

EXHIBIT C.3

New Mexico Counter De...

1 IN THE SUPREME COURT OF THE UNITED STATES
2 BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

3
4 STATE OF TEXAS)
)
5 Plaintiff,)
) Original Action Case
6 VS.) No. 220141
) (Original 141)
7 STATE OF NEW MEXICO,)
and STATE OF COLORADO,)
8)
Defendants.)

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11 *****

12 REMOTE ORAL AND VIDEOTAPED DEPOSITION OF
13 ESTEVAN LOPEZ
14 SEPTEMBER 18, 2020

15 *****
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REMOTE ORAL AND VIDEOTAPED DEPOSITION of ESTEVAN
17 LOPEZ, produced as a witness at the instance of the
United States, and duly sworn, was taken in the
18 above-styled and numbered cause on September 18, 2020,
from 9:02 a.m. to 12:38 p.m., before Heather L. Garza,
19 CSR, RPR, in and for the State of Texas, recorded by
machine shorthand, remotely at the offices of HEATHER
20 L. GARZA, CSR, RPR, The Woodlands, Texas, pursuant to
the Federal Rules of Civil Procedure and the
21 provisions stated on the record or attached hereto;
that the deposition shall be read and signed.

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R E M O T E A P P E A R A N C E S

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16 VIDEOGRAPHER:

17 Ms. Kayla Brown

18 ALSO PRESENT:

19 Shelly Dalrymple
20 Kari Olson
21 Al Blair
22 Greg Ridgley
23 John D'Antonio
24 Robin Cypher
25 Gary Esslinger
26 EreK Fuchs
27 Phil King
28 Cheryl Thacker
29 Daniel Ortiz

1 outside independent consultant.

2 Q. Okay. You're not an employee of the State?

3 A. I am not.

4 Q. Okay. And does your role as a 30(b)(6)
5 deponent change any of the responses you gave in your
6 prior depositions as an expert witness?

7 A. That's a very broad question, but I don't
8 think that it really changes any of the -- the
9 responses that I had before.

10 Q. Okay. So should we understand that the
11 opinions that you gave as an independent consultant
12 are the views of the State of New Mexico?

13 A. I believe that's correct. You know, there --
14 there may be some where some portions of the
15 depositions were done. It's been a lot of questions
16 asked. There may be certain questions if I were asked
17 today that I would answer in a more way. It's just as
18 I mentioned, it's a very, very broad question here
19 you're asking me. I don't -- unless I were asked a
20 specific question, I'm not sure that I could give you
21 a more specific answer than that.

22 Q. Okay. How about the -- the questions that
23 you were asked about what New Mexico's apportionment
24 is under the Compact, will those change?

25 A. No.

1 Q. Okay. Is it New Mexico's position that the
2 Rio Grande Compact is a complete apportionment of the
3 flows of the Rio Grande between the head waters and
4 Fort Quitman?

5 A. Yes. Excuse me. Can I ask a question, kind
6 of a process question?

7 Q. Sure.

8 A. In -- in prior depositions, I've had access
9 to realtime -- the realtime transcript. I don't have
10 that up right now. I'm not sure if that's --

11 Q. I think that's a good idea to get that up.

12 MR. DUBOIS: I assume, Heather, that it
13 is the usual transcript realtime.

14 THE REPORTER: Yes.

15 THE VIDEOGRAPHER: Do you want to go off
16 the record to set this up?

17 MR. DUBOIS: Yeah. Why don't we go off
18 the record and get that up.

19 THE VIDEOGRAPHER: The time is 9:18 a.m.
20 We're off the record.

21 (Break.)

22 THE VIDEOGRAPHER: The time is 9:23 a.m.
23 We're on the record.

24 Q. (BY MR. DUBOIS) Okay. I think that we -- you
25 -- we were just talking about whether or not the Rio

1 Grande Compact is complete apportionment of the flows
2 of the Rio Grande, and you said that it was. What --
3 what does New Mexico think that a -- a complete
4 apportionment of the flows of the Rio Grande means?
5 What does that mean?

6 A. I think that it means that all of the flows
7 that arise in the Rio Grande between the head waters
8 and Fort Quitman are divide -- are divided as between
9 the three states.

10 Q. So was there any flow of the Rio Grande
11 between the head waters and Fort Quitman that was not
12 apportioned by the Compact?

13 A. I cannot think of any, no.

14 Q. Okay. Now, you've also -- you previously
15 stated in earlier deposition that the Rio Grande below
16 Elephant Butte was fully appropriated by 1938. Do you
17 remember discussing that in depositions?

18 A. Yes.

19 Q. Okay.

20 A. Yes, I do.

Texas
Affirmative

21 Q. And -- okay. Do you still stand by the --
22 the conclusion that the Rio Grande below Elephant
23 Butte was fully appropriated in 1938?

24 A. I do.

25 Q. Okay. And so that -- I just want to be clear

1 that that's also the position of the State of New
2 Mexico then?

3 A. That's correct.

4 Q. Okay. Okay. What does it mean that the
5 river was fully appropriated?

6 A. That means that all of the waters -- all of
7 the surface waters of the river are -- have been
8 spoken for.

9 Q. Okay. So all of the surface water had
10 already been allocated to existing water rights? Is
11 that another way of saying it?

12 A. Yes. Let me -- let me review that. Yes,
13 that's correct.

14 Q. Okay. And does that mean that any additional
15 diversions after 1938 that deplete the river would
16 take water away from existing water rights?

17 MR. WECHSLER: Object to form.

18 A. It would impact those water rights, yes.

19 Q. (BY MR. DUBOIS) All right. If you're taking
20 water away from them, that would be a -- add adverse
21 impact of those water rights?

22 MR. WECHSLER: Object to form. And I
23 also think we're getting a little beyond the scope.

24 MR. DUBOIS: No, we aren't, but he can
25 answer if he knows anyway.

1 A. Generally speaking, I think that's correct.

2 Q. (BY MR. DUBOIS) Okay. Does the Rio Grande
3 Compact apportion water to New Mexico below San
4 Marcial?

5 A. Yes.

6 Q. Does New Mexico assert that it receives an
7 apportionment of water -- does New Mexico assert that
8 it receives an apportionment of water from the Rio
9 Grande below San Marcial?

10 A. I'm not sure I understand what distinction
11 you're making between that and your prior question.

12 Q. Okay. When did -- when did New Mexico
13 determine that it had an apportionment of water below
14 San Marcial?

15 A. I think when we agreed to the Compact.

Texas
Affirmative

16 Q. What is New Mexico's apportionment of water
17 under the Rio Grande Compact?

18 A. Under the Rio Grande Compact?

19 Q. Yes.

20 A. This is what we receive from Colorado under
21 Article 3 of the Compact at the state line, plus all
22 of the inflows that arise between the state line and
23 Elephant Butte, less our obligation to deliver water
24 into Elephant Butte under Article 4, plus 57 percent
25 of project supply below Elephant Butte, project supply

1 being comprised of releases of usable water, inflows
2 below Elephant Butte, and return flows, returning
3 drain flows.

4 Q. So let's -- let's -- and my question was
5 overly broad for my purposes, I guess. So let's just
6 focus on the apportionment of water below San Marcial,
7 the apportionment of water to New Mexico below San
8 Marcial. That's -- just focus on that and call that
9 out from the answer. So what's the apportionment of
10 water to New Mexico below San Marcial?

11 A. So I think this is probably the same thing,
12 but I'm going to -- I'm going to just clarify that I'm
13 referring to below Elephant Butte given that the
14 delivery point under Article 4 was changed in 1948.
15 So I'll -- I'll be responding --

16 Q. And that's fine. That's fine. I understand.

17 A. So as I -- as I answered above, and as I've
18 laid out in my reports and in questions -- in
19 responses to questions before, it is 57 percent of the
20 project supply, and that project supply being
21 comprised of releases of usable water inflows below
22 Elephant Butte and returning drain flows.

23 Q. So do the downstream contract -- do you --
24 are you familiar with what the term downstream
25 contracts refers to?

1 A. I am. Certainly as I've defined them in my
2 reports, there may -- and I think it's consistent with
3 how it's been used otherwise by others.

4 Q. And so when you're referring to the
5 downstream contracts, what are you referring to?

6 A. I'm referring -- in my report, I referred
7 specifically to three contracts, 19 -- I may get the
8 dates from memory, get them off, but --

9 Q. Would it be helpful to have them in front of
10 you?

11 A. I can look at my reports. I have the copy of
12 my reports in front of me. If it's all right, I can
13 refer to that if you'd like.

14 Q. You can. I can also -- I can also provide
15 you the contracts.

16 A. That's fine. So let me tell you generally,
17 it's a 1938 contract between Elephant Butte and --
18 Elephant Butte Irrigation District and Reclamation.
19 It's either 1937 to 1938, that -- that contract is,
20 and similar time frames for a contract between
21 Reclamation and El Paso County Water Improvement
22 District No. 1, and the third contract that I referred
23 to as one of the -- the downstream contracts is a 1938
24 contract between the two districts that was later
25 approved by the Department of Interior. I believe it

1 was in April of 1938. Is that -- is that sufficient
2 specificity?

3 Q. Yes. As I said, I can provide them. I just
4 wanted to make sure that we're talking about the same
5 things. So do the -- do the -- do the downstream
6 contracts between the United States and EBID and
7 between EBID and EPCWID define the apportionment to
8 New Mexico?

9 A. I think they inform the -- the apportionment
10 to New Mexico. They don't define it as explicitly as
11 -- as -- as I've defined here in my responses to you.
12 They inform it by -- in several ways. First of all,
13 the -- the contract between EBID and -- and EP No. 1
14 that is EPCWID has a shortage provision that is
15 specific and explicit about in times of shortage,
16 water is to be shared 57/43. In essence, in
17 proportion to the acreage in each of the districts as
18 a total of -- a total project authorized acreages.
19 And then the -- the two contracts between Reclamation
20 and the districts specify the acreages of each of the
21 districts, the authorized acreages of each of the
22 districts. That's consistent with that. Those two
23 contracts also have essentially identical terms except
24 for the -- the proportion of payment that is also
25 proportionate to the acreage and so those things

1 inform that apportionment, and in my report and in
2 responses to my prior depositions, I've explained how
3 the 57/43 that I assert is the apportionment below
4 Elephant Butte we get from a reading of the Compact
5 together with those downstream contracts and the
6 historical practice of how the project has been
7 operated up until essentially 2006.

8 Q. So is the contract with EBID the sole means
9 for New Mexico obtaining its apportionment under the
10 Compact?

11 MR. WECHSLER: Object to form.

12 A. Are you referring only to that -- the
13 apportionment below Elephant Butte?

14 Q. (BY MR. DUBOIS) Yes. I'm sorry. I should
15 have been clear on that. I apologize.

16 A. I believe that it is, yes.

17 Q. Okay. Is it New Mexico's position that the
18 contracts between the United States and the two
19 districts and the contract between the two districts
20 are integrated into the Compact?

21 A. I think what I testified is that they -- that
22 the Compact and the project are inextricably linked,
23 and the -- and the contracts are also kind of
24 inextricably linked to -- or inextricably intertwined,
25 I think is what I -- what I said in my report. I was

1 using some of the language that the -- that the
2 Supreme Court has used and relied on that -- on that
3 -- their findings, as well.

4 Q. What do you mean by inextricably intertwined?

5 A. They work together. They work together, and
6 you can't -- you can't -- you can't read them
7 independent of one another.

8 Q. So anything -- I'm just trying to understand
9 this. So anything that impacts the project water
10 supply impacts the apportionment; is that correct?

11 MR. WECHSLER: Object to form.

12 A. Could you rephrase that? I'm not
13 understanding what you're asking.

14 Q. (BY MR. DUBOIS) Well, I'm trying to
15 understand when you say that they're inextricably
16 intertwined and that they have to be read as part and
17 parcel of each other; is that correct? Is that what
18 you're saying?

19 A. Yes. And I'm specifically speaking as to how
20 you -- how you make a determination as to the
21 apportionment. Certainly, there is probably elements
22 that could be looked at independently, but -- but for
23 -- for getting to an apportionment below Elephant
24 Butte, I think you have to look at all three of these
25 -- all, I guess, four of these documents together.

1 Q. Okay. And so my question was then if they're
2 inter -- interdependent and intertwined, anything that
3 affects -- is anything that affects the project water
4 supply affecting the Compact?

5 A. So first of all, if -- I think you may have
6 just been reading what I answered earlier. I don't
7 think that I said they were inextricably
8 interdependent. I did they they were inextricably
9 intertwined. And that's -- if you're asking me the
10 difference, I don't know that I -- that I can say what
11 the difference is. But nevertheless, you asked if --
12 is anything that affects project supply also affecting
13 the Compact. I'm not sure. I don't know that. I
14 don't know the answer to that. Unless you give more
15 specificity to what you're talking about in -- in
16 anything.

17 Q. Is there any other apportionment in the
18 Compact to New Mexico below Elephant Butte, other than
19 the water under the contract with EBID?

20 MR. WECHSLER: Object to form.

21 A. I think I already answered that, and I said
22 no.

23 Q. (BY MR. DUBOIS) Okay. Is there any
24 apportionment of water to New Mexico below Elephant
25 Butte, other than project water that EBID is entitled

1 to under what we've been referring to as the
2 downstream contracts?

3 A. Again, I'm not seeing how this is different
4 than your prior question.

5 Q. It's slightly different so please answer it.
6 Or should I just -- can I take it that the answer to
7 that is no?

8 A. I'm rereading it.

9 Q. Uh-huh.

10 A. I think the answer is no.

New Mexico
Counter De...

11 Q. Okay. So are the -- the EBID project
12 allocation and New Mexico's apportionment under the
13 Rio Grande Compact below Elephant Butte the same?

14 A. They are not certainly -- they are certainly
15 not since the 2008 operating agreement.

16 Q. That's not what I asked. Are the EBID
17 project allotment and New Mexico's apportionment under
18 the Compact below Elephant Butte reservoir the same?

19 MR. WECHSLER: Object to form.

20 A. Not since two thousand -- not since 2006.

21 Q. (BY MR. DUBOIS) You're refusing to answer the
22 question.

23 A. I have answered the question.

24 Q. Let me try again.

25 A. You don't like my answer.

1 Q. All right. Let's rephrase the question then.

2 Is it the Compact's intent that the EBID project
3 allotment and New Mexico's apportionment under the Rio
4 Grande Compact below Elephant Butte reservoir the
5 same? Are they to be the same?

6 A. Would you please -- please define project
7 allotment for me, please?

8 Q. What EBID is entitled to receive under the
9 downstream contracts?

10 A. In that instance, I would say yes.

11 Q. Okay. Are the contracts for the Rio Grande
12 project the only means provided for in the Compact for
13 distribution of New Mexico's apportionment?

14 MR. WECHSLER: Object to form.

15 A. Well, to the extent that you're asking that
16 -- I guess the way I would say it and I have said it
17 is that the operation of the project is the -- is the
18 -- the mechanism for effectuating the Compact
19 apportionment.

20 Q. (BY MR. DUBOIS) And the operation of the
21 project is pursuant to the downstream contracts; is
22 that correct?

23 A. Generally, yes.

24 Q. Okay.

25 A. Or at least --

1 Q. So the downstream -- I'm sorry. What? I
2 didn't mean to cut you off.

3 A. Or at least it was.

4 THE REPORTER: I'm sorry. Please repeat
5 that again.

6 THE WITNESS: I said, "Or at least it
7 was."

8 Q. (BY MR. DUBOIS) Okay. Does Texas have an
9 apportionment of water under Elephant Butte -- below
10 Elephant Butte reservoir?

11 A. As I've testified in my reports and in my
12 depositions, my prior depositions, yes, it has an
13 apportionment below Elephant Butte.

14 Q. And I know some of this is repetitive,
15 Mr. Lopez, but you're now -- you're now speaking for
16 the State of New Mexico as opposed to as an
17 independent contractor so they seem redundant, but I'm
18 still needing to ask you these things. So it's fine
19 that you clarify and -- and reiterate your prior
20 testimony, but, you know, there's -- there is a reason
21 that we're covering some same ground?

22 A. I understand.

23 Q. So just --

24 A. I'm simply --

25 Q. Okay. All right.

1 A. -- simply trying to -- you asked me earlier
2 if -- if my responses had changed. They hadn't, and
3 hasn't really changed --

4 Q. Okay.

5 A. -- from my reports either.

6 Q. No, and that's -- and that's fine.

7 Basically, that's what we're trying to -- to make sure
8 that we're consistent going along here, so that's --
9 that's fine. Understand that I do appreciate some of
10 this is plowing old ground, but because of sort of
11 your -- your position in this deposition, we're going
12 to -- we're going to recover some of that. So I'm,
13 you know, just explaining that I'm not merely doing
14 this to be obnoxious, not the only reason.

15 A. And I'm not -- I'm not trying to be obnoxious
16 by responding by referring to --

17 Q. No.

18 A. -- my prior depositions or my reports. I
19 simply want to say that it hasn't changed.

20 Q. Okay. And that's -- and that's fine. So
21 just so we know that we're -- we're both on the same
22 track, so that's good.

23 So what's Texas' apportionment of the Rio
24 Grande Compact?

25 A. 47 -- excuse me. 43 percent or roughly 43

1 percent of the project supply that arises below
2 Elephant Butte, and that is comprised of releases of
3 usable water of Caballo reservoir, inflows between
4 there and Fort Quitman, and returning drain flows.

5 Q. So do the downstream contracts define the
6 apportionment to Texas?

7 A. My response here would be the same as my
8 response was to -- to their relationship to -- they
9 inform the apportionment to Texas in the same way that
10 they inform the apportionment to New Mexico that I
11 described above.

12 Q. So under the Compact, is the EPCWID project
13 allotment intended to be identical to Texas'
14 apportionment?

15 MR. WECHSLER: Object to form.

16 A. With the same caveats as my responses
17 earlier, that is that at least originally, yes.

18 Q. (BY MR. DUBOIS) Okay. And are -- are the
19 contracts for the Rio Grande project to EPCWID the
20 only means provided for in the Compact for
21 distribution of Texas' apportionment?

22 MR. WECHSLER: Object to form.

23 A. I will respond again mirroring my response to
24 your similar question on EBID, and that is that it's
25 my opinion that the -- that the operation of the

1 project is the means, the mechanism by which the
2 Compact apportionment is effectuated.

New Mexico
Counter De...

3 Q. (BY MR. DUBOIS) Is there any apportionment to
4 Texas under the Rio Grande Compact other than project
5 water that EPCWID is entitled to under its contracts?

6 MR. WECHSLER: Object to form.

7 A. I would say no.

Texas
Affirmative

8 Q. (BY MR. DUBOIS) Okay. Does New Mexico agree
9 that groundwater pumping in New Mexico below Elephant
10 Butte dam in the Mesilla and Rincon basins for
11 irrigation and municipal and industrial uses in New
12 Mexico deplete the flows of the Rio Grande that are
13 available for diversion by the Rio Grande Project?

14 MR. WECHSLER: Object to form; scope.

15 A. The groundwater pumping in New Mexico does
16 impact surface supply.

17 Q. (BY MR. DUBOIS) Does it deplete the surface
18 supply?

19 MR. WECHSLER: Same objection.

20 A. I think that it does, yes.

21 Q. (BY MR. DUBOIS) Okay. What obligation does
22 New Mexico have under the Compact to be sure that the
23 project water supply is not depleted or reduced by
24 non-project water users?

25 A. I'm not sure that we have any specific

1 obligation not to deplete or reduce project supply
2 unless -- unless there is some notice that -- that
3 there is -- that Texas is not getting its
4 apportionment. Having said that, New Mexico does and
5 has permitted such uses to -- to require that any
6 impacts -- any such impacts would be offset since it's
7 closed the basin -- or since it's -- since it's
8 declared the basin. Excuse me.

9 Q. All right. So all the development before it
10 closed the basin is ignored for purposes of
11 administration; is that correct?

12 MR. WECHSLER: Object to form.

13 A. No, it's not ignored, but I think that unless
14 -- unless we are put on notice that Texas is not
15 getting its apportionment, we don't necessarily have
16 to do anything about it.

17 Q. (BY MR. DUBOIS) So there's no obligation
18 under the -- let me rephrase that. If pumping of
19 groundwater in New Mexico depletes the flow of the Rio
20 Grande, either directly by pulling water from the
21 river drains or by preventing water from returning to
22 the river and -- and they reduce the project water
23 supply, do those depletions to the river count against
24 New Mexico's apportionment?

25 MR. WECHSLER: Object to form.

1 A. I think that it is non -- for non-project
2 uses. If it is for non-project uses, those might have
3 to be offset, but not if it's for project uses.

4 Q. (BY MR. DUBOIS) Why not if it's for project
5 uses?

6 A. Because -- well, one of the -- one of the
7 purposes of the Compact is to -- is to make the -- the
8 project viable over the long haul, and that viability
9 includes getting -- or having access to groundwater
10 for conjunctive use, and that's consistent in both
11 states.

12 Q. Is there any limitation on New Mexico as to
13 how much surface water can be depleted by pumping in
14 New Mexico?

15 MR. WECHSLER: Object to form.

16 A. Are you asking about for a specific purpose
17 or just generally?

18 Q. (BY MR. DUBOIS) Generally.

19 A. Well, yes, I think there is a limitation. If
20 -- if Texas is not getting 43 percent of its project
21 supply of the project supply then I think that would
22 -- that would set the limitation.

23 Q. But you've told me that depletions to the
24 water supply from pumping, at least for pumping for
25 project beneficiaries, does not count against the

1 MR. DUBOIS: Okay.

2 THE VIDEOGRAPHER: The time is 11:19
3 a.m. We're off the record.

4 (Break.)

5 THE VIDEOGRAPHER: The time is 11:30
6 a.m. we're on the record.

7 Q. (BY MR. DUBOIS) Mr. Lopez, I think I've only
8 got one more question at this point, and I'll turn it
9 over to Mr. Somach. Your testimony that New Mexico's
10 obligations under the Compact not to deplete the flow
11 of the Rio Grande through non-project water users --
12 non-project pumpers isn't triggered until Texas
13 complains, I mean, is that -- is that a fair summary
14 of what you said is that New Mexico's obligation under
15 the Compact not to deplete flows through non-project
16 users isn't triggered until Texas complains about not
17 getting its apportionment?

18 MR. WECHSLER: Object to form.

19 A. You know, I think -- I think I did say that.

20 Q. (BY MR. DUBOIS) Okay.

21 A. I think that is what I said earlier. But I
22 -- but, you know, I -- the reality is that I think
23 that we have -- New Mexico has, in fact, been
24 requiring any non-project users that have -- you know,
25 get permits or whatever else to offset their impacts.

1 So we're --

2 Q. But that's true -- that's true only of
3 non-project pumpers after the closure of the basin,
4 right?

5 A. That's correct. But I also think -- and this
6 is probably subject to check, but I think that the --
7 that largely, the -- here, I'm thinking about
8 municipal -- municipal users, Las Cruces specifically.
9 I think that their -- their impacts have been
10 essentially offset by their -- by their wastewater
11 effluent.

12 Q. A factual question that's sort of outside of
13 our discussion, I think.

14 A. Sure.

15 Q. But -- but my understanding is what you said
16 was that also applied to non-project irrigators?

17 A. That's correct.

18 Q. Okay. So if the Compact allegation in that
19 regard is triggered once Texas lodges some sort of a
20 formal complaint, do you agree that the complaint that
21 Texas filed in this original action constitutes such a
22 formal complaint?

23 A. I do. I think it constituted a formal
24 complaint. So --

25 Q. Right.

1 A. -- and the way --

2 Q. So -- go ahead. I'm sorry. And the way?

3 A. And the way I would see that playing out is
4 there will be an investigation as to whether there is
5 -- whether Texas has actually been shorted and that we
6 would deal with it. I think that's kind of what's
7 going on here.

New Mexico
Counter De...

8 Q. Okay. So what, if any, investigations of
9 impacts in the river has been done regarding those
10 non-project irrigation users?

11 A. I think we've investigated every facet of
12 project operations and non-project operations, every
13 facet of water use in that section of the river that I
14 can think of, and, you know, having said all of that,
15 my -- my impression is that Texas has not been
16 shorted.

17 Q. Has the -- have those -- has the pumping by
18 those non-project irrigators impacted the amount of
19 water available to EBID?

20 A. You know, I don't recall -- I don't recall
21 the -- there's a -- we've got an analysis of that. I
22 just don't recall the specific --

23 Q. Okay. Fair enough.

24 A. -- answer for that.

25 Q. Okay. Fair enough.

1 A. But I think -- I think -- I think it is
2 within all of the various scenarios that are laid out
3 in -- in the Spronk report, series of reports.

4 Q. And then -- but none of those impacts for --
5 for pumping initiated prior to the designation of the
6 basis -- basin, excuse me, has -- requires offsets; is
7 that right?

8 A. You're asking if New Mexico requires that
9 pumping for non-project irrigation that precedes the
10 basin declaration requires offsets?

11 Q. Uh-huh. Yes.

12 A. You know, I believe -- I believe they don't,
13 but I think someone else would be better equipped to
14 answer that.

15 Q. I just was recalling that I think maybe this
16 was discussed in one of your prior depositions and
17 merely closing my own intellectual curiosity on that.

18 MR. DUBOIS: Okay. I -- at this point,
19 I don't think I have anymore questions for you,
20 Mr. Lopez. Thank you. I'll turn it over to
21 Mr. Somach.

22 THE WITNESS: Thank you.

23 E X A M I N A T I O N

24 BY MR. SOMACH:

25 Q. Mr. Lopez, I'm going to try to get through

1 these relatively quickly, because I know we have
2 others and other depositions that we want to get into
3 today. You indicated at the beginning of Mr. Dubois'
4 questions that you understood that you were testifying
5 as if you were New Mexico; is that correct?

6 A. Yes.

7 Q. That's the difference between your
8 depositions that were taken as an independent expert
9 versus your 30(b)(6) deposition that's being taken
10 here today, you understand that distinction; is that
11 correct?

12 A. Yes, that's correct.

13 Q. Okay. And so when I refer to you in this
14 deposition, I'll try to distinguish between your prior
15 depositions and your reports versus your speaking for
16 New Mexico and so do you understand that when I use
17 the word "you" in this deposition, I'm referring to
18 the State of New Mexico?

19 A. I will try and keep that in mind.

20 Q. Okay. And I'll remind you if there appears
21 to be any confusion. Is it your opinion that actions
22 by New Mexico are having -- with respect to -- to
23 actions below Elephant Butte reservoir are having no
24 injury, they're not injuring Texas in any respect?

25 A. I guess to the extent that you're asking in

1 any given year, I don't know the answer in any given
2 year. I think if you look at things cumulatively
3 through, let's say, I think from '85 through 2017, I
4 would say that, yes, there's -- there's been no injury
5 to Texas.

6 Q. And under the same qualification you just
7 made, are you saying that the converse or the contrary
8 is true with respect to Texas' injury to New Mexico,
9 that, in fact, over that period of time, Texas'
10 actions have injured New Mexico's rights under the
11 Compact?

12 A. So I -- let me just answer the question fully
13 just so that -- I believe that during that same time
14 period, Texas' actions have injured New Mexico.

Texas
Affirmative

15 Q. Okay. Does groundwater have any -- anything
16 to do at all with the 1938 Compact apportionment?

17 A. No. Other than I would say that the Compact
18 allows the conjunctive use of that groundwater.

19 Q. And -- and what do you refer to with respect
20 to the Compact that gives rise to that answer?

21 A. Well, again, I'm -- I'm referring to
22 documents that were contemporaneous with the Compact
23 and -- and -- and the practice that has happened since
24 -- since then up until now. The specific document
25 that I -- that I would refer to there is the rules and

1 regs of the -- of the -- of the Compact commission.

2 Q. Are you referring, when you say this, to the
3 rules and regulations or other historic documents that
4 relate to the fact that except as provided for in the
5 Compact, each state is allowed to fully develop their
6 water resources, is that -- is that what you're
7 talking about?

8 A. Yes. That's paraphrased, but yes.

9 Q. Okay. And --

10 A. And then the other -- the other aspect of it
11 that I was referring to has been the historic practice
12 that has -- that has come about since the Compact was
13 signed.

14 Q. Okay. Let's -- let me look upstream a little
15 bit here above Elephant Butte just to understand and
16 provide some context for that. Are there any limits
17 on Colorado's ability to develop its upstream
18 resources within the Compact, is there any Compact
19 limit on what they can do in terms of -- of developing
20 water upstream.

21 MR. WALLACE: Object to form?

22 A. I think there are, and specifically, I think
23 that they are able to develop their -- their upstream
24 resources as long as they continue to meet their
25 obligations under Article 3 and -- and then there's

1 other limitations in terms of the storage of water in
2 post-Compact reservoirs, I think, in their instance,
3 it's post '37 reservoirs, but other than that, you can
4 develop their resources.

5 Q. And I think we -- we may have talked about
6 this in one of your prior depositions, but those
7 limitations are to ensure that depletions in Colorado
8 would be -- it seems what existed in 1938; is that
9 correct?

10 MR. WALLACE: Object to form.

11 A. I think that's largely -- largely correct.

12 Mr. Somach, can I ask you to speak up just a little
13 bit? I'm having a little bit of trouble hearing you
14 as you ask your questions.

15 Q. (BY MR. SOMACH) I will -- I will try to speak
16 up and get closer to my microphone here.

17 A. Thank you.

18 Q. Now, with respect to development above
19 Elephant Butte reservoir, to the extent that there are
20 limits on what New Mexico can do in terms of
21 developing full water resources above Elephant Butte,
22 is that also similarly limited to -- to depletions
23 that would have existed at -- in 1938?

24 A. I think that's correct. I think there's
25 reference in New Mexico -- in New Mexico's case to

Texas
Affirmative

1 depletions as of 1929. I think there's a couple of
2 references to that, one with regard to reservoirs
3 built after '29, and then a second for the -- in the
4 resolution -- the 1948 resolution that changed the --
5 our delivery point from San Marcial to Elephant Butte,
6 I think there's also -- depletions above Otowi have to
7 be constrained to 1929, and if they're not, then you
8 have to make an adjustment as between above Otowi and
9 below Otowi.

10 Q. 1929 was the date of the temporary --
11 so-called temporary contract among Colorado, New
12 Mexico, and Texas; is that -- is that correct?

13 A. The temporary Compact, correct? Is that --

14 Q. I said contract. I meant Compact.

15 A. Yeah. Yes. That's correct.

Texas
Affirmative

16 Q. Were New Mexico's ability to develop -- fully
17 develop its water resources below Elephant Butte
18 Reservoir also constrained by ensuring that depletions
19 below Elephant Butte reservoir did not exceed that
20 which existed in 1938?

21 A. I don't think those are similarly
22 constrained, no.

23 Q. Okay. So -- and here, I'll -- I'll separate
24 out New Mexico from Texas below Elephant Butte. So
25 New Mexico -- Colorado was constrained by the

1 depletions that existed as of 1938 in its delivery to
2 New Mexico, and New Mexico was constrained in terms of
3 its deliveries into Elephant Butte reservoir based
4 upon depletions that existed in 1938, but New Mexico
5 below Elephant Butte reservoir is not constrained by
6 depletions that might have existed in 1938; is that --
7 is that what you're saying, that there's a distinction
8 between the obligations above Elephant Butte and those
9 that exist below Elephant Butte?

10 MR. WALLACE: Object to form.

11 A. I think that's correct. There is a
12 distinction.

13 Q. (BY MR. SOMACH) And explain to me that
14 distinction.

15 A. There is no constraint below Elephant Butte.
16 There is no 1938 -- in my report and in response to
17 previous depositions, I -- I've responded about the
18 '38 condition -- depletion condition. That's --
19 that's what I was talking about. There is -- there is
20 no -- there is no such condition placed in the Compact
21 for the section below Elephant Butte.

22 Q. Let -- let me clarify something here, and
23 that is -- and this is the distinction between you as
24 the State of New Mexico and you as Estevan Lopez,
25 independent expert. You've written a number of expert

1 reports that have been disclosed and submitted in this
2 case; is that correct?

3 A. I have.

4 Q. How many reports have you -- have you written
5 in this case?

6 A. I guess three, and then the third one has a
7 second edition.

8 Q. Okay. And that -- the last report was what
9 we got earlier this week, I think; is that correct?

10 A. That's correct. That's the second edition of
11 the supplemental.

12 Q. Okay. Those reports all have opinions within
13 them; is that correct?

14 A. They do.

15 Q. Do you, as New Mexico, have a -- a different
16 view with respect to the opinions that you rendered in
17 -- that -- that Estevan Lopez rendered in his reports
18 that Estevan Lopez did with respect to those opinions?
19 In other words -- let me try to say that better.

20 I'm just trying to figure out if -- if you,
21 as New Mexico, concur with all of the opinions that
22 were rendered in the Estevan Lopez expert reports.
23 I'm hoping that that will shorten things up because
24 we've asked you about all of those things, and I'm
25 just trying to figure out if that's the case?

New Mexico
Counter De...

1 A. I, as New Mexico, concur with the opinions
2 expressed by I, as Estevan Lopez.

3 Q. Okay. And presumably, to the extent that
4 questions were asked of you in depositions, you, as
5 the State of New Mexico, concur with the answers you
6 gave to those questions when you were acting as
7 Estevan Lopez, expert witness; is that correct?

8 A. Yes. That's generally correct. As I
9 mentioned earlier with Mr. Dubois, I think there was a
10 lot of questions, and I might answer some of those
11 questions with a bit of different nuance, answering on
12 behalf of the State of New Mexico.

13 Q. And why -- why is that? Why would it -- why
14 would your answers be more nuanced for the State of
15 New Mexico than when you responded to those same
16 questions on behalf of the -- of the -- on your own
17 behalf?

18 A. Well, I think -- I think even -- even from my
19 very first deposition, I've -- just speaking as -- as
20 Estevan Lopez, I think my understanding has evolved
21 somewhat over time of various aspects of things, and
22 -- and that continues into today as -- as I speak for
23 the State of New Mexico.

24 Q. Okay. So -- so it's just the evolution over
25 time of the more you've thought about these things,

1 the little variation, it's nothing more systemic, more
2 -- more substantive than just that evolution; is that
3 correct?

4 A. I think that's correct. I think as a result
5 of your questions and those of other lawyers, I
6 certainly have thought about things much in more
7 detail than I have as I wrote these things initially.

8 Q. Now, you referred to, I think, three
9 contracts as defining the apportionments of the
10 relative apportionments below Elephant Butte and to --
11 to Texas and to New Mexico, and those were the two
12 1937 contracts between the districts and the United
13 States, plus the 1938 contract among the United
14 States, EP No. 1, and EBID; is that correct -- is that
15 correct?

16 A. That's generally correct. I did not say that
17 they define the apportionments. I said they inform
18 the apportionments along with the Compact and with
19 historic practice.

20 Q. That's -- actually, you've -- you've --
21 you've hit on the exact question, whether you knew it
22 or not, that I wanted to ask. I don't understand what
23 the word inform means in the context of that response.
24 I simply don't know how you're using it there so
25 perhaps you can explain the difference between

1 something informing and -- and something being the
2 apportionment?

3 A. I'll do my best. What I mean is, you know,
4 I've said in -- in my reports, my Estevan Lopez
5 reports, that -- that the Compact is not explicit as
6 to how it apportions water. Well, nor -- the -- those
7 downstream contracts are not explicit that way either.
8 They don't say New Mexico gets 43 percent of the water
9 from the project, and Texas gets -- or New Mexico gets
10 57 percent, and Texas gets 43 percent. Rather,
11 there's other elements that -- that we read together
12 with the Compact with other historical documents from
13 the time and the practice that evolved from that to
14 come to the conclusion that the apportionment is
15 57/43. That's what I meant by saying that it informs
16 that.

17 Q. So do you start with those contracts? Is
18 that the place you start and then there is -- I mean,
19 the contracts provide certain specific things, don't
20 they?

21 A. They do provide certain specific things. I
22 start with the Compact first, and -- and then the --
23 then I look to the -- to the contracts, which were
24 essentially contemporaneous with the Compact. I think
25 they were probably at the fore of everybody's thinking

1 as they were concluding the Compact negotiations and
2 then I look at some of the documents by some of the
3 Compact negotiators that -- that kind of give us an
4 insight into what they were thinking and I look at the
5 practice of Reclamation and how it's operated the
6 project since.

7 Q. So if I -- if I, for the sake of just moving
8 this along, start with the contracts, how did the
9 Compact modify those contracts, the obligations under
10 those contracts?

11 MR. WECHSLER: Object to form.

12 A. I don't -- I don't think that the Compact
13 modifies, at least that's not -- you know, I'm not --
14 I'm not a lawyer. I'm not a contract law expert or
15 anything else, but I don't -- at least it's my opinion
16 that the Compact doesn't modify the contracts. The --
17 however, once the Compact -- once you have an
18 apportionment based on the contemporaneous reading of
19 those con -- contracts with the Compact and the
20 documents beyond there, that then, in my estimation,
21 becomes part of -- that is set, the 57/43 then is set
22 and is not nothing that can be simply modified by
23 modifying or -- or amending the contract. So I don't
24 think -- I don't think it modifies the -- the
25 contract, but I would say that after that time, that

1 yielded a full supply, as has been defined by the
2 project.

3 Q. (BY MR. SOMACH) Well, I think you -- you also
4 said, though, that groundwater pumping, which is --

5 A. I'm sorry. I'm having trouble hearing you
6 again.

7 Q. I think you've also said that groundwater
8 pumping, which is a -- a condition of depletions has
9 increased over time and that that increase in
10 depletion has affected flow in -- in -- in the river.
11 I think you said that?

12 A. Well, you know, I think -- I think I probably
13 did say that, but let me put some fine point -- finer
14 points on that. It certainly increased pretty
15 dramatically in the '50s from essentially no
16 groundwater pumping, for project purposes, to pretty
17 substantial project -- groundwater pumping. Then we
18 have a period of full project supply where groundwater
19 pumping was greatly reduced in the early 2000s,
20 2003/2004, again, groundwater pumping went up pretty
21 dramatically, but not -- not appreciably more than
22 what we had that we experienced in the '50s. It did
23 go up appreciably after the 2006 and the 2008
24 operating agreement where New Mexico's surface water
25 allotments were dramatically reduced as a result of

1 the operating agreement.

2 Q. To the extent that -- that losses exist in
3 the system, do they -- do they reduce the amount of
4 surface water that -- that is available for
5 application of consumptive use in the project? And
6 here, I'm not -- I'm not distinguishing between --
7 between New Mexico project lands and Texas project
8 lands. I'm just asking the general question of
9 whether losses affect the amount of water that can be
10 applied and consumed by crops?

11 MR. WECHSLER: Object to form.

12 A. So certainly, losses reduce the amount of
13 water. If there were no losses, there would be more
14 water available. We could build up -- keep a lot more
15 water in the reservoir, wouldn't have to call -- call
16 for as much water. But the project -- you know, the
17 project anticipated that. Every project has losses,
18 and this one is no different.

19 Q. (BY MR. SOMACH) If losses are greater in one
20 year than they were in a prior year, with everything
21 else being equal, that is the amount of -- of usable
22 water released from the reservoir, if -- if losses are
23 greater in one year than another year, will that
24 result in less water available for actual application
25 to -- to irrigated lands?

1 MR. WECHSLER: Form and foundation.

2 A. It depends. It depends. I mean, certainly
3 losses probably vary every year. I doubt that they're
4 ever exactly the same from one year to the other.
5 But, you know, if you have a full supply period, you
6 might have very -- very high losses and still there's
7 absolutely no reduction to -- to the project users.
8 So that's a -- you're going to need a lot more
9 information before you can answer that question.

10 Q. (BY MR. SOMACH) I think you said, and
11 actually, I wrote this down from the realtime. I
12 think you said, "I'm not sure that New Mexico has any
13 specific obligation not to deplete or reduce project
14 supply." Do you recall saying that?

15 A. You're talking about earlier today?

16 Q. Yeah.

17 A. Yeah. I think -- I think that I did say
18 that.

19 Q. I think you said that you -- you qualified
20 that by saying unless you have notice, and I think at
21 the very end of Mr. Dubois' questioning, you suggested
22 that the complaint itself in this case was -- was
23 notice; is that correct?

24 A. I did.

25 Q. Do you, State of New Mexico, think that you

1 have a obligation not to deplete or reduce project
2 supply if you -- if you know that your actions are
3 depleting project supply?

4 MR. WECHSLER: Object to form.

5 A. Again, I -- I don't -- I don't think that we
6 -- if -- if our actions are such that were depleting
7 the project supply and Texas is not getting their
8 apportionment and they let us know and, yes, in fact,
9 we verify it, yes, I think we have to do something
10 about it.

11 Q. (BY MR. SOMACH) Yes. But you added something
12 to that in that if they let us know.

13 A. Right.

14 Q. What happens if you know but Texas hasn't
15 provided you whatever you are talking about in terms
16 of notice?

17 A. I'm sorry? I -- let me -- let me read this.
18 I'm having trouble hearing you.

19 Q. I'm sorry. You -- you qualified your answer
20 to the last question with "if Texas lets us know."
21 What happens if Texas doesn't provide you notice, but
22 nonetheless, you are aware that you are depleting
23 supplies that otherwise would be going to Texas? Do
24 you have an obligation if you know that that's what's
25 happening?

Texas
Affirmative

1 A. I would say no, not if we're depleting
2 supplies, but rather if Texas is not getting its
3 apportionment, then we have an obligation.

4 Q. Even if Texas hasn't provided you notice?

5 A. If we know about it, I would say yes.

6 Q. Does the Compact treat lands apportioned
7 water in New Mexico the same way as it treats lands
8 apportioned water in Texas?

9 A. I'm -- I'm puzzled by -- by your -- your
10 question asking about how the Compact treats lands.
11 What -- what are you getting at? Perhaps you can
12 expand on that.

13 Q. What I'm looking for or what I'm asking is
14 whether or not the -- the Compact apportionment treats
15 New Mexico below Elephant Butte the same as it treats
16 the apportionment to Texas below Elephant Butte
17 reservoir. Is there any distinction made in the
18 Compact?

19 A. In my estimation, no. I believe that both
20 should be treated -- that the Compact should -- treats
21 both equally.

22 Q. Okay. Let me look -- I want to be -- I want
23 to be done, actually. I want to in the worst possible
24 way be done, but hold on a second. I think you
25 indicated earlier that the historic operations of the

New Mexico
Counter De...

1 project, since 1938, are an element of understanding
2 New Mexico's apportionment; is that -- is that
3 correct?

4 A. I -- I think they're an element of
5 understanding both states' apportionment, yes.

6 Q. Are there any specific years after 1938 that
7 one looks to or is it the entire universe of years
8 from 1938 to price of time that one -- or at least in
9 2006 that one looks to?

10 A. I would look at the entire period between '38
11 and 2006, but recognizing that in the very first few
12 years, through the '40s, there was kind of a unique
13 situation, one was an abundance of supply. I think
14 that everybody was still getting used to -- used to
15 operating under a Compact and what that meant, and
16 finally, not until the late '40s and into early -- the
17 1950s, did they -- did Reclamation specifically start
18 really focusing in on tightening up its operation to
19 make sure that in less than full supply years, they
20 were allocating or apportioning water consistently.

21 Q. Well, can you point to any specific years
22 after 1938 where they got it right versus other years
23 where they got it wrong?

24 A. You know, no, that -- that -- I prefer not to
25 do that. I'd rather look at kind of the entire time

1 frame and, you know, this is a lot of what Dr. Barroll
2 did for us. She -- she tracked how much was delivered
3 to each district year by year, and under different
4 operations regimes and -- and largely, as I said, if
5 we just kind of remove the '40s from the '50s through
6 '78 is pretty consistent. Largely 57/43, then after
7 '78, D1/D2, that was meant to -- that was a mechanism,
8 frankly, to try and repeat what had happened before
9 under the control of three different entities as
10 opposed to a single entity, and largely, it
11 accomplished that, and the districts, by and large,
12 got 57/43. Not until 2006 did that really start
13 changing.

14 MR. SOMACH: Okay. I don't -- I don't
15 have anymore questions.

16 THE WITNESS: Am I done?

17 MR. SOMACH: I don't know.

18 MR. DUBOIS: Not quite. Not quite.

19 I've got literally one follow-up question, and I don't
20 know if anybody else is going to have any questions or
21 not so I'll just ask my one follow-up question, and
22 we'll work from there and see if anybody else has any
23 questions.

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IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

STATE OF TEXAS)
)
Plaintiff,)
) Original Action Case
VS.) No. 220141
) (Original 141)
STATE OF NEW MEXICO,)
and STATE OF COLORADO,)
)
Defendants.)

THE STATE OF TEXAS :
COUNTY OF HARRIS :

I, HEATHER L. GARZA, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that the above and foregoing answers of the witness, ESTEVAN LOPEZ, to the interrogatories as indicated were made before me by the said witness after being first remotely duly sworn to testify the truth, and same were reduced to typewriting under my direction; that the above and foregoing deposition as set forth in typewriting is a full, true, and correct transcript of the proceedings had at the time of taking of said deposition.

I further certify that I am not, in any capacity, a regular employee of the party in whose

1 behalf this deposition is taken, nor in the regular
2 employ of this attorney; and I certify that I am not
3 interested in the cause, nor of kin or counsel to
4 either of the parties.

5
6 That the amount of time used by each party at
7 the deposition is as follows:

8 MR. SOMACH - 00:48:35
9 MR. WECHSLER - 00:00:00
10 MR. DUBOIS - 02:02:47
11 MR. WALLACE - 00:00:00
12 MS. O'BRIEN - 00:13:01
13 MS. BARNCASTLE - 00:00:00

14
15 GIVEN UNDER MY HAND AND SEAL OF OFFICE, on
16 this, the 7th day of October, 2020.



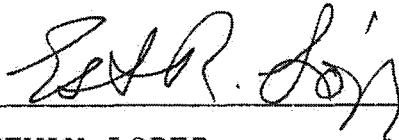
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S I G N A T U R E O F W I T N E S S

I, ESTEVAN LOPEZ, solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s).



ESTEVAN LOPEZ

Job No. 65405