

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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**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY'S  
*AMICUS CURIAE* BRIEF REGARDING WHETHER TEXAS'S PROPOSED  
SUPPLEMENTAL COMPLAINT EXCEEDS THE SCOPE OF THE ORIGINAL  
COMPLAINT ACCEPTED FOR FILING BY THE COURT**

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## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES .....	ii
INTRODUCTION .....	1
INTEREST OF THE WATER AUTHORITY .....	3
BACKGROUND .....	4
A. Rio Grande Basin above Elephant Butte Reservoir .....	4
B. Rio Grande Compact above Elephant Butte Reservoir .....	7
ARGUMENT .....	8
POINT I: TEXAS’S PROPOSED SUPPLEMENTAL COMPLAINT IS THE EQUIVALENT OF A NEW ORIGINAL ACTION INVOLVING WHOLLY DIFFERENT ISSUES.....	8
POINT II: TEXAS’S PROPOSED SUPPLEMENTAL COMPLAINT WOULD RESULT IN THE REALIGNMENT OF PARTIES, POSSIBLY NEW PARTIES, AND NEW AMICI.....	11
A. New Municipal Stakeholders.....	11
B. New Irrigation Stakeholders .....	13
C. New Tribal Stakeholders.....	13
D. New Environmental Interests.....	14
E. Realignment of Parties, Federal Conflicts of Interest, and Possible Intervention.....	15
POINT III: TEXAS’S MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT SHOULD BE FILED DIRECTLY WITH THE COURT .....	17
CONCLUSION .....	18
EXHIBIT NOS. 1 AND 2	

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Nebraska v. Wyoming</i> , 515 U.S. 1 (1995).....	17
<i>South Carolina v. North Carolina</i> 558 U.S. 256 (2010).....	16
<i>Texas v. New Mexico</i> , 343 U.S. 932 (1952).....	18
<i>Texas v. New Mexico</i> , 352 U.S. 991 (1957).....	18
<i>Texas v. New Mexico</i> , 571 U.S. 1173 (2014).....	1
<i>Texas v. New Mexico</i> , 138 S. Ct. 954 (2018).....	15, 17
<b>Statutes</b>	
16 U.S.C. § 1531 (1973) <i>et seq.</i> .....	14
33 U.S.C. § 701b-1 .....	5
43 U.S.C. § 620 (1962) <i>et seq.</i> .....	4
P.L. 116-260.....	16
Act of March 13, 1928, 45 Stat. 312.....	6
Act of June 30, 1948, 62 Stat. 1175 .....	5
Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 .....	<i>passim</i>
<b>Court Rules</b>	
SUP. Ct. R. 17.....	1
SUP. Ct. R. 37.....	1, 11

## INTRODUCTION

The Albuquerque Bernalillo County Water Utility Authority (“Water Authority”) submits this *amicus curiae* brief pursuant to SUP. Ct. R. 17 and SUP. Ct. R. 37 and Paragraph J of the Special Master’s Order dated July 7, 2021 (Docket No. 521) (“Order”). The Order allows current parties and *amici* in *Texas v. New Mexico and Colorado*, Original, No. 141, to file briefs describing how Texas’s proposed Supplemental Complaint would affect the current lawsuit.<sup>1</sup> This includes new issues, new parties, new *amici*, new discovery, new motions, and a new trial.

The Water Authority also concurs in and supports the State of New Mexico’s Limited Response to Texas’s Motion for Leave to File Supplemental Complaint and the letter from the Lower Rio Grande *Amici* regarding Texas’s Motion for Leave to File Supplemental Complaint, both filed on July 15, 2021.

The original action accepted for filing by the Court in 2014 relates to Rio Grande Compact interpretation and enforcement below Elephant Butte Reservoir, *i.e.*, defining New Mexico’s and Texas’s Compact apportionments and determining whether each State has received its Compact apportioned water. *See Texas v. New Mexico*, 571 U.S. 1173 (2014); *see also* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (“Rio Grande Compact” or “Compact”). The new allegations in Texas’s Supplemental Complaint relate to interpretation and enforcement of the Rio Grande Compact above Elephant Butte Reservoir in New Mexico and Colorado. While Texas’s allegations are ostensibly against New Mexico, they apply equally to Colorado. If accepted for filing, Texas’s Supplemental Complaint would, in essence, start a new original action

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<sup>1</sup> *See* State of Texas’s Motion for Leave to File Supplemental Complaint, the Supplemental Complaint, and the Brief in Support of Motion for Leave to File the Supplemental Complaint, filed with the Special Master on June 24, 2021.

that could take a decade to resolve, involving different issues, re-alignment of parties, potential motions to intervene, and new *amici* whose water rights are at risk.

This brief does not address the merits of Texas's Motion for Leave to File Supplemental Complaint, the Supplemental Complaint, or the Brief in Support of the Motion for Leave to File the Supplemental Complaint. The Water Authority reserves the right to address those issues on the merits when a full briefing schedule is set. *See* Order at ¶ J. Issues to address on the merits include, but are not limited to: 1) whether these claims should have been brought at the time of the Texas's original Complaint in 2013; 2) whether the claims are ripe; 3) whether after close scrutiny the issues in the proposed pleading amendments would take the litigation beyond what the Court reasonably anticipated when granting leave to file the initial pleadings, keeping in mind several of New Mexico's counterclaims were not allowed to proceed as being outside of the scope of the original case;<sup>2</sup> 4) whether the issues are of such serious magnitude that the Court should exercise its original jurisdiction; 5) the precedential effect of the Court's dismissal of Texas's similar claims based on the United States being an indispensable party because of tribal claims when Texas sought enforcement of the Compact in 1951; and 6) whether Texas has exhausted its administrative remedies.

Because the issues, parties, and *amici* would be different, and bear no relation to the scope of case that the Court accepted for filing in 2014, and because accepting the Supplemental Complaint for filing will require answers, possible counterclaims and cross-claims, new discovery, a new motion practice, and a new trial segment or trial segments if the new case is bifurcated, all

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<sup>2</sup> If Texas's Motion for Leave to File its Supplemental Complaint is granted resulting in the expansion of the case, the ruling excluding certain New Mexico counterclaims should also be reconsidered because the basis for denial was that they would expand the litigation beyond its original scope. *See generally* Special Master's Order dated March 31, 2020 (Docket No. 338). If Texas opens the door to expansion of the litigation, New Mexico's excluded counterclaims should also be reconsidered in that context.

scheduled well into the future, Texas’s Motion for Leave to File its Supplemental Complaint should be filed directly with the Court for resolution.

### **INTEREST OF THE WATER AUTHORITY**

The Water Authority has been participating as an *amicus curiae* in the litigation to date to bring to the Special Master’s and Court’s attention issues not addressed or emphasized by the parties. *See generally* <https://www.abcwua.org/your-drinking-water>. While Texas’s Complaint, the United States’ Complaint-in-Intervention, and New Mexico’s Counterclaims relate to interpretation and enforcement of the Rio Grande Compact below Elephant Butte Reservoir, the Water Authority has participated as an *amicus* because it is concerned about how resolution of those issues could affect the Water Authority’s water rights and operations and administration of the Middle Rio Grande.<sup>3</sup> In addition, the Water Authority has been involved as an *amicus* because it has long been suspected that Texas and the other entities aligned with it would attempt to expand the litigation above Elephant Butte Reservoir. That day has come.

The allegations in Texas’s Supplemental Complaint directly threaten the Water Authorities’ water rights and operations. Texas is seeking wholesale changes in Middle Rio Grande Compact administration through its allegations related to Articles VI, VII, and VIII. Those changes would adversely affect the Water Authority’s Drinking Water Project and it may also negatively affect its groundwater permits.

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<sup>3</sup> In particular, the Water Authority is concerned about Texas’s and/or the United States’ allegations regarding: 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; 2) a firm State Line delivery obligation; 3) the federalization of groundwater in New Mexico from the United States’ continuing claim that all groundwater users below a federal reclamation project should obtain a federal contract for the use of groundwater, based on the contention that all groundwater is “Project Water;” and 4) changes in Elephant Butte Reservoir operations caused by the 2008 Operating Agreement that effects evaporation calculations (the Water Authority stores imported San Juan-Chama Project water in Elephant Butte Reservoir), credit water, storage upstream, and actual or hypothetical spills that impact Middle Rio Grande Compact administration and therefore Water Authority operations.

## BACKGROUND

Because Texas's Complaint and the United States' Complaint-in-Intervention relate to claims below Elephant Butte Reservoir, the physical features of the river upstream have not been described. The same is true for certain articles in the Rio Grande Compact.

### A. Rio Grande Basin above Elephant Butte Reservoir.

The headwaters of the Rio Grande are in the San Juan Mountains of Colorado where the river flows south through the San Luis Valley into New Mexico. *See* Exhibit No. 1. In Colorado, the two primary storage reservoirs are the Rio Grande and Platoro reservoirs.

The Rio Grande flows from the New Mexico-Colorado state line south to the confluence with the Rio Chama just upstream of the Otowi Gaging Station. *Id.* In New Mexico, this is called the Upper Rio Grande. The Otowi Gage is the index gage to determine New Mexico's delivery obligation to Elephant Butte Reservoir under Article IV of the Rio Grande Compact. There are a multitude of municipal, tribal, and irrigation surface and groundwater users in the Upper Rio Grande, including, but not limited to, the Town of Taos, El Prado Water and Sanitation District, the Eight Northern Pueblos, the City of Espanola, and many centuries-old Spanish acequias. The Eight Northern Pueblos include Taos Pueblo, Picuris Pueblo, Ohkay Owingeh, Santa Clara Pueblo, San Ildefonso Pueblo, Nambe Pueblo, Pojoaque Pueblo, and Tesuque Pueblo. *See* Exhibit No. 2.

The Rio Chama is a major tributary of the Rio Grande where three large storage reservoirs are located, including Heron, El Vado and Abiquiu reservoirs. *See* Exhibit No. 1. Heron Reservoir has a capacity of 401,000 acre-feet and is owned and operated by BOR and was constructed as part of the San Juan-Chama Project ("SJCP"). *See* Act of June 16, 1962, 76 Stat. 96, 43 U.S.C. § 620 *et seq.* The SJCP imports approximately 96,200 acre-feet per year into the Rio Grande Basin via a transmountain diversion. This is a portion of New Mexico's Upper Colorado River Basin

Compact water. There are 20 SJCP contractors in New Mexico, including the Water Authority, City of Santa Fe, Jicarilla Apache Nation, Ohkay Owingeh, and the Middle Rio Grande Conservancy District (“MRGCD”).

El Vado Reservoir has a capacity of approximately 196,000 acre-feet and was constructed in the 1930s. BOR rehabilitated El Vado Reservoir in the 1950s for MRGCD as part of the Middle Rio Grande Project Act. *See* Act of June 30, 1948; 62 Stat. 1175. BOR owns and operates El Vado Reservoir which stores native Rio Grande and SJCP water for the Six Middle Rio Grande Pueblos and MRGCD.

Abiquiu Reservoir is owned and operated by the U.S. Army Corps of Engineers (“COE”) and was authorized in the Flood Control Acts of 1948 and 1950, primarily for flood control purposes with provisions to store native Rio Grande and SJCP water within the flood control space. *See* Act of June 30, 1948; 62 Stat. 1175; 64 Stat. 170, 33 U.S.C. § 701b-1. Abiquiu Reservoir has a flood control capacity of more than 500,000 acre-feet and is authorized to provide water supply storage for both native Rio Grande and SJCP water of approximately 240,000 acre-feet. To date, there has been no native Rio Grande water stored in Abiquiu Reservoir.

On the mainstem of the Rio Grande south of Otowi Gage, Cochiti Reservoir provides flood control protection for the Middle Rio Grande. Otowi Gage to Elephant Butte Reservoir is the Middle Rio Grande in New Mexico. Cochiti Reservoir is owned and operated by COE, along with Jemez Canyon and Galisteo reservoirs. The latter two reservoirs are on tributaries of the Rio Grande located south of Cochiti Reservoir, and were authorized with Cochiti Reservoir.

MRGCD is a quasi-State entity which is responsible for the irrigation of approximately 60,000 acres straddling the Rio Grande from Cochiti Pueblo south past Socorro. Besides storage of native Rio Grande and SJCP water in El Vado, MRGCD also directly diverts native Rio Grande



surface water for irrigation. MRGCD owns and operates four diversion dams that divert water from the Rio Grande for irrigation purposes for its farmers and for the Six Middle Rio Grande Pueblos.

The Six Middle Rio Grande Pueblos are part of MRGCD. They irrigate in the Middle Valley and rely on storage in post-1929 reservoirs. They include Cochiti Pueblo, Santo Domingo Pueblo, San Felipe Pueblo, Santa Ana Pueblo, Sandia Pueblo, and Isleta Pueblo. *See* Exhibit No. 2. Congress recognized and protected these Pueblos “prior and paramount” water rights in the Middle Rio Grande for irrigation, domestic, and livestock purposes. *See* Act of March 13, 1928 (45 Stat. 312).

Municipal interests in the Middle Rio Grande obtain their water supplies from native Rio Grande flows, groundwater, and SJCP water. They include Albuquerque, Santa Fe, Rio Rancho, Belen, Socorro, and the communities of Bernalillo and Los Lunas. The Water Authority and Santa Fe rely on native Rio Grande water either directly or as part of their project operations. Many municipalities in this reach of the river rely on groundwater for their water supply. Since the declaration of the Middle Rio Grande Basin in 1956, they have had to offset surface water depletions that result from groundwater diversions to protect senior water rights and the Rio Grande Compact. To do so, they have acquired Rio Grande surface water rights and transferred them from agricultural to municipal and industrial purposes to serve as offsets.

Other native surface water users in the Middle Rio Grande include the Sevilleta National Wildlife Refuge and the Bosque del Apache National Wildlife Refuge, both of which are owned and operated by the U.S. Fish and Wildlife Service (“FWS”).

## **B. Rio Grande Compact above Elephant Butte Reservoir.**

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. *See* Compact Article III. 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.<sup>4</sup> *Id.* at Article IV. Flexibility from Articles III and IV delivery obligations are set forth in Article VI.

Under Article VI of the Compact, New Mexico and Colorado are allowed to under-deliver and over-deliver on an annual basis within specified limits for annual and accrued credits and debits, with all accrued debits being cancelled in any year in which there is an actual spill of usable water. *Id.* at Article VI. New Mexico is allowed to have a maximum accrued debit up to 200,000 acre-feet, plus holdover storage in post-1929 reservoirs.<sup>5</sup> New Mexico's maximum annual debit shall not exceed 150,000 acre-feet, not including the gains in the quantity of water in storage in such year. Neither Colorado's annual nor its accrued debit shall exceed 100,000 acre-feet, except as either or both amounts can be exceeded by holdover storage in post-1937 reservoirs. *Id.* Article VI provides New Mexico and Colorado the discretion to store or not store in post-1929 and post-1937 reservoirs, respectively, when they are in debit status.

In January of any year in which there are accrued debits, Article VIII allows Texas to demand of Colorado and New Mexico, and New Mexico to demand of Colorado, the release of holdover or retained water from the previous calendar year stored in post-1929 reservoirs in an

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<sup>4</sup> 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.

<sup>5</sup> Post-1929 reservoirs in New Mexico that can be restricted under the Rio Grande Compact include El Vado, Abiquiu, Galisteo, Cochiti, Jemez Canyon, Nichols, and McClure.

amount up to the accrued debit of each State, respectively, sufficient to bring usable Project storage up to 600,000 acre-feet by March 1<sup>st</sup> and to maintain that amount through April 30<sup>th</sup>. *Id.* at Article VIII.

Under Article VII, neither New Mexico nor Colorado is allowed to increase water in storage in post-1929 reservoirs when there is less than 400,000 acre-feet of usable water in Project storage in Elephant Butte and Caballo reservoirs. In addition, Article VII allows New Mexico and Colorado to relinquish accrued credits, and if Texas accepts them, to store a like amount of the relinquishment credit water in the same year or future years in which Article VII restrictions are in effect.

## **ARGUMENT**

### **POINT I**

#### **TEXAS'S SUPPLEMENTAL COMPLAINT IS THE EQUIVALENT OF A NEW ORIGINAL ACTION INVOLVING WHOLLY DIFFERENT ISSUES**

Texas's Complaint and the United States' Complaint-in-Intervention allege that New Mexico has violated the Rio Grande Compact downstream of Elephant Butte Reservoir. *See* Texas's Complaint at ¶¶ 18-21; United States' Complaint-in-Intervention at ¶¶ 12-15. New Mexico's Counterclaims were limited to the same scope. *See* Special Master's Order dated March 31, 2020 (Docket No. 338). Texas's Complaint and the United States' Complaint-in-Intervention do not contain any allegations that New Mexico or Colorado violated their respective upstream deliveries requirements under Articles III or IV.

In its proposed Supplemental Complaint, Texas now alleges that New Mexico has violated the Rio Grande Compact upstream of Elephant Butte Reservoir. More specifically, Texas alleges that New Mexico has violated Articles VI, VII, and VIII of the Rio Grande Compact. Texas also contends that Article IV is violated by implication through under-delivery to Elephant Butte

Reservoir when read in conjunction with the Articles VI, VII, and VIII. Texas's allegations apply equally to both New Mexico and Colorado.

Texas's proposed Supplemental Complaint is the equivalent of a new original action. The allegations in the Supplemental Complaint are not within the scope of the Complaint accepted for filing by the Court. The claims in the Supplemental Complaint are entirely different matters that have not been previously framed by a complaint and answers, possible counterclaims and cross-claims, motions to intervene, discovery, or pre-trial motions.

With respect to Article VI, Texas claims that if New Mexico and Colorado have not retained or carried over the amount of native water in storage in the amount of an accrued debit, they have an affirmative duty to store that amount for delivery into Elephant Butte Reservoir prior to allowing any diversions or uses of their Article III and IV apportionments.<sup>6</sup> *See* Texas's Supplemental Complaint at ¶¶ 8-12. In other words, neither New Mexico nor Colorado would be able to divert and consume their Articles III and IV apportionments until each actively stores the equivalent of its accrued debit. This interpretation eliminates the discretion that New Mexico and Colorado have historically exercised in allowing, or not allowing, storage in post-1929 and post-1937 reservoirs when they were in debit status.

Article VII prohibits storage of native water in post-1929 reservoirs upstream when useable Project storage in Elephant Butte and Caballo reservoirs is less than 400,000 acre-feet. *See* Compact Article VII. Interestingly, Texas claims that Article VII does not mean what it says, and that New Mexico and/or Colorado are actually required to store water in post-1929 reservoirs when

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<sup>6</sup> Specifically, Texas alleges that New Mexico "has violated Article VI of the Compact by failing to retain the required amounts of water in reserve to make up for its inability to deliver its fair share of water to the Reservoir." *See* Texas's Supplemental Complaint at ¶ 8. Similarly, Texas contends: "New Mexico's failure to retain water in storage that is equal to the amount of water that it is in arrears violates New Mexico's unambiguous obligations under Article VI of the Compact." *Id.* at ¶ 10.

either or both have an accrued debit under Article VI. *See* Texas’s Supplemental Complaint at ¶ 16. Furthermore, Texas alleges that New Mexico and Colorado have must cease all diversions and use of native Rio Grande water under Articles III and IV when Project storage is less than 400,000 acre-feet and when New Mexico and Colorado are in debit status.<sup>7</sup> *Id.*

Finally, Texas anticipates that New Mexico could violate Article VIII in January of 2022 by not releasing from storage the amount of its accrued debit. *See* Texas’s Supplemental Complaint at ¶ 17. This alleged Compact violation is based on a misreading of what water needs to be stored and released under Articles VI and VIII and Texas’s ability to divine the future.

In sum, Texas alleges that New Mexico and Colorado have a Compact obligation to cease diversions and use of native Rio Grande water above Elephant Butte Reservoir when New Mexico and/or Colorado are in debit status under Article VI or when usable Project storage is less than 400,000 acre-feet under Article VII. In other words, neither New Mexico nor Colorado has the right to use native Rio Grande water apportioned to them under Articles III and IV when they are in debit status or when there is less than 400,000 acre-feet of water in Elephant Butte and Caballo reservoirs.

The recitation of Texas’s new allegations makes clear that the issues are new and are not within the scope of the original action accepted by the Court.

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<sup>7</sup> Texas contends that “New Mexico has an obligation, operating consistently with Articles VI and VIII, to increase useable water in Project storage without allowing or authorizing diversions in New Mexico above the San Marcial gauge of water released from upstream storage unless and until useable water in Project storage reaches 400,000 acre feet.” *See* Texas’s Supplemental Complaint at ¶ 16.

## POINT II

### TEXAS'S PROPOSED SUPPLEMENTAL COMPLAINT WOULD RESULT IN THE REALIGNMENT OF PARTIES, POSSIBLY NEW PARTIES, AND NEW *AMICI*

Because the allegations in Texas's proposed Supplemental Complaint involve different articles of the Compact and an entirely new geographical area, the parties and *amici* would be significantly different if the Court grants Texas's Motion for Leave to File Supplemental Complaint.

#### *A. New Municipal Stakeholders.*

The water supplies for all municipalities in the Rio Grande Basin above Elephant Butte Reservoir would be at issue if Texas is allowed to file its Supplemental Complaint. *Amici* participation is automatically allowed for municipalities pursuant to Supreme Court Rule 37.4.<sup>8</sup>

The Water Authority's municipal water supplies would be directly at risk based on the allegations in Texas's Supplemental Complaint. The Water Authority conjunctively manages native Rio Grande surface water, groundwater, and SJCP supplies for 675,000 people. The Water Authority has a New Mexico State Engineer permit to divert and consume its imported SJCP water, *i.e.*, Permit No. SP-4830, also known as the Drinking Water Project ("DWP").<sup>9</sup> Full consumptive use of this renewable, imported surface water, along with a very successful water conservation program, has allowed the Water Authority to significantly reduce groundwater diversions to preserve and protect the Middle Rio Grande Basin aquifer. Permit No. SP-4830 allows native Rio Grande flows to be diverted in a like amount to SJCP water, with only the SJCP water being

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<sup>8</sup> S.Ct. Rule 37.4 states: "No motion for leave to file an *amicus curiae* brief is necessary if the brief is presented on behalf of . . . a State, Commonwealth, Territory, or Possession when submitted by its Attorney General; or on behalf of a city, county, town, or similar entity when submitted by its authorized law officer."

<sup>9</sup> The Water Authority has a contract with COE to store SJCP water in Abiquiu Reservoir and provides a portion of its unused storage space to the City of Santa Fe, Ohkay Owingeh, BOR, and other SJCP contractors.

consumed and the native surface flows being returned to the river undiminished. *See* ¶ 9, Conditions of Approval, Amended Order for SP-4830, November 6, 2014. The permit has conditions of approval that require the DWP to reduce, and eventually cease, operations when the native flow in the Rio Grande is below a specified level. *Id.* at ¶¶ 12 and 13. The permit also has conditions of approval that allow for further State Engineer regulation for Compact compliance. *Id.* at ¶ 13. The Water Authority also has more than 90 groundwater wells with associated water rights, including vested and acquired water rights as offsets. Texas's contention that New Mexico is required to store up to its accrued debit in post-1929 reservoir, and that New Mexico cease diversions and use of native water as apportioned to New Mexico under Article IV when it is in debit status or when Project storage is less than 400,000 acre-feet is a serious threat to the Water Authority's operations.

The City of Santa Fe also conjunctively manages native Rio Grande surface water, groundwater, and SJCP water. Santa Fe owns and operates two reservoirs on the Santa Fe River, a tributary of the Rio Grande, *viz.*, McClure and Nichols reservoirs. The City has a permit to store native surface flows in both reservoirs for use as a municipal water supply for 85,000 people. These reservoirs have both pre- and post-1929 storage rights. Texas cited Santa Fe's water use as a specific alleged Compact violation in its Supplemental Complaint. *See* Texas's Supplemental Complaint at ¶ 13. If Texas's Motion for Leave to File its Supplemental Complaint is granted, Santa Fe's water rights and water supply projects are directly at risk.

Collectively, the allegations in Texas's Supplemental Complaint put at risk all municipalities' water supplies, including the administration of native surface water offsets for depletions that result from groundwater pumping. The same issue applies to all commercial and domestic well owners in New Mexico above Elephant Butte Reservoir. The Court should expect

additional municipalities will participate as *amici* if new claims are allowed above Elephant Butte Reservoir.

***B. New Irrigation Stakeholders.***

The major irrigation interest in New Mexico above Elephant Butte threatened by Texas's proposed Supplemental Complaint is MRGCD. MRGCD's diversions were cited by Texas as an alleged Compact violation. *See* Texas's Supplemental Complaint at ¶ 13. Nearly every aspect of MRGCD's operations is threatened by Texas's interpretation of Articles VI, VII, and VIII, including storage of native Rio Grande water in post-1929 reservoirs and direct diversions of surface flows. MRGCD will participate in some capacity if Texas's Motion for Leave to File Supplemental Complaint is granted, and a new case is filed above Elephant Butte Reservoir.

***C. New Tribal Stakeholders.***

Texas's proposed Supplemental Complaint would implicate the Six Middle Rio Grande Pueblo's water rights and administration of the river as it relates to the Pueblos' prior and paramount rights, including storage in El Vado Reservoir. If Texas's Motion for Leave to File Supplemental Complaint is granted, defining the tribal water rights and administering them in relation to the Rio Grande Compact will be complicated, particularly given Article XVI ("Nothing in this Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties, or to the Indian Tribes, or as impairing the rights of the Indian Tribes"). The same issues would be present for the Eight Northern Pueblos. Tribal interests, either through the Pueblos themselves or through the United States, would seek to become parties or *amici* if litigation begins above Elephant Butte Reservoir.



***D. New Environmental Interests.***

There are several listed endangered species in the Middle Rio Grande, including the Rio Grande Silvery Minnow, Southwest Willow Flycatcher, Yellow-billed Cuckoo, and New Mexico Jumping Mouse. *See* Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1973) (“ESA”). In 2016, the FWS issued a new Biological Opinion regarding Middle Rio Grande water operations to BOR, MRGCD, and the State of New Mexico. The 2016 Biological Opinion was based on the 2015 Biological Assessment prepared by BOR, MRGCD, and New Mexico regarding legal obligations and discretion for water operations in the Middle Rio Grande, including reservoir storage and releases, diversions, and use of native Rio Grande and SJCP water.

Since 1999, New Mexico water users in the Middle Rio Grande, along with New Mexico officials, have worked diligently with BOR to adjust river operations and administration to meet the hydrologic needs of the endangered species. These changes have reduced New Mexico’s ability to fully use its water apportioned under the Rio Grande, Colorado River, and Upper Colorado River Basin compacts. To date, neither Colorado’s nor Texas’s use of native Rio Grande water have been analyzed for their effects on endangered species. Nor have they altered their river management or administration to contribute to ESA compliance.<sup>10</sup>

The allegations in Texas’s Supplemental Complaint threaten to change the operational framework for the Middle Rio Grande. Texas has been aware of BOR’s Biological Assessments outlining federal and non-federal legal obligations and discretion related to water operations in the Middle Rio Grande for more than 20 years based on the common, historical interpretation of the Rio Grande Compact. Now, Texas is proposing to operate the Middle Rio Grande on a much

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<sup>10</sup> Several entities and Middle Rio Grande *amici* may encourage New Mexico seek to expand the litigation through counterclaims and cross-claims to address these ESA issues if the Supplemental Complaint is allowed and a new phase of Rio Grande Compact litigation begins above Elephant Butte Reservoir.

different interpretation of the Compact, one which turns on its head 20 years of administration and project operation to assist endangered species. Given Texas's Supplemental Complaint, the possibility exists for the re-initiation of consultation with FWS, something that would affect both federal and non-federal entities in the Middle Rio Grande.<sup>11</sup>

If Texas's Motion for Leave to File its Supplemental Complaint is granted, these ESA issues will need to be addressed in relation to the Rio Grande Compact. Environmental stakeholders may seek to participate as *amici*.

***E. Realignment of Parties, Federal Conflicts of Interest, and Possible Intervention.***

Texas's Complaint contains allegations related to the interpretation and enforcement of the Rio Grande Compact below Elephant Butte Reservoir. The United States was allowed to intervene as a party plaintiff and file a Complaint-in-Intervention because its allegations did not expand the scope of Texas's Complaint. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018).

If the Court grants Texas's Motion for Leave to File Supplemental Complaint, the United States' role becomes complicated. Above Elephant Butte Reservoir, the United States has several conflicting fiduciary responsibilities, including tribal interests, irrigation interests, ESA compliance, and COE operations. More specifically, this includes: 1) storage of prior and paramount rights for irrigation by the Six Middle Rio Grande Pueblos in El Vado Reservoir; 2) storage of irrigation water for MRGCD in El Vado Reservoir; 3) responsibilities by BOR and FWS for operation of their projects, where there is federal discretion, for ESA compliance; 4) COE flood

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<sup>11</sup> There is a long history of litigation in the Middle Rio Grande related to the impacts of storage, release, and diversion of native Rio Grande water on endangered species. Most recently, on June 9, 2021, WildEarth Guardians filed a 60-day notice of intent to file civil action against BOR and FWS. WildEarth Guardians also stated its intent to file civil action against MRGCD and the State of New Mexico. WildEarth Guardians is alleging that New Mexico's administration of the Middle Rio Grande for Compact compliance is in violation of the ESA.

control operations;<sup>12</sup> and 5) direct diversions for the Bosque del Apache and Sevilleta National Wildlife Refuges.

These competing obligations make the United States' role uncertain if the Supplemental Complaint is allowed. If any of the parties affiliated with the United States believe a conflict exists, they may seek to intervene on the basis that the United States cannot adequately represent their interests. *See South Carolina v. North Carolina*, 558 U.S. 256 (2010).

Moreover, other affected parties will need to know if the United States will waive its sovereign immunity with respect to the new allegations of Compact violations in Texas's Supplemental Complaint. Whether the United States consents to be sued, and if so, in what capacity are essential issues that must be resolved. Unmistakably, Texas has specifically alleged Compact violations against the United States (BOR). *See Texas's Supplemental Complaint at ¶ 13*. While some allegations are ostensibly against New Mexico, it is BOR that stores prior and paramount water in El Vado for the Six Middle Rio Grande Pueblos on an annual basis whether or not the provisions of Article VII are in effect. Certain Texas allegations also relate to BOR operations of reservoirs for ESA compliance. The role of the United States is no small issue in Texas's Supplemental Complaint.

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<sup>12</sup> COE owns and operates Abiquiu, Cochiti, Galisteo, and Jemez Canyon dams which are all post-1929 flood control reservoirs. These reservoirs are operated primarily for flood control purposes in strict compliance with federal authorizations and the Rio Grande Compact. Although Abiquiu Reservoir is authorized for native Rio Grande storage, no native water has been stored and when that occurs that storage must comply with the Rio Grande Compact and resolutions of the Rio Grande Compact Commission. P.L. 116-260, § 337, 134 Stat. 2712.

### POINT III

#### TEXAS'S MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT SHOULD BE FILED DIRECTLY WITH THE COURT

Texas's Motion for Leave to File its Supplemental Complaint should be filed directly with the Court for several reasons. First, the Court jealously guards its original jurisdiction. Not all new claims or amendments to pleadings are allowed. As the Court held in *Nebraska v. Wyoming*, 515 U.S. 1 (1995): "The requirement of obtaining leave to file a complaint in an original action serves an important gatekeeping function and proposed pleading amendments must be scrutinized closely to see whether they would take the litigation beyond what the Court reasonably anticipated when granting leave to file the initial pleadings." *Ibid.* In that case, the Court not only set briefing on the merits, it also held oral argument on the scope of the amended pleadings in relation to the original pleadings.

The principle of closely hueing to the scope of the original action that was accepted for filing by the Court has been followed in this case since it was first filed. For example, the United States was allowed to file its Complaint-in-Intervention because it did not exceed the scope of Texas's Complaint. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018). Similarly, several of New Mexico's counterclaims were dismissed because they exceeded the scope of the case. *See Special Master's Order* dated March 31, 2020 (Docket No. 338).

Texas's Supplemental Complaint bears no resemblance to its original Complaint. The allegations are wholly unrelated. Texas's Supplemental Complaint would "take the litigation beyond what [the Court] reasonably anticipated when we granted leave to file the initial pleadings." *See generally Nebraska v. Wyoming*, 515 U.S. 1 (1995).

Second, Texas's Complaint alleging violations in the operation of the storage reservoirs above Elephant Bute Reservoir was dismissed in 1957 because the United States was not joined

as a party on behalf of its tribal interests, and the Court deemed the United States to be an indispensable party. *See Texas v. New Mexico*, 343 U.S. 932 (1952); *Texas v. New Mexico*, 352 U.S. 991 (1957); Complaint in Original No. 9. The United States did not waive its sovereign immunity. Seventy years ago, the Court understood the complications of the Middle Rio Grande, including the significance of the tribal issues and the importance of the United States being joined as a party defendant. That precedent is still applicable today.

Third, because of the new issues raised in Texas's Supplemental Complaint, if the Court allows it to be filed, the other parties will have to file answers, and potential counterclaims and cross-claims. An entirely new pre-trial and trial phase will need to be established, including deadlines for witness and exhibit designations, expert witness reports, written discovery, depositions, potential dispositive motions, pre-trial motions, and ultimately a new trial setting.

Because Texas's Motion for Leave to File its Supplemental Complaint comes after eight years of litigation and on the verge of starting trial on the issues in the original Complaint, the Special Master should not allow this late attempt to expand the case to delay or disrupt the trial on the Compact issues below Elephant Butte Reservoir.

### **CONCLUSION**

Because Texas's Supplemental Complaint greatly exceeds the scope of its original Complaint that the Court accepted for filing, Texas's Motion for Leave to File its Supplemental Complaint should be submitted to the Court for consideration and further direction. The Court should determine whether it will take briefs and hear oral arguments prior to ruling or refer the matter to the Special Master for his recommendation. The Court's direct review is important given magnitude of the issues.

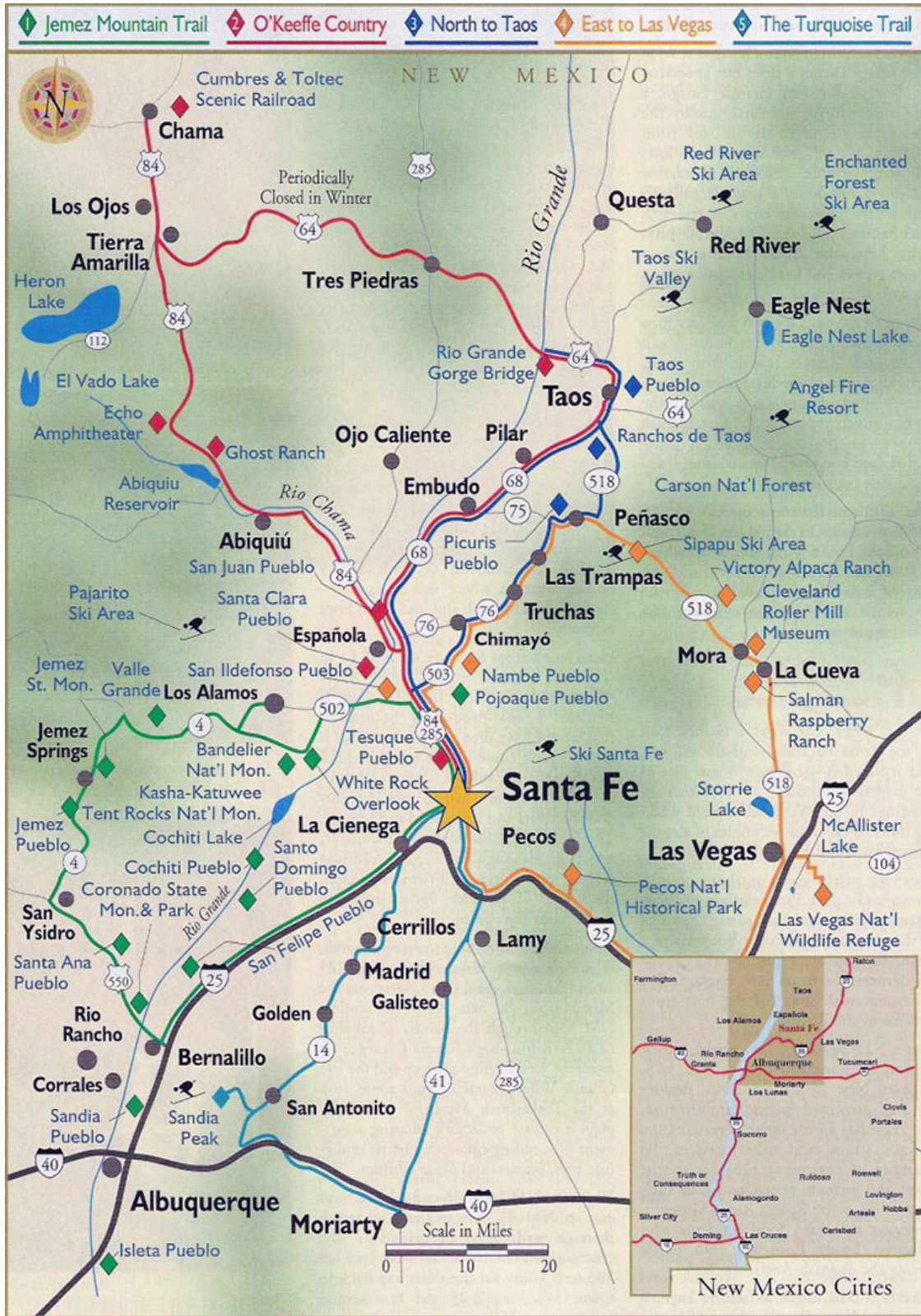
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No. 141, Original

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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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***AMICUS CURIAE* ALBUQUERQUE BERNALILLO  
COUNTY WATER UTILITY AUTHORITY'S  
CERTIFICATE OF SERVICE**

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This is to certify that on the 15th day of January 2021, I caused a true and correct copy of the *Albuquerque Bernalillo County Water Utility Authority Amicus Curiae Brief Regarding Whether Texas's Proposed Supplemental Complaint Exceeds the Scope of the Original Complaint Accepted for Filing by the Court* to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 15th day  
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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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## SPECIAL MASTER

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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](mailto:Priscilla.Hubenak@oag.texas.gov) to the Service list.

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

Added Toby Crouse ([toby.crouse@ag.ks.gov](mailto: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](mailto: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](mailto:eric.olson@coag.gov)) for the State of Colorado

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

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

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

**\*\*Update 11/6/19**

Added Lamai Howard ([lamaih@modrall.com](mailto:lamaih@modrall.com)) for El Paso County Water District No. 1.  
Removed Leanne Martony.

**\*\*Update 11/21/19**

Added Jo Harden ([jo@tessadavidson.com](mailto: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](mailto:gencounsel@nmsu.edu)) email for New Mexico State University.

- \*\*Update 1/7/20**  
Added David W. Gehlert ([david.gehlert@usdoj.gov](mailto:david.gehlert@usdoj.gov)) for the United States. Updated Solicitor General information. Also added John P. Tustin ([john.tustin@usdoj.gov](mailto: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](mailto: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](mailto:zogaz@nmag.gov)) for State of New Mexico.
- \*\*Update 1/26/21**  
Added Southern Rio Grande Diversified Crop Farmers Association information.
- \*\*Update 2/1/21**  
Added Robert Cabello and removed Marcia Driggers for City of Las Cruces.
- \*\*Update 2/23/21**  
Updated Solicitor General information and removed John P. Tustin for the United States.
- \*\*Update 7/1/21**  
Added Charlie Padilla ([CharlieP@modrall.com](mailto:CharlieP@modrall.com)) and removed Shannon Gifford for EPCWID.