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.

OFFICE OF THE SPECIAL MASTER

STATE OF NEW MEXICO'S CONSOLIDATED RESPONSE TO *AMICUS CURIAE* ELEPHANT BUTTE IRRIGATION DISTRICT, CITY OF EL PASO, AND EL PASO COUNTY WATER IMPROVEMENT DISTRICT'S BRIEFS REGARDING APPORTIONMENT OF WATER BELOW ELEPHANT BUTTE RESERVOIR

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February 5, 2021

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The State of New Mexico herein consolidates its replies to briefs filed by *amicus curiae* Elephant Butte Irrigation District ("EBID"), the City of El Paso ("El Paso"), and El Paso County Water and Improvement District's ("EPCWID") (together, "*amicus* briefs"). For the reasons given below, the *amicus* briefs should be disregarded.[1]

ARGUMENT

I. THE *AMICUS* BRIEFS DO NOT SERVE THEIR PROPER PURPOSE

United States Supreme Court Rule 37 provides:

> An *amicus curiae* brief that brings to the attention of the Court relevant matter not already brought to its attention by the parties may be of considerable help to the Court. An *amicus curiae* brief that does not serve this purpose burdens the Court, and its filing is not favored.

U.S. Sup. Ct. R. 37(1). The *amicus* briefs do not bring to the Court any relevant material that the parties have not already presented. Rather, as discussed below, each of the three *amicus* briefs has a slightly different mix of either attempting to add irrelevant issues to the case or repeating the parties' positions. Even after leave to file an *amicus* brief has been granted, if the brief proves unhelpful it may be disregarded. *Duronslet v. Cty. of L.A.*, No. 2:16-cv-08933-ODW(PLAx), 2017 U.S. Dist. LEXIS 213736, 4 (C.D. Cal. Jan. 23, 2017), *citing Neonatology Assocs., P.A. v. Commissioner*, 293 F.3d 128, 133 (3d Cir. 2002). *See Hazlin v. Botanical Labs., Inc.*, No. 13cv0618-KSC, 2015 U.S. Dist. LEXIS 189687, 13 (S.D. Cal. May 20, 2015) ("*Amicus* briefs which are unhelpful or fail to present unique information ... may be disregarded"). Because these briefs do not assist the Court in understanding any relevant matter, the Special Master should disregard these *amicus* briefs.

[1] In this Reply Brief, New Mexico adopts the abbreviation for briefs contained in New Mexico's Consolidated Reply to Parties in Support of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment (N.M. App. Reply). All exhibits designated "NM-EX __" in this Reply Brief are contained in New Mexico's Final Exhibit Compendium dated February 5, 2021, filed with New Mexico's Reply Briefs.

II. EBID'S *AMICUS* BRIEF ATTEMPTS TO ADD IRRELEVANT ISSUES TO THE CASE, RELYING ON ERRORS OF STATE AND FEDERAL LAW TO DO SO

Amicus EBID's *Brief Regarding Apportionment of Water Below Elephant Butte Reservoir* (January 6, 2021) [Doc. No. 445] ("EBID *Amicus* Br.") consists to a great extent of an airing of fears and grievances regarding the New Mexico State Engineer ("State Engineer"). This is another attempt by EBID to establish a position of dominance in the New Mexico Lower Rio Grande ("LRG") that has already been flatly rejected. None of the matters raised by EBID are either relevant or helpful to the Court or the Special Master in resolving the legal issues in this case.

A. EBID Does Not Address Relevant Issues

EBID fails to address relevant issues or shed light on issues so as to assist the Court. Instead, EBID's brief is rife with unfounded accusations, and conspiracy theories that fail to assist the Court in any material way. EBID's brief makes it clear that it seeks to impeach the State's position[2] because it fears that the State Engineer will exercise control over New Mexico's apportionment, which would result in transparency requirements for the Rio Grande Project ("Project") accounting and operations, a result EBID appears to dread. EBID *Amicus* Br. at 2-3. EBID also professes to fear that in some unspecifiable way the State Engineer will control Texas's water use in Texas as well, while admitting that the logistics of that are "unclear." *Id.* In a footnote, EBID reveals that it sees New Mexico's "true intentions" for control of the Project in that New Mexico has expressed frustration with the 2008 Operating Agreement. *Id.*, n.1. Contrary to its position, however, EBID does not have unrestricted authority as to the water below the reservoir. *See* EBID *Amicus* Br. at 12-13 (EBID argues that EBID has absolute, unconstrained, sovereign-

[2] Special Master Grimsal remarked severely on EBID's impeachment of the State when considering EBID's Motion to Intervene in this case, calling an effort by an in-State entity to impeach a State " . . . offensive to the notion of sovereign dignity and prohibited by the doctrine of *parens patriae*." *First Interim Report of the Special Master* (February 9, 2017) [Doc. No. 54], 263, *citing New Jersey v. New York,* 345 U.S. 369, 373 (1953).

like power over water below the reservoir and can make any deals it wants to, no matter how extreme); EBID *Amicus* Br. at 27 ("The real reason New Mexico wants an apportionment in the Lower Rio Grande is so it can invalidate the 2008 Operating Agreement and any other Project operations it does not approve of."). The unseemliness of this grasp at unconstrained power is underscored by EBID's improper view of itself as "Compact Texas,"[3] despite the fact that it is a creature of New Mexico statute. NMSA 1978 §73-10-1, *et seq.; see* section II. D., *infra*.

None of this assists the Court in this case or address the specific question of apportionment that EBID's *amicus* brief purports to address. New Mexico makes no secret of its view that the 2008 Operating Agreement did not benefit New Mexico and New Mexico's citizens, and there is no reason to look for New Mexico's "true intentions" behind that position. EBID's fears regarding the State of New Mexico's "true intentions" are *not* relevant to this case, nor is the array of aggrieved and unfounded claims of ill-usage that EBID offers in its brief. EBID Br. at 19-24. Instead EBID offers only intra-state disputes with its parent State and such matters are not appropriate within the scope of this litigation.

[3] EBID's attempt to drag this court into an intrastate dispute is further highlighted by its assertion that it understands of itself as "geographic New Mexico but Compact Texas." EBID Br. Attachment 1, *Affidavit of Gehrig "Gary" L. Esslinger*, ¶7. This assertion is not only irrelevant to this case but is incorrect and has no legal basis. It is not even clear what the phrase means, unless it is intended to explain why EBID aligns with Texas in this case, contrary to the positions of many of its constituents. Groups of farmers within EBID have filed as *amici* in this case briefs supporting the State of New Mexico. *See Joint Brief of Amici Curiae New Mexico Pecan Growers and the Southern Rio Grande Diversified Crop Farmers Association in Support of State of New Mexico and in Response to the United States of America's Motion for Partial Summary Judgment*. In that brief *amici* support New Mexico's positions in these summary judgment motions, stating that they view the dispositive motions of Texas and the United States in this case as "directly attacking their individual rights to use Project water that have been exercised for over a century." Moreover, they argue, the relief requested in the Texas and United States motions "would require the extinction of groundwater irrigation rights established with the encouragement of the United States for over 60 years." *Id.,* 1-2. EBID's view of itself as "Compact Texas" may be why it has failed to support the view of farmers within EBID that the dispositive motions filed in this case are attacks on Project rights and seek relief that is both unfair and destructive. If so, then EBID's evidence and argument about "Compact Texas" is another invitation to the Special Master to embroil the case unnecessarily in intrastate tensions. It should be disregarded.

EBID demonstrates the irrelevance of its own brief to the issues in this case when it argues that the existence or not of a Compact apportionment below Elephant Butte Reservoir does not matter to EBID's position that it is not subject to any water use enforcement oversight by the State of New Mexico—of which EBID is a political subdivision. EBID Br. at 10, 24-25. If Compact apportionment is not relevant to the arguments in EBID's brief, then EBID's *Brief Regarding Apportionment of Water Below Elephant Butte Reservoir* does not assist the Court as to the issues in this case and should be disregarded. *See* U.S. Sup. Ct. R. 37.

B. The Court Rejected EBID's Motion to Intervene, Which Was Based on the Same Unfounded Assertions as EBID Makes in its Current Amicus Brief

As an *amicus curiae*, EBID makes the same unfounded allegations as to its power and status that were rejected in the context of its earlier effort to intervene as a party in this case. EBID was denied the status of an intervenor in *Texas v. New Mexico*, 138 S. Ct. 349 (2017) (Mem.). This order comported with the recommendation of Special Master Grimsal, who discussed at length EBID's proposed intervention. *First Interim Report of the Special Master* (February 9, 2017) [Doc. No. 54] ("*First Interim Report*"), 244-67. In the course of that discussion, Special Master Grimsal correctly concluded that EBID's self-image as a powerful sovereign-like entity with respect to Project operations was highly inflated, observing instead that:

> Quite possibly, EBID actually has less of an interest in this case if any interest at all, than any other affected Rio Grande water user or claimant in New Mexico. EBID does not possess the rights or responsibility under federal reclamation law to carry out the provisions of the Rio Grande Project–the United States has those. And EBID holds no beneficial-use interests; as EBID acknowledges in its papers, the individual entrymen who purchased the land under the Reclamation Act and repaid the United States for the construction and maintenance costs of the irrigation works and the right to use water hold the beneficial-use water rights.

First Interim Report, 544. Special Master Grimsal also flatly rejected EBID's argument that only EBID, and not New Mexico, had responsibility for Project operations, making the inescapable

point that "EBID's 'statutory mission' proceeds directly from the State of New Mexico." *Id.* at 261. Thus, the United States has the right and responsibility to carry out the provisions of the Project, while EBID represents neither the State of New Mexico nor its own "entrymen" members who shouldered the actual repayment for the Project and who own the beneficial-use water rights. *Id.*, 544; *See Ickes v. Fox*, 300 U.S. 82 (1937) (the owners of water rights on a Reclamation project are the individual beneficial users, under state law). Many of those "entrymen" members have asserted positions in this case in support of the State and contrary to EBID. *See e.g*. *Joint Brief of Amici Curiae New Mexico Pecan Growers and the Southern Rio Grande Diversified Crop Farmers Association in Support of State of New Mexico and in response to the United States of America's Motion for Partial Summary Judgment* (January 6, 2021) [Doc. No. 447] ("NMPG & SRGDCF *Amicus* Br.").

Although EBID may well have less of an interest in this case than any other water user or claimant in New Mexico, and although it is entirely a New Mexican entity, EBID again attempts to use the occasion of this case to distract the Court into matters related to its differences with the State Engineer. *But see First Interim Report*, 265 ("If EBID, as a creature wholly of the State of New Mexico, is allowed to intervene despite New Mexico's presence in the case, the Supreme Court 'could, in effect, be drawn into an intramural dispute over the distribution of water' within New Mexico . . . .") (quoting *New Jersey v. New York*, 345 U.S. 369, 373 (1953). EBID's arguments have already been found to be baseless distractions from the issues in this case and should be rejected here in their present form.

C. EBID's Misinterprets NMSA 1978 § 72-9-4

EBID argues that NMSA 1978 §72-9-4, enacted in 1941, constituted an unnoticed, massive change in the relationship between the state and the federal government on Reclamation projects. EBID Br. 5. The provision states:

> Except as provided in Sections 15 and 22 [72-5-33 and 19-7-26 NMSA 1978] of this act nothing herein shall be construed as applying to or in any way affecting any federal reclamation project heretofore or hereafter constructed pursuant to the act of congress approved June 17, 1902, known as the Federal Reclamation Act, or acts amendatory thereof or supplementary thereto.

NMSA 1978 §72-9-4.

As with EBID's misunderstanding of Section 8 of the Reclamation Act, the staightforward reading of this statute is that the legislature was trying to ensure that its 1941 enactment—"this act"—would make as little change as possible to the long-established legal arrangements between New Mexico and federal Reclamation projects. The notes to the statute confirm this reading, stating unequivocally that "'[t]his act' refers to Laws 1941, ch. 126, which is codified as 19-7-26 and various sections throughout Chapter 72 NMSA 1978." NMSA 1978 §19-7-26. In *City of Raton v. Vermejo Conservancy District*, 678 P.2d 1170 (1984), the New Mexico Supreme Court held that the provision created an exemption for Reclamation from one of the provisions that had been amended in the 1941 Act, a provision related to the water rights application procedure. Nothing would suggest the radical interpretation that EBID offers here, that NMSA 1978 §72-9-4 creates a blanket exemption for Reclamation from all provisions not only of "this act," meaning the 1941 Act, but from the entire chapter of New Mexico's statutes regarding water law. Neither by its terms nor in any interpretation has the statute been read to mean that the State Engineer has no water administration authority within the area of Reclamation projects. The provisions in "this act" did not include the State Engineer's general supervisory authority over waters of the State, which has been in place largely unchanged since the State Water Code was passed in 1907. NMSA

1978 §72-2-1. Thus, provisions regarding the State Engineer's broad authority to administer water rights established through the use of water from federal Reclamation projects in 1941 continue to apply today.

EBID's improbable, radical reading of this statue, for which EBID offers neither argument nor support, entails the belief that the 1941 legislature suddenly, quietly and indirectly created an almost blanket exemption for federal Reclamation projects from any application of state water law anywhere in New Mexico. Such a result would have a disruptive and destructive effect both within and on areas outside the Lower Rio Grande ("LRG"). In its zeal to assert its own absolute power over the LRG, EBID is ready to cancel New Mexico water law and disrupt federal/state relationships all over New Mexico. With regard to both the Enabling Act and NMSA 1978 §72-9-4, however, the intent of the statute was to *preserve* legal relationships between the State and Reclamation, not to destroy them.

III. THE CITY OF EL PASO'S *AMICUS* BRIEF ADDS NOTHING TO THE CASE

The *Response Brief of Amicus Curiae City of El Paso to the State of New Mexico's Motions for Summary Judgment* (January 6, 2021) [Doc. No. 443] ("El Paso *Amicus* Br.") recites and largely duplicates, with a few exceptions, arguments made in Texas's Response Briefs regarding the relationship of Texas's apportionment to "full supply" under the Project, and the question of Compact apportionment to New Mexico below Elephant Butte Reservoir. *See* Doc. Nos. 427, 428.[4] El Paso's *Amicus* brief does not fulfill the proper purpose of an *amicus* brief and should be disregarded. *See* U.S. Sup. Ct. R. 37; section I, *supra*.

[4] New Mexico's replies to Texas's responses on New Mexico's Apportionment Motion and Full Supply Motion are addressed at length in the N.M. App. Reply and N.M. Full Supply Reply, filed concurrently herewith, and New Mexico incorporates those arguments here by reference.

El Paso puts the "full supply" issue in terms that suggest its real concern in this controversy when it observes that:

> [The] difference between the Compact's normal release and [Reclamation]'s full supply allocation represents a renewable water supply that the City of El Paso could put to beneficial use, instead of pursuing more expensive alternatives such as importing groundwater from Hudspeth County or desalinization.

El Paso *Amicus* Br. 5. This wistful assertion reflects what is undoubtedly true, that El Paso would like a municipal supply of water that is over and above the amount needed for agricultural uses in the Project, and likely would have preferred a type of compact that simply apportioned water between states rather than tying apportionment to the Project. Under the Compact that was actually adopted, however, Texas's Compact apportionment is tied to EPCWID, which has meant that for many years El Paso has been forced to work through EPCWID and Reclamation to obtain surface water, and otherwise to rely heavily on groundwater. NM-EX 423, Rio Grande Project Implementing Third-Party Contract among the Bureau of Reclamation, El Paso County Water Improvement District 1, and the City of El Paso (4/10/2001); NM-EX 447, Ashworth, J.B., *Evaluation of Ground-Water Resources in El Paso County, Texas, Texas Water Development Board*, Report 324 (3/1990), 12-16, 19, 21-23.

El Paso also offers various excerpts and quotations to support a notion that New Mexico and Texas agreed to create "Compact Texas" in 1938. El Paso *Amicus* Br. 7-11. None are persuasive and they have no bearing on the present controversy. For example, El Paso quotes language from a draft unexecuted 1985 operating agreement between the two districts and Reclamation that defined "Texas" for Compact purposes as including lands in New Mexico. El Paso *Amicus* Br. 7. This language was certainly not agreed to by the State of New Mexico. In any event, it had no practical effect on Compact deliveries. El Paso then cites a line from a 2002 Memorandum of Understanding between the Rio Grande Compact Commission and the United

States which stated that deliveries from New Mexico were to be delivered to Texas at Elephant Butte Reservoir. *Id.* This statement is incomplete in that it does not discuss what happens below the reservoir. Undeniably, New Mexico makes Compact deliveries into Elephant Butte Reservoir. Then, through the Project, Compact deliveries are made to both Texas and New Mexico by releases from Elephant Butte Reservoir.

Next, El Paso provides a quotation from the former Bureau of Reclamation's Area Manager and a statement from a former EBID Board president both essentially stating New Mexico had no apportionment of water below Elephant Butte and that Texas is committed to the service of the entire Project. El Paso *Amicus* Br. 7-9. What these individuals and any others expressing such views believed is irrelevant because there is no formal support for their quoted beliefs. Even if there was once a time when Texas understood its role in the Project in accordance with these beliefs, Commissioner Gordon's deposition testimony demonstrates the contrary reality of the present situation. In the absence of express terms in the Compact, Commissioner Gordon has no formal or legal obligation to treat EBID as "Compact Texas," and has not done so. Nor does he intend to do so. According to Commissioner Gordon, New Mexico groundwater uses will need to be shut down, including those of EBID's farmers, to ensure water is delivered to Texas, and Texas has no obligation to figure out how that should be done. NM-EX 259, Gordon Dep. (Vol. 2) (July 15, 2020) 143: 23-24; 144: 1-6. In short, Texas in no way considers EBID to be "Compact Texas," and has not been protecting EBID's interests. Instead, Texas and its supporting *amici* pursue their own interest in obtaining as much water as possible from New Mexico. El Paso's interpretation of the Compact is unfounded and should be disregarded.

IV. EPCWID'S REPETITION OF ARGUMENTS MADE BY TEXAS AND THE UNITED STATES ADDS LITTLE, AND ITS MISCHARACTERIZATIONS OF NEW MEXICO'S POSITION RENDER ITS BRIEF UNHELPFUL

EPCWID's *Amicus Brief in Response to Summary Judgment Motions on Apportionment Issues* ("EPCWID *Amicus* Br.") repeats positions and arguments made by other parties. EPCWID "does not stake out a specific position on the question" of whether New Mexico has a Compact apportionment in southern New Mexico, EPCWID *Amicus* Br. 3, n.3, but acknowledges that the United States Supreme Court inferred that southern New Mexico received an apportionment through the Project. EPCWID *Amicus* Br. 4; *see Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). EPCWID also explicitly endorses the United States' position that southern New Mexico *does* have an apportionment. EPCWID *Amicus* Br. 1.

The only Compact apportionment position EPCWID does stake out is that the Compact does not *quantify* the apportionment for southern New Mexico. EPCWID *Amicus* Br. 23-28. New Mexico has fully explained the quantification of apportionment below Elephant Butte in the *State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support* (Nov. 5, 2020) ("N.M. App. Br."). Rather than duplicate that argument here, New Mexico incorporates it by reference. EPCWID's brief should be disregarded. U.S. Sup. Ct. R. 37; *see* section I, *supra*.

A. EPCWID's Misrepresentations of New Mexico's Positions are Not Helpful to the Case

EPCWID misrepresents New Mexico's positions in this case, when it states, for example, that it is "[New Mexico's] argument—that it can take indirectly what it has agreed it cannot take directly . . .," EPCWID *Amicus* Br. 9, and that it is "New Mexico's argument that, notwithstanding its entry into the Compact, it nonetheless remains free to interfere with Project deliveries if acting under color of New Mexico law." EPCWID *Amicus* Br. 22-23. EPCWID is fighting strawmen. These are not New Mexico's positions. New Mexico's actual positions on apportionment are explained at length in the N.M. App. Br., and New Mexico incorporates it by reference.

EPCWID's failure to acknowledge or engage with New Mexico's actual positions means that its *amicus* brief does not offer anything to the resolution of this case. EPCWID's mischaracterizations of New Mexico's positions should be disregarded.

EPCWID also misstates the situation when it quotes the United States' claim that "New Mexico does essentially nothing to offset . . . diversions to eliminate net depletions." EPCWID *Amicus* Br. 10. Especially by contrast to Texas, but even standing on its own, New Mexico has a robust and comprehensive water-rights administrative system in the Lower Rio Grande that requires depletions to be offset. See generally NM-EX 007, D'Antonio 2d Decl. and NM-EX 010, Serrano Decl.; and compare NM-EX 606, Comparison of Select New Mexico and Texas Water Administration Facts. As thoroughly shown in New Mexico's response to the United States' motion for partial summary judgment, New Mexico disputes this particular claim, and the matter is not ripe for summary judgment at this stage of the case.

B. EPCWID's Unfounded Accusations of Bad Faith Offer Less than Nothing to the Case

EPCWID cites to contract law principles in accusing New Mexico of bad faith in its dealings under the Compact. EPCWID *Amicus* Br. 22. The accusation is based on the same mischaracterization of New Mexico's position in the lawsuit that renders the entire *amicus* brief useless, stating falsely that it is "New Mexico's argument that, notwithstanding its entry into the Compact, it nonetheless remains free to interfere with Project deliveries if acting under color of New Mexico law." EPCWID *Amicus* Br. 23. As discussed above, this is not New Mexico's position in this lawsuit. New Mexico is not attempting to undermine the Compact, but to uphold its Compact obligation intended, so that Texas and New Mexico obtain their Compact apportionments below Elephant Butte Reservoir through the Project, while developing their

groundwater resources as appropriate. The precise effects of groundwater pumping in both states is a disputed factual matter not ripe for summary judgment.

EPCWID's *Amicus* brief, by either repeating arguments or misrepresenting and failing to engage with New Mexico's actual positions, does not contribute to the resolution of this controversy. It is not useful.

V. THE DISTRICTS' ARGUMENTS REGARDING STATE ENGINEER AUTHORITY ARE BASED ON ERRORS OF LAW

Although EBID's and EPCWID's arguments regarding intramural differences within New Mexico are largely distractions from the issues of this case, they contain a number of legal errors that should not go uncorrected.

A. The State Engineer Retains Authority Over New Mexico's Water Resources in the Lower Rio Grande

EBID and EPCWID both argue that because EBID is the repayment administrator[5] on the Project and the State was not a signatory to the Downstream Contracts, the State Engineer's statutory authority over water in New Mexico has somehow been ousted. EBID *Amicus* Br. 6-7. EPCWID in particular repeatedly states that the State Engineer is not part of Project operations nor a signatory to contracts with the United States. EPCWID *Amicus* Br. 9, 15, 25, 26.

The reason for this insistence is unclear. New Mexico agrees that EBID is the lone Project beneficiary in New Mexico, but New Mexico is necessarily involved in all of EBID's actions, as EBID's authority to participate in Project operations and contracts arises from New Mexico state law. NMSA 1978 §73-10-1, *et seq.* *See First Interim Report*, 261 (in the context of EBID's motion to intervene, the Special Master rejected EBID's claim that it had a special statutory mission with

[5] EBID is the administrator for repayment but, as Special Master Grimsal observed, the benefical-use water rights owners were the ones who actually paid off the contract obligations for the Project. *First Interim Report*, 544. As demonstrated by their *amici* participation in this case, many of these beneficial-use water right owners reject EBID's position.

regard to the Project that was independent of the state, observing that "EBID's 'statutory mission' proceeds directly from the State of New Mexico"). EBID in fulfilment of its statutory duties as an irrigation district constituted under New Mexico law may have opinions regarding the Project, but when it comes to the Compact, only the State of New Mexico has the authority to offer New Mexico's position on Compact compliance. *Id.,* 263 (the Special Master states that New Mexico is *parens patriae* for EBID on Compact matters).

There is also no legal support for EBID claiming it is "Compact Texas" under the Compact. Texas has no jurisdiction within New Mexico and no ability to administer water rights, the very water rights that EBID relies. Although perhaps that is EBID's goal, to have no administration. Currently, EBID water users are subject to the New Mexico State Engineer's administration of water rights, which includes enforcing groundwater permit conditions and preventing excessive or illegal uses of water. NMSA 1978 §§72-2-18; 72-5-39. EBID is also subject to the metering requirement for all groundwater uses, and the reporting of such metering data to the State Engineer. NMSA 1978 §72-12-27; *e.g.* NM-EX-533, State Engineer Supplemental Order #180 (03/21/2007) (Final Metering Order). Additionally, since the surface waters in the Lower Rio Grande are over-appropriated, no new appropriation of surface waters are permitted in the LRG. Similarly, since the declaration of the LRG Groundwater Basin in the early 1980s, no permits to use groundwater are issued, unless the surface water is protected from new depletions caused by the groundwater pumping. All of these administrative tools protect the water users and their water rights in the Lower Rio Grande. Day in and day out, the on the ground administration, compliance, and enforcement activities are run from the State Engineer's local District IV office, situated in Las Cruces, New Mexico. Under EBID's scheme of "Compact Texas," however, neither Texas nor New Mexico would administer EBID's water in the Lower Rio Grande. The administrative void

would leave EBID to act as it wished, regardless of the impacts on the region or the other water users. This simply cannot be.

New Mexico constitutional law renders impossible any attempt by the two districts to oust the State Engineer from his involvement with EBID and with the LRG in New Mexico. Under the New Mexico Constitution, water belongs to the State and is "subject to appropriation for beneficial use, *in accordance with the laws of the state*." N.M. Const. art. XVI, §2 (emphasis added). Because of this constitutional provision, New Mexico does not have the power either to alienate water from public ownership or, under the emphasized constitutional language, to set aside "the laws of the state" with regard to the appropriation of water. *See Bounds v. State ex rel. D'Antonio*, 306 P.3d 457, 467 (2013) (the "in accordance with the laws of the state" constitutional language regarding water law rests authority in the legislature in water administration matters).

The State Engineer's legislatively mandated duty to provide "general supervision" of the waters of New Mexico, NMSA 1978 §72-2-1, therefore, must apply in the LRG as it does in the rest of the State. It arises from New Mexico constitutional and statutory state law, as EBID's authority to perform its statutory duties also stems from New Mexico state law. *Compare* NMSA 1978 §72-2-1 (description of the broad powers of the State Engineer) *with* NMSA 1978 §73-10-1*, et seq.* (description of the powers of EBID). These simultaneous duties can and should be read harmoniously. *State v. Lucero*, 2007-NMSC-041, ¶ 8, 142 N.M. 102, 163 P.3d 489 (statutes should be read harmoniously rather than contradictorily when possible); *see also, Sacred Garden, Inc. v. N.M. Taxation & Revenue Dep't*, No. A-1-CA-37142, 2020 N.M. App. LEXIS 3, ¶ 17 (Ct. App. Jan. 28, 2020) (statutes with the same subject matter should be read harmoniously to maintain a consistent and sensible scheme). EBID and EPCWID have not shown nor could they show any conflict with EBID's own statutory authority that would prevent a harmonious reading. There is

no legal basis, therefore, for the two district's conclusion that EBID's authorities have pre-empted the authority of the State Engineer.

B. The Two Districts' Arguments on The New Mexico Enabling Act Misread Both State And Federal Law

The two districts argue and also err in their interpretation of the effect of New Mexico's Enabling Act on State Engineer authority in Reclamation projects. EBID *Amicus* Br. 5; EPCWID *Amicus* Br. 26. The two districts point to a provision of the Act that reads in part: "[t]hat there be and are reserved to the United States, with full acquiescence of the State all rights and powers for the carrying out of the provisions by the United States of the [Reclamation Act], and Acts amendatory thereof or supplementary thereto, to the same extent as if said State had remained a Territory." Act of June 20, 1910, § 2., 36 Stat. 557; *See* N.M. Const. art XXI, §7. EBID characterizes this provision as "requiring deference to Federal Reclamation Law. . . ." EBID *Amicus* Br. 5. The provision more plausibly reads as an effort to ensure that New Mexico's statehood made no changes at all in the relationship between the new State and the federal government with regard to Reclamation Projects.

The distinction makes no difference, however. Section 8 of the Reclamation Act of 1902, in force at the time of New Mexico's Enabling Act and *now codified at* 43 U.S.C. §383, provides:

> Nothing in this Act shall be construed as affecting or intending to affect or to in any way interfere with the laws of any state or territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any state or of the federal government or of any landowner, appropriator, or user of water in, to or from any interstate stream or the waters thereof.

Section 8 of the Reclamation Act of 1902, 43 U.S.C. § 383. Under Section 8, federal Reclamation law is clear that nothing in the 1902 Act is intended to interfere with state laws. The statute then

goes further, requiring that the federal government actually *comply* with state law. It was under Section 8, for example, that the United States Reclamation Service, the predecessor to Reclamation, filed notices of the appropriation of water for the Project in 1906 and 1908. See NM-EX 306, NM-EX 309. The State's alleged deference under the Enabling Act would entail deference to Section 8's directive to Reclamation to comply with state law. No matter how the Enabling Act is read, therefore, the result is that Reclamation law does not oust state law, but is, by its own terms, complies with it.

EPCWID's approach is flawed in a similar way. First, EPCWID argues that Section 8 of the Reclamation Act "is nothing more than a general default principle, and it is displaced in this situation." EPCWID *Amicus* Br. 20. EPCWID does not explain how it was displaced and what has displaced it. Instead, EPCWID cites case law holding that where there is a conflict between "specific congressional directives" and Section 8, the specific congressional directives prevail. *California v. United States*, 438 U.S. 645, 672 n.25 (1978) and cases cited therein. EPCWID *Amicus* Br. 20. EPCWID does not identify any "specific congressional directive" that would justify the drastic result that New Mexico no longer had sovereign control within its boundaries over so critical a natural resource as water. The vague contention that, in unspecified and unproven ways, groundwater pumping under New Mexico state law "thwarts Project operations and deliveries" is not enough to meet the standard of those cases. EPCWID *Amicus* Br. 21. In any event, New Mexico disputes that Project operations are thwarted by groundwater uses, and this disputed fact precludes summary judgment

Having failed to find a "specific congressional directive" that would oust the State Engineer from the authority over the administration of water in the LRG, EPCWID nevertheless points to the Enabling Act and asserts that "there is no end-run around this problem by invoking Section 8

of the Reclamation Act." EPCWID *Amicus* Br. 22. It is genuinely difficult to understand the point that EPCWID is trying to make. Section 8 is a provision of the Reclamation Act. The Enabling Act and the New Mexico Constitution reserve to the United States all rights and powers for carrying out the Reclamation Act. Therefore, the Enabling Act and the Constitution reserve to the United States all rights and powers for carrying out Section 8 of the Reclamation Act. Under New Mexico law, that is, the United States cannot be hindered from complying with New Mexico law, which Section 8 of the Reclamation Act requires it to do. EPCWID's apparent certainty that the Enabling Act is some sort of unanswerable proof that a section of the Reclamation Act need *not* be followed fails.

CONCLUSION

For the foregoing reasons, the *amicus* briefs filed by EBID, El Paso, and EPCWID should be disregarded.

Respectfully submitted,
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