

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

DECLARATION OF ALLIE W. BLAIR, P.E., PH.D.

I, Allie W. Blair, declare as follows:

1. My name is Allie (Al) W. Blair. I am over the age of 18 and have personal knowledge of the facts stated herein.
2. I received a Bachelor of Science in Agricultural Engineering from the University of Arizona, Tucson, a Master of Science in Agricultural Engineer from Texas A&M University,

College Station, and a Doctorate of Philosophy in Civil Engineering from the University of Texas, Austin. I am a licensed engineer in the State of Texas and the State of New Mexico.

3. Since 1991, I have served as a consulting engineer and, since 2003, as the District Engineer for El Paso County Water Improvement District No. 1 (EPCWID or District).

4. As part of my duties as District Engineer I am responsible for and oversee matters relating to the allocation, release, and delivery of Rio Grande Project (Project) water supply to EPCWID pursuant to the District's rights under reclamation law, reclamation contracts, and congressional acts.

5. I was actively involved in the negotiation of what ultimately became the 2008 Operating Agreement for the Rio Grande Project (Operating Agreement). The Operating Agreement was the settlement of litigation (Cause No. EP-07-CA-0027) regarding Project operations and delivery of Project water to EPCWID and Elephant Butte Irrigation District (EBID). EPCWID had filed suit against the United States, Bureau of Reclamation (Reclamation) and EBID for failure to consummate an operating agreement for the Project as required by 1979 and 1980 reclamation contracts relating to title transfer of Project works to the Districts, and for failing to account for depletions of Project water supplies and reduction of Project deliveries to EPCWID caused by groundwater pumping in New Mexico.

6. The Operating Agreement resolved all matters relating to Project operations and ensured the reliable and efficient release and delivery of Project water supply to both EPCWID and EBID, accounting for losses in New Mexico and Texas attributable to groundwater diversions.

7. The only entities entitled to water supply from the Rio Grande Project are EPCWID and EBID. The Districts collectively paid for the construction of the Project and continue to pay for operation and maintenance of the Project.

8. The 1938 Rio Grande Compact (Compact) requires that water be delivered by New Mexico to the Rio Grande at San Marcial gage, located immediately upstream of Elephant Butte Reservoir. In 1948, the Rio Grande Compact Commissioners changed the location of New Mexico's delivery requirement from Rio Grande at San Marcial "to deliver water in the Rio Grande into Elephant Butte Reservoir." Resolution Adopted By Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948. Usable Water "is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico" (Rio Grande Compact Article I (1)).

9. The 1938 Compact does not contain any requirements or provisions regarding the allocation, release, delivery, or accounting of Usable Water and does not direct or determine how the Rio Grande Project is to be operated. The Rio Grande Project was authorized by Congress in 1905 (33 Stat. 814) and the Elephant Butte Dam became operational in 1916.

10. The Special Master has determined, the Compact "relies on the Rio Grande Project for water delivery and is *programmatic* in its apportionment of water as between Texas and New Mexico" and such "apportionment is limited to water from the Project delivered by Reclamation" Special Master Order of May 21, 2021 at 3, emphasis in the original.

11. The Project operates programmatically in delivering apportioned water to Districts downstream of Elephant Butte Reservoir. Reclamation and the Districts have developed detailed technical methods and procedures for determining Project allocations,

coordinating, and controlling the release Project water from storage to meet District water orders, and accounting for Project deliveries consistent with reclamation law and applicable contracts.

12. I am EPCWID's representative to the Rio Grande Project Allocation Committee, formed after title transfer of Project works to the Districts under the auspices of the Operating Agreement. Pursuant to the District's contracts with Reclamation and reclamation law, one of my committee responsibilities is to coordinate with EBID and Reclamation in determining the annual allocations of, and daily allocation charges for, Project water.

13. Neither the Rio Grande Compact Commission, nor the States play a role in Project allocations and accounting or in any aspect of Project operations.

14. I have reviewed the states' November 14, 2022 proposed decree and supporting declarations presented to the Special Master. The proposed decree conflicts with a variety of technical and operational principles critical to, and used in, Project operations and delivery of water supply to the Districts. It also directly and adversely impacts the rights and obligations of EPCWID in and to its Project water supply under reclamation law and contracts. The proposed decree does this because it is based on an artificial index contrived to facilitate post facto bookkeeping of water delivered to Texas and not the efficient hour-by-hour operation of the Project to deliver water to EBID and EPCWID based on the ground, real-time conditions.

15. The proposed decree modifies critical Project allocation accounting procedures and equations, the location of allocation charge measurements, and transfers the authority for making allocations from Reclamation and the Districts to the Rio Grande Compact Commission.

16. The proposed decree changes the measurement location for allocation charges for EPCWID diversions from canal headings specified in the Operating Agreement to the Rio Grande at El Paso gage. The Rio Grande first crosses into Texas near Anthony, New Mexico,

about 17 river miles upstream from the “El Paso Gage” identified in the proposed decree. About 9 miles downstream from its Anthony-area crossing into Texas, the Rio Grande flows back into New Mexico. Then approximately 4 more miles downstream, the center of the Rio Grande becomes the New Mexico-Texas boundary for approximately 1,500 feet before flowing back into New Mexico. The Rio Grande flows back into Texas again about 4 miles further downstream, near the Courchesne Bridge. This is where the El Paso Gage is located on Rio Grande. Starting just a short distance below the El Paso Gage, the Rio Grande becomes the New Mexico-Texas boundary again for about 2 miles, until it reaches the Gadsden Monument (the intersection of New Mexico, Texas, and Mexico).

17. The proposed decree mandates that Project operations incorporate a modified D2 equation different from the D2 equation incorporated in the Operating Agreement, and changes the definition of “Project water supply” found in the Operating Agreement. These changes force other modifications to the Operating Agreement and otherwise alter the water supply allocated or available to EPCWID. For example, modification of the D2 equation—the fundamental basis of the amount of water available to be allocated to the Districts—would require modification of other provisions in the Operating Agreement. The primary difference between the D2 Equation and the Modified D2 Equation is that the Modified D2 Equation incorporates the effect of a previous year’s release on the current year allocation. This previous year effect is important in multi-year droughts. The Multi-Year Drought Correction Factor (MYDCF) in the Operating Agreement serves the same purpose, and if the D2 equation is replaced with the Modified D2 Equation, the MYDCF must be removed from the Operating Agreement. If the MYDCF is not removed, then the EPCWID allocation will be significantly reduced during times of drought.

18. In addition to the mandated changes that conflict with the Operating Agreement, there may be additional changes mandated in the future as determined by the Rio Grande Compact Commission based on presently unknowable methods. The proposed decree requires that “Project operations and Project Accounting must be consistent with this Decree” and “Project operations and Project Accounting must not interfere with Compact administration” (Consent Decree at Section III). This statement is open ended and ambiguous as to what changes may or may not be required and by whom. It suggests that the States would control what is and is not consistent with the proposed decree in implementing the “adjustments in Project operations, or Project accounting” (proposed decree, section II.D.1), or propose changes that “Reclamation will implement” (proposed decree, sections II.D.2.c and I.D.3.b.).

19. The proposed decree’s Index method of accounting is set out in Section 8 of Appendix 1. Section V of the decree allows Appendix 1 to be modified at any time by unanimous agreement of the Compacting States. Therefore, the States may implement additional provisions that conflict with the Operating Agreement. The language in Section 8 states that “At a minimum, the following are examples of procedures to ensure that Texas and New Mexico receive their equitable apportionment below Elephant Butte Reservoir as contemplated in the Decree”. This statement implies that there is no limit to the “examples of procedures” that the State Commissioners may implement. This situation creates uncertainty regarding how the proposed decree would function and renders it unworkable. It also will result in future conflicts between the proposed decree and the programmatic operation of the Project.

20. Even with the uncertainty, if the decree is implemented, EPCWID’s allocations will increase in some years and decrease in others as compared to allocations pursuant to the Operating Agreement. This is primarily a result of the requirements of the proposed decree,

(appendix 1 section 8.1). Increases in allocations will be in “wet” years when supply is greater than demand. In contrast, in drier years, when demand is greater than supply, and EPCWID really needs the water, EPCWID’s allocations are projected to decrease, adversely affecting the water supply EPCWID is entitled to under reclamation law and contracts.

21. The proposed decree affects the Operating Agreement provisions to carryover EBID and EPCWID end-of-year allocation balances from one year to the next (carryover). Carryover of unused allocations at the end of each year allows a District to conserve water during a wet year for use during subsequent drier years, and promotes conservation and the efficient use of water. Carryover of annual allocations is particularly important to EPCWID because most of the groundwater in El Paso Valley is saline and harmful to most agricultural crops. The proposed decree reduces the amount of water available to EPCWID to carryover because the of the provisions of the proposed decree (appendix 1 section 8.2.2) and that proposed New Mexico’s negative departures are “erased” if EPCWID carries over a certain amount of water (180,00 acre-feet) based on a three year rolling average. Because New Mexico’s negative departures will affect EPCWID (less water at the state line), a “forgiveness” provision linked to carryover will also affect how EPCWID can or does manage its water supply. At a minimum, the linking of a forgiveness of a delivery failure to EPCWID’s conserved water in storage is contrary to conservation. Additionally, the proposed decree mandates that carryover not “caus[e] Negative Departures or caus[e] a Trigger to be exceeded” (proposed decree, section III A. Carryover provisions in the proposed decree are based on the erroneous assumption that carryover causes “deviations” in New Mexico’s ability to meet the manufactured Index delivery requirement (proposed decree, appendix 1, section 5). The proposed decree does not provide any method to assess or determine the cause of any given Index departure (annual or accrued). This

lack of clarity to determine causality creates ambiguity and will result in future controversy relating to EPCWID's water supply and rights to carryover water it conserves from one year to the next, increasing the harm caused by drought to the District.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 20th, day of January at Austin, Texas

A handwritten signature in cursive script, appearing to read "Al Blair", is written above a horizontal line.

Allie (Al) W. Blair, PE, Ph.D.