennifer.najjar@usdoj.gov)  
(202) 305-0476

**STATE OF NEW MEXICO**

**HECTOR H. BALDERAS**  
*New Mexico Attorney General*  
**TANIA MAESTAS**  
*Chief Deputy Attorney General*  
**CHOLLA KHOURY**  
*Assistant Attorney General*  
STATE OF NEW MEXICO  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
**PATRICIA SALAZAR** - Assistant

[hbalderas@nmag.gov](mailto:hbalderas@nmag.gov)  
[tmaestas@nmag.gov](mailto:tmaestas@nmag.gov)  
[ckhoury@nmag.gov](mailto:ckhoury@nmag.gov)  
[psalazar@nmag.gov](mailto:psalazar@nmag.gov)  
(505) 239-4672

**MARCUS J. RAEL, JR.\***  
**LUIS ROBLES**  
**SUSAN BARELA**  
*Special Assistant Attorneys General*  
ROBLES, RAEL & ANAYA, P.C.  
500 Marquette Avenue NW, Suite 700  
Albuquerque, New Mexico 87102  
**CHELSEA SANDOVAL** - Paralegal  
**PAULINE WAYLAND** – Paralegal  
**BONNIE DEWITT** – Paralegal

[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
[luis@roblesrael.com](mailto:luis@roblesrael.com)  
[susan@roblesrael.com](mailto:susan@roblesrael.com)  
[chelsea@roblesrael.com](mailto:chelsea@roblesrael.com)  
[pauline@roblesrael.com](mailto:pauline@roblesrael.com)  
[bonnie@roblesrael.com](mailto:bonnie@roblesrael.com)  
(505) 242-2228

**BENNETT W. RALEY**  
**LISA M. THOMPSON**  
**MICHAEL A. KOPP**  
*Special Assistant Attorneys General*  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203

[braley@troutlaw.com](mailto:braley@troutlaw.com)  
[lthompson@troutlaw.com](mailto:lthompson@troutlaw.com)  
[mkopp@troutlaw.com](mailto:mkopp@troutlaw.com)  
(303) 861-1963

**JEFFREY WECHSLER**

*Special Assistant Attorney General*  
MONTGOMERY & ANDREWS  
325 Paseo De Peralta  
Santa Fe, NM 87501

[jwechsler@montand.com](mailto:jwechsler@montand.com)  
(505) 986-2637

**DIANA LUNA** – Paralegal

[dluna@montand.com](mailto:dluna@montand.com)

**JOHN DRAPER**

*Special Assistant Attorney General*  
DRAPER & DRAPER LLC  
325 Paseo De Peralta  
Santa Fe, NM 87501

[john.draper@draperllc.com](mailto:john.draper@draperllc.com)  
(505) 570-4591

**DONNA ORMEROD** – Paralegal

[donna.ormerod@draperllc.com](mailto:donna.ormerod@draperllc.com)

**STATE OF COLORADO**

**PHILIP J. WEISER**

*Attorney General of Colorado*

**ERIC R. OLSON**

*Solicitor General*

[eric.olson@coag.gov](mailto:eric.olson@coag.gov)

**LAIN LEONIAK**

*Acting First Assistant Attorney General*

**CHAD M. WALLACE\***

*Senior Assistant Attorney General*

**PRESTON V. HARTMAN**

*Assistant Attorney General*

COLORADO DEPARTMENT OF LAW

Ralph Carr Judicial Center

7<sup>th</sup> Floor

1300 Broadway

Denver, CO 80203

**NAN EDWARDS**, Paralegal II

[chad.wallace@coag.gov](mailto:chad.wallace@coag.gov)  
(720) 508-6281 (Direct)  
[preston.hartman@coag.gov](mailto:preston.hartman@coag.gov)  
(720) 508-6257 (direct)

[nan.edwards@coag.gov](mailto:nan.edwards@coag.gov)

**STATE OF TEXAS**

**STUART 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 Capital Mall, Suite 1000

Sacramento, CA 95814-2403

[ssomach@somachlaw.com](mailto:ssomach@somachlaw.com)  
[ahitchings@somachlaw.com](mailto:ahitchings@somachlaw.com)  
[rhoffman@somachlaw.com](mailto:rhoffman@somachlaw.com)  
[mgoldsberry@somachlaw.com](mailto:mgoldsberry@somachlaw.com)  
[tbarfield@somachlaw.com](mailto:tbarfield@somachlaw.com)  
[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)  
[bjohnson@somachlaw.com](mailto:bjohnson@somachlaw.com)  
[rdeitchman@somachlaw.com](mailto:rdeitchman@somachlaw.com)  
(916) 446-7979  
(916) 803- 4561 (cell)

**CORENE RODDER - Secretary**  
**CRYSTAL RIVERA - Secretary**  
**CHRISTINA GARRO – Paralegal**  
**YOLANDA DE LA CRUZ - Paralegal**

[crodder@somachlaw.com](mailto:crodder@somachlaw.com)  
[crivera@somachlaw.com](mailto:crivera@somachlaw.com)  
[cgarro@somachlaw.com](mailto:cgarro@somachlaw.com)  
[ydelacruz@somachlaw.com](mailto:ydelacruz@somachlaw.com)

**KEN PAXTON**

*Attorney General*

(512) 463-2012

**JEFFREY C. MATEER**

(512) 457-4644 Fax

*First Assistant Attorney General*

**DARREN L. McCARTY**

*Deputy Attorney General for Civil Litigation*

**PRISCILLA M. HUBENAK**

[Priscilla.Hubenak@oag.texas.gov](mailto:Priscilla.Hubenak@oag.texas.gov)

*Chief, Environmental Protection Division*

OFFICE OF ATTORNEY GENERAL

OF TEXAS

P.O. Box 12548

Austin, TX 78711-2548

**AMICI / FOR INFORMATIONAL PURPOSES ONLY**

**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY**

**JAMES C. BROCKMANN\***

(505) 983-3880

**JAY F. STEIN**

[jcbrockmann@newmexicowaterlaw.com](mailto:jcbrockmann@newmexicowaterlaw.com)

STEIN & BROCKMANN, P.A.

[jfstein@newmexicowaterlaw.com](mailto:jfstein@newmexicowaterlaw.com)

P.O. Box 2067

[administrator@newmexicowaterlaw.com](mailto:administrator@newmexicowaterlaw.com)

Santé Fe, New Mexico 87504

**Administrative Copy**

**PETER AUH**

(505) 289-3092

ALBUQUERQUE BERNALILLO COUNTY

[pauh@abcwua.org](mailto:pauh@abcwua.org)

WATER UTILITY AUTHORITY

P.O. Box 568

Albuquerque, NM 87103-0568

**CITY OF EL PASO**

**DOUGLAS G. CAROOM\***

(512) 472-8021

**SUSAN M. MAXWELL**

[dcaroom@bickerstaff.com](mailto:dcaroom@bickerstaff.com)

BICKERSTAFF HEATH DELGADO

[smaxwell@bickerstaff.com](mailto:smaxwell@bickerstaff.com)

ACOSTA, LLP

2711 S. MoPac Expressway

Building One, Suite 300

Austin, TX 78746



**CITY OF LAS CRUCES**

**JAY F. STEIN \***

(505) 983-3880

**JAMES C. BROCKMANN**  
STEIN & BROCKMANN, P.A.  
P.O. Box 2067  
Santé Fe, New Mexico 87504  
**Administrative Copy**

[jcbrockmann@newmexicowaterlaw.com](mailto:jcbrockmann@newmexicowaterlaw.com)  
[jfstein@newmexicowaterlaw.com](mailto:jfstein@newmexicowaterlaw.com)  
[administrator@newmexicowaterlaw.com](mailto:administrator@newmexicowaterlaw.com)

**JENNIFER VEGA-BROWN**

(575) 541-2128

**MARCIA B. DRIGGERS**  
LAW CRUCES CITY ATTORNEY'S OFFICE  
P.O. Box 20000  
Las Cruces, New Mexico 88004

[jvega-brown@las-cruces.org](mailto:jvega-brown@las-cruces.org)  
[marcyd@las-cruces.org](mailto:marcyd@las-cruces.org)

**ELEPHANT BUTTE IRRIGATION DISTRICT**

**SAMANTHA R. BARNCASTLE\***

(575) 636-2377

BARNCASTLE LAW FIRM, LLC  
1100 South Main, Suite 20 (88005)  
P.O. Box 1556  
Las Cruces, NM 88004

(575) 636-2688 (fax)  
[samantha@h2o-legal.com](mailto:samantha@h2o-legal.com)

**JANET CORRELL – Paralegal**

[janet@h2o-legal.com](mailto:janet@h2o-legal.com)

**EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1**

**MARIA O'BRIEN\***

(505) 848-1803 (direct)

**SARAH M. STEVENSON**  
MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, PA

[mobrien@modrall.com](mailto:mobrien@modrall.com)  
[sarah.stevenson@modrall.com](mailto:sarah.stevenson@modrall.com)

500 Fourth Street N.W., Suite 1000  
Albuquerque, New Mexico 87103-2168  
**SHANNON GIFFORD – Legal Assistant**

[shannong@modrall.com](mailto:shannong@modrall.com)

**RENEA HICKS**

[rhicks@renea-hicks.com](mailto:rhicks@renea-hicks.com)

LAW OFFICE OF MAX RENE HICKS  
P.O.Box 303187  
Austin, TX 78703-0504

(512)480-8231

**HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1**

**ANDREW S. "DREW" MILLER\***

(512) 320-5466

**KEMP SMITH LLP**  
919 Congress Avenue, Suite 1305

[dmiller@kempsmith.com](mailto:dmiller@kempsmith.com)

Austin, TX 78701

**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 Attorney General*

120 S. W. 10th Ave., 2nd Floor

Topeka, KS 66612

(785) 296-2215

[toby.crouse@ag.ks.gov](mailto:toby.crouse@ag.ks.gov)

[bryan.clark@ag.ks.gov](mailto:bryan.clark@ag.ks.gov)

**NEW MEXICO PECAN GROWERS**

**TESSA T. DAVIDSON\***

DAVIDSON LAW FIRM, LLC

4206 Corrales Road

P.O. Box 2240

Corrales, NM 87048

**JO HARDEN – Paralegal**

[ttd@tessadavidson.com](mailto:ttd@tessadavidson.com)

(505) 792-3636

[jo@tessadavidson.com](mailto:jo@tessadavidson.com)

**NEW MEXICO STATE UNIVERSITY**

**JOHN W. UTTON\***

UTTUN & KERY, P.A.

P.O. Box 2386

Santa Fe, New Mexico 87504

(505) 699-1445

[john@uttkery.com](mailto:john@uttkery.com)

*General Counsel*

New Mexico State University

Hadley Hall Room 132

2850 Weddell Road

Las Cruces, NM 88003

[gencounsel@nmsu.edu](mailto:gencounsel@nmsu.edu)

(575) 646-2446