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STATE OF NEW MEXICO
OFFICE OF THE STATE ENGINEER
CONCHA ORTIZ Y PINO BUILDING, 130 SOUTH CAPITOL, SANTA FE, NM 87501
TELEPHONE: (505) 827-6091

MIKE A. HAMMAN, P.E.
STATE ENGINEER

Mailing Address:
P.O. Box 25102
Santa Fe, NM 87504-5102

June 28, 2024

Jason Casuga, Chief Engineer/CEO
Middle Rio Grande Conservancy District
P.O. Box 581
Albuquerque, NM 87103

RE: Depletion Reduction Programs and the Rio Grande Compact

Dear Mr. Casuga:

Thank you for the Middle Rio Grande Conservancy District's (MRGCD) efforts to implement voluntary depletion-reduction programs. I am writing to provide an explanation from the New Mexico Office of the State Engineer (NMOSE), of the reasons farmer-members of the MRGCD should participate in such voluntary programs in order to facilitate deliveries under the Rio Grande Compact (Compact) to Elephant Butte Reservoir.

As you are aware, the State of New Mexico is obligated to deliver a quantity of water each year to Elephant Butte Reservoir. The precise obligation is calculated through an index set forth at Article IV of the Compact, as modified through the resolutions of the Rio Grande Compact Commission. New Mexico is currently in an accrued debit status, and depletions must be restricted if we are to meet the delivery obligations and climb out of the debit.

New Mexico's ability to store water upstream in post-1929 reservoirs is also restricted based on two different metrics. Article VII of the Compact prohibits junior upstream storage when usable water in Rio Grande Project storage (water in Elephant Butte and Caballo reservoirs combined) is less than 400,000 acre-feet. Additionally, under Article VI of the Compact, when New Mexico's accrued delivery status is negative, or in debit, New Mexico must reserve for the Lower Rio Grande any native water stored, up to the amount of the debit, before we can store any native water for use in the middle Rio Grande.

These restrictions have real consequences for MRGCD because El Vado Reservoir is a post-1929 reservoir. In other words, when New Mexico is in Compact debit status and/or Rio Grande Project storage is less than 400,000 acre-feet, MRGCD cannot store native water under its El Vado storage permit. Thus, for these reasons alone, it is in the interest of MRGCD's members to facilitate reducing depletions in the middle Rio Grande to help deliver more water to Elephant Butte and climb out of Compact debit status.

There are potentially greater consequences for New Mexico's water users if New Mexico's accrued compact debit status climbs above 200,000 acre-feet. New Mexico's Compact debit is currently 121,500 acre-feet. That number has grown steadily since 2018, when the Compact debit stood at near zero acre-feet.

Article VI of the Compact states that New Mexico's compact debit "shall not exceed 200,000 acre-feet at any time." While the Compact does not specify Texas's remedy should New Mexico violate this provision, there is reason to believe that the remedy Texas would seek would be extraordinarily painful for nearly all water users in the middle Rio Grande.

Under U.S. Supreme Court precedent, the use of water rights under state law is subordinate to a state's obligations under an interstate compact. In *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108 (1938) the Supreme Court ruled that a State could curtail uses by senior water users when necessary to honor interstate obligations, because no user within a state is entitled to use any greater right than the state's equitable share under the compact.

If New Mexico exceeds the 200,000 acre-foot threshold, Texas could file an original action against New Mexico seeking an injunction requiring New Mexico to take all actions necessary to deliver water to Texas until the debit falls below 200,000 acre-feet. While it would be impossible to know what relief a court would ultimately order, all diversions of native surface or groundwater within the middle Rio Grande, other than Pueblo water rights, could be vulnerable to a Compact call.

The only water rights that would not be subject to curtailment in the event of a Compact call would be Pueblo water rights, which are protected against impairment under Article XVI of the Compact, and San Juan-Chama Project (SJC) contract allocations, which are protected under Article X of the Compact. The amount of SJC water that MRGCD could use, however, would be limited to MRGCD's SJC allocation in that year, any carryover SJC storage from previous allocations, or any leased water acquired from other SJC contractors.

The use of groundwater wells, including pre-basin wells and wells with pre-1907 rights, for irrigation, stock, municipal, and domestic use would all be vulnerable to a Compact call as well. This would have an impact on many farmers and ranchers, as well as many municipalities. While New Mexico would seek to protect the ability of municipal and domestic users to utilize water indoors, there could be extreme restrictions on other municipal and domestic uses of water, such as outdoor watering or washing cars.

The scenario outlined above represents a worst-case scenario that would have extremely negative consequences for all New Mexicans within the middle Rio Grande. Most non-Pueblo farms could receive little, if any, surface water, and could not use wells; livestock watering could be negatively affected; and municipalities and domestic users could see extreme water rationing and the potential loss of trees and other vegetation.

The NMOSE and New Mexico Interstate Stream Commission (NMISC) are committed to doing everything possible to prevent these scenarios from occurring. The New Mexico State Legislature has appropriated to the agency significant funding to address the river channel, drains and the Low Flow Conveyance Channel to increase delivery efficiencies to Elephant Butte Reservoir. Funding

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was also allocated to encourage interim fallowing to provide financial incentives for MRGCD farmers who may otherwise lose crops during shortages. This investment is intended to compliment the extensive efforts of MRGCD to reduce depletions in accordance with available supplies and with an eye toward assisting the state in meeting the annual Compact delivery requirement. We are aware of the MRGCD's efforts to bring its farmers into compliance with its own Water Distribution Policy through more investments in metering, monitoring and education and we are willing to assist with these conservation programs and provide state dollars to help leverage federal grants for these purposes. Those activities will go a long way towards preventing a breach of the 200,000 acre-foot threshold.

Ultimately, the NMOSE and NMISC will also seek to work with all major water users on planned management of available surface water and groundwater based on hydrologic and Compact conditions, including shortage sharing, to ensure that New Mexico is never in danger of crossing the threshold, while also giving water users certainty about the amount of water they will be able to use under given hydrologic conditions. In other basins in New Mexico (including the lower Rio Grande and Pecos), litigation over alleged compact violations has cost the state and water users millions of dollars.

Ultimately, regardless of whether litigation takes place, reducing depletions and managed shortage sharing, as well as improving infrastructure, are the best avenues for maintaining Compact compliance and avoiding catastrophic curtailment. We therefore encourage and will support MRGCD and its members in being proactive in carrying out depletion reduction programs, and in working with the NMOSE/NMISC and other stakeholders towards an agreed shortage sharing plan that will be part of a comprehensive Compact compliance strategy.

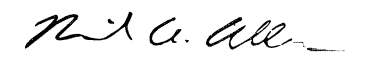

Sincerely,



Mike A. Hamman, P.E.
State Engineer



Hannah Riseley-White, Director
Interstate Stream Commission



Nat Chakeres
OSE General Counsel

MAH/HRW/NC/kme

cc: Stephanie Russo Baca, Chair of MRGCD Board