

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 SUPPORT OF THE STATE OF NEW MEXICO'S
MOTIONS FOR SUMMARY JUDGMENT AND IN OPPOSITION TO THE STATE OF
TEXAS'S AND THE UNITED STATES' MOTIONS FOR SUMMARY JUDGMENT**

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INTRODUCTION

The Albuquerque Bernalillo County Water Utility Authority (“Water Authority”) submits this *amicus curiae* brief in support of: 1) the State of New Mexico’s Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support, dated November 5, 2020 (“New Mexico’s Apportionment Brief”); 2) the State of New Mexico’s Motion for Partial Summary Judgment to Exclude Texas’s Claim for Damages in Certain Years and Brief in Support, dated November 5, 2020 (“New Mexico’s Brief to Limit Texas’s Damages Claims”); and 3) the State of New Mexico’s Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortages and Brief in Support, dated November 5, 2020 (“New Mexico’s Notice Brief”); and in opposition to 4) the State of Texas’s Motion for Partial Summary Judgment; Memorandum of Points and Authorities in Support Thereof; Federal Rule of Civil Procedure 56, dated November 5, 2020 (“Texas’s Apportionment Brief”); and 5) the United States of America’s Motion for Partial Summary Judgment and Memorandum in Support, dated November 5, 2020 (“United States’ Apportionment Brief”). The Water Authority also addresses the response briefs filed by New Mexico, Texas, Colorado, and the United States, on December 22, 2020, to the motions for summary judgment set forth immediately above.

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 37.¹ Pursuant to the Special Master’s Order dated December 9, 2020, this *amicus curiae* brief is being filed after the

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 may file an *amicus curiae* 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.

parties filed their dispositive motions and briefs in support and response briefs, but before the parties' filed their reply briefs.

As it has done in past briefs, 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 the parties' dispositive motions, supporting briefs, and responses.

More specifically, the Water Authority seeks to: 1) ensure a proper articulation of rights and responsibilities of the Compacting States and the United States in relation to the Rio Grande Compact, particularly Compact apportionments above Elephant Butte Reservoir where its water rights are administered; and 2) ensure a proper articulation of rights and responsibilities of the Compacting States and the United States in relation to the Rio Grande Compact and the Rio Grande Project below Elephant Butte Reservoir, as those determinations have the potential to affect reservoir operations and Compact obligations above Elephant Butte.

Adverse rulings on these issues could negatively affect administration of the Water Authority's water rights which are governed by New Mexico state law, including its reliance on New Mexico's historical administration of the Rio Grande in relation to the Rio Grande Compact.

The Water Authority encourages narrow rulings on the dispositive motions and only in instances where there are clearly no genuine issues of material fact in dispute for two reasons. First, if any of the dispositive motions defining the rights and responsibilities of the Compacting States and United States *viz-a-viz* the Rio Grande Compact and Rio Grande Project are granted, it would likely result in exceptions to the Court, along with related briefs and oral argument, delaying trial until those issues are resolved. The benefit, of course, is that it would narrow the issues for trial. Second, in original actions involving interstate water disputes, the Court favors full

development of the facts and trial on each parties' legal theories related to Compact liability and defense. *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 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). Full development of the facts at trial also helps to avoid the possibility of a remand to hear additional evidence on legal theories that were prematurely disallowed. *Cf. Florida v. Georgia*, 138 S. Ct. 2502 (2018) (case remanded to the Special Master because he applied too strict of standard).

INTEREST OF THE WATER AUTHORITY

The Water Authority is the largest provider of municipal water in New Mexico, located in central New Mexico, 150 miles upstream of Elephant Butte Reservoir, in the Middle Rio Grande. The Water Authority is responsible for providing a potable water supply to more than 675,000 people in Albuquerque and Bernalillo County. The Water Authority's drinking water supply comes from two sources.

First, it has groundwater wells located in the Middle Rio Grande Underground Water Basin, authorized and administered by the New Mexico State Engineer under Permit No. RG-960 *et al.* Second, it has a perpetual contract for 48,200 acre-feet per year of imported Colorado River water from the San Juan-Chama Project (“SJCP”), a federal Reclamation project, administered under State Engineer Permit No. SP-4830. *See* 43 U.S.C. § 615pp.

The Water Authority conjunctively manages its imported SJCP surface water with its groundwater, both of which are subject to permits and active administration from the New Mexico State Engineer.² The volume and timing of both sources of supply are dependent on native water supplies available to New Mexico under the Rio Grande Compact, particularly Article IV, including river operations of the Middle Rio Grande Project for irrigation of lands within the Middle Rio Grande Conservancy District (“MRGCD”).³ 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.

Examples of how this litigation could affect the Water Authority include: 1) the imposition of a 1938 Condition in Article IV of the Compact that “freezes” depletions on a specific date rather than its historical administration based on inflow/outflow criteria; and 2) changes in Elephant Butte Reservoir operations that affect evaporation calculations (the Water Authority stores SJCP in Elephant Butte), credit water, storage upstream, and actual or hypothetical spills that impact Middle Rio Grande Compact administration.

BACKGROUND

This Background section is limited to issues addressed in the Water Authority’s Response. Water use and administration in the Middle Rio Grande is governed by a combination of the Rio

² The Water Authority also has vested and acquired water rights from the Middle Rio Grande in its portfolio. It also maximizes its water rights through aquifer storage and recovery, through both infiltration and direct injection, and it uses non-potable wastewater and surface water for irrigation and industrial use.

³ The Middle Rio Grande Project is a U.S. Bureau of Reclamation project that includes storage in El Vado Reservoir on the Rio Chama that provides water for irrigation of approximately 60,000 acres in the Middle Rio Grande. The United States owns MRGCD’s project works.

Grande Compact and New Mexico water law.⁴ See Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (“Rio Grande Compact” or “Compact”).

A. Rio Grande Compact.

The Water Authority will provide only a truncated description of the Rio Grande Compact as it relates to points made in this brief as the Special Master is now well versed in its language.

The Compact apportionment above Elephant Butte Reservoir is straightforward. Pursuant to Article III, 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.* 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.⁵ Under Article VI of the Compact, Colorado and New Mexico may accrue debits up to a specified amount and erase debits by an “actual spill” at Elephant Butte Reservoir. *Id.*

The apportionment upstream of Elephant Butte Reservoir 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 delivered 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

⁴ 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.

⁵ 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.

delivery obligations. Tributary inflows from summer monsoons in the Middle Rio Grande downstream of the gauging station are allocated to New Mexico and do not change the delivery requirement under Article IV. In other words, the amount available for New Mexico to use annually consists of both the apportionment and tributary inflows, meaning that the total amount of native surface water available to New Mexico in the Middle Rio Grande is highly variable. Accordingly, the amount of Rio Grande water available for use in Colorado and New Mexico above Elephant Butte changes from year-to-year based on the flow of the Rio Grande. The Compact has operated successfully under long periods of debits, *i.e.*, 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).

Nothing in the Rio Grande Compact or its historical administration suggests that Colorado or New Mexico have a fixed delivery obligation above Elephant Butte Reservoir. In fact, the Rio Grande Compact provides a highly flexible apportionment to Colorado and the Middle Rio Grande as demonstrated by 80 years of Compact accounting and administration. The Compact apportionment above Elephant Butte Reservoir is express, variable, and unambiguous.

B. New Mexico Water Administration in the Middle Rio Grande.

The New Mexico State Engineer is responsible for intrastate administration of water rights to ensure compliance with New Mexico's Compact obligation. The New Mexico State Engineer has jurisdiction over all surface water in New Mexico by virtue of the surface water code of 1907. *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.

The native Middle Rio Grande water supply is augmented with imported surface water from the San Juan River, a tributary of the Colorado River by the San Juan-Chama Project, 43 U.S.C. 615 *et seq.* The SJCP is a U.S. Bureau of Reclamation project that imports a portion of New Mexico’s Colorado River allocation from diversions in Colorado which are conveyed into New Mexico through a series of tunnels for ultimate storage in Heron Reservoir. Heron Reservoir is located on the Rio Chama, a tributary to the mainstem Rio Grande, and has a storage capacity of just more than 400,000 acre-feet. Stored Colorado River water is released from Heron Reservoir to the SJCP contractors on an annual basis in accordance with contracts. The Water Authority stores a portion of its SJCP allocation in Abiquiu Reservoir, 40 miles downstream of Heron Reservoir, for release and use within the City of Albuquerque and Bernalillo County. Imported water is the private property of the importer. *See Carangelo v. Albuquerque-Bernalillo Cnty. Water Util. Auth.*, 2014-NMCA-032, 320 P.3d 492. SJCP water is owned by the Water Authority, other municipalities, MRGCD, and various Indian tribes.

SUMMARY OF ARGUMENT

The Water Authority supports all three of New Mexico's Motions for Summary Judgment.

In its Apportionment Motion and Supporting Brief, New Mexico has set forth the law and undisputed issues of material fact that establish that it has a Compact appointment below Elephant Butte Reservoir, with New Mexico being entitled to 57% of the Project supply and Texas being entitled to 43% of the Project supply. Its position is supported by the Court's opinion, the Compact, and 80 years of Compact and Project administration. New Mexico's motion for summary judgment should be granted.

To the contrary, the United States and Texas have not demonstrated that there are undisputed issues of material fact and neither is entitled to summary judgment. Texas disagrees with the Court's conclusion that New Mexico has an apportionment below Elephant Butte, so it interprets the Court's language as dicta. The United States is not quite so bold, but after admitting that New Mexico has an apportionment below Elephant Butte, makes it hollow by contending that New Mexico has no authority or control over its apportioned water. Both Texas and the United States find implied rights and obligations in the Compact where none expressly exist. A prime example that directly affects the Water Authority is an allegation that the Compact freezes depletions at a 1938 level through the Rio Grande Basin in New Mexico and Colorado, but not Texas. Additionally, both the United States and Texas ignore decades of Compact and Project administration.

The Water Authority encourages the Special Master to grant New Mexico's motions for summary judgment. Short of that, there are undisputed issues of material fact that require trial. At a minimum, the Special Master should confirm the Court's conclusion that New Mexico has a Compact apportionment below Elephant Butte Reservoir.

ARGUMENT

POINT I

IT IS UNDISPUTED THAT NEW MEXICO HAS A DEFINED COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR

New Mexico has demonstrated that there is no genuine dispute of any material fact and that the Special Master can declare as a matter of law that both New Mexico and Texas have an apportionment below Elephant Butte Reservoir under the Rio Grande Compact. *See* New Mexico's Apportionment Brief at 26; S. Ct. R. 17.2; and FED. R. CIV. P. 56. New Mexico has also shown that the Rio Grande Project was incorporated into the Rio Grande Compact and that the Compact governs the distribution of Rio Grande Project water pursuant to the Downstream Contracts, with New Mexico entitled to 57% of the Project supply and Texas entitled to 43% of the Project supply. *Id.* New Mexico's positions are supported by the Court's 2018 opinion, the text of the Compact, and there are no genuine disputes of material fact regarding the parties' course of conduct for the last 80 years that supports New Mexico's position. *See Texas v. New Mexico, et al.*, 138 S. Ct. 954 (2018). The Water Authority agrees with and supports New Mexico's Apportionment Motion and Brief.⁶

Initially, as New Mexico points out, the Court found New Mexico has a Compact apportionment below Elephant Butte Reservoir. *See* New Mexico's Apportionment Brief at 26-

⁶ The Water Authority also agrees with and supports the State of New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Certain Years and the State of New Mexico's Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortages. Both motions are based on the Court's determination that the Rio Grande Project was incorporated into the Rio Grande Compact. *See Texas v. New Mexico*, 138 S. Ct. at 959. Both motions also demonstrate that there are no genuine issues of material fact in dispute regarding the Project's historical operations, thereby precluding Texas's claims for damages when EP#1 received a full Project supply, after 2006 when the United States began giving a major share of New Mexico's Compact apportionment below Elephant Butte to Texas, and in years in which New Mexico did not receive notice that Texas was not receiving its Compact entitlement.

28. The Court stated that the United States might be said to serve as a sort of agent of the Compact through the Downstream Contracts, “charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico is, in fact, made.” *See Texas v. New Mexico*, 138 S. Ct. at 959. Thus, according to the Court, New Mexico has a Compact apportionment below Elephant Butte.⁷ While New Mexico and the United States agree that the Court found that New Mexico has an apportionment below Elephant Butte, the United States interprets New Mexico’s apportionment in a way that makes it meaningless. *See infra* at Point II.A.

New Mexico explains that 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. The Court found that the division of Project water under the Downstream Contracts is 57% to New Mexico and 43% to Texas. *See id.* at 957. The Project defines the apportionment. New Mexico has a Compact apportionment equal to 57% of the Rio Grande Project supply and Texas has a Compact apportionment equal to 43% of the Project supply.⁸ New Mexico’s articulation of the appointment between it and Texas downstream of Elephant Butte is properly drawn from the Court’s opinion.

⁷ Given the Court’s determination that New Mexico has a Compact apportionment below Elephant Butte Reservoir, the 2008 Operating Agreement is null and void as it gives away a significant portion of New Mexico’s apportioned Compact water without its consent. The Water Authority acknowledges that the Special Master has expressed a desire to first articulate and quantify the apportionment below Elephant Butte Reservoir, including expressing the relationship between the Compact and the Project. Once each state’s entitlements, rights, and responsibilities have been clearly defined, past and present operations will be examined, and changes made to Project operations where they were not authorized or are not consistent with each State’s Compact apportionment. *See* Special Master’s Order dated March 31, 2020, at 29-30, 32-33. *See also* Albuquerque Bernalillo County Water Utility Authority Brief in Response to Dispositive Motions filed by the State of Texas and the United States, dated February 28, 2019, at 12-16.

⁸ Apportionment of the Rio Grande Project supply 57% to New Mexico and 43% to Texas involves complex accounting of deliveries into various irrigation canals. Compact compliance must be evaluated by irrigation Project entitlements and deliveries and not by unrelated river flows. *See infra* Point IV. Because of the physical layout of the Rio Grande Project, with canals crossing back and forth across the state line, there

Next, New Mexico describes the Compact language that supports its description of the apportionment below Elephant Butte Reservoir. *See* New Mexico’s Apportionment Brief at 28-36. The incorporation of the Rio Grande Project into the Rio Grande Compact serves as the basis for the Compact apportionment between New Mexico and Texas and establishes the division of water between the two states. *Id.* There is nothing in the Compact that suggests that New Mexico’s and Texas’s Compact apportionments below Elephant Butte are treated or administered differently. *Id.* at 32-36.

Finally, New Mexico sets forth undisputed material facts that demonstrate the Project and Compact have been operated for 80 years consistent with its description and quantification of the Compact apportionment and the other parties’ acquiesce and support. *Id.* at 43-53. The Special Master indicated this operational history could be important:

In any event, there are over eighty years of performance under the Compact to inform the Court as to the parties’ longstanding understanding of the limits of the full extent of play in the system, the limits to which the ratio cited in the Downstream Contracts actually might define a Compact right to Project supply, and the extent to which individual state’s groundwater laws must be deemed subservient to the Compact.

See Special Master’s Order dated April 14, 2020, at 21.

The United States’ and Texas’s responses to New Mexico’s Apportionment Brief essentially incorporate positions from their apportionment motions which the Water Authority addresses *infra* at Points II and III. *See generally* United States of America’s Memorandum in Response to the State of New Mexico’s Motions for Summary Judgment, dated December 22, 2020 (“United States’ Response to New Mexico’s Apportionment Brief”) and the State of Texas’s

can be no state-line delivery, contrary to allegations in Texas’s Complaint at ¶¶ 18 and 19. Rather, as the Court found, the Project supply is divided based upon the ratio of irrigated acres that existed under the Downstream Contracts. *See Texas v. New Mexico*, 138 S. Ct. at 957.

Opposition to the State of New Mexico’s Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support (“Texas’s Response to New Mexico’s Apportionment Brief”).

When compared to the United States’ or Texas’s articulation of the Compact apportionment below Elephant Butte Reservoir, New Mexico is the only party that articulated the Compact apportionment and Project operation in a way that respects and give substantive meaning to the Court’s 2018 opinion which is consistent with 80 years of Compact and Project administration. It treats New Mexico and Texas as equal sovereigns and equitably in the quantification and administration of their Contract apportionments below Elephant Butte. It puts New Mexico and Texas irrigators on equal footing and treats them equally and equitably in the distribution of the States’ Compact apportionments of irrigation water. It recognizes that the Project allocation administered by the United States and the two irrigation districts is governed by the Compact apportionment between the States, yet it recognizes and respects the role of the United States and the two irrigation districts in their role as day-to-day operators of the Project, but reserving into the States the ability to ensure that their Compact apportionments are not diminished or compromised in any respect. In sum, New Mexico is the only party that articulates and quantifies the Compact apportionment and Project operations in a way that harmonizes the interests, rights, and responsibilities of the Compacting States and the United States.⁹

The Water Authority agrees with and supports New Mexico’s position that both New Mexico and Texas have equitable apportionments below Elephant Butte Reservoir under the Rio Grande Compact and that New Mexico has a Compact entitlement to 57% of the Project supply

⁹ The Water Authority set forth a very similar position when it described how the Compact and Project interrelate, complying with the Compact apportionment to New Mexico and Texas below Elephant Butte, and respecting the roles of the Compacting States, the United States, and the irrigation districts in Compact and Project operations. *See* Albuquerque Bernalillo County Water Utility Authority Brief in Response to Dispositive Motions filed by the State of Texas and the United States, dated February 28, 2019, at 16-19.

and Texas has a Compact entitlement to 43% of the Project supply. Importantly for the Water Authority and other water users in the Middle Rio Grande, this leaves unaffected the Compact delivery obligation under Article IV as it has been historically interpreted and administered.

POINT II

NEW MEXICO'S APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR CANNOT BE MEANINGLESS AS THE UNITED STATES CONTENDS

The United States seeks summary judgment against New Mexico declaring that New Mexico has an obligation to not intercept or interfere with deliveries of water by the Rio Grande Project that effectuate the Compact apportionment to New Mexico and Texas below Elephant Butte Reservoir. *See* United States' Apportionment Brief at 1, 21-22. The United States also seek injunctive relief against New Mexico claiming that New Mexico has not and cannot comply with the apportionment as the United States has defined it. *Id.* at 1, 34-40. The United States suggests that New Mexico's obligations under the Rio Grande Compact can be declared as a matter of law because "the Compact's meaning is plain." *Id.* at 21.

More specifically, the United States contends that: 1) while New Mexico has an equitable apportionment in name below Elephant Butte Reservoir, it has no control or authority over its Compact apportionment; 2) the apportionment did not specify the amount of water allocated to each state, but nonetheless is based on a 1938 condition; and 3) New Mexico's apportionment is limited to water for irrigation demand within EBID. *See* United States of America's Memorandum in Response to New Mexico's Motions for Summary Judgement, dated December 22, 2020 ("United States' Response to New Mexico's Apportionment Brief"). The United States' positions are set forth in its Apportionment Brief and further explicated in its Response to New Mexico's Apportionment Brief.

New Mexico has described genuine disputes of material fact that preclude granting the United States' motion for summary judgment. *See* New Mexico's Response to the United States' Apportionment Motion. The Water Authority agrees with and supports New Mexico's Response and will summarize four points that potentially affect its interests.

A. New Mexico's Apportionment Below Elephant Butte Provides Rights to New Mexico.

The United States admits that the Court recognized that New Mexico has an apportionment below Elephant Butte Reservoir under the Rio Grande Compact. *See* United States' Apportionment Brief at 1, 23. More specifically, the United States concedes that the Rio Grande Compact effectuates an equitable apportionment as between New Mexico and Texas below Elephant Butte Reservoir. *See* United States' Response to New Mexico's Apportionment Motion at 1, 2, 5, 7, and 10 fn 6. In one of the few instances in which the United States has not been in lockstep with Texas against New Mexico and its water users, the United States disagrees with Texas's argument that New Mexico does not have an apportionment below Elephant Butte. *See* United States' Response to New Mexico's Apportionment Brief at 10, fn 6. The flaw with the United States' argument, however, is that while it purports to recognize a New Mexico apportionment below Elephant Butte, it defines the apportionment in a way that makes it hollow – it provides no rights to New Mexico.

The United States argues that New Mexico must comply with Article IV of the Compact by delivering water to Elephant Butte Reservoir. *See* United States' Apportionment Brief at 22-23. Once stored, the United States contends that New Mexico cannot intercept or interfere with Project water once it is released. *Id.* at 21-22. Parroting Texas' positions, the United States falls back on Special Master Grimsal's First Report to argue that once stored, New Mexico is required to relinquish control of the water to the Project, which then effectuates the Compact apportionment

by releasing water for deliver to Mexico and for diversion and use by Elephant Butte Irrigation District (“EBID”) for irrigation purposes with the balance being delivered to Texas without quantification or constraints in use. *Id.* at 27-28. The United States drives home the point by stating that “New Mexico does not regain control of the water, or the ability to reapportion it through operation of state law, once it is released.” *Id.* at 28.

The United States pays lip service to the Court’s determination that New Mexico has an appointment below Elephant Butte but makes it meaningless by arguing that New Mexico has no rights associated with its Compact apportionment. According to the United States, it and EBID have complete discretion to determine how and in what quantity “New Mexico’s apportionment” is used. *Id.* at 15, Statement of Material Fact No. 71. As demonstrated by the 2008 Operating Agreement, the United States and EBID believe they have the unfettered authority to give some or all of New Mexico’s Compact apportionment to Texas and New Mexico has no recourse.

The Special Master should not sanction the United States view that New Mexico has an apportionment in name only, without any corresponding rights.

B. Not defining New Mexico’s or Texas’s Apportionments below Elephant Butte Reservoir precludes Summary Judgement.

The United States argues that the Special Master can determine that New Mexico has violated the Compact by allegedly depleting the Rio Grande in unknown quantities, at unknown times, and notwithstanding whether the alleged depletions negatively affect Project flows or are in excess of irrigation demands. Moreover, the United States seeks a declaration of a New Mexico Compact violation and an injunction, contending it is not necessary to first define and quantify New Mexico’s or Texas’s apportionment below Elephant Butte. *See* United States’ Apportionment Brief at 23, fn 98, 30, and 34.

These contentions are fatal flaws to the United States' motion for summary judgment. As the Special Master previously made clear:

Seemingly, one of the important issues that remains outstanding is the exact clarification of each state's Compact-based equitable apportionment in reference to the Downstream Contracts and the Project. In fact, it would be difficult to address Texas's claims that New Mexico is failing to protect Texas's apportionment without first defining precisely what each state and its citizens are entitled to receive below the Dam. This fact is true regardless of whether New Mexican entitlements below the Dam are deemed Compact rights.

See Special Master's Order dated April 14, 2020, at 19.

Contrary to the United States' contention, it is not possible to determine Compact violations without first articulating and quantifying New Mexico's and Texas's Compact rights below Elephant Butte Reservoir. Even after quantification of Compact rights and responsibilities, evidence will be required of Project deliveries and need. *See infra* Point IV.

The United States argument on this issue brings in focus an important point. The United States has been conspicuously quiet about the need to articulate or quantify Texas's apportionment below Elephant Butte Reservoir under the Downstream Contract and Compact or to examine how Texas's administration of the Project is harming New Mexico and the Project as a whole. As discussed *supra*, the United States' apportionment theory limits water use in New Mexico to EBID contracts for irrigation purposes with Texas receiving the balance without qualification, quantification, or constraint, *e.g.*, the water would be Texas's apportioned water even if El Paso County Water Improvement District No. 1's ("EP#1") irrigation demands had been fully met.¹⁰ In

¹⁰ For example, EP#1 allotted a significant portion of its water supply to the City of El Paso for municipal and industrial use even though the explicit language in the Compact requires demands to be determined based on irrigation needs. Ignoring the Compact, the United States allowed Texas to transfer water apportioned to EP#1 for irrigation to the City of El Paso for municipal use in a way that changes Texas's irrigation demands and Project operations.

essence, the United States has assumed the role as a fiduciary to EP#1 and Texas irrigators to the exclusion of EBID and New Mexico irrigators.

The 2008 Operating Agreement is a glaring example. The United States does not have the authority to favor one irrigation district over the other in the administration of the Project, just as it does not have the right to unilaterally determine when one state is allegedly violating the Compact and imposing its own remedies as it did with the 2008 Operating Agreement.¹¹ The Project was intended to operate as a single unit with irrigators in both New Mexico and Texas on equal footing being treated equally. The present operation of the Project significantly deviates from that intention, which deviation is supported by the United States.¹²

Potential violations of the Compact apportionment cannot be evaluated absent an articulation of the rights and responsibilities of the Compacting States and the United States.

C. The Compact does not contain a 1938 Condition below Elephant Butte Reservoir.

As part of its apportionment theory, the United States argues that there is a 1938 condition above which there cannot be depletions in New Mexico. The United States suggests “the Compact’s meaning is plain” in this regard. *See* United States’ Apportionment Brief at 21.

¹¹ Furthermore, the United States does not have the authority to allow for additional storage in Elephant Butte Reservoir as allowed in the 2008 Operating Agreement without approval of the Rio Grande Compact Commission, which it did not obtain. Additional storage in Elephant Butte affects the operation of the reservoir, including determinations of usable water, credit water, and actual and hypothetical spills, thereby affecting Compact rights and obligations.

¹² If the United States acts as an agent for the Project and owes an equal fiduciary obligation to Project water users in New Mexico and Texas, New Mexico Project water users may need to evaluate a claim against the United States. Initially, the United States agreed to the 2008 Operating Agreement which shifts a major share of New Mexico’s Rio Grande Project surface water from EBID to EP#1 under the premise and with the promise that New Mexico groundwater pumping for irrigation could continue without limit. Then, after allowing a major shift in the Project surface water from New Mexico irrigators to Texas irrigators, the United States argues that New Mexico irrigators must be restricted in their groundwater diversions. The United States argues for no such limits in Texas. The United States is strongly favoring the Texas Project irrigators to the detriment of the New Mexico Project irrigators.

The United States limits its argument for a 1938 condition below Elephant Butte Reservoir. *See, e.g.*, United States’ Apportionment Brief Motion at 25 (“The water apportioned by the Compact includes such returns flows from the use of Project water, undiminished by new water resource development after the States approved the Compact in 1938”); *id.* at 9, Statement of Material Fact No. 39 (“The parties to the Compact did not intend for there to be additional development of water resources in New Mexico below Elephant Butte Reservoir that would deplete the surface water supply of the Project”). *See also* United States’ Response to New Mexico’s Apportionment Brief at 2, 3, 13, and 14.

In essence, the United States finds an implied injunction against New Mexico preventing post-1938 depletions of water below Elephant Butte Reservoir without any supporting language in the Compact. The Water Authority’s concern is that the United States 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. *See supra* at 5-6.

The United States goes far beyond the Court’s opinion, the language of the Compact, and the historical administration of the Compact in suggesting that New Mexico is enjoined from post-1938 depletions of water below Elephant Butte Reservoir under the Rio Grande Compact.

First, the Court said nothing about the Compact enjoining New Mexico from allowing depletions above a 1938 condition in its 2018 opinion. *See generally, Texas v. New Mexico*, 138 S. Ct. at 954. Second, the Rio Grande Compact itself says nothing about enjoining New Mexico’s post-1938 depletions below Elephant Butte Reservoir. In fact, 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, IV, and VI of the Compact provide significant

flexibility in Compact operations and give the States considerable latitude in managing annual deliveries. The United States' apportionment theory would produce the opposite result below Elephant Butte Reservoir. The Compact neither expressly nor impliedly enjoins New Mexico depletions below Elephant Butte Reservoir as of 1938.¹³ 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).

Third, in 80 years of Rio Grande Compact administration, the Compacting States and the United States have never operated the Project or administered water users in Texas or New Mexico to hue to a 1938 hydrologic condition. *See, e.g.,* New Mexico's Response to Texas' Appointment Brief at 39-59. As the Court stated in *Tarrant*, a "'part[y's] course of performance under the compact is highly significant' evidence of its understanding of the compact's terms." *See Tarrant Reg'l Water District v. Hermann*, 569 U.S. 614, 636 (2013) (quoting *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010)). *See also* Special Master's Order dated April 14, 2020, at 21 ("In any event, there are over eighty years of performance under the Compact to inform the Court as to the parties' longstanding understanding of the limits of the full extent of play in the system, the limits to which the ratio cited in the Downstream Compacts actually might define a Compact right to

¹³ It makes no sense for New Mexico to freeze its economy below Elephant Butte Reservoir as of 1938 as follows from the United States' and Texas's arguments. 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.

Project supply, and the extent to which individual state's groundwater laws must be deemed subservient to the Compact").

Fourth, the United States fails to explain why, under its theory, there is a 1938 condition in New Mexico but not in Texas. The Project was designed to operate as a single unit with equal treatment for irrigators in New Mexico and Texas. Just as changes in Project operations, administration, and system efficiencies in New Mexico have the potential to affect irrigators in Texas, so do such changes in Texas affect Project water users in New Mexico. The United States has ignored half of the equation. If the United States' and Texas's theory that the Compact impliedly requires adherence to a 1938 condition, including the United States contention that water must be used for irrigation purposes only, that must apply equally in Texas and New Mexico, with potentially severe consequences for the City of El Paso's water supply, a significant portion of which is derived from Rio Grande Project water.

The Special Master has already provided his preliminary thoughts on summary disposition of the United States' and Texas's claim of a 1938 condition. He stated:

Texas asserts: 'New Mexico must refrain from Post-1938 depletion of water (i.e., depletions that are greater than what occurred in 1938) below Elephant Butte Reservoir.' The parties have not yet developed a record to demonstrate the states' understanding and intent as to the relationship between groundwater and Project water deliveries at the time of Compact formation, at the present time, or at times in between. Both the law and scientific understanding have evolved substantially throughout the twentieth century as to the relationship between surface waters and groundwater. This statement simply touches upon an area where it is necessary to create a record for the Court's review.

Special Master's Order dated April 14, 2020, at 23. Lacking undisputed material facts, nothing in the United States' or Texas's apportionment briefs changed the posture of the case such that trial on this issue is not necessary.¹⁴

¹⁴ If the Special Master grants New Mexico's apportionment motion, the theory that there is a 1938 condition necessarily fails.

D. New Mexico has jurisdiction over groundwater and surface water users in New Mexico.

In the United States' Apportionment Brief, it contends that "New Mexico has an obligation to exercise its regulatory authority over water use within its borders consistent with the Compact, and it may not permit New Mexico water users to interfere with the Project's delivery of the Compact apportionment." *See* United States' Apportionment Brief at 1. The United States goes on to allege that New Mexico has failed to curtail its water users and lacks a system to do so, making it necessary to issue an injunction against New Mexico to ensure its performance.¹⁵ *Id.*

First, as demonstrated in New Mexico's Response to the United States' Apportionment Brief, New Mexico has exercised extensive administrative control over water users in New Mexico, including the Lower Rio Grande, and it can and will continue to do so to comply with its Compact obligations. *Ibid.* at 46-60. The Water Authority can speak directly to the rigorous New Mexico State Engineer administration in the Middle Rio Grande as its groundwater permits and SJCP permit are highly conditioned. The Water Authorities' groundwater permits, Permit No. RG-960 *et al.*, require offsets for surface water depletions that result from groundwater pumping since 1956. Similarly, Permit No. SP-4830 is highly conditioned to protect native flows of the Rio Grande with respect to other New Mexico water users and to ensure Compact compliance. Contrary to Texas's assertions, the State of New Mexico is active and advanced in its water administration.

Second, in its Complaint-in-Intervention, the United States alleges that:

New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of

¹⁵ The United States' allegations are ironic when New Mexico's and Texas's water laws and administration are compared. In Texas, groundwater is governed by the rule of capture, meaning no applications or permits are required from the State, pumping is unregulated, not metered, not reported, and effects on intrastate or interstate interests are not considered. In New Mexico, none of that is true.

Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contractual amounts.

See United States' Complaint-in-Intervention at ¶ 13. It contends that only entities having contracts with the Secretary are entitled to Project water, and that the only entity in New Mexico with a water supply contract with the United States is EBID. *Id.* at ¶ 12.

By now alleging that New Mexico has failed in its obligation to administer its water users in a way that protects the Compact apportionment, the United States appears to have renounced the untenable position set forth in its Complaint-in -that it should administer all surface water and groundwater in the Lower Rio Grande. As described previously by the Water Authority, this would federalize the Rio Grande below Elephant Butte Reservoir and allowed the United States to administer all surface water and groundwater in that river reach in New Mexico through federal contracts.¹⁶ See Water Authority's Brief in Support of the State of New Mexico's Exceptions to the First Interim Report of the Special Master, dated June 5, 2017, at 32-38. An express statement by the United States on this issue would narrow the issues going forward.¹⁷

¹⁶ 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, if successful. 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.

¹⁷ In allowing the United States to intervene as a plaintiff, the Court noted as one of four reasons that the United States would not 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.

POINT III

NEW MEXICO AND TEXAS EACH HAVE AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR BASED UPON THE RIO GRANDE PROJECT

Texas contends that the Rio Grande Compact is unambiguous in defining the rights and responsibilities of the Compacting Parties and the United States. *See* Texas's Apportionment Brief at 3, 54, 59-61. Texas argues that it is apportioned all water delivered into Elephant Butte Reservoir, subject only to the treaty obligation to Mexico and EBID's Project contract for irrigation water. *Id.* at 1, 54, 64. Once those two obligations are met, Texas's position is its Compact apportionment is unlimited and unquantified. Moreover, Texas posits that New Mexico has no apportionment below Elephant Butte and that it, not the Project, is entitled to water delivered into Elephant Butte Reservoir. *See* State of Texas's Response to and in Support of the United States of America's Motion for Partial Summary Judgment, December 22, 2020, at 3-6.

New Mexico has described genuine disputes of material fact that preclude granting Texas's motion for summary judgment. *See generally* New Mexico's Response to Texas's Apportionment Brief. In addition, Texas's apportionment theory is constructed on the premise that New Mexico has no apportionment below Elephant Butte which can only be made by characterizing the Court's conclusion to the contrary as dicta. The Water Authority supports New Mexico's Response opposing Texas' Apportionment Brief and will summarize three points that potentially affect its interests.

A. The Court has held that New Mexico has an Apportionment Below Elephant Butte.

While New Mexico's Apportionment Brief gives meaning and substance to the Court's 2018 opinion, Texas ignores it, opining that the Court's statements about the Compact and Project

were nothing more than dicta. *See* Texas’s Apportionment Brief at 72-73. Texas must take this position because its apportionment theory collapses if the Court meant what it plainly said.

Texas’s apportionment theory begins with New Mexico having no apportionment below Elephant Butte. In its opinion, however, the Court found 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.”¹⁸ *See Texas v. New Mexico*, 138 S. Ct. at 959. Further, the Court stated that the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, “charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico is, in fact, made.” *Id.*

Texas also overlooks that the Court’s conclusion that New Mexico has a Compact apportionment below Elephant Butte was an express reason for granting the United States’ motion to intervene as a plaintiff in this original action. As such, the Court’s language was not mere dicta.

In an earlier Order, the Special Master indicated that the Court had, in fact, determined that New Mexico has a Compact apportionment below Elephant Butte Reservoir. Specifically, the Special Master stated: “As just quoted, the Court, too, appears to characterize water delivered by

¹⁸ Texas and the United States have reversed course. In opposing New Mexico’s motion to dismiss Texas’s complaint, Texas and the United States argued that the Rio Grande Project was incorporated in the Compact. New Mexico argued that protection of Project flows was a matter of State law and not a Compact obligation. Texas and the United States prevailed in their argument. Now, not liking the consequences of that decision, they argue that the Project’s allocation and how that water is accounted is purely a matter of Reclamation law and not the Compact. *See* Texas’s Apportionment Brief at 71-72. If the Compact were not applicable below Elephant Butte as Texas and the United States now argue, the Court would not have exercised its original jurisdiction. Because the Court was convinced that this was a dispute between states over the interpretation and enforcement of an interstate water compact, it now must be litigated as such. Arguments now that divisions of Project water have nothing to do with the Compact and belong in federal district court do not square with their earlier positions in the litigation.

the Project to southern New Mexican water users as part of New Mexico's equitable apportionment." *See* Special Master's Order dated April 14, 2020, at 19.

Texas has offered nothing but recycled arguments and no reason to reconsider the conclusions reached in the Court's opinion, as also reflected in the Special Master's Order, that New Mexico has a Compact apportionment below Elephant Butte Reservoir.¹⁹

B. The Express Language in the Compact does not Support Texas's Apportionment Theory.

Without citing to any express language in the Compact, Texas argues that the Compact is unambiguous in defining the apportionment below Elephant Butte Reservoir. No straightforward reading of the Rio Grande Compact results in an apportionment to Texas of all water delivered to Elephant Butte, minus treaty deliveries to Mexico, and contract deliveries to EBID for irrigation purposes, with no corresponding apportionment to New Mexico. Rather, Texas's apportionment theory must be cobbled together with fragments of statements here and there and a definition of "delivery" that overstates and distorts its meaning. *See* Texas's Apportionment Brief at 59-68. New Mexico has demonstrated that there are genuine disputes of material fact that preclude Texas's motion for summary judgment. *See generally* New Mexico's Response to Texas's Apportionment Brief.

C. There is no 1938 Condition above Elephant Butte Reservoir.

While the United States contends there is a 1938 condition below Elephant Butte in New Mexico (but not in Texas), Texas argues that there is a 1938 condition above and below Elephant Butte Reservoir, including the Middle Rio Grande in New Mexico and Colorado. Texas contends that all depletions of the Rio Grande in New Mexico and Colorado were "frozen" as of 1938. *See*

¹⁹ If only one issue is resolved in this round of dispositive motions it should be that New Mexico has a Compact apportionment below Elephant Butte Reservoir.

Texas's Apportionment Brief at 3, 14-15. Texas's premise is that the Compact protects the Project and its operations under conditions that existed in 1938 at the time the Compact was executed. *Id.* at 5, 8, *passim*.

The Water Authority has already addressed the argument that there was a 1938 condition below Elephant Butte in New Mexico. *See supra* at Point II.C. Texas's argument mirrors the United States,' so the Water Authority will not reiterate its response here. What the Water Authority does address below is Texas's contention that depletions were frozen above Elephant Butte Reservoir in New Mexico and Colorado at 1938 levels.

Texas argues that Articles III and IV of the Compact are unambiguous in requiring that New Mexico and Colorado restrict depletions above a 1938 condition above Elephant Butte Reservoir. *See* Texas's Apportionment Brief at 14-15, 55, 77-82. There is simply nothing in the Court's opinion or the Compact that indicates that such a restriction exists.

Colorado has properly described the operation of Articles III and IV of the Compact in its response brief, including an explanation of why a 1938 condition does not exist above or below Elephant Butte. *See* State of Colorado's Response to the Motions for Partial Summary Judgment of Texas, the United States, and New Mexico, December 22, 2020, at 21-24. Because it is directly applicable to the Water Authority, Colorado's response is quoted extensively below:

In order to construct a 1938 condition theory that applies below Elephant Butte Reservoir, Texas looks to the terms of the Compact that set out Colorado's and New Mexico's delivery obligations. Texas contends that the Compact contains a 1938 condition that governs consumption upstream of Elephant Butte Reservoir, so that an analogous implied term must govern consumption below the reservoir as well. Texas' theory not only mischaracterizes Colorado's obligations under the Compact, it alters the bargain that the states struck when they entered into the Compact.

The Compact does not limit consumption in Colorado to that which occurred in any period of time. The most obvious reason for this is that the Compact contains no such term. [citation omitted]. It could, as does the Pecos River Compact, include a provision that limits consumption to that which existed in a particular year. [citation omitted]. Yet, the

Rio Grande Compact should not be read to include an unwritten term that appears expressly in other compacts. [citation omitted].

The states did set out to address the effect of Colorado's water use on downstream states. That downstream impact is one reason the states negotiated the Compact. But they did not limit Colorado's impact by choosing a date at which to freeze Colorado's consumption. Rather, they established a delivery requirement based on tables of relationship, another 10,000 acre-feet allowance over and above the figures in the table, and a system of credits and debits. *See* Compact Articles III, VI. They did much the same for New Mexico's obligations. *See* Compact Articles IV, VI. These express terms do not limit consumption to the same as in 1938 or even to the conditions found in the Joint Investigation Report. [citation omitted]. Thus, the Compact does not fix Colorado's consumption at its 1938 level.

As long as they meet their delivery requirements, the Compact expressly allows future increases in consumption in Colorado and New Mexico. The Compact contemplates the Closed Basin Project in Colorado, which was authorized by Congress in 1972 and still operates today. *See* Compact Article IV. It also contemplates importation of water from the San Juan River into the Rio Grande in New Mexico, *see* Compact Article IX, which the San Juan Chama Project does. As for the Compact, there are no limits on consumption in Colorado and New Mexico other than those which they must impose on themselves to meet their delivery obligations in Articles III and IV of the Compact. This is not to say that there are no restraints on New Mexico below Elephant Butte Reservoir that protect Texas, only that those restraints are not found in the Compact as a 1938 condition.

Another failing of an implied 1938 consumptive use condition is that it relies on express terms governing flows above Elephant Butte Reservoir to imply a different term below the reservoir. This is contrary to the principles of compact interpretation. It makes little sense for the states to have imposed detailed obligations on Colorado and New Mexico in Articles III and IV incorporating inflow and outflow gages and then silently impose an obligation based on a 1938 condition below Elephant Butte Reservoir.

Id.

A plain reading of Articles III and IV show that they establish variable delivery obligations based on gaged inflows and outflows. Colorado and New Mexico are responsible for intrastate administration of their surface and groundwater users to ensure compliance with these specified Compact obligations, subject to adjustments as may be necessary from time to time and under Articles VI and VII. Simply put, there is no Compact requirement for a 1938 condition above or below Elephant Butte Reservoir.

Beyond the express language in the Compact, there is nothing in the 80-year history of Compact administration that suggests the Compacting States have ever administered the Compact above Elephant Butte to adhere to a 1938 condition.

POINT IV

TEXAS AND THE UNITED STATES HAVE FAILED TO PROVIDE UNDISPUTED MATERIAL FACTS THAT NEW MEXICO HAS DEPLETED THE RIO GRANDE PROJECT SUPPLY

Texas and the United States argue that it is undisputed that groundwater pumping in the Lower Rio Grande in New Mexico has depleted the Rio Grande, which they argue is a *de facto* Compact violation. *See generally* United States' Apportionment Brief and Texas's Apportionment Brief. To make this argument, they make many untenable assumptions, including, but not limited to: 1) equating all flows in the Rio Grande with Project water; 2) assuming all groundwater in the Lower Rio Grande is the result of Project operations; 3) assuming that all groundwater diversions have an immediate and direct hydrologic effect on the surface flows; and 4) assuming that any reduction in surface flows is evidence of a violation of Project entitlements, as opposed to evidence that shows that irrigators have been deprived of their entitled water supplies at diversion points. Moreover, as set forth above, the United States' and Texas' focus is solely on New Mexico operations and administration, while ignoring adverse effects on New Mexico that occur from the same actions of Texas.

Because the United States and Texas have not set forth all material facts to evaluate Compact violations and New Mexico has demonstrated that there are genuine disputes of material fact, Texas's and the United States' motions for summary judgement must be denied.

CONCLUSION

In original actions, the Court has stated a strong preference for the full development of the facts and trial on each parties' legal theories related to compact liability and defense. The Special Master has echoed this position. Unless there is clearly no genuine dispute of material fact, summary judgment motions should be denied, and the case should go to trial. Here, New Mexico is the only party that has demonstrated that its motions for summary judgment are based upon undisputed material facts and that it is entitled to judgment as a matter of law.

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 6th day of January 2021, I caused a true and correct copy of the *Albuquerque Bernalillo County Water Utility Authority Amicus Curiae Brief in Support of the State of New Mexico's Motions for Summary Judgment and in Opposition to the State of Texas's and The United States' Motions for Summary Judgment* to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 6th day
of January, 2021.

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**In The Supreme Court of the United States, Original No. 141
STATE OF TEXAS v. STATE OF NEW MEXICO and STATE OF COLORADO**

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MEDIATOR

Mediator	Hon. Oliver W. Wanger (U.S.D.J. Ret.) WANGER JONES HELSLEY PC 265 E. River Park Circle Suite 310 Fresno, CA 93720	owanger@wjhattorneys.com dpell@wjhattorneys.com
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SPECIAL MASTER

Special Master	Honorable Michael J. Melloy <i>Special Master</i> United States Circuit Judge 111 Seventh Avenue, S.E., Box 22 Cedar Rapids, IA 52401 Michael E. Gans, Clerk of Court United States Court of Appeals – Eighth Circuit Thomas F. Eagleton United States Courthouse 111 South 10th Street, Suite 24.329 St. Louis, MO 63102	(319) 432-6080 TXvNM141@ca8.uscourts.gov (314)244-2400 TXvNM141@ca8.uscourts.gov
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****Updated 4/16/2018**

Corrected the spelling of Pricilla M. Hubenak to Priscilla M. Hubenak and added her e-mail address Priscilla.Hubenak@oag.texas.gov to the Service list.

****Updated 4/18/2018**

Added Toby Crouse (toby.crouse@ag.ks.gov) as the Solicitor General for the State of Kansas and removed Stephen R. McAllister.

****Updated 4/24/2018**

Added Clerk of Court information and updated Special Master e-mail address.

****Updated 11/16/18**

Added Bryan Clark's e-mail address (bryan.clark@ag.ks.gov) for the State of Kansas

****Updated 3/14/19**

Updated Attorney General of Colorado to Philip J. Weiser
 Added Solicitor General Eric R. Olson (eric.olson@coag.gov) for the State of Colorado

****Update 3/19/19**

Added legal assistants Shannon Gifford (shannong@modrall.com) and Leanne Martony (leannem@modrall.com) for El Paso County Water District No. 1
 Added James M. Speer, Jr., information for El Paso County Water District No. 1

****Update 5/6/19**

Added Sarah A. Klahn (sklahn@somachlaw.com), Richard S. Deitchman (rdeitchman@somachlaw.com), Rena Wade (rwade@somachlaw.com) and Corene Rodder (crodder@somachlaw.com) for State of Texas. Removed Rhonda Stephenson.

- **Update 11/6/19**
Added Lamai Howard (lamaih@modrall.com) for El Paso County Water District No. 1.
Removed Leanne Martony.
- **Update 11/21/19**
Added Jo Harden (jo@tessadavidson.com) for New Mexico Pecan Growers. Removed Patricia McCann.
- **Update 11/22/19**
Removed Lizbeth Ellis and Clayton Bradley and added General Counsel (gencounsel@nmsu.edu) email for New Mexico State University.
- **Update 1/7/20**
Added David W. Gehlert (david.gehlert@usdoj.gov) for the United States. Updated Solicitor General information. Also added John P. Tustin (john.tustin@usdoj.gov) for the United States.
- **Update 2/19/20**
Added Renea Hicks for El Paso County Water Improvement District No. 1. Removed James M. Speer and Lamai Howard.
- **Update 2/26/20**
Added Darren L. McCarty for State of Texas. Removed Brantley Starr and James Davis. Also added Crystal Rivera and removed Rena Wade.
- **Update 5/1/20**
Added Cholla Khoury, Luis Robles, Jeffrey Wechsler and John Draper for the State of New Mexico. Removed David A. Roman. Also added Bonnie DeWitt, Pauline Wayland, Diana Luna and Donna Ormerod.

Added Preston Hartman for the State of Colorado. Removed Karen Kwon.
- **Update 7/7/20**
Added mediator information - Hon. Oliver W. Wanger.
- **Update 10/1/20**
Added Susan Barela (susan@roblesrael.com) for State of New Mexico.
- **Update 10/2/20**
Added Jennifer A. Najjar and removed Stephen M. MacFarlane, Thomas Snodgrass and David W. Gehlert for the United States.
- **Update 12/14/20**
Added Zachary E. Ogaz (zogaz@nmag.gov) for State of New Mexico.