

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 TO
EXCLUDE TEXAS'S CLAIM FOR DAMAGES IN CERTAIN YEARS
AND BRIEF IN SUPPORT**

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**MOTION FOR PARTIAL SUMMARY JUDGMENT TO EXCLUDE TEXAS’S CLAIM
FOR DAMAGES IN CERTAIN YEARS**

COMES NOW, the State of New Mexico (“New Mexico”), pursuant to S. Ct. Rule 17.2 and in the nature of Fed. R. Civ. P. 56(a), and moves for partial summary judgment that all years before 1985, and the years 1985-2002, 2005, and 2007-2010, be excluded from Texas’s claim for damages. There is no genuine dispute of material fact, and the State of New Mexico is entitled to judgment as a matter of law.

As more fully stated in the accompanying brief in support, the grounds for this motion are as follows:

1. The question presented is a legal question based on undisputed facts.
2. The quantification of damages for violation of an interstate water compact requires expert analysis and opinion, which must be submitted in the form of expert reports during the discovery period. Texas has submitted expert reports quantifying alleged monetary damages only for the years 1985 through 2016.
3. The Court has ruled that the Rio Grande “Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” and “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 et al.*, 138 S. Ct. 954, 959 (2018) (internal quotation omitted).
4. Under the Downstream Contracts, “the federal government [Reclamation] promised to supply water” to the New Mexico water district Elephant Butte Irrigation District (“EBID”) and the Texas water district El Paso County Water Improvement District No. 1

(“EPCWID”), in accordance with their irrigable acres within the Rio Grande Project (“Project”)—“roughly 57% for New Mexico and 43% for Texas.” *Id.* at 957.

5. In each of the years 1985-2002, 2005 and 2007-2010, Reclamation allocated to EPCWID a full Project supply. This full Project supply is Texas’s equitable apportionment for each of those years under the Compact. In each of those 23 full supply years, Texas had available to it all that it bargained for under the Compact. There was no failure of performance, no violation of any right Texas has under the Compact, and no breach entitling Texas to relief. In each of those full supply years, Texas suffered no legal injury, and, as a matter of law, Texas has no claim for damages from New Mexico.

WHEREFORE, New Mexico requests partial summary judgment that all years before 1985 and the years 1985-2002, 2005, and 2007-2010 be excluded from Texas’s claim for damages as a matter of law.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

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**STATE OF NEW MEXICO'S BRIEF IN SUPPORT OF MOTION FOR PARTIAL
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INTRODUCTION

Texas complains in this case that New Mexico has violated the Rio Grande Compact (“Compact”) and that, as a result, Texas has suffered injury entitling it to monetary damages. However, in more than half of the years for which Texas claims damages, the Texas water district El Paso County Water Improvement District No. 1 (“EPCWID”) was allocated a full supply from the Rio Grande Project (“Project”). In each of those full supply years (1985-2002, 2005 and 2007-2010), Texas was allocated and had available to it its equitable apportionment under the Compact¹—there was no failure of performance, no violation of any right Texas has under the Compact, and no breach entitling Texas to relief.

Further, the quantification of monetary damages for violation of an interstate water compact requires expert analysis and opinion, which must be submitted in the form of expert reports during the discovery period. Texas submitted expert reports on claimed monetary damages by its economic expert, Dr. David Sunding.² Those reports quantify damages only for the years 1985 through 2016.³ Texas has, therefore, relinquished any claim to damages arising before 1985.

¹ Concurrent with this Motion, New Mexico has filed a Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support (“Compact Apportionment Motion”). In that Compact Apportionment Motion, New Mexico moves for partial summary judgment that New Mexico and Texas each have a Compact apportionment of the surface waters of the Rio Grande below Elephant Butte Dam, and that this apportionment is 57% of Project supply to New Mexico and 43% of Project supply to Texas.

² The Supreme Court has affirmed that the form of remedy for violation of an interstate water compact may be either water or money, and that it is for the Special Master to recommend to the Court the form of remedy that is appropriate in each instance. *See Kansas v. Colorado*, 533 U.S. 1, 6 (2001); *Texas v. New Mexico*, 482 U.S. 124, 129–132 (1987). The choice of remedy requires expert analysis and trial testimony. *See Kansas v. Colorado*, No. 105, Orig., Third Report of the Special Master 108-118 (Aug. 31, 2000), *available at* <https://www.supremecourt.gov/SpecMastRpt/ORG105-8-2000.pdf>.

³ Texas claimed only monetary damages in its Complaint, and quantifies those alleged monetary damages only in the expert reports of Dr. Sunding. Texas Complaint, ¶ 27, Prayer at 3.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. The Court has already found, in this case, that “the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” and that the “purpose” of the Compact “to effect an equitable apportionment of the waters of the Rio Grande between the affected States” can only be achieved because “the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring that the Compact’s equitable apportionment to Texas *and part of New Mexico* is, in fact, made.” *Texas v. New Mexico et al.*, 138 S. Ct. 954, 959 (2018) (internal quotations and citations omitted) (emphasis added); *see also* NM-EX 003, Declaration of E. Lopez [hereinafter “Lopez Decl.”], ¶ 14, 27.⁴

2. In the Downstream Contracts, and in particular in the 1938 Downstream Contract, “the federal government promised to supply” Project water to the New Mexico water district Elephant Butte Irrigation District (“EBID”) and to the Texas water district EPCWID (collectively, the “Districts”) in accordance with their irrigable acres within the Project—“roughly 57% for New Mexico and 43% for Texas.” *Texas v. New Mexico et al.*, 138 S. Ct. at 957.

3. The Project is operated by the United States Bureau of Reclamation (“Reclamation”). The operations of the Project include the allocation and delivery of Project water stored in Elephant Butte and Caballo reservoirs to the Districts and to Mexico. NM-EX 001, Declaration of P. Barroll [hereinafter “Barroll Decl.”], ¶ 14; NM-EX 003, Lopez Decl., ¶ 19; *see also e.g.*, NM-EX 529, Bureau of Rec., Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas: Final Environmental Impact Statement [hereinafter “FEIS”] at 3–4 (Sep. 30, 2016).

⁴ All Exhibits (“NM-EX”) identified in this Motion are part of the State of New Mexico’s Exhibit Compendium dated November 5, 2020 filed with New Mexico’s Partial Summary Judgment Motions dated November 5, 2020. They may also be downloaded from the following address: <https://ws.onehub.com/folders/prxrgg18>.

4. The term “Project supply” is the annual release of Usable Water from Project Storage, as defined in the Compact, along with the return flows and tributary inflows below Elephant Butte, which the Project recaptures and delivers to the downstream water users. NM-EX 001, Barroll Decl., ¶ 15; NM-EX 529, FEIS at 3–4.

5. The Compact provides that “a normal release ... from Project Storage” is 790,000 acre-feet (“AF”). NM-EX 001, Barroll Decl., ¶ 16; NM-EX 330, Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785 [hereinafter “Compact”], art. VIII; *see also* NM-EX 529, FEIS at 17 (describing a full allocation release to be 790,000 acre-feet per year (“AFY”) as provided in the Compact).

6. The Compact defines “Project Storage” as “the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project”; and “Usable Water” as “all water exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.” NM-EX 001, Barroll Decl., ¶ 17; NM-EX 003, Lopez Decl., ¶ 12; NM-EX 330, Compact, arts. I (k), (l).

7. Project Allocations are the amount of Project supply each District (EBID and EPCWID) is entitled to order (take) from the Project, each year, and the amount Mexico is entitled to receive by Treaty. NM-EX 001, Barroll Decl., ¶ 18; NM-EX 003, Lopez Decl., ¶ 23; NM-EX 307, Convention between the United States and Mexico: Equitable Distribution of the Waters of the Rio Grande [hereinafter “Treaty”] (May 21, 1906); NM-EX 529, FEIS at 4.

8. On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938. NM-EX 324, Contract between Elephant Butte Irrigation District

and El Paso County Water Improvement District No. 1 [hereinafter “1938 Downstream Contract”] (Feb. 16, 1938). The 1938 Downstream Contract states that in the event of a shortage of water “the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].” *Id.*; NM-EX 001, Barroll Decl., ¶ 19; NM-EX 003, Lopez Decl. ¶¶ 20–22.

9. Until about 1979, Reclamation delivered Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings. Reclamation ditch riders then delivered the ordered water to individual farms. NM-EX 001, Barroll Decl., ¶ 20; NM-EX 003, Lopez Decl., ¶¶ 24-25; NM-EX 529, FEIS at 5.

10. In about 1979, Project operations changed, and Reclamation started to allocate water to each District for delivery at the Districts’ canal headings (*i.e.*, Arrey, Leasburg, Mesilla, Franklin, and Riverside). Reclamation now determines the Districts’ Project allocations, takes water orders from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for each District. The Districts in turn take farm orders from their members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates. NM-EX 001, Barroll Decl., ¶ 21; NM-EX 003, Lopez Decl., ¶ 26; NM-EX 529, FEIS at 5.

11. Starting in about 1990, Reclamation determined that a release of 763,842 AFY from Project Storage was a full-supply condition. *See, e.g.*, NM-EX 105, Excerpts, United States’ Disclosure of Expert Rebuttal Witness Dr. Ian M. Ferguson (Dec. 30, 2019) [hereinafter “Ferguson Discl.”] at 8 (“Prior to the [2008 Operating Agreement], full supply was defined by

Usable Water available for the current-year allocation equal to or greater than 763,800 acre-feet . . .”); NM-EX 104, Excerpts, United States’ Disclosure of Rebuttal Expert Dr. Al Blair (Dec. 30, 2019) [hereinafter “Blair Discl.”] at 8 (stating that prior to 2008 Operating Agreement a maximum annual release for a full-supply year was 763,840 AF). Reclamation determined that this release from Project Storage would provide 931,841 AFY of divertible water at U.S. and Mexico canal headings. NM-EX 001, Barroll Decl., ¶ 22; NM-EX 400, Bureau of Rec., Rio Grande Project Water Supply Allocation Procedures [hereinafter “WSAP”] at 4. According to Project allocation procedures at that time, from this 931,841 AFY, 60,000 AFY was deducted for delivery to Mexico. Reclamation then divided the remaining 871,841 AFY, 43% (376,862 AFY) to EPCWID and 57% (494,979 AFY) to EBID in accordance with the percentages set out in the 1938 Downstream Contract. NM-EX 001, Barroll Decl., ¶ 22; NM-EX 400, WSAP at 4–5; NM-EX 324, 1938 Downstream Contract. The 376,842 AFY quantity represents a full-supply Project allocation to EPCWID that Reclamation will ensure is available for diversions at EPCWID’s headgates if EPCWID orders (takes) this volume of water. NM-EX 001, Barroll Decl., ¶ 23; NM-EX 400, WSAP at 4–5; *see also* NM-EX 529, FEIS at 86 (referring to “[t]he historical full [EPCWID] allocation of 376,842 acre-feet”).

12. Between 1985 and 1990, before Reclamation had finalized the analysis described above, Reclamation’s full-supply year determinations for EPCWID varied slightly from 376,842 AFY. For example, from 1985 through 1988, Reclamation determined a full-supply year Project allocation to EPCWID to be 363,963 AFY; and in 1989 and 1990, Reclamation determined a full-supply year Project allocation to EPCWID to be 359,165 AFY. These were hydrologically wet years with plenty of water in Project Storage and full-supply allocations were available to both Districts (EBID and EPCWID). NM-EX 001, Barroll Decl., ¶ 24; NM-EX 509, Bureau of

Reclamation Table, Rio Grande Project Allocation of Project Water Supply (Apr. 3, 2008) (“Reclamation Data Table”) at col. 2.

13. From 2006 onwards, Reclamation has determined annual Project allocations to the Districts under the 2008 Operating Agreement, and the antecedent D3-Allocation-Plus-Carryover method from which the 2008 Operating Agreement was developed.⁵ NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, Operating Agreement for the Rio Grande Project [hereinafter “2008 Operating Agreement”] (Mar. 10, 2008); NM-EX 502, D3 Allocation of Project Water to the Districts and Mexico; NM-EX 507, 2007 Operating Procedures. Under the 2008 Operating Agreement, Reclamation determines a full-supply year Project allocation to EPCWID to be 388,192 AFY. NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, 2008 Operating Agreement at 3; *see, e.g.*, NM-EX 105, Ferguson Discl. at 8 (“[U]nder the [2008 Operating Agreement], full supply conditions are defined by Usable Water available for the current-year allocation equal to or greater than 790,000 acre-feet.”); NM-EX 104, Blair Discl. at 8 (stating that prior to the 2008 Operating Agreement, a maximum annual release for a full-supply year was 763,840 AF).

14. During each irrigation season (approximately March through October), each District is entitled to order delivery of Project Water up to its annual Project allocation. Deliveries to the Districts are measured by gages and are converted into what are known as “Charged Diversions” (Allocation Charges), which are then subtracted from each District’s allocation account as the irrigation season progresses. NM-EX 001, Barroll Decl., ¶¶ 21, 26; NM-EX 510, 2008 Operating Agreement at 9–11; NM-EX 529, FEIS at 18, 24, App. B.

⁵ Under the post-2006 allocation system, EPCWID was allocated far more Project Water than the share due its 67,000 of 155,000 Project irrigable acres (43%), and received far more than its 43% share of Project Water. NM-EX 001, Barroll Decl., ¶ 36; *see also* NM-EX 100, P. Barroll Expert Report (Oct. 31, 2019), at x-xi, 31, 33, 69.

15. During the course of the irrigation season, Reclamation receives orders from the Districts and adjusts the gates of Caballo Dam so that these orders are delivered to the Districts' canal headings. *See* NM-EX 531, Rio Grande Project Operations Manual at 4-5 (2018) [hereinafter "Operations Manual"]. Reclamation sets the Caballo release amount taking into account the losses and gains between Caballo Dam and the canal headings to which it is delivering water, so that regardless of what losses or gains are occurring, the amount ordered will reach the canal heading for which the order is being made. NM-EX 531, Operations Manual at 4–8. If the delivery to EPCWID falls short of the order, there is a procedure by which EPCWID, EBID and Reclamation coordinate and water is released from EBID's works to temporarily mitigate the shortfall until adjustment of Caballo releases resolves the problem. NM-EX 001, Barroll Decl., ¶ 27; NM-EX 531, Operations Manual, at 8. Historically, Reclamation has always been able to fulfill the orders made by the Districts. NM-EX 001, Barroll Decl., ¶ 27; *see also* NM-EX 105, Ferguson Discl. at 12–13 ("EPCWID received all water that the district ordered during the period 1979-2002"); NM-EX 210, Deposition of Dr. Ian M. Ferguson,⁶ Vol. 2 (Feb. 20, 2020) [hereinafter "Ferguson Dep. Vol. 2"] at 260:6-7 ("I'm not aware of any records that suggest EP1 [EPCWID] ordered water that it did not receive.").

16. Reclamation recognizes the years 1985 through 2002 and 2005 as full supply years for the Project, and also recognizes those years as *full-supply years for EPCWID*, meaning that in

⁶ Dr. Ferguson is a Hydrologic Engineer for Reclamation, and since June 2011 Dr. Ferguson has provided technical support to Reclamation's Albuquerque Area Office on issues related to the Rio Grande Project. NM-EX 209, Deposition of Dr. Ian M. Ferguson, Vol. 1 (Feb. 19, 2020) [hereinafter "Ferguson Dep. Vol. 1"] at 13:4-19 (stating that he joined Reclamation in April 2001 as a hydrologic engineer and is currently a hydrologic engineer at Reclamation); *id.* at 44:6-16 (stating that he provided technical support for Reclamation's Albuquerque-area office on issues relating to the Rio Grande project).

each of those years Reclamation determined that a full allocation of Project water was available for diversions at EPCWID's headgates if ordered. NM-EX 001, Barroll Decl., ¶¶ 28–30, 32–33, 37 & Table 1; *see also* NM-EX 402, EPCWID Accounting Records [EOY_Acct_EP_1985-2016]; NM-EX 509, Reclamation Data Table; NM-EX 202, Deposition of Filiberto Cortez,⁷ Vol. 1 (Jul. 30, 2020) [hereinafter “Cortez Dep. Vol. 1”] at 82:16-83:2, 91:1-8, 92:19-93:7) (stating that 1979 through 2002 were “full supply” years, that a full Project supply allocation is the maximum amount that Reclamation will allocate, and that “[a] full supply is the allocation made to the district based on historical data” about irrigation demands); NM-EX 210, Ferguson Dep. Vol. 2 at 229:15-18 (“[F]rom about 1985 or '6, through about 2002 . . . I know to be years of full project supply.”), 233:1-3 (agreeing that “there’s full supply from 1979 to 2002”); and 259:12-16 (agreeing that “[t]he project enjoyed full supply conditions from 1979 through 2002, and EPCWID was allocated a full supply in each year”); NM-EX 412, Herman R. Settemeyer,⁸ P.E., Rio Grande Project/Rio Grande Compact Operation [hereinafter “Settemeyer Presentation”] at G-4 (2004) (presenting that “Rio Grande Project water users enjoyed full allocations of water from 1979 until 2003”); *see also* NM-EX 214, Excerpts, Deposition of J. Phillip King,⁹ Vol. 1 (May 18, 2020) [hereinafter “King

⁷ Mr. Cortez is the former manager of Reclamation's El Paso office, which previously managed the water supply for the Rio Grande Project. NM-EX 202, Cortez Dep. Vol. 1 at 24:5-18 (stating that starting in 2007 he was the manager for the [Reclamation] El Paso Field Division, which is “the office which operated the Rio Grande Project at that time . . . That involved the management of the reservoirs . . . dealings with the irrigation districts, water deliveries, making the allocation, anything having to do with the Rio Grande Project”); *see also id.* at 10:25-11:2 (explaining that currently he is “the special assistant to the [Reclamation] Albuquerque office area manager”).

⁸ Mr. Settemeyer is the former Texas Engineer Advisor to the Rio Grande Compact Commission. NM-EX 225, Deposition of Herman Settemeyer, Vol. 1 (Jul. 30, 2020) at 29:13-18, 29:25-31:3 (stating that he started working on interstate compacts in 1987; “I was the engineer Advisor for the . . . Rio Grande [Compact]”).

⁹ Dr. King has been identified as an expert witness for the State of Texas and for the United States in this case. *See* NM-EX 214, King Dep. Vol. 1 at 44:10-14; 21:10-16 (stating that he considers himself an expert in “[i]rrigation and draining engineering and management, irrigation system operation, engineering hydrology, and statistical hydrology”).

Dep. Vol. I”] at 102:19-23 (confirming that a full supply “is the amount of water that Reclamation allocated to each district from 1979 to 2002, when each year was a full-supply” and that in each of those years “[t]here was a full supply available for release from storage”).

17. The years 2007 through 2010 were also full-supply years for EPCWID because in each of those years EPCWID’s annual allocation available for diversions at EPCWID’s headgates (if ordered) exceeded 376,862 AFY—the full-supply allocation amount determined by Reclamation in 1990—and also exceeded the higher full-supply allocation to EPCWID (388,192 AFY) under the 2008 Operating Agreement. NM-EX 001, Barroll Decl., ¶¶ 28, 31, 34-37 & Table 2; NM-EX 402, EPCWID Accounting Records; NM-EX 500, EPCWID Water Allocation Records (2006-2016); NM-EX 510, 2008 Operating Agreement, Tables 2 & 4.

LEGAL STANDARD

Although not strictly applicable to cases arising under the Court’s original jurisdiction, Rule 56(c) of the Federal Rules of Civil Procedure and Supreme Court precedent construing that Rule serve as useful guidelines. *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). 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. *Id.* 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. *Id.* In determining whether a material factual dispute exists, the Court views the evidence through the prism of the controlling legal standard. *Id.*

It is appropriate to apply principles of contract interpretation to the interpretation of interstate water compacts. *Texas v. New Mexico*, 482 U.S. at 128–129. It is also appropriate to look to the Restatement of Contracts and treatises on contract law. *See, e.g., id.* at 129 (citing Restatement (Second) of Contracts § 33(2) and Comment b (1981) in interpreting the Pecos River

Compact); *Texas v. New Mexico*, 138 S. Ct. at 959 (citing 11 Williston on Contracts § 30:26 (4th ed. 2017) in interpreting the Rio Grande Compact); *Kansas v. Colorado*, 533 U.S. 1, 11 n.4, 14 (2001) (citing Restatement of Contracts § 337, p. 542 (1932) in interpreting the Arkansas River Compact); *see also id.* at 22 (O’ Connor, J., dissenting in part) (citing 11 Williston on Contracts § 30:19 (4th ed. 1999)).

“A compact ... represents a bargained-for exchange between its signatories and ‘remains a legal document that must be construed and applied in accordance with its terms.’” *Kansas v. Colorado*, 533 U.S. at 20 (O’Connor, J., dissenting in part) (quoting *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). The burden is on Texas, in this case, to show that New Mexico has violated a right Texas has under the Compact, and that, as a result of that violation, Texas has sustained injury entitling it to monetary damages. *See, e.g., Texas v. New Mexico*, 482 U.S. at 128–129; *Alabama Power Co. v. Ickes*, 302 U.S. 464, 479 (1938) (“An injury, legally speaking, consists of a wrong done to a person, or in other words, a violation of his right.”).

Performance discharges a contractual duty. Restatement (First) of Contracts § 386 (1932); *see also* Restatement (Second) of Contracts § 235(1) (1981) (“Full performance of a duty under a contract discharges the duty.”). As a matter of contract law, if Texas receives its bargain under the Compact, Texas suffers no legal injury, and has no claim to damages. *See, e.g., Texas v. New Mexico*, 482 U.S. at 129 (“A court should provide a remedy *if* ... a breach has in fact occurred.”) (emphasis added); *Id.* at 130 (*where a breach has occurred* “in a case involving a compact,” monetary damages may be appropriate); *see also* 24 Williston on Contracts § 64:1 (4th ed. 2020) (“The fundamental principle that underlies the availability of contract damages is that of compensation ... [the] promisee is entitled to the benefit of his or her bargain and should be placed, as nearly as is possible through an award of money damages, in the position he or she would have

been in had the []promisor fully performed the contract.”); *Kansas v. Nebraska*, 574 U.S. 445, 482 (2015) (“The usual remedy for breach of a contract is damages based on the injured party’s ‘actual loss caused by the breach.’”) (Thomas, J., concurring in part) (citing Restatement (Second) of Contracts § 347, Comment *e*, p. 116 (1979)).

ARGUMENT

Texas has alleged in its Complaint in this case that it “has sustained damages arising from New Mexico’s [alleged] breach of the Rio Grande Compact” and seeks monetary damages “consisting of the value of Texas’ apportioned share of the waters of the Rio Grande lost to Texas.” Texas Complaint at ¶ 27, Prayer at 3.

First, Texas has presented no evidence substantiating any claim to relief prior to 1985. Texas has only presented expert reports quantifying monetary damages from 1985 onwards. Texas has, therefore, relinquished any claim for damages occurring before 1985.

Second, for the reasons that follow, in 1985 through 2002, in 2005, and in 2007 through 2010, Texas suffered no legal injury and thus, as a matter of law, Texas has no claim for damages from New Mexico. Each of those 23 years were full supply years—years in which the Texas water district EPCWID received a full supply Project allocation. In each of those full supply years, based on undisputed facts, Texas received its equitable apportionment of Rio Grande water and thus received all that it bargained for under the Compact. There was no failure of performance, no violation of any right Texas has under the Compact, and no breach entitling Texas to relief.¹⁰ New Mexico is, therefore, entitled to judgment as a matter of law excluding those years from Texas’s

¹⁰ New Mexico believes that it can prove at trial that Texas has no claim to relief in any of the remaining 9 years for which Texas seeks damages (2003-2004, 2006, and 2011-2016). In each of those 9 years, less than a full allocation of Project water was determined by Reclamation to be available to EPCWID (Texas), and New Mexico will show that this partial supply was not the result of any failure of performance, or breach by New Mexico.

claim to damages.

Excluding these 23 full supply years from Texas's damages claim will simplify the issues for trial and will have the beneficial effect of reducing trial time.

I. TEXAS HAS RELINQUISHED ANY CLAIM FOR DAMAGES BEFORE 1985.

Damage claims in interstate water compact cases require expert analysis. *See Kansas v. Colorado*, 533 U.S. at 16–18 (determining damages based on expert reports and testimony). Expert opinions must be provided during discovery by means of expert reports. *See* Fed. R. Civ. P. 26(a)(2); Case Management Plan at 6 (Sep. 6, 2018). Texas pleads a claim to monetary damages in its complaint and relies only on the expert reports of Dr. Sunding to quantify this. Texas Complaint, ¶ 22, Prayer at 3. Dr. Sunding clearly states in both his opening and reply expert reports that his “analysis focuses on Texas injury occurring between the years 1985 and 2016.” NM-EX 114, Excerpt, Report of Dr. David Sunding, ¶ 7 (May 31, 2019); NM-EX 115, Excerpt, Reply and Supplemental Report of Dr. David Sunding, ¶ 2 (Dec. 30, 2019) (“As in my previous expert report, I estimate direct damages to Texas water users, as well as indirect and induced losses experienced by other Texas residents between 1985 and 2016.”). Texas thus presents no evidence to support any claim for damages for any year prior to 1985. Texas has, therefore, relinquished any claim for relief in any of those years.

II. TEXAS CAN HAVE NO CLAIM FOR DAMAGES IN PROJECT FULL-SUPPLY YEARS 1985-2002, 2005 AND 2007-2010.

The Court affirmed, for the first time, in 1987 that remedies would be available to states to remedy past breaches of interstate water compacts. *Texas v. New Mexico*, 482 U.S. at 129. Applying the Court's language from that case to this motion: “A court should provide a remedy *if* . . . a breach has occurred.” *Id.* (emphasis added). If it is established, as a matter of undisputed

fact, that no breach occurred in a particular year, then, as a matter of law, there can be no claim to damages for that year.

In full supply years, the Districts have a full allocation of Project water available to them. These full allocations of Project water are New Mexico's and Texas's equitable apportionments for that year under the Compact downstream of Elephant Butte Reservoir. NM-EX 003, Lopez Decl., ¶¶ 30–33; NM-EX 001, Barroll Decl., ¶¶ 22–37. We know this because the Court has ruled that “the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” and “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 omitted).

In accordance with the 1938 Downstream Contract, Reclamation supplies Project water to the New Mexico water district EBID, and to the Texas water district EPCWID, in accordance with their irrigable acres within the Project—“57% for New Mexico and 43% for Texas.” *Id.* at 957; NM-EX 324, 1938 Downstream Contract; NM-EX 003, Lopez Decl., ¶¶ 21–22, 25–26; NM-EX 001, Barroll Decl., ¶ 19. Since at least 1979, Reclamation has determined a “Full Water Supply Allocation” available to the Districts to be 871,841 AF, and a full supply allocation available to Texas (EPCWID) to be 376,862 AF (43% of 871,841 AF). *See, e.g.*, NM-EX 400, WSAP at 5–6, 10–11; NM-EX 001, Barroll Decl., ¶¶ 22–24. Under the 2008 Operating Agreement, Reclamation determines a full-supply allocation available to Texas (EPCWID) to be 388,192 AFY. NM-EX 510, 2008 Operating Agreement, Tables 2 & 4; NM-EX 001, Barroll Decl., ¶ 25.

Each of the years 1985 through 2002, 2005 and 2007 through 2010 were full-supply years for EPCWID (Texas), which means that a full allocation of Project water was determined by

Reclamation to be available for diversions at EPCWID's headgates if ordered by EPCWID (Texas) that year. NM-EX 001, Barroll Decl., ¶¶ 24–25, 27–37, Tables 1 & 2 (showing that each of 1985-2002, 2005 and 2007-2010 were full supply years for EPCWID); NM-EX 003, Lopez Decl., ¶ 30; NM-EX 509, Reclamation Data Table (showing that each of 1985-2002 and 2005 were full supply years for EPCWID); NM-EX 402, EPCWID Accounting Records; NM-EX 500, EPCWID Water Allocation Records (2006-2016); NM-EX 202, Cortez Dep. Vol. I at 92-93:25, 1 (stating that 1979 through 2002 were “full supply” years and that a full Project supply allocation is the maximum amount that Reclamation will allocate and that “[a] full supply is the allocation made to the district based on historical data” about irrigation demands); NM-EX 210, Ferguson Dep. Vol. 2 at 229:17-18, 259:12-16 (stating that 1985 through 2002 were “years of full project supply” and agreeing that “EP1 [EPCWID] was allocated a full supply in each” of those years); NM-EX 412, Settemeyer Presentation at G-4 (presenting that “Rio Grande Project water users enjoyed full allocations of water from 1979 until 2003”); NM-EX 214, King Dep. Vol. 1 at 102:19-23 (confirming that “Reclamation allocated to each district from 1979 to 2002 ... a full-supply”).

In each of those 23 years (1985-2002, 2005, and 2007-2010) Texas had available to it its full Project allocation and thus had the full benefit of its bargain under the Compact. *See, e.g., Kansas v. Colorado*, 533 U.S. at 20 (O'Connor, J., dissenting in part) (“A compact ... represents a bargained-for exchange”); 24 Williston on Contracts § 64:1 (4th ed. 2020) (a promisee's entitlement is “the benefit of his or her bargain”); NM-EX 003, Lopez Decl., ¶¶ 30–33. In each of those years there was no failure of performance, no violation of any right Texas has under the Compact, and no breach entitling Texas to relief. Restatement (First) of Contracts § 386 (1932) (a contractual duty is discharged by performance); Restatement (Second) of Contracts § 235(1) (1981) (accord); *Alabama Power Co.*, 302 U.S. at 479 (a legal injury requires a violation of a right);

Texas v. New Mexico, 482 U.S. at 129 (a remedy is available “*if* a breach has in fact occurred.”) (emphasis added); *Kansas v. Nebraska*, 574 U.S. at 482 (damages are based on “actual loss”). As a matter of law, in each of 1985-2002, 2005, and 2007-2010, Texas thus suffered no legal injury and has no claim for damages from New Mexico.

CONCLUSION

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

Respectfully submitted,

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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 to Exclude Texas's Claim for Damages in Certain Years 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.

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