

No. 141, Original

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**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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**CITY OF LAS CRUCES' CONSOLIDATED *AMICUS CURIAE* BRIEF  
IN RESPONSE TO DISPOSITIVE MOTIONS FILED BY  
THE STATE OF TEXAS AND THE UNITED STATES**

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## INTRODUCTION

The City of Las Cruces (“City or “Las Cruces”) files this consolidated Response to: (i) the United States’ Motion for Judgment on the Pleadings Against New Mexico’s Counterclaims 2, 3, 5, 6, 7, 8, and 9 (“U.S. Motion”); (ii) Texas’s Motion to Strike or for Partial Summary Judgment Regarding New Mexico’s Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12 (c) and Rule 56 (“Texas Motion for Partial Summary Judgment”); and (iii) 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 (“Texas Request for Judicial Declaration”). The City’s Response is filed pursuant to the Case Management Plan of September 6, 2018, and Supreme Court Rules 17 and 37.

Las Cruces is New Mexico’s second largest city with a service area of approximately 105,000 consumers. Las Cruces has been among the ten fastest growing cities in the western United States, with an average annual growth of up to 3.5%. Geographically, Las Cruces is located below the outlet of Elephant Butte Reservoir, on the east and west banks of the Rio Grande.

Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a municipal water supply for a growing city. Water use for the emerging community of Las Cruces was initiated in 1847 from the Acequia Madre de las Cruces which diverted surface water from the Rio Grande for domestic purposes. The City’s groundwater use commenced in 1905 with the City’s first well under LRG-430 *et al.* The LRG-430 wells divert water in the Mesilla Valley and were adjudicated a 1905 priority date for the beneficial use of 21,869 acre-feet per year for municipal and related purposes. *See* Exhibit “A.” The East Mesa well field was permitted by the State Engineer in 2002 for an additional 10,200 acre feet of water per year. The

East Mesa well field is sited in the Jornada del Muerto sub basin which is largely disconnected from the Rio Grande with a minimal offset requirement after 100 years.

City diversions from its wells are treated to drinking water standards as required by applicable provisions of the Safe Drinking Water Act (“SDWA”). *See* 42 U.S.C. §300f *et seq.* (1974). Treated water is distributed to consumers within the City’s service area. Approximately 50% is consumed and 50% is returned to the Rio Grande pursuant to NPDES Permit No. NM0023311 as required by applicable provisions of the Clean Water Act (“CWA”). *See* 33 U.S.C. § 1251 *et seq.* (1972). Because of the limited connection between the East Mesa and the Rio Grande, effluent returns to the Rio Grande from East Mesa wells are largely additive to the river as “imported water.” As groundwater levels continue to fall in the East Mesa, the connection to the Rio Grande will disappear.

Petition for leave to file this case was sought by Texas in December of 2013. Following opposition to the motion by New Mexico, leave was granted by the Court on January 27, 2014, with the provision that New Mexico could file a motion to dismiss. Texas’s allegations generally assert that New Mexico has violated the Rio Grande Compact by allowing diversions of groundwater in hydrologically connected reaches of the Rio Grande below Elephant Butte Reservoir which deplete surface water released from the Reservoir and owed to Texas under the Compact. The United States was granted leave to intervene on March 10, 2014, alleging delivery obligations with respect to Texas’s share of Rio Grande Project water and ownership interests in the Rio Grande Underground Basin in New Mexico. Following denial of New Mexico’s motion to dismiss, Texas and the United States announced their intent to file dispositive motions related to the Court’s decision.



## SUMMARY OF ARGUMENT

Las Cruces will address three issues. First, in seeking to strike New Mexico's equitable defenses, Texas has confused the law developed by the Supreme Court in enforcing equitable apportionments. *See Nebraska v. Wyoming*, 507 U.S. 584, 593-95 (1993). This fallacy is compounded by Texas's misallocation of burden of proof under Fed. R. Civ. P. 56 (c). *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986); *Colorado v. New Mexico*, 467 U.S. 310 (1984).

Second, Las Cruces' use of groundwater for 80 years was made without objection by Texas or the United States precluding challenges under the equitable doctrines pled by New Mexico, and asserted by *amicus* Las Cruces. *See Washington v. Oregon*, 297 U.S. 517 (1936); *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973); *Nebraska v. Wyoming*, 507 U.S. 584, 593-95 (1993). The New Mexico water rights adjudication identifies water rights adjudicated to Las Cruces and the United States and raises genuine issues of material fact in opposition to Texas's Motion for Partial Summary Judgment under Fed. R. Civ. P. 56 (c). *See State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996).

Third, New Mexico appears as *parens patriae* in this case in a quasi-sovereign capacity and can assert affirmative defenses regarding the Rio Grande Project. With respect to Texas's Determination No. 5, New Mexico's law is not preempted in compact administration. Instead, it is the basis for compact administration. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938); see also *Nebraska v. Wyoming*, 507 U.S. 584, 602-03 (1993); *Nebraska v. Wyoming*, 515 U.S. 1, 9-11 (1995).

## BACKGROUND

### *The Rio Grande Compact*

The Rio Grande rises in the San Luis Valley in Colorado, flows southward into New Mexico, and then into Texas. The river was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (“Rio Grande Compact” or “Compact”). Colorado is obligated to deliver a percentage of the recorded inflow at the Colorado-New Mexico state line under Article III of the Compact. This delivery obligation is measured by a gaging station at Lobatos, Colorado, near the state line.

In New Mexico, the Rio Grande flows through the state into Elephant Butte Reservoir located approximately 100 miles north of the New Mexico-Texas state line. Article IV of the Rio Grande Compact, as amended, specifies New Mexico’s delivery obligation as being into Elephant Butte Reservoir and is determined as a percentage of the inflow recorded at a gaging station at Otowi, New Mexico. 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.

The Rio Grande Compact provides for credits and debts accounting. Neither Colorado nor New Mexico is in default for shortfalls or debits within allowed limits. Article III permits Colorado to accrue debits of 100,000 acre-feet. Article IV permits New Mexico to accrue debits of 200,000 acre-feet. All debits are erased or forgiven by an “actual spill” over the reservoir. By 1967, Colorado had amassed nearly 1,000,000 acre-feet of accrued debit to New Mexico.

Article XIII states that “[t]o administer the provisions of this Compact there shall be constituted a commission composed of one representative from each state to be known as the Rio

Grande Compact commission.” The Compact commission is charged with “the collection, correlation and presentation of factual data and the maintenance of records having a bearing upon the administration of this compact, and, by unanimous action, to the making of recommendations to the respective states upon matters connected with the administration of the Compact.”

The Rio Grande is administered as three separate stream systems in New Mexico. The Upper Rio Grande extends from the Colorado-New Mexico state line to Otowi Gage. The Middle Rio Grande is situated between the Otowi Gage and Elephant Butte Reservoir, and the Lower Rio Grande stretches from the outlet works of Elephant Butte Reservoir to the New Mexico-Texas state line. *Elephant Butte Irrigation District v. Regents of New Mexico State University*, 1993-NMCA-009, 115 N. M. 229, 849 P. 2d 372.

### ***The 2008 Operating Agreement***

An “Operating Agreement” was negotiated in August of 2008 among the United States, EBID, and EP No. 1 to change the historical operations of the Project in settlement of the case of *United States v. EBID*, No. CV 00-1309-RB/KBM. Las Cruces was a party to that case. The City was granted leave to intervene on July 2, 2003. The City’s concern was transfers from agricultural use to municipal and industrial (“Ag/MI”) which was bifurcated from the Operating Agreement phase. At the conclusion of the Operating Agreement phase the City’s concurrence in the Operating Agreement which settled the case was required. The City agreed with one caveat -- that its water rights and effluent discharge were not included in the final Operating Agreement or “Project Water.”

The Operating Agreement provided for material changes to the historical operation of Elephant Butte Reservoir resulting in Project allocations to New Mexico being some 150,000 acre-feet per year less than historical operations and changes in annual releases to the irrigation districts

from 57% (EBID) – 43% (EP No. 1) to 50% (EBID) - 50% (EP No. 1) and, in some analyses, 38% (EBID) - 62% (EP No. 1). The principal results of the Operating Agreement affecting Las Cruces have been increased diversions of groundwater from the aquifer underlying the Lower Rio Grande Underground Water Basin by irrigators within EBID.

### ***State Stream System Adjudication***

A general stream system adjudication in New Mexico is a special statutory proceeding set forth at N.M. Stat. §§ 72-4-13 through 72-4-19 (1907). An adjudication decree filed pursuant to N.M. Stat. § 72-4-19 (1907) must declare the following:

...as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

The Lower Rio Grande Adjudication (“LRG Adjudication”) was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico. *See State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996). The LRG Adjudication includes many claimants of surface water and groundwater rights between Elephant Butte Reservoir and the New Mexico-Texas state line, including all constituents of EBID that use surface water. All claimants to water rights within a stream system must be joined to ensure due process.

Las Cruces has a two-fold interest in the LRG Adjudication. First, the City seeks judicial recognition of its water rights to supply its municipal needs. Second, Las Cruces must be prepared to challenge *inter se* other defendants’ water right claims that may infringe on the City’s water use. The City’s interest is only served if all water rights claimants (indispensable parties) are present and joined to a decree for post-adjudication administration.

The United States was joined to the LRG Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its interest in the Rio Grande Project. *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372; *United States v. City of Las Cruces et al.*, 289 F.3d 1170, 1177-78 (10<sup>th</sup> Cir. 2002). The judicial determination of the United States' Rio Grande Project rights is now complete. The LRG Adjudication Court has quantified the United States' Rio Grande Project right to store, release, and divert surface water at specified downstream points of diversion.<sup>1</sup> The Court determined the Rio Grande Project priority date following a two-week trial in September of 2015 and briefing and oral argument in September of 2016.

Importantly, the LRG Adjudication Court has also held that groundwater is not part of Rio Grande Project water supply.<sup>2</sup> The Court correctly recognized that the Project water supply originates upstream of Elephant Butte Reservoir based upon the United States' obtaining its water rights under state law as set forth in the Reclamation Act of 1902. Combined with that holding, the LRG Adjudication Court also found that return flows and seepage are necessary to meet Project deliveries downstream of Elephant Butte Reservoir. *See Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for*

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<sup>1</sup> *See Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (3<sup>rd</sup> Jud. Dist.) filed Feb. 17, 2014.

<sup>2</sup> The LRG Adjudication Court held that "New Mexico law . . . controls the determination of the source or sources of water for the Project." *See Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3<sup>rd</sup> Jud. Dist.) filed Aug. 16, 2012 at 4. It found that "[t]he points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to *surface water* under New Mexico law . . ." *Id.* at 6 (emphasis added).

Summary Judgment, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3<sup>rd</sup> Jud. Dist.) filed Aug. 16, 2012 at 6-7. The LRG Adjudication Court's analysis and ruling with respect to return flows and seepage is consistent with federal Reclamation project operations across the western United States.<sup>3</sup>

While a final adjudication decree will ultimately be utilized for administration of all interrelated surface water and groundwater rights in the Lower Rio Grande, the New Mexico Supreme Court has upheld the authority of the State Engineer to administer water rights without a final adjudication decree pursuant to Active Water Resource Management Regulations. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, 289 P.3d 1232.

## ARGUMENT

### POINT I

#### EQUITABLE CONSIDERATIONS ARE INCLUDED IN COMPACT ENFORCEMENT CASES

Texas has confused the doctrine of equitable apportionment with the Court's jurisprudence in enforcing equitable apportionments. *See* Texas's Motion for Partial Summary Judgment at 20-29. Texas asserts that "[t]raditionally, equitable considerations have played no role in determining violations in compact enforcement proceedings. [citing] *Texas v. New Mexico*, 462 U.S. at 554; *Texas v. New Mexico*, 482 U.S. 124 (1987)." *Id.* at 21. Texas also cites *Nebraska v. Wyoming*, 504 U.S. 587 (1993), [sic], although that case stands for the opposite principle.<sup>4</sup> *Id.* at 21-22. Texas's

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<sup>3</sup> The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the LRG Adjudication and EP No. 1 has been an active *amicus curiae*, filing briefs and presenting oral arguments in that case.

<sup>4</sup> Texas cited *Nebraska v. Wyoming* as 504 U.S. 587 (1993). If *Nebraska II* was intended, the correct citation is *Nebraska v. Wyoming*, 507 U.S. 584 (1993).

argument is intended to preclude New Mexico's affirmative defenses of “unclean hands,” acceptance/waiver/estoppel, laches, and the “failure to exhaust administrative remedies” because these defenses “fail” as a matter of law.

### ***Burden of Proof***

Initially, Texas’s Motion is procedurally defective. Texas cites *Celotex v. Catrett*, 477 U.S. 317 (1986), but has not complied with Fed. R. Civ. P. 56 (c). Texas invokes Fed. R. Civ. P. 56, arguing that summary judgment is appropriate “against a party who fails to make a showing sufficient to establish the existence of an element to that party’s case, and on which that party will bear the burden of proof at trial,” but has not identified any undisputed material facts as required by the Rule.

*Celotex* involved a grant of summary judgment to a defendant corporation in a wrongful death case who did not bear the burden of persuasion at trial and moved for summary judgment on the absence of proof in the plaintiff’s case. The defendant corporation/movant asserted that in response to its summary judgment motion, the non-movant plaintiff had “fail[ed] to make a showing sufficient to establish the existence of an essential element to the party’s case, and on which that party will bear the burden of proof at trial.” 477 U.S. at 322. *Celotex* did not absolve the movant from the required showing, *i.e.*, “identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any’ which it believes demonstrate the absence of a genuine issue of material fact.” 477 U.S. at 323. A movant who does not bear the burden of persuasion at the trial “may discharge its initial burden in two ways: by producing evidence that negates the nonmovant’s claims or defenses” or “[b]y pointing to an absence of evidence to support an essential element of the nonmoving party’s claim.” J.W. Moore *et al.* 11 MOORE’S FEDERAL PRACTICE § 56.40 [1] [b] (3<sup>rd</sup>. ed. 2018). Texas

has done nothing more in support of this motion other than make unsupported contentions. Las Cruces demonstrates the existence of disputed issues of fact supporting acquiescence or laches with its subfile order for its LRG-430 *et al.* water rights. See *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996), verifying beneficial use of its rights on an expanding basis since 1905. See Exhibit “A.” Moreover, in *Anderson v. Liberty Lobby*, 477 U.S. 242 (1986), the Court affirmed that the burden of proof under Fed. R. Civ. P. 56 is measured by the burden of proof at trial. The Court held that “we conclude that the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case.” 477 U.S. at 255. Should the Special Master recommend the new distribution of water brought about by the Operating Agreement, which replaces the former apportionment of 57% - 43% with 50% - 50% or 38% - 62%, the standard is “clear and convincing” evidence. See *Colorado v. New Mexico*, 467 U.S. 310, 315-17 (1984). Texas has not done so.

### ***Enforcement***

The Court had not excluded equitable considerations from Compact enforcement cases. The Court has held that proceedings “under [the] Court’s original jurisdiction are basically equitable in nature.” See *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973). As the Court held in *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983) “apportionment is based on broad and flexible equitable concerns rather than on precise legal entitlements.” An apportionment of interstate water, whether by interstate compact or decree of the United States Supreme Court results from weighing equities which have over-appropriated the waters of an interstate stream. See Simms, Richard A., *Equitable Apportionment Priorities and New Uses*, 29 N.R. J. 549 (1989). See *Kansas*



*v. Colorado*, 206 U.S. 46 (1907); *Wyoming v. Colorado*, 259 U.S. 419 (1922); *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945).

Texas's argument that enforcement cases cannot encompass equitable considerations misreads the cases. Moreover, it unduly restricts the Court in fashioning remedies. An action may be barred, or recovery constrained, under various equitable considerations. *Texas v. New Mexico* was a case for enforcement of the Pecos River Compact. *Texas v. New Mexico*, 462 U.S. 554 (1983), did not preclude equitable defenses by New Mexico. The Court rejected the Special Master's recommendation to the Court to amend the Pecos River Compact by the appointment of "either the United States Commissioner or some other third party [ to] be given a vote on the Pecos River Commission and empowered to participate in all Commission deliberations" as a tie-breaker for Compact Commission deadlocks. This remedy was beyond the Court's jurisdiction, but it did not preclude New Mexico from raising equitable defenses. 462 U.S. at 554-56. Nor does *Texas v. New Mexico*, 482 U.S. 124 (1987), preclude equitable defenses in compact enforcement actions.

Texas has misread *Nebraska v. Wyoming*, 507 U.S. 584 (1993). *Nebraska v. Wyoming* was a case for enforcement of the 1945 North Platte Decree by Nebraska arising from *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Nebraska v. Wyoming*, 325 U.S. 665 (1945). One issue concerned the priority date for the Inland Lakes, a component of the North Platte Project, located in Nebraska but with a point of diversion in Wyoming. The United States had not applied for a storage permit from the Inland Lakes Reservoir in Wyoming. Wyoming contended that the Inland Lakes was therefore not entitled to a 1904 priority date, resulting in a more junior date subject to call. The Court characterized the Inland Lakes question as an "enforcement" issue, but resolved it on the basis of Nebraska's equitable defense of acquiescence --- one of the defenses raised by New

Mexico in its Affirmative Defense No. 2, and asserted by Las Cruces as *amicus* with respect to its water rights.

The *Nebraska* Court held that “we believe that the Inland Lakes’ question is fairly characterized as an enforcement issue.” 507 U.S. at 592. It summarized the operative fact that “the Inland Lakes always have been operated with the December 6, 1904, priority date that Wyoming recognizes for other original components of the North Platte Project, even though the Bureau never obtained a separate Wyoming storage permit the Inland Lakes.” 507 U.S. 594. The Court held:

We think the evidence from the prior litigation supports the conclusion that the Inland Lakes’ priority was settled there. And even if the issue was not previously determined, we would agree with the Special Master that Wyoming’s arguments are foreclosed by its postdecree acquiescence. Cf. *Ohio v. Kentucky*, 410 U.S. 641, 648 (1973) (“[P]roceedings under this Court’s original jurisdiction are basically equitable in nature, and a claim not technically precluded nonetheless may be foreclosed by acquiescence” (citation omitted)). Accordingly, we clarify today that the Inland Lakes share a December 6, 1904, priority date with other original components of the North Platte Project.

The enforcement phase for the dispute over the Arkansas River Compact, Act of May 31, 1949 (63 Stat. 145), involved equitable remedies in the damages phase. See *Kansas v. Colorado*, 533 U.S. 1, 13-16 (2001)

Accordingly, New Mexico’s affirmative defenses survive summary judgment.

## **POINT II**

### **CHALLENGES TO THE CITY’S WATER RIGHTS ARE PRECLUDED**

Texas contends that “[f]our of New Mexico’s nine affirmative defenses asserted in its Answer to Texas’s Complaint fail as a matter of law and are appropriate for dismissal on partial

summary judgment.” Texas’s Motion for Partial Summary Judgment at 20. These include: unclean hands, acceptance/waiver/estoppel, laches and failure to exhaust administrative remedies. Texas’s argument is based on an artificial distinction it has created between the establishment of an equitable apportionment and enforcement. Texas claims that “equitable considerations have played no role in determining violations in compact enforcement proceedings. [citing] *Texas v. New Mexico*, 462 U.S. at 554 (1983); *Texas v. New Mexico*, 482 U.S. 124 (1987)” and *Nebraska v. Wyoming*, 504 U.S. 587 (1993) [sic] *Id* at 21. As set forth above, acquiesces and laches are encompassed within the Court’s equitable jurisdiction.

### ***Laches***

In 1951, Texas sought leave to file a Complaint in *Texas v. New Mexico*, No. 9, Original, 344 U.S. 906 (1952). This was based on alleged storage of water in excess of accrued debits pursuant to Art. VII of the Compact. Texas sought an injunction restraining New Mexico from storing water in El Vado Reservoir, or any other post-1929 upstream reservoir, when there was less than 400,000 acre-feet of water in project storage in Elephant Butte Reservoir, and that New Mexico and the Middle Rio Grande Conservancy District (“MRGCD”) be enjoined from diverting native water when its accrued debits were more than 200,000 acre-feet. *Id*. Both Texas and New Mexico pled that New Mexico’s delivery obligation was into Elephant Butte Reservoir. New Mexico pled:

The compact provides that New Mexico make certain deliveries at the San Marcial gaging station located some 165 miles northerly from the Texas-New Mexico boundary. Water so delivered at the San Marcial gaging station is utilized for the satisfaction of the international obligation of the United States to deliver water at Juarez, Mexico, and to satisfy contract obligations of the United States Bureau of Reclamation to deliver water for the irrigation of some 86,000 acres of land in the Elephant Butte Irrigation District in New Mexico and the irrigation of some 64,000 acres of land in El Paso County Water Improvement District No. 1 in Texas. The obligation of New Mexico to deliver and the right of Texas to receive water at the Texas-New Mexico boundary line has never been defined in any way.

The case was dismissed because of the failure of Texas to join the United States as an indispensable party given its fiduciary obligation to New Mexico tribal communities on the Middle Rio Grande with storage rights in El Vado Reservoir. *See Texas v. New Mexico*, 352 U.S. 991 (1957).

Significantly, Texas made no claim as to the depletion of releases below Elephant Butte Reservoir in that case. No parties were placed on notice that Texas suffered injury by diversions below Elephant Butte Reservoir in the 1948-1951 period of record, and therefore Las Cruces' development of its well field north of the New Mexico-Texas state line continued through the state process.

In 1967, after Colorado's accrued debit had reached 939,900 acre-feet (New Mexico's accrued debit in 1965 was 420,000 acre-feet), Texas, joined by New Mexico, filed suit against Colorado.

On April 17, 1969, the states signed a Joint Motion for Continuance. On April 19, the United States filed a Motion for Relief seeking leave for the United States to intervene.

On July 2, 1985, the Rio Grande Compact Commission determined that "pursuant to the May 13, 1985 agreement an actual spill of usable water, as defined by Article I of the Rio Grande Compact, had occurred on June 13, 1985, and that all previously accrued water debits of Colorado and New Mexico were cancelled." Accordingly, the three states moved to dismiss the 1969 case.

No allegations were made with respect to depletions of releases from Elephant Butte Reservoir.

#### ***Texas's and the United States' acquiescence in Las Cruces water use***

Las Cruces' well field was initiated in 1905 with the drilling of the City's first well. *See*

The City is primarily reliant on its LRG-430 *et al.* wells which provide rights to 21,869 acre feet per year from wells which are a “combined and comingled” source under New Mexico law. Following declaration of the Lower Rio Grande Underground Water Basin on September 11, 1980, the City filed a Declaration evidencing its LRG 430 *et al.* rights with the State Engineer. Subsequent supplemental wells were permitted thereafter upon application to the State Engineer, public notice to allow protests by affected parties, and hearing where protests could not be settled.

Las Cruces submits that acquiescence or laches in the development and exercise of the City’s water rights is shown by the consent decree in the adjudication determining the City’s water rights which shows uninterrupted development of the water rights since 1905. (“Exhibit A”). At a minimum these documents create disputed issues of material fact for defenses of acquiescence or laches as concerns Las Cruces’ water rights as part of the New Mexico’s water use in the Lower Rio Grande.

### **POINT III**

#### **NEW MEXICO STATE LAW GOVERNS RIO GRANDE COMPACT COMPLIANCE**

Two of the movants’ related contentions challenge New Mexico’s appearance as *parens patriae* in this case and its administrative jurisdiction over water rights within its borders. The United States’ Motion and Memorandum in Support contend that New Mexico cannot assert its Second counterclaim which relates to the Rio Grande Project. The United States argues that New Mexico lacks “a particularized interest” in the allocation of Rio Grande water by the Project and “a cognizable interest” in how the project allocates water to EBID and EP#1. *See* United States’ Memorandum at 24-25. The United States claims that New Mexico as a “State, *quastate*, is not a

Project beneficiary.” See United States’ Memorandum at 25. The United States asserts that New Mexico “paid nothing for construction of the Project, pays nothing for operation and maintenance of the Project, and receives no monetary remuneration form the Project.” See United States’ Memorandum at 25.

### ***Parens Patriae***

In asserting that New Mexico requires a “particularized interest” in the Rio Grande Project, the United States is misapplying the law of *parens patriae* in original actions. Under the *parens patriae* doctrine, a particularized interest is not required. Instead, a state has standing to sue *parens patriae* when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating for the personal claims of its citizens. See *Pennsylvania v. New Jersey* 426 U.S. 660 (1976). In that case, the Court held that it “has recognized the legitimacy of *parens patriae* suits and that it has “become settled doctrine that a State has standing to sue only when its sovereign or quasi-sovereign interests are implicated and it is not merely litigating as a volunteer for the personal claims of its citizens.” 426 U.S. at 665. A summary of this principle appears in *Alfred L. Snapp & Sons, Inc. v. Puerto Rico*, 458 U.S. 592, 602-07 (1982), where the Court analyzed the *parens patriae* precedents where states had appeared in their quasi-sovereign capacities. The precedent included *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), where the Court had included *parens patriae* interests as including “an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.” 458 U.S. at 604. States have been accorded *parens patriae* states in interstate water disputes beginning with *Kansas v. Colorado*, 206 U.S. 46 (1907).

### ***State administration***

Texas's "Determination" No. 5 states: "New Mexico State Law plays no role in an interstate dispute." That "holding" was not addressed by the Court. As set forth below, the western states have plenary control over the water within their border. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), was a suit to enforce compliance with the La Plata River Compact. It contemplates administration of state water rights by state officials to comply with compact obligations.

Prior to 1866, rights to the use of water on the public domain were retained by the United States. In enacting the Public Land Acts of 1866, 14 Stat. 153 (1866) and 1870, 16 Stat. 218 (1870), and the Desert Land Act of 1877, 19 Stat. 377 (1877), Congress severed ownership of the United States in all non-navigable waters from the public domain, extinguished federal ownership, and explicitly recognized that state law controlled the use of those waters. *See Oregon v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-64 (1935); *California v. United States*, 438 U.S. 645 (1978).

Three laws relate back to the opening of the lands in the public domain for settlement after the Civil War. The Act of 1866 was a mining law which opened the public domain to exploration and occupation. *See* 1W. A. Hutchins, WATER RIGHTS LAWS IN THE NINETEEN WESTERN STATES 172 (2004). However, Section 9 of the Act of 1866 contained this provision: "Whenever, by priority of possession, rights to the use of water for mining, agriculture, manufacturing, or other purposes had vested and accrued and were recognized and acknowledged by local customs, laws, and court decisions, their possessors should be protected in the same." *Id.*

On July 9, 1870, the 1866 Act was amended. As *Hutchins* states:

The Act of 1866 had recognized water rights and rights of way on public lands as against the Government. The amendment of 1870 clarified the intent of Congress that the water rights and rights of way to which the 1866 legislation related were effective not only as against the United States, but also against its grantees – that

anyone who acquired title to public lands took such title burdened with any easements for water rights or rights of way that had been previously acquired, with the Government's consent, against such lands while they were in public ownership. *Id.* at 173.

The Desert Land Act of 1877 provided the final expression of federal law on this point. It provided that water rights on tracts of desert land should depend upon prior appropriations, and that all surplus water in excess of actual appropriations were to be held for future appropriation by the public. The Desert Land Act of 1877 applied to Arizona, California, Idaho, Montana, Nevada, New Mexico, North Dakota, Oregon, South Dakota, Utah, Washington, and Wyoming.

This tradition of law was construed in *Oregon v. Beaver Portland Cement Co.*, *supra*, where the United States Supreme Court held:

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, the full power of choice must remain with the state. The Desert Land Act does not bind or purport to bind the states to any policy. It simply recognizes and gives sanction, in so far as the United States and its future grantees are concerned, to the state and local doctrine of appropriation, and seeks to remove what otherwise might be an impediment to its full and successful operation. See *Wyoming v. Colorado*, 259 U.S. 46, 465. (emphasis added).

295 U.S. at 163-64.

This tradition was affirmed in 1978. In *California v. United States*, 438 U.S. 645 (1978), California asserted that the United States Bureau of Reclamation was subject to state law in acquiring water rights under the Reclamation Act of 1902. The Supreme Court agreed in clear terms, holding that "[w]here Congress has expressly addressed the questions of whether federal entities must abide by state law, it has almost invariably deferred to state law." 438 U.S. at 653-70, 678-79.



The New Mexico Constitution which provides that: “[t]he 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.” N.M. Const. art. XVI § 2. Accordingly, New Mexico owns the water in the public domain in trust for the people, who acquire rights to it upon application to the State Engineer as administrator of the State’s water resources. *See, e.g.*, NMSA 1978, §§ 72-2-1(1907); 72-5-3(1907); 72-12-3 (1931); *Vanderwork v. Hewes*, 1910-NMSC-031, ¶ 5, 15 N.M. 439, 110 P. 567. *State ex rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 23, 62 N.M. 264, 308 P. 2d 983, concerned an action by the State Engineer to enjoin an illegal irrigation of land. The New Mexico Supreme Court held:

All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water but the use thereof may be acquired and the basis of such acquisition is beneficial use. §§ 75-5-1 and 75-11-1. *The state as owner of water has the right to prescribe how it may be used.*

*Id.* at ¶ 23. (emphasis added).

New Mexico law is clear that the water in streams remains public waters of New Mexico.

## CONCLUSION

For the foregoing reasons, the Special Master should deny the United States’ Motion for Judgment on the Pleadings Against New Mexico’s Counterclaims 2, 3, 5, 6, 7, 8, Texas’s Motion to Strike or for Partial Summary Judgment Regarding New Mexico’s Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure, Rule 12 (c) and Rule 56 and 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.

Respectfully submitted,

/s/ Jay F. Stein

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Underground Water Basin

(3) Purpose of Use: Municipal water supply and related as allowed under New Mexico law.

(4) Points of Diversion for this right:

|   |  |
|---|--|
| Well No.: <u>LRG-430 (Well 10)</u>      | Location: X= <u>1,478,453</u> Y= <u>480,788</u> Map: <u>LRN-10</u>             |
| Well No.: <u>LRG-430-S (Well 44)</u>    | Location: X= <u>1,486,797</u> Y= <u>472,115</u> Map: <u>LRN-14</u>             |
| Well No.: <u>LRG-430-S-2 (Well 45)</u>  | Location: X= <u>1,482,670</u> Y= <u>488,434</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-3 (Well 58)</u>  | Location: X= <u>1,476,541</u> Y= <u>467,513</u> Map: <u>LRN-14</u>             |
| Well No.: <u>LRG-430-S-4 (Well 38)</u>  | Location: X= <u>1,488,633</u> Y= <u>475,124</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-6 (Well 19)</u>  | Location: X= <u>1,486,244</u> Y= <u>479,464</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-7 (Well 20)</u>  | Location: X= <u>1,486,695</u> Y= <u>477,573</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-8 (Well 21)</u>  | Location: X= <u>1,485,249</u> Y= <u>481,160</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-9 (Well 62)</u>  | Location: X= <u>1,481,087</u> Y= <u>488,247</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-10 (Well 23)</u> | Location: X= <u>1,479,845</u> Y= <u>489,942</u> Map: <u>LRN-11,</u>            |
| <u>Just off the top right corner</u>    |  |
| Well No.: <u>LRG-430-S-11 (Well 24)</u> | Location: X= <u>1,486,443</u> Y= <u>475,136</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-12 (Well 26)</u> | Location: X= <u>1,484,298</u> Y= <u>476,633</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-13 (Well 25)</u> | Location: X= <u>1,482,036</u> Y= <u>486,677</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-14 (Well 27)</u> | Location: X= <u>1,484,263</u> Y= <u>478,885</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-15 (Well 28)</u> | Location: X= <u>1,482,913</u> Y= <u>485,134</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-16 (Well 29)</u> | Location: X= <u>1,472,362</u> Y= <u>476,170</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-17 (Well 65)</u> | Location: X= <u>1,471,818</u> Y= <u>470,210</u> Map: <u>LRN-14</u>             |
| Well No.: <u>LRG-430-S-18 (Well 31)</u> | Location: X= <u>1,468,103</u> Y= <u>483,005</u> Map: <u>LRN-10</u>             |
| Well No.: <u>LRG-430-S-19 (Well 32)</u> | Location: X= <u>1,479,323</u> Y= <u>473,763</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-20 (Well 33)</u> | Location: X= <u>1,473,082</u> Y= <u>486,300</u> Map: <u>LRN-10</u>             |
| Well No.: <u>LRG-430-S-21 (Well 35)</u> | Location: X= <u>1,482,053</u> Y= <u>470,361</u> Map: <u>LRN-14</u>             |
| Well No.: <u>LRG-430-S-22 (Well 36)</u> | Location: X= <u>1,448,315</u> Y= <u>465,378</u> Map: <u>LRN-15</u>             |
| Well No.: <u>LRG-430-S-23 (Well 37)</u> | Location: X= <u>1,445,733</u> Y= <u>465,407</u> Map: <u>LRN-15</u>             |
| Well No.: <u>LRG-430-S-25 (Well 54)</u> | Location: X= <u>1,485,224</u> Y= <u>484,062</u> Map: <u>LRN-11</u>             |
| Well No.: <u>LRG-430-S-26 (Well 40)</u> | Location: X= <u>1,509,596</u> Y= <u>515,825</u> Map: <u>LRN-15<sup>1</sup></u> |
| Well No.: <u>LRG-430-S-27 (Well 39)</u> | Location: X= <u>1,477,149</u> Y= <u>487,939</u> Map: <u>LRN-10</u>             |
| Well No.: <u>LRG-430-S-28 (Well 41)</u> | Location: X= <u>1,509,550</u> Y= <u>518,473</u> Map: <u>LRN-15<sup>2</sup></u> |

<sup>1</sup> Changes from LRG-430-S-26 to LRG-3289 upon completion of infrastructure and notice to the State Engineer, after which it will no longer serve as a supplemental point of diversion for this right, pursuant to the conditions of the permit as detailed in the Conditions of Approval for Applications LRG-3283 through LRG-3296, attached to the State of New Mexico's Offer of Judgment as Attachment A.

<sup>2</sup> Changes from LRG-430-S-28 to LRG-3288 upon completion of infrastructure and notice to the State Engineer, after which it will no longer serve as a supplemental point of diversion for this right, pursuant to the conditions of the permit as detailed in the Conditions of Approval for Applications LRG-3283 through LRG-3296, attached to the State of New Mexico's Offer of Judgment as Attachment A.

Well No.: LRG-430-S-29 (Well 42) Location: X= 1,513,830 Y= 521,312 Map: LRN-15<sup>3</sup>  
 Well No.: LRG-430-S-30 (Well 43) Location: X= 1,515,477 Y= 521,302 Map: LRN-15<sup>4</sup>  
 Well No.: LRG-430-S-31 (Well 57) Location: X= 1,488,480 Y= 478,928 Map: LRN-11  
 Well No.: LRG-430-S-32 (Well 59) Location: X= 1,466,828 Y= 473,808 Map: LRN-9  
 Well No.: LRG-430-S-33 (Driving Range) Location: X= 1,482,119 Y= 491,743  
 Map: LRN-11, Just off the top right corner  
 Well No.: LRG-430-S-34 (Paz Park) Location: X= 1,482,790 Y= 480,912 Map: LRN-11  
 Well No.: LRG-430-S-35 (Well 60) Location: X= 1,480,633 Y= 475,342 Map: LRN-11  
 Well No.: LRG-430-S-36 (Well 46) Location: X= 1,450,354 Y= 465,486 Map: LRN-15  
 Well No.: LRG-430-S-37 (Well 61) Location: X= 1,486,357 Y= 476,054 Map: LRN-11  
 Well No.: LRG-430-S-38 (Well 63) Location: X= 1,448,428 Y= 463,098 Map: LRN-15  
 Well No.: LRG-430-S-39 (Well 64) Location: X= 1,448,327 Y= 457,796 Map: LRN-15  
 Well No.: LRG-430-S-42 (Well 67) Location: X= 1,474,347 Y= 474,111 Map: LRN-15

on the New Mexico State Plane Coordinate System, Central Zone, 1983  
 N.A.D.

Not foreclosing additional supplemental points of diversion for this right as may be approved in the future by the Office of the State Engineer pursuant to statute, the points of diversion listed above represent all existing LRG-430 series supplemental wells from which the Defendant may divert. In addition to the points of diversion listed above, Office of the State Engineer permits have been approved, and have not been withdrawn, for three (3) additional supplemental LRG-430 series wells under Office of the State Engineer file numbers LRG-430-S-40, LRG-430-S-41, and LRG-430-S-43 (Well 68) but these wells have not yet been drilled. Additionally, an emergency permit has been approved by the Office of the State Engineer under file number LRG-430-S-44 (Well 71), pursuant to NMSA 1978 Section 72-12-24 (A), authorizing the drilling and use by the Defendant of a supplemental LRG-430 series well prior to publication and a hearing. This well also has not yet been drilled and a permit for this well has not been approved, pursuant to NMSA 1978, Section 72-12-3, by the Office of the State Engineer.

- (5) Amount of Water: Diversion from the LRG-430 wells not to exceed 21,869 acre-feet per annum from all points of diversion combined. Further provided that during periods of drought which, for purposes of this

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<sup>3</sup> Adjudicated an LRG-430 right under this subfile pending adjudication as a supplemental point of diversion under City East Mesa Permit Nos. LRG-3283-3285 and 3288-3296, upon which event it will cease to be a supplemental point of diversion for this right.

<sup>4</sup> Adjudicated an LRG-430 right under this subfile pending adjudication as a supplemental point of diversion under City East Mesa Permit Nos. LRG-3283-3285 and 3288-3296, upon which event it will cease to be a supplemental point of diversion for this right.

Offer of Judgment, are defined as years when the annual *pro rata* share of Rio Grande Project water available to acreage supplied with such water within Elephant Butte Irrigation District falls below two (2.0) acre-feet per acre, the Defendant shall not consumptively use the treated effluent derived from the LRG-430 wells listed in paragraph A (4), but shall return the effluent derived from these wells to the stream system. If the preceding year ended with an annual *pro rata* share of less than two (2.0) acre-feet per acre, the system remains in drought until the annual *pro rata* share is greater or equal to two (2.0) acre-feet per acre.

- (6) Place of Use: The municipal water utility service area of the City of Las Cruces in Dona Ana County, generally west of the Organ Mountains, as may be extended from time to time in the future pursuant to state statute and upon notice to the State Engineer. The current boundaries of the City of Las Cruces municipal water utility service area are shown on the Hydrographic Survey Map for Subfile No. LRN-28-011-0078-A attached to the State of New Mexico's Offer of Judgment.
3. By signing the State of New Mexico's Offer of Judgment, the Defendant accepted all of the terms and conditions set forth or incorporated in the Offer of Judgment.
4. All terms or conditions set forth or incorporated in the State of New Mexico's Offer of Judgment are incorporated into this Order.
5. The Court enters this Order as a final judgment based on the acceptance by the Defendant of the State of New Mexico's Offer of Judgment, and therefore, pursuant to the Court's procedural orders addressing finality, this Order is final and not subject to appeal.
6. There is no just reason for delay of the entry of a final judgment as to the elements of the claims of the Defendant adjudicated by this Order.

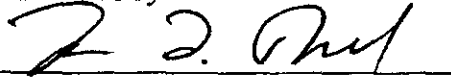
IT IS THEREFORE ORDERED that the rights of the Defendant are as set forth above.

IT IS THEREFORE ORDERED that the Defendant and all those in privity with the Defendant are enjoined from any diversion or use of the public surface and underground waters of the Lower Rio Grande stream system and the Lower Rio Grande Underground Water Basin, under the Office of the State Engineer files identified above, except in strict accordance with the rights set forth hereinabove or in other Orders of the Court.

**Jerald A. Valentine**

Jerald A. Valentine  
DISTRICT JUDGE

Submitted by:



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Approved as to form:

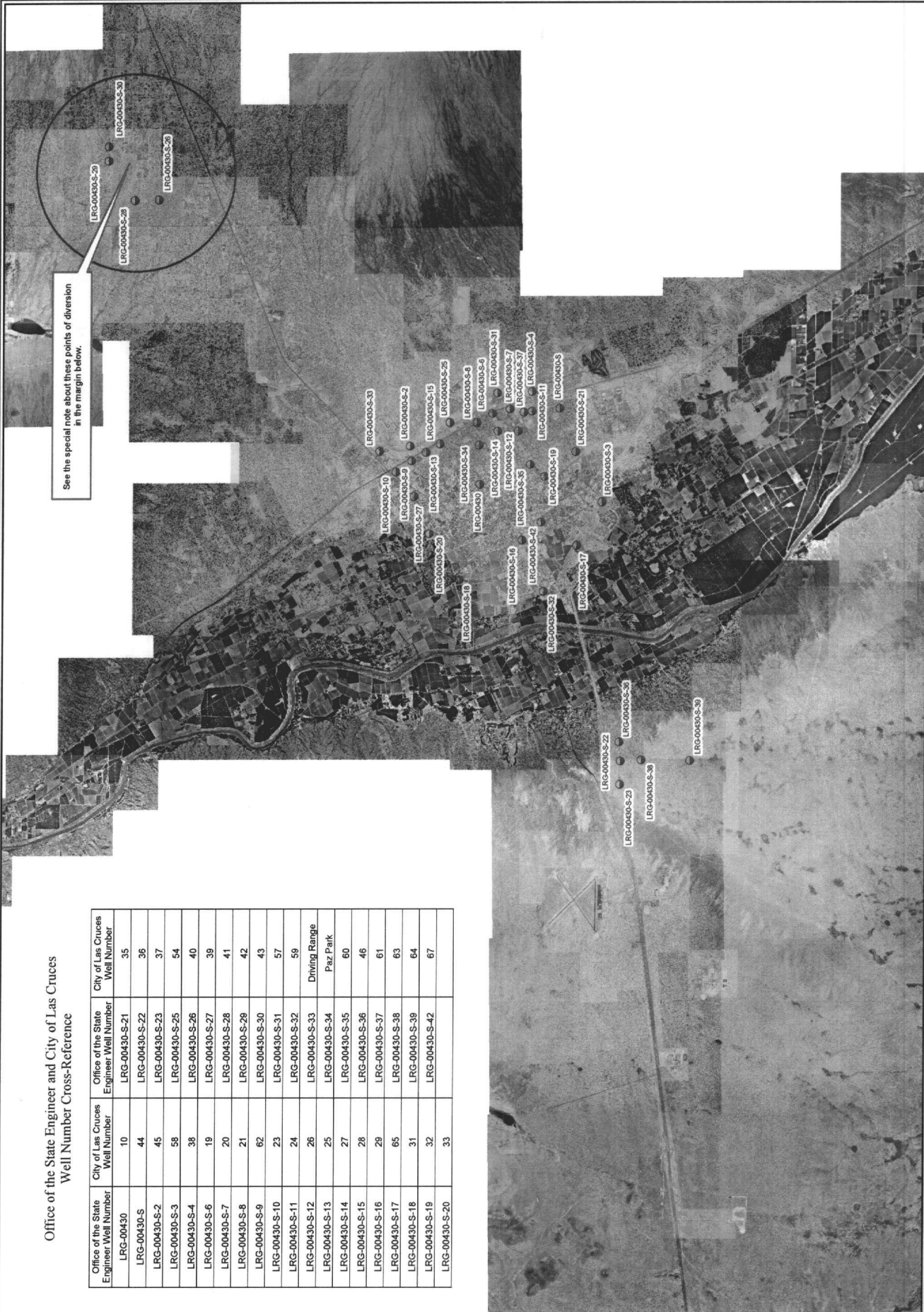


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Office of the State Engineer and City of Las Cruces  
Well Number Cross-Reference

| Office of the State Engineer Well Number | City of Las Cruces Well Number | Office of the State Engineer Well Number | City of Las Cruces Well Number |
|--|--------------------------------|--|--------------------------------|
| LRG-00430                                | 10                             | LRG-00430-S-21                           | 35                             |
| LRG-00430-S                              | 44                             | LRG-00430-S-22                           | 36                             |
| LRG-00430-S-2                            | 45                             | LRG-00430-S-23                           | 37                             |
| LRG-00430-S-3                            | 58                             | LRG-00430-S-25                           | 54                             |
| LRG-00430-S-4                            | 38                             | LRG-00430-S-26                           | 40                             |
| LRG-00430-S-6                            | 19                             | LRG-00430-S-27                           | 39                             |
| LRG-00430-S-7                            | 20                             | LRG-00430-S-28                           | 41                             |
| LRG-00430-S-8                            | 21                             | LRG-00430-S-28                           | 42                             |
| LRG-00430-S-9                            | 62                             | LRG-00430-S-30                           | 43                             |
| LRG-00430-S-10                           | 23                             | LRG-00430-S-31                           | 57                             |
| LRG-00430-S-11                           | 24                             | LRG-00430-S-32                           | 59                             |
| LRG-00430-S-12                           | 26                             | LRG-00430-S-33                           | Driving Range                  |
| LRG-00430-S-13                           | 25                             | LRG-00430-S-34                           | Paz Park                       |
| LRG-00430-S-14                           | 27                             | LRG-00430-S-35                           | 60                             |
| LRG-00430-S-15                           | 28                             | LRG-00430-S-36                           | 46                             |
| LRG-00430-S-16                           | 29                             | LRG-00430-S-37                           | 61                             |
| LRG-00430-S-17                           | 65                             | LRG-00430-S-38                           | 63                             |
| LRG-00430-S-18                           | 31                             | LRG-00430-S-39                           | 64                             |
| LRG-00430-S-19                           | 32                             | LRG-00430-S-42                           | 67                             |
| LRG-00430-S-20                           | 33                             |  |                                |

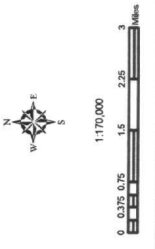


**Legend**  
 • Wells  
 ■ Las Cruces Service Area as of June 2005

**Special Note**  
 LRG-00430-S-26, S-28, S-29 and S-30 are adjudicated as points of diversion for subtitle LRN-28-011-0078-A, pending satisfaction of conditions stipulated to by the State of New Mexico and the City of Las Cruces as described in the Offer of Judgment. Upon satisfaction of these conditions, they will no longer serve as points of diversion for this subtitle.

Large scale hydrographic survey maps for this subtitle are attached to copies of the Offer of Judgment on file with the Court, New Mexico Office of the State Engineer, and the City of Las Cruces.

STATE OF NEW MEXICO  
 OFFICE OF THE STATE ENGINEER  
 JOHN R. DANTON, P.E., STATE ENGINEER  
 LITIGATION AND ADJUDICATION PROGRAM  
 LOWER RIO GRANDE BASIN HYDROGRAPHIC SURVEY  
 MONITORING AND MAINTENANCE DIVISION  
 Prepared by James E. Hill  
 AUGUST 19, 2005  
 Subtitle Map for the City of Las Cruces  
 LRN-28-011-0078-A



**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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***AMICUS CURIAE* CITY OF LAS CRUCES  
CERTIFICATE OF SERVICE**

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This is to certify that on the 28th day of February, 2019, I caused a true and correct copy of the City of Las Cruces' Consolidated *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  
of February, 2019.

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