No. 141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

On Exceptions to the First Interim Report of the Special Master

CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF IN SUPPORT OF STATE OF NEW MEXICO'S EXCEPTIONS TO THE FIRST INTERIM REPORT OF THE SPECIAL MASTER

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

JENNIFER VEGA-BROWN, ESQ.
MARCIA B. DRIGGERS, ESQ.
CITY OF LAS CRUCES
City Attorney's Office
P.O. Box 20000
Las Cruces, NM 88004-9002

Counsel for Amicus Curiae
City of Las Cruces

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

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The City of Las Cruces ("City" or "Las Cruces") submits this *amicus curiae* brief in support of the State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support dated June 9, 2017 ("New Mexico's Brief on Exceptions to the First Interim Report"), pursuant to Sup. Ct. R. 37.4.[1] The City brings to the Court's attention issues not raised

[1] The City of Las Cruces is an incorporated New Mexico municipality. While the City can file an *amicus* brief as of right pursuant to Sup. Ct. R. 37.4 as a "city, county, town, or similar entity," it nonetheless provided notice to all parties of its intent to file an *amicus curiae* brief.

in New Mexico's Brief on Exceptions to the First Interim Report.[2]

INTEREST OF *AMICUS CURIAE*

Las Cruces is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. The City was founded in the mid-1800s, the first settlers having arrived in 1839, led by Don Jose Costales. *See Regional Planning Part VI – The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-37* at 72 (1938). The emerging community received its first water supply from the Acequia Madre de Las Cruces around 1849. Las Cruces transitioned to groundwater wells more than a century ago. Today the City is responsible for providing a potable water supply to more than 100,000 people. Las Cruces is one of the fastest growing municipalities in the western United States and its population is expected to exceed 150,000 by 2050. The City's water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin. Pursuant to state law, Las Cruces is entitled to have a forty-year water supply. *See* NMSA 1978, § 72-1-9 (1985).

[2] The City supports the Special Master's recommended denial of Elephant Butte Irrigation District's Motion to Intervene and El Paso County Water Improvement District No. 1's Motion to Intervene. *See* First Interim Report at 237-77.

Texas' Complaint alleges that the 1938 Rio Grande Compact was premised on the "understanding" that Texas bargained for a "1938 condition" of the Rio Grande that incorporated the Rio Grande Project. In Texas' view, this renders post-1938 depletions of the river Compact violations. The underlying premise of the United States' Complaint in Intervention is that groundwater in storage in the Lower Rio Grande is "Project Supply" for the Rio Grande Project, not public water of the State, thereby obligating water users in New Mexico to obtain federal contracts despite decades of exercising state-based water rights under state permits and Declarations. In recommending denial of New Mexico's Motion to Dismiss Texas' Complaint, the Special Master adopts Texas' theory that the Compact required state line deliveries under a "1938 condition." Moreover, although he recommended granting New Mexico's Motion to Dismiss the United States' Complaint in Intervention, he nonetheless recommended that the United States remain a party to pursue federal Reclamation law claims pursuant to the Court's discretionary, non-exclusive original jurisdiction pursuant to 28 U.S.C. § 1251(b)(2).

There are significant adverse consequences to Las Cruces from the Special Master's recommendations in the First Interim Report. In short, he recommends a *de facto* apportionment of the Lower Rio Grande that: 1) requires specific state line deliveries that ignore Las Cruces' historical and present water use and locks Las Cruces and New Mexico into 1938 water use conditions; 2) divests New Mexico of jurisdiction over

surface water and groundwater in the Lower Rio Grande; 3) places Las Cruces' state-based groundwater rights in jeopardy by requiring the City to obtain water supply contracts from the United States decades after its state-based rights were perfected by application to beneficial use; and 4) creates confusion as to the status of the general stream system adjudication styled *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District et al.*, No. CV-96-888 (3d Jud. Dist. filed Sept. 24, 1996), where the City's and the United States' rights are being determined.[3]

BACKGROUND

1. Rio Grande Compact.

The Rio Grande rises in the San Luis Valley in Colorado, flows southward into New Mexico, and then into Texas. The river was apportioned among the states of Colorado, New Mexico, and Texas by the Rio Grande Compact of 1938. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact" or "Compact"). Colorado is obligated to deliver a percentage of the recorded inflow at the Colorado-New

[3] If the recommendations in the First Interim Report are adopted, a 1938 condition would also apply in Texas above Ft. Quitman as well as in New Mexico; the United States would also administer all surface water and groundwater in Texas above Ft. Quitman; groundwater users above Ft. Quitman, including the City of El Paso, would have to obtain water supply contracts from the United States; and any Texas-based water rights set forth in its adjudication would be at risk of being null and void.

Mexico state line under Article III of the Rio Grande Compact. This delivery obligation is measured by a gaging station at Lobatos, Colorado, near the state line.

In New Mexico, the Rio Grande flows through the state into Elephant Butte Reservoir located approximately 100 miles north of the New Mexico-Texas state line. Article IV of the Rio Grande Compact, as amended, specifies New Mexico's delivery obligation as being into Elephant Butte Reservoir and is determined as a percentage of the inflow recorded at a gaging station at Otowi, New Mexico. The Resolution adopted at the Compact Commission meeting on February 14-16, 1949, changed New Mexico's point of delivery from San Marcial to Elephant Butte Reservoir, and revised the measurement of deliveries in Article IV.

The Rio Grande is administered as three separate stream systems in New Mexico. The Upper Rio Grande extends from the Colorado-New Mexico state line to Otowi Gage. The Middle Rio Grande is situated between the Otowi Gage and Elephant Butte Reservoir, and the Lower Rio Grande stretches from the outlet works of Elephant Butte Reservoir to the New Mexico-Texas state line.

Prior to either the Rio Grande Project or the Rio Grande Compact, Las Cruces initiated and maintained a municipal water supply for a growing city.

2. The Rio Grande Project.

Pursuant to the Reclamation Act, the United States initiated the acquisition of surface water rights for the Rio Grande Project by filing Notices of Intent to Appropriate with the New Mexico Territorial Engineer in 1906 and 1908. *See* Reclamation Act of 1902, §§ 2 and 8, 32 Stat. 388; *see also* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40. The Notices of Intent sought to reserve then-unappropriated surface waters upstream of Elephant Butte Reservoir for storage in Elephant Butte Reservoir for use in the Rio Grande Project. New Mexico's delivery obligation into Elephant Butte Reservoir is governed by Article IV of the Rio Grande Compact.

Once released from Elephant Butte Reservoir, Project surface water is allocated between Elephant Butte Irrigation District ("EBID"), located in New Mexico, and El Paso County Water Improvement District No. 1 ("EP No. 1"), located in Texas. Ever since the Rio Grande Compact has been entered, Rio Grande Project water released from Elephant Butte Reservoir has been governed and administered by a combination of contracts and state and federal law.

3. Lower Rio Grande Adjudication.

A general stream system adjudication in New Mexico is a special statutory proceeding set forth at N.M. Stat. §§ 72-4-13 through 72-4-19 (1907). An

adjudication decree filed pursuant to N.M. Stat. § 72-4-19 must declare the following:

> . . . as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority.

The Lower Rio Grande Adjudication ("LRG Adjudication") was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico. *See State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist. filed Sept. 24, 1996). The LRG Adjudication includes many claimants of surface water and groundwater rights between Elephant Butte Reservoir and the New Mexico-Texas state line, including all constituents of EBID that use surface water. All claimants to water rights within a stream system must be joined to ensure due process.

Las Cruces has a two-fold interest in the LRG Adjudication. First, the City seeks judicial recognition of its water rights to supply its municipal needs. Second, Las Cruces must be prepared to challenge *inter se* other defendants' water right claims that may infringe on the City's water use. The City's interest is only served if all water rights claimants (indispensable parties) are present and joined to a decree for post-adjudication administration.

Despite its opposition, the United States was joined to the LRG Adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its interest in the Rio Grande Project. *See Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 1993-NMCA-009, 115 N.M. 229, 849 P.2d 372; *United States v. City of Las Cruces et al.*, 289 F.3d 1170 (10th Cir. 2002). The judicial determination of the United States' Rio Grande Project rights is now complete. The LRG Adjudication Court has quantified the United States' Rio Grande Project right to store, release, and divert surface water at specified downstream points of diversion.[4] The Court determined the Rio Grande Project priority date following a two-week trial in September of 2015 and briefing and oral argument in September of 2016.

Importantly, the LRG Adjudication Court has also held that groundwater is not part of Rio Grande Project water supply.[5] The Court correctly recognized that

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[4] *See* Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District, et al.*, No. CV-96-888 (3d Jud. Dist.) filed Feb. 17, 2014.

[5] The LRG Adjudication Court held that "New Mexico law . . . controls the determination of the source or sources of water for the Project." *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 of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist.) filed Aug. 16, 2012 at 4. It found that "[t]he points of diversion constructed by the United States

the Project water supply originates upstream of Elephant Butte Reservoir based upon the United States obtaining its water rights under state law as set forth in the Reclamation Act of 1902. Combined with that holding, the LRG Adjudication Court also found that return flows and seepage are necessary to meet Project deliveries downstream of Elephant Butte Reservoir. The Court stated:

> The Project relies upon reuse of water in order to execute the Project's purposes of storing, releasing, and delivering the waters of the Rio Grande for irrigation in New Mexico and Texas and fulfill the United States' treaty obligation to Mexico. In this regard, it is a typical reclamation project. The parties do not appear to dispute that reuse of Project water is an inherent component of the Project operation, as the Project delivers an annual average of 930,000 acre-feet from an annual release of roughly 790,000 of water stored in Project reservoirs.
>
> *Ide* explains that seepage and return flows from a federal reclamation project that are captured and reused may be identified as project water:

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and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to *surface water* under New Mexico law. . . ." *Id.* at 6 (emphasis added).

> Nor is it essential to his control that the appropriator maintain continuous actual possession of such water. So long as he does not abandon it or forfeit it by failure to use, he may assert his rights. It is not necessary that he confine it upon his own land or convey it in an artificial conduit. It is requisite, of course, that he be able to identify it; but, subject to that limitation, he may conduct it through natural channels and may even commingle it or suffer it to commingle with other waters.

263 U.S. at 506 (*quoting United States v. Haga*, 276 Fed. 41, 43 (1921)). The reclamation project water at issue in *Ide* had been applied to irrigation uses and, after migrating downstream, emerged as seepage to create surface flow that was still identifiable as project water. Under New Mexico law, "[w]hen an artificial or natural flow of surface water, through percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under the provisions of [Section 72-12-1] and are subject to appropriation in accordance with applicable statutes." *Kelley v. Carlsbad Irr. Dist.*, 76 N.M. 466, 472, 415 P.2d 849, 853 (1966); *See also State ex rel. Reynolds v. King*, 63 N.M. 425, 428, 321 P.2d 200, 201 (1958).

> Determining whether Project water retain its identity as Project water is a condition-specific and technical inquiry. The scope of the adjudication, in contrast, is more limited, focusing on defining the elements of the right. NMSA 1978, § 72-4-19 (1907) (stating that an adjudication decree shall "declare, as to the water right adjudged to each party, the priority, amount, purpose, periods and place of use, and as to water used for irrigation, except as otherwise provided in this article, the specific tracts of land to which it shall be appurtenant, together with such other conditions as may be necessary to define the right and its priority"). The Court leaves the determination of whether Project water retains its identification to administrative proceedings conducted before the State Engineer.

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 of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist.) filed Aug. 16, 2012 at 6-7. The LRG Adjudication Court's analysis and ruling with respect to return flows and seepage is consistent with federal Reclamation project operations across the western United States.

The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the LRG Adjudication and EP No. 1 has been an active *amicus*

curiae, filing briefs and presenting oral arguments in that case.[6]

While a final adjudication decree will ultimately be utilized for administration of all interrelated surface water and groundwater rights in the Lower Rio Grande, the New Mexico Supreme Court has upheld the authority of the State Engineer to administer water rights without a final adjudication decree pursuant to Active Water Resource Management Regulations. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, 289 P.3d 1232.

4. First Interim Report of the Special Master.

The First Interim Report of the Special Master was issued on February 9, 2017 ("First Interim Report"). The Special Master recommended denial of New Mexico's Motion to Dismiss Texas' Complaint and the granting of New Mexico's Motion to Dismiss the United States' Complaint in Intervention. He recommended that the United States nevertheless be granted leave to participate pursuant to 28 U.S.C. § 1251(b)(2) under the Court's discretionary, non-exclusive original jurisdiction to pursue claims under federal Reclamation law, but not Compact claims. The First Interim Report adopted Texas' contention that the apportionment by the Rio Grande Compact was completed at the New Mexico-Texas state line, not 100

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[6] El Paso, supported by EP No. 1, moved twice to stay proceedings in the LRG Adjudication. Both motions were denied. The issue is now moot.

miles to the north at Elephant Butte Reservoir as expressed in Article IV of the Compact and as administered by the Rio Grande Compact Commission. The First Interim Report was prefaced by 187 pages of Compact history containing numerous extrinsic archival and secondary sources.

The State of New Mexico moved to dismiss Texas' Complaint and the United States' Complaint in Intervention on April 30, 2014. A draft report was circulated by the Special Master on July 1, 2016. More than 60 pages of comments were received, including those from the City of Las Cruces.

SUMMARY OF ARGUMENT

In recommending denial of New Mexico's Motion to Dismiss Texas' Complaint, the Special Master erred in three respects. First, he undertook independent fact finding from extrinsic evidence to reach findings and conclusions on the merits that extend far beyond a motion to dismiss. The Special Master's exhaustive research into original and secondary documents was conducted and his conclusions reached without proper participation from the parties, *viz.*, no answer, counterclaim, cross-claims, discovery, or evidence at trial. His conclusions were rendered despite the express terms of the Rio Grande Compact and Compact administration to the contrary since 1939.

Second, he failed to address precedent that Texas' claims were barred by acquiescence. *Cf. Washington v.*

Oregon, 297 U.S. 517 (1936); *Nebraska v. Wyoming*, 507 U.S. 584 (1993). Previous actions filed by Texas seeking relief relating to Rio Grande Compact interpretation and administration failed to raise the issues now raised by Texas regarding diversions below Elephant Butte Dam.

Third, with respect to the United States' Complaint in Intervention, he recommended a misapplication of 28 U.S.C. § 1251(b)(2) to keep the United States a party despite finding that the United States' Complaint does not implicate the Rio Grande Compact. The United States' claims to the Rio Grande Project have been determined in an alternative forum. This recommendation contravenes the *Colorado River* abstention doctrine and creates a conflict with the state LRG Adjudication proceedings. *See Colorado River Conservation District v. United States*, 424 U.S. 800 (1976).

Moreover, if the United States is allowed to pursue federal Reclamation claims, as recommended by the Special Master, including that parties have taken Project water without a contract, it would be a denial of due process if the affected surface and groundwater users such as Las Cruces were not a party to the litigation. If the Court accepts the Special Master's recommendation that the United States be allowed to pursue federal Reclamation claims in the Court's discretionary, non-exclusive original jurisdiction, Las Cruces and other LRG water users will have to consider intervention, because they are the real parties-in-interest against whom federal Reclamation contract claims are being asserted.

The more judicious approach is for the Court to grant New Mexico's Motion to Dismiss the United States' Complaint in Intervention.

ARGUMENT

POINT I

THE FIRST INTERIM REPORT EXCEEDS THE SCOPE OF RULE 12(b)(6) TO THE DETRIMENT OF LAS CRUCES

Under Fed. R. Civ. P. 12(b)(6): "[i]n deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the judge may take judicial notice."[7] 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[2] (3d ed. 2017); *see, e.g.*, *Yassan v. J.P. Morgan Chase & Co.*, 708 F.3d 963 (7th Cir. 2013). Typically, "once the court decides to accept 'matters outside the pleadings', the motion will be treated as one for summary judgment and disposed of as provided in Rule 56." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][a] (3d ed. 2017). The purpose of this is to ensure that "'all parties' are 'given a reasonable opportunity to present material that is pertinent,' to a Rule 56 summary judgment motion." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE § 12.34[3][b]

[7] Pursuant to Sup. Ct. Rule 17.2 for Procedure in an Original Action, "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed." *Ibid.*

(3d ed. 2017). This provides "that the court must make sure that the parties know that the court is considering rendering a summary judgment in the matter. In addition, the court must give the parties a fair opportunity, a reasonable amount of time, to assemble summary judgment affidavits and other supporting and opposing materials and present them to the court." *Id.*; *In re Rockefeller Ctr. Props. Sec. Litig.*, 184 F.3d 280, 287-89 (3d Cir. 1999); *Krijn v. Pogue Simone Real Estate Co.*, 896 F.2d 687 (2d Cir. 1990).

A significant issue has been created with New Mexico's Motions to Dismiss Texas' Complaint and the United States' Complaint in Intervention because the Special Master has *sua sponte* gone extensively beyond the pleadings to resolve the motion to dismiss. The parties were not provided notice that the Special Master was going to resolve many of the issues on the merits, *viz.*, converting the motion to dismiss into a motion for summary judgment, and therefore, did not have a reasonable opportunity to respond with their own evidence given the gravity of the Special Master's recommendations on the merits of the case. The result is a confusing procedural posture of the case beyond recommending that a sufficient claim has been stated to proceed to trial.

The Special Master conducted his own exhaustive research into primary archival materials from various archives and other document repositories and secondary sources related to the Rio Grande Compact. *See* First Interim Report at 9-187. For example, the Special Master's assistant traveled to Austin, Texas, to

collect and review "archival original source documents," and spent hundreds of hours researching and analyzing primary and secondary source materials beyond what was in the parties' pleadings.[8] The topics researched by the Special Master include evidence from the Compact negotiations, Compact negotiators' intent, and Compact administration, with documents that include law review articles and other secondary sources such as Douglas R. Littlefield's treatise entitled *Conflict on the Rio Grande: Water and the Law, 1879-1939* (Univ. of Calif. Press 2008). The historical documents include materials provided by the Special Master on a DVD and other source material cited in the Table of Authorities of the First Interim Report.

The historical research and analysis set forth in the First Interim Report went significantly beyond "background" or providing "historical context" to the Rio Grande Compact. First Interim Report at 8, 193. Instead, a review of the First Interim Report reveals that the Special Master relied on and cited his own independent research as authority in reaching decisions on the merits rather than simply determining whether Texas' Complaint states a "plausible" claim upon which relief can be granted. *Id.* at 203-17. A complaint must "state a claim to relief that is plausible on its face." *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544

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[8] *See* Special Master's petitions for fees filed with the Court. That the Special Master went to Austin, Texas, to conduct archival research, but not New Mexico or other locations, creates a question of whether the research was complete.

(2007). This applies to the factual allegations of a complaint. It requires "some minimal factual exposition sufficient to state a claim that is 'plausible on its face' in order to survive a motion to dismiss." 2 JAMES WM. MOORE, *et al.*, MOORE'S FEDERAL PRACTICE, § 12.34[1][a] (3d ed. 2017). Under Rule 12(b)(6), the Court must accept the plaintiff's factual allegation as true. *See Erickson v. Pardus*, 551 U.S. 89, 94 (2007). *See* First Interim Report at 187-237.

Pursuant to Rule 12(b)(6), the only issue before the Special Master was whether there was a plausible claim upon which relief could be granted. Compact interpretation can be governed by contract law. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987); *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951). Any ambiguities in a contract that is the subject of a claim prevent dismissal on a motion for failure to state a claim. *See Martin Marietta Corp. v. International Telecommunications Satellite Org.*, 991 F.2d 94, 97 (4th Cir. 1992) ("the construction of ambiguous contract provisions is a factual determination that precludes dismissal on a motion for failure to state a claim.").

In this case, the Special Master went far beyond what was essential to resolve New Mexico's Motions to Dismiss. Without an answer, counterclaims, cross-claims, discovery, and evidence at trial that could be marshalled and vetted by the parties, the First Interim Report went to the merits. Premature findings include that: 1) "the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte

Reservoir" (First Interim Report at 197); 2) "the equitable appointment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project; that water is not subject to appropriation or distribution under New Mexico state law" (*id.* at 211); 3) "New Mexico . . . may not divert or intercept water it is required to deliver pursuant to the 1938 Compact to Elephant Butte Reservoir after that water is released from the Reservoir by Reclamation for deliveries pursuant to the administration of the Rio Grande Project (*id.* at 213); 4) water released from Elephant Butte Reservoir "has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico" (*id.* at 213); 5) "New Mexico . . . relinquished its own rights to the water it delivers in Elephant Butte Reservoir, allocating the rights to that water instead to the Rio Grande Project to irrigation lands in Texas and lower New Mexico" (*id.* at 216); and 6) the United States can pursue "federal reclamation law claims" under the Court's discretionary, non-exclusive original jurisdiction pursuant to §1251(b)(2) based upon its allegation that all surface water and groundwater below Elephant Butte Reservoir is Project water and no one can divert surface and groundwater without a federal contract (*id.* at 231-34).

On what should have been a narrow ruling on a motion to dismiss, without taking evidence from the parties related to the history of the Rio Grande Compact, its historical operation and administration in

Colorado, New Mexico and Texas, and the states' previous actions under the Compact, including related litigation of the Rio Grande Compact, the Special Master has made extreme rulings that go to the merits that result in: 1) taking the unambiguous Article IV of the Compact which defines New Mexico's deliveries into Elephant Butte Reservoir and turning it into a state line delivery obligation based upon 1938 conditions, all of which turns on the Special Master's interpretation of "deliver"; and 2) giving the United States control over all groundwater and surface water in the Lower Rio Grande, usurping New Mexico's jurisdiction over these water resources within its borders. These conclusions significantly undermine the State's responsibility to administer, and the stakeholders' opportunity to interact with the State administration. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938).

Because the parties did not have the opportunity to review or respond to the evidence the Special Master independently collected and analyzed, including procedural protection if the evidence was taken at trial pursuant to the Federal Rules of Evidence, they have been denied due process. The Special Master should have made a narrow ruling on the Rule 12(b)(6) motions and fleshed out the evidence at trial. For these reasons, the First Interim Report should be rejected.

POINT II

THE SPECIAL MASTER FAILED TO CONSIDER TEXAS' PREVIOUS LAWSUITS ON THE RIO GRANDE

In its Complaint, Texas asserts that it entered into the Rio Grande Compact under the premise that the Rio Grande Project's allocations to Texas were recognized and protected by the Rio Grande Compact. Texas' Complaint at ¶ 11. Moreover, Texas claimed that it assumed that New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico. *Id.*

In subsequent paragraphs of the Complaint, Texas links the actual apportionment provisions of Articles III and IV to the Rio Grande Project. *See* Texas' Complaint at ¶ 12, 13.

In relevant part, ¶ 18 states:

> New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact. The Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico-Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed. New Mexico, through the actions of its officers, agents and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and

> authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico. The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas.

See Texas' Complaint at ¶ 18.

None of these paragraphs identify an amount of water that Texas claims it has been shorted. None identify the period of record over which the alleged shortfalls occurred. These issues are basic to understanding the vulnerability of New Mexico interests to Texas' allegations.

The Special Master has an exhaustive exposition of the "background" or "context" to the Compact. First Interim Report at 9-187. Importantly, it does not contain a description of the two lawsuits filed by Texas in 1951 and 1967, beyond one cursory mention of them, where Texas made allegations of injury under the Compact, but without reference to or allegations of depletions of releases below Elephant Butte Dam. Texas' putative case and the Special Master's description of background ignores the history of Compact administration and of two previous actions filed by Texas. *See Texas v. New Mexico*, No. 9, Original, 344 U.S. 906 (1952); *Texas & New Mexico v. Colorado*, No. 29, Original, 389 U.S. 1000 (1967).

Compact administration can be divided into five periods: (i) 1939-1942; (ii) 1942-1985; (iii) 1985-1995; (iv) 1995-present; and (v) 2008-present. They correspond to the following:

- The period of 1939-1942 is the period in which Compact procedures were established and the first "actual spill" occurred in 1942.
- The second period from 1942-1985 was a period in which the two upstream states of Colorado and New Mexico amassed large accrued debits. Two lawsuits were filed: (i) *Texas v. New Mexico*, No. 9, Original, in which Texas claimed Compact violations against New Mexico based on New Mexico's storage practices in El Vado Reservoir, which Texas claimed were contrary to Articles VII and VIII of the Rio Grande Compact; and (ii) *New Mexico and Texas v. Colorado*, No. 29, Original, in which New Mexico and Texas challenged Colorado's accrued debit as a violation of Article VI when it reached nearly one million acre-feet.
- The third period of record, 1985-1995, was a period in which there were actual spills of usable water in 1985, 1986, 1987, 1988, 1994 (not a spill of usable water), and 1995.
- The fourth period of record from 1995 to the present has been a period in which New Mexico has enjoyed credit status.

- The fifth period of record, which overlaps the fourth, relates to administration under the 2008 Operating Agreement in which New Mexico has received much less than 57% of the surface water than was originally allocated.

In 1951, Texas sought leave to file a Complaint in *Texas v. New Mexico*, No. 9, Original, 344 U.S. 906 (1952), Texas claimed that unless its rights under the Compact were enforced "defendants will continue to wrongfully store, divert, and use waters of the Rio Grande in violation of the rights of the State of Texas and its citizens under said Compact. . . ." Texas Complaint at ¶ X in No. 9, Original. Suit was filed when New Mexico's accrued debit reached 263,100 acre-feet on January 1, 1951. *Id.* at ¶ VI. This was based on alleged storage of water in excess of accrued debits pursuant to Art. VII of the Compact. Texas sought an injunction restraining New Mexico from storing water in El Vado Reservoir, or any other post-1929 upstream reservoir, when there was less than 400,000 acre-feet of water in project storage in Elephant Butte Reservoir, and that New Mexico and the Middle Rio Grande Conservancy District ("MRGCD") be enjoined from diverting native water when its accrued debits were more than 200,000 acre-feet. *Id.* Both Texas and New Mexico pled that New Mexico's delivery obligation was into Elephant Butte Reservoir. New Mexico pled:

> The compact provides that New Mexico make certain deliveries at the San Marcial gaging station located some 165 miles northerly from

> the Texas-New Mexico boundary. Water so delivered at the San Marcial gaging station is utilized for the satisfaction of the international obligation of the United States to deliver water at Juarez, Mexico, and to satisfy contract obligations of the United States Bureau of Reclamation to deliver water for the irrigation of some 86,000 acres of land in the Elephant Butte Irrigation District in New Mexico and the irrigation of some 64,000 acres of land in El Paso County Water Improvement District No. 1 in Texas. The obligation of New Mexico to deliver and the right of Texas to receive water at the Texas-New Mexico boundary line has never been defined in any way.

See New Mexico Answer at ¶ 3. Texas alleged that "[t]he supply of water required by the Compact to be delivered by New Mexico into Elephant Butte Reservoir . . . has been seriously diminished. . . ." Texas' Complaint in No. 9, Original, at ¶ VII.

The case was dismissed because of the failure of Texas to join the United States as an indispensable party given its fiduciary obligation to New Mexico tribal communities on the Middle Rio Grande with storage rights in El Vado Reservoir. *See Texas v. New Mexico*, 352 U.S. 991 (1957).

Significantly, Texas made no claim as to the depletion of releases below Elephant Butte Reservoir in that case. No parties were placed on notice that Texas suffered injury by diversions below Elephant Butte Reservoir in the 1948-1951 period of record, and therefore

Las Cruces' development of its well field north of the New Mexico-Texas state line continued through the state process.

Dismissal of *Texas v. New Mexico*, No. 9, Original, was followed by years of accounting debits by New Mexico and Colorado. In 1967, after Colorado's accrued debit had reached 939,900 acre-feet (New Mexico's accrued debit in 1965 was 420,000 acre-feet), Texas, joined by New Mexico, filed suit against Colorado. Colorado's Counterclaim referenced Elephant Butte Reservoir as the point where New Mexico's delivery obligation was established. *See* Colorado Counterclaim in No. 29, Original, ¶ IV.

On April 17, 1969, the states signed a Joint Motion for Continuance. On April 19, the United States filed a Motion for Relief seeking leave for the United States to intervene.

On July 2, 1985, the Rio Grande Compact Commission determined that "pursuant to the May 13, 1985 agreement an actual spill of usable water, as defined by Article I of the Rio Grande Compact, had occurred on June 13, 1985, and that all previously accrued water debits of Colorado and New Mexico were cancelled." Accordingly, the three states moved to dismiss the 1969 case. No allegations were made with respect to depletions of releases from Elephant Butte Reservoir. The City continued development of its well field.[9]

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[9] *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379 (D.N.M. 1983) construed the Rio Grande Compact to

Having pled causes of action under the Rio Grande Compact twice, omitting any allegations of depletions below Elephant Butte Reservoir, Texas is barred by acquiesence from relitigating issues which could have been pled in No. 9, Original, or No. 29, Original, and imposing injunctions on the river which limit Las Cruces' groundwater rights. Texas has acquiesced in the development of the City well field.

Supreme Court precedent in *Washington v. Oregon*, 297 U.S. 517 (1936), provides authority on laches in interstate law. In *Washington v. Oregon*, the division of the interstate waters of the Walla Walla River between Oregon and Washington was affected by a protracted period of non-use, and delay in building infrastructure by Gardena Farms in Washington, an irrigation district in that state. A principle extracted by the Court was that enjoining possessory interests that had been enjoyed for half a century created an unpassable burden of proof on the plaintiff.

A similar issue was raised in *Nebraska v. Wyoming*, 507 U.S. 584 (1993). That case was an original action brought by the State of Nebraska to enforce the 1945 North Platte Decree issued in *Nebraska v. Wyoming*, 325 U.S. 665 (1945). An issue in the case concerned the Inland Lakes which consist of four-off channel reservoirs served by the Interstate Canal, which diverts from the North Platte River at Whelan,

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"not apportion any specified amount of water to Texas below Elephant Butte" and require New Mexico's deliveries at Elephant Butte Reservoir, not the state line. 563 at 385.

Wyoming. Both the Inland Lakes and the Interstate Canal are part of the North Platte Project, a series of reservoirs and canals operated by the Bureau of Reclamation and spanning two states, *i.e.*, Wyoming and Nebraska, even as the Rio Grande Project spans the states of New Mexico and Texas. It was undisputed that since 1913 the Bureau of Reclamation had diverted water through the Interstate Canal for storage in the Inland Lakes during non irrigation months for release to Nebraska water uses during the irrigation season. The Inland Lakes had always been operated with a December 6, 1904, priority date that Wyoming recognized for other components of the North Platte Project. However, an issue arose because the Bureau of Reclamation had never obtained separate Wyoming storage permits for the Inland Lakes.

In that original action, Nebraska and the United States moved for summary judgment "seeking determinations that the decree entitles the Bureau to continue its longstanding diversion and storage practices and that the Inland Lakes have a priority date of December 6, 1904." *See Nebraska v. Wyoming*, 507 U.S. 589, 594 (1993). The Special Master recommended granting the motions for summary judgment of Nebraska and the United States ruling "[t]hat the Bureau lacks a separate Wyoming permit for the Inland Lakes . . . is immaterial because the question of the Inland Lakes' priority was determined in the original proceedings." *Id.* at 594. The Court also reasoned that "even if the issue was not previously determined, we would

agree with the Special Master that Wyoming's arguments are foreclosed by its post decree acquiescence." *Cf. Ohio v. Kentucky*, 410 U.S. 641, 648 (1973) ("[P]roceedings under this Court's original jurisdiction are basically equitable in nature, and a claim not technically precluded nonetheless may be foreclosed by acquiescence") (citations omitted)) 507 U.S. at 595.

In the instant case, the *Nebraska v. Wyoming* criterion of a previous determination of the issue has been satisfied.

POINT III

THE SPECIAL MASTER'S RECOMMENDATION THAT THE UNITED STATES PARTICIPATE PURSUANT TO 28 U.S.C. § 1251(b)(2) CREATES A CONFLICT WITH THE STREAM SYSTEM ADJUDICATION

The state adjudication is critical because the Special Master misinterprets *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The Special Master suggests that because the Rio Grande Project is the vehicle by which the states agreed upon an interstate allocation of water as between them, it somehow cloaks those water rights with a special status that removes them from state jurisdiction or administration, including priority enforcement. *See* First Interim Report at 211-17. *Hinderlider* does not stand for the proposition that a corpus of water that is the subject on an interstate compact or an equitable appointment is not subject to state jurisdiction

or administration. Instead, that case stands for the proposition that a state court decree cannot confer a right in the waters of an interstate stream in excess of the state's equitable share. *Hinderlider*, 304 U.S. at 102. In other words, while each upstream state to an interstate water compact or equitable apportionment has an obligation to provide water to the downstream state, how it complies with that interstate obligation is entirely within the upstream state's discretion. The upstream state does not lose jurisdiction over some subset of its appropriators who obtained their water rights under state law simply because of the existence of an interstate compact or equitable apportionment. Accordingly, because New Mexico is charged with meeting its interstate water obligations to Texas under the Rio Grande Compact, it is essential for New Mexico to complete its LRG Adjudication so it can administer intrastate water rights among all its water users to comply with the Compact.

Accordingly, the Special Master's treatment of the United States creates a practical problem for stakeholders like Las Cruces who are engaged in the LRG Adjudication to quantify their water rights. The adjudication pending in state court serves to determine the rights of stakeholders in the Lower Rio Grande. *See* NMSA 1978, § 72-4-13 *et seq.* (1907). It also provides for *inter se* challenges among defendants. The "removal" of the federal claims to the Supreme Court under 28 U.S.C. § 1251(b)(2) excludes the stakeholders, and leaves the adjudication of the United States' interest, which is now complete, in question.

The Special Master recommended granting New Mexico's Motion to Dismiss the United States' Complaint in Intervention on the grounds that the United States did not assert "violations [which] have the effect of undermining [its own] apportionment [of water]." First Interim Report at 231. The Special Master found that "[t]he 1938 Compact apportions no water to the United States; therefore, the United States cannot state a claim under the Compact against New Mexico." *Id.*

The United States' Complaint in Intervention at ¶ 13 alleged that "New Mexico has allowed the diversion of surface and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir by water users who either do not have contracts with the Secretary [of the Interior] or are using water in excess of contracted amounts." *Id.* at 217. The Special Master characterized the United States' Complaint as seeking "declaratory and injunctive relief, asking the Court: (i) to declare that New Mexico, as a party to the 1938 Compact, may not permit parties not in privity with the Bureau of Reclamation, as well as Rio Grande Project beneficiaries in New Mexico, to interrupt or interfere with delivery of water from the Rio Grande Project; and (ii) to enjoin New Mexico from permitting such interception and interference." *Id.* at 218. The United States' Complaint in Intervention effectively asserts a claim to the groundwater in storage in the Lower Rio Grande.

The Special Master recommended that "[d]espite the fact that the United States is prohibited as a

non-signatory to the 1938 Compact from asserting claims under that compact, it nevertheless has stated a plausible claim against New Mexico under federal reclamation law:. . . ." *Id.* at 231. Having found that because the United States has not stated a cause of action under the Rio Grande Compact "its claims cannot be properly resolved by the Supreme Court pursuant to its original and exclusive jurisdiction, which is reserved for resolution of 'controversies between two or more states.' 28 U.S.C. § 1251(a)." *Id.* at 232-33. He recommended the Court exercise its non-exclusive original jurisdiction under 28 U.S.C. § 1251(b)(2). His basis for doing so is that the United States' interest involves "more than 'competing claims to water within a single State,' over which the Court has expressed reluctance to exercise its original jurisdiction," citing *United States v. Nevada and California*, 412 U.S. 534, 538 (1973). *Id.* at 235.

However, the United States' "Project claims" have been presented and determined in *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3d Jud. Dist. filed Sept. 24, 1996). This includes its claim to groundwater, amount of water, purpose and place of use, and priority date. Having been properly joined to the State court proceedings by the McCarran Amendment, the determination of the United States' interest is factual and binding. *See United States v. City of Las Cruces et al.*, 289 F.3d 1170 (10th Cir. 2002). The Special Master's recommendation creates the problem of relitigating the issues already determined in state court without the participation by

other water users like Las Cruces. In such circumstances, the Court has frequently abstained.

In *Colorado River Water Conservation District v. United States*, 424 U.S. 800 (1976), the Supreme Court recognized that despite the "virtually unflagging obligation" of the federal courts to exercise jurisdiction vested by the Congress, the federal courts should defer to concurrent state court proceedings if certain criteria are satisfied. 424 U.S. at 817. Indeed, the general proposition that a federal court has a virtually unflagging obligation to exercise its federal jurisdiction, "gives substantially less guidance to the court in water rights litigation than might otherwise be the case because a water rights adjudication is a 'virtually unique type of proceeding' and the McCarran Amendment is a 'virtually unique federal statute.'" *United States v. Bluewater-Toltec Irr. Dist.*, 580 F.Supp. 1434, 1443 (10th Cir. 1984) (citing *Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 571 (1983)).

In *Colorado River*, the United States brought suit in federal district court against some 1,000 water right claimants, seeking the declaration of its rights to waters in certain rivers and their tributaries within Colorado. 424 U.S. at 805. A water rights adjudication was already pending in Colorado state court when the federal proceeding was initiated. That adjudication was being conducted pursuant to a comprehensive statutory scheme enacted by the Colorado legislature for the adjudication of all water right claims in the state. The United States was subsequently joined in the state

court adjudication pursuant to the McCarran Amendment.[10] Several defendants and intervenors in the federal proceeding then sought dismissal of the federal proceeding. The Court held that, although dismissal of the federal district court case in favor of the pending state court adjudication was not appropriate on traditional abstention grounds, dismissal of the district court proceeding was, nonetheless, appropriate out of "considerations of [w]ise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." 424 U.S. at 817 (citing *Kerotest Mfg. Co. v. C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183 (1952)).

By far the most important factor counseling for abstention by the *Colorado River* Court was the McCarran Amendment, and the policies underlying the Amendment. 424 U.S. at 819-20. The McCarran Amendment expressly waives the sovereign immunity of the United States and allows joinder of the United States in the state courts in controversies involving the adjudication of rights to the use of water under state law. 43 U.S.C. § 666(a). The Amendment is clear evidence of congressional deference to the state courts for the adjudication of the water rights of all claimants, including federal claimants. The Senate Report on the McCarran Amendment observed:

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[10] In contrast to *Colorado River* where the United States was not joined in the state court adjudication until after the federal action was filed, here, the United States has been a party to the state court adjudication in the Lower Rio Grande from the very beginning.

> In the administration of and the adjudication of water rights under State law the State Courts are vested with the jurisdiction necessary for the proper and efficient disposition thereof, and by reason of the interlocking of adjudicated rights on any stream system, any order or action affecting one right affects all such rights. Accordingly all water users on a stream, in practically every case, are interested and necessary parties to any court proceedings. It is apparent that if any water user claiming to hold such right by reason of the ownership thereof by the United States or any of its departments is permitted to claim immunity from suit in, or orders of, a State court, such claims could materially interfere with the lawful and equitable use of water for beneficial use by the other water users who are amenable to and bound by the decrees and orders of the State courts.

S.Rep. No. 755, 82d Cong., 1st Sess. 4-5 (1951), cited in *Colorado River*, 424 U.S. at 811. In addition to manifesting a clear deference to the states in the administration and adjudication of water rights, the Senate Report emphasizes Congress' recognition of the interdependence of all water rights claims in a stream system, and the risk of inconsistent decrees unless the United States is amenable to suit in the states' courts and bound by their decrees. The Court has interpreted the McCarran Amendment broadly and has repeatedly refused to narrow its applicability where adjudications of a river system are concerned. *See, e.g.*, *Arizona v. San*

Carlos Apache Tribe, 463 U.S. 545, 570 (1983) (McCarran Amendment waives Indian sovereign immunity in all states); *Colorado River*, 424 U.S. at 811 (waiver applies to adjudication of federal reserved water rights held by the United States in trust for Indians); *United States v. District Court of Eagle, Colo.*, 401 U.S. 520, 524 (1971) (McCarran Amendment is "all-inclusive," and applies to federal reserved water rights appurtenant to national forest lands).

The Court's chief concern in *Colorado River* was with the avoidance of piecemeal adjudication of water rights in a river system. 424 U.S. at 819. The Court explained that this concern also underlies the rule which requires that jurisdiction be yielded to the court which first acquires control of property. The concern is with the potential for inconsistent dispositions of property through multiple litigations. *Id.* at 819. That concern is:

> heightened with respect to water rights, the relationships among which are highly interdependent. Indeed, we have recognized that actions seeking the allocation of water essentially involve the disposition of property and are best conducted in unified proceedings. [citation omitted]. The consent to jurisdiction given by the McCarran Amendment bespeaks a policy that recognizes the availability of comprehensive state systems for adjudication of water rights as the means for achieving these goals.

The concern identified by the Court in *Colorado River* would be raised by accepting the Special Master's recommendation here. Not only would duplicative proceedings result, but indispensable parties could be excluded. Perhaps most importantly, the United States would be given leave to become the administrator of water rights in the Lower Rio Grande if it prevailed in its contention that contracts were required of groundwater users in the basin. *See* United States' Complaint in Intervention at ¶¶ 12, 13, and Prayer for Relief. If the United States were to prevail, the circumstance sought to be avoided by the McCarran Amendment and *Colorado River* abstention would arise through an alternative permitting process by federal contract that supplants vested state rights and administration – exactly what *Colorado River* sought to preclude.

CONCLUSION

The Special Master's extensive research into extrinsic materials, *viz.*, primary and secondary sources documents gathered from various record collections and archives, went significantly beyond what was in the parties' pleadings and beyond documents with which judicial notice could be taken. Compounding the issue, the Special Master cites those documents, not as "background," but in his analysis and recommendations on the merits regarding Rio Grande Compact interpretation. The record in this regard should not, and cannot, be created without the parties' ability to participate as is typically done in the development of a

case through answers, counterclaims, cross-claims, discovery, and trial, where evidence can be marshalled and vetted. In making his recommendations, the Special Master has not considered or addressed important case law and legal principles, such as the previous litigation in *Texas v. New Mexico*, No. 9, Original, *Texas v. New Mexico*, No. 29, Original, and that claims can be barred by latches and acquiesce. Accordingly, his recommendations go too far into deciding the merits and are premature.

Finally, by recommending that the United States be allowed to pursue federal Reclamation claims, but not Compact claims, in this case pursuant to the Court's discretionary, non-exclusive original jurisdiction, the Special Master has created a potential conflict with the LRG Adjudication directly contrary to the *Colorado River* abstention doctrine which is so prevalent in western water law. For these reasons, the Court should reject the First Interim Report and grant New Mexico's Motion to Dismiss the United States' Complaint in Intervention.

Respectfully submitted,

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

JENNIFER VEGA-BROWN, ESQ.
MARCIA B. DRIGGERS, ESQ.
CITY OF LAS CRUCES
City Attorney's Office
P.O. Box 20000
Las Cruces, NM 88004-9002

Counsel for Amicus Curiae
City of Las Cruces