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

THE STATE OF TEXAS'S REPLY BRIEF IN SUPPORT OF TEXAS'S MOTION FOR PARTIAL SUMMARY JUDGMENT

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I. INTRODUCTION

The State of New Mexico (New Mexico), through its Response to the State of Texas's Motion for Partial Summary Judgment ("Response" or "NM Response") filed on December 22, 2020, failed to meet its burden of proof. As set forth below, and in the State of Texas's (Texas) concurrently filed objections and responses to New Mexico's facts and evidence, New Mexico's Response is substantively and procedurally deficient, largely non-responsive to the issues raised by Texas, and/or otherwise does not establish the presence of any genuine dispute of material facts. Accordingly, the Texas Motion for Partial Summary Judgment ("Texas Motion" or "TX Motion") should be granted in its entirety.[1]

II. NEW MEXICO FAILED TO MEET ITS BURDEN OF PROOF, ENTITLING TEXAS TO PARTIAL SUMMARY JUDGMENT AS A MATTER OF LAW

"[S]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Nebraska v. Wyoming,* 507 U.S. 584, 590 (1993) (citing Fed. R. Civ. P. 56(c))[2]; *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010). Once a properly supported motion for summary judgment is presented, as Texas did herein, the burden shifts to New Mexico, as the non-

[1] At the outset of New Mexico's Response, it accuses Texas of "fail[ing] to follow procedural rules requiring that all asserted facts be set out and enumerated in a summary judgment brief." NM Response at 1. New Mexico's accusation is unfounded, and incorrect, as evidenced by its failure to cite to any rule to support the claim. Instead, New Mexico cited "generally" to Rule 56, which actually supports Texas's procedural *compliance,* since Rule 56 does not require any party to "enumerate" facts in a summary judgment brief. As such, Texas fully complied with all procedural requirements.

[2] The standard for granting summary judgment is now contained in subdivision (a), following 2010 amendments to Rule 56. However, "[t]he standard for granting summary judgment remains unchanged." Fed. R. Civ. P. 56 advisory committee's notes to 2010 amendment.

moving party, who bears the burden of proof to show with " 'significant probative' evidence" that there exists triable issues of fact. *Kansa Reinsurance Co. v. Cong. Mortg. Corp.,* 20 F.3d 1362, 1371 (5th Cir. 1994), citing *In re Mun. Bond Reporting Antitrust Litig.,* 672 F.2d 436, 440 (5th Cir.1982).

In opposition to a motion for summary judgment, New Mexico must present more than "evidence which is merely colorable or is not significantly probative;" rather, New Mexico may only defeat Texas's Motion with "significant probative evidence demonstrating the existence of a triable issue of fact." *Resolution Tr. Corp. v. Murray*, 935 F.2d 89, 92 (5th Cir. 1991) (quoting *Southmark Props. v. Charles House Corp.*, 742 F.2d 862, 877 (5th Cir. 1984)). The "mere existence of an alleged factual dispute will not defeat . . . the motion." *Butts v. Aurora Health Care, Inc*., 387 F.3d 921, 924 (7th Cir. 2004). Instead, New Mexico must present "definite, competent evidence in rebuttal." *Id.*

The substantive and procedural deficiencies that are replete throughout New Mexico's Response render its Response incapable of meeting the threshold burden of proof to defeat the Texas Motion. As discussed below and in Texas's accompanying pleadings and spreadsheets which address the New Mexico facts and evidence with particularity, the "facts" proffered by New Mexico, and the evidence purporting to support the facts, are not "definite, competent" or "significantly probative"—in many cases the facts are not even responsive.[3] As such, the Texas facts remain undisputed and the Texas Motion should be granted.

[3] As is detailed in Texas's accompanying Objections/Reply to New Mexico's Facts/Evidence, New Mexico, in its three Motions for Partial Summary Judgment filed on November 5, 2020, listed 172 alleged undisputed facts (some with multiple subparts). Then, in its December 22, 2020 response briefs to both Texas and the United States, New Mexico adds an additional

A. New Mexico's Improper Focus on Reclamation Law Issues, Which are Not Properly Before this Court, Obfuscates the Resolution of the Compact Dispute

There have been hundreds of pages of briefing filed with the Special Master to date arguing a variety of positions by the parties to this action and by amici. A great many of these pages focus on the Rio Grande Reclamation Project (the "Project") and issues associated with Reclamation law and the operation of the Project. This original action, however, is *not* about Reclamation law and is *not* about the operation of the Project. Rather, it is a case about the 1938 Rio Grande Compact[4] ("1938 Compact" or "Compact"). Arguments that deflect from the Compact unnecessarily confuse the resolution of the Compact dispute which is the only proper subject of this litigation and, by extension, the various motions now before the Special Master.

Texas petitioned to file its Complaint[5] based upon a simple proposition: Texas was apportioned water under the Compact and New Mexico's authorization and permitting of groundwater pumping in New Mexico for use in New Mexico deprived Texas of water apportioned to it under the Compact and therefore violated the Compact. *See* TX Complaint at 4, 18; *see also* First Report at 4-5, 187-88.[6]

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148 alleged undisputed facts, bringing the total to 320 (again, some with multiple subparts). Rather than using the same numbering nomenclature in its latter filing that it used to support its November 5, 2020 Motions for Partial Summary Judgment, for some inexplicable reason, New Mexico combines ("consolidates") all its alleged undisputed facts and creates a wholly new numbering system that does not relate to its original system used to support its motions. Proceeding in this manner has caused Texas and other parties to spend hours trying to sort through and understand exactly which "facts" are relied upon and where they are relied upon. Exhibit A to Texas's Objections/Reply to New Mexico's Facts/Evidence includes columns to sort through all of this and in aid to the Special Master.

[4] Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.

[5] Texas's Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint (TX Complaint) is lodged with the Special Master as Docket No. 63.

[6] First Interim Report of the Special Master, on New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention and Motions of Elephant Butte

In its Motion to Dismiss the Texas Complaint, New Mexico argued that it had no Compact responsibility below Elephant Butte Reservoir because there was no state line delivery requirement in the Compact. This argument was extended to include an assertion that because there was no state line delivery requirement, there was no limit on how much water New Mexico could deplete below Elephant Butte Reservoir through groundwater pumping. *See* First Report at 6-8, 188-89.

Contrary to these assertions by New Mexico, Texas had never argued that there was a Texas-New Mexico state line Compact delivery obligation. *See* First Report at 189-90. Instead, Texas asserted that the Compact delivery obligation was at Elephant Butte Reservoir and that the surface water below the Reservoir had been apportioned to Texas, subject to the Mexico treaty obligations and the Reclamation contract with Elephant Butte Irrigation District (EBID). As EBID stated: "EBID's water supply comes from the Texas apportionment." EBID Brief Regarding Apportionment of Water Below Elephant Butte Reservoir (Jan. 6, 2021) (EBID Brief on Apportionment) at 18; *see also* Declaration of Gehrig "Gary" Lee Esslinger in Support of the EBID Brief on Apportionment at 5, ¶ 14. This position which speaks to the concept of a "Compact Texas" is consistent with the various letters written by Texas Commissioner Clayton which New Mexico is fond of quoting out of context. It is also consistent with the plain language and structure of the Compact.

The first Special Master rejected the New Mexico position and found that the plain language and structure of the Compact required New Mexico to deliver indexed quantities of water to Elephant Butte Reservoir and that once delivered it had no further

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Irrigation District and El Paso County Water Improvement District No. 1 for Leave to Intervene (First Report) (Feb. 9, 2017); *see* First Report lodged with the Special Master as Docket No. 54.

sovereign interest in that water. First Report at 195-98. He further opined that if Texas's allegation that New Mexico had interfered with the flow of surface water to Texas through its groundwater pumping were true, then New Mexico would have violated the Compact and Texas would be injured. *Id.* The Special Master, therefore, recommended that the New Mexico Motion to Dismiss be denied, which the Court did on October 10, 2017. *Texas v. New Mexico*, 138 S. Ct. 349 (2017); *see also* First Report at 197.

In the Supreme Court's 2018 Opinion in this case, *Texas v. New Mexico*, 138 S. Ct. 954 (2018) (2018 Opinion), the issue before the Court was whether the United States could intervene and whether the intervention could expand beyond the Compact issues presented by Texas in its Complaint. The concern was that the Compact issues in the case would be expanded to address Reclamation law issues. This concern had been expressed, ironically, by New Mexico and was the focal point of New Mexico's Motion to Dismiss the United States' Complaint in Intervention. In fact, the only issue before the Court during the proceedings that led to the Court's 2018 Opinion was the Special Master's recommendation to dismiss the United States' Complaint because of concerns its intervention would expand the litigation to address Reclamation issues. *Texas v. New Mexico*, 138 S. Ct. at 956 ("In today's lawsuit, Texas claims that New Mexico has defied the Compact. But at this stage in the proceedings, we face only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already has? We believe it may.").

While the Court decided that the United States could intervene, it refused to allow the issues in the case to expand beyond the issues raised by Texas in its Complaint. In its fourth point, the Court noted that "the United States has asserted its *Compact claims in an*

existing action brought by Texas, seeking substantially the same relief and without that State's objection." *Texas v. New Mexico*, 138 S. Ct. at 960 (emphasis added).

Notwithstanding the fact that this litigation is properly focused only on the 1938 Compact, New Mexico has itself attempted to expand the litigation to address Reclamation law issues, including the 2008 Operating Agreement, that have nothing to do with the Compact. In dismissing most of New Mexico's counterclaims, the Special Master, in the March 31, 2020 Order,[7] determined that Project operations would be relevant only to the extent that they informed the relationship between the Project and the Compact. *See* March 31, 2020 Order at 29.

Ignoring this admonition (i.e., ". . . it is my view that this is neither the time nor the forum to address the validity of the 2008 Operating Agreement") (March 31, 2020 Order at 29), New Mexico has simply recast its Reclamation law arguments, some even made in a separate piece of litigation now pending in federal district dourt, in an attempt to litigate those issues in this Compact case, including its challenge to the 2008 Operating Agreement. This end-run around the jurisdictional limits in original actions merely confuses resolution of the actual Compact issues in this case and distracts from the fundamental question of whether depletions associated with New Mexico groundwater pumping deprive Texas of its apportionment in violation of the Compact.

Moreover, the dispute that New Mexico is attempting to litigate is one with EBID and the United States over contracting arrangements that Reclamation and EBID have made related to the Project as well as Project accounting and maintenance issues, not Compact issues. These issues have nothing to do with Texas and they seek to improperly

[7] *See* March 31, 2020 Order lodged with the Special Master as Docket No. 338 (March 31, 2020 Order).

intrude on the contractual arrangements of third parties with which they have no legal interest. To the extent that New Mexico has problems with how the Project is operated and assuming it has standing to pursue those complaints, it should avail itself of the several alternative forums in which it can attempt to address those issues.

Texas has made no Reclamation law claims in this litigation. Texas does not seek to challenge, modify, or affect either EBID or El Paso County Water Improvement District No. 1 (EP#1) Reclamation Contracts. Texas does not seek to overturn the 2008 Operating Agreement which it views as an attempt to mitigate the harm caused by New Mexico's groundwater pumping. Resolution of this litigation in Texas's favor will not void the Operating Agreement, although presumably it will reduce the burden on EBID and increase the total supply of water available to the Project by reducing the depletion of surface water caused by groundwater pumping in New Mexico.[8]

Issues associated with the resolution of disputes over Reclamation law are not a proper subject of this original action and they certainly are not the proper subject of motions for summary judgment.

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[8]And as the Special Master noted in the March 31, 2020 Order, after entry of a decree in this case "[t]o the extent current operations are inconsistent with the Court's ultimate decree on apportionment, any operating agreement will have to be brought into conformity with the decree." March 31, 2020 Order at 29.

B. The Substantive and Procedural Deficiencies in New Mexico's Response Support Granting Partial Summary Judgment in Texas's Favor

1. New Mexico's Response improperly comingles arguments, facts, and evidence between separate and distinct motions

The New Mexico Response[9] to Texas's Motion cannot be read without some reference to New Mexico's own Motions for Partial Summary Judgment filed on November 5, 2020. Indeed, New Mexico has used its Response to Texas's Motion to inappropriately amend its own motion. New Mexico has crafted major sections of its "opposition" brief, not to argue against positions or arguments made in the Texas Motion, but rather to raise new primary arguments on points that they have never made before.[10] When parties submit cross-motions for summary judgment, "each motion must be considered on its own merits," and in fulfilling its duty to review each cross-motion separately, the court "must review evidence submitted in support of each cross-motion." *Fair Hous. Council v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001); *see also Kohl v. Ass'n of Trial Lawyers of Am.*, 183 F.R.D. 475, 478 (D. Md. 1998) (When a court is confronted with cross-motions for summary judgment, the court must consider each party's motion individually to determine if that party has satisfied the summary judgment standard.).

[9] Texas responds to any arguments made by New Mexico amici that are germane to the issues raised in the motions in its Response to the Colorado and Amici Briefs, filed concurrently herewith.

[10] *See, e.g.,* New Mexico's Response at section VII, pages 59-69. These arguments should be stricken or at least disregarded by the Special Master. New Mexico's arguments at section VII of its Response can only be read as requesting affirmative relief due to its alleged injury from the operation of the 2008 Operating Agreement and is not responsive to anything in the Texas Motion. *See* section II.G, *infra,* for further discussion. Moreover, New Mexico's counterclaim based upon the 2008 Operating Agreement was dismissed. *See* March 31, 2020 Order.

Similarly, although both Texas and New Mexico moved for partial summary judgment on issues related to apportionment, and although a similar set of legal issues are associated with each motion, the motions must nonetheless be considered individually on their own merits. New Mexico's comingling of its separate motions for partial summary judgment, with its responses to both the Texas and United States motions, is improper. *See also* Texas's Objections and Reply to New Mexico's Consolidated Statement of Facts and Appendix 1 Filed by New Mexico in Response to Texas's Motion for Partial Summary Judgment (TX Objections/Reply to New Mexico's Facts/Evidence), filed concurrently herewith.

2. New Mexico's evidentiary deficiencies confirm that New Mexico failed to meet its burden of proof

While some types of extrinsic evidence may be appropriate even in motions for summary judgment, it is never an appropriate basis for summary judgment if the extrinsic evidence offered is material and in dispute. As demonstrated in Texas's objections and reply to New Mexico's facts and evidence, the "facts" proffered by New Mexico, and the evidence purporting to support the facts, are not "definite, competent," or "significantly probative"—in many cases the facts are not even responsive, such that New Mexico failed to meet its burden of proof. However, if the Special Master and Court view the New Mexico facts as "definite, competent," or "significantly probative," then the facts that New Mexico relies on are both material and in dispute. *See* Texas's Objections/ Reply to New Mexico's Facts/Evidence and Exs. A and B thereto. A mere statement by New Mexico to the contrary does not cure this fundamental defect. Nor does New Mexico's reference to excerpts of reports, depositions, or historic documents without appropriate authentication constitute an undisputed material fact. Worse, even citation to

unauthenticated materials for a factual proposition should support the proposition, yet in almost every case the proposition relied upon by New Mexico cannot be found in the unauthenticated materials that New Mexico cites. Summary judgment simply is not available to New Mexico based on the types of "evidence" it relies on.

To the extent that New Mexico relies on declarations to support its arguments, those declarations are not of a quality that allows for the granting of summary judgment. In many respects, as is set forth in Texas's accompanying objections and reply to New Mexico's facts and evidence, portions of several of the New Mexico declarations directly contradict deposition testimony by New Mexico's own agents, indicating that the deponents have effectively manufactured facts for the sole purpose of either proclaiming that a material fact is "undisputed," or to attempt to create a dispute where none exists. These sham declarations have been offered by New Mexico's own agents, as well as their "experts" who have no expertise in the area upon which they opine, or who now "testify" in a manner or on subjects that they have not previously provided expert reports or deposition testimony. In many cases, they opine on matters that they previously stated, under oath, that they have no expertise in. Summary judgment, indeed, any kind of judgment, cannot be based upon this type of evidence.

C. The Supreme Court Has Not Ruled on Apportionment

New Mexico erroneously argues that Texas "invites" the Special Master to "ignore the decision" of the Court. NM Response at 1. Texas does no such thing. As previously addressed in the Texas Motion, the Court has not yet ruled on apportionment. Indeed, the Special Master has already acknowledged that the Court has not ruled on apportionment inasmuch as the Special Master has expressly stated that the apportionment issue is not resolved and might be appropriate to address by summary

judgment. *See* Transcript of May 1, 2020, Teleconference Before Honorable Michael A. Melloy[11] at 31:13-16 ("In other words, one of the issues that I understand that's going to have to be resolved is what apportionment, if any, does New Mexico even have?"), and at 40:9-13 ("We can't even agree if New Mexico has an apportionment. Now, if the Compact is as unambiguous as people say it is, we should be able to resolve that by summary judgment.").

The Court's reference to an "apportionment" in the 2018 Opinion is dictum because the issue was not before the Court, or necessary to the ruling. *Texas v. New Mexico*, 138 S. Ct. at 959. The dictum was derived from statements in the First Report in which the first Special Master said, "[t]he Rio Grande Project [was intended] to be the sole vehicle by which Texas and lower New Mexico would receive the equitable apportionment of Rio Grande waters." First Report at 194-95. The Supreme Court decision merely repeats this language in the context of describing the United States' role "as a sort of 'agent'" of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico "is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959. Indeed, the context of the 2018 Opinion was the Court's determination as to whether the United States could intervene in the case. *Id.* The context was *not* a discussion of Compact apportionment. *Id.*

The question of whether New Mexico has, or does not have, an apportionment below Elephant Butte Reservoir was not an issue before the Special Master when he issued the First Report and was not subject to a finding in the First Report. The issue was never briefed or otherwise addressed in the context of any of the issues that were the

[11] Transcript of May 1, 2020, Teleconference Before Honorable Michael A. Melloy lodged with the Special Master as Docket No. 396.

subject of the First Report. Likewise, the issue of whether New Mexico is entitled to any water delivery below Elephant Butte Reservoir, by way of apportionment, allocation, or otherwise, was never briefed, analyzed, or addressed by the Supreme Court. An isolated comment by the Court in an opinion is dictum, where the comment is not essential to the Court's disposition of any of the issues contested in the case. *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001); *see also California v. United States*, 438 U.S. 645, 673-74 (1978) (disavowing dicta in two prior cases that "undoubtedly goes further than necessary to decide the cases presented to the Court" to the extent it would prevent the state from imposing conditions on a permit granted to the United States that were not inconsistent with the federal reclamation statute). Thus, the language in the First Report and in the 2018 Opinion was, at most, dictum. The instant briefing (in conjunction with the separately filed Texas Motion) is the first time that the apportionment issue has been addressed in this litigation.

Significantly, New Mexico cites to the First Report in its Response, and relies on the First Report (NM Response at 2), despite its historical rejection of the First Report and numerous arguments that this Special Master and the Court should not consider the content of the report or give it any credit.[12] Texas supports giving credence to the First Report, but New Mexico does not get to cherry-pick statements it likes and ask the Special Master to ignore portions that are not favorable to New Mexico's position. Texas

[12] *See* New Mexico's Exceptions to the First Report, TX_MSJ_006941, at 2-3 (New Mexico's request that the Court "affirmatively disavow" the first Special Master's reasoning in the First Report), filed on or about June 9, 2017, with the Supreme Court; *see also* New Mexico's Motion for Partial Judgment on Matters Previously Decided at 18 (New Mexico argued that the First Report does not bind the Court or Special Master), lodged with the Special Master as Docket No. 165.

agrees that the entirety of the first Special Master's analysis as reflected in the First Report has meaning and should be considered.

D. New Mexico Failed to Refute Texas's Proper Articulation of Compact Apportionment Based Upon the Plain Language and Structure of the Compact

1. New Mexico's reliance on extrinsic evidence is irrelevant when Compact terms are unambiguous

New Mexico concedes that "if the text of the Compact is unambiguous it is conclusive." NM Response at 10, citing *Alabama,* 560 U.S. at 352; *Kansas v. Colorado*, 514 U.S. 673, 690 (1995). New Mexico further concedes that the Court should consider extrinsic evidence *if there is ambiguity*. *Id.,* citing *Oklahoma v. New Mexico*, 501 U.S. at 234 n.4. However, after New Mexico recites the correct and controlling law, New Mexico concludes that "the plain language and structure of the Compact, *as confirmed by the available extrinsic evidence and long course of performance,* indicate that New Mexico has an apportionment below Elephant Butte equal to 57% of the Rio Grande Project water supply." NM Response at 11 (emphasis added). New Mexico's argument is nonsensical at best because the law is clear that the Court should only turn to extrinsic evidence if the Compact were found to be ambiguous. *See* TX Motion at section V.A.2.

As described herein and in accompanying pleadings, while Texas's Motion is centered on the unambiguous plain language and structure of the Compact, New Mexico's separately filed motions for partial summary judgment, and its Response to the Texas Motion, as it has admitted, are based almost exclusively on extrinsic evidence. At trial, in the event the Special Master determines that the Compact is ambiguous on the points raised, New Mexico will be free to attempt to introduce and justify the use of these extrinsic materials and argument. However, reliance on the type of extrinsic evidence

that New Mexico has presented on summary judgment is not appropriate and summary judgment cannot be granted based upon this type of evidence. *See* TX Motion at section V.A.

Since New Mexico skipped the step of the legal evaluation that mandates a finding of *ambiguity* before turning to extrinsic evidence, New Mexico failed to meet its burden of proof to refute Texas's position. Texas's articulation of Compact apportionment, which is properly based upon the plain language and structure of the Compact itself, without the need to evaluate extrinsic evidence to interpret *ambiguous* Compact terms, must prevail. Additionally, if the Court does find that the Compact is ambiguous, and that extrinsic evidence is appropriate, the extrinsic evidence at issue is materially disputed and the issue must proceed to trial. *See* TX Motion at section V.A.3; *see also* TX Objections/Reply to New Mexico's Facts/Evidence, filed concurrently herewith.

2. New Mexico's proposed Apportionment Scheme does not equate to disputed material facts for purposes of challenging the merits of Texas's Motion

New Mexico devotes a significant portion of its brief to arguing in support of its implausible conclusion that the Compact unambiguously apportions 57 percent of the Project supply to New Mexico below the Reservoir (the "New Mexico Apportionment Scheme"). NM Response at 9-25.[13] In so arguing, New Mexico breaks from the proper summary judgment procedure, and appears to be simply regurgitating its own affirmative argument set forth in its separately filed MSJ on Apportionment, instead of *opposing* the

[13] The New Mexico Apportionment Scheme is also the subject of New Mexico's separately filed Motion for Partial Summary Judgment on Compact Apportionment (Nov. 5, 2020) (NM MSJ on Apportionment), opposed by Texas on December 22, 2020.

Texas Motion. If its proposed Apportionment Scheme were offered to *dispute* Texas's position, then New Mexico would necessarily have to admit, and argue, that it views the Compact as ambiguous. Instead, New Mexico clearly states the opposite. As such, any consideration of its proposed Apportionment Scheme is properly considered only in the context of New Mexico's separately filed MSJ on Apportionment. And, to the extent that the Special Master, and Court, find that Texas's position herein is accurate, then New Mexico's separately filed MSJ on Apportionment becomes moot.

3. The unambiguous Compact does not apportion water to New Mexico below Elephant Butte Reservoir

The question of Compact interpretation begins with the threshold legal issue of determining whether the Compact is unambiguous, which simply requires looking to the plain text and structure of the Compact. *See* TX Motion at section V.A. As New Mexico correctly states, courts "will not order relief inconsistent" with the express terms of the Compact, "no matter what the equities of the circumstances might otherwise invite." *See* NM Response at 41, citing *Alabama,* 560 U.S. at 352 (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998) and *Texas v. New Mexico,* 462 U.S. 554, 564 (1983)).

Texas and New Mexico agree on the fundamental express terms of the Compact:

- The preamble to the 1938 Compact declares that the signatory states intended to apportion equitably the waters of the Rio Grande above Fort Quitman, Texas. Compact at 1; NM Response at 11.
- There are two delivery obligations in the Compact: the Colorado to New Mexico state line delivery set forth in Article III, and the New Mexico to Elephant Butte Reservoir delivery set forth in Article IV. Compact, arts. III and IV; NM Response at 12.

- "Once New Mexico meets its Article IV obligation, the water becomes 'Usable Water' in 'Project Storage.' " Compact, arts. I(*l*) and I(k); NM Response at 13.
- "Reclamation releases Usable Water from Project Storage for delivery to Project beneficiaries and to Mexico as part of the operations of the Rio Grande Project. Releases are made in response to orders by the Districts, and in accordance with each year's schedule of deliveries to Mexico." New Mexico Consolidated Statement of Material Facts (Dec. 22, 2020), No. 133.

Despite the agreement regarding the fundamental express terms of the Compact, New Mexico nonetheless goes well beyond anything that can be gleaned from the plain text of the Compact when it concludes that the Article IV delivery requirement by New Mexico into the Reservoir is only one *part* of its two-part equitable apportionment for the "Middle Rio Grande." NM Response at 14. Ignoring the actual plain language of the Compact, which apportions to New Mexico the water that Colorado delivers to New Mexico, pursuant to Article III of the Compact, subject only to its Article IV obligation to deliver water to Texas at Elephant Butte Reservoir, New Mexico fabricates a position in which it gets two apportionments, one above and one below Elephant Butte Reservoir. New Mexico's position, however, can be found nowhere in the plain language of the Compact. New Mexico reads language into the Compact that simply does not exist. New Mexico also ignores the Article VII and VIII provisions of the Compact which provide the Texas Rio Grande dominion and control over deliveries into Elephant Butte Reservoir. There are no parallel provisions of the Compact that give any similar control to New Mexico.

4. The water delivered to EBID pursuant to its contract with the United States is a Project allocation, not a Compact apportionment to New Mexico

The water released from Elephant Butte Reservoir and delivered to EBID pursuant to the United States' Downstream Contracts with EBID,[14] is not a Compact apportionment to New Mexico. This water is a Project allocation, defined by the United States' Contracts with EBID. New Mexico nonetheless argues that because of these contracts it has apportionments both above and below Elephant Butte Reservoir. With this argument, New Mexico ignores the plain language and structure of the Compact. But there can be no dispute that the 57 to 43 percent split that it hangs its Compact argument on does *not* arise out of the Compact. It arises out of the Downstream Contracts to which New Mexico is not even a party, either directly or indirectly. The Compact serves to ensure that the volume of water delivered into the Reservoir, as specified in Article IV, is available to meet the Texas apportionment and is not depleted.

Indeed, as the Supreme Court has noted, it is the EBID contract in the context of contracts with EP#1 that allows Texas to take its apportionment at Elephant Butte Reservoir in lieu of a state line delivery. *Texas v. New Mexico*, 138 S. Ct. at 957 (Elephant Butte delivery point was chosen "in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water

[14] The November 9, 1937 contract between the United States and EBID (1937 US/EBID Contract) at TX_MSJ_004434-004461, and the February 16, 1938 contract between EBID and El Paso County Water Improvement District No. 1 (EP#1) and approved by the United States on April 11, 1938 (1938 US/EBID/EP#1 Contract) at TX_MSJ_005249-005250, are collectively the "United States' Contracts with EBID." Bates numbers referenced herein that are defined with the "TX_MSJ" prefix include evidence in "Texas's Appendix of Evidence" filed in support of TX Motion on November 5, 2020, evidence submitted on December 22, 2020 in Texas's Appendix of Evidence in Support of the Texas's Oppositions to New Mexico's Motions for Partial Summary Judgment, and additional evidence submitted concurrently herewith.

every year from the Reservoir's resources"). EBID and EP#1 entered into contracts with the United States in November 1937. 1937 US/EBID Contract at TX_MSJ_004434-004461; 1937 US/EP#1 Contract at TX_MSJ_004464-004488. The repayment contract between EBID and EP#1 that established the districts' respective allocations was effective in February 1938, one month before the states signed the Compact. 1938 US/EBID/EP#1 Contract at TX_MSJ_005249-005250. The Compact apportions the waters of the Rio Grande in the context of the contractual allocations of Project water.

But those allocations are not coextensive with the apportionment. Under New Mexico's theory of the case, all the water that it delivers into the Reservoir is apportioned to it, subject to the 43 percent that EP#1 is allocated under its Downstream Contract. This, of course, would put the Compact on its head. It would limit the water that Texas is entitled to under the EP#1 contract and make meaningless the plain language of the Compact that extends the Compact to Fort Quitman, Texas. The Compact does not end at the boundaries of EP#1 but extends into Hudspeth County to Fort Quitman. The water that New Mexico delivers into Elephant Butte Reservoir is the Texas *apportionment,* subject to the 57 percent Project *allocation* to EBID and the Treaty with Mexico. The rest of the water belongs to Texas.

Further, no Compact accounting has ever taken place below Elephant Butte Reservoir because, as noted, Texas's apportionment is delivered to Elephant Butte Reservoir. *See* excerpts of Deposition of Herman Settemeyer, 7/30/2020 (Settemeyer Depo., 7/30/2020) at TX_MSJ_001301-001302, 001307, 30:4-31:11, 44:12-21 (Mr. Settemeyer testified that the Engineer Advisors "never do [*sic*] an accounting below Elephant Butte"). The Report of the Engineer Advisors to the Rio Grande Compact Commissioners, dated February 22, 2002, demonstrates that there is nothing in all the

figures that the Compact Commission collects that addresses the 57 to 43 percent split. Declaration of Robert J. Brandes, P.E., Ph.D. in Support of the State of Texas's Motion for Partial Summary Judgment (Brandes Decl.) at TX_MSJ_000014-000015. This is because Compact accounting is limited to "*deliveries by New Mexico to Texas at Elephant Butte.*" *Id.* at TX_MSJ_000001-000014 (emphasis added).[15] The percentage of the water delivered to Elephant Butte Reservoir that is allocated to EBID is just that—an allocation, not a Compact issue. *Id.* at TX_MSJ_000014-000015.

5. New Mexico ignores that it has no rights pursuant to the United States' Downstream Contracts with EBID

What New Mexico *fails* to address in its Response is important. New Mexico does not argue that it has any right whatsoever as a contracting party, or even a third-party contract beneficiary, under the United States' Downstream Contracts with EBID. New Mexico does not argue that it has a right to enforce the Downstream Contracts, interfere with, modify, or otherwise exercise any right pursuant to the Downstream Contracts. New Mexico likewise does not argue that it has an obligation pursuant to the Downstream Contracts—i.e., delivering Project water to Texas. In fact, it argues to the contrary—that New Mexico has no obligation in that regard.[16] It effectively concedes that it is not a party to the Downstream Contracts, has no rights pursuant to the contracts, and has no obligations under the contracts. Notwithstanding these concessions, New Mexico stubbornly argues that all of the water that the Project delivers to EBID is a

[15] *See* section 2.1 of the Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation (BOR), included in the 2001 Report of the Rio Grande Compact Commission.

[16] New Mexico witnesses also confirm that there is no administration of water below Elephant Butte Reservoir to ensure Texas receives its apportionment. *See, infra*, at section F.1, n.20.

second apportionment to New Mexico. There is simply no rational argument to support the contention that water under contract to EBID is a second apportionment to New Mexico. Neither the plain language of the Compact, nor well-accepted principles of contract interpretation, support this argument.

As a practical matter, however, regardless how one characterizes the use of water in New Mexico below Elephant Butte Reservoir, there are limitations placed on that use. Use of water below Elephant Butte Reservoir, in New Mexico, is absolutely limited by the terms of EBID's Downstream Contract with the United States, a fact confirmed by New Mexico's agents and employees. TX Motion at 69-70; excerpts of Rule 30(b)(6) Deposition of Estevan Lopez, 9/18/2020 (Lopez 30(b)(6) Depo., 9/18/2020) at TX_MSJ_001142-001148, 20:4-23:16, 25:17-26:10; excerpts of Deposition of John D'Antonio, 8/14/2020 (D'Antonio Depo., 8/14/2020), at TX_MSJ_000875, 000879-000880, 145:13-18, 149:6-150:2; United States of America's Memorandum in Support of Motion for Partial Summary Judgment (US MSJ) at 23, 30-31.

EBID is the only entity in New Mexico that has a contract with the United States to receive irrigation water from the Project below Elephant Butte Reservoir (US MSJ, Statement of Fact No. 17, at 6) and there is no action that New Mexico can take that can alter the rights provided to EBID under that contract. Because there is no dispute that the use of water below Elephant Butte Reservoir, in New Mexico, is limited to Downstream Contract uses in EBID, New Mexico cannot claim that the water delivered to EBID by the Project pursuant to its contract with the United States is an apportionment to New Mexico.

6. New Mexico misapplies legal authority in an attempt to challenge principles of equitable apportionment

Contrary to New Mexico's argument at pages 4-5 of its Response, *Tarrant* is not "directly applicable" except insofar as it states the proper standard for evaluating preemption of state law by the Rio Grande Compact. *See, infra,* at section F.1. In *Tarrant Reg'l Water Dist. v. Hermann,* 569 U.S. 614 (2013), a Texas water district sought to appropriate water in Oklahoma on the theory that Red River compact language was ambiguous about whether or not states had cross-border rights to invade a neighboring state to obtain water that was not otherwise physically available. Texas is not seeking to invade New Mexico for anything—it simply asks that New Mexico regulate its groundwater pumping to avoid depleting Texas's apportionment.

In reaching for another novel and unsupportable application of *Tarrant,* New Mexico's argument seems to be that the physical division of water below Elephant Butte Reservoir is binary: either that Texas has a right to *all* the water below Elephant Butte Reservoir, or New Mexico has a right to some of it. In fact, a third—and correct option—is that Texas's apportionment is to the water in Elephant Butte Reservoir subject to the EBID contract and the Treaty with Mexico. Because the water in Elephant Butte Reservoir is Texas's apportionment subject to these contractual and legal limitations, there is no sovereignty for New Mexico to cede vis-a-vis the Elephant Butte Reservoir deliveries. However, and as amplified at section F.1, New Mexico's argument that Texas's apportionment is just another New Mexico water right is the position that risks state sovereignty—*Texas's state sovereignty*—and to date New Mexico has offered no legal support for the proposition (because there is none) that Texas would "easily cede its sovereignty" in this fashion. *Tarrant,* 569 U.S. at 631.

New Mexico's hair-on-fire arguments about Texas depriving New Mexico citizens residing below Elephant Butte Reservoir of water supplies (NM Response at 7-8) are simply a different species of the ditch company's arguments in *Hinderlider v. La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938). Texas's apportionment is not available to New Mexico citizens under any circumstances and in any event the quantity of water that is *physically* available to New Mexico citizens below Elephant Butte Reservoir does not change whether or not New Mexico has a Compact interest. It is the same if it is a Compact apportionment or if it is an EBID contract allocation. The only thing that changes is the nature of the legal entitlement by which that quantity of water is made available. If Texas is correct and New Mexico has no Compact interest below Elephant Butte Reservoir, the only water that is physically available to its citizens below the Reservoir is made legally available through EBID's contract. Significantly, New Mexico agrees with this, as reflected in the deposition testimony of New Mexico's designated Rule 30(b)(6) witness. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001142-001145, 20:4-23:16, 25:17-26:10.

E. Texas is Entitled to Summary Judgment on the 1938 Condition Issues Because New Mexico Failed to Show a Genuine and Material Dispute

In its Motion, Texas seeks an order of partial summary judgment in its favor on six issues involving depletion conditions that existed in 1938 (the "1938 Condition"). *See* TX Motion at 5 (identifying partial summary judgment issues 4-5, and subparts) and 77-92 (sections V.E - V.F, discussing issues 4-5). Particularly, Texas argues that the Compact protects the Project and its operations under the conditions that existed in 1938, at the time the Compact was executed, and New Mexico, through its groundwater pumping below Elephant Butte Reservoir, depletes surface water flows and the volume of

water in the Rio Grande in excess of depletion conditions that existed in 1938. *Id.* There are several subparts to these issues, as set forth in Texas's Motion. *Id.*

New Mexico's response, as summarized on page 39 of its Response brief, is not a response at all. In fact, New Mexico conflates what is actually at issue in the Texas Motion—what the Compact was intended by the parties to protect when it was executed in 1938—with unrelated issues of subsequent groundwater development, Project accounting, Project operations, and Project allocations. New Mexico also argues that Texas's alleged "failure to object" to post-Compact Project accounting issues (an affirmative defense at best), negates New Mexico's obligation to meet its burden of proof to refute the actual issues that are the subject of this motion. The issue herein is the meaning of the Compact, at the time the Compact was enacted in 1938—not anything that happened thereafter. As argued by Texas in its Motion, the "historical background forming the basis of the Compact negotiations is well documented, and not subject to any reasonable material dispute." *See* TX Motion at 77. Thus, Texas appropriately evaluated this issue based upon admissible evidence (to which New Mexico did not object) proffered in support of the historical background, that is not subject to any reasonable material dispute. *See* TX Objections/Reply to New Mexico's Facts/Evidence, filed concurrently herewith.

Assuming Texas is granted summary judgment on the six issues presented that deal with the 1938 Condition, New Mexico is welcome to present evidence at trial, as it sees fit, on how the 1938 Condition is defined, whether or not New Mexico's affirmative defenses are legally or factually applicable, and/or what Texas should be entitled to in terms of damages or otherwise, under the 1938 Condition. None of those issues are a subject of the Texas Motion. Thus, for purposes of summary judgment, New Mexico's

arguments are non-responsive, and a mere distraction to what is currently before the Special Master and the Court. Additionally, and to the extent that the Special Master concludes that New Mexico's "facts" and supporting evidence do present genuine and materially disputed facts, then the issues must be resolved at trial.

F. New Mexico's Murky View of Preemption Does Not Support its Assertion of State Sovereignty Below Elephant Butte Reservoir

As Texas has consistently argued elsewhere, New Mexico law is preempted by the Compact, and while it can be applied by New Mexico to ensure Compact compliance, New Mexico law cannot be applied to regulate Texas's apportionment per se.

New Mexico's view is contrary. It argues that New Mexico water law governs below Elephant Butte Reservoir subject to certain ill-defined Compact-driven limits on how New Mexico can exercise its authority over the Texas apportionment. *See, e.g.,* NM Response at 25-36. New Mexico further argues that, in any event, the proper role of New Mexico law is of no consequence because Texas received its apportionment undisturbed in every year except 2003 and 2004. NM Response at 4, 29-30. This position is asserted by New Mexico despite the contrary testimony of its own witnesses and agents that New Mexico groundwater pumping does in fact deplete the Rio Grande and Texas's apportionment.[17] New Mexico maintains its absurd position, in part, by arguing that there is no Compact limitation on depletions caused by New Mexico pumping and that Texas is only entitled to whatever water might reach Texas after irrigation needs in New Mexico are fully met using the combined surface and groundwater rights issued to New Mexico water users under New Mexico state law.

[17] Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001139-001141, 17:21-19:1; excerpts of Deposition of Jorge Garcia (Garcia Depo., 2/6/2019), at TX_MSJ_001056, 001066-1001068, 6:10-16, 43:17-25, 44:1-5, 45:11-19.

Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001159-001161, 75:18-77:21; NM MSJ on Apportionment at 29; NM Response at 13-14. New Mexico attempts to support its position by cherry-picking quotes from various cases involving interstate compacts.

Regardless of how New Mexico attempts to muddle the clear legal framework that governs actions involving compacts, the Compact preempts conflicting New Mexico state law and New Mexico state law cannot determine the scope and extent of the Texas apportionment.[18]

1. New Mexico state law authorizing groundwater pumping that depletes Texas's apportionment in contravention of the Compact is preempted

New Mexico state law conflicts with the Compact and therefore conflicts with federal law.[19] New Mexico state law treats Texas as it would any other water user in New Mexico[20] and, as applied, New Mexico law utterly fails to protect Texas's Compact apportionment from depletion. Excerpts of Rule 30(b)(6) Deposition of Cheryl Thacker, 9/18/2020 (Thacker 30(b)(6) Depo., 9/18/2020), at TX_MSJ_001366-001367, 33:19-34:2; *see also* excerpts of the Deposition of Ryan Serrano, 4/17/2019 (Serrano Depo., 4/17/2019), at TX_MSJ_001280-001281, 186:13-187:3. New Mexico's failure to regulate New Mexico groundwater users to protect Texas's apportionment from depletion interferes with the Compact's goal of equitably apportioning water among the

[18] *See* TX Motion at 92, 93; *New Jersey v. New York*, 523 U.S. 767, 810 (1998) (quoting *Rhode Island v. Massachusetts*, 12 Peters 657, 727 (1838)); *Texas v. New Mexico*, 138 S. Ct. at 958 (citing *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)); *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (citing *New Jersey v. New York*, 523 U.S. at 811); *see also Maryland v. Louisiana*, 451 U.S. 725, 746 (1981).

[19] New Mexico spends several pages of its Response surveying the law of pre-emption, concluding Texas has failed to identify which type of preemption it asserts. NM Response at 26. Texas previously explained that New Mexico law conflicts with the Compact and is thus preempted. TX Motion at 93.

[20] Excerpts of Rule 30(b)(6) Deposition of Peggy Barroll, 10/21/2020 (Barroll 30(b)(6) Depo., 10/21/2020) at TX_MSJ_007661-007662, 007667-007668, 18:13-19:4, 52:24-53:4.

compacting states including Texas. This conflict between New Mexico law and the Compact requires preemption of New Mexico state law under the standard imposed by the Supreme Court in *Tarrant,* 569 U.S. at 628 n.8 and 631 n.10.

Tarrant involved a dispute over cross-border rights under the Red River Compact. The Tarrant Regional Water District, a water district in the Dallas/Fort Worth area, sought an Oklahoma permit for waters tributary to the Red River within the boundaries of Oklahoma and within the compact area. Because its pathway to a permit under Oklahoma state law was problematic, Tarrant sought an interpretation that the compact language "Signatory States shall have equal rights to the use of water [in Sub-basin 5, Reach II of the Red River]" pre-empted Oklahoma state water laws.

In concluding that the Red River Compact did not grant the cross-border rights sought by Tarrant, the United States Supreme Court applied three interpretative tools.[21] Importantly, the Court expressly *rejected* reliance on the presumption against preemption—the very interpretive tool upon which New Mexico relies in its Response. NM Response at 27-28. The Court stated:

> There is however, *one interpretive tool that is inapplicable here*[.] The Court of Appeals repeatedly referenced and relied upon the presumption [against pre-emption] in its opinion. [Citation.] Yet the presumption against pre-emption is rooted in respect for the States as independent sovereigns in our federal system and assumes that Congress does not cavalierly pre-empt state laws. *Wyeth v. Levine*, 535 U.S. 555, 565-566, n.3 (2009). *When the States themselves have drafted and agreed to the terms of a compact, and Congress' role is limited to approving that compact, there is no reason to invoke the presumption.*

[21] First, the "well-established principle" that states do not easily cede their sovereignty; second, the customary practices of other states entering into interstate compacts that expressly granted cross-border rights; and third, the parties' conduct under the Compact. *Tarrant,* 569 U.S. at 631.

Tarrant, 569 U.S. at 631, n.10 (emphasis added, internal quotations omitted).[22] As one of the compacting states, New Mexico agreed to the Rio Grande Compact and the presumption against preemption is simply inapplicable.

The *Tarrant* Court rejected the preemption argument of the Tarrant Regional Water District after examining the compact and concluding there was no actual conflict between Oklahoma law and the compact. A similar analysis in this case demonstrates there *is* a conflict between the application of New Mexico water law and the Rio Grande Compact. The Compact equitably apportioned the Rio Grande between the three compacting states; the explicit intent of the Compact was for each state to get its apportionment undiminished by the actions of the other states. It makes no sense to equitably apportion a river if one of the compacting states could siphon off for use in an upstream state a downstream state's apportionment.

However, that is exactly what the application of New Mexico law allows—it allows groundwater users in the Lower Rio Grande to pump groundwater without regard to any adverse impacts on Texas's apportionment. New Mexico's unremitting argument that Texas's apportionment should be regulated under New Mexico law, just like any other New Mexico water right, only highlights the conflict. Texas's apportionment is not a New Mexico water right, and receipt of its apportionment is not dependent on the vagaries of New Mexico law. The Compact stands for the proposition that once delivered to Elephant Butte Reservoir, the water belongs to Texas subject to the EBID contract and the Mexico Treaty. New Mexico's only obligation after delivery is to ensure that its actions do not facilitate the depletion of Texas's apportioned water which, by its

[22] New Mexico's reliance on *Wyeth v. Levine* on page 27 of its Response is misleading and wrong.

own admission, it has failed to do. Serrano Depo., 4/17/2019 at TX_MSJ_001284-001, 268:8-11; excerpts of Deposition of Peggy Barroll, 8/7/2020 (Barroll Depo., 8/7/2020), at TX_MSJ_007639-007640, at 204:23-206:1; excerpts of Deposition of Estevan Lopez, 2/26/2020 (Lopez Depo., 2/26/2020), at TX_MSJ_007577, 37:3-13. Under *Tarrant*, New Mexico cannot rest on the notion of a presumption against preemption, and conflicting New Mexico law must give way.

New Mexico also invokes *Tarrant* (NM Response at 29) for the related argument that it is entitled to "regulate the activities of its own citizens." It then takes this concept and illogically implies that if it is obligated to meet its Compact obligations and curtail groundwater pumping to avoid depleting Texas's apportionment this impinges impermissibly on its sovereignty. New Mexico's interpretation turns the *Tarrant* reasoning inside out. New Mexico's arguments present a serious threat to Texas's sovereignty, because New Mexico effectively seeks an interpretation that in entering the Compact Texas *waived* the protections afforded its apportionment under federal law in favor of having its apportionment treated like any other New Mexico water right. This would require a showing that Texas "ceded its sovereignty" through silence in the Compact and would require examination of other compacts to determine if submission to an upstream state's laws to undo the very purpose of the Compact is done impliedly or expressly. New Mexico's argument is without basis under *Tarrant.*

Texas negotiated the Rio Grande Compact along with New Mexico and Colorado to equitably apportion the Rio Grande. Rather than respect Texas's right to receive its apportionment undepleted, New Mexico authorizes groundwater pumping that intercepts the water intended for Texas before it reaches the state line. New Mexico's interpretation of the Compact does not respect state sovereignty and should be rejected.

2. Preemption of state law by the Compact is consistent with *Hinderlider*

There is nothing novel or offensive to a State's sovereignty about recognizing that an interstate compact is superior to state law and can limit an upstream compacting state's groundwater usage to avoid depleting the downstream state's apportionment. Yet New Mexico continues its drumbeat for application of New Mexico law to Texas's apportionment by mischaracterizing the holding in *Hinderlider*, along with a host of other cases (including *Tarrant, see supra*). NM Response at 4-5, 28-29.

Hinderlider involved a constitutional challenge by curtailed ditch owners ("Ditch Company") to the validity of the La Plata River Compact, and the *authority* of the Colorado State Engineer to preferentially deliver water to New Mexico under the compact rather than abiding by state law and delivering water to the Ditch Company based upon Colorado water rights priority. Before upholding the Colorado State Engineer's rejection of Colorado state law generated priorities in order to comply with the terms of the La Plata River Compact, the Court first observed:

> The claim that on interstate streams the upper State has such ownership or control of the whole stream as entitles it to divert all the water, regardless of any injury or prejudice to the lower State, has been made by Colorado in litigation concerning other interstate streams, but has been consistently denied by this Court.

Hinderlider, 304 U.S. at 102. The Court went on to find:

- A compact provides authority to "diminish or modify" water rights that deplete the downstream state's apportionment. *Hinderlider,* 304 U.S. at 102-03.
- Apportionment through interstate compact (or judicial apportionment) is binding upon "citizens of each State and all water claimants, even where the

State had granted the water rights before it entered into the compact . . . ." *Id.* at 106.

- "As Colorado possessed the right only to an equitable share of the water in the stream, the decree of January 12, 1898 [held by the Ditch Company] did not award to the Ditch Company any right greater than the [state's] equitable share." *Id.* at 108.

Applying these Supreme Court determinations to the instant dispute over the Rio Grande Compact: (1) New Mexico's groundwater rights are subject to "diminishment or modification" to ensure Texas receives its apportionment undepleted; (2) the Compact authorizes "diminishment or modification" of New Mexico water rights to protect Texas's apportionment even if the New Mexico groundwater rights were granted prior to entry of the Compact; and (3) Texas's apportionment is *not available* to satisfy New Mexico water rights and thus is not subject to New Mexico law.

3. *Alamosa-La Jara* and *California v. United States* support Texas's arguments on preemption

Texas previously briefed the applicability of the *Alamosa-La Jara Water Users Prot. Ass'n v. Gould (In re Rules & Regulations Governing Use, Control, & Prot. Of Water Rights, etc.),* 674 P.2d 914 (Colo. 1983) (*ALJ*) case and *California v. United States* on numerous occasions, and New Mexico's mention of these cases at pages 30-31 of its Response does not raise any new arguments.[23] In any event and to summarize the Texas response on these issues:

[23] *See* TX Motion at 94-98; TX Opposition to NM MSJ on Apportionment at 8-9; Texas Response to the Colorado and Amici Briefs at 8-10.

The *ALJ* decision demonstrates that New Mexico regulation of its groundwater pumping must achieve the goal of protecting Texas's Compact apportionment even if that regulation is inconsistent with state law. The rules that were the subject of the Colorado challenge incorporated curtailment obligations enshrined in the Compact, not curtailment obligations that would have been applicable under state law in 1983.

Texas has previously explained that *California v. United States* does not support New Mexico's arguments that Texas's apportionment should be subject to regulation under New Mexico law. TX Motion at 96-99; Texas's Opposition to New Mexico's Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortages at 5-6. Texas has already laid out on several occasions the conflicts between New Mexico law and the Compact. *See id.; see, supra,* section F.1, n.19. To date, New Mexico has not explained in any brief why the holding of the 9th Circuit on remand does not apply here: "we do not think that section 8 of the Reclamation Act was intended to require any later Congress to tolerate state laws whose operation would otherwise be curtailed by the Supremacy Clause." *United States v. Cal. State Water Res. Control Bd.,* 694 F.2d 1171, 1176 (9th Cir. 1982). New Mexico's arguments about the applicability of *California v. United States* to resolution of the issues in this case should be rejected.

4. New Mexico has no authority over water delivered to Elephant Butte Reservoir and destined for EBID pursuant to EBID's contract

In addition to arguments Texas has previously made addressing this point, Texas adopts amicus EBID's arguments on this issue as reflected in the EBID Brief on Apportionment and incorporates them herein.

5. New Mexico's offer to "enforce priorities" to resolve the dispute in this case should be disregarded

When New Mexico asserts that it "stands ready" to "respond to calls, enforce priorities, and take any other action needed to comply with this Court's orders" (NM Response at 38), it avoids addressing its actual Compact obligations. How New Mexico attempts to satisfy competing uses within southern New Mexico is a matter for New Mexico. Stopping the depletion of flow apportioned to Texas is the focus of this litigation. As discussed in the next section, calls and priorities—the framework of prior appropriative rights—have no place in remedying New Mexico's failure to regulate groundwater to avoid depletions to Texas's apportionment. The only application of New Mexico law that is appropriate in the context of the Rio Grande Compact is curtailment or regulation of New Mexico groundwater pumping in a manner that protects Texas's apportionment from depletion.

Further, New Mexico's actions establish that it does not seriously believe that a priority call is necessary to remedy the unregulated groundwater pumping depleting Texas's apportionment. After all, in 2004-2006, New Mexico developed regulations that were proposed, in part, to remedy groundwater depletions effecting Texas's apportionment and the regulations were developed at the behest of the legislature—without calls or requests for priority enforcement. This was regulatory action that, by the admission of State Engineer John D'Antonio, was for the purpose of protecting Texas's apportionment from depletion. Barroll 30(b)(6) Depo., 10/21/2020, at TX_MSJ_000960, 000982-000984, 67:1-69:12; D'Antonio Depo., 8/14/2020, at TX_MSJ_007688-007691, 153:8-156:20. New Mexico scrapped these plans after the adoption of the 2008 Operating Agreement and because of political resistance from the very New Mexico

interests that would be the subject of actions that would need to be taken in order to ensure New Mexico's Compact compliance. NM Response at 35.

New Mexico has shown itself unwilling or unable to regulate its groundwater pumping to protect Texas's apportionment and this is why Texas asks this Court to impose an injunction to address this Compact violation.

6. New Mexico's "administration" does not include protection of Texas's apportionment

New Mexico spends several pages in its Response (NM Response at 31-36, as well as New Mexico's Response to the US MSJ at 53-57), detailing the various regulatory authorities the Office of the State Engineer (OSE) has under New Mexico state law, in an attempt to demonstrate that the Court need not impose any limitations on New Mexico groundwater use because of the depth and breadth of the New Mexico regulatory scheme. What goes unmentioned in these various New Mexico recitations is that numerous New Mexico witnesses testified that *no part* of existing water administration under New Mexico state law in the Lower Rio Grande is actually directed at protecting Texas's apportionment[24] and this is part of what creates the conflict requiring preemption of New Mexico law as described above.

This testimony is consistent with the testimony of New Mexico witnesses proffered under 30(b)(6). According to Margaret Barroll, Texas's apportionment is treated just like every other water entitlement below Elephant Butte Reservoir: "The administration of water below Elephant Butte Reservoir is the same for all of the water rights below Elephant Butte Reservoir. We do not have a special administration for

[24] *See* Serrano Depo., 4/17/2020, at TX_MSJ_001284-001, 268:10-11. "My office [Serrano's Water Master Office in District 4, the Lower Rio Grande] does not do anything locally to effectuate the compact."

water associated with water released pursuant—that had been stored as part of Texas's entitlement under the Compact." Barroll Rule 30(b)(6) Depo., 10/21/2020, at TX_MSJ_007667-007668, 52:24-53:4. New Mexico's other 30(b)(6) witness on the same topic, Cheryl Thacker[25] testified more succinctly that in the context of the water administrators' duties in the District 4:

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[25] *See* Declaration of Theresa C. Barfield at TX_MSJ_000704-000705 in Texas's Appendix of Evidence, Ex. 1, New Mexico's September 10, 2020 Objections to the United States' Notice of 30(b)(6) Deposition and to State of Texas's Cross-Notice, TX_MSJ_000706-000728; Ms. Thacker also testified:

> Q: Okay. Ms. Thacker, how does the -- the State Engineer account for the water that it is entitled to -- the Rio Grande water it is entitled to under the Compact? A: I don't know how a [sic] state engineer accounts for the water under the Compact. (Thacker 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001358, 15:8-13.)
>
> Q: All right. So your involvement isn't with regard to tracking or accounting or measuring of water in the Rio Grande that New Mexico as part of its Compact entitlement? A: As part of the Compact entitlement, I don't have any part in that. (*Id.* at TX_MSJ_001356, 13:17-22.)
>
> Q: Now, based on the extended discussion that Mr. Weschler and Mr. Leininger had at the beginning of the deposition, is it fair to say that you are not aware of specific activities New Mexico has done to enforce compliance with the Rio Grande Compact? A: That's absolutely right. (*Id.* at TX_MSJ_007708, 69:5-10.)
>
> Q: (By Ms. Klahn) Do you understand your duties to extend to protecting water in the lower Rio Grande to ensure waters delivered to Texas under the Compact? A: I wouldn't characterize it that way. I would say specifically my authority is to do evaluations when an application is filed for impairment, and to ensure no new depletions occurred in the river. So that's -- that's the authority I've been given. (*Id.* at TX_MSJ_007711, 72:14-21.)
>
> Q: How does that answer my question? A: I think it does I -- I don't know what you mean. (*Id.* at TX_MSJ_007711, 72:22-24.)
>
> Q: Well, I asked if your duties extended to protecting water in the lower Rio Grande to ensure that water is deliver to Texas under the Compact . . . I just want you to connect the dots for me. How is that ensuring delivery of Texas' water under the Compact? A: Will since I'm not specifically involved with the Compact, I can't speak to that . . . . (*Id.* at TX_MSJ_007711-007712, 72:14-73:10.)

Additionally, Margaret Barroll testified on October 2020 as follows:

> A: The administration of water below Elephant Butte Reservoir is the same for all of the water rights below Elephant Butte Reservoir. We do not have a special administration for water associated with water released pursuant -- that had been

> Q: Ms. Thacker, did Mr. D'Antonio or anyone else at the OSE ever give you any instructions or guidance about the role of the Compact in your professional duties? A: No. (Thacker Depo., 9/18/2020, at TX_MSJ_001385, 79:20-25.)
>
> Q: Have you ever had any instruction or guidance on how the Compact plays into your duties? A: No. (*Id.* at TX_MSJ_001385-001386: 80:5-7.)

Contrary to New Mexico's arguments, Texas's apportionment is not just another New Mexico water right. The effectiveness of New Mexico's current scheme to protect Texas's apportionment was put at issue in Texas's Motion. TX Motion at 100-03. New Mexico's recitation in its Response, along with the testimony of its witness under Rule 30(b)(6) demonstrates that New Mexico's administrative scheme is not only ineffective, but it also is not even designed to protect Texas's apportionment.

7. New Mexico's arguments regarding Texas water administration are irrelevant and non-responsive to the Texas Motion

As an initial matter, New Mexico does not have standing to complain about Texas's water administration. Because New Mexico does not have an apportionment below Elephant Butte Reservoir, it has no basis to demand any kind of special Compact administration from Texas. Further, even if New Mexico has a Compact apportionment below the Reservoir, because of the preemption of state law (which applies in Texas as well as New Mexico), the status of Texas's administrative structure to regulate water rights in Texas is largely beside the point.

In addition, New Mexico's allegations at pages 36-38 of its Response, that somehow actions in Texas (as the downstream state) have an adverse effect on New Mexico (as the upstream state) are non-responsive to the issues in the Texas Motion,

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> stored as part of Texas' entitlement under the Compact. (Barroll 30(b)(6) Depo., 10/21/2020, at TX_MSJ_007661-007662, 007667-007668, 18:13-19:4, 52:24-53:4.)

irrelevant, and otherwise disputed. New Mexico cites two types of pumping impacts: the first associated with pumping by the City of El Paso in the Canutillo area from the Mesilla Bolson, which is the same aquifer that underlies the Mesilla and Rincon Valleys in New Mexico and does in fact extend into Texas. The second is pumping in the Hueco Bolson, a separate aquifer disconnected from the Mesilla Bolson and also disconnected from the Rio Grande.

On purported impacts from the City of El Paso's pumping, New Mexico claims wells in this area have "proliferat[ed]." NM Response at 37. However, according to New Mexico's own declarant, Margaret Barroll, El Paso pumps only about 24,000 acre-feet/year. Margaret Barroll's Second Declaration (Barroll2d Decl.), Ex. 6, para. 31. By comparison, New Mexico's pumping in the Rincon and Mesilla Valleys from the Mesilla Bolson averages 140,000 acre-feet/year and is as much as 250,000 acre-feet/year. Declaration of Robert Brandes, P.E., Ph.D. in Support of Texas Opposition to New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Brandes2d Decl.), at TX_MSJ_007312-007329. To the extent the Special Master determines that New Mexico is entitled to complain about El Paso's pumping of 24,000 acre-feet/year, and to the extent it can be shown to adversely affect EBID farmers, Texas has in this litigation repeatedly stated that it is committed to regulation that would protect EBID.[26]

As far as impacts from Texas pumping in the Hueco Bolson (NM Response at 37), New Mexico appears to assert damage to *Texas* from this pumping, as well as New Mexico. New Mexico does not have standing to raise shortages Texas allegedly

[26] For example, Texas law provides for the imposition of a groundwater management area that would allow regulation of El Paso's pumping in a manner that protects any legitimate New Mexico interests from depletion.

causes itself and these alleged shortages are not part of the Texas Complaint. New Mexico further complains that Texas has failed to "control" groundwater use within its borders. *Id*. As the downstream state, Texas's administration of its groundwater is no affair of New Mexico's. If past original actions are any guide, New Mexico's tit-for-tat argument on the adequacy of Texas's groundwater administration is an uphill challenge. In *Nebraska v. Wyoming*, the Supreme Court, in considering exceptions to the Special Master's recommendations regarding motions to amend the pleadings, the Court observed:

> We fail to see how the mere fact of unregulated pumping within Nebraska can serve to bar Nebraska's claim. Nebraska is the downstream State and claims that Wyoming's pumping hurts it; Wyoming is upstream and has yet to make a showing that Nebraska's pumping hurts it or anyone else. If Wyoming ultimately makes such a showing, it could well affect the relief to which Nebraska is entitled, but that is a question for trial, and does not stop Nebraska from amending its claims at this stage.

Nebraska v. Wyoming, 515 U.S. 1, 14 (1995). The difference here is that the parties are not arguing about amending pleadings. Discovery is over and a trial is on the horizon and New Mexico's facts simply do not support New Mexico's position that pumping in the Hueco impacts either flows at the El Paso gage or to releases from Elephant Butte Reservoir or from Caballo Reservoir. *See* excerpts of Deposition of Shane Coors, 6/22/20, at TX_MSJ_007596-007597, 228:24-229:20.

Finally, many of New Mexico's arguments and the declarations to which it refers relate to Project operations[27] and cannot find a remedy in this lawsuit. These are Project accounting issues involving the United States, EBID, and EP#1, the contracting parties.

[27] S*ee* NM Response at 37-38, taking issue with whether EP#1 has been charged for the use of return flows and asserting that EP#1 now relies more heavily on reservoir water, citing the Barroll2d Decl. at paras. 46-55.

The Special Master in his March 31, 2020 Order struck New Mexico's Counterclaims 2, 3, and 5-9, which include the allegations regarding improper Project accounting and operation under the 2008 Operating Agreement. To the extent New Mexico seeks to put on testimony consistent with the March 31, 2020 Order to show the impact of operations, accounting, and other Project-related facts, that showing can wait for trial and the necessary evidentiary rulings to appropriately limit New Mexico's factual showings to issues related to the Compact.

G. New Mexico's Argument at Section VII of its Response is Irrelevant, Non-Responsive, and Should be Stricken

New Mexico's Response at section VII, pages 59-69, should be stricken or at least disregarded by the Special Master. New Mexico's arguments can only be read as requesting affirmative relief due to an alleged injury from the operation of the 2008 Operating Agreement. For example, on page 59: "The genesis of the current dispute was New Mexico's concern over reallocation of project water by the 2008 Operating Agreement." This statement and the argument that follows are not responsive to anything in the Texas Motion, which only mentions the Operating Agreement in one footnote, noting that it is a short-term remedy for the injury that Texas has suffered from unregulated New Mexico pumping. The Special Master struck New Mexico's counterclaims related to the 2008 Operating Agreement in the March 31, 2020 Order. Thus, the argument, in its entirety, should be stricken as unresponsive.

New Mexico raises issues of disputed fact alleging that its water use below Elephant Butte Reservoir has remained stable, and that effects from groundwater pumping have not appreciably increased. NM Response at 61-64. As a starting point, the idea that decades of groundwater pumping made without regard for depletions to the

surface stream have not caused an "appreciable increase" in the impacts to the Rio Grande is inconsistent with the understood, well-accepted fact that groundwater depletion impacts extend over years if not decades. Figure 2 of Barroll's Second Declaration shows the total surface water and groundwater delivered to New Mexico farms but does not account for the increase in the depletions of surface water from the Rio Grande that occurred through increased seepage due to lowered groundwater levels caused by New Mexico pumping. Brandes2d Decl. at TX_MSJ__0007312, 0007328. Cumulative impacts from groundwater pumping are reflected in the change in Montoya Drain flows shown in Figure which shows a reduction of approximately 39,000 acre-feet/year since 1950. *Id.*

New Mexico has also quantified these increased seepage losses with results from its own Integrated Lower Rio Grande Model (ILRGM) model for Run 1, which represents the historical condition simulation for 1940-2017 with all historical groundwater pumping, and for Run 3, which represents a corresponding simulated hypothetical condition with all of New Mexico's groundwater pumping turned off. As summarized in the Declaration of William Hutchison in Support of Texas's Motion for Partial Summary Judgment (Hutchison Decl.), TX_MSJ_000657-000669, New Mexico's model shows the impact from groundwater pumping in the Rincon and Mesilla Valleys of New Mexico averaged approximately 52,000 acre-feet/year. *Id.* at TX_MSJ_000657. In addition, under the "pumping off" modeling run (Run 3), groundwater elevations in the Rincon and Mesilla Basins are generally higher than the groundwater elevations in the Rincon and Mesilla Basins under Run 1, which New Mexico says reproduces historical conditions. The higher groundwater elevations result in more groundwater discharge to

the surface water system (canals, drains and the Rio Grande itself), and, thus, results in higher surface water flows. *Id.*

The increase in the depletions of the total Project water supply due to increased seepage losses from the Rio Grande caused by groundwater pumping in New Mexico is not accounted for in New Mexico's conclusory arguments or in the analysis it relies on made by Margaret Barroll in her Second Declaration. When taken into consideration, the evidence shows that there *has* been a significant increase in the overall depletions associated with irrigation within New Mexico since the 1950s.

Further, New Mexico's argument is founded on Margaret Barroll's Second Declaration which inappropriately used the "assessed or authorized" Project acreage rather than the *actual* irrigated acreage to calculate the irrigation water use per acre to conclude that EBID's total irrigation water application at the farm level (surface water and groundwater) has not changed from the 1940s and 1950s to present. Use of actual irrigated acreage for EBID as the basis for this calculation of irrigation water use per acre, which is more meaningful for expressing the real consumptive use of water by crops, demonstrates that the amount of irrigation water applied was 4.0 acre-feet per acre. Further, Margaret Barroll apparently knows this because in Table 1 of the Barroll report referenced in her Declaration, she uses *actual* irrigated acreage for EBID for 2008-2019 and reports an average total farm delivery of irrigation water of 4.0 acre-feet per acre. This more accurate representation of total irrigation water use illustrates that, in fact, EBID irrigators applied more irrigation water per acre (15 to 20 percent) during the more recent 2008-2019 period than they did historically during the 1940s and 1950s.

New Mexico raises issues of equity—related to its affirmative defenses that the Special Master reserved ruling on the applicability of in his March 31, 2020 Order.

NM Response at 65-69. However, these arguments should have been included in New Mexico's Motions. It is too late to seek relief on these issues now.

III. CONCLUSION

Based on the foregoing, Texas respectfully requests that the Special Master recommend, and that the Court grant, partial summary judgment of the 18 issues itemized in Texas's Notice of Motion, because each of the issues represents a core component of the claims set forth in Texas's Complaint that have not been genuinely disputed by New Mexico.

As demonstrated herein and supported by all of Texas's pleadings and evidence filed in support of the Texas Motion, there is no genuine dispute as to any material fact with respect to these issues, and Texas is therefore entitled to judgment as a matter of law. To the extent that the Special Master does not recommend that the Court grant all the relief requested by the Motion, Texas alternatively requests an order "stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g).

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Respectfully submitted,

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