No. 220141 Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

**On Motion For Leave
To File Bill Of Complaint**

BRIEF OF *AMICUS CURIAE* EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1 IN SUPPORT OF THE STATE OF TEXAS' MOTION FOR LEAVE TO FILE COMPLAINT

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TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BRIEF FOR EL PASO COUNTY WATER IMPROVEMENT DISTRICT AS *AMICUS CURIAE*

This *amicus curiae* brief by El Paso County Water Improvement District No. 1 ("EPCWID"), a political subdivision of the State of Texas, is filed by its authorized law officer in support of the State of Texas' Motion for Leave to File Complaint ("Motion") pursuant to Supreme Court Rule 37.[1]

INTRODUCTION

Texas' Motion should be granted. Texas brings to this Court a significant, serious, and dignified dispute regarding the State of New Mexico's violations and misinterpretations of the Rio Grande Compact, an interstate water compact between Texas, New Mexico, and the State of Colorado. Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact"). The Rio Grande Compact was designed to protect the operational integrity of the Rio Grande Reclamation Project, a federal interstate reclamation project ("Rio Grande Project" or "Project"), which assures delivery

[1] Counsel of record for all parties received notice at least ten days prior to the due date of the *amicus curiae*'s intention to file this brief. EPCWID is a Texas political subdivision, equivalent to a county, *see Bennett v. Brown Cnt'y Water Improvement Dist. No. 1*, 272 S.W.2d 498, 500 (Tex. 1954); *see also Nw. Austin Mun. Utility Dist. No. 1 v. Holder*, 557 U.S. 193, 206 (2009), and therefore, pursuant to Rule 37.4 of this Court, files this brief as *amicus curiae* without seeking the consent of the parties or order of the Court.

of the water apportioned to Texas under the Rio Grande Compact. As one of two beneficiaries of the Rio Grande Project, EPCWID has a unique and vital interest in this Court's resolving the interstate dispute between Texas and New Mexico with regard to the waters of the Rio Grande. Without this Court's review of the claims raised in Texas' Complaint, New Mexico's violations and misinterpretations of the Rio Grande Compact would remain unaddressed. Absent such review, the water to which Texas is entitled will not be available to EPCWID, and EPCWID will not be able to supply water to its users, or its supplies would be drastically reduced. The water users of EPCWID include thousands of farmers, the municipalities of Canutillo, Anthony, Socorro, and Clint, Texas, and the City of El Paso, Texas, with a population of approximately 800,000 and which provides water to many public and private schools, hospitals, the University of Texas at El Paso, the Texas Tech University Medical School, and the Lower Valley Water District. Without an adequate water supply EPCWID and its users will suffer irreparable injuries and damages.

In its Complaint, Texas prays that this court:

1. Declare the rights of the State of Texas to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act;

2. Issue its Decree commanding the State of New Mexico, its officers, citizens and political subdivisions, to: (a) deliver the waters of the Rio Grande in accordance with the

> provisions of the Rio Grande Compact and the Rio Grande Project Act; and (b) cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project;
>
> 3. Award to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Texas as a result of the State of New Mexico's past and continuing violations of the Rio Grande Compact and the Rio Grande Project Act; and
>
> 4. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

Complaint, *State of Texas v. States of New Mexico and Colorado*, No. 22O141 ORG (filed Jan. 8, 2013) ("Complaint"), at pp. 15-16.

Texas alleges, in pertinent part, that New Mexico has violated and misinterpreted the Rio Grande Compact in two fundamental respects: (1) by allowing the interception and conversion of Rio Grande water in New Mexico after it has been released from Elephant Butte Dam for use by downstream users in Texas, including EPCWID, under the Rio Grande Compact, Complaint at ¶¶ 18-19; and (2) by interfering with and attempting to control the operation of the Rio Grande Project by the United States Bureau of Reclamation ("Bureau of Reclamation") in contravention of the Rio Grande Compact, the Rio Grande Project Act, and a 2008 Operating Agreement among

the United States, the Elephant Butte Irrigation District ("EBID"), and EPCWID, Complaint at ¶¶ 20-21. The Rio Grande Compact requires New Mexico to deliver specified amounts of Rio Grande water into Elephant Butte Reservoir, the primary storage reservoir for the Rio Grande Project. Rio Grande Compact, Art. IV. Upon delivery to Elephant Butte Reservoir, "that water is allocated and belongs to the 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." Complaint at ¶ 4.

The basis for the dispute – that New Mexico is depriving Texas of a water supply under an interstate compact apportioning the waters of an interstate stream – is a fundamental sovereign interest this Court has repeatedly recognized as sufficiently serious and dignified to support exercise of the Court's original jurisdiction. The interstate nature of the dispute requires that all signatory states be brought before this Court, which alone has exclusive and original jurisdiction over interstate disputes. No alternative forum exists which has jurisdiction over the three signatory states to the Rio Grande Compact and in which complete relief can be afforded regarding Texas' claims. Absent relief in this Court, EPCWID irrigators and municipal users in western Texas will continue to suffer deprivation of the water supply to which they are entitled to the great detriment of the economy of western Texas and the well-being and livelihoods of its inhabitants.

INTEREST OF THE *AMICUS CURIAE*

EPCWID is a political subdivision of the State of Texas, organized under the Texas Constitution. Tex. Const. Art. XVI, § 59. EPCWID provides water for irrigation and municipal uses (pursuant to contracts entered into, with the approval of the Secretary of Interior, in accordance with 43 U.S.C. § 521). There are 69,010 acres of lands within EPCWID which are classified as irrigable. EPCWID provides, on average, over fifty per-cent of the annual water supply of the City of El Paso from EPCWID's allocation of Rio Grande Project water. Located in a part of the United States with an average rainfall of eight inches per year, EPCWID's users are dependent on Rio Grande water apportioned to Texas, and allocated to EPCWID through the Rio Grande Project, for irrigation, crop production, and municipal uses. EPCWID was organized to "distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract." Tex. Water Code § 55.364. EPCWID is one of the two Rio Grande Project beneficiaries in the United States below Elephant Butte Dam and above Fort Quitman, Texas; the other is EBID, serving southern New Mexico water users. *See El Paso Cnty. Water Improvement Dist. No. 1 v. City of El Paso*, 133 F. Supp. 894, 914 (W.D. Tex. 1955), *aff'd as modified*, 243 F.2d 927 (5th Cir. 1957) (internal footnotes omitted) (stating EPCWID is a political subdivision of the State of

Texas, and EPCWID "is not only an arm of the State, but is fashioned to perform public service and duties of high importance to the welfare of the people of Texas").

The Rio Grande Project was authorized in 1905 for the purpose of supplying irrigation water to EBID in southern New Mexico and EPCWID in western Texas, and pursuant to international treaty, to Mexico. Act of February 25, 1905, ch. 798, 33 Stat. 814 (extending the Reclamation Act of 1902, 32 Stat. 388 (June 17, 1902) (codified as amended at 43 U.S.C. § 371, *et seq.*) ("Reclamation Act") to Texas and authorizing the construction of what is now Elephant Butte Dam to provide water for irrigation in Texas and New Mexico) ("Rio Grande Project Act"); Convention with Mexico for the Upper Rio Grande, 34 Stat. 2953 (1906). The Rio Grande Compact was designed to ensure that the Project remained viable by requiring New Mexico's Rio Grande Compact deliveries into the Project at Elephant Butte Reservoir, where the water delivered would become Project water to be allocated and delivered by the Bureau of Reclamation to the Project beneficiaries.

EPCWID's predecessor, the El Paso Valley Water Users' Association ("Association"), was created to facilitate the implementation of the Rio Grande Project in 1905, following Congressional authorization of the Project. The Association entered into contracts with the United States for repayment of construction costs associated with the Rio Grande Project, and for water supply. EPCWID was created

in 1917, through an election called by the El Paso County Commissioner's Court pursuant to Article XVI, Section 59(b) of the Texas Constitution, which provides for the creation of conservation and reclamation districts that "shall be governmental agencies and bodies politic and corporate with such powers of government and with the authority to exercise such rights, privileges and functions." The United States entered into a contract dated December 29, 1917, with EPCWID and the Association, and, thereafter, the Association was dissolved. In 1920, EPCWID merged with the El Paso County Conservation and Reclamation District No. 2, with the merged district known as EPCWID.

EPCWID is authorized to enter into contracts with the United States, Tex. Water Code § 55.185, and provides water to its users pursuant to its authority under Texas law and contracts with the Bureau of Reclamation. These contracts concern allocation, delivery, and repayment costs related to EPCWID's water from the Rio Grande Project. EPCWID has a contract with EBID, approved by the United States, dated February 16, 1938, which provides in part that 67/155th of the Rio Grande Project water is to be distributed to EPCWID, and 88/155th to EBID. In 2007, EPCWID filed a lawsuit in the Western District of Texas against EBID and the Bureau of Reclamation, seeking to enforce the obligations of the United States to allocate and deliver EPCWID's Project water. *El Paso Cnty. Water Improvement Dist. No. 1 v. Elephant Butte Irrigation*

Dist., et al., No. EP07CA0027 (W.D. Tex. 2007). EPCWID requested that the court declare the contractual obligations of the United States and compel the United States to allocate and deliver Project water in accordance with the Rio Grande Project Act and the contracts between and among EPCWID, EBID, and the United States. The litigation culminated in a settlement agreement which included an operating agreement for the Project ("2008 Operating Agreement") which establishes a method for the Bureau of Reclamation to allocate and deliver Project water released from Elephant Butte Dam. The United States currently delivers Project water to EBID, EPCWID, and Mexico in accordance with the 2008 Operating Agreement. New Mexico's violations of the Rio Grande Compact by allowing depletions of Project water in New Mexico below Elephant Butte Reservoir to which EBID, EPCWID, and Mexico are entitled, and interference with the operation of the Project by the United States has and will continue to have detrimental effects on the continued viability of the Rio Grande Project and on the 2008 Operating Agreement.

EPCWID's rights to water in the Rio Grande Project were adjudicated in a final decree in *In re: Adjudication of all Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin*, No. 2006-3291 (327th Jud. Dist. Tex., October 30, 2006). The United States (through the Bureau of Reclamation) is a joint owner with EPCWID of the water rights adjudicated

in Texas to the United States and EPCWID. The Texas Commission on Environmental Quality, on March 7, 2007, issued a Certificate of Adjudication pursuant to the final decree, authorizing EPCWID and the United States to divert, and EPCWID to use, water distributed pursuant to the Rio Grande Project ("TECQ Decree") (reprinted in the Appendix to this brief). New Mexico's noncompliance with its obligations under the Rio Grande Compact negatively impact the ability of the United States and EPCWID to receive the benefit of the rights adjudicated to them by Texas in the TECQ Decree.

EPCWID is involved in two ongoing cases in New Mexico which relate to the water supply and operation of the Rio Grande Project. EPCWID is a named defendant in the suit brought by the State of New Mexico in the United States District Court in New Mexico wherein New Mexico has attempted to void the 2008 Operating Agreement, *New Mexico v. U.S. Bureau of Reclamation, et al.*, CIV-11-691-JB/ACT (D.N.M.), and is *amicus curiae* in the New Mexico general stream adjudication in New Mexico state court, *New Mexico ex rel. N.M. State Eng'r v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888, SS-97-104 (Third Jud. Dist. Ct., N.M.). In both cases, New Mexico is attempting to undermine the Rio Grande Project and alter New Mexico's obligations under the Rio Grande Compact in the absence of Texas and Colorado. Neither case can resolve the multitude of issues relating to the Rio Grande Compact and the Rio Grande Project in the absence of the signatory states to the Compact.

EPCWID is the sole Texas governmental entity party to the 2008 Operating Agreement and joint holder of the water rights adjudicated by the decree to EPCWID and the United States for the Rio Grande waters obligated to Texas under the Rio Grande Compact. EPCWID and its constituents will be directly affected by the Court's interpretation of the rights and obligations of the parties to the Rio Grande Compact. Because of its direct and unique interest, EPCWID is acutely aware of the importance of the issues brought before this Court by Texas and the importance of resolving New Mexico's violations of the Rio Grande Compact in the only forum which can consider and resolve the full nature of the dispute.

SUMMARY OF ARGUMENT

EPCWID supports Texas' Motion for Leave to File Complaint. The Texas Complaint properly invokes the Court's original and exclusive jurisdiction under Article III, Section 2 of the United States Constitution and 28 U.S.C. § 1251(a). The claims presented, for interpretation and enforcement of the Rio Grande Compact, are serious and dignified claims asserted in Texas' sovereign capacity and which only may be heard by this Court. This Court must resolve Texas' claims to ensure the continued operation of the Rio Grande Project by the Bureau of Reclamation consistent with federal law and contracts, upon which irrigators and other residents of Texas, supplied by EPCWID, have depended for close to a century to

secure their fair share of the waters of the Rio Grande. Because this Court has original and exclusive jurisdiction of disputes between states, there is no alternative forum in which Texas can bring its claims to interpret and enforce the Rio Grande Compact against New Mexico and Colorado.

ARGUMENT

The Texas Complaint alleges a controversy which warrants the exercise of this Court's original jurisdiction. The Court has original and exclusive jurisdiction over cases and controversies between two or more States. U.S. Const. Art. III, § 2, Cl. 2; 28 U.S.C. § 1251(a). The original and exclusive jurisdiction of the Court "extends to a suit by one State to enforce its compact with another State or to declare rights under a compact." *Texas v. New Mexico*, 462 U.S. 554, 567 (1983). In determining whether to permit a complaining State to invoke the Court's original jurisdiction, the Court focuses on the "'seriousness and dignity of the claim,'" *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992) (quoting *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972)), and "the availability of an alternative forum in which the issue tendered can be resolved," *ibid.* This Court has rarely declined to exercise its original jurisdiction in interstate compact disputes or where competing rights to an interstate stream are at issue. *See Texas v. New Mexico,* 462 U.S. 554, 567-68 (1983). The claims of Texas regarding violations of the Rio Grande Compact fall squarely within the exclusive

jurisdiction of the Court. *See ibid*; *Nebraska v. Wyoming*, 325 U.S. 589 (1945); *Wyoming v. Colorado*, 298 U.S. 573 (1936); *Kansas v. Colorado*, 185 U.S. 125 (1902). Texas' Complaint plainly satisfies both the requirement that the claims be serious and dignified and that there exists no alternative forum in which such claims can be heard.

I. The Texas Complaint Asserts Serious and Dignified Claims Which are Within this Court's Original and Exclusive Jurisdiction.

"The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983); *id.* at 567 (stating that this jurisdiction includes interstate compact disputes between signatory states). "[T]he Framers . . . thought that the original jurisdiction was a necessary substitute for the powers of war and diplomacy that these sovereigns previously had relied upon." *S. Carolina v. Regan*, 465 U.S. 367, 397 (1984); *see also* The Federalist, No. 80, p. 36 (A. Hamilton) (Scott ed., 1898) (discussing the Court's original jurisdiction, and stating, "Whatever practices may have a tendency to disturb the harmony between the States, are proper objects of federal superintendence and control").

The Texas Complaint for interpretation and enforcement of the rights and obligations of signatories to the Rio Grande Compact presents a serious and dignified claim. The Complaint asserts that New Mexico has violated the Rio Grande Compact by allowing the diversion of surface waters and the interception of surface water by pumping of waters hydrologically connected to the Rio Grande, which violations have depleted and continue to deplete Rio Grande waters obligated to the State of Texas and EPCWID. Complaint at ¶¶ 18-21. The depletion of surface and underground waters by New Mexico water users within the Rio Grande Project in New Mexico have impaired, and continue to impair, the water supply of the Project and the water available to EPCWID as the downstream Project beneficiary and the rights which Texas was assured under the Rio Grande Compact. *Ibid.* at ¶¶ 18-19. The United States set aside all of the unappropriated waters in the Rio Grande in 1906 and 1908 for purposes of the Rio Grande Project, without limitation. *Ibid.* at ¶ 7. EPCWID as a Project beneficiary is entitled to its share of the United States' reservation of the water supply for the Project. As a condition to its admission to the Union in 1912, New Mexico acknowledged and accepted the permanent retention by the United States of "all rights and powers for the carrying out of the provisions" of the Reclamation Act. Enabling Act, ch. 310, 36 Stat. 557, 559 (1910). In the Rio Grande Compact, New Mexico agreed, accepted and acknowledged the existence and operation of the Project and the water supply for the Project required by the Rio

Grande Compact. Texas' Complaint seeks to enforce those sovereign commitments. Absent such enforcement, EPCWID and its users will be deprived of a vital water supply supporting irrigation and municipal uses in western Texas.

The Rio Grande Project was authorized by the Rio Grande Project Act as a federal reclamation project. Under the terms of the Rio Grande Compact, New Mexico's delivery requirements into Elephant Butte Reservoir are for the benefit of the Project. The Rio Grande Compact was entered into and designed to protect Rio Grande Project water deliveries for Texas for the purpose of providing water supply for the Project and its beneficiaries, EBID in New Mexico and EPCWID in Texas, and Mexico pursuant to treaty. Once delivered, the water belongs to the Rio Grande Project and its beneficiaries and cannot, as New Mexico has allowed, be taken back below Elephant Butte Reservoir in New Mexico through surface water diversions and diversions of underground waters hydrologically connected to Project supply. New Mexico cannot now reach below its Rio Grande Compact delivery point and abscond with water allocated to Texas under the Rio Grande Compact and to the Project beneficiaries in New Mexico and Texas by allowing non-Project depletions of Project water supply in New Mexico. Only this Court can resolve the Rio Grande Compact violations which Texas alleges in its Complaint which relate to essential sovereign interests regarding water and the Compact obligations imposed on the States as sovereigns.

Texas' claims assert substantial sovereign interests over which the Court should exercise its exclusive and original jurisdiction. *See Montana v. Wyoming*, ___ U.S. ___, ___, 131 S. Ct. 1765, 1770 (2011) (exercising jurisdiction over a complaint alleging breach of an interstate river compact by, *inter alia*, subsurface water pumping and new irrigation systems); *Kansas v. Nebraska*, 527 U.S. 1020 (1999) (having asserted original jurisdiction, granting leave to file a motion to dismiss on the question of whether the Republican River Compact restricts a State's consumption of groundwater; motion subsequently denied, 530 U.S. 1272 (2000)); *Kansas v. Colorado*, 514 U.S. 673, 690-91 (1995) (considering exceptions to the report of the special master regarding groundwater pumping claims); *Nebraska v. Wyoming*, 515 U.S. 1, 15 (1995) (accepting the recommendation of the special master to permit Nebraska to amend its complaint and assert claims related to groundwater pumping). The Rio Grande Compact and disputes among Colorado, New Mexico, and Texas regarding the waters of the Rio Grande have been the subject of prior cases over which this Court has exercised its original jurisdiction. *See Texas v. Colorado*, 389 U.S. 1000 (1967); *Texas v. New Mexico*, 343 U.S. 932 (1952); *Texas v. New Mexico*, 296 U.S. 547 (1935). The claims Texas brings before this Court similarly allege a dispute among the states of Colorado, New Mexico, and Texas as to the correct interpretation of the Rio Grande Compact and violations of the Rio Grande Compact. The Court should exercise its original

jurisdiction and grant Texas leave to file its Complaint.

Texas also alleges that New Mexico has interfered with and has attempted to impermissibly assert jurisdiction over the operations of the Rio Grande Project in violation of the rights of Texas under the Rio Grande Compact and in violation of the Rio Grande Project Act. Complaint at ¶¶ 18, 20-21. The water supply of the Rio Grande Project is inextricably related to the waters guaranteed to Texas by the Rio Grande Compact. This Court must interpret and enforce the rights of the respective states in and to the waters apportioned by the Rio Grande Compact, including the exclusive right of the United States to operate the Project for the benefit of the Project beneficiaries. Through the Reclamation Act, Congress authorized the Bureau of Reclamation to operate the Project, and the Rio Grande Compact does not provide New Mexico an operational interest in or authority over the Project.

The Project is currently operated pursuant to the terms agreed to by EPCWID, EBID, and the United States in the 2008 Operating Agreement. The 2008 Operating Agreement defines and protects the rights of EPCWID and EBID to the Project water supply. New Mexico's actions and violations of the Rio Grande Compact as set forth in Texas' Complaint undermine the rights of the Project beneficiaries under the Rio Grande Project Act and 2008 Operating Agreement and impair the ability of the United States to perform its obligations to EPCWID under

the Rio Grande Project Act and the 2008 Operating Agreement.

The Operating Agreement assumes New Mexico's compliance with its Rio Grande Compact delivery obligations, as does the TECQ Decree entered by Texas in its adjudication of EPCWID's Project water supply. New Mexico's current actions, however, are in derogation of the requirements imposed on it by the Rio Grande Compact, its contract with Texas and Colorado to govern the use by the three sister States of the Rio Grande's waters. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987) ("[A] compact when approved by Congress becomes a law of the United States, but a Compact is, after all, a contract.") (internal citations, quotation marks, and alterations omitted). The interpretation and enforcement of the Rio Grande Compact must take into account the operation of the Rio Grande Project pursuant to the 2008 Operating Agreement. "[T]he equities supporting the protection of existing economies will usually be compelling. The harm that may result from disrupting established uses is typically certain and immediate, whereas the potential benefits from a proposed diversion may be speculative and remote." *Colorado v. New Mexico*, 459 U.S. 176, 187 (1982). As described in Texas' Complaint, New Mexico's acts and conduct in failing to comply with its obligations under the Rio Grande Compact and the Rio Grande Project Act significantly impair the operation of the Rio Grande Project. Complaint at ¶¶ 24-25. In order to ensure the Rio Grande Project continues to operate as

it has for close to a century, supplying irrigators and other water users in New Mexico and Texas with their fair share of the supply of Rio Grande water, this Court must accept jurisdiction over Texas' Complaint and resolve the claims asserted therein.

II. There are No Alternative Forums in Which Texas Can Seek Relief with Regard to the Claims Asserted in its Complaint.

There are no alternative forums in which Texas' claims may be heard because this Court and only this Court has exclusive original jurisdiction. *See* The Federalist, No. 81, p. 445 (A. Hamilton) (Scott ed., 1898) ("In cases in which a State might happen to be a party, it would ill suit its dignity to be turned over to an inferior tribunal."). Neither the Rio Grande Compact Commission nor either of the ongoing litigations in New Mexico can assert jurisdiction over the relevant parties or provide complete relief to the interstate dispute Texas brings to this Court.

A. The Rio Grande Compact Commission is Not an Alternative Forum for the Claims Stated in Texas' Complaint.

The Rio Grande Compact Commission has no authority to consider the claims stated in the Texas Complaint. The Rio Grande Compact limits the Compact Commission's authority to administering the Rio Grande Compact and to collecting and maintaining data related to the administration of the Rio

Grande Compact. Rio Grande Compact, Art. XII. In a suit to adjudicate rights under the Pecos River Compact, this Court stated that "we shall not construe a compact to preclude a State from seeking judicial relief when the compact does not provide an equivalent method of vindicating the State's rights." *Texas v. New Mexico*, 462 U.S. 554, 569-70 (1983). The same rationale applies here. Moreover, any action of the Compact Commission requires unanimous consent. Rio Grande Compact, Art. XII. As set forth in Texas' Complaint, the Compact Commissioners have reached an impasse with regard to underlying issues relating to Texas' alleged violations of the Rio Grande Compact by New Mexico. Complaint at ¶ 23.

B. Federal District Court is Not an Alternative Forum for the Claims Stated in Texas' Complaint.

The suit brought by New Mexico in the United States District Court for the District of New Mexico is not an effective forum that eliminates the need for the Court to consider Texas' claims. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992) (rejecting the argument that a federal district court had jurisdiction over a boundary dispute between two states because Congress granted "'original and *exclusive* jurisdiction of all controversies between two or more States'" to the Supreme Court) (quoting 28 U.S.C. § 1251(a)). Neither Texas nor Colorado are parties to the New Mexico federal district court action. Nor could they be made parties. The federal district court in New

Mexico lacks jurisdiction over Texas or Colorado as sovereigns who have not subjected themselves to the jurisdiction of that court. The action New Mexico has brought in federal district court is simply an attempted end run around the exclusive jurisdiction of this Court. Perhaps New Mexico is concerned that its fate on the Rio Grande will be similar to that on the Pecos River where, in another original jurisdiction action, New Mexico was held liable for its upstream depletions that deprived Texas of its share of Pecos River Compact waters. *See Texas v. New Mexico*, 482 U.S. 124, 128-29, 131-32 (1936).

Any judgment entered by the federal district court in New Mexico, to the extent the issues in that case are related to the claims Texas has brought to this Court, would not be binding on Texas or Colorado with regard to their rights or obligations under the Rio Grande Compact. This is exactly why this Court has original and exclusive jurisdiction over disputes between states, in particular disputes involving interpretation and enforcement of interstate compacts. *See Mississippi v. Louisiana*, 506 U.S. 73, 77-78 (1992); *see also Maryland v. Louisiana*, 451 U.S. 725, 744 (1981) (concluding that a federal district court was an "inadequate forum" for dispute regarding state severance tax where the proceeding "necessarily would not include the [original action] plaintiff States"). Any judgment entered by the federal district court in New Mexico will not fully resolve the claims in the Texas Complaint and will not provide the certainty and protection to the water supply of

EPCWID necessary to provide the water to which its users are entitled.

C. The General Stream Adjudication in New Mexico State Court is Not an Alternative Forum for the Claims Stated in Texas' Complaint.

The ongoing general stream adjudication in New Mexico state court is not an alternative forum for Texas' claims. *See Maryland v. Louisiana*, 451 U.S. 725, 741 n.17 (1981) (noting that the plaintiff states could not be made parties to the state court litigation); *id.* at 744 (concluding an action in state court challenging a state severance tax was not a viable alternative to proceeding under the original jurisdiction of this Court because such a challenge "implicates serious and important concerns of federalism fully in accord with the purposes and reach of our original jurisdiction"). This Court has never viewed its original and exclusive jurisdiction to be obviated by a state general stream adjudication vis-à-vis an interstate compact dispute. *See Arizona v. California*, 460 U.S. 605 (1983) (apportioning waters of the Colorado River in original jurisdiction action during pendency of general stream adjudications on Colorado tributaries, *see Arizona v. San Carlos Apache Tribe of Ariz.*, 463 U.S. 545 (1983)); *see also Montana v. Wyoming*, No. 137 Orig., First Interim Report of the Special Master, 2010 WL 4111634, *15 (Feb. 10, 2010) (Special Master found that intrastate remedies did not preclude Montana from enforcing its rights under

the Yellowstone Compact which "requires Wyoming to ensure that new diversions in Wyoming do not prevent sufficient water from reaching the border to enable Montana to satisfy its pre-1950 appropriations"). Nor could such a forum be deemed to be an adequate forum for resolution of interstate stream disputes. A general stream adjudication determines individual claims to ownership of water within a stream system, *see Dugan v. Rank*, 372 U.S. 609, 618 (1963), not to resolution of disputes between states as to the apportionment of the waters of the stream pursuant to an interstate compact. The latter is a matter within the exclusive original jurisdiction of this Court. *See Texas v. New Mexico,* 462 U.S. 554, 567-68 (1983). Regardless, Texas is not a proper party to the state general stream adjudication and could not be joined to the adjudication because it has not consented to suit in that forum. Indeed, at the initial stages of the adjudication when EPCWID sought to intervene as a party to protect its rights in the Project, New Mexico objected to its intervention, claiming EPCWID owned no water rights. Although EPCWID has continued as *amicus curiae* in that proceeding, the proceeding cannot provide full relief. Furthermore, the state adjudication court is declining to provide full faith and credit to the TECQ Decree in derogation of the rights of EPCWID to its allocation of Rio Grande water supply. *Cf. Texas v. Florida*, 306 U.S. 398, 410 (1939) (holding the exercise of original jurisdiction proper to resolve claims by multiple states to tax the same estate). The state adjudication court cannot resolve the allegations of Texas that New

Mexico has violated its obligations to Texas under the Rio Grande Compact. The state court, federal district court, and the Rio Grande Compact Commission are not alternative forums in which Texas' Complaint may be heard.

CONCLUSION

Texas should be granted leave to file its Complaint. The Complaint asserts serious and dignified claims for which no alternative forum is available.

Respectfully submitted,

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March 2013

TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

[SEAL]

CERTIFICATE OF ADJUDICATION

CERTIFICATE OF ADJUDICATION NO. 23-5940

Names of Holders:
United States of America

El Paso County Water Improvement District No. 1

Address:
Bureau of Reclamation
505 Marquette NW, Suite 1313
Albuquerque, NM 87102-2162

294 Candelaria Street
El Paso, TX 79907

Priority Dates:
July 6, 1889 and January 1, 1918

Purpose:
Agricultural, Municipal, Industrial, Mining, and/or Recreational Uses

Counties:
El Paso and Hudspeth

Watercourse:
Rio Grande (above Ft. Quitman, Texas)

Watershed:
Rio Grande Basin

WHEREAS, in 1905, the United States enacted the Rio Grande Reclamation Project Act of February 25, 1905, 33 Stat. 814, authorizing the construction of storage facilities on the Rio Grande in the Territory of New Mexico for storage of water of the Rio Grande for irrigation of lands in New Mexico and Texas for the Rio Grande Reclamation Project;

WHEREAS, in 1905, the State of Texas enacted House Bill 588, 29th Legislature, Chapter 101 (as amended, now Section 11.052 of the Texas Water Code), which authorized the Secretary of the Interior to make all necessary examinations and surveys for, and to locate and construct reclamation works for irrigation purposes within the State of Texas, and to perform any and all acts necessary to carry into effect the provisions of the Reclamation Act of 1902 (38 Stat. 388, now 43 U.S.C. § 371, *et seq.*) as to such lands, subject to all the provisions, limitations, charges, terms and conditions of the said Reclamation Act;

WHEREAS, Section 8 of the Reclamation Act of 1902 (now 43 U.S.C. §§ 372 and 383) provides in part: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.";

WHEREAS, in 1906, the United States entered into the Convention with Mexico for the Rio Grande providing for the equitable distribution of water of the Rio Grande for irrigation purposes (34 Stat. 2953).

The Convention also provides that the delivery of said amount of water to Mexico shall be assured by the United States, and shall be distributed through the year in the same proportions as the water supply furnished from said irrigation system to lands in the United States in the vicinity of El Paso, Texas, and in case of extraordinary drought or serious accident to the irrigation system in the United States, the amount delivered to Mexico at the Acequia Madre shall be diminished in the same proportion as the water delivered to lands under said irrigation system in the United States. Under Article IV of such Convention, Mexico waived any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the Acequia Madre and Fort Quitman, Texas;

WHEREAS, in 1906 and 1908, pursuant to the Reclamation Act of 1902, the Reclamation Service notified the Territorial Irrigation Engineer for the Territory of New Mexico of reservations by the United States of Rio Grande water for the Rio Grande Reclamation Project in accordance with the laws of the Territory of New Mexico;

WHEREAS, in 1910, Congress approved an Act (36 Stat. 559) which enabled the people of New Mexico to form a constitution and state government and to be admitted to the Union on an equal footing with the original States. Section 2 of such Act provided in part, "that there be and are reserved to the United States, with full acquiescence of the State [New Mexico], all rights and powers for the carrying out of

the provisions by the United States of an Act of Congress entitled 'An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands' approved June seventeenth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto [43 U.S.C. § 371 *et seq.*], as to the same extent as if said State had remained a Territory";

WHEREAS, in 1911, the State of Texas adopted what is now Section 11.005, Texas Water Code, which provides as follows: "This chapter applies to the construction, maintenance, and operation of irrigation works constructed in this state under the federal reclamation act, as amended (43 U.S.C. Sec. 371 et. seq.), to the extent that this chapter is not inconsistent with the federal act or the regulations made under that act by the secretary of the interior.";

WHEREAS, the United States stores water in two reservoirs, Elephant Butte and Caballo, located in New Mexico, for use throughout the Rio Grange [sic] Reclamation Project and for delivery to Mexico. The United States releases water from such storage and supplements such released water with return flow to the Rio Grande and water in the Rio Grande from other sources, and diverts such water at a series of diversion dams on the Rio Grande in New Mexico and Texas;

WHEREAS, the United States purchased lands, canals and water rights in Texas for the construction

of the Rio Grande Reclamation Project, and such purchases included, without limitation, the Franklin Canal and the lands and water rights identified in the Loomis affidavits of 1889, later embodied in Certified Filing No. 123, using Reclamation funds which were subject to reimbursement to the United States by Rio Grande Reclamation Project water users;

WHEREAS, in 1939, the United States, Colorado, New Mexico and Texas entered into the Rio Grande Compact (53 Stat. 785; Section 41.009, Texas Water Code), which constitutes statutory law of the United States and the States of Colorado, New Mexico, and Texas and by the terms of the Compact cannot be modified without the approval of all four parties to the Compact;

WHEREAS, the United States releases stored water from Elephant Butte and Caballo Reservoirs to supply water to the Elephant Butte Irrigation District in New Mexico and the El Paso County Water Improvement District No. 1 in Texas. The first two diversion dams downstream of Caballo Dam (Percha Diversion Dam and Leasburg Diversion Dam) are used by the United States to deliver water to land in New Mexico. A substantial amount of water diverted by these two diversion dams for use in New Mexico is returned to the Rio Grande for use downstream of the dams. The next downstream diversion dam is the Mesilla Diversion Dam, which is located in New Mexico but is used to divert water to both the Elephant Butte Irrigation District and the El Paso County Water Improvement District No. 1. The

American Diversion Dam is the next diversion dam downstream on the Rio Grande. It is the first diversion dam in Texas, and divides water in the Rio Grande between Mexico and the United States. Water for Mexico is provided by the United States and delivered to Mexico at the International Diversion Dam, in the Rio Grande downstream of the American Diversion Dam. Water for the El Paso County Water Improvement District No. 1 is presently diverted by the United States into the American Canal at the American Diversion Dam, but for many years the United States diverted some of such water at the Riverside Diversion Dam, which is presently not functional but may be rebuilt in the future;

WHEREAS, approximately 2.3 miles downstream from the American Diversion Dam is the International Diversion Dam. The International Diversion Dam is used to provide and deliver 60,000 acre-feet of water per year to Mexico pursuant to the 1906 Convention, and is the only diversion location authorized by the 1906 Convention or any other treaty between the United States and Mexico for diversion of water from the Rio Grande upstream of Fort Quitman, Texas. The Riverside Diversion Dam is the last downstream diversion dam on the Rio Grande below Caballo Dam and upstream of Fort Quitman, Texas. The Riverside Diversion Dam is presently not functional but may be rebuilt in the future;

WHEREAS, the United States entered into a contract dated December 29, 1917, with the El Paso County Water Improvement District No. 1 and the El

Paso Valley Water Users' Association. Thereafter, the El Paso Valley Water Users' Association was dissolved;

WHEREAS, the El Paso County Water Improvement District No. 1 ("District") is a political subdivision of the State of Texas, organized and existing under Article XVI, Section 59 of the Texas Constitution, and is subject to Chapter 55 of the Texas Water Code and other provisions thereof. The District is authorized by statute to enter into contracts or other obligations with the United States (§ 55.185, Texas Water Code). By statute the District is required to " . . . distribute and apportion all water acquired by the district under a contract with the United States in accordance with acts of Congress, rules and regulations of the secretary of the interior, and provisions of the contract" (Section 55.364, Texas Water Code). The El Paso County Water Improvement District No. 1 includes 69,010 acres within its boundaries that are classified by the United States and the District as irrigable;

WHEREAS, in 1920, the El Paso County Water Improvement District No. 1 merged with the El Paso County Conservation and Reclamation District No. 2, with the merged districts thereafter known as the El Paso County Water Improvement District No. 1;

WHEREAS, in 1924, the United States entered into a contract (the "Warren Act Contract") with the Hudspeth County Conservation and Reclamation District No. 1 ("HCCRD"), pursuant to the Warren Act of

1911 (43 U.S.C. §§ 523-525), and the parties amended such contract in 1951. HCCRD holds Texas Permit No. 236 as amended by Permit No. 236A. Such permit authorizes HCCRD to divert water from the Rio Grande at two grade control structures, located at latitude 31.413 degrees north 106.096 degrees west in El Paso County, Texas and at latitude 31.318 degrees north and longitude 105.936 degrees west in Hudspeth County, Texas;

WHEREAS, in 1996, the United States conveyed to the El Paso County Water Improvement District No. 1 certain facilities and rights-of-way within the District's boundaries but reserved ownership of the American Canal, the American Canal Extension, and the American, International and Riverside Diversion Dams;

WHEREAS, pursuant to 43 U.S.C. § 521, which allows the Secretary of the Interior to authorize conversion of water used in the Rio Grande Reclamation Project from irrigation to other uses, the United States entered into contracts with the El Paso County Water Improvement District No. 1 and the City of El Paso in 1941, 1944, 1949, 1962, 1999, and 2001 for the supply of Rio Grande Reclamation Project irrigation water for municipal and industrial uses by the City. The United States, the El Paso County Water Improvement District No. 1, and the Lower Valley Water District entered into similar contracts in 1988 and 1999 pursuant to 43 U.S.C. § 521 as well;

WHEREAS, in 1991, the District applied for a permit and asserted in its application that without waiving any, and while still preserving all, of its legal and "equitable" rights under federal and state law, (including, without limitation, the Rio Grande Compact; the 1906 Water Convention, May 21, 1906, between the United States and Mexico; contracts between or among the El Paso County Water Improvement District No. 1 and other entities, including the United States and New Mexico or its agencies; the Reclamation Laws of the United States and those acquired in New Mexico by virtue of the reservation of water rights by the United States as provided by notices from the United States to the New Mexico Territorial Engineer in 1906 and 1908). The Texas Natural Resource Conservation Commission (the "Commission") recognized that the El Paso County Water Improvement District No. 1 had those rights to that portion of the facilities and water of the Rio Grande Reclamation Project and the Rio Grande and its tributaries which have been reserved for or appropriated by or for the benefit of the District and its predecessors and beneficial users or which otherwise have been provided to them by law, equity or contract;

WHEREAS, pursuant to such application, the Commission issued to the District Permit No. 5433;

WHEREAS, by final decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3291, In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort

Quitman, Texas) Segment of the Rio Grande Basin, dated October 30, 2006, rights were recognized authorizing the United States and the El Paso County Water Improvement District No. 1 to impound, divert, and use waters of the State of Texas as set forth below.

NOW, THEREFORE, this certificate to appropriate waters of the State of Texas in the Rio Grande Basin is issued to the United States of America and the El Paso County Water Improvement District No. 1, subject to the following terms and conditions:

1. IMPOUNDMENT AND USE

   a. Certificate Holder United States is authorized to impound 2,638,860 acre-feet of water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico

   b. Certificate Holders United States and El Paso County Water Improvement District No. 1 are authorized to divert and Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year from the following sources:

      i. all rights which Certificate Holders acquired or perfected pursuant to Certified Filing No. 123;

      ii. 67/155 of all water stored in Project Storage (as defined in the Rio Grande Compact) and legally available for release

to the Elephant Butte irrigation District and the El Paso County Water Improvement District No. 1, plus any additional share of Project Water obtained by Certificate Holders, or either of them, through allocation, purchase and/or operation rules, "Project Water" being defined as all water legally dedicated to the Rio Grande Reclamation Project;

and

iii. any waters entering Texas in the bed of the Rio Grande from New Mexico, including, but not limited to, return flows from New Mexico's use and groundwater discharged into the Rio Grande.

c. In addition to the water diverted pursuant to paragraph 1.b above, Certificate Holders are authorized to divert from the Rio Grande up to 234,022 acre-feet per year of measurable surface-water based effluent, groundwater based effluent, or groundwater discharged into the Rio Grande by the District or any other entity with whom the District has entered into legal contract for such water. "Effluent" as used in this Certificate of Adjudication means any and all water that reaches the bed of the Rio Grande from agricultural drains, sewage treatment plants, or storm water runoff.

d. in addition to the water diverted pursuant to paragraphs 1.b. and 1.c. above, Certificate Holders are authorized to divert from the Rio Grande an average of 1,899 acre-feet of

water per year, when averaged over any five-year period, from tributary inflows of the Rio Grande between the Texas/New Mexico state line and the Riverside Diversion Dam.

e. Certificate Holders are authorized to use the bed and banks of the Rio Grande to transport the water which is the subject of this Certificate of Adjudication, and to operate and maintain diversion dams and works.

2. DIVERSION POINTS

a. Certificate Holders are authorized to divert all or any part of the water authorized for diversion in paragraphs 1.b and 1.c above at the following diversion points:

i. Mesilla Diversion Dam located on the Rio Grande in New Mexico;

ii. American Diversion Dam located on the Rio Grande at the point where Texas, Mexico, and New Mexico meet; and

iii. Riverside Diversion Dam located on the Rio Grande approximately 13.5 miles downstream of the American Diversion Dam;

at a combined maximum diversion rate of 1,355 cubic feet per second.

b. Certificate Holders are authorized to divert the water authorized for diversion in paragraph 1.d above, from the American Diversion Dam and the Riverside Diversion Dam at a combined maximum diversion rate of 10 cubic feet per second.

3. PURPOSE AND PLACE OF USE

Certificate Holder El Paso County Water Improvement District No. 1 is authorized to use all of the water authorized herein for agricultural, municipal, industrial, mining, or recreational purposes and/or irrigation of a maximum of 69,010 acres of land within the District's boundaries and/or to sell any of this water surplus to the District's needs for any of the authorized purposes of use in El Paso and Hudspeth Counties.

4. SPECIAL CONDITIONS

a. This Certificate of Adjudication does not supersede any legal requirement for the protection of environmental water needs pursuant to international treaty, interstate compact, or other applicable law to which Certificate Holders are subject irrespective hereof. Nothing in this condition is intended to grant to the State of Texas any authority additional to that provided by law or to waive any right of Certificate Holders.

b. This Certificate of Adjudication is not intended to in any way compromise or diminish the volume of water which the United States is obligated to provide to Mexico on an annual basis pursuant to the terms of the Convention of May 21, 1906, between the United States and Mexico; nor does the Certificate grant to the District, for any use whatsoever, any waters to which Mexico is entitled pursuant to the above referenced 1906 Convention.

c. Nothing in this Certificate of Adjudication is intended to modify any authority of the State of Texas or the United States of America provided by law, now or in the future.

5. PRIORITY

a. The time priority for use of the water included in paragraphs 1.b. and 1.c., as referenced above, is July 6, 1889.

b. The time priority for use of the water included in paragraph 1.d., as referenced above, is January 1, 1918.

The locations of pertinent features related to this Certificate of Adjudication are shown on pages 1 through 18 of the Appendix to the Report of the Investigation of Water Rights in the Upper Rio Grande (above Fort Quitman) Segment of the Rio Grande Basin, Texas. Copies of such pages are located in the office of the Texas Commission on Environmental Quality, Austin, Texas.

This Certificate of Adjudication is issued subject to all terms, conditions and provisions in the Final Decree of the 327th Judicial District Court of El Paso County, Texas, in Cause No. 2006-3291, In Re: Adjudication of All Claims of Water Rights in the Upper Rio Grande (above Fort Quitman, Texas) Segment of the Rio Grande Basin dated October 30, 2006, and supersedes all rights of Certificates Holders asserted in that cause.

This Certificate of Adjudication is issued subject to senior and superior water rights in the Rio Grande Basin.

This Certificate of Adjudication is issued subject to the rules of the Texas Commission on Environmental Quality and its continuing right of supervision of State water resources consistent with the public policy of the State as set forth in the Texas Water Code, to the extent that such rules and supervision are not inconsistent with the federal Reclamation Act (43 U.S.C. § 371, *et seq.*) or the regulations made under that Act by the Secretary of the Interior as provided in Section 11.005 of the Texas Water Code.

TEXAS COMMISSION ON
ENVIRONMENTAL QUALITY

/s/ Kathleen H. White — 3/7/07

Kathleen Hartnett White, Chairman — Date Issued

ATTEST:

/s/ LaDonna Castanuela

LaDonna Castanuela,
Chief Clerk