

No. 141, Original

IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS,  
*Plaintiff,*

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO,  
*Defendants.*

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Before Special Master Michael J. Melloy  
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**STATE OF NEW MEXICO'S ANSWER TO  
THE STATE OF TEXAS'S COMPLAINT**

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303-861-1963

May 22, 2018

## ANSWER

COMES NOW the State of New Mexico by and through counsel and submits this Answer to the State of Texas's Complaint.

1. Paragraph 1 of the Complaint states a legal conclusion to which no response is required.
2. New Mexico admits the allegations in Paragraph 2 of the Complaint.
3. In response to the allegations in Paragraph 3 of the Complaint, New Mexico states that the Rio Grande Compact ("Compact") speaks for itself. New Mexico affirmatively states that the preamble to the Compact states the purposes of the Compact, and denies any allegations in the first sentence of Paragraph 3 that are explicitly or implicitly inconsistent with that preamble. New Mexico admits the allegations in the second sentence of Paragraph 3, and admits that the original Compact is reprinted in the Appendix to the Complaint. New Mexico further states that the Compact was modified by a 1948 resolution of the Rio Grande Compact Commission ("Commission"), which is not included in the Appendix. *See App. 11.*
4. In response to Paragraph 4 of the Complaint, New Mexico states that the Compact speaks for itself, and denies any allegations in Paragraph 4 that are inconsistent with the express terms of the Compact. In response to the first sentence of Paragraph 4, New Mexico admits that the Compact incorporates the Rio Grande Reclamation Project ("Project"). New Mexico denies that the Compact requires delivery of solely "Rio Grande water," but otherwise admits the allegations in the second sentence of Paragraph 4 of the Complaint with the clarifications that not all of the water delivered by New Mexico into Elephant Butte Reservoir is Project water and that the amount of water that the Compact requires New Mexico to deliver into Elephant Butte Reservoir

varies each year and is set by the indices contained in Article IV of the Compact, subject to the credit and debit provisions of Article VI of the Compact. New Mexico denies the remaining allegations in Paragraph 4 of the Complaint.

5. With respect to the allegation in Paragraph 5 of the Complaint, this allegation purports to set forth general details about the Complaint to which no response is necessary. To the extent a response is necessary, New Mexico admits that Colorado is a signatory to the Compact, but is without knowledge or information sufficient to form a belief as to the reason that Colorado is named as a Defendant.
6. In response to the first sentence of Paragraph 6 of the Complaint, New Mexico admits that an Irrigation Congress was held in El Paso, Texas in 1904, and admits that resolving a dispute between interests in Mexico, New Mexico, and Texas was one issue that was addressed by the Irrigation Congress. New Mexico denies the remaining allegations in the first sentence of Paragraph 6. In response to the second sentence of Paragraph 6, New Mexico affirmatively states that the Complaint mistakenly refers to the actions of the Bureau of Reclamation in 1902. New Mexico assumes the Complaint intended to refer to the United States Reclamation Service, the predecessor agency to the Bureau of Reclamation (“Reclamation”). Further, New Mexico affirmatively states that the 1904 Irrigation Congress resulted in a resolution endorsing the construction of Elephant Butte dam and reservoir to “add to the agricultural resources of the United States and Mexico.” New Mexico further affirmatively states that New Mexico was a territory, not a State, in 1904. In response to the fourth sentence of Paragraph 6, New Mexico admits that the Rio Grande Reclamation Project Act was passed by Congress on February 25, 1905, ch. 798, 33 Stat. 814, and further admits that the Project was

contemplated by the Rio Grande Reclamation Project Act, but denies that the Project was authorized by the Act as the Act required a finding of feasibility by the Secretary of the Interior and authorization by the Secretary of the Interior, and such finding and authorization did not occur until after passage of the Rio Grande Reclamation Project Act. Unless specifically admitted, the remaining allegations in Paragraph 6 of the Complaint are denied.

7. In response to the first sentence of Paragraph 7, New Mexico admits that the United States filed notices in 1906 and 1908. Those notices speak for themselves, and New Mexico denies the characterization of those notices in the first sentence of Paragraph 7. New Mexico admits the allegations in the second sentence of Paragraph 7.
8. New Mexico admits that Project water deliveries are required to be made based upon the irrigable acreage of Project lands. New Mexico denies that the Project continues to make deliveries on this basis. In response to the second sentence of Paragraph 8, New Mexico admits that approximately 57% of Project lands are located in New Mexico and 43% of Project lands are located in Texas. In response to the third sentence of Paragraph 8, New Mexico admits that Elephant Butte Irrigation District (“EBID”) is a political subdivision of the State of New Mexico and has contracts with Reclamation for Project water. New Mexico denies that EBID is the “Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in southern New Mexico” because individual water users are the Project beneficiaries in New Mexico. In response to the fourth sentence of Paragraph 8, New Mexico admits that El Paso County Water Improvement District No. 1 (“EPCWID”) is a political subdivision of the State of Texas and has contracts with Reclamation for Project water. New Mexico denies

that EPCWID is the “Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in Texas” because individual water users are the Project beneficiaries in Texas. New Mexico is without knowledge or information sufficient to form a belief as to the truth of the allegations in the last sentence of Paragraph 8 and therefore denies the same. Unless specifically admitted, the remaining allegations in Paragraph 8 of the Complaint are denied.

9. New Mexico admits the allegations in Paragraph 9 of the Complaint with the clarification that the 60,000 acre-foot delivery to Mexico is subject to adjustment in case of extraordinary drought or serious accident to the irrigation system in the United States.
10. New Mexico admits the allegations in the first two sentences of Paragraph 10. In response to the third sentence of Paragraph 10, New Mexico states that the Compact speaks for itself, and denies any allegations that are inconsistent with the express terms of the Compact. In particular, New Mexico affirmatively states that the preamble to the Compact states the purposes of the Compact. New Mexico denies any allegations in the third sentence of Paragraph 10 that are explicitly or implicitly inconsistent with that preamble. New Mexico denies the allegations in the fourth sentence of Paragraph 10 of the Complaint.
11. New Mexico is without knowledge or information sufficient to form a belief as to the truth of the allegations in the first sentence of Paragraph 11 of the Complaint. In response to the second sentence of Paragraph 11, New Mexico admits that Project operations have the potential to affect Compact allocations and admits that the United States has affirmative obligations regarding operating the Project that, because of the

Project incorporation, are Compact obligations. Unless specifically admitted, the remaining allegations in Paragraph 11 of the Complaint are denied.

12. In response to Paragraph 12, New Mexico states that the Compact speaks for itself, and denies any allegations that are inconsistent with the express terms of the Compact. In particular, New Mexico affirmatively states that the preamble to the Compact states the purposes of the Compact. New Mexico denies any allegations in Paragraph 12 that are explicitly or implicitly inconsistent with that preamble. New Mexico admits the allegations in the second sentence of Paragraph 12 of the Complaint.

13. As to the allegations in the first sentence of Paragraph 13 of the Complaint, New Mexico admits that New Mexico was originally obligated under Article IV to deliver water at San Marcial. In response to the allegations in the second sentence, New Mexico admits that in 1948, the Commission changed New Mexico's delivery obligation from San Marcial to Elephant Butte Reservoir. Beyond this, New Mexico affirmatively states that the Commission's 1948 Resolution also adopted a new delivery schedule for New Mexico in Article IV of the Compact. New Mexico admits the allegations in the third sentence of Paragraph 13 except New Mexico denies that the Compact states or otherwise requires that New Mexico deliver water to the Project, and denies that all deliveries to Elephant Butte Reservoir are deliveries to the Rio Grande Project. In response to the allegations in the fourth sentence of Paragraph 13, New Mexico states that Article IV of the Compact speaks for itself, and denies any allegations that are inconsistent with the express terms of Article IV. New Mexico admits the allegations in the fifth sentence of Paragraph 13.

14. New Mexico denies the allegations in Paragraph 14. To the extent Texas seeks to

summarize or explain the meaning of various Compact provisions, those provisions speak for themselves.

15. New Mexico denies the allegations in Paragraph 15 of the Complaint. To the extent Texas seeks to summarize or explain the meaning of various Compact provisions, those provisions speak for themselves.

16. New Mexico denies the allegations in Paragraph 16 of the Complaint. To the extent Texas seeks to summarize or explain the meaning of various Compact provisions, those provisions speak for themselves.

17. New Mexico denies the allegations in Paragraph 17 of the Complaint. To the extent Texas seeks to summarize or explain the meaning of various Compact provisions, those provisions speak for themselves.

18. In response to the allegations in the second sentence of Paragraph 18 of the Complaint, New Mexico affirmatively states that there is no state-line delivery requirement for New Mexico in the Compact. In response to the fifth sentence of Paragraph 18, New Mexico admits the Compact places an affirmative duty on Texas to formally or officially “request that New Mexico take action to cease . . . diversions or extractions” that intercept or adversely affect the delivery of water intended for use within the Project area in Texas, but denies that Texas did so. New Mexico denies the remaining allegations in Paragraph 18 of the Complaint.

19. New Mexico denies the allegations in Paragraph 19 of the Complaint. New Mexico further affirmatively states that Texas has failed to control groundwater pumping in Texas.

20. New Mexico admits neither it nor Texas is a party to the Operating Agreement for the

Rio Grande Project (March 10, 2008) among the United States, EBID, and EPCWID regarding Project operations (“2008 Operating Agreement”), and affirmatively states that the 2008 Operating Agreement is inconsistent with the Compact. New Mexico admits Texas is not a party to *State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. 11-CIV-691 (D.N.M., filed Aug. 8, 2011). New Mexico denies the remaining allegations in Paragraph 20 of the Complaint.

21. New Mexico denies the allegations in Paragraph 21 of the Complaint.
22. New Mexico admits that Texas issued a Certificate of Adjudication in 2007 relating to the waters of the Rio Grande. New Mexico denies the remaining allegations in Paragraph 22 of the Complaint.
23. New Mexico admits the Commission did not agree on the accounting for the years 2011 to the present. New Mexico denies the remaining allegations in Paragraph 23 of the Complaint. New Mexico affirmatively states that the disagreement over Compact accounting concerns the unauthorized release of Compact Credit Water and does not concern any allegations Texas raises in its Complaint.
24. New Mexico denies the allegations in Paragraph 24 of the Complaint.
25. New Mexico denies the allegations in Paragraph 25 of the Complaint.
26. New Mexico denies the allegations in Paragraph 26 of the Complaint.
27. New Mexico denies the allegations in Paragraph 27 of the Complaint.
28. New Mexico denies the allegations in Paragraph 28 of the Complaint.
29. New Mexico denies any allegations contained within the Prayer for Relief of the Complaint.



## **AFFIRMATIVE DEFENSES**

30. New Mexico incorporates each and every admission, denial, and allegation made by New Mexico in Paragraphs 1 through 29 as set forth herein. New Mexico asserts separately and/or alternatively, the following affirmative defenses. In doing so, New Mexico does not assume any burden of pleading or proof that would otherwise rest on Plaintiff Texas. New Mexico reserves the right to add defenses, or to supplement, amend, or withdraw any of these affirmative or other defenses.

### **FIRST AFFIRMATIVE DEFENSE (NO DAMAGES)**

31. Texas is not entitled to relief because it has not suffered damages. In many years, even years of less than a full Project allocation, Project beneficiaries in Texas have not used a significant portion of the Project water allotted to them. Nor have Texas Project beneficiaries ever been denied any Project water which they ordered. Texas's claims are barred, in whole or in part, because Texas has not been damaged by New Mexico's conduct.

### **SECOND AFFIRMATIVE DEFENSE (FAILURE TO PROVIDE NOTICE)**

32. Texas's claims are barred, in whole or in part, because Texas failed to notify New Mexico of its alleged injuries. The Compact incorporates principles of Reclamation law and prior appropriation law, which impose a duty on a downstream water user to notify upstream water users if the downstream user is not receiving all water to which it is entitled. Absent notice, New Mexico has no way to know whether Texas has received all water the Compact allocates to it, or the extent of any shortfall.

33. For all or almost all years prior to 2013, when Texas filed its Complaint in this matter, Texas failed to notify New Mexico that Texas believed it was not receiving all Project

water allocated to EPCWID in that year or the amount of the alleged shortfall, nor did Texas request that New Mexico allow additional water to flow downstream to Texas to remedy this alleged injury. Texas's failure to notify New Mexico of its alleged injury deprived New Mexico of the opportunity to remedy the alleged injury.

34. Texas's claims are barred, in whole or in part, for any year in which Texas failed to notify New Mexico of an alleged injury or the extent of its injury.

**THIRD AFFIRMATIVE DEFENSE (UNCLEAN HANDS)**

35. Texas's claims are barred by the doctrine of unclean hands. Texas's inequitable conduct includes, but is not limited to, (i) allowing water users in Texas to develop groundwater resources within the Project area in Texas, lowering groundwater levels, reducing Project efficiency, and reducing return flows, requiring additional releases from Project Storage to meet irrigation demand in EPCWID; (ii) failing to correctly account for historic Project return flows; (iii) transferring Project water uses from irrigation to other purposes, including municipal use, in violation of federal requirements and without approval of the Compacting States; and (iv) otherwise interfering with the Compact's apportionment. Texas's own inequitable conduct in relation to the matter in controversy has injured New Mexico and inflicted injury on Texas for which it now seeks to hold New Mexico liable. Texas's own conduct makes it inequitable for Texas to obtain the equitable relief it seeks from New Mexico.

**FOURTH AFFIRMATIVE DEFENSE (ACCEPTANCE/WAIVER/ESTOPPEL)**

36. Texas's claims are barred in whole or in part by the related doctrines of acceptance, acquiescence, waiver, and estoppel. For each year following adoption of the Compact through 2010, Texas accepted and acquiesced to Project and Compact accounting, as

well as to Project allocations that implicitly included the effects of groundwater pumping in both Texas and New Mexico.

37. Beginning with the year 2011, Texas refused to approve Compact accounting due to a dispute with New Mexico and Colorado over the proper method of accounting for evaporation of Credit Water from Project storage and associated Project operations. At no time did Texas refuse to approve Compact accounting on the grounds that it reflected the effect of alleged improper water uses in the New Mexico portion of the Project.
38. Texas's actions are inconsistent with the allegations in the Complaint, and Texas has waived any claims it may have had prior to 2011.

#### **FIFTH AFFIRMATIVE DEFENSE (LACHES)**

39. Immediately following adoption of the Compact in 1939, the signatory States adopted Rules and Regulations for Administration of the Rio Grande Compact (December 19, 1939) confirming the right of each signatory State to “to develop its water resources at will, subject only to its obligations to deliver water in accordance with the schedules set forth in the Compact.”
40. Consistent with these rules, groundwater was developed in both Texas and New Mexico, but only New Mexico adopted meaningful limits and regulations for groundwater. Texas has been aware of the potential effects of groundwater pumping on surface water for decades, but declined to protest groundwater applications in New Mexico or curtail its own groundwater pumping. Texas also did not raise groundwater pumping below Elephant Butte in either of the two previous original actions it filed to enforce the Compact. The second of these cases, *Texas and New Mexico v. Colorado*,

No. 29, Original, was dismissed with prejudice following an actual spill of water from Project Storage in 1985. Texas offers no explanation for its significant delay in raising these issues, and Texas's lack of diligence will prejudice New Mexico.

41. During the intervening decades, relying on: (1) the Texas-approved Rules and Regulations of the Compact Commission (1939); (2) the approval and encouragement of the United States; and (3) Texas's own development of groundwater resources, water users within the New Mexico Project area constructed irrigation wells as a supplement to Project surface water deliveries. Municipal expansion in the Project area in both New Mexico and Texas also occurred, and was supplied in part with groundwater diversions. If Texas's unreasonably delayed claims are allowed to proceed, a ruling in favor of Texas would be extremely unfair, inequitable and detrimental to the economy and communities of southern New Mexico.

42. Because Texas unreasonably delayed asserting its claims, and because New Mexico will be harmed for its reliance on Texas's delay, Texas's claims are barred, in whole or in part, by the doctrine of laches.

**SIXTH AFFIRMATIVE DEFENSE (FAILURE TO MITIGATE DAMAGES)**

43. Texas's claims should be denied, in whole or in part, because Texas has failed to take steps to mitigate the harm and injury it alleges in its Complaint. This failure to mitigate includes, but is not limited to, Texas's failure to properly regulate or manage surface or groundwater resources within the Project area in Texas, failure to prevent groundwater development in Texas, and failure to properly account for Project water.

**SEVENTH AFFIRMATIVE DEFENSE (FAILURE TO EXHAUST REMEDIES)**

44. The Compact confers authority on the Commission to take actions that could have

- assessed and mitigated the harm Texas complains of, including, but not limited to, Article II authority to establish additional gaging stations, Article XII authority to adopt rules and regulations to administer the Compact, and Article XIII authority to make recommendations to the Compacting States and Congress for revisions to the Compact.
45. Despite the foregoing, Texas failed to complain about its alleged injury to the Commission or request the Commission exercise any of its powers, including but not limited to establishing gaging stations in the Project area to monitor Compact compliance, adopting or modifying applicable rules and regulations, or recommending amendments to the Compact to address the allocation, accounting, and reporting of water in the Project.
46. Texas's claims are barred, in whole or in part, because Texas failed to exhaust its administrative remedies.

#### **EIGHTH AFFIRMATIVE DEFENSE (SET-OFF)**

47. Since the 1950s, Texas has allowed or authorized extensive groundwater development within the Project area in Texas and has called for Project water that was not used on Project lands in Texas but was delivered, either directly or in the form of Project return flows, to non-Project beneficiaries in Texas. Texas's actions require additional releases from Project storage, reducing Project Storage reserves that would otherwise be available for allocation to both States and harming New Mexico. Since adoption of the 2008 Operating Agreement, Texas has also received more water than it was apportioned by the Compact as a result of changes to Project operations. Any damages to Texas should be offset, in whole or in part, by damages Texas has inflicted on New Mexico and by the amount of additional Project water Texas unjustly received as a

- result of the 2008 Operating Agreement.
48. Since the Compact was executed, Texas has also been harmed, in part, by hydrologically connected groundwater pumping and unauthorized surface diversions occurring near the Project area in Mexico. New Mexico's liability for damages Texas has suffered, if any, should be reduced by the amount of such damages attributable to water uses in Mexico in excess of those allowed under the 1906 Convention.
49. Additionally, to the extent Texas is allowed to raise claims against New Mexico based on allegations that New Mexico failed to deliver sufficient Project water to Texas, Texas should reduce its claimed injury to account for any additional factors outside New Mexico's control.

**NINTH AFFIRMATIVE DEFENSE (SPILL)**

50. Article VI of the Compact provides, in relevant part, "[i]n any year in which there is actual spill of usable water, or at the time of hypothetical spill thereof, all accrued debits of Colorado, or New Mexico, or both, at the beginning of the year shall be cancelled." Article VI reflects the intention of the drafters to eliminate liability for prior Compact under-deliveries whenever the Project is unable to store all available water. The most recent spill of water from the Project occurred in 1995. As of the beginning of 1996, all accrued debits and credits of New Mexico and Colorado were eliminated (set to zero) by the Commission. Therefore, Texas is barred from asserting injury or seeking damages based on allegations insufficient water was available in Project Storage for all years up to and including 1995.

**PRAYER FOR RELIEF ON TEXAS'S COMPLAINT**

New Mexico denies that Texas is entitled to relief, and prays that judgment be entered:

- A. Dismissing Texas's Complaint with prejudice;
- B. Rejecting all of Texas's requests for relief; and
- C. Granting such further relief to New Mexico as this Court may deem just and proper.

Respectfully submitted,

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