

EXHIBIT 1

**AGREEMENT CONCERNING COMPROMISE DISCUSSIONS,
EXCLUSION OF EVIDENCE, AND CONFIDENTIALITY**

THIS CONFIDENTIALITY AND EXCLUSION OF EVIDENCE AGREEMENT (“Agreement”) is entered into by the United States of America, acting through the United States Department of Justice (United States), the State of Texas (Texas), acting through its Counsel of Record in the Original Action (defined below), the State of New Mexico acting through the New Mexico Attorney General (New Mexico), and the State of Colorado (Colorado), acting through the Colorado Attorney General’s Office, each a “Party,” and collectively “the Parties.”

WHEREAS, in 2013, Texas brought suit against New Mexico and Colorado in the United States Supreme Court, *Texas v. New Mexico and Colorado*, No. 141 Original (above and hereafter referred to as the Original Action), which the United States joined in 2014 as an independent Plaintiff with its own claims;

WHEREAS, the Federal Rules of Evidence recognize that it is in the public interest and the interest of individual litigants to encourage consensual resolution of disputes, and Rule 408 Federal Rules of Evidence therefore restricts the admission of evidence not only of settlement offers and demands, but also of conduct and statements made in compromise discussions;

WHEREAS, the Parties wish to initiate discussions specific to resolution of the Original Action;

WHEREAS, meaningful compromise discussions require the sharing of documents and other information by and among the Parties; and

WHEREAS, the Parties expect and intend that Rule 408 will apply and protect each of their interests, but also wish to provide broader protection for their confidential settlement information (as defined below) shared with each other during compromise discussions;

Therefore, to facilitate discussions among the Parties, it is agreed as follows:

(1) **Confidential Information and Meeting**. Individuals acting for Texas, New Mexico and the U.S. Department of the Interior (Interior) met on October 20, 2015, and again on December 2, 2015, and held high-level framework discussions to explore the Parties' respective interests in pursuing settlement discussions to potentially resolve claims in the Original Action. Based on those initial conversations, Texas, New Mexico and Interior arrived at a mutual interest in further discussions to explore the potential for settlement of the Original Action. A further meeting is being scheduled for March 2016. The Parties anticipate their authorized representatives may exchange information and discuss how that information relates to operation and management of the Rio Grande Project. The Parties, by this Agreement, seek to protect past and future offers of compromise, communications, and related records to the extent provided in this Agreement, subject to the exclusions of paragraph 8, below.

(2) **Confidential Settlement Information**. This Agreement applies to "confidential settlement information," which means any statement, conduct, document, map, electronic file, statement or nonverbal indication of position, mental impression or other information, including offers of compromise, in whatever form, including oral, written, visual or electronic, that is disclosed by a Party or Parties, to a Party or Parties, in

the course of the pending or potential future settlement discussions. It does not include “Non-Covered Information” as defined in paragraph 8 below. All documents or electronic data containing confidential settlement information shall be marked “Confidential Settlement Information” and shall be protected under this Agreement unless a Party or Parties object at the time the document or data is disclosed in the context of these discussions; in the event of an objection, the Party proffering the objected-to document or data shall have the right to withdraw that document or data to the effect that the document or data shall have the same confidentiality status under this Agreement as it did prior to disclosure.

(3) **Federal Rule of Evidence 408**. All Parties agree that all confidential settlement information is subject to protection under Rule 408 of the Federal Rules of Evidence, and shall be inadmissible in any court and protected to preserve all privileges (including protected attorney work product) against involuntary disclosure of information that may be legally available to a Party or Parties. Nothing in this Agreement is intended to waive or diminish any such privilege.

(4) **No disclosure**. A Party shall not disclose, or seek to admit another Party’s confidential settlement information into evidence, in any proceeding or litigation in any other forum, including without limitation the Original Action, *New Mexico v. Jewell*, Case No. 11-cv-691 (D. NM) (hereafter referred to as *NM v. Jewell*), and *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District*, No. CV-96-888, in the Third Judicial District Court, State of New Mexico, County of Dona Ana (*New Mexico v. EBID*) for any purpose, unless such disclosure is required by law or the prior written consent of the other Parties has been obtained.

(5) **No waiver.** A Party shall not assert that the work product doctrine, the attorney-client privilege, or any other applicable privilege has been waived, or that any confidential settlement information has been rendered discoverable or admissible, due to the sharing of that information during the discussions described herein.

(6) **No disclosure to non-parties.** Unless required by law, a Party shall not disclose another Party's confidential settlement information to persons or entities not a party to this Agreement (hereinafter, non-parties), with the exception of consultants and experts retained by the Parties individually or collectively prior to or in the course of these compromise discussions for the purpose of assisting the Parties in these discussions, unless the prior written consent of all the other Parties as been obtained.

(7) **Continued protection.** Any confidential settlement information disclosed by counsel for a Party to consultants or experts for these discussions is and will remain confidential and will continue to be protected from disclosure to any non-Party pursuant to the terms of this Agreement.

(8) **Non-covered Information.** Information that is (1) otherwise discoverable; (2) produced in the ordinary course of business outside the context of these settlement discussions; or (3) known, already in the possession of, or potentially available to the Parties independently of these settlement discussions, including without limitation any documents or data which a Party has objected to being treated as confidential as provided for in paragraph 2, above, shall not be rendered confidential, non-discoverable, or inadmissible in any proceeding or litigation in any other forum, including without limitation the Original Action, *NM v. Jewell*, and *New Mexico v. EBID*, because of its

disclosure in these settlement discussions.

(9) **No waiver of privilege against non-parties.** By sharing confidential settlement information, the Parties do not hereby waive any privilege otherwise applicable to confidential settlement information as against non-parties requesting such information.

(10) **Requests for public records or similar requests.** If a Party receives a Freedom of Information Act (FOIA) request, a public records request under any applicable state statute, or other similar request for confidential settlement information, the Party receiving the request must assert, to the extent allowable by law, all grounds for maintaining the confidentiality of the confidential settlement information. A Party receiving a public records or FOIA request must give notice as soon as possible to the other Parties and before production, if any, of the requested information and, while respecting applicable statutory deadlines, allow them a reasonable opportunity to share their concerns regarding disclosure and to pursue their rights, if any, to prevent or restrict such disclosure.

(11) **Retroactive and prospective protection.** The provisions of this Agreement are retroactive as well as prospective and expressly extend to all confidential settlement information shared by any Party from October 20, 2015, through the pendency of these settlement discussions. If, between October 20, 2015, and the effective date of this Agreement, a Party has disclosed or used confidential settlement information in such a way as to violate the terms of this Agreement, each Party hereby waives any remedy it might have for such violation.

(12) **Criminal proceedings.** This Agreement does not constitute an agreement to keep statements made, and/or information and documents exchanged in discussions pursuant to this agreement confidential from criminal prosecutors.

(13) **Confidentiality survival.** Confidential settlement information shall remain subject to the provisions of this Agreement whether the settlement discussions end in settlement or not unless all Parties agree otherwise in writing, or unless a Party's applicable laws require disclosure

(14) **Termination.** Any Party may terminate its participation in this Agreement by ten business days' prior written notice to the other Parties. Notwithstanding any termination, the provisions of this Agreement shall continue to apply to all confidential settlement information shared during the pendency of this Agreement.

(15) **Representations.** The persons signing below by their signatures represent and warrant that each has the authority to bind his or her respective Party and assure compliance with this Agreement by consultants and experts, and any attendee designated pursuant to Paragraph 23 with whom confidential settlement information has been shared in accordance herewith

(16) **Counterparts.** This Agreement may be executed in counterparts, with separate signature pages to be effective as of the date of last signature.

(17) **Agreement and Compliance.** The Parties shall agree hereby to take all necessary and appropriate measures to ensure that the Parties' consultants, experts,

employees, and attendees who are granted access to confidential settlement information shared pursuant to this Agreement are made familiar with the terms of this Agreement and have agreed to comply with such terms as they relate to the duties of such person.

(18) **Modification or Amendment.** No part of this Agreement shall be waived, modified, or amended, including the addition of new parties as signatories to this Agreement, unless agreed to in writing by each of the parties.

(19) **Miscellaneous.** This Agreement shall automatically apply to substitute or associated counsel who may appear on behalf of a Party. This Agreement shall not be subject to abrogation by any successor in interest to a Party. Nor shall such successor in interest waive any privilege, doctrine, or exemption under the FOIA or applicable state public records law that may be applicable to confidential settlement information shared by or among the Parties to this Agreement.

(20) **Judicial Review.** This Agreement does not create any independent right of action subject to judicial review.

(21) **Final Disposition.** Unless earlier terminated, this Agreement shall terminate upon entry of an order from the United States Supreme Court and final disposition of the Original Action, provided, however, the provisions of this Agreement shall continue to apply to all confidential settlement information shared during the pendency of this Agreement.

(22) **Participants.** To promote consistency and facilitate a positive outcome, the Parties shall disclose to each other in writing no less than five days prior to the initial

meeting a list of their attendees. It is the intent of the Parties that their attendees shall remain the same throughout the discussions unless a Party determines that circumstances require it to change its attendees. Each Party retains absolute discretion to choose and change its attendees. Any party desiring to change its attendee list must provide written notice to the other Parties at least five days prior to bringing a new attendee.

AGREED TO BY:

STATE OF NEW MEXICO

By:

Hector Balderas

Signed:

[Signature]

Dated:

Feb 3, 2016

STATE OF TEXAS

By:

Stuart L. Somsch

Signed:

[Signature]

Dated:

February 16, 2016

STATE OF COLORADO

By:

Chad M. Wallace

Signed:

[Signature]

Dated:

February 16, 2016

UNITED STATES OF AMERICA

By:

U.S. Department of Justice-ENRD

Signed:

[Signature]
Senior Attorney

Dated:

February 2, 2016

EXHIBIT 2



U.S. Department of Justice
Environment and Natural Resources Division

RLL

*999 18th Street, South Terrace – Suite 370
Denver, CO 80202*

*Telephone (303) 844-1364
Facsimile (202) 305-0506*

November 7, 2022

Chad M. Wallace
Colorado Department of Law
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 10th Floor
Denver, Colorado 80203

Jeffrey J. Wechsler
Montgomery & Andrews, P.A.
325 Paseo de Peralta (87501)
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Santa Fe, NM 87504-2307

Stuart L. Somach
Somach Simmons & Dunn
500 Capitol Mall, Suite 1000
Sacramento, CA 95814

Re: *Texas v. New Mexico & Colorado*, No. 141, Orig.

Counsel:

The United States has significant concerns about the potential disclosure of confidential settlement information in the States' upcoming filings with the Special Master. We have similar concerns with such disclosure at the Rio Grande Compact Commission "special" meeting, announced on November 2, to be held by Zoom on November 10. We request that you immediately reconsider these proposed disclosures, which, based on the information you have provided to date, we believe may constitute a breach of your obligations under the Parties' Agreement Concerning Compromise Discussions, Exclusion of Evidence, and Confidentiality ("Confidentiality Agreement").

Further, the United States intends to move to amend the briefing schedule in the Special Master's Order of October 26, 2022, to provide the United States with an opportunity to seek appropriate protective relief, if necessary, before the States file the motion to adopt the proposed settlement decree on the docket. To avoid irreversible prejudice to the United States, and potential litigation over violations of the Confidentiality Agreement, we request that the States: (1) **on or before November 7 at 5:00 p.m. MT**, furnish a copy of all materials that the States plan to present to the Commission; and (2) **on or before November 8 at 5:00 p.m. MT**, provide the United States with a position on its proposed motion to amend the briefing schedule.

Confidentiality. The Confidentiality Agreement and the Special Master’s orders confirming the confidentiality of mediation discussions preclude disclosure of confidential settlement information. *See* Attachment 1; *see also* Sp. M. Dkt. 700, 706. The Confidentiality Agreement states an intent to provide broader protection than Federal Rule of Evidence 408 would otherwise provide. To that end, the Confidentiality Agreement prohibits any party from “disclos[ing], or seeking to admit another Party’s confidential settlement information into evidence, in any proceeding . . . for any purpose,” Attachment 1, at 3, ¶ 4; prohibits any party from “disclos[ing] another Party’s confidential settlement information to persons or entities not a party to th[e] Agreement,” *id.* at 4, ¶ 6; and defines “confidential settlement information” to include “any statement, conduct, document, map, electronic file, statement or nonverbal indication of position, mental impression or other information, . . . in whatever form, . . . that is disclosed by a Party or Parties, to a Party or Parties, in the course of . . . settlement discussions,” *id.* at 2-3, ¶ 2. Importantly, the parties also agreed that confidential settlement information “shall remain subject to the provisions of th[e] Agreement whether the settlement discussions end in settlement or not.” *Id.* at 6, ¶ 13. Thus, absent the written consent of the United States, the Confidentiality Agreement and Special Master’s Orders preclude disclosure of confidential settlement information in any proceeding for any purpose, including to the Court and non-parties.

The States’ draft decree that you provided on October 20, 2022, is carved out from a comprehensive settlement that was being negotiated by the United States, with substantial contributions of work product by the United States, including its counsel and engineers. We have not yet seen the States’ motion to adopt the proposed settlement decree and accompanying attachments. But based on the draft decree that you provided, we have significant concerns that the filing of the States’ motion and accompanying attachments with the Court would disclose confidential settlement information, in violation of the Confidentiality Agreement.

Rio Grande Compact Commission Meeting. We have also been informed that there will be a special meeting of the Rio Grande Compact Commission on November 10 to vote on a resolution recommending approval of the States’ proposed decree. Based on the draft decree that you provided on October 20, 2022, we have significant concerns that, by putting the States’ proposed decree and related materials before the Commission, the States would be disclosing confidential settlement information, in violation of the Confidentiality Agreement. Accordingly, we request that the States furnish a copy of all materials that the States plan to put before the Commission, as well as a copy of the resolutions that the States intend the Commission to consider, to the United States by **November 7 at 5:00 p.m. MT**. Once we review those materials, we will advise you on whether we object to the disclosure of the States’ proposed decree and any related materials to the Commission.

Motion to Amend Briefing Schedule. We intend to move to amend the briefing schedule to ensure that the United States has a meaningful opportunity to seek appropriate protective relief, if necessary, before the States file the motion to adopt the proposed settlement decree and accompanying attachments on the docket. We intend to propose that, in lieu of filing the motion and accompanying attachments with the Court under seal, the States serve the motion and its accompanying attachments on the United States for its review on or before the current deadline of November 14, 2022. Briefing would then proceed on the following schedule:

1. **States’ Motion to Adopt Proposed Settlement Decree.** The States shall serve their motion on the United States, with all supporting attachments and papers, on or before

November 14, 2022. The motion shall not be filed with the Court or served upon the amici until any issues of confidentiality are resolved by the parties or by order of the Special Master or Court.

2. **United States' Motion for Protective Relief.** The United States shall file any motion for protective relief on or before **December 5, 2022**; the States shall file any responses on or before **January 6, 2023**; and the United States shall file any reply on or before **January 14, 2023**. The motion, responses, and reply shall be drafted and argued using only non-confidential information. Parties may include citations to settlement documentation limited to page and paragraph numbers.

3. **Restoration of Original Schedule.** If the United States elects not file a motion for protective relief, the States shall file their motion to adopt the proposed settlement decree, with all supporting attachments and papers, with the Court on or before December 7, 2022, and the schedule for response and reply briefs, including the briefs of amici, shall be as stated in the Special Master's Order of October 26, 2022.

We respectfully request the States' positions on our motion to amend the briefing schedule no later than **November 8 at 5:00 p.m. MT**.

Please do not hesitate to contact us for further discussion of our concerns. We look forward to your response.

Sincerely,

/s/
R. LEE LEININGER
U.S. Department of Justice
Environment & Natural Resources Division

Counsel of Record for the United States

EXHIBIT 3



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November 7, 2022

Via E-mail

Lee Leininger
Environment & Natural Resources Division
999 18th Street
South Terrace, Suite 370
Denver, CO 80202
Email: Lee.Leininger@usdoj.gov

Re: *Texas v. New Mexico & Colorado*, No. 141, Original
Response to the United States' November 7, 2022 Demand Letter

Dear Mr. Leininger:

This letter is on behalf of the State of Texas, State of New Mexico, and the State of Colorado (the "Compacting States.") We have reviewed the above-referenced Demand Letter. That letter raises issues and invites argument over matters that you have previously raised with, and which were addressed by the Special Master. Over your objection, the Special Master instructed the Compacting States to file their motion for entry of their proposed Consent Decree by November 14, 2022. We are in the middle of preparing that motion and associated documents to be able to file those materials with the Special Master on the date ordered. As instructed by the Special Master we will file the proposed Consent Decree under seal. We anticipate that briefing will continue in an orderly fashion with hearings scheduled for January 24 and 25, 2023. At your request, you will have 45 days to respond to the Compacting States' motion.

We do not agree with your proposed motion to amend the briefing schedule established by the Special Master. In any event, your proposal is not a proposed amendment to the briefing schedule, but rather replacing the briefing schedule on the Compacting States' motion with a briefing schedule on something completely different, on a matter already rejected by the Special Master. We also do not agree with the idea of providing the United States (but not the Special Master) with the Compacting States' motion and supporting materials so you can review it and at some indefinite time in the future, if ever, respond to it. What you propose, in summary, is not supported by the governing documents and procedures and we do not agree to it.

Lee Leininger

Re: *Texas v. New Mexico & Colorado*, No. 141, Original

Response to the United States' November 7, 2022 Demand Letter

November 7, 2022

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We note your repeated concern about confidential materials, Rule 408, and the Confidentiality Agreement and related Special Master Orders. The United States appears to believe that the proposed Decree and related materials are the "work product" of the United States as opposed to documents and materials that were developed by multiple parties. We reject this notion. Nonetheless, we understand the confidentiality requirements at issue, and our filings will comply with those requirements.

Finally, the United States has requested advance copies of materials related to the Rio Grande Compact Commission meeting scheduled for November 10, 2022. As you are aware, the Agenda for that meeting has been publicly posted. That Agenda includes an Executive Session that has been designed to ensure that the proposed Consent Decree remains confidential in keeping with the Special Master's direction that the proposed Consent Decree remain confidential. The individual Commissioners are of course already aware of the contents of the proposed Consent Decree, in keeping with their positions with their respective States. We believe it would be inappropriate to provide you with materials prior to the time they are available to the public in general and, therefore, decline your demand for advance copies of those materials.

We urge you to allow us to complete our briefing so it can be filed as ordered by the Special Master and that you adhere to the briefing schedule that has been provided for your opposition, assuming you still intend to oppose the Compacting States' motion. Please do not hesitate to contact any of the undersigned if you have any questions or need additional information.

Sincerely,

By: //s// Stuart L. Somach
Stuart L. Somach, Esq.
Counsel for the State of Texas

By: //s// Jeffrey J. Wechsler
Jeffrey J. Wechsler
Counsel for the State of New Mexico

By: //s// Chad M. Wallace
Chad M. Wallace
Counsel for the State of Colorado

SLS:JJW:CMW/yd

cc: Grant Dorfman (*via e-mail*)
Priscilla Hubenak (*via e-mail*)
Nathaniel Chakeres (*via e-mail*)
Judith Coleman (*via e-mail*)

EXHIBIT 4

Rio Grande Compact Commission Colorado New Mexico Texas

Special Meeting (107th Commission Meeting) Virtual Meeting

Thursday, November 10, 2022, 9:00 AM (MST) 10:00 AM (CST)
Video link: <https://us02web.zoom.us/j/89668107950?pwd=WEVNdDc3d0NkUDRzRnpOWW9sM2RIUT09>

Agenda

1. Call to order
2. Approval of the meeting format
3. Approval of the Agenda
4. Executive Session for discussion regarding pending litigation, Original Action 141, *Texas v. New Mexico and Colorado*, in the United States Supreme Court
5. Business
 - a. Resolution Recommending Approval of the Compacting States' Proposed Decree in Original Action 141, *Texas v. New Mexico and Colorado*, in the United States Supreme Court
 - b. Resolution to Adopt the Compacting States' Agreement for Administration and Accounting of Compact Credit Water
6. Adjournment