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.

On Motion To Dismiss

NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

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MOTION

In accordance with the Court's order of January 27, 2014, New Mexico by its Attorney General, Gary K. King, hereby respectfully moves to dismiss the Complaint filed by the State of Texas and the Complaint in Intervention filed by the United States on the grounds that they fail to state a claim for relief under the Rio Grande Compact ("Compact"), Act of May 31, 1939, ch. 155, 53 Stat. 785 (Appendix A to Texas' Complaint). The grounds for this motion are:

1. The plain language of the Compact provides that New Mexico's obligation to Texas is to deliver water to Elephant Butte Reservoir, not to the Texas-New Mexico stateline. Further, the Compact also expressly states that Texas' right of enforcement against New Mexico to be at Elephant Butte Reservoir. The parties do not dispute that New Mexico has made all required Compact deliveries for Texas at Elephant Butte Reservoir, the point of delivery specified in the Compact.

2. The Compact does not require New Mexico to maintain depletions within the Rio Grande Basin in New Mexico below Elephant Butte at the levels existing as of 1938.

3. The Compact imposes no affirmative duty on New Mexico to prevent interference with deliveries of Rio Grande Project ("Project") water by the United States. Nor can the United States, which is not a party to the Compact, assert claims based on the Compact. To the extent that the United States seeks

to raise claims herein based on state or federal law asserting injury to its Project right, resolution of those claims in an original action is an unnecessary and inappropriate use of the Court's original jurisdiction.

WHEREFORE, for the above and other just reasons as more fully explained in the accompanying brief, New Mexico respectfully requests that the Court dismiss Texas' Complaint and the United States' Complaint in Intervention in their entirety.

Respectfully submitted,

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BRIEF IN SUPPORT OF NEW MEXICO'S MOTION TO DISMISS TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION

INTRODUCTION

New Mexico brings this motion in the nature of a motion to dismiss to test the allegations of Texas' and the United States' Complaints. As discussed more fully below, the Texas' Complaint should be dismissed because New Mexico has complied with its Compact obligations; the alleged violations of the Rio Grande Compact below Elephant Butte Reservoir by New Mexico find no support in the plain language of the Compact or the Court's precedent. For the same reasons, and also because the United States is not a party to the Compact, the United States' Complaint in Intervention should be dismissed as well.

STATEMENT

The Rio Grande is an interstate and international stream. National Resources Committee, Regional Planning, *Part VI-The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937* at 7 (1938) ("Joint Investigation).*[1] It rises in Colorado and flows southward

[1] New Mexico has offered to lodge with the Clerk of the Court this lengthy document and others marked with an "*" pursuant to Supreme Court Rule 32.3.

through New Mexico and into Texas, where it forms the boundary between Texas and the Republic of Mexico. *Id.* The river flows for over 1,800 miles before it empties into the Gulf of Mexico, traveling for the majority of its length through arid or semi-arid lands for which irrigation is required to grow crops. *Id.*

The Rio Grande is naturally divided into two major basins: the Upper Basin, extending some 600 miles south from the Rio Grande's headwaters to a narrow gorge just below Fort Quitman, Texas, and the Lower Basin, extending from Fort Quitman to the Gulf of Mexico. *Id.* More than 99 percent of the water in the Upper Basin originates in Colorado or New Mexico. *Id.* Most of the water in the Lower Basin is supplied by tributaries rising in Mexico. *Id.*

The Upper Basin is naturally divided into "three principal areas: the San Luis section in Colorado, the Middle section in New Mexico, and the Elephant Butte-Fort Quitman Section in New Mexico, Texas, and Mexico." *Id.* The Elephant Butte-Fort Quitman Section is often referred to as the Lower Rio Grande when discussing the three Upper Basin areas. This river section is the subject of Texas' and the United States' Complaints. The Joint Investigation described the Lower Rio Grande as follows:

> The Elephant Butte Reservoir of the Rio Grande Project, United States Bureau of Reclamation, occupies the immediate river valley from San Marcial narrows to Elephant Butte, a distance of about 40 miles. What is here designated as the Elephant Butte-Fort

> Quitman section includes the reservoir area and the wide plains and long strips of land adjacent to the river from Elephant Butte to Fort Quitman, some 210 miles, of which 130 miles are above El Paso. Like the Middle section, Elephant Butte-Fort Quitman section is a succession of valleys separated by canyons and narrows. Of these valleys, Rincon, Mesilla, and the northern half of El Paso Valley on the Texas side of the river comprise the area of the Rio Grande project. Included in the southern half of El Paso Valley, on the Texas side, is the area of the Hudspeth County Conservation and Reclamation District.

Id.

I. HISTORY OF THE RIO GRANDE PROJECT

Pueblo Indians and later Spanish settlers irrigated crops along the Rio Grande in the Upper Basin for centuries. *Id.* The river generally contained adequate water to support these uses, but the development of irrigated agriculture in the San Luis Valley of Colorado rapidly intensified in the 1880s, resulting in water shortages in the Mesilla and El Paso Valleys and near Juarez, Mexico. *Id.* at 8. The water shortages created considerable controversy, including conflicting proposals for reservoir locations along the Rio Grande. *Id.* Mexico eventually pressed a claim for damages against the United States on the grounds that excessive upstream diversions deprived its citizens of water. *Id.* In response, in 1896 the United States placed a moratorium on granting new rights of

way across public lands and on federal funding for new irrigation diversion and storage structures on the Rio Grande and its tributaries. *Id.* This effectively precluded new irrigation development along the river. *Id.* Given the extensive tracts of public land throughout the Upper Basin, it made "storage of any magnitude impossible." *Id.*

A. The Rio Grande Project

The Reclamation Act in 1902 authorized the federal government to engineer and fund large scale irrigation projects in the western United States, where rainfall is generally insufficient to sustain large-scale agricultural production without irrigation. Act of June 17, 1902, ch. 1093, 32 Stat. 388 ("Reclamation Act"). In 1905, Congress authorized the Secretary of the Interior, under the Reclamation Act, to proceed with cost feasibility studies and, contingent on those studies, to construct a dam and reservoir on the Rio Grande near Engle, New Mexico (the current location of Elephant Butte Reservoir) providing:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of the reclamation Act approved June seventeenth, nineteen hundred and two, shall be extended for the purposes of this Act to the portion of the State of Texas bordering upon the Rio Grande which can be irrigated from a dam to be constructed near Engle, in the Territory of New Mexico, on the Rio

> Grande, to store the flood waters of that river, and if there shall be ascertained to be sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise, then the Secretary of the Interior may proceed with the work of constructing a dam on the Rio Grande as part of the general system of irrigation, should all other conditions as regards feasibility be found satisfactory.

Act of February 25, 1905, ch. 798, 33 Stat. 814 ("Rio Grande Project Act"). This reservoir would ensure a reliable supply of water to the Elephant Butte-Fort Quitman section of the Rio Grande and would enable the United States to supply water to settle its diplomatic dispute with Mexico. Joint Investigation at 8.

As required by Section 8 of the Reclamation Act, 43 U.S.C. § 383, and the territorial law of New Mexico, 1905 N.M. Laws ch. 102, § 22, the United States filed a territorial water appropriation notice in 1906 with the New Mexico Territorial Engineer seeking the right to appropriate and store 730,000 acre-feet per year of Rio Grande water in Elephant Butte Reservoir. Letter from B.M. Hall, Reclamation Service Supervising Engineer, to David L. White, Territorial Irrigation Engineer of New Mexico (Jan. 23, 1906) (App. 8). The United States then filed a supplemental notice in 1908 under a 1907 amendment of the territorial appropriation statute, 1907 N.M. Laws ch. 49, § 40, asserting an additional claim for all of the unappropriated

surface water of the Rio Grande and its tributaries, to be stored at Elephant Butte Reservoir and released and diverted at diversion dams. Letter from Louis C. Hill, Reclamation Service Supervising Engineer, to Vernon L. Sullivan, Territorial Engineer of New Mexico (April 28, 1908) (App. 11).

With the plan that Elephant Butte Reservoir would increase and stabilize the availability of water in the region, the United States signed a treaty with Mexico in 1906 providing for annual delivery in perpetuity of 60,000 acre-feet of water (with adjustments during times of drought) from Elephant Butte Reservoir to be delivered at Juarez, Mexico in exchange for Mexico dropping its claims for damages and relinquishing all claims to any other water from the Rio Grande above Fort Quitman. Convention for the Equitable Distribution of the Waters of the Rio Grande of May 21, 1906 Between the United States and Mexico, 34 Stat. 2953.

B. Rio Grande Project Operations

The United States completed construction of Elephant Butte Dam and Reservoir in 1916. Joint Investigation at 8. Elephant Butte Reservoir is the main storage feature for the Project and, as of 1995, had a storage capacity of approximately 2,065,000 acre-feet of water. U.S. Bureau of Reclamation, Dep't of the Interior, *Legal and Institutional Framework for Rio Grande Project Water Supply and Use: A Legal Hydrograph* II-2 (1995) ("Project Hydrograph").* In 1938 Congress authorized the construction of Caballo Reservoir 25 miles downstream from Elephant Butte

with a storage capacity of 331,500 acre-feet of water as released from Elephant Butte for power generation, flood control and irrigation. *Id.* at II-2 to II-3. Other Project works include diversion dams in both Texas and New Mexico; canals, ditches and laterals; and a series of drains constructed beginning in 1917 beneath Project lands to lower the water table and prevent waterlogged soils from impairing agriculture in the Project. *Id.* at II-1 to II-3, II-11 to II-13; Joint Investigation at 73.

The Bureau of Reclamation ("Reclamation") continues to own and operate Elephant Butte Dam and Reservoir, Caballo Dam and Reservoir, and the river diversion dams. Project Hydrograph at II-2, II-11. The planned irrigated acreage of the Rio Grande Project was 155,000 irrigable acres, of which 88,000 were located in New Mexico and 67,000 in Texas. Joint Investigation at 83. "[T]hese are the acreages included respectively in the Elephant Butte Irrigation District and the El Paso County Water Improvement District, the two organizations which represent the water users under the Rio Grande Project." *Id.*

In 1906, Reclamation entered into a contract with Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District ("EPCWID") for repayment of the Rio Grande Project. Project Hydrograph at II-7, II-15. EBID and EPCWID subsequently executed a contract in February 1938, just before the Compact was signed, confirming that 57 percent (or 88/155) of Project water would be delivered to EBID and 43 percent (or 67/155) to EPCWID. Contract Between Elephant Butte Irrigation District

and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (App. to U.S. Br. as Amicus Curiae). The contract also allows each district to increase its irrigated acreage by up to 3 percent. *Id.*

II. HISTORY OF THE RIO GRANDE COMPACT

Although development of the Project enabled the United States to settle Mexico's claims and resolve the water disputes in the Elephant Butte-Fort Quitman section of the Rio Grande, it did not resolve all water disputes in the Upper Basin. Joint Investigation at 8. "Upstream water users . . . perceived [the 1896 moratorium] as enormously unfair because it left them at the mercy of the recurrent cycles of flood and drought while water users below Elephant Butte had a guaranteed water supply." William A. Paddock, *The Rio Grande Compact of 1938*, 5 U. Denv. Water L. Rev. 1, 13 (2001). To resolve these issues, Colorado, New Mexico, and Texas agreed to negotiate an interstate compact to govern the waters of the Rio Grande. Joint Investigation at 8.

Negotiations commenced in 1923, and the parties executed a temporary compact in 1929. Act of June 17, 1930, ch. 506, 46 Stat. 767 (1929) ("1929 Temporary Compact"). The 1929 Temporary Compact, among other things, required the parties to negotiate a new, permanent compact, *id.* Art. VII, and reimposed a moratorium on new development on the river, in part to allow the parties to better understand the conditions on the Rio Grande and to incorporate

this understanding into a final compact, *id.* Art. V (Colorado), Art. XII (New Mexico). Specifically, with regard to New Mexico, the 1929 Temporary Compact provided:

> New Mexico agrees with Texas, with the understanding that prior vested rights *above and below* Elephant Butte Reservoir will never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return.

Id. Art. XII (emphasis added).

In 1935, the United States, through the federal National Resources Committee and with the cooperation of Colorado, New Mexico and Texas, began the Rio Grande Joint Investigation, a detailed hydrological survey of the Upper Rio Grande Basin – *i.e.*, the area above Fort Quitman. Joint Investigation at 10. The Joint Investigation was intended to provide sufficient data on available water supply, existing uses, and possible additional water supplies by "storage, importations and salvage of present losses and wastes" to provide a basis for negotiation of a permanent compact. *Id.* at 10-11. The Joint Investigation released its extensive report, covering water utilization, water importation and storage, groundwater resources, water quality, and other topics, in 1937. *Id.* at Preface.

The Rio Grande Basin States began negotiations in earnest for a final compact in 1937, working from a draft of the Joint Investigation Report. Paddock at 18. New Mexico's initial position was that increased storage within the San Luis Valley was acceptable so long as the rights of New Mexico were adequately protected and a separate water project transferring water from the San Juan River into the Rio Grande Basin was completed. *Statement Submitted by Thomas M. McClure, Commissioner for New Mexico* (Sept. 28, 1937), in *Proceedings of the Rio Grande Compact Commission Held in Santa Fe, New Mexico* at 59 (Sept. 27 to Oct. 1, 1937) ("Commission Proceedings").* New Mexico also declared that it was willing to "negotiate with the State of Texas as to the right to the use of water claimed by citizens of Texas under the Elephant Butte Project on the basis of fixing a definite amount of water to which said project is entitled." *Id.* New Mexico also sought to ensure its right to develop the Middle Rio Grande basin. *Id.*

Texas, for its part, stated that while it felt "that it should share in the benefits from new works for the augmentation of the water supply of the Rio Grande," it would not insist on this, provided that Colorado and New Mexico would "release and deliver at San Marcial a supply of water sufficient to assure the release annually from Elephant Butte Reservoir of 800,000 acre-feet of the same average quality as during the past ten years." *Statement Submitted by Frank B. Clayton, Commissioner for Texas* (Sept. 28, 1937), Commission Proceedings at 60.

Working from these positions and from the final draft report of the Rio Grande Joint Investigation, the Commission began final negotiations towards a permanent compact. Paddock at 18. To provide a basis for apportionment in the final compact, the Commission charged its engineering advisors to develop a set of delivery schedules based on the relationship between inflows to the San Luis Valley and outflows at the Colorado-New Mexico stateline and the relationship between inflows to the Middle Rio Grande at Otowi gage and outflows to Elephant Butte Reservoir, measured at San Marcial just upstream of the reservoir.[2] *Id.* at 20-32. In developing these schedules, the parties agreed to designate 790,000 acre-feet, rather than 800,000 acre-feet, as a normal annual release from Elephant Butte. *Id.* at 32. Elephant Butte Reservoir, rather than the New Mexico-Texas stateline, was specifically chosen as the point of delivery for New Mexico. Frank Clayton, the Texas Compact Commissioner, explained the choice of the delivery point at Elephant Butte:

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[2] New Mexico's point of delivery was later changed to Elephant Butte Reservoir in 1948 by a unanimous decision of the Rio Grande Compact Commission. Resolution of the Rio Grande Compact Commission at the Annual Meeting Held at El Paso, Texas, February 22-24, 1948, Changing Gaging Stations and Measurements of Deliveries by New Mexico. The change in the point of delivery was needed because river conditions at San Marcial made gage maintenance impossible.

> [B]y reason of the irregular contour of the boundary between the two States and other physical facts, it is practically impossible to measure the water passing the state line at the various places in the river channel and in the canals, laterals, and drains. Moreover, since the source of supply for all the lands above Fort Quitman and below Elephant Butte reservoir, whether in Texas or New Mexico, is the reservoir itself, it could hardly be expected of Colorado and New Mexico that they should guarantee a certain amount of water to pass the Texas line, since this amount is wholly dependent on the releases from the reservoir and the reservoir is under the control of an entirely independent agency: the Bureau of Reclamation.

Letter from Frank B. Clayton, Compact Commissioner for Texas, to C.S. Clark, Chairman of the Texas Board of Water Engineers (Oct. 16, 1938) (App. 25-26).

Working from the final delivery schedules and report of the engineering advisors, the States' legal advisors drafted the terms of the compact. Paddock at 34. The final Compact was signed on March 18, 1938, subject to ratification by the respective States legislatures and Congress. *Id.* Ratification proved controversial in Texas because Rio Grande water users below Fort Quitman felt that the Compact benefitted a relatively small area within Texas at the expense of water users downriver and demanded an intrastate allocation of Rio Grande water that guaranteed them 200,000 acre-feet annually at Fort Quitman. *Id.* at

40-41. Some in the Lower Basin in Texas threatened to fight ratification of the Compact if they did not receive such a promise, noting that the Compact did not explicitly apportion any specific quantity of water to Texas. *Id.* at 41.

In the midst of this controversy, an attorney representing the Water Conservation Association of the Lower Rio Grande Valley wrote to Texas Commissioner Clayton to ask why the Compact did not address the relative rights of New Mexico and Texas. Letter from Sawnie B. Smith, attorney for the Water Conservation Association of the Lower Rio Grande Valley, to Frank B. Clayton, Compact Commissioner for Texas (Sept. 29, 1938) ("Smith Letter to Clayton") (App. 29). Commissioner Clayton responded in detail. Letter from Frank B. Clayton, Compact Commissioner for Texas, to Sawnie B. Smith, attorney for the Water Conservation Association of the Lower Rio Grande Valley (Oct. 4, 1938) ("Clayton Letter to Smith") (App. 31). First, he noted that the United States, not New Mexico or Colorado, controlled Elephant Butte Dam and Colorado and New Mexico therefore could not guarantee a fixed schedule of water to be delivered from the dam. *Id.* Second, he pointed out that the nature of the border between New Mexico and Texas, and the proliferation of ditches crossing and re-crossing that border, would make stateline measurements extremely difficult, if not impossible. *Id.* (App. 32). Third, he observed:

> [T]he question of the division of the water released from Elephant Butte reservoir *is taken care of by contracts between the districts under the Rio Grande Project and the*

> *Bureau of Reclamation. These contracts provide that the lands within the project have equal water rights, and the water is allocated according to the areas involved in the two States.* By virtue of the contract recently executed, the total area is "frozen" at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the Elephant Butte District, and 67,000 acres for the El Paso County Water Improvement District No. 1, with a "cushion" of three per cent for each figure.

Id. (emphasis added).

III. THE RIO GRANDE COMPACT

The Compact apportions waters of the Rio Grande River among Colorado, New Mexico and Texas. The first paragraph states the Compact's purpose:

> [D]esiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes. . . .

To that end, the Compact establishes specific rights and obligations in the signatory States, including the obligation of Colorado to deliver a specified quantity of water to New Mexico at the Colorado-New Mexico

stateline, and the obligation of New Mexico to deliver water to Elephant Butte Reservoir, in quantities proportional to the amount of water at agreed-upon locations along the Rio Grande. Compact, Arts. III & IV. New Mexico was originally obligated to deliver water upstream from Elephant Butte Reservoir at San Marcial, New Mexico (the headwater of the reservoir). *Id.* Art. IV. As previously mentioned, the Commission shifted New Mexico's delivery point to Elephant Butte Reservoir in 1948 pursuant to Article V, as natural conditions on the river made it impossible to maintain the gage at San Marcial. The Compact provides for no delivery obligation below Elephant Butte Reservoir.

The Compact creates a Rio Grande Compact Commission with sole jurisdiction to administer the Compact and to maintain and operate gaging stations along the river for Compact accounting. *Id.* Arts. XII, II. The United States is not a party to the Compact, but is entitled to appoint a non-voting representative to chair the Commission. *Id.* Art. XII.

Article VI contains the provisions for Compact accounting for deliveries by Colorado and New Mexico under Articles III and IV, respectively. Article VI further provides for negotiated release of Credit Water by Colorado and New Mexico in return for storage rights in upstream reservoirs and potential release of credits (*i.e.*, Credit Water) from Elephant Butte Reservoir by the Colorado and New Mexico Commissioners.

Article VII prohibits increase in storage of water in reservoirs in Colorado and New Mexico constructed after 1929, whenever there is less than 400,000 acre-feet of usable water in Project storage.

IV. PREVIOUS AND ONGOING LITIGATION

A. Prior Original Actions

The Compact states have engaged in several original actions before this Court. *Texas v. New Mexico*, No. 10, Orig. (1935), filed prior to ratification of the Compact, involved a dispute over construction of El Vado Reservoir in the Middle Rio Grande and whether this violated the 1929 Temporary Compact. This case was dismissed after the Compact was ratified. In *Texas v. New Mexico*, No. 9, Orig. (1951), Texas brought allegations that New Mexico had violated Compact provisions regarding accumulation of debits and storage of water in upstream post-1929 reservoirs. It was dismissed after the United States was deemed an indispensable party but refused to intervene. *Texas and New Mexico v. Colorado*, No. 29, Orig. (1967), involved claims that Colorado had accumulated excess debits and was routinely delivering less water than the Compact required. It was dismissed after Colorado's accumulated debits were cancelled by a spill at Elephant Butte Reservoir.

B. Lower Rio Grande Adjudication

The water rights of the United States and other water users in the Rio Grande Basin in New Mexico

south of Elephant Butte Reservoir are currently being determined in a water adjudication in state court. *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-CV-888 ("LRG Adjudication"). The United States was joined pursuant to the federal waiver of sovereign immunity in the McCarran Amendment, 43 U.S.C. § 666, but initially sought dismissal from the case. *Elephant Butte Irrigation Dist. v. Regents of New Mexico State Univ.*, 849 P.2d 372 (N.M. Ct. App. 1993).

After the United States was unsuccessful in getting the state court adjudication of the Lower Rio Grande dismissed, it filed an action in federal court seeking a declaration of its water rights. *United States v. City of Las Cruces*, 289 F.3d 1170 (10th Cir. 2002). The district court abstained in favor of the ongoing state proceeding, and the Tenth Circuit Court of Appeals affirmed. *Id.*

Water adjudications in New Mexico "determine all claims to the use of the water in a given stream system in order to facilitate the administration of unappropriated waters and to aid in the distribution of waters already appropriated." *Rosette, Inc. v. U.S. Dep't of the Interior*, 169 P.3d 704, 711 (N.M. Ct. App. 2007) (internal quotation omitted). These are complex, lengthy procedures, involving designation of a stream basin, joinder of all known claimants to water in the basin, a hydrographic survey of the basin by the New Mexico State Engineer, resolution of basin-wide issues, determination of the characteristics – including the validity and relative priority – of each

claimant's right to water in the basin, and entry of a comprehensive decree describing all the adjudicated rights. Brigette Buynak & Darcy Bushnell, *Adjudications*, Water Matters! (Nov. 2013), *available at* http://uttoncenter.unm.edu/ombudsman/water-program.php.

The LRG Adjudication Court is currently resolving basin-wide issues, including Issue 104: the United States' interests in the Project. As part of this resolution, the United States moved for summary judgment on the question of whether its water right for the Project includes both surface water and hydrologically connected groundwater. United States' Motion for Summary Judgment, LRG Adjudication (May 18, 2012). New Mexico agreed that surface water was a source for the United States' Project right and that this included return flows of Project water that actually migrates back into the surface stream, whether from surface runoff or from hydrologically connected underground water. State of New Mexico's Memorandum of Law in Support of Motion to Dismiss the United States' Claims to Groundwater as a Source of Water for the Rio Grande Project, LRG Adjudication (May 18, 2012). But New Mexico disputed that the United States had a valid claim to Project water that percolates into an underground aquifer because, under New Mexico law, such water has escaped the United States' control, losing its identity as surface water and once again becoming public water, subject to appropriation. *Id.* at 8-9.

The LRG Adjudication Court agreed with New Mexico, noting that surface and groundwater are "distinct entities with distinct administrative schemes" under New Mexico law. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, LRG Adjudication (Aug. 16, 2012). As the court noted, the United States' original appropriation notices and points of diversion identified in the LRG Adjudication did not include any underground sources, indicating that the United States established a right only to surface water, not groundwater. *Id.* at 6. The LRG Adjudication Court recognized that distinguishing between Project water that migrates into an aquifer and "thereby loses its identity as surface water" and Project water that eventually migrates back into the stream would be difficult. *Id.* at 7. It nonetheless held that this was "a condition-specific and technical inquiry" rather than a legal matter and would best be addressed in administrative proceedings before the State Engineer. *Id.*

The LRG Adjudication Court issued a second order more fully defining the United States Project right. Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, LRG Adjudication (Feb. 17, 2014).

C. United States District Court Case

In 2008, the United States entered into an operating agreement with EBID and EPCWID, which New Mexico alleges materially changed the historical 57%/43% allocation of Project water for New Mexico and Texas and altered Project accounting. *See* U.S. Bureau of Reclamation, Dep't of the Interior, *Operating Agreement for the Rio Grande Project* at 6 (Mar. 10, 2008) ("2008 Operating Agreement"), *available at* http://www.usbr.gov/uc/albuq/rm/RGP/pdfs/Operating-Agreement2008.pdf. New Mexico also alleges that, in 2011, Reclamation released a portion of New Mexico's credit water to Texas. New Mexico filed suit in federal district court in 2011 challenging the 2008 Operating Agreement as well as Reclamation's unauthorized release of New Mexico's Compact Credit Water. Complaint, *New Mexico v. United States*, No. 11-CV-0691 (D.N.M. Aug. 8, 2011). That suit is currently stayed pending clarification of the scope of this case. *See* Memorandum Opinion and Order, *New Mexico v. United States*, No. 11-CV-0691 (Mar. 29, 2013).

SUMMARY OF ARGUMENT

Both the Texas Complaint and the United States Complaint in Intervention rest on the incorrect notion that the Compact imposes a Texas stateline delivery obligation and a duty on New Mexico to protect Rio Grande Project deliveries to the stateline. Nowhere is such an obligation evident in the express language of

the Compact, and the Court has repeatedly declined to read implied terms into an interstate compact. Moreover, extrinsic sources confirm that the Compact negotiators understood that New Mexico's delivery obligation would be at Elephant Butte, not the stateline.

Similarly, there is no language in the Compact that obligates New Mexico to preserve the conditions on the Rio Grande below Elephant Butte as they existed in 1938. Extrinsic sources confirm that the Compact's silence on this point was intentional, and was premised on the understanding that the allocation of Project water below Elephant Butte was accomplished entirely by the contracts between the irrigation districts and the Bureau of Reclamation. Other interstate compacts that explicitly protect conditions existing as of a certain date indicate that the drafters of the Compact knew how to express such an obligation and could easily have included such a provision if that is what they had intended.

Neither Texas nor the United States state a claim under the Compact for interference with the *Project* water right, because New Mexico has no *Compact* duty to protect Reclamation's contract deliveries. Reclamation's Project water right was secured under New Mexico state law, in accordance with reclamation law. Thus, Reclamation has full recourse to the legal and administrative remedies provided for under New Mexico law to protect the Project water right from interference by junior appropriators in New Mexico. New Mexico does not deny that it has the authority and the obligation under New Mexico law

to protect senior water rights from interference by junior appropriators when it receives a priority call or request for enforcement, but the United States has made no such call.

Finally, the Court's non-exclusive original jurisdiction should not be burdened with a suit to enforce contract deliveries. If the Compact claims of Texas and the United States are dismissed, any remaining ancillary claims related to the use or overuse of water in New Mexico should also be dismissed to allow those claims to be litigated in a more appropriate forum.

ARGUMENT

I. STANDARD OF DECISION

A. Motions to Dismiss

New Mexico brings this motion in the nature of a motion under Rule 12(b)(6), Federal Rules of Civil Procedure. Although the Court is not bound by the Federal Rules of Civil Procedure in this original action, the Rules provide guidance. S. Ct. R. 17.2. The Court applies a familiar standard in deciding a motion to dismiss. A motion under Rule 12(b)(6) should be granted when a complaint's "well-pleaded factual allegations," accepted as true for purposes of the motion, fail to show that the plaintiff is entitled to relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). In deciding the motion, the Court is not bound to accept the plaintiff's legal conclusions or other mere

conclusory statements. *Id.* Rather, the Court may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. "While legal conclusions can provide the framework of a complaint," they are not sufficient to survive a motion to dismiss unless they are supported by factual allegations showing that the plaintiff is entitled to relief. *Id.*

B. Interpretation of Interstate Compacts

Interstate compacts are solemn agreements among co-sovereigns and construed under contract law principles, and the compact's express terms are "the best indication of the intent of the parties." *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2130 (2013) ("*Tarrant*"). If an interstate water compact is silent on a matter, the Court presumes that the States intended to retain and protect their sovereignty over their water except to the extent that they expressly agreed to limit their authority. *Id.* at 2132.

> We have long understood that as sovereign entities in our federal system, the States possess an absolute right to all their navigable waters and the soils under them for their own common use. Drawing on this principle, we have held that ownership of submerged lands, and the accompanying power to control navigation, fishing, and other public uses of water, is an essential attribute of sovereignty. Consequently, a court deciding a question of title to a bed of navigable water

> within a State's boundaries must begin with a strong presumption against defeat of a State's title.
>
> Given these principles, when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that if any interference at all is to be drawn from such silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.

Id. (internal quotations, citations, and alterations omitted). The Court may also look to customary practices in other compacts and the parties' course of dealing over time. *Id.* at 2133, 2135.

II. TEXAS' COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF A STATELINE DELIVERY OBLIGATION

A. Texas' Allegations

Texas' legal theory is that New Mexico has breached an implied obligation of good faith and fair dealing and unspecified other contractual obligations Texas understands to be inherent in the Rio Grande Compact: "[New Mexico's] 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." Compl. ¶ 21. Texas' theory is based on the legal conclusion that New Mexico has violated the "purpose and intent" of the Compact by "allowing

and authorizing the interception of Rio Grande Project water intended for use in Texas." *Id.* ¶ 4. While admitting that the Compact does not state a requirement that New Mexico deliver to Texas at the stateline any specific amount of water, Texas alleges that the 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." *Id.* ¶ 18 (emphasis added). It alleges that New Mexico has "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." *Id.* (emphasis added). According to Texas, these alleged downstream diversions violate New Mexico's "obligations . . . with respect to the delivery of Texas' apportionment of water . . . *to the New Mexico-Texas state line*." *Id.* ¶ 26 (emphasis added). Texas asserts that its "fundamental premises" for entering into the Compact included its alleged understanding that "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." *Id.* ¶ 11.

Texas' legal conclusion that New Mexico has failed to comply with implicit "obligations" to deliver water to the stateline contrasts with the Complaint's other allegations of the Compact's specific terms, which require delivery to Elephant Butte Reservoir.

The Complaint acknowledges that the Compact does *not* "articulate a specific [New Mexico-Texas] state-line delivery allocation," and that it does *not* "specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas." *Id.* ¶ 10. Instead, as Texas admits in its Complaint, "[t]he Rio Grande Compact requires that New Mexico *deliver specified amounts of Rio Grande water into Elephant Butte Reservoir*." *Id.* ¶ 4 (emphasis added). New Mexico's duty to deliver water at Elephant Butte – approximately 105 miles upstream of the New Mexico-Texas stateline – contrasts with Colorado's duty under Article III of the same Compact to deliver water "at the Colorado-New Mexico state line." *Id.* ¶ 12, App. 5 (Art. III).

As alleged in the Complaint, the Compact quantifies New Mexico's obligation to deliver water at Elephant Butte Reservoir based on stream flows above the Reservoir. New Mexico's "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." *Id.* ¶ 13, App. 9-10 (Art. IV). All of the indices used to quantify New Mexico's delivery obligation are *upstream* of Elephant Butte Reservoir, specifically at Otowi Gage near San Ildefonso and at San Marcial. *Id.* The Compact does provide for measurements of stream flows at two points below Elephant Butte Reservoir. *Id.* App. 5 (Art. II(*k*), (*l*)). Significantly, however, the Compact makes no provision for adjusting New Mexico's delivery

obligations based on such downstream flows or other data collected below Elephant Butte Reservoir.

The Complaint further alleges that upon its delivery of Rio Grande water into Elephant Butte Reservoir, the State of New Mexico relinquishes possession and control of the water: "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." *Id.* ¶ 4. At that point, as alleged in the Complaint, the Compact relies "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." *Id.* ¶ 10.

B. Texas Has Not Stated a Claim for Breach of a Duty to Deliver Water to the Stateline

Texas' Complaint should be dismissed because Texas has failed to show that it is entitled to relief under the Compact. The Complaint alleges that New Mexico has "allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico." Compl. ¶ 4. That

allegation, accepted as true for purposes of this motion only, does not state a claim for relief because Texas has failed to establish that any term of the Compact imposes a duty on New Mexico either to deliver water at the New Mexico-Texas stateline or to prevent diversions of water after New Mexico has delivered it at Elephant Butte Reservoir.

1. As summarized above, Texas' principal allegation is that New Mexico has breached an "obligation of good faith and fair dealing implicit in the Rio Grande Compact." Compl. ¶ 21. This Court, however, has squarely rejected the proposition that "an interstate compact approved by Congress includes an implied duty of good faith and fair dealing." *Alabama v. North Carolina*, 560 U.S. 330, 351 (2010). The Court has explained that an interstate compact is a federal statute, not merely a contract, and that a court cannot add a "fairness requirement" or other provision to a federal statute. *Id.* at 351-52. The Court added, "We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented." *Id.* at 352; *accord New Jersey v. New York*, 523 U.S. 767, 811 (1998) ("'[N]o court may order relief inconsistent with [an interstate compact's] express terms' no matter what the equities of the circumstances might otherwise invite.") (quoting *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)).

2. Texas alleges that New Mexico has breached unspecified other "contractual obligations under the Rio Grande Compact." Compl. ¶ 21. Texas has failed, however, to point to any Compact language supporting its legal conclusion that the Compact obligates New Mexico to deliver water to Texas at the stateline.

a. Interpretation of the Compact begins with its "express terms" inasmuch as "no court may order relief inconsistent with" those terms. *Texas v. New Mexico*, 462 U.S. at 564; *see Tarrant*, 133 S. Ct. at 2130. Where a compact is silent, the Court presumes a state did not intend to limit its sovereignty to regulate waters within its borders. *Tarrant*, 133 S. Ct. at 2132. As Texas acknowledges, the Compact's express terms establish New Mexico's obligation to deliver water at Elephant Butte Reservoir, more than 100 miles upstream of the New Mexico-Texas stateline. Compl. ¶¶ 4, 13, App. 9-11 (Art. IV). Texas' assertion that New Mexico has breached the Compact depends on the assumption that New Mexico has delivery "obligations" at the stateline as well as at Elephant Butte Reservoir. *Id.* ¶¶ 13, 26. It must be presumed, however, that the signatory States and Congress said in the Compact what they meant and meant in the Compact what they said, namely, that New Mexico's obligation is "to deliver water in the Rio Grande at San Marcial," just above Elephant Butte Reservoir. *Id.* App. 9 (Art. IV); *see Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). The most natural reading of that language is that it implicitly excludes an obligation to deliver water at

the stateline by expressly specifying that New Mexico's delivery obligation is at Elephant Butte Reservoir. *TRW Inc. v. Andrews*, 534 U.S. 19, 28 (2001) ("*Expressio unius est exclusio alterius.*") (citation omitted). Texas' interpretation requires the Court to presume from the Compact's silence that New Mexico intended to restrict its jurisdiction to regulate waters below Elephant Butte Reservoir, a presumption this Court has rejected. *Tarrant*, 133 S. Ct. at 2133 ("States rarely relinquish their sovereign powers, so when they do we would expect a clear indication of such devolution, not inscrutable silence.).

b. The natural reading of Article IV's language specifying New Mexico's delivery obligation at Elephant Butte is confirmed when Article IV is read in harmony with other language in the Compact. *Tarrant*, 133 S. Ct. at 2131, *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("A court must . . . fit, if possible, all parts [of a statute] into a harmonious whole.") (citation omitted). The Compact makes clear that New Mexico's obligation to deliver water at Elephant Butte Reservoir is quantified on the basis of stream flows upstream but not downstream of the Reservoir, and that its delivery of water is to be measured at (or immediately upstream of) the Reservoir. Compl. App. 9-11 (Art. IV). Moreover, the language of Article IV fixing New Mexico's delivery obligation at Elephant Butte stands in conspicuous contrast with the language of Article III fixing Colorado's delivery

obligation "at the Colorado-New Mexico State Line." Compl. App. 5.

The contrast between Articles III and IV makes clear that the signatory States and Congress knew how to fix a State's delivery obligation at the stateline. *See Hardt v. Reliance Standard Life Ins. Co.*, 560 U.S. 242, 252 (2010); *accord Sebelius v. Cloer*, 133 S. Ct. 1886, 1894 (2013) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (citation omitted). What Texas asks the Court to do – to read a stateline delivery obligation into the Compact – "more closely resembles invent[ing] a statute rather than interpret[ing] one." *Hardt*, 560 U.S. at 252 (citation omitted).

Additionally, several Courts have explained the Compact delivery obligation of New Mexico. As the United States District Court for the Western District of El Paso aptly described, the designated Compact delivery point for New Mexico is Elephant Butte Reservoir, at which point the water[3] becomes Rio Grande Project water for use in New Mexico and Texas:

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[3] All of Texas' Compact water is in Elephant Butte Reservoir but not all the water in Elephant Butte Reservoir is Texas' Compact Water.

> This Compact has a number of peculiar provisions. For example, the water New Mexico must pass to Texas is delivered not where the two States meet, but at San Marcial, New Mexico, more than 100 miles above the point where the Rio Grande leaves New Mexico. This delivery is made into the reservoir of the Elephant Butte Dam, the principal structure of the Rio Grande Project. Some of this Water eventually goes to Mexico. The Compact, instead of leaving the Texas share of the water open for disposition under the general water statutes of Texas, plainly directs same for irrigation in the Project.

El Paso County Water Imp. Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 907 (W.D. Tex. 1955); *see also City of El Paso ex rel. Public Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 385 (D.N.M. 1983) ("While Colorado is required to make a scheduled delivery of water annually at the Colorado-New Mexico state line, New Mexico is not required to deliver anything at the New Mexico-Texas state line. New Mexico's only delivery obligation is set forth in Article IV of the Compact, which designates Elephant Butte Reservoir as the point of delivery."); *Regents of New Mexico State University*, 849 P.2d at 378 ("[The] Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border, rather than at the state line.").

c. Delivery obligations in other interstate water compacts further support the conclusion that the signatory States and Congress deliberately chose

not to impose a delivery obligation at the stateline, but instead required New Mexico to deliver water at Elephant Butte Reservoir. *Tarrant*, 133 S. Ct. at 2133 ("Looking to the customary practices employed in other interstate compacts also helps us to ascertain the intent of the parties to this Compact."); *see also Alabama v. North Carolina*, 560 U.S. at 347-48, 353. Other interstate water compacts routinely specify that an upstream State's delivery of water is to be made and measured at the stateline, even when, as in the present case, water allocated to the downstream State may be stored in an upstream reservoir. *E.g.*, *Texas v. New Mexico*, 462 U.S. at 559 (citing Pecos River Compact of 1949, ch. 184, Art. III(a), 63 Stat. 159, 161); Arkansas River Compact of 1949, ch. 155, arts. IV-V, 63 Stat. 145, 147 (allocating water stored in John Martin Reservoir to Colorado and Kansas, but requiring Colorado to deliver Kansas' allocation at stateline). "[T]he compact here . . . has no such provision" requiring New Mexico to deliver water to Texas at the stateline, "and the contrast is telling." *Alabama v. North Carolina*, 560 U.S. at 348; *see Texas v. New Mexico*, 462 U.S. at 565 ("The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it."). Indeed, Texas itself acknowledges that "[t]he Rio Grande Compact is unique because it does not set forth a specific delivery requirement at the New Mexico-Texas state line" but "[i]nstead . . . requires New Mexico to deliver water into Elephant Butte Reservoir." Brief in Support of Motion for Leave to File Complaint 2.

d. The negotiation history of the Rio Grande Compact confirms the States' understanding that New Mexico's delivery obligation is at Elephant Butte Reservoir rather than the stateline. It is "appropriate to look to extrinsic evidence of the negotiation history of the Compact in order to interpret" its terms. *Oklahoma and Texas v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) ("We previously have pointed out that a congressionally approved compact is both a contract and a statute, and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous.") (citations omitted). Before the Compact was signed, Texas' Compact Commissioner and negotiator explicitly recognized at a meeting of the Rio Grande Compact Commission that New Mexico would satisfy Texas' interests by delivering water at San Marcial:

> Although the State of Texas feels that it should share in the benefits from new works for the augmentation of the water supply of the Rio Grande, it will not insist thereon, provided that the States of Colorado and New Mexico will *release and deliver at San Marcial* a supply of water sufficient to assure the release annually from Elephant Butte Reservoir of 800,000 acre-feet of the same average quality as during the past ten years, or the equivalent of this quantity if the quality of the supply is altered by any developments upstream.

Commission Proceedings at 60. Commissioner Clayton was later questioned by a lawyer for Texas water

interests on why the Compact "makes no provision for the division of waters below Elephant Butte between the States of New Mexico and Texas and makes no provision concerning the amount of water to which Texas is entitled." Smith Letter to Clayton (App. 29). The questioner, believing that the apparent omission was "too obvious to have been inadvertent," asked "why the respective rights of Texas and New Mexico to those waters were not defined and provided for in the compact in express terms." *Id.* (App. 30). With respect to the absence of a requirement that New Mexico deliver water to the stateline, Commissioner Clayton replied:

> The question of where the point of division of the waters of the Rio Grande as between Texas and New Mexico should be fixed has been the subject of a great deal of study ever since the original Rio Grande Compact Act was passed, in 1928. It was decided . . . that New Mexico's obligations as expressed in the compact must be with reference to deliveries at Elephant Butte reservoir. . . . The reasons for it are numerous. In fact, the obstacles in the way of providing for any fixed flow at the Texas line were considered insuperable. . . . Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent government agency.

Clayton Letter to Smith (App. 31). As to the absence of precise apportionment between New Mexico and

Texas, he added, "[T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according to the areas involved in the two States." *Id.* (App. 32). By these and similar statements, Texas publicly acknowledged its understanding at the time of the Compact's formation that New Mexico's obligation under the Compact was to deliver Rio Grande water at Elephant Butte, and that upon delivery there the Bureau of Reclamation took control of the allocation and release of the water to downstream water users.

3. Texas appears to argue that the Compact includes an implied covenant prohibiting New Mexico from "allow[ing] and authoriz[ing]" downstream diversions after New Mexico has performed its duty to deliver the water at Elephant Butte Reservoir. *See, e.g.*, Compl. ¶ 4. Such an implied covenant theory fails for two reasons. First, as already stated, to "read absent terms into an interstate compact" is not a proper part of the judicial function. *Alabama v. North Carolina*, 560 U.S. at 351-52. Second, Texas predicates its claim of breach on its own alleged understanding that "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." Compl. ¶ 11. That claim fails as a matter of both *statutory* interpretation and

contract interpretation. *See Oklahoma v. New Mexico*, 501 U.S. at 235 n.5 ("[A] congressionally approved compact is both a contract and a statute."). Texas has failed to show that its understanding in entering into the Compact was anything other than an undisclosed intention, which is immaterial to the Court's construction of the agreement actually made by the parties. *See Grosholz v. Newman*, 88 U.S. 481, 487 (1874) ("A secret intention of the seller, not made known, cannot affect a purchaser."); Restatement (Second) of Contracts § 2, com. b (1981); *cf. Oklahoma v. New Mexico*, 501 U.S. at 236 n.6 ("It is beyond cavil that statements allegedly made by, or views allegedly held by, those engaged in negotiating the treaty which were not embodied in any writing and were not communicated to the government of the negotiator or to its ratifying body, are of little use in ascertaining the meaning of compact provisions.") (citation omitted).

4. The United States has argued that New Mexico's position is inconsistent with the Compact's purpose to equitably apportion the water of the entire Rio Grande Basin above Fort Quitman, Texas. Memorandum in Support of Motion of the United States to Intervene as a Plaintiff ("U.S. Mem.") 10.

a. New Mexico does not argue, however, that the Compact fails to apportion the water of the Rio Grande Basin. Rather, New Mexico argues that Texas has failed to identify any term of the Compact (and there is none) requiring New Mexico to control diversions of either Project or non-Project water after

it has relinquished control over the water by delivering it into Elephant Butte Reservoir. The United States aptly articulates the reason why New Mexico's duty to control diversions terminates upon its delivery of the water into the Reservoir: "When New Mexico 'delivers' water to Elephant Butte Reservoir under the Compact, it relinquishes control of the water to the Project. The *Project* then is to release the water 'in accordance with irrigation demands' for Project beneficiaries . . . and for 'deliveries to Mexico.'" U.S. Mem. 10 (quoting Compact Art. I(*l*)) (emphasis in U.S. Mem.). Texas alleges much the same thing: "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." Compl. ¶ 4.

b. The Reclamation Act incorporates New Mexico state water law as it applies to the administration of the water stored in the Project. Section 8 of the Reclamation Act requires Reclamation "to comply with state law in the 'control, appropriation, use, or distribution of water.'" *California v. United States*, 438 U.S. 645, 675 (1978) (quoting § 8). Although "Congress intended to defer to the substance, as well as the form, of state water law," *id.*, the fact remains that Reclamation rather than the State of New Mexico is the entity with the power and duty to distribute the water after New Mexico delivers it into Elephant Butte Reservoir. It follows that if Texas is dissatisfied

with Reclamation's distribution of water to Texas water users, Texas' recourse is against Reclamation, not against New Mexico. Similarly, if the United States believes that its Project right is being impaired by groundwater pumpers, its recourse and remedy is under state law against the offending pumpers.

c. The Compact's express terms confirm that Texas' recourse for the relief it seeks in this case is against Reclamation. The Compact defines and limits the scope of Texas' recourse against New Mexico: "[N]othing herein 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 the water, *at the point of delivery*, be changed hereafter by one signatory state to the injury of another." Compl. ¶ 16, App. 16 (Art. XI) (emphasis added). The Compact thus limits Texas' recourse against New Mexico to a failure to perform "at the point of delivery." *Id.* That limitation is fully consistent with the view – evidently shared by the United States, New Mexico, *and* Texas – that once New Mexico performs its obligations "at the point of delivery," its control over the allocation and delivery of Rio Grande Compact water has reached its end.

The Complaint does not allege that New Mexico has in any way failed to perform its Compact obligations "at the point of delivery." Compl. ¶ 16, App. 16 (Art. XI). It seeks instead to hold New Mexico liable for breach of an implied duty to prevent diversions of Project water after New Mexico has performed its duty to deliver Rio Grande Compact water to

the possession and control of Reclamation. Texas has failed, however, to identify any such duty in the language of the Compact, *id.* ¶¶ 4, 18-21, and this Court cannot add such language to the Compact. *Alabama v. North Carolina*, 560 U.S. at 351-52; *Texas v. New Mexico*, 462 U.S. at 564. Texas' claim that New Mexico has breached the Rio Grande Compact should therefore be dismissed.

III. TEXAS' COMPLAINT FAILS TO STATE A CLAIM FOR BREACH OF A 1938 CONDITION

A. Texas' Allegations

Texas alleges that a "fundamental purpose" of the 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.*" Compl. ¶ 10 (emphasis added). These are two very different allegations – first, that the Compact was intended to protect the Project supply and, second, that this protection was intended to include an implied prohibition on additional depletions over those existing in the Lower Rio Grande in New Mexico in 1938. New Mexico agrees that one of the purposes of the Compact was to protect deliveries to the Project. It does not follow that the Compact imposes a silent obligation to cap depletions below Elephant Butte in New Mexico at a level equal to those that were occurring in 1938.

Specifically, Texas claims that the 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." *Id.* ¶ 18. The ground and surface diversions New Mexico has allegedly permitted in the Rio Grande Basin below Elephant Butte are, according to Texas, "intercept[ing] water that in 1938 would have been available for use in Texas, and convert[ing] that water for use in New Mexico." *Id.* Texas asserts that because "[t]hese extractions were not occurring in 1938 when Colorado, New Mexico, and Texas entered into the Rio Grande Compact," "New Mexico has changed the conditions that existed in 1938 when the Compact was executed to the detriment of the State of Texas." *Id.* Texas, however, fails to show that the Compact obligates New Mexico to preserve a 1938 condition below Elephant Butte Reservoir. Texas' Complaint should be dismissed.

B. Texas Has Failed to State a Compact Claim for Breach of a 1938 Condition

1. Texas points to no language in the Compact obligating New Mexico to preserve the conditions on the Rio Grande below Elephant Butte as they existed in 1938. Again, interpretation of a Compact begins with its express terms. *Tarrant*, 133 S. Ct. at 2130; *Texas v. New Mexico*, 462 U.S. at 564. The Compact contains no reference to a 1938 condition. In contrast, there are express provisions limiting additional

depletions of Rio Grande water above Elephant Butte, but not below. Specifically, Article IV of the Compact establishes a schedule of deliveries for New Mexico at Elephant Butte and provides that "appropriate adjustments shall be made for . . . (b) depletion after 1929 in New Mexico at any time of the year of the natural runoff *at Otowi Bridge*." Compl. App. 10 (emphasis added).[4] The effect of Article IV is to allow delivery adjustments for post-1929 depletions above Otowi gage (located above Elephant Butte Reservoir). *Id.*

Notably absent from the Compact is any comparable language limiting new or increased diversions or depletions *below* Elephant Butte. The inclusion of such provisions above Elephant Butte Reservoir, but not below, makes it clear that the Compact's drafters recognized the desire of Colorado and New Mexico to develop the Rio Grande's waters and included express Compact limitations on additional diversions and depletions, but only *above* Elephant Butte. They did not include similar provisions regarding diversions and depletions *below* Elephant Butte. *See Cloer*, 133 S. Ct. at 1894 ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.")

[4] Article III contains a delivery schedule for Colorado and similar adjustment requirements for any increased depletions. *Id.* (App. 5-8).

(citation omitted). The Compact contains no term limiting post-1938 development in the Rio Grande below Elephant Butte, and the Court may not rewrite the Compact to insert such a term. *Texas v. New Mexico*, 462 U.S. at 565.

2. Other extrinsic evidence of the Compact's formation reveals the reasoning behind the drafters' decision to omit such terms. *See Oklahoma v. New Mexico*, 501 U.S. at 235 n.5 (it is "appropriate to look to extrinsic evidence of the negotiation history of the Compact" to interpret any ambiguities). Shortly after the Compact was signed, but before it was ratified, Sawnie Smith, an attorney representing the Water Conservation Association of the Lower Rio Grande Valley, wrote Commissioner Clayton and asked him about several aspects of the Compact that Rio Grande water users below Fort Quitman in Texas found troubling. Smith Letter to Clayton (App. 29). Among other concerns, Smith noted, "I do not find anything in the compact, however, which ties down and limits the use or division of the waters [below Elephant Butte] according to present uses and physical conditions." *Id.* (App. 30). Clayton replied that "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation." Clayton Letter to Smith (App. 32).

Commissioner Clayton's statements directly explain the Compact's silence on depletions below Elephant Butte. The Compact Commission viewed

Project allocations as "taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation." *Id.* (App. 32). Thus, by design, the Compact does not address a 1938 condition or otherwise limit depletions below Elephant Butte Reservoir.

3. The language and practice of other compacts similarly supports the conclusion that the Rio Grande Compact does not require New Mexico to maintain any particular level of depletions. *Tarrant*, 133 S. Ct. at 2133 (the Court may look to other interstate compacts to determine the intent of the parties to a compact). The absence in the Compact of a duty to maintain the condition existing in 1938 below Elephant Butte Dam stands in stark contrast to other compacts that contain explicit protections for conditions existing as of a specific date, including the 1929 Temporary Compact. The 1929 Temporary Compact is particularly instructive because it served as the starting point for negotiations of the final Compact. The 1929 Temporary Compact provided:

> New Mexico agrees with Texas, with the understanding that prior vested rights above *and below Elephant Butte Reservoir* will never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired by new or increased diversion or storage *within the limits of New Mexico unless and until such depletion is offset by increase of drainage return.*

Art. XII (emphasis added). This provision was not carried over into the final Rio Grande Compact, and

"the contrast is telling." *Alabama v. North Carolina*, 560 U.S. at 348; *see also Texas v. New Mexico*, 462 U.S. at 565.

Other contemporaneous compacts explicitly impose a duty to maintain a historical condition, again in contrast to this Compact. For example, the Pecos River Compact of 1949, ch. 184, Art. III(a), 63 Stat. 159, 161, mandates that "New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water *equivalent to that available to Texas under the 1947 condition*" (emphasis added). Similarly, the Arkansas River Compact explicitly allows upstream development in Colorado, provided "that the waters of the Arkansas River . . . *shall not be materially depleted* in usable quantity or availability for use to the water users in Colorado or Kansas under this Compact by such future development or construction." Arkansas River Compact of 1949, ch. 155, Art. IV(D), 63 Stat. 145, 147 (emphasis added). In contrast, the Rio Grande Compact limits new depletions only above Elephant Butte. The existence of such provisions in other compacts, including the 1929 Temporary Compact, shows the compact drafters knew how to write a condition limiting additional depletions below Elephant Butte into the Compact and deliberately chose not to do so.

4. Finally, the course of performance between Texas and New Mexico suggests that neither party understood the Compact to limit post-1938 development below Elephant Butte. *See Alabama v. North Carolina*, 560 U.S. at 346 ("the parties' course of

performance under the Compact is highly significant"); *Tarrant,* 133 S. Ct. at 2135. Just after the Compact was ratified, in 1940, the Rio Grande Compact Commission adopted rules to administer the Compact. Rio Grande Compact Commission, *Rules and Regulations for Administration of the Rio Grande Compact* (Feb. 29, 1940) (App. 34). At the time, two of the three Compact Commissioners were those who had negotiated and drafted the Compact.[5] These rules contain the following language in the preamble, confirming the understanding that the Compact did not prohibit post-1938 development below Elephant Butte: "A Compact, known as the Rio Grande Compact, between the States of Colorado, New Mexico and Texas . . . which equitably apportions the waters of the Rio Grande above Fort Quitman and *permits each State 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. . . .*" *Id.* at 1 (emphasis added).

a. Pursuant to this understanding, both Texas and New Mexico have developed groundwater resources south of Elephant Butte Reservoir. Prior to 1950, only a small number of wells existed in the area. Joint Investigation at 13. Starting in the 1950s, increased groundwater development occurred south of Elephant Butte. Project Hydrograph, I-1-2. The Project water right is the largest right in the Lower

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[5] Frank Clayton, the Texas Commissioner who negotiated the Compact, had resigned to accept another position.

Rio Grande. Since the Compact was entered into, hundreds of wells have been drilled in both Texas and New Mexico, all of which affect the regional water supply. *Id.* at IV-6-7.

b. Similarly, in Texas, the City of El Paso began developing the Cañutillo well field just east of the Rio Grande along the New Mexico-Texas border after the Compact. Project Hydrograph at IV-7. The Cañutillo wells supply water primarily to El Paso for municipal use. *Id.* Pumping from these wells is controversial, and EBID has alleged that the wells illegally intercept groundwater within New Mexico. *Id.* Texas' allowance of this and other post-1938 developments upstream of Project beneficiaries in New Mexico and Texas demonstrates Texas' understanding that the Compact contains no such restrictions.

5. In short, Texas has asked the Court to enforce the terms of the Compact but bases its claims, in part, on an alleged and silent "fundamental purpose" of preserving conditions as they existed in 1938, when the Compact was signed. Compl. ¶ 10. The Compact, however, imposes no duty to maintain the conditions existing in 1938 below Elephant Butte. Further, the other means of interpreting a Compact, the legislative history of this Compact, the language of other Compacts, and the parties' course of dealing, all point to the same conclusion. While Project deliveries were to be protected, there was no requirement that New Mexico preserve the conditions

existing in 1938. As such, Texas' claims based on the preservation of a mythical 1938 condition below Elephant Butte should be dismissed.

IV. TEXAS' COMPLAINT AND THE UNITED STATES' COMPLAINT IN INTERVENTION FAIL TO STATE A CLAIM FOR INTERFERENCE WITH THE PROJECT WATER RIGHT

A. Relevant Allegations

Both Texas and the United States claim that New Mexico has allowed groundwater and surface water users to intercept Project water. Compl. ¶ 18; U.S. Compl. ¶¶ 13-14. The allegations thus presuppose an affirmative duty on the part of New Mexico to ensure deliveries of Rio Grande Project water to the stateline, undepleted as measured against a mythical 1938 standard. Although neither Texas nor the United States identifies a provision of the Compact or other source for this affirmative duty, Texas and the United States seek injunctive relief commanding New Mexico to "affirmatively prevent" its water users from interfering with Project deliveries, U.S. Compl. at 5, and to "cease and desist all actions which interfere with and impede the authority of the United States to operate the Rio Grande Project," Compl. at 16. No such duty exists in the Compact, rather the administration of, and therefore protection

of, the Project water right is based on New Mexico state water law.

B. Law Governing the Scope and Administration of a Reclamation Water Right

Under the Reclamation Act, Congress established a federal program to "provide federal financing, construction, and operation of water storage and distribution projects to reclaim arid lands in many Western States." *Orff v. United States*, 545 U.S. 596, 598 (2005); *see also Kansas v. Colorado*, 206 U.S. 46 (1907). With the Act, Congress created a blueprint for the orderly development of the West, and water was the instrument by which that plan was to be carried out. *See Ivanhoe Irrigation Dist. v. McCracken,* 357 U.S. 275, 292 (1958). At the time, however, it was not clear this program was within federal powers to implement. In *Kansas v. Colorado*, 206 U.S. at 87, 90-94, the Court noted: "That involves the question whether the reclamation of arid lands is one of the powers granted to the general government. . . . [T]he constant declaration of this Court from the beginning is that this government is one of enumerated powers." The Court emphasized that the Constitution contained no such grant of power to the United States and that the Tenth Amendment to the United States Constitution must be construed broadly in deference to the sovereignty of all States equal to that of the original thirteen. *Id.* Congress' plan necessarily includes purposeful and continued deference to state water law, to govern the acquisition,

administration, and ownership of all water rights absent a clear Congressional directive to the contrary. *California v. United States*, 438 U.S. at 653-70, 678-79; *United States v. New Mexico,* 438 U.S. 696, 702 & n.5 (1978). Section 8 of the Reclamation Act left little room for doubt:

> Nothing in this Act shall be construed as affecting or intended to affect or in any way interfere with the laws of any State or Territory relating to the *control, appropriation, use, or distribution of water* . . . and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . .

43 U.S.C. § 383 (emphasis added). Section 8 thus requires that the federal government, in operating reclamation projects, must comply with state water laws.

In *California v. United States*, this Court confirmed that under Section 8, the United States must, first, "appropriate, purchase, or condemn necessary water rights in strict conformity with state law," and, second, "once the waters [a]re released from the Dam, their distribution to individual landowners [will] again be controlled by state law." 438 U.S. at 665, 667. Summarizing Congress' reclamation laws, this Court stated:

> The history of the relationship between the Federal Government and the States in the reclamation of the arid lands of the Western

> States is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress.

Id. at 653; *see also Nebraska v. Wyoming*, 325 U.S. 589, 613-14 (1945) ("All of these steps make plain that [reclamation] projects were designed, constructed, and completed according to the pattern of state law as provided in the Reclamation Act.").[6]

These principles apply to the Rio Grande Project. *Jicarilla Tribe v. United States*, 657 F.2d 1126, 1133 (10th Cir. 1981) ("The concept of beneficial use expressed in language similar to that of the Reclamation Act is contained in New Mexico's permit system of prior appropriation."); *EPCWID v. El Paso*, 133 F. Supp. at 904-05. New Mexico law and the Reclamation Act both follow prior appropriation doctrine. N.M. Const. Art. XVI, §§ 2, 3; NMSA §§ 72-1-1 *et seq.* (1978); 43 U.S.C. § 372.

The United States also defers to ongoing state adjudications as the most appropriate forums for determining the elements of Reclamation water rights. 43 U.S.C. § 666. In *City of Las Cruces*, 289 F.3d at 1179, the United States brought suit to quiet title to water rights in the lower Rio Grande to define the Project water right. The Tenth Circuit Court of

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[6] Return flows and seepage state laws govern Reclamation Projects as well. U.S. Bureau of Reclamation, Dep't of the Interior, *Reclamation Policy Manual: Reuse of Project Water*, PEC P13 (Mar. 19, 2013) (App. 1).

Appeals held that New Mexico law applies to the scope and administration of the Project water right in New Mexico, and that federal law defers to state adjudications as well. Thus the district court did not abuse its discretion in abstaining from hearing the case in favor of the concurrent state adjudication. *Id.* at 1184, 1193.

C. The Project Water Right Is Defined by New Mexico Law and Does Not Include Groundwater

As described above, the Rio Grande Project was created under the Rio Grande Project Act and the federal Reclamation Act. Under Section 8, the United States obtained the water right associated with the Project from the Territory of New Mexico in conformance with New Mexico law.

1. As the LRG Adjudication Court noted in ruling that the United States Project right did not include groundwater, the United States' 1906 and 1908 notices of intent to appropriate water did not refer to groundwater. Order granting the State's Motion to Dismiss the United States' claims to Groundwater and Denying the United States' Motion for Summary Judgment at 6, LRG Adjudication (Aug. 16, 2012).

2. In the McCarran Amendment recognizing that water rights adjudications are traditionally within state court jurisdiction, Congress expressly waived the United States' sovereign immunity in suits to determine the water rights of all parties claiming water

from a "river system or other source," or "for the administration of such rights." 43 U.S.C. § 666. This Court described the Senate Report on the McCarran Amendment as "[p]erhaps the most eloquent expression" of deference to state water law. *California v. United States*, 438 U.S. at 678. That Senate Report provides:

> In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, which State is vested with the primary control thereof.
>
> . . .
>
> Since it is clear that the States have the control of water within their boundaries, it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years.

Id. at 678-79 (quoting S. Rep. No. 755, 82d Cong., 1st Sess., 3, 6 (1951)).

As this Court held in *Colorado River Water Conservation Dist. v. United States,* 424 U.S. 800, 819 (1976), the determination of water rights for federal projects must proceed in recognition of "the availability of comprehensive state systems for adjudication of water rights." Thus, pursuant to the McCarran

Amendment, the water right for the Rio Grande Project is being adjudicated in the LRG Adjudication.

3. Based on its Notices of Intent, the United States holds a New Mexico water right for the Project, the elements of which are being determined in the ongoing stream adjudication. Stream System Issue No. SS-97-104 in the LRG Adjudication is the proceeding in which the Project water right is being defined, and the United States has been an active participant. To date, the LRG Adjudication Court has made several rulings regarding the scope of the Project right.

a. As noted above, the LRG Adjudication Court ruled that the Project right is a surface water right, as distinct from a groundwater right, under New Mexico law. Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 4-6, LRG Adjudication (Aug. 16, 2012) ("The points of diversion constructed by the United States and utilized for the Project, coupled with the notices describing the water to be appropriated as water from the Rio Grande and its tributaries, indicate that the United States has established a right to surface water under New Mexico law for purposes of the adjudication."). While reserving the quantification of return flows and seepage for further technical proceedings before the State Engineer, August 16, 2012 Order at 7, the LRG Adjudication Court explained that, under New Mexico law, "'[w]hen an artificial or natural flow of surface water, through

percolation, seepage or otherwise, reaches an underground reservoir and thereby loses its identity as surface water, such waters become public under the provisions of [Section 72-12-1] and are subject to appropriation in accordance with applicable statutes.'" *Id.* at 7 (quoting *Kelley v. Carlsbad Irrigation Dist.*, 415 P.2d 849, 853 (N.M. 1966)); *see also Reynolds v. City of Roswell,* 654 P.2d 537, 541 (N.M. 1982) ("The City readily acknowledges, and we agree, that once the effluent actually reaches a water course or underground reservoir, the City has lost control over the water and cannot recapture it."); *State ex rel. Reynolds v. King*, 321 P.2d 200, 201 (N.M. 1958) ("When waters, either artificial surface waters or natural surface waters, reach an established underground water basin by percolation, seepage, or otherwise, they become public waters. . . .").

b. Second, the LRG Adjudication Court has ruled concerning the United States' right to a maximum storage capacity, normal annual release, and ability to divert Project water at downstream diversion dams in New Mexico. Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference at 2-5, LRG Adjudication (Feb. 17, 2014).

c. The United States is bound by the rulings of the LRG Adjudication and appeals therefrom, *City of Las Cruces*, 289 F.3d at 1191-92, and it does not claim to challenge those rulings in this Court.

4. As outlined above, the United States allocates and delivers Project water to users in New Mexico and Texas for use on authorized acreage. All of the water for the New Mexico district, EBID, is allocated to users and is put to beneficial use under the laws of New Mexico. Water for the Texas District, EPCWID, is governed by Texas law to the extent not inconsistent with the Reclamation Act. *EPCWID v. El Paso*, 133 F. Supp. at 907. As a senior water right holder, Reclamation has effective tools available under New Mexico law to protect the Project right from interference by junior groundwater appropriators in New Mexico.

a. New Mexico follows the prior appropriation doctrine, a doctrine enshrined in the State's constitution and statutes. *See State ex rel. State Game Commission v. Red River Valley Co.*, 182 P.2d 421, 428 (N.M. 1945); N.M. Const. Art. XVI, § 2; NMSA §§ 72-1-1 to -12 (1978). Under the prior appropriation doctrine, the water right is a usufruct, defined by its historic beneficial use. *See Snow v. Abalos*, 140 P. 1044, 1048 (N.M. 1914). The Reclamation Act provides the same, 43 U.S.C. § 372. When there is a shortage, the senior appropriator has the right to take all of his water before the junior appropriator can take any. *See City of Albuquerque v. Reynolds*, 379 P.2d 73, 79 (N.M. 1962).

b. In the prior appropriation doctrine, the mechanism by which an appropriator protects its rights from impairment by others is a priority call. A priority call consists of notice to the offending

appropriator that insufficient water is available to permit full enjoyment of the senior appropriator's right. *See Worley v. U.S. Borax & Chemical Co.*, 428 P.2d 651, 654-55 (N.M. 1967) (holding that junior appropriator could not be held liable for senior appropriator's shortage of water in the absence of a demand by the senior appropriator that sufficient water be allowed to reach his diversion point to satisfy his senior rights). Upon receiving a call, the junior appropriator must either reduce or cease use of his right and send the water downstream, or show why his use of the water is not the cause of the downstream senior appropriator's deficiency. Because New Mexico manages surface water and groundwater conjunctively, these principles apply equally to groundwater and surface water rights. A senior surface water user such as the Project can make a priority call against a junior groundwater user in the same basin if the groundwater use is interfering with the surface water right. *City of Albuquerque*, 379 P.2d at 79.

In recognition of the need for efficient and effective water rights administration to comply with interstate compacts and protect senior appropriators, New Mexico law vests the New Mexico Office of the State Engineer with authority to conduct administration of water rights where, as in the Lower Rio Grande, a final adjudication of the rights in a given basin has not been completed. NMSA § 72-2-9.1 (1978). That authority was recently confirmed by the New Mexico Supreme Court in *Tri-State Generation*

& Transmission Ass'n, Inc. v. D'Antonio, 289 P.3d 1232, 1235 (N.M. 2012).

c. Like other water right owners in the Lower Rio Grande, Reclamation can initiate enforcement by notifying the New Mexico Office of the State Engineer ("OSE") that the actions of junior appropriators are interfering with the Project water right, and request that the OSE administer the water rights in the Lower Rio Grande. Once a request has been made, the OSE has both the authority and the obligation to enforce New Mexico laws and protect senior water rights, such as the Project's, from interference. *See, e.g.*, NMSA § 72-2-1 (1978) ("[The New Mexico State Engineer] has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required."); NMSA § 72-2-9.1 (1978) (authority of State Engineer to adopt rules for priority administration); NMSA § 72-2-18 (1978) (enforcement authority of State Engineer, authority to issue compliance orders). The LRG Adjudication Court recently confirmed that the United States has these state law remedies at its disposal to protect the Project water right: "[T]he United States may pursue any administrative action available under New Mexico law to protect its right from other appropriations, pending or existing, that encroach upon its right." Order Granting the State's Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment at 4, LRG Adjudication (Aug. 16, 2012).

D. The Compact Does Not Create a Duty for New Mexico to Protect Reclamation's Contract Deliveries

1. Contrary to the allegations of Texas and the United States, New Mexico's obligations with respect to Project water that is released below Elephant Butte arise under the above state laws and authorities, not under the Compact. New Mexico's duty under the Compact is to deliver water to Elephant Butte Reservoir, and neither Texas nor the United States alleges that New Mexico breached that duty. Once the water is delivered to Elephant Butte, it is *Reclamation's* obligation to make contract deliveries to Project beneficiaries. If Reclamation or the Project beneficiaries believe that groundwater pumping by junior water users in New Mexico below Elephant Butte is interfering with the Project water right, Reclamation must take the necessary steps to avail itself of the mechanisms provided under New Mexico law to protect those rights. Only then does the State of New Mexico have a duty to act. Neither Texas nor the United States allege that the United States ever made a "call" or otherwise requested action from New Mexico that would have triggered a duty on the part of New Mexico to ensure that senior Project rights were being satisfied.

a. This structure of New Mexico's obligations with respect to the Project – *i.e.*, a Compact obligation to deliver the water to Elephant Butte, and a state law obligation to protect the Project water

right from interference by junior appropriators – is underscored by the Project's control over releases below Elephant Butte. The amount of water that is released from the Project and delivered to Texas varies depending upon the demands of EPCWID. When EPCWID needs water to be delivered to the stateline, it calls for that water from Reclamation, and if available, that water is released from the Project. New Mexico has no control over how much water is released, nor does the Compact require that New Mexico be provided with real-time data regarding releases, as would be expected if New Mexico had a Compact obligation to monitor Project deliveries to EPCWID. As a result, New Mexico has no way of knowing how much water should be delivered to Texas at any given time.

b. Reliable extrinsic sources made contemporaneously to the Compact support New Mexico's position. For example, Texas Commissioner Clayton explained in his letter of October 16, 1938, that because the Project is the source of supply for all the lands below, and because "an entirely independent agency" (Reclamation) controls releases from the Project, New Mexico should not be expected to "guarantee a certain amount of water pass the Texas state line." Clayton Letter to Clark (App. 25-26). Had the Compact been intended to place an affirmative duty on New Mexico to deliver water to the stateline, it would have contained provisions to enable New Mexico's knowledge of, and ability to control, Project releases.

c. Reclamation law further supports the proposition that New Mexico's obligations with respect to Project releases below Elephant Butte arise under state law and not the Compact. Since the Project Act expressly incorporates the provisions of the Reclamation Act, including the deference to state law, the Compact drafters would have expressly rejected that law if they had intended to deviate from the status quo by imposing a Compact duty on New Mexico to deliver water at the stateline. Instead, the only duty that Compact expressly imposes on New Mexico is to deliver water to Elephant Butte.

2. Despite the lack of any express terms in the Compact imposing a duty to deliver water to the stateline, both Texas and the United States allege that the Compact imposes some separate duty, outside of state water law, for New Mexico affirmatively to protect Project deliveries. *See, e.g.*, Texas' Compl. at ¶¶ 11, 18, 19; U.S. Compl. at 5 (prayer for relief). However, neither Texas nor the United States identifies an operative provision of the Compact, and such a duty cannot be implied when it is not reflected in the Compact's express terms. The Court has recognized that interstate compacts are the products of careful negotiation between sovereign States, and is reluctant to imply obligations or requirements that are not contained in the plain language. *See New Jersey v. Delaware*, 552 U.S. 597, 615-16 (2008). The Court recently emphasized and explained this reluctance

in the interstate compact case *Alabama v. North Carolina*:

> We do not – we cannot – add provisions to a federal statute. And in that regard a statute which is a valid interstate compact is no different. We are especially reluctant to read absent terms into an interstate compact given the federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented.

560 U.S. at 352. *See also id.* (noting previous cases in which the Court had refused to order relief inconsistent with the express terms of a compact, no matter what the equities of the circumstances might otherwise invite (citing *New Jersey v. New York*, 523 U.S. at 811; *Texas v. New Mexico*, 462 U.S. at 564)).

3. In sum, New Mexico's duty under the Compact is to deliver water to Elephant Butte. If the United States or the Project's beneficiaries believe that junior appropriators in New Mexico are interfering with Project water rights, Reclamation can invoke the authority of the New Mexico State Engineer under state law. At that point, New Mexico acknowledges that it would have an obligation to protect Project releases that flow into Texas from interference by New Mexico appropriators, but that has not occurred. The Court should reject the request of Texas and the United States to read into the Rio Grande Compact an implied duty on the part of New Mexico

to protect Project water rights below Elephant Butte from interference, outside of the remedies already provided under New Mexico law.

V. THE COURT'S NON-EXCLUSIVE ORIGINAL JURISDICTION SHOULD NOT BE BURDENED WITH A SUIT TO ENFORCE CONTRACT DELIVERIES

As described above, the Compact imposes no duty on New Mexico to affirmatively protect the Project water right. If the Court dismisses the Compact claims, no exclusive original action claims survive under 28 U.S.C. § 1251(a). To the extent that any secondary claims remain, those claims would have to be based on a theory of harm to the United States' *Project* water right since the United States is not a party to the Compact.[7] Claims related to the use or overuse of water in New Mexico, however, should not be litigated in this Court.

The Court has discretion over its original docket, and it is "particularly reluctant to take jurisdiction of a suit where the plaintiff has another adequate forum in which to settle [its] claim." *United States v. Nevada*, 412 U.S. 534, 538 (1973). For example, in *California v. Nevada*, 447 U.S. 125 (1980), California sought a determination of its boundary with Nevada. After the boundary dispute was resolved, the Court

[7] New Mexico does not concede that Texas or the United States has properly pled any non-Compact claim.

denied a request to enlarge the case to include ownership and title issues between the United States and one of the States on the grounds that "litigation in other forums seems an entirely appropriate means of resolving whatever questions remain." *Id.* at 133. Similarly, in *United States v. Nevada*, the United States sought "a declaration of the respective rights of the States and of the United States in the Truckee River," including the rights of Reclamation in one of its projects. 412 U.S. at 535. The Court declined to consider a dispute over the effect of a lower water decree on the Reclamation project, stating that "[w]e need not employ our original jurisdiction to settle competing claims to water within a single State." *Id.* at 538.

Ancillary issues that would survive dismissal of the Compact claims fall into the category of "competing claims to water within a single State" that should be addressed in a New Mexico court. The Court should therefore dismiss all claims asserted by Texas and the United States, including any claims independent of the Compact. If it has any, this would allow the United States to bring an action in the appropriate forum on claims related to its New Mexico water right.

CONCLUSION

Texas' Complaint and the United States' Complaint in Intervention should both be dismissed.

Respectfully submitted,

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(Minor revisions approved 03/19/2013)

Reclamation Manual
Policy

Subject: Reuse of Project Water

Purpose: To set forth the Bureau of Reclamation's policy concerning the reuse of return flows from applications of project water.

Authority: The Reclamation Project Act of 1902 (32 Stat. 388; 43 U.S.C. 391), and acts amendatory thereof and supplementary thereto, especially Reclamation Project Act of 1939 (53 Stat. 1192; 43 U.S.C. 485g), and the Water for Miscellaneous Purposes Act of 1920 (41 Stat. 451; 43 U.S.C. 521).

Approving Official: Commissioner

Contact: Policy and Administration (84-50000)

1. Introduction.

A. After delivery, the ability to control project water available for reuse due to waste (both treated and untreated), seepage, and return flows (collectively "return flows"), greatly enhances Reclamation's flexibility and efficiency in meeting the various competing demands

on its projects. It is therefore Reclamation's policy to encourage and facilitate the reuse of project water within the bounds of state water laws and Reclamation's state-issued use permits. Reclamation will assert and protect its interest in return flows either under state law or as Federal property. In furtherance of this Policy, Reclamation should endeavor to monitor water after initial delivery to identify opportunities for successive uses, and will pursue contracts for reuse wherever it is practical and physically and legally tenable.

B. That Reclamation may control reuse of project water is inherent in principles of property law and has been upheld in Federal case law. Reclamation may require contractual restrictions more stringent than those imposed by state water law. However, Reclamation's authority to enter contracts for the reuse of project water is subject to any limitations on use that may be imposed by applicable state laws and relevant water rights. Because laws vary from state to state, and because Reclamation's water rights may vary from project to project, the potential for and character of agreements made in furtherance of this Policy will also vary. Reclamation will pursue this Policy to the fullest extent that relevant laws, permits, and physical exigencies will allow, evaluating the potential for reuse on a case-by-case basis.

2. **Applicability.** This Policy applies to staff responsible for executing and administering contracts

executed pursuant to the Reclamation Project Act of 1902 (32 Stat. 388; 43 U.S.C. 391), and acts amendatory thereof and supplementary thereto, especially Reclamation Project Act of 1939 (53 Stat. 1192; 43 U.S.C. 485g), and the Water for Miscellaneous Purposes Act of 1920 (41 Stat. 451; 43 U.S.C. 521).

3. **Definitions.**

A. **Project Water.** Surface or ground water, including project return flows, which is pumped diverted, and/or stored:

(1) Based upon the exercise of water rights which have been appropriated or acquired by the United States or others, or which have been decreed, permitted, certificated, licensed, or otherwise granted to the United States or others, for a Reclamation project or a Water Conservation Utilization Act of 1939 (Pub. L. 398; 53 Stat. 1418) (WCUA) project, or

(2) Based upon a withdrawal or reservation of water from appropriation by the United States for a Reclamation project or a WCUA project, or

(3) In accordance with section 215 of the Reclamation Reform Act of 1982 (43 U.S.C. 390oo), or

(4) Based upon an act of Congress which allocated or apportioned water to a Reclamation project or a WCUA project.

4. **Responsibilities.**

   A. **Commissioner.** The Commissioner is responsible for establishing Reclamation-wide policy regarding the reuse of project water.

   B. **Regional Directors and Director, Policy and Administration.** Regional directors and the Director, Policy and Administration are responsible for ensuring compliance with policies regarding the reuse of project water.

5. **Contract provisions.** Reclamation's ownership interests in waste, seepage, and return flows from the application of project water (return flows) are described in varying detail in existing contracts. The most common contract provisions addressing Reclamation's ownership interests in return flows contain language similar "The United States claims all of the waste, seepage, and return flow water derived from water delivered pursuant to this contract and the same is hereby reserved and retained by the United States for beneficial use on the project."

   A. In the absence of such a provision, Reclamation's administrative control over return flows may also be established by the "Rules and Regulations" provision, which is included in most Reclamation contracts. The language in these articles typically restates the general authority given the Secretary in the 1902 Act and the 1939 Act; i.e., to perform any of the necessary actions and to make any rules and regulations deemed necessary to carry out the provisions of Reclamation law, the implementation of the particular project

plan, and the administration of the subject contract according to the 'true intent' of these applicable authorities.

B. Even where not addressed by contract, Reclamation, at a minimum and within the boundaries of the Reclamation project, retains return flow rights to the extent that they are established in the state water right and are not expressly granted to another entity by contract. In some circumstances, Reclamation return flow rights under state and/or Federal law define Reclamation's legal authority to assert administrative control over return flows, provided other contract provisions do not expressly state otherwise. In other circumstances, Reclamation may have the right to control project water to exhaustion.

C. Generally, return flows are to be used "for the benefit of the project."[1] The 'benefit of the project' is sufficiently broad to provide for reuse of the water for purposes other than that of the initial use. For example, return flows from irrigation use may be subsequently applied for municipal uses and vice-versa, where both uses are consistent with the project authorization.

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[1] It is important to note that even where there is only one principal project contractor, that entity does *not* supplant the project, for the purpose of determining what qualifies as a "benefit of the project." Rather, it remains for Reclamation to determine what qualifies as a "benefit of the project," as indicated by relevant statutes and project documents.

D. In some cases, the return flows are specifically designated for beneficial use by a project contractor, or within a contractor's boundaries. Regardless of the designation of beneficiaries, or lack thereof, Reclamation's rights to return flows should be asserted and protected. Where water rights are held in the name of the project contractor, Reclamation should encourage the contractor to assert and protect any rights it has to reuse the water. Where state law allows, Reclamation should assert its Federal property right.

6. **Third-party contracts.**

A. Reclamation projects often serve multiple water users and multiple purposes. In many cases, Reclamation and the water users have found it efficient to transfer responsibility for water deliveries to a central authority, e.g., a master conservancy district or municipality. This delegation of authority does not relinquish Reclamation's right to seepage or return flows.

B. Third-party contracts must expressly provide that their terms are subject to the terms of the master contract. Reuse contracts with third parties must follow master contracts containing language to the effect that the third-party contractors are also not entitled to the use, or further distribution, of return flows.

7. **Charges.** Charges will be considered on a case-by-case basis, relative to the contracting authority used and the situation of the project.

Reclamation Manual Transmittal Sheet

Effective Date: **03/19/2013** Release No. **458**

Please ensure that all employees who need this information are forwarded a copy of this release.

Reclamation Manual Release Number and Subject

PEC P13 Reuse of Project Water

Summary of Changes

SUPERSEDES WTR P09 (236) 01/20/2006

Minor revisions approved to reflect current organizational structure and comply with the requirements of RCD 03-01.

NOTE: This Reclamation Manual release applies to all Reclamation employees. When an exclusive bargaining unit exists, changes to this Reclamation Manual release may be subject to the provision of your collective bargaining agreements.

Filing Instructions

Remove Sheets	Insert Sheets
WTR P09 pp 1-3	**PEC P13 pp 1-4**

All Reclamation Manual releases are available at http://www.usbr.gov/recman/.

Filed by: _____ Date: _____

Water Appropriations.
Rio Grande Project.

DEPARTMENT OF THE INTERIOR

UNITED STATES GEOLOGICAL SURVEY,
RECLAMATION SERVICE.

Carlsbad, New Mexico, Jan. 23, 1906.

Mr. David L. White,
Territorial Irrigation Engineer,
Santa Fe, New Mexico.

Dear Sir: –

The United States Reclamation Service, acting under authority of an act of Congress known as the Reclamation Act, approved June 17, 1902 (32 Stat., 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande project. The operation of the works in question contemplates the diversion of water from the Rio Grande River.

Section 22 of Chapter 102 of the laws enacted in 1905 by the 26th Legislative Assembly of the Territory of New Mexico – an act entitled, "An Act Creating the Office of Territorial Irrigation Engineer, to Promote Irrigation Debelopment [sic] and Conserve the Waters of New Mexico for the Irrigation of Lands and for other Purposes," approved March 16, 1905 – reads as follows:

> "Whenever the proper officers of the United States Authorized by law to construct irrigation works, shall notify the territorial irrigation engineer that the United States intends

> to utilize certain specified waters, the waters so described, and unappropriated at the date of such notice, shall not be subject to further appropriations under the laws of New Mexico, and no adverse claims to the use of such waters, initiated subsequent to the date of such notice, shall be recognized under the laws of the territory, except as to such amount of the water described in such notice as may be formally re-leased in writing by an officer of the United States thereunto duly authorized."

In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to wit: –

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 at a point described as follows:

Storage dam about 9 miles west of Engle, New Mexico, with capacity for 2,000,000 acre-feet, and diversion dams below in Palomas Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.

It is, therefore, requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in

the premises be otherwise protected as contemplated by the statute above cited.

Very truly yours,

(Signed) B. M. Hall
Supervising Engineer.

Phoenix, Arizona, April, 1908

COPY

Mr. Vernon L. Sullivan,
Territorial Engineer,
Santa Fe, New Mexico.

Dear Sir:

Claiming and reserving all rights under our former notice of January 23, 1906, addressed to David L. White, Territorial Irrigation Engineer of New Mexico, which said notice advised him of the intention of the United States to use the waters of the Rio Grande for the purpose of irrigation, and is now filed in your office, I do now hereby give you the following notice in addition to said former notice and supplemental thereto.

The United States acting under authority of an Act of Congress, known as the Reclamation Act, approved June 17, 1902 (32 Stat. 388), proposes to construct within the Territory of New Mexico certain irrigation works in connection with the so-called Rio Grande Project. The operation of the works in question contemplates the diversion of the water of the Rio Grande River.

Section 40 of Chapter 49 of the laws enacted in 1907 by the 37th Legislative Assembly of the Territory of New Mexico, an Act entitled, "An Act to conserve and regulate the use and distribution of the waters of New Mexico; to create the office of Territorial Engineer; to create a Board of Water

Commissioners, and for other purposes," approved March 19, 1907, reads as follows:

> Whenever the proper officers of the United States authorized by law to construct works for the utilization of waters within the Territory, shall notify the Territorial Engineer that the United States intends to utilize certain specified waters, the waters so described, and unappropriated, and not covered by applications or affidavits duly filed or permits as required by law, at the date of such notice, shall not be subject to a further appropriation under the laws of the Territory for a period of three years from the date of said notice, within which time the proper officer of the United States shall file plans for the proposed work in the office of the Territorial Engineer for his information, and no adverse claim to the use of the water required in connection with such plans, initiated subsequent to the date of such notice, shall be recognized under the laws of the Territory, except as to such amounts of water described in such notice as may be formally released in writing by an officer of the United States thereunto duly authorized; Provided, that in case of failure to file plans of the proposed work within three years, as herein required, the waters specified in the notice given by the United States to the Territorial Engineer shall become public water, subject to general appropriations.

In pursuance of the above statute of the territory you are hereby notified that the United States intends to utilize the following described waters, to-wit:

All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River at a point described as follows:

Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre feet, and diversion dams below the Palomas, Rincon, Mesillas and El Paso Valleys in New Mexico and Texas.

It is therefore requested that the waters above described be withheld from further appropriation and that the rights and interests of the United States in the premises be otherwise protected as contemplated by the statute above cited.

Yours very truly.

(signed)

Louis C. Hill
Supervising Engineer.

J.H. McBROOM FRANK B. CLAYTON

LAW OFFICES
McBROOM & CLAYTON
BASSETT TOWER
EL PASO, TEXAS

October 16, 1938

Mr. C. S. Clark,
Chairman, Board of Water Engineers,
Austin, Texas

Dear Mr. Clark:

I have just to-day returned from the lower Rio Grande valley, where I discussed the Rio Grande situation in general, and the Compact in particular, with representatives of the various irrigation districts in Cameron, Hidalgo, and Willacy County, and with others in the lower valley who are interested in the matter. As a result of these conferences, I hope and believe that whatever misunderstandings may have existed between those in the upper and lower sections of the river, in Texas, are now cleared up and that the relations between the two sections will henceforth be of a cordial and cooperative nature.

It seemed to me that no small part of those misunderstandings was brought about by statements or reports apparently originating with you and reflecting on me, both personally and officially, and on the officials of the irrigation districts above Fort Quitman. For instance, the impression was prevalent in the valley that you and the Board of Water Engineers had been ignored in the negotiations for the

permanent compact and that you had not been consulted nor taken into our confidence.

This came as a complete surprise to me.

The statute places the responsibility for the Rio Grande Compact upon the Rio Grande Compact Commissioner, subject of course to ratification by the Legislature, and not on the Board of Water Engineers. However, since I have been commissioner I have made it a point to keep you fully advised, by oral or written communications, of all material developments. On the occasion of my every visit to Austin, whether on official business as commissioner or not, I made it a point to call at your office to discuss matters with you if you were in town. I believe you were notified in advance of every meeting of the Compact Commission, and certainly you were notified of the more recent meetings of the Commission and of the meetings at El Paso with the engineering advisers and representatives of Texas' interest preliminary to meetings of the Commission itself.

I have just reviewed my files, and they bear out my recollection of those matters.

Specifically, you attended the meeting of the Rio Grande Compact Commission in the latter part of September, 1937, which was the first meeting held by the Commission after the report of the Rio Grande Joint Investigation had been made available to the Commissioners. It was at this meeting that the first serious attempt was made to arrive at a permanent compact, since not until that time did we have the

necessary data upon which to predicate the negotiations. All the previous meetings had been in connection with the temporary compact, in the endeavor to keep it alive pending the negotiation of a permanent compact, and for the exchange of engineering data in accordance with the terms of the temporary compact, in working out the details for the conduct of the Rio Grande Joint Investigation, and in connection with matters of a more or less routine nature.

While I do not at this moment have before me the correspondence between us relative to these meetings prior to September, 1937, it is my very definite recollection that you were kept informed of developments, and I am positive that I discussed these matters with you from time to time in Austin.

My files reflect that you were notified of the September, '37 meeting and invited to attend; that you did attend, in company with certain gentlemen from the lower Rio Grande valley; that you left the meeting before it was adjourned but wrote me asking for a report of the developments following your departure. Under date of October 7, 1937 I wrote you in full, acquainting you of such developments, and I sent you a copy of the transcript of the proceedings of the meeting. I also informed you that further meetings with the engineering advisers of the Commission would be held to consider the report the engineers were to make upon which a permanent compact could be based.

On January 15, 1938 I sent you a copy of the report of the committee of engineers, and asked you for any suggestions that you might wish to make, and in my letter of that date I informed you of the meeting of the Texas representatives called for January 24 and 25 in my office, and invited you to be present. You were present at that meeting, in company with Messrs. Tamm, Robertson, and Anderson, as I recall, and perhaps others of the lower valley. And at that meeting you expressed your approval of the report, in general, and made certain suggestions with respect to particular portions of it. Some, and perhaps all, of those suggestions were embodied in the final draft of the Compact.

Following the meeting of January 24-25, I had further correspondence with you and sent you copies of letters received from and written to the Commissioner for New Mexico and his engineering advisers.

I also discussed with you the problems of the lower Rio Grande, and suggested to you the thought that in the negotiations for the permanent compact there could be no allocation of Texas' share of the waters between sections of the State but that that was a matter for internal negotiation, our one object in the negotiations with Colorado and New Mexico being to secure for Texas all the water to which she was entitled. In a letter you addressed to me under date of February 2, 1938 you expressed yourself as being in harmony with this thought.

You were notified of the meeting of the Rio Grande Compact Commission in March, of this year, at which, after many days of arduous negotiation, a permanent compact was finally arrived at, and you and Mr. Robertson and the late Mr. Montgomery attended that meeting, and you were kept fully advised of the progress of the negotiations. You will recall that at both this meeting and the meeting of September, 1937 you were invited to attend all the private conferences of the Texas representatives, held for the purpose of determining matters of policy.

As far as I know, you were never misled nor "kept in the dark" as to any material development in connection with the negotiations, from their inception to their conclusion, for a permanent Rio Grande compact, nor thereafter.

Because of other engagements, as I was given to understand, you and Mr. Robertson and Mr. Montgomery were forced to leave before the meeting in March was concluded. But in response to your request a copy of the tentative draft of the Compact was sent to you, and also to Mr. Roberson, and in a telegram you sent to me at Santa Fe on March 15 you stated that the preliminary draft was satisfactory. The final draft was, in all essentials, the same as the preliminary draft.

After that meeting and at the request of you and Mr. Robertson, I called a meeting in El Paso with representatives of the irrigation districts above and below Fort Quitman, and this meeting you attended,

and you were supplied with copies of the transcript of the proceedings of that meeting. It was my understanding when you were about to return to Austin after that meeting that you were satisfied with the reasons given by the various interests above Fort Quitman why no contract could be entered into with the lower interests with respect to the waters passing Fort Quitman. At that meeting I was not representing any interest but acted merely as chairman by special request, and as you know I made every effort to see that every man present was given full opportunity to express his views. When the meeting was ready to be concluded I understood it to be the attitude of every one in attendance that the Compact, which, in effect, prevents any further encroachment on the waters of the Rio Grande by Colorado and New Mexico, was the very best that Texas could get and at least equal to what she could get by litigation, and that any question of internal division of the waters of the river should not be allowed to prejudice ratification of the Compact. As Mr. Robertson said at that meeting, "We came up here to ask you gentlemen for an agreement. I take it for granted that your explanation why you can't enter into such an agreement is perfectly reasonable. I don't believe you could if you would." This same thought was expressed to me by Mr. Robertson at San Benito this past week, and his attitude I thought was one of friendly cooperation, to the end that the two sections together might solve their mutual problems.

It was further pointed out at the meeting just referred to that it was to the interest of the districts above Fort Quitman to pass as much water by Fort Quitman as possible in order to preserve a salt balance, the report of the Rio Grande Joint Investigation having shown that there is an annual accumulation of salt in the valleys above Fort Quitman resulting from a deficient supply of water to carry the salt. Mr. Fiock, the superintendent of the Rio Grande Project, and the managers of the two irrigation districts under the Project, all expressed their purpose to use as much water as was available.

If you have been kept in the dark as to any matter connected with the permanent Rio Grande Compact or the negotiations leading up to it, I am at a loss to know what it is. My attitude has always been that of cooperation with you and your department, and I am sorry that, as the statements attributed to you reflect, you have viewed the matter in any other light.

I was also informed upon the occasion of my recent visit to the lower valley that you had reported to certain individuals in that section that immediately following the conference at Austin on September 6, between Assistant Attorney General H. Grady Chandler, representatives of lower valley interests, Major Richard F. Burges, and me, which meeting you attended, I boarded the first plane out of Austin for Denver, the implication being that I was trying to take some sinister advantage or the lower Rio Grande Valley interests. The most casual investigation upon

your part would have revealed that I did nothing of the kind. I did not take the plane nor any other conveyance to Denver, nor have I been any nearer Denver since that meeting than El Paso, and I have had no subsequent communication with officials of either Colorado or New Mexico, oral or written, except for a visit paid me by former Governor Corlett on September 26, who came here to discuss the mechanics of entering the proposed decree and left without our having reached any agreement whatsoever with respect thereto. I was at the Stephen F. Austin Hotel, at Austin, from September 6 to September 10, both inclusive. You will recall that I had a telephone conversation with you from my hotel room during that period. On September 11 I went direct to Beaumont, leaving my forwarding address with the hotel clerk at the S. F. Austin. I returned to Austin from Beaumont on September 13, and remained there through the 14th. A telephone call, therefore, to my hotel, at any time from September 6 to September 14 would have informed you as to my whereabouts and that I did not go to Denver. Even had I gone to Denver, I can not see how it could have reflected on me in any way.

This may seem to you a trivial matter. But reports of this character coming from a responsible state official, are calculated to inspire anything but confidence; and I can not say that I blame those in the lower valley for having viewed me, in the light of these reports, with some misgiving, if not active distrust. This feeling I sincerely hope my visit to the valley has entirely overcome.

There ~~is~~ are of course very frequently grounds for differences in viewpoint between reasonable men, even when all the facts are available and there is no misunderstanding about the facts. But the least that can be said is that such differences should not be aggravated by misrepresentation of the facts, whether deliberate or unintentional.

I am not here attempting to debate with you the question of whether the lower Rio Grande valley has any material interest in the waters of the river passing Fort Quitman, although I am constrained to think they do not, considering the fact that the water passing Fort Quitman contains some two and three-quarter tons of salt per acre-foot and has to traverse some twelve hundred miles of river channel, with countless diversions in between, before any of it could be available in Hidalgo, Cameron or Willacy County, and in view of the further fact that the average over the past few years (some 200,000 acre-feet annually), if it could be transported bodily, without loss, to the lower valley, would represent barely three per cent. of the water supply at Rio Grande City and about five per cent. of the amount annually wasted into the Gulf by reason of lack of storage facilities.

It should be borne in mind that even before the beginning of this century irrigation development in Colorado had used up all the normal flow of the stream, above Ft. Quitman, leaving only the spring and flood flow. This gave rise to protests from Mexico and from water users on the American side, and, as a result, the United States placed an embargo on

further development upstream, and, in 1906, signed the treaty with Mexico whereby, in exchange for Mexico's surrender of her claims for damages and of her rights in the waters of the Rio Grande above Fort Quitman, the United States agreed to build a storage reservoir and to deliver to Mexico, free of cost, at the Acequia Madre opposite El Paso, sixty thousand acre-feet of water annually. Filings were thereupon made by the Bureau of Reclamation on all unappropriated waters of the Rio Grande in what was then the Territory of New Mexico, near Engle, New Mexico, for the benefit of the lands between that point and Fort Quitman. Pursuant to those filings, Elephant Butte dam was built and diversion and drainage works constructed below the dam, at a cost of some fifteen millions of dollars. Of this cost, the federal government, because of this country's obligation to Mexico, assumed $1,000,000.00, and the landowners in the Rio Grande Project, above Fort Quitman, assumed the other $14,000,000.00.

If, by all this, any damage was done to irrigation interests below Fort Quitman, the damage occurred at the time the filings were made and the dam built, and not subsequently. However, at that time there was no shortage of water in the valleys below Fort Quitman. As a matter of fact, the shortages in the lower valley have been of very recent occurrence – within the past few years. And these recurring shortages, as I understand the situation, are caused, not by any developments above Fort Quitman, but by the

increasing developments on tributaries below Fort Quitman, chiefly in Mexico.

The lower valley has a problem of alternating floods and water shortages similar to the problem which existed above Fort Quitman before Elephant Butte dam was built. And the solution, as I see it, is the same: the construction of dams to control floods and store water for orderly release and use.

Development of irrigation above Fort Quitman and below Elephant Butte dam reached its maximum between 1920 and 1930, and since about 1928 there has been no increase in the irrigated acreage in this section of the valley to an extent that could adversely affect the flow past Fort Quitman.

The flow at Fort Quitman has of course always fluctuated, depending largely on the releases from Elephant Butte reservoir and on rainfall and other climatic conditions beyond human control. But since the great drouth of 1934 which reduced the flow past Fort Quitman to its lowest point (about 102,420 acre-feet), the flow has steadily increased, reaching approximately 145,000 acre-feet in 1935, 149,000 acre-feet in 1936, and 179,000 in 1937. If the permanent compact will have any effect on this flow, at all, it will be to increase it, since the Compact insures Texas against further encroachments upstream, and thus assures a more reliable water supply.

To you was also attributed a statement to the effect that in negotiating the permanent compact I

disregarded the rights and interests of the lower Rio Grande valley.

As you know, the commissioners found it utterly impossible to agree on the relative priorities of the rights of the three States, and the whole effect of the Compact is to "freeze" the supply of water to Elephant Butte reservoir at its present status: that is, to guarantee to Texas that no further encroachments will be made up-stream, in New Mexico or Colorado. And it was the sense of all concerned, including yourself as I recall your expressions on the subject, that this was the very best Texas could hope to get.

Obviously, no allocation of waters as between different sections of the same State was possible in an interstate compact, and none was attempted.

Furthermore, there seems to have been some misunderstanding regarding the fact that it is the supply to the reservoir that is provided for in the Compact, and not what passes the New Mexico-Texas state line:

As you know, by reason of the irregular contour of the boundary between the two States and other physical facts, it is practically impossible to measure the water passing the state line at the various places in the river channel and in the canals, laterals and drains.

Moreover, since the source of supply for all the lands above Fort Quitman and below Elephant Butte

reservoir, whether in Texas or New Mexico, is the reservoir itself, it could hardly be expected of Colorado and New Mexico that they should guarantee a certain amount of water to pass the Texas line, since this amount is wholly dependent upon the releases from the reservoir and the reservoir is under the control of an entirely independent agency: the Bureau of Reclamation.

Also, by contract between the New Mexico interests and the Texas interests in the Rio Grande Project, all the lands in the Project have equal water rights, and the acreage to be irrigated is practically "frozen" at its present figure, with a three per cent. "cushion."

It is therefore not necessary, even if it were practicable, to make any definite provision in the Compact for the amount of water to pass the Texas-New Mexico state line.

All these matters have contributed to the misunderstandings between the upper and lower sections of the river in Texas: misunderstandings that should never have existed but that I now sincerely hope have been dispelled. In my humble opinion, the interests of the two sections are not antagonistic, and their prosperity lies in cooperation, not in strife.

Further, it seems obvious to me that the only real and complete solution of the very serious water problems of the lower valley is first to secure a treaty with Mexico which will permit the building of storage reservoirs on the river below Fort Quitman, and

anything that tends to arouse suspicion and create discord between the different sections along the river in Texas and between Texas and the States in the watershed of the Colorado of the West is highly prejudicial to the prospects of obtaining such a treaty, and finally solving those very grave problems.

The cordial reception given me by the people in the lower valley this past week leads me to hope and believe that there will no longer be any differences between the two sections of the river but that we will all view the problems as common ones and mutually strive for their solution. I know I can speak thus for the people in this section of the State. Their attitude is one of the friendliest cooperation towards their friends and fellow citizens downstream.

If the cause of any of these misunderstandings has erroneously been attributed to you, I should be glad to hear from you to this effect, and I should be happy to know that you are in no wise responsible for them, since, under the circumstances, I feel that I have not been fairly dealt with.

Yours sincerely,

/s/ Frank B. Clayton
Frank B. Clayton
Rio Grande Compact
Commissioner for Texas

P. S. Since dictating the foregoing letter, I attended a hearing at Monte Vista, Colorado, called by the War Department to consider a proposed flood survey on the upper Rio Grande. Neither the Compact nor the

proposed agreed judgment in the suit pending before the United States Supreme Court was discussed.

F. B. C.

FBC:ESG
cc of letter and p. s. to:

Mr. Alfred A. Tamm, Harlingen
Judge Oscar C. Dancy, Brownsville
Judge Oliver C. Aldrich, Edinburg

SMITH & HALL
ATTORNEYS
EDINBURG, TEXAS

SAWNIE B. SMITH
HARRY L. HALL

September 29, 1938

Mr. Frank B. Clayton
Rio Grande Compact Commissioner
for Texas, Bassett Tower,
El Paso, Texas

Dear Mr. Clayton:

There has been considerable comment on the fact that the Rio Grande Compact between Colorado, New Mexico and Texas, dated March 18, 1938, makes no provision for the division of waters below Elephant Butte between the States of New Mexico and Texas and makes no provision concerning the amount of water to which Texas is entitled.

I understand that theoretically, if not in fact, the total amount of water in the project storage provided for in the compact is used or needed by the Rio Grande project except the portion thereof required to be delivered to Mexico. I also understand that the Rio Grande project is an established, defined area lying about 60% in New Mexico and about 40% in Texas. Therefore, if these understandings are correct, and the present usage and physical conditions remain the same, the division of the waters as between Texas and New Mexico would be in the proportions of the Rio Grande project area in said two States.

I do not find anything in the compact, however, which ties down and limits the use or division of the waters according to present usage and physical conditions, and nothing that would prevent controversy between the two States in the future regarding the division of the waters between the two States.

This omission is too obvious to have been inadvertent, and, therefore, unquestionably, the Commissioners had what they considered valid reason for it. In behalf of a number of interested parties in this area, I would appreciate it very much if you would advise me why the respective rights of Texas and New Mexico to these waters were not defined and provided for in the compact in express terms.

With best wishes, I am,

Yours very truly,

/s/ Sawnie B. Smith
Sawnie B. Smith

SBS:BH

October 4, 1938

Mr. Sawnie B. Smith,
Edinburg, Texas

Dear Mr. Smith:

This will acknowledge receipt of your letter of September 29.

The question of where the point of division of the waters of the Rio Grande as between Texas and New Mexico should be fixed has been the subject of a great deal of study ever since the original Rio Grande Compact Act was passed, in 1928. It was decided prior to the signing of the temporary compact that New Mexico's obligations as expressed in the compact must be with reference to deliveries at Elephant Butte reservoir, and this provision was inserted in the temporary compact. The reasons for it are numerous. In fact, the obstacles in the way of providing for any fixed flow at the Texas line were considered insuperable.

The Rio Grande Project, as you know, is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time. Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent government agency.

Moreover, measurements of the waters passing the Texas state line would be very difficult and expensive, if not impossible. This, for the reason that irrigation canals, ditches and laterals cross the line, which is of a very irregular contour, at many different points, carrying water in addition to what is carried in the river, itself, and it would require continual measurements in these various channels to make any reasonably accurate computations of the total flow.

However, the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according to the areas involved in the two States. By virtue of the contract recently executed, the total area is "frozen" at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a "cushion" of three per cent. for each figure.

I apprehend that there will never be any difficulty about the allocation of this water.

The arrangement just mentioned is of course a private one between the districts involved, and for that reason it was felt neither necessary nor desirable that it be incorporated in the terms of the Compact.

The lands above Fort Quitman and below the Rio Grande Project eastern boundary receive only "tail-end" or waste water, the lands in the Hudspeth County district taking its water by virtue of a contract and the lands privately owned below the district lower boundary only by taking by gravity or pumps what happens to be in the river channel.

The deliveries to Mexico are of course governed by treaty.

I trust this is the information you desire but if there is any other which I can supply, please feel free to call upon me.

With best regards personally, I am

Yours sincerely,

Frank B. Clayton
Rio Grande Compact
Commissioner for Texas

FBC:ESC

RULES AND REGULATIONS FOR ADMINISTRATION OF THE RIO GRANDE COMPACT

A Compact, known as the Rio Grande Compact, between the States of Colorado, New Mexico and Texas, having become effective on May 31, 1939, by consent of the Congress of the United States, which equitably apportions the waters of the Rio Grande above Fort Quitman and permits each State 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, the following Rules and Regulations have been adopted for its administration by the Rio Grande Compact Commission; to be and remain in force and effect only so long as the same may be satisfactory to each and all members of the Commission, and provided always that on the objection of any member of the Commission, in writing, to the remaining two members of the Commission after a period of sixty days from the date of such objection, the sentence, paragraph or any portion or all of these rules to which any such objection shall be made, shall stand abrogated and shall thereafter have no further force and effect; it being the intent and purpose of the Commission to permit these rules to obtain and be effective only so long as the same may be satisfactory to each and all of the Commissioners.

Gaging Stations

Responsibility for the equipping, maintenance and operation of the stream gaging stations and reservoir gaging stations required by the provisions of Article II of the Compact shall be divided among the signatory states as follows:

(a) Gaging stations on streams and reservoirs in the Rio Grande Basin above the Colorado-New Mexico boundary shall be equipped, maintained, and operated by Colorado in cooperation with the United States Geological Survey.

(b) Gaging stations on streams and reservoirs in the Rio Grande Basin below Lobatos and above San Marcial shall be equipped, maintained and operated by New Mexico in cooperation with the U. S. Geological Survey; the gaging station on the Rio Grande at San Marcial shall likewise be the responsibility of New Mexico to the extent that this station is not maintained and operated by the International Boundary Commission, or some other federal agency.

(c) Gaging stations on Elephant Butte Reservoir and on Caballo Reservoir, and the stream gaging stations on the Rio Grande below those reservoirs shall be equipped, maintained and operated by or on behalf of Texas through the agency of the U. S. Bureau of Reclamation.

The equipment, method and frequency of measurements at each gaging station shall be sufficient to obtain records at least equal in accuracy to those

classified as "good" by the U. S. Geological Survey. Water stage recorders on the reservoirs specifically named in Article II of the Compact shall have sufficient range below maximum reservoir level to record major fluctuations in storage. Staff gages may be used to determine fluctuations below the range of the water stage recorders on these and other large reservoirs, and staff gages may be used upon approval of the Commission in lieu of water stage recorders on small reservoirs, provided that the frequency of observations is sufficient in each case to establish any material changes in water levels in such reservoirs.

Reservoir Capacities

Colorado shall file with the Commission a table of areas and capacities for each reservoir in the Rio Grande Basin above Lobatos constructed after 1937; New Mexico shall file with the Commission a table of areas and capacities for each reservoir in the Rio Grande Basin between Lobatos and San Marcial constructed after 1929; and Texas shall file with the Commission tables of areas and capacities for Elephant Butte Reservoir and for all other reservoirs actually available for the storage of water between Elephant Butte and the first diversion to lands under the Rio Grande Project.

Whenever it shall appear that any table of areas and capacities is in error by more than five percent, the Commission shall use its best efforts to have a resurvey made and a corrected table of areas and

capacities to be substituted as soon as practicable. To the end that the records of flow of the Rio Grande at San Marcial, at San Acacia, and below Elephant Butte Reservoir may be correlated, the Commission shall use its best efforts to have the rate of accumulation and the place of deposition of silt in Elephant Butte Reservoir checked at least every three years.

Evaporation Losses

The Commission shall encourage the equipping, maintenance and operation, in cooperation with the United States Weather Bureau or other appropriate agency, of evaporation stations at Elephant Butte Reservoir and at or near each major reservoir in the Rio Grande Basin within Colorado constructed after 1937 and in New Mexico constructed after 1929. The net loss by evaporation from a reservoir surface shall be taken as the difference between the actual evaporation loss and the evapo-transpiration losses which would have occurred naturally, prior to the construction of such reservoir. Changes in evapo-transpiration losses along stream channels below reservoirs may be disregarded.

Adjustments of Records

The Commission shall keep a record of the location and description of each gaging station and evaporation station, and, in the event of change in location of any stream gaging station for any reason, it shall ascertain the increment in flow or decrease in flow

between such locations for all stages. Wherever practicable, concurrent records shall be obtained for one year before abandonment of the previous station.

New or Increased Depletions

In the event any works are constructed which alter or may be expected to alter the flow at any of the Index Gaging Stations mentioned in the Compact, or which may otherwise necessitate adjustments in the application of the schedules set forth in the Compact, it shall be the duty of the Commissioner specifically concerned to file with the Commission all available information pertaining thereto, and appropriate adjustments shall be made in accordance with the terms of the Compact; provided, however, that any such adjustments shall in no way increase the burden imposed upon Colorado or New Mexico under the schedules of deliveries established by the Compact.

Trans-mountain Diversions

In the event any works are constructed for the delivery of waters into the drainage basin of the Rio Grande from any stream system outside of the Rio Grande Basin, such waters shall be measured at the point of delivery into the Rio Grande Basin and proper allowance shall be made for losses in transit from such points to the Index Gaging Station on the stream with which the imported waters are commingled.

Quality of Water

In the event that delivery of water is made from the Closed Basin into the Rio Grande, sufficient samples of such water shall be analyzed to ascertain whether the quality thereof is within the limits established by the Compact.

Secretary

The Commission shall employ a secretary who shall be a registered professional engineer, or a Corporate Member of the American Society of Civil Engineers, experienced in irrigation, agricultural or hydraulic engineering. The period of employment of the secretary shall be at the pleasure of the Commission but not exceeding one year, at the end of which period his services shall automatically terminate; provided, however, that the Commission, upon unanimous agreement, may extend his employment for a period not exceeding one year following the year within which his employment has been automatically terminated, or may employ another individual under like conditions with respect to period of employment; it being the intent and purpose of the Commission to limit the term of employment of any such appointee so that any re-appointment, or the appointment of any successor, can be made for a period of but one year, and then only by the unanimous action of the Commission.

The salary of the secretary shall be determined by the Commission. He shall be reimbursed for his

necessary traveling expenses incurred in performing his official duties, as may be determined by the Commission.

Each of the respective states, at its own expense, shall provide adequate office facilities for the use of the secretary of the Commission.

It shall be the duty of the secretary to collect and correlate all factual data and other records having a bearing upon the administration of the Compact, and to keep each Commissioner advised thereof. It shall be the further duty of the secretary to inspect all gaging stations maintained by the Commission, and to make recommendations to the Commission as to any changes or improvements to existing stations, and for the addition of new stations, to the end that reliable records may be had for the proper carrying out of the provisions of the Compact.

The secretary shall report to each Commissioner by letter on or before the fifteenth day of each month, except January, a summary of all hydrographic data then available for the current year – on forms prescribed by the Commission – pertaining to:

(a) Deliveries by Colorado at State Line;

(b) Deliveries by New Mexico at San Marcial; and

(c) Release and Spill from Project Storage.

He shall also compile a complete report covering his secretarial activities, and a summary of all factual

data required by the Compact during the preceding calendar year, and submit the same to the Commission at its regular meeting in February, first following the calendar year covered by such report.

The secretary shall carry on such other duties as the Commission may assign to him from time to time, and shall devote his entire time to the duties of his office. He shall execute and deliver a surety bond satisfactory to the Commission, conditioned upon the faithful performance of the duties of his office.

Costs

In February of each year the Commission shall adopt a budget for the ensuing fiscal year beginning July first.

Such budget shall set forth the total cost of maintenance and operation of gaging stations, of evaporation stations, the cost of engineering and clerical aid, and all other necessary expenses excepting the salaries end personal expenses of the Rio Grande Compact Commissioners.

Contributions made directly by the United States and the cost of services rendered by the United States without cost shall be deducted from the total budget amount; the remainder shall then be allocated equally to Colorado, New Mexico and Texas.

Expenditures made directly by any State for purposes set forth in the budget shall be credited to that State; contributions in cash or in services by any

State under a cooperative agreement with any Federal agency shall be credited to such State, but the amount of the Federal contribution shall not so be credited; in event any State, through contractual relationships, causes work to be done in the interest of the Commission, such State shall be credited with the cost thereof, unless such cost is borne by the United States.

The secretary shall present to each participating state through the Commissioner of such state, a certified statement of one-third of the cost of his salary, traveling expense, the expense incident to the maintenance of the offices of the Commission, and each Commissioner shall arrange for the prompt payment thereof by the appropriate agency of his state.

The Commissioner of each state shall report at the annual meeting each year the amount of money expended during the year by the state which he represents, as well as the portion thereof contributed by all cooperating federal agencies, and the Commission shall arrange for such proper reimbursement in cash or credits between states as may be necessary to equalize the contributions made by each state in the equipment, maintenance and operation of all gaging stations authorized by the Commission and established under the terms of the Compact.

It shall be the duty of each Commissioner to endeavor to secure from the Legislature of his state an appropriation of sufficient funds with which to meet

the obligations of his state, as provided by the Compact.

Meetings of Commission

The Commission shall meet in February of each year for the consideration and adoption of the annual report for the calendar year preceding, and for the transaction of any other business consistent with its authority. The annual meeting in 1940 shall be held at Monte Vista, Colorado, and thereafter rotate alphabetically according to the states, the place in each state to be designated by the Commissioner from that state. Other meetings as may be deemed necessary shall be held at any time and place set by mutual agreement, for the consideration of data collected and for the transaction of any business consistent with its authority.

No action of the Commission shall be effective until approved by the Commissioner from each of the three signatory states.

/s/ M C Hinderlider
M. C. HINDERLIDER
Commissioner for Colorado

/s/ Thomas M. McClure
THOMAS M. McCLURE
Commissioner for New Mexico

/s/ Julian P. Harrison
JULIAN P. HARRISON
Commissioner for Texas

ADOPTED: 2/29, 1940