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

THE STATE OF TEXAS'S OPPOSITION TO THE STATE OF NEW MEXICO'S MOTION FOR PARTIAL SUMMARY JUDGMENT ON COMPACT APPORTIONMENT AND BRIEF IN SUPPORT

Stuart L. Somach, Esq.*
Andrew M. Hitchings, Esq.
Robert B. Hoffman, Esq.
Francis M. Goldsberry II, Esq.
Theresa C. Barfield, Esq.
Sarah A. Klahn, Esq.
Brittany K. Johnson, Esq.
Richard S. Deitchman, Esq.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com
**Counsel of Record*

December 22, 2020

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Federal Cases

State Statutes

Legislative Authority

Rules of Court

I. INTRODUCTION

The State of Texas (Texas) opposes the State of New Mexico's (New Mexico) Motion for Partial Summary Judgment on Compact Apportionment (NM MSJ on Apportionment).

In its motion, New Mexico seeks a declaration that the 1938 Rio Grande Compact[1] (Compact) apportions 57 percent of the Rio Grande Project (Project) water supply below Elephant Butte Reservoir to New Mexico and 43 percent to Texas. New Mexico's argument is based upon what it alleges is the "plain language" of the Compact. In support of its position, it recites the correct rule of interpretation of an interstate compact: "if the text of the Compact is unambiguous it is conclusive" and "no court may order relief inconsistent with its express terms." NM MSJ on Apportionment at 25 (internal citations omitted). After reciting the rule, it then proceeds to ignore it.

New Mexico's argument goes well beyond the plain language of the Compact. Nowhere does New Mexico cite any Compact language, plain or otherwise, that supports its contentions. There is nothing in the Compact that can be read as adopting a 57-43 percent apportionment split between Texas and New Mexico below Elephant Butte Reservoir; and there is nothing in the Compact that supports New Mexico's contention that it receives any apportionment below Elephant Butte Reservoir. It is axiomatic that if one relies upon the "plain language" of the Compact to support a position one ought, at some point, actually identify the "plain language" that is alleged to support the position asserted.[2]

[1] Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.

[2] On November 5, 2020, Texas filed its Motion for Partial Summary Judgment (TX MSJ). Among other things, Texas seeks an order setting forth the parties' respective Compact apportionments, based upon the plain language of the Compact. Unlike New Mexico, Texas sets forth the express Compact language defining the apportionments to each of the parties to the Compact.

In its disjointed argument, New Mexico ignores the law it says controls and instead of referring to the plain language of the Compact, relies upon language from third party contracts to which it is not a party, as well as other extrinsic evidence including "negotiating history," "course of performance," and "other interstate compacts."[3] Contrary to New Mexico's assertion, its argument is completely inconsistent with the assertion that the Compact is unambiguous. Instead, New Mexico effectively argues that the Compact is ambiguous, and that the Court must look to extrinsic evidence to define apportionment. This point is underscored by New Mexico's reliance on 114 enumerated paragraphs which it purports to be "undisputed material facts." NM MSJ on Apportionment at 1-24. Those facts are, however, disputed. Extrinsic evidence is factual in nature. Therefore, when it is contested, as it is here, then there are genuine issues of fact that can only be resolved at trial.

Importantly, in the event that the Court denies NM MSJ on Apportionment and grants partial summary judgment in Texas's favor on issues 1 and 2 in the concurrently pending TX MSJ, the apportionment issue will be resolved and will not need to be addressed at trial. Issues 1 and 2 of the TX MSJ seek orders that the Compact is unambiguous and that the apportionments of Rio Grande water to New Mexico and Texas are set forth in the Compact's plain text and structure. TX MSJ at 3-4, 59-68. Texas's argument is grounded in the Compact itself, relying upon the Compact language and legal authority. *Id.* Texas does not

[3] Oddly enough, it was the alleged reliance on this extrinsic evidence that was the basis of New Mexico's criticism leveled at the first Special Master in New Mexico's attacks on the First Interim Report of the Special Master, on New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention and Motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 for Leave to Intervene (First Report) (Feb. 9, 2017). *See* State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support (Jun. 9, 2017) (NM Exceptions to First Report), at TX_MSJ_007004-007010; Declaration of Theresa Barfield 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.

cite to extrinsic evidence such as "negotiating history," "course of performance," and "other interstate compacts" to define the New Mexico and Texas apportionments because the language is unambiguous on the face of the Compact. *Id.*

New Mexico's entire argument is based upon the notion that the Court must look *outside* the four corners of the Compact to determine Compact apportionments. And, the extrinsic facts that it points to are material and are disputed by Texas. Because New Mexico's motion is based upon genuinely disputed extrinsic evidence, summary judgment is simply improper. Accordingly, New Mexico's request that the Special Master recommend, and that the Court declare, that the Compact apportions water to both New Mexico and Texas below the Reservoir on a 57 to 42 percent split basis must fail as a matter of law.

II. ARGUMENT

A. New Mexico's Motion is Based upon Disputed Issues of Material Fact, Rendering Summary Judgment Improper as a Matter of Law

1. The summary judgment standard of review

This Court is not bound by the Federal Rules of Civil Procedure but may use Rule 56 as a guide. Sup. Ct. R. 17.2; *Nebraska v. Wyoming*, 507 U.S. 584, 590 (1993). Summary judgment should only be granted if the record and affidavits show that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). The parties may support their positions by citing to the record, including documents, affidavits, or declarations, or by showing that the materials cited by the other party do or do not establish the absence of a genuine dispute. Fed. R. Civ. P. 56(c). An issue is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 258 (1986); *see also Mitchell v. Shane*, 350 F.3d 39, 47 (2d Cir. 2003). A fact

is material if it "might affect the outcome of the suit under the governing law." *Anderson*, 477 U.S. at 248. Thus, "the substantive law will identify which facts are material." *Id.* Facts that are "critical" under the substantive law are material, while facts that are "irrelevant or unnecessary" are not. *Id.*

The moving party shoulders the initial burden of setting out the basis of its motion and showing the absence of a genuine issue of material fact. *Celotex*, 477 U.S. at 323. Once the moving party has met this burden, the nonmoving party must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial by depositions, affidavits, or otherwise. *Mosley v. City of Northwoods*, 415 F.3d 908, 910 (8th Cir. 2005). However, "because we view the facts in the light most favorable to the nonmoving party, we do not weigh the evidence or attempt to determine the credibility of the witnesses." *Kammueller v. Loomis, Fargo & Co.*, 383 F.3d 779, 784 (8th Cir. 2004). Instead, "the court's function is to determine whether a dispute about a material fact is genuine." *Quick v. Donaldson Co., Inc.*, 90 F.3d 1372, 1376-77 (8th Cir. 1996).

2. Texas disputes critical aspects of New Mexico's purported "undisputed material facts"

New Mexico enumerates 114 paragraphs that it declares to be "undisputed material facts," upon which its motion relies. NM MSJ on Apportionment at 1-24. These 114 enumerated paragraphs constitute a mixed bag of information: some are factual in nature, some legal, and some are mixed presentations of fact and law. *Id.* New Mexico purports to support these 114 enumerated paragraphs with "evidence." *Id.* However, New Mexico seeks to support these "facts" with evidence that is largely inadmissible, fails to lend support for the intended "facts," or is simply not evidence at all.

Texas addresses each of the 114 enumerated paragraphs, and the evidence New Mexico proffers in support thereof, in a separate pleading filed concurrently herewith, entitled *The State of Texas's Evidentiary Objections and Responses to New Mexico's Facts.* Texas incorporates its objections and responses to New Mexico's purported evidence and facts herein by reference, but, with the exception of a few areas, does not repeat the objections and responses here.[4]

3. The plain language of an unambiguous interstate compact must be enforced without modification

The standard for compact interpretation is well-established. An interstate compact, upon its approval by Congress, is both a contract and a law of the United States. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). Accordingly, the rules of contract interpretation and statutory interpretation apply. *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)); *Texas v. New Mexico*, 482 U.S. at 128.

In interpreting a compact as a federal statute, the Court gives effect to every word. "Interstate compacts, like treaties, are presumed to be 'the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.' " *New Jersey v. Delaware*, 552 U.S. at 615-16 (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). If the text of a compact is unambiguous, "no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983); *see also Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (holding that the "clear language" of the compact refuted

[4] In section II.E, hereto, Texas highlights several of the more significant areas of dispute raised by New Mexico's 114 enumerated paragraphs.

Colorado's legal challenge). "[C]ourts have no power to substitute their own notions of 'equitable apportionment' for the apportionment chosen by Congress." *Texas v. New Mexico*, 462 U.S. at 568. "If there is a compact, it is a law of the United States, and [the Court's] first and last order of business is interpreting the compact." *Id.* at 567-68. In effect, the unambiguous terms of the Compact are conclusive.

4. If the terms of a compact are ambiguous, then summary judgment is improper, and the factual dispute must proceed to trial

An interpretation of a compact term that produces impractical results suggests that the term is ambiguous, and an ambiguous term should be harmonized with the intent of the drafters. *Oklahoma v. New Mexico*, 501 U.S. at 232-33, 237. It is only appropriate to resort to extrinsic material to interpret a compact that is ambiguous. *Id.* at 235 n.5 (affirming that negotiation history of a compact is relevant to interpretation of an ambiguous term of the compact). When a compact term is ambiguous, it is appropriate to "turn to other interpretive tools to shed light on the intent of the Compact's drafters." *Tarrant Reg'l Water Dist. v. Hermann*, 569 U.S. 614, 630 (2013); *Oklahoma* at 234-35, n.5 ("a congressionally approved compact is both a contract and a statute . . . and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous").

Summary judgment is improper when an ambiguous contract is coupled with material issues of fact. *Ultra Clean Holdings, Inc. v. TFG-Cal., Ltd. P'ship,* 534 F.App'x 776, 780 (10th Cir. 2013) (stating that in an ambiguous contract, a genuine issue of material fact exists which cannot be determined summarily by the court); *Baum v. Helget Gas Prods., Inc.*, 440 F.3d 1019, 1023 (8th Cir. 2006) (holding that "[w]here the contract is textually ambiguous, a question of material fact exists as to the parties' intent," which cannot be resolved on motion for summary judgment).

Thus, if the Special Master concludes that the Compact is ambiguous based upon New Mexico's premise, partial summary judgment would be improper, and the issue should proceed to trial.

B. New Mexico's Motion Should be Denied Because its Proposed Apportionment Scheme Belies Established Principles of Compact Interpretation

New Mexico asks the Court to declare that both New Mexico and Texas have Compact apportionments below Elephant Butte Reservoir, and that the apportionment is 57 percent of the Project water supply to New Mexico and 43 percent to Texas (New Mexico Apportionment Scheme). NM MSJ on Apportionment at 26. In making this argument, New Mexico relies upon the Court's 2018 opinion in this case (*Texas v. New Mexico*, 138 S. Ct. 954 (2018) (2018 Opinion), "the structure and plain language of the Compact[,]" and extrinsic evidence (negotiating history, course of performance and other interstate Compacts). NM MSJ Apportionment at 26-54.

As discussed in detail below, New Mexico's application of the 2018 Opinion to this issue is misplaced and speculative at best, because the Court has not yet considered, through briefing, Special Master recommendations, oral argument or otherwise, the issue of apportionment. Further, its argument that the Compact's structure and plain language support the New Mexico Apportionment Scheme is incorrect. To the contrary, the Compact's plain language makes no reference to any apportionment to New Mexico below the Reservoir. The Compact's plain language requires New Mexico to "deliver" water to Elephant Butte Reservoir. The plain language and structure of the Compact is that the delivery is to Texas. Nothing in the plain language of the Compact or its structure would even remotely suggest that New Mexico delivers water *to itself* at Elephant Butte Reservoir. *See* TX MSJ at 61-69.

Since the plain language and structure of the Compact does not support the New Mexico position, it is left with relying on extrinsic evidence. This violates the well-established standards for interstate compact interpretation discussed at sections II.A.3-4, *supra*, and is, in any event, contrary to New Mexico's assertion that the argument is based upon the Compact's plain language and structure. Finally, pursuant to proper Compact interpretation principles, New Mexico's reliance on any form of extrinsic evidence to support its Apportionment Scheme necessarily means that the Compact is ambiguous, precluding summary judgment as a matter of law. *See* section II.A.4, *supra.*

C. <u>The Supreme Court Has Not Ruled on Apportionment</u>

New Mexico argues that a ruling on apportionment must be consistent with the 2018 Opinion. In making this argument New Mexico conflates the Court's dictum with the Court's opinion.

The Court's reference to an "apportionment" in the 2018 Opinion is dictum because the issue was not before the Court, or necessary to the ruling. *Texas v. New Mexico,* 138 S. Ct. at 959. The dictum was derived from statements in the First Report in which the Special Master said "[t]he Rio Grande Project [was intended] to be the sole vehicle by which Texas and lower New Mexico would receive the equitable apportionment of Rio Grande waters." First Report at 194-95. The Supreme Court decision merely repeats this language in the context of describing the United States' role "as a sort of 'agent' " of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico "is, in fact, made." *Texas v. New Mexico,* 138 S. Ct. at 959. Indeed, the context of the 2018 Opinion was the Court's determination as to whether the United States could intervene in the case. *Id.* The context was *not* a discussion of Compact apportionment. *Id.*

The question of whether New Mexico has, or does not have, an apportionment below Elephant Butte Reservoir was not an issue before the Special Master when he issued the First Report and was not subject to a finding in the First Report. The issue was never briefed or otherwise addressed in the context of any of the issues that were the subject of the First Report. Likewise, the issue of whether New Mexico is entitled to any water delivery below Elephant Butte Reservoir, by way of apportionment, allocation, or otherwise, was never briefed, analyzed, or addressed by the Supreme Court. An isolated comment by the Court in an opinion is dictum, where the comment is not essential to the Court's disposition of any of the issues contested in the case. *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001); *see also California v. United States*, 438 U.S. 645, 673-74 (1978) (disavowing dicta in two prior cases that "undoubtedly goes further than necessary to decide the cases presented to the Court" to the extent it would prevent the state from imposing conditions on a permit granted to the United States that were not inconsistent with the federal reclamation statute).

Thus, the language in the First Report and in the 2018 Opinion was, at most, dictum. The instant briefing (in conjunction with the separately filed TX MSJ) is the first time that the apportionment issue has been addressed in this litigation. That is the case no matter how many times New Mexico quotes the Court's 2018 Opinion. *See* NM MSJ on Apportionment at 24, 28, 30, 33, and 53. Furthermore, as set forth in *Texas's Evidentiary Objections and Responses to New Mexico's Facts* filed concurrently herewith, New Mexico's attempt to utilize statements made by the Court in the 2018 Opinion as "undisputed material facts" is improper. *See* NM MSJ on Apportionment at 24, ¶¶ 113, 114. Statements by the Court in the 2018 Opinion do not constitute "undisputed material facts" (i.e., "evidence") for purposes of a

motion for summary judgment. The 2018 Opinion is appropriately analyzed and discussed in the context of the parties' legal arguments.

D. The Plain Text of the Compact Does Not Support New Mexico's Proposed Apportionment Scheme

1. The unambiguous Compact does not apportion water to New Mexico below Elephant Butte Reservoir

The question of Compact interpretation begins with the threshold legal issue of determining whether the Compact is unambiguous, which simply requires looking to the plain text and structure of the Compact. *See* section II.A.3, *supra*. As New Mexico correctly states, "no court may order relief inconsistent" with the express terms of the Compact. *See* NM MSJ on Apportionment at 28, quoting *Texas v. New Mexico,* 462 U.S. at 564.

Texas and New Mexico agree on the fundamental express terms of the Compact:

- The preamble to the 1938 Compact declares that the signatory states intended to apportion equitably the waters of the Rio Grande above Fort Quitman, Texas. Compact at 1; NM MSJ on Apportionment at 29.

- The scope of the apportionment is clear from the definition of "Rio Grande Basin," which means "all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman . . . ." Compact, art. I(c); NM MSJ on Apportionment at 29.

- There are two delivery obligations in the Compact: The Colorado to New Mexico state line delivery set forth in Article III, and the New Mexico to Elephant Butte Reservoir delivery set forth in Article IV. Compact, arts. III and IV; NM MSJ on Apportionment at 29.

- "Once New Mexico meets its Article IV obligation, the water becomes 'Usable Water' in 'Project Storage,' " and Reclamation releases the water "pursuant to the Downstream Contracts and the 1906 treaty[5] that were already in place when the

[5] Convention Between U.S. and New Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mexico, May 21, 1906, 34 Stat. 2953 (May 21, 1906), Treaty Series No. 455 (1906 Treaty).

Compact was signed." Compact, arts. I(*l*) and I(k); NM MSJ on Apportionment at 29-30.

Despite the agreement regarding the fundamental express terms of the Compact, New Mexico nonetheless goes well beyond anything that can be gleaned from the plain text of the Compact when it concludes that the Article IV delivery requirement by New Mexico into the Reservoir is only one *part* of its two-part equitable apportionment "for the Middle Rio Grande." NM MSJ on Apportionment at 29. Ignoring the actual plain language of the Compact, which apportions to New Mexico the water that Colorado delivers to New Mexico, pursuant to Article III of the Compact, subject only to its Article IV obligation to deliver water to Texas at Elephant Butte Reservoir, New Mexico fabricates a position in which it gets two apportionments, one above and one below Elephant Butte Reservoir. New Mexico's position, however, can be found nowhere in the plain language of the Compact. New Mexico reads language into the Compact that simply does not exist. On that basis alone, New Mexico's proposed Apportionment Scheme must fail as a matter of law.

Notwithstanding the foregoing and with no apparent embarrassment, New Mexico proceeds to argue that it receives the "remainder of its equitable apportionment of water under the Compact for lands in southern New Mexico, and Texas receives its entire equitable apportionment, through the Project" and that those deliveries are divided according to the 57 to 43 percent split reflecting irrigated acreage proportions. NM MSJ on Apportionment at 30. New Mexico cites to 23 numbered paragraphs of its purported "undisputed material facts" to support its concept of a double apportionment. *Id.* The fact that New Mexico resorts to extrinsic evidence in its strained attempt to support its Apportionment Scheme necessarily means that New Mexico goes far beyond the plain language of the Compact and, as such,

views the Compact as ambiguous. Thus, partial summary judgment is improper, and the issue should proceed to trial. *See* section II.A.4, *supra*.

2. The water delivered to Elephant Butte Irrigation District pursuant to the United States' contracts with EBID is a Project allocation, not a Compact apportionment to New Mexico

The water released from Elephant Butte Reservoir and delivered to Elephant Butte Irrigation District (EBID) pursuant to the United States' Downstream Contracts with EBID,[6] is not a Compact apportionment to New Mexico. This water is a Project allocation, defined by the United States' Contracts with EBID. New Mexico nonetheless argues that because of these contracts it has an apportionment both above and below Elephant Butte Reservoir. With this argument, New Mexico ignores the plain language and structure of the Compact. But there can be no dispute that the 57 to 43 percent split does *not* arise out of the Compact. It arises out of the Downstream Contracts to which New Mexico is not even a party, either directly or indirectly. The Compact serves to ensure that the volume of water delivered into the Reservoir, as specified in Article IV, is available to meet the Texas apportionment and is not depleted.

Indeed, as the Supreme Court has noted, it is the EBID contract in the context of contracts with EP#1 that allows Texas to take its apportionment at Elephant Butte Reservoir in lieu of a state line delivery. *Texas v. New Mexico*, 138 S. Ct. at 957 (Elephant Butte delivery point was chosen "in light of the simultaneously negotiated Downstream Contracts

[6] The November 9, 1937 contract between the United States and EBID (1937 US/EBID Contract) at TX_MSJ_004434-004461, and the February 16, 1938 contract between EBID and El Paso County Water Improvement District No. 1 (EP#1), and approved by the United States on April 11, 1938 (1938 US/EBID/EP#1 Contract) at TX_MSJ_005249-005250, are collectively the "United States' Contracts with EBID." Bates numbers referenced herein that are defined with the "TX_MSJ" prefix include evidence in "Texas's Appendix of Evidence," filed in support of TX MSJ on November 5, 2020, as well as evidence submitted concurrently herewith in Texas's Appendix of Evidence in Support of the Texas's Oppositions to New Mexico's Motions for Partial Summary Judgment.

that promised Texas water districts a certain amount of water every year from the Reservoir's resources"). EBID and EP#1 entered into contracts with the United States in November 1937. 1937 US/EBID Contract at TX_MSJ_004434-004461; 1937 US/EP#1 Contract at TX_MSJ_004464-004488. The repayment contract between EBID and EP#1 that established the districts' respective allocations was effective in February 1938, one month before the states signed the Compact. 1938 US/EBID/EP#1 Contract at TX_MSJ_005249-005250. The Compact apportions the waters of the Rio Grande in the context of the contractual allocations of Project water.

But those allocations are not coextensive with the apportionment. Under New Mexico's theory of the case, all the water that it delivers into the Reservoir is apportioned to it, subject to the 43 percent that EP#1 is allocated under its Downstream Contract. This, of course, would put the Compact on its head. It would limit the water that Texas is entitled to under the EP#1 contract and make meaningless the plain language of the Compact that extends the Compact to Fort Quitman, Texas. The Compact does not end at the boundaries of EP#1 but extends into Hudspeth County to Fort Quitman. The water that New Mexico delivers into Elephant Butte Reservoir is the Texas *apportionment*, subject to the 57 percent Project *allocation* to EBID and the Treaty with Mexico. The rest of the water belongs to Texas.

Further, no Compact accounting has ever taken place below Elephant Butte Reservoir because, as noted, Texas's apportionment is delivered to Elephant Butte Reservoir. *See* excerpts of Deposition of Herman Settemeyer, 7/30/2020 (Settemeyer Depo., 7/30/2020), at TX_MSJ_001301-001302, 001307, 30:4-31:11, 44:12-21 (Mr. Settemeyer testified that the Engineer Advisors "never do [*sic*] an accounting below Elephant Butte"). The Report of the

Engineer Advisors to the Rio Grande Compact Commissioners, dated February 22, 2002 demonstrates that there is nothing in all the figures that the Compact Commission collects that addresses the 57 to 43 percent split. Declaration of Robert J. Brandes, P.E., Ph.D. in Support of the State of Texas's Motion for Partial Summary Judgment (Brandes Decl.) at TX_MSJ_000014-000015. This is because Compact accounting is limited to "*deliveries by New Mexico to Texas at Elephant Butte.*" *Id.* at TX_MSJ_000001-000014 (emphasis added).[7] The percentage of the water delivered to Elephant Butte that is allocated to EBID is just that – an allocation, not a Compact issue. Brandes Decl. at TX_MSJ_000014-000015.

3. New Mexico conspicuously ignores that it has no rights pursuant to the United States' Downstream Contracts with EBID

What New Mexico *fails* to address in its motion is important. New Mexico does not argue that it has any right whatsoever as a contracting party, or even a third party contract beneficiary, under the United States' Downstream Contracts with EBID. New Mexico does not argue that it has a right to enforce the Downstream Contracts, interfere with, modify, or otherwise exercise any right pursuant to the Downstream Contracts. New Mexico likewise does not argue that it has an obligation pursuant to the Downstream Contracts – i.e., delivering Project water to Texas. In fact, it argues to the contrary – that New Mexico has no obligation in that regard. It effectively concedes that it is not a party to the Downstream Contracts, has no rights pursuant to the contracts, and has no obligations under the contracts. Notwithstanding these concessions, New Mexico stubbornly argues that all of the water that the Project delivers to EBID is a second apportionment to New Mexico. There is simply no

[7] *See* section 2.1 of the Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation (BOR), included in the 2001 Report of the Rio Grande Compact Commission.

rational argument to support the contention that water under contract to EBID is a second apportionment to New Mexico. Neither the plain language of the Compact, nor well-accepted principles of contract interpretation, support this argument.

As a practical matter, however, regardless how one characterizes the use of water in New Mexico below Elephant Butte Reservoir, there are limitations placed on that use. Use of water below Elephant Butte Reservoir, in New Mexico, is absolutely limited by the terms of EBID's Downstream Contract with the United States. TX MSJ at 69-70; excerpts of Rule 30(b)(6) Deposition of Estevan Lopez, 9/18/2020 (Lopez 30(b)(6) Depo., 9/18/2020) at TX_MSJ_001142-001148, 20:4-23:16, 25:17-26:10; excerpts of Deposition of John D'Antonio, 8/14/2020 (D'Antonio Depo., 8/14/2020), at TX_MSJ_000875, 000879-000880, 145:13-18, 149:6-150:2; United States of America's Memorandum in Support of Motion for Partial Summary Judgment (US MSJ), at 23, 30-31. EBID is the only entity in New Mexico that has a contract with the United States to receive irrigation water from the Project below Elephant Butte Reservoir (US MSJ, Statement of Fact No. 17, at 6) and there is no action that New Mexico can take that can alter the rights provided to EBID under that contract. Because there is no dispute that the use of water below Elephant Butte Reservoir, in New Mexico, is limited to Downstream Contract uses in EBID, New Mexico cannot claim that the water delivered to EBID by the Project pursuant to its contract with the United States is an apportionment to New Mexico. As such, its summary judgment argument fails as a matter of law.

4. New Mexico's own prior admissions support that it does not have a Compact apportionment below Elephant Butte Reservoir

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.

Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001142-001145, 20:4-23:16, 25:17-26:10. New Mexico also admits that New Mexico's interests below Elephant Butte Reservoir are strictly limited to the four corners of the 1937 contract between EBID and the United States and the 1938 contract between EBID, the United States, and EP#1. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001147-001148, 25:17-26:10.

New Mexico concedes that it cannot, in any way, control or affect that contract. D'Antonio Depo., 8/14/2020, at TX_MSJ_000867, 93:1-11, 24-25 ("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. Indeed, as a non-party to that contract, New Mexico has no standing to challenge or enforce those contracts. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) (holding that where there is no express or implied intention of the parties to a contract to benefit a third party, the third party may not enforce the contract). New Mexico admits that the use, place of use, timing of delivery, and total amount of water is absolutely limited by these contracts. D'Antonio Depo., 8/14/2020, at TX_MSJ_000875, 000879-000880, 145:13-18, 149:6-150:2. Whatever "right" to water New Mexico claims below Elephant Butte Reservoir is not an apportionment of water protected by the Compact.

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." *Texas v. New Mexico*, 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. 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. *Id.* 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. Excerpts of Deposition of Peggy Barroll, 2/6/2020 (Barroll Depo., 2/6/2020), at TX_MSJ_000937, 314:12-16.

E. Highlights of Extrinsic Factual Disputes that Preclude Summary Judgment Based on New Mexico's Apportionment Scheme

Pursuant to compact interpretation principles, New Mexico's reliance on any form of extrinsic evidence to support its Apportionment Scheme, including its arguments that consider negotiating history, course of performance, and the "customary practices" of other interstate compacts, necessarily means that the Compact is ambiguous, precluding summary judgment as a matter of law. *See* section II.A.4, *supra*.

In each of New Mexico's arguments in sections III (negotiating history), IV (course of performance), and V (customary practices), New Mexico relies on several cases to support its position that the Court should consider extrinsic evidence to interpret the Compact. *See* NM Motion on Apportionment at 36-37, citing *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013), *Alabama v. North Carolina*, 560 U.S. 330 (2010), *Oklahoma v. New Mexico*, 501 U.S. 221 (1991), among others, in support of its section III negotiating history

argument; Motion on Apportionment at 43-44, citing *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013) and *Alabama v. North Carolina*, 560 U.S. 330 (2010) in support of its section IV course of performance argument; Motion on Apportionment at 53-54, citing *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013) in support of its section V customary practices argument.

However, the cases New Mexico relies upon in its extrinsic evidence discussions all address instances of *ambiguity*, wherein each of the courts turned to extrinsic evidence to assist in interpreting ambiguity in portions of the compacts at issue. *See Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. at 615 ("the Court begins by examining the Compact's express terms as the best indication of the parties' intent. However, § 5.05(b)(1)'s silence is, at the very least, ambiguous regarding cross-border rights under the Compact, so the Court turns to other interpretive tools to shed light on the drafters' intent."); *Oklahoma v. New Mexico,* 501 U.S. at 234-35, n.5, 237 ("we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous" and "the Compact's ambiguous use of the term 'originating' can only be harmonized with the apparent intent of the Compact drafters"); *Alabama*, 560 U.S. at 345 (the Special Master concluded that the phrase "appropriate steps" in the compact was ambiguous, and considered the parties' course of performance). Thus, New Mexico's arguments at sections III (negotiating history), IV (course of performance), and V (customary practices), which are all entirely based upon extrinsic factual disputes supported by law that is applicable to interpreting compact ambiguity, preclude summary judgment as a matter of law. *See* NM MSJ on Apportionment at 36-54.[8]

[8] Notably, in NM Exceptions to First Report, New Mexico included a detailed challenge to the first Special Master's analysis of extrinsic evidence in the First Report and asked that the Court strike the

As referenced *supra,* at section II.A.2, Texas incorporates its separately filed *Evidentiary Objections and Responses to New Mexico's Facts* herein by reference but highlights several of the more significant areas of dispute raised by New Mexico's 114 enumerated paragraphs.

1. New Mexico mischaracterizes historical documents in an attempt to support its Apportionment Scheme

New Mexico relies on two 1938 letters from Texas's former Rio Grande Compact Commissioner Frank B. Clayton (the "Clayton Letters"). New Mexico cites to the Clayton Letters in support of its discussions addressing negotiating history and course of performance. *See* NM MSJ on Apportionment, Statement of Undisputed Material Facts (UMF) 46-47, NM-EX 328-329, and discussions at 8, 9, 39, 41, 42, 47, 48. Texas's expert historian Scott A. Miltenberger sets forth in detail the historical significance of the Clayton Letters, highlighting significant areas of dispute between New Mexico and Texas, therefore precluding summary judgment. TX_MSJ_007371-007450.

Special Master's discussion. *See* NM Exceptions to First Report at 49-55, TX_MSJ_007004-007010. There, New Mexico acknowledged that "this Court has held that it can be 'appropriate to look to extrinsic evidence of the negotiation history' of the compact in question in order to interpret *ambiguous* terms." *Id.* at 50-51, TX_MSJ_007005-007006. New Mexico cited *Oklahoma v. New Mexico* for that position, just as it cites herein, only in the current motion New Mexico is arguing that the Compact is *unambiguous*, rendering its reliance on *Oklahoma v. New Mexico*, and other cases based on an *ambiguous* compact, inappropriate. Further, New Mexico admitted that, "[i]n this case, by contrast, the Special Master has explicitly stated his belief that the Compact is *not* ambiguous . . . thereby rendering development of the negotiation and legislative history improper." *Id.* at 51, TX_MSJ_007006. New Mexico also admits therein that if extrinsic sources are pertinent in this case, "[t]hey will then be subject to the normal evidentiary requirements of authentication, relevance, and reliability. *E.g.*, Fed. R. Evid. 401, 901." *Id.* at 54, TX_MSJ_007009; *see also* Texas's Evidentiary Objections and Responses to New Mexico's Facts filed concurrently herewith, detailing New Mexico's failure to adhere to these "normal evidentiary requirements" for the introduction of extrinsic evidence.

a. Clayton's October 4, 1938 letter to Sawnie B. Smith does not offer an explanation of Compact apportionment below the Reservoir

Frank B. Clayton's (Clayton) October 4, 1938 letter to Sawnie B. Smith (Smith) (Clayton October 4 Letter) does not offer an explanation of "the way that the Compact divided water below Elephant Butte[,]" as New Mexico's motion indicates. *See* NM MSJ on Apportionment, UMF 46, NM-EX 328 and discussions at 8, 39, 41, 42, 47, 48; "UMF 46." The Clayton October 4 Letter was drafted to respond to one Clayton had received on September 29, 1938, from Smith, an attorney from the McAllen area of Texas below Fort Quitman. 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 Decl. in Opp. to NM MSJ) at TX_MSJ_007383-007387; *see also* Miltenberger Decl. ¶¶ 31, 42 at TX_MSJ_001585. Smith was specifically concerned that "the Rio Grande Compact makes no provision for the division of waters below Elephant Butte between the States of New Mexico and Texas, and makes no provision concerning the amount of water to which Texas is entitled." Miltenberger Decl. in Opp. to NM MSJ at TX_MSJ_007383-007387. This, Smith, reasoned, would only lead to controversy. *Id.*

Clayton's October 4 Letter to Smith distinguished between the "question of where the point of division of the waters of the Rio Grande as between Texas and New Mexico should be fixed," and "the question of the division of the water released from Elephant Butte reservoir[.]" Miltenberger Decl. in Opp. to NM at TX_MSJ_007383-007387. Regarding this first question, Clayton emphasized to Smith that federal control of Elephant Butte and the historical development of the Rio Grande Project rendered a state line delivery to Texas impossible; he also cited the "irregular contour" of the state line as presenting difficulties in assessing "the water passing the Texas state line[.]" *Id.* As far back as the temporary

compact, the states had therefore agreed that "New Mexico obligations as expressed in the compact must be with reference to deliveries at Elephant Butte." *Id.* Elephant Butte, in short, was the delivery point for Texas's apportionment.

As to the separate "question of the division of the water released from Elephant Butte reservoir[,]" Clayton pointed to federal contracts for Project water as well as the 1906 Mexican treaty. Miltenberger Decl. in Opp. to NM at TX_MSJ_007383-007387. Those contracts included not only the so-called "Downstream Contracts" – the 1937 contracts between the United States and EBID and the United States and EP#1, and the 1938 contract between EBID and EP#1 concerning Project repayments and water delivery – but also a Warren Act contract with Hudspeth County Conservation and Reclamation District No. 1 (Hudspeth), below the Project and above Fort Quitman, for water wasted beyond the Project (referenced in Miltenberger Decl. ¶¶ 34, 42 [TX_MSJ_001585]). Miltenberger Decl. in Opp. to NM at TX_MSJ_007383-007387.

The districts' 1937 contracts, Clayton explained, provided for water on an equal basis between the two Project districts based "on the areas involved in the two States," and the 1938 contract identified more precisely "the acreage now actually in cultivation" between the two districts: 88,000 in EBID and 67,000 in EP#1. Miltenberger Decl. in Opp. to NM at TX_MSJ_007383-007387. The Texas Commissioner thus expressed confidence to Smith that there would be no "difficulty about the allocation of this water" in the future – a statement clearly intended to assuage Smith's concern about a possible "controversy." *Id.* However, he went on to say that the 1938 contract was purposefully excluded from the Compact because, according to Clayton, the contract was "a private one between the districts involved . . . it was felt neither necessary nor desirable that it be incorporated in the terms of the Compact." *Id.*

This statement supports the conclusion that the Compact negotiators intended for the Compact to stand alone and supports the conclusion that none of the contracts referenced or discussed by Clayton bear on Compact administration, and that New Mexico's assertion in UMF 46 is incorrect. *Id*.

Further, releases from Elephant Butte Reservoir served more than Project lands, as Clayton pointed out to Smith. Miltenberger Decl. in Opp. to NM at TX_MSJ_007383-007387. In addition to the 1906 Treaty obligation, the Texas Commissioner noted that non-Project lands above Fort Quitman received water in the form of return flows from upstream drains. *Id.* Clayton acknowledged this phenomenon, observing to Smith that Hudspeth obtained " 'tail-end' or waste water" from the Project, water the non-Project district could divert under its Warren Act contract. *Id.* "[L]ands privately owned below [Hudspeth]" also acquired water "by taking by gravity or pumps what happens to be in the river channel," the Texas Commissioner told Smith – a further indication of return flows from upstream and water service beyond the limits of the Project. *Id.* Importantly, in calling attention to the attenuated nature of this water below the Project and above Fort Quitman, Clayton underscored the fact that little water would pass Fort Quitman and be available to downstream water users outside the Compact. *Id.*

Importantly, while New Mexico has taken the Clayton October 4 Letter out of context in UMF 46, New Mexico has also *not* cited to any contemporaneous documents, summaries, or assessments of the Compact made by New Mexico officials involved in the Compact. That is because there are no identifiable historical documents that would support New Mexico's assertion that the Compact commissioners intended the contracts to supplement the Compact. Miltenberger Decl. in Opp. to NM at TX_MSJ_007383-007387. Contemporaneous

summaries and assessments of the Compact by the New Mexico State Engineer and Rio Grande Compact Commissioner Thomas McClure and his engineering advisor John Bliss following the Compact do not mention these contracts as a component or an element of Compact administration. *Id.* Moreover, neither recognized that New Mexico obtained an apportionment below Elephant Butte by these contracts. *Id.*

In summary, Clayton's October 4 letter to Smith is not an explanation of how the Compact was to function as asserted by New Mexico in UMF 46. Miltenberger Decl. in Opp. to NM at TX_MSJ_007383-007387. Rather, to address Smith's specific concerns, Clayton offered a description of the prevailing physical circumstances that structured the Compact and the "present uses" which the Compact was intended to respect and preserve. *Id.* Throughout the Compact negotiations, Texas advocated for protection of the Project for only through the Project could it obtain Rio Grande water. *Id.* The downstream state accepted that releases from the Reservoir under federal control served Project lands in New Mexico by contract in accordance with Project operations – just as those releases also satisfied the 1906 Treaty obligation. *Id.* The water delivered by New Mexico pursuant to the Compact, as Clayton's letter to Smith makes clear, was nonetheless ultimately water for Texas. *Id.*

b. Clayton's October 16, 1938 letter to C.S. Clark does not describe the operation of the Compact

Texas Commissioner Clayton's October 16, 1938 letter to C.S. Clark (Clark) does not "describe[] the operation of the Compact," as New Mexico's motion posits. Miltenberger Decl., TX_MSJ_007387-007390. Clark was the chair of the Texas Board of Water Engineers, and Clayton's letter was sent immediately following meetings the Texas Commissioner had with water users below Fort Quitman, meetings in which "misunderstandings" about the Compact were voiced that Clayton was compelled to correct. *Id.*

One "statement" in particular, "attributed" to Clark was "to the effect that in negotiating the permanent compact [Clayton] disregarded the rights and interests of the lower Rio Grande Valley." Miltenberger Decl. in Opp. to NM at TX_MSJ_007387-007390. The Texas Commissioner reminded the chair that "the commissioners found it utterly impossible to agree on the relative priorities of the rights of the three States." *Id.* Instead, they drafted a Compact which had "the whole effect . . . to 'freeze' the supply of water to Elephant Butte reservoir at its present status; that is, to guarantee to Texas that no further encroachments will be made up-stream, in New Mexico or Colorado." *Id.* According to Clayton, "it was the sense of all concerned, including [Clark] . . . that this was the very best Texas could hope to get." *Id.* In other words, that the Compact privileged existing uses of water over rights and sought to protect the hydrological status quo in the basin. Miltenberger Decl. ¶¶ 20-26 [TX_MSJ_001585]. Clayton went on to observe that "no allocation of waters as between different sections of the same State was possible in an interstate compact, and none was attempted." Miltenberger Decl. in Opp. to NM at TX_MSJ_007387-007390. In responding to misunderstandings that arose at the meeting regarding the lack of state-line delivery requirements, Clayton cited "the irregular contour of the boundary between the two States and other physical facts" that made "it . . . practically impossible to measure the water passing the state line at the various places in the river channel and in the canal, lateral and drains." *Id.*

Review of Clayton's October 16 letter to Clark is particularly illuminating because it is only at this point in the letter, when Clayton begins to discuss the import of federal control of Elephant Butte Reservoir, that the quotation offered by New Mexico in UMF 47 begins.[9]

[9] The Texas Commissioner noted to Clark that "since the source of supply for all the lands above Fort Quitman and below Elephant Butte reservoir, whether in Texas or New Mexico, is the reservoir itself," neither Colorado nor New Mexico "could hardly be expected . . . [to] guarantee a certain amount of water to pass the Texas line . . . ." Miltenberger Decl. in Opp. to NM at TX_MSJ_007387-007390.

Miltenberger Decl. in Opp. to NM at TX_MSJ_007387-007390. New Mexico uses the quote out of context, because the letter goes on to observe, "all the lands in the Project have equal water rights, and the acreage to be irrigated is practically 'frozen' at its present figure, with a three per cent. 'cushion.' " "It is therefore not necessary," he expressed to Clark, "even if it were practicable, to make definite provision in the Compact for the amount of water to pass the Texas-New Mexico state line." *Id.*

In short, New Mexico's reliance on UMF 47 is misplaced and misleading. The quotation relates to a discussion regarding the absence of a state line delivery requirement and an attempt by Clayton to allay concerns that the lack of such a delivery provision in the Compact would preclude Texas from obtaining its equitable apportionment under the Compact. Miltenberger Decl. in Opp. to NM at TX_MSJ_007387-007390. Clayton viewed federal control of Elephant Butte Reservoir and the contracts that directed water delivery to Project lands in New Mexico and Texas as providing assurance to Texas, independent of the Compact but consistent with the Compact's aim of safeguarding existing uses. *Id.*

2. New Mexico conflates Compact apportionment with Project allocations in its discussion of negotiating history and course of performance

New Mexico asserts that the states relied on the Project "to apportion" water, and that the parties' actions "repeatedly demonstrate their understanding that the Compact apportioned 57% of Project supply to New Mexico in the Lower Rio Grande." NM Motion on Apportionment at 39, 44. New Mexico cites to a series of facts it purports to be undisputed describing the states' purported understanding of the Compact, as well as Project operations, in support of this premise. *Id.* at 7-16, UMFs 38-82. Many of these "facts" are genuinely

---

That amount was "wholly dependent upon the releases from the reservoir, and the reservoir is under the control of an entirely independent agency: the Bureau of Reclamation." *Id.*

disputed because they are incorrect, misleading, and otherwise taken out of context. Miltenberger Decl. in Opp. to NM at TX_MSJ_007371-007450; 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 Decl. in Opp. to NM MSJ) at TX_MSJ_007321-007329.

Additionally, however, and an issue of genuine and material factual dispute, is that the entire discussion of the 57-43 percent *split of Project supply* is a Project operations issue, *not Compact apportionment*. *See* 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 Decl. in Opp. to NM MSJ) at TX_MSJ_007269-007274; Brandes Decl. at TX_MSJ_000001-000016. New Mexico repeatedly conflates the two issues, without evidentiary support. As discussed *supra* at section II.B, and in the TX MSJ at 61-69, there is nothing in the plain text of the unambiguous Compact that can be read as adopting a 57-43 percent apportionment split between Texas and New Mexico below Elephant Butte Reservoir. Rather, this is a Project operations and Project allocation issue. *See, supra*, at section II.D.2; Brandes Decl. at TX_MSJ-000001-000016. Nonetheless, in the event that the Court views this as an issue of Compact ambiguity, the issue is one of genuine and material factual dispute, incapable of resolution at the summary judgment stage.

3. New Mexico's characterization of Texas's prior conduct and position on Compact apportionment is replete with genuinely disputed issues of fact

New Mexico argues that Texas's prior conduct and positions on Compact apportionment are "instructive." NM Motion on Apportionment at 47. In its discussion, it repeats its mischaracterization of the Clayton Letters addressed *supra* at section II.E.1, and thereafter attempts to take the Rio Grande Compact Commissioner Patrick Gordon to task, by

calling out conduct that is mischaracterized in part, and in other instances simply wrong. *Id.* at 47-48. As set forth in Commissioner Gordon's Declaration submitted concurrently herewith, the contents of New Mexico's "evidence" is expressly disputed. Gordon Decl. in Opp. to NM at TX_MSJ_007269-007274. The Commissioner did not make the statements attributed to him and did not represent in any context that the Compact *apportions* water below Elephant Butte Reservoir between New Mexico and Texas. *Id.*

Further, New Mexico offers a photograph into evidence of what it describes as "handwritten notes" that are "talking points that represented Texas's positions on the Rio Grande Compact." NM Motion on Apportionment at 48; NM-EX 519. New Mexico does not, however, offer any authentication whatsoever for this exhibit, does not attempt to address the hearsay implications, and Commissioner Gordon expressly denies that the "handwritten notes" were written by him, and expressly denies that they represented "talking points" of Texas's position. Gordon Decl. in Opp. to NM at TX_MSJ_007269-007274.

Similarly, New Mexico uses what it purports to be a transcript of a 2011 Rio Grande Commission meeting, without any authentication whatsoever that the transcript actually is what New Mexico says it is. NM Motion on Apportionment at 48; NM-EX 518. Then, New Mexico refers to a discussion about the same document that occurred during Commissioner Gordon's deposition. NM Motion on Apportionment at 48-49. However, New Mexico only cites to portions of the deposition transcript that it apparently believes are beneficial to its argument, while ignoring other portions of Commissioner Gordon's deposition that dispute New Mexico's characterization of what occurred at the 2011 Rio Grande Commission meeting. *Id.* Commissioner Gordon's Declaration submitted concurrently herewith, along with excerpts of his deposition testimony that reflect the full exchange at his deposition,

clarifies the facts. Gordon Decl. in Opp. to NM at TX_MSJ_007269-007274. At any rate, the facts asserted by New Mexico are genuinely disputed, rendering summary judgment improper.

New Mexico additionally argues that Texas's current position on Compact apportionment "was first asserted midway through the present litigation[]" and that this "new legal position" supports its request to "disregard[]" Texas's position on Compact apportionment. NM Motion on Apportionment at 51. New Mexico's argument is disputed, and simply wrong.

In support of this assertion, New Mexico states that Texas "has now confirmed it filed this lawsuit in the United States Supreme Court in response to New Mexico asserting its own Compact rights in response to the adoption of the 2008 Operating Agreement." NM Motion on Apportionment at 51, UMF 82. The "fact" offered by New Mexico (UMF 82), states that Texas filed this original action "in reaction" to the 2011 federal district lawsuit, and cites to Commissioner Gordon's deposition to support the "fact." NM Motion on Apportionment at 16. This is a mischaracterization of Commissioner Gordon's deposition testimony and is disputed. Gordon Decl. in Opp. to NM at TX_MSJ_007269-007274. The actual testimony by Commissioner Gordon was that the 2011 federal district lawsuit "impacted" Texas's decision to proceed with this original action because, 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." *Id.* at TX_MSJ_007272. Further, as set forth in Commissioner Gordon's Declaration, Texas did not file this original action "in reaction" to New Mexico's 2011 federal district lawsuit as stated by New Mexico. *Id.* The decision by Texas to file the present

original action was based upon many factors. *Id.* The primary factor, before and after New Mexico's 2011 federal district lawsuit, and the "problem that existed" that he 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. *Id.*

Finally, New Mexico recites portions of the Texas Complaint allegations, as well as cherry picks references from prior briefs that are taken out of context, in its attempt to support the proposition that Texas is somehow changing its legal position on apportionment. NM Motion on Apportionment at 18, 19, 51, 52. Contrary to New Mexico's assertion, when Texas's Complaint, as well as prior briefing, are taken as a whole instead of read out of context, it is clear that Texas has always maintained the same position on Compact apportionment. *See, e.g.*¸ Texas Brief in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention (June 16, 2014), 22[10]; Texas's Reply to Exceptions to First Interim Report of Special Master (July 28, 2017), 17.[11] *See also The State of Texas's Evidentiary Objections and Responses to New Mexico's Facts,* objections and responses to New Mexico's UMF 92. The position has further been

[10] "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 ¶¶ 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 ¶¶ 18-19."

[11] " '[T]he 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."

consistently articulated by counsel at various oral arguments before the Special Master, in the presence of counsel for New Mexico.[12]

As reiterated by Commissioner Gordon, who is authorized by Texas statute[13] 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 Colorado[], New Mexico[], and Texas." Gordon Decl. in Opp. to NM at TX_MSJ_007271. "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." *Id.* "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." *Id.* 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 [] EBID." *Id.* "The Compact does not apportion water to New Mexico below Elephant Butte Reservoir." *Id.* "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." *Id.* This water is a Project allocation, defined by the United States' downstream contracts with EBID." *Id.* "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

[12] *See, e.g.*, Docket No. 37, Transcript of August 19, 2015 Oral Argument Before A. Gregory Grimsal, Esq. Special Master, 79, 84-86; Docket No. 137, Transcript of April 23, 2018 Teleconference before Honorable Michael A. Melloy, Special Master, 53-54; Docket No. 399, Transcript of June 12, 2020 Teleconference before Honorable Michael A. Melloy, Special Master, 36-37.

[13] Title 3, ch. 41, Texas Water Code.

Compact, even from itself, for the benefit of interests downstream of Elephant Butte Reservoir." *Id.* "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." *Id.*, *see also*, 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; TX_MSJ_006892-006940.

III. CONCLUSION

Based upon the foregoing, and the TX MSJ, Texas respectfully requests that the Special Master recommend that the Court deny the NM MSJ on Apportionment.

Dated: December 22, 2020

Respectfully submitted,

s/ Stuart L. Somach

STUART L. SOMACH, ESQ.*
ANDREW M. HITCHINGS, ESQ.
ROBERT B. HOFFMAN, ESQ.
FRANCIS M. GOLDSBERRY II, ESQ.
THERESA C. BARFIELD, ESQ.
SARAH A. KLAHN, ESQ.
BRITTANY K. JOHNSON, ESQ.
RICHARD S. DEITCHMAN, ESQ.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record*