

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 TEXAS'S MOTION FOR LEAVE TO FILE
SUPPLEMENTAL COMPLAINT, THE SUPPLEMENTAL
COMPLAINT, AND THE BRIEF IN SUPPORT OF MOTION FOR
LEAVE TO FILE THE SUPPLEMENTAL COMPLAINT**

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
**Counsel of Record*

June 24, 2021

TABLE OF CONTENTS

	Page
1. MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT	1
2. THE STATE OF TEXAS’S SUPPLEMENTAL COMPLAINT	1
EXHIBITS	
3. BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT	1

MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT

The State of Texas hereby respectfully moves the Court for leave to file the Supplemental Complaint submitted herewith.¹

In support of its Motion, Texas asserts that its claims as set forth in the Supplemental Complaint arise from an interstate water compact, its claims are serious and dignified, and there is no alternative forum in which adequate and complete relief may be obtained. Texas further asserts that allegations within the Supplemental Complaint are related to the allegations found in the Complaint filed by Texas and that they arise out of changed circumstances that could not have been reasonably anticipated in 2013 when Texas filed its original Motion for Leave to File Complaint or in 2014 when leave was granted by the Court. For the reasons more fully set forth in the accompanying Supplemental Complaint, Texas's Motion for Leave to File Supplemental Complaint should be granted.

¹ The Motion for Leave to File Supplemental Complaint, Supplemental Complaint, and Brief in Support of Motion for Leave to File Supplemental Complaint have been authorized by the Rio Grande Compact Commissioner for the State of Texas, the Texas Commission on Environmental Quality, and the Attorney General of the State of Texas.

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

THE STATE OF TEXAS'S SUPPLEMENTAL COMPLAINT

Stuart L. Somach, Esq.*
Andrew M. Hitchings, Esq.
Robert B. Hoffman, Esq.
Francis M. Goldsberry II, Esq.
Theresa C. Barfield, Esq.
Sarah A. Klahn, Esq.
Brittany K. Johnson, Esq.
Richard S. Deitchman, Esq.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*

June 24, 2021

INTRODUCTION

In January 2014, the Supreme Court granted Texas's motion for leave to file its Bill of Complaint ("Complaint"), which alleges that New Mexico has been violating Article IV of the 1938 Rio Grande Compact ("Compact") by intercepting water rightfully apportioned to Texas and diverting it for use in New Mexico. Though Article IV requires New Mexico to deliver certain quantities of water of the San Marcial gauge and into the Elephant Butte Reservoir ("Reservoir") for Texas's use, New Mexico has surreptitiously permitted, approved, or otherwise acquiesced in groundwater pumping and illegal surface water diversions *below* the Reservoir, thereby taking back water deposited by New Mexico in the Reservoir intended for Texas's use but used in New Mexico as it exits the Reservoir en route to Texas. New Mexico's efforts to arrogate an outsized amount of water to itself at the expense of Texas violates New Mexico's express obligations under Article IV of the Compact and is inconsistent with the Compact's declared purpose of ensuring an "equitable apportionment" of the waters of the Rio Grande.

Through this Supplemental Complaint, Texas seeks to hold New Mexico to account for additional, recently discovered and developing violations of the Compact. In addition to violating its Article IV delivery requirement by siphoning off water apportioned to Texas *below* the Reservoir, New Mexico has violated that delivery obligation in a second way by intercepting and using water in areas *above* the Reservoir. Likewise, New Mexico has declined to meet its obligation under Article IV of the Compact to retain enough water in reserve in an amount equal to its year-to-year delivery shortfall. And New Mexico's failure to meet its Article VI obligation to retain water in storage in amounts equal to its accrued debit has created the condition that New Mexico cannot meet its obligations under Article VIII of

the Compact. New Mexico’s own Compact Commissioner has admitted this violation by conceding that New Mexico is unable to meet a timely request by Texas under the Compact for release of water New Mexico owes Texas.

New Mexico has consistently, systematically, and continuously violated the Compact. All of these actions have been to New Mexico’s benefit and Texas’s detriment. The Court should hold New Mexico to its obligations under the Compact, order New Mexico to satisfy its past water-delivery obligations, award damages to Texas in an amount to be proved at trial, and prevent New Mexico from continuing to violate the Compact in the future.

GENERAL ALLEGATIONS

1. Texas incorporates by reference the allegations and prayer in the original Complaint.
2. The Compact is an agreement between the States of Colorado, New Mexico, and Texas that is intended to set the ground rules for “effecting an equitable apportionment” “of the waters of the Rio Grande above Fort Quitman, Texas.”
3. Article II identifies locations for the establishment and maintenance of various gaging stations used to measure the water level at certain sites along the Rio Grande. Most of these gaging stations are located upstream of the Reservoir, and they are tools used to aid in determining whether Colorado and New Mexico have met their obligations under the Compact with respect to the delivery of water. Colorado’s water-delivery obligation (to take place near the Colorado–New Mexico border) is set forth in Article III with reference to a schedule of relationships between flows at certain gages.¹ Likewise, New Mexico’s

¹ Texas makes no claims against the State of Colorado. Indeed, on information and belief, Colorado, at least since 1986, has always made its Article III delivery and has not accrued any Article VI debits.

Article IV delivery obligation at the San Marcial gauge and on into the Reservoir is defined with reference to a schedule of relationships between flows at certain gages.

4. Recognizing the need to accommodate and account for the physical reality of real-world operating conditions—specifically, limited shortfalls or excesses in deliveries—while at the same time protecting the long-term supply of water for the Rio Grande Reclamation Project (“Project”), Article VI imposes an accounting regime on the upstream states (Colorado and New Mexico) designed to enable them to meet their delivery obligations under the Compact. Specifically, Article VI establishes a system for the computation of annual and accrued debits and credits for New Mexico and Colorado with respect to their water-delivery obligations; imposes limits on those credits and debits; and imposes requirements to hold water in, or release water from, upstream non-Project storage in relation to the State’s credit and debit amounts.

5. Article VI’s system of credits and debits, as well as other related provisions of the article, provides limited flexibility. For example, Article VI limits New Mexico’s accrued debits to an amount not to exceed 200,000 acre-feet. And Article VI further *requires* New Mexico to retain in storage upstream of the Reservoir, *at all times*, an amount of water equal to its accrued debits. Article VII creates additional limits limiting the ability of New Mexico and Colorado to increase the amount of water held in storage in any upstream, non-Project reservoirs constructed after 1929 if there is less than 400,000 acre-feet of water in Project storage.

6. Finally, Article VIII provides that, in January of every year, Texas may demand of Colorado and New Mexico (and New Mexico may demand of Colorado), the release of water stored in reservoirs constructed after 1929 up to and in proportion to each

upstream state's accrued debits. Releases may be demanded "to bring the quantity of usable water in project storage to 600,000 acre-feet by March first and to maintain this quantity in storage until April thirtieth, to the end that a normal annual release of 790,000 acre feet may be made from project storage in that year." Thus, every January, Article VIII grants Texas the right to demand that the upstream states release water stored in upstream reservoirs to the extent they have accrued debits belonging to Texas, with the water to be delivered into Project storage.

SUPPLEMENTAL CAUSE OF ACTION

7. Consistent with the Compact's chief aim of ensuring an "equitable apportionment" of the waters of the Rio Grande River among Colorado, New Mexico, and Texas, Article IV of that agreement requires New Mexico to deliver indexed flows of water to the San Marcial gauge and from there into the Reservoir, so that the water may then be apportioned for Texas's use and for certain contractually limited uses by New Mexico. But, as Texas's Complaint explains, New Mexico has evaded this Article IV delivery requirement by intercepting water apportioned for Texas's use after it exits the Reservoir and diverting it to New Mexico. Specifically, by permitting, authorizing, or otherwise acquiescing in groundwater pumping (and unlawful surface water diversions) in areas below the Reservoir, New Mexico causes water apportioned for Texas's use to be rerouted to New Mexico.

8. New Mexico's efforts to raid Texas's rightful share of water and shirk its cornerstone obligation under this eight-decade-old multi-state Compact would be bad enough—and standing alone it warrants relief for Texas. But Texas has recently discovered that New Mexico has failed to live up to its obligations under the Compact in at least three separate and additional ways. It has violated Article IV delivery requirement again—this time

by diverting water for its own use even *before* it delivers that water in the Reservoir for apportionment to Texas. It has violated Article VI of the Compact by failing to retain the required amounts of water in reserve to make up for its inability to deliver its fair share of water to the Reservoir. And New Mexico's actions as alleged herein have rendered it presently impossible, by the admission of New Mexico's own Compact Commissioner, for New Mexico to meet its Article VIII obligations in January 2022, when Texas will request release of water New Mexico is obligated to deliver under the Compact. Each of these violations of the Compact provides an additional basis for granting relief to Texas.

9. In addition to intercepting and using water rightfully apportioned to Texas *below* the Reservoir after it has exited, New Mexico has also been siphoning off water in areas *above* the Reservoir. Thus, rather than delivering water into the Reservoir for Texas's use, New Mexico has instead chosen to disregard its Compact obligations under Articles VI-VIII and instead release water stored upstream for diversion and use in New Mexico above the San Marcial gauge and before it is delivered into Project storage. There can be no excuse for New Mexico's dereliction of duty: on information and belief, sufficient water existed in the Rio Grande at all relevant times to allow New Mexico to meet its Article IV delivery requirement. New Mexico has therefore *doubly* violated Article IV.

10. New Mexico has compounded the failure to meet its Article IV delivery requirement by also failing to retain enough water in storage to make up for its chronic failure to meet its Compact obligation to deliver water to the Reservoir for Texas's use. New Mexico's failure to retain water in storage that is equal to the amount of water that it is in arrears violates New Mexico's unambiguous obligations under Article VI of the Compact.

11. As described above, Article VI of the Compact sets forth a method for adjusting New Mexico’s Article IV delivery requirements from year to year. This system compensates New Mexico for over-deliveries of water and penalizes it for under-deliveries through a system of credits and debits. Critically, Article VI also establishes a limit on the total amount of debits and credits New Mexico may accrue: “In the case of New Mexico, the accrued debit shall not exceed 200,000 acre feet at any time.” And to further protect the Texas apportionment, the Compact provides that “New Mexico *shall retain water in storage*” in post-1929 reservoirs in the drainage basin of the Rio Grande above Lobatos “*at all times* to the extent of its accrued debit.” (Emphasis added.)

12. New Mexico has failed to comply with its storage obligations under Article VI of the Compact. Currently, New Mexico’s accrued debits are 96,300 acre-feet. And on information and belief, by January 2022 New Mexico’s accrued debits will (at a minimum) rise to 130,000 acre-feet of water. But by New Mexico’s own admission it will not—and currently does not—have enough stored water to meet Texas’s demand as required by the Compact.

13. New Mexico’s non-compliance is evidenced by the recent admissions of its own Compact Commissioner. On March 22, 2021, New Mexico’s Commissioner notified local officials and the United States Bureau of Reclamation—but not Texas—that it had *not* retained water in upstream storage equal to its accrued debits and that it would not be able to do so. *See* Ex. 1 (Letter from John R. D’Antonio, N.M. Rio Grande Compact Comm’r, to Mike Hamman, Chief Exec. Officer & Chief Eng’r, Middle Rio Grande Conservancy Dist., Jim Wilber, Deputy Area Manager, U.S. Bureau of Reclamation, and Jesse Roach, Water Div. Dir., City of Santa Fe, (March 22, 2021)). Despite acknowledging this shortfall, the letter did

not order or otherwise cause the Middle Rio Grande Conservancy District (“MRGCD”), the City of Santa Fe, or any other entity in the Middle Rio Grande to cease the diversion and use of Rio Grande water.

14. After learning of New Mexico’s violations of Article VI of the Compact, Texas’s Rio Grande Compact Commissioner demanded that New Mexico cease and desist from those violations and bring itself into compliance, not only with Article VI, but also with Article VII. *See* Ex. 2 (Letter from Pat Gordon, Tex. Rio Grande Compact Comm’r to John R. D’Antonio, N.M. Rio Grande Compact Comm’r (May 6, 2021)).

15. But New Mexico refused. On May 21, 2021, New Mexico sent a letter to Texas confirming that New Mexico had not stored enough water to cover what it owed Texas and, importantly, that it would not be curing this noncompliance. *See* Ex. 3 (Letter from John R. D’Antonio, N.M. Rio Grande Compact Comm’r to Robert (Bobby) Skov, Tex. Rio Grande Compact Comm’r (May 21, 2021)). New Mexico has attempted to justify its failure to meet this Article VI storage requirement through a tortured reading of Article VII of the Compact that is contradicted by Article VII’s plain terms. Contrary to New Mexico’s misreading, Article VII precludes New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929 where, as here, there is less than 400,000 acre-feet of useable water in Rio Grande Project storage. *Id.* But Article VII cannot bear the weight placed on it by New Mexico.

16. Article VII protects Texas’s apportionment and the New Mexico apportionment allocated to the Elephant Butte Irrigation District. Article VII does not excuse New Mexico’s admitted violations of Article VI of the Compact. Rather, Articles VI and VII must be read in harmony and a proper reading reinforces both New Mexico’s Compact-

mandated obligations to protect Project storage and Project rights and New Mexico's violation of those obligations. New Mexico's violation has nothing to do with its ability (or inability) to store water under Article VII conditions, it instead involves New Mexico's failure to *retain* water in storage prior to its decision to release water for use in New Mexico above the Reservoir. Article VII does not sanction or allow the diversion and use of Rio Grande water for use above the Reservoir when New Mexico fails to meet its Article IV delivery obligation and its Article VI obligation to retain in storage an amount equal to its accrued debit. Moreover, Article VII does not preclude the storage of Rio Grande water in the Reservoir equal to New Mexico's accrued debit for the benefit of Texas and that portion of New Mexico that obtains water pursuant to the United States Bureau of Reclamation contract with the Elephant Butte Irrigation District. Rather, Article VII further enhances the Compact's protection of Project storage in the Reservoir by dictating that New Mexico has an obligation, operating consistently with Articles VI and VIII, to increase useable water in Project storage without allowing or authorizing diversions in New Mexico above the San Marcial gauge of water released from upstream storage unless and until useable water in Project storage reaches 400,000 acre feet.

17. Finally, Article VIII of the Compact provides that in January of each year, the Texas Commissioner may demand of New Mexico the release of water from storage reservoirs constructed after 1929 up to the amount of accrued debits and New Mexico must release water equal to the accrued debits at the greatest rate predictable by March of that year. On information and belief, by January 2022, New Mexico will have accrued a debit of at least 130,000 acre-feet of water. Texas's Compact Commissioner will demand that New Mexico release this water. But New Mexico has admitted that its actions already have rendered it

unable to honor this Article VIII demand because of its failure to retain in storage a quantity of water equal to its accrued debit. *See Exs 1 & 3.*

18. In short, New Mexico has violated Articles IV and VI of the Compact, and New Mexico admits its actions have made inevitable a breach of Article VIII in March 2022. New Mexico's compliance with the Compact is not discretionary, it is mandatory.

PRAYER

WHEREFORE Texas respectfully prays that the Court enter a Decree:

1. Declaring the rights of Texas to the waters of the Rio Grande under the Compact, including the provisions of Articles IV, VI, VII, and VIII;
2. Issue a decree commanding New Mexico, its officers, citizens, and political subdivisions to deliver waters of the Rio Grande in accordance with the provisions of Articles IV, VI, and VIII of the Compact and to cease and desist all actions which violate the delivery obligation of New Mexico under these provisions;
3. Award damages to Texas from New Mexico for the value of the water that New Mexico has not delivered to Elephant Butte Reservoir for the benefit of Texas because of its violation of Articles IV, VI, and VIII of the Compact according to proof at trial; and

///
///
///
///
///
///
///
///

4. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

Dated: June 24, 2021

Respectfully submitted,

s/ Stuart L. Somach
STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*

EXHIBIT 1

RIO GRANDE COMPACT COMMISSION

COLORADO **TEXAS** **NEW MEXICO**
CONCHA ORTIZ Y PINO BUILDING, 130 SOUTH CAPITOL, SANTA FE, NM 87501
TELEPHONE: (505) 827-6091 FAX: (505) 827-3806

JOHN R. D'ANTONIO JR., P.E.
STATE ENGINEER
NM RIO GRANDE COMPACT COMMISSIONER

Mailing Address:
P.O. Box 25102
Santa Fe, NM 87504-5102

March 22, 2021

Mike Hamman, Chief Engineer/CEO
Middle Rio Grande Conservancy District
1931 Second Street SW
Albuquerque, New Mexico 87102-4515

Jim Wilbur, Acting Area Manager
Albuquerque Area Office
U.S. Bureau of Reclamation
555 Broadway Blvd. NE
Albuquerque, New Mexico 87102

Jesse Roach, P.E., PhD
Water Division Director
City of Santa Fe
P.O. Box 909
Santa Fe, NM 87504

SUBJECT: 2021 Storage and Use of Native Rio Grande Water

Dear Messrs. Hamman, Wilbur, and Roach:

This letter concerns the potential in 2021 for retention of debit water and storage and release of Rio Grande Compact (Compact) relinquishment credit water (relinquishment credit) available to New Mexico under Article VII of the Compact. Each of your agencies has previously been allocated relinquishment credit and have remaining allocation amounts for storage in future years when New Mexico is under Compact Article VII restrictions.

The purpose of this letter is to provide notice that for 2021, given that the storage constraints of both Article VI and VII of the Compact are in effect and apply to the reservoirs that you operate, neither storage or retention of debit water nor storage of relinquishment credit water is permissible. Therefore, no native Rio Grande water may be stored in El Vado, Nichols, or McClure Reservoirs in post-1929 storage space unless as described below.

In accordance with Article VII of the Compact, New Mexico negotiated with the State of Texas between 2003 and 2010 to relinquish a total of 380,500 acre-feet of New Mexico credit water in Elephant Butte Reservoir for use by Rio Grande Project farmers. Based on the finalized

negotiations, the New Mexico Compact Commissioner may store the resulting relinquished credit water at his discretion. Various New Mexico Rio Grande Compact Commissioners have allocated the full amount of relinquishment credit to the United States (acting through the U.S. Bureau of Reclamation (Reclamation)), the Middle Rio Grande Conservancy District (MRGCD), the City of Santa Fe, and the State of New Mexico for storage in reservoirs constructed after 1929 when New Mexico is under Compact Article VII restrictions.

In 2020 New Mexico had a Compact accrued debit of approximately 38,000 acre-feet. At the direction of the New Mexico Compact Commissioner, approximately 38,000 acre-feet of the accrued debit water was retained in storage during the 2020 spring snowmelt runoff. Further, New Mexico went into Compact Article VII restrictions on June 19, 2020 and the restriction is expected to continue for the foreseeable future.

New Mexico now finds itself with a more significant Compact accrued debit of approximately 96,300 acre-feet for the calendar year 2021. Under Article VI of the Compact, that amount of Rio Grande water must be stored and retained in El Vado, Nichols, and McClure reservoirs before post-compact Rio Grande water may be stored for later release and use upstream of Elephant Butte Reservoir. The increase in the Compact accrued debit from 2020 to 2021 is due to several factors: first, efforts last summer pursuant to State Engineer Order No. 189 and other actions to keep the river flowing in the Rio Chama and middle Rio Grande valleys to benefit farmers, silvery minnow habitat, the environment, and recreation on the river during the pandemic; second, a lack of channel maintenance within portions of the Middle Rio Grande Project that contributes to decreased channel conveyance, increased overbank flooding at relatively low flows and riparian vegetation growth, all resulting in increased depletions of water; and third, the hot and dry conditions that resulted in low amounts of the summer precipitation which normally decreases evapotranspiration and provides additional deliveries to Elephant Butte Reservoir.

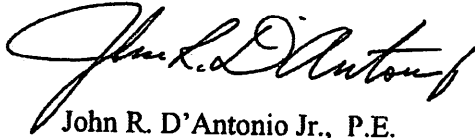
I want to acknowledge and express my appreciation to the MRGCD for its efforts over the last few years to help keep New Mexico's Compact accrued debit to manageable levels. Those efforts were helpful and benefitted both the State and the MRGCD. As we discussed last summer, the water operations conducted at that time were needed but had the potential to make conditions more difficult in 2021. Despite careful and coordinated planning and operations last fall and this spring, we find ourselves faced with the unenviable combination of a large Compact accrued debit, Compact Article VII storage restrictions in place, and extraordinary drought. The stark reality is that, should Rio Grande water be stored this spring and released for consumption above Elephant Butte Reservoir, New Mexico's Compact accrued debit could significantly increase in 2022. That is a prospect I seek to avoid.

There are two caveats to my direction to you on storage of Rio Grande water. First, my direction not to store does not apply to a reasonable amount of storage by Reclamation to protect the six Middle Rio Grande Pueblos' irrigation of prior and paramount lands in 2021. Second, I will reconsider whether it is appropriate to store allocated relinquishment credit in April 2021, based upon hydrologic conditions existing at that time and projected Compact deliveries to Elephant Butte Reservoir in 2021. This is conditioned on the MRGCD's promise to delay the start of the

irrigation season until April 1, 2021, and therefore not diverting any water from the Rio Grande in March 2021.

Should you have any questions, please do not hesitate to contact Page Pegram, Rio Grande Compact Commission Engineer Adviser for New Mexico, at (505) 383-4051 or page.pegram@state.nm.us or me at john.dantonio@state.nm.us.

Sincerely,



John R. D'Antonio Jr., P.E.
New Mexico State Engineer
Rio Grande Compact Commissioner for New Mexico

JRD/kme

cc: Caroline Buerkle, Governor's Office
Tripp Stelnicki, Director of Communications, Governor's Office
Courtney Kerster, Director of Federal Affairs, Governor's Office
Karen Dunning, MRGCD Board Chairwoman
NMISC Commissioners
Rolf Schmidt-Petersen, Director NMISC
Ariane Singer, General Counsel NMISC
Page Pegram, New Mexico Engineer Adviser
Lt. Col. Patrick M. Stevens V, USACE
Nabil Shafike, Reservoir Control and Water Operations, USACE
Carolyn Donnelly, Reclamation Albuquerque Area Office

EXHIBIT 2

Patrick R. Gordon, *Commissioner*
Suzy Valentine, P.E., *Engineer Adviser*
Priscilla Hubenak, *Legal Adviser*



RIO GRANDE COMPACT COMMISSION OF TEXAS

May 6, 2021

Via Electronic Delivery

John R. D'Antonio, Jr., P.E.
Rio Grande Compact Commissioner
State of New Mexico
New Mexico Office of the State Engineer
P.O. Box 25102
Santa Fe, New Mexico 87504-5102
John.DAntonio@state.nm.us

Re: Rio Grande Compact of 1938 ("Compact") – Article VI - New Mexico Accrued Debit Water

Dear Commissioner D'Antonio:

For the calendar year 2021, New Mexico has an accrued debit of 96,300 acre-feet of water. Article VI of the Compact provides that, as long as post-1929 reservoirs have the physical capacity, "New Mexico *shall* retain water in storage *at all times* to the extent of its accrued debit."

Just a few days ago, I was provided a copy of your March 22, 2021 letter, which appears to notify the City of Santa Fe, the Middle Rio Grande Conservancy District ("MRGCD") and the Bureau of Reclamation that New Mexico does not intend to store water up to its accrued debit in the denominated post-1929 reservoirs, but instead will allow water to flow through those reservoirs into the boundaries of the MRGCD, where it will presumably be diverted for use there. This notice is despite New Mexico has an accrued debit of 96,300 acre-feet of water.

Article VI of the Compact is very clear. It obligates New Mexico to retain water in storage *at all times* to the extent of its accrued debt. Under Article VIII of the Compact, the Texas Commissioner can demand the accrued debit water in January. Articles VI and VIII are designed to mitigate an increase in the accrued debit water by New Mexico and help ensure deliveries of water to Texas.

New Mexico's obligation to retain in storage accrued debit water under Article VI is not conditioned upon a maximum 200,000 acre-feet of accrued debit, nor is it excused when Article VII conditions exist. Rather, Articles VI and VII are designed to work together to protect deliveries to Texas. They should not be used against each other, as New Mexico suggests, to benefit deliveries of water to the MRDCD to the detriment of Texas. Based on your handling of the

{99PGOR.17/PGOR/06820906.5}

John R. D'Antonio, Jr., P.E.

May 6, 2021

Page 2 of 2

accrued debit storage by releasing water under Article VII, all of this water should be delivered to EBR, not MRGCD

Your action is a Compact violation, and the purpose of this letter is to put you on notice of such violation. Texas intends to enforce its rights under the Compact. Demand is hereby made that New Mexico cease and desist its Compact violation.

If you have any questions, please contact me.

Sincerely,

Pat Gordon,
Texas Rio Grande Compact Commissioner

cc: via electronic delivery

Commissioner Kevin Rein, Colorado Compact Commissioner
Chairman Hal Simpson, Rio Grande Compact Commissioner
for the United States

Priscilla Hubenak, Legal Advisor for Texas

Suzy Valentine, Engineer Advisor for Texas

Page Pegram, Engineer Advisor for New Mexico

Chris Shaw, Legal Advisor for New Mexico

Craig Cotten, Engineer Advisor for Colorado

Chad Wallace, Legal Advisor for Colorado

Wayne Pullan, Upper Colorado River Basin Bureau of Reclamation Regional Director

Carolyn Donnelly, Albuquerque Bureau of Reclamation Water Operations Supervisor

David Palumbo, PE, Deputy Commissioner, Bureau of Reclamation

Stuart Somach, Somach Simmons & Dunn, PC

{99PGOR.17/PGOR/06820906.5}

EXHIBIT 3

RIO GRANDE COMPACT COMMISSION

COLORADO **TEXAS** **NEW MEXICO**
CONCHA ORTIZ Y PINO BUILDING, 130 SOUTH CAPITOL, SANTA FE, NM 87501
TELEPHONE: (505) 827-6091 FAX: (505) 827-3806

JOHN R. D'ANTONIO JR., P.E.
NM RIO GRANDE COMMISSONER
STATE ENGINEER

Mailing Address:
P.O. Box 25102
Santa Fe, NM 87504-5102

May 21, 2021

Via email and U.S. Mail

Robert (Bobby) Skov
Texas Rio Grande Compact Commissioner
SK2 Farms
15511 Alameda Ave.
Fabens, TX 79838
bsskov@msn.com

**RE: Response to May 6, 2021 Letter Regarding Storage of Water in Post-1929
Reservoirs**

Dear Commissioner Skov,

Please accept my congratulations for your appointment as Texas Rio Grande Compact Commissioner. I look forward to working with you. I am writing to respond to the letter dated May 6, 2021 from former Commissioner Gordon regarding the storage of water in post-1929 reservoirs in New Mexico upstream of Elephant Butte Reservoir. New Mexico welcomes this opportunity to address your concerns and explain how New Mexico's Compact administration and water management has led to more water flowing into Elephant Butte Reservoir than would otherwise be the case. Unfortunately, however, I must respectfully disagree with Texas's interpretation of the Rio Grande Compact ("Compact") set forth in the May 6th letter.

As a starting point, it is helpful to recognize that the region is experiencing one of the worst droughts in recorded history. The drought conditions in the Rio Grande basin are so severe there will be insufficient flow of native Rio Grande water to satisfy the needs of all surface water users, including the Bosque del Apache National Wildlife Refuge, middle Rio Grande valley farmers, Pueblos, acequias and the critical habitat needs of listed species including the Rio Grande silvery minnow, once the snow runoff ends. Drought conditions have posed obstacles to water management and Compact administration in both States. Even so, as detailed below, New Mexico has remained committed to complying with the Compact.

I believe that Texas and New Mexico share an interest in ensuring that water is delivered to Elephant Butte Reservoir to serve citizens in both States. To that end, in 2020 and 2021 New Mexico has taken several significant actions to deliver more water to the Reservoir. Those actions include the following:

- In June 2020, consistent with Article VII of the Compact, I notified water users with post-1929 storage rights that no Rio Grande water could be stored in post-1929 reservoirs (except to satisfy the six Middle Rio Grande Pueblos' prior and paramount rights) . That storage constraint has remained in-place since that time.
- In coordination with my office, the Middle Rio Grande Conservancy District ("MRGCD") ended its 2020 irrigation season early to allow unused water to flow into Elephant Butte Reservoir.
- In January 2021, New Mexico complied with Texas's Article VIII request by releasing water retained in post-1929 reservoirs.
- New Mexico decided not to utilize existing relinquishment credits in 2021 to store water during the existing Article VII conditions.
- In coordination with my office, MRGCD started its 2021 irrigation season a month late, and since the start of the irrigation season has been operating at reduced diversion rates.

We hope that these efforts give you comfort that New Mexico is committed to responsible water administration.

Turning to the Compact interpretation issues that Texas raises, the Compact establishes a balance between storage in post-1929 upstream reservoirs, use of water in the Middle Rio Grande, and delivery obligations at Elephant Butte Reservoir. This balance addresses the needs of water users above and below Elephant Butte Reservoir in both States. To understand the rules for storage in post-1929 reservoirs, it is useful to review the interplay of Articles IV, VI, VII, and VIII.

Article IV establishes New Mexico's delivery obligations to Elephant Butte Reservoir based on the index flows at the Otowi gage. These index flows also set guard rails, defining New Mexico's right to use the remaining flows in the Middle Rio Grande. Article VI then provides necessary flexibility by allowing New Mexico an accrued debit of up to 200,000 acre-feet of water. If New Mexico has a debit, however, the Compact requires New Mexico to retain "holdover storage" in post-1929 reservoirs "to the extent of its accrued debit." New Mexico is required to retain that water in storage until New Mexico repays the debit, the Rio Grande Compact Commission ("RGCC") unanimously agrees to a release of water under Article VI, or Texas invokes the release provision of Article VIII. With regard to the new storage of water after such a release, Article VII prohibits New Mexico from storing water

in post-1929 reservoirs “whenever there is less than 400,000 acre-feet of usable water in project storage.”

New Mexico has managed water in careful compliance with these provisions.

In the May 6th letter, Texas relies heavily on the Article VI obligation to “retain water at all times” to assert that New Mexico has an affirmative obligation to actively store or replace water in post-1929 reservoirs until such newly stored water matches an existing accrued debit. To reach that conclusion, Texas misconstrues the word “retain” to have the same meaning as the word “store,” but that understanding is not supported in the Compact and ignores the relationship between Article VI and other Compact provisions. Contrary to Texas’s position, the Compact does not require New Mexico to actively store or replace water in post-1929 reservoirs after an Article VIII release. Rather, the Article VI obligation to retain water only applies if New Mexico, in its sole discretion, decides to increase storage at a time it also has an accrued debit. Under those circumstances, New Mexico must “retain” water in storage equivalent to its debit before it can release any of the newly stored water for use in the Middle Rio Grande. But if New Mexico does not allow new storage in post-1929 reservoirs in the first place, then the Article VI obligation does not apply because there is no water in storage to “retain.”

To see that “retain” and “store” have different meanings in the Compact, one need only look to Articles VI and VII. In both normal usage and in the Compact, “retain” means to continue to hold water after it has previously been stored in a reservoir. Thus Article VI speaks in terms of “holdover storage of water in reservoirs.” In contrast, Article VII makes clear that to “store” means to “increase the amount of water in storage.” It follows that New Mexico must retain water in post-1929 reservoirs to the extent of the accrued debit if those reservoirs already hold previously stored water, but it has no obligation to actively store or “increase the amount of water in storage.” Further support is found in the Article VI duty to “replace” water that was released by agreement of the RGCC. This language reveals a distinction between replacing water that was previously retained and actively storing water. By arguing that New Mexico must actively store water to match its accrued debit after an Article VIII release, Texas effectively claims that Article VIII requires that New Mexico “replace” released water. But unlike Article VI, the Compact does not require that water released pursuant to Article VIII be “replaced.”

Texas’s interpretation is inconsistent with the Compact in three additional ways. First, Texas’s understanding would create a new obligation that would require an upstream State to actively store water each year up to the total amount of its debit. There is no language in the Compact to support such an obligation. Second, after an Article VIII release, Texas’s interpretation would effectively prevent New Mexico water users from applying any water in the Middle Rio Grande until the State actively stored water up to the accrued debit. This is inconsistent with both Article IV and the system of debits and credits adopted by the Compact. Under Texas’s interpretation, there would be no reason for the Compact to have allowed 200,000 acre-feet in “accrued debits” because New Mexico could be required to release the total amount of its debits from post-1929 reservoirs each year pursuant to Article VIII. Nor would there have been any reason to define separately the terms “annual debits” and “accrued

debits” in Article I. Third, Texas’s interpretation ignores the plain meaning of Article VII. In years such as the present, when Article VII is in effect, New Mexico is flatly prohibited from “increase[ing] the amount of water in storage” in post-1929 reservoirs. Texas offers no explanation for this inconsistency.

Applying the plain language of the Compact to the present circumstances, New Mexico is in compliance with the Compact. In January 2021, New Mexico complied with Texas’s Article VIII request to release all retained water in post-1929 reservoirs. As a consequence of that release, New Mexico had no water in post-1929 reservoirs to “retain.” The Compact imposes no obligation to replace water released pursuant to Article VIII, and New Mexico has not actively stored any water since the release. Put simply, because there is no Rio Grande water being stored in post-1929 reservoirs this year in accordance with Article VII, no water has been stored, and therefore there is no water to be *retained*. Instead, New Mexico has continued to deliver water in accordance with Article IV as contemplated by the Compact. And because the accrued debit of 96,300 acre-feet is well below the compliance limit of 200,000 acre-feet, New Mexico remains in compliance with the Compact, and there is no violation to cease and desist.

Finally, the stated motivation for the May 6th letter is to maximize the delivery of water to Elephant Butte Reservoir. However, Texas’s interpretation actually works at cross purposes with that goal. This is true because if water is actively stored in upstream reservoirs, as Texas suggests, it is prevented from flowing downstream, so it is not available to serve Project beneficiaries until at least the next irrigation season.

New Mexico is interested in working through our disagreements in good faith. In this spirit, we would be happy to meet with you to discuss these issues, including ways we might cooperate to maximize the efficient administration of water during these trying times. If you have any questions, please contact me.

Respectfully,



John R. D’Antonio Jr. P.E.
Commissioner for New Mexico
New Mexico State Engineer

cc: Patrick R. Gordon, *former Compact Commissioner for Texas*
Suzy Valentine, *Engineer Adviser for Texas*
Priscilla Hubenak, *Legal Advisor for Texas*
Kevin Rein, *Commissioner for Colorado*
Craig Cotten, *Engineer Adviser for Colorado*
Chad Wallace, *Legal Advisor for Colorado*
Rolf Schmidt-Petersen, *Director New Mexico Interstate Stream Commission*

New Mexico Response to May 6, 2020 Letter
Page 5 of 5
May 21, 2021

Page Pegram, Engineer Adviser for New Mexico
Chris Shaw, Legal Adviser for New Mexico
Hal Simpson, Federal Chair for the United States
Alex Graziano, RGCC Secretary
Jennifer Faler, Bureau of Reclamation Area Manager
Wayne Pullan, Upper Colorado River Basin Bureau of Reclamation Regional Director
Carolyn Donnelly, Albuquerque Bureau of Reclamation Water Operations Supervisor
David Palumbo, Deputy Commissioner, Bureau of Reclamation
Stuart Somach, Somach Simmons & Dunn, PC
Jeffrey Wechsler, Montgomery & Andrews

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

**BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE
SUPPLEMENTAL COMPLAINT**

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*

June 24, 2021

TABLE OF CONTENTS

	Page
INTRODUCTION	1
BACKGROUND	2
A. Texas’s Original Bill of Complaint and the Proceedings to Date.....	2
B. The Proposed Supplemental Complaint.....	4
ARGUMENT	5
A. The Supplemental Complaint Presents Serious, Dignified Claims and Texas Has No Alternative Forum to Seek Redress.....	6
B. The Supplemental Complaint Does Not Take the Litigation Beyond What Was Reasonably Anticipated When the Court Granted Texas’s Motion to File its Original Bill of Complaint	8
C. The Supplemental Complaint Addresses Changed Circumstances and Conditions that Relate to the Core Compact Claims at Issue in this Original Action, But Could Not Have Been Reasonably Known Until This Year.....	10
D. In the Alternative, the Special Master Should Defer Consideration of the Claims in the Supplemental Complaint Until After Trial in September 2021	13

TABLE OF AUTHORITIES

	Page(s)
 CASES	
<i>Arizona v. California</i> , 530 U.S. 392 (2000).....	5
<i>Hinderlider v. La Plata River & Cherry Creek Ditch Co.</i> , 304 U.S. 92 (1938).....	7
<i>Kansas v. Colorado</i> , 185 U.S. 125 (1902).....	7
<i>Mississippi v. Louisiana</i> , 506 U.S. 73 (1992).....	6
<i>Nebraska v. Wyoming</i> , 515 U.S. 1 (1995).....	6, 8, 9, 10
<i>Ohio v. Kentucky</i> , 410 U.S. 641 (1973).....	6
<i>Texas v. New Mexico</i> , 138 S. Ct. 954 (2018).....	9
<i>Texas v. New Mexico</i> , 462 U.S. 554 (1983).....	7
<i>Texas v. New Mexico</i> , 482 U.S. 124 (1987).....	8
<i>Wyoming v. Oklahoma</i> , 502 U.S. 437 (1992).....	8
 CONSTITUTIONS	
United States Constitution Article III, Section 2, Clause. 2.....	8
 STATUTES	
28 U.S.C. § 1251(a)	8
Rio Grande Compact, Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.....	1

**BRIEF IN SUPPORT OF MOTION FOR LEAVE TO FILE
SUPPLEMENTAL COMPLAINT**

The State of Texas submits the following in support of its Motion for Leave to File Supplemental Complaint:

INTRODUCTION

For the better part of a decade, New Mexico has systematically and intentionally reneged on its obligations to Texas, assumed eight decades ago under the 1938 Rio Grande Compact² (“Compact”), by intercepting water rightfully apportioned to Texas and diverting it for use in New Mexico. Though the Compact requires New Mexico to deliver certain quantities of water into the Elephant Butte Reservoir (“Reservoir”) for Texas’s use, New Mexico has surreptitiously permitted, approved, or otherwise acquiesced in groundwater pumping below the Reservoir, thereby taking back water deposited by New Mexico in the Reservoir for Texas’s use in New Mexico as it exits the Reservoir en route to Texas.

New Mexico’s effort to take Texas’s water supply below the Reservoir is reason enough for the Court to award Texas relief. But Texas has recently discovered that New Mexico’s actions stretch even further. These actions include: efforts to divert water for New Mexico’s own use even *before* it deposits that water into the Reservoir for apportionment to Texas; a plan to retain no water in reserve to account for its year-to-year delivery shortfall; and a scheme to render itself unable to meet its obligation to satisfy Texas’s forthcoming request under the Compact to release water owed to it by New Mexico. Texas therefore moves for leave to file a Supplemental Complaint to place the full scope of New Mexico’s conduct in view of this Court.

² Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.

Under the well-established standards governing original proceedings, the Special Master should grant Texas’s motion. The Supplemental Complaint, like the original Complaint (“Complaint”), implicates serious and dignified issues, and Texas lacks an adequate, alternative forum to raise them. The claims, moreover, fall well within the ambit of what the Supreme Court reasonably anticipated when it granted leave to file the Complaint. And Texas could not have raised these issues at any earlier date because Texas only recently discovered New Mexico’s additional efforts to deprive Texas of its rightful share of water.

As is noted below, trial before the Special Master on the downstream Article IV Compact violations is scheduled to begin in September of this year. Texas does not seek to delay this trial, and believes that the issues in this Supplemental Complaint can either be dealt with on Summary Judgment or in a second phase evidentiary hearing that can take place after the evidentiary hearing on the downstream Article IV Compact violations has concluded.

BACKGROUND

A. Texas’s Original Bill of Complaint and the Proceedings to Date

The Compact is the product of decades of negotiations in the early twentieth century between Texas, New Mexico, and Colorado, that is designed to “remove all causes of present and future controversy among these States” by setting the ground rules for “effecting an equitable apportionment” “of the waters of the Rio Grande above Fort Quitman, Texas.” Supplemental Complaint, ¶ 2. In an effort to ensure an equitable apportionment of water among these three States, the upstream states agreed to deliver certain quantities of water at specified intervals along the Rio Grande River so that the downstream states would have an equal opportunity to share in the use of water from the

Rio Grande. Thus, in Article III of the Compact, Colorado agreed to deliver to New Mexico specified quantities of water at sites near the Colorado-New Mexico border. Supplemental Complaint, ¶ 3. Similarly, in Article IV of the Compact, New Mexico agreed to deliver specified quantities of water at a site just upstream of the Reservoir, located in New Mexico roughly 100 miles from the Texas border, so that the water can then be apportioned for Texas's use and for certain contractually limited uses by New Mexico. *Id.*

In January 2013, Texas filed a motion for leave to file a bill of complaint in the Supreme Court, seeking to hold New Mexico to account for violating its water-delivery obligations under the Compact by siphoning off water downstream of the Reservoir that was apportioned to Texas. New Mexico's actions—permitting, authorizing, or otherwise acquiescing in groundwater pumping in areas below the Reservoir—caused water apportioned for Texas's use to be rerouted to New Mexico. The Supreme Court granted Texas's motion in January 2014. Shortly thereafter, the United States intervened, seeking roughly the same relief that Texas sought.

In May 2018, New Mexico filed its answer to Texas's Complaint and asserted nine affirmative defenses and nine counterclaims against Texas and the United States, separately and jointly. Texas and the United States filed motions to dismiss and for partial summary judgment as to New Mexico's counterclaims and affirmative defenses, which New Mexico opposed and moved for leave to amend its pleadings. In a ruling issued in March 2020, the Special Master granted, in part, the motions of Texas and the United States, dismissing the majority of New Mexico's counterclaims, one of its affirmative defenses, as well as its motion for leave to amend its pleadings. Docket

No. 338.³ That order outlined the standards governing modifications of the pleadings in an ongoing original-jurisdiction case. *See* Docket No. 338 at 22-27. The Special Master concluded that “[p]ursuant to the gatekeeping function, it remains necessary to ensure the matters brought before the Court are commensurate in scope with the subject matter over which the Court has chosen to exercise its original jurisdiction.” Docket No. 338 at 26. Texas, New Mexico, and the United States then filed partial summary judgment motions on different theories related to the Compact. In May 2021, the Special Master issued a ruling granting and denying in part the parties’ motions. Docket No. 503. The parties’ remaining Compact claims are set for trial in September 2021.

B. The Proposed Supplemental Complaint

The Supplemental Complaint filed with this motion seeks to hold New Mexico accountable for additional, recently discovered violations of the Compact aimed at robbing Texas of its fair share of water guaranteed by the Compact. Like the Complaint, the Supplemental Complaint concerns New Mexico’s failure to deliver enough water into the Reservoir for Texas as required by Article IV of the Compact. But while the Complaint points to New Mexico’s siphoning of water *below* the Reservoir (i.e., between the Reservoir and the Texas border), the Supplemental Complaint alleges that New Mexico is engaged in the same actions in areas *above* the Reservoir (i.e., between the Colorado border and the Reservoir). Specifically, Texas has recently discovered New Mexico is not protecting the water apportioned to Texas as it passes through the Middle Rio Grande—the section of the Rio Grande between the Colorado border and the Reservoir. Supplemental Complaint, ¶ 9. New Mexico thus violates the Compact by

³ References to “Docket No.” are to the Special Master’s Docket for *Texas v. New Mexico and Colorado*, No. 141 Original. The Docket can be found at <https://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original>.

intercepting and using water in the Middle Rio Grande that must be delivered to the Reservoir to satisfy New Mexico’s Article IV delivery obligation. Supplemental Complaint, ¶ 10.

The Supplemental Complaint also describes recent admissions by New Mexico’s Rio Grande Compact Commissioner revealing that New Mexico has failed to retain enough water in storage to make up for its chronic inability to deliver enough water to the Reservoir for Texas’s use, as it is required to do under Article VI of the Compact. Supplemental Complaint ¶¶ 10-16. And the Supplemental Complaint further observes that New Mexico will soon violate Article VIII in January 2022—as its own Compact Commissioner admits—when it is unable to meet Texas’s request under the Compact for the release of water that it is owed. Supplemental Complaint, ¶ 17.

New Mexico’s newly discovered violations of the Compact amount to changed conditions over those that existed at the time Texas filed its Complaint. The Complaint and Supplemental Complaint, taken together, allege that New Mexico has consistently, systematically, and continuously violated the Compact by failing to satisfy its delivery obligations under Article IV to New Mexico’s benefit and to Texas’s detriment.

ARGUMENT

In actions between States brought under the Supreme Court’s original jurisdiction, no less than in ordinary civil litigation between private parties in federal district court, parties may seek leave to amend or supplement their pleadings. *See Arizona v. California*, 530 U.S. 392, 409 n.4 (2000) (State parties may “seek leave to file a supplemental pleading ‘setting forth . . . occurrences or events which have happened since the date of the pleading sought to be amended.’ Fed. Rule Civ. Proc. 15(d).”).

In determining whether to grant leave, “the critical first step” is for the Special Master to consider whether the amended or supplemental pleading “would take the litigation beyond what [the Court] reasonably anticipated when [the Court] granted leave to file the initial pleadings.” *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995) (citing *Ohio v. Kentucky*, 410 U.S. 641, 644 (1973)). This analysis is informed by “an understanding of the scope of th[e] litigation as envisioned under the initial pleadings.” *Id.* at 8. And the Special Master may look to the Supreme Court’s previous decisions in the case or to its own Interim Reports to determine the scope of the litigation. *Id.* at 8-9. Ultimately, the amended or supplemental pleading must be “of that character and dignity which makes the controversy a justiciable one under [the Supreme Court’s] original jurisdiction.” *Id.* (citation omitted). Thus, the claims introduced by the amended pleading must still involve a “serious” and “dignified” claim and the proponent must lack an alternative forum where the issues could be resolved. *Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992).

Application of these standards warrants granting Texas’s motion to file a supplemental complaint here. The Supplemental Complaint, like the Complaint, implicates serious and dignified issues, and Texas lacks an adequate, alternative forum to raise them. The claims, moreover, fall well within the ambit of what the Supreme Court reasonably anticipated when it granted leave to file the Complaint. And Texas could not have raised these issues at any earlier date because they are recent occurrences that Texas only discovered in the past few months.

A. The Supplemental Complaint Presents Serious, Dignified Claims and Texas Has No Alternative Forum to Seek Redress

At the outset, the claims raised by the Supplemental Complaint are precisely the type of substantial, weighty issues that independently fall within the Supreme Court’s

original jurisdiction. Through the Supplemental Complaint, Texas alleges that New Mexico has repeatedly and systematically violated the Compact by intercepting and diverting water rightfully destined for Texas in areas both above and below the Reservoir; by shirking its obligation to keep in storage an amount of water that equals its year-to-year delivery shortfall; and by rendering itself unable to meet its obligation to satisfy Texas's request under the Compact to release water owed to it by New Mexico. Put simply, New Mexico has sought to arrogate to itself an outsized share of water from the Rio Grande at the expense of Texas by exploiting Texas's status as the furthest downstream State.

This is a quintessential original-jurisdiction dispute. "The model case for invocation of this Court's original jurisdiction is a dispute between States of such seriousness that it would amount to *casus belli* if the States were fully sovereign." *Texas v. New Mexico*, 462 U.S. 554, 571 n.18 (1983); *see also Kansas v. Colorado*, 185 U.S. 125, 143-44 (1902). And if Texas and New Mexico were fully sovereign, New Mexico's attempts to wrest control of, and deprive Texas of access to, a finite natural resource would amount to *casus belli*. The Supreme Court has also acknowledged that it has a unique duty to entertain claims concerning the interpretation and application of interstate compacts, which are, in effect, federally recognized treaties between two or more sovereign states. *See Texas v. New Mexico*, 462 U.S. at 567-68 ("There is no doubt that this Court's jurisdiction to resolve controversies between two States . . . extends to a . . . suit by one State to enforce its compact with another State or to declare rights under a compact."); *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (States' authority to apportion interstate rivers by Compact is "a part of the general right of sovereignty"). And if more were needed, the Special Master should look

no further than the Supreme Court’s decision to affirm the serious and dignified nature of Texas’s Compact claims *in this very case* by granting Texas’s motion for leave to file the original Complaint; the Supplemental Complaint merely builds on the same allegations of the Complaint and the Supreme Court’s earlier decision applies here *a fortiori*.

Texas also lacks an alternative forum within which to pursue the substantial interstate claims raised by the Supplemental Complaint. In evaluating the availability of an alternative forum, the Supreme Court considers whether the alternative forum may provide “full relief” for the States. *Wyoming v. Oklahoma*, 502 U.S. 437, 452 (1992). The analysis is straightforward here, because the Supreme Court is the *only* court in which Texas is permitted to seek a remedy. *See* U.S. Const. art. III, § 2, cl. 2; 28 U.S.C. § 1251(a). Indeed, the Court has held that “[b]y ratifying the Constitution, the States gave [the] Court *complete* judicial power to adjudicate disputes among them . . . and this power includes the capacity to provide one State a remedy for the breach of another.” *Texas v. New Mexico*, 482 U.S. at 128 (emphasis added). The Court affirmed that Texas had no adequate forum to resolve the claims contained in the original Complaint by authorizing its filing. Likewise, and for those same reasons, Texas has no adequate forum except the Supreme Court to resolve the Compact claims set forth in the Supplemental Complaint.

B. The Supplemental Complaint Does Not Take the Litigation Beyond What Was Reasonably Anticipated When the Court Granted Texas’s Motion to File its Original Bill of Complaint

The claims and allegations in the Supplemental Complaint also fall comfortably within the scope of what was reasonably anticipated by the Supreme Court when it granted Texas’s motion to for leave to file the original complaint. *Nebraska v. Wyoming*, 515 U.S. at 8. As the Supreme Court put it just three years ago, the thrust of Texas’s

Complaint is that “New Mexico is effectively breaching its Compact duty to deliver water to the Reservoir by allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate.” *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018). This was a problem the Court recognized because those “Downstream Contracts . . . promised Texas water districts a certain amount of water every year from the Reservoir’s resources.” *Id.* Thus, as the Special Master observed, Texas’s chief complaint is that New Mexico’s conduct “depriv[es] Texas of its equitable apportionment of water to which it is entitled pursuant to the 1938 Compact.” Docket No. 54 at 187.

The Supplemental Complaint is premised on the same basic theory: New Mexico has been methodically repudiating its obligations under the Compact in order to secure for itself a disproportionate share of water from the Rio Grande. In fact, the Supplemental Complaint makes the same allegations that the Complaint does about New Mexico’s duplicitous efforts to intercept and divert water below the Reservoir; the Supplemental Complaint merely adds the critical new detail that New Mexico is also “siphon[ing] off” water in areas *above* the Reservoir. Supplemental Complaint ¶ 9. It matters not that the Supplemental Complaint specifically focuses on an area above the Reservoir. “[T]he territorial scope of the case extends” to more than just the areas downstream of the Reservoir. *Nebraska v. Wyoming*, 515 U.S. at 13. As the Complaint explains, Texas’s lawsuit is aimed generally at “New Mexico’s actions in allowing and authorizing the interception of Rio Grande Project water intended for use in Texas.” Original Complaint, ¶ 4. And the Complaint seeks a remedy for “New Mexico’s actions [that] have reduced Texas’s water supplies and the apportionment of water it is entitled to

from the Rio Grande Project and under the Rio Grande Compact.” Original Complaint, ¶ 4.

For similar reasons, the Supplemental Complaint’s claims related to New Mexico’s violation of its storage obligations under Article VI of the Compact and its impending violation of its Article VIII obligation to release water to Texas upon request, Supplemental Complaint, ¶¶ 10-17, do not “take the litigation beyond” what was anticipated in the Complaint. *Nebraska v. Wyoming*, 515 U.S. at 8. This conduct is part and parcel of New Mexico’s broader scheme to extract as much water as it can for itself and leaving nothing for Texas, and it works hand-in-glove with New Mexico’s efforts, catalogued in the Complaint, to siphon off water little-by-little as it makes its way through New Mexico on its way to Texas. Stated differently, all of the conduct described in the Supplemental Complaint concerns New Mexico’s attempt to thwart “its obligations under the Rio Grande Compact with respect to the delivery of Texas’ apportionment of water under the Rio Grande Compact to the New Mexico-Texas state line, despite requests by Texas that New Mexico do so.” Original Complaint, ¶ 14.

The Supplemental Complaint addresses Compact violations reasonably within the scope of the Compact violations already at issue in the Complaint. Because the Supplemental Complaint does not take the litigation unreasonably beyond the scope of the Complaint, the Special Master should authorize the filing.

C. The Supplemental Complaint Addresses Changed Circumstances and Conditions that Relate to the Core Compact Claims at Issue in this Original Action, But Could Not Have Been Reasonably Known Until This Year

The factual circumstances supporting the claims set forth in the Supplemental Complaint did not exist until at least the spring of 2021. As explained in the Supplemental Complaint, in March 2021 New Mexico notified local officials in New

Mexico and the Bureau of Reclamation—but not Texas—that it had not retained water in upstream storage equal to its accrued debits and that it would not be able to do so.

Supplemental Complaint, ¶ 13. New Mexico did not order or otherwise cause the Middle Rio Grande Conservancy District (“MRGCD”) or the City of Santa Fe or any other entity in the Middle Rio Grande to cease the diversion and use of Rio Grande water. *Id.*

Upon learning of these Compact violations, Texas demanded in a letter dated May 6 that New Mexico cease and desist from violating the Compact and bring itself into compliance with Articles IV and VI of the Compact. Supplemental Complaint, ¶ 14. But New Mexico refused. On May 21, 2021, New Mexico sent a letter to Texas confirming that New Mexico had not stored enough water to cover what it owed Texas and, importantly, that it would not be curing this noncompliance. Supplemental Complaint, ¶ 15. New Mexico attempted to justify its failure to retain in storage at all times a quantity of water equal to its accrued debit through a unique and aberrant interpretation of Article VI of the Compact. *Id.*

Worse yet, New Mexico’s May 21 letter made clear that it would soon violate Article VIII of the Compact as well. That Article authorizes Texas’s Compact Commissioner to demand during the month of January of any year, that New Mexico release the amount water from storage reservoirs to cover its accrued debits and New Mexico must release water equal to the accrued debits at the greatest rate predictable. Texas understands that by January 2022, New Mexico will have accrued a debit of at least 130,000 acre-feet of water. Supplemental Complaint, ¶ 17. The Texas Rio Grande Compact Commissioner will make a demand upon New Mexico for the release of this water and New Mexico has admitted that it will not be able to honor this Article VIII

demand because of its failure to retain in storage a quantity of water equal to its accrued debit and its inability to do so between now and January 2022. *Id.*

As the foregoing demonstrates, the facts giving rise to the claims in the Supplemental Complaint only came to Texas's attention last month and only arose this past March, so Texas could not have raised the issues in the Supplemental Complaint before then. Because Texas diligently attempted to bring these issues to the Court's attention and has not engaged in undue delay, the Special Master should authorize the filing of the Supplemental Complaint.

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

///

D. In the Alternative, the Special Master Should Defer Consideration of the Claims in the Supplemental Complaint Until After Trial in September 2021

Texas requests that the Special Master grant leave to file the Supplemental Complaint. Because the trial of the Complaint is to be held in phases, with the first phase scheduled to commence on September 13, 2021, the issues addressed in the Supplemental Complaint could be tried in a subsequent phase after the completion of the first phase trial. Proceeding in this manner would not affect the trial date or proceedings on the Complaint but provides Texas the necessary forum to address the serious and ongoing violations of the Rio Grande Compact above the Reservoir.

Dated: June 24, 2021

Respectfully submitted,

s/ Stuart L. Somach

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*

No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO AND
STATE OF COLORADO,

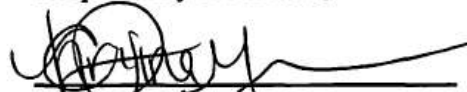
Defendants.

OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on this 24th day of June 2021, I caused a true and correct copy of the State of Texas's Motion for Leave to File Supplemental Complaint, the Supplemental Complaint, and the Brief in Support of the Motion for Leave to File the Supplemental Complaint to be served upon all parties and *amici curiae*, by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was effected by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

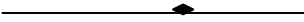
Respectfully submitted,



Christina Garro

Dated: June 24, 2021

SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE



SPECIAL MASTER

Special Master	Honorable Michael J. Melloy <i>Special Master</i> United States Circuit Judge 111 Seventh Avenue, S.E. Box 22 Cedar Rapids, IA 52401 Michael E. Gans, Clerk of Court United States Court of Appeals – Eighth Circuit Thomas F. Eagleton United States Courthouse 111 South 10th Street, Suite 24.329 St. Louis, MO 63102	TXvNM141@ca8.uscourts.gov (319) 432-6080 TXvNM141@ca8.uscourts.gov (314) 244-2400
-----------------------	---	--

PARTIES
(Service via Electronic Mail)

PARTIES⁴

STATE	ATTORNEY & ADDRESS	PHONE & EMAIL
Texas	<p>STUART L. SOMACH* ANDREW M. HITCHINGS ROBERT B. HOFFMAN FRANCIS M. GOLDSBERRY II THERESA C. BARFIELD SARAH A. KLAHN BRITTANY K. JOHNSON RICHARD S. DEITCHMAN SOMACH SIMMONS & DUNN, PC 500 Capitol Mall, Suite 1000 Sacramento, CA 95814-2403</p> <p>KEN PAXTON <i>Attorney General of Texas</i> BRENT WEBSTER <i>First Assistant Attorney General</i> GRANT DORFMAN <i>Deputy First Assistant Attorney General</i> SHAWN COWLES <i>Deputy Attorney General for Civil Litigation</i> PRISCILLA M. HUBENAK* <i>Chief, Environmental Protection Div.</i> OFFICE OF THE ATTORNEY GENERAL OF TEXAS P.O. Box 12548 Austin, TX 78711-2548</p>	<p>(916) 446-7979 ssomach@somachlaw.com ahitchings@somachlaw.com rhoffman@somachlaw.com mgoldsberry@somachlaw.com tbarfield@somachlaw.com sklahn@somachlaw.com bjohnson@somachlaw.com rdeitchman@somachlaw.com</p> <p>Secretary: Corene Rodder crodder@somachlaw.com Secretary: Crystal Rivera crivera@somachlaw.com Paralegal: Christina M. Garro cgarro@somachlaw.com Paralegal: Yolanda De La Cruz ydelacruz@somachlaw.com</p> <p>(512) 463-2012 (512) 457-4644 Fax</p> <p>priscilla.hubenak@oag.texas.gov</p>

⁴ (*) = *Counsel of Record*

<p>New Mexico</p>	<p>HECTOR H. BALDERAS New Mexico Attorney General TANIA MAESTAS Chief Deputy Attorney General CHOLLA KHOURY Assistant Attorney General ZACHARY E. OGAZ Assistant Attorney General STATE OF NEW MEXICO P.O. Drawer 1508 Santa Fe, NM 87501 Patricia Salazar – Assistant MARCUS J. RAEL, JR. * LUIS ROBLES SUSAN BARELA Special Assistant Attorneys General ROBLES, RAEL & ANAYA, P.C. 500 Marquette Ave. NW, Suite 700 Albuquerque, NM 87102 Chelsea Sandoval-Firm Administrator Pauline Wayland – Paralegal Bonnie DeWitt – Paralegal BENNET W. RALEY LISA M. THOMPSON MICHAEL A. KOPP Special Assistant Attorneys General TROUT RALEY 1120 Lincoln St., Suite 1600 Denver, CO 80203 JEFFREY WECHSLER Special Assistant Attorney General MONTGOMERY & ANDREWS 325 Paseo De Peralta Santa Fe, NM 87501 Diana Luna - Paralegal JOHN DRAPER Special Assistant Attorney General DRAPER & DRAPER LLC 325 Paseo De Peralta Santa Fe, NM 87501 Donna Ormerod – Paralegal</p>	<p>hbalderas@nmag.gov tmaestas@nmag.gov ckhoury@nmag.gov zogaz@nmag.gov (505) 239-4672 psalazar@nmag.gov marcus@roblesrael.com luis@roblesrael.com susan@roblesrael.com (505) 242-2228 chelsea@roblesrael.com pauline@roblesrael.com bonnie@roblesrael.com braley@troutlaw.com lthompson@troutlaw.com mkopp@troutlaw.com (303) 861-1963 jwechsler@montand.com (505) 986-2637 dluna@montand.com john.draper@draperllc.com (505) 570-4591 donna.ormerod@draperllc.com</p>

<p>Colorado</p>	<p>PHILIP J. WEISER Colorado Attorney General ERIC R. OLSON Colorado Solicitor General LAIN LEONIAK Acting First Asst. Attorney General CHAD M. WALLACE* Senior Assistant Attorney General PRESTON V. HARTMAN Assistant Attorney General</p> <p>COLORADO DEPARTMENT OF LAW Ralph Carr Judicial Center 7th Floor 1300 Broadway Denver, CO 80203 Nan Edwards – Paralegal II</p>	<p>eric.olson@coag.gov</p> <p>chad.wallace@coag.gov (720) 508-6281 (direct)</p> <p>preston.hartman@coag.gov (720) 508-6257 (direct)</p> <p>nan.edwards@coag.gov</p>

<p>United States</p>	<p>ELIZABETH B. PRELOGAR * Acting Solicitor General EDWIN S. KNEEDLER Deputy Solicitor General JEAN E. WILLIAMS Deputy Assistant Attorney General FREDERICK LIU Assistant to the Solicitor General U.S. DEPT. OF JUSTICE 950 Pennsylvania Ave, NW Washington, DC 20530-0001</p> <p>JAMES J. DUBOIS* R. LEE LEININGER U.S. DEPT. OF JUSTICE Environment & Natural Resources Div. 999 18th Street South Terrace – Suite 370 Denver, CO 80202 Seth C. Allison, Paralegal</p> <p>JUDITH E. COLEMAN JENNIFER A. NAJJAR U.S. DEPT. OF JUSTICE Environment & Natural Resources Div. P.O. Box 7611 Washington, DC 20044-7611</p>	<p>supremectbriefs@usdoj.gov (202) 514-2217</p> <p>james.dubois@usdoj.gov (303) 844-1375 lee.leininger@usdoj.gov (303) 844-1364</p> <p>seth.allison@usdoj.gov (303) 844-7917</p> <p>judith.coleman@usdoj.gov (202) 514-3553 jennifer.najjar@usdoj.gov (202) 305-0476</p>
-----------------------------	---	---

AMICI

AMICI	ATTORNEY AND ADDRESS	PHONE & EMAIL
<p>Albuquerque Bernalillo County Water Utility Authority</p>	<p>JAY F. STEIN JAMES C. BROCKMANN* STEIN & BROCKMANN, P.A. P.O. Box 2067 Santa Fe, NM 87504 Administrative Copy</p> <p>PETER AUH Albuquerque Bernalillo County Water Utility Authority P.O. Box 568 Albuquerque, NM 87103-0568</p>	<p>jfstein@newmexicowaterlaw.com jcbrockmann@newmexicowaterlaw.com (505) 983-3880</p> <p>administrator@newmexicowaterlaw.com</p> <p>pauh@abcwua.org (505) 289-3092</p>
<p>City of El Paso</p>	<p>DOUGLAS G. CAROOM* SUSAN M. MAXWELL BICKERSTAFF HEATH DELGADO ACOSTA LLP 3711 S. MoPac Expressway Building One, Suite 300 Austin, TX 78746</p>	<p>dcaroom@bickerstaff.com smaxwell@bickerstaff.com (512) 472-8021</p>
<p>City of Las Cruces</p>	<p>JAY F. STEIN* JAMES C. BROCKMANN STEIN & BROCKMANN, P.A. P.O. Box 2067 Santa Fe, NM 87504 Administrative Copy</p> <p>JENNIFER VEGA-BROWN ROBERT CABELLO LAS CRUCES CITY ATTORNEY'S OFFICE P.O. Box 20000 Las Cruces, NM 88004</p>	<p>jfstein@newmexicowaterlaw.com jcbrockmann@newmexicowaterlaw.com (505) 983-3880</p> <p>administrator@newmexicowaterlaw.com</p> <p>jvega-brown@las-cruces.org rcabello@las-cruces.org (575) 541-2128</p>

<p>El Paso County Water Improvement District No. 1</p>	<p>MARIA O'BRIEN* SARAH STEVENSON MODRALL, SPERLING, ROEHL, HARRIS & SISK, P.A. 500 Fourth Street N.W., Suite 1000 Albuquerque, NM 87103-2168 Shannon Gifford – Legal Assistant</p> <p>RENEA HICKS LAW OFFICE OF MAX RENE HICKS P.O. Box 303187 Austin, TX 78703-0504</p>	<p>mobrien@modrall.com sarah.stevenson@modrall.com (505) 848-1803 (direct)</p> <p>shannong@modrall.com</p> <p>rhicks@renea-hicks.com (512) 480-8231</p>
<p>Elephant Butte Irrigation District</p>	<p>SAMANTHA R. BARNCASTLE* BARNCASTLE LAW FIRM, LLC 1100 South Main, Suite 20 (88005) P.O. Box 1556 Las Cruces, NM 88004 Janet Correll - Paralegal</p>	<p>samantha@h2o-legal.com (575) 636-2377 Fax: (575) 636-2688</p> <p>janet@h2o-legal.com</p>
<p>Hudspeth County Conservation and Reclamation District No. 1</p>	<p>ANDREW S. "DREW" MILLER* KEMP SMITH LLP 919 Congress Ave., Suite 1305 Austin, TX 78701</p>	<p>dmiller@kempsmith.com (512) 320-5466</p>
<p>New Mexico Pecan Growers</p>	<p>TESSA T. DAVIDSON* DAVIDSON LAW FIRM, LLC 4206 Corrales Rd. P.O. Box 2240 Corrales, NM 87048 Jo Harden - Paralegal</p>	<p>ttd@tessadavidson.com (505) 792-3636</p> <p>jo@tessadavidson.com</p>

<p>New Mexico State University</p>	<p>JOHN W. UTTON* UTTON & KERY, P.A. P.O. Box 2386 Santa Fe, NM 87504</p> <p>General Counsel Hadley Hall Room 132 2850 Weddell Road Las Cruces, NM 88003</p>	<p>john@uttonkery.com (505) 699-1445</p> <p>gencounsel@nmsu.edu (575) 646-2446</p>
<p>State of Kansas</p>	<p>DEREK SCHMIDT Attorney General of Kansas JEFFREY A. CHANAY Chief Deputy Attorney General TOBY CROUSE* Solicitor General of Kansas BRYAN C. CLARK Assistant Solicitor General DWIGHT R. CARSWELL Assistant Solicitor General 120 S.W. 10th Ave., 2nd Floor Topeka, KS 66612</p>	<p>toby.crouse@ag.ks.gov (785) 296-2215 bryan.clark@ag.ks.gov</p>
<p>Southern Rio Grande Diversified Crop Farmers Association</p>	<p>ARNOLD J. OLSEN* HENNIGHAUSEN OLSEN & McCREA, L.L.P. P. O. Box 1415 Roswell, NM 88202-1415</p> <p>Malina Kauai – Paralegal Rochelle Bartlett – Legal Assistant</p>	<p>ajolsen@h2olawyers.com (575) 624-2463</p> <p>mkauai@h2olawyers.com rbartlett@h2olawyers.com</p>