

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**

---

**SECOND DECLARATION OF MICHAEL A. HAMMAN, 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**

---

February 3, 2023

I, Michael A. Hamman, 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.

2) I am the State Engineer for the State of New Mexico and the cabinet-level head of the Office of the State Engineer (“OSE”). My experience, work history, and qualifications are set out in my November 14, 2022 declaration, filed at Dkt. 720 (“November Declaration”). I have been asked to respond to allegations made and opinions asserted by the United States and its declarants in the United States Memorandum in Opposition to Compacting States’ Joint Motion to Enter Consent Decree at Dkt. 754.

3) To reiterate my responsibilities as the State Engineer, as they relate to allegations by the United States, I am statutorily charged with supervising the state’s water resources through the measurement, appropriation, and distribution of all ground and surface water in New Mexico, including streams and rivers that cross state boundaries. In my role as the State Engineer, I serve as the Secretary of the Interstate Stream Commission (“ISC”). I also stand, ex officio, as New Mexico Commissioner on the Rio Grande Compact. I am responsible for New Mexico water administration assuring compliance with the compacts to which New Mexico is a signatory, including the Rio Grande Compact (“Compact”).

4) I have the authority and means to assure compliance with the Settlement Agreement and Consent Decree (“Consent Decree”), which ensures that New Mexico complies with the Compact.

5) In my November Declaration I explained the following:

- a. The structures and statutory mandates of the OSE and ISC (§§ 4-6);
- b. New Mexico’s water administration system (§§ 7-8);
- c. The benefits to and obligations of New Mexico under the Consent Decree (§§ 9-10, 12, 16); and
- d. The actions New Mexico may be required to take in order to meet the requirements of the Effective El Paso Index (“EEPI”) and assure that New Mexico and Texas receive their full Compact apportionment of surface water, as well as the tools New Mexico has available to meet its obligations (§§ 12-14).

**New Mexico Is Committed to Assuring Compliance with the Consent Decree. New Mexico Has the Power and Authority to Assure Compliance.**

6) As I described in my November Declaration and reiterate now, the State Engineer has the tools and authority to manage water use in the Lower Rio Grande (“LRG”). For instance, through statutory and regulatory authority, including the Active Water Resources Management regulations, the State Engineer has the authority to administer water rights prior to a final judgment in a stream adjudication. New Mexico is committed to taking appropriate administrative, legislative, and enforcement actions to assure compliance with the Consent Decree. What actions are appropriate will depend upon the circumstances in any given situation.

7) The Compact does not direct New Mexico to administer New Mexico water in any particular manner. Through its constitution and statutes, the State of New Mexico maintains and exercises control over its waters, in accordance with all applicable laws.

8) The United States has not contradicted the authority of the State Engineer to employ any of the management options I presented in my November Declaration. The United States has not challenged the efficacy of any of the water management and administrative tools I described in my November Declaration.

9) Demonstrating the commitment of New Mexico to assuring compliance with the Compact and the Consent Decree, there are a number of proposals in the current legislative session intended to assure and advance this issue:

- a. Recommendations in both the executive and legislative finance committee budgets to increase the staff of the OSE and ISC to implement the Consent Decree and administer groundwater depletions in the LRG;
- b. Recommendations in both the executive and legislative finance committee budgets for one-time special appropriations and capital appropriations to implement the Consent Decree through fallowing/groundwater rights acquisition, development of new sources of imported water for the LRG, and conservation /efficiency /infrastructure improvement measures;
- c. Recommendations in both the executive and legislative finance committee budgets to conserve water in the middle Rio Grande and improve deliveries of water into Elephant Butte Reservoir.

The fact that these proposals are present in both the executive and legislative finance committee budgets indicates that there is a broad consensus among the state’s political leadership that the state will make major investments to bring the state’s groundwater depletions in line with D2 levels in an equitable way, and thereafter manage groundwater depletions to maintain compliance with the Consent Decree. These proposals do not, at this point, mandate specific measures to be taken

to achieve these depletions. This is appropriate, because equitably reducing groundwater depletions involves significant public policy tradeoffs that should be resolved by policymakers and stakeholders in an inclusive process.

10) If policymakers and stakeholders are unable to agree on a method of reducing groundwater depletions, the backstop is strict priority administration by the State Engineer. The budget increases contemplated in the budget will ensure that the State Engineer is fully funded to carry out this duty if necessary.

### **The United States Misstates the Role of the Consent Decree**

11) The declaration of Dr. Phillip King explains that, under the current 2008 Operating Agreement, the members of EBID suffer the entire burden of ensuring that EPCWID (the “Districts”) receives the Project Allocation consistent with D2 conditions. King Decl. ¶ 17. It is this state of affairs that David Palumbo lauds as what “keeps the peace” in the lower Rio Grande – despite the fact that there is currently no peace at all, as demonstrated by this litigation. *See* Palumbo Decl. ¶ 16. Mr. Palumbo also claims that the Rio Grande Project has survived “with less conflict than other projects.” Palumbo Decl. ¶ 21. While he does not cite which projects he has in mind, the level of conflict with this project over the past four decades, at all levels, is intolerable to the State of New Mexico and its water users. The Consent Decree, which will resolve New Mexico’s dispute with Texas, is an important step towards a more peaceful state of affairs.

12) Dr. Phillip King claims that “EBID, and only EBID,” will be forced to mitigate “all groundwater pumping effects on Project water supply in the New Mexico Rincon and Mesilla basins should New Mexico fail to manage and administer groundwater depletions effectively.” King Decl. ¶ 22. But this assumes, unfairly, that New Mexico will “*fail* to manage and administer groundwater depletions effectively.” This assumption is contradicted by extensive unrefuted evidence at the October/November 2021 trial of this matter that the LRG Water Master actively enforces current groundwater regulations and water management directives. *See* Transcript of Proceedings, Vol. XVIII (November 9, 2021), testimony of Ryan Serrano at 19:20-20:9; 22:25-23:20; 34:3-17; 41:25-144:11. No one on behalf of the United States contradicts this evidence; there is no reason to believe the State Engineer will not take any measures necessary to assure compliance with the Consent Decree. I have discussed some of the available mechanisms in my November Declaration, ¶ 14.

13) Further, Dr. King states that “Without very different groundwater regulations and management by New Mexico, any increase in groundwater depletions in New Mexico will further impair EBID’s Project supply allocation ...” King Decl. ¶ 18. Dr. King ignores that historically EBID has fought every measure by the State Engineer to administer and regulate groundwater in the LRG. Among EBID’s oppositions to the OSE, it has challenged the authority of the State Engineer to enact the AWRM regulations (*see Tri-State Generation & Transmission Ass’n v. D’Antonio*, 2012-NMSC-039, 289 P.3d 1232, EBID as amicus to plaintiff); filed a legal action to

enjoin the State Engineer's order that groundwater wells be metered; fought the draft LRG District Specific Rules implementing AWRM administration in the LRG; and refused to consider the early studies and evaluations by the OSE demonstrating that under the 2008 Operating Agreement, New Mexico received less than its 57% Compact apportionment and less than New Mexico crops required. *See, e.g.*, John D'Antonio Decl. ¶¶ 44, 46, 49 at Dkt. 439.

14) Despite EBID's historic antipathy to State water regulation, the State Engineer has prevailed in enacting and enforcing the laws and regulations necessary to administer the waters of the State in conformity with all applicable laws and regulations, and for the benefit of all its citizens. It will continue to do so. It is the responsibility of New Mexico, not the United States, to assure New Mexico's Compact compliance.

### **New Mexico Has Several Processes and Venues Available to the United States to Address Water Rights and Water Usage Issues**

15) The United States claims that if the Consent Decree is entered and this Original Action matter resolved, it will not have a forum in which to address its New Mexico intrastate issues. This is not true; there are several vehicles available to the United States to address intrastate issues. *See*, for example, my November Declaration, ¶ 15. I will describe other venues available to the United States.

16) The United States' criticism is based on the flawed assumption that the Compact and Consent Decree must address the intrastate administration of water in New Mexico. That is not true. The Compact apportions water between Texas and New Mexico, and does not dictate how some New Mexico users must be protected from other New Mexico users. For that, New Mexico state law provides ample protection.

17) The United States complains that the proposed Consent Decree does not mandate that New Mexico curtail groundwater pumping that is "junior" to the New Mexico District. It should be noted that the Compact does not even mention groundwater. This case, and this Consent Decree, is not an appropriate forum for establishing the seniority of the New Mexico District's rights vis-à-vis other water users, or whether one set of New Mexico users has interfered with other New Mexico users.

- a. On the local level, OSE District IV, situated in Las Cruces, New Mexico, is the office charged with implementing State Engineer administration in the LRG. In addition, the New Mexico LRG Water Master manages from this office, and has testified to the extensive administrative and enforcement activity of that office; his testimony was unrefuted. *See* ¶ 12, above. District IV conducts the on-the-ground administration, compliance, and enforcement activities of the OSE in the LRG.

Those issues that cannot be resolved by District IV are referred to appropriate divisions within the OSE, including the Administrative Litigation Unit (ALU).

- b. It is the exclusive jurisdiction of a State water adjudication court to determine the right to use the waters of New Mexico. NMSA 1978 § 72-4-17. The determination of water rights in the LRG is accomplished through the State district court adjudication entitled *State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District et al.*, No. D-307-CV-96-888 (the “LRG Adjudication”). In addition to adjudicating individual water rights, the LRG Adjudication court determined that there were several overarching issues impacting the LRG which should be addressed separately. These were termed “Stream System Issues” and “Expedited Inter Se Proceedings” and were or will be litigated and tried apart from the individual water rights claims.

18) Among the Stream System Issues in the LRG Adjudication is *Stream System 104 / Expedited Inter Se Proceeding*. This Stream System issue addressed “the interests of the United States deriving from the establishment of the Rio Grande Project” for determination in the LRG Adjudication.<sup>1</sup>

- a. By Order dated August 16, 2012 the LRG Adjudication court ruled on summary judgment that the United States had no interests in groundwater. It found that groundwater and surface water are separate sources of water for purposes of appropriation, the United States had not appropriated groundwater for the Project, and that groundwater is not Project water. This Order is subject to appeal when final; it is stayed by request of the parties.
- b. *Stream System 104* went to trial in summer 2016 on the sole issue of the priority date of Project surface water, all other issues having been resolved. The LRG Adjudication court entered its Findings of Fact and Conclusions of Law on April 17, 2017 holding the Project has a surface water priority date of March 1, 1903. No final order has been issued on these Findings; it is stayed by request of the parties.
- c. With a (non-final) priority date of March 1, 1903, the United States’ Project water rights are senior to most of the groundwater rights in the LRG. Should there ever be a need for priority administration in the LRG, which is one of the tools the State

---

<sup>1</sup> In 1997 the United States attempted to get its claim that groundwater is part of the Project litigated in federal court, side-stepping the LRG Adjudication. The United States brought suit in New Mexico federal court to quiet title to its Project water rights, including groundwater in its claim to Project water. The federal district court dismissed the suit in favor of allowing the New Mexico State LRG Adjudication court to determine the issues. *See United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002).

Engineer can use to assure compliance with the Consent Decree, these relative priority dates would be significant.

- d. This pending Stream System matter in the LRG Adjudication provides the United States a proper forum to seek a final determination of the sources and priority date for Project water.

19) In 2011 New Mexico sued the United States in federal district court over issues involving the 2008 Operating Agreement. *State of New Mexico v. United States, et al.*, D.N.M. 11-CV-691 (2011). Among other charges, New Mexico alleged that Reclamation's actions violated the Compact. The court stayed this federal litigation pending resolution of the claims in this Original Action. When the stay in the district court litigation is lifted, the United States may pursue its claims involving Project operations in this forum.

20) A forum for resolving the United States' claim that only New Mexican individuals or entities with contracts with Reclamation can use Project water is provided in *Elephant Butte Irr. Dist. v. United States*, D.N.M., No. CIV 00-1309 (2000).

#### **Appropriate Gaging is No Impediment to the Consent Decree**

21) The Declaration of William Finn, the Chief of the Water Accounting Division of the U.S. International Boundary and Water Commission ("U.S. IBWC"), notes that the U.S. IBWC currently owns, operates, and maintains the Rio Grande at El Paso gage; that the U.S. IBWC does not operate the gage for Rio Grande Compact purposes; that it does not operate the gage to meet the U.S.G.S. standards applicable for compact gages; and that to meet the U.S.G.S. standards applicable for compact gages, there would be costs involved. Finn Decl. ¶¶ 6-10; Estrada-Lopez Decl. ¶ 16.

22) None of what Mr. Finn says is incorrect, but none of it is a barrier to the entry of the Consent Decree. Article II of the Compact states that gaging stations shall be maintained "at such other points as may be necessary for the securing of records required for the carrying out of the Compact," and that the gages shall be equipped, maintained and operated by the Rio Grande Compact Commission directly or in cooperation with an appropriate Federal or State agency. In addition, Article V of the Compact allows the RGCC to establish new gaging stations under specified parameters, and the RGCC did in fact use this Article to effect the substitution of the San Marcial gaging station in 1948 with the Elephant Butte gage.


23) The Compacting States, through the Commission, will have the duty of maintaining the El Paso gage (and, for that matter, the Caballo gage) at Compact-level standards, including the cost of installing additional necessary equipment. They will shoulder the cost of doing so. The Consent Decree reflects this at ¶ II.B.ii.g by noting that Colorado is not responsible for the cost of the El Paso gage – which indicates that Texas and New Mexico *are* responsible for that cost.

24) As is typical throughout the West, compacting states often pay federal agencies (typically U.S.G.S.) to maintain compact gages and data. There is nothing in the Consent Decree that would be contrary to this customary practice.

25) Mr. Finn's declaration does not suggest that the U.S. IBWC is unwilling to maintain the El Paso gage as a Compact gage if it is provided the funding to do so by New Mexico and Texas. However, in the event that the U.S. IBWC would not be so willing, the New Mexico State Engineer has the authority to oversee the measurement of the waters of the state, NMSA 1978, § 72-2-1.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed this 2nd day of February, 2023, at Albuquerque, New Mexico.



Michael A. Hamman, P.E.