

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

UNITED STATES' ANSWER TO NEW MEXICO'S COUNTERCLAIMS

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The United States of America (United States), Plaintiff in Intervention, hereby answers the Counterclaims of Defendant State of New Mexico (New Mexico), filed on May 23, 2018. All numbered paragraphs correspond to the numbered paragraphs in New Mexico's Counterclaims. The headings used in this Answer follow the major section headings in New Mexico's Counterclaims and are included solely for the purpose of organizational convenience matching the answers provided here with the allegations made in the Counterclaims. The headings are not part of the United States' Answer to the allegations. The United States does not waive any defensive theory or agree to or admit that New Mexico's headings are accurate, appropriate, or substantiated.

JURISDICTION AND VENUE

1. The United States admits that this Court has jurisdiction over this case and that venue is proper in this Court. The United States denies all other allegations in Paragraph 1.

GENERAL ALLEGATIONS

A. The Rio Grande Project

2. The United States admits the allegations in the first and third sentences of Paragraph 2. The United States denies the allegations in the second sentence of Paragraph 2.
3. The United States admits the allegations in Paragraph 3 except the allegation that New Mexico was one of the "western states" in 1902, which allegation the United States denies; the United States avers that, when the Reclamation Act was enacted in 1902, Act of June 17, 1902, ch. 1093, 32 Stat. 388 (Reclamation Act), New Mexico was a territory and not a state.
4. The United States denies the allegations in Paragraph 4.

5. The United States admits the allegations in the first sentence of Paragraph 5. The United States denies the allegations in the second and third sentences of Paragraph 5, and avers that the Act of February 25, 1905, ch. 798, 33 Stat. 814 (Rio Grande Project Act), extended the provisions of the Reclamation Act to that part of Texas that could be irrigated with water stored by the Rio Grande Project (Project) and authorized the Secretary of the Interior to “proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation,” if “there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise.”
6. The allegations in the first sentence of Paragraph 6 are vague and ambiguous, and the United States denies them on that basis. As to the second sentence of Paragraph 6, the United States admits that a Notice was filed with the New Mexico Territorial Engineer on January 23, 1906, and denies the remaining allegations. As to the third sentence of Paragraph 6, the United States admits that the 1906 Notice contained the quoted language, and denies the remaining allegations. The United States admits the allegation in the fourth sentence. The last sentence in Paragraph 6 is a characterization by New Mexico of the ongoing state adjudication court proceedings in Stream System Issue SS-97-104; to the extent the allegations are inconsistent with the rulings of the adjudication court, they are denied.
7. The allegations in Paragraph 7 are characterizations by New Mexico of state adjudication court proceedings in Stream System Issue SS-97-104; to the extent the allegations in Paragraph 7 are inconsistent with the rulings of the adjudication court, they are denied.

8. The United States admits the allegations in Paragraph 8.
9. The United States admits the allegations in the first two sentences of Paragraph 9. As to the third sentence of Paragraph 9, the United States admits that water is delivered to Mexico from storage in Elephant Butte Reservoir pursuant to the 1906 Convention between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes (Convention), May 21, 1906, U.S.-Mex., 34 Stat. 2953, and denies the remaining allegations.
10. The United States admits that the Bureau of Reclamation (Reclamation) manages Elephant Butte Reservoir, which releases water for delivery to Mexico, and to districts in southern New Mexico (Elephant Butte Irrigation District (EBID)) and in west Texas (El Paso County Water Improvement District No. 1 (EPCWID)) that are Project contractors, and denies the remaining allegations in Paragraph 10.
11. The United States admits the allegations in Paragraph 11, and further avers that the referenced contracts were with water users' associations and were replaced by repayment contracts with districts organized under state law.
12. The United States admits the allegations in the first sentence of Paragraph 12. The United States admits the allegations in the second sentence of Paragraph 12, and avers that the contracts governing the repayment of Project construction costs and operation and maintenance responsibilities for the two districts were executed in 1937 pursuant to the Interior Department Appropriation Act, 1938, §1, 50 Stat. 593.
13. The United States admits the allegations in the first sentence of Paragraph 13 and avers that EBID also delivers Project water to landowners in EPCWID. The United States denies the allegations in the second sentence of Paragraph 13.

14. The United States admits the allegations in the first, second, third, and fourth sentences of Paragraph 14. The United States denies the allegations in the fifth sentence of Paragraph 14.

B. The Rio Grande Compact

15. The United States admits the allegations in Paragraph 15.

16. The United States admits that the Rio Grande Compact (Compact), Act of May 31, 1939, ch. 155, 53 Stat. 785, equitably apportions the waters of the Rio Grande, but denies that the Compact apportions all of the waters of the Rio Grande between the named states. The United States denies all remaining allegations of Paragraph 16.

17. The United States lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the first sentence of Paragraph 17 and, on that basis denies them. As to the second sentence of Paragraph 17, the United States admits that the Compact incorporates the Project as the means by which Rio Grande water is delivered to lands in New Mexico downstream from Elephant Butte Reservoir and to Texas, and denies the remaining allegations. The United States denies the allegations in the third sentence of Paragraph 17.

18. The first sentence in Paragraph 18 is vague and ambiguous, and accordingly the United States denies the allegations therein on that basis. As to the second sentence in Paragraph 18, the United States admits that the quoted language appears in Article I(h) of the Compact. As to the third sentence in Paragraph 18, the United States admits that the quoted language appears in Article I(k) of the Compact. As to the fourth sentence in Paragraph 18, the United States admits that the quoted language appears in Article I(l) of the Compact. As to the fifth sentence in Paragraph 18, the United States admits that the

quoted language appears in Article I(m) of the Compact. As to the sixth sentence of Paragraph 18, the United States admits that credit water is stored in Elephant Butte Reservoir, but denies the remaining allegations in that sentence. The United States avers that the Compact is a federal statute and any allegations in Paragraph 18 that are inconsistent with the statute are denied.

19. The United States admits the allegations in Paragraph 19.

20. The United States admits the allegations in Paragraph 20.

21. The United States admits the allegations in Paragraph 21.

22. The United States admits that the partially quoted language in Paragraph 22 appears in Article VI of the Compact, but denies that the quoted language is the only language in the Compact “relevant to credits.”

23. The United States admits that the quoted language in Paragraph 23 appears in Article VII of the Compact, but denies that the quoted language is the only language in the Compact that is the “pertinent part” relating to or applying to issues in this dispute.

24. The United States admits the allegation in Paragraph 24.

C. Historic Project Operations

25. The United States admits the allegations in the first and second sentences of Paragraph 25 and avers that the Project also supplies water for municipal use in Texas. The third sentence of Paragraph 25 contains vague and ambiguous allegations and the United States, on that basis, denies them.

26. The allegations in Paragraph 26 are an incorrect characterization by New Mexico of Project Storage and accordingly are denied.

27. The United States admits the allegation in Paragraph 27.

28. The United States admits the allegations in Paragraph 28.
29. The United States admits the allegation in the first sentence of Paragraph 29 that the EPCWID delivers Project water to the city of El Paso and to farmers in the El Paso Valley, but denies the allegation that EPCWID diverts Project water at American Dam. The United States denies all remaining allegations in the first sentence of Paragraph 29. The United States admits the allegations in the second sentence of Paragraph 29.
30. The United States denies the allegations in the first sentence of Paragraph 30. As to the second sentence of Paragraph 30, the United States admits that Hudspeth County Conservation and Reclamation District's (HCCRD) members are not Project beneficiaries and that HCCRD's members have contracts to use Project water; the remaining allegations in the second sentence purport to characterize the contents of contracts between HCCRD's members and Reclamation, and the United States denies any allegation inconsistent with the terms of those contracts. The United States denies the allegations in the third sentence of Paragraph 30.
31. The allegations in Paragraph 31 are vague and ambiguous, and the United States denies them on that basis; the United States avers that water is delivered to Mexico at the International Dam pursuant to the 1906 Convention with Mexico.
32. The United States denies the allegations in Paragraph 32, and avers that Project return flows are part of Project supply available for reuse on Project lands.
33. The United States admits the allegation in the first sentence of Paragraph 33. The allegation in the second sentence of Paragraph 33 is vague and ambiguous, and on that basis, the United States denies the same. The United States admits the allegations in the third and fourth sentences of Paragraph 33.

34. The United States admits the allegation in Paragraph 34 that the New Mexico State Engineer closed the Lower Rio Grande basin. The United States denies the remaining allegations in Paragraph 34.
35. The United States denies the allegations contained in the first sentence of Paragraph 35. The allegations in the second sentence of Paragraph 35 consist of vague and ambiguous characterizations and the United States, on that basis, denies them.
36. The United States admits the allegations in the first sentence of Paragraph 36. The United States denies the allegations in the second sentence of Paragraph 36.
37. The United States admits the allegations in the first sentence of Paragraph 37. The United States denies the allegations in the second sentence of Paragraph 37.
38. The United States admits that, in approximately 1980, EBID and EPCWID met their repayment obligations, and that the United States transferred, in approximately 1983, the responsibility for operation and maintenance of most Project facilities, other than the storage reservoirs, and the American and International dams, to the districts, and denies the remaining allegations in Paragraph 38.
39. The United States admits that Reclamation delivers Project water to EBID and EPCWID and avers that the International Boundary Waters Commission delivers water at the American Dam. The United States denies all remaining allegations in Paragraph 39.
40. The United States denies the allegations in Paragraph 40.
41. The United States denies the allegations in Paragraph 41.
- D. The 2008 Operating Agreement**
42. The United States denies the allegations in Paragraph 42.

43. The United States admits that as part of a settlement of litigation over Project operations, the United States, EBID, and EPCWID executed the 2008 Operating Agreement. The United States denies all remaining allegations in the first sentence of Paragraph 43. The United States denies the allegations in the second sentence of Paragraph 43. The United States admits the allegations in the third sentence of Paragraph 43.
44. The United States denies the allegations in Paragraph 44.
45. The United States denies the allegations in Paragraph 45.
46. The United States denies the allegations in Paragraph 46.
47. The United States denies the allegations in the first sentence of Paragraph 47. As for the allegations in the second sentence of Paragraph 47, the United States admits that the Operating Agreement allows for carryover accounting, and denies the remaining allegations. The United States denies the allegations in the third and fourth sentences in Paragraph 47.
48. The United States denies the allegations in Paragraph 48.
49. The United States denies the allegations in Paragraph 49.
50. The United States denies the allegations in Paragraph 50.
51. The United States denies the allegations in Paragraph 51.
52. The United States denies the allegations in Paragraph 52.
53. The United States admits that New Mexico brought suit in 2011 against Reclamation and the two irrigation districts in federal district court in New Mexico, and denies the remaining allegations in the first sentence of Paragraph 53. The United States admits the allegations in the second and third sentences of Paragraph 53.

E. Credit Water

54. The United States admits the allegations in Paragraph 54.
55. The United States denies the allegations in Paragraph 55, but avers that “relinquishment” is provided for in the Compact.
56. The United States lacks knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 56 and, on that basis, denies them.
57. The United States admits that the Rio Grande Compact Commission took the referenced action at its 67th Annual Meeting but denies the allegation in Paragraph 57 that the Rio Grande Compact Commission has the authority to direct Reclamation as to (1) the physical operations of the Project reservoirs or (2) the disposition of usable water, and avers that Texas subsequently withdrew its approval for the referenced action.
58. The United States denies the allegations in Paragraph 58.
59. The United States denies the allegations in Paragraph 59.
60. The United States denies the allegations in Paragraph 60.
61. The United States denies the allegations in Paragraph 61.
62. The United States denies the allegations in Paragraph 62.

FIRST CLAIM FOR RELIEF

(Alleged Compact Violation by Texas Caused by Unauthorized Depletions)

63. The United States incorporates by reference its responses to Paragraphs 1 through 62.
64. Paragraph 64 consists of New Mexico’s allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.
65. Paragraph 65 consists of New Mexico’s allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

66. Paragraph 66 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

67. Paragraph 67 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

68. Paragraph 68 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

69. Paragraph 69 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

70. Paragraph 70 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

71. Paragraph 71 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

SECOND CLAIM FOR RELIEF

(Alleged Interference with Compact Apportionment Against the United States)

72. The United States incorporates by reference its responses to Paragraphs 1 through 71.

73. The United States denies the allegations in Paragraph 73.

74. The United States denies the allegations in Paragraph 74.

75. The United States denies the allegations in Paragraph 75.

76. The United States denies the allegations in Paragraph 76.

77. The United States denies the allegations in Paragraph 77.

78. The United States denies the allegations in Paragraph 78.

79. The United States admits the allegations in Paragraph 79.

80. The United States denies the allegations in Paragraph 80.

81. The United States denies the allegations in Paragraph 81.

82. The United States denies the allegations in Paragraph 82.

83. The United States denies the allegations in Paragraph 83.

THIRD CLAIM FOR RELIEF

(Alleged Improper Release of Compact Credit Water Against the United States)

84. The United States incorporates by reference its responses to Paragraphs 1 through 83.

85. The United States denies the allegations in the first sentence of Paragraph 85. The United States admits that the quoted language in the second sentence of Paragraph 85 appears in Article VII of the Compact but denies any other allegation in this sentence.

86. The United States admits that the quoted language in Paragraph 86 appears in Article VI of the Compact but denies any other allegation in this sentence.

87. The United States denies the allegations in Paragraph 87.

88. The United States denies the allegations in Paragraph 88.

89. The United States denies the allegations in Paragraph 89.

90. The United States denies the allegations in Paragraph 90.

FOURTH CLAIM FOR RELIEF

(Alleged Compact Violation and Unjust Enrichment Against Texas)

91. The United States incorporates by reference its responses to Paragraphs 1 through 90.

92. Paragraph 92 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.
93. Paragraph 93 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.
94. Paragraph 94 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.
95. Paragraph 95 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.
96. Paragraph 96 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.
97. Paragraph 97 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.
98. Paragraph 98 consists of New Mexico's allegations against Texas, and on that basis, does not require a response from the United States. To the extent that a response is required from the United States, the allegations are denied.

FIFTH CLAIM FOR RELIEF

(Alleged Violation of the Water Supply Act by the United States)

99. The United States incorporates by reference its responses to Paragraphs 1 through 98.

100. The United States admits that the Reclamation Act as amended and supplemented; the Rio Grande Project Act; section 8 of the Reclamation Act, 43 U.S.C. 383; and the Compact, 53 Stat. 785, N.M. Stat. Ann. § 72-15-23 (LexisNexis 1997), as amended and supplemented, have some applicability to the operation of the Project in their amended forms. The United States denies that 43 U.S.C. 371 *et seq.*, including those portions of the Reclamation Act called the Water Supply Act of 1958, 43 U.S.C. 390b, applies to the Project.

101. The United States denies the allegations in Paragraph 101.

102. The United States denies the allegations in Paragraph 102.

103. The United States denies the allegations in Paragraph 103.

104. The United States denies the allegations in Paragraph 104.

SIXTH CLAIM FOR RELIEF

(Alleged Improper Compact and Project Accounting Against the United States)

105. The United States incorporates by reference its responses to Paragraphs 1 through 104.

106. The United States denies the allegations in Paragraph 106.

107. The United States denies the allegations in Paragraph 107.

SEVENTH CLAIM FOR RELIEF

(Alleged Violation of the Miscellaneous Purposes Act and the Compact Against Texas and the United States)

108. The United States incorporates by reference its responses to Paragraphs 1 through 107.

109. The allegations in the first sentence of Paragraph 109 characterize a federal statute; to the extent the allegations are inconsistent with the statute, they are denied. The United States denies the allegations in the second and third sentences in Paragraph 109.

110. The United States denies the allegations in Paragraph 110.

111. The United States denies the allegations in Paragraph 111.

112. The United States denies the allegations in Paragraph 112.

113. The United States denies the allegations in Paragraph 113.

114. The United States denies the allegations in Paragraph 114.

115. The United States denies the allegations in Paragraph 115.

EIGHTH CLAIM FOR RELIEF

(Alleged Improper Project Maintenance Against the United States)

116. The United States incorporates by reference its responses to Paragraphs 1 through 115.

117. The United States admits the allegations that it has transferred operation and maintenance responsibility for most Project works to EBID and EPCWID and that it retains operation and maintenance responsibility for the Project's storage reservoirs and the American and International dams, and denies the remaining allegations in Paragraph 117.

118. The United States denies the allegations in Paragraph 118.

119. The United States denies the allegations in Paragraph 119.

120. The United States denies the allegations in Paragraph 120.

121. The United States denies the allegations in Paragraph 121.

122. The United States denies the allegations in Paragraph 122.

NINTH CLAIM FOR RELIEF

(Alleged Failure to Enforce the 1906 Convention and Compact Violation Against the United States)

123. The United States incorporates by reference its responses to Paragraphs 1 through 122.

124. The United States admits that the quoted language in Paragraph 124 appears in Article XIV of the Compact.

125. The United States admits that the quoted text in Paragraph 125 appears in Article IV of the Convention but denies New Mexico’s characterization of this text as the “relevant part” of the Convention.
126. The United States lacks knowledge and information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 126 that “pumping of groundwater hydrologically connected to the Rio Grande and unauthorized surface diversions from the Rio Grande have greatly increased in Mexico above Fort Quitman, Texas, since 1906” and on that basis denies them. The United States denies all of the remaining allegations in Paragraph 126.
127. The United States denies the allegations in Paragraph 127.
128. The United States denies the allegations in Paragraph 128.
129. The United States denies the allegations in Paragraph 129.
130. The United States denies the allegations in Paragraph 130.
131. The United States denies the allegations in Paragraph 131.
132. The United States denies the allegations in Paragraph 132.

PRAYER FOR RELIEF

The remaining allegations in the Counterclaims consist of New Mexico’s Prayer for Relief to which no response is required. To the extent a response is required, the United States denies that New Mexico is entitled to its requested relief or to any relief whatsoever.

GENERAL DENIAL

Any allegations contained in New Mexico’s Counterclaims, whether express or implied, that have not been specifically admitted, denied, or otherwise answered, are hereby denied.

DEFENSES

Without limiting or waiving any defenses available to it, the United States hereby asserts the following defenses:

FIRST DEFENSE

New Mexico lacks standing to assert some or all of its Counterclaims against the United States.

SECOND DEFENSE

Some or all of New Mexico's Counterclaims fail to state claims upon which relief can be granted.

THIRD DEFENSE

Some or all of New Mexico's Counterclaims against the United States are barred by sovereign immunity.

FOURTH DEFENSE

New Mexico's Ninth Counterclaim is non-justiciable.

FIFTH DEFENSE

New Mexico's Ninth Counterclaim is barred under the foreign affairs doctrine.

SIXTH DEFENSE

Some or all of New Mexico's Counterclaims are barred from recovery, in whole or in part, by its failure to mitigate any of its alleged damages.

FIRST AFFIRMATIVE DEFENSE

Some or all of New Mexico's Counterclaims are barred, in whole or in part, by waiver and estoppel.

SECOND AFFIRMATIVE DEFENSE

Some or all of New Mexico's Counterclaims are time-barred under 28 U.S.C. 2401.

THIRD AFFIRMATIVE DEFENSE

Some or all of New Mexico's Counterclaims are barred from recovery, in whole or in part, by the equitable doctrine of unclean hands.

RELIEF REQUESTED

As a result of the foregoing, the United States respectfully requests that the Court grant the following relief:

- A. enter judgment in favor of the United States and dismiss New Mexico's Counterclaims with prejudice;
- B. award the United States its costs incurred in this proceeding;
- C. any further and other relief that the Court may deem appropriate.

Respectfully submitted this 23rd day of July, 2018.

/s/ Stephen M. Macfarlane
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OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on the 23rd day of July, 2018, I caused a true and correct copy of **UNITED STATES' ANSWER TO NEW MEXICO'S COUNTERCLAIMS** to be served upon the Special Master via electronic and U.S. Mail, as indicated below:

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On the 23rd day of July, 2018, **UNITED STATES' ANSWER TO NEW MEXICO'S COUNTERCLAIMS** was served via electronic mail and/or U.S. Mail as indicated, upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ Seth C. Allison

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