

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 DAVID PALUMBO
IN SUPPORT OF THE UNITED STATES' OPPOSITION TO PROPOSED DECREE**

I, David Palumbo, declare as follows:

1. I am over 18 years of age and have personal knowledge of the facts stated herein.
2. I currently serve as the Deputy Commissioner for Operations of the United States Department of the Interior's Bureau of Reclamation (Reclamation).
3. Reclamation was established in 1902, with a mandate to investigate, plan, and construct irrigation works. Today, Reclamation is the nation's largest wholesale water supplier, operating 338 reservoirs with a total storage capacity of 140 million acre-feet. The irrigation

water that Reclamation provides to Western farmers, including Native American Tribes, produces 60 percent of the nation's vegetables and 25 percent of its fresh fruit and nut crops. Each year, Reclamation projects also supply municipal water to more than 31 million people, and Reclamation's hydroelectric plants generate 40 billion kilowatt-hours on average. The most recent Department of the Interior Economic Contributions Report (2019) indicates that Reclamation projects support 373,000 jobs and generate economic activity valued at approximately \$47 billion per year.

4. As Deputy Commissioner, I oversee operations in Reclamation's five regions, as well as Reclamation's Native American and International Affairs Office and Technical Resources Offices. I work closely with Reclamation's partners and stakeholders, including not only Reclamation irrigation districts and hydropower customers, but also States, Tribal nations, and foreign governments, including those of Mexico and Canada. On behalf of Reclamation, my directorates and I have also advised water management agencies in countries around the world, including Australia, Brazil, Japan, Kenya, Iraq, Malaysia, South Africa, Sweden, and Taiwan. Reclamation engineering and operational protocols, developed over the past 120 years, serve as a model both here and abroad.

5. I have held the position of Deputy Commissioner for Operations since 2015. I previously served as Deputy Regional Director for the Lower Colorado Region, where I oversaw operations at Hoover Dam and other facilities on the Lower Colorado River. I first joined Reclamation in 2005, where I served as a project manager overseeing construction of the Brock Reservoir Project in Southern California's Imperial Valley. In 2008, I received Reclamation's Engineer of the Year Award. I received the Department of the Interior's Superior Service Award in 2011 and the Department's Meritorious Service Award in 2014.

6. I am familiar with the litigation and settlement efforts in *Texas v. New Mexico*, No. 141, Original. In fact, one of the first matters I worked on as Deputy Commissioner was participating in the settlement discussions that began in 2015 and 2016. I attended nearly all of the in-person mediation sessions that occurred in 2021 and 2022 and strongly support ongoing collaboration between United States, the Compacting States, the Elephant Butte Irrigation District (EBID), and El Paso County Water Improvement District No. 1 (EPCWID), to develop a negotiated solution that all parties can accept. Reclamation stands ready to assist in any way that it can, within its existing authorizations and appropriations, including in any settlement talks that may resume in the future.

7. I was discouraged to learn that the Compacting States had submitted a proposed consent decree over the United States' objection, and that they had done so using materials from the settlement discussions that I had understood to be confidential. I was also disappointed to see that the way the Compacting States had chosen to resolve the dispute was to propose a decree that requires Reclamation to take actions contrary to its statutory authorities and contractual obligations, while imposing no obligation upon New Mexico to reduce the depletion of Rio Grande Project surface water by groundwater pumping.

8. I have been asked to provide a declaration identifying how the proposed consent decree is inconsistent with Reclamation's existing policies and practices and my concerns about its potential effects in other regions of the West. I begin with some context about federal reclamation projects generally.

9. Prior to the passage of the Reclamation Act in 1902, Congress had passed various laws to encourage irrigation of lands in the arid West. One of those acts, the Carey Act of 1894, encouraged the States to plan and construct irrigation projects on federal public domain lands. If

the project was successful, the Secretary of the Interior (Secretary) could transfer ownership of those lands to the State. In the end, there were only a handful of projects successfully constructed by the States under the Carey Act.

10. Under the Reclamation Act of 1902, irrigation projects were to be financed and constructed by the federal government, not the States. Early projects like the Rio Grande Project could not be constructed until the Secretary had entered into contracts with water user associations guaranteeing the repayment of the government's costs. The law was then amended to require the creation of irrigation districts, with taxing authority under state law, and those districts would become the entities under contract with Reclamation.

11. For any projects proposed today, federal reclamation law requires not only contracts, but a feasibility study demonstrating that the proposed project will be financially and economically viable based on estimated receipts under the contracts, and that it will be feasible from an environmental and a technical standpoint.

12. Reclamation has constructed 189 projects across the West for irrigation and other purposes. About two-thirds of those projects are operated by irrigation districts or water user associations pursuant to contracts with Reclamation.

13. Reclamation (through the Secretary) has entered into very few contracts with the States, and the few contracts that exist are expressly authorized by law. For example, under the Boulder Canyon Project Act, 43 U.S.C. § 617d, Reclamation may provide water from the Colorado River only to those entities that have contracts with the Secretary. The Secretary has contracts with the States of Arizona and California for that purpose. Under the Water Supply Act of 1958, 43 U.S.C. § 390b, the Secretary may also enter into contracts with a State for the expansion of a planned project where the State agrees to repay the additional costs. The

Secretary has a contract with the State of Wyoming relating to the expansion of storage capacity in Fontanelle Reservoir under that statutory authorization. And under the Fish and Wildlife Coordination Act, 72 Stat. 563-567 §3b, the Secretary has a contract with the State of Washington's Department of Ecology for specific in-stream flow purposes.

14. There are no federal reclamation projects operated by States or multistate agencies. The federal government typically retains title to all federal storage projects and diversion structures constructed on federal land or rights of way, unless transfer of title is initiated pursuant to specific statutory authorities. In some federal projects, like the Rio Grande Project, the Secretary has transferred operational responsibility and ownership of some of the distribution infrastructure to the irrigation districts. In these projects, Reclamation and the irrigation districts cooperatively operate the irrigation system, while Reclamation maintains ownership of and control releases from the project's major reservoirs. The irrigation districts reimburse Reclamation's costs of operating and maintaining the federal components of the project.

15. I understand that the proposed consent decree would mandate that Reclamation operate the Project to be "consistent with the terms" of the decree generally, but also specifically require Reclamation to transfer allocated water from EBID to EPCWID at New Mexico's request, or at the direction of the States collectively, to prevent "accrued Negative Departures" from exceeding certain limits. I also understand that there are some scenarios in which Reclamation would be required to transfer allocated water from EPCWID to EBID, or to unilaterally reduce EPCWID's carryover balances in ways that are not authorized by the federal contracts with the Districts. These provisions are concerning in several ways.

16. First, the mandates and provisions in the decree would significantly impair Reclamation's discretion to operate the federal facilities in the Rio Grande Project to ensure

compliance with its contractual and statutory obligations. Reclamation has developed detailed allocation and accounting methods with the Districts over many years. Based on my conversation with the Districts' boards and managers, I understand that the allocation and accounting methods in the 2008 Operating Agreement are the result of hard-fought battles to ensure everyone got a fair deal and that a balance was struck. And for Reclamation, the 2008 Operating Agreement ended two lawsuits challenging its operation of the Project and potentially prevented others. Giving the States the power to force allocation transfers and impose new Project accounting methods through the decree would upset the delicate balance that "keeps the peace" below Elephant Butte.

17. Second, I can see that the proposed consent decree does not provide adequate operational guidance for managing a project of this size. Terms like "consistent" are too vague to tell Rio Grande Project managers and engineers what to do, and terms like "interfere" are too vague to tell them what not to do. Reclamation goes to great lengths to assure precise language in its contracts, and provides extensive guidance on this subject in the Reclamation Manual.

18. The decree is missing many other important provisions, such as provisions detailing how and when allocation transfers are supposed to be made, or how disputes about Index accounting are supposed to be resolved by the States.

19. I am also concerned that the proposed consent decree will have broader implications for reclamation projects in other regions of the West. The consent decree would make the Rio Grande Project the only reclamation project in the United States that is subject to the direction and control of States who do not have contracts with the Secretary. Setting aside any potential legal issues, I am concerned that this decree will create tremendous uncertainty West-wide about whether Reclamation has obligations to States or other entities who do not have contracts for

project water. Reclamation's contracts are designed to secure operational and financial stability for the federal project without imposing unrealistic burdens on the water users. If a project must be operated to provide water for other purposes, such as the implementation of interstate settlements, the water users are being deprived of the benefit of the bargain.

20. The uncertainty created by the consent decree, not only for the Rio Grande Project, but for Reclamation more broadly, could not come at a worse time. Across the West, we are seeing the dramatic effects of climate change and persistent drought. Reclamation has had to be flexible and creative in response to these unique challenges, while staying within the bounds of its statutory authorizations and appropriations. In basins across the west, such as the Klamath, the Deschutes, the Sacramento, the Colorado, the Columbia, and of course the Rio Grande, Reclamation works with project beneficiaries to adjust operations, re-time deliveries, manage in-stream habitat, borrow supplies from other entities on the project, or take other extraordinary collaborative measures to assure the long-term viability of the projects that serve those communities. While consensus is the goal in these arrangements, they still require difficult choices that often bring hardship and controversy.

21. The Rio Grande Project has survived with less conflict than other projects, in my view due to the Operating Agreement. If the proposed consent decree is entered, it would significantly constrain Reclamation's discretion to respond to a crisis if one occurred in the future.

22. I am also concerned that the proposed consent decree will imply judicial approval of the unlawful interception of Project return flows within New Mexico, and elsewhere. The Rio Grande Project is not the only project in the country that depends heavily upon the use of return flows. And it is far from the only project that is affected by groundwater pumping. I understand

that there is no requirement for cutbacks or curtailment of groundwater pumping that is “junior” to EBID or occurring entirely outside of EBID. This solution is not equitable because it penalizes the federal irrigation district in New Mexico more than it would other water users in New Mexico.

23. The same is true in Texas. Based on the way the Index equations are constructed, the depletion of the Rio Grande caused by pumping in the Texas part of the Mesilla Valley is counted as part of New Mexico’s delivery to Texas. When “accrued Positive Departures” or over-deliveries, go above certain limits, the decree requires EPCWID to give up some of its Project allocation of surface water. The decree does not require Texas to curtail any pumping in Texas that contributed to the over-delivery by depleting the Rio Grande.

24. In my opinion, not only as Deputy Commissioner, but as an engineer and former project manager, the proposed consent decree is not a workable solution. Designing a long-term solution for water shortages on the Rio Grande requires the participation of the federal government and the two Districts. And the proposed consent decree creates significant uncertainty about the long-term operation of the Rio Grande Project because it contains no provisions that mandate the reduction of groundwater pumping in New Mexico.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 20th day of January, 2023, at Washington, D.C.



David Palumbo