

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,

UNITED STATES OF AMERICA,

Intervenor.

—◆—
**On Exception To The
Third Interim Report Of The Special Master**
—◆—

**ELEPHANT BUTTE IRRIGATION
DISTRICT'S *AMICUS CURIAE* BRIEF
IN SUPPORT OF EXCEPTION AND
BRIEF FOR THE UNITED STATES**
—◆—

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**INTEREST OF ELEPHANT BUTTE
IRRIGATION DISTRICT**

The Elephant Butte Irrigation District (“EBID”)¹ respectfully submits this *amicus curiae* brief in support of the United States’ Exception to the Third Interim Report of the Special Master and Brief in Support of Exception. EBID interests are jeopardized by the proposed Consent Decree, which suggests violations of Federal Reclamation law and the Rio Grande Compact can be ignored, and further that violations of state laws recognizing the unique nature of the Rio Grande Project can also be set aside. EBID is vitally interested in pointing out the disregard for other applicable laws, especially in the context of the change in relative jurisdiction among the interests of the parties and *amici* Irrigation Districts, imposition of new duties, and what purports to be the disposition of various rights and claims of the United States and the Irrigation Districts without a full and fair opportunity to be heard. Finally, EBID has a particular interest in the proper application of the Rio Grande Compact, because the Compact was intended primarily to protect the interests of the Rio Grande Project, and only secondarily to define the interests of the States in and to the remaining, if any, waters of the Rio Grande.

When viewed in the proper historical and legal context, it is clear the proposed Consent Decree fails. The Exception of the United States should be accepted

¹ Pursuant to Rule 37.6 of this Court, EBID, as a political subdivision of the State of New Mexico, files this *amicus curiae* brief through its authorized law officer.

and the Third Interim Report, its recommendations, and the proposed Consent Decree should all be set aside. The States' joint motion to enter a consent decree should be denied.

A. History of the District and Overview of Relevant Law and Contracts

1. Elephant Butte Irrigation District

EBID is an irrigation district political subdivision duly incorporated and organized under New Mexico law. EBID is governed by a nine member board of directors, each of which is an irrigator elected from within one of nine precincts. EBID's powers, rights, and duties derive from a variety of State, Federal, and Constitutional law, all intertwined and overlapping.

Under authority provided by law, EBID is authorized to enter contracts with the United States to develop and distribute water supplies to irrigators in southern New Mexico and West Texas, and to construct, operate and maintain various facilities – canals, ditches, reservoirs, sites, water rights, rights-of-way, and other property necessary for this purpose. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16. EBID assumed all of the rights and accepted all of the duties of its predecessor organizations. New Mexico Statutes, ch. 73, Art. 10, § 73-10-45. Many of the property owners who formed the predecessor organizations, and eventually EBID, held water and real property rights

deriving from the earliest of American laws to blanket this area of the United States.

2. Early Federal Reclamation laws

Congress is specific about who may contract and control Reclamation water. Reclamation was initially only authorized to contract with water users because attempts to deal with States on water projects in the late 1800s had proved such a dismal failure.² Congress decided to fund water projects out of public land sales under the 1902 Reclamation Act because only the Federal government could afford it.³ Act of Jun. 17, 1902, ch. 1093, 32 Stat. 388.

The Fact Finders' Act of 1924 also showed that contracting with individual farmers was also a disaster. The Fact Finders' Act wrote off the repayment obligation for hundreds of thousands of acres of unproductive land within Reclamation Projects because individuals were not making their payments. Act of Dec. 5, 1924, ch. 4, 43 Stat. 701. Eventually Congress passed the Omnibus Adjustment Act of 1926, which only allowed the Secretary to contract with irrigation districts. Act of May 25, 1926, ch. 383, § 46, 44 Stat. 649.

² Congress tried financing water projects with States in the Carey Act of August 18, 1894, 28 Stat. 372. The States were too poor causing the whole attempt to fail.

³ The Legislative history for the 1902 Act describing the inability of States to "carry on this work" can be found at 35 Cong. Rec. 6676 (1902).

While the Project's first contracts were with the water users associations, Section 45 of the Omnibus Adjustment Act of 1926 authorized amendment of existing contracts to allow water districts to take over the repayment obligations. *Id.* It was not until much later in the Water Supply Act of 1958, and long after the Rio Grande Project was constructed and operating, that there was an authorization for a state to act as a repayment entity.⁴ Act of Jul. 3, 1958, 72 Stat. 319. By that time, the Rio Grande Project, the Rio Grande Compact, and New Mexico's own territorial and state law had long been settled without leaving a role in water administration within the Rio Grande Project for the State of New Mexico, beyond the role that was carved out for EBID.

3. Project construction and finance

The New Mexico portion of the Rio Grande Project ("Project") was authorized by act of Congress known as the Reclamation Act of 1902, and the Texas portion authorized by the Rio Grande Project Act of 1905. Act of Jun. 17, 1902, ch. 1093, 32 Stat. 388 and Act of Feb. 25, 1905, ch. 798, 33 Stat. 814. The purpose of the Project was to ensure a stable water supply for irrigation of lands in southern New Mexico and west Texas, and to fulfill the United States' anticipated treaty obligation to allocate a portion of the waters of the Rio Grande to the Republic of Mexico, which obligation came to

⁴ Even then, the authorization was extremely limited and inapplicable here.

fruition in 1906. See *Convention Between the United States and Mexico providing for the Equitable Distribution of Waters of the Rio Grande for Irrigation Purposes*, May 21, 1906, 34 Stat. 2953 (“1906 Treaty”).

The United States required the creation of an entity, under state law, that could contract with the United States regarding payment for construction and other Project operations costs. The entity in New Mexico that was initially responsible for contracting with the United States was the Elephant Butte Water Users’ Association (“EBWUA”), a private association of individuals owning lands in the reservoir district within what was then known as the Elephant Butte Project. EBWUA was dissolved when EBID was organized pursuant to authority of New Mexico law and, as the successor to EBWUA, EBID executed a contract with the United States on January 7, 1918. *Holguin v. Elephant Butte Irrigation District*, 575 P.2d 88, 90 (N.M. 1977).

Eventually, the Project required drains to prevent inundation and destruction of viable farmland due to the rising of the water table after controlled releases from the reservoir began. However, Reclamation refused construction of the drainage system until the EBWUA became an irrigation district. In order to provide more funds, Reclamation insisted that EBWUA be abandoned as the governing organization in favor of a public entity that had the power to levy taxes on all of the lands of the district to guarantee repayment of the construction, operation, and maintenance costs, something the water users association could not legally do. Because of the Reclamation Extension Act of 1914, the

District could act as a collection agent for repayment to the United States by irrigators. Act. of Aug. 13, 1914, ch. 247, 38 Stat. 686. Out of that requirement, EBID was created under state law. New Mexico Statutes, ch. 73, Art. 10, § 73-10-1 *et seq.* (1978).

The New Mexico Legislature created the authority of the District to levy taxes against the lands benefiting from the Project sufficient to repay the United States for construction, operation, and maintenance obligations. *Id.* The legislature further gave EBID the responsibility and authority for management and operation of the New Mexico portion of the Rio Grande Project, through cooperation with the Federal government. New Mexico Statutes, ch. 73, Art. 10, § 73-10-16 (1978). We note that under its authorizing statutes, EBID only collects assessments from irrigators who actually receive the benefit of water from the Project.

EBID collected assessments from its members and remitted those to the United States to repay the construction costs for the Project. In 1971, EBID completed repayment of its share of the construction costs for the Project and requested that the operation and maintenance of the Project be delegated to it consistent with the 1902 Act as implemented through its congressionally authorized repayment contract. After the irrigators repaid their contractual obligation to the United States, Congress, in 1992, authorized the Secretary of the Interior to transfer title to EBID of certain Project facilities consisting of water delivery and drainage systems. Act of Oct. 30, 1992, 106 Stat. 4705. In 1996, the Secretary of the Interior issued deeds that

transferred title to the facilities covered by the Act of Congress to EBID, not the State of New Mexico, just as Congress required. Thus, EBID owns and operates the Project distribution and drainage facilities in New Mexico.

EBID continues to collect assessments from its members annually for the operation and maintenance of the system. Reclamation invoices the irrigation districts annually to cover expenses associated with the Project including salaries for Federal personnel required to operate the Rio Grande Project, metering and measuring expenses associated with the Project operations and water distribution, and other expenses incidental to the Project. EBID remains contractually responsible for this annual payment to Reclamation. The EBID member assessment is also used internally within EBID to perform operation and maintenance required to ensure continued system function. EBID irrigators are the only ones in New Mexico who pay this assessment.

B. Water Administration and Distribution in the Project

1. The Rio Grande Project

The Territory of New Mexico was so anxious to obtain the benefits of the Project that it offered to reserve water for the Rio Grande Project in a 1905 territorial statute. The United States Reclamation Service gave notice to the New Mexico Territorial Engineer that the Territory should reserve from further appropriation

the waters of the Rio Grande for the development of the Rio Grande Project. *Letter from B.M.Hall, Dept. of Int. Reclamation Service Supervising Engineer, to David L. White, Territorial Engineer of New Mexico* (Jan. 23, 1906). The original notice was for the use of “a volume of water equivalent to 730,000 acre-feet per year” to be diverted from Elephant Butte Reservoir “and diversion dams below.” Notice of Intent to Appropriate, *supra*. Two years later, the United States supplemented its notice to include “all the unappropriated water of the Rio Grande and its tributaries.” *Letter from Louis C.B. Hill, Dept. of Int. Reclamation Service Supervising Engineer, to Vernon L. Sullivan, Territorial Engineer of New Mexico* (Apr. 1, 1908).

The amount of water reserved for the Project as shown by these notices was sufficient to irrigate the surveyed and authorized acreage of approximately 155,000 acres, because after EBID diverts Project water from the river and delivers it to irrigators within the district, a substantial portion of the used water is returned to the river through the drain system that was completed by the United States in 1916. *The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico and Texas, 1936-1937* (1938). The drain system was designed as part of the Project to allow used water to be returned to the river, and thus to be re-diverted and reused several times as it flows through the Project area. The cost of construction of the drains was added to the repayment charges EBID farmers had to repay. Sundry Civil Expenses

Appropriations Act of June 12, 1917, ch. 27, 40 Stat. 105 (1917).

The return flows are tributary flows originally considered in the 1908 notice, and they are a vital component of the Project because the drain flows and seepage flows are returned to the river for reuse, thus enabling the Project to (typically) divert significantly more water for irrigation use than is actually released from the storage reservoirs. Seepage and return flows are part of the Project water supply and are essential to the ability to fulfill congressional purposes of the Project. *See Ide v. United States*, 263 U.S. 497 (1924).

2. The Rio Grande Compact

The Rio Grande Compact governs “the use of the waters of the Rio Grande above Fort Quitman, Texas.” Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785. While the primary purpose of the Compact was to protect the water supply for the international and interstate Project, the Compact also apportions Rio Grande water. First it divides water between two upstream States, Colorado and New Mexico, by requiring Colorado to deliver a specified quantity of water to New Mexico. After the Colorado delivery, the quantity of water New Mexico may use north of Elephant Butte reservoir is limited by what it must deliver to the Project. Each apportionment to the upstream states is determined with an eye on what is required to be delivered to the Project at Elephant Butte Reservoir. The Compact does not apportion water to Texas, but

instead apportions water to the Project, which serves users in New Mexico, Texas, and Mexico. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 385 (D. N.M. 1983).

While it is one among many laws that protect the Rio Grande Project as the superior water user on the Rio Grande, the significance of the Rio Grande Compact is that it requires the States of Colorado and New Mexico to deliver a certain quantity of water to the Project each year based on the amount of water that passes various gauging stations. The Rio Grande Compact contains no provision for allocation of water among Project beneficiaries and, instead, those arrangements are left to the 1906 Treaty with Mexico and Project contracts.

3. 2008 Operating Agreement

The Project is administered via contracts (“the Downstream Contracts”) among the United States and the two irrigation districts; EBID in New Mexico and the El Paso County Water Improvement District No. 1 (“EP1”) in Texas. In the more than one hundred years of the Project’s existence, hundreds of contracts governing various aspects of Project operation and maintenance have been entered into among the three. The most important here is the 2008 Operating Agreement.

One consequence of the transfer of operation, maintenance, and title from the Federal government to the irrigation districts was that an operating agreement among the Project participants be developed. This was especially important since the Project

irrigation and distribution facilities, which had been operated in both States by the United States, was now going to be separately owned and operated by EBID and EP1. In addition, arrangements needed to be made to assure that the operation of the Project considered the 1906 Treaty.

The importance of the 2008 Operating Agreement cannot be overstated. The agreement established the period 1951-1978 (the “D2” period) as the baseline for allocation of water to EP1, with EBID absorbing the impacts of any shortages in divertible water from that baseline for a given level of annual release from Caballo Reservoir. It defines allocation and operating procedures to guarantee the delivery of water through the New Mexico portion of the Project to EP1 and Mexico based on the quantity of water available for diversion for a given release during the baseline period.

The Agreement does not restrict groundwater pumping in New Mexico, which was outside of EBID’s authority in entering said agreement, but it does require EBID to deliver sufficient surface water to guarantee that downstream obligations are met.

4. The Proposed Consent Decree

The proposed Consent Decree (“Decree”) index methodology uses a regression analysis to determine how much water must reach the state line based upon how much has been released from Project storage. It is assumed that the index will never be met in a way that does not produce departures from what is required to

be delivered, whether negative or positive, so departures are allowed within limits. While the index is also based upon the historical period of Rio Grande Project performance known as D2, the Decree proposes a different allocation method than the 2008 Operating Agreement. Even though the 2008 Operating Agreement and the Decree use the D2 time period as a baseline, there remain important differences between the two allocation procedures and how D2 is used.

The Decree authorizes the States to agree to a reallocation of Project supply in multiple scenarios. If EP1 carries over too much water, then negative departures by New Mexico are erased. Otherwise negative departures (or under-deliveries) “trigger” certain water management actions by New Mexico in which case New Mexico is obligated to send additional water to Texas each year in an effort to remediate the negative departures. New Mexico may accomplish this by transferring water from EBID to EP1. Both examples of water administration under the Decree are forms of reallocation of Project water.

Most notably, the reallocation procedures allow New Mexico to take water from EBID when groundwater depletions have violated the Compact by exceeding the baseline limits, without regard for who caused the depletions that caused the shortfall to Texas. In so doing, the Decree essentially enshrines New Mexico’s practice of violating the Compact by not addressing excessive water use that harms the Project, and instead, the Decree’s only mechanism for Compact compliance is the continual raiding of EBID’s allocation account.

The central issue here has always been the interference with Project supply and EBID's obligation to pay for the same whether EBID members have caused the interference or not.

Finally, the Decree commands the United States and Irrigation Districts adjust operations to comply based upon directives issued by the Rio Grande Compact Commission ("Commission"). This has been described as meaning the Downstream Contracts must come into compliance with the Compact, as dictated by the Commission. In other words, contractual rights obtained by the Irrigation Districts as part of the Project must change going forward. Specifically, the right to Project water no longer belongs exclusively to those who pay for it, it belongs to whomever and in whatever quantity the Commission dictates. Further, should the United States fail to comply with the Decree or Commission directives, it is EBID who suffers the direct harm in the form of allocation transfers to EP1.

C. Statement of EBID Interest

Throughout more than one hundred years of the Project, EBID has entered into numerous contracts with the United States and EP1. These contracts form the basis of each's rights in and to the Project, and EBID has an interest in protecting the rights derived from these contracts to ensure the future success of the Project and irrigators in southern New Mexico. EBID has an interest in ensuring contract obligations are met because EBID's compliance with contractual

obligations ensures the ability of its members to continue to access Project supply.

The Compact, and EBID's interest thereunder, are unique because, under the Compact, Texas agreed to have water delivered to it at Elephant Butte Reservoir, located approximately 100 miles north of the state border, rather than electing to receive delivery of its share of Compact water at the state line. *Elephant Butte Irrigation District v. Regents of New Mexico State University*, 849 P.2d 372, 378 (N.M. Ct. App. 1993). Because Rio Grande Compact water is converted to Project water upon delivery to Elephant Butte Reservoir, and because EBID is responsible for delivery of the New Mexico share of Rio Grande Project water to irrigators within southern New Mexico who pay for the Project and, further, because EBID is responsible for ensuring delivery of EP1 and 1906 Treaty water both physically and via contractual obligations, EBID is uniquely situated and is unlike any other party or *amici* in this case. EBID has a direct interest in the protection of Project supply.

EBID has broad authority over Project operations that does not implicate other state agencies in New Mexico. The Office of the State Engineer, the agency generally responsible for administration of use of water in New Mexico, and the agency New Mexico seeks, through the Decree, to delegate authority over the Project to, does not have the statutory or contractual authority to deal with any aspect of the Project.

The State Engineer is authorized by § 72-2-1 and other statutes to supervise the administration of water and water rights in New Mexico. *See Generally* New Mexico Statutes, ch. 72, Art. 2, § 72-2-1 *et seq.* (1978), ch. 72, Art. 5, § 72-5-1 *et seq.*, and ch. 72, Art. 12, § 72-12-1 *et seq.* He is also the Rio Grande Compact Commissioner. Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785. However, 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]⁵ 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.” New Mexico Statutes, ch. 72, Art. 2, § 72-9-4 *et seq.* (1978), *see also City of Raton v. Vermejo Conservancy District*, 101 N.M. 95, 678 P.2d 1170 (1984). That statute effectively removes the authority of the Office of the State Engineer from any dealings with Project water and is consistent with the New Mexico Enabling Act requiring deference to Federal Reclamation law for Reclamation Projects.

⁵ The Legislature logically did not exempt a Federal Reclamation project from Section 72-5-33 of the Water Code because this provision allows the initial step toward securing the water for such a project. Similarly, Section 19-7-26 deals with State lands “within areas to be irrigated from works constructed or controlled by the United States,” so the Legislature excluded it from the general exemption found in Section 72-9-4.

Case law in New Mexico has also held that EBID is the sole entity in control of project allocations. See *Brantley Farms v. Carlsbad Irr. Dist.*, 1998-NMCA-023, 954 P.2d 763. In that case, involving the only other Federal Reclamation project in New Mexico, the New Mexico Court of Appeals construed the express language in Section 73-10-24 by saying it “suggests that an irrigation district’s duty to distribute available water is discretionary rather than mandatory and therefore not subject to mandamus.” *Id.* at 770. The Court went on to say that:

“Instead, Section 73-10-24 expressly invests the Board with discretion to decide how to respond under those given facts, stating that it shall be the duty of the [B]oard of [D]irectors to distribute all available water upon certain or alternate days to different localities, as they may in their judgment think best for the interests of all parties concerned. This provision allows the Board to act as it, in the exercise of its discretion and judgment, believes best for all members of the District; it does not require the Board to automatically distribute water. . . .”

Brantley Farms v. Carlsbad Irr. Dist., 1998-NMCA-023, 954 P.2d 763, 770-71 (internal quotations omitted).

The New Mexico Legislature and Courts have long recognized the autonomy of Reclamation Projects and irrigation districts within those Projects in New Mexico. Even though this Court has determined that the Project and the “downstream contracts” are “inextricably intertwined” with the Compact, that relationship

does not create a new, or different, role for the State Engineer or the Rio Grande Compact Commission than what has historically existed. *Texas v. New Mexico*, 138 S.Ct. 954 (2018) and Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785. Similarly, nothing in the language of the Compact creates any role for either within the Project. New Mexico is not a party to any of the Downstream Contracts it now seeks to control with the proposed Decree. EBID, being the only entity that is a party to those Downstream Contracts, has an interest in protecting its statutory grant of authority and contractual rights acquired thereunder.

More than a half century ago, a Texas federal district court rejected the City of El Paso's argument that the Rio Grande water entering Texas, even though it is handled by the United States for the Project, becomes subject to the laws of Texas once it crosses into Texas.

“This Compact has a number of peculiar provisions. . . . The Compact, instead of leaving the Texas share of the water open for disposition under the general water statutes of Texas, plainly directs same for irrigation in the Project. A large part of the Project lands are in New Mexico and, consequently, this water delivered to Texas goes to irrigate not only Texas lands, but also New Mexico lands in the Project. The apparent reason for all this is that when the Compact was negotiated, the Rio Grande Project, in all of its far flung works and physical properties was, and for some time had been, superimposed on the Rio Grande and its adjoining valleys all the way

from the Elephant Butte Reservoir in New Mexico, to a point below Fabens in Texas and that fait accompli colored the whole Compact as between New Mexico and Texas. Perhaps the problem was handled in the only practicable way.

In any event, an analysis of the Compact shows convincingly that the water belonging to Texas is definitely committed to the service of the Rio Grande Project. This Compact is binding on Texas and the defendant City and, for that matter, is binding on the inhabitants and citizens of Texas.”

El Paso County Water Imp. Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 907-08 (W.D. Tex. 1955). The same is true on the New Mexico side of the state line, leaving no role for New Mexico in administration of the Project or the use of Project water. The State Engineer and the Rio Grande Compact Commission are not beneficiaries of the Project and are in no way authorized, by statute or contract, to deal with Project operations. EBID has an interest in ensuring this structure of the law is upheld to ensure its interests, and the interests of those who invested in the Project and continue to pay for all operation and maintenance of it, are protected.

EBID has an interest in ensuring the Decree is not used to the detriment of its contract and property rights. Any remedial determinations should acknowledge that EBID Project water users, though most of whom have groundwater rights, are the only water

users who have offset the effects of their groundwater pumping on the Project to date. The States' position regarding the Decree would subordinate the Project to other water rights within New Mexico under a twisted reading of Compact law while effectively ignoring all other bodies of law, including the Doctrine of Prior Appropriation. EBID has an interest in ensuring its interests are not subordinated in such a way.

Finally, EBID maintains an interest in ensuring its rights, and that the rights of the United States and EBID members in the 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 contractual and statutorily conveyed rights are directly impacted by specific provisions of the Proposed Decree in a way no others are. EBID has been singled out in a manner no other New Mexico water user has, and in a legally indefensible way. EBID is no ordinary water user and it has an interest in ensuring its rights are protected from unlawful intrusion to prevent harm to its financial and other interests in the Project.

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SUMMARY OF ARGUMENT

The Decree fails to address the crux of the case, whether junior groundwater use impacts on the Project water supply may be enjoined under the Compact, in favor of altogether turning centuries worth of law on its head. Streamflow depletion, including tributary

flow in drains, by groundwater pumping is undisputed. It is also undisputed that EBID is not the cause of the adverse depletion effects on the Project, having offset for its impacts under the 2008 Operating Agreement. The States do not properly address is who is responsible for such depletion. In ignoring the primary issue, they arrived at a Decree that interferes with the Downstream Contracts and requires EBID to surrender valid property and contractual rights in violation of law.

The Decree, in subordinating the Project to the Compact rather than recognizing the supremacy of the Downstream Contracts in setting the allocation, fails to properly account for multiple other bodies of law that protect the Project from exactly the type of intrusion complained of here. The States argue that Compact law authorize the conclusion that the States can involve themselves in the operation of the Project to effectuate allocations and transfers of water inconsistent with the Downstream Contracts, and eventually to altogether deprive one Irrigation District of its senior water right without due process. In so arguing, the States ignore all other bodies of law and legal principles that pull in the opposite direction. This is not a simple Compact law case, and other bodies of law cannot summarily be set aside.

The Compact, however, was crafted to insure the Project against upstream depletions that would adversely affect the Project's operations, in part to protect the farmers' investment necessary to reclaim this part of the West. The whole purpose of the Compact

was to protect the Project's water supply. To place the full financial burden of compliance with the Compact on EBID, while continuing to allow junior groundwater users to interfere with the Project's senior water rights is contrary to the purpose and intent of the Compact.

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 and the supremacy of Federal contractual interests. This Court must reinforce the Doctrine of Prior Appropriation and the supremacy of Reclamation law within the Rio Grande Project. The Decree causes illegal harm to the Project, and specifically EBID, therefore it must fail.

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ARGUMENT

A. The Decree Ignores the Entire Body of Law in Existence in the Lower Rio Grande for over a Century.

1. The New Mexico Enabling Act, enshrined in the New Mexico Constitution, holds early property rights inviolable.

The Project, with its interstate and international functions and existing repayment contracts and Congressional authorizations, was created when New Mexico was still a territory. Congress desired that this statutory and contractual program remain undisturbed when New Mexico became a state, thus 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”).

The necessity of preserving the undisturbed operation of Reclamation law at statehood was also due to the Treaty of Guadalupe Hidalgo, which initially set the stage for protection of land and property rights within the newly acquired territories. *Barker v. Harvey*, 181 U.S. 481 (1901). The New Mexico Constitution holds those Treaty rights inviolable. N.M. Const. Art. II, § 5. This was also recognition that if the State, through water administration, were to interfere with the Project, it may not be able to meet its financial obligations, thus, removing the State from the equation ensured the Federal interest would be preserved. The Enabling Act set the stage for a conversation much different than that which occurs within Reclamation projects anywhere else in the West.

2. The Doctrine of Prior Appropriation ensures the legal health of the West by providing a certain and reliable foundation for water rights administration that cannot be set aside at the whims of States.

As with each of the seventeen western arid States, the Doctrine of Prior Appropriation governs water

rights in New Mexico. The New Mexico Constitution sets up the 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. 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.” “Priority of appropriation” is also 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*, 162 P.3d 882 (N.M. 2007).

Part of the Project water right has already been adjudicated as the senior in the Lower Rio Grande state court adjudication case. The priority date for the United States’ interest in the Rio Grande Project is March 1, 1903. Thus, the Project has established that it holds the most “senior” water right in the Lower Rio Grande under the Doctrine of Prior Appropriation. EBID and its members’ rights have not yet been adjudicated except in the context of the Project water right. The adjudication case is stayed because of this Original Action.

Around the turn of the Century, as development was ramping up, and carrying forward to the Compact negotiations, the irrigators 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. Irrigators that joined 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. EBID’s ability, in a different forum, to protect what constitutes its senior water right is called into question by the Decree’s provisions forcing transfers of senior water rights to offset for effects caused by junior groundwater pumping.

While it is argued that EBID will not be foreclosed from presenting evidence sufficient to define and protect its rights in other fora, it remains true that the Decree will be used to show that EBID’s rights can be surrendered without its consent, without cause that would be required under other laws, and without recourse. If EBID can be deprived of its rights as provided in the Decree, a priority call to protect its rights would be meritless because the Decree sanctions other, junior, water users’ continued interference by requiring EBID to offset for all depletion effects. If a priority call is determined to be futile, no action is taken to curb junior groundwater uses, effectively eliminating

EBID's ability to protect its senior water right. Such an outcome violates the Doctrine of Prior Appropriation and introduces uncertainty in an otherwise settled area of law.

3. The express purpose and intent of the Rio Grande Compact prevent the States from imposing requirements through water administration that are inconsistent with the Project's interests.

It remains undisputed that, the Compact's purpose and intent were to protect the Project. In essence, the whole point of the Compact negotiations was to protect the Project while determining the level of acceptable upstream development. Ensuring available water supply based upon downstream irrigation demand is the center feature of the Compact. Article I defines how much water can be stored for the Project, while Articles III and IV set limits on upstream entitlements. *See Generally* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (1930). Article VII functions as a permanent call on the river to prevent storage in upstream reservoirs when the Project is otherwise in need of water, and Article VIII requires the upstream States to disgorge water to cover their debits to the Project. *Id.* All facets of the Compact were set up to ensure the Project's primacy over water along the Rio Grande.

It is worth pointing out that Article V only allows the Commission to change one specific item in the

Compact (gauging locations), and only if the change “will result in substantially the same results so far as the rights and obligations to deliver water are concerned.” *Id.* Article XII of the Compact generally restricts the Compact Commission to an accounting role, and nowhere does the Compact empower the Commission to operate or otherwise interfere with the operation of the Project. *Id.* The Consent Decree, by contrast, drastically overinflates the role of the Commission beyond that provided in the Compact. In approving the Compact, Congress never intended to allow the States to violate the Project or Downstream Contracts.

The States’ focus during Compact negotiations was on protection of delivery of supply to the Project at Elephant Butte. In other words, the States negotiated a resolution that protected the senior water supply for the Project against upstream development. Not having a need to include specific provisions to protect the Project from itself, it is entirely correct that the intent of the Compact was not expressed as a function of preventing depletions of Project supply by groundwater pumping in the local area. However, in view of the ultimate purpose and intent of the Compact, 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 and in the name of the Compact, to allow the use of Project supply by junior groundwater users who are not members of EBID and do not pay for Project benefits.

The Texas Complaint in this Original Action alleged “the [Compact], among other purposes, was entered into to protect the operation of the [Project]. The [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.” Texas Complaint, No. 141, Original, Docket No. 63, ¶ 4. The Texas Complaint reiterates that protection of the Project was a “fundamental purpose” of the Compact. *Id.*

The Special Master agreed, determining 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.” Special Master Order, No. 141, Original, Docket No. 503, P.13. He stated that “Colorado sought to develop its water resources. New Mexico sought to protect and develop its water resources between Colorado and the Reservoir. And Texas, along with interests in southern New Mexico, sought to protect the Project’s water supply.” *Id.* (*internal references omitted*). He went 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.*

The general intent to protect the Project supply found in the Compact, and the Project's supremacy under the Compact are called into question by the Decree. Instead of determining what constitutes Project supply, then seeking to protect it from depletion, the States seek to allow depletions originally complained of to continue. In so doing, the Decree places the full burden of compliance with the Compact on EBID, depriving it of valuable water and property rights, thereby reducing assessments it is able to collect, and reducing its ability to operate and maintain the Project. A solution more consistent with the Compact and the Doctrine of Prior Appropriation, would be to require New Mexico to offset for depletions on the Project water supply, after a determination of what that water supply is, using water from outside the Project. Simply granting unto itself the ability to take control of the Project allocation to enable it to take water from EBID outside of priority is inconsistent with the purpose and intent of the Compact.

B. The Decree Causes Direct Harm to EBID

Harm to EBID caused by the Decree will take two forms. First, is the loss of water that will make it more difficult for irrigators to fund operation and maintenance of the Project. Second, and equally important, is the intrusion on EBID's surface water jurisdiction and

right to contract. Both forms of harm are avoidable by proper application of the law.

1. The direct effect of New Mexico's failure to reduce depletions to Project supply is the requirement that EBID surrender additional water and suffer related negative financial considerations.

The financial failure of the Project leading to cessation of payment of operating and maintenance costs by the irrigation districts used for the upkeep of the federally owned infrastructure will necessarily impact the Federal interests. The purpose and intent of all Congressional directives related to reclamation projects, in general, then later specifically the Rio Grande Project, were intended to ensure the continued economic viability of Federal Reclamation projects. Reallocating EBID's water, thus making it unavailable to EBID, will reduce the assessments it is able to collect, jeopardizing the Federal interests Congress sought to protect.

The Decree, summarily removes EBID's control over its most valuable property right, its water, instead reallocating it not to EBID irrigators but to junior water users who do not pay for it. EBID's assessment is set up in two tiers; first is a per acre price for up to a certain amount of water, then water is sold by acre foot thereafter. In effect, within the first tier farmers will pay for a benefit they will not receive, or will pay the same amount for a reduced benefit. Then, water is less

likely to be available in the amount necessary to reach second tier sales, eliminating that income source altogether. Eventually assessments will be insufficient and the viability of the Project will cease. Reclamation's contractual obligation to deliver water to EBID on condition of payment, and the corresponding waiver of sovereign immunity for enforcement of such arrangement is rendered useless within the Project if the Decree stands. Reclamation Reform Act of Oct. 12, 1982, 96 Stat. 1261. Inability to pay for ongoing Project costs jeopardizes contractual rights and the physical ability to receive water, rendering the Project useless.

2. The Decree sets up an unnecessary jurisdictional conflict in an otherwise settled area of law.

The Decree further blurs the lines between jurisdiction of the State Engineer and of EBID under New Mexico law. In the Lower Rio Grande, the clear legal regime that has existed for over 100 years is that EBID controls the surface water, and the State Engineer controls the groundwater. Neither can take any action to overstep or harm the jurisdiction of the other. The primary difference is that the State Engineer is funded by taxpayer dollars collected throughout New Mexico, and EBID is funded solely by irrigator assessments from within its boundaries.

The Decree would ignore the express intent of Congress, who chose to give control over Project water to the Project owners, and would instead reverse

course from current and historical practice and place the right to control the Project allocation in the legal hands of the States, via the Compact Commission. Put another way, it would allow the State to take control of the EBID allocation contrary to New Mexico law and in violation of the Compact. The State Engineer, and the Compact Commission on which he sits, lack the Federal law authority to contract related to the Project, or to interfere with Project contracts. Such a change in legal jurisdiction of agencies within New Mexico is contrary to the state law regime, contrary to Federal law governing contracts within Reclamation projects, and is contrary to the Compact itself.

The issue does not turn on which method is to be used to determine the allocations, but, instead, on *who* has the authority to make allocation decisions. Similar to the Decree, the 2008 Operating Agreement obligated EBID to offset for ongoing interference with Project supply caused by groundwater pumping within New Mexico, however, the solution provided under the Decree, while in appearance may seem like that of the Operating Agreement is different. The offset mechanism in the 2008 Operating Agreement was only intended to protect EBID members, but the Decree now forces EBID to offset for all effects of groundwater depletions, not just its own irrigators'. The Decree grants to non-Project water users benefits of the Project supply they are otherwise not entitled to receive. Under Federal law, it is Reclamation and the irrigation districts that decide the rules for use of Project water. Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388.

The Decree would also amount to an end run around other pending litigation without a full and fair opportunity to reach the merits there. The proposal to subordinate the Project to the Compact found in the Decree would hand New Mexico a summary victory in other litigation in which it has improperly claimed certain rights to interfere with Project contracts. In 2011, the State of New Mexico sued the Federal government in Federal District Court in New Mexico regarding the 2008 Operating Agreement. New Mexico amended their Complaint and joined the irrigation districts (EBID and EP1) in 2012. *State of New Mexico v. United States of America, et al.*, No. CIV 11-691 JB/SMV (N.M. Dist.). New Mexico then proposed identical counter-claims in this Original Action, though they were disallowed by the Special Master.

The central issue is a challenge to the authority of the Project to contract regarding allocation procedures. New Mexico conceded that “the Irrigation Districts are parties to the 2008 Operating Agreement, which the State seeks to have declared void” and the Districts, thereby, “have an interest related to the subject of [the] action that could be impaired by the relief the State seeks.” *See State of New Mexico v. United States, et al.*, United States District Court for the District of New Mexico Case No. 1:11-CV-000691-JB-KK (Motion to Join El Paso County Water Improvement District No. 1 (EPCWID) and Elephant Butte Irrigation District (EBID) as Additional Parties/Defendants, Document 30-1, Filed 12/20/2011), citing *Enterprise Management Consultants, Inc. v. U.S.*, 883 F.2d 890, 893 (10th Cir.

1989) and *Jicarilla Apache Tribe v. Hodel*, 821 F.2d 537, 540 (10th Cir. 1978); Federal Judge James Browning agreed, *see State of New Mexico v. United States, et al.*, United States District Court for the District of New Mexico Case No. 1:11-CV-000691-JB-KK (Memorandum Opinion and Order Granting Motion to Join El Paso County Water Improvement District No. 1 (EPCWID) and Elephant Butte Irrigation District (EBID) as Additional Parties Document 30, Filed 1/24/2012).

The Decree commands that Project contracts must be modified or voided to comply with the Decree. Such a situation is not supported by other bodies of law, especially in the absence of the contracting parties who will suffer the loss of property rights along the way. The Decree effectively eliminates the need to litigate the 2011 case, ruling, instead, summarily in favor of New Mexico granting itself the right to supplant EBID's authority to contract and operate the Project.

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 contracts and property rights. EBID irrigators 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. Amend. XIV, § 1. EBID cannot be deprived of the benefits of its Congressionally approved bargain without

applying all relevant specific laws regarding the project in addition to principles of due process and equal protection.⁶ The harm complained of here is not harm to individual citizens, but harm to the rights and benefits received from the Federal government pursuant to contract and Federal law.

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CONCLUSION

When other bodies of law are properly factored into the equation, it is clear that the States are not entitled to control the Project or its supply below the reservoir, whether it is an “apportionment” to a state or not. Given that it is EBID that controls Project Supply within New Mexico under the Downstream Contracts and the legal authority granted to it by state and Federal law, it is difficult to determine how the States can require EBID to give up water allocated to it in a manner contrary to state law. EBID has a direct interest in the merits of the claims raised in this Original Action by virtue of its ownership of Project facilities, its interests in contracts governing the Project functions, and its members’ interests in the continued use of both Project supply and groundwater. The Third Interim Report of the Special Master should be rejected, the Proposed

⁶ The idea that the Compact can override Federal objectives and Federal contractual rights is also fundamentally incorrect. *See also* 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. I, § 10.

Decree should be rejected, and this case should proceed to a determination of what constitutes Project supply and who and to what extent are improperly interfering with that supply before any remedial determinations are made.

Respectfully submitted,

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