

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.

◆

Before Special Master Michael J. Melloy
◆

STATE OF NEW MEXICO'S COUNTERCLAIMS

◆

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Pursuant to Case Management Order No. 16, and consistent with Supreme Court Rule 17 and Federal Rules of Civil Procedure 8 and 13, the State of New Mexico (“New Mexico”) asserts the following counterclaims against the State of Texas (“Texas”) and the United States of America (“United States”):

JURISDICTION AND VENUE

1. Jurisdiction and venue are proper before this Court pursuant to Article III, Section 2, Clause 2 of the Constitution of the United States in connection with 28 U.S.C. § 1251(a).

GENERAL ALLEGATIONS

A. The Rio Grande Project

2. The Rio Grande is an interstate and international stream that rises in the mountains of Colorado and flows south into and through New Mexico. When the Rio Grande reaches Texas, it does not form the border between Texas and New Mexico, but instead crosses into Texas and then crosses back into New Mexico before it reaches the boundary between Texas and Mexico. It then forms the international boundary between the United States and Mexico until it empties into the Gulf of Mexico.
3. In 1902, Congress passed the Reclamation Act, which authorized the United States Reclamation Service (“Reclamation Service”), precursor to the Bureau of Reclamation (“Reclamation”), to undertake water development and reclamation projects in western states, including New Mexico. Act of June 17, 1902, ch. 1093, 32 Stat. 388.
4. The Reclamation Act specifically incorporates the congressional policy of deference to the water laws of the states and territories. *See, e.g.*, 43 U.S.C. § 383; *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

5. Pursuant to the Reclamation Act, in 1905, Congress passed the Rio Grande Reclamation Project Act (“Project Act”). Act of February 25, 1905, ch. 798, 33 Stat. 814. The Project Act contemplated the ability of the Reclamation Service to construct the Rio Grande Project (“Project”) pending a finding of feasibility and authorization by the Secretary of the Interior. The Project Act also extended the provisions of the Reclamation Act to that portion of Texas capable of being irrigated by the Project.
6. To achieve the purposes of the Project, it was necessary for the Reclamation Service to obtain a New Mexico water right. Accordingly, on January 23, 1906, the Reclamation Service filed a Notice to appropriate water with the New Mexico Territorial Engineer. That filing declares the intent of the United States to appropriate: “[a] volume of water equivalent to 730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner’s inches said water to be diverted or stored from the Rio Grande River (sic) at a point described as follows: Storage dam about 9 miles west of Engle New Mexico. . . .” The 1906 Notice was supplemented by a second Notice in 1908. The effect of the 1906 and 1908 Notices was determined in the adjudication court in *State of New Mexico ex rel., Office of the New Mexico State Engineer v. Elephant Butte Irrigation District, et al.*, No. CV-96-888, Stream System Issue SS-97-104.
7. Consistent with the language of the 1906 and 1908 Notices, in adjudicating the interest of the United States in the Project, the adjudication court determined the United States had appropriated only surface water of the Rio Grande and did not appropriate ground water, such that the United States’ right for the Project is a surface water right only, and the Project is not entitled to groundwater.

8. Elephant Butte Reservoir, the largest storage facility in the Project, was completed and in operation by 1916.
9. Elephant Butte Reservoir is located near Truth or Consequences, New Mexico, over 100 miles north of the Texas-New Mexico border. The Project delivers water to both southern New Mexico and west Texas. It also serves as a mechanism for delivering water to Mexico pursuant to the Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 (“1906 Convention”).
10. Elephant Butte Reservoir is managed by Reclamation, which releases water for delivery to Mexico and to Project beneficiaries in southern New Mexico and west Texas.
11. On June 27, 1906, the United States executed a contract with the Elephant Butte Water Users’ Association of New Mexico (“EBWUA”) and the El Paso Valley Water Users’ Association (“EPVWUA”) in Texas, which represented water users in the proposed Project area in their respective States, to repay the costs of the proposed Project.
12. In the late 1910s, Elephant Butte Irrigation District (“EBID”), in New Mexico, and El Paso County Water Improvement District No. 1 (“EPCWID”), in Texas, were organized to manage water resources in their respective geographic regions and to assume the assets and obligations of EBWUA and EPVWUA. EBID and EPCWID entered into separate contracts with the United States governing repayment of costs to construct the Project.
13. EBID operates the Project’s water delivery infrastructure in New Mexico and has contractual obligations to deliver water to Project beneficiaries in New Mexico once it is released from Project storage. EPCWID is similarly responsible for operating the

Project's delivery infrastructure in Texas and delivering water to Project beneficiaries in Texas.

14. In February of 1938, EBID and EPCWID entered into an agreement regarding the distribution of Project water (the "1938 Contract"). The 1938 Contract was approved by the United States in April 1938. The 1938 Contract recognized that the Project was authorized to irrigate approximately 155,000 acres of land consisting of 88,000 acres in New Mexico and 67,000 acres in Texas (collectively, the "Project Area"), plus each district could irrigate up to an additional 3% above this amount. The 1938 Contract further specified that, in the event of a water shortage, the available supply would be distributed in the proportion of 88/155 (approximately 57%) to the lands of EBID and 67/155 (approximately 43%) to the lands of EPCWID. The 1938 Contract thereby recognized that Project water was divided between the irrigation districts such that lands in New Mexico were entitled to approximately 57% of Project water and lands in Texas were entitled to approximately 43% of Project water.

B. The Rio Grande Compact

15. In March of 1938, the States of Colorado, New Mexico, and Texas signed the Rio Grande Compact ("Compact"). The Compact was approved by Congress on May 31, 1939. 53 Stat. 785.
16. The Compact apportions the waters of the Rio Grande from its headwaters in Colorado to Fort Quitman, Texas among the States of Colorado, New Mexico, and Texas.
17. The States intended the Project to be the vehicle by which Texas and New Mexico would receive their equitable apportionment of water for the lower Rio Grande. For that reason, the Project, the 1938 Contract, and other Project contracts in effect when the Compact

was signed are incorporated into the Compact. *See Texas v. New Mexico*, 138 S.Ct. 954, 959 (2018). In particular, the 57/43 ratio, and the requirement that the Project deliver an equal amount of water to each irrigated acre in the Project Area, were incorporated into the Compact.

18. Article I of the Compact defines operable terms. The following relevant terms are defined in Article I:

- a. Article I(h) of the Compact defines Annual Credits as “the amounts by which actual deliveries in any calendar year exceed scheduled deliveries.”
- b. Article I(k) of the Compact defines Project Storage as “the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project, but not more than a total of 2,638,860 acre feet.”
- c. Article I(l) of the Compact defines Usable Water as “all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.”
- d. Article I(m) of the Compact defines Credit Water as “that amount of water in project storage which is equal to the accrued credit of Colorado, or New Mexico, or both.” Credit Water is water stored in Elephant Butte Reservoir pursuant to the Compact and administered by the Rio Grande Compact Commission (“Commission”).

19. Article III of the Compact establishes schedules of deliveries for Colorado at the Colorado-New Mexico state line based on flows at specified upstream gages.

20. Article IV of the Compact initially established a schedule of deliveries for New Mexico at San Marcial, just upstream of Elephant Butte Reservoir, based on flows at specified upstream gages. In 1948, in accordance with the terms of Article V of the Compact, the Commission established a new annual schedule of deliveries for New Mexico at Elephant Butte Reservoir.
21. Article VI of the Compact establishes a system of debits and credits to provide flexibility to Colorado and New Mexico in meeting the delivery schedules established in Articles III and IV, respectively.
22. As relevant to credits, Article VI of the Compact further provides: “To the extent that accrued credits are impounded . . . such credits . . . shall be reduced annually to compensate for evaporation losses in the proportion that such credits . . . bore to the total amount of water in such reservoirs during the year.”
23. Article VII of the Compact provides in pertinent part that “Neither Colorado nor New Mexico shall increase the amount of water in storage in reservoirs constructed after 1929 whenever there is less than 400,000 acre feet of usable water in project storage” and “that Colorado or New Mexico, or both, may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished.”
24. New Mexico has reservoir storage capacity upstream of Elephant Butte Reservoir that was constructed after 1929 that is subject to the Article VII storage limitation.

C. Historic Project Operations

25. Project storage is held in two reservoirs in New Mexico: Elephant Butte Reservoir is the main storage feature for the Project. Caballo Reservoir is located just 25 miles south and

is operated in conjunction with Elephant Butte Reservoir. By releasing Usable Water from storage at these reservoirs and reuse of Project return flows, the Project supplies irrigation water to authorized lands in New Mexico and Texas and to Mexico pursuant to the 1906 Convention.

26. Three pools of stored water are contained within Project Storage: 1) Usable Water, 2) Credit Water, and 3) San Juan-Chama water. *See* Compact Article I and Pub. L. No. 97-140.
27. Reclamation allocates and releases Usable Water to EBID, EPCWID, and Mexico.
28. EBID diverts Project water from the Rio Grande at Percha and Leasburg dams to serve New Mexico Project beneficiaries. EBID also diverts Project water from the Rio Grande at Mesilla Dam in New Mexico to serve New Mexico Project beneficiaries and to deliver water to EPCWID to serve EPCWID lands in the Texas part of the Mesilla Basin.
29. EPCWID currently diverts Project water from the Rio Grande at American Dam in Texas and delivers Project water to the City of El Paso for municipal use and to EPCWID farmers in the El Paso Valley via the Franklin and Riverside canals. EPCWID historically diverted part of its water below American Dam for use on Project lands.
30. Water that is surplus to and not needed for EPCWID Project lands is used on approximately 18,000 acres in Hudspeth County, Texas that are part of Hudspeth County Conservation and Reclamation District (“HCCRD”). HCCRD’s members are not Project beneficiaries, and HCCRD and its members have contracts to use Project water only when it is in excess of the requirements of Project lands. The water delivered to lands in Hudspeth County is not included in the annual Rio Grande Project allocation or in Compact accounting, and neither EPCWID nor HCCRD has the right to call for releases

of Project water—or, in the case of EPCWID, deliver Project water—solely to supply lands in Hudspeth County.

31. Project deliveries to Mexico take place at International Dam.
32. Project return flows generated from distribution and use of Project water are water that returns to the bed of the river or that is measured in Project canals and drains within the dominion and control of the Project. These return flows are part of Project supply available for reuse on Project lands. Project supply does not include groundwater in the Project Area.
33. Farmers in both EBID and EPCWID pump groundwater to supplement surface water supplies. In addition, significant amounts of municipal pumping occur in the Project area, particularly in Texas and Mexico. Between 1938 and 1980, groundwater pumping increased in New Mexico, Texas, and Mexico. This pumping, to varying degrees, had the potential to affect surface water flows in the Project Area.
34. In 1980, the New Mexico State Engineer took action to close the Lower Rio Grande basin by prohibiting new groundwater permits in New Mexico that did not include offsets to replace their additional depletions to the river.
35. Unlike New Mexico, neither Texas nor Mexico has acted to prohibit or restrict groundwater extraction with the potential to affect surface water flows in the Project Area. Groundwater pumping has continued and increased in Texas and Mexico in the Project area since the Compact was signed.
36. New Mexico requires metering of all groundwater wells in the Project area in New Mexico. In contrast, Texas does not require wells to be metered in the Texas portion of the Project area.

37. Until approximately 1980, Reclamation allocated and delivered water directly to Project beneficiaries at their farm headgates. As required by the Compact, allocation to Project beneficiaries was made on the basis of an equal allotment of water per authorized acre, regardless of which State or district the acre was in.
38. In approximately 1980, EBID and EPCWID met their repayment obligations, and the United States transferred the responsibility for operation and maintenance of most Project facilities, other than the storage reservoirs and the diversion structures on the Rio Grande, to the districts.
39. After the transfer of operational responsibility to the districts, Reclamation delivered Project water directly to each district, leaving to the districts the obligation to ensure appropriate and equal deliveries to the lands within their districts.
40. Because Reclamation no longer assumed responsibility to deliver Project water directly to each beneficiary, Reclamation developed a set of formulas, known as the “D1/D2 curves,” based on Project releases and deliveries from 1951 to 1978 to predict how much water would be delivered to each acre of Project land based on the amount of water released from Project storage. The D1 curve represents the relationship between Project releases and individual farm deliveries to the districts and Mexico during the 1951-1978 period. The D2 curve predicts the amount of water that will be available at major canal headings based on releases from Project storage. Because the D1/D2 curves determine average relationships based on variable data, they over-predict deliveries for some years during the 1951-1978 period and under-predict deliveries in others. An allocation methodology was also developed at this time based on the D1/D2 Curves, which first subtracted Mexico’s share and then attempted to allocate 57% of the remaining Project

water to EBID for diversion at canal headings, and 43% to EPCWID for diversion at canal headings.

41. The D1/D2 Curves are designed, in part, to reflect the hydrologic effects of groundwater diversions in Texas, Mexico, and New Mexico from 1951 to 1978.

D. The 2008 Operating Agreement

42. Because the Compact incorporates the Project, the United States is not authorized to make operational changes to the Project that materially alter the Compact allocation.
43. In 2008, the United States and the two irrigation districts entered into a new water delivery arrangement known as the 2008 Operating Agreement. The 2008 Operating Agreement had the effect of causing delivery to Texas of more than its share of Project water as allocated by the Compact. None of the Compact States of Colorado, New Mexico or Texas were parties to the 2008 Operating Agreement.
44. The 2008 Operating Agreement changed the water allocation methodology for Project water, materially altering the Project's allocation of water.
45. Under the 2008 Operating Agreement, Mexico and EPCWID are generally allocated water according to the D1/D2 methodology, but EBID is not. Instead, under the 2008 Operating Agreement, EBID's allocation is calculated based on a new Project diversion ratio ("New Diversion Ratio"). This New Diversion Ratio predicts Project deliveries based on a set of estimates and forecasts, and then charges EBID for any estimated deficiency in Project deliveries as compared to the deliveries predicted by the D1/D2 Curves, regardless of the cause of the delivery inefficiency. As a result of the implementation of the New Diversion Ratio, EBID's allocation of Project water has

materially decreased since adoption of the 2008 Operating Agreement, depriving New Mexico of water it is apportioned by the Compact.

46. Since the 2008 Operating Agreement was adopted, the United States also has failed to allocate water in storage on an annual basis to both districts.
47. Under historical Project operations, if a full allocation was not needed or a district failed to call for release of its full annual allocation, any unused portion of the allocation remaining in Project Storage after the irrigation season was accounted for as Usable Water and allocated on an equal basis to Project lands in both districts in the following year. Unlike historical Project operations, the 2008 Operating Agreement allows for long-term storage by the districts, also known as carryover accounting. Using carryover accounting, a district that does not use its full allocation in a given year can leave it in Project storage indefinitely. That water is not allocated on an equal basis to each Project acre, but instead is available solely to Project lands in a single district.
48. With carryover accounting, the amount of Usable Water that is available for 57/43 allocation to Project lands in both districts is reduced. The result is that New Mexico has received considerably less water than it would have received under historical Project operations and that it is entitled to under the Compact.
49. Under the 2008 Operating Agreement, New Mexico is disproportionately charged with evaporative losses from Project Storage, including evaporative losses associated with carryover water reserved for Texas water users. As a result, the 2008 Operating Agreement further injures New Mexico.
50. The 2008 Operating Agreement also debits EBID for all carriage and groundwater depletions in the system, regardless of whether those losses are attributable to

groundwater pumping in New Mexico, Texas, or Mexico. In other words, by incorporating the New Diversion Ratio into the allocation procedures, the 2008 Operating Agreement requires EBID to pay for system inefficiencies caused by pumping in Texas and Mexico.

51. The changes to the Project operations by the 2008 Operating Agreement result in significant differences in amounts of Project water delivered to each authorized acre, and result in New Mexico receiving less water than it is entitled to under the Compact.
52. The 2008 Operating Agreement has also resulted in increased irrigation well pumping in New Mexico because the amount of Project Water delivered to New Mexico Project beneficiaries since implementation of the 2008 Operating Agreement is far less than the amount they would have received under historical Project operations.
53. Because of the over-allocation to Texas under the 2008 Operating Agreement, New Mexico brought suit in 2011 against Reclamation and the two irrigation districts in federal district court in New Mexico. While the district court suit was pending, Texas initiated the present proceeding by invoking this Court's original jurisdiction. The district court case is currently stayed.

E. Credit Water

54. Article VI credits (*i.e.*, Credit Water) are computed annually and approved by the Commission at its annual meeting.
55. The ability of New Mexico to offer a "relinquishment", as provided by the Compact, is a valuable Compact right that is critical to maintaining upstream operations for multiple users.

56. Having Accrued Credit when Usable Water is less than 400,000 acre-feet and Compact Article VII storage restrictions are in effect provides New Mexico the opportunity to aid its Rio Grande water users, both upstream and downstream of Elephant Butte Reservoir, during drought.
57. During the Commission's 67th Annual Meeting (March 23, 2006), the Commission expressly directed the United States that Credit Water was to be held constant during the calendar year and that the United States could not unilaterally allocate or release the States' credits, including reductions for evaporation losses:
1. the Engineer Advisers requested that the Commission direct that credit water be held constant during the year, and
 2. that the Commission direct the Engineer Advisers to meet if the total combined accrued credit water exceeds 150,000 acre-feet and Usable Water is less than a full allocation or if the combined accrued credit water exceeds 50 percent of Project Storage and make a recommendation to the Commission regarding optimum use of water in Project Storage, and
 3. that the Commission direct Reclamation to allocate or release credit water only as directed by the Commission. The recommendations were approved by the Commission.
58. The Compact does not authorize or give Reclamation discretion to reduce or release Credit Water, absent explicit State authorization to do so. Each State has sole authority over disposition of its Credit Water. Contrary to this, the United States unilaterally and without authorization did reduce and release New Mexico's Credit Water in June 2011.
59. The total amount of Credit Water in Elephant Butte Reservoir at the beginning of 2011, as authorized by the Commission at its 72nd Annual Meeting in March 2011, was 167,400 acre-feet. The Commission determined that New Mexico's Credit Water amount was 164,700 acre-feet and Colorado's was 2,700 acre-feet. Colorado subsequently offered to relinquish and Texas accepted 1,100 acre feet of Credit Water, resulting in a total credit in Elephant Butte Reservoir of 166,300 acre-feet.

60. In June 2011, the United States, acting *ultra vires*, reduced the Credit Water in Project Storage from 166,300 acre-feet to 100,000 acre-feet and, over New Mexico's objections, released a portion of New Mexico's Commission approved Credit Water. This reduction was made without New Mexico's or the Commission's approval. This accounting change altered the Commission's approved Credit Water numbers and reduced New Mexico's allocation of Credit Water.
61. Pursuant to the Compact and the Commission's 2006 Credit Water directive, the United States is without the authority to reduce or release New Mexico's Credit Water for any reason.
62. The United States' actions reducing and releasing New Mexico's Credit Water were in direct contradiction to the terms of the Compact and the Commission's 2006 Credit Water directive.

FIRST CLAIM FOR RELIEF

(Compact Violation by Texas Caused by Unauthorized Depletions)

63. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
64. Since 1938, Texas has allowed the construction and use of hydrologically connected groundwater wells for irrigation, municipal, and other uses, has allowed the unauthorized use of surface water, and has allowed Project return flows to be unaccounted for, all in violation of the Compact.
65. The excess diversion of Rio Grande surface water and hydrologically connected groundwater within Texas adversely affects New Mexico in two ways. First, surface and groundwater diversions in Texas interfere with the Project's ability to deliver water to

New Mexico's Project beneficiaries near the Texas-New Mexico border by directly intercepting water meant for delivery to Project beneficiaries in New Mexico. This either immediately harms these beneficiaries or induces them to call for additional water to be released from Project Storage, reducing the amount of Usable Water in Project Storage available for future allocation. Second, unauthorized surface and groundwater diversions in Texas interfere with the Project's ability to deliver water to Texas Project beneficiaries, causing Texas Project beneficiaries to call for releases of additional Project water, and thereby reducing the amount of Usable Water in Project storage available for allocation to New Mexico Project beneficiaries.

66. Unauthorized depletions in Texas have increased over time, creating deficits in the shallow alluvial aquifer that have reduced Project efficiency, impacted Project releases, lowered the water table to the extent that return flows seldom appear in Project drains and are otherwise unavailable for use on EPCWID lands, and reduced the amount of Usable Water in Project Storage.
67. By undertaking and allowing the unauthorized diversions, Texas has depleted and is threatening to further deplete the waters of the Rio Grande allocated to New Mexico under the Compact.
68. By depleting the waters allocated to New Mexico, Texas has injured New Mexico and its water users.
69. Unless relief is granted by this Court, water use in Texas in excess of its equitable share of the waters of the Rio Grande will continue and increase, resulting in substantial and irreparable injury to New Mexico and its water users.

70. New Mexico has no effective remedy to enforce its rights under the Compact against Texas, except by invoking the Court's original jurisdiction in this proceeding.
71. New Mexico has no adequate remedy at law to enforce its rights to the waters of the Rio Grande.

SECOND CLAIM FOR RELIEF

(Interference with Compact Apportionment Against the United States)

72. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
73. The Compact places obligations on the United States related to its operation and management of the Project. For example, the Compact requires the United States to allocate Project water on an equal basis to each Project acre, regardless of state or district boundaries.
74. Similarly, the United States may not alter Project operations or accounting in a manner that materially changes the Compact's apportionment.
75. Despite this, the United States has implemented changes to Project operations that have materially altered the apportionment of water between New Mexico and Texas. These include, but are not limited to, the 2008 Operating Agreement. In part, the 2008 Operating Agreement allows for long-term, carryover storage for EBID and EPCWID, in contradiction to historical operations and the Compact. By withholding water in Project storage from annual allocation on a pro-rata basis, the United States has reduced the amount of water available to New Mexico beyond what would have been available under historic annual accounting practices. Furthermore, by allocating some water in Project storage wholly to beneficiaries in one State, the United States no longer allocates

Project water on an equitable pro-rata basis, but instead allocates more water to one State, to the detriment of the other.

76. The 2008 Operating Agreement also applies the New Diversion Ratio, which debits New Mexico for all Project inefficiencies, regardless of whether those losses are attributable to groundwater pumping in New Mexico, Texas, or Mexico, or to other causes outside New Mexico's control. By applying the New Diversion Ratio in the Operating Agreement, the United States has improperly reduced the amount of water apportioned to New Mexico by the Compact.
77. The 2008 Operating Agreement has reduced allocations of Project water to New Mexico compared to allocations under historic Project operations. In contrast, allocations to Texas under the 2008 Operating Agreement have exceeded those which would have been allocated under historical Project operations.
78. By adopting major operational changes that materially alter the historical operation of the Project and result in significant changes in the apportionment of Project water between New Mexico and Texas, the United States has unilaterally changed the bargain on which the Compact was based and has unilaterally reduced the amount of New Mexico's apportionment.
79. The States are not parties to the 2008 Operating Agreement.
80. By adopting and implementing the 2008 Operating Agreement and making other changes to Project operations, the United States has interfered with and violated the Compact.
81. The acts and conduct of the United States, its officers, and agencies in adopting and implementing the 2008 Operating Agreement, and making other changes to Project

operations that have altered and reduced New Mexico's apportionment, have caused grave and irreparable injury to New Mexico and its citizens.

82. Grave and irreparable injury will be suffered in the future by New Mexico and its citizens unless relief is afforded by this Court to prevent the United States, its officers, and agencies from operating the Project pursuant to the terms of the 2008 Operating Agreement or in any manner inconsistent with the equal allotment of Project water to each Project acre required by the Compact.
83. New Mexico has sustained damages arising from the United States' breach of the Compact.

THIRD CLAIM FOR RELIEF

(Improper Release of Compact Credit Water Against the United States)

84. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
85. Pursuant to Article VII of the Compact, New Mexico has sole authority over any decision to relinquish Credit Water attributed to the State of New Mexico, with such relinquishments creating important concomitant storage rights under the Compact. New Mexico "may relinquish accrued credits at any time, and Texas may accept such relinquished water, and in such event the state, or states, so relinquishing shall be entitled to store water in the amount of the water so relinquished."
86. Pursuant to Article VI of the Compact, Accrued Credit in Project storage "shall be reduced annually to compensate for evaporation losses in the proportion that such credits . . . bore to the total amount of water in such reservoirs during the year."

87. In 2011, the United States, acting through Reclamation, caused the amount of New Mexico's Credit Water in Project Storage to be reduced by approximately 64,000 acre-feet without New Mexico's authorization or consent and subsequently, over New Mexico's objection, released New Mexico Commission approved Credit Water to EPCWID.
88. The United States did not and does not have the authority, without New Mexico's express prior authorization, to reduce or release New Mexico's Compact Credit Water for any purpose except in accordance with the Compact and the Commission's 2006 Credit Water directive.
89. New Mexico has been harmed by the United States' illegal reduction and release of New Mexico's Compact Credit Water. The United States' actions deprive New Mexico of its right under the Compact to relinquish its Credit Water in exchange for the ability to store water in upstream reservoirs.
90. The United States' unilateral actions to reduce and/or release New Mexico's Credit Water violated New Mexico's rights under the Compact and was not authorized by New Mexico as required in the Compact.

FOURTH CLAIM FOR RELIEF

(Compact Violation and Unjust Enrichment Against Texas)

91. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
92. The State of Texas is entitled to no more water under the Compact than is necessary to deliver an amount of water to each acre of Project lands in Texas equal to the amount of water delivered to each acre of Project lands in New Mexico.

93. At least since the adoption of the 2008 Operating Agreement and various other operational changes, as well as through the use of inequitable accounting methods by the United States, the State of Texas has been receiving more water under the Compact than it would receive under historical Project operations where Project water is allotted on an equal basis to each acre of Project lands in both States.
94. Relying on the United States' operation of the Project in violation of the Compact, Texas has violated the Compact by receiving and claiming the right to receive more water than is necessary to deliver an equal amount of water to each acre of Project lands in Texas and New Mexico.
95. In 2011, Texas received excess water as a result of the unauthorized reduction of New Mexico's Compact Credit Water by the United States.
96. Texas will continue its violations of the Compact unless this Court acts to prevent the same.
97. New Mexico has been damaged by the violations of the Compact by Texas.
98. Texas has been unjustly enriched by receiving, and claiming the right to receive, more water than it is entitled to under the Compact.

FIFTH CLAIM FOR RELIEF

(Violation of the Water Supply Act by the United States)

99. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
100. The United States has an obligation to operate the Project in accordance with, *inter alia*, the Reclamation Act of June 17, 1902, ch. 1093, 32 Stat. 388 as amended and supplemented ("Reclamation Act"), 43 U.S.C. §§ 371 *et seq.*, including those portions of

the Reclamation Act called the Water Supply Act of 1958, 43 U.S.C. §390b, the Rio Grande Project Act, ch. 798, 33 Stat. 814, Act of February 25, 1905, section 8 of the Reclamation Act, 43 U.S.C. § 383, and the Compact, 53 Stat. 785, NMSA 1978 § 72-15-23.

101. The Water Supply Act, in 43 U.S.C. § 390b(e), prohibits the Bureau of Reclamation from making major operational changes to federal reclamation projects, including the Project, without the approval of Congress.
102. The United States has made major operational changes to the Project without Congressional approval by, among other things, executing contracts allowing significant amounts of Project water to be used for municipal and industrial purposes in the City of El Paso and elsewhere in Texas; by approving major operational changes to the Project in the 2008 Operating Agreement, including but not limited to allowing for carryover storage and materially altering the historical allocation of water between New Mexico and Texas; and by adopting or declining to adopt accounting methods that have materially altered Project operations and allocations.
103. Contrary to the Water Supply Act, the United States did not obtain the approval of Congress prior to taking any of these actions.
104. New Mexico and its citizens have suffered and will continue to suffer harm because of the United States' failure to follow the Water Supply Act.

SIXTH CLAIM FOR RELIEF

(Improper Compact and Project Accounting Against the United States)

105. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.

106. The United States has a duty to conduct annual Project accounting in a manner that is consistent with the Compact.
107. The United States has breached this duty through improper accounting, including but not limited to: failing to account for depletions to Project surface flow caused by groundwater pumping and unauthorized surface diversions in Texas and groundwater pumping and surface diversions in Mexico in excess of the 60,000 acre-feet annually Mexico is allowed under the 1906 Convention, and by adopting accounting practices that artificially inflate the amount of Project water allocated to Texas, including but not limited to: carryover accounting; monthly evaporation accounting for Credit Water; improperly allocating credits to Texas in Project accounting; failing to allocate water saved by efficiency improvements equally to all Project lands; not accounting for all usable Project water in Texas; allowing EPCWID to call for additional water from Project storage when Project return flows are already available to supply EPCWID lands; not accounting for or obtaining Commission approval for municipal transfers; and various other improper and irregular means, all to the detriment of New Mexico.

SEVENTH CLAIM FOR RELIEF

(Violation of the Miscellaneous Purposes Act and the Compact Against Texas and the United States)

108. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
109. The Miscellaneous Purposes Act (“MPA”) allows for the sale of surplus waters under conditions set forth in 43 U.S.C. § 521. Because the Compact incorporates the Project, the United States cannot take any actions or make any changes to Project operations that

materially alter the Compact's apportionment. This includes making unilateral determinations that Project water is available for non-irrigation or non-Project uses; that provision of Project water for these uses is not detrimental to the Project, the rights of Project beneficiaries, or the Compact's apportionment; or proceeding to sell or distribute Project waters pursuant to contracts executed under the MPA or any other authority without the express prior authorization of the Compacting States.

110. Contrary to the Compact, the United States and Texas have allowed Project water released from Elephant Butte Reservoir to be diverted from the Rio Grande and used in Texas for purposes other than Project irrigation, including but not limited to municipal and industrial uses in the City of El Paso.
111. The United States, with the participation of Texas and its political subdivisions, has entered into Miscellaneous Purposes Act contracts in violation of the Miscellaneous Purposes Act and Compact. Specifically, the United States, with the participation of Texas and its political subdivisions, has entered into agreements allowing Project water to be used for non-Project purposes without the approval of New Mexico, despite available alternative water supplies and even though the delivery of such Project water is detrimental to the Project, New Mexico, and EBID.
112. The United States' and Texas' actions have reduced New Mexico's water supplies and deprived New Mexico of the equities and protections it bargained for when it entered into the Compact.
113. The acts and conduct of the United States and Texas in failing to comply with the Miscellaneous Purposes Act and Compact have caused grave and irreparable injury to

New Mexico and its citizens who are entitled to receive and use the water apportioned to them pursuant to the Compact.

114. Grave and irreparable injury will be suffered in the future by New Mexico and its citizens unless relief is afforded by this Court to prevent the United States and Texas from continuing to disregard the Miscellaneous Purposes Act in violation of the Compact.
115. New Mexico has sustained damages arising from the actions of the United States and Texas.

EIGHTH CLAIM FOR RELIEF

(Improper Project Maintenance Against the United States)

116. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
117. The United States has transferred operation and maintenance responsibility for most Project works to the districts, but it retains the responsibility to operate and maintain the Project's storage reservoirs, diversion structures, and the main channel of the Rio Grande.
118. In derogation of these responsibilities, the United States has allowed the growth of water-consuming vegetation around Project reservoirs and along the channel of the Rio Grande. This vegetation consumes large quantities of Project water each year and can reduce water transport efficiency.
119. The United States has also allowed the channel of the Rio Grande, which is used to deliver water to the districts, to fill with silt and other debris. The siltation of the river channel has the effect of slowing the flow of water through the channel, increasing evaporation and seepage losses from the river, and reducing the efficiency of other Project works, including but not limited to Project drains.

120. The acts and conduct of the United States in failing to comply with its responsibilities to properly maintain the Project have caused grave and irreparable injury to New Mexico and its citizens by causing or increasing the loss of water from the Project and creating inefficiencies in the Project's delivery of water which are then charged to New Mexico pursuant to the 2008 Operating Agreement.
121. Grave and irreparable injury will be suffered in the future by New Mexico and its citizens unless relief is afforded by this Court to prevent the United States from continuing to disregard its responsibility to properly maintain the Project.
122. New Mexico has sustained damages arising from the actions of the United States.

NINTH CLAIM FOR RELIEF

(Failure to Enforce the 1906 Convention and Compact Violation Against the United States)

123. New Mexico incorporates the allegations in all preceding paragraphs as if fully set forth herein.
124. Article XIV of the Compact states, "The schedules herein contained and the quantities of water herein allocated shall never be increased nor diminished by reason of any increase or diminution in the delivery or loss of water to Mexico."
125. Article IV of the 1906 Convention provides in relevant part that Mexico "waives any and all claims to the waters of the Rio Grande for any purpose whatever between the head of the present Mexico Canal and Fort Quitman, Texas."
126. Despite Mexico's agreement in the 1906 Convention to waive any and all claims to the waters of the Rio Grande in the Project area beyond the 60,000 acre-feet annually it receives under the 1906 Convention, pumping of groundwater hydrologically connected

to the Rio Grande and unauthorized surface diversions from the Rio Grande have greatly increased in Mexico above Fort Quitman, Texas, since 1906, creating deficits in the shallow alluvial aquifer that have reduced Project efficiency, impacted Project releases, reduced return flows, and decreased the amount of water in Project Storage available for future use.

127. Despite the negative effect on Project deliveries attributable to water diversions in Mexico in excess of the 60,000 acre-feet annually guaranteed to Mexico by the 1906 Convention, the United States has failed to enforce the 1906 Convention. Nor has the United States taken actions to ensure Compact water allocations from the Project are not diminished by the loss of water to Mexico, in violation of the Compact.
128. The acts and conduct of the United States in failing to enforce the 1906 Convention or comply with the Compact have caused grave and irreparable injury to New Mexico and its citizens.
129. Grave and irreparable injury will be suffered in the future by New Mexico and its citizens unless relief is afforded by this Court to prevent the United States from continuing to disregard its responsibility to enforce the 1906 Convention and to comply with the Compact.
130. New Mexico has no effective remedy to enforce its rights under the Treaty or Compact, except by invoking the Court's original jurisdiction in this proceeding.
131. New Mexico has no adequate remedy at law to enforce its rights to the waters of the Rio Grande.
132. New Mexico has sustained damages arising from the actions of the United States.

WHEREFORE, the State of New Mexico respectfully prays that the Court:

- A. Declare the rights of the State of New Mexico to the waters of the Rio Grande pursuant to and consistent with the Compact;
- B. Issue its Decree commanding the State of Texas, its officers, citizens and political subdivisions to cease and desist all actions which violate the Compact;
- C. Issue its Decree commanding the United States, its officers, and agencies to cease and desist all actions which violate the Compact;
- D. Award to the State of New Mexico all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of New Mexico as a result of the State of Texas's unjust enrichment and its past and continuing violations of the Compact;
- E. Find and declare that the 2008 Operating Agreement violates the Compact and the Water Supply Act and is void as a matter of law, and enjoin the United States, its officers, and its agencies from implementing the 2008 Operating Agreement;
- F. Declare that MPA contracts the United States has executed with the City of El Paso and others violate the Compact and the MPA and enjoin the United States, its officers, and its agencies from releasing and delivering Project water for non-irrigation purposes until the United States complies with the MPA and the Compact;
- G. Declare that the United States, its officers, and its agencies are not authorized to reduce or release New Mexico's Compact Credit Water from Project Storage for any purpose without the express authorization of New Mexico or the Commission and enjoin the United States, its officers, and its agencies from reducing or releasing Compact Credit Water except as directed by New Mexico or the Commission;

- H. Declare that the United States, its officers, and its agencies have violated the Compact by failing to properly account for Project operations and order the United States, its officers, and its agencies to properly account for Project operations, including in Texas and Mexico;
- I. Declare that the United States, its officers, and its agencies have violated the Compact by failing to maintain the Project and order the United States, its officers, and its agencies to properly maintain Project infrastructure under the United States' control;
- J. Declare that the United States, its officers, and its agencies have violated the Compact by failing to enforce the 1906 Convention and order the United States, its officers, and its agencies to prevent Project water allocations from being diminished by the loss of water to Mexico;
- K. Award to the State of New Mexico all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of New Mexico as a result of the United States' past and continuing violations of the Compact;
- L. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

Respectfully submitted,

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