

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 TEXAS'S EVIDENTIARY OBJECTIONS AND RESPONSES TO
THE STATE OF NEW MEXICO'S FACTS**

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The State of Texas (Texas) hereby submits the following evidentiary objections and responses to the State of New Mexico's (New Mexico) facts set forth in the following three New Mexico motions:

1. New Mexico's Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support filed on November 5, 2020 (NM MSJ on Apportionment);
2. New Mexico's Motion for Partial Summary Judgment to Exclude Claims for Damages in Years That Texas Failed to Provide Notice to New Mexico of Its Alleged Shortages filed on November 5, 2020; and
3. New Mexico's Motion for Partial Summary Judgment to Exclude Texas's Claim for Damages in Certain Years and Brief in Support filed on November 5, 2020.

These three New Mexico motions are collectively referred to herein as "Motions."

GENERAL OBJECTIONS TO EVIDENCE PROFFERED BY NEW MEXICO FOR THE MOTIONS

Federal Rule of Civil Procedure 56 states that a "party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible at trial." Fed. R. Civ. P. 56(c)(2). Objection to evidence in a motion for summary judgment serves the function of an objection at trial, regardless of the pretrial setting. Fed. R. Civ. P. 56(c)(2), Notes of Advisory Committee on 2010 amendments. The moving party has the burden to prove the evidence relied upon is admissible as presented. *Id.*

Texas objects to multiple categories of evidence proffered by New Mexico in support of the Motions on the grounds that the material cited to support "facts" is provided in a form that would not be admissible at trial.

Objection #1: Expert Reports

[NM Exhibits 100 – 115]

Texas objects to New Mexico's reliance on expert reports as evidence in support of the Motions. This includes the exhibits identified as NM-EX-100 to NM-EX-115 in the Motions and appended to the folder titled "NM Exhibits Compendium." New Mexico attempts to use 15 retained expert reports that have been disclosed in this matter since May of 2019. New Mexico even includes six reports (NM-EX-104, 105, 106, 111, 114, and 115) that are authored by experts disclosed by Texas and the United States. To be admissible at trial, an exhibit must first be authenticated. To properly authenticate an exhibit as evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). New Mexico makes no attempt whatsoever to verify the authenticity of any of these reports in whole or in part. Regarding, for example, New Mexico's disclosed expert Margaret Barroll, Ph.D., who also submitted a separate declaration in support of New Mexico's Motions (NM-EX-001), this expert merely states that she wrote several reports during the course of the litigation and otherwise fails to make any statement to identify any of her reports as true and accurate, the cornerstone of evidence authentication. *See* NM-EX-001 at 1. The expert reports, NM-EX-100 - 115, are inadmissible evidence because they do not include affidavits verifying their authenticity. *Scott v. Edinburg*, 346 F.3d 752, 759-760, (7th Cir. 2003); *Haywood v. Lucent Techs., Inc.*, 323 F.3d 524, 533 (7th Cir. 2003).

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). Such affidavits or declarations "must be made on personal knowledge, set out facts that would be

admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed. R. Civ. P. 56(c)(4).

“The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56(e) provides that affidavits in support of and against summary judgment ‘shall set forth such facts as would be admissible in evidence.’” Fed. R. Civ. P. 56(e); see also *Cnty. of Roquefort v. William Faehndrich, Inc.*, 303 F.2d 494, 498 (2d Cir. 1962) (“Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall ‘set forth such facts as would be admissible in evidence.’”) (citation omitted). *Raskin v. Wyatt Co.*, 125 F.3d 55, 66, 1997 U.S. App. LEXIS 23616, *30-31; *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 175-76 (5th Cir. 1990). As such, expert reports may be rejected as evidence on summary judgment if they fail to include a supporting affidavit to verify its authenticity. *Scott*, at 759-760; *Haywood*, at 533.

The New Mexico Motions cite to expert reports (NM-EX-100 to NM-EX-115) none of which include a supporting affidavit to verify its authenticity or truth and accuracy of the information contained in each report. The expert reports submitted in support of New Mexico’s Motions (NM-EX-100 to NM-EX-115) are inadmissible and should be stricken.

Objection #2: Non-Authenticated Transcripts

[NM Exhibits 200 – 225]

Texas objects to New Mexico’s reliance on inadmissible, non-authenticated copies of deposition testimony. A wide range of documents may be submitted as evidence on summary judgment including deposition transcripts, documents, and interrogatory answers. Fed. R. Civ. P. (c)(1)(A). However, exhibits may only be considered on summary judgment to the

extent that the contents of the exhibit in question would be admissible at trial. Fed. R. Civ. P. 56(c)(4). To be admissible at trial, an exhibit must first be authenticated. To properly authenticate an exhibit as evidence, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). This requires the evidence to be submitted under oath. Fed. R. Civ. P. 56(c)(4). Without authentication, “documents cannot be considered in a motion for summary judgment.” *Besett v Wadena County*, 890 F.Supp.2d 1076, 1092, 2012 U.S. Dist. LEXIS 116427, **36 citing (*Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002)).

New Mexico attached excerpts from 25 deposition transcripts in this case to its compendium of exhibits and cites to the transcripts repeatedly in its Motions. However, New Mexico failed to authenticate any of the deposition transcripts. New Mexico failed to attach portions of the transcripts where each witness was sworn in by the court reporter. Moreover, New Mexico failed to attach witness certifications, confirming that the witness was indeed given the oath and that the transcript is true and correct.¹ Further, New Mexico only provided the transcript pages for the specific cited testimony and excluded transcript pages that would provide context for purposes of foundation and personal knowledge. Fed. R. Evid. 602. In sum, all of the deposition transcripts in New Mexico’s compendium (NM-EX-200 - 225), and relied upon by New Mexico in the Motions, should be stricken as inadmissible.

¹ The witness certifications in this case state the following above the signature line: “I, [witness name], solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s).” See, e.g., Signature of Witness for Transcript of Oral and Videotaped Deposition of Peggy Barroll (Jul. 9. 2020) at TX_MSJ_007310.

Objection #3: Non-Authenticated Documents

[NM Exhibits 400 – 531]

Texas objects to New Mexico’s reliance on non-authenticated documents included in the “NM Exhibits Compendium” in support of the Motions. The non-authenticated documents are inadmissible evidence because they do not include affidavits or any other means for verifying their authenticity. To properly authenticate an exhibit as evidence, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.” Fed. R. Evid. 901(a). This requires the evidence to be submitted under oath. Fed. R. Civ. P 56(c)(4). Without authentication, “documents cannot be considered in a motion for summary judgment.” *Besett v Wadena County*, 890 F.Supp.2d 1076, 1092, 2012 U.S. Dist. LEXIS 116427, **36 citing *Orr v. Bank of America*, NT & SA, 285 F.3d 764, 773 (9th Cir. 2002).

A wide range of documents may be submitted as evidence on summary judgment including deposition transcripts, documents, and interrogatory answers. Fed. R. Civ. P (c)(1)(A). However, exhibits may only be considered on summary judgment to the extent that the contents of the exhibit in question would be admissible at trial. Fed. R. Civ. P 56(c)(4). To be admissible at trial, an exhibit must first be authenticated.

A substantial number of the documents New Mexico cites and relies on as “evidence” in their motions are not authenticated. The following exhibits appended to the folder titled “NM Exhibits Compendium” are not authenticated by any means: NM-EX-400 - 531.² Texas objects to New Mexico’s use of and reliance on these documents because they are not

² Texas does not object to the following documents referenced in the Declaration of Jennifer Stevens, Ph.D. in Support of New Mexico’s Motions for Partial Summary Judgement (NM-EX-005) for failure to authenticate: NM-EX-300 - 331. Texas raises other specific evidentiary objections to NM-EX-300 - 331, to the extent applicable, in the table below.

properly identified or authenticated. Texas requests that the preceding list of non-authenticated and/or improperly identified documents relied upon by New Mexico be stricken as evidence in support of the Motions.

Objection #4: Non-Authenticated Hearing Transcripts and Pleadings

[NM Exhibits 600 – 602]

Texas objects to New Mexico's reliance on non-authenticated hearing transcripts and pleadings included in the "NM Exhibits Compendium" in support of the Motions. A wide range of documents may be submitted as evidence on summary judgment including deposition transcripts, documents, and interrogatory answers. Fed. R. Civ. P. (c)(1)(A). However, exhibits may only be considered on summary judgment to the extent that the contents of the exhibit in question would be admissible at trial. Fed. R. Civ. P. 56(c)(4). To be admissible at trial, an exhibit must first be authenticated. To properly authenticate an exhibit as evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). This requires the evidence to be submitted under oath. Fed. R. Civ. P. 56(c)(4). Without authentication, "documents cannot be considered in a motion for summary judgment." *Besett v Wadena County*, 890 F.Supp.2d 1076, 1092, 2012 U.S. Dist. LEXIS 116427, **36 citing *Orr v. Bank of America, NT & SA*, 285 F.3d 764, 773 (9th Cir. 2002).

The documents labeled NM-EX-600 - 602 include copies of what appear to be the following documents: NM-EX-600 appears to be a copy of the Transcript of August 19, 2015 Oral Argument Before A. Gregory Grimsal, Esq. Special Master; NM-EX-601 appears to be a copy of State of Texas's Response to State of New Mexico First Set of Interrogatories to the State of Texas (Aug. 28, 2020); and, NM-EX-602 appears to be a copy of the United States of

America's Response to New Mexico's First Set of Requests for Admission (Nov. 4, 2019). Texas objects to NM-EX-600 - 602 because they are not properly authenticated. Fed. R. Evid. 901(a). New Mexico made no attempt to authenticate NM-EX-600 - 602 as true and correct copies of the documents they purport to be. Thus, Texas requests that all non-authenticated hearing transcripts and pleadings (NM-EX-600 - 602) relied upon by New Mexico be stricken as evidence in support of New Mexico's Motions for failure to properly authenticate documents.

Objection #5: Declaration of Margaret Barroll, Ph.D.

[NM Exhibit 001]

Texas objects to New Mexico's reliance on the Declaration of Margaret Barroll, Ph.D. In Support of State of New Mexico's Partial Summary Judgment Motions (Barroll Declaration). The Barroll Declaration is identified NM-EX-001 in the Motions appended to the folder titled "NM Exhibits Compendium." The Barroll Declaration is inadmissible evidence to the extent Dr. Barroll asserts the truth of facts to which she has no personal knowledge and to the extent Dr. Barroll opines on subject matter outside her area of expertise.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). "The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56(e) provides that affidavits in support of and against summary judgment 'shall set forth such facts as would be admissible in evidence.'" Fed. R. Civ. P. 56(e); *see also Cmty. of Roquefort* at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.'" (citation

omitted). *Raskin v. Wyatt Co.*, 125 F.3d 55, 66, 1997 U.S. App. LEXIS 23616, *30-31; *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 175-76 (5th Cir. 1990).

Such affidavits or declarations “must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.” Fed. Civ. P. 56(c)(4). The requirement of personal knowledge may be only overcome if a “reasonable person[] could differ as to whether the witness had an adequate opportunity to observe” the facts to which the declarant attests. *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013). The Barroll Declaration (numbered NM-EX-001) includes references to and interpretation of the 1938 Rio Grande Compact, a topic on which Dr. Barroll testified at multiple depositions in this litigation is outside her expertise³:

- Oral and Videotaped Deposition of Peggy Barroll, Vol. 2 (Feb. 6, 2020)
 - At 313:15-21: “Do you have an opinion – an expert opinion about the quantity of water that was apportioned to Texas under the 1938 Compact? A. Well, Texas – I don’t regard myself as an expert on the Compact or what the Compact law is.” TX_MSJ_007284.
 - At 318:8-12: “What period was used for the Colorado delivery requirements to New Mexico within the Compact? A. I’m afraid I don’t know the Compact that well that I could tell you.” TX_MSJ_007289.
- Oral and Videotaped Deposition of Peggy Barroll (July 9, 2020)

³ Excerpts from Dr. Barroll’s depositions cited herein are attached to the Texas Appendix of Evidence in Support of Texas’s Oppositions to the State of New Mexico’s Motions for Partial Summary Judgment and Briefs in Support.

- At 27:21-25: “I think we established at your first deposition that you're not an expert on the Compact itself; is that -- is that -- do I recall that correctly? A. I'm not an expert on the Compact itself.”

TX_MSJ_007305.

- Oral and Videotaped Deposition of Peggy Barroll, Vol. 2 (Aug. 7, 2020)
 - At 188:22-25: “A. I think that the -- my understanding from a Compact perspective that -- that if EBID is shorted, then New Mexico, under the Compact, is shorted. But, again, as we said earlier, I'm not a Compact expert.” TX_MSJ_0007261.

Texas objects to New Mexico's use of the Barroll Declaration (NM-EX-001) to the extent that Dr. Barroll asserts the truth of facts to which the declarants have no personal knowledge and asserts opinions on topics outside of Dr. Barroll's expertise (i.e., the 1938 Rio Grande Compact).

Texas requests that the following paragraphs from the Barroll Declaration (NM-EX-001) be stricken in their entirety for the reason that they assert opinions on topics outside of Dr. Barroll's expertise and/or on topics in which she previously testified she does not have personal knowledge (i.e., interpretation of and circumstances surround the 1938 Rio Grande Compact): paragraphs 15, 16, 17 (at NM-EX-001, pp. 4 - 5). Texas requests that these objectionable paragraphs of the Barroll be stricken as evidence in support of New Mexico's Motions.

Objection #6: Declaration and Expert Reports of Estevan R. Lopez, P.E.

[NM Exhibit 003 & NM Exhibits 107-110]

Texas objects to New Mexico's reliance on the Declaration of Estevan R. Lopez, P.E. In Support of State of New Mexico's Motions for Partial Summary Judgment (Lopez Declaration). The Lopez Declaration is identified NM-EX-003 in the Motions appended to the folder titled "NM Exhibits Compendium." Texas further objects to New Mexico's reliance on the four experts reports of Estevan R. Lopez, P.E. dated October 31, 2019, June 15, 2020, July 15, 2020, and September 15, 2020 (Lopez Reports). The Lopez Reports are identified NM-EX-107 - 110 in the Motions appended to the filed titled "NM Exhibits Compendium." The Lopez Declaration and Lopez Reports are inadmissible evidence to the extent Mr. Lopez opines on subject matter outside his area of expertise.

The moving party must support its assertions by "citing to particular parts of materials in the record including . . . affidavits or declarations." Fed. R. Civ. P. 56(c)(1)(A). "The principles governing admissibility of evidence do not change on a motion for summary judgment. Rule 56(e) provides that affidavits in support of and against summary judgment 'shall set forth such facts as would be admissible in evidence.'" Fed. R. Civ. P. 56(e); *see also Cmty. of Roquefort* at 498 ("Since the object [of summary judgment] is to discover whether one side has no real support for its version of the facts, the Rule specifically states that affidavits shall 'set forth such facts as would be admissible in evidence.'" (citation omitted). *Raskin v. Wyatt Co.*, 125 F.3d 55, 66, 1997 U.S. App. LEXIS 23616, *30-31; *Lavespere v. Niagara Mach. & Tool Works, Inc.*, 910 F.2d 167, 175-76 (5th Cir. 1990).

Such affidavits or declarations "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to

testify on the matters stated.” Fed. Civ. P. 56(c)(4). The requirement of personal knowledge may be only overcome if a “reasonable person[] could differ as to whether the witness had an adequate opportunity to observe” the facts to which the declarant attests. *See Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1045 (9th Cir. 2013). The Lopez Declaration (numbered NM-EX-003) and the Lopez Reports (NM-EX-107 - 110) include legal conclusions, historical information, and statements regarding the operation of the Rio Grande Project, all topics on which Mr. Lopez testified at depositions in this litigation are outside his expertise⁴:

- Oral and Videotaped Deposition of Estevan Lopez, (Feb. 26, 2020)
 - At 15:8-18: “. . . what’s the purpose of having your testimony in this case? Do you have an understanding of that? A. Well, I think the purpose is as laid out in this case, but more broadly and more generally, I think this case is about the Compact and so, at least from my perspective, it seems appropriate to give us some perspective about that Compact. Q. Based on your time as head of the Interstate Stream Commission? A. Primarily. That’s – that’s what I worked on.” TX_MSJ_007340.
 - At 22:2-7: “. . . which [Reclamation project] have you had specific experience with operations of? [objection omitted] A. Well, I think I’ve had specific – not to say I’ve operated them. I haven’t operated a single one of them.” TX_MSJ_007343.

⁴ Excerpts from Mr. Lopez’s depositions cited herein are attached to the Texas Appendix of Evidence in Support of Texas’s Oppositions to the State of New Mexico’s Motions for Partial Summary Judgment and Briefs in Support.

- At 23:1-3: “Now, when you were at Reclamation, what was your involvement with the Rio Grande Project.” A. None.”

TX_MSJ_007344.

- Remote Oral and Videotaped Deposition of Estevan Lopez, Vol. 1 (Jul. 6, 2020)
 - At 25:2-8: “The first thing I want to do is if I understood your testimony with respect to the first report, you are not purporting . . . to be an expert regarding legal questions; . . . is that correct? A. That’s correct. I’m not – not an attorney. I don’t purport to be an expert on law or legal questions.” TX_MSJ_007358.
 - At 26:24-25-27:1-7: “And the same is true with respect to . . . the historical information you provide in your report; you’re not offering that as a expert historian, but rather based on stuff you read? [objection omitted] A. That’s – that’s correct. I am not the expert historian.” TX_MSJ_007359 - 007360.

Texas objects to New Mexico’s use of the Lopez Declaration (NM-EX-003) and the Lopez Reports (NM-EX-107 - 110) to the extent that Mr. Lopez asserts the truth of facts to which the declarant has no personal knowledge and asserts opinions on topics outside of Mr. Lopez’s expertise (i.e., legal conclusions, historical information, and statements regarding the operation of the Rio Grande Project).

Texas requests that the following paragraphs from the Lopez Declaration (NM-EX-003) be stricken in their entirety for the reason that they assert opinions on topics outside of Mr. Lopez’s expertise: paragraphs 4, 7, 12 - 15, 17, 19 - 28 (at NM-EX-003, pp. 2-

6, 8-11). Texas further requests that any and all references to the objectionable subject matter as described herein that is contained within the Lopez Reports be stricken. Texas requests that these objectionable paragraphs of the Lopez Declaration and sections of the Lopez Reports be stricken as evidence in support of New Mexico’s Motions.

SPECIFIC EVIDENTIARY OBJECTIONS AND RESPONSE TO NEW MEXICO’S “FACTS” FOR EACH OF THE MOTIONS

I. New Mexico’s Motion for Partial Summary Judgment on Compact Apportionment and Brief in Support

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| 1 | <p>Following an investigation, the Reclamation Service (precursor to the Bureau of Reclamation) (both the Reclamation Service and Bureau of Reclamation are referred to herein as “Reclamation”) recommended that Congress authorize a storage reservoir near Elephant Butte, New Mexico, rather than an alternative site at El Paso, Texas, to capture, store, and regulate torrential and storm water flows in the Upper Rio Grande.</p> <p><i>See</i> NM-EX 300, F.H. Newell, <i>Second Annual Report of the Reclamation Service</i>, H.R. Doc. No. 58-44, at 375-80 (1904); NM-EX 301, B.M. Hall, <i>A Discussion of the Past and Present Plans for Irrigation of the Rio Grande Valley</i>, 52 (Nov. 1904); NM-EX 106, Nicolai Kryloff, <i>Context of the 1938 Rio Grande Compact</i>, 6 (May 31, 2019) (“Kryloff Rep.”); <i>see also</i> <i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018) (“The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water. Eventually, the government identified a potential dam site near Elephant Butte, New</p> | <p>NM-EX-106: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual “evidence” as contemplated by Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded. The United States Reclamation Service (Reclamation) did recommend construction of a storage reservoir near Elephant Butte over another site at El Paso, Texas, and that the reservoir was to capture and store flood waters. However, review of the provided primary-source documents – F.H. Newell’s <i>Second Annual Report of the Reclamation Service</i> (1904), NM-EX-300, and B.M. Hall’s <i>A Discussion of Past and Present Plans for Irrigation of the Rio Grande Valley</i> (Nov. 1904), NM-EX 301 – indicates that these were not the only waters contemplated to be captured and stored for later use. Newell’s report observed that the “proposed [Elephant Butte] reservoir” was “the only . . . with a capacity large enough to utilize the entire flow of the drainage basin. It is situated sufficiently low in the basin to intercept, practically, all of the waters . . .” – an inclusive statement</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | Mexico, about 105 miles north of the Texas state line."). | | of the waters to be stored. Similarly, Hall's report – which considered dams at both the Elephant Butte and El Paso sites before endorsing the former over the latter – noted that with regard to "these projects, or any other plan of water storage on the Rio Grande, it is well to keep in mind the following facts," of which the second was: "All of the water that comes down the river is needed for irrigation. We cannot afford to waste any of it." Declaration of Scott A. Miltenberger, Ph.D. in Support of the State of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Miltenberger Dec. in Opp. to NM) at TX_MSJ_007371, paragraphs 1 – 8. |
| 2 | At the Twelfth National Irrigation Congress in 1904, Reclamation engineer Benjamin Hall reported that the proposed reservoir at Elephant Butte was preferable to the project proposed near El Paso because it would have a greater storage capacity, would minimize flooding that would render unusable irrigable land in New Mexico, and would impound sufficient water to irrigate 110,000 acres in New Mexico in addition to making deliveries to Mexico and irrigable land in Texas. NM-EX 303, Guy Elliott Mitchell, <i>The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas, Nov. 15-16-17-18, 1904</i> , 213-15 (1905); <i>see also</i> NM-EX 111, Scott A. Miltenberger, <i>Expert Report of Scott A. Miltenberger, Ph.D.</i> , 8 (May 31, 2019) ("Miltenberger Rep."); NM-EX 112, Jennifer Stevens, Ph.D., <i>The History of Interstate Water Use on the Rio Grande: 1890--1955</i> , 17 (Oct. 28, 2019) ("Stevens Rep."). | NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. | Subject to the stated objection, undisputed. |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| 3 | <p>The Reclamation proposal recommended delivery of water as between the lands in southern New Mexico and Texas based on the ratio of project lands within each state.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020), 39:7-20.</p> | <p>NM-EX-220: <i>See</i> General Objection #2.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objection, disputed in part. This paragraph is misleading in that the cited deposition testimony is incomplete, and taken out of context. At the subject deposition, counsel for New Mexico read a portion of paragraph 6 of the Texas Complaint to Texas's expert Scott Miltenberger, Ph.D. to which Dr. Miltenberger responded that he agreed with the statement. The full statement that Dr. Miltenberger agreed with was the following: "The 1904 irrigation Congress also recommended delivery of water <i>from the proposed project</i> as between the lands in southern New Mexico and in Texas based on the ratio of project lands within each state. The recommendations of the 1904 irrigation Congress were adopted by the secretary of the interior and the Rio Grande Reclamation project was authorized pursuant to the Rio Grande Reclamation Act."</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 39:7-20 (emphasis added).</p> <p>The New Mexico proposed "fact" number 3 excludes the phrase "from the proposed project," as well as the language regarding authorization of the Project.</p> <p>The testimony immediately before the quoted testimony is also relevant for context: Dr. Miltenberger agreed with paragraph 4 of the Texas Complaint as follows: "Once delivered to Elephant Butte Reservoir, the water is allocated and belongs to the Rio Grande project beneficiaries in southern New Mexico and in Texas based upon allocations derived from the Rio Grande project</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | | authorization and relevant contractual arrangements." NM-EX 220, Miltenberger Dep. (June 8, 2020) 38:22-39:6. |
| 4 | Delegates from Mexico, New Mexico, and Texas at the Irrigation Congress each approved the Reclamation proposal and unanimously passed a resolution declaring that the proposed project would affect "an equitable distribution of the waters of the Rio Grande with due regard to the rights of New Mexico, Texas and Mexico." NM-EX 303, Guy Elliott Mitchell, <i>The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas, Nov. 15-16-17-18, 1904</i> , 107 (1905); NM-EX 111, Miltenberger Rep. 9; NM-EX 106, Kryloff Rep. 6. | NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. NM-EX-106: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. | Subject to the stated objections, undisputed. |
| 5 | In support of Congressional authorization to begin work on the reservoir, the Reclamation Service Director testified to Congress that the project would be engineered to supply enough water to irrigate 20,000-25,000 acres in Mexico, 110,000 in New Mexico, with the "balance" to Texas. Mr. Newell further testified that "New Mexico, Texas, and old Mexico will divide the water in about the proportion stated." <i>See</i> NM-EX 305, The Reclamation Work of the Government Under the National Irrigation Act: Hearing Before the H. Comm. on Irrigation of Arid Lands, 59 Cong. 222 (1906) (statement of Frederick Newell, Reclamation Service Director); NM-EX 112, Stevens Rep. 18. | NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c). | Subject to the stated objection, disputed. This paragraph is factually incorrect. Neither cited source (NM-EX 305 and NM-EX 112) indicates that Newell made the quoted remarks in relation to congressional authorization for work on the reservoir. Congress authorized the Rio Grande Project, with Elephant Butte Dam as its centerpiece, the previous year, in 1905. Additionally, the provided quote is incomplete and misleading. According to both cited sources, Newell identified the "balance" of the acreage distribution as "the balance below El Paso on the Texan side of the river." Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 - 7, 9. |

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| 6 | <p>In 1906, the United States entered into a treaty with the Republic of Mexico for annual delivery of 60,000 acre-feet of water to the Acequia Madre, above Juarez, in years of full supply, with proportionate reductions in times of shortage.</p> <p>NM-EX 307, Distribution of the Waters of the Rio Grande, Mex.-U.S., May 21, 1906, 34 Stat. 2953; NM-EX 111, Miltenberger Rep. 9; <i>see also Texas v. New Mexico</i>, 138 S. Ct. 954, 957 (2018) ("in 1906, the United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.")</p> | <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objection, undisputed.</p> |
| 7 | <p>In 1907, Congress authorized construction to begin on the Elephant Butte Reservoir.</p> <p>An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Eight, and for Other Purposes, Pub. Law No. 59-253, 34 Stat. 1295 (1907); NM-EX 112, Stevens Rep. 19.</p> | <p>Pub. Law No. 59-253, 34 Stat. 1295 (1907): The cited statute does not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c).</p> <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. This paragraph is factually incorrect. The 1907 Appropriations Act authorized, for the Department of State, \$1 million "Toward the construction of a dam for storing and delivering sixty thousand acre-feet of water annually . . . as provided by a convention between the United States and Mexico . . ."; it did not authorize construction of the dam itself. Congress authorized construction of Elephant Butte Dam along with the Rio Grande Project in 1905.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 9-10.</p> |
| 8 | <p>In its initial conception, Reclamation engineered the Project to deliver an annual release between 750,000 acre-feet and 800,000 acre-feet, enough to provide 60,000 acre-feet of water to</p> | <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, disputed. This paragraph is factually incomplete and mischaracterizes the cited primary-source document, Fund for Reclamation of Arid Lands, H.R.</p> |

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| | <p>Mexico and to irrigate 155,000 acres in the United States (assuming delivery of three acre-feet per acre, plus twenty percent loss in the distribution system), of which 110,000 acres would be situated in New Mexico and 45,000 in Texas.</p> <p><i>See</i> NM-EX 310, Fund for Reclamation of Arid Lands, H.R. Doc. 61-1262, at 106 (1911); NM-EX 112, Stevens Rep. 21.</p> | <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Doc 61-1262 (1911). NM-EX-310. References to 750,000 acre-feet and 800,000 acre-feet in the document are projections and estimates of "annual supply" from the reservoir – not as expected release figures. These estimates were based not only on reservoir capacity, but also flow, evaporation, and (as acknowledged by the paragraph), a three acre-feet per acre water duty and losses. Forty percent and not "20 per cent" was the total allowance to be made for those losses: 1) "loss in the distribution system" ("20 per cent"), and 2) "losses in transit" ("20 per cent").</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 11.</p> |
| 9 | <p>Reclamation appropriated water for the Project under New Mexico territorial law, consistent with Section 8 of the Reclamation Act. Specifically, Reclamation provided notice to the Territorial Engineer for the Territory of New Mexico to appropriate and store 730,000 acre-feet per year at Elephant Butte Reservoir in 1906 and to appropriate all "unappropriated waters of the Rio Grande" at Elephant Butte in 1908.</p> <p><i>See</i> NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger Rep. 9-10; <i>see also Texas v. New Mexico</i>, 138 S. Ct. 954, 957 (2018) ("After obtaining</p> | <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c).</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objection, disputed. This paragraph is misleading. Reclamation made these filings – Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906) (NM-EX 306), and NM-EX 309, a Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Irrigation Engineer, Territory of New Mexico (Apr. 1908). However, neither filing cited Section 8 of the 1902 National Reclamation Act. Both filings instead referenced the United States "authority" under the 1902 Reclamation Act to pursue construction of "certain irrigation works in connection with the so-called Rio Grande Project," and observed that "operation of the works in question contemplates the diversion of water from the Rio Grande River." Both</p> |

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| | <p>the necessary water rights, the United States began construction of the dam in 1910 and completed it in 1916 as part of a broader infrastructure development known as the Rio Grande Project.”).</p> <p>Ultimately, the Rio Grande water appropriated by the United States was limited by the size of the Project.</p> | <p>The stated “facts” constitute improper legal conclusions in whole and/or in part.</p> <p>New Mexico failed to cite to any evidence in support of the last sentence in the paragraph. Fed. R. Civ. P. 56(c).</p> | <p>filings also cited New Mexico territorial law – Sec. 22, Chap. 102 of the 1905 laws, in the case of the 1906 filing, NM-EX-306; and Sec. 40, Chap. 49 of the 1907 laws, in the case of the 1908 filing, NM-EX-309.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 12.</p> |
| 10 | <p>In 1915, while Project construction was ongoing, Reclamation began water deliveries through the Project.</p> <p><i>See</i> NM-EX 404, Robert Autobee, United States Bureau of Reclamation, <i>Rio Grande Project</i>, at 12 (1994); NM-EX 311, United States Reclamation Service, <i>Project History Rio Grande Project Year 1915</i>, 137-141 (1915).</p> | <p>NM-EX-404: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, undisputed.</p> |
| 11 | <p>By 1919, construction of the Elephant Butte Dam and the major diversion works of the Project was complete.</p> <p>NM-EX 312, United States Reclamation Service, <i>Project History Rio Grande Project Year 1919</i>, 4-5 (1919) (reporting “practical completion of the main canal system, including diversion dams, for the lands of the New Mexico and El Paso County Irrigation Districts”); <i>see also</i> NM-EX 111, Miltenberger Rep. 10.</p> | <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, undisputed.</p> |
| 12 | <p>By 1921, Reclamation reported that the final “determined irrigable area of the project” in the United States was 155,000 acres.</p> <p><i>See</i> NM-EX 313, United States Reclamation Service, <i>Project History Rio Grande Project Year 1921</i>, 6-7 (1921); NM-EX 106, Kryloff Rep. at 23.</p> | <p>NM-EX-106: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, undisputed.</p> |

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| 13 | <p>Upon completion of the major storage and diversion works for the Project, Colorado proposed to New Mexico legislation authorizing a joint commission between the two states, and New Mexico and Colorado each appointed commissioners in 1923 to negotiate an interstate compact regarding development upstream of Elephant Butte Reservoir.</p> <p><i>See</i> NM-EX 111, Miltenberger Rep. 11; NM-EX 112, Stevens Rep. 29.</p> | <p>NM-EX-111: <i>See</i> General objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, undisputed. |
| 14 | <p>After the first meeting of the Colorado and New Mexico commissioners in 1924, Texas petitioned the Secretary of Commerce, who served as the federal representative, to "accord[] [to the Texas] the same representation upon that Commission which is accorded to the States of New Mexico and Colorado."</p> <p><i>See</i> NM-EX 314, Letter from Pat M. Neff, Governor, State of Texas, to Herbert Hoover, Secretary of Commerce (Sept. 20, 1924); NM-EX 111, Miltenberger Rep. 12.</p> | <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objection, undisputed. |
| 15 | <p>The New Mexico Compact Commissioner supported the inclusion of Texas in further compact negotiations. He wrote the New Mexico Governor that the exclusion Texas "assumed" that Reclamation would "protect[]" the rights of the Project in negotiations, but this assumption proved false because "the Reclamation Service apparently decided to take no action whatever looking to the presentation of the rights of the Rio Grande Project either as to lands in New Mexico or Texas, although it was expected that this would be done."</p> | <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objection, disputed. This paragraph is factually incorrect. The assumption expressed was not Texas's. In his February 20, 1925 letter to Governor A.T. Hannett in February 1925, New Mexico Compact Commissioner J.O. Seth noted that "Chapter 112 of the Session Laws of 1923 makes no provision whatever for according Texas the right of representation on the Commission." This law was New Mexico's own, authorizing compact negotiations with Colorado. The New Mexico Commissioner wrote to Hannett:</p> |

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| | <p>See NM-EX 315, Letter from J.O. Seth, Commissioner, State of New Mexico, to A.T. Hannett, Governor, State of New Mexico, at 3 (Feb. 20, 1925).</p> | | <p>The omission of the State of Texas from Chapter 112 of the Session laws of 1923 can be accounted for only on the theory that the Legislature assumed that the only lands in Texas that would be affected by any Compact or Agreement are those lying above Fort Quitman and within the Rio Grande Project of the United States Reclamation Service and that all rights to the waters of the Rio Grande held by these lands would be protected by the Reclamation Service.</p> <p>The full quotation, read in context, indicates that Commissioner Seth presumed the New Mexico State Legislature believed that Reclamation would safeguard Texas's Project water supply.</p> <p>Miltenerberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 17.</p> |
| 16 | <p>Compact negotiations resumed in 1928 following the appointment of a Texas commissioner. Those initial negotiations resulted in a temporary compact in February 1929.</p> <p>See NM-EX 111, Miltenberger Rep. 13; NM-EX 112, Stevens Rep. 29, 35, 40; NM-EX 316, Rio Grande Compact Commission, <i>First Annual Report of the Rio Grande Compact Commission</i>, 1-10 (1931).</p> | <p>NM-EX-111: See General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-112: See General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, undisputed.</p> |

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| 17 | <p>In December 1935, the Rio Grande Compact Committee met to continue negotiations. At that meeting, officials from the National Resources Committee presented a proposal for a comprehensive study of the Rio Grande in order to facilitate an agreement.</p> <p><i>See</i> NM-EX 317, Proceedings of the Rio Grande Compact Commission held in Santa Fe, New Mexico December 2-3, 1935, at 5-7 (1935); NM-EX 112, Stevens Rep. at 55.</p> | <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. This paragraph excludes context essential to understanding how the resulting "comprehensive study" – the Rio Grande Joint Investigation (as referenced in paragraph 18 of New Mexico's Motion for Partial Summary Judgment on Compact Apportionment) – was framed. The proposal by the National Resources Committee (NRC) resulted from an NRC Board of Review's assessment that the "water resources of the Rio Grande were fully appropriated," and that New Mexico's Middle Rio Grande Conservancy District's project and other proposed projects in New Mexico and Colorado above Elephant Butte threatened the Rio Grande Project. Miltenberger Declaration paragraphs 12-16 addresses this context. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 14.</p> |
| 18 | <p>This proposed comprehensive study became the Rio Grande Joint Investigation. According to the authors, the "prime purpose" of the investigation was "to determine the basic facts needed in arriving at an accord" among the states "on an allocation and use of Rio Grande waters in the future development of the upper basin."</p> <p>NM-EX 318, Harlow M. Stafford et al., <i>Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation</i>, 10-11 (1937); NM-EX 112, Stevens Rep. 62.</p> | <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, undisputed.</p> |

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| 19 | <p>One category of required information was accurate data concerning existing diversions, including those of the Project. The Joint Investigation Report collected available data to prepare and present a comprehensive analysis of actual diversions, including diversions between Elephant Butte Reservoir and Fort Quitman, Texas, for the period 1930-36. The Joint Investigation Report also catalogued Project Acreage, including lands for "Cities, Towns, and Villages."</p> <p><i>See NM-EX 318, Harlow M. Stafford et al., Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation, 11, 14-16 (1937); NM-EX 112, Stevens Rep. 64.</i></p> | <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading. Diversions were a category of information in the Joint Investigation Report (or "<i>JIR</i>," NM-EX 318), but those diversions were not limited to the waters that might be considered as derived solely from reservoir releases. The <i>JIR</i> noted that "return flow" from drains constituted 50 percent of the diversions within the Rio Grande Project, which New Mexico's citation omits. Miltenberger Declaration paragraph 35 likewise notes the importance the <i>JIR</i> placed on return flows. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 15.</p> |
| 20 | <p>In entering negotiations New Mexico stressed that for it to agree, the final compact needed to provide that "[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said river system." This position was important to New Mexico, in part, because the surface water in the Lower Rio Grande in New Mexico was fully appropriated and New Mexico expected the final compact to protect those existing rights.</p> <p><i>See NM-EX 319, Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937, 12-13 (1937); NM-EX 111, Miltenberger Rep. 25; NM-EX 112, Stevens Rep. 65; NM-EX 005, Stevens Decl. ¶ 8; NM-EX 002, D'Antonio Decl. ¶ 9.</i></p> | <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading. According to the cited pages of the primary-source document – the September 27 to October 1, 1937 Rio Grande Compact Commission proceedings, NM-EX 319 – New Mexico expressed it "was willing to negotiate" for a compact on the basis of several "minimum requirements" (the fourth of which is the quoted statement), and not that the final compact had to possess all these elements for the state to consummate a Compact with Colorado and Texas, as this paragraph implies. The historical record further indicates that the Compact ultimately privileged uses over rights in the Upper Rio Grande Basin, and that New Mexico bargained for water uses above San Marcial and below the Colorado-New Mexico state line, while Texas bargained for water use below San Marcial. Miltenberger Declaration paragraphs 20-26 discuss</p> |

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| | | | <p>the privileging of uses over rights, TX_MSJ_001585; and Miltenberger Declaration paragraphs 8, 24, 26, and 37 specifically address what New Mexico and Texas bargained for. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 16, 49.</p> |
| 21 | <p>The Engineer Advisors for the three states used the Joint Investigation to prepare a Report of Committee of Engineers to the Rio Grande Compact Commissions, dated December 27, 1937. The express "general purpose" of this report was to recommend apportionment among three divisions of the Rio Grande - the San Luis Valley, the "Middle Rio Grande from Lobatos to Elephant Butte Reservoir," and the Project from Elephant Butte Reservoir to Fort Quitman, Texas - according to a "general policy" that "present uses of water in each of the three States must be protected in formulation of the Compact."</p> <p><i>See</i> NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937); NM-EX 111, Miltenberger Rep. 29; NM-EX 112, Stevens Rep. 67-68.</p> | <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded. The facts presented in this paragraph are incomplete and assert an incomplete understanding of the Committee of Engineers' December 27, 1937 Report. NM-EX-322. As stated on the first page of the report (after the title page), the "general policy" was expressed by the Compact Commissioners themselves, and the engineers "avoided discussion of the relative rights of the water users in the three states." Miltenberger Declaration paragraphs 20-26 discuss the privileging of uses over rights in the development of the Compact and the Committee of Engineers' December 27, 1937 Report. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 17.</p> |
| 22 | <p>The Committee of Engineers initially recommended a "normal release" from Elephant Butte Reservoir of 800,000 acre-feet per annum.</p> <p><i>See</i> NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact</p> | <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, undisputed.</p> |

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| | Commission (Dec. 27, 1937); NM-EX 112, Stevens. Rep. 67-68. | | |
| 23 | <p>Following negotiations, the Committee of Engineers revised its recommendation to provide for a normal release from the Reservoir of 790,000 acre-feet per year to meet the irrigation demands of Project lands in New Mexico and Texas and to make the 1906 treaty delivery to Mexico.</p> <p><i>See</i> NM-EX 325, Letter from Thomas M. McClure, State Engineer, State of New Mexico, to S.O. Harper, Chairman, Rio Grande Compact Commission (Jan. 25, 1938), in <i>Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc.</i> 1938, at CO-006216 (1938); NM-EX 325, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Mar. 9, 1938), in <i>Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc.</i> 1938, at CO-006226-33 (1938); NM-EX 112, Stevens Rep. 68-70; NM-EX 111, Miltenberger Rep. 33, 37-39.</p> | <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded. The facts presented in this paragraph are incomplete and assert an incomplete understanding of the reasons for the revision. The Committee of Engineers (or Engineering Advisors) revised the normal release figure downward from 800,000 acre-feet to 790,000 acre-feet only after protests made by the Middle Rio Grande Conservancy District's consulting engineer H.C. Neuffer. New Mexico State Engineer and Compact Commissioner Thomas McClure supported Neuffer, even though McClure's engineering advisor John Bliss had accepted the 800,000 acre-feet figure for which Texas had advocated and which the Committee of Engineers had recommended in December 1937. Miltenberger Declaration paragraphs 35-38 discuss this change. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 18.</p> |
| 24 | <p>On March 18, 1938, the members of the Rio Grande Compact Commission ("RGCC") each executed the final Rio Grande Compact. Congress gave its approval to the Rio Grande Compact on May 31, 1939.</p> <p><i>See</i> NM-EX 325, Rio Grande Compact Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc.</i></p> | <p>Pub. Law No. 76-95, 53 Stat. 785 (1939): The cited statute does not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objection, undisputed.</p> |

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| | 1938, 34-35 (1938); An Act Giving Consent and Approval of Congress to the Rio Grande Compact Signed at Santa Fe, New Mexico, on March 18, 1938, Pub. Law No. 76-95, 53 Stat. 785 (1939). | | |
| 25 | <p>The preamble of the Rio Grande Compact of 1983 states: "The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes"</p> <p>NM-EX 330, Rio Grande Compact of 1938, 53 Stat. 785, 785 (1939) ("Rio Grande Compact" or "Compact").</p> | | Disputed only as follows: "1983," as set forth in the first sentence, is understood by Texas to be "1938." |
| 26 | <p>Article I, Paragraph (k) of the Compact defines "Project Storage" as "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande project, but not more than a total of 2,638,860 acre-feet."</p> <p>53 Stat. at 786.</p> | | Undisputed. |
| 27 | The limit on Project Storage within the Compact accords with what was considered the maximum capacity of Elephant Butte Reservoir. | NM-EX-107: <i>See</i> General Objection #1; General Objection | Subject to the stated objections, disputed. The <i>Expert Report of Estevan R. Lopez, P.E.</i> at the page cited in this paragraph, page 15, provides no evidence that the figure given for |

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| | <p><i>See</i> NM-EX 107, Estevan R. Lopez, <i>Expert Report of Estevan R. Lopez, P.E.</i>, 15 (Oct. 31, 2019) ("Lopez Rep.").</p> | <p>#6; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part.</p> <p>Fed. R. Civ. P. 56(c).</p> | <p>"Project Storage within the Compact" was considered the "maximum capacity of Elephant Butte Reservoir." NM-EX 107.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 19.</p> |
| 28 | <p>The Compact contemplates that usable water will be released from storage to meet irrigation demands. Article I, Paragraph (l) of the Compact defines "Usable Water" as "all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico."</p> <p>53 Stat. at 786; NM-EX 107, Lopez Rep. 16.</p> | <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, undisputed.</p> |
| 29 | <p>Article I, Paragraph (o) of the Compact defines "Actual Release" as "the amount of usable water released in any calendar year from the lowest reservoir comprising project storage."</p> <p>53 Stat. at 786.</p> | | <p>Undisputed.</p> |
| 30 | <p>Article I, Paragraph (p) of the Compact defines "Actual Spill" as "all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled."</p> <p>53 Stat. at 786.</p> | | <p>Undisputed.</p> |

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| 31 | <p>Article I, Paragraph (q) of the Compact defines "Hypothetical Spill" as "the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet has been released therefrom at rates proportion to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs."</p> <p>53 Stat. at 786.</p> | | Undisputed. |
| 32 | <p>Article II of the Compact specifies that stream gaging stations be established at specific locations in the Rio Grande Basin for the purposes of Compact accounting. The lowest required stream gage under Article II is just below Caballo Reservoir.</p> <p><i>See</i> 53 Stat. at 786-87; NM-EX 107, Lopez Rep. 18.</p> | <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>Fed. R. Evid. 704: The statement includes impermissible legal conclusions.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. The statement mischaracterizes Article II of the Compact. Article II does not include the following language: 1. "for the purposes of Compact accounting;" 2. "The lowest required stream gage under Article II is just below Caballo Reservoir."</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 19.</p> |
| 33 | <p>Article IV of the Compact defines New Mexico's obligation to deliver water from the Rio Grande to San Marcial based upon nine (9) non-summer months of river flows. The delivery obligation at San Marcial is defined by a mathematical relationship corresponding to recorded flow at the Otowi gage during those months. The Otowi gage located in New Mexico about 100 miles south of the Colorado border. The San Marcial gage was</p> | <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>Fed. R. Evid. 704: The statement includes impermissible legal conclusions.</p> | <p>Subject to the stated objections, disputed in part. Although the content of Article IV of the Compact and the relationship between the Otowi and San Marcial gages is correctly stated in this paragraph, the paragraph's presented facts are incomplete. NM-EX-330. The paragraph does not recognize the temporal basis for the delivery schedule, which is important context for understanding what those flows truly are and how the Compact works. Miltenberger Declaration</p> |

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| | located just upstream of Elephant Butte Reservoir. <i>See</i> 53 Stat. at 788; NM-EX 107, Lopez Rep. at 20. | | paragraphs 22-24 discuss the temporal basis for the delivery schedule. TX_MSJ_001585. Miltenerberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 20. |
| 34 | In 1948, the RGCC changed New Mexico's delivery schedule under Article IV of the Compact to require deliveries at Elephant Butte Reservoir, rather than San Marcial, and removed the Article II gaging stations at San Marcial and San Acacia. <i>See</i> NM-EX 331, Rio Grande Compact Commission, Tenth Annual Report of the Rio Grande Compact Commission, 17-18 (1948); NM-EX 107, Lopez Rep., 18-22. | NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay. | Subject to the stated objections, undisputed. |
| 35 | Article VI of the Compact defines procedures to determine the annual credits and debits for Colorado and New Mexico. Of note, Article VI permits Colorado and New Mexico to authorize releases of Credit Water to avoid spill in excess of downstream demand and permits such releases to be included in the accounting of an Actual Spill. <i>See</i> 53 Stat. at 789-90; NM-EX 107, Lopez Rep. 22-23. | NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay. | Subject to the stated objection, undisputed. |
| 36 | Article VII of the Compact prohibits any increase in storage by either New Mexico or Colorado in reservoirs constructed after 1929 if the volume of Usable Water in Project Storage is less than 400,000 acre-feet. This threshold value decreases if the aggregate releases from Project storage have averaged more than 790,000 acre-feet from the beginning of the calendar year following the effective date of the | NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay. The cited evidence does not support the stated "facts" in whole and/or in part. | Subject to the stated objections, disputed in part. The content of Article VII of the Compact as presented in this paragraph is correct. NM-EX 330. However, neither the Compact nor the Lopez expert report state at their respective cited pages that the "relinquished Credit Water becomes Useable Water and is available for use on lands in both New Mexico and Texas." NM-EX-107. |

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| | <p>Compact, or from the beginning of the calendar year following an Actual Spill, before the storage limitation takes effect. Further, the article permits that either Colorado or New Mexico may offer to relinquish accrued Credit Water to Texas, and Texas may accept such an offer at its discretion. If New Mexico and Texas agree on a relinquishment, the relinquished Credit Water becomes Usable Water and is available for use on lands in both New Mexico and Texas.</p> <p><i>See</i> 53 Stat. at 790; NM-EX 107, Lopez Rep. 23.</p> | <p>Fed. R. Civ. P. 56(c).</p> <p>Fed. R. Evid. 704: The statement includes impermissible legal conclusions.</p> | <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 21.</p> |
| 37 | <p>Article VIII of the Compact permits New Mexico to demand of Colorado, and Texas to demand that Colorado and New Mexico, in January, release of water then held in storage from post-1929 reservoirs upstream of Elephant Butte to the amount of any accrued debits of Colorado and New Mexico, respectively, as necessary to help bring the amount of water in Project Storage up to 600,000 acre feet by March first. The purpose of this provision is to bring the quantity of Usable Water in Project Storage to 600,000 acre-feet by March first and to maintain this quantity until April thirtieth to allow for a normal release of 790,000 acre feet in that year.</p> <p><i>See</i> 53 Stat. at 790.</p> | | <p>Subject to the stated objections, disputed in part. Although the content of Article VIII as presented is correct, this paragraph does not acknowledge the second-order purpose of Article VIII: to protect the Project, and thus the water supply to Texas. Miltenberger Declaration paragraph 24 and paragraph 40 address this. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 22.</p> |
| 38 | <p>The historical record indicates that one purpose of the Compact was to protect the operation of the Project.</p> <p>NM-EX 111, Miltenberger Dep. (June 8, 2020) 38:8-17, 137:9-138:21; NM-EX 112, Stevens Rep. 72; NM-EX 005, Stevens Decl. ¶ 10. <i>See, e.g.</i>, NM-EX 319, Rio Grande Compact</p> | <p>NM-EX-111: Exhibit is incorrectly identified.</p> <p>NM-EX-112: <i>See</i> General Objection #1; Fed.</p> | <p>Subject to the stated objections, undisputed.</p> |

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| | Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937</i> , 12-13 (1937). | R. Evid. 801(c), hearsay. NM-EX-005: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 702 – the statement in the Stevens Decl. constitutes improper opinion testimony because it is not based on sufficient facts and is a mere conclusion. NM-EX-220 [Miltenerberger deposition transcript, not properly cited]: <i>See</i> General Objection #2 | |
| 39 | The historical record indicates that another purpose of the Compact was to protect existing rights. NM-EX 106, Kryloff Dep. (Aug. 6, 2020) 108:9-109:18; NM-EX 005, Stevens Decl. ¶ 11. <i>See, e.g.</i> , NM-EX 319, Rio Grande Compact Commission, <i>Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937</i> , 12-13 (1937); NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937). | NM-EX-215: <i>See</i> General Objection #2. NM-EX-005: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 702: the statement in the Stevens Decl. constitutes improper opinion testimony because it is not based on sufficient facts and is a mere conclusion. The cited evidence does not support the stated "facts" in | Subject to the stated objections, disputed. This paragraph mischaracterizes the historical record. The historical record makes clear that existing uses, circa 1938, not rights were to be protected by the Compact. Miltenerberger Declaration paragraphs 20-27 address the privileging of uses over rights in the Compact. TX_MSJ_001585. Miltenerberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 23. |

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| | | whole and/or in part. Fed. R. Civ. P. 56(c). | |
| 40 | <p>Prior to negotiation of the Compact, Reclamation administered the Project as a single unit.</p> <p>NM-EX 111, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18; NM-EX 107, Lopez Rep. 25.</p> | <p>NM-EX-111: Exhibit is incorrectly identified; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>NM-EX-107: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-220 [Miltenberger deposition transcript, not properly cited]: <i>See</i> General Objection #2</p> | Subject to the stated objections, undisputed. |
| 41 | <p>The understanding of the compacting States was that Reclamation would continue to operate the Project in that manner.</p> <p>NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-EX 327, J.H. Bliss, <i>Provisions of the Rio Grande Compact</i>, 1 (Apr. 2, 1938) ("The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit."); NM-EX 112, Stevens Rep.72.</p> | <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, disputed regarding the ambiguity of the phrase "in that manner." To the extent that "in that manner" is referable to #40, the item is undisputed. |

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| 42 | <p>In negotiating the Compact, the States understood that all lands within the Project had equal rights to water.</p> <p>NM-EX 111, Miltenberger Dep. (June 8, 2020) 44:4-23; NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-EX 107, Lopez Rep. 26-27, 35, 67-68; NM-EX 005, Stevens Decl. ¶ 11.</p> | <p>NM-EX-111: Exhibit is incorrectly identified.</p> <p>NM-EX-220 [Miltenberger deposition transcript, not properly cited]: <i>See</i> General Objection #2.</p> <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-005: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 702: the statement in the Stevens Decl. constitutes improper opinion testimony because it is not based on sufficient facts and is a mere conclusion.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> <p>Fed. R. Evid. 704: The statement includes</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading. In the cited Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938), Clayton was referencing contract rights – not appropriative rights. NM-EX 328. Miltenberger Declaration paragraphs 30 and 42-45 discuss the contracts for water delivery for the two Rio Grande Project districts – Elephant Butte Irrigation District (EBID) in New Mexico, and El Paso County Water Improvement District No. 1 (EP #1) in Texas. TX_MSJ_001585. The meaning and intent of the Clayton-Smith letter is addressed more fully in paragraphs 28-37.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 24, 28 - 37.</p> |

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| | | impermissible legal conclusions. | |
| 43 | <p>The historical record reflects that the States agreed on 790,000 acre-feet per year as a normal release in the Compact because it was sufficient to satisfy irrigation demands in both New Mexico and Texas, as well as address water quality concerns.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 146:21-148:1; NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 55:17-56:25, 89:20-90:1; NM-EX 106, Kryloff Rep. 25-26.</p> | <p>NM-EX-220: <i>See</i> General Objection #2.</p> <p>NM-EX-215: <i>See</i> General Objection #2.</p> <p>NM-EX-106: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading. The 790,000 acre-feet release was to serve Project lands in New Mexico and Texas, the 1906 Mexican treaty obligation, and non-Project lands in Texas down to Ft. Quitman, ca. 1938. Miltenberger Declaration paragraphs 29-38 discuss this. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 25, 49 – 51.</p> <p>Additionally, the cited evidence does not support the asserted statement regarding water quality concerns. NM-EX-106, the Kryloff Report, references that the <i>JIR</i> "incorporated certain modifications to account for salinity control" at page 25. Otherwise, none of the cited evidence mentions "water quality."</p> |
| 44 | <p>The historical record indicates that the Compact relied upon the Project and its allocation and delivery of water in relation to the proportion of Project irrigable lands to provide the basis for the apportionment of Rio Grande waters to users in New Mexico and Texas.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 40:7-22; NM-EX 107, Lopez Rep. 67-68.</p> | <p>NM-EX-220: <i>See</i> General Objection #2.</p> <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading because the Compact does not rely upon the Project to effectuate any apportionment between New Mexico and Texas below Elephant Butte, as the paragraph implies. Instead, it depends on the Project to see that Project beneficiaries in New Mexico receive water – in other words, protecting the Project as an existing use. Miltenberger Declaration paragraphs 26-46 discuss this. TX_MSJ_1585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 26, 49 – 51.</p> |

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| | | | <p>Additionally, the deposition testimony attributed to Scott Miltenberger is misrepresented by New Mexico. Dr. Miltenberger testified that he agreed with Paragraph 10 of the Texas Complaint when it was read to him, and into the record, by counsel for New Mexico at his deposition. The statement he agreed to was the following: "The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas, nor did it articulate a specific state line delivery allocation. Instead, it relied upon the Rio Grande project and its allocation and delivery of water in relation to the proportion of Rio Grande project irrigable lands in southern New Mexico and in Texas <i>to provide the basis of the allocation of Rio Grande waters between Rio Grande project beneficiaries in southern New Mexico and the State of Texas.</i>" NM-EX-220, Miltenberger Dep. (June 8, 2020) 40:7-22 (emphasis added).</p> <p>New Mexico improperly changed the highlighted testimony above, which was a clear statement regarding the Project allocations to Project beneficiaries, to be a "basis for the <i>apportionment</i> of Rio Grande waters <i>to users</i> in New Mexico and Texas." UMF 44.</p> |
| 45 | The historical record confirms that historically Project deliveries were made based upon the ratio between Project acreage in New Mexico and Project acreage in Texas. In other | NM-EX-220: <i>See</i> General Objection #2. | Subject to the stated objections, disputed. This paragraph mischaracterizes the historical record and Scott Miltenberger's deposition testimony. The historical record |

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| | <p>words, under the Compact, the delivery of water through the Project was based on the irrigable acres in each State. Historically that ratio is 57% to New Mexico and 43% to Texas.</p> <p>NM-EX 220, Miltenberger Dep. (June 8, 2020) 39:2-40:6, 47:17-48:18.</p> | <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>indicates that Project deliveries were generally based on irrigable acreage in the two states in a ratio of 57 percent for Project lands in New Mexico and 43 percent for Project lands in Texas. However, this paragraph does not offer any supporting evidence that deliveries were made in this fashion in every year and that deliveries were always made in accordance with the 57-43 percent ratio. Dr. Miltenberger did not testify that either was the case.</p> <p>Dr. Miltenberger merely replied in the affirmative when asked if he agreed with a portion of Texas's Complaint that noted this general, historical distribution of Project water deliveries. At least one primary-source document produced by New Mexico in support of its motions in fact suggests that allotments of Project water were not always equal (see paragraph 53 to the Miltenberger Declaration). NM-EX-323. Moreover, there is no language in the Compact requiring deliveries of Project water in this manner, and Dr. Miltenberger did not testify that the Compact directed Project deliveries in any way, which the phrase "under the Compact" in this paragraph implies. NM-EX-330.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 27, 53.</p> |
| 46 | <p>Shortly after the Compact was finalized, Texas Commissioner Frank Clayton explained the way that the Compact divided water below Elephant Butte:</p> <p>[T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts</p> | <p>NM-EX-215: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, disputed. This paragraph mischaracterizes Frank B. Clayton's October 4, 1938 letter to Sawnie Smith. NM-EX 328. Although the paragraph accurately quotes Frank Clayton, it pays insufficient attention to the details of the letter and fails to acknowledge the context in which the letter was</p> |

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| | <p>under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according the areas involved in the two States. By virtue of the contract recently executed, the total areas is 'frozen' at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a 'cushion' of three per cent for each figure.</p> <p>NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938).</p> <p>The expert historian for the United States agreed that this letter was "an important document" for understanding the way that the Compact divides the water below Elephant Butte.</p> <p><i>See</i> Ex 215, Kryloff Dep. (Aug. 6, 2020) 41:15-20, 41:21-42:9; NM-EX 106, Kryloff Rep. 12; <i>see also</i> NM-EX 220, Miltenberger Dep. (June 8, 2020) 43:17-44:23.</p> | <p>NM-EX-106: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-220: <i>See</i> General Objection #2. The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>drafted – both of which are essential to understanding the ideas Mr. Clayton was expressing to Mr. Smith. Miltenberger Declaration paragraphs 31 and 42 discuss the Clayton-Smith letter and additional discussion is provided in the Scott Miltenberger Declaration submitted herewith to clarify further the letter's meaning. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 28 - 37.</p> <p>Additionally, the deposition testimony attributed to Mr. Kryloff is misrepresented by New Mexico. Mr. Kryloff testified that he agreed that the Clayton letter is "an important document" "for understanding the intent of the parties <i>with regard to allocating water</i> below Elephant Butte." <i>See</i> Ex 215, Kryloff Dep. (Aug. 6, 2020) 41:15-20 (emphasis added). He did not state, as represented by New Mexico in #46, that the Clayton letter is important "for understanding the way that <i>the Compact</i> divides the water below Elephant Butte."</p> <p>Further, the Miltenberger testimony cited by New Mexico does not support the stated "fact."</p> |
| 47 | <p>Similarly, shortly after the Compact was finalized, Texas Commissioner Frank Clayton described the operation of the Compact to the Chairman of the Texas Board of Water Engineers. Commissioner Clayton explained:</p> <p>Moreover, since the source of supply for all lands above Fort</p> | <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objection, disputed. This paragraph mischaracterizes the document, 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-EX 329. As with the</p> |

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| | <p>Quitman and below Elephant Butte reservoir, whether in Texas or New Mexico, is the reservoir itself, it could hardly be expected of Colorado and New Mexico that they should guarantee a certain amount of water to pass the Texas state line, since this amount is wholly dependent upon the releases from the reservoir and the reservoir is under the control of an entirely independent agency – the Bureau of Reclamation.</p> <p>Also, by contract between the New Mexico interests and the Texas interests in the Rio Grande Project, all the lands in the Project have equal water rights, and the acreage to be irrigated is practically "frozen" at its present figures, with a three per cent "cushion."</p> <p>It is therefore not necessary, even if it were practicable, to make any definite provision in the Compact for the amount of water to pass the Texas-New Mexico state line."</p> <p>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).</p> | | <p>Clayton-Smith letter, the quotation offered from the Clayton-Clark letter is correct. NM-EX 328. However, attention to the details of the letter and the essential context for the letter reveals a different purpose and meaning for the communication and the provided quotation.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 38 - 45.</p> |
| 48 | <p>In 1968, Raymond Hill, the Engineer Advisor for the State of Texas during Compact negotiations explained "that the Rio Grande Compact Commissioners, at the time of executing the Rio Grande Compact of 1938, anticipated that compliance" with Articles III and IV "would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 AF per year</p> | <p>NM-EX-401: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, disputed. This paragraph does not provide sufficient context to understand fully the meaning of the quotation provided from Raymond Hill's <i>Development of the Rio Grande Compact of 1938</i>. NM-EX-401. The paragraph correctly quotes from Hill's narrative, but in the absence of context – much of which is also discussed in Miltenberger Declaration paragraphs</p> |

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| | <p>from Project storage <i>for use on lands in New Mexico downstream of Elephant Butte Reservoir</i> and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico.”</p> <p>NM-EX 401, Raymond A. Hill, <i>Development of the Rio Grande Compact of 1938</i>, 38 (Oct. 8, 1968) (emphasis added).</p> | | <p>29-46 – the quotation is misleading. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 46 - 51.</p> |
| 49 | <p>Under the Reclamation Act, Congress intended that water projects would be self-supporting, and each would generate sufficient revenue to cover the approximate costs of construction and operation and maintenance. Thus, Reclamation intended for the total estimated costs of the Rio Grande Project to be equitably borne by its beneficiaries.</p> <p>NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 3 (Sept. 30, 2016); NM-EX 005, Stevens Decl. ¶ 13.</p> | <p>NM-EX-529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objection, undisputed.</p> |
| 50 | <p>The Project beneficiary in New Mexico is Elephant Butte Irrigation District (“EBID”). EBID is a New Mexico entity created by New Mexico statute and subject to New Mexico law.</p> <p><i>See</i> Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014); <i>see also</i> NM-EX 302, Elephant Butte Water Users Association, Articles of Incorporation (Dec. 22, 1904); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger Rep. 9.</p> | <p>Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014): The cited EBID motion is not supported by evidence. As such, it does not constitute factual “evidence” as contemplated by Fed. R. Civ. P. 56(c); the material cited to support the “fact”</p> | <p>Subject to the stated objections, disputed in that it mischaracterizes the cited “evidence;” the “evidence” does not stand for the stated proposition; and contains an improper legal conclusion by stating that EBID is a “New Mexico entity,” “subject to New Mexico law.” The lack of definitions and scopes for the terms used render the statements objectionable.</p> |

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| | | <p>cannot be presented in a form that would be admissible in evidence pursuant to Fed. R. Civ. P. 56(c).</p> <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | |
| 51 | <p>The Project beneficiary in Texas is El Paso County Water Improvement District No. 1 ("EPCWID" or "EP No. 1"). EPCWID is a Texas entity created by Texas statute and subject to Texas law.</p> <p><i>See</i> Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); <i>see also</i> NM-EX 304, El Paso Valley Water Users' Association, Articles of Incorporation (Mar. 31, 1905); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger Rep. 9.</p> | <p>Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); The cited EP #1 motion is not supported by evidence. As such, it does not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c); the material cited to support the "fact" cannot be presented in a form that would be admissible in evidence pursuant to</p> | <p>Subject to the stated objections, disputed in that is mischaracterizes the cited "evidence"; the "evidence" does not stand for the stated proposition; and contains an improper legal conclusions by stating that EP#1 is a "Texas entity," "subject to Texas law." The lack of definitions and scopes for the terms used render the statements objectionable.</p> |

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| | | <p>Fed. R. Civ. P. 56(c).</p> <p>NM-EX-112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | |
| 52 | <p>To comply with the principle that the beneficiaries equitably bear the costs of the Project, Reclamation entered into contracts with EBID and EPCWID to establish the repayment obligations between the two districts based on the irrigable acreage within each district.</p> <p>NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 4 (Sept. 30, 2016); <i>e.g.</i>, NM-EX 308, Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association (June 27, 1906) ("1906 Contract"); NM-EX 321, Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes (Nov. 10, 1937) (reciting amendments to 1906 Contact); NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes (Nov. 9, 1937) (same); NM-EX 326, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement</p> | <p>NM-EX-529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay; Fed. R. Evid. 401, 402. The cited portion of the document is irrelevant because it does not stand for the "fact(s)" stated.</p> | <p>Subject to the stated objections, undisputed.</p> |

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| | District No. 1 (Feb. 16, 1938) ("1938 Downstream Contract"). | | |
| 53 | <p>At the time the Compact was executed, 88,000 authorized Project acres were situated within EBID in New Mexico, and 67,000 authorized Project acres were situated in EPCWID in Texas.</p> <p>NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938).</p> <p>Thus, approximately 57% of Project acreage was located in New Mexico, and 43% of Project acreage was located in Texas.</p> <p>NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 4 (Sept. 30, 2016).</p> | <p>NM-EX-529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objection, undisputed. |
| 54 | <p>At the time the Compact was signed, Reclamation had been operating the Project, in its entirety, as a single unit for over twenty years. During that time, the Project operated under Reclamation law.</p> <p><i>See, e.g.,</i> NM-EX 318, Harlow M. Stafford et al., <i>Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation</i>, 8 (1937); NM-EX 005, Stevens Decl. ¶ 9.</p> | <p>NM-EX-005: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 702: the statement in the Stevens Decl. constitutes improper opinion testimony because it is not based on sufficient facts and is a mere conclusion.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. While this paragraph is correct that "[a]t the time the Compact was signed" the Project had been in operation for "over twenty years," the cited sources in this paragraph do not provide support for the claim that the Project had been operated "as a single unit" nor do they explain what is meant by "under Reclamation law." NM-EX-318 and NM-EX-005. NM-EX-005 paragraph 9 states that the Project was operated "as a single unit and pursuant to Reclamation law" but does not cite to documentary evidence.</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 52.</p> |

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| | | The stated "facts" constitute improper legal conclusions in whole or in part. | |
| 55 | <p>In the years prior to the Compact being signed (1928-37), the average release from the Project was 780,640 acre-feet to satisfy irrigation demands on Project lands in both New Mexico and Texas.</p> <p>NM-EX 323, United States Reclamation Service, <i>Project History Rio Grande Project Year 1937</i> (1938).</p> | | Undisputed. |
| 56 | <p>In the years prior to the Compact being signed, the Project would set an equal allotment for each Project acre to satisfy irrigation demands.</p> <p>NM-EX 323, United States Reclamation Service, <i>Project History Rio Grande Project Year 1937</i> (1938). The amount of water that was actually used on each acre depended on the amount called for by the individual farmers. <i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 18:10-22; Ex.100, Margaret Barroll, Ph.D, <i>Expert Report of Margaret Barroll, Ph.D.</i>, 32 (Oct. 31, 2019) ("Barroll Rep.).</p> | <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading. The cited primary document, United States Reclamation Service, <i>Project History Rio Grande Project Year 1937</i> (1938) suggests that an equal allocation was set in 1937. NM-EX-323. However, it is unclear from that document if this was the practice in all years prior to the Compact. Even for 1937, the allotment basis was abandoned because individual water users had exceeded that amount in July.</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 53.</p> |
| 57 | <p>In 1937 and 1938, Congress authorized the execution of amended repayment contracts with EBID and EPCWID. These contracts addressed the repayment obligations of the Districts and established a corresponding right of use to a proportion of the annual Project water supply during times of shortage based on an established irrigation acreage in each District: 57% to EBID in New Mexico, and 43% to EPCWID in Texas.</p> | <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-109: <i>See</i> General Objection #1; General Objection</p> | <p>Subject to the stated objections, disputed in part. This paragraph is factually misleading. Congress authorized the execution of amended repayment contracts with EBID and EPCWID (or EP #1) in 1937, but it did not authorize the 1938 contract as such. The 1938 Downstream Contract was instead part of an effort by Reclamation, extending back to 1929, to fix the basis for repayments between the two districts. The districts</p> |

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| | <p>NM-EX 107, Lopez Rep. 26-27; NM-EX 109, Estevan R. Lopez, P.E., Supplemental Rebuttal Expert Report of Estevan R. Lopez, P.E., 6-7 (July 15, 2020) (“Lopez Supp. Reb. Rep.”); <i>see, e.g.</i>, NM-EX 308, Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users’ Association (June 27, 1906); NM-EX 321, Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes (Nov. 10, 1937); NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes (Nov. 9, 1937); NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (“1938 Downstream Contract”). Collectively, these contracts are known as the “Downstream Contracts.”</p> | <p>#6; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated “facts” in whole and/or in part.</p> <p>Fed. R. Civ. P. 56(c).</p> | <p>themselves ultimately instigated this particular agreement to settle the issue. Miltenberger Declaration paragraphs 43-45 discuss the 1937 and 1938 Downstream Contracts. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 54 - 59.</p> |
| 58 | <p>For example, the 1938 Downstream Contract quantified the authorized irrigable acreage within each district as 88,000 acres in EBID, and 67,000 acres in EPCWID (for a total of 155,000 Project acres). It goes on to state that in the event of a shortage of water, “the distribution of the available supply in such a year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].”</p> <p>NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938); NM-EX 107, Lopez Rep. 26-27; NM-EX 001, Barroll Decl. ¶19.</p> | <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-001: <i>See</i> General Objection #5.</p> | <p>Subject to the stated objections, disputed in part. This paragraph correctly quotes from the cited document but mischaracterizes the context and purpose of the 1938 Downstream Contract as discussed in paragraphs 54-59 of the Miltenberger Declaration. NM-EX 324.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 54 - 60.</p> |

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| 59 | <p>Until about 1979, Reclamation operated the entire Project, including delivering Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings. Reclamation ditch riders then delivered the ordered water to individual farms.</p> <p><i>See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:6-59:11; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement, 5 (Sept. 30, 2016).</i></p> | <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>NM-EX-529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | Subject to the stated objections, undisputed. |
| 60 | <p>The allocation of Project supply available for lands in the two States was historically equally divided to all Project lands on an acre foot per acre basis.</p> <p><i>NM-EX 506, Cortez Affidavit ¶ 8 (Apr. 20, 2007); NM-EX 108, Estevan R. Lopez, P.E., Rebuttal Report of Estevan R. Lopez, P.E., 7-9 (June 15, 2020) ("Lopez Reb. Rep."); NM-EX 210, Ferguson Dep. (Feb. 20, 2020) 240:25-241:5; NM-EX 214, King Dep. (May 18, 2020) 115:13-25.</i></p> | <p>NM-EX-506: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-108: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-210: <i>See</i> General Objection #2.</p> <p>NM-EX-214: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, disputed in part. New Mexico's reference in paragraphs 60, 63 and 64 of the NM MSJ on Apportionment regarding how Project supply was historically allocated based on an equal acre foot per acre basis is not relevant to apportionment of Rio Grande water under the Compact.</p> <p>This allocation applies solely to Project water already stored in Elephant Butte Reservoir and inflows to the Rio Grande downstream of the reservoir, whereas the Compact applies to Rio Grande deliveries to Elephant Butte Reservoir. Project allocations made to respond to orders by the District water users do not form the basis of Texas's Compact apportionment. The Compact requires New Mexico to deliver prescribed and indexed quantities of</p> |

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| | | | <p>Rio Grande water to Texas in Elephant Butte Reservoir. The 1906 treaty with Mexico and the contracts between the federal government and the Districts then allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1.</p> <p>Declaration of Robert J. Brandes, P.E., Ph.D. in Support of the State of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Brandes Dec. in Opp. to NM) at TX_MSJ_007312, paragraphs 1 – 9, 25-27.</p> |
| 61 | <p>Prior to 1951, the Project enjoyed plentiful water supplies, and Reclamation allowed Project farmers to order water as they needed to irrigate their crops.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 18:16-19:15, 58:6-18.</p> | <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. The testimony cited by New Mexico does not support that "Prior to 1951, the Project enjoyed plentiful water supplies."</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 18:16-19:15, 58:6-18.</p> |
| 62 | <p>In 1951, drought forced Reclamation to limit per-acre allocations to Project lands, which it did by evaluating deliveries to lands from 1946 through 1950.</p> <p><i>Id.</i> at 19:1-20:4, 58:19-59:7; NM-EX 100, Barroll Rep. 32.</p> <p>Reclamation in 1951 determined that 3.0241 acre-feet per acre constituted a full allocation to Project lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 19:8-20:4.</p> | <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-202: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, undisputed.</p> |

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| 63 | <p>From 1951 through 1979, Reclamation allocated Project deliveries on an equal basis to all Project lands and delivered allocated water directly to Project lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:19-59:7; NM-EX 511, Filiberto Cortez, Lower Rio Grande Project Operating Agreement: Settlement of Litigation 4 (Oct. 2008) ("Cortez Presentation"); NM-EX 100, Barroll Rep. 31-32.</p> | <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>NM-EX-511: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. New Mexico's reference in paragraphs 60, 63 and 64 of the NM MSJ on Apportionment regarding how Project supply was historically allocated based on an equal acre foot per acre basis is not relevant to apportionment of Rio Grande water under the Compact.</p> <p>This allocation applies solely to Project water already stored in Elephant Butte Reservoir and inflows to the Rio Grande downstream of the reservoir, whereas the Compact applies to Rio Grande deliveries to Elephant Butte Reservoir. Project allocations made to respond to orders by the District water users do not form the basis of Texas's Compact apportionment. The Compact requires New Mexico to deliver prescribed and indexed quantities of Rio Grande water to Texas in Elephant Butte Reservoir. The 1906 treaty with Mexico and the contracts between the federal government and the Districts then allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-27.</p> |
| 64 | <p>Before 1980, Reclamation operated the Project in its entirety, combining storage and return flows so that each acre of Project land was entitled to receive an equal amount of water regardless of the source of the water or in what State the land was located. Thus, based on each District's share of authorized acreage, "EBID is allocated 88/155 of the available Project water supply and EPCWID is allocated</p> | <p>NM-EX-506: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. New Mexico's reference in paragraphs 60, 63 and 64 of the NM MSJ on Apportionment regarding how Project supply was historically allocated based on an equal acre foot per acre basis is not relevant to apportionment of Rio Grande water under the Compact.</p> <p>This allocation applies solely to Project water already stored in Elephant Butte</p> |

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| | <p>67/155 of the available Project water supply.”</p> <p>NM-EX 506, Cortez Decl. ¶ 11 (Apr. 20, 2007); NM-EX 100, Barroll Rep. 31.</p> <p>During this period, there is no record that any party lodged an objection, whether through the RGCC or Reclamation, to challenge Reclamation's principle of allocation on an equal per-acre basis.</p> <p>NM-EX 005, Stevens Decl. ¶ 12; NM-EX 003, Lopez Decl. 25; EX-NM 002, D'Antonio Decl. ¶ 16.</p> | <p>NM-EX-005: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 702: the statement in the Stevens Decl. constitutes improper opinion testimony because it is not based on sufficient facts and is a mere conclusion.</p> <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4).</p> <p>NM-EX-002: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602, 702: Mr. D'Antonio lacks personal knowledge regarding the pre-1980 period and the statement constitutes improper opinion testimony because it is not based on sufficient facts and is a mere conclusion.</p> | <p>Reservoir and inflows to the Rio Grande downstream of the reservoir, whereas the Compact applies to Rio Grande deliveries to Elephant Butte Reservoir. Project allocations made to respond to orders by the District water users do not form the basis of Texas's Compact apportionment. The Compact requires New Mexico to deliver prescribed and indexed quantities of Rio Grande water to Texas in Elephant Butte Reservoir. The 1906 treaty with Mexico and the contracts between the federal government and the Districts then allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-27.</p> |
| 65 | <p>From 1931 to 1979, Reclamation operated the Project such that the diversions for EBID in New Mexico totaled 54.5% and diversions for EPCWID in Texas totaled 45.5% of total diversions. From 1951, when Reclamation began enforcing allocations to each acre, until 1979, the diversions for EBID in New Mexico totaled 56.2% and diversions for</p> | <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-101: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed. New Mexico's own data as reported in the underlying files of the Spronk Report are inconsistent with the diversion percentages reported in paragraph 65 of NM MSJ on Apportionment and attributed in paragraph 65 to the work of New Mexico's other expert, Peggy Barroll. In paragraph 65, New Mexico states</p> |

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| | <p>EPCWID in Texas totaled 43.8% of total diversions.</p> <p>NM-EX 100, Barroll Rep., Appx. 1, A-8. This is shown graphically in Figure A-3 of Dr. Barroll's Expert Report:</p> <p><i>[graphic omitted, see NM MSJ on Apportionment at p. 13]</i></p> <p>See also <i>id.</i> at A-9; NM-EX 101, Margaret Barroll, Ph.D., Rebuttal Expert Report of Margaret Barroll, Ph.D at 41, Appendix A, 39 (June 15, 2020) ("Barroll Reb. Rep.").</p> | <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>that from 1931 to 1979, diversions by EP#1 totaled 45.5 percent of total diversions, but the Spronk data show only 41.7 percent, slightly less than the 43 percent allocation. Similarly, for 1951 to 1979, in paragraph 65 New Mexico reports that EP#1 diverted 43.8 percent of the total diversions, whereas the Spronk data show that EP#1 diverted only 38.5 percent. Methods used by Peggy Barroll and those described in the underlying data of the Spronk Report also differ in how the distributions of diversions by EP#1 in Mesilla Valley were made, with Barroll assuming 20 percent and Spronk an average of 14 percent.</p> <p>See Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 28.</p> |
| 66 | <p>In approximately 1979, Project operations changed with the transfer of some Project facilities to the Districts. Reclamation started to allocate water to each District for delivery at the District's canal headings (i.e., Arrey, Leasburg, Mesilla, Franklin and Riverside) rather than directly to farm headgates. Since those transfers, Reclamation determines the Districts' Project allocations, takes water orders from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for water users in each District. The Districts in turn take farm orders from their members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates in each State.</p> | <p>NM-EX-202: See General Objection #2.</p> <p>NM-EX-210: See General Objection #2.</p> <p>NM-EX-208: See General Objection #2.</p> <p>NM-EX-222: See General Objection #2.</p> <p>NM-EX-223: See General Objection #2.</p> | <p>Subject to the stated objections, undisputed.</p> |

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| | NM-EX 001, Barroll Decl. ¶ 21; <i>See</i> NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 208, Esslinger Dep. (Vol. II), 57:4-58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20. | | |
| 67 | <p>Historically, Reclamation calculated and declared the allocation of Project supply available to lands in New Mexico, lands in Texas, and Mexico on the basis of water in storage available for release and on historical return flows to the Rio Grande.</p> <p>NM-EX 506, Cortez Decl. ¶ 7 (Apr. 20, 2007); NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 393:3-5; NM-EX 219, Lopez Dep. (Vol. III) (Aug. 21, 2020) 40:13-20; NM-EX 107, Lopez Rep. 5-6.</p> | <p>NM-EX-506: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay; Fed. R. Evid. 401, 402. The cited portion of the document is irrelevant because it does not stand for the "fact(s)" stated.</p> <p>NM-EX-200: <i>See</i> General Objection #2.</p> <p>NM-EX-219: <i>See</i> General Objection #2.</p> <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, undisputed. |
| 68 | <p>After 1979, Reclamation developed a method known as the D1/D2 method for allocating water to the Districts.</p> <p><i>See</i> NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4</p> | <p>NM-EX-403: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how |

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| | (1985) (unexecuted draft); NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 33. | <p>NM-EX-511: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p> |
| 69 | <p>According to Reclamation, "D2 was developed to calculate the amount of water that was needed at the main canal headings to make the 3.0241 ac-ft/acre deliveries to the lands."</p> <p>NM-EX 409, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Chris Rich et al. (Apr. 12, 2002).</p> | <p>NM-EX-409: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | | <p>Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p> |
| 70 | <p>The D1/D2 method was based on the distribution of Project supply during the period from 1951 to 1978 and continued allocating 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 170:25-172:10 (examining NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4 (1985) (unexecuted draft)); NM-EX 100, Barroll Rep. at 33-34.</p> | <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte</p> |

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| | | | <p>Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p> |
| 71 | <p>According to Reclamation, prior to 2005, the Districts did not sign an "operating agreement, plan, or criteria," but "acquiesced and cooperated with Reclamation's procedures on a year to year basis."</p> <p>NM-EX 508, Bureau of Reclamation, Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas 3 (June 11, 2007); NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 87:8-88:10.</p> | <p>NM-EX-508: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-202: <i>See</i> General Objection #2; Fed. R. Evid. 401: The testimony was not taken under Fed. R. Civ. P. 30(b)(6), so it is improper to represent as Reclamation's position.</p> | Subject to the stated objections, undisputed. |
| 72 | Reclamation began making Project allocations using the D1/D2 allocation procedure from at least 1985. | NM-EX-202: <i>See</i> General Objection #2. | Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method |

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| | NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 168:20-24; NM-EX 100, Barroll Rep. 33-34. | NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. | referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec). <i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29. |
| 73 | Reclamation continued making allocations to the Districts in the proportion of 57% of Project water to New Mexico lands and 43% of Project water to Texas lands using the D1/D2 method through 2005. | NM-EX-202: <i>See</i> General Objection #2. NM-EX-511: <i>See</i> General Objection #3; Fed. | Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact |

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| | NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 59:12-60:9; NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 34, n.66. | R. Evid. 801(c), hearsay. NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. | apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec). <i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29. |
| 74 | In 2003, the Project began to suffer the effects of the severe drought that has plagued the Rio Grande basin for the last two decades. NM-EX 412, Herman Settemeyer, Rio Grande Project/Rio Grande Compact Operation 4 (2004) ("Settemeyer Presentation"); NM-EX 213, Ivey Dep. (Vol. 2) (Aug. 28, 2020) 69:25-71:1, 75:19-24. | NM-EX-412: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay. NM-EX-213: <i>See</i> General Objection #2. | Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New |

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| | <p>Nonetheless, in 2003 and 2004, Reclamation allocated 57% of Project water to New Mexico Project lands and 43% to Texas Project lands using the D1/D2 method.</p> <p>NM-EX 201, Rule 30(b)(6) Dep. of the U.S. Bureau of Reclamation by and through Filiberto Cortez (Aug. 20, 2020) 50:6-51:15.</p> | <p>NM-EX-201: <i>See</i> General Objection #2.</p> | <p>Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p> |
| 75 | <p>In 2005, Reclamation was able to make a full D1/D2 allocation in the percentage of 57% to New Mexico lands and 43% to Texas lands.</p> <p>NM-EX 202, Cortez Dep. (Vol. 1) 89:21-90:5 (examining NM-EX 328, Bureau of Reclamation, <i>Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas</i>, 4 (June 11,</p> | <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. .</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate</p> |

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| | 2007)); NM-EX 100, Barroll Rep. 34, n.66. | | <p>the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p> |
| 76 | <p>From 1979 to 2005, Reclamation allocated Project water such that 57% of Project supply was available for EBID lands in New Mexico and 43% of Project supply was available for EPCWID lands in Texas.</p> <p>NM-EX 100, Barroll Rep., Appx. A, A-13-15.</p> <p>This is illustrated in Figure A.5 of Dr. Barroll's expert report: <i>[graphic omitted, see NM MSJ on Apportionment at p. 15]</i></p> <p>From 1979 to 2005, the charged diversions by EBID in New Mexico (which accounts for water available <i>and ordered</i> by the Districts) totaled 58% and charged diversions for</p> | <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-101: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. This paragraph is misleading. The D1/D2 method referenced in paragraphs 68 through 70 and paragraphs 72 through 76 of NM MSJ Motion on Apportionment has nothing to do with Compact apportionment; rather, it relates to how the Project was operated during 1951 through 1978. The Compact requires Rio Grande water deliveries from New Mexico to Elephant Butte Reservoir for Texas, and the 1906 treaty with Mexico and the contracts between the federal government and the Districts allocate the stored water in Elephant Butte Reservoir, along with downstream inflows to the Rio Grande, to Mexico, EBID, and EP#1. Furthermore, the</p> |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| | <p>EPCWID in Texas totaled 42% of total diversions.</p> <p>NM-EX 100, Barroll Rep., Appx. A, A-16-19. <i>See also</i> NM-EX 101, Barroll Reb. Rep., Appx. A, 41-42.</p> | | <p>D1/D2 method does not reflect Project water supply conditions as they existed at the time of Compact adoption in 1938. The D1/D2 method understates the supply of Project water available under the Compact because it is based on Project delivery conditions that occurred during 1951 and 1978 when substantial groundwater pumping had already developed in the Rincon and Mesilla basins of New Mexico (<i>See</i> Figure 5) causing flows in the drains and in the Rio Grande at El Paso relative to releases from Caballo Reservoir and the deliveries to EP#1 to be reduced. (<i>See</i> Figures 9 and 10 to Brandes Dec).</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 29.</p> |
| 77 | <p>In 2006 Reclamation began using a new method for allocating Project water between the two Districts. Neither the RGCC nor New Mexico were given input into the new method before it was implemented.</p> <p>NM-EX 100, Barroll Rep. 40; NM-EX 004, Schmidt-Petersen Decl. ¶ 10; NM-EX 003, Lopez Decl. ¶ 29; NM-EX 002, D’Antonio Decl. ¶ 10; <i>see, e.g.</i>, NM-EX 504, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Gary Esslinger, Manager-Treasurer, Elephant Butte Irrigation District (Nov. 21, 2006).</p> | <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-004: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602: Mr. Schmidt-Petersen does not have personal knowledge regarding all potential communications to the “RGCC or New Mexico” regarding the 2006 method for water allocation.</p> | <p>Subject to the stated objections, disputed in part. The cited evidence does not support the assertion that “Neither the RGCC nor New Mexico were given input into the new method before it was implemented.”</p> |

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| | | <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602 : Mr. Lopez does not have personal knowledge regarding all potential communications to the "RGCC or New Mexico" regarding the 2006 method for water allocation.</p> <p>NM-EX-504: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | |
| 78 | In January and February 2008, Reclamation, EPCWID, and EBID negotiated a new operating agreement for the Project as settlement for the two lawsuits among the parties ("2008 Operating Agreement"). <i>See generally</i> NM-EX 511, Cortez Presentation. The negotiations were mediated by Pat Gordon, Texas's Compact Commissioner. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 42:8-43:24; NM-EX 107, Lopez Rep. 43. | <p>NM-EX-511: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-212: <i>See</i> General Objection #2.</p> <p>NM-EX-107: <i>See</i> General Objection #1; General Objection</p> | Subject to the stated objections, undisputed. |

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| | | #6; Fed. R. Evid. 801(c), hearsay. | |
| 79 | <p>The 2008 Operating Agreement changed the way that water was allocated between the two Districts, and therefore the amount of water that was available for lands in New Mexico and Texas.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 94:23-96:9 (examining NM-EX 506, Cortez Affidavit ¶¶ 11, 25 (Apr. 20, 2007)); NM-EX 100, Barroll Rep. 40-46; NM-EX 107, Lopez Rep. 44-46.</p> | <p>NM-EX-202: <i>See</i> General Objection #3.</p> <p>NM-EX-100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. In paragraph 79 of NM MSJ on Apportionment, New Mexico asserts that the 2008 Operating Agreement "changed the way that water was allocated between the two Districts, and therefore the amount of water that was available for lands in New Mexico and Texas." In paragraph 80, New Mexico asserts its "primary concern" with the 2008 Operating Agreement is that it is not consistent with the Compact and does not allocate 57 percent of Project supply to New Mexico lands. In fact, under the Operating Agreement New Mexico has received more water than it otherwise should have based solely on the D2 Curve prior to implementation of the Operating Agreement. This is demonstrated by the graph in Figure 11. The blue x's show total Project surface water diversions between 2008 and 2016; the black x's show the total amount of diversions, including groundwater pumping by New Mexico, for the same period.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 30-31.</p> |
| 80 | <p>In 2010, after it had an opportunity to study the new operations and method for allocating water, New Mexico raised several concerns about the 2008 Operating Agreement. One of New Mexico's primary concerns was that the 2008 Operating Agreement was inconsistent with the Compact because it did not allocate 57% of Project supply to New Mexico lands.</p> | <p>NM-EX-517: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. In paragraph 79 of NM MSJ on Apportionment, New Mexico asserts that the 2008 Operating Agreement "changed the way that water was allocated between the two Districts, and therefore the amount of water that was available for lands in New Mexico and Texas." In paragraph 80, New Mexico asserts its "primary</p> |

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| | NM-EX 517, Letter from John D'Antonio, State Engineer, State of New Mexico to Michael Connor, Commissioner, United States Bureau of Reclamation (Mar. 4, 2010); NM-EX 002, D'Antonio Decl. ¶ 11. | | concern" with the 2008 Operating Agreement is that it is not consistent with the Compact and does not allocate 57 percent of Project supply to New Mexico lands. In fact, under the Operating Agreement New Mexico has received more water than it otherwise should have based solely on the D2 Curve prior to implementation of the Operating Agreement. This is demonstrated by the graph in Figure 11. The blue x's show total Project surface water diversions between 2008 and 2016; the black x's show the total amount of diversions, including groundwater pumping by New Mexico, for the same period. <i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 25-26, 30-31. |
| 81 | After attempts to resolve the issues related to the 2008 Operating Agreement failed, in 2011, New Mexico filed suit in federal district court seeking to have the 2008 Operating Agreement set aside. NM-EX 520, Complaint for Declaratory and Injunctive Relief, New Mexico v. United States, No. 1:11-cv-00691 (D.N.M. Aug. 8, 2011). | NM-EX-520: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay. | Subject to the stated objections, undisputed. |
| 82 | Texas filed the present original action in reaction to New Mexico's 2011 federal district lawsuit. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 109:2-13; NM-EX 224, Schmidt-Petersen Dep. (Vol. I) (June 29, 2020) 40:19-41:12. | NM-EX-212: <i>See</i> General Objection #2. NM-EX-224: <i>See</i> General Objection #2; Fed. R. Evid. 602: Mr. Schmidt-Petersen lacks personal knowledge regarding the intent of Texas in filing the | Subject to the stated objections, disputed. Texas did not file this original action "in reaction" to New Mexico's 2011 federal district lawsuit as stated by New Mexico in paragraph 82, page 16 of its brief in support of its partial summary judgment motion on Compact apportionment. As stated by the Rio Grande Compact Commissioner Patrick Gordon at his deposition, the 2011 federal district lawsuit "impacted" Texas's decision to proceed with this original action because, |

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| | | <p>present original action.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>although "the operating agreement attempted to solve the issues of the diversion . . . of water to the contract users," it became apparent from the 2011 litigation that New Mexico "had no intention of trying to fix the problem that existed." <i>See</i> NM-EX 212, Gordon Depo. (Vol. II) (July 15, 2020) at 109:2-13. The decision by Texas to file the present original action was based upon many factors. The primary factor, before and after the New Mexico's 2011 federal district lawsuit, and the "problem that existed" that Commissioner Gordon referred to during his deposition, was the historical and continuing depletions of Texas's Compact apportionment of Rio Grande surface water due to New Mexico's groundwater pumping and illegal surface water pumping below Elephant Butte Reservoir.</p> <p>Declaration of Patrick R. Gordon in Support of the State of Texas's Oppositions to the State of New Mexico's Motions for Partial Summary Judgment and Briefs in Support (Gordon Dec. in Opp. to NM) at TX_MSJ_007269, paragraphs 1 - 7, 9 - 10.</p> |
| 83 | <p>Consistent with the Reclamation Act, Texas adjudicated the Project Right in Texas. Specifically, it determined that EPCWID had the right to divert up to 376,000 from the Rio Grande.</p> <p>NM-EX 505, Texas Comm'n on Env't Quality, Certificate of Adjudication No. 23-5940, ¶ 1.b. (Mar. 7, 2007); <i>see also</i> Final Judgment and Decree, <i>In re: The Adjudication of Water Rights in the Upper Rio Grande Segment of Rio Grande Basin</i>, No. 2006-3219 (El Paso Cty. Dist. Ct., Oct. 30, 2006).</p> | <p>NM-EX-505: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> <p>The cited evidence does not support the</p> | <p>Subject to the stated objections, disputed as follows:</p> <p>Regarding the "facts" asserted based on NM-EX-505, this paragraph is misleading in that the source documents provide additional factual context that New Mexico excluded and/or otherwise states "facts" out of context.</p> <p>Regarding the asserted "fact" that '[u]sing the D1/D2 method, 376,000</p> |

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| | <p>Using the D1/D2 method, 376,000 AF represents approximately 43% of Project water when there is a full supply.</p> <p>NM-EX 001, Barroll Decl. 23.</p> <p>376,000 AF also represents approximately 43% of Project supply under a normal release of 790,000 AF, once return flows are taken into account.</p> <p><i>See, e.g.,</i> NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 20:11-21:11.</p> | <p>stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> <p>Final Judgment and Decree, <i>In re: The Adjudication of Water Rights in the Upper Rio Grande Segment of Rio Grande Basin</i>, No. 2006-3219 (El Paso Cty. Dist. Ct., Oct. 30, 2006).</p> <p>NM-EX-001: Fed. R. Evid. 401, 402. The cited portion of the document is irrelevant because it does not stand for the "fact(s)" stated.</p> <p>NM-EX-212: <i>See</i> General Objection #2.</p> | <p>AF represents approximately 43% of Project water when there is a full supply." The use of the D1/D2 method produces 376,000 acre-feet for EP1. However, as the D1/D2 method does not reflect 1938 conditions and does not represent Texas's Compact apportionment.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 9, 29-32.</p> <p>Regarding the last paragraph, the cited evidence does not represent the asserted "fact." <i>See</i> NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 20:11-21:11.</p> |
| 84 | <p>The Texas Compact Commissioner recognizes that a full supply release from the Project is 790,000 AF, and that Texas water users are entitled to 43% of Project supply and New Mexico water users are entitled to 57% of Project supply.</p> <p>NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-73:13; NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:20-13:21, 20:11-21:11, 121:9-11.</p> | <p>NM-EX-211: <i>See</i> General Objection #2.</p> <p>NM-EX-212: <i>See</i> General Objection #2.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. The stated "fact" mischaracterizes the deposition testimony cited as evidence.</p> <p>The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is divided according to downstream contracts, and that EP#1 is entitled to receive 43 percent of the "790 times 120 percent on a full release."</p> <p>NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:13-24; 20:11-21:11; NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-72:10.</p> |

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| 85 | <p>The Texas Compact Commissioner concedes that Rio Grande water is divided below Elephant Butte by the Downstream Contracts and that the Downstream Contracts "are incorporated into the Compact."</p> <p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 10:25-12:19, 15:6-16:18.</p> | <p>NM-EX-212: <i>See</i> General Objection #2.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. The stated "facts" mischaracterize the deposition testimony cited as evidence.</p> <p>The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is "allocated...to Mexico under the 1906 treaty, and then to EBID and EP1 under the 1938 contracts."</p> <p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 11:13-19.</p> <p>The Texas Rio Grande Compact Commissioner further testified that he thinks the Project is "incorporated into the Compact," but not "under the Compact." The "Compact was the mechanism for New Mexico to deliver its apportioned water to Texas. When the water is released from Elephant Butte reservoir, it's delivered to the downstream contracts – contractors as well as Mexico."</p> <p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 15:6-17.</p> <p>The testimony of the Texas Rio Grande Compact Commissioner was not a "concession" as asserted by New Mexico, and the cited evidence does not support that assertion.</p> |
| 86 | <p>The Texas Compact Commissioner concedes that the Project acts as the mechanism by which water users in New Mexico receive 57% of Project supply and water users in Texas are allocated 43% of Project supply. He further concedes that the mechanism</p> | <p>NM-EX-212: <i>See</i> General Objection #2.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part.</p> | <p>Subject to the stated objections, disputed in part. The stated "facts" mischaracterize the deposition testimony cited as evidence.</p> <p>The Texas Rio Grande Compact Commissioner further testified that he thinks the Project is "incorporated into</p> |

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| | <p>for delivering Project water was incorporated into the Compact.</p> <p>NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 10:25-16:24.</p> | <p>Fed. R. Civ. P. 56(c).</p> | <p>the Compact," but not "under the Compact." The "Compact was the mechanism for New Mexico to deliver its apportioned water to Texas. When the water is released from Elephant Butte reservoir, it's delivered to the downstream contracts – contractors as well as Mexico."</p> <p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 15:6-17.</p> <p>The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is "allocated . . . to Mexico under the 1906 treaty, and then to EBID and EP1 under the 1938 contracts."</p> <p>NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 11:13-19.</p> <p>The Texas Rio Grande Compact Commissioner testified that the water below the Reservoir is divided according to downstream contracts, and that EP#1 is entitled to receive 43 percent of the "790 times 120 percent on a full release."</p> <p>NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:13-24; 20:11-21:11; NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-72:10.</p> <p>The testimony of the Texas Rio Grande Compact Commissioner was not a "concession" as asserted by New Mexico, and the cited evidence does not support that assertion.</p> <p>The testimony of the Texas Rio Grande Compact Commissioner is consistent with the Texas's position on apportionment, as stated by the</p> |

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| | | | <p>Commissioner: "As the Rio Grande Compact Commissioner, I am authorized to state, under oath, the position of Texas on the issue of Compact apportionment. The position of Texas is as follows: The Compact equitably apportions the waters of the Rio Grande from its headwaters to Fort Quitman, Texas, among the State of Colorado (Colorado), the State of New Mexico (New Mexico), and Texas. 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. 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 water delivered by New Mexico in Elephant Butte Reservoir is apportioned to Texas, subject to the United States' Treaty obligation to Mexico and the United States' contractual obligations to Elephant Butte Irrigation District (EBID). The Compact does not apportion water to New Mexico below Elephant Butte Reservoir. The water released from Elephant Butte Reservoir and delivered to EBID pursuant to the United States' downstream contracts with EBID, is not a Compact apportionment to New Mexico. This water is a Project allocation, defined by the United States' downstream contracts with EBID. Article VII of the Compact provides that Texas may accept relinquished water (relinquished by Colorado and New Mexico) thereby allowing additional storage in upstream reservoirs. New Mexico has no ability to accept water under the Compact,</p> |

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| | | | <p>even from itself, for the benefit of interests downstream of Elephant Butte Reservoir. Article VIII of the Compact provides that the Texas Rio Grande Commissioner can demand of Colorado and New Mexico the release of water from the upstream storage reservoirs under specified circumstances."</p> <p><i>See</i> Gordon Dec. in Opp. to NM at TX_MSJ_007269, paragraphs 1 – 8; <i>See also</i>, Deposition of Patrick R. Gordon, (Vol. 1) (July 14, 2020) (Gordon Depo. 7/14/20), at 67:4-20; 144:7-16; 157:2-12; 157:23-159:14; 161:17-162:6; 162:12-163:2; 164:7-165:7; 165:23-167:11; 169:10-17, at TX_MSJ_006892-006940.</p> |
| 87 | <p>In official remarks at the 2011 RGCC meeting, Texas Compact Commissioner Gordon acknowledged that the Compact apportioned water between New Mexico and Texas based on the 57%-43% split. Specifically, Commissioner Gordon responded to comments of the New Mexico Commissioner by stating "I agree that the purpose of the Compact was to allocate the water between the Districts and the 53[-]47 [sic] as provided in the Compact. I do agree with that."</p> <p>NM-EX 518, Rio Grande Compact Commission, Transcript of the 72nd Annual Meeting (94th Meeting), 59:2-4 (Mar. 30, 2011).</p> | <p>NM-EX-518: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading in that New Mexico excluded deposition testimony by Commissioner Gordon wherein this issue was discussed and clarified.</p> <p>Counsel for New Mexico showed the unauthenticated "transcript" to Commissioner Gordon during his deposition. He had not (until then), seen a copy of the document. Although it is correct that there are usually transcripts of Commission meetings, Commissioner Gordon cannot verify its accuracy. Regarding the language that New Mexico references, and assuming for purposes of this comment that the transcript is true and correct (which Commissioner Gordon cannot verify), Commissioner Gordon would not have spoken to the commission meeting attendees in legal terms. He also did not use the term "apportionment." The transcript reflects use of the word "allocation," which is referable to</p> |

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| | | | <p>Project operations and the delivery of contract water to the districts in accordance with Reclamation contracts. The Reclamation contracts include a 1938 contract between the United States, EBID and El Paso County Water Improvement District No. 1 (EP#1), which includes a reference to the 57/43 percentage split regarding irrigated acres in each district. The Compact does not contain 57/43 percentage language that states or even suggests that there is a 57/43 apportionment of Rio Grande water between New Mexico and Texas. At Commissioner Gordon's deposition, when counsel for New Mexico showed him the transcript now marked in support of New Mexico's motion as NM-EX 518, and asked him about the language in the transcript, he testified that the comments were not correct, that he likely misspoke, and that people at the Commission meetings often mix up the verbiage between the Project and Compact. New Mexico, however, excluded that portion of his testimony from paragraph 87 in its motion on Compact apportionment.</p> <p><i>See Gordon Dec. in Opp. to NM at TX_MSJ_007269, paragraphs 1 – 8, 11; See also, See Gordon Depo. 7/14/20 at 130:8-19, 134:3-19 at TX_MSJ_006892 - TX_MSJ_006940.</i></p> |
| 88 | <p>In 2004, the Texas Compact Engineer Advisor from 1987 to 2015 wrote that "[t]he Compact specifies a normal release of 790,000 acre–feet annually from Project Storage for use in Texas and New Mexico and for delivery of water to Mexico."</p> <p>NM-EX 412, Herman R. Settemeyer, "Rio Grande Project/Rio Grande</p> | <p>NM-EX-412: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in</p> | <p>Subject to the stated objections, disputed. The cited evidence does not support the asserted facts. The document is unauthenticated, and there is no evidence of who the author was, or the authority of the author to make any statement on behalf of Texas as to the meaning and/or purpose of the Compact. Even if the documents</p> |

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| | Compact Operation," in CLE International, <i>Rio Grande Superconference</i> G-1, G-2 (2004) ("Settemeyer CLE Presentation"). | whole and/or in part. Fed. R. Civ. P. 56(c). | contents were taken as true, the quoted sentence is taken out of context. The sentence, in context, concerns an explanation of Project operations. |
| 89 | The Texas Compact Engineer Advisor from 1987 to 2015 testified that "the Rio Grande Compact incorporated the Rio Grande Project." NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10. | NM-EX-225: <i>See</i> General Objection #2; Fed. R. Evid. 602. | Subject to the stated objection, disputed in part. The cited deposition testimony does not establish that the deponent was the Engineer Advisor from 1987 to 2015. |
| 90 | The Texas Compact Engineer Advisor from 1987 to 2015 further testified that "the Rio Grande Project [water] is apportioned 57 – 57 percent to New Mexico and 43 percent to Texas." NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10. | NM-EX-225: <i>See</i> General Objection #2; Fed. R. Evid. 602. | Subject to the stated objections, disputed. The evidence cited does not support the asserted "fact." |
| 91 | In May of 2011, Texas and New Mexico met to discuss the implications of the 2008 Operating Agreement on the Compact. Prior to the meeting, Texas had developed a set of talking points that represented Texas's positions on the Rio Grande Compact. A photograph of those talking points is NM-EX 519 (Schmidt-Petersen, Photographs of Handwritten Notes on Easel). NM-EX 003, Lopez Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11. Using those talking points, Texas expressed its position that the Compact apportions the water below Elephant Butte between New Mexico and Texas "based on acreage" existing in each State. Texas further explained its position that under the Compact, the State of Texas is entitled to 43% of Project supply and the State of New | NM-EX-519: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay. NM-EX-003: <i>See</i> General Objection #6; Fed. R. Evid. 602; Fed. R. Evid. 801(c), hearsay. NM-EX-004: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602; Fed. R. Evid. 801(c), hearsay. | Subject to the stated objections, disputed. Texas Compact Commissioner Patrick Gordon reviewed the representation of Rolf Schmidt-Petersen in paragraph 11 of his declaration submitted in support of the New Mexico motions for partial summary judgment (NM-EX 004) and referenced in paragraph 91, page 18, of the New Mexico motion on Compact apportionment. He also reviewed the representation of Estevan Lopez in paragraph 18 of his declaration submitted in support of the New Mexico motions for partial summary judgment (NM-EX-003) and referenced in paragraph 91, page 18, of the New Mexico motion on Compact apportionment. Both deponents use the same language, verbatim, for this testimony. Both deponents refer to NM-EX-519. Commissioner Gordon reviewed NM-EX 519 in conjunction with making his declaration. |

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| | <p>Mexico is entitled to 57% of Project supply.</p> <p>NM-EX 519, Schmidt-Petersen, Photographs of Handwritten Notes on Easel; NM-EX 003, Lopez Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11.</p> | | <p>Commissioner Gordon attended a meeting in approximately May of 2011 with representatives of New Mexico. The purpose of the meeting was to discuss the Operating Agreement. Compact apportionment was not a subject of the meeting. The handwriting depicted in NM-EX-519 is not Commissioner Gordon's. He does not know whose handwriting is depicted in NM-EX-519. The notes depicted in NM-EX-519 were not "talking points that represented Texas's position on the Rio Grande Compact" as stated by declarants Lopez and Schmidt-Petersen. Further, the declarants' representations of Commissioner Gordon's statements, and Texas's "positions" are incorrect. Commissioner Gordon did not make any statement, or represent that it was the position of Texas, that the Compact <i>apportions</i> water below Elephant Butte Reservoir between New Mexico and Texas. Commissioner Gordon did not make any statement, or represent that it was the position of Texas, that there is a 57/43 apportionment pursuant to the Compact.</p> <p><i>See</i> Gordon Dec. in Opp. to NM at TX_MSJ_007269, paragraphs 1 – 8, 12.</p> |
| 92 | <p>Even in this litigation, Texas has admitted on numerous occasions that New Mexico has a Compact apportionment below Elephant Butte Reservoir.</p> <p>a. In its Complaint in this case, Texas made the following relevant factual allegations:</p> <p>i. "[T]he Rio Grande Compact, among other purposes, was entered into to protect the</p> | <p>Allegations in a Complaint (unverified), or language in a brief supporting a motion that is not based on evidence, do not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c). The</p> | <p>Subject to the stated objections, disputed in part.</p> <p>a. Regarding the Texas Complaint, New Mexico takes allegations out of context, and excludes other allegations relevant to Texas's position on apportionment, that support Texas's consistent position on apportionment.</p> |

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| | <p>operation of the Rio Grande Reclamation Project.”</p> <p>Compl. ¶ 4 (Jan. 8, 2013).</p> <p>ii. “Project water deliveries are made based upon the ratio between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas.”</p> <p><i>Id.</i> at ¶ 8.</p> <p>iii. The Compact “relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas.”</p> <p><i>Id.</i> at ¶ 10.</p> <p>b. Texas’s brief in support of its motion to file its complaint referred to Elephant Butte Irrigation District as the entity formed within New Mexico to contract with the United States “for the water allocated <i>and apportioned</i> for use within New Mexico.”</p> <p>Texas’s Brief in Support of Motion to File Complaint 7 (Jan. 2013) (emphasis added).</p> <p>c. In the course of its briefing on New Mexico’s Motion to Dismiss,</p> | <p>pleadings discussed by New Mexico here are not supported by evidence and, as such, are inadmissible and irrelevant for purposes of summary judgment. Fed. R. Civ. P. 56(c); Fed. R. Evid. 401.</p> | <p>Paragraph 4 articulates Texas’s position that in delivering water to Elephant Butte, New Mexico in fact relinquishes that water to the Project: “[t]he Rio Grande Compact requires that New Mexico deliver specified amounts of Rio Grande water into Elephant Butte Reservoir [and that once] delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements.”</p> <p>Paragraph 11 alleges: The State of Texas entered into the Rio Grande Compact under the following fundamental premises: (a) the operation of the Rio Grande Project by the United States, and the Rio Grande Project’s allocations to Texas, were recognized and protected by the Rio Grande Compact; (b) New Mexico was required to make deliveries into Elephant Butte Reservoir to ensure that the United States could continue to operate the Rio Grande Project, and thereby provide for deliveries of water from the Rio Grande Project as had been previously authorized; and (c) New Mexico would not allow Rio Grande Project water allocated by the United States to Texas to be intercepted above the Texas state line for use in New Mexico.</p> <p>In full context, Paragraph 10 of Texas’s Complaint is simply stating that <i>in lieu of a specific quantitative or state-line delivery measure</i>, the Compact relied on the Project as it existed in 1938 to deliver Texas’s apportioned water from</p> |

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| | <p>Texas defined its apportionment as "the water New Mexico delivers to Elephant Butte, less the water provided to Rio Grande Project lands in New Mexico by the Rio Grande Project."</p> <p>Texas' Brief in Response to New Mexico's Motion to Dismiss Texas' complaint and the United States' Complaint in Intervention, 11 (June 16, 2014).</p> <p>d. Further, in briefing on exceptions to the First Interim Report of the Special Master, Texas averred: "[T]he compact utilizes the Rio Grande Project, operated by the United States, as the single vehicle by which to apportion Rio Grande water to Texas and New Mexico."</p> <p><i>See</i> Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017) (quotation marks omitted).</p> | | <p>Elephant Butte to the state line. In other words, "the Compact utilized the Rio Grande Project to ensure that Texas receives the water that was apportioned to it. Usable Water is available for release to meet irrigation demands on Rio Grande Project lands in New Mexico and in Texas, as well as for delivery to Mexico to satisfy treaty obligations. It is not available for use and appropriation in New Mexico pursuant to New Mexico state law."</p> <p>Texas Brief in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 28 (June 16, 2014).</p> <p>Page 22 of Texas's 2014 Brief in Opposition to New Mexico's Motion to Dismiss encapsulates the Complaint: "Texas asserts that the Compact requires New Mexico to deliver a scheduled amount of Rio Grande water into Elephant Butte Reservoir, to relinquish control of that water for storage and distribution by the Rio Grande Project, and not to intercept, deplete or otherwise interfere with water released by the Rio Grande Project for the benefit of Rio Grande Project lands in Texas. Compl. at paragraphs 10-11, 13, 18-19. New Mexico violates the Compact, including its delivery obligation in Article IV, when it allows water users to intercept, deplete or otherwise divert flows of the Rio Grande below Elephant Butte, which adversely affects Rio Grande Project operations including the amount of water that flows to irrigable lands in Texas. Compl. at paragraphs 18-19."</p> |

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| | | | <p data-bbox="1092 300 1515 447">Texas Brief in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 22 (June 16, 2014).</p> <p data-bbox="1036 489 1531 741">"The water apportioned to New Mexico by the Compact is the water in the Basin above Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. ... No water below Elephant Butte is apportioned to New Mexico."</p> <p data-bbox="1068 783 1531 951">Texas's Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 10 (June 16, 2014).</p> <p data-bbox="1036 993 1531 1392">b. Regarding Texas's brief in support of its motion to file its complaint, the entity that this sentence actually concerns is the Elephant Butte Water Users Association, the predecessor entity to EBID, and in context the sentence is not referring to the Compact at all, but specifically to a 1906 contract between that entity and the United States for the use of not-yet-developed Rio Grande Project water.</p> <p data-bbox="1068 1434 1515 1497">Texas's Brief in Support of Motion to File Complaint at 7.</p> <p data-bbox="1036 1539 1531 1890">c. Regarding briefing on New Mexico's Motion to Dismiss, New Mexico cites to an excerpt that it views as favorable to its position, and omits that on the very preceding page of that brief, Texas expressly defined New Mexico's apportionment: "The water apportioned to New Mexico by the Compact is the water in the Basin above Elephant Butte in excess of its</p> |

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| | | | <p>delivery obligation, less the waters apportioned to Colorado. ... No water below Elephant Butte is apportioned to New Mexico."</p> <p>Texas's Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 10 (June 16, 2014).</p> <p>In that same brief:</p> <p>"The Compact requires New Mexico to deliver water into Elephant Butte Reservoir and to thereby relinquish control of the water for storage and distribution by the Rio Grande Project. New Mexico's jurisdiction over the waters in the Lower Rio Grande is limited by both the express requirements of the Compact and the operation of the Rio Grande Project. New Mexico has ceded regulatory authority over this portion of the Rio Grande. The Commissioner negotiating the Compact for New Mexico recognized this cession of control when he stated: '[f]or purposes of the Compact, Elephant Butte Dam should be deemed to be the dividing line between New Mexico and Texas.'"</p> <p>Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 19 (June 16, 2014).</p> <p>"[Las Cruces argues] it would have been 'absurd' for New Mexico to enter a compact 'which limited water rights below Elephant Butte Reservoir to the irrigation interests of the Rio Grande Project' In making this argument, Las Cruces ignores that in the negotiations leading to the Compact, New Mexico users below the Dam</p> |

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| | | | <p>were aligned with Texas. Moreover, Las Cruces ignores the fact that New Mexico traded off additional benefits to lands below Elephant Butte in New Mexico in return for the substantial benefits it obtained for lands in the Middle Rio Grande in New Mexico." Brief in Response to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 20, FN12 (June 16, 2014) (citations omitted).</p> <p>d. In Texas's briefing on exceptions to the First Interim Report of the Special Master, Texas stated: " . . . the plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir.' First Report at 197. New Mexico's duties to relinquish control of the water at Elephant Butte and refrain from post-Compact depletions of water below Elephant Butte Reservoir do not arise from any implied covenant or implied term, but from the very meaning of the text of the Compact."</p> <p>Texas's Reply to Exceptions to First Interim Report of Special Master, 17 (July 28, 2017)</p> <p>"The terms of the Compact provide that three sovereign states agreed to an equitable apportionment of an interstate stream, which Congress approved. 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,</p> |

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| | | | <p>and Mexico. First Report at 201. Likewise, the Compact is not silent on what occurs below Elephant Butte Reservoir when it expressly provides for New Mexico's obligation to "deliver" water at Elephant Butte. Neither New Mexico nor its citizens can take back or attempt to reassert control under state processes over water apportioned to Texas."</p> <p>Texas's Reply to Exceptions to First Interim Report of Special Master, 31 (July 28, 2017)</p> <p>"New Mexico does not have the legal authority to administer or adjudicate rights under state law to water that has been equitably apportioned to Texas under the Rio Grande Compact. Once New Mexico has delivered that apportioned water to Elephant Butte Reservoir, it has relinquished jurisdiction over the distribution of that water, as the Special Master properly held."</p> <p>Texas's Reply to Exceptions to First Interim Report of Special Master, 33 (July 28, 2017)</p> |
| 93 | <p>In connection with filing the Complaint in this case, Texas issued a News Release. In that News Release, Texas admitted "[h]istorically, <i>water apportioned under the Rio Grande Compact</i> has resulted in approximately 57 percent of the water supply below the Elephant Butte Reservoir being delivered to New Mexico, and 43 percent being delivered across the New Mexico-Texas state line for Texas."</p> <p>NM-EX 524, Tex. Comm'n on Env't Quality, <i>News Release</i>, 2 (Jan. 8, 2013) (emphasis added).</p> | <p>NM-EX-524: <i>See</i> General Objection #3; Fed. R. Civ. P. 56(c); Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed. The cited evidence does not support the asserted facts. The document is unauthenticated, and there is no evidence of who the author was, or the authority of the author to make any statement on behalf of Texas as to the meaning and/or purpose of the Compact.</p> |

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| 94 | <p>Every alternate year the Texas Commission on Environmental Quality (“TCEQ”) reports to the Texas Legislature about environmental issues, including interstate river compacts. In describing the Rio Grande Compact in 2014, the TCEQ explained “[t]he compact did not contain specific wording regarding the apportionment of water in and below Elephant Butte Reservoir. However, the compact was drafted and signed against the backdrop of the 1915 Rio Grande Project and a 1938 U.S. Bureau of Reclamation contract that referred to a division of 57 percent to New Mexico and 43 percent to Texas.”</p> <p>NM-EX 526, Texas Comm’n on Env’t. Quality, <i>Biennial Report to the 84th Legislature</i> (2014) (emphasis added).</p> | <p>NM-EX-526: <i>See</i> General Objection #3; Fed. R. Civ. P. 56(c); Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed. The cited evidence does not support the asserted facts. The document is unauthenticated, and there is no evidence of who the author was, or the authority of the author to make any statement on behalf of Texas as to the meaning and/or purpose of the Compact.</p> |
| 95 | <p>In New Mexico’s adjudication of Lower Rio Grande water rights, the United States requested that the New Mexico Adjudication Court “recognize an amount of up to 376,000 acre-feet per year for delivery to Texas.”</p> <p><i>See</i> NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, <i>New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.</i>, no. CV-96-888, ¶ 4 (N.M. 3d Judicial Dist., Feb. 17, 2014).² Footnote ²: In response to the United States request that New Mexico recognize 376,000 AFA for delivery to Texas, the New Mexico Adjudication Court explained that the United States’ request was beyond the jurisdiction</p> | <p>NM-EX-527: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated “facts” in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading. Although the quoted language is contained within NM-EX-527, New Mexico does not include the full context of the Court’s statement, and there is no foundation to infer the intent of the United States in making that statement, or others, to the Court. The full text of the Court’s discussion in NM-EX 527 clearly denotes that the subject is “Project deliveries to Texas as an essential element of the Project.” Nothing in NM-EX-527 supports the implication that the statement attributed to the United States was predicated on a position about Compact apportionment as opposed to simply an effort to preserve its contract delivery obligations to Texas, or some other reason.</p> |

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| | <p>of the court, but that the "State of New Mexico's offer of judgment appropriately recognizes Project deliveries to Texas as an essential element of the Project." <i>Id.</i></p> <p>As discussed, under the D1/D2 method, 376,000 acre-feet was a full supply for EPCWID, and represents approximately 43% of Project water when there is a full supply.</p> | | |
| 96 | <p>Reclamation has recognized that "[b]ecause one district is located in New Mexico (EBID) and the other is located in Texas (EP#1), the operation of the Rio Grande Project has a bearing on each state's claim to the waters of the Rio Grande."</p> <p>NM-EX 503, Briefing Paper by Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Robert W. Johnson, Commissioner, Bureau of Reclamation (Nov. 2, 2006).</p> | <p>NM-EX-503: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading. Although the quote from NM-EX503 is recited correctly, Texas disputes that Reclamation "recognized" anything pertaining to Compact apportionment below the Reservoir. New Mexico does not include the full context of the document. The stated purpose of the document is to "update the status of the . . . Project . . . operating agreement negotiations" between EBID, EP#1 and the United States. There is no foundation to support New Mexico's implication that the quoted statement was Reclamation recognizing a Compact apportionment to New Mexico below Elephant Butte.</p> |
| 97 | <p>Reclamation has acknowledged the intent of the Compact "to recognize a yearly average of 790,000 AF release from Project storage to satisfy water users" in both States and Mexico.</p> <p>NM- EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).</p> | <p>NM-EX-411: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. New Mexico misrepresents the author's statement in NM-EX-411, and takes the excerpt out of context. The full sentence quoted by New Mexico is as follows: "Reclamation interprets this accrued departure from normal release as a measure of how the Rio Grande Project is complying with its obligation to meet yearly demand from the water users of the Rio Grande Project and at the same time comply</p> |

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| | | | with the Rio Grande Compact intent to recognize a yearly average of 790,000 AF release from Project storage <i>to satisfy water users within the 'Texas portion' of the Compact.</i> " NM-EX-411, 2 (emphasis added). Thus, NM-EX-411 actually supports <i>Texas's</i> position: that the 790,000 AF release from Project storage is Texas's apportionment, subject to the 1906 Treaty and downstream contract (constituting "water users within the 'Texas portion' of the Compact"). |
| 98 | <p>Reclamation has recognized that "[t]he 1938 Rio Grande Compact intended to use the Reclamation Rio Grande Project as the vehicle to guarantee delivery of Texas's, <i>New Mexico's</i> and Mexico's equitable apportionment of the Rio Grande waters below Elephant Butte Dam."</p> <p>NM-EX 530, Filiberto Cortez, Bureau of Reclamation, EBID Depletion Reduction and Offset Program WaterSMART Grant Proposal, 1 (emphasis added).</p> | <p>NM-EX-530: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed. This paragraph is misleading. Although the quote from NM-EX-530 is recited correctly, Texas disputes that Reclamation "recognized" anything pertaining to Compact apportionment below the Reservoir. New Mexico does not include the full context of the document. The language quoted is within a paragraph that describes the background of the parties' positions in this case. There is no foundation to support New Mexico's implication that the quoted statement was Reclamation recognizing a Compact apportionment to New Mexico below Elephant Butte. It is pure speculation as to the intent of the author in including the quoted language, and whether or not that language is intended to capture one of the parties' positions in this case, or otherwise.</p> |
| 99 | <p>At the hearing on New Mexico's Motion to Dismiss in this proceeding, counsel for the United States conceded that the "[P]roject is central to the [C]ompact," that "New Mexico would also, by the same token, have an</p> | <p>Hrg. Tr. 88:17, 91:6-14, 100:7-18 (Aug. 19, 2015): Fed. R. Evid. 901; Fed. R. Evid. 801(c), hearsay. Statements by lawyers during a</p> | <p>Subject to the stated objections, disputed. Statements by lawyers during a hearing are not sworn testimony and do not constitute factual "evidence" for purposes of summary judgment. Additionally, the language</p> |

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| | <p>apportionment" delivered through the Project, and that the Downstream contracts "effectuate the intended apportionment that is made in the [C]ompact."</p> <p>Hrg. Tr. 88:17, 91:6-14, 100:7-18 (Aug. 19, 2015).</p> | <p>hearing are not sworn testimony and do not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c). The transcript excerpt is not supported by evidence and, as such, is inadmissible and irrelevant for purposes of summary judgment. Fed. R. Civ. P. 56(c); Fed. R. Evid. 401.</p> | <p>New Mexico quotes omits the statement immediately following the quoted portion: "So all flows at Elephant Butte are delivered not merely to the river, but they are delivered to project storage. Again, the project is central here. So, in delivering it to the project storage, the Special Master has to interpret it that New Mexico simply doesn't have the authority to claw it back. The delivery means something. It's transferring. It's putting it in the possession and control of the project for effectuating the apportionment. If this was a commercial good, it would be a transfer in a manner that can't be recalled by the grantor. But here New Mexico is arguing exactly the opposite, that having relinquished control, having transferred, having delivered that water, they can immediately start clawing it back before the usable water, which is usable for the project, for irrigation -- before it can even get to the first headgate, they can start clawing it back because, they assert, there's no ground rules below Elephant Butte."</p> <p><i>See Docket No. 37, Transcript of August 19, 2015 Oral Argument Before A. Gregory Grimsal, Esq. Special Master, 91:15 – 92:6.</i></p> |
| 100 | <p>The United States has taken the following relevant positions in this case:</p> <p>a. "New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir, and Texas receives its entire equitable apportionment of</p> | <p>Language/arguments in a brief supporting a motion do not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c). The pleadings discussed by New Mexico</p> | <p>Subject to the stated objections, disputed. New Mexico purports to rely on certain statements attributed to the United States that support its own positions on the apportionment issue while ignoring other adverse statements the United States expresses in the same pleadings.</p> <p><u>100a</u></p> |

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| | <p>water, through the Project, in the form of water released by the Project 'in accordance with irrigation demands.' Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigation acreage in EBID and EPCWID, respectively."</p> <p>Brief for the United States in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention, 28 (June 2014) (quoting Compact Art. I(l)).</p> <p>b. "Usable Water" is "available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico."</p> <p>Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 6 (July 2017).</p> <p>c. "To effectuate an equitable apportionment of the waters of the Rio Grande, the compacting States incorporated and relied upon an existing reclamation project 'as the vehicle to guarantee delivery of Texas's <i>and part of New Mexico's equitable apportionment of the stream.</i>' The United States agreed to that arrangement through congressional approval of the Compact."</p> | <p>here are not supported by evidence and, as such, are inadmissible and irrelevant for purposes of summary judgment. Fed. R. Civ. P. 56(c); Fed. R. Evid. 401; Fed. R. Evid. 801(c), hearsay.</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> | <p>Following the quoted statement, the United States adds: "[t]he Compact necessarily limits the extraction of hydrologically connected groundwater, to the extent that the groundwater is necessary for the Project to make deliveries in response to irrigation demands," (30); and that "[t]his Court has previously recognized that groundwater pumping that interferes with the equitable apportionment of water under an interstate compact must be counted toward a state's use of its equitable apportionment." (31). Elsewhere, the United States repeats its claim, according with Texas's, that "New Mexico is in breach of its obligation under Article IV of the Compact to 'deliver' the water—and thus to relinquish control of it—at Elephant Butte Reservoir."</p> <p><u>100b</u></p> <p>This recitation offers nothing to further New Mexico's claim, and is in fact entirely consistent with Texas's fundamental position that Texas is apportioned all the water New Mexico delivers to Elephant Butte, less Mexico's treaty water and water allocated (not apportioned) to EBID under its Reclamation contract.</p> <p><u>100c</u></p> <p>On the same page, the United States expresses a position that undermines the one New Mexico attributes to it: "By compact, New Mexico agreed that it would deliver water to the Project at Elephant Butte Reservoir, Compact Art. IV, 53 Stat. 788, at which point it becomes "[u]sable [w]ater" that must be available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico,</p> |

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| | <p><i>Id.</i> at 18 (emphasis added) (quoting First Interim Report of the Special Master, 204 (Feb. 9, 2017)).</p> <p>d. "In the Compact, the States (i) incorporated and relied upon an existing Reclamation project to deliver Texas's and part of New Mexico's equitable apportionment."</p> <p>Sur-Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 12-13 (September 2017).</p> <p>e. "[T]he Compact identifies what is to be done with water that is delivered by New Mexico to Elephant Butte Reservoir, and the Compact 'protects the water that is released from Elephant Butte in order for it to reach its intended destination.'"</p> <p><i>Id.</i> at 13 (quoting First Interim Report of the Special Master, 200 (Feb. 9, 2017)).</p> | | <p>Compact Art. I(1), 53 Stat. 786. New Mexico cannot administer water rights in the area of New Mexico below Elephant Butte Reservoir in a way that interferes with the Project's ability to make deliveries to satisfy those demands."</p> <p><u>100e</u></p> <p>New Mexico omits that <i>Texas</i> is the "intended destination" the United States refers to. The next sentence states: "Indeed, if the Compact did not prohibit New Mexico water users from interfering with Project deliveries, 'then the question of Texas's equitable apportionment' under the Compact would be 'an open, major source of controversy,' contrary to the basic purpose of the Compact to 'effect[] an equitable apportionment of' the waters of the Rio Grande above Fort Quitman, Texas." (quoting First Interim Report of the Special Master, 200 (Feb. 9, 2017))</p> |
| 101 | <p>In response to a Request for Admission, the United States admitted for all purposes in this case that "under the Compact, the states relied upon an existing Reclamation project to deliver Texas's and part of New Mexico's equitable apportionment."</p> <p>NM-EX 602, United States of America's Responses to New Mexico's First Set of Requests for Admission, 13 (November 4, 2019) (response to Request for Admission 30).</p> | <p>NM-EX-602: <i>See</i> General Objection #4; Fed. R. Evid. 801(c), hearsay.</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> | <p>Subject to the stated objections, disputed. The quoted language is taken out of context, mischaracterizes the Request for Admission response, and ignores the objection expressed by the United States in responding to the Request for Admission. In its quoted response to New Mexico's Request for Admission No. 30, the full response of the United States is that it "avers that in its Reply and Sur-Reply briefs in the Supreme Court, the United States stated its position that under the Compact" Thus, the United States only "admitted" stating that position in</p> |

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| | | | a brief. Any factual or legal interpretation beyond that is speculation. The United States further objected to the compound nature of New Mexico's request, and that the request sought admission of the truth of a conclusion of law. |
| 102 | <p>The expert historian sponsored by the United States in this case has opined that that the States intended for the Compact to apportion surface water below Elephant Butte Reservoir to New Mexico for the lands in New Mexico under the Rio Grande Project.</p> <p>NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 52:23-53:8, 73:23-74:9.</p> | <p>NM-EX-215: <i>See</i> General Objection #2.</p> <p>Fed. R. Evid. 704: The statement includes impermissible legal conclusions.</p> | <p>Subject to the stated objections, disputed. Texas disputes that the States intended for the Compact to apportion any Rio Grande surface water below the Reservoir New Mexico.</p> <p><i>See</i> Miltenberger Declaration, TX_MSJ_001585 and Miltenberger Dec. in Opp. to NM at TX_MSJ_007371; <i>See</i> Gordon Dec. in Opp. to NM at TX_MSJ_007269.</p> |
| 103 | <p>Consistent with the Reclamation Act (and the adjudication in Texas), New Mexico adjudicated the Project Right in New Mexico. In accordance with the Compact, the New Mexico Adjudication Court established that the Project is entitled to an annual release of up to 790,000 acre-feet.</p> <p><i>See</i> NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding PriorityDate; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, <i>New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.</i>, no. CV-96-888 (N.M. 3d Judicial Dist., Feb. 17, 2014).</p> | <p>NM-EX-527: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. The evidence (NM-EX-527) does not support the asserted fact. New Mexico states "[i]n accordance with the Compact, the New Mexico Adjudication Court established that the Project is entitled to an annual release of up to 790,000 acre-feet." Exhibit NM-EX-527 does not state "[i]n accordance with the Compact" but states "or as otherwise provided for by the Rio Grande Compact." <i>See</i> NM-EX-527 at 2.</p> |
| 104 | <p>Unlike Texas, the New Mexico Adjudication Court set limits on the amount of surface water and groundwater that could be diverted or</p> | <p>NM-EX-527: <i>See</i> General Objection #3; Fed.</p> | <p>Subject to the stated objections, disputed. The evidence (NM-EX-527) does not support the asserted fact. Exhibit NM-EX-527 provides no</p> |

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| | <p>consumed on an acre of Project land in New Mexico.</p> <p><i>See</i> NM-EX 527, Final Judgment, <i>New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist.</i>, no. CV-96-888 (N.M. 3d Judicial Dist., Aug. 22, 2011). Consistent with Reclamation operations and analysis, New Mexico recognized the right for each Project acre to receive 3.024 acre-feet per annum of surface water. <i>Id.</i> at ¶ I.A.</p> | <p>R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> | <p>support for the "[u]nlike Texas" portion of the asserted fact. Further, the stated "fact" is a conclusory, overbroad, statement, without foundation in the cited evidence.</p> |
| 105 | <p>Prior to this litigation, New Mexico has consistently taken the position that the Compact divides the waters below Elephant Butte according to the acreage in each State so that New Mexico is entitled to 57% and Texas is entitled to 43% of Project supply. For example, in negotiations that occurred during the 1990s and 2000s, New Mexico was steadfast in its position that a potential operating agreement for the Project could not alter the 57-43 division of water below Elephant Butte that was required by the Compact.</p> <p>NM-EX 004, Schmidt-Petersen Decl. ¶ 12; NM-EX 003, Lopez Decl. ¶ 17; NM-EX 002, D'Antonio Decl. ¶ 13.</p> | <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4).</p> <p>NM-EX-004, 002: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602, 701: Mr. Schmidt-Petersen, and Mr. D'Antonio lack personal knowledge regarding all circumstances considering New Mexico's positions "[p]rior to this litigation" and the statement regarding the requirements of the Compact is an improper legal conclusion and improper opinion testimony of a lay witness with respect to Mr. Schmidt-Petersen and Mr.</p> | <p>Subject to the stated objections, disputed.</p> <p>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.</p> <p>Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001142-001145, 20:4-23:16, 25:17-26:10.</p> <p>New Mexico 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.</p> <p>Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001147-001148, 25:17-26:10.</p> <p>New Mexico concedes that it cannot, in any way, control or affect that contract.</p> <p>D'Antonio Depo., 8/14/2020, at TX_MSJ_000867, 93:1-11, 24-25</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | D'Antonio who were not disclosed as experts in this litigation. | <p>("The contracts are in place, the project is under Reclamation law and it runs"; "New Mexico's not involved to administer the contract water, no."), 94:2-13 ("New Mexico does not administer the surface water that's under contract . . . we don't administer on a day-to-day basis any of the water that's meant for the project."), 95:21-96:7.</p> <p>New Mexico admits that the use, place of use, timing of delivery, and total amount of water is absolutely limited by these contracts.</p> <p>D'Antonio Depo., 8/14/2020, at TX_MSJ_000875, 000879-000880, 145:13-18, 149:6-150:2.</p> <p>Until this litigation, New Mexico never argued that it had an apportionment of Rio Grande water below Elephant Butte Reservoir. In fact, in 1951, in prior Supreme Court litigation between New Mexico and Texas, John H. Bliss, the New Mexico State Engineer, on behalf of the state of New Mexico, stated unequivocally under oath: "The Rio Grande Compact does not attempt to make any apportionment between the New Mexico area and the Texas area below Elephant Butte Reservoir."</p> <p><i>Texas v. New Mexico</i>, U.S. Supreme Court, No. 9 Original, Return of Defendants to Rule of Show Cause at 3; Declaration of Scott Miltenberger (Miltenberger Decl.), at TX_MSJ_001610.</p> <p>Significantly, the John H. Bliss who so swore is the same John H. Bliss who was the New Mexico engineer representative to the Engineer Advisors to the negotiators of the 1938 Compact.</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | | <p><i>Id.</i></p> <p>Until the Supreme Court's 2018 Opinion, New Mexico consistently admitted that its rights under the Compact ended at Elephant Butte Reservoir, with no further apportionment of water, once New Mexico delivered the water into the Reservoir pursuant to Article IV of the Compact.</p> <p>Excerpts of Deposition of Peggy Barroll, 2/6/2020 (Barroll Depo., 2/6/2020), at TX_MSJ_000937, 314:12-16.</p> |
| 106 | <p>The RGCC and its Engineer Advisers regularly request information and receive briefings from Reclamation on Project operations, including operations below Elephant Butte.</p> <p>NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 45:9-46:12; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM-EX 003, Lopez Decl. ¶ 13; NM-EX 525, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Kenneth Rice, Bureau of Reclamation (May 2, 2013); NM-EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996).</p> | <p>NM-EX-202: <i>See</i> General Objection #2.</p> <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4).</p> <p>NM-EX-525: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-405: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-004: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602, 701.</p> | <p>Subject to the stated objections, undisputed.</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| 107 | <p>Reclamation reports to the RGCC every year about operations that are relevant to the Compact. As part of that report, Reclamation provides information about the operations of the Rio Grande Project.</p> <p><i>See, e.g.,</i> NM-EX 512, Bureau of Reclamation, Calendar Year 2009 Report to the Rio Grande Compact Commission, 59-67 (Mar. 2010); NM-EX 003, Lopez Decl. ¶ 13; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM-EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996); NM-EX 410, Fascimile from Steve Vandiver, Engineer Adviser, State of Colorado, to Ken Maxey, Albuquerque Area Manager, Bureau of Reclamation, and Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation (Aug. 2, 2002).</p> | <p>NM-EX-512: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4).</p> <p>NM-EX-405: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-410: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-004: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602, 701.</p> | Subject to the stated objections, undisputed. |
| 108 | <p>The RGCC conducts Compact accounting on an annual basis. Part of the Compact accounting includes a report on the Project Storage and Releases. That accounting tracks both the releases of Usable Water to water users in both States to satisfy irrigation demands, and the accrued departure of the releases from the Compact's normal release of 790,000 acre-feet per year.</p> <p><i>See, e.g.,</i> NM-EX 501, Rio Grande Compact Commission, Report of the Rio Grande Compact Commission 2005, 20 (Mar. 23, 2006). <i>See also</i></p> | <p>NM-EX-501: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4).</p> <p>NM-EX-004: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602, 701.</p> | Subject to the stated objections, disputed. There is no evidence cited in support of this "fact." New Mexico's reference to " <i>See, e.g.</i> " does not constitute supporting evidence. |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 14. | | |
| 109 | <p>"Reclamation interprets this accrued departure from normal release [Compact accounting provision] as a measure of how the Rio Grande Project is complying with its obligation to meet yearly demand from the water users of the Rio Grande Project and at the same time comply with the Rio Grande Compact intent to recognize a yearly average of 790,000 AF release from project storage to satisfy water users" below Elephant Butte.</p> <p>NM-EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).</p> | <p>NM-EX-411: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed. The evidence (NM-EX-411) does not support the asserted fact. New Mexico quotes the document correctly but adds "below Elephant Butte" after the quote in the asserted fact. Immediately following the quoted text, however, Exhibit NM-EX-411 states "within the 'Texas portion' of the Compact." <i>See</i> NM-EX-411 at 2.</p> |
| 110 | <p>The releases from Project Storage are tracked so that the Compact Commissioner from each respective State is able to understand the amount of Project water that users in his or her State are entitled to.</p> <p>NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 13.</p> | <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4).</p> <p>NM-EX-004: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602, 701.</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> | <p>Subject to the stated objections, disputed. New Mexico misstates and mischaracterizes the cited evidence.</p> <p>The Schmidt-Petersen declaration states that project releases are accounted and reported "so that the Compact Commissioner from each respective State is able to understand the amount of Project water that users in his or her State <i>received in the previous year.</i>" (NM-EX 004) (emphasis added). Schmidt-Petersen did not state anything about "entitlement to water."</p> <p>NM-EX 004, Schmidt-Petersen Decl. paragraph 14.</p> <p>The Lopez declaration states that the RGCC and Engineer Advisers request information and receive briefings from Reclamation on Project operations.</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | | NM-EX 003, Lopez Decl. paragraph 13. |
| 111 | <p>The RGCC acts or speaks in a number of forms, including through resolutions, all of which must have unanimous agreement.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15.</p> <p>Through unanimous resolutions, the RGCC has taken the following relevant positions:</p> <p>a. The State of New Mexico has a Compact apportionment in southern New Mexico below Elephant Butte, as recognized in the citations below:</p> <p>i. "[O]ver half of New Mexico's population is located within the Rio Grande basin and depends on New Mexico's allocation of Rio Grande water under the Rio Grande compact."</p> <p>NM-EX 406, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Need for Careful Evaluation of the Water Supply and Socioeconomic Impacts of Any Designation of Critical Habitat for the Rio Grande Silvery Minnow (Mar. 25, 1999).</p> <p>ii. "[A]ll Rio Grande water allocated to New Mexico both upstream <i>and downstream from Elephant Butte Reservoir</i> is fully appropriated under New Mexico state law."</p> <p><i>Id.</i> (emphasis added).</p> | <p>NM-EX-406: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-002: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 401, 602, 701.</p> <p>NM-EX-408: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-528: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-003: General Objection #6; Fed. R. Civ. P. 56(c)(4).</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> | <p>Subject to the stated objections, disputed. The cited evidence does not support the stated legal conclusions summarized by New Mexico (as facts) in "a." and "b." The evidence (NM-EX-528) does not support the asserted fact. New Mexico, partially quoting Exhibit NM-EX-528, states "<i>The Project</i> is 'required to be operated in compliance with the Rio Grande Compact.'" But, Exhibit NM-EX-528 states only that ". . . <i>El Vado Reservoir</i> is a post-1929 reservoir and is required to be operated in compliance with the Rio Grande Compact."</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | <p>iii. "[T]he waters of the Rio Grande Project are used to . . . provide a water supply <i>for Southern New Mexico</i> and Texas downstream of Elephant Butte Reservoir."</p> <p>NM-EX 408, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Development of an Appropriate Methodology for Determining the Annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002) (emphasis added).</p> <p>b. The operations and accounting of the Project have the potential to impact New Mexico's Compact apportionment. <i>Id.</i> ("[T]he dissemination of inaccurate allotments [by Reclamation] causes unnecessary hardship to the water users <i>of Southern New Mexico</i> and Texas along the Rio Grande downstream of Elephant Butte Reservoir") (emphasis added);</p> <p>NM-EX 002, D'Antonio Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 15</p> <p>c. The Project is "required to be operated in compliance with the Rio Grande Compact."</p> <p>NM-EX 528, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding Temporary Modification of Operations at El Vado Reservoir in New</p> | | |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | Mexico during April, May, and June 2015 (Mar. 24, 2015); <i>see also</i> NM-EX 002, D'Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15. | | |
| 112 | <p>To address the potential for Project operations to impact New Mexico's (and Texas's) Compact apportionment, the RGCC has taken at least these three actions by resolution:</p> <p>a. First, the RGCC unanimously "request[ed] that the Bureau of Reclamation work cooperatively with the Engineer Advisers to develop procedures for determining the annual allotments of water supply in accordance with the Rio Grande Compact."</p> <p style="padding-left: 40px;">NM-EX 408, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Development of an Appropriate Methodology for Determining the annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002); <i>see also</i> NM-EX 002, D'Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.</p> <p>b. Second, the RGCC entered into a memorandum of understanding ("MOU") with Reclamation to "conduct a Compact water accounting documentation project." The purpose of the MOU was "to clarify and formally articulate the details of the duties, roles and responsibilities of each party for the water accounting, reporting, and documentation</p> | <p>NM-EX-408: <i>See</i> General Objection 3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-002: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 401, 602, 802. The statement is irrelevant, not within Mr. D'Antonio's personal knowledge, and constitutes impermissible hearsay.</p> <p>NM-EX-003: <i>See</i> General Objection #6; Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 401, 602, 802. The statement is irrelevant, not within Mr. Lopez's personal knowledge, and constitutes impermissible hearsay. NM-EX-408 speaks for itself.</p> <p>NM-EX-407: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, disputed. The cited evidence does not support the stated legal conclusion summarized by New Mexico (as fact) in its opening paragraph. |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | <p>of the waters of the Rio Grande Basin above Fort Quitman, Texas, in accordance with the Compact.”</p> <p>NM-EX 407, Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation, 2 (Mar. 21, 2002); <i>see also</i> NM-EX 002, D'Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.</p> <p>c. Third, the RGCC unanimously “request[ed] those federal agencies that operate water-related facilities within the Rio Grande basin to advise the Rio Grande Compact Commission prior to changing the operation of any of those facilities and when deemed necessary by the Rio Grande Compact Commission, seek its unanimous consent for changes prior to implementation.”</p> <p>NM-EX 413, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Concerning Federal Agency Operations of Their Water-Related Facilities on the Rio Grande Compact Accounting (Mar. 25, 2004); NM-EX 002, D'Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.</p> | <p>NM-EX-413: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | |
| 113 | <p>The Court held in this case that “the Compact . . . implicitly . . . incorporates the Downstream Contracts by reference.” <i>Texas v. New Mexico</i>, 138 S. Ct. at 959. It noted that the “Compact is inextricably intertwined</p> | <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual “evidence” as</p> | <p>Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | with the Rio Grande Project and the Downstream Contracts." <i>Texas v. New Mexico</i> , 138 S. Ct. at 959. | contemplated by Fed. R. Civ. P. 56(c). | considered in the context of the parties' legal arguments. |
| 114 | The Court further held that "the United States might be said to serve, through the Downstream Contracts as a sort of agent of the Compact, charged with assuring that the Compact's equitable apportionment to Texas <i>and part of New Mexico</i> is, in fact, made." <i>Texas v. New Mexico</i> , 138 S. Ct. at 959 (emphasis added; internal quotation marks omitted). | <i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c). | Texas disputes the application of the Supreme Court opinion, or portion thereof, as a "fact" for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court's opinion should only be considered in the context of the parties' legal arguments. |

II. New Mexico's Motion for Partial Summary Judgment to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortages

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| 1 | One purpose of the Rio Grande Compact, among others, was to protect the operation of the Rio Grande Project. <i>See</i> NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:8-17; NM-EX 204, D'Antonio Dep. (Vol. II) (June 25, 2020), 163:7-13; NM-EX 217, Lopez Dep. (Vol. I) (July 6, 2020), 137:20-138:3; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 66:14-15; NM-EX 005, Stevens Decl. ¶ 10. | NM-EX 220, 204, 217, 211: <i>See</i> General Objection #2. NM-EX-005: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 702: the statement in the Stevens Decl. constitutes improper opinion testimony because it is not based on sufficient facts and is a mere conclusion. | Subject to the stated objections, undisputed. |
| 2 | Reclamation operates Elephant Butte Reservoir as part of the principal | NM-EX 202: <i>See</i> General Objection #2. | Subject to the stated objections, disputed in part. The cited testimony |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| | <p>storage infrastructure for the Rio Grande Project.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 56:20-58:3.</p> | <p>The cited evidence does not support the stated “facts” in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>does not support the statement in the Motion.</p> |
| 3 | <p>Once delivered to the Elephant Butte Reservoir, Project water is allocated to the Rio Grande Project beneficiaries in southern New Mexico and in Texas.</p> <p><i>See</i> NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:22-39:6.</p> <p>The Project water users are located in Elephant Butte Irrigation District (“EBID”) and El Paso County Water Improvement District No. 1 (“EPCWID”) (referred to jointly as “Districts”).</p> <p><i>See</i> Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014); Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); NM-EX 112, Jennifer Stevens, Ph.D., <i>The History of Interstate Water Use on the Rio Grande: 1890-1955</i>, 18 (Oct. 28, 2019) (“Stevens Rep.”); NM-EX 111, Scott A. Miltenberger, <i>Expert Report of Scott A. Miltenberger, Ph. D.</i>, 9 (May 31, 2019) (“Miltenberger Rep.”).</p> | <p>NM-EX 220: <i>See</i> General Objection #2.</p> <p>NM-EX 112, 111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay</p> <p>Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014): The cited EBID motion is not supported by evidence. As such, it does not constitute factual “evidence” as contemplated by Fed. R. Civ. P. 56(c); the material cited to support the “fact” cannot be presented in a form that would be admissible in evidence pursuant to Fed. R. Civ. P. 56(c).</p> <p>Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in</p> | <p>Subject to the stated objections, disputed in part. Paragraph two mischaracterizes the cited “evidence”; the “evidence” does not stand for the stated proposition; and contains an improper legal conclusions.</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | <p>Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015): The cited EP#1 motion is not supported by evidence. As such, it does not constitute factual "evidence" as contemplated by Fed. R. Civ. P. 56(c); the material cited to support the "fact" cannot be presented in a form that would be admissible in evidence pursuant to Fed. R. Civ. P. 56(c).</p> | |
| 4 | <p>Project Allocations are the amounts of Project Supply that each District is entitled to order each year from Project supply and the amount Mexico is entitled to receive by treaty.</p> <p>NM-EX 001, Barroll Decl., ¶ 18; NM-EX 307, Distribution of the Waters of the Rio Grande, Mex.-U.S., May 21, 1906, 34 Stat. 2953; NM-EX 529, Bureau of Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i>, 4 (Sept. 30, 2016).</p> | <p>NM-EX 001: Texas objects to Barroll paragraph 18's definition of "Project Allocations" to the extent it incorporates paragraph 15's definition of "Project Supply," which is a legal conclusion and not a basis for "undisputed facts."</p> <p>NM-EX 529: See General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in</p> | <p>Subject to the stated objections, disputed in part. The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| | | <p>whole and/or in part. Fed. R. Civ. P. 56(c).</p> <p>Fed. R. Evid. 704: The statement includes impermissible legal conclusions.</p> | |
| 5 | <p>On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts (EPCWID and EBID) entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938.</p> <p>NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (“1938 Downstream Contract”).</p> <p>The 1938 Downstream Contract states that in the event of a shortage of water “the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].”</p> <p><i>Id.</i>; NM-EX 001, Barroll Decl., ¶ 19.</p> <p>The Court has found that the “Downstream Contracts,” including the 1938 Downstream Contract, are “inextricably intertwined with” the Project and the Compact.</p> <p><i>Texas v. New Mexico</i>, 138 S. Ct. at 959.</p> | <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual “evidence” as contemplated by Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. The second paragraph, correctly quotes from the 1938 Downstream Contract but in the absence of an understanding of the context and purpose of the, the paragraph is misleading. NM-EX-324.</p> <p>Congress authorized the execution of amended repayment contracts with EBID and EPCWID (or EP #1) in 1937, but it did not authorize the 1938 contract as such. The 1938 Downstream Contract was instead part of an effort by Reclamation, extending back to 1929, to fix the basis for repayments between the two districts. The districts themselves ultimately instigated this particular agreement to settle the issue. Miltenberger Declaration paragraphs 43-45 discuss the 1937 and 1938 Downstream Contracts; the context and purpose of the 1938 Downstream Contract is addressed in more detail in the paragraphs cited below. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 - 7, 43 - 45, 54-59, 61.</p> <p>Texas disputes the application of the Supreme Court opinion, or portion</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | | thereof, as a "fact" for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court's opinion should only be considered in the context of the parties' legal arguments. New Mexico's statement also mischaracterizes the Court's opinion. |
| 6 | <p>The Rio Grande Compact incorporates the Rio Grande Project as the mechanism by which water users in Texas (EPCWID) receive the State's equitable apportionment of the waters of the Rio Grande.</p> <p><i>See</i> NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 14:22-16:10; Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); <i>see also</i> First Interim Report of the Special Master, 194-95 (Feb. 9, 2017); Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 18 (July 2017).</p> | <p>NM-EX 212: <i>See</i> General Objection #2.</p> <p>Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); <i>see also</i> First Interim Report of the Special Master, 194-95 (Feb. 9, 2017); Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 18 (July 2017): Language in a legal brief prepared by the party's attorneys supporting a motion that is not based on evidence, do not constitute factual</p> | Subject to the stated objections, undisputed. |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | <p>"evidence" as contemplated by Fed. R. Civ. P. 56(c). The pleadings discussed by New Mexico here are not supported by evidence and, as such, are inadmissible and irrelevant for purposes of summary judgment. Fed. R. Civ. P. 56(c); Fed. R. Evid. 401.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | |
| 7 | <p>To support the Rio Grande Project, Reclamation notified the State Engineer for the Territory of New Mexico that it intended to appropriate all "unappropriated waters of the Rio Grande" at Elephant Butte in 1908.</p> <p><i>See</i> NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger Rep. 9-10.</p> | <p>NM-EX 111: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. This paragraph is factually incomplete. The 1908 filing was for "all the unappropriated waters of the Rio Grande and its tributaries." NM-EX-309.</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 - 7, 62.</p> |
| 8 | <p>From that point forward, the New Mexico State Engineer considered the surface waters of the Rio Grande below</p> | <p>NM-EX 200, 205: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, undisputed.</p> |

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| | <p>Elephant Butte Reservoir to be fully appropriated.</p> <p><i>See</i> NM-EX 002, D’Antonio Decl. ¶ 9; NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 424:15-425:4, 426:13-18; NM-EX 106, Nicolai Kryloff, <i>Context of the 1938 Rio Grande Compact</i>, 26-27 (May 31, 2019) (“Kryloff Rep.”); NM-EX 205, D’Antonio Dep. (Vol. III) (June 26, 2020), 274:1-5.</p> | <p>NM-EX 106: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | |
| 9 | <p>The Rio Grande Project is a federal Reclamation Project, therefore neither Texas nor New Mexico have a direct role in the operation of the Project.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 63:18-69:2; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 89:4-11, 172:13-22.</p> | <p>NM-EX 202, 211: <i>See</i> General Objection #2.</p> | Subject to the stated objections, undisputed. |
| 10 | <p>Specifically, although New Mexico retains administrative jurisdiction over the surface water of the Rio Grande Project, the New Mexico State Engineer has no involvement in day-to-day Project operations, including orders and deliveries.</p> <p>NM-EX 206, D’Antonio Dep. (Vol. IV) (Aug. 14, 2020), 93:12-96:7.</p> | <p>NM-EX 206: <i>See</i> General Objection #2.</p> | Subject to the stated objections, undisputed. |
| 11 | <p>While Project construction was ongoing, the Reclamation Service began water deliveries through the Project in 1915.</p> <p><i>See</i> NM-EX 404, Robert Autobee, United States Bureau of Reclamation, <i>Rio Grande Project</i>, at 12 (1994); NM-EX 311, United States Reclamation Service, <i>Project History Rio Grande Project Year 1915</i>, 137-141.</p> | <p>NM-EX 404: <i>See</i> General Objection #4; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, undisputed. |

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| 12 | <p>From inception of the Project until 1951, Reclamation administered the Rio Grande Project as a single unit to deliver water directly to farm turnouts in both States on the basis of individual farm orders.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 58:6-18; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 107, Estevan R. Lopez, <i>Expert Report of Estevan R. Lopez, P.E.</i>, 25 (Oct. 31, 2019) (“Lopez Rep.”).</p> | <p>NM-EX 202, 220: <i>See</i> General Objection #2.</p> <p>NM-EX 107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed. The cited “evidence” does not stand for the stated proposition.</p> |
| 13 | <p>The understanding of the compacting States was that Reclamation would continue to operate the Project in this manner.</p> <p>NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938) (“Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent agency.”); NM-EX 327, J.H. Bliss, <i>Provisions of the Rio Grande Compact</i>, 1 (Apr. 2, 1938) (“The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit.”); NM-EX 112, Stevens Rep.72.</p> | <p>NM-EX 112: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed regarding the ambiguity of the phrase “in that manner.” To the extent that “in that manner” is referable to #12, the item is disputed.</p> |
| 14 | <p>Between 1951 and 1979, Reclamation would perform an annual assessment of available Project supply to determine whether a full or partial allocation would be made. Reclamation would announce the allocation figures to individual farmers through the irrigation districts. Then, individual</p> | <p>NM-EX 202: <i>See</i> General Objection #2.</p> | <p>NM-EX202: Subject to the stated objections, disputed regarding the use of the term “discretion.” The witness does not use the term “discretion” in describing individual farmer’s ability to place orders directly between 1951-1979.</p> |

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| | <p>farmers retained discretion to order Project deliveries up to the amount of their respective allocations.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:19-59:11.</p> | | |
| 15 | <p>During this period, Reclamation operated the Project as a single unit and on an equal per-acre allocations to all beneficiaries of the Project.</p> <p><i>See</i> NM-EX 100, Barroll Rep., 32; NM-EX 216, Lopez Dep. (Feb. 26, 2020), 29:1-9; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18.</p> | <p>NM-EX 100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 202: <i>See</i> General Objection #2.</p> <p>NM-EX 220: <i>See</i> General Objection #2.</p> <p>NM-EX 216: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 – The witness lacks sufficient personal knowledge for this statement (the testimony cites only to the affidavit another as the basis for his statement).</p> | <p><u>NM-EX 202, NM-EX 216, NM-EX 220:</u> Subject to the stated objections, disputed regarding the ambiguity of the phrase “during this period.” To the extent the phrase “during this period” refers to #14, disputed. The respective witness’s testimony does not involve the period from 1951-1979.</p> <p><u>NM-EX 100:</u> Subject to the stated objections, disputed regarding the ambiguity of the phrase “during this period.” To the extent the phrase “during this period” refers to #14, disputed. The exhibit does not involve the period from 1951-1979.</p> |
| 16 | <p>Reclamation also maintained the Districts’ annual allocation accounting. Reclamation tracked the amount of surface water delivered to individual farm turnouts and assessed these amounts against the farmers’ respective allocations.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 42:15-43:4, 58:6-59:11; NM-EX 100, Barroll Rep. 32-33; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of</p> | <p>NM-EX 202: <i>See</i> General Objection #2.</p> <p>NM-EX 100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, generally disputed regarding the ambiguity of the time period referred to.</p> <p>NM-EX 202: The cited “evidence” does not stand for the stated proposition that Reclamation assessed “amounts against the farmers’ respective allocations.”</p> |

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| | Reclamation, <i>Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement</i> , 5 (Sept. 30, 2016). | NM-EX 529: <i>See</i> General Objection #4; Fed. R. Evid. 801(c), hearsay. | NM-EX 100: The cited “evidence” does not stand for the stated proposition. NM-EX 001: The cited “evidence” does not stand for the stated proposition. NM-EX 529: The cited “evidence” does not stand for the stated proposition. |
| 17 | In 1979, Reclamation transferred ownership of the canals and laterals to the Districts (EBID and EPCWID). In the period thereafter, Reclamation made allocations to the District river diversions, rather than to individual farmers, and the Districts assumed responsibility for delivery of the Project water from their respective diversion points to individual farm turnouts. <i>See</i> NM-EX 001, Barroll Decl. ¶ 21; NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 100, Barroll Rep. 8, 33. | NM-EX 202, 210: <i>See</i> General Objection #2. NM-EX 100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay. | Subject to the stated objections, undisputed. |
| 18 | Reclamation retained, in the period after 1979, the responsibility to account for the total deliveries to each District (EBID and EPCWID) and to Mexico at their respective diversion headings in a given year. <i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 31:13-23, 49:3-11. From 1979 through 2005, Reclamation continued to operate the Project as a single unit on an equal amount of water per acre basis. | NM-EX 202: <i>See</i> General Objection #2. | Subject to the stated objections, undisputed with regard to the first sentence. Subject to the stated objections, disputed with regard to the second sentence. The cited “evidence” does not stand for the stated proposition. |

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| 19 | <p>Reclamation relies on the Districts to monitor and report the actual diversions that each takes at its diversion points from the Rio Grande.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 49:20-50:12.</p> | <p>NM-EX 202: <i>See</i> General Objection #2.</p> | Subject to the stated objections, undisputed. |
| 20 | <p>Reclamation compiles its accounting of the Districts’ respective Project allocation and delivery charges on a monthly basis.</p> <p><i>See</i> NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 215:23-216:16; NM-EX 221, Reyes Dep. (Nov. 16, 2018), 65:8-66:8.</p> | <p>NM-EX 203, 221: <i>See</i> General Objection #2.</p> | Subject to the stated objections, undisputed. |
| 21 | <p>In operation of the Rio Grande Project, Reclamation is responsible to control releases of Project supply from Elephant Butte and Caballo reservoirs to assure delivery of all ordered water to the canal diversions. This function includes monitoring the river to determine gains and losses throughout the river reaches between stream gages.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 34:12-35:5.</p> | <p>NM-EX 202: <i>See</i> General Objection #2.</p> | Subject to the stated objections, disputed. The cited “evidence” does not stand for the stated proposition. |
| 22 | <p>In order to calibrate releases of Project supply from Caballo and Elephant Butte reservoirs into the Rio Grande, Reclamation takes delivery orders from each District and makes appropriate reservoir release adjustments on a daily basis.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 64:3-15.</p> | <p>NM-EX 202: <i>See</i> General Objection #2.</p> | Subject to the stated objections, undisputed. |
| 23 | <p>To facilitate this process, the Districts take water orders from their respective constituents and transmit total orders to Reclamation.</p> | <p>NM-EX 208, 222, 223: <i>See</i> General Objection #2.</p> | Subject to the stated objections, undisputed. |

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| | See NM-EX 208, Esslinger Dep. (Vol. II), 57:4-58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20; NM-EX 001, Barroll Decl. ¶ 21. | | |
| 24 | <p>Once Reclamation delivers water to a District’s diversion point, the District administers the conveyance of that water to individual farm turnouts and accounts for delivery of the water in satisfaction of the farmers’ respective orders.</p> <p>See NM-EX 208, Esslinger Dep. (Vol. II) (Aug. 18, 2020), 56:19-58:23, 60:22-62:7; NM-EX 223, Rios Dep., 31:4-6, 33:10-14.</p> | NM-EX 208, 223: See General Objection #2. | Subject to the stated objections, undisputed. |
| 25 | <p>Following the 2008 Operating Agreement, among other changes, the Districts assumed from Reclamation the responsibility to calculate the actual Project release as a function of their total daily orders.</p> <p>See NM-EX 207, Esslinger Dep. (Vol. I) (Aug. 17, 2020), 122:4-9; NM-EX 221, Reyes Dep. (Nov. 16, 2008), 23:20-24:18; NM-EX 001, Barroll Decl. ¶ 21.</p> | NM-EX 207, 221: See General Objection #2. | <p>Subject to the stated objections, disputed.</p> <p>NM-EX 001: Cited “evidence” does not support the proposition.</p> <p>NM-EX 207: Cited “evidence” does not support the proposition.</p> <p>NM-EX 221: Cited “evidence” does not support the proposition.</p> |
| 26 | Reclamation compiles an annual written report to the Rio Grande Compact Commission and gives an annual oral report at the Rio Grande Compact Commission meeting regarding operation of the Rio Grande Project. These reports contain general, annualized data concerning the operation of the Project, such as the total amount of release from Project Storage, the amount of water in Project Storage, and the annual allocations to each district. | <p>NM-EX 202, 203: See General Objection #2.</p> <p>NM-EX 516: See General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 003: See General Objection #6.</p> | Subject to the stated objections, undisputed. |

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| | <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 44:6-45:4, 102:21-103:6; NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 209:20-210:14. <i>E.g.</i>, NM-EX 516, Bureau of Reclamation, <i>Calendar Year 2009 Report to the Rio Grande Compact Commission</i>, 59-67 (Mar. 2010); NM-EX 003, Lopez Decl. ¶¶ 14-15.</p> | | |
| 27 | <p>Reclamation also provides to the State of New Mexico courtesy copies of periodic reports concerning Rio Grande Project operations, including reservoir elevations, flow readings, and storage transfers between reservoirs.</p> <p><i>See</i> NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 220:2-222:4. <i>E.g.</i>, NM-EX 513, Letter from Filiberto Cortez, Manager El Paso Field Division, Bureau of Reclamation, to Water Accounting Division, U.S. Section, International Boundary Water Commission (Sept. 29, 2009); NM-EX 514, Letter from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Lieutenant Col. Kimberly Colloton, District Engineer, Army Corps of Engineers (Sept. 29, 2009).</p> | <p>NM-EX-203: <i>See</i> General Objection #2.</p> <p>NM-EX 513, 514: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, undisputed. |
| 28 | <p>New Mexico does not, however, receive daily operation information such as the daily release amount, the order amounts, or the timing of releases to satisfy orders.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 114:6-22; NM-EX 002, D’Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; NM-EX 100, Barroll Rep., 47; NM-EX 107, Lopez Rep. 73 (“Historically, Reclamation information and data about Project operations has not routinely been shared with the States.”)</p> | <p>NM-EX 002, 004, 100: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 –These individuals lack sufficient personal knowledge to assert that no agent or representative of the State of New Mexico has ever received information.</p> | <p>Subject to the stated objections, disputed.</p> <p>This paragraph is misleading insofar as it suggests that the only way that New Mexico had notice of the depletion its ground water pumping was causing to Texas’s apportionment was by means of daily Project operational information. New Mexico’s depletions have been ongoing since the early 1950s, and New Mexico’s actual notice of the impact from its ground water pumping on Texas’s apportionment is reflected</p> |

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| | | <p>NM-EX 107: <i>See</i> General Objection #1; General Objection #6; Fed. R. Evid. 801(c), hearsay.</p> <p>All: Fed. R. Evid. 401 – Even if true, New Mexico not receiving daily operation information is irrelevant. The “fact” has no tendency to make it any less probable that New Mexico was on notice as a general matter that its groundwater pumping would be depleting surface flows destined for Texas.</p> | <p>in the following documents, with the earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> |
| 29 | <p>Likewise, New Mexico does not receive any routine notice that any specific water order, whether at the district or individual farmer level, has or has not been filled.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.</p> | <p>NM-EX 002, 004: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 – These declarants lack sufficient personal knowledge to assert that no agent or representative of the State of New Mexico has ever received such information.</p> <p>Fed. R. Evid. 401 – Even if true, lack of routine notice about specific water orders is irrelevant. That has no tendency to</p> | <p>Subject to the stated objections, disputed.</p> <p>This paragraph is misleading insofar as it suggests that the only way that New Mexico had notice of the depletion its ground water pumping was causing to Texas's apportionment was by means of daily Project operational information. New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> |

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| | | make it any less probable that New Mexico was on notice as a general matter that its groundwater pumping would be depleting surface flows destined for Texas. | <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63 - 77. TX_MSJ_6492-6891. |
| 30 | <p>Accordingly, New Mexico has no means to know, at any given time, what proportion of the water in the Rio Grande below Elephant Butte Reservoir is destined for delivery to EBID, EPCWID, or Mexico.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.</p> | <p>NM-EX 002, 004: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 – These declarants lack sufficient personal knowledge to assert that no agent or representative of the State of New Mexico is capable of knowing such information.</p> <p>Fed. R. Evid. 401 – Even if true, the proportionate quantities of water in the river at any given time has no tendency to make it any less probable that New Mexico was on notice as a general matter that groundwater pumping would be depleting surface flows destined for Texas.</p> | <p>Subject to the stated objections, disputed.</p> <p>This paragraph is misleading insofar as it suggests that the only way that New Mexico had notice of the depletion its ground water pumping was causing to Texas's apportionment was by means of daily Project operational information. New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> |
| 31 | Further, New Mexico has no means to know, at any given time, whether the Rio Grande Project releases are in fact delivered to Texas in satisfaction of EPCWID orders. | <p>NM-EX 002, 004: Fed. R. Civ. P. 56(c)(4); Fed. R. Evid. 602 – These declarants lack</p> | <p>Subject to the stated objections, disputed.</p> <p>EX-211: Cited "evidence" does not support the proposition.</p> |

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| | NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; <i>see also</i> NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 180:14-181:7. | <p>sufficient personal knowledge to assert that no agent or representative of the State of New Mexico is or ever has been capable of knowing such information.</p> <p>NM-EX 211: <i>See</i> General Objection #2.</p> <p>All: Fed. R. Evid. 401 – Even if true, lack of knowledge about specific releases at any given point in time is irrelevant. That has no tendency to make it any less probable that New Mexico was on notice as a general matter that groundwater pumping would be depleting surface flows destined for Texas.</p> | <p>Further, this paragraph is misleading insofar as it suggests that the only way that New Mexico had notice of the depletion its ground water pumping was causing to Texas's apportionment was by means of daily Project operational information. New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> |
| 32 | <p>Conversely, to the extent that any amount of water released from Project supply pursuant to a specific order is intercepted prior to delivery, New Mexico would have no basis to know of a shortage to either District without explicit notice.</p> <p>NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.</p> | <p>NM-EX-002, 004: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 – These declarants lack sufficient personal knowledge to assert that no agent or representative of the State of New Mexico is or ever has been capable of knowing this information.</p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico's depletions have been ongoing since the early 1950s, and New Mexico's actual notice of the impact from its ground water pumping on Texas's apportionment is reflected in the following documents, with the earliest dated 1947:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> |

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| | | | TX_MSJ_6492-6891. |
| 33 | <p>From 1938 through the inception of this litigation, New Mexico did not receive any notice, with the potential exception of one complaint concerning surface water diversions (discussed below), whether from Reclamation, Texas, EBID, or EPCWID, that the conduct of water users in New Mexico prevented the United States from making delivery of Project water called for by Texas (EPCWID).</p> <p>NM-EX 002, D’Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 16; <i>see</i> Ex 218, Lopez Dep. (Vol. II) (July 7, 2020), 140:13-141:13; Ex. 204, D’Antonio Dep. (Vol. II) (June 25, 2020), 169:1-7.</p> | <p>NM-EX 002, 004: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 – These declarants lack sufficient personal knowledge to assert that no agent or representative of the State of New Mexico has ever received such information.</p> <p>NM-EX 204: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, disputed.</p> <p>EX-204: Cited “evidence” does not support the proposition; Gordon Dec. in Opp. To NM at TX_MSJ_007269-007274.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas’s apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> |
| 34 | <p>Filiberto Cortez, El Paso Field Division manager for Reclamation, testified that Reclamation has only made one communication to New Mexico that notified New Mexico of concerns regarding water use in New Mexico potentially impacting Project deliveries.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 111:13-112:10.</p> | <p>NM-EX 202: <i>See</i> General Objection #2.</p> | <p>. Subject to the stated objections, disputed.</p> <p>EX-202: Cited “evidence” does not support the proposition;</p> <p>New Mexico has been on notice about the effect of its pumping on Texas’s apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> |
| 35 | <p>Specifically, in April 2012, Reclamation informed the New Mexico Office of the State Engineer that the Districts and Reclamation had identified a number of river pumps that were “impacting the deliveries” from the Rio Grande Project to EPCWID and Mexico.</p> | <p>NM-EX 521: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas’s apportionment since at least 1947 as shown in the following documents:</p> |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| | <p><i>See</i> NM-EX 521, Email from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Rolf Schmidt-Peterson, Rio Grande Bureau Basin Manager, N.M. Interstate Stream Comm’n (Apr. 11, 2012).</p> | | <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas’s apportionment.</p> |
| 36 | <p>The New Mexico State Engineer performed an investigation of the water pumps at issue and responded on September 21, 2012. The investigation concluded that all but two of the sites were operating in compliance with adjudicated water rights that are senior to the Project’s or approved groundwater withdrawal permits. With regard to the remaining two sites, the investigation concluded that the pumps in question were no longer operable, and it was not possible to determine if any diversion occurred at either site.</p> <p><i>See</i> NM-EX 523, Letter from Scott A. Verhines, State Engineer, State of N.M., to Ed Drusina, Comm’r, Int’l Boundary and Water Comm’n, and Mike Hamman, Albuquerque AreaManager, U.S. Bureau of Reclamation (Sept. 21, 2012).</p> | <p>NM-EX 523: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas’s apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas’s apportionment.</p> |
| 37 | <p>The New Mexico State Engineer further invited Reclamation to “continue to notify” the State of any “potential unlawful diversions” so that the State Engineer could “initiate appropriate water administration actions, if necessary, to prevent the unlawful diversion of water.”</p> <p><i>Id.</i></p> | <p>NM-EX 523: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas’s apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | | Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment. |
| 38 | <p>Following this invitation, Reclamation made no further reports to the New Mexico State Engineer concerning improper surface water diversions.</p> <p><i>See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 119:7-120:9.</i></p> | <p>NM-EX-202: <i>See General Objection #2.</i></p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</i></p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p> <p>NM-EX 202: cited evidence does not support the proposition.</p> |
| 39 | <p>Other than this surface pump investigation, Reclamation has not requested that New Mexico investigate or curtail any illegal water use, whether surface or groundwater.</p> <p><i>See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 113:11-18.</i></p> | <p>NM-EX-202: <i>See General Objection #2.</i></p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</i></p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | | <p>decades of its ground water pumping impact on Texas's apportionment.</p> <p>NM-EX 202: cited evidence does not support the proposition.</p> |
| 40 | <p>Further, Reclamation has not informed New Mexico that it was unable in any year to deliver Project water that Texas (EPCWID) ordered due to the actions of New Mexico water users.</p> <p><i>See</i> NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 114:23-115:7. NM-EX 002, D'Antonio Decl. ¶ 19.</p> | <p>NM-EX 202: <i>See</i> General Objection #2.</p> <p>NM-EX 002: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 – The declarant lacks sufficient personal knowledge to assert that no agent or representative of the State of New Mexico ever received such information.</p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for decades of its ground water pumping impact on Texas's apportionment.</p> <p>NM-EX 202: cited evidence does not support the proposition.</p> |
| 41 | <p>Likewise, Texas has not, through the Rio Grande Compact Commission, provided any notification that Texas's Project deliveries were shorted in any year.</p> <p><i>See</i> NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020) 192:10-193:2. NM-EX 002, D'Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 17.</p> | <p>NM-EX 002, 004: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 602 – The declarants lack sufficient personal knowledge about "any year" since the inception of the Rio Grande Compact Commission.</p> <p>NM-EX 211: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, disputed.</p> <p>New Mexico has been on notice about the effect of its pumping on Texas's apportionment since at least 1947 as shown in the following documents:</p> <p><i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1-7, 63-77.</p> <p>TX_MSJ_6492-6891.</p> <p>Also, one example of formal notice of illegal river pumping is irrelevant to the notice New Mexico has had for</p> |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| | | | <p>decades of its ground water pumping impact on Texas’s apportionment.</p> <p>Schmidt-Peterson Depo. 6/29/2020, 41:20-25 (“I mean, the first day I showed up on the job, which was in December of 1999, Joe G. Hanson, the then Compact commissioner, stood up and said, you know, deliver or we’ll sue. And that’s just kind of a constant refrain in the entire time that I’ve been there no matter what the supply is.”)</p> |

III. New Mexico’s Motion for Partial Summary Judgment to Exclude Texas’s Claim for Damages in Certain Years and Brief in Support

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| 1 | <p>The Court has already found, in this case, that “the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” and that the “purpose” of the Compact “to effect an equitable apportionment of the waters of the Rio Grande between the affected States” can only be achieved because “the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring that the Compact’s equitable apportionment to Texas <i>and part of New Mexico</i> is, in fact, made.”</p> <p><i>Texas v. New Mexico et al.</i>, 138 S. Ct. 954, 959 (2018) (internal quotations and citations omitted) (emphasis added); <i>see also</i> NM-EX 003, Declaration of E. Lopez [hereinafter “Lopez Decl.”], ¶ 14, 27.</p> | <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual “evidence” as contemplated by Fed. R. Civ. P. 56(c).</p> <p>The stated “facts” constitute improper legal conclusions in whole or in part.</p> <p>NM-EX 003: <i>See</i> General Objection #6.</p> | <p>Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be considered in the context of the parties’ legal arguments. New Mexico’s statement also mischaracterizes the Court’s opinion.</p> <p>NM-EX-003 does not support the statement.</p> |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| 2 | <p>In the Downstream Contracts, and in particular in the 1938 Downstream Contract, “the federal government promised to supply” Project water to the New Mexico water district Elephant Butte Irrigation District (“EBID”) and to the Texas water district EPCWID (collectively, the “Districts”) in accordance with their irrigable acres within the Project—“roughly 57% for New Mexico and 43% for Texas.”</p> <p><i>Texas v. New Mexico et al.</i>, 138 S. Ct. at 957.</p> | <p><i>Texas v. New Mexico</i>, 138 S. Ct. 954, 957(2018): Case law/legal opinions do not constitute factual “evidence” as contemplated by Fed. R. Civ. P. 56(c).</p> | <p>Texas disputes the application of the Supreme Court opinion, or portion thereof, as a “fact” for purposes of summary judgment. Notably, the Supreme Court ruling in question did not arise from an evidentiary hearing. The Court’s opinion should only be considered in the context of the parties’ legal arguments. New Mexico’s statement also mischaracterizes the Court’s opinion.</p> |
| 3 | <p>The Project is operated by the United States Bureau of Reclamation (“Reclamation”). The operations of the Project include the allocation and delivery of Project water stored in Elephant Butte and Caballo reservoirs to the Districts and to Mexico.</p> <p>NM-EX 001, Declaration of P. Barroll [hereinafter “Barroll Decl.”], ¶ 14; NM-EX 003, Lopez Decl., ¶ 19; <i>see also e.g.</i>, NM-EX 529, Bureau of Rec., Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas: Final Environmental Impact Statement [hereinafter “FEIS”] at 3–4 (Sep. 30, 2016).</p> | <p>NM-EX 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 003: <i>See</i> General Objection #6.</p> | <p>Subject to the stated objections, undisputed.</p> |
| 4 | <p>The term “Project supply” is the annual release of Usable Water from Project Storage, as defined in the Compact, along with the return flows and tributary inflows below Elephant Butte, which the Project recaptures and delivers to the downstream water users.</p> <p>NM-EX 001, Barroll Decl., ¶ 15; NM-EX 529, FEIS at 3–4.</p> | <p>NM-EX 001: <i>See</i> General Objection #5 and the definition of “Project supply” for purposes of the Compact is a legal conclusion, not an undisputed fact. The definition of “Project supply” is a Compact-related question that is</p> | <p>Subject to the stated objections, disputed. The definition of “Project supply” for purposes of the Compact is a legal conclusion, not an undisputed fact. The definition of “Project supply” is a Compact-related question that is outside Dr. Barroll’s area of expertise. NM-EX-529 does not support declarant’s definition.</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | | <p>outside Dr. Barroll's area of expertise.</p> <p>NM-EX 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | |
| 5 | <p>The Compact provides that "a normal release . . . from Project Storage" is 790,000 acre-feet ("AF").</p> <p>NM-EX 001, Barroll Decl., ¶ 16; NM-EX 330, Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785 [hereinafter "Compact"], art. VIII; <i>see also</i> NM-EX 529, FEIS at 17 (describing a full allocation release to be 790,000 acre-feet per year ("AFY") as provided in the Compact).</p> | <p>NM-EX 001: <i>See</i> General Objection #5.</p> <p>NM-EX 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>Fed. R. Evid. 704: The statement includes impermissible legal conclusions.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, disputed in part. Texas does not dispute that the quoted language is contained in Article VIII of the Compact. The precise meaning of Article VIII is a legal conclusion. The 790,000 acre-feet release was to serve Project lands in New Mexico and Texas, the 1906 Mexican treaty obligation, and non-Project lands in Texas down to Ft. Quitman, ca. 1938. Miltenberger Declaration paragraphs 29-38 discuss this. TX_MSJ_001585.</p> <p>Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 25, 49 - 51.</p> |
| 6 | <p>The Compact defines "Project Storage" as "the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project . . ."; and "Usable Water" as "all water exclusive of credit water, which is in project storage and which</p> | <p>NM-EX 001: <i>See</i> General Objection #5.</p> <p>NM-EX 003: <i>See</i> General Objection #6.</p> <p>Fed. R. Evid. 704: The statement includes</p> | <p>Subject to the stated objections, undisputed.</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| | <p>is available for release in accordance with irrigation demands, including deliveries to Mexico."</p> <p>NM-EX 001, Barroll Decl., ¶ 17; NM-EX 003, Lopez Decl., ¶ 12; NM-EX 330, Compact, arts. I (k), (l).</p> | <p>impermissible legal conclusions.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | |
| 7 | <p>Project Allocations are the amount of Project supply each District (EBID and EPCWID) is entitled to order (take) from the Project, each year, and the amount Mexico is entitled to receive by Treaty.</p> <p>NM-EX 001, Barroll Decl., ¶ 18; NM-EX 003, Lopez Decl., ¶ 23; NM-EX 307, Convention between the United States and Mexico: Equitable Distribution of the Waters of the Rio Grande [hereinafter "Treaty"] (May 21, 1906); NM-EX 529, FEIS at 4.</p> | <p>NM-EX 001: Texas objects to Barroll paragraph 18's definition of "Project Allocations" to the extent it incorporates paragraph 15's definition of "Project Supply," which is a legal conclusion and not a basis for "undisputed facts."</p> <p>NM-EX 003: <i>See</i> General Objection #6.</p> <p>NM-EX 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> <p>Fed. R. Evid. 704: The statement includes impermissible legal conclusions.</p> | <p>Subject to the stated objections, disputed in part. The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| 8 | <p>On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938.</p> <p>NM-EX 324, Contract between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 [hereinafter "1938 Downstream Contract"] (Feb. 16, 1938).</p> <p>The 1938 Downstream Contract states that in the event of a shortage of water "the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID]."</p> <p><i>Id.</i>; NM-EX 001, Barroll Decl., ¶ 19; NM-EX 003, Lopez Decl. ¶¶ 20–22.</p> | <p>NM-EX 003: <i>See</i> General Objection #6.</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> | <p>Subject to the stated objections, disputed in part. The second paragraph correctly quotes from the 1938 Downstream Contract but in the absence of an understanding of the context and purpose, the paragraph is misleading. NM-EX-324. Congress authorized the execution of amended repayment contracts with EBID and EPCWID (or EP #1) in 1937, but it did not authorize the 1938 contract as such. The 1938 Downstream Contract was instead part of an effort by Reclamation, extending back to 1929, to fix the basis for repayments between the two districts. The districts themselves ultimately instigated this particular agreement to settle the issue. Miltenberger Declaration paragraphs 43-45 discuss the 1937 and 1938 Downstream Contracts; the context and purpose of the 1938 Downstream Contract is addressed in more detail in the paragraphs cited below. TX_MSJ_001585.</p> <p>The discussion is lengthy, and is incorporated herein by reference. <i>See</i> Miltenberger Dec. in Opp. to NM at TX_MSJ_007371, paragraphs 1 – 7, 43 – 45, 54-59, 61.</p> |
| 9 | <p>Until about 1979, Reclamation delivered Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings.</p> | <p>NM-EX 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay. The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | <p>Subject to the stated objections, undisputed.</p> |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| | <p>Reclamation ditch riders then delivered the ordered water to individual farms.</p> <p>NM-EX 001, Barroll Decl., ¶ 20; NM-EX 003, Lopez Decl., ¶¶ 24-25; NM-EX 529, FEIS at 5.</p> | | |
| 10 | <p>In about 1979, Project operations changed, and Reclamation started to allocate water to each District for delivery at the Districts’ canal headings (<i>i.e.</i>, Arrey, Leasburg, Mesilla, Franklin, and Riverside). Reclamation now determines the Districts’ Project allocations, takes water orders from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for each District. The Districts in turn take farm orders from their members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates.</p> <p>NM-EX 001, Barroll Decl., ¶ 21; NM-EX 003, Lopez Decl., ¶ 26; NM-EX 529, FEIS at 5.</p> | <p>NM-EX 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 003: <i>See</i> General Objection #6.</p> | <p>Subject to the stated objections, undisputed.</p> |
| 11 | <p>Starting in about 1990, Reclamation determined that a release of 763,842 AFY from Project Storage was a full-supply condition.</p> <p><i>See, e.g.</i>, NM-EX 105, Excerpts, United States’ Disclosure of Expert Rebuttal Witness Dr. Ian M. Ferguson (Dec. 30, 2019) [hereinafter “Ferguson Discl.”] at 8 (“Prior to the [2008 Operating Agreement], full supply was defined by Usable Water available for the current-year allocation equal to or greater than 763,800 acre-feet”); NM-EX 104, Excerpts, United</p> | <p>NM-EX 105, 104: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 400: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed in part. In NM-EX 001, the statement that “Reclamation will ensure” the allocation is available for diversion is not supported by citations NM-EX-400 or NM-EX-529.</p> |

| | <u>New Mexico’s Stated “Fact(s)” and Proffered Evidence</u> | <u>Texas’s Evidentiary Objection(s)</u> | <u>Texas’s Response to New Mexico’s “Fact(s)”</u> |
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| | <p>States’ Disclosure of Rebuttal Expert Dr. Al Blair (Dec. 30, 2019) [hereinafter “Blair Discl.”] at 8 (stating that prior to 2008 Operating Agreement a maximum annual release for a full-supply year was 763,840 AF).</p> <p>Reclamation determined that this release from Project Storage would provide 931,841 AFY of divertible water at U.S. and Mexico canal headings.</p> <p>NM-EX 001, Barroll Decl., ¶ 22; NM-EX 400, Bureau of Rec., Rio Grande Project Water Supply Allocation Procedures [hereinafter “WSAP”] at 4.</p> <p>According to Project allocation procedures at that time, from this 931,841 AFY, 60,000 AFY was deducted for delivery to Mexico. Reclamation then divided the remaining 871,841 AFY, 43% (376,862 AFY) to EPCWID and 57% (494,979 AFY) to EBID in accordance with the percentages set out in the 1938 Downstream Contract.</p> <p>NM-EX 001, Barroll Decl., ¶ 22; NM-EX 400, WSAP at 4–5; NM-EX 324, 1938 Downstream Contract.</p> <p>The 376,842 AFY quantity represents a full-supply Project allocation to EPCWID that Reclamation will ensure is available for diversions at EPCWID’s headgates if EPCWID orders (takes) this volume of water.</p> <p>NM-EX 001, Barroll Decl., ¶ 23; NM-EX 400, WSAP at 4–5; <i>see also</i> NM-EX 529, FEIS at 86 (referring to “[t]he historical full [EPCWID] allocation of 376,842 acre-feet”).</p> | <p>The cited evidence does not support the stated “facts” in whole and/or in part. Fed. R. Civ. P. 56(c).</p> | |

| | <u>New Mexico's Stated "Fact(s)" and Proffered Evidence</u> | <u>Texas's Evidentiary Objection(s)</u> | <u>Texas's Response to New Mexico's "Fact(s)"</u> |
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| 12 | <p>Between 1985 and 1990, before Reclamation had finalized the analysis described above, Reclamation's full-supply year determinations for EPCWID varied slightly from 376,842 AFY. For example, from 1985 through 1988, Reclamation determined a full-supply year Project allocation to EPCWID to be 363,963 AFY; and in 1989 and 1990, Reclamation determined a full-supply year Project allocation to EPCWID to be 359,165 AFY. These were hydrologically wet years with plenty of water in Project Storage and full-supply allocations were available to both Districts (EBID and EPCWID).</p> <p>NM-EX 001, Barroll Decl., ¶ 24; NM-EX 509, Bureau of Reclamation Table, Rio Grande Project Allocation of Project Water Supply (Apr. 3, 2008) ("Reclamation Data Table") at col. 2.</p> | <p>NM-EX 509: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX-001: <i>See</i> General Objection #5.</p> | <p>Subject to the stated objections, disputed. In NM-EX-001, the quantifications about EP#1 allocations are not supported and the citation to NM-EX-509 does not show allocations to each district.</p> <p>Additionally, <i>see</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p> |
| 13 | <p>From 2006 onwards, Reclamation has determined annual Project allocations to the Districts under the 2008 Operating Agreement, and the antecedent D3-Allocation-Plus-Carryover method from which the 2008 Operating Agreement was developed.⁵</p> <p>NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, Operating Agreement for the Rio Grande Project [hereinafter "2008 Operating Agreement"] (Mar. 10, 2008); NM-EX 502, D3 Allocation of Project Water to the Districts and Mexico; NM-EX 507, 2007 Operating Procedures.</p> <p>Under the 2008 Operating Agreement, Reclamation determines</p> | <p>NM-EX 001: <i>See</i> General Objection #5.</p> <p>NM-EX 502, 510, 507: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 105, 104: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 100: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p> |

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| | <p>a full-supply year Project allocation to EPCWID to be 388,192 AFY.</p> <p>NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, 2008 Operating Agreement at 3; <i>see, e.g.</i>, NM-EX 105, Ferguson Discl. at 8 (“[U]nder the [2008 Operating Agreement], full supply conditions are defined by Usable Water available for the current-year allocation equal to or greater than 790,000 acre-feet.”); NM-EX 104, Blair Discl. at 8 (stating that prior to the 2008 Operating Agreement, a maximum annual release for a full-supply year was 763,840 AF).</p> <p>Footnote ⁵ Under the post-2006 allocation system, EPCWID was allocated far more Project Water than the share due its 67,000 of 155,000 Project irrigable acres (43%), and received far more than its 43% share of Project Water.</p> <p>NM-EX 001, Barroll Decl., ¶ 36; <i>see also</i> NM-EX 100, P. Barroll Expert Report (Oct. 31, 2019), at x-xi, 31, 33, 69.</p> | | |
| 14 | <p>During each irrigation season (approximately March through October), each District is entitled to order delivery of Project Water up to its annual Project allocation. Deliveries to the Districts are measured by gages and are converted into what are known as “Charged Diversions” (Allocation Charges), which are then subtracted from each District’s allocation account as the irrigation season progresses.</p> <p>NM-EX 001, Barroll Decl., ¶¶ 21, 26; NM-EX 510, 2008 Operating Agreement at 9–11; NM-EX 529, FEIS at 18, 24, App. B.</p> | <p>NM-EX 001: <i>See</i> General Objection #5.</p> <p>NM-EX 510, 529: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | Subject to the stated objections, undisputed. |

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| 15 | <p>During the course of the irrigation season, Reclamation receives orders from the Districts and adjusts the gates of Caballo Dam so that these orders are delivered to the Districts' canal headings.</p> <p><i>See</i> NM-EX 531, Rio Grande Project Operations Manual at 4-5 (2018) [hereinafter "Operations Manual"].</p> <p>Reclamation sets the Caballo release amount taking into account the losses and gains between Caballo Dam and the canal headings to which it is delivering water, so that regardless of what losses or gains are occurring, the amount ordered will reach the canal heading for which the order is being made.</p> <p>NM-EX 531, Operations Manual at 4-8.</p> <p>If the delivery to EPCWID falls short of the order, there is a procedure by which EPCWID, EBID and Reclamation coordinate and water is released from EBID's works to temporarily mitigate the shortfall until adjustment of Caballo releases resolves the problem.</p> <p>NM-EX 001, Barroll Decl., ¶ 27; NM-EX 531, Operations Manual, at 8.</p> <p>Historically, Reclamation has always been able to fulfill the orders made by the Districts.</p> <p>NM-EX 001, Barroll Decl., ¶ 27; <i>see also</i> NM-EX 105, Ferguson Discl. at 12-13 ("EPCWID received all water that the district ordered during the period 1979-2002"); NM-EX 210, Deposition of Dr. Ian M. Ferguson,⁶ Vol. 2 (Feb. 20, 2020) [hereinafter "Ferguson Dep. Vol. 2"] at 260:6-7</p> | <p>NM-EX 531: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 001: Fed. R. Civ. P. 56(c)(4), Fed. R. Evid. 702(a) – Dr. Barroll cites Dr. Ferguson as her only source for her statement that "Historically, Reclamation has always been able to fulfill the orders made by the Districts." She has insufficient personal knowledge to assert this opinion for purposes of Rule 56 summary judgment, and at trial she would lack qualification to offer this opinion as an expert under Fed. R. Evid. 702(a), and it would additionally be based on insufficient facts and data under Fed. R. Evid. 702(a).</p> <p>NM-EX 105: <i>See</i> General Objection #1; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 210: <i>See</i> General Objection #2.</p> <p>NM-EX 209: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, disputed in part. Dr. Barroll cites Dr. Ferguson as her only source for her statement that "Historically, Reclamation has always been able to fulfill the orders made by the Districts." She has insufficient personal knowledge to assert this opinion for purposes of Rule 56 summary judgment, and at trial she would lack qualification to offer this opinion as an expert under Fed. R. Evid. 702(a), and it would additionally be based on insufficient facts and data under Fed. R. Evid. 702(a).</p> |

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| | <p>("I'm not aware of any records that suggest EP1 [EPCWID] ordered water that it did not receive.").</p> <p>Footnote ⁶: Dr. Ferguson is a Hydrologic Engineer for Reclamation, and since June 2011 Dr. Ferguson has provided technical support to Reclamation's Albuquerque Area Office on issues related to the Rio Grande Project.</p> <p>NM-EX 209, Deposition of Dr. Ian M. Ferguson, Vol. 1 (Feb. 19, 2020) [hereinafter "Ferguson Dep. Vol. 1"] at 13:4-19 (stating that he joined Reclamation in April 2001 as a hydrologic engineer and is currently a hydrologic engineer at Reclamation); <i>id.</i> at 44:6-16 (stating that he provided technical support for Reclamation's Albuquerque-area office on issues relating to the Rio Grande project).</p> | <p>The cited evidence does not support the stated "facts" in whole and/or in part. Fed. R. Civ. P. 56(c).</p> <p>The stated "facts" constitute improper legal conclusions in whole or in part.</p> | |
| 16 | <p>Reclamation recognizes the years 1985 through 2002 and 2005 as full supply years for the Project, and also recognizes those years as <i>full-supply years for EPCWID</i>, meaning that in each of those years Reclamation determined that a full allocation of Project water was available for diversions at EPCWID's headgates if ordered.</p> <p>NM-EX 001, Barroll Decl., ¶¶ 28–30, 32–33, 37 & Table 1; <i>see also</i> NM-EX 402, EPCWID Accounting Records [EOY_Acct_EP_1985-2016]; NM-EX 509, Reclamation Data Table; NM-EX 202, Deposition of Filiberto Cortez,⁷ Vol. 1 (Jul. 30, 2020) [hereinafter "Cortez Dep. Vol. 1"] at 82:16-83:2, 91:1-8, 92:19-93:7) (stating that 1979 through 2002 were "full supply" years, that a full Project supply allocation is the</p> | <p>NM-EX 001: <i>See</i> General Objection #5.</p> <p>NM-EX 402: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 509: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 202: <i>See</i> General Objection #2.</p> <p>NM-EX 210: <i>See</i> General Objection #2.</p> | <p>Subject to the stated objections, disputed.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p> |

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| | <p>maximum amount that Reclamation will allocate, and that “[a] full supply is the allocation made to the district based on historical data” about irrigation demands); NM-EX 210, Ferguson Dep. Vol. 2 at 229:15-18 (“[F]rom about 1985 or ’6, through about 2002 . . . I know to be years of full project supply.”), 233:1-3 (agreeing that “there’s full supply from 1979 to 2002”); and 259:12-16 (agreeing that “[t]he project enjoyed full supply conditions from 1979 through 2002, and EPCWID was allocated a full supply in each year”); NM-EX 412, Herman R. Settemeyer,⁸ P.E., Rio Grande Project/Rio Grande Compact Operation [hereinafter “Settemeyer Presentation”] at G-4 (2004) (presenting that “Rio Grande Project water users enjoyed full allocations of water from 1979 until 2003”); <i>see also</i> NM-EX 214, Excerpts, Deposition of J. Phillip King,⁹ Vol. 1 (May 18, 2020) [hereinafter “King Dep. Vol. I”] at 102:19-23 (confirming that a full supply “is the amount of water that Reclamation allocated to each district from 1979 to 2002, when each year was a full-supply” and that in each of those years “[t]here was a full supply available for release from storage”).</p> <p>Footnotes 7, 8, and 9:</p> <p>⁷ Mr. Cortez is the former manager of Reclamation’s El Paso office, which previously managed the water supply for the Rio Grande Project.</p> <p>NM-EX 202, Cortez Dep. Vol. 1 at 24:5-18 (stating that starting in 2007 he was the manager for the [Reclamation] El Paso Field Division, which is “the office which operated the Rio Grande Project at that time . . . That involved the management of the</p> | <p>NM-EX 412: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 214: <i>See</i> General Objection #3.</p> <p>NM-EX 225: <i>See</i> General Objection #2.</p> | |

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| | <p>reservoirs . . . dealings with the irrigation districts, water deliveries, making the allocation, anything having to do with the Rio Grande Project”); <i>see also id.</i> at 10:25-11:2 (explaining that currently he is “the special assistant to the [Reclamation] Albuquerque office area manager”).</p> <p>⁸ Mr. Settemeyer is the former Texas Engineer Advisor to the Rio Grande Compact Commission.</p> <p>NM-EX 225, Deposition of Herman Settemeyer, Vol. 1 (Jul. 30, 2020) at 29:13-18, 29:25-31:3 (stating that he started working on interstate compacts in 1987; “I was the engineer Advisor for the . . . Rio Grande [Compact]”).</p> <p>⁹ Dr. King has been identified as an expert witness for the State of Texas and for the United States in this case.</p> <p><i>See</i> NM-EX 214, King Dep. Vol. 1 at 44:10-14; 21:10-16 (stating that he considers himself an expert in “[i]rrigation and draining engineering and management, irrigation system operation, engineering hydrology, and statistical hydrology”).</p> | | |
| 17 | <p>The years 2007 through 2010 were also full-supply years for EPCWID because in each of those years EPCWID’s annual allocation available for diversions at EPCWID’s headgates (if ordered) exceeded 376,862 AFY—the full-supply allocation amount determined by Reclamation in 1990—and also exceeded the higher full-supply allocation to EPCWID (388,192 AFY) under the 2008 Operating Agreement.</p> | <p>NM-EX 001: <i>See</i> General Objection #5.</p> <p>NM-EX 402: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> <p>NM-EX 500: <i>See</i> General Objection #3; Fed. R. Evid. 801(c), hearsay.</p> | <p>Subject to the stated objections, disputed.</p> <p><i>See</i> Brandes Dec. in Opp. to NM at TX_MSJ_007312, paragraphs 1 – 24. The discussion is lengthy, and is incorporated herein by reference.</p> |

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| | NM-EX 001, Barroll Decl., ¶¶ 28, 31, 34-37 & Table 2; NM-EX 402, EPCWID Accounting Records; NM-EX 500, EPCWID Water Allocation Records (2006-2016); NM-EX 510, 2008 Operating Agreement, Tables 2 & 4. | | |

Dated: December 22, 2020

Respectfully submitted,

s/ Stuart L. Somach

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