

No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

**STATE OF NEW MEXICO'S NOTICE OF FILING OF LETTERS BY
FORMER TEXAS RIO GRANDE COMPACT COMMISSIONER
AND NEW MEXICO RIO GRANDE COMPACT COMMISSIONER**

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COMES NOW, the State of New Mexico (“New Mexico”) and provides notice of the filing of the two letters discussed by attorneys for Texas and New Mexico at the June 3, 2021, Status Conference Hearing with regard to Texas’s consideration of filing a motion to amend pleadings.

Attachment A: May 6, 2021 Pat Gordon, Texas Rio Grande Compact Commissioner (former) letter re: *Rio Grande Compact of 1938 (“Compact”) – Article VI – New Mexico Accrued Debit Water*;

Attachment B: May 21, 2021 John D’Antonio, New Mexico Rio Grande Compact Commissioner letter re: *Response to May 6, 2021 Letter Regarding Storage of Water in Post-1929 Reservoirs*.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

◆

This is to certify that on June 7, 2021, I caused a true and correct copy of the **State of New Mexico's Notice of Filing of Letters by Former Texas Rio Grande Compact Commissioner and New Mexico Rio Grande Compact Commissioner** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 7th day of June, 2021.

/s/ Michael A. Kopp

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RIO GRANDE COMPACT COMMISSION OF TEXAS

May 6, 2021

Via Electronic Delivery

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Re: Rio Grande Compact of 1938 ("Compact") – Article VI - New Mexico Accrued Debit Water

Dear Commissioner D'Antonio:

For the calendar year 2021, New Mexico has an accrued debit of 96,300 acre-feet of water. Article VI of the Compact provides that, as long as post-1929 reservoirs have the physical capacity, "New Mexico *shall* retain water in storage *at all times* to the extent of its accrued debit."

Just a few days ago, I was provided a copy of your March 22, 2021 letter, which appears to notify the City of Santa Fe, the Middle Rio Grande Conservancy District ("MRGCD") and the Bureau of Reclamation that New Mexico does not intend to store water up to its accrued debit in the denominated post-1929 reservoirs, but instead will allow water to flow through those reservoirs into the boundaries of the MRGCD, where it will presumably be diverted for use there. This notice is despite New Mexico has an accrued debit of 96,300 acre-feet of water.

Article VI of the Compact is very clear. It obligates New Mexico to retain water in storage *at all times* to the extent of its accrued debt. Under Article VIII of the Compact, the Texas Commissioner can demand the accrued debit water in January. Articles VI and VIII are designed to mitigate an increase in the accrued debit water by New Mexico and help ensure deliveries of water to Texas.

New Mexico's obligation to retain in storage accrued debit water under Article VI is not conditioned upon a maximum 200,000 acre-feet of accrued debit, nor is it excused when Article VII conditions exist. Rather, Articles VI and VII are designed to work together to protect deliveries to Texas. They should not be used against each other, as New Mexico suggests, to benefit deliveries of water to the MRDCD to the detriment of Texas. Based on your handling of the

John R. D'Antonio, Jr., P.E.

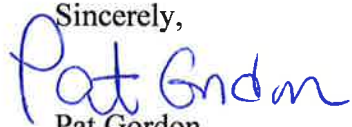
May 6, 2021

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accrued debit storage by releasing water under Article VII, all of this water should be delivered to EBR, not MRGCD

Your action is a Compact violation, and the purpose of this letter is to put you on notice of such violation. Texas intends to enforce its rights under the Compact. Demand is hereby made that New Mexico cease and desist its Compact violation.

If you have any questions, please contact me.

Sincerely,

Pat Gordon,
Texas Rio Grande Compact Commissioner

cc: via electronic delivery

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Via email and U.S. Mail

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RE: Response to May 6, 2021 Letter Regarding Storage of Water in Post-1929 Reservoirs

Dear Commissioner Skov,

Please accept my congratulations for your appointment as Texas Rio Grande Compact Commissioner. I look forward to working with you. I am writing to respond to the letter dated May 6, 2021 from former Commissioner Gordon regarding the storage of water in post-1929 reservoirs in New Mexico upstream of Elephant Butte Reservoir. New Mexico welcomes this opportunity to address your concerns and explain how New Mexico's Compact administration and water management has led to more water flowing into Elephant Butte Reservoir than would otherwise be the case. Unfortunately, however, I must respectfully disagree with Texas's interpretation of the Rio Grande Compact ("Compact") set forth in the May 6th letter.

As a starting point, it is helpful to recognize that the region is experiencing one of the worst droughts in recorded history. The drought conditions in the Rio Grande basin are so severe there will be insufficient flow of native Rio Grande water to satisfy the needs of all surface water users, including the Bosque del Apache National Wildlife Refuge, middle Rio Grande valley farmers, Pueblos, acequias and the critical habitat needs of listed species including the Rio Grande silvery minnow, once the snow runoff ends. Drought conditions have posed obstacles to water management and Compact administration in both States. Even so, as detailed below, New Mexico has remained committed to complying with the Compact.

I believe that Texas and New Mexico share an interest in ensuring that water is delivered to Elephant Butte Reservoir to serve citizens in both States. To that end, in 2020 and 2021 New Mexico has taken several significant actions to deliver more water to the Reservoir. Those actions include the following:

- In June 2020, consistent with Article VII of the Compact, I notified water users with post-1929 storage rights that no Rio Grande water could be stored in post-1929 reservoirs (except to satisfy the six Middle Rio Grande Pueblos' prior and paramount rights). That storage constraint has remained in-place since that time.
- In coordination with my office, the Middle Rio Grande Conservancy District ("MRGCD") ended its 2020 irrigation season early to allow unused water to flow into Elephant Butte Reservoir.
- In January 2021, New Mexico complied with Texas's Article VIII request by releasing water retained in post-1929 reservoirs.
- New Mexico decided not to utilize existing relinquishment credits in 2021 to store water during the existing Article VII conditions.
- In coordination with my office, MRGCD started its 2021 irrigation season a month late, and since the start of the irrigation season has been operating at reduced diversion rates.

We hope that these efforts give you comfort that New Mexico is committed to responsible water administration.

Turning to the Compact interpretation issues that Texas raises, the Compact establishes a balance between storage in post-1929 upstream reservoirs, use of water in the Middle Rio Grande, and delivery obligations at Elephant Butte Reservoir. This balance addresses the needs of water users above and below Elephant Butte Reservoir in both States. To understand the rules for storage in post-1929 reservoirs, it is useful to review the interplay of Articles IV, VI, VII, and VIII.

Article IV establishes New Mexico's delivery obligations to Elephant Butte Reservoir based on the index flows at the Otowi gage. These index flows also set guard rails, defining New Mexico's right to use the remaining flows in the Middle Rio Grande. Article VI then provides necessary flexibility by allowing New Mexico an accrued debit of up to 200,000 acre-feet of water. If New Mexico has a debit, however, the Compact requires New Mexico to retain "holdover storage" in post-1929 reservoirs "to the extent of its accrued debit." New Mexico is required to retain that water in storage until New Mexico repays the debit, the Rio Grande Compact Commission ("RGCC") unanimously agrees to a release of water under Article VI, or Texas invokes the release provision of Article VIII. With regard to the new storage of water after such a release, Article VII prohibits New Mexico from storing water

in post-1929 reservoirs “whenever there is less than 400,000 acre-feet of usable water in project storage.”

New Mexico has managed water in careful compliance with these provisions.

In the May 6th letter, Texas relies heavily on the Article VI obligation to “retain water at all times” to assert that New Mexico has an affirmative obligation to actively store or replace water in post-1929 reservoirs until such newly stored water matches an existing accrued debit. To reach that conclusion, Texas misconstrues the word “retain” to have the same meaning as the word “store,” but that understanding is not supported in the Compact and ignores the relationship between Article VI and other Compact provisions. Contrary to Texas’s position, the Compact does not require New Mexico to actively store or replace water in post-1929 reservoirs after an Article VIII release. Rather, the Article VI obligation to retain water only applies if New Mexico, in its sole discretion, decides to increase storage at a time it also has an accrued debit. Under those circumstances, New Mexico must “retain” water in storage equivalent to its debit before it can release any of the newly stored water for use in the Middle Rio Grande. But if New Mexico does not allow new storage in post-1929 reservoirs in the first place, then the Article VI obligation does not apply because there is no water in storage to “retain.”

To see that “retain” and “store” have different meanings in the Compact, one need only look to Articles VI and VII. In both normal usage and in the Compact, “retain” means to continue to hold water after it has previously been stored in a reservoir. Thus Article VI speaks in terms of “holdover storage of water in reservoirs.” In contrast, Article VII makes clear that to “store” means to “increase the amount of water in storage.” It follows that New Mexico must retain water in post-1929 reservoirs to the extent of the accrued debit if those reservoirs already hold previously stored water, but it has no obligation to actively store or “increase the amount of water in storage.” Further support is found in the Article VI duty to “replace” water that was released by agreement of the RGCC. This language reveals a distinction between replacing water that was previously retained and actively storing water. By arguing that New Mexico must actively store water to match its accrued debit after an Article VIII release, Texas effectively claims that Article VIII requires that New Mexico “replace” released water. But unlike Article VI, the Compact does not require that water released pursuant to Article VIII be “replaced.”

Texas’s interpretation is inconsistent with the Compact in three additional ways. First, Texas’s understanding would create a new obligation that would require an upstream State to actively store water each year up to the total amount of its debit. There is no language in the Compact to support such an obligation. Second, after an Article VIII release, Texas’s interpretation would effectively prevent New Mexico water users from applying any water in the Middle Rio Grande until the State actively stored water up to the accrued debit. This is inconsistent with both Article IV and the system of debits and credits adopted by the Compact. Under Texas’s interpretation, there would be no reason for the Compact to have allowed 200,000 acre-feet in “accrued debits” because New Mexico could be required to release the total amount of its debits from post-1929 reservoirs each year pursuant to Article VIII. Nor would there have been any reason to define separately the terms “annual debits” and “accrued

debits” in Article I. Third, Texas’s interpretation ignores the plain meaning of Article VII. In years such as the present, when Article VII is in effect, New Mexico is flatly prohibited from “increase[ing] the amount of water in storage” in post-1929 reservoirs. Texas offers no explanation for this inconsistency.

Applying the plain language of the Compact to the present circumstances, New Mexico is in compliance with the Compact. In January 2021, New Mexico complied with Texas’s Article VIII request to release all retained water in post-1929 reservoirs. As a consequence of that release, New Mexico had no water in post-1929 reservoirs to “retain.” The Compact imposes no obligation to replace water released pursuant to Article VIII, and New Mexico has not actively stored any water since the release. Put simply, because there is no Rio Grande water being stored in post-1929 reservoirs this year in accordance with Article VII, no water has been stored, and therefore there is no water to be *retained*. Instead, New Mexico has continued to deliver water in accordance with Article IV as contemplated by the Compact. And because the accrued debit of 96,300 acre-feet is well below the compliance limit of 200,000 acre-feet, New Mexico remains in compliance with the Compact, and there is no violation to cease and desist.

Finally, the stated motivation for the May 6th letter is to maximize the delivery of water to Elephant Butte Reservoir. However, Texas’s interpretation actually works at cross purposes with that goal. This is true because if water is actively stored in upstream reservoirs, as Texas suggests, it is prevented from flowing downstream, so it is not available to serve Project beneficiaries until at least the next irrigation season.

New Mexico is interested in working through our disagreements in good faith. In this spirit, we would be happy to meet with you to discuss these issues, including ways we might cooperate to maximize the efficient administration of water during these trying times. If you have any questions, please contact me.

Respectfully,



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New Mexico State Engineer

cc: Patrick R. Gordon, *former Compact Commissioner for Texas*
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New Mexico Response to May 6, 2020 Letter

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May 21, 2021

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