

Health of Settlements – Two Examples on the Rio Grande

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Good afternoon. Yesterday I attended a hearing on the priority date of the Rio Grande Project, and there were eight or nine lawyers there. Most of them were scheduled to be here and my hat is off to Tessa Davidson and Alvin Jones who were the only two who made it here with me after that long hearing that dismissed late into the wee hours of the morning.

The photo in Figure 1 was taken by one of my associates, Samantha Barncastle, and shows Elephant Butte at 2 percent of capacity. After the September rains came in, somebody from Santa Fe asked me how our water supply was looking. I said it was at 4 percent now, and they said we ought to be thrilled since our water supply has doubled.



Figure 1. Elephant Butte at 2 percent capacity

When I was given this topic, the health of the settlements, I thought, wow, there are other settlements out there than the two I know most

about. One of them I had something to do with, the other one I didn't. I want to talk about the Rio Grande Compact, which is in a sense the ultimate settlement so to speak, between three states and the United States that was confirmed by Congress. Also, there are court settlements, one of which I was recently involved with.

To tell you what compacts are supposed to do, I quote from the opening pages of the Rio Grande Compact: *The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes... have agreed upon the following articles...* "Desiring to remove all causes of present and future controversy among these states" — that is what was supposed to have been accomplished.

Figure 2 provides the traditional Rio Grande Compact map. You see the state of Colorado, Texas, and New Mexico and you see the district that I represent. We call it "no-man's land," EBID (Elephant Butte Irrigation District). It is always nice to come up here and visit New Mexico. As you can see in my picture, I don't live in New Mexico, I live in Compact Texas. I happen to live in Mesilla, too, in a pecan orchard that is actually on a piece of land that is part of a Spanish Land Grant, and I don't share my water with anybody.

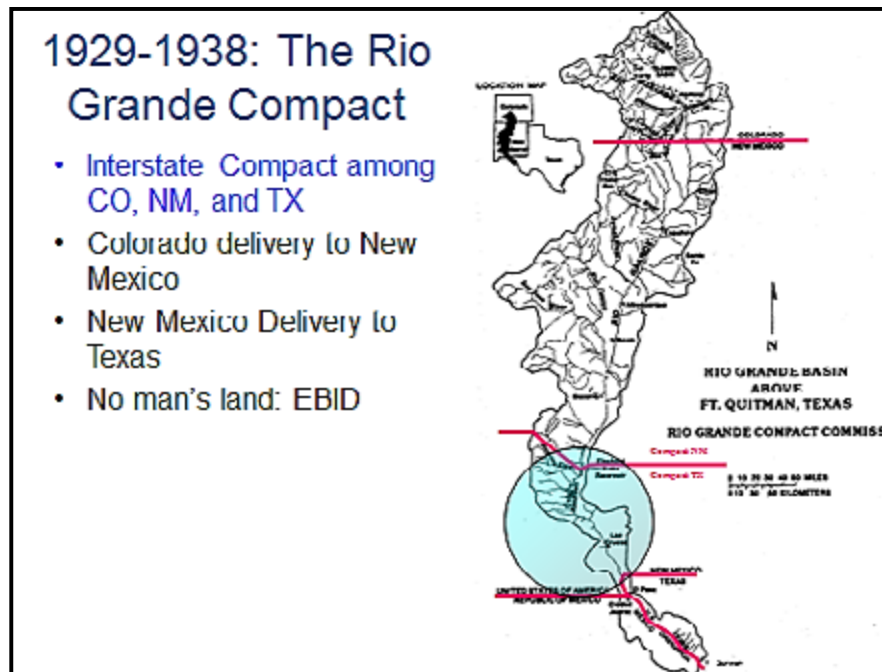


Figure 2. Rio Grande Compact map

This is a very strange situation and always hard to explain to people, including new legislators. State Engineer, Scott Verhines, has jurisdiction over our groundwater pumping, but I look to Herman Settemeyer and Pat Gordon from Texas to protect my surface water. The two district recipients of the Rio Grande Project are EBID with 90,640 acres (57%) and the El Paso district with 69,010 acres (43%). And, of course, built into an already complex interstate system, is the international part of our delivery obligations, which is to provide 60,000 acre-feet to Mexico under the Mexican Treaty of 1906.

To provide an illustration of what brought us into one of our recent litigations, I want to give you a bit of history on the Project. In 1979-1980, the two irrigation districts paid off the project construction costs of building the Rio Grande Project. Apparently, our loan payment schedule was a bit different—EBID paid off in 1979 and the El Paso district paid off in 1980. Nobody really knew what to do then because we were the first two districts in the country to have paid off its construction obligation to the United States for a Reclamation project.

We sat down and made an agreement, and we said that at some point in time we would make a contract with respect to how the United States would divide the water between the two

districts. That was important because when the Bureau of Reclamation ran the project, it ignored the state line. The deliveries it made to anybody in Texas or New Mexico weren't any different—they ignored the state line. Once the districts paid off the construction costs, and they received back their drainage and distribution system with the districts running the diversions from the dam, there had to be some agreement as to how the allocation of Project Water was going to work. Well, nothing was done about it for a long, long time because we had years of full water supply. At that time, I was busy

fending off the City of El Paso when it applied to drill 266 wells in southern New Mexico. We had other things on our plate.

Nothing really happened until 1997 when the United States, seeing the writing on the wall, filed a quiet title suit to rights in the Project. After the suite was filed, we went to court mediation. They wanted an answer to who owns what within the Project, and they gave money for mediation. At that point, the El Paso district started to mention concerns about pumping in New Mexico and how that pumping was affecting their deliveries. Mediation didn't go anywhere, and the parties were told to go back and proceed to argue in the state stream adjudication to see if they could sort out those issues. I'll talk more about that stream adjudication in a bit.

Drought returned, and in 2003, the State of Texas said it is very concerned about pumping in the Mesilla Valley that they said was affecting deliveries to the El Paso district. I think Texas raised \$3 million to undertake efforts to look at litigation, and I think New Mexico responded with \$3 million of its own. Then, Texas said, I call and raise you to \$6 million. It is really hard to get in a Texas Hold 'Em game with Texas—they keep raising.

At this time, Reclamation started getting extreme pressure by the El Paso district, which said, you're the one in charge here, you need to make

a decision about what you are going to do about pumping in New Mexico that is affecting the delivery of our supply. Reclamation came up with what we call the "ad hoc" allocation procedure. Reclamation tried to step in as a referee and said it would go through a series of credits that recognized carryover storage to resolve the problem. Neither district was happy with that. EBID thought they went too far, and the El Paso district thought they didn't go far enough. EBID ran to federal court in New Mexico and filed against the United States saying that Reclamation was allocating too much to the El Paso district. El Paso ran to the federal district court in El Paso and said the same thing, but the other way around, that the Bureau had lost its mind and was allocating too much to EBID, and we want you to settle it.

Since we beat them by two days, I thought we were going to have this case heard in New Mexico. Unfortunately for me, there is a mandatory mediation provision in the federal district court of Texas. So, right away, we went to mediation. We didn't think we would get anywhere, but lo and behold, we did. We actually resolved our differences in the Operating Agreement Settlement that describes how Reclamation will allocate the water between the two districts, and how EBID guarantees that supply to the El Paso district. The El Paso district abandoned its claim that EBID must account for groundwater pumping after the Compact. El Paso and EBID got carryover storage for each district. And now because the two districts get together and place their orders, the ebb and flows of water delivery from the river are much more controlled. This resulted in very good efficiency and delivery.

One of the key aspects of this is that we built in an annual operating manual review process to anticipate issues that we hadn't thought of, which now that I think about it, every compact should have. The Rio Grande Compact should have had that. The recent drought and the efficiency of the river was one of the issues picked up at the last meeting of the engineers to make sure that EBID was not unfairly punished for the decline in river efficiency. So, the Texas threat of filing in the U.S. Supreme Court was removed.

In the stream adjudication case (*NM v. EBID, et al.*, 96 CV-888 (1986)) that I

was talking about earlier, we recently completed working on the issue concerning the source or sources of water for the Rio Grande Project. The court recently granted the state motion that the U.S. has no claim to groundwater as a source of water for the Project, only surface releases. What the court didn't formally recognize was that from the release of 790,000 acre-feet, 930,000 acre-feet is actually delivered to farmers. How can that be? It is because there are 457 miles of drains within EBID that capture that water once it leaves the farm and is put back into the river system. The court indicated that it would not declare that as part of Project supply. It would let New Mexico State Engineer Scott Verhines in an administrative proceeding figure that out—it wasn't going to be easy to deal with it. Yesterday we argued what the priority date is for the Project.

NMSU Professor Phil King provided Figure 3 for those of you who don't understand how the surface water-groundwater-drain return interaction works. Note that the river feeds the diversion/conveyance to the canal. Then there is seepage from the canal. Water is put into the field; crop water use takes part of that, but the rest of it percolates down. The deep percolation hits the drains and that is the return flow. That is where the controversy is—that return product of the initial release of the Project. It makes it into the groundwater table, wells go in, the wells form a cone of depression—the red triangle in the figure. How do you manage that cone of depression? How do you make sure that it doesn't interfere with senior rights whether by Texas or New Mexico?

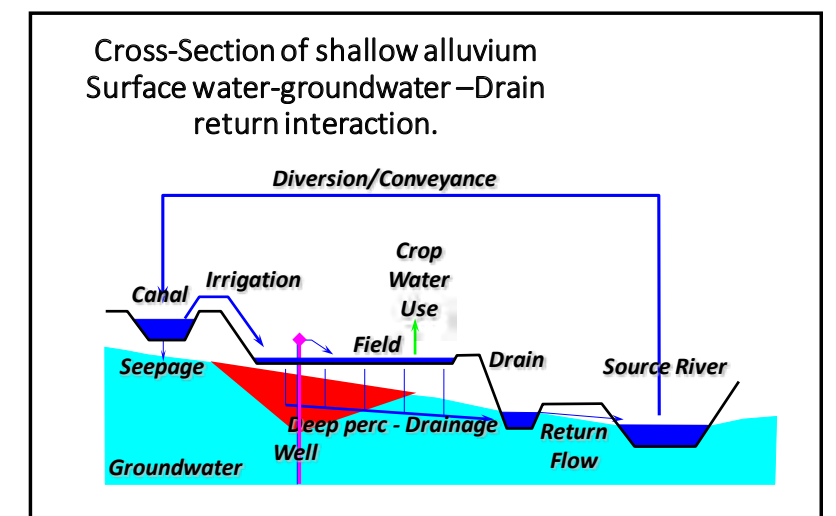


Figure 3. Surface water-groundwater drain return interaction. Courtesy of J. Phillip King

So, the New Mexico Attorney General files suit in 2011 on two grounds. The first was that the Compact accounting gave more water to Texas in a dispute over evaporation losses and the second ground was that the 2008 Operating Agreement Settlement had changed allocation of Project water in favor of Texas. There were two settlements in place: the Compact and the 2008 Operating Agreement Settlement. But obviously, nothing is ever settled because it continues in litigation and somebody will always find something that you missed.

Interestingly, that year the United States also allowed releases demanded by the International Boundary and Water Commission for Mexico under the treaty, which cost the districts 25,000 acre-feet of Project supply. The two districts believe that was a breach of the Mexican Treaty. Now that I have heard Tanya Trujillo's explanation of the deal with Mexico made from Colorado River water, I wonder if this wasn't part of the deal.

Motions to dismiss have been argued in the case, but Judge Browning has said that he is going to await the outcome of the decision by the United States Supreme Court in the January 8th State of Texas filing against New Mexico. Texas complains that as a result of New Mexico's actions, Texas does not receive its share of water apportioned by the Compact and allocated by the Rio Grande Project. They go back and cite their concern over the ruling by the adjudication court that does not recognize return flows as being part of the United State's right in water that composes Project supply and instead leaves that decision to an administrative hearing before the New Mexico State Engineer. Texas has now gone back to its previous position and says it wants all groundwater pumping in southern New Mexico initiated after the Compact accounted for. Everybody jumped into that case. Responses come from New Mexico, Colorado, the City of Las Cruces, El Paso County Water Improvement District #1, the City of El Paso, and Hudspeth Irrigation District. EBID did not file anything. The United States Supreme Court has asked the U.S. for their position. Right before the sequestration, the United States was ready to file their response. It has been put off so we are all on hold waiting to see if the U.S. Supreme Court retains this case. Then we intend to jump into the case as an intervenor.

It used to be that most Supreme Court cases involving states were limited to states and the United States. But guess what happened a couple years ago? *South Carolina v. North Carolina* 130 S.Ct. 854 (2010): for the first time in a water case, the U.S. Supreme Court has allowed non-state parties to come in if they can show some compelling interest in its own right apart from his interest in a class with all other citizens which interest is not represented by the state. In the South Carolina case, you have a district serving water users in two states and Duke Energy serving electricity in both states. The U.S. Supreme Court said these two parties can come in on this water dispute. The City of Charlotte, however, was found to have been represented by its state, so they were not allowed to intervene.

Even now when we think that compacts resolve all issues between the states, they are still in litigation. What the U.S. Supreme Court has done is to open the door to allow non-state parties to enter into these U.S. Supreme Court litigations. So you will see EBID attempt to intervene in this case—because I don't know if I am in New Mexico or I am in Texas.

Thank you.