

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

STATE OF NEW MEXICO'S REPLY TO STATEMENT OF FACTS

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STATE OF NEW MEXICO’S REPLY TO STATEMENT OF FACTS

On December 22, 2020, the United States filed The United States of America’s Response to the State of New Mexico’s Statements of Undisputed Material Facts, comprising the U.S.’s challenges to the Statements of Undisputed Material Facts contained in each New Mexico’s three (3) motions for partial summary judgment filed on November 5, 2020: Apportionment Motion, Full Supply Motion, and Notice Motion (collectively, “New Mexico Motions”).

On the same day, Texas filed the State of Texas’s Evidentiary Objections and Responses to the State of New Mexico’s Facts (“Tex. Objections”). The Tex. Objections has two components: (a) technical evidentiary objections, and (b) substantive challenges to each of the Statements of Undisputed Material Facts contained in each of the New Mexico Motions. In response to Texas’s technical evidentiary objections, New Mexico filed State of New Mexico’s Response to State of Texas’s Evidentiary Objections (2-5-2021).

The Tex. Objections also includes a table listing all of the New Mexico Undisputed Material Facts from the New Mexico Motions and identifying any Texas substantive challenge to those facts. Tex. Objections at 14-127. New Mexico has adopted that table, in its entirety, and added columns for the U.S. fact challenges, as well as New Mexico’s Responses to the Tex. Objections.

New Mexico believes this is the most efficient method for the Court to review all of the material facts presented by New Mexico in the New Mexico Motions, together with Texas’s and the U.S.’s challenges to those facts, and New Mexico’s response thereto.

Following, is a combined table, divided into three sections corresponding to Texas’s organization:

Section I: Apportionment Motion Facts

Section II: Notice Motion Facts

Section III: Full Supply Motion Facts

SECTION I

NEW MEXICO APPORTIONMENT MOTION FACTS

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
1	<p>Following an investigation, the Reclamation Service (precursor to the Bureau of Reclamation) (both the Reclamation Service and Bureau of Reclamation are referred to herein as "Reclamation") recommended that Congress authorize a storage reservoir near Elephant Butte, New Mexico, rather than an alternative site at El Paso, Texas, to capture, store, and regulate torrential and storm water flows in the Upper Rio Grande.</p> <p><i>See</i> NM-EX 300, F.H. Newell, <i>Second Annual Report of the Reclamation Service</i>, H.R. Doc. No. 58-44, at 375-80 (1904); NM-EX 301, B.M. Hall, <i>A Discussion of the Past and Present Plans for Irrigation of the Rio Grande Valley</i>, 52 (Nov. 1904); NM-EX 106, Nicolai Kryloff, <i>Context of the 1938 Rio Grande Compact</i>, 6 (May 31, 2019) ("Kryloff Rep."); <i>see also Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018) ("The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water. Eventually, the government identified a potential dam site near Elephant Butte, New</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded. The United States Reclamation Service (Reclamation) did recommend construction of a storage reservoir near Elephant Butte over another site at El Paso, Texas, and that the reservoir was to capture and store flood waters. However, review of the provided primary-source documents – F.H. Newell's <i>Second Annual Report of the Reclamation Service</i> (1904), NM-EX-300, and B.M. Hall's <i>A Discussion of Past and Present Plans for Irrigation of the Rio Grande Valley</i> (Nov. 1904), NM-EX 301 – indicates that these were not the only waters contemplated to be captured and stored for later use. Newell's report observed that the "proposed [Elephant Butte] reservoir" was "the only . . . with a capacity large enough to utilize the entire flow of the drainage basin. It is situated sufficiently low in the basin to intercept, practically, all of the waters" – an inclusive statement of the waters to be stored. Similarly, Hall's report – which considered dams at both the Elephant Butte and El Paso sites before endorsing the former over the latter – noted that with regard to "these projects, or any other plan of water storage on the Rio Grande, it is well to keep in mind the following facts," of which the second was: "All of the water that comes down</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the material fact that Reclamation recommended that Congress authorize a storage reservoir near Elephant Butte rather than an alternative site at El Paso, Texas.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Mexico, about 105 miles north of the Texas state line.”).	<p>the river is needed for irrigation. We cannot afford to waste any of it.”</p> <p>Declaration of Scott A. Miltenberger, Ph.D. in Support of the State of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Miltenberger Dec. in Opp. to NM) at TX_MSJ_007371, paragraphs 1 – 8.¹</p>		
2	<p>At the Twelfth National Irrigation Congress in 1904, Reclamation engineer Benjamin Hall reported that the proposed reservoir at Elephant Butte was preferable to the project proposed near El Paso because it would have a greater storage capacity, would minimize flooding that would render unusable irrigable land in New Mexico, and would impound sufficient water to irrigate 110,000 acres in New Mexico in addition to making deliveries to Mexico and irrigable land in Texas.</p> <p>NM-EX 303, Guy Elliott Mitchell, <i>The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas</i>, Nov.</p>	Subject to the stated objection, undisputed.	Not disputed.	This fact is undisputed.

¹ New Mexico will refer to the second Miltenberger declaration, Miltenberger Dec. in Opp. to NM, numbered TX_MSJ_007371-TX_MSJ_007566) as “Miltenberger Dec. Decl.”

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	15-16-17-18, 1904, 213-15 (1905); <i>see also</i> NM-EX 111, Scott A. Miltenberger, <i>Expert Report of Scott A. Miltenberger, Ph.D.</i> , 8 (May 31, 2019) ("Miltenberger Rep."); ² NM-EX 112, Jennifer Stevens, Ph.D., <i>The History of Interstate Water Use on the Rio Grande: 1890--1955</i> , 17 (Oct. 28, 2019) ("Stevens Rep.").			
3	<p>The Reclamation proposal recommended delivery of water as between the lands in southern New Mexico and Texas based on the ratio of project lands within each state.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020), 39:7-20.</p>	<p>Subject to the stated objection, disputed in part. This paragraph is misleading in that the cited deposition testimony is incomplete, and taken out of context. At the subject deposition, counsel for New Mexico read a portion of paragraph 6 of the Texas Complaint to Texas's expert Scott Miltenberger, Ph.D. to which Dr. Miltenberger responded that he agreed with the statement. The full statement that Dr. Miltenberger agreed with was the following: "The 1904 irrigation Congress also recommended delivery of water <i>from the proposed project</i> as between the lands in southern New Mexico and in Texas based on the ratio of project lands within each state. The recommendations of the 1904 irrigation Congress were adopted by the secretary of the interior and the Rio Grande Reclamation project was authorized</p>	<p>Disputed. Reclamation Service Engineer Hall did not recommend delivery of water based on the ratio of project lands within the state. Hall expressly avoided the issue of how impounded and released water would be distributed. <i>See</i> NMEX-303, 1904 Irr. Cong., at 219.</p>	<p>The United States raises a genuine dispute to the accuracy of the Texas expert's assertion that the division of water based on Project lands was already expressed at the 1904 Congress; however, this fact is not material to the determination that New Mexico and Texas each have a Rio Grande Compact apportionment of the Rio Grande Project water supply below Elephant Butte Reservoir.</p> <p>The apportionment of these waters in the particular ratio of 57% to New Mexico and 43% to Texas, reflecting the ratio of Project lands, is the subject of NM UMFs 45, 64-65.</p>

² Portions of the Miltenberger expert report (May 31, 2019) were provided on 11-5-2020 as NM-EX 111. The entirety of this report is now provided as NM-EX 128, Miltenberger Rep.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>pursuant to the Rio Grande Reclamation Act.”</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 39:7-20 (emphasis added).</p> <p>The New Mexico proposed “fact” number 3 excludes the phrase “from the proposed project,” as well as the language regarding authorization of the Project. The testimony immediately before the quoted testimony is also relevant for context: Dr. Miltenberger agreed with paragraph 4 of the Texas Complaint as follows: “Once delivered to Elephant Butte Reservoir, the water is allocated and belongs to the Rio Grande project beneficiaries in southern New Mexico and in Texas based upon allocations derived from the Rio Grande project authorization and relevant contractual arrangements.”</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 38:22-39:6.</p>		<p><u>Response to Texas:</u> Texas does not dispute that Miltenberger agreed, <i>based on his review of the historical record</i>, that: “The 1904 irrigation Congress also recommended delivery of water from the proposed project as between the lands in southern New Mexico and in Texas based on the ratio of project lands within each state.”</p>
4	Delegates from Mexico, New Mexico, and Texas at the Irrigation Congress each approved the Reclamation proposal and unanimously passed a resolution declaring that the proposed project would affect “an equitable distribution of the waters of the Rio Grande with due regard to the	Subject to the stated objections, undisputed.	Disputed. The delegates from Mexico, New Mexico, and Texas unanimously adopted a resolution stating that they “heartily endorse and approve the proposal of building the Elephant Butte dam as a happy solution of a vexed question that has heretofore embarrassed the parties interested, providing that an equitable distribution of the waters	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to U.S.:</u> The New Mexico evidentiary cite (NM-EX 303, 1904 Irr. Cong., at 107) contains the exact same language as the U.S. evidentiary cite.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>rights of New Mexico, Texas and Mexico.”</p> <p>NM-EX 303, Guy Elliott Mitchell, <i>The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas, Nov. 15-16-17-18, 1904</i>, 107 (1905); NM-EX 111, Miltenberger Rep. 9; NM-EX 106, Kryloff Rep. 6.</p>		<p>of the Rio Grande with due regard to the rights of New Mexico, Texas, and Mexico.” NM-EX-303,1904 Irr. Cong., at 109.</p>	
5	<p>In support of Congressional authorization to begin work on the reservoir, the Reclamation Service Director testified to Congress that the project would be engineered to supply enough water to irrigate 20,000-25,000 acres in Mexico, 110,000 in New Mexico, with the “balance” to Texas. Mr. Newell further testified that “New Mexico, Texas, and old Mexico will divide the water in about the proportion stated.”</p> <p><i>See</i> NM-EX 305, The Reclamation Work of the Government Under the National Irrigation Act: Hearing Before the H. Comm. on Irrigation of Arid Lands, 59 Cong. 222 (1906) (statement of Frederick Newell, Reclamation Service Director); NM-EX 112, Stevens Rep. 18.</p>	<p>Subject to the stated objection, disputed. This paragraph is factually incorrect. Neither cited source (NM-EX 305 and NM-EX 112) indicates that Newell made the quoted remarks in relation to congressional authorization for work on the reservoir. Congress authorized the Rio Grande Project, with Elephant Butte Dam as its centerpiece, the previous year, in 1905. Additionally, the provided quote is incomplete and misleading. According to both cited sources, Newell identified the “balance” of the acreage distribution as “the balance below El Paso on the Texan side of the river.”</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 - 7, 9.</p>	<p>Not disputed.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> New Mexico agrees that the quoted language is from Newell in his presentation to Congress relating to the funding of the construction of the Elephant Butte Dam and the amount of water to be fixed in the 1906 Treaty with Mexico.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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6	<p>In 1906, the United States entered into a treaty with the Republic of Mexico for annual delivery of 60,000 acre-feet of water to the Acequia Madre, above Juarez, in years of full supply, with proportionate reductions in times of shortage.</p> <p>NM-EX 307, Distribution of the Waters of the Rio Grande, Mex.-U.S., May 21, 1906, 34 Stat. 2953; NM-EX 111, Miltenberger Rep. 9; <i>see also Texas v. New Mexico</i>, 138 S. Ct. 954, 957 (2018) (“in 1906, the United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.”)</p>	<p>Subject to the stated objection, undisputed.</p>	<p>Disputed. The 1906 treaty does not refer to “years of full supply.” It provides for the United States to deliver 60,000 acre-feet “annually” into the bed of the Rio Grande, with proportionate reduction “[i]n case . . . of extraordinary drought or serious accident to the irrigation system in the United States.” NM-EX-307 at 1, 2.</p>	<p>The material fact that the US entered into a treaty with Mexico for the annual deliver of 60,000 AF of water to Mexico with proportionate reductions in times of shortage is undisputed.</p>
7	<p>In 1907, Congress authorized construction to begin on the Elephant Butte Reservoir.</p> <p>An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Eight, and for Other Purposes, Pub. Law No. 59-253, 34 Stat. 1295 (1907); NM-EX 112, Stevens Rep. 19.</p>	<p>Subject to the stated objections, disputed. This paragraph is factually incorrect. The 1907 Appropriations Act authorized, for the Department of State, \$1 million “Toward the construction of a dam for storing and delivering sixty thousand acre-feet of water annually . . . as provided by a convention between the United States and Mexico”; it did not authorize construction of the dam itself. Congress authorized construction of Elephant Butte Dam along with the Rio Grande Project in 1905.</p>	<p>Disputed. The 1907 Act appropriated federal funds for the Rio Grande Project construction. 34 Stat. 1357. The authority to construct the Project derives from the Reclamation Act of 1902, and the Rio Grande Project Act of Feb. 25, 1905, 33 Stat. 814 (1905), which extended the 1902 Act to the portion of Texas that would benefit from the Project.</p>	<p>The material facts that Congress appropriated funds for the construction of Elephant Butte Dam and also authorized construction of the Dam are undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 9-10.		
8	<p>In its initial conception, Reclamation engineered the Project to deliver an annual release between 750,000 acre- feet and 800,000 acre-feet, enough to provide 60,000 acre-feet of water to Mexico and to irrigate 155,000 acres in the United States (assuming delivery of three acre-feet per acre, plus twenty percent loss in the distribution system), of which 110,000 acres would be situated in New Mexico and 45,000 in Texas.</p> <p><i>See</i> NM-EX 310, Fund for Reclamation of Arid Lands, H.R. Doc. 61-1262, at 106 (1911); NM-EX 112, Stevens Rep. 21.</p>	<p>Subject to the stated objection, disputed. This paragraph is factually incomplete and mischaracterizes the cited primary-source document, Fund for Reclamation of Arid Lands, H.R. Doc 61-1262 (1911). NM-EX-310. References to 750,000 acre-feet and 800,000 acre-feet in the document are projections and estimates of “annual supply” from the reservoir – not as expected release figures. These estimates were based not only on reservoir capacity, but also flow, evaporation, and (as acknowledged by the paragraph), a three acre-feet per acre water duty and losses. Forty percent and not “20 per cent” was the total allowance to be made for those losses: 1) “loss in the distribution system” (“20 per cent”), and 2) “losses in transit” (“20 per cent”).</p> <p>Miltenberger Dec. in Opp. To NM at TX_MSJ_007371, paragraphs 1 – 7, 11.</p>	<p>Disputed. The report cited here was prepared in 1910, several years after the “initial conception” of the project and before the dam was constructed. The report states that “there seems to be an assured supply of 750,000 to 800,000 acre-feet” for the Project, and it considers the amount of water that would be provided for irrigation use from assumed releases of 750,000 acre-feet (“af”) and 800,000 af. NM-EX-310, Recl. Fund Rep., at 105, ¶¶ 15-16. The report finds the “amount required for diversion to lands in the United States is 581,250 acre-feet,” in order to provide each farm enough water to apply 3 af/acre (“af/ac”) after accounting for on-farm distribution losses. <i>Id.</i> At 106, ¶ 18. The report finds that “approximately 800,000 acre-feet would be required” to overcome the twenty percent transit loss in the river to make the 581,250 af available for diversion. <i>Id.</i> The report does not draw the same conclusion for a release of 750,000 af or any amount less than 800,000 af. <i>See id.</i> The report states that that “the total area in the Project is 155,000 acres,” of which 45,000 acres were in Texas and 132,000</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and the U.S.:</u> Texas and the U.S. provide no evidence that in this context an “annual release” is any different from “an annual supply” is any different from an “assured supply.” See NM-EX 016, Stevens Decl., ¶ 5. The confusion of the numbers presented by the parties do not create a genuine dispute as to the fact that the Reclamation estimates assumed the release or supply amount was sufficient to provide acre of the “total area in the Project” of 155,000 acres with three AF of water per acre.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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			acres were in new Mexico (110,000 acres plus 12,000 acres of public land "subject to the reclamation act," i.e., withdrawn from entry). <i>Id.</i> , 19.	
9	<p>Reclamation appropriated water for the Project under New Mexico territorial law, consistent with Section 8 of the Reclamation Act. Specifically, Reclamation provided notice to the Territorial Engineer for the Territory of New Mexico to appropriate and store 730,000 acre-feet per year at Elephant Butte Reservoir in 1906 and to appropriate all "unappropriated waters of the Rio Grande" at Elephant Butte in 1908.</p> <p><i>See</i> NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger</p>	<p>Subject to the stated objection, disputed. This paragraph is misleading. Reclamation made these filings – Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906) (NM-EX 306), and NM-EX 309, a Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Irrigation Engineer, Territory of New Mexico (Apr. 1908). However, neither filing cited Section 8 of the 1902 National Reclamation Act. Both filings instead referenced the United States "authority" under the 1902 Reclamation Act to pursue construction of "certain irrigation works in connection with the so-called Rio Grande Project," and observed that "operation of the works in question contemplates the diversion of water from the Rio Grande River." Both filings also cited New Mexico territorial law – Sec. 22, Chap. 102 of the 1905 laws, in the case of the 1906 filing, NM-EX-306; and Sec. 40, Chap. 49 of the</p>	<p>[a] Disputed. Reclamation appropriated water for the Project in 1903. <i>See</i> Findings of Fact and Conclusions of Law 29-30, 52-54, <i>State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District</i>, No. CV-9688, Stream Sys. Issue No. 104 (N.M. 3d Jud. Dist. Apr. 17, 2017) ("SS 104") (in U.S. Supp. App.). The 1906 notice to the New Mexico Territorial Engineer was not an appropriation but, instead, is a request from the United States to the Territory of New Mexico to reserve from appropriation by others the waters of the Rio Grande the United States' intended to utilize described as "[a] volume of water equivalent to 730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches. . . ." NM-EX-306, Letter to White dated Jan. 23, 1906, at 1. The 1908 notice expands the United States' request to reserve from appropriation by others all the unappropriated waters of the Rio Grande and its tributaries within the Territory, not just at Elephant</p>	<p>The material fact that, pursuant to then-governing New Mexico law, Reclamation notified the New Mexico Territorial Engineer of its intent to appropriate all unappropriated waters of the Rio Grande by 1908 is undisputed.</p> <p><u>Response to Texas:</u> The NM UMF³ does not state Reclamation "cited" Section 8; the NM UMF states Reclamation's actions were "consistent with Section 8."</p> <p><u>Response to U.S.:</u> The U.S.'s gloss on the NM UMF language does not create a dispute as to this fact.</p>

³ The Undisputed Material Facts identified in New Mexico's November 5, 2020 motions for partial summary judgment, and as identified herein on the far-left column, will be identified herein as "NM UMF [#]."

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>Rep. 9-10; <i>see also Texas v. New Mexico</i>, 138 S. Ct. 954, 957 (2018) (“After obtaining the necessary water rights, the United States began construction of the dam in 1910 and completed it in 1916 as part of a broader infrastructure development known as the Rio Grande Project.”).</p> <p>Ultimately, the Rio Grande water appropriated by the United States was limited by the size of the Project.</p>	<p>1907 laws, in the case of the 1908 filing, NM-EX-309.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 12.</p>	<p>Butte. NM-EX-309, Letter to Sullivan dated Apr. 1908. The notices were filed to conform with provisions of the New Mexico territorial code regarding federal projects. <i>See</i> SS 104 at 40-42.</p> <p>[b] Disputed. The statement that the “water appropriated by the United States was limited by the size of the Project” is vague and ambiguous, and appears to be a conclusion of law. New Mexico has not cited any materials supporting this statement.</p>	
10	<p>In 1915, while Project construction was ongoing, Reclamation began water deliveries through the Project.</p> <p><i>See</i> NM-EX 404, Robert Autobee, United States Bureau of Reclamation, <i>Rio Grande Project</i>, at 12 (1994); NM- EX 311, United States Reclamation Service, <i>Project History Rio Grande Project Year 1915</i>, 137-141 (1915).</p>	<p>Subject to the stated objection, undisputed.</p>	<p>Disputed. Water was diverted from the Rio Grande at a Project diversion structure at Leasburg, New Mexico, beginning in 1908. NM-EX-404, Autobee Rep., at 9. The first deliveries of water released from storage in Elephant Butte reservoir began in February 1915, although more than a year remained before completion of the Elephant Butte Dam. NM-EX-311, 1915 Project History, at 138.</p>	<p>The material fact that in 1915, while Project construction was ongoing, Reclamation began Project water deliveries from Elephant Butte Dam is undisputed.</p>
11	<p>By 1919, construction of the Elephant Butte Dam and the major diversion works of the Project was complete.</p> <p>NM-EX 312, United States Reclamation Service, <i>Project</i></p>	<p>Subject to the stated objection, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<i>History Rio Grande Project Year 1919</i> , 4-5 (1919) (reporting “practical completion of the main canal system, including diversion dams, for the lands of the New Mexico and El Paso County Irrigation Districts”); <i>see also</i> NM-EX 111, Miltenberger Rep. 10.			
12	By 1921, Reclamation reported that the final “determined irrigable area of the project” in the United States was 155,000 acres. <i>See</i> NM-EX 313, United States Reclamation Service, <i>Project History Rio Grande Project Year 1921</i> , 6-7 (1921); NM-EX 106, Kryloff Rep. at 23.	Subject to the stated objection, undisputed	Disputed. The 1921 Project History was compiled in 1922. <i>See</i> NM-EX 313, 1912 Project History, at 6-7 (pdf pages 44-45) (reporting costs “to January 1, 1922”). The quoted portion of the Project History does not characterize the “determined irrigable area” as “final.” The United States does not dispute this statement if it is revised to read: “In 1922, Reclamation reported that ‘the determined irrigable area of the project’ included 155,000 acres in the United States.”	The material fact that “In 1922, Reclamation reported that ‘the determined irrigable area of the project’ included 155,000 acres in the United States” is undisputed.
13	Upon completion of the major storage and diversion works for the Project, Colorado proposed to New Mexico legislation authorizing a joint commission between the two states, and New Mexico and Colorado each appointed commissioners in 1923 to negotiate an interstate compact regarding development upstream of Elephant Butte Reservoir. <i>See</i> NM-EX 111,	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	Miltenberger Rep. 11; NM-EX 112, Stevens Rep. 29.			
14	<p>After the first meeting of the Colorado and New Mexico commissioners in 1924, Texas petitioned the Secretary of Commerce, who served as the federal representative, to "accord[] [to the Texas] the same representation upon that Commission which is accorded to the States of New Mexico and Colorado."</p> <p><i>See</i> NM-EX 314, Letter from Pat M. Neff, Governor, State of Texas, to Herbert Hoover, Secretary of Commerce (Sept. 20, 1924); NM-EX 111, Miltenberger Rep. 12.</p>	Subject to the stated objection, undisputed.	Not disputed.	This fact is undisputed.
15	The New Mexico Compact Commissioner supported the inclusion of Texas in further compact negotiations. He wrote the New Mexico Governor that the exclusion Texas "assumed" that Reclamation would "protect[]" the rights of the Project in negotiations, but this assumption proved false because "the Reclamation Service apparently decided to take no action whatever looking to the presentation of the rights of the Rio Grande Project either as to lands in New Mexico or Texas, although it was expected that this would be done." <i>See</i> NM-	Subject to the stated objection, disputed. This paragraph is factually incorrect. The assumption expressed was not Texas's. In his February 20, 1925 letter to Governor A.T. Hannett in February 1925, New Mexico Compact Commissioner J.O. Seth noted that "Chapter 112 of the Session Laws of 1923 makes no provision whatever for according Texas the right of representation on the Commission." This law was New Mexico's own, authorizing compact negotiations with Colorado. The New Mexico Commissioner wrote to Hannett:	Disputed. The quoted portion of the letter states that the exclusion of Texas from the joint commission "can be accounted for only <i>on the theory</i> that the Legislature assumed that the only lands in Texas that would be affected by any Compact or Agreement [between New Mexico and Colorado] are those [in the Project] and that all rights to the waters of the Rio Grande held by these lands would be protected by the Reclamation Service." NM-EX-315, Seth Letter, at 3. The report states that "up to . . . October, 1924,"	<p>There is no genuine dispute as to the fact that the New Mexico Compact Commissioner supported the inclusion of Texas in further Compact negotiations.</p> <p><u>Response to Texas:</u> If the "of", inadvertently omitted before the word "Texas" in the second sentence is supplied, it is clear that New Mexico was not attributing the statement to Texas. <i>See</i> NM-EX 016, Stevens Decl., ¶ 6.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	EX 315, Letter from J.O. Seth, Commissioner, State of New Mexico, to A.T. Hannett, Governor, State of New Mexico, at 3 (Feb. 20, 1925).	<p>The omission of the State of Texas from Chapter 112 of the Session laws of 1923 can be accounted for only on the theory that the Legislature assumed that the only lands in Texas that would be affected by any Compact or Agreement are those lying above Fort Quitman and within the Rio Grande Project of the United States Reclamation Service and that all rights to the waters of the Rio Grande held by these lands would be protected by the Reclamation Service.</p> <p>The full quotation, read in context, indicates that Commissioner Seth presumed the New Mexico State Legislature believed that Reclamation would safeguard Texas's Project water supply.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 17</p>	Reclamation had not taken action, but notes that had apparently been “taking steps to properly present the rights of the Rio Grande Project” since then. <i>Id.</i>	
16	<p>Compact negotiations resumed in 1928 following the appointment of a Texas commissioner. Those initial negotiations resulted in a temporary compact in February 1929.</p> <p><i>See</i> NM-EX 111, Miltenberger</p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Rep. 13; NM-EX 112, Stevens Rep. 29, 35, 40; NM-EX 316, Rio Grande Compact Commission, <i>First Annual Report of the Rio Grande Compact Commission</i> , 1-10 (1931).			
17	<p>In December 1935, the Rio Grande Compact Committee met to continue negotiations. At that meeting, officials from the National Resources Committee presented a proposal for a comprehensive study of the Rio Grande in order to facilitate an agreement.</p> <p><i>See</i> NM-EX 317, Proceedings of the Rio Grande Compact Commission held in Santa Fe, New Mexico December 2-3, 1935, at 5-7 (1935); NM-EX 112, Stevens Rep. at 55.</p>	<p>Subject to the stated objections, disputed in part. This paragraph excludes context essential to understanding how the resulting “comprehensive study” – the Rio Grande Joint Investigation (as referenced in paragraph 18 of New Mexico’s Motion for Partial Summary Judgment on Compact Apportionment) – was framed. The proposal by the National Resources Committee (NRC) resulted from an NRC Board of Review’s assessment that the “water resources of the Rio Grande were fully appropriated,” and that New Mexico’s Middle Rio Grande Conservancy District’s project and other proposed projects in New Mexico and Colorado above Elephant Butte threatened the Rio Grande Project. Miltenberger Declaration paragraphs 12-16 addresses this context. TX_MSJ_001585.⁴</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 14.</p>	Not disputed.	<p>The material fact that in December 1935 the Rio Grande Compact Committee met to continue negotiations, and that officials from the National Resources Committee presented a proposal for a comprehensive study of the Rio Grande in order to facilitate an agreement is not disputed.</p> <p><u>Response to Texas:</u> It was the need for coordinated development that prompted the Rio Grande Joint Investigation. NM-EX 016, Stevens Decl., ¶ 7.</p>

⁴ New Mexico will refer to the first Miltenberger declaration, numbered TX_MSJ_001585-TX_MSJ_006491) as “Miltenberger Nov. Decl.”

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
18	<p>This proposed comprehensive study became the Rio Grande Joint Investigation. According to the authors, the “prime purpose” of the investigation was “to determine the basic facts needed in arriving at an accord” among the states “on an allocation and use of Rio Grande waters in the future development of the upper basin.”</p> <p>NM-EX 318, Harlow M. Stafford et al., <i>Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation</i>, 10-11 (1937); NM-EX 112, Stevens Rep. 62.</p>	<p>Subject to the stated objection, undisputed.</p>	<p>Not disputed, with the qualification that “upper basin,” as used in the Joint Investigation Report (“JIR”) refers to the Rio Grande Basin from its headwaters to Fort Quitman, Texas, and that the quoted text actually says: “an <i>equitable</i> allocation and use... .” NM-EX-318, JIR excerpts, at 10-11 (emphasis added).</p>	<p>This fact is not disputed.</p>
19	<p>One category of required information was accurate data concerning existing diversions, including those of the Project. The Joint Investigation Report collected available data to prepare and present a comprehensive analysis of actual diversions, including diversions between Elephant Butte Reservoir and Fort Quitman, Texas, for the period 1930-36. The Joint Investigation Report also catalogued Project Acreage, including lands for “Cities, Towns, and Villages.”</p> <p><i>See</i> NM-EX 318, Harlow M.</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. Diversions were a category of information in the Joint Investigation Report (or “<i>JIR</i>,” NM-EX 318), but those diversions were not limited to the waters that might be considered as derived solely from reservoir releases. The <i>JIR</i> noted that “return flow” from drains constituted 50 percent of the diversions within the Rio Grande Project, which New Mexico’s citation omits. Miltenberger Declaration paragraph 35 likewise notes the importance the <i>JIR</i> placed on return flows. TX_MSJ_001585.</p>	<p>Not disputed.</p>	<p>The material fact that one category of required information in the Rio Grande Joint Investigation (RGJI) was accurate data concerning diversions, including those of the Project, and that the RGJI also catalogued Project Acreage is not disputed.</p> <p><u>Correction to Texas:</u> Miltenberger’s confusion over the return flow percentages is clarified at NM-EX 006, Barroll 2d Decl., ¶48.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Stafford et al., <i>Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation</i> , 11, 14-16 (1937); NM-EX 112, Stevens Rep. 64.	Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 15		
20	<p>In entering negotiations New Mexico stressed that for it to agree, the final compact needed to provide that “[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said river system.” This position was important to New Mexico, in part, because the surface water in the Lower Rio Grande in New Mexico was fully appropriated and New Mexico expected the final compact to protect those existing rights.</p> <p><i>See</i> NM-EX 319, Rio Grande Compact Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937</i>, 12-13 (1937); NM-EX 111, Miltenberger Rep. 25; NM-EX 112, Stevens Rep. 65; NM-EX 005, Stevens Decl.1</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading. According to the cited pages of the primary-source document – the September 27 to October 1, 1937 Rio Grande Compact Commission proceedings, NM-EX 319 – New Mexico expressed it “was willing to negotiate” for a compact on the basis of several “minimum requirements” (the fourth of which is the quoted statement), and not that the final compact had to possess all these elements for the state to consummate a Compact with Colorado and Texas, as this paragraph implies. The historical record further indicates that the Compact ultimately privileged uses over rights in the Upper Rio Grande Basin, and that New Mexico bargained for water uses above San Marcial and below the Colorado-New Mexico state line, while Texas bargained for water use below San Marcial. Miltenberger Declaration paragraphs 20-26 discuss the privileging of uses over rights, TX_MSJ_001585; and Miltenberger Declaration paragraphs 8, 24, 26, and 37 specifically address what New</p>	<p>[a] Not disputed. [b] Disputed. Whether this position was “important” to New Mexico is a subjective determination, not a statement of fact, and the reasons why the position might have been to New Mexico important are matters of speculation. The statement is also ambiguous in its reference to “those existing rights.” The New Mexico Compact Commissioner explained that “[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said River System,” suggesting that New Mexico’s affirmation of the Compact endorsed the Project as a mechanism for supplying an adequate water supply in the lower portion of New Mexico. NM-EX 319, RGCC Sept.-Oct 1937, at 59.</p>	<p>The material fact that at the Rio Grande Compact Commission negotiation meetings New Mexico stated that a minimum requirement for New Mexico was that “[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said River System” is undisputed.</p> <p><u>Response to Texas:</u> In his declarations, Miltenberger expresses new expert opinions. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger’s untimely expert opinions. Further, Miltenberger excluded the parts of the quote at issue that do not fit his theory. <i>See</i> NM-EX 016, Stevens Decl., ¶ 8.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	¶ 8; NM-EX 002, D'Antonio Decl. ¶ 9.	Mexico and Texas bargained for.TX_MSJ_001585. Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 16, 49.		
21	<p>The Engineer Advisors for the three states used the Joint Investigation to prepare a Report of Committee of Engineers to the Rio Grande Compact Commissions, dated December 27, 1937. The express “general purpose” of this report was to recommend apportionment among three divisions of the Rio Grande - the San Luis Valley, the “Middle Rio Grande from Lobatos to Elephant Butte Reservoir,” and the Project from Elephant Butte Reservoir to Fort Quitman, Texas - according to a “general policy” that “present uses of water in each of the three States must be protected in formulation of the Compact.”</p> <p><i>See</i> NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded. The facts presented in this paragraph are incomplete and assert an incomplete understanding of the Committee of Engineers’ December 27, 1937 Report. NM-EX-322. As stated on the first page of the report (after the title page), the “general policy” was expressed by the Compact Commissioners themselves, and the engineers “avoided discussion of the relative rights of the water users in the three states.” Miltenberger Declaration paragraphs 20-26 discuss the privileging of uses over rights in the development of the Compact and the Committee of Engineers’ December 27, 1937 Report. TX_MSJ_001585.</p>	<p>Disputed. The report does not use the term “apportionment.” The report proposes a “definite schedule of deliveries,” and states the advisors’ opinion that “the [delivery] schedules and provisions will permit the maximum practicable use of the waters of the Rio Grande.” NM-EX 322, Dec. 1937 Eng. Rep., at 1, 9.</p>	<p>The material facts that “The Engineer Advisors for the three states used the Joint Investigation to prepare a Report of Committee of Engineers to the Rio Grande Compact Commissions, dated December 27, 1937” and that the “express ‘general purpose’ of this report was to recommend apportionment among three divisions of the Rio Grande” are undisputed.</p> <p>In his declarations, Miltenberger expresses new opinions. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger’s untimely expert opinions.</p> <p><u>Response to U.S.:</u> Whether the report uses the term “apportionment” or “allocation” is immaterial in this context.⁵</p>

⁵ The terms “apportionment” and “allocation” have historically been used interchangeably. The Compact itself uses both terms, referring to the “equitable apportionment of such waters” to the States in its preamble, and “the quantities of water herein allocated” in Article XIV.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Commission (Dec. 27, 1937); NM-EX 111, Miltenberger Rep. 29; NM-EX 112, Stevens Rep. 67-68.	Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 17		
22	<p>The Committee of Engineers initially recommended a “normal release” from Elephant Butte Reservoir of 800,000 acre-feet per annum.</p> <p><i>See</i> NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937); NM-EX 112, Stevens. Rep. 67-68.</p>	Subject to the stated objection, undisputed.	Disputed. The Engineer Advisors’ report recommends that “the normal release from Elephant Butte Reservoir <i>be deemed to be</i> 800,000 acre-feet per annum, adjusted for any gain or loss of usable water resulting from the operation of any reservoir below Elephant Butte,” NM-EX-322, Dec. 1937, Eng. Rep. at 9 (emphasis added). They also recommended “this normal release be reduced or increased by two-thirds of any change in the aggregate diversions or loss to Mexico.” <i>Id.</i>	This fact is undisputed.
23	<p>Following negotiations, the Committee of Engineers revised its recommendation to provide for a normal release from the Reservoir of 790,000 acre-feet per year to meet the irrigation demands of Project lands in New Mexico and Texas and to make the 1906 treaty delivery to Mexico.</p> <p><i>See</i> NM-EX 325, Letter from Thomas M. McClure, State Engineer, State of New Mexico, to S.O. Harper, Chairman, Rio Grande Compact Commission (Jan. 25, 1938), <i>in</i> Rio Grande Compact Commission,</p>	Subject to the stated objections, disputed in part. This paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded. The facts presented in this paragraph are incomplete and assert an incomplete understanding of the reasons for the revision. The Committee of Engineers (or Engineering Advisors) revised the normal release figure downward from 800,000 acre-feet to 790,000 acre-feet only after protests made by the Middle Rio Grande Conservancy District’s consulting engineer H.C. Neuffer. New Mexico State Engineer and Compact Commissioner Thomas	Disputed. The revised recommendation is “that the normal release from Elephant Butte Reservoir be deemed to be <i>an average of</i> 790,000 acre-feet per annum, adjusted for any gain or loss of usable water resulting from from the operation of any reservoir below Elephant Butte.” NM-EX-325, RGCC Mar. 1938 Proc., at CO-006233.	<p>The material fact that “the Committee of Engineers revised its recommendation to provide for a normal release from the Reservoir of <i>an average of</i> 790,000 acre-feet per year to meet the irrigation demands of Project lands in New Mexico and Texas and to make the 1906 treaty delivery to Mexico” is undisputed.</p> <p><u>Response to Texas:</u> The NM UMF does not address the “reasons” for the revision of the initial recommendation of 800,000 AF to 790,000 AF; Texas’s proffered “reasons” are</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p><i>Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc.</i> 1938, at CO-006216 (1938); NM-EX 325, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Mar. 9, 1938), <i>in</i> Rio Grande Compact Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc.</i> 1938, at CO-006226- 33 (1938); NM-EX 112, Stevens Rep. 68-70; NM-EX 111, Miltenberger Rep. 33, 37-39.</p>	<p>McClure supported Neuffer, even though McClure's engineering advisor John Bliss had accepted the 800,000 acre-feet figure for which Texas had advocated and which the Committee of Engineers had recommended in December 1937. Miltenberger Declaration paragraphs 35-38 discuss this change. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 18.</p>		<p>immaterial to this NM UMF and do not create a genuine dispute of fact.</p> <p>Further, the precise reasons are unknown. NM-EX 016, Stevens Decl., ¶ 9. Miltenberger's new opinion on the reasons conflict with his previous opinions on the reasons. <i>Id.</i> The historical record is clear that Texas's attempts to obtain the 800,000 AF figure relate to its concerns over water quality. <i>Id.</i> Miltenberger's new opinion of the role of MRGCD and Neuffer mischaracterizes the historical record. <i>Id.</i></p>
24	<p>On March 18, 1938, the members of the Rio Grande Compact Commission ("RGCC") each executed the final Rio Grande Compact. Congress gave its approval to the Rio Grande Compact on May 31, 1939.</p> <p><i>See</i> NM-EX 325, Rio Grande Compact Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to</i></p>	<p>Subject to the stated objection, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<i>March 18th, inc. 1938, 34-35 (1938); An Act Giving Consent and Approval of Congress to the Rio Grande Compact Signed at Santa Fe, New Mexico, on March 18, 1938, Pub. Law No. 76-95, 53 Stat. 785 (1939).</i>			
25	<p>The preamble of the Rio Grande Compact of 1983 states: "The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes ..."</p> <p>NM-EX 330, Rio Grande Compact of 1938, 53 Stat. 785, 785 (1939) ("Rio Grande Compact" or "Compact").</p>	Disputed only as follows: "1983," as set forth in the first sentence, is understood by Texas to be "1938."	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> New Mexico agrees with the correction to "1938."</p>
26	Article I, Paragraph (k) of the Compact defines "Project Storage" as "the combined	Undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande project, but not more than a total of 2,638,860 acre-feet.”</p> <p>53 Stat. at 786.</p>			
27	<p>The limit on Project Storage within the Compact accords with what was considered the maximum capacity of Elephant Butte Reservoir.</p> <p><i>See</i> NM-EX 107, Estevan R. Lopez, <i>Expert Report of Estevan R. Lopez, P.E.</i>, 15 (Oct. 31, 2019) (“Lopez Rep.”).</p>	<p>Subject to the stated objections, disputed. The <i>Expert Report of Estevan R. Lopez, P.E.</i> at the page cited in this paragraph, page 15, provides no evidence that the figure given for “Project Storage within the Compact” was considered the “maximum capacity of Elephant Butte Reservoir.” NM-EX 107.</p> <p>Miltenerberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 19.</p>	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas provides no evidence contradicting that “The limit on Project Storage within the Compact accords with what was considered the maximum capacity of Elephant Butte Reservoir.”</p>
28	<p>The Compact contemplates that usable water will be released from storage to meet irrigation demands. Article I, Paragraph (1) of the Compact defines “Usable Water” as “all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.”</p> <p>53 Stat. at 786; NM-EX 107,</p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Lopez Rep. 16.			
29	Article I, Paragraph (o) of the Compact defines "Actual Release" as "the amount of usable water released in any calendar year from the lowest reservoir comprising project storage." 53 Stat. at 786.	Undisputed.	Not disputed.	This fact is undisputed.
30	Article I, Paragraph (p) of the Compact defines "Actual Spill" as "all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled." 53 Stat. at 786.	Undisputed.	Not disputed.	This fact is undisputed.
31	Article I, Paragraph (q) of the Compact defines "Hypothetical Spill" as "the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet has been released therefrom at rates proportion to the actual release in every year from the starting date to the end of the year in which	Undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	hypothetical spill occurs.” 53 Stat. at 786.			
32	Article II of the Compact specifies that stream gaging stations be established at specific locations in the Rio Grande Basin for the purposes of Compact accounting. The lowest required stream gage under Article II is just below Caballo Reservoir. <i>See</i> 53 Stat. at 786-87; NM-EX 107, Lopez Rep. 18.	Subject to the stated objections, disputed. The statement mischaracterizes Article II of the Compact. Article II does not include the following language: 1. “for the purposes of Compact accounting;” 2. “The lowest required stream gage under Article II is just below Caballo Reservoir.” Miltenerberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 19.	Not disputed.	This fact is undisputed. <u>Response to Texas:</u> Texas provides no evidence contradicting the Lopez characterizations of Art. II provisions: Miltenerberger Dec. Decl. ¶ 19 does not address gages.
33	Article IV of the Compact defines New Mexico's obligation to deliver water from the Rio Grande to San Marcial based upon nine (9) non-summer months of river flows. The delivery obligation at San Marcial is defined by a mathematical relationship corresponding to recorded flow at the Otowi gage during those months. The Otowi gage located in New Mexico about 100 miles south of the Colorado border. The San Marcial gage was located just upstream of Elephant Butte Reservoir. <i>See</i> 53 Stat. at 788; NM-EX 107, Lopez Rep. at 20.	Subject to the stated objections, disputed in part. Although the content of Article IV of the Compact and the relationship between the Otowi and San Marcial gages is correctly stated in this paragraph, the paragraph's presented facts are incomplete. NM- EX-330. The paragraph does not recognize the temporal basis for the delivery schedule, which is important context for understanding what those flows truly are and how the Compact works. Miltenerberger Declaration paragraphs 22-24 discuss the temporal basis for the delivery schedule. TX_MSJ_001585. Miltenerberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 20.	Not disputed.	This fact is undisputed. <u>Response to Texas:</u> Texas's gloss on the NM UMF as to “temporal basis” is immaterial to the NM UMF and does not create a genuine dispute of fact.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
34	<p>In 1948, the RGCC changed New Mexico's delivery schedule under Article IV of the Compact to require deliveries at Elephant Butte Reservoir, rather than San Marcial, and removed the Article II gaging stations at San Marcial and San Acacia.</p> <p><i>See NM-EX 331, Rio Grande Compact Commission, Tenth Annual Report of the Rio Grande Compact Commission, 17-18 (1948); NM-EX 107, Lopez Rep., 18-22.</i></p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
35	<p>Article VI of the Compact defines procedures to determine the annual credits and debits for Colorado and New Mexico. Of note, Article VI permits Colorado and New Mexico to authorize releases of Credit Water to avoid spill in excess of downstream demand and permits such releases to be included in the accounting of an Actual Spill.</p> <p><i>See 53 Stat. at 789-90; NM-EX 107, Lopez Rep. 22-23.</i></p>	Subject to the stated objection, undisputed.	Not disputed.	This fact is undisputed.
36	Article VII of the Compact prohibits any increase in storage by either New Mexico or Colorado in reservoirs constructed after 1929 if the volume of Usable Water in Project Storage is less than 400,000 acre-feet. This	Subject to the stated objections, disputed in part. The content of Article VII of the Compact as presented in this paragraph is correct. NM-EX 330. However, neither the Compact nor the Lopez expert report state at their respective cited pages	Not disputed , with the clarification that relinquished Credit Water becomes Usable Water and is available for delivery to lands in both New Mexico and Texas and delivery to Mexico.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas does not dispute the factual nature and materiality of the statement regarding relinquished Credit Water.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>threshold value decreases if the aggregate releases from Project storage have averaged more than 790,000 acre-feet from the beginning of the calendar year following the effective date of the Compact, or from the beginning of the calendar year following an Actual Spill, before the storage limitation takes effect. Further, the article permits that either Colorado or New Mexico may offer to relinquish accrued Credit Water to Texas, and Texas may accept such an offer at its discretion. If New Mexico and Texas agree on a relinquishment, the relinquished Credit Water becomes Usable Water and is available for use on lands in both New Mexico and Texas.</p> <p align="center"><i>See 53 Stat. at 790; NM-EX 107, Lopez Rep. 23.</i></p>	<p>that the “relinquished Credit Water becomes Useable Water and is available for use on lands in both New Mexico and Texas.” NM-EX-107.</p> <p align="center">Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 21.</p>		<p><u>Response to U.S.:</u> New Mexico agrees that relinquished Credit Water becomes Usable Water and is available for delivery to lands in both New Mexico and Texas and delivery to Mexico.</p>
37	<p>Article VIII of the Compact permits New Mexico to demand of Colorado, and Texas to demand that Colorado and New Mexico, in January, release of water then held in storage from post- 1929 reservoirs upstream of Elephant Butte to the amount of any accrued debits of Colorado and New Mexico, respectively, as necessary to help bring the amount of water in Project</p>	<p>Subject to the stated objections, disputed in part. Although the content of Article VIII as presented is correct, this paragraph does not acknowledge the second-order purpose of Article VIII: to protect the Project, and thus the water supply to Texas. Miltenberger Declaration paragraph 24 and paragraph 40 address this. TX_MSJ_001585.</p>	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas's gloss on this NM UMF as to a purported “second-order purpose of Article VII” is immaterial to the NM UMF and does not create a genuine dispute of fact.</p> <p><u>Correction to Texas:</u> <i>See</i> NM-EX 016, Stevens Decl., ¶¶ 12, 13.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	Storage up to 600,000 acre feet by March first. The purpose of this provision is to bring the quantity of Usable Water in Project Storage to 600,000 acre-feet by March first and to maintain this quantity until April thirtieth to allow for a normal release of 790,000 acre feet in that year. <i>See</i> 53 Stat. at 790.	Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 22.		
38	The historical record indicates that one purpose of the Compact was to protect the operation of the Project. NM-EX 111, Miltenberger Dep. (June 8, 2020) 38:8-17, 137:9-138:21; NM-EX 112, Stevens Rep. 72; NM-EX 005, Stevens Decl. ¶ 10. <i>See, e.g.</i> , NM-EX 319, Rio Grande Compact Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937</i> , 12-13 (1937).	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
39	The historical record indicates that another purpose of the Compact was to protect existing rights. NM-EX 106, Kryloff Dep. (Aug. 6, 2020) 108:9-109:18; NM-EX 005, Stevens Decl. ¶ 11. <i>See, e.g.</i> , NM-EX 319, Rio	Subject to the stated objections, disputed. This paragraph mischaracterizes the historical record. The historical record makes clear that existing uses, circa 1938, not rights were to be protected by the Compact. Miltenberger Declaration paragraphs 20-27 address the privileging of uses over rights in the	Disputed. “Existing rights,” as used in the statement, is ambiguous and disputed to the extent New Mexico construes it to mean the Compact was intended to protect the rights of water users within the States. The engineer advisors for the negotiating committee “avoided discussion of the relative rights of water users in	The material fact that “The historical record indicates that another purpose of the Compact was to protect existing rights” is undisputed. <u>Response to Texas:</u> Miltenberger’s effort to assert a meaningful distinction between uses and rights

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Grande Compact Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937</i> , 12-13 (1937); NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937).	Compact. TX_MSJ_001585. Miltenerberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 23.	the three States" See NM-EX-22, Dec. 1937 Eng. Rep., at 2 (pdf page).	and to suggest that users were exclusively to be protected over rights is a gloss on the historical record with imagines a dispute where no genuine dispute exists. See, e.g., NM UMF 20-21 and Miltenerberger's objection thereto. In his declarations, Miltenerberger expresses new opinions. New Mexico intends to object to the new opinions disclosed by Miltenerberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenerberger's untimely expert opinions. The historical record is clear that Compact negotiators considered both uses <i>and</i> rights to craft their solutions. NM-EX 016, Stevens Decl., ¶ 15.
40	Prior to negotiation of the Compact, Reclamation administered the Project as a single unit. NM-EX 111, Miltenerberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18; NM-EX 107, Lopez Rep. 25.	Subject to the stated objections, undisputed.	Disputed. "Administered as a single unit," as used in the statement, is ambiguous and the statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project "is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very	There is no genuine dispute as to this fact. <u>Response to U.S.:</u> The U.S. provides no evidence contradicting the NM UMF that Reclamation had been operating the Project as a single unit prior to the Compact.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			probably even beyond that time.” NM-EX-328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938)(Clayton Letter) at 1. The United States disputes any other construction of Statement of Fact No. 40. The United States does not dispute that prior to the Compact, the Project delivered water to farms in the Project area, and did not allocate to District diversion headings as it does now.	
41	<p>The understanding of the compacting States was that Reclamation would continue to operate the Project in that manner.</p> <p>NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM- EX 327, J.H. Bliss, <i>Provisions of the Rio Grande Compact</i>, 1 (Apr. 2, 1938) (“The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit.”); NM-EX 112, Stevens Rep.72.</p>	<p>Subject to the stated objections, disputed regarding the ambiguity of the phrase “in that manner.” To the extent that “in that manner” is referable to #40, the item is undisputed.</p>	<p>Disputed. The Compacting States were aware of the possibility that Reclamation could transfer ownership or responsibility for Project infrastructure and operations to the districts after they satisfied their repayment obligations. The October 4, 1938 letter cited in this Statement says that the Rio Grande Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Clayton Letter, at 1.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to U.S.:</u> The U.S.’s evidence confirms that the contemporary understanding of the Compact negotiators was that the Project would continue to be operated as a unit.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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42	<p>In negotiating the Compact, the States understood that all lands within the Project had equal rights to water.</p> <p>NM-EX 111, Miltenberger Dep. (June 8, 2020) 44:4-23; NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-EX 107, Lopez Rep. 26-27, 35, 67-68; NM-EX 005, Stevens Decl. ¶ 11.</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading. In the cited Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938), Clayton was referencing contract rights – not appropriative rights. NM-EX 328. Miltenberger Declaration paragraphs 30 and 42-45 discuss the contracts for water delivery for the two Rio Grande Project districts – Elephant Butte Irrigation District (EBID) in New Mexico, and El Paso County Water Improvement District No. 1 (EP #1) in Texas. TX_MSJ_001585. The meaning and intent of the Clayton- Smith letter is addressed more fully in paragraphs 28-37.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 24, 28 – 37.</p>	<p>Disputed. “Equal rights to water,” as used in this statement, is ambiguous and the statement is disputed on that basis. Texas Commissioner Clayton’s statement that “lands within the Project have equal water rights” does not mean that all acreage had equal rights to water. Mr. Clayton referred to the Project “areas involved in the two States,” which he describes as 88,000 acres for Elephant Butte Irrigation District and 67,000 acres for El Paso Water Improvement District No. 1, not to individual lands or acres within the Project. NM-EX-328, Clayton Letter. Additionally, Mr. Clayton’s letter says the water distribution “is of course a private one between the districts involved, and for that reason it was felt neither necessary nor desirable that it be incorporated in the terms of the Compact.”</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and the U.S.:</u> Clayton writes: “These contracts provide that the lands within the Project have equal water rights, and the water is allocated according to the areas involved in the two States.” NM-EX 328, Clayton-Smith (1938) Letter.</p> <p><u>Response to Texas:</u> In his declarations, Miltenberger expresses new opinions. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger’s untimely expert opinions. Miltenberger’s new interpretation of the letter (comprising ¶¶ 28-37 of Miltenberger Dec. Decl.) is a tortured attempt to subvert the fact that Clayton’s letter says what it says. NM-EX 016, Stevens Decl., ¶ 10. The difference between contract and appropriative rights is not at issue in this UMF.</p> <p><u>Response to U.S.:</u> The U.S.’s current position contradicts its earlier responses in NM-EX 602, United States of America’s</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
				Responses to New Mexico's First Set of Requests for Admission, RFAs 12, 13. A matter admitted under Fed. R. C. P. 36(b) "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."
43	<p>The historical record reflects that the States agreed on 790,000 acre-feet per year as a normal release in the Compact because it was sufficient to satisfy irrigation demands in both New Mexico and Texas, as well as address water quality concerns.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 146:21-148:1; NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 55:17-56:25, 89:20-90:1; NM-EX 106, Kryloff Rep. 25-26.</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading. The 790,000 acre-feet release was to serve Project lands in New Mexico and Texas, the 1906 Mexican treaty obligation, and non-Project lands in Texas down to Ft. Quitman, ca. 1938. Miltenberger Declaration paragraphs 29-38 discuss this. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 25, 49 - 51.</p> <p>Additionally, the cited evidence does not support the asserted statement regarding water quality concerns. NM-EX-106, the Kryloff Report, references that the <i>JIR</i> "incorporated certain modifications to account for salinity control" at page 25. Otherwise, none of the cited evidence mentions "water quality."</p>	<p>Disputed. The Joint Investigation Report did not conclude that a 790,000 acre-feet per year release addressed water quality concerns. The Report states that "[q]uality of water, as well as quantity of water, becomes [] an important consideration particularly to the waters that are available to the lowest lands in the basin, such as those in the Tornillo unit of the Rio Grande Project and in the Hudspeth District." JIR 62 (in U.S. App. at TX_00000561). The release from Elephant Butte Reservoir of 766,000 acre-feet of water was calculated to remove 620,000 tons of dissolved solids past Fort Quitman, indicating that the amount of pre-Compact releases of water and drainage return flows was important to maintain flushing of salts. <i>Id.</i> at 64. The continuing concern for water quality is demonstrated by Article XI permitting "recourse by a signatory state to the Supreme Court of the United States for redress should the</p>	<p>The material fact that the States agreed on 790,000 AF/yr release as a normal release in the Compact, and that that amount was sufficient to satisfy irrigation demands in both New Mexico and Texas is undisputed.</p> <p><u>Response to Texas:</u> New Mexico agrees that the 790,000 AF/yr also satisfies the Mexico Treaty obligation. New Mexico also agrees that the non-Project lands in Texas down to Ft. Quitman (<i>i.e.</i>, Hudspeth County Conservation and Reclamation District No. 1) were at the time of Compact negotiation receiving return flows from the Project, although there was not guarantee of a specific amount.</p> <p><u>Response to Texas and U.S.:</u> That <i>water quality concerns were addressed</i> by the 790,000 AF/yr</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another.”	normal release agreed to by the Compact negotiators is amply supported and Texas and the U.S. are ignoring their own evidence. <i>See</i> Miltenberger Nov. Decl. ¶¶ 35, 38 (discussing the amount of water necessary to address water quality concerns). <i>See also</i> NM-EX 016, Stevens Decl., ¶¶ 9, 13; NM-EX 113, Stevens Rep., 64-65.
44	<p>The historical record indicates that the Compact relied upon the Project and its allocation and delivery of water in relation to the proportion of Project irrigable lands to provide the basis for the apportionment of Rio Grande waters to users in New Mexico and Texas.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 40:7-22; NM-EX 107, Lopez Rep. 67-68.</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading because the Compact does not rely upon the Project to effectuate any apportionment between New Mexico and Texas below Elephant Butte, as the paragraph implies. Instead, it depends on the Project to see that Project beneficiaries in New Mexico receive water – in other words, protecting the Project as an existing use.</p> <p>Miltenberger Declaration paragraphs 26-46 discuss this. TX_MSJ_1585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 26, 49 - 51.</p> <p>Additionally, the deposition testimony attributed to Scott Miltenberger is misrepresented by New Mexico. Dr. Miltenberger testified that he agreed</p>	<p>Disputed. The United States disputes that delivery of water “in relation to the proportion of Project irrigable lands” was an assumption on which the Compacting States “relied” as a basis for concluding that the operation of the Project would effect an equitable apportionment. Under the 1938 contract, the distribution of water was to be made in proportion of Project irrigable lands in the States only “in the event of a shortage of water for irrigation in any year,” and only “so far as practicable.” NM-EX-324, 1938 Contract. The United States does not dispute this statement if “in relation to the proportion of” is deleted.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> To support its claim that the Compact fails to provide New Mexico an apportionment for the bottom third of the state, Texas largely relies on <i>entirely new opinions</i> offered by Miltenberger. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger’s untimely expert opinions.</p> <p><u>Response to U.S.:</u> The U.S. here denies its former admissions:</p> <p>RFA / ANSWER 79: “The United States admits that</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>with Paragraph 10 of the Texas Complaint when it was read to him, and into the record, by counsel for New Mexico at his deposition. The statement he agreed to was the following: "The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas, nor did it articulate a specific state line delivery allocation. Instead, it 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 <i>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.</i>" NM-EX-220, Miltenberger Dep. (June 8, 2020) 40:7-22 (emphasis added).</p> <p>New Mexico improperly changed the highlighted testimony above, which was a clear statement regarding the Project allocations to Project beneficiaries, to be a "basis for the <i>apportionment</i> of Rio Grande waters <i>to users</i> in New Mexico and Texas." UMF 44.</p>		<p>Reclamation implements the Compact through its operation of the Rio Grande Project."</p> <p>NM-EX 607, United States of America's Responses to New Mexico's Second Set of Requests for Admission (8-28-2020), RFA 79.</p> <p>A matter admitted under Fed. R. C. P. 36(b) "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."</p>
45	The historical record confirms that historically Project deliveries were made based upon the ratio between Project acreage in New Mexico	Subject to the stated objections, disputed. This paragraph mischaracterizes the historical record and Scott Miltenberger's deposition	Disputed. The terms "historically," "based upon," and "under the Compact," as used in this statement are ambiguous and the statement are disputed on that basis. The Compact	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute that the historical record</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>and Project acreage in Texas. In other words, under the Compact, the delivery of water through the Project was based on the irrigable acres in each State. Historically that ratio is 57% to New Mexico and 43% to Texas.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 39:2-40:6, 47:17-48:18.</p>	<p>testimony. The historical record indicates that Project deliveries were generally based on irrigable acreage in the two states in a ratio of 57 percent for Project lands in New Mexico and 43 percent for Project lands in Texas. However, this paragraph does not offer any supporting evidence that deliveries were made in this fashion in every year and that deliveries were always made in accordance with the 57-43 percent ratio. Dr. Miltenberger did not testify that either was the case.</p> <p>Dr. Miltenberger merely replied in the affirmative when asked if he agreed with a portion of Texas's Complaint that noted this general, historical distribution of Project water deliveries. At least one primary-source document produced by New Mexico in support of its motions in fact suggests that allotments of Project water were not always equal (see paragraph 53 to the Miltenberger Declaration). NM-EX-323. Moreover, there is no language in the Compact requiring deliveries of Project water in this manner, and Dr. Miltenberger did not testify that the Compact directed Project deliveries in any way, which the phrase "under the Compact" in this paragraph implies. NM-EX-330.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 27, 53.</p>	<p>does not address the allocation within the Rio Grande Project. 53 Stat. 785. As noted, the 1938 contract between EBID and EPCWID (NM-EX 324) called for the distribution of available supply in proportion to acreage only in the event of a shortage of water for irrigation, and only so far as practicable. Until 1978, the Project delivered water to lands and did not allocate to the districts. Diversion records show that the percentage of total diversions to EBID ranged from 48.5% to 65.6%, and that the average diversion to EBID was 56.2%. NM-EX-100, Barroll Oct. 2019 Rep. at A-7-A-8. <i>See also</i> Statement of Fact 62 (summary statistics that do not align with 57/43 split).</p>	<p>indicates that Project deliveries were made based upon the ratio between Project acreages in New Mexico and Texas at the ratio of 57% for New Mexico and 43% for Texas.</p> <p><u>Response to U.S.:</u> The U.S. admitted: "Before 1980, Reclamation allocated water to Project lands that were under irrigation in a given year. This allocation was made per acre irrigated, without regard to the district in which the land was located. Thus, in some years, it is possible that water delivered to lands in EBID would not precisely equal 57% (or 88/155) of available Project water supply and water delivered to EPCWID would not precisely equal 43% (or 67/155) of available Project water supply, if the acres under irrigation were not in the same proportion. After 1980, Reclamation has allocated water to the districts, not to irrigated acres. The allocation is 88/155 of available Project water supply to EBID and 67/155 to EPCWID, prior to carryover accounting." NM-EX 608, U.S.'s Supplemental Responses to New Mexico's First Set of Discovery Requests (3-18-2020), Response to Interrogatory</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
				50, explaining U.S. response to New Mexico RFA 21. A matter admitted under Fed.R.C.P. 36(b) "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."
46	<p>Shortly after the Compact was finalized, Texas Commissioner Frank Clayton explained the way that the Compact divided water below Elephant Butte:</p> <p>[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</p>	<p>Subject to the stated objections, disputed. This paragraph mischaracterizes Frank B. Clayton's October 4, 1938 letter to Sawnie Smith. NM-EX 328. Although the paragraph accurately quotes Frank Clayton, it pays insufficient attention to the details of the letter and fails to acknowledge the context in which the letter was drafted – both of which are essential to understanding the ideas Mr. Clayton was expressing to Mr. Smith. Miltenberger Declaration paragraphs 31 and 42 discuss the Clayton-Smith letter and additional discussion is provided in the Scott Miltenberger Declaration submitted herewith to clarify further the letter's meaning. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. See Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 28 - 37.</p> <p>Additionally, the deposition testimony attributed to Mr. Kryloff is</p>	<p>[a] Not disputed, to the extent the statement is intended to report the fact of what Clayton wrote, and not to establish the specific contents of his statement as a factual matter.</p> <p>[b] Not disputed, with the qualification that Mr. Kryloff is retained by the United States but has not been identified by the United States as a witness as of this filing.</p>	<p>There is no genuine dispute as to this fact.</p> <p>The contents of the Clayton-Smith (1938) Letter are undisputed.</p> <p><u>Response to Texas:</u> Miltenberger offers an <i>entirely new opinion</i> of the NM-EX 328, Clayton-Smith (1938) Letter. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger's untimely expert opinions. Not only is Miltenberger's current interpretation of the letter (comprising ¶¶ 28-37 of his Dec. Declaration) a tortured attempt to subvert that fact that Clayton's letter is explicit as to how Compact apportionment works in</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>cent for each figure.</p> <p>NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938).</p> <p>The expert historian for the United States agreed that this letter was “an important document” for understanding the way that the Compact divides the water below Elephant Butte.</p> <p><i>See</i> Ex 215, Kryloff Dep. (Aug. 6, 2020) 41:15-20, 41:21-42:9; NM-EX 106, Kryloff Rep. 12; <i>see also</i> NM-EX 220, Miltenberger Dep. (June 8, 2020) 43:17-44:23.</p>	<p>misrepresented by New Mexico. Mr. Kryloff testified that he agreed that the Clayton letter is “an important document” “for understanding the intent of the parties <i>with regard to allocating water</i> below Elephant Butte.” <i>See</i> Ex 215, Kryloff Dep. (Aug. 6, 2020) 41:15-20 (emphasis added). He did not state, as represented by New Mexico in #46, that the Clayton letter is important “for understanding the way that <i>the Compact</i> divides the water below Elephant Butte.”</p> <p>Further, the Miltenberger testimony cited by New Mexico does not support the stated “fact.”</p>		<p>southern New Mexico and Texas, but <i>Miltenberger's new opinion contradicts his earlier position</i> on Compact apportionment and should be disregarded.</p> <p><i>See</i> NM-EX 016, Stevens Decl., ¶¶ 9, 10, 11 as to the Compact nature of the Clayton-Smith (1938) Letter.</p> <p>As to the testimony of Kryloff, Texas grossly misrepresents his testimony. <i>See</i> NM-EX 253, Kryloff Dep. 39:1-40:9 (discussing archival documents relevant to the fact that the Project is the vehicle or mechanism by which the water is allocated between New Mexico and Texas below Elephant Butte. <i>Id.</i> at 40:10-20.)</p> <p><u>Response to U.S.:</u> The U.S. offers no evidence contradicting the New Mexico analysis of the contents of the NM-EX 328, Clayton-Smith (1938) Letter. In fact, the U.S. expert historian testified that this letter substantively describes the New Mexico-Texas Compact apportionment below Elephant Butte. <i>See discussion herein.</i></p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
47	Similarly, shortly after the Compact was finalized, Texas Commissioner Frank Clayton described the operation of the Compact to the Chairman of the Texas Board of Water Engineers. Commissioner Clayton explained: Moreover, since the source of supply for all lands above Fort Quitman and below Elephant Butte reservoir, whether in Texas or New Mexico, is the reservoir itself, it could hardly be expected of Colorado and New Mexico that they should guarantee a certain amount of water to pass the Texas state line, since this amount is wholly dependent upon the releases from the reservoir and the reservoir is under the control of an entirely independent agency – the Bureau of Reclamation. Also, by contract between the New Mexico interests and the Texas interests in the Rio Grande Project, all the lands in the Project have equal water rights, and the acreage to be irrigated is practically “frozen” at its present figures, with a three per cent “cushion.” It is therefore not	<p>Subject to the stated objection, disputed. This paragraph mischaracterizes the document, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas to C.S. Clark, Chairman, Board of Water Engineers, State of Texas (October 16, 1938). NM-EX 329. As with the Clayton-Smith letter, the quotation offered from the Clayton-Clark letter is correct. NM-EX 328. However, attention to the details of the letter and the essential context for the letter reveals a different purpose and meaning for the communication and the provided quotation.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 38 45.</p>	Not disputed , to the extent the statement is intended to report the fact of what Clayton wrote, and not to establish the specific contents of the letter as a factual matter.	<p>There is no genuine dispute as to this fact.</p> <p>The contents of the Clayton-Clark (1938) Letter⁶ are undisputed.</p> <p><u>Response to Texas:</u> Miltenberger offers an <i>entirely new opinion</i> of the NM-EX 328, Clayton-Clark(1938) Letter. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger's untimely expert opinions. Miltenberger's interpretation of the letter (comprising ¶¶ 38-45 of Miltenberger Dec. Decl.) a tortured attempt to subvert that fact that Clayton's letter is explicit that it explains how Compact apportionment works in southern New Mexico and Texas. <i>See</i> NM-EX 016, Stevens Decl., ¶¶ 10, 11.</p> <p><u>Response to U.S.:</u> The U.S. offers no evidence contradicting the New</p>

⁶ NM-EX 329, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas to C.S. Clark, Chairman, Board of Water Engineers, State of Texas (October 16, 1938), hereinafter the “Clayton-Clark (1938) Letter.”

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>necessary, even if it were practicable, to make any definite provision in the Compact for the amount of water to pass the Texas-New Mexico state line.”</p> <p>NM-EX 329, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas to C.S. Clark, Chairman, Board of Water Engineers, State of Texas (October 16, 1938).</p>			<p>Mexico analysis of the contents of the Clayton-Clark (1938) Letter. <i>See discussion herein.</i></p>
48	<p>In 1968, Raymond Hill, the Engineer Advisor for the State of Texas during Compact negotiations explained “that the Rio Grande Compact Commissioners, at the time of executing the Rio Grande Compact of 1938, anticipated that compliance” with Articles III and IV “would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 AF per year from Project storage <i>for use on lands in New Mexico downstream of Elephant Butte Reservoir</i> and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico.”</p> <p>NM-EX 401, Raymond A. Hill, <i>Development of the Rio</i></p>	<p>Subject to the stated objection, disputed. This paragraph does not provide sufficient context to understand fully the meaning of the quotation provided from Raymond Hill’s <i>Development of the Rio Grande Compact of 1938</i>. NM-EX-401. The paragraph correctly quotes from Hill’s narrative, but in the absence of context – much of which is also discussed in 29-46 – the quotation is misleading. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 46 - 51. Miltenberger Declaration paragraphs</p>	<p>Not disputed, to the extent the statement is intended to report the fact of what Hill wrote, and not to establish the content of what he wrote as a factual matter.</p>	<p>There is no genuine dispute as to this fact.</p> <p>The contents of the Hill quotes are undisputed.</p> <p><u>Response to Texas:</u> Miltenberger devotes 6 paragraphs to providing “context” for the language quoted in the NM UMF. Miltenberger Dec. Decl. ¶¶ 46-51. This “context” does not create an issue of disputed fact as to NM UMF 48. <i>See</i> NM-EX 016, Stevens Decl., ¶ 14, for a discussion of the flaws in the Miltenberger interpretation of the Hill document.</p> <p><u>Response to U.S.:</u> The U.S. offers no evidence</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<i>Grande Compact of 1938</i> , 38 (Oct. 8, 1968) (emphasis added).			contradicting the New Mexico analysis of the contents of the Raymond Hill Oct. 8, 1968 report.
49	<p>Under the Reclamation Act, Congress intended that water projects would be self-supporting, and each would generate sufficient revenue to cover the approximate costs of construction and operation and maintenance. Thus, Reclamation intended for the total estimated costs of the Rio Grande Project to be equitably borne by its beneficiaries.</p> <p>NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 3 (Sept. 30, 2016); NM-EX 005, Stevens Decl. ¶ 13.</p>	Subject to the stated objection, undisputed.	<p>[a] Not disputed.</p> <p>[b] Disputed. “Equitably,” as used in the statement, is ambiguous, and the statement is disputed on that basis. The United States does not dispute the statement if “equitably” is deleted.</p>	<p>This fact is undisputed.</p> <p><u>Response to U.S.:</u> The U.S. cannot in good faith object to the term “equitably” inasmuch as it sanctioned the term in similar contexts in NM UMFs 4, 18, 25. The U.S. offers no evidence contradicting New Mexico’s evidence.</p>
50	<p>The Project beneficiary in New Mexico is Elephant Butte Irrigation District (“EBID”). EBID is a New Mexico entity created by New Mexico statute and subject to New Mexico law.</p> <p><i>See</i> Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum</p>	Subject to the stated objections, disputed in that it mischaracterizes the cited “evidence;” the “evidence” does not stand for the stated proposition; and contains an improper legal conclusions by stating that EBID is a “New Mexico entity,” “subject to New Mexico law.” The lack of definitions and scopes for	Not disputed.	There is no genuine dispute as to this fact.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	and Points of Authority, 2 (Dec. 3, 2014); <i>see also</i> NM-EX 302, Elephant Butte Water Users Association, Articles of Incorporation (Dec. 22, 1904); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger Rep. 9.	the terms used render the statements objectionable.		<u>Response to Texas:</u> Texas offers no evidence ⁷ contradicting New Mexico's evidence to this well-established UMF.
51	<p>The Project beneficiary in Texas is El Paso County Water Improvement District No. 1 ("EPCWID" or "EP No. 1"). EPCWID is a Texas entity created by Texas statute and subject to Texas law.</p> <p><i>See</i> Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); <i>see also</i> NM-EX 304, El Paso Valley Water Users' Association, Articles of Incorporation (Mar. 31, 1905); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger</p>	Subject to the stated objections, disputed in that is mischaracterizes the cited "evidence"; the "evidence" does not stand for the stated proposition; and contains an improper legal conclusions by stating that EP#1 is a "Texas entity," "subject to Texas law." The lack of definitions and scopes for the terms used render the statements objectionable.	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas offers no evidence contradicting New Mexico's evidence to this well-established UMF.</p>

⁷ The mere statement that a fact is controverted does not automatically make it so. Instead, the other party's statement of fact must be opposed with evidence in the form of an affidavit, deposition, or some other allegation of fact backed by the penalty of perjury. *Woods-Leber v. Hyatt Hotels of Puerto Rico, Inc.*, 951 F. Supp. 1028, 1034 (D.P.R. 1996), aff'd, 124 F.3d 47 (1st Cir. 1997).

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Rep. 9.			
52	<p>To comply with the principle that the beneficiaries equitably bear the costs of the Project, Reclamation entered into contracts with EBID and EPCWID to establish the repayment obligations between the two districts based on the irrigable acreage within each district.</p> <p>NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 4 (Sept. 30, 2016); e.g., NM-EX 308, Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association (June 27, 1906) ("1906 Contract"); 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) (reciting amendments to 1906 Contract); NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes</p>	Subject to the stated objections, undisputed.	Disputed. As noted above, "equitably" is ambiguous, and the statement is disputed on that basis. The United States does not dispute the statement if the term "equitably" is deleted.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to U.S.:</u> The U.S. cannot in good faith object to the term "equitably" inasmuch as it sanctioned the term in similar contexts in UMFs 4, 18, 25. The U.S. offers no evidence contradicting New Mexico's evidence.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	(Nov. 9, 1937) (same); NM-EX 326, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) ("1938 Downstream Contract").			
53	<p>At the time the Compact was executed, 88,000 authorized Project acres were situated within EBID in New Mexico, and 67,000 authorized Project acres were situated in EPCWID in Texas.</p> <p>NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938).</p> <p>Thus, approximately 57% of Project acreage was located in New Mexico, and 43% of Project acreage was located in Texas.</p> <p>NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 4 (Sept. 30, 2016).</p>	Subject to the stated objection, undisputed.	Not disputed.	This fact is undisputed.
54	At the time the Compact was signed, Reclamation had been operating the Project, in its entirety, as a single unit for over	Subject to the stated objections, disputed in part. While this paragraph is correct that "[a]t the time the Compact was signed" the Project had	[a] Disputed. As noted in response to Statement No. 40, "as a single unit" is ambiguous, and "in its entirety," as used in this statement is	There is no genuine dispute as to this fact.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>twenty years. During that time, the Project operated under Reclamation law.</p> <p><i>See, e.g.,</i> NM-EX 318, Harlow M. Stafford et al., <i>Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation</i>, 8 (1937); NM-EX 005, Stevens Decl. ¶ 9.</p>	<p>been in operation for “over twenty years,” the cited sources in this paragraph do not provide support for the claim that the Project had been operated “as a single unit” nor do they explain what is meant by “under Reclamation law.” NM-EX-318 and NM-EX-005. NM-EX-005 paragraph 9 states that the Project was operated “as a single unit and pursuant to Reclamation law” but does not cite to documentary evidence.</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 52.</p>	<p>also ambiguous. Statement No. 54 is disputed because of those ambiguities. The United States does not dispute the statement if “, in its entirety, as a single unit” is deleted. [b] Not disputed, insofar as the Project has always been operated pursuant to federal reclamation law. The term “operated under Reclamation law” as used in the statement is disputed if given any other construction.</p>	<p><u>Response to Texas:</u> Texas provides no evidence contradicting New Mexico's evidence that Reclamation had been operating the Project, in its entirety, as a single unit. Further, Texas expert Miltenberger testified that Reclamation treated the Project “as an administrative unit” and the “Project must be operated as a unit.” Miltenberger Nov. Decl. ¶¶ 30, 31; <i>see also</i> NM-EX 128, Miltenberger Rep., 100-101.</p> <p><u>Response to U.S.:</u> The U.S. provides no evidence contradicting New Mexico's evidence that Reclamation had been operating the Project, in its entirety, as a single unit. <i>See also</i> NM UMF 54; NM-EX 016, Stevens Decl., ¶ 10(b), 11.</p>
55	<p>In the years prior to the Compact being signed (1928-37), the average release from the Project was 780,640 acre-feet to satisfy irrigation demands on Project lands in both New Mexico and Texas.</p> <p>NM-EX 323, United States Reclamation Service, <i>Project History Rio Grande Project Year 1937</i> (1938).</p>	<p>Undisputed.</p>	<p>Disputed. The 1937 Project History contains a report, dated May 3, 1937, that states that the average annual release “for the past 10 years” was 780,640 acre-feet. That 10-year period would have been 1927 to 1936, not 1928 to 1937. The report does not state that this release actually did “satisfy” irrigation demands, or that the release was made solely to meet the irrigation demands in the districts and excluded the release to Mexico. <i>See</i></p>	<p>There is no genuine dispute as to this fact as corrected.</p> <p>New Mexico corrects its NM UMF as follows: “In the years 1927-1936 the average release from the Project was 780,640 acre-feet to satisfy irrigation demands on Project lands as well in both New Mexico and Texas, as well as meet Mexico delivery obligations.”</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			NM-EX 323, at pdf p.27. In several years, the annual release exceeded 820,000 acre-feet. <i>See, e.g.</i> Project History for 1932, US0178115, at US0178127 (in U.S. Supp. App.); Project History for 1933, US0178318 at US0178330 (in U.S. Supp. App.).	<u>Response to U.S.:</u> New Mexico does not state that the release actually did satisfy Project demands; there can be no dispute that the intent of Project releases is to satisfy Project demands.
56	<p>In the years prior to the Compact being signed, the Project would set an equal allotment for each Project acre to satisfy irrigation demands.</p> <p>NM-EX 323, United States Reclamation Service, <i>Project History Rio Grande Project Year 1937</i> (1938). The amount of water that was actually used on each acre depended on the amount called for by the individual farmers. <i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 18:10-22; Ex.100, Margaret Barroll, Ph.D, <i>Expert Report of Margaret Barroll, Ph.D.</i>, 32 (Oct. 31, 2019) ("Barroll Rep.).</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading. The cited primary document, United States Reclamation Service, <i>Project History Rio Grande Project Year 1937</i> (1938) suggests that an equal allocation was set in 1937. NM-EX-323. However, it is unclear from that document if this was the practice in all years prior to the Compact. Even for 1937, the allotment basis was abandoned because individual water users had exceeded that amount in July.</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 53.</p>	<p>Disputed. The Project did not set an allotment every year. In years with higher starting levels of reservoir storage (such as 1932, 1933, and 1934), the Project Histories do not reflect that any per-acre allotment was set. <i>See</i> Project History for 1932, US0178115, at US0178127, US0178201-202 (showing one notice regarding irrigation deliveries); Project History for 1933, US0178318, at US0178328, US0178391-392 (showing one notice regarding irrigation deliveries); Project History for 1934, US0178513, at US0178523. In years without allotments, Reclamation allowed farmers to take more than the "irrigation duty" of water, which was assumed to be 3 af/ac (after accounting for on-farm distribution losses) but did not represent an "allotment." NM-EX 323 at pdf 22 (Division Memorandum dated July 15, 1937 in the United States Reclamation Service, Project History Rio Grande Project Year 1937 (1938)). In years with lower initial</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and the U.S.:</u> The historical record is clear and it is undisputed that in the years prior to the Compact being signed and through at least 1978 <i>each Project acre was equally entitled to Project water.</i> "From 1908 through 1979, Reclamation operated the RGP. Reclamation determined the annual allotment of RGP water per acre of authorized land and delivered the annual allotment..." NM-EX 529, FEIS, ¶ 1.4.2.1. In fact, the Reclamation El Paso Field Manager testified that the Project allocation "has historically been equally divided to all Project lands on an acre foot per acre basis." NM-EX 506, Affidavit of Filiberto Cortez (4-20-2007), ¶ 8. Evidence that in years of plentiful water supply the per acre allotment was raised or even not identified does not create a dispute that every acre on the</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			reservoir storage (such as 1935), Reclamation set an initial allotment but sometimes raised it over the course of the year as more water came in to storage. <i>See</i> Project History for 1935, US0178674, US0178737-742. <i>See also</i> NM-EX-323, July 1937 Mem., at pdf 22. Delivery records also showed that the amount of water delivered per acre in any given year was not equal but varied across the different divisions of the Project. <i>See, id.</i> at 48 of pdf.	Project was equally entitled to Project water.
57	<p>In 1937 and 1938, Congress authorized the execution of amended repayment contracts with EBID and EPCWID. These contracts addressed the repayment obligations of the Districts and established a corresponding right of use to a proportion of the annual Project water supply during times of shortage based on an established irrigation acreage in each District: 57% to EBID in New Mexico, and 43% to EPCWID in Texas.</p> <p>NM-EX 107, Lopez Rep. 26-27; NM-EX 109, Estevan R. Lopez, P.E., Supplemental Rebuttal Expert Report of Estevan R. Lopez, P.E., 6-7 (July 15, 2020) ("Lopez Supp. Reb. Rep."); <i>see, e.g.</i>, NM-EX 308, Articles of Agreement</p>	<p>Subject to the stated objections, disputed in part. This paragraph is factually misleading. Congress authorized the execution of amended repayment contracts with EBID and EPCWID (or EP #1) in 1937, but it did not authorize the 1938 contract as such. The 1938 Downstream Contract was instead part of an effort by Reclamation, extending back to 1929, to fix the basis for repayments between the two districts. The districts themselves ultimately instigated this particular agreement to settle the issue. Miltenberger Declaration paragraphs 43-45 discuss the 1937 and 1938 Downstream Contracts. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. To</p>	<p>Disputed. The 1937 contracts between the Secretary and the Districts do not provide for a "right of use to a proportion of the annual Project water supply during times of shortage based on an established irrigation acreage in each District." <i>See</i> NMEX-320, 1937 EBID Contract; NM-EX-321, 1937 EPCWID Contract. The 1938 contract between EBID and EPCWID states 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. NM-EX-324, 1938 Contract. The contract does not establish a "right of use."</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the material fact that the Downstream Contracts "addressed the repayment obligations of the Districts and established a corresponding right of use to a proportion of the annual Project water supply during times of shortage based on an established irrigation acreage in each District: 57% to EBID in New Mexico, and 43% to EPCWID in Texas." In fact, this is the position Texas briefs in its Opposition to the State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment ("TX Apportionment Response"): "The repayment contract between EBID</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association (June 27, 1906); 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); NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes (Nov. 9, 1937); NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) ("1938 Downstream Contract"). Collectively, these contracts are known as the "Downstream Contracts."</p>	<p>NM at TX_MSJ_007371, paragraphs 1 – 7, 54-59.</p>		<p>and EP#1 <i>that established the districts' respective allocations ...</i>" (emphasis added). <i>Id</i> at 13.</p> <p>Miltenberger's inconsistent opinions about the Downstream Contracts is discussed in detail at NM-EX 016, Stevens Decl., ¶¶ 16-17. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger's untimely expert opinions.</p> <p><u>Response to U.S.:</u> "In 1937, Congress authorized the execution of amended repayment contracts with EBID and EPCWID. These contracts reduced the repayment obligations <i>and established a corresponding right of use</i> to a proportion of the annual water supply, based on an established irrigated acreage in each district: 57 percent to EBID and 43 percent to EPCWID ..." NM-EX 529, FEIS (prepared by Reclamation), ¶ 1.4.2.1 (emphasis added).</p>
58	<p>For example, the 1938 Downstream Contract quantified the authorized irrigable acreage within each district as 88,000 acres in EBID, and 67,000 acres</p>	<p>Subject to the stated objections, disputed in part. This paragraph correctly quotes from the cited document but mischaracterizes the context and purpose of the 1938</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> See NM UMF 57. Miltenberger's inconsistent opinions about the Downstream</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>in EPCWID (for a total of 155,000 Project acres). It goes on to state that in the event of a shortage of water, "the distribution of the available supply in such a year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID]."</p> <p>NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938); NM-EX 107, Lopez Rep. 26-27; NM-EX 001, Barroll Decl. ¶19.</p>	<p>Downstream Contract as discussed in paragraphs 54-59 of the Miltenberger Declaration. NM-EX 324.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 54-60.</p>		<p>Contracts is discussed in detail at NM-EX 016, Stevens Decl., ¶¶ 16-17. New Mexico intends to object to the new opinions disclosed by Miltenberger pursuant to FRCP 56(c)(2), and reserves the right to file a motion to strike or a motion in limine as to Miltenberger's untimely expert opinions.</p>
59	<p>Until about 1979, Reclamation operated the entire Project, including delivering Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings. Reclamation ditch riders then</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>delivered the ordered water to individual farms.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:6-59:11; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 5 (Sept. 30, 2016).</p>			
60	<p>The allocation of Project supply available for lands in the two States was historically equally divided to all Project lands on an acre foot per acre basis.</p> <p>NM-EX 506, Cortez Affidavit ¶ 8 (Apr. 20, 2007); NM-EX 108, Estevan R. Lopez, P.E., Rebuttal Report of Estevan R. Lopez, P.E., 7-9 (June 15, 2020) (“Lopez Reb. Rep.”); NM-EX 210, Ferguson Dep. (Feb. 20, 2020) 240:25-241:5; NM-EX 214, King Dep. (May 18, 2020) 115:13-25.</p>	<p>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</p>	<p>Disputed. The term “allocation of Project supply available for lands” is ambiguous. Reclamation historically announced an amount of water available to Project lands on an acre-feet per acre basis based on the amount of water in storage at the start of the irrigation season. <i>See</i> NM-EX-323, United States Reclamation Service, Project History, Rio Grande Project Year 1937, at NM_00024896-7. Water was not delivered to lands based on an equal acre-foot per acre basis; water was delivered to fulfill farm</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas does not dispute the NM UMF.⁸ Texas's assertions comprise legal argument insufficient to create a genuine dispute of fact.</p> <p><u>Response to the U.S.:</u> The NM UMF addresses allocation, not delivery. The U.S. here admits “Reclamation historically announced an amount of water available to Project lands on an acre-feet per acre basis ...” This</p>

⁸ Once a proper motion for summary judgment is made, the nonmovant must then direct the court's attention to evidence in the record sufficient to establish that there is a genuine issue of material fact. To satisfy this burden, then nonmovant must set forth specific facts, and mere conclusory allegations are not sufficient to defeat a motion for summary judgment. *Topalian v. Ehrman*, 954 F.2d 1125 (5th Cir.1992).

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>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.</p> <p>Declaration of Robert J. Brandes, P.E., Ph.D. in Support of the State of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Brandes Dec. in Opp. To NM) at TX_MSJ_007312, paragraphs 1 – 9, 25-27.</p>	<p>orders. <i>See</i> New Mexico Statement of Fact No. 59 (above).</p>	<p>describes <i>allocation</i> and is in accord with the NM UMF.</p>
61	<p>Prior to 1951, the Project enjoyed plentiful water supplies, and Reclamation allowed Project farmers to order water as they needed to irrigate their crops.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 18:16-19:15, 58:6-18.</p>	<p>Subject to the stated objections, disputed in part. The testimony cited by New Mexico does not support that "Prior to 1951, the Project enjoyed plentiful water supplies."</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 18:16-19:15, 58:6-18.</p>	<p>Disputed. Although some years did see high levels of reservoir storage and inflow, Reclamation announced potential and initial allotments in a number of years prior to 1951 based on <i>low</i> water supply. <i>See</i> Response to Statement No. 36, <i>supra</i>; <i>see also</i> Project History for 1934, US0178513, at US0178523 (in U.S. Supp. App.) (stating that Project would rely on reservoir storage that year because reservoir inflow was</p>	<p>There is no genuine dispute as to the fact that prior to 1951 Reclamation allowed Project farmers to order water as they needed to irrigate their crops.</p> <p><u>Response to U.S.:</u> Nothing in the U.S.'s proffered evidence contradicts the NM UMF that "Reclamation allowed Project farmers to order water as they needed to irrigate their crops." <i>See</i></p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			<p>“the second lowest in the recorded history of the Rio Grande at San Marcial”); Project History for 1947, US017169, at US017200 (in U.S. Supp. App.) (announcing, in August 1947, an allotment of 1 af/ac for 1948 based on “the record low stage of the Rio Grande storage reservoirs as a result of five consecutive years of below normal inflow”). Sometimes the allotments announced in these years were increased or lifted if conditions changed, but farmers could not always “order water as they needed” in earlier parts of the season. <i>See, e.g.</i>, Project History for 1935, US0178674 at US0178737-742 (in U.S. Supp. App.).</p>	<p><i>also</i> NM-EX 511, Filiberto Cortez Presentation (10-2008), 5. Further, the U.S.’s position here seemingly contradicts its position as to NM UMF 56.</p>
62	<p>In 1951, drought forced Reclamation to limit per-acre allocations to Project lands, which it did by evaluating deliveries to lands from 1946 through 1950.</p> <p><i>Id.</i> at 19:1-20:4, 58:19-59:7; NM-EX 100, Barroll Rep. 32.</p> <p>Reclamation in 1951 determined that 3.0241 acre-feet per acre constituted a full allocation to Project lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 19:8-20:4.</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Disputed. The cited sources do not show that Reclamation conducted an evaluation in 1951, or that Reclamation was “forced” to make per-acre allotments only for the first time in 1951, or that drought began in 1951. The Project History for 1947 cites “five consecutive years of below normal inflow.” Project History for 1947, US017169, at US017200. The allotment initially imposed for 1948 was lifted but water conditions continued to be unreliable, resulting in steadily reduced reservoir storage, and culminating in initial reservoir storage of approximately 443,000 af</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to U.S.:</u> The U.S. provides no evidence contradicting the testimony of its employee, Filiberto Cortez, supporting the fact that in 1951 Reclamation determined that 3.0241 AF/acre constituted a full allocation.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			<p>in 1951 and a total allotment of 1.75 af/ac that year. Project History for 1951 (file 2 of 6), US0018796, at US0018805, US0018841 (in U.S. Supp. App.). <i>See also id.</i> at US0018843 (stating that “[i]nflow to Elephant Butte since 1915 has averaged annually 1,039,500, while for the past eight years the average has been only 659,400 acre-feet.”). The 1951 Project History states that “average annual use” for the eight years prior to 1951 was 3.1 af/ac, not 3.0241 af/ac. <i>Id.</i> A 1956 memorandum states that a normal delivery was equivalent to 3.0241 af/ac, based on the average total Project delivery in the years 1946 to 1950. <i>See</i> Memorandum of Conversation re 1906 Treaty Deliveries to Mexico (June 29, 1956)(1956 Memo), US0171657 at US01716560. “Full allocation” not a term used to describe the supply and delivery of Project water in 1946-1950. <i>See id.</i></p>	
63	<p>From 1951 through 1979, Reclamation allocated Project deliveries on an equal basis to all Project lands and delivered allocated water directly to Project lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:19-59:7; NM-EX 511, Filiberto</p>	<p>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</p>	<p>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 an equal basis to each acre. NM-EX-202, Cortez 7/30/20 Dep. Tr. 58:19-59:7.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas provides no evidence contradicting the New Mexico UMF. Texas's assertions comprise legal argument insufficient to create a disputed issue of fact.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Cortez, Lower Rio Grande Project Operating Agreement: Settlement of Litigation 4 (Oct. 2008) ("Cortez Presentation"); NM-EX 100, Barroll Rep. 31-32.	<p>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.</p> <p align="center"><i>See Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-27.</i></p>		<p><u>Response to the U.S.:</u> The U.S.'s assertions do not create a genuine dispute of fact, and its cite to the Cortez testimony does not support its assertion. To the extent the U.S. attempts to create a dispute of fact it contradicts the U.S.'s earlier admission that "Project allocation was allocated to all Project lands on an acre-foot-per-acre basis in the period prior to 1980." NM-EX 602, U.S. Response to NM RFA (1st) No. 12.</p> <p>A matter admitted under Fed. R. C. P. 36(b) "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."</p>
64	Before 1980, Reclamation operated the Project in its entirety, combining storage and return flows so that each acre of Project land was entitled to receive an equal amount of water regardless of the source of the water or in what State the land was located. Thus, based on each District's share of authorized acreage, "EBID is allocated 88/155 of the available Project water supply and	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	[a] Disputed. "Operated the Project in its entirety" and "entitled to," as used in this statement, are ambiguous, and the statement is disputed on that basis. The United States does not dispute that from 1951 to 1979, Reclamation considered the amount of usable water in Project storage and predicted reservoir inflows to determine whether it would be necessary to issue and enforce	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not provide evidence contradicting the NM UMF. Texas's assertions comprise legal argument insufficient to create a disputed issue of fact. Further, Texas expert Miltenberger testified that historic documents required that the "Project must be</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>EPCWID is allocated 67/155 of the available Project water supply.”</p> <p>NM-EX 506, Cortez Decl. ¶ 11 (Apr. 20, 2007); NM-EX 100, Barroll Rep. 31.</p> <p>During this period, there is no record that any party lodged an objection, whether through the RGCC or Reclamation, to challenge Reclamation's principle of allocation on an equal per-acre basis.</p> <p>NM-EX 005, Stevens Decl. ¶ 12; NM- EX 003, Lopez Decl. 25; EX-NM 002, D'Antonio Decl. ¶ 16.</p>	<p>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.</p> <p><i>See Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-27.</i></p>	<p>reduced allotments of water on an acre-foot-per-acre basis to all Project lands. Project efficiency and the availability of return flows were also considered. The quotation of Paragraph 11 of the Cortez Declaration applies to water allocations <i>since</i> 1980, not before. NM-EX-506, Cortez Decl. ¶¶ 8, 9, 11. After 1980, Reclamation set an annual diversion allocation of the available water supply to each District in proportion to its irrigable acreage. <i>See</i> NM-EX-400, Allocation Procedures. Reclamation did not operate the Project under a legal requirement that each acre of Project land was entitled to receive an equal amount of water.</p> <p>[b] Disputed. Mr. Cortez's statement on diversion allocation relates to Project operations after 1980.</p> <p>[c] Not disputed, with the clarification that the statement refers to the period before 1980.</p>	<p>operated as a unit.” Miltenberger Nov. Decl. ¶ 31.</p> <p><u>Response to U.S.:</u> The U.S. cannot in good faith dispute that Reclamation “operated the Project in its entirety” – evidence is undisputed that Reclamation operated the entire Project until the Districts paid off their loans and assumed certain responsibilities. NM-EX 602, U.S. Responses to New Mexico's First Set of Requests for Admissions, ## 13, 14, 15.</p> <p>A matter admitted under Fed. R. C. P. 36(b) “is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended.”</p>
65	<p>From 1931 to 1979, Reclamation operated the Project such that the diversions for EBID in New Mexico totaled 54.5% and diversions for EPCWID in Texas totaled 45.5% of total diversions. From 1951, when Reclamation began enforcing allocations to each acre, until 1979, the</p>	<p>Subject to the stated objections, disputed. New Mexico's own data as reported in the underlying files of the Spronk Report are inconsistent with the diversion percentages reported in paragraph 65 of NM MSJ on Apportionment and attributed in paragraph 65 to the work of New Mexico's other expert, Peggy Barroll.</p>	<p>Not disputed.</p>	<p>This fact is disputed.</p> <p><u>Response to Texas:</u> Brandes used the wrong data comparisons and therefore calculated incorrect percentages. This is more fully explained at NM-EX 014, Barroll 3rd Decl., ¶ 37.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>diversions for EBID in New Mexico totaled 56.2% and diversions for EPCWID in Texas totaled 43.8% of total diversions.</p> <p>NM-EX 100, Barroll Rep., Appx. 1, A-8. This is shown graphically in Figure A-3 of Dr. Barroll's Expert Report:</p> <p><i>[graphic omitted, see NM MSJ on Apportionment at p. 13]</i></p> <p><i>See also id.</i> at A-9; NM-EX 101, Margaret Barroll, Ph.D., Rebuttal Expert Report of Margaret Barroll, Ph.D at 41, Appendix A, 39 (June 15, 2020) ("Barroll Reb. Rep.").</p>	<p>In paragraph 65, New Mexico states that from 1931 to 1979, diversions by EP#1 totaled 45.5 percent of total diversions, but the Spronk data show only 41.7 percent, slightly less than the 43 percent allocation. Similarly, for 1951 to 1979, in paragraph 65 New Mexico reports that EP#1 diverted 43.8 percent of the total diversions, whereas the Spronk data show that EP#1 diverted only 38.5 percent. Methods used by Peggy Barroll and those described in the underlying data of the Spronk Report also differ in how the distributions of diversions by EP#1 in Mesilla Valley were made, with Barroll assuming 20 percent and Spronk an average of 14 percent.</p> <p><i>See Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 28.</i></p>		
66	<p>In approximately 1979, Project operations changed with the transfer of some Project facilities to the Districts. Reclamation started to allocate water to each District for delivery at the District's canal headings (i.e., Arrey, Leasburg, Mesilla, Franklin and Riverside) rather than directly to farm headgates. Since those transfers, Reclamation determines the Districts' Project allocations, takes water orders from the Districts, releases water from</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>Caballo reservoir, and then makes deliveries to canal headings for water users in each District. The Districts in turn take farm orders from their members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates in each State.</p> <p>NM-EX 001, Barroll Decl. ¶ 21; <i>See</i> NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 208, Esslinger Dep. (Vol. II), 57:4-58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20.</p>			
67	<p>Historically, Reclamation calculated and declared the allocation of Project supply available to lands in New Mexico, lands in Texas, and Mexico on the basis of water in storage available for release and on historical return flows to the Rio Grande.</p> <p>NM-EX 506, Cortez Decl. ¶ 7 (Apr. 20, 2007); NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 393:3-5;</p>	Subject to the stated objections, undisputed.	Not disputed , to the extent that “historically” refers to operations before 1979.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	NM-EX 219, Lopez Dep. (Vol. III) (Aug. 21, 2020) 40:13-20; NM-EX 107, Lopez Rep. 5-6.			
68	<p>After 1979, Reclamation developed a method known as the D1/D2 method for allocating water to the Districts.</p> <p><i>See</i> NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4 (1985) (unexecuted draft); NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 33.</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i></p>	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (See Figures 9 and 10 to Brandes Dec).</p> <p>See Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p>		
69	<p>According to Reclamation, “D2 was developed to calculate the amount of water that was needed at the main canal headings to make the 3.0241 ac-ft/acre deliveries to the lands.”</p> <p>NM-EX 409, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Chris Rich et al. (Apr. 12, 2002).</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based</p>	<p>Not disputed that the quoted sentence was included in an email from Mr. Cortez, with the clarification that the D1 and D2 Curves were developed to represent the relationship between historical releases, diversions, and deliveries under the range of hydrologic conditions from 1951-1978, and 3.024 acre-feet/acre was calculated as the annual acre-feet charged to farms on the Project irrigated acres averaged over the five year period from 1946 to 1950. NM-EX-400, Allocation Procedures, at 9-14.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.</p> <p><u>Response to U.S.:</u> Neither party provides evidence contradicting the NM UMF.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p>		
70	<p>The D1/D2 method was based on the distribution of Project supply during the period from 1951 to 1978 and continued allocating 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 170:25-172:10 (examining NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4 (1985) (unexecuted draft)); NM-EX 100, Barroll Rep. at 33-34.</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project</p>	<p>Disputed. The D1/D2 allocation method does not “continue[] allocating 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands.” The D1/D2 allocation method was developed from a regression equation to estimate the amount of water that could be delivered to Project headgates in a given year based upon the amount of water available for release in that year. The D1/D2 method allocates water to each district at its respective points of diversion based on the approximate 57/43 ratio of irrigable lands in EBID and EPCWID. NM-EX-529, FEIS at 8-9.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p>		
71	<p>According to Reclamation, prior to 2005, the Districts did not sign an “operating agreement, plan, or criteria,” but “acquiesced and cooperated with Reclamation’s procedures on a year to year basis.”</p> <p>NM-EX 508, Bureau of Reclamation, Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating</p>	Subject to the stated objections, undisputed.	Not disputed , with the clarification that “each district may be under protest, but they still would comply with the amount of water that was going to be delivered to their facilities.” NM-EX-202, Cortez 7/30/20 Dep. Tr. 88:1-4.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas 3 (June 11, 2007); NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 87:8-88:10.			
72	<p>Reclamation began making Project allocations using the D1/D2 allocation procedure from at least 1985.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 168:20-24; NM-EX 100, Barroll Rep. 33-34.</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and</p>	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p>		
73	<p>Reclamation continued making allocations to the Districts in the proportion of 57% of Project water to New Mexico lands and 43% of Project water to Texas lands using the D1/D2 method through 2005.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 59:12-60:9; NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 34, n.66.</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available</p>	<p>Disputed. The reference to allocations to “lands” in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each district. The districts then determine allocations to lands within their boundaries. <i>See</i> NM-EX-100, Barroll Oct. 2019 Rep., Appendix A, A-13.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.</p> <p><u>Response to U.S.:</u> The U.S. cannot in good faith claim that the term “lands” in this context is ambiguous or vague in that the U.S. has not objected to the term or has used the term itself in similar contexts in responses to NM UMFs 3, 23, 26, 36, 42, 44, 45, 55, 60, 62, 63, 64, 67, 69, 70, 79, 80.</p> <p>The evidence proffered by U.S. for the its remaining assertions support the NM UMF.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p>		
74	<p>In 2003, the Project began to suffer the effects of the severe drought that has plagued the Rio Grande basin for the last two decades.</p> <p>NM-EX 412, Herman Settemeyer, Rio Grande Project/Rio Grande Compact Operation 4 (2004) (“Settemeyer Presentation”); NM-EX 213, Ivey Dep. (Vol. 2) (Aug. 28, 2020) 69:25-71:1, 75:19-24.</p> <p>Nonetheless, in 2003 and 2004, Reclamation allocated 57% of Project water to New Mexico Project lands and 43% to Texas Project lands using the D1/D2</p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the</p>	<p>Disputed. The term “severe drought” is not defined and is ambiguous. The United States does not dispute that 2003 was a year of low Project storage. The reference to allocations to “lands” in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each district. The districts then determine allocations to lands within their boundaries. <i>See</i> NM-EX-100, Expert Report: Margaret Barroll, Appendix A, A-13.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.</p> <p><u>Response to U.S.:</u> The U.S. offers no evidence to contradict that in 2003 the Project began to suffer the effects of the severe drought. The U.S. has admitted that in 2003 and 2004 Reclamation allocated 88/155 of the U.S. share of available annual Project water supply to EBID, and 67/155 of the U.S. share of the available annual</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>method.</p> <p>NM-EX 201, Rule 30(b)(6) Dep. of the U.S. Bureau of Reclamation by and through Filiberto Cortez (Aug. 20, 2020) 50:6-51:15.</p>	<p>D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p>		<p>Project water supply to EPCWID. NM-EX 602, U.S. Responses to New Mexico's First Set of Requests for Admissions, RFA 28. A matter admitted under Fed. R. C. P. 36(b) "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."</p>
75	<p>In 2005, Reclamation was able to make a full D1/D2 allocation in the percentage of 57% to New Mexico lands and 43% to Texas lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. 1) 89:21-90:5 (examining NM-EX 328, Bureau of Reclamation, <i>Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating</i></p>	<p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal</p>	<p>Disputed. The reference to allocations to "lands" in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each district. The districts then determine allocations to lands within their boundaries. <i>See</i> NM-EX-100, Expert Report: Margaret Barroll, Appendix A, A-13.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.</p> <p><u>Response to U.S.:</u> The evidence proffered by U.S. for its assertions support the NM UMF.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<i>Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas</i> , 4 (June 11, 2007)); NM-EX 100, Barroll Rep. 34, n.66.	government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec). <i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.		
76	From 1979 to 2005, Reclamation allocated Project water such that 57% of Project supply was available for EBID lands in New Mexico and 43% of Project supply was available for EPCWID lands in Texas. NM-EX 100, Barroll Rep., Appx. A, A- 13-15.	Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951	[a] Disputed. The term “Project supply” is not defined and is ambiguous. The reference to allocations to “lands” in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each	There is no genuine dispute as to this fact. <u>Response to Texas:</u> Texas does not address the NM UMF. The unrelated assertions by Texas comprise legal argument insufficient to create a genuine dispute of fact.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>This is illustrated in Figure A.5 of Dr. Barroll's expert report: <i>[graphic omitted, see NM MSJ on Apportionment at p. 15]</i></p> <p>From 1979 to 2005, the charged diversions by EBID in New Mexico (which accounts for water available <i>and ordered</i> by the Districts) totaled 58% and charged diversions for EPCWID in Texas totaled 42% of total diversions.</p> <p>NM-EX 100, Barroll Rep., Appx. A, A- 16-19. <i>See also</i> NM-EX 101, Barroll Reb. Rep., Appx. A, 41-42.</p>	<p>through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p>	<p>district. The districts then determine allocations to lands within their districts. <i>See</i> NM-EX-100, Expert Report: Margaret Barroll, Appendix A, A-13.</p> <p>[b] Not disputed.</p>	<p><u>Response to U.S.:</u> The U.S. cannot in good faith claim that the term "Project supply" is not defined or is ambiguous given that the U.S. did not object to the use of the term "Project supply" in similar contexts in NM UMFs 64, 67, 70, 80, 91, 105.</p> <p>The evidence proffered by U.S. for its assertions support the NM UMF. <i>See</i> NM-EX 100, Barroll Rep., Appx A, pages A13-15, Tables A.4 and A.5.</p>
77	In 2006 Reclamation began using a new method for allocating Project water between the two Districts.	Subject to the stated objections, disputed in part. The cited evidence does not support the assertion that "Neither the RGCC nor New Mexico	Not disputed , to the extent "given input" means that the RGCC as an entity, and the State of New Mexico,	There is no genuine dispute as to this fact.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>Neither the RGCC nor New Mexico were given input into the new method before it was implemented.</p> <p>NM-EX 100, Barroll Rep. 40; NM-EX 004, Schmidt-Petersen Decl. ¶ 10; NM- EX 003, Lopez Decl. ¶ 29; NM-EX 002, D'Antonio Decl. ¶ 10; <i>see, e.g.</i>, NM-EX 504, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Gary Esslinger, Manager-Treasurer, Elephant Butte Irrigation District (Nov. 21, 2006).</p>	<p>were given input into the new method before it was implemented.”</p>	<p>as an entity did not participate in the negotiations.</p>	<p><u>Response to Texas and U.S.:</u> Neither Texas nor the U.S. provide evidence to contradict the NM UMF.</p> <p><u>Response to Texas:</u> Texas falsely claims that New Mexico's evidence does not support its UMF; in fact, every citation supports this UMF. E.g.: NM-EX 002, D'Antonio Decl. ¶ 10 (“As State Engineer and New Mexico's Rio Grande Compact Commissioner from 2003-2011, I confirm that Reclamation did not solicit input or opinions from the [OSE] or [RGCC] on its new method of allocating water between [the Districts] ...”).</p>
78	<p>In January and February 2008, Reclamation, EPCWID, and EBID negotiated a new operating agreement for the Project as settlement for the two lawsuits among the parties (“2008 Operating Agreement”). <i>See generally</i> NM-EX 511, Cortez Presentation. The negotiations were mediated by Pat Gordon, Texas's Compact Commissioner. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 42:8-43:24; NM-EX 107, Lopez Rep. 43.</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>
79	<p>The 2008 Operating Agreement changed the way that water was allocated between the two</p>	<p>Subject to the stated objections, disputed in part. In paragraph 79 of NM MSJ on Apportionment, New</p>	<p>Disputed. The 2008 Operating Agreement did not change the 57/43 ratio in allotting the available supply</p>	<p>There is no genuine dispute as to this fact.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>Districts, and therefore the amount of water that was available for lands in New Mexico and Texas.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 94:23-96:9 (examining NM-EX 506, Cortez Affidavit ¶¶ 11, 25 (Apr. 20, 2007)); NM-EX 100, Barroll Rep. 40-46; NM-EX 107, Lopez Rep. 44-46.</p>	<p>Mexico asserts that the 2008 Operating Agreement “changed the way that water was allocated between the two Districts, and therefore the amount of water that was available for lands in New Mexico and Texas.” In paragraph 80, New Mexico asserts its “primary concern” with the 2008 Operating Agreement is that it is not consistent with the Compact and does not allocate 57 percent of Project supply to New Mexico lands. In fact, under the Operating Agreement New Mexico has received more water than it otherwise should have based solely on the D2 Curve prior to implementation of the Operating Agreement. This is demonstrated by the graph in Figure 11. The blue x’s show total Project surface water diversions between 2008 and 2016; the black x’s show the total amount of diversions, including groundwater pumping by New Mexico, for the same period.</p> <p><i>See Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 30-31.</i></p>	<p>to the Districts based on the D1/D2 methodology. Under the Operating Agreement, the Elephant Butte Irrigation District foregoes a portion of that allocation to account for deviations in Project performance to mitigate the effect of ground water pumping in New Mexico. NM-EX-529, FEIS Appendix C at 8-9.</p>	<p><u>Response to Texas:</u> This UMF does not address receipt of water but allocation of water; Texas provides no evidence contradicting this UMF. <i>See also</i> NM-EX 017, Sullivan 3rd Decl., ¶ 25 (discussing the errors in the calculations by Brandes).</p> <p><u>Response to U.S.:</u> The U.S. explains the allocation changes in its discovery responses: Under the 2008 Operating Agreement: “Reclamation estimates the available Project allocation to the lands using the D1 Curve ... [then] ... the diversion allocation is split 57/43 between EBID and EPCWID. Reclamation applies a diversion ratio adjustment to calculate the portion of annual allocation that EBID voluntarily surrenders ...” NM-EX 608, U.S.’s Supplemental Responses to New Mexico’s First Set of Discovery Requests (3-18-2020), Supp. Response to Interrogatory No. 19.</p>
80	<p>In 2010, after it had an opportunity to study the new operations and method for allocating water, New Mexico raised several concerns about the 2008 Operating Agreement. One</p>	<p>Subject to the stated objections, disputed in part. In paragraph 79 of NM MSJ on Apportionment, New Mexico asserts that the 2008 Operating Agreement “changed the way that water was allocated between the two Districts,</p>	<p>Disputed. The United States disputes the statement to the extent the statement implies New Mexico did not have “an opportunity to study” the new operations any earlier than 2010 or 2008, as the project had</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and U.S.:</u> Neither party disputes that “in 2010 ... New Mexico raised</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>of New Mexico's primary concerns was that the 2008 Operating Agreement was inconsistent with the Compact because it did not allocate 57% of Project supply to New Mexico lands.</p> <p>NM-EX 517, Letter from John D'Antonio, State Engineer, State of New Mexico to Michael Connor, Commissioner, United States Bureau of Reclamation (Mar. 4, 2010); NM-EX 002, D'Antonio Decl. ¶ 11.</p>	<p>and therefore the amount of water that was available for lands in New Mexico and Texas." In paragraph 80, New Mexico asserts its "primary concern" with the 2008 Operating Agreement is that it is not consistent with the Compact and does not allocate 57 percent of Project supply to New Mexico lands. In fact, under the Operating Agreement New Mexico has received more water than it otherwise should have based solely on the D2 Curve prior to implementation of the Operating Agreement. This is demonstrated by the graph in Figure 11. The blue x's show total Project surface water diversions between 2008 and 2016; the black x's show the total amount of diversions, including groundwater pumping by New Mexico, for the same period.</p> <p><i>See Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 30-31.</i></p>	<p>operated in the manner set forth in the agreement since 2006. <i>See</i> Statement of Fact No. 77, <i>supra</i>. The United States also disputes the statement to the extent it purports to characterize the Operating Agreement, under which approximately 57% of the total amount available for diversion in the United States is allocated to EBID, which then foregoes a portion of that allocation to account the effect of groundwater pumping in New Mexico. NM-EX-529, FEIS, Appendix C at 8-9. <i>See also</i> U.S. Mem. 15 & n.70. The United States does not dispute that New Mexico raised concerns about the Operating Agreement in 2010 in the letter that is cited.</p>	<p>several concerns about the 2008 Operating Agreement" or that the cited evidence says what it does.</p> <p><u>Response to Texas:</u> Texas again changes the terms of the NM UMF when it ignores the change in allocation effected by the 2008 Operating Agreement and makes statements about the receipt of water. <i>See also</i> NM-EX 017, Sullivan 3rd Decl., ¶ 25 (discussing the errors in the calculations by Brandes).</p> <p><u>Response to U.S.:</u> <i>See</i> UMF 79.</p>
81	<p>After attempts to resolve the issues related to the 2008 Operating Agreement failed, in 2011, New Mexico filed suit in federal district court seeking to have the 2008 Operating Agreement set aside.</p> <p>NM-EX 520, Complaint for Declaratory and Injunctive</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	Relief, New Mexico v. United States, No. 1:11-cv- 00691 (D.N.M. Aug. 8, 2011).			
82	<p>Texas filed the present original action in reaction to New Mexico's 2011 federal district lawsuit.</p> <p>NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 109:2-13; NM-EX 224, Schmidt-Petersen Dep. (Vol. I) (June 29, 2020) 40:19-41:12.</p>	<p>Subject to the stated objections, disputed. Texas did not file this original action "in reaction" to New Mexico's 2011 federal district lawsuit as stated by New Mexico in paragraph 82, page 16 of its brief in support of its partial summary judgment motion on Compact apportionment. As stated by the Rio Grande Compact Commissioner Patrick Gordon at his deposition, the 2011 federal district lawsuit "impacted" Texas's decision to proceed with this original action because, although "the operating agreement attempted to solve the issues of the diversion . . . of water to the contract users," it became apparent from the 2011 litigation that New Mexico "had no intention of trying to fix the problem that existed." <i>See</i> NM-EX 212, Gordon Depo. (Vol. II) (July 15, 2020) at 109:2-13. The decision by Texas to file the present original action was based upon many factors. The primary factor, before and after the New Mexico's 2011 federal district lawsuit, and the "problem that existed" that Commissioner Gordon referred to during his deposition, was the historical and continuing depletions of Texas's Compact apportionment of Rio Grande surface water due to New Mexico's groundwater pumping and</p>	Not disputed.	<p>Texas disputes this fact but it is not material to the determination that New Mexico and Texas each have a Rio Grande Compact apportionment of the Rio Grande Project water supply below Elephant Butte Reservoir, and this apportionment is 57% to New Mexico and 43% to Texas.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>illegal surface water pumping below Elephant Butte Reservoir.</p> <p>Declaration of Patrick R. Gordon in Support of the State of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Gordon Dec. in Opp. to NM) at TX_MSJ_007269, paragraphs 1 - 7, 9 -10.</p>		
83	<p>Consistent with the Reclamation Act, Texas adjudicated the Project Right in Texas. Specifically, it determined that EPCWID had the right to divert up to 376,000 from the Rio Grande.</p> <p>NM-EX 505, Texas Comm'n on Env't Quality, Certificate of Adjudication No. 23-5940, ¶ 1.b. (Mar. 7, 2007); <i>see also</i> Final Judgment and Decree, <i>In re: The Adjudication of Water Rights in the Upper Rio Grande Segment of Rio Grande Basin</i>, No. 2006-3219 (El Paso Cty. Dist. Ct., Oct. 30, 2006).</p> <p>Using the D1/D2 method, 376,000 AF represents approximately 43% of Project water when there is a full</p>	<p>Subject to the stated objections, disputed as follows:</p> <p>Regarding the "facts" asserted based on NM-EX-505, this paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded and/or otherwise states "facts" out of context.</p> <p>Regarding the asserted "fact" that "[u]sing the D1/D2 method, 376,000 AF represents approximately 43% of Project water when there is a full supply:" The use of the D1/D2 method produces 376,000 acre-feet for EP1. However, as the D1/D2 method does not reflect 1938 conditions and does not represent Texas's Compact apportionment.</p> <p><i>See Brandes Dec. in Opp. to NM</i></p>	<p>[a] Disputed. Whether the Texas adjudication was "[c]onsistent with the Reclamation Act" is a legal conclusion, not a statement of fact. The United States disputes the statement on this basis but does not dispute the statement if "Consistent with the Reclamation Act" is deleted.</p> <p>[b] Disputed. The cited paragraph of Dr. Barroll's declaration does not support the first sentence in the statement, and the figure she uses in that paragraph is 376,842 af. This number is not consistent with the number in the preceding paragraph (376,862 af). "Project water" and "full supply" are ambiguous in the context of this statement, and the statement is disputed on that additional basis. The designation of a "full supply" in the 2008 Operating Agreement, or under the 1985 draft operating agreement, does not</p>	<p>The material fact that "Texas adjudicated the Project Right in Texas; specifically, it determined that EPCWID had the right to divert up to 376,000 from the Rio Grande" is undisputed.</p> <p>Further, the purported disputes with full supply amounts is not actually a dispute:</p> <p><u>Response to Texas:</u> With regard to Brandes calculations, <i>see</i> NM-EX 017, Sullivan 3rd Decl., ¶ 26 (discussing the errors in the calculations by Brandes).</p> <p><u>Response to U.S.:</u> Dr. Barroll explains the U.S.'s confusion as to numbers at NM-EX 014, Barroll 3rd Decl., ¶¶ 8-10.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>supply.</p> <p>NM-EX 001, Barroll Decl. 23.</p> <p>376,000 AF also represents approximately 43% of Project supply under a normal release of 790,000 AF, once return flows are taken into account.</p> <p><i>See, e.g.,</i> NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 20:11-21:11.</p>	<p>at TX_MSJ_007312, paragraphs 1 – 9, 29-32.</p> <p>Regarding the last paragraph, the cited evidence does not represent the asserted “fact.” <i>See</i> NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 20:11-21:11.</p>	<p>represent the maximum supply that could have been available but for the influence of groundwater pumping, as evidenced by the releases substantially greater than 790,000 af in some years before the Compact. <i>See</i> Resp. to Statement No. 55.</p> <p>[c] Disputed. The term “Project supply” as used in this statement is ambiguous. Dr. Barroll defines Project supply in her declaration in a way that includes the water allocated to Mexico under the treaty, and the calculations in her declaration show she excludes the treaty water. NM-EX 001, Barroll Decl. ¶ 22. This statement does not provide for an exclusion of treaty water. Further, 376,862 af is approximately 43% of the total diversion allocation to the Districts applying “the D1/D2 method” to an assumed release of 763,842 acre-feet. <i>Id.</i></p>	
84	<p>The Texas Compact Commissioner recognizes that a full supply release from the Project is 790,000 AF, and that Texas water users are entitled to 43% of Project supply and New Mexico water users are entitled to 57% of Project supply.</p> <p>NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-73:13; NM-EX 212, Gordon</p>	<p>Subject to the stated objections, disputed in part. The stated “fact” mischaracterizes the deposition testimony cited as evidence.</p> <p>The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is divided according to downstream contracts, and that EP#1 is entitled to receive 43 percent of the “790 times 120 percent</p>	<p>Not disputed, with the clarification that Mr. Gordon’s explanation of Project supply is not clearly defined.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> The Gordon deposition transcript cites support the NM UMF. Texas is attempting to claw back the sworn testimony of its Rio Grande Compact Commissioner. First, Commissioner Gordon testified that a full supply release is 790,000 AF and that EPCWID is</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Dep. (Vol. II) (July 15, 2020) 11:20-13:21, 20:11-21:11, 121:9-11.	on a full release." NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:13-24; 20:11-21:11; NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-72:10.		entitled to 43% of that. Commissioner Gordon further testified that the Downstream Contracts are incorporated into the Compact, so the 43% of Project supply is to Texas.
85	The Texas Compact Commissioner concedes that Rio Grande water is divided below Elephant Butte by the Downstream Contracts and that the Downstream Contracts "are incorporated into the Compact." NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 10:25-12:19, 15:6-16:18.	Subject to the stated objections, disputed in part. The stated "facts" mischaracterize the deposition testimony cited as evidence. The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is "allocated...to Mexico under the 1906 treaty, and then to EBID and EP1 under the 1938 contracts." NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 11:13-19. The Texas Rio Grande Compact Commissioner further testified that he thinks the Project is "incorporated into the Compact," but not "under the Compact." The "Compact was the mechanism for New Mexico to deliver its apportioned water to Texas. When the water is released from Elephant Butte reservoir, it's delivered to the downstream contracts – contractors as well as Mexico."	Not disputed, with the clarification that Mr. Gordon's explanation of Project supply is not clearly defined.	This fact is undisputed. <u>Response to Texas:</u> See NM UMF 84. Despite Texas's attempts to claw back the Gordon testimony, Gordon testified that the Downstream Contracts "are incorporated into the Compact."

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 15:6-17.</p> <p>The testimony of the Texas Rio Grande Compact Commissioner was not a "concession" as asserted by New Mexico, and the cited evidence does not support that assertion.</p>		
86	<p>The Texas Compact Commissioner concedes that the Project acts as the mechanism by which water users in New Mexico receive 57% of Project supply and water users in Texas are allocated 43% of Project supply. He further concedes that the mechanism for delivering Project water was incorporated into the Compact.</p> <p>NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 10:25-16:24.</p>	<p>Subject to the stated objections, disputed in part. The stated "facts" mischaracterize the deposition testimony cited as evidence.</p> <p>The Texas Rio Grande Compact Commissioner further testified that he thinks the Project is "incorporated into the Compact," but not "under the Compact." The "Compact was the mechanism for New Mexico to deliver its apportioned water to Texas. When the water is released from Elephant Butte reservoir, it's delivered to the downstream contracts – contractors as well as Mexico."</p> <p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 15:6-17.</p> <p>The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is "allocated . . . to Mexico under the 1906 treaty, and then to EBID and EP1 under the 1938</p>	<p>Not disputed, with the clarification that Mr. Gordon's explanation of Project supply is not clearly defined.</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> See NM UMFs 84-85. Despite Texas's attempts to claw back the Gordon testimony, Gordon testified that the Downstream Contracts are incorporated into the Compact and the Project is the Compact delivery mechanism.</p> <p>In Commissioner Pat Gordon's declaration he directly contradicts statements made in sworn deposition testimony. New Mexico objects to Gordon's "sham affidavit" and reserves the right to file a motion to strike or a motion in limine as to its contents.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>contracts.”</p> <p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 11:13-19.</p> <p>The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is divided according to downstream contracts, and that EP#1 is entitled to receive 43 percent of the “790 times 120 percent on a full release.”</p> <p>NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:13-24; 20:11-21:11; NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-72:10.</p> <p>The testimony of the Texas Rio Grande Compact Commissioner was not a “concession” as asserted by New Mexico, and the cited evidence does not support that assertion.</p> <p>The testimony of the Texas Rio Grande Compact Commissioner is consistent with the Texas's position on apportionment, as stated by Commissioner: “As the Rio Grande Compact Commissioner, I am authorized to state, under oath, the position of Texas on the issue of Compact apportionment. The position of Texas is as follows: The Compact</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>equitably apportions the waters of the Rio Grande from its headwaters to Fort Quitman, Texas, among the State of Colorado (Colorado), the State of New Mexico (New Mexico), and Texas. Article III of the Compact provides water for use in Colorado, subject to the obligation to deliver indexed flows of water to New Mexico just below the Colorado-New Mexico state line. Articles III and IV of the Compact together provide water for use in New Mexico, subject to the obligation to deliver an indexed flow of water to Texas in Elephant Butte Reservoir. The water delivered by New Mexico in Elephant Butte Reservoir is apportioned to Texas, subject to the United States' Treaty obligation to Mexico and the United States' contractual obligations to Elephant Butte Irrigation District (EBID). The Compact does not apportion water to New Mexico below Elephant Butte Reservoir. The water released from Elephant Butte Reservoir and delivered to EBID pursuant to the United States' downstream contracts with EBID, is not a Compact apportionment to New Mexico. This water is a Project allocation, defined by the United States' downstream contracts with the EBID. Article VII of the Compact provides that Texas may accept relinquished water (relinquished by Colorado and New Mexico) thereby</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>allowing additional storage in upstream reservoirs. New Mexico has no ability to accept water under the Compact, even from itself, for the benefit of interests downstream of Elephant Butte Reservoir. Article VIII of the Compact provides that the Texas Rio Grande Commissioner can demand of Colorado and New Mexico the release of water from the upstream storage reservoirs under specified circumstances.”</p> <p>See Gordon Dec. in Opp. to NM at TX_MSJ_007269, paragraphs 1 – 8; See also, Deposition of Patrick R. Gordon, (Vol. 1) (July 14, 2020) (Gordon Depo. 7/14/20), at 67:4-20; 144:7-16; 157:2-12; 157:23-159:14; 161:17-162:6; 162:12-163:2; 164:7-165:7; 165:23-167:11; 169:10-17, at TX_MSJ_006892-006940.</p>		
87	<p>In official remarks at the 2011 RGCC meeting, Texas Compact Commissioner Gordon acknowledged that the Compact apportioned water between New Mexico and Texas based on the 57%-43% split. Specifically, Commissioner Gordon responded to comments of the New Mexico Commissioner by stating “I agree that the purpose of the Compact was to allocate the water between the Districts and the 53[-]47 [sic] as provided</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading in that New Mexico excluded deposition testimony by Commissioner Gordon wherein this issue was discussed and clarified.</p> <p>Counsel for New Mexico showed the unauthenticated “transcript” to Commissioner Gordon during his deposition. He had not (until then), seen a copy of the document. Although it is correct that there are usually transcripts of Commission meetings,</p>	<p>Not disputed, with the clarification that the sentence immediately following the quoted statement says, “[h]owever, that 53/47 needs to take into account diversions that are happening in each of the particular states, whether it’s Texas, New Mexico; and we believe that the Operating Agreement tried to take those diversions into account to fairly allocate the water that was allocated to the users at Elephant Butte Reservoir and take into account any downstream diversions</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> The entire RGCC transcript is provided for context. and the context is clear.</p> <p>Texas is understandably unhappy with Gordon’s statements at the RGCC meeting because they contradict Texas’s litigation position.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>in the Compact. I do agree with that."</p> <p>NM-EX 518, Rio Grande Compact Commission, Transcript of the 72nd Annual Meeting (94th Meeting), 59:2-4 (Mar. 30, 2011).</p>	<p>Commissioner Gordon cannot verify its accuracy. Regarding the language that New Mexico references, and assuming for purposes of this comment that the transcript is true and correct (which Commissioner Gordon cannot verify), Commissioner Gordon would not have spoken to the commission meeting attendees in legal terms. He also did not use the term "apportionment." The transcript reflects use of the word "allocation," which is referable to Project operations and the delivery of contract water to the districts in accordance with Reclamation contracts. The Reclamation contracts include a 1938 contract between the United States, EBID and El Paso County Water Improvement District No. 1 (EP#1), which includes a reference to the 57/43 percentage split regarding irrigated acres in each district. The Compact does not contain 57/43 percentage language that states or even suggests that there is a 57/43 apportionment of Rio Grande water between New Mexico and Texas. At Commissioner Gordon's deposition, when counsel for New Mexico showed him the transcript now marked in support of New Mexico's motion as NM-EX 518, and asked him about the language in the transcript, he testified that the comments were not correct, that he likely misspoke, and that people at the Commission meetings often mix up</p>	<p>that were occurring." NMEX 518, 59:4-11. Later in the transcript, Mike Hamman from the Bureau of Reclamation explains that the premise of the Operating Agreement was address concerns about increased groundwater pumping in the Mesilla Valley. <i>Id.</i>, 92:7-19.</p>	<p>In Commissioner Pat Gordon's declaration he directly contradicts statements made in sworn deposition testimony. New Mexico objects to Gordon's "sham affidavit" and reserves the right to file a motion to strike or a motion in limine as to its contents.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>the verbiage between the Project and Compact. New Mexico, however, excluded that portion of his testimony from paragraph 87 in its motion on Compact apportionment.</p> <p><i>See Gordon Dec. in Opp. to NM at TX_MSJ_007269, paragraphs 1 – 8, 11; See also, See Gordon Depo. 7/14/20 at 130:8-19, 134:3-19 at TX_MSJ_006892- TX_MSJ_006940.</i></p>		
88	<p>In 2004, the Texas Compact Engineer Advisor from 1987 to 2015 wrote that “[t]he Compact specifies a normal release of 790,000 acre–feet annually from Project Storage for use in Texas and New Mexico and for delivery of water to Mexico.”</p> <p>NM-EX 412, Herman R. Settemeyer, “Rio Grande Project/Rio Grande Compact Operation,” in CLE International, <i>Rio Grande Superconference</i> G-1, G-2 (2004) (“Settemeyer CLE Presentation”).</p>	<p>Subject to the stated objections, disputed. The cited evidence does not support the asserted facts. The document is unauthenticated, and there is no evidence of who the author was, or the authority of the author to make any statement on behalf of Texas as to the meaning and/or purpose of the Compact. Even if the documents contents were taken as true, the quoted sentence is taken out of context. The sentence, in context, concerns an explanation of Project operations.</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> By its objections Texas’s attempts to create an issue of disputed fact where there is none. Settemeyer was questioned about the document at his deposition and answered questions about its substance. NM-EX 256, Settemeyer Dep. (7-31-2020), 326:6-330:3.</p>
89	<p>The Texas Compact Engineer Advisor from 1987 to 2015 testified that “the Rio Grande Compact incorporated the Rio Grande Project.”</p> <p>NM-EX 225, Settemeyer</p>	<p>Subject to the stated objection, disputed in part. The cited deposition testimony does not establish that the deponent was the Engineer Advisor from 1987 to 2015.</p>	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas provides no evidence disputing the NM UMF.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Dep. (Vol. I) (July 30, 2020) 41:24-42:10.			
90	<p>The Texas Compact Engineer Advisor from 1987 to 2015 further testified that “the Rio Grande Project [water] is apportioned 57 – 57 percent to New Mexico and 43 percent to Texas.”</p> <p>NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10.</p>	Subject to the stated objections, disputed. The evidence cited does not support the asserted “fact.”	Disputed. The quotation does not appear in the cited document. <i>See</i> NMEX 225.	<p>This fact is undisputed.</p> <p><u>Response to Texas and U.S.:</u> To the extent New Mexico's citation was incomplete:</p> <p>“A: No. 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. So by incorporating that project, it provided water to Texas associated with its portion of the Rio Grande Project.</p> <p>Q: And what portion, then, was allocated to Texas?</p> <p>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 47 percent.</p> <p>...</p> <p>Reclamation operates the Rio Grande Project and, as such, they make an allocation each and every year to – to New Mexico and to Texas, ... that allocation is split 57/43 between the two districts, basically, between the two states.”</p> <p>NM-EX 255, Settemeyer Dep. (Vol. I) (7-30-2020), 42:5-43:15.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
91	<p>In May of 2011, Texas and New Mexico met to discuss the implications of the 2008 Operating Agreement on the Compact. Prior to the meeting, Texas had developed a set of talking points that represented Texas's positions on the Rio Grande Compact. A photograph of those talking points is</p> <p align="center">NM-EX 519 (Schmidt-Petersen, Photographs of Handwritten Notes on Easel). NM-EX 003, Lopez Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11.</p> <p>Using those talking points, Texas expressed its 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.</p> <p align="center">NM-EX 519, Schmidt-Petersen, Photographs of Handwritten Notes on Easel; NM-EX 003, Lopez Decl. ¶</p>	<p>Subject to the stated objections, disputed. Texas Compact Commissioner Patrick Gordon reviewed the representation of Rolf Schmidt-Petersen in paragraph 11 of his declaration submitted in support of the New Mexico motions for partial summary judgment (NM-EX 004) and referenced in paragraph 91, page 18, of the New Mexico motion on Compact apportionment. He also reviewed the representation of Estevan Lopez in paragraph 18 of his declaration submitted in support of the New Mexico motions for partial summary judgment (NM-EX-003) and referenced in paragraph 91, page 18, of the New Mexico motion on Compact apportionment. Both deponents use the same language, verbatim, for this testimony. Both deponents refer to NM-EX-519. Commissioner Gordon reviewed NM-EX 519 in conjunction with making his declaration. Commissioner Gordon attended a meeting in approximately May of 2011 with representatives of New Mexico. The purpose of the meeting was to discuss the Operating Agreement. Compact apportionment was not a subject of the meeting. The handwriting depicted in NM-EX-519 is not Commissioner Gordon's. He does not know whose handwriting is depicted in NM-EX-519. The notes</p>	<p>Disputed, to the extent New Mexico asserts that the hand-written notes establishes a Texas position that Texas is entitled to only 43% of Project water released from storage, and not the amount of return flows expected under pre-pumping historic conditions. The same photographs of the handwritten notes state under the heading "Apportionment of Project Water to Project Users" assumes "[a]ll delivery of Project water to Project users are undiminished by 'man's activities'" and that "Pumping is a 'man's activity.'" NM-EX 519 (underline in original).</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> In Commissioner Pat Gordon's declaration he directly contradicts statements made in sworn deposition testimony. New Mexico objects to Gordon's "sham affidavit" and reserves the right to file a motion to strike or a motion in limine as to its contents.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11.	depicted in 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. Further, the declarants' representations of Commissioner Gordon's statements, and Texas's "positions" are incorrect. Commissioner Gordon did not make any statement, or represent that it was the position of Texas, that the Compact <i>apportions</i> water below Elephant Butte Reservoir between New Mexico and Texas. Commissioner Gordon did not make any statement, or represent that it was the position of Texas, that there is a 57/43 apportionment pursuant to the Compact. <i>See</i> Gordon Dec. in Opp. to NM at TX_MSJ_007269, paragraphs 1 – 8, 12.		
92	Even in this litigation, Texas has admitted on numerous occasions that New Mexico has a Compact apportionment below Elephant Butte Reservoir. a. In its Complaint in this case, Texas made the following relevant factual allegations: i. "[T]he Rio Grande	Subject to the stated objections, disputed in part. a. Regarding the Texas Complaint, New Mexico takes allegations out of context, and excludes other allegations relevant to Texas's position on apportionment, that support Texas's consistent position on apportionment. Paragraph 4 articulates Texas's position that in delivering water to Elephant	Not disputed.	There is no genuine dispute as to this fact. <u>Response to Texas:</u> The positions taken by Texas in its pleadings speak for themselves.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>Compact, among other purposes, was entered into to protect the operation of the Rio Grande Reclamation Project.”</p> <p align="center">Compl. ¶ 4 (Jan. 8, 2013).</p> <p>ii. “Project water deliveries are made based upon the ratio between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas.”</p> <p align="center"><i>Id.</i> at ¶ 8.</p> <p>iii. 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</p>	<p>Butte, New Mexico in fact relinquishes that water to the Project: “[t]he Rio Grande Compact requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir [and that once] delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements.”</p> <p>Paragraph 11 alleges: The State of Texas entered into the Rio Grande Compact under the following fundamental premises: (a) the operation of the Rio Grande Project by the United States, and the Rio Grande Project's allocations to Texas, were recognized and protected by the Rio Grande Compact; (b) New Mexico was required to make deliveries into Elephant Butte Reservoir to ensure that the United States could continue to operate the Rio Grande Project, and thereby provide for deliveries of water from the Rio Grande Project as had been previously authorized; and (c) New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico.</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>Project beneficiaries in southern New Mexico and the State of Texas.”</p> <p><i>Id.</i> at ¶ 10.</p> <p>b. Texas's brief in support of its motion to file its complaint referred to Elephant Butte Irrigation District as the entity formed within New Mexico to contract with the United States “for the water allocated <i>and apportioned</i> for use within New Mexico.</p> <p>Texas's Brief in Support of Motion to File Complaint 7 (Jan. 2013) (emphasis added).</p> <p>c. In the course of its briefing on New Mexico's Motion to Dismiss, Texas defined its apportionment as “the water New Mexico delivers to Elephant Butte, less the water provided to Rio Grande Project lands in New Mexico by the Rio Grande Project.”</p> <p>Texas' Brief in Response to New</p>	<p>In full context, Paragraph 10 of Texas's Complaint is simply stating that <i>in lieu of a specific quantitative or state-line delivery measure</i>, the Compact relied on the Project as it existed in 1938 to deliver Texas's apportioned water from Elephant Butte to the state line. In other words, “the Compact utilized the Rio Grande Project to ensure that Texas receives the water that was apportioned to it. Usable Water is available for release to meet irrigation demands on Rio Grande Project lands in New Mexico and in Texas, as well as for delivery to Mexico to satisfy treaty obligations. It is not available for use and appropriation in New Mexico pursuant to New Mexico state law.”</p> <p>Texas Brief in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 28 (June 16, 2014).</p> <p>Page 22 of Texas's 2014 Brief in Opposition to New Mexico's Motion to Dismiss encapsulates the Complaint: “Texas asserts that the Compact requires New Mexico to deliver a scheduled amount of Rio Grande water into Elephant Butte Reservoir, to relinquish control of that water for storage and distribution by the Rio Grande Project, and not to</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>Mexico's Motion to Dismiss Texas' complaint and the United States' Complaint in Intervention, 11 (June 16, 2014).</p> <p>d. Further, in briefing on exceptions to the First Interim Report of the Special Master, Texas averred: "[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."</p> <p><i>See Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017) (quotation marks omitted).</i></p>	<p>intercept, deplete or otherwise interfere with water released by the Rio Grande Project for the benefit of Rio Grande Project lands in Texas. Compl. at paragraphs 10-11, 13, 18-19. New Mexico violates the Compact, including its delivery obligation in Article IV, when it allows water users to intercept, deplete or otherwise divert flows of the Rio Grande below Elephant Butte, which adversely affects Rio Grande Project operations including the amount of water that flows to irrigable lands in Texas. Compl. at paragraphs 18-19."</p> <p>Texas Brief in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 22 (June 16, 2014).</p> <p>"The water apportioned to New Mexico by the Compact is the water in the Basin above Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. ... No water below Elephant Butte is apportioned to New Mexico."</p> <p>Texas's Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 10 (June 16, 2014).</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>b. Regarding Texas's brief in support of its motion to file its complaint, the entity that this sentence actually concerns is the Elephant Butte Water Users Association, the predecessor entity to EBID, and in context the sentence is not referring to the Compact at all, but specifically to a 1906 contract between that entity and the United States for the use of not-yet- developed Rio Grande Project water.</p> <p>Texas's Brief in Support of Motion to File Complaint at 7.</p> <p>Regarding briefing on New Mexico's Motion to Dismiss, New Mexico cites to an excerpt that it views as favorable to its position, and omits that on the very preceding page of that brief, Texas expressly defined New Mexico's apportionment: "The water apportioned to New Mexico by the Compact is the water in the Basin above Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. ... No water below Elephant Butte is apportioned to New Mexico."</p> <p>Texas's Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 10 (June 16, 2014).</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>In that same brief:</p> <p>“The Compact requires New Mexico to deliver water into Elephant Butte Reservoir and to thereby relinquish control of the water for storage and distribution by the Rio Grande Project. New Mexico’s jurisdiction over the waters in the Lower Rio Grande is limited by both the express requirements of the Compact and the operation of the Rio Grande Project. New Mexico has ceded regulatory authority over this portion of the Rio Grande. The Commissioner negotiating the Compact for New Mexico recognized this cession of control when he stated: ‘[f]or purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas.’”</p> <p>Brief in Response to New Mexico’s Motion to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention, 19 (June 16, 2014).</p> <p>“[Las Cruces argues] it would have been ‘absurd’ for New Mexico to enter a compact ‘which limited water rights below Elephant Butte Reservoir to the irrigation interests of the Rio Grande Project’ In making this argument,</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>Las Cruces ignores that in the negotiations leading to the Compact, New Mexico users below the Dam were aligned with Texas. Moreover, Las Cruces ignores the fact that New Mexico traded off additional benefits to lands below Elephant Butte in New Mexico in return for the substantial benefits it obtained for lands in the Middle Rio Grande in New Mexico.” Brief in Response to New Mexico’s Motion to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention, 20, FN12 (June 16, 2014) (citations omitted).</p> <p>d. In Texas’s briefing on exceptions to the First Interim Report of the Special Master, Texas stated: “‘ . . . the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir.’ First Report at 197. New Mexico’s duties to relinquish control of the water at Elephant Butte and refrain from post-Compact depletions of water below Elephant Butte Reservoir do not arise from any implied covenant or implied term, but from the very meaning of the text of the Compact.”</p> <p>Texas’s Reply to Exceptions to First Interim Report of Special</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>Master, 17 (July 28, 2017)</p> <p>“The terms of the Compact provide that three sovereign states agreed to an equitable apportionment of an interstate stream, which Congress approved. Thus, the 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. First Report at 201. Likewise, the Compact is not silent on what occurs below Elephant Butte Reservoir when it expressly provides for New Mexico’s obligation to “deliver” water at Elephant Butte. Neither New Mexico nor its citizens can take back or attempt to reassert control under state processes over water apportioned to Texas.”</p> <p>Texas’s Reply to Exceptions to First Interim Report of Special Master, 31 (July 28, 2017)</p> <p>“New Mexico does not have the legal authority to administer or adjudicate rights under state law to water that has been equitably apportioned to Texas under the Rio Grande Compact. Once New Mexico has delivered that</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		<p>apportioned water to Elephant Butte Reservoir, it has relinquished jurisdiction over the distribution of that water, as the Special Master properly held."</p> <p>Texas's Reply to Exceptions to First Interim Report of Special Master, 33 (July 28, 2017)</p>		
93	<p>In connection with filing the Complaint in this case, Texas issued a News Release. In that News Release, Texas admitted "[h]istorically, <i>water apportioned under the Rio Grande Compact</i> has resulted in approximately 57 percent of the water supply below the Elephant Butte Reservoir being delivered to New Mexico, and 43 percent being delivered across the New Mexico-Texas state line for Texas."</p> <p>NM-EX 524, Tex. Comm'n on Env't Quality, <i>News Release</i>, 2 (Jan. 8, 2013) (emphasis added).</p>	<p>Subject to the stated objections, disputed. The cited evidence does not support the asserted facts. The document is unauthenticated, and there is no evidence of who the author was, or the authority of the author to make any statement on behalf of Texas as to the meaning and/or purpose of the Compact.</p>	<p>Not disputed, except the extent "admitted" is used to imply a binding admission for purposes of litigation.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas provides no evidence contradicting that the Texas Commission on Environmental Quality (TCEQ) published the subject news release on Jan. 8, 2013.</p>
94	<p>Every alternate year the Texas Commission on Environmental Quality ("TCEQ") reports to the Texas Legislature about environmental issues, including interstate river compacts. In describing the Rio Grande Compact in 2014, the TCEQ explained "[t]he compact did not</p>	<p>Subject to the stated objections, disputed. The cited evidence does not support the asserted facts. The document is unauthenticated, and there is no evidence of who the author was, or the authority of the author to make any statement on behalf of Texas as to the meaning and/or purpose of the Compact.</p>	<p>Not disputed.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas provides no evidence contradicting that the TCEQ issued the subject report to the Texas legislature.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>contain specific wording regarding the apportionment of water in and below Elephant Butte Reservoir. However, the compact was drafted and signed against the backdrop of the 1915 Rio Grande Project and a 1938 U.S. Bureau of Reclamation contract that referred to a division of <i>57 percent to New Mexico and 43 percent to Texas.</i>"</p> <p>NM-EX 526, Texas Comm'n on Env't. Quality, <i>Biennial Report to the 84th Legislature</i> (2014) (emphasis added).</p>			
95	<p>In New Mexico's adjudication of Lower Rio Grande water rights, the United States requested that the New Mexico Adjudication Court "recognize an amount of up to 376,000 acre-feet per year for delivery to Texas."</p> <p><i>See</i> NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, <i>New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.</i>, no. CV-96-888,</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading. Although the quoted language is contained within NM-EX-527, New Mexico does not include the full context of the Court's statement, and there is no foundation to infer the intent of the United States in making that statement, or others, to the Court. The full text of the Court's discussion in NM-EX 527 clearly denotes that the subject is "Project deliveries to Texas as an essential element of the Project." Nothing in NM-EX-527 supports the implication that the statement attributed to the United States was predicated on a position about Compact apportionment as opposed</p>	<p>[a] Not disputed, with the clarification that the United States made this request on the basis of seeking full faith and credit for the Texas determination.</p> <p>[b] Disputed. The Allocation Procedures (NM-EX 400, at 9-14) characterize the allocation to EPCWID in a "full supply year" as approximately 376,000 af, not that this is a "full supply for EPCWID." The 376,000 af is roughly 43% of the amount available for allocation to the Districts in a "full supply year," not 43% of "Project water," some of which is released for Mexico under the 1906 treaty. The designation of a "full supply" in the Allocation Procedures does not represent the maximum supply that could have</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and U.S.:</u> The entire order is available for context. The court specifically referred to the role of the Compact in its order: "The moving parties are entitled to judgment as a matter of law, concerning the right to release from storage a normal annual release of 790,000 acre-feet, or as otherwise provided for by the Rio Grande Compact." NM-EX 527, Order, 2 at ¶ 2.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>¶ 4 (N.M. 3d Judicial Dist., Feb. 17, 2014).² Footnote ²: In response to the United States request that New Mexico recognize 376,000 AFA for delivery to Texas, the New Mexico Adjudication Court explained that the United States' request was beyond the jurisdiction of the court, but that the "State of New Mexico's offer of judgment appropriately recognizes Project deliveries to Texas as an essential element of the Project." <i>Id.</i></p> <p>As discussed, under the D1/D2 method, 376,000 acre-feet was a full supply for EPCWID, and represents approximately 43% of Project water when there is a full supply.</p>	<p>to simply an effort to preserve its contract delivery obligations to Texas, or some other reason.</p>	<p>been available but for the influence of groundwater pumping. NM-EX-100, Barroll Oct. 2019 Rep. 35 [c, footnote]. Not disputed.</p>	
96	<p>Reclamation has recognized that "[b]ecause one district is located in New Mexico (EBID) and the other is located in Texas (EP#1), the operation of the Rio Grande Project has a bearing on each state's claim to the waters of the Rio Grande."</p> <p>NM-EX 503, Briefing Paper by Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Robert W.</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading. Although the quote from NM-EX503 is recited correctly, Texas disputes that Reclamation "recognized" anything pertaining to Compact apportionment below the Reservoir. New Mexico does not include the full context of the document. The stated purpose of the document is to "update the status of the . . . Project . . . operating agreement negotiations" between EBID, EP#1 and the United States.</p>	<p>Disputed. Mr. Cortez was not making, and could not legally make, any statement binding upon or imputable to Reclamation in the cited document. The United States does not dispute that the document contains the quoted statement.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> The complete Briefing Paper by Cortez is available for context. Texas provides no evidence disputing the Cortez statements.</p> <p><u>Response to U.S.:</u> The U.S. cannot in good faith assert that statements made by Cortez are not imputable to Reclamation in that the U.S. has sanctioned or relied upon Cortez</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	Johnson, Commissioner, Bureau of Reclamation (Nov. 2, 2006).	There is no foundation to support New Mexico's implication that the quoted statement was Reclamation recognizing a Compact apportionment to New Mexico below Elephant Butte.		statements on behalf of Reclamation throughout this litigation. <i>See</i> NM UMFs 40, 56, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 106, 107, 109. At the time that Further, Cortez has been presented as an FRCP Rule 30(b)(6) witness on behalf of Reclamation in this litigation <i>See, e.g.</i> , NM-EX 228.
97	<p>Reclamation has acknowledged the intent of the Compact "to recognize a yearly average of 790,000 AF release from Project storage to satisfy water users" in both States and Mexico.</p> <p>NM- EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).</p>	Subject to the stated objections, disputed. New Mexico misrepresents the author's statement in NM-EX-411, and takes the excerpt out of context. The full sentence quoted by New Mexico is as follows: "Reclamation interprets this accrued departure from normal release as a measure of how the Rio Grande Project is complying with its obligation to meet yearly demand from the water users of the Rio Grande Project and at the same time comply with the Rio Grande Compact intent to recognize a yearly average of 790,000 AF release from Project storage <i>to satisfy water users within the 'Texas portion' of the Compact.</i> " NM-EX-411, 2 (emphasis added). Thus, NM-EX-411 actually supports <i>Texas's</i> position: that the 790,000 AF release from Project storage is Texas's apportionment, subject to the 1906 Treaty and downstream contract (constituting "water users within the 'Texas portion'	Disputed. Mr. Cortez was not making, and could not legally make, any statement binding upon or imputable to Reclamation in the cited document. The United States does not dispute that the document contains the quoted statement.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> The complete letter by Cortez is available for context.</p> <p>The Cortez letter does not support Texas's position, except through misreading. Cortez puts quote marks around "Texas portion" indicating that it is a term of art. New Mexico's interpretation of that term of art is appropriate, given the testimony in this case that EBID considered itself to be "Compact Texas." Affidavit of Gehrig Esslinger, ¶ 7, Att. 1 to EBID's <i>amicus</i> brief (1-6-2020). Cortez's quote marks imply he was referring to this concept. Otherwise, the statement is nonsensical as 790,000 is far to much water to be the amount</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		of the Compact").		needed to satisfy only water users in Texas. <u>Response to U.S.:</u> The U.S. cannot in good faith assert that statements made by Cortez are not imputable to Reclamation. Note that this same Cortez letter is quoted at NM UMF 109 but the U.S. did not object to Cortez imputing positions to Reclamation in that UMF.
98	<p>Reclamation has recognized that "[t]he 1938 Rio Grande Compact intended to use the Reclamation Rio Grande Project as the vehicle to guarantee delivery of Texas's, <i>New Mexico's</i> and Mexico's equitable apportionment of the Rio Grande waters below Elephant Butte Dam."</p> <p>NM-EX 530, Filiberto Cortez, Bureau of Reclamation, EBID Depletion Reduction and Offset Program WaterSMART Grant Proposal, 1 (emphasis added).</p>	<p>Subject to the stated objections, disputed. This paragraph is misleading. Although the quote from NM-EX-530 is recited correctly, Texas disputes that Reclamation "recognized" anything pertaining to Compact apportionment below the Reservoir. New Mexico does not include the full context of the document. The language quoted is within a paragraph that describes the background of the parties' positions in this case. There is no foundation to support New Mexico's implication that the quoted statement was Reclamation recognizing a Compact apportionment to New Mexico below Elephant Butte. It is pure speculation as to the intent of the author in including the quoted language, and whether or not that language is intended to capture one of the parties' positions in this case, or otherwise.</p>	<p>Disputed. Mr. Cortez was not making, and could not legally make, any statement binding upon or imputable to Reclamation in the cited document. The United States does not dispute that the document contains the quoted statement.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> The complete Briefing Memorandum by Cortez is available for context.</p> <p><u>Response to U.S.:</u> The U.S. cannot in good faith assert that statements made by Cortez are not imputable to Reclamation in that the U.S. has sanctioned or relied upon Cortez statements on behalf of Reclamation throughout this litigation. <i>See</i> NM UMFs 40, 56, 59, 60, 61, 62, 63, 64, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 77, 78, 79, 106, 107, 109.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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99	<p>At the hearing on New Mexico's Motion to Dismiss in this proceeding, counsel for the United States conceded that the "[P]roject is central to the [C]ompact," that "New Mexico would also, by the same token, have an apportionment" delivered through the Project, and that the Downstream contracts "effectuate the intended apportionment that is made in the [C]ompact."</p> <p>Hrg. Tr. 88:17, 91:6-14, 100:7-18 (Aug. 19, 2015).</p>	<p>Subject to the stated objections, disputed. Statements by lawyers during a hearing are not sworn testimony and do not constitute factual "evidence" for purposes of summary judgment. Additionally, the language New Mexico quotes omits the statement immediately following the quoted portion: "So all flows at Elephant Butte are delivered not merely to the river, but they are delivered to project storage. Again, the project is central here. So, in delivering it to the project storage, the Special Master has to interpret it that New Mexico simply doesn't have the authority to claw it back. The delivery means something. It's transferring. It's putting it in the possession and control of the project for effectuating the apportionment. If this was a commercial good, it would be a transfer in a manner that can't be recalled by the grantor. But here New Mexico is arguing exactly the opposite, that having relinquished control, having transferred, having delivered that water, they can immediately start clawing it back before the usable water, which is usable for the project, for irrigation -- before it can even get to the first headgate, they can start clawing it back because, they assert, there's no ground rules below Elephant Butte."</p> <p><i>See Docket No. 37, Transcript of</i></p>	<p>Not disputed, except to the extent "conceded" implies a statement against interest.</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas offers no evidence contradicting the NM UMF.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		August 19, 2015 Oral Argument Before A. Gregory Grimsal, Esq. Special Master, 91:15 – 92:6.		
100	<p>The United States has taken the following relevant positions in this case:</p> <p>a. “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 irrigation acreage in EBID and EPCWID, respectively.”</p> <p align="center">Brief for the United States in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 28 (June 2014) (quoting Compact Art. I(1)).</p> <p>b. “Usable Water” is</p>	<p>Subject to the stated objections, disputed. New Mexico purports to rely on certain statements attributed to the United States that support its own positions on the apportionment issue while ignoring other adverse statements the United States expresses in the same pleadings.</p> <p><u>100a</u></p> <p>Following the quoted statement, the United States adds: “[t]he Compact necessarily limits the extraction of hydrologically connected groundwater, to the extent that the groundwater is necessary for the Project to make deliveries in response to irrigation demands,” (30); and that “[t]his Court has previously recognized that groundwater pumping that interferes with the equitable apportionment of water under an interstate compact must be counted toward a state's use of its equitable apportionment.” (31). Elsewhere, the United States repeats its claim, according with Texas's, that “New Mexico is in breach of its obligation under Article IV of the Compact to ‘deliver’ the water—and thus to relinquish control of it—at Elephant Butte Reservoir.”</p> <p><u>100b</u></p> <p>This recitation offers nothing to</p>	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> The U.S., who published the statements at issue, does not dispute that it has taken the positions identified in this UMF and, in fact, agrees with New Mexico that New Mexico has a Compact apportionment below Elephant Butte.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>“available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico.”</p> <p>Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 6 (July 2017).</p> <p>c. “To effectuate an equitable apportionment of the waters of the Rio Grande, the compacting States incorporated and relied upon an existing reclamation project ‘as the vehicle to guarantee delivery of Texas’s <i>and part of New Mexico’s equitable apportionment of the stream.</i>’ The United States agreed to that arrangement through congressional approval of the Compact.”</p> <p><i>Id.</i> at 18 (emphasis added) (quoting First Interim Report of the Special Master, 204 (Feb. 9, 2017)).</p>	<p>further New Mexico’s claim, and is in fact entirely consistent with Texas’s fundamental position that Texas is apportioned all the water New Mexico delivers to Elephant Butte, less Mexico’s treaty water and water allocated (not apportioned) to EBID under it would deliver water to the Project at Elephant Butte Reservoir, Compact Art. IV, 53 Stat. 788, at which point it becomes “[u]sable [w]ater” that must be available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico, its Reclamation contract.</p> <p><u>100c</u></p> <p>On the same page, the United States expresses a position that undermines the one New Mexico attributes to it: “By compact, New Mexico agreed that it would deliver water to the Project at Elephant Butte Reservoir, Compact Art. IV, 53 Stat. 788, at which point it becomes “[u]sable [w]ater” that must be available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico, Compact Art. I(l), 53 Stat. 786. New Mexico cannot administer water rights in the area of New Mexico below Elephant Butte Reservoir in a way that interferes with the Project’s ability to make deliveries to satisfy those demands.”</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>d. "In the Compact, the States (i) incorporated and relied upon an existing Reclamation project to deliver Texas's and part of New Mexico's equitable apportionment."</p> <p align="center">Sur-Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 12-13 (September 2017).</p> <p>e. "[T]he Compact identifies what is to be done with water that is delivered by New Mexico to Elephant Butte Reservoir, and the Compact 'protects the water that is released from Elephant Butte in order for it to reach its intended destination.'</p> <p align="center"><i>Id.</i> at 13 (quoting First Interim Report of the Special Master, 200 (Feb. 9, 2017)).</p>	<p><u>100e</u></p> <p>New Mexico omits that <i>Texas</i> is the "intended destination" the United States refers to. The next sentence states: "Indeed, if the Compact did not prohibit New Mexico water users from interfering with Project deliveries, 'then the question of Texas's equitable apportionment' under the Compact would be 'an open, major source of controversy,' contrary to the basic purpose of the Compact to 'effect[] an equitable apportionment of' the waters of the Rio Grande above Fort Quitman, Texas." (quoting First Interim Report of the Special Master, 200 (Feb. 9, 2017))</p>		
101	In response to a Request for Admission, the United States admitted for all purposes in this case that "under the Compact, the states relied upon an existing Reclamation project to deliver	Subject to the stated objections, disputed. The quoted language is taken out of context, mischaracterizes the Request for Admission response, and ignores the objection expressed by the	Not disputed , with the qualification that this Statement of Fact and the United States' response to the Admission is a legal conclusion.	This fact is undisputed. <u>Response to Texas:</u> The U.S., who published the statements at issue, does not dispute that it made the admission in this UMF and, in

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>Texas's and part of New Mexico's equitable apportionment."</p> <p>NM-EX 602, United States of America's Responses to New Mexico's First Set of Requests for Admission, 13 (November 4, 2019) (response to Request for Admission 30).</p>	<p>United States in responding to the Request for Admission. In its quoted response to New Mexico's Request for Admission No. 30, the full response of the United States is that it "avers that in its Reply and Sur-Reply briefs in the Supreme Court, the United States stated its position that under the Compact" Thus, the United States only "admitted" stating that position in a brief. Any factual or legal interpretation beyond that is speculation. The United States further objected to the compound nature of New Mexico's request, and that the request sought admission of the truth of a conclusion of law.</p>		<p>fact, agrees with New Mexico that New Mexico has a Compact apportionment below Elephant Butte.</p> <p>A matter admitted under Fed. R. C. P. 36(b) "is conclusively established unless the court, on motion, permits the admission to be withdrawn or amended."</p>
102	<p>The expert historian sponsored by the United States in this case has opined that that the States intended for the Compact to apportion surface water below Elephant Butte Reservoir to New Mexico for the lands in New Mexico under the Rio Grande Project.</p> <p>NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 52:23-53:8, 73:23-74:9.</p>	<p>Subject to the stated objections, disputed. Texas disputes that the States intended for the Compact to apportion any Rio Grande surface water below the Reservoir New Mexico.</p> <p><i>See</i> Miltenberger Declaration, TX_MSJ_001585 and Miltenberger Dec. in Opp. to NM at TX_MSJ_007371; <i>See</i> Gordon Dec. in Opp. to NM at TX_MSJ_007269.</p>	<p>Not disputed, with the qualification that the United States has not designated Mr. Kryloff as a witness for trial as of this filing.</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> The U.S., who sponsored the historian who published the opinion at issue, does not dispute this NM UMF. Texas's challenge is legal argument insufficient to create a genuine dispute as to this fact.</p>
103	<p>Consistent with the Reclamation Act (and the adjudication in Texas), New Mexico adjudicated the Project Right in New Mexico. In accordance with the Compact, the New Mexico Adjudication Court established</p>	<p>Subject to the stated objections, disputed. The evidence (NM-EX-527) does not support the asserted fact. New Mexico states "[i]n accordance with the Compact, the New Mexico Adjudication Court established that the Project is entitled to an annual</p>	<p>Disputed. Whether the New Mexico adjudication court's decisions are "[c]onsistent with the Reclamation Act" and "[i]n accordance with the Compact" are legal conclusions, not a statements of fact. What the court "established" is also a legal</p>	<p>The fact that that New Mexico adjudicated the Project Right in New Mexico and that the Project is entitled to an annual release of up to 790,000 acre-feet or as otherwise provided for by the Rio Grande Compact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>that the Project is entitled to an annual release of up to 790,000 acre-feet.</p> <p><i>See</i> NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding PriorityDate; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, <i>New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.</i>, no. CV-96-888 (N.M. 3d Judicial Dist., Feb. 17, 2014).</p>	<p>release of up to 790,000 acre-feet.” Exhibit NM-EX-527 does not state “[i]n accordance with the Compact” but states “or as otherwise provided for by the Rio Grande Compact.” <i>See</i> NM- EX-527 at 2.</p>	<p>conclusion. The United States disputes the statement on these grounds.</p>	<p>The complete Order is available for context.</p>
104	<p>Unlike Texas, the New Mexico Adjudication Court set limits on the amount of surface water and groundwater that could be diverted or consumed on an acre of Project land in New Mexico.</p> <p><i>See</i> NM-EX 527, Final Judgment, <i>New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.</i>, no. CV-96-888 (N.M. 3d Judicial Dist., Aug. 22, 2011).</p> <p>Consistent with Reclamation operations and analysis, New Mexico recognized the right for</p>	<p>Subject to the stated objections, disputed. The evidence (NM-EX-527) does not support the asserted fact. Exhibit NM-EX-527 provides no support for the “[u]nlike Texas” portion of the asserted fact. Further, the stated “fact” is a conclusory, overbroad, statement, without foundation in the cited evidence.</p>	<p>Disputed. The state adjudication court order cited as NM-EX-527 is not titled a “Final Judgment” and does not reference a limit on the amount of surface water that can be diverted or consumed on an acre of Project land in New Mexico. The limits decreed by the adjudication court for use of surface water on irrigated crops is defined as the farm delivery requirement (FDR), stating that an “FDR of 3.024 afay is a reasonable FDR, and is representative of historic agricultural practices in the Lower Rio Grande, for those crops irrigated with surface</p>	<p>This fact is undisputed, subject to the evidence correction.</p> <p>New Mexico inadvertently cited to the wrong court order in this UMF. The Final Judgment described in this NM UMF is at NM-EX 541.</p> <p>It is undisputed that “the New Mexico Adjudication Court set limits on the amount of surface water and groundwater that could be diverted or consumed on an acre of Project land in New Mexico.” The language cited by the U.S. in its challenge is from the</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	each Project acre to receive 3.024 acre- feet per annum of surface water. <i>Id.</i> At ¶ I.A.		water only.” <i>See</i> Final Judgment, New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist., no. CV-96-888 (N.M. 3d Judicial Dist., Aug. 22, 2011), NM_0082198. The United States disputes the implication that “Reclamation operations and analysis” conferred a “right for each Project acre to receive 3.024 acre-feet-per-acre per annum.”	Final Order at NM-EX 541.
105	<p>Prior to this litigation, New Mexico has consistently taken the position that the Compact divides the waters below Elephant Butte according to the acreage in each State so that New Mexico is entitled to 57% and Texas is entitled to 43% of Project supply. For example, in negotiations that occurred during the 1990s and 2000s, New Mexico was steadfast in its position that a potential operating agreement for the Project could not alter the 57-43 division of water below Elephant Butte that was required by the Compact.</p> <p>NM-EX 004, Schmidt-Petersen Decl. ¶ 12; NM-EX 003, Lopez Decl. ¶ 17; NM-EX 002, D’Antonio Decl. ¶ 13.</p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico admits that whatever interest New Mexico may have below Elephant Butte Reservoir, it is limited to the rights that exist pursuant to the EBID contracts.</p> <p>Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001142-001145, 20:4-23:16, 25:17-26:10.</p> <p>New Mexico admits that New Mexico’s interests below Elephant Butte Reservoir are strictly limited to the four corners of the 1937 contract between EBID and the United States and the 1938 contract between EBID, the United States, and EP#1.</p> <p>Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001147-001148, 25:17-26:10.</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> The evidence incompletely cited by Texas relating to the role of the Downstream Contracts does not contradict the UMF. <i>See</i> NM UMFs 85, 86, 89, 113, discussing that the <i>Compact incorporates the Project.</i></p> <p>In claiming that New Mexico had never until this litigation argued that it had a Compact apportionment below Elephant Butte, Texas ignores <i>El Paso by Pub. Serv. Bd. v. Reynolds</i>, 563 F. Supp. 379 (D.N.M. 1983), in which the New Mexico State Engineer made exactly that argument. The federal district court rejected the argument. The Supreme Court, however, has ruled that there was an</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>New Mexico concedes that it cannot, in any way, control or affect that contract.</p> <p>D'Antonio Depo., 8/14/2020, at TX_MSJ_000867, 93:1-11, 24-25 ("The contracts are in place, the project is under Reclamation law and it runs"; "New Mexico's not involved to administer the contract water, no."), 94:2-13 ("New Mexico does not administer the surface water that's under contract . . . we don't administer on a day-to-day basis any of the water that's meant for the project."), 95:21-96:7.</p> <p>New Mexico admits that the use, place of use, timing of delivery, and total amount of water is absolutely limited by these contracts.</p> <p>D'Antonio Depo., 8/14/2020, at TX_MSJ_000875, 000879-000880, 145:13-18, 149:6-150:2.</p> <p>Until this litigation, New Mexico never argued that it had an apportionment of Rio Grande water below Elephant Butte Reservoir. In fact, in 1951, in prior Supreme Court litigation between New Mexico and Texas, John H. Bliss, the New Mexico State Engineer, on behalf of</p>		<p>apportionment below Elephant Butte. <i>Texas v. New Mexico</i>, 138 S. Ct. 954, 959 (2018) ("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 <i>and part of New Mexico</i> is, in fact, made.") New Mexico then returned to its long-standing position, offered in the 1983 case, that New Mexico has an apportionment below Elephant Butte.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>the state of New Mexico, stated unequivocally under oath: "The Rio Grande Compact does not attempt to make any apportionment between the New Mexico area and the Texas area below Elephant Butte Reservoir."</p> <p><i>Texas v. New Mexico, U.S. Supreme Court, No. 9 Original, Return of Defendants to Rule of Show Cause at 3; Declaration of Scott Miltenberger</i></p> <p>Significantly, the John H. Bliss who so swore is the same John H. Bliss who was the New Mexico engineer representative to the Engineer Advisors to the negotiators of the 1938 Compact.</p> <p><i>Id.</i></p> <p>Until the Supreme Court's 2018 pinion, New Mexico consistently admitted that its rights under the Compact ended at Elephant Butte Reservoir, with no further apportionment of water, once New Mexico delivered the water into the Reservoir pursuant to Article IV of the Compact.</p> <p>Excerpts of Deposition of Peggy Barroll, 2/6/2020 (Barroll Depo., 2/6/2020), at TX MSJ 000937,</p>		

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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		314:12-16.		
106	<p>The RGCC and its Engineer Advisers regularly request information and receive briefings from Reclamation on Project operations, including operations below Elephant Butte.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 45:9-46:12; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM-EX 003, Lopez Decl. ¶ 13; NM-EX 525, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Kenneth Rice, Bureau of Reclamation (May 2, 2013); NM-EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996).</p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
107	<p>Reclamation reports to the RGCC every year about operations that are relevant to the Compact. As part of that report, Reclamation provides information about the operations of the Rio Grande Project.</p> <p><i>See, e.g.</i>, NM-EX 512, Bureau of Reclamation, Calendar Year 2009 Report to the Rio Grande Compact</p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Commission, 59-67 (Mar. 2010); NM- EX 003, Lopez Decl. ¶ 13; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM- EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996); NM-EX 410, Fascimile from Steve Vandiver, Engineer Adviser, State of Colorado, to Ken Maxey, Albuquerque Area Manager, Bureau of Reclamation, and Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation (Aug. 2, 2002).			
108	<p>The RGCC conducts Compact accounting on an annual basis. Part of the Compact accounting includes a report on the Project Storage and Releases. That accounting tracks both the releases of Usable Water to water users in both States to satisfy irrigation demands, and the accrued departure of the releases from the Compact's normal release of 790,000 acre-feet per year.</p> <p><i>See, e.g.</i>, NM-EX 501, Rio Grande Compact Commission, Report of the</p>	Subject to the stated objections, disputed. There is no evidence cited in support of this "fact." New Mexico's reference to " <i>See, e.g.</i> " does not constitute supporting evidence.	Not disputed.	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> New Mexico's cited evidence amply supports the UMF. Texas proffers no evidence contradicting the UMF.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	Rio Grande Compact Commission 2005, 20 (Mar. 23, 2006). <i>See also</i> NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 14.			
109	<p>“Reclamation interprets this accrued departure from normal release [Compact accounting provision] as a measure of how the Rio Grande Project is complying with its obligation to meet yearly demand from the water users of the Rio Grande Project and at the same time comply with the Rio Grande Compact intent to recognize a yearly average of 790,000 AF release from project storage to satisfy water users” below Elephant Butte.</p> <p>NM-EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).</p>	<p>Subject to the stated objections, disputed. The evidence (NM-EX-411) does not support the asserted fact. New Mexico quotes the document correctly but adds “below Elephant Butte” after the quote in the asserted fact. Immediately following the quoted text, however, Exhibit NM-EX-411 states “within the ‘Texas portion’ of the Compact.” <i>See</i> NM-EX-411 at 2.</p>	<p>Disputed. The statement says, “...intent to recognize a yearly average of 790,000 AF release from Project storage to satisfy water users within the ‘Texas portion’ of the Compact.” NM-EX 411 at 2.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and the U.S.:</u> In his letter, Cortez puts quote marks around “Texas portion” indicating that it is a term of art. New Mexico’s interpretation of that term of art is appropriate given the testimony in this case that EBID considers itself to be “Compact Texas.” Affidavit of Gehrig Esslinger, ¶ 7, Att. 1 to EBID’s <i>amicus</i> brief (1-6-2021). Cortez’s quote marks imply that he was referring to that position. Otherwise the statement is nonsensical as 790,000 is far too much water to be the amount needed to satisfy only water users in Texas.</p>
110	<p>The releases from Project Storage are tracked so that the Compact Commissioner from each respective State is able to understand the amount of Project water that users in his or her State are entitled to.</p>	<p>Subject to the stated objections, disputed. New Mexico misstates and mischaracterizes the cited evidence.</p> <p>The Schmidt-Petersen declaration states that project releases are accounted and reported “so that the</p>	<p>Disputed. “Entitled to,” as used in this statement, is ambiguous. The statement is disputed on that basis. The Project allocates water to the Districts. The United States does not dispute the statement if “users in his or her State are entitled to” is</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and U.S.:</u> The parties cannot in good faith dispute that an allocation is set at the beginning of each year, and the</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 13	<p>Compact Commissioner from each respective State is able to understand the amount of Project water that users in his or her State <i>received in the previous year.</i>" (NM-EX 004) (emphasis added). Schmidt-Petersen did not state anything about "entitlement to water."</p> <p>NM-EX 004, Schmidt-Petersen Decl. paragraph 14.</p> <p>The Lopez declaration states that the RGCC and Engineer Advisers request information and receive briefings from Reclamation on Project operations.</p>	replaced with "the District in his or her state has been allocated."	<p>allocation is published so that beneficiaries know how much water they are entitled to receive that year.</p> <p>Definitions of "entitled": <i>Merriam-Webster</i> (online dictionary): "having a right to certain benefits or privileges" <i>Collins</i> (online dictionary): "having the right or permission to do something"</p>
111	<p>The RGCC acts or speaks in a number of forms, including through resolutions, all of which must have unanimous agreement.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15.</p> <p>Through unanimous resolutions, the RGCC has taken the following relevant positions:</p> <p>a. The State of New Mexico has a Compact apportionment in southern New Mexico below Elephant Butte, as recognized in the citations below:</p>	<p>Subject to the stated objections, disputed. The cited evidence does not support the stated legal conclusions summarized by New Mexico (as facts) in "a." and "b." The evidence (NM-EX-528) does not support the asserted fact. New Mexico, partially quoting Exhibit NM-EX-528, states "<i>The Project</i> is 'required to be operated in compliance with the Rio Grande Compact.'" But, Exhibit NM-EX-528 states only that ". . . <i>El Vado Reservoir</i> is a post-1929 reservoir and is required to be operated in compliance with the Rio Grande Compact.'" </p>	Not disputed , to the extent the statement is characterizing positions taken by the RGCC.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas.</u> Texas provides no evidence contradicting the UMF. Each of the resolutions summarized by New Mexico is available in its entirety to review for context.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>i. “[O]ver half of New Mexico’s population is located within the Rio Grande basin and depends on New Mexico’s allocation of Rio Grande water under the Rio Grande compact.”</p> <p>NM-EX 406, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Need for Careful Evaluation of the Water Supply and Socioeconomic Impacts of Any Designation of Critical Habitat for the Rio Grande Silvery Minnow (Mar. 25, 1999).</p> <p>ii. “[A]ll Rio Grande water allocated to New Mexico both upstream <i>and downstream from Elephant Butte Reservoir</i> is fully appropriated under New Mexico state law.”</p> <p><i>Id.</i> (emphasis added).</p>			

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>iii. "[T]he waters of the Rio Grande Project are used to . . . provide a water supply <i>for Southern New Mexico</i> and Texas downstream of Elephant Butte Reservoir."</p> <p>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) (emphasis added).</p> <p>b. The operations and accounting of the Project have the potential to impact New Mexico's Compact apportionment. <i>Id.</i> ("[T]he dissemination of inaccurate allotments [by Reclamation] causes unnecessary hardship to the water users of <i>Southern New Mexico</i> and Texas along</p>			

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>the Rio Grande downstream of Elephant Butte Reservoir") (emphasis added);</p> <p align="center">NM-EX 002, D'Antonio Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 15</p> <p>c. The Project is "required to be operated in compliance with the Rio Grande Compact."</p> <p align="center">NM-EX 528, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding Temporary Modification of Operations at El Vado Reservoir in New Mexico during April, May, and June 2015 (Mar. 24, 2015); <i>see also</i> NM-EX 002, D'Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15.</p>			
112	<p>To address the potential for Project operations to impact New Mexico's (and Texas's) Compact apportionment, the RGCC has taken at least these three actions by resolution:</p> <p>a. First, the RGCC</p>	<p>Subject to the stated objections, disputed. The cited evidence does not support the stated legal conclusion summarized by New Mexico (as fact) in its opening paragraph.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas provides no evidence to contradict this UMF. The documents are provided in their entirety for context and interpretation.</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>unanimously “request[ed] that the Bureau of Reclamation work cooperatively with the Engineer Advisers to develop procedures for determining the annual allotments of water supply in accordance with the Rio Grande Compact.”</p> <p>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); <i>see also</i> NM-EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.</p> <p>b. Second, the RGCC entered into a memorandum of understanding (“MOU”) with Reclamation to “conduct a Compact water accounting documentation project.” The purpose of the MOU was “to clarify and formally articulate the details of the duties, roles and responsibilities of each party for the water accounting</p>			

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	<p>reporting, and documentation of the waters of the Rio Grande Basin above Fort Quitman, Texas, in accordance with the Compact.”</p> <p>NM-EX 407, Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation, 2 (Mar. 21, 2002); <i>see also</i> NM-EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.</p> <p>c. Third, the RGCC unanimously “request[ed] those federal agencies that operate water- related facilities within the Rio Grande basin to advise the Rio Grande Compact Commission prior to changing the operation of any of those facilities and when deemed necessary by the Rio Grande Compact Commission, seek its unanimous consent for changes prior to implementation.”</p> <p>NM-EX 413, Rio Grande Compact Commission,</p>			

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

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	Resolution of the Rio Grande Compact Commission Concerning Federal Agency Operations of Their Water- Related Facilities on the Rio Grande Compact Accounting (Mar. 25, 2004); NM-EX 002, D'Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.			
113	<p>The Court held in this case that “the Compact . . . implicitly . . . incorporates the Downstream Contracts by reference.” <i>Texas v. New Mexico</i>, 138 S. Ct. at 959. It noted that the “Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts.”</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. at 959.</p>	<p>Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be considered in the context of the parties’ legal arguments.</p>	<p>Disputed. The citation elides a number of significant points. The quoted passage reads in full:</p> <p>First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec [t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. 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</p>	<p>There is no dispute that the United States Supreme Court stated that “the Compact . . . implicitly . . . incorporates the Downstream Contracts by reference.” <i>Texas v. New Mexico</i>, 138 S. Ct. at 959. It noted that the “Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts.”</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			<p>assuring that the Compact's equitable apportionment" to Texas and part of New Mexico "is, in fact, made." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts § 30:26 (4th ed. 2017). However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 959 (2018)</p>	
114	<p>The Court further held that “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 <i>and part of New Mexico</i> is, in fact, made.”</p> <p><i>Texas v. New Mexico</i>, 138 S.</p>	<p>Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be considered in the context of the parties’ legal arguments.</p>	<p>Disputed. The United States disputes the characterization of this statement as a holding. The United States does not dispute this statement if “held” is changed to “stated.”</p>	<p>There is no dispute that the United States Supreme Court stated that “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.”</p>

State of New Mexico's Reply to Statement of Facts: Apportionment Motion

	New Mexico's Apportionment Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	United States' Response to New Mexico's Apportionment Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Ct. at 959 (emphasis added; internal quotation marks omitted).			

SECTION II
NEW MEXICO NOTICE MOTION FACTS

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
1	<p>One purpose of the Rio Grande Compact, among others, was to protect the operation of the Rio Grande Project.</p> <p><i>See</i> NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:8-17; NM-EX 204, D'Antonio Dep. (Vol. II) (June 25, 2020), 163:7-13; NM-EX 217, Lopez Dep. (Vol. I) (July 6, 2020), 137:20- 138:3; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 66:14-15; NM-EX 005, Stevens Decl. ¶ 10.</p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
2	<p>Reclamation operates Elephant Butte Reservoir as part of the principal storage infrastructure for the Rio Grande Project.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 56:20-58:3.</p>	Subject to the stated objections, disputed in part. The cited testimony does not support the statement in the Motion.	Not disputed.	This fact is undisputed.
3	<p>Once delivered to the Elephant Butte Reservoir, Project water is allocated to the Rio Grande Project beneficiaries in southern New Mexico and in Texas.</p> <p><i>See</i> NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:22-39:6.</p> <p>The Project water users are located in Elephant Butte Irrigation District ("EBID") and El Paso County Water Improvement District No. 1</p>	Subject to the stated objections, disputed in part. Paragraph two mischaracterizes the cited "evidence"; the "evidence" does not stand for the stated proposition; and contains an improper legal conclusions.	Disputed. "Project water" is not a term defined by the Compact and is ambiguous. Water delivered to Elephant Butte Reservoir, exclusive of credit water and imported water from the San Juan Chama Project, becomes "usable water." Art. I(I), 53 Stat. 786; <i>see also</i> U.S. Mem. 8, ¶ 31 & nn.31. This useable water is available for release in accordance with irrigation demands, including	There is no dispute that water delivered to Elephant Butte Reservoir, exclusive of credit water and imported water from the San Juan Chama Project, becomes "usable water," and that this useable water is available for release in accordance with irrigation demands, including deliveries to Mexico.

State of New Mexico’s Reply to Statement of Facts: Notice Motion

	New Mexico’s Notice Motion UMFs (11-5-2020)	Texas’s Response to New Mexico’s Notice Motion UMFs (12-22-2020)	United States’ Response to New Mexico’s Notice Motion UMFs (12-22-2020)	New Mexico’s Response / Final Disposition of Facts
	<p>(“EPCWID”) (referred to jointly as “Districts”).</p> <p><i>See</i> Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014); Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); NM-EX 112, Jennifer Stevens, Ph.D., <i>The History of Interstate Water Use on the Rio Grande: 1890-1955</i>, 18 (Oct. 28, 2019) (“Stevens Rep.”); NM-EX 111, Scott A. Miltenberger, <i>Expert Report of Scott A. Miltenberger, Ph. D.</i>, 9 (May 31, 2019) (“Miltenberger Rep.”).</p>		<p>deliveries to Mexico. Art. I(<i>l</i>), 53 Stat. 786; <i>see also</i> U.S. Mem. 8, ¶ 33. Thus, all usable water is not allocated to Rio Grande Project beneficiaries in southern New Mexico and in Texas, nor are all users of the usable water located in EBID or EPCWID.</p>	
4	<p>Project Allocations are the amounts of Project Supply that each District is entitled to order each year from Project supply and the amount Mexico is entitled to receive by treaty.</p> <p>NM-EX 001, Barroll Decl., ¶ 18; NM-EX 307, Distribution of the Waters of the Rio Grande, Mex.-U.S., May 21, 1906, 34 Stat. 2953; NM-EX 529,</p>	<p>Subject to the stated objections, disputed in part. The cited evidence does not support the stated “facts” in whole and/or in part. Fed. R. Civ. P. 56(c).</p>	<p>Disputed. New Mexico’s proposal to define “Project Allocations” in a particular way for purposes of litigation is not a statement of fact. New Mexico may define “Project Allocations” however it chooses for purposes of litigation, unless it is intending to capture the definition used in a particular document. The United States</p>	<p>This fact is not genuinely disputed.</p> <p><u>Response to Texas:</u> Texas states that the cited evidence does not support the stated fact, but does not explain why. It also identifies no material dispute with this fact.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i> , 4 (Sept. 30, 2016).		disputes the definition because “entitled” is ambiguous and apparently reflects a conclusion of law. Reclamation uses the term “diversion allocation.” As stated in the FEIS, “Reclamation allocates RGP water supplies such that the diversion allocations to EBID and EPCWID are proportionate to each district’s respective acreages.” NM- EX529 FEIS, at 25 (pdf page).	<u>Response to the United States:</u> The United States objects to the wording New Mexico used, but the passages it quotes confirm the fact as presented.
5	<p>On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts (EPCWID and EBID) entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938.</p> <p>NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (“1938 Downstream Contract”).</p> <p>The 1938 Downstream Contract states that in the event of a shortage of water “the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%]</p>	<p>Subject to the stated objections, disputed in part. The second paragraph, correctly quotes from the 1938 Downstream Contract but in the absence of an understanding of the context and purpose of the, the paragraph is misleading. NM-EX-324.</p> <p>Congress authorized the execution of amended repayment contracts with EBID and EPCWID (or EP #1) in 1937, but it did not authorize the 1938 contract as such. The 1938 Downstream Contract was instead part of an effort by Reclamation, extending back to 1929, to fix the basis for repayments between the two districts. The districts themselves ultimately instigated this particular agreement to settle</p>	<p>RESPONSE: Disputed. This statement is a mixed assertion of legal interpretation and fact. The United States does not dispute the factual assertions or quoted contract language. The United States disputes New Mexico’s framing that the legal conclusion by the Court—that the Downstream Contracts are “inextricably intertwined with’ the Project and Compact”—is a “fact.” Additionally, the citation elides a number of significant points. The Court concluded:</p> <p>First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec [t] an equitable apportionment" of "the</p>	<p>These facts are not genuinely disputed.</p> <p><u>Response to the United States:</u> This paragraph 5 is identical to paragraph 8 in New Mexico’s Full Supply Motion and the U.S. does not dispute these same facts as stated in that paragraph 8.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the quotations, but seeks to press arguments concerning the legal implication of the fact to manufacture a factual dispute.</p>

State of New Mexico’s Reply to Statement of Facts: Notice Motion

	New Mexico’s Notice Motion UMFs (11-5-2020)	Texas’s Response to New Mexico’s Notice Motion UMFs (12-22-2020)	United States’ Response to New Mexico’s Notice Motion UMFs (12-22-2020)	New Mexico’s Response / Final Disposition of Facts
	<p>to the lands within [EBID].”</p> <p><i>Id.</i>; NM-EX 001, Barroll Decl., ¶ 19.</p> <p>The Court has found that the “Downstream Contracts,” including the 1938 Downstream Contract, are “inextricably intertwined with” the Project and the Compact.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. at 959.</p>	<p>the issue. Miltenberger Declaration paragraphs 43-45 discuss the 1937 and 1938 Downstream Contracts; the context and purpose of the 1938 Downstream Contract is addressed in more detail in the paragraphs cited below. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 - 7, 43 - 45, 54-59, 61.</p> <p>Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be considered in the context of the parties’ legal arguments. New Mexico’s statement also mischaracterizes the Court’s opinion.</p>	<p>waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. 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." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts § 30:26 (4th ed. 2017). However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream</p>	

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			<p>Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 959 (2018).</p>	
6	<p>The Rio Grande Compact incorporates the Rio Grande Project as the mechanism by which water users in Texas (EPCWID) receive the State's equitable apportionment of the waters of the Rio Grande.</p> <p><i>See</i> NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 14:22-16:10; Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); <i>see also</i> First Interim Report of the Special Master, 194-95 (Feb. 9, 2017); Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 18 (July 2017).</p>	Subject to the stated objections, undisputed.	<p>Disputed. The express language of the Compact does not incorporate the Rio Grande Project. This assertion by New Mexico is an incomplete conclusion of law that ignores several significant points. The Supreme Court's discussion of the Compact's implicit "incorporation" of the Downstream Contracts reads in full:</p> <p>First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec [t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had</p>	<p>This fact is not genuinely disputed.</p> <p><u>Response to the United States:</u> The United States does not dispute the facts stated, but seeks to press an argument concerning interpretation of the Compact.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			<p>negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. 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." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts § 30:26 (4th ed. 2017). However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct.</p>	

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			54, 959 (2018)	

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
7	<p>To support the Rio Grande Project, Reclamation notified the State Engineer for the Territory of New Mexico that it intended to appropriate all "unappropriated waters of the Rio Grande" at Elephant Butte in 1908.</p> <p><i>See</i> NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger Rep. 9-10.</p>	<p>Subject to the stated objections, disputed in part. This paragraph is factually incomplete. The 1908 filing was for "all the unappropriated waters of the Rio Grande and its tributaries." NM-EX-309.</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 - 7, 62.</p>	<p>Disputed. Reclamation's notification to the New Mexico State Engineer in 1908 was not limited to appropriation of water at Elephant Butte Reservoir. The notice states:</p> <p>In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to-wit: All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River at a point described as follows: Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre feet, and diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.</p> <p>NM-EX-309, Letter to Sullivan dated April 1908 at NM_00113008.</p>	<p>It is undisputed that to support the Rio Grande Project, Reclamation notified the State Engineer for the Territory of New Mexico that it intended to appropriate all "unappropriated waters of the Rio Grande and its tributaries."</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
8	<p>From that point forward, the New Mexico State Engineer considered the surface waters of the Rio Grande below Elephant Butte Reservoir to be fully appropriated.</p> <p><i>See</i> NM-EX 002, D'Antonio Decl. ¶ 9; NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 424:15-425:4, 426:13- 18; NM-EX 106, Nicolai Kryloff, <i>Context of the 1938 Rio Grande Compact</i>, 26-27 (May 31, 2019) ("Kryloff Rep."); NM-EX 205, D'Antonio Dep. (Vol. III) (June 26, 2020), 274:1-5.</p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
9	<p>The Rio Grande Project is a federal Reclamation Project, therefore neither Texas nor New Mexico have a direct role in the operation of the Project.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 63:18-69:2; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 89:4-11, 172:13-22.</p>	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
10	Specifically, although New Mexico retains administrative jurisdiction over the surface water of the Rio Grande Project, the New Mexico State Engineer has no involvement in day-	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico’s Reply to Statement of Facts: Notice Motion

	New Mexico’s Notice Motion UMFs (11-5-2020)	Texas’s Response to New Mexico’s Notice Motion UMFs (12-22-2020)	United States’ Response to New Mexico’s Notice Motion UMFs (12-22-2020)	New Mexico’s Response / Final Disposition of Facts
	to- day Project operations, including orders and deliveries. NM-EX 206, D’Antonio Dep. (Vol. IV) (Aug. 14, 2020), 93:12-96:7.			
11	While Project construction was ongoing, the Reclamation Service began water deliveries through the Project in 1915. <i>See</i> NM-EX 404, Robert Autobee, United States Bureau of Reclamation, <i>Rio Grande Project</i> , at 12 (1994); NM-EX 311, United States Reclamation Service, <i>Project History Rio Grande Project Year 1915</i> , 137-141.	Subject to the stated objections, undisputed.	Disputed. Although it is undisputed that the first deliveries by Reclamation from Project storage began in 1915, a Rio Grande diversion structure at Leasburg, New Mexico diverted its first water in 1908. NM-EX-404, Autobee Rep., at 11.	It is undisputed that the first deliveries by Reclamation from Project storage began in 1915.
12	From inception of the Project until 1951, Reclamation administered the Rio Grande Project as a single unit to deliver water directly to farm turnouts in both States on the basis of individual farm orders. <i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 58:6-18; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 107, Estevan R. Lopez, <i>Expert Report of Estevan R. Lopez, P.E.</i> , 25 (Oct. 31, 2019) (“Lopez Rep.”).	Subject to the stated objections, disputed. The cited “evidence” does not stand for the stated proposition.	Disputed. The phrase “administered . . . as a single unit,” as used in this statement, is ambiguous and the statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very	There is no genuine dispute as to this fact. <u>Response to the United States:</u> The U.S. provides no evidence contradicting New Mexico evidence that Reclamation had been operating the Project as a single unit. <i>See also</i> NM-EX 506, Affidavit of Filiberto Cortez (4-20-2007) (then Manager of the El Paso Field Division for Reclamation), ¶ 8.

State of New Mexico’s Reply to Statement of Facts: Notice Motion

	New Mexico’s Notice Motion UMFs (11-5-2020)	Texas’s Response to New Mexico’s Notice Motion UMFs (12-22-2020)	United States’ Response to New Mexico’s Notice Motion UMFs (12-22-2020)	New Mexico’s Response / Final Disposition of Facts
			probably even beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 12.	Texas expert Miltenberger testified that historic documents required that the “Project must be operated as a unit.” Miltenberger Nov. Decl. ¶ 31; <i>see also</i> NM-EX 128, Miltenberger Rep., 100-101 (noting that in a piece summarizing the Compact, Rio Grande Compact Commissioner Thomas B. McClure agreed with the NM-EX 328, Clayton-Smith (1938) Letter ¹ explanation that the absence of a state-line delivery to Texas “is necessary because the Rio Grande Project... must be operated as a unit.”).
13	<p>The understanding of the compacting States was that Reclamation would continue to operate the Project in this manner.</p> <p>NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938) (“Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent</p>	<p>Subject to the stated objections, disputed regarding the ambiguity of the phrase “in that manner.” To the extent that “in that manner” is referable to #12, the item is disputed.</p>	<p>Disputed. The phrase “in this manner” is ambiguous, and the statement is disputed on that basis. Moreover, if Statement of Fact No. 13 is intended to relate to Statement of Fact No. 12, “administered . . . as a single unit,” as used in that statement, is ambiguous and the statement is also disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation,</p>	<p>There is no genuine dispute as to this fact.</p> <p>In any event, a dispute as to this fact does not preclude a ruling in New Mexico’s favor on New Mexico’s Notice Motion.</p> <p><u>Response to the United States:</u> The U.S. confirms that the Clayton-Smith (1938) Letter refers to Reclamation continuing to operate the Project “as an administrative unit.” The U.S. offers no evidence contradicting the NM UMF</p>

¹ NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938), hereinafter the “Clayton-Smith (1938) Letter.”

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	agency.”); NM-EX 327, J.H. Bliss, <i>Provisions of the Rio Grande Compact</i> , 1 (Apr. 2, 1938) (“The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit.”); NM- EX 112, Stevens Rep.72.		and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 13.	evidence that the contemporary understanding of the Compact negotiators was that the Project would continue to be operated as a unit.
14	Between 1951 and 1979, Reclamation would perform an annual assessment of available Project supply to determine whether a full or partial allocation would be made. Reclamation would announce the allocation figures to individual farmers through the irrigation districts. Then, individual farmers retained discretion to order Project deliveries up to the amount of their respective allocations. <i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:19-59:11.	NM-EX202 ^[SEP] Subject to the stated objections, disputed regarding the use of the term “discretion.” The witness does not use the term “discretion” in describing individual farmer’s ability to place orders directly between 1951-1979.	Disputed. The term “available Project supply” is not defined and is ambiguous. Reclamation’s assessment of available water in any year is not limited to a single annual assessment of availability at a particular time, but an ongoing process. The referenced deposition does not establish the existence of a single assessment. <i>See</i> NM- EX-202, Cortez Dep. (Vol. I) (July 30, 2020) 58:19-59:11	It is undisputed that between 1951 and 1979, Reclamation would determine whether a full or partial allocation would be made. Reclamation would announce the allocation figures to individual farmers through the irrigation districts. In any event, a dispute as to this fact as stated by New Mexico does not preclude a ruling in New Mexico’s favor on New Mexico’s Notice Motion.
15	During this period, Reclamation operated the Project as a single unit and on an equal per-acre allocations to	NM-EX 202, NM-EX 216, NM-EX 220 ^[SEP] Subject to the stated objections, disputed regarding the	Disputed. “Operated the Project as a single unit,” as used in the statement, is ambiguous and the	There is no genuine dispute that between 1951 and 1979, Reclamation operated the

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>all beneficiaries of the Project.</p> <p><i>See</i> NM-EX 100, Barroll Rep., 32; NM-EX 216, Lopez Dep. (Feb. 26, 2020), 29:1-9; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18.</p>	<p>ambiguity of the phrase “during this period.” To the extent the phrase “during this period” refers to #14, disputed. The respective witness’s testimony does not involve the period from 1951-1979.</p> <p>NM-EX 100:^[1]_{SEP} Subject to the stated objections, disputed regarding the ambiguity of the phrase “during this period.” To the extent the phrase “during this period” refers to #14, disputed. The exhibit does not involve the period from 1951-1979.</p>	<p>statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 15. In addition, between 1951 and 1979, Reclamation enforced an equal amount of water to each acre during years of inadequate supply. During years when the water supply exceeded a normal supply (typically 3.0 acre-feet per acre) the on-farm delivery may not have been based on an equal basis to each acre. NM-EX 202, 58:19-59:7.</p>	<p>Project as an administrative unit.</p> <p>In any event, a dispute as to this fact as stated by New Mexico does not preclude a ruling in New Mexico’s favor on New Mexico’s Notice Motion.</p> <p><u>Response to the United States:</u> The assertion that on-farm deliveries “may not have been based on an equal basis to each acre” in full supply years is not sufficient to create a factual dispute.</p>
16	<p>Reclamation also maintained the Districts’ annual allocation accounting. Reclamation tracked the amount of surface water delivered to individual farm turnouts and assessed these amounts against the farmers’</p>	<p>Subject to the stated objections, generally disputed regarding the ambiguity of the time period referred to.</p> <p>NM-EX 202:^[1]_{SEP} The cited</p>	<p>Disputed. Between 1951 and 1978, Reclamation did not maintain “Districts’ annual allocation accounting,” because water was not allocated to the</p>	<p>There is no genuine dispute that between 1951 and 1979, Reclamation tracked the amount of surface water delivered to individual farm turnouts and assessed these amounts against</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>respective allocations.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 42:15-43:4, 58:6-59:11; NM-EX 100, Barroll Rep. 32-33; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of</p>	<p>“evidence” does not stand for the stated proposition that Reclamation assessed “amounts against the farmers’ respective allocations.”</p>	<p>Districts. NM-EX-529, FEIS, at 5.</p>	<p>the farmers’ respective allocations.</p> <p>In any event, a dispute as to this fact as stated by New Mexico does not preclude a ruling in New Mexico’s favor on New Mexico’s Notice Motion.</p>
17	<p>In 1979, Reclamation transferred ownership of the canals and laterals to the Districts (EBID and EPCWID). In the period thereafter, Reclamation made allocations to the District river diversions, rather than to individual farmers, and the Districts assumed responsibility for delivery of the Project water from their respective diversion points to individual farm turnouts.</p> <p><i>See</i> NM-EX 001, Barroll Decl. ¶ 21; NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 100, Barroll Rep. 8, 33.</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Disputed. In 1979 and 1980, the United States transferred to EBID and EPCWID, respectively, the operation and maintenance responsibility for the canals, laterals, and drains within each District. NM-EX-529, FEIS, at 5.</p>	<p>It is undisputed that in 1979 and 1980, the United States transferred to EBID and EPCWID, respectively, the operation and maintenance responsibility for the canals, laterals, and drains within each District. And that in the period thereafter, Reclamation made allocations to the District river diversions, rather than to individual farmers, and the Districts assumed responsibility for delivery of the Project water from their respective diversion points to individual farm turnouts.</p> <p>In any event, a dispute as to this fact as stated by New Mexico does not preclude a ruling in New Mexico’s favor on New Mexico’s Notice Motion.</p>
18	<p>Reclamation retained, in the period after 1979, the responsibility to</p>	<p>Subject to the stated objections, undisputed with regard to the first</p>	<p><i>[a] Reclamation retained, in the period after 1979, the</i></p>	<p>It is not disputed that Reclamation retained, in the</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>account for the total deliveries to each District (EBID and EPCWID) and to Mexico at their respective diversion headings in a given year.</p> <p><i>See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 31:13-23, 49:3-11.</i></p> <p>From 1979 through 2005, Reclamation continued to operate the Project as a single unit on an equal amount of water per acre basis.</p>	<p>sentence.</p> <p>Subject to the stated objections, disputed with regard to the second sentence. The cited “evidence” does not stand for the stated proposition.</p>	<p><i>responsibility to account for the total deliveries to each District (EBID and EPCWID) and to Mexico at their respective diversion headings in a given year. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 31:13-23, 49:3-11.</i></p> <p><i>[b] From 1979 through 2005, Reclamation continued to operate the Project as a single unit on an equal amount of water per acre basis.</i></p> <p>RESPONSE:^[1]^[SEP] [a] Not disputed, with the clarification that Reclamation included diversions at headings in its accounting.</p> <p>[b] Disputed. “[O]perate the Project as a single unit,” as used in the statement, is ambiguous and the statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very</p>	<p>period after 1979, the responsibility to account for diversions to each District (EBID and EPCWID) and to Mexico at their respective diversion headings in a given year.</p> <p>Also, there is no genuine dispute that from 1979 through 2005, Reclamation continued to operate the Project as a single unit on an equal amount of water per acre basis.</p> <p><u>Response to Texas:</u> Texas identifies no material dispute with this latter fact.</p> <p><u>Response to the United States:</u> Similarly, the U.S. provides no evidence contradicting New Mexico evidence that Reclamation had been operating the Project as a single unit. <i>See also</i> NM-EX 506, Affidavit of Filiberto Cortez (4-20-2007) (then Manager of the El Paso Field Division for Reclamation), ¶ 8.</p> <p>Texas expert Miltenberger testified that historic documents required that the “Project must be operated as a unit.” Miltenberger Nov. Decl. ¶ 31; <i>see also</i> NM-EX 128, Miltenberger Rep., 100-101</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			probably even beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 18.	(noting that in a piece summarizing the Compact, Rio Grande Compact Commissioner Thomas B. McClure agreed with the NM-EX 328, Clayton-Smith (1938) Letter ² explanation that the absence of a state-line delivery to Texas “is necessary because the Rio Grande Project... must be operated as a unit.”).
19	Reclamation relies on the Districts to monitor and report the actual diversions that each takes at its diversion points from the Rio Grande. <i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 49:20-50:12.	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
20	Reclamation compiles its accounting of the Districts' respective Project allocation and delivery charges on a monthly basis. <i>See</i> NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 215:23-216:16; NM-EX 221, Reyes Dep. (Nov. 16, 2018), 65:8-66:8.	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
21	In operation of the Rio Grande Project, Reclamation is responsible to control	Subject to the stated objections, disputed. The cited “evidence”	Disputed. The United States does not dispute the factual assertion	This fact is not genuinely disputed.

² NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938), hereinafter the “Clayton-Smith (1938) Letter.”

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>releases of Project supply from Elephant Butte and Caballo reservoirs to assure delivery of all ordered water to the canal diversions. This function includes monitoring the river to determine gains and losses throughout the river reaches between stream gages.</p> <p><i>See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 34:12-35:5.</i></p>	<p>does not stand for the stated proposition.</p>	<p>that Reclamation is responsible for controlling releases from Elephant Butte and Caballo reservoirs to the extent it is consistent with Mr. Cortez's Deposition. NM-EX-202, Cortez 7/30/20 Dep. Tr., 34:12-35:5. However, neither Mr. Cortez's deposition testimony nor the document he is discussing, FC3, reflects that Reclamation has the responsibility "to assure delivery of all ordered water to the canal diversions" or that this "function includes monitoring the river to determine gains and losses throughout the river reaches between the stream gages." <i>Id.</i></p>	<p><u>Response to United States:</u> The United States does not dispute that "Reclamation sets the Caballo release amount taking into account the losses and gains between Caballo Dam and the canal headings to which it is delivering water, so that regardless of what losses or gains are occurring, the amount ordered will reach the canal heading for which the order is being made." <i>See</i> United States Challenge to New Mexico's Full Supply Material Facts, at 15.</p>
22	<p>In order to calibrate releases of Project supply from Caballo and Elephant Butte reservoirs into the Rio Grande, Reclamation takes delivery orders from each District and makes appropriate reservoir release adjustments on a daily basis.</p> <p><i>See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 64:3-15.</i></p>	<p>Subject to the stated objections, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>
23	<p>To facilitate this process, the Districts take water orders from their respective constituents and transmit total orders</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Not disputed.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	to Reclamation. <i>See</i> NM-EX 208, Esslinger Dep. (Vol. II), 57:4-58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20; NM-EX 001, Barroll Decl. ¶ 21.			
24	Once Reclamation delivers water to a District's diversion point, the District administers the conveyance of that water to individual farm turnouts and accounts for delivery of the water in satisfaction of the farmers' respective orders. <i>See</i> NM-EX 208, Esslinger Dep. (Vol. II) (Aug. 18, 2020), 56:19-58:23, 60:22-62:7; NM-EX 223, Rios Dep., 31:4-6, 33:10-14.	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
25	Following the 2008 Operating Agreement, among other changes, the Districts assumed from Reclamation the responsibility to calculate the actual Project release as a function of their total daily orders. <i>See</i> NM-EX 207, Esslinger Dep. (Vol. I) (Aug. 17, 2020), 122:4-9; NM-EX 221, Reyes Dep. (Nov. 16, 2008), 23:20-24:18; NM-EX 001, Barroll	Subject to the stated objections, disputed. NM-EX 001: Cited "evidence" does not support the proposition. NM-EX 207: Cited "evidence" does not support the proposition. NM-EX 221: Cited "evidence" does not support the proposition.	Not disputed.	There is no genuine dispute as to this fact. <u>Response to Texas:</u> Texas states that the cited evidence does not support the stated fact, but does not explain why. It also identifies no material dispute with this fact.

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	Decl. ¶ 21.			
26	<p>Reclamation compiles an annual written report to the Rio Grande Compact Commission and gives an annual oral report at the Rio Grande Compact Commission meeting regarding operation of the Rio Grande Project. These reports contain general, annualized data concerning the operation of the Project, such as the total amount of release from Project Storage, the amount of water in Project Storage, and the annual allocations to each district.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 44:6-45:4, 102:21-103:6; NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 209:20-210:14. <i>E.g.</i>, NM-EX 516, Bureau of Reclamation, <i>Calendar Year 2009 Report to the Rio Grande Compact Commission</i>, 59-67 (Mar. 2010); NM-EX 003, Lopez Decl. ¶¶ 14-15.</p>	Subject to the stated objections, undisputed.	Not disputed , with the clarification that this statement is correct only for the period of time after 1980 when annual allocations were made to each district. The United States disputes any other construction of Statement of Fact No. 26.	This fact is undisputed as to the period of time after 1980.
27	Reclamation also provides to the State of New Mexico courtesy copies of periodic reports concerning Rio Grande Project operations, including reservoir elevations, flow readings, and storage transfers between reservoirs.	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p><i>See</i> NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 220:2-222:4. <i>E.g.</i>, NM-EX 513, Letter from Filiberto Cortez, Manager El Paso Field Division, Bureau of Reclamation, to Water Accounting Division, U.S. Section, International Boundary Water Commission (Sept. 29, 2009); NM-EX 514, Letter from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Lieutenant Col. Kimberly Colloton, District Engineer, Army Corps of Engineers (Sept. 29, 2009).</p>			
28	<p>New Mexico does not, however, receive daily operation information such as the daily release amount, the order amounts, or the timing of releases to satisfy orders.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 114:6-22; NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; NM-EX 100, Barroll Rep., 47; NM-EX 107, Lopez Rep. 73 ("Historically, Reclamation information and data about Project operations has not routinely been shared with the States.")</p>	<p>Subject to the stated objections, disputed.</p> <p>This paragraph is misleading insofar as it suggests that the only way that New Mexico had notice of the depletion its ground water pumping was causing to Texas's apportionment was by means of daily Project operational information. New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press a separate legal argument.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p>		
29	<p>Likewise, New Mexico does not receive any routine notice that any specific water order, whether at the district or individual farmer level, has or has not been filled.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.</p>	<p>Subject to the stated objections, disputed.</p> <p>This paragraph is misleading insofar as it suggests that the only way that New Mexico had notice of the depletion its ground water pumping was causing to Texas's apportionment was by means of daily Project operational information. New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63 - 77.</p> <p>TX_MSJ_6492-6891.</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press a separate legal argument.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
30	<p>Accordingly, New Mexico has no means to know, at any given time, what proportion of the water in the Rio Grande below Elephant Butte Reservoir is destined for delivery to EBID, EPCWID, or Mexico.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.</p>	<p>Subject to the stated objections, disputed.¹ This paragraph is misleading insofar as it suggests that the only way that New Mexico had notice of the depletion its ground water pumping was causing to Texas's apportionment was by means of daily Project operational information. New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press a separate legal argument.</p>
31	<p>Further, New Mexico has no means to know, at any given time, whether the Rio Grande Project releases are in fact delivered to Texas in satisfaction of EPCWID orders.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; <i>see also</i> NM-EX 211, Gordon Dep.</p>	<p>Subject to the stated objections, disputed.</p> <p>EX-211: Cited "evidence" does not support the proposition.</p> <p>Further, this paragraph is misleading insofar as it suggests that the only way that New</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press a separate legal argument.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	(Vol. I) (July 14, 2020), 180:14-181:7.	<p>Mexico had notice of the depletion its ground water pumping was causing to Texas's apportionment was by means of daily Project operational information. New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> <p><i>See Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</i></p> <p>TX_MSJ_6492-6891.</p>		

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
32	<p>Conversely, to the extent that any amount of water released from Project supply pursuant to a specific order is intercepted prior to delivery, New Mexico would have no basis to know of a shortage to either District without explicit notice.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.</p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p>	<p>Disputed. The record shows that New Mexico was aware of the potential breach as of at least 1980, when New Mexico closed the groundwater basin below Elephant Butte Reservoir. NMAC 19.27.48; <i>see also</i> U.S. Mem. 11, ¶ 50. In addition, the AWRM Presentation N.M. Interstate Stream Comm'n, Active Water Resource Management in the Lower Rio Grande: Tools for a New Era in Water Management at 7 (Aug. 19, 2005)(“AWRM Presentation”) created by the Office of State Engineer in 2005, TX00175991, as well as the attempted adoption of AWRM regulations, 19.5.13.1-19.5.50, NMAC, illustrate that New Mexico was aware of the impact of groundwater pumping on Rio Grande flows and Project diversions. <i>See generally</i> U.S. Mem. 15-17. Finally, in 1954 the United States Geological Survey published a report documenting its conclusion that groundwater pumping educes the flows in Project drains and depletes surface water in the Rio Grande, thereby reducing the surface water supply for the Project. 1954 Conover at 115, 133 (point 5), US0027948, at 28062, 28080l; <i>see also</i> U.S. Mem.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas and the United States:</u> Texas and the United States identify no material dispute with this fact, and seek to press separate legal arguments.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
			10, ¶ 44-45.	
33	From 1938 through the inception of this litigation, New Mexico did not receive any notice, with the potential exception of one complaint concerning surface water diversions (discussed below), whether from Reclamation, Texas, EBID, or EPCWID, that the conduct of water users in New Mexico prevented the United States from	Subject to the stated objections, disputed. EX-204: Cited "evidence" does not support the proposition. ^[1] Gordon Dec. in Opp. To NM at TX_MSJ_007269-007274.	Disputed. The record shows that New Mexico was aware of the potential breach as of at least 1980, when New Mexico closed the groundwater basin below Elephant Butte Reservoir. NMAC 19.27.48; <i>see also</i> U.S. Mem. 11, ¶ 50. In addition, the AWRM Presentation created by the Office of State	There is no genuine dispute as to these facts. <u>Response to Texas:</u> Texas does not dispute the accuracy of the facts stated, but seeks to press a separate legal argument.

State of New Mexico’s Reply to Statement of Facts: Notice Motion

	New Mexico’s Notice Motion UMFs (11-5-2020)	Texas’s Response to New Mexico’s Notice Motion UMFs (12-22-2020)	United States’ Response to New Mexico’s Notice Motion UMFs (12-22-2020)	New Mexico’s Response / Final Disposition of Facts
	<p>making delivery of Project water called for by Texas (EPCWID).</p> <p>NM-EX 002, D’Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 16; <i>see</i> Ex 218, Lopez Dep. (Vol. II) (July 7, 2020), 140:13-141:13; Ex. 204, D’Antonio Dep. (Vol. II) (June 25, 2020), 169:1-7.</p>	<p>New Mexico has been on notice about the effect of its pumping on Texas’s apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p>	<p>Engineer in 2005, TX00175991, as well as the attempted adoption of AWRM regulations, 19.5.13.1-19.5.50, NMAC, illustrate that New Mexico was aware of the impact of groundwater pumping on Rio Grande flows and Project diversions. <i>See generally</i> U.S. Mem.15-17. Finally, in 1954 the United States Geological Survey published a report documenting its conclusion that groundwater pumping educes the flows in Project drains and depletes surface water in the Rio Grande, thereby reducing the surface water supply for the Project. 1954 Conover Rpt., at 115, 133 (point 5), US0027948, at 28062, 28080l; <i>see also</i> U.S. Mem. 10 at ¶ 44-45.</p>	<p><u>Response to the United States:</u> The United States offers no basis for disputing these facts, and seeks to press a separate legal argument.</p>
34	<p>Filiberto Cortez, El Paso Field Division manager for Reclamation, testified that Reclamation has only made one communication to New Mexico that notified New Mexico of concerns regarding water use in New Mexico potentially impacting Project deliveries.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 111:13-112:10.</p>	<p>Subject to the stated objections, disputed.</p> <p>EX-202: Cited “evidence” does not support the proposition;</p> <p>New Mexico has been on notice about the effect of its pumping on Texas’s apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371,</p>	<p>Not disputed.</p>	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the facts stated, but seeks to press a separate legal argument.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p>		
35	<p>Specifically, in April 2012, Reclamation informed the New Mexico Office of the State Engineer that the Districts and Reclamation had identified a number of river pumps that were "impacting the deliveries" from the Rio Grande Project to EPCWID and Mexico.</p> <p><i>See</i> NM-EX 521, Email from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Rolf Schmidt-Peterson, Rio Grande Bureau Basin Manager, N.M. Interstate Stream Comm'n (Apr. 11, 2012).</p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press separate legal arguments.</p>
36	<p>The New Mexico State Engineer performed an investigation of the water pumps at issue and responded on September 21, 2012. The investigation concluded that all but two of the sites were operating in compliance with adjudicated water rights that are senior to the Project's or approved groundwater withdrawal permits. With</p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press separate legal arguments.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p>regard to the remaining two sites, the investigation concluded that the pumps in question were no longer operable, and it was not possible to determine if any diversion occurred at either site.</p> <p><i>See</i> NM-EX 523, Letter from Scott A. Verhines, State Engineer, State of N.M., to Ed Drusina, Comm'r, Int'l Boundary and Water Comm'n, and Mike Hamman, Albuquerque AreaManager, U.S. Bureau of Reclamation (Sept. 21, 2012).</p>	<p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p>		
37	<p>The New Mexico State Engineer further invited Reclamation to "continue to notify" the State of any "potential unlawful diversions" so that the State Engineer could "initiate appropriate water administration actions, if necessary, to prevent the unlawful diversion of water."</p> <p><i>Id.</i></p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press separate legal arguments.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		Texas's apportionment.		
38	<p>Following this invitation, Reclamation made no further reports to the New Mexico State Engineer concerning improper surface water diversions.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 119:7-120:9.</p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p> <p>NM-EX 202: cited evidence does not support the proposition.</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press separate legal arguments.</p>
39	Other than this surface pump investigation, Reclamation has not requested that New Mexico investigate or curtail any illegal water use, whether surface or groundwater.	<p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
	<p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 113:11-18.</p>	<p>least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p> <p>NM-EX 202: cited evidence does not support the proposition.</p>		<p>stated, but seeks to press separate legal arguments.</p>
40	<p>Further, Reclamation has not informed New Mexico that it was unable in any year to deliver Project water that Texas (EPCWID) ordered due to the actions of New Mexico water users.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 114:23-115:7. NM-EX 002, D'Antonio Decl. ¶ 19.</p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal</p>	<p>Disputed. At minimum, the filing of the United States' Complaint in this proceeding provides notice to New Mexico of its violation of the Rio Grande Compact. Lopez 30b6 Tr. 69:20-24; Barroll 30b6 Tr. 47:17-22, 48:10-13; <i>see also</i> U.S. Mem. 20, ¶ 96.</p>	<p>It is not genuinely disputed that Reclamation has not informed New Mexico that it was unable in any year to deliver Project water that Texas (EPCWID) ordered due to the actions of New Mexico water users.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, but seeks to press separate legal arguments.</p> <p><u>Response to the United States:</u> The United States does not dispute the accuracy of the fact stated, but</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		<p>notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p> <p>NM-EX 202: cited evidence does not support the proposition.</p>		<p>claims that since "the filing of the United States' Complaint in this proceeding" the United States has provided "notice to New Mexico" that New Mexico is (allegedly) violating "the Rio Grande Compact." With its objection, the United States provides no factual support for this claim.</p>
41	<p>Likewise, Texas has not, through the Rio Grande Compact Commission, provided any notification that Texas's Project deliveries were shorted in any year.</p> <p><i>See</i> NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020) 192:10-193:2. NM-EX 002, D'Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 17.</p>	<p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p>	Not disputed.	<p>There is no genuine dispute as to this fact.</p> <p><u>Response to Texas:</u> Texas does not dispute the accuracy of the fact stated, and seeks to press separate legal arguments. New Mexico has responded to Texas's reference to the deposition testimony of Schmidt-Peterson in New Mexico's Notice Reply Brief.</p>

State of New Mexico's Reply to Statement of Facts: Notice Motion

	New Mexico's Notice Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Notice Motion UMFs (12-22-2020)	United States' Response to New Mexico's Notice Motion UMFs (12-22-2020)	New Mexico's Response / Final Disposition of Facts
		Schmidt-Peterson Depo. 6/29/2020, 41:20-25 ¹¹ _{SEP} ("I mean, the first day I showed up on the job, which was in December of 1999, Joe G. Hanson, the then Compact commissioner, stood up and said, you know, deliver or we'll sue. And that's just kind of a constant refrain in the entire time that I've been there no matter what the supply is.")		

SECTION III
NEW MEXICO FULL SUPPLY MOTION FACTS

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	New Mexico's Full Supply Motion UMFs (11-5-2020)	Texas's Response to New Mexico's Full Supply Motion UMFs	United States' Challenge to New Mexico's Full Supply Motion UMFs	New Mexico's Response / Final Disposition of Fact
1	The Court has already found, in this case, that “the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” and that the “purpose” of the Compact “to effect an equitable apportionment of the waters of the Rio Grande between the affected States” can only be achieved because “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 <i>and part of New Mexico</i> is, in fact, made.” <i>Texas v. New Mexico et al.</i> , 138 S. Ct. 954, 959 (2018) (internal quotations and citations omitted) (emphasis added); <i>see also</i> NM-EX 003, Declaration of E. Lopez [hereinafter “Lopez Decl.”], ¶ 14, 27.	Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be considered in the context of the parties’ legal arguments. New Mexico’s statement also mischaracterizes the Court’s opinion. NM-EX-003 does not support the statement.	Not disputed , provided that “found” does not imply a finding of fact.	There is no dispute that the United States Supreme Court stated that “the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” that the “purpose” of the Compact is “to effect an equitable apportionment of the waters of the Rio Grande between the affected States” and that “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.”
2	In the Downstream Contracts, and in particular in the 1938 Downstream Contract, “the federal government promised to supply” Project water to the New Mexico water district Elephant Butte Irrigation District (“EBID”) and to the Texas water district EPCWID (collectively, the “Districts”) in accordance with their irrigable acres within the Project—“roughly	Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be considered in the context of the parties’ legal arguments.	Disputed. In the 1937 contract with EBID (NM-EX 320), and the 1937 contract with EPCWID (NM-EX 321), the United States agreed to supply water from the Project to each district. The 1938 contract (NM-EX 324) was an agreement between EBID and EPCWID, approved by the Assistant	Texas and the United States do not dispute the accuracy of the quotations from the Court’s opinion.

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	57% for New Mexico and 43% for Texas.” <i>Texas v. New Mexico et al.</i> , 138 S. Ct. at 957.	New Mexico’s statement also mischaracterizes the Court’s opinion.	Secretary of the Interior. It established for the first time the number of irrigable acres in each district, approximately 67,000 acres in EPCWID and approximately 88,000 acres in EBID. <i>Id.</i> The contract also 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 the proportion of 67/155 to the lands within [EPCWID] and 88/155 to the lands within [EBID].” <i>Id.</i> The contract thus provides for a proportionate division only in shortage years, and only “so far as practicable.” It does not reflect “a promise by the United States to supply Project water to the districts “in accordance with their irrigable acres within the Project.,” as New Mexico contends.	
3	The Project is operated by the United States Bureau of Reclamation (“Reclamation”). The operations of the Project include the allocation and delivery of Project water stored in Elephant Butte and Caballo reservoirs to the Districts and to Mexico. NM-EX 001, Declaration of P. Barroll [hereinafter “Barroll Decl.”], ¶ 14; NM-EX 003, Lopez Decl., ¶ 19;	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico’s Reply to Statement of Facts: Full Supply Motion

	<p><i>see also e.g.</i>, NM-EX 529, Bureau of Rec., Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas: Final Environmental Impact Statement [hereinafter “FEIS”] at 3–4 (Sep. 30, 2016).</p>			
4	<p>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; NM-EX 529, FEIS at 3–4.</p>	<p>Subject to the stated objections, disputed. The definition of “Project supply” for purposes of the Compact is a legal conclusion, not an undisputed fact. The definition of “Project supply” is a Compact-related question that is outside Dr. Barroll’s area of expertise. NM-EX-529 does not support declarant’s definition.</p>	<p>Disputed. New Mexico’s proposal to define “Project supply” in a particular way for purposes of litigation is not a statement of fact. New Mexico may define “Project supply” however it chooses for purposes of litigation, unless it is intending to capture the definition used in a particular document. The United States has characterized the water supply available to the Project in various ways over time. <i>See, e.g.</i>, NM-EX-510, 2008 Operating Agreement 2, NM-EX 510 (defining “Project water” as including “usable water in Project Storage,” “all water required by the Rio Grande Compact to be delivered into Elephant Butte Reservoir,” and “all water released from Project storage and all inflows reaching the bed of the Rio Grande between Caballo Dam and Fort Quitman, Texas.”); NM-EX-400, Allocation Procedures, at 9 (attachment to Water Supply Allocation Procedures defining</p>	<p>This fact is undisputed.</p> <p>Texas and the United States do not dispute the sources of water that constitute the supplies relied on by the Rio Grande Project. Their objections to New Mexico defining the term “Project Supply” to encompass these sources does not indicate any material factual dispute.</p>

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

			“Project Water Supply” as “stored water legally available for release from Elephant Butte and Caballo Reservoirs and including the legally appropriated waters reaching the bed of the Rio Grande between Caballo Dam and Riverside Diversion Dam.”).	
5	The Compact provides that “a normal release ... from Project Storage” is 790,000 acre-feet (“AF”). NM-EX 001, Barroll Decl., ¶ 16; NM-EX 330, Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785 [hereinafter “Compact”], art. VIII; <i>see also</i> NM-EX 529, FEIS at 17 (describing a full allocation release to be 790,000 acre-feet per year (“AFY”) as provided in the Compact).	Subject to the stated objections, disputed in part. Texas does not dispute that the quoted language is contained in Article VIII of the Compact. The precise meaning of Article VIII is a legal conclusion. The 790,000 acre-feet release was to serve Project lands in New Mexico and Texas, the 1906 Mexican treaty obligation, and non-Project lands in Texas down to Ft. Quitman, ca. 1938. Miltenberger Declaration paragraphs 29-38 discuss this. TX_MSJ_001585. Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 25, 49 - 51.	Disputed. The United States does not dispute that Article VIII of the Compact refers to a “normal release of 790,000 acre-feet.” The United States disputes the characterization of the FEIS in the parenthetical. The FEIS states that 790,000 acre feet “is specified as the normal release in the Rio Grande Compact.” NM-EX-529, FEIS at 17. It does not state that the Compact characterizes it as a “full” release.	This fact is undisputed. <u>Response to Texas:</u> Texas disputes only the legal implications of the fact, which New Mexico does not address here. <u>Response to the United States:</u> The United States disputes only New Mexico’s use of the word “full” in characterizing the discussion in NM-EX 529.
6	The Compact defines “Project Storage” as “the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project”; and “Usable Water” as “all water exclusive of credit water,	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.” NM-EX 001, Barroll Decl., ¶ 17; NM-EX 003, Lopez Decl., ¶ 12; NM-EX 330, Compact, arts. I (k), (l).			
7	Project Allocations are the amount of Project supply each District (EBID and EPCWID) is entitled to order (take) from the Project, each year, and the amount Mexico is entitled to receive by Treaty. NM-EX 001, Barroll Decl., ¶ 18; NM-EX 003, Lopez Decl., ¶ 23; NM-EX 307, Convention between the United States and Mexico: Equitable Distribution of the Waters of the Rio Grande [hereinafter “Treaty”] (May 21, 1906); NM-EX 529, FEIS at 4.	Subject to the stated objections, disputed in part. The cited evidence does not support the stated “facts” in whole and/or in part. Fed. R. Civ. P. 56(c).	Disputed. New Mexico’s proposal to define “Project Allocations” in a particular way for purposes of litigation is not a statement of fact. New Mexico may define “Project Allocations” however it chooses for purposes of litigation, unless it is intending to capture the definition used in a particular document. The United States disputes the definition because “entitled” is ambiguous and apparently reflects a conclusion of law. Reclamation uses the term “diversion allocation.” As stated in the FEIS, “Reclamation allocates RGP water supplies such that the diversion allocations to EBID and EPCWID are proportionate to each district’s respective acreages.” NMEX529 FEIS, at 25 (pdf page). The FEIS continues, “[t]he annual diversion allocation is the quantity of RGP water that is allocated each year for delivery to EBID, EPCWID, and Mexico at their respective diversion	This fact is undisputed. <u>Response to Texas:</u> Texas states that the cited evidence does not support the stated fact, but does not explain why. It also identifies no material dispute with this fact. <u>Response to the United States:</u> The United States objects to the wording New Mexico used, but the passages it quotes confirm the fact as presented.

State of New Mexico’s Reply to Statement of Facts: Full Supply Motion

			headings.” <i>Id.</i> By treaty, Mexico receives 60,000 acre feet per year, except in cases of extraordinary drought or serious accident to the irrigation system, whereby the amount delivered shall be diminished in the same proportion as the water delivered to lands in the United States. NM-EX-307, Convention between the United States and Mexico: Equitable Distribution of the Waters of the Rio Grande [hereinafter “Treaty”] (May 21, 1906).	
8	On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938. NM-EX 324, Contract between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 [hereinafter “1938 Downstream Contract”] (Feb. 16, 1938). The 1938 Downstream Contract states that in the event of a shortage of water “the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].” <i>Id.</i> ; NM-EX 001, Barroll Decl., ¶ 19;	Subject to the stated objections, disputed in part. The second paragraph correctly quotes from the 1938 Downstream Contract but in the absence of an understanding of the context and purpose, the paragraph is misleading. NM-EX-324. Congress authorized the execution of amended repayment contracts with EBID and EPCWID (or EP #1) in 1937, but it did not authorize the 1938 contract as such. The 1938 Downstream Contract was instead part of an effort by Reclamation, extending back to 1929, to fix the basis for repayments between the two districts. The districts themselves ultimately instigated this particular agreement to settle the issue. Miltenberger Declaration paragraphs 43-45	Not disputed.	This fact is undisputed. <u>Response to Texas:</u> Texas does not dispute the accuracy of the quotations, but seeks to press arguments concerning the legal implication of the fact to manufacture a factual dispute.

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	NM-EX 003, Lopez Decl. ¶¶ 20–22.	discuss the 1937 and 1938 Downstream Contracts; the context and purpose of the 1938 Downstream Contract is addressed in more detail in the paragraphs cited below. TX MSJ 001585.		
9	Until about 1979, Reclamation delivered Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings. Reclamation ditch riders then delivered the ordered water to individual farms. NM-EX 001, Barroll Decl., ¶ 20; NM-EX 003, Lopez Decl., ¶¶ 24-25; NM-EX 529, FEIS at 5.	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.
10	In about 1979, Project operations changed, and Reclamation started to allocate water to each District for delivery at the Districts' canal headings (<i>i.e.</i> , Arrey, Leasburg, Mesilla, Franklin, and Riverside). Reclamation now determines the Districts' Project allocations, takes water orders from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for each District. The Districts in turn	Subject to the stated objections, undisputed.	Not disputed.	This fact is undisputed.

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	take farm orders from their members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates. NM-EX 001, Barroll Decl., ¶ 21; NM-EX 003, Lopez Decl., ¶ 26; NM-EX 529, FEIS at 5.			
11	<p>(a) Starting in about 1990, Reclamation determined that a release of 763,842 AFY from Project Storage was a full-supply condition. <i>See, e.g.</i>, NM-EX 105, Excerpts, United States' Disclosure of Expert Rebuttal Witness Dr. Ian M. Ferguson (Dec. 30, 2019) [hereinafter "Ferguson Discl."] at 8 ("Prior to the [2008 Operating Agreement], full supply was defined by Usable Water available for the current-year allocation equal to or greater than 763,800 acre-feet"); NM-EX 104, Excerpts, United States' Disclosure of Rebuttal Expert Dr. Al Blair (Dec. 30, 2019) [hereinafter "Blair Discl."] at 8 (stating that prior to 2008 Operating Agreement a maximum annual release for a full-supply year was 763,840 AF).</p> <p>(b) Reclamation determined that this release from Project Storage would provide 931,841 AFY of divertible water at U.S. and Mexico canal headings. NM-EX</p>	Subject to the stated objections, disputed in part. In NM-EX 001, the statement that "Reclamation will ensure" the allocation is available for diversion is not supported by citations NM-EX-400 or NM-EX-529.	(a) Disputed. "Full supply" as used in the cited sources refers to what was considered to be the maximum release for purposes of calculating diversion allocations. That maximum was derived from storage and diversion records from 1951-1978. The Water Supply Allocation Procedures incorporate the assessment of "normal supply" in a 1956 memorandum setting forth how Reclamation would allocate water as between the Districts and Mexico in years of shortage. 1956 Memo, US0171657 at US01716560. The "normal" supply calculated to be 3.024 acre-feet/acre in the 1956 memo may therefore reflect to some extent the influence of groundwater pumping. The Allocation Procedures, in turn, use the 3.024 af/ac number to characterize 931KAF as a full supply, and reservoir release of 764KAF as the amount associated with a full supply	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas identifies no material dispute with this fact, but instead asserts that the statement that "Reclamation will ensure" delivery of a district's allocation is not supported by the citations given. This is incorrect. Moreover, the United States indicates it does not dispute UMF No. 15, below, which explains how Reclamation ensures delivery of a district's allocation.</p> <p><u>Response to the United States:</u></p> <p>(a) The United States' assertion that the definition of a "normal supply" was not calculated until 1956 is misleading and is refuted by the document the United States cites. The 1956 memorandum the United States cites clearly indicates it is a summary of procedures that Reclamation was already applying to determine Project allocations. 1956 Memo at US0171657. In particular, it indicates that the assessment of a "normal supply" is based on Project deliveries for the years 1946-1950, when minimal groundwater</p>

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

<p>001, Barroll Decl., ¶ 22; NM-EX 400, Bureau of Rec., Rio Grande Project Water Supply Allocation Procedures [hereinafter “WSAP”] at 4.</p> <p>(c) According to Project allocation procedures at that time, from this 931,841 AFY, 60,000 AFY was deducted for delivery to Mexico.</p> <p>(d) Reclamation then divided the remaining 871,841 AFY, 43% (376,862 AFY) to EPCWID and 57% (494,979 AFY) to EBID in accordance with the percentages set out in the 1938 Downstream Contract. NM-EX 001, Barroll Decl., ¶ 22; NM-EX 400, WSAP at 4–5; NM-EX 324, 1938 Downstream Contract.</p> <p>(e) The 376,842 AFY quantity represents a full-supply Project allocation to EPCWID that Reclamation will ensure is available for diversions at EPCWID’s headgates if EPCWID orders (takes) this volume of water. NM-EX 001, Barroll Decl., ¶ 23; NM-EX 400, WSAP at 4–5; <i>see also</i> NM-EX 529, FEIS at 86 (referring to “[t]he historical full [EPCWID] allocation of 376,842 acre-feet”).</p>		<p>year. NM-EX 400 at 9- 12. Therefore characterizing any particular amount in storage, or any particular release from storage, as “full” supply is misleading.</p> <p>(b) Not disputed.</p> <p>(c) Not disputed.</p> <p>(d) Disputed. The Water Supply Allocation Procedures document does not link the 57%-43% division of water between EBID and EPCWID to the 1938 Contract. NM-EX-400, Allocation Procedures, at 4.</p> <p>(e) Not disputed, provided that “full-supply Project allocation” is a characterization of the Water Supply Allocation Procedures calculation, and not an attempt to characterize actual physical conditions or the apportionment effected by the Compact. The allocations to the districts under Allocation Procedures were based on the “D2 Curve,” a regression analysis of delivery data from the period 1951-1978, when groundwater pumping had already been established within EBID. <i>See</i> NM-EX-400, Allocation Procedures, at 9-14. The D2 thus reflects the effects</p>	<p>pumping was occurring. <i>Id.</i> US0171657-58, US0171660.</p> <p>The United States has also previously admitted, in response to discovery propounded by New Mexico, that, from “1950 to 1980, a full annual allocation to Project lands was 3.024 AF/acre to each acre of authorized Project land under irrigation.” U.S. Resp. N.M. Interrog. 13. From 1981 1990, “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).” <i>Id.</i> From 1991 to 2007, “a full annual allocation to the U.S. canal headings was 871,841 AF (494,979 AF to EBID; 376,862 to EPCWID).” <i>Id.</i></p> <p>(b) The United States does not dispute this fact.</p> <p>(c) The United States does not dispute this fact.</p> <p>(d) The United States does not identify a material dispute with the fact that Reclamation divided the Project allocation, after deducting deliveries to Mexico, 43% to EPCWID and 57% to EBID.</p> <p>(e) The United States does not dispute this fact. In attempting to “clarify” this fact, however, the United States misrepresents the nature of D2. D2 is not used to determine the amount of a full-supply</p>
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State of New Mexico's Reply to Statement of Facts: Full Supply Motion

			of this “significant” amount of pumping. NM-EX-100, Barroll Oct. 2019 Rep. 35. Allocations based on the D2 Curve do not represent the maximum allocations that would have been possible in the absence of groundwater pumping.	allocation. It is used only to determine how much water the Project needs to release to deliver the full-supply allocation to each district’s river headgates. NM-EX 527, FEIS, at E-14.
12	<p>(a) Between 1985 and 1990, before Reclamation had finalized the analysis described above, Reclamation’s full-supply year determinations for EPCWID varied slightly from 376,842 AFY. For example, from 1985 through 1988, Reclamation determined a full-supply year Project allocation to EPCWID to be 363,963 AFY; and in 1989 and 1990, Reclamation determined a full-supply year Project allocation to EPCWID to be 359,165 AFY.</p> <p>(b) These were hydrologically wet years with plenty of water in Project Storage and full-supply allocations were available to both Districts (EBID and EPCWID). NM-EX 001, Barroll Decl., ¶ 24; NM-EX 509, Bureau of Reclamation Table, Rio Grande Project Allocation of Project Water Supply (Apr. 3, 2008) (“Reclamation Data Table”) at col. 2.</p>	<p>Subject to the stated objections, disputed. In NM-EX-001, the quantifications about EP#1 allocations are not supported and the citation to NM-EX-509 does not show allocations to each district.</p> <p>Additionally, <i>see</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p>	<p>[a] Disputed. The BOR data table, dated 2008, designates certain years as years of “full supply irrigation” and shows the total amounts in storage and the allocations to the two districts and Mexico combined. The table does not reflect “full supply determinations for EPCWID.” Dr. Barroll’s calculations appear to be based on taking the reported total allocation (902,000 af in 1985-1988, e.g.), subtracting 60,000 af for Mexico (yielding 842,000 af, e.g.), then multiplying the remainder by 88/155 (resulting in 363,963 af, e.g.). That is Dr. Barroll’s calculation. It does not show a “determination” by Reclamation.</p> <p>[b] Disputed. The terms “hydrologically wet” and “plenty of water” are statements of opinion and are ambiguous when presented as facts. Because of that ambiguity, the statement as a whole is disputed. The United States notes that the Compact defines “Project</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> The sources New Mexico cites clearly indicate the Project enjoyed full-supply allocations in the years indicated. Texas’s citation to the Brandes Declaration, TX_MSJ_007312, does not support Texas’s assertion that this fact is disputed. In Paragraph 8 of the Brandes Declaration, Texas witness Dr. Brandes states, “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>I generally agree</i>; however, based on annual allocations presented in the Barroll Report, the allocation for the year 2007 was less (by about 23,000 acre-feet) than the full supply allocation for the El Paso County Water Improvement District No. 1 (EP#1) as determined from the Bureau of Reclamation’s D2 Curve.” TX_MSJ_007312 (emphasis added).</p> <p>Dr. Brandes’s opinion concerning 2007 is addressed in Fact No. 17, below. For the years indicated here, Dr. Brandes identifies no dispute.</p>

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

			storage” by reference to a maximum of around 2.6 million acre-feet (“af”), and that beginning-of-year Project storage in the years 1985 to 1988 ranged from 1.8 million af to 2.4 million af, approximately. The United States also notes that spring run-off in 1988, 1989, and 1990 was also much lower than the run-off in 1985, 1986, and 1990. Reclamation characterized these years on the 2008 data table as “full supply irrigation years” based on the allocation procedures developed in 1990.	<u>Response to the United States:</u> The United States identifies no material dispute with this fact. It merely disputes the characterization that the sources cited confirm Reclamation made certain calculations, as opposed to Dr. Barroll. It identifies no dispute with the calculations. As for whether the years in question were hydrologically wet years, the data the United States lists here confirms that the Project had ample supplies of water in storage, more than enough to make the undisputed full-supply allocations identified in each of these years.
13	<p>(a) From 2006 onwards, Reclamation has determined annual Project allocations to the Districts under the 2008 Operating Agreement, and the antecedent D3-Allocation-Plus-Carryover method from which the 2008 Operating Agreement was developed. NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, Operating Agreement for the Rio Grande Project [hereinafter “2008 Operating Agreement”] (Mar. 10, 2008); NM-EX 502, D3 Allocation of Project Water to the Districts and Mexico; NM-EX 507, 2007 Operating Procedures.</p> <p>(b, footnote) Under the post-2006 allocation system, EPCWID was allocated far more Project Water than the share due its 67,000 of</p>	<p>Subject to the stated objections, disputed.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p>	<p>(a) Not disputed, with qualification. The “D3-Allocation-Plus-Carryover method” is Dr. Barroll’s characterization of the allocation method used in the 2008 Operating Agreement, based on a document generated by EBID that refers to a “D3 Allocation Method.” The Operating Agreement does not use the terms “D3” or “D3-Allocation-Plus-Carryover method.”</p> <p>[b, Footnote] Disputed. The term “share” and the phrase “share due” are ambiguous and appears to reflect conclusions of law. The Operating Agreement determines the diversion allocation to each district consistent with the 67/155 and</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas does not specify which portions of this fact it disputes, other than to refer generally to the Brandes Declaration, TX_MSJ_007312, paragraphs 1-24. None of the paragraphs Texas cites contradicts this fact as stated by New Mexico.</p> <p><u>Response to the United States:</u> The United States does not dispute what it denotes as parts (a) and (c) of this fact. The United States disputes the footnote, part (b). New Mexico disagrees with the United States’ characterization of allocations to EPCWID under the 2008 Operating Agreement, but the fact laid out in the footnote flagged as part (b) provides context only and is not essential to New Mexico’s Motion.</p>

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	<p>155,000 Project irrigable acres (43%), and received far more than its 43% share of Project Water. NM-EX 001, Barroll Decl., ¶ 36; <i>see also</i> NM-EX 100, P. Barroll Expert Report (Oct. 31, 2019), at x-xi, 31, 33, 69.</p> <p>(c) Under the 2008 Operating Agreement, Reclamation determines a full-supply year Project allocation to EPCWID to be 388,192 AFY. NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, 2008 Operating Agreement at 3; <i>see, e.g.</i>, NM-EX 105, Ferguson Discl. at 8 (“[U]nder the [2008 Operating Agreement], full supply conditions are defined by Usable Water available for the current-year allocation equal to or greater than 790,000 acre-feet.”); NM-EX 104, Blair Discl. at 8 (stating that prior to the 2008 Operating Agreement, a maximum annual release for a full-supply year was 763,840 AF).</p>		<p>88/155 proportions of irrigated acreage. EPCWID continues to be allocated 67/155 of the amount available for allocation. NM-EX-510, Operating Agreement, at US0108802. Under the agreement, EBID voluntarily cedes—i.e., agrees not to order--some of the amount it was allocated, to compensate for the effects of groundwater pumping on Project deliveries. <i>Id.</i> at US0108799; U.S. Mem.15 & nn.71.</p> <p>[c] Not disputed, provided that “full-supply year Project allocation” is a characterization of the Operating Agreement calculation and not the Compact.</p>	
14	<p>During each irrigation season (approximately March through October), each District is entitled to order delivery of Project Water up to its annual Project allocation. Deliveries to the Districts are measured by gages and are converted into what are known as “Charged Diversions” (Allocation Charges), which are then subtracted from each</p>	<p>Subject to the stated objections, undisputed.</p>	<p>Not disputed, provided that “entitled to order” is a characterization of the Operating Agreement.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	District's allocation account as the irrigation season progresses. NM-EX 001, Barroll Decl., ¶¶ 21, 26; NM-EX 510, 2008 Operating Agreement at 9–11; NM-EX 529, FEIS at 18, 24, App. B.			
15	<p>(a) During the course of the irrigation season, Reclamation receives orders from the Districts and adjusts the gates of Caballo Dam so that these orders are delivered to the Districts' canal headings. <i>See</i> NM-EX 531, Rio Grande Project Operations Manual at 4-5 (2018) [hereinafter "Operations Manual"]. Reclamation sets the Caballo release amount taking into account the losses and gains between Caballo Dam and the canal headings to which it is delivering water, so that regardless of what losses or gains are occurring, the amount ordered will reach the canal heading for which the order is being made. NM-EX 531, Operations Manual at 4–8. If the delivery to EPCWID falls short of the order, there is a procedure by which EPCWID, EBID and Reclamation coordinate and water is released from EBID's works to temporarily mitigate the shortfall until adjustment of Caballo releases resolves the problem. NM-EX 001, Barroll Decl., ¶ 27; NM-EX 531, Operations Manual, at</p>	<p>Subject to the stated objections, disputed in part. Dr. Barroll cites Dr. Ferguson as her only source for her statement that "Historically, Reclamation has always been able to fulfill the orders made by the Districts." She has insufficient personal knowledge to assert this opinion for purposes of Rule 56 summary judgment, and at trial she would lack qualification to offer this opinion as an expert under Fed. R. Evid. 702(a), and it would additionally be based on insufficient facts and data under Fed. R. Evid. 702(a).</p>	<p>[a] Not disputed, provided that "[h]istorically" refers to 1979 to present.</p> <p>[b] Not disputed.</p>	<p>This fact is undisputed.</p>

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

<p>8. Historically, Reclamation has always been able to fulfill the orders made by the Districts. NM-EX 001, Barroll Decl., ¶ 27; <i>see also</i> NM-EX 105, Ferguson Discl. at 12–13 (“EPCWID received all water that the district ordered during the period 1979–2002”); NM-EX 210, Deposition of Dr. Ian M. Ferguson, Vol. 2 (Feb. 20, 2020) [hereinafter “Ferguson Dep. Vol. 2”] at 260:6–7 (“I’m not aware of any records that suggest EP1 [EPCWID] ordered water that it did not receive.”).</p> <p>(b) Dr. Ferguson is a Hydrologic Engineer for Reclamation, and since June 2011 Dr. Ferguson has provided technical support to Reclamation’s Albuquerque Area Office on issues related to the Rio Grande Project. NM-EX 209, Deposition of Dr. Ian M. Ferguson, Vol. 1 (Feb. 19, 2020) [hereinafter “Ferguson Dep. Vol. 1”] at 13:4–19 (stating that he joined Reclamation in April 2001 as a hydrologic engineer and is currently a hydrologic engineer at Reclamation); <i>id.</i> at 44:6–16 (stating that he provided technical support for Reclamation’s Albuquerque-area office on issues relating to the Rio Grande project).</p>			
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State of New Mexico's Reply to Statement of Facts: Full Supply Motion

16	<p>(a) Reclamation recognizes the years 1985 through 2002 and 2005 as full supply years for the Project, and also recognizes those years as <i>full-supply years for EPCWID</i>, meaning that in each of those years Reclamation determined that a full allocation of Project water was available for diversions at EPCWID's headgates if ordered. NM-EX 001, Barroll Decl., ¶¶ 28–30, 32–33, 37 & Table 1; <i>see also</i> NM-EX 402, EPCWID Accounting Records [EOY_Acct_EP_1985-2016]; NM-EX 509, Reclamation Data Table; NM-EX 202, Deposition of Filiberto Cortez, Vol. 1 (Jul. 30, 2020) [hereinafter “Cortez Dep. Vol. 1”] at 82:16-83:2, 91:1-8, 92:19-93:7) (stating that 1979 through 2002 were “full supply” years, that a full Project supply allocation is the maximum amount that Reclamation will allocate, and that “[a] full supply is the allocation made to the district based on historical data” about irrigation demands); NM-EX 210, Ferguson Dep. Vol. 2 at 229:15-18 (“[F]rom about 1985 or ’6, through about 2002 . . . I know to be years of full project supply.”), 233:1-3 (agreeing that “there’s full supply from 1979 to 2002”); and 259:12-16 (agreeing that “[t]he project enjoyed full supply conditions from 1979 through 2002, and</p>	<p>Subject to the stated objections, disputed.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p>	<p>(a) Not disputed, with qualification. New Mexico’s statement that “Reclamation recognizes” particular years as “full supply” years is based on the testimony of Filiberto Cortez, who was deposed in his capacity as a fact witness for Reclamation, not a witness designated on behalf of Reclamation pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The United States does not dispute the statement if the phrase “for purposes of Reclamation’s allocation procedures” is inserted after “full supply years for the Project.” As noted in response to Statement No. 11, the “full supply” and “full Project allocation” under the Allocation Procedures and Operating Agreement do not reflect the maximum supply or maximum allocation that would have been possible in the absence of groundwater pumping.</p> <p>[b, footnote (Cortez)]. Not disputed.</p> <p>[c, footnote (Settemeyer)]. Not disputed.</p> <p>[d, footnote (King)]. Not disputed.</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> Texas’s supposed “dispute” with this fact is contradicted by the declaration it cites. Specifically, Dr. Brandes admits in paragraph 8 of his declaration that his “generally agrees” these are years of full supply. TX_MSJ_007312. Dr. Brandes’s only dispute is with 2007, which is addressed in the next fact. <i>Id.</i></p> <p><u>Response to the United States:</u> While the United States does not dispute this fact, it also improperly characterizes New Mexico’s only support for this assertion as Filiberto Cortez’s deposition testimony, when New Mexico clearly cites multiple sources to support this fact. The United States’ responses to New Mexico’s Interrogatories also support this fact. Therein, the United States admitted these were full supply years for the Project. U.S. Resp. N.M. Interrog. No. 14.</p>
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State of New Mexico's Reply to Statement of Facts: Full Supply Motion

<p>EPCWID was allocated a full supply in each year”); NM-EX 412, Herman R. Settemeyer, P.E., Rio Grande Project/Rio Grande Compact Operation [hereinafter “Settemeyer Presentation”] at G-4 (2004) (presenting that “Rio Grande Project water users enjoyed full allocations of water from 1979 until 2003”); <i>see also</i> NM-EX 214, Excerpts, Deposition of J. Phillip King, Vol. 1 (May 18, 2020) [hereinafter “King Dep. Vol. I”] at 102:19-23 (confirming that a full supply “is the amount of water that Reclamation allocated to each district from 1979 to 2002, when each year was a full-supply” and that in each of those years “[t]here was a full supply available for release from storage”).</p> <p>(b) Mr. Cortez is the former manager of Reclamation’s El Paso office, which previously managed the water supply for the Rio Grande Project. NM-EX 202, Cortez Dep. Vol. 1 at 24:5-18 (stating that starting in 2007 he was the manager for the [Reclamation] El Paso Field Division, which is “the office which operated the Rio Grande Project at that time ... That involved the management of the reservoirs ... dealings with the irrigation districts, water deliveries, making the allocation,</p>			
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State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	<p>anything having to do with the Rio Grande Project”); <i>see also id.</i> at 10:25-11:2 (explaining that currently he is “the special assistant to the [Reclamation] Albuquerque office area manager”).</p> <p>(c) Mr. Settemeyer is the former Texas Engineer Advisor to the Rio Grande Compact Commission. NM-EX 225, Deposition of Herman Settemeyer, Vol. 1 (Jul. 30, 2020) at 29:13-18, 29:25-31:3 (stating that he started working on interstate compacts in 1987; “I was the engineer Advisor for the ... Rio Grande [Compact]”).</p> <p>(d) Dr. King has been identified as an expert witness for the State of Texas and for the United States in this case. <i>See</i> NM-EX 214, King Dep. Vol. 1 at 44:10-14; 21:10-16 (stating that he considers himself an expert in “[i]rrigation and draining engineering and management, irrigation system operation, engineering hydrology, and statistical hydrology”).</p>			
17	<p>The years 2007 through 2010 were also full-supply years for EPCWID because in each of those years EPCWID’s annual allocation available for diversions at EPCWID’s headgates (if ordered) exceeded 376,862 AFY—the full-supply allocation amount</p>	<p>Subject to the stated objections, disputed.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p>	<p>RESPONSE: Not disputed, provided that “for purposes of Reclamation’s allocation procedures” is inserted after “full-supply years.” As noted in response to Statement Nos. 11 and 16, the “full supply” and “full supply allocation” under</p>	<p>This fact is undisputed.</p> <p><u>Response to Texas:</u> In Paragraph 8 of the Brandes Declaration, TX_MSJ_007312, Texas witness Dr. Brandes states, “I have reviewed Project allocations for the years 1985-2002, 2005 and 2007-2010 (Subject Years) identified by New Mexico as “full</p>

State of New Mexico's Reply to Statement of Facts: Full Supply Motion

	<p>determined by Reclamation in 1990—and also exceeded the higher full-supply allocation to EPCWID (388,192 AFY) under the 2008 Operating Agreement. NM-EX 001, Barroll Decl., ¶¶ 28, 31, 34-37 & Table 2; NM-EX 402, EPCWID Accounting Records; NM-EX 500, EPCWID Water Allocation Records (2006-2016); NM-EX 510, 2008 Operating Agreement, Tables 2 & 4.</p>		<p>the Operating Agreement do not reflect the maximum supply or maximum allocation that would have been possible in the absence of groundwater pumping.</p>	<p>supply” years for the Rio Grande Project. I generally agree; however, based on annual allocations presented in the Barroll Report, the allocation for the year 2007 was less (by about 23,000 acre-feet) than the full supply allocation for the El Paso County Water Improvement District No. 1 (EP#1) as determined from the Bureau of Reclamation’s D2 Curve.”</p> <p>New Mexico witness Dr. Barroll explains why Dr. Brandes is mistaken regarding 2007. NM-EX 014, Barroll 3d Decl. ¶¶ 8-10.</p>
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Respectfully submitted,

/s/ Jeffrey J. Wechsler

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