

No. 141, Original

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**In The  
Supreme Court of the United States**

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STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO and STATE OF  
COLORADO,

*Defendants.*

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**Before Special Master Honorable D. Brooks Smith**

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**JOINT REQUEST OF NEW MEXICO *AMICI CURIAE* FOR ORAL  
PRESENTATIONS AT STATUS CONFERENCE**

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This Joint Request by the New Mexico *amici curiae* is submitted to respectfully request thirty minutes for the New Mexico *amici* to make oral presentations at the Status Conference on October 23, 2024. The New Mexico *amici curiae* consist of – from North to South – the Albuquerque Bernalillo County Water Utility Authority (“Water Authority”), the City of Las Cruces, and the Camino Real Regional Utility Authority (“CRRUA,” a municipal water provider) (collectively the

“Municipal Interests”); the New Mexico Pecan Growers (“NMPG”), the Southern Rio Grande Diversified Crop Farmers Association (“SRGDCFA”), and New Mexico State University (“NMSU”) (collectively, the “agricultural interests”); and TXNM Energy, Inc. (“TXNM”) (formerly the Public Service Co. of New Mexico, a utility).

The New Mexico *amici* respond to the Special Master’s request for a “tutorial.” *See* Order of Special Master, October 7, 2023, at ¶ 3. In previous proceedings of this case, all *amici* have been treated equally and afforded the same opportunities to supplement the presentations of the parties. The New Mexico *amici* are the real parties-in-interest whose water rights will be affected by the outcome of the litigation.<sup>1</sup> Participation by the New Mexico *amici* is an essential part of the tutorial as the United States asserts two contentions affecting their water rights: (i) that development along New Mexico’s Rio Grande corridor was frozen in 1938 with the ratification of the Rio Grande Compact (“Compact”); and (ii) that the United States is the owner of groundwater underlying federal Bureau of Reclamation (“BOR”) districts.<sup>2</sup> *See Texas v. New Mexico & Colorado*, 602 U.S. at 18 (2004) (Slip Op).

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<sup>1</sup> EBID and EP No. 1 don’t own water rights; they deliver the farmers’ surface water to the farmers.

<sup>2</sup> Ownership of water within the western states and territories is within the plenary control of the states. *See California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 163-164 (1942), construing the provisions of the Desert Land Act of 1877, Act of March 3, 1877, 19 Stat. 377.

### ***Municipal Interests***

The New Mexico State Engineer has issued groundwater permits for municipal supply to the cities of Albuquerque (predecessor in interest to the Water Authority) and Las Cruces which are conditioned on compliance with the Compact. The permits account for the depletive effects of groundwater pumping on the Rio Grande from wells that are hydrologically connected to the river in three ways: i) by recognizing “vested” pre-Compact depletive rights; ii) by requiring “offsets” for post-Compact depletions; and iii) and by authorizing the use of “foreign” or “imported” water from the Colorado/San Juan River system by the Water Authority (and certain other contractors) and the Jornada del Muerto sub-basin for use by Las Cruces. *Cf. Albuquerque v. Reynolds*, 1962-NMSC-173, 71 N.M. 428, 379 P.2d 33. Imported water replaces depletions of native Rio Grande water thereby relieving the stress on the Compact.

Las Cruces is the second largest city in New Mexico, located south of Elephant Butte Reservoir, in the Lower Rio Grande (“LRG”). Its municipal water supply comes solely from groundwater. As a component of that supply, the City

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Whatever the merits of the United States’ claims regarding its ownership of water rights in the LRG, the Tenth Circuit Court of Appeals has held that the proper forum to assert them is the LRG Stream System adjudication court in Doña Ana County in New Mexico. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1191 (10<sup>th</sup> Cir. 2002).

utilizes “imported water” from the Jornada del Muerto sub-basin (“East Mesa”) which is disconnected from the Rio Grande by a geologic barrier known as the “horst.” The result is that pumping of up to 11,254 AFY from the City’s permits on the East Mesa has no depletive effect on the Rio Grande, and treated sewage returned to the Rio from the East Mesa augments the supply of the native water, negating City depletions and facilitating Compact deliveries.

A “1938 Condition,” or a federalization of groundwater would upend state administration of groundwater use through 1978, as effectuated by the BOR under the “D-2” formula and as relied upon by the City by moving the baseline back to 1938. A “1938 Condition” would cut the City’s water rights by 89%. Because the City’s wells are drilled into the same aquifer in which the United States claims ownership, the federal claim would presumably invalidate the City’s state issued groundwater Declaration and permits of up to 51,179 AFY because the State Engineer would not have had jurisdiction to issue the permits, leaving 125,000 residents without a water supply.

CRRUA is a regional water and wastewater utility created by joint powers agreement between the City of Sunland Park and Doña Ana County to provide service to the City and the Santa Teresa border area of New Mexico, consisting of approximately 22,000 residents. CRRUA relies on groundwater to provide municipal and industrial supply in accordance with water right permits issued by the

New Mexico State Engineer. All of CRRUA's water rights have a post-1938 priority date and are in jeopardy if the United States' claims are recognized.

The Water Authority provides municipal water and wastewater service within central New Mexico to the City of Albuquerque, Bernalillo County, parts of the City of Rio Rancho and to a Chapter of the Navajo Nation (pending infrastructure completion). It is located in the Middle Rio Grande ("MRG") upstream of Elephant Butte Reservoir and below Otowi Gage. It has approximately 90 groundwater wells authorized and administered by the New Mexico State Engineer under permits for the diversion of up to 155,000 AFY to serve the needs of some 650,000 customers. Under Permit No. SP-4830 the Water Authority also has a permit to use 48,200 AFY of imported San Juan-Chama water from the Colorado/San Juan River system. *See Carangelo v. Albuquerque-Bernalillo CNTY Util. Authority*, 2014-NMCA-032, 320 P.3d 492.

A "1938" baseline condition curtailing the amount of groundwater use in conjunction with federal ownership of groundwater underlying the Middle Rio Grande Conservancy District would jeopardize the Water Authority's permits, and its ability to continue serving New Mexico's largest population center. Under a "1938 Condition," the Water Authority would be required to limit depletions to a level that corresponds to that "baseline", without regard for the amount of water that New Mexico was apportioned under Article IV of the Compact. This would upend

more than 100-years of state administration and settled reliance, effectively revoking the Water Authority's priority standing within that system. The Water Authority is uniquely positioned to demonstrate the municipal impacts in the underlying litigation related to central New Mexico and the State's most populous region.

### ***Agricultural Interests***

NMPG and the SRGDCFA are non-profit trade organizations formed in New Mexico in 2002 and 2009, respectively, to promote and protect the interests of farmers in New Mexico's southern Rio Grande valley who collectively irrigate approximately 60,000 acres of croplands and orchards. They have used surface water from the Rio Grande Project to grow the largest-producing pecan crop in the United States, world-famous Hatch green chile, vegetables, and various other crops. Since the 1950s, and with the encouragement of EBID and the United States, they have also pumped supplemental groundwater from wells to meet their irrigation needs. As irrigators who have established water rights to use groundwater under New Mexico's prior appropriation doctrine, they have an interest in ensuring their groundwater rights are not "federalized" and remain exercisable within New Mexico's apportionment under the Compact.

The United States' contention that New Mexico is violating the Compact by allowing groundwater pumping "beyond the levels that existed when the Compact was signed in 1938" is both unworkable and contradicted by its own practice. *See*

US Ex. Br. 22. Given that most irrigation wells used by the farmers were drilled after 1938, this baseline condition would effectively prevent the farmers from using *any* groundwater to supplement the mere inches of surface water they have been receiving since 2008 under the Operating Agreement for the Rio Grande Project between the irrigation districts and the United States. It is a fatal proposition.

Moreover, the United States did not plead for a “1938 Condition” in its Complaint in Intervention. *See* U.S. Compl. (Mar. 23, 2018) ¶¶ 14-15. This is likely because a “1938 Condition” would have established its duty to operate the Project in accordance with conditions prevailing in 1938 – which it has not done. In 1979 Reclamation devised the D-2 Curve to divide water between the irrigation districts based on the Project’s delivery performance during 1951-1978. Thus, the United States itself has a demonstrated history of *not* operating the Project in accordance with a 1938 baseline condition.

The farmers’ overriding interest in this matter is simple – survival. EBID’s position in the Joint Status Report filed by EBID and EP No. 1 does not advance the farmers’ goals. Accordingly, they request an equal opportunity to participate in the tutorial requested by the Special Master in their capacity as *amici*.

Since its founding in 1890, NMSU has served as the State of New Mexico’s land grant university. It relies on both groundwater from its own wells and surface water supplied by the Rio Grande Project for irrigation of the University’s

agricultural lands, especially at its experimental and educational facilities. NMSU's main campus is located in Las Cruces and has continuously used groundwater for higher educational purposes for over 130 years. NMSU is a member of EBID. NMSU continues to support the D-2 baseline because it embodies historical use of water on which NMSU and other groundwater users have long relied.

### ***Utility Interest***

TXNM Energy is the largest provider of electricity in New Mexico and owns and operates the Afton Power Plant located within the LRG in New Mexico, which produces 230 Megawatts of electricity, enough to power the demand of over 100,000 households. The plant uses groundwater for cooling and relies on seven groundwater rights purchased and permitted for that purpose with priority dates ranging from 1949 to 1972. After TXNM Energy gave public notice of transfer of these existing water rights to the plant, the United States did not protest the transfer, the State Engineer issued the permits and TXNM Energy constructed and opened the plant at a cost of 240 million dollars. If the United States prevails in claiming a "1938 Condition," all of the Afton Power Plant's water rights are in jeopardy. Likewise, the United States' claim to ownership of groundwater would undermine the regulatory structure on which the plant's operations rely.



## CONCLUSION

The New Mexico *amici curiae* respectfully request that the Special Master allow 30 minutes to present their equitable interests relating to the impacts of the United States' arguments for a “1938 Condition” and federal ownership of groundwater at the status conference, and answer any questions the Special Master has. The *amici* propose that argument be divided as follows:

- New Mexico Municipal interests (Water Authority and City of Las Cruces) -12 minutes
- Agricultural interests (Pecan Growers and Southern Diversified Croppers) – 11 minutes
- Institutional and Utility interests (NMSU, CRRUA and TXNM)- 7 minutes

Respectfully submitted,

JAMES C. BROCKMANN, ESQ.\*  
JAY F. STEIN, ESQ.  
JOHN M. STOMP, III, ESQ.  
Stein & Brockmann, P.A.  
P.O. Box 2067  
Santa Fe, NM 87504-2067  
(505) 983-3880  
[jcbrockmann@newmexicowaterlaw.com](mailto:jcbrockmann@newmexicowaterlaw.com)  
*\*Counsel of Record for the Albuquerque  
Bernalillo County Water Utility Authority*

CHRISTOPHER MELENDREZ, ESQ.  
ALBUQUERQUE BERNALILLO  
COUNTY WATER UTILITY  
AUTHORITY  
P.O. Box 568  
Albuquerque, NM 87103  
(505) 289-3051  
[ckolberg@abcwua.org](mailto:ckolberg@abcwua.org)  
[cmelendrez@abcwua.org](mailto:cmelendrez@abcwua.org)

NANN WINTER, ESQ.  
Stelzner Winter Warburton Flores  
Sanchez Dawes, P.A.  
P.O. Box 528  
Albuquerque, NM 87103  
(505) 938-7770  
[nwinter@stelznerlaw.com](mailto:nwinter@stelznerlaw.com)  
*Counsel for Amicus Curiae  
Albuquerque Bernalillo County  
Water Utility Authority*

TESSA T. DAVIDSON, ESQ.  
DAVIDSON LAW FIRM, LLC  
4206 Corrales Rd.  
P.O. Box 2240  
Corrales, New Mexico 87048  
(505) 792-3636  
[ttd@tessadavidson.com](mailto:ttd@tessadavidson.com)  
*Counsel of Record for  
New Mexico Pecan Growers*

ARNOLD J. OLSEN, ESQ.  
ROBERT MCCREA, ESQ.  
HENNIGHAUSEN OLSEN  
& McCREA, L.L.P.  
P. O. Box 1415  
Roswell, NM 88202-1415  
(575) 624-2463  
[ajolsen@h2olawyers.com](mailto:ajolsen@h2olawyers.com)  
[bmccrea@h2olawyers.com](mailto:bmccrea@h2olawyers.com)

OLIVIA R. M. STANDISH  
The Standish Law Firm, LLC  
P.O. Box 320  
Tucumcari, NM 88401  
(575) 208-4233  
[ostandish@standishlawfirm.com](mailto:ostandish@standishlawfirm.com)  
*Counsel of Record for Southern Rio  
Grande Diversified Crop Farmers  
Association*

JAY F. STEIN, ESQ.\*  
JAMES C. BROCKMANN, ESQ.  
JOHN M. STOMP, III, ESQ.  
Stein & Brockmann, P.A.  
P.O. Box 2067  
Santa Fe, NM 87504-2067  
(505) 983-3880  
[jfstein@newmexicowaterlaw.com](mailto:jfstein@newmexicowaterlaw.com)  
*\*Counsel of Record for the City of Las Cruces*

BRAD DOUGLAS, ESQ.  
City of Las Cruces  
City Attorney's Office  
P.O. Box 20000  
Las Cruces, NM 88004  
(575) 541-2128  
[jgarrison@las-cruces.org](mailto:jgarrison@las-cruces.org)  
[bdouglas@las-cruces.org](mailto:bdouglas@las-cruces.org)  
*Counsel for Amicus Curiae  
City of Las Cruces*

JOHN W. UTTON, ESQ.  
UTTON & KERY, P.A.  
675 Alto Street  
Santa Fe, NM 87501  
(505) 699-1445  
[john@uttonkery.com](mailto:john@uttonkery.com)  
*Counsel of Record for NMSU, TXNM  
Energy and the Camino Real Regional  
Utility Authority.*

PATRICK SCOTT FIELD, ESQ.  
Interim General Counsel  
NEW MEXICO  
STATE UNIVERSITY  
MSC 3UGC  
P.O. Box 30001  
Las Cruces, NM 88003  
(575) 646-2446  
[psfield@nmsu.edu](mailto:psfield@nmsu.edu)  
*Counsel for New Mexico  
State University*

STACEY GOODWIN, ESQ.  
Associate General Counsel  
TXNM Energy, Inc.  
414 Silver Ave., SW  
MS0805  
Albuquerque, NM 87158-0805  
(505) 241-4927  
[Stacey.Goodwin@pnmresources.com](mailto:Stacey.Goodwin@pnmresources.com)  
*Counsel for Public Service  
Company of New Mexico*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed and served on this 16<sup>th</sup> day of October 2024, through the CM/ECF system, which caused the parties or counsel of record to be served by electronic means.

STEIN & BROCKMANN, P.A.

/s/Jay F. Stein  
Jay F. Stein