December 8, 1940

Julian P. Harrison, Esq.
Rio Grande Compact Commissioner
for the State of Texas,
First National Bank Building,
El Paso, Texas.

Re: Release of Debit Water.

Dear Julian:

At the last meeting of the Rio Grande Compact Commission there was some discussion of the release and delivery of debit water by Colorado and by New Mexico and of the point of measurement of debit water released from storage under the provisions of the Compact. You asked for my opinion then; the following is in confirmation of my statements at that meeting.

ARTICLE VIII of the Compact provides in effect that if the usable water in Elephant Butte and Caballo Reservoirs is less than 600,000 acre feet during any January, both Colorado and New Mexico shall release enough debit water from storage reservoirs to maintain at least 600,000 acre feet in the lower reservoirs until the end of April. The amount released by each is limited by the total accrued debit of each. If the release of part of the debit water is sufficient to fill the project reservoirs to the 600,000 acre foot level, then each state shall release only its proportional part of the total required.

If, for example, New Mexico has an accrued debit of 70,000 acre feet at the end of 1940 and there are only 500,000 acre feet in Elephant Butte and Caballo Reservoirs, you can demand the release of any water in storage in reservoirs in New Mexico built after 1929 up to a total of 70,000 acre feet. New Mexico is entitled to stop releasing water from storage whenever there is 600,000 acre feet in Project storage. If there were 150,000 acre feet in El Vado Reservoir, you could not require the release of more than 70,000 acre feet even though the quantity of water stored in Elephant Butte and Caballo Reservoirs never reached 600,000 acre feet.

In like manner, you can demand the release of any water in storage reservoirs in Colorado constructed after 1929. Again, the total release is limited by the accrued debit and no release need be made whenever there are more than 600,000 acre feet in the Project reservoirs. Note that you can demand and Colorado must release water stored in reservoirs constructed since 1929. Hinderlider and Corlett are under the impression that Article VIII does not apply to reservoirs built before 1938.

The release of debit water from storage reservoirs above San Marcial to the extent outlined above is in complete satisfaction of the obligations of the upper states under Article VIII of the Compact. Such water released must necessarily be measured at or near the reservoir from which the release is made.

On the other hand, the release of debit water under the provisions of Article VIII does not constitute the delivery of water at Lobatos or at San Marcial as provided for in Article III and Article IV of the Compact. This is a matter of fact to be determined from the records of flow at these and the upper index gaging stations at the end of the calendar year in which the release from storage was made.

For the purpose of computing the amount of water which New Mexico, for example, is obligated to deliver at San Marcial during 1941, it makes no difference whether water was released from El Vado Reservoir on the demand of Texas or whether it was released for irrigation use in the Middle Rio Grande Valley. In either case the "Otowi Index Supply is the recorded flow of the Rio Grande .....at Otowi Bridge ..... corrected for the operation of reservoirs constructed after 1929 in the drainage basin of the Rio Grande between Lobatos and Otowi Bridge".

Practically, water released at the greatest rate practicable during January, February, March, and April from reservoirs above San Marcial will not be used or lost to any large extent between the point of release and Elephant Butte Reservoir. However, if the water should be intercepted, the accrued debit of the upper state would only be reduced at the end of the year by the amount which reached the lower index station in excess of the scheduled delivery.

The confusion which has arisen, I believe, is one of definition. The word "release" applies only to water which is allowed to flow out of the reservoir. This is in the same sense that the word is used in the definition of "Actual Release" in Article I. The word "delivery" applies only to water which actually reaches Lobatos or San Marcial, as the case may be. Water "released" from El Vado Reservoir might reach San Marcial and cause an increase in flow of like magnitude. In such event, the "release " would be equal to the "delivery", or vice versa. However, this coincidence would be of significance only when it became time to compute debits and credits for the year in which the "release" was made. Even then amount released would be used only th adjust the Index Flow at the upper station.

I trust that the foregoing is in sufficient explanation of the non-legal language used by the Engineering Committee in drafting portions of the Compact.

Sincerely yours,

RAH/RAH

RAYMOND A. HILL

August 12, 1938

Judge Edwin Mechem,
First National Bank Building,
Las Cruces

Dear Judge Mechem:

I haven't heard anything from Carr or any of the other Colorado people.

In accordance with your letter of August 10, I have written Dr. Barrows, and am enclosing a copy of that letter. You will note I make some reference to my good friend Neuff. He threatens that Albuquerque will upset the apple-cart and defeat ratification if we don't clear her project. He wanted to know if he couldn't come down here and talk with us about it. I told him that he is a sterling gentleman and that we should all be pleased to see him but that I didn't think his visit would be effectual, as far as changing our attitude is concerned. He intimated that he might come, anyway.

With best regards,

Yours sincerely,

Frank B. Clayton

FBC:ESC
encl

August 30, 1939

Major Richard F. Burges,
C/o Messrs. Black & Graves,
Attorneys at Law,
Austin

Dear Major Burges:

I believe you have kept abreast of developments in Colorado and New Mexico with respect to the Compact. As you know, Carr and Corlett have applications in for federal funds for the construction of the Wagon Wheel Gap and Canajos reservoir projects, and they have asked me to give clearance to these improvements on the strength of the Compact. A similar request was made of me a short time ago by Mr. H. C. Neuffer, for clearance of the Jones Creek-Albuquerque water supply project. To each of these requests I have replied that until the Compact has been ratified by the three state legislatures and approved by the Congress, it is actually not a compact and affords us no protection, their pledge that the Compact will be ratified by their States notwithstanding. Each and all these gentlemen threaten to defeat ratification in their legislatures if they are prevented from getting federal funds at this time on account of our failure to clear the projects. New Mexico has already agreed with Colorado to clear the Wagon Wheel Gap and Canajos projects - I suspect because they want clearance for their own projects.

At Professor Barrows' request, I attended a meeting at Denver last month. The Colorado and New Mexico interests were represented by a good many of their high functionaries. However, I did not recede from my position, and Carr stated most emphatically that he was going to do all in his power to defeat ratification if clearance was not given to the Colorado projects. As you perhaps know, he is running for governor of Colorado on the Republican ticket.

Carr and Corlett suggested that a contract be entered into between the appropriate Colorado agencies and the appropriate federal agencies conditioning the use of federal funds upon the compliance with the terms of the Compact, whether ratified or not, the terms to be incorporated in the contract as a component part thereof. I expressed objection to this

method of procedure, both because of doubts as to the legality of such a contract and of a feeling that I should not undertake thus to bind the State until the Legislature has had an opportunity to pass upon the terms of the Compact. I expressed the personal opinion that we would probably have no objection to the earmarking of federal funds to be expended contingent upon the ratification of the Compact, and Professor Harrows is endeavoring to work out some such arrangement with the Secretary of the Interior but expresses grave doubts that he will be successful.

To-day I have another request this time from Mr. Phillipi, Assistant Chief Engineer of the Middle Rio Grande Conservancy District, asking that I give clearance to a small development in his district, for which an application for federal funds is pending. I have not yet replied to this but contemplate giving him the same answer I have given to Messrs. Moulton, Carr and Conkedt.

However, it occurred to me some time ago that a perfect reply to each of these requests would be that we are willing to withdraw all opposition to the projects provided Colorado will intervene in the lawsuit and that the three States will then enter into a consent decree embodying the terms of the Compact. I can not see how such an arrangement could possibly be prejudicial to us. It would be even more binding, as far as practical enforcement is concerned, than a compact ratified by the legislatures but the terms of which were not embodied in a decree. As a matter of fact, you will recall that during the compact negotiations we insisted on this being done, and receded from our position only when it became apparent that to insist upon it as a sine qua non would result in collapse of the negotiations.

Moreover, it is my belief that we could make this proposition to New Mexico independently of whether Colorado joined, since, in the judgment of all of us, what we gained by the Compact was all we hoped or expected to gain by the lawsuit.

I have discussed this with Harwell, and he concurs in my view.

I should like to have your opinion, and also that of Mr. H. Grady Chandler.

Any such proposition, before it is submitted to Colorado and New Mexico, must of course have the approval and

consent of the Attorney General.

I should like to have yours and Mr. Chandler's opinions separately on the propositions: 1) should we submit this to Colorado and New Mexico jointly, to be made contingent upon their joint consent? and, 2) should we propose to New Mexico that regardless of Colorado's attitude we make this proposition to them independently, so that if they agree and the consent decree is entered their projects can be given clearance?

In order to expedite matters, I am sending a copy of this letter to Mr. Chandler, and I should appreciate it if you will discuss the matter with him and let me have an expression from each of you at the earliest possible moment.

I am withholding reply to Mr. Phillipi until I shall have heard from you.

If convenient, I would suggest that you and Mr. Chandler wire me.

I might suggest this further: it would, I think, put us in a very good light with the National Resources Committee to make this proposition. I strongly suspect that Colorado would decline it. However, at the Denver meeting they charged us with lack of good faith in our refusal to give clearance to their projects, their idea being that the reasons we gave were not valid ones but that what we were trying to do was to keep them from getting this federal money in the hope and expectation that if they didn't get it now they never would get it, and consequently the projects would never be completed. This would utterly refute that charge, because there is no valid objection to such a proceeding from their standpoint; it can be done promptly; and it is an absolute guaranty that the terms of the Compact will be enforced.

Yours sincerely,

Frank B. Clayton
Rio Grande Compact Commissioner for Texas

FBC:MSC
by air

September 20, 1939

Hon. Oscar C. Dancy,
Brownsville

Dear Judge:

This will acknowledge the receipt of your airmail letter of September 19.

I am sorry I could not get a reply to you before the meeting at Weslaco to-day.

The proposition of the Attorney General for settlement of the lawsuit between Texas and New Mexico would indeed give the State of Texas security for the enforcement of the terms of the Compact but it would not be equivalent to ratification. The reason for this is because the Compact sets up certain machinery for its enforcement, which requires the appointment of commissioners representing the three States, et cetera. We did not intend the agreed judgment to be a substitute for ratification, but it was intended only as an expedient to permit Colorado and New Mexico to obtain federal funds for their wanted projects, because if they don't get them, they threaten to defeat ratification in their own legislatures, a contingency that we wish to avoid if possible.

The truth of the matter is that the chief reason Colorado and New Mexico agreed to the terms of the Compact was that they could build these improvements with government money, and if they don't get this money their interest in ratification is materially lessened.

I would not want my statements in this regard to get into the newspapers or the hands of any of the officials of the two upper States, but they represent about the situation.

As a matter of fact, I haven't even the remotest hope that Colorado and New Mexico are going to accept the Attorney General's proposition. They emphatically refused to put into the Compact a provision, which we advocated, that the terms of the Compact should be embodied in a consent decree of the Supreme Court so as to secure their readier enforcement. So bitter were they about this provision that we were forced to recede from it, and I have no idea now that they are going to change their minds. Regardless of this, we

need ratification in order to provide machinery for the enforcement of the Compact.

It seems to me that some of the gentlemen from the lower valley are sadly misinformed about this situation, and they are busily engaged in digging a grave for all the hopes of the lower valley ever to find a solution for its water problems. I am absolutely certain that if ratification is defeated by Texas, Colorado and New Mexico will obtain the assistance of the United States Government nevertheless, and Texas will once again be plunged into a costly lawsuit, with the outcome very uncertain. I am just as certain that another result of the defeat of ratification in this State would be that Texas will lose the support of the National Resources Committee and the State Department in negotiating a treaty with Mexico, and this is obviously the only solution to the alternating problems of flood and drought in the lower valley. As I understand these gentlemen, they figure on sinking the ship with all of us aboard, themselves included, just to force the upper river interests into some agreement which, if made, could not, in my honest judgment, be carried out and which would benefit the lower valley not at all. Two hundred thousand acre-feet of water, on the average, has gone past Fort Quitman every year for the last ten years. I do not believe that any less will continue to pass that point. However, I do not believe that any substantial portion of it ever reaches the lower Rio Grande valley. Even if the agreement they desire were made and could be literally carried out, there is no assurance that the small portion of that water, if any, at all, reaching the lower valley would arrive in times of drought, when it is needed, rather than in times of flood. It is physically impossible to regulate the flow of this small amount over twelve hundred miles of river-bed, with countless diversions in between. When we contrast this small flow of highly undesirable water, undesirable because of its poor quality, with the approximately four million acre-feet that flow unused into the Gulf each year because of lack of storage on the river between Brownsville and Fort Quitman, it is indeed surprising that any one from the lower valley should attach any importance to it, certainly to the extent that he is willing to imperil, if not entirely defeat, the chances for a real solution of the problem confronting the people of the lower valley, just to get this rather intangible and, to my notion, valueless agreement. It is true that defeat of ratification would badly hurt Texas water users above Fort Quitman. But no corresponding benefit would accrue to the users below. In fact, I am convinced that the result would be just the contrary.

I am indeed surprised that Mr. Robertson is now taking this attitude, since I understood from his remarks towards the conclusion of our conference here last May 27 that he appreciated the situation and was willing to recede from his demand for such

an agreement and would not oppose ratification. That seemed to me the clear import of his closing remarks as they appear in the transcript, copies of which I sent you, of the proceedings of that meeting.

I appreciate very much your thoughtfulness in sending me the clipping and the copies of letters.

With kindest personal regard.

Yours sincerely,

Frank B. Clayton
Rio Grande Compact Commissioner for Texas

FBC:MSC

OFFICE OF THE ATTORNEY GENERAL

AUSTIN

September 8, 1938

Honorable Frank H. Patton
Attorney General of New Mexico
Santa Fe, New Mexico

Honorable Byron G. Rogers
Attorney General of Colorado
Denver, Colorado

Gentlemen:

As you know, the Commissioners of the States of Colorado, New Mexico and Texas signed a permanent Rio Grande Compact on March 18, 1938 providing for the allocation of the waters of the Rio Grande above Fort Quitman, Texas. This compact, of course, must be ratified by the Legislatures of the three States and approved by Congress before it becomes effective. This cannot be done until the Legislatures meet next January. In the meantime Colorado and New Mexico have applications pending with the Public Works Administration and other administrative agencies of the United States Government for Federal funds for the construction of certain projects in their States. The two principal ones in Colorado, as we understand, are the Wagon Wheel Gap Reservoir project on the Rio Grande, and the Conejos Reservoir project on the Conejos. The two principal New Mexico projects, as we understand, are the so-called Jemez Creek-Albuquerque water supply project and a project for the inclusion of a sub-district known as the "Carr Irrigation District" of approximately 800 or 900 acres in the Middle Rio Grande Conservancy District.

These projects, as well as any others involving the use of the waters of the Rio Grande above Fort Quitman, must receive the approval of the National Resources Committee under the terms of the Presidential Order issued September 23, 1935. The final paragraph of that Executive Order is as follows:

> "Please instruct appropriate officials of your Agency in Colorado and New Mexico, as well as in Washington or any other supervisory offices, not to approve any application for a project involving the use of Rio Grande waters without securing from the National Resources Committee a prompt opinion on it from all relevant points of view." (See Regional Planning Part VI - Upper Rio Grande - National Resources Committee, p.10)

The National Resources Committee very properly, as we think, has taken the position that it will not clear any project involving the use of Rio Grande waters until the ratification and approval of the Compact, or at least until the State Legislatures and the Congress have had an opportunity to pass upon the Compact, without the unanimous consent of the Compact Commissioners of the three States. For various reasons, which have been outlined in correspondence between certain officials of Colorado and New Mexico, and Mr. Frank S. Clayton, Rio Grande Compact Commissioner for Texas, Mr. Clayton has felt that he is unable to give his consent to the clearance of these projects until the Compact becomes effective by its ratification and approval. Certain alternative methods or securing to the States the protection of the terms of the Compact prior to its ratification have been suggested by interested officials in Colorado, but these were thought by Mr. Clayton to be inadequate and beyond his authority as Commissioner, and hence he felt compelled to withhold his consent to these proposals. We understand that Colorado and New Mexico desire immediate clearance in order to obtain Federal aid, which their officials believe may not be available if action is delayed until the Legislatures meet in January.

It is not the desire of this Department, nor of the Commissioner for Texas, to defeat Colorado and New Mexico in their applications, except on grounds which we believe to be of compelling importance. We have given a good deal of thought and study to this situation and think that we have arrived at a solution which should be satisfactory to all three States.

There is pending in the Supreme Court of the United States a law suit between Texas and New Mexico over the waters of the Rio Grande. Final hearings in this law suit were held in abeyance pending negotiations for a permanent compact, which it was hoped would resolve the differences between the two States. The final disposition of this law suit is in the hands of the Attorneys General of the two States, of course, quite independent of the compact, and we believe it is entirely feasible for the two States, through their counsel, to dispose of the law suit by the entry of an agreed decree embodying the provisions of the compact even prior to its ratification by the Legislature. If Colorado should intervene in this law suit, and likewise enter into such an agreed decree, the same result could be reached as by final ratification of the compact by the three State Legislatures and the approval of Congress. This, it is thought, can be done with very little delay, and if it is done the objections by the Rio Grande Compact Commissioner of Texas to the proposed projects will be withdrawn and doubtless Federal funds can be secured within the time limit which we understand has been set by the Federal authorities for the allocation of Federal funds.

We submit this proposal to you in a spirit of cooperation with the States of Colorado and New Mexico in order that the danger which the officials of those two States believe is inherent in further delay may be obviated.

Mr. Clayton is writing to the interested officials of Colorado and New Mexico with respect to this matter and enclosing copies of this letter.

We feel that this proposal removes the present obstacle to the obtaining of Federal funds, and at the same time preserves to the three States the protection of the provisions of the Compact, and is the only method we know of which can accomplish these two objectives.

We should appreciate an expression from you of your views on this proposal at your earliest convenience. To expedite action we suggest that copies of any letters or telegrams sent to this office, which should be addressed to the writer, should at the same time be sent to Mr. Frank B. Clayton, El Paso, Texas, Rio Grande Compact Commissioner for Texas, who is also of counsel for Texas in the law suit pending between Texas and New Mexico.

Yours very truly

H. GRADY CHANDLER
First Assistant Attorney General

HGC:DG