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

ELEPHANT BUTTE IRRIGATION DISTRICT'S BRIEF REGARDING MOTION TO ENTER CONSENT DECREE

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January 20, 2023

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I. INTRODUCTION AND OVERVIEW

The Special Master's Order of May 21, 2021 regarding summary judgment and evidentiary issues stated that "New Mexico's duty to protect Texas's Compact apportionment necessarily includes the duty to protect the Rio Grandes' hydrologically connected return flows. The extent to which this duty accommodates some degree of groundwater pumping—at particular rates, in particular places, or at particular times—without substantially affecting Project operations is not an issue appropriate for summary resolution." Docket 503, P. 39. The states have, through a negotiated resolution of the issues amongst themselves, resolved the issue of what they believe constitutes reasonable interference with Rio Grande Project (the "Project") supply deliveries, which are also referred to as Compact apportionments of the states of New Mexico and Texas. The states have submitted this agreement to the Special Master as Exhibit 1 to their Motion to Enter Consent Decree, hereafter referred to as the "Proposed Decree." *See* Docket 720, Exhibit 1.

The states have also proposed, as part of the Proposed Decree, summary resolution of their claim of authority to charge EBID's allocation account for one hundred percent of the effects of groundwater pumping on the river, even though it is undisputed that EBID is not one hundred percent of the cause of the adverse depletion effects on the Project. See Declaration of Dr. James P. King, dated January 20, 2023 included with United States brief filed of this date. In fact, Dr. King presents evidence to support the conclusion that EBID members are <u>not</u> the problem at all, having corrected for their impacts long ago under the 2008 Operating Agreement. *Id.* These provisions, which provide for raiding EBID's allocation account, will be referred to in this Brief as the "Reallocation Provisions."

Through these Reallocation Provisions, the states have improperly claimed for themselves the right to settle their differences using the allocation accounts of the Reclamation Project Irrigation Districts (EBID and EP1). For the reasons detailed in this Brief, EBID will show that the states have gone a step too far when they prescribed these particular remediation and compliance provisions. Aside from the illegal nature of the Reallocations Provisions as a matter of law, absent an evidentiary showing that EBID is the sole source of the problem, which, in fact cannot be shown (*See* Declaration of Dr. James P. King), it is incomprehensible how the states can simply take for themselves the ability to raid EBID's allocation without ever affording EBID an opportunity to defend itself on the merits. Finally, the remedial provisions are unnecessary and need not be a part of the ultimate agreement of the states regarding the index-based apportionment, and the Proposed Decree can still be entered to resolve this case without those provisions and without detriment to either state.

EBID maintains an interest in ensuring its rights, and the rights of the United States and EBID members, in the Rio Grande Project are not adversely harmed in a proceeding in which a full and fair disposition of the merits cannot be achieved. In this case, EBID is not a party, yet its rights are directly impacted by specific provisions of the Proposed Decree in a way no other citizen or entity within New Mexico's water rights are.[1] EBID has been singled out in a manner no other New Mexico water user has, and in a legally indefensible way. The provisions complained of in the Proposed Decree are improper and illegal, but can be struck while also

[1] The El Paso County Water Improvement District No. 1 is in the exact same situation with regard to the same provisions in the Proposed Decree, though their rights are implicated in different ways. This brief, it's arguments, and legal authorities apply equally to the Texas-EP1 dynamic as they do to the New Mexico-EBID relationship, though EBID will solely focus on its own interests herein. Likewise, EBID understands that EP1 and the United States are making certain legal arguments in their briefs that EBID will not cover herein, and EBID reserves the right to discuss those matters at oral argument even if they have not been specifically raised here.

saving the remainder of the Decree for entry consistent with the states' request regarding apportionment of Compact water.

There exist a multitude of legal issues that are in need of resolution in other courts, which this court should take care to avoid disrupting in a manner that is contrary to Western water law. This must be done with great care to ensure the Rio Grande Project within New Mexico (EBID) is not unnecessarily harmed by the Proposed Decree such that it is prevented from raising arguments and legal authority to protect itself on issues that have not been fully and finally litigated here or elsewhere. Of the utmost importance is avoiding compromising the adjudication of EBID's water rights under state law and proper intrastate administration of those rights vis-à-vis other water rights in southern New Mexico.

II. SUMMARY OF ARGUMENT

Streamflow depletion by groundwater pumping is undisputed. What the states do not properly address is who is responsible for such depletion as a basis of support for the proposed remedial provisions. In fact, the states cannot address such an issue in this Original Action. Such an issue is not appropriate for this venue, nor is it necessary to resolve such issues in this context—the illegal remedial provisions can simply be struck and administration within New Mexico can be left to other more proper venues and proceedings. That said, without determining who should be held responsible through water rights administration and litigation in the intrastate context, or a settlement where the US and EBID to agree to such provisions, the states and this Court are without proper authority to enter a Consent Decree that contains specific provisions regarding the administration of one individual water right (EBID's allocation account). Put another way, these are the so-called "intrastate" issues that remain unresolved.

The remedy, or Reallocation Provisions, the states propose, described in detail below, to address departures at the state line from what is expected by the Effective El Paso Index ("EEPI") are illegal, and before any such provision can be imposed, a full and fair trial on the merits regarding the senior nature of EBID and the Rio Grande Project rights, under all sets of laws, is required in order to provide EBID with proper due process related to the administration of its rights. EBID rejects the notion, on multiple legal grounds, that its allocation account is wholesale available to the state of New Mexico to be used for the payment of New Mexico's debt to the state of Texas if the EEPI is not complied with. Before EBID can be held solely responsible for the debts of its state, EBID must have an opportunity to defend itself and its water right.

First and foremost, the State Court adjudication[2] of the US, EBID, and EBID member rights in relation to the Rio Grande Project should be completed. *See New Mexico ex rel. Office of the State Engineer v. EBID* , No. CV-96-888 (N.M. 3d Judicial Dist.). This should not be done in a venue that deprives EBID of the ability to prove up, using all available historical evidence, all of its water rights in an effort to protect its members. EBID agrees the Compact did not foreclose groundwater development within the Project area, EBID simply disagrees with the assertion that it must foot the full bill for all groundwater development impacts on the (geographic) Texas portion of the Rio Grande Project, including by others who are not

[2] There is also a pending Federal Quiet Title Case, United States v. EBID, et. al., CIV 97-0803 (NM Fed. Dist.) that serves as an option to litigate the merits of some of the outstanding claims related to water rights and authority within the Rio Grande Project as those issues may and may not be fully covered by the state court adjudication.

assessment paying members of EBID.[3] EBID's argument concludes that this Court need not reach those issues here, thereby depriving EBID of due process, and instead need only preserve them for a different, more appropriate venue, many of which are already available.

EBID's position also includes the legal determination that was, in part, set up by the Special Master in the May 21, 2021 Order, which included a directly pertinent and accurate history of the Project and Compact. This historical recount is important here, because it establishes that everyone understood the Project would need to function a particular way, unimpeded by depletion impacts caused by capture of Project water, in order to effectuate the Compact's purpose. The Compact was specifically set up to insure the Project against depletions that would adversely affect the Project's operations, in part to protect the farmers' investment necessary to reclaim this part of the West. In ignoring this history and jumping to a remedy that requires the states to raid District allocation accounts to administer the Compact, the States violate the fundamental purpose of the Compact—to protect the Project's programmatic apportionment of water between the two states below the reservoir.

EBID also argues that the states have dodged the main issue—directly addressing the impacts by non-irrigation junior groundwater users (Domestic, Commercial, Municipal and Industrial, or "DCMI") in a manner that does not threaten EBID's existence in violation of the Compact, Reclamation law, and state law of prior appropriation. The states have focused on achieving the Compact Apportionment, and rules for ensuring the Texas portion reaches the state line, but they have altogether failed to ensure the EBID portion of the Project is protected. While

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[3] Other water users will be referred to in this Brief as "DCMI", which is short for "Domestic, Commercial, Municipal, and Industrial" categories of water rights, as opposed to the US, EBID, and EBID members' "Irrigation" rights.

this Court has pointed out that protection of EBID may not be required, or even contemplated by the Compact, the Compact did contemplate protection of the Project as a whole. This Court has also acknowledged that some protection may come from another source of law outside of Compact law. At the end of the day, simply taking water from one project allocation account and giving it to another, without stopping the reason for the need for such a shift in allocation balances (increased DCMI pumping) will continue to erode the surface supply to the detriment of the Project and in violation of the Compact.

The capture issues must be directly addressed before a remediation protocol can be adjudged to be legal. Even if it is under different laws, outside of Compact law, that EBID must seek protection, this Court should avoid foreclosing such ability. By simply charging EBID's allocation account, the State of New Mexico avoids its ultimate obligation—to administer water rights pursuant to state and federal law so as to prevent interference with the EBID portion of the Project. By failing to curb groundwater capture of Project supply by DCMI that impact project operations, then taking more water from EBID to make up for the increased depletion effect at the state line, EBID is harmed twice. *See* Declaration of Dr. James P. King. EBID argues such an outcome is an inappropriate remedy that will ultimately result in the downfall of the entire Project. *Id.*

As an equally important matter, EBID does not take issue with the states determining that they intended to protect Project supply consistent with the D2 baseline, but this determination should not foreclose EBID's ability to argue for a more expansive view of its water right under state or federal law in other venues. In other words, EBID takes issue with the determination that D2, used as a baseline for Compact deliveries, is the same as its water right under state law. The

two are not the same, and EBID should not be foreclosed from arguing that its state and Reclamation law based rights are deserving of recognition in a larger quantity than D2, protection as the senior, and even protection under the Compact. This Court should be careful to limit its order to a ruling that the Decree resolves the division of water among the states as a Compact matter without, in any way, passing on the priority, quantity and other points of the water right, or its protectability from outside depletions for the Project under other bodies of law.

Finally, Project operations must continue to be dictated by the United States and the Districts, while state law and the doctrine of prior appropriation must govern who must be responsible for returning water to the river if a shortfall to Texas triggering action occurs. It cannot be the sole responsibility of the Project to remediate such a shortfall, especially where EBID is not responsible for the shortfall. Such provisions amount to highway robbery to the direct detriment of the Project. The unfairness oozes from every crevice, and there are many crevices in the foundation the states rely on to justify the proposed remedial provisions that focus solely on EBID. If the Decree is entered as proposed, EBID is without a hope of survival given that the perpetual development of other, junior groundwater uses can continue at its sole expense and in violation of the Doctrine of Prior Appropriation (not to mention the Compact). The remediation provisions of the Proposed Decree must be struck as invalid violations of numerous laws.

Development, and now survival, of the West has long relied upon extensive and careful water management, relying heavily on sound and inviolable legal institutions such as the Doctrine of Prior Appropriation. This Court must reinforce the Doctrine of Prior Appropriation

and the supremacy of Reclamation law or risk the downfall of the West (and the public's pocketbook at the grocery store).[4]

III. SPECIFIC DECREE PROVISIONS AND DISCUSSION

In this Section, EBID delineates the specific sections of the Proposed Decree that are remedial in nature, and the specific problems they create. Legal arguments are made only generally in this section for the purposes of educating the Court regarding the issues as they are understood by EBID. Citation to legal authority may be found in the next section of the body of this brief. EBID requests that the following provisions be clarified and/or struck from the Decree before it is entered:

1. Definitions P.2: "Annual Allocated Water": (in part) "The Annual Allocated Water allocated to water users within the United States represents the equitable apportionment of Rio Grande water to Texas and New Mexico below Elephant Butte Reservoir…"
    a. This definition appears to be a correct statement but it requires clarification that the states themselves do not enjoy any Project benefits directly, and instead, it is the United States, Irrigation Districts and their members that hold those water rights. Further clarification is necessary to establish that this Decree does not change or otherwise undermine the

[4] EBID is not alone in its pleas for reinforcement of the Doctrine of Prior Appropriation, the foundation of western water law in general. *See* Brief of Western Water Users and Trade Associations as *Amici Curiae* In Support of Petitioners (United States) filed Dec, 2022 in the matter of Arizona v. Navajo Nation & United States v. Navajo Nation, In the Supreme Court of the United States, Nos. 21-1484 & 22-51: 20221227151118571_21-1484 and 22-51 Brief.pdf (supremecourt.gov).

EBID water right, and instead, that right is to be administered pursuant to New Mexico law (doctrine of prior appropriation) and consistent with the intent of the compact (which intent is, fundamentally, to protect the Project).

2. Definitions, P. 4 and 5

    a. "New Mexico Escrow Account" and "Texas Escrow Account"

        i. These definitions support the ultimately illegal reallocation provisions of the Decree and should be struck.

    b. "Project Supply" definition contains a limiting clause that states that inflows and return flows are only part of project supply if they "reach the bed of the Rio Grande or Project conveyances".

        i. This is an issue that is disputed in multiple state court cases and administrative proceedings related to the characterization of EBID, EBID members, and the United States' Rio Grande Project water rights. Particularly, the United States and EBID argue that intercepting return flows prior to their reaching the bed of the Rio Grande or Project conveyances is a violation of the Project water right. This clause allows the State of NM to "win" those cases without actually litigating the merits of what was intended to be appropriated by the Rio Grande Project at its inception. This clause should be struck or clarified to allow EBID and the United States

to pursue these matters in the State Court adjudication or the Federal Quiet Title case where they originated.

3. Section II. Injunction—A. General Provisions—6: "This Decree specifies procedures to ensure the proper apportionment of Rio Grande water between Texas and New Mexico below Elephant Butte Reservoir."
    a. EBID requests clarification regarding what is meant by "Rio Grande water" and this section likewise may potentially need to be struck to ensure that water right adjudication arguments are preserved for EBID, EBID Members, and the United States in the Lower Rio Grande Adjudication. EBID asserts that the apportionment agreed to by the States is not synonymous with EBID, EBID Members, or the United States' water right, which is based upon development of the Rio Grande Project.
    b. EBID also asserts that this statement is actually incorrect to the extent remedial provisions are included in the Proposed Decree. Remedial provisions go beyond simply apportioning water among the states, and instead get into enforcement and remedial mechanisms that have not been tested on the legal merits. This statement will be correct when the Court strikes the illegal remedial provisions and otherwise clarifies matters related to adjudication of the Rio Grande Project water right.
4. Section II. Injunction—B. Division of Water Below Elephant Butte Reservoir—ii. The Effective El Paso Index—b: "New Mexico is entitled to use the balance of

the Rio Grande water released from Caballo Dam so long as its use complies with the other provisions of this Decree."

a. New Mexico has no legal or other entitlement to receive or use water released from Caballo Dam except via contracts and water rights held by the Rio Grande Project beneficiaries, who consist solely of EBID and its members.

b. This provision needs clarification, at a minimum, and potentially needs to be struck as inconsistent with both federal and state law.

5. Section II. Injunction—B. Division of Water Below Elephant Butte Reservoir—ii. The Effective El Paso Index—c: "The Index was developed to ensure Texas and New Mexico receive the amounts of water each is entitled to under the Compact below Elephant Butte Reservoir based upon Project operations during the D2 Period."

a. For the reasons stated in the preceding section (item 3 above), this section likewise requires clarification and possible exclusion from the Final Decree.

6. Section II. Injunction—B. Division of Water Below Elephant Butte Reservoir—ii. The Effective El Paso Index—f (third sentence, second clause): "...and provisions for ensuring that Project operations effectuate the equitable apportionment of water between the Compacting States."

a. This section (not quoted above) first correctly points out that the system is complex within the Lower Rio Grande below Elephant Butte, and that

departures from the Index Obligation are inevitable. This section also highlights the practical reasons why Reallocation Provisions of the Decree are illegal. There are numerous factors beyond EBID's control that could cause shortfalls in deliveries at the state-line. This section goes on to require, through the Reallocation Provisions address this problem by simply taking water from EBID to make up for those shortfalls instead of addressing the nature of the problem itself.

b. This Court and the states lack the legal authority to impose the Reallocation Provisions the states have included in the Proposed Decree, which they refer to in this section as "provisions for ensuring that Project operations effectuate" their agreement. While it is true that, under some circumstances, the Project would need to adjust its operations to achieve the apportionment, if it was not already achieving the apportionment, it is not true that all deviations from the Index would be the result of Project operations. In other words, not all circumstances that could result in a failure to deliver the Index required supply to the state-line are the fault of Project operations or EBID's actions. This was, and remains, the reason the United States sought to enter this case to protect the Project, and EBID, as part of the Project.

c. It is incorrect to say that the States have the legal authority to require project operations adjustments in particular ways, as they have with the Reallocation Provisions. The States have inappropriately side-stepped the

question of who is at fault within Intrastate New Mexico, and whether other hydrologic factors affect the delivery obligation, and instead have simply placed full liability for all deviations, regardless of their cause, completely and totally on EBID alone by singling out the Project.

d. Likewise, this Court cannot enter such remedial provisions without a trial on the merits in a venue of competent jurisdiction where each of the parties to the contracts to be changed are present to participate, such as the ongoing Federal District Court case brought by New Mexico against the US and Districts regarding the 2008 Operating Agreement, and still pending on the Court's Docket awaiting resolution of this matter.

e. This clause should be struck.

7. Section II. Injunction—C. Index Departure Limits—b.(i)(last sentence): "With the agreement of Texas, New Mexico shall have the option to transfer part of the water apportioned to New Mexico from the irrigation district in New Mexico to the irrigation district in Texas in order to satisfy this obligation."

   a. This is the "Reallocation Provision."

   b. This provision appears again at II.C.3.b(ii).

   c. The illegality of the foregoing (and following) provisions called out in this section is ultimately rooted in the illegality of these Reallocation Provisions.

d. This is the primary provision EBID takes issue with, the remainder of the Proposed Decree being satisfactory as a settlement of the issues the states may properly address, so long as this and related provisions are excluded.

8. Section II. Injunction—D. Triggers for Water Management Actions—2.a: "New Mexico shall have discretion to determine what water management actions are necessary and appropriate."

   a. Clarification by the Court is requested related to New Mexico's obligation to comply with the doctrine of prior appropriation, as that doctrine is deployed by the legislature and courts of New Mexico, and may not violate Reclamation law or other state law in administering water rights to achieve Compact compliance.

   b. This statement also requires clarification insofar as New Mexico has only one statutorily authorized entity, EBID, who may administer water use within the Rio Grande Project. Allowing the New Mexico Compact Commissioner (or the Commission in general) authority where that authority does not independently exist outside of the Proposed Decree is in violation of multiple bodies of applicable law.

   c. The last sentence of this Section also includes an illegal Reallocation Provision that must be struck.

9. Section II. Injunction—D. Triggers for Water Management Actions—2.b: "If the accrued Negative Departures have not been reduced to 16,000 acre-feet within three calendar years of the exceedance of the Negative Departure Trigger, then

part of the water apportioned to New Mexico shall be transferred to Texas to reduce the accrued Negative Departures to less than 16,000 acre-feet by the end of three additional calendar years (years 4-6)."

a. This should be struck as an illegal Reallocation Provision.

10. Section II. Injunction—D. Triggers for Water Management Actions—2.c (and all subparts): (not re-typed here due to length)

a. Should be struck as illegal and supportive of the illegal Reallocation Provisions.

11. Section II. Injunction—D. Triggers for Water Management Actions—3. Positive Departures (and all subparts): (not re-typed here due to length)

a. This entire section should be struck as illegal and supportive of the illegal Reallocation Provisions.

12. III.A. Project Operations to Enable Compact Compliance: (not re-typed here due to length)

a. EBID does not contest that it, and other water users, will be required to comply with a Final Decree entered in this case.

b. It is not clear why the states single out the Project to seemingly indicate that it is Project operations that are expected to "interfere" with the states "rights." The reason this case was brought was because other, junior groundwater users were interfering with the Project's rights.

c. The states do not define what they claim are their "rights", clarification is necessary consistent with the principles raised in this Brief.

d. Singling out EBID in this manner, and through the Reallocation Provisions, is a violation of multiple foundational principles of law such as due process and equal protection requirements.

e. This section should be struck entirely.

13. IV. Construction of the Decree—Section C—third sentence: "The Compact and Decree govern the legal rights and obligations of the Compacting States."

a. Clarification is requested that the Decree does not foreclose the ability of the United States or EBID to pursue water right claims not fully litigated here on behalf of the New Mexico portion of the Project, which claims may impact the State of New Mexico's ability to interfere with the EBID and EBID member water rights.

b. For example, EBID has consistently argued that its water right is protected from interference by junior groundwater pumping both under state law and Compact law. This court has specifically stated that it has not decided that issue, and it should clarify that EBID may still pursue those claims despite the entry of this Decree.

IV. STATES' ONLY SETTLEMENT AND ASSOCIATED FINAL DECREE CANNOT VIOLATE THE PURPOSE AND INTENT OF THE COMPACT

A. All parties and the Court agree, and it remains undisputed that, the Rio Grande Compact's purpose and intent were to protect the Rio Grande Project.

Paragraph four of the Texas Complaint alleges that "[a]s detailed below, the Rio Grande Compact, among other purposes, was entered into to protect the operation of the Rio Grande Reclamation Project. The Rio Grande Compact Requires that New Mexico deliver specified

amounts of Rio Grande water into Elephant Butte Reservoir, a storage feature of the Rio Grande Reclamation Project. Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements." Docket No. 63. Paragraph 10 of the Texas Complaint again reiterates that protection of the Project was a "fundamental purpose" of the Compact, and in Paragraph 11, that a "fundamental premise" under which Texas entered the Compact was that the United States would control the operation of the Project. *Id.*

Likewise, and consistent with the Texas position, Paragraph 12 of the United States Complaint in Intervention states that "[o]nly persons having contracts with the Secretary may receive deliveries of water, including seepage and return flow, from a Reclamation project. *See*, e.g., 43 U.S.C. 423d, 423e, 431, 439, 461. Accordingly, the only entity in New Mexico that is permitted to receive delivery of Project water is EBID, pursuant to its contract with the Secretary." Docket No. 65.

Eventually, this Court, by Order of May 21, 2021, determined that "the express text of the Compact establishes that the states entered into the Compact against the backdrop of the existing Project and relied on its established operations to effectuate the Compact." Docket No. 503, P.13. The court's description of what was going on during the Compact negotiations is accurate and important here. *Id.* at 34. The Court stated that "Colorado sought to develop its water resources. Stevens 28; Miltenberger, 5-6. New Mexico sought to protect and develop its water resources between Colorado and the Reservoir. Stevens, 28. And Texas, along with interests in southern New Mexico, sought to protect the Project's water supply." *Id.* The Court

goes on to recognize that initially New Mexico and Colorado sought their own deal, but eventually "Texas later joined the discussions, recognizing the need to advocate for protection of the Project." *Id.* at 32. Compact negotiations centered on what it would take to adequately meet downstream irrigation demand within the Project. *Id.*

If the point of the Compact negotiations was to protect the Project while determining the level of acceptable upstream development, this Court cannot allow the states to fundamentally change the score by now seeking entry of a Final Decree construing the Compact in a manner so as to require it to perform as a sort of insurance mechanism against New Mexico's otherwise non-irrigation groundwater development that harms Project operations. This Court must ensure the Final Decree is consistent with the purpose and intent of the Compact, which is fundamentally to ***protect*** the Project's water supply. The Reallocation Provisions, as remedies for failure of the Index, cannot be said to "protect the Project" since they simply allow the continued raiding of Project water by DCMI groundwater depletions within New Mexico. As Texas once put it, the size of the pie continues to be diminished by simply allowing the Project to continue to have to pay for all other junior groundwater pumping.

B. The farmers within the Rio Grande Project are, and have always understood themselves to be the "senior water right holder" under all forms of law in place at the time of the Project's inception.

The states may argue that EBID is incorrect here because, as the Court points out "[t]he compacting states did not express an intent for agricultural practices, irrigation practices, and other forms of development to remain static." Docket No. 503, P.5. The reason this statement is true is not discussed in the Order but it is actually supported by a significant amount of historical evidence, and this statement does not, in fact lend support to the states' Reallocation Provisions

in any way. The reason is directly related to the dynamic in play over one hundred years ago, including the Doctrine of Prior Appropriation and the fundamental purpose of the Compact.

At the turn of the 20th century, the farmers agreed to come into the Project on equal footing more than thirty years before the Compact was agreed to by the states. Farmers that came into the Project dedicated their already perfected water rights to the Project, and agreed not to call priorities against each other, but to preserve their ability to, as a single unit, make priority calls as against all other, non-project water users who would deplete the river in violation of their senior rights. The evidence regarding this matter is plentiful, dating back to the mid-1800s when the individual ditch associations were formed, eventually held elections to join the Project, and then really taking shape in the early Elephant Butte Water User Association Bylaws and Articles of Incorporation. EBID expects to be allowed to put on evidence in an upcoming proceeding in the Lower Rio Grande Adjudication to establish these facts as they relate to rights that pre-date the Project but that were "rolled into" it at the time of the Project's inception.[5] The Rio Grande Project has also been adjudicated a senior priority date of March 1, 1903 in the pending state court adjudication.[6] Around the turn of the century as development was ramping up, and carrying forward to the Compact negotiations, the farmers within the Project, particularly in the New Mexico portion, already understood that they were senior to all other uses by virtue of having been in existence long before other established institutions arrived in the local area.

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[5] This proceeding is known as Stream System Issue 107 in the Lower Rio Grande Adjudication. The Court's order setting this Stream System Issue for merit-based determination upon Motion of EBID can be found at: https://lrgadjudication.nmcourts.gov/home/ss-97-107-pre-project-interests/

[6] This Adjudication Court 2017 decision (Findings of Fact and Conclusions of Law) may be found in the files for the calendar year 2014 on the court's website at: https://lrgadjudication.nmcourts.gov/home/ss-97-104-us-interest/

Further, it was not development of the local area, so much as it was development upstream that was causing problems for the Project, which is the reason no intention to restrict development was expressed in the Lower Rio Grande itself, and instead the states' focus in negotiations was on protection of delivery of supply to the Project at Elephant Butte. As the Court notes, the Texas commissioner negotiated on behalf of the whole project, and against New Mexico, in the Compact negotiations. Not expressing an intent to limit water use that violates the Project's rights within the Compact were not at the forefront of the issues that led Texas to engage in the negotiations to begin with. Not having a need to include specific provisions to protect the Project within the area Texas sought to protect from upstream development by virtue of the senior nature of the water rights of the Project in the Lower Rio Grande under state law as described above, it is entirely correct that the intent of the Compact was not expressed related to depletions of Project supply by groundwater pumping in the local area, but instead the states focused on the intent to protect the Project supply in a more general sense. The failure to include such specific intent in the Compact is not fatal to EBID's ability to be protected from junior groundwater depletions of Project supply.

C. The Reallocation Provisions are fundamentally at odds with the purpose and intent of the Compact.

It is true that no intent was expressed that would limit development in the area of the Project, but, in view of the ultimate purpose and intent of the Compact against the above described backdrop, it is incorrect, and even illogical, to jump straight to the conclusion that the failure to include such language allows New Mexico, through water rights administration (or failure thereof), to allow the theft of Project supply by DCMI's junior groundwater pumping. The Reallocation Provisions are fundamentally at odds with the established purpose and intent of

the Compact, which was to protect the Project supply, regardless of what the Compact failed to say regarding further development under the Compact's terms.

Instead of addressing the underlying problem that groundwater depletions by DCMI are affecting Project operations within New Mexico, the states wrongly focus solely on the Project, and specifically on EBID within New Mexico. Such a focus is inconsistent with the fundamental purpose and intent of the Compact. Even if not explicitly recognized in this case, this Court should not foreclose EBID's ability to present its historical evidence, including evidence related to the purpose and intent of the Compact to protect even EBID's share of the Project water, determination of what constitutes "Project water" and other issues related to Protection of the Project. Again, EBID believes that these are matters more appropriately addressed in other venues, and is unnecessary to ultimately resolving issues sufficient to enter the Final Decree.

V. ANY STATES' ONLY SETTLEMENT AND ASSOCIATED FINAL DECREE CANNOT VIOLATE CONSTITUTIONAL, RECLAMATION OR STATE LAW IN THE NAME OF "THE COMPACT"

A. This Court has already ruled on the importance of application of other laws to this case.

The Special Master has already made determinations consistent with this point and it is black letter law that cannot reasonably be the subject of dispute. First, in its Order of April 14, 2020, the Special Master said "given the role of the Project and the Downstream Contracts in this case and the potential role of state law as an inferior source of authority as discussed below, the applicability of the Compact makes it the superior, but not the exclusive source of authority over the river." Docket 340, P. 21. In so doing, the court eventually concluded that Texas' assertion that state law plays no role in this Compact dispute is rejected, and instead, "state law...is inescapable when looking at the application of reclamation law, and, as just stated, may

serve to aid in defining New Mexico's Compact apportionment..." *Id.* Again, on May 21, 2021, the Special Master stated that "[t]he Compact imposes on New Mexico a duty to employ its laws to protect Compact deliveries to Texas and treaty deliveries to Mexico. New Mexico's sovereign laws apply to define the relative rights between New Mexicans as to their respective share of New Mexico's overall Compact apportionment." Docket 503. While EBID wholesale disagrees with the idea that its members' investment, and the resulting rights achieved when it brought water into this region can be disregarded under the Compact, EBID nonetheless agrees that state law serves an important purpose in defining its, its members, and the United States' rights under water law principles (as distinct from Compact law principles).

The court concluded that "New Mexico law, however, governs EBID's existence and authority and the relative rights of individual New Mexicans to their share of New Mexico's apportionment." Id at 51. This being the case, the states cannot disregard New Mexico law to raid EBID's allocation account to pay for shortfalls at the state line as that would be a violation of multiple laws including the Doctrine of Prior Appropriation and an entire body of state law that governs EBID's authority to control the New Mexico portion of the Rio Grande Project in cooperation with the United States. These fundamental water law and legal authority principles serve as the foundation for both the creation of the Project and the Compact; both of which were designed based upon the existing state law.

B. The Doctrine of Prior Appropriation controls in the West.

As with each of the seventeen western arid states, the doctrine of prior appropriation is the body of law that governs water rights in New Mexico. The New Mexico constitution sets up this regime: "The unappropriated water of every natural stream, perennial or torrential, within

the state of New Mexico, is hereby declared to belong to the public and to be subject to appropriation for beneficial use, in accordance with the laws of the state. Priority of appropriation shall give the better right." N.M. Const. art. XVI, § 2. It is important to note that this section specifically declares that only the "unappropriated water" is declared to be public. This is because Section 1 of the same Article provides protection for water already appropriated at the time New Mexico achieved statehood (and its constitution). *See N.M.* Const. art. XVI, § 1: "All existing rights to the use of any waters in this state for any useful or beneficial purpose are hereby recognized and confirmed." It is also important to note that "priority of appropriation" is a fundamental staple in determining administration of water rights throughout the West. And, finally, A water right is a property right in New Mexico. *Walker v. United States*, 2007-NMSC-038, ¶27, 142 N.M. 45, 53.

State Court adjudication proceedings are usually the proper venue for determination of water rights claims. As noted above, part of the Project water right has already been adjudicated as the senior in the Lower Rio Grande Adjudication. The priority date for the United States interest in the Rio Grande Project has been determined, after a full and fair trial on the merits, to be March 1, 1903. EBID and its members rights have not been fully adjudicated, though priority dates that are consistent with the early ditch associations that pre-dated the Project are reasonably expected to be achieved when a trial on the merits is completed. By contrast, other groundwater rights did not, in large part, come in until long after the farmers had completely appropriated the surface water, including seepage and return flows (sometimes referred to as "hydrologically connected groundwater", though that term is a bit of a misnomer). There was

ample evidence to this effect introduced in the first portion of trial in this matter via the expert historians.

EBID disagrees with anyone who would assert that there are any water rights lawfully considered senior to the Project's water rights. *See Ide v. United States,* 263 U.S. 497 (1924) and *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The other, non-project, claims to water rights are limited to claims of groundwater only, while EBID's claims are quite a bit more complex, relying on the hydrologic cycle and legal regime in place when the farmers developed the Project. EBID has not yet had its claims heard, and many of the claims related to the United States interest are unfinished, though on hold awaiting conclusion of this matter.

The notion that a state can take water away from a Reclamation project, which has lawfully appropriated water under state and territorial law, and which has been adjudicated in two state adjudications as the senior water right belonging to the United States and the Districts is a clear violation of the Doctrine of Prior Appropriation. Absent administrative action consistent with the rules and regulations in place to implement that doctrine in New Mexico, the Court cannot order EBID be deprived of its property right, for any reason, including for Compact administration. The Court should take care not to erode western water law in the name of Compact law, and should instead seek a full and proper resolution of the relative priorities of the water rights at stake if it would seek to administer any water rights in connection with this case.

C. Prior EBID briefs in this case have covered other areas of state law that are directly applicable and show states cannot take Rio Grande Project allocations for their own use.

EBID has fully developed many of the state and federal law issues related to the states' roles in the Rio Grande Project in other briefs filed in this matter. EBID's Brief Regarding Apportionment of Water Below Elephant Butte Reservoir, filed January 6, 2021 [Docket No. 445] is incorporated herein, however, specific passages are recounted here for the Court's ease of reference. These points of law, many of which are settled principles, though admittedly some may require additional litigation on fact specific inquiries, are final statements of the law in New Mexico, which the states are bound by and which the decree must be measured against.

First, EBID has established that the State Engineer, who also serves as New Mexico's Rio Grande Compact Commissioner, has general supervision authority over the waters of the State of New Mexico, but this authority does not extend to the Rio Grande Project in any way. This division of authority, reserving to EBID instead of the State Engineer the authority to govern Project operations outside of the State Engineer's jurisdiction, was initially set up by Treaty and land grants that predate even the Rio Grande Project, and that expressly protected formerly Mexican landowners from intrusion by the United States Government. *Treaty of Guadalupe Hidalgo,* art. VII (Feb. 2, 1848)("In the said territories, property of every kind, now belonging to Mexicans not established there, shall be inviolably respected."). Ultimately, the landowners protected by the Treaty and their land grants, processed and confirmed by the Court of Private Land Claims (later disbanded in 1904), are the same farmers who voted individually to establish the early Elephant Butte Water Users Association in the Lower Rio Grande in New

Mexico, for the purpose of organizing sufficiently to gain the United States' interest in assisting with the creation of reclamation facilities necessary to sustain life in the local area.

The United States imposed similar restrictions to those imposed by the Treaty on New Mexico when it entered into the Union. The Enabling Act for New Mexico provided "[t]hat there be and are reserved to the United States, with full acquiescence of the State all rights and powers for the carrying out of the provisions by the United States of the [Reclamation Act], and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory." Act of June 20, 1910, § 1 *et seq.*, 36 Stat. 557; N.M. Const. art. XXI, § 7 (New Mexico's "Enabling Act"). It is undeniable that this is strong language in support of the supremacy of the Project and the State of New Mexico's lack of authority therein.[7]

Finally, as previously described, New Mexico Statutes governing application of the New Mexico Water Code recognize that "[e]xcept as provided in Sections 15 and 22 [72-5-33 and 19-7-26 NMSA 1978] of this act nothing herein shall be construed as applying to or in any way affecting any federal reclamation project heretofore or hereafter constructed pursuant to the act of congress approved June 17, 1902, known as the Federal Reclamation Act, or acts amendatory thereof or supplementary thereto." NMSA 1978 § 72-9-4, *See also City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984) and *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, 954 P.2d 763. That statute, and caselaw construing state law as it applies to Federal Reclamation projects, effectively removes the authority of the Office of the State Engineer from any dealings with Project water, and reserves that power to the Board of Directors for the irrigation District. This is consistent with everything else in the historical

[7] The intention to leave New Mexico without authority in the Project is also supported by the historical record.

record intended to protect these farmers, going all the way back to the Treaty of Guadalupe Hidalgo.

D. Reclamation law likewise shows the states cannot take Rio Grande project allocations for their own use.

It is well established and will not be repeated here, that the states do not hold reclamation contracts and are not Rio Grande Project beneficiaries. What began as a series of major failures causing Congress to rethink its strategy related to contracting for Reclamation projects in the early turn of the 20th Century, led to EBID being the only entity in New Mexico with a contract for the Rio Grande Project. A detailed history of the various Reclamation laws, and their evolution, has been previously provided by EBID and is not the subject of dispute by any party in this case. Suffice it to say, by the time states could legally contract with the Federal Government for reclamation projects, the Rio Grande Project, the Rio Grande Compact, and New Mexico's own state law had long been settled without leaving a role for New Mexico, beyond the role that was carved out for EBID, in the Project.

In 2011, the State of New Mexico sued the federal government in Federal District Court in New Mexico regarding the 2008 Rio Grande Project Operating Agreement. New Mexico amended their Complaint and joined the irrigation districts (EBID and EP1) in 2012. That case is still pending and on hold, awaiting resolution of this matter and exists as an alternative venue wherein the legal issues related to EBID's contracts are more properly litigated. *State of New Mexico v. United States of America, et al.*, No. CIV 11-691 JB/SMV (N.M. Dist.).

The State of New Mexico, in seeking entry of enforcement provisions against EBID alone in the proposed decree, singles EBID out to decide legal issues against it in a context where EBID is limited in how it can protect itself and how it can provide proof of its water right

sufficient to receive the court's protection. New Mexico is attempting to both revive and substantively rule in its own favor on its original Counterclaim 2, which alleged changes to project operations pursuant to the 2008 Operating Agreement violate the Compact. As was previously shown, New Mexico's Counterclaims in this proceeding were almost verbatim, exactly the same as those raised in the Federal District Court case against the United States and the Districts. New Mexico has argued that EBID lacked the necessary authority to bind the State of New Mexico when Compact and Project issues intersect.

In allowing itself authority to govern EBID's allocation via the Remediation Provisions complained of in this brief, New Mexico has effectively ruled in its own favor without ever giving EBID a chance to defend against New Mexico's claims. At a minimum, it has significantly muddied the waters as to what is still live for resolution in the 2011 Case. Forcing reallocation as a mechanism for Compact compliance arguably decides the issues against the United States and the Districts by implication without any opportunity for review of the applicable law or the merits of the New Mexico claims. Texas was complicit in New Mexico's end run.

This Court's order dated March 31, 2020 has acknowledged that "[t]oday's ruling reflects the view that the present [Compact] action is not a forum for...attacking particular contracts for delivery of water." Docket 338 P. 1. It goes on to say "[t]o the extent the United States, as operator of the Project, has various day-to-day accounting or other duties arising under Reclamation law, such duties do not necessarily become separately enforceable Compact duties." *Id.* at 32. "If those states in and of themselves fail to enforce laws or control individual water users within their states, then the other Compact signatory states may sue the non-

compliant state generally for redress and leave to the offending state the problem of administering the relative rights of its own citizens." *Id.* at 35.

Other venues exist with pending litigation that will resume once this case is completed and direction is provided to those lower courts, including the state court adjudication, multiple administrative water rights protest proceedings[8], and two federal district court cases.[9] All of these include issues awaiting litigation on the merits, but which would potentially become unnecessary if the States' remediation provisions prevail. Most importantly, the State of New Mexico would have been successful in "winning" many of its arguments against the Project in all of these proceedings, without ever having to test the evidence or contrary law raised by the United States and EBID. In effect, the States will have short-circuited the other litigation to avoid a determination on the merits by achieving this court's approval of those remedial provisions through the Proposed Decree. This court should not sanction such action by the states, and instead should stick to its earlier ruling that those issues are not properly before this court.

E. Constitutional law also prohibits the imposition of Reallocation Provisions that target EBID and EBID alone.

Various, well defined, provisions of the Constitution of the United States and the mirror image provisions in the Constitution of New Mexico prevent the singling out of EBID, without due process, and in violation of its private contracts and private property rights, as proposed by the states through the Reallocation Provisions. EBID does not seek to make constitutional

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[8] These are not specifically discussed here again, though the undersigned has raised these other proceedings a number of times in this case and believes the Special Master adequately understands what is at stake.

[9] The Quiet Title case above referenced will not proceed outside of completion of the state court adjudication, absent certain specific circumstances. The 2011 Operating Agreement case will proceed in some form as soon as this matter is resolved.

arguments herein in any detail, and instead merely seeks to point out the plethora of issues that are raised by the Reallocation Provisions. The Proposed Decree's remedial provisions can be said to be a sort of field day for a first-year constitutional law student on an issue spotting mission, though, many of its issues are more than obvious and need no discussion whatsoever.

In any case, EBID would be remiss if it did not point out some of the obvious. First, EBID farmers have invested generations worth of resources in the Rio Grande Project and their associated farms. The right to not be deprived of life, liberty, and property without due process law, and the right to equal protection under the law, are enshrined in American law in almost every way imaginable. U.S. Const. Amendment XIV, § 1. It is one thing to say that a state represents its citizens *parens patriae*, and another thing entirely to allow a state to violate its own citizens in the name of *parens patriae*.

On April 14, 2020, this court stated that: "Any remedy ordered in this case will be imposed upon an entire state, not on a portion of a state. No state's duties and rights can be viewed in isolation nor treated as applying only in part of a state." Docket No. 340, P. 21. To allow the states to single out EBID as the only mechanism for payment of the State of New Mexico's debts is a violation of property rights, without due process, and without regard for principles of Equal Protection. What, really, is the rational (or any other) basis for allowing New Mexico to raid EBID's allocation instead of requiring it to protect EBID from unlawful depletions caused by DCMI's junior groundwater pumping? EBID paid for 57% of the Project reimbursable costs based on the 1937 repayment contract. How, then, can EBID be deprived of the benefits of its congressionally approved bargain in a case that doesn't directly involve EBID? EBID asserts, without diving deep into the constitutional caselaw, that this is a simple matter,

and the Reallocation Provisions are more than clearly in violation of multiple constitutional principle in place to protect EBID and its members.

Other, more obscure, but no less applicable, Constitutional principles apply, such as the "Contracts Clause" that says, in pertinent part: "No state shall enter into any...Alliance, or Confederation [or]...pass any...Law impairing the Obligation of Contracts..." U.S. Const. art 1. § 10. While this body of law is complex, and any outcome it may dictate in this situation cannot be readily determined at this juncture, it does not need to be—this court can, and should defer imposition of any remedial action that may violate this or any other provision of the Constitution, or any other body of law, to after a full and fair development of the issues can be achieved. This may require allowing other courts to determine relative rights of various water users before the states can claim the lawful authority under this, and other Constitutional provisions, to allow their proposed actions here. In sum, however, all of the law and history discussed above prohibits such a twisted reading of the Compact that would lead to the conclusion that the states can raid Project allocations for their own purposes. The idea that the Compact can override federal objectives and federal contracts is fundamentally incorrect.

F. The illegality of the Reallocation Provisions shines brightly when viewed in light of the above other bodies of law.

When New Mexico and Reclamation law are properly factored into the equation, it is clear that New Mexico, through its State Engineer and Compact Commissioner, is not entitled to control the Project or its supply below the reservoir, whether it is a "New Mexico apportionment" or not. Given that it is EBID that controls said apportionment under the downstream contracts and the legal authority granted to it by state and federal law, it is difficult

to determine how New Mexico can require EBID to give up water allocated to it in a manner contrary to state law.

New Mexico was not in any way associated with the creation or funding of the Project, and for over 100 years it has not been involved in operations whether on a day-to-day level or at a higher policy and contracting level. To determine anything different would be an unnecessary intrusion into the private property rights of the farmers within the Rio Grande Project. As previously stated, EBID agrees the purpose of the Compact was to protect the Project. New Mexico is also correct that the Compact intended to protect existing rights below Elephant Butte Reservoir. State of N.M. Mot. for Partial Summ. J. on Apportionment, at Page 38. To adequately protect EBID, and the water rights existing below the reservoir prior to the Compact, this court must defer to other courts of competent jurisdiction where many of the unresolved issues here are still pending. EBID admits that requiring it to pay for shortfalls caused by DCMI pumping at the state line is the easiest mechanism to resolution of the Texas concerns; however, EBID disagrees that such provisions are adequate in isolation. Without determining whether EBID is junior to those other water rights, it cannot be said that taking EBID's water to pay for those junior uses is consistent with the law—in fact, it is not.

Here the effect of the reallocation provisions is to rearrange the relative priorities of water rights among water users in New Mexico without the water users at the table to defend their rights, many of which remain unadjudicated and require due process before the State can deprive the water user of the use of those rights. Instead of holding off on the question of how New Mexico should manage, the states jump to the conclusion that they can manage using EBID's account alone, and without proper contribution from other water users who are junior

and who also have an impact on surface water deliveries to EP1. Given the complexity of balancing competing claims to dwindling water resources, remediation provisions should not be imposed on EBID alone, and instead, the senior nature of its water rights should be protected, even if that protection is simply to allow EBID to get into a different, more appropriate proceeding, where all competing water users may participate under clear procedures that provide all proper due process. That forum has, until this case began, been the Lower Rio Grande Adjudication.

This problem is easily resolved by striking the remedial provisions of the Proposed Decree that are, at this juncture, premature at best. If the states are successful in defending those illegal provisions in this venue, and through motions practice alone, they will arguably have succeeded, at least in part, in adversely adjudicating part of the US, EBID, and EBID members' rights without ever reaching the merits of our claims. Such an end run around due process and all of western water law should not be sanctioned by this Court, or this court risks destabilizing all of Reclamation and Western Water law in its wake.

The proposed Reallocation Provisions in an already stressed system will only make Compact compliance more difficult, resulting in more loss of water by EBID as the State becomes increasingly reliant on EBID's account to make up for shortfalls caused by others. *See* Declaration of Dr. James P. King. This new, novel approach to the application of the doctrine of prior appropriation as proposed by the reallocation provisions, where the senior is the first to cut back to allow juniors to continue pumping, cannot be tolerated or sanctioned by this Court. This is a complete sidestepping of western water law which threatens not only the investments of EBID farmers, but of all farmers in Reclamation projects throughout the west.

The court recognized that if New Mexico or Texas has been deprived of its equitable apportionment under the Compact, it is very possible that any such shortfall may be the result of a combination of factors. Court order dated March 31, 2020, Docket No. 338, P. 29. Why then, is it justifiable to require EBID to pay for any and all shortfalls to Texas without evaluating what the shortfalls are and what has caused them? Enforcement of the kind proposed is, at best, premature, and at worst, the worst example of New Mexico's failure to protect EBID on record in our more than 100 years of existence. To be clear, EBID does not challenge the states' determination of apportionment. EBID solely challenges remedial provisions that purport to subordinate its rights to those of all other water users, despite being the senior on the river under state law, by requiring EBID to pay the debts owed by New Mexico for failure to manage other groundwater impacts.

Reallocation provisions that shortcut application of other bodies of law are illegal. To the extent that part of the NM apportionment under the Compact is achieved below the reservoir, the downstream component of New Mexico's Compact apportionment is defined solely by the Downstream Contracts with EBID. EBID believes the sole and only way to describe the Compact rights below the reservoir is in relation to its and EP1's contracts with each other and the Federal Government for the water supply that was created with the farmers' investment. No other water user in New Mexico holds any rights to Compact water below the reservoir. The states cannot, in the name of the Compact, seek to "protect" the Project supply by simply shuffling water among the Irrigation Districts without regard for the DCMI pumping that is reducing the "size of the pie" without restriction. This simply cannot be what the Compact, state law, or any other body of law requires.

VI. PROPOSED RESOLUTION OF THE ISSUES TO AVOID UNNECESSARY ADVERSE IMPACTS TO THE NEW MEXICO PORTION OF THE RIO GRANDE PROJECT

A. Reaffirm the Court's prior conclusions in this context.

EBID asks that the Special Master reaffirm multiple points of law already expressed. First, that "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts." Docket 340. "The Project operates pursuant to reclamation law. The interplay of reclamation law and state law is complex even in the absence of a Compact, and that interplay does not become less complicated when a Compact exists but leaves many things unsaid." Docket No. 340. "Regardless, even if it is appropriate to characterize New Mexicans' entitlement to these limited waters as a Compact right, it is possible that various other laws may serve to define and limit that right in a manner neither stated expressly in, nor inconsistent with, the Compact (*beneficial use limitations, express calls for delivery*, etc.)." *Id.* (*emphasis added*).

The Special Master continued on saying that "[i]t cannot be disputed that New Mexico will be required to administer its other laws in a manner consistent with and in support of the Compact." *Id.* It has also been said multiple times that "New Mexico has a Compact-sourced duty to protect Project deliveries intended for Texas...still, no such duty has been defined." *Id.* "Further, state law cannot be irrelevant to any such duty if New Mexico's own entitlement to water is potentially defined at least partially through state law or reclamation law." *Id.* Reaffirming the Court's prior rulings that other law may serve to define protections for EBID's portion of the Project is necessary at this juncture.

Order of May 21, 2021 "Fifth, the compacting states intended to protect not merely water deliveries into the Reservoir, but also a baseline level of Project operations generally as reflected

in Project operations prior to Compact formation." Docket 503, P.5. While this is a correct statement, it is at odds with the states' newly self-granted authority to raid Irrigation District allocation accounts when in need to make up shortfalls to each other, even if those shortfalls are not caused by the Irrigation Districts' members or operations. EBID requests the court reaffirm its prior decision that the baseline level of operations be protected for the whole project.

The Compact is noticeably silent on requiring the United States and Districts to be deprived of water to allow increased groundwater depletions within the Project because the purpose and intent of the Compact was to *protect* the Project (all of it, not just the Texas portion). It cannot be said wholesale that raiding EBID's allocation account is the only mechanism for achieving Compact compliance where EBID is already sending additional water from its allocation (voluntarily) to EP1 via the 2008 Operating Agreement, and is, therefore, not the culprit guilty of illegally depleting the streamflow. Whether it is Compact law or otherwise, there are a number of laws that protect EBID from the raid on its allocation account proposed by the states. There is simply no basis for requiring EBID alone to suffer the consequences of a system-wide failure. EBID seeks reaffirmation of the conclusions that the purpose and intent of the Compact was to protect the whole project, and further, affirmation that the doctrine of prior appropriation prevents the states from attacking EBID in this context.

B. Strike and otherwise clarify illegal provisions.

EBID also seeks clarification of multiple matters. First, EBID seeks to clarify that the states do not enjoy project benefits directly and any language granting to the states the right to enjoy District allocation balances for their own purposes requires further definition, at a minimum, but more likely should be stricken as illegal. EBID also request further clarification

that the states lack the legal authority to dictate project operations by imposing remedial provisions on the Project alone, especially through the Reallocation Provisions, without agreement of the Project because only the United States and Districts may change their contracts.

Next, the Special Master should clarify that the apportionment is achieved through the Project, but that the apportionment is not protected if the DCMI pumping impacts are not properly accounted for. The Court should send the State of New Mexico, United states, and amici back to the state court adjudication for a determination of the relative rights to water in the Lower Rio Grande before providing any remedial provisions that harm individuals, such as those proposed by the Reallocation Provisions. To this end, the Court should also issue a limiting instruction declaring that the Compact apportionment is effectuated through the Project, but this Court is not foreclosing the ability of EBID and the United States to claim the State of New Mexico wrongly deprived EBID of a portion of its allocation by failing to administer water rights based on New Mexico law, or the Doctrine of Prior Appropriation and other legislative and caselaw driven requirements regarding water rights within New Mexico and Reclamation projects. In other words, clarify that claims of violation of EBID or United States rights are preserved for other, more proper, venues.

The Special Master should also take care to clarify that multiple factors beyond EBID's control may affect the state-line delivery, not solely Project operations, and EBID cannot, therefore, be held solely responsible without further development of the evidence in other courts of competent jurisdiction. This should include the clarification that the states lack the authority to impose remedial provisions in the proposed summary fashion.

Next, EBID requests that the Court clarify that the states have resolved their issues related to interference with the Project as a matter of apportionment under the Compact, but that does not equate to adjudication of EBID's water right under state law. The Special Master previously determined that "[m]aterial dispute remains as to what is meant by "Project water supply." Order of May 21, 2021, Docket 503, P. 51. As previously described, the definition of project water supply has not been completed by the adjudication court in New Mexico. In the proposed decree, the states choose to use the nebulous term "Rio Grande Water" which remains undefined and further complicates this situation. EBID requests clarification that the States' definition of project supply in this context does not foreclose EBID from seeking a larger, more expansive definition of project supply in the state court adjudication, where evidence regarding the maximum beneficial use achieved by the project is relevant to the ultimate recognition of the water right.

In other words, EBID seeks to prove in the state court adjudication that what was appropriated in 1903, and what was appropriated before then that went into the coffers of the Project, was and is larger than what the states have settled on today as part of the Proposed Decree. EBID also intends to make claims regarding priority dates for its (and its members') water rights in the state court adjudication regarding what was appropriated by its members both before and as part of the Reclamation project. This is a hybrid state and Reclamation law based claim that EBID views as the proper definition of "what constitutes project supply" pursuant to New Mexico's law of prior appropriation and caselaw construing Reclamation project water rights. The Court should take care to ensure that any Final Decree does not undermine EBID's ability to plead its case in the state court adjudication regarding the contours of Project supply as

it existed in 1903, instead of being limited to the states agreement regarding the apportionment for purposes of resolving this case.

EBID requests that this court clarify that EBID's authority-based claims in the 2011 Federal District Court case regarding the 2008 Operating Agreement have not been resolved by this proceeding, and EBID remains free to pursue those claims, undiminished by anything in the Proposed Decree. This court should also strike remedial provisions included in the Proposed Decree that would arguably prematurely "decide" those issues.

This Court should also confirm that, until both the rights of the Project are resolved in both the state adjudication case and the 2011 Federal District Court case are completed, there can be no provision for reallocation of EBID's water, even if it is agreed to by the states, in the absence of agreement by the United States and EBID. The Reallocation Provisions of the Proposed Decree must be stricken. The same applies to and any other provisions that would seek to violate EBID's contract rights, or that would impose on the United States and Districts a new legal regime not adequately vetted through the lower federal courts who are already dealing with those issues.

VII. CONCLUSION

The importance of this decision cannot be understated. If this Court, through the Proposed Decree, allows the states to sidestep the sanctity of the doctrine of prior appropriation, Reclamation project rights, and Constitutional law, and is permitted to simply remediate their own problems by singling out water users without due process or proper merit based determinations—the entire foundation the West was built on is called into question. Protection from illegal provisions of the Proposed Decree are necessary to ensure water users can depend

on their water rights on a prospective basis such that their investments are protected. Allowing the states to use the Districts' allocations instead of fixing the lack of groundwater administration of DCMI pumping in New Mexico is not consistent with any known law, and jeopardizes the investment of the farmers in the Rio Grande Project.

The deprivation of EBID's rights solely, without regard for others' depletion impacts on the system constitute a threat to the State of New Mexico's critically important agricultural economy which would lead to harsh negative consequences for farmers alone. Shortage conditions already persistent within the Lower Rio Grande only serve to exacerbate the consequences of depriving EBID of its allocation when other water users are part of the problem but not paying for their own debts. See Declaration of Dr. King. Short circuiting the doctrine of prior appropriation to deprive EBID of its rights for the sole purpose of paying for the depletion caused by others threatens to upset the stability of western water law. If, in the name of Compacts, states can fail to apply the doctrine of prior appropriation and instead are allowed to come up with water for others by simply raiding Reclamation Projects, the entire west is in trouble. This was, and still seems to be, settled law in the west.

Moreso, the entire union stands to lose at the grocery store if the cost to produce food increases while the capacity to produce decreases due to lack of water. Farmers cannot be expected to pay full freight for all others, particularly through remedial provisions of the Proposed Decree that are inconsistent with virtually every other law in place in the West. To be clear, EBID does not advocate for a decision that would tell New Mexico how to administer its water resources. Instead, EBID advocates for its day in court, and the ability to protect itself from remedial provisions that violate its rights without taking into account any other, more

junior, rights and their impacts. It simply cannot be said that Congress, when it approved the Rio Grande Compact, intended to allow deviation from the Doctrine of Prior Appropriation to allow the states to deprive the Federal project of water whenever they so choose. In fact, the Compact was put in place to *prevent* depletion of water, not to sanction it and allow for more theft directly from EBID's allocation account.

The United States and Districts have long maintained that we would, once the Compact was construed, look to our operations to determine if we are consistent with the commands of the Court and Compact. Much of the Court's prior rulings are based upon this notion. The states, in putting forward a remedy in the Proposed Decree that otherwise permissibly construes the Compact, has poisoned the punch bowl. EBID contends the Decree is salvageable with proper limiting instructions from this Court—wholesale rejection of the Proposed Decree is unnecessary. EBID also contends that the Compacting States, although going too far in including illegal remediation provisions, have appropriately determined what they believe the state-line delivery should be, and the parts they got wrong related to interference with project operations can simply be removed from the Decree without affecting the remainder of the agreement or the certainty in water apportionment the states bargained for. This Court must heed EBID's warning, or risk the downfall of all of Western agriculture in the wake incomprehensible changes to such far reaching principles of law the states seek to impose through their proposal.

Respectfully submitted this 20th day of January, 2023

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CERTIFICATE OF SERVICE

On the 20th day of January, 2023, I hereby certify that a true and correct copy of the foregoing was served via electronic mail, as indicated, upon those individuals listed on the service list attached hereto.

By _____
Samantha R. Barncastle

SERVICE LIST FOR ALL PARTIES

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

PARTIES[1]

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SPECIAL MASTER

Special Master	Honorable Michael J. Melloy *Special Master* United States Circuit Judge 111 Seventh Avenue, S.E., Box 22 Cedar Rapids, IA 52401 Michael E. Gans, Clerk of Court United States Court of Appeals – Eighth Circuit Thomas F. Eagleton United States Courthouse 111 South 10th Street, Suite 24.329 St. Louis, MO 63102	(319) 432-6080 TXvNM141@ca8.uscourts.gov (314)244-2400 TxvNM141@ca8.uscourts.gov

**Updated 4/16/2018
Corrected the spelling of Pricilla M. Hubenak to Priscilla M. Hubenak and added her e-mail address Priscilla.Hubenak@oag.texas.gov to the Service list.

**Updated 4/18/2018
Added Toby Crouse (toby.crouse@ag.ks.gov) as the Solicitor General for the State of Kansas and removed Stephen R. McAllister.

**Updated 4/24/2018
Added Clerk of Court information and updated Special Master e-mail address.

**Updated 11/16/18
Added Bryan Clark's e-mail address (bryan.clark@ag.ks.gov) for the State of Kansas

**Updated 3/14/19
Updated Attorney General of Colorado to Philip J. Weiser
Added Solicitor General Eric R. Olson (eric.olson@coag.gov) for the State of Colorado

**Update 3/19/19
Added legal assistants Shannon Gifford (shannong@modrall.com) and Leanne Martony (leannem@modrall.com) for El Paso County Water District No. 1
Added James M. Speer, Jr., information for El Paso County Water District No. 1

**Update 5/6/19
Added Sarah A. Klahn (sklahn@somachlaw.com), Richard S. Deitchman (rdeitchman@somachlaw.com), Rena Wade (rwade@somachlaw.com) and Corene Rodder (crodder@somachlaw.com) for State of Texas. Removed Rhonda Stephenson.

**Update 11/6/19
Added Lamai Howard (lamaih@modrall.com) for El Paso County Water District No. 1. Removed Leanne Martony.

**Update 11/21/19
Added Jo Harden (jo@tessadavidson.com) for New Mexico Pecan Growers. Removed Patricia McCann.

**Update 11/22/19
Removed Lizbeth Ellis and Clayton Bradley and added General Counsel (gencounsel@nmsu.edu) email for New Mexico State University.

**Update 1/7/20

Added David W. Gehlert (david.gehlert@usdoj.gov) for the United States. Updated Solicitor General information. Also added John P. Tustin (john.tustin@usdoj.gov) for the United States.

**Update 2/19/20

Added Renea Hicks for El Paso County Water Improvement District No. 1. Removed James M. Speer and Lamai Howard.

**Update 2/26/20

Added Darren L. McCarty for State of Texas. Removed Brantley Starr and James Davis. Also added Crystal Rivera and removed Rena Wade.

**Update 5/1/20

Added Cholla Khoury, Luis Robles, Jeffrey Wechsler and John Draper for the State of New Mexico. Removed David A. Roman. Also added Bonnie DeWitt, Pauline Wayland, Diana Luna and Donna Ormerod.

Added Preston Hartman for the State of Colorado. Removed Karen Kwon.

**Update 7/7/20

Added mediator information - Hon. Oliver W. Wanger.

**Update 10/1/20

Added Susan Barela (susan@roblesrael.com) for State of New Mexico.

**Update 10/2/20

Added Jennifer A. Najjar and removed Stephen M. MacFarlane, Thomas Snodgrass and David W. Gehlert for the United States.

**Update 12/14/20

Added Zachary E. Ogaz (zogaz@nmag.gov) for State of New Mexico.

**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) and removed Shannon Gifford for EPCWID.

**Update 7/21/21

Updated Attorney General/Solicitor General information and removed Christina Garro for State of Texas.

**Update 8/27/21

Updated Solicitor General information for the United States.

**Update 9/16/21

Updated ABCWUA information, substituting Charles W. Kolberg for Peter Auh.

**Update 9/28/21

Updated New Mexico information, adding Shelly Dalrymple, Kaleb Brooks, Corinne Atton and Jennifer Van Wiel.

**Update 11/2/21

Updated United States information, adding Elizabeth Prelogar and removing Brian Fletcher. Removed Mediator information.

**Update 1/3/22

Updated United States information, adding Jeffrey Candrian and removing James Dubois.

**Update 1/12/22

Updated New Mexico information, adding Nathaniel Chakeres, Richard Allen and Jonas Armstrong; removing Susan Barela and Patricia Salazar.
Updated New Mexico State University information; updating John Utton's address.

**Update 12/16/22

Updated New Mexico information, adding Christopher Shaw and Michele Del Valle; removing Jonas Armstrong and Jennifer Van Wiel.

**Update 1/20/23

Updated City of Las Cruces information, adding Jocelyn Garrison and Brad Douglas; removing Jennifer Vega-Brown and Robert Cabello.