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* CITY OF EL PASO, TEXAS IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

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BRIEF OF *AMICUS CURIAE* CITY OF EL PASO, TEXAS IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE BILL OF COMPLAINT

INTEREST OF *AMICUS CURIAE*[1]

The City of El Paso, Texas, with its population of almost 650,000, is the twenty-second most populous city in the United States. With its sister city, Cuidad Juárez, it is the second most populous metropolitan area on the United States-Mexico border and a center for international trade, with one of the nation's busiest free trade zones. It is home to Fort Bliss, one of the U.S. Army's largest military complexes. El Paso is also a regional education center, home of the University of Texas at El Paso and the Medical Center of the Americas, Paul L. Foster School of Medicine.

However, El Paso is located in the northern reach of the Chihuahuan Desert with less than eight inches per year of average annual rainfall. Its continued growth and prosperity depend upon having an adequate water supply, made up of groundwater and Rio Grande Project surface water.

Although El Paso has historically relied upon both surface and underground water for its sources of supply, use of groundwater from the Hueco Bolson

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[1] Under Rule 37.4, the City of El Paso is not required to file a motion for leave, and is not subject to the Rule 37.6 requirement. However, the notice of intent to file this brief, required under Rule 37.2(a), was timely provided to counsel of record.

formation increased until El Paso's use reached almost 80,000 acre-feet in 1989.[2] This raised serious questions about the long-term ability of the aquifer to support this level of pumping, causing El Paso to undertake a water management strategy that seriously promotes water conservation (per capita use in El Paso has dropped from 200 gallons per capita per day (gpcd) in 1990 to the current level of 133 gpcd), maximizes use of surface water, and increases the use of reclaimed water.[3] Additionally, El Paso Water Utilities in cooperation with Fort Bliss has constructed, developed and operates the largest inland desalination plant in the world, capable of producing 27.5 million gallons per day of potable water from underground brackish water sources.[4] These proactive strategies have allowed El Paso to cut its reliance upon the Hueco Bolson by half and reduce demand to a level that the aquifer can sustain.

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[2] The Hueco Bolson is the underground water formation located in Texas and Mexico, underlying all but the westernmost portion of the City of El Paso. Distinct from the Hueco Bolson, the Mesilla Bolson is the underground water formation located primarily in New Mexico and Mexico, with only a small portion extending into the westernmost corner of the State of Texas. The Rio Grande, as well as the Rio Grande Project in New Mexico, overlie the Mesilla Bolson before entering Texas. A map showing both formations is available on the webpage identified in footnote 3.

[3] A description of El Paso's water resources, as well as past, current and planned water use, is available at: http://www.epwu.org/water/water_resources.html.

[4] *See* http://www.epwu.org/water/desal_info.html.

The availability of surface water is critical to El Paso's current and future water supply, and El Paso's only source of surface water is the Rio Grande Project (Project). El Paso currently has contracts with the El Paso County Water Improvement District No. 1 (EPCWID) that entitle it to approximately 70,000 acre-feet of water in years when a full allotment of water is available from the Rio Grande Project. During years of partial supply, El Paso's municipal supply is reduced proportionately with EPCWID's irrigation supplies. This water supply is potentially available only during the seven-month irrigation season, which corresponds with the peak demands upon El Paso's municipal system.

El Paso's current water supply and treatment capability is roughly 130,000 acre-feet per year; actual demand on the system varies from about 115,000 acre-feet per year to 125,000 acre-feet per year. This is a conjunctive supply of both surface and groundwater. Surface water is used to the maximum extent available in order to conserve limited groundwater supplies, and can meet more than half of El Paso's annual demand. In years when surface water is limited, groundwater makes up the shortage, with El Paso's demands on the Hueco Bolson again approaching 80,000 acre-feet per year under extreme drought conditions.[5]

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[5] *See* Op. Cit.

The continued availability of surface water from the Rio Grande Project is critical to El Paso's future water supply capability, both in terms of meeting current and anticipated demands and in terms of avoiding placing additional demand on groundwater sources on which the City needs to be able to rely for long-term supply.

For this reason, actions by the State of New Mexico to increase demands on Project water in New Mexico, reducing water available to Texas users, and actions to institutionalize those increased New Mexico demands, are a cause of serious concern to El Paso and Texas. The State of Texas' Complaint, that New Mexico is violating the Rio Grande Compact by impairing delivery of Project water to Texas, presents these issues to the Court. Addressing these issues is a matter of critical importance to the almost 750,000 residents of the region that depend upon El Paso and the Rio Grande Project for their water supply.

SUMMARY OF ARGUMENT

Surface waters of the Rio Grande and the Rio Grande Project below Elephant Butte Reservoir are hydrologically connected to the Mesilla Bolson, the local underground water formation in New Mexico below Elephant Butte Reservoir. Lowering the level of underground water by pumping in New Mexico causes increased losses of surface water and diminished

deliveries of Project water to Texas. New Mexico law allows such depletions of surface water supplies by groundwater pumping, and New Mexico is currently taking steps to institutionalize and protect such groundwater pumping in New Mexico, regardless of the adverse impact that this pumping has on deliveries of water to Texas.

Texas' Complaint, arguing that the Rio Grande Compact incorporates and protects deliveries of Rio Grande Project water to Texas, presents an issue squarely within this Court's original jurisdiction. It is a reasonable and appropriate construction of the Compact that has been previously urged by the State of New Mexico. No other forum is available for the State of Texas' Complaint.

El Paso urges the Court to accept and adjudicate Texas' Complaint.

ARGUMENT

I. Background

A. Factual Background

The Rio Grande below Elephant Butte Reservoir (part of the Rio Grande Project, and located in New Mexico) is hydrologically connected to the underground water formation, the Mesilla Bolson, which underlies the irrigated acreage of the Project in New Mexico. Thus, when groundwater levels are high, the Rio Grande can be a "gaining stream," with groundwater discharges contributing to the surface water

system. Under such conditions, delivery losses of Project water are low, and drain water and return flows from irrigation are high, all contributing to downstream deliveries. Conversely, when groundwater levels are lower, as a result of pumping in New Mexico, the Rio Grande becomes a "losing stream," with surface water feeding the underground system and high losses in the delivery of Project water downstream.

Groundwater resources were thoroughly investigated as part of the Rio Grande Joint Investigation, which served as a basis for compact negotiations and was submitted to the President on December 23, 1937. *See* Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 14 NAT. RESOURCES J. 163, 170 (1974). El Paso understands that at that time the Rio Grande was a gaining stream with positive groundwater contributions. By 1983, when El Paso sought the right to drill wells in New Mexico for its own water supply, thousands of wells had been drilled in the Mesilla Bolson in New Mexico and up to 185,000 acre-feet of water per year was being withdrawn. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 387 (D.N.M. 1983). During the last 30 years, pumping in New Mexico has further increased, further diminishing underground water reserves, and resulting in greater losses from the Project and the Rio Grande to the groundwater system.

Against this backdrop, after years of litigation and years of complaining by the El Paso County Water Improvement District No. 1 (EPCWID) that

both the quality and quantity of deliveries of Project water were being harmed by excessive groundwater pumping in New Mexico, the U.S. Bureau of Reclamation (USBR), the Elephant Butte Irrigation District (EBID) in New Mexico, and EPCWID entered into the Rio Grande Project Operating Agreement (Operating Agreement) in 2008. One fundamental purpose of the Operating Agreement is to mitigate the adverse impact of groundwater pumping in New Mexico upon deliveries of Project water to Texas. As discussed below, irrigators in New Mexico who are unable to obtain a full water supply from their surface water rights are able to pump underground water to make up the shortage. In order to protect Project deliveries to EPCWID, the Operating Agreement effectively reduces the delivery of Project water to EBID by an amount needed to make up for the adverse impact of groundwater pumping on state-line deliveries of Project water to EPCWID. EBID irrigators can still make up any shortages by pumping additional groundwater and the impact of groundwater pumping on EPCWID deliveries is mitigated.

B. Legal Background

The hydrologic situation found in the Lower Rio Grande in New Mexico, with senior surface water rights being impacted by junior groundwater pumping, is not unique to the Rio Grande Project or the Lower Rio Grande. New Mexico courts have developed an equitable doctrine that allows irrigators, such as those within EBID who cannot obtain an

adequate supply of surface water, to pump groundwater to supplement their surface water rights. The *Templeton* doctrine, based upon *Templeton v. Pecos Valley Artesian Conservancy District*, 65 N.M. 59, 332 P.2d 465 (N.M. 1958), addresses the situation where junior wells intercept groundwater that previously discharged to the surface, thereby depriving the senior surface water appropriator(s) of their water rights. As recently described by the New Mexico Supreme Court:

> To address this circumstance, the Court in *Templeton* fashioned an equitable remedy to allow senior surface water appropriators, impacted by junior wells, to timely reassert their priority by drilling a supplemental well. Through this well the senior surface water right owner can supplement existing surface supply, if any, by drawing upon the groundwater that originally fed the surface water supply.

Herrington v. State, 139 N.M. 368, 133 P.3d 358, 372 (N.M. 2012) (citations omitted). Rather than protecting senior surface water rights by limiting groundwater pumping in a hydrologically connected system, New Mexico authorizes *additional* pumping by the surface water right holder to protect himself against junior groundwater pumping. Numerous irrigators within EBID have followed this pattern, developing groundwater supplies to supplement declining surface water available from the Project. Whether these wells will ultimately be determined to be new appropriations or supplemental wells under the *Templeton*

doctrine has not yet been determined. The adverse impact on deliveries to Texas, however, is the same and violates the long-standing Rio Grande Compact agreed upon by Texas, New Mexico and Colorado.

At the same time that New Mexico is allowing its residents to access underground water via the *Templeton* doctrine and new non-supplemental wells, New Mexico is taking affirmative action to cut off the Project and USBR from groundwater resources below Elephant Butte Reservoir. In the ongoing water rights adjudication proceeding in New Mexico state district court,[6] the United States sought a determination that the sources of Rio Grande Project water include both surface water and hydrologically connected groundwater. The State of New Mexico and other New Mexico parties filed motions to dismiss the claim of the United States to hydrologically connected groundwater. Even though the United States argued that such groundwater, as well as seepage and return flows of Project water, had been historically available and was needed to make deliveries of Project water to Texas and Mexico, the State's motion to dismiss claims of the United States to groundwater as a source of water for the Project was granted and the claim of the United States dismissed.[7]

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[6] *See State v. Elephant Butte Irrigation District*, No. CV-96-888, 3rd Judicial District Court, Doña Ana County.

[7] *See* Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *State v. Elephant Butte*

(Continued on following page)

Further, as noted by the State of Texas' Complaint, paragraph 20, New Mexico has initiated litigation against USBR, EPCWID and EBID to set aside the Rio Grande Project Operating Agreement. *State of New Mexico v. U.S. Bureau of Reclamation*, No. Civ. 11-691 JB/WDS (D.N.M. filed Aug. 8, 2011). If successful, this suit would remove the final impediment to New Mexico's apparent effort to make maximum use of hydrologically connected groundwater, regardless of the impact of such use on New Mexico's Rio Grande Compact obligations and deliveries of Project water to Texas.

Thus, it appears that New Mexico is taking steps to institutionalize its production of hydrologically connected groundwater from below Elephant Butte Reservoir within the Project in New Mexico, regardless of the impact that such groundwater production may have on New Mexico's Compact obligations and deliveries to Texas.

II. Argument and Authorities

That pumping of hydrologically connected groundwater can reduce state-line deliveries of surface water and cause violation of interstate surface water compacts, appropriate to invoke this Court's original jurisdiction, has been proven by New Mexico on the Pecos River. *See Texas v. New Mexico*, 462 U.S. 554,

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Irrigation Dist., No. CV-96-888, Stream System Issue SS-97-104, United States' Interest (Aug. 16, 2012).

557 (1983); *Texas v. New Mexico*, 482 U.S. 124 (1987); *see also Kansas v. Nebraska*, No. 126, Original (alleging Nebraska's violation of the Republican River Compact by allowing proliferation and use of hydrologically connected groundwater wells); *Kansas v. Colorado*, 514 U.S. 673, 693-94 (1995) (holding that groundwater pumping in Colorado had violated the Arkansas River Compact). The same thing is happening now on the Rio Grande.

El Paso agrees with the State of Texas that this dispute centers on a fundamental difference in interpretation of the plain terms of the Rio Grande Compact, and the parties' intent in executing the Compact. *Brief in Support of Motion for Leave to File Complaint* at 21. There is no doubt that this Court's jurisdiction 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. at 567; *Kansas v. Colorado*, 514 U.S. at 693-94.

Although New Mexico can be expected to argue that its responsibilities end under the Rio Grande Compact when water is delivered into Elephant Butte Reservoir, El Paso would point out that this has not always been New Mexico's position. In *City of El Paso v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983), when El Paso sought to produce and export groundwater from New Mexico for use in El Paso, New Mexico argued that the Rio Grande Compact apportioned the surface waters of the Rio Grande between the states of New

Mexico and Texas and controls the use of hydrologically related groundwater. *Id.* at 382. Further, New Mexico argued that the Rio Grande Project's division of water released from Elephant Butte Reservoir operated to apportion between Texas and New Mexico water not expressly apportioned by the Compact. *Id.* at 386. For these reasons, New Mexico asserted that El Paso could not take groundwater from New Mexico without violating the Rio Grande Compact.

The district court in *City of El Paso v. Reynolds* ruled against New Mexico's construction of the Rio Grande Compact, but its ruling does not detract from Texas' cause of action. In that case, New Mexico was arguing that the district court lacked jurisdiction because the case involved a Compact construction issue and Colorado, Texas and the United States were indispensable parties. *Id.* at 382. The district court, however, ruled that the Compact signatories were not indispensable parties and "[n]ot being parties to this action, they are not bound by the judgment herein." *Id.* Moreover, the court expressly stated:

> Contrary to defendants' contention, a decision that the compact does not apportion the river below Elephant Butte does not mean that New Mexico, having made its delivery, could undermine it by pumping down the surface flow of the river below the point of

> delivery. *This opinion does not address that issue at all.*

Id. at 386 (emphasis added). Thus, *City of El Paso v. Reynolds* shows that New Mexico has previously argued precisely the Compact construction suggested by Texas' Complaint and that the rejection of this argument by the district court presents no impediment to this Court hearing Texas' Complaint.

The two criteria identified by this Court for determining whether to grant Texas' Motion for Leave to File Complaint are fully satisfied. Enforcement of interstate water compacts is, perhaps unfortunately, becoming an increasingly frequent basis for exercising the Court's original jurisdiction. *See, e.g.*, *Montana v. Wyoming*, 131 S. Ct. 1765 (2011) (Yellowstone River Compact); *Kansas v. Nebraska*, No. 126, Original (Republican River Compact); *Kansas v. Colorado*, No. 105, Original (Arkansas River Compact). No question exists that Texas' Complaint falls squarely within the description of disputes justifying the Court's exercise of its original jurisdiction.

Similarly, no question exists regarding the availability of an alternate forum for resolution of the dispute. The Rio Grande Compact, like the Pecos River Compact, requires unanimity of the commissioners from New Mexico, Colorado and Texas for action and has proven incapable of addressing the issues presented by Texas' Complaint. The parties are at an impasse. *See* Pl.'s App. 16-18 (Compact art. XII).

Therefore, it is not a viable forum, and the only meaningful recourse is to this Court. *Cf. Texas v. New Mexico*, 462 U.S. at 562.

Neither the adjudication of Lower Rio Grande water rights in the New Mexico district court, *State v. Elephant Butte Irrigation District*, *supra* nor New Mexico's federal court suit against USBR and the irrigation districts, *State of New Mexico v. U.S. Bureau of Reclamation*, *supra*, presents a viable forum for the State of Texas' Complaint. The State of Texas is not subject to the jurisdiction of a New Mexico state court. Neither Texas nor Colorado is subject to the jurisdiction of the federal district court hearing New Mexico's claim against USBR, and the case involves entirely different issues than those presented by Texas' Complaint.

CONCLUSION

Texas' Complaint presents issues of construction and enforcement of an interstate water compact that are squarely within this Court's original jurisdiction. The water supply implications of these issues are of critical importance to regional municipal, commercial and agricultural interests, as well as the United States' military interests. Opportunities for cooperative resolution have been exhausted. This Court should grant Texas' Motion for Leave to File Complaint to

allow presentation and adjudication of the issues presented.

Respectfully submitted,

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