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Re: *State of Texas & United States of America v. State of New Mexico and State of Colorado, Original No. 141: Filing of Amicus Curiae Albuquerque Bernalillo County Water Utility Authority Response Brief*

Dear Special Master Melloy:

Pursuant to Paragraph 3.3 of the Case Management Plan dated September 6, 2018, and Sup. Ct. R. 37.4, enclosed is a copy of the Albuquerque Bernalillo County Water Utility Authority *Amicus Curiae* Brief in Response to Dispositive Motions Filed by the State of Texas and the United States. This pleading was served upon the parties and *amici* electronically this date.

Sincerely,

James C. Brockmann

Cc: Attached Service List, via email

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

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY *AMICUS CURIAE* BRIEF IN RESPONSE TO DISPOSITIVE MOTIONS FILED BY THE STATE OF TEXAS AND THE UNITED STATES

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INTRODUCTION

The Albuquerque Bernalillo County Water Utility Authority ("Water Authority") submits this *amicus curiae* brief in response to: 1) The State of Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon, dated December 26, 2018 ("Texas's Request for Judicial Declaration"); 2) Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12(C) and Rule 56, dated December 26, 2018 ("Texas's Motion for Partial Judgment"); and 3) the United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8, and 9, dated December 21, 2018 ("United States' Motion for Judgment on the Pleadings").[1] The Water Authority's response is filed pursuant to Paragraph 3.3 of the Case Management Plan dated September 6, 2018, as amended, and Supreme Court Rules 17 and 37.[2]

The Water Authority brings to the Special Master's attention issues that could affect the Water Authority's water rights and administration of the Middle Rio Grande above Elephant Butte Reservoir under the Rio Grande Compact in a way not addressed in New Mexico's response to Texas's and the United States' dispositive motions. More specifically, the Water Authority seeks

[1] The Water Authority is comprised of the City of Albuquerque, an incorporated New Mexico municipality, Bernalillo County, and the Village of Los Ranchos. All are political subdivisions of the State of New Mexico. While the Water Authority can file an *amicus* brief as of right pursuant to Sup. Ct. R. 37.4 as a "city, county, town, or similar entity," its *amicus* brief is also allowed by the Case Management Plan in this case.

[2] Two of the dispositive motions expressly seek to interpret the Court's decision and articulate legal issues claimed to have been resolved. *See* Texas's Request for Judicial Declaration and State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support, dated December 26, 2018. The United States' Motion for Judgment on the Pleadings and Texas's Motion for Partial Judgment also implicitly seek rulings on decisions made by the Court to date. Texas's Motion for Partial Judgment and the United States' Motion for Judgment on the Pleadings also seek judgment on the pleadings and/or summary judgment – legal rulings that would limit New Mexico's counterclaims and affirmative defenses. Rulings on all four motions have the potential to limit the scope of trial on the merits.

to: 1) ensure a proper articulation of Texas's and New Mexico's apportionment below Elephant Butte Reservoir based upon the Rio Grande Project being incorporated into the Rio Grande Compact as set forth in the Court's rulings to date; 2) support New Mexico's position that the 2008 Operating Agreement is null and void because it significantly reduces New Mexico's Rio Grande Project apportionment without New Mexico's consent in violation of the Rio Grande Compact, and correspondingly, dispute Texas's and the United States' position that the United States can unilaterally reallocate all of New Mexico's apportionment of Rio Grande Project water to Texas without New Mexico's consent; and 3) outline the roles of New Mexico, Texas, the United States, and Elephant Butte Irrigation District ("EBID") and El Paso County Improvement District No. 1 ("EP#1") *viz.-a-viz.* surface water and groundwater in the Lower Rio Grande below Elephant Butte Reservoir that result from the Court's opinion.

The Water Authority encourages narrow rulings on which legal issues have been decided by the Court to allow for full development of the facts and trial on each parties' legal theories related to Compact liability and defense, thereby avoiding the possibility of a remand to take additional evidence on legal theories that were prematurely disallowed.[3] *Cf. Florida v. Georgia,* 138 S. Ct. 2502 (2018) (case remanded to the Special Master because he applied too strict of standard).

INTEREST OF *AMICUS CURIAE*

The Water Authority is the largest provider of municipal water in New Mexico, located in the Middle Rio Grande, about 150 miles upstream of Elephant Butte Reservoir. The Water

[3] While the Water Authority is not submitting a response brief in relation to Texas's and the United States' Rule 12 and Rule 56 dispositive motions, it supports allowing New Mexico's counterclaims and affirmative defenses to proceed to the fullest extent. All of New Mexico's allegations directly relate to Rio Grande Compact administration and compliance, including issues that affect Project water supply, with New Mexico acting in a *parens patria* capacity on behalf of its citizens.

Authority's drinking water supply comes from groundwater in the Middle Rio Grande Underground Water Basin and imported Colorado River water from the San Juan-Chama Project ("SJCP").[4] *See* 43 U.S.C. § 615pp. The Water Authority conjunctively manages its imported SJCP surface water with its groundwater, and both are subject to permits from the New Mexico State Engineer. The volume and timing of both sources of supply are dependent on native water supplies available to New Mexico under Paragraph IV of the Rio Grande Compact. Moreover, the ability of the Water Authority to provide drinking water under its present water supply portfolio is dependent on Rio Grande Compact administration in the Middle Rio Grande as it has historically been done and subject to the New Mexico State Engineer's jurisdiction over the water resources in the Middle Rio Grande.[5]

BACKGROUND

1. Rio Grande Compact.

A brief summary of the Rio Grande Compact is important to the parties' dispositive motions. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). Pursuant to Article III of the Rio Grande Compact, Colorado is obligated to deliver a variable percentage of the recorded inflows to a gaging station near Lobatos, Colorado, near the Colorado-New Mexico state line. *Id.* Downstream in New Mexico is the Otowi Gage which is the dividing point between the Upper and Middle Rio Grande in New Mexico for purposes of Compact administration. *Id.*

[4] The Water Authority also has vested and acquired water rights in the Middle Rio Grande in its portfolio.

[5] The Water Authority's interests are set forth in more detail in its *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master, dated June 9, 2017.

Article IV, as amended, contains a variable water supply index that determines the amount of water that must be delivered by New Mexico into Elephant Butte Reservoir.[6] *Id.* Importantly, New Mexico is entitled to the tributary inflows between Otowi Gage and Elephant Butte Reservoir as those inflows are not considered in Compact accounting. This means that the amount of Rio Grande water available for use in the Middle Rio Grande is variable and changes from year-to-year based on the amount of Rio Grande water at the Otowi Gage, and by the amount of tributary inflow which also varies from year-to-year.

Under Article VI of the Compact, Colorado and New Mexico are allowed to accrue debits and to erase debits by an "actual spill" at Elephant Butte Reservoir. *Id.* Colorado can accrue 100,000 acre-feet of debits and New Mexico can accrue 200,000 acre-feet of debits. *Id.* An "actual spill" erases debits and re-starts Compact accounting. *Id.*

The apportionment set forth in the Rio Grande Compact gives considerable latitude to the upstream States in terms of managing annual deliveries. Articles III, IV, and VI provide flexibility in Compact operations. The Compact does not impose a specified quantity of native water that must be delivery in every year independent of river conditions. Instead, Articles III and IV provide a highly flexible accounting methodology that reflects inflow in any given year in Colorado and New Mexico which then determines their delivery obligations. Moreover, under Article VI of the Compact, New Mexico and Colorado are not penalized by shortfalls in individual years (debits) and in addition, can receive credits when native flows are delivered in excess of Compact requirements. *Id.* The Compact has operated successfully under long periods of debits, *i.e.*,

[6] The Resolution adopted at the Compact Commission meeting on February 14-16, 1949, changed New Mexico's point of delivery from San Marcial to Elephant Butte Reservoir, and revised the measurement of deliveries in Article IV.

between the actual spills of 1942 and 1985. *See generally* S.E. Reynolds, Phillip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 N.R.J. 201 (1974).

2. Water Administration in the Middle Rio Grande.

The New Mexico State Engineer has jurisdiction over all surface water in New Mexico, including the Middle Rio Grande, by virtue of the surface water code of 1907.[7] *See* N.M. Const. Art. XVI, Sec. 2, NMSA 1978, § 72-1-1 (1907); NMSA 1978 §§ 72-5-1-39 (1907). Prior to the adoption of the surface water code, acquisition and use of surface water was governed by the common law of prior appropriation. By virtue of the groundwater code of 1931, the New Mexico State Engineer acquires jurisdiction over groundwater only when he has "declared" an underground water basin having reasonably ascertainable boundaries. *See* NMSA 1978, §§ 72-12-1-28 (1931). Prior to the declaration of a groundwater basin, the acquisition and use of groundwater was also governed by the common law. The result of the groundwater code is a patchwork of groundwater basins throughout New Mexico with different inception dates on which the groundwater basin was declared. The Rio Grande Underground Water Basin, extending from Taos to Elephant Butte Reservoir, was declared by the New Mexico State Engineer on November 29, 1956.[8]

Upstream of Elephant Butte Reservoir in New Mexico, the Bureau of Reclamation operates the SJCP and owns the project works for the Middle Rio Grande Conservancy District, an irrigation district in the Middle Rio Grande serving roughly 60,000 acres. Reservoirs upstream of Elephant

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[7] The Middle Rio Grande contains important components of New Mexico's economy including the cities of Albuquerque, Santa Fe, Rio Rancho, Espanola, Belen, and Socorro, and the communities of Bernalillo and Los Lunas. Straddling the Rio Grande is the Middle Rio Grande Conservancy District, a quasi-State entity which was rehabilitated by the Bureau of Reclamation in the 1950s.

[8] Additional information on water administration in the Middle Rio Grande is set forth in the Albuquerque Bernalillo County Water Utility Authority's *Amicus Curiae* Brief in Support of State of New Mexico's Exceptions to the First Interim Report of the Special Master, dated June 9, 2017.

Butte Reservoir that are considered post-1929 reservoirs for the purpose of Rio Grande Compact administration (Articles VII and VIII), include El Vado, Abiquiu, Nichols, and McClure reservoirs.[9] *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785.

3. The Court's Opinion.

New Mexico's Motion to Dismiss was fundamentally a choice of law issue: Whether Rio Grande Project waters were protected as a matter of state law or were they incorporated into and protected under the Rio Grande Compact. New Mexico never claimed it could deplete all Project water once it is released from Elephant Butte Reservoir under either legal regime. New Mexico's point was important because there is no express provision in the Rio Grande Compact that defines a division of water in the Lower Rio Grande between New Mexico and Texas. Rather, the division had to be inferred. New Mexico's position was also supported by several court holdings that there was not an apportionment between New Mexico and Texas below Elephant Butte Reservoir. *See City of El Paso v. Reynolds*, 563 F. Supp. 379, 385 (D.N.M. 1983), *Elephant Butte Irrigation Dist. v. Regents of New Mexico State Univ.*, 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372, and *El Paso Cty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 907 (W.D. Tex. 1955).

In its opinion, however, the Court found that the Rio Grande Project was incorporated into the Rio Grande Compact with the Downstream Contracts defining the apportionment. Specifically, the Court stated that "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts," and that "by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *See Texas v. New Mexico,*138 S. Ct. 954, 959 (2018). Accordingly, the Court determined that the Rio Grande

[9] Heron Reservoir stores only SJCP water and Cochiti, Jemez, and Galisteo reservoirs have operational rules that are also applicable because they are also flood control reservoirs.

Project and Downstream Contracts implicitly accomplish an apportionment of water as between New Mexico and Texas through the Rio Grande Compact.

The Court also determined that the division of water under the Downstream Contracts is 57% to New Mexico and 43% to Texas, with the ratio corresponding to the number of irrigated acres within each state. *Id.* at 957. Because the Downstream Contracts have been determined to be part of the Rio Grande Compact, they also set and define the apportionment of Project water as 57% to New Mexico and 43% to Texas. The Special Master characterized the Court's decision as stating that "57 percent of the water will be accrued to New Mexico, 43 percent to Texas . . .." *See* Transcript of In-Person Scheduling Conference Before the Honorable Michael J. Melloy, Special Master, dated August 28, 2018, at 126, lines 7-9.

The Court further found the United States, through the Bureau of Reclamation, has a role in the administration of the Downstream Contracts and a responsibility to ensure treaty compliance with Mexico. *See Texas v. New Mexico*, 138 S. Ct. at 959-60. Moreover, an important basis for the Court's granting the United States' intervention was its determination that the United States' claims and requested relief were substantially the same as Texas's. *Id.* at 956, 960.

The Court did not decide whether New Mexico had violated the Compact in any respect.[10] Justice Gorsuch stated: "In today's lawsuit, Texas claims that New Mexico has defied the Compact. But at this stage in the proceedings we face only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already has? We believe it may." *Id.* at 956. The Court was explicit that it was not ruling on whether there have been violations of the Compact.

[10] At the time of the Court's opinion, New Mexico had not yet filed its counterclaims and affirmative defenses.

SUMMARY OF ARGUMENT

The Water Authority supports the arguments set forth in the State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support, dated December 26, 2018 ("New Mexico's Motion for Partial Judgment"). The Water Authority submits this *amicus curiae* brief to address three specific issues that are raised in Texas's and the United States' dispositive motions that have potential ramifications for its water rights and administration of the Rio Grande Compact above Elephant Butte Reservoir.

First, the Court ruled that the Rio Grande Compact, through the Downstream Contracts, apportioned Rio Grande Project water 57% to New Mexico and 43% to Texas. The apportionment between New Mexico and Texas downstream of Elephant Butte Reservoir is not made based on a state-line delivery and it is not tied to a 1938 condition.

Second, because the Downstream Contracts *are* the apportionment between New Mexico and Texas below Elephant Butte Reservoir, any change in the 57% - 43% apportionment must be approved by the compacting States, *i.e.*, New Mexico and Texas. Texas and the United States admit that the 2008 Operating Agreement changed the 57% - 43% allocation of Project water, as did the creation of separate carryover storage accounts which have no basis in the Compact or historical Compact administration. These constitute significant changes in New Mexico's Compact apportionment that can only be accomplished with New Mexico's consent. Because New Mexico did not approve the 2008 Operating Agreement that reduces its Project allocation, *i.e.,* New Mexico's apportionment, the 2008 Operating Agreement is null and void.

Third, historically, the United States, EBID and EP#1 have jointly met and conferred about annual Rio Grande Project operations. Likewise, the signatory States have met and conferred about Rio Grande Compact accounting and compliance issues. Finally, the State of New Mexico

through the Office of the State Engineer has always administered surface water and groundwater below Elephant Butte Reservoir. This authority includes permitting, adjudications, and compliance actions. With the Court's decision that the Rio Grande Project is incorporated into the Rio Grande Compact and that the apportionment of Project water is 57% to New Mexico and 43% to Texas, New Mexico, Texas, and the United States all have an interest in ensuring the apportionment is properly accounted and administered. There is no basis under state or federal law for the United States to administer all surface water and groundwater in New Mexico below Elephant Butte Reservoir. Likewise, the United States cannot unilaterally administer New Mexico's 57% apportionment of Project water below Elephant Butte Reservoir.

In the past, the exact nature of the apportionment between New Mexico and Texas below Elephant Butte Reservoir was not clear. Resolution of this litigation, either by judicial decree or by settlement, will allow New Mexico's, Texas's, and the United States' respective roles to be more clearly defined in the administration of the Compact apportionment through the Downstream Contracts, but all three must have a role. Administration of all surface water and groundwater users in New Mexico must remain with the State of New Mexico.

ARGUMENT

POINT I

BECAUSE THE DOWNSTREAM CONTRACTS WERE INCORPORATED BY REFERENCE INTO THE RIO GRANDE COMPACT, THE APPORTIONMENT OF RIO GRANDE PROJECT WATER IS 57% TO NEW MEXICO AND 43% TO TEXAS

Texas claims that the Court has decided that New Mexico is enjoined from allowing post-1938 depletions of water below Elephant Butte Reservoir. *See* Texas's Request for Judicial Declaration at 10-11 (Determination No. 4). In doing so, Texas is requesting a ruling on the scope

of the apportionment between New Mexico and Texas below Elephant Butte Reservoir far beyond what was determined by the Court. The Water Authority's concern is that Texas is seeking an apportionment of a specific amount of water below Elephant Butte Reservoir based on a 1938 condition that cannot be squared with the variable inflows into Elephant Butte Reservoir, potentially affecting the Rio Grande Compact above Elephant Butte Reservoir.

Initially, in its opinion the Court stated that "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts," and that "by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *See Texas v. New Mexico*, 138 S. Ct. at 959. Accordingly, the Court determined that the Rio Grande Project and Downstream Contracts accomplish an apportionment of water as between New Mexico and Texas implicitly through the Rio Grande Compact. None of the parties dispute this determination. *See* Texas's Request for Judicial Declaration at 7-8 (Determination 1), United States' Motion for Judgment on the Pleadings at 9-10, 26, 31, and New Mexico's Motion for Partial Judgment at 13-14, ¶¶ 2, 5, 6, and 7.

Next, the Court found that the division of Project water under the Downstream Contracts is 57% to New Mexico and 43% to Texas. *See Texas v. New Mexico*, 138 S. Ct. at 957. Accordingly, New Mexico is entitled to 57% of the Rio Grande Project supply and Texas is entitled to 43% of the Project supply.[11] The parties do not disagree with the ratio of irrigated acres in New Mexico and Texas. *See* Texas's Request for Judicial Declaration at 13-14, ¶¶ 2, 3, 4, 5, and 6, and New Mexico's Motion for Partial Judgment at 13-14 (¶¶ 4, 6, and 7) and 16.

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[11] Apportionment of the Rio Grande Project supply 57% to New Mexico and 43% to Texas involves complex accounting of deliveries into various irrigation canals. Because of the physical layout of the Rio Grande Project, with canals crossing back and forth across the state line, there can be no state-line delivery. Rather, as the Court found, the Project supply is divided based upon the ratio of irrigated acres that existed under the Downstream Contracts.

These were the only determinations made by the Court about the nature and extent of the apportionment between New Mexico and Texas downstream of Elephant Butte Reservoir.

In its Request for Judicial Declaration, Texas goes beyond the Court's opinion and requests a determination that New Mexico is enjoined from post-1938 depletions of water below Elephant Butte Reservoir under the Rio Grande Compact. *See* Texas's Request for Judicial Declaration at 10-11 (Determination 4). There is no basis for this implied injunction in the Court's opinion, in the Compact, or in historical compact administration.

First, the Court said nothing about the Compact enjoining New Mexico from allowing depletions above a 1938 condition. Similarly, in summarizing the salient points from the Court's opinion, the Special Master reached no such conclusion. *See* Transcript of In-Person Scheduling Conference Before the Honorable Michael J. Melloy, Special Master, dated August 28, 2018, at 125-28.

Second, the Rio Grande Compact itself says nothing about enjoining New Mexico's post-1938 depletions below Elephant Butte Reservoir. Enjoining New Mexico's depletions below Elephant Butte Reservoir based upon a 1938 condition is the antithesis of the Rio Grande Compact. As described above, Articles III and IV of the Rio Grande Compact do not impose specific, fixed delivery obligations independent of river conditions. The inflow/outflow indices allow different levels of depletions depending on the water supply as recorded at gaging stations. Annual water supplies are variable in each reach of the river and the Compact recognizes and accounts for these variable conditions by allowing variable levels of depletion depending on the river conditions. Coupled with Article VI that allows New Mexico and Colorado to accrue compact credits and debits, the Rio Grande Compact provides significant flexibility in compact operations and gives the States considerable latitude in managing annual deliveries. In addition, the Project water

supply includes inflows and Project return flows below Elephant Butte Reservoir. The Compact neither expressly nor impliedly enjoins New Mexico depletions below Elephant Butte Reservoir as of 1938.[12] The Court has recognized that interstate compacts are the products of careful negotiation between sovereign states and is reluctant to imply obligations or requirements that are not contained in the plain language. *See generally New Jersey v. Delaware,* 552 U.S. 597, 615-16 (2008) and *Alabama v. North Carolina,* 560 U.S. 330, 351-52 (2010).

In sum, in determining that the Rio Grande Project is incorporated into the Rio Grande Compact and that the Downstream Contracts apportion Project water 57% to New Mexico and 43% to Texas, the Court did not implicitly enjoin New Mexico from allowing post-1938 depletions below Elephant Butte Reservoir or establish a state-line delivery.

POINT II

THE 2008 OPERATING AGREEMENT REDUCES NEW MEXICO'S APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR WITHOUT NEW MEXICO'S CONSENT AND IS THEREFORE NULL AND VOID

As set forth above, the parties now agree that the Court determined that the Rio Grande Project is incorporated into the Rio Grande Compact by reference through the Downstream Contracts and that the apportionment is 57% of Project supply to New Mexico and 43% of Project supply to Texas. However, Texas and the United States now take the position that while New

[12] It makes no sense for New Mexico to freeze its economy below Elephant Butte Reservoir as of 1938 as follows from Texas's argument. This would preclude New Mexico from any increased economic activity or growth, including growth of cities. Rather, the apportionment that was accomplished was a division of Rio Grande Project supplies for irrigation. There are other water supplies below Elephant Butte Reservoir that can be appropriated and administered by New Mexico without affecting Rio Grande Project supplies. *See* Motion for Leave to File and Brief of *Amicus Curiae* New Mexico State University in Support of Defendant State of New Mexico, June 9, 2017.

Mexico has responsibility to ensure Texas's Project apportionment under the Compact, New Mexico has no right to protect its Compact apportionment.[13]

Initially, Texas claims that New Mexico must relinquish all "control and dominion" over the water it deposits into Elephant Butte Reservoir. *See* Texas's Request for Judicial Declaration at 8 (Determination No. 2). Texas's claim that this issue has been resolved rests on the tenuous proposition that this matter was resolved by Special Master Grimsal, even though the Court did not address it. Special Master Grimsal's First Interim Report should be placed in context. The Court was circumspect in its opinion that the Rio Grande Project and Downstream Contracts were "inextricably intertwined" with the Rio Grande Compact, or stated differently, the "Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *See Texas v. New Mexico*, 138 S. Ct. at 959. The Court's deliberate choice of words made clear that any apportionment between New Mexico and Texas below Elephant Butte Reservoir was implicit, not explicit, in the provisions of the Rio Grande Compact. Because of the Court's departure from Special Master Grimsal's First Interim Report in this important respect, because the First Interim Report ventured into issues that were never briefed or argued by the parties and were unnecessary to the resolution of New Mexico's motion to dismiss, and because the Court neither accepted nor rejected the First Interim Report as urged by the parties, it would be prudent to allow the parties to develop their case theories and evidence based upon the Court's opinion, not the First Interim Report. The Court has long supported resolution of original actions based upon the full development of the facts. *See United States v. Texas*, 339 U.S. 707, 715 (1950) ("The Court in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts. *United*

[13] This issue is important to the Water Authority because of the Bureau of Reclamation's involvement with the SJCP water and the MRGCD in the Middle Rio Grande.

States v. Texas, 162 U.S. 1; *Kansas v. Colorado*, 185 U.S. 125, 144, 145, 147; *Oklahoma v. Texas,* 253 U.S. 465, 471.") *See also Texas v. New Mexico,* 462 U.S. 554, 571 n.18 (1983)*, Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *United States v. Wyoming*, 331 U.S. 440, 458-59 (1947); and *Iowa v. Illinois*, 151 U.S. 238, 242 (1894).

Importantly, the Court said nothing to support Texas's position that New Mexico lost its ability to protect its Compact apportionment and likewise, the Special Master did not indicate that this was one of the points made by the Court. *See* Transcript of In-Person Scheduling Conference Before the Honorable Michael J. Melloy, Special Master, dated August 28, 2018, at 125-128. In fact, the Court said it was not deciding any issues related to Compact compliance. *See Texas v. New Mexico*, 138 S. Ct. at 956.

Next, the United States takes the strange position that while New Mexico was apportioned 57% of the Project water under the Compact, "it lacks a cognizable interest in how the Project allocates water to EBID and EPCWID under the Downstream Contracts." *See* United States' Motion for Judgment on the Pleadings at 25-27. The United States goes on to argue that because New Mexico is not entitled to Project water under the Downstream Contracts and because it is not a party to the 2008 Operating Agreement, it lacks standing to challenge the 2008 Operating Agreement or how the United States allocates Project water between EBID and EP#1. *Id.* at 27-28. Ignoring the Court's opinion, Texas chimes in with a similar argument that challenges common sense, contending that there is a distinction between "allocations of water" under the Downstream Contracts and the "apportionment of water" under the Compact. *See* Texas's Motion for Partial Judgment at 17. Essentially, the United States and Texas claim that the United States can unilaterally reallocate all of New Mexico's Compact apportioned Project water and give it to Texas, and New Mexico has no recourse. That is absurd.

Both Texas and the United States admit that the 2008 Operating Agreement significantly reduces New Mexico's 57% of Project supply and gives Texas a corresponding increase. *See* Texas's Motion for Partial Judgment at 18; *see also Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas, Final Environmental Impact Statement* (U.S. Bureau of Reclamation, Sept. 30, 2016) (https://www.usbr.gov/uc/envdocs/eis/pdf/2008OperatingAgreementRioGrandeEIS_Final.pdf).[14] The rationale, according to them, is to compensate for New Mexico's groundwater depletions that affect Project supply – essentially a self-help remedy. In addition, the 2008 Operating Agreement created separate storage accounts for the two irrigation districts in Elephant Butte Reservoir and the United States unilaterally took New Mexico's credit water.[15]

Having pressed the argument that the Rio Grande Compact apportions Project water between New Mexico and Texas below Elephant Butte Reservoir, Texas and the United States now want to run from the ramifications of that decision – that is, New Mexico also has a Compact apportionment in Project water below Elephant Butte Reservoir and a right to protect it.[16] The

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[14] The significant departure from the Compact apportionment is illustrated in the Final Environmental Impact Statement for the 2008 Operating Agreement. In that document, the Bureau of Reclamation found EBID's allocation would average of 314,327 acre-feet per year under previous accounting and be reduced to an average of 213,110 acre-feet per year if the 2008 Operating Agreement was adopted. *Id.* at iii. Conversely, EP#1 would receive an average of 239,317 acre-feet per year under the previous accounting, which would increase to an average of 224,049 acre-feet per year under the 2008 Operating Agreement. *Id.* In other words, according to the Bureau's FEIS, the 2008 Operating Agreement would reduce New Mexico's apportionment from 57% to 49% of the Project supply. In practice, New Mexico's reduction in Project supply has been greater than forecast in the FEIS.

[15] The 2008 Operating Agreement also resulted in changes to reservoir evaporation accounting under the Rio Grande Compact that was detrimental to New Mexico, a change that must be consented to by New Mexico.

[16] The Unites States and Texas have no problem arguing Texas has an apportionment in Project water but refuse to recognize New Mexico's corresponding apportionment. They argue that Texas has an "apportionment" in Project water, but New Mexico only has an "allocation."

Court was clear that the Rio Grande Project through the Downstream Contracts was incorporated into the Rio Grande Compact. *See Texas v. New Mexico*, 138 S. Ct. at 959. The Compact apportionment was based upon irrigable acres, giving New Mexico 57% of the Project supply and 43% to Texas. *Id.* at 957. Only New Mexico can agree to modify its Compact apportionment. It certainly cannot be done unilaterally by the United States, or even by the United States with two private irrigation districts. Because New Mexico did not consent to the 2008 Operating Agreement which affects New Mexico's apportionment and creates separate reservoir storage accounts, the 2008 Operating Agreement is null and void.

POINT III

THAT NEW MEXICO ADMINISTERS SURFACE WATER AND GROUNDWATER BELOW ELEPHANT BUTTE RESERVOIR DOES NOT PRECLUDE NEW MEXICO, THE UNITED STATES, AND TEXAS FROM A ROLE IN ENSURING THE DOWNSTREAM CONTRACTS PROPERLY EFFECTUATE THE APPORTIONMENT

Texas claims that New Mexico law plays no role in an interstate dispute. *See* Texas's Request for Judicial Declaration at 11-12 (Determination No. 5). The United States contends that New Mexico has no "particularized interest in the allocation by the Project," that once New Mexico delivers Rio Grande water to Elephant Butte Reservoir it is committed to the Project, and that the United States has the sole responsibility for allocating Project water.[17] *See* United States' Motion for Judgment on the Pleadings at 24-25. Once again, it is instructive to return to the Court's opinion to refute these arguments.[18]

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[17] The Water Authority is concerned that the United States' argument seeking to displace New Mexico's jurisdiction over surface water and groundwater when a federal project is involved will migrate upstream into the Middle Rio Grande. The Water Authority's water rights are based in state law and continued administration by the State of New Mexico is critical to the Water Authority.

[18] As set forth above, the Court's opinion should be the cornerstone of the Special Master's rulings on the dispositive motions, not Special Master Grimsal's First Interim Report, because the Court (continued)

The Court found that the Downstream Contracts were incorporated into the Rio Grande Compact, creating an apportionment to New Mexico and Texas below Elephant Butte Reservoir. That apportionment was 57% of Project water to New Mexico and 43% of Project water to Texas. *See Texas v. New Mexico*, 138 S. Ct. at 957, 959. The Special Master noted these as points made by the Court in its opinion. *See* Transcript of In-Person Scheduling Conference Before the Honorable Michael J. Melloy, Special Master, dated August 28, 2018, at 125-128. The Court also found the United States has a role in the administration of the Downstream Contracts and a responsibility to ensure treaty compliance with Mexico. *See Texas v. New Mexico*, 138 S. Ct. at 959-60. The Court further held that the United States could not expand the case beyond Texas's complaint. *Id.* at 956, 960.

Taken together, the Court laid out the framework for administration of the Rio Grande Compact below Elephant Butte Reservoir.[19] New Mexico, Texas, and the United States all have an interest in ensuring that New Mexico receives 57% of the Project water below Elephant Butte Reservoir and Texas receives 43% of the Project water. This administration must include New Mexico and Texas as the States to which the apportionments are made and the United States

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neither accepted nor rejected the First Interim Report and the Court's opinion deviates from the First Interim Report in important respects. *See supra* at 13.

[19] The framework set forth herein is based on a direct analogy for the joint administration of an interstate water compact and Bureau contracts. On the Colorado River, New Mexico was apportioned 11.25% of the Colorado River and the SJCP is a portion of that water. The New Mexico Interstate Stream Commission, a sister agency to the New Mexico State Engineer, allocated the water from the SJCP to various contractors and the United States entered into contracts with those entities for delivery of the Compact/SJCP water. In the instant case, the Rio Grande Compact apportioned Project water below Elephant Butte Reservoir between New Mexico and Texas 57% and 43% respectively. With the apportionment, the Bureau's contracts with EBID and EP#1 provide a vehicle for delivery. The Colorado River and Rio Grande are similar examples of New Mexico obtaining a Compact apportionment and the United States executing contracts with entities to deliver the water.

through which the Downstream Contracts were entered.[20] At the same time, as it has done in the past, the United States will ensure deliveries to meet its international treaty obligations to Mexico.

With New Mexico and Texas responsible for and ensuring their respective Compact apportionments, the United States, EBID and EP#1 can carry out day-to-day operations to distribute Project water accordingly.

Finally, as a result of the Public Land Acts of 1866, 1870, and the Desert Land Act of 1877, ownership of the United States in non-navigable waters was severed from the public domain and vested in the western states and territories. *See United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 702-09 (1899). The principle was confirmed several years later by the Court:

> What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris, subject to the plenary control of the designated states,* including those since created out of the territories named, with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain. For since "congress cannot enforce either rule upon any state," *Kansas v. Colorado*, 206 U.S. 46, 94, 27 S. Ct. 655, 666, 51 L.Ed. 956, the full power of choice must remain with the state.

California Oregon Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 163-64 (1935) (emphasis added). *See also California v. United States*, 438 U.S. 645 (1978) and *United States v. New Mexico*, 438 U.S. 696 (1978). Accordingly, New Mexico, not the United States, has the ability to regulate and administer surface water and groundwater rights in the Lower Rio Grande.

There is no basis under state or federal law for the United States to administer all surface water and groundwater in New Mexico below Elephant Butte Reservoir under the false premise

[20] The importance of the States' roles in protecting their respective apportionments is demonstrated by the 2008 Operating Agreement in which the United States unilaterally changed New Mexico's Project apportionment, created separate reservoir storage accounts, and imposed new reservoir evaporation protocols, all in violation of the Rio Grande Compact and without New Mexico's consent.

that it is all Rio Grande Project water.[21] There is surface water and groundwater in the Lower Rio Grande beyond Rio Grande Project water. Accordingly, as set forth in *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 105-106 n.11 (1938), the State of New Mexico has jurisdiction and the obligation to administer surface water and groundwater appropriators below Elephant Butte Reservoir to ensure Rio Grande Compact deliveries are met.

Having requested a ruling that the Rio Grande Project is incorporated into the Rio Grande Compact, Texas and the United States cannot now ignore New Mexico's right to protect its apportionment in the Lower Rio Grande which derive from the Downstream Contracts. That makes New Mexico a necessary party to decisions that affect the Rio Grande Project apportionment.

CONCLUSION

In making critical decisions related to the scope of the case for trial, both with respect to issues already decided by the Court and New Mexico's counterclaims and affirmative defenses, the Special Master should closely follow the Court's jurisprudence in original actions favoring full development of the facts. That said, this case has already narrowed, and the Court has provided significant guidance thus far in ruling that the Rio Grande Project was incorporated into the Rio Grande Compact by reference and that New Mexico and Texas have an apportionment in Project water. That Compact apportionment provides a right to have a role in Project administration. While the United States also has a role in administering the Downstream Contracts and is

[21] In allowing the United States to intervene as a plaintiff, the Court noted as one of four reasons that the United States was not being allowed to expand the case beyond Texas's complaint. *See Texas v. New Mexico*, 138 S. Ct. at 956, 960. This prevents the United States from pursuing federal contracts from any appropriator below Elephant Butte Reservoir that diverts groundwater hydrologically connected to the river, as set forth in its complaint-in-intervention. *See* United States' Complaint in Intervention, filed on March 23, 2018, at ¶¶ 12-13.

responsible for ensuring compliance with international treaties, it cannot unilaterally reduce New Mexico's Compact apportionment under the guise of Project administration. New Mexico must have the ability to protect its 57% apportionment in Project water and continue to administer surface water and groundwater throughout the Rio Grande in New Mexico.

Respectfully submitted,

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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

AMICUS CURIAE ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY CERTIFICATE OF SERVICE

This is to certify that on the 28th day of February, 2019, I caused a true and correct copy of the **Albuquerque Bernalillo County Water Utility Authority *Amicus Curiae* Brief in Response to Dispositive Motions Filed by the State of Texas and the United States** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 28th day
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