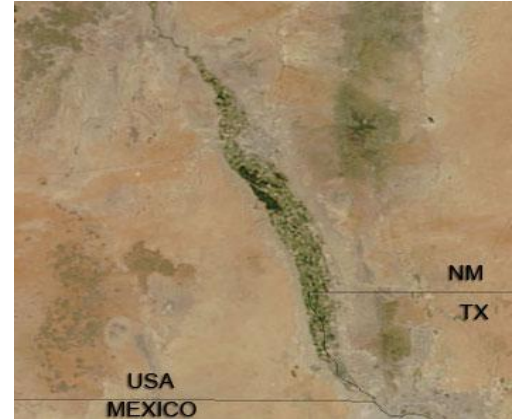


Texas v. New Mexico and Colorado, No. CV No. 220141 ORG (U.S. Jan. 8, 2013).¹

Executive Summary

Texas wants to sue New Mexico in the U.S. Supreme Court over Rio Grande deliveries. This article explains why Texas chose the Supreme Court and the criteria it must meet in order for the Court to accept the case. It also lays a foundation for an understanding about why Texas and New Mexico are at odds over the river and its water.



The N.M. Lower Rio Grande Valley,
*Courtesy of NASA/Visible Earth*²

To do so the article provides background about the Rio Grande Compact, the Rio Grande Project, and the efforts made by the States and individuals since the late 19th century to divide the waters of the river. It covers times of drought and times of plenty and the responses to the changing hydrologic environment by water managers, farmers and others. Then the article briefly explains New Mexico water law, including management strategies, and the ground and surface water hydrology which are a part of understanding the situation. Finally, the article looks at recent legislative responses from both sides of the state line and reviews some of the risks New Mexico will face if the Supreme Court takes the case, *State of Texas v. State of New Mexico and State of Colorado*.

Introduction

The Texas Commission on Environmental Quality, on behalf of the State of Texas [hereinafter Texas], sued the State of New Mexico in the U.S. Supreme Court over alleged Rio Grande Compact violations on January 8, 2013 in a case named *Texas v. New Mexico and Colorado*.³ Texas complained that as a result of New Mexico's actions and inaction, Texas does not receive its share of water apportioned by the 1938 Rio Grande Compact⁴ [hereinafter Compact] and allocated under the Rio Grande Project operations.⁵ According to Texas, this is an interstate disagreement about the interpretation of an interstate compact and the operations of an interstate irrigation project. It has asked the Court to hear the case, enjoin New Mexico's diversions and depletions that take Texas' portion of Rio Grande Project water, order New Mexico to pay for the water it has allegedly taken through groundwater pumping and unpermitted surface diversions since 1938, and specifically allocate Texas' portion of water under the Compact: in short to interpret and enforce the Rio Grande Compact.⁶

Water allocation and administration issues are and have long been hotly contested in south-central New Mexico and the surrounding area. Shrinking water supplies and growing population are sapping the Rio Grande and related aquifers. Those who depend on these water sources face increased administrative, economic and legal challenges. *Texas v. New Mexico and Colorado* [hereinafter *Tx. v. N.M.*] is one of three active cases in which questions of water right definition, water allocation and water administration in the region are being decided. The other two cases are

State of New Mexico ex rel. State Engineer v. EBID, et al. [hereinafter *S.E. v. EBID*], a New Mexico water rights case⁷ and *State of New Mexico v. U.S.* [hereinafter *A.G. v. U.S.*], a case in which the New Mexico Attorney General [hereinafter Attorney General] is suing the U.S. Bureau of Reclamation and the districts – Elephant Butte Irrigation District and El Paso County Water Improvement District – over the operation of the Rio Grande Project [hereinafter Project].⁸

The U.S. Supreme Court is now considering whether to grant Texas' motion to accept the *Tx. v. N.M.* case. If the Court proceeds with the case, it will rule on the Texas requests that it a) interpret the Compact by defining the State's rights to its equitable apportionment of water as well a New Mexico's obligations to deliver that water, and b) enforce New Mexico's obligations. Texas requested the Court to determine its Compact rights, claiming that the Texas share of Rio Grande Compact water does not reach the state line. It argued that the Compact and the Project are so intertwined that to understand how Texas gets its share of Compact water, the Project operations and delivery system must be considered. It wants the Court to enforce the Compact by ordering New Mexico to stop its residents from intercepting Project water⁹ bound for the Texas political subdivision, El Paso County Water Improvement District [hereinafter EP No. 1].¹⁰

Texas described the delivery process as follows. New Mexico delivers the Texas' Compact water to the Elephant Butte Reservoir. Each year the U.S. Bureau of Reclamation [hereinafter Reclamation], as Project manager, allocates the water in the reservoir between the two beneficiaries of the Project: Elephant Butte Irrigation District [hereinafter EBID] and EP No. 1. Reclamation releases the EP No. 1 allocation from the reservoir, which then travels down the river to the state line. Texas then argued that New Mexico residents take its water through two mechanisms. First, unpermitted surface water diversions take the Texas district's allocation directly from the river and second, groundwater pumping in New Mexico lowers the surrounding water table, causing the EP No. 1's Project surface water allocation to leave the river and recharge the hydrologically connected aquifers. These activities, according to Texas, interfere with the delivery of its Compact equitable apportionment and EP No. 1's full allocation. Texas complained that this situation has existed since 1938, the date of the Compact, and that the State of New Mexico has not taken action to remedy the matter. Therefore, Texas seeks a resolution from the U.S. Supreme Court.¹¹

New Mexico responded to the Texas motion to file the suit on March 11, 2013. New Mexico contended that it has met the Compact obligation to deliver water to Elephant Butte Reservoir. It argued that any problems involving the delivery of water below the Elephant Butte Dam to Texas are Project problems, not Compact problems, and should be raised by EP No. 1, a Project beneficiary or by the United States, the Project operator. New Mexico asserted that it has not violated any express term of the Compact, there is no Compact dispute between the States, the problems described by Texas can be resolved in other pending cases, and the case does not belong in the U.S. Supreme Court.¹²

In the water rights adjudication, *S.E. v. EBID*, the New Mexico State Engineer, acting for the State of New Mexico, filed the case in 1996 in the Third Judicial District Court located in Las Cruces, New Mexico [hereinafter state or adjudication court].¹³ This type of case formally identifies and recognizes water uses within stream system boundaries located in New Mexico.¹⁴ The

adjudication court must determine the nature of all the water uses, including those of the United States, in the area between the face of the Elephant Butte Dam and the state line. The state court must also decide stream system issues that affect many or all of the claimants in the adjudication.¹⁵ Thus far, the court has made determinations for many individual rights and on stream system issue 101 (about the Farm Delivery Requirement¹) where it defined the amount of water allowed per irrigated acre each year¹⁶ and on part of stream system issue 104 (about the United States' water right) by denying the United States' claims to the groundwater.¹⁷ Through consideration of specific claims, the adjudication court determines the amount of groundwater that can be pumped from each well in the area. As a part of the *inter se* portion of the case, any party can challenge any other party's agreement with the State.¹⁸

This case may relate to *Tx. v. N.M.* because Texas has identified unpermitted surface diversions and groundwater pumping exercised by individual New Mexicans as the source of the claimed injury to its Compact allocation. Texas has also identified tributary groundwater as an important component of the overall Project supply. It argued that since the New Mexico adjudication court has ruled that the United States is not entitled to groundwater as a part of its Project right, the ability of the Project to deliver to Texas is in jeopardy.¹⁹

In the federal district court case, *A.G. v. U.S.*, the New Mexico Attorney General sued the United States, Reclamation and the districts over the method of allocation of Project water between the two districts and over the agency's reallocation of water that New Mexico claims as credit water. In 2008, the districts and Reclamation negotiated an operations agreement that changed the method of allocating annual Project water. These changes included an EBID surface water allocation that accounts for groundwater depletions on both sides of the state line and the inclusion of a new provision that allows the districts a limited ability to store or "carry-over" part of an allocation from year-to-year.²⁰

The Attorney General asserted that the operating agreement results in a significant change to the historic surface water allocation between the districts which is unfair to EBID farmers and threatens the sustainable future of the related aquifers. The Attorney General argued that the farmers will achieve the farm delivery requirement identified in the state adjudication through a combination of surface and groundwater diversions as they have done historically.²¹ A significant reduction in EBID's surface water allocation therefore will result in a double hit on the aquifers through less recharge from water traveling through the district's ditches and increased pumping.

¹ "Farm Delivery Requirement" (FDR) is "The quantity of water, expressed in acre feet per acre per year, exclusive of effective precipitation, which is delivered to the farm headgate or diverted from a well to satisfy the *consumptive irrigation requirement* for one calendar year" [Italic indicated term defined below].

"Consumptive Irrigation Requirement" (CIR) is "the quantity of water, expressed in acre feet per acre per year, exclusive of effective precipitation, that is consumptively used by crops or evaporated from the soil surface during one calendar year".

From: Definition of Terms, Partial Final Judgment & Decree on Surface Rights & Supplemental Rights in the Membership Phase of the CID section of the Pecos River Stream System Adjudication, <http://www.ose.state.nm.us/LAP/CID/definitions.html>

These effects will jeopardize the river environment and the sustainability of the regional water sources.²² This case may relate to *Tx. v. N.M.* because it deals with the Project operations and the New Mexico groundwater pumping which allegedly affect the delivery of EP No. 1's Project water and Texas' Compact water.

U.S. Supreme Court

Procedures

On January 8, 2013, Texas filed its motion and brief with its complaint attached as an exhibit in *Texas v. New Mexico and Colorado*.²³ A party wishing to bring a suit in the U.S. Supreme Court must first file a motion requesting permission to file the complaint and a brief explaining why the Court should hear the case.²⁴ The complaint is attached to the motion and brief so that if the Court grants its permission to proceed, the complaint can be filed without delay. The State of New Mexico and the State of Colorado filed responses and the city of Las Cruces, city of El Paso, EP No. 1 and the Hudspeth Irrigation District filed *amicus* briefs on March 11, 2013. Texas filed its reply on March 22, 2013. The Court reviewed the case in its April 12, 2013 conference and invited the U.S. Solicitor to file a brief explaining the United States' position.²⁵ EBID plans to participate if the Court grants the motion to take the case.²⁶

If the Court decides to hear the case, it will likely appoint a special master to hear the facts and submit reports to the Court so it may make the necessary decisions.²⁷ Parties may object to the special master's report or request that the Court adopt it. The Court considers the parties' filings and may allow oral argument.²⁸ The Court will not make a decision within any specific time, and the final decision in the case is likely to come after years of litigation and many millions of dollars.²⁹

Why the United States Supreme Court?

If the U.S. Supreme Court accepts this case, the State of Texas will challenge the State of New Mexico over alleged Compact violations and obligations. Texas asserts that it has no other judicial or mediation options for resolving the dispute.³⁰ In its response, New Mexico argues that there is no Compact violation, and maintains that lower courts will address issues which will resolve the problems raised by Texas.³¹

Under the U.S. Constitution, the Supreme Court has original and exclusive jurisdiction over cases and controversies between two or more states.³² This means that when a serious dispute arises between states as political units (as opposed to between their citizens or agencies), the Supreme Court is the only court from which a judicial resolution can be obtained. The Court's exercise of its original jurisdiction is discretionary, meaning that it chooses which of these cases to hear.³³ In making the decision, it looks to 1) the seriousness of the dispute and 2) the availability of an alternative forum.³⁴

The issues must be state issues – those which involve sovereign or quasi-sovereign interests and not private or agency claims.³⁵



U.S. Supreme Court, Washington, D.C.,
Courtesy of the U.S. Supreme Court³⁶

The dispute must be of sufficient seriousness to invoke the Court's acceptance of the case. The dispute must be such seriousness, that if the states were sovereign nations, it would lead to war.³⁷ Entering into a compact to accomplish the equitable apportionment of waters between states is "the legislative means of adapting to our Union of sovereign States the age-old treaty-making power of independent sovereign nations."³⁸ When states are unable to resolve their differences about their rights and obligations under a compact, the Court has "a serious responsibility to adjudicate where there are actual, existing controversies over how interstate streams should be apportioned among States."³⁹ In keeping with that responsibility, the Court has heard cases in which States sue 1) to divide the waters of an interstate river between them; 2) to resolve disputes between states about an apportionment; 3) to enforce compacts as between them; or 4) to declare rights under a compact.⁴⁰

A Serious & Sovereign Dispute

In its motion and brief, Texas sought to describe a dispute with New Mexico that is appropriate for U.S. Supreme Court attention. According to Texas, New Mexico violated the Rio Grande Compact by interfering with the delivery of the Texas equitable share of the river's water below Elephant Butte Dam. Texas asserted that its neighbor condones unpermitted surface diversions and groundwater pumping both of which intercept the Texas Compact water flowing through the area to the state line. Texas argued that this interest is protected by the Compact because if it does not receive its water at the state line, then the Compact – a contract – fails since Texas gave up some of its claims to Rio Grande water in return for a secure Compact allocation.⁴¹ In addition, Texas claimed that if it does not receive its full allotment of water, its adjudication will not receive full "faith and credit" as required by the U.S. Constitution.⁴² According to Texas, this dispute has caused such a grave and serious injury that if the two States were nations, war would ensue.⁴³

In support of its position that it has a compact claim requiring Supreme Court review, Texas carefully crafted the connection between the Compact and the Project. In summary, this argument states that an interstate agreement was created to support an interstate project that supplies water to users in two states.⁴⁴ Texas aligned the purpose of the Compact with the preservation and support of the Project, stating that the Compact "incorporates the basic assumption of the authorization, construction and operation of the [Project] by the United States. Without this basic assumption the [Compact] would have little meaning and would be incapable of fulfilling the Rio Grande Compact rights of Texas."⁴⁵ Through this argument, Texas asserted that a Compact violation occurred even though the Compact does not make a specific allocation to Texas⁴⁶ and even though it does not assert that New Mexico has not met its Compact delivery obligation at Elephant Butte Reservoir.⁴⁷ Texas claimed that New Mexico has violated "the purpose and intent of the Compact"⁴⁸.

New Mexico challenged Texas' claim that this Compact dispute is between sovereign states and, therefore, belongs in the U.S. Supreme Court.⁴⁹ New Mexico argued that in order for Texas to sustain a sufficient injury, New Mexico would have to fail in its delivery obligation to Elephant Butte Reservoir. New Mexico acknowledged its obligation to annually deliver a specific amount of water to Elephant Butte Reservoir under the express terms of the Compact and asserted that it has met this responsibility. New Mexico also noted that Texas admits that nothing in the Compact

allocates a specific amount of water to Texas or requires New Mexico to deliver a certain amount at the state line.⁵⁰

New Mexico argued that since the Texas claim is not based on the express terms of the Compact,⁵¹ Texas is attempting to create Compact obligations where none exist. The Texas assertion that New Mexico has violated the “intent and purpose” of the Compact by allowing depletions to the river between the dam and the state line was such an attempt.⁵² According to New Mexico, operations, depletion and delivery issues below the dam are not Compact concerns, but rather Project issues. As such, they belong to the United States as Project operator and to EBID and EP No. 1 as Project beneficiaries – not to the State of Texas. New Mexico argued that these parties’ recourse is in state law, particularly where groundwater is concerned.⁵³ According to New Mexico, Texas wants the Compact’s express terms amended to address its problems, and in the past the Court has declined such undertakings.⁵⁴

Texas replied that New Mexico’s response clearly shows that the States fundamentally disagree about Texas’ rights and New Mexico’s obligations under the Compact.⁵⁵ It denied that a remedy for its claim for Compact interpretation and enforcement could be found in New Mexico state law, decisions in the state adjudication or the decisions in the New Mexico federal district court reviewing the operating agreement. In answer to the New Mexico assertion that the Supreme Court will not take a case if the compact’s express terms have not been violated, Texas provided examples of where the Supreme Court had done so. The cases provided were examples of conflicts about groundwater pumping interfering with surface deliveries to downstream states. In these instances, according to Texas, the disputes arose because the compacts were silent on the question of groundwater pumping impacts on a river.⁵⁶

Finally, Texas argued that although it adjudicated its water rights in the Project in 2006, the decree and the Certificate of Adjudication cannot have practical effect unless New Mexico ensures the deliveries of EP No. 1’s allocation to the state line. Texas asserted that unless New Mexico complies with its interpretation of responsibilities under the Project Act and the Compact, the decree and Certificate will not enjoy the “full faith and credit”⁵⁷ owed by the State of New Mexico to the State of Texas by virtue of Article IV, Section 1 of the U.S. Constitution.⁵⁸ New Mexico dismissed Texas’ full faith and credit argument stating that “one state cannot control the use of water in another state by virtue of a state adjudication.”⁵⁹

New Mexico argued that other defects in the Texas argument weigh against the Supreme Court taking the case. New Mexico observes that the Texas Commission on Environmental Quality and the Texas Compact Commissioner have filed the action in the U.S. Supreme Court, not the State of Texas as required in an original action.⁶⁰ Texas replied that these entities are a part of the State of Texas and therefore able to represent its interests.⁶¹ In addition, New Mexico noted Texas’ failure to join the United States and argued that the United States is an indispensable party. It asserted that any final resolution of the issues will “necessarily affect the United States’ interests in the Project.” Since Texas did not seek to join the United States and the United States has not consented to be a part of the case, the case must be dismissed.⁶² Texas answered that the United States is not a required party because none of its interests will be affected by the resolution of the Compact issues

raised in this case.⁶³ On April 12, 2013, the Supreme Court invited the U.S. Solicitor General to file a brief.⁶⁴

Availability of Alternative Forum

The U.S. Supreme Court encourages States to resolve these types of disputes outside of its halls.⁶⁵ Texas, however, argued there is no other forum – whether a state or federal lower court or the Compact Commission which can afford “adequate and complete relief” in its dispute with New Mexico.⁶⁶ Texas recognized that New Mexico is engaged in two other lawsuits regarding the water allocation within the Rio Grande Project: *S.E. v. EBID*, the water rights adjudication in the New Mexico Third Judicial District of Doña Ana County⁶⁷ and *A.G. v. U.S.*, the case in which New Mexico has sued the United States in federal district court over the 2008 Operating Agreement.⁶⁸ Texas asserts that because it is not a party to either of these cases nor is it subject to the jurisdiction of the relevant courts, its claims will not be addressed in either case.⁶⁹ The Rio Grande Compact Commission also offers no help to resolve issues. Commission decisions must be unanimous and, since the two states cannot resolve their differences, the Commission cannot provide the relief Texas seeks.⁷¹ Texas also alleged that negotiations with New Mexico would not be fruitful since New Mexico will not admit to the obligations Texas wants recognized.⁷² Thus, Texas has turned to the Supreme Court.



*Third Judicial District Court,
Courtesy of 3rd Judicial Dist. Ct., Las Cruces, N.M.⁷⁰*

New Mexico disagrees, maintaining that existing cases in its state court and the federal district court may answer the problems Texas brings to the U.S. Supreme Court; and if the courts do not resolve these issues, the parties have recourse to the decisions through the appeals process.⁷⁴ New Mexico reports that in deciding whether to allow another forum to resolve an issue, the Supreme Court looks to whether that body has jurisdiction over the *issues*, not whether it has jurisdiction over the *parties*.⁷⁵



*District of N.M., Las Cruces,
N.M., Courtesy of U.S. District Court⁷³*

According to New Mexico, the Texas claim is a Project claim. Since United States’ Project rights are now before the adjudication court, it is the proper place for the resolution of the issue. The

United States will be afforded an opportunity to challenge groundwater uses within the Project.⁷⁶ The adjudication court has already found that the United States has sufficient state law remedies for injurious groundwater pumping by junior well owners.⁷⁷ If the United States chooses, it can challenge this ruling in the appeals process.⁷⁸

New Mexico has brought the question of the Project operations and the proper way to account for groundwater pumping before the New Mexico federal district court.⁷⁹ The federal district court has jurisdiction over and will determine the question of whether the Operating Agreement is an appropriate mechanism for managing the Project. New Mexico argues that since this problem is a Project problem and the State of Texas is not a Project beneficiary, the problem will be resolved without Texas’ participation in *A.G. v. U.S.*⁸⁰ Thus in New Mexico’s view, the Texas concerns about water reaching the state line will be met.

Historic Background⁸¹

Problems with water allocation and distribution along the Rio Grande between the United States and Mexico as well as Colorado, New Mexico and Texas extend back to the late 19th century. The United States and Mexico entered into a treaty in 1906⁸² that allocated 60,000 acre-feet annually to Mexico. In 1905, Congress passed the Rio Grande Project Act which authorized the building and operation of the Rio Grande Project. The Project provided the storage and delivery system for Mexico's treaty allotment as well as water allotments for EBID and EP No. 1.



*Elephant Butte Dam and Reservoir,
Courtesy of Bureau of Reclamation⁸³*

The Act provided that the districts' allocations would be based upon a ratio of irrigated lands, determined by a survey conducted by the U.S. Bureau of Reclamation [hereinafter Reclamation]. The survey resulted in a ratio allotting 57% of the United States' share of available annual Project water to EBID and 43% to EP No. 1. In 1938, the States of Colorado, Texas and New Mexico entered into the Rio Grande Compact to allocate water between these sister States. Under the Compact, New Mexico is obligated to deliver water to Elephant Butte Reservoir for south-central New Mexico and Texas.⁸⁴

During the 1950's drought, the Project surface water supply dwindled. Farmers on both sides of the state line turned to groundwater to keep their crops alive.⁸⁵ In a Reclamation Annual report for 1954, the Bureau reported that storage "was so limited that even the first irrigation had to be made with a combination of water pumped from farm wells and water from the storage supply."⁸⁶ In 1956 – the worst year for surface allotments in the Project – Reclamation allocated .39 acre-feet or five inches per acre for the entire year.⁸⁷ To cope with the surface water shortages, farmers on both sides of the state line drilled hundreds of supplemental irrigation wells. Reclamation Project Manager W.F. Resch issued "Water Announcements", dated March 1, 1954 and June 21, 1954, requesting that farmers throughout the Project with irrigation wells use them "to the greatest extent possible... and to make available for transfer their allotment water to those farmers who do not have satisfactory wells."⁸⁸ The drought lingered until 1978 when relatively wet years prevailed. Drought conditions returned in 2003.⁸⁹

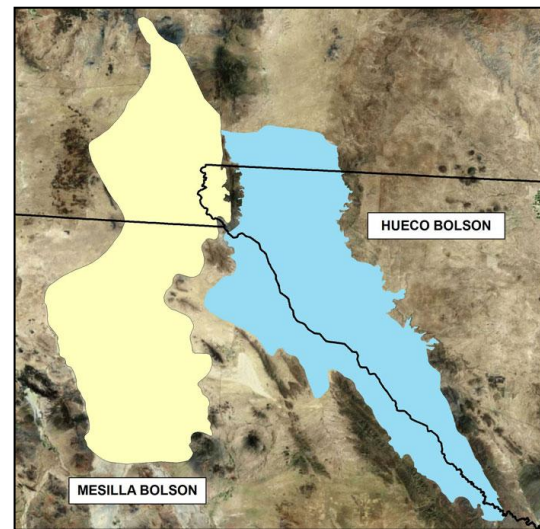
In and near the Rio Grande Project area, groundwater comes from the Rincon Bolson (aquifer) in New Mexico, the Mesilla Bolson shared by New Mexico and Texas, and the Hueco Bolson shared by New Mexico, Texas and Mexico. The number of groundwater wells grew during the drought years. In the 1954 "Operation and Maintenance of Irrigation System Report, Ysleta Branch" of the Project, Reclamation reported that 418 irrigation wells were constructed in the El Paso Valley of Texas between 1950 and 1954.⁹⁰ In the mid-1950s between Anthony, New Mexico and south of the city of El Paso, two hundred and fifty irrigation wells were put into production.⁹¹

More recently, EP No. 1 drilled sixty-two wells to supply farmers in EP No. 1 and the Hudspeth County Conservation & Reclamation District No. 1 located south of the Project.⁹² It is estimated that approximately 1000 irrigation wells were drilled in the New Mexico Mesilla and Rincon

Basins during the 1950's drought.⁹³ During the 1970's, EBID drilled several wells to supply supplemental water to the district.⁹⁴

In addition to irrigation wells, there are numerous municipal and industrial wells within and near the Project boundaries in both New Mexico and Texas. The city of Las Cruces and the city of El Paso have municipal well fields in the Mesilla Basin.⁹⁵ The cities of El Paso and Juarez have large municipal well fields in the Hueco Bolson.⁹⁶ In a 2012 press release, the New Mexico State Engineer reported that there are now about 3,000 metered wells in the Lower Rio Grande Water Master District.⁹⁷

From the late 1990s to 2008, the United States, EBID and EP No.1 struggled with how to manage the Project appropriately in light of groundwater pumping and surface water shortages. In 2006, Reclamation unilaterally implemented an operating procedure, the “*ad hoc*” procedure without the concurrence of the districts.



Mesilla and Hueco Bolsons,
Courtesy of El Paso Water Utility, Water Res. Dept.⁹⁸

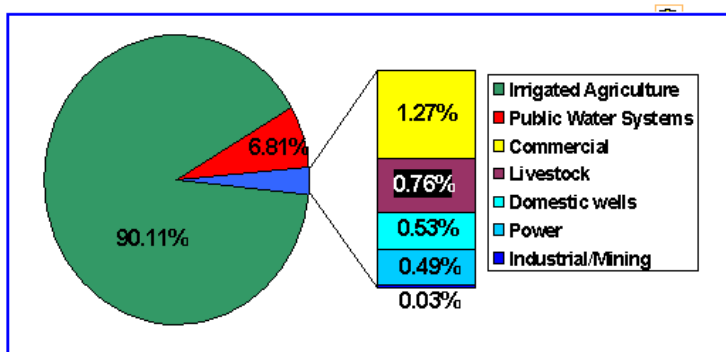
Both districts subsequently filed suit over the operations of the Project. In 2007, EBID filed suit in the New Mexico federal district court and, shortly thereafter, EP No.1 filed in the federal district court of western Texas. In each instances, the district sought resolution to the operations dilemma.⁹⁹ The west Texas court immediately sent the districts and Reclamation to mediation and in 2008, they crafted the Operating Agreement Settlement for the Rio Grande Project [hereinafter Operating Agreement]. The States of Texas and New Mexico were not parties to the negotiations.¹⁰⁰

The 2008 Operating Agreement changed the allocation method and operations of the Project. The parties to the agreement intended that it account for depletion effects on the river from groundwater pumping and increase management flexibility by allowing the districts to a limited amount of carry-over conserved water from one year to the next.¹⁰¹ The Operating Agreement changed the historic Project surface water allocations of 57% for EBID and 43% for EP No. 1 as well as the Project operations.¹⁰² According to the New Mexico Attorney General, the ratio for the allocation of Project surface water in 2011 changed to about 22% for EBID and 78% for EP No. 1.¹⁰³ The Attorney General also asserted that under the agreement, EBID unfairly absorbs the depletions to the river from groundwater pumping on both sides of the state line.¹⁰⁴ In exchange, EBID countered, it negotiated the 1951-1978 condition as the baseline for pumping effects rather than 1938 when the Compact was signed. According to EBID, this part of the agreement allowed the hundreds of groundwater wells developed between 1951 and 1978 to be “grandfathered” into the Project operations.” The carry-over provisions allowed EP No. 1 more flexibility for its surface water management.¹⁰⁵

In August of 2011, the New Mexico Attorney General sued Reclamation and the districts in the New Mexico federal district court, seeking to invalidate the Operating Agreement and to obtain an

injunction against its use.¹⁰⁶ New Mexico believes that Project operations under the agreement are grossly unfair to New Mexico farmers for several reasons. Under the agreement, EBID’s surface water allocation is reduced by more than 170,000 acre-feet in full supply years. New Mexico estimates that the value of the water and the taxes generated by water-related activities ranges from millions to billions of dollars. The reduction in Project surface water forces farmers to turn to groundwater to make up the difference. Reliance on groundwater threatens the sustainability of the aquifers underlying the Project. Farmers with no wells or with shallow wells are placed in jeopardy without surface water and so it is important, in New Mexico’s view, that the historic ratio of Project surface allocation remain in effect.¹⁰⁷

The New Mexico adjudication of all the water right claims to ground and surface water in the lower Rio Grande in the state court has been ongoing since 1997. This court will determine the United States’ claims in the Rio Grande Project in stream system issue 104.¹⁰⁸ In its statement of claims, the United States claimed all the surface and tributary groundwater required by the Project.¹⁰⁹



Water Use by Sector in LRG, Courtesy of Dr. Phil King¹¹⁰

On August 16, 2012, the adjudication court entered an order resolving the first issue, “What is the source or sources of water for the United States’ Rio Grande Project right?” It held that the United States has established a surface water right under state law, but rejected the government’s claim for tributary groundwater. The court also found that the United States has adequate remedies

under state law for any injury caused by groundwater pumping in New Mexico. The United States had claimed that groundwater supplying the river is a part of its rights because the Rio Grande Project system needs that water to make its deliveries to Texas and Mexico. The adjudication court ruled that this claim is unsupported by the Notices of Appropriation filed in 1906 and 1908.¹¹¹ The court has set a briefing schedule for the determination of the United States Project right elements of priority and amount of water.¹¹²

These rulings by the adjudication court echo rulings made in 1983 by the New Mexico federal district court. In that case, *El Paso, et al. v. Reynolds, et al.*, the city of El Paso challenged the constitutionality of a New Mexico statute¹¹³ which prohibited the exportation of water from New Mexico. In determining that the statute was unconstitutional, the federal court ruled on the questions of whether the Compact “(1) apportions the surface water of the Rio Grande between New Mexico and Texas and (2) controls the use of groundwater hydrologically connected to the River.”¹¹⁴ As a part of its argument, New Mexico asserted that since the drafters of the 1938 Compact were silent on Texas’ share of the Rio Grande, they were relying on the Project managers to make the equitable apportionment of surface water between the two states through the contracts between Reclamation and the two Project districts. The federal district court rejected this argument finding that the Compact mentions neither the apportionment of water to Texas at the state line nor groundwater.¹¹⁵ The court also opined that if there are issues of impairment of senior

rights resulting from groundwater pumping, those issues should be handled administratively.¹¹⁶ In today's case, Texas brings that argument forward again, for review this time, by the U.S. Supreme Court.

Water Management Problems

Water management within the Project is complicated. The districts and the Bureau of Reclamation manage the surface water. The State of New Mexico manages the groundwater south of the dam to the state line.¹¹⁷ The State of Texas has limited legal authority to manage groundwater within its boundaries.¹¹⁸ Hydrologists have known for years that there is a close relationship between the groundwater and surface water in the lower Rio Grande.¹¹⁹ Groundwater pumping lowers the water table;¹²⁰ surface water in the river and ditches recharge the aquifers; and groundwater discharges into the drains and river.¹²¹ The many problems faced by Project managers today are exacerbated by the current drought.

Project Operations

The State of New Mexico believes that EBID farmers are not getting their fair allotment of Project water under the 2008 Operating Agreement.¹²² EBID maintains that the three parties negotiated a fair agreement which accounts for groundwater pumping depletions.¹²³ New Mexico asserts that the EBID unfairly must absorb all the depletions from groundwater pumping on both sides of the state line by giving up surface water to EP No. 1. New Mexico argues that Texas pumping must be offset by Texas; annual diversions must be reasonable; the allocation scheme must reflect system efficiencies; and operations must be more transparent. The State of New Mexico anticipates that unless EBID's historic allocation is restored, increased irrigation pumping and reduced aquifer charge will damage the aquifers.¹²⁴ EBID responds that in exchange for a reduced surface water allocation, it got the pumping condition of 1978 so that the drought pumping of the 1950s is "grandfathered in." EBID also asserts that EP No. 1 can now get a full delivery under the Operating Agreement in normal years, because EBID uses some of its surface water allotment to insure deliveries to EP No. 1.¹²⁵ Texas wants to get its share of Compact water delivered at the state line.¹²⁶ And all these deliveries and plans are contingent upon drought conditions and the availability of wet water.

Drought & Farmers' Responses

The current drought began in 2003 and continues today, with only a year's respite in 2008. The U.S. Drought Monitor reported that although the early part of 2010 had significant winter precipitation, by the end of the year most of New Mexico – including the lower Rio Grande area – was abnormally dry. In February of 2013, the Monitor reported that the previous 24 months were second driest on record.¹²⁷ On March 12, 2013, the Monitor classified the drought in the Project area as "severe"¹²⁸ and on March 7, 2013, the U.S. Seasonal Drought Outlook indicated that this drought will persist or intensify in the predictable future.¹²⁹

In nine out of the last ten years, Project farmers in New Mexico have not received a full allotment of surface water.¹³⁰ This year, as of February 2013, the reservoir was reported at 4% capacity.¹³¹ In the same month, EBID management posted on its website that the surface water delivery will start in June and likely be no more than half an acre-foot.¹³² According to Gary Esslinger, manager for EBID, “It’s probably one of the worst situations I’ve had to face since I’ve been here... If we make any release at all, it will be in June or July, and it will only be for a short duration... There just isn’t enough usable water in storage.”¹³³



Low Water Levels at Elephant Butte, Courtesy of Bureau of Reclamation¹³⁵

Historically in times of drought, New Mexico farmers supplemented short surface water supplies with groundwater or transferred over surface water rights from other irrigated lands.¹³⁴ As in the past, today’s farmers with wells have turned to groundwater pumping. According to the OSE, 2011 groundwater pumping for irrigation doubled over the withdrawals of the previous two years. The records indicated that the farmers had not changed the total amount of water applied to their fields and orchards.¹³⁶ In April of 2012 long before the peak watering season, the State Engineer cautioned EBID irrigators to stay within the limits set by the adjudication court¹³⁷ and warned that heavy groundwater pumping is not sustainable in the long term.¹³⁸

Water Law and Hydrology

In its complaint, Texas asserts that its Project water allocation is being intercepted by New Mexico surface water diversions and river depletions caused by groundwater pumping. To understand the context of these activities, it is useful to review the hydrology of the area and New Mexico water law.

Lower Rio Grande Hydrology

In this area, the surface water and groundwater are hydrologically connected. The primary groundwater basins connected to the Rio Grande include the Rincon and Mesilla basins. Where the water table is high, it supports the river flows and may discharge into the river. In this condition the Rio Grande is a “gaining river.” Where the water table is low, water drains from the river to recharge the aquifer below and the Rio Grande becomes a “losing river.”¹³⁹ Below Elephant Butte Dam, the aquifers recharge from the river and seepage from irrigation canals and ditches. The river’s surface water flows derive from releases from the Elephant Butte Reservoir and Caballo Reservoir, stormwater runoff, municipal return flows, and EBID drain return flows.¹⁴⁰

Water Law

Along with prior appropriation rules, New Mexico courts have recognized certain hydrologic facts: surface water can be supplied by underground baseflow¹⁴¹ and surface water can recharge aquifers. Thus when water tables drop, surface water can replace depleted groundwater.¹⁴² The courts have



made legal determinations based in at least in part on these understandings. In some instances, the surface appropriators have been allowed to pursue diminished surface flows into the groundwater that serves as baseflow of a stream, as long as the withdrawals do not impair existing rights.¹⁴³ It has also been held that where surface water enters the ground, the water ceases to be surface water and becomes a part of the public groundwater, subject to appropriation by others.¹⁴⁴

These rulings form a basis for understanding part of the lower Rio Grande conundrum. New Mexico and EBID do not challenge the Texas assertions that pumping in the lower Rio Grande lowers the water table or that the river flows are consequently recharging the aquifers, particularly the Mesilla Bolson. EBID recognized this hydrologic fact when it negotiated the 2008 Operating Agreement. However, New Mexico and the district disagree about how the depletions should be covered in project operations. And Texas claims that New Mexico's failure to accommodate these depletions deprives it of its Compact water.

Surface Water and Rights

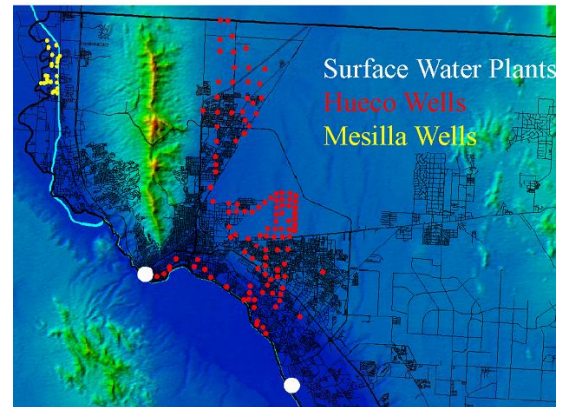
In its complaint, Texas asserted that unpermitted surface water diversions intercept river flows headed to Texas but did not call out specific diversion points. New Mexico claims that the only non-district surface water diversions occurring between the Dam and the state line are those which predate the Project; that is, those which were developed before 1906, the date of the Project's appropriation and maintained ever since.¹⁴⁵

In New Mexico, permitting of surface water uses was not possible until the passage of the 1905 Territorial Water Code.¹⁴⁶ Prior to the passage of the Code, surface water users could initiate and sustain surface water rights without a permit from the government.¹⁴⁷ The New Mexico Constitution protects these prior rights,¹⁴⁸ to the extent that they still exist.¹⁴⁹ The New Mexico adjudication statutes provide the process for defining these rights.¹⁵⁰ Some claimants have asked the lower Rio Grande adjudication court to address their pre-1906 rights as stream system issue no. 106.¹⁵¹ If the New Mexico unpermitted surface diversions are pre-1906 rights, Texas is correct – they have no “permits”. These rights may be protected under New Mexico law unless and until the adjudication court finds that they are no longer valid.

*Groundwater and Rights*¹⁵²

Texas' main focus is on the effects of groundwater pumping on the Rio Grande in New Mexico, south of the Elephant Butte Dam to the state line. Texas claims that New Mexico's groundwater pumping since 1938 has been lowering the water table north of the state line and causing the Rio Grande Project flows destined for Texas to leave the river to feed the aquifer. This condition has allegedly lead to the shorting of EP No. 1's share of water under the Rio Grande Project and prevented delivery of part of Texas' Compact entitlement for EP No. 1.¹⁵³ Texas has asked the court for damages and relief for its injuries suffered as a result of New Mexico's alleged past and continuing actions.¹⁵⁴ These damages could be calculated from 1938 or some other date.

New Mexico has jurisdiction over groundwater pumping within the Project.¹⁵⁵ It recognizes that groundwater pumping has an effect on the Rio Grande. But New Mexico maintains that the depletions to the river are the result of pumping on both sides of the state line and that EBID should not be required to accommodate all the effects. It argues that any solution to Project operations problems requires that the depletions be shared proportionally according to pumping within each district's boundaries.¹⁵⁶



City of El Paso Well Field 2001,
Courtesy of the City of El Paso Water Utility Authority

Administrative Tools

New Mexico has certain tools for monitoring and administering groundwater rights in the area.¹⁵⁷ Under state law, the State Engineer gained authority to regulate wells and groundwater withdrawals when the local groundwater basins were “declared.”¹⁵⁸ A basin declaration is accomplished when the Engineer formally describes the boundaries of a given groundwater basin.¹⁵⁹ The Engineer declared the basins underlying the lower Rio Grande between 1961 and 1982, long after the drilling of hundreds of wells in the 1950’s drought.¹⁶⁰ Since the declaration of the basins, all new wells and changes to existing wells in the area undergo permitting by the State Engineer. The permitting process requires notice to the community of the proposed change to the *status quo* and allows an opportunity for objections before the State Engineer makes the decision of whether to allow the change.¹⁶¹

Several types of wells – primary irrigation, supplemental irrigation, commercial, municipal, domestic, livestock and others – exist in these groundwater basins. Anyone who owns a pre-basin well has more than likely had to refurbish, move or sell the well since basin declaration was completed. If this activity occurred after the relevant basin was declared, the State Engineer has issued a permit for the activity. The State Engineer entered an order in 2004 requiring all wells, except those used for domestic and livestock purposes, to be metered. Between these activities and new permits issued since the declaration of the basins, the State Engineer has a good handle on all the wells in the area, with the possible exception of single family domestic wells and livestock wells. The State Engineer still lacks authority to turn down a domestic well permit application and these wells are still being developed without notice to and input from the community.¹⁶²

Shortage Management Strategies

Reclamation law requires that state law be applied to questions of water management.¹⁶³ In New Mexico the law describes two approaches for shortage administration: priority administration or Active Water Resource Management (AWRM). One of the provisions of AWRM is a recognition that communities may also be able to create strategies that will work as well as either of the sanctioned approaches.

Priority Administration: New Mexico’s water administration system is based on prior appropriation. In this system, the priority date of a water right is the date on which the water was first put to beneficial use. In times of shortage, the water administrator arranges water rights by priority date and serves water right owners according to priority date, starting with the most senior

users, until such time that the available water supply is exhausted.¹⁶⁴ The State Engineer has yet to conduct a priority call; however, in the Pecos River Basin on March 14, 2013, the Carlsbad Irrigation District on March 14, 2013, made a formal request to the agency to proceed with priority administration because the district anticipates it will not receive the water contemplated by the Pecos Settlement Agreement of 2003.¹⁶⁵ This system is couched in the New Mexico Constitution, Article I.¹⁶⁶

Based upon the Notices of Appropriation filed by the United States in 1906 and 1908, the Project's surface water rights likely have priority dates as of those years.¹⁶⁷ This question is currently



*Low Water Levels at Caballo Reservoirs,
Courtesy of Bureau of Reclamation, El Paso Office¹⁶⁸*

before the adjudication court.¹⁶⁹ The priority of some surface water rights in the lower Rio Grande in New Mexico may predate these dates,¹⁷⁰ but most if not all groundwater rights post-date or are junior to the Project rights. Priority dates are formally identified through water right adjudications.¹⁷¹ In times of shortage, a senior user not receiving water can ask the State Engineer to temporarily shutdown junior users until the shortage is remedied. Because of the potential economic, social and political consequences, priority calls are reserved as a last resort in water management.¹⁷²

If New Mexico junior groundwater pumping is interfering with surface deliveries in Texas, the United States as Project operator could request that the New Mexico State Engineer implement priority administration. Texas or EP No. 1 likely could not make that request because they are not under the jurisdiction of the New Mexico State Engineer or courts.

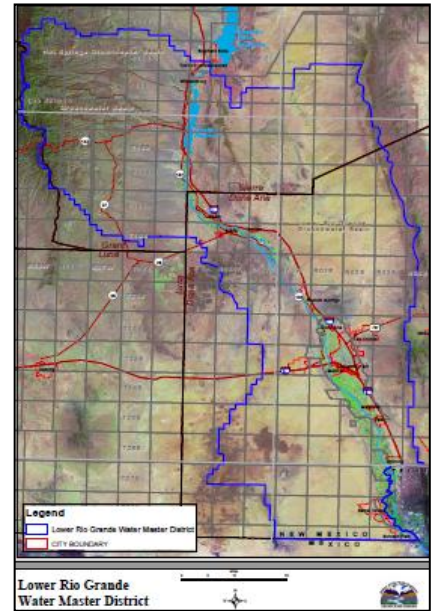
Active Water Resource Management (AWRM):¹⁷³ The State Engineer can conduct a priority call regardless of whether an adjudication of rights has been completed. Recognizing that adjudications may not have been completed before shortages make administration necessary, the New Mexico Legislature enacted legislation in 2003 allowing the State Engineer to develop regulations to “administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available.”¹⁷⁴ The State Engineer’s plan was to develop state-wide and basin-specific regulations.¹⁷⁵ The statewide regulations were completed in 2004.¹⁷⁶ The tools available in AWRM include metering, water management regulations, water master districts with water masters, water master manuals,¹⁷⁷ and within the regulations, accommodation for water use plans to be employed instead of a priority call.¹⁷⁸

In 2004, the State Engineer also embarked on the development of AWRM rules for the lower Rio Grande. The process and draft regulations were not well received by members of EBID.¹⁷⁹ In 2005 before the regulations became final, the Tri-State Generation and Transmission Association and the New Mexico Mining Association challenged the 2004 legislation as unconstitutional. In November 2012, the New Mexico Supreme Court rejected the Associations’ challenges and held that the statute was constitutional.¹⁸⁰

Prior to the effort to develop AWRM regulations, EBID and lower Rio Grande water users began work on a Regional Water Plan. The initial effort concluded in 2004. The group recognized that the lower Rio Grande was fully appropriated, Rio Grande depletions would have to be curbed and conjunctive management of the surface and groundwater was critical. Although then State Engineer John D’Antonio put AWRM draft regulations on hold, he had already created the Lower Rio Grande Water Master District in December of 2004 to provide a structure for groundwater administration. He issued an order for the metering of irrigation wells and published metering guidelines a year later.¹⁸¹

Since the lower Rio Grande adjudication is not complete, a priority call could be made under AWRM. The call would align the senior water rights entitled to water with the available supply.¹⁸² The desirability of a call where the junior users are groundwater pumpers is questionable. Junior well users tend to include commercial and industrial users, domestic facilities and many irrigators. Observers believe that the economic effect of denying access to water for such users, even temporarily, would be devastating.¹⁸³

In December 2004, the State Engineer created the Lower Rio Grande Water Master District to provide for the “economical and satisfactory apportionment” and administration of groundwater in the lower Rio Grande stream system. The water master district includes the Hot Springs, Las Animas Creek and Lower Rio Grande administrative groundwater basins. The State Engineer also embarked on a program to meter all district wells except for small wells serving only livestock or one household. As of 2012, about 3,000 wells had been metered.¹⁸⁴



Lower Rio Grande Water Master District
 LRG Water Master District (blue line)
 Courtesy of the Office of the State Engineer

Legislative Responses to Shortages

New Mexico Legislature



N.M. Legislature – The Roundhouse
 Courtesy of University of New Mexico¹⁸⁵

The New Mexico 2013 Legislative session closed without the passage of any water bills relating to the lower Rio Grande although several bills made it to committee.¹⁸⁶ Several bills and memorials related indirectly to the *Texas v. New Mexico* case and water management in the lower Rio Grande, including but not limited to the following:

- an appropriation for \$400,000 dollars to the N.M. Interstate Stream Commission [hereinafter ISC] for updating the lower Rio Grande regional water plan (S.B. 135);¹⁸⁷
- an appropriation of \$50,000 dollars to NMSU to develop a “water management plan to help lower Rio Grande farmers manage their irrigation water more effectively and efficiently” (S.B. 449) & (H.B. 470);¹⁸⁸

- an appropriation of \$120 million dollars to the Interstate Stream Commission “to acquire, retire, protect and conserve water rights and conserve water in the lower Rio Grande basin” (S.B. 440);¹⁸⁹
- a request that the State Engineer “create a list of major rights claimants in the upper, middle and lower reaches of the Rio Grande with the most junior water rights claimants listed first... and report its findings to the appropriate legislative interim committee...” (S.M. 90);¹⁹⁰
- a Senate Capital Outlay Request of \$25 million dollars for a southern New Mexico water pipeline from the Gila-San Francisco basin of “to plan, design and construct a water conveyance pipeline from the Gila-San Francisco water basin to the Las Cruces metropolitan area in Hidalgo, Luna, Dona Ana and Grant counties” (SCO-0038); and,
- a Senate Capital Outlay Request of \$75 million dollars for a southern New Mexico water pipeline from Salt/Tularosa/Carlsbad areas to “plan, design and construct a water conveyance pipeline from the Salt, Tularosa, Carlsbad and other water basins in Dona Ana, Otero and Eddy counties.”¹⁹¹

Of these bills, the proposed appropriation for \$120 million dollars was perhaps the most controversial. Some members of the public perceived the bill as an attempt to set up a fund to purchase and retire water rights in the lower Rio Grande, similar to that set up in the Pecos River Water Rights Settlement of March 2003 in the wake of New Mexico’s loss to Texas over Pecos River Compact violations. As a result of the Pecos effort, \$120 to \$130 million dollars were spent by New Mexico taxpayers to take more than 12,000 acres out of production as well as other measures. Observers estimate that a similar buy-out in the lower Rio Grande would run up to \$1 billion¹⁹² just for the water rights and would have a huge effect on the local economy and agriculture.

The New Mexico Legislature included funding for *Texas v. New Mexico* in the House Appropriations Bill 2. It set aside \$6.5 million dollars for the State Engineer for water litigation in interstate streams and \$400 thousand for water planning. It authorized the New Mexico Attorney General and Environment Department to use part of those funds.¹⁹³

Texas Legislature

Texas is suffering the third worst drought since 1895 – the beginning of its recorded weather history – and no relief is in sight. An estimated \$7.6 billion dollars in agricultural losses in 2011 and future projections of nearly \$12 billion dollars a year in losses has made water a priority for the Legislature.¹⁹⁴ In 2013, the Texas Legislature is taking up water planning, water cooperation and water litigation bills. On March 27, 2013, the House approved a bill to create a water infrastructure bank to fund projects to begin implementation of projects identified the state’s 50-year water plan. On April 11, 2013 the Senate Finance Committee approved a constitutional amendment to pay for projects from the Rainy Day Fund and a proposal of \$2.5 billion is being considered.¹⁹⁵ If an adequate water supply is not secured, income loss projections have been made of nearly \$12 billion dollars a year from the current drought.¹⁹⁶ To address regional water issues and planning among Texas, neighboring states and Mexico, the Texas Legislature has introduced H.B. 1189 to create the Southwestern States Water Commission.¹⁹⁷

In the Texas General Appropriations Act for 2012-13 Biennium, the Texas Attorney General was authorized to use funds from its budget for “potential intervention in certain developing ground and surface water disputes with the state of New Mexico along the Rio Grande project....”¹⁹⁸ In the proposed General Appropriations Bill, the Texas Legislature has identified \$5 million dollars for “fiscal year 2014 to be used to cover expenses incurred by the Rio Grande Compact Commission relating to investigations and legal expenses resulting from litigation between the State of Texas and the State of New Mexico over the equitable distribution of water according to the Rio Grande Compact.”¹⁹⁹

Risks

The cost of litigation is dear. And so is the cost of doing nothing. The blow to agricultural production in the lower Rio Grande – estimated at \$400 million last year²⁰⁰ – will be enormous if the area has reduced access to surface and groundwater. Municipal, commercial and other users in the area will also face challenges. These challenges will have to be met whether they arise because of litigation and judgments against New Mexico or because of the redistribution of surface water and stressed aquifers.

Litigation in the U.S. Supreme Court is expensive, very expensive if it continues over several years. The results can be expensive as well. There are the costs of conducting the case, of judgment, if any, against the State, and of implementing changes to prevent future problems and the costs to the communities that depend on the water which may or may not be available by virtue of the Court’s decision. To gain understanding what these costs might be, the Pecos River Compact case from the 1970s and 1980s is instructive.

Texas v. New Mexico – Pecos Style and the 2003 Pecos Settlement Agreement

New Mexico and Texas signed the Pecos Compact in 1948. New Mexico agreed to “not deplete by man’s activities the flow of the Pecos River at the New Mexico – Texas state line below the ‘1947 condition’.” Largely because of groundwater depletions in the Roswell Basin, New Mexico under-delivered to Texas by about 10,000 acre-feet annually from the mid-1950s to the mid-1980s.²⁰¹ Texas filed suit in the U.S. Supreme Court in June of 1974.²⁰² The Court appointed a special master to hear the case in 1975,²⁰³ made its final decision in 1987,²⁰⁴ and entered its final decree and appointed a federal river master in 1988.²⁰⁵

| <i>Texas v. New Mexico Pecos Compact</i> | |
|--|----------------------------------|
| Litigation costs: | 14 years - unknown |
| Special Master: | 14 years - unknown |
| River Master: | 24 years - \$ 275,868 |
| Judgment: | \$14,000,000 |
| Compliance: | \$120,000,000 - \$130,000,000 |
| Regional Economic Costs: | 39 years - unknown |

The expenses related to conducting a U.S. Supreme Court case are generally unmeasured, although some information is known. The States of Texas and New Mexico split the costs of the court’s special master and federal river master.²⁰⁶ In 1990, the Court rendered its judgment against New Mexico which included \$14 million dollars, annual calculations for delivery to Texas, management by a federal River Master, rapid repayment of any shortfalls and compliance with the Pecos Compact. The remedy could have included water as well, but did not.²⁰⁷ The Court retained jurisdiction for further action as needed.²⁰⁸

When drought reoccurred around 2003, interested parties came together to develop the Pecos Settlement.²⁰⁹ In an effort to keep the river whole and to remain in compliance with the Compact and Decree, New Mexico has expended between \$120 and \$130 million dollars²¹⁰ to purchase and retire up to 17,000 acres of water rights and to develop two augmentation well fields which may deliver up to 100,000 acre-feet in any five years and no more than 35,000 acre-feet in any one year to the Pecos River as well as \$14 million in damages to Texas.²¹¹

As a part of the Settlement, the parties developed a strategy to avoid future priority calls. But in the face of drought, on April 2, 2013, the Carlsbad Irrigation District made that call.²¹²

Costs of a Lower Rio Grande Lawsuit in the Supreme Court

A New Mexico loss on the Rio Grande would be very expensive for the communities in south-central New Mexico in terms of losses in agricultural and supporting businesses and to the state in general.²¹³ The area is already strained by reduced surface water availability from the drought and under the Operating Agreement. If the U.S. Supreme Court ordered curtailment of groundwater pumping, the pecan orchards and other crops may be severely damaged or lost. “Texas winning the lawsuit in its entirety... would be a death knell for agriculture in southern New Mexico,” said Matt Rush of the New Mexico Farm and Livestock Bureau in Las Cruces. “We’re amidst one of the greatest droughts that we’ve ever had, and we’re without any water from the river.”²¹⁴

The Supreme Court could also order restitution in the form of water or money or both.²¹⁵ Texas is asking the Court for compensation for New Mexico pumping since the date of the Rio Grande Compact, that is, 1938.²¹⁶ If, as in the Pecos litigation, New Mexico must retire farmland water rights to accommodate a judgment, the cost has been estimated to be upwards of \$1 billion dollars.²¹⁷ If solutions such as augmentation well fields or pipelines are required, millions more will follow.

However, the cost of doing nothing could be just as devastating. In June of 2012, the Interstate Stream Commission reported that estimated value of water reallocated in the Project between EBID and EP No. 1 was between several million to 2.5 billion dollars.²¹⁸ The New Mexico Attorney General reported in August 2012 that the area would suffer an annual loss of \$183 million dollars if it did not sue Reclamation to recover lost credit water and to return the historic methodology for calculating of Project surface water allocations.²¹⁹

Between the reallocation and the drought, farmers, municipalities and others have turned increasingly to groundwater. Not only does extensive groundwater use threaten the aquifer sustainability and but it also threatens to change the aquifers from sustainably managed resources to mined resources. If groundwater pumping must continue over the long run, river losses to the aquifers are likely to remain high, and deliveries to EP No. 1 will continue to be a problem.²²⁰

The pumping also adds to farm costs. It is more expensive to run groundwater pumps than to divert from ditches – adding 10 to 15% to annual operation expenses. In addition, there are the costs of constructing and maintaining wells.²²¹ In addition, the groundwater in the lower Rio Grande tends to be more salty than surface water, particularly in the northern reaches of EBID, such as the Hatch area. Salty water and salt buildup in the soil stunt plant growth. Salinity is best

combated with surface water to flush the salt through the soils. When groundwater is the only thing available, that is what gets used to keep lands in production.²²² However, farmers will suffer from increased costs and reduced yields. If less surface water is available through reallocation under the Operating agreement, the effects on farming and the region's economic base could be painful.

Conclusion

South-central New Mexico is in water trouble. Finding solutions to the water requirements and entitlements of farmers and municipalities will be challenging. The law suits filed in the U.S. Supreme Court, New Mexico federal district court, and the State's Third Judicial court are and will be expensive to pursue to their ends. As much as possible, these courts prefer parties to work out water problems outside of their doors but, if necessary, will shoulder the load of evidence, hearings and trials. If the Pecos version of *Texas v. New Mexico* is any indication, a loss in the lower Rio Grande lawsuit, *Texas v. New Mexico*, will pose a huge economic and social burden for the area for years to come.

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- ¹ Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint, *Texas v. New Mexico and Colorado* [hereinafter *Tex. v. N.M.*], No. 22O141 ORG (U.S. Jan. 8, 2013), <http://uttoncenter.unm.edu/pdfs/01-08-13-motion-complaint-brief.pdf>; U.S. Supreme Court Docket, *Tex. v. N.M.*, <http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/22o141.htm>
- ² NASA Image, from "Making the Desert Bloom": Rio Grande Project, U.S. NAT'L. PARK SERV., <http://www.nps.gov/nr/twhp/wwwlps/lessons/141RioGrande/141RioGrande.htm>
- ³ Complaint at 2-3, *Tex. v. N.M.*, *supra* at note 1 [Rio Grande Compact has three signatories: Texas, New Mexico & Colorado. Texas includes Colorado in suit only because it is a signatory].
- ⁴ Act of May 31, 1939 [hereinafter Rio Grande Compact or Compact], Pub. L. 76-96, 53 Stat. 785 (1939) (as amended 1948), http://www.ose.state.nm.us/PDF/ISC/ISC-Compacts/Rio_Grande_Compact.pdf
- ⁵ Act of Feb. 25, 1905 [hereinafter Project Act], Pub. L. No. 58-104, 33 Stat 814.
- ⁶ Brief at 16, *Tex. v. N.M.*, *supra* at note 1, Complaint at 10, 15-16, *Tex. v. N.M.*, *supra* at note 1; Reply Brief of State of Texas [hereinafter Texas Reply] at 2, *Tex. v. N.M.*, *supra* at note 1.
- ⁷ *State Engineer v. EBID* [hereinafter *S.E. v. EBID*] CV No. 96-888, Third Judicial Dist. Ct., Cnty. of Doña Ana, N.M. (1996), <https://lrgadjudication.nmcourts.gov>
- ⁸ *New Mexico v. United States, et al.* [hereinafter *A.G. v. U.S.*], D.N.M. 11-CV-691 (2011).
- ⁹ Compromise & Settlement Agreement [aka 2008 Operating Agreement] § 1.6 at 2. "Project Water, as used herein, shall mean: 1) useable water in Project Storage; 2) all water required by the Rio Grande Compact of 1938 to be delivered into Elephant Butte Reservoir; and 3) all water released from Project Storage and all inflows reaching the bed of the Rio Grande between Caballo Dam, New Mexico and Fort Quitman, Texas.", <http://ebid-nm.org/Static/PDF/OpAg/OpAg.pdf>
- ¹⁰ Texas Reply at 2, *Tex. v. N.M.*, *supra* at note 1; Brief at 2-3, 10-14, 18-21, *Tex. v. N.M.*, *supra* at note 1; Complaint at 15-16, *Tex. v. N.M.*, *supra* at note 1.
- ¹¹ Brief at 2-3, 16-17, 20, *Tex. v. N.M.*, *supra* at note 1; Complaint at 2-3, 9-10, *Tex. v. N.M.*, *supra* at note 1.
- ¹² N.M.'s Brief in Opposition to Texas' Motion for Leave to File Complaint [hereinafter N.M. Response] at 1-3, 11-31, *Tex. v. N.M.*, *supra* at note 1.
- ¹³ *S.E. v. EBID*, *supra* at note 7.
- ¹⁴ NMSA 1978 § 72-4-17 [suits for determination of water rights; parties; hydrographic survey; jurisdiction; unknown claimants].
- ¹⁵ *See*, Sixth Amended Order Re Stream Adjudication Procedures, *S.E. v. EBID* (Sep. 14, 2009), *supra* at note 7.

16 Final Judgment [hereinafter Final Judgment 101], *S.E. v. EBID* (Aug. 22, 2011), supra at note 7 [re stream system
issue 101].

17 Order Granting State’s Motion to Dismiss U.S.’ Claims to Groundwater & Denying U.S.’ Motion for Summary
Judgment [hereinafter Order Dismissing U.S. Groundwater Claims], *S.E. v. EBID* (Aug. 16, 2012), supra at note 7.

18 Brigitte Buynak, Esq., *Adjudications* at 5, *Water Matters!*, UTTON CTR. (2013), [http://uttoncenter.unm.edu/
projects/water-matters.php](http://uttoncenter.unm.edu/projects/water-matters.php)

19 Brief at 8, 15-16, *Tex. v. N.M.*, supra at note 1; Complaint at 4, 5 & 9, *Tex. v. N.M.*, supra at note 1.

20 First Amended Complaint at 3, 18-20, 26, *A.G. v. U.S.* (Feb. 14, 2012), supra at note 8.

21 Final Judgment 101, *S.E. v. EBID*, supra at note 7.

22 First Amended Complaint at 2, *A.G. v. U.S.*, supra at note 8.

23 *Tex. v. N.M.*, supra at note 1.

24 SUP. CT. R. 17(3).

25 All Mar. 11, 2013 and Mar. 22, 2013 filings maybe viewed at New Mexico’s Lower Rio Grande, UTTON CTR.,
<http://uttoncenter.unm.edu/projects/lower-rio-grande.php>; U.S. Supreme Court Docket, [http://www.supremecourt.
gov/Search.aspx?FileName=/docketfiles/22o141.htm](http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/22o141.htm) [docket listing only].

26 Telephone Interview with Steven L. Hernandez, counsel for EBID (Mar. 14, 2013).

27 *S.C. v. N.C.*, 558 U.S. 256, 278 (2010)

28 *See, e.g., id.* at 259, 270.

29 *See, Tex. v. N.M.*, 482 U.S. 124 (1987) [Court granted motion to file complaint in this suit regarding Pecos River
Compact violations on Apr. 21, 1975; entered final decree on June 8, 1987; and, retained jurisdiction to act as
necessary, entering latest order on Nov. 14, 1994]; Pecos River in N.M. at slides 6-8, N.M. INTERSTATE STREAM
COMMISSION [hereinafter ISC], [http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=
0CEkQFjAD&url=http%3A%2F%2Fwww.carlosuresti.com%2Fsites%2Fdefault%2Ffiles%2FKristin%2520-
%2520Copy%2520of%2520Pecos%2520Compact-Settlement%2520Presentation%2520WQ.pptx&ei=
7mFwUb7sL6X9iQKdg4CgCg&usq=AFQjCNEe18MQw4pwH5CjZZOxDZWHnwS1Fw&sig2=WB9Irx55n--
vVkWntJQ6A&bvm=bv.45373924.d.cGE](http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=4&ved=0CEkQFjAD&url=http%3A%2F%2Fwww.carlosuresti.com%2Fsites%2Fdefault%2Ffiles%2FKristin%2520-%2520Copy%2520of%2520Pecos%2520Compact-Settlement%2520Presentation%2520WQ.pptx&ei=7mFwUb7sL6X9iQKdg4CgCg&usq=AFQjCNEe18MQw4pwH5CjZZOxDZWHnwS1Fw&sig2=WB9Irx55n--vVkWntJQ6A&bvm=bv.45373924.d.cGE) [presented to Pecos River Water Quality Coalition, Oct. 21, 2011].

30 Rio Grande Compact, art. 1(b), art. 4 & art. 12, supra at note 4; Project Act, supra at note 5.

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32 U.S. Const., art. III, § 2, cl. 2; 28 U.S.C. § 1251(a).

33 *Tex. v. N.M.*, 462 U.S. 554, 570 (1983) [Court has “substantial discretion to make case-by-case judgments as to the
practical necessity of an original forum in this Court”].

34 *Miss. v. La.*, 506 U.S. 73, 77 (2003) (citations omitted).

35 *Kan. v. Colo.*, 533 U.S. 1, 8 (2001).

36 Franz, Jantzen, *West Façade of the Supreme Court Building*, USSC, [http://www.supremecourt.gov/about/photo1
.aspx](http://www.supremecourt.gov/about/photo1.aspx) [flipped]

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38 *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938).

39 *Ariz. v. Colo.*, 373 U.S. 546, 557-558 (1963).

40 *Id.* at 567 (citing *Kan. v. Colo.*, 185 U.S. 125, 145 (1902); *Wyo. v. Colo.*, 298 U.S. 573 (1936); *Va. v. W.Va.*, 206
U.S. 290 (1936)).

41 Brief at 3, 17-18, 21, *Tex. v. N.M.*, supra at note 1; Texas Reply at 5-6, *Tex. v. N.M.*, supra at note 1.

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⁵⁵ Texas Reply at 2, *Tex. v. N.M.*, supra at note 1.

⁵⁶ *Id.* at 3, *Tex. v. N.M.*, supra at note 1 (citing *Mt. v. Co.*, ___ U.S. ___, 131 S.Ct. 1765 (2011); *Kan. v. Neb.*, 538 U.S. 720 (2003); *Kan. v. Colo.*, 514 U.S. 673 (1995); *Tex. v. N.M.*, 462 U.S. 554 (1983)).

⁵⁷ U.S. Const., art. IV, § 1. [“Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.”]

⁵⁸ Brief at 15-16, *Tex. v. N.M.*, supra at note 1.

⁵⁹ N.M. Response at 34-36, *Tex. v. N.M.*, supra at note 1.

⁶⁰ *Id.* at 3, n. 3, *Tex. v. N.M.*, supra at note 1 [“a case brought by a political subdivision and a political appointee of Texas is not a case brought by the Texas *qua state*” (citing *Ill. v. City of Milwaukee*, 406 U.S. 91, 98 (1972))].

⁶¹ Texas Reply at 1, n. 1, *Tex. v. N.M.*, supra at note 1.

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⁶⁴ U.S. Supreme Court Docket, *Tex. v. N.M.*, supra at note 1.

⁶⁵ See *Tex. v. N.M.*, 462 U.S. at 567, n. 13.

⁶⁶ Motion at 2, *Tex. v. N.M.*, supra at note 1; Brief at 4, 18-19, 21-27, *Tex. v. N.M.*, supra at note 1; Texas Reply at 9-12, *Tex. v. N.M.*, supra at note 1.

⁶⁷ *S.E. v. EBID*, supra at note 7.

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⁶⁹ Brief at 4, *Tex. v. N.M.*, supra at note 1.

⁷⁰ Third Judicial District Court, Doña Ana County, N.M., <http://www.thirddistrictcourt.com/>

⁷¹ *Id.*; Rio Grande Compact, art. XII, supra at note 4.

⁷² Brief at 5, 21, *Tex. v. N.M.*, supra at note 1.

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⁷⁵ *Id.* at 22-23 (citing *Miss. v. La.*, 506 U.S. at 77; *Ariz. v. N.M.*, 425 U.S. 794,797 (1976)).

⁷⁶ *Id.* at 27-31.

⁷⁷ N.M. Response at 27-31, *Tex. v. N.M.*, supra at note 1; Order Dismissing U.S. Groundwater Claims at 2-6, *S.E. v. EBID*, supra at note 7.

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⁷⁹ *A.G. v. U.S.*, supra at note 8.

⁸⁰ N.M. Response at 24-27.

⁸¹ For more information on New Mexico’s lower Rio Grande history, see Darcy S. Bushnell, Esq., Water Litigation in the Lower Rio Grande [hereinafter LRG Litigation] at 7-10, *Water Matters!*, supra at note 18; Margaret Vick, J.S.D., Transboundary Waters: The Rio Grande as an International River, *Water Matters!*, supra at note 18; Project Act, supra at note 5; Rio Grande Compact, supra at note 4.

⁸² Convention [for the] Equitable Distribution of Waters of the Rio Grande, U.S. – Mexico, May 21, 1906, 34 Stat. 2953, <http://www.ibwc.state.gov/Files/1906Conv.pdf>

⁸³ ELEPHANT BUTTE DAM & RESERVOIR, USBR, http://www.usbr.gov/projects/Facility.jsp?fac_Name=Elephant+Butte+Dam

⁸⁴ Rio Grande Compact, art. IV, as amended, supra at note 4; Stephen Farris, Esq. & Sarah Bond, Esq., *Briefing by New Mexico Attorney General’s Office* [hereinafter Farris Briefing] at 4, N.M. LEGISLATURE, <http://www.nmlegis.gov/lcs/committeedetail.aspx?CommitteeCode=WNR> [presented to Leg. Interim Committee on Water & Nat. Resources, Aug. 27, 2012]; Gary L. Esslinger, Manager of EBID, Lower Rio Grande Project Operating Agreement: Settlement of Litigation at 3, WRRI, <http://wrri.nmsu.edu/publish/watcon/proc53/esslinger.pdf> [presented at Surface Water Opportunities in N.M. Oct. 2008].

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- ¹⁶⁰ Rules and Regulations Governing Appropriation and use of Ground Water in New Mexico, art. 7 (Aug. 15, 2006) (<http://www.ose.state.nm.us/PDF/GroundWaterRegs-Article7.pdf> [by 2006, all groundwater basins in New Mexico had been declared].
- ¹⁶¹ NMSA 1978 § 72-12-3 [Application for Use of Underground Water; Publication of Notice; Permit].
- ¹⁶² NMSA 1978 § 72-12-1.1 [Domestic Wells]; Amended Order Designating Priority, Transferability & Beneficial Use Elements of a Domestic Well Water Right as a Stream System Issue and Commencing Stream System Issue No. 103, *S.E. v. EBID* (Dec. 23, 2009), supra at note 7 [no action since Sep. 9, 2010]; Order, In the Matter of the Requirements for Metering Groundwater Withdrawals in the Lower Rio Grande Watermaster District, NM, as amended (Dec. 3, 2004), as supplemented (Mar. 21, 2007), http://www.ose.state.nm.us/water_info_awrm_basins_lrg_metering_info.html
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- ¹⁷¹ NMSA 1978 § 72-4-19 [Adjudication of Rights; Decree Filed with State Engineer; Contents of Decree].
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- ¹⁷⁹ *Id.*
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