

No. 141, Original

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In the  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO,

Defendants.

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**OFFICE OF THE SPECIAL MASTER**

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**DECLARATION OF ESTEVAN R. LOPEZ, P.E.**

**IN SUPPORT OF JOINT MOTION OF THE STATE OF TEXAS,  
STATE OF NEW MEXICO, AND STATE OF COLORADO FOR ENTRY  
OF CONSENT DECREE SUPPORTING THE RIO GRANDE COMPACT**

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February 3, 2023

I, Estevan R. Lopez, P.E., pursuant to 28 U.S.C. § 1746, hereby declare as follows:

1. I am over 18 years of age and have personal knowledge of the facts stated herein. I am competent to testify to the matters herein. If called to testify, I can and will testify in accordance with the following:

**Water Resource Professional Experience**

2. I am currently the principal of Estevan Lopez Consulting, LLC, in Peñasco, New Mexico. In this position I consult and mediate on water management and policy, interstate compact issues, and water supply within New Mexico.

3. On January 26, 2022, New Mexico Governor Michele Lujan-Grisham appointed me as New Mexico’s Commissioner on the Upper Colorado River Commission and as Principal for Colorado River Issues and activities. In that position, I am currently working with other Colorado River Basin States’ Principals and the United States Bureau of Reclamation (“Reclamation”) to address current Colorado River water operations challenges.

4. I was appointed by United States President Barack Obama to serve as Commissioner for Reclamation in 2014 and was confirmed by the United States Congress. I served from October 2014 to January 2017. As Commissioner for Reclamation, I directed all aspects of Reclamation business managing water throughout seventeen (17) western states, which included almost 200 Reclamation water projects and units of various types. I led a staff of over 5,000 employees and was responsible for an annual appropriated budget of approximately \$1.25 billion. Reclamation is one of the primary federal agencies charged with development and implementation of water policy and water planning in the western United States. I interacted with Congress both formally in Committee and Sub-committee hearings, and informally in helping craft water policy and management legislation, providing informational briefings, and responding to requests for information. I also interacted extensively with water managers from Mexico, the 17 western United States, Native American tribes, municipal water utilities and irrigation entities related to development, operations and management of water project infrastructure, and Indian water settlements. To the extent that such interactions related to water in an interstate river system it was imperative to be cognizant of any underlying interstate stream compacts that might apply.

5. Reclamation had an estimated \$100 billion of water infrastructure under its ownership, management, and operation at that time. As Mr. David Palumbo noted in his declaration (Palumbo Decl. ¶ 3), Reclamation is the largest wholesale water supplier in the nation, operating 338 reservoirs with a total capacity of 140 million acre-feet. It provides water to 1 out of 5 (about 140,000) Western farmers with irrigation supply and delivers water to more than 31 million people each year. As Reclamation Commissioner, I worked with Mr. Palumbo.

6. As Reclamation Commissioner, I was personally involved in the negotiation and implementation of Treaty Minutes, Indian Water Rights Settlements, rural water supply

projects, and Drought Contingency Plans involving international water treaties, various interstate water compacts, and federal and state laws requiring careful adherence to international, interstate, and intrastate apportionments.

7. From January 2003 to October 2014, I was Director of the New Mexico Interstate Stream Commission (“ISC”), appointed by the Governor of the State of New Mexico. In that position I supervised and directed all aspects of ISC business under the general policy direction of its nine (9) member Commission. The ISC is authorized by New Mexico statutes to:

[N]egotiate compacts with other states to settle interstate controversies or looking toward an equitable distribution and division of waters in interstate stream systems, subject, in all cases, to final approval by the legislature of New Mexico; to match appropriations made by the congress of the United States for investigations looking to the development of interstate streams originating in or flowing through the state of New Mexico; to investigate water supply, to develop, to conserve, to protect and to do any and all other things necessary to protect, conserve and develop the waters and stream systems of this state, interstate or otherwise; to institute or cause to be instituted in the name of the state of New Mexico any and all negotiations and/or legal proceedings as in its judgment are necessary to carry out the provisions of this act. . . . (N.M.S.A. § 72-14-3.)

New Mexico is party to eight (8) interstate stream compacts that apportion water with neighboring states. As Director, I led the agency responsible for understanding New Mexico’s rights and obligations relative to other compacting states, overseeing New Mexico’s compliance with relevant laws, confirming compact accounting, supervising intrastate actions to comply with compacts and decrees, and interacting with other compacting states. During my eleven (11) year tenure as Director of the ISC, I further served as:

- New Mexico Engineer Adviser to the Rio Grande Compact Commission. *See* NM-EX 330, Rio Grande Compact, Act of May 31, 1939 (“the Compact”);
- New Mexico Governor’s Representative to the Colorado River Compact;
- New Mexico Compact Commissioner for the Upper Colorado River Basin Compact; and
- New Mexico Compact Commissioner for the Canadian River Compact.

I also supervised New Mexico’s actions on the four (4) other interstate stream compacts to which New Mexico is a party: the Pecos River Compact, the Costilla Creek Compact, the La Plata River Compact, and the Animas-La Plata Project Compact. Examples of my responsibilities relating to New Mexico’s interstate compacts include but are not limited to:

- I led ISC implementation of the Pecos River Compact Compliance Program, acquiring land and water rights to assure compliance with the United States Supreme Court Decree in *Texas v New Mexico*, 485 U.S. 388 (1988). Since that implementation, New Mexico has remained in compliance with the Decree.

- I led New Mexico's efforts on planning and authorization of the Eastern New Mexico Water Supply System to put to use water apportioned to New Mexico under the Canadian River Compact.
- I served as the Non-Federal Co-chair to the Rio Grande Endangered Species Collaborative Program. New Mexico participation in this Program was largely to assure that compliance with Endangered Species Act mandates would not interfere with New Mexico's benefits and obligations under the Rio Grande Compact.

8. As ISC Director, I also dealt with Reclamation on a regular basis with regard to numerous Reclamation projects in New Mexico, including: Brantley Project, Carlsbad Irrigation Project, Fort Sumner Irrigation Project, Hammond Project, Middle Rio Grande Project, San Juan-Chama Project, Navajo Indian Irrigation Project, Tucumcari Project, and the Rio Grande Project. Of New Mexico's eight interstate compacts, four of those compacts (Rio Grande Compact, Upper Colorado River Compact, Pecos River Compact and Canadian Compact) encompass one or more of these Reclamation projects. Additionally, two additional interstate compacts (Colorado River Compact and Animas-La Plata Project Compact) include other Reclamation projects outside of New Mexico.

9. While at the ISC, I also served as Deputy New Mexico State Engineer. The State Engineer is charged, under New Mexico Statutes, with "general supervision of waters of the state and of measurement, appropriation, distribution thereof, and such other duties as required." (N.M.S.A. § 72-2-1.)

10. Prior to joining the ISC in 2003, I was employed by Santa Fe County from 1997 to January 2003 in positions of increasing authority. Initially I worked in Santa Fe County's Utilities Department, handling all aspects of setting up and running a new county water utility. By the time I left the employ of Santa Fe County I was County Manager, in which position I supervised and directed all aspects of Santa Fe County government under the policy direction of the Santa Fe County Board of County Commissioners.

11. I earned two Bachelor of Science Degrees in Petroleum Engineering and Chemistry from New Mexico Institute of Mining and Technology in 1979. I am licensed by New Mexico as a Professional Engineer.

12. I have been asked by counsel for New Mexico to respond to declarations submitted by the United States in support of its Memorandum in Opposition to Compacting States' Joint Motion to Enter Consent Decree, Dkt. 754 (U.S. Memorandum"), based on my knowledge and experience relating to the Rio Grande Compact (the "Compact"), the Rio Grande Compact Commission ("RGCC"), the relationship between the Compact and the Rio Grande Project ("Project"), and their operations.

## The Consent Decree Does Not Interfere with Reclamation's Rights or Obligations

13. Mr. Palumbo expressed disappointment 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...” Palumbo Decl. ¶ 7. He further contends that “the decree would significantly impair Reclamation’s discretion to operate the federal facilities in the Rio Grande to ensure compliance with its contractual and statutory obligations.” Palumbo Decl. ¶ 16.<sup>1</sup> Mr. Palumbo does not identify any statutory authorities or contractual obligations he is concerned about. Nor does he identify what aspects of the Consent Decree would be contrary to or impair such obligations. I am not aware of any laws with which the Consent Decree might conflict. Rather, it is my understanding that the Compact is a federal statutory and constitutional obligation to which Reclamation’s contractual obligations are subservient.<sup>2</sup> This federal obligation necessarily includes operating the Project to achieve the 57:43 division of Project supply to effect Compact apportionment. See TX-0224, Expert Report of Estevan R. Lopez, P.E. (October 31, 2019), at 26-27. Reclamation’s “discretion” has never included the authority to ignore Compact obligations.

14. The Consent Decree was negotiated by the Compacting States as an agreed mechanism for assuring that the 57:43 Compact apportionment is achieved and maintained. I am not aware of any contractual obligations Reclamation has that will be impaired by the Consent Decree. In fact, the 1938 Downstream Contract specifically requires that in times of shortage, the allocations should be divided between the Districts in a 57:43 ratio. See TX-0224, at 42. That requirement is consistent with the Compact and the Consent Decree. I am not aware of any specific provisions of the Downstream Contracts that are inconsistent with the Consent Decree, and Mr. Palumbo does not identify any.

15. As to Reclamation’s statutory and contractual obligation to conform to the Compact, Mr. Palumbo does not mention the *Resolution of the Rio Grande Compact Commission Regarding the Proposed Consent Decree in Original Action No. 141, Texas v. New Mexico and Colorado, in the United States Supreme Court*. See Exhibit A, attached hereto. The RGCC commissioners unanimously passed this resolution on November 10, 2022, finding that the Consent Decree is “consistent with the Compact, and fair to all the Compacting States.” *Id.* The RGCC commissioners endorsed the Consent Decree and stated it “fully resolved[s] the outstanding Compact Claims and counterclaims” in this litigation. *Id.*

16. Mr. Palumbo also ignores the Supreme Court’s determination that Reclamation is the agent for the Compact when he states that the Consent Decree renders the Project “the only Reclamation project in the United States that is subject to the direction and control of States ...” Palumbo Decl. ¶ 19. When I was Reclamation Commissioner,

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<sup>1</sup> This response applies equally to Ms. Estrada Lopez’s concerns at ¶ 19 of her declaration.

<sup>2</sup> In fact, Reclamation and the Districts specifically acknowledge this principle in their 2008 Operating Agreement: “Nothing herein is entered to alter, amend, repeal, modify, or be in conflict with the provisions of the Rio Grande Compact.” 2008 OA ¶ 6.12.

Reclamation viewed interstate compacts as federal law that Reclamation was required to follow in operating its projects. Consistent with that principle, based on my experience, Reclamation must operate the Project in conformity with the Compact, regardless of the existence of various Reclamation contracts associated with the Project in both New Mexico and Texas. *See* footnote 2, above. That obligation remains the same under the Consent Decree, which simply provides a mechanism to assure that deliveries of Compact water, through the Project, comport with the Compact. The Compacting States devised the Consent Decree to remove ambiguities about how Compact compliance will be accomplished in the Compact reach below Elephant Butte dam, where the apportionment between New Mexico and Texas occurs. This ends decades of dispute on this issue. The signatories to the Compact, rather than Reclamation and the Districts, have the right, the obligation, and the authority to clarify Compact ambiguities. *See, e.g.*, NM-EX-108, Rebuttal Expert Report of Estevan R. Lopez P.E. (June 15, 2020), at 17.

17. The fact that Reclamation requires the legal structure of an irrigation district or other entity in order to establish or operate a project is unrelated to the intent and operation of the Consent Decree. *See* Palumbo Decl. ¶¶ 10-14. Mr. Palumbo omits the fact that the Districts are political subdivisions of the States of New Mexico and Texas and exist at the discretion of those states. The Compact does not apportion water to the Districts or to Reclamation, but rather to the Compacting States. Individual water users are the beneficiaries of each State's apportionment. The States of New Mexico and Texas are the authorities acting on behalf of their citizen water users to assure that the States receive the Compact apportionment to which they are entitled.

18. Mr. Palumbo's concern that the Consent Decree may require Reclamation to adjust the division of water from EBID to EPCWID, or vice versa, reflects a misunderstanding of the purpose and effect of Compact allocation transfers provided for in the Consent Decree when a departure trigger is met. *See* Palumbo Decl. ¶ 15. The Consent Decree creates a mechanism enabling the Compacting States and the RGCC to track how closely the Project deliveries to the Districts comport with the Compact apportionment of 57:43. To the extent those deliveries stray from 57:43, those who received the extra water were not entitled to it, and those who bore the burden of the mis-apportionment must be reimbursed. That is what the Compact allocation transfers accomplish. The Downstream Contracts are silent on this mechanism, but to the extent Reclamation's contracts with the Districts do not "authorize" a truing-up of the 57:43 apportionment, they arguably do not comport with the Compact.

19. The United States raises concerns several times about the potential impacts of the Consent Decree to Carryover Accounting. *See* U.S. Memorandum at 33, 38-39, 41, 55, 60-61. In his ¶ 15, Mr. Palumbo also briefly addresses carryover. The United States misunderstands the history of carryover and the relevant Consent Decree mechanisms. Carryover is not contemplated by the Compact and was not imposed until 2006 and subsequently incorporated into the 2008 Operating Agreement. Prior to 2006 there had never been separate carryover accounts for the Districts. Unused water from one year was reallocated in the next year to both Districts in a roughly 57:43 split of allocations. However, the imposition of carryover in 2006 impacted the allocations such that they deviated from

the 57:43 Compact apportionment. This deviation is corrected by the Carryover Accounting provisions in the Consent Decree. That is all. The Compacting States have negotiated reasonable protocols that permit the continuation of carryover without violating the Compact, by addressing evaporation, carriage charges, and practical carryover volume.

20. There is a long history of conjunctive use of groundwater throughout the Project, as well as Reclamation's encouragement of such conjunctive use. *See* NM-EX-108, at 13-14. Depletions caused by groundwater pumping have been accounted for in Project allocations since Reclamation's application of the D2 Curve in the 1980s, which effectively incorporates the level of groundwater pumping conducted during the 1951-1978 baseline years. The Compacting States recognize that groundwater pumping is an established fact and is essential to meet the needs of water users in both States. Through their settlement negotiations they have determined the appropriate process – based on each State's needs and goals – to account for the depletion effects of groundwater pumping in effecting a 57:43 apportionment. This interstate agreement is reflected in the Consent Decree.

21. The United States, however, demands that the Consent Decree mandate groundwater management measures – at least by New Mexico. Palumbo Decl. ¶¶ 7, 22. Such mandates are intrastate water administration issues not properly addressed in the Consent Decree, which resolves only interstate issues. Further, the Compact does not even mention groundwater. Finally, Mr. Palumbo does not acknowledge the measures New Mexico is committed to undertaking to assure New Mexico will comply with the Consent Decree, which includes actions relating to groundwater pumping. *See* Hamman 1<sup>st</sup> Decl. ¶¶ 12-14.

22. Mr. Palumbo's statements in his ¶ 22 that the “consent decree will imply judicial approval of the unlawful interception of Project return flows within New Mexico...” is confusing in light of the fact that from the early 1980s and to today, Project accounting incorporates groundwater pumping and return flow impacts comparable to those from 1951 to 1978 through the use of the D2 curve. *See* TX-0224, at 35-36. Under the Consent Decree, return flows will continue to be included in Project supply.

### **The Consent Decree and Appendices Provide Sufficient Guidance for Reclamation to Exercise its Discretion in Operations**

23. In ¶ 17, Mr. Palumbo asserts that “the proposed decree does not provide adequate operational guidance for managing a project of this size” and makes a similar complaint in ¶ 18.<sup>3</sup> These complaints misrepresent the purpose of the Consent Decree, which settles the interstate Compact issues. *See, generally* the John Longworth declaration discussing this issue. Neither the Compact nor its implementing documents mandate or have ever mandated specific operational procedures to Reclamation. Reclamation has autonomy and discretion in determining the most effective means to operate the Project, subject to long-existing reporting requirements to the RGCC, and so long as its operations do not

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<sup>3</sup> This response applies equally to dispel the concerns about “vagueness” raised by Ms. Estrada-Lopez. *See* Estrada-Lopez Decl. ¶¶ 20-24.

interfere with the Compact apportionment. Once the Consent Decree is entered, Reclamation and the Districts may use their expertise to determine the best methods to conform to Compact obligations as defined by the Consent Decree. See Consent Decree, ¶ III.A.

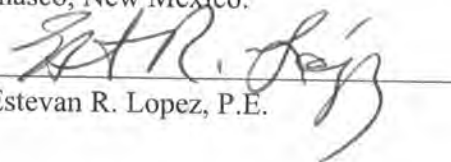
### **The Consent Decree Resolves Long-Standing Conflict on the Rio Grande**

24. Mr. Palumbo surprisingly states that the Project “has survived with less conflict than other projects, in my view due to the [2008] Operating Agreement.” Palumbo Decl. ¶ 21. By this statement Mr. Palumbo disregards decades of dispute between New Mexico and Texas relating to the division of the Compact waters, culminating in the significant conflict regarding Project operations that directly flow from the 2008 Operating Agreement. The Consent Decree ends these conflicts and provides a means for the Compacting States to move forward cooperatively.

25. The Compacting States agree with Mr. Palumbo that dealing with water shortages on the Rio Grande over the next decades will require close working relationships between the states, the federal government, and the water districts. Palumbo Decl. ¶ 24. Mr. Palumbo is wrong, however, when he opines the Consent Decree creates uncertainty – it does the exact opposite. For the first time in decades, there is certainty as to how the Compacting States will achieve Compact compliance. This is an enormous benefit to the citizen water users of the Compacting States and water administrators. I believe that when the United States and the Districts accept the benefits of the Consent Decree and cooperate in its implementation, their doubts about its benefits will be removed.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on February 2, 2023 in Penasco, New Mexico.

  
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Estevan R. Lopez, P.E.



**RESOLUTION OF THE RIO GRANDE COMPACT COMMISSION  
REGARDING the PROPOSED CONSENT DECREE in ORIGINAL ACTION NO. 141,  
*TEXAS v. NEW MEXICO AND COLORADO*, in the  
UNITED STATES SUPREME COURT**

November 10, 2022

**WHEREAS**, the States of Colorado, New Mexico, and Texas entered into the Rio Grande Compact, signed in 1938, apportioning the waters of the Rio Grande above Fort Quitman, Texas; and

**WHEREAS** the Rio Grande Compact (Compact) was passed as Public Act No. 96 by the 76th Congress of the United States and approved by the President on May 31, 1939; and

**WHEREAS**, Texas filed Original Action No. 141 (the Original Complaint), and the Supreme Court exercised original jurisdiction over this controversy involving the States of Colorado, New Mexico, and Texas; and

**WHEREAS**, the Original Complaint alleges New Mexico violated and continues to violate the Compact, and the New Mexico counterclaims allege Texas violated and continues to violate the Compact; and

**WHEREAS**, Colorado, an originally named defendant, has a general interest in litigation of the Original Complaint, insofar as Colorado is a signatory to the Compact, and Colorado's own Compact interests based upon water releases and storage duties and rights may be affected by reservoir levels and releases in New Mexico and Texas; and

**WHEREAS**, the Compacting States have reached a settlement in principle of the Compact issues that have been raised in this Original Action; and, in furtherance of said settlement in principle, the Compacting States have agreed to file a motion requesting that the Special Master recommend that a Consent Decree and its appendices be entered by the Court resolving the Compacting States' dispute; and, the Consent Decree resolves the interstate Compact issues; and

**WHEREAS**, the Consent Decree does not address intrastate issues within New Mexico associated with the Rio Grande Project; and

**WHEREAS**, the Rio Grande Compact Commission has considered the Consent Decree in a closed executive session.

**NOW, THEREFORE, IT IS HEREBY RESOLVED**, that the Rio Grande Compact Commission hereby finds the Consent Decree and its appendices to be consistent with the Compact, and fair to all the Compacting states; and

**EXHIBIT A - LOPEZ DECLARATION**

**BE IT FURTHER RESOLVED**, that the Consent Decree provides for the collection, correlation, and presentation of factual data necessary for the administration of the Compact's apportionment of water among New Mexico and Texas below Elephant Butte Reservoir; and

**BE IT FURTHER RESOLVED**, that the Rio Grande Compact Commission hereby endorses the Consent Decree and its appendices and finds that the Consent Decree and its appendices fully resolve the outstanding Compact claims and counterclaims in the Original Action No. 141; and

**BE IT FURTHER RESOLVED**, that the Rio Grande Compact Commission does recommend to the Attorneys General of the Compacting States that they approve the Consent Decree for administration of the Compact as a resolution of the current dispute among the States regarding the apportionment of water below Elephant Butte Reservoir; and

**BE IT FINALLY RESOLVED**, that nothing herein represents a waiver or admission of any legal or factual matter by any Commissioner, Engineer Adviser, Legal Adviser, or the States of Colorado, New Mexico and Texas.



Kevin G. Rein  
*Commissioner for Colorado*



Robert S. Skov  
*Commissioner for Texas*



Michael A. Hamman  
*Commissioner for New Mexico*