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

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICUS CURIAE* NEW MEXICO PECAN GROWERS IN SUPPORT OF DEFENDANT STATE OF NEW MEXICO

TESSA DAVIDSON
Counsel of Record
DAVIDSON LAW FIRM, LLC
P.O. Box 2240
4206 Corrales Road
Corrales, New Mexico 87048
(505) 792-3636
ttd@tessadavidson.com

Counsel for Amicus Curiae
New Mexico Pecan Growers

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

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

Pursuant to Supreme Court Rule 37.2(b), New Mexico Pecan Growers ("NMPG") respectfully moves for leave to file the accompanying *amicus curiae* brief in support of Defendant State of New Mexico. NMPG provided notice of its intent to file this brief to the parties and has been advised that New Mexico, Colorado, and the United States consent to the filing of this brief. Texas does not consent to the filing of this brief.

This is an original action brought by Texas and the United States alleging that New Mexico has breached the Rio Grande Compact ("Compact"). *See* Act of May 31, 1939, ch. 155, 53 Stat. Under the Compact, New Mexico is required to deliver a specified quantity of water to Elephant Butte Reservoir, the main storage reservoir of the Rio Grande Project ("Project"), a federal Bureau of Reclamation project. Elephant Butte Reservoir is located approximately 105 miles north of the Texas state line.

Texas alleges that New Mexico has depleted Texas' equitable apportionment of water released from Elephant Butte by intercepting water intended for use in Texas. The United States alleges New Mexico is allowing the use of waters released from Elephant Butte by users who either do not have contracts with the Secretary of the Interior, or are using water in excess of contractual amounts, thereby interfering with its obligations to deliver water to the Project's beneficiaries and Mexico pursuant to the Convention of 1906.

The Court invited New Mexico to file a motion to dismiss the complaints of Texas and the United States, which New Mexico did. The motion was referred to Special Master Gregory Grimsal for his consideration and recommendation. In the First Interim Report of the Special Master filed with the Court on March 20, 2017, the Special Master concludes that Texas has pled a breach of Compact claim and recommends New Mexico's motion to dismiss Texas' Complaint be denied. He also concludes that while the United States has not stated a claim under the Compact, the Court should exercise its non-exclusive jurisdiction to determine the United States' allegations against New Mexico under reclamation law.

NMPG does not dispute the Special Master's recommendations for final disposition of New Mexico's motion to dismiss. It does contend, however, that the Special Master prematurely considered historical facts not offered by the parties to support his interpretation of the Compact as requiring New Mexico's relinquishment of its control over water below Elephant Butte. NMPG's *amicus curiae* brief illustrates that the Special Master's analysis is incomplete, thereby necessitating a full development of the record before a determination of New Mexico's authority over waters within its boundaries can be made.

NMPG is a New Mexico non-profit organization formed in 2006 to promote and protect the interests of pecan growers in New Mexico. NMPG's members irrigate approximately 25,000 acres of orchards within the

Elephant Butte Irrigation District ("EBID") with surface water released from Elephant Butte. They also irrigate their orchards with groundwater from wells drilled in New Mexico's Lower Rio Grande Groundwater basin below Elephant Butte Reservoir.

Reliable access to irrigation water is absolutely vital to pecan farmers because their orchards are a permanent crop that cannot be fallowed. Accordingly, they have invested extensively to procure reliable sources of groundwater to protect against surface water shortages. Due to recent changes in Project operations to deliver more water to Texas, and the severest drought on record in New Mexico, pecan farmers have had to rely more heavily on groundwater to irrigate their orchards.

NMPG's members' interests in this matter are two pronged. First, as irrigators within EBID who have established water rights in surface water delivered from the Project, they have an interest in ensuring their entitlement to Project supply is protected under the Compact. Second, as irrigators who have also established water rights in groundwater, they have an interest in ensuring that their groundwater rights remain exercisable in accordance with New Mexico law.

New Mexico seeks to protect its sovereignty over its waters. While NMPG agrees that New Mexico's sovereignty must be protected, NMPG also has a unique interest in protecting its members' two-pronged interests in Project water and groundwater. Thus, NMPG raises significant points in its *amicus curiae* brief that

NMPG cannot reasonably expect New Mexico to fully develop.

NMPG's members have a direct stake in this controversy, and its participation will contribute to a full and fair exposition of the issues involved. *See, e.g.*, Special Master's First Interim Report at 267 (encouraging EBID's participation as *amicus curiae* to "ensure a full and fair exposition of the factual and legal issues"). In these circumstances, NMPG's *amicus* participation is appropriate.

NMPG respectfully requests that it be granted leave to file the accompanying brief as *amicus curiae* in support of Defendant State of New Mexico.

Respectfully submitted,

TESSA DAVIDSON
Counsel of Record
DAVIDSON LAW FIRM, LLC
P.O. Box 2240
4206 Corrales Road
Corrales, New Mexico 87048
(505) 792-3636
ttd@tessadavidson.com

Counsel for Amicus Curiae
New Mexico Pecan Growers

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

INTEREST OF *AMICUS CURIAE*[1]

New Mexico Pecan Growers ("NMPG") is a New Mexico non-profit organization formed in 2006 to promote and protect the interests of pecan growers in New Mexico. Its 302 members own pecan orchards throughout central and southern New Mexico, the majority of which are located in the Mesilla Valley in Dona Ana County. NMPG's members irrigate approximately 25,000 acres of orchards within the Elephant Butte Irrigation District ("EBID") with surface water released from the Elephant Butte Reservoir, the main storage reservoir of the Bureau of Reclamation's Rio Grande Project ("Project"). They also irrigate their orchards with groundwater from wells drilled in New Mexico's Lower Rio Grande Groundwater basin.

Reliable access to irrigation water is absolutely vital to pecan farmers because their orchards are a permanent crop that cannot be fallowed. Over the past eighty years pecan growers have invested extensively to procure reliable sources of groundwater to protect against surface-water shortages and meet their orchards' needs. Like their pecan-farming neighbors in Texas, New Mexico's pecan growers have drilled wells into the aquifers underlying the Rio Grande in

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[1] NMPG provided notice of its intent to file this brief to the parties and has been advised that New Mexico, Colorado, and the United States consent to the filing of this brief. Texas does not consent to the filing of this brief. No person or entity other than New Mexico Pecan Growers has authored any portion of this brief or made a monetary contribution to the preparation or submission of this brief.

accordance with applicable state laws and without interference from each other or the United States.

New Mexico's pecan growers below Elephant Butte ("lower New Mexico") have recently had to rely more heavily on groundwater as a result of two factors that have led to drastic reductions in their surface water supplies: the Operating Agreement for the Rio Grande Project executed by the United States Bureau of Reclamation, EBID, and the El Paso County Water Improvement District No. 1 ("EPCWID") on March 10, 2008 ("2008 Operating Agreement"); and severe drought. One primary purpose of the 2008 Operating Agreement is to allocate more surface water from the Project to EPCWID than was historically allocated for the purpose of "offsetting" the effects on surface water resulting from groundwater pumping in lower New Mexico. Soon after the 2008 Operating Agreement was executed, New Mexico experienced the severest drought of record, further exacerbating the effects of the new water allocation procedures within the New Mexico portion of the Project.[2]

In an effort to address the water supply stresses in lower New Mexico, NMPG, along with other major groundwater users in the Mesilla Valley, began meeting in 2011 and eventually formed the Lower Rio Grande Water Users.[3] Over the last several years the

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[2] To date, Reclamation continues to operate the Project in accordance with the 2008 Operating Agreement.

[3] The Lower Rio Grande Water Users consist of NMPG, Southern Rio Grande Diversified Crop Farmers Association, City

user group has worked with the New Mexico State Engineer, EBID and other stakeholders to develop methods by which Project supplies continue to be protected, as they are currently under the 2008 Operating Agreement, and provide efficient administrative and management mechanisms to allow groundwater users to maintain their uses to the extent possible.

NMPG has also actively participated in New Mexico's Lower Rio Grande Basin water rights adjudication on behalf of its members. It sought and secured the adjudication court's final determination of irrigation water requirements for all crops in the basin. NMPG recently worked in conjunction with the United States to secure the court's recognition of a 1903 priority date for Project water.

NMPG has an interest in providing the Court the perspective of its members who not only rely on the Project's ability to provide them reliable surface water for irrigation, but also the ability to use groundwater by virtue of their rights established under New Mexico law. It also has an interest in ensuring its members' water rights are fully protected under the Rio Grande Compact, and that the Compact is not interpreted in a manner that adversely affects their rights.

The outcome of this matter is crucial to the future of the New Mexico pecan industry and its continued ability to contribute to the state's economy. Pecans

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of Las Cruces, New Mexico State University, Public Service Company of New Mexico, Camino Real Regional Utility Authority, and Stahmanns Inc.

are the state's highest commodity crop with sales of $183 million, ranking New Mexico as the second top pecan-producing state in the nation.[4] For every 100 jobs in the New Mexico pecan industry, approximately 125 are added to other business sectors; and for every $100 increase in pecan production, approximately $80 is added to the state's economy.

SUMMARY OF ARGUMENT

The State of Texas and the United States have filed complaints to enforce their rights under the Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Compact"). The Court invited the State of New Mexico to file a motion to dismiss the complaints, which New Mexico did. The Court referred New Mexico's motion to Special Master Gregory Grimsal for his consideration and recommendation. In the First Interim Report of the Special Master filed with the Court on March 20, 2017 ("Report"), the Special Master concludes that Texas has pled a breach of Compact claim and recommends New Mexico's motion to dismiss Texas' Complaint be denied. He also concludes that while the United States has not stated a claim under the Compact, the Court should exercise its non-exclusive jurisdiction under 28 U.S.C. § 1251(b)(2) to determine the United States' allegations against New Mexico under reclamation law. NMPG files this *amicus*

[4] New Mexico Department of Agriculture, *2015 New Mexico Agricultural Statistics*, 37 (November 2016), *available at* http://www.nmda.nmsu.edu/wp-content/uploads/2015/02/Ag-Stats2015.pdf.

curiae brief in support of New Mexico's exceptions to the Report and to bring to the Court's attention issues unique to NMPG's members.

NMPG does not contest the Special Master's recommended disposition of New Mexico's motion. It does, however, dispute the Special Master's interpretation of the Compact to find: 1) New Mexico relinquished control over *its own* water delivered to Elephant Butte Reservoir; and 2) the sole method by which lower New Mexico receives *its portion* of the Rio Grande is through Reclamation's administration of the Project to irrigate lands in New Mexico. *See* Report at 210-217. NMPG asks the Court to expressly refrain from adopting these conclusions. In the exercise of its original jurisdiction, the Court has traditionally allowed for full development of the record before making its determination of the nature and scope of obligations between sovereigns. *See United States v. Texas*, 339 U.S. 707, 715 (1950) (citations omitted). The issue of New Mexico's authority and control over Rio Grande water apportioned to lower New Mexico should be reserved for later judgment of the Court.

If the Compact required the Project to be the sole method by which lower New Mexico received its portion of the Rio Grande, the entire area below Elephant Butte would have been relegated to a static agrarian society in 1938. Whether intentional or not, the Special Master ignores that unappropriated groundwater and non-Project water uses existed at the time the Project was formed and when the Compact was executed. The Special Master also fails to consider that the compacting parties intended for each party to develop their

water resources as they saw fit, subject only to meeting their obligations under the Compact. Like Colorado and Texas, New Mexico treats groundwater as a resource to be developed distinct from surface water. All three states have developed groundwater in accordance with applicable common, territorial and state law prior to the construction of the Project, the negotiation of the Compact and up until the present.

Further, in finding that New Mexico has no authority over Rio Grande water apportioned to lower New Mexico under the Compact, the Special Master seemingly disregards congressional directives requiring the adjudication and distribution of water rights in reclamation projects in accordance with state law under the McCarran Amendment and Section 8 of the 1902 Reclamation Act. The Special Master cannot simply ignore that, for over a century, Congress has deferred to the operation and effect of state water law in reclamation projects.

In fact, "cooperative federalism" is playing out in New Mexico's Lower Rio Grande. Pursuant to the McCarran Amendment, the United States has been joined in the state district court's water rights adjudication for the purpose of determining its interests in the Project. The adjudication is making significant progress. In 2011, the court entered a final judgment in the stream system issue established for determining irrigation water requirements, thereby capping the total amount of groundwater that can be used for irrigation purposes in lower New Mexico. The adjudication court

also recently confirmed a senior priority date for the Project.

Pecan farmers have an interest in ensuring that all claims to use water in New Mexico's Lower Rio Grande Basin are adjudicated. Although the United States appropriated Rio Grande water for the Project, farmers who used it for irrigation on their lands own the water rights for such use. The adjudication provides the only forum for irrigators in New Mexico to obtain legal recognition of their individual rights to use surface water delivered from the Project and groundwater from their wells.

Pecan farmers also have an interest in ensuring their water rights are administered under New Mexico's priority system. While a state may not use more water than its apportionment, pecan growers in lower New Mexico were not transformed into Texans upon ratification of the Compact. They remain entitled to the continued exercise of vested water rights under New Mexico law subject to their administration as necessary to ensure New Mexico's compliance with the Compact.

For over a century New Mexico's pecan growers have established patterns of water use based on investment-backed expectations that their water rights would not only be protected by reclamation law applicable to Project water, but administered under New Mexico's priority system. Given the history of groundwater development for irrigation purposes within the Project on both sides of the border, it is inconceivable

that unbeknownst to New Mexico's farmers, their state-recognized groundwater rights are invalid because New Mexico relinquished authority to control and administer its apportionment of water under the Compact to Reclamation in 1938.

The Court should reject the Report's conclusions that New Mexico relinquished its authority over water within its boundaries, and that the Project is the sole method by which lower New Mexico receives its apportionment. Rather, the parties should be afforded the opportunity to develop a full record on these issues.

ARGUMENT

I. The Special Master fails to consider the compacting states' development of groundwater prior to and after the Compact.

NMPG does not dispute that the Compact requires Texas receive its apportionment of the Rio Grande from Elephant Butte via administration of the Project.[5] However, it does contest the Special Master's conclusion that Reclamation's administration of the Project provides the sole method by which lower New Mexico receives its portion of the Rio Grande. *See* Report at 210-217. If this were true, the entire area below Elephant Butte Reservoir would be relegated to a static

[5] The Project is currently being administered under the 2008 Operating Agreement which provides Texas more than its pro-rata share of Project water to address impacts to the Rio Grande resulting from groundwater pumping in New Mexico.

agrarian society, forever limited to using only surface water for irrigation purposes and nothing more.

The Special Master provides 156 pages of background facts, some of which were obtained from sources outside of the record, to provide historical "context" for his interpretation of the Compact. Report at 193. Not only is the Special Master's approach in resolving a motion to dismiss unorthodox, it is incomplete. For example, it failed to identify that the compacting states expected they would be allowed to continue to develop new water resources so long as they met their delivery obligations under the Compact. This is clearly seen in the initial rules for administration of the Compact which provided the Compact "equitably apportion[s] the waters of the Rio Grande above Fort Quitman *and permits each State to develop its water resources at will, subject only to its obligations to deliver water in accordance with the schedules set forth in the Compact. . . .*" Rio Grande Compact Commission, *Rules and Regulations for Administration of the Rio Grande Compact*, preamble (adopted December 19, 1939), *reprinted in* First and Second Annual Reports of the Rio Grande Compact Commission 1939 and 1940, 15 (1941) *available at* http://www2.cde.state.co.us/artemis/rgc_rrcserials/rgc11internet/rgc11193940internet.pdf.

The Special Master's failure to recognize this important fact is a consequence of his overly-narrow focus on the development of surface water uses in the basin. For instance, when he explores the relevance of Colorado attempting to import the "status quo" of the interim 1929 Rio Grande Compact ("1929 Interim

Compact") to the negotiations of the final Compact, the Special Master points to the following language from Article VII of the 1929 Interim Compact:

> . . . [A]nd that the Commission so named shall equitably apportion the waters of the Rio Grande as of conditions obtaining on the river and within the Rio Grande Basin at the time of the signing of the Compact.

Report at 142. From that language, the Special Master concludes "the 'conditions obtaining on the *river*' at the signing of the 1929 Interim Compact included the operation of the Rio Grande Project and the allocation and distribution of water downstream of Elephant Butte Reservoir by Reclamation." *Id.* (emphasis added). His analysis ignores Article VII's additional reference to conditions "within the Rio Grande *basin*" at the signing of the 1929 Interim Compact. *Id.* (emphasis added). Article VII's reference to conditions "within the basin" would have encompassed all existing water uses, including groundwater uses, and unappropriated groundwater in storage. *See, e.g.*, *Colorado v. New Mexico*, 459 U.S. 176, 187-188 (1982) (in a proceeding for the equitable apportionment of an interstate river there is a need to protect established water uses but it is also appropriate to consider additional factors relevant to a just apportionment). The protection of all existing rights is also seen in Article XII of the 1929 Interim Compact wherein New Mexico and Texas agreed that "*prior vested rights* above *and below* Elephant Butte Reservoir shall never be impaired hereby." Act of June 17, 1930, ch. 506, 46 Stat. 772 (emphasis added).

In fact, all three compacting states were developing groundwater from aquifers underlying the Rio Grande even before Congress authorized the Project in 1905. *See generally* John J. Vernon, Francis E. Lester, *Pumping for Irrigation from Wells*, N.M. College of Ag. and Mech. Arts: Bul. No. 45, Tables 9-13 (1903), *available at* http://contentdm.nmsu.edu/cdm/compoundobject/collection/AgCircs/id/16632/rec/41 (providing data for existing groundwater wells in New Mexico and Texas); William J. Powell, *Ground-water Resources of the San Luis Valley, Colorado*: U.S. Geol. Survey Water-Supply Paper 1379, 6 (1958), *available at* https://pubs.usgs.gov/wsp/1379/report.pdf (describing wells in Colorado's San Luis Valley as early as 1887). Investigations to determine the extent of groundwater storage below the El Paso and Mesilla valleys were occurring at the same time Reclamation was working to solve the surface-water supply problems in the lower Rio Grande basin. *See* Charles S. Slichter, *Observations on the Ground Waters of the Rio Grande Valley*, U.S. Geol. Survey Water-Supply Paper 141 (1905) *available at* https://pubs.er.usgs.gov/publication/wsp141. Specific attention was given to testing existing wells to determine the potential for expanding groundwater use for irrigation. *Id.* In 1905 it was noted that "[o]wing to frequent shortage in the river supply of water," a number of wells were drilled in the Mesilla Valley and used for "obtaining ground water for irrigation." *Id.* at 22. When droughts resulted in reduced surface-water supplies, the compacting states turned to groundwater storage to meet their needs. "A major asset of the upper Rio Grande [was] the facilities for water storage, partly in

surface reservoirs but dominantly in ground-water reservoirs." H. E. Thomas, *Effects of Drought in the Rio Grande Basin*, U.S. Geol. Survey Water-Supply Paper 372-D (1963), *available at* https://pubs.usgs.gov/pp/0372d/report.pdf.

New Mexico, in particular, began establishing the legal right to use groundwater long before its statehood. *See generally* Ira. G. Clark, *Water in New Mexico: A History of its Management and Use* 234 (1987) (containing a discussion of the various rules states developed to govern groundwater appropriations). It eventually codified the common law applicable to the appropriation of groundwater in separate statutory sections than those applicable to surface water. *See* 1907 N.M. Laws, ch. 49 (surface water); 1931 N.M. Laws, ch. 131 (groundwater). However, both codes incorporated the doctrine of prior appropriation, which has always been the law governing the appropriation of surface water and groundwater in New Mexico. *Yeo v. Tweedy*, 286 P. 970 (N.M. 1929). The prior appropriation doctrine generally provides that the state owns water subject to its citizens' use for beneficial purposes, and it is allocated based upon the fundamental rule that the first person to use water possesses the absolute right to its future use as against all later users. *See Montana v. Wyoming*, 563 U.S. 368, 375-376 (2011) (providing general description of the prior appropriation doctrine adopted by western states); N.M. Const. art. XVI, §§ 2, 3 ("Beneficial use shall be the basis, the measure and the limit of the right to the use of water"

and "[p]riority of appropriation shall give the better right.").

In contrast, Texas has never applied the prior appropriation doctrine to groundwater development. Rather, groundwater use is allowed in accordance with the "rule of capture." The rule generally provides that groundwater underlying land is the private property of the landowner and can be pumped and "captured" without limitation or liability to surrounding landowners. *See* Tex. Water Code Ann. § 36.002(a) (2011) (landowner owns the groundwater below the surface of the landowner's land as real property).

After the construction of Elephant Butte Reservoir was completed, groundwater development in Texas and lower New Mexico proceeded at a relatively slow pace because sufficient surface water was available for storage in the reservoir for a number of years. In the mid-1940s drought conditions greatly impacted water deliveries to Elephant Butte and eventually resulted in below-normal water releases in the 1950s. Thomas, *supra* at D18. During this time, irrigation water requirements could be met only by pumping from groundwater reservoirs. *Id.* It is estimated that by the mid-to-late 1950s, 1,200 wells had been drilled to irrigate Project lands in New Mexico, and approximate 500 irrigation wells had been drilled in the El Paso area.[6] *Id.* at D14-D16. Drought conditions led the

[6] Colorado's San Luis Valley had up to 7,500 artesian wells and 1,300 unconfined groundwater wells around this time. Powell *supra* at 27, 57.

United States Geological Survey to investigate the feasibility of using groundwater to supplement the Project's surface water supplies. *See* C. S. Conover, *Ground-water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico*, U.S. Geol. Survey Water-Supply Paper 1230, 4 (1954), *available at* https://pubs.usgs.gov/wsp/1230/report.pdf. By the mid-1970s, more than 800 irrigation wells in the El Paso valley were available to provide supplemental water for irrigation purposes. J. C. Day, *International Aquifer Management: The Hueco Bolson on the Rio Grande River*, 18 Nat. Resources J. 163, 174 (1978), *available at* digitalrepository.unm.edu/cgi/viewcontent.cgi?article=3118&context=nrj.

Towns and cities in the Mesilla and El Paso valleys also developed groundwater for public water supply. The City of Las Cruces, for example, has exclusively used groundwater to meet its needs since 1905. The City of El Paso relies on Rio Grande surface water in addition to groundwater from several large-capacity wells first drilled near Canutillo, Texas in the 1950s. E. R. Leggat, *et al.*, *Ground-water Resources of the Lower Mesilla Valley, Texas and New Mexico*, U.S. Geol. Survey Water-Supply Paper 1669-AA, AA 13 (1963), *available at* https://pubs.usgs.gov/wsp/1669aa/report.pdf. El Paso also attempted to drill 326 wells in New Mexico to export groundwater to Texas. When the New Mexico State Engineer denied El Paso's well applications, it sued New Mexico in federal district court, wherein the court observed that groundwater pumping could be permitted "even assuming the Compact protects

surface water rights within the Rio Grande Project from impairment through pumping of hydrologically connected ground water." *City of El Paso ex rel. Public Service Board v. Reynolds*, 563 F. Supp. 379, 382 (D.N.M. 1983). In such case, "[t]he State Engineer need only condition ground water permits to require offsets of the effects on the river through return flows or retirement of prior surface and/or ground water rights." *Id.*

City of El Paso recognized that where a hydrologic connection between unappropriated groundwater and surface water exists, New Mexico has conjunctively managed both resources under the prior appropriation doctrine to protect existing water rights. *See City of Albuquerque v. Reynolds*, 379 P.2d 73 (N.M. 1962) (unappropriated groundwater may be taken for beneficial use, but impacts to the Rio Grande must be offset to protect existing water rights). The application of this management tool is expressly required in the New Mexico State Engineer's guidelines for the Mesilla basin in lower New Mexico. *See Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications* (1999), *available at* http://www.ose.state.nm.us/RulesRegs/lrg-criteria/MesillaValleyGuidelines-2007-01-05.pdf. Except for *de minimis* uses, the guidelines require applications for groundwater appropriations to "offset 100% of the surface water depletions caused by the appropriation." *Id.* at 4.

As shown above, the Special Master failed to consider the compacting parties' development of groundwater uses when he concluded the Project is the sole

method by which New Mexico receives its apportionment of water below Elephant Butte. The parties' "'course of performance under the Compact is highly significant' evidence of [their] understanding of the compact's terms." *See Tarrant Regional Water Dist. v. Herrmann*, ___ U.S. ___, 133 S. Ct. 2120, 2135 (2013) (*quoting Alabama v. North Carolina*, 560 U.S. 330 (2010)). The rules of the first Compact commission in 1939, together with the history of groundwater development by all three compacting states, provides significant evidence that each state intended to retain control over its apportionment and use of Rio Grande waters under the Compact.

II. The Special Master disregards congressional directives requiring the adjudication of the United States' Project rights in accordance with state law.

The Special Master's conclusion that New Mexico relinquished control over its water below Elephant Butte reservoir cannot be reconciled with congressional directives under Section 8 of the Reclamation Act, 43 U.S.C. § 383, which requires deference to state laws relating to the control, appropriation, use and distribution of water within reclamation projects, and the McCarran Amendment, 43 U.S.C. § 666, under which the United States waives sovereign immunity for purposes of water rights adjudication suits. To the extent these key provisions are not inconsistent with the Compact, both are applicable to New Mexico's apportionment of the Rio Grande below Elephant Butte

Reservoir. *See California v. United States*, 438 U.S. 645 (1978) (state law controls the appropriation and distribution of water for reclamation projects if not inconsistent with other congressional directives). Yet, in denying New Mexico control over its own water below Elephant Butte, the Special Master fails to provide any analysis as to whether or how the Compact conflicts with these directives. Instead, he simply applies dictionary definitions to the words "obligation" and "deliver" in Article IV of the Compact to arrive at a conclusion that dismisses Reclamation's deference to state law for 115 years. *See* Report at 196-197.

The Special Master cannot simply ignore that Congress has deferred to the operation and effect of state water law in reclamation projects for over a century. *See, e.g.*, *California*; *United States v. New Mexico*, 438 U.S. 696, 702 (1978) (where Congress has expressly addressed the question of whether federal entities must abide by state water law, it has almost invariably deferred to state law). This Court has observed the "most eloquent expression" of the need for federal projects to observe state water law is found in the Senate Report on the McCarran Amendment:

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> . . . .

> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, *if there is to be a proper administration of the water law as it has developed over the years*.

California, 438 U.S. at 678-679 (quoting from S. Rep. No. 755, 3, 6 (1951)) (emphasis added).

In fact, the "cooperative federalism" described in *California* is playing out in New Mexico's Lower Rio Grande water rights adjudication in New Mexico's Third Judicial District Court. *See New Mexico, ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 (1996) ("LRG adjudication"). Pursuant to the McCarran Amendment, the United States has been joined in the matter for the purpose of determining its interests in the Project.[7] The LRG adjudication court is charged with determining "the priority, amount, purpose, periods, and place of use of water" for over 16,000 water-rights claimants in New Mexico's Lower Rio Grande Basin. *See* N.M. Stat. Ann. § 72-4-19 (1978).

The LRG adjudication court has made significant progress. In 2011 it entered a final judgment in the stream system issue established for determining

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[7] The United States litigated against its waiver of sovereign immunity and joinder to the state court adjudication for several years. The issue was finally resolved against the United States in *Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d 372 (N.M. Ct. App. 1993).

irrigation water requirements. *See* LRG Adjudication Court, SS-97-101 (CIR/FDR), Final Judgment (Aug. 22, 2011) ("Irrigation Judgment").[8] The Irrigation Judgment quantifies the water requirements for farmers who irrigate with Project water only, Project and groundwater combined, and groundwater only, thereby effectuating a "cap" on all irrigation pumping in the basin. *Id.* at 6-8. No party to the LRG adjudication appealed the Irrigation Judgment, including the United States, and it constitutes a final decision of the court.

The LRG adjudication court has also determined the United States' claims for the Project, confirming all but one – its claim that groundwater is a source of Project water supply. *See* LRG Adjudication, SS-97-104 (United States' Interest), Order Granting State's Motion to Dismiss United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment (Aug. 16, 2012). The adjudication court found that based on the United States' own actions and statements, such as those contained in its notice of appropriation filings made with New Mexico in 1906 and 1908, the United States only appropriated surface water for the Project. *Id.* at 6. Further, in response to the United States' claim that it retains its appropriative right for water that seeps into the ground, the court determined that surface water that seeps into an underground aquifer loses its identity as surface water under New Mexico law. *Id.* at 7 (citing *Kelley v. Carlsbad Irr. Dist.*, 415 P.2d 849, 853 (N.M. 1966)). Even so,

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[8] The LRG adjudication court's decisions are available at https://lrgadjudication.nmcourts.gov/.

the court found the United States "may pursue any administrative action available under New Mexico law" to protect Project water from other appropriations that encroach upon it. *Id.* at 4.

The LRG adjudication court recently confirmed the United States' claim of a 1903 priority date for the Project. *See* LRG Adjudication, SS-97-104 (United States' Interest), Findings of Fact and Conclusions of Law (April 17, 2017). The court found that Reclamation's surveying work at the Elephant Butte Reservoir site on March 1, 1903 constituted a sufficient first step towards the appropriation of the Rio Grande under New Mexico's relation-back doctrine to establish a 1903 priority date for Project water. *Id.* at ¶¶ 17, 28. The court's recognition of the 1903 priority date is significant because it provides farmers within EBID a priority date that is senior to all but a few other claimants that have received sub-file orders from the LRG adjudication court.[9]

A. Pecan farmers have an interest in ensuring all claims to water in New Mexico's Lower Rio Grande Basin are adjudicated.

No doubt, the United States complied with New Mexico's legal requirements when it appropriated the waters of the Rio Grande for use in the Project. Report

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[9] These sub-file orders remain subject to *inter se* objection in the adjudication. In addition, the LRG adjudication court has not yet issued an appealable judgment on the United States' interests.

at 102-106. Its appropriation, however, does not create a water right in the United States, or otherwise ameliorate state law requiring an appropriation of water *and* application of water to beneficial use to create the legal right to use water. *See, e.g.*, *Nebraska v. Wyoming*, 325 U.S. 589, 614 (1945) (government does not own water rights but appropriated water for use of land owners who became the owners of water rights through beneficial use) (quoted citation omitted); *Hudspeth County Conservation & Reclm. Dist. No. 1 v. Robbins*, 213 F.2d 425, 429 (5th Cir. 1954), *cert. denied*, 348 U.S. 833 (1954) (by appropriating and impounding the Rio Grande, the United States did not become the owner of water in its own right). Rather, the individual farmers within EBID who have put Project water to beneficial use for irrigation purposes are the owners of the water rights appurtenant to their farms. *See Ickes v. Fox*, 300 U.S. 82, 95-96 (1937) (in arid states it has long been established that the right to use irrigation water is based on beneficial use and, once established, the right is appurtenant to the land); 43 U.S.C. § 372 (the right to use water under the Reclamation Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right); N.M. Stat. Ann. § 72-5-23 (1978) (all water used for irrigation purposes shall be considered appurtenant to the land).

The LRG adjudication court provides the only forum for irrigators in New Mexico to obtain legal recognition of their individual rights to use surface water delivered from the Project and groundwater from their

wells. Their participation is crucial because the adjudication court determines the priority date and other elements that define their individual rights to use water relative to other users in New Mexico. *See, e.g.*, *Colorado River Water Conservation Dist. v. U.S.*, 424 U.S. 800, 811 (1976) (by reason of the "interlocking of adjudicated rights on any stream system," all water users on a stream are interested and necessary parties to adjudication proceedings) (quoting Senate Report on McCarran Amendment, S. Rep. No.755, 4-5 (1951)). Indeed, because the priority date for the Project applies to the individual water rights established by EBID irrigators, including pecan growers, NMPG actively participated at trial with the United States to secure confirmation of the 1903 priority for Project water. If, as the Special Master suggests, New Mexico is found to have no authority to adjudicate interests in Project water, farmers will be left without any forum to protect their individual water rights established through beneficial use under state and reclamation law.

B. Pecan farmers have an interest in ensuring adjudicated water rights are administered under New Mexico's priority system.

NMPG understands that a state may not use more water than its apportionment. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-108 (1938) (requiring Colorado's administration of existing water rights to comply with Colorado's apportionment

under the La Plata River Compact). And, to the extent groundwater uses may affect the river, each compacting state must ensure their groundwater use is restricted as necessary to ensure the other states receive their apportionments of the river. *See Kansas v. Nebraska*, ___ U.S. ___, 135 S. Ct. 1042, 1050 (2015) (to the extent Nebraska's groundwater pumping depleted stream flow in the basin, it counted against its annual allotment of water under the Republican River Compact). Even so, pecan growers in lower New Mexico were not transformed into Texans upon ratification of the Compact. They have not lost the right to the continued exercise of their vested water rights under New Mexico law subject to their administration as necessary to ensure New Mexico's compliance with the Compact. *See id.*

For over a century New Mexico's pecan growers have established patterns of water use based on investment-backed expectations that their water rights would not only be protected by reclamation law applicable to Project water, but also administered under New Mexico's priority system. If the Project is the sole method by which lower New Mexico receives its equitable apportionment of the Rio Grande, then farmers' groundwater rights established and adjudicated under state law are arguably invalid or otherwise administered under federal law. Given the history of groundwater development for irrigation purposes on both sides of the border, it is inconceivable that unbeknownst to New Mexico's farmers, their state-recognized groundwater rights are invalid because New Mexico relinquished

authority to control and administer its apportionment of water under the Compact to Reclamation in 1938. This interpretation of the Compact results in the same type of "re-sorting of settled water rights" that would "reshuffle the economies in the valley" that the Colorado Supreme Court avoided when interpreting water administration requirements under the Compact. *See In re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos River Basins and Their Tributaries*, 674 P.2d 914, 923 (Colo. 1983). The Special Master's premature invitation to upend farmers' reliance on the laws of New Mexico should be refused.

CONCLUSION

Determining the extent New Mexico retained its authority over its apportionment of the Rio Grande in lower New Mexico under the Compact will require full development and consideration of evidence not yet before the Court. NMPG respectfully requests the Court to expressly refrain from adopting the Special Master's conclusions regarding the nature and scope of New

Mexico's obligations under the Compact, as these matters should be reserved for later judgment of the Court.

Respectfully submitted,

TESSA DAVIDSON
Counsel of Record
DAVIDSON LAW FIRM, LLC
P.O. Box 2240
4206 Corrales Road
Corrales, New Mexico 87048
(505) 792-3636
ttd@tessadavidson.com

Counsel for Amicus Curiae
New Mexico Pecan Growers

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