

Compact Complications

Water Wars between Texas and New Mexico Are Nothing New—But the Times Are Changing

By Laura Paskus

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It has been hard enough for states to share water during the best of times—when winters provide decent snowpack and rivers flow steadily. Add drought to the equation, factor in depleted groundwater levels and burgeoning populations, and the problems become even more extreme. Next, toss in a few lawsuits, competing water users, and climate change—and you’ll have some idea of the morass New Mexico is facing over at least the next decade. Earlier this year, Texas filed a request with the United States Supreme Court to sue New Mexico and Colorado for alleged violations by New Mexico of the 1938 Rio Grande Compact.

Under the Compact, Colorado, New Mexico, and Texas share the waters of the upper Rio Grande. Whereas Colorado’s deliveries across the New Mexico state line are based on stream gage readings near the river’s headwaters, getting water to Texas is more complicated. Under the Compact, New Mexico delivers water into Elephant Butte Reservoir—90 miles north of the border with Texas. From there, water is allocated by the U.S. Bureau of Reclamation to the Rio Grande Project beneficiaries in both southern New Mexico and Texas. (Historically, 57 percent of the water was allocated to EBID in New Mexico, 43 percent to El Paso County Water Improvement District (EPCWID) in Texas.)

Now, Texas is alleging that New Mexico has violated its obligations under the Rio Grande Compact by repeatedly “intercepting” water intended for use in Texas. New Mexico has allegedly done this in two ways: By allowing diversions of surface water and by allowing groundwater pumping downstream of Elephant Butte Dam. Texas alleges that by increasing the amount of groundwater pumping, New Mexico is depleting the amount of surface water available to Rio Grande Project users in Texas.

Officials with the New Mexico Office of the State Engineer and the New Mexico Interstate Stream Commission say the Texas Supreme Court suit is an attempt to “divert attention away” from ongoing litigation filed by the New Mexico Attorney General against the U.S. Bureau of Reclamation in August 2011 and the ongoing New Mexico adjudication of the U.S.’ rights in the Project in a New Mexico state adjudication court.

New Mexico State Engineer public information officer Lela Hunt explains in an email that the state’s suit against the federal government arose, in part, over a 2008 Rio Grande Project operating agreement that redistributed “large volumes of New Mexico surface water to Texas at the expense of New Mexicans in the Lower Rio Grande.” She points out that the State of New Mexico is not a party to that operating agreement.

“We are concerned that Texas is trying to get water above and beyond what they already have. This lawsuit is yet another example of a tactic used by Texas to attack neighboring states,” says State Engineer Scott Verhines, in a written statement. “We are seeing a pattern of Texas litigation demanding interstate waters for which they have no legal right. Texas sues instead of addressing increasing water use within Texas. Fortunately neither state nor federal law supports

Texas' claims. My focus will continue to be on the needs of our citizens, our environment and the state of New Mexico.”

Legal Limbo for Farmers

The suit has the potential to impact millions of water users in three states. And yet, the situation is even more complicated than it seems at first glance. That's in part because the Elephant Butte Irrigation District—which is part of the Rio Grande Project—exists in something of a legal limbo between New Mexico and Texas.

“We're waiting to see the response by the State of New Mexico to the Texas allegations because right now, we're of the opinion that neither state represents us because of the unique position we're in,” says Steven Hernandez, attorney for the Elephant Butte Irrigation District. “We're ‘compact Texas’ for the purposes of surface water, but we're geographically in New Mexico with respect to groundwater and the position of the (New Mexico) Office of the State Engineer.”

Hernandez says the State Engineer doesn't represent the needs of the EBID; at the same time, New Mexico farmers lack political influence in Texas.

Hernandez also places blame for the suit being filed in the Supreme Court squarely on the New Mexico Office of the Attorney General. EBID, EPCWID, and the United States, he says, had previously come to an agreement to overcome depletions when all three parties signed on to the 2008 Operating Agreement. That agreement is the result of drought. “When the drought came (in the early 2000s), pumping in the valley increased,” says Hernandez, adding that the groundwater pumping affected surface flows of the river. After 20 years of a full reservoir and full allocations, EBID knew it was now vulnerable to Texas's demands for water. “New Mexico was unable to reach an agreement with Texas, so the district stepped up, made an agreement with the United States and the El Paso district on a way to do it,” he says.

“EBID said, ‘We'll make sure Texas gets its deliveries, and if additional water is needed, EBID will guarantee that. In exchange, EBID farmers want the threat of Texas suing in Supreme Court removed,’” he says. “Then, the Attorney General filed the suit last summer—seeking to overturn the Operating Agreement—and as promised, Texas filed the complaint in the Supreme Court.” As he feared, Hernandez says Texas is now asking for more than what the three entities had previously been agreed upon. Under the 2008 Operating Agreement, Texas agreed to essentially grandfather in 40-years' worth of groundwater wells and to base depletions on 1978 hydrological conditions, rather than those in 1938, when only a handful of groundwater wells existed in the basin. “That was a major concession,” he says, adding that in its filing to the Supreme Court, Texas is now requesting that all wells drilled in the basin since 1938 be considered additional depletions.

Hernandez says that voiding the 2008 Operating Agreement removes a degree of certainty that farmers rely upon to make a living. Farmers are already grappling with economic uncertainty and drought. Now, they'll also be confronting regulatory uncertainty—for the foreseeable future.

In the short-term, farmers can expect continued drought and a tightening of surface water supplies: As of mid-February, the Rio Grande Project had a total of 201,816 acre feet stored in

Elephant Butte and Caballo reservoirs. Irrigation season is expected to begin in mid-June and last six to eight weeks. As the drought continues, the district has warned that farmers should expect a short allocation year. Not only that, but EPCWID is also dealing with a “very short supply” and the two districts plan on “running water together” with Mexico. Unlike some years, all three users—EBID, EPCWID, and Mexico—will start running irrigation water on the same date this year. With water in such short supply, everyone will get a run at the water, and it will ensure less water is lost from the system.

Meanwhile, in Texas, the Rio Grande Project supplies the EPCWID, which provides water for 69,010 acres of water rights land (in a region that receives on average eight inches of rain each year). According to its website, the EPCWID encompasses 156 square miles, more than 350 miles of canals and laterals in the distribution system and more than 269 miles in the drainage system. The system has more than 2,205 turnouts, which are used to irrigate cotton, alfalfa, pecan, chile, wheat, milo, and vegetables.

EPCWID’s general manager, Jesus Reyes, is unable to comment on the litigation. But he explains that the district has 32,000 water accounts—85 percent of which serve tracts of land that are five acres or less. The district also supplies irrigation water via the American Canal to the City of El Paso for municipal uses. During full allocation years, 50 percent of the water El Paso uses comes from the Rio Grande Project under EPCWID’s contracts.

The drought has hit Texas users hard: During full allocation, EPCWID delivers four acre-feet of water per acre to its farmers. In 2012, it delivered only about 2.5 acre feet, says Reyes. (Unlike in New Mexico, where in theory, senior water rights holders receive their water before junior rights holders, in Texas all users are treated the same: Orders to EPCWID are placed on a first-come, first-served list. Farmers there also share shortages regardless of priority.) Reyes estimates that last year, farmers in the district chose to not plant about half what they might normally.

And this year promises to be worse: Currently, EPCWID has only 35,000 acre-feet of water stored at Elephant Butte Reservoir. During a full allocation year, he explains, the district has 380,000 acre-feet.

Managers and farmers within EPCWID are also concerned about the dissolution of the 2008 Operating Agreement. As Reyes explains, the agreement allowed the district to conserve water, promote conservation, and carry over water from year to year. “That is, any water we conserved one season, we could carry over to the next season,” he explains, adding that the district was capped at 32,000 acre feet. “This carry-over helps our community because we were able to let our constituents and the City of El Paso know how much water we have, early in the year.” Leaving that water behind Elephant Butte Dam benefited EBID, he says, and recreationists in New Mexico.

History Repeats Itself

As tensions rise among farmers, states, and attorneys, it’s worth remember that this isn’t the first time that Texas has sued New Mexico over groundwater pumping and its effects on surface flows. In 1974, Texas sued New Mexico in the U.S. Supreme Court, claiming New Mexico had violated the 1948 Pecos River Compact and shortchanged it by 1.2 million acre-feet of water

since the 1960s. The suit dragged on for almost two decades and cost both states millions of dollars.

In his 2002 book, “High and Dry: The Texas-New Mexico Struggle for the Pecos River,” G. Emlen Hall, Emeritus Professor of Law at the University of New Mexico School of Law, details that suit and the impact it had on New Mexico. “No winner,” he writes, “has emerged in the aftermath of *Texas v. New Mexico*.”

Although they’re different in geography and scope, the Pecos suit and the current suit on the Rio Grande share a few similarities. Hall notes that the complaint Texas recently filed is a familiar one.

“This is the old Pecos River problem where the Roswell wells were depleting the flow of the Pecos outside the Compact,” he writes in an email. “That’s a real problem, but I’m not sure it’s a Rio Grande Compact one. Under the Compact, New Mexico’s obligation is to deliver water to Elephant Butte. What happens after that may be a federal problem, but not a Compact one.” Without supplemental groundwater, New Mexico’s farmers in the southern part of the state will be “out of luck,” according to Hall, who adds: “And, the stakes are very high, higher than the Pecos—which took millions of dollars to get out of.”

In the final chapter of “High and Dry,” Hall addresses the issue of compacts, which he notes are “important everywhere in the West” because they address the basic legal framework within which individual states share water. He continues:

“Most of those compacts, like the Pecos River Compact, date from the mid-twentieth century and represent compromises by which the rapid unfettered development of the first half of the twentieth-century could be protected, regulated, and continued in the second half. Lawsuits between states over those compacts, like *Texas v. New Mexico*, No. 65 Original, reveal late twentieth-century structural flaws which indicated the lawsuits and compacts no longer are capable of mediating between the water past and the water future.”

Indeed, this problem will become increasingly severe throughout the 21st century.

The New Normal

While it’s fair to say that the lawsuit has caused some political panic, two critical words are still missing from most public discussions about water use along the Rio Grande: climate change. And yet, climatic shifts in the southwestern United States are already affecting the amount of surface water available to municipalities, states, and irrigators.

Currently, New Mexico is warmer than it was a decade ago. Since the 1960s, the growing season has lengthened. Taken together, 2011 and 2012 were the warmest and driest two-year stretch since record-keeping began in New Mexico in the 19th century. And last summer, 53 miles of the Rio Grande south of Albuquerque dried.

And the situation is projected to get worse.

As part of the U.S. Bureau of Reclamation's 2011 SECURE Water Act Report—an effort by the agency to assess climate change risks in major western water basins and how those risks may affect water operations—the agency evaluated climate change impacts and projections for the Rio Grande Basin.

Changes in the basin's climate and hydrology are projected to include: a 5-6 degree Fahrenheit temperature increase during the 21st century, continued variability in precipitation with a 2.3 to 2.5 percent decrease in annual precipitation by 2050, and a 7.3 to 14.4 percent decrease in mean annual runoff by 2050. In addition, precipitation falling in the form of rain at lower elevations (as opposed to snow at higher elevations) will increase wintertime runoff and decrease runoff during the summer and irrigation season. The agency has also identified a number of potential impacts as a result of those changes, including:

- Decreases in spring and early summer runoff may reduce water supplies available to meet irrigation demands and increase wintertime flood control challenges.
- Warmer conditions might result in increased stress on fish such as the silvery minnow, increased water demands for instream flows for ecosystems, and increased invasive species infestations.
- The New Mexico upper Rio Grande Basin is heavily reliant on groundwater for municipal and rural uses. Warmer conditions might increase evaporation and decrease runoff, which will likely result in less natural groundwater recharge, resulting in even lower groundwater levels.

Even taken alone, each of these impacts will place additional demands on New Mexico's ability to deliver water downstream to Texas. Along with unforeseen conditions and impacts, together, they will challenge even the most adept, powerful, and innovative water managers.

Now, if the Supreme Court accepts the 2013 *Texas v. New Mexico* case, New Mexico can expect at least a decade of expensive legal battles, uncertainty and perhaps, major economic and social changes.

Resources:

Water Litigation in the Lower Rio Grande WATER MATTERS! (2013).

U.S. Bureau of Reclamation climate risk assessment information,
<http://www.usbr.gov/climate/SECURE/index.html>

U.S. Bureau of Reclamation map: "Climate Change Impacts and Changes to Precipitation in the West",
<http://www.usbr.gov/climate/maps.html>

EBID Water Supply Outlook, February 13, 2013,
http://www.ebid-nm.org/static/pdf/news/2013_WaterOutlook.02.22.13.pdf

Legal References

New Mexico v. EBID, *et al.*, No. 96-CV-888, 3rd Jud. Distr. Ct., Doña Ana County (1996),
<https://rgadjudication.nmcourts.gov/> (New Mexico water rights adjudication of the lower Rio Grande).

New Mexico v. U.S., *et al.*, No. 1:11-cv-00691-JB-WDS (Aug. 8, 2011) (New Mexico sues the U.S. over the use of the 2008 Operating Agreement and a release of New Mexico's Compact credit water).

New Mexico, CV No. 22O141 ORG, (U.S. Jan. 8, 2013), <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/22o141.htm> (Texas sues New Mexico on Compact violations and includes Colorado because it is a party to the Rio Grande Compact).

Motion for Leave to File Complaint,
Complaint
Brief in Support of Motion for Leave to File Complaint

Act of Feb. 25, 1905, 33 Stat. 814. (Rio Grande Project Act)

Convention [for the] Equitable Distribution of the Waters of the Rio Grande, U.S. – Mexico, May 21, 1906, 34 Stat. 2953, <http://www.ibwc.gov/Files/1906Conv.pdf>

Rio Grande Compact of 1938, Act of May 31, 1939, art. III, art. IV, ch. 155, 53 Stat. 783, http://www.ose.state.nm.us/PDF/ISC/ISC-Compacts/Rio_Grande_Compact.pdf

Reclamation, Rio Grande Project Operations, *2008 Operating Agreement*, <http://www.usbr.gov/uc/albuq/rm/RGP/index.html>

U.S. Const. art. III, § 2, cl.2; 28 U.S.C. § 1251(a). When there is a dispute between states the U.S. Supreme Court is the only court that can hear the case.

Texas v. NM, 462 U.S. 554, 567 (1983) The U.S. Supreme Court hears cases in which one state seeks to enforce its compact or have its rights under the compact decided.