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.

OFFICE OF THE SPECIAL MASTER

CONSOLIDATED REPLY TO THE PARTIES IN SUPPORT OF STATE OF NEW MEXICO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COMPACT APPORTIONMENT

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ABBREVIATIONS FOR BRIEFS CITED

	Full Title of Brief		Abbreviation
	New Mexico Briefs		
1	State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support		Apportionment Motion *or* N.M. App. Mot. *or* N.M. App. Br.
2	State of New Mexico's Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of Its Alleged Shortage and Brief in Support		Notice Motion *or* N.M. Notice Mot. *or* N.M. Notice Br.
3	State of New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Certain Years and Brief in Support		Full Supply Motion *or* N.M. Full Supply Mot. *or* N.M. Full Supply Br.

	Full Title of Brief		Abbreviation
4	State of New Mexico's Response to the State of Texas's Motion for Partial Summary Judgment		N.M. Resp. Tex.
5	State of New Mexico's Response to United States of America's Motion for Partial Summary Judgment		N.M. Resp. U.S.
6	State of New Mexico's Consolidated Statement of Material Facts		NMCSMF
7	Consolidated Reply to Parties in Support of State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment		N.M. App. Reply
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9	Consolidated Reply in Support of State of New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Certain Years		N.M. Full Supply Reply *or* N.M. FS Reply
10	State of New Mexico's Consolidated Reply to *Amicus Curiae* Elephant Butte Irrigation District, City of El Paso, and El Paso County Water Improvement District Regarding Apportionment of Water Below Elephant Butte Reservoir		N.M. *Amicus* Reply
11	State of New Mexico's Response to State of Texas's Evidentiary Objections		Response to Texas Objections *or* N.M. Resp. Tex. Obj.
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17	The State of Texas's Response to and in Support of the United States of America's Motion for Partial Summary Judgment		Tex. Resp. U.S.
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	United States Briefs		
19	The United States of America's Motion for Partial Summary Judgment		U.S. Motion *or* U.S. Mot. *or* U.S. Br.

	Full Title of Brief		Abbreviation
20	United States of America's Memorandum in Response to the State of New Mexico's Motions for Summary Judgment		U.S. Response *or* U.S. Resp.
21	The United States of America's Response to the State of New Mexico's Statements of Undisputed Material Facts		U.S. Resp. UMF
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The State of New Mexico hereby replies in support of its Motion for Partial Summary Judgment on Compact Apportionment as follows:

UNDISPUTED MATERIAL FACTS

New Mexico addresses each of the undisputed material facts and related argument from Texas and the United States in its Reply to the Statement of Facts, which is filed concurrently herewith.[1] As New Mexico explains therein, and in Section I.B below, Texas and the United States fail to establish a genuine dispute over the material facts.

ARGUMENT

I. THE UNDISPUTED MATERIAL FACTS SHOW THAT NEW MEXICO IS ENTITLED TO SUMMARY JUDGMENT

A. New Mexico's Apportionment Position Is the Only Position that Is Consistent with the Compact's Plain Language, the Negotiating History, the Course of Performance, and the 2018 Decision

Now that the briefing on the apportionment is complete, the positions of the Parties on the apportionment have come into focus.

Texas asserts that ***all*** of the water delivered to Elephant Butte Reservoir belongs to Texas, and none is apportioned to New Mexico. It reads into the Compact's silence an intent for New Mexico to surrender all sovereign right to water (including hydrologically connected groundwater) to serve the roughly 88,000 acres of prime agricultural land south of the Reservoir as well as numerous municipalities. Although the Compact contains no language distinguishing Texas from New Mexico below Elephant Butte, Texas claims that it has a *Compact* apportionment to 43% of Project supply, while 57% of Project supply is available to EBID (as opposed to the State of New Mexico) pursuant to a *contract* right alone.

[1] New Mexico has also filed a Response to Texas's Evidentiary Objections.

Unlike Texas, the United States acknowledges that New Mexico has a Compact apportionment below Elephant Butte. According to the United States, however, the Compact "does not specify amounts of water 'apportioned' to each state" below Elephant Butte Reservoir. U.S. Resp. 2. Thus, the United States argues that there is no way to "quantify" the amount of water that each State is entitled to receive, leaving the States no way to ensure Compact compliance or to establish liability in this case.[2]

Colorado, for its part, adopts the reasoning of the Motion to Dismiss that was rejected by Special Master Grimsal by claiming that there was no apportionment below Elephant Butte at all.

Only New Mexico offers a complete and holistic understanding of the apportionment. As detailed in its opening brief and in this Reply brief, New Mexico contends that the Compact apportions water below Elephant Butte to both New Mexico and Texas. After accounting for the water allocated to Mexico by Treaty, the water is apportioned 57% of Project supply to New Mexico and 43% of Project supply to Texas. New Mexico's position is equitable to both States. It is based on the purpose of the Compact to "effect[] an equitable apportionment," and the requirement that Project water be released to meet "irrigation demands" in both New Mexico and Texas with a "normal release" of 790,000 acre-feet, if available. New Mexico's position is founded on the longstanding and undisputed principle that each acre of Project land is entitled to an equal amount of Project water. New Mexico's position is thus grounded in the plain language of the Compact, and it is the only apportionment position that explains all of the language of the Compact. New Mexico's apportionment position is also the only position that is consistent with

[2] The United States' full position on the quantification below Elephant Butte is not clear, even after the extensive briefing. The United States acknowledges that the Downstream Contracts inform the apportionment. U.S. Resp. 17. It further admits that those same Downstream Contracts "call[] for a 57%-43% division," but only "when there is a shortage of water for irrigation." *Id*. (internal quotation marks omitted). The United States thus appears to acknowledge that the apportionment *can be quantified*, in times of shortage. *See* Section III.E.1, *supra*.

the negotiating history, the long course of performance, and the 2018 Decision. As discussed in detail below, the Court should grant New Mexico's Apportionment Motion.

B. Texas and the United States Have Failed to Identify Material Disputes Over Facts

Texas and the United States purport to address each of the Undisputed Material Facts ("UMF") articulated by New Mexico in its Motion. In most instances, Texas and the United States claim to dispute each of the material facts. The vast majority of these alleged disputes, however, do not rise to the level necessary to overcome summary judgment.

For example, New Mexico UMF No. 63 (reprinted as No. 154 in New Mexico's Consolidated Statement of Material Facts ("NM-CSMF")) is illustrative. New Mexico UMF No. 63 states:

> From 1951 through 1979, Reclamation allocated Project deliveries on an equal basis to all Project lands and delivered allocated water directly to Project lands. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:19-59:7; NM-EX 511, Filiberto Cortez, Lower Rio Grande Project Operating Agreement: Settlement of Litigation 4 (Oct. 2008) ("Cortez Presentation"); NM-EX 100, Barroll Rep. 31-32.

NM Br. 11.

In response, Texas argues:

> Subject to the stated objections, disputed in part. New Mexico's reference in paragraphs 60, 63 and 64 of the NM MSJ on Apportionment regarding how Project supply was historically allocated based on an equal acre foot per acre basis is not relevant to apportionment of Rio Grande Water under the Compact. This allocation applies solely to Project water already stored in Elephant Butte Reservoir and inflows to the Rio Grande downstream of the reservoir, whereas the Compact applies to Rio Grande deliveries to Elephant Butte Reservoir. Project allocations made to respond to orders by the District water users do not form the basis of Texas's Compact apportionment. The Compact requires New Mexico to deliver prescribed and indexed quantities of Rio Grande water to Texas in Elephant Butte Reservoir. The 1906 treaty with Mexico and the contracts between the federal government and the Districts then allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. *See* Brandes Dec. in Opp. to NM at Tex._MSJ_007312, paragraphs 1-9, 25-27.

Tex. Evid. 48.

> The United States responds as follows to New Mexico UMF 63:
>
> RESPONSE: Disputed. From 1951 through 1979, Reclamation enforced an equal amount of water to each acre during years of inadequate supply. In other years the on-farm delivery may not have been based on equal basis to each acre. NM-EX-202, Cortez 7/30/20 Dep. Tr. 58:19-59:7.

U.S. Resp. UMF 21, ¶ 63. A review of the United States' citation reveals no evidence contrary to UMF No. 63.

"Summary judgment … is inappropriate when the evidence is susceptible of different interpretations or inferences by the trier of fact." *Hunt v. Cromartie*, 526 U.S. 541, 553 (1999). "If reasonable minds could differ as to the import of the evidence, summary judgment should not be granted." *Anderson v. Liberty Lobby*, Inc. 477 U.S. 242, 250 (1986).

"The obligation of the non-moving party to establish a genuine issue of material fact, however, is not trivial." *Montana v. Wyoming*, No. 137 Original, *Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgment (Notice Requirement for Damages)* at 3 (Sept. 28, 2012) ("*Montana* PSJ Opinion"). Rather, Rule 56(c) provides that an adverse party's response to a motion for summary judgment, by affidavit or other permissible evidence, must "cit[e] to *particular parts of materials* in the record." Fed. R. Civ. P. 56(c)(1)(A) (emphasis added). Those materials must be contrary to the evidence cited in the motion.

Where affidavits or other evidence requires inferences to be drawn, all such inferences "must be made in favor of the non-movant." *Davis v. City of Chicago*, 841 F.2d 186, 189 (7th Cir. 1988). "Inferences may be drawn from underlying facts that are not in dispute, such as background or contextual facts, and from underlying facts on which there is conflicting direct evidence but which the judge must assume may be resolved at trial in favor of the nonmoving party." *T.W.*

Electrical Serv., Inc. v. Pacific Electrical Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987), (citing *First Nat'l Bank v. Cities Serv. Co*., 391 U.S. 253, 285-86 (1968)). That said, inferences must be "reasonable." *Davis,* 841 F.2d at 189; *T.W. Electrical Serv*., 809 F.2d at 631. "Clearly, there must be some limit on the extent of the inferences that may be drawn in the nonmoving party's favor from whatever 'specific facts' it sets forth; if not, Rule 56[]'s requirement of 'specific facts' would be entirely gutted" *T.W. Electrical Serv.,* 809 F.2d at 631. Furthermore, the "mere possibility that a factual dispute may exist, without more, is an insufficient basis upon which to justify denial of a motion for summary judgment." *Id*.

For example, in *Lujan v. National Wildlife Federation*, 497 U.S. 871 (1990), one issue was the plaintiff's standing to challenge reclassification of public lands in Wyoming. The affidavit of one of the plaintiff's members claimed that she used lands "in the vicinity" of the public lands at issue. *Id*. at 846. The Court of Appeals held that this was sufficient to prevent summary judgment. Noting that the affidavit was at a minimum ambiguous regarding the specific lands she used, the Court of Appeals concluded that the ambiguity "means that the District Court was obliged to resolve any factual ambiguity in favor of [plaintiff], and would have had to assume, for the purposes of summary judgment, that Peterson used the 4500 affected acres." *Id*. at 889. A majority of the Supreme Court disagreed, emphasizing the importance of specificity and not simply assuming critical facts on summary judgment:

> That is not the law. In ruling upon a Rule 56 motion, "a District Court must resolve any factual issues of controversy in favor of the non-moving party" only in the sense that, where the facts specifically averred by that party contradict facts specifically averred by the movant, the motion must be denied. That is a world apart from "assuming" that general averments embrace the "specific facts" needed to sustain the complaint. As set forth above, Rule 56(e) provides that judgment "shall be entered" against the nonmoving party unless affidavits or other evidence "set forth specific facts showing that there is a genuine issue for trial." The object of this provision is not to replace conclusory allegations of the complaint or answer with conclusory allegations of an affidavit. …. At the margins there is some room

> for debate as to how "specific" must be the "specific facts" that Rule 56(e) requires in a particular case. But … Rule 56(e) is assuredly not satisfied by averments which state only that one of respondent's members uses unspecified portions of an immense tract of territory ….

Id. at 888-889; *see also Hadley v. County of Du Page*, 715 F.2d 1238, 1243 (7th Cir. 1983); *David*, 841 F.2d at 189.

More recently, in *Montana v. Wyoming*, another interstate case, Special Master Thompson granted summary judgment despite the presence of generally contrary evidence. That motion addressed the years in which Montana had provided notice of its water shortage to Wyoming. Deposition testimony indicated that notice had been provided "every time there was a drought" or low flows. *Montana* PSJ Opinion at 18. The Special Master found that evidence insufficient, however, because it was no more than a "broad conclusory statement." *Id*.

That same reasoning applies here. Neither the United States' nor Texas's response to New Mexico UMF No. 63 meets the summary judgment standards necessary to establish a disputed fact. Neither cites to specific evidence that actually shows a disputed issue that must be resolved by the Special Master or the Court at trial. Instead, Texas argues that the fact is irrelevant, and the United States speculates, without evidence or "contradict[ory] facts," that "the on-farm delivery *may* not have been based on an equal basis to each acre" in other years. Taken together, those statements are insufficient to create a genuine issue of material fact.

As discussed in New Mexico's Reply to Statement of Facts, the majority of the other "disputed" facts suffer from the same defects. As a result, Texas[3] and the United States have not established a genuine issue of material fact on the apportionment issue.

[3] Texas also misstates the standard for objecting to evidence on a motion for summary judgment. *See* Fed. R. Civ. Pro. 56(c) and New Mexico's Response to State of Texas's Evidentiary Objections.

C. The Undisputed Facts Establish that New Mexico Is Entitled to Summary Judgment

Applying the correct standard, a careful review indicates that neither Texas nor the United States presents evidence that genuinely disputes any of the following material facts:

- The States agreed that the Compact should protect the existing pre-Compact uses of water in all three States, including the Project irrigated acreage located in New Mexico. UMF ¶¶ 20-21, 39 (i.e., NM-CSMF ¶¶ 27, 29, 67, respectively).
- One purpose of the Compact is to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." UMF ¶ 25 i.e., NM-CSMF ¶ 34).
- Another purpose of the Compact is 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." UMF ¶ 25 (i.e., NM-CSMF ¶ 34).
- The Compact identifies a "normal release" as 790,000 acre-feet, which is an amount of water sufficient to irrigate Project lands in both New Mexico and Texas. UMF ¶¶ 23, 28, 43 (i.e., NM-CSMF ¶¶ 31, 38, 71, respectively).
- One purpose of the Compact was to protect the existing operations of the Project. UMF ¶ 38 (i.e., NM-CSMF ¶ 66).
- Prior to the negotiation of the Compact, Reclamation administered the Project as a single unit. UMF ¶ 40 (i.e., NM-CSMF ¶ 40). The States contemplated that the Project would continue to be operated as a single unit for at least the foreseeable future. UMF ¶ 41.

- Texas Compact Commissioner Clayton explained the division of water and Compact as follows:

  > [T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according the areas involved in the two States. By virtue of the contract recently executed, the total areas is 'frozen' at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a 'cushion' of three per cent for each figure.

  UMF ¶ 46 (i.e., NM-CSMF ¶ 76); *see also* UMF ¶ 47 (i.e., NM-CSMF ¶ 77).

- Prior to 1980, Project water was allocated to all Project lands on an acre-foot-per-acre basis so that each acre was entitled to receive an equal amount of water. UMF ¶¶ 56, 60, 63 (i.e., NM-CSMF ¶¶ 148, 132, 154, respectively); See also NM-CSMF ¶ 217; NM-EX 602, RFA No. 12.

- The Court held that the Compact "implicitly . . . incorporate[d] the Downstream Contracts by reference." *Texas v. New Mexico*, 138 S. Ct. at 959. It is undisputed that the 1938 Downstream Compact provides that "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in proportion" to the acreage. UMF ¶ 57 (i.e., NM-CSMF ¶ 141).

- The Downstream Contracts quantified the irrigable acreage in each district such that 57% of Project lands are located in New Mexico and 43% of Project lands are located in Texas. UMF ¶ 58 (i.e., NM-CSMF ¶ 141).

- In 1951, Reclamation determined that 3.0241 acre-feet per acre constituted a full allocation to Project lands. NM-EX 202, Cortez Dep. (July 30, 2020), 19:8-20:4; UMF ¶ 62 (i.e., NM-CSMF ¶ 153); NM-EX 612 at Interrog. No. 13.
- From 1951 until 1978, Reclamation allocated Project deliveries on an equal basis so that each acre of Project land was entitled to receive an equal amount of water. UMF ¶ 63 (i.e., NM-CSMF ¶ 154); NM-EX 602 at 7-8, RFA No. 13; NM-EX 612 at Interrog. No. 13.
- The D2 method was developed to calculate the amount of water that was needed at the main canal headings to make the 3.0241 acre-feet per acre deliveries to Project lands. UMF ¶ 69 (i.e., NM-CSMF ¶ 166).
- The D1/D2 method was used from 1980 until 2005. The D1/D2 method allocates water to each District based on the 57%-43% ratio of irrigable lands in EBID and EPCWID. UMF ¶¶ 70, 73, 76 (i.e., NM-CSMF ¶¶ 163, 174, 176, respectively); NM-EX 602 at 8, RFA Nos. 14 and 15.

See generally New Mexico's Reply to Statement of Facts. As discussed below, these facts, coupled with the plain language and structure of the Compact, establish that New Mexico is entitled to partial summary judgment.

II. REPLY TO THE STATE OF TEXAS

Texas makes three arguments to avoid partial summary judgment on the apportionment issue: (1) the Special Master need not follow the 2018 Supreme Court Decision because it is dicta and is in no way relevant to the issue of apportionment; (2) the text and structure of the Compact does not support New Mexico's theory of apportionment; and (3) selected factual disputes preclude summary judgment. As demonstrated below, each of these arguments should be rejected.

A. Texas's Argument Is Inconsistent with the Prior Decisions in this Case

In its Response, Texas again invites the Special Master to disregard the 2018 Decision of the Supreme Court. Tex. App. Resp. 8-9. Texas argues that the Court's discussion of the Downstream Contracts and the equitable apportionment "was, at most, dictum." *Id*. at 9. New Mexico previously explained that the 2018 Decision provided meaningful guidance on the apportionment that was essential to the 2018 Decision. N.M. Resp. Tex. 3-4. Because this is an important issue, New Mexico further addresses Texas's dicta argument below.

In the 2018 Decision, the Court was addressing whether the United States "may pursue claims for violations of the Compact itself." *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018). The Court noted that the United States' allegations "parallel Texas's," *id.*, and that the United States sought "substantially the same relief" as Texas, *id*. at 960. Although the United States does not have "blanket authority" to intervene in compact disputes, the Court evaluated "several considerations" to determine whether this case presented an appropriate case for the United States to raise its "claims for violations of the Compact." *Id*. at 959.

The very first of these considerations was that "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts." *Id*. The Court noted that the Compact can only "effect an equitable apportionment" because through the Downstream Contracts the United States "assumed a legal responsibility to deliver a certain amount of water" to New Mexico and Texas. *Id*. "In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is in fact made." *Id.*

Dictum is language in a judicial opinion that is "not essential to [the court's] disposition of any of the issues contested" in the case. *See Central Green Co. v. U.S.*, 531 U.S. 425, 431 (2001). No reasonable analysis could result in a conclusion that the Court's express recognition that the

Compact equitably apportions the waters of the Rio Grande below Elephant Butte between New Mexico and Texas is dictum. Rather, the Court was explicit that the United States' duties under the Downstream Contracts, "which are themselves essential to the fulfillment of the Compact's expressly stated purpose" of effecting an equitable apportionment between New Mexico and Texas, was one of the factors that "persuaded" the Court to allow the United States "to pursue the Compact claims." *Id*. 959-60. *See also* April 14, 2020 Order of the Special Master at 18-19 (quoting the Court's finding that the United States is "charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made," and stating that one outstanding issue "is the exact clarification of each state's Compact-based equitable apportionment in reference to the Downstream Contracts and the Project") ("April 14 Order"). Texas's dicta argument lacks merit.

B. The Text and Structure of the Compact Support New Mexico's Understanding of the Compact

1. The Text and Structure of the Compact Confirm that New Mexico Has an Apportionment Below Elephant Butte

For its first argument regarding the text of the Compact, Texas claims that the "argument that the Compact's structure and plain language support the New Mexico Apportionment Scheme is incorrect." Tex. App. Resp. 7. In its Apportionment Motion, New Mexico explained:

> Once New Mexico meets its Article IV obligation, the water becomes "Usable Water" in "Project Storage," "which is available for release in accordance with irrigation demands, including deliveries to Mexico." *Id.* at 786 (Art. I(*l*) and I(k)). In its operation of the Project, Reclamation releases water for those uses identified in Article I(*l*) of the Compact pursuant to the Downstream Contracts and the 1906 treaty that were already in place when the Compact was signed. The Downstream Contracts froze the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte Reservoir at 57% for lands in New Mexico and 43% for lands in Texas. UMF ¶¶ 52-53, 57-58; *see New Jersey v. New York,* 523 U.S. 767, 783, n. 6 (1998) (existing background principles relevant to compact interpretation). Thus, by operation of the Project to deliver water for Article I(*l*) purposes, "the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring

> that the Compact's equitable apportionment to Texas and part of New Mexico is in fact made." *Texas v. New Mexico*, 138 S. Ct. at 959 (internal quotation marks omitted); *see also id.* ("Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts"). By operation of these provisions, New Mexico receives the remainder of its equitable apportionment of water under the Compact for lands in southern New Mexico, and Texas receives its entire equitable apportionment, through the Project, in the form of water released by the Project "in accordance with irrigation demands." *Id*. (Art. I(*l*)). Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage in each State. UMF ¶¶ 42-44, 55-56, 58-76; *Texas v. New Mexico*, 138 S. Ct. at 957.

NM App. Mot. 29-30. New Mexico further detailed that the Compact contemplates a "normal release" of 790,000 acre feet per year to satisfy "irrigation demands," and that "[t]his term was a key component of the negotiated equities because it defined the amount of water available to Project lands in both compacting States." *Id*. at 31. As explained by the Texas Engineer Advisor at the time of the Compact, a "normal release of 790,000 acre-feet per year from Project Storage" was intended "for use on lands in New Mexico downstream of Elephant Butte Reservoir and on lands in Texas." NM-EX 401 at 38.

New Mexico thus relied upon the plain language of Articles I(*l*), I(k), VI, VII, and VIII to support its argument that the Compact apportioned water to both New Mexico and Texas below Elephant Butte. Texas says that New Mexico "ignore[d]" the plain language, but that is obviously not the case. Texas's bald assertion that New Mexico's apportionment position is "incorrect," is difficult to countenance because Texas makes no effort *whatsoever* to address *any* of these arguments or the Compact provisions on which New Mexico relies. *See* Tex. App. Resp. 7-8, 10-12. Texas's position on the plain language of the Compact should be disregarded on that basis alone.

Next, Texas asserts that "[t]he plain language and structure of the Compact is that the delivery is to Texas." *Id*. at 7. Texas might have an argument if it were correct that the Compact

specified delivery "to Texas." *Id*. But as New Mexico explained in its Response to Texas's Motion, the Compact does not provide for "delivery . . . to Texas" as Texas alleges. Instead, the Compact specifies delivery at Elephant Butte, which is tantamount to delivery to the Project. And it is undisputed that the Project is "inextricably intertwined" with the Compact in order to "effect[] an equitable apportionment." *Texas v. New Mexico*, 138 S. Ct. at 959; N.M. Resp. Tex. 13. It is the releases and delivery of water through the Project that fulfil this purpose. Texas entirely fails to address this fact.

Last, Texas argues that New Mexico should be "embarrass[ed]" to claim an apportionment below Elephant Butte "for lands in southern New Mexico." Tex. Resp. 11. Texas reasons that New Mexico should not "get[] two apportionments, one above and one below Elephant Butte Reservoir." *Id*. But as New Mexico explained in its Response to Texas's Motion, at 4-22, it is not claiming "two apportionments" – it is claiming one apportionment sufficient to provide water for all its citizens, both above and below Elephant Butte. Ensuring an adequate water supply for all New Mexico's citizens is neither unreasonable nor unfair. *See generally, Hinderlider*, 304 U.S. at 107 (in negotiating the Compact, New Mexico was "acting as a quasi sovereign and representative of the interests and rights of her people"). Nor is it uncommon, as Texas suggests, for an interstate water compact to include more than one method for apportioning water for different parts of a state. NM Resp. Tex. 52-53. For example, the Yellowstone River Compact utilizes three different methods to apportion waters to different geographic regions in Montana. *See* Act of October 30, 1951, ch. 629, 65 Stat. 663 at Articles V(A), (B), and (D).

Importantly, through this argument, Texas takes the untenable position that New Mexico intentionally negotiated away its entitlement to water or protection for its citizens below Elephant Butte. As discussed in New Mexico's Response to Texas, NM Resp. Tex. 4-9, this is an

unprecedented argument that finds no support in the Compact, the historic record, or the Court's decisions.

2. The Compact Does Not Distinguish Between New Mexico and Texas Below Elephant Butte

Notably, Texas admits that New Mexico farmers are entitled to 57% of Project supply on New Mexico lands. It nonetheless argues that New Mexico's entitlement, unlike Texas's entitlement, is a "Project allocation, defined by the United States' Contracts with EBID." Tex. App. Resp. 12. According to Texas, this means "that the 57 to 43 percent split does *not* arise out of the Compact." *Id*. (emphasis in original). This is so, Texas continues, because New Mexico "has no rights pursuant to the United States' Downstream Contracts with EBID." *Id*. at 14. Texas's argument fails for five reasons.

First, as discussed in both New Mexico's Apportionment Motion (at 32-36) and New Mexico's Response to Texas's Motion (at 18-21), there is no basis (and Texas offers none) for treating Texas and New Mexico differently below Elephant Butte.

Second, Texas sets up a strawman when it claims that "[u]nder New Mexico's theory of the case, all the water that it delivers into the Reservoir is apportioned to it, subject to the 43 percent that EP#1 is allocated under its Downstream Contract." Tex. App. Resp. 13. That is not New Mexico's theory. Rather, New Mexico contends that the Project and the Downstream Contracts are "inextricably intertwined" with the Compact, and the Compact relied on existing principles to apportion 57% of the Rio Grande Project supply to New Mexico and 43% of Rio Grande Project supply to Texas, after taking into account the water owed to Mexico by Treaty. Even today, that represents a fair and equitable division of the water.

Third, Texas's theory that "[t]he water that New Mexico delivers into Elephant Butte Reservoir is the Texas *apportionment*, subject to the 57 percent Project *allocation* to EBID and the

Treaty with Mexico," suffers from debilitating conceptual holes. Tex. App. Resp. 13 (emphasis in original). For example, Texas Commissioner Gordon admits that Texas has no contractual or other relationship with EBID. NM-EX 212, Gordon Dep. (July 15, 2020), 13:1 – 15:17. And the Compact is an agreement among the three States, and does not include Reclamation, EBID or EPCWID. Because that is true, Texas has no way of explaining why 57% of *its* water is delivered to EBID, even though Texas and EBID have no contractual or other relationship. In other words, if Texas were correct that all of the water delivered to Elephant Butte belonged *to Texas*, there would need to be a contract, legal lever, or other mechanism that entitled EBID to receive water *from Texas*. There is no such mechanism, and Texas cannot explain why EBID is entitled to part of "Texas's water." *See* Texas Const. art. XVI § 59(a) (declaring that the rights to control "the waters of its rivers and streams" are "public rights and duties"); Tex. Water Code § 11.0121 ("The water of the ordinary flow, underflow and tides of every flowing river, natural stream and lake . . . is the property of the state.").

Fourth, for purposes of briefing, Texas now takes the position that the Rio Grande Project allocations to the Districts "are not coextensive with the apportionment." Tex. App. Resp. 13. But this is inconsistent with the position of Commissioner Gordon, who testified that the water apportioned to Texas is the same water that EPCWID is entitled to under its contract. NM-EX 212, Gordon Dep. (July 15, 2020), 11:25 – 12:10; NM-EX 259, Gordon Dep. (July 15, 2020) 20:11-21:11, 23:15-20; *see also* NM-EX 225, Settemeyer Dep. (July 30, 2020), 43:1-15 (explaining that the 43% allocation to EPCWID is the water apportioned to Texas). Commissioner Gordon not only testified that the 43% of Project supply that is allocated to EPCWID is the same amount that Texas claims in this case, but also that the Downstream Contracts "are incorporated into the Compact." NM-EX 212, Gordon Dep. (July 15, 2020), 11:25 – 12:10; NM-EX 259,

Gordon Dep. (July 15, 2020), 21:19 – 22:2. By incorporating the Downstream Contracts, the States transformed the division of water under those Contracts into the Compact apportionment.[4] At that point, the entitlement to 57% and 43% of Project supply became a State *Compact* entitlement.

Fifth, Texas argues that New Mexico "has no rights pursuant to the contracts, and has no obligations under the contracts." Tex. App. Resp. 14. Texas offers no persuasive reason why this fact is material, but if it is, the same reasoning applies to Texas. *See* NM Resp. Tex. 20-21. Like New Mexico, Texas also has "no rights pursuant to the contracts, and has no obligations under the contracts." Tex. App. Resp. 14. In Texas's words, "[EPCWID] is the only entity in [Texas] that has a contract with the United States to receive irrigation water from the Project below Elephant Butte Reservoir . . . and there is no action that [Texas] can take that can alter the rights provided to [EPCWID] under that contract." Tex. App. Resp. 15. In the end, however, it does not matter whether Texas and New Mexico are parties to the Downstream Contracts because when the Compacting States "implicitly . . . incorporate[d] the Downstream Contracts by reference," they adopted the 57%-43% division of water *as part of the Compact*. *Texas v. New Mexico*, 138 S. Ct. at 959.

3. Contrary to Texas's Assertion, New Mexico Has Always Claimed Water Below Elephant Butte to Serve Its Citizens

Texas recycles its argument that New Mexico has previously admitted that it does not have a Compact apportionment below Elephant Butte. That is incorrect. State Engineer John D'Antonio, and Estevan Lopez, the former Director of the New Mexico Interstate Stream Commission, and the former New Mexico Engineer Advisor to the Rio Grande Compact, both

[4] This is true whether or not Commissioner Gordon is correct that the Project allocation and Compact apportionment are the same.

testified that "[p]rior to this litigation, New Mexico has consistently taken the position that the waters below Elephant Butte Reservoir are divided according to the acreage in each State so that New Mexico is entitled to 57% and Texas is entitled to 43% of Project supply." NM-EX 002, D'Antonio Decl., ¶ 13; *see also* NM-EX 003, Lopez Decl., ¶ 17; NM-EX 004, Schmidt-Peterson Decl., ¶ 12. And it is undisputed that the Rio Grande Compact Commission has unanimously stated its position that both States have a Compact entitlement below Elephant Butte that is impacted by Project operations. NM-CSMF ¶¶ 104-108.

Texas assigns importance to its observation that "whatever interest New Mexico may have below Elephant Butte Reservoir . . . is limited to the rights that exist pursuant to the EBID contracts." Tex. App. Resp. 15. New Mexico accepts that its apportionment below Elephant Butte is limited to 57% of Project supply, just as Texas accepts that its apportionment below Elephant Butte is limited to 43% of Project supply. NM-EX 212, Gordon Dep. (July 15, 2020), 11:25-12:6; NM-EX 259, Gordon Dep. (July 15, 2020), 20:11-21:11, 23:15-20; NM-EX 255, Settemeyer Dep. (July 30, 2020), 43:1-15. This in no way diminishes either State's sovereign interest to its Compact apportionment, and Texas offers no argument to the contrary.

Finally, Texas points to the 1951 original jurisdiction case over the Rio Grande Compact. In that case, Texas sued New Mexico over water administration above Elephant Butte Reservoir. Texas identifies a statement from one of the briefs and suggests that it supports its assertion that New Mexico has "never argued that it had an apportionment of Rio Grande water below Elephant Butte Reservoir." Tex. App. Resp. 16. As with many of its assertions, a closer look reveals that Texas is mistaken.

Texas limits the language it relies upon from the brief; the full quote reads:

> *Rights to the use of water stored in Elephant Butte Reservoir on said land in Texas above Fort Quitman* is based upon and exists solely by reason of contracts

> entered into between the Secretary of the Interior, acting for the United States, on the one hand, and the water users or representatives of the water users, on the other hand. The Rio Grande Compact does not attempt to make any apportionment between the New Mexico area and the Texas area below Elephant Butte.

State of Texas v. State of New Mexico, Orig., No. 9*, Return of Defendants to Rule to Show Cause* at 3 (Dec. 15, 1951) (emphasis added). It is clear that this passage is referring to the use of water "on said land *in Texas*," which "exists solely by reason of contracts." It was not intended as a limitation on New Mexico's right to use water below Elephant Butte, as Texas suggests.

New Mexico went on to explain in 1951 that "[t]he State of New Mexico, as *parens patriae*, will stand in judgment for all of its water users in an original interstate action." *Id.* at 6. Because that is true, it explained that Texas had no standing to raise claims impacting any New Mexico citizens, including EBID. *Id*. at 7. In that way, New Mexico confirmed its responsibility for all water and water users in New Mexico, including those physically located below Elephant Butte.

Later in the proceeding, New Mexico clarified the intended use of Project supply:

> Water delivered at San Marcial for Elephant Butte and Caballo Reservoirs is utilized for the following purposes: (1) Satisfaction of the international obligation of the United States to deliver water to Mexico; (2) *the irrigation of approximately 86,000 acres of land in the Elephant Butte Irrigation District in New Mexico*; and (3) the irrigation of approximately 64,000 acres in El Paso Water Improvement District No. 1 in Texas.

State of Texas v. State of New Mexico, Orig., No. 9*, Answer of the State of New Mexico* at 3 (Aug. 14, 1952) (emphasis added). Thus, the positions in the 1951 case in no way assist Texas in its claim that all of the water delivered to Elephant Butte belongs to Texas. Rather, New Mexico has always mai ntained a State entitlement to the water necessary to supply its citizens below Elephant Butte – 57% of Project supply. Texas's implication to the contrary is flatly incorrect.

Lastly, Texas's assertion that New Mexico has "never argued that it had an apportionment of Rio Grande water below Elephant Butte Reservoir," is demonstrably false. In the last case to

address the issue of the apportionment below Elephant Butte, New Mexico explicitly argued that "the Compact . . . apportions the surface waters of the Rio Grande between New Mexico and Texas" below Elephant Butte. *City of El Paso v. Reynolds*, 563 F. Supp. 379, 384 (D.N.M. 1983).[5] Texas ignores this case, and ignores the long history of Compact communications in which both States agreed that New Mexico has an apportionment below Elephant Butte, and that the apportionment was 57% of Project supply. UMF ¶¶ 87-94, 105-112 (i.e., NM-CSMF ¶¶ 83-90, 101-08).

C. The Negotiating History Confirms New Mexico's Position on Apportionment

In its Apportionment Motion, New Mexico described the negotiating history that establishes that the States intended to protect existing uses in both States. Specifically, New Mexico explained that the Compact was intended to protect all existing water rights and uses; the Compact included a "normal release" from Elephant Butte of 790,000 to meet "irrigation demands" in both New Mexico and Texas; the Compacting States intended to protect the existing operations of the Project; the Project was operated as a single unit such that Project lands were treated equally; each acre of Project land was entitled to an equal allocation of water, which allowed the Compacting States to determine the relative proportions of Project supply; and that the negotiators intended the equitable apportionment below Elephant Butte to be based on the relative proportion of acreage in each State, 57% to New Mexico and 43% to Texas. N.M. App.

[5] Texas and the United States also ignore the *City of El Paso v. Reynolds* court's explicit rejection of the argument that the Compact apportioned hydrologically-related groundwater:

> [E]ven assuming the Compact protects surface water rights within the Rio Grande Project from impairment through pumping of hydrologically connected ground water, pumping can still be permitted. The State Engineer need only condition ground water permits to require offsets of the effects on the river through return flows or retirement of prior surface and/or ground water rights.

El Paso v. Reynolds, 563 F.Supp. at 382. New Mexico's administration of groundwater pumping in the LRG has conformed to this statement. NM-EX 007, D'Antonio 2d Decl. ¶¶ 15, 21-24, 37, 43-45, 54-55, 57, 59; NM-EX 010, Serrano Decl. ¶¶ 10-14, 16-21, 31-34.

Mot. 38-42. Texas does not address the majority of this negotiating history. Indeed, Texas concedes that the States intended to protect existing uses, Tex. Evid. Resp. ¶¶ 20-21, 39; the Compact was intended to protect the operation of the Project, *id*. ¶ 38; the Compact was operated as a single unit, *id*. ¶ 40; at the time of the Compact, 57% of Project acreage was located in New Mexico and 43% of Project acreage was located in Texas, *id*. ¶ 53; the Project supply was historically divided to all lands on an acre foot per acre basis, *id*. ¶¶ 56, 60; and the irrigation district in New Mexico is entitled to 57% of Project supply during water short years and the irrigation district in Texas is entitled to 43% of Project supply during water short years, *id*. ¶ 57. These undisputed facts alone establish that New Mexico is entitled to summary judgment.

Rather than dispute the major conclusions of the negotiating history, Texas expends considerable effort in an attempt to explain away the statements of Texas Compact Commissioner Frank Clayton about Compact negotiations. But even that effort ultimately supports New Mexico's understanding of the apportionment below Elephant Butte. As discussed in the Apportionment Motion, shortly after the Compact was entered, Commissioner Clayton responded to inquiries from constituents about how the Compact functioned below Elephant Butte. He explained:

> [T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according the areas involved in the two States. By virtue of the contract recently executed, the total areas is 'frozen' at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a 'cushion' of three per cent for each figure.

NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938). All three historians disclosed in this case have recognized the relevance

of this passage to explain the apportionment below Elephant Butte. UMF ¶ 46 (i.e., NM-CSMF ¶ 46); *see also* FIR at 180-82, 207-09.

Dr. Miltenberger, Texas's historian, now offers new opinions about this letter.[6] According to Dr. Miltenberger, "Clayton offered a description of the prevailing physical circumstances that structured the Compact and the 'present uses' which the Compact was intended to respect and preserve." "A primary intent of the Compact," Dr. Miltenberger further opines, "was to protect 'present uses' of water in the Upper Rio Grande Basin, circa 1938," and "the Rio Grande Project was an existing 'use' to be safeguarded." Miltenberger Response Declaration ¶ 37, TX_MSJ007387.

Texas seems to suggest that Dr, Miltenberger's new opinions undermine New Mexico's reliance on Commissioner Clayton's letter, but that is not the case. Texas admits that the Project delivered Project supply to New Mexico and Texas lands prior to the Compact, and admits that the percentage of Project lands existing in each State was 57% in New Mexico and 43% in Texas. And Texas concedes that the Project and the Downstream Contracts were incorporated into the Compact. NM-EX 212, Gordon Dep. (July 15, 2020), 11:13-12:10, 14:22-16:13; NM-EX 259, Gordon Dep. (July 15, 2020) at 21:19-22:2; *see also Texas v. New Mexico*, 138 S. Ct. at 959. By virtue of that incorporation, the Compacting States also incorporated the conditions described by Commissioner Clayton, and thereby "preserv[ed]" the existing operations of the Project and "protect[ed] 'present uses' of water," including the 57%-43% division of water under "the Rio Grande Project." Miltenberger Response Declaration ¶ 37, TX_MSJ007387. Because the Project and Downstream Contracts were incorporated into the Compact, the existing operations became a

[6] New Mexico intends to file a motion to strike or motion *in limine* to address these new opinions.

matter of Compact apportionment, and the distinction between the Project and the Compact that Dr. Miltenberger strains so hard to identify loses all consequence.[7]

D. The Course of Performance Confirms that the State of New Mexico Has an Apportionment Below Elephant Butte Reservoir

1. Texas's Distinction Between Apportionment and Allocation Is Not Supported

As part of its endeavor to identify disputes over material facts regarding the course of performance, Texas suggests that there is a meaningful distinction between the use of the term "apportionment" and the term "allocation." There are several problems with Texas's claim.

Unlike Texas, the Court has not recognized this semantic difference in compact litigation. *E.g. Montana v. Wyoming*, 563 U.S. at 372 (explaining how the Yellowstone River Compact "allocates [water] to each State"); *Kansas v. Nebraska*, 135 S. Ct. 1255 (2015) (decree) (describing the water "allocated" to each State). More importantly, these terms are, in fact, synonymous in the Rio Grande Compact. The Compact uses both terms, referring to the "equitable *apportionment* of such waters" to the States in its preamble (emphasis added), and "the quantities of water herein *allocated*" in Article XIV (emphasis added). While the Compact does not explicitly set forth the exact apportionment or allocation below Elephant Butte, it does require that Project water be released "in accordance with irrigation demands," Art. I(*l*), and provides for a normal release of 790,000 acre-feet annually, Art. VIII, an amount sufficient to irrigate lands in New Mexico and

[7] This point is underscored because the Downstream Contracts themselves contain explicit provisions regarding the protection of existing and future "water rights" established through the use of Project water. *See* NM-EX 016, Stevens Decl. ¶ 15. The Downstream Contracts (incorporated by the Compact) explicitly protected "the *right* of project land owners to such *water rights* as may be or become appurtenant to their lands under Federal Reclamation Laws and under the original contracts entered into between the original water users' association on this Project and the United States." NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes, at 12 (Nov. 9, 1937) (emphasis added); *see also* NM-EX 321, Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes (Nov. 10, 1937) (same).
.

Texas. Here, the Parties are further guided by the decisions of the Court, which has held that the United States has a "legal responsibility" through "the Downstream Contracts" to "assur[e] that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959 (internal quotation marks omitted). This makes clear that, regardless of the terminology employed, the "apportionment" of water below Elephant Butte between New Mexico and Texas is the "allocation" of Project water between the irrigation Districts.

That is precisely how that term was historically used. For example, in his final report on the deliberations of the RGCC, the Federal Representative, S.O. Harper, reported to the Secretary of the Interior that the Compact "fully safeguarded" the "interests of the United States" by "inclusion, *in the State allocations*, of all water to which Federal irrigation projects are entitled." NM-EX 325, Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938*, 85 (emphasis added). The Federal Representative thereby made the highly relevant statement that by including the water intended for EBID and EPCWID "in the State allocations," the Compact protected the United States' interests.

More recently, the RGCC evaluated the impact of Project operations on the Compact apportionment. Because Project operations and the District Allocations below Elephant Butte impact the Compact apportionment, the RGCC unanimously "request[ed] that the Bureau of Reclamation work cooperatively with the Engineer Advisors to develop procedures for determining the annual allotments of water supply in accordance with the Rio Grande Compact." NM-EX 408, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Development of an Appropriate Methodology for Determining the Annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002).

Even if there were a historical distinction between "allocation" and "apportionment," as Texas now claims (but the record refutes), Texas itself has previously explained that by incorporating the Project and Downstream Contracts, the allocations and the apportionment have become coextensive. For example, in the very first brief it filed in this case seeking leave to be heard by the Court, Texas stated:

> In fact, the Rio Grande Compact is a means of protecting the Rio Grande Project, its operations and *the allocations* of water to Rio Grande Project beneficiaries.

Texas Brief in Support of Motion for Leave to File Complaint at 11 (January 2013) (emphasis added); *see also Montana v. Wyoming*, No. 137 Orig., *Memorandum Opinion of the Special Master on Montana's Claims Under Article V(B)* at 8 (Dec. 20, 2011) (explaining the importance of the pleadings filed at the motion for leave stage in construing a Parties claims). Texas later expounded:

> *The allocations of water*, provided for as part of the authorization of the Rio Grande Project, *were intended by the Rio Grande Compact to also apportion the waters* of the Rio Grande between New Mexico and Texas.

Id. at 14 (emphasis added). Still today, Texas alleges in its Complaint that the Compact "relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas." Tex. Compl. ¶ 10. And Commissioner Gordon has confirmed that the only water to which Texas claims it is entitled is the 43% of Project supply that is allocated to EPCWID each year. NM-EX 212, Gordon Dep. (July 15, 2020), 11:25-12:6; NM-EX 259, Gordon Dep. (July 15, 2020) 20:11-21:11, 23:15-20; NM-EX 255, Settemeyer Dep. (Vol. I) (July

30, 2020), 43:1-15.[8] Thus, the artificial distinction that Texas attempts to draw in its Response is not grounded in the Compact or in history, and the Special Master should reject Texas's position.

2. Texas Does Not Address the Decades of Project Operations

On the issue of the Project operations, the Special Master stated:

> [T]here are over eighty years of performance under the Compact to inform the Court as to the parties' longstanding understanding of the limits of the full extent of play in the system, the limits to which the ratio cited in the Downstream Contracts actually might define a Compact right to Project supply, and the extent to which individual state's groundwater laws must be deemed subservient to the Compact.

April 14 Order at 21; *see also Tarrant Reg'l Water Dist*. 569 U.S. at 636 (quoting *Alabama v. North Carolina*, 560 U.S. at 346).

In its Apportionment Motion, New Mexico explains that "[t]he Parties course of performance since the execution of the Compact similarly makes clear that the Compact apportions water to New Mexico below Elephant Butte Reservoir." NM App. Mot. 43. New Mexico described that "the Parties' actions, from the time the Compact was adopted until the present, repeatedly demonstrate their understanding that the Compact apportioned 57% of Project supply to New Mexico in the Lower Rio Grande." *Id*. at 44. New Mexico went on to detail that:

- From 1951 to 1978, Reclamation allocated Project supply on an equal basis to all Project lands, resulting in an allocation of 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands. *Id*. at 45.
- From 1978 through 2005, Reclamation utilized the D1/D2 Method to allocate water 57% to New Mexico and 43% to Texas. *Id*. at 45-46.
- No State or Party objected to the 57% / 43% split from 1951 to 2005.

[8] Commissioner Gordon also confirmed that this amount is equivalent to 376,000 acre-feet in a full supply year. NM-EX 212, Gordon Dep. (Vol. II (July 15, 2020), 20:11-21:11.

- The amount of water that Texas adjudicated to EPCWID corresponds to 43% of Project supply. *Id*. at 46.

Texas makes no effort to contest this long course of performance in its brief, and its failure to do so is significant. *See, e.g.*, *Yunker v. AllianceOne Receiveables Management, Inc.*, Case No. 10cv61796-UU, 2011 WL 13323094 at * (S.D. Fla. Aug. 2, 2011) ("[A] failure to make an argument in response to a motion for summary judgment generally operates as a waiver."); *see New England Health Care Employees Union, Dist. 1199 v. Rhode Island Legal Services*, No. Civ.A. 00-249T, 2001 WL 34136692 (D.R.I. 2001) (argument not made in opposition to summary judgment motion is waived); *Steiny and Co., Inc. v. Local Union 6, Int'l Broth. Of Elec. Workers*, No. C-91-0155-DLJ, 1991 WL 516835 (N.D. Cal. 1991 (same)); *see also United States v. Berkowitz*, 927 F.2d 1376, 1384 (7th Cir.), *cert. denied*, 502 U.S. 845 (1991) (perfunctory and undeveloped arguments are waived).

3. Texas's Attempts to Renounce Its Prior Apportionment Positions Should Be Disregarded

In its Apportionment Motion, New Mexico identified several instances prior to this case in which Texas expressed its long held position that the Compact apportions the water below Elephant Butte 57% to New Mexico and 43% to Texas. *See* NM-CSMF ¶¶ 79-90; NM App. Mot. 47-49. Most of these instances are not addressed in Texas's Response. Nevertheless, in an effort to avoid partial summary judgment, Texas attempts to renounce two of its prior statements through a new declaration from Commissioner Gordon. That approach might be understandable if it were not for the fact that Commissioner Gordon has already disavowed knowledge of both prior statements that Texas seeks to disclaim.

The first articulation of Texas's longstanding Compact position that Texas attempts to walk back is a set of meeting notes from a 2011 meeting between Texas and New Mexico over the 2008

Operating Agreement. Current ISC Director Schmidt-Petersen and New Mexico expert Estevan Lopez (previously the ISC Director and Rio Grande Engineer Advisor) attended the meeting, and both testify that NM-EX 519 is a photograph of notes that Texas prepared to express "[Texas's] position that the Compact apportions the water below Elephant Butte between New Mexico and Texas 'based on acreage' existing in each State. Texas further explained its position that under the Compact, the State of Texas is entitled to 43% of Project supply and the State of New Mexico is entitled to 57% of Project supply." NM-EX 004, Schmidt-Peterson Decl., ¶ 11; *see also* NM-EX 003, Lopez Decl., ¶ 18.

During his deposition, New Mexico asked Commissioner Gordon about NM-EX 519 at length. Commissioner Gordon answered that he did not recall or did not know information about NM-EX 519 no less than *19 times*. NM-EX 258, Gordon Dep. (July 14, 2020), 136:19 – 143:11. Because he had no information about NM-EX 519, that led counsel for New Mexico to state that it would have to "ask somebody who remembers" the exhibit. It is therefore beyond surprising that Commissioner Gordon has now recovered his memory enough to suggest in his declaration that NM-EX 519 "were not talking points that represented Texas's position on the Rio Grande Compact' as stated by declarants Lopez and Schmidt-Petersen." Gordon Declaration at ¶ 12, TX-MSJ_007274. *See also United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001) (conclusory and "self-serving allegations are not the type of 'significant probative evidence' required to defeat summary judgment"). Texas and Commissioner Gordon had their chance to explain NM-EX 519 at his deposition. Having failed to do so, the Special Master should disregard Commissioner Gordon's newfound contrary and self-serving statements. *Jiminez v. All Am. Rathskeller, Inc.*, 503 F.3d 247, 253 (3d Cir. 2007) (trial court is justified in discounting affidavit that is "offered solely for the purpose of defeating summary judgment").

Likewise, in its Apportionment Motion, New Mexico pointed to official remarks from Commissioner Gordon at a RGCC meeting. New Mexico State Engineer and Compact Commissioner D'Antonio expressed New Mexico's concerns that the Operating Agreement violated the Compact by drastically reducing the percentage of water that EBID received. NM-EX 518, Rio Grande Compact Commission, Transcript of the 72nd Annual Meeting (94th Meeting), 49:9 – 51:25. In response, Commissioner Gordon explained that "I agree that the purpose of the Compact was to allocate the water between the Districts and the 53 47 [sic] as provided in the Compact. I do agree with that." *Id*. at 59:2-4. He went on to "respectfully disagree that the Operating Agreement violates the Compact." *Id*. at 59:14-15. In his sworn deposition, Commissioner Gordon admitted that the exhibit reflects his actual statements, NM-EX 258, Gordon Dep. (July 14, 2020), 134:3-9, but offered that he may have misspoke, but only "[t]o the extent it's inconsistent with" the Compact, the Project and the Downstream Contracts. *Id*. 134:8-19. When asked, however, Commissioner Gordon could not identify any way that his statement at the RGCC meeting that "the purpose of the Compact was to allocate the water between the Districts and the [57%-43%]" was inconsistent with the Compact, the Project, or the Downstream Contracts. *Id*. 134:10 – 135:2. Given this testimony, Texas's newly minted position that the 2011 RGCC meeting was a misstatement is problematic, at best.

Unfortunately for Texas, it could not wipe away all of its previous positions on the Compact, and it makes no effort to do so. Most important is the testimony of former Texas Engineer Advisor Herman Settemeyer. Mr. Settemeyer worked on the Rio Grande Compact on behalf of Texas for almost 20 years. NM-EX 255, Settemeyer Dep. (July 30, 2020), 29:25 – 34:22; NM-EX 609, Settemeyer Dep. Ex. 2. Contrary to Texas's new litigation position, Mr. Settemeyer testified that the Compact does not have a 1938 condition. NM-EX 255, Settemeyer Dep. (Julu

30, 2020), 45:20 – 47:1. Instead, "the Rio Grande Compact incorporated the Rio Grande Project and – and the water use associated with the Rio Grande Project by Texas and New Mexico." *Id*. 42:14-25. More specifically, Mr. Settemeyer offered the following testimony:

> **Q. And what portion, then, was allocated to Texas?**
> A. Well, the Rio Grande Project is apportioned 57 – 57 percent to – to New Mexico and 43 percent to Texas. So the portion that Texas got associated with the Rio Grande Project was the – was the 43 percent.
>
> **Q. And describe for me what that's 43 percent of. Is it 43 percent of the water in storage?**
> A. No, the – the Bureau of Reclamation operates the Rio Grande Project and, as such, they make an allocation each and every year to – to New Mexico and to Texas, EBID EP No. 1, they make an allocation and those – that allocation is split 57/43 between the two districts, basically between the two states.

Id. 43:1-15.

4. Texas's Argument Is Inconsistent with Its Own Prior Positions in this Case

Not only is Texas's argument inconsistent with the prior decisions of the Court and special masters, it is inconsistent with its own prior positions in this case. "[W]here a party assumes a certain position in a legal proceeding and succeeds in maintaining that position he may not thereafter, simply because his interests have changed, assume a contrary position." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001); *see also id*. at 751-55 (holding that New Hampshire was judicially estopped from giving a different meaning to the term "Middle of the River," which it defined in one manner in settling the initial dispute, and in another manner in a subsequent proceeding); *Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991) (judicial estoppel, also known as "preclusion of inconsistent positions," prohibits a litigant from asserting inconsistent positions in the same litigation). As discussed at length in New Mexico's Apportionment Motion, Texas has consistently recognized the historical allocation of the waters of the Rio Grande below Elephant Butte as between the states when it understands such an argument to be to its benefit. *See* N.M. App. Mot. 51-52. In particular, in its Reply to Exceptions

to the First Interim Report of the Special Master, Texas explicitly acknowledged the apportionment between the States, stating:

> [T]he Compact is not silent on what occurs below Elephant Butte Reservoir. The law of equitable apportionment applies because the Compact expressly apportions Rio Grande water and then used the Project as the sole method for distributing that equitable apportionment to New Mexico, Texas, and Mexico. . . . [T]he Compact utilizes the Rio Grande Project, operated by the United States, as the single vehicle by which to apportion Rio Grande water to Texas and New Mexico.

Tex. Reply to Exceptions at 40. Similarly, in its Sur-Reply to the Court, Texas argued:

> There is a relationship between the 1938 Compact and the Project. The Special Master properly addressed and accurately characterized that relationship in the First Report. The Special Master concluded that: the 1938 Compact integrates the Project 'wholly and completely,' First Report at 198; the signatory States intended to use the Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's apportionment, First Report at 204; and the water delivered by New Mexico *into* Elephant Butte Reservoir 'has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico . . .,' First Report at 213. "Therefore, the Project water *leaving* Elephant Butte belongs to either New Mexico or Texas *by compact*, or to Mexico by the Convention of 1906."

Texas's Sur-Reply at 1-2 (Aug. 2017). Texas has used similar language in numerous other pleadings in this case as well. *See* NM App. Mot. UMF 92(a)-(d). Permitting Texas to change its position now would be inconsistent with well-established legal principles and this Court's relevant jurisprudence. *E.g., New Hampshire v. Maine*, 532 U.S. at 749

For example, in a recent original jurisdiction case arising from an interstate compact dispute, Texas attempted to reverse its position as to the permissibility of setting aside certain procedural deadlines set out in the Pecos River Master's Manual while Texas and New Mexico attempted to agree on a novel accounting procedure. *See Texas v. New Mexico*, 141 S.Ct. 509, 513-14 (2020). Several years passed and the negotiations between the states broke down, leading New Mexico to file a motion seeking resolution from the River Master. After the River Master ruled in New Mexico's favor, Texas took the position that the River Master's ruling should be

reversed because New Mexico's motion was untimely. *See id.* at 514. This Court summarily dismissed Texas's timeliness argument, noting that "Texas's argument disregards the history of the proceedings in this case," and concluding that Texas cannot reverse its position in the procedure it previously agreed to. *Id.*

Texas's attempt to reverse its position in this case is analogous. In pleading its case and articulating its legal positions between 2014 and 2017, Texas repeatedly acknowledged the apportionment of Rio Grande water between Texas and New Mexico south of Elephant Butte. Now, when it views the existence of such an apportionment to be detrimental to its interests, Texas argues that there is no apportionment, but only Project allocations. Texas should not be permitted to reverse its position mid-litigation.[9]

III. REPLY TO THE UNITED STATES

A. The United States' Apportionment Theory Would Fail to Effect an Equitable Apportionment

The United States argues that New Mexico is not entitled to summary judgment because the Compact "does not specify amounts of water 'apportioned' to each state" below Elephant Butte Reservoir. U.S. Resp. 2. The United States thereby argues that the Rio Grande Compact does not "quantify" the amount of water that each State is entitled to receive below Elephant Butte. The United States' apportionment theory fails on multiple levels.

1. An Equitable Apportionment Must Define the Rights of the States

The Court has explained that "a State may not preserve solely for its own inhabitants natural resources located within its borders." *Idaho ex rel. Evans v. Oregon*, 462 U.S. 1017, 1025 (1983). That principle is "[a]t the root of the doctrine" of equitable apportionment. *Id*. *See also*

[9] Texas cites both its Complaint and its Reply to Exceptions to FIR of Special Master in support of the proposition that it has not reversed its position on Compact apportionment. *See* Tex. App. Resp. at 29 n.10-11. The cited material does not expressly address the issue of apportionment between the states, and instead appears to address New Mexico's duty not to "deplete" or "interfere" with Project water released by the United States for the benefit of Texas. *See id.*

Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 356 ("few public interests are more obvious, indisputable and independent of particular theory than the interest of the public of a State to maintain the rivers that are wholly within it substantially undiminished"); *Kansas v. Colorado*, 206 U.S. 46, 97 ("One cardinal rule underlying all the relations of the states to each other is that of equality of right"). "Equitable apportionment is the doctrine of federal common law that governs disputes between states concerning their rights to use the water of an interstate stream." *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (citing *Connecticut v. Massachusetts*, 282 U.S. 660, 670-671 (1931); *Kansas v. Colorado*, 206 U.S. 46, 98 (1907)). For more than a century, "disputes over the allocation of water [have been] subject to equitable apportionment by the courts." *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 619 (2013). S*ee also, e.g., Nebraska v. Wyoming*, 325 U.S. 589, 617-19 (1945); *Nebraska v. Wyoming*, 515 U.S. 1, 14 (1995); *Washington v. Oregon*, 297 U.S. 517, 522-23 (1936).

States have historically had three avenues to resolve water disputes with other states: (1) interstate compacts subject to congressional approval, (2) congressional intervention, and (3) an original action before the Supreme Court. George William Sherk, *Dividing the Waters: The Resolution of Interstate Water Conflicts in the United States* 1-2 (2000). Regardless of which approach is applied, the goal of an equitable apportionment is to "secure a 'just and equitable' allocation" to each of the States. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)). With regards to interstate water compacts, the Court has stated:

> This Court's authority to apportion interstate streams encourages States to enter into compacts with each other. When the division of water is not "left to the pleasure" of the upstream State, but States instead "know[ ] that some tribunal can decide on the right," then "controversies will [probably] be settled by compact."

Kansas v. Nebraska, 574 U.S. 445, 455 (2015) (quoting ***Kansas v. Colorado,*** 185 U.S., at 144); *see also id.* ("we remain aware that the States bargained for those rights in the shadow of our equitable apportionment power"); *Texas v. New Mexico*, 462 U.S. 554, 569 (1983) ("Our equitable power to apportion interstate streams and the power of the States and Congress acting in concert to accomplish the same result are to a large extent complementary.").

There are a variety of ways to divide the waters of an interstate river, but "[t]o apportion water between states, a compact must either (1) limit how much water the upper state can use or (2) guarantee the lower state a certain amount of water." 3 Waters and Water Rights § 46.03 (Amy K. Kelley, ed., 3rd ed. LexisNexis/Matthew Bender 2020). For that reason, "[e]very case apportioning water among states does so in order to finally determine the quantity of water that can be maintained by each state for future use. Every case interpreting interstate compacts has done so as to clarify the quantity of water apportioned to each compacting state and to determine whether another state has illegally attempted to take water apportioned to another state." Charles T. DuMars & Stephen Curtice, *Interstate Compacts Establishing State Entitlements to Water: An Essential Part of the Water Planning Process*, 64 Okla. L. Rev. 515, 531 (2012). *See also* Connor B. Egan, *Shaping Interstate Water Compacts to Meet the Realities of the Twenty-First Century*, 6 Ky. J. Equine, Agric. & Nat. Resources L. 327, 331 (2014) (apportionment "establish[es] a permanent distribution of the interstate water"); Professor Robert "Bo" Abrams, *50th Anniversary of the Delaware River Basin Compact*, ABA Water Resources Committee Newsl., February 2012, at 8 ("It is a fair generalization to say that most interstate water compacts have stressed the interstate allocation function and provided that each state thereafter would control its in-state water users in accordance with state law.").

Thus, the cases speak in terms of identifying "the extent of the existing equitable right," *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 104 (1938), the "division of water," *Kansas v. Nebraska*, 574 U.S. at 455, the "right of each [State] to receive benefit," *Kansas v. Colorado*, 206 U.S. at 117, the "just and equitable' allocation," *Nebraska v. Wyoming*, 325 U.S. at 618, or the "equitable share of the flow," *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). But whatever the language, the concept is the same – to effect an equitable apportionment, the Compact must define the rights of the parties and allow each State to understand how much water it is entitled to use. This division is necessary because water users in New Mexico and Texas – that is, the individual members of EBID and EPCWID – receive their State-based water rights directly from the State apportionment. *Hinderlider*, 304 U.S. at 106, 108; *Nebraska v. Wyoming*, 325 U.S. 589, 627, 629 (1945); *Wyoming v. Colorado*, 309 U.S. 572, 579 (1940).

2. The United States' Theory Fails to Define the Rights of the States

By arguing that the Compact does not establish a mechanism to quantify the apportionment below Elephant Butte, the United States attempts to insulate itself from claims arising under the Compact. In particular, the United States is attempting to shield the 2008 Operating Agreement from claims that it alters the apportionment granted under the Compact.

New Mexico has shown that the 2008 Operating Agreement causes Texas to receive more water than it is entitled to receive under the Compact. *See* N.M. Resp. U.S. at 13-15, 47-48; N.M. Resp. Tex. at 66-69; NM-CSMF ¶¶ 186-189, 194-196. This is so because, as the United States admits, "[t]he effect of the 2008 Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes to Project efficiency caused by groundwater pumping in New Mexico." Memorandum in Support of Motion of the United States to Intervene as a Plaintiff at 6 (February 2014). However, because the Compact apportions water to "part of New Mexico" as the Court held, *Texas v. New Mexico*, 138 S. Ct. at 959, it acts as a constraint on the Project,

and prevents the United States from operating the Project in a way that re-apportions the Rio Grande water distributed by the Project without New Mexico's consent. That dispute, and the desire of the United States to preserve the 2008 Operating Agreement (which improperly re-apportions Compact water), has always been at the heart of this case.

The United States now accepts that the Compact apportions water to New Mexico below Elephant Butte, but it argues that it is not possible to "quantify" or "specify amounts of water 'apportioned' to each state." U.S. Resp. 2-3. The United States therefore argues that "it is unnecessary for the United States to weigh in on precisely what Texas as a State is apportioned under the Compact." U.S. Br. 30. That position is unprecedented and suffers from three fatal flaws.

First, as explained above, the fundamental characteristic of an equitable apportionment is the division of the relative rights of the States to the shared water resources. This division may occur in a variety of ways, but there must be a defining principle that allows each State to understand how much water it is apportioned so that it can stay within its allotted amount. The United States' theory offers *no* defining principle, which runs contrary to the Court's established rules on compacts and equitable apportionment. *See* Section III.A.1, *supra*. Under the United States' theory, Texas and New Mexico would simply have no way of knowing whether they were in compliance with the Compact below Elephant Butte.

Second, Texas and the United States brought claims against New Mexico based on the allegation that Texas was not receiving its share of water. In the United States' words, New Mexico "*may*" have violated the Compact because New Mexico's actions "*could* reduce Project efficiency to a point where 43% of the available water could not be delivered to EPCWID." U.S. Compl. in Intervention ¶¶ 14-15 (emphasis added). But if the Court cannot quantify "specif[ic]

amounts of water 'apportioned' to each state," U.S. Resp. 2-3, or determine "what Texas as a State is apportioned under the Compact," U.S. Br. 30, then there is no way to determine if Texas has received its share "of the available water" required by the Compact, U.S. Compl. in Intervention ¶ 15. More to the point, if the Compact does not "quantify" the amount of water that is apportioned to each State, then there is no basis for a claim of injury at all, and the claims against New Mexico should be summarily dismissed.[10]

Third, the United States' claim that the apportionment of the two States cannot be quantified is inconsistent with Texas's allegations and the United States' position. In its Complaint, Texas alleges that the amount of water it is entitled to receive each year under the Compact is defined by the Texas adjudication. Texas Compl. ¶ 22. That adjudicated amount is 376,000 acre feet. NM-EX 505, Texas Comm'n on Env't Quality, Certificate of Adjudication No. 23-5940, ¶ 1.b; *see also* EPCWID Motion to Intervene at App. 1 (April 2015); UMF ¶¶ 83, 95 (i.e., NM-CSMF ¶¶ 79, 91, respectively). Consistent with that position, the United States asked the New Mexico Adjudication Court to specifically "recognize an amount of *up to* 376,000 acre-feet per year for delivery to Texas." NM-EX 527, Order, *New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.*, no. CV-96-888, ¶ 4 (N.M. 3d Judicial Dist., Feb. 17, 2014) (emphasis added); U.S. Resp. UMF ¶ 95. And the United States admits that "376,000 [acre-feet] is roughly 43% of the amount available for allocation to the Districts in a 'full supply year.'" U.S. Resp. UMF ¶ 95. This fits with the United States' allegation that Texas is entitled to "43% of the available water," and by extension, New Mexico is entitled to 57%. U.S. Compl. in Intervention ¶ 15. Hence, both the United States and Texas have advocated for 376,000 acre-feet (43% of a full supply) as the maximum Compact apportionment to Texas. The United States' argument that

[10] In light of its own argument that violations of the Compact cannot be quantified, it is extraordinary that the United States, seeks to have groundwater pumping in New Mexico enjoined. *See* U.S. Motion 32-39.

the apportionment below Elephant Butte cannot be quantified is inconsistent with that longstanding position.

3. The United States' Theory Fails to Accomplish the Stated Purpose of the Compact

The Court has explained that a compact should be interpreted in line with its stated purpose. *See Green v. Biddle*, 8 Wheat. (14 U.S.) 1, 91 (1823) (interpretation of a compact that would defeat the States' stated purpose "is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it."); *see also Texas v. New Mexico*, 462 U.S. 554, 566-72 (1983) (rejecting New Mexico's argument that the Court has a limited role in reviewing compact commission actions, where the result might defeat the purpose of the compact). The stated purpose of the Compact is to "effect[] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." Compact at Preamble. By the Court's reasoning, the expressed intentions of the Compacting States to divide the water between New Mexico and Texas below Elephant Butte must be given considerable weight. The United States' theory would fail to accomplish this purpose.

The United States walks through a puzzling discussion of the definition of "effect" to conclude that "[t]hrough the use of the term 'effecting,' the Compacting States signaled that they intended for the Compact to 'operate as' an equitable apportionment, or to 'produce' or 'result' in one. They did not intend or attempt to quantify it." U.S. Resp. 7. The United States' conclusion does not follow from the applicable definitions.

To "effect" means "to cause to come into being," "to bring about," or to "accomplish." Merriam-Webster's Collegiate Dictionary at 367 (10th ed. 1997); *see also* American Heritage Dictionary 439 (2nd College Ed. 1985) (defining "effect" as "to produce as a result," "to bring into

existence," and "to bring about"). Thus, the purpose of the Compact is to accomplish or bring about an "equitable apportionment."

To give any meaning to this articulated purpose, however, it is necessary to understand what is meant by an "equitable apportionment." As discussed above, an "equitable apportionment" is a term of art that alternatively means the "division of water," *Kansas v. Nebraska*, 574 U.S. at 455, the "right of each [State] to receive benefit," *Kansas v. Colorado*, 206 U.S. at 117, the "just and equitable' allocation," *Nebraska v. Wyoming*, 325 U.S. at 618, or the "equitable share of the flow." *Colorado v. Kansas*, 320 U.S. 383, 392. All of these definitions used by the Court produce the result that the Compact States were intending to divide or "accomplish" a "division" of the waters below Elephant Butte. And in case there was any doubt, the definition of "apportion" is "to divide and distribute proportionally." Black's Law Dictionary 66 (6th Ed. 1991); *see also* Merriam-Webster's Collegiate Dictionary at 57 (defining "apportion" as "to divide and share out according to a plan" and "to make a proportionate division or distribution of"); American Heritage Dictionary 121 (defining "apportion" as "[t]o divide and assign according to a plan or proportion" and "allot").

It follows that the purpose of the Compact is to divide the waters of the Rio Grande, including below Elephant Butte, so that both New Mexico and Texas were given their fair share of water. The United States' argument that the Compact failed to divide the waters of the Rio Grande should be rejected.

4. The United States' Theory Would Invite Disputes Contrary to the Intent of the Compact

Another stated purpose of the Rio Grande Compact is to "remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas." This

purpose can be understood "in the shadow" of the existing original jurisdiction lawsuit that was pending at the time of the Compact. *Kansas v. Nebraska*, 574 U.S. at 455; *see also* NM-EX 112, Spronk Rep., 54, 58-59. Indeed, Federal Representative Harper recognized that "[t]he Compact, if ratified, will end over forty years of controversy and dispute among the States." NM-EX 325, Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938*, at 84. In agreeing to the Compact, Texas Compact Commissioner Clayton similarly wrote that the Compact "represented a fair and equitable settlement of the controversies that have raged almost continuously for over forty years between the three states." He continued that "We feel that we have secured in this compact exactly what we were entitled to and all that we could get, as a practical matter, as the result of litigation." *Id*. at 72-73.

The United States' theory that the Compact "does not specify amounts of water 'apportioned' to each state" below Elephant Butte Reservoir, U.S. Resp. 2, would not "remove all causes of present and future controversy," Compact, Preamble. Rather it would invite "future controversy" because the States would not understand the amount of water to which they are entitled below Elephant Butte. *See* FIR at 202-03. The United States' theory would thus perpetuate the "controversies that have raged almost continuously" below Elephant Butte. NM-EX 325, *Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938*, at 72-73.

5. The United States' Theory Is Inherently Inconsistent

The United States' argument that the Compact allocations cannot be quantified is also internally inconsistent. The United States argues that "[t]he Compact is one step removed from the apportionment, which is effectuated by the customary operation of the Project." U.S. App.

Resp. 6. But that argument cannot be squared with the United States' admission that "the Compact *incorporates the existing operation of the Project*." *Id*. 3 (emphasis added). That is precisely the point – once the States incorporated the Project and the Downstream Contracts, then the 57%-43% division of water based on acreage in each State was adopted as a Compact entitlement to each State.

Furthermore, the United States identifies a number of conditions that it argues are "critical to understanding the apportionment that the Compact intended to effect." *Id*. The United States discusses return flows, which, if properly defined, form part of Project supply. What the United States fails to comprehend is that identifying the appropriate Compact conditions is the first step to quantifying the apportionment. For example, in its Apportionment Motion, New Mexico asks that the Court recognize one aspect of the of the division of waters, namely that the Compact divided the water below Elephant Butte based on the longstanding and undisputed principle that each Project acre is entitled to the same amount of water. NM-EX 602 at 7, RFA No. 12; NM-EX 506, Cortez Aff., ¶ 8; NM-EX 529, Bureau of Reclamation, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, at 5 (Sept. 30, 2016) (hereinafter, "FEIS"). This principle was an established part of the "the existing operation of the Project" that the United States correctly observes was incorporated into the Compact. U.S. App. Resp. 3. Such a ruling is possible now based on the undisputed material facts, and it would allow the States to better understand the Compact division for trial.

Filling in the remaining Compact conditions at trial (*e.g.* treatment of return flows in both States, treatment of groundwater in both States) will allow the Compact apportionment below Elephant Butte to be fully quantified. The United States focuses on whether depletions caused by groundwater pumping should be accounted for in determining the annual amount of water

available to each State. New Mexico acknowledges that this question will ultimately need to be answered in determining the final apportionment methodology or dividing principle, but as it explained in response to the United States Motion, and in Section III.H below, there are significant disputes over the material facts that preclude a ruling on this issue at this time.

B. The United States' Apportionment Theory Is Inconsistent with the Prior Decisions in this Case

Next, the United States' position that the Compact "does not specify amounts of water 'apportioned' to each state" below Elephant Butte Reservoir, U.S. Resp. 2, is inconsistent with the prior orders in this case in three meaningful ways.

First, the United States' position that the Compact lacks a discernible division of water between New Mexico and Texas is inconsistent with Special Master Grimsal's First Interim Report ("First Report" or "FIR"). In the Motion to Dismiss that precipitated the First Report, New Mexico argued that once water was delivered into Elephant Butte, its Compact obligations ended. New Mexico's theory was that *the Compact* did not divide or apportion the water below Elephant Butte.[11] Instead, the water was allocated to the two Districts through the Project as a matter of Reclamation law, not the Compact. *See*, NM Mot. Dis. at 30-40. The United States new theory is remarkably similar to this position in that the United States now argues that there is no Compact division and no Compact obligations imposed below Elephant Butte. U.S. Resp. 6-7. Under this new theory, like New Mexico's unsuccessful argument on the Motion to Dismiss, the Compact does not impose any restrictions below Elephant Butte. *Id*.

[11] This was the ruling of *City of El Paso v. Reynolds, supra*. In that case, the court rejected New Mexico's argument that there was an apportionment below Elephant Butte. 563 F.Supp. at 385 (the Compact "did not apportion any specified amount of water to Texas below Elephant Butte"). Thus, in the Motion to Dismiss before this Court, New Mexico argued that there was no apportionment. The Court, however, ruled that there was an apportionment below Elephant Butte, and the State now returns to its original, long-held view that the Compact apportioned water below Elephant Butte by incorporating the Project.

The initial problem with this theory is that it was previously rejected by Special Master Grimsal. In denying New Mexico's motion, Special Master Grimsal recognized that the Project is "wholly incorporated throughout the 1938 Compact, which imposes rights and duties on each of the signatory States." He held that "the Project water leaving Elephant Butte belongs to either New Mexico or Texas by compact." FIR at 212-213. For that reason, "any question of the rights of any signatory State to water apportioned by the 1938 Compact – *including the rights to that portion of water mandated by compact to be delivered to lower New Mexico* via the Rio Grande Project – must be decided" in this case. *Id*. at 216 (citing *Hinderlider*, 304 U.S. at 110) (emphasis added). The United States supported this language before the Court, and it cannot be squared with the United States' new apportionment theory.

Second, the United States' new theory that the Compact does not "quantify" the apportionments to New Mexico and Texas below Elephant Butte is irreconcilable with the Court's 2018 Decision. As explained above, in that Decision, the Court explained that "the Rio Grande Project and its Elephant Butte Reservoir played a central role" in "resolving . . . disputes among the various States" through the Compact. 138 S. Ct. 957. It found that the delivery point of Elephant Butte in the Compact "made all the sense in the world in light of the simultaneously negotiated Downstream Contracts" that promised "a certain amount of water every year from the Reservoir's resources" to supply water to 57% of Project lands in New Mexico and 43% of Project lands in Texas. *Id*. The Downstream Contracts "are themselves essential to the fulfillment of the Compact's expressly stated purpose" to "'effect an equitable apportionment.'" *Id*. at 959 (quoting Compact at Preamble). The apportionment is "achieve[d] . . . only because by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts" which ensure "*a certain amount of water*" to Texas and New Mexico. *Id*.

(emphasis added). Thus, contrary to the United States' new position that the Compact does not "apportion[] particular quantities of water," U.S. Resp. 7, the Court has held that the Compact protects "a certain amount of water" to the Compacting States through the implicit incorporation of the Downstream Contracts. *Id*.

Third, the United States new apportionment theory is inconsistent with the more recent guidance from the Special Master. In ruling on the law of the case issues, the Special Master observed:

> Seemingly, one of the important issues that remains outstanding is the exact clarification of each state's Compact-based equitable apportionment in reference to the Downstream Contracts and the Project. In fact, it would be difficult to address Texas's claims that New Mexico is failing to protect Texas's apportionment without first defining precisely what each state and its citizens are entitled to receive below the Dam. This fact is true regardless of whether New Mexican entitlements below the Dam are deemed Compact rights.

April 14 Order at 19. The Special Master further noted that "the Court . . . appears to characterize water delivered by the Project to southern New Mexican water users as part of New Mexico's equitable apportionment." *Id*. Putting these two statements together, the task before the Special Master in the current briefing is "defining precisely" how much water New Mexico and Texas received "as part of [their] equitable apportionment[s]" below Elephant Butte. *Id.* Or to use the language from the Court, the Special Master must define that "certain amount of water" that each State is entitled to receive below Elephant Butte.

In sum, the United States' theory that the Compact does not divide the water below Elephant Butte is refuted or inconsistent with the holdings of the Court and both Special Masters who have worked on the case.

C. The United States' Apportionment Theory Is Inconsistent with Its Own Prior Positions in this Case

The United States' position on the apportionment below Elephant Butte has evolved over the course of this case. As discussed, in its Complaint in Intervention, the United States alleged that it was required to deliver "43% of the available water" to the Texas District, allowing "[57% of the available water" for the New Mexico District. Compl. in Intervention ¶ 15. Consistent with that position, the United States opposed the Motion to Dismiss, and argued that the water below Elephant Butte was divided 57%-43% according to the percentage of Project lands located in each State. The United States' original position on the apportionment is best summarized by its own words:

> In its operation of the Project, Reclamation controls the releases for those uses described in Article I(*l*) pursuant to the federal contracts and the 1906 treaty that were already in place when the Compact was signed, and pursuant to the agreement between EBID and EPCWID – signed one month before the Compact was signed – to freeze the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte Reservoir at 57% for EBID and 43% for EPCWID. As the Compact Commissioner for Texas explained in response to a letter from an attorney for downstream Rio Grande interests who inquired why the Compact did not provide for a specific amount of water to be delivered to Texas, "the question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation" in which "the total area is frozen at the figure representing the acreage [then] in cultivation."
>
> By operation of these provisions, New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir, and Texas receives its entire equitable apportionment of water through the Project, in the form of water released by the Project "in accordance with irrigation demands." Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage in EBID and EPCWID respectively.

U.S. Resp. Mot. Dis. 27-28 (citations omitted). The United States thereby supported a position on apportionment that is remarkably similar to the position that New Mexico advocates today.

Subsequently, after the case returned to the Special Master from the Court, the United States changed its position. It argued for the first time in the law of the case briefing that "[n]othing

in the Compact 'apportions' Rio Grande water to New Mexico lands below Elephant Butte Reservoir." U.S. Resp. to Legal Motions of Tex. and NM Regarding Issues Decided at 18 (Feb. 28, 2019).

Now, the United States has shifted its position on the apportionment yet again. Subject to further fluctuation, the United States now takes the position that New Mexico *does* have an apportionment below Elephant Butte. U.S. Resp. 2. Nevertheless, the United States presently disavows its former position that the Compact "divided [available water] according to the 57% to 43% split reflecting the historical proportion of irrigated acreage." U.S. Resp. Mot. Dis. 28. In its place, the United States today says that "the Compact contains no provision establishing a specifically quantified 'portion' of water belonging to New Mexico or such a 'portion' of water belonging to Texas." U.S. Resp. 6.

It is not hard to understand the reasons for the United States' shifting positions. The United States now recognizes that if a Compact apportionment can be determined, as it advocated at the pleading and Motion to Dismiss stages, then that apportionment provides a yardstick by which to measure the amount of water available to each State under the 2008 Operating Agreement. Once that measurement is performed, it is clear that New Mexico has not received its share of Rio Grande water since 2006. *See* N.M. Resp. U.S. 13-15, 47-48; N.M. Resp. Tex. 66-69. In short, the United States has shifted its position to insulate the 2008 Operating Agreement. The Special Master should not allow this metamorphosis to continue.

D. New Mexico Recognizes the Clarifications Identified by the United States

The United States raises several issues that it claims "express limitations the Compact imposes." U.S. Resp. 9. The United States asserts that New Mexico does not recognize these "limitations." As demonstrated below, the United States is mistaken, and New Mexico accepts

that summary judgment in its favor would take into account the clarifications described by the United States.

1. New Mexico Recognizes the Rights of Mexico Pursuant to Treaty

Initially, the United States asserts that New Mexico "fails to account for the United States' treaty obligation in its apportionment." *Id*. The United States is incorrect. For purposes of briefing, New Mexico expressly defined "Project Supply" to include water available for Mexico. NMCMF ¶ 125. And throughout the briefing, New Mexico recognized the Treaty obligations. For example, New Mexico explained that "deliveries were based on equal-per-acre allocations, *while guaranteeing to Mexico a defined annual diversion above Juarez*." N.M. App. Motion 40 (emphasis added). New Mexico, thus, recognizes that deliveries for Mexico are set first, and that the 57% -43% division between the States is then based on the amount available for Project lands (i.e. lands within the United States). *See, e.g.*, NM-CSMF ¶¶ 31, 38, 62, 125. Indeed, even before the present briefing, New Mexico has made its position known. For example, Mr. Lopez opined in his very first expert report:

> [*A]fter allowance for deliveries to Mexico pursuant to the 1906 Treaty*, Project water supply comprised of (1) Usable Water released from Elephant Butte Reservoir, (2) inflows below Elephant Butte and (3) return flows, is implicitly apportioned between New Mexico and Texas based on equal deliveries to all irrigated Project acres within the two states.

NM-EX 107, Lopez Rep. at 42 (emphasis added). Thus, it should come as no surprise to the United States that New Mexico agrees that the Special Master's order on summary judgment should recognize that the 57%-43% apportionment between the States comes "after allowance for deliveries to Mexico pursuant to the 1906 Treaty." *Id*.

2. New Mexico Has Asserted that the Apportionments Are Limited to Use of Project Supply on Project Acreage

Similarly, the United States argues that New Mexico "fails to incorporate qualifications on the use of the water that derive from the Compact's text." U.S. Resp. 10. In particular, the United States argues that the apportionment below Elephant Butte is limited to water for Project purposes. *Id*. It is hard to understand the United States' characterization of New Mexico's position in light of the emphasis that New Mexico has placed on the intent of the Compact to protect the Project. New Mexico has acknowledged that Compact releases are intended to satisfy "irrigation demands" on Project lands, and that the underlying basis for the apportionment is that each acre of Project land is entitled to an equal amount of water. Nonetheless, to the extent that it is not clear to the United States, New Mexico agrees that "the apportionment to New Mexico [and Texas] below Elephant Butte" is calculated based on Project supply available to satisfy "irrigation demand within EBID [and EPCWID]." *Id*.

3. New Mexico Recognizes that the Compact Does Not Guarantee a Fixed Annual Amount of Water

Last, the United States suggests that New Mexico seeks "judgment declaring that each State is 'apportioned' a fixed" amount of water. That too is incorrect. New Mexico recognizes that the Compact does not guarantee a "fixed" amount of water to either Texas or New Mexico the way that some Compacts do. *See* Colorado River Compact, 45 Stat. 1057 (1928) (requiring the Upper Basin States to deliver 7.5 million acre feet of water annually). Rather, after accounting for water to satisfy the Treaty obligations with Mexico, New Mexico is entitled to 57% of available Project supply below Elephant Butte and Texas is entitled to 43% of available Project supply, up to a maximum allocation that constitutes a full supply to satisfy "irrigation demands." *Cf.* Hilary t. Jacobs, *When the River Dries Up, the Compact Need Not Wither Away: Amending Interstate Water Compacts to Ensure Long-Term Viability*, 73 Md. L. Rev. Endnotes 96, 123 (2014) (arguing

that "States should amend compacts to allocate water in terms of percentages, rather than in specific amounts"). The actual amount of water allocated and available for each State will vary by water supply conditions and amount of Usable Water available for delivery to Project lands.

Nor does New Mexico claim that the Compact dictates all aspects of Project operations as the United States implies. U.S. Resp. 6. Most operational issues are left to Reclamation and the two Districts. The Compact does, however, impose meaningful limitations on Project operations such as specifying that releases must be for "irrigation demands," Art. I(*l*), defining a "normal release" of 790,000 acre-feet to meet Project lands in both States, Art. VII and VIII, annual accounting, Art. I(g), I(h), I(o), and limiting when credit water may be released, Art. VII. Because the Compact is federal law specific to the Rio Grande Project, Reclamation is bound to follow these provisions of the Compact. Most importantly, as an "agent of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact made," Reclamation is required to operate the Project in a way that is consistent with the 57%-43% apportionment below Elephant Butte. *Texas v. New Mexico*, 138 S. Ct. at 959.

E. The Compact Apportions 57% of Project Supply to New Mexico and 43% of Project Supply to Texas

The United States, like Texas, accepts that New Mexico lands have historically been allocated 57% of Project supply, which the United States (unlike Texas) agrees is part of New Mexico's equitable apportionment. U.S. Resp. 2. As discussed, however, the United States is reluctant to accept that the 57%-43% division is a quantifiable Compact apportionment. It raises two objections to this division. Neither objection has merit.

1. The Compact Incorporates the Project and the Downstream Contracts

The United States acknowledges that the "Compact . . . implicitly . . . incorporate[s] the Downstream Contracts by reference." *Texas v. New Mexico*, 138 S. Ct. at 959. It asserts that

"there is no dispute that the 1938 contract informs the apportionment," and "calls for a 57%-43% division." U.S. Resp. 17. In that way, the United States accepts, by extension, that the Compact itself "calls for a 57%-43% division." But the United States argues that the "57%-43% division" applies only in times of shortage. *Id*. There are several problems with the United States' assertion.

First and foremost, the United States overlooks the primary dividing principle underlying the Compact. As the United States admits, "the Project allocation was allocated to all Project lands on an acre-foot-per-acre basis." NM-EX 602, 7, RFA No. 12. In the words of Reclamation witness Cortez, "the allocation has historically been *equally divided* to all Project lands on an acre-foot per acre basis . . . combining storage and return flows so that *each acre of farm land received an equal amount of water* regardless of the source of the water or what district the land was located." NM-EX 506, Cortez Aff., ¶ 8 (emphasis added); *see also* NM-EX 529, FEIS at 5 ("From 1908 through 1979, Reclamation operated the [Rio Grande Project ("RGP")]. Reclamation determined the annual allotment of RGP water per acre of authorized land and delivered the annual allotment to farm headgates and to the Acequia Madre for Mexico."). This dividing principle has historically applied in both times of shortage and in times of plenty. NM-EX 107, Lopez Rep. at 26-27; NM-EX 108, Lopez Reb. Rep. at 6-9.

Texas Commissioner Clayton detailed the application of this principle to the Compact. In explaining the operation of the Compact, Texas Commissioner Clayton stated that "the question of the division of water released from Elephant Butte Reservoir is taken care of" by the Downstream Contracts. NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938). Because "[t]hese contracts provide that the lands within the Project have equal water rights, . . . *the water is allocated according to the areas involved in the two States*." *Id*. (emphasis added). And because the total

area is "frozen" at "88,000 acres" in New Mexico, and "67,000" in Texas, the Compact apportionment is "frozen" at 57%-43%. *Id*.; *see also* TX_MSJ_007462 (Reclamation explaining in 1938 that the "main object" of the Downstream Contract "was to accomplish an agreement between the districts whereby each agreed to and should abide by the fixed percentage . . . in the allocation of water"). The United States offers no comment on, or resistance to this description of the Compact apportionment, which it concedes is "important." U.S. Resp. UMF ¶ 46.

A fatal problem with the United States' theory is that it has no alternative dividing principle for apportioning the water during times of full supply. Presumably, under the United States' theory, this would mean that in times of full supply the Compact does not prevent the United States from allocating water to the two States in whatever proportion it deems suitable. That would make the amount of water apportioned to each State unknowable and dependent on the discretion of Reclamation – a non-signatory to the Compact. *Accord Tarrant*, 569 U.S. at 631 (explaining the "background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts"). As discussed above, this would be contrary to established principles of equitable apportionment, it could produce anomalous or arbitrary results, and it would preclude the States from predicting how much water they are apportioned in any given year. For example, it would be a strange result indeed if New Mexico were entitled to 57% of the available water during times of shortage, but only 30% of the available water during times of full supply.

Finally, the United States points to the language in one of the Downstream Contracts that the "57%-43% division" applies "so far as practicable." U.S. Resp. 17. New Mexico acknowledges the possibility that this provision might have relevance under extraordinary circumstances. For example, it might theoretically apply if it were not "practicable" to deliver water to portions of EBID's acreage because one or two of the diversion structures were broken.

But the United States has offered no argument, no reason, and no evidence showing why this language has actually applied at any time in the Project's history. Certainly, that language does not permit Reclamation to carte blanche ignore the apportionment agreed to in the Compact (and set its own allocation).

2. New Mexico Defines "Project Supply" as that Term Has Historically Been Used

The United States also complains that New Mexico "does not include a definition" of "Project supply." U.S. Resp. 11. But it immediately undercuts this argument by pointing out that Dr. Barroll included a definition of "Project supply" in her declaration, and by citing to New Mexico's Apportionment Motion for the proposition that "'Project supply' refers to the waters available for distribution by the Project in a given year." *Id*. at 13.

The concept of Project supply is not a matter in dispute in this case. Reclamation witness Cortez defined Project supply as being "made out of two components, one being the usable water," and the other being "return flow back to the river, which is captured and delivered to the project water users." NM-EX 257, Cortez Dep. (July 30, 2020), 77:18-22. This accords with the definition offered in New Mexico's briefing:

> The term "Project Supply" means the Usable Water released from Caballo Dam, plus Project return flows and inflows occurring below Caballo Dam, that can be allocated and delivered to the beneficiaries of the Project – namely EBID and EPCWID – and to Mexico.

NM-CSMF ¶ 125. It accords with the definition of Project supply offered by Dr. Barroll in support of New Mexico's Motion:

> The term "Project Supply" is the annual release of Usable Water from Project Storage, as defined in the Compact, along with the return flows and tributary inflows below Elephant Butte, which the Project recaptures and delivers to the downstream water users.

NM-EX 001, Barroll Decl., ¶ 15; *see also* NM-EX 006, Barroll 2d Decl., ¶¶ 10-11. And it accords with the definition offered by New Mexico expert Estevan Lopez in his first expert report:

> Project water supply [is] comprised of (1) Usable Water released from Elephant Butte Reservoir, (2) inflows below Elephant Butte and (3) return flows.

NM-EX 107, Lopez Rep., 42. Thus the Parties are in agreement on the meaning and definition of Project supply.

Although there is no dispute, this definition is important because it is Project supply that is divided between the two States each year. NM-EX 602 at 8, RFA No. 15 (Project allocates "the available Project water supply"); *see also* U.S. Compl. in Intervention ¶ 15 (alleging that the Compact protects a delivery of "43% of *the available water*" (emphasis added)). Specifically, "Reclamation allocates RGP water supplies such that the diversion allocations to EBID and EPCWID are proportionate to each district's respective acreage." NM-EX 529, FEIS at 4. To accomplish this allocation, the "available Project water supply," NM-EX 602 at 8, RFA No. 15, is determined each year by Reclamation "based on the amount of [Project] water in storage available for release and the estimated amount of water available for diversion at river headings accounting for canal bypass, drainage return flows, and other inflows or losses to the Rio Grande." NM-EX 529, FEIS at 4 (Reclamation describing the allocation process); UMF ¶ 67 (i.e., NM-CSMF ¶ 131). New Mexico does not seek to change this process; it seeks only to ensure that its citizens receive the benefit of the State's 57% of Project supply that represents New Mexico's Compact apportionment.

In short, the United States' feigned confusion over the meaning of Project supply is no more than an attempt to manufacture an issue to postpone a decision on the apportionment.

F. The United States Does Not Address the Negotiating History

The United States does not criticize or even address New Mexico's description of the negotiating history. As a result, the United States apparently accepts that the Compact was intended to protect all existing uses in New Mexico, *see* N.M. App. Mot. 37-39, that the Project was intended to operate as a single unit, *id.* at 40, and that the equal allocation of water to each Project acre allowed the States to determine the 57%-43% division of water between the States, *id.* at 41. Based on the negotiating history established by New Mexico, including the "important" statements from Texas Commissioner Clayton, NM-EX 215, Kryloff Dep. (Aug. 6, 2020), 41:15-20, 41:21-42:9, the United States implicitly recognizes that "the question of the division of the water released from Elephant Butte reservoir is taken care of by the [Downstream Contracts]," that "provide . . . the lands within the Project [with] equal water rights," and allocate the water "according to the areas involved in the two States." NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938).

G. The United States Largely Agrees with New Mexico on the Course of Performance

1. The Project Operations from 1938 to 2006 Confirms the 57%-43% Apportionment

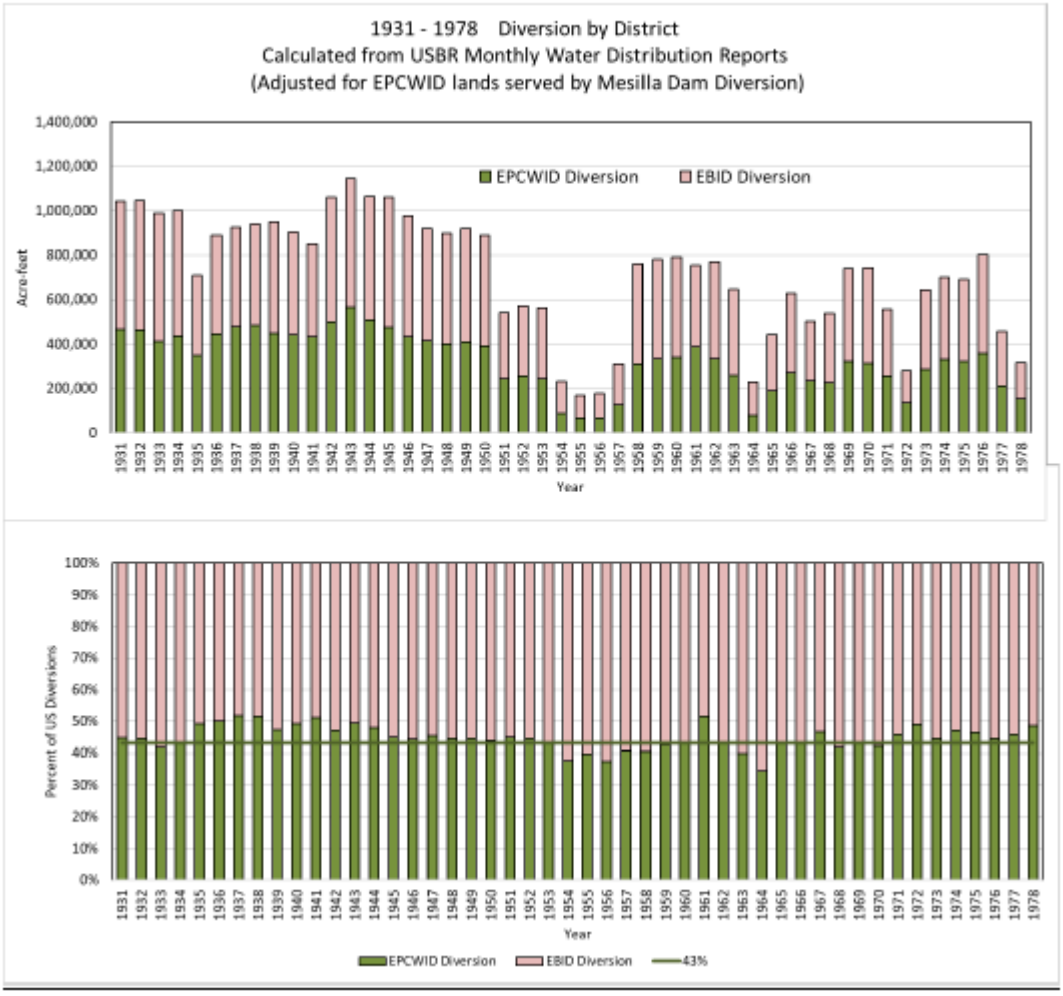
As discussed in Section II.D.2, *supra*, New Mexico detailed the 80-year course of performance in its Apportionment Motion and demonstrated that this course of performance is strongly supportive of New Mexico's position that the Compact apportions the water 57%-43% below Elephant Butte. The United States does not take issue with the majority of this "highly significant" course of performance. *Tarrant*, 569 U.S. at 636 (quoting *Alabama v. North Carolina*, 560 U.S. at 346).

Instead, the United States attempts to manufacture a dispute over the facts by pulling a linguistic sleight of hand and focusing on "diversions" rather than "allocations" (also referred to

as "allotments") to suggest that "New Mexico's allegation that Project deliveries were 'allocated' 57%-43% in these years, does not accurately represent what the data show." U.S. App. Resp. 17; s*ee generally id.* 16-19. A review of the data on both *diversions* and *allocations* reveals that the United States' argument should be rejected.

In its Apportionment Motion, New Mexico noted that the records show that *even the diversion data* generally illustrates the 57%-43% division of water. Specifically, New Mexico showed the following figure from Dr. Barroll's Rebuttal Expert Report:

Figure A.3. District Diversions 1931 - 1978



NM-EX 100, Barroll Rep., Appx. 1, A-8. As New Mexico pointed out, from 1951, when Reclamation began enforcing allocations, until 1979, when Reclamation transferred some facilities to the Districts, the diversions totaled 56.2% in New Mexico and 43.8% in Texas. UMF ¶ 65 (i.e., NM-CSMF ¶ 157). This shows a remarkable fidelity to a 57-43 split, considering that diversions depend on decisions from thousands of individual farmers about when to irrigate, what crops to grow, and when to call for water. Far from inconsistent with a 57%-43% apportionment, as the United States suggests, this evidence of diversions is therefore highly suggestive of such a division.

Further, as the United States no doubt understands, when considering the apportionment, the focus is not on *diversions*, but on *allocations*. *See* U.S. Resp. Br. 17-18. This is so because unlike diversions, which depends on the actions of individuals, an allocation represents the amount of water available to the citizens in each State. As discussed above, farmers do not always order all of the allocation for a variety of reasons. Allocations, consequently better represents the apportionment. Here it is undisputed that the *allocation* data supports that the apportionment is "*precisely* 57% to New Mexico and *precisely* 43% to Texas." U.S. App. Resp. 16 (emphasis in original).

It is undisputed that "[f]rom 1951 to 1978, Reclamation made allotments of water to all Project lands in acre-feet-per-acre." U.S. Resp. Br. 17. Reclamation explained these operations in its Environmental Impact Statement on the 2008 Operating Agreement, stating "[f]rom 1908 through 1979, Reclamation operated the [Rio Grande Project]. Reclamation determined the annual allotment of RGP water per acre of authorized land." NM-EX 529, FEIS at 5. Consistent with this, the United States admitted in response to a Request for Admission ("RFA") that "the Project allocation was allocated to all Project lands on an acre-foot-per-acre basis in the period prior to 1980." NM-EX 602, 7, RFA No. 12. Because 57% of Project acreage is located in New Mexico,

this allocation "prior to 1980," including the time that the Compact was negotiated, was "*exactly* 57%-43%." U.S. App. Resp. 17 (emphasis in original). *See also* NM-EX 108, Lopez Reb. Rep. at 8-9 (collecting citations where experts designated by the United States have admitted that the equal allotment of water to each acre resulted in a historic 57/43 division of water).

Similarly, from 1979 until 2006, it is undisputed that Project supply was *allocated* 57% to New Mexico, and 43% to Texas. In that regard, the United States has again made two significant admissions in responses to RFAs:

- "[A]t least from 1979 until . . . 2006 . . . the water allocation was made to EBID and EPCWID on the basis of their respective acreage relative to the total authorized Rio Grande Project acreage," NM-EX 602, 8, RFA No. 14; and
- "[B]etween 1980 and 2007, the water allocation to EBID and EPCWID was made on the basis of the respective acreage in each district relative to the Total Rio Grande Project acreage, with EBID allocated 88/155 [57%] of the available Project water supply and EPCWID allocated 67/155 [43%] of the available Project water supply," *Id*. at 8, RFA No. 15.

These statements demonstrate that the United States has admitted for all purposes in this proceeding that the allocation was "*exactly* 57%-43%" between the two States from 1979 until 2006. As discussed in New Mexico's Apportionment Motion, at 43-47, "Reclamation and Texas did not allow 57% of the water to be allocated to New Mexico lands for over 70 years 'out of love for the [Land of Enchantment].' They did it . . . because it was their understanding of how the Compact was supposed to work." N.M. App. Mot. 47 (quoting *Alabama v. North Carolina*, 560 U.S. at 346).

2. Neither the United States Nor EBID Has Authority to Cede Part of New Mexico's Compact Apportionment

As shown in the discussion above, the Project operations from prior to the Compact all the way until 2006 allocated 57% of Project supply to New Mexico and 43% to Texas. That leaves the period following the 2008 Operating Agreement. As New Mexico has explained, the division of water under the 2008 Operating Agreement has drastically changed to that New Mexico is deprived of its equitable share.

In spite of this change, the United States makes the surprising assertion that even under the 208 Operating Agreement, it is *still* allocating water 57% to New Mexico and 43% to Texas. It claims that "[t]he 2008 Operating Agreement did not change the 57/43 ratio in allotting the available supply to the Districts based on the D1/D2 methodology." U.S. Resp. to UMF at 25-26, ¶ 79; *see also id*. at 26, ¶ 80. To explain the decreased water in New Mexico since 2006, the United States goes on to argue that under the 2008 Operating Agreement, after 57% of Project supply is allocated to New Mexico, EBID "foregoes a portion of that allocation to account for deviations in Project performance to mitigate the effect of ground water pumping in New Mexico." *Id*. *See also* U.S. Br. 15, ¶ 71 ("The effect of the 2008 Operating Agreement is that EBID voluntarily cedes some of its surface water allocation to EPCWID to compensate for surface water depletion caused by groundwater pumping in New Mexico, including pumping by water users outside of EBID."). This is an argument that the United States has carried forward since the start of this case, *see* Brief for the United States as Amicus Curiae (On Motion for Leave to File) 18-19 (Dec. 2013), and it parallels the argument of *amicus* EBID, which claims, without citation, that "there is nothing that prevents the Project beneficiaries from making deals with one another that change the distribution of water within the Project." EBID *Amicus* Br. 16.

For purposes of deciding New Mexico's Motion, it is not necessary to resolve whether EBID can "forego" part of New Mexico's apportionment. This is so because the United States' argument addresses what happens *after* the allocation is already assigned 57%-43%, and this Motion only seeks a ruling on the apportionment. Nonetheless, in case it is of interest to the Special Master, New Mexico explains below that this argument fails for at least four reasons.

First, the Compact apportions Rio Grande Project water supply to the State of New Mexico, not to any individual citizen. *See, e.g.*, Rio Grande Compact, 53 Stat. 785, 785 (1939) (declaring that the compacting States' purpose for entering into the Compact was to "effect[t] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas"); U.S. Resp. to UMF at 9, ¶ 25. In negotiating the Compact, New Mexico was "acting as a quasi sovereign and representative of the interests and rights of her people." *Hinderlider*, 304 U.S. at 107. EBID, like all of New Mexico's citizens and water users, shares New Mexico's apportionment. Neither EBID, nor any other single water user has the right to "forego" part of the State's apportionment without the State's consent. *Id*. at 106-08; *see also Nebraska v. Wyoming*, 325 U.S. at 627, 629; *Wyoming v. Colorado*, 309 U.S. at 579.

Second, under the New Mexico Constitution and applicable law, waters of the State, including the water apportioned to the State of New Mexico by the Compact, are committed to the public, allowing only the *use* of the water by individual citizens. N.M. Const. art. XVI, § 2; *see also* NMSA 1978, § 72-1-1 ("All natural waters flowing in streams and watercourses, whether such be perennial, or torrential, within the limits of the state of New Mexico, belong to the public and are subject to appropriation for beneficial use"); NM-CSMF ¶ 288. The New Mexico Supreme Court has discussed this principle: "The water in the public stream belongs to the public. The appropriator does not acquire a right to specific water flowing in the stream, but only the right to

take therefrom a given quantity of water, for a specified purpose." *State ex rel. State Game Comm'n v. Red River Valley Co.*, 1945-NMSC-034, ¶ 42, 182 P.2d 421 (internal quotation marks omitted); *see also State ex. rel. Erickson v. McLean*, 1957-NMSC-012, ¶ 53, 308 P.2d 983 ("All water within the state, whether above or beneath the surface of the ground belongs to the state, which authorizes its use, and there is no ownership in the corpus of the water"). EBID cannot surrender a State resource that belongs to the public.

Third, the right to use the water apportioned to New Mexico belongs to the farmers, not EBID. Courts have confirmed time and again that the actual water rights associated with Project deliveries belong to the water users themselves, not the districts. *Ickes v. Fox*, 300 U.S. 82, 95 (1937);[12] *Nevada v. U.S.*, 463 U.S. 110, 123 (1983) ("The property right in the water right is separate and distinct from the property right in the reservoirs, ditches or canals. The water right is appurtenant to the land, the owner of which is the appropriator."); *Nebraska v. Wyoming*, 325 U.S. 589, 614; *Hudspeth County Conservation and Reclamation Dist. No. 1 v. Robbins*, 213 F.2d 425, 429-430 (5th Cir. 1954); *Bean v. U.S.,* 163 F. Supp. 838 (Fed. Ct. Cl. 1958); *U.S. v. Pioneer Irr. Dist.*, 157 P.3d 600, 609 (2007) (holding "the use of the water is held by the consumers or users of the water," the "irrigation organizations act on behalf of the consumers or users," and the "interest of the consumers or users of the water is . . . derived from law and is not based exclusively on the contracts between the Bureau of Reclamation and the irrigation organizations"); *see also* Joint Brief of *Amici Curiae* New Mexico Pecan Growers and the Southern Rio Grande Diversified Crop Farmers Association in Support of State of New Mexico and In Response to the United States of America's Motion for Partial Summary Judgment at 19 (disputing that EBID has authority to

[12] The NMPG and SRGDCFA explain that *Ickes* involved a Reclamation contract with identical language to the Downstream Contracts. They further explain the relevance of specific provisions of the Downstream Contracts. NMPG & SRGDCFA *Amicus* Br. 14-15.

"voluntarily cede" water without their knowledge and opportunity to object and affirmatively stating EBID farmers had no notice that EBID agreed to a reduced surface water supply in exchange for groundwater pumping until after the agreement was signed"). Put simply, the underlying water rights do not belong to EBID, and EBID cannot "forego" or otherwise transfer water that does not belong to it.[13]

Fourth, the theory articulated by the United States that EBID voluntarily cedes some of its surface water allocation to EPCWID would violate New Mexico law governing the transfer of water out of the State. New Mexico's Water Export Statute, NMSA 1978, § 72-12B-1, requires an entity to obtain a permit from the State Engineer before transporting water outside of the State, or changing the place of use to a place out of State. NMSA 1978, § 72-12B-1. Neither EBID nor its farmer members have applied for or obtained a permit to export water to Texas or to change the place of use to EPCWID. NMCSMF ¶ 195. EBID's agreement to a transfer of New Mexico water outside the State without a permit would therefore contravene New Mexico law.

If raised at the appropriate time,[14] the United States' theory that it is permissible for one New Mexico citizen (EBID) to voluntarily forego part of the State's apportionment, should be rejected.

[13] For example, the theory articulated by the United States would reduce the water available for EBID members under the Final Judgment in Stream System Issue 101 ("SSI 101"). *See* NM-EX 541. Consistent with the Compact, the Final Judgment in SSI 101 provides limits on the amount of water that can be used on New Mexico lands below Elephant Butte. *See id*. Unlike Texas, the Final Judgment requires that New Mexico water users use their surface water allotment from EBID first, before supplementing that supply with groundwater, up to the maximum amount allotted to each individual water right (4.5 to 5.5 acre-feet). Inasmuch as the United States asserts that Project surface water is allotted to EBID, before being ceded to Texas, that allotment would count as part of each individual farmer's total. In other words, the Project surface water that was ceded to EPCWID would be subtracted from the total amount of water available to EBID members under the Final Judgment in SSI 101.

[14] As explained, the United States' argument on this point applies after the apportionment has already been decided, likely as a defense for operating the Project in a way that is inconsistent with the Compact.

H. New Mexico Agrees that the Court Will Need to Decide How the Compact Treats Groundwater, but Disputed Facts Preclude a Decision at this Time

Finally, the United States devotes several pages in its brief to an issue that New Mexico intentionally reserved from its Apportionment Motion—how depletions to Project supply caused by groundwater pumping are to be accounted for in both States. U.S. App. Resp. 12-16. In its Response to the United States Motion, New Mexico noted several pertinent facts: (1) that Reclamation encouraged water users in both States to pump groundwater to supplement Project surface water, (2) that farmers in both States have relied on hundreds of wells for decades to supplement Project supply, (3) that no State objected to groundwater use, and (4) that Reclamation incorporated the effects of groundwater pumping into its allocation methodology since 1980. NM Resp. to U.S. 19-31. New Mexico is confident that the Court will ultimately rely on that evidence to find that both States understood the Compact to allow groundwater pumping.

Out of an abundance of caution, however, New Mexico withheld the groundwater issue from its Apportionment Motion because it recognizes that there are disputes over material facts that preclude summary judgment. Two examples are instructive. The United States (and the Districts) have taken the position that depletions from levels of groundwater pumping that existed from 1951 until 1978 *are consistent with* the Compact. They admitted as much by entering the 2008 Operating Agreement, which allocates water to EPCWID based on the D2 method. NM-EX 608, U.S. Supp. Response to NM Interrog. 19; NM-EX 529, FEIS at 7. The D2 method, in turn, incorporates the effects on Project supply of all groundwater pumping that occurred through the years 1951 to 1978. NM-CSMF ¶ 215; NM-EX 529, FEIS at 7-8. In entering the Operating Agreement, the United States therefore expressly recognized that this level of groundwater pumping is consistent "with the provisions of the Rio Grande Compact." NM-EX 510, 2008 Operating Agreement, 14, ¶ 6.12. Or, put another way, the Reclamation 30(b)(6) witness testified

on behalf of Reclamation that the Operating Agreement "grandfathers" in the groundwater pumping from 1951 until 1978, and the level of groundwater pumping from this time period is allowed by the Compact. NM-EX 260, Cortez 30(b)(6) Dep., (Aug. 20, 2020), 73:7 – 74:19. But there is a dispute with New Mexico over whether the Compact limits groundwater pumping to 1978 levels as articulated by Reclamation, or whether all groundwater pumping is contemplated by the Compact, as advocated by New Mexico. And Texas, unlike the United States and the Texas District (EPCWID), does not accept that 1978 levels of groundwater pumping are allowed by the Compact (despite its failure to regulate *any* groundwater within the Compact area). It follows that the exact level of groundwater pumping allowed by the Compact will need to be decided at trial.

Likewise, the United States argues in its response that the "Compact apportionment necessarily includes all of the return flows that would reach the Project but for" the actions of the States. U.S. Resp. 13. But as New Mexico explained in its Response to the United States, at 60-62, the United States has previously defined return flows as only that water that actually "reaches the bed of the Rio Grande." NMCSMF ¶¶ 261, 286. For example, Reclamation witness Filiberto Cortez testified that return flows that do not reach the bed of the Rio Grande do not form part of Project supply. NM-EX 260, Cortez 30(b)(6) Dep., (Aug. 20, 2020), 77:23 – 79:19. This creates a dispute over material fact as to the United States' inconsistent argument and inconsistent approach to return flows from groundwater in Texas and New Mexico. NM Resp. to Tex. 60-62.

Numerous other disputes over facts material to the groundwater issue exist. Thus, while New Mexico recognizes that the issue of how the Compact treats groundwater will ultimately need to be decided, it accepts that the issue will need to await trial. It was for that reason that New Mexico narrowly crafted the relief it seeks in its Motion for Partial Summary Judgment to exclude the groundwater issue. Ripe for summary judgment, however, is New Mexico's request for a

declaration that after taking into account the water owed to Mexico by Treaty, "the Compact apportions water to both New Mexico and Texas below Elephant Butte Reservoir – 57% of the Rio Grande Project supply to New Mexico and 43% of the Rio Grande Project supply to Texas." Motion at 3. Summary judgement on that issue would make trial more efficient by allowing the Parties to tailor their evidence to the appropriate standard.

IV. REPLY TO THE STATE OF COLORADO

New Mexico agrees with Colorado on several principles, including the following:

- "The Compact has no implied 1938 condition," CO Resp. 21;
- "The Compact does not limit consumption in Colorado [or New Mexico]," *id*. at 22;
- "As long as they meet their delivery requirements, the Compact expressly allows future increases in consumption in Colorado and New Mexico," *id*. at 23;
- "It makes little sense for the states to have imposed detailed obligations on Colorado and New Mexico in Articles III and IV incorporating inflow and outflow gages and then silently impose an obligation based on a 1938 condition below Elephant Butte Reservoir," *id*. at 24;
- "Texas attempts to improperly expand the Compact to dictate how Colorado and New Mexico must regulate water use within their borders," *id.* at 25; and
- "The Court should not adopt an interpretation of the Rio Grande Compact that imposes requirements for intrastate regulation that do not appear in the Compact," *id*. at 25.

The problem with the remainder of Colorado's argument on apportionment is that it is four years too late. *See generally* FIR (decided Feb. 9, 2017). Colorado raises the same legal arguments that New Mexico raised in its Motion to Dismiss. Like the Motion to Dismiss, Colorado argues that the Compact does not incorporate the Project or the Downstream Contracts, *compare* N.M. Mot. Dismiss 49-63, *with* CO Resp. 16-21, 36; like the Motion to Dismiss, Colorado argues that

the Compact ends at Elephant Butte, *compare* N.M. Mot. Dismiss 49-63, *with* CO Resp. 30-35; like the Motion to Dismiss, Colorado argues that the Compact does not apportion water below Elephant Butte, *compare* N.M. Mot. Dismiss 49-63, *with* CO Resp. 37-38; and like the Motion to Dismiss, Colorado argues that only Reclamation law, not the Compact, applies below Elephant Butte, *compare* N.M. Mot. Dismiss 49-63, *with* CO Resp. 38-40. Special Master Grimsal rejected exactly these arguments, no Party (including Colorado) took exception on that issue, and the Court denied the Motion to Dismiss Texas's claims. *See generally*, NM Mot. for PSJ on Matters Previously Decided at 11-15 (Dec. 26, 2018) (describing the law of the case doctrine) (Doc. 165). Nor was that decision based on facts such that it can be revisited on summary judgment. In short, New Mexico has accepted the Court's decision on this issue, the litigation has moved on, and Colorado's arguments are precluded at this stage of the proceeding.[15]

New Mexico believes that the position set forth in its Apportionment Motion is the correct understanding of the Compact. If Colorado's position that "[t]he Compact unambiguously does not allocate water individually to either New Mexico or Texas below the San Marcial gage," CO Br. 6, were valid, then the proper remedy would be to dismiss this case on the grounds that neither Texas nor New Mexico has a Compact apportionment below Elephant Butte and thus, neither can establish a cause of action under the Compact. *See* Section III.A, *supra*.

CONCLUSION

New Mexico's Apportionment Motion offers a unified and equitable explanation of the Compact that gives meaning to all of the plain language. It is the only apportionment position that is consistent with the negotiating history, the course of performance, the Court's precedent, and the 2018 Decision. New Mexico's Apportionment Motion should be granted.

[15] One of the important ways the litigation has advanced is through the Court's 2018 Decision. For many of the reasons discussed above, Colorado's position is inconsistent with the 2018 Decision.

Respectfully submitted,

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