

No. 141, Original

IN THE  
SUPREME COURT OF THE UNITED STATES

---

STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO,

*Defendants.*

---

**OFFICE OF THE SPECIAL MASTER**

---

**STATE OF NEW MEXICO'S MOTION FOR PARTIAL SUMMARY JUDGMENT  
ON COMPACT APPORTIONMENT AND BRIEF IN SUPPORT**

---

HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
SUSAN BARELA  
Special Assistant Attorney General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

November 5, 2020

COMES NOW, the State of New Mexico (“New Mexico”) and moves for a partial summary judgment ruling that New Mexico and the State of Texas (“Texas”) each have a Rio Grande Compact apportionment of the Rio Grande Project water supply below Elephant Butte Reservoir, and that this apportionment of the Rio Grande Project water supply is 57% to New Mexico and 43% to Texas. As more fully stated in the accompanying brief in support, the grounds for this motion are as follows:

1. There is no genuine dispute of material fact: the question presented is a legal question of interpretation and the associated facts are undisputed;
2. The Compact is “inextricably intertwined” with the Rio Grande Project and the Downstream Contracts. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018);
3. The plain text of the Compact equitably apportions the waters of the Rio Grande from Elephant Butte Reservoir to Fort Quitman, Texas;
  - a. The plain text and structure of the Compact reflects an intent to incorporate the project and apportion the waters below Elephant Butte between New Mexico and Texas;
  - b. The Compact’s declared intention to “effect[] an equitable apportionment” of all “the waters of the Rio Grande above Fort Quitman, Texas” can only be accomplished if the waters below Elephant Butte are apportioned between New Mexico and Texas;
  - c. Water in “Project Storage” is only “available for release in accordance with irrigation demands;”
  - d. The Rio Grande Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas, and to supply water to Mexico pursuant to a 1906 Treaty.

57% of the Project lands are located in New Mexico and 43% of Project lands are located in Texas;

- e. To satisfy the “irrigation demands” of these Project lands, the Compact specifies a “normal release” of “Usable Water” of “790,000 are-feet per annum” to serve Project lands in both States, and satisfy deliveries to Mexico;
  - f. The text of the Compact provides no basis for treating New Mexico differently from Texas below Elephant Butte Reservoir;
4. The Downstream Contracts confirms that 57% of the Project supply is allocated to Project lands located in New Mexico and 43% of the Project supply is allocated to Project lands located in Texas;
  5. The negotiating history confirms that the compacting States intended to protect existing uses and rely on the Project as the vehicle to deliver water according to existing acreage in both States; and
  6. The long course of performance underscores that the Parties understood the Compact to apportion the waters below Elephant Butte 57% to New Mexico and 43% to Texas.

WHEREFORE, New Mexico requests partial summary judgment declaring that the Compact apportions water to both New Mexico and Texas below Elephant Butte Reservoir – 57% of the Rio Grande Project supply to New Mexico and 43% of the Rio Grande Project supply to Texas.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
SUSAN BARELA  
Special Assistant Attorney General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

JEFFREY J. WECHSLER  
Special Assistant Attorney General  
MONTGOMERY & ANDREWS, P.A.  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[jwechsler@montand.com](mailto:jwechsler@montand.com)  
505-986-2637

BENNETT W. RALEY  
LISA M. THOMPSON  
MICHAEL A. KOPP  
Special Assistant Attorneys General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
303-861-1963

JOHN B. DRAPER  
Special Assistant Attorney General  
CORINNE E. ATTON  
DRAPER & DRAPER LLC  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[john.draper@draperllc.com](mailto:john.draper@draperllc.com)  
505-570-4591

No. 141, Original

IN THE  
SUPREME COURT OF THE UNITED STATES



STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO,

*Defendants.*



OFFICE OF THE SPECIAL MASTER



**STATE OF NEW MEXICO'S BRIEF IN SUPPORT OF  
PARTIAL SUMMARY JUDGMENT ON COMPACT APPORTIONMENT**

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES.....iii

STATEMENT OF UNDISPUTED MATERIAL FACTS..... 1

I. DEVELOPMENT OF THE RIO GRANDE PROJECT..... 1

II. NEGOTIATION OF THE RIO GRANDE COMPACT ..... 3

III. TERMS OF THE RIO GRANDE COMPACT OF 1938 ..... 5

IV. THE STATES’ UNDERSTANDING OF THE COMPACT ..... 7

V. OPERATIONS OF THE RIO GRANDE PROJECT ..... 9

    A. Operation of the Rio Grande Project Prior to the Compact..... 9

    B. Operation of the Rio Grande Project from 1938 Until 1979.....11

    C. Operation of the Rio Grande Project from 1979 Until 2005.....13

    D. Operation of the Rio Grande Project from 2006 Until the Present..... 16

VI. POSITIONS OF THE PARTIES ON THE COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE ..... 17

    A. Position of Texas on the Compact Apportionment Below Elephant Butte.....17

    B. Position of the United States on the Compact Apportionment Below Elephant Butte... 19

    C. Position of New Mexico on the Compact Apportionment Below Elephant Butte.....21

VII. POSITION OF THE RIO GRANDE COMPACT COMMISSION ON THE COMPACT APPORTIONMENT ..... 21

VIII. DECISION OF THE SUPREME COURT ON THE COMPACT APPORTIONMENT. 24

STANDARD OF DECISION..... 25

I. SUMMARY JUDGMENT ..... 25

II. COMPACT INTERPRETATION ..... 25

ARGUMENT.....26

|                                                                                                                                                        |    |
|--------------------------------------------------------------------------------------------------------------------------------------------------------|----|
| I. A RULING ON THE APPORTIONMENT BELOW ELEPHANT BUTTE MUST BE CONSISTENT WITH THE COURT’S 2018 OPINION.....                                            | 26 |
| II. THE PLAIN LANGUAGE OF THE COMPACT DEMONSTRATES THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR.....               | 28 |
| A. The Compact Relied Upon the Project to Apportion the Waters Below Elephant Butte Reservoir Between Texas and New Mexico.....                        | 29 |
| B. The Language of the Compact Offers No Basis for Treating New Mexico Differently than Texas Below Elephant Butte.....                                | 32 |
| III. THE NEGOTIATING HISTORY CONFIRMS THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR .....                           | 36 |
| A. The Negotiating History Illustrates that the States Intended to Protect Existing Rights in Both States.....                                         | 37 |
| B. The Negotiating History Shows that the States Relied Upon the Project to Apportion the Water Below Elephant Butte Between Texas and New Mexico..... | 39 |
| IV. THE COURSE OF PERFORMANCE CONFIRMS THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR.....                           | 43 |
| A. Project Operations.....                                                                                                                             | 43 |
| B. Prior Positions of the Parties on the Apportionment.....                                                                                            | 47 |
| C. Prior Positions of the Parties in this Case.....                                                                                                    | 51 |
| V. CUSTOMARY PRACTICES CONFIRM THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR .....                                  | 53 |
| CONCLUSION.....                                                                                                                                        | 55 |

**TABLE OF AUTHORITIES**

**Supreme Court Cases**

|                                                                             |                                |
|-----------------------------------------------------------------------------|--------------------------------|
| <i>Alabama v. North Carolina</i> , 560 U.S. 330 (2010).....                 | 25-26, 36, 43, 47              |
| <i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....                         | 32                             |
| <i>Colorado v. New Mexico</i> , 467 U.S. 310 (1984).....                    | 26                             |
| <i>Green v. Biddle</i> , 8 Wheat (14 U.S.) 1 (1823) .....                   | 34                             |
| <i>Kansas v. Colorado</i> , 514 U.S. 673 (1995).....                        | 25                             |
| <i>Montana v. Wyoming</i> , 563 U.S. 368 (2011) .....                       | 37                             |
| <i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945).....                       | 35                             |
| <i>Nebraska v. Wyoming</i> , 507 U.S. 584 (1993).....                       | 25                             |
| <i>New Jersey v. Delaware</i> , 552 U.S. 597 (2008).....                    | 25, 26                         |
| <i>New Jersey v. New York</i> , 345 U.S. 369 (1953).....                    | 35                             |
| <i>New Jersey v. New York</i> , 523 U.S. 767 (1998).....                    | 25, 30, 37                     |
| <i>Oklahoma v. New Mexico</i> , 501 U.S. 221 (1991) .....                   | 25-26, 37-38                   |
| <i>Petty v. Tennessee-Missouri Bridge Comm’n</i> , 359 U.S. 275 (1959)..... | 37                             |
| <i>Rocca v. Thompson</i> , 223 U.S. 317 (1912) .....                        | 26                             |
| <i>South Carolina v. North Carolina</i> , 558 U.S. 256 (2010).....          | 35                             |
| <i>Tarrant Reg’l Water Dist. v. Herrmann</i> , 569 U.S. 614 (2013) .....    | 25-26, 35-36, 38, 43-44, 53-54 |
| <i>Texas v. New Mexico</i> , 138 S. Ct. 349 (2017) (Mem.).....              | 33                             |
| <i>Texas v. New Mexico</i> , 138 S. Ct. 954 (2018).....                     | passim                         |
| <i>Texas v. New Mexico</i> , 462 U.S. 554 (1983).....                       | 25, 28, 34                     |
| <i>Texas v. New Mexico</i> , 482 U.S. 124 (1987).....                       | 25-26                          |
| <i>United States v. Nevada</i> , 412 U.S. 534 (1973) .....                  | 35                             |
| <i>Virginia v. Maryland</i> , 540 U.S. 56 (2003).....                       | 36                             |

**Lower Federal Court Cases**



*Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769 (9th Cir. 1994) .....35

**State Court Cases**

*New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.*, no. CV-96-888, (N.M. 3d Judicial Dist., Feb. 17, 2014) .....19, 21, 47

**Statutes**

Arkansas River Compact, 63 Stat. 145 (1949) .....53

Pecos River Compact, 63 Stat. 159 (1949).....53

An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Eight, and for Other Purposes, Pub. Law No. 59-253, 34 Stat. 1295 (1907).....2

An Act Giving Consent and Approval of Congress to the Rio Grande Compact Signed at Santa Fe, New Mexico, on March 18, 1938, Pub. Law No. 76-95, 53 Stat. 785 (1939) .....5

Yellowstone River Compact, 65 Stat. 631 (1951) .....53

**Other Authorities**

11 R. Lord, *Williston on Contracts* § 30:26 (4th ed. 2017) .....28

Jerome C. Muys, Nat'l Technical Info. Serv. Rep. No. NWC-L-71-011 (PB 202 998), *Interstate Water Compacts – The Interstate Compact and Federal-Interstate Compact* 12 and n.22 (National Water Comm'n 1971) .....53

Restatement (Second) of Contracts § 202 (1981) .....36

Restatement (Second) of Contracts § 214 (1981) .....37

Restatement (Second) of Contracts § 223 (1981) .....43

New Mexico moves for partial summary judgment to resolve the legal issue of apportionment of surface waters of the Rio Grande below Elephant Butte Reservoir between New Mexico and Texas.

All exhibits identified in this brief (“NM-EX \_\_”) are provided in the Exhibits Compendium submitted contemporaneously. They may also be downloaded from the following address: <https://ws.onehub.com/folders/prxrgg18>.

## STATEMENT OF UNDISPUTED MATERIAL FACTS

### I. DEVELOPMENT OF THE RIO GRANDE PROJECT

1. Following an investigation, the Reclamation Service (precursor to the Bureau of Reclamation) (both the Reclamation Service and Bureau of Reclamation are referred to herein as “Reclamation”) recommended that Congress authorize a storage reservoir near Elephant Butte, New Mexico, rather than an alternative site at El Paso, Texas, to capture, store, and regulate torrential and storm water flows in the Upper Rio Grande. *See* NM-EX 300, F.H. Newell, *Second Annual Report of the Reclamation Service*, H.R. Doc. No. 58-44, at 375-80 (1904); NM-EX 301, B.M. Hall, *A Discussion of the Past and Present Plans for Irrigation of the Rio Grande Valley*, 52 (Nov. 1904); NM-EX 106, Nicolai Kryloff, *Context of the 1938 Rio Grande Compact*, 6 (May 31, 2019) (“Kryloff Rep.”); *see also Texas v. New Mexico*, 138 S. Ct. 954, 957(2018) (“The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water. Eventually, the government identified a potential dam site near Elephant Butte, New Mexico, about 105 miles north of the Texas state line.”).

2. At the Twelfth National Irrigation Congress in 1904, Reclamation engineer Benjamin Hall reported that the proposed reservoir at Elephant Butte was preferable to the project proposed near El Paso because it would have a greater storage capacity, would minimize flooding that would render unusable irrigable land in New Mexico, and would impound sufficient water to irrigate 110,000 acres in New Mexico in addition to making deliveries to Mexico and irrigable land in Texas. NM-EX 303, Guy Elliott Mitchell, *The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas, Nov. 15-16-17-18, 1904*, 213-15 (1905); *see also* NM-EX 111, Scott A. Miltenberger, *Expert Report of Scott A. Miltenberger, Ph.D.*, 8 (May 31, 2019) (“Miltenberger Rep.”); NM-EX 112, Jennifer Stevens, Ph.D., *The History of Interstate Water Use on the Rio Grande: 1890-1955*, 17 (Oct. 28, 2019) (“Stevens Rep.”).

3. The Reclamation proposal recommended delivery of water as between the lands in southern New Mexico and Texas based on the ratio of project lands within each state. NM-EX 220, Miltenberger Dep. (June 8, 2020), 39:7-20.

4. Delegates from Mexico, New Mexico, and Texas at the Irrigation Congress each approved the Reclamation proposal and unanimously passed a resolution declaring that the proposed project would affect “an equitable distribution of the waters of the Rio Grande with due regard to the rights

of New Mexico, Texas and Mexico.” NM-EX 303, Guy Elliott Mitchell, *The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas, Nov. 15-16-17-18, 1904*, 107 (1905); NM-EX 111, Miltenberger Rep. 9; NM-EX 106, Kryloff Rep. 6.

5. In support of Congressional authorization to begin work on the reservoir, the Reclamation Service Director testified to Congress that the project would be engineered to supply enough water to irrigate 20,000-25,000 acres in Mexico, 110,000 in New Mexico, with the “balance” to Texas. Mr. Newell further testified that “New Mexico, Texas, and old Mexico will divide the water in about the proportion stated.” See NM-EX 305, *The Reclamation Work of the Government Under the National Irrigation Act: Hearing Before the H. Comm. on Irrigation of Arid Lands, 59 Cong. 222 (1906)* (statement of Frederick Newell, Reclamation Service Director); NM-EX 112, Stevens Rep. 18.

6. In 1906, the United States entered into a treaty with the Republic of Mexico for annual delivery of 60,000 acre-feet of water to the Acequia Madre, above Juarez, in years of full supply, with proportionate reductions in times of shortage. NM-EX 307, *Distribution of the Waters of the Rio Grande, Mex.-U.S., May 21, 1906*, 34 Stat. 2953; NM-EX 111, Miltenberger Rep. 9; see also *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018) (“in 1906, the United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.”)

7. In 1907, Congress authorized construction to begin on the Elephant Butte Reservoir. An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Eight, and for Other Purposes, Pub. Law No. 59-253, 34 Stat. 1295 (1907); NM-EX 112, Stevens Rep. 19.

8. In its initial conception, Reclamation engineered the Project to deliver an annual release between 750,000 acre-feet and 800,000 acre-feet, enough to provide 60,000 acre-feet of water to Mexico and to irrigate 155,000 acres in the United States (assuming delivery of three acre-feet per acre, plus twenty percent loss in the distribution system), of which 110,000 acres would be situated in New Mexico and 45,000 in Texas. See NM-EX 310, *Fund for Reclamation of Arid Lands, H.R. Doc. 61-1262*, at 106 (1911); NM-EX 112, Stevens Rep. 21.

9. Reclamation appropriated water for the Project under New Mexico territorial law, consistent with Section 8 of the Reclamation Act. Specifically, Reclamation provided notice to the Territorial Engineer for the Territory of New Mexico to appropriate and store 730,000 acre-feet per year at Elephant Butte Reservoir in 1906 and to appropriate all “unappropriated waters of the Rio Grande” at Elephant Butte in 1908. See NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger Rep. 9-10; see also *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018) (“After obtaining the necessary water rights, the United States began construction of the dam in 1910 and completed it in 1916 as part of a broader infrastructure development known as the Rio Grande Project.”). Ultimately, the Rio Grande water appropriated by the United States was limited by the size of the Project.

10. In 1915, while Project construction was ongoing, Reclamation began water deliveries through the Project. *See* NM-EX 404, Robert Autabee, United States Bureau of Reclamation, *Rio Grande Project*, at 12 (1994); NM-EX 311, United States Reclamation Service, *Project History Rio Grande Project Year 1915*, 137-141 (1915).

11. By 1919, construction of the Elephant Butte Dam and the major diversion works of the Project was complete. NM-EX 312, United States Reclamation Service, *Project History Rio Grande Project Year 1919*, 4-5 (1919) (reporting “practical completion of the main canal system, including diversion dams, for the lands of the New Mexico and El Paso County Irrigation Districts”); *see also* NM-EX 111, Miltenberger Rep. 10.

12. By 1921, Reclamation reported that the final “determined irrigable area of the project” in the United States was 155,000 acres. *See* NM-EX 313, United States Reclamation Service, *Project History Rio Grande Project Year 1921*, 6-7 (1921); NM-EX 106, Kryloff Rep. at 23.

## II. NEGOTIATION OF THE RIO GRANDE COMPACT

13. Upon completion of the major storage and diversion works for the Project, Colorado proposed to New Mexico legislation authorizing a joint commission between the two states, and New Mexico and Colorado each appointed commissioners in 1923 to negotiate an interstate compact regarding development upstream of Elephant Butte Reservoir. *See* NM-EX 111, Miltenberger Rep. 11; NM-EX 112, Stevens Rep. 29.

14. After the first meeting of the Colorado and New Mexico commissioners in 1924, Texas petitioned the Secretary of Commerce, who served as the federal representative, to “accord[] [to the Texas] the same representation upon that Commission which is accorded to the States of New Mexico and Colorado.” *See* NM-EX 314, Letter from Pat M. Neff, Governor, State of Texas, to Herbert Hoover, Secretary of Commerce (Sept. 20, 1924); NM-EX 111, Miltenberger Rep. 12.

15. The New Mexico Compact Commissioner supported the inclusion of Texas in further compact negotiations. He wrote the New Mexico Governor that the exclusion Texas “assumed” that Reclamation would “protect[]” the rights of the Project in negotiations, but this assumption proved false because “the Reclamation Service apparently decided to take no action whatever looking to the presentation of the rights of the Rio Grande Project either as to lands in New Mexico or Texas, although it was expected that this would be done.” *See* NM-EX 315, Letter from J.O. Seth, Commissioner, State of New Mexico, to A.T. Hannett, Governor, State of New Mexico, at 3 (Feb. 20, 1925).

16. Compact negotiations resumed in 1928 following the appointment of a Texas commissioner. Those initial negotiations resulted in a temporary compact in February 1929. *See* NM-EX 111, Miltenberger Rep. 13; NM-EX 112, Stevens Rep. 29, 35, 40; NM-EX 316, Rio Grande Compact Commission, *First Annual Report of the Rio Grande Compact Commission*, 1-10 (1931).

17. In December 1935, the Rio Grande Compact Committee met to continue negotiations. At that meeting, officials from the National Resources Committee presented a proposal for a comprehensive study of the Rio Grande in order to facilitate an agreement. *See* NM-EX 317,

Proceedings of the Rio Grande Compact Commission held in Santa Fe, New Mexico December 2-3, 1935, at 5-7 (1935); NM-EX 112, Stevens Rep. at 55.

18. This proposed comprehensive study became the Rio Grande Joint Investigation. According to the authors, the “prime purpose” of the investigation was “to determine the basic facts needed in arriving at an accord” among the states “on an allocation and use of Rio Grande waters in the future development of the upper basin.” NM-EX 318, Harlow M. Stafford et al., *Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation*, 10-11 (1937); NM-EX 112, Stevens Rep. 62.

19. One category of required information was accurate data concerning existing diversions, including those of the Project. The Joint Investigation Report collected available data to prepare and present a comprehensive analysis of actual diversions, including diversions between Elephant Butte Reservoir and Fort Quitman, Texas, for the period 1930-36. The Joint Investigation Report also catalogued Project Acreage, including lands for “Cities, Towns, and Villages.” See NM-EX 318, Harlow M. Stafford et al., *Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation*, 11, 14-16 (1937); NM-EX 112, Stevens Rep. 64.

20. In entering negotiations New Mexico stressed that for it to agree, the final compact needed to provide that “[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said river system.” This position was important to New Mexico, in part, because the surface water in the Lower Rio Grande in New Mexico was fully appropriated and New Mexico expected the final compact to protect those existing rights. See NM-EX 319, Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937*, 12-13 (1937); NM-EX 111, Miltenberger Rep. 25; NM-EX 112, Stevens Rep. 65; NM-EX 005, Stevens Decl.<sup>1</sup> ¶ 8; NM-EX 002, D’Antonio Decl. ¶ 9.

21. The Engineer Advisors for the three states used the Joint Investigation to prepare a Report of Committee of Engineers to the Rio Grande Compact Commissions, dated December 27, 1937. The express “general purpose” of this report was to recommend apportionment among three divisions of the Rio Grande—the San Luis Valley, the “Middle Rio Grande from Lobatos to Elephant Butte Reservoir,” and the Project from Elephant Butte Reservoir to Fort Quitman, Texas—according to a “general policy” that “present uses of water in each of the three States must be protected in formulation of the Compact.” See NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937); NM-EX 111, Miltenberger Rep. 29; NM-EX 112, Stevens Rep. 67-68.

22. The Committee of Engineers initially recommended a “normal release” from Elephant Butte Reservoir of 800,000 acre-feet per annum. See NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937); NM-EX 112, Stevens. Rep. 67-68.

---

<sup>1</sup> Decl. refers to Declaration submitted in the Exhibits Compendium submitted contemporaneously with this brief.

23. Following negotiations, the Committee of Engineers revised its recommendation to provide for a normal release from the Reservoir of 790,000 acre-feet per year to meet the irrigation demands of Project lands in New Mexico and Texas and to make the 1906 treaty delivery to Mexico. See NM-EX 325, Letter from Thomas M. McClure, State Engineer, State of New Mexico, to S.O. Harper, Chairman, Rio Grande Compact Commission (Jan. 25, 1938), in Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938*, at CO-006216 (1938); NM-EX 325, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Mar. 9, 1938), in Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938*, at CO-006226-33 (1938); NM-EX 112, Stevens Rep. 68-70; NM-EX 111, Miltenberger Rep. 33, 37-39.

24. On March 18, 1938, the members of the Rio Grande Compact Commission (“RGCC”) each executed the final Rio Grande Compact. Congress gave its approval to the Rio Grande Compact on May 31, 1939. See NM-EX 325, Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938*, 34-35 (1938); An Act Giving Consent and Approval of Congress to the Rio Grande Compact Signed at Santa Fe, New Mexico, on March 18, 1938, Pub. Law No. 76-95, 53 Stat. 785 (1939).

### **III. TERMS OF THE RIO GRANDE COMPACT OF 1938**

25. The preamble of the Rio Grande Compact of 1938 states: “The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes . . . .” NM-EX 330, Rio Grande Compact of 1938, 53 Stat. 785, 785 (1939) (“Rio Grande Compact” or “Compact”).

26. Article I, Paragraph (k) of the Compact defines “Project Storage” as “the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande project, but not more than a total of 2,638,860 acre-feet.” 53 Stat. at 786.

27. The limit on Project Storage within the Compact accords with what was considered the maximum capacity of Elephant Butte Reservoir. See NM-EX 107, Estevan R. Lopez, *Expert Report of Estevan R. Lopez, P.E.*, 15 (Oct. 31, 2019) (“Lopez Rep.”).

28. The Compact contemplates that usable water will be released from storage to meet irrigation demands. Article I, Paragraph (l) of the Compact defines “Usable Water” as “all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.” 53 Stat. at 786; NM-EX 107, Lopez Rep. 16.

29. Article I, Paragraph (o) of the Compact defines “Actual Release” as “the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.” 53 Stat. at 786.
30. Article I, Paragraph (p) of the Compact defines “Actual Spill” as “all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.” 53 Stat. at 786.
31. Article I, Paragraph (q) of the Compact defines “Hypothetical Spill” as “the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet has been released therefrom at rates proportion to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs.” 53 Stat. at 786.
32. Article II of the Compact specifies that stream gaging stations be established at specific locations in the Rio Grande Basin for the purposes of Compact accounting. The lowest required stream gage under Article II is just below Caballo Reservoir. *See* 53 Stat. at 786-87; NM-EX 107, Lopez Rep. 18.
33. Article IV of the Compact defines New Mexico’s obligation to deliver water from the Rio Grande to San Marcial based upon nine (9) non-summer months of river flows. The delivery obligation at San Marcial is defined by a mathematical relationship corresponding to recorded flow at the Otowi gage during those months. The Otowi gage located in New Mexico about 100 miles south of the Colorado border. The San Marcial gage was located just upstream of Elephant Butte Reservoir. *See* 53 Stat. at 788; NM-EX 107, Lopez Rep. at 20.
34. In 1948, the RGCC changed New Mexico’s delivery schedule under Article IV of the Compact to require deliveries at Elephant Butte Reservoir, rather than San Marcial, and removed the Article II gaging stations at San Marcial and San Acacia. *See* NM-EX 331, Rio Grande Compact Commission, Tenth Annual Report of the Rio Grande Compact Commission, 17-18 (1948); NM-EX 107, Lopez Rep., 18-22.
35. Article VI of the Compact defines procedures to determine the annual credits and debits for Colorado and New Mexico. Of note, Article VI permits Colorado and New Mexico to authorize releases of Credit Water to avoid spill in excess of downstream demand and permits such releases to be included in the accounting of an Actual Spill. *See* 53 Stat. at 789-90; NM-EX 107, Lopez Rep. 22-23.
36. Article VII of the Compact prohibits any increase in storage by either New Mexico or Colorado in reservoirs constructed after 1929 if the volume of Usable Water in Project Storage is less than 400,000 acre-feet. This threshold value decreases if the aggregate releases from Project storage have averaged more than 790,000 acre-feet from the beginning of the calendar year following the effective date of the Compact, or from the beginning of the calendar year following an Actual Spill, before the storage limitation takes effect. Further, the article permits that either Colorado or New Mexico may offer to relinquish accrued Credit Water to Texas, and Texas may accept such an offer at its discretion. If New Mexico and Texas agree on a relinquishment, the

relinquished Credit Water becomes Usable Water and is available for use on lands in both New Mexico and Texas.. See 53 Stat. at 790; NM-EX 107, Lopez Rep. 23.

37. Article VIII of the Compact permits New Mexico to demand of Colorado, and Texas to demand that Colorado and New Mexico, in January, release of water then held in storage from post-1929 reservoirs upstream of Elephant Butte to the amount of any accrued debits of Colorado and New Mexico, respectively, as necessary to help bring the amount of water in Project Storage up to 600,000 acre feet by March first. The purpose of this provision is to bring the quantity of Usable Water in Project Storage to 600,000 acre-feet by March first and to maintain this quantity until April thirtieth to allow for a normal release of 790,000 acre feet in that year. See 53 Stat. at 790.

#### IV. THE STATES' UNDERSTANDING OF THE COMPACT

38. The historical record indicates that one purpose of the Compact was to protect the operation of the Project. NM-EX 111, Miltenberger Dep. (June 8, 2020) 38:8-17, 137:9-138:21; NM-EX 112, Stevens Rep. 72; NM-EX 005, Stevens Decl. ¶ 10. See, e.g., NM-EX 319, Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937*, 12-13 (1937).

39. The historical record indicates that another purpose of the Compact was to protect existing rights. NM-EX 106, Kryloff Dep. (Aug. 6, 2020) 108:9-109:18; NM-EX 005, Stevens Decl. ¶ 11. See, e.g., NM-EX 319, Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937*, 12-13 (1937); NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937).

40. Prior to negotiation of the Compact, Reclamation administered the Project as a single unit. NM-EX 111, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18; NM-EX 107, Lopez Rep. 25.

41. The understanding of the compacting States was that Reclamation would continue to operate the Project in that manner. NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-EX 327, J.H. Bliss, *Provisions of the Rio Grande Compact*, 1 (Apr. 2, 1938) (“The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit.”); NM-EX 112, Stevens Rep.72.

42. In negotiating the Compact, the States understood that all lands within the Project had equal rights to water. NM-EX 111, Miltenberger Dep. (June 8, 2020) 44:4-23; NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-EX 107, Lopez Rep. 26-27, 35, 67-68; NM-EX 005, Stevens Decl. ¶ 11.

43. The historical record reflects that the States agreed on 790,000 acre-feet per year as a normal release in the Compact because it was sufficient to satisfy irrigation demands in both New Mexico and Texas, as well as address water quality concerns. NM-EX 220, Miltenberger Dep. (June 8, 2020) 146:21-148:1; NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 55:17-56:25, 89:20-90:1; NM-EX 106, Kryloff Rep. 25-26.



44. The historical record indicates that the Compact relied upon the Project and its allocation and delivery of water in relation to the proportion of Project irrigable lands to provide the basis for the apportionment of Rio Grande waters to users in New Mexico and Texas. NM-EX 220, Miltenberger Dep. (June 8, 2020) 40:7-22; NM-EX 107, Lopez Rep. 67-68.

45. The historical record confirms that historically Project deliveries were made based upon the ratio between Project acreage in New Mexico and Project acreage in Texas. In other words, under the Compact, the delivery of water through the Project was based on the irrigable acres in each State. Historically that ratio is 57% to New Mexico and 43% to Texas. NM-EX 220, Miltenberger Dep. (June 8, 2020) 39:2-40:6, 47:17-48:18.

46. Shortly after the Compact was finalized, Texas Commissioner Frank Clayton explained the way that the Compact divided water below Elephant Butte:

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

NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938). The expert historian for the United States agreed that this letter was “an important document” for understanding the way that the Compact divides the water below Elephant Butte. *See* Ex 215, Kryloff Dep. (Aug. 6, 2020) 41:15-20, 41:21-42:9; NM-EX 106, Kryloff Rep. 12; *see also* NM-EX 220, Miltenberger Dep. (June 8, 2020) 43:17-44:23.

47. Similarly, shortly after the Compact was finalized, Texas Commissioner Frank Clayton described the operation of the Compact to the Chairman of the Texas Board of Water Engineers. Commissioner Clayton explained:

Moreover, since the source of supply for all lands above Fort Quitman and below Elephant Butte reservoir, whether in Texas or New Mexico, is the reservoir itself, it could hardly be expected of Colorado and New Mexico that they should guarantee a certain amount of water to pass the Texas state line, since this amount is wholly dependent upon the releases from the reservoir and the reservoir is under the control of an entirely independent agency – the Bureau of Reclamation.

Also, by contract between the New Mexico interests and the Texas interests in the Rio Grande Project, all the lands in the Project have equal water rights, and the acreage to be irrigated is practically “frozen” at its present figures, with a three per cent “cushion.”

It is therefore not necessary, even if it were practicable, to make any definite provision in the Compact for the amount of water to pass the Texas-New Mexico state line.”

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

48. In 1968, Raymond Hill, the Engineer Advisor for the State of Texas during Compact negotiations explained “that the Rio Grande Compact Commissioners, at the time of executing the Rio Grande Compact of 1938, anticipated that compliance” with Articles III and IV “would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 AF per year from Project storage *for use on lands in New Mexico downstream of Elephant Butte Reservoir* and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico.” NM-EX 401, Raymond A. Hill, *Development of the Rio Grande Compact of 1938*, 38 (Oct. 8, 1968) (emphasis added).

## V. OPERATIONS OF THE RIO GRANDE PROJECT

### A. Operation of the Rio Grande Project Prior to the Compact

49. Under the Reclamation Act, Congress intended that water projects would be self-supporting, and each would generate sufficient revenue to cover the approximate costs of construction and operation and maintenance. Thus, Reclamation intended for the total estimated costs of the Rio Grande Project to be equitably borne by its beneficiaries. NM-EX 529, Bureau of Reclamation, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 3 (Sept. 30, 2016); NM-EX 005, Stevens Decl. ¶ 13.

50. The Project beneficiary in New Mexico is Elephant Butte Irrigation District (“EBID”). EBID is a New Mexico entity created by New Mexico statute and subject to New Mexico law. *See* Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014); *see also* NM-EX 302, Elephant Butte Water Users Association, Articles of Incorporation (Dec. 22, 1904); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger Rep. 9.

51. The Project beneficiary in Texas is El Paso County Water Improvement District No. 1 (“EPCWID” or “EP No. 1”). EPCWID is a Texas entity created by Texas statute and subject to Texas law. *See* Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); *see also* NM-EX 304, El Paso Valley Water Users’ Association, Articles of Incorporation (Mar. 31, 1905); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger Rep. 9.

52. To comply with the principle that the beneficiaries equitably bear the costs of the Project, Reclamation entered into contracts with EBID and EPCWID to establish the repayment obligations between the two districts based on the irrigable acreage within each district. NM-EX 529, Bureau of Reclamation, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 4 (Sept. 30, 2016); *e.g.*, NM-EX 308, Articles of

Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association (June 27, 1906) ("1906 Contract"); NM-EX 321, Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes (Nov. 10, 1937) (reciting amendments to 1906 Contract); NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes (Nov. 9, 1937) (same); NM-EX 326, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) ("1938 Downstream Contract").

53. At the time the Compact was executed, 88,000 authorized Project acres were situated within EBID in New Mexico, and 67,000 authorized Project acres were situated in EPCWID in Texas. NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938). Thus, approximately 57% of Project acreage was located in New Mexico, and 43% of Project acreage was located in Texas. NM-EX 529, Bureau of Reclamation, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 4 (Sept. 30, 2016).

54. At the time the Compact was signed, Reclamation had been operating the Project, in its entirety, as a single unit for over twenty years. During that time, the Project operated under Reclamation law. *See, e.g.*, NM-EX 318, Harlow M. Stafford et al., *Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation*, 8 (1937); NM-EX 005, Stevens Decl. ¶ 9.

55. In the years prior to the Compact being signed (1928-37), the average release from the Project was 780,640 acre-feet to satisfy irrigation demands on Project lands in both New Mexico and Texas. NM-EX 323, United States Reclamation Service, *Project History Rio Grande Project Year 1937* (1938).

56. In the years prior to the Compact being signed, the Project would set an equal allotment for each Project acre to satisfy irrigation demands. NM-EX 323, United States Reclamation Service, *Project History Rio Grande Project Year 1937* (1938). The amount of water that was actually used on each acre depended on the amount called for by the individual farmers. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 18:10-22; Ex.100, Margaret Barroll, Ph.D, *Expert Report of Margaret Barroll, Ph.D.*, 32 (Oct. 31, 2019) ("Barroll Rep.).

57. In 1937 and 1938, Congress authorized the execution of amended repayment contracts with EBID and EPCWID. These contracts addressed the repayment obligations of the Districts and established a corresponding right of use to a proportion of the annual Project water supply during times of shortage based on an established irrigation acreage in each District: 57% to EBID in New Mexico, and 43% to EPCWID in Texas. NM-EX 107, Lopez Rep. 26-27; NM-EX 109, Estevan R. Lopez, P.E., Supplemental Rebuttal Expert Report of Estevan R. Lopez, P.E., 6-7 (July 15, 2020) ("Lopez Supp. Reb. Rep."); *see, e.g.*, NM-EX 308, Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association (June 27, 1906); NM-EX 321, Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes (Nov. 10, 1937); NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes (Nov. 9, 1937); NM-EX

324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (“1938 Downstream Contract”). Collectively, these contracts are known as the “Downstream Contracts.”

58. For example, the 1938 Downstream Contract quantified the authorized irrigable acreage within each district as 88,000 acres in EBID, and 67,000 acres in EPCWID (for a total of 155,000 Project acres). It goes on to state that in the event of a shortage of water, “the distribution of the available supply in such a year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].” NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938); NM-EX 107, Lopez Rep. 26-27; NM-EX 001, Barroll Decl. ¶19.

### **B. Operation of the Rio Grande Project from 1938 Until 1979**

59. Until about 1979, Reclamation operated the entire Project, including delivering Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings. Reclamation ditch riders then delivered the ordered water to individual farms. *See* NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:6-59:11; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of Reclamation, *Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 5 (Sept. 30, 2016).

60. The allocation of Project supply available for lands in the two States was historically equally divided to all Project lands on an acre foot per acre basis. NM-EX 506, Cortez Affidavit ¶ 8 (Apr. 20, 2007); NM-EX 108, Estevan R. Lopez, P.E., Rebuttal Report of Estevan R. Lopez, P.E., 7-9 (June 15, 2020) (“Lopez Reb. Rep.”); NM-EX 210, Ferguson Dep. (Feb. 20, 2020) 240:25-241:5; NM-EX 214, King Dep. (May 18, 2020) 115:13-25.

61. Prior to 1951, the Project enjoyed plentiful water supplies, and Reclamation allowed Project farmers to order water as they needed to irrigate their crops. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 18:16-19:15, 58:6-18.

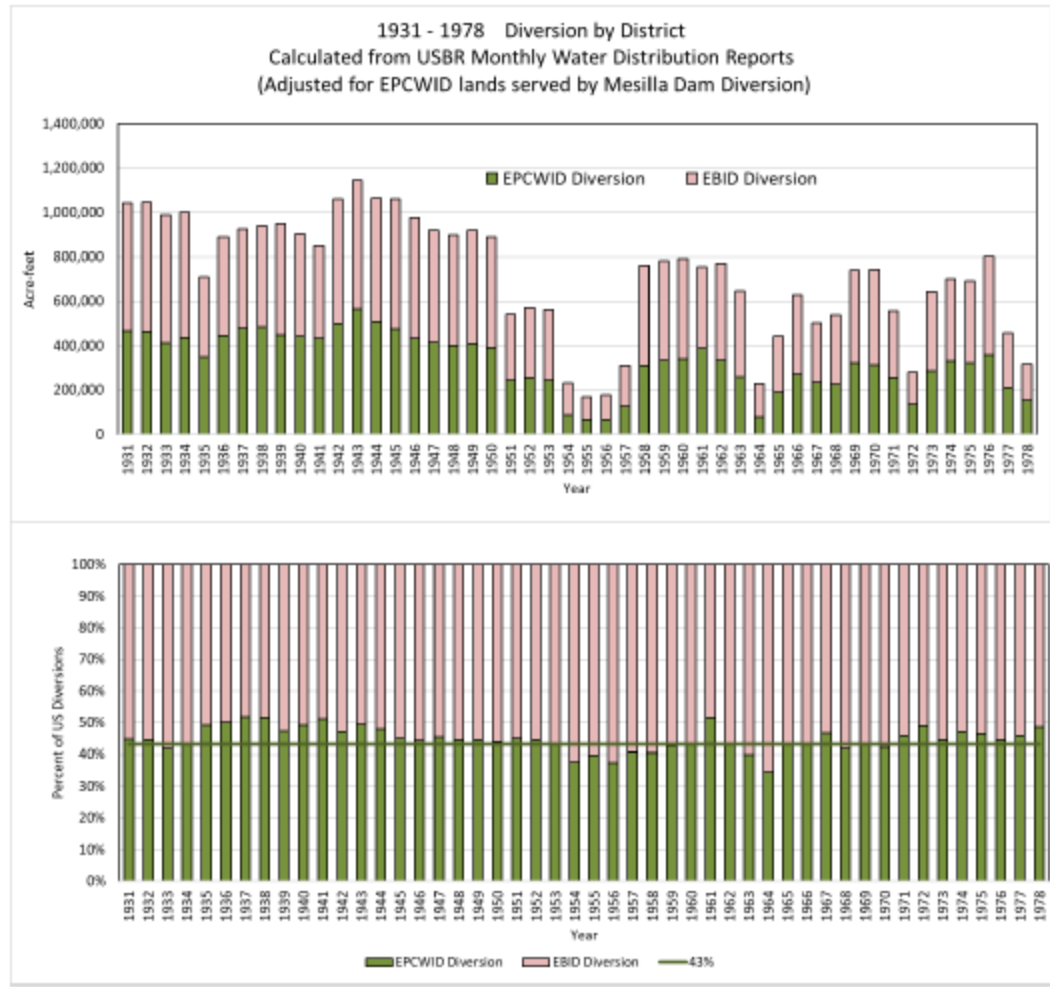
62. In 1951, drought forced Reclamation to limit per-acre allocations to Project lands, which it did by evaluating deliveries to lands from 1946 through 1950. *Id.* at 19:1-20:4, 58:19-59:7; NM-EX 100, Barroll Rep. 32. Reclamation in 1951 determined that 3.0241 acre-feet per acre constituted a full allocation to Project lands. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 19:8-20:4.

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

64. Before 1980, Reclamation operated the Project in its entirety, combining storage and return flows so that each acre of Project land was entitled to receive an equal amount of water regardless of the source of the water or in what State the land was located. Thus, based on each District's share of authorized acreage, "EBID is allocated 88/155 of the available Project water supply and EPCWID is allocated 67/155 of the available Project water supply." NM-EX 506, Cortez Decl. ¶ 11 (Apr. 20, 2007); NM-EX 100, Barroll Rep. 31. During this period, there is no record that any party lodged an objection, whether through the RGCC or Reclamation, to challenge Reclamation's principle of allocation on an equal per-acre basis. NM-EX 005, Stevens Decl. ¶ 12; NM-EX 003, Lopez Decl. 25; EX-NM 002, D'Antonio Decl. ¶ 16.

65. From 1931 to 1979, Reclamation operated the Project such that the diversions for EBID in New Mexico totaled 54.5% and diversions for EPCWID in Texas totaled 45.5% of total diversions. From 1951, when Reclamation began enforcing allocations to each acre, until 1979, the diversions for EBID in New Mexico totaled 56.2% and diversions for EPCWID in Texas totaled 43.8% of total diversions. NM-EX 100, Barroll Rep., Appx. 1, A-8. This is shown graphically in Figure A-3 of Dr. Barroll's Expert Report:

**Figure A.3. District Diversions 1931 - 1978**



See also *id.* at A-9; NM-EX 101, Margaret Barroll, Ph.D., Rebuttal Expert Report of Margaret Barroll, Ph.D at 41, Appendix A, 39 (June 15, 2020) (“Barroll Reb. Rep.”).

**C. Operation of the Rio Grande Project from 1979 Until 2005**

66. In approximately 1979, Project operations changed with the transfer of some Project facilities to the Districts. Reclamation started to allocate water to each District for delivery at the District’s canal headings (i.e., Arrey, Leasburg, Mesilla, Franklin and Riverside) rather than directly to farm headgates. Since those transfers, Reclamation determines the Districts’ Project allocations, takes water orders from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for water users in each District. The Districts in turn take farm orders from their members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates in each State. NM-EX 001, Barroll Decl. ¶ 21; See NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 208, Esslinger Dep. (Vol. II), 57:4-

58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20.

67. Historically, Reclamation calculated and declared the allocation of Project supply available to lands in New Mexico, lands in Texas, and Mexico on the basis of water in storage available for release and on historical return flows to the Rio Grande. NM-EX 506, Cortez Decl. ¶ 7 (Apr. 20, 2007); NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 393:3-5; NM-EX 219, Lopez Dep. (Vol. III) (Aug. 21, 2020) 40:13-20; NM-EX 107, Lopez Rep. 5-6.

68. After 1979, Reclamation developed a method known as the D1/D2 method for allocating water to the Districts. *See* NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4 (1985) (unexecuted draft); NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 33.

69. According to Reclamation, “D2 was developed to calculate the amount of water that was needed at the main canal headings to make the 3.0241 ac-ft/acre deliveries to the lands.” NM-EX 409, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Chris Rich et al. (Apr. 12, 2002).

70. The D1/D2 method was based on the distribution of Project supply during the period from 1951 to 1978 and continued allocating 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 170:25-172:10 (examining NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4 (1985) (unexecuted draft)); NM-EX 100, Barroll Rep. at 33-34.

71. According to Reclamation, prior to 2005, the Districts did not sign an “operating agreement, plan, or criteria,” but “acquiesced and cooperated with Reclamation’s procedures on a year to year basis.” NM-EX 508, Bureau of Reclamation, Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas 3 (June 11, 2007); NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 87:8-88:10.

72. Reclamation began making Project allocations using the D1/D2 allocation procedure from at least 1985. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 168:20-24; NM-EX 100, Barroll Rep. 33-34.

73. Reclamation continued making allocations to the Districts in the proportion of 57% of Project water to New Mexico lands and 43% of Project water to Texas lands using the D1/D2 method through 2005. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 59:12-60:9; NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 34, n.66.

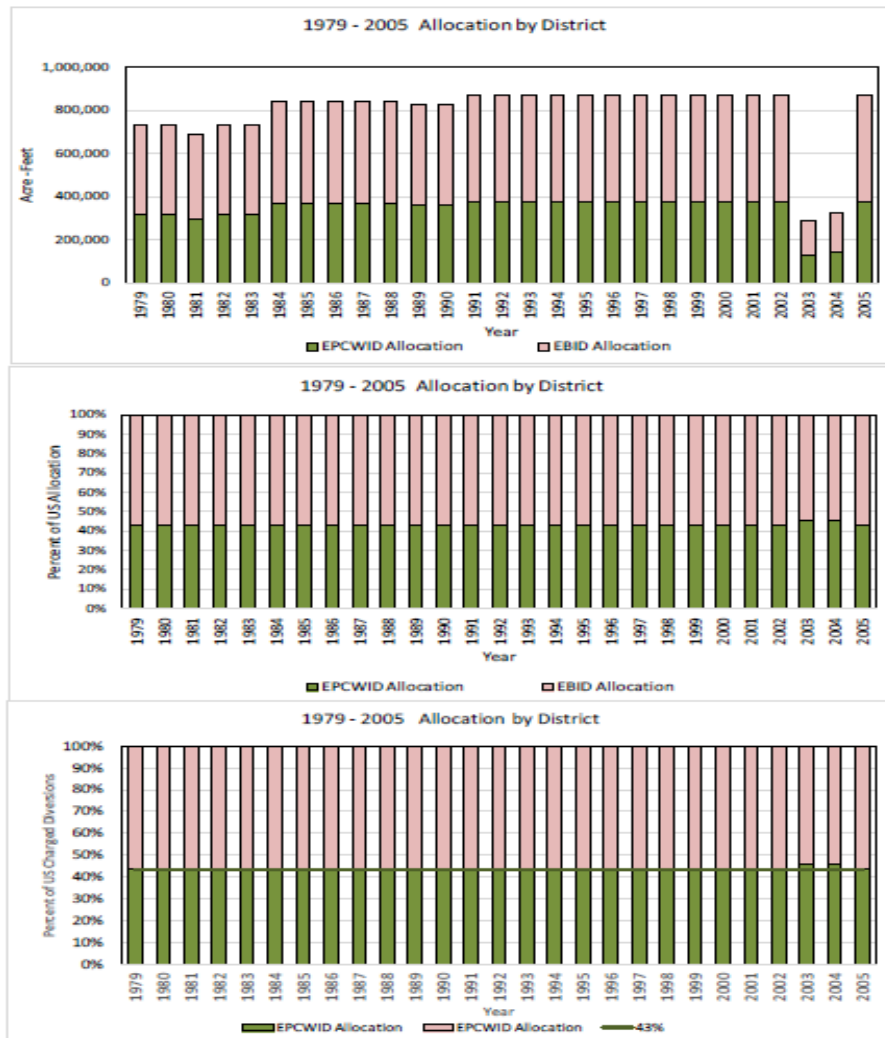
74. In 2003, the Project began to suffer the effects of the severe drought that has plagued the Rio Grande basin for the last two decades. NM-EX 412, Herman Settemeyer, Rio Grande Project/Rio Grande Compact Operation 4 (2004) (“Settemeyer Presentation”); NM-EX 213, Ivey Dep. (Vol. 2) (Aug. 28, 2020) 69:25-71:1, 75:19-24. Nonetheless, in 2003 and 2004, Reclamation allocated 57% of Project water to New Mexico Project lands and 43% to Texas Project lands using

the D1/D2 method. NM-EX 201, Rule 30(b)(6) Dep. of the U.S. Bureau of Reclamation by and through Filiberto Cortez (Aug. 20, 2020) 50:6-51:15.

75. In 2005, Reclamation was able to make a full D1/D2 allocation in the percentage of 57% to New Mexico lands and 43% to Texas lands. NM-EX 202, Cortez Dep. (Vol. 1) 89:21-90:5 (examining NM-EX 328, Bureau of Reclamation, *Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas*, 4 (June 11, 2007)); NM-EX 100, Barroll Rep. 34, n.66.

76. From 1979 to 2005, Reclamation allocated Project water such that 57% of Project supply was available for EBID lands in New Mexico and 43% of Project supply was available for EPCWID lands in Texas. NM-EX 100, Barroll Rep., Appx. A, A-13-15. This is illustrated in Figure A.5 of Dr. Barroll’s expert report:

**Figure A.5. Total Allocation to Districts and Mexico: D1/D2 Allocation (1979-2005)**





From 1979 to 2005, the charged diversions by EBID in New Mexico (which accounts for water available *and ordered* by the Districts) totaled 58% and charged diversions for EPCWID in Texas totaled 42% of total diversions. NM-EX 100, Barroll Rep., Appx. A, A-16-19. *See also* NM-EX 101, Barroll Reb. Rep., Appx. A, 41-42.

#### **D. Operation of the Rio Grande Project from 2006 Until the Present**

77. In 2006 Reclamation began using a new method for allocating Project water between the two Districts. Neither the RGCC nor New Mexico were given input into the new method before it was implemented. NM-EX 100, Barroll Rep. 40; NM-EX 004, Schmidt-Petersen Decl. ¶ 10; NM-EX 003, Lopez Decl. ¶ 29; NM-EX 002, D’Antonio Decl. ¶ 10; *see, e.g.*, NM-EX 504, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Gary Esslinger, Manager-Treasurer, Elephant Butte Irrigation District (Nov. 21, 2006).

78. In January and February 2008, Reclamation, EPCWID, and EBID negotiated a new operating agreement for the Project as settlement for the two lawsuits among the parties (“2008 Operating Agreement”). *See generally* NM-EX 511, Cortez Presentation. The negotiations were mediated by Pat Gordon, Texas’s Compact Commissioner. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 42:8-43:24; NM-EX 107, Lopez Rep. 43.

79. The 2008 Operating Agreement changed the way that water was allocated between the two Districts, and therefore the amount of water that was available for lands in New Mexico and Texas. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 94:23-96:9 (examining NM-EX 506, Cortez Affidavit ¶¶ 11, 25 (Apr. 20, 2007)); NM-EX 100, Barroll Rep. 40-46; NM-EX 107, Lopez Rep. 44-46.

80. In 2010, after it had an opportunity to study the new operations and method for allocating water, New Mexico raised several concerns about the 2008 Operating Agreement. One of New Mexico’s primary concerns was that the 2008 Operating Agreement was inconsistent with the Compact because it did not allocate 57% of Project supply to New Mexico lands. NM-EX 517, Letter from John D’Antonio, State Engineer, State of New Mexico to Michael Connor, Commissioner, United States Bureau of Reclamation (Mar. 4, 2010); NM-EX 002, D’Antonio Decl. ¶ 11.

81. After attempts to resolve the issues related to the 2008 Operating Agreement failed, in 2011, New Mexico filed suit in federal district court seeking to have the 2008 Operating Agreement set aside. NM-EX 520, Complaint for Declaratory and Injunctive Relief, *New Mexico v. United States*, No. 1:11-cv-00691 (D.N.M. Aug. 8, 2011).

82. Texas filed the present original action in reaction to New Mexico’s 2011 federal district lawsuit. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 109:2-13; NM-EX 224, Schmidt-Petersen Dep. (Vol. I) (June 29, 2020) 40:19-41:12.

## VI. POSITIONS OF THE PARTIES ON THE COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE

### A. Position of Texas on the Compact Apportionment Below Elephant Butte

83. Consistent with the Reclamation Act, Texas adjudicated the Project Right in Texas. Specifically, it determined that EPCWID had the right to divert up to 376,000 from the Rio Grande. NM-EX 505, Texas Comm'n on Env't Quality, Certificate of Adjudication No. 23-5940, ¶ 1.b. (Mar. 7, 2007); *see also* Final Judgment and Decree, *In re: The Adjudication of Water Rights in the Upper Rio Grande Segment of Rio Grande Basin*, No. 2006-3219 (El Paso Cty. Dist. Ct., Oct. 30, 2006). Using the D1/D2 method, 376,000 AF represents approximately 43% of Project water when there is a full supply. NM-EX 001, Barroll Decl. ¶ 23. 376,000 AF also represents approximately 43% of Project supply under a normal release of 790,000 AF, once return flows are taken into account. *See, e.g.*, NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 20:11-21:11.

84. The Texas Compact Commissioner recognizes that a full supply release from the Project is 790,000 AF, and that Texas water users are entitled to 43% of Project supply and New Mexico water users are entitled to 57% of Project supply. NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-73:13; NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:20-13:21, 20:11-21:11, 121:9-11.

85. The Texas Compact Commissioner concedes that Rio Grande water is divided below Elephant Butte by the Downstream Contracts and that the Downstream Contracts “are incorporated into the Compact.” NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 10:25-12:19, 15:6-16:18.

86. The Texas Compact Commissioner concedes that the Project acts as the mechanism by which water users in New Mexico receive 57% of Project supply and water users in Texas are allocated 43% of Project supply. He further concedes that the mechanism for delivering Project water was incorporated into the Compact. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 10:25-16:24.

87. In official remarks at the 2011 RGCC meeting, Texas Compact Commissioner Gordon acknowledged that the Compact apportioned water between New Mexico and Texas based on the 57%-43% split. Specifically, Commissioner Gordon responded to comments of the New Mexico Commissioner by stating “I agree that the purpose of the Compact was to allocate the water between the Districts and the 53[-]47 [sic] as provided in the Compact. I do agree with that.” NM-EX 518, Rio Grande Compact Commission, Transcript of the 72nd Annual Meeting (94th Meeting), 59:2-4 (Mar. 30, 2011).

88. In 2004, the Texas Compact Engineer Advisor from 1987 to 2015 wrote that “[t]he Compact specifies a normal release of 790,000 acre–feet annually from Project Storage for use in Texas and New Mexico and for delivery of water to Mexico.” NM-EX 412, Herman R. Settemeyer, “Rio Grande Project/Rio Grande Compact Operation,” in CLE International, *Rio Grande Superconference* G-1, G-2 (2004) (“Settemeyer CLE Presentation”).

89. The Texas Compact Engineer Advisor from 1987 to 2015 testified that “the Rio Grande Compact incorporated the Rio Grande Project.” NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10.

90. The Texas Compact Engineer Advisor from 1987 to 2015 further testified that “the Rio Grande Project [water] is apportioned 57 – 57 percent to New Mexico and 43 percent to Texas.” NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10.

91. In May of 2011, Texas and New Mexico met to discuss the implications of the 2008 Operating Agreement on the Compact. Prior to the meeting, Texas had developed a set of talking points that represented Texas’s positions on the Rio Grande Compact. A photograph of those talking points is NM-EX 519 (Schmidt-Petersen, Photographs of Handwritten Notes on Easel). NM-EX 003, Lopez Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11. Using those talking points, Texas expressed its position that the Compact apportions the water below Elephant Butte between New Mexico and Texas “based on acreage” existing in each State. Texas further explained its position that under the Compact, the State of Texas is entitled to 43% of Project supply and the State of New Mexico is entitled to 57% of Project supply. NM-EX 519, Schmidt-Petersen, Photographs of Handwritten Notes on Easel; NM-EX 003, Lopez Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11.

92. Even in this litigation, Texas has admitted on numerous occasions that New Mexico has a Compact apportionment below Elephant Butte Reservoir.

- a. In its Complaint in this case, Texas made the following relevant factual allegations:
  - i. “[T]he Rio Grande Compact, among other purposes, was entered into to protect the operation of the Rio Grande Reclamation Project.” Compl. ¶ 4 (Jan. 8, 2013).
  - ii. “Project water deliveries are made based upon the ratio between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas.” *Id.* at ¶ 8.
  - iii. The Compact “relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas.” *Id.* at ¶ 10.
- b. Texas’s brief in support of its motion to file its complaint referred to Elephant Butte Irrigation District as the entity formed within New Mexico to contract with the United States “for the water allocated *and apportioned* for use within New Mexico.” Texas’s Brief in Support of Motion to File Complaint 7 (Jan. 2013) (emphasis added).
- c. In the course of its briefing on New Mexico’s Motion to Dismiss, Texas defined its apportionment as “the water New Mexico delivers to Elephant Butte, less the water provided to Rio Grande Project lands in New Mexico by the Rio Grande Project.” Texas’ Brief in Response to New Mexico’s Motion to Dismiss Texas’ complaint and the United States’ Complaint in Intervention, 11 (June 16, 2014).

- d. Further, in briefing on exceptions to the First Interim Report of the Special Master, Texas averred: “[T]he compact utilizes the Rio Grande Project, operated by the United States, as the single vehicle by which to apportion Rio Grande water to Texas and New Mexico.” See Texas’s Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017) (quotation marks omitted).

93. In connection with filing the Complaint in this case, Texas issued a News Release. In that News Release, Texas admitted “[h]istorically, *water apportioned under the Rio Grande Compact* has resulted in approximately 57 percent of the water supply below the Elephant Butte Reservoir being delivered to New Mexico, and 43 percent being delivered across the New Mexico-Texas state line for Texas.” NM-EX 524, Tex. Comm’n on Env’t Quality, *News Release*, 2 (Jan. 8, 2013) (emphasis added).

94. Every alternate year the Texas Commission on Environmental Quality (“TCEQ”) reports to the Texas Legislature about environmental issues, including interstate river compacts. In describing the Rio Grande Compact in 2014, the TCEQ explained “[t]he compact did not contain specific wording regarding the apportionment of water in and below Elephant Butte Reservoir. However, the compact was drafted and signed against the backdrop of the 1915 Rio Grande Project and a 1938 U.S. Bureau of Reclamation contract that referred to a division of *57 percent to New Mexico and 43 percent to Texas.*” NM-EX 526, Texas Comm’n on Env’t. Quality, *Biennial Report to the 84th Legislature* (2014) (emphasis added).

### **B. Position of the United States on the Compact Apportionment Below Elephant Butte**

95. In New Mexico’s adjudication of Lower Rio Grande water rights, the United States requested that the New Mexico Adjudication Court “recognize an amount of up to 376,000 acre-feet per year for delivery to Texas.” See NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.*, no. CV-96-888, ¶ 4 (N.M. 3d Judicial Dist., Feb. 17, 2014).<sup>2</sup> As discussed, under the D1/D2 method, 376,000 acre-feet was a full supply for EPCWID, and represents approximately 43% of Project water when there is a full supply.

96. Reclamation has recognized that “[b]ecause one district is located in New Mexico (EBID) and the other is located in Texas (EP#1), the operation of the Rio Grande Project has a bearing on each state’s claim to the waters of the Rio Grande.” NM-EX 503, Briefing Paper by Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Robert W. Johnson, Commissioner, Bureau of Reclamation (Nov. 2, 2006).

97. Reclamation has acknowledged the intent of the Compact “to recognize a yearly average of 790,000 AF release from Project storage to satisfy water users” in both States and Mexico. NM-

---

<sup>2</sup> In response to the United States request that New Mexico recognize 376,000 AFA for delivery to Texas, the New Mexico Adjudication Court explained that the United States’ request was beyond the jurisdiction of the court, but that the “State of New Mexico’s offer of judgment appropriately recognizes Project deliveries to Texas as an essential element of the Project.” *Id.*

EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).

98. Reclamation has recognized that “[t]he 1938 Rio Grande Compact intended to use the Reclamation Rio Grande Project as the vehicle to guarantee delivery of Texas’s, *New Mexico’s* and Mexico’s equitable apportionment of the Rio Grande waters below Elephant Butte Dam.” NM-EX 530, Filiberto Cortez, Bureau of Reclamation, EBID Depletion Reduction and Offset Program WaterSMART Grant Proposal, 1 (emphasis added).

99. At the hearing on New Mexico’s Motion to Dismiss in this proceeding, counsel for the United States conceded that the “[P]roject is central to the [C]ompact,” that “New Mexico would also, by the same token, have an apportionment” delivered through the Project, and that the Downstream contracts “effectuate the intended apportionment that is made in the [C]ompact.” Hrg. Tr. 88:17, 91:6-14, 100:7-18 (Aug. 19, 2015).

100. The United States has taken the following relevant positions in this case:

a. “New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir, and Texas receives its entire equitable apportionment of water, through the Project, in the form of water released by the Project ‘in accordance with irrigation demands.’ Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigation acreage in EBID and EPCWID, respectively.” Brief for the United States in Opposition to New Mexico’s Motion to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention, 28 (June 2014) (quoting Compact Art. I(1)).

b. “Usable Water” is “available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico.” Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 6 (July 2017).

c. “To effectuate an equitable apportionment of the waters of the Rio Grande, the compacting States incorporated and relied upon an existing reclamation project ‘as the vehicle to guarantee delivery of Texas’s *and part of New Mexico’s equitable apportionment of the stream.*’ The United States agreed to that arrangement through congressional approval of the Compact.” *Id.* at 18 (emphasis added) (quoting First Interim Report of the Special Master, 204 (Feb. 9, 2017)).

d. “In the Compact, the States (i) incorporated and relied upon an existing Reclamation project to deliver Texas’s and part of New Mexico’s equitable apportionment.” Sur-Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 12-13 (September 2017).

e. “[T]he Compact identifies what is to be done with water that is delivered by New Mexico to Elephant Butte Reservoir, and the Compact ‘protects the water that is released from Elephant Butte in order for it to reach its intended destination.’” *Id.* at 13 (quoting First Interim Report of the Special Master, 200 (Feb. 9, 2017)).

101. In response to a Request for Admission, the United States admitted for all purposes in this case that “under the Compact, the states relied upon an existing Reclamation project to deliver Texas’s and part of New Mexico’s equitable apportionment.” NM-EX 602, United States of America’s Responses to New Mexico’s First Set of Requests for Admission, 13 (November 4, 2019) (response to Request for Admission 30).

102. The expert historian sponsored by the United States in this case has opined that that the States intended for the Compact to apportion surface water below Elephant Butte Reservoir to New Mexico for the lands in New Mexico under the Rio Grande Project. NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 52:23-53:8, 73:23-74:9.

### **C. Position of New Mexico on the Compact Apportionment Below Elephant Butte**

103. Consistent with the Reclamation Act (and the adjudication in Texas), New Mexico adjudicated the Project Right in New Mexico. In accordance with the Compact, the New Mexico Adjudication Court established that the Project is entitled to an annual release of up to 790,000 acre-feet. *See* NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.*, no. CV-96-888 (N.M. 3d Judicial Dist., Feb. 17, 2014).

104. Unlike Texas, the New Mexico Adjudication Court set limits on the amount of surface water and groundwater that could be diverted or consumed on an acre of Project land in New Mexico. *See* NM-EX 527, Final Judgment, *New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.*, no. CV-96-888 (N.M. 3d Judicial Dist., Aug. 22, 2011). Consistent with Reclamation operations and analysis, New Mexico recognized the right for each Project acre to receive 3.024 acre-feet per annum of surface water. *Id.* at ¶ I.A.

105. Prior to this litigation, New Mexico has consistently taken the position that the Compact divides the waters below Elephant Butte according to the acreage in each State so that New Mexico is entitled to 57% and Texas is entitled to 43% of Project supply. For example, in negotiations that occurred during the 1990s and 2000s, New Mexico was steadfast in its position that a potential operating agreement for the Project could not alter the 57-43 division of water below Elephant Butte that was required by the Compact. NM-EX 004, Schmidt-Petersen Decl. ¶ 12; NM-EX 003, Lopez Decl. ¶ 17; NM-EX 002, D’Antonio Decl. ¶ 13.

## **VII. POSITION OF THE RIO GRANDE COMPACT COMMISSION ON THE COMPACT APPORTIONMENT**

106. The RGCC and its Engineer Advisers regularly request information and receive briefings from Reclamation on Project operations, including operations below Elephant Butte. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 45:9-46:12; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM-EX 003, Lopez Decl. ¶ 13; NM-EX 525, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Kenneth Rice, Bureau of Reclamation (May 2, 2013); NM-

EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996).

107. Reclamation reports to the RGCC every year about operations that are relevant to the Compact. As part of that report, Reclamation provides information about the operations of the Rio Grande Project. *See, e.g.*, NM-EX 512, Bureau of Reclamation, Calendar Year 2009 Report to the Rio Grande Compact Commission, 59-67 (Mar. 2010); NM-EX 003, Lopez Decl. ¶ 13; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM-EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996); NM-EX 410, Fascimile from Steve Vandiver, Engineer Adviser, State of Colorado, to Ken Maxey, Albuquerque Area Manager, Bureau of Reclamation, and Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation (Aug. 2, 2002).

108. The RGCC conducts Compact accounting on an annual basis. Part of the Compact accounting includes a report on the Project Storage and Releases. That accounting tracks both the releases of Usable Water to water users in both States to satisfy irrigation demands, and the accrued departure of the releases from the Compact's normal release of 790,000 acre-feet per year. *See, e.g.*, NM-EX 501, Rio Grande Compact Commission, Report of the Rio Grande Compact Commission 2005, 20 (Mar. 23, 2006). *See also* NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 14.

109. "Reclamation interprets this accrued departure from normal release [Compact accounting provision] as a measure of how the Rio Grande Project is complying with its obligation to meet yearly demand from the water users of the Rio Grande Project and at the same time comply with the Rio Grande Compact intent to recognize a yearly average of 790,000 AF release from project storage to satisfy water users" below Elephant Butte. NM-EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).

110. The releases from Project Storage are tracked so that the Compact Commissioner from each respective State is able to understand the amount of Project water that users in his or her State are entitled to. NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 13.

111. The RGCC acts or speaks in a number of forms, including through resolutions, all of which must have unanimous agreement. NM-EX 002, D'Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15. Through unanimous resolutions, the RGCC has taken the following relevant positions:

a. The State of New Mexico has a Compact apportionment in southern New Mexico below Elephant Butte, as recognized in the citations below:

i. "[O]ver half of New Mexico's population is located within the Rio Grande basin and depends on New Mexico's allocation of Rio Grande water under the Rio Grande compact." NM-EX 406, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Need for Careful Evaluation of the Water Supply and Socioeconomic Impacts of Any Designation of Critical Habitat for the Rio Grande Silvery Minnow (Mar. 25, 1999).

ii. “[A]ll Rio Grande water allocated to New Mexico both upstream *and downstream from Elephant Butte Reservoir* is fully appropriated under New Mexico state law.” *Id.* (emphasis added).

iii. “[T]he waters of the Rio Grande Project are used to . . . provide a water supply *for Southern New Mexico and Texas downstream of Elephant Butte Reservoir.*” NM-EX 408, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Development of an Appropriate Methodology for Determining the Annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002) (emphasis added).

b. The operations and accounting of the Project have the potential to impact New Mexico’s Compact apportionment. *Id.* (“[T]he dissemination of inaccurate allotments [by Reclamation] causes unnecessary hardship to the water users *of Southern New Mexico and Texas along the Rio Grande downstream of Elephant Butte Reservoir*”) (emphasis added); NM-EX 002, D’Antonio Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 15

c. The Project is “required to be operated in compliance with the Rio Grande Compact.” NM-EX 528, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding Temporary Modification of Operations at El Vado Reservoir in New Mexico during April, May, and June 2015 (Mar. 24, 2015); *see also* NM-EX 002, D’Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15.

112. To address the potential for Project operations to impact New Mexico’s (and Texas’s) Compact apportionment, the RGCC has taken at least these three actions by resolution:

a. First, the RGCC unanimously “request[ed] that the Bureau of Reclamation work cooperatively with the Engineer Advisers to develop procedures for determining the annual allotments of water supply in accordance with the Rio Grande Compact.” NM-EX 408, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Development of an Appropriate Methodology for Determining the annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002); *see also* NM-EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.

b. Second, the RGCC entered into a memorandum of understanding (“MOU”) with Reclamation to “conduct a Compact water accounting documentation project.” The purpose of the MOU was “to clarify and formally articulate the details of the duties, roles and responsibilities of each party for the water accounting, reporting, and documentation of the waters of the Rio Grande Basin above Fort Quitman, Texas, in accordance with the Compact.” NM-EX 407, Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation, 2 (Mar. 21, 2002); *see also* NM-EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.

c. Third, the RGCC unanimously “request[ed] those federal agencies that operate water-related facilities within the Rio Grande basin to advise the Rio Grande Compact Commission prior to changing the operation of any of those facilities and when deemed necessary by the Rio Grande Compact Commission, seek its unanimous consent for



changes prior to implementation.” NM-EX 413, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Concerning Federal Agency Operations of Their Water-Related Facilities on the Rio Grande Compact Accounting (Mar. 25, 2004); NM-EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.

## **VIII. DECISION OF THE SUPREME COURT ON THE COMPACT APPORTIONMENT**

113. The Court held in this case that “the Compact . . . implicitly . . . incorporates the Downstream Contracts by reference.” *Texas v. New Mexico*, 138 S. Ct. at 959. It noted that the “Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts.” *Texas v. New Mexico*, 138 S. Ct. at 959.

114. The Court further held that “the United States might be said to serve, through the Downstream Contracts as a sort of agent of the Compact, charged with assuring that the Compact’s equitable apportionment to Texas *and part of New Mexico* is, in fact, made.” *Texas v. New Mexico*, 138 S. Ct. at 959 (emphasis added; internal quotation marks omitted).

## STANDARD OF DECISION

### I. SUMMARY JUDGMENT

The Court has stated the legal standard to be applied in ruling on motions for summary judgment in cases in the Court’s original jurisdiction as follows:

[A]lthough not strictly applicable, Rule 56(c) of the Federal Rules of Civil Procedure and our precedents construing that Rule serve as useful guides. Summary 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. When the nonmoving party bears the burden of proof at trial, summary judgment is warranted if the nonmovant fails to make a showing sufficient to establish the existence of an element essential to its case. In determining whether a material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard.

*Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993) (citations, internal quotation marks, and brackets omitted); *accord Alabama v. North Carolina*, 560 U.S. 330, 344 (2010).

### II. COMPACT INTERPRETATION

An interstate compact is both a contract between States and a law of the United States. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). As a result, the customary rules of contract interpretation and statutory construction apply. *Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013); *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). As with other contracts and federal laws, if the text of the Compact is unambiguous it is conclusive. *See, e.g., Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (“[U]nless the compact to which Congress has consented is somehow unconstitutional, no court may order relief inconsistent with its express terms.”) (citing *Texas v. New Mexico*, 462 U.S. 554, 564 (1983)). In *New Jersey v. Delaware* the Court observed:

Interstate compacts, like treaties, are presumed to be the “subject of careful consideration before they are entered into, and are drawn by persons competent

to express their meaning, and to choose apt words in which to embody the purpose of the high contracting parties.”

552 U.S. at 615-16 (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). In interpreting a compact, the Court should give effect to every clause and every word. *Id.* at 611; *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001); *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) (noting that a compact is “a legal document that must be construed and applied in accordance with its terms”).

On the other hand, if the language of the Compact is determined to be ambiguous, other reliable sources may be taken into account, including the negotiating history, *Oklahoma*, 501 U.S. at 235 n.5; course of performance, *Alabama*, 560 U.S. at 346 (explaining that the “parties’ course of performance under the Compact is highly significant”); and customary practices employed in other interstate compacts, *Tarrant Regional Water District*, 569 U.S. at 633.

## **ARGUMENT**

The Special Master should declare that both New Mexico and Texas have Compact apportionments of the waters of the Rio Grande below Elephant Butte Reservoir and that the apportionment is 57% of Rio Grande Project supply to New Mexico and 43% of Rio Grande Project supply to Texas. As discussed in greater detail below, this conclusion is supported by the 2018 decision of the Court, 138 S. Ct. 954 (“2018 Decision”); the structure and plain language of the Compact; the extrinsic evidence surrounding execution of the Compact, including the negotiating history; the course of performance; and the customary practices for interstate compacts.

### **I. A RULING ON THE APPORTIONMENT BELOW ELEPHANT BUTTE MUST BE CONSISTENT WITH THE COURT’S 2018 OPINION**

In original actions, the Court bears “ultimate responsibility” for all findings and conclusions. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). It is therefore necessary that

any decision of the Special Master on the apportionment below Elephant Butte Reservoir be consistent with the Court’s 2018 Decision. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018).

In that 2018 Decision, the Court observed that while Colorado has a state line delivery, New Mexico delivers water to Elephant Butte Reservoir, more than 100 miles inside New Mexico. *Id.* at 957. While the lack of a state line delivery requirement for New Mexico may initially seem dissonant with the purpose of an equitable apportionment, the negotiating history of the Compact makes clear that the States relied upon the existing Rio Grande Project and the Downstream Contracts negotiated simultaneously with the Compact to divide the Project water supply between New Mexico and Texas:

[T]he Compact required Colorado to deliver a specified amount of water annually to New Mexico at the state line. *Id.*, at 787–788. But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line, the Compact directed New Mexico to deliver water to the Reservoir. *Id.*, at 788. In isolation, this might have seemed a curious choice, for a promise to deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas. *But the choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts* that promised Texas water districts a certain amount of water every year from the Reservoir's resources.

*Id.* (emphasis added). Therefore, the Compact incorporates the Downstream Contracts, which divide the Project supply to New Mexico and Texas below the Reservoir. Thus, the Compact must be reviewed and understood in the historical context that included existing Project operations and the simultaneously executed Downstream Contracts:

*[T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts.* The Compact indicates that its purpose is to “effec[t] an equitable apportionment” of “the waters of the Rio Grande” between the affected States. 53 Stat. 785. *Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water*

to Texas. In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with *assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made.*

*Id.* (emphasis added; internal quotation marks omitted). Despite the lack of specific language regarding the lands below Elephant Butte Reservoir, the Compact made “all the sense in the world” in that Texas’s and New Mexico’s apportionments downstream of the Reservoir arise out of Project operations and the “inextricably intertwined” Downstream Contracts, both of which assured each State a share of the water as part of the Rio Grande Project. *Id.* The Court in *Texas v. New Mexico* also explained that “the Compact could be thought *implicitly to incorporate the Downstream Contracts* by reference.” *Id.* at 959 (citing 11 R. Lord, Williston on Contracts § 30:26 (4th ed. 2017)) (emphasis added).

In sum, the Special Master’s decision on the apportionment below Elephant Butte must be consistent with the following principles articulated by the Court in its 2018 Decision: (1) the Compact is “inextricably intertwined” with the Project; (2) the Compact “implicitly . . . incorporate[d] the Downstream Contracts by reference”; and (3) the Compact relies upon the Project to deliver “the Compact’s equitable apportionment to Texas and part of New Mexico.”

## **II. THE PLAIN LANGUAGE OF THE COMPACT DEMONSTRATES THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR**

Interpretation of the Compact begins with its “express terms” inasmuch as “no court may order relief inconsistent with” those terms. *Texas v. New Mexico*, 462 U.S. 554, 564 (1983). The structure and plain language of the Rio Grande Compact demonstrates that both the State of New Mexico and the State of Texas have apportionments below Elephant Butte Reservoir.

### **A. The Compact Relied Upon the Project to Apportion the Waters Below Elephant Butte Reservoir Between Texas and New Mexico**

The preamble to the Compact declares that the compacting States' purpose for entering into the Compact was to "effec[t] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." Rio Grande Compact, 53 Stat. 785, 785 (1939). The Compact, in turn, defines the "Rio Grande Basin" as "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman." *Id.* at 785 (Art. I(c)). Accordingly, the States intended to apportion all waters within the "Rio Grande Basin" among the three States.

To accomplish that apportionment, the Compact initially defines two delivery obligations. The first requires Colorado to deliver water to the New Mexico state line based on hydrologic conditions. *Id.* at 787 (Art. III). Colorado's equitable apportionment thus constitutes the difference of the water above the Colorado-New Mexico state line minus Colorado's Article III delivery requirement. The Compact then requires New Mexico to deliver a specific quantify of water to Elephant Butte Reservoir. *Id.* at 788 (Art. IV). Part of New Mexico's equitable apportionment (for the Middle Rio Grande) thus includes the water between the Colorado-New Mexico state line and Elephant Butte Reservoir, minus New Mexico's Article IV delivery requirement.

But, the Compact does not end with delivery of water into Elephant Butte Reservoir; instead, it relies upon the Rio Grande Project to complete the apportionment as between New Mexico and Texas. Once New Mexico meets its Article IV obligation, the water becomes "Usable Water" in "Project Storage," "which is available for release in accordance with irrigation demands, including deliveries to Mexico." *Id.* at 786 (Art. I(l) and I(k)). In its operation of the Project, Reclamation releases water for those uses identified in Article I(l) of the Compact pursuant to the

Downstream Contracts and the 1906 treaty that were already in place when the Compact was signed. The Downstream Contracts froze the historical proportions of irrigated acreage supplied by the Project downstream of Elephant Butte Reservoir at 57% for lands in New Mexico and 43% for lands in Texas. UMF ¶¶ 52-53, 57-58; see *New Jersey v. New York*, 523 U.S. 767, 783, n. 6 (1998) (explaining that existing background principles of law are relevant to compact interpretation). Thus, by operation of the Project to deliver water for Article I(l) purposes, “the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico is in fact made.” *Texas v. New Mexico*, 138 S. Ct. at 959 (internal quotation marks omitted); see also *id.* (“Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts”). By operation of these provisions, New Mexico receives the remainder of its equitable apportionment of water under the Compact for lands in southern New Mexico, and Texas receives its entire equitable apportionment, through the Project, in the form of water released by the Project “in accordance with irrigation demands.” *Id.* (Art. I(l)). Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage in each State. UMF ¶¶ 42-44, 55-56, 58-76; *Texas v. New Mexico*, 138 S. Ct. at 957.

The plain language and structure of the Compact further reflects an intent to incorporate the Project and complete the apportionment as between Texas and New Mexico in multiple ways. First, the definition of “Usable Water” is critical to understanding the Compact. The term “Usable Water” shows up in six (6) Compact definitions (“Project Storage”, “Usable Water”, “Unfilled Capacity”, “Actual Release”, “Actual Spill”, and “Hypothetical Spill”) and three (3) Compact Articles (Articles VI, VII, VIII). The Compact emphasizes its reliance on Project operations to divide the waters of the Rio Grande by dictating that “Usable Water” is released only in accordance

with irrigation demands for downstream Project water users. Art. I(l). Likewise, “Actual Release” of “Usable Water” each year is defined in the Compact as “the amount of *usable water released in any calendar year* from the lowest reservoir comprising project storage.” Compact, art. I(o) (emphasis added). And an “Actual Spill” from the Reservoir, according to the Compact definitions, occurs when the water spilled from the reservoir, or released for flood control, is “*in excess of the current demand on project storage.*” *Id.*, art. I(p) (emphasis added).

Next, a normal annual release of “Usable Water” from “Project Storage” to satisfy the “irrigation demands” on Project lands is expressly established in the Compact as 790,000 acre-feet per year. *Id.* at 790 (Art. VIII). This term was a key component of the negotiated equities because it defined the amount of water available to Project lands in both compacting States. UMF ¶¶ 21-24. Again, at the time the Compact was negotiated, the Project lands were “frozen” at 155,000 acres total, with 57% of the lands in New Mexico and 43% of the lands in Texas. The plain language thereby reveals an intent to apportion “the waters of the Rio Grande above Fort Quitman” between Texas and New Mexico because 790,000 acre-feet is more water than is necessary to satisfy Project lands in Texas alone.

Moreover, the States’ intent to ensure water users below Elephant Butte in both States received their equitable share of “Usable Water” based on a “normal release of 790,000” is further reflected in Articles VII and VIII. Article VII protects the Project water supply by limiting storage above Elephant Butte when “Project Storage” is less than 400,000 acre feet to meet irrigation demands for lands in both New Mexico and Texas. 53 Stat. at 790 (Art. VII). Similarly, Article VIII permits New Mexico to demand that Colorado, and Texas to demand that Colorado and New Mexico release water from storage in certain circumstances to bring the quantity of “Usable Water” in the Project to 600,000 acre-feet. *Id.* (Art. VIII); UMF ¶ 37. If all water delivered to the Project



pursuant to Article IV was apportioned to Texas alone, there would be no reason to grant New Mexico the authority to demand upstream releases to increase the volume of “Usable Water” in “Project Storage.” Both provisions are designed to ensure the Project has sufficient water to “meet its irrigation demands” in both States. First Interim Report of the Special Master, 201 (Feb. 9, 2017) (“FIR”).

Finally, the Compact specifies that a river gage be located below Caballo Reservoir in order to track releases from “Project Storage” to serve Project lands in New Mexico and Texas. 53 Stat. at 786-87; UMF ¶ 32. The existence of this gage reflects the compacting States’ interest in tracking releases from Project storage in view of Compact’s reliance on Project deliveries.

These Compact provisions clearly manifest the compacting States’ intent that both New Mexico and Texas would receive apportionments through the operation of the Project.

### **B. The Language of the Compact Offers No Basis for Treating New Mexico Differently than Texas Below Elephant Butte**

As discussed above, the States entered into the Compact for the purpose of “effecting an equitable apportionment” of “the waters of the Rio Grande above Fort Quitman, Texas.” 53 Stat. at 785. Despite this clear purpose, Texas has asserted that New Mexico has no rights or apportionment of water below Elephant Butte. This argument is contrary to the plain language of the Compact for at least five reasons.

*First*, Texas’s assertion that New Mexico lacks a Compact apportionment below Elephant Butte is inconsistent with the 2018 Decision. In its Motion to Dismiss, New Mexico asserted that even when the well-pleaded factual allegations were accepted as true for purposes of the motion, the complaints failed to show that either Texas or the United States was entitled to relief. *See* New Mexico’s Motion to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention, 22 (Apr. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). New Mexico’s primary

argument was that *the Compact* did not control actions below Elephant Butte and did not apportion water to the States below Elephant Butte Reservoir. The Special Master rejected that argument, *see generally* FIR 217-37, and the Court denied the Motion to Dismiss and found that Texas’s Compact claims below Elephant Butte stated a cause of action. *Texas v. New Mexico*, 138 S. Ct. 349 (mem.) (2017). The necessary implication of the denial of the Motion to Dismiss is that the Compact *does* govern the apportionment, rights, and obligations of the States below Elephant Butte. Finding that New Mexico lacked an apportionment below Elephant Butte would be inconsistent with that ruling. More explicitly, the Court held that “the Compact is inextricably intertwined with the Rio Grande Projects and the Downstream Contracts,” and that the Project acts as a vehicle “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 (emphasis added). This language leaves no room for the argument that New Mexico lacks an apportionment below Elephant Butte.

*Second*, a reading of the language to deprive New Mexico of a Compact apportionment below Elephant Butte Reservoir would be contrary to the purpose of the Compact to “effec[t] an equitable apportionment” of “the waters of the Rio Grande above Fort Quitman, Texas.” 53 Stat. at 785 This is true because the preamble makes clear that the Compact apportions all waters of the Rio Grande “above Fort Quitman, Texas.” This necessarily includes that part of New Mexico below Elephant Butte, a significant portion of the State of New Mexico, which contains more than half of the authorized acreage in the Rio Grande Project—88,000 acres of irrigable lands. UMF ¶¶ 12, 45, 53, 57-58. To accept Texas’s argument, the Court would have to tolerate a reading of the Compact that excludes Southern New Mexico from the “equitable apportionment” provided in the Compact, despite the lack of any textual support.

Even more problematic, that argument would deprive New Mexico of a Compact entitlement to water below Elephant Butte. But it is hard to imagine that New Mexico would have assented to the Compact if the interpretation Texas asserts—that the Compact deprives New Mexico of any right to use Rio Grande water in the southern part of the State—were correct. The Court has never held that an interstate compact approved by the legislatures and governors of the respective States and by the Congress and President of the United States has failed to attain its stated purpose. *See, e.g., Green v. Biddle*, 8 Wheat (14 U.S.) 1, 91 (1823) (construction by which purposes of the Compact would be defeated “is too monstrous to be for a moment entertained. The best feelings of our nature revolt against a construction which leads to it”); *see also Texas v. New Mexico*, 462 U.S. at 566-72 and n.17. By the same reasoning, the expressed intentions of the compacting states to apportion “the waters of the Rio Grande above Fort Quitman, Texas” should be enforced. Any other result would be contrary to the express intentions of the States.

*Third*, there is no textual basis in the Compact for treating Texas and New Mexico differently below Elephant Butte. *Cf. Aristocrat Tech. Australia Pty Ltd. v. Int’l Game Tech.*, 709 F.3d 1348, 1364 (Fed. Cir. 2013) (declining to treat a party who induces a patent infringement differently from a direct infringer because “there is no reason, either in the text of the statute or in the policy underlying it, to treat two inducers differently” (internal citation omitted)). The Compact language referring to Project operations contains no language distinguishing between Texas and New Mexico with regard to releases of “Usable Water” to meet “irrigation demands” in both States. Rather, as discussed above, the “normal release of 790,000 acre-feet” is an amount of water that was designed to satisfy the irrigation demands of Project lands in both States. UMF ¶¶ 39-45. Never once does the Compact reference “Usable Water” as Texas’s water, never once does the Compact establish the “annual release of 790,000 acre-feet” per year as a Texas release,

and never once does the Compact make a reference to “Actual” or “Hypothetical” spills as spilling Texas’s water. The reason is clear in the plain language and history of the Compact. The Project serves as the vehicle for delivery of the apportionment to all Project lands in both southern New Mexico and Texas. *See* FIR 203.

*Fourth*, the absence of express language depriving New Mexico of authority over waters within its own borders is meaningful. “A state has a sovereign interest in natural resources within its boundaries.” *Alaska Sport Fishing Ass’n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994). In that regard, the Supreme Court “recognized in *New Jersey v. New York*, a State’s sovereign interest in ensuring an equitable share of an interstate river’s water is precisely the type of interest that the State, as *parens patriae*, represents on behalf of its citizens.” *South Carolina v. North Carolina*, 558 U.S. 256, 274 (2010) (citing *New Jersey v. New York*, 345 U.S. 369 (1953) (*per curiam*)); *see also United States v. Nevada*, 412 U.S. 534, 539 (1973); *Nebraska v. Wyoming*, 325 U.S. 589, 616 (1945). But despite New Mexico’s interest in “ensuring an equitable share” of the Rio Grande and protecting its water users, Texas reads into the Compact’s silence an intent by New Mexico to abandon its interests in waters flowing through its borders and, with them, the interests of its citizens in southern New Mexico.

In *Tarrant Regional Water District*, 569 U.S. at 614, the Court was asked to interpret the Red River Compact to determine whether the compact entitled a Texas water district to acquire water from within Oklahoma, thereby pre-empting Oklahoma statutes restricting out-of-state diversions of water. Finding that the compact was silent on that issue, the Court first noted that the “background notion that a State does not easily cede its sovereignty has informed our interpretation of interstate compacts.” *Id.* at 631. Relying on this fundamental principle, the Court

reaffirmed this central rule of interpretation regarding inferences to be drawn from silence in intrastate compacts:

[W]hen confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that "[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens."

*Id.* (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)). The Court thus rejected any inference from the compact's silence that the signatory states had "dispensed with the core state prerogative to control water within their own boundaries." *Id.* Consistent with the established principles reaffirmed in *Tarrant*, silence in the Rio Grande Compact must be construed in favor of finding that New Mexico, like Texas, has an apportionment of water below Elephant Butte.

*Last*, one of the purposes of the Compact is to "remove all causes of present and future controversy." 53 Stat. at 785. But if the Compact were understood in the way Texas suggests, the question of New Mexico's entitlement to water, authority, rights and obligations would be "an open, major source of controversy," contrary to the basic purpose of the Compact to "effect[] an equitable apportionment of" the waters of the Rio Grande. FIR 202-03.

### **III. THE NEGOTIATING HISTORY CONFIRMS THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR**

In construing the Compact, "if the principal purpose of the parties is ascertainable it is given great weight." Restatement (Second) of Contracts § 202(1); *accord Tarrant*, 569 U.S. at 631 (setting forth factors for the Court to examine to determine the compacting parties' intent); *Alabama*, 560 U.S. at 345, 359 (Kennedy, J., concurring) ("The Court's duty in interpreting a compact involves ascertaining the intent of the parties."). The Court may therefore consider contemporaneous evidence of the parties' intent and purpose during negotiations to understand the Compact. *See Tarrant Reg. Water Dist.*, 569 U.S. at 639 (relying on interpretive comments to

interstate compact to reject argument that the compact left certain waters “unallocated”); *Oklahoma*, 501 U.S. at 235 (examining letters from New Mexico’s principal negotiators to its governor and senators). *See, generally*, Restatement (Second) of Contracts § 214 (1981) (citing cases for use of “evidence of prior or contemporaneous agreements and negotiations” to ascertain “the meaning of the writing, whether or not integrated”). The Court may also consider whether circumstances surrounding a negotiation indicate a shared factual understanding that bears upon the interpretation of the compact. *See Oklahoma v. New Mexico*, 501 U.S. at 235 (reviewing extrinsic evidence of compact negotiators’ understanding of future in-basin development). Finally, the Court may consider the degree to which background principles of law, applicable at the time, colored the states’ understanding of compact terms. *See New Jersey v. New York*, 523 U.S. 767, 783, n. 6 (1998) (“the silence of the Compact was on the subject of settled law governing avulsion, which the parties’ silence showed no intent to modify”); *see also Montana v. Wyoming*, 563 U.S. 368, 375-80 (2011) (surveying development of the “no-injury rule as it exists in Montana and Wyoming,” to interpret compact language) (citation omitted); *Petty v. Tennessee-Missouri Bridge Comm’n*, 359 U.S. 275, 280-81 (1959) (reading “sue-and-be-sued” clause of compact in context of the “federal climate of opinion which by that time had grown up around” the question of sovereign immunity).

**A. The Negotiating History Illustrates that the States Intended to Protect Existing Rights in Both States**

By 1938, all surface water within the Rio Grande Basin in New Mexico was fully appropriated—including the surface water appropriated to serve Project lands. UMF ¶¶ 9, 20. Protecting these rights was a priority for New Mexico in negotiating a Compact. For that reason, New Mexico stressed that for it to agree, the final compact needed to protect “[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico,” and needed to ensure that those

existing rights had “an adequate supply of water from said river system.” NM-EX 319, Rio Grande Compact Commission, *Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937*, at 12-13; UMF ¶ 20. Similarly, the Engineer Advisors emphasized in their Report of Committee of Engineers to the RGCC emphasized that “present uses of water in each of the three States must be protected in [the] formulation of the Compact.” NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission; UMF ¶ 21.

Not surprisingly, the expert historians agree that one purpose of the Compact was to protect existing rights in both States. UMF ¶ 39. This purpose is important in understanding the apportionment because the States intended the Compact to apportion sufficient water to provide for irrigation demands for existing rights in both States. In the absence of contrary language in the Compact, of which there is none, it is reasonable to understand that the States apportioned water in such a way so as to protect existing rights to water below Elephant Butte Reservoir. *See Oklahoma*, 501 U.S. at 231 (reasoning that an interpretation of compact terms that would cause New Mexico to undertake an “extremely expensive” set of obligations with respect to reservoir maintenance should be disfavored absent “persuasive evidence that the drafters of the Compact intended that New Mexico should bear such a burden”); *see also Tarrant Reg. Water Dist.*, 569 U.S. at 630 (making a “commonsense” reading of the purpose and function compact provisions).

To accomplish this, the States devoted significant effort to evaluating and negotiating the annual “normal release” of “Usable Water” from the Project that would be sufficient to meet “irrigation demands” in both States. After numerous discussions, the Committee of Engineers agreed on a “normal release” from the Reservoir of 790,000 acre feet per year to meet the “irrigation demands” of Project lands in New Mexico and Texas. UMF ¶¶ 22-23, 43, 84, 87, 97.

It necessarily follows, from this negotiating history, that the States intended the Compact to protect deliveries of “Usable Water” to satisfy the “irrigation demands.”

**B. The Negotiating History Shows that the States Relied Upon the Project to Apportion the Water Below Elephant Butte Between Texas and New Mexico**

The negotiating history confirms that the compacting States relied upon the existing Project to apportion the water below Elephant Butte based on the irrigated acreage existing in the two States. UMF ¶¶ 38, 40-42, 46-49, 53-58, 60, 62-64, 85-86, 92, 98.

The Congressional authorization for the Rio Grande Project occurred in 1905, and provided that construction could begin upon a determination that there was “sufficient land in New Mexico and in Texas which can be supplied with the stored water at a cost which shall render the project feasible and return to the reclamation fund the cost of the enterprise.” Act of February 25, 1905, 33 Stat. 814. Reclamation later formally established the Rio Grande Project’s limits at 155,000 acres, with 88,000 acres in New Mexico (57% of the total) and 67,000 in Texas (43% of the total). NM-EX 310, Fund for Reclamation of Arid Lands, H.R. Doc. 61-1262, at 106 (1911).

By 1938, the irrigation districts agreed on the water allocations in proportion to the Project acreages in each state. NM-EX 324, 1938 Downstream Contract; UMF ¶ 57. Thus, by the time of the Compact’s execution in 1938, the infrastructure of the Rio Grande project was in place, and the Project deliveries were occurring to the irrigation districts in New Mexico and Texas. UMF ¶¶ 10-12, 49-58. Elephant Butte Reservoir served as the principal storage reservoir for the Rio Grande Project. Reclamation controlled releases from the Reservoir, diversions from the main stem of the Rio Grande, and the farm deliveries to irrigated lands in New Mexico and Texas within the Project, and the compacting States understood that these operations would continue. NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); UMF ¶¶ 41-42, 46.



During the early Compact negotiations, the parties acknowledged that protection of a water supply for the Project was a principal intent. UMF ¶¶ 15-16, 21; NM-EX 316, Rio Grande Compact Commission, *First Annual Report of the Rio Grande Compact Commission*, 1-10 (1931) (containing the terms of the 1929 temporary compact). Indeed, all parties to this litigation now agree that one of the primary purposes of the Compact was to protect the existing operations of the Rio Grande Project. UMF ¶¶ 38, 86, 92, 98. In the words of Reclamation, “[t]he 1938 Rio Grande Compact intended to use the Reclamation Rio Grande Project as the vehicle to guarantee delivery of Texas’s, New Mexico’s, and Mexico’s equitable apportionment of the Rio Grande waters below Elephant Butte Dam.” NM-EX 530, Filiberto Cortez, Bureau of Reclamation, *EBID Depletion Reduction and Offset Program WaterSMART Grant Proposal*, 1; UMF ¶ 98. Several principles emerge from the history of negotiations that inform the Compact apportionment.

First, in the Compact negotiations, both New Mexico and Texas explicitly couched their positions in terms of fixing a definite amount of water to which the Rio Grande Project would be entitled. UMF ¶¶ 21-24. By 1938, the Rio Grande Project had been in operation for over twenty years, and Reclamation had a history of making farm deliveries. UMF ¶¶ 10, 40-41, 53-58. These deliveries were based on equal-per-acre allocations, while guaranteeing to Mexico a defined annual diversion above Juarez. UMF ¶¶ 4, 42, 56, 60, 62-64.

Next, the Project was operated as a single unit. UMF ¶¶ 40, 41, 54. For example, New Mexico’s Engineer Advisor J.H. Bliss recounted that the delivery obligation at San Marcial presumed that the “Project must be operated as a unit,” in terms of proportionate deliveries in New Mexico and Texas. NM-EX 327, J.H. Bliss, *Provisions of the Rio Grande Compact*, 1 (Apr. 2, 1938); UMF ¶ 41. In part, this meant that all Project lands were treated the same, regardless of which state they were located in.

Furthermore, because each acre of Project land was entitled to an equal allocation of water, it was possible to determine the relative proportions of Project supply that each State was entitled to receive. Based on the acreage, New Mexico was entitled to 57% of Project supply and Texas was entitled to 43% of Project supply. UMF ¶¶ 44, 45, 49, 53, 86, 92, 98.

This Compact apportionment below Elephant Butte was succinctly described by Texas Commissioner Frank Clayton shortly after the Compact was finalized. Texas Commissioner Clayton wrote that “[o]bviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent government agency.” He continued:

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

NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); UMF ¶ 46. The expert historians agree that this is an “important” document for understanding the Compact apportionment. UMF ¶ 46.

Less than a month later, Texas Commissioner Clayton reiterated this understanding, stating that “by contract between the New Mexico interests and the Texas interests in the Rio Grande Project, all the lands in the Project have equal water rights, and the acreage to be irrigated is practically ‘frozen’ at its present figures.” NM-EX 329, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to C.S. Clark, Chairman, Board of Water Engineers, State of Texas (October 16, 1938); UMF ¶ 46. And in 1968, the former Texas Engineer Advisor, who was involved in the Compact negotiations, explained that the “normal release of 790,000 per year”

was selected by the compacting States “for use on lands in New Mexico downstream of Elephant Butte Reservoir and on lands in Texas.” NM-EX 401, Raymond A. Hill, Development of the Rio Grande Compact of 1938, 38 (Oct. 8, 1968). Based on these contemporaneous writings, the States understood that the equal-per-acre allocation formula was the basis of the equitable apportionment below Elephant Butte Reservoir, and the Project supply would be allocated according to the acreage under cultivation in the two states—roughly 88,000 acres in New Mexico (57%) and 67,000 acres in Texas (43%). UMF ¶¶ 44-45.

Finally, in the 2018 Decision, the Court recognized that the very “purpose” of the Compact to establish an equitable apportionment can “only” be achieved “because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts.”<sup>3</sup> *Texas v. New Mexico*, 138 S. Ct. at 959. It is explicitly agreed in the 1938 Downstream Contract that the New Mexico and Texas water Districts would receive the benefit of receiving annual Project water in accordance with the respective proportion of the total acreage of irrigable land that falls within their state lines. The 1938 Downstream Contract identified 88,000 acres within New Mexico and 67,000 acres within Texas. NM-EX 326, 1938 Downstream Contract, at 2 (“there will be within the Elephant Butte Irrigation District 88,000 acres of land, and within El Paso County Water Improvement District No. 1, 67,000 acres ... [and] the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within El Paso County Water Improvement District No. 1, and 88/155 to the lands within Elephant Butte Irrigation District.”); UMF ¶ 58. This roughly 57% (New Mexico) and 43% (Texas) apportionment of the Project water is the foundation upon which New Mexico and Texas executed the Compact. UMF ¶¶ 57, 58.

---

<sup>3</sup> Particularly, the February 16, 1938 contract between EBID and EPCWID that was approved by the Assistant Secretary of the Interior on April 11, 1938.

#### **IV. THE COURSE OF PERFORMANCE CONFIRMS THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR**

##### **A. Project Operations**

The Parties' course of performance since the execution of the Compact similarly makes clear that the Compact apportions water to New Mexico below Elephant Butte Reservoir. Reclamation allocated 57% of Project deliveries to lands in New Mexico for decades, and the Parties relied on this distribution to apportion the waters of the Rio Grande between New Mexico and Texas in the Lower Rio Grande. For decades, no party to the Compact objected to this apportionment, and the behavior of the parties, including Texas, was consistent with this understanding.

A course of performance is previous conduct between the parties to an agreement which is fairly regarded as establishing a common basis of understanding for interpreting their expressions and conduct. Unless otherwise agreed, a course of performance between the parties gives meaning to or supplements their agreement. Restatement (Second) of Contracts § 223 (describing course of dealings). Generally, a party's course of performance is given the greatest weight when there are "repeated occasions for performance" and "opportunity for objection to it," and yet performance is "accepted or acquiesced in without objection." *Id.* § 202(4). The Supreme Court has applied this principle of construction to interstate compacts, recognizing on several occasions that a "'part[y's] course of performance under [a] Compact is highly significant' evidence of its understanding of the compact's terms." *Tarrant Reg'l Water Dist.*, 569 U.S. at 636 (quoting *Alabama v. North Carolina*, 560 U.S. at 346) (alterations in original).

For example, in *Alabama v. North Carolina*, the Court recognized that the Southeast Interstate Low-Level Radioactive Waste Management Compact contained no explicit provision that parties provide financial assistance to North Carolina to license and construct a disposal

facility for radioactive waste. Nonetheless, the Court held the compact contained a financial assistance requirement, in part because the parties to that compact had consistently behaved as though they were obligated to share in the costs. 569 U.S. at 636. “There is [no language] to support the proposition that the other States had an obligation under the Compact to share the licensing costs through the Commission; but we doubt that they did so out of love for the Tarheel State. They did it, we think, because that was their understanding of how the Compact was supposed to work.” *Id.* On this basis, the Court held that, once the other states and compact commission stopped providing North Carolina funds to help defray its costs, North Carolina did not violate that compact by discontinuing its efforts to license and construct the disposal facility. *Id.* at 346-47.

To the same effect, in *Tarrant Regional Water District*, the Court examined whether the parties’ course of conduct under the Red River Compact supported the plaintiff water district’s contention that the compact authorized water users in one state to divert water from another state across state lines. 569 U.S. at 636. Recognizing that no one else had done so in the 27 years between that compact’s ratification and the date the water district filed its lawsuit, and that the water district had attempted to purchase water from Oklahoma for a price tag in the “billions” prior to asserting the existence of a compact right to make such a diversion, the Court held that the Red River Compact contained no such right to make cross-border diversions. *Id.*

Here, the Parties’ actions, from the time the compact was adopted in 1938 until the present, repeatedly demonstrate their understanding that the Compact apportioned 57% of Project supply to New Mexico in the Lower Rio Grande. Prior to 1951, the Project enjoyed plentiful water supplies, and Reclamation allowed Project farmers to order the water they needed to irrigate their crops. UMF ¶¶ 54, 56, 60, 61. In 1951, drought forced Reclamation to determine per-acre

allocations to Project lands, which it did by looking at average deliveries to lands from 1946 through 1950. UMF ¶ 62. From 1951 through 1978, Reclamation allocated Project deliveries on an equal basis to all Project lands, consistent with the terms of the 1938 Downstream Contract, and then delivered this allocated water directly to Project lands. UMF ¶¶ 62, 63, 69. This allocation, which is reflected in the Project Histories and accounting, resulted in approximately 57% of Project water being delivered to and used on Project lands in New Mexico, and approximately 43% being delivered to and used on Project lands in Texas. UMF ¶¶ 64-65. During this time, none of the compacting States objected to the 57% allocation and delivery of Project supply to lands in New Mexico. UMF ¶ 64.

After 1978, Reclamation, anticipating the transfer of ownership of Project canals and laterals to the Districts along with the responsibility to deliver Project supply to their members, developed delivery calculations known as the D1 and D2 calculations to maintain the historical relationship between Project releases from Project Storage and deliveries to the districts. UMF ¶¶ 66-70. This method was based on releases and deliveries made in the period from 1951 to 1978 and preserved the ratio of 57% to 43% of allocations made to New Mexico and Texas lands, respectively. UMF ¶ 70, 73, 76. Reclamation continued making allocations to the irrigation districts in the proportion of 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands using the D1/D2 method through at least 2005. UMF ¶ 71-76. The irrigation Districts acquiesced to these operations, and no Compact party objected to them, either. UMF ¶ 71.

In 2003, the Project began to suffer the effects of the severe drought that has plagued the Rio Grande basin for the last two decades. NM-EX 412, Settemeyer CLE Presentation at 4. In 2003 and 2004, Reclamation was unable to make full allocations to the Districts, but still attempted

to allocate Project water 57% to New Mexico and 43% to Texas using the D1/D2 method. UMF ¶ 74; Reclamation Deposition at 50-51. In 2005, Reclamation was able to make a full D1/D2 allocation in the percentage of 57% to New Mexico lands and 43% to Texas lands. UMF ¶ 75. This long pattern shows that the parties understood that New Mexico was apportioned and was entitled to receive 57% of Project water.<sup>4</sup>

The long history of allocating 57% of Project supply to New Mexico lands is not the only historical practice demonstrating the parties' understanding of the Compact apportionment in the Lower Rio Grande. Another example of Texas's own performance recognizing the Compact apportionment is the adjudication of water rights that occurred in Texas in the mid-2000s. The Texas Commission on Environmental Quality ("TCEQ") issued a Certificate of Adjudication on March 7, 2007, confirming the rights approved in that adjudication. UMF ¶ 83. This Certificate authorizes the EPCWID to divert and use "an aggregate amount of water from the Rio Grande not in excess of 376,000 acre-feet per year" from several sources, including "67/155 of all water stored in Project storage." NM-EX 505, Texas Comm'n on Env'tl. Quality, Certificate of Adjudication No. 23-5940, ¶ 1.b. (Mar. 7, 2007). In other words, the only water that Texas officially recognized it had a right to was 43% of Project supply. UMF ¶ 83. Notably, the Certificate did not recognize the right of EPCWID to use an amount of water comprising all water stored in Project storage, not

---

<sup>4</sup> Despite this shared understanding and long standing practice, when the drought hit in 2003, EPCWID pushed for a new operating agreement to reduce New Mexico's 57% apportionment and allow for Texas to carry over Project water that Texas did not order in that year—a dramatic departure from the historical operations. Cortez Affidavit pars. 22-25. This departure was memorialized in the 2008 Operating Agreement – a document that was not signed by the compacting States. After reviewing and evaluating the 2008 Operating Agreement, New Mexico repeatedly raised concerns and protests with the new operations. Primary among those concerns was that the 2008 Operating Agreement radically changed the allocation of water under the Compact, with the result that in most years, Texas lands would be allocated far more than 43% of Project water. *E.g.*, NM-EX 517, Letter from John D'Antonio, State Engineer, State of New Mexico to Michael Connor, Commissioner, United States Bureau of Reclamation (Mar. 4, 2010); UMF ¶ 80. When Reclamation ignored New Mexico's objections, New Mexico filed suit in federal district court in 2011 seeking to have the 2008 Operating Agreement set aside. NM-EX 520, Complaint for Declaratory and Injunctive Relief, New Mexico v. United States, No. 1:11-cv-00691 (D.N.M. Aug. 8, 2011); UMF ¶ 81.

even subject to a “contractual right” of EBID to use a portion of this water, as Texas now refers to New Mexico’s apportionment in the Lower Rio Grande.

The United States took a similar position in the New Mexico adjudication. In that case, the United States requested that the New Mexico Adjudication Court “recognize an amount of up to 376,000 acre-feet per year for delivery to Texas.” *See* NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.*, no. CV-96-888, ¶ 4 (N.M. 3d Judicial Dist., Feb. 17, 2014); UMF ¶ 95. Again, this is equivalent to 43% of Project supply once return flows are taken into account. The positions of Texas and the United States in the adjudications further demonstrate the long held understanding that the Compact apportioned 57% of Project supply to New Mexico and 43% of Project supply to Texas.

In sum, Reclamation and the States have a long history of ensuring that water below Elephant Butte was divided 57% of Project supply to New Mexico and 43% of Project supply to Texas. Reclamation and Texas did not allow 57% of the water to be allocated to New Mexico lands for over 70 years “out of love for the [Land of Enchantment]. They did it . . . because it was their understanding of how the Compact was supposed to work.” *Alabama v. North Carolina*, 560 U.S. at 346.

### **B. Prior Positions of the Parties on the Apportionment**

The prior positions of the Parties to this litigation on the Compact apportionment is also highly instructive.

From 1938 to 2005, it was clear to all Parties that the 57/43 ratio was the apportionment established by the Compact. Texas’s Compact Commissioner Frank Clayton confirmed this in the



letter he sent shortly after the Compact's ratification, as noted above, where he explained that the "question of the division of the water released from Elephant Butte Reservoir is taken care of by the contract between the district under the Rio Grande Project and the Bureau of Reclamation" and "the water is allocated according to the areas involved in the two States." NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); UMF ¶ 46.

This understanding is consistent with the position Texas has expressed to New Mexico in multiple settings over the years. For example, in May of 2011, Texas and New Mexico met to discuss the implications of the 2008 Operating Agreement on the Compact. Prior to the meeting, Texas had developed a set of talking points that represented Texas's positions on the Rio Grande Compact. Using those talking points, Texas explained that the Compact apportions the water below Elephant Butte between New Mexico and Texas "based on acreage" existing in each State. Texas further stated its position that under the Compact, the State of Texas is entitled to 43% of Project supply and the State of New Mexico is entitled to 57% of Project supply. NM-EX 519 Schmidt-Petersen, Photographs of Handwritten Notes on Easel; UMF ¶ 91.

In that same year, Texas Compact Commissioner Gordon responded to concerns from New Mexico about the impact of the 2008 Operating Agreement on the Compact apportionment in official remarks at the 2011 RGCC meeting. Commissioner Gordon stated "I agree that the purpose of the Compact was to allocate the water between the Districts and the 53 47 [sic] as provided in the Compact. I do agree with that." NM-EX 518, Rio Grande Compact Commission, Transcript of the 72nd Annual Meeting (94th Meeting), 59:2-4 (Mar. 30, 2011); UMF ¶ 87. In this case, Commissioner Gordon testified that a full supply release from the Project is 790,000 AF, that Texas water users are entitled to 43% of Project supply and New Mexico water users are entitled

to 57% of Project supply, that Rio Grande water is divided below Elephant Butte by the Downstream Contracts, that the Downstream Contracts “are incorporated into the Compact,” and that the Project was incorporated into the Compact and acts as the vehicle for delivering project supply to water users in New Mexico and Texas. NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-73:13; NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:20-13:21, 10:25-16:24, 20:11-21:11, 121:9-11; UMF ¶¶ 84-86.

By the same token, Herman Settemeyer, the Texas Compact Engineer Adviser from 1987 through 2015, testified that “the Rio Grande Project [water] is apportioned 57 – 57 percent to New Mexico and 43 percent to Texas.” NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10; UMF ¶¶ 88-90. More recently, the Texas Commission on Environmental Quality recognized that “the Compact was drafted and signed against the backdrop of the 1915 Rio Grande Project and a 1938 U.S. Bureau of Reclamation contract that referred to a division of 57 percent to New Mexico and 43 percent to Texas.” NM-EX 526, Texas Comm’n on Env’t. Quality, Biennial Report to the 84th Legislature (2014); UMF ¶ 94. Even in its briefing in this case, Texas has argued on multiple occasions that New Mexico has an apportionment of water below Elephant Butte. UMF ¶ 92.

As for the United States, Filiberto Cortez, who for many years oversaw operations at the Rio Grande Project for the Bureau of Reclamation, confirmed his understanding in 2007 that “EBID is allocated 88/155 of the available Project water supply and EPCWID is allocated 67/155 of the available Project water supply,” and that a reallocation of water “deprive[s] EBID of its proportionate share of water.” NM-EX 506, Cortez Decl. ¶ 11 (Apr. 20, 2007); UMF ¶ 64. And in briefing to Reclamation leadership, Mr. Cortez confirmed that “[t]he 1938 Rio Grande Compact intended to use the Reclamation Rio Grande Project as the vehicle to guarantee delivery of Texas’s,

*New Mexico's* and Mexico's equitable apportionment of the Rio Grande water's below Elephant Butte Dam.” NM-EX 530, Filiberto Cortez, Bureau of Reclamation, EBID Depletion Reduction and Offset Program WaterSMART Grant Proposal, 1; UMF ¶ 98.

Finally, there may be no better source on the positions of the Parties on the Compact apportionment than the RGCC. The RGCC is created by the Compact (Article XII), and acts as the forum for the States to address Compact related issues. Here too, the record reflects a long held understanding that the Compact apportions water below Elephant Butte to New Mexico. The Compact Commissioners and Engineer Advisors receive annual reports from Reclamation on the operations of the Project, and they track releases of water from the Project in annual accounting. UMF ¶¶ 106-109. Reclamation considers this accounting to be “a measure of how the Rio Grande Project is complying with its obligation to meet yearly demand from the water users of the Rio Grande Project and at the same time comply with the Rio Grande Compact intent to recognize a yearly average of 790,000 AF release from project storage to satisfy water users.” UMF ¶ 109.

Moreover, in unanimous Resolutions, the RGCC has confirmed that New Mexico has an “allocation of Rio Grande water under the Rio Grande Compact” for lands “downstream from Elephant Butte.” NM-EX 413, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Concerning Federal Agency Operations of Their Water-Related Facilities on the Rio Grande Compact Accounting (Mar. 25, 2004); UMF No. 112. Because Project operations below Elephant Butte and the District allocations have the potential to impact the Compact apportionment in Texas and New Mexico, the RGCC has unanimously “request[ed] that the Bureau of Reclamation work cooperatively with the Engineer Advisers to develop procedures for determining the annual allotments of water supply in accordance with the Rio Grande Compact.” NM-EX 408, Rio Grande Compact Commission, Resolution of the Rio Grande

Compact Commission Regarding the Development of an Appropriate Methodology for Determining the annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002); *see also* UMF ¶¶ 111-112.

All of these examples illustrate the longstanding recognition that the Compact apportions water below Elephant Butte to both States in the same proportion as the Project acreage – 57% to New Mexico and 43% to Texas.

### **C. Positions of the Parties in the Course of this Case**

So far as New Mexico can tell, Texas’s current position that the Compact apportions all water in the Lower Rio Grande to Texas was first asserted midway through the present litigation. The novelty of this position is underscored by its contrast with Texas’s long course of performance recognizing New Mexico’s apportionment of 57% of Project water. This contrast between Texas’s new legal position versus its long course of performance provides further support for disregarding Texas’s recently asserted argument on the Compact’s apportionment.

Texas has now confirmed it filed this lawsuit in the United States Supreme Court in response to New Mexico asserting its own Compact rights in response to the adoption of the 2008 Operating Agreement. UMF ¶ 82. Even still, Texas never asserted in its Motion seeking leave to file its complaint that it was taking the position that the Compact apportioned no water to New Mexico; Texas’s brief in support of its motion to file its complaint referred to Elephant Butte Irrigation District as the entity formed within New Mexico to contract with the United States “for the water allocated *and apportioned* for use within New Mexico.” Texas’s Brief in Support of Mot to File Complaint 7 (Jan. 2013) (emphasis added); UMF No. 92. Indeed, in its Complaint in this case, Texas alleges that “[t]he State of Texas entered into the Rio Grande Compact,” among other things, “under the ... fundamental premise[]” that “the operation of the Rio Grande Project by the United States ... [was] recognized and protected by the Rio Grande Compact.” Texas

Compl. ¶11; *see also* UMF ¶¶ 92-94. It alleged that the Compact apportioned the waters of the Rio Grande below Elephant Butte “in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas.” Texas Complaint ¶ 10.

Likewise, in the course of briefing on New Mexico’s Motion to Dismiss, Texas defined its apportionment as “the water New Mexico delivers to Elephant Butte, less the water provided to Rio Grande Project lands in New Mexico by the Rio Grande Project.” Texas’ Brief in Response to New Mexico’s Motion to Dismiss Texas’ complaint and the United States’ Complaint in Intervention, 11 (June 16, 2014). Elsewhere, Texas made this relationship explicit:

Thus, the Compact is not silent on what occurs below Elephant Butte Reservoir. The law of equitable apportionment applies because the Compact expressly apportions Rio Grande water and then used the Project as the sole method for distributing that *equitable apportionment to New Mexico, Texas, and Mexico.*

...

[T]he compact utilizes the Rio Grande Project, operated by the United States, as the single vehicle by which to *apportion Rio Grande water to Texas and New Mexico.*

*See* Texas’s Reply to Exceptions to First Interim Report of Special Master at 40 (July 28, 2017) (quotation marks omitted) (emphasis added); UMF ¶ 92.

The United States has also represented to this Court on several occasions that it recognized and accepted that New Mexico received an apportionment of 57% of Project supply for lands below Elephant Butte:

By operation of [the Project], *New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir*, and Texas receives its entire equitable apportionment of water, through the Project, in the form of water released by the Project ‘in accordance with irrigation demands.’ These deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage in EBID and EPCWID, respectively.

Brief for the United States in Opposition to New Mexico’s Motion to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention at 28 (June 2014) (emphasis added); *see also*

Exception of the United States and Br. in Support of Exception at 29, 39, 40 (June 2017); Reply Brief for the United States at 18, 22 (July 2017); Tr. of Oral Argument Before the Special Master at 91:12-14, 100:7-18 (Aug. 19, 2015); UMF ¶¶ 100-102.

This accords with the evidence presented by the United States. Most significantly, in response to a Request for Admission, the United States has admitted for all purposes that “under the Compact, the states relied upon an existing reclamation project to deliver Texas’s and part of New Mexico’s equitable apportionment.” UMF ¶ 101; *see also* UMF ¶ 102.

#### **V. CUSTOMARY PRACTICES CONFIRM THAT THE STATE OF NEW MEXICO HAS AN APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR**

Finally, in determining the intent of the States the Court should look to “the customary practices employed *in other interstate compacts . . .*” *Tarrant Reg’l Water Dist.*, 569 U.S. at 633-34. The customary practice in other interstate compacts is to protect existing water uses at the time of the Compact. This was explained by former Special Master Jerome Muys in his treatise, *Interstate Water Compacts*, where after discussing various methods of compact apportionment, he stated: “Whatever the allocation formula, existing uses and/or rights are usually protected.” Jerome C. Muys, Nat’l Technical Info. Serv. Rep. No. NWC-L-71-011 (PB 202 998), *Interstate Water Compacts – The Interstate Compact and Federal-Interstate Compact* 12 and n.22 (National Water Comm’n 1971). *See, e.g.*, Pecos River Compact, 63 Stat. 159, Art. III (1949) (prohibiting New Mexico from “deplet[ing] by man’s activities the flow of the Pecos River at the New Mexico-Texas state line”); Yellowstone River Compact, Art. V.A, 65 Stat. 631 (1951) (protecting “beneficial uses of the water of the Yellowstone River System existing in each Signatory State as of January 1, 1950”); Arkansas River Compact, 63 Stat. 145, Art. IV.D (1949) (providing that “the waters of the Arkansas River . . . shall not be materially depleted in usable quantity or availability” by “future development or construction”).

That principle should be applied to the interpretation of the Rio Grande Compact. As discussed in Section III, the general understanding of the States was that the Compact would protect existing water uses below Elephant Butte Reservoir, including those uses in New Mexico. For that reason, if the Compact was instead intended to abrogate or alter existing water rights below Elephant Butte Reservoir contrary to the expressed intentions, one would expect the Compact to do so explicitly and unequivocally. But the Compact contains no such language, and in the absence of such language, it is fair to follow the customary practice in interstate compacts and interpret the Compact to protect existing and prior uses of water. *Tarrant*, 569 U.S. at 633-34.

## CONCLUSION

The Special Master should grant partial summary judgment and hold that New Mexico and Texas each have a Compact apportionment below Elephant Butte Reservoir, and that this apportionment is 57% of Project Supply to New Mexico and 43% of Project Supply to Texas.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

HECTOR H. BALDERAS  
New Mexico Attorney General  
TANIA MAESTAS  
Deputy Attorney General  
CHOLLA KHOURY  
Assistant Attorney General  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
505-239-4672

MARCUS J. RAEL, JR.\*  
LUIS ROBLES  
SUSAN BARELA  
Special Assistant Attorney General  
Robles Rael & Anaya  
500 Marquette Ave NW #700  
Albuquerque, NM 87102  
[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
505-242-2228

*\*Counsel of Record*

JEFFREY J. WECHSLER  
Special Assistant Attorney General  
MONTGOMERY & ANDREWS, P.A.  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[jwechsler@montand.com](mailto:jwechsler@montand.com)

BENNETT W. RALEY  
LISA M. THOMPSON  
MICHAEL A. KOPP  
Special Assistant Attorneys General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
303-861-1963

JOHN B. DRAPER  
Special Assistant Attorney General  
CORINNE E. ATTON  
DRAPER & DRAPER LLC  
325 Paseo de Peralta  
Santa Fe, NM 87501  
[john.draper@draperllc.com](mailto:john.draper@draperllc.com)  
505-570-4591



No. 141, Original

IN THE  
SUPREME COURT OF THE UNITED STATES

◆  
\_\_\_\_\_  
STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO,

*Defendants.*

◆  
\_\_\_\_\_  
**OFFICE OF THE SPECIAL MASTER**

◆  
\_\_\_\_\_  
**STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE**

◆  
\_\_\_\_\_

This is to certify that on November 5th, 2020, I caused a true and correct copy of the **State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support** to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.

Respectfully submitted this 5th day of November 2020.

*/s/ Michael A. Kopp*

\_\_\_\_\_  
Michael A. Kopp  
Special Assistant Attorney General  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203  
(303) 861-1963

## SPECIAL MASTER

### **HONORABLE MICHAEL J. MELLOY**

*Special Master*

United States Circuit Judge  
111 Seventh Avenue, S.E., Box 22  
Cedar Rapids, IA 52401-2101

[TXvNM141@ca8.uscourts.gov](mailto:TXvNM141@ca8.uscourts.gov)  
(319) 432-6080  
(service via email and U.S. Mail)

### **MICHAEL E. GANS**

*Clerk of the Court*

United States Court of Appeals - Eighth Circuit  
Thomas F. Eagleton United States Courthouse  
111 South 10th Street, Suite 24.329  
St. Louis, MO 63102

[TXvNM141@ca8.uscourts.gov](mailto:TXvNM141@ca8.uscourts.gov)  
(314) 244-2400

## MEDIATOR

### **HON. OLIVER W. WANGER (USDJ RET.)**

WANGER JONES HELSLEY PC  
265 E. River Park Circle, Suite 310  
Fresno, California 93720

[owanger@wjhattorneys.com](mailto:owanger@wjhattorneys.com)  
(559) 233-4800 Ext. 203

### **DEBORAH L. PELL (Paralegal)**

[dpell@whjattorneys.com](mailto:dpell@whjattorneys.com)

## UNITED STATES

### **JEFFERY WALL\***

*Acting Solicitor General*

### **JEAN E. WILLIAMS**

*Deputy Assistant Attorney General*

### **FREDERICK LIU**

*Assistant to the Solicitor General*

U.S. DEPARTMENT OF JUSTICE  
950 Pennsylvania Avenue, NW  
Washington, DC 20530-0001

[supremectbriefs@usdoj.gov](mailto:supremectbriefs@usdoj.gov)  
(202)514-2217

### **JAMES J. DUBOIS\***

### **R. LEE LEININGER**

U.S. DEPARTMENT OF JUSTICE  
Environment & Natural Resources Division  
999 18th Street  
South Terrace – Suite 370  
Denver, Colorado 80202

[james.dubois@usdoj.gov](mailto:james.dubois@usdoj.gov)  
(303) 844-1375  
[lee.leininger@usdoj.gov](mailto:lee.leininger@usdoj.gov)  
(303) 844-1364

### **SETH C. ALLISON, Paralegal**

[Seth.allison@usdoj.gov](mailto:Seth.allison@usdoj.gov)  
(303)844-7917

**JUDITH E. COLEMAN**  
**JOHN P. TUSTIN**  
**JENNIFER A. NAJJAR**  
U.S. DEPARTMENT OF JUSTICE  
Environment & Natural Resources Division  
P.O. Box 7611  
Washington, D.C. 20044-7611

[Judith.coleman@usdoj.gov](mailto:Judith.coleman@usdoj.gov)  
(202) 514-3553  
[john.tustin@usdoj.gov](mailto:john.tustin@usdoj.gov)  
(202) 305-3022  
[jennifer.najjar@usdoj.gov](mailto:jennifer.najjar@usdoj.gov)  
(202) 305-0476

**STATE OF NEW MEXICO**

**HECTOR H. BALDERAS**  
*New Mexico Attorney General*  
**TANIA MAESTAS**  
*Chief Deputy Attorney General*  
**CHOLLA KHOURY**  
*Assistant Attorney General*  
STATE OF NEW MEXICO  
P.O. Drawer 1508  
Santa Fe, New Mexico 87501  
**PATRICIA SALAZAR** - Assistant

[hbalderas@nmag.gov](mailto:hbalderas@nmag.gov)  
[tmaestas@nmag.gov](mailto:tmaestas@nmag.gov)  
[ckhoury@nmag.gov](mailto:ckhoury@nmag.gov)  
[psalazar@nmag.gov](mailto:psalazar@nmag.gov)  
(505) 239-4672

**MARCUS J. RAEL, JR.\***  
**LUIS ROBLES**  
**SUSAN BARELA**  
*Special Assistant Attorneys General*  
ROBLES, RAEL & ANAYA, P.C.  
500 Marquette Avenue NW, Suite 700  
Albuquerque, New Mexico 87102  
**CHELSEA SANDOVAL** - Paralegal  
**PAULINE WAYLAND** – Paralegal  
**BONNIE DEWITT** – Paralegal

[marcus@roblesrael.com](mailto:marcus@roblesrael.com)  
[luis@roblesrael.com](mailto:luis@roblesrael.com)  
[susan@roblesrael.com](mailto:susan@roblesrael.com)  
[chelsea@roblesrael.com](mailto:chelsea@roblesrael.com)  
[pauline@roblesrael.com](mailto:pauline@roblesrael.com)  
[bonnie@roblesrael.com](mailto:bonnie@roblesrael.com)  
(505) 242-2228

**BENNETT W. RALEY**  
**LISA M. THOMPSON**  
**MICHAEL A. KOPP**  
*Special Assistant Attorneys General*  
TROUT RALEY  
1120 Lincoln Street, Suite 1600  
Denver, Colorado 80203

[braley@troutlaw.com](mailto:braley@troutlaw.com)  
[lthompson@troutlaw.com](mailto:lthompson@troutlaw.com)  
[mkopp@troutlaw.com](mailto:mkopp@troutlaw.com)  
(303) 861-1963

**JEFFREY WECHSLER**

*Special Assistant Attorney General*

MONTGOMERY & ANDREWS

325 Paseo De Peralta

Santa Fe, NM 87501

**DIANA LUNA** – Paralegal

[jwechsler@montand.com](mailto:jwechsler@montand.com)

(505) 986-2637

[dluna@montand.com](mailto:dluna@montand.com)

**JOHN DRAPER**

*Special Assistant Attorney General*

DRAPER & DRAPER LLC

325 Paseo De Peralta

Santa Fe, NM 87501

**DONNA ORMEROD** – Paralegal

[john.draper@draperllc.com](mailto:john.draper@draperllc.com)

(505) 570-4591

[donna.ormerod@draperllc.com](mailto:donna.ormerod@draperllc.com)

**STATE OF COLORADO**

**PHILIP J. WEISER**

*Attorney General of Colorado*

**ERIC R. OLSON**

*Solicitor General*

**LAIN LEONIAK**

*Acting First Assistant Attorney General*

**CHAD M. WALLACE\***

*Senior Assistant Attorney General*

**PRESTON V. HARTMAN**

*Assistant Attorney General*

COLORADO DEPARTMENT OF LAW

Ralph Carr Judicial Center

7<sup>th</sup> Floor

1300 Broadway

Denver, CO 80203

**NAN EDWARDS**, Paralegal II

[eric.olson@coag.gov](mailto:eric.olson@coag.gov)

[chad.wallace@coag.gov](mailto:chad.wallace@coag.gov)

(720) 508-6281 (Direct)

[preston.hartman@coag.gov](mailto:preston.hartman@coag.gov)

(720) 508-6257 (direct)

[nan.edwards@coag.gov](mailto:nan.edwards@coag.gov)

**STATE OF TEXAS**

**STUART SOMACH\***

**ANDREW M. HITCHINGS**

**ROBERT B. HOFFMAN**

**FRANCIS M. GOLDSBERRY II**

**THERESA C. BARFIELD**

**SARAH A. KLAHN**

**BRITTANY K. JOHNSON**

**RICHARD S. DEITCHMAN**

SOMACH SIMMONS & DUNN, PC

500 Capital Mall, Suite 1000

Sacramento, CA 95814-2403

[ssomach@somachlaw.com](mailto:ssomach@somachlaw.com)

[ahitchings@somachlaw.com](mailto:ahitchings@somachlaw.com)

[rhoffman@somachlaw.com](mailto:rhoffman@somachlaw.com)

[mgoldsberry@somachlaw.com](mailto:mgoldsberry@somachlaw.com)

[tbarfield@somachlaw.com](mailto:tbarfield@somachlaw.com)

[sklahn@somachlaw.com](mailto:sklahn@somachlaw.com)

[bjohnson@somachlaw.com](mailto:bjohnson@somachlaw.com)

[rdeitchman@somachlaw.com](mailto:rdeitchman@somachlaw.com)

(916) 446-7979

(916) 803- 4561 (cell)

**CORENE RODDER - Secretary**  
**CRYSTAL RIVERA - Secretary**  
**CHRISTINA GARRO – Paralegal**  
**YOLANDA DE LA CRUZ - Paralegal**

[crodder@somachlaw.com](mailto:crodder@somachlaw.com)  
[crivera@somachlaw.com](mailto:crivera@somachlaw.com)  
[cgarro@somachlaw.com](mailto:cgarro@somachlaw.com)  
[ydelacruz@somachlaw.com](mailto:ydelacruz@somachlaw.com)

**KEN PAXTON**

*Attorney General*

(512) 463-2012

**JEFFREY C. MATEER**

(512) 457-4644 Fax

*First Assistant Attorney General*

**DARREN L. McCARTY**

*Deputy Attorney General for Civil Litigation*

**PRISCILLA M. HUBENAK**

[Priscilla.Hubenak@oag.texas.gov](mailto:Priscilla.Hubenak@oag.texas.gov)

*Chief, Environmental Protection Division*

OFFICE OF ATTORNEY GENERAL

OF TEXAS

P.O. Box 12548

Austin, TX 78711-2548

**AMICI / FOR INFORMATIONAL PURPOSES ONLY**

**ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY**

**JAMES C. BROCKMANN\***

(505) 983-3880

**JAY F. STEIN**

[jcbrockmann@newmexicowaterlaw.com](mailto:jcbrockmann@newmexicowaterlaw.com)

STEIN & BROCKMANN, P.A.

[jfstein@newmexicowaterlaw.com](mailto:jfstein@newmexicowaterlaw.com)

P.O. Box 2067

[administrator@newmexicowaterlaw.com](mailto:administrator@newmexicowaterlaw.com)

Santé Fe, New Mexico 87504

**Administrative Copy**

**PETER AUH**

(505) 289-3092

ALBUQUERQUE BERNALILLO COUNTY

[pauh@abcwua.org](mailto:pauh@abcwua.org)

WATER UTILITY AUTHORITY

P.O. Box 568

Albuquerque, NM 87103-0568

**CITY OF EL PASO**

**DOUGLAS G. CAROOM\***

(512) 472-8021

**SUSAN M. MAXWELL**

[dcaroom@bickerstaff.com](mailto:dcaroom@bickerstaff.com)

BICKERSTAFF HEATH DELGADO

[smaxwell@bickerstaff.com](mailto:smaxwell@bickerstaff.com)

ACOSTA, LLP

2711 S. MoPac Expressway

Building One, Suite 300

Austin, TX 78746

**CITY OF LAS CRUCES**

**JAY F. STEIN \***

(505) 983-3880

**JAMES C. BROCKMANN**  
STEIN & BROCKMANN, P.A.  
P.O. Box 2067  
Santé Fe, New Mexico 87504  
**Administrative Copy**

[jcbrockmann@newmexicowaterlaw.com](mailto:jcbrockmann@newmexicowaterlaw.com)  
[jfstein@newmexicowaterlaw.com](mailto:jfstein@newmexicowaterlaw.com)  
[administrator@newmexicowaterlaw.com](mailto:administrator@newmexicowaterlaw.com)

**JENNIFER VEGA-BROWN**

(575) 541-2128

**MARCIA B. DRIGGERS**  
LAW CRUCES CITY ATTORNEY'S OFFICE  
P.O. Box 20000  
Las Cruces, New Mexico 88004

[jvega-brown@las-cruces.org](mailto:jvega-brown@las-cruces.org)  
[marcyd@las-cruces.org](mailto:marcyd@las-cruces.org)

**ELEPHANT BUTTE IRRIGATION DISTRICT**

**SAMANTHA R. BARNCASTLE\***

(575) 636-2377

BARNCASTLE LAW FIRM, LLC  
1100 South Main, Suite 20 (88005)  
P.O. Box 1556  
Las Cruces, NM 88004

(575) 636-2688 (fax)  
[samantha@h2o-legal.com](mailto:samantha@h2o-legal.com)

**JANET CORRELL – Paralegal**

[janet@h2o-legal.com](mailto:janet@h2o-legal.com)

**EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1**

**MARIA O'BRIEN\***

(505) 848-1803 (direct)

**SARAH M. STEVENSON**  
MODRALL, SPERLING, ROEHL, HARRIS  
& SISK, PA

[mobrien@modrall.com](mailto:mobrien@modrall.com)  
[sarah.stevenson@modrall.com](mailto:sarah.stevenson@modrall.com)

500 Fourth Street N.W., Suite 1000  
Albuquerque, New Mexico 87103-2168  
**SHANNON GIFFORD – Legal Assistant**

[shannong@modrall.com](mailto:shannong@modrall.com)

**RENEA HICKS**

[rhicks@renea-hicks.com](mailto:rhicks@renea-hicks.com)

LAW OFFICE OF MAX RENE HICKS  
P.O.Box 303187  
Austin, TX 78703-0504

(512)480-8231

**HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1**

**ANDREW S. "DREW" MILLER\***

(512) 320-5466

KEMP SMITH LLP  
919 Congress Avenue, Suite 1305

[dmiller@kempsmith.com](mailto:dmiller@kempsmith.com)

Austin, TX 78701

**STATE OF KANSAS**

**DEREK SCHMIDT**

*Attorney General of Kansas*

**JEFFREY A. CHANAY**

*Chief Deputy Attorney General*

**TOBY CROUSE\***

*Solicitor General of Kansas*

**BRYAN C. CLARK**

*Assistant Solicitor General*

**DWIGHT R. CARSWELL**

*Assistant Attorney General*

120 S. W. 10th Ave., 2nd Floor

Topeka, KS 66612

(785) 296-2215

[toby.crouse@ag.ks.gov](mailto:toby.crouse@ag.ks.gov)

[bryan.clark@ag.ks.gov](mailto:bryan.clark@ag.ks.gov)

**NEW MEXICO PECAN GROWERS**

**TESSA T. DAVIDSON\***

DAVIDSON LAW FIRM, LLC

4206 Corrales Road

P.O. Box 2240

Corrales, NM 87048

**JO HARDEN – Paralegal**

[ttd@tessadavidson.com](mailto:ttd@tessadavidson.com)

(505) 792-3636

[jo@tessadavidson.com](mailto:jo@tessadavidson.com)

**NEW MEXICO STATE UNIVERSITY**

**JOHN W. UTTON\***

UTTUN & KERY, P.A.

P.O. Box 2386

Santa Fe, New Mexico 87504

(505) 699-1445

[john@uttkery.com](mailto:john@uttkery.com)

*General Counsel*

New Mexico State University

Hadley Hall Room 132

2850 Weddell Road

Las Cruces, NM 88003

[gencounsel@nmsu.edu](mailto:gencounsel@nmsu.edu)

(575) 646-2446