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 STATE OF TEXAS'S MOTION FOR PARTIAL SUMMARY JUDGMENT

_____♦_____

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TABLE OF CONTENTS

INTRODUCTION **1**

STATEMENT OF MATERIAL FACTS **1**

ARGUMENT **1**

I. TEXAS'S ARGUMENT THAT NEW MEXICO DOES NOT HAVE A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE IS INCONSISTENT WITH THE COURT'S 2018 DECISION 1

II. TEXAS'S ARGUMENT THAT NEW MEXICO DOES NOT HAVE A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE IS CONTRARY TO ACCEPTED PRINCIPLES OF EQUITABLE APPORTIONMENT BY COMPACT 4

III. THE STATE OF NEW MEXICO HAS A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR 9

A. The Plain Language and Structure of the Compact Shows that the State of New Mexico Has a Compact Apportionment Below Elephant Butte Reservoir 11

1. The Compact Relies on the Project to Apportion 57% of Project Supply to the State of New Mexico 11

2. The Compact Treats New Mexico and Texas Equally Below Elephant Butte 18

3. Articles VII and VIII of the Compact Support New Mexico's Understanding of the Compact 21

4. New Mexico Has Never Agreed That Its Claim to a Compact Apportionment Below Elephant Butte is Inferior to Texas's Claim 22

B. The Negotiating History and Course of Performance Confirm New Mexico's Compact Apportionment Below Elephant Butte 22

IV. NEW MEXICO HAS THE SOVEREIGN POWER TO ADMINISTER WATER BELOW ELEPHANT BUTTE IN A MANNER CONSISTENT WITH THE COMPACT 25

A. The Compact Does Not Necessarily Preempt New Mexico Water Law South of Elephant Butte 26

B. New Mexico's Administration of Water South of Elephant Butte Is Consistent with the Compact 31

C. Texas's Administration of Water Does Not Comply with the Compact 36

V. TEXAS'S ARGUMENTS AGAINST NEW MEXICO'S FIRST AND FOURTH COUNTERCLAIMS SHOULD BE REJECTED BECAUSE NEW MEXICO HAS A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE 38

VI. THERE IS NO "1938 CONDITION"—THE COMPACT AND THE PROJECT WERE DESIGNED TO FLEXIBLY AND EQUITABLY APPORTION RIO GRANDE SURFACE WATER BETWEEN NEW MEXICO AND TEXAS 39

A. There is No "1938 Condition" Governing the Allocation and Apportionment of Rio Grande Surface Water Below Elephant Butte Reservoir 40

1. The Plain Language of the Compact Does Not Provide For a 1938 Condition 40

2. The Course of Performance Is Inconsistent with a 1938 Condition 45

a. Since 1938, Project Conditions Have Evolved and Depletions Have Changed 46

b. Project Allocations Have Been Made for 70 Years Incorporating Impacts from Groundwater Pumping and Use 49

B. The States Understood that the Amount of Water to Be Delivered Through the Project Was Not Static 52

C. In Any Event, Consumptive Use Should Not Be Frozen Based on Depletions in a Single Year 54

1. Any Depletion Limit Must Be Based on Depletions over Multiple Years 54

2. The Project Was Not Fully Developed in 1938 56

D. Any Depletion Limit Must Be Applied to Both States 57

E. Disputed Factual Issues Preclude Summary Judgment on Texas's 1938 Condition Argument ..... **Error! Bookmark not defined.**

VII. AT LEAST SINCE 2006, IT IS NEW MEXICO, NOT TEXAS, THAT HAS BEEN DEPRIVED OF ITS EQUITABLE SHARE OF RIO GRANDE WATER 59

A. The Genesis of the Current Dispute Was New Mexico's Concern Over the Reallocation of Project Water By the 2008 Operating Agreement 59

B. Water Use in New Mexico Has Remained Stable 61

C. The 2008 Operating Agreement was Adopted Based on the Incorrect Theory that Texas Was Being Harmed, but Texas Has Not Been Harmed 65

D. Since 2006, Texas Has Been Allocated More than its Compact Apportionment at the Expense of New Mexico 66

CONCLUSION 69

APPENDIX A – TEXAS ALLEGATIONS OF FACT

TABLE OF AUTHORITIES

SUPREME COURT CASES

Alabama v. North Carolina, 560 U.S. 330 (2010) 10, 22, 41, 43, 45

Cal.-Or. Power Co. v. Beaver Portland Cement Co., 295 U.S. 142 (1935) 8, 9

California v. United States, 438 U.S. 645 (1978) 30

Connecticut v. Massachusetts, 282 U.S. 660 (1931) 5

Duncan v. Walker, 533 U.S. 167 (2001) 11

Fidelity Fed'l Sav. & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982) 27

Hillsborough County, Fla. v. Automated Medical Laboratories, Inc., 471 U.S. 707 (1985) 27

Hinderlider v. La Plata River & Cherry Creek Ditch Co., 304 U.S. 92 (1938) 25, 28, 29, 30, 33

Hines v. Davidowitz, 312 U.S. 52 (1941) 27

Illinois Vent. R.R. Co. v. Illinois, 146 U.S. 387 (1892) 8

Kansas v. Colorado, 206 U.S. 46 (1907) 4

Kansas v. Colorado, 514 U.S. 673 (1995) 10, 44, 45

Kansas v. Colorado, 543 U.S. 86 (2004) 28

Kansas v. Nebraska, 135 S. Ct. 1042 (2015) 28

Kowalski v. Tesmer, 543 U.S. 125 (2004) 31

Martin v. Lessee of Waddell, 41 U.S. 367 (1842) 5

Montana v. Wyoming, 138 S. Ct. 758 (2018) 33

Montana v. Wyoming, 563 U.S. 368 (2011) 10, 28, 44

Nebraska v. Wyoming, 325 U.S. 589 (1945) 6

Nebraska v. Wyoming, 515 U.S. 1 (1995) 8

New Hampshire v. Maine, 532 U.S. 742 (2001) 3

New Jersey v. Delaware, 552 U.S. 597 (2008) 10, 11, 42

New Jersey v. New York, 283 U.S. 336 (1931) 6, 8

New Jersey v. New York, 523 U.S. 767 (1998) 8, 10, 16, 17, 41, 45

Oklahoma v. New Mexico, 501 U.S. 221 (1991) 9, 10, 23

Rhode Island v. Massachusetts, 37 U.S. 675 (1838) 4

Rocca v. Thompson, 223 U.S. 317 (1912) 11

Rodriguez v. U.S., 480 U.S. 522 (1987) 43

Russello v. United States, 464 U.S. 16 (1983) 43

Shively v. Bowlby, 152 U.S. 1 (1894) 8

South Carolina v. North Carolina, 558 U.S. 256 (2010) 6

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941(1982) 17

Tarrant Regional Water District v. Herrmann, 569 U.S. 614 (2013) 5, 10, 19, 22, 28, 29

Texas v. New Mexico, 138 S. Ct. 954 (2018) 1, 2, 3, 4, 13, 14, 16, 18, 22, 39, 59

Texas v. New Mexico, 462 U.S. 554 (1983) 7, 8, 41, 43

Texas v. New Mexico, 482 U.S. 124 (1987) 9

United States v. Alaska, 521 U.S. 1 (1997) 5

United States v. Texas, 339 U.S. 707 (1950) 59

Virginia v. Maryland, 540 U.S. 56, (2003) 5, 29

West Virginia ex rel. Dyer v. Sims, 341 U.S. 22 (1951) 6

Williamson v. Mazda Motor of America, 562 U.S. 323 (2011) 27

Wyeth v. Levine, 555 U.S. 555 (2009) 27, 28

OTHER JURISDICTIONS

Alamosa-La Jara Water Users Protection Ass'n v. Gould, 674 P.2d 914 (Colo. 1983) 30

Alaska Sport Fishing Ass'n v. Exxon Corp., 34 F.3d 769 (9th Cir. 1994)..... 4

Bean v. United States, 163 F. Supp. 838 (Fed. Ct. Cl. 1958) 20, 21

Boston Five Cents Sav. Bank v. Secretary of Dept. of Housing and Urban Development, 768 F.2d 5 (1st Cir.1985)..... 16

Clark v. Briscoe Irr. Co., 200 S.W.2d 674 (Tex. Civ. App. 1947)..... 9

Holguin v. Elephant Butte Irrigation Dist., 575 P.2d 88 (N.M. 1977)..... 17

Hudspeth Cnty. Conservation & Reclamation Dist. No. 1 v. Robbins, 213 F.2d 425 (10th Cir. 1954)..... 21

Intech, Inc. v. Consolidated Freightways, Inc., 836 F.2d 672 (1st Cir. 1987) 15

Jicarilla Apache Tribe v. United States, 657 F.2d 1126 (10th Cir. 1981)..... 17

Kalamath Water Users Protective Ass'n v. Patterson, 204 F.3d 1206 (9th Cir. 1999)..... 20

May v. Nevada Irrigation District, 600 F.2d 1280 (9th Cir. 1979) 15, 16

Mercer v. Davis & Berryman International, Inc., 834 F.2d 922 (11th Cir. 1987) 15

New Mexico v. Elephant Butte Irrigation Dist., No. D-307-CV-96-888 (N.M. 3d Jud. Dist. Sept. 24, 1996) 34

New Mexico v. United States, No. 1:11-cv-00691 (D.N.M. Aug. 8, 2011)..... 60

Public Service Co. of Colorado v. F.E.R.C., 754 F.2d 1555 (10th Cir. 1985) 17

RCI Northeast Services Div. v. Boston Edison Co., 822 F.2d 199 (1st Cir.1987)..... 16

Ronzio v. Denver & R.G.W.R. Co., 116 F.2d 604 (10th Cir. 1940)..... 17

Sarnoff v. American Home Products Corp., 798 F.2d 1075 (7th Cir.1986)..... 3

Sipriano v. Great Spring Waters of Am., Inc., 1 S.W.3d 75 (Tex. 1999) 36

Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio, 289 P.3d 1232 (N.M. 2012) 34, 55

CODES, STATUTES, RULES

Arkansas River Compact, 63 Stat. 145, 147 (1949) 45

Pecos River Compact, 63 Stat. 159 (1949) 43

Reclamation Act, 43 U.S. § 383 30

Rio Grande Compact, 53 Stat. 785 (1939) ..... passim

Yellowstone River Compact, 65 Stat. 663 52

Fed. R. Civ. P. 56(a) 1

NMSA 1978, § 72-2-1 32

NMSA1978, § 72-2-9.1 ..... 32, 33

NMSA 1978, § 72-2-18 32

N.M.S.A. § 72-2-91 34

Tex. Water Code § 11.021 9

CONSTITUTIONAL PROVISIONS

Colo. Const., Art. 16, § 5 8

N.M. Const. art. XVI, § 2 9

N.M. Const. art. XVI, § 3 55

Texas Const. Art. XVI § 59(a) 9

OTHER AUTHORITIES

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Oxford English Dictionary (1933) 15

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Restatement (Second) of Contracts § 202 (1981) 22

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Restatement (Second) of Contracts §223 45

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INTRODUCTION

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

STATEMENT OF MATERIAL FACTS

Texas failed to follow procedural rules requiring that all asserted facts be set out and enumerated in a summary judgment brief. *See generally* Fed. R. Civ. P. 56(a). New Mexico has attempted to compile and address all asserted facts found in Texas's Brief in the attached Appendix.

Further, 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. TEXAS'S ARGUMENT THAT NEW MEXICO DOES NOT HAVE A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE IS INCONSISTENT WITH THE COURT'S 2018 DECISION

Texas invites the Special Master to ignore the decision of the United States Supreme Court in 2018. Tex. Br. 72-73. As New Mexico explained in its Apportionment Brief, Texas's position is inconsistent with the 2018 Decision. N.M. Apportionment Br. 26-28, 32-33. In that Decision, the Court held that "the Compact is inextricably intertwined with the Rio Grande Projects and the Downstream Contracts," and that the Project is a vehicle "charged with assuring that the Compact's equitable apportionment to Texas *and part of New Mexico* is in fact made." *Texas v.*

New Mexico, 138 S. Ct. 954, 959 (2018) (emphasis added). This language leaves no room for Texas's argument that New Mexico lacks a Compact apportionment below Elephant Butte.

In the First Interim Report, Special Master Grimsal rejected New Mexico's argument that the Compact did not apportion water to the States below Elephant Butte Reservoir. *See* First Interim Report of the Special Master 217-37 (Feb. 9, 2017) ("FIR"). More specifically, Special Master Grimsal found that "the plain text and structure of the 1938 Compact reveals" that the Project is "wholly incorporated throughout the 1938 Compact, which imposes rights and duties on each of the signatory States" in the "context" of the Project. The Special Master acknowledged that "the Project water leaving Elephant Butte belongs to either New Mexico or Texas by compact, or to Mexico by the Convention of 1906," FIR 212-13, and held that "[a]n examination of the plain text and structure of the 1938 Compact reveals that the signatory States intended the Rio Grande Project to be the sole vehicle by which Texas *and lower New Mexico* would receive their equitable apportionments of the Rio Grande waters." *Id.* at 194-95 (emphasis added). *See also* FIR 147, n. 41 ("both Texas's apportionment and part of New Mexico's apportionment (the Elephant Butte Irrigation District) of Rio Grande water was to be delivered via the Rio Grande Project"); 209 ("It is plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters."); 213 ("[Project] water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico"); 216 ("Therefore, any question of the rights of any signatory State to water apportioned by the 1938 Compact – including the rights to that portion of water mandated by compact to be delivered to lower New Mexico via the Rio Grande Project – must be decided pursuant to the original and exclusive jurisdiction of the Supreme Court."). No party excepted to this language in the First Interim Report.

To the contrary, Texas affirmatively represented to the Court that it supported this position:

> Thus, the Compact is not silent on what occurs below Elephant Butte Reservoir. The law of equitable apportionment applies because the Compact expressly apportions Rio Grande water and then used the Project as the sole method for distributing that *equitable apportionment to New Mexico*, Texas, and Mexico.
>
> . . .
>
> [T]he compact utilizes the Rio Grande Project, operated by the United States, as the single vehicle by which to *apportion Rio Grande water to Texas and New Mexico*.

Texas's Reply to Exceptions to First Interim Report of Special Master at 31, 40 (July 28, 2017) (quotation marks omitted) (emphasis added). *See generally New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) ("where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position he may not thereafter, simply because his interests have changed, assume a contrary position"). When the Court denied New Mexico's motion to dismiss, the necessary implication of that denial is that the States have rights and obligations, including a Compact apportionment, below Elephant Butte.

Texas suggests that the language of the Court describing the apportionment is dicta, Tex. Br. 73, but that is not the case. Dicta is a "a statement in a judicial opinion that could have been deleted without seriously impairing the analytical foundations of the holding—that, being peripheral, may not have received the full and careful consideration of the court that uttered it." *Sarnoff v. American Home Products Corp.*, 798 F.2d 1075, 1084 (7th Cir. 1986). In this case, the United States took exception to Special Master Grimsal's recommendation that the United States' Complaint in Intervention should be dismissed to the extent that it asserts claims under the Rio Grande Compact. To evaluate that claim, the Court identified "several considerations" that "collectively persuade[d]" it that that the United States should be allowed to pursue its claims. *Texas v. New Mexico*, 138 S. Ct. at 959. The first consideration the Court identified was that the "only" reason the Compact could achieve an equitable apportionment was because "the United

States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas." *Id.* "In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of 'agent' of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is in fact made." *Id.* (internal quotation marks omitted). Far from "[a]n isolated comment," Tex. Br. 73, this reasoning formed part of the rationale for allowing the United States' claims to proceed.

II. TEXAS'S ARGUMENT THAT NEW MEXICO DOES NOT HAVE A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE IS CONTRARY TO ACCEPTED PRINCIPLES OF EQUITABLE APPORTIONMENT BY COMPACT

According to Texas, "New Mexico does not have **any** Compact apportionment below Elephant Butte Reservoir." Tex. Br. 61 (emphasis added). Rather "**all** of the usable water in Elephant Butte Reservoir is apportioned to Texas." *Id.* at 64 (emphasis added). Texas' position is both illogical and unprecedented, and should be soundly rejected as contrary to principles of sovereignty and equitable apportionment in at least three meaningful ways.

First, Texas's position is contrary to the principle that a State has a sovereign interest in its water. *See, e.g., Kansas v. Colorado*, 206 U.S. 46, 99 (1907) (describing the interest of a State in a shared river as one that rises "above a mere question of local private right and involves a matter of state interest"); *Alaska Sport Fishing Ass'n v. Exxon Corp.*, 34 F.3d 769, 773 (9th Cir. 1994) ("A state has a sovereign interest in natural resources within its boundaries"). The retained sovereignty of each State within its borders as against its neighboring states is one of the foundations of the Union. *Rhode Island v. Massachusetts*, 37 U.S. 657, 733-34 (1838). The Supreme Court from an early date acknowledged that, upon entering the Union, the people of each state "became themselves sovereign; and in that character hold the absolute right to all their

navigable waters and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution to the general government." *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842). Thus, disputes over interstate waters "are to be settled on the basis of equality of right." *Connecticut v. Massachusetts*, 282 U.S. 660, 670-71 (1931).

Tarrant Regional Water District v. Herrmann, 569 U.S. 614 (2013) is directly applicable. In *Tarrant*, the petitioner contended that an interstate compact allocating the water from the Red River created a right for the compacting States to cross each other's borders to access water subject to the compact. *Id.* at 631. Based on that interpretation, a Texas water utility sought to obtain extra water by going into Oklahoma and "divert[ing]" a "tributary of the Red River located in Oklahoma." *Id*. at 630. The Court framed the question as whether the Texas utility had "the right to cross state lines and divert water from Oklahoma" under the compact. *Id*. at 631. The Court answered in the negative, in part because States are presumed not to cede their prerogative to "control water within their own boundaries." *Id.*

As in *Tarrant*, Texas seeks to "cross state lines," and reach into New Mexico to claim all of the water below Elephant Butte for itself. But as explained below, there is no language in the Compact indicating New Mexico intended to surrender all rights to the waters of the Rio Grande in that part of the State. "[W]hen confronted with silence in [the Rio Grande Compact] touching on [New Mexico's] authority to control [its] waters," the Special Master should rely on "the background notion that a State does not easily cede its sovereignty," and does not surrender "control [of] water within [its] own boundaries." *Id*. at 633-34 (quoting *Virginia v. Maryland,* 540 U.S. 56, 67 (2003)); *see also United States v. Alaska,* 521 U.S. 1, 34 (1997) ("[a] court deciding a question of title to [a] bed of navigable water [within a State's boundaries] must ... begin with a strong presumption against defeat of a State's title." (internal quotations omitted)).

Second, Texas's claim that New Mexico received no water to serve its citizens below Elephant Butte violates established principles of equitable apportionment. Justice Holmes famously described a river as "more than an amenity, it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342-43 (1931). Water, he explained, is a "necessity of life" so vital that the law requires it to "be rationed among those who have power over it." *Id*. For that reason, "[b]oth States [in a compact] have real and substantial interests in [a] River that must be reconciled." *Id*.

An interstate compact endorsed by congressional consent is in essence a treaty between sovereign States adapted to the federal system of the United States. *See, e.g.*, *West Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 31 (1951) (noting that an interstate compact "adapts to our Union of sovereign States the age-old treaty-making power of independent sovereign nations"). In that regard, the Supreme Court has recognized "a State's sovereign interest in ensuring an equitable share of an interstate river's water is precisely the type of interest that the state, as *parens patriae*, represents on behalf of its citizens." *South Carolina v. North Carolina*, 558 U.S. 256, 274 (2010). In dividing the waters between two States, the Court has explained the "delicate adjustment of interests which must be made." *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945). Among the considerations is "[p]riority of appropriation," "physical and climatic conditions, the consumptive use of water in the several sections of the river, the character and rate of return flows, the extent of established uses, the availability of storage water, the practical effect of wasteful uses on downstream areas, the damage to upstream areas as compared to the benefits to downstream areas if a limitation is imposed on the former." *Id*.

In entering the Compact, New Mexico had to weigh these interests, as well as balance the interests of its many water users located along the Rio Grande, which spans the entire length of the State. NM-CSMF ¶¶ 19, 27-29, 55-65-67, 70-71. Texas asserts, in effect, that New Mexico

overlooked the needs of its citizens in the 105-mile stretch of irrigated agriculture from Elephant Butte to the Texas state line. Texas's assertion is not correct. At the outset of negotiations on the final Compact, New Mexico's Compact Commissioner, Thomas McClure, informed the other parties that one of New Mexico's "minimum requirements" for the Compact was that "[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said River System." NM-CSMF ¶ 27; *see also* NM-CMSF ¶¶ 23-24 (stating that for some of the basic facts needed in order to arrive at an accord among the states, the Rio Grande Joint Investigation "RGJI" catalogued Project Acreage for cities, towns, and villages).

Moreover, the Court has explained that its "equitable power to apportion interstate streams and the power of the States and Congress acting in concert to accomplish the same result are to a large extent complementary." *Texas v. New Mexico*, 462 U.S. 554, 569 (1983). The "right to invoke the original jurisdiction of this Court was an important part of the context in which the Compact was framed; indeed, the threat of such litigation undoubtedly contributed to [the] willingness to enter into a compact." *Id.* It is difficult to conceive that New Mexico "would trade away its right to seek an equitable apportionment of the river" without having secured the right to water to serve its citizens below Elephant Butte. *Id*.

As Frankfurter and Landis stated persuasively three-quarters of a century ago, "[N]o one State can control the power to feed or to starve, possessed by a river flowing through several States." Felix Frankfurter & James M. Landis, *The Compact Clause of the Constitution - A Study in Interstate Adjustments*, 34 Yale L.J. 685, 701 (1925) (quoted in *Texas v New Mexic*o, 462 U.S. at 569 n. 15). Although it is the downstream state, that is precisely what Texas seeks to do here by urging that New Mexico silently surrendered its sovereign rights to the waters of the Rio Grande

below Elephant Butte to Texas. Under Texas's view, New Mexico would have no rights to the flow of the Rio Grande, and no recourse if Texas or the United States deprived New Mexico citizens of water in that part of the State. *See, e.g., Nebraska v. Wyoming*, 515 U.S. 1, 20 (1995) (state should have recourse "to vindicate its 'quasi-sovereign' interests" in water); *Texas v. New Mexico*, 462 U.S. at 570; *New Jersey v. New York*, 283 U.S. at 342-43 (recognizing that, just as New York could not prevent all water from flowing into New Jersey, "equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished").

Third, Texas's unprecedented position is contrary to background principles of water administration. The Court has explained that the government held water "for the benefit of the whole people," and "in trust." *Shively v. Bowlby*, 152 U.S. 1, 30, 49 (1894). Similarly, Justice Field explained in *lllinois Vent. R.R. Co. v. Illinois* that the states' relationship with water is "different in character" from other resources, in that it is held "in trust for the people of the state." 146 U.S. 387, 401 (1892). *See also Cal.-Or. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 158, 163-64 (1935) (describing water as "publici juris, subject to the plenary control of the designated states").

These principles of holding the water in trust for the benefit of all are enshrined in the State constitutions of the compacting States. *See New Jersey v. New York*, 523 U.S. 767, 783 n.6 (1998) (existing background principles of law are important for compact interpretation). The Colorado Constitution provides that "[t]he water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided." Colo. Const., Art. 16, § 5.

The New Mexico Constitution commits the waters of the state to the public domain, allowing only the use of the water by individual citizens. "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." N.M. Const. art. XVI, § 2; *see also* NM-CSMF ¶ 288. This conforms to the policy of other western states. *California Oregon Power*, 295 U.S. at 162 (the 1877 Desert Land Act confirmed that all non-navigable waters were reserved for the use of the public under the laws of the states and territories named).

The Texas Constitution similarly declares the "conservation and development of all of the natural resources of this State . . . including the control, storage, preservation and distribution of its storm and flood waters, the waters of its rivers and streams, for irrigation, power and all other useful purposes . . . are each and all hereby declared public rights and duties." Texas Const. Art. XVI § 59(a); *see also* Tex. Water Code § 11.021 ("The water of the ordinary flow, underflow and tides of every flowing river, natural stream and lake . . . in the state is the property of the state."); *see also Clark v. Briscoe Irr. Co.*, 200 S.W.2d 674, 680 (Tex. Civ. App. 1947).

In the absence of contrary language abrogating or altering these bedrock principles, it must be presumed that the compacting States intended to act in concert with their State constitutions. Texas's argument to the contrary should be rejected.

III. THE STATE OF NEW MEXICO HAS A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE RESERVOIR

The Compact is "a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). More specifically, the Compact is both a contract and a law of the United States. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991). As a result, the customary rules of contract interpretation and statutory construction

apply. *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)).

Applying these rules, the Court "interpret[s] the Compact according to the intent of the parties, here the signatory States." *Montana v. Wyoming*, 563 U.S. 368, 375 n.4 (2011). To discern the parties' intent, the Court begins with the express terms. *Tarrant Reg. Water Dist. v. Hermann*, 569 U.S. at 628. 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. at 386. As with other contracts and federal laws, if the text of the Compact is unambiguous it is conclusive. *See, e.g., Alabama v. North Carolina*, 560 U.S. 330, 352 (2010); *Kansas v. Colorado*, 514 U.S. 673, 690 (1995). But, if the Court's reading reveals an ambiguity, the Court may consider extrinsic evidence to interpret the meaning of compact terms. *See Oklahoma v. New Mexico*, 501 U.S. at 234 n.4 (considering extrinsic evidence to interpret the meaning of the term "originating").

Here, Texas avers that "[t]he Texas apportionment is the water New Mexico delivers into Elephant Butte Reservoir pursuant to Article IV, subject only to the 1906 Treaty and the United States' contracts with EBID," and "New Mexico receives its sole apportionment of water pursuant to Article III of the Compact at the Colorado-New Mexico state line." *See* Tex. Br. 62-63. Thus, Texas argues that that the plain language of the Compact indicates that New Mexico receives no Compact apportionment below Elephant Butte Reservoir. Texas states in absolute terms "[n]ot a single provision in the compact provides or even suggests that New Mexico has an apportionment of Rio Grande water below Elephant Butte Reservoir." *Id.* at 65.

This argument strains credulity because, as explained at length in the State of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support

(Nov. 5, 2020) ("New Mexico Apportionment Brief" or "N.M. Apportionment Br."), the plain language and structure of the Compact, as confirmed by the available extrinsic evidence and long course of performance, indicate that New Mexico has an apportionment below Elephant Butte equal to 57% of the Rio Grande Project water supply. Rather than duplicate that argument here, New Mexico incorporates it by reference and focuses upon the specific flaws in Texas's construction that were not addressed in New Mexico's Apportionment Brief.

A. The Plain Language and Structure of the Compact Shows that the State of New Mexico Has a Compact Apportionment Below Elephant Butte Reservoir

As the Court observed in *New Jersey v. Delaware*: "Interstate compacts, like treaties, are presumed to be the 'subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purpose of the high contracting parties.'" 552 U.S. at 615-16 (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). As such, in interpreting the Compact, the court should begin with the plain language of the agreement. *See id.* The Court should give effect to every clause and every word. *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

1. The Compact Relies on the Project to Apportion 57% of Project Supply to the State of New Mexico

In interpreting the plain text of the Compact, Texas and New Mexico agree that the preamble to the Compact declares the compacting States' principal purpose for entering into the Compact: the States sought to "effec[t] an equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." NM-EX 330, Compact at Preamble. Accordingly, there is no dispute that the States intended to apportion all surface waters within the Rio Grande Basin among the three States.

Texas and New Mexico further agree that, in order to accomplish that apportionment, the Compact divides the area into three sections. Initially the Compact defines two specific delivery

obligations based on an inflow-outflow methodology. The first requires Colorado to deliver water to the New Mexico state line based on a supply index. *Id.* at Art. III. The Compact then requires New Mexico to deliver water to Elephant Butte Reservoir also based on a supply index. *Id.* at Art. IV. Thus, there is no dispute that part of New Mexico's apportionment includes the difference between the water delivered by Colorado under Article III (plus additional inflow in New Mexico) minus the amount New Mexico must deliver at Elephant Butte Reservoir pursuant to Article IV.

Texas suggests that this quantity is the "sole apportionment" to New Mexico. Tex. Br. 62. To reach this conclusion, Texas principally relies upon a single word, "deliver," which it tasks with wide-ranging and extensive work. NM-EX 330, Compact at Art. at IV. For Texas, "[d]elivery means" that New Mexico must "relinquish control and dominion" over the water delivered, and it cannot claim any apportionment right to water that it has delivered under Article IV. Tex. Br. 65. Texas's argument suffers from a number of flaws.

Initially, Texas's argument is not persuasive because its interpretation of the term "deliver" is inconsistent with the usage of the term elsewhere in the Compact. Contrary to Texas's position, the Compact specifically indicates that upstream states retain certain rights with regard to delivered water regardless of their possession. For instance, the definition of "Annual Credits" includes "the amounts by which *actual deliveries* in any calendar year exceed *scheduled deliveries*." *See* NM-EX 330, Compact at Art. I(i) (emphasis added). Accordingly, both "Accrued Credits" and total "Credit Water" comprise water that was "deliver[ed]" within the meaning of the Compact. *See id.* at Art. I(j), (m). But, although an upstream state may not have possession or control of its Credit Water following delivery, it maintains substantive Compact rights concerning the use of its Credit Water.

Texas's argument that "deliver" means to "relinquish control" further fails because that argument disregards the Compact's use of the term "relinquish" in Article VII. Article VII provides a mechanism for an upstream state to "relinquish" its rights to Credit Water in Project Storage to a downstream state irrespective of possession over the physical water in Project Storage. Colorado, for example, does not have possession or physical control over any water in Project Storage (which is located entirely within the sovereign jurisdiction of New Mexico), but it nonetheless has a Compact right to direct the party in control (i.e., Reclamation) to impound its Credit Water unless and until Colorado agrees to relinquish it. The same is true for New Mexico's Credit Water pursuant to Article VII. Under the Compact, a State may deliver possession and physical control of water to another party without relinquishing its Compact rights to the same water. It follows that the States intended the term "deliver" to be distinct from the term "relinquish" for purposes of the Compact. Texas's argument fails to recognize this distinction.

Next, the Compact does not provide for "delivery" to Texas. Instead, the delivery at Elephant Butte is ultimately delivery to the Project, which is "inextricably intertwined" with the Compact. *Texas v. New Mexico*, 138 S. Ct. at 959; *see also* NM-CSMF ¶¶ 57-59. The Compact provides that the water New Mexico delivers into Elephant Butte Reservoir becomes "Usable Water" in "Project Storage," "which is available for release in accordance with irrigation demands, including deliveries to Mexico." NM-EX 330, Compact at Art. I(*l*) and I(k). Read with the benefit of this context, Article IV requires New Mexico to deliver water into the Project to satisfy "irrigation demands" on Project lands. NM-CSMF ¶¶ 38, 57, 96. Those lands are situated in both New Mexico and Texas. Thus, by operation of the Project to deliver water for Article I(*l*) purposes, "the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part

of New Mexico is in fact made." *Texas v. New Mexico*, 138 S. Ct. at 959 (internal quotation marks omitted). Hence, in addition to its apportionment in the Middle Rio Grande, New Mexico receives an equitable apportionment of water under the Compact for its Project lands in southern New Mexico. Texas receives its entire equitable apportionment through the Project for its Project lands. Both receive these apportionments in the form of water released by the Project "in accordance with irrigation demands." NM-CSMF ¶ 64.

Texas's argument also fails because it further ignores the multiple other provisions of the Compact confirming the fate of the delivered water. For example, "Actual Spill" occurs when the water spilled from the reservoir, or released for flood control, is "*in excess of the current demand on project storage*," and therefore not "usable water." NM-EX 330, Compact at Art. I(p) (emphasis added). Further, the Compact defines the normal release of "usable water" from "project storage" to satisfy the irrigation demands within the Project as 790,000 acre-feet. *Id.* at Art. VIII. At the time the Compact was negotiated, the Project lands were "frozen" at 155,000 acres total, with 57% of the lands in New Mexico and 43% of the lands in Texas. NM-CSMF ¶¶ 76-77, 142. The plain language thereby reveals that because 790,000 acre-feet is more water than is necessary to satisfy Project demands in Texas alone, the intent is to apportion the usable water between Texas and New Mexico to meet irrigation demands. NM-CSMF ¶¶ 31, 71, 78. Texas's interpretation of "deliver" provides no explanation for these provisions.

Texas also cherry-picks definitions of "deliver" or "delivery" that it prefers, but there are numerous definitions. Tex. Br. 33. For example, definitions not cited by Texas include the following:

- Oxford Dictionary
  - Deliver. TRANSITIVE VERB [WITH OBJECT]. "Bring and hand over (a letter, parcel, or ordered goods) to the proper recipient or address." Deliver,

Oxford Dictionary (U.S.), https://www.lexico.com/en/definition/deliver (last visited Dec. 15, 2020).

- Merriam-Webster
  - Deliver, transitive verb. 2(a): "to take and hand over to or leave for another: CONVEY// deliver a package[.]" Deliver, *Merriam-Webster.com Dictionary*, https://www.merriam-webster.com/dictionary/deliver (last visited Dec. 15, 2020).
- Deliver, *Oxford English Dictionary* (1933)
  - "8. To hand over, transfer, commit to another's possession or keeping; spec. to give or distribute to the proper person or quarter (letters or goods brought by post, carrier, or messenger)[.]"
- Deliver, *Webster's New International Dictionary of the English Language* (1923).
  - "2. To give or transfer; to yield possession or control of; to part with (to); to make or hand over; to make delivery of (see delivery); to commit; to surrender; to resign[.]"

Each contains multiple alternative definitions. The basic idea that can be distilled from all of the definitions is that delivery means the transfer, conveyance, or transport of an item or object from one place to another, or from one party to another. That notion is not consistent with Texas's argument that New Mexico "relinquishes control" and surrenders any right to an equitable share of water below Elephant Butte.

What's more, even the dictionaries on which Texas relies include multiple definitions and types of deliveries. For example, the 1910 edition of Black's Law Dictionary cited by Texas includes "In conveyancing" deliveries, "In the law of sales" deliveries, "In medical jurisprudence" deliveries, "Absolute and conditional delivery," "Actual and constructive" deliveries, and "Symbolical delivery." Indeed, the law recognizes many different meanings and contexts for the words "deliver" or "delivery." Black's Law Dictionary explains that "[w]hat constitutes delivery depends largely on the intent of the parties." Black's Law Dictionary (6th ed. 1991); *see also Intech, Inc. v. Consolidated Freightways, Inc.*, 836 F.2d 672, 674 (1st Cir. 1987) (delivery depends on the language of a contract and the intent of the parties); *Mercer v. Davis & Berryman International, Inc.*, 834 F.2d 922, 927-28 (11th Cir. 1987) (same); *May v. Nevada Irrigation*

District, 600 F.2d 1280, 1282 (9th Cir. 1979) (same).[1] All of which underscores that the interpretation of the term "deliver" depends on the context and the intent of the parties.

For purposes of understanding the intent of the term "deliver" as it was used in the Compact, there are two highly instructive sources. The first is the Downstream Contracts. Those Contracts were in place in 1938, and are "inextricably intertwined" with the Compact. *Texas v. New Mexico*, 138 S. Ct. at 954; NM-CSMF ¶¶ 53, 109-111, 141-142. By way of illustration, the Downstream Contract between EBID and Reclamation provides for the "Operation and Maintenance of Storage System for ***Delivery*** of Irrigation Water." NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes, 7 (Nov. 9, 1937) (emphasis added). If the term "delivery" were understood, as advocated by Texas, to mean that Reclamation "relinquishes control" of the water when it is delivered to EBID under the Downstream Contract, then Reclamation would have no right to return flows, and indeed, no claims in this case. But we know that the Project itself relied upon return flows, and the use and re-use of water down the system to ensure that all acres of land received their supply. *See, e.g.*, NM-CSMF ¶¶ 26, 125-126, 131, 149, 156, 261. This counsels in favor of an understanding of "deliver" to mean ensuring that a certain amount of water arrives at a specified location.

Second, in the absence of a Compact definition, the Court should understand the term "deliver" in the customary way it was used for water administration. *New Jersey v. New York*, 523

[1] Intent, in turn, is a question of fact to be determined from examining the Compact and from the facts and circumstances surrounding their execution. In the context of a motion for summary judgment, the interpretation of a contract (and, here, the meaning of delivery) may be a question of fact or law. *RCI Northeast Services Div. v. Boston Edison Co.*, 822 F.2d 199, 202 (1st Cir.1987). If reasonable persons cannot differ as to what the contract means, "either because the language is unambiguous" or the evidence about the parties' intent is "sufficiently one sided," the judge must decide the issue as one of law. *Boston Five Cents Sav. Bank v. Secretary of Dept. of Housing and Urban Development*, 768 F.2d 5, 8 (1st Cir.1985). Otherwise, the question is a factual one.

U.S. at 783, n. 6 (existing background principles of law are important for compact interpretation). Here the relevant background principle is that "[u]nder the prior appropriation doctrine, a water right is a usufructuary right, and is in no sense a right of ownership of the corpus of the water itself." *Public Service Co. of Colorado v. F.E.R.C.*, 754 F.2d 1555, 1566 (10th Cir. 1985) (citing Hutchins, 1 Water Rights Laws in the Nineteen Western States at 151 (1971)); *see also Sporhase v. Nebraska ex rel. Douglas*, 458 U.S. 941, 963 (1982) (Rehnquist, J., dissenting) (noting that water in western states "cannot be reduced to possession under state law"); *Ronzio v. Denver & R.G.W.R. Co.*, 116 F.2d 604, 605-06 (10th Cir. 1940) (applying New Mexico law). Water is held by the States for public use, and water users obtain a right through beneficial use. "[New Mexico] controls the use of water because it does not part with ownership; it only allows a usufructuary right to water." *Jicarilla Apache Tribe v. United States*, 657 F.2d 1126, 1132 (10th Cir. 1981) (citing *Holguin v. Elephant Butte Irrigation Dist.*, 575 P.2d 88 (N.M. 1977).

The United States obtained a Project right in accordance with state law, as required by Section 8 of the Reclamation Act, some thirty years before the Compact's adoption. New Mexico had already been "delivering" water to the Project for more than two decades when the Compact was adopted. NM-CSMF ¶ 146. The only change effected by Article IV was to fix the amount of water to be delivered. There is no indication in the text or structure of the Compact that by codifying that practice in the Compact, New Mexico intended to surrender its right to an equitable share of water below Elephant Butte.

Texas takes the position that the delivery of water to Elephant Butte Reservoir is like the transfer of a deed for real property that, once transferred, no rights remain. *See* Tex. Br. at 66. A better analogy might be that the delivery of water by New Mexico to the Project at Elephant Butte is akin to the delivery of 'property' to a trustee for distribution to the trust's beneficiaries. Using

this analogy, the Project is, in effect, a sort of trust, and Reclamation is the trustee—or using the Court's words—Reclamation is the "'agent' of the Compact," which incorporates the Project. *Texas v. New Mexico*, 138 S. Ct. at 959. New Mexico is obliged, by the Compact, to fund the trust by delivering a certain amount of water to the Project, and Reclamation is required, as trustee, to deliver this water to the three beneficiaries of the Project—Mexico, EBID and EPCWID.

Taken together, the text and structure of the Compact indicate that the apportionment of water relies upon the operation of the Project to effectuate a division of waters below Elephant Butte Reservoir. That is, the Article IV delivery requirement, when read in context, is not, as Texas suggests, a requirement that New Mexico deliver *to Texas* its apportionment. NM-CSMF ¶¶ 57-59. Rather, Article IV requires New Mexico to deliver a surface supply *to the Project*, such that, by ordinary operation of the Project to satisfy irrigation demands in each state, New Mexico and Texas each receive their respective apportionment of water south of Elephant Butte.

2. The Compact Treats New Mexico and Texas Equally Below Elephant Butte

In its Compact construction, Texas posits a distinction between the treatment of Texas and New Mexico below Elephant Butte. According to Texas, the right of Texas water users to receive Article IV water is guaranteed by the Compact as a matter of equitable apportionment, but the right of water users in New Mexico to receive Article IV water is merely a contract right governed by Reclamation law. Tex. Br. 63, 68. In New Mexico's Apportionment Brief, New Mexico explained that the plain language of the Compact does not support Texas's claim for at least five reasons:

> *First*, as discussed at length in Section I, *supra*, Texas's assertion that New Mexico lacks a Compact apportionment below Elephant Butte is inconsistent with the Court's 2018 Decision. N.M. Apportionment Br. 32-33;
>
> *Second*, a reading of the language to deprive New Mexico of a Compact apportionment below Elephant Butte would be contrary to the purpose of the Compact to "effect[] an

equitable apportionment" of "the waters of the Rio Grande above Fort Quitman, Texas." N.M. Apportionment Br. 33-34;

Third, there is no textual basis in the Compact for treating Texas and New Mexico differently below Elephant Butte. N.M. Apportionment Br. 34-35;

Fourth, if New Mexico were intending to abrogate or give away its existing rights to water below Elephant Butte, you would expect affirmative language stating that position. *Tarrant Regional Water District*, 569 U.S. at 614; N.M. Apportionment Br. 35-36; and

Fifth, Texas's interpretation would invite controversy, contrary to express purpose of the Compact. N.M. Apportionment Br. 36.

Two points merit additional discussion. It cannot be emphasized enough how similarly positioned New Mexico and Texas are with regard to the Compact below Elephant Butte. Article IV provides for the delivery of water to Elephant Butte, not to Texas or New Mexico. NM-CSMF ¶¶ 44-46, 57-59. Once the water is in the Reservoir, it becomes "Usable Water" available for "release in accordance with irrigation demands" for lands in both States. And the "normal release" of 790,000 AF is for lands in both States, not just for Texas. NM-CSMF ¶¶ 31, 62, 71. There is one irrigation district in each State, and each of those districts has a contract with Reclamation. In fact, those Downstream Contracts with EBID in New Mexico and EPCWID in Texas are materially identical. *Compare* NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes (Nov. 9, 1937) (EBID), *with* NM-EX 321, Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes (Nov. 10, 1937) (EPCWID).

In his deposition, Pat Gordon, the Texas Compact Commissioner who speaks for Texas on matters related to the Compact, was asked about the differences between the two States and the

rationale for Texas's position that the two should be treated differently. Commissioner Gordon made the following meaningful admissions:

- Article IV does not specify that water is being delivered to Texas. NM-EX 211, Gordon Dep. (July 14, 2020) at 159:9-14;
- There is no language in the Compact that specifies that Texas and New Mexico should be treated differently below Elephant Butte. *Id.* at 161:12-16;
- The definitions of "Usable Water" and "Project Storage" do not indicate that Texas and New Mexico should be treated differently below Elephant Butte. *Id.* at 162:7-10;
- The 790,000 normal release from Elephant Butte Reservoir is intended to serve water users in *both* States. *Id.* at 163:21 – 164:12, 166:6 – 167:4;
- The New Mexico Compact Commissioner represents water users both above and below Elephant Butte. *Id.* at 178:23 – 179:1; and
- It is logical to understand that the New Mexico Compact negotiators wanted to ensure a water supply for New Mexico citizens *below* Elephant Butte Reservoir. *Id.* at 179:2-7.

When asked for the principled basis for treating Texas and New Mexico below Elephant Butte differently, Commissioner Gordon had no explanation. NM-EX 212, Gordon Dep. (July 15, 2020) at 10:14–17:16, 65:2–68:13.

Furthermore, Texas and New Mexico water users in the Project rely upon the Downstream Contracts to access water in Project Storage to the same extent. Texas contends that New Mexico cannot have a Compact apportionment below Elephant Butte because only EBID, not New Mexico, is party to the Downstream Contracts. Tex. Br. 68-70. Only EBID, Texas argues, and not New Mexico, has standing to enforce or challenge those contracts. *Id.* at 70 (citing *Kalamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999)). Of course, this argument is not unique to New Mexico. EPCWID, not Texas itself, is the party to the Downstream Contracts entitled to receive water in Texas. The exact same reasoning would therefore apply to Texas. In fact, time and again courts have confirmed that the actual water rights associated with Project deliveries belong to the water users themselves, and not the districts. *See, e.g.*, *Bean v.*

United States, 163 F. Supp. 838 (Fed. Ct. Cl. 1958); *see also Hudspeth Cnty. Conservation & Reclamation Dist. No. 1 v. Robbins*, 213 F.2d 425, 429-30 (10th Cir. 1954).

3. Articles VII and VIII of the Compact Support New Mexico's Understanding of the Compact

Texas argues that the Texas Compact Commissioner is "vested" with the sole[]" authority to protect the Project. Tex. Br. 64. As evidence, Texas points to Articles VII and VIII of the Compact. Neither provision supports Texas's argument that Texas is entitled to *all* of the water below Elephant Butte.

First, Texas relies on Article VIII, but that provision supports New Mexico. Texas correctly notes that Article VIII allows Texas to demand that Colorado and New Mexico release water from upstream reservoirs when the water levels drop below 600,000 AF of storage in Elephant Butte. Tex. Br. 64-65. According to Texas "New Mexico cannot make this demand because none of the water in Elephant Butte Reservoir is apportioned to New Mexico." *Id*. at 65. This assertion is flatly contradicted by the language of Article VIII, which states that "Texas may demand of Colorado and New Mexico, *and the commissioner for New Mexico may demand of Colorado*, the release of water from [upstream] storage" in order "to bring the quantity of usable water in project storage to 600,000 acre-feet by March first." NM-EX 330, Compact at Art. VIII (emphasis added); NM-CSMF ¶ 52. Thus, by Texas's own reasoning, because New Mexico can demand that upstream water be delivered to Elephant Butte Reservoir, it follows that New Mexico has Compact interests and rights below the Reservoir. It is those rights that New Mexico is authorized to protect in Article VIII, and that means that water in Elephant Butte Reservoir is apportioned to New Mexico.

Similarly, Texas argues that New Mexico should be deprived of an apportionment below Elephant Butte because only Texas can "accept" a relinquishment of Compact credit water under

Article VII. *Id.* at 65. But Texas ignores that only New Mexico and Colorado can *offer* a relinquishment. NM-EX 330, Compact at Art. VII; NM-CSMF ¶ 60. Texas Compact Commissioner Gordon admits that a relinquishment of water under Article VII requires mutual agreement and, if there is a relinquishment, New Mexico lands are entitled to 57% of the water that is released. NM-EX 211, Gordon Dep. (July 14, 2020) at 174:7–175:13.

4. New Mexico Has Never Agreed That Its Claim to a Compact Apportionment Below Elephant Butte is Inferior to Texas's Claim

Texas wrongly suggests that "until this litigation, New Mexico never argued that it had an apportionment of Rio Grande water below Elephant Butte Reservoir." Tex. Br. 70. In support of this assertion, Texas misconstrues, and takes out of context, certain deposition testimony in this case, and certain testimony in earlier litigation. In any event, the Supreme Court's recent decision has put to rest any notion as to whether the Compact apportions the Rio Grande below Elephant Butte. The Court has found that the Compact equitably apportions the water delivered to the Project at Elephant Butte "to Texas and part of New Mexico." *Texas v. New Mexico*, 138 S. Ct. at 959.

Certainly, before this Court, the State of New Mexico takes the position that its status as a state is of equal dignity to that of the State of Texas under the Rio Grande Compact.

B. The Negotiating History and Course of Performance Confirm New Mexico's Compact Apportionment Below Elephant Butte

To the extent necessary, the Court may consider extrinsic evidence to resolve ambiguities and interpret the Compact. *See Tarrant Reg. Water Dist.*, 569 U.S. at 639. Relevant evidence includes contemporary evidence of the parties' intent and purpose and subsequent evidence of the parties' course of performance and dealing. *See generally* Restatement (Second) of Contracts § 202 (1981); *accord Alabama v. North Carolina*, 560 U.S. at 345.

Texas improperly suggests that the Court may not consider extrinsic evidence at summary judgment. *See* Tex. Br. 58-59. To the contrary, the Court treats extrinsic evidence bearing on interpretation in the same fashion as any other evidence. *See Oklahoma v. New Mexico*, 501 U.S. at 234 n.5. As such, the Court may grant summary judgment construing the Compact on the basis of undisputed extrinsic evidence of the parties' intent.

Here the voluminous and undisputed extrinsic evidence of the compacting States' negotiating history and course of performance confirm that the parties understood the Compact to grant New Mexico an apportionment of water below Elephant Butte based upon the Project acreage in each state. New Mexico discussed this evidence in Sections III and IV of New Mexico's Apportionment Brief. Because Texas does not, generally, address extrinsic evidence, it is unnecessary to duplicate New Mexico's analysis here. Instead, New Mexico incorporates by reference its prior briefing for the Court's consideration.

However, the number of statements advanced in Texas's putative "plain text" reading of the Compact that are plainly inconsistent with the contemporaneous evidence of the parties' intent is noteworthy. For instance, Texas states, without analysis, that "[t]he 57/43 split does not arise out the Compact." Tex. Br. 71. To the contrary, abundant extrinsic evidence indicates that the parties understood the Compact to maintain the division of water in Project operations through 1938—*i.e.*, the equal-per-acre process of allocation that results in an approximate 57%/43% distribution between New Mexico and Texas. *See* NM-CSMF ¶¶ 66-78. For example, New Mexico's Engineer Advisor J.H. Bliss recounted that the delivery obligation at San Marcial presumed that the "Project must be operated as a unit," in terms of proportionate deliveries in New Mexico and Texas. NM-EX 327, J.H. Bliss, *Provisions of the Rio Grande Compact*, 1 (Apr. 2, 1938); NM-CSMF ¶ 75. This meant that all Project lands were treated the same (equal water

rights), regardless of which state they were located in. Likewise, Texas Commissioner Clayton directly addressed the structure and effect of the Compact:

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

NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-CSMF ¶ 76. Commissioner Clayton clearly articulated the division of water was based on the Downstream Contracts and that each acre was treated equally regardless of whether the land was in New Mexico or Texas. Commissioner Clayton later explained that the Compact effectively presumes that "all the lands in the Project have equal water rights, and the acreage to be irrigated is practically 'frozen' at its present figures." NM-EX 329, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to C.S. Clark, Chairman, Board of Water Engineers, State of Texas (October 16, 1938); NM-CSMF ¶ 77. This evidence indicates that no contemporary party held Texas's novel understanding that the division of water in the Project was a matter separate and apart from the Compact.

Texas also misconstrues, in its limited treatment of the topic, the parties' course of performance with regard to Compact administration below Elephant Butte. Texas avers that "no Compact accounting has ever taken place below Elephant Butte," which Texas suggests is an indication that the Compact does not apply. Tex. Br. 71. Texas is incorrect. As New Mexico explained in its Apportionment Brief, Reclamation reports to the Rio Grande Compact Commission ("RGCC") every year about Project Operations. NM-CSMF ¶¶ 101-04. 265; NM-

EX 512, Bureau of Reclamation, Calendar Year 2009 Report to the Rio Grande Compact Commission, at 59-67 (Mar. 2010). Data that are reported to the RGCC include the releases from Caballo Reservoir and the allocations to each of the Districts. *Id*. Discussions about Project operations impacting the Compact apportionment regularly take place at both the RGCC annual meetings and the Engineer Advisor meetings. NM-CSMF ¶¶ 101-04, 265; NM-EX 518, Rio Grande Compact Commission, Transcript of the 72nd Annual Meeting (94th Meeting) (Mar. 30, 2011) at 49-53, 57-60.

Moreover, the record is replete with examples of the States, through the Compact Commission, reaffirming the 57%/43% split. NM-CSMF ¶¶ 102-08; *see also* NM-EX 413, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Concerning Federal Agency Operations of Their Water-Related Facilities on the Rio Grande Compact Accounting (Mar. 25, 2004) (requesting that "federal agencies that operate water-related facilities within the Rio Grande basin to advise the Rio Grande Compact Commission prior to changing the operation of any of those facilities and when deemed necessary by the Rio Grande Compact Commission, seek its unanimous consent for changes prior to implementation" so as to not affect the Compact apportionment); NM-EX 002, D'Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.

IV. NEW MEXICO HAS THE SOVEREIGN POWER TO ADMINISTER WATER BELOW ELEPHANT BUTTE IN A MANNER CONSISTENT WITH THE COMPACT

Texas argues that because the Compact is federal law, as well as an agreement between the States, it "preempts conflicting New Mexico State law" and "does not control Texas's apportionment." Tex. Br. 93. New Mexico recognizes that the Compact is "binding upon the citizens of [New Mexico] and all water claimants," and that New Mexico may not exercise its authority over water rights in the Lower Rio Grande in a way that is inconsistent with the Compact. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). But Texas

overreaches when it asserts New Mexico state law "has no application" in Compact compliance. Tex. Br. 92. Here, there is no conflict between New Mexico state law and the Compact. New Mexico administrative structures are in place to ensure Texas receives its apportioned share of Project deliveries. Should this Court determine additional action is needed, the New Mexico State Engineer can and will administer water rights to meet the Court's requirements. Texas must be required to do the same. Pumping and changed operations in Texas impact the total allocation available to New Mexico and treaty deliveries to Mexico. Texas must be held to the same standard and show that it also has the ability to administer its water use in compliance with the Compact.

The United States has agreed with New Mexico in its prior briefing that the signing of the Compact did not mean that New Mexico surrendered all regulatory authority over water use south of Elephant Butte Reservoir in New Mexico. *See* U.S. Reply on Exceptions at 6, 15-16. The United States recognized that New Mexico's state water administration still applies below Elephant Butte Reservoir, although "New Mexico cannot administer water in way that conflicts with the Compact's equitable apportionment." *Id*. at 16. The United States has further acknowledged that "[s]tate law . . . protect[s] Project water deliveries (including to Texas and Mexico) from interference or impairment." *Id*. New Mexico agrees with the United States that the Compact imposes "limits on how [New Mexico] may exercise its authority over water," but also agrees that "[t]he extent of the limitations imposed by the Compact" has yet to be determined in this proceeding. *Id*.

A. The Compact Does Not Necessarily Preempt New Mexico Water Law South of Elephant Butte

Texas's assertion that the Compact preempts New Mexico state law, Tex. Br. 92-93, fails to establish any actual conflict between New Mexico state law and the Compact. Texas broadly asserts that if New Mexico allows *any* action, including pumping groundwater, "that depletes the

Texas Compact apportion by way of depriving either EBID or EP#1 of their contractual entitlements to water," New Mexico is violating the Compact.[2] Tex. Br. 93.

This Court's Supremacy Clause jurisprudence generally recognizes preemption in three scenarios: first, where Congress explicitly states that it is preempting state law in a certain area; second, where "the scheme of federal regulation is sufficiently comprehensive to make reasonable the inference that Congress 'left no room' for supplementary state regulation" or where federal interests are so "dominant" that courts presume Congress intended to preclude enforcement of state laws on the same subject; and third, where an actual conflict between federal and state law exists. *Hillsborough County, Fla. v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 713 (1985).

Although Texas does not specify which form of preemption it is claiming, it suggests an actual conflict exists between the Compact and New Mexico water law. Texas fails to demonstrate the existence of any such conflict. "Under ordinary conflict pre-emption principles a state law that 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of a federal law is pre-empted." *Williamson v. Mazda Motor of America*, 562 U.S. 323, 330 (2011) (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941)). State law is also preempted if it is impossible to comply with both state and federal statutes. *Fidelity Fed'l Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982). However, "in all pre-emption cases, and particularly those in which Congress has legislated in a field which the States have traditionally occupied, we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Wyeth v. Levine*, 555

[2] As a factual matter, this has never occurred. Reclamation has always been able to deliver water that was allocated and ordered. NM-EX 006, Barroll 2nd Decl. ¶ 13; *see also* NM-CSMF ¶ 177.

U.S. 555, 565 (2009) (internal quotations and alterations omitted). To identify Congress's purposes, the Court reviews the history of the act in question. *Id*. at 566.

Here, control of water is not merely a "field which the States have traditionally occupied." *Id*. at 565. This Court has described control of water as a "core state prerogative." *Tarrant*, 569 U.S. at 632. Texas points to nothing in the plain language of the Compact, its enabling legislation, or its negotiating history to suggest the "clear and manifest purpose of Congress" in approving the Compact was to preempt New Mexico water law south of Elephant Butte. Nor does Texas point to any other examples of compacts that expressly or impliedly preempt state laws in the absence of an actual conflict.

It is true that the Court has recognized, in *Hinderlider* and elsewhere, that state law must be exercised in a manner consistent with a compact's requirements. New Mexico acknowledges its duty to exercise its laws in conformity with the Compact, and does not dispute *Hinderlider*'s applicability to the Compact or this case. However, subject to the rule in *Hinderlider*, this Court has repeatedly recognized the role that state law plays in ensuring compliance with an interstate compact.

In *Kansas v. Nebraska*, the Court rejected Kansas's requested injunction because "Nebraska's new compliance measures, so long as followed, are up to the task of keeping the State within its allotment." 135 S. Ct. at 1059. Similarly, in *Montana v. Wyoming*, the Court found that the water the downstream state receives under the Yellowstone River Compact depends on the upstream state's system of prior appropriation. *See* 563 U.S. at 375-76.

Further, in *Kansas v. Colorado*, 543 U.S. 86, 103-04 (2004), the Court upheld the recommendation that matters integral to Arkansas River Compact accounting be quantified by the upstream state's water courts. More recently, in *Tarrant Reg'l. Water Dist. v. Hermann*, 569 U.S.

at 631, the Court concluded that "when confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.'" (quoting *Virginia v. Maryland*, 540 U.S. at 67).

Even *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, the seminal case confirming that state water rights and state administration must conform to compact requirements, acknowledged administration of state water rights by state officials is valid if the rights and administration comply with compact obligations. The Court considered whether Colorado's adoption of a compact *conferred* authority on Colorado to enforce its terms. *Id.* at 108. *Hinderlider* concluded a state's authority to enforce a compact is a necessary incident to its constitutional authority to enter the compact. *Id*. *Hinderlider* did not hold that Colorado relinquished its jurisdiction to administer La Plata River water, even the water apportioned to New Mexico. On the contrary, state administration was the means by which Colorado enforced the compact and ensured New Mexico received its share of the river's water. Colorado's method of administering its water rights may have been modified by the La Plata River Compact, but its jurisdiction to administer water within its borders was not superseded. *Hinderlider* shows that, while a compact controls, state law is still the mechanism used to comply with that compact.

Here, New Mexico has demonstrated that Texas received its full Compact apportionment in the full supply years 1985 to 2002, 2005, and 2007 through 2010. *See* State of New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Certain Years (Nov. 5, 2020) ("New Mexico Full Suply Motion" or "NM Full Supply Br."). In each of these years, it is undisputed that Texas received its full allocation of Project surface water under the Compact. From 2006 to present, New Mexico's experts have also shown that under the 2008

Operating Agreement Texas is receiving more than its 43% Compact apportionment in violation of the Compact. NM-CSMF ¶¶ 179-180, 182-83, 188-89. Requiring New Mexico to curtail groundwater pumping after 2006, as suggested by Texas and the United States, would result in a larger imbalance of water and equities to Texas. This leaves two years, 2003 and 2004, during which Texas might have a claim to injury. If Texas is able to establish at trial that water administration is necessary to protect Texas's apportionment, New Mexico has the legal and administrative enforcement tools needed to address groundwater pumping in these years. *See* New Mexico's Response to the United States' Motion for Summary Judgment at Section VI.

The cases Texas cites are inapposite and unpersuasive, and do not support its contention that the Compact extinguishes New Mexico state law. As Texas admits, *Alamosa-La Jara Water Users Protection Ass'n v. Gould*, 674 P.2d 914 (Colo. 1983), involves the application of a compact to an *intrastate* water dispute. Tex. Br. 94. It has no bearing on this interstate water dispute, and in any event, it merely extends *Hinderlider* to intrastate water administration. 674 P.2d at 922-23. New Mexico does not dispute *Hinderlider*'s applicability to the application of New Mexico law throughout the State, including south of Elephant Butte.

Texas next raises *California v. United States*, 438 U.S. 645 (1978). *California v. United States* concerns the applicability of state law to the operation of federal reclamation projects, and stands for the proposition that state law, pursuant to § 8 of the Reclamation Act, 43 U.S. § 383, applies to federal Reclamation projects to the extent it is not inconsistent with applicable federal law. Texas defensively argues that *California v. United States* does not endorse application of state law to the Compact because (1) that case involved a reclamation project operating only in one State and (2) state water law cannot apply to Reclamation projects if it conflicts with federal

law, including a compact. Tex. Br. 97-98. However, the burden is still on Texas to establish inconsistencies between the Compact and state law, and Texas has made no effort to do so.

Texas's final preemption argument is that New Mexico law does not control the allocation of Project water *to EBID*. Tex. Br. 99-101. Texas fails to explain why New Mexico law would not apply within New Mexico to a New Mexico entity. Nor does Texas establish why it has standing to raise any arguments at all regarding the application of New Mexico law to a New Mexico entity. *E.g., Kowalski v. Tesmer*, 543 U.S. 125 (2004) ("[W]e have not looked favorably on third-party standing."). Texas's arguments regarding the applicability of New Mexico law to EBID fail for the same reason its other arguments fail: there is no conflict between New Mexico law and the Compact.

B. New Mexico's Administration of Water South of Elephant Butte Is Consistent with the Compact

Texas later argues that New Mexico must "make modifications" to its water rights to comport with the Compact, including adopting active water administration south of Elephant Butte, which it contends New Mexico has not done, Tex. Br. 100-03. Contrary to its earlier arguments, Texas switches from arguing that state law has "no application to the water it delivers to the Project," to recognizing New Mexico has authority under state law to administer water rights in the Lower Rio Grande, *id*. 104, but it unfairly faults New Mexico for not doing more to control water uses in this area, *id.* 105-06.

New Mexico has repeatedly acknowledged that it must administer water throughout the State, including in the Lower Rio Grande, if this is necessary to comply with the Compact. As discussed in more detail in New Mexico's Response to the United States' Motion for Summary Judgment at Section VI, filed herewith, New Mexico has a comprehensive water administration scheme and has taken numerous steps to regulate water use in the Lower Rio Grande. That

discussion is also incorporated here. These efforts accelerated in the early 2000s, when severe drought gripped the Rio Grande basin. Unfortunately, the United States' adoption of the 2008 Operating Agreement, aided and abetted by Texas's Rio Grande Compact Commissioner, amplified the problem in New Mexico by radically changing the Compact apportionment to the detriment of New Mexico and forcing New Mexico water users to rely on groundwater to supplement their reduced surface water allocations. This upended New Mexico's water administration in the Lower Rio Grande and led directly to the dispute before the Court today. Until the surface water shortages and impact to the aquifer brought on by the 2008 Operating Agreement are addressed, New Mexico will continue to be harmed because no amount of water administration or regulation can overcome the unequitable allocations New Mexico is receiving under the 2008 Operating Agreement.

New Mexico law vests the New Mexico Office of the State Engineer ("OSE") with the authority to administer water rights. NMSA1978, § 72-2-9.1. The OSE enforces New Mexico's water laws and protects senior water rights from interference. *See, e.g.*, NMSA 1978, § 72-2-1 ("[The New Mexico State Engineer] has general supervision of waters of the state and of the measurement, appropriation, distribution thereof and such other duties as required."); NMSA 1978, § 72-2-9.1 (authority of State Engineer to adopt rules for priority administration); NMSA 19788, § 72-2-18 (enforcement authority). *See* NM-CSMF ¶ 220, 228, 288-300; NM-EX 007, D'Antonio 2d Decl. ¶¶ 1-59.

As explained in New Mexico's Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice ("New Mexico's Notice Motion" or "N.M. Notice Br."), like other water right owners in the Lower Rio Grande, Reclamation can initiate enforcement by notifying the OSE that the actions of junior appropriators are interfering

with the Project water right, requesting the OSE to administer the water rights in the Lower Rio Grande. This is entirely consistent with *Hinderlider*, 304 U.S. at 108, and is required under New Mexico state law, N.M.S.A. § 72-2-9.1. *Cf. Montana v. Wyoming*, 138 S. Ct. 758 (2018) (mem.) (requiring a priority call to enforce the Yellowstone River Compact); Special Master's Second Interim Report, *Montana v. Wyoming*, No. 137 Original, at 47 (S. Ct. Dec. 29, 2014).

The OSE has taken numerous affirmative water management actions even without such a priority call. New Mexico State Engineer John D'Antonio, New Mexico Interstate Stream Director Rolf Schmidt-Petersen, and Lower Rio Grande Water Master Ryan Serrano testify at length by declaration about New Mexico water administration and management. *See* NM-CSMF ¶¶ 112, 195, 217, 220-222, 287-300, 303-320 NM-EX 007, D'Antonio 2d Decl., NM-EX 009, Schmidt-Petersen 2d Decl.; NM-EX 010, Serrano Decl. As explained more fully in New Mexico's Response in Opposition to the United States' Motion for Partial Summary Judgment, submitted concurrently herewith, the actions the State Engineer has taken include, in 1980 and 1982, declaring the Lower Rio Grande Underground Water Basin, foreclosing new groundwater appropriations, and requiring that depletions caused by changes to groundwater uses be offset. NM-CSMF ¶¶ 108, 222, 295; NM-EX 007, D'Antonio 2d Decl. ¶ 15, 21; NM-EX 006, Barroll 2d Decl. ¶ 78. Until recently, Texas did not complain about groundwater use, and did not advocate for groundwater regulation. Rather than support New Mexico's decision to declare the Lower Rio Grande groundwater basin in 1980, Texas complained and urged New Mexico to reconsider. NM-CSMF ¶ 216; NM-EX 418, Transcript (Mar. 25, 1982) (urging New Mexico's State Engineer to "give reconsideration" to his order declaring the basin, "because we have developed below Elephant Butte Reservoir in Texas and New Mexico agriculture which requires… an absolute minimum in most crops of three acre-feet, and in many crops of much more than three acre-feet").

The State also initiated an adjudication of water rights in the Lower Rio Grande in 1996 to conclusively determine existing claims and uses and ease administration of water in the area. *New Mexico v. Elephant Butte Irrigation Dist.*, No. D-307-CV-96-888 (N.M. 3d Jud. Dist. Sept. 24, 1996); NM-CSMF ¶ 301; NM-EX 007, D'Antonio 2d Decl. ¶ 32. And in 1999, the OSE issued the Mesilla Valley Administrative Area Guidelines to aid administration of both surface and groundwater in a critical portion of the Lower Rio Grande. NM-EX_007, D'Antonio 2d Decl. ¶¶ 22.

When drought hit in the early 2000s and groundwater pumping throughout the Project area increased in response, the OSE redoubled its efforts to regulate water use and extraction in the Lower Rio Grande. In 2003, the New Mexico Legislature directed the OSE to promulgate regulations to facilitate administration of water rights prior to completion of adjudications throughout the entire state. N.M.S.A. § 72-2-91; NM-CSMF ¶ 301. One year later, the State Engineer adopted Active Water Resource Management (AWRM) Framework Regulations. Although these were tied up in court challenges until 2012, *Tri-State Generation and Transmission Ass'n, Inc. v. D'Antonio*, 289 P.3d 1232 (N.M. 2012), the State Engineer continued tightening administration in the Lower Rio Grande. NM-CSMF ¶¶ 296-298; NM-EX 007, D'Antonio 2d Decl. ¶¶ 39-44, 45-46.

In 2004, the State Engineer created the Lower Rio Grande Water Master District in OSE District IV and required metering of all non-domestic wells. NM-CSMF ¶¶ 171, 232, 289-290, 298; NM-EX_007, D'Antonio 2d Decl. ¶¶ 5, 44; NM-EX 006, Barroll 2d Decl. ¶ 22; NM-EX 533, State Engineer Order No. 180 (Mar. 28, 2007). The District IV office in Las Cruces implements State Engineer administration in the Lower Rio Grande. District IV conducts on-the-ground administration, compliance, and enforcement of OSE mandates. Those issues that cannot be

resolved by District IV are referred to appropriate divisions within the OSE, including the Administrative Litigation Unit (ALU). The State Engineer shuts down illegal surface diversions, does not allow new groundwater appropriations after 1980 that are not fully offset, and tracks all groundwater pumping with strict limitations on total conjunctive use. NM-CSMF ¶¶ 289, 290, 309-310; NM-EX 007, D'Antonio 2d Decl. ¶¶ 5, 21; NM-EX 010, Serrano Decl. ¶¶ 22-26, 28-30.

The State Engineer also drafted 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. ¶¶ 45-47. The draft DSRs contained additional provisions designed to protect Texas and Mexico deliveries, if necessary. NM-CSMF ¶¶ 296-99; NM-EX 007, D'Antonio 2d Decl. ¶ 52. The draft DSRs received a negative response from some water users in the Lower Rio Grande, in particular EBID. NM-EX 007, D'Antonio 2d Decl. ¶ 46.

The primary reason the State Engineer never finalized the draft DSRs was the adoption of the 2008 Operating Agreement. NM-CSMF ¶ 226, 296; NM-EX 007, D'Antonio 2d Decl. ¶¶ 47-48, 52. The 2008 Operating Agreement intruded upon the State Engineers' authority to regulate water use and groundwater pumping in New Mexico. Without a quantitative analysis, the 2008 Operating Agreement reduced surface water allocations to New Mexico lands based on the United States' rationale that the reduced surface water was in exchange for allowing farmers to pump groundwater in New Mexico. NM-EX 119, United States' Suppl.l Disclosure of Ian M. Ferguson at 4 (Sept. 16, 2019); NM-EX 238, Ferguson Dep. (Feb. 19, 2020) 129:20-24. Because the measure of New Mexico's apportionment in the Lower Rio Grande is EBID's allocation of surface water, the 2008 Operating Agreement takes water apportioned to New Mexico and, without New Mexico's consent, transfers that water to Texas.[3]

[3] This out-of-state transport of New Mexico waters violates New Mexico law. NM-EX 007, D'Antonio 2d Decl. ¶ 50.

The problems with the 2008 Operating Agreement are legion. Not only does it violate the Compact by effectively reapportioning the Lower Rio Grande without New Mexico's consent—it also reduces EBID's allocation far more than any reasonable estimate of the impacts of New Mexico pumping on Texas. NM-CSMF ¶ 187, 248-256; NM-EX 006, Barroll 2d Decl. ¶¶ 64-65, 80. As anticipated by the United States, the reduced surface water allocations have forced New Mexico farmers to engage in *more* pumping in the Lower Rio Grande, not less. NM-CSMF ¶ 189, 256; Barroll 2d Decl. ¶¶ 62, 67; NM-EX 010, Serrano Decl. ¶ 36. Because the 2008 Operating Agreement changed Project operations so drastically, it rendered the draft DSRs for the Lower Rio Grande obsolete. NM-CSMF ¶ 26; NM-EX 007, D'Antonio 2d Decl. ¶¶ 48, 52.

From a Compact perspective, since adoption of the 2008 Operating Agreement, New Mexico—not Texas—is the injured party. NM-EX 006, Barroll 2nd Decl. ¶¶ 80-81; NM-EX 007, D'Antonio 2nd Decl. ¶ 49. Under the 2008 Operating Agreement, Texas receives far more than its 43% share of Project water. NM-CSMF ¶¶ 250-252; NM-EX 006, Barroll 2d Decl. ¶ 62. In these circumstances, to curtail additional groundwater pumping in New Mexico as Texas suggests would only exacerbate the harm to New Mexico.

C. Texas's Administration of Water Does Not Comply with the Compact

The many administrative actions New Mexico has taken stands in stark contrast to the lack of any administration of groundwater in Texas. Texas follows the rule of capture for groundwater, meaning that every landowner has the right to extract as much groundwater from his or her property as possible, without limitation, and without any regard to impacts on other landowners or surface water. *See Sipriano v. Great Spring Waters of Am., Inc.*, 1 S.W.3d 75, 76 (Tex. 1999) ("Essentially, the rule [of capture] provides that, absent malice or willful waste, landowners have the right to take all the water they can capture under their land and do with it what they please, and they will not be liable to neighbors even if in so doing they deprive their neighbors of

the water's use."). This has led to a proliferation of wells in Project acreage in Texas, including numerous municipal wells the City of El Paso has relied on for decades as its primary source of supply. NM-CSMF ¶¶ 238-239; 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. NM-CSMF ¶¶ 149-150, 170; NM-EX 006, Barroll 2d Decl. ¶¶ 50-51. Texas has also allowed the extraction of groundwater from the portion of the state that lies within the Mesilla Bolson, including but not limited to extractions of water for ever-increasing municipal use at the City of El Paso's Canutillo wellfield—increasing depletions to Rio Grande surface water that flows into the El Paso Valley, depletions for which Texas now seeks to hold New Mexico liable. NM-CSMF ¶ 239; NM-EX 006, Barroll 2d Decl. ¶ 31.

These actions not only harm Texas, but also New Mexico.[4] Because EPCWID is no longer charged for the use of return flows (including municipal return flows derived from Project water), as it was previously, 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 Project water to both New Mexico and Texas lands. *Id*. ¶ 55; NM-CSMF ¶ 261-262. Despite these severe and increasing impacts, Texas has yet to take any concrete steps to control groundwater use within its borders. It has declined to use even the few administrative tools 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

[4] The Unclean Hands defense is an equitable maxim intended to prevent a court from intervening to award a party the fruits of his inequitable conduct. *See, e.g.*, McClintock Handbook of the Principles of Equity § 26, at 61 n.64. That doctrine should be applied here.

that there are "pretty sizeable" cones of depression in the area. NM EX 239, Mills Dep. (Aug. 27, 2020) 28:1-13, 17-25; 29:3-23; 38:1-25; 39:1.

The administrative actions New Mexico has taken—closing the Lower Rio Grande basin to new groundwater appropriations, initiating a stream adjudication, issuing the MVAA Guidelines, issuing a metering order, appointing a water master, issuing draft AWRM regulations—are consistent with the Compact's apportionment of water in the Lower Rio Grande on the basis of irrigation demands. As occurred during the D1/D2 period, pumping occurs primarily when surface water supplies are limited as farmers try to salvage their crops and livelihoods. During wetter periods, pumping decreases as farmers use available surface water to supply their irrigation demands. Pumping in excess of water rights is prohibited, and that prohibition is enforced. NM-CSMF ¶¶ 308-310; NM-EX 007, D'Antonio 2d Decl. ¶¶ 57-59; NM-EX 010, Serrano Decl. ¶¶ 22-25. Nonetheless, should the Court determine 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 needed to comply with this Court's orders and the Compact. New Mexico stands ready to do so. Texas must do the same.

V. TEXAS'S ARGUMENTS AGAINST NEW MEXICO'S FIRST AND FOURTH COUNTERCLAIMS SHOULD BE REJECTED BECAUSE NEW MEXICO HAS A COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE

New Mexico's First and Fourth Counterclaims allege that Texas has received more water than it is entitled to under the Compact, that actions in Texas have harmed New Mexico by reducing New Mexico's Compact apportionment, and that New Mexico is, therefore, entitled to relief. Texas argues that these counterclaims "must fail as a matter of law." Tex. Br. at 74. Texas's argument relies entirely on the incorrect assertion that New Mexico has no Compact apportionment below Elephant Butte Reservoir. Texas's argument must fail if the Court determines—as, in fact,

it already has—that New Mexico has a Compact apportionment below Elephant Butte. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). For the reasons discussed above, and in New Mexico's Apportionment Brief, New Mexico has a Compact apportionment of 57% of Project supply below Elephant Butte. Texas's motion to dismiss New Mexico's counterclaims should, therefore, be denied.

VI. THERE IS NO "1938 CONDITION"—THE COMPACT AND THE PROJECT WERE DESIGNED TO FLEXIBLY AND EQUITABLY APPORTION RIO GRANDE SURFACE WATER BETWEEN NEW MEXICO AND TEXAS

Texas's "1938 Condition" argument is a fiction contradicted by the language of the Compact and by Texas itself in its own Brief. On the one hand, Texas argues that a 1938 Condition is of "fundamental importance" and was "the foundation for Compact formation." Tex. Br. 46, 86. On the other hand, Texas acknowledges that there was extensive groundwater development at least in the 1950s, and acknowledges that Project accounting for at least the last 40 years has implicitly incorporated all depletions, including any caused by groundwater pumping, when determining annual allocations. Tex. Br. 23, 29-30, 33-34, 87. Texas failed to object to these developments for decades, and now seeks to rewind 80 years of Project history in a smoke and mirrors exercise targeted to overcome New Mexico's complaint that the allocation procedure under the 2008 Operating Agreement violates the Compact. In truth, there is no "1938 Condition." The Compact incorporates the Project and the 57%:43% equitable apportionment of Project Supply, and leaves it to Reclamation to ensure that these equitable apportionments are made—an obligation Reclamation has failed to satisfy since the change of operations to the D3 methodology in 2006.

A. There is No "1938 Condition" Governing the Allocation and Apportionment of Rio Grande Surface Water Below Elephant Butte Reservoir

1. The Plain Language of the Compact Does Not Provide For a 1938 Condition

Texas takes the position that the Compact imposes a "1938 Condition" on the apportionment below Elephant Butte Reservoir: "The apportionments to Colorado, New Mexico, and Texas must all be based on the freezing of depletions at the 1938 Condition." Tex. Br. 82. That is, Texas insists that depletions within New Mexico below Elephant Butte are limited by the Compact to the level of depletions that occurred in 1938. It claims such a limitation appears in the "express terms" of the Compact, *Id.* at 77-78, but cites no provision of the Compact that addresses a "1938 Condition." NM-CSMF ¶ 56; NM-EX 008, Lopez 2d Decl. ¶ 24.

The Compact makes no mention of a "1938 Condition" below Elephant Butte, nor does it make any reference to the specific number of acre-feet that Texas now claims is the limit of consumption in New Mexico under the supposed "1938 Condition," which it quantifies at 149,005 acre-feet per year in one of the Texas expert reports.[5] *See* NM-CSMF ¶ 56; NM-EX 126, Hutchison Rep. 41, ¶ 135.

Texas also claims that adopting a "1938 Condition" is the only way to achieve "an 'equitable apportionment.'" Tex. Br. 82. Texas argues that, notwithstanding the drafters' clear choice to reject the methodology below Elephant Butte, the Court should read an inflow-outflow relationship into the apportionment below Elephant Butte because the deliveries specified for Colorado and New Mexico at and above the reservoir are based on inflow-outflow (index gage) relationships.

[5] As discussed below, in addition, this amount is based on depletions *in a single year*—1938. Texas offers no justification as to why any calculation based on a single year is appropriate.

The Court has turned back arguments in other interstate compact enforcement cases that the Court should use equities to alter or adjust the plain language of a compact. In *Alabama v. North Carolina*, 560 U.S. 330, for example, the Court was urged to read into an interstate compact a duty of good faith and fair dealing. The Court noted that a compact is not only a contract, but also a federal statute, precluding the Court from reading additional requirements into an interstate compact. Pointing to the "federalism and separation-of-powers concerns that would arise were we to rewrite an agreement among sovereign States, to which the political branches consented," the Court stated, "we will not order relief inconsistent with the express terms of a compact, no matter what the equities of the circumstances might otherwise invite." *Id.*, at 352 (quoting *New Jersey v. New York*, 523 U.S. at 811 and *Texas v. New Mexico*, 462 U.S. 554, 564 (1983) (quotation marks and brackets omitted)). Yet Texas claims that the equities require such a result: "Because the Colorado and New Mexico apportionments are framed by the 1938 Condition, Texas's apportionment must necessarily also be framed by the 1938 Condition. It is the only way that there is an 'equitable apportionment.'" Tex. Br. 82.

While reliance on principles of equity and of equitable apportionment of interstate waters is appropriate and necessary when Congress approves a compact apportioning such waters, the apportionment, once set, is not open to reassessment. Texas may now wish the Compact adopted a "1938 Condition," but such a procedure cannot be imposed unless it was the express intent of the States. Therefore, equitable principles cannot establish a basis for the newly minted Texas argument that the Compact *should* impose a "1938 Condition."[6]

The plain language of the Compact offers no support for Texas. *See* NM-CSMF ¶ 56. In fact, Texas not only ignores the language of the Compact, its argument, that the presence of index

[6] New Mexico does not agree that a "1938 Condition" would be equitable in any respect.

gages for delivery obligations at and above Elephant Butte Reservoir requires insertion of a similar requirement below the Reservoir, proves the opposite. This part of their argument is actually contrary to the express terms of the Compact. Texas is asking the Court to ignore the differences in the plain wording of the Compact, between the inflow-outflow/index gage provisions of Articles III and IV, and the obvious lack of such provisions below Elephant Butte Reservoir. The drafters of the Rio Grande Compact obviously knew how to draft an inflow-outflow/index gage provision if they had agreed to such a condition, and they intentionally chose not to, as shown unequivocally by the plain language of the Compact. *See New Jersey v. Delaware*, 552 U.S. at 615-16 (compacts "are presumed to be the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purpose of the high contracting parties" (internal quotation marks and citation omitted)).

The extrinsic evidence confirms this intentional decision. As discussed above and in New Mexico's Apportionment Brief, shortly after the Compact was adopted, Texas Commissioner Clayton explained that "[o]bviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas state line when the operation of the dam is not within their control." NM-EX 328, Letter (Oct. 4, 1938). He continued by explaining that an index gage approach (like the inflow-outflow method) was not practical in light of the Project, because it "would be very difficult and expensive, if not impossible" to "measure[] . . . the waters passing the Texas state line" and would "require continual measurements in these various channels to make any reasonably accurate computations of the total flow." *Id.* A specified amount of water passing the state line was not necessary, he continued, because "the question of the division of the water released from Elephant Butte reservoir is taken care by contracts between the districts under the Rio Grande Project," which provided "equal water" to each acre of land in the Project. *Id.*; NM-

CSMF ¶ 70. Thus, the States relied upon the Project to apportion the waters, and rejected the use of an inflow-outflow or gage methodology below Elephant Butte. *See, e.g., Rodriguez v. United States*, 480 U.S. 522, 525 (1987) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)).

The omission of inflow-outflow requirements below Elephant Butte Reservoir becomes even starker when compared to other contemporaneous compacts. Comparison with other interstate compacts approved by Congress has been adopted as an interpretational tool in previous compact enforcement cases, especially in determining the significance of including certain language in one compact but not in another. *See Alabama v. North Carolina*, 560 U.S. at 341-42; *Texas v. New Mexico*, 462 U.S. at 565 ("The Pecos River Compact clearly lacks the features of these other compacts, and we are not free to rewrite it."). On the merits of the Texas argument, it is therefore useful to compare the Rio Grande Compact with the Pecos River Compact. The Pecos River Compact provides in Article III(a) that:

> 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 (1949) (emphasis added). Both compacts were entered into by the same two States ten years apart but use a starkly different approach for depletions. The Pecos River Compact limits depletions to an established condition, and utilizes an inflow-outflow method. The Rio Grande Compact does not.

Similarly, in *Montana v. Wyoming*, 563 U.S. 368, Montana claimed—as Texas does here—that the upstream State was limited to the consumptive use existing in the year the Yellowstone River Compact was adopted. Like the Rio Grande Compact, no such condition was stated in the Yellowstone River Compact. 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 determined that the Yellowstone River Compact did not limit the consumptive use in the upstream State to the consumption occurring at the time of the Compact. *Id*. at 377. That same reasoning applies here.

Both the Yellowstone River Compact and the Rio Grande Compact rely on background principles of water administration and management to effectuate the apportionment, and both compacts protect pre-compact uses by relying on the existing regulatory system. Neither Compact states a depletion or consumption limit for the applicable area. The Special Master should follow the Court's lead in *Montana v. Wyoming*, and decline Texas' invitation to rewrite the Compact to include an inflow-outflow method, "1938 Condition," or depletion limit.

One further example from the interstate jurisprudence of the Court is instructive. In *Kansas v. Colorado*, 514 U.S. 673, Kansas, the downstream State, sought to enforce the Arkansas River Compact against the upstream State, Colorado. Although enforcement was ordered in other respects, the Court rejected Kansas' Compact claim with respect to Trinidad Reservoir. The operative apportionment provision of the Arkansas River Compact is Article IV-D, which provides

that the waters of the Arkansas River "shall not be materially depleted." Arkansas River Compact, 63 Stat. 145, 147 (1949). Kansas sought to have a change in reservoir operations at Trinidad Reservoir declared a Compact violation on the grounds that the change in operations violated Reclamation's Operating Principles for the Reservoir. Reclamation agreed that the change "constituted a departure from the intent of the operating principles," but the Court rejected Kansas' claim, holding that "Kansas, in order to establish a Compact violation based upon failure to obey the Operating Principles, was required to demonstrate that this failure resulted in a material depletion under Article IV-D." *Kansas v. Colorado,* 514 U.S. at 683. This decision again shows that the Court will not rewrite a compact to impose requirements that are not fairly expressed in the plain language of the compact. There is no "1938 Condition" in the Rio Grande Compact.

2. **The Course of Performance Is Inconsistent with a 1938 Condition**

The law is clear 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); *see also id.* at §223 (1) ("A course of dealing is a sequence of previous conduct between the parties to an agreement which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct."); §223 at Cmt g. ("The parties to an agreement know best what they meant, and their action under it is often the strongest evidence of their meaning."). The Court has specifically affirmed that "the parties' course of performance under [a] Compact is highly significant." *Alabama v. North Carolina*, 560 U.S. at 346, citing Scalia J. (dissenting) in *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").

The Parties' course of performance since the execution of the Compact makes it clear that the States did not understand or intend the Compact to impose a "1938 Condition," utilize an inflow-outflow method, or enact a depletion limit.

a. Since 1938, Project Conditions Have Evolved and Depletions Have Changed

Since 1938, with the active participation of Reclamation and the States, Project conditions and operations have evolved in ways that benefit Texas. Despite this, Texas now argues that "[t]he Compact protects the Project and its operations under the conditions that existed in 1938," and that the Compact prohibits New Mexico from depleting "surface water flows and the volume of water in the Rio Grande in excess of depletion conditions that existed in 1938." Tex. Br. 5, 77. Specifically, Texas alleges that New Mexico has excessively diverted "Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir … that in 1938 would have been available for use in Texas," and without this "volume of water" Texas is unable to "obtain an equitable apportionment of Rio Grande flows." Tex. Br. 8, 55. None of these allegations are true.[7] Nor is it true that "the Compact … relies on the Project, as it operated in 1938, as the means to provide Compact apportionments." Tex. Br. 77-78. On the contrary, the Compact requires that the Project allocations to New Mexico and Texas lands reflect the equitable apportionments of these States. Texas "is entitled to its 43 percent" slice of the Project Supply pie, *see* NM-EX 212, Gordon Dep. (Jul. 15, 2020) at 11:25-12:5, 13:1-9, but that 43% allocation is not based on a historical condition set forevermore in stone. NM-CSMF ¶¶ 80-81. Instead, until 2006, Reclamation calculated the allocations to each District (and, therefore, to New Mexico and

[7] As one obvious example, as New Mexico has explained in N.M. Full Supply Br. and in its Response to the U.S. Br., the Project establishes an annual maximum amount of water that will be delivered to Project lands, if ordered. That amount corresponds to the maximum amount of water allowed by Texas' adjudication of its own water rights. In full supply years, Texas would receive no additional water, regardless of any depletions by New Mexico.

Texas) based on current conditions, factoring in activities occurring throughout the Project, in both New Mexico, *and* in Texas.

It is not enough for Texas to now argue that it negotiated the Compact based on an undocumented assumption of "a 1938 Condition of consumption below Elephant Butte Reservoir" and an "understanding of then existing depletions to the Rio Grande, EBID's use of water in New Mexico, and the Treaty with Mexico." Tex. Br. 16. It is also not enough for Texas to argue that it "did not anticipate that Project return flows" may change over time. *Id.* This is especially true given Texas's concession that "[t]he Compact negotiators and engineers recognized that groundwater development below Elephant Butte would … deplete the available surface water," and Texas's acknowledgement that at least some groundwater pumping was occurring in 1938. Tex. Br. 17-18, 87. Texas alleges "[r]eturn flows are a key part of Project operations" and were an "important source of water for Project users" that "was contemplated" in the negotiations leading to the Compact. Tex. Br. 25, 32. Given its knowledge of the potential impact of groundwater pumping on return flows, and the importance Texas now places on these flows, it is noteworthy that Texas offers no explanation as to why it did not insist on an explicit Compact requirement concerning groundwater. But Texas did not, and this silence is deafening.

Texas's position hinges on its understanding that "[t]he Project was fully developed at the time the 1938 Compact was negotiated and approved." Tex. Br. 79. But Texas' argument fails, because this understanding is not correct. The Project and its operations have continued to evolve throughout the Project's more than 100 years of history, and Texas and New Mexico have both benefited from this evolution. NM-CSMF ¶ 137; NM-EX 008, Lopez 2d Decl. ¶¶ 33, 35. Major changes to the Project since 1938 that have benefited Texas, and which have impacted depletions include:

- Completion of the Rectification and Canalization projects;
- Proliferation of groundwater wells in both States and in Mexico;
- Project acreage buildout then reduction in irrigated acreage;
- Changes in on-farm irrigation efficiencies;
- Changes in crop mix;
- Urbanization of Project area;
- Growth of municipal water demands with significant amounts of that demand being supplied by the Project;
- Significant Project accounting changes;
- Infrastructure changes (*e.g.*, construction of the American Canal and its Extension);
- Designation of wastewater treatment plant treated effluent as non-Project water (in Texas only);
- Transfer of ownership and operation of Project infrastructure from Reclamation to the Districts; and
- Significantly modified Project operations under the 2008 Operating Agreement.

NM-CSMF ¶ 137; NM-EX 008, Lopez 2d Decl. ¶¶ 33, 35. Each of these changes has impacted depletions since 1938. And Texas never suggested that there was a "1938 Condition" until this lawsuit.

Further undercutting its own theory, Texas acknowledges that "beginning in the 1950s" there was extensive groundwater development in the Project. Tex. Br. 87. The fact that groundwater development occurred in both States, and neither State suggested that these changes violated any "1938 Condition" directly contradicts any assertion that Project operations and accounting were frozen in 1938.

b. Project Allocations Have Been Made for 70 Years Incorporating Impacts from Groundwater Pumping and Use

Project accounting, which controls how much water is available for use in each State, is also fundamentally inconsistent with any "1938 Condition." As Texas acknowledges, in the early 1980s, Reclamation proposed the D1/D2 Allocation method. Tex. Br. 34; see NM-CSMF ¶ 174. During this time, Project operations were changing from allocations to individual farms, to allocations to Districts. NM-EX 001, Barroll Decl. ¶¶ 20-21. Continuing the practice of allocating the same amount of Project Supply to each Project acre, the D1/D2 Allocation Method explicitly divided the United States' share of Project water 88/155 (57%) to EBID and 67/155 (43%) to EPCWID, in accordance with the irrigable acreages in each of those Districts. NM-CSMF ¶ 174. In developing this method, Reclamation made "[s]tatistical evaluations of operational records for the period 1951 through 1978," which "provided graphs, equations, and data" which were to be "used to ensure that future allocations to Mexico and the allocations to the U.S. maintain the historical relationship between the delivery of water to U.S. farms and Mexico." NM-EX 400, WSAP 9; NM-EX 006, Barroll 2d Decl. ¶ 57. Pursuant to this method, Mexico's share of Project Supply is calculated using the D1 Curve, and the remaining Project Supply is split 57% to EBID and 43% to EPCWID using the D2 Curve. NM-CSMF ¶¶ 163-64; NM-EX 006, Barroll 2d Decl. ¶ 57. The D2 Curve is based on the historical relationship between Project releases from storage and total Project diversions (including to Mexico) throughout the period 1951-1978 and is, therefore, a measure of Project delivery performance over this 29-year period. NM-EX 006, Barroll 2d Decl. at ¶ 57. Reclamation used the D1/D2 Allocation Method to determine the annual Project allocations to the Districts until 2005, and still uses the D1 Curve to determine the Project allocation to Mexico and the D2 Curve to determine the Project allocation to Texas (but uses a

different method, D3, for New Mexico). NM-CSMF ¶¶ 163-65; NM-EX 006, Barroll 2d Decl. ¶ 57; NM-EX 012, Sullivan Decl. ¶ 112.

Throughout this D2 Curve development period (1951-1978), groundwater pumping and use throughout the Project increased significantly. Tex. Br. 23, 29. Reclamation played an active role in this development, advising Project farmers in the late 1940s that Project reservoir levels were getting low and that Project supply may be inadequate. NM-EX 006, Barroll 2d Decl. ¶ 15. Reclamation recorded the number of irrigation wells, at least throughout the 1950s, and encouraged Project farmers to pump groundwater, specifically requesting that farmers with wells use them "to the greatest extent possible." NM-EX 006, Barroll 2d Decl. ¶ 17; NM-EX 419, RGPH (Water Announcement 1951); NM-EX 417; NM-EX 438, BOR (Water Announcement 1952); EX 433, BOR (Water Announcement 1954); NM-EX 420, RGPH (O&M 1951-57). Reclamation also asked farmers with wells "to arrange for transfer of a part of their unused allotment water to [other farmers] who are in need of additional water," and worked with farmers to distribute pumped groundwater through Project conveyances. NM-EX 006, Barroll 2d Decl. ¶ 18; NM-CSMF ¶ 209; NM-EX 420, RGPH (O&M 1951-57); NM-EX 419, RGPH (Water Announcement 1951). Later, in the 1970s, Reclamation worked with the Districts to develop District-owned irrigation supply wells. NM-CSMF ¶ 21; NM-EX 006, Barroll 2d Decl. ¶ 21; NM-EX 444, RGHP License. As explained further in N.M. Resp. to U.S. Br., these actions are all consistent with the understanding of the United States and the states that supplemental groundwater pumping was allowed.

Also consistent with this same understanding, Texas has historically recognized and 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-CSMF ¶¶ 66-67, 216; NM-EX 418, RGCC Tr. (Mar. 25, 1982) 66-67. This position, taken 40 years ago, is plainly inconsistent with the position Texas is now taking in this litigation.

What is important about the D2 Curve development period (1951-1978) and the application of D2 for the last 40 years, is that the effects of groundwater pumping were built into the procedure. NM-CSMF ¶ 215. In Texas's words, the D2 method "reflect[s] conditions that are different from the flow regime that existed at the time of the Compact," and "were based upon the depleted flow conditions influenced by … groundwater pumping … during the 1951-1978 period." Tex. Br. 34, 87. This concession cannot be squared with Texas's position that the Compact imposes a "1938 Condition" or a depletion limit. New Mexico and Texas accepted (or at least acquiesced to)[8] use of the D2 Curve to determine the 57%:43% Project allocations to EBID and to EPCWID since the early 1980s, and Texas continues to accept use of the D2 Curve to determine the annual allocation to EPCWID. Indeed, the 2008 Operating Agreement still bases the allocation to Texas lands on the D2 Curve, and confidently proclaims that its use (including the effects of groundwater pumping from 1951 to 1978) is consistent "with the provisions of the Rio Grande Compact." NM-CSMF ¶

[8] For the reasons set out in N.M. Resp. to U.S. Br., Texas and the United States have acquiesced to groundwater pumping, throughout the Project, at least to the extent reflected in the D2 Curve. The D2 Curve reflects Project dynamics and performance over a 27-year period between 1951 and 1978. The D2 Curve has been used by Reclamation, and accepted by Texas for 40 years (from the early 1980s to the present).

218; NM-EX 510, 2008 OA 14, ¶ 6.12 ("Nothing herein is intended to alter, amend, repeal, modify, or be in conflict with the provisions of the Rio Grande Compact.").

This course of performance by Reclamation and by Texas is entirely inconsistent with any "1938 Condition."

B. The States Understood that the Amount of Water to Be Delivered Through the Project Was Not Static

Texas alleges that "the only way" that Texas can have an equitable apportionment of Rio Grande surface water below Elephant Butte Reservoir is if "Texas's apportionment [is] necessarily … framed by the 1938 Condition." Tex. Br. 82. In framing this argument, Texas is again asking the Court to import an inflow-outflow method below Elephant Butte—something the States considered but rejected. NM-EX 328, Letter (Oct. 4, 1938).

Texas offers no principled basis as to why the same method for apportioning water must be used throughout the Compact, despite plain language to the contrary. Again, it is instructive to consider this claim in light of another interstate water compact. The Yellowstone River Compact, discussed above, uses *three* different methods to allocate water. Act of October 30, 1951, ch. 629, 65 Stat. 663. Article V(A) of the Yellowstone River Compact protects existing uses "in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Article V(B) of that compact divides the "unused and unappropriated waters" according to percentage allocations. Finally, Article V(D) then divides the waters between Montana and North Dakota below Intake, Montana "on a proportionate basis of acreage irrigated." Texas cites no support for its argument that a compact must use a single methodology for apportioning water. At the time of the Compact, the Project had been operating successfully for a number of years, and the States were satisfied with the division of water under the Project and the Downstream Contracts. NM-EX 112, Stevens Rep. at 72. Based on this history, it was perfectly acceptable that

the method for apportionment in Articles III and IV was different than the Project apportionment below Elephant Butte.

Nor is there any inequity in the way depletions are handled in the Rio Grande Compact above and below Elephant Butte Reservoir. "Usable Water" and "Project Storage," as those terms are used in the Rio Grande Compact, are a function of prevailing water supply conditions, including precipitation, soil moisture, temperature, crops and a number of other variables. Neither the Compact, nor the Project establishes a set amount of water that must be delivered to the Texas state-line. *See* NM-CSMF ¶¶ 75, 77; NM-EX 328, Letter (Oct. 4, 1938). Rather, it was always understood that the Project would evolve, and the amount of water that actually arrives in Texas each year will depend on "irrigation demands" and orders made by EPCWID.

Texas suggests that New Mexico is of the opinion that it can deplete Rio Grande surface water below Elephant Butte Reservoir without limit, Tex. Br. 83, but that is not the case. By order of the Adjudication Court in Stream System Issue 101, irrigation pumping in New Mexico is limited to supplementing surface supply up to an established amount. And as explained below, New Mexico's water use and consumption has not increased since the 1951-1978 period. NM-EX 012, Sullivan Decl. ¶ 62.

Texas acknowledges the flexibility of the Compact in its Brief: "the Compact is flexible with respect to delivery requirements allowing its operation to be governed by the natural hydrology of the Rio Grande." Tex. Br. 35. And the Texas Commissioner at the time of the Compact, Frank B. Clayton, confirmed in 1938 that under the "Project, all the lands in the Project have equal water rights." NM-CSMF ¶¶ 76-77; NM-EX 328, Letter (Oct. 4, 1938); NM-EX 329 Letter (Oct. 16, 1938). From the inception of the Project, all Project acreages were treated the same, regardless of which state they are located in. NMCSMF ¶ 159. This approach held true

until the change of Project operations in 2006, which precipitated this litigation. NM-CSMF ¶¶ 197-98. It is the 2008 Operating Agreement that upsets the equitable apportionment between New Mexico and Texas and violates the Compact. Imposition of a "1938 Condition" would further upset the Compact's equitable apportionments.

C. In Any Event, Consumptive Use Should Not Be Frozen Based on Depletions in a Single Year

Texas claims that pursuant to a "1938 Condition," New Mexico's depletions below Elephant Butte Reservoir are frozen to the depletion level that occurred *in the single year* of 1938. This single year argument has no support in the record. First, even the inflow-outflow indices in Articles III and IV show that any similar condition for the Lower Rio Grande would not be based on depletions in any one year, but rather on average conditions over multiple years. Second, in 1938 the Project acreage in both states was not yet fully developed. Third, Texas's single year depletion argument does not factor in, and similarly freeze Texas's depletions to the single year 1938. If Texas is right that depletions were set in stone based on the depletions that occurred in 1938, then all groundwater pumping and depletions beyond this 1938 level that have occurred in Texas also violate the Compact. Texas may well be significantly worse off in such a scenario than New Mexico, because Texas groundwater pumping is now exponentially higher than it was in 1938.

1. Any Depletion Limit Must Be Based on Depletions over Multiple Years

Texas argues that the Compact "protects the Project and its operations under the conditions that existed in 1938." Tex. Br. 77. Texas's expert Dr. William Hutchison then opines that these "conditions" are the depletions that occurred in New Mexico in that single year, 1938. NM-EX 012, Sullivan Decl. ¶ 96; NM-EX 126, Hutchison Rep. (May 31, 2019) 41 ¶ 135. There is no basis for this in the record. If anything, Articles III and IV in the Compact suggest that the drafters

would have looked at average depletions over multiple years to determine allowable depletions limits within the Project area. Texas acknowledges that Articles III and IV of the Compact, which contain the inflow-outflow schedules establishing delivery targets for the San Luis and Middle Rio Grande sections of the Compact, were based on an analysis of depletions occurring over multiple years. Tex. Br. 15, n.16. Article III's delivery schedules are based on an analysis of depletions over the years 1928-1937, while Article IV's delivery schedules are based on an analysis of depletions over the years 1890-1929. *Id*. The reason for this is simple: depletions within a large area of irrigated agriculture vary widely from year-to-year due to many different factors, but primarily due to differences in yearly temperature and precipitation. NM-EX 012, Sullivan Decl. ¶ 96. Annual depletions in New Mexico in the period leading up to 1938, calculated as the difference between the release from the Project at Caballo reservoir minus flows in the Rio Grande at the El Paso gage, varied considerably.[9] *Id*. ¶ 62 & Fig. 11.

The concept of including a number of years is also consistent with prior appropriation principles. Under the doctrine of appropriation, "water rights are both established and exercised by beneficial use, which forms 'the basis, the measure, and the limit of the right to use of the water.'" *Tri-State Generation*, 289 P.3d at 1242 (quoting N.M. Const. art. XVI, § 3). The quantity of water that is protected is the maximum amount that was historically consumed, regardless of the year. *See, e.g.*, Robert E. Beck & Eugene Kuntz, *Reallocations, Transfers, and Changes*, in *Waters and Water Rights*, at 14-54 (Robert E. Beck & Amy K. Kelley eds., 3d ed. 2009). Hence, the beneficial use of water and the associated historical consumptive use is not locked in based on a single year; rather, the concept of beneficial use of the water right allows for flexibility to meet

[9] These large year-to-year fluctuations in depletions also explain why the Compact includes a system of credits and debits in Article VI to provide flexibility for the Article III and IV delivery schedules. Any calculation of a "1938 Condition" in the Lower Rio Grande would need to provide similar flexibility.

demands, and the associated historical consumptive use is determined over the period of time in which the water rights is lawfully used.

For these reasons, the Court should not accept Texas's single year "1938 Condition." The precise nature of any condition, including allowable levels of depletions, involves numerous disputed facts that would need to be resolved at trial.

2. The Project Was Not Fully Developed in 1938

As mentioned previously, Texas also asserts that the Project "was fully developed at the time the 1938 Compact was negotiated and approved." Tex. Br. 79. This is demonstrably incorrect. Reclamation records clearly show that, as of 1938, only about 140,000 acres were being irrigated in the Project, which is roughly 20,000 acres less than the full irrigated area authorized in the 1938 Downstream Contract. NM-CSMF ¶ 113; NM-EX 012, Sullivan Decl. ¶ 44. Project acreage gradually increased through the 1940s, reaching its maximum extent of around 160,000 acres in the early 1950s. NM-CSMF ¶ 113; NM-EX 012, Sullivan Decl. ¶¶ 44, 101 (Project authorized 155,000 acres with a 3% cushion). The drafters of the Compact understood this. Further, adopting Texas's position based on less than the full authorized Project acreage, would frustrate the Compact's stated purpose of meeting the "irrigation demands" of the Project. At the very least, there are disputed issues of material fact that preclude any ruling at this time as to the exact nature and amount of depletions that might be inherent in a "1938 Condition."

D. Any Depletion Limit Must Be Applied to Both States

Further, if any depletion limit were to be applied, it must also be applied to Texas. Texas's pumping impacts the Project as a whole, which in turn affects New Mexico's apportionment. NM-CSMF ¶¶ 37-249; NM-EX 006, Barroll 2d Decl. ¶¶ 35, 37, 42, 52. Specifically, because Texas draws its allocation from the same source as New Mexico (Elephant Butte and Caballo reservoirs), actions within Texas that impact the total releases from the reservoirs also impact Project storage

and, therefore, impact the annual allocation (apportionment) to New Mexico. NM-CSMF ¶¶ 37, 249. In this way, Texas, even though it is the downstream state, carries the same obligations as New Mexico if a "1938 Condition" is imposed.

In 1938, Texas had limited groundwater pumping and a high percentage of Project returns that supplied Project lands in Texas. Pumping to support the City of El Paso was just a few thousand acre-feet per year, and there was very limited agricultural pumping on Project lands. Since 1938, Texas has drilled hundreds of agricultural wells to supplement its surface supply. NM-CSMF ¶ 239; NM-EX 006 Barroll 2d Decl. ¶¶ 17, 27. It is estimated that Texas's total pumping averaged 127,500 AF/y during 1951-2017, with irrigation pumping averaging 41,600 AF/y (155,000 AF/y maximum) and non-irrigation pumping averaging 85,900 AF/y (124,000 AF/y maximum. NM-EX 012, Sullivan Decl. ¶ 14.

As part of its municipal supplies, Texas has developed well fields in part of the Mesilla basin to support its ever-rising municipal demands. The City of El Paso developed a large well field near Canutillo, Texas, referred to as the Canutillo well field, which pumps approximately 24,000 acre-feet per year. NM-CSMF ¶ 238; NM-EX 006, Barroll 2d Decl. ¶ 31. Further south, in the Hueco bolson, the City of El Paso and Ciudad Juarez in Mexico have historically pumped large amounts of groundwater for municipal use, creating a cone of depression more than 100 feet deep. This pumping has expanded greatly since 1938, increasing from a few thousand acre-feet in 1938 for the City of El Paso, to up to approximately 75,000 acre-feet per year around 1990. NM-CSMF ¶¶ 239-40; NM-EX 006, Barroll 2d Decl. ¶ 33.

Texas groundwater pumping intercepts irrigation return flows, reduces drain flows, and increases seepage losses from the Rio Grande. NM-CSMF ¶ 246; NM-EX 006, Barroll 2d Decl. ¶¶ 34-45. These impacts cause Reclamation to release more water from Project Storage to deliver

water to Project beneficiaries than it otherwise would have. NM-CSMF ¶ 245; NM-EX 006, Barroll 2d Decl. ¶ 37.

With regard to the return flows, all the parties agree that return flows form part of the Project supply. NM-EX 006, Barroll 2d Decl. ¶ 46. Project return flows largely return through Project drains and wasteways. Historically, in addition to EPCWID's first diversion from the Rio Grande in the upper part of the El Paso Valley, EPCWID also had several river diversion headings further downstream, including the Riverside, Tornillo, Hanson, and Guadalupe canal headings. These additional headings diverted Project return flows generated in the upper part of the El Paso Valley, as well as municipal effluent generated by the City of El Paso. NM-CSMF ¶¶ 149, 261; NM-EX 006, Barroll 2d Decl. ¶ 50. The RGJI reports that diversions in the Upper El Paso Valley from 1930 to 1936 consisted of approximately 35.1% drain flows and seepage, whereas diversions in the Lower El Paso Valley consisted of approximately 57.7% drain flows and seepage, the difference reflecting return flows generated in the El Paso Valley. NM-CSMF ¶ 26; NM-EX 006, Barroll 2d Decl. ¶ 50. Groundwater pumping in Texas intercepts these return flows that previously met Project demands. NM-CSMF ¶¶ 246, 248; NM-EX 006, Barroll 2d Decl. ¶ 52. Since Texas alleges that the Compact protects "the Rio Grande Project and its operations *under the conditions that existed in 1938 at the time the Rio Grande Compact was executed*," Texas Compl. ¶ 10 (emphasis added), any 1938 Condition must also protect the conditions that existed in Texas in 1938. In other words, any 1938 Condition imposed on New Mexico must also apply to Texas.

E. Disputed Factual Issues Preclude Summary Judgment on Texas's 1938 Condition Argument

Unlike other compacts that expressly apportion interstate water based on a specific depletion or condition, the Rio Grande Compact does not contain such a provision. *See* NM-CSMF ¶ 56. It is undisputed that there is no "1938 Condition" below Elephant Butte within the

Compact's express terms. As explained in the previous sections, New Mexico disputes that there is any interpretation of the Compact that supports a "1938 Condition." New Mexico also disputes that there is any extrinsic evidence—negotiating history or course of performance—that supports a "1938 Condition." Rather, it is New Mexico's position that conjunctive use of ground water has occurred for 70 years to meet the needs of the Project, and that this conjunctive use is consistent with the Compact. This contrasts sharply with Texas's request for curtailment of all New Mexico—but notably not Texas's—groundwater pumping since 1938. There are disputed issues of fact here that require significant expert analysis, testimony, and legal framing. A full record must be developed on this issue—the Court should deny Texas's motion on this ground alone. *United States v. Texas*, 339 U.S. 707, 715 (1950) (stating that the Court, "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts").

VII. AT LEAST SINCE 2006, IT IS NEW MEXICO, NOT TEXAS, THAT HAS BEEN DEPRIVED OF ITS EQUITABLE SHARE OF RIO GRANDE WATER

A. The Genesis of the Current Dispute Was New Mexico's Concern Over the Reallocation of Project Water By the 2008 Operating Agreement

The genesis of the dispute in this case is not any legitimate concern on the part of Texas that it is not receiving its Compact apportionment, but rather, the concern of New Mexico that it is being deprived of its equitable share of Project Supply because this water is being over-allocated to Texas. As explained in this Response Brief and in New Mexico's Apportionment Brief, the Compact is "inextricably intertwined" with the Project and the 1938 Downstream Agreement; the operation of the Project is not shackled by any historical condition existing when the Compact was signed; and the United States, Texas and New Mexico all agreed for more than 50 years that Project allocations (and, therefore, Compact apportionments) were to be equitably made factoring in Project dynamics. *Texas v. New Mexico*, 138 S. Ct. at 95; NM-CSMF ¶ 109. This changed in

2006, when Texas negotiated with Reclamation and the Districts (without the participation of New Mexico) to change Project accounting to introduce the D3 Allocation plus carryover methodology. The D3 methodology, enshrined in the 2008 Operating Agreement, now penalizes EBID (New Mexico) for all Project dynamics and accounting that departs from the historic 1951-1978 level (the D2 Curve), regardless of how and who caused these departures. NM-CSMF ¶¶ 181-83; NM-EX 006, Barroll 2d Decl. ¶ 58 The net effect of this is that since 2006, New Mexico has received on average 94,000 AF less water per year. NM-CSMF ¶¶ 252, 254.

Reclamation, EPCWID and EBID negotiated the 2008 Operating Agreement, with the notable absence of the States as negotiating parties. NM-EX 008, Lopez 2d Decl. ¶ 35(i). In 2011, New Mexico filed suit against Reclamation claiming, among other things, that "[i]n 2006 and 2007, [Reclamation] unilaterally adopted Project operational changes," and that "[t]he 2008 OA amounts to a major operational change by, *inter alia*, allowing long-term carry over storage and materially altering the distribution of project water without Congressional authorization." NM-EX 008, Lopez 2d Decl. ¶ 39; NM-EX 520, Compl., *New Mexico v. United States*, No. 1:11-cv-00691 (D.N.M. Aug. 8, 2011) at 3, 15. New Mexico further claimed that the 2008 Operating Agreement inequitably "debits EBID for all carriage and groundwater depletions in the system, regardless of whether those losses are attributable from groundwater pumping in New Mexico or Texas," and that "[t]he new and drastically different operating procedures have caused substantial harm to New Mexico and its citizens." NM-EX 008, Lopez 2d Decl. ¶ 39; NM-EX 520, Compl., *New Mexico*, No. 1:11-cv-00691 at 18-20. In response to the federal district court litigation brought by New Mexico, Texas filed this original jurisdiction case. NM-CSMF ¶¶ 197-98; NM-EX 008, Lopez 2d Decl. ¶ 39.

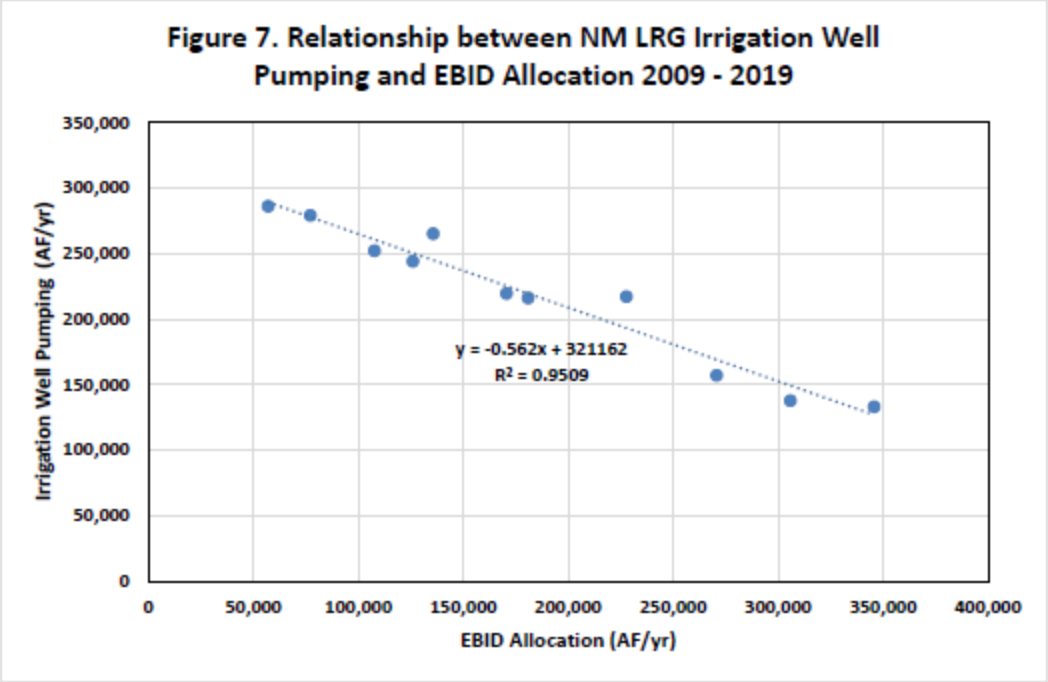
B. Water Use in New Mexico Has Remained Stable

Texas claims that New Mexico has depleted surface water in excess of what the Compact allows, and that those "excess" depletions have "increased over time." Tex. Br. 2. The facts do not support Texas' claim. Rather, water use in the Project area in New Mexico has been remarkably stable.

Water supply shortages, the Great Depression, and flooding events that caused the river to move all caused great variations in irrigated acreage in the 1920s and 1930s in both Districts. NM-EX 011, Stevens 2d Decl. ¶ 30. As a result, it was not until the early 1950s that the irrigated acreage within the Project reached the maximum authorized area in both States. NM-CSMF ¶ 113; NM-EX 012, Sullivan Decl. ¶ 44. Since that time, irrigation pumping in New Mexico, as well as its effects, has not appreciably increased.

Irrigation pumping in New Mexico has historically been variable because groundwater is used conjunctively to supplement surface water in order to meet irrigation demands. NM-CSMF ¶ 247. For that reason, as shown in Dr. Barroll's Rebuttal Report, Figure 7, there is a very close relationship between groundwater pumping and surface water supply:

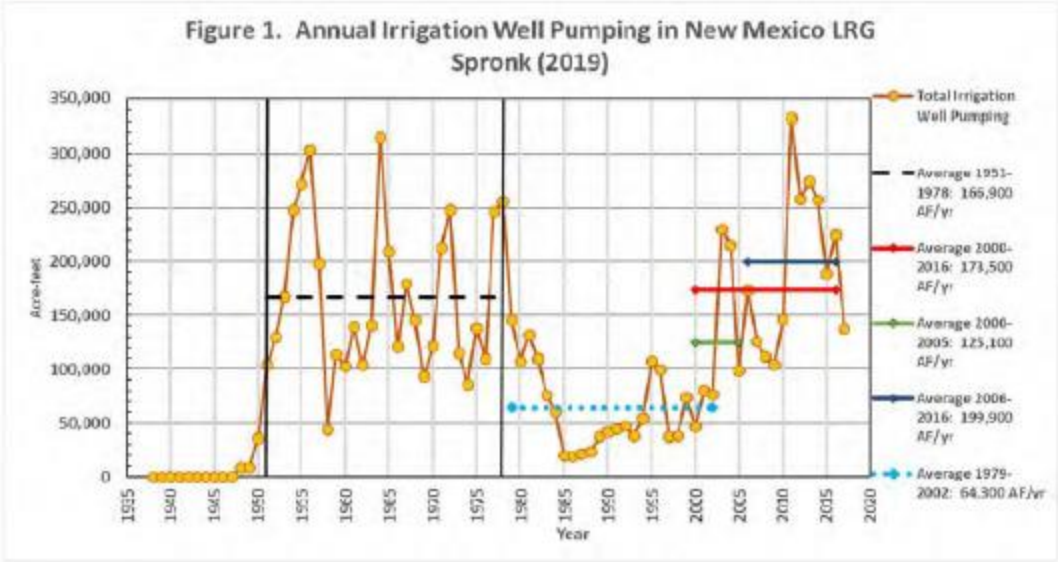
Figure 7. Relationship between NM LRG Irrigation Well Pumping and EBID Allocation 2009-2019



NM-EX 101, Barroll Reb. Rep. 9. This is important because Project acreage is not increasing. Since the amount of water diverted or pumped is driven by irrigation demand, it follows that there is a maximum amount of water from all sources that could be used for irrigation on New Mexico Project lands. In other words, Texas' claim that depletions in New Mexico can be expected to continue to increase "unabated" is unfounded and incorrect. Tex. Br. 2. The historic water use in New Mexico bears this out.

Annual irrigation pumping in New Mexico tends to increase in years of low surface water supply and increase in years of full surface water supply. On average, annual irrigation pumping in New Mexico prior to the 2008 Operating Agreement was lower than historical levels. Unfortunately, the change in Project operations in 2006 has forced New Mexico water users to rely on groundwater pumping so that pumping amounts have recently increased:

Figure 1. Annual Irrigation Well Pumping in New Mexico LRG Spronk (2019)

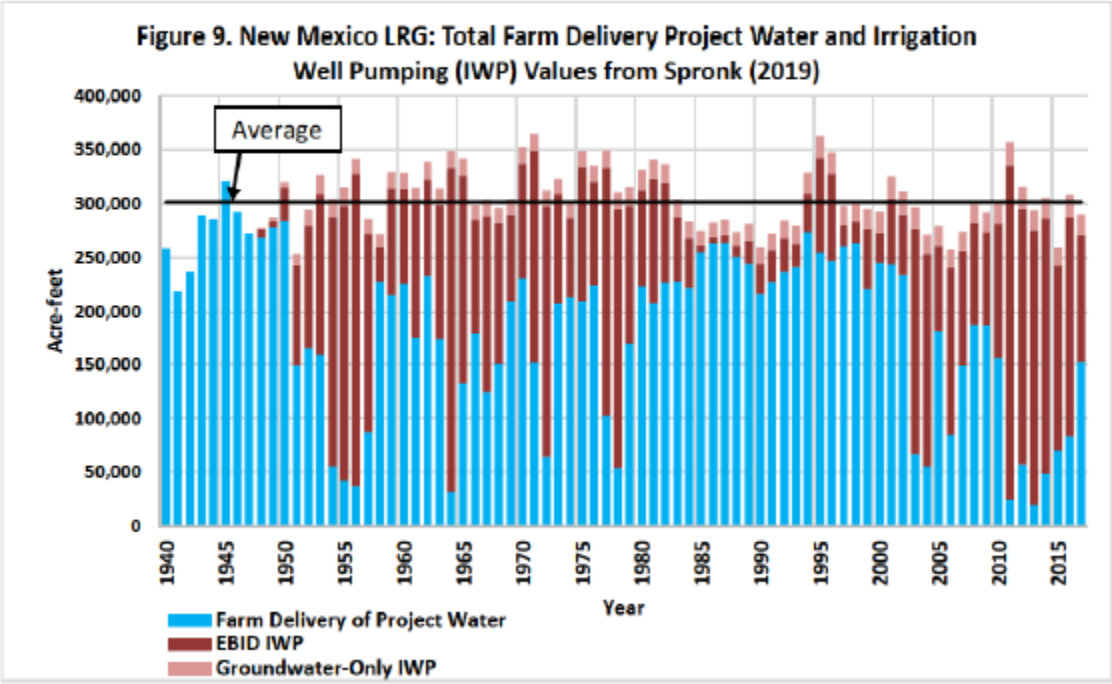


NM-EX 101, Barroll Reb. Rep. 2-3. In general, however, irrigation well pumping in New Mexico in recent years of low Project supply are comparable to those historically occurring during low supply years. *Id*. A difference now is that due to the reduced supply of surface water in New Mexico resulting from the 2008 Operating Agreement, the aquifer in New Mexico has not recovered as it historically has, and there may be long-term damage. NM-EX 100, Barroll Rep. 72-76.

Because the amount of groundwater pumping is a function of availability of Project supply, the combined water use from surface and groundwater has remained stable. The total farm delivery to New Mexico Project lands from both surface and groundwater has averaged approximately 4.0 AF per acre since 2008. NM-EX 101, Barroll Reb. Rep. 7-8. This compares favorably to Texas, where EPCWID provides a full supply allotment to farmers of 4.0 AF per acre *for surface water only*. NM-CSMF ¶ 232; NM-EX 006, Barroll 2d Decl. ¶ 22. On top of that amount, EPCWID farmers have unlimited access to groundwater to supplement surface water. *Id.* ¶ 27. Moreover,

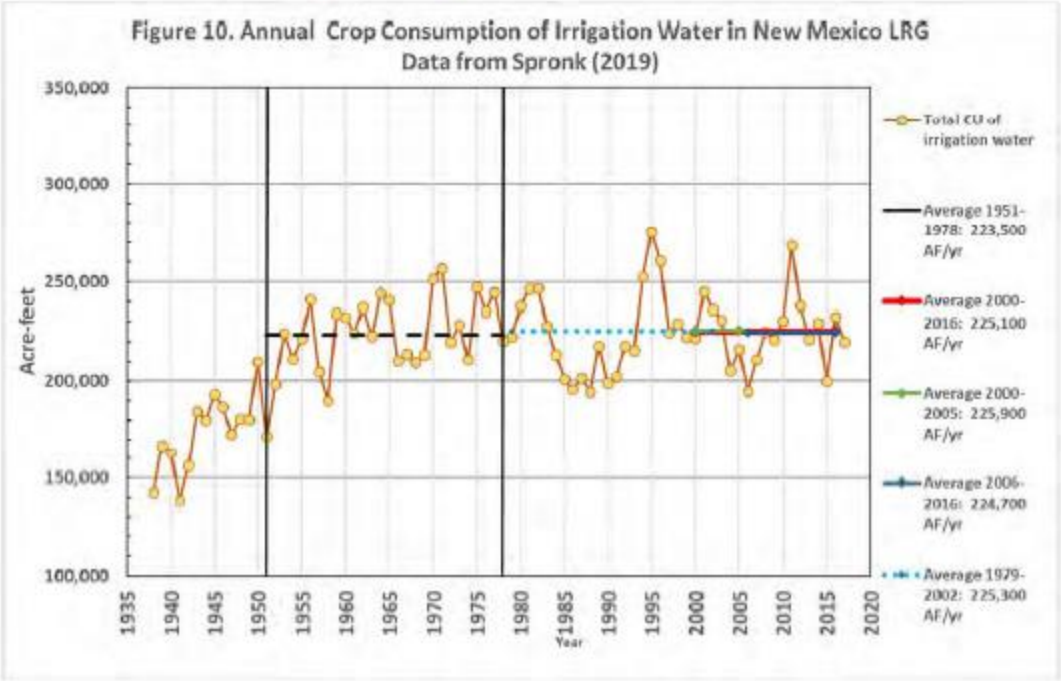
the total amount of water delivered to New Mexico lands is consistent with the historic record, which has averaged approximately 300,000 AF per year:

Figure 9. New Mexico LRG: Total Farm Delivery Project Water and Irrigation Well Pumping (IWP) Values from Spronk (2019)



NM-EX 101, Barroll Reb. Rep. 10. Therefore, contrary to Texas's claims, the net depletions in New Mexico have not increased since Project acreage was fully developed in the 1950s:

Figure 10. Annual Crop Consumption of Irrigation Water in New Mexico LRG Spronk (2019)



NM-EX 101, Barroll Reb. Rep. 11-12.

C. The 2008 Operating Agreement was Adopted Based on the Incorrect Theory that Texas Was Being Harmed, but Texas Has Not Been Harmed

Texas complains in this case that New Mexico has violated the Compact, taking more than its Compact apportionment of Rio Grande surface water, and that, as a result, Texas has suffered injury entitling it to monetary damages. Texas claims damages for the years 1985 through 2016. Tex. Compl. ¶ 27, Prayer at 3; NM-EX 114, Excerpt Sunding Rep. ¶ 7 (my "analysis focuses on Texas injury occurring between the years 1985 and 2016."); NM-EX 115, Excerpt Sunding Reply Rep. ¶ 2 ("As in my previous expert report, I estimate direct damages to Texas water users, as well as indirect and induced losses experienced by other Texas residents between 1985 and 2016."). However, as explained in New Mexico's Full Supply Motion, in more than half of these years—1985-2002, 2005 and 2007-2010—EPCWID was allocated a full Project Supply by Reclamation, and there is no question that EPCWID received all of the water that it ordered in each of these

years. *See* N.M. Full Supply Br. New Mexico incorporates the arguments from its Full Supply Motion herein. In short, every year in which EPCWID received a full allocation of Project water, Texas received its Compact apportionment and suffered no legal injury entitling Texas to any relief.

D. Since 2006, Texas Has Been Allocated More than its Compact Apportionment at the Expense of New Mexico

Since 2006, under the D3 Allocation plus Carryover method, Texas has been allocated more than its Compact Apportionment, at the expense of New Mexico. NM-CSMF ¶ 196; NM-EX 006, Barroll 2d Decl. ¶¶ 46, 63, 66-68, 72-73, 75. Project allocations to the Districts have now flipped in that EPCWID (Texas) now receives an average of 56% of the Districts' total allocation, compared with a historical and Compact-dictated 43%; and EBID receives a significantly diminished share of 44% (compared with a historical and Compact-dictated 57%). NM-CSMF ¶ 111; NM-EX 006, Barroll 2d Decl. ¶ 62. This ongoing Compact violation also has a number of impacts to the detriment of both Districts: now that less Rio Grande surface water is allocated to southern New Mexico, EBID farmers need to pump more groundwater to irrigate their crops. *Id*. ¶ 67. This depletes New Mexico's groundwater reserves and potentially depletes Project Supply; through use of the D3 Allocation plus carryover method. *Id*. EBID then receives still less surface water in subsequent years, which exacerbates and perpetuates this unsustainable cycle, to the clear detriment of EBID and New Mexico, and with very little benefit to EPCWID and Texas. *Id*. Prior to 2005, groundwater levels in New Mexico responded resiliently to pumping—replenishing in full supply and spill years. This reactive behavior changed after the adoption of the D3 method. Now, with an insufficient and inequitable allocation of Project surface water, replenishment is not possible. *Id*.

Another inequity introduced in the 2008 Operating Agreement is Carryover. If a District elects not to order all of its Project allocation in any year, it can now "carryover" any remaining allotment to the next year. This carryover amount is then deducted from Project Storage before the D3 Allocation for the next year is calculated. NM-CSMF ¶ 184; NM-EX 006, Barroll 2d Decl. ¶ 60. This represents a major change from historical Project allocations procedures, which allocated unused water from prior years between the Districts based on their irrigation demands, 57%:43%. Accounting issues with Carryover procedures, including failure to account for evaporation, compound the problems with Carryover. The effect of this new D3 Allocation plus carryover method is that since 2006, EBID is doubly penalized. Not only must New Mexico bear the cost of all negative departures from the D2 Curve, regardless of how they are caused or by whom, but New Mexico is also deprived of its share of water used to meet EPCWID's carryover obligation. This is the inequity in Project operations that is violating the Compact—not any action by EBID or New Mexico.

If EBID had been allocated its 57% share of Project Supply between 2006 and 2019, EBID (New Mexico) would have available to it 693,408 additional AF of Project water. NM-CSMF ¶ 189; NM-EX 006, Barroll 2d Decl. ¶ 62. At the same time, the Project as a whole would have benefitted from an improvement in groundwater conditions in New Mexico that would have reduced stream losses and increased drain flows. This improvement in groundwater conditions would, in turn, have increased Project delivery efficiency and thereby further increased EBID's allocation and delivery at little cost to EPCWID. NM-CSMF ¶ 256; NM-EX 006, Barroll 2d Decl. ¶ 63. Instead, the D3 Allocation plus carryover method starves the upper part of the Project of water, which reduces total Project return flows and depletes groundwater supply. The net result is a reduction in Project delivery efficiency and a reduction in total Project Supply. NM-CSMF ¶

251; NM-EX 006, Barroll 2d Decl. ¶ 64. To use Texas's analogy, the 2008 Operating Agreement itself "reduces the size of the pizza," reducing Project Supply to the detriment of both Districts (and, therefore, both states). NM-CSMF ¶ 251; NM-EX 006, Barroll 2d Decl. ¶ 64.

Analysis by New Mexico's experts using the New Mexico Integrated Lower Rio Grande Model ("Integrated Model") shows that the impact on Texas of groundwater pumping in New Mexico is much smaller than the reallocation of Project water away from EBID (New Mexico) under the D3 Allocation plus Carryover method of the 2008 Operating Agreement. NM-CSMF ¶ 253; NM-EX 006, Barroll Decl. ¶¶ 68, 80; NM-EX 103, Barroll 2d Suppl. Rep. vi-vii, 9, 20.

As an aside, for reasons that are not clear to New Mexico, Texas uses the briefing to criticize New Mexico's modeling effort. Tex. Br. 90-91. New Mexico's Integrated Lower Rio Grande Model ("Integrated Model") is the best available tool for evaluating the claims and counterclaims in this case because it is the only hydrologic model available to evaluate the effects of groundwater pumping and changes in historical Project operations on Project deliveries to Texas and New Mexico. NM-CSMF ¶¶ 257-59; NM-EX 012, Sullivan Decl. ¶ 60, 86, 118-19. The Integrated Model is superior to the Texas groundwater model of the Rincon and Mesilla basins ("Texas Model") because (i) it simulates the entire Lower Rio Grande area from Elephant Butte Reservoir to Fort Quitman, (ii) it employs monthly stress periods that allow it to simulate the important seasonal variations in groundwater and surface water flows, and (iii) it is capable of simulating the dynamic response of Project operations to changes in flow throughout the entire Project area. *Id*. Conversely, the Texas Model fails to accurately evaluate pumping effects to Project deliveries because it does not simulate the dynamic response of Project reservoir releases to changes in flows that occur without pumping. It also provides no simulations for the area downstream of the El Paso gage and thus cannot simulate the feedback response from a large part

of the Project area. Finally, it uses annual stress periods that prevent it from distinguishing impacts that occur during the Project release period (irrigation season) from impacts that occur during the non-irrigation season and, thus, do not affect Project releases or deliveries. In short, the Texas Model's absence of dynamic simulation of Project operations renders the model useless in analyzing the key issue presented in this case: impacts to Project deliveries from groundwater pumping and changes in historical Project operations. NM-CSMF ¶ 258; NM-EX 012, Sullivan Decl. ¶¶ 61, 78, 118-19.

Data from New Mexico's Integrated Model analysis shows that if EBID (New Mexico) had been allocated 57% of Project Supply, as it should have been, from 2006 to 2017, the combined effects of that allocation increase and the resulting improved groundwater conditions, and Project performance, would have resulted in EBID receiving 1,130,608 AF more water than EBID (New Mexico) in fact received under the D3 Allocation. This is an average of 94,000 AF more per year, for a total of 12 years (2006-2017). NM-CSMF ¶ 254; NM-EX 006, Barroll 2d Decl. ¶ 69; NM-EX 103, Barroll 2d Suppl. Rep. 18-20. In short, the 2008 Operating Agreement has harmed New Mexico by substantially reducing EBID's surface water supply—negatively impacting the water balance of groundwater systems of the Rincon and Mesilla basins. NM-CSMF ¶ 196; NM-EX 006, Barroll 2d Decl. ¶ 72; NM-EX 100, Barroll Rep. 71-77. EPCWID and Texas, on the other hand, have benefitted by gaining a disproportionate and inequitable share of Rio Grande surface water. NM-CSMF ¶ 196; NM-EX 006, Barroll 2d Decl. ¶ 72.

CONCLUSION

For the foregoing reasons, the Texas motion should be denied.

Respectfully submitted,

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APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	HISTORICAL AND GENERAL STATEMENTS		
1.	The Rio Grande is an interstate and international river, approximately 1,800 miles long, originating in southern Colorado. It winds southward approximately 400 miles across New Mexico, and crosses into Texas near the city of El Paso, where it defines the 1,250 mile international boundary between the United States and Mexico as it traverses to the Gulf of Mexico. Along its entire course, the Rio Grande provides a source of surface water that is used extensively to meet the needs of municipalities, industries, and agricultural irrigators, as well as to support various environmental uses. Numerous dams and reservoirs exist along the river primarily for water supply and flood control purposes; consequently, flows in much of the river are substantially controlled and regulated. With respect to the usage of water, the river is divided into two distinct sections, the Upper and Lower Rio Grande basins, at Fort Quitman.	9-10	This fact/s is undisputed by New Mexico.
2.	The Upper Rio Grande basin (the area above Fort Quitman, Texas) is comprised of parts of Colorado and New Mexico, and a small part of Texas. The Upper Rio Grande basin itself is divided into three sections: (1) the San Luis section in Colorado, (2) the Middle section in New Mexico, and (3) the Elephant Butte-Fort Quitman section in New Mexico, Texas, and Mexico.	10	Undisputed, but see NM-EX 007, D'Antonio 2nd Decl. at 2, fn 2, describing the New Mexico terminology for Lower Rio Grande (LRG).
3.	In the late-nineteenth century, Mexican irrigators in the vicinity of Juarez, and irrigators in the Mesilla Valley in New Mexico and the El Paso Valley in Texas, all began complaining of diminished Rio Grande flows reaching their lands. They attributed this depletion to extensive development of Colorado's San Luis Valley in the 1880s. Formal complaints lodged by the Mexican government prompted the Secretary of the Interior, in 1896, to impose an "embargo," or moratorium, on the use of all public lands, including federal land, for reservoirs and other facilities, bringing private irrigation efforts largely to a halt in the San Luis Valley.	11-13	This fact/s is undisputed by New Mexico.

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	The embargo, while protested by Colorado interests, fostered settlement of the international dispute between the United States and Mexico and made the Project possible. The 1904 National Irrigation Congress advanced a proposal for a federal reservoir to store water to irrigate lands in Mexico, New Mexico, and Texas. The idea of an "international dam" in the vicinity of El Paso to deliver water to Mexico had been contemplated since the 1890s, but placement of the dam at the geological formation known as Elephant Butte, about 110 miles upstream of the New Mexico-Texas state line, offered an additional advantage: assuring water to lands in southern New Mexico and western Texas. Following the authorization of the Project in 1905, the United States entered into the Treaty with Mexico in 1906. Thereafter, Colorado agitated unsuccessfully for revocation of the embargo for nearly 30 years. Federal authorities, however, retained the moratorium out of concern that depletions above the now-constructed Elephant Butte Reservoir would reduce the quantity of water that flowed into the Reservoir and was available downstream for lands in Mexico, New Mexico, and Texas.		
RIO GRANDE COMPACT STATEMENTS			
4.	Viewing an interstate water compact as a means of ending the embargo, Colorado entered into negotiations with New Mexico and Texas in the early 1920s. Revocation of the embargo in 1925 prompted New Mexico to withdraw from the negotiations, and when the states met once more in 1928, Colorado was unable to convince either New Mexico or Texas that upstream reservoirs would not deplete flows to the downstream states.	13	This fact/s is undisputed by New Mexico.
5.	The three states therefore committed to a temporary compact, approved by the legislatures of the signatory states in 1929, and approved by the United States Congress in 1930. The Temporary Compact was to last until 1935, allowing time for gathering the data necessary to resolve this issue and provide for a permanent compact.	13	This fact/s is undisputed by New Mexico.
6.	The historical background forming the basis of the Compact negotiations is well documented, and not subject to any reasonable material dispute.	77	NM-EX 011, Stevens 2nd Decl. at ¶ 24 and entire Stevens Decl.
7.	The negotiation of a permanent compact proved troublesome in the early 1930s, with the states continuing to disagree over upstream development.	13	This fact/s is undisputed by New Mexico.

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8.	During the negotiations for what became the 1938 Compact, there were three distinct positions. Colorado sought the right to develop lands within the Rio Grande watershed above the Colorado-New Mexico state line.	14	This fact/s is undisputed by New Mexico.
9.	New Mexico sought to foster the Middle Rio Grande Conservancy District project above Elephant Butte Reservoir.	14	NM-EX 011, Stevens 2nd Decl. at ¶¶ 6, 7, 8, 9, 17
10.	Texas sought to protect the Project as a unit, and thereby, Texas, from upstream depletions by Colorado and New Mexico.	14	NM-EX 011, Stevens 2nd Decl. at ¶¶ 8, 9, 19
11.	In essence, these were the same positions of the states at the time of the 1929 Temporary Compact, and were reflected in the Supreme Court litigation.	14	NM-EX 011, Stevens 2nd Decl. at ¶¶ 11, 13, 14, 15, 21, 22
12.	Without deviation, in deliberating a compact, the three states advocated for what each thought important.	14	This fact/s is undisputed by New Mexico.
13.	The decision to deliver Texas's water in Elephant Butte Reservoir was sound in 1938 when the Compact was adopted.	88	This fact/s is undisputed by New Mexico.
14.	Indeed, the Project was authorized in 1905, and by 1938 had already been in operation for decades. Also in existence were the 1906 Treaty and the pre-existing contracts by and between the United States, EBID, and EP#1, addressing deliveries of Project water.	77	This fact/s is undisputed by New Mexico.
15.	The Project was fully developed at the time the 1938 Compact was negotiated and approved.	79	TX-NM 006, Barroll 2nd Decl. at ¶ 23.
16.	As a result of the negotiations to formalize the 1938 Compact, depletions were frozen at pre-1938 conditions. The ultimate result of Compact negotiations, informed by streamflow data and analyses developed by the JIR, was an agreement that mimicked the 1929 Temporary Compact by freezing depletions at pre-1938 conditions.	14, 81, 82	NM-EX 011, Stevens 2nd Decl. at ¶¶ 21, 22, 23 NM-EX 008, Lopez 2nd Decl. at ¶¶ 8, 9, 10

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	The Compact "freezes" depletions above Elephant Butte Reservoir to pre-1938 conditions. The provisions that reference 1937 and 1929 facilities create a 1938 Condition for Colorado and New Mexico. Compact, arts. II, IV, VI, VII, VIII;		
17.	The nub of the dispute between the states was not the volume of the Reservoir release alone, but rather how much of the water released (along with return flows and other downstream accretions) would ultimately reach Texas, 100 miles downstream.	86	NM-EX 011, Stevens 2nd Decl. at ¶ 28 NM-EX 008, Lopez 2nd Decl. at ¶ 19
18.	Specifically, the adjustment to the delivery schedule for depletions at Otowi Bridge, compared to the absence of a similar adjustment for depletions below Elephant Butte Reservoir, reflects that the drafters understood the operations of the Project in 1938 and intended them to continue.	82	NM-EX 011, Stevens 2nd Decl. at ¶ 23 NM-EX 008, Lopez 2nd Decl. at ¶ 10
19.	Two delivery schedules, or indices, were adopted: one for Colorado to New Mexico, and one for New Mexico to Elephant Butte Reservoir. These delivery mandates are based upon the adoption of two delivery schedules, or indices: one for Colorado to New Mexico, and one for New Mexico to Texas.	14, 80	NM-EX 008, Lopez 2nd Decl. at ¶ 7
20.	For New Mexico's delivery to Texas, the indices used were based upon flow data for an 1890-1929 period of record that nonetheless reflected an accepted 1938 Condition of consumption in the Middle Rio Grande that would protect the supply for lands below Elephant Butte Reservoir and to Texas.	81	NM-EX 011, Stevens 2nd Decl. at 21
21.	These schedules were derived from streamflow data and analyses developed primarily by the JIR – an effort to provide the needed data to resolve the impasse over the apportionment of the Rio Grande waters above Fort Quitman. During Compact negotiations, the schedules were derived from streamflow data and analyses developed by the JIR, an investigation undertaken to provide the needed data to resolve the impasse over the apportionment of the Rio Grande waters above Fort Quitman.	14-15, 35-36, 80	NM-EX 011, Stevens 2nd Decl. at ¶¶ 24, 31 NM-EX 008, Lopez 2nd Decl. at ¶ 8

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	The indices were based upon data that existed in 1938 and were intended to maintain the 1938 Condition, protecting downstream interests from post-1938 depletions. There are provisions in Article III addressing post-1937 reservoirs that might be constructed in Colorado to ensure that those reservoirs, if constructed, will not deplete the flow at the gauge in excess of what existed in 1938. The indices were based upon data that existed in 1938 and were intended to maintain the 1938 Condition, protecting downstream interests from upstream post-1938 depletions by New Mexico. There are specific provisions in Article IV addressing and protecting Texas from other post-1929 depletions in New Mexico upstream from Elephant Butte Reservoir.		
22.	This 1938 Condition also protected New Mexico from post-1938 depletions that could occur above the Colorado-New Mexico state line.	81	This fact/s is undisputed by New Mexico.
23.	These provisions allowed the continued development of 1929 and 1937 facilities, addressed in the Compact, as long as they did not increase depletions beyond what existed in 1938. These protections were to the benefit of Texas and the Project, which was downstream from all of the developments above Elephant Butte.	15	NM-EX 011, Stevens 2nd Decl. at ¶ 25 NM-EX 008, Lopez 2nd Decl. at ¶ 8
24.	The drafters provided for the necessary adjustments to deliveries in Elephant Butte Reservoir if New Mexico were to deplete river flow by building storage works above San Marcial.	79	This fact/s is undisputed by New Mexico.
25.	Accordingly, it was Texas, in Articles VII and VIII, that was granted the Compact right to ensure that depletions upstream of Elephant Butte Reservoir were protected from post-1938 depletions by Colorado or New Mexico.	15	NM-EX 011, Stevens 2nd Decl. at ¶ 19 NM-EX 008, Lopez 2nd Decl. at ¶ 18
26.	The question of what specifically was being protected below Elephant Butte Reservoir was fiercely debated and focused on the right figure to attach to releases from the Reservoir.	15	NM-EX 011, Stevens 2nd Decl. at ¶ 27

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	The amount of water to be released related directly to the upstream obligation to deliver water. The higher the amount to be released, the more water needed to be delivered to the Reservoir. Texas argued for a normal release of 800,000 acre feet as necessary to guarantee that a sufficient quantity and quality of water actually reached Texas. Texas's negotiating position was based on an understanding of then existing depletions to the Rio Grande, EBID's use of water in New Mexico, and the Treaty with Mexico.		NM-EX 008, Lopez 2nd Decl. at ¶ 19
27.	Texas sought a volume that also took into account the degraded water quality of deliveries to Texas, resulting from the use and reuse of irrigation return flows on lands between the release point at Caballo and the Texas state lines.	15-16	NM-EX 011, Stevens 2nd Decl. at ¶ 14
28.	In response, New Mexico, protecting its upstream apportionment from Colorado and its uses of that entitlement in the Middle Rio Grande, took a position at odds with the stance of interests downstream from Elephant Butte Reservoir. P16 New Mexico argued for a normal release around 750,000 acre feet, thereby protecting it from Texas's demand. [New Mexico] argued that a smaller figure could sustain uses below Elephant Butte, and thus it should be obligated to make lesser deliveries.	16	NM-EX 011, Stevens 2nd Decl. at ¶ 16, 18, 26
29.	Ultimately, the parties agreed to a normal release of 790,000 acre feet. While this was a negotiated number, Texas believed the quantity adequate to secure the water apportioned to it under the 1938 Compact, assuming a 1938 Condition of consumption below Elephant Butte Reservoir.	16	NM-EX 011, Stevens 2nd Decl. at ¶ 28
30.	Texas did not anticipate that Project return flows, which were anticipated to comprise a significant portion of the 790,000 acre feet of Texas's entitlement, would be intercepted by New Mexico groundwater pumping.	16	NM-EX 011, Stevens 2nd Decl. at ¶ 28 NM-EX 008, Lopez 2nd Decl. at ¶ 23

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
31.	The total water supply available for diversion by EBID, EP#1, and Mexico included storage in and releases from Elephant Butte Reservoir and return flows generated within EBID and EP#1.	16	NM-EX 008, Lopez 2nd Decl. at ¶¶ 37
32.	The Compact negotiators and engineers recognized that groundwater development below Elephant Butte would not augment the basin's supply, but rather deplete the available surface water. There was effectively no groundwater pumping below Elephant Butte Reservoir in New Mexico, the irrigation uses were limited to EBID, which holds a contract to water in the Reservoir, and the volume of M&I water used in 1938 was minor.	17-18, 88	NM-EX 011, Stevens 2nd Decl. at ¶ 31 NM-EX 008, Lopez 2nd Decl. at ¶¶ 22, 23, 30
33.	This conclusion was also reflected in the United States Geological Survey study conducted at the request of the New Mexico State Engineer and EBID in the late 1940s and early 1950s.	18	NM-EX 011, Stevens 2nd Decl. at ¶ 32 NM-EX 008, Lopez 2nd Decl. at ¶ 23
34.	The preamble to the 1938 Compact declares that the signatory states intended to apportion equitably the waters of the Rio Grande above Fort Quitman, Texas. The states' understanding that the basin was fully appropriated is incorporated into the 1938 Compact, and formed the basis for the agreement, "desiring to remove all causes of present and future controversy among the[] States." The Compact drafters intended to "remove all causes of present and future controversy among [the] States . . . to the use of the waters of the Rio Grande above Fort Quitman, Texas," and to "effect[] an equitable apportionment of such waters." Mr. Lopez testified that New Mexico understood that the waters of the Rio Grande below Elephant Butte Reservoir were fully appropriated in 1938 at the time it agreed to the Compact.	60, 85, 89	This fact/s is undisputed by New Mexico.
35.	The 1938 Compact equitably apportions the waters of the Rio Grande from its headwaters to Fort Quitman, Texas, among Colorado, New Mexico, and Texas.	61	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
36.	The United States' representative at the meeting of the Rio Grande Compact Commission in 1938 stated that the intent of the Compact was an "equitable division of the water of the Rio Grande" and "[i]t is my belief that the interests of the United States are fully safeguarded by (a) inclusion, in the State allocations, of all water to which Federal irrigation projects are entitled . . . ."	78	This fact/s is undisputed by New Mexico.
37.	Article I of the Compact contains definitions that are discussed below in the context of other articles in the Compact. Article I(k) defines "Project Storage" as the combined capacity of Elephant Butte Reservoir and Caballo Reservoir, but not more than 2,638,860 acre feet. Article I(l) defines "Usable Water" as all of the "water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands," including deliveries to Mexico.	35, 37	This fact/s is undisputed by New Mexico.
38.	(Notably, the references to "project storage" in this article (as well as in Articles I(m)-(q)) and the reference as a point of location "the lands of the Rio Grande Project" in Article I(k), are the only direct references to the Rio Grande Reclamation Project in the Compact.) These references, as well as the definitions of "Credit Water," "Unfilled Capacity," "Actual Release," "Actual Spill," and "Hypothetical Spill" all related to Elephant Butte Reservoir and are intended to ensure that deliveries into the Reservoir and Texas's apportionment are protected from upstream post-1938 depletions. The drafters' acknowledgment of the relationship between the Compact and the Project is apparent in Article I of the Compact by the inclusion of the reference to the Project in the definitions of "Project Storage" and "Usable Water."	37, 78	NM-EX 008, Lopez 2nd Decl. at ¶ 4
39.	The scope of the apportionment is also clear from the definition of "Rio Grande Basin," which means "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman . . . ."	60	NM-EX 008, Lopez 2nd Decl. at ¶ 5

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
40.	Because the Compact is flexible with respect to delivery requirements allowing its operation to be governed by the natural hydrology of the Rio Grande, Article II requires the Rio Grande Compact Commission to cause various gaging stations on the river to be maintained and operated. Due to the concern about post-1938 depletions, gaging stations were to be maintained and operated below any reservoir constructed after 1929 and at other locations at each of the post-1929 reservoirs.	35	NM-EX 008, Lopez 2nd Decl. at ¶ 6
41.	Article III of the Compact requires "Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line . . . ." The quantity of water to be delivered is based upon indexed flows provided in the article. The actual quantity of water to be delivered is based upon the flow available in the river at the referenced gauges as compared with the indices provided for in the article. Article III of the Compact provides water for use in Colorado, subject to the obligation to deliver indexed flows of water to New Mexico just below the Colorado-New Mexico state line. Article III of the Compact requires "Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line" in established quantities, based upon flows of water that are measured at various index stations. Footnoted: New Mexico admits this statement. NM Answer at ¶ 12 Water exceeding the delivery requirement to New Mexico is the Colorado apportionment to be used in Colorado. Articles III and IV of the Compact identify delivery of water by New Mexico as an obligation.	35, 61-63, 66-67	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	New Mexico, by and through its State Engineer John D'Antonio, admits that when Colorado "delivers" water to New Mexico pursuant to Article III, Colorado loses dominion and control of the water:		
42.	Water in excess of the delivery requirement is the Colorado apportionment to be used in Colorado.	35	NM-EX 011, Stevens 2nd Decl. at ¶ 28
43.	Articles III and IV of the Compact together provide water for use in New Mexico, subject to the obligation to deliver an indexed flow of water to Texas in Elephant Butte Reservoir. The obligation of New Mexico to deliver water in the Rio Grande at San Marcial . . . shall be that quantity set forth in the following tabulation of relationship which corresponds to the quantity at the upper index station. Similarly, Article IV requires New Mexico to deliver indexed flows of water in Elephant Butte Reservoir.	36, 61, 66, 80	NM-EX 011, Stevens 2nd Decl. at ¶
44.	Article IV of the Compact identified the volume of water that New Mexico could utilize in the Middle Rio Grande based upon the 1938 Condition.	55	NM-EX 008, Lopez 2nd Decl. at ¶ 26
45.	Article IV of the Compact also protected the delivery of water in Elephant Butte Reservoir from post-1938 depletions in the New Mexico Middle Rio Grande.	55, 82-83	NM-EX 008, Lopez 2nd Decl. at ¶ 8
46.	New Mexico admits [These provisions [in Article IV] together ensured that the volume of indexed flows within the Rio Grande above Elephant Butte Reservoir would not be depleted above the depletion conditions that existed in 1938], but denies that there is any 1938 depletion condition below Elephant Butte Reservoir that would protect the volumes of water that Texas was apportioned.	55, 83	This fact/s is undisputed by New Mexico.
47.	Thus, according to New Mexico, Colorado and New Mexico benefit and are protected from upstream depletions that exceed the depletions that occurred in 1938, but Texas has no such protections.	83	NM-EX 008, Lopez 2nd Decl. at ¶ 11

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
48.	New Mexico does not have any Compact apportionment below Elephant Butte Reservoir. Water that is delivered is the New Mexico apportionment to be used in New Mexico, subject to the delivery requirement in Article IV. Water delivered by Colorado at the New Mexico state line is the New Mexico apportionment to be used in New Mexico, subject to the delivery requirement in Article IV. For Colorado's delivery to New Mexico, the indices used were based upon flow data for a 1928-1937 period of record that nonetheless reflected an accepted 1938 Condition of consumption in the San Luis Valley that would protect flows for the Middle Rio Grande below the state line. Notably, the Compact was structured such that New Mexico's apportionment was above Elephant Butte Reservoir. Notably, absent post-1938 depletions caused by New Mexico, the Texas Project allocation and the Texas apportionment would be the same. The water New Mexico delivers in Elephant Butte Reservoir is apportioned to Texas, subject to the 1906 Treaty obligation to Mexico and subject to EBID's contract entitlements. The United States' Contracts with EBID fully define EBID's rights, and nothing in the contracts gives the state of New Mexico any rights. EBID is entitled to 88/155 of the available Project supply, which corresponds to its 56.7742 repayment obligation. The 1938 depletions are protected by the Compact, not by the Project contracts.	61, 35, 63, 80, 81, 45,	NM-EX 008, Lopez 2nd Decl. at ¶¶ 24, 26
49.	Article IV of the Compact requires "New Mexico to deliver water in the Rio Grande at San Marcial [later changed to Elephant Butte Reservoir] . . . ."	36-37	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	As was the case with Article III, the quantity of water to be delivered is based upon indexed flows provided for in the article. Water in excess of the delivery requirement is the New Mexico apportionment to be used in New Mexico above Elephant Butte Reservoir. Article VI establishes a system of "credits" and "debits, defined in Articles I(g)-(j).		
50.	Article IV requires adjustments to the scheduled amounts based on depletion of tributary runoff between Otowi Bridge and San Marcial during July, August, and September by works constructed after 1937. This protects Texas's apportionment from upstream development by ensuring an agreed upon level of flow to Elephant Butte Reservoir and normal releases from the Project.	78-79	NM-EX 008, Lopez 2nd Decl. at ¶ 34
51.	Articles II and V of the Compact deal with the placement of gauges on the Rio Grande.	38	This fact/s is undisputed by New Mexico.
52.	There are two types of debits: "Annual Debits" and "Accrued Debits," and two types of credits: "Annual Credits" and "Accrued Credits."	37	NM-EX 008, Lopez 2nd Decl. at ¶13
53.	Once delivered, New Mexico's regulatory authority over water released from the Reservoir ceases.	63	NM-EX 007, D'Antonio 2nd Decl. at ¶¶ 8, 24, 16, 17, 50, 51, 53, 54
54.	Article VII precludes Colorado and New Mexico from increasing the amount of water in post-1929 upstream storage reservoirs whenever there is less than 400,000 acre feet of usable water in Elephant Butte Reservoir and Caballo Reservoir. If there are accrued credits in Elephant Butte Reservoir, Colorado or New Mexico (depending on which or both have accrued credits in the Reservoir) may relinquish those credits at any time. Article VII of the Compact addresses upstream depletions and the release of water from upstream post-1929 reservoirs, in the context of relinquishment of credits by Colorado and New Mexico for the benefit of interests downstream of Elephant Butte Reservoir. The significance of accepting relinquishment is that Colorado or New Mexico can increase the	37-38, 64	NM-EX 008, Lopez 2nd Decl. at ¶ 14

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	amount of water stored in post-1929 upstream reservoirs in an amount equal to the water relinquished and accepted by Texas. But relinquishment alone is not effective unless Texas accepts that relinquishment.		
55.	Articles VII and VIII of the Compact provide that the Texas Rio Grande Commission shall demand and ensure that Colorado and New Mexico limit their upstream activities and release water in Elephant Butte Reservoir to ensure that Texas receives its apportionment. Once Colorado delivers a certain indexed volume of water to New Mexico at the New Mexico state line, Colorado has no further dominion or control over the water delivered.	61, 63	This fact/s is undisputed by New Mexico.
56.	But relinquishment alone is not effective unless Texas accepts that relinquishment. The power to accept relinquishment is solely vested in Texas because the water in Elephant Butte Reservoir is apportioned to Texas. New Mexico has no power to accept relinquishment because it has no interest in the water in Elephant Butte Reservoir. The Compact provides that Texas – not New Mexico –may accept relinquished water (relinquished by Colorado and New Mexico) thereby allowing additional storage in upstream reservoirs.	38, 65	NM-EX 008, Lopez 2nd Decl. at ¶ 15
57.	Article VIII of the Compact provides that during the month of January each year, Texas's Rio Grande Commissioner may demand of Colorado and New Mexico that they release water from upstream storage reservoirs constructed after 1929 to the amount of accrued debits in Elephant Butte Reservoir sufficient to bring the quantity of usable water in Elephant Butte and Caballo Reservoirs to 600,000 acre feet by March first, and to maintain this quantity in storage until April thirteenth, to the end that a normal release of 790,000 acre feet may be made from Project storage in that year.	38	This fact/s is undisputed by New Mexico.
58.	Again, the demand is to be made by Texas in order to protect its apportionment in Elephant Butte and Caballo Reservoirs from upstream depletion. Article VIII of the Compact provides that the Texas Rio Grande Commissioner, not New Mexico,	38, 64, 80, 86,	NM-EX 011, Stevens 2nd Decl. at ¶ 15, 27 NM-EX 008, Lopez 2nd Decl. at ¶¶ 16, 19, 20, 21

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	can demand of Colorado and New Mexico the release of water from these upstream storage reservoirs under specified circumstances. The drafters took great care to ensure that New Mexico delivers sufficient water in Elephant Butte Reservoir to maintain normal releases of Project water for irrigation demands in Texas, Project lands in New Mexico, and delivery to Mexico. During Compact negotiations, Texas argued that normal releases should be 800,000 acre feet and New Mexico, seeking to protect the Middle Rio Grande from Texas, argued for a much lower number. Ultimately, after much argument and negotiation, the states agreed to 790,000 acre feet as a normal release for Texas.		
59.	Nor does [the Compact] provide the United States as the owner and operator of the Project any ability to protect the volume of water that is "delivered" in Elephant Butte Reservoir. That authority is vested solely in the Texas Rio Grande Commissioner.	64	NM-EX 011, Stevens 2nd Decl. at ¶ 19 NM-EX 008, Lopez 2nd Decl. at ¶ 17
60.	Articles IX and X deal with the development of additional waters among New Mexico, Colorado, and the United States and how those waters are to be treated and used. These provisions do not allow for any post- 1938 depletions.	38-39	NM-EX 008, Lopez 2nd Decl. at ¶ 24
61.	Article XI addresses the then-existing Supreme Court litigation between Texas and New Mexico and indicates that the Compact resolves that dispute.	39	This fact/s is undisputed by New Mexico.
62.	Article XII of the Compact provides the powers of the Rio Grande Commission established in this article. The Commission may, by unanimous action, adopt rules and regulations to govern its proceedings. Finally, "the findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact."	39	This fact/s is undisputed by New Mexico.
63.	Article XVI of the Compact provides that its provisions shall not affect the 1906 Treaty with Mexico or treaties and rights of Indian Tribes. Article XIV provides that any losses resulting from	39	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	the delivery or loss of water to Mexico shall never affect the delivery schedules in Articles III and IV of the Compact.		
64.	The balance of the Compact provisions deal with miscellaneous matters.	39	This fact/s is undisputed by New Mexico.
65.	In 1966, New Mexico and Texas together filed suit in the Supreme Court against Colorado, alleging that Colorado's upstream depletions were causing harm to the downstream states.	46	This fact/s is undisputed by New Mexico.
66.	Texas brought the 1935, 1951, and 1966 actions, as well as entered the 1938 Compact, to prevent the water delivered in Elephant Butte Reservoir from being depleted by upstream actions. These were not academic exercises. This case, too, is focused on the fundamental importance of maintaining depletions at the conditions that existed in 1938. Texas took all of these actions to ensure that the volumes of water Texas had agreed to as its apportionment in 1938 would actually be received, and not intercepted and depleted between Elephant Butte Reservoir and Texas.	46	NM-EX 011, Stevens 2nd Decl. at ¶ 14
67.	In fact, no Compact accounting has ever taken place below Elephant Butte Reservoir because, as noted, Texas's apportionment is delivered to Elephant Butte Reservoir. The Report of the Engineer Advisors to the Rio Grande Compact Commissioners, dated February 22, 2002 demonstrates that there is nothing in all the figures that the Compact Commission collects that addresses the 57/43 split. This is because that is an allocation issue and not a Compact issue. If it were a Compact issue, it would have been accounted for as such.	71-72	NM-EX 008, Lopez 2nd Decl. at ¶ 31
68.	Section 2.1 of the Memorandum of Understanding between the Rio Grande Compact Commission and the BOR, included in the 2001 Report of the Rio Grande Compact Commission, confirms that the Compact accounting data includes "deliveries by New Mexico to Texas at Elephant Butte."	72	NM-EX 008, Lopez 2nd Decl. at ¶ 32
69.	Based upon the application of well-established principles of compact interpretation, the Compact protects the Project and its operations under the conditions that existed in 1938, and relies on the Project, as it operated in 1938, as the means to provide Compact apportionments. Accordingly, the drafters did not provide river flow adjustments below Elephant Butte	77, 79	NM-EX 008, Lopez 2nd Decl. at ¶ 33

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	Reservoir because they understood the operations of the Project in 1938 and intended them to continue.		
70.	Other Compact provisions demonstrate the drafters' intent to protect the normal operation of the Project, i.e., a normal release of 790,000 acre feet from further development of the river.	78	NM-EX 011, Stevens 2nd Decl. at ¶ 23
71.	The Compact also protects Project Storage to allow for "a normal release" from the Project. If Colorado or New Mexico have Accrued Debits stored in reservoirs constructed after 1929, then Texas may demand the release of that water to maintain the quantity of Usable Water in Project Storage at levels sufficient to allow "a normal release" of 790,000 acre feet from Project Storage in that year. Thus, the drafters protected the quantity of water flowing in Elephant Butte Reservoir during dry years, or years when New Mexico and Colorado are filling reservoirs constructed after 1929.	79	NM-EX 008, Lopez 2nd Decl. at ¶ 21
72.	Mr. Lopez, speaking on behalf of the state of New Mexico, indicates the Compact imposes an obligation on Colorado to maintain its depletions of the Rio Grande to those levels that existed in 1938. In New Mexico above Elephant Butte Reservoir, New Mexico is required to limit its depletions of the Rio Grande to the levels existing in 1938. New Mexico, however, contends the Compact imposes no limitation upon depletions of the Rio Grande Below Elephant Butte Reservoir. In an effort to qualify this distinction, Mr. Lopez testified "if our actions are such that were (sic) depleting the Project supply and Texas is not getting their apportionment and they let us know and, yes, in fact, we verify it, yes, I think we have to do something about it." He further elaborated that in the event Texas did not provide notice, but New Mexico was aware that Texas was not getting its apportionment, New Mexico would have an obligation to remedy the situation.	89-90	This fact/s is undisputed by New Mexico.
DOWNSTREAM CONTRACT ASSERTIONS			
73.	These [DOWNSTREAM] contracts were negotiated, entered into, and approved contemporaneously with the negotiation and execution of the 1938 Compact.	40	This fact/s is undisputed by New Mexico.
74.	Repayment for municipal, power, and other non-irrigation components were required to bear interest. Initially, the repayment obligation was dealt with through the issuance of certificates to landowners and contracts with irrigation associations. Predecessor irrigation associations of EBID and EP#1 had these types of agreements with the United States.	41-44	The contracts speak for themselves.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	The 1937 US/EP#1 Contract and the 1937 US/EBID Contract are, in essence identical, with certain District-specific exceptions. Both were entered into in November 1937 (EBID on November 9, 1937 and EP#1 on November 10, 1937). The 1937 US/EP#1 Contract refers to predecessor contracts with the El Paso Valley Water Users' Association and the 1937 US/EBID Contract refers to the predecessor contract of the Elephant Butte Water Users' Association. Both 1937 contracts refer to joint contracts entered into over time between the two predecessor associations that dealt with various aspects of repayment and operation of the Project. Article 3 of both contracts explains the rationale for the 1937 contracts as relieving the Districts of construction costs associated with power, an interest bearing component of the Project, and allowing for the reallocation of the Districts' repayment obligation accordingly. In return, the power features of the Project were conveyed to the United States. This resulted in a reduction to each District of the construction costs chargeable to power development. The repayment obligation articulated in Article 5 of the respective contracts indicates that EBID is responsible for 56.7742 per centum of the fixed costs attributable to the repayment obligation and EP#1 is responsible for 43.2258 per centum of the fixed costs attributable to the repayment obligation. Article 6 of the contracts similarly adjusts the Districts' respective operation and maintenance costs for the Project. In Article 7, interest charges related to the power component of the Project for the years 1930-1936, were added to the Districts' repayment obligation. Article 8 in each of the 1937 contracts provides the new repayment obligation of the Districts and delineates how those payments are to be made. Article 9 in each of the two contracts deals with the segregation of the operation and maintenance purposes of the Project for power from the remaining features of the Project and the United States' obligation to continue to operate the Project. Article 10 of the two contracts deals with the payment by the Districts		

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	to the United States for the operation and maintenance of the Project and explains how operation and maintenance charges to the Districts for 1937 will be dealt with. Article 11 deals with how operation and maintenance charges will be dealt with after January 1, 1938. Article 12 addresses the provision of water to HCCRD in Texas and how the charges from HCCRD for the "rental" of water will be credited against the two Districts' payment obligation. Article 13 provides that the Project water supply will be primarily for irrigation. Articles 15 and 16 address the continued construction of Project features and how funding will be addressed. Articles 17 and 18 again deal with the power components of the Project, including the conveyance of the Districts' interest in power to the United States. Articles 19, 20, and 21 address payment, and also address the requirement to repay even if individuals within the Districts default on payments to the Districts and even if it requires the Districts to exercise their respective taxing authority to insure that payments are made. The remaining provisions of the contracts are general provisions. The 1938 US/EBID/EP#1 Contract is an agreement between EBID and EP#1 approved by the United States. This agreement complemented the 1937 contracts between the United States and the two Districts by specifying the acreage to be irrigated in the respective Districts. The agreement provided there will be 88,000 acres of land within EBID and 67,000 acres of land within EP#1 "upon which construction and operation and maintenance charges may be levied. Each District could increase this acreage by 3 percent: up to 2,640 additional acres for EBID and up to 2,010 additional acres for EP#1. The contract provided that the distribution of available supply would be 67/155 to EP#1 and 88/155 to EBID (which represents about 43 percent to EP#1 and 57 percent to EBID). Repayment and operation and maintenance charges were also established by the use of these figures. The obligations under this contract were directly tied to the Districts' 1937 contracts. The Downstream Contracts together define the allocation of Project supply.		

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
75.	New Mexico admits that whatever interest New Mexico may have below Elephant Butte Reservoir, it is limited to the rights that exist pursuant to the EBID contracts. New Mexico also admits that New Mexico's interests below Elephant Butte Reservoir are strictly limited to the four corners of the 1937 contract between EBID and the United States and the 1938 contract between EBID, the United States, and EP#1. New Mexico admits that the use, place of use, timing of delivery, and total amount of water is absolutely limited by these contracts.	69-70	NM-EX 008, Lopez 2nd Decl. at ¶ 30.
76.	The water delivered is apportioned to Texas, subject to the Treaty obligation to Mexico and the United States' Downstream Contracts with EBID. Texas's apportionment is delivered by New Mexico in Elephant Butte Reservoir pursuant to Article IV of the Compact, subject only to the 1906 Treaty and the United States' contract with EBID. Notably, absent post-1938 depletions caused by New Mexico, the Texas Project allocation and the Texas apportionment would be the same. The water New Mexico delivers in Elephant Butte Reservoir is apportioned to Texas, subject to the 1906 Treaty obligation to Mexico and subject to EBID's contract entitlements. The United States' Contracts with EBID fully define EBID's rights, and nothing in the contracts gives the state of New Mexico any rights. EBID is entitled to 88/155 of the available Project supply, which corresponds to its 56.7742 repayment obligation. The 1938 depletions are protected by the Compact, not by the Project contracts.	36, 61, 45	NM-EX 008, Lopez 2nd Decl. at ¶¶ 24, 26 NM-EX 011, Stevens 2nd Decl. at ¶ 23
77.	This amount of water must be used on Project lands that are limited to 88,000 acres, plus up to an additional 2,640 acres. Absent subsequent contractual arrangements, the water is to be used for irrigation purposes.	45	NM-EX 008, Lopez 2nd Decl. at ¶ 27
78.	The contracts only deal with the available Project supply and cannot address depletions in New Mexico that reduce the volume of that supply.	45	NM-EX 008, Lopez 2nd Decl. at ¶ 28

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
79.	The repayment contract between EBID and EP#1 that established the Districts' respective allocations was effective in February 1938, one month before the states signed the Compact.	69	NM-EX 008, Lopez 2nd Decl. at ¶ 29
80.	Thus, the Project was among the "present uses" of water in the three states that the Compact drafters intended to protect.	69	This fact/s is undisputed by New Mexico.
81.	Twelve years later, during the 1968 dispute with Colorado, New Mexico State Engineer Reynolds opined that the delivery schedules upon which the Compact relied "makes the control of ground water appropriations in the upstream states essential" as otherwise the states could not adhere to their "compact commitments."	18	NM-EX 008, Lopez 2nd Decl. at ¶ 41
82.	The Project, in turn, is the means by which the water apportioned to Texas by the Compact is stored in Elephant Butte Reservoir and subsequently delivered to Texas, subject to deliveries to EBID pursuant to its contract with the United States, and to Mexico pursuant to the 1906 Treaty.	23	NM-EX 008, Lopez 2nd Decl. at ¶ 40
83.	Of the 790,000 acre feet delivered to the Reservoir, New Mexico argues that it is entitled to 57 percent of (1) usable water released from the Reservoir, (2) arroyo flow and other accretions below the Reservoir, and (3) return flows from the use of water on Project lands. There is no question that these are the elements associated with the total volume of water to which the Districts are entitled pursuant to the Downstream Contracts, and that these figures mirror the conditions that were contemplated in 1938.	P66 P67	NM-EX 008, Lopez 2nd Decl. at ¶ 25
84.	X		
RIO GRANDE PROJECT AND HYDROLOGY RELATED STATEMENTS			
85.	The Project was ultimately authorized pursuant to the Rio Grande Reclamation Project Act of 1905 as a federal project that provides water from the Rio Grande primarily for agricultural irrigation along the Rio Grande in southern New Mexico and in the El Paso Valley of Texas. Elements of the Project also provide hydropower, flood control, and water for municipal users. It included construction of Elephant Butte Dam and Reservoir ("Elephant Butte Reservoir" or "Reservoir") on the Rio Grande near Truth or Consequences, New Mexico, to provide stored water for Project users.	12	This fact/s is undisputed by New Mexico.
86.	EBID water users receive deliveries of surface water from the Project and many also have groundwater wells.	22	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
87.	EBID landowners, and those entities owning EBID acres, such as the city of Las Cruces, are the only New Mexico water users authorized to use releases from the Reservoir.	22	NM-EX 006, Barroll 2nd Decl. at ¶ 10
88.	EBID water users rely on releases from the Reservoir, and are also entitled to rely on return flows from Project operations.	22	NM-EX 006, Barroll 2nd Decl. at ¶¶ 28, 29, 46
89.	EBID water users also rely on groundwater pumping.	22	NM-EX 006, Barroll 2nd Decl. at ¶¶ 27, 28, 30, 31, 32, 33
90.	Municipal water users include the city of Las Cruces, the second largest city in New Mexico, which has grown from a population of several thousand in 1938 to a population of more than 100,000 in the city limits and considerably more in the service area in 2020.	22	This fact/s is undisputed by New Mexico.
91.	The city of Las Cruces owns or leases approximately 1,412 acres of surface water rights in EBID.	23	NM-EX 013, Wilson Decl. at ¶ 8.
92.	The city does not use its EBID surface water supplies. Thus, Las Cruces relies solely on groundwater.	23	NM-EX 013, Wilson Decl. at ¶ 8
93.	The Project is dependent on the Compact for its water supply.	23	NM-EX 006, Barroll 2nd Decl. at ¶¶ 9, 46 NM-EX 100, Barroll Rep. at 1 NM-EX 107, Lopez Rep. at 24-26
94.	The Project, in turn, is the means by which the water apportioned to Texas by the Compact is stored in Elephant Butte Reservoir and subsequently delivered to Texas, subject to deliveries to EBID pursuant to its contract with the United States, and to Mexico pursuant to the 1906 Treaty.	23	NM-EX 008, Lopez 2nd Decl. at 39 NM-EX 012, Sullivan Decl. at ¶¶ 23, 99
95.	Both the Project and the Compact were conceived and implemented prior to the significant development of groundwater in the Rincon and Mesilla basins of New Mexico, which began in the early 1950s.	23	NM-EX 006, Barroll 2nd Decl. at ¶¶ 14, 17, 19 NM-EX 012, Sullivan Decl. at ¶¶ 23, 99
96.	Today, the Project includes Elephant Butte Dam and Reservoir, Caballo Dam and Reservoir located immediately below Elephant Butte Dam, a hydropower plant at Elephant Butte Dam, three diversion dams on the Rio Grande in New Mexico (Percha, Leasburg, and Mesilla), two diversion dams on the Rio Grande in Texas (American and International, both owned and	24	NM-EX 006, Barroll 2nd Decl. at ¶¶ 48, 49, 50, 51, 54, 55 NM-EX 012, Sullivan Decl. at ¶ 100

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	operated by the International Boundary and Water Commission), and an extensive system of canals, laterals, waste ways, and drainage ways that support irrigation operations in EBID and EP#1.		
97.	The major dams and reservoirs and the diversion dams included in the Project are identified in Figure 5.	24	NM-EX 006, Barroll 2nd Decl. at ¶ 48 NM-EX 012, Sullivan Decl. at ¶ 100
98.	There are 159,650 acres authorized within the Project, with 90,640 acres within EBID in New Mexico and 69,010 acres within EP#1 in Texas.	24-25	NM-EX 100, Barroll Rep. at 1 NM-EX 012, Sullivan Decl. at ¶ 101
99.	These acreages translate to approximately a 57/43 split for the distribution of irrigable acres between EBID and EP#1 (collectively, "Districts").	25	NM-EX 100, Barroll Rep. at 1
100.	As a practical matter, however, diversions by the Districts and Mexico consist of varying amounts of reservoir storage, return flows from upstream irrigation operations, and occasional arroyo inflows.	25	NM-EX 006, Barroll 2nd Decl. at ¶¶ 28, 29, 31, 55
101.	Return flows are a key part of Project operations, and interference with return flows removes a critical component of deliveries to Project users.	25	NM-EX 006, Barroll 2nd Decl. at ¶¶ 13, 36, 50, 55 NM-EX 012, Sullivan Decl. at ¶¶ 25, 102
102.	Project return flows consist of excess irrigation tailwater and groundwater seepage from irrigated fields that are collected in drains that convey these return flows to the Rio Grande.	25	NM-EX 006, Barroll 2nd Decl. at ¶¶ 47, 51, 55 NM-EX 012, Sullivan Decl. at ¶¶ 26, 102
103.	The proportion of return flows in the river increases in the downstream direction relative to stored water from the reservoirs, and the water diverted by Project users in the lower Mesilla basin and in the El Paso Valley of Texas includes diversion of significant quantities of return flows.	25	NM-EX 006, Barroll 2nd Decl. at ¶¶ 34, 47 NM-EX 012, Sullivan Decl. at ¶¶ 27, 102
104.	Figure 6 shows the percentage of net diversions for each valley for reservoir releases, arroyo flow, and drain flow for the period prior to the Compact.	25	NM-EX 006, Barroll 2nd Decl. at ¶ 48

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	The net diversions in the Rincon portion of EBID contained 0.3 percent drain flow and seepage (return flows) and net diversions in the Mesilla portion of EBID contained 7.4 percent, while the net diversions into the Franklin canal in EP#1 contained 35.1 percent return flows and the net diversions into the Tornillo canal in EP#1 contained 57.7 percent return flows and only 38.2 percent of reservoir releases.		NM-EX 012, Sullivan Decl. at ¶ 103
105.	After diversion by EP#1, Project water is delivered to the city of El Paso for municipal use under agreements with EP#1 and its constituents that assign their Project water allotments for specific land parcels to the city.	26	NM-EX 006, Barroll 2nd Decl. at ¶¶ 54, 55
106.	Excess canal flows and return flows from Project lands within EP#1 also provide a supplemental water supply for approximately 18,000 acres of land within the Hudspeth County Conservation and Reclamation District No. 1 (HCCRD) below EP#1 down to Fort Quitman, Texas.	26	NM-EX 100, Barroll Rep. at 2 NM-EX 107, Lopez Rep. at 59
107.	Project water was to be allocated between irrigators in southern New Mexico and in the El Paso Valley of Texas in proportion to the irrigated acreage of Project lands within each state.	26	NM-EX 006, Barroll 2nd Decl. at ¶¶ 56, 57, 58, 62
108.	Contracts executed with irrigation interests in New Mexico and Texas permitted the orderly operation of the Project both during construction and upon completion of Elephant Butte Reservoir in 1915.	26-27	NM-EX 006, Barroll 2nd Decl. at ¶¶ 58, 59, 60, 61, 62, 68
109.	Significant groundwater development began in the early 1950s in the Project area within the Rincon and Mesilla basins of New Mexico.	29	NM-EX 006, Barroll 2nd Decl. at ¶¶ 14, 15, 17 NM-EX 112, Stevens Rep. at 30 NM-EX 012, Sullivan Decl. at ¶ 28
110.	Prior to the development of extensive groundwater pumping in the Rincon and Mesilla basins, groundwater levels generally were relatively high and fluctuated in response to the seasonal application of irrigation water from the Rio Grande on Project lands.	29-30	NM-EX 012, Sullivan Decl. at ¶ 106
111.	In the early days of the Project, this phenomenon created a serious problem.	30	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
112.	Soon after the Project began delivering water to the irrigators, groundwater levels rose in New Mexico to and above ground level, thereby waterlogging and making useless land previously capable of growing crops. The solution was to construct a complex system of drains that would capture excess groundwater created by irrigation and return it to the river. This "return flow" became a significant source of irrigation water for downstream irrigators, particularly in Texas, a fact recognized and catalogued in the JIR.	30	NM-EX 012, Sullivan Decl. at ¶¶ 29, 105
113.	With the construction of the drains, irrigation water not consumed by crops and other vegetation or by evaporation, percolated down through the soil into the groundwater system, which typically flowed toward and into drains specifically designed for collecting groundwater and for conveying groundwater and excess irrigation tailwater away from fields and to the Rio Grande. p30	30	NM-EX 106, Barroll 2nd Decl. at 47 NM-EX 012, Sullivan Decl. at ¶¶ 30, 106
114.	As shown, Project water is diverted from the Rio Grande into an irrigation system canal and then distributed to individual irrigated fields, where it is either consumptively used by the growing crops or evaporated into the atmosphere. Any excess irrigation water is either discharged directly to the drain as tailwater or percolated through the subsurface into the groundwater system. p31 The bottom of the drain is below the upper level of the groundwater; thus, groundwater is induced to flow toward and into the drain. Similarly, the bottom of the river channel is below the level of the groundwater, with water shown flowing in both directions depending on the relative heights of the water in the river and the groundwater from location to location. The irrigation tailwater and groundwater collected in the drain flows to the river and is referred to as return flow.	31	NM-EX 012, Sullivan Decl. at ¶¶ 31, 32, 33, 34, 106, 107

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
115.	The return flow from the drain that is discharged into the Rio Grande provides an important supply of Project water for users located downstream, namely users in the lower Mesilla basin and in the El Paso Valley of Texas.	31	NM-EX 006, Barroll 2nd Decl. at ¶¶ 47, 50, 55 NM-EX 012, Sullivan Decl. at ¶¶ 35, 107
116.	This important source of water for Project users was contemplated in the early development of Project operations and in the negotiations among the states leading up to adoption of the 1938 Compact.	32	This fact/s is undisputed by New Mexico.
117.	For example, the 1938 JIR, which was conducted by federal agencies at the request of the Rio Grande Compact Commissioners with input from Colorado, New Mexico, and Texas representatives, determined that approximately 35 percent of the total supply of Project water delivered to Texas in the El Paso Valley was from upstream return flows, with the majority of the balance originating as releases from Caballo Reservoir.	32	NM-EX 006, Barroll 2nd Decl. at ¶ 50 NM-EX 012, Sullivan Decl. at ¶ 108
118.	Conversely, since water for Project users in New Mexico was diverted from the Rio Grande farther upstream, i.e., above the river outfalls of most drains, less than seven percent of New Mexico's total deliveries originated from return flows.	32	NM-EX 012, Sullivan Decl. at ¶ 108
119.	With the extensive development and use of groundwater in the Rincon and Mesilla basins of New Mexico that began during the early 1950s – particularly in the relatively shallow aquifers with generally high groundwater levels such as those along the Rio Grande – groundwater levels began to fluctuate and decline in some areas.	32	NM-EX 106, Barroll 2nd Decl. at ¶¶ 44, 45 NM-EX 012, Sullivan Decl. at ¶¶ 36, 109
120.	This in turn caused reduction of discharges of groundwater into the drains, and directly into the river.	32	NM-EX 006, Barroll 2nd Decl. at ¶¶ 47, 52 NM-EX 012, Sullivan Decl. at ¶¶ 37, 109
121.	Eventually, with enough groundwater pumping, the groundwater gradient in many areas reversed, with significant reductions in the groundwater inflows to the drains and into the river.	32	NM-EX 006, Barroll 2nd Decl. at ¶ 52 NM-EX 100, Barroll Rep. at 26-29 NM-EX 012, Sullivan Decl. at ¶¶ 38, 109

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
122.	This condition is illustrated by the diagram in Figure 11. As shown, the level of the groundwater is below the bottom of the river channel and the drain, and water flowing in the river and into the drain moves toward and into the groundwater system, rather than the other way around, as it did prior to the initiation of groundwater pumping.	32	NM-EX 012, Sullivan Decl. at ¶¶ 39, 109, 110
123.	The discharge of return flow from the drain into the river is substantially curtailed, if not reduced to zero, thereby also reducing the flow in the river.	33	NM-EX 006, Barroll 2nd Decl. at ¶¶ 13, 36 NM-EX 012, Sullivan Decl. at ¶¶ 40, 110
124.	The phenomenon of reduced river flows caused by groundwater withdrawals is an underlying component of what is referred to as streamflow depletions, and these streamflow depletions have increased along the Rio Grande within the Rincon and Mesilla basins since significant groundwater development began in the early 1950s.	33	NM-EX 006, Barroll 2nd Decl. at ¶¶ 13, 36, 37, 38 NM-EX 012, Sullivan Decl. at ¶¶ 41, 111
125.	One of the obvious impacts of these increased streamflow depletions has been to alter the Project water budget by reducing flows in the Rio Grande that otherwise would ultimately reach water users in the lower Mesilla basin and in the El Paso Valley in Texas.	33	NM-EX 006, Barroll 2nd Decl. at ¶¶ 13, 36. 37 NM-EX 100, Barroll Rep. at 8 – 13, and Appx. B NM-EX 001, Barroll 1st Decl. at ¶¶ 33, 37 NM-EX 012, Sullivan Decl. at ¶¶ 42, 111
126.	In essence, the release of a specific quantity of water from Caballo Reservoir now contributes less to the surface water supply for these users because of the losses of flow due to the increased seepage from the Rio Grande and interior drainage ways, thus altering the previously existing Project water budget.	33-34	NM-EX 006, Barroll 2nd Decl. at ¶¶ 50, 55, 39, 41 NM-EX 012, Sullivan Decl. at ¶¶ 43, 111
127.	In the early 1980s, the BOR developed the D1 and D2 allocation curves for the Project based on 1951-1978 operating data.	34	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
128.	Under normal supply conditions for the Project, these curves provided for 122 percent of the annual Caballo Reservoir release to be diverted from the Rio Grande for Project users. This additional 22 percent was almost entirely from return flows discharged into the Rio Grande from drains.	34	NM-EX 006, Barroll 2nd Decl. at ¶ 57 NM-EX 100, Barroll Rep. at §§ 6 and 7
129.	This is shown on Figure 10, Schematic of Rio Grande and Groundwater System Interaction Prior to Development of Groundwater Pumping in Rincon and Mesilla basins. p34	34	
130.	These D1 and D2 allocation curves reflect conditions that are different from the flow regime that existed at the time of the Compact (1938 Condition).	34	NM-EX 100, Barroll Rep. at 20
131.	The D1 and D2 curves were based upon the depleted flow conditions influenced by the extensive groundwater pumping in New Mexico during the 1951-1978 period.	34	NM-EX 006, Barroll 2nd Decl. at ¶ 57
132.	Of the 790,000 acre feet delivered to the Reservoir, New Mexico argues that it is entitled to 57 percent of (1) usable water released from the Reservoir, (2) arroyo flow and other accretions below the Reservoir, and (3) return flows from the use of water on Project lands. There is no question that these are the elements associated with the total volume of water to which the Districts are entitled pursuant to the Downstream Contracts, and that these figures mirror the conditions that were contemplated in 1938.	86-87	NM-EX 008, Lopez 2nd Decl. at ¶ 20, 25
133.	Missing from New Mexico's analysis, however, is a consideration of depletions from the volume of water that otherwise would have been available under the conditions that existed in 1938.	87	NM-EX 006, Barroll 2nd Decl. at ¶ 53
134.	Regarding the 57/43 split, referable to Project allocations, the Project delivers the *water available to it* at the points of diversion on the river.	87	NM-EX 100, Barroll Rep. at 14-16 and Appx. C
135.	The volume of Project water that was split 57/43 in 1938 for the Project to make the allocation to EBID and EP#1 pursuant to the contracts with the United States reflected the acreages of irrigated land in the two Districts at that time and the generally gaining condition of the river below Caballo Reservoir as influenced by relatively high groundwater levels in the absence of significant pumping.	87	NM-EX 100, Barroll Rep. at 1 NM-EX 012, Sullivan Decl. at ¶¶ 44, 112

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
136.	This changes beginning in the 1950s with the extensive development of groundwater in New Mexico and the subsequent lowering of groundwater levels along the Rio Grande that altered the condition of the river from a generally gaining stream to a generally losing stream.	87	NM-EX 100, Barroll Rep. at 19-21, 37-38 NM-EX 012, Sullivan Decl. at ¶¶ 45, 112
137.	The implications of this change are obvious – river flow losses mean greater depletions and less Project water for downstream users.	87	NM-EX 006, Barroll 2nd Decl. at ¶¶ 34, 35, 36 NM-EX 012, Sullivan Decl. at ¶¶ 46, 112
138.	The Project has no control over New Mexico's depletions and can only allocate the amount of water remaining after the New Mexico groundwater pumping depletes Project water in the river, including Reservoir releases.	87	NM-EX 006, Barroll 2nd Decl. at ¶¶ 15, 17, 18, 19, 20, 28, 36, 37, 38, 39, 40, 41
139.	Surface water and groundwater are interconnected in the Rincon and Mesilla basins.	27	NM-EX 012, Sullivan Decl. at ¶ 47
140.	As water flows in a surface water feature (e.g., a stream, canal, or river), the surface water flow can either increase from the inflow of groundwater (referred to as a "gaining" stream) or decrease due to seepage losses to the underlying aquifer (referred to as a "losing" stream). When groundwater elevations are higher than surface water elevations, groundwater flows into the surface water body and surface flow increases (a gaining stream condition). When groundwater elevations are lower than surface water elevations, surface water flows into the surrounding aquifer and surface flow decreases (a losing stream condition).	27	This fact/s is undisputed by New Mexico.
141.	This is a losing stream condition, and the seepage rate out of the stream is dependent on the difference between the elevation of the water in the stream and the elevation of the groundwater.	28	NM-EX 012, Sullivan Decl. at ¶ 48
142.	In this case, involving a disconnected stream, the seepage rate out of the stream has reached its maximum and is based on the depth of the stream only. p28	28-29	NM-EX 012, Sullivan Decl. at ¶ 49
143.	One of the impacts of groundwater pumping is the reduction of groundwater elevations (also known as drawdown). p29	29	This fact/s is undisputed by New Mexico.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
144.	Long-term groundwater pumping can result in drawdown to the point where a stream that has been historically gaining (i.e., groundwater flows into the stream providing base flow) can be changed to a losing or disconnected stream (i.e., water percolates out of the stream and recharges the underlying aquifer).	29	NM-EX 012, Sullivan Decl. at ¶ 50
145.	A water budget is an accounting for a defined time period of the inflows into, and the outflows from, a defined control area.	29	NM-EX 012, Sullivan Decl. at ¶¶ 51, 105
146.	Often, performing a water budget with known volumes of inflows and outflows for a specific time period can lead to the quantification of one or more unknown variables for that same time period.	29	NM-EX 012, Sullivan Decl. at ¶¶ 52, 105
147.	Performing multiple water budgets for a specific control area for different time periods can provide information regarding how certain phenomena may have changed.	29	NM-EX 012, Sullivan Decl. at ¶¶ 53, 105
148.	Even a visual depiction of the water budget for a control area showing the generalized movement of water into, within, and out of the Project area under different conditions and circumstances can be informative and help to understand how the Project water supply system was originally conceived to work and how it has changed with the development of groundwater in New Mexico.	29	NM-EX 012, Sullivan Decl. at ¶¶ 54, 105
149.	Since 1938, the volume of groundwater pumped in the Rincon and Mesilla Valleys in New Mexico has increased.	86	NM-EX 012, Sullivan Decl. at ¶¶ 55, 114
150.	One of these groundwater models addresses the Rincon and Mesilla aquifers which underlie southern New Mexico and a small portion of Texas, and the other covers the Hueco Bolson aquifer which underlies the El Paso Valley.	90-91	NM-EX 012, Sullivan Decl. at ¶ 57
151.	These groundwater models have been combined with a RiverWare model of the surface waters network in the Rincon, Mesilla, and El Paso Valleys.	91	NM-EX 012, Sullivan Decl. at ¶ 58
152.	The ILRGM has been used by the New Mexico experts to evaluate various historic conditions and hypothetical situations involving the Compact's appropriation to Texas that New Mexico believes to be involved in this dispute.	91	NM-EX 012, Sullivan Decl. at ¶ 59
153.	Although Texas disputes the need for, and reliability of, the ILRGM to evaluate certain situations, results from this model are instructive regarding the question of whether	91	NM-EX 012, Sullivan Decl. at ¶ 60

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	groundwater pumping in the Rincon and Mesilla Valleys depletes the surface water flows of the Rio Grande below Elephant Butte and Caballo Reservoirs.		
154.	New Mexico has run its ILRGM and made calculations from the ILRGM output to address the surface water depletions.	91	NM-EX 012, Sullivan Decl. at ¶ 61
155.	Again, without conceding the need for or reliability of the ILRGM, its results are the only evidence that New Mexico has disclosed on these issues and serve as admissions.	91	NM-EX 012, Sullivan Decl. at ¶ 62
156.	New Mexico's analysis indicates that groundwater pumping during the period of 1940 to 2017 has depleted the streamflow of the Rio Grande, on average, in the amount of 66,351 acre feet per year (AF/yr).	91	NM-EX 012, Sullivan Decl. at ¶ 63
157.	New Mexico's calculations from this analysis further indicate that 52,610 AF/yr of the total depletion is attributable to New Mexico's pumping and 13,700 AF/yr is due to Texas's pumping.	91	NM-EX 012, Sullivan Decl. at ¶ 64
158.	The Project was authorized in 1905 and began deliveries in 1916 to the predecessor water user organizations of EP#1 and EBID.	99	NM-EX 011, Stevens 2nd Decl. at 5
159.	Upon adoption of the Compact, delivery of water into the Project became the basis for New Mexico to satisfy its Compact obligations to Texas, and New Mexico relinquishes regulatory authority over the water once it is delivered.	99	
160.	It is undisputed that New Mexico pumping intercepts and depletes the Rio Grande [Hutchison Decl. at TX_MSJ_000657-000669; see section V.F.3, *supra* (New Mexico admitted that its pumping depletes surface water flows)], and as such, operation of these water rights under New Mexico law conflicts with the Compact – federal law – and the California rule has no application.	98-99	NM-EX 006, Barroll 2nd Decl. at ¶¶ 34 – 41 NM-EX 012, Sullivan Decl. at ¶ 65
161.	Mr. Lopez concedes that groundwater pumping in New Mexico below Elephant Butte Reservoir has depleted the surface water of the Rio Grande.	89	NM-EX 006, Barroll 2nd Decl. at ¶¶ 35, 37, 52 NM-EX 012, Sullivan Decl. at ¶ 66
162.	In this matter, it is undisputed that groundwater pumping in New Mexico below Elephant Butte Reservoir depletes surface water flow of the Rio Grande, and that groundwater pumping has increased substantially since 1938.	85	NM-EX 006, Barroll 2nd Decl. at ¶¶ 35, 37, 52

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
			NM-EX 012, Sullivan Decl. at ¶ 67
163.	Now, New Mexico's post-Compact development has depleted that water supply by capturing returns flows that otherwise would have been available.	16	NM-EX 006, Barroll 2nd Decl. at ¶¶ 35, 37, 50, 52, 55 NM-EX 100, Barroll Rep. at 26-30, 49-50, 55-61 NM-EX 012, Sullivan Decl. at ¶ 68
164.	Few groundwater wells were in use at the time of Compact adoption in 1938.	17	NM-EX Stevens 2nd Decl. at ¶ 30 NM-EX 006, Barroll 2nd Decl. at ¶ 14
165.	As early as the 1900s, studies determined that the groundwater and surface water in the Rio Grande below Elephant Butte Reservoir were interconnected.	17	NM-EX 011, Stevens 2nd Decl. at ¶ 31
NEW MEXICO WATER ADMINISTRATION ASSERTIONS			
166.	By 1938, the Lower Rio Grande basin of New Mexico was fully appropriated.	17	NM-EX 007, D'Antonio 2nd Decl. at ¶ 16
167.	Few groundwater wells were in use at the time of Compact adoption in 1938.	17	NM-EX 008, Lopez 2nd Decl. at ¶ 22 NM-EX 011, Stevens 2nd Decl. at ¶ 4
168.	At that time, and later, releases from Elephant Butte Reservoir comprised effectively all of the Rio Grande surface water supply in the Lower Rio Grande. Footnote 18: In addition to releases from the Reservoir, small amounts of seasonal arroyo discharges contribute to available water in the Rio Grande. Brandes Decl. at TX_MSJ_000001-000016. These arroyo flows were included in the total volume of water that was to be made available downstream of the Reservoir. Id	17	NM-EX 006, Barroll 2nd Decl. at ¶ 10 NM-EX 100, Barroll Rep. at § 5
169.	By the mid-1950s, New Mexico's understanding of the connection between surface water and groundwater in the Upper Rio Grande basin was reduced to an order of the New Mexico State	18	NM-EX 008, Lopez 2nd Decl. at ¶ 41.

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	Engineer, S.E. Reynolds, using his statutory authority to declare an "Underground Water Basin" for the Middle Rio Grande. Reynolds' Order acknowledged that groundwater fed the Rio Grande.		
170.	Twelve years later, during the 1968 dispute with Colorado, New Mexico State Engineer Reynolds opined that the delivery schedules upon which the Compact relied "makes the control of ground water appropriations in the upstream states essential" as otherwise the states could not adhere to their "compact commitments."	18	NM-EX 008, Lopez 2nd Decl. at ¶ 40
171.	This acknowledgment of the impact groundwater pumping had on Rio Grande surface waters was also among the bases of the New Mexico State Engineer's opposition to the city of El Paso's efforts to appropriate groundwater in New Mexico.	18	NM-EX 007, D'Antonio 2nd Decl.at ¶ 14
172.	Finally, in the early 1980s, an internal study of streamflow depletion below Elephant Butte Reservoir conducted by State Engineer Reynolds' office concluded that groundwater development since the 1950s in New Mexico had altered flows to such an extent that greater releases were required from the Reservoir for the same quantity of water to reach the city of El Paso under the accepted 1938 Condition.	18	NM-EX 007, D'Antonio 2nd Decl. at ¶ 14, fn 5
173.	New Mexico understood that groundwater pumping would deplete the volume of Rio Grande surface water, and that the basin was fully appropriated.	19	NM-EX 007, D'Antonio 2nd Decl. at ¶ 16 NM-EX 006, Barroll 2nd Decl. at ¶ 43 NM-EX 008, Lopez 2nd Decl. at ¶ 23
174.	Nonetheless, New Mexico authorized the appropriation of groundwater to address the immediate water supply problems associated with the drought of the 1950s.	19	NM-EX 007, D'Antonio 2nd Decl. at ¶ 18 NM-EX 006, Barroll 2nd Decl. at ¶¶ 15, 17, 18, 19, 20 NM-EX 008, Lopez 2nd Decl. at ¶ 23

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
TABLE ASSIGNING "TAF" NUMBERS AND REFLECTING DISPUTE BY NEW MEXICO

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
175.	The number of groundwater wells has increased from 60 in 1938 to over 8,000 in 2020.	19	NM-EX 010, Serrano Decl. at ¶ 14, 18-21
176.	In 1980, the New Mexico Office of the State Engineer (OSE) "closed" the basin to new appropriations. As discussed at section C.2, supra, New Mexico "closed" the Lower Rio Grande groundwater basin in 1980, prohibiting new appropriations of groundwater, which should be seen as an admission that New Mexico understood the impacts on Texas's apportionment of Rio Grande surface water from Lower Rio Grande well pumping.	19, 103-04	NM-EX 007, D'Antonio 2nd Decl. at ¶ 15, 17, 18
177.	As a practical matter, the closure of the basin simply meant that no new appropriations were authorized (N.M. Stat. Ann. § 72-12-3.1), and there was no water available for appropriation.	20	NM-EX 007, D'Antonio 2nd Decl. at ¶ 19, 21-27 NM-EX 011, Stevens 2nd Decl. at ¶ 4
178.	Notwithstanding the closing of the basin, groundwater pumping in New Mexico continued unabated. In 2010, New Mexico determined the groundwater basin was being mined. Mining of a groundwater basin means that more water is being pumped from the groundwater basin than can be replaced, causing groundwater levels to decline and causing the further depletion of the volume of water available to Texas. Groundwater pumping in New Mexico continues unabated today. The net result is that, notwithstanding the ongoing and recognized depletion of surface water flow through New Mexico's groundwater pumping in New Mexico below Elephant Butte Reservoir, pumping continues unabated, to the detriment of Texas.	19-22	NM-EX 007, D'Antonio 2nd Decl. at ¶ ¶1-11, 21, 23-28, 43-49, 55, 57-59 NM-EX 010, Serrano Decl. at ¶ 4-7, 10-14, 16, 18-21, 37 NM-EX 006, Barroll 2nd Decl. at ¶¶ 41, 66
179.	All wells continued unregulated groundwater pumping until December 3, 2004, when the OSE ordered the creation of a Water Master District on the Lower Rio Grande, appointed a water master, and ordered measurement and reporting of groundwater pumping. While New Mexico now measures how much groundwater is pumped, New Mexico has taken no action to	20-21	NM-EX 007, D'Antonio 2nd Decl. at ¶¶ 57-59 Serrano Decl. at ¶¶ 4-5, 10-30 NM-EX 006, Barroll 2nd Decl. at ¶ 81

TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
	establish a system for administration as required to meet downstream interstate delivery entitlements.		
180.	Further, transfers of existing groundwater rights continue apace, both formally through the statutory transfer process and informally through the Lower Rio Grande's "owner management program" (OWMAN). OWMAN allows groundwater users to combine operations of multiple groundwater permits at one well. Similarly, New Mexico cannot use the fact that the groundwater diversions at issue in this case may be consistent with New Mexico law as a shield against Texas's Complaint that its apportionment is being depleted by New Mexico's groundwater pumping. Footnote 38: New Mexico groundwater permit holders in the Lower Rio Grande also have the benefit of the New Mexico OSE's OWMAN which authorizes groundwater users to combine their permitted amounts for diversion out of a single well. See section II.C.2, infra; see also Serrano Depo., 2/26/2019, at TX_MSJ_001224-001227, 85:17-88:6.	21, 96	NM-EX 010, Serrano Decl. at ¶4-5, 31-34
181.	Irrigation is the primary use of water in the Lower Rio Grande in New Mexico.	22	This fact/s is undisputed by New Mexico.
182.	As a practical matter, New Mexico has admitted through 30(b)(6) testimony, that it does not monitor farmer diversions of surface water within EBID.		NM-EX 007, D'Antonio 2nd Decl. at ¶ 26, 29-37, 54, 55 NM-EX 010, Serrano Decl. at ¶ 13
183.	Similarly, the New Mexico State Engineer is not only authorized, he is obligated, to adopt regulations to "actively" administer the groundwater pumping in the Lower Rio Grande in New Mexico to protect Texas's apportionment from post-1938 depletions. In 2003, the New Mexico state Legislature adopted N.M. Stat. Ann. § 72-2-9.1(A) and (B) (emphasis added): [STATUTORY PROVISIONS FOLLOW]	101	NM-EX 007, D'Antonio 2nd Decl. at ¶ 38-48 NM-EX 006, Barroll 2nd Decl. at ¶ 81

APPENDIX 1: TEXAS ALLEGATIONS OF FACT
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TAF NO.	TEXAS ALLEGATION OF FACT	TEX. BR. PAGE	NEW MEXICO RESPONSE
184.	To lay the ground work for adoption of district specific Active Water Resource Management (AWRM) regulations, the New Mexico State Engineer imposed a metering order in December of 2004 on the Lower Rio Grande below Elephant Butte, requiring all groundwater wells to be metered; prior to that time, meters were not required on irrigation wells.	101	NM-EX 007, D'Antonio 2nd Decl. at ¶ 38-48, 54
185.	However, to date, measuring is all New Mexico has done. Footnote 40: Other New Mexico witnesses have confirmed that there has been no curtailment of groundwater pumping in the Lower Rio Grande. See, e.g., Barroll Depo., 2/5/2020, at TX_MSJ_000901, 56:19-20 (". . . so far in the Lower Rio Grande, we have not done active curtailment of any water rights"); Serrano Depo., 2/26/2019, at TX_MSJ_001194, 55:14-22; D'Antonio Depo., 6/26/2020, at TX_MSJ_000847, 325:10-23; Barroll 30(b)(6) Depo., 10/21/2020, at TX_MSJ_000976-000977, 31:23-32:5.	102	NM-EX 007, D'Antonio 2nd Decl. at ¶ 23, 24, 44-48, 53, 55, 56, 57 NM-EX 010, Serrano Decl. at ¶ 4-5, 10, 13-14, 22-30, 27 fn 5 ** NM-EX 006, Barroll 2nd Decl. at ¶ 81
186.	As New Mexico's 30(b)(6) witness, Cheryl Thacker testified that "we can't manage what we don't measure."	101-02	This fact/s is undisputed by New Mexico.
187.	As the legislation's title implies, Active Water Resource Management authorizes the New Mexico OSE to adopt regulations that will allow for "active" management of water rights. Asked about the distinction between "active" and "normal" or "standard" administration of water rights, Dr. Barroll responded: [N]ormal or standard administration of water rights versus active administration of water rights, active administration being more related to some sort of priority call or other curtailment of water rights, if necessary, in times of shortage.	102 102	This fact/s is undisputed by New Mexico.
188.	In 2005 and 2006, the OSE began an effort to promulgate district specific regulations under the AWRM statute for the Lower Rio Grande at least in part to avoid a lawsuit from Texas.	102	NM-EX 007, D'Antonio 2nd Decl. at ¶ 38-48
189.	However, according to Dr. Barroll: ". . . so far in the Lower Rio Grande, we have not done active curtailment of any water rights." Footnote 42: Barroll Depo., 2/5/2020, at TX_MSJ_000901, 56:19-20; see also D'Antonio Depo., 6/26/2020, at TX_MSJ_000847, 325:21-23 ("[The district-specific regulations] aren't in place	103	NM-EX 007, D'Antonio 2nd Decl. at ¶ 38-42, 53 fn 19 NM-EX 010, Serrano Decl. at ¶ 4-5, 10, 13-14, 22-30, 27 fn 5

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	yet, so any active curtailment with respect to water administration, that piece is not in place yet.").		NM-EX 006, Barroll 2nd Decl. at ¶ 81
190.	However, the administrative closure did not limit pumping from existing wells, which continued to increase [see **Figures 3 and 4**; Schorr Decl. at TX_MSJ_000697-000699] and did not impose a requirement to obtain a well permit.	104	NM-EX 007, D'Antonio 2nd Decl. at ¶ 5. 15, 18-21
191.	Indeed, the New Mexico OSE's Watermaster for the Lower Rio Grande admitted New Mexico's lack of action to ensure Compact compliance: Q: What does your office do to implement the terms of the Rio Grande Compact, if any? A: My office does not do anything locally to effectuate the Compact.	104	NM-EX 007, D'Antonio 2nd Decl. at ¶ 55 fn 19, 57-59 NM-EX 010, Serrano Decl. at ¶ 4-5, 10-11, 13-14, 22-30, 27 fn 5
192.	New Mexico could actively curtail groundwater pumping to ensure delivery of Texas's apportionment without interference. The [New Mexico] Legislature has directed the State Engineer to engage in this type of "active" administration. See, *supra*, section G.4 (discussion of AWRM); however, New Mexico has admitted it considered but ultimately rejected regulations which would have required curtailment of wells in the Lower Rio Grande.	104	NM-EX 007, D'Antonio 2nd Decl. at ¶ 38-40, 42, 44, 46-48. 55 fn 19 NM-EX 010, Serrano Decl. at ¶ 4-5, 10, 13-14, 22-30, 27 fn 5 NM-EX 006, Barroll 2nd Decl. at ¶ 81
193.	On numerous occasions, New Mexico witnesses have referred to "conjunctive use" of groundwater and surface water supplies as if allowing groundwater use to replace unavailable surface water is an acceptable means of controlling depletions. Plainly stated, it is not – conjunctive use simply means that surface water shortages will be made up for with groundwater pumping.	105	NM-EX 007, D'Antonio 2nd Decl. at ¶ 8, 23
194.	Regardless of the label applied by New Mexico, groundwater pumping depletes the surface water supply as admitted by New Mexico. The pumping does enhance the New Mexico water supply, but that is accomplished by depleting the surface water supply that otherwise would have been delivered to EP#1 and Mexico.	105	NM-EX 006, Barroll 2nd Decl. at ¶20, 28

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19	Under New Mexico law, "offsets" are authorized, and indeed under the 1999 "Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications" (MVAA Guidelines) require gross volumetric "offsets" when a water user files an application to transfer groundwater rights46 to either new places of use or new types of use. Footnote 46: It is undisputed that the Lower Rio Grande is fully appropriated and, according to Cheryl Thacker, there is no water available for any new appropriations. Thacker Depo., 4/18/2019, at TX_MSJ_001326-001327, 21:6-22:24. As applied by New Mexico in the Lower Rio Grande, offsets are volume-based replacement of depletions to the Rio Grande, and are typically designed to replace a volumetric amount of depletions, but offsets may be "paid" to the river in the next calendar year, and in any event do not ensure replacement in time and location. In addition, the State Engineer "will not require offsets of surface water depletions when the proposed transfer of water rights results in an increased calculated depletion of less than 3% of the total amount of water diverted and consumed." Similarly, in transfers of groundwater rights a de minimis volume of depletion is authorized. Thus, offsets are only imposed on transfers or new uses sought for existing groundwater rights, but all existing groundwater pumping is allowed without offsets or replacement water. In addition, even when offsets are required, under the MVAA Guidelines all depletions are not replaced in volume, and the guidelines have no requirements to replace depletions in time and location.	105-06	NM-EX 010, Serrano Decl. at ¶ 11-12 NM-EX 007, D'Antonio 2nd Decl. at ¶ 22, 23, 24

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 Response to the State of Texas's 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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