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 IN SUPPORT OF STATE OF NEW MEXICO'S MOTION FOR PARTIAL SUMMARY JUDGMENT TO EXCLUDE TEXAS'S CLAIM FOR DAMAGES IN CERTAIN YEARS

_____♦_____

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This consolidated Reply Brief is filed in response to Texas's Opposition to New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Certain Years ("Tex. FS Resp.")[1] and the United States' Memorandum in Response to New Mexico's Motions for Summary Judgment ("U.S. Resp."). [2]

INTRODUCTION

New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claims for Damages in Certain Years ("N.M. Full Supply Motion") rests on the fact that in 1985-2002, 2005, and 2007-2010 the Bureau of Reclamation ("Reclamation") allocated and made available to EPCWID (Texas) a Full Supply. Texas agrees that these years were in fact Full Supply years, with the limited exception of 2007.[3] Texas, however, alleges that even in these Full Supply years, Texas did not receive a full allocation due to groundwater pumping in New Mexico interfering with its water deliveries. Alternatively, Texas argues that even if it did receive a Full Supply, and was not shorted in the years identified, Reclamation should have calculated a larger Full Supply based not on the D2 curve, but on Project conditions existing in 1938.

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[1] In this Reply Brief, New Mexico adopts the abbreviation for briefs contained in New Mexico's Consolidated Reply to Parties in Support of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment (N.M. App. Reply).

[2] Amicus curiae the City of El Paso also raises certain arguments, derivative of Texas's arguments, regarding New Mexico's Motion. Response Brief of Amicus Curiae City of El Paso to the State of New Mexico's Motions for Partial Summary Judgment 2-5. These arguments are addressed in New Mexico's Consolidated Response to Amicus Curiae Elephant Butte Irrigation District, City of El Paso and El Paso County Water Improvement District's Briefs Regarding Apportionment of Water Below Elephant Butte Reservoir. To the extent they are not, New Mexico incorporates its response to the City of El Paso herein.

[3] Texas alleges that the only disputed year is 2007 because according to its accounting 2007 was not a Full Supply year because in this year Texas was allocated approximately 23,000 acre-feet less than a Full Supply allocation of 376,000 acre-feet. Texas's accounting excludes water available to order from EPCWID's "carryover account." The year 2007 is discussed in more detail at section V(A) below.

Texas's arguments misapprehend how Reclamation determined a Full Supply and how Reclamation delivers the allocated water—Reclamation calculated a Full Supply based on a maximum irrigation demand for each Project acre under pre-pumping conditions, and then delivered this amount to the irrigation districts at their canal headings. For Texas, its Full Supply was set by Reclamation at approximately 376,000 acre-feet per year (AFY) to meet their full irrigation demand.

This point bears repeating: Reclamation made these Full Supply determinations, not New Mexico. If Texas disputed them, it should have complained to Reclamation. It did not. Instead, Texas adopted Reclamation's Full Supply of 376,000 AFY in Texas's own state water rights adjudication, and Texas accepted this amount as its Full Supply for decades. Pumping in New Mexico is irrelevant in Full Supply years as to whether or not Texas receives its full allocation because Reclamation adjusts reservoir releases to ensure that EPCWID receives all the water it ordered at its canal headings. Therefore, there is no injury to Texas, and no claim for damages, in years when Texas was allocated a Full Supply. Texas's claims for damages are relevant only to non-Full Supply years, and will be addressed at trial. Finally, Texas admits that it does not seek damages in any year prior to 1985, but argues that New Mexico's request for an order confirming that Texas has no claim for damages before 1985 should come later. There is no basis or reason to defer this ruling.

ARGUMENT

I. New Mexico Is Entitled to Judgment as a Matter of Law that Texas Has No Claim to Damages Before 1985.

Texas admits it "has chosen not to seek money damages for impacts to Texas's apportionment pre-dating 1985." Tex. FS Resp. 2. Texas's only disclosed evidence of damages

is limited to 1985-2016. New Mexico is, therefore, entitled to a ruling that Texas has no claim to damages prior to 1985.

Texas argues New Mexico is not entitled to a summary judgment ruling limiting Texas's damages claims to 1985-2016, and that New Mexico must wait and file a motion in limine seeking to exclude evidence of pre-1985 damages. *Id*. at 3. There is no basis for Texas's claim that summary judgment on pre-1985 damages is improper at this time. In fact, "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses. . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Texas has admitted that it does not seek damages prior to 1985, and because Texas's claims for damages prior to 1985 are factually unsupported, the Court should "isolate and dispose of" such claims prior to trial. *Id*. at 323. The Court will still hear pre-1985 evidence on historical operations, deliveries, hydrology, and so on to understand the Parties' historical Compact interpretations and course of dealings; however, Texas has waived its right to claim damages for any year prior to 1985, and the Court should confirm this in a summary judgment ruling.

II. There Are No Disputed Issues of Material Fact Relating to This Motion

Texas argues that the Court should deny this Motion because disputed issues of material fact preclude a ruling at this time. Tex. FS Resp. 3-5. This is false.[4] This motion turns on whether EPCWID had available to it a Full Supply in each of the years New Mexico identifies—if so, as a matter of law, there can be no injury and no claim to damages in those years. N.M. Full Supply

[4] Texas raises various objections to facts New Mexico sets out in its Motion, but these objections generally relate to the authentication and admissibility of the evidence cited to support these facts—they are generally not objections to the facts as stated. Tex. Evid. Objs. 3-14, 114-27. New Mexico addresses Texas's objections in its Response to the State of Texas's Evidentiary Objections and Responses to the State of New Mexico's Facts filed concurrently herewith.

Mot. 1. Texas expert Dr. Brandes *agrees* (with the exception of 2007)[5] that the years New Mexico identified in its Motion as Full Supply years were years in which Reclamation allocated to EPCWID the maximum allocation it could receive from the Project that year (*i.e.* a Project Full Supply). Brandes Decl. ¶ 8 (Dec. 22, 2020), TX_MSJ_007312 ("I have reviewed Project allocations for the years 1985-2002, 2005 and 2007-2010 (Subject Years) identified by New Mexico as 'full supply' years for the Rio Grande Project. I generally agree…."). This admission contradicts Texas's assertion that there are disputes over material facts that preclude a ruling in New Mexico's favor on this Motion.

Further, Texas has failed to identify any significant disagreement with the substance of the other material facts New Mexico laid out in its Motion. *See* Tex. Evid. Objs. 114-27. For example, Texas does not dispute the facts regarding Reclamation's historical delivery of water ordered by the Districts—"Reclamation then determined what releases and diversions were needed to fulfill those orders…" and "Reclamation…takes water order from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for each District." *E.g., id*. 118-19 (acknowledging Texas does not dispute material facts 9 and 10). Even as to the fact that Reclamation has always delivered the water EPCWID ordered—which is acknowledged by United States' expert Dr. Ian Ferguson, N.M. Full Supply Mot. 7, and which the United States does not dispute—Texas raises only evidentiary objections, not any substantive disagreement. *Id*. 123-24 (responding to material fact 15).

[5] Dr. Brandes's disagreement with 2007 as a Full Supply year and why he is mistaken are discussed in section V(A) below.

III. Texas Was Not Harmed in Full Supply Years Due to Groundwater Pumping in New Mexico

Texas argues that New Mexico's Motion should be denied because Texas did not receive its full Compact apportionment even in Project Full Supply years—because of groundwater pumping in New Mexico. Tex. FS Resp. 5. Texas claims that New Mexico pumping intercepted the *delivery* of "Texas's Project allocation" (Compact apportionment), even in Full Supply years. Tex. FS Resp. 5-6.[6] According to Texas, it would have received additional deliveries from Reclamation in the years 1980-2017 but for New Mexico's pumping. Tex. FS Resp. 5. Texas is incorrect that groundwater pumping has any influence over whether a Full Supply is amount allocated or delivered to Texas.

A. Reclamation Determined Texas's Full Supply Based on Irrigation Demands During a Pre-Pumping Period (1946-1950)

As described in Dr. Barroll's declaration filed herewith, Reclamation established the "normal delivery" allotment to Project lands as 3.024 acre-feet per acre based on the average farm delivery per acre during the years 1946-1950. NM-EX 014, Barroll 3d Decl. ¶ 20.[7] This was memorialized in a 1956 IBWC memorandum, which described Reclamation's calculation for the 3.024 acre-feet per acre as the total acre-feet delivered to farms divided by the Project irrigated acres. *Id*. Reclamation adopted the 3.024 acre-feet per acre after the 1946-1950 period as the basis for calculating Full Supply allocations, and re-confirmed its use of the 3.024 acre-feet per acre in its Water Supply Allocation Procedures (WSAP) document (circa 1990). *Id*. ¶¶ 22, 23. In the

[6] Texas bases this argument on a declaration filed by Dr. Brandes who, prior to Texas's Response to this Motion, did not previously offer any opinions on New Mexico's Integrated Model.

[7] All exhibits designated "NM-EX __" in this Reply Brief are contained in the State of New Mexico's Final Exhibit Compendium dated February 5, 2021 filed with New Mexico's Reply Briefs.

WSAP summary, Reclamation provides for a Full Supply allocation at the canal headings of 376,862 AFY to EPCWID in order to supply 3.024 acre-feet per acre to Texas's authorized acreage. *Id.* ¶¶ 22, 23; NM-EX 400, WSAP. The WSAP also describes the D2 Curve and associated calculations (as further described below). NM-EX 014, Barroll 3d Decl. ¶¶ 22, 23; NM-EX 400, WSAP.

Reclamation more recently confirmed in the Final Environmental Impact statement for the 2008 Operating Agreement that the 3.024 acre-feet per acre was long considered the amount of water per acre to determine Full Supply allocations:

> Analysis carried out during the early 1950s, based on actual irrigation deliveries to Project lands **during the period 1946-1950**, determined that a delivery of 36.29 inches **(3.024 acre-feet per acre)** constituted a "normal delivery to the project lands". The D-1 Curve was later used to estimate the release from Project storage that would provide for delivery of 3.024 acre-feet per acre (assuming 155,000 irrigated acres within the Project). The resulting release of 763,842 acre-feet [was] considered 'full supply' for allocation purposes prior to the OA. A release of 790,000 acre-feet is considered 'full supply' for allocation purposes under the OA.

NM-EX 529, FEIS at E-14 (PDF p. 311) (emphasis added). As Reclamation explains in the above quotation, it used the D-1 curve to "estimate the release from Project storage that would provide for *delivery* of 3.024 acre-feet per acre," but it determined that 3.024 acre-feet per acre is the measure of a Full Supply based on an analysis of deliveries during the pre-pumping years of 1946-1950. *Id*. (emphasis added); NM-EX 014, Barroll 3d Decl. ¶¶ 20, 22, 38. As described below, the 2008 Operating Agreement changed the Full Supply release amount (from 763,000 AFY to 790,000 AFY) and EPCWID's Full Supply allocation (from 376,000 AFY to 388,000 AFY) without considering whether the additional water was needed to meet irrigation demands.

B. Texas Adopted a Project Full Supply of 376,000 AFY in Its Own Intrastate Adjudication

Starting in 1994, and completed in 2006, Texas adjudicated water rights in the Texas Compact area. This adjudication gives EPCWID and the United States the right to divert up to 376,000 AFY of Project supply in the El Paso Valley (the amount of EPCWID's Full Supply allocation under Project operations prior to 2006). NM-EX 505, Texas Comm'n on Env't Quality, Certificate of Adjudication No. 23-5940, ¶ 1.b. (Mar. 7, 2007); s*ee also* NM-EX 515, Final Judgment and Decree, *In re: The Adjudication of Water Rights in the Upper Rio Grande Segment of Rio Grande Basin*, No. 2006-3219 (El Paso Cty. Dist. Ct., Oct. 30, 2006). Notably, in this adjudication, Texas did not award EPCWID the right to divert more than 376,000 AFY. This shows that Texas understood 376,000 AFY to be the measure of EPCWID's Project Full Supply allocation—the maximum amount expected from the Project in a given year. This is also consistent with Texas's Complaint in this case, where Texas asserted EPCWID's and the United States' adjudication certificate for the 376,000 AFY is "consistent with the provisions of the . . . Rio Grande Compact" and "sufficient to meet the Rio Grande Project and Rio Grande Compact diversion and use rights in Texas." Tex. Compl. ¶ 22.

The United States also supports 376,000 AFY as EPCWID's Project Full Supply allocation. The United States was a party to the Texas water rights adjudication and accepted the judgment awarding the United States and EPCWID the right to divert up to 376,000 AFY. *See* NM-EX 505. Since the adjudication, United States witnesses have acknowledged that the "Texas adjudication certificate define[s]" Texas's entitlement to water from the Project. NM-EX 257, Cortez Dep. (July 30, 2020) 105: 14-16.

More recently, the United States argued in the New Mexico adjudication of water rights in the Lower Rio Grande that the Adjudication Court should "give full faith and credit" to the Texas

adjudication and recognize the Project's water right includes "the right to deliver to Project diversion dams in Texas . . . up to a diversion amount of 376,000 acre-feet per annum." NM-EX 611, United States' Memorandum in Support of Motion for Summary Judgment 28, *New Mexico ex rel. State Engineer v. Elephant Butte Irrigation Dist.*, No. 96-cv-888 (N.M. 3d Jud. Dist. Ct., Apr. 24, 2013). The United States did not seek the right to deliver more than 376,000 AFY of water to Texas, which it could have done if it believed there was a legal and factual basis to make such a claim. Instead, the United States sought recognition of the Project's delivery of up to 376,000 AFY to EPCWID—the exact amount allocated to EPCWID in Project Full Supply years prior to 2006.

C. Texas Has Accepted a Project Full Supply of 376,000 AFY for Decades

Texas has accepted and acquiesced to a Project Full Supply of 376,000 AFY to EPCWID (Texas) for decades. NM-EX 001, Barroll Decl. ¶¶ 21-22. The Court has long recognized in interstate cases that acquiescence to a course of conduct can preclude a state from raising claims about the propriety of the conduct later. *E.g., Ohio v. Kentucky*, 410 U.S. 641, 648-49 (1973) (Ohio's "long acquiescence" to the location of its border with Kentucky precluded Ohio's claim that the border was located elsewhere). Here, Texas's long acquiescence to a Project Full Supply of 376,000 AFY to EPCWID should preclude Texas from now claiming that this Full Supply should somehow have been larger. In any event, it escapes belief that EPCWID, and Texas, would have accepted this amount for decades if they had held the opinion, before this litigation, that 376,000 AFY was not a Project Full Supply to EPCWID and did not constitute a full Compact apportionment to Texas.

D. New Mexico Pumping Did Not Reduce Texas's Project Full Supply Allocation

Texas overlooks that Project releases dictate flows below the reservoir, and that Reclamation adjusts those releases based on the amount of water actually flowing in the river below Elephant Butte Reservoir to meet District water orders. N.M. Full Supply Mot. 7; NM-CSMF ¶ 15. This is significant—it means Reclamation does not allocate water it cannot deliver, or release more Usable Water from Project Supply than is needed in the river system to meet the requested order. Therefore, regardless of whether, and how much, groundwater is pumped in New Mexico, EPCWID's Project Full Supply allocation remains the same, and EPCWID (Texas) will receive all of this water, if it orders it from Reclamation.

Reclamation establishes Full Supply allocations only when it has sufficient usable water available in Project storage to ensure it is able to deliver these allocations to each District in that year, regardless of groundwater pumping anywhere within the Project area. N.M. Full Supply Mot. 5, 7; NM-EX 001, Barroll Decl. ¶ 23. Hence in Full Supply years, Texas was allocated the maximum allocation for that year and would have *received* that water had they ordered it. Reduced pumping in either New Mexico or Texas would not have changed that Full Supply allocation and the deliveries that year.

Texas expert Dr. Brandes agrees that EPCWID (Texas) received a Project Full Supply allocation in each of 1985-2002, 2005 and 2007-2010, with the minor disagreement that he believes 2007 was slightly under a Full Supply for EPCWID. Brandes Decl. ¶ 8 (Dec. 22, 2020), TX_MSJ_007312. He claims that in 2007 EPCWID was allocated slightly less than a Full Supply by about 23,000 acre-feet. *Id*. Regardless, as Dr. Barroll explains in her two declarations filed in support of this Motion, this shortfall is more than made up once carryover water and the Reclamation credits EPCWID received are taken into account, which Dr. Brandes failed to do.

Once these are factored in, then 2007 is clearly a Full Supply year. NM-EX 001, Barroll Decl. ¶ 31 & n.3; NM-EX 014, Barroll 3d Decl. ¶¶ 8, 9; NM-EX 017, Sullivan 2d Decl. ¶ 14.

E. New Mexico's Integrated Model Does Not Show that Groundwater Pumping in New Mexico Reduced Texas Project Allocation in Full Supply Years

Texas alleges that results from the New Mexico Integrated Model "show that without groundwater pumping from 1980-2017 [EPCWID] would have had available to it an increased annual allocation." Tex. FS Resp. 5. Because this date range "includes" Project Full Supply years, Texas argues that, over this 37-year period (1980-2017), EPCWID may have been allocated more water by Reclamation absent New Mexico pumping. *Id.* This misses the point. The 376,000 AFY Full Supply amount determined by Reclamation is not affected by New Mexico groundwater pumping because this amount is based on the number of acres in EPCWID and the amount of water that each of those acres needs for irrigation, along with delivery efficiency within EPCWID. Further, whether EPCWID (Texas) might have received a larger Project allocation in years other than those New Mexico identifies in this motion as Full Supply years is irrelevant to the question of law presented in this motion—that is an issue that will be litigated at trial.

Dr. Brandes, who offers opinions on New Mexico's Integrated Model[8] and its results for the first time in his December declaration, filed after the close of discovery,[9] opines that results from this model show that Texas might have received additional allocation in three Full Supply years—2007, 2009, and 2010—had there been no groundwater pumping in New Mexico. Brandes Decl. ¶ 10 & Fig. 2 (Dec. 22, 2020), TX_MSJ_007312. EPCWID's initial allocation by

[8] Texas relied on New Mexico's Integrated Model instead of Texas's Model because Texas's Model is incapable of simulating changes in Project operations and deliveries.

[9] New Mexico intends to object to the new opinions Dr. Brandes discloses in this declaration pursuant to Federal Rule of Civil Procedure 56(c)(2) and reserves the right to file a motion to strike or motion in limine as to Dr. Brandes's untimely expert opinions.

Reclamation at the start of the irrigation season in each of these years was less than a Full Supply allocation; however, EPCWID's carryover account (created as a result of the 2008 Operating Agreement), and allocation credits, increased the water available for allocation to EPCWID in each of these three years. As a result, EPCWID's total allocation of Project water in each of these three years exceeded its Full Supply allocation and, in fact, in 2009 and 2010, EPCWID's Project allocation greatly exceeded its Full Supply allocation. NM-EX 001, Barroll Decl. ¶ 31 & Fig. 2; NM-EX 014, Barroll 3d Decl. ¶¶ 8-10 & Fig. 1; NM-EX 017, Sullivan 2d Decl. ¶ 14.[10]

As Dr. Barroll shows in Figure 2 in her first declaration, Dr. Brandes misses the mark even further in alleging that there was some negative impact to Texas because in each of those three years Texas did not even order all the water available to it. NM-EX 014, Barroll 3d Decl. ¶¶ 12, 14, Figs. 3 & 4. How Texas can now claim that it was shorted water due to groundwater pumping in New Mexico in years that Texas never even called for its full Project allocation is incomprehensible.

Dr. Brandes also opines, again for the first time in his December 22, 2020 declaration, that New Mexico's Integrated Model shows EPCWID's diversions would have been higher in certain Full Supply years but for New Mexico's pumping. Brandes Decl. ¶ 11 & Fig. 3 (Dec. 22, 2020), TX_MSJ_007312. Again, Dr. Brandes misinterprets the results of this model and misleads the Court. The increased "diversions" Dr. Brandes identifies do not establish EPCWID (Texas) was injured in any of these years because diversions is the wrong measure to evaluate, and moreover, Dr. Brandes misinterprets the model outputs as Mr. Sullivan describes in his declaration filed

[10] New Mexico disputes that Texas is entitled to any water in excess of EPCWID's Full Supply allocation, regardless of whether Texas receives this water through EPCWID's initial allocation or as a result of additional water added via EPCWID's carryover account or allocation credits. New Mexico also disputes that the carryover storage provisions in the 2008 Operating Agreement comply with the Compact.

herewith. NM-EX 017, Sullivan 2d Decl. ¶ 15. *Id*. Dr. Brandes also ignores that the historical data show that EPCWID had more water available to it in many years, but chose not to order all of its allocation. NM-EX 014, Barroll 3d Decl. ¶¶ 12, 14, Figs. 3 & 4.

F. Texas's Claims to "Accumulated" Effects of Groundwater Pumping Do Not Impact Texas's Full Supply Allocations

Texas further argues that "[d]epletions associated with [New Mexico] pumping and associated damage accumulate[] over time." Tex. FS Resp. 8. Texas claims groundwater pumping caused groundwater levels to fall, that these impacts accumulate over time, and that with lower groundwater levels, Project drain flows were reduced. *Id*. Again, whether EPCWID (Texas) may have received a larger Project allocation in years *other* than those New Mexico identifies in this motion as Full Supply years is irrelevant to the question of law presented in this motion—EPCWID's allocation in those other years will be litigated at trial. In Project Full Supply years, Reclamation commits to make available to EPCWID (Texas) the maximum amount of water EPCWID (Texas) has historically received from the Project—the amount Reclamation calculated is sufficient to meet EPCWID's irrigation demands. This maximum amount is Texas's full Compact apportionment—the amount Texas bargained for in the Compact.

IV. Texas's Arguments Based on the D2 Curve Are Irrelevant to This Motion

Texas further argues that had depletions been frozen in 1938, and had Reclamation's D2 allocation methodology—which is used to calculate the reservoir releases needed to deliver specified amounts of water based on data from the years 1951-1978, when groundwater pumping was occurring throughout the Project area—not been used, EPCWID (Texas) would have received more water. *Id.* at 7-8.

Texas's arguments based on the D2 methodology are irrelevant to the question of law presented in this Motion. D2 is a graph of the historical relationship between reservoir releases

and canal heading diversions. The Full Supply allocation is the amount needed to be delivered to the canal headings in order to get a Full Supply to the farm headgates. The Full Supply allocation is a function of the number of authorized acres, the historical farm headgate requirement, and the historical conveyance losses between the canal headings and the fields; it is not a function of river gains and losses between the reservoir and the canal headings. NM-EX 014, Barroll 3d Decl. ¶ 38. Therefore, D2 is irrelevant to the Full Supply allocation for diversion at the canal headings. *Id*.

It is true that the 2008 Operating Agreement changed the measure of Project Full Supply, instead defining a Full Supply based on a release of 790,000 acre-feet, which slightly increased the EPCWID Full Supply from 376,000 AFY to 388,192 AFY. NM-EX 529, FEIS at E-14 (PDF p. 311); NM-EX 014, Barroll 3d Decl. ¶ 24**.** This illustrates another problem with the 2008 Operating Agreement, which is that it fails to consider irrigation demands on Project lands, as required by Article I(l) of the Compact, and instead dictates that Reclamation release 790,000 acre-feet per year when possible. Regardless, this adjustment impacts only three of the twenty-three Full Supply years New Mexico identified in its Motion—2008 through 2010—and in these years, as New Mexico noted in its Motion, EPCWID (Texas) was not injured because it had far more allocation available to it than its Full Supply allocation under either pre- or post-2008 Operating Agreement allocation procedures; EPCWID failed to order the allocation that was available; and EPCWID (Texas) did not protest the allocation it received. NM-EX 014, Barroll 3d Decl. ¶¶ 9, 10, 12 & Fig. 1, 3. If Texas suffered any injury from a failure to receive sufficient water in these years, that injury is attributable to EPCWID's own failure to order sufficient water, not New Mexico pumping.

Finally, New Mexico is unaware that Texas ever objected to the allocations it received in these years, or requested additional water. NM-EX 015, Lopez 3d Decl. ¶ 4. In these years, EPCWID had just executed the 2008 Operating Agreement, which Texas Compact Commissioner Pat Gordon mediated. NM-EX 258, Gordon Dep. (July 14, 2020) 185:1-20. Texas identifies no reason why it was damaged in years when it received large allocations, well in excess of any it received historically, and well in excess of Reclamations' previous determination of a Full Supply. On the contrary, there is no basis to conclude that Texas was injured in 2008, 2009, or 2010—regardless of the fact that a version of the D2 method was used to determine EPCWID's Project allocation in these years.

V. Reclamation's Allocation to EPCWID in Full Supply Years Is Texas's Compact Apportionment

As described in the separately filed *Consolidated Reply to Parties in Support of State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment*, Texas's Compact apportionment is the annual Project Allocation to Texas. Texas argues, contrary to the Compact's plain language, that Texas "is entitled to 790,000 acre-feet per year of release from Elephant Butte Reservoir." Tex. FS Resp. 6. Texas relies on Article VIII to support its position that a release of 790,000 AFY is required and that this entire release is Texas's Compact apportionment. *Id*.

There are many problems with Texas's reading of Article VIII, including that Article VIII does not state that 790,000 AFY is released to Texas or is Texas's Compact apportionment. On the contrary, it is plain from Article VIII that both Texas *and New Mexico* can demand that the upstream Compact states—both New Mexico and Colorado for Texas; and Colorado for New Mexico—release enough water from upstream post-1929 reservoirs to increase Project storage to 600,000 acre-feet by March 1st "to the end that a normal release of 790,000 acre-feet may be made

from Project storage in that year." *Id.* In this way, Article VIII expressly provides that New Mexico has co-equal rights to protect and access water in Project storage.[11]

Further, Article VIII does not require that the Project *release* 790,000 acre-feet each year. Instead, it allows that "a normal release of 790,000 acre-feet *may* be made." (Emphasis added). Article VIII also cannot be read in isolation from the rest of the Compact, particularly Article I(l). Article I(l) provides that usable water in project storage is "available for release in accordance with irrigation demands, including deliveries to Mexico." Read in conjunction, Article I(l) and Article VIII are clear that the Project "may" make a normal release of 790,000 acre-feet, Art. VIII, if it is needed to meet "irrigation demands, including deliveries to Mexico." Art. I(l).[12] Nothing in the Compact requires the Project to release 790,000 acre-feet every year.[13]

The parties' course of performance under the Compact, specifically the United States' operation of the Project, confirms that the Compact does not mandate that the Project release 790,000 AFY. With few exceptions, Reclamation has not released 790,000 acre-feet or more in any given year, even when this amount, or more, was available in storage. NM-EX 014, Barroll 3d Decl. ¶ 25. For example, during the 1980s and 1990s, when the Project had ample water supplies available every year, the only years when the Project released 790,000 acre-feet or more were years when the Project spilled water from Project storage or threatened to spill from storage.

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[11] Although New Mexico can only demand that Colorado release water—whereas Texas can demand both New Mexico and Colorado release water—practically speaking both States have equal rights under Article VIII, since there would be little point in allowing New Mexico to demand releases of water from itself.

[12] The proviso that usable water is to be released not only to meet irrigation demands in the United States but also to make deliveries to Mexico further confirms that Project releases are not all apportioned to Texas.

[13] The United States argues that a release of 763,800 acre-feet cannot represent a Full Supply because, prior to the Compact, the Project sometimes released up to 820,000 AFY. U.S. Resp. 22. This is, of course, before the States agreed to the Compact and the 790,000 acre-feet limitation in Article VIII, as well as the irrigation demands limitation in Article I(l).

Id. This is curious if the Compact required annual releases of 790,000 acre-feet from the Project, as Texas now claims. Certainly, if Reclamation had understood that the Compact required it to release 790,000 acre-feet whenever possible, it would have done so. Yet, Reclamation did not.

Texas's own past behavior is also inconsistent with its expansive new theory of Compact apportionment. If Texas understood that it was entitled to a 790,000 acre-feet release, Texas no doubt would have demanded that Reclamation release this water. Yet Texas has never made this demand. NM-EX 015, Lopez 3d Decl. ¶ 4.

VI. The United States Presents No Additional Reason to Deny New Mexico's Motion

In its Response, the United States principally argues that New Mexico's definition of "full supply" does not represent the "full potential of the Project as the Compacting States would have understood it." U.S. Resp. 20. It also argues that absent historical "groundwater pumping the total of the expected deliveries to the Districts would have been higher." *Id*. at 21. These arguments are addressed above.

Regarding what the Project's measure of a Full Supply was during this period, and whether the Project made Full Supply allocations in the years New Mexico has identified, New Mexico observes that the United States has already agreed with New Mexico. In fact, in response to New Mexico's request that the United States explain what it considers "to be a full annual allocation of water from the Project to New Mexico and Texas," NM-EX 612, N.M. Interrog. to U.S. No. 13, the United States responded in detail regarding Full Supply, including as follows:

- From 1950 to 1980, Reclamation delivered water to Project lands. **A full annual allocation to Project lands was 3.024 AF/acre to each acre of authorized Project land under irrigation.**
- In 1980, EBID and EPCWID took over operation and maintenance of Project canals, laterals, and drains. . . . [A] full annual allocation to the U.S. canal headings ranged from 750,650 AF to 902,000 AF (392,111 AF to 478,039 AF to EBID; 298,539 AF to 363,961 AF to EPCWID). . . .

- From 1991 to 2007, Reclamation allocated water to EBID and EPCWID based on the D1 and D2 Curves. During this period, a full annual allocation to the U.S. canal headings was 871,841 AF (494,979 AF to EBID; 376,862 to EPCWID).
- From 2008 to present, Reclamation allocates water to EBID and EPCWID according to the Operating Agreement (2019 Allocation Spreadsheet). Under the Operating Agreement, the full annual diversion allocation to the U.S. canal headings is 898,056 AF (509,864 AF to EBID; 388,192 AF to EPCWID). . . .

NM-EX 612, U.S. Resp. to N.M. Interrog. No. 13 (emphasis added). This confirms the United States dictated Project allocations and that the United States agrees with New Mexico's description of a full Project allocation. This summary also highlights a serious flaw in Texas's argument. It is Reclamation, not New Mexico, that determined Full Supply allocations to EPCWID (Texas). Responsibility for this decision and allocation lies with Reclamation, *not* with New Mexico. Further, for decades EPCWID (and Texas) accepted the Reclamation-determined Full Supply allocation to EPCWID. There simply is no basis to conclude that any act or omission of New Mexico deprived Texas of water in these years.

Additionally, in response to a New Mexico interrogatory requesting that the United States "list all years in which [the United States was] able to make a full annual allocation of Project water to New Mexico and Texas as [the United States defined in its] response to Interrogatory No. 13," N.M. Interrog. to U.S. No. 14, the United States submitted a table of Project allocations for the years 1951 through 2018 showing that the Project made full allocations in the years 1985-2002 and 2005. NM-EX 612, U.S. Resp. to N.M. Interrog. No. 14. Though this table shows that the Project as a whole did not make full allocations in 2007 through 2010, as New Mexico explains above, and as relevant to this Motion, EPCWID still received more than a Full Supply of water in each of these years.

CONCLUSION

For all of the foregoing reasons, and for the reasons set out in the Motion, New Mexico respectfully requests that all years before 1985, and the Full Supply years 1985-2002, 2005, and 2007-2010 be excluded as a matter of law from Texas's claim for damages.

Respectfully submitted,

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