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 Exception To The Third Interim Report Of The Special Master

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY AND CITY OF LAS CRUCES' JOINT *AMICI CURIAE* BRIEF IN SUPPORT OF THE JOINT REPLY TO EXCEPTION OF THE UNITED STATES BY THE STATES OF TEXAS, NEW MEXICO, AND COLORADO

JAY F. STEIN, ESQ.*
JAMES C. BROCKMANN, ESQ.
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santa Fe, NM 87504-2067
(505) 983-3880
jfstein@newmexicowaterlaw.com
**Counsel of Record for the City of Las Cruces*

[Additional Counsel in Signature Block]

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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The Albuquerque Bernalillo County Water Utility Authority ("Water Authority") and the City of Las Cruces ("City" or "Las Cruces") ("New Mexico Municipal *Amici*") submit this joint *amici curiae* brief[1] in support

[1] No counsel for any party authored this brief in whole or in part, and no party made a monetary contribution intended to fund

of the Joint Reply to Exception of the United States by the States of Texas, New Mexico, and Colorado ("Compacting States' Joint Reply"). In doing so, the New Mexico Municipal *Amici* support the Third Interim Report of the Special Master and the Consent Decree and urge their adoption by the Court. Both the Water Authority and Las Cruces have participated as active *amici* in the proceedings before the Special Master and the Court in this original action. While briefing by the parties on the United States' Exception has focused on the interstate apportionment made by the Rio Grande Compact, Act of May 31, 1939, Ch. 155, 53 Stat. 785 ("Compact") and Rio Grande Project ("Project") agricultural and contract issues, the New Mexico Municipal *Amici* bring to the Court's attention municipal water supply issues affecting one million people in New Mexico located along the Rio Grande, not addressed in the parties' briefs.[2]

INTERESTS OF *AMICI CURIAE*

1. Interest of the City of Las Cruces.

Las Cruces is the second largest city in New Mexico and is located south of Elephant Butte Reservoir in the Lower Rio Grande ("LRG"). The LRG is the focus

preparation or submission of this brief. No other person made any contribution to the preparation or submission of this brief.

[2] Transcript references to witnesses from the Water Authority and Las Cruces are from the Special Master Docket https://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original (hereafter "Doc.").

of the United States' Exception, and it has expressed a particular concern with municipal water supplies.[3] This is ironic because agricultural diversions account for approximately 85% of the total groundwater diversions in the LRG, while municipal, industrial, commercial, and domestic diversions make up the remaining 15%. Las Cruces represents some 7% of that amount. A return to a 1938 Condition[4] in the LRG would jeopardize one hundred years of reliance on State Engineer permitting and planning by the City.

The Las Cruces community was formed in the mid-1800s, the first settlers having arrived in 1839, led by Don Jose Costales. *See Regional Planning Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas*, *1936-37* at 72 (1938). Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a municipal water supply from surface water for an emerging community from the Acequia Madre de Las Cruces in 1849. Las Cruces is the oldest continuous water user in the LRG. Las Cruces transitioned to groundwater wells more than a century ago. Diversions from groundwater wells can deplete water from a hydrologically connected stream. In some instances, under New Mexico law, vested groundwater diversions are allowed to impact a stream. *See State ex rel. Reynolds v. Mendenhall*, 1961-NMSC-083, 68 N.M. 467, 362 P.2d 998. In other

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[3] *See* Exception of the United States at 9, 46.

[4] The term 1938 Condition and 1938 Baseline are the same concept. *See* Compacting States' Joint Reply at 10.

instances, stream effects must be offset by retiring a surface water right in an equal amount to the river effect that results from groundwater diversions. *See City of Albuquerque v. Reynolds*, ¶ 21, 1962-NMSC-123, 71 N.M. 428, 379 P.2d 73. New Mexico uses hydrologic models to determine the timing and amount of river effects that result from groundwater diversions.

Dr. Jorge Garcia, P.E., the former Director of Las Cruces Joint Utilities, testified in the trial proceedings on November 2-3, 2021. He described the City's water rights and water management in its 40-year Water Development Plan. 11/3/2021 Trial Tr. Vol. XIV, 10-23, Doc. 701; *see* N.M. Ex. No. 2492. Pursuant to state law, all New Mexico municipalities are required to have a 40-year water supply. *See* NMSA 1978, § 72-1-9 (1985). Today, the City's water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin, including a vested *Mendenhall* water right to deplete the Rio Grande from the City's LRG-430, *et al.* wells. Las Cruces is the only water user in the LRG to add water to the Rio Grande from its East Mesa wells sited in the Jornada del Muerto sub-basin which is hydrologically disconnected from the Rio Grande. *See* N.M. Ex. No. 2492, Appx. B. The effect is two-fold. First, the City's diversions from groundwater wells in the Jornada del Muerto do not have a depletive effect on the Rio Grande. Second, the treated return flow effluent from this source augments the native supply when it is discharged into the Rio Grande.

The Consent Decree equitably includes the depletive effects on the river that result from agricultural

and municipal groundwater diversions in amounts used during the D2 Period[5] consistent with historical Rio Grande Project operations and leaves management and administration of the surface water and groundwater in the LRG to the State of New Mexico. For more than a century, Las Cruces has relied on a system of state administration under New Mexico law to build and manage its water rights portfolio.

If the United States' Exception is sustained and the Consent Decree is not entered, Las Cruces could be adversely affected in many ways, including creation of a 1938 Condition that freezes vested water rights and their depletions in the LRG in New Mexico and Texas as of 1938. According to the 1940 Census, the City served some 8,000 residents in 1938 using approximately 2,400 acre-feet per year, compared to 125,000 customers using approximately 21,000 acre-feet per year today. In addition, the assertion of potential federal jurisdiction over groundwater within the perimeter of the Rio Grande Project, risks the validity of groundwater permits issued by the New Mexico State Engineer to Las Cruces by requiring federal contracts to pump groundwater while imposing obstacles as to how significantly increased offsets can be obtained. In Paragraphs 12 and 13 of its Complaint in Intervention, the United States alleges groundwater that is hydrologically connected to the Rio Grande is "Project water" and that it is illegal for anyone to use that groundwater without a contract from the Bureau of Reclamation.

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[5] *See* Compacting States' Joint Reply at 6.

If it were successful in proving this allegation, the Unites States would usurp New Mexico's jurisdiction over and federalize groundwater.

The United States' interests can be addressed in other pending litigation. The United States is a party defendant to the general stream system adjudication, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District* (N.M. 3rd Dist., No. CV-96-888), where water rights in the Lower Rio Grande are determined. Moreover, the United States is a party in two cases in federal district court to which Las Cruces is also a party. In *Elephant Butte Irr. Dist. v. United States* (D.N.M. CIV-00-1309), the issue of state or federal jurisdiction to transfer City agricultural rights within EBID to municipal and industrial use is pending, but inactive. Las Cruces is a party to *State of New Mexico v. United States* (D.N.M. No. 11-CV-00691), the suit to invalidate the Operating Agreement on the issue of the adequacy of the Environmental Impact Statement to assess the effects of increased groundwater pumping by irrigators on City rights.

2. Interest of the Water Authority.

The Water Authority is comprised of the City of Albuquerque, Bernalillo County, and the Village of Los Ranchos. All are political subdivisions of the State of New Mexico. The initial water use by the Pueblo de Albuquerque y San Francisco Xavier (predecessor to the Water Authority) was in 1706. The Water Authority is the largest municipal water provider in New Mexico,

located in central New Mexico, 150 miles upstream of Elephant Butte Reservoir, in the Middle Rio Grande ("MRG"). The MRG in New Mexico is located between Otowi Gage and Elephant Butte Reservoir.

The Water Authority's drinking water supply comes from two sources.[6] First, it has approximately 90 groundwater wells located in the Rio Grande Underground Water Basin, authorized and administered by the New Mexico State Engineer under Permit No. RG-960, *et al.* *See* N.M. Ex. No. 997. The replacement value of these wells exceeds half a billion dollars. Second, the Water Authority has a perpetual contract for 48,200 acre-feet per year of imported Colorado River water from the San Juan-Chama Project ("SJCP"), a federal U.S. Bureau of Reclamation project. *See* 43 U.S.C. § 615pp; TX. Ex. No. 325. The Water Authority's SJCP water is derived from New Mexico's apportionment under the Colorado River Compact, 45 Stat. 1057, 1065 (1928), and the Upper Colorado River Basin Compact, Act of April 6, 1969, 63 Stat. 31. SJCP water is conveyed from the Colorado River Basin into the Rio Grande through trans-basin tunnels from diversions in tributaries in the headwaters in Colorado. The SJCP water is stored in Heron and Abiquiu reservoirs in New Mexico for release and use downstream. 11/5/2021 Trial Tr. Vol. XVI, 20, Doc. 701. The Water Authority has a New Mexico State Engineer Permit to divert its SJCP

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[6] The baseline for the Water Authority's water rights includes vested and acquired rights to deplete the Rio Grande up to 26,422 acre-feet per year. 11/5/2021 Trial Tr. Vol. XVI, 35-36, Doc. 701. *See also* FN 8 *infra.*

water and native Rio Grande surface water – Permit No. SP-4830. Pursuant to that Permit the Water Authority constructed a surface water diversion and treatment facility ("Drinking Water Project") at a cost of about a half billion dollars to divert and fully consume its SJCP water. Permit No. SP-4830 also allows the diversion of native Rio Grande surface water that is used as "carry water," that is, it is not consumed, but is returned to the Rio Grande in the same amount as diverted to provide for the full consumption of the imported SJCP water.[7] Permit No. SP-4830 for the Drinking Water Project has conditions that impose operational constraints that require diversions from the Rio Grande be curtailed or suspended when native surface flows of the Rio Grande go below a set minimum flow measured at the Albuquerque Gage. Condition of Approval No. 13 suspends diversions under the Permit if "necessary to meet Compact obligations." This requires the Water Authority to closely monitor the flows in the Rio Grande and how New Mexico administers its surface water in the MRG, including compliance with the Rio Grande Compact. It is not uncommon for the Water Authority to shut down the Drinking Water Project due to low flows in the Rio Grande.

The Water Authority conjunctively manages its imported SJCP surface water with its groundwater,

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[7] A common ratio for municipalities is that 50% of the water that is diverted is consumed and 50% is return flow, in this case, return flow to the river. That ratio changes as municipal water conservation plans are implemented, resulting in less water consumed and higher return flows.

both of which are subject to permits and active administration from the New Mexico State Engineer.[8] The volume and timing of both sources of supply are dependent on native water supplies available to New Mexico under the Rio Grande Compact, particularly Article IV, including river operations of the Middle Rio Grande Project for irrigation of lands within the Middle Rio Grande Conservancy District ("MRGCD").[9] The ability of the Water Authority to provide drinking water under its present water supply portfolio is dependent on Rio Grande Compact administration in the MRG as it has historically been undertaken and subject to the New Mexico State Engineer's jurisdiction over the surface water and groundwater in the Middle Rio Grande, concepts that are preserved by the Consent Decree. *See* Consent Decree at II.D.2.a.

The Water Authority is concerned about rulings in this case that will be applied in the MRG and thereby affect Rio Grande Compact administration in this reach of the river and the Water Authority's water rights. Mr. John Stomp, P.E., then-Chief Operating Officer of the

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[8] The Water Authority also has "vested and acquired" surface water rights from the Middle Rio Grande in its portfolio totaling 26,422 acre-feet per year. These constitute vested water rights to deplete the Rio Grande in that amount. It also maximizes its water rights through aquifer storage and recovery, through both infiltration and direct injection, and it uses nonpotable wastewater for irrigation and industrial use.

[9] The Middle Rio Grande Project is a U.S. Bureau of Reclamation project that includes storage in El Vado Reservoir on the Rio Chama that provides water for irrigation of approximately 60,000 acres in the Middle Rio Grande. The United States owns MRGCD's project works.

Water Authority, was called as a witness in the November 2021 trial proceeding. He addressed the Water Authority's interest as "starting first with protecting our water rights, our water rights permits, and also protecting the administration of our water rights so that we can continue to operate as we have in the past, present, and in the future in accordance with our hundred-year water plan. We're concerned about the 1938 Condition and the idea that there's a fixed amount of depletion in the Middle Rio Grande." 11/5/2021 Trial Tr. Vol. XVI, 7-8, Doc. 701.

The Consent Decree would continue the administration of the MRG as it historically has been done. Under the Consent Decree, there is no 1938 Condition above Elephant Butte Reservoir that would affect Compact administration under Article IV. New Mexico would continue with intrastate administration of surface water and groundwater in the MRG. The Water Authority has relied on State administration of the water resources in the MRG in acquiring its water rights portfolio and in its municipal water supply planning. The Consent Decree ensures that state administration continues in the future. That certainty is essential for present and future municipal water operations and planning.

If the United States' Exception is sustained and the Consent Decree is not entered, it could adversely affect the Water Authority in several ways, including: 1) effectively amending Art. IV of the Compact by limiting New Mexico's apportionment in the MRG by freezing depletions of water under a 1938 Condition

rather than the historical administration which provides for depletions that vary from year to year based on a percentage on the annual amount of surface water that flows past the Otowi Gage and the amount of surface water that enters the Rio Grande between the Otowi gage and Elephant Butte; 2) allowing United States' jurisdiction over groundwater within the perimeter of a U.S. Bureau of Reclamation project (*see supra* at 5-6); and 3) allowing the continuation of the 2008 Operating Agreement that provides the Irrigation Districts the ability to store water allocated for release but conserved in Elephant Butte Reservoir. The storage of conserved water negatively affects the Water Authority because the Rio Grande Compact accounting procedures do not account for the evaporation of this water or the effect on how the additional conservation water stored affects actual and hypothetical spills.

3. Joint Interest of both New Mexico Municipal *Amici*.

These issues affecting the New Mexico Municipal *Amici* are resolved under the Consent Decree agreed to among the Compacting States and recommended by Special Master Melloy. Entry of the Consent Decree would provide certainty for established municipal water supply for the Water Authority and the City of Las Cruces and their customers by ensuring that their water rights portfolios can continue to be exercised as in previous decades. The New Mexico Municipal *Amici* concur in the Special Master's comprehensive analysis of a state's role and responsibilities in representing its

citizens under the *parens patriae* doctrine in construing an interstate compact apportioning trans-boundary water. *See* Third Interim Report of the Special Master, *Texas v. New Mexico & Colorado*, No. 141, Original (July 3, 2023) at, *e.g.*, 5, 16, 40, 94, 105. The New Mexico *Amici* have relied on a known system of State administration and what were assumed to be allowable levels of depletions for the past 85 years in acquiring their water rights portfolios and in constructing related infrastructure. It would be highly disruptive and expensive to change these predicates now as urged by the United States in its Exception.

SUMMARY OF ARGUMENT

The New Mexico Municipal *Amici* concur in the Compacting States' Joint Reply. The Water Authority and Las Cruces also support the Third Report of the Special Master and Consent Decree. The Consent Decree resolves the interstate issues that were in dispute in this original action. The Consent Decree: 1) establishes procedures and standards for measuring Texas' Compact apportionment, removing previous ambiguity; 2) strikes a strategic balance in its adoption of the D2 Baseline as the basis of the apportionment below Elephant Butte Reservoir consistent with historical operations; 3) leaves Art. IV of the Compact to be administered as it has been done historically; 4) contains an affirmative duty for New Mexico to administer its water resources to achieve Compact compliance; and 5) properly leaves intrastate water administration

to the respective States. In New Mexico, State administration includes intrastate administration of surface water and groundwater to comply with New Mexico's delivery obligations under the Rio Grande Compact.

The United States' Exception invites administrative chaos if it is sustained by ignoring established law and practice. First, acceptance of the United States' contention that there is an inflexible 1938 Condition governing Compact deliveries below Elephant Butte Reservoir in combination with a rejection of the D2 Baseline historically used to provide for New Mexico's deliveries to Texas, and to protect long standing groundwater use in New Mexico, will upend established water uses and state water administration. Second, the allegation that the United States controls all groundwater under the guise of it being "Project water" would potentially result in the federalization of the groundwater rather than following established Western water jurisprudence that holds that States have plenary control over the surface water and groundwater within their borders. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935); *California v. United States*, 438 U.S. 645 (1978); *Cf. United States v. New Mexico*, 438 U.S. 696 (1978). If sustained, the United States' Exception threatens essential municipal supply to New Mexico's citizens on the Rio Grande.

The New Mexico Municipal *Amici* submit the following arguments. First, Art. IV provided a flexible delivery obligation allowing for municipal development by Albuquerque in the MRG and the Consent Decree adopts the D2 Baseline allowing for some flexibility in municipal development for Las Cruces in the LRG (the

D2 Baseline has also been used by the Bureau of Reclamation in Rio Grande Project operations historically) contrary to the inflexible 1938 Condition asserted by the United States in its Exception. Second, beginning with the declaration of the Rio Grande Underground Water Basin on November 29, 1956, municipal water use and planning have successfully adopted compliance with the Rio Grande Compact as a fundamental objective. The New Mexico Municipal *Amici* have pioneered the use of "imported water" added to the Rio Grande from disconnected sources with imported SJCP water by the Water Authority and Jornada del Muerto water by Las Cruces, augmenting native supply and ameliorating the depletive effects of groundwater pumping in conjunction with the use of native supplies. This regime should not be disturbed. The Consent Decree recognizes and leaves undisturbed New Mexico's water administration for both intrastate and interstate compliance purposes. *See* Consent Decree at Section II.D.

ARGUMENT

POINT I

A 1938 CONDITION WOULD IMPEDE WATER SUPPLY TO NEW MEXICO'S TWO LARGEST MUNICIPALITIES

In its Exception, the United States argues that the Consent Decree would dispose of the United States' Compact claims without the United States' consent and "would be contrary to the Compact." *See* Exception of the United States at 17. At its core, the United States

seeks to expand New Mexico's delivery obligations under the Compact to encompass a duty not to interfere with the operation of the Rio Grande Project below Elephant Butte by allowing groundwater pumping above 1938 levels because it "would measure New Mexico's 'compliance with the Compact' according to a state-line delivery index based on conditions during the D2 Period, from 1951 to 1978," during which "groundwater pumping exploded" – albeit primarily from the agricultural sector which accounts for 85% of groundwater pumping in the Lower Rio Grande. *Id.* at 22. In sum, the United States contends that "[t]he applicable legal standard is defined by conditions in 1938, not during the D2 period." *Id.* at 42. Both principles threaten the existing municipal water supplies for communities along the Rio Grande.

1. A 1938 Condition was not Pleaded by the United States and finds no Support in the Compact.

The United States' principal Exception is that there is a Compact delivery obligation by New Mexico consisting of a 1938 Condition above which there cannot be depletions in New Mexico. *See, e.g.*, Exception at 10, 22, 42, 46. The United States finds an implied injunction against New Mexico and Texas preventing post-1938 depletions of water below Elephant Butte Reservoir without any supporting language in the Compact. In addition, the United States never objected to post-1938 depletions for 85 years and it did not plead any such allegation in its Complaint in

Intervention. *See* Compacting States' Joint Reply at 7. From the standpoint of the Water Authority, the United States is seeking an apportionment of a specific amount of water below Elephant Butte Reservoir based on a 1938 Condition that cannot be squared with the variable inflows into Elephant Butte Reservoir under Art. IV. At trial on November 5, 2021, Mr. Stomp testified that to his knowledge no depletions to the Rio Grande from the Water Authority wells have caused New Mexico to fail in its Compact delivery obligations. 11/5/2021 Trial Tr. Vol. XVI, 39, Doc. 701. A 1938 Condition would change the assumptions on which the Water Authority's water rights are administered. The infrastructure on the river, including use of Compact compliant SJCP water, was not present in 1938. 11/5/2021 Trial Tr. Vol. XVI, 21-22, Doc. 701.

For Las Cruces, a 1938 Condition would roll water use back to a 1938 level of development when the City was serving less than 8,000 residents, not 125,000, without any analysis or consideration of its impact on the region's largest municipality. Moreover, the impact would be felt disproportionately on the City and the essential services it supplies. While Las Cruces accounts for 7% of the depletions, it is wholly reliant on groundwater. It would forgo a greater percentage of water in relation to agricultural uses without the United States having explained the effects of this proposition. The City's Consent Order for its LRG-430, *et al.*, water rights already requires that unconsumed return flows be returned to the Rio Grande when the annual allotment in EBID is less than two acre-feet per acre.

The City's East Mesa permit for the Jornada del Muerto sub-basin, Permit No. LRG-3283 thru 3285 and LRG-3288 thru LRG-3296, and West Mesa permit, No. LRG-3275, *et al.*, contain requirements for offsets for any depletions. 11/3/2021 Trial Tr. Vol. XIV, 12-13, Doc. 701. Nevertheless, a consequence of a 1938 Condition would be to risk the validity of State Engineer permits which are based on State jurisdiction over underground water on the Lower Rio Grande Underground Water Basin.[10] Federal jurisdiction would entail a contractual or permitting process under federal, not state law, as it has developed for more than 100 years. Acquiring surface water offsets that result from post-1938 groundwater diversions could cost the City millions of dollars.

There is no reference to a 1938 Condition in the Compact. The Rio Grande Compact says nothing about enjoining New Mexico's post-1938 depletions below Elephant Butte Reservoir. In fact, enjoining New Mexico's depletions below Elephant Butte Reservoir based upon a 1938 Condition is the antithesis of the Rio Grande Compact. Articles III, IV, and VI of the Compact

[10] New Mexico has jurisdiction over all surface water by virtue of the Water Code of 1907. The State Engineer has jurisdiction over groundwater within "declared underground water basins" following issuance of an order "declaring" a Basin. *See Bliss v. Dority*, 1950-NMSC-066, 55 N.M. 12, 225 P.2d 1007. The Rio Grande Underground Water Basin was declared on November 29, 1956. The Basin was declared following *Texas v. New Mexico & Colorado*, 352 U.S. 991 (1957) to enable the State to secure compliance with the delivery obligations under the Rio Grande Compact. The Lower Rio Grande Underground Water Basin was declared on November 11, 1980.

provide significant flexibility in Compact operations and give the States considerable latitude in managing annual deliveries. This flexibility has provided for the municipal economies of the Middle and Lower Rio Grande. The United States' apportionment theory would produce the oppose result below Elephant Butte Reservoir. The Compact neither expressly nor impliedly enjoins New Mexico depletions below Elephant Butte Reservoir as of 1938.[11] The Court has recognized that interstate compacts are the products of careful negotiation between sovereign states and is reluctant to imply obligations or requirements that are not contained in the plain language. *See generally New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008) and *Alabama v. North Carolina*, 560 U.S. 330, 351-52 (2010). This Court said nothing about the Compact enjoining New Mexico from allowing depletions above a 1938 Condition in its 2018 opinion. *See generally Texas v. New Mexico*, 583 U.S. 407 (2018).

In 85 years of Rio Grande Compact administration, the Compacting States and the United States have never operated the Rio Grande Project or administered water users in Texas or New Mexico to hue to a 1938 hydrologic condition. As the Court stated in *Tarrant*, a "'part[y's] course of performance under the compact is highly significant' evidence of its understanding

[11] It makes no sense for New Mexico negotiators to the Compact to freeze its economy below Elephant Butte Reservoir as of 1938 as follows from the United States' arguments. This would preclude New Mexico from any increased economic activity or growth, including growth of cities.

of the compact's terms." *See Tarrant Reg'l Water District v. Herrmann*, 569 U.S. 614, 636 (2013) (quoting *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010); *see generally Udall v. Tallman*, 380 U.S. 1 (1964); *see also* Special Master's Order dated April 14, 2020, at 21 ("In any event, there are over eighty years of performance under the Compact to inform the Court as to the parties' longstanding understanding of the limits of the full extent of play in the system, the limits to which the ratio cited in the Downstream Compacts actually might define a Compact right to Project supply, and the extent to which individual state's groundwater laws must be deemed subservient to the Compact."). Moreover, as an amendment to the Art. IV provisions of the Compact, the United States is held to a burden of proof of demonstrating "substantial injury." *See Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995). In seeking to amend the apportionment provisions in Art. IV of the Compact, the United States has made no effort to satisfy its high burden of proof, which the *Nebraska* Court described as "far from insignificant." 515 U.S. at 12.

The United States fails to explain why, under its theory, there is a 1938 Condition in New Mexico but not in Texas. The Project was designed to operate as a single unit with equal treatment for irrigators in New Mexico and Texas. Just as changes in Project operations, administration, and system efficiencies in New Mexico have the potential to affect irrigators in Texas, so do such changes in Texas affect Project water users in New Mexico. The United States has ignored half of the equation. If the United States' theory that the

Compact impliedly requires adherence to a 1938 Condition that must apply equally in Texas and New Mexico, with potentially severe consequences for the City of El Paso's water supply, a significant portion of which is derived from Rio Grande Project water.

2. The D2 Baseline is Equitable and Consistent with Historical Rio Grande Project Administration.

The D2 Period incorporates the effects of New Mexico and Texas groundwater pumping during 1951-1978. The hydrologic conditions and the state of water use and groundwater development during the baseline D2 period are incorporated into the Index Obligation. Significantly, this computes to the ratio of 57% to 43% on which the Compact has been managed to supply the apportionment to the two States. *Id.* at ¶ 25. In their Reply, the Compacting States succinctly summarize the facts and applicable law, noting that the development of the D2 Baseline and its use for 40 years to make Compact deliveries was developed by the United States Bureau of Reclamation. *See* Compacting States' Joint Reply at I.3.

The D2 period incorporates and vests the effects of Las Cruces' groundwater pumping through 1978 and has been relied upon by the City in its water planning. The City concurs in the Compacting States argument on the D2 Baseline as it preserves pumping levels until 1978 and protects the City's investment and reliance

on its state permits. *See* Compacting States' Joint Reply at 26-28.

The issue of post-Decree reliance on the course of conduct of the parties was raised in *Nebraska v. Wyoming*, 507 U.S. 584 (1993), a case brought by the State of Nebraska to enforce the 1945 North Platte Decree issued in *Nebraska v. Wyoming*, 325 U.S. 589 (1945). One issue in the case concerned the Inland Lakes which consist of four off-channel reservoirs served by the Interstate Canal, which diverts from the North Platte at Whelan, Wyoming. Both the Inland Lakes and the Interstate Canal are part of the North Platte Project, a series of reservoirs and canals operated by the Bureau of Reclamation and spanning two states, *i.e.*, Wyoming and Nebraska, even as the Rio Grande Project spans the States of New Mexico and Texas. It was undisputed that since 1913 the Bureau of Reclamation had diverted water through the Interstate Canal for storage in the Inland Lakes during non-irrigation months for release to Nebraska water uses during the irrigation season. The Inland Lakes had always been operated with a December 6, 1904, priority date that Wyoming recognized for other components of the North Platte Project. However, an issue arose because the Bureau of Reclamation had never obtained separate Wyoming storage permits for the Inland Lakes.

Both Nebraska and the United States moved for summary judgment "seeking determinations that the decree entitles the Bureau to continue its longstanding diversion and storage practices and that the Inland

Lakes have a priority date of December 6, 1904." *See Nebraska v. Wyoming*, 507 U.S. 589, 594 (1993). The Special Master recommended granting the motions for summary judgment of Nebraska and the United States "[t]hat the Bureau lacks a separate Wyoming permit for the Inland Lakes . . . is immaterial because the question of the Inland Lakes' priority was determined in the original proceedings." The *Nebraska* Court reasoned that the issue had been determined in the original litigation but "even if the issue was not previously determined, we would agree with the Special Master that Wyoming's arguments are foreclosed by its post decree acquiescence." *Cf. Ohio v. Kentucky*, 410 U.S. 641, 648 (1973) ("[P]roceedings under this Court's original jurisdiction are basically equitable in nature, and a claim not technically precluded nonetheless may be foreclosed by acquiescence") (internal citations omitted) 507 U.S. at 595.[12]

In the instant case, the *Nebraska v. Wyoming* standard of post-Compact reliance on use of the D2 Baseline for Compact administration has been satisfied.

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[12] In *Washington v. Oregon*, 257 U.S. 517 (1936), the Court viewed Washington's failure to timely assert its rights as a matter of laches.

POINT II

SECTION II.D. OF THE CONSENT DECREE PROTECTS STATE ADMINISTRATION OF MUNICIPAL WATER RIGHTS

The centerpiece of the Consent Decree is the Effective El Paso Index which establishes an annual, volumetric target for New Mexico to deliver water to Texas. The Index approach described in the Consent Decree is similar to Arts. III and IV of the Compact. *See* Consent Decree at II.B-F. This is a new Index under which the annual release from Caballo Dam will be used to determine New Mexico's obligation to deliver water to Texas at the El Paso Gage (USGS 08364000), a stream gage near the New Mexico-Texas state line. The Index is comprised of two basic parts: the Index Obligation, which establishes the New Mexico annual delivery target; and the Index Delivery, which is a measurement of amount of water that New Mexico actually delivers to Texas, largely measured at the El Paso Gage. *See* Consent Decree at II.B.

The Negative Departure limits set in the Consent Decree are 150,000 acre-feet for the first 5 years, and 120,000 acre-feet thereafter. *See* Consent Decree at II.C. If New Mexico reaches 150,000 (or 120,000) acre-feet of accrued Negative Departures from the Index Obligation, it is in violation of the Consent Decree. However, the Consent Decree contains "triggers" to prevent this. The Accrued Index Departures can also be positive if New Mexico over-delivers water to Texas. *See* Consent Decree at II.D.3. The Compacting States negotiated a similar positive "trigger" of 30,000

acre-feet. If accrued Positive Departures are greater than 30,000 acre-feet for two consecutive years, Texas is required to transfer a part of its apportioned water to New Mexico over a 3-year period until the Accrued Index Departures are less than 16,000 acre-feet. The transfers move water to where it should have been.

Project operations and accounting must be consistent with the Decree and must not interfere with the Compacting States' rights and entitlements under the Decree and Compact. *See* Consent Decree at III.A. Procedures that are necessary to maintain consistency between the Consent Decree and Project operations are provided in Appendix 1 of the Consent Decree.

Measures to ensure compliance in New Mexico are set forth in Section II.D. Building on the principle that New Mexico is responsible for Compact compliance measures, *i.e.*, "New Mexico shall have discretion to determine which management actions are necessary," the Consent Decree provides New Mexico with "Triggers for Water Management Actions" "[t]o avoid excessive Accrued Index Departures. . . ." *See* Consent Decree at II.D.1. These include the obligation for New Mexico to "take water management actions to reduce the accrued Negative Departures to less than 16,000 acre-feet within three calendar years (years 1-3) following the exceedance of the Negative Departures Trigger." *See* Consent Decree at II.D.2.a.

New Mexico has exercised administration over water use in New Mexico, and will continue to do so to comply with its Compact obligations. The Water

Authority can speak directly to the past and current rigorous New Mexico State Engineer administration in the Middle Rio Grande as its groundwater rights and SJCP permits are conditioned to protect Compact deliveries. The Water Authority's groundwater permit, Permit No. RG-960, *et al.*, requires offsets for surface water depletions that result from groundwater pumping since 1963 in excess of its vested rights. Similarly, Permit No. SP-4830 is conditioned to protect native flows of the Rio Grande with respect to other New Mexico water users and to ensure Compact compliance. 11/5/2021 Trial Tr. Vol. XVI, 37-38, Doc. 701. In *Carangelo v. Albuquerque Bernalillo County Water Utility Authority*, 2014-NMCA-032, ¶¶ 78, 79, 320 P.3d 492, the New Mexico Court of Appeals affirmed that the State Engineer, and district court on appeal "fulfilled [their] duties and sufficiently analyzed the issue of the Rio Grande Compact compliance."

Similarly, Las Cruces' Consent Order in the stream system adjudication contains a provision requiring the City to maintain return flows to the Rio Grande from its LRG-430, *et al.* Adjudication Order if an annual allotment in EBID is less than two acre-feet per acre. The City's East and West Mesa permits each require offsets for any depletive effects. 11/3/2021 Trial Tr. Vol. XIV, 12-20, Doc. 701.

New Mexico is committed to satisfying its various compliance obligations under the Compact Decree. *See*, *e.g.*, Hamman Decl., New Mexico State Engineer, in Support of Joint Motion of the State of Texas, State of New Mexico, and State of Colorado for Entry of Consent

Decree, 11/14/2022, Exhibit 5, ¶ 14.d. Doc. 720. These include the commitment by State Engineer Hamman "to work with municipal water suppliers and users in the Lower Rio Grande to implement conservation measures, to maximize the benefits of regionalization, and to optimize the use of return flows and offsets to assure compliance with the Consent Decree for current and future conditions." *Ibid.*

CONCLUSION

The Albuquerque Bernalillo County Water Utility Authority and the City of Las Cruces request the Court to overrule the United States' Exception to the Third Interim Report of the Special Master in its entirety, to accept the Special Master's Third Interim Report, and to enter the Consent Decree.

Respectfully submitted this 11th day of December 2023.

JAY F. STEIN, ESQ.*
JAMES C. BROCKMANN, ESQ.
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santa Fe, NM 87504-2067
(505) 983-3880
jfstein@newmexicowaterlaw.com
**Counsel of Record for the City of Las Cruces*

LINDA A. SAMPLES, ESQ.
BRAD DOUGLAS, ESQ.
CITY OF LAS CRUCES
CITY ATTORNEY'S OFFICE
P.O. Box 20000
Las Cruces, NM 88004
(575) 541-2128
lsamples@lascruces.gov
bdouglas@lascruces.gov
Counsel for Amicus Curiae City of Las Cruces

JAMES C. BROCKMANN, ESQ.*
JAY F. STEIN, ESQ.
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santa Fe, NM 87504-2067
(505) 983-3880
jcbrockmann@
newmexicowaterlaw.com
**Counsel of Record for the Albuquerque Bernalillo County Water Utility Authority*

CHARLES W. KOLBERG, ESQ.
CHRISTOPHER P. MELENDREZ, ESQ.
ALBUQUERQUE BERNALILLO
COUNTY WATER UTILITY
AUTHORITY
P.O. Box 568
Albuquerque, NM 87103
(505) 289-3051
ckolberg@abcwua.org
cmelendrez@abcwua.org

NANN WINTER, ESQ.
STELZNER WINTER
WARBURTON FLORES
SANCHEZ DAWES, P.A.
P.O. Box 528
Albuquerque, NM 87103
(505) 938-7770
nwinter@stelznerlaw.com
Counsel for Amicus Curiae Albuquerque Bernalillo County Water Utility Authority