

No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

♦

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and

STATE OF COLORADO,

Defendants,

UNITED STATES OF AMERICA,

Intervenor.

♦

OFFICE OF THE SPECIAL MASTER

♦

**THE STATE OF COLORADO’S BRIEF CONCURRING IN
JOINT MOTION TO ENTER COMPACT DECREE**

♦

Introduction

The State of Colorado’s primary objective in this litigation is to guard against any encroachment on its authority and discretion to administer the Rio Grande Compact. Colorado consents to the negotiated resolution of this dispute because it preserves this discretion. The State of Colorado writes separately to emphasize the benefit of this bargain that matters most to it.

Discussion

I. The State of Colorado Has a Strong Interest in Preserving Its Autonomy to Administer Its Interstate Water Compacts

Because control over natural resources is a key element of state sovereignty, states can only agree to divest their authority over them by compact.¹ Absent compact requirements to the contrary, states maintain autonomy to control the water within the state as they see fit.² In Colorado, the Division of Water Resources, headed by the state engineer, has statutory authority to administer water rights specifically for compacts.³ In addition to this authority, the state engineer has promulgated rules in several water basins requiring specific measures for compact compliance.⁴

When issues do arise that require coordination between the parties to the interstate water compact, many compacts have an interstate compact commission composed of member states that addresses those issues.⁵

¹ *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 631 (2013).

² *Id.* at 632-633 (where a compact is silent, the Court will infer that a state retains its sovereign power to regulate its own waters).

³ Colo. Rev. Stat. §37-80-104; Ex. 1, Cotten Decl. ¶¶ 7-8.

⁴ Cotten Decl. ¶ 8.

⁵ *See e.g.*, Amended Costilla Creek Compact, Act of Dec. 12, 1963, 77 Stat. 350 and Arkansas River Compact, Act of May 31, 1949, ch. 155, 63 Stat. 145.

The preservation of this legal landscape is uniquely important to the Colorado. Colorado is at the headwaters of many water basins in the Western United States and is a party to nine interstate water compacts – more than any other state.⁶

II. The State of Colorado’s Administration of the Rio Grande Compact Relies Upon This Autonomy

Colorado’s administration of the Rio Grande follows this approach. There is an interstate compact commission⁷ that handles matters such as compact accounting and maintenance of gaging stations.⁸ And Colorado actively administers intrastate water use for its compliance with the Compact.⁹

The United States has no irrigation projects in the portion of the river located in Colorado and is subject to Colorado’s administration of the Rio Grande Compact similar to that of any other water user.¹⁰

⁶ See <https://cwcb.colorado.gov/focus-areas/interstate/interstate-compacts>; Cotten Decl. ¶ 6.

⁷ The Rio Grande Compact Commission is composed of one representative from each compacting state. The United States may provide a representative, but any federal representative has no voting power. See Rio Grande Compact at Art. XII, Act of May 31, 1939, ch. 155, 54 Stat. 785.

⁸ Cotten Decl. ¶¶ 11-22.

⁹ Colorado has established three sets of rules for the Rio Grande basin. See <https://dwr.colorado.gov/division-offices/division-3-office>; see also Cotten Decl. ¶ 9.

¹⁰ Water rights appropriated by the United States are adjudicated under the Colorado Water Right Determination and Administration Act of 1969. C.R.S. §37-

III. The Proposed Settlement Structure Does Not Erode The State of Colorado's Autonomy with Respect to the Rio Grande Compact

As outlined in the Compacting States brief,¹¹ the proposed resolution of this matter includes a consent decree, which puts into place specific procedures to ensure the proper apportionment of Rio Grande water between Texas and New Mexico below Elephant Butte Reservoir and quantifies New Mexico's obligation to deliver water to Texas. It does not address any obligations of the United States and leaves day-to-day operational details to separate agreements outside of the Rio Grande Compact.

The United States has agreed to dismiss its claims with prejudice in this case, and the outside agreements to which the United States is a party relate only to portions of the Rio Grande outside of Colorado.

Accordingly, the settlement package does not erode any of Colorado's autonomy to administer its intrastate water to comply with the Compact, or to work

92-101 *et seq.* Colorado courts review the United States' application and issue a final decree defining the scope of those rights. The United States is likewise subject to state administration for compact compliance. For example, surface water rights decreed to the United States are curtailed the same amount as other similarly situated rights for compact deliveries to New Mexico. Cotten Decl. ¶ 10.

¹¹ See Memorandum of Points and Authorities in Support of the Joint Motion of the State of Texas, State of New Mexico, and State of Colorado to enter Compact Decree Supporting the Rio Grande Compact, filed concurrently.

through the Rio Grande Commission on any interstate issues with respect to the Compact.

Conclusion

For the foregoing reason, and for those stated in the concurrently filed Compacting States brief, the State of Colorado concurs with the resolution of this matter.

Respectfully submitted this 29th day of August, 2025,

/s/Chad M. Wallace

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OFFICE OF THE SPECIAL MASTER

THE STATE OF COLORADO'S CERTIFICATE OF SERVICE

This is to certify that on the 29th day of August, 2025, I caused a true and correct copy of the foregoing **The State of Colorado's Brief Concurring in Joint Motion to Enter Compact Decree** to be served upon the parties and filed with the Special Master through the Third Circuit Case Management and Electronic Case Filing (CM/ECF) System.

/s/ Chad M. Wallace

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IN THE
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♦
STATE OF TEXAS,

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STATE OF NEW MEXICO and
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Defendants

♦

DECLARATION OF CRAIG W. COTTEN, P.E.

**IN SUPPORT OF JOINT MOTION OF THE STATE OF TEXAS, STATE
OF NEW MEXICO, AND STATE OF COLORADO FOR ENTRY OF
COMPACT DECREE SUPPORTING THE RIO GRANDE COMPACT**

♦

I, Craig W. Cotten, P.E., hereby declare as follows:

- 1) I am over 18 years of age and have personal knowledge of the facts stated herein. I am competent to testify to the matters herein. If called to testify, I can and will testify in accordance with the following.
- 2) I earned a Bachelor of Science degree in Civil Engineering from Colorado State University (1990) and am a Registered Professional Engineer in Colorado, holding License No. 30527. I possess 34 years of experience in water resources and water administration in the Rio Grande basin. As part of

my position as an engineer I have presented at numerous internal and external short courses and seminars relating to surface and ground water and the Rio Grande Compact. In addition, I have been admitted by the Colorado Water Court as an expert witness in: Rio Grande Compact administration, water resource engineering, surface and groundwater hydrology, water rights administration and management, interpretation and administration of water decrees, water data collection and analysis, water augmentation plans, usage quantifications, replacement calculations, determination of tributary or non-tributary water, aerial photography interpretation, and water rights analysis.

- 3) Since 2009 I have been the Division Engineer for Water Division 3 for the Colorado Division of Water Resources, which encompasses the Rio Grande basin in Colorado. I supervise a staff of approximately 30 employees, who are involved in water rights administration in Colorado's Rio Grande basin. As part of my job duties, I am responsible for water rights administration, diversion records, stream gages and records, administration of the Rio Grande Compact and Costilla Creek Compact, dam safety, and ground water permitting in Division 3. I am involved in the water court process with recommendations, consultations, and data collection for the court and I provide expert testimony in hydrology and water rights administration matters before the Colorado Water Court. I also serve as Colorado's Engineer Adviser to the

Rio Grande Compact Commission and the Costilla Creek Compact Commission. In these roles, I coordinate with the Engineer Advisers from New Mexico and Texas on matters pertaining to the compacts to which they are signatories. I also provide technical advice to Colorado's Compact Commissioner and the state on administration of the compacts and matters pertaining to this case. Prior to my role as Division Engineer, I was responsible for portions of Division 3 water rights administration, diversion records, portions of Compact Administration, dam safety, ground water permitting, and providing technical advice and recommendations for the Colorado Water Court. I have also been the manager of the Hydrographic Program in Division 3 which includes collection, analysis, and review of hydrologic and meteorological data used to operate and maintain stream gaging stations and to develop official streamflow records for the Rio Grande Basin in Colorado. I participated in several streamflow investigations in New Mexico regarding the Rio Grande Compact.

- 4) I have read and am familiar with the proposed Compact Decree submitted with the Compacting States Joint Motion to Enter Compact Decree Supporting the Rio Grande Compact.
- 5) The Compact Decree retains Colorado's authority and discretion to administer water rights according to Colorado laws and for its Rio Grande Compact

obligations. Colorado has historically exercised state authority over its water resources, both for in-state water rights and administration for interstate compacts.

- 6) Colorado is a significant source of water for the American West. All the major river basins in Colorado are governed by a compact. Colorado is home to nine interstate water compacts and two United States Supreme Court equitable apportionment decrees.
- 7) The Colorado Division of Water Resources, headed by the state engineer, has statutory authority to administer the use of water in Colorado. Under Colorado's constitution, unappropriated water is available for appropriation for beneficial uses. Earlier water uses have priority over later uses. When there is insufficient supply, later, or junior, water rights must either stop diversions or replace their impacts to senior water rights. This is also called priority administration.
- 8) The state engineer administers water rights for compacts and promulgates rules to allow the state to meet its compact obligations, in accordance with Colorado law.
- 9) In the Rio Grande basin in Colorado these rules include: Rules Governing the Withdrawal of Groundwater in Water Division No. 3 (the Rio Grande Basin)

and Establishing Criteria for the Beginning and End of the Irrigation Season in Water Division No. 3 for all Irrigation Water Rights; Rules Governing the Measurement of Ground Water Diversions Located in Water Division No. 3, the Rio Grande Basin; and Rules Governing New Withdrawals of Ground Water in Water Division 3 Affecting the Rate or Direction of Movement of Water in the Confined Aquifer System.

- 10) Colorado administers the water rights appropriated by the United States like any other water user in the state. Water rights appropriated by the United States are adjudicated under the Colorado Water Right Determination and Administration Act of 1969. C.R.S. §37-92-101 et seq. The United States files an application for water rights in the Colorado courts which issues a final decree defining the scope of those rights. The United States is likewise subject to state administration for compact compliance. For example, surface rights owned by the United States are curtailed in the same manner as other similarly situated rights for compact deliveries to the Colorado/New Mexico state line. Wells owned by the United States are governed by groundwater management plans operated by water districts. The districts were formed in part to aid in compliance with Colorado's rules. These districts calculate impacts to senior rights caused by their member wells and provide replacement water or

otherwise ameliorate injury. The water districts also manage the Rio Grande aquifers in Colorado for sustainable use.

- 11) The Compact Decree adds gages and measurement methods consistent with past and current administration of the Compact.
- 12) The Compact uses an inflow-outflow index to determine Colorado's annual Compact delivery obligation. Several gages measure inflows in Colorado including: The Rio Grande near Del Norte, The Conejos River near Mogote, the Los Pinos River near Ortiz, and the San Antonio River at Ortiz. Colorado outflow gages are located on the Conejos River near Los Sauces and on the Rio Grande near Lobatos. Colorado's obligations are determined by measurement of flows not known until the end of the calendar year. This is a difficult task that requires knowledge of the hydrologic system, water demand, and estimates of future conditions. Colorado also uses up-to-date information to adjust curtailment of water diversions during the irrigation season. Using these estimates allows Colorado to better meet its end of year delivery targets while allowing use of Colorado's apportionment.
- 13) Accounting at the time of the signing of the Rio Grande Compact relied on twelve index gages and three reservoir gages: on the Rio Grande near Del Norte above the principal points of diversion to the San Luis Valley, on the Conejos River near Mogote, on the Los Pinos River near Ortiz, on the San

Antonio River at Ortiz, on the Conejos River at its mouths near Los Sauces, on the Rio Grande near Lobatos, El Vado Reservoir, on the Rio Chama below El Vado Reservoir, on the Rio Grande at Otowi Bridge near San Ildefonso, on the Rio Grande near San Acacia, on the Rio Grande at San Marcial, Elephant Butte Reservoir, on the Rio Grande below Elephant Butte Reservoir, Caballo Reservoir, and on the Rio Grande below Caballo Reservoir.

- 14) The Compact Commission has previously added and eliminated gages for Compact compliance.
- 15) For example, a 1948 resolution the Rio Grande Compact Commission (“Commission”) eliminated the San Marcial and San Acacio gages, added Elephant Butte Reservoir change in storage, and amended calculation of the New Mexico Article IV tabulation of relationship to eliminate the San Marcial Index Supply and use the new Elephant Butte Effective Index Supply.
- 16) The Compact requires that similar gaging stations shall be maintained and operated below any other reservoir constructed after 1929, and at such other points as may be necessary for the securing of records required for the carrying out of the compact; and automatic water stage recorders shall be maintained and operated on each of the reservoirs mentioned, and on all others constructed after 1929. Therefore, multiple additional stream and reservoir gaging stations have been installed and are currently utilized for the accounting of the Rio

Grande Compact. These include but are not limited to: Platoro Reservoir and the Conejos River below Platoro Reservoir, Abiquiu Reservoir and the Rio Chama below Abiquiu Reservoir, and Cochiti Reservoir and the Rio Grande below Cochiti Reservoir.

- 17) The addition of the El Paso gage in the Compact Decree is consistent with past practice of the Commission adding and deleting gage locations.
- 18) The proposed Compact Decree retains the authority of the Commission over compact accounting.
- 19) Each Compacting State has appointed an Engineer Adviser to collect, review, and present data and records for the administration of the Compact, among other duties.
- 20) The Engineer Advisers draft and present an annual report of all data pertinent to administration of the Compact and the Compacting States' rights and obligations under the Compact. The reports include data on gage flows, reservoir storage and evaporation, reservoir capacities, debits, credits, Usable Supply, Credit Water, etc. The Engineer Advisers have authority to determine accuracy of the data used in the report and that authority is retained under the Compact Decree.

- 21) The Engineer Advisers present their joint report at an annual meeting for acceptance by the Commission. The accepted report forms the basis for the official accounting record of each states' apportionment and use of water under the Compact.
- 22) The Engineer Advisers are able to incorporate the data and use the methodology from the Compact Decree in their annual accounting. The addition of this measurement method is similar to past changes by the Commission, described above.

I declare under penalty of perjury under the laws of the United States of America that the foregoing declaration is true and correct. Executed this 26th day of August 2025, at Alamosa, Colorado.

Craig W. Cohen

Craig W. Cotten, P.E.

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF ALAMOSA)

Subscribed and sworn to before me this 26 day of August 2025,

by Roberta Barre

Witness my hand and official seal.

My commission expires:

