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.

On Exceptions To The Third Interim Report Of The Special Master

JOINT BRIEF OF *AMICI CURIAE* NEW MEXICO PECAN GROWERS AND THE SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION IN SUPPORT OF THE COMPACTING STATES' JOINT REPLY TO THE UNITED STATES' EXCEPTION TO THE THIRD REPORT OF THE SPECIAL MASTER

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INTERESTS OF *AMICI*

Amicus Curiae New Mexico Pecan Growers and *Amicus Curiae* Southern Rio Grande Diversified Crop Farmers Association (collectively *Amici*)[1] are non-profit trade organizations formed in New Mexico in 2002 and 2009, respectively, to promote and protect the interests of farmers in New Mexico's southern Rio Grande valley. Their several hundred members collectively irrigate approximately 60,000 acres of croplands and orchards within the Elephant Butte Irrigation District (EBID) using surface water released from the storage reservoirs of the Rio Grande Project (Project). They have used Project water to grow the largest-producing pecan crop in the United States, world-famous Hatch green chile, vegetables, and various other crops.[2] Like their neighbors in Texas, and with the encouragement of their irrigation districts and the United States, they have also pumped supplemental groundwater from wells to meet their irrigation needs. Generally speaking, the farmers' use of wells for irrigation began in the early 1940s but gained traction in the 1950s – several years after they first irrigated with surface water delivered from the Project. *See*, *e.g.*,

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[1] No other person or entity other than the *Amici* has authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief.

[2] Pecan and chile farming industries make up almost 10% of New Mexico's gross domestic product. *See* N.M. Attorney General H. Balderas Op. Stmt., Special Master Docket (at https://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original, hereinafter "Doc.") 701, Vol. I, Tr. 47:14-17.

S. Stahmann Test., Doc. 701, Vol. XIX, Tr. 77:9-16; M. Barroll Rpt., Doc. 418, Vol. 1 at 80, NM EX-100.

The farmers' interests in this matter are two pronged. First, as irrigators within EBID who have established water rights in Rio Grande water delivered from the Project, they have an interest in ensuring their entitlement to use Project supply is protected under the Rio Grande Compact, 53 Stat. 785 (May 31, 1939) (Compact). Second, as irrigators who have established water rights to use groundwater under New Mexico's prior appropriation doctrine, they also have an interest in ensuring those rights remain exercisable within New Mexico's apportionment under the Compact. *See* N.M. Stat. Ann. § 72-12-1, *et seq.* (1978) (New Mexico's groundwater code); and N.M. Const. Art. XVI, §§ 2, 3 ("[p]riority of appropriation shall give the better right").

Although *Amici's* farmers are legally entitled to use Project water, they now rely more heavily on their irrigation wells because of changes to Project operations under an agreement reached in 2008 between EBID, the United States Bureau of Reclamation (Reclamation), and the El Paso County Water Improvement District No. 1 (EP1). *See* Operating Agreement for the Rio Grande Project (Mar. 10, 2008) (Operating Agreement), Doc. 418, Vol. 4 at 80, NM EX-510. The Operating Agreement's change to the historic pro-rata allocation of Project water between the districts in New Mexico and Texas has created an unstable hydrologic condition in New Mexico that has never-before existed in over 100 years of Project operations. And, while farmers in Texas have received full surface-water allocations from

the Project to meet their irrigation needs, farmers in New Mexico have received only a fraction of the surface water needed to meet theirs.

The farmers' overriding interest in this matter is simple – it's survival. *Amici's* goal is to reestablish the equitable treatment of their members' rights to use surface water from the Project, and groundwater from their irrigation wells, under the Compact. *Amici* believe the consent decree proposed by Texas, New Mexico, and Colorado (Compacting States) achieves this goal. Accordingly, *Amici* support the Compacting States' request for the Court to accept and adopt the Third Interim Report of the Special Master (Third Report) and enter their proposed consent decree, attached as the Addendum to the report (Consent Decree). *Amici* offer this brief for the specific purpose of providing additional grounds for the Court to overrule the United States' Exception to the Third Report (October 6, 2023) (US Ex. Br.).[3]

[3] *Amici* acknowledge that EBID has filed an *Amicus Curiae* Brief in Support of Exception and Brief for the United States (October 12, 2023) (EBID Br.). EBID does not speak for the interests of *Amici's* farmers in this original action. EBID is a statutorily created irrigation district under N.M. Stat. Ann. §§ 73-10-1 *et seq*. (1978) responsible for the delivery of surface water within New Mexico's portion of the Project, but it is not a beneficial user of that water. *Amici's* farmers are the beneficial users of water. They have interests, separate and apart from EBID, in protecting their legally established water rights to use both surface water delivered by the Project and groundwater pumped from their wells to meet their irrigation needs.

SUMMARY OF ARGUMENT

The Consent Decree is consistent with the historic 57:43 division of Project water to irrigators in New Mexico and Texas incorporated into the Compact. In taking exception to the Special Master's recommendation that the Consent Decree be approved, the United States asserts the right to seek the Court's declaration that New Mexico has an obligation to protect the Project from interference and mandate how it must do so. But who is the United States trying to protect? The Compacting States assert their interests are adequately protected under the Consent Decree, and the United States can make no specific showing of injury to Mexico.[4] At the heart of the questions before the Court, then, is whether the Compact requires protection of the historic pro-rata distribution of water to *all* users of Project supply, or whether it allows the United States to dictate how much Rio Grande water is delivered to users in New Mexico?

The Court has already found Reclamation's contracts negotiated and approved at the time of the Compact (Downstream Contracts) formed the basis of the apportionment of the Rio Grande below Elephant Butte. Accordingly, the Compacting States had to expect the United States would continue to equitably operate the Project to meet the irrigation demands of all Project beneficiaries in accordance with the 57:43 division of water established by the Downstream

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[4] *See* Special Master's Order on Motion to Unseal and Motion to Strike (Dec. 30, 2022), Doc. 742 at 6-7.

Contracts. In addition, those contracts confirmed the irrigators owned the rights to use Project water and that their rights were appurtenant to their lands. Although the United States explicitly promised to never construe the Downstream Contracts in a manner that would diminish or impair the irrigators' water rights, its implementation of the Operating Agreement in 2008 has done just that.

Under the Operating Agreement, irrigators in EBID have received only a fraction of their 57% share of Project supply, forcing them to pump more groundwater to supplement the water needed to grow their crops. Having to pump more groundwater has significantly increased their operating costs and created the vicious cycle of declining groundwater levels, reduced river efficiencies, and even further reductions to EBID's allocations. Farmers without irrigation wells have simply lost the ability to farm.

The Consent Decree restores stability to the Project and reaffirms the United States' legal responsibilities under the Compact to operate the Project in accordance with its promises in the Downstream Contracts. In requesting the Court to reject it, the United States is effectively asking it to find that Reclamation has authority to amend its contractual promises incorporated into the Compact over the objection of the Compacting States. And, simultaneously, it demands the right to pursue a 1938 baseline condition in New Mexico that conflicts with Reclamation's demonstrated history of encouraging the farmers' use of groundwater for irrigation and allocating water between the

districts based on the Project's performance during the 1951-1978 time period (D2 period).

What the United States seeks would result in continued disparate treatment of Project water users in New Mexico – those users the United States claims it has a Compact-level duty to protect. US Ex. Br. 45. If the United States' wishes were granted, Project operations under the Operating Agreement would continue to provide EBID's farmers only a small fraction of their share of Project water while a 1938 baseline would prevent them from pumping their irrigation wells to meet their irrigation demands. It is a fatal scenario that could not have been envisioned by the Compacting States in 1938.

ARGUMENT

Amici's farmers support entry of the Consent Decree because it preserves the 57:43 division of water in the original Downstream Contracts that were incorporated into, and formed the basis of, the Compact's interstate apportionment below Elephant Butte Reservoir. Further, the Court's entry of the Consent Decree will prevent the type of instability and inequity that has resulted from the United States' implementation of the Operating Agreement – the flame that ignited this original action. The Consent Decree restores the equitable basis for New Mexico's apportionment of water below Elephant Butte that the Operating Agreement disturbed, preserves the farmers' existing

rights to use groundwater developed during the D2 period, and provides a baseline for New Mexico's administration of water uses in accordance with its prior appropriation doctrine. Additionally, the United States' insistence on litigating a 1938 baseline condition would operate to the detriment of only those Project beneficiaries in New Mexico. If it was genuinely concerned with protecting the beneficiaries in both irrigation districts, the United States would support the Court's entry of the Consent Decree.

I. The Consent Decree is Consistent with the Compact's Division of Water to Irrigators Established by the Downstream Contracts

The Consent Decree ensures that users of Project water in New Mexico will be allocated water based on an index methodology that provides each state its equitable apportionment of the Rio Grande in the 57:43 ratio established at the time of the Compact. *See* Barroll Decl. Doc. 720, Ex. 6, ¶¶ 25, 43; Brandes Decl., Doc. 720, Ex. 3, ¶ 38; Hutchison Decl., Doc. 720, Ex. 4, ¶ 111; and Sullivan Decl., Doc. 720, Ex, 7, ¶ 28. In taking exception to the Special Master's recommendation, the United States argues that the Consent Decree must be rejected because it is contrary to Reclamation's "existing responsibilities" to allocate water per the "formula" in its current contract with the irrigation districts – not those contracts in effect in 1938. US Ex. Br. 40. In so doing, the United States clearly views the apportionment of water below Elephant Butte as what it, and the irrigation districts, deem it to be. *Id.*, 44-45. If

the Court were to adopt the same view, that would amount to a Compact with an empty promise and one that defeats the express purpose of "effecting an equitable apportionment" of the Rio Grande. *See* Compact, preamble, 53 Stat. at 785.

However, the United States cannot ignore that the Court has already found that the Downstream Contracts – Reclamation contracts "simultaneously" negotiated and approved at the time of the Compact – formed the basis of Texas's apportionment of the Rio Grande. *See Texas v. New Mexico*, 583 U.S. 407, 410 (2018). The Court described Reclamation's contracts executed with the irrigation districts in 1937 as follows:

> In the first set of agreements, the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State – roughly 57% for New Mexico and 43% for Texas.

Id.; *see also* Contract between the United States and EBID Adjusting Construction Charges and for Other Purposes (Nov. 9, 1937), Doc. 88 at 22**,** and Contract between the United States and EP1 Adjusting Construction Charges and for Other Purposes (Nov. 10, 1937), Doc. 88 at 8 (1937 Contracts). The contract Reclamation executed with the districts in 1938 confirmed that available water supply in times of shortage would be distributed in the same 57:43 proportion. *See*

Contract with EBID and EP1 (Feb. 16, 1938) (1938 Contract), Doc. 88 at 36. Accordingly, the Court found that through its negotiations and approval of the Downstream Contracts, the United States "*assumed a legal responsibility* to deliver a certain amount of water to Texas." 583 U.S. at 413 (emphasis added). This responsibility was in addition to its existing obligation to make deliveries of water to Mexico under a 1906 treaty. *See* Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953 (Treaty). The Treaty provided that in times of shortage, Project water was to be shared with Mexico "in the same proportion as the water delivered to lands in the United States." 34 Stat. at 2953-2954, Arts. I-II.

Given this legal backdrop, the Compacting States drafted a Compact that ensured New Mexico delivered water to Project storage to be available for release to meet "irrigation demands." *See* Compact, 53 Stat. at 786, Art. I ¶ l. The Compact provides for a normal release of 790,000 acre-feet, the amount of water determined sufficient to make deliveries to Mexico and to meet the irrigation demands in the districts. *See id.* at 790, Art. VIII. And, because the Downstream Contracts were "simultaneously" executed with the Compact, the Compacting States could reasonably expect that the maximum authorized acreage in the Project would be a regulator on irrigation demands.

For *Amici*, the significance of the Downstream Contracts is not only the degree to which they established

the states' apportionment of the Rio Grande below Elephant Butte, but also how they defined the United States' legal responsibilities to all users of Project water. The contracts expressly provided that the water rights established through an irrigator's beneficial use of Project water became appurtenant to the land upon which they were used pursuant to Reclamation law. *See* 43 U.S.C. § 372 ("[t]he right to the use of water" within a federal project "shall be appurtenant to the land irrigated"). For example, Reclamation's original contract with water-user associations executed in 1906 provided that existing water rights, and rights to be initiated from the newly proposed irrigation works "shall be, and thereafter continue to be, forever appurtenant to designated lands owned by [the] shareholders." *See* Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association (June 27, 1906) (1906 Contract), Doc. 413, Vol. 2 at 907, 908. The 1937 Contracts were "supplemental" to the 1906 Contract and provided:

> Nothing in this contract shall ever be construed or interpreted so as to *alter, diminish, or impair* the right of project land owners to *such water rights* as may be or become appurtenant to their lands under Federal Reclamation Laws and under the *original contracts* entered into between the original water users' association on this Project and the United States.

Doc. 88 at 16, 29, Arts. 13, 28 (emphasis added).

The 1937 Contracts were executed in the same year the Court confirmed that irrigators who use water from a reclamation project own the water rights appurtenant to their lands. *Ickes v. Fox*, 300 U.S. 82, 95 (1937) (facts involving a contract with verbatim terms as the 1906 Contract); *see also Nebraska v. Wyoming*, 325 U.S. 589, 615-16 (1945) ("[I]ndividual landowners" hold the right to use water under state law.). So, at the time of the Compact, the United States was not only responsible for ensuring Texas's apportionment was made, but it was also contractually obligated to deliver a 57% share of Project supply to farmers in EBID so as to not "alter, diminish or impair" their legally established water rights. *See* 1937 Contracts, Art. 13.

The Compacting States trusted the United States to operate the Project in accordance with the provisions in the Downstream Contracts. *See Texas v. New Mexico*, 583 U.S. at 414 (noting the Downstream Contracts are "essential to the fulfillment of the Compact's expressly stated purpose"). That trust was well-placed for decades, during which time the United States first operated the Project to respond to farmers' calls for water (from 1938-1951) and then allotted an equal amount of water to each acre in the Project (from 1951-1978). *See* Ferguson Discl., Doc. 439, Vol. 1 at 155, NM EX-119. After the irrigation districts took over the operation of facilities within their boundaries in 1980, Reclamation agreed to allocate and deliver water to the districts at their respective points of diversion. In so doing, it used a new allocation method derived from the relationship between releases from Project storage

and total diversions that reflected the impact of groundwater pumping on Project supply occurring from 1951 to 1978 (D2 Curve). *See* Barroll 2d. Decl., Doc. 439, Vol. 1 at 23-24, NM EX-006, ¶ 57. Up until 2005, the United States used the D2 Curve to ensure that the irrigation districts, on average, received the 57:43 apportionment established in the Downstream Contracts. *Id.* ¶¶ 56, 57. Beginning in 2006, however, Reclamation implemented new allocation methods which had the effect of reducing EBID's allocations and deliveries, while increasing EP1's. The new allocation methods were incorporated into the Operating Agreement in 2008.

The United States now insists on pursuing a claim that would require the Court to find the Compact's equitable apportionment of the Rio Grande subordinate to Reclamation's authority to allocate Project water in the manner provided in the Operating Agreement – or in any other way it deems necessary. It is for this reason that *Amici* urge the Court's approval of the Consent Decree. As shown below, the decree rectifies the harm suffered by *Amici's* members resulting from the Operating Agreement and affirms the United States' responsibility to equitably allocate the waters of the Rio Grande in accordance with the 57:43 division established in the Downstream Contracts.

II. The Consent Decree Restores Stability in the Project that the Operating Agreement Unsettled

A. The Operating Agreement's Injurious Effects in New Mexico

Since the inception of the Project over 100 years ago, vibrant economies have grown and thrived in both Texas and New Mexico. Several of *Amici's* members are fourth and fifth generation farmers whose long line of family members paid for the Project's construction and continue to pay for its operation and maintenance. *See*, *e.g.*, S. Franzoy Test., Doc. 701, Vol. XIII, Tr. 154:6-156:25; D. Salopek Test., Doc. 701, Vol. XII, Tr. 201:14-203:10; and S. Stahmann Test., Doc. 701, Vol. XIX, Tr. 38:5-42:21, 43:20-44:5, 49:8-21. They have built businesses that have relied on it being operated in accordance with the United States' promises to provide each irrigable acre in the Project equal footing and to refrain from diminishing their vested rights to receive and use Project water. In 2008, those promises were broken.

For the last seventeen years *Amici's* farmers have suffered from the unsustainable consequences resulting from the Operating Agreement's allocation procedures that require EBID's allocation be reduced to address reductions in Project delivery performance relative to the D2 Period. *See* Barroll 2d Decl., Doc. 439, Vol. 1 at 24, NM EX-006, ¶ 58. Notably, the Operating Agreement is not narrowly tailored to address only those reductions to Project deliveries caused by EBID's farmers. *Id.* Instead, it charges EBID for any and all

calculated reductions, including those that may be caused by other factors such as groundwater pumping in Texas, poor river maintenance, increased riparian water consumption, and non-irrigation water uses. *See*, *e.g.*, *id*., ¶¶ 38, 41, 42, and 44. The United States has described this function of the agreement as "EBID *voluntarily* ced[ing] some of its surface water allocation to [EP1] to compensate for surface water depletion caused by groundwater pumping in New Mexico, including pumping by water users outside of EBID." *See* United States' Notice of Motion for Partial Summary Judgment (Nov. 5, 2020), Doc. 414 at 34, ¶ 71 (emphasis added).

The Operating Agreement was the result of EBID's participation in confidential negotiations to resolve litigation with the United States and EP1. *See* G. Esslinger Test., Doc. 701, Vol. III, Tr. 125:2-20, 126:19-133:6. *Amici* acknowledge that EBID had a genuine interest in resolving disputes involving Project operations, however, it had no authority to "cede" any water necessary to supply its members water rights. *See* N.M. Stat. Ann. § 73-10-16 (1978) (preventing EBID from contracting for the use of water with others if it would "interfere with the vested rights of any water user or with the exercise of such rights of any such water user"). Further, *Amici's* farmers had no notice that their share of Rio Grande water supply was the bargaining chip exchanged for groundwater pumping until after the agreement was signed.[5] *See* D. Salopek

[5] New Mexico and the Rio Grande Compact Commission were also not asked to provide input before the new allocation procedures

Test., Doc. 701, Vol. XIII, Tr. 56:15-21. And thereafter, neither they, nor New Mexico, were provided any opportunity to object to the implementation of a settlement that significantly altered the farmers' rights to use water from the Rio Grande – an interstate river subject to a compact with Texas. *Cf. State ex rel. Off. of State Engr. v. Lewis*, 150 P.3d 375 (N.M. App. 2006) (irrigators afforded opportunity in Pecos River Adjudication to object to agreement between New Mexico, United States, and irrigation districts regarding New Mexico's obligations to Texas under the Pecos River Compact).

It was not until discovery commenced in this original action that *Amici* became aware that the United States had not even assessed the degree to which groundwater pumping in New Mexico, or other factors, might be affecting deliveries of Project water to Texas before implementing the Operating Agreement. *See* Barroll 2d Decl., Doc. 439, Vol. 1 at 26, NM EX-006, ¶ 65. It is now known that approximately 74,000 acre-feet of calculated reductions in annual Project performance were simply the result of accounting changes in the Operating Agreement that were not attributable to any action or inaction of New Mexico or its water users. *Id.* ¶ 59.

Amici's farmers have paid their pro-rata share of Reclamation's costs to construct and operate the

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were incorporated into the Operating Agreement. *See* Lopez Decl., Doc. 418, Vol. 1 at 33, NM EX-003 ¶ 29; and D'Antonio Decl., Doc. 418, Vol. 1 at 18, NM EX-002, ¶ 10.

Project, and they alone continue to shoulder the additional financial burden of paying assessments to maintain EBID's facilities – facilities that are not only used to deliver water to their farms, but also to deliver water downstream to EP1. *See* D. Salopek Test., Doc. 701, Vol. XIII, Tr. 14:20-15:8. Nonetheless, under the Operating Agreement they have received drastically little surface water compared to farmers in EP1. For example, farmers in EP1 received 4.0 acre feet of water per acre (afa) per year in 2018, 2019, and 2020. In contrast, farmers in EBID received only .83 afa in 2018, and 1.17 afa in both 2019 and 2020. *See* M. Estrada-Lopez Test., Doc. 701, Vol. II, Tr. 102:11-103:4; and Appendix A at App. 1-2, Comparison of Districts Allotment Data 2008-2020, NM-DEMO-003. In years in which the Project has had a full supply, the Operating Agreement has reduced EBID's allocation by more than one-third. Barroll 2d Decl., Doc. 439, Vol. 1 at 11, NM EX-006, ¶ 26. Moreover, the amount farmers in EBID have had to pay to use Project water has grossly exceeded the amount paid by farmers in EP1. In 2021, for example, farmers in EBID paid $270 per acre foot of water, while farmers in EP1 paid only $12.50 per acre foot. D. Salopek Test., Doc. 701, Vol. XIII, Tr. 59:14-24.

Since the Operating Agreement was implemented, farmers in EBID have had no choice but to live with reduced deliveries of Project water and "make-up" irrigation supply with groundwater. Using more groundwater has resulted in increased operational costs associated with pumping greater volumes of water, drilling and maintaining deeper wells, and managing

increased soil salinity. *See* S. Stahmann Test., Doc. 701, Vol. XIX, Tr. 18:5-19:12. Some farmers are spending double the amount per acre for just the additional electricity and fuel needed to pump replacement groundwater from their wells. D. Salopek Test., Doc. 701, Vol. XIII, Tr. 39:2-9. However, those most injured by reduced Project deliveries are farmers who do not have irrigation wells. They have lost orchards, crops, and subsistence gardens because they have had no ability to pump groundwater to replace lost surface water supply. *Id.* at Tr. 41:11-18; and R. Serrano Decl., Doc. 439, Vol. 1 at 91, NM EX-010, ¶ 35.

Finally, less surface water being used within EBID has led to declining groundwater levels, worsening delivery efficiencies and even further reductions in EBID's allocations. Barroll 2d. Decl. Doc. 755, Ex. E, ¶ 19. In short, the Operating Agreement has resulted in a vicious hydrologic cycle that is unsustainable. *See* Barroll Demo Ex., Doc. 439, Vol. 1 at 150, NM EX-118 (depicting the spiraling effect of having less surface water available for groundwater recharge, increased groundwater pumping, declining groundwater levels, negative Project performance, and further reduced allocations to EBID). As shown below, the Court's approval of the Consent Decree will provide New Mexico the means by which the detrimental consequences of the Operating Agreement can be corrected.

B. The Consent Decree Restores Equity in the Project and, Hence, the Compact

The Consent Decree establishes an index methodology (Index) that calculates Texas's 43% share of a given annual release from Project Supply in a manner that can be measured at a specific point – the El Paso Gage – to ensure each state receives its apportionment. *See* Sullivan Decl., Doc. 720, Ex. 7, ¶ 28; and Hutchison Decl., Doc. 720, Ex. 4, ¶ 111. It both defines Texas's apportionment and enjoins New Mexico to deliver water in compliance with the Index. If the El Paso Gage measures a significant departure from the Index, that indicates a state has received more water than its Compact entitlement established by the Downstream Contracts. In that event, the Index provides for water to be transferred from one district to the other to ensure that the United States is fulfilling its responsibility to deliver water in accordance with the 57:43 apportionment.

The United States argues the Consent Decree impermissibly "forc[es] the transfer of water from one District to another." US Ex. Br. 22. Yet, it cannot ignore that Reclamation is already transferring portions of EBID's allocation to EP1 to compensate for deliveries that fall below the D2 Curve per the Operating Agreement's allocation procedures. *See supra* at 14. And, given that EBID simply "forgoes a portion of its allocation" under the Operating Agreement, US Ex. Br. 9, it is the height of irony that EBID joins the United States in urging rejection of the Consent Decree because it

results in "the continual raiding of EBID's allocation account." *See* EBID Br. 12.

As the Special Master notes, the Index and Reclamation's current allocation procedures have some things in common. Third Report 10. However, understanding the difference between the Operating Agreement's effect on *Amici's* farmers today versus the effects of the Consent Decree on them in the future is vitally important.[6] Today, EBID continues to simply give away an excessive portion of the farmers' share of surface water from the Project to offset purported reductions in Project delivery performance not caused by the farmers. Having to pump more groundwater to replace reduced surface supply has resulted in significantly higher operational costs. It has also stressed the aquifers upon which the farmers need to rely in times of drought, as they have in the past.

In contrast, the Consent Decree's Index methodology confirms New Mexico's delivery obligation to Texas in accordance with the 57:43 apportionment established in the Downstream Contracts. *See* Sullivan Decl., Doc. 720, Ex. 7, ¶ 28 (showing annual deliveries of Project water supply averaging 57% to New Mexico and 43% to Texas over a long term period). Measuring New Mexico's Index obligation at the El Paso Gage will effectively resolve the Operating Agreement's most-egregious accounting methods that worked to unfairly reduce EBID's allocations. Barroll Decl., Doc. 720, Ex.

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[6] This distinction highlights why EBID does not speak for *Amici's* farmers.

6, ¶ 40(b)-(d). Going forward, *Amici's* farmers will know that Texas's apportionment under the Compact is "fixed" and they can plan accordingly. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (compact apportionment is considered "fixed" and "conclusive" and "binding upon the citizens of each State"). They will have the ability to seek administration and priority enforcement from the New Mexico State Engineer for any impairment to their senior irrigation water rights caused by non-Project users. *See* Consent Decree at II.B.ii.a.; *see also* Hamman Decl., Doc. 720, Ex. 5, ¶¶ 13, 14 (acknowledging decree requires New Mexico to "administer water rights in the Lower Rio Grande to ensure compliance with the Rio Grande Compact and the Consent Decree"). Finally, the Consent Decree provides a reasonable period of time for New Mexico to bring its depletions back to D2 Period levels, which it is already doing. *See* Barroll Decl., Doc. 720, Ex. 6, ¶ 31 and Hamman Decl., Doc. 720, Ex. 5, ¶ 14 (discussing New Mexico's implementation of pilot fallowing program and other actions planned to reduce depletions). With that aim, *Amici* have been working cooperatively with other water users and the State Engineer on proposals for groundwater management and voluntary fallowing whereby farmers that participate will be compensated, and those who continue farming will have the certainty that their groundwater rights established during the D2 Period will not be extinguished. *See* D. Salopek Test., Doc. 701, Vol. XIII, Tr. 55:11-56:10. Although the Consent Decree will require belt-tightening in New Mexico, it will also restore the equitable operation of

the Project without unduly infringing upon New Mexico's sovereignty to address water-related disputes between New Mexicans, including EBID, and between New Mexico and the United States.[7]

III. The United States' Purported Claim for a 1938 Baseline is Not Genuine

To add insult to the injuries being suffered under the Operating Agreement, the United States also insists it must be able to litigate the claim that New Mexico is violating the Compact by allowing groundwater pumping "beyond the levels that existed when the Compact was signed in 1938." *See* US Ex. Br. 22. Given that most irrigation wells used by *Amici's* farmers were drilled after 1938, this "baseline" condition would effectively prevent the farmers from using *any* groundwater to supplement the mere inches of surface water they have been receiving under the Operating Agreement. It is a fatal proposition. *See* D. Salopek Test., Doc. 701, Vol. XIII, Tr. 60:10-14 (confirming that pecan farmers "would be out of business in less than a year" if they could not use groundwater).

Regardless, the United States alludes that a 1938 baseline is required to ensure it can make deliveries of Project water to Mexico. US Ex. Br. 6. However, the

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[7] There is nothing in the Consent Decree that prevents the United States from seeking priority enforcement from the New Mexico State Engineer, or from pursuing litigation in other *fora*, to prevent interference with Project deliveries by non-Project users within New Mexico. *See* Third Report 97-103.

Consent Decree's Index methodology does not impact deliveries to Mexico. Third Report 67-68; and Barroll Decl., Doc. 720, Ex. 6, ¶ 22. Moreover, the United States has done nothing in this matter to show at trial that its Treaty obligations to Mexico are being impacted, or will be impacted, by New Mexico in the future. It also failed to provide the Special Master any "meaningful arguments in opposition to the Consent Decree based on the Treaty." Third Report 12, n.1. Thus, even if it wanted to, it is too late for the United States to show at trial that a 1938 baseline is necessary to protect deliveries to Mexico. *See id.* at 111-112 (noting all parties' experts have filed reports and have been deposed).

Further, unlike Texas, the United States did not plead for a 1938 condition in its Complaint in Intervention. *See* U.S. Compl. (Mar. 23, 2018) ¶¶ 14-15. This was likely because a 1938 condition would establish Reclamation's duty to operate the Project in accordance with conditions prevailing in 1938 – which it has not done. As shown *supra* at 11-12, Reclamation devised the D2 Curve to divide water between the districts based on the Project's delivery performance during 1951-1978. The D2 Curve remains the basis for allocating water to Texas under the Operating Agreement. In fact, the United States' own technical expert opined early in the case that the D2 Curve was "an appropriate basis to determine Project allocations" because it was based on "historical Project operations during the 1951-1978 period." U.S. Supp. Expert Wit. Disc., I. Ferguson (Sept. 16, 2019), Doc. 370 at 23.

Moreover, there is a wealth of additional evidence to demonstrate Reclamation has an established history of *not* operating the Project in accordance with a 1938 baseline condition. A few examples are Reclamation's funding of projects in EP1 that now prevent seepage and return-flows that were available for use in Texas in 1938;[8] Reclamation's contract with EP1 allowing the City of El Paso to use Project water for municipal and industrial purposes;[9] and, since the 1950s, Reclamation's active encouragement for farmers in both irrigation districts to drill hundreds of wells to irrigate lands with groundwater.[10] With knowledge of this evidence, the Special Master has questioned how the United States could argue for a 1938 condition "with a straight face." Oral Arg. (February 6, 2023), Doc. 779, Tr., 71:21-22.

The United States' purported claim for a 1938 condition is not genuine. It is simply a transparent, last ditch effort to veto the Consent Decree.

[8] *See*, *e.g.*, J. Reyes Test., Doc. 701, Vol. V, Tr. 143:14-24, 161:12-162:2; and Barroll 2d Decl., Doc. 439, Vol. 1 at 24, NM EX-006, ¶¶ 48-49.

[9] *See*, *e.g.*, M. Estrada-Lopez Test., Doc. 701, Vol. I, Tr. 143:13-22.

[10] *See*, *e.g.*, J. Stevens Test., Doc. 701, Vol. X, Tr. 71:11-72:15; M. Estrada-Lopez Test., Doc. 701, Vol. II, Tr. 25:14-26:6; Appendix B at App. 3-5, El Paso Herald Post, *U.S. Engineer Urges 614 Wells in Valley* (June 12, 1951), Tr. Ex. NM-0899; and Appendix 1-3 to States' Joint Reply Brief (December 2023), W.F. Resch, Project Manager, "Rio Grande Project-New Mexico-Texas: Water Announcement," (June 21, 1954) (encouraging farmers to use groundwater "to the greatest extent possible"), Tr. Ex. JT-0227.

CONCLUSION

Amici respectfully request the Court overrule the United States' Exception, adopt the Special Master's Third Report, and enter the Consent Decree.

Respectfully submitted,

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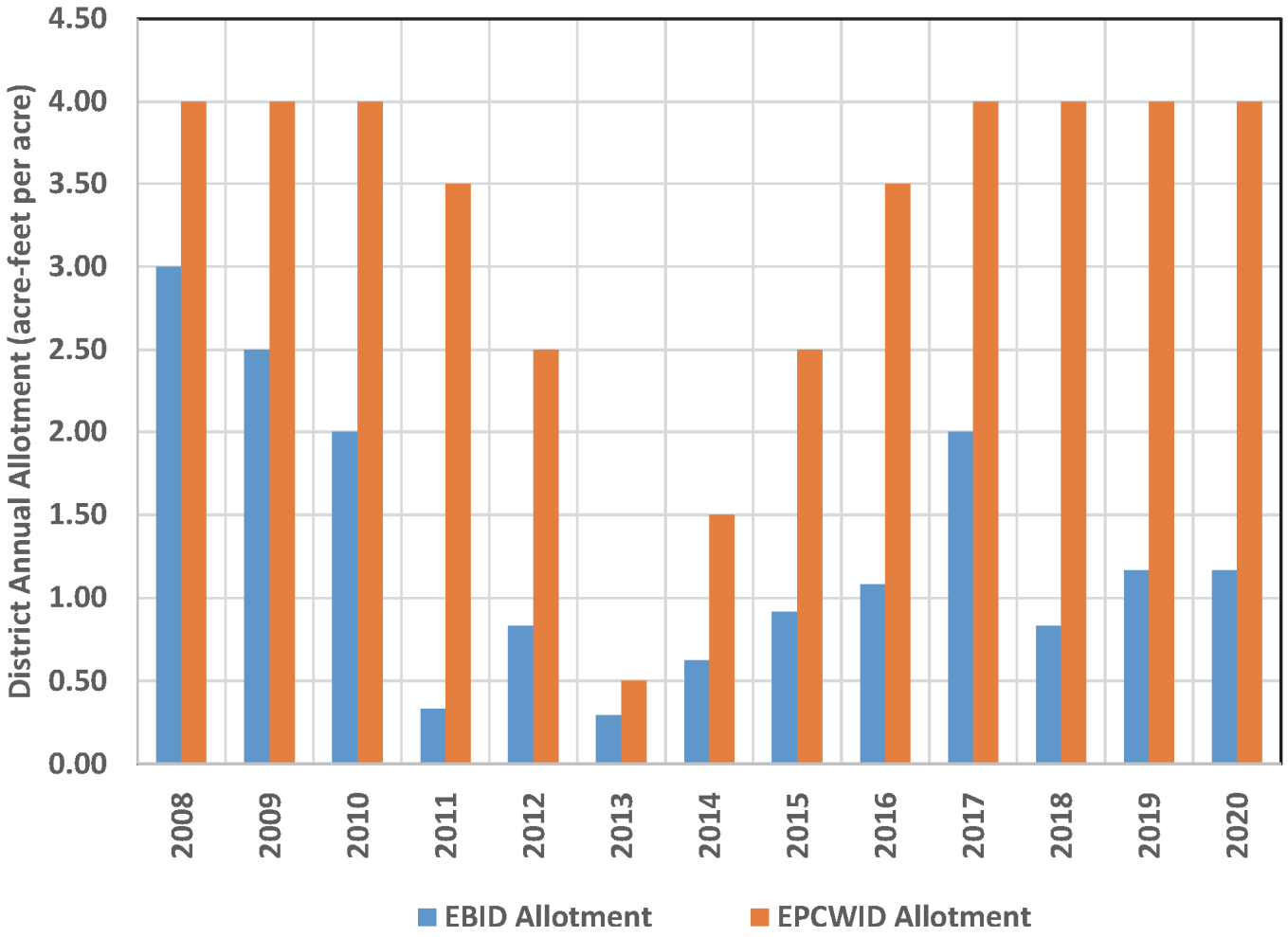
APPENDIX TABLE OF CONTENTS

APPENDIX A



Data Sources:
EBID Allotments: Barroll 2019 Expert Report, Table A.15;
EBID Board Meeting Minutes from 2019 and 2020.
EPCWID Allotments: US0608182.

Peggy Barroll, Ph. D.
Water Resource Hydrologist

Comparison of the Annual Allotments set by EBID and EPCWID for Delivery to Irrigated Lands 2008-2020		
Year	**EBID Allotment**	**EPCWID Allotment**
	Acre-feet per Acre	Acre-feet per Acre
2008	3.00	4.00
2009	2.50	4.00
2010	2.00	4.00
2011	0.33	3.50
2012	0.83	2.50
2013	0.29	0.50
2014	0.63	1.50
2015	0.92	2.50
2016	1.08	3.50
2017	2.00	4.00
2018	0.83	4.00
2019	1.17	4.00
2020	1.17	4.00
EBID Allotments: Barroll 2019 Expert Report, Table A.15; and EBID Board Meeting Minutes from 2019 and 2020.		
EPCWID Allotments: US0608182.		

APPENDIX B

El Paso Herald–Post

VOL. LXXI. No. 140. EL PASO, TEXAS,
TUESDAY, JUNE 12, 1951

U.S. Engineer Urges 614 Wells in Valley

A U. S. Bureau of Reclamation engineer recommended today that Valley farmers drill 614 new water wells to provide irrigation for the 1952 crop.

Estimated cost of the wells is over $6,000,000.

The engineer, H. R. McDonald of the bureau's Denver office surveyed conditions arising from the acute water shortage and reported that it is "very apparent that pumping is desirable." His survey was made at the request of El Paso County Water Improvement District No. 1 and the Elephant Butte Irrigation Project.

Need 350 Wells

Mr. McDonald, an expert on well irrigation, estimated it would take 350 wells to assure El Paso County farms enough water for next season. The county already has sunk 56 irrigation wells, not counting shallow surface wells.

Mesilla and Rincon Valleys would require twice their present number of wells, Mr. McDonald reported. Since these valleys already have sunk 320 deep or medium wells, they would require another 320, or a total for both districts of 614 wells.

Neither district has acted as yet on the recommendation.

Directors to Get Report

N.B. Phillips, manager of the El Paso district, said he will present the McDonald report to his directors next week.

"Personally, I see no way out except through a pumping program," Mr. Phillips said. "The runoff this year has been two-tenths of one per cent of normal, or about zero. There is nothing to indicate we will get any water in the reservoir this year, barring a miracle. Consequently Elephant Butte and Caballo reservoirs should go dry about Aug. 31. The increase of one half of an acre foot in the allotment takes into account every drop of water now in storage."

In order to plant next year's cotton crop farmers want water by April 10, whereas next spring's runoff will not start until April 25, and the high snow runoff is not due until next June 15.

How to finance the well drilling program is still an unsolved problem.

Farmers who are financially able can drill their own wells, Mr. Phillips said, but it may be necessary to form a pumping district to finance the little fellows. He estimated an average well of the depth recommend by Engineer McDonald (120 to 140 feet), would cost

$10,000. Well irrigation equipment is getting scarcer all the time, he added.