No. 22O141, Original

In The
Supreme Court of the United States

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO
and STATE OF COLORADO,

Defendants.

On Motion For Leave To File A Bill Of Complaint

CITY OF LAS CRUCES' *AMICUS CURIAE* BRIEF OPPOSING TEXAS' MOTION FOR LEAVE TO FILE A BILL OF COMPLAINT AND SUPPORTING DEFENDANTS

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

HARRY S. CONNELLY, JR., ESQ.
MARCIA B. DRIGGERS, ESQ.
CITY OF LAS CRUCES
CITY ATTORNEY'S OFFICE
P.O. Box 20000
Las Cruces, NM 88004

Counsel for Amicus Curiae City of Las Cruces

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF *AMICUS CURIAE* 1

BACKGROUND 3

1. Rio Grande Project 3

2. Rio Grande Compact 4

3. Lower Rio Grande Adjudication 5

4. Operating Agreement Litigation 7

SUMMARY OF ARGUMENT 8

ARGUMENT 10

POINT I: The Original Jurisdiction of the Court is Invoked Sparingly 10

POINT II: Texas has not pled a Cause of Action for Enforcement of the Rio Grande Compact 13

A. Texas has not pled a Violation of the Rio Grande Compact 14

B. Texas seeks to Modify, not Enforce, the Rio Grande Compact 18

POINT III: There is pending Litigation Providing Alternative Forums for the Issues Raised by Texas 20

A. The Lower Rio Grande Adjudication is the only Forum to Determine Rights to the Rio Grande Project 20

TABLE OF CONTENTS – Continued

Page

B. State Administration is Required for the Adjudication Decree 23

C. The Federal Operating Agreement Litigation is resolving Project Allocation Issues 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

CASES

Arizona v. California, 373 U.S. 546 (1963).....18

Arizona v. New Mexico, 425 U.S. 794 (1976).....9, 12, 13

C. T. Hellmuth & Assoc. v. Washington Metro. Area Trans. Auth., 414 F. Supp. 408 (D. Md. 1976).....19

City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds, 563 F. Supp. 379 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984).....15, 16

El Paso County Water Impr. Dist. No. 1 v. City of El Paso, 133 F. Supp. 894 (W.D. Tex. 1955), *aff'd*, 243 F.2d 927 (5th Cir. 1957), *cert. den.,* 355 U.S. 820 (1957).....16

Elephant Butte Irrigation Dist. v. Regents of New Mexico State University, 849 P.2d 372, 115 N.M. 229 (Ct. App. 1993).....6, 16, 21

Illinois v. City of Milwaukee, 406 U.S. 91 (1972) 11

Maryland v. Louisiana, 451 U.S. 725 (1981).....12

New Jersey v. New York, 523 U.S. 767 (1998).....18

Ohio v. Wyandotte Chemicals Corp., 401 U.S. 493 (1971).....25

Rio Grande Silvery Minnow v. Keys, 469 F. Supp. 2d 973 (10th Cir. 2002).....16

State ex rel. Reynolds v. Allman, 427 P.2d 886, 78 N.M. 1 (1967).....22

TABLE OF AUTHORITIES – Continued

Page

State ex rel. Reynolds v. Sharp, 344 P.2d 943, 66 N.M. 192 (1959).....22

State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al., No. CV-96-888 (3rd Jud. Dist. filed September 24, 1996).....6, 23

State of New Mexico v. U.S. Bureau of Reclamation, et al., No. 1:2011-cv-00691-JB-ACT (D.N.M. filed August 8, 2011).....8, 24

Texas v. New Mexico, 462 U.S. 554 (1983).....9, 18, 23, 24

Texas v. New Mexico, No. 9, Original, October Term (1952).....17

Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio, 2012-NMSC-039, ___ P.3d ___.....24

United States v. Nevada, 412 U.S. 534 (1973)...8, 11, 12

CONSTITUTIONAL PROVISIONS

U.S. Const. art. I, § 10.....18

U.S. Const. art. III, § 2.....11

STATUTES AND REGULATIONS

28 U.S.C. § 1251.....11

Laws of the Territory of New Mexico 1905, ch. 102, § 22.....3

Laws of the Territory of New Mexico 1907, ch. 49, § 40.....3

McCarran Amendment, 43 U.S.C. § 666 (1952)....6, 21

TABLE OF AUTHORITIES – Continued

Page

National Environmental Policy Act, 42 U.S.C. § 4331 *et seq*. 25

40 C.F.R. §§ 1508.25(a)(1) & (2) 25

40 C.F.R. § 1508.27(b)(7) 25

N.M. Stat. §§ 72-4-13 through 72-4-19 (1907, as amended through 2012) 6

Reclamation Act of 1902, § 2, 32 Stat. 390 3

Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ..... *passim*

TREATISES AND OTHER AUTHORITIES

H.R. Doc. No. 319, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, and Adjudications* (1968) 16

Raymond Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163 (1974 No. 2) 16, 19

Rio Grande Compact Commission, *Resolution of the Rio Grande Compact Commission*, Annual Meeting of the Commission, El Paso, Texas (Feb. 22-24, 1948) 4, 15

S.E. Reynolds and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 Nat. Resources J. 201 (1974 No. 2) 17

Sup. Ct. R. 37.4 1

The City of Las Cruces ("City" or "Las Cruces") submits this *amicus curiae* brief in opposition to the State of Texas' Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint in *Texas v. New Mexico and Colorado*, Original, No. 141. Las Cruces is filing this *amicus curiae* brief pursuant to Sup. Ct. R. 37.4, bringing to the attention of the Court related municipal water supply issues unique to the City.[1]

INTEREST OF *AMICUS CURIAE*

Las Cruces is an incorporated municipality of the State of New Mexico. It is the second largest city in New Mexico and is located south of Elephant Butte Reservoir. The City was founded in the mid-1800s and today 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 United States and its population is expected to exceed 150,000 by 2050. The City's present water supply comes solely from groundwater wells located in the Lower Rio Grande Underground Water Basin ("Lower Rio Grande").[2] Las Cruces had plans to diversify its

[1] New Mexico received timely notice of the City's intent to file an *amicus curiae* brief and consents. Colorado and Texas received less than ten days' notice, with Colorado consenting and Texas acknowledging receipt of notice and stating that consent was not required under the Rules.

[2] Lower Rio Grande as used in this brief refers to the Rio Grande Basin in New Mexico between Elephant Butte Reservoir and the New Mexico-Texas state line.

municipal water supply by acquiring renewable surface water rights presently used for irrigated agriculture and converting them to municipal use, but those plans are in jeopardy as set forth below.

The City is presently a party in two pending lawsuits in other forums relating to water rights and water supply issues in the Lower Rio Grande. One suit was initiated in the 1980s and began in earnest in the 1990s in state district court in New Mexico and involves an adjudication of all interrelated water rights in the Lower Rio Grande. This adudication will define and quantify the United States' water rights in the Rio Grande Project. *See infra* at 5-7. Las Cruces is an indispensable party to that suit.

The second suit involves the allocation of the Rio Grande Project surface water between Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1 ("EP No. 1") through an Operating Agreement signed by those two irrigation districts and the United States Bureau of Reclamation ("BOR") in 2008. *See infra* at 7-8. The City is a party to that case because the allocation of the Rio Grande Project surface water between EBID and EP No. 1 results in greater groundwater pumping in New Mexico, adversely affecting the City's groundwater rights and its plan to expand its water rights portfolio to include renewable surface water.

Texas' complaint would replace decades of ongoing litigation essential to protection of the City's water rights with an original action in which the City's ability to intervene is discretionary. The City is

entirely dependent on water rights that Texas seeks to curtail.

BACKGROUND

1. Rio Grande Project.

The Rio Grande Project consists of two irrigation districts. EBID contains 90,640 irrigated acres located in New Mexico and EP No. 1 consists of 69,010 acres located in Texas. Both irrigation districts are supplied with surface water released from Elephant Butte Reservoir. Historically, the Rio Grande Project surface water available to the districts has been divided 57% to EBID and 43% to EP No. 1 based upon their respective amounts of irrigated acres.

The surface water rights for the Rio Grande Project were acquired under New Mexico law pursuant to the Reclamation Act. *See* Reclamation Act of 1902, § 2, 32 Stat. 390. Pursuant to New Mexico Territorial law, the United States filed notices of intent in 1906 and 1908, the effect of which were to reserve from the then-unappropriated waters of the Rio Grande sufficient surface water for the Rio Grande Project which was planned for 730,000 acre-feet per year of native flows and to store up to 2,000,000 acre-feet in Elephant Butte Reservoir. *See* Laws of the Territory of New Mexico 1905, ch. 102, § 22 and Laws of the Territory of New Mexico 1907, ch. 49, § 40. Because the Rio Grande Project water rights were acquired under New Mexico law, they are adjudicated and administered under New Mexico law.

2. Rio Grande Compact.

The Rio Grande Compact was entered in 1938 to apportion the waters of the Rio Grande among the states of New Mexico, Colorado, and Texas. *See* Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 ("Rio Grande Compact"). Several articles of the Rio Grande Compact are pertinent to Texas' motion for leave to file complaint and Las Cruces' *amicus curiae* response.

Article III of the Rio Grande Compact contains Colorado's delivery obligation to New Mexico. Colorado's obligation is to "deliver water in the Rio Grande at the Colorado-New Mexico State Line, measured at or near Lobatos, in each calendar year . . . " according to the schedule set forth in Article III. *Id.*

Article IV describes New Mexico's delivery obligation. That obligation is to "deliver water in the Rio Grande at San Marcial, during each calendar year, exclusive of the months of July, August, and September . . . " in the "quantity set forth in the following tabulation of relationship . . .." *Id.* The location of New Mexico's delivery obligation was changed by resolution of the Rio Grande Compact Commission in 1948 to provide for delivery of water directly into Elephant Butte Reservoir. *See* Rio Grande Compact Commission, *Resolution of the Rio Grande Compact Commission*, Annual Meeting of the Commission, El Paso, Texas (Feb. 22-24, 1948).

The delivery obligations at Lobatos and Elephant Butte Reservoir are undertaken on an inflow/outflow

basis according to measurements taken at various stream gauges with the Rio Grande Compact quantifying the inflow into the lower gauge based upon the outflow of the upper gauge. This established allowable depletions within river segments that vary with the river flows.

Article XI of the Rio Grande Compact states that "upon the effective date of this Compact all controversies between said States relative to the quantity or quality of the water of the Rio Grande are composed and settled . . .." *See* Rio Grande Compact. It goes on to provide that the states have the right of recourse to the Court "should the character or quality of the water, at the point of delivery, be changed . . .." *Id.*

Accordingly, the Rio Grande Compact resolved all issues of allocations of the Rio Grande among the three states and the only right to seek recourse of the Court was if the quantity or quality of water changed "at the point of delivery" as described in Articles III and IV. *Id.*

No article of the Rio Grande Compact allocates water between EBID and EP No. 1 below Elephant Butte Reservoir. No article of the Rio Grande Compact requires New Mexico to deliver water to the New Mexico-Texas state line.

3. Lower Rio Grande Adjudication.

A general stream system adjudication of the Lower Rio Grande was filed by New Mexico in 1996

and continues today. *See State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed September 24, 1996). A general stream system adjudication is a special statutory proceeding set forth at N.M. Stat. §§ 72-4-13 through 72-4-19 (1907, as amended through 2012). The 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 United States was joined to the adjudication pursuant to the McCarran Amendment, 43 U.S.C. § 666 (1952), for the determination of its interest in the Rio Grande Project. 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, 115 N.M. 229 (Ct. App. 1993).

The nature, extent, and priority of the Rio Grande Project water rights are not defined, but will be resolved in the Lower Rio Grande adjudication. The City of El Paso, which takes a portion of EP No. 1's water for municipal use, is a party to the adjudication

and EP No. 1 has been an active *amicus curiae*, filing briefs and presenting oral arguments.

4. Operating Agreement Litigation.

In 2008, an Operating Agreement was negotiated among EBID, EP No. 1, and the BOR to govern the Rio Grande Project surface water releases from Elephant Butte Reservoir.[3] After the Operating Agreement became public, hydrologic analyses by New Mexico revealed that the effect of the Operating Agreement was to alter the historical releases of the Rio Grande Project surface water from Elephant Butte Reservoir which had been made 57% to EBID and 43% to EP No. 1 to a new ratio, possibly as low as 38% to EBID and 62% to EP No. 1. The consequence is to significantly increase groundwater pumping in New Mexico, thus decreasing groundwater in storage where the City's groundwater rights are situated. Instead of conducting an Environmental Impact Statement ("EIS") over the 50-year period of the Operating Agreement to understand the hydrological impacts, the BOR undertook a cursory analysis over a three-year period that excluded an analysis of the hydrologic impact on the aquifer, resulting in an Environmental Assessment and a Finding of No Significant Impact.

On August 8, 2011, New Mexico filed suit in federal district court in New Mexico to invalidate the

[3] The division of the Rio Grande Project surface water in the Operating Agreement was not perceived as a Rio Grande Compact matter by EBID, EP No. 1, or the BOR, or it could not have been negotiated without the states.

Operating Agreement in *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. 1:2011-cv-00691-JB-ACT (D.N.M. filed August 8, 2011). The City intervened to seek to require the BOR to conduct an EIS over the 50-year life of the Operating Agreement to identify the impacts of increased groundwater diversions resulting from the Operating Agreement on groundwater in storage in the aquifer, including any adverse impacts on the City's groundwater rights.

SUMMARY OF ARGUMENT

Texas' putative complaint asserts violations of the Rio Grande Compact based on New Mexico's alleged failure to protect Rio Grande Project surface water supply by allowing diversions of surface water and groundwater below Elephant Butte Reservoir beyond 1938 conditions. Contrary to the express language in the Rio Grande Compact, Texas contends that New Mexico has a delivery obligation at the New Mexico-Texas state line that has been violated.

The Court exercises its original jurisdiction sparingly and has declined jurisdiction when there are alternative forums available in which to settle the same issues. *See*, *e.g.*, *United States v. Nevada*, 412 U.S. 534 (1973). Further, where a state has sought to file an original action *parens patriae* but the real parties-in-interest are already litigating the same issues in another forum, the Court has declined to

exercise its jurisdiction. *See Arizona v. New Mexico*, 425 U.S. 794 (1976). That is the circumstance here. *See infra* at Point I.

Texas has posited an interpretation of the Rio Grande Compact that has been squarely rejected by numerous courts and commentators for decades. According to the overwhelming authority, New Mexico's delivery obligation under the Rio Grande Compact is at Elephant Butte Reservoir, not the New Mexico-Texas state line. Once a compact has been ratified by the states and Congress, its terms are binding and "no court may order relief inconsistent with its express terms." *See Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The relief that Texas seeks, *viz.*, state line deliveries, would result in modification, not enforcement, of the Rio Grande Compact to the exclusion of Las Cruces' interests. An interstate compact cannot be modified without the consent of the participating states and Congress. *See infra* at Point II.

In addition to ignoring the express language of the Rio Grande Compact, Texas ignores alternative forums where pending litigation will resolve the issues it requests the Court to hear. In the Lower Rio Grande adjudication, the state district court is determining the nature and extent of the Rio Grande Project water supply. In federal district court, several parties are litigating the nature and extent of an Operating Agreement that allocates the Rio Grande Project surface water between EBID and EP No. 1. These are the appropriate forums to resolve the Rio Grande Project surface water supply issues relating

to allocations of Project water below Elephant Butte Reservoir. *See infra* at Point III.

Because the Rio Grande Compact does not contain a state line delivery obligation, an original action to "enforce" the Compact would, in reality, have the Court wade into a quantification of the Rio Grande Project water supply, something presently being accomplished in the Lower Rio Grande adjudication, analyze and resolve the Rio Grande Project surface water allocation issues between EBID and EP No. 1, matters presently pending in federal district court, and create a new apportionment of the Rio Grande below Elephant Butte Reservoir contrary to the express terms of the Compact and to the exclusion of Las Cruces' interests.

ARGUMENT

POINT I

The Original Jurisdiction of the Court is Invoked Sparingly.

Texas argues that there are two factors that the Court examines in deciding whether to grant a motion for leave to file a complaint in an original action – the nature of the interest of the complaining state with a focus on the seriousness and dignity of the claim, and the availability of an alternative forum in which the issues tendered can be resolved. *See* Texas' Brief in Support of Motion for Leave to File Complaint at 18-19 ("Texas' Brief").

While the jurisdiction of the Court extends to interstate suits under Article III, § 2 of the United States Constitution and 28 U.S.C. § 1251(a), that jurisdiction is exercised sparingly. The Court has deferred to alternative forums where the issues can be decided. The Court declined jurisdiction in *Illinois v. City of Milwaukee*, 406 U.S. 91, 93-94 (1972), stating that:

> [w]e construe 28 U.S.C. §1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had. We incline to a sparing use of our original jurisdiction so that our increasing duties with the appellate docket will not suffer.

In *United States v. Nevada*, *supra*, the United States sought an original action declaring the rights of California and Nevada to the Truckee River and federal reserved rights for Pyramid Lake for which the United States claimed a prior right on behalf of the Paiute Tribe. The Court found the petition to concern a dispute between the United States and the two states over which the Court had original, but not exclusive, jurisdiction and that there was a pending case in Nevada with jurisdiction over the interested

parties. The Court declined jurisdiction, confirming: "[w]e seek to exercise our original jurisdiction sparingly and are particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle his claim." *See United States v. Nevada*, 412 U.S. at 538.

Deference to alternative forums has also been applied within the Court's exclusive original jurisdiction. In *Arizona v. New Mexico*, *supra*, Arizona sought to file an original action challenging New Mexico's energy tax in both its propriety capacity and as *parens patriae*. Noting that the three Arizona utilities affected by the tax had filed suit in state court to hold the tax unconstitutional, the Court held: "[i]n the circumstances of this case, we are persuaded that the pending state-court action provides an appropriate forum in which the *issues* tendered here may be litigated." *See Arizona v. New Mexico*, 425 U.S. at 797 (emphasis in original); *see generally Maryland v. Louisiana*, 451 U.S. 725, 739-45 (1981).

Arizona v. New Mexico is significant in relation to Texas' motion for leave to file because the Court looked behind Arizona's allegation that it was appearing *parens patriae* to the underlying interests consisting of the three utility companies. The Court found that the existing state court proceeding provided an alternative forum where the "issues" could be determined among the real parties-in-interest irrespective of the fact that Arizona had attempted to create an original action. *See Arizona v. New Mexico*, 425 U.S. at 797.

The same logic applies here. EP No. 1 and the City of El Paso are the real and only parties-in-interest in Texas. There are two pending lawsuits, *viz.*, alternative forums, in which one or both entities are parties to the identical issues that Texas seeks to have the Court resolve in this original action. One lawsuit is a district court proceeding in New Mexico adjudicating rights to the Rio Grande Project, among others, and the other is a federal district court proceeding related to the 2008 Operating Agreement which allocates the Rio Grande Project surface water between the two irrigation districts. The issues tendered by Texas in this putative original action are issues that should be resolved in alternative forums through pending litigation. *See infra* at Point III. As it did in *Arizona v. New Mexico*, the Court should look behind Texas' allegation that it is appearing *parens patriae* to the underlying interests of EP No. 1 and the City of El Paso, decline to exercise its original jurisdiction, and allow the same issues to be resolved in alternative forums.

POINT II

Texas has not pled a Cause of Action for Enforcement of the Rio Grande Compact.

Texas has failed to plead a justiciable cause of action for enforcement of the Rio Grande Compact within the Court's original jurisdiction for two reasons. First, Texas misconstrues the Rio Grande Compact to require a delivery obligation at the New Mexico-Texas

state line where none exists and then alleges violations of that supposed obligation by New Mexico. Second, what Texas actually seeks is a modification of the Rio Grande Compact, a remedy which the Court cannot provide.

A. Texas has not pled a Violation of the Rio Grande Compact.

Texas' putative complaint alleges violations of the Rio Grande Compact. *See* Texas' Brief at 1. Contrary to its express terms, Texas alleges that New Mexico has violated the Rio Grande Compact by allowing the diversion of surface water and groundwater between Elephant Butte Reservoir and the New Mexico-Texas state line beyond 1938 conditions. *See* Texas' Complaint at ¶¶4, 10, 11, 18, and 19. Texas improperly transforms the allocation of the Rio Grande Project surface water below Elephant Butte Reservoir into a Compact delivery obligation.

Nothing in the Rio Grande Compact quantifies the Rio Grande Project water supply or makes protection of that water New Mexico's obligation under the Compact. Instead, the Rio Grande Project water supply released from Elephant Butte Reservoir must be quantified and administered under New Mexico state law where the Rio Grande Project water rights emanate. Issues relating to the allocation of the Rio Grande Project surface water between EBID and EP No. 1 are not subject to the jurisdiction of the Court

because they are not obligations in an interstate compact. *See infra* at Point III.

Texas' proposition that New Mexico is required by Compact to deliver the Rio Grande Project surface water to EP No. 1 creates a fictional state line delivery obligation by New Mexico. This is contrary to the express terms of the Compact. New Mexico's delivery obligation is set forth in Article IV of the Rio Grande Compact and requires delivery of Rio Grande flows into Elephant Butte Reservoir, not at the state line. *See* Rio Grande Compact and Rio Grande Compact Commission, *Resolution of the Rio Grande Compact Commission*, Annual Meeting of the Commission, El Paso, Texas (Feb. 22-24, 1948).

An overwhelming number of cases, treatises, and law review articles agree that New Mexico's delivery obligation under the Rio Grande Compact ends at Elephant Butte Reservoir and that there is no state line delivery obligation. In *City of El Paso v. Reynolds*, the federal district court held that "New Mexico is obligated to make delivery not at the New Mexico-Texas state line but 'into Elephant Butte Reservoir.'" *See City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 384 (D.N.M. 1983), *aff'd on reh'g*, 597 F. Supp. 694 (D.N.M. 1984). The court further observed that neither the history of the Compact negotiations nor the ultimate terms of the Compact "support the conclusion that the parties to the agreement intended it to apportion either the surface water of the river or the related ground water below Elephant Butte between New Mexico and

Texas." *Id.* Moreover, the district court held that the Compact "did not apportion any specified amount of water to Texas below Elephant Butte." *Id.* at 385.

An identical holding was reached by the New Mexico Court of Appeals when it held that the "Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the state line." *See Elephant Butte Irrigation Dist. v. Regents of New Mexico State University*, 849 P.2d at 378. Similarly, a federal district court in Texas agreed, stating that the Rio Grande Compact:

> [h]as a number of peculiar provisions. For example, the water New Mexico must pass to Texas is delivered not where the two States meet, but at San Marcial, New Mexico, more than 100 miles above the point where the Rio Grande leaves New Mexico. This delivery is made into the reservoir of the Elephant Butte Dam . . ..

See El Paso County Water Impr. Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 907 (W.D. Tex. 1955), *aff'd*, 243 F.2d 927 (5th Cir. 1957), *cert. den.,* 355 U.S. 820 (1957). *See also Rio Grande Silvery Minnow v. Keys*, 469 F. Supp. 2d 973, 996 (10th Cir. 2002); H.R. Doc. No. 319, *Documents on the Use and Control of the Waters of Interstate and International Streams: Compacts, Treaties, and Adjudications*, at 272-291 (1968); Raymond Hill, *Development of the Rio Grande Compact of 1938*, 14 Nat. Resources J. 163 (1974 No. 2);

and S.E. Reynolds and Philip B. Mutz, *Water Deliveries Under the Rio Grande Compact*, 14 Nat. Resources J. 201 (1974 No. 2). Many more citations exist.

More telling, in invoking the Court's original jurisdiction in *Texas v. New Mexico*, No. 9, Original, in the Court's October Term, 1952, Texas pled that New Mexico's delivery obligation was into Elephant Butte Reservoir. That case involved allegations that New Mexico had violated the storage provisions of the Compact related to El Vado Reservoir upstream of Elephant Butte. Texas pled: "[t]he supply of water *required by the Compact to be delivered by New Mexico into Elephant Butte Reservoir* for the benefit of the State of Texas has been seriously diminished as a result of these violations . . .." *See* Texas' Complaint, *Texas v. New Mexico*, No. 9, Original at ¶ VII (emphasis added).

As set forth in Article XI of the Rio Grande Compact, all controversies related to the allocation of waters among the states were resolved in the Compact. Recourse to the Court was allowed should the quantity or quality of water change at the "point of delivery." The only points of delivery set forth in the Rio Grande Compact are described in Articles III and IV. Texas makes no allegations of shortfalls into Elephant Butte Reservoir under Article IV of the Compact. Instead, Texas seeks recourse for water deliveries not mentioned anywhere in the Rio Grande Compact.

As the Court stated in *Texas v. New Mexico*, *supra*, once a compact has been ratified by the states and Congress, its terms are binding and "no court may order relief inconsistent with its express terms." *See Texas v. New Mexico*, 462 U.S. at 564; *see also New Jersey v. New York*, 523 U.S. 767, 811 (1998); *compare Arizona v. California*, 373 U.S. 546, 565-66 (1963). In this case, Texas is seeking relief inconsistent with the express terms of the Rio Grande Compact.

B. Texas seeks to Modify, not Enforce, the Rio Grande Compact.

Because the Rio Grande Compact is explicit that New Mexico's delivery obligation is into Elephant Butte Reservoir, the relief that Texas seeks would result in modification, not enforcement, of the Rio Grande Compact. Such relief is beyond the Court's jurisdiction as the Court can only order relief consistent with the Compact's express terms. *See Texas v. New Mexico*, 462 U.S. at 564.

The process for negotiating an interstate compact is set forth in Article I, § 10 of the United States Constitution. Congress must consent to the negotiation of an interstate compact and appoint a federal representative to safeguard the United States' interest. Upon the completion of negotiations, the compact must be ratified by each of the state legislatures and Congress. Accordingly, it becomes both a state and federal law. This process was exemplified in the negotiation and ratification of the Rio Grande

Compact in 1938 and it would be required if the Rio Grande Compact were to be modified today as requested by Texas. When enacted, an interstate compact "constitutes not only law, but a contract which may not be amended, modified, or otherwise altered without the consent of all parties." *See C. T. Hellmuth & Assoc. v. Washington Metro. Area Trans. Auth.*, 414 F. Supp. 408, 409 (D. Md. 1976).

Texas' claim that New Mexico has a state line delivery obligation under the Rio Grande Compact has significant ramifications. As stated by the Commissioner negotiating the Compact for New Mexico, "for the purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas." *See* Hill, *supra*, at 172. Only New Mexico's equities above Elephant Butte Reservoir were considered and evaluated in determining New Mexico's allocation of water under the Rio Grande Compact. New Mexico's equities below Elephant Butte Reservoir were not considered. Had New Mexico's delivery point under the Rio Grande Compact been at the state line instead of into Elephant Butte Reservoir, equities south of Elephant Butte Reservoir, principally Las Cruces' interests as the state's second largest city, would have to have been included in determining New Mexico's allocation of Rio Grande water. The fictional compact which Texas seeks to enforce makes the absurd assumption that New Mexico approved a compact which limited water rights below Elephant Butte Reservoir to those of the Rio Grande Project with the full understanding

that this meant there could be no groundwater diversions by Las Cruces. New Mexico never would have ratified such a compact intentionally excluding Las Cruces' interests.

POINT III

There is pending Litigation Providing Alternative Forums for the Issues Raised by Texas.

Texas' putative complaint is incorrectly based on the premise that there is an interstate cause of action among Texas, New Mexico, and Colorado predicated on violations of the Rio Grande Compact in the Lower Rio Grande. To the contrary, the Lower Rio Grande presents issues requiring a determination of the United States' interest in the Rio Grande Project. Those issues are presently being litigated by the real parties-in-interest in alternative forums in the Lower Rio Grande adjudication in New Mexico and in the federal district court where the Operating Agreement is at issue.

A. The Lower Rio Grande Adjudication is the only Forum to Determine Rights to the Rio Grande Project.

The first alternative forum is the Lower Rio Grande adjudication. *See supra*, at 5-7. Texas' effort to remove adjudication issues from the adjudication court to the United States Supreme Court would deny due process to all other claimants for the following

reasons. First, the issue of the Rio Grande Project rights is necessary in the state court adjudication in order to finally resolve claims with respect to the Rio Grande Project, both for the United States and *inter se* with respect to the other claimants. Second, the Court cannot undertake an adjudication involving thousands of defendants in New Mexico under its original jurisdiction. Third, the Court does not administer adjudication decrees.

The United States has been joined to the adjudication pursuant to the terms of 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 New Mexico State University*, 849 P.2d at 378. Texas has equated its claimed Compact interest with that of the United States' Rio Grande Project interest:

> The United States, in 1906 and again in 1908, as part of the planning and implementation of the Rio Grande Project, set aside all of the unappropriated waters of the Rio Grande that were necessary for the operation of the Rio Grande Project. Notice of Water Appropriation and Supplemental Notice of Water Appropriation, *supra*. The Rio Grande Compact succeeded to these water rights.

See Texas' Brief at 15.

The United States' rights are exercised in relation to those of other parties, including those of the City. Texas cannot be allowed to remove the United States'

Rio Grande Project interest for a separate adjudication in the Court to the prejudice of the City and other interests which are interconnected.

New Mexico spent $3,000,000 on a hydrographic survey to identify the water rights claims on the Lower Rio Grande. There are 18,000 defendants claiming rights to the surface and groundwater of the Lower Rio Grande, with 14,000 active subfiles, and more than 5,000 subfile orders have been entered. It is not feasible for the Court to remove the adjudication, or one part of it, into its original jurisdiction.

An adjudication is an inherently *inter se* proceeding. The rights adjudicated to one party affect those adjudicated to another. For this reason, the New Mexico adjudication process is divided into two phases. In the first phase, the state appears as the nominal plaintiff against the water users or claimants as the nominal defendants. The adjudication is not complete until a second phase has been held in which the individual claimants are entitled to contest the rights adjudicated to other defendants. *See State ex rel. Reynolds v. Sharp*, 344 P.2d 943, 66 N.M. 192 (1959); *State ex rel. Reynolds v. Allman*, 427 P.2d 886, 78 N.M. 1 (1967).

Stream System Issue No. 104 is addressing "stream system issues," in which the extent of the United States' rights in the Rio Grande Project for EBID and EP No. 1 will be determined. These include whether or not there is a right to groundwater,

priority date, amount of water, and purpose of use of water stored in Elephant Butte Reservoir. The two Texas parties with an interest in the adjudication in New Mexico, the City of El Paso and EP No. 1, are present. The designation of "stream system issues" by the adjudication court is intended to address issues which "would, as a practical matter, be dispositive of the interests of other claimants," or "substantially impair or impede the ability of claimants or the State to protect their interests . . .." *See* First Amended Case Management Order of September 14, 2009, *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist., et al.*, No. CV-96-888 (3rd Jud. Dist. filed September 24, 1996). Removing Rio Grande Project issues now cannot be done without substantially impairing or impeding the ability of Las Cruces to protect its interest.

B. State Administration is Required for the Adjudication Decree.

The purpose of an adjudication is to provide a decree containing a full description of the water rights adjudged to each party. Following the entry of an adjudication decree, administration is then undertaken by the state court or the State Engineer. The Court has declined to undertake decree administration of the kind that would follow from granting Texas' motion. As the Court stated in *Texas v. New Mexico*, *supra*:

> [w]e have expressly refused to make indefinite appointments of quasi-administrative officials to control the division of interstate waters on a day-to-day basis, even with the consent of the States involved. *E.g.*, *Vermont v. New York*, 417 U.S. 270 (1974); *Wisconsin v. Illinois*, 289 U.S. 710, 711 (1933). Continuing supervision by this Court of water decrees would test the limits of proper judicial functions, and we have thought it wise not to undertake such a project. *Vermont v. New York*, *supra*, at 277.

Texas v. New Mexico, 462 U.S. at 566.

In 2012, the New Mexico State Engineer obtained the ability to undertake administration of water rights on the basis of documents on file in the State Engineer's Office, without waiting for the completion of an adjudication. *See Tri-State Generation & Transmission Ass'n, Inc. v. D'Antonio*, 2012-NMSC-039, ___ P.3d ___. Accordingly, there is an alternative forum of administration for Texas' issues.

C. The Federal Operating Agreement Litigation is resolving Project Allocation Issues.

In *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. 1:2011-cv-00691-JB-ACT (D.N.M. filed August 8, 2011), the City, as an intervenor, seeks declaratory and injunctive relief to compel the BOR to complete an EIS covering the 50-year term of the Operating Agreement to analyze its adverse effects on groundwater in storage where Las Cruces diverts its

municipal water supply. *See* National Environmental Policy Act, 42 U.S.C. § 4331 *et seq*.; 40 C.F.R. §§ 1508.25(a)(1) & (2), 1508.27(b)(7). The City also seeks to determine what remains of its plans to buy surface water rights from agricultural users and convert them into municipal rights.

Until an EIS is completed and the litigation resolved regarding the validity of the Operating Agreement, the allocation of the Rio Grande Project surface water between EBID and EP No. 1 remains unknown and therefore, Texas has no definitive allocation to protect or enforce. The proper forum for these issues is the federal district court in New Mexico. The issues in Texas' complaint are not ripe until this has been completed.

The Court has been hesitant to expand its original docket with cases involving the complexities of water quality issues. *See Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971). In *Wyandotte*, the Court eschewed any expertise in assessing the complicated scientific issues at stake, noting that it would have "to reduce drastically our attention to those controversies for which this Court is a proper and necessary forum." *Id*. at 505. The same is true with preparing an EIS here.

CONCLUSION

For the foregoing reasons, Texas' motion for leave to file its complaint should be denied.

Respectfully submitted,

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