



U.S. Department of Justice

Environment and Natural Resources Division

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April 13, 2018

Hon. Michael J. Melloy
Senior United States Circuit Judge
United States Courthouse
111 Seventh Ave. S.E., Box 22
Cedar Rapids, IA 52401-2101

Re: Texas v. New Mexico and Colorado
Supreme Court No. 141 Original

Dear Judge Melloy:

In response to your letter of April 3, 2018, the United States provides this brief summary of the main issues it believes will need to be resolved in this case, together with a broad outline of anticipated discovery necessary to that resolution. Of necessity, this outline provides only a general overview and does not preclude the United States from addressing other issues in the litigation. Further, because New Mexico has indicated that it is likely to file counterclaims as well as an answer, the list of issues and necessary discovery is likely to expand.

The Rio Grande Compact ("Compact") incorporates into its structure the Rio Grande Project, a U.S. Bureau of Reclamation ("Reclamation") Project that stores in Elephant Butte Reservoir all of the surface flow of the Rio Grande River mandated by the Compact to be delivered to that point. Elephant Butte Reservoir is located approximately 100 miles north of the Texas-New Mexico Border. The Rio Grande Project was already in existence when the Compact was negotiated and entered into by the states of Texas, New Mexico, and Colorado. The Compact recognizes that, as a general proposition, all of the water delivered by New Mexico to Elephant Butte Reservoir becomes Project water under the control of Reclamation.¹ Reclamation releases water stored in Elephant Butte Reservoir based on Project demand (as requested by the two Districts contracting for the water)², and re-diverts it at a series of canals and ditches located in New Mexico and Texas. The United States also delivers water from the Project to Mexico pursuant to a 1906 Treaty. Thus, the Rio Grande Project is the means adopted by the Compact to deliver water apportioned under the Compact to southern New Mexico and Texas, and to Mexico under the 1906 Treaty.

¹ Some water that is imported from the Colorado River Basin is also stored in Elephant Butte by agreement, but that water is irrelevant to the current dispute, and is not part of the interstate apportionment effected by the Compact.

² Those districts are the Elephant Butte Irrigation District whose service area lies in southern New Mexico, and the El Paso County Water Improvement District No. 1, whose service area lies in Texas.

Historically, the Project relied upon the recapture of return flows to allow it to meet its obligations to the New Mexico and Texas Irrigation Districts, as well as Mexico. Project water applied to irrigate upstream lands is not fully consumed, and the unconsumed portion returns to the Rio Grande through drains or through groundwater returns to the river, augmenting the river's flow, and thereby becoming available to Project ditches located downstream. Thus, because of the Project's reuse of return flows, an acre-foot of water released from Elephant Butte Reservoir produced more than an acre-foot of water diverted within the Project.

The United States alleges that New Mexico, although a Compact signatory, has permitted groundwater development that has depleted the flows of the Rio Grande River, reducing the water supply of the Project. The United States asserts that groundwater pumping permitted by New Mexico dries up drains, reduces subsurface return flows to the river, and causes greater seepage losses from the River and Project canals and ditches, thus capturing the Project water released from Elephant Butte Reservoir for delivery to the Irrigation Districts in New Mexico and Texas and for delivery to Mexico. As a result, the pumping allowed by New Mexico injures the water and property rights of the United States in New Mexico, and potentially injures and reduces water deliveries to Texas under the Compact and to Mexico under the 1906 Treaty.

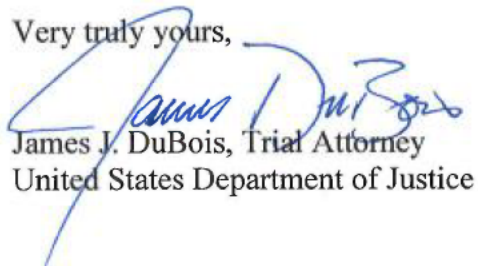
The main issues that the United States believes need to be resolved include:

- 1) Whether pumping of groundwater by wells below Elephant Butte Dam in New Mexico depletes Project Water to which the Project, its beneficiaries, and the United States are entitled.
- 2) What water is Texas entitled to under the Compact?
- 3) Whether New Mexico has allowed water development that effectively takes water from the Rio Grande Project and reallocates it to water users in New Mexico.
- 4) Whether the Compact allows New Mexico to take or reallocate water from the Rio Grande Project water supply;
- 5) Whether non-Project diversions in New Mexico that deplete waters of the Rio Grande apportioned by the Compact violates the provisions of the Compact.
- 6) Whether non-Project depletions in New Mexico interfere with the United States' fulfillment of its treaty obligations with Mexico.
- 7) What is the appropriate remedy for any breach of the Compact.

The United States anticipates that the parties will make requests regarding a significant number of historical documents related to the Compact itself and regarding historical engineering or data gathering that occurred in relation to the Compact negotiation. In addition, there may be requests for a significant volume of documents related to system hydrology, Project operation and accounting, and operation of the Elephant Butte Irrigation District and the El Paso County Improvement District No. 1. These requests may become quite burdensome not only to the parties, but also to amici who will be subject to requests under Rule 45 of the Federal Rules of Civil Procedure. This is particularly true if any parties casts an unnecessarily wide net. For this reason, the parties have tried to provide sufficient times for responses in order to make document production tasks manageable.

The United States also anticipates that the analysis of technical issues of the impacts of well pumping on both the flow of the Rio Grande and on the Project water supply, as well as on deliveries to Texas, will involve complex computer modeling. The United States anticipates that each party will designate expert witnesses to testify regarding models they have developed or reviewed, and also for rebuttal testimony. The models themselves, together with the data on which they rely, will be the subject of extensive discovery, including document requests for the underlying code and data, and a number of multi-day depositions to examine the opinions of the parties' experts. The parties have built in substantial time for this process, as review of computer models is a time consuming and potentially difficult task. The position of the United States regarding the timing and sequencing of expert witness designations is addressed in separate correspondence to Your Honor, and in the version of draft Appendix B proposed by the United States and Texas that accompanies the draft proposed Case Management Plan.

Very truly yours,

A handwritten signature in blue ink, appearing to read "James J. DuBois", is written over the typed name and title.

James J. DuBois, Trial Attorney
United States Department of Justice

cc: Service List