

No. 141, Original
In the Supreme Court of the United States

STATE OF TEXAS, PLAINTIFF,
UNITED STATES OF AMERICA, PLAINTIFF-IN-INTERVENTION,

v.
STATE OF NEW MEXICO

AND

STATE OF COLORADO,
DEFENDANTS.

BRIEF OF AMICUS CURIAE EL PASO COUNTY WATER IMPROVEMENT DISTRICT
NO. 1 IN RESPONSE TO STATE OF NEW MEXICO'S MOTION FOR PARTIAL
JUDGMENT ON MATTERS PREVIOUSLY DECIDED AND BRIEF IN SUPPORT

Maria O'Brien*
Sarah M. Stevenson
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
500 Fourth Street N.W., Suite 1000
Albuquerque, New Mexico 87102
mobrien@modrall.com
**Counsel of Record*

Attorneys for El Paso County Water Improvement District No. 1

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Amicus curiae El Paso County Water Improvement District No. 1 (“EPCWID”) submits this brief in response to the State of New Mexico’s Motion for Partial Judgment on Matters Previously Decided and Brief in Support (Dec. 26, 2018) (“New Mexico Motion”). The New Mexico Motion should be denied due to legal and factual errors on which the motion is premised, and for the reasons set forth in 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 (“Texas Law of the Case Motion”). On the facts and the law, the New Mexico Motion demonstrates New Mexico’s ongoing confusion over the relationship between the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785, an interstate compact that apportions the waters of the Rio Grande, and the Rio Grande Reclamation Project (“Rio Grande Project” or “the Project”), an irrigation project governed by federal reclamation law that allocates waters of the Rio Grande between EPCWID and Elephant Butte Irrigation District (“EBID”) in the geographic area served by the Project. This confusion, as well as a demonstrated misunderstanding regarding the function and operation of the 2008 Operating Agreement, render New Mexico’s legal arguments unsupportable. New Mexico’s arguments are also faulty as the New Mexico Motion selectively identifies rulings made by the Supreme Court for law of the case effect, ignores other findings and rulings, and sets forth “principles” that are not based on findings of the Court.

I. Background.

EPCWID is one of two beneficiaries of the Rio Grande Reclamation Project (“Rio Grande Project” or “the Project”), a federal interstate reclamation project which serves as the vehicle for delivery of the water apportioned to Texas under the Rio Grande Compact. EPCWID incorporates in full the Background section set forth in its response to the United States’ Motion for Judgment on the Pleadings Against New Mexico’s Counterclaims 2, 3, 5, 6, 7 8 and 9 (Dec. 21, 2018) (“U.S. Motion”) and Memorandum of Points and Authorities in Support of the U.S. Motion (Dec. 21,

2018) (“Memorandum in Support of U.S. Motion”), filed this same date (“EPCWID Response to U.S. Motion”).

II. New Mexico misstates the applicable law of the case doctrine and decisions made by the Supreme Court.

The New Mexico Motion correctly acknowledges that application of the law of the case doctrine is discretionary. *See* New Mexico Motion, 11. New Mexico is incorrect, however, in its assertion that the law of the case doctrine can never apply to a ruling on a motion to dismiss. *See id.*, 12. As explained in the Texas Law of the Case Motion, 18-19, the Supreme Court may make legal rulings in deciding a motion to dismiss that are binding on the parties as the case proceeds.

Despite arguing that the law of the case doctrine does not apply to decisions on a motion to dismiss, New Mexico goes on to argue that eleven “principles” constitute law of the case based on the Supreme Court’s acceptance of the Special Master’s Recommendation that its motion to dismiss be denied. *See* New Mexico Motion, 13-14. While EPCWID agrees with New Mexico that the Supreme Court ruled that Texas and the United States pled claims under the Compact, *id.* 13 ¶ 1; that the United States has entered into a treaty to deliver 60,000 acre-feet annually to Mexico, *id.* ¶ 3; and that the Compact obligates New Mexico to deliver a specific amount of water into Elephant Butte Reservoir annually, *id.* 3 ¶ 9,¹ the majority of New Mexico’s eleven “principles” do not represent findings by the Court and are an improper attempt to expand the Court’s rulings.

A primary error contained in the New Mexico Motion is New Mexico’s misunderstanding of the difference between apportionment of water to the signatory states of the Rio Grande Compact and allocation of Project water to EPCWID and EBID, the two beneficiaries of the Rio Grande Project. This error is embodied in New Mexico’s second “principle” that the Compact

¹ The Compact provides that the obligation of New Mexico to deliver water in the Rio Grande is at San Marcial. *See* Rio Grande Compact, Art. IV. For the purposes of this brief, New Mexico’s Compact delivery obligation at San Marcial will be referenced as delivery into Elephant Butte Reservoir.

applies below Elephant Butte. As Texas explains in its 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 (Dec. 26, 2018), 17, the Compact apportions water among the signatory states, with New Mexico's apportionment being those waters between the Colorado-New Mexico state line and Elephant Butte Reservoir, as defined in the Compact. Texas's Compact apportionment is the water delivered into Elephant Butte Reservoir. After delivery by New Mexico, Texas's apportionment is allocated by the Project to EPCWID and EBID for delivery to the District's respective constituents, and pursuant to contracts entered into under reclamation law to the City of El Paso. The Compact apportions the waters of the Rio Grande, which is then allocated below Elephant Butte to EBID and EPCWID by virtue of the Downstream Contracts and contracts entered into under reclamation law governing Project operations.

New Mexico however, turns the distinction between what has been apportioned to the respective states under the Compact to what is allocated below Elephant Butte to the Project beneficiaries (the two Districts), on its head. The allocation below Elephant Butte is an allocation to the Project beneficiaries – not an apportionment or an allocation to New Mexico as a state. By stating the Downstream Contracts are in effect an apportionment, New Mexico confuses the concepts of Project allocations governed by reclamation law and apportionments among the states pursuant to Compact law. *See* New Mexico Motion 13, ¶¶ 6, 7. The Compact applies below Elephant Butte. Its application however, is not to apportion further water to New Mexico, but rather it applies to protect and ensure delivery of Texas's apportionment delivered through the Project. New Mexico's obligations under the Compact continue below the Reservoir; but it does not receive a further apportionment. New Mexico's obligation below Elephant Butte is to refrain from interfering with Texas' apportionment once New Mexico has delivered that apportionment

into Elephant Butte. New Mexico’s argument that the Compact generally “applies below Elephant Butte” for purposes of providing New Mexico—as opposed to Texas—an apportionment below Elephant Butte once New Mexico has delivered into the reservoir is not supported by the Compact or any ruling or finding by the Court or Special Master in this case. *See* New Mexico Motion 13, ¶ 2; Compact Art. IV; First Interim Report of the Special Master (Feb. 9, 2017), 198 (“First Special Master Report”); *Texas v. New Mexico*, 583 U.S. ___, 138 S.Ct. 954, 957 (2018). The Compact makes no separate apportionment to “part of New Mexico” below Elephant Butte. *Id.* 14, ¶ 8. That is water dedicated to the Rio Grande Project for allocation to the two Districts and delivery to the State of Texas. First Special Master Report, 198.

New Mexico also errs in equating the irrigable acreage in EBID and EPCWID and allocation of Project water pursuant to various reclamation contracts to a determination of Texas’ Compact apportionment. However, none of the terms of any reclamation contract governing Project operations allocate water on a pro rata, per acre basis; and no Project contracts could or do determine Texas’s Compact apportionment on a pro rata basis requiring delivery of an equal amount of water to each acre within the Project. The Project serves 159,650 irrigable acres – 67/155th within EBID and 88/155th within EPCWID. The 1938 Contract, which New Mexico appears to rely on as the basis for its misguided “pro rata” Compact argument establishes the irrigable acreage in each District as a basis for those lands entitled to receive Project water; and the percentage therefore of the repayment costs each District would be required to pay for the Project – 57% EBID and 43% EPCWID. *See Texas v. New Mexico*, 138 S.Ct. at 957. While the repayment of construction costs and the eligible irrigable acreage pursuant to reclamation law is a 53-47% split, this does not equate to a pro rata per acre allocation of Project water pursuant to the Compact or otherwise dictate Project operations pursuant to reclamation law. And while the 1938

contract between EBID and EPCWID provides that in times of drought the irrigable acreage may serve as a basis for distribution of water “as far as practicable”, that contract does not determine either Project allocations or Texas’ Compact apportionment. New Mexico’s attempt to state or create a “principle” that New Mexico has an apportionment after it delivers water to Elephant Butte, based on either the Compact or the Court’s rulings in this case must fail as a matter of law.

III. Conclusion.

New Mexico’s Motion for Partial Summary Judgment on Matters Previously Decided should be denied.

Respectfully submitted,

/s/ Maria O’Brien

Maria O’Brien*

Sarah M. Stevenson

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

500 Fourth Street N.W., Suite 1000

Albuquerque, New Mexico 87102

mobrien@modrall.com

**Counsel of Record*

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OFFICE OF THE SPECIAL MASTER



**EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1'S
CERTIFICATE OF SERVICE**

This is to certify that on the 28th of February, 2019, I caused true and correct copies of the **Brief of Amicus Curiae El Paso County Water Improvement District No. 1 in Response to the State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support** to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 28th day of February, 2019.

/s/ Maria O'Brien

Maria O'Brien*

Sarah M. Stevenson

Modrall, Sperling, Roehl, Harris & Sisk, P.A.

500 Fourth Street N.W., Suite 1000

Albuquerque, New Mexico 87102

mobrien@modrall.com

**Counsel of Record*

UNITED STATES

JAMES J. DUBOIS*
R. LEE LEININGER
THOMAS K. SNODGRASS
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
999 18th Street
South Terrace – Suite 370
Denver, Colorado 80202
Seth Allison, Paralegal

james.dubois@usdoj.gov
(303) 844-1375
lee.leininger@usdoj.gov
(303)844-1364
thomas.snodgrass@usdoj.gov
(303)844-7233

seth.allison@usdoj.gov
(303)844-7917

NOEL J. FRANCISCO*
Solicitor General
JEFFREY H. WOOD
Acting Assistant Attorney General
ANN O'CONNELL
Assistant to the Solicitor General
U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

supremectbriefs@usdoj.gov
(202)514-2217

STEPHEN M. MACFARLANE
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
501 I Street, Suite 9-700
Sacramento, CA 95814

stephen.macfarlane@usdoj.gov
(916) 930-2204

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

judith.coleman@usdoj.gov
(202) 514-3553

STATE OF NEW MEXICO

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672
hbalderas@nmag.gov
tmnaestas@nmag.gov

MARCUS J. RAEL, JR.*
DAVID A. ROMAN
Special Assistant Attorneys General
ROBLES, RAEL & ANAYA, P.C.
500 Marquette Avenue NW,
Suite 700
Albuquerque, New Mexico 87102
505-242-2228
marcus@roblesrael.com

**Counsel of Record*
BENNET W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203 303-
861-1963
braley@troutlaw.com
lthompson@troutlaw.com
mkopp@troutlaw.com

STATE OF COLORADO

CHAD M. WALLACE*
Senior Assistant Attorney General
COLORADO DEPARTMENT OF LAW
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
chad.wallace@coag.gov
Paralegal: Nan B. Edwards
nan.edwards@coag.gov

CYNTHIA H. COFFMAN
Attorney General of Colorado
KAREN M. KWON
First Assistant Attorney General
Colorado Department of Law
1300 Broadway
Denver, CO 80203
Tel. 720-508-6281
cynthia.coffman@coag.gov
karen.kwon@coag.gov

STATE OF TEXAS

STUART L. SOMACH*
ANDREW M. HITCHINGS
ROBERT B. HOFFMAN
FRANCIS M. "MAC"
GOLDSBERRY II

(916) 446-7979
(916) 803- 4561 (cell)
ssomach@somachlaw.com ahitchings@somachlaw.com
rhoffman@somachlaw.com mgoldsberry@somachlaw.com
tbarfield@somachlaw.com bjohnson@somachlaw.com

THERESA C. BARFIELD
BRITTANY K. JOHNSON
SOMACH SIMMONS & DUNN, PC
500 Capital Mall, Suite 1000
Sacramento, CA 95814
Tel. 916-446-7979
Cell 916-803-4561

Rhonda Stephenson – Secretary
Christina Garro – Paralegal
Yolanda De La Cruz – Secretary

rstephenson@somachlaw.com
cgarro@somachlaw.com
ydelacruz@somachlaw.com

KEN PAXTON, Attorney General
JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS, Deputy
Attorney General
PRICILLA M. HUBENAK
Chief, Environmental Protection Division
P.O. Box 12548
Austin, TX 78711-2548

Priscilla.Hubenak@oag.texas.gov

AMICI / FOR INFORMATIONAL PURPOSES ONLY

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

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

(505) 983-3880
jcbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

PETER AUH
ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY
P.O. Box 568
Albuquerque, NM 87103-0568

(505) 289-3092
pauh@abcwua.org

CITY OF EL PASO

DOUGLAS G. CAROOM*
SUSAN M. MAXWELL
BICKERSTAFF HEATH DELGADO
ACOSTA, LLP
2711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746

(512) 472-8021
dcaroom@bickerstaff.com
smaxwell@bickerstaff.com

CITY OF LAS CRUCES

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

(505) 983-3880
jcbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

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

(575) 541-2128
jvega-brown@las-cruces.org
marcyd@las-cruces.org

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCastle*
BARNCastle LAW FIRM, LLC
1100 South Main, Ste. 20
P.O. Box 1556
Las Cruces, NM 88004
Janet Correll – Paralegal

(575) 636-2377
(575) 636-2688 (fax)
samantha@h2o-legal.com

janet@h2o-legal.com

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT

ANDREW S. "DREW" MILLER*
KEMP SMITH LLP
816 Congress Avenue, Suite 1305
Austin, TX 78701

(512) 320-5466
dmiller@kempsmith.com

STATE OF KANSAS

TOBY CROUSE*

Solicitor General, State of Kansas

DEREK SCHMIDT

Attorney General, State of Kansas

JEFFREY A. CHANAY

Chief Deputy Attorney General

BRYAN C. CLARK

Assistant Solicitor General

DWIGHT R. CARSWELL

Assistant Attorney General

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

Topeka, KS 66612

(785) 296-2215

toby.crouse@ag.ks.gov

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON*

DAVIDSON LAW FIRM, LLC

4206 Corrales Road

P.O. Box 2240

Corrales, NM 87048

(505) 792-3636

ttd@tessadavidson.com

Patricia McCan – Paralegal

patricia@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON*

UTTUN & KERY, P.A

P.O. Box 2386

Santa Fe, New Mexico 87504

(505) 699-1445

john@uttonkery.com

LIZBETH ELLIS

General Counsel

CLAYTON BRADLEY

Counsel

New Mexico State University

Hadley Hall Room 132

2850 Weddell Road

Las Cruces, NM 88003

(575) 646-2446

lellis@ad.nmsu.edu

bradleyc@ad.nmsu.edu