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Via Electronic Mail

Honorable Michael J. Melloy
Special Master, U.S. Circuit Judge
United States Courthouse
111 Seventh Avenue, S.E.
P.O. Box 22
Cedar Rapids, IA 52401
TXvNM141@ca8.uscourts.gov

*Re: State of Texas v. State of New Mexico and State of Colorado,
United States Supreme Court, Original No. 141*

Dear Special Master Melloy:

This letter is in response to Your Honor's Order of July 7, 2021, and is submitted jointly by New Mexico's four *amici* with interests below Elephant Butte Reservoir: the City of Las Cruces, the New Mexico Pecan Growers, New Mexico State University ("NMSU") and the Southern Rio Grande Diversified Crop Farmers Association ("Lower Rio Grande *amici*"). The Order invited comment that did not argue the merits of issues in Texas's proposed Supplemental Complaint, but addressed its practical applications including "whether new parties, new *amici*, and new discovery would be required." *See* Order at 6.

Texas's Supplemental Complaint would expand and fundamentally transform the current case from one focused on Compact issues below Elephant Butte Reservoir to New Mexico and Colorado above Elephant Butte Reservoir. The Supplemental Complaint asserts that New Mexico has violated Articles VI, VII, and VIII of the Rio Grande Compact, Act of May 31, 1939, 53 Stat, 785. It alleges that "New Mexico has violated that (Article IV) delivery obligation... by interrupting and using water in areas *above* the Reservoir." Texas Motion at 2. Texas states that "New Mexico has declined to meet its obligation under Article IV of the Compact to retain enough water in reserve in an amount equal to its year-to-year delivery shortfall." *Id.* In essence, Texas complains that water held in storage for use by Texas was released in violation of Article VI.

Texas's Supplemental Complaint would change the present case in the following respects: (i) new issues would have to be addressed, including claims by the United States Fish and Wildlife Service under FWS Final Biological Opinion No. 02ENNM00-2013-F-0033 for the endangered Rio Grande Silvery Minnow, as well as for the endangered Southwest Willow Flycatcher, Yellow-

billed Cuckoo, and New Mexico Jumping Mouse, and by the United States on behalf of sixteen (16) Pueblo (tribal) nations in New Mexico; (ii) new parties would be required to be added, including the United States on behalf of its sixteen (16) Pueblo (tribal) wards and for endangered species under the Endangered Species Act, 16 U.S.C § 1531 *et seq.* (1973) and perhaps on behalf of the Middle Rio Grande Project (“Middle Rio Grande Conservancy District” or “MRGCD”); (iii) new *amici* would seek leave to participate, including MRGCD which holds storage rights in El Vado Reservoir, and the City of Santa Fe which holds storage rights in Nichols and McClure Reservoirs, and potentially various Pueblos including the “six Middle Rio Grande Pueblos” who hold storage rights in El Vado Reservoir. Two other Pueblos in the Middle Rio Grande, *i.e.*, Zia Pueblo and Jemez Pueblo, do not have storage rights in El Vado Reservoir.

The relationship of new claims and required release of stored water on Article IV deliveries remains uncertain. However, the effect of Pueblo diversion and storage rights would bring Article XVI and its effects on Article IV into issue.

These questions impact municipal and agricultural rights below Elephant Butte Reservoir. The New Mexico *amici* have devoted considerable time and resources to the litigation of the current Texas claims, and expanding the claims to include issues above Elephant Butte Reservoir would further extend the time and resources needed to continue meaningful participation in this case. The Lower Rio Grande *amici* believe that before an informed decision can be made by the Court the following steps should be undertaken:

- Identification of the positions of Colorado and the United States on the Supplemental Complaint;
- Identification of interest by the 16 Pueblos;
- A statement of claims by interested Pueblos or, alternatively, discovery to ascertain their claims; and
- Determination of the requirements of the Endangered Species Act with respect to the Rio Grande Compact.

The Lower Rio Grande *amici* reserve the right to brief the issues in Texas’s Supplemental Complaint on the merits. Given the new issues, and their complexity, referral to the Court is advisable.

Under Article III of the Rio Grande Compact, Colorado is required to deliver water “at the Colorado-New Mexico State Line” in an amount “ten-thousand-acre feet less than the sum of those quantities” set forth in two tabulations corresponding to quantities in the upper index stations....” Imported Colorado River water from the San Juan-Chama Project (SJCP) is stored for use in New Mexico in Heron Reservoir, located on the Rio Chama. Nichols and McClure Reservoirs, which are off-channel reservoirs which store water for use by Santa Fe from the tributary Santa Fe River. El Vado Reservoir stores native and SJCP water for use on irrigated land within the MRGCD, including “prior and paramount” rights for use by the “six Middle Rio Grande Pueblos.”¹ New

¹ The “six Middle Rio Grande Pueblos” with storage rights in El Vado Reservoir are: Cochiti Pueblo, Isleta Pueblo, Santa Ana Pueblo, San Felipe Pueblo, Sandia Pueblo, and Santo Domingo Pueblo.

Mexico's delivery obligations are triggered by the amount of inflow recorded at the gauging station at Otowi. North of Otowi, eight northern Pueblos use native Rio Grande surface water, *i.e.*, the "eight northern Pueblos."² Municipal interests include the City of Albuquerque (now the Albuquerque Bernalillo County Water Utility Authority or "ABCWUA"), Santa Fe, and other communities.³

Water stored in El Vado Reservoir for the "six Middle Rio Grande Pueblos" is tribal water which may be exempted from the Rio Grande Compact under Article XVI for "prior and paramount" tribal uses. Native Rio Grande and SJCP water in the Middle Rio Grande is managed in part to meet the hydrologic needs required under the Endangered Species Act. The United States also has an interest in water operations through the U.S. Bureau of Reclamation in conjunction with the federal Middle Rio Grande Project and is the owner and operator of El Vado Reservoir on the Rio Chama. Release authority from reservoirs like El Vado is not held by State of New Mexico, but by the United States which made the releases from El Vado Reservoirs for those purposes.

The Lower Rio Grande *amici* concur in the contentions raised and issues identified by the State of New Mexico and the ABCWUA with respect to the need to join the United States and the State of Colorado to the issues in the Supplemental Complaint. Both are indispensable defendants to the claims amended by Texas. The United States is indispensable as the release of stored reservoir water was undertaken by the United States to satisfy the "prior and paramount" claims of the "six Middle Rio Grande Pueblos," and the requirements of the Endangered Species Act for the Rio Grande Silvery Minnow, Southwest Willow Flycatcher, Yellow-billed Cuckoo, and New Mexico Jumping Mouse. *See generally Texas v. New Mexico*, 352 U.S. 991 (1957).

As set forth in Article IV, New Mexico's delivery obligation into Elephant Butte Reservoir is measured by the amount of inflow recorded at the gauging station at Otowi, between Santa Fe and Taos. The ratio is set forth in the Table in Article IV. Article XVI provides that:

Nothing in the Compact shall be construed as affecting the obligations of the United States of America to Mexico under existing treaties or to Indian tribes, or as impairing the rights of Indian tribes.

The Pueblo communities of New Mexico are the oldest users of water for irrigated agriculture in North America. They were cultivating crops from surface water when the Spanish arrived in New Mexico in the 1500's. Hence, the "prior and paramount" nature of their claims. Accordingly, releases of "prior and paramount" water from El Vado complicates accounting under

² The "eight northern Pueblos" are: Taos Pueblo, Picuris Pueblo, Santa Clara Pueblo, Ohkay Owingeh Pueblo (formerly San Juan Pueblo), San Ildefonso Pueblo, Nambe Pueblo, Pojoaque Pueblo, and Tesuque Pueblo. In addition, on the Rio Chama, a tributary to the Rio Grande, the Jicarilla Apache Nation has post-1929 storage water rights.

³ Native Rio Grande water is conjunctively used by the ABCWUA and Santa Fe with imported San Juan Chama Project water apportioned to New Mexico by the Upper Colorado River Basin Compact, Act of April 6, 1949, 63 Stat. 31; Act of June 16, 1962, 76 Stat. 96, 43 U.S.C. § 620 *et seq.*

July 15, 2021

Page 4

the Compact. It may affect the amount of water required to be delivered into Elephant Butte by Article IV.

Finally, the granting of the motion by Texas will have a profound and adverse effect on New Mexico farmers in the Lower Rio Grande for two primary reasons. First, farming in the Lower Rio Grande Basin requires that farmers have certainty in the administration of water rights by the New Mexico State Engineer, by the delivery of water by the Bureau of Reclamation, and the day to day maintenance of the irrigation district by its directors. To allow Texas to file an amended complaint asserting additional compact violations will deprive the agricultural community of the certainty needed to plan and carry out their farming practices. This deprivation will lead to the second reason the request to file a Supplemental Complaint should be referred to the Supreme Court. If the motion is approved, the financial implications are far reaching and are not limited to a single agricultural producer. All producers must make decisions based up water availability, economic forecasts, weather forecasts, consumer demands, and political events—to name a few. The motion by Texas, if granted, directly prohibits agricultural producers from being able to depend on maintaining the status quo operations of the Rio Grande until the trial of the present complaint is completed and an order entered.

Thank you for your consideration in this matter.

Sincerely,

/s/Jay Stein

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