

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* CITY OF LAS CRUCES' BRIEF IN OPPOSITION TO THE
STATE OF TEXAS'S MOTION FOR CONTINUANCE OF TRIAL SETTING**

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INTRODUCTION

Amicus Curiae City of Las Cruces (“City” or “Las Cruces”) submits this brief in opposition to the State of Texas’s Motion for Continuance of Trial Setting and Memorandum in Support (August 19, 2021) (“Motion”), pursuant to by ¶ 2 of the Special Master’s Order of August 19, 2021. Las Cruces opposes any continuance of the trial scheduled to begin September 13, 2021, because a continuance will result in prejudice to the City’s ability to conduct long term planning by extending the cloud over the City’s water rights and continuing the loss of recharge to the groundwater system. Las Cruces adopts and joins in the State of New Mexico’s Response in Opposition to the State of Texas’s Motion for Continuance of Trial Setting together with filings by the other New Mexico *amici*.

ARGUMENT

Las Cruces is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. The City was founded in the mid-1800s, the first settlers having arrived in 1839, led by Don Jose Costales. *See Regional Planning Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-37 at 72* (1938). The emerging community received its first water supply from the Acequia Madre de Las Cruces around 1849. Las Cruces transitioned to groundwater wells more than a century ago. Today the City is responsible for providing a potable water supply to more than 100,000 people. Las Cruces is one of the fastest growing municipalities in the western United States and its population is expected to exceed 150,000 by 2050. The City’s water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin. Pursuant to state law, Las Cruces is required to plan for a forty-year water supply. *See* NMSA 1978, § 72-1-9 (1985); *City of Las Cruces 40-Year Water Development Plan* (April 2017).

The City of Las Cruces owns vested, pre-Compact and pre-basin water rights of 21,869 AFY under Declaration No. LRG-430 *et al.*¹ These rights were judicially adjudicated in *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996) (“LRG Adjudication”).² The City owns permitted water rights of 10,200 AFY under its East Mesa Permit Nos. LRG-3283 through 3285 and LRG-3288 through LRG-3296 in the Jornada del Muerto sub-basin, which is experiencing the most rapid growth.³ The East Mesa rights are largely disconnected from the Rio Grande. Approximately 25% of the City’s water use is derived from East Mesa water. Treated returns from the East Mesa under NPDES Permit No. NM0023311 are additive to the Rio Grande flows as imported water and supplement and augment surface flows. The Special Master observed those returns into the Rio Grande at the stop at the outlet works of the Jacob Hands Wastewater Treatment Plant on the Basin Tour on August 23, 2021. The treated returns offset virtually all of the City’s effects on the Rio Grande. The City owns 8,000 AFY of permitted rights under Permit Nos. LRG-3275-POD1-LRG-3275-POD-7 on the West Mesa. The West Mesa rights are in hydrologic communication with the Rio Grande and will require offsets when they come on line in the mid-to-late 2030s.

¹ In New Mexico, the State Engineer has jurisdiction over all surface water by virtue of the surface water code of 1907, NMSA 1978, §72-5-1 (1907) *et seq.* The State Engineer has jurisdiction over groundwater only within “declared” underground basins with “reasonably ascertainable boundaries,” which have been established by the State Engineer through an executive order. *See* NMSA, 1978, § 72-12-1 (1931). The Lower Rio Grande Underground Water Basin was declared on September 11, 1980. Groundwater uses in existence at the time of the establishment of a declared underground water basin are recognized as vested rights upon the filing of a “Declaration.” *See* NMSA 1978, § 72-12-5 (1931); *State v. Mendenhall*, 68 N.M. 467, 362 P.2d 998 (1961). All subsequent acquisitions of groundwater appropriations, as well as all changes in purpose or place of use, or points of diversion, are subject to a State Engineer permitting process. *See* NMSA 1978, § 72-12-1 (1931) *et seq.*

² Under the terms of its Consent Decree in the water rights adjudication styled *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed Sept. 24, 1996). Las Cruces is required to return its effluent discharge from the LRG-430 *et al.* rights to the Rio Grande when the allocation at Elephant Butte Irrigation District is less than 2.0 feet.

³ Four LRG-430 wells were sited in the East Mesa. Two have since changed to the East Mesa numbering and accounting system. LRG-430-S-29 and LRG-430-S-30 remain on the East Mesa.

Las Cruces' water rights are used for the municipal purposes of water supply to homes, schools, the two regional hospitals, commercial businesses and industries which provide the economic base of the City's economy, municipal, state, and federal offices and installations, restaurants and recreation. The exercise of these water rights is governed by state and federal regulations. Diversions are regulated by the New Mexico State Engineer with conditions of approval attached to the permitted supplemental rights in the LRG-430 *et al.* series and the permitted rights on the East and West Mesa.⁴ They require the reporting of diversions on a monthly basis. The East Mesa permits under the LRG-3200 *et al.* series mandate conservation goals with yearly reporting on water conservation efforts to the State Engineer.

Distribution of the diverted water is regulated by the Safe Drinking Water Act, 42 U.S.C. § 3001 *et seq.*, and is subject to a testing and supply regime under federal law.

Discharge of treated effluent back to the Rio Grande from the City's wells and other regional users is governed by the Clean Water Act, 33 U.S.C § 1251 *et seq.*, and the City's NPDES Permit No. NM002331 imposes treatment requirements at the Jacob Hands Wastewater Treatment Plant prior to effluent discharge into the Rio Grande. Continuous monitoring and supply of all treated discharges occurs on a daily basis.

Since the inception of this case, these rights have been under a cloud resulting from Texas's allegations that groundwater pumping affects Compact deliveries to the Rio Grande. In its Complaint in Intervention, the United States asserts contracting authority over water in storage in the Lower Rio Grande Underground Basin regardless of its pre-Compact status. *See* United States

⁴ Supplemental groundwater rights permitted by the New Mexico State Engineer pursuant to NMSA 1978, § 72-12-24 (1959) are used to provide additional points of diversion to a primary water right, but may not increase the amount of the primary right. Permitting is dependent on non-impairment to the rights of others.

Complaint in Intervention at ¶ 13.⁵ These contentions challenge the validity of State Engineer permits issued to the City as well as to the irrigators' within Elephant Butte Irrigation District. The irrigators' wells constitute more than 85% of the groundwater diversions that Texas, the United States, E.P. No.1, and EBID complain of. Texas seeks a 60% reduction to the rights. Further delay in resolving the issues raised by these parties prejudices the City's water use and long term planning by creating additional uncertainty over water rights exercised for decades.

The City concurs with the State of New Mexico's assertion that it has been prejudiced by the loss of 94,000 AFY since 2008, an aggregate of some 1,131,000 acre feet, and contends that lost amount has resulted in reduction of recharge to the groundwater system that would otherwise not have occurred, resulting in lost groundwater resources for Las Cruces. *See* New Mexico Response at 3, citing NM-EX_066, 2d Barroll Decl. ¶69. Las Cruces will suffer prejudice from further delay in rectifying the situation.

CONCLUSION

Further delay in resolving the issues raised by Texas, the United States, EP No.1, and EBID prejudices the City of Las Cruces by further preventing its ability to undertake long term planning by extending the cloud over its water rights and by continuing to deprive the groundwater system of recharge. This is a far cry from the mere "inconvenience" alleged by EP No.1. *See* Response of El Paso County Water Improvement District No. 1 to the State of Texas's Motion for Continuance of Trial Setting at 2.

Texas's Motion should be denied.

⁵ "New Mexico has allowed the diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary or are using water in excess of contractual amounts."

Respectfully submitted this 26th day
of August, 2021.

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

This is to certify that on the 26th day of August, 2021, I caused a true and correct copy of the *Amicus Curiae City of Las Cruces' Brief in Opposition to the State of Texas's Motion for Continuance of Trial Setting* to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 26th day
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