

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.*

---

**TEXAS'S COMPLAINT**

---

STUART L. SOMACH, ESQ.\*  
ANDREW M. HITCHINGS, ESQ.  
ROBERT B. HOFFMAN, ESQ.  
FRANCIS M. GOLDSBERRY II, ESQ.  
SOMACH SIMMONS & DUNN, PC  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814  
Telephone: 916-446-7979  
[ssomach@somachlaw.com](mailto:ssomach@somachlaw.com)

\* *Counsel of Record*

January 2013

## TEXAS'S COMPLAINT

The State of Texas brings this action against the Defendants the State of New Mexico and the State of Colorado, and for its cause of action asserts as follows:

1. The Court has original and exclusive jurisdiction of this suit under Article III, Section 2, Clause 2 of the Constitution of the United States, and Title 28, Section 1251(a) of the United States Code.

2. The Rio Grande is an interstate and international river that originates in Colorado, flows in a southerly direction into and through New Mexico and into Texas, and then to the Gulf of Mexico. The Rio Grande, after crossing the New Mexico–Texas state line, forms the international boundary between the United States of America (the “United States”) and the United States of Mexico (“Mexico”).

3. As a matter of interstate comity, and in order to resolve the existing and future controversies among them, and to equitably divide and apportion the water of the Rio Grande among them, the States of Colorado, New Mexico, and Texas signed the Rio Grande Compact on March 18, 1938. The Rio Grande Compact was ratified thereafter by the respective state Legislatures, and was consented to and approved by the United States pursuant to an Act of Congress. Act of May 31, 1939, ch. 155, 53

Stat. 785. The Rio Grande Compact is reprinted in the Appendix to this Complaint.

4. As detailed below, the Rio Grande Compact, among other purposes, was entered into to protect the operation of the Rio Grande Reclamation Project. The Rio Grande Compact requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir, a storage feature of the Rio Grande Reclamation Project. Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements. In order for water to be delivered to Rio Grande Project beneficiaries in southern New Mexico and in Texas, it must be released from Rio Grande Project facilities, and allowed to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas. New Mexico has, contrary to the purpose and intent of the Rio Grande Compact, allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico. New Mexico's actions, in allowing and authorizing the interception of Rio Grande Project water intended for use in Texas, violates the purpose and intent of the Rio Grande Compact, causing grave and irreparable injury to Texas.

5. The State of Colorado is named as a Defendant to this Complaint on the basis that it is a signatory to the Rio Grande Compact.

6. In 1904, an Irrigation Congress was held in El Paso, Texas, for the purpose of addressing and resolving a dispute between interests in New Mexico and interests in Texas over the waters of the Rio Grande (“1904 Irrigation Congress”). The 1904 Irrigation Congress resulted in a recommendation for the construction by the United States of a federal dam and reservoir near Engle, New Mexico (which became Elephant Butte Dam and Reservoir), to be operated as a federal reclamation project, pursuant to the Reclamation Act of 1902, by the United States Bureau of Reclamation (“Bureau of Reclamation”). The 1904 Irrigation Congress also recommended delivery of water from the proposed project as between the lands in southern New Mexico and in Texas based on the ratio of project lands within each State. The recommendations of the 1904 Irrigation Congress were adopted by the Secretary of the Interior, and the Rio Grande Reclamation Project (“Rio Grande Project” or “Project”) was authorized pursuant to the Rio Grande Reclamation Project Act, Act of February 25, 1905, ch. 798, 33 Stat. 814 (“Rio Grande Project Act”).

7. In 1906 and again in 1908, the United States through the Bureau of Reclamation filed notices with the Territorial Engineer of the Territory of New Mexico of reservations of Rio Grande water for the Rio Grande Project, which gave notice that the United States had set aside all unappropriated waters of the Rio Grande for the federal purposes of the Project. The Bureau of Reclamation commenced operation of the Rio Grande Project in 1916.

8. As noted, Rio Grande Project water deliveries are made based upon the ratio between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas. The Elephant Butte Irrigation District (“EBID”), a political subdivision of the State of New Mexico, is the Rio Grande Project beneficiary of water from the Rio Grande Project for delivery and use in southern New Mexico. The El Paso County Water Improvement District No. 1 (“EPCWID”), a political subdivision of the State of Texas, is the Rio Grande Project beneficiary of the water from the Rio Grande Project for delivery and use in Texas. On average, the City of El Paso, Texas receives approximately 50% of its water supply from the Rio Grande Project pursuant to contracts with EPCWID for Rio Grande Project water supply.

9. In 1906, the United States and Mexico entered into a Convention between the United States and Mexico for the Equitable Distribution of the Waters of the Rio Grande. Convention with Mexico for Upper Rio Grande, 34 Stat. 2953 (“1906 Treaty”). This Treaty provided for the delivery at or near El Paso, Texas, and Juarez, Mexico, up to a total maximum of 60,000 acre-feet of water annually from the Rio Grande Project. 1906 Treaty at Article I.

10. The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a

specific state-line delivery allocation. Instead, it relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas. A fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact was executed. The relationship between the Rio Grande Project authorization and the Rio Grande Compact presents unique issues that only this Court can resolve.

11. The State of Texas entered into the Rio Grande Compact under the following fundamental premises: (a) the operation of the Rio Grande Project by the United States, and the Rio Grande Project's allocations to Texas, were recognized and protected by the Rio Grande Compact; (b) New Mexico was required to make deliveries into Elephant Butte Reservoir to ensure that the United States could continue to operate the Rio Grande Project, and thereby provide for deliveries of water from the Rio Grande Project as had been previously authorized; and (c) New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico. Unless the United States' operation of the Rio Grande Project is protected, as intended by the Rio Grande Compact and as authorized by the Rio Grande Project Act, Rio Grande Project

deliveries of water to southern New Mexico, Texas and Mexico cannot be assured, and the rights of Texas under the Rio Grande Compact cannot be protected.

12. Various provisions of the Rio Grande Compact reflect one of the Rio Grande Compact's fundamental purposes of protecting the Rio Grande Project. Article III of the Rio Grande Compact requires that Colorado deliver water in the Rio Grande at the Colorado–New Mexico state line in established quantities, based upon flows of water that are measured at various index stations.

13. Article IV obligates New Mexico to deliver water in the Rio Grande at San Marcial, New Mexico, which is just upstream of Elephant Butte Reservoir. In 1948, a Resolution adopted by the Rio Grande Compact Commission, in accordance with its powers afforded under Article XII of the Compact, changed the location of the gage for the measurement of New Mexico's deliveries from San Marcial to Elephant Butte Reservoir. These deliveries to Elephant Butte Reservoir, and thus to the Rio Grande Project, are based upon a tabulation of relationships that correspond to the quantity of water at specified indices in New Mexico. These index flows are to be further adjusted to establish New Mexico's delivery obligation based upon the water that would have been available for the Rio Grande Project absent upstream development that took place after 1929 and 1937. Water is delivered to Elephant Butte Reservoir because it was (and still is) the primary water storage location for the Rio

Grande Project when the Rio Grande Compact was adopted.

14. Article I(l) of the Rio Grande Compact defines “usable water” as “all water, exclusive of credit water, which is in [Rio Grande] project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.” Article I also defines “credits” and “debits” as the amounts of water delivered or not delivered by Colorado or New Mexico above or below their respective delivery obligations. Article VI of the Compact allows for and delineates how “credits” and “debits” are to be accounted. These terms reflect the interconnected nature of the Rio Grande Project and the Rio Grande Compact. These terms have no meaning absent the existence and operation of the Rio Grande Project by the United States.

15. Article VII of the Rio Grande Compact precludes Colorado and New Mexico from increasing the amount of water in storage in reservoirs constructed after 1929, whenever there is less than 400,000 acre-feet of usable water stored in Rio Grande Project facilities, subject to exceptions associated with releases from Elephant Butte Reservoir that are, on average, greater than 790,000 acre-feet per annum, or where there are relinquishments of accrued credits available. Under specified circumstances, Article VIII of the Rio Grande Compact allows the Commissioner of Texas to demand that Colorado and/or New Mexico release water from storage in reservoirs constructed after 1929 to the amount of accrued debits sufficient to



bring the quantity of usable water in Rio Grande Project storage to 600,000 acre-feet.

16. Article XI of the Rio Grande Compact provides that nothing within the Compact shall be interpreted to prevent recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of water, at the point of delivery, be changed hereafter by one signatory state to the injury of another.

17. Article XII of the Rio Grande Compact created the Rio Grande Compact Commission, and requires that the actions of the Commission must be unanimous. Article XIII requires that the terms of the Rio Grande Compact cannot be amended without the unanimous approval of all four parties to the Compact.

18. New Mexico's actions have reduced Texas' water supplies and the apportionment of water it is entitled to from the Rio Grande Project and under the Rio Grande Compact. The Rio Grande Compact is predicated on the understanding that delivery of water at the New Mexico–Texas state line would not be subject to additional depletions beyond those that were occurring at the time the Rio Grande Compact was executed. New Mexico, through the actions of its officers, agents and political subdivisions, has increasingly allowed the diversion of surface water, and has allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New

Mexico. The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas. Despite the State of Texas' request that New Mexico take action to cease these diversions and extractions, these unlawful surface water diversions and extractions of water from beneath the ground have increased over time until, in 2011, they amounted to tens of thousands of acre-feet of water annually. These unlawful surface water diversions and extractions of water from beneath the ground intercept water that in 1938 would have been available for use in Texas, and convert that water for use in New Mexico. The unlawful diversion of surface water and extraction of underground water also require more water to be released from Elephant Butte Reservoir depleting Rio Grande Project storage. These extractions also create deficits in tributary underground water, which must be replaced before the Rio Grande can efficiently deliver Rio Grande Project water. This requires additional releases of water from Elephant Butte Reservoir, which has a detrimental effect on the amount of water stored in Elephant Butte Reservoir for future use. Depleted reserves at Elephant Butte Reservoir have adverse impacts on future water supplies that should otherwise be available to the Rio Grande Project for delivery in southern New Mexico, Texas and Mexico. These extractions have a direct adverse impact on the amount of water delivered to Texas pursuant to the Rio Grande Project authorization and the Rio Grande Compact.

These extractions were not occurring in 1938 when Colorado, New Mexico, and Texas entered into the Rio Grande Compact to equitably apportion these waters. Thus, New Mexico has changed the conditions that existed in 1938 when the Compact was executed to the detriment of the State of Texas.

19. New Mexico's actions, including the actions of its State Engineer and its Rio Grande Compact Commissioner, have validated and encouraged, rather than prevented, the development of post-Compact depletions of the Rio Grande below Elephant Butte Reservoir. This has resulted in ongoing, material depletions of flows of the Rio Grande at the New Mexico–Texas state line, causing substantial and irreparable injury to Texas. By its failure to control and prevent the proliferation of post-Rio Grande Compact pumping of water hydrologically connected to the Rio Grande, and by its acquiescence in surface water diversions and failure to prevent non-permitted diversion of surface water, New Mexico has ignored and undermined Texas' rights to water from the Rio Grande Project, and has breached and continues to breach its obligations and responsibilities under the Rio Grande Compact.

20. New Mexico has attempted and continues to attempt to control the operation of the Rio Grande Project in contravention of the Rio Grande Project Act and the Rio Grande Compact, through novel interpretations of the Rio Grande Compact that New Mexico has offered in litigation it initiated in the United States District Court in New

Mexico (*State of New Mexico v. U.S. Bureau of Reclamation, et al.*, No. Civ. 11-691 JB/WDS (D. N.M. filed Aug. 8, 2011)), and in Rio Grande Compact Commission meetings and deliberations. In the United States District Court action, New Mexico has asked the Court to interpret the Rio Grande Compact incorrectly in contravention of New Mexico's rights and obligations under the Compact, and thereby, among other things, enable New Mexico to vitiate a 2008 agreement among the United States, EBID and EPCWID relating to Project operations and the allocation of Project water to EBID and EPCWID. Operating Agreement for the Rio Grande Project (March 10, 2008); hereafter the "2008 Operating Agreement." The States of New Mexico and Texas are not parties to the 2008 Operating Agreement, nor is Texas a party to this federal court litigation in which New Mexico challenges the 2008 Operating Agreement.

21. New Mexico has also taken positions in actions in New Mexico state court advancing novel views of the application of Section 8 of the 1902 Reclamation Act, 43 U.S.C. § 383, which are adverse to Texas' rights under the Rio Grande Compact and Rio Grande Project Act. These positions, if adopted, would result in a decrease of the lawful amounts of Rio Grande Project water available for delivery by the United States from the Rio Grande Project, including water apportioned to Texas, in contravention of the Rio Grande Project Act and the Rio Grande Compact. Specifically, New Mexico has asserted that the Rio Grande Project is not entitled to the full benefit of the waters of the Rio Grande

below Elephant Butte Reservoir, and that New Mexico pumpers of water found under the ground have a prior right to Rio Grande Project water, regardless of the fact that this water is hydrologically connected to the Rio Grande and originated from the Rio Grande and the Rio Grande Project. In essence, New Mexico asserts that so long as it has made Rio Grande Compact deliveries into Elephant Butte Reservoir, New Mexico may intercept and take this same water for use in New Mexico once it is released from Elephant Butte Reservoir. Thus, water allocated to Texas from the Rio Grande Project and the Rio Grande Compact would never leave New Mexico. These actions constitute a breach of New Mexico's contractual obligations under the Rio Grande Compact, including a breach of its obligation of good faith and fair dealing implicit in the Rio Grande Compact.

22. Consistent with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the State of Texas has adjudicated the Rio Grande above Fort Quitman, Texas, entering a final decree in 2006 binding on the United States and EPCWID. In furtherance, Texas issued a Certificate of Adjudication in 2007 allowing for the diversion of water sufficient to meet Rio Grande Project and Rio Grande Compact diversion and use rights in Texas. The Certificate of Adjudication assumes compliance by the State of New Mexico with the provisions of the Rio Grande Project Act and the Rio Grande Compact. Absent New Mexico's compliance with the provisions of the Rio Grande Project Act and the Rio Grande Compact, the judicial decree entered into in Texas

can have no practical effect, and cannot serve as a source of legal stability to those in Texas who obtain water from the Rio Grande Project. The Certificate of Adjudication and the Final Decree of the 327th Judicial District Court in El Paso County, Texas, have not been given full faith and credit by the State of New Mexico, in violation of Article IV, Section 1 of the United States Constitution.

23. The aforementioned actions of New Mexico have resulted in the Rio Grande Compact Commission's inability to unanimously agree on appropriate accounting as is required under Articles XII and XIII of the Rio Grande Compact.

24. The acts and conduct of New Mexico, its officers, citizens and subdivisions in failing, neglecting and refusing to deliver water to Texas in available quantities required by the Rio Grande Project Act and the Rio Grande Compact, have caused grave and irreparable injury to Texas and its citizens who are entitled to receive and use the water apportioned to them pursuant to the Rio Grande Project Act and the Rio Grande Compact.

25. Grave and irreparable injury will be suffered in the future by Texas and its citizens unless relief is afforded by this Court to prevent New Mexico, its officers, citizens and political subdivisions from using and withholding water that Texas is entitled to, and which New Mexico is obligated to deliver, pursuant to the provisions of the Rio Grande Project Act and by the Rio Grande Compact.

26. New Mexico refuses to comply with its obligations under the Rio Grande Compact with respect to the delivery of Texas' apportionment of water under the Rio Grande Compact to the New Mexico–Texas state line, despite requests by Texas that New Mexico do so.

27. Texas has sustained damages arising from New Mexico's breach of the Rio Grande Compact, such damages consisting of the value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act, in an amount to be proven at trial.

28. Texas has no effective remedy to enforce its rights under the Rio Grande Project Act and the Rio Grande Compact against New Mexico, except by invoking the Court's original jurisdiction in this proceeding.

WHEREFORE, the State of Texas respectfully prays that the Court:

1. Declare the rights of the State of Texas to the waters of the Rio Grande pursuant to and consistent with the Rio Grande Compact and the Rio Grande Project Act;

2. Issue its Decree commanding the State of New Mexico, its officers, citizens and political subdivisions, to: (a) deliver the waters of the Rio

Grande in accordance with the provisions of the Rio Grande Compact and the Rio Grande Project Act; and (b) cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project;

3. Award to the State of Texas all damages and other relief, including pre- and post-judgment interest, for the injury suffered by the State of Texas as a result of the State of New Mexico's past and continuing violations of the Rio Grande Compact and the Rio Grande Project Act; and

4. Grant all such other costs and relief, in law or in equity, that the Court deems just and proper.

Respectfully submitted,

STUART L. SOMACH, ESQ.\*  
ANDREW M. HITCHINGS, ESQ.  
ROBERT B. HOFFMAN, ESQ.  
FRANCIS M. GOLDSBERRY II, ESQ.  
SOMACH SIMMONS & DUNN, PC  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814  
Telephone: 916-446-7979  
[ssomach@somachlaw.com](mailto:ssomach@somachlaw.com)

\* *Counsel of Record*

January 2013