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TEXAS COMMISSION ON ENVIRONMENTAL QUALITY

Protecting Texas by Reducing and Preventing Pollution

May 18, 2012

Mr. Edward Drusina
Commissioner, United States Section
International Boundary and Water Commission
The Commons, Building C, Suite 310
4171 N. Mesa Street
El Paso, Texas 79902

Re: Allocation of Water at Fort Quitman

Dear Commissioner Drusina:

As you are aware, Texas has raised an issue concerning the accounting of the waters passing the stream gage at Fort Quitman. These waters are clearly assigned to the United States under the 1906 Convention. IBWC has no authority to split this ownership under the 1944 Treaty. Our recent discussions at the irrigation managers meeting and this letter provide an opportunity to address this issue further.

Please accept this letter on behalf of the TCEQ, the Lower Rio Grande Valley Water District Managers' Association, Rio Grande Regional Water Authority, Watermaster Advisory Committee and the Rio Grande Regional Water Planning Group representatives with whom I have discussed this issue and who share the below outlined position.

TCEQ Chairman Buddy Garcia formally raised this issue in a letter to IBWC Commissioner Carlos Marin on June 30, 2008. After Commissioner Marin's untimely death, Acting IBWC Commissioner Alfredo Riera responded to Chairman Garcia's letter on November 5, 2008 indicating that their review of historical records does not support a change in the accounting practice.

The TCEQ and others have conducted additional research into this matter. It is fascinating to research how the 1906 Convention, the Rio Grande Compact, the Rio Grande Project, and the 1944 Treaty were all negotiated, agreed upon, and implemented. I believe we have to understand each, and the intent behind them, to implement them appropriately. I believe the IBWC has failed to do so regarding this issue.

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The 1906 Convention was the first agreement which divided the waters of the Rio Grande above Fort Quitman between the United States and Mexico. The Convention provided Mexico their water in the bed of the Rio Grande at a point where the head works of the Acequia Madre existed. The Convention recognized that Mexico **waived all claims** to water of the Rio Grande between the Acequia Madre and Fort Quitman; therefore all flows reaching the stream gage at Fort Quitman belong to the United States. The Rio Grande Project provided for the construction of Elephant Butte Reservoir which serves to provide Mexico's allocation of water and provides the return flows which reach Fort Quitman.

In 1938, the States of Colorado, New Mexico, and Texas entered into the Rio Grande Compact. During the negotiations of the Compact, the lower Rio Grande valley wanted a scheduled delivery of water, 200,000 acre-feet at Fort Quitman. They were advised that the return flows from the Rio Grande Project at Fort Quitman were approximately 200,000 acre-feet per year and that these flows would likely not diminish because of the need to flush the salts from project lands. Thus, they removed their opposition to the approval of the Compact.

Following the completion of the Rio Grande Compact, the 1944 Treaty with Mexico was developed and executed. Historical sources of the negotiations that led to the 1944 Treaty report that in February 1943, Mexico proposed that its 60,000 acre feet of upper Rio Grande water under the 1906 Convention be increased by one-half of the flows in the Rio Grande between El Paso and Fort Quitman. The US refused to consider this proposal stating that the earlier treaty had settled this question. As noted above, Mexico **waived its claims** to flows in that reach, and the 1944 Treaty did not change this waiver and those flows remained owned 100% by the US.

The 1944 Treaty was developed knowing full well that the Rio Grande valley believed that the average return flows of 200,000 acre-feet at Fort Quitman belong to them. I believe that is the reason the 1944 Treaty Article IV(d) states "One-half of all other flows not otherwise allocated by this Article occurring in the main channel of the Rio Grande (Rio Bravo), including the contributions from all the unmeasured tributaries, which are those not named in this Article, between Fort Quitman and the lowest major international storage dam". In other words allocations under the 1944 Treaty begin **below** and not **at** Fort Quitman.

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Acting Commissioner Riera's letter directed us to the testimony of Bureau of Reclamation Commissioner Harry W. Bashore before Committee on Foreign Relations, U. S. Senate in January 1945. Commissioner Bashore stated that "Returning to conditions on the Rio Grande, we find that approximately 2,000,000 acre-feet of water rise in the States of Colorado, New Mexico, and Texas. Diversions and developments on the river consume nearly all of this and the flow, largely return flow from the irrigation, amounts to approximately 200,000 acre-feet at Fort Quitman, and becomes part of the amount which will be divided under this treaty." The 200,000 acre-feet of return flows is the amount of water the lower Rio Grande understood they would be provided.

While we agree the testimony says the 200,000 becomes part of the amount divided under this treaty, we disagree that is to be divided 50/50. As you know, the treaty divides and allocates all waters below Fort Quitman. Some of it is allocated all to one country, some 50/50, and some streams have delivery requirements. Nothing says the water at Fort Quitman is divided 50/50, in fact I believe the lower Rio Grande always understood otherwise.

Our research led us to several internal IBWC memoranda on this issue. These memoranda are dated May 27-28, 1953, September 21, 1953, August 4, 1955, and February 10, 1958. While IBWC uses these documents to support the division of the water at Fort Quitman 50/50, they are all apparently based on nothing more than the vague testimony of Commissioner Bashore.

Article 25 of the 1944 Treaty states "Decisions of the Commission shall be recorded in the form of Minutes....." It goes on to say "If either Government disapproves a decision of the Commission the two Governments shall take cognizance of the matter, and if an agreement regarding such matter is reached between the two Governments, the agreement shall be communicated to the Commissioners, who shall take such further proceedings as may be necessary to carry out such agreement. It appears IBWC did not adhere to the protocol outlined in Article 25. The decision to allocate the waters at Fort Quitman was done at the level of the Principal Engineers; an official Minute was never drafted or approved reflecting the accounting practice.

Mr. Edward Drusina

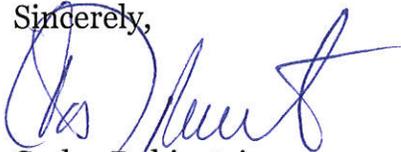
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I believe it was the intent of both the 1906 Convention and the 1944 Treaty that the waters of the Rio Grande that originate above and reach Fort Quitman be allocated entirely to the United States. This is consistent with the understanding of those involved with the negotiations which resulted in both the 1944 Treaty and the 1938 Rio Grande Compact. Further, it is time that this matter be formally resolved in accordance with the formal process outlined by the Treaty. To this end, I request that following your review of this letter, we schedule a face to face meeting with US IBWC representatives and the aforementioned entities to resolve this issue.

Sincerely,

A handwritten signature in blue ink, appearing to read 'Carlos Rubinstein', with a stylized flourish extending to the right.

Carlos Rubinstein
Commissioner