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 RESPONSE TO THE UNITED STATES OF AMERICA'S MOTION FOR PARTIAL SUMMARY JUDGMENT

_____♦_____


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The State of New Mexico responds in opposition to the United States of America's Motion for Partial Summary Judgment and Memorandum in Support of Motion for Partial Summary Judgment (Nov. 5, 2020) ("U.S. Br."). For the reasons stated herein, the motion should be denied.

## STATEMENT OF MATERIAL FACTS

### I. RESPONSE TO THE UNITED STATES' STATEMENT OF MATERIAL FACTS

**USMF 1:**[1] This fact is undisputed by New Mexico.

**USMF 2:** This fact is undisputed by New Mexico.

**USMF 3:** This fact is undisputed by New Mexico.

**USMF 4**: New Mexico disputes this fact. New Mexico recognizes its responsibility to comply with the Compact and to work in good faith with Reclamation to address any problems in Project operations that occur in New Mexico. NM-EX 006, Barroll 2d Decl. ¶ 77; NM-EX 007, D'Antonio 2d Decl. ¶¶ 7, 55; NM-EX 010, Serrano Decl. ¶¶ 5, 13, 29, 30.

**USMF 5:** This fact is generally undisputed by New Mexico, but New Mexico wishes to clarify that the Rio Grande in southern New Mexico and Texas has historically had both gaining and losing reaches. Pumping in both New Mexico and Texas can impact the rate at which water accrues to or is lost from the river. NM-EX 006, Barroll 2d Decl. ¶¶ 35, 37.

**USMF 6**: New Mexico disputes this fact. Stream depletion by groundwater pumping does not necessarily impair other water rights, even in a fully appropriated stream system. Expert analysis is needed to determine whether, when, and to what extent groundwater pumping, including pumping in Texas, interferes with Project deliveries. NM-EX 006, Barroll 2d Decl. ¶¶ 36, 38; NM-EX 012, Sullivan Decl. ¶ 13.

**USMF 7**: New Mexico disputes this fact. Stream depletion by groundwater pumping does not necessarily impair other water rights, even in water-short years. Expert analysis is needed to determine whether, when, and to what extent groundwater pumping, including pumping in Texas, interferes with Project deliveries. NM-EX 006, Barroll 2d Decl. ¶ 39; NM-EX 012, Sullivan Decl. ¶ 14.

**USMF 8**: New Mexico disputes this fact. New Mexico has a comprehensive water administration and enforcement system in place in the Project area and diligently enforces water right restrictions. It is incorrect and disingenuous to assert that New Mexico in any sense fails in its water administration responsibilities or Compact obligations. Moreover, the Project has, since 2006, over-allocated water to Texas, making additional curtailment in New Mexico unnecessary.

[1] Facts 1-97 listed in the "Statement of Material Facts" on pages 3-20 of the United States of America's Memorandum in Support of Motion for Partial Summary Judgment (filed November 5, 2020), will be cited in this brief as "USMF#__".

NM-EX 007, D'Antonio 2d Decl. ¶ 58; NM-EX 009, Schmidt-Petersen 2d Decl. ¶¶ 4-22; NM-EX 008, Lopez 2d Decl. ¶¶ 23, 35; NM-EX 006, Barroll 2d Decl. ¶¶ 61-67, 72.

**USMF 9**: New Mexico disputes this fact. There has never been a priority call in the Lower Rio Grande, but if a water right owner were to make a priority call, the State Engineer would promptly take action to determine the validity and cause of any shortage and to determine and implement appropriate short-term and long-term solutions. Potential solutions include, but are not limited to, release of storage water or curtailment of junior surface or groundwater diversions. Short-term responses could be implemented within days, with longer-term responses taking weeks to months to implement. Thus far, neither the United States nor Texas has made a valid priority call, nor have they demonstrated the need for one given the over-allocation of water to Texas since 2006. NM-EX 007, D'Antonio 2d Decl. ¶ 53; NM-EX 006, Barroll 2d Decl. ¶ 80.

**USMF 10**: New Mexico disputes this fact. There has never been a priority call in the LRG, nor have the United States and Texas demonstrated the need for a priority call. If a call were made, New Mexico's response to USMF No. 9 describes how the State Engineer would respond. NM-EX 007, D'Antonio 2d Decl. ¶ 53; NM-EX 006, Barroll 2d Decl. ¶ 80; NM-EX 012, Sullivan Decl. ¶ 15.

**USMF 11:** This fact is undisputed by New Mexico.

**USMF 12:** This fact is undisputed by New Mexico, although it should be expanded to also explain that historically, in addition to EPCWID's first diversion from the Rio Grande in the El Paso valley (located initially at the International Dam, and later at the American Dam), EPCWID also had several river diversion headings further downstream, including the Riverside, Tornillo, Hanson and Guadalupe canal headings. These additional headings diverted return flows generated in the upper part of the El Paso valley as well as municipal effluent generated by the City of El Paso, and any other Project waters available at these locations. NM-EX 006, Barroll 2d Decl. ¶ 50.

**USMF 13**: New Mexico disputes this fact. The New Mexico Adjudication Court has issued rulings determining the scope of the United States' water right for the Project. Although these orders are not yet final, New Mexico disputes any implication regarding the nature of the Project's water right that is inconsistent with the Adjudication Court's orders. Moreover, New Mexico's administration of water in the Lower Rio Grande is premised on the fact that surface water in the Lower Rio Grande has been fully appropriated since 1908. NM-EX 007, D'Antonio 2d Decl. ¶¶ 16, 37c.

**USMF 14:** This fact is undisputed by New Mexico, but New Mexico asserts that its administration of water in the Lower Rio Grande is premised on the fact that Rio Grande surface water has been fully appropriated since 1908. New Mexico has allowed no new appropriations of Rio Grande surface water since 1908. NM-EX 007, D'Antonio 2d Decl. ¶ 16.

**USMF 15:** This fact is undisputed by New Mexico.

**USMF 16:** This fact is undisputed by New Mexico.

**USMF 17:** This fact is undisputed by New Mexico.

**USMF 18:** This fact is undisputed by New Mexico.

**USMF 19:** This fact is undisputed by New Mexico.

**USMF 20:** This fact is undisputed by New Mexico.

**USMF 21:** This fact is undisputed by New Mexico.

**USMF 22:** This fact is undisputed by New Mexico, except New Mexico adds that the Project water supply also has included treated municipal wastewater discharges to the Rio Grande south of Elephant Butte. NM-EX 006, Barroll 2d Decl. ¶¶ 29, 50, 55, 58; NM-EX 008, Lopez 2d Decl. ¶ 37.

**USMF 23**: New Mexico disputes this fact. Drain flows did not comprise 50% of Project deliveries between 1930 and 1936, but instead comprised approximately 17.2% of Project deliveries in these years as shown in RGJI Table 90. Further, the percentages in RGJI Table 90 are not representative of present conditions because reconfiguration of the Project infrastructure in the El Paso Valley eliminated downstream river diversions in Texas that historically diverted high quantities of return flows generated in Texas. NM-EX 006, Barroll 2d Decl. a¶ 48.

**USMF 24:** New Mexico disputes this fact. Groundwater was recognized as a potential source of irrigation supply as early as the turn of the 20th Century. Groundwater was also recognized and used as a source of municipal supply south of Elephant Butte at the time the Compact was drafted. NM-EX 011, Stevens Decl. ¶¶ 4, 30.

**USMF 25:** New Mexico disputes this fact. Scientific understanding of the relationship between groundwater and surface water in the Rio Grande, particularly south of Elephant Butte, was limited as of 1938, in part because Texas objected to studies of groundwater resources in the area. NM-EX 011, Stevens Decl. ¶ 31.

**USMF 26**: New Mexico disputes this fact. While the United States is correct that these were the principal crops grown in the Project area at the time, nothing in the Compact itself or the historical record indicates the Compact drafters intended to prohibit the planting of other crops in the Project area, or to prohibit further development in the Compact area in general. NM-EX 011, Stevens 2d Decl. ¶¶ 12, 25, 29.

**USMF 27:** This fact is undisputed by New Mexico.

**USMF 28:** This fact is undisputed by New Mexico.

**USMF 29:** This fact is undisputed by New Mexico.

**USMF 30:** This fact is undisputed by New Mexico.

**USMF 31:** This fact is undisputed by New Mexico.

**USMF 32:** This fact is undisputed by New Mexico.

**USMF 33:** This fact is undisputed by New Mexico.

**USMF 34:** This fact is undisputed by New Mexico.

**USMF 35:** This fact is undisputed by New Mexico.

**USMF 36:** New Mexico disputes this fact. While New Mexico's apportionment is based on water the Project releases for delivery to EBID members pursuant to the Downstream Contracts, there are some limited pre-Project water rights that are part of New Mexico's apportionment. In addition, the apportionment is an apportionment to New Mexico, not to EBID, and would continue even if EBID ceased to exist. NM-EX 008, Lopez 2d Decl. ¶¶ 24, 30.

**USMF 37:** New Mexico disputes this fact. While New Mexico's apportionment is based on water the Project releases for delivery to EBID members pursuant to the Downstream Contracts, there are some limited pre-Project water rights that are part of New Mexico's apportionment. In addition, the apportionment is an apportionment to New Mexico, not to EBID, and would continue even if EBID ceased to exist. NM-EX 008, Lopez 2d Decl. ¶¶ 24, 30.

**USMF 38:** New Mexico disputes this fact. While New Mexico's apportionment is based on water the Project releases for delivery to EBID members pursuant to the Downstream Contracts, there are some limited pre-Project water rights that are part of New Mexico's apportionment. In addition, the apportionment is an apportionment to New Mexico, not to EBID, and would continue even if EBID ceased to exist. NM-EX 008, Lopez 2d Decl. ¶¶ 24, 30.

**USMF 39**: New Mexico disputes this fact. Neither the Compact nor the historical record of the Compact's negotiation reflect that the parties intended to freeze additional development below Elephant Butte Reservoir. On the contrary, the historical record reflects that all parties intended further development to occur in this area. NM-EX 008, Lopez 2d Decl. ¶ 23; NM-EX 010, Stevens Decl. ¶¶ 12, 23, 25.

**USMF 40:** This fact is undisputed by New Mexico.

**USMF 41:** This fact is undisputed by New Mexico.

**USMF 42**: New Mexico does not dispute this fact, but clarifies that natural variability in climate and water supply means the Project cannot deliver 3.024 acre-feet per acre in every year. NM-EX 006, Barroll 2d Decl. ¶ 17.

**USMF 43**: New Mexico disputes this fact. It is generally correct that groundwater pumping in New Mexico began to increase in the late 1940s and early 1950s, but groundwater pumping in Texas also increased at this time. Pumping in both areas occurred in response to severe drought and with the knowledge of and encouragement from the United States. NM-EX 006, Barroll 2d Decl. ¶ 15; NM-EX 010, Stevens Decl. ¶ 32.

**USMF 44**: New Mexico disputes this fact. Stream depletions from groundwater pumping do not always reduce the Project's surface water supply. Expert analysis is needed to determine the location, extent, and timing of any impacts. To the extent impacts occur, they also are caused by pumping in Texas, not just New Mexico. NM-EX 006, Barroll 2d Decl. ¶¶ 34-39.

**USMF 45**: New Mexico disputes this fact. Stream depletions from groundwater pumping do not always reduce the Project's surface water supply. Expert analysis is needed to determine the location, extent, and timing of any impacts. To the extent impacts occur, they also are caused by pumping in Texas, not just New Mexico. NM-EX 006, Barroll 2d Decl. ¶¶ 34-39.

**USMF 46:** This fact is undisputed by New Mexico.

**USMF 47:** This fact is undisputed by New Mexico.

**USMF 48**: New Mexico disputes this fact. Reclamation used the D2 Curve from the 1980s through 2005, but, in 2006, the Project allocation method changed. Starting in 2006, Reclamation substantially reduced allocations and deliveries to EBID, while increasing EPCWID's allocation of Project Water. NM-EX 006, Barroll 2d Decl. ¶ 57.

**USMF 49:** This fact is undisputed by New Mexico.

**USMF 50:** This fact is undisputed by New Mexico, except that New Mexico clarifies that the 1980 order declaring the basin initially included only the Mesilla Basin, and the basin was extended to the remainder of the Project area in New Mexico—the Rincon Basin—by a 1982 order. NM-EX 007, D'Antonio 2d Decl. ¶ 15.

**USMF 51:** This fact is undisputed by New Mexico. Further detail regarding the procedure for obtaining such a permit can be found in NM-EX 007, D'Antonio 2d Decl. ¶ 21.

**USMF 52**: New Mexico disputes this fact. Although permits were not required to construct wells prior to declaration of the basin, the owners of preexisting wells were encouraged to file claims describing their rights. These claims reveal that most wells were drilled during droughts in the 1950s and 1970s, often with Reclamation's encouragement. NM-EX 007, D'Antonio 2d Decl. ¶¶ 18, 19.

**USMF 53**: New Mexico disputes this fact. Since the LRG Basin was declared in 1980 (*see* NM-EX 007, D'Antonio 2d Decl. at ¶ 15), the OSE has permitted approximately 2,678 irrigation wells. Each one went through the rigorous and comprehensive analysis required by the permitting process. NM-EX 007, D'Antonio 2d Decl. ¶ 23; NM-EX 010, Serrano Decl. ¶ 19.

**USMF 54**: New Mexico disputes this fact. Some acres in both EBID and EPCWID were planted in pecans at the time the Compact was drafted, and pecan acreage has since increased in both districts. NM-EX 006, Barroll 2d Decl. ¶ 23.

**USMF 55**: New Mexico disputes this fact. As of 2020 there are approximately 3,000 active irrigation and "M&I" wells in the LRG. NM-EX 010, Serrano Decl. ¶ 20.

**USMF 56**: New Mexico disputes this fact. The source the United States relies on for this assertion is incomplete regarding Las Cruces municipal water supplies and is disputed. NM-EX 013, Wilson Decl. ¶ 4.

**USMF 57**: New Mexico disputes this fact. The United States overstates Las Cruces' pumping. Las Cruces's average annual use of its LRG 430 water rights was 15,260.5 acre-feet per year from 2016 to 2019. Three thousand acre-feet of this pumping was occurring before 1980. Of the 15,260.5 acre-feet pumped, an average of 9,181.5 acre-feet per year was discharged from the city's wastewater treatment plants back to the river, and an additional 3,500 acre-feet per year percolates back into the aquifer, resulting in minimal net depletions, which are offset by Las Cruces' ownership of 1354.61 acres of EBID land and non-use of the associated water rights. NM-EX 013, Wilson Decl. ¶ 5, 6.

**USMF 58**: New Mexico does not dispute this fact generally, but does dispute any implication that all municipal groundwater below Elephant Butte did not begin until after the Compact was signed, and further asserts that municipal groundwater withdrawals in Texas are much greater than those in New Mexico. NM-EX 013, Wilson Decl. ¶ 7; NM-EX 012, Sullivan Decl. ¶ 16.

**USMF 59**: New Mexico disputes this fact. The number of domestic well permits cited by the United States is not reflective of the number of active domestic wells in the Lower Rio Grande, as many wells have been plugged or abandoned after the homes they served connected to municipal water service. Total domestic and stock well use in the Lower Rio Grande is also approximately 2,000 to 3,000 acre-feet per year, or less than 1% of the total surface and groundwater use in the Lower Rio Grande. NM-EX 007, D'Antonio 2d Decl. ¶ 37(b) fn12; NM-EX 010, Serrano Decl. ¶ 13.

**USMF 60:** New Mexico disputes this fact. When the State Engineer's metering order was implemented in 2007, OSE discovered some domestic wells were being improperly used for irrigation. These improper uses were rectified long ago. NM-EX 010, Serrano Decl. ¶ 15-16.

**USMF 61**: New Mexico disputes this fact. Stream depletion by groundwater pumping does not necessarily impair the surface water supply for the Project. Expert analysis is needed to determine whether, when, and to what extent groundwater pumping, including pumping in Texas, interferes with Project deliveries. NM-EX 006, Barroll 2d Decl. ¶¶ 36-42; NM-EX 012, Sullivan Decl. ¶ 17.

**USMF 62**: New Mexico disputes this fact. Stream depletion by groundwater pumping does not necessarily impair Project allocations and deliveries, even in water-short years. Expert analysis

is needed to determine whether, when, and to what extent groundwater pumping, including pumping in Texas, interferes with Project deliveries. NM-EX 006, Barroll 2d Decl. ¶¶ 36-42; NM-EX 008, Lopez 2d Decl. ¶ 23; NM-EX 012, Sullivan Decl. ¶ 18.

**USMF 63**: New Mexico disputes this fact. The extent of any injury resulting from a reduction in diversions caused by New Mexico pumping is a complex matter requiring expert analysis and expert opinion. To the extent that New Mexico pumping has reduced Project diversions, so has Texas pumping. In addition, the imposition of the 2008 OA, increases in Project operational waste, and change in EPCWID operations have caused significant negative impacts to New Mexico that far exceed any impacts of New Mexico pumping on Texas. NM-EX 006, Barroll 2d Decl. ¶¶ 36, 37, 56-67; NM-EX 012, Sullivan Decl. ¶ 19.

**USMF 64**: New Mexico disputes this fact, including the implication that shortages during these years are attributable to New Mexico. For the years 2006 through 2019, EPCWID's percentage share of Project allocation, excluding Carryover, has averaged 56% of the total Districts' allocation, compared with 43% prior to 2006. NM-EX 006, Barroll 2d Decl. ¶ 62.

**USMF 65**: New Mexico disputes this fact. The United States provides no basis for the numbers cited in this fact other than Dr. Barroll's expert reports, which do not contain these numbers. NM-EX 006, Barroll 2d Decl. ¶ 73.

**USMF 66**: New Mexico disputes these facts. The United States appears to have misinterpreted results from the ILRG Model and Dr. Barroll's report, which do not conclude the Project would have experience full supply conditions in these years but for New Mexico's pumping. NM-EX 006, Barroll 2d Decl. ¶ 74.

**USMF 67**: New Mexico disputes this fact. Groundwater pumping in both New Mexico and Texas may cause stream depletions, but the extent to which these depletions impact Project deliveries and induce Reclamation to release additional water from storage is properly the subject of expert analysis, as is the extent to which any additional releases impact storage in future years after accounting for evaporation and other changes in operations. NM-EX 006, Barroll 2d Decl. ¶¶ 37-41.

**USMF 68**: New Mexico disputes this fact. New Mexico has taken numerous administrative actions in the Lower Rio Grande to curb groundwater use, including prohibiting new groundwater appropriations without offsets and curtailing pumping in excess of permitted amounts. This is in stark contrast to the complete lack of Texas groundwater administration. NM-EX 007, D'Antonio 2d Decl. ¶¶ 21, 53 fn19, 57, 58; NM-EX 010, Serrano Decl. ¶ 22-27, 26 fn.5.

**USMF 69**: New Mexico disputes this fact. Starting in 2006, Reclamation began using the D3 allocation method and carryover accounting, both of which have substantially reduced EBID's annual Project allocations. These changes were formally adopted in the 2008 Operating Agreement. As a result of these changes. EPCWID has received, on average, 56% of Project allocations since 2006, rather than 43%. NM-EX 006, Barroll 2d Decl. ¶¶ 58-62.

**USMF 70**: New Mexico disputes this fact. New Mexico in particular disputes the implication that changes in Project delivery performance are all attributable to pumping in New Mexico. Approximately 74,000 acre-feet of apparent reductions in performance are simply the result of accounting changes that are not attributable to any action or inaction of New Mexico or its citizens. NM-EX 006, Barroll 2d Decl. ¶ 59.

**USMF 71**: New Mexico disputes this fact. The volume of water ceded by EBID exceeds any reasonable estimate of the actual impacts of depletions from New Mexico pumping. The United States also did not perform any quantitative analysis of the impacts of New Mexico pumping before adopting the 2008 Operating Agreement. NM-EX 006, Barroll 2d Decl. ¶¶ 25, 65, 68-70; NM-EX 008, Lopez 2d Decl. ¶ 38; NM-EX 012, Sullivan Decl. ¶ 20.

**USMF 72**: New Mexico disputes this fact. New Mexico pumping in the years 2011-2017 reflects excessive pumping directly caused by the United States' decision to deprive New Mexico of its share of the Compact's apportionment. The United States also ignores the volume of groundwater pumped by Texas during the same time period. NM-EX 006, Barroll 2d Decl. ¶¶ 26, 31-33.

**USMF 73:** New Mexico disputes this fact. The New Mexico Adjudication Court has issued orders determining the scope of the United States' water right for the Project, including the Project's priority date. New Mexico disputes any implications inconsistent with the Adjudication Court's orders. NM-EX 007, D'Antonio 2d Decl. ¶ 37(c).

**USMF 74:** New Mexico disputes this fact. The New Mexico Legislature did not enact NMSE § 72-2-9.1 to address concerns about compliance with interstate compacts, but to enable the State Engineer to address urgent administrative issues during times of drought while adjudications are ongoing. NM-EX 007, D'Antonio 2d Decl. ¶ 38.

**USMF 75:** New Mexico disputes this fact. The United States oversimplifies the purpose and scope of the Active Water Resources Management Regulations ("AWRM Framework Rules"), which address many other issues. NM-EX 007, D'Antonio 2d Decl. ¶¶ 39-42.

**USMF 76:** New Mexico disputes this fact. The United States misrepresents certain details regarding the chronology of regulatory actions in the Lower Rio Grande. NM-EX 007, D'Antonio 2d Decl. ¶ 43, 44.

**USMF 77:** New Mexico disputes this fact. The State Engineer did not give EBID a "grace period," but instead had to resolve legal actions and complaints filed by EBID against the metering order before OSE staff were able to install meters on EBID members' wells. NM-EX 007, D'Antonio 2d Decl. ¶ 44.

**USMF 78:** New Mexico disputes this fact. Specifically, New Mexico disputes the United States' characterization of the purpose of the proposed District Specific Rules ("DSRs") for District IV. NM-EX 007, D'Antonio 2d Decl. ¶¶ 45-46.

**USMF 79:** New Mexico disputes this fact. The State Engineer released draft District IV DSRs for public comment on June 28, 2006. Despite extensive outreach, the draft DSRs received negative responses from New Mexico stakeholders, including EBID. However, Reclamation's adoption of the D3 allocation method and implementation of carryover accounting for Project water also began in 2006 and were continued in the 2008 Operating Agreement. These changes dramatically altered Project operations without New Mexico's consent and rendered the draft DSRs obsolete. At this point, the Office of the State Engineer turned its attention to trying to rectify problems with the 2008 Operating Agreement before finalizing the draft DSRs. NM-EX 007, D'Antonio 2d Decl. ¶¶ 46-48.

**USMF 80:** New Mexico disputes this fact. The procedural history of the adjudication is complex, but EBID first filed suit seeking an adjudication of water rights in the Lower Rio Grande. The State intervened in the lawsuit in 1996. NM-EX 007, D'Antonio 2d Decl. ¶¶ 32-36.

**USMF 81:** New Mexico disputes this fact. The United States oversimplifies the purpose of Stream System Issue 101. The United States also ignores that it was a party to Stream System Issue 101, was apprised of the proposed settlement, and did not object to or appeal the court's order adopting the settlement. NM-EX 007, D'Antonio 2d Decl. ¶ 37a.

**USMF 82:** New Mexico disputes this fact. See New Mexico's Response to USMF 81. NM-EX 007, D'Antonio 2d Decl. ¶ 37a.

**USMF 83:** New Mexico disputes this fact. See New Mexico's Response to USMF 81. NM-EX 007, D'Antonio 2d Decl. ¶ 37a.

**USMF 84:** New Mexico disputes this fact. Out of over 18,000 claimants in the LRG Adjudication, there were 956 Notices of Intent to file proof of beneficial use of up to 5.5 AF/yr filed by the December 2012 deadline. The opportunity to provide evidence supporting those claims of beneficial use closed in 2013. NM-EX 007, D'Antonio 2d Decl. ¶ 37 fn.11.

**USMF 85**: New Mexico disputes this fact. The many administrative actions New Mexico has taken in the Lower Rio Grande are discussed in John D'Antonio's Second Declaration. NM-EX 007, D'Antonio 2d Decl. ¶ 37a.

**USMF 86:** New Mexico disputes this fact. The United States does not accurately describe the Water Master's procedure for monitoring diversions and determining and responding to over-diversions. NM-EX 010, Serrano Decl. ¶¶ 14, 22-27.

**USMF 87:** New Mexico disputes this fact. The United States misleadingly cites deposition testimony to exaggerate the number of overdiversions that occur each year. The total volume of overdiversions in most years also is not large. NM-EX 010, Serrano Decl. ¶ 25, 26.

**USMF 88:** New Mexico disputes this fact. The Water Master addresses every overdiversion discovered using several different methods. NM-EX, Serrano Decl. ¶¶ 22-27.

**USMF 89:** New Mexico disputes this fact. The number of enforcement actions referred to the administrative litigation unit is not reflective of lax enforcement but of effective procedures for addressing violations without the need for litigation. NM-EX 010, Serrano Decl. ¶ 23.

**USMF 90:** New Mexico disputes this fact. This is reflective of OSE's ability to achieve compliance without a court order, not any failure of enforcement. NM-EX 010, Serrano Decl. ¶ 27.

**USMF 91**: New Mexico disputes this fact. The Compact does not apportion or even mention groundwater. NM-EX 008, Lopez 2d Decl. ¶ 23.

**USMF 92**: New Mexico disputes this fact. The United States has not requested priority enforcement against any junior groundwater pumpers in EBID. The United States also executed the 2008 Operating Agreement with EBID, depriving them of surface water allocation in exchange for their continued ability to pump. The United States did this without New Mexico's consent or participation. Even absent the 2008 Operating Agreement, the extent of pumping allowed in the Lower Rio Grande is not clear from the Compact and is the subject of dispute. NM-EX 008, Lopez 2d Decl. ¶ 23.

**USMF 93**: New Mexico disputes this fact. There are historical municipal return flows. For example, the City of Las Cruces pumps water from the Jornada del Muerto basin, which is hydrologically disconnected from the Mesilla basin, but discharges return flows from this water into the Rio Grande, along with return flows from the Mesilla basin groundwater it pumps, offsetting a significant percentage of the City's depletions. NM-EX 006, Barroll 2d Decl. ¶ 29; NM-EX 013, Wilson Decl. ¶ 6.

**USMF 94**: New Mexico disputes this fact. New Mexico will enforce a valid priority call. New Mexico disputes that curtailment is the only available means to enforce a call or otherwise protect the Project right if it is being impaired. NM-EX 007, D'Antonio 2d Decl. ¶ 53.

**USMF 95**: New Mexico will investigate groundwater impacts to the Project's surface water supply for Compact enforcement purposes only upon a complaint from Texas or the United States. NM-EX 008, Lopez 2d Decl. ¶ 39; NM-EX 010, Serrano Decl. ¶ 14j.

**USMF 96**: New Mexico disputes this fact. New Mexico regards the Texas and United States complaints in this case as responses to New Mexico's own complaint in its lawsuit against the United States over the 2008 Operating Agreement. Resolving the dispute over the 2008 Operating Agreement—that is, ensuring each State receives its surface water apportionment—is a necessary predicate to resolving the dispute over the impacts of groundwater pumping—that is, determining what is necessary to protect that surface water apportionment. Texas currently receives too much surface water, not too little. Forcing New Mexico to curtail pumping without addressing the deprivation of New Mexico's surface water apportionment via the 2008 Operating Agreement would violate the Compact and would be extremely inequitable, depriving New Mexico of both surface water and groundwater in the Lower Rio Grande. NM-EX 008, Lopez 2d Decl. ¶ 39.

**USMF 97**: New Mexico disputes this fact. New Mexico has investigated and sought enforcement against illegal river pumpers, and has also initiated a pilot fallowing program. New Mexico is not required to take drastic steps to curtail additional water use while it, not Texas or the United States, is the injured party under the Compact. NM-EX 007, D'Antonio 2d Decl. ¶ 40; NM-EX 008, Lopez 2d Decl. ¶ 39; *see also* New Mexico's response to USMF 96.

## II. ADDITIONAL MATERIAL FACTS

For the convenience of the Court and the parties, New Mexico has made its statement of additional material facts in a separate Consolidated Statement of Material Facts that is filed contemporaneously with this brief. Citations to the numbered statements of fact therein follow the following convention: NM-CSMF ¶ __. New Mexico incorporates its Consolidated Statement of Material Facts herein as if set out in whole.

## ARGUMENT

## I. STANDARD OF DECISION

### A. Standard for Summary Judgment

The Court has stated that the legal standard to be applied in ruling on motions for summary judgment in cases in the Court's original jurisdiction is 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).

### B. Standard for Injunctive Relief

An injunction "is not a remedy which issues as of course." *See Montana v. Wyoming*, No. 137 Orig., Final Report of the Special Master (Jan. 10, 2018), at 116 (citing *Weinberger v. Romero-*

*Barcelo*, 456 U.S. 305, 311 (1982); *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 337-338 (1933)).[2] The Court has found that "[t]he decision to grant or deny permanent injunctive relief is an act of equitable discretion." *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006); *see also Winter v. NRDC, Inc.*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course") (internal citation omitted).

> According to well-established principles of equity, a plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction.

*eBay*, 547 U.S. at 391. For the Court to enjoin a State from violating an interstate compact, there must also be a "cognizable danger of recurrent violation." *Kansas v. Nebraska*, 574 U.S. 445, 466 (2015) (internal citation omitted). *See also Madsen v. Women's Health Ctr.*, 512 U.S. 753, 804 (1994). A danger grounded in "mere possibility" or in "speculation" is not sufficient. *Montana*, No. 137 Orig., Final Report of the Special Master, at 117 (citing *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953), *City of Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)). In interstate disputes, the party seeking an injunction faces the burden to prove this danger by clear and convincing evidence because the "power to control the conduct of one State at the suit of another" is "extraordinary." *Connecticut v. Massachusetts*, 282 U.S. 660, 669 (1931).

As discussed below, an injunction is both inappropriate and unjustified in this case.

[2] The United States is seeking an injunction on a summary judgment motion. It, therefore, appears that the relief they are seeking is not provisional or interim pending trial, but rather they are seeking permanent relief.

## II. THE UNITED STATES' POSITION WOULD CHANGE THE COMPACT APPORTIONMENT

The United States acknowledges that groundwater use has been prevalent in both Texas and New Mexico for over one hundred years. The United States overlooks this history, NM-CSMF ¶¶ 199-201; NM-EX 005, Stevens 2d Decl. ¶ 4, and seeks the extraordinary relief of enjoining tens of thousands of individuals and numerous municipalities and farms from all groundwater pumping in New Mexico. Before addressing the specifics of the United States' position, it is worthwhile to identify two overarching issues that permeate the United States' argument and should be considered upfront in evaluating its position.

First, the United States' position would alter the Compact apportionment by depriving New Mexico of *both* surface water *and* groundwater. What became known as the 2008 Operating Agreement (also referred to as the "2008 OA") reallocated much of the Project surface water supply to EPCWID (Texas). NM-CSMF ¶ 189. This reallocation was the genesis for the current dispute. *See, e.g.*, 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); NM-CSMF ¶¶ 197-98. The United States fails to account for this change when it demands a complete end to New Mexico groundwater pumping.

As discussed below, the 2008 Operating Agreement changed the way that water is allocated between the two Districts and, therefore, the amount of water available for Project lands in New Mexico and Texas. New Mexico has not received its full Compact apportionment of Project supply since 2006 when Reclamation changed its allocation procedures culminating in the 2008 Operating Agreement. Since the inception of the D3 Allocation method, the United States (Reclamation) has calculated Project allocations to New Mexico (EBID) and to Texas (EPCWID) using a new "Diversion Ratio." *See e.g.*, NM-EX 510, 2008 Operating Agreement, at 5; NM-CSMF ¶ 181.

Under this new accounting method, Texas continues to receive its Project allocation using data from 1951 to 1978 as set forth in the D2 curve. NM-CSMF ¶ 181. At the same time, all negative departures from the D2 curve, and therefore all reductions attributable to actions since 1978, are taken out of EBID's Project allocation, regardless of who or what caused these departures. NM-CSMF ¶¶ 181-83; NM-EX 006, Barroll 2d Decl. ¶¶ 41, 58-59. As New Mexico will establish at trial, much of the apparent negative departure from the D2 curve is the result of accounting changes or other factors outside New Mexico's control, and are not the result of groundwater pumping. NM-CSMF ¶ 183; NM-EX 006, Barroll 2d Decl. ¶ 58. The net effect of this change is that New Mexico's share of Project water (after the allocation by Treaty to Mexico) has decreased from 57 to 43 per cent annually—a loss of 693,408 acre-feet ("AF") between 2006 and 2019. NM-CSMF ¶¶ 188-89; NM-EX 006, Barroll 2d Decl. ¶¶ 41, 62. At the same time, Texas's share of water *increased* by that exact same amount—693,408 AF. NM-CSMF ¶ 189; NM-Ex 006, Barroll 2d Decl. ¶¶ 41, 62.

This loss to New Mexico comes at a significant ongoing cost. As EBID's Project allocation is reduced, the reduction forces New Mexico farmers to pump additional groundwater to meet irrigation demand, which causes groundwater levels in New Mexico to decline. NM-CSMF ¶¶ 189, 250. That decline then decreases drain flows and increases river losses, reducing Project performance. NM-CSMF ¶ 251. That decrease in Project performance is then used through the D3 Allocation method to reduce still further EBID's allocation, and this unsustainable spiral continues. NM-EX 006, Barroll 2d Decl. ¶ 67. All the while, as EBID's Project allocation is inequitably reduced, New Mexico is being deprived of its Compact apportionment of Rio Grande surface water.

The purpose of the 2008 Operating Agreement was to charge EBID for the impact of groundwater pumping in New Mexico and to allow New Mexico farmers to continue to utilize groundwater. NM-CSMF ¶ 187; NM-EX 119, Ferguson Rep. 5. Unfortunately, the United States did not quantify those effects before it entered the agreement. NM-CSMF ¶ 187; NM-EX 006, Barroll 2d Decl. ¶ 65. The result is that the 2008 Operating Agreement over-charges EBID, including charging EBID for reductions caused by Texas and Mexico, and significantly reduces New Mexico's surface water supply. NM-CSMF ¶¶ 181-83.

More importantly, having already reduced New Mexico's surface water supply in the 2008 Operating Agreement, the United States now asks the Court to halt all New Mexico groundwater pumping. The result would be to dramatically reduce the total amount of water available to New Mexico water users. Simply put, the relief sought in the United States' Motion is redundant and completely unjustified. The United States adopted the 2008 Operating Agreement to address perceived depletions of Project Supply by groundwater pumping in New Mexico. U.S. Br. Statement of Fact No. 71. The United States' Motion seeks the same relief. If groundwater pumping violates the Compact, which is the subject of considerable dispute, that perceived problem would be remedied (in fact *over*-remedied) by the 2008 Operating Agreement, and there is no need for the relief sought by the Motion.

Second, the United States was allowed to intervene in this case, on the understanding that it was asserting "essentially the same claims Texas already has." *Texas v. New Mexico*, 138 S. Ct. at 956. Yet the United States' Motion goes further than raising the same Compact issues as Texas by now seeking relief on behalf of the Project water users based on the incorporated Downstream Contracts. U.S. Not. of Mot. 2 ("New Mexico may not allow water users other than those within the Elephant Butte Irrigation District ('EBID') to deplete the surface water supply of the Project").

The United States, however, cannot raise "Compact" claims on behalf of either EBID or EPCWID. The Districts Project deliveries are in fact the States' apportionments. The States represent all water users *parens patriae*. *South Carolina v. North Carolina,* 558 U.S. 256, 275 (2010) ("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"). Neither the Districts nor the United States can negotiate away or dictate the States' respective apportionments.

This is an original jurisdiction case brought by the State of Texas against the State of New Mexico. It is these two States that have Compact apportionments, and their respective water Districts, EPCWID and EBID, have Project allocations derived solely from those Compact apportionments. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938). The question therefore to be resolved in this case is whether New Mexico and Texas are receiving their Compact apportionments, not intrastate issues as to how that apportionment gets used.

The United States oversteps its role in this case when it asserts, "New Mexico cannot allow anyone, anywhere, to engage in groundwater pumping that depletes and reallocates the 'useable water' delivered to the Project." US Br. 30. Again, how New Mexico utilizes its apportionment within New Mexico is not for the United States to dictate.

The United States further makes the bold assertion that because New Mexico has breached a duty to prevent any depletions below Elephant Butte Reservoir that "it is unnecessary for the United States to weigh in on precisely what Texas as a State is apportioned under the Compact." U.S. Br. 30. In other words, the United States asserts that the Court does not even need to know Texas's equitable apportionment to Texas, and by implication New Mexico's equitable apportionment below Elephant Butte, let alone whether either State received it. Rather, any pumping should result

in a declaration that New Mexico is in violation of the Compact, and therefore the United States urges the Court to shut down a $162.3 million industry, and shut off the water supply to New Mexico municipalities, towns and individual homes. NM-EX 010, Serrano Decl. ¶ 8. That is a startling assertion from the "agent" of the Project that has a duty to both States, not just Texas. What's more, the United States argument disregards the well-chosen words of the Special Master that the "relationship between Project operations and the Compact's equitable apportionment of the Rio Grande's waters remains a fundamental matter to be determined in this case." Order of the Special Master of March 31, 2020, at 29.

## III. THE COMPACTING STATES ANTICIPATED THE DEVELOPMENT AND USE OF GROUNDWATER BELOW ELEPHANT BUTTE RESERVOIR

The United States Motion rests on its assertion that groundwater use is prohibited by the Compact. The evidence does not support this assertion. Rather, the plain language, negotiating history, and longstanding course of performance establish that the Compact allows conjunctive use of groundwater to supplement Project supply to meet irrigation demands. New Mexico systematically details part of that history below.

In the alternative, if the Court is not persuaded that the compacting States intended to allow groundwater for Project purposes, or that the States did not address groundwater, then the doctrine of acquiescence applies.

### A. The Compacting States Intended the Conjunctive Use of Surface Water and Groundwater on Project Acreage

The idea that groundwater pumping in EBID (New Mexico) is a *per se* Compact violation entitling the United States to the prospective equitable relief it seeks is extraordinary. It is extraordinary because the United States' claim to such relief is unprecedented, especially on a summary judgment motion. It is extraordinary because the United States has historically encouraged groundwater pumping throughout the Project in times of drought. *See* NM-CSMF ¶¶

205-14. And it is extraordinary because the Project accounting methodology developed by the United States and used between 1980 and 2005[3] (which is still used to determine Texas's Project allocation) inescapably reflects all historical groundwater pumping occurring throughout the Project, including pumping in New Mexico. *See* NM-CSMF ¶¶ 162-65, 181, 216-16. Groundwater pumping in EBID or in EPCWID, is permitted by the Compact. The conduct and course of performance of the United States, Texas, and New Mexico for the last 60 years confirms this proposition.

1. **The Plain Language of the Compact Supports the Use of Supplemental Groundwater to Satisfy Irrigation Demands**

The Compact is fundamentally a contract that the Court must construe in accord with the Compacting States' intent. *See Montana v. Wyoming*, 563 U.S. 368, 375 n.4 (2011) ("As with all contracts, we interpret the Compact according to the intent of the parties, here the signatory States."). To discern the parties' intent, the Court begins with the express terms. *Tarrant Reg. Water Dist.*, 569 U.S. at 628 (2013). To the extent possible, the Court prefers a "plain reading," informed by the "circumstances existing in the signatory states when the Compact was drafted." *See Montana v. Wyoming*, 563 U.S. 368, 386 (2011). Where the terms of a compact are unambiguous, the Court does not vary or deviate from the express terms. *Alabama v. North Carolina*, 560 U.S. 330, 352 (2010).

There is no direct mention of groundwater in the Compact, so the United States finds no support in the plain text for its assertion that groundwater pumping is contrary to the Compact. NM-CSMF ¶ 63. The United States concedes, as it must, that New Mexico has an apportionment below Elephant Butte. But as discussed below, *infra* § IV, that apportionment is not defined by an inflow-outflow or depletion limit like Articles III and IV. *See Maine Community Health*

[3] The D2 Method is still used to determine EPCWID's—but not EBID's—allocation. NM-CSMF ¶ 181.

*Options v. United* States, 140 S. Ct. 1308, 1323 (2020) ("This Court generally presumes that when Congress includes particular language in one section of a statute but omits it in another, Congress intended a difference in meaning." (internal quotation omitted)); *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013) (inference to be drawn from silence in a Compact is that state retained its sovereign authority); NM-CSMF ¶ 63. Rather, the United States admits that the "Compact incorporates the . . . Project as the mechanism for effectuating the Compact apportionment to Texas and part of New Mexico." U.S. Br. 1.

Like Texas, the United States places great emphasis on the undefined term "deliver." U.S. Br. 27-29. But the word "deliver" offers the United States no comfort because the plain text of the Compact refutes the United States' argument that it means "relinquish," the United States' construction is inconsistent with the use of the term in the Downstream Contracts, the term is ambiguous, and the United States' argument is contrary to background principles and established precedent. *See* N.M. Resp. Tex. § II. That argument is set out in full in New Mexico's Response to Texas, and New Mexico incorporates it here by reference.

The other textual clues in the Compact support an understanding that the States intended to ensure that the Project succeeded. *E.g.* NM-EX 330, Compact, Art. I(*l*) (defining "Usable Water" as the amount available for release to satisfy "irrigation demands").

2. **The Negotiation History Reveals an Intent to Allow Development of Water Supplies, Including Groundwater**

The Court may consider evidence of the negotiating history to determine states' intent, *Oklahoma v. New Mexico*, 501 U.S. 221, 234 n.4 (1991), or to resolve ambiguities arising from silence of the express terms, *Tarrant Reg. Water Dist.*, 569 U.S. at 631-33. The United States bases its Motion on the proposition that the Compact protects the Rio Grande, "undiminished by

new water resource development after the States approved the Compact in 1938." U.S. Br. 25. This is incorrect, and the negotiating history contradicts the United States' argument.

By the beginning of the twentieth century, groundwater was recognized as a potential source of supply for irrigation in the Rio Grande Valley. NM-CSMF ¶¶ 199-203; NM-EX 011, Stevens 2d Decl. ¶ 4. In 1903, the New Mexico Agricultural Experiment Station recorded that Texas farmers around El Paso had "been compelled to turn their attention to other water supplies or else abandon all agricultural work," and these farmers had shown "that crops can be profitably grown by irrigation from wells tapping the underflow in the Rio Grande Valley." NM-CSMF ¶ 200; NM-EX 332, John J. Vernon & Francis E. Lester, Agricultural Experiment Station, N.M. College of Agriculture and Mechanical Arts, Bulletin No. 45, Pumping for Irrigation from Wells, at 12-14, 56 (1903). New Mexico farmers in the Mesilla Valley used groundwater to irrigate their crops in the years immediately following the turn of the century, before the Project was approved and constructed. NM-CSMF ¶¶ 202-02; NM-EX 011, Stevens 2d Decl. at ¶ 4; NM-EX 332, John J. Vernon & Francis E. Lester, Agricultural Experiment Station, N.M. College of Agriculture and Mechanical Arts, Bulletin No. 45, Pumping for Irrigation from Wells, at 55 (1903).

The reliance on groundwater in the Rio Grande was corroborated in a U.S. Geological Survey paper published in 1905, that records that a "number of pumping wells have been installed for the purpose of obtaining ground water for irrigation" in the Mesilla Valley. NM-EX 011, Stevens 2d Decl. at ¶ 30; NM-EX 342, Charles S. Slichter, United States Geological Survey, Water Supply and Irrigation Paper No. 141, Observations on the Ground Waters of the Rio Grande Valley, at 22 (1905); *see also* NM-CSMF ¶¶ 201, 204. The author of that study concluded that "[t]here seems to be a reasonable expectation of increasing enormously the specific capacity of the wells, and consequently the amount of ground water available for irrigation by drilling wells to

greater depths." NM-EX 342, Charles S. Slichter, United States Geological Survey, Water Supply and Irrigation Paper No. 141, *Observations on the Ground Waters of the Rio Grande Valley*, at 29 (1905). Similarly, a 1919 report produced by Reclamation engineers determined that groundwater could be used to supplement Project supply in water short years. NM-EX 113, Stevens Rep. 10-12; NM-EX 349, Harold Conkling, United States Reclamation Service, Water Supply of the Rio Grande River, at TX_00182134 (June 18, 1919); *see also* NM-CSMF ¶ 203. Another study of the Project's water supply by D.C. Henny, who later served as an engineer advisor during Compact negotiations, expressly noted that supplemental groundwater may be developed to address supply shortages during periodic droughts. NM-EX 337, D.C. Henny, Board of Engineers, Rio Grande Project, *Report on Water Supply and Project Area High Line Canal Construction Power Development and City Water Supplies*, at 35-36 (Nov. 1919); *see also* NM-CSMF ¶ 203.

The Rio Grande Joint Investigation, which was used by the States in negotiating the Compact, involved little study of groundwater below Elephant Butte Reservoir. NM-CSMF ¶¶ 23, 25, 29; NM-EX 113, Stevens Rep. 56-57; NM-EX 318, Harlow M. Stafford et al., *Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation*, 12 (1937). Texas objected to even a "limited" groundwater investigation below Elephant Butte, reasoning that "groundwater supplies along the Rio Grande are of little importance in relation to the total supply." NM-CSMF ¶ 25; NM-EX 345, Letter from Raymond A. Hill, Engineer Advisor, State of Texas, to Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas (Jan. 27, 1936).

Confirmation that the compacting States anticipated the development of their water resources, including groundwater, when negotiating the Compact is also clearly found in the "Rules and Regulations for the Administration of the Rio Grande Compact" ("Compact Rules"). The Compact Rules were adopted at the first annual meeting of the Rio Grande Compact

Commission ("RGCC") in 1939. NM-CSMF ¶ 28; NM-EX 352, Rio Grande Compact Commission, *First and Second Annual Reports of the Rio Grande Compact Commission 1939 and 1940*, at 15-19 (Feb. 25, 1941). The preamble of the Compact Rules states:

> A Compact, known as *the Rio Grande Compact*, between the States of Colorado, New Mexico and Texas … which equitably apportions the waters of the Rio Grande above Fort Quitman and *permits each State to develop its water resources at will, subject only to its obligations to deliver water in accordance with the schedules set forth in the Compact*, the following Rules and Regulations have been adopted for its administration by the Rio Grande Compact Commission …

NM-EX 352, Rio Grande Compact Commission, *First and Second Annual Reports of the Rio Grande Compact Commission 1939 and 1940*, at 17 (Feb. 25, 1941) (emphasis added). It is unmistakable from this language that it was the understanding of the RGCC and the compacting States that each State was at liberty "to develop its water resources at will," including its groundwater resources. *Id.* These Compact Rules have remained in force until the present day, published in every RGCC annual report, with no edits or revisions made to this preamble language. *See, e.g.*, NM-EX 331, Rio Grande Compact Commission, *Tenth Annual Report of the Rio Grande Compact Commission*, at 24 (1948); NM-EX 501, Rio Grande Compact Commission, *Report of the Rio Grande Compact Commission 2005*, at 10 (Mar. 23, 2006). This fact alone negates much of the premise on which the United States' motion is based.

After reviewing the voluminous historic record, expert historian Dr. Jennifer Stevens offered the following opinion:

> Simply put, the Compact framers did not evince an intent to preclude future groundwater development in the basin. All parties understood that the 1938 Rio Grande Compact was not intended to freeze development in the Upper Rio Grande Basin [(which includes New Mexico)], as had been the intent of the 1929 temporary Compact, but instead understood that it was designed to provide a realistic path forward for future additional development throughout the basin, consistent with the rights of each compacting state.

NM-EX 112, Stevens 2d Decl. at 12. At the very least, this evidence precludes summary judgment on the United States' Motion because it highlights factual issues that must be determined after trial.

### 3. The Course of Performance Confirms that Both States Understood the Compact to Allow Supplemental Groundwater to Satisfy Irrigation Demands

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. 330, 346 (2010)) (alterations in original). The Restatement provides that "[w]here an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement." Restatement (Second) of Contracts §§ 202(4) (1979). Thus, in *Tarrant Regional Water District*, the Court reasoned that a twenty-seven year history, after execution of the Red River Compact, without any interstate water appropriations suggested that the compact did not intend to permit such appropriations. 569 U.S. at 636. *See also Alabama v. North Carolina*, 560 U.S. at 346 (using the "course of performance" is "highly significant" to interpret a compact); *New Jersey v. New York*, 523 U.S. 767, 830-31 (1998) ("It is hornbook contracts law that the practical construction of an ambiguous agreement revealed by later conduct of the parties is good indication of its meaning").

Here, the conduct and course of performance of Texas, New Mexico, and the United States since 1938 reveals their shared understanding that the Compact allowed groundwater pumping to supplement Project supply and meet irrigation demands.

### a. Conjunctive Groundwater Use for Irrigation

In the late 1940s, Reclamation warned New Mexico and Texas farmers that Project reservoir levels were getting low and that Project surface water supply may be inadequate. NM-CSMF ¶ 206; NM-EX 006, Barroll 2d Decl. at ¶ 15; *see also, e.g.*, NM-EX 334, Barroll Excerpts of Rio Grande Project Histories 1946-50, at NM_00027487. During this period, farmers throughout the Project drilled irrigation wells, and this drilling increased significantly during the drought of the 1950s. NM-CSMF 208; *see, e.g.* NM-EX 006, Barroll 2d Decl. at ¶ 17; NM-EX 424, C.S. Conover, United States Geological Survey, Geological Survey Water Supply Paper 1230, Ground-Water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico (1954); NM-EX 432, Narenda N. Gunaji, Engineering Experiment Station, New Mexico State University, Groundwater Conditions in Elephant Butte Irrigation District (Nov. 1961).

Reclamation's Rio Grande Project Histories ("RGPH" or "Project Histories") during this period report on the importance of groundwater, combined with surface water, to irrigate Project acreage. NM-CSMF ¶¶ 209-210. For example, the 1952 Reclamation water announcement reported that low Project Supply in that year would be "supplemented by the flow from several hundred private irrigation wells and utilization of available return flow." NM-EX 417, Barroll Excerpts of Rio Grande Project Histories 1951-1957, at NM_00029819; *see also* NM-CSMF ¶ 209 (citing similar documents). A 1956 report also recorded that "[t]he main source of irrigation water through the past year has been the farm wells as the storage carry over and the ensuing run off was extremely subnormal." NM-EX 420, Barroll Excerpts of Rio Grande Project Histories 1951-1957, at NM_00031107. Similarly, the 1954 Project History O&M Report for Ysleta reports that "418 irrigation wells, installed since 1950" supplied "enough irrigation water for almost normal requirements," and the 1954 Project History O&M Report for Las Cruces reports that "the storage water carryover was so limited that even the first irrigation had to be made with a

combination of water pumped from farm wells and water from the storage supply." *Id.* at NM_00030570, NM_00030577; *see also* NM-CSMF ¶¶ 209-210 (citing similar documents).

Project Histories throughout the 1950s also show that Reclamation actively promoted the use of groundwater irrigation wells during the drought, actively encouraging "[w]ater users who have pumps of good capacity … to arrange for transfer of a part of their unused allotment water to those who are in need of additional water." NM-EX 006, Barroll 2d Decl. at ¶ 17; NM-EX 419, Barroll Excerpts of Rio Grande Project Histories 1951, at NM_00029507; *see also* NM-CSMF ¶ 209. Reclamation issued the same encouragement the following year (1952), and in 1954, when Reclamation requested that Project farmers with wells use them "to the greatest extent possible." NM-EX 006, Barroll 2d Decl. at ¶ 17; NM-EX 417, RGPH Water Announcement (Mar. 1, 1954) at 8, 17; *see also* NM-CSMF ¶ 209. Reclamation also worked with Project farmers during the 1950s to distribute pumped groundwater through Project conveyances. NM-EX 006, Barroll 2d Decl. at ¶ 18; NM-EX 420, Barroll Excerpts of Rio Grande Project Histories 1951-1957, at NM_00029465, NM_0029793.

The system of conjunctive management that emerged during the drought of the 1940s and 1950s continued after the drought relented. Gary Esslinger, the manager of EBID, describes the system of conjunctive use of surface supply and supplemental irrigation water by analogy to checking and savings accounts: "The wells in our view, my view, and the EBID board view [are] the savings account. You draw from that when your checking account, which is a surface water, is low." NM-EX 213, Esslinger Dep. (Aug. 17, 2020) 112:4-113; *see also* NM-EX 550; NM-CSMF ¶ 213. Reclamation continued to support and encourage conjunctive use throughout the Project history. For example, Reclamation encouraged the Districts throughout the 1960 and 1970s to develop formal well drilling programs. NM-CSMF ¶ 214; NM-EX 242, Esslinger Dep.

(Aug. 18, 2020) 22:8-24:18. These efforts culminated in EBID's drilling a series of five large capacity irrigation wells in the 1970s, as part of a master plan to drill 36 total wells that the district used to supplement surface supplies. *See* NM-EX 441, Salopeck Aff., ¶¶ 8-9 (Mar. 3, 2004) (produced as EBID141921-2007); NM-EX 006, Barroll 2d Decl. at ¶ 21; NM-EX 550; *see also* NM-EX 422, License Agreement with EPCWID for Installation of 4 Water Wells (Feb. 1, 1978).

In similar fashion, EPCWID maintains 62 high capacity wells, and its constituents have an unknown additional number of private wells for supplemental irrigation use. NM-CSMF ¶ 224; NM_EX 100, Barroll Rep. 25; *see also* NM-EX 244, Reyes Dep. (Aug. 31, 2002) 36:22-50:2 (discussing the wells and their use during the 2003-04 drought). It is known that the largest Texas diversions in the Mesilla Basin are from the Canutillo well field, which pumps approximately 24,000 AF/yr based on data by the El Paso Water Utility, for El Paso municipal use. NM-CSMF ¶ 238; NM-EX 006, Barroll 2d Decl. at ¶ 31. In this environment, Project farmers have developed agricultural practices that rely upon conjunctive management; for instance, many crops that have become prevalent within the Project require groundwater prior to the beginning of the releases from Elephant Butte Reservoir. *See* NM-CSMF ¶ 224; NM-EX 214, King Dep. (May 18, 2020) 91-92, 101; NM-EX 242, Esslinger Dep. (Aug. 18, 2020) 30:12-46:4.

In short, Reclamation has long recognized that "[i]n addition to their allocations of surface water from the [Rio Grande Project], irrigators within EBID and EPCWID have historically relied on groundwater pumping for supplemental irrigation"; "[g]roundwater use for supplemental irrigation is widespread during periods of low Project supply"; and "as in Texas, Project farmers in New Mexico are free to pump groundwater from privately-owned wells on their lands to supplement Project surface-water supplies." NM-EX 529, Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and

Texas: Final Environmental Impact Statement, at 25, 219 (Appendix D), E-13 (Sept. 30, 2016). Based on this evidence and his expertise in interstate compacts, former Commissioner for the United States Bureau of Reclamation, Estevan Lopez opined that the Compact allows "[c]onjunctive management of surface and groundwater . . . in both States to meet irrigation demands on Project acreage." NM-EX 107, Lopez Rep. at 42.

**b. Neither Reclamation Nor Texas Objected to Groundwater Use in Either State**

Despite recognizing the potential impact of groundwater pumping on Project supply, the historical record contains no evidence that any party objected to the increase in groundwater extraction. NM-CSMF ¶¶ 205, 212, 215, 231. Dr. Stevens concluded that, "the historical record offers no indication of parties expressing concern over pumping or expressing concern that pumping groundwater would constitute a Compact violation." NM-EX 113, Stevens Reb. Rep. 18; *see also* NM-EX 241, Miltenberger Dep. (June 8, 2020) 93:10-19, 114:9-115:23; NM-EX 240, Kryloff Dep. (Aug. 6, 2020) 111:1-112:14. Instead, the historical evidence confirms "[i]mproving scientific understanding" about the groundwater supply "led to Reclamation-led conjunctive (joint) management of the overall supply," including both groundwater and surface water. *See* NM-EX 113, Stevens Reb. Rep. 15; *see also* NM-CSMF ¶¶ 212-13.

Far from Reclamation or Texas objecting to EBID's pumping, Texas has supported groundwater pumping in EBID. In 1982, when New Mexico declared the Lower Rio Grande Groundwater Basin, placing restrictions on groundwater use in New Mexico, Texas Compact Commissioner Jesse Gilmer encouraged the New Mexico Compact Commissioner and State Engineer Steve Reynolds to reconsider. Texas Commissioner Gilmer explained that agriculture "below Elephant Butte Reservoir in Texas and New Mexico … requires … an absolute minimum in most crops of" more water than the Project combined with New Mexico's new groundwater

restrictions allowed, and voiced the opinion that "the people of New Mexico" should not be restricted to this lesser amount with the result that they may have to let part of their land lay fallow. NM-EX 107, *E. Lopez. Rep.* (Oct. 31, 2019) at 33; NM-EX 418, Transcript of Proceedings from 43rd Annual Meeting of the Rio Grande Compact Commission (Mar. 25, 1982).

**c. Project Allocation Methods Confirm the Intention to Allow Groundwater Use**

Reclamation further formalized the conjunctive use of groundwater in the Rio Grande below Elephant Butte in the course of its transfer of Project facilities to the irrigation districts. Specifically, in the early 1980s, Reclamation developed a new allocation methodology to divide Project supply between EBID and EPCWID, rather than to individual farms. *See* NM-CSMF ¶ 215; NM-EX 202, Cortez Dep. (July 30, 2020), 59:12-60:4; NM-EX 100, Barroll Rep. 8, 33. To develop this methodology, Reclamation performed an analysis of historical distribution data from 1951 to 1978. NM-CSMF ¶¶ 162-65. From the data, Reclamation developed two relationships. *See* NM-EX 100, Barroll Rep., 33-34. First, the observed relationship between total Project release from storage and farm delivery plus the delivery to Mexico was termed the "D1 Curve." *Id.* Second, the observed relationship between Project release from storage and total project diversions, including Mexico, was termed the "D2 Curve." *Id.* Reclamation then developed a system to allocate available surface supply in a given year to the districts on the basis of the expected diversions for a given expected release after accounting for delivery to Mexico, using the D2 Curve. NM-EX 107, Lopez Rep. 35-36; *see also* NM-CSMF ¶ 164.

Because these relationships included diversion data from a period after the significant development of groundwater in the 1940s and 1950s, the resulting allocation system does not represent project efficiency as it would have existed in 1938. NM-CSMF ¶ 215. Rather, the allocations that the D2 methodology produces reflects the impact on Project supply of all

groundwater pumping that occurred through the years 1951 to 1978. *Id.*; *see also* NM-EX 006, Barroll 2d Decl. at ¶ 57; NM-EX 246, Gordon Dep. (Jul. 15, 2020) 70:19-24 (Texas Commissioner Patrick R. Gordon confirming that "D2 is based on 1951 to '78 operations of the project, which included groundwater pumps" and that the 2008 OA grandfathers in this level of groundwater pumping). As such, acceptance of this allocation method by Reclamation, the districts, and the compacting States is consistent with a common understanding that groundwater pumping for supplemental irrigation purposes is permitted under the Compact. *See* NM-CSMF 215; *see also* NM-EX 107, Lopez Rep. 35-36; NM-EX 108, Lopez Reb. Rep. 14; NM-EX 101, Barroll Reb. Rep. 1. Texas and New Mexico *both* accepted use of the D2 Curve to determine the 43%:57% Project allocations for more than 20 years, until the change in Project operations in 2006. NM-CSMF ¶¶ 156, 178-80, 212.

Even the 2008 Operating Agreement was adopted to formalize conjunctive supplemental groundwater use within the Project. It does so by incorporating the D2 Curve as the method for determining allocations to EPCWID. EBID understood the agreement to "grandfather" levels of groundwater pumping in New Mexico commensurate with the D2 period. NM-CSFM ¶ 225; NM-EX 108, Lopez Reb. Rep. 17; NM-EX 101, Barroll Reb. Rep. 43; *see, e.g.*, NM-EX 208, Esslinger Dep. (Aug. 18, 2020) 157:11-24.

This is significant because the 2008 Operating Agreement professes to be consistent with the Compact. NM-EX 510, 2008 Operating Agreement, p. 14, ¶ 6.12.

4. **Background Principles Support the Use of Groundwater for Project Purposes**

Finally, background principles of law may inform Compact construction. *See Montana*, 131 U.S. at 375-80. Here those background principles also support a finding that the Compact allows conjunctive use of surface and groundwater on Project acreage.

New Mexico established the right to use groundwater even before statehood. *See generally,* Ira G. Clark, *Water in New Mexico: A History of its Management and Use* 234 (1987). In 1931, before the Compact, New Mexico adopted a separate statute for groundwater. 1907 N.M. Laws, ch. 131 (groundwater). Given this regulatory scheme, it is meaningful that the States did not refer to groundwater in the Compact. NM-CSMF ¶ 63.

Moreover, Reclamation obtained a water right for the Project from the Territory of New Mexico in 1906 and 1908. "The United States' Rio Grande Project water filings with the New Mexico Territorial Engineer in 1906 and 1908 *did not include, nor were they intended to include, the Upper Rio Grande Basin's groundwater*." NM-EX 112, Stevens Rep. 11, ¶ 5 (emphasis added); *see also* NM-EX 113, Stevens Reb. Rep. 8 (contrasting Reclamation's filings on the Rio Grande Project to those for the Salt River Project and Garden City Project, both of which expressly included groundwater); *see also* NM-CSMF 9, 11. This was subsequently confirmed in 2012 by the Lower Rio Grande Adjudication Court which held that the United States "has established a right to surface water," but not groundwater for the Project. NM-EX 535, Order Granting the States' Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico v. Elephant Butte Irr. Dist.*, No. CV-96-88 (Stream System Issue SS-97-104), 6, 8 (N.M. 3d Jud. Dist. Ct. Aug. 16, 2012).

To the same effect is that same court's determination in Stream System Issue 101, which addressed the irrigation requirements for all lands in the Lower Rio Grande in New Mexico. The court in that proceeding held that individual New Mexico water users have a right to conjunctively use surface and groundwater, up to a limit of 4.5 AF per acre. NM-EX 541, Final Judgment, *New Mexico v. Elephant Butte Irr. Dist.*, No. CV-96-888 (Stream System Issue SS-97-101), 6-7 (N.M.

3d Jud. Dist. Ct. Aug. 22, 2011). The United States was party in that proceeding, and did not appeal that holding. The United States has also failed to object to well permits issued by the New Mexico State Engineer since the LRG Underground Water Basin was first declared in 1980. NM-CSMF ¶¶ 219-22; NM-EX 007, D'Antonio 2d Decl. at ¶ 21.

### B. In the Alternative, the United States and the States Acquiesced to Groundwater Pumping Throughout the Project

In the alternative, the United States and Texas have acquiesced to groundwater pumping at least to the extent reflected in the D2 Curve (level of pumping from 1951-1978). The Court has found that "[a]s between States, long acquiescence may have controlling effect." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), 218 (citing *Ohio v. Kentucky*, 410 U.S. 641, 651 (1973) and *Massachusetts v. New York*, 271 U.S. 65, 95 (1925)); *see also California v. Nevada*, 447 U.S. 125, 131 (1980) (recognizing that "longstanding acquiescence" may determine a boundary "whether or not federal authorities had the power to draw them"); *Wyoming v. Colorado*, 309 U.S. 572, 581-82 (1940) (recognizing the doctrine of acquiescence as a defense to a claim for violation of the decree on the Laramie River).

In *Georgia v. South Carolina*, a case concerning the boundary between the two states along the Savannah River, the Court found that "[i]naction, in and of itself, is of no great importance; what is legally significant is silence in the face of circumstances that warrant a response," however, "inaction alone may constitute acquiescence when it continues for a sufficiently long period." *Georgia v. South Carolina*, 497 U.S. 376, 389, 393 (1990). In that case, despite a 1787 treaty to the effect that all islands in the Savannah River belonged in Georgia, and a 1955 Court of Appeals decision recognizing Georgia's sovereignty over the islands, South Carolina showed that since 1813, it had in some manner taxed, policed, patrolled and cultivated certain islands, and Georgia had notice of these activities. *Id.* at 388-93. South Carolina prevailed on the ground of prescription

and acquiescence. *Id*. at 393. Similarly, here, there can be no reasonable doubt that both the United States and Texas knew that groundwater pumping had occurred historically and was occurring on an ongoing basis throughout the Project, including throughout the 1951 to 1978 period, and beyond. NM-CMF ¶¶ 205-14. No attempt was made to quantify and exclude the impacts of groundwater pumping when calculating the D2 Curve, and no objection was made by Texas to the implementation of the D2 Curve. To this day, the United States and Texas accept the D2 Curve as the methodology to determine Project allocations to EPCWID, and this has been so for nearly 40 years.

In *New Jersey v. New York*, 523 U.S. 787 (1998), again in the context of a boundary dispute, the Court found that "acquiescence may be presumed" from "evidence of open, notorious, visible, and uninterrupted" acts. Such evidence was not presented in that case. An 1834 compact between the states of New York and New Jersey, set the boundary line between the states as the middle of the Hudson River, with the exception that Ellis Island was to be part of New York, up to the low-water mark on the New Jersey side. New Jersey retained the right to submerged lands on its side of the boundary. *Id.* at 773-74. Over the next 42 years, the Federal Government filled around the island's shoreline, ultimately adding 24.5 acres. *Id.* at 776-77. When challenged, the Court found that the boundary line between the states was as stated—the low-water mark on the New Jersey side. *Id.* at 779-80, 808, 809-10. In contradistinction to the facts of the *Georgia* case, New York did not obtain sovereignty over the filled land. This is because the actions taken by New York during the period under review were deemed too slight or equivocal. *Id.* at 794-97. The same is not true here. Reclamation acknowledges in the Final Environmental Impact Statement for the 2008 Operating Agreement that "[i]n addition to their allocations of surface water from the [Rio Grande Project], irrigators within EBID and EPCWID have historically relied on groundwater

pumping for supplemental irrigation," and "[g]roundwater use for supplemental irrigation is widespread during periods of low Project supply." NM-EX 529, Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas: Final Environmental Impact Statement, at 25, E-13 (Sept. 30, 2016). Reclamation also proposed and implemented the D1/D2 Allocation Method that irrefutably captures all impacts of all groundwater pumping throughout the Project between the years 1951 and 1978, and still uses the D2 Curve to allocate Project supply to EPCWID. NM-CSMF ¶¶ 162-164, 181, 215. During this same period, Reclamation actively encouraged groundwater pumping throughout the Project, including in EBID, and Texas actively supported groundwater pumping in EBID. NM-CSMF ¶¶ 209, 214, 217. Had the United States or Texas been of the opinion that groundwater pumping impacts Project Supply, it should have objected many decades earlier. In fact, Texas appeared in two prior original actions before the Court, *Texas v. New Mexico,* No. 9 Original, 344 U.S. 906 (1952) and *Texas v. New Mexico and Colorado*, No. 29, Original, 389 U.S. 1000 (1967), claiming Rio Grande Compact violations, but never raised concerns related to groundwater use below Elephant Butte Reservoir. NM-CSMF ¶ 231.

Acquiescence was also raised in *Nebraska v. Wyoming*, *507* U.S. 584 (1993). That case was an original action brought by Nebraska to enforce the 1945 North Platte Decree issued in *Nebraska v. Wyoming*, 325 U.S. 665 (1945). An issue in the case concerned the Inland Lakes which was part of the North Platte Project (a series of reservoirs and canals operated by the Reclamation and spanning two states, i.e., Wyoming and Nebraska). It was undisputed that since 1913 Reclamation had diverted water for storage in the Inland Lakes during non-irrigation months for release to Nebraska water uses during the irrigation season. The Inland Lakes had always been operated with a December 6, 1904, priority date that Wyoming recognized for other components

of the North Platte Project. However, an issue arose because Reclamation had never obtained separate Wyoming storage permits for the Inland Lakes. Nebraska and the United States moved for summary judgment "seeking determinations that the [prior] decree entitles the Bureau to continue its longstanding diversion and storage practices and that the Inland Lakes have a priority date of December 6, 1904." See *Nebraska v. Wyoming*, 507 U.S. 589, 594 (1993). The Special Master recommended granting the motions for summary judgment of Nebraska and the United States ruling that Reclamation's lack of a Wyoming permit for the Inland Lakes was "immaterial because the question of the Inland Lakes' priority was determined in the original proceedings," *Id*. at 594, yet "even if the issue was not previously determined, we would agree with the Special Master that Wyoming's arguments are foreclosed by its post decree acquiescence." 507 U.S. at 595. (*Cf. Ohio v. Kentucky*, 410 U.S. 641, 648 (1973) ("[P]roceedings under this Court's original jurisdiction are equitable in nature, and a claim not technically precluded nonetheless may be foreclosed by acquiescence")).

The Court has "never established a minimum period" for a showing of acquiescence, but has "noted that the period must be 'substantial'." *Virginia v. Maryland*, 540 U.S. 56, 76 (2003) (citing *N.J. v. New York*, 523 U.S. 786, 789 (1998)). In *Nebraska v Wyoming*, the Court found acquiescence after a period of 41 years. 507 U.S. 584, 594-95 (1993). Here, the D2 Curve reflects Project dynamics and performance over a 27-year period between 1951 and 1978, capturing the first 27 years of Project operations in which allocations were made not to farms, but direct to the Districts. NM-CSMF ¶ 215. The D2 Curve has since been used by Reclamation, and accepted by Texas for close to an additional 40 years (from the early 1980s to the present). NM-CSMF ¶¶ 178, 185-87. This is classic acquiescence on the part of the United States and Texas. And the relief the United States now seeks—whether a blanket prohibition on all groundwater pumping in

southern New Mexico, or a prohibition on any part of groundwater pumping in EBID that is reflected in the D2 Curve—flies in the face of more than 80 years of Project operations, and more than 70 years of post-Compact operations.

## IV. THE UNITED STATES MISTAKENLY ARGUES THAT THE COMPACT REQUIRES AN INFLOW-OUTFLOW METHODOLOGY TO APPORTION THE WATER BELOW ELEPHANT BUTTE

The United States articulates a theory of the Compact's apportionment below Elephant Butte which, in some ways, accords with New Mexico's view: the "Compact . . . incorporates the operation of the Project to implement the apportionment below Elephant Butte while securing ongoing deliveries to Mexico" by making "'releases in accordance with irrigation demands'" so that "Texas *and the part of New Mexico below Elephant Butte* receive their apportionment." U.S. Br. 22 (quoting *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018)) (emphasis added). However, the United States makes a critical, flawed assumption in its view of the Compact, namely that "[t]he water apportioned by the Compact includes such return flows from the use of Project water, *undiminished by new water resource development after the States approved the Compact in 1938*." *Id.* at 25 (emphasis added). There is no such limitation in the plain language of the Compact. NM-EX 330, Compact.at Arts. III & IV. Upstream, the Compact used what is known as an inflow-outflow method to apportion the Rio Grande surface water. But below Elephant Butte Reservoir, Rio Grande surface water is instead equitably apportioned based on Project acreage. NM-CSMF ¶¶ 63, 96(a), 142; NM-EX 324, 1938 Downstream Contract; NM-EX 008, Lopez 2d Decl. ¶¶ 24, 41; U.S. Br. in Opp. to N.M. Mot. to Dismiss 28.

### A. The Compact Relies on Project Operations to Apportion Rio Grande Surface Water Below Elephant Butte Reservoir

The United States acknowledges that the Project effectuates the Compact apportionment to both New Mexico *and* Texas below Elephant Butte Reservoir, but then incorrectly argues that

the Compact prohibits "groundwater pumping that decreases the Project water supply and the apportioned river flows below Elephant Butte." U.S. Br. 1, 22, 25. Implicit in this argument is the idea that the Compact establishes an unspecified level of permitted depletions in the Lower Rio Grande. Accepting this argument would transform the apportionment below Elephant Butte into an inflow-outflow methodology that strictly prohibits *any* depletions to river flows. This is directly contrary to the Compact's plain language.

**1. Depletion Limits in Compacts Must Be Established by Clear Language**

The Court has stated that it "will not order relief inconsistent with the express terms of a compact, no matter what the equities of the circumstances might otherwise invite." *Alabama v. North Carolina*, 560 U.S. at 352 (quoting *New Jersey v. New York*, 523 U.S. 767, 811 (1998) and *Texas v. New Mexico,* 462 U.S. 554, 564 (1983) (quotation marks and brackets omitted)). A compact apportionment, once set, is therefore not open to reassessment. Based on this principle, Supreme Court precedent teaches that compact limits on depletions or consumption must be unambiguous.

For example, in New Mexico's Response to Texas, New Mexico draws the comparison to the Pecos River Compact, another Compact between these same two States. *See* N.M. Response to Tex. § 6(A). As explained in that Brief, the Pecos River Compact contains express language adopting a depletion limit:

> Except as stated in paragraph (f) of this Article, New Mexico shall not deplete by man's activities the flow of the Pecos River at the New Mexico-Texas state line below an amount which will give to Texas a quantity of water equivalent to that available to Texas under the 1947 condition.

*Pecos River Compact*, 63 Stat.159, 161 (Article III(a)) (1949) (emphasis added). *See also Kansas v. Colorado*, 514 U.S. 673, 683 (1995) (holding that "Kansas, in order to establish a Compact

violation based upon failure to obey the [Trinidad Reservoir] Operating Principles, was required to demonstrate that this failure resulted in a material depletion under Article IV-D").

In contrast, in *Montana v. Wyoming*, 563 U.S. 368 (2011), the Court considered a compact that lacked an express deletion limit. Instead, the operative language of the Yellowstone River Compact is found in Article V(A):

> Article V(A) of the Compact states that "[a]ppropriative rights to the beneficial uses of [water] . . . existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Montana claims that its pre-1950 appropriators' rights are not "continu[ing] to be enjoyed" because upstream pre-1950 appropriators in Wyoming have increased their consumption by switching from flood to sprinkler irrigation.

*Montana v. Wyoming*, 563 U.S. at 374. The Court rejected Montana's argument that this language included a depletion limit, and that the upstream State *could* increase its consumption occurring at the time of the Compact, so long as the chief water characteristics of the water rights involved are not changed. *Id*., at 377 ("so long as no additional water is diverted from the stream and the conserved water is used on the same acreage for the same agricultural purpose as before.").

Applying these principles to this case, a depletion limit must be clearly stated in a compact. Here, the Rio Grande Compact contains no clear provision that there is such a constraint, and the Court should decline to rewrite the Compact.

### 2. The States Rejected an Inflow-Outflow Methodology Below Elephant Butte Reservoir

An inflow-outflow method sets limits on depletions between two measurement points, creating a depletion cap in the intervening reach (subject to allowed debits and credits). The Rio Grande Compact uses a version of an inflow-outflow methodology in Articles III and IV, each of

which require flows at downstream points in amounts determined by flows at upstream points.[4] NM-CSMF ¶ 63; NM-EX 008, Lopez 2d Decl. ¶ 23. The Compact contains no language suggesting that the apportionment of water below Elephant Butte is an inflow-outflow apportionment, or is subject to a static depletion amount, and the Court is not free to read such a requirement into the Compact. *Alabama v. North Carolina*, 560 U.S. at 351-52; *Texas v. New Mexico*, 462 U.S. at 564.

Instead, the Compact directs that usable water in Project storage is to be released "in accordance with irrigation demands." NM-EX 330, Compact at Art. I(l). It also prescribes a "normal release" of 790,000 acre-feet. *Id.* at Art. VIII. Taken together, these provisions place boundaries on the Project's use and release of water. The Compact then relies, as the Court has recognized, on the incorporation of the Project and Project operations to equitably apportion surface water in the Lower Rio Grande. *Texas v. New Mexico*, 138 S. Ct. at 959. The Compact makes no distinction as to Project lands in New Mexico and Project lands in Texas, rather the Project has always been treated as a single unit that allocates an equal amount of water to each authorized Project acre. NM-CSMF ¶ 58; NM-EX 008, E. Lopez 2d Decl. ¶ 24.

If the compacting States had intended to apportion water below Elephant Butte on an inflow-outflow basis, they "could have done so as plainly as other compacts that do just that." *Montana v. Wyoming*, 563 U.S. at 388. Indeed, the drafters of the Compact could have dictated an inflow-outflow apportionment below Elephant Butte as plainly as they did for the San Luis Valley and Middle Rio Grande sections in Articles III and IV of the Compact, respectively. These articles contain clear and explicit tables setting downstream flow requirements in amounts dictated by upstream flows, subject to the system of credits and debits established in Article VI. The lack

[4] The delivery requirements in Articles III and IV are subject to the system of debits and credits established in Article VI.

of such a requirement for water delivered to Elephant Butte is too conspicuous to be inadvertent. *Cf. Jama v. Immigration & Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply"). The Compact's drafters chose not to use an inflow-outflow methodology for the apportionment south of Elephant Butte.

Below Elephant Butte, the Compact incorporates the Project, and Project water is allocated based on the percentages set out in the 1938 Downstream Contract. NM-CSMF ¶ 142; NM-EX 324, 1938 Downstream Contract. This requires the allocation of Project water on an equal basis to each Project acre. NM-CSMF ¶ 58; NM-EX 008, E. Lopez 2d Decl. ¶¶ 23-24; NM-CSMF ¶ 154; NM-EX 511, Filiberto Cortez, Settlement of Litigation 4. The 1938 Downstream Contract provides, in pertinent part, that in times of shortage, "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 [EPCWID], and 88/155 to the lands within [EBID]." NM-CSMF ¶ 142; NM-EX 324, 1938 Downstream Contract (emphasis added).

Further, Article I(*l*) of the Compact refers to a volume of water released for beneficial use—that is, "irrigation demands"—which is terminology with a specific and accepted meaning relating to supply (not to consumption or depletion). *Montana v. Wyoming*, 563 U.S. at 387 ("The amount of water put to 'beneficial use' has never been defined by net water consumption. The quantity of water 'beneficially used' in irrigation, for example, has always included some measure of necessary loss such as runoff, evaporation, deep percolation, leakage, and seepage . . . ."). This reading of the Compact finds further support in Article VIII, which establishes 790,000 acre-feet as a "normal release." A release of water supply in no way implies, on its own, a depletion limit on the released water, and the Compact contains no other terms implying such a limit on any water

released as part of a "normal release." Taken together, the 1938 Downstream Contract and Article I(*l*) of the Compact plainly direct a division of Project Supply (*i.e.,* Project deliveries)—not a division of, or cap on, depletions.

The negotiation history of the Compact confirms its plain language. In 1929, the States executed a temporary compact to limit development on the river while the parties negotiated a final compact. NM-CSMF ¶ 18, NM-EX 316, Rio Grande Compact Commission, First Annual Report of the Rio Grande Compact Commission, 1-10 (1931) (containing the 1929 Temporary Compact). The 1929 Temporary Compact contained a clear prohibition on increased depletions:

> New Mexico agrees with Texas, with the understanding that prior vested rights above and below Elephant Butte Reservoir will never be impaired hereby, that she will not cause or suffer the water supply of the Elephant Butte Reservoir to be impaired *by new or increased diversion or storage within the limits of New Mexico unless and until such depletion is offset by increase of drainage return*.

*Id.* at Art. XII (emphasis added). This language from the 1929 Temporary Compact, or similar language, was not carried forward to the 1938 Compact. The Compact makes no mention of "new or increased diversion" within New Mexico, or of new depletions being "offset by increase of drainage return." *Compare id. with* NM EX-330, Compact. Instead, the drafters chose to apportion water below Elephant Butte "in accordance with irrigation demands," based on the total acreage in each State, and limited to a normal release of Project water of 790,000 acre-feet. NM-EX 330, Compact at Arts. I(l), VII; *see also* NM-CSMF ¶¶ 21, 68.

Correspondence from the Compact's drafters, specifically Texas commissioner Frank Clayton, also confirms this understanding. In a letter from Commissioner Clayton to a Texas attorney who had asked him why the Compact did not address the relative rights of New Mexico and Texas in the area below Elephant Butte, Mr. Clayton responded that because the United States operated the Project, New Mexico could not be expected to guarantee delivery of any fixed amount

of water to Texas. NM-CSMF ¶¶ 75-76; NM-EX 328, Letter from Frank B. Clayton to Sawnie B. Smith (Oct. 4, 1938). Clayton pointed out that the nature of the border between Texas and New Mexico, including the proliferation of ditches crossing and re-crossing the border, would make measurement of deliveries extremely difficult, if not impossible. *Id*. Clayton also said that:

> [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 to the areas involved in the two States*. By virtue of the contract recently executed, the total area is "frozen" at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for the Elephant Butte District, and 67,000 acres for the El Paso County Water Improvement District No. 1, with a "cushion" of three per cent for each figure.

*Id.* (emphasis added). As Commissioner Clayton's explanation makes clear, the Compact's drafters chose to address limitations on water use below Elephant Butte by "fr[eezing]" the total Project acreage, but otherwise imposed no affirmative limitations on depletions. A few weeks later, in a separate letter, Commissioner Clayton elaborated:

> [B]y reason of the irregular contour of the boundary between the two States and other physical facts, it is practically impossible to measure the water passing the state line at the various places in the river channel and in the canals, laterals, and drains. Moreover, *since the source of supply for all the 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 line*, since this amount is wholly dependent on the releases from the reservoir and the reservoir is under the control of an entirely independent agency: the Bureau of Reclamation.

NM-CSMF ¶ 77; NM-EX 329, Letter from Frank B. Clayton to C.S. Clark (Oct. 16, 1938) (emphasis added). This communication makes clear Texas's understanding, in 1938, that Texas

had no "guarantee" from New Mexico of any "certain amount of water to pass the Texas line." *Id*. In Compact terms, this meant that Texas understood there was no depletion limit.

New Mexico is not contending that the Compact allows New Mexico or Texas to freely deplete Project releases. This is true because the Project acreage was frozen in each state. NM-CSMF ¶¶ 76-77, 140. As a result, there is a natural limit to the water that can be consumed on that acreage. In the meantime, it is clear that the United States is not correct that all groundwater pumping that "intercepts the flow of the Rio Grande or reduces the return of water to the Rio Grande within the Project" violates the Compact. U.S. Br. 29.

### B. By Seeking to Curtail Groundwater Pumping in New Mexico, the United States Ignores Principles of Conjunctive Use and Western Water Administration

#### 1. To Constitute an Injury, Depletions Must Reduce Project Deliveries to Texas

The United States seeks to enjoin New Mexico from any groundwater pumping or other water uses in the Lower Rio Grande ("LRG") that "intercept the flow of the Rio Grande or intercept[] or reduce[] the return of water to the Rio Grande within the Project." U.S. Br. 29. Not only does this request incorrectly assume the existence of a depletion limit, it also fundamentally misunderstands western water administration.

It has long been a central goal of water administration in New Mexico to maximize beneficial use of water. The New Mexico Supreme Court has made this clear:

> [W]ater was placed in a unique category in our Constitution—something that cannot be said of lumbering, coal mining, or any other element or industry. The reason for this is of course too apparent to require elaboration. Our entire state has only enough water to supply its most urgent needs. Water conservation and preservation is of utmost importance. *Its utilization for maximum benefits is a requirement second to none, not only for progress, but for survival.*

*State ex rel. Martinez v. City of Las Vegas*, 89 P.3d 47, 59 (N.M. 2004) (quoting *Kaiser Steel Corp. v. W.S. Ranch Co.*, 467 P.2d 986, 989 (N.M. 1970) (emphasis added)).

This policy is also supported by Article XVI, section 2 of the New Mexico Constitution, which provides:

> The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public and to be *subject to appropriation for beneficial use*, in accordance with the laws of the state. (emphasis added).

*See also Yeo v. Tweedy*, 286 P. 970 (N.M. 1929) (applying section 2 to groundwater). The thrust of the provision is to make it a bedrock principle of New Mexico law that the public waters of groundwater aquifers are subject to appropriation and ensure that water is used as efficiently as possible to maximize limited supplies.

New Mexico has a long and strong tradition of the coordination of surface and groundwater. *See, e.g. Templeton v. Pecos Valley Artesian Conservancy Dist.*, 332 P.2d 465 (N.M. 1958). This is true in the Lower Rio Grande in New Mexico were hundreds of wells and 57% of Project surface water serve a thriving agricultural community and a growing metropolitan area. *See* NM-EX 006, Barroll 2d Decl. ¶ 28 ("it is likely farmers will go out of business if they are unable to pump groundwater"); *see also* NM-CSMF ¶¶ 208-210, 224. That water is subject to the conjunctive use limits set by the New Mexico Adjudication Court on surface and groundwater use. NM-CSMF ¶ 301-302.

Not all well pumping harms senior surface water rights. Rather, there must be an actual injury to the senior right. *See, e.g.*, David H. Getches, Water Law in a Nutshell, at 110 (2009) ("A senior cannot enforce a water right if a junior can prove that the senior would not put the water to a beneficial use . . . ."); *Worley v. U.S. Borax & Chem. Corp.*, 428 P.2d 651, 654 (N.M. 1967) (applying the doctrine of prior appropriation and holding that a downstream senior appropriator does not have a right to demand delivery of water that he cannot put to beneficial use). While groundwater pumping may cause depletions in some circumstances, historically, "Reclamation has

always been able to fulfill the orders made by the Districts." NM-EX 006, Barroll 2d Decl. ¶ 13. In addition, the amount of water that is depleted depends on the timing and location of pumping. *Id*. ¶ 34. The impact of those stream depletions, in turn "depends on a number of factors, including hydrologic conditions and river conditions." *Id*. ¶ 36; *see also* NM-CSMF ¶ 244.

The United States seeks to short-circuit this necessary analysis by contending that *all* post-1938 pumping in New Mexico necessarily injures the Project. In essence, the United States would create a bright line rule that depletions to Rio Grande surface water violates the Compact. This is not correct. Instead, whether each of the States has received its apportionment depends on whether the water users have received the water that the ordered to satisfy "irrigation demands."

New Mexico does not dispute that groundwater pumping, throughout the Project (including in Texas), has the potential to impact surface water flows under certain conditions, and that this might mean that additional water needs to be released from Project storage to satisfy District water orders. *See e.g.*, NM-EX 006, Barroll 2d Decl. at ¶¶ 36, 37; NM-CSMF ¶ 245. However, there can be no impact in full supply years, when the Districts have available to them a full allocation of Project water. *See generally* N.M. Full Supply Br.; U.S. Br. 31-32; NM-EX 012, G. Sullivan Decl. at ¶ 25; *see also* NM-CSMF ¶¶ 246-47. It also has little or no practical impact in those partial supply years when EPCWID elects not to order all of the water allocated to it—in such years, EPCWID (Texas) leaves water on the table. *See* NM-CSMF ¶¶ 246-47. And the Project does not release or charge for water in winter, so any pumping impacts that occur outside the irrigation season when the Project is not delivering water do not harm the Project or its water users, and do not amount to a Compact violation. NM-EX 012, G. Sullivan Decl. at ¶ 25.

River depletions in advance of a surface water shortage *might* reduce Project allocations and Project deliveries in subsequent partial supply years, but any reduction in allocation would not

necessarily equal river depletions. NM-EX 006, Barroll 2d Decl. ¶ 39; *see* NM-CSMF ¶ 246. To rise to the level of an injury, any impact caused by groundwater pumping, therefore, needs to be quantifiable in partial supply years before there is any injury to Texas. NM-CSMF ¶ 246. The United States makes no effort to establish this material fact, and its Motion should be denied.

**2. The Project Does Not Include a Groundwater Right**

The United States alleges that "groundwater is just Project surface water diverted by other means," and that groundwater pumping depletes Rio Grande surface flows, which adversely impacts "Project supply, Project deliveries, and Project efficiency." U.S. Br. 29, 30, 31, 33, 37. The United States has misconceived the matter.

*First*, the Compact does not apportion groundwater. The Compact apportions "the waters of the Rio Grande above Fort Quitman, Texas." NM-EX, 330, Compact, Preamble. Groundwater is not part of the Project. The United States has admitted as much in the FEIS for the 2008 Operating Agreement, conceding that "[g]roundwater pumping … is not directly a part of [Rio Grande Project ("RGP")] operations." NM-EX 519, FEIS, at 26. And the New Mexico Adjudication Court specifically rejected this claim and found that the Project does not include groundwater. NM-EX 535, Order Granting the States' Motion to Dismiss the United States' Claims to Groundwater and Denying the United States' Claims to Groundwater and Denying the United States' Motion for Summary Judgment, *New Mexico v. Elephant Butte Irr. Dist.*, No. CV-96-88 (Stream System Issue SS-97-104), 6, 8 (N.M. 3d Jud. Dist. Ct. Aug. 16, 2012); *see also* NM-CSMF ¶¶ 9-11.

*Second*, groundwater is not "just Project surface water," nor is groundwater merely "a change in method, time and place of diversion" of Project water as the United States suggests. U.S. Br. 10, ¶ 45. As discussed above, it is also a misleading oversimplification to allege that *all*

groundwater pumping adversely impacts Project supply, deliveries and Project efficiency. U.S. Br. 37, 25, 26.

*Third*, as described, depletion of river flows in full supply years has no effect on either the Project allocation to the Districts or the water delivered to the Districts in those years. NM-CSMF ¶¶ 244, 246-47. Significantly, there has never been a year in which EPCWID (Texas) has sought more Project water than its annual allocation, on any basis, or a year in which Reclamation has been unable to deliver all of the water EPCWID (Texas) ordered. NM-EX 006, Barroll 2d Decl. at ¶¶ 13, 40. There is therefore no interference to the United States Compact deliveries to Texas. The United States' claim to relief is overstated.

## V. THE UNITED STATES IS NOT ENTITLED TO INJUNCTIVE RELIEF

The relief sought by the United States is inappropriate and unjustified. The United States fails to even articulate the correct standard, let alone show "irreparable injury"; that the "remedies available at law . . . are inadequate;" that the balance of the equities favors an injunction; that "the public interest would not be disserved by a permanent injunction;" and that there is a "cognizable danger of recurrent violation." *eBay*, 547 U.S. at 391; *Kansas*, 574 U.S. at 466. An injunction, particularly enjoining a State is "exceptional relief." *Kansas*, 574 U.S. at 448. "An injunction is a matter of equitable discretion," and it does not follow 'as a matter of course' even from a "success on the merits." *Winter*, 555 U.S. at 32. The United States has failed to meet these stringent requirements.

### A. Material Issues of Fact Preclude Summary Judgment

The United States is not entitled to relief at this stage of proceedings, because there are genuine issues of material fact in dispute. See Fed. R. Civ. P. 56(a). These include material facts relating to whether there has been any violation of the Compact, and if there has been a violation,

how that might be quantified, and remedied. These factual issues must be resolved at trial, and summary judgment would be inappropriate at this time.

**B. The United States' Request for an Injunction is Premature at Best**

In addition to other flaws discussed herein, the United States' claim for relief is also premature. The United States admits as much when it states that "the scope and nature of" the relief it seeks needs "to be determined at trial." U.S. Br. 33. In fact, the United States concedes no less than three times that (1) "the extent of actual and potential harm to the Project may require resolution at trial," *id.* at 34, (2) "the scope of the" relief it seeks needs "to be determined by trial at a later date," *id.* at 2, and (3) "[t]he scope of the injunction" it seeks "should be tailored to the extent of the violation and injury to the Project and to Texas, accounting for any mitigating considerations that New Mexico may proffer. These are matters appropriate for trial," *id.* at 40. The United States has never even raised the subject of a preliminary injunction to preserve the status quo. It is, therefore, surprising that the United States would pursue permanent relief at this preliminary stage of the proceedings.

No Compact violation by Texas or New Mexico has yet been proven, nor any injury established. The Unites States requests relief before liability is proven, even while a significant number of material facts are still in dispute, including New Mexico's allegation that the 2008 Operating Agreement deprives New Mexico of its equitable Compact apportionment. *See* NM-CMSF ¶¶ 182-183, 187-189, 196. The proper course is for the evidence to be presented at trial.

**C. The United States Seeks to Enjoin the Very Conduct it Caused**

If groundwater pumping has increased in EBID since 2006, New Mexico's experts will show that this is a direct result of the 2008 Operating Agreement starving southern New Mexico of its Compact apportionment of Project surface water. NM-CMSF ¶¶ 250-52; NM-EX 006, Barroll 2d Decl. a¶¶ 64, 67-68. As explained more fully above, Project operations since 2005 have

set in motion an unsustainable cycle. Because they have been deprived of surface water, EBID farmers need to pump more groundwater to irrigate their crops, which depletes New Mexico's groundwater reserves. NM-CSMF ¶ 226. To the extent that this groundwater pumping depletes Project Supply—a question of material fact in dispute—the United States then allots EBID less Project surface water in subsequent years, which exacerbates and perpetuates this cycle. *Id*.; NM-EX 006, Barroll 2d Decl. at ¶ 67. Before 2006, in spill and full Project Supply years, New Mexico's groundwater reserves were able to replenish from seepage into the aquifer. NM-CSMF ¶ 250. Now, with an insufficient and inequitable amount of Project surface water available to EBID, this replenishment is not possible. NM-CSMF ¶¶ 251-56. In its motion, the United States seeks to require New Mexico to prohibit its farmers from pumping New Mexico groundwater. If successful, New Mexico farmers will have little surface water, and no groundwater, to irrigate their crops. This would be the true violation of the Compact. In short, the United States is seeking to enjoin the groundwater pumping it necessitated by its change of Project operations.

It is also remarkable that the United States is seeking this relief given that (1) Reclamation has historically actively encouraged groundwater pumping throughout the Project, including in EBID (NM-CSMF ¶¶ 208-10), and (2) the D2 methodology proposed by Reclamation and used to determine the Project allocation to EPCWID (Texas) reflects all historical groundwater pumping occurring throughout the Project, including in New Mexico (NM-CSMF ¶¶ 214-215, 217). Groundwater pumping on Project acreage is not *per se* a Compact violation. The conduct and course of performance of the United States, Texas and New Mexico for the last 60 years confirms this.

Even assuming that there has been an increase in groundwater pumping in EBID since 2006, and assuming that this has impacted Project Supply, the cure should be directed at the

disease, not at the symptom. The change in Project operations in 2006, culminating in the 2008 OA has reduced the Project surface water supply to New Mexico below Elephant Butte. This is a Compact violation which is causing grave injury to New Mexico.

### D. The United States Has Failed to Establish a Cognizable Danger of a Recurrent Violation

New Mexico strongly disagrees that it has violated the Compact. But beyond that dispute, there is no "cognizable danger" that New Mexico will fail to comply with an order of this Court. The United States has failed to present evidence to meet its heavy burden, and the Motion should be denied on that basis alone. *Kansas*, 574 U.S. at 466.

The Court has denied requests for injunctive relief in two recent interstate water compact disputes. *See Montana v. Wyoming*, 138 S.Ct. 758 (2018) (adopting Final Report of the Special Master rejecting injunctive relief); *Kansas v. Nebraska*, 574 U.S. at 466-67. In both cases, the Court determined the existence and scope of liability under the compacts before opining on the requests for relief. In *Montana v. Wyoming*, the Court adopted the Special Master's Final Report denying Montana's request to enjoin Wyoming to comply with the Yellowstone River Compact. *See Montana v. Wyoming*, 138 S.Ct. at 758; *Montana v. Wyoming*, No. 137 Orig., Final Report of the Special Master at 121. Liability in that case was determined after multiple summary judgment motions and a trial limited to "whether Wyoming violated the [c]ompact and, if so, the size of any violation." *Id.* at 7. Only after liability was determined did the Court remand the case back to the Special Master to consider appropriate relief. *Id.* at 9 (citing *Montana v. Wyoming*, 136 S. Ct. 1034 (2016)). The Special Master specifically considered the issue of "cognizable danger of recurrent violation" in that case and denied injunctive relief. The Court affirmed. *Montana*, 138 S. Ct. at 758.

In *Kansas v. Nebraska*, the Court also denied a request for injunctive relief. 574 U.S. at 451, 466. In that case, the Court resolved the issues of compact interpretation, and the states entered into negotiations, which resulted in "detailed mechanisms to promote compliance with the Compact's terms." *Id.* at 451. The states subsequently returned to the Court after Nebraska violated the terms of the settlement. *Id.* at 451-52. There, as here, the state seeking an injunction (Kansas) was unable to show a "cognizable danger" of repeated violations in the future. *Id.* at 466. Even after the trial had established violations of the Court's decree enforcing the Republican River Compact, the Court accepted the assurances of Nebraska that it would comply in the future. For similar reasons, no injunction is called for here.

As the Special Master explained in *Montana v. Wyoming*, "[a] clear and specific decree . . . can reduce any uncertainty that [a] state has regarding its obligations, decreasing the chances that the upstream state will violate the compact . . ." *Montana v. Wyoming*, No. 137 Orig., Final Report of the Special Master at 56. If Texas, New Mexico, or the United States is directed to take actions, they will almost certainly comply. For New Mexico's part, State Engineer John D'Antonio has testified that "the State of New Mexico has a robust and comprehensive system for water administration and enforcement in the LRG. New Mexico has successfully employed this system to ensure compliance [with] the Compact and stands ready to utilize that system to vigorously enforce the orders of the Court in this case, whatever those orders may be." NM-EX 007, D'Antonio 2d Decl. ¶ 59.

Furthermore, the United States not only accuses New Mexico of a Compact violation, but it also presumes that it is entitled to dictate how New Mexico must remedy the supposed violation. This misapprehends the Court's historic deference to states with respect to how they should comply with interstate compact obligations. One recent example of this is *Kansas v. Nebraska*,

No. 126. *Compare Kansas v. Nebraska*, No. 126, Orig., Petition Prayer for Relief, at 12, ¶ 6 (requesting that Nebraska be "ordered to reduce groundwater pumping, or to take other specific and equivalent actions") *with* the Decree in the same case, 575 U.S. 134 (2015), (decreeing damages for violation of the Republican River Compact, but without ordering the specific actions by which compliance in the future should be achieved). These cases stand for the proposition that the Court should proceed by: (1) giving the Parties clear guidance as to their obligations under the Compact, (2) determine the scope of liability (if any) for past violations, and (3) give the Parties an opportunity to comply before entertaining a request for injunctive relief.

**E. The Balance of Hardships Strongly Weigh in Favor of Denial**

The balance of the equities (or hardships) weighs strongly against the United States.

The harms to the Project would be minimal. It is undisputed that the total amount of irrigated acreage in EBID has decreased in recent decades from a high of over 90,000 acres during the 1950s to approximately 75,000 acres today. *See* NM-CSMF ¶¶ 113-114; NM-EX 006, Barroll 2d Decl. at ¶ 24. When the total amount of irrigation water applied in the LRG is averaged over the entire EBID authorized acreage of 90,640, the result is 3.4 AF per acre of assessed or authorized Project acreage. This value is consistent with the irrigation demand per acre (3.5 AF per acre) used in a 1961 analysis of water use during the 1950's drought, and the estimate of 3.3 AF per acre made in 1947. This shows that the total application of irrigation water in New Mexico has not increased in more than 60 years. *See* NM-CSMF ¶¶ 113-114; NM-EX 432, Narenda N. Gunaji, Engineering Experiment Station, New Mexico State University, Groundwater Conditions in the Elephant Butte Irrigation District, at 3, 19 (1961) (reporting per-acre demand figures during the 1950s); NM-EX 343, C.S. Conover, Preliminary Memorandum on Groundwater Supplies for Elephant Butte Irrigation District, New Mexico, at 6 (Sept. 1947) (reporting demand figures for the 1940s). The available evidence also suggests that the total application of irrigation water in

EBID, including both surface water and groundwater sources, has not increased since the 1950s, and depletions associated with irrigation within EBID have not increased since the 1950s. NM-CSMF ¶ 114; NM-EX 006, Barroll 2d Decl. at ¶ 25. Irrigation well pumping levels in EBID in recent years are also consistent with irrigation well pumping estimated during the 1950's drought. NM-CSMF ¶ 227; NM-EX 006, Barroll 2d Decl. at ¶ 26. Current levels of irrigation well pumping in New Mexico are in part due to drought conditions, and in part due to the change in Project operations in 2006. NM-CSMF ¶¶ 226, 250-51. But still, irrigation well pumping in EBID in recent low-supply years is consistent with that in the drought of the 1950s. NM-CSMF ¶ 227.

In contrast, the United States' request for an injunction would impose extreme hardship on New Mexico. A large portion of New Mexico's economy below Elephant Butte Reservoir is supported by groundwater resources. The City of Las Cruces, New Mexico's second largest municipality and a regional hub, is located in the Rio Grande Basin south of Elephant Butte. Las Cruces had a population of only 8,000 when the Compact was executed but now has a population of more than 100,000. Las Cruces relies heavily on groundwater supplies both within and outside of the Rio Grande Basin. These groundwater supplies are offset by several sources that ensure that Las Cruces' groundwater pumping does not impair the Project. NM-CSMF ¶¶ 235-36, 262; NM-EX 013, Wilson Decl. at ¶ 6. An injunction would impose harsh impacts on Las Cruces and its citizens.

In addition, an injunction would severely impact New Mexico's agricultural economy south of Elephant Butte, with compounding effects on the rest of this region. Pecan production in New Mexico is centered in the Lower Rio Grande and is New Mexico's number one cash crop. NM-EX 010, Serrano Decl. at ¶ 8. Chile and onion production in New Mexico (primarily in Lower Rio Grande) is in the top five for total production in the nation. *Id.* With its regional hub and one

of its primary economic industries crippled, southern New Mexico would be devastated by an injunction prohibiting groundwater pumping.

These hardships far outweigh any alleged hardships to the United States. Indeed, the United States has not even asserted any. The Motion should be denied.

## VI. NEW MEXICO'S ADMINISTRATIVE STRUCTURE BELOW ELEPHANT BUTTE IS CONSISTENT WITH THE COMPACT AND IS SUFFICIENT TO ENSURE COMPACT COMPLIANCE

The United States argues that New Mexico's administration of water, particularly groundwater in the Lower Rio Grande, has been minimal and ineffective and, therefore, an injunction is justified. U.S. Br. at 34. The United States ignores New Mexico's robust administrative structure developed over several decades, which is in stark contrast to the lack of effective administration in Texas.

### A. New Mexico Has the Administrative Structure in Place to Administer Groundwater in Compliance with the Compact

The New Mexico State Engineer has "broad powers" to administer water and water rights throughout the state of New Mexico. *Tri-State Generation & Transmission Ass'n v. D'Antonio*, 289 P.3d 1232, 1239, 1241 (N.M. 2012) (construing N.M.S.A. 1978 § 72-2-1); NM-EX 007, D'Antonio 2d Decl. at ¶¶ 4, 8. Among other things, the New Mexico Office of the State Engineer (1) requires permits for all new surface water appropriations, (2) requires permits for all new groundwater appropriations in declared groundwater basins,[5] (3) enforces water rights and prevents waste and excessive or illegal use, (4) prepares hydrographic surveys to support water rights adjudications, and (5) can order metering of all surface and groundwater diversions. NM-EX 007, D'Antonio 2d Decl. at ¶ 5(a)-(e). Additionally, New Mexico's Interstate Stream

[5] All known shallow groundwater basins in New Mexico, including the LRG Underground Water Basin, have been declared. NM-EX 007, D'Antonio 2d Decl. at ¶ 4.

Commission assures significant management and technical support for the eight (8) compacts to which New Mexico is a party. NM-EX 009, Schmidt-Petersen 2d Decl. at ¶¶ 4-22. The Interstate Stream Commission has authority to protest water rights applications in New Mexico which it deems have the potential to affect New Mexico's compact obligations. *Id*. ¶¶ 4-11. This serves as an additional protection to ensure New Mexico stays in compliance with its interstate compacts, including the Rio Grande Compact. *Id*. ¶¶ 5-6.

The administrative actions New Mexico has taken are consistent with the Compact's apportionment of water in the Lower Rio Grande based on irrigation demands. Pumping in excess of irrigation demands is curtailed in New Mexico. NM-EX 010, Serrano Decl. at ¶¶ 22-25. Should the Court determine that additional or different administration of water uses in the Lower Rio Grande is necessary to comply with the Compact, New Mexico has the regulatory structure in place to undertake such administration, including the ability to respond to calls, enforce priorities, and take any other action necessary to comply. NM-EX 007, D'Antonio 2d Decl. ¶ 59.

### B. The New Mexico State Engineer Has Proactively Expanded the Administrative Structure in the Lower Rio Grande to a Support Sustainable Water Supply

As previously discussed, groundwater pumping throughout the Project became a necessity in the late 1940s through the droughts of the 1950s, and continued through to the present during water short years. NM-CSMF ¶ 208-211, 223. Nonetheless, in 1980 and 1982, the New Mexico State Engineer acted proactively to declare the Lower Rio Grande Underground Water basin.[6] NM-CSMF ¶ 219; NM-EX 007, D'Antonio 2d Decl. ¶ 15; NM-EX 006, Barroll 2d Decl. ¶ 78. He did so even though neither the United States nor Texas had complained to New Mexico about any adverse impact of groundwater pumping at that time. NM-EX 007, D'Antonio 2d Decl. ¶¶ 14-15.

[6] The State Engineer's 1980 order declared the Mesilla Bolson as part of the basin, while the 1982 order added the Rincon Bolson to the basin. NM-EX 006, Barroll 2d Decl. ¶ 77.

Texas protested this decision. NM-CSMF ¶ 216; NM-EX 418, Transcript (Mar. 25, 1982). Since the declaration of the basin, no new depletions from groundwater pumping are allowed unless they are fully offset. NM-CSMF ¶ 220; NM-EX 007, D'Antonio 2d Decl. ¶ 19; NM-EX 006, Barroll 2d Decl. ¶ 78.

Shortly thereafter, New Mexico initiated the adjudication of water rights in the Lower Rio Grande to determine relative rights and priorities in this area and facilitate administration in the basin.[7] *New Mexico v. Elephant Butte Irrigation Dist.*, No. D-307-CV-96-888 (N.M. 3d Jud. Dist. Sept. 24, 1996) ("LRG Adjudication"); NM-CSMF ¶ 301; NM-EX 007, D'Antonio 2d Decl. ¶ 30. As part of the LRG Adjudication, the Office of the State Engineer has conducted hydrographic surveys of the entire basin to provide detailed and accurate information regarding water uses in the area. NM-CSMF ¶ 301; NM-EX 007, D'Antonio 2d Decl. ¶ 31; NM-EX 006, Barroll 2d Decl. ¶ 76.

In 1999, the New Mexico State Engineer also issued the Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications ("MVAA Guidelines"). NM-EX 007, D'Antonio 2d Decl. ¶ 22; *see* MVAA Guidelines at TX_MSJ_001243-TX_MSJ_001266. The MVAA Guidelines require local impairment analyses and calculation of depletions for all new permit applications, establishing more stringent water use limitations in a "High Impact Area" consisting of the Rio Grande Alluvium and any area within one mile of a surface water source. NM-EX 007, D'Antonio 2d Decl. ¶ 22.

When the current drought hit in the early 2000s, New Mexico took additional action to manage water use. In 2003, the New Mexico Legislature passed a statute authorizing the State

[7] As the Tenth Circuit recounted in *United States v. City of Las Cruces*, 289 F.3d 1170, 1177 (10th Cir. 2002), the United States repeatedly tried to evade jurisdiction in the New Mexico adjudication court, despite the clear mandate in the Reclamation Act requiring that the United States to obtain and manage water rights pursuant to *state* law, and participate in state water right adjudications. 289 F.3d at 1177-79 (citing 43 U.S.C. § 383 and § 666).

Engineer to administer water rights in advance of a final adjudication, and to adopt regulations implementing such administration. NM-CSMF ¶ 296; NMSA. § 72-2-9.1; NM-EX 007, D'Antonio 2d Decl. ¶ 38. In 2004, the State Engineer promulgated Active Water Resource Management ("AWRM") Framework Regulations. NM-EX 007, J. D'Antonio 2d Decl. at ¶ 39. In addition to confirming the State Engineer's preexisting authority to conduct priority administration, the AWRM Framework Regulations provide the authority to conduct alternative methods of administration statewide. NM-CSMF ¶ 297; NM-EX 007, D'Antonio 2d Decl. ¶ 40.

The Office of the State Engineer proceeded to draft district-specific AWRM regulations ("DSRs") for the Lower Rio Grande, which it published for public comment in 2006. NM-CSMF ¶ 296; NM-EX 007, D'Antonio 2d Decl. ¶ 45. At the same time, the State Engineer ordered that all wells in the Lower Rio Grande be equipped with a meter to monitor pumping volumes, and that meter readings be submitted regularly to the State Engineer. NM-CSMF ¶ 298; NM-007, D'Antonio 2d Decl. ¶ 44. The State Engineer also appointed a water master to help implement and enforce these measures. NM-CSMF ¶ 303; NM-EX 007, D'Antonio 2d Decl. ¶ 41. In his Declaration, Water Master Ryan Serrano describes the numerous activities he and his team take to administer, measure, and enforce water use in the Lower Rio Grande in New Mexico on a daily basis. NM-EX 010, Serrano Decl. ¶¶ 10-34.

The United States argues that it would take "years" for New Mexico to enforce restrictions on groundwater pumping in the Lower Rio Grande. U.S. Br. 36. The only evidence the United States offers in support of this claim is deposition testimony speculating that, for New Mexico to *curtail* well pumping in the Lower Rio Grande, it would take "months" to conduct an investigation and to make the necessary pumping reductions. U.S. Br. 35 (quoting Barroll 30(b)(6) Tr. 47:7-16). However, the New Mexico State Engineer confirms that in the event of a "priority call" the

OSE would promptly take action and effect timely and appropriate resolutions. NM-CSMF ¶ 299; see also NM-EX 226, Rule 30(b)(6) Dep. of New Mexico by and through Barroll (errata at 47:9), in which Dr. Barroll's corrects her testimony. To date, there has never been a call in the Lower Rio Grande. NM-EX 007, D'Antonio 2d Decl. ¶ 53.

Should any water rights owner in the LRG request a priority call due to water shortage, the State Engineer would promptly take the following actions:

a) Investigate the validity and cause of the claimed shortage, and

b) Determine appropriate short-term and long-term actions.

Potential responses include, but are not limited to, release of storage water, curtailment of junior surface water diversions, curtailment of junior groundwater rights, and the possibility of a number of agreed-upon alternatives to strict priority administration. NM-EX 007, D'Antonio 2d Decl. ¶ 53.

To date, the United States has not identified any actual Compact violations by New Mexico, it only speculates as to hypothetical future violations. This is not sufficient. The bottom line is that, after the Court makes a determination as to Compact apportionments in the Lower Rio Grande, New Mexico will be able to swiftly ensure that it complies with that apportionment. Until the Court makes that determination, any order that New Mexico curtail pumping in the Lower Rio Grande—particularly because New Mexico has been deprived of its equitable apportionment of surface water since 2008—is entirely premature.

### C. Texas Lacks Any Effective Groundwater Administration in the Lower Rio Grande

It is important to contrast the many administrative steps New Mexico has taken in the Lower Rio Grande with the lack of any administration of groundwater in Texas. Although Texas

has adjudicated surface water rights in the Project area, it conducts only minimal surface water administration, and exercises no control over groundwater in Texas whatsoever.

As explained by the Texas Supreme Court, "[e]fforts to pass a comprehensive, statewide, groundwater management scheme [in Texas] ha[ve] repeatedly failed." *Edwards Aquifer Auth. v. Day*, 369 S.W.3d 814, 833 (Tex. 2012). Instead, Texas follows the rule of capture in determining ownership, use and control of groundwater. Under this rule, landowners have the legal right to pump unlimited quantities of water beneath their land, without liability to surrounding landowners. *E.g.*, *Houston & T.C. Ry. V. East*, 81 S.W. 279 (1904), *aff'd by Sipriano v. Great Spring Waters of America*, 1 S.W.3d 75 (Tex. 1999). More specifically, the law of capture gives Texas landowners the unlimited right to capture groundwater, the unlimited right to use the groundwater, and the unlimited right to sell the groundwater.

In recent years, Texas has enacted provisions that allow groundwater conservation districts to regulate groundwater. However, landowners must be compensated for groundwater regulation that negatively affects them. *Edwards Aquifer*, 369 S.W.3d at 838. More importantly, "[t]he rule of capture exists unmodified in areas without groundwater conservation districts." Petrossian, R., George, P., Bradley, R.G., Backhouse, S., Boghici, R., Olden, M.O., *Transborder Aquifers: A Summary of Aquifer Properties, Policies, and Planning Approaches for Texas, Surrounding States, and Mexico*, Texas Water Development Board, Groundwater Management Report 17-01 (April 2017), available online at http://www.twdb.texas.gov/groundwater/docs/GMR_reports/GMR17-01_TransborderAquifers.pdf . Unfortunately, even though El Paso County has been designated as a priority groundwater management area, NM-EX 446, *Priority Groundwater Management Areas and Groundwater Conservation Districts*, Report to the 85th Texas Legislature at Figure 2, page

23 (January 2017), no groundwater conservation district has been designated in the applicable areas of El Paso and Hudspeth Counties. *Id*. at 17; *Transborder Aquifers* at 39.

This lack of regulation has led to a proliferation of groundwater wells in Texas. *See, e.g.*, Water Data Interactive provided by the Texas Water Development Board, available at https://www2.twdb.texas.gov/apps/WaterDataInteractive/GroundWaterDataViewer[8]; *see* NM-EX 012, Sullivan Decl. ¶¶ 22, 55 and accompanying figures. The new wells include hundreds of wells the City of El Paso has relied on for decades as its primary source of municipal supply. NM-EX 012, Sullivan Decl. ¶ 21. The resulting over-extraction of groundwater in Texas has led to severe declines in groundwater levels in and around the City of El Paso, changing the Rio Grande in Texas from a gaining stream to a losing stream and virtually eliminating Project return flows that formerly were generated and used within Texas to satisfy Project demand. *Id*.; NM-EX 006, Barroll 2d Decl. ¶¶ 35, 42. Texas has also allowed the extraction of groundwater from the Mesilla Bolson aquifer. This pumping increases depletions to Rio Grande surface water that flows into the El Paso Valley—depletions for which the United Sates now seeks to hold New Mexico liable. NM-EX 006, Barroll 2d Decl. ¶ 31.

These actions not only harm Texas, but also New Mexico. Because EPCWID is no longer charged for the use of return flows (including municipal return flows from Project supplies), EPCWID now relies more heavily on reservoir water to meet its demands, increasing the draw on the reservoir and depleting the common storage pool used to allocate water to both New Mexico and Texas lands. *Id*. ¶ 55.

Despite these severe and increasing impacts, Texas has yet to take any concrete steps to control groundwater use within its borders. Texas has declined to use even the few administrative

[8] Use the search term "El Paso County," and zoom out to see the numerous groundwater wells in the Rio Grande Basin in Texas, as represented by the Texas Water Development Board.

tools it has at its disposal, failing to form a groundwater management district anywhere within the Compact area in Texas despite recognizing that groundwater withdrawals in the El Paso area exceed recharge, and that there are "pretty sizeable" cones of depression in the area. NM-EX 239, Mills Dep. (Aug. 27, 2020) at 28:1-13, 17-25; 29:3-23; 38:1-25; 39:1.

The Court has recognized that the United States "might be said to serve . . . 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 that role, the United States has equivalent duties to both New Mexico and Texas in its operation of the Project. As discussed below, the United States should (at minimum) be seeking equivalent limits on groundwater pumping in Texas to protect the long-term viability of the Project.

## VII. IN THE ALTERNATIVE, BOTH STATES MUST ACCOUNT FOR AND BE CHARGED FOR DEPLETIONS CAUSED BY ACTIONS WITHIN THEIR BORDERS

The foundational centerpiece of the United States argument is that "[g]roundwater pumping *by New Mexico water users* interferes with the Project's ability to deliver the Compact apportionment." U.S. Br. 1 (emphasis added). New Mexico has explained the numerous errors in the United States' reasoning above, including that it rests on an inherently flawed understanding of water administration, is at odds with the language of the Compact, and is inconsistent with the long history of Compact performance. Assuming for the purposes of this Section VII only, however, that all groundwater depletions must be accounted for, what is most remarkable about the United States' position is that the United States focuses on groundwater pumping "by New Mexico water users," (U.S. Br. 1) while completely ignoring the impacts of "groundwater pumping by [Texas] water users."

Indeed, this position highlights an unfortunate pattern by the United States of repeatedly taking positions in support of water users in the Texas portion of the Project, to the detriment of water users in the New Mexico portion of the Project. An illustration of this incongruent treatment is the United States' position on return flows.[9] In New Mexico, the United States bases its entire litigation claim on the notion that groundwater pumping prevents Project water from returning to the Rio Grande and is therefore a violation of the Compact. *See, e.g.*, U.S. Br. 29 (arguing that "[g]roundwater pumping that . . . intercepts or reduces the return of water to the Rio Grande within the Project" is a Compact violation). Under that theory, any action by New Mexico that prevents water from returning to the river is strictly prohibited. But, that position cannot be squared with the United States' position on return flows in Texas.

In stark contrast with its position on New Mexico return flows, in Texas, Reclamation has taken the position that water is only Project supply if it "reaches the bed of the Rio Grande." NM-CSMF ¶¶ 261, 286. According to this definition, water that does not reach "the bed of the Rio Grande" does not even qualify as Project supply, and can therefore be used by EPCWID without being charged against its annual allocation, even if the water was on its way to the river. Based on that definition for return flows, Reclamation has approved a credit for municipal effluent that originates from Project supply but is delivered into the ACE, the primary canal at the top of the Texas part of the Project. The ACE is a cement-lined canal that parallels the river and is only a few hundred feet from the Rio Grande. EPCWID and Reclamation divert all Rio Grande water intended for use in the United States into the ACE so that it is functionally the equivalent of the bed of the river. NM-CSMF ¶ 137, 149, 182; NM-EX 100, Barroll Rep. § 5.4, Appx.

[9] An even more concerning example of the United States' incongruent treatment is the D3 method and the 2008 Operating Agreement. As discussed, the 2008 OA reduces EBID's allocation (and therefore New Mexico's apportionment) for all negative departures from the 1951 to 1978 period, including departures that are caused by water use and depletions in Texas. *See* NM-CSMF ¶¶ 252, 254; NM-EX 101, Barroll Reb. Rep. § R2, R11.

C; NM-EX 101, Barroll Reb. Rep. §§ R6, R8. Municipal effluent was historically treated as Project supply. *Id.* Today, however, even though the ACE functionally acts as the bed of the river, and the effluent water continues to be used by EPCWID members, Reclamation gives EPCWID a credit for the municipal effluent because the return flows do not technically "reach the bed of the Rio Grande." NM-CSMF ¶¶ 137, 149, 182; Barroll Rep. § 5.4, Appx. C; NM-EX 101, Barroll Reb. Rep. §§ R6, R8. The result is to increase the supply of water in Texas and reduce the supply of water in New Mexico. In other words, the same action—impeding return flows from reaching the bed of the Rio Grande—is identified as a Compact violation in New Mexico, but deemed worthy of an accounting credit in Texas.

There is no principled basis for the United States' disparate treatment of actions in New Mexico and Texas. As discussed at length in New Mexico's Apportionment Motion, the Project was intended to be operated as a single unit. NM-CSMF ¶¶ 58, 69, 75, 146; N.M. Apportionment Br. 40. In general, the Project allocates water to the Districts each year to satisfy the irrigation demands of water users in New Mexico and Texas. Water is then released from the Project in response to orders from the Districts. NM-EX 006, Barroll 2d Decl. ¶¶ 13-14. In years of full supply, the Districts, and therefore the States, are allocated all of the water they are entitled to. *See generally* NM Full Supply Br.; *see also* NM-EX 012, Sullivan Decl. ¶ 14; NM-EX 122, Sullivan & Welsh Rep. (2d Ed.) (July 15, 2020) at 318. But even in years of short supply, the Project releases sufficient water to satisfy all water orders up to the amount of a District's allocation. NM-CSMF ¶¶ 115; NM-EX 006, Barroll 2d Decl. ¶ 14. As a result, neither the United States nor Texas can identify a time when the Project was unable to fulfill water orders. *Id.*; NM-EX 602 at RFA No. 78 (admitting that Reclamation "has released water deemed sufficient to meet EPCWID's orders"); NM-EX 210 , Ferguson Dep. (Feb. 20, 2020) 260:6-7 ("I'm not aware of any records that

suggest EPCWID ordered water that it did not receive."); NM-EX 231, Rios Dep. at 56:21-24; Esslinger Dep. (Aug. 17, 2020) at 121:18-122:3; NM-EX 228, Rule 30(B)(6) Dep. of Reclamation by and through Cortez 20:22-22:18.

This does not mean, however, that there is no potential for injury in years of short supply. Assuming, *arguendo*, that depletions to Project supply caused by groundwater pumping must be counted against a State's percentage apportionment, that injury is measured by the impact to Project supply in water short years. This is true because although the Districts receive all of their water in full supply years, stream depletions that occurred in the years leading up to a shortage could reduce the Project allocations in the subsequent water-short years. NM-CSMF ¶ 246; NM-EX 006, Barroll 2d Decl. ¶ 39; NM-EX 012, Sullivan Decl. ¶ 14; NM-EX 112, Sullivan and Welsh Rep. (2d Ed.) (July 15, 2020) 318. When a water-short year arrives, the stream depletions that occurred in the previous years serve to reduce the overall amount of Project supply available for division.

It is true that groundwater pumping in New Mexico can impact Project supply in water-short years in this way, but it is equally true that groundwater pumping in Texas can impact Project supply. NM-CSMF 106, 246; NM-EX 006, Barroll 2d Decl. ¶¶ 37-39. By focusing exclusively on New Mexico pumping,[10] the United States ignores that an appreciable percentage of the calculated impacts to Project surface deliveries come from pumping in Texas, not New Mexico. NM-CSMF ¶¶ 239, 241, 246, 252; NM-EX 012, Sullivan Decl. ¶ 18; NM-EX 101, Barroll Reb.

[10] The United States' inconsistent position with regard to impacts to Project supply from groundwater pumping in New Mexico when compared to groundwater pumping in Texas might be understandable if the United States only recently learned of this fact, but that is not the case. Even before this litigation was filed, the United States understood that *Texas* groundwater pumping impacts Project supply. For example, in communications between the attorneys for the United States and the Texas Compact Commissioner planning for this lawsuit, the United States opined that some Texas groundwater pumping "is clearly a violation" of the Compact. NM-EX 409, Email from C. Rich to P. Gordon and L. Leininger, (May 17, 2011).

Rep. § R5. Specifically, approximately 23% of the annual impacts on Rio Grande flows at El Paso are attributable to Texas and/or Mexico, and *not* New Mexico. NM-EX 101, Barroll Reb. Rep. § R5.

In short, if the Special Master and Court determine that groundwater depletions that impact Project supply must be deducted from a State's apportionment, groundwater depletions in both States must be accounted for.

## CONCLUSION

For all of the reasons set out above, the relief the United States seeks is inappropriate and unjustified. This relief also rests on a significant number of underlying facts that are strongly disputed. The Motion should be denied.

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 December 22nd, 2020, I caused a true and correct copy of the **State of New Mexico's Reply to the United States' Motion for Partial Summary Judgment** 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 22nd day of December, 2020.

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