

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**

**STATE OF NEW MEXICO'S LIMITED RESPONSE TO TEXAS'S  
MOTION FOR LEAVE TO FILE SUPPLEMENTAL COMPLAINT**

HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
ZACHARY E. OGAZ  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
SUSAN BARELA  
Special Assistant Attorneys General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

July 15, 2021

COMES NOW the State of New Mexico (“New Mexico”), pursuant to the directive of the Special Master, and partially responds to the State of Texas’s Motion for Leave to File Supplemental Complaint. As directed by the Special Master, New Mexico is not providing a full response to the Motion for Leave, but is instead limiting this response

“to the issue of how the proposed amendment would affect the current lawsuit. Whether new parties, new amici, new discovery, etc. would be required. The response does not need to go to the merits of the motion, but rather the practical implications.”

Order at ¶ J (July 7, 2021) [Dkt. 521].<sup>1</sup> As explained in more detail below, the Special Master should direct Texas to file the Motion for Leave with the Supreme Court so that the Court can determine whether it will consider Texas’s new claim.

#### **STANDARD FOR AMENDMENTS TO PLEADINGS IN ORIGINAL ACTIONS**

The Supreme Court has original jurisdiction over controversies between two or more states. 28 U.S.C. § 1251(a); U.S. Const. art. III, § 2, cl. 2. In cases invoking the Court’s original jurisdiction, the Court has construed its jurisdiction as obligatory “only in appropriate cases.” *Maryland v. Louisiana*, 451 U.S. 725, 739 (1981) (internal quotation omitted). To serve its “gatekeeping function” in original actions, *Nebraska v. Wyoming*, 515 U.S. 1, 8 (1995), the Court has required states to file a motion for leave to file a complaint addressing both “the nature of *the interest* of the complaining State . . . focusing on the ‘seriousness and dignity of *the claim*,’” as well as the “availability of an alternative forum in which *the issue* tendered can be resolved.” *Maryland v. Louisiana*, 451 at 77 (citations omitted) (emphasis added). Thus, the Court undertakes a particularized inquiry, focusing on the specific interests, claims, and issues presented in a complaint before accepting an original action.

---

<sup>1</sup> If the Special Master is inclined to evaluate the merits of the Motion for Leave, New Mexico respectfully requests an opportunity to fully address the issues.

In evaluating these interests, claims, and issues, the Court has repeatedly affirmed a long-standing “philosophy” that its original jurisdiction “should be invoked sparingly.” *Illinois v. City of Milwaukee, Wisconsin*, 406 U.S. 91, 93 (1972); *see also Arizona v. New Mexico*, 425 U.S. 794, 797 (1976). Indeed, Chief Justice Rehnquist explained that the original jurisdiction “is of so delicate and grave a character that it was not contemplated that it would be exercised save when the necessity was absolute.” *Mississippi v. Louisiana*, 506 U.S. 73, 76 (1992) (quoting *Louisiana v. Texas*, 176 U.S. 1, 15 (1900)). This philosophy has guided the Court’s exercise of discretion to refuse to entertain claims within the original jurisdiction in actions between two States. *See e.g., Mississippi v. Louisiana*, 506 U.S. 73, 77 (1992); *Arizona v. New Mexico*, 425 U.S. 794 (1976). In view of the Court’s careful inquiry and sparing exercise of its original jurisdiction, Texas is limited to the theory advanced in its original complaint, and it is bound by the representations that it made in persuading the Court to grant it leave to file that complaint.

Turning to amendments to pleadings, the Court has explained that “the solicitude for liberal amendment of pleadings animating the Federal Rules of Civil Procedure does not suit cases within th[e] Court’s original jurisdiction.” *Nebraska v. Wyoming*, 515 U.S. at 8 (citations omitted). Because the Court performs an “important gatekeeping function” when it scrutinizes the initial motion for leave to file, “proposed pleading amendments must [likewise] be scrutinized closely in the first instance to see whether they would take the litigation beyond what [the Court] reasonably anticipated when [it] granted leave to file the initial pleadings.” *Id.* Accordingly, matters outside the scope of the original complaint as pleaded are not properly before the Special Master at this juncture, and would require the Court to grant Texas leave to file its Supplemental Complaint.

## **ARGUMENT**

### **I. THE SUPPLEMENTAL COMPLAINT WOULD EXPAND THE CASE BEYOND THE INITIAL PLEADINGS**

As discussed above, the current case is limited to the theory advanced in Texas’s original complaint, and an amendment may not “take the litigation beyond what [the Court] reasonably anticipated when [it] granted leave to file the initial pleadings.” *Id.* Texas recognizes this principle, Tex. Br. 6, 8, but argues that the Supplemental allegations “fall comfortably within the scope of what was reasonably anticipated by the Supreme Court when it granted Texas’s motion for leave to file the original complaint.” *Id.* at 8 (citing *Nebraska v. Wyoming*, 515 U.S. at 8). A basic review of the record reveals that Texas is mistaken.<sup>2</sup>

The starting point for understanding the issues anticipated by the Court is the original Texas Complaint. The gravamen of that pleading is Texas’s claim that New Mexico violated the Compact by allowing groundwater pumping to deplete Texas’s share of Project supply. Tex. Compl. ¶¶ 18-19. The original Complaint recognizes the distinction between Compact requirements above Elephant Butte Reservoir, which are guided by Article IV, and the Compact requirements below Elephant Butte Reservoir, *id.* ¶¶ 8, 10-11, 13, but focuses all of its allegations on actions “below Elephant Butte Reservoir.” *Id.* ¶¶ 10, 19, 21; *see also id.* at ¶ 18 (alleging that New Mexico “has allowed and authorized the extraction of water from beneath the ground, *downstream of Elephant Butte Dam*”) (emphasis added). The original Complaint does not contain a single allegation directed at actions above Elephant Butte Reservoir, deliveries to the Project, water use in the Middle Rio Grande, or reservoir operations in post-1929 reservoirs.

In contrast, the entire Supplemental Complaint is based on actions above Elephant Butte Reservoir. Whereas the original Complaint focuses on the impact of groundwater pumping on Project supply in the Lower Rio Grande, the Supplemental Complaint centers on alleged under-

---

<sup>2</sup> *Amicus Curiae* Albuquerque Bernalillo County Water Utility Authority provides a background section in its brief on this issue. New Mexico refers the Special Master to that amicus brief for information on the features and water use in the Middle Rio Grande.

deliveries *into* Elephant Butte Reservoir caused by actions in the Middle Rio Grande. Texas thus claims for the first time that longstanding management practices of post-1929 upstream reservoirs and water use above the Project violated the Compact. This claim, unlike the original Complaint, requires the Court to interpret Articles IV, VI, VII, and VIII to determine whether New Mexico’s water use upstream of Elephant Butte has been consistent with the Compact. This new claim requires an examination of a whole new set of facts and law, and represents a vast expansion beyond the original Complaint.

Four additional points make clear that the Supplemental Complaint expands the case beyond what the Court anticipated when it granted leave to file the original case. First, the Court’s understanding of the scope of the case is not a mystery – it articulated its understanding in its 2018 Decision. *See Texas v. New Mexico*, 138 S.Ct. 954 (2018). In the unanimous opinion, the Court understood Texas to allege that New Mexico violated the Compact “by allowing downstream New Mexico users to siphon off water below the Reservoir in ways the Downstream Contracts do not anticipate.” *Id.* at 958. It went on to provide an explanation of the case that concentrated entirely on obligations and actions below Elephant Butte Reservoir. The Court mentions no other allegations, as would be expected if the Court believed Texas’s original Complaint were broader. Similarly, the Special Master described Texas as alleging that “New Mexico improperly has been taking more surface water, hydrologically connected groundwater, and return flows between the Elephant Butte Dam and Texas than allowed by the Rio Grande Compact.” Order at 1 (April 14, 2020) (Dkt. 340). Neither understanding is broad enough to include claims that New Mexico violated its obligations above Elephant Butte Reservoir.

Second, any allegations of Compact violations in Texas’s original Complaint must have been sufficient to have given New Mexico “fair notice of what the ... claim is and the grounds

upon which it rests.” *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Under Supreme Court Rule 17.2, the Federal Rules of Civil Procedure – and thus Rule 8(a)(2) – guide pleadings in original actions. Although “detailed factual allegations” are unnecessary, a “plaintiff’s obligation to provide the ‘grounds’ of his ‘entitle[ment] to relief’ requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* A complaint must contain more than “naked assertions” and “unadorned, the-defendant-unlawfully-harmed-me accusations.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Rule 8(a)(2) “requires a ‘showing,’ rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.” *Bell Atlantic Corp.*, 550 U.S. at 555 n. 3. Read with these standards in mind, Texas’s original Complaint raises only allegations related to depletions to Project supply below Elephant Butte.

Third, all of the proceedings prior to the Supplemental Complaint have been based on actions below Elephant Butte that impact Project supply. In discovery, New Mexico confirmed with Texas that Texas was not raising claims arising from New Mexico actions above Elephant Butte that violated Article IV. As one example, Texas Rio Grande Compact Commissioner Gordon stated as much in his deposition:

“Q. In this case, is Texas claiming that New Mexico had under deliveries to Elephant Butte reservoir?

A. That’s not in this suit.”

Gordon Dep., Vol. II, 144:7-10 (July 15, 2020); *see also* Texas’s Responses to New Mexico’s First Set of Requests for Admission at RFA No. 66 (admitting that “from 1985 to the present, New

Mexico has delivered into Project storage all water it is required to deliver pursuant to Article IV of the Compact”).

Fourth, confronting the claims in the Supplemental Complaint would require an exploration of a different set of facts and distinct technical evaluations. For example, to defend against Texas’s original claims, New Mexico invested significant time and resources to develop the Integrated Lower Rio Grande Model (“ILRGM”). But that model focuses on Project operations and water use below Elephant Butte; it would be of no value in defending against Texas’s new theory above Elephant Butte. Instead, to assess the impact of Texas’s new claims, New Mexico would need to evaluate technical options, including expanding the ILRGM or utilizing the Upper Rio Grande Water Operations Model (“URGWOM”), a RiverWare model used by the United States and others for operational, water accounting, and planning purposes above Elephant Butte Reservoir. See e.g., URGWOM Summary, available at <https://www.spa.usace.army.mil/Missions/Civil-Works/URGWOM/>.

Finally, in previous cases, Special Masters have deferred the question of whether to allow an amendment to the pleadings to the Court itself. For example, in *Montana v. Wyoming*, the Special Master held that Montana’s claims were limited to one section of the Yellowstone River Compact, but left open the possibility that Montana could “seek leave *from the Supreme Court* to amend its Complaint.” Memorandum Opinion of the Special Master on Montana’s Claims Under Article V(B) at 15 (Dec. 20, 2011) (Docket Number 121, Docket available at <https://web.stanford.edu/dept/law/mvn/>) (emphasis added).

In short, the broad reading of the original Complaint that Texas advocates would undermine the purposes underlying the requirement that a state seek leave to file its complaint. This entire case has centered on actions below Elephant Butte that reduce Project supply. Texas’s

Supplemental Complaint would represent a significant expansion of the case beyond what was represented in Texas's original pleadings.

## **II. THE SUPPLEMENTAL COMPLAINT WOULD REQUIRE SIGNIFICANT DISCOVERY**

Next, Texas's Supplemental Complaint would result in a significant expansion of discovery. Because the claim is based on a completely different set of facts, the discovery conducted to date would be of limited value, and New Mexico would need to explore all of the underlying facts through discovery. And because the new claims involve different issues, different parties, different evidence, different witnesses, and a different technical analysis, that discovery is likely to be extensive.

For example, the United States Army Corps of Engineers describe water use in the Middle Rio Grande as follows:

Historically, water of the Rio Grande has been used primarily for crop irrigation; however, rapid population growth in the Basin and urbanization in many areas has resulted in increasing and diversifying demands on the hydrologic system. Water management decisions must account for a broad range of issues including flood control, irrigation demands, transmountain diversions, the Rio Grande Compact, municipal and industrial demands, Native American water rights, Endangered Species Act compliance, and recreational uses. As the wide range of water demands grow in the face of an inherently variable, and limited water supply, higher levels of precision and reliability in water accounting and forecasting are required.

URGWOM Purpose and Need, available at <https://www.spa.usace.army.mil/Missions/Civil-Works/URGWOM/Purpose-and-Need/>. Setting aside the Compact interpretation issues, to evaluate whether Texas's new claim has caused any injury, New Mexico would need to explore the development and use of an expanded ILRGM or the URGWOM model as well as each of the



uses described above to understand the impacts and whether conforming to Texas's theory would have resulted in any additional water arriving in Elephant Butte Reservoir as Texas alleges.<sup>3</sup>

In addition, addressing Texas's Supplemental Complaint would involve a significant new technical effort. At a minimum, New Mexico anticipates that additional expert testimony may be necessary on the new claims in the areas of Compact history, reservoir operations, and modeling. The long course of performance would also need to be investigated. All told, New Mexico anticipates that the discovery process for the Supplemental Complaint would add years to this case.

### **III. THE SUPPLEMENTAL COMPLAINT WOULD EXPAND THE *AMICUS* PARTIES IN THE CASE**

Finally, the Supplemental Complaint would dramatically expand the number of amicus parties involved in the case. The Middle Rio Grande is the most populated area in New Mexico. Since Texas filed its Supplemental Complaint, New Mexico has talked with dozens of Middle Rio Grande water users who have expressed concern about Texas's novel allegations. For example, in the Supplemental Complaint, Texas directly implicates management of post-1929 storage rights. As an illustration, attached as Exhibit A is a letter from the City of Santa Fe's Public Utilities Director expressing the concerns of one city with regard to such rights. Likewise, New Mexico has extensive agricultural interests in the Middle Rio Grande. Attached as Exhibit B is an affidavit from the Middle Rio Grande Conservancy District ("MRGCD") explaining the MRGCD's interests as well as the complexities of selected issues; Exhibit C is a letter from the Rio Chama Acequia Association ("RCAA") identifying the ways in which the family farms in the RCAA would be impacted. And because Texas claims that all water use in New Mexico must stop until

---

<sup>3</sup> Texas's Supplemental Complaint may implicate water operations of several major New Mexico water projects, the State Engineer's Active Water Resource Management efforts on the Rio Chama (a major tributary to the Rio Grande), and the 2016 Middle Rio Grande Water Operations Biological Opinion, to name a few. Only some of these impacts could be evaluated with URGWOM; others would require a different type of technical analysis.

water is stored in post-1929 reservoirs, Tex. Supp. Compl. ¶ 16, the Supplemental Complaint has the potential to impact every single one of New Mexico's water users both upstream and downstream of the post-1929 reservoirs.

Of particular note are the tribal and environmental interests in the Middle Rio Grande since both raise a number of nuanced issues. There are fourteen Pueblos located on or near the mainstem of the Rio Grande in New Mexico upstream of Elephant Butte, as well as the Jicarilla Apache Nation, each of which has rights or claims to water from the Rio Grande, or its tributaries, in New Mexico. Six of the Pueblos, referred to as the Six Middle Rio Grande Pueblos (Cochiti Pueblo, Isleta Pueblo, Santa Ana Pueblo, San Felipe Pueblo, Sandia Pueblo, and Santo Domingo), also have interests in post-1929 storage. The presence of the Six Middle Rio Grande Pueblos has previously raised issues in Compact litigation. As explained in Exhibit B, in 1951, Texas filed a motion for leave to file an original complaint. Like Texas's Supplemental Complaint, the stated purpose of the 1951 litigation was to restrain diversions above Elephant Butte Reservoir, including storage in El Vado Reservoir. However, because the United States represented the Six Middle Rio Grande Pueblos, the Court dismissed the case for failure to join an indispensable party. *See Texas v. New Mexico*, 343 U.S. 932 (1954). While the United States is a Party to the claims below Elephant Butte Reservoir, it is not clear whether its waiver of sovereign immunity would extend to claims involving the Middle Rio Grande, and the Court may have to resolve some complicated sovereign immunity issues. If the Supplemental Complaint is accepted, the Court would also have to interpret Article XVI and determine the impact of Texas's claims on tribal water rights in New Mexico and on the storage of water in post-1929 reservoirs to serve the prior and paramount lands of the Six Middle Rio Grande Pueblos.

Similarly, there are endangered species in the Middle Rio Grande that depend, in part, on releases of stored water from post-1929 reservoirs and the maintenance of flows in the river. Approved biological opinions outline water operations that may be conducted without jeopardizing the endangered species. The Court would need to examine what impact Texas's claims may have on these issues.

Last, Texas's Supplemental Complaint impacts existing Parties in meaningful ways. For example, although Colorado has an indirect interest in the original Complaint, its management of its own post-1929 reservoirs and water use would be directly implicated. Likewise, the United States has numerous interests in the Middle and Lower Rio Grande, and it is unclear what their position on the issues raised by Texas would be. Given its conflicting federal interests, its current posture in the case, and the Court's previous guidance, there are questions as to whether the United States could adequately represent the interests of the Six Middle Rio Grande Pueblos or the nine other Pueblos and tribes whose interests may be impacted by Texas's new claims.

### **CONCLUSION**

The Special Master should refer Texas's Motion for Leave to File Supplemental Complaint to the Supreme Court for a ruling on whether the new claims will be allowed, or for direction on how to proceed. *See Nebraska v. Wyoming*, No. 108 Original, Docket Entry of March 21, 1994 (Court received the motions to amend the pleadings before referring the same to the Special Master for recommendations).<sup>4</sup>

---

<sup>4</sup> (available at <https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/22o108.html> ).

Respectfully submitted,

/s/ Jeffrey J. Wechsler

---

HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
ZACHARY E. OGAZ  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
SUSAN BARELA  
Special Assistant Attorneys General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

JEFFREY J. WECHSLER  
Special Assistant Attorney General  
KALEB W. BROOKS  
MONTGOMERY & ANDREWS, P.A.  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[jwechsler@montand.com](mailto:jwechsler@montand.com)  
[kwbrooks@montand.com](mailto:kwbrooks@montand.com)

BENNETT W. RALEY  
LISA M. THOMPSON  
MICHAEL A. KOPP  
Special Assistant Attorneys General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
303-861-1963

JOHN B. DRAPER  
Special Assistant Attorney General  
CORINNE E. ATTON  
DRAPER & DRAPER LLC  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[john.draper@draperllc.com](mailto:john.draper@draperllc.com)  
505-570-4591

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**  
\_\_\_\_\_

**STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE**  
\_\_\_\_\_

This is to certify that on July 15, 2021, I caused a true and correct copy of the **State of New Mexico's Limited Response to Texas's Motion for Leave to File Supplemental Complaint** to be served by e-mail and U.S. Mail upon the Special Master and by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 15th day of July, 2021.

/s/ Michael A. Kopp

Michael A. Kopp  
Special Assistant Attorney General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
(303) 861-1963

## UNITED STATES

**ELIZABETH B. PRELOGAR\***

*Acting Solicitor General*

**EDWIN S KNEEDLER**

*Deputy Solicitor General*

**JEAN E. WILLIAMS**

*Deputy Assistant Attorney General*

**FREDERICK LIU**

*Assistant to the Solicitor General*

U.S. DEPARTMENT OF JUSTICE

950 Pennsylvania Avenue, NW

Washington, DC 20530-0001

[supremectbriefs@usdoj.gov](mailto:supremectbriefs@usdoj.gov)

(202)514-2217

**JAMES J. DUBOIS\***

**R. LEE LEININGER**

U.S. DEPARTMENT OF JUSTICE

Environment & Natural Resources Division

999 18th Street

South Terrace – Suite 370

Denver, Colorado 80202

**SETH C. ALLISON, Paralegal**

[james.dubois@usdoj.gov](mailto:james.dubois@usdoj.gov)

(303) 844-1375

[lee.leininger@usdoj.gov](mailto:lee.leininger@usdoj.gov)

(303) 844-1364

[Seth.allison@usdoj.gov](mailto:Seth.allison@usdoj.gov)

(303)844-7917

**JUDITH E. COLEMAN**

**JENNIFER A. NAJJAR**

U.S. DEPARTMENT OF JUSTICE

Environment & Natural Resources Division

P.O. Box 7611

Washington, D.C. 20044-7611

[Judith.coleman@usdoj.gov](mailto:Judith.coleman@usdoj.gov)

(202) 514-3553

[jennifer.najjar@usdoj.gov](mailto:jennifer.najjar@usdoj.gov)

(202) 305-0476

## STATE OF NEW MEXICO

**HECTOR H. BALDERAS**

*New Mexico Attorney General*

**TANIA MAESTAS**

*Chief Deputy Attorney General*

**CHOLLA KHOURY**

*Assistant Attorney General*

[hbalderas@nmag.gov](mailto:hbalderas@nmag.gov)

[tmaestas@nmag.gov](mailto:tmaestas@nmag.gov)

[ckhoury@nmag.gov](mailto:ckhoury@nmag.gov)

[zogaz@nmag.gov](mailto:zogaz@nmag.gov)

[psalazar@nmag.gov](mailto:psalazar@nmag.gov)

(505) 239-4672

**ZACHARY E. OGAZ**

*Assistant Attorney General*

STATE OF NEW MEXICO

P.O. Drawer 1508

Santa Fe, New Mexico 87501

**PATRICIA SALAZAR** - Assistant

**MARCUS J. RAEL, JR.\***

**LUIS ROBLES**

**SUSAN BARELA**

*Special Assistant Attorneys General*

ROBLES, RAEL & ANAYA, P.C.

500 Marquette Avenue NW, Suite 700

Albuquerque, New Mexico 87102

**CHELSEA SANDOVAL** - Paralegal

**PAULINE WAYLAND** – Paralegal

**BONNIE DEWITT** – Paralegal

[marcus@roblesrael.com](mailto:marcus@roblesrael.com)

[luis@roblesrael.com](mailto:luis@roblesrael.com)

[susan@roblesrael.com](mailto:susan@roblesrael.com)

[chelsea@roblesrael.com](mailto:chelsea@roblesrael.com)

[pauline@roblesrael.com](mailto:pauline@roblesrael.com)

[bonnie@roblesrael.com](mailto:bonnie@roblesrael.com)

(505) 242-2228

**BENNETT W. RALEY**

**LISA M. THOMPSON**

**MICHAEL A. KOPP**

*Special Assistant Attorneys General*

TROUT RALEY

1120 Lincoln Street, Suite 1600

Denver, Colorado 80203

[braley@troutlaw.com](mailto:braley@troutlaw.com)

[lthompson@troutlaw.com](mailto:lthompson@troutlaw.com)

[mkopp@troutlaw.com](mailto:mkopp@troutlaw.com)

(303) 861-1963

**JEFFREY WECHSLER**

*Special Assistant Attorney General*

MONTGOMERY & ANDREWS

325 Paseo De Peralta

Santa Fe, NM 87501

**DIANA LUNA** – Paralegal

[jwechsler@montand.com](mailto:jwechsler@montand.com)

(505) 986-2637

**JOHN DRAPER**

*Special Assistant Attorney General*

DRAPER & DRAPER LLC

325 Paseo De Peralta

Santa Fe, NM 87501

**DONNA ORMEROD** – Paralegal

[john.draper@draperllc.com](mailto:john.draper@draperllc.com)

(505) 570-4591

[donna.ormerod@draperllc.com](mailto:donna.ormerod@draperllc.com)

**STATE OF COLORADO**

**PHILIP J. WEISER**

*Attorney General of Colorado*

**ERIC R. OLSON**

*Solicitor General*

[eric.olson@coag.gov](mailto:eric.olson@coag.gov)

**LAIN LEONIAK**

*Acting First Assistant Attorney General*

**CHAD M. WALLACE\***

*Senior Assistant Attorney General*

**PRESTON V. HARTMAN**

*Assistant Attorney General*

COLORADO DEPARTMENT OF LAW

Ralph Carr Judicial Center

7<sup>th</sup> Floor

1300 Broadway

Denver, CO 80203

**NAN EDWARDS**, Paralegal II

[chad.wallace@coag.gov](mailto:chad.wallace@coag.gov)

(720) 508-6281 (direct)

[preston.hartman@coag.gov](mailto:preston.hartman@coag.gov)

(720) 508-6257 (direct)

[nan.edwards@coag.gov](mailto:nan.edwards@coag.gov)

**STATE OF TEXAS**

**STUART SOMACH\***

**ANDREW M. HITCHINGS**

**ROBERT B. HOFFMAN**

**FRANCIS M. GOLDSBERRY II**

**THERESA C. BARFIELD**

**SARAH A. KLAHN**

**BRITTANY K. JOHNSON**

**RICHARD S. DEITCHMAN**

SOMACH SIMMONS & DUNN, PC

500 Capital Mall, Suite 1000

Sacramento, CA 95814-2403

**CORENE RODDER - Secretary**

**CRYSTAL RIVERA - Secretary**

**CHRISTINA GARRO – Paralegal**

**YOLANDA DE LA CRUZ - Paralegal**

[ssomach@somachlaw.com](mailto:ssomach@somachlaw.com)

[ahitchings@somachlaw.com](mailto:ahitchings@somachlaw.com)

[rhoffman@somachlaw.com](mailto:rhoffman@somachlaw.com)

[mgoldsberry@somachlaw.com](mailto:mgoldsberry@somachlaw.com)

[tbarfield@somachlaw.com](mailto:tbarfield@somachlaw.com)

[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)

[bjohnson@somachlaw.com](mailto:bjohnson@somachlaw.com)

[rdeitchman@somachlaw.com](mailto:rdeitchman@somachlaw.com)

(916) 446-7979

(916) 803- 4561 (cell)

[crodder@somachlaw.com](mailto:crodder@somachlaw.com)

[crivera@somachlaw.com](mailto:crivera@somachlaw.com)

[cgarro@somachlaw.com](mailto:cgarro@somachlaw.com)

[ydelacruz@somachlaw.com](mailto:ydelacruz@somachlaw.com)

**KEN PAXTON**

*Attorney General*

**JEFFREY C. MATEER**

*First Assistant Attorney General*

**DARREN L. McCARTY**

*Deputy Attorney General for Civil Litigation*

**PRISCILLA M. HUBENAK**

*Chief, Environmental Protection Division*

OFFICE OF ATTORNEY GENERAL

OF TEXAS

P.O. Box 12548

Austin, TX 78711-2548

(512) 463-2012

(512) 457-4644 Fax

[Priscilla.Hubenak@oag.texas.gov](mailto:Priscilla.Hubenak@oag.texas.gov)



**AMICI / FOR INFORMATIONAL PURPOSES ONLY**

**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY**

**JAMES C. BROCKMANN\***

(505) 983-3880

**JAY F. STEIN**

[jcbrockmann@newmexicowaterlaw.com](mailto:jcbrockmann@newmexicowaterlaw.com)

STEIN & BROCKMANN, P.A.

[jfstein@newmexicowaterlaw.com](mailto:jfstein@newmexicowaterlaw.com)

P.O. Box 2067

[administrator@newmexicowaterlaw.com](mailto:administrator@newmexicowaterlaw.com)

Santé Fe, New Mexico 87504

**Administrative Copy**

**PETER AUH**

(505) 289-3092

ALBUQUERQUE BERNALILLO COUNTY

[pauh@abcwua.org](mailto:pauh@abcwua.org)

WATER UTILITY AUTHORITY

P.O. Box 568

Albuquerque, NM 87103-0568

**CITY OF EL PASO**

**DOUGLAS G. CAROOM\***

(512) 472-8021

**SUSAN M. MAXWELL**

[dcaroom@bickerstaff.com](mailto:dcaroom@bickerstaff.com)

BICKERSTAFF HEATH DELGADO

[smaxwell@bickerstaff.com](mailto:smaxwell@bickerstaff.com)

ACOSTA, LLP

2711 S. MoPac Expressway

Building One, Suite 300

Austin, TX 78746

**CITY OF LAS CRUCES**

**JAY F. STEIN \***

(505) 983-3880

**JAMES C. BROCKMANN**

[jcbrockmann@newmexicowaterlaw.com](mailto:jcbrockmann@newmexicowaterlaw.com)

STEIN & BROCKMANN, P.A.

[jfstein@newmexicowaterlaw.com](mailto:jfstein@newmexicowaterlaw.com)

P.O. Box 2067

[administrator@newmexicowaterlaw.com](mailto:administrator@newmexicowaterlaw.com)

Santé Fe, New Mexico 87504

**Administrative Copy**

**JENNIFER VEGA-BROWN**

(575) 541-2128

**ROBERT CABELLO**

LAW CRUCES CITY ATTORNEY'S OFFICE

[jvega-brown@las-cruces.org](mailto:jvega-brown@las-cruces.org)

P.O. Box 20000

[rcabello@las-cruces.org](mailto:rcabello@las-cruces.org)

Las Cruces, New Mexico 88004

## **ELEPHANT BUTTE IRRIGATION DISTRICT**

**SAMANTHA R. BARNCASTLE\***  
BARNCASTLE LAW FIRM, LLC  
1100 South Main, Suite 20 (88005)  
P.O. Box 1556  
Las Cruces, NM 88004  
**JANET CORRELL – Paralegal**

(575) 636-2377  
(575) 636-2688 (fax)  
[samantha@h2o-legal.com](mailto:samantha@h2o-legal.com)  
  
[janet@h2o-legal.com](mailto:janet@h2o-legal.com)

## **EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1**

**MARIA O'BRIEN\***  
**SARAH M. STEVENSON**  
MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, PA  
500 Fourth Street N.W., Suite 1000  
Albuquerque, New Mexico 87103-2168  
**CHARLIE PADILLA – Legal Assistant**

(505) 848-1803 (direct)  
[mobrien@modrall.com](mailto:mobrien@modrall.com)  
[sarah.stevenson@modrall.com](mailto:sarah.stevenson@modrall.com)  
  
[charliep@modrall.com](mailto:charliep@modrall.com)

**RENEA HICKS**  
LAW OFFICE OF MAX RENE HICKS  
P.O.Box 303187  
Austin, TX 78703-0504

[rhicks@renea-hicks.com](mailto:rhicks@renea-hicks.com)  
(512)480-8231

## **HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1**

**ANDREW S. “DREW” MILLER\***  
KEMP SMITH LLP  
919 Congress Avenue, Suite 1305  
Austin, TX 78701

(512) 320-5466  
[dmiller@kempsmith.com](mailto:dmiller@kempsmith.com)

## **STATE OF KANSAS**

**DEREK SCHMIDT**  
*Attorney General of Kansas*  
**JEFFREY A. CHANAY**  
*Chief Deputy Attorney General*  
**TOBY CROUSE\***  
*Solicitor General of Kansas*  
**BRYAN C. CLARK**  
*Assistant Solicitor General*  
**DWIGHT R. CARSWELL**  
*Assistant Attorney General*  
120 S. W. 10th Ave., 2nd Floor  
Topeka, KS 66612

(785) 296-2215  
[toby.crouse@ag.ks.gov](mailto:toby.crouse@ag.ks.gov)  
[bryan.clark@ag.ks.gov](mailto:bryan.clark@ag.ks.gov)

## NEW MEXICO PECAN GROWERS

**TESSA T. DAVIDSON\***  
DAVIDSON LAW FIRM, LLC  
4206 Corrales Road  
P.O. Box 2240  
Corrales, NM 87048  
**JO HARDEN – Paralegal**

[ttd@tessadavidson.com](mailto:ttd@tessadavidson.com)  
(505) 792-3636

[jo@tessadavidson.com](mailto:jo@tessadavidson.com)

## NEW MEXICO STATE UNIVERSITY

**JOHN W. UTTON\***  
UTTUN & KERY, P.A.  
P.O. Box 2386  
Santa Fe, New Mexico 87504

(505) 699-1445  
[john@uttonkery.com](mailto:john@uttonkery.com)

*General Counsel*  
New Mexico State University  
Hadley Hall Room 132  
2850 Weddell Road  
Las Cruces, NM 88003

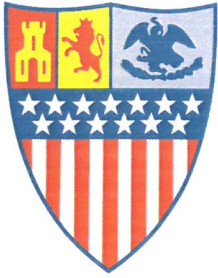
[gencounsel@nmsu.edu](mailto:gencounsel@nmsu.edu)  
(575) 646-2446

## SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION

**ARNOLD J. OLSEN\***  
HENNIGHAUSEN OLSEN & MCCREA, L.L.P.  
P.O. Box 1415  
Roswell, NM 88202-1415  
**Malina Kauai, Paralegal**  
**Rochelle Bartlett, Legal Assistant**

(575) 624-2463  
[ajolsen@h2olawyers.com](mailto:ajolsen@h2olawyers.com)

[mkauai@h2olawyers.com](mailto:mkauai@h2olawyers.com)  
[rbartlett@h2olawyers.com](mailto:rbartlett@h2olawyers.com)



# City of Santa Fe, New Mexico

200 Lincoln Avenue, P.O. Box 909, Santa Fe, N.M. 87504-0909

[www.santafenm.gov](http://www.santafenm.gov)

*Alan Webber, Mayor*

Councilors:

Signe I. Lindell, Mayor Pro Tem, District 1

Renee Villarreal, District 1

Michael J. Garcia, District 2

Carol Romero-Wirth, District 2

Roman "Tiger" Abeyta, District 3

Chris Rivera, District 3

Jamie Cassutt, District 4

JoAnne Vigil Coppler, District 4

July 14, 2021

Honorable Michael J. Melloy  
Special Master  
United States Supreme Court  
111 Seventh Avenue, S.E. Box 22  
Cedar Rapids, IA 52401

Re: State of Texas's Motion for Leave to File Supplemental Complaint, the Supplemental Complaint, and the Brief in Support of Motion for Leave to File the Supplemental Complaint, *Texas v. New Mexico and Colorado*, Original No. 141

Dear Special Master Melloy:

The City of Santa Fe's Utilities Department, which includes its Water Division, has reviewed Texas's proposed Supplemental Complaint that it is seeking to file this statement in *Texas v. New Mexico and Colorado*, Original No. 141. Santa Fe is located in the Middle Rio Grande, 264 miles north of Elephant Butte Reservoir. The City's Utilities Department has assessed Texas's proposed expansion of the litigation and concludes that the proposal could affect river operations well above Elephant Butte Reservoir.

The City of Santa Fe has two reservoirs on the Santa Fe River, a tributary of the Rio Grande, that are integral parts of its municipal water supply for 85,000 people. They are McClure and Nichols reservoirs. These reservoirs have served Santa Fe since before New Mexico's statehood, as the City is more than 400 years old. Due to their later expansion, Santa Fe has both pre-1929 storage rights and post-1929 storage rights in relation to the Rio Grande Compact.

The allegations and relief sought in Texas's Supplemental Complaint related to storage in post-1929 reservoirs above Elephant Butte Reservoir, if accepted and granted, would directly threaten the City's operation of its municipal water reservoirs. For example, Texas complains that "New Mexico did not order or otherwise cause the Middle Rio Grande Conservancy District ( MRGCD ) or the City of Santa Fe or any other entity in the Middle Rio Grande to cease the diversion and use of Rio Grande water." Supp. Complaint at 11. It is not clear to the City why the State would

order the Santa Fe to cease diversion and use of water for which it has valid pre-compact rights. Other sections of Texas's Supplemental Complaint related to the Rio Grande Compact Articles IV, VI, VII, and VIII also place the City's administration of the City's water rights as they relate to the Rio Grande Compact at issue. For example, Texas appears to be claiming a right to restrict diversions of upstream appropriators, like the City, that would effectively eliminate the water rights of pre-compact appropriators when Elephant Butte has less than 400,000 AF of water in storage. Without the ability to use these rights, half of the City's surface water supply could be jeopardized.

If the Court grants Texas's Motion for Leave to File its Supplemental Complaint and expands the litigation above Elephant Butte Reservoir, I understand an entirely new phase of the litigation will begin. Santa Fe will certainly monitor the expanded litigation and my Department may also seek to engage the City's Governing Body to participate as an *amicus curiae* given what appears to be a direct threat to the City's municipal water supply. I remain hopeful that this matter can be addressed in the Rio Grande Compact Commission without years of litigation.

Sincerely,



Shannon Jones  
City of Santa Fe  
Public Utilities Director

cc: Marcos Martinez, Senior Assistant City Attorney  
Erin McSherry, City Attorney

**AFFIDAVIT OF MIKE HAMMAN, CEO / CHIEF ENGINEER  
OF THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT IN SUPPORT OF NEW  
MEXICO'S OPPOSITION TO TEXAS MOTION TO SUPPLEMENT COMPLAINT**

STATE OF NEW MEXICO       )  
  ) ss.  
COUNTY OF BERNALILLO    )

I, MIKE HAMMAN, CHIEF EXECUTIVE OFFICER / CHIEF ENGINEER OF THE MIDDLE RIO GRANDE CONSERVANCY DISTRICT, ON THIS 14th DAY OF JULY, 2021, AFTER BEING DULY SWORN, STATE AS FOLLOWS:

I.       I have served as the Chief Executive Officer / Chief Engineer of the Middle Rio Grande Conservancy District, a political subdivision of the State of New Mexico for six years and eight months. Prior to that time, I served as the Area Manager of the Albuquerque Area Office for the United States Bureau of Reclamation for five years. I understand fully all of the operations of the Middle Rio Grande Conservancy District and those of the United States Bureau of Reclamation, including the relationships between the Middle Rio Grande Conservancy District and the Pueblos located within the Middle Rio Grande Basin and the relationship of the United States Bureau of Reclamation acting as federal trustee for the Pueblos. While Chief Executive Officer of the Middle Rio Grande Conservancy District and Area Manager of the United States Bureau of Reclamation, I dealt extensively with the United States Bureau of Indian Affairs, which will most certainly be affected if the Motion is granted. Finally, I have been involved for the last twelve years in working with the United States Fish and Wildlife Service in development of two Biological Opinions for protection, *inter alia*, of the Middle Rio Grande endangered species for which critical habitat has been identified and designated above Elephant Butte Reservoir to Cochiti Dam. I have also worked closely with the United States Army Corps of Engineers, an agency having jurisdiction above Elephant Butte Reservoir. While at the United States Bureau of

Reclamation and the Middle Rio Grande Conservancy District, I negotiated multiple contracts and agreements with the United States Army Corps of Engineers that provide essential flood control protection from the mainstem of the Rio Grande and other comparable protection for the residents of the Middle Rio Grande Valley.

2. **General Background.** The Middle Rio Grande Conservancy District was established by New Mexico statute in 1923 as amended in 1927 under the Conservancy Act that provided broad authorities to provide irrigation, river flood protection, and drainage to over 123,000 acres in the Middle Rio Grande.

The Middle Rio Grande Conservancy District entered into agreements to combine 77 separate irrigation entities that included serving six native American tribes (Six Middle Rio Grande Pueblos), numerous existing acequia communities that originated under early Spanish/Mexican immigration, ditch companies, and other entities formed after the Treaty of Guadalupe Hidalgo of 1848 when New Mexico became a U.S. territory. These authorities included taxation and setting of water service charges as well as land acquisitions and construction of major facilities to address the mission of irrigation, flood control, and drainage. The Middle Rio Grande Conservancy District holds “reclaimed” water rights on behalf of all its constituents as a result of the reclamation and expansion of lands that were previously inundated or covered in sediment as a result of the high water table and poor drainage. The Middle Rio Grande Conservancy District constructed or rehabilitated four river diversion structures, 1,200 linear miles of canals, laterals, ditches, drains and levees. At one time, the Middle Rio Grande Conservancy District delivered water to approximately 90,000 acres within the four county area. This acreage has now been reduced to approximately 60,000 acres as a result of urbanization.

The Middle Rio Grande Conservancy District continues to provide valuable benefits to the residents of the Rio Grande Valley including affordable irrigation infrastructure (gravity fed) and access to irrigation water, recreation, wildlife habitat, and critical flood protection. Agricultural production on District lands is estimated to generate \$35 to \$70 million per year. The continued presence of traditional farming techniques and infrastructure in the middle valley gives the area a unique rural/urban environmental and social mix. A greenbelt composed of small farms, wildlife refuges, irrigated pastures and gardens within and adjacent to metropolitan areas provide food security for communities and wildlife and helps temper the contemporary, urban landscapes. With increased urbanization, District land along with private agricultural land is an oasis in the midst of the state's largest metropolitan area for people, migratory species and regional wildlife. The Middle Rio Grande Conservancy District owns and manages 30,000 acres of bosque (a cottonwood dominate, riparian forest), and has helped to establish Tingley and San Gabriel Parks, the Rio Grande Nature Center, the Rio Grande Valley State Park and other regional river parks and open spaces, all of which are open to recreational use by the public. The Middle Rio Grande Conservancy District will continue to maintain the Rio Grande's irrigation and flood control facilities while encouraging the preservation, restoration, and sustainable management of the bosque and adjacent agricultural land. Through innovative resource conservation, the Middle Rio Grande Conservancy District is committed to preserving, and when possible, enhancing the Rio Grande agri-ecosystem in the heart of New Mexico. The creation of the Middle Rio Grande Conservancy District's Conservation Program in 2019 has strengthened the District's commitment to responsible resource management and regional partnership. A guiding principle for the



Conservation Program and for the District is that sustaining healthy agriculture in the middle valley is crucial to maintaining a healthy Rio Grande ecosystem.

3. Texas claims, in the State of Texas's proposed Supplemental Complaint ("Supplemental Complaint"), that "New Mexico has also been siphoning off water in areas above the [Elephant Butte] Reservoir."<sup>1</sup> Texas complains, in spite of the Article VII restriction currently in force against doing so, that New Mexico, in violation of the Compact, has failed to retain in storage the amount equal to its accrued debit, and instead is allowing the Middle Rio Grande Conservancy District, City of Santa Fe, and other Middle Rio Grande entities to divert Rio Grande water.<sup>2</sup> Presumably now regretting its 2020 approval<sup>3</sup> of New Mexico's emergency release request,<sup>4</sup> pursuant to Article VI, which ultimately resulted in New Mexico releasing 31,892 acre-feet of accrued debit water that benefitted both the endangered species and Middle Rio Grande irrigators,<sup>5</sup> the Texas Rio Grande Commissioner stated, "based on [New Mexico's] handling of the accrued debit storage by releasing water under Article VII [sic], all of this water should be delivered to EBR [Elephant Butte Reservoir], not MRGCD."<sup>6</sup>

4. A similar issue has previously been before the United States Supreme Court, but was not resolved because of a determination by the United States Supreme Court that the United

---

<sup>1</sup> Supplemental Complaint, ¶ 9.

<sup>2</sup> *Id.* ¶ 13.

<sup>3</sup> See Ex. B, attached hereto (Letter from Texas Rio Grande Compact Commissioner Patrick Gordon to New Mexico Rio Grande Compact Commissioner John R. D'Antonio, Jr. (July 16, 2020)).

<sup>4</sup> See Ex. A, attached hereto (Letter from New Mexico Rio Grande Compact Commissioner John R. D'Antonio, Jr. to Colorado Rio Grande Compact Commissioner Kevin Rein and Texas Rio Grande Compact Commissioner Patrick Gordon (July 14, 2020)).

<sup>5</sup> See Ex. C, attached hereto (Rio Grande Compact Commission, *Minutes of the Rio Grande Compact Commission 81<sup>st</sup> Annual Meeting*, 12, Nov. 12, 2020).

<sup>6</sup> See Supplemental Complaint, Ex. 2, Letter from Texas Rio Grande Compact Commissioner Patrick Gordon to New Mexico Rio Grande Compact Commissioner John R. D'Antonio, Jr. (May 6, 2021).

States was an indispensable party to the action, and the United States could not be joined because it is immune from suit. *Texas v. New Mexico*, No. 9, Original, 352 U.S. 991 (1957). Texas's Motion for Leave to File Complaint and Complaint (filed November 2, 1951) leading to that decision stated on its face that "For several years, defendants [including, *inter alia*, the State of New Mexico and the Middle Rio Grande Conservancy District and its Board of Directors], to the irreparable injury of plaintiff and its citizens, have refused to deliver to plaintiff the water which the Compact requires to be delivered." Motion for Leave at 2. And, in its prayer for relief, Texas requested that "said defendants be enjoined and restrained from diverting and using, within the State of New Mexico, above San Marciel,<sup>7</sup> any of the waters of the Rio Grande or its tributaries allocated to and due Texas under the Rio Grande Compact." Complaint at 17.

5. In 1951, when Texas filed the Complaint in *Texas v. New Mexico*, No. 9, Original, the Indian Pueblos were using Rio Grande water,<sup>8</sup> but the conflicts of interest raised by Texas's current proposed Supplemental Complaint were at issue because there was no Endangered Species Act that placed additional restrictions on the use of water and there was no San Juan-Chama diversion making water available for irrigators of the Middle Rio Grande Conservancy District and for domestic use by the Albuquerque Bernalillo County Water Utility Authority and other municipal and tribal jurisdictions within the Rio Grande Basin.

6. I believe the following listed agencies, entities and projects will be directly affected by granting the Motion: Bureau of Indian Affairs; United States Department of Justice; the Middle Rio Grande Pueblos in each of their separate capacities; El Vado Reservoir; New Mexico Interstate

---

<sup>7</sup> As originally drafted, the delivery point under the Compact was San Marciel; because of the inability to measure flows at that location, the delivery point was moved downstream.

<sup>8</sup> An analysis of the case reflects that water for the Pueblos was the basis for storage of water in El Vado Reservoir.

Stream Commission; Office of the New Mexico State Engineer/the New Mexico State Engineer; Albuquerque Bernalillo County Water Utility Authority; United States Bureau of Reclamation; Middle Rio Grande Conservancy District; City of Santa Fe/County of Santa Fe, and Buckman Direct Diversion Project. A brief description of the function of each agency, entity and project listed, as relating to the Middle Rio Grande Valley and how each may be affected by granting the Motion, follows.

7.     **The United States Bureau of Indian Affairs.** This agency works closely with the Middle Rio Grande Pueblos that, because of their status as domestic independent nations with entitlements under federal trust responsibility law and under federal statutes, require daily interaction with the United States Bureau of Indian Affairs to ensure that their Pueblo lands, which are held in fee simple title under the Treaty of Guadalupe Hidalgo, signed in 1848, and their water rights, which were granted pursuant to that same Treaty of Guadalupe Hidalgo and fully recognized by federal statutes and within the Rio Grande Compact under Article XVI, are fully protected.

8.     **The United States Department of Justice.** This federal agency is charged with representation of the Middle Rio Grande Pueblos in all litigation that could affect their land and their water rights. If Texas's Complaint is expanded, the Department of Justice will face conflicts among three independent obligations: a) the duty of the Department of Justice to aggressively represent the Middle Rio Grande Pueblos in all matters that could negatively affect the Pueblos' prior and paramount water rights codified by federal statute in 1928 (*see* Act of March 13, 1928 (45 Stat. 312)); b) the Department of Justice's obligation to vigorously enforce the Endangered Species Act of 1973, 16 U.S.C. § 1531 *et seq.*, and to prevent a "take" of endangered species

identified under the Endangered Species Act within the Middle Rio Grande Valley by any party diverting water from the Rio Grande; and, c) the Department of Justice's duty to represent the United States in support of Texas's claim of a breach of the Rio Grande Compact by New Mexico. In the Lower Rio Grande, those conflicts do not arise. If the Motion is granted, all of those irreconcilable conflicts would immediately arise.

9. **The Middle Rio Grande Pueblos.** The following Pueblos divert water from the Rio Grande using the Middle Rio Grande Conservancy District's diversion dams and other constructed facilities: Santa Ana, Cochiti, Santo Domingo, San Felipe, Sandia, and Isleta. These Pueblos hold title to their lands in fee simple as the result of a unique provision in the 1848 Treaty of Guadalupe Hidalgo and subsequent quitclaims and patents from the United States in 1858 deeding the lands to the Pueblos contained in their grants from Mexico. *See New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1000-01, 1009 (D.N.M. 1985). The Pueblos hold what are recognized as Pueblo water rights—rights to water that were continued back to and including the Spanish period under the Treaty of Guadalupe Hidalgo. *See New Mexico ex rel. Reynolds v. Aamodt*, 618 F. Supp. 993, 1009 (D.N.M. 1985); *see also United States v. Abouselman*, 976 F.3d 1146 (10th Cir. 2020). The Pueblos' water rights were recognized and quantified by an Act of Congress in 1928 as being prior and paramount to the water rights held by others in New Mexico under state law. Act of March 13, 1928 (45 Stat. 312). That same Act of Congress recognized other water rights for lands that were reclaimed by the Bureau of Reclamation and share a priority date on parity with other water users within the Middle Rio Grande Conservancy District.

10. **El Vado Reservoir.** El Vado Reservoir in the Middle Rio Grande Basin is used by the United States Bureau of Reclamation during every irrigation season to ensure the Middle Rio

Grande Pueblos receive delivery of their prior and paramount water rights as well as water for Pueblo newly reclaimed lands. The use of the reservoir for prior and paramount purposes provides an insurance supply if direct flow rights are unavailable due to shortages under the 1981 Letter Agreement between the Bureau of Indian Affairs and the Bureau of Reclamation. This is the same reservoir that Texas's proposed Supplemental Complaint alleges has been improperly utilized by the United States Bureau of Reclamation, the United States Fish and Wildlife Service and the Middle Rio Grande Conservancy District. Article XVI of the Rio Grande Compact provides that the Compact shall not be construed as impairing the rights of the Pueblos or affecting the obligations of the United States, on behalf of the Pueblos. That provision has never been adjudicated in this Court. Therefore, it will be incumbent on the Department of Justice and its private counsel to defend the Pueblos against the allegations of Texas, which allege misuse of El Vado Reservoir by the State of New Mexico, the Middle Rio Grande Conservancy District and the United States Bureau of Reclamation.

11. **The New Mexico Interstate Stream Commission.** The New Mexico Interstate Stream Commission works closely with the Albuquerque Bernalillo County Water Utility Authority, the Middle Rio Grande Conservancy District, the Bureau of Reclamation, the United State Army Corps of Engineers, and the United States Fish and Wildlife Service on compliance with the 2016 Biological Opinion that provides the New Mexico Interstate Stream Commission protection from an allegation of "a taking" of the Rio Grande silvery minnow as a result of its river management practices. Alteration of river management operations in the Middle Rio Grande could lead to a jeopardy finding involving all of the above agencies.

**12. The Office of the New Mexico State Engineer/the New Mexico State Engineer.**

The reach of the river between Santa Fe and down to Elephant Butte Reservoir is unique among western rivers. This is because the New Mexico Supreme Court was prescient in its understanding that the hydraulic connection between groundwater wells in the Middle Rio Grande Basin meant that all new wells that are drilled have the potential for depleting water in the Rio Grande. *City of Albuquerque v. Reynolds*, 71 N.M. 428, 379 P.2d 73 (1962). For this reason, the State Engineer has required for the past 60 years that any new well affecting the flow of the Rio Grande must be offset by the retirement of a surface right on the Rio Grande. This method of management ensures that, prior to water in the Rio Grande reaching Elephant Butte Reservoir, the Rio Grande does not suffer depletions from new groundwater wells. As a result of this policy, there are essentially no wells drilled after 1962 for which the impacts of pumping have not been fully offset by purchase and retirement of irrigation surface water rights. And, as opposed to what has happened along the Lower Rio Grande, essentially no supplemental wells were drilled within the Middle Rio Grande Basin during the drought of the fifties. The proposed Supplemental Complaint alleges that the actions of the New Mexico State Engineer have not provided protection to deliveries under the Compact. It is essential that the New Mexico State Engineer be provided the opportunity to defend the extraordinarily laudable approach utilized for the last 60 years to ensure deliveries under the Rio Grande Compact.

**13. Albuquerque Bernalillo County Water Utility Authority.** The Albuquerque Bernalillo County Water Utility Authority has been granted the right to file an amicus brief in this case. Surely that brief will describe, *inter alia*, how it has complied with the requirement of obtaining offset water rights for water from its groundwater wells, and furthermore, explain that it

now utilizes almost exclusively water diverted from the Colorado River by way of the San Juan-Chama Diversion works, not only for domestic use, but also to recharge the aquifer from which its wells were drawing water. The results of that work in replenishing the aquifer are laudable and remarkable.

14. **The United States Bureau of Reclamation.** The United States Bureau of Reclamation approves storage releases from El Vado Reservoir and approved the releases from storage that are challenged by the proposed Supplemental Complaint. Texas's Solicitor agreed to the substance of the 2016 Biological Opinion, which contains the current operative policy guidance for management of endangered species along the Middle Rio Grande. The 2016 Biological Opinion found no jeopardy to the Rio Grande silvery minnow. The United States Bureau of Reclamation also works closely with the Pueblos to coordinate storage and releases of water for the Pueblos in direct contravention of the position taken in Texas's proposed Supplemental Complaint. The United States Bureau of Reclamation also is directly implicated by the Supplemental Complaint, which logically would extend to the responsibility of the United States to deliver water to Elephant Butte Reservoir for use by Texas because the United States Bureau of Reclamation has jurisdiction over and responsibilities for moving water in the bed and channel of the Rio Grande as it makes its way to Texas. In *Texas v. New Mexico*, No. 9, Original, the Special Master concluded that the United States was an indispensable party to the original case by Texas against New Mexico and the Middle Rio Grande Conservancy District because of the trust relationship to the Pueblos. *See* Report of the Special Master Respecting Indispensability of the United States and of Elephant Butte Irrigation District, as Parties, *Texas v. New Mexico, et al.*, No. 9, Original (March 15, 1954). In the Special Master's view, the Pueblos' right to storage of Rio

Grande water was not pre-empted by the Rio Grande Compact. On February 25, 1957, the Supreme Court, without opinion, dismissed Texas's Complaint for failure to join the United States as an indispensable party. *See Texas v. New Mexico*, 352 U.S. 991 (1957). Therefore, in the interest of protecting the Pueblos served by the Middle Rio Grande Conservancy District, there can be no question that the United States, through the United States Bureau of Reclamation, is an indispensable party to this case. This is true not because of the United States Bureau of Reclamation's role in the Rio Grande Project, which is located in the Lower Rio Grande Basin, but rather, because of the interest of the United States in protection of the Middle Rio Grande Pueblos based upon Article XVI of the Rio Grande Compact and the Special Master's Opinion that they have the right to receive water from El Vado Reservoir, notwithstanding the language of Article VII of the Rio Grande Compact prohibiting New Mexico from storing water in El Vado when there is less than 400,000 acre-feet of water in usable project storage in the Lower Rio Grande.

15. **The Middle Rio Grande Conservancy District.** The Middle Rio Grande Conservancy District claims beneficial ownership of all non-Pueblo water stored in El Vado Dam. The Middle Rio Grande Conservancy District allocates that water among holders of pre-1907 water rights within the Middle Rio Grande Conservancy District and also allocates the Middle Rio Grande Conservancy District's own water, all through the Middle Rio Grande Conservancy District's works. Once water is released from El Vado Reservoir, the Middle Rio Grande Conservancy District allocates water among all users below the diversion dams on the Middle Rio Grande, with first preference for use of water confirmed by the 1928 Act benefitting the Middle Rio Grande Pueblos within the Middle Rio Grande Conservancy District. The Middle Rio Grande



Conservancy District is directly affected because it played a pivotal role in the development of the 2016 Biological Opinion and continues to work with the United States Fish and Wildlife Service, the United States Bureau of Reclamation, the Albuquerque Bernalillo County Water Utility Authority, the New Mexico Interstate Stream Commission, the United States Army Corps of Engineers and the Office of the New Mexico State Engineer to ensure compliance with the 2016 Biological Opinion and to avoid extirpation of the Rio Grande silvery minnow. The Middle Rio Grande Conservancy District coordinates with the United States Bureau of Indian Affairs and the United States Bureau of Reclamation to ensure that releases from El Vado Reservoir conform to the rights of the Pueblos as well as the non-Pueblo irrigators. Finally, the Middle Rio Grande Conservancy District continues to facilitate opportunities for lease of water for uses other than agriculture during this current drought, which is the greatest drought that has occurred since the early fifties. All of these actions depend upon the flexibility to coordinate releases from El Vado Reservoir based upon hydrology presented to the Middle Rio Grande Conservancy District and the United States Bureau of Reclamation in cooperation with the New Mexico Interstate Stream Commission and the U.S. Army Corps of Engineers.


**16. The City of Santa Fe/County of Santa Fe Buckman Direct Diversion Project.** The City and County of Santa Fe formed a joint entity so as to manage diversions directly from the Rio Grande at the end of Buckman Road. This project is known as the Buckman Direct Diversion Project. There is a question currently being litigated over the viability of the Buckman Direct Diversion Project, but when there is adequate supply in the river, it appears to function. Native Rio Grande water rights have been transferred upstream from the Middle Rio Grande Valley and downstream from prior diversions above Questa, New Mexico as offsets. The water is

diverted from the Rio Grande, placed into settling ponds and pumped up from where it is treated and circulated to users within the City and County of Santa Fe distribution system. With respect to all water rights that are served by storage in El Vado Reservoir, less storage in El Vado Reservoir would have a direct effect on the Buckman Direct Diversion Project and the people in Santa Fe utilizing that water. Therefore, granting Texas's Motion for Leave to File the Supplemental Complaint would directly affect the Buckman Direct Diversion Project.

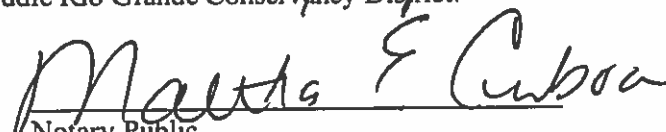
17. It is the position of the Middle Rio Grande Conservancy District that to grant the Motion to Supplement the Complaint would raise a host of issues not contemplated by or involved with the original Complaint in this case. The original Complaint is straightforward and simply challenges the deliveries of water to Texas after water is delivered by Colorado and other users within New Mexico, including the water users within the Middle Rio Grande Basin. The Middle Rio Grande Basin and the Lower Rio Grande Basin are polar opposites. The Lower Rio Grande Basin pits a single irrigation district and the City of Las Cruces against the State of Texas; the only question is whether sufficient water is being delivered at the Texas border, based upon the theories of Texas. The United States' role is limited because the sole issue is the impact on the Rio Grande Project, not to be confused with the Rio Grande Project in the Middle Rio Grande Basin. The Middle Rio Grande Basin contains six Indian Pueblos, all with Congressionally quantified water rights; it contains multiple endangered species over which there has been litigation involving the United States since the early 2000s; and, the Middle Rio Grande Project is symbiotically tied to the use of water by the Middle Rio Grande Conservancy District, with oversight by the New Mexico State Engineer and the New Mexico Interstate State Stream Commission. For these reasons it would appear to be wholly inappropriate to engraft upon the

original case filed by Texas a Supplemental Complaint raising claims that are *sui generis* to the Middle Rio Grande, and therefore, wholly unrelated.

FURTHER AFFIANT SAYETH NAUGHT.

 P.E.  
Mike Hamman, CEO / Chief Engineer  
Middle Rio Grande Conservancy District

Subscribed and sworn to before me this 1<sup>st</sup> day of July, 2021 by Mike Hamman, CEO / Chief Engineer of the Middle Rio Grande Conservancy District.

  
Notary Public

My Commission Expires:

September 30, 2022



September 30, 2022

# **RIO GRANDE COMPACT COMMISSION**

**COLORADO**

**TEXAS**

**NEW MEXICO**

CONCHA ORTIZ Y PINO BUILDING, 130 SOUTH CAPITOL, SANTA FE, NM 87501

TELEPHONE: (505) 827-6091

FAX: (505) 827-3806

**JOHN R. D'ANTONIO JR., P.E.**  
**STATE ENGINEER**  
**NM RIO GRANDE COMPACT COMMISSIONER**

Mailing Address:  
P.O. Box 25102  
Santa Fe, NM 87504-5102

July 14, 2020

Kevin Rein  
Rio Grande Compact Commissioner  
Colorado Division of Water Resources  
1313 Sherman St., Room 818  
Denver, CO 80203  
[Kevin.rein@state.co.us](mailto:Kevin.rein@state.co.us)

Patrick Gordon  
Rio Grande Compact Commissioner  
State of Texas  
4594 N. Mesa, Suite 100  
El Paso, TX 79912  
[pgordon@eplawyers.com](mailto:pgordon@eplawyers.com)

**Via email and U.S First Class Mail**

**RE: Request For Emergency Release of Approximately 38,000 acre-feet of Water New Mexico Retained Pursuant to Article VI of the Rio Grande Compact**

Dear Commissioner's Gordon and Rein:

On Monday July 6, 2020 the Rio Grande Compact Engineer Adviser and Legal Advisor reached out via email to their respective counterparts in Texas and Colorado, requesting they consult with their Commissioners and Legal Advisors to consider an emergency release of approximately 38,000 acre-feet of water New Mexico has retained in storage to the extent of New Mexico's current debit in accordance with Article VI of the Rio Grande Compact.

This water is needed on or before Friday, July 17, 2020 in order to sustain flow in the river to maintain critical habitat for listed endangered species pursuant to the terms of the 2016 Final Biological Opinion for Non-Federal Water Management and Maintenance Activities on the Middle Rio Grande. We expect extensive drying in the middle Rio Grande in the upcoming weeks, which may cause significant damage to the Rio Grande silvery minnow population. Release of this debit water would provide an approximately 60-day supply of a minimum amount of water to help minnow survival. I am aware that this water will most likely not reach Elephant Butte Reservoir

**EXHIBIT A**

Kevin Rein, Rio Grande Compact Commissioner  
Patrick Gordon, Rio Grande Compact Commissioner  
July 14, 2020  
Page 2 of 2

and will not contribute to New Mexico's accrued delivery and could put New Mexico in further accrued debit next year.

Because of the urgency of the situation, please provide your written response by noon Thursday, July 16, 2020. Given the current Covid-19 restrictions in place in each state, we propose that the Commission's decision be memorialized at the next Compact Commission meeting. If you have any questions regarding the request, please do not hesitate to contact me directly. Thank you.

Sincerely,

A handwritten signature in black ink, reading "John R. D'Antonio Jr." in a cursive script.

John R. D'Antonio Jr., P.E.  
New Mexico Rio Grande Compact Commissioner

JRD/kme

cc: Hal Simpson, Federal Chairman, R. G. Compact Commission  
Page Pegram, NM Engineer Adviser



## RIO GRANDE COMPACT COMMISSION

PATRICK R. GORDON  
TEXAS COMMISSIONER

401 E. FRANKLIN AVE., STE 560  
EL PASO, TEXAS 79901-1212  
TELEPHONE: (915) 834-7075  
FAX : (915) 834-7080

July 16, 2020

By Email: [john.dantonio@state.nm.us](mailto:john.dantonio@state.nm.us)

John R. D'Antonio Jr. P.E.  
New Mexico State Engineer  
Rio Grande Compact Commissioner  
Concha Ortiz Y Pino Building  
130 South Capital  
Santa Fe, New Mexico 87501

Re: Request for emergency release of 38,000 acre feet of stored debit water held for Texas under Article VI of the Rio Grande Compact ("Compact")

Dear John:

This letter responds to your request to approve an emergency release of approximately 38,000 acre-feet of stored debit water retained by New Mexico in El Vado Reservoir under the Compact.

While Texas is not responsible for the silvery minnow, Texas understands that without the emergency releases of the stored debit water held for Texas in El Vado and other upstream reservoirs, the silvery minnow survival would be seriously impacted, possibly putting the Biological Opinion requirements in jeopardy. In addition, without the requested releases, New Mexico farmers in the middle Rio Grande would suffer extreme hardships and crop losses. Texas also understands that once released, this water is under control of New Mexico, so the State's cooperation is necessary to optimize the releases for these purposes.

Texas consents to your request for the release of stored debit water subject to the following conditions:

- only water that is necessary for purposes of saving the silvery minnow and assisting the farmers be released, and the water is conserved to the extent possible;

- irrigation diversions are taken as far downstream as possible to allow water to stay in the river further downstream to protect the silvery minnow and other wildlife;
- water is released only during dry periods, such that if the drought recedes and runoff occurs during this time period, the releases would stop to retain the debit water in the upstream reservoir for later release to Texas;
- irrigation return flows and drainage are directed back into the river to assist with the silvery minnow survival;
- any other water (such as San Juan-Chama water) that may become available is used first and/or to augment the debit releases; and
- any unreleased debit water will be available for release under Article VIII of the Compact in 2021.

As stated in Commissioner Rein's letter dated July 16, 2020, the releases and actions in this matter are not a concession of any position taken by the respective states regarding Article VI issues.

Sincerely,



Pat Gordon  
Texas Rio Grande Compact  
Commissioner

# **Rio Grande Compact Commission**

## **81<sup>st</sup> Annual Meeting**

**November 12, 2020**

Webcast from Santa Fe, New Mexico

Chairman Simpson called the 104<sup>th</sup> (81<sup>st</sup> Annual) Meeting of the Rio Grande Compact Commission to order on November 12, 2020, at 10:00 A.M. He welcomed the participants, numbering over 70, to the meeting being held via a webcasting platform. The virtual format of the meeting, which was required due to the coronavirus pandemic, was then approved by the Commission.

Each member of the public was able to view ten people on the screen, including the Rio Grande Compact Federal Chairman and the Commissioners, Engineer Advisers, and Legal Advisers representing New Mexico, Colorado and Texas.

Commissioner Kevin Rein of Colorado introduced Craig Cotten, Engineer Adviser, and Chad Wallace, Legal Adviser, for the State of Colorado. Commissioner Pat Gordon introduced Suzy Valentine, Engineer Adviser, and Priscilla Hubenak, Legal adviser, for the State of Texas. As host of the virtual meeting, Commissioner John D'Antonio then introduced Page Pegram, Engineer Adviser, and Chris Shaw, Legal Adviser, for the State of New Mexico.

The agenda for the meeting was approved by the Commission and was posted on the New Mexico Interstate Stream Commission (NMISC) website at [https://www.ose.state.nm.us/Compacts/RioGrande/isc\\_RioGrande.php](https://www.ose.state.nm.us/Compacts/RioGrande/isc_RioGrande.php).

Next, the Engineer Adviser for New Mexico, Page Pegram, gave the Engineer Advisers' Report. The full report was also posted on the New Mexico website, and Ms. Pegram presented key excerpts from the Report.

She reported that the Engineer Advisers to the Rio Grande Compact Commission met in Albuquerque, New Mexico, on February 7, 2020, and between March 2 and March 6, 2020, to receive reports; prepare the 2019 Rio Grande Compact (Compact) water accounting; discuss continuing and new issues in preparation for the 2020 annual meeting of the Rio Grande Compact Commission (Commission); and prepare the Engineer Advisers' Report.



The Engineer Advisers received the participation of the U.S. Geological Survey (USGS), the U.S. Bureau of Reclamation (Reclamation), the U.S. Army Corps of Engineers (Corps), the U.S. Bureau of Indian Affairs (BIA), the International Boundary and Water Commission (IBWC), and the U.S. Fish and Wildlife Service (Service) at the meetings. The agencies each presented information about their specific water-related activities in the basin during the previous calendar year.

Regarding Compact accounting, the Engineer Advisers reviewed the streamflow and reservoir storage records and other pertinent data for the Upper Rio Grande Basin during calendar year 2019 and were again unable to reach a consensus on the accounting. The lack of consensus arises from a disagreement that began in 2011 amongst the Texas Engineer Adviser and the New Mexico and Colorado Engineer Advisers on the release of Credit Water by Reclamation from Elephant Butte Reservoir in late summer of 2011. As a result, the Engineer Advisers have not reached consensus on how to finalize the 2011 through 2019 Compact Delivery Tables for Colorado and New Mexico and the Release and Spill from Project Storage Table.

For 2019, as in previous years, each of the Engineer Advisers developed accounting methods described in the addenda to the Engineer Advisers' Report. At its 2019 meeting, the Commission did not approve any of the proposed accounting methods. In 2020, the Engineer Advisers used the accounting methods they individually prepared to carry forward Compact accounting for the 2019 calendar year.

As described in the New Mexico Engineer Adviser's addenda in previous years, the use of accounting methods 1 and 2 had an impact on the timing of Article VII storage restrictions and upstream storage operations. In 2019, Article VII timing was different for both accounting methods. By method 1 (Reclamation and Texas), Article VII restrictions were lifted on May 12, 2019, and by method 2 (New Mexico and Colorado), Article VII restrictions were lifted on May 11, 2019.

New Mexico began 2020 with an Accrued Debit. In 2020, New Mexico stored native Rio Grande water, retained water in storage in upstream reservoirs to the extent of its 2020 Accrued Debit and may release all or part of this stored water after November 1, 2020, for delivery to Elephant Butte Reservoir.

Regarding the Elephant Butte Delta Channel Project, during the 2019 snowmelt runoff, flows in the Delta Channel exceeded the design capacity, resulting in overbanking and erosion of spoil berms. Several breaches in the project spoil berms occurred during the snowmelt runoff and two distinct sediment plugs formed. A breach on the east side of the channel was discovered

early during snowmelt runoff, and Reclamation crews were able to mobilize and make necessary repairs.

During September, October, and November of 2019, the NMISC construction contractor repaired spoil-bank breaches and excavated one of the sediment plugs. They also performed other in-channel maintenance, sandbar devegetation and access road grading throughout the Delta Channel Project area. The second sediment plug was located in a stretch of the Delta Channel project area that at the time of the maintenance operations was within the active pool of the reservoir and thus not excavated.

On relinquishment updates, the total amount of Accrued Credit relinquished by Colorado since 2013 is 3,000 acre-feet. Between 2013 and 2019, Colorado stored a total of 2,068 acre-feet of relinquished water in Platoro Reservoir. Colorado did not store any relinquished water in 2019, which leaves a balance of 932 acre-feet in Colorado's relinquishment account.

The total amount of Accrued Credit relinquished by New Mexico since 2003 was 380,500 acre-feet. Four hundred acre-feet of relinquished water was stored in El Vado Reservoir in 2019 by Reclamation on behalf of the State of New Mexico. Relinquishment-water storage to date totals 288,728 acre-feet, leaving a balance of 91,772 acre-feet available to be stored in future years when Article VII storage restrictions are in effect.

On gaging station reviews, the USGS also reported that they reviewed and approved the 2019 Rio Grande below Caballo Reservoir streamflow gage (#08362500) flow records developed by Reclamation, and that all necessary documentation was provided. The USGS reported that the record accuracy looked good, in large part due to the high number of measurements made at the gage (63 in total).

In 2019, Reclamation was able to utilize the Acoustic Doppler Velocity Meter (ADVM) to collect data for the entire irrigation season. However, this data was not used in the development of the records because Reclamation is continuing to evaluate quality control methods for the ADVM data. The USGS stated that once the quality control issues have been resolved, measurement quantity could be reduced by fully utilizing the ADVM installed at the site. The USGS also reported that they ran levels in cooperation with Reclamation in 2019 to verify the gage datum at the site.

At the 2020 pre-Engineer Advisers' meeting, Reclamation stated that they are in the process of relocating the Rio Grande below Caballo Reservoir gage (#08362500) to the opposite side of the river and approximately 100 feet upstream. Reclamation stated that the change in elevation between the two gage locations was calculated to be 0.008 feet, and they will run the gages concurrently to compare the discharge records for the two gage locations.

Reclamation is currently coordinating with the USGS and is now anticipating that relocation work will be completed sometime during 2020. Reclamation also reported that they had investigated the feasibility of flow meters in the outlets of Caballo Reservoir but had decided not to install them due to the high costs.

At their 2018 meeting, the Engineer Advisers requested that Reclamation prepare a report on the cause of discrepancies between lake elevation surveys and the stage discharge recorder and stressed the critical nature of this issue. Reclamation has not yet provided the requested report since they are still evaluating the issue. NMISC and Reclamation will continue to perform side-by-side surveys at select times during 2020 to ensure the accuracy of the reservoir elevation data.

On gaging station operating costs, in recent years, the Engineer Advisers and Compact Commissioners have expressed concern over the large differences in costs between what Reclamation charges to operate the gage below Caballo Reservoir as compared to what the Colorado Division of Water Resources (CDWR) and USGS charge on average for other Compact gages. The three Compact states split the costs of their operations in support of the Compact equally, including operation and maintenance of the Compact gaging stations.

In the last few years, Reclamation has decreased their charged amount for the gage below Caballo Reservoir. However, the charged amount for fiscal year (FY) 2021 rose by approximately 64 percent from FY 2020. This FY 2021 cost charged by Reclamation is over twice as high as the costs charged per gage by CDWR and the USGS. The Engineer Advisers are again concerned with Reclamation's high costs the operation of this gage, and with the large fluctuations in the charged costs year to year.

Regarding snowmelt runoff forecasting, as part of this ongoing effort to increase the accuracy and reliability of the forecasts, unique solutions have been developed. In Colorado, a Doppler radar unit was installed at the Alamosa airport in May of 2019. The main purpose of this radar unit is to capture the snow water equivalent (SWE) precipitation that falls in the upper basin of Colorado in the winter. By using the traditional snow telemetry network (SNOTEL) gaging stations as ground truth stations, this radar better tracks the winter precipitation that occurs throughout the basin, and in turn increases the accuracy of the forecasting models. The radar was operational in the fall of 2019 and is currently being used for the first time for winter precipitation and water supply forecasting.

For the Six Middle Rio Grande Pueblos prior and paramount (P&P) water operations, the Engineer Advisers remain concerned about the procedures for quantifying storage, release, and delivery of water for the P&P lands of the Pueblos. The Texas Engineer Adviser remains

concerned about the storage of native Rio Grande water in El Vado Reservoir by Reclamation when the storage restrictions of Article VII are in effect.

For Rio Grande Project (Project) operations, there was a final 2019 in-season allocation of 705,496 acre-feet, including Mexico's full allocation of 60,000 acre-feet.

Please note that this number was the July number, and was later revised to 726,525 acre-feet. During 2019, Mexico's diversion allocation was increased to 60,000 acre-feet, and 39,935 acre-feet were delivered due to the late start of the irrigation season. Reclamation reported that Project releases from Elephant Butte Reservoir started on May 2, 2019 and continued through October 7, 2019.

The USGS reported that the total annual flow at the gage below Elephant Butte Dam was 468,896 acre-feet. Elephant Butte Reservoir storage peaked at 577,261 acre-feet on July 14, 2019; and the storage at Caballo Reservoir peaked at 55,947 acre-feet on May 30, 2019.

Releases from Caballo Reservoir for irrigation began on May 24 and lasted until October 12, 2019. Diversions to Mexico began on June 5 and ended on September 30, 2019.

Reclamation also recorded Usable Water in Project Storage, which is Elephant Butte and Caballo Reservoirs combined, was 128,816 acre-feet on January 1, 2019, and 579,377 acre-feet on December 31, 2019.

Usable Water storage rose above 400,000 acre-feet on May 12 and reached a high for the year on July 14 at 607,303 acre-feet, according to Method 1, utilized by the Upper Rio Grande Water Operations Model (URGWOM). Usable Water in Rio Grande Project Storage remained over 400,000 acre-feet through the remainder of 2019.

Implementation of a new area-capacity table for Elephant Butte Reservoir resulted in the total reduction in storage at the spillway elevation of 13,686 acre-feet between the last reservoir survey in 2007, and the 2017 survey. For Caballo Reservoir, the reduction in storage at the top of the flood control elevation was 425 acre-feet for this same period.

Using the new area-capacity tables, the available storage for both reservoirs is equal to the capacity of Elephant Butte Reservoir, which is 2,010,900 acre-feet, minus the amount that Reclamation reserves for operational flood control space, which is 25,000 acre-feet during the October 1<sup>st</sup> to March 31<sup>st</sup> winter period, and 50,000 acre-feet during the summer; plus the capacity of Caballo Reservoir, about 324,509 acre-feet, minus about 100,000 acre-feet for flood control space, for a total of 2,210,409 acre-feet during the winter, and 2,185,409 acre-feet during the summer.

The New Mexico Engineer Adviser expressed concern about continued use of the 2008 Operating Agreement for the Rio Grande Project. These concerns include changes in Reclamation's reported annual allocation and delivery values since 2008. Additionally, the New Mexico Engineer Adviser expressed concern over operational and administrative changes that have been made under the 2008 Operating Agreement.

Representatives of the USGS, Reclamation, the Corps, the Service, and IBWC presented additional information to the Engineer Advisers in the form of written reports. Ms. Pegram did not go over these reports in detail but reminded everyone again that the reports of the federal agencies are available on the New Mexico website.

Regarding the Rio Grande silvery minnow, the Service and Reclamation reported on the 2019 monitoring results for the silvery minnow using the October catch per unit effort (CPUE) data typically used to report long-term trends and relative abundance. The 2019 October CPUE survey for the Middle Rio Grande resulted in an estimated silvery minnow density of 3.41 silvery minnow per 100 square meters. A large increase from the 2018 CPUE of 0.09 silvery minnows per 100 square meters. The Service acknowledged the impressive efforts in 2018 by water managers to ensure survival of the species, and they made a determination that the low 2018 CPUE will not be counted against the proposed action in the 2016 Biological Opinion (BO). The Service recognized that the low density was a result of climatic conditions, and not of the 2016 BO partner agencies' actions.

On Middle Rio Grande Project channel maintenance, Reclamation took advantage of the formation of a sediment plug within the boundaries of the Bosque del Apache Wildlife Refuge (BDANWR) and the San Acacia Reach during the 2019 spring snowmelt runoff to move forward with the Pilot River Realignment Project previously in the planning stages. The 2019 sediment plug formed in the exact area that a sediment plug formed in 2017 was subsequently excavated by Reclamation.

The New Mexico Engineer Adviser had previously expressed concern over the impact that the Pilot Project might have on water delivery efficiency into Elephant Butte Reservoir, and Reclamation had agreed to reevaluate their project design to potentially address these concerns. The emergency nature of the 2019 sediment plug and Reclamation's decision to take advantage of the conditions on the ground to implement their Pilot Project meant that Reclamation, for environmental compliance reasons, had to implement their original design.

Reclamation had agreed to work with NMISC to monitor the post-construction conditions of the Pilot Project, and to conduct additional work as necessary to ensure a sufficient water delivery.

Regarding the southwestern willow flycatcher and yellow-billed cuckoo, Reclamation and others continued to conduct surveys and monitoring for the flycatcher during the summer along 200 miles of the Rio Grande, mainly from the San Acacia Diversion Dam to Elephant Butte Reservoir, and some select areas near Caballo Reservoir.

In total, 440 flycatcher territories were documented from Albuquerque to the Texas state line. The majority of flycatchers were present in the San Marcial and Elephant Butte Reservoir area with a total of 294 territories. Reclamation has historically conducted surveys for the cuckoo from Belen to El Paso, Texas. In 2019, however, the surveyed area only extended from San Acacia Diversion Dam to El Paso. Within this area, an estimated 96 breeding territories of 429 individual detections were documented.

As with the flycatcher, the San Marcial and Elephant Butte Reservoir pool had the highest concentration of cuckoo territories. A new, revised proposal for critical habitat for the cuckoo was announced in February 2020. The final designation of critical habitat was anticipated to be announced in the Federal Register on or before August 2020.

The Service stated that they are strongly considering excluding the Elephant Butte and Caballo Reservoirs, and areas downstream from the critical habitat designation because of the management plans being developed by Reclamation and IBWC.

The Service also reported that they are working on a 12-month finding regarding the 2017 petition to delist the cuckoo, which was based on the petitioners' opinion that the original listing of the species was in error. The conclusion of the analysis is expected in the Federal Register in 2020.

Regarding IBWC activities, they estimated that 450,000 to 490,000 cubic yards of silt is deposited into the Rio Grande Canalization Project reach annually. This results in sediment plugs, island formations, raised riverbeds, increased flooding risks, and inhibited irrigation return flows. The Canalization Reach is defined as 105 river miles from Percha Dam to El Paso.

Prior to 1990, IBWC removed 250,000 to 300,000 cubic yards of sediment per year. During 2019, IBWC removed over 422,000 cubic yards, including 292,000 cubic yards as part of canalization, and 130,000 cubic yards for rectification. They have used outside contracts to remove about 1,188,000 cubic yards in 2020.

And finally, for Engineer Adviser recommendations, Reclamation has recently conducted surveys to develop a new area-capacity table for Elephant Butte Reservoir. These tables account for the sediment buildup within the reservoir and the related loss of storage. They also are used to determine the current total storage volume of the reservoir. The Rio Grande Compact Rules

and Regulations describe the now-outdated total storage volume in the reservoir. The Engineer Advisers recommend that the Commissioners direct the Engineer Advisers to review the best method to incorporate the new tables developed by Reclamation for Elephant Butte Reservoir into the Compact Rules and Regulations.

Signed by Craig W. Cotten, PE, the Engineer Adviser for Colorado; Page Pegram, the Engineer Adviser for New Mexico; and Suzy Valentine, PE, the Engineer Adviser for Texas, the main Report was approved by the Commissioners, but not the addenda.

Mr. Chris Shaw provided the report from the Legal Committee comprised of the Legal Advisers of each state.

During the 80<sup>th</sup> Rio Grande Compact Commission meeting, the Compact Commission directed the Legal Committee to review two legal matters and directed the Committee to provide its response prior to the 2020 Engineer Adviser meetings.

The two legal questions the Commission requested the Committee to review are as follows: 1) The Engineer Advisers recommend that the Commissioners direct the Legal Committee to review the Federal District Court ruling in the WildEarth Guardians v. U.S. Army Corps of Engineers, and provide legal opinions on the implications and impacts, if any, to the Commission and the Compact; and 2) that the Legal Committee study the request for future deviations at El Vado for endangered species as it affects the Compact.

To that end, the Committee met telephonically and conferred with the Engineer Advisers as directed on Friday, February 28<sup>th</sup> to review the two legal questions.

On the first question, the Committee agreed the WildEarth Guardians v. U.S. Army Corps of Engineers case, in its current status, would not impact the Commission or the Compact.

On the second issue, the Committee studied the issues related to the deviations at El Vado but did not reach consensus on any recommended actions that should be taken regarding whether a future request for deviations at El Vado for endangered species would affect the Compact.

The Committee agreed to advise their respective Commissioners about this report and to report findings to the Compact Commission during the Annual Compact Meeting.

The Commissioners approved the report from the Legal Committee.

The reports from the Commissioners began with Commissioner Rein from Colorado. He reported that 2019 was a good water year for Colorado, with significantly above average flows



on the Rio Grande and Conejos River. The Rio Grande had the highest annual flow since 1997 with a total of 929,000 acre-feet, or 145 percent of the average flow. The Conejos River also had the highest annual flow since 1995 with 195,000 acre-feet, or 128 percent of the average.

However, the flows dropped to near or below normal in the late summer and fall which led into a much drier 2020 year, with significantly below average flows on the Rio Grande and Conejos rivers. In 2020 the Rio Grande recorded 380,000 acre-feet which is only 59 percent of the average. On the Conejos, there was an annual flow of 165,000 acre-feet, which is 51 percent of average. All the streams of the Upper Rio Grande Basin experienced a very low-flow year, with flow levels dropping off quickly in the summer. Water users on all of the valley streams ended the irrigation season around November 1<sup>st</sup>. The recharge canals were still running but would shut down soon.

In November, the current climate conditions were improving due to recent storms in southern Colorado and the Rio Grande Basin which was well above average. Southern Colorado was seeing more early precipitation than northern Colorado.

Commissioner Rein then discussed the groundwater administration in Colorado, including the rules and regulations which became final in 2019. The new rules require that the groundwater users replace the impacts to the streams. Colorado has actively curtailed surface water usage to ensure that they meet their Compact obligations. One of the main objectives of requiring groundwater users to replace any impacts to the streams is to ensure that the surface water users are not injured by groundwater withdrawals.

The rules rely on the Rio Grande Decision Support System Groundwater Model to determine impacts to the surface water users. The requirement to replace any impacts to the surface water users goes into effect on March 15, 2021. There is also a sustainability component to the rules to face the continuous challenge of climate change. If the well owners are not within a fully functioning subdistrict or have an augmentation plan by March 15<sup>th</sup>, they will not be allowed to pump.

Commissioner Rein described the seven subdistricts. Subdistrict 1 has been in operation for nine years and has an approved plan. Three other subdistricts are in their first year of operations and have approved annual replacement plans. They are also operating. There are three additional subdistricts which have finalized their plans, and they will also be able to begin operating by the deadline.

Covid restrictions in Colorado are impacting the budget for the Division of Water Resources. DWR employees are generally working from home. Recent work on automation and digital materials has helped with this effort. Impacts to travel continue to be a challenge.



Commissioner Rein concluded his report, and there were no questions.

Commissioner Pat Gordon provided a report for Texas. He thanked the participants for their work and did not need to make comments on Project operations already covered by the Engineer Advisers' Report.

He did raise the issue from 2019 concerning the San Juan-Chama water losses and how they were calculated in the Upper Rio Grande Water Operations Model (URGWOM). He acknowledged the April 2020 meeting between the Corps and the Engineer Advisers to discuss this concern and Reclamation's analysis in 2011 of the evaporation losses. Commissioner Gordon also expressed continued concerns about the dynamics between the San Juan-Chama water and native Rio Grande water loss calculations and is looking forward to developing a better understanding of that process.

Commissioner Gordon also commented about the Bonita Lateral flows, stating that he would like additional information from Reclamation to better understand how these flows work. Texas does not believe that the water taken from Elephant Butte and Caballo via the Bonita Lateral is a delivery of Compact water to Texas as it is under the accounting. Even though it is not a lot of water, he looks forward to a more detailed explanation from Reclamation in 2021 regarding the Bonita Lateral.

A third concern expressed by Commissioner Gordon was related to the applications for new appropriations of water in the Lower Rio Grande, and he looks forward to working with the New Mexico State Engineer regarding this issue.

The next concern was with the New Mexico Copper Mine application for the transfer of water rights from Santa Teresa Capital, which is far away from the mine. Therefore, there could be direct impacts to the flows of the Rio Grande and water in Caballo Reservoir, in addition to environmental impacts.

Commissioner Gordon also commented on the Caballo storage which began 2020 at 26,938 acre-feet and ended up at an even higher level at 33,872 acre-feet. Elephant Butte started significantly higher but ended up at a very low level. He expressed concerns about storing that much water in Caballo during a dry year like 2020, even though Reclamation may be wanting to protect artifacts, etc.

As a final comment, Commissioner Gordon thanked the IBWC for their sediment removal work. They had done an enormous amount of work in 2020, and he wanted them to know that he appreciated their efforts and looked forward to it continuing.

Commissioner John D’Antonio provided the report for the State of New Mexico. He thanked attendees and particularly Page Pegram, his Engineer Adviser, and Linda Tenorio for organizing the virtual meeting. Commissioner D’Antonio reported that New Mexico faced hydrologic extremes within the Rio Grande Basin since he returned as a Commissioner, with both an abundance of water, and extreme water shortages during those past two years. He described the many water-related issues and challenges being addressed in New Mexico, including water rights implementation and negotiations, water shortages, water planning efforts, alternative administration, mainly in the form of shortage sharing agreements, and interstate and intrastate litigation.

He then provided a hydrology review for calendar year 2019, which would normally have been given in March. The 2018 to 2019 winter saw well above average snowpack, and snowmelt runoff within the Rio Grande Basin in New Mexico was extremely high. However, the monsoon activity was below average for 2019. The Otowi index supply for 2019 was 1.36 million acre-feet, 17<sup>th</sup> highest on record, compared to 312,000 acre-feet in 2018.

New Mexico’s delivery obligation to Elephant Butte for 2019 was 957,400 acre-feet, with an actual delivery of about 914,002 acre-feet. New Mexico began 2019 with an Accrued Credit of 5,400 acre-feet. However, under the accounting Method 2 which is used by New Mexico and Colorado, New Mexico ended 2019 with an under-delivery, and Accrued Debit of 38,800 acre-feet.

Article VII storage restrictions were lifted on May 11, 2019, when Usable Water and Project Storage rose above the 400,000-acre-foot trigger, and they remained lifted for the duration of 2019.

Inflow into El Vado Reservoir during 2019 was well above average, and the reservoir reached its maximum allowable storage of approximately 115,000 acre-feet. This is lower than the capacity of the reservoir, but it is a current maximum until dam safety repairs can be made for El Vado Dam. The Middle Rio Grande Conservancy District (MRGCD) was able to store more than 100,000 acre-feet in El Vado Reservoir by the end of the 2019 snowmelt runoff. Because 2019 was a high runoff year, New Mexico's delivery obligations to Elephant Butte were also very high. Coordination among water managers was necessary to move stored water, primarily in November and December, to Elephant Butte to minimize New Mexico’s Accrued Debit. The two sediment plugs in the river channel at BDANWR and the Delta Channel, complicated this operation. Commissioner D’Antonio thanked everyone who assisted with this effort for their quick actions to mitigate the plugs.

Commissioner D’Antonio then discussed the year 2020 conditions and operations. The year 2020 was an extremely poor water year, as opposed to 2019. Even though Article VII

restrictions were lifted, the 2020 snowmelt runoff inflow to El Vado Reservoir from March to July were only about 80,000 acre-feet, or 36 percent of average.

The Otowi index supply for 2020 was predicted to be only 410,000 acre-feet, much lower than in 2019. Due to the Accrued Debit status for 2020, Commissioner D'Antonio directed Reclamation, MRGCD, the City of Santa Fe, to comply with Article VI of the Compact and retain the amount of the 2019 Debit Water to be stored, primarily in El Vado Reservoir.

By mid-July, MRGCD had nearly exhausted its irrigation storage and requested consent of the Commission to release the Debit Water that was being retained in El Vado Reservoir for irrigation and endangered species purposes. He reached out to the other commissioners regarding the emergency request, and on July 16, 2020, Commissioner Gordon consented with conditions to allow the release. Commissioner Rein did not object.

Commissioner D'Antonio expressed his gratitude to the commissioners from Texas and Colorado for their cooperation in allowing the emergency release of the retained Debit Water which both benefitted the MRGCD and endangered species. Commissioner D'Antonio issued a State Engineer Order on July 17, 2020, which authorized the release including the requirements specified by the Texas commissioner in his consent. The releases began on July 18<sup>th</sup> and ended on September 7, 2020. During that period, 31,892 acre-feet were released, with about 3,400 acre-feet remaining in storage. He requested that the Engineer Advisers coordinate on releasing the remaining Debit Water at the earliest practical time for delivery into Elephant Butte Reservoir.

Looking forward to the 2021 calendar year, New Mexico may carry an Accrued Debit of 90- to 100,000 acre-feet. The MRGCD will need to work closely with the New Mexico staff to deliver more water in 2021. This could include delivering as much water as possible during snowmelt runoff and delaying the start of the 2021 irrigation season, as well as delaying or foregoing any storage operations.

Commissioner D'Antonio stated that he would provide a copy of the understanding regarding the emergency release and the State Engineer Order to be incorporated into the report of the proceedings (see two documents attached). He also recognized Mike Hamman, Chief Executive Officer and Chief Engineer for the MRGCD and asked him to say a few words.

Mr. Hamman described the letter from the MRGCD Board chairman, Ms. Karen Dunning, expressing their extreme gratitude for the actions of the Commission that allowed them to avoid the serious losses in agriculture production as well as meeting the commitments for the BO partners to protect the endangered species in the reach of the Middle Rio Grande. He stated that the MRGCD is dedicated to do their part in the equitable distribution of the limited water resources in the Rio Grande Basin. Therefore, they plan to work closely with the State in

developing their operational plans for 2021 to do everything possible to erase the debit situation in New Mexico.

Commissioner D'Antonio then continued his report and reviewed the efforts by New Mexico to conserve and assist in the recovery of threatened and endangered species and the status of those commitments. These include efforts on behalf of the Rio Grande silvery minnow, the southwestern willow flycatcher, the yellow-billed cuckoo, and the New Mexico meadow jumping mouse.

New Mexico staff have been assisting with fish rescue efforts, silvery minnow egg collections, fish recovery studies, research on spring runoff and reservoir modifications and monitoring floodplain use by the silvery minnow. Additionally, the Los Lunas Silvery Minnow Refugium has produced over 10,000 fish to stock into the river in 2019. About \$1 million is allocated annually to accomplish New Mexico's endangered species objectives.

Water management in 2019 was focused on flood control, levee protection, and floodplain monitoring. Significant and prolonged inundation of restored floodplains occurred, and increased fish habitat provided an opportunity for the silvery minnow population to bounce back somewhat after 2018. Commissioner D'Antonio provided information on fish densities and cautioned that with another dry year in 2020, the fish number could drop again below the threshold of 0.3 fish per 100 square meters, as they did in 2018.

Accomplishments in 2019 included completion or nearly so of several of the Lower Reach Plan projects, including the BDANWR pilot river realignment, the MRGCD Socorro Hub and Delta Channel maintenance. The pilot realignment construction was expedited to circumvent the sediment plugs that occurred in the adjacent main channel.

Many other Lower Reach Plan projects were in the planning or environmental compliance stage. Numbers of southwestern willow flycatchers have continued to increase in the Middle Rio Grande, specifically in the Elephant Butte Reservoir delta. A total of 426 territories were detected in 2019, mostly below San Marcial. This is the highest number since 2000. There have also been flycatcher numbers in the Caballo to El Paso section of the Rio Grande. Commissioner D'Antonio concluded by reporting that progress continues to be made to the satisfaction of the Service on many conservation measures in the 2106 BO.

New Mexico continues to gather data and evaluate the potential depletions that could affect Compact deliveries and impact the ability to administer the State's water. The losses are of concern to New Mexico as vegetation within the river channel trends upwards. This could become even more concerning as climate change models predict higher temperatures in the southwest in the future.

Commissioner D'Antonio also responded to Commissioner Gordon's comments about continued groundwater applications on the Lower Rio Grande, stating that New Mexico would continue to address those. Since 1980, New Mexico has offset the effects of any groundwater pumping and transfers. When they look at a change of place and purpose of use, they always look at the depletions. Commissioner D'Antonio stated that there were no new depletions within the Lower Rio Grande and that the basin was declared in 1980. He said that they will continue to offset any depletions as they have for the last 40 years. That concluded the report by Commissioner D'Antonio, and there were no further questions.

Normally, the federal agencies would provide verbal presentations regarding their activities and summarizing their written reports. Because of the meeting format, there would be no verbal presentations for this meeting, and the reports are provided on the NMISC website for the participants to review.

Suzy Valentine presented the cost of operations for FY 2019, beginning July 1, 2018 and ending June 30, 2019, of \$200,403. The cost borne by the United States was \$51,594, and the cost which was borne equally by each of the three states was \$49,603. The FY 2019 budget report was then approved by the Commission. She also presented the budget for FY 2021, beginning July 1, 2020 and ending June 30, 2021. The total budget amount was reported as \$228,043, the cost to be borne by United States was reported as \$74,017, and the cost borne equally by each of the three states is \$51,342. However, an error was later discovered: the correct total budget was \$228,229, and the correct cost borne by the United States was \$74,203. These corrections will be reported as errata in the 2020 Report of the Rio Grande Compact Commission. The Commissioners then approved the FY 2021 budget report.

Craig Cotten presented the cooperative agreement with the USGS which had been signed and approved by the Commissioners previously in summer of 2020. The Cooperative Agreement for Investigation of Water Resources with the USGS for the period July 1, 2020, to June 30, 2021 includes the USGS funding \$6,426, and each of the states, Colorado, New Mexico, and Texas, paying \$4,929.

The next agenda item was approval of the 2019 meeting minutes for the 80<sup>th</sup> Annual Meeting. A copy of the minutes was also provided on the NMISC website. The minutes were approved with no changes or amendments.

Under other business on the agenda, Chairman Simpson described a letter he received from the Corps on September 3, 2019, requesting approval of a temporary deviation from the Water Control Plan in the operation of Cochiti Lake and Jemez Canyon Dam. The Water Resources Development Act of 2018 authorized the temporary deviation for five years, which requires approval from the Commission. The Corps was requesting a written statement of

approval from the Commission for them to restart the deviation. Chairman Simpson had prepared a letter after consulting with the Commissioners and Engineer Advisers which stated that the states had concerns about the reoperation of the deviation as requested and suggested that the Corps take efforts to address the concerns before seeking approval again. The letter will be delivered to Lieutenant Colonel Patrick Stevens.

Commissioner D'Antonio expressed concerns about restarting the deviation now because it would put nearly 200 archaeological sites in the Pueblo of Cochiti at significant risk from the impacts from inundation and wave action that could be created. There are also concerns with depletions that are associated with the deviations which have not been identified. He suggested, as included in the letter, that they work with the Corps, utilizing the State of New Mexico's 50-year water plan, to do a cautionary study involving all the stakeholders within the basin. Commissioner D'Antonio is concerned how the deviation could affect the Pueblos and others, and wants to ensure sufficient water planning is driven from stakeholders and driven upwards, which will take into consideration all the stakeholders within New Mexico. He concluded by stating that he looks forward to working with the Corps regarding the State's planning effort. New Mexico has submitted a letter of intent for this purpose.

Page Pegram presented the letters to the governors to be signed by each of the Commissioners. Since the Commissioners were meeting remotely, the letters would be routed to each Commissioner, and once signed, originals would be sent to each state for distribution to their governor and for their files.

The 81<sup>st</sup> Annual Meeting of the Rio Grande Compact Commission was then adjourned.

# **RIO GRANDE COMPACT COMMISSION**

**COLORADO**

**TEXAS**

**NEW MEXICO**

November 12, 2020

## **UNDERSTANDING REGARDING THE EMERGENCY RELEASE OF COMPACT DEBIT WATER**

In 2020, New Mexico retained approximately 38,000 acre-feet of water in storage to the extent of its current debit. Article VI of the Rio Grande Compact (Compact) states in relevant part: “The Commission by unanimous action may authorize the release from storage of any amount of which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter.”

Due to extreme drought conditions in the Rio Grande basin during 2020 there was insufficient flow of native water to satisfy the needs of all surface water users, including, middle Rio Grande valley farmers, pueblos, acequia’s and critical habitat needs of listed species.

In June 2020, the Middle Rio Grande Conservancy District (District) inquired of the New Mexico Engineer Advisor whether New Mexico would consider releasing retained debit water in order to sustain flow in the river to provide minimum irrigation water for farmers and to maintain critical habitat for listed endangered species pursuant to the terms of the 2016 Final Biological Opinion for Non-Federal water Management and Maintenance Activities on the Rio Grande.

Release of this water would provide an approximately 60-day supply of a minimum amount of water to help middle Rio Grande farmers as well as provide flows to maintain critical habitat for the listed Rio Grande silvery minnow.

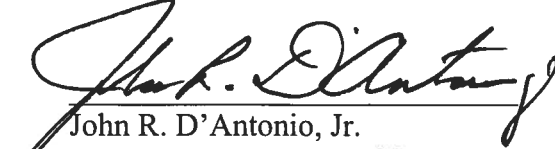
On or about July 6, 2020 the Rio Grande Compact Engineer Adviser and Legal Advisor reached out via email to their respective counterparts in Texas and Colorado, requesting they consult with their Commissioners and Legal Advisors to consider an emergency release of approximately 38,000 acre-feet of water New Mexico had retained in storage.

On or about July 16, 2020 the Compact Commissioner for the State of Texas consented with conditions, via email to the release of stored debit water and the Compact Commissioner for the state of Colorado via email did not object to the release of water New Mexico retained.

On or about July 17, 2020 the New Mexico State Engineer entered Order #189 to administer the diversion and use of released Compact debit water and on or about July 24, 2020 the Office of the State Engineer District 1 Water Master (Water Master) entered an Agreement with the District outlining the administration of Compact debit water in order to avoid the unauthorized diversion and depletion of such water and in such a way that water remaining in El Vado storage may be available for release under Art. VIII of the Compact.

November 12, 2020

This memorializes the 2020 action taken to release water New Mexico retained by reason of accrued debits as described herein.



John R. D'Antonio, Jr.  
*Commissioner for New Mexico*



**OFFICE OF THE STATE ENGINEER**

**STATE OF NEW MEXICO**

**IN THE MATTER OF THE NEED FOR EMERGENCY        )  
ADMINISTRATIVE ACTION IN THE ADMINISTRATION )  
OF RELEASED RIO GRANDE COMPACT DEBIT WATER )       Order No. 189**

**ORDER IMPLEMENTING THE EMERGENCY RELEASE OF APPROXIMATELY  
38,000 ACRE-FEET OF WATER NEW MEXICO RETAINED PURSUANT TO  
ARTICLE VI OF THE RIO GRANDE COMPACT**

**WHEREAS**, due to extreme drought conditions in the Rio Grande basin there currently is insufficient flow of native Rio Grande water to satisfy the needs of all surface water users, including Middle Rio Grande Valley farmers, Pueblos, acequias, and the critical habitat needs of listed endangered species.

**WHEREAS**, Article VI of the Rio Grande Compact (Compact) states in relevant part:

In the case of New Mexico, the accrued debit shall not exceed 200,000 acre-feet at any time, except as such debit may be caused by holdover storage of water in reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and San Marcial. Within the physical limitations of storage capacity in such reservoirs, New Mexico shall retain water in storage at all times to the extent of its accrued debit.

**WHEREAS**, in early 2020, New Mexico retained approximately 38,000 acre-feet of water in storage to the extent of its current accrued debit in accordance with Article VI of the Compact.

**WHEREAS**, Article VI states further: "The commission by unanimous action may authorize the release from storage of any amount of water which is then being held in storage by reason of accrued debits of Colorado or New Mexico; provided, that such water shall be replaced at the first opportunity thereafter."

**WHEREAS**, on Monday July 6, 2020 the New Mexico Rio Grande Compact Engineer Adviser and Legal Advisor reached out via email to their respective counterparts in Texas and Colorado, requesting they consult with their Compact Commissioners and Legal Advisors to consider an emergency release of approximately 38,000 acre-feet of water New Mexico has retained in storage to the extent of New Mexico's current debit in accordance with Article VI of the Rio Grande Compact.

**WHEREAS**, on July 16, 2020 the Compact Commissioner for the State of Texas consented with conditions to the release of stored debit water and the Compact Commissioner for the State of

Colorado did not object to the release (See, July 16, 2020 letters from the States of Colorado and Texas attached hereto as exhibit "A").

**WHEREAS**, under NMAC 19.25.13.43 the State Engineer may determine that the need for water rights administration in a specific district is so urgent that water rights administration may proceed directly under an order issued by the State Engineer pursuant to Section 72-2-8(B)(3).

**WHEREAS**, there is an urgent need for water rights administration in the Middle Rio Grande to sustain flow in the river to provide minimal irrigation water for farmers and to maintain critical habitat for listed endangered species pursuant to the terms of the 2016 Final Biological Opinion for Non-Federal Water Management and Maintenance Activities on the Middle Rio Grande.

**WHEREAS**, release of this debit water would provide up to a 60-day supply to help Middle Rio Grande farmers as well as provide flows to maintain critical habitat for the listed Rio Grande silvery minnow.

**WHEREAS**, due to extreme drought conditions in the Rio Grande Basin released debit water will most likely not reach Elephant Butte Reservoir. If significant rains do not occur this summer to contribute flow to Elephant Butte Reservoir, New Mexico will be in a larger Accrued Debit under the Compact in 2021. Such status would significantly and potentially negatively impact next year's reservoir storage and release operations on the Rio Chama.

## **ORDER**

### **IT IS ORDERED that:**

1. Water currently retained in storage to the extent of New Mexico's current debit in accordance with Article VI of the Compact may be released for the purposes specifically provided below.
2. The Water Master shall administer the diversion and use of released debit water to avoid the unauthorized diversion and depletion of such water.
3. The Water Master shall administer the diversion and use of released debit water to conserve such water to the greatest extent possible.
4. The Water Master shall administer the diversion and use of released debit water as necessary only for the following purposes: (1) providing a minimum amount of irrigation water to MRGCD farmers to reduce economic harm to them; (2) sustaining wetted habitat for the endangered Rio Grande silvery minnow; (3) preserving the recreational and aesthetic benefits of the Rio Grande for the public; and (4) assisting water users upstream of the Rio Grande Middle Valley on the Rio Chama and on the Rio Grande downstream of Ohkay Owingeh.
5. To achieve these purposes debit water shall be released from El Vado Reservoir under a plan approved by the New Mexico Compact Commissioner in coordination with the Middle Rio


Grande Conservancy District (District) with a 60-day average release of 300 cfs per day and a maximum rate of release of 400 cfs per day.

6. Water shall be released only during dry periods. If rain contributes flow to the river and the drought conditions recede, the debit water release shall be paused or stopped in order to retain debit water in El Vado for later release.
7. Portions of this water shall be used within the river and/or be directed back to the river through irrigation return flows and drainage to assist with silvery minnow survival.
8. Any other water, such as San Juan Chama Project water that may become available, shall be used first and or used to augment debit water releases.
9. Any unreleased water shall be available for release under either Art. VI or Art. VIII of the Compact.
10. These provisions for the administration of released debit water shall automatically expire after the end of the current irrigation season on October 31, 2020.

**EFFECTIVE DATE:** This Order shall become effective upon the signature of the State Engineer.

**WITNESS** my hand and official seal of my office this 17 day of July, 2020.



  
John R. D'Antonio Jr., PE  
State Engineer

Rio de Chama Acequia Association, Inc.

P.O. Box 1163

Española, NM 87532

Honorable Michael J. Melloy  
Special Master, Texas v. New Mexico  
United States Circuit Judge  
111 Seventh Avenue, S.E., Box 22  
Cedar Rapids, IA 82401

Re: Texas v. New Mexico, No. 141, Original: Texas motion to amend

The Rio Chama Acequia Association (“RCAA”) is an association of acequias that irrigate lands on the Rio Chama stream system of the State of New Mexico. The term “acequia” refers both to the canal that delivers water from the stream to lands to be planted, and to the political institution that governs the distribution of water to the *parciantes*, the members of the acequia who have the right to use water from the ditch. “The community irrigating ditch or acequia is an institution peculiar to the native people living in that portion of the southwest which was acquired by the United States from Mexico. It was part of their system of agriculture and community life long before the American occupation.” *Snow v. Abalos*, 140 P. 1044, 1047 (N.M. 1914). In addition, acequia and community ditch associations are political subdivisions of the State of New Mexico. N.M. Stat. Ann. 1978 § 73-2-28 (1965).

The Rio Chama Acequia Association (“RCAA”) is made up of 31 acequias, 21 of which are organized as acequia associations. These acequias serve nearly six hundred families and more than 5,000 irrigated acres located within the mainstream section of the Rio Chama, with flows originating from the base of Abiquiu Dam and joined by flows from Abiquiu Creek, El Rito Creek, Rio del Oso, and Rio Ojo Caliente. The members’ water rights were adjudicated in a Partial Final Judgment and Decree entered in *Aragon*. The majority of the RCAA’s *parciantes* are situated on numerous land grants within the Rio Chama’s mainstream section that have acequias with 18th century priority dates, with the oldest dating back to 1600, the earliest priority acequias in New Mexico.

The RCAA will be substantially impacted by any new restrictions to post-1929 storage above Elephant Butte as it has permitted storage in Abiquiu Reservoir and leased storage in El Vado Reservoir, both of which serve to extend the growing season for our *parciantes*. In addition, by agreement with the Middle Rio Grande Conservancy District, the member acequias of the RCAA are allowed to divert the MRGCD’s water released through Abiquiu Dam under certain low flow conditions when there is insufficient native flow in the river to meet the irrigation diversion requirements of the acequias. If Texas were to prevail on their amended complaint, the MRGCD releases would be reduced and the RCAA’s member ditches would suffer a greatly reduced growing season.

For the reasons set forth above, if Texas is successful in amending their complaint, the RCAA will seek to join the litigation as a party, reopen discovery, and fully protect its interests.

Sincerely,

A handwritten signature in black ink, appearing to read "Darel Madrid". The signature is fluid and cursive, with a large initial "D" and a stylized "M".

Darel Madrid, President  
Rio Chama Acequia Association