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 TO EXCLUDE CLAIMS FOR DAMAGES IN YEARS THAT TEXAS FAILED TO PROVIDE NOTICE TO NEW MEXICO OF ITS ALLEGED SHORTAGES

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I. INTRODUCTION

In the State of New Mexico's (New Mexico) 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 (hereinafter NM MSJ on Failed Notice), New Mexico develops a convoluted and erroneous theme that the State of Texas's (Texas) Compact entitlement is "just" Project water and, as with any other United States Bureau of Reclamation (BOR) project supply, subject to state law, in this case, New Mexico state law. NM MSJ on Failed Notice goes on to further extend this erroneous position by arguing that Texas is only entitled to receive its apportionment to satisfy "irrigation demands" upon adequate notice to New Mexico. NM MSJ on Failed Notice at 8. It is upon this shaky foundation that New Mexico's "notice" motion is based.

Contrary to New Mexico's assertions, "background principles" of Reclamation law *do not* place in Texas the responsibility of ensuring that it receives its 1938 Rio Grande Compact[1] (Compact) apportionment without interference from New Mexico groundwater pumping. Aside from attempting to impose New Mexico's obligations onto Texas, New Mexico's arguments are flawed for two additional distinct reasons. First, its statements with respect to what Reclamation law requires is just wrong. There is no "notice requirement" inherent in Reclamation law. Second, it is the Compact, not Reclamation law, which governs the actions of the parties to this litigation and there is no notice requirement express or implied in the Compact.

New Mexico's argument treats the day before the Compact was effective the same as the day after. But legally, things were not the same. Prior to the Compact, New Mexico had

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

no obligation to deliver water to Elephant Butte Reservoir because the water stored in Elephant Butte Reservoir was simply Project water, subject only to Reclamation law. Additionally, what happened in New Mexico below Elephant Butte Reservoir was also probably governed, to a degree, by New Mexico law. In fact, upstream uses or depletions and conflicts over them were the catalyst for the Compact. Declaration of Scott Miltenberger, Ph.D. at TX_MSJ_001585.[2] This Reclamation/state law status quo was not sustainable and was a basis for the Compact. The Compact changed things.

After the effective date of the Compact, the Compact *required* New Mexico to deliver water to Elephant Butte Reservoir, and, pursuant to the provisions of the Compact, upon delivery, the water took on the legal character of Texas's apportionment. And, directly as a consequence of the Compact, since its effective date, New Mexico *has been on notice* that it must not only deliver specified quantities of water into Elephant Butte Reservoir, but it also *has been on notice* that it must take steps to ensure that these volumes are not interfered with once they are released from the Reservoir.

New Mexico, in its motion, ignores the actual notice requirements imposed on it by the Compact and instead tries to place the burden on Texas of ensuring that New Mexico does not interfere with Texas's receipt of its Compact apportionment, thereby attempting to indict the victim of over-pumping instead of taking responsibility for its own unlawful activities. In any event, there is no notice requirement such as the one that New Mexico postulates. Texas

[2] Bates numbers referenced herein that are defined with the "TX_MSJ" prefix include evidence in "Texas's Appendix of Evidence," filed in support of Texas's Motion for Partial Summary Judgment (TX MSJ) on November 5, 2020, as well as evidence submitted concurrently herewith in Texas's Appendix of Evidence in Support of Texas's Oppositions to New Mexico's Motions for Partial Summary Judgment.

is not required to give notice to New Mexico that New Mexico's groundwater pumping is interfering with Texas's receipt of its apportionment.

II. LEGAL 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 by depositions, affidavits, or otherwise, designate specific facts showing that there is a genuine

issue for trial. *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 Monta 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 facts"

New Mexico enumerates 41 paragraphs that it declares to be "undisputed facts," upon which its motion relies. NM MSJ on Failed Notice at 1-7. These 41 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 41 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 41 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.[3]

[3] As the discussion in section II.E and TX_MSJ_006492-006891 demonstrate, the very premise of New Mexico's Motion – that it has never received notice that its groundwater pumping was depleting Texas's apportionment – is without basis.

In addition, and as described in section E of this brief, New Mexico had either constructive or actual notice of the impact its groundwater pumping was having on Texas's apportionment as early as 1947. Although *The State of Texas's Evidentiary Objections and Responses to New Mexico's Facts* demonstrates numerous flaws in New Mexico's 41 enumerated paragraphs of "facts," the gravamen of New Mexico's motion raises significant questions of fact such that summary judgment is not appropriate.

B. New Mexico State Law Does Not Control Texas's Apportionment

New Mexico argues that because the Supreme Court has held that "[t]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts[,]" and the parties agree that the Project is the vehicle by which Texas receives its apportionment, "the Court may consider background principles of law in understanding compact terms." NM MSJ on Failed Notice at 8. It is not clear exactly what "background principles of law" New Mexico has in mind, but it appears that New Mexico is again arguing that section 8 of the Reclamation Act controls, and that pursuant to convoluted reasoning, the holding in *California v. United States,* 438 U.S. 645, 674-75 (1978) controls. Consequently, according to New Mexico, Texas takes its apportionment under the Compact subject to New Mexico state law and is subject to the rule in *Worley v. United States Borax & Chem. Corp.,* 78 N.M. 112, 428 P.2d 651 (N.M. 1967) which stands for the proposition that a senior surface water right on the stream must let the upstream junior surface water user know when she is not receiving her full entitlement.

Aside from the fact that these arguments have already been rejected in this case on at least three occasions, New Mexico's arguments are without foundation.[4] While section 8 of

[4] *See, e.g.,* New Mexico's Brief in Opposition to Texas's Motion for Leave to File Complaint (Mar. 11, 2013) at TX_MSJ_007087-007133; briefing and argument involving New Mexico's Motion

the Reclamation Act applied to the operation of the Rio Grande Project prior to 1938,[5] adoption of the Compact interposed federal law to protect Texas's apportionment. Reclamation law, including the application of section 8 and by extension New Mexico state law that was inconsistent with the Compact, was preempted under *California v. United States.* Inconsistent New Mexico state law must give way.

New Mexico's assertion that Texas, as a downstream recipient of a Compact apportionment must, because of New Mexico law, divine that New Mexico has allowed groundwater pumping to intercept over 50,000 acre-feet/year[6] that would otherwise have passed the El Paso gage and then request that New Mexico curtail that pumping to ensure Texas receives its apportionment without depletion, conflicts with the Compact and, therefore, conflicts with federal law. New Mexico's argument that the principles of *Worley* are the only basis by which Texas can receive its apportionment undepleted simply cannot be reconciled with the Compact goal to equitably apportion the waters of the Rio Grande, including to ensure Texas's apportionment arrived in Texas without it being depleted by New Mexico groundwater pumping. *Cal., State Water. Res. Control Bd.* states that "[w]e do not think that section 8 of the 1902 Reclamation Act was intended to require any later Congress to

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to Dismiss Texas's Complaint and the United States' Complaint in Intervention (Apr. 30, 2014) at TX_MSJ_007134-007253; and New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support (Dec. 26, 2018), is lodged with the Special Master as Docket No. 165.

[5] Even prior to 1938, New Mexico law played a minimal role in the operation of the Rio Grande Project, based on New Mexico's assertion of undisputed facts that: (a) the United States appropriated all unappropriated water in 1908, and thus the OSE has since treated the area below Elephant Butte as fully appropriated; (b) Reclamation operates the Project and so New Mexico has no involvement in its operation but nonetheless retains unspecified "administrative control" over the surface water of the Rio Grande. NM MSJ on Failed Notice at 2, 3.

[6] *See* Hutchison Affidavit at TX_MSJ_000667.

tolerate state laws whose operation would otherwise be curtailed by the Supremacy Clause." *United States v. Cal., State Water. Res. Control Bd.,* 694 F.2d 1171, 1176 (9th Cir. 1982).

C. Texas is Not Tarrant

As demonstrated above, a goal of the Compact is to ensure Texas receives its apportionment undepleted by New Mexico pumping. This Compact goal cannot be reconciled with New Mexico's position that Texas is required to ask for curtailment of New Mexico wells or forego damages or other remedies.

New Mexico erroneously analogizes Texas's resistance to acquiescing to New Mexico state law to the dispute in *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614 (2013). *Tarrant* involved an effort by a Texas water board to use the Red River Compact to reach into the State of Oklahoma to appropriate water and export it for use in the Dallas-Fort Worth area, contrary to Oklahoma law. Tarrant argued that state lines were irrelevant under the Red River Compact, and while Oklahoma law prohibited the appropriation Tarrant sought to make, the Supreme Court should interpret the compact to authorize its actions.

In evaluating *Tarrant's* interpretation of the Red River Compact, the United States Supreme Court referred to the "background understanding" of the states that entered in the Red River Compact and concluded that the Compact was ambiguous. *Tarrant*, 569 U.S. at 630-31. Ultimately the Supreme Court rejected Tarrant's arguments because if Tarrant's interpretation of the Compact were implemented it would create a "jurisdictional and administrative quagmire" wherein Oklahoma would be tasked with resolving ambiguities in the Compact which the compacting states themselves had never attempted to resolve. *Id.* at 635.

As a starting point, resort to "background understanding" of the parties to interpret the Rio Grande Compact to require notice of the sort New Mexico demands requires an assertion

and finding that the Compact is ambiguous on this point. New Mexico has not made such an assertion and, as the TX MSJ lays out, the Compact is not ambiguous. TX MSJ section V.C. The Compact is devoid of language requiring Texas to give notice to New Mexico that New Mexico's pumping is depleting Texas's apportionment and that should end the matter. Further, New Mexico's motion does not substantiate the "background understanding" among the states when the Compact was entered into that would authorize New Mexico water users to re-divert water delivered to Elephant Butte Reservoir through groundwater pumping below Caballo. In fact, as detailed below, any "background understanding" was to the contrary: that pumping groundwater below Elephant Butte Reservoir would result in a 1:1 depletion of stream flow, to the detriment of Texas.

But be that as it may, Texas is not *Tarrant*. Under the Rio Grande Compact, New Mexico agreed to an affirmative obligation to deliver Texas's apportionment by agreeing to deliver to Elephant Butte Reservoir volumes of water consistent with the schedule laid out in Article IV of the Compact. New Mexico effectively utilizes state law to ensure that the water users in the Middle Rio Grande do not intercept volumes of water that New Mexico is obligated to deliver into Elephant Butte Reservoir. It does so to ensure its Compact compliance above the Reservoir because that is needed to protect Texas's apportionment. It must do the same below Elephant Butte Reservoir. It makes absolutely no sense to protect the delivery of water into the Reservoir to meet Compact apportionment obligations to Texas, but to do the opposite when the water is released from the Reservoir. The purpose of protecting Article IV Compact flows into the Reservoir is to ensure that Texas obtains its apportionment. The same obligation is imposed on New Mexico below Elephant Butte Reservoir.

This case has nothing to do with *Tarrant*. Ironically, if there is any relevance here to *Tarrant,* it is that New Mexico's argument, like Tarrant's, is a dead letter. Texas has no way to know the exact effect of New Mexico groundwater pumping on its apportionment until the harm has already occurred. Apparently, New Mexico would have Texas "invade" New Mexico to investigate on an ongoing basis what is occurring with New Mexico groundwater pumping in order to ensure it receives its Compact apportionment without being deprived of 50,000 acre-feet annually by New Mexico's groundwater pumping. New Mexico's arguments are without basis, as were Tarrant's.

D. There is No Interpretation of the Rio Grande Compact that Imposes a Notice on Texas

As New Mexico admits, "not all interstate water compacts require notice." NM MSJ on Failed Notice at 13. This is an understatement. Texas's review of compact apportionment cases suggests that the United States Supreme Court's finding that the language of the Yellowstone Compact requires the *downstream state* to give notice to the upstream state to ensure receipt of the downstream state's apportionment undepleted is unique. With that said, notice has been imposed in original actions on several occasions on the *upstream* state in the remedies phase. For example, Colorado was required to notify Kansas when it was not going to satisfy its Compact delivery obligations to Kansas through the "shortfall" account. No. 105 Orig., *Kansas v. Colorado,* Fifth and Final Report, Vol. II, Proposed Judgment and Decree (Jan. 2008), Appendix A at 5-6, lodged with the Special Master Report at https://www.supremecourt.gov/SpecMastRpt/20264littleworth-vol-II.pdf (last visited Dec. 19, 2020).

In any event, the Yellowstone Compact has no relevance or similarity to the Rio Grande Compact, other than it being an interstate compact. Indeed, it is hard to conceive of

an equitable apportionment compact more different from the Rio Grande Compact than the Yellowstone Compact. For example, the Yellowstone Compact provides at Article V:

> Appropriative rights to the beneficial uses of water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation.

In *Montana v. Wyoming,* Special Master Thompson's interpretation of this language was: "inherent in Article V(A)'s incorporation of prior appropriation law. Article V(A) provides for [use] of pre-1950 [water] rights 'in accordance with the laws governing . . . use of water under the doctrine of appropriation.' "[7]

The Rio Grande Compact, in contrast, provides at Article IV:

> The obligation of New Mexico to deliver water in the Rio Grande to San Marcial, during each calendar year, exclusive of the months of July, August and September, shall be that quantity set forth in the following tabulation relationship, which corresponds to the quantity at the upper index station.

Whereas the Yellowstone Compact relies on the integrity of Wyoming's administrative system to ensure that Wyoming takes only the amounts it is entitled to under its pre-1950 rights and that the remainder is left in the river to satisfy Montana's pre-1950s water rights, the Rio Grande Compact creates an obligation for New Mexico to shepherd water through the Middle Rio Grande to avoid being diverted by prior appropriative rights in that region, and deliver an indexed amount depending on the flows at the San Marcial gage (now measured at Elephant Butte). New Mexico's obligations do not end upon delivery of the water to Elephant Butte Reservoir. It is also required to protect Texas's apportionment from depletion by groundwater pumping below Caballo in New Mexico. New Mexico's failure to

[7] Orig. 137, Orig., *Montana v. Wyoming*, Second Interim Report of the Special Master (Dec. 29, 2014) at 57; *see* Second Interim Report lodged with SCOTUSblog at https://www.scotusblog.com/wp-content/uploads/2018/02/22o137-2014.12.29-second-interim-report.pdf (last visited Dec. 19, 2020).

regulate groundwater pumping in the Rincon and Mesilla Valleys of New Mexico consistent with state statute to avoid depleting Texas's apportionment as it travels to the El Paso gage is not a defense. The fact that Texas and New Mexico also rely on the doctrine of prior appropriation for intrastate determinations of water rights is irrelevant to the administration of the Compact and does not convert the Rio Grande Compact into a "prior appropriation" compact.[8]

In finding that the Yellowstone Compact required Montana to give notice to Wyoming, the Special Master also relied on pattern of practice, including a 1982 Commission Report that Montana "must notify" Wyoming when it is not able to obtain its pre-1950 water. No such pattern or practice exists here.

Finally, even in the context of the Yellowstone Compact, Special Master Thompson concluded the notice requirement was not absolute. He found "that there were several potential exceptions to the general notice rule that could exclude Montana from providing notice[,]" including circumstances in which "Wyoming had *other sufficient reason* to believe or know that Montana was receiving insufficient water to satisfy its [Compact] rights . . . ."[9] Wyoming's Renewed Motion for Partial Summary Judgment. As described immediately below, New Mexico had either actual or constructive notice of the impact that groundwater pumping in New Mexico's Rincon and Mesilla Valleys was having on releases from Caballo, and its effect on Texas's apportionment.

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[8] Under this theory, any compact involving prior appropriation states would "incorporate the doctrine of prior appropriation" and state law notice requirements.

[9] No. 137, Orig., *Montana v. Wyoming*, Memorandum Opinion of the Special Master on Wyoming's Renewed Motion for Partial Summary Judgement (Sept. 28, 2012) at 2 (emphasis added) (Memorandum Opinion); *see* Memorandum Opinion lodged with the Stanford Law School as Docket No. 214 at http://web.stanford.edu/dept/law/mvn/ (last visited Dec. 19, 2020).

E. New Mexico has had Either Actual or Constructive Notice of Impacts to Texas's Apportionment from New Mexico's Groundwater Pumping Since at Least 1947

The Supreme Court has defined constructive notice as "no more than evidence of notice, the presumption of which is so violent that the court will not even allow of its being controverted." *Townsend v. Little*, 109 U.S 504, 511 (2012). The Court has also endorsed the ideas that "[w]hatever is notice enough to excite attention, and put the party on his guard, and call for inquiry, is notice of everything to which such inquiry might have led[,]" and "[w]hen a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." *Wood v. Carpenter*, 101 U.S. 135, 141 (1879) (internal quotations omitted). The Eighth Circuit has similarly stated the rule that "[n]otice of facts which would incite a man of ordinary prudence to inquiry under similar circumstances is notice of all the facts which a reasonably diligent inquiry would disclose." *Coder v. McPherson*, 152 F. 951, 953 (1907).

There is no doubt that New Mexico had "notice enough to excite attention . . . and call for inquiry" into the effect on Texas's apportionment from groundwater pumping in New Mexico's Rincon and Mesilla Valleys. Documents collected at TX_MSJ_006492-006829 as well as the testimony and associated Powerpoint exhibit from the deposition of State Engineer John D'Antonio (TX_MSJ_006830-006891) includes sworn testimony from New Mexico witnesses, as well as documents and technical reports of which New Mexico was aware – either because they were involved in or authored the documents or because the materials were directed at or originated from New Mexico officials. There are numerous statements by state engineers from as long ago as Steve Reynolds' tenure and as recently as John D'Antonio's tenure, with a sampling of statements by State Engineer Turney from the early 2000s. Excerpts of relevant statements found in these documents include:

- C.S. Conover, Ground-Water Conditions in the Rincon and Mesilla Valleys and Adjacent Areas in New Mexico (1954), prepared in cooperation with EBID (1954 Conover):

  Ground water obtained by pumping in the Rincon and Mesilla Valleys does not represent an additional supply or new source of water to the project, but rather a change in method, time, and place of diversion[.] 1954 Conover at TX_MSJ_006527.

  [I]n a hypothetical year having only 50 percent of a normal supply of surface water available for diversions, the project lands would require an additional acre-foot per acre of water from wells to assure successful irrigation of the crops. However, because of the reduction in flow of the drains caused by pumping and because of losses in distribution, the use of water from wells to supply this deficit would require pumping 2.42 acre-feet per acre, or 213,000 acre-feet a year for the 88,000 acres of water right land in New Mexico. Of the amount pumped, it is calculated that all but 63,000 acre-feet would be diverted from surface-water flow. **If supplemental pumping were resorted to for 5 successive dry years, continued pumping would be necessary for 3 to 4 years after a return to normal surface supply so as to permit bypassing of the required share of water to the El Paso district, awaiting the restoration of ground-water storage by recharge from surface wate**r. 1954 Conover at TX_MSJ_006528 (emphasis added).

- 1956 Memorandum to Declaration of the Rio Grande Underground Water Basin (1956) (1956 Memorandum):

  The effect of pumping on the [Rio Grande] river at any given time is directly proportioned to the amount of the withdrawal. 1956 Memorandum at TX_MSJ_006733.

- Rio Grande- Elephant Butte Dam to El Paso, Texas (1982) (1982 Report)

  In conclusion, all four figures used in this analysis show that the effects of groundwater development below Elephant Butte Dam induced by the drought of the 1950s have significantly affected the amount of water reaching El Paso. The new relationship is well defined and is continuous to the present (1982). 1982 Report TX_MSJ_006740.

- State of New Mexico, Office of the State Engineer: Comments of Thomas C. Turney before the United States Senate Committee of Energy and Natural Resources

(Aug. 14, 2001) (Turney Testimony) (testifying about water supply and regulatory conditions on the Lower Rio Grande):

> Because the primary aquifer [in the Lower Rio Grande] region is hydrologically connected to the Rio Grande-groundwater pumping from this aquifer ultimately will result in diminishment of surface water flows in the Rio Grande. It is likely that surface water rights will have to be acquired to offset all new groundwater withdrawals in the Santa Teresa area. Turney Testimony at TX_MSJ_006765.
>
> The State of New Mexico must by necessity begin to actively manage its water resources . . . . In the Lower Rio Grande Basin, the state will have to curtail junior rights in times of shortage, or as required to satisfy interstate obligations. Turney Testimony at TX_MSJ_006765-006766.

- January 5, 2004 Letter from Susan Maxwell, attorney for City of El Paso to Bert Cortez at the Bureau of Reclamation, copying New Mexico State Engineer John D'Antonio and others (Letter from Susan Maxwell):

  > As the drought continues and Texas users of Project water face increasingly short supplies, we have become increasingly concerned that pumping of groundwater within the Elephant Butte Irrigation District (EBID) is contributing to the shortage Texas is experiencing. Letter from Susan Maxwell at TX_MSJ_006821.
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  > ***
  >
  > It appears likely that such pumping in New Mexico intercepts drain water and return flows that might otherwise be available to Texas, as well as substantially increasing transmission losses due to the lower groundwater table and increased recharge. These effects may continue to impact deliveries to Texas even after the drought conditions and pumping cease. Letter from Susan Maxwell at TX_MSJ_006821.

In short, New Mexico has known for decades that its groundwater pumping in the Rincon and Mesilla Valleys was depleting release from Caballo and interfering with Texas's receipt of its apportionment. It just has not wanted to do anything about it.

III. CONCLUSION

The legal arguments made by New Mexico in support of its motion are simply incorrect and do not support the granting of summary judgment. Additionally, New Mexico's arguments are based upon disputed material facts that cannot support the granting of summary judgment. New Mexico's motion should be denied.

Dated: December 22, 2020

Respectfully submitted,

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