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April 13, 2018

Honorable Michael J. Melloy
Special Master
Senior United States Circuit Judge
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401

VIA EMAIL ONLY

Dear Special Master Melloy:

Pursuant to the direction given in your letter of April 3, 2018, the State of New Mexico respectfully submits this letter setting out the main issues of law and fact the Supreme Court may need to resolve in this case, as well as a broad outline of the discovery that may be required to address those issues. Of course, this is necessarily a high-level summary rather than an exhaustive list of issues, and New Mexico reserves the right to raise additional issues as they surface in this litigation.

This lawsuit involves allegations by Texas that groundwater pumping in New Mexico within the Rio Grande Project (“Project”) area below Elephant Butte Reservoir (“Elephant Butte”) has the effect of depleting Project water deliveries to Texas, and therefore New Mexico has violated the Compact. Intervenor United States also alleges that New Mexico has violated the Compact because groundwater pumping by New Mexico entities interferes with the United States’ ability to make deliveries to the two contractual recipients of Project water, Elephant Butte Irrigation District (“EBID”) in New Mexico and El Paso Water Improvement District No. 1 (“EPCWID”) in Texas. The United States further alleges that all groundwater users in New Mexico below Elephant Butte must obtain federal water supply contracts.

But there is another side to this case, which has heretofore been untold in this litigation. What Texas and the United States fail to acknowledge in their Complaints is that Texas groundwater pumping and its reallocation of Project water from irrigation to municipal uses, among other activities, have had a significant negative impact on Useable Water in Project Storage and Project water deliveries. The Complaints further fail to take into account that, for many decades, the United States encouraged groundwater pumping in the Project area in both New Mexico and Texas and expressly allowed for a defined period of groundwater pumping in this area in both States. Moreover, the United States has repeatedly and unilaterally changed Project operations in a manner that re-allocated historical Project water deliveries between New Mexico and Texas, and even released New Mexico and Colorado Compact protected Credit Water, all without obtaining authorization from the Compacting States, the Rio Grande Compact Commission (“Compact Commission”), or Congress. As a result, in order to provide a full picture of Compact obligations and Project operations in the Lower Rio Grande, a broad range of legal and factual issues will need to be litigated and resolved.

One threshold issue that will need to be resolved at an early stage is the period of record for which Texas is alleging Compact violations. Although Texas is presumably alleging that New Mexico is responsible

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for violations beginning with the signing of the Compact in 1938, it does not specify a period of record in its Complaint, and the Compact does not specify a "1938 condition," but is instead administered based on a variable water supply. Texas has filed two previous original actions related to the Compact, *Texas v. New Mexico*, No. 9 Original, in 1951, which was dismissed in 1957 for failure to join the United States as an indispensable party, and *Texas and New Mexico v. Colorado*, No. 29 Original, in 1969, which was dismissed in 1985 when an actual spill at Elephant Butte occurred, eliminating Colorado's accrued debits. In neither case did Texas raise the issue of groundwater pumping below Elephant Butte. Nor did it assert claims to the Compact Commission that its water district was not getting the water it ordered. Whether Texas is precluded from asserting its claims for any period prior to 1985, as well as the effect on claims of the 1985 reservoir spill or any subsequent spill, or the effect of Texas not raising purported delivery shortages to the Compact Commission, will have to be resolved.

The Compact is silent on how water is allocated below Elephant Butte and on the signatory parties' rights and obligations below the Reservoir. However, as the Supreme Court held in its recent opinion in this matter, 138 S.Ct. 954, the Compact is "inextricably intertwined" with the Project and the contracts between the irrigation districts that specify an allocation of Project water released from Elephant Butte in a proportion of roughly 57% of surface water supplies for irrigation of Project lands in New Mexico and 43% of surface water supplies for irrigation of Project lands in Texas. However, this finding raises as many questions as it answers. This litigation will have to resolve further legal issues related to Compact rights and obligations, such as what is the meaning, as a practical matter, of the 57%-43% allocation, whether the Compact implicitly requires the Project continue to be operated as a unit without a state-line delivery requirement, what is the proper measure of Compact compliance, whether the Compact confers any rights or obligations upon the United States, what obligations Texas is under before it may bring a claim for damages, and whether the water allocated to the States below Elephant Butte must be used exclusively in accordance with the Project irrigation demands and the contracts implementing the Project, to name just a few. The litigation also implicates numerous factual questions intertwined with these legal issues, such as whether Texas and New Mexico have received their Compact share of water below Elephant Butte, whether all acres of Project land have received equal amounts of surface water, whether return flow accounting throughout the Project has been accurately calculated, and whether EPCWID failed to receive any allocated water for which it called. Significant to these questions is a thorough look at diversions, groundwater pumping, return flows, and uses throughout the Project area because the Project operates as a unit, and has always operated as a unit. Texas and United States will strenuously try to convince this Court that it is unnecessary to look below the New Mexico-Texas state line. However, this Court should insist that it look behind the curtain and understand Project operations not only in New Mexico but also in Texas and Mexico, and critical to this review is the United States' role in encouraging groundwater pumping by the States, while simultaneously ignoring increasing ground water pumping in Mexico that depletes Project water.

Groundwater pumping in Texas, New Mexico, and Mexico and its impacts on Project deliveries will be at the heart of this case. Another issue as a legal matter will be whether the Compacting States and the federal government intended for the Compact to prevent development of groundwater resources in the Lower Rio Grande basin and whether it is necessary to account for groundwater pumping in Texas, New Mexico, and Mexico in determining the States' Compact compliance below Elephant Butte. The issue of what, if any, measurable impacts to Project deliveries have occurred as a result of groundwater pumping in Texas, New Mexico, and Mexico and as a result of changes in use of Project water throughout the entire Project area will require extensive hydrologic modeling. In addition, the scope of the United States' Project water right in New Mexico, including priority dates, the source of Project water, and the extent of the Project's legal entitlement to return flows was adjudicated in New Mexico State District Court as contemplated by the Reclamation Act of 1902. While the factual question of the amount of Project water that retains its identity as Project return

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flows may be at issue in this case, the scope of the United States' Project water right in New Mexico cannot be relitigated in this forum.

In 2006, EBID, EPCWID, and the United States entered into an Operating Agreement ("OA") governing the Project as a means of settling EPCWID's complaint that groundwater pumping in New Mexico was depleting surface waters that it should have been receiving as part of its Project deliveries. The effect of the OA was to give EPCWID more surface water and make New Mexico more reliant on groundwater. In addition, the OA gave the irrigation districts individual carryover storage accounts in Elephant Butte, a concept foreign to the Compact. Significantly, none of the Compacting States were parties to the OA. New Mexico sued in federal district court to invalidate the OA, and that case is stayed because of potential overlap with the instant litigation. Because the Compact incorporates the Project, the impact of the OA on the Compact will be a significant part of this litigation.

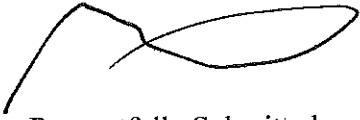
Legal issues that will have to be determined as part of this litigation include whether it is a violation of the Compact for the United States to operate the Project in a manner that alters the allocation of water to the States below Elephant Butte as well as the Compact Article VII storage and spill provisions, whether the OA constitutes a modification of the Compact that required the assent of the Signatory States and Congress, whether the OA's unprecedented creation of carryover storage accounts violated the Compact, and whether the taking of New Mexico's credit water constituted a Compact violation.

As you can see, this litigation raises a very complicated set of issues. Due to the size and complexity of the case, New Mexico anticipates that a substantial amount of discovery will be needed. Historical data and information relevant to this case extends back well into the late-19th century and is compiled into a vast array of media from loose paper stored in archives to voluminous electronic spreadsheets, and intricate computational models and decision support systems. This factual and interpretive information, as well as lay and expert witnesses, extend within portions of three western states and the Republic of Mexico in various international, federal, state, and county agencies, irrigation and water districts, commercial businesses, agricultural enterprises, academic institutions, and non-governmental agencies.

Records of the Project's operation by each irrigation district and the United States will be needed, as will records of water use in each Compacting State and documents regarding changes in Project operations since the Project's inception. Additional topics of discovery may include the past action or inaction of federal agencies and officials concerning the Project and Compact, Project and Compact accounting, and the actions of or communications with the Commission, Reclamation, and other entities. Ultimately, resolution of the merits will require extensive technical inquiries into changes in hydrologic conditions within the Project area using independent and conjunctive surface water, groundwater, consumptive use, economic, canal and reservoir operational computer models and experts. Computerized hydrological models looking at large regional areas and impacts thereto are very complex, and it is anticipated that the parties will put forth multiple competing models whose accuracy and assumptions will need to be fully assessed.

Until the parties have all answered the claims and any counterclaims, it is difficult to enumerate the possible topics and scope of discovery necessary to resolve affirmative defenses with any certainty. However, to put the remarkable undertaking of discovery in this case into perspective, in the recent case of *Florida v. Georgia*, No. 142, Original, at one point before discovery was even complete Florida had produced approximately 1.8 million pages of documents to Georgia, whereas Georgia to the same point had produced 1.3 million pages of documents in addition to 2.3 terabytes of data relevant to its hydrologic modeling. New Mexico has no reason to believe that the burden in this case will be any less. Thank you for your consideration. We look forward to working with you to resolve these intricate and interesting issues in this litigation.

Honorable Michael J. Melloy
April 4, 2018



Respectfully Submitted,

Marcus J. Rael, Jr.

MJR/dar

cc: Service List