

**No. 141, Original**

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**In the  
SUPREME COURT OF THE UNITED STATES**

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**STATE OF TEXAS,**

**Plaintiff,**

**v.**

**STATE OF NEW MEXICO and  
STATE OF COLORADO,**

**Defendants**

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**OFFICE OF THE SPECIAL MASTER**

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**UNITED STATES OF AMERICA'S NOTICE OF MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

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**TO THE SPECIAL MASTER, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE** that pursuant to the Case Management Plan adopted September 6, 2018, and amendments thereto, including the September 29, 2020 Order and Amendment to Trial Management Schedule, and consistent with Federal Rule of Civil Procedure, Rule 56, the the United States of America (“United States”) hereby moves the Special Master for a recommendation to the Supreme Court for summary judgment:

(i) declaring that, as a party to the Rio Grande Compact, the State of New Mexico has an obligation not to intercept or interfere with deliveries of water by the federal Rio Grande Project (“Project”) that effectuate the Compact apportionment to Texas and the part of New Mexico below Elephant Butte Reservoir, such that

(a) New Mexico may not allow water users other than those within the Elephant Butte Irrigation District (“EBID”) to deplete the surface water supply of the Project;

(b) New Mexico may not allow water users within EBID to deplete the surface water supply in excess of the amount allocated to EBID from the Project pursuant to EBID’s contract with the Secretary of the Interior; and

(c) New Mexico must affirmatively act to prohibit and prevent such depletions by, among other things, accounting and providing offsets to the Project water supply and the flows of the Rio Grande to compensate for the depletions; and

(ii) finding that injunctive relief is warranted because New Mexico has not fulfilled its obligations and thereby violated the Compact, and because a declaration of New Mexico’s obligations standing on its own would not be sufficient to remedy the violation and prevent future violations from occurring.

This motion is made consistent with Federal Rule of Civil Procedure 56, which provides that a party may move for summary judgment on a claim or part of a claim, and that summary judgment shall be granted when there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The United States seeks partial summary judgment on these issues, each of which represents a distinct part of the claims set forth in the United States' Complaint in Intervention and is based on facts and evidence in the record that cannot be genuinely disputed by New Mexico. Summary judgment is warranted at this stage because the undisputed facts show the United States is entitled to the requested declaratory and injunctive relief as a matter of law.

To the extent the Special Master does not recommend that the Court grant all of the relief requested by the motion, the United States alternatively requests an order "stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g).

This motion is supported by the Memorandum in Support of Motion for Partial Summary Judgment filed herewith, the United States' Appendix of Evidence, the files and records in this action, the oral argument of counsel, and any further evidence or argument that the Special Master may properly receive at or before the hearing.

Respectfully submitted this 5th day of November, 2020.

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CERTIFICATE OF SERVICE

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This is to certify that on the 5th day of November 2020, I caused a true and correct copy of the **UNITED STATES OF AMERICA’S NOTICE OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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**OFFICE OF THE SPECIAL MASTER**

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**UNITED STATES OF AMERICA'S MEMORANDUM IN SUPPORT  
OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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## ABBREVIATIONS AND ACRONYMS

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Dorman [Date] Tr.	Sheldon Dorman	NM	June 9, 2020
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Lopez [Date] Tr.	Estevan Lopez as retained expert	NM	July 6 and 7, 2020
Serrano [Date] Tr.	Ryan Serrano	NM	February 26 and April 17, 2019
Stevens [Date] Tr.	Jennifer Stevens	NM	July 27, 2020
Sullivan [Date] Tr.	Gregory Sullivan, Spronk Water Engineering, as retained expert	NM	August 13, 2020

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Abbreviation/Citation	Expert and Firm	State	Date(s)
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Schorr & Kikuchi	Montgomery & Associates		May 31, 2019
Stevens Rep.	Jennifer Stevens, Stevens Historical	NM	October 31, 2019
Sullivan & Welsh Rep.	Gregory Sullivan, Heidi Welsh Spronk Water	NM	October 31, 2019 & July 15, 2020
Thoreson	Bryan P. Thoreson, Davids Engeneering		October 31, 2019

## Other Documents

Abbreviation/short cite	Document	Date	Bates No. or Location
Compact	Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785	Signed 1938 Approved 1939	
1954 Conover Rep.	C.S. Conover, Ground-Water Conditions in the Rincon and Mesilla Valley and Adjacent Areas in New Mexico, U.S.GS. Geological Survey Water Supply Paper No. 1230 (1954)	1954	US0027948
CLC 2017 Rep.	City of Las Cruces 40-Year Water Development Plan at 23-31 (2017)	April, 2017	Exhibit 7 to Lee Wilson Deposition
CLC Water Use Plan	CLC 40-year Water Development Plan, 2008		NM_00304583
FEIS	Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas; Final Environmental Impact Statement	Sept. 30, 2016	Included in references to Barroll Oct. 2019 Report
First Interim Rep.	First Interim Report of Special Master Gregory Grimsal	Feb. 9, 2017	
JIR	Nat'l Res. Comm., Regional Planning, <i>Part VI--The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937</i>	February 1938	US07121553 TX00000561
AWRM Presentation	N.M. Interstate Stream Comm'n, Active Water Resource Management in the Lower Rio Grande: Tools for a New Era in Water Management at 7 (Aug. 19, 2005)	August 19, 2005	TX00175991
1956 Recon. Report	Bureau of Reclamation, Reconnaissance on Water Conservation Plans for the Rio Grande Project, Appendices	July 1956	US0350245
2013 LRG Ann. Rep.	New Mexico Office of the States Engineer Lower Rio Grande Water Master Annual	2013	NM_00018160

	Report, 2013 Accounting Period		
2007 Water Report	New Mexico Office of the States Engineer Lower Rio Grande Water Master District 2007 Report	January. 18, 2008	NM_0018155
2017 Water Report	New Mexico Office of the States Engineer Lower Rio Grande Water Master Annual Report, 2017 Accounting Period	2017	NM_000018261
SOF	Statement of Facts		
	New Mexico v. EBID No. CV-96-888, JWL Cropping Patter Report, April 21, 2011, State Exhibit No. 24	April 21, 2011	NM_00082472
Proposed Regs	Proposed Rules and Regulations providing for Active Water Resources Admin. of the Waters of the LRG Water Master	June 28, 2006	NM_00075541

**MEMORANDUM IN SUPPORT OF  
THE UNITED STATES OF AMERICA’S MOTION  
FOR SUMMARY JUDGMENT**

From the United States’ perspective, this case is straightforward. The Rio Grande Compact apportions all of the waters of the Rio Grande above Fort Quitman, Texas, and the Compact incorporates the federal Rio Grande Project (“Project”) as the mechanism for effectuating the Compact apportionment to Texas and part of New Mexico, while securing deliveries to Mexico under a 1906 treaty. *See Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). As a party to the Compact, the State of New Mexico is bound to the apportionment to which it agreed. Therefore, New Mexico has an obligation to exercise its regulatory authority over water use within its borders consistent with the Compact, and it may not permit New Mexico water users to interfere with the Project’s delivery of the Compact apportionment. New Mexico does not dispute that it has this obligation to protect the Project. Therefore, the United States is entitled to judgment declaring that obligation as a matter of law.

The United States is also entitled to an injunctive remedy to bring New Mexico into compliance with its Compact obligation. In actions to enforce an interstate compact, the Court “may invoke equitable principles . . . to provide effective relief” for violations and “prevent abuse,” so long as the remedy is not inconsistent with the Compact’s terms. *Kansas v. Nebraska*, 574 U.S. 445, 455, 456 (2015). Groundwater pumping by New Mexico water users interferes with the Project’s ability to deliver the Compact apportionment. Indeed, New Mexico’s witnesses acknowledged that at least some forms of groundwater pumping do so, and other forms of such pumping cannot be distinguished. Because New Mexico has not curtailed those uses and lacks a system adequate to do so with any alacrity, a judicial declaration of New Mexico’s obligations is not sufficient to protect the Project. The United States is entitled to

judgment as a matter of law that New Mexico has violated its obligations, and that an injunction is warranted.

For these reasons, further described below, the United States respectfully submits that it should be granted summary judgment declaring New Mexico's obligations under the Compact, that New Mexico failed to meet those obligations, and that an injunctive remedy is warranted consistent with requests for relief in the Complaint in Intervention, with the scope of the remedy to be determined by trial at a later date.

### **LEGAL STANDARDS**

In an original action, “[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed,” and “[i]n other respects, those Rules and the Federal Rules of Evidence may be taken as guides.” S. CT. R. 17.2. Under Rule 56 of the Federal Rules of Civil Procedure, a party may seek summary judgment on a claim or part of a claim. FED. R. CIV. P. 56(a). “The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” *Id.* If the court does not grant all of the relief requested, “it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.” FED. R. CIV. P. 56(g).

A State's obligations under an interstate compact can be declared by summary judgment. *See, e.g.,* Report of Special Master re Winter Storage Motions, *Kansas v. Colorado*, No. 105, Orig., 1994 WL 16189353, at \*154 (filed Sep. 15, 1989; reprinted Oct. 3, 1994)). *See also Texas v. New Mexico*, 462 U.S. 554, 564, 568 (1983) (an interstate compact is federal law, and the Court has the power to declare rights and award relief enforcing its terms).

## STATEMENT OF MATERIAL FACTS

On a motion for summary judgment, a party asserting that a fact cannot be genuinely disputed “must support the assertion by . . . citing to particular parts of materials in the record,” including documents, deposition testimony, admissions, responses to interrogatories or other materials produced in discovery. FED. R. CIV. P. 56(c). The following facts are not disputed or cannot genuinely be disputed based on the record.

### A. Introduction

1. The Rio Grande Compact was intended to effect, and did effect, an equitable apportionment of the Rio Grande between its headwaters and Fort Quitman, Texas.<sup>1</sup>
2. The Compact incorporates the Bureau of Reclamation’s Rio Grande Project to effectuate the apportionment to southern New Mexico and Texas.<sup>2</sup>
3. The Project stores water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico, for release to downstream diversion and conveyance facilities serving Project water users in New Mexico and Texas.<sup>3</sup>
4. As a party to the Compact, New Mexico has a responsibility not to interfere with the delivery of water by the Project and to “work in concert with Reclamation” to do “whatever is necessary” to protect those deliveries.<sup>4</sup>
5. In the Rincon and Mesilla Valleys below Elephant Butte Reservoir (hereafter “Elephant Butte”), the groundwater is hydrologically connected to the surface water: generally, groundwater in the shallow aquifer is recharged by percolation

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<sup>1</sup> Compact, Preamble, 53 Stat. 785; Lopez 30b6 Tr. 16:1-5, 17:2-13. Please see the table of acronyms and abbreviations for full citations. Some statements in this section are mixed statements of law and fact based on the testimony of New Mexico’s designated witnesses.

<sup>2</sup> Barroll 30b6 Tr. 15:14-21; Lopez 30b6 Tr. 27:17-1; *see also Texas v. New Mexico*, 138 S. Ct. at 959.

<sup>3</sup> FEIS at 3-5; JIR at 73-74, 83-86, 99-104, 446 [TX\_00000561, at 646-47, 656-59, 672-77, 1017].

<sup>4</sup> Barroll 30b6 Tr. 15:19-16:1 *See also id.* at 14:23-15:8.

of water from the surface, and the removal of groundwater (by pumping) also takes water from the surface.<sup>5</sup>

6. Groundwater pumping in New Mexico below Elephant Butte interferes with Project deliveries because it depletes the surface water flows in the river, canals, and drains, and the Project must release additional water from the reservoir to compensate for the depletions instead of storing that water for use in future years.<sup>6</sup>
7. In years when surface water supply is low, pumping in New Mexico below Elephant Butte reduces the amount of water the Project can deliver to Texas.<sup>7</sup>
8. Notwithstanding its obligation to protect the Project deliveries that effectuate the Compact apportionment, and the undisputed impact of groundwater pumping on those deliveries, New Mexico has failed to implement a program adequate to prevent and mitigate that impact in full, and New Mexico will investigate its compliance with the Compact only upon a “formal complaint” by Texas or the United States that New Mexico deems to be “valid.”<sup>8</sup>
9. Under New Mexico’s current system of groundwater administration, it would take “months” for New Mexico to curtail groundwater pumping below Elephant Butte in response to such a complaint from Texas or the United States.<sup>9</sup>
10. In the seven years since Texas filed its complaint in this action (and six years since the United States filed its complaint), New Mexico has not curtailed any groundwater pumping to address those complaints.<sup>10</sup>

## **B. The Rio Grande Project**

11. The Rio Grande rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio

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<sup>5</sup> JIR at 55 [TX\_00000561, at 628]; *see also id.* 47-49, 62, 102 [TX\_00000561, at 620, 622, 635, 675].

<sup>6</sup> Barroll Oct. 2019 Rep. at 18, 23, 55; Barroll 7/9/20 Tr. 26:20-25; 43:20-23; Barroll 8/7/20 Tr. 180:14-181:11; 205:23-25; Sullivan & Welsh Sept. 2020 Rep. at 119; Sullivan 8/13/20 Tr. 140:16-19, 142: 20-22; 143:25-144:3, 145:12-16.

<sup>7</sup> Barroll 8/7/20 Tr. 184, 186:12-15, 204:23-205:4, 205:23-206:1.

<sup>8</sup> Barroll 30b6 Tr. 15:4-6, 37:5-8; 42:18-43:14; 24:18-27:17; Lopez 30b6 Tr. 31:21-32:4, 32-35, 68-69, 70:2-7, 92-94.

<sup>9</sup> Barroll 30b6. Tr. 47:7-16.

<sup>10</sup> Barroll 30b6 Tr. 47:23-48:19; Barroll 7/9/20 Tr. 113:12-13.

Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville, Texas.<sup>11</sup>

12. The Rio Grande Project is a federal irrigation project that was authorized in 1905 and currently consists of the Elephant Butte and Caballo Dams and Reservoirs in New Mexico; a power generating plant in New Mexico; the Percha, Leasburg, and Mesilla Diversion Dams in New Mexico; the American and International Diversion Dams in Texas; and approximately 141 miles of canals, 462 miles of lateral ditches, and 457 miles of drains in the two states.<sup>12</sup>
13. In 1906 and 1908, pursuant to New Mexico territorial law, the United States filed notices for the Project announcing an intent to store Rio Grande water at what became Elephant Butte Reservoir and to utilize all unappropriated waters of the Rio Grande and its tributaries for diversion at what became Elephant Butte Dam and the Project's downstream diversions.<sup>13</sup>
14. As of the filing of the 1908 notice, the surface waters of the Rio Grande and its tributaries were fully appropriated under New Mexico territorial and later state law.<sup>14</sup>
15. Pursuant to federal reclamation law and a delegation of authority from the Secretary of the Interior ("Secretary"), Reclamation entered into contracts to provide water from the Project to the water users associations that eventually became the Elephant Butte Irrigation District ("EBID") in New Mexico and the El Paso County Water Improvement District No. 1 ("EPCWID") in Texas (together, the "Districts"), and later into contracts with the Districts themselves.<sup>15</sup>

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<sup>11</sup> U.S. Compl. ¶ 2; N.M. Answer to U.S. Compl. ¶ 2.

<sup>12</sup> FEIS at 1.

<sup>13</sup> Letter to David White, N.M. Territorial Engineer, from B.M. Hall, Supervising Engineer, dated Jan. 23, 1906, US0070234; Letter to Vernon L. Sullivan, N.M. Territorial Engineer, from Louis C. Hill, Supervising Engineer, dated April 1908, US0070236 1905 N.M. Laws 277 (ch. 102, § 22); 1907 N.M. Laws 85-86 (ch. 49, § 40).

<sup>14</sup> Barroll 30b6 Tr. 10-11 (surface waters fully appropriated by 1908); Barroll 7/9/20 Tr. 14-18; Lopez 30b6 Tr. 17:21- 18:13; *see also* Stevens Tr. 49:11-12 (surface supply fully appropriated as of 1935).

<sup>15</sup> Contract between the United States of America, the Elephant Butte Water Users Association, the El Paso Water Users Association, dated June 27, 1906, US0398320 (reprint); Contract between the United States of America and the Elephant Butte Irrigation District, dated June 15, 1918, NM\_00017916; Contract between the United States of America and El Paso County Water Improvement District No. 1, dated January 17, 1920, US0534075; Contract

16. The contracts with EBID and EPCWID provide Project water for the irrigation of approximately 155,000 acres of land—88,000 acres in New Mexico, and 67,000 acres in Texas—with a proportionate reduction of deliveries when there is a shortage of water for irrigation in any given year.<sup>16</sup>
17. EBID is the only entity in New Mexico that has a contract with the Secretary to receive irrigation water from the Project below Elephant Butte.<sup>17</sup>
18. In addition to water that the Project delivers to EBID and EPCWID, the Project delivers water to Mexico pursuant to a 1906 treaty (the “1906 Convention”), which guarantees to Mexico a delivery of 60,000 acre-feet of water per year from the Project, except in cases of “extraordinary drought.”<sup>18</sup>
19. In cases of “extraordinary drought,” “the amount [of water] delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States.”<sup>19</sup>
20. Not all the water that the Project delivers to EBID and EPCWID is consumed by irrigation practices, and a portion returns to the Rio Grande as “return flows.” The Project reuses return flows to make some deliveries within New Mexico and Texas, such that the Project, in effect, delivers more water than it releases from storage.<sup>20</sup>

### C. The Rio Grande Compact

21. In developing the agreement that would become the Rio Grande Compact, the Compacting States were informed by various investigations of the water supply of the Rio Grande, the results of which were ultimately compiled in the Natural

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between the Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 dated Feb. 16, 1938 (“1938 Contract”), US0398329-331.

<sup>16</sup> 1938 Contract, at US0398329; JIR at 73, 83 [TX\_00000561, at 646, 656]; U.S. Compl. ¶ 8; N.M. Answer to U.S. Compl. ¶ 8.

<sup>17</sup> FEIS at 3-10.

<sup>18</sup> Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, U.S.-Mex., 34 Stat. 2953 (“1906 Convention”), US0168978 (reprint); *see id.* arts. I & II, 34 Stat. 2953-2954.

<sup>19</sup> *Id.* arts. II, 34 Stat. 2954.

<sup>20</sup> *See* JIR at 13; 47-49, 55-56, 100 [TX\_00000561, at 585, 620-22, 628-29, 673]; N.M. Answer to U.S. Compl. ¶ 11; N.M. Resp. to U.S. RFA No. 11; N.M. Resp. to Tex. RFA No. 11. As used in this memorandum, “return flows” means water from initial deliveries that seeps into the ground or flows off the agricultural fields and becomes available for redelivery and reuse.

Resource Committee's Joint Investigation Report in 1938 (we refer to these investigations together as the "Joint Investigation" and cite the report as the "JIR").<sup>21</sup>

22. The Compacting States were aware, from the Joint Investigation, that the surface water supply of the Rio Grande in New Mexico below Elephant Butte Reservoir consisted only of the water released from Elephant Butte Reservoir by the Project, intermittent and unpredictable tributary flows, and return flows from Project irrigation.<sup>22</sup>
23. The Compacting States were aware, from the Joint Investigation, that return flows were an "important consideration" in the Project water supply below Elephant Butte Reservoir, in particular the deliveries to Texas, averaging fifty percent of total net Project diversions between 1930 and 1936.<sup>23</sup>
24. The Compacting States were aware, from the Joint Investigation, that, at the time of the Compact, groundwater pumping below Elephant Butte was not extensive and was not a significant source of water supply for irrigation.<sup>24</sup>
25. The Compacting States were aware, from the Joint Investigation, that practically all of the groundwater below Elephant Butte originated as streamflow and precipitation on the valley floor and that pumping of this groundwater constituted a depletion of stream flows rather than a source of additional water.<sup>25</sup>
26. The Compacting States were aware, from the Joint Investigation, that the Project acreage was principally planted in cotton, alfalfa, and row crops, not permanent crops.<sup>26</sup>
27. On February 16, 1938, EBID and EPCWID signed a contract, which was also signed by the Assistant Secretary of the Interior, that committed the Districts to

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<sup>21</sup> Stevens Tr. 40:16-19, 43:24-44:3.

<sup>22</sup> JIR at 47-49, 82-83, 446 [TX\_00000561, at 620-22, 655-56, 1017]; Lopez 30b6 Tr. 87:10-25.

<sup>23</sup> JIR at 13, 47-49, 55 tablet 46, 62, 447 [TX\_00000561, at 585, 620, 622, 628, 635, 1018].

<sup>24</sup> JIR at 55-56 [TX\_00000561, at 628-629].

<sup>25</sup> JIR at 56, 104 [TX\_00000561, at 629, 677].

<sup>26</sup> JIR at 382, table 94 [TX00000561, at 954]; Thoreson Oct. 2019 Rep. at 94, 198-200, table 5C-1 (showing that cotton was the dominant crop in 1938, followed by alfalfa).

repay the costs of the Project in proportion to each District's respective irrigable acreage, which was roughly equivalent to 57% for EBID and 43% for EPCWID.<sup>27</sup>

28. On March 18, 1938, Colorado, New Mexico, and Texas signed the Rio Grande Compact, and Congress approved the Compact on May 31, 1939.<sup>28</sup>
29. The Compact has been incorporated into New Mexico state law.<sup>29</sup>
30. Article I(k) of the Compact defines "project storage" as the combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project."<sup>30</sup>
31. Article I(l) defines "usable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico."<sup>31</sup>
32. Under Article IV of the Compact and a later adjustment made by the Rio Grande Compact Commission, New Mexico is required to deliver water to Elephant Butte Reservoir in an amount that is determined by a schedule.<sup>32</sup>
33. Once the water is delivered by New Mexico to Elephant Butte Reservoir (*i.e.*, into "project storage" for purposes of the Compact, Art. I(k)), it becomes "usable water" under the Compact, to be released by the Project "in accordance with irrigation demands, including deliveries to Mexico."<sup>33</sup>
34. The Project is the means by which the Compact apportionment to Texas and part of New Mexico is effectuated: After the water is delivered into "project storage"

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<sup>27</sup> US0398329-331.

<sup>28</sup> Act of May 31, 1939, ch. 155, 53 Stat. 785.

<sup>29</sup> N.M. Stat. § 72-15-23 (1978).

<sup>30</sup> 53 Stat. 786.

<sup>31</sup> 53 Stat. 786. "Usable water" excludes credit water, *i.e.*, water delivered by New Mexico in excess of its delivery requirement. *See* Compact art I(l), (m), 53 Stat. 786.

<sup>32</sup> 53 Stat. 788; N.M. Suppl. Resp. to Tex. RFA No. 8; U.S. Compl. ¶ 5; N.M. Answer to U.S. Compl. ¶ 5. *See also* Compact Art. XII, 53 Stat. 791 (establishing Commission).

<sup>33</sup> Art. I(l), 53 Stat. 786.

by New Mexico, Reclamation releases the water “in accordance with irrigation demands” to Project water users in New Mexico and Texas.<sup>34</sup>

35. The Secretary’s contracts with EBID and EPCWID, and the 1938 Contract between EBID and EPCWID (the “Downstream Contracts”), are “essential to the fulfillment of the Compact’s expressly stated purpose” of effecting an apportionment of the Rio Grande, and “the Compact could be thought implicitly to incorporate the Downstream Contracts by reference.”<sup>35</sup>
36. The Compact apportionment to the part of New Mexico below Elephant Butte Reservoir is the water released to EBID to meet irrigation demands pursuant to its contract with the Secretary.<sup>36</sup>
37. The Compact apportionment to the part of New Mexico below Elephant Butte Reservoir is water delivered through operation of the Rio Grande Project for irrigation use within EBID.<sup>37</sup>
38. The Compact apportionment to the part of New Mexico below Elephant Butte Reservoir does not include water for any entity or individual other than EBID.<sup>38</sup>
39. The parties to the Compact did not intend for there to be additional development of water resources in New Mexico below Elephant Butte Reservoir that would deplete the surface water supply of the Project.<sup>39</sup>

#### **D. Project Operations 1939-1980**

40. From the inception of the Project to present, Reclamation has been responsible for allocating and releasing water from storage for delivery to the Acequia Madre (i.e., the “Mexican Canal” in the 1906 Convention); the International Boundary

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<sup>34</sup> Art. I(l), 53 Stat. 786, Art. I(k), Art. IV, 53 Stat. 786, 788; *Texas v. New Mexico*, 138 S. Ct. at 959.

<sup>35</sup> *Texas v. New Mexico*, 138 S. Ct. at 959; Stevens Tr. 99:23-100:1; N.M. Suppl. Resp. to Tex. RFA No. 9.

<sup>36</sup> Lopez 30b6 Tr. 23:8-16, 25:23-26, 27:1-10.

<sup>37</sup> Lopez 30b6 Tr. 30:21-23, 31:1-2.

<sup>38</sup> Lopez 30b6 Tr. 25:23-25, 26:1-10; 35:1-3, 41:2-6, 52:1-5, Tr. 55:1-11 (changing use from irrigation to municipal without offsets is an “unauthorized” use under the Compact); *see also* Lopez 30b6 Tr. 55:23-56:5..

<sup>39</sup> Stevens Tr. 109:5-10; 112:20-25.

and Water Commission is responsible for managing the diversion of water delivered to Mexico at the Acequia Madre.<sup>40</sup>

41. From the Project's inception to 1979, Reclamation was responsible for operating and maintaining the Project facilities and for making deliveries to water users in EBID and EPCWID (referred to in places as delivery "at the headgate" or delivery "to lands" or "to farms").<sup>41</sup>
42. Based on reported irrigation deliveries for the period 1946-1950, Reclamation determined that 3.024 acre-feet-per-acre ("af/ac") per year constituted a "normal delivery" of water that could be allocated and delivered to Project irrigable lands.<sup>42</sup>
43. Groundwater pumping in New Mexico below Elephant Butte intensified in the late 1940s and early 1950s, with the number of irrigation wells increasing from less than a dozen in 1947 to more than 1,100 by 1955.<sup>43</sup>
44. In 1954, the U.S. Geological Survey published a report finding that groundwater pumping in the Rincon and Mesilla valleys reduces the flows in Project drains and depletes surface water in the Rio Grande, thereby reducing the surface water supply for the Project.<sup>44</sup>
45. The 1954 report also concluded that the so-called "supplemental" use of groundwater in years of low surface water supply "does not represent an additional supply or new source of water but rather a change in method, time and place of diversion of available supplies" of the surface water.<sup>45</sup>

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<sup>40</sup> FEIS at 5.

<sup>41</sup> FEIS at 5, App. C. at 7 (p.222 of 582 in PDF); Memorandum re Historic and Current Rio Grande Project Water Allocation Procedures (Sept. 29, 1980), US0171808; Memorandum of Conversation re 1906 Treaty Deliveries to Mexico (June 29, 1956) ("1956 Memo"), US0171656.

<sup>42</sup> 1956 Memo at 2, US0171656 at US0171657. The 1956 memo refers to a normal delivery of 36.26 inches per acre, which is 3.024 acre-feet.

<sup>43</sup> Recon. Report 1956 at A-7, US0350245, at 350258.

<sup>44</sup> Conover 1954 at 115, 133 (point 5), US0027948, at 28062, 28080.

<sup>45</sup> Conover 1954 at 121 [US0027948, at 27954]; *see also id.* at 132 ("water pumped by wells in the Rincon and Mesilla Valleys . . . is water that would normally flow to the drains and be diverted for use in a lower part of the project. Pumping of ground water, therefore, is essentially a change in point of diversion of an existing supply.").

46. In 1979 and 1980, the United States transferred to EBID and EPCWID, respectively, the operation and maintenance responsibility for the canals, laterals, and drains within each District.<sup>46</sup>
47. Since 1979, Reclamation has allocated water for delivery to the Districts' diversion points on the Rio Grande, instead of to individual farms, and the Districts are responsible for distributing the water within their respective boundaries consistent with the terms and conditions in their contracts with the Secretary.<sup>47</sup>
48. Since the 1980s, Reclamation has used the D2 Curve to estimate the amount of Project water that will be available for diversion at Project headings for a given amount of Project release from Caballo Dam, in order to determine the annual diversion allocations to the Districts.<sup>48</sup>
49. The "D2 Curve" is a linear regression equation based on project operational data from 1951 to 1978 and is intended to reflect the relationship between the total annual release from Project storage and the total annual project delivery to canal headings on the Rio Grande during that period.<sup>49</sup>

#### **E. Developments Since the 1980s**

50. In 1980, the New Mexico State Engineer issued a declaration designating the area in the Rio Grande basin below Elephant Butte, including EBID, as the Lower Rio Grande Underground Water Basin in 1980.<sup>50</sup>
51. Since the 1980 declaration, a water user must obtain a permit to drill a well or change an existing well in the basin.<sup>51</sup>

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<sup>46</sup> FEISEIS at 5.

<sup>47</sup> Allocation Procedures, US0170037 at US0170048 (p.12 of 16 in PDF).

<sup>48</sup> FEISEIS at 5-8; Allocation Procedures, US-170037-52; Barroll Oct. 2019 Rep. at 33.

<sup>49</sup> FEISEIS at 8; Rio Grande Project, Water Supply Allocation Procedures (version dated Oct. 30, 1997)("Allocation Procedures"), US0170037-52.

<sup>50</sup> NMAC 19.27.48.

<sup>51</sup> Lopez 7/7/20 Tr. 15

52. A permit was generally not required to drill a well for groundwater in the basin prior to the declaration, and New Mexico has not required the owners of those wells to obtain permits unless they are moved or changed.<sup>52</sup>
53. As of 2016, the State Engineer had issued permits for more than 800 wells for irrigation use.<sup>53</sup>
54. Since 1980, an increasing proportion of the acreage in EBID has been converted from row crops to permanent crops with higher water requirements, in particular pecans.<sup>54</sup>
55. As of 2016, the State Engineer had issued permits for more than 300 wells for municipal and industrial use.<sup>55</sup>
56. The City of Las Cruces (“the City” or “Las Cruces”), which is located partly within the EBID boundary, had two wells in use prior to 1937, five wells in use as of 1947, and 45 wells in use as of 2017, many of them drilled after 1980.<sup>56</sup>
57. While the City’s permitted (*i.e.*, post-1980) wells are subject to volume limitations and some offset requirements to account for estimated surface water depletions attributable to the pumping, the City is authorized to pump up to 21,869 acre-feet annually under its pre-1980 groundwater right (“LRG-430”), subject only to a condition that the City forgo consumption of municipal effluent in cases of drought (defined as years when the Project’s surface water allocation is equivalent to 2.0 af/ac).<sup>57</sup>
58. Since 1980, groundwater pumping for non-irrigation uses (including municipal use) below Elephant Butte has nearly doubled, from about 20,000 acre-feet per year to about 37,000 acre-feet per year, driven by an increase in pumping by

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<sup>52</sup> Lopez 7/6/20 Tr. 135:5-6; Lopez Expert Rpt Oct. 2019, p 39; Barroll Oct. 2019 Report, at 22, n.47

<sup>53</sup> Schorr & Kikuchi May 2019 Rep. 104 (fig. 4.4).

<sup>54</sup> Barroll 8/7/20 Tr. 256: 4-9; Barroll Oct. 2019 Rep. at 55, 61; Longworth, et al., Cropping Pattern Report dated Apr. 21, 2011 (submitted in SS 97-101), NM\_00082472, at NM\_00082480 (finding 28,331 acres in pecans in 2008 and 18,833 acres in alfalfa); Thoreson Oct. 2019 Rep. at 21, 198-200; Kimmelshue May 2019 Rep. at 11.

<sup>55</sup> Schorr & Kikuchi May 2019 Rep. 104 (fig. 4.4).

<sup>56</sup> Conover 1954 at 88; City of Las Cruces 40-Year Water Development Plan at 23-31 (2017) (“CLC 2017 Rep.”), Exhibit 7 to Wilson Dep.

<sup>57</sup> CLC 2017 Rep. at 28; Subfile Order for LRG-430, et al., LRG Adjudication (reprinted in 2008 CLC Water Use Plan), NM\_00304583, at 304668-73.

entities other than the City of Las Cruces whose groundwater use began after the Compact.<sup>58</sup>

59. Since 1980, the New Mexico State Engineer has issued permits to more than 5,000 wells for domestic use, which are subject only to a standard volume limitation and generally not subject to metering requirements.<sup>59</sup>
60. Domestic wells have also sometimes been used to provide water for supplemental irrigation below Elephant Butte.<sup>60</sup>

#### **F. Effects of Groundwater Pumping in Years of Less than Full Project Supply**

61. Groundwater pumping in New Mexico impacts the surface water supply for the Project because it depletes the flow of the Rio Grande, and reduces the amount of water flowing in Project drains and canals.<sup>61</sup>
62. Groundwater pumping in New Mexico in years of lower surface water supply can reduce the volume of water available for Project allocation and delivery to the Districts, and thus reduce the apportionment to Texas.<sup>62</sup>
63. On average, groundwater pumping in New Mexico reduced Project diversions by over 60,000 acre-feet annually between 1951 and 2017.<sup>63</sup>

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<sup>58</sup> N.M. Resp. to U.S. RFA No. 13; Sullivan & Welsh Oct. 2019 Rep. at 205 (fig. 5-26).

<sup>59</sup> Schorr & Kikuchi May 2019 Rep. at 104 (fig. 4-4); D’Antonio 6/26/20 Tr. 328:18-331:24; Barroll 2/5/20 Tr. 42. Only between 400 and 450 wells for “non-irrigation” uses (domestic, municipal, commercial uses, e.g.) are metered below Elephant Butte, and use from these wells was not tracked by the Water Master until 2012. Serrano 2/26/19 Tr. 73:4-13.

<sup>60</sup> Dorman Tr. 72:6-21.

<sup>61</sup> See Lopez 30b6 Tr. 31:15-20 (“The groundwater pumping does impact surface supply.”; “I think that it does [deplete surface supply]”); Lopez 7/7/20 Tr. 145:3-6; D’Antonio 6/25/20 Tr. 193:20-24 (“pumping can and does affect river flow”); see also N.MNM. Resp. to US RFA Nos. 6-9; N.M. Suppl. Resp. to Tex. RFA Nos. 33, 34.

<sup>62</sup> Lopez Tr. 47:7-11; Barroll 8/7/20 Tr. 184; 186:12-15; N.M. Suppl. Resp. to Tex. RFA Nos. 33 & 34.

<sup>63</sup> Sullivan & Welsh Sept. 2020 Rep. at 119 (calculating that pumping in New Mexico in the period 1951-2017 decreased Project diversions to EBID by an average of 46,300 acre-feet-per year in and decreased diversions to EPCWID by 18,500 acre-feet-per year during the primary irrigation season); see also *id.* at 354.

64. From 2000 to 2018, the Project’s surface water supply was so low that the Project allocated shortages under the “extraordinary drought” provision of the 1906 Convention in all but five years.<sup>64</sup>
65. Between 2003 and 2005, when the Project allocations to the Districts were less than 50% of a normal allocation (equivalent to 1.37 af/ac in 2003, 1.01 af/ac in 2004, and 1.13 af/ac in 2005), groundwater pumping in New Mexico depleted the surface water supply available for allocation by the Project to the Districts by more than 200,000 acre-feet.<sup>65</sup>
66. Had all groundwater pumping in New Mexico below Elephant Butte been “turned off” between 2003 and 2005, EBID and EPCWID could have received a full allocation from the Project.<sup>66</sup>
67. Groundwater pumping in New Mexico, even in years of higher surface water supply, reduces the amount of water retained in Project reservoir storage, which can affect the amount of water available for the Compact apportionment in the following year.<sup>67</sup>
68. Other than through permit conditions, New Mexico has never exercised its regulatory authority to curtail any water user’s groundwater pumping below Elephant Butte Reservoir.<sup>68</sup>

#### **G. The 2008 Operating Agreement**

69. Reclamation continues to calculate diversion allocations of Project water based on the split of 57% for EBID and 43% for EPCWID (after subtraction of Mexico’s share of the water), which corresponds to the proportion of irrigable acreage in each district.<sup>69</sup>
70. In 2008, Reclamation, EBID, and EPCWID entered into an agreement (“the 2008 Operating Agreement”) that defines the procedure for making the Project allocation:

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<sup>64</sup> Barroll Oct. 2019 Rep., App. A-1, tables A-9 and A-1.

<sup>65</sup> Barroll 8/7/20 Tr. 184:4-186:20; Barroll July 2020 Rep. at 7-9.

<sup>66</sup> Barroll 8/7/20 Tr. 184:4-186:20. Barroll July 2020 Rep. at 7-9.

<sup>67</sup> Barroll Tr. 8/7/20 180:14-181:11; Barroll Oct. 2019 Report, at xi; Barroll Oct. 2019 Report at 12; Sullivan and Welsh Oct. 2019 Report (Revised Jul 2020) at 12.

<sup>68</sup> Serrano 2/26/19 Tr. 55:14-22.

<sup>69</sup> FEIS Appendix C at 8-9.

(1) Reclamation uses the D2 Curve to estimate how much water would be available for delivery, including return flows, from a given volume of water released from the Project under 1951-1978 hydrological conditions;

(2) after subtracting Mexico's share of the water, Reclamation assigns 43% of the estimated available water to EPCWID and 57% of the water to EBID;

(3) EBID then forgoes a portion of that allocation to account for changes in Project delivery performance between current-year conditions and the 1951-1978 conditions reflected in the D2 Curve, as quantified by a figure called the "Diversion Ratio."<sup>70</sup>

71. The effect of the 2008 Operating Agreement is that EBID voluntarily cedes some of its surface water allocation to EPCWID to compensate for surface water depletion caused by groundwater pumping in New Mexico, including pumping by water users outside of EBID.<sup>71</sup>

#### **H. Administration by New Mexico**

72. The volume of groundwater pumped in New Mexico below Elephant Butte, found to be minimal at the time of the Compact, has averaged more than 200,000 acre-feet pumped annually in the years 2011-2017, far exceeding what was documented at the time of the Compact.<sup>72</sup>

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<sup>70</sup> FEIS Appendix C at 8-9.

<sup>71</sup> Lopez 30b6 Tr. 67:4-7; Barroll 7/9/20 Tr. 51:12-16.

<sup>72</sup> Compare Sullivan & Welsh Oct. 2019 Rep. at 239 (fig. 9-3) with JIR at 55, 97, 105 [TX\_00000561, at 628, 670, 678] (finding that groundwater was not used to an appreciable extent and estimating 3,420 acre-feet of municipal pumping below Elephant Butte, excluding El Paso, with 2,400 af of associated stream-flow depletion). See also N.M. Suppl. Resp. to Tex. RFA No. 24; N.M. Interstate Stream Comm'n, Active Water Resource Management in the Lower Rio Grande: Tools for a New Era in Water Management at 7 (Aug. 19, 2005) ("AWRM Presentation"), TX00175991, at TX00175997 (noting, in 2005, that "200,000 – 300,000 (?)" acre-feet may be pumped for irrigation in years of low project supply); Lower Rio Grande Water Master Annual Report, 2013 Accounting Period ("2013 LRG Ann. Rep."), NM\_00018160, at NM\_00018168-69 (showing metered diversions of more than 300,000 acre-feet in 2011, 2012, and 2013)..

73. With few exceptions, all of the groundwater pumping in New Mexico below Elephant Butte is junior in priority to the Project.<sup>73</sup>

### **1. AWRM Statute and Regulations**

74. In 2003, to address concerns about compliance with interstate compacts, the New Mexico Legislature enacted NMSA 1978, Section 72-2-9.1, authorizing the State Engineer to administer water rights prior to adjudication and directing him to issue regulations for priority administration.<sup>74</sup>
75. In response, the State Engineer developed the Active Water Rights Management (“AWRM”) regulations, 19.5.13.1-19.5.50, NMAC, under which the State Engineer identifies water districts in need of management and appoints a water master to manage these districts.<sup>75</sup>
76. In 2004, the State Engineer identified the Rio Grande basin below Elephant Butte Reservoir as “District IV” or the “Lower Rio Grande” District for purposes of management under the AWRM regulations, appointed a water master, and issued a metering order.<sup>76</sup>
77. The 2004 metering order, as implemented by the District IV water master, required water users to install a meter on every irrigation well by 2006 and report irrigation from such wells quarterly, but EBID water users were given a “grace period” and did not begin installing meters until the 2007 irrigation season.<sup>77</sup>
78. In 2006, the State Engineer published proposed district-specific AWRM regulations that were intended to tailor the statewide AWRM regulations to District IV to ensure, among other things, that the Project’s water supply was

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<sup>73</sup> Lopez 7/7/20 Tr. 11-24. *See also* Findings of Fact and Conclusions of Law, LRG Stream System Issue 104, United States’ Interests (Apr. 17, 2017) (ruling that the Project has a priority date of 1903).

<sup>74</sup> *See generally* *Tri-State Generation & Transmission Ass’n v. D’Antonio (Tri-State)*, 289 P.3d 1232, 1235-36 (N.M. 2012).

<sup>75</sup> *See Tri-State*, 289 P.3d at 1235-36; D’Antonio 6/25/20 Tr. 183:1-21.

<sup>76</sup> D’Antonio 6/25/20 Tr. 200:12-201:23.

<sup>77</sup> NMOSE, Lower Rio Grande Water Master District 2007 Report (Jan. 18, 2008), NM\_0018155, at NM\_0018157-58; D’Antonio 6/26/20 Tr. 316:18-23; Barroll 2/5/20 39:4-5 (metering order “really went into effect in 2008”).

protected and that New Mexico could meet its obligations under the Rio Grande Compact.<sup>78</sup>

79. The State Engineer never finalized or adopted the district-specific AWRM regulations for District IV.<sup>79</sup>

## **2. Groundwater Basin and Permitting**

80. In 1996, the State Engineer commenced a general stream adjudication of the Rio Grande below Elephant Butte, known as the Lower Rio Grande or “LRG” adjudication.<sup>80</sup>

81. In an LRG adjudication matter known as “Stream System Issue 101,” the State Engineer, New Mexico Pecan Growers, New Mexico Diversified Crop Growers Association and EBID negotiated a settlement agreement, later adopted by the adjudication court, under which the State Engineer may issue permits for irrigation wells in EBID provided that the wells are for use of groundwater as a supplement to the surface water supply from the Project, subject to a maximum “Farm Delivery Requirement” (“FDR”).<sup>81</sup>

82. Under the Stream System 101 order, the State Engineer may issue a permit allowing a water user to pump as much as needed above their share of the Project allocation in order to achieve a farm delivery of 4.5 af/ac, or upon submission of evidence, as much as 5.5 af/ac. This means that an irrigator with rights to use both surface water and groundwater may pump up to 1.476 af/ac above the 3.024 af/ac amount determined to be the normal supply from the Project historically. , And, in a year when the Project supply is less than 3.024 af/ac an irrigator may pump even more - the difference between the reduced allocation and the 4.5 or 5.5 af/ac.<sup>82</sup>

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<sup>78</sup> D’Antonio 8/14/20 Tr. 43-44, 50:21-52:2.

<sup>79</sup> Barroll 30b6 7:18-22.

<sup>80</sup> *New Mexico v. Elephant Butte Irrigation Dist.*, D-307-CV-96-888 (N.M. 3d Jud. Dist. Sept. 24, 1996).

<sup>81</sup> See Final Judgment, LRG Adjudication, Stream System Issue 97-101 (“SS 101 Order”) at 5 (Aug. 15, 2011), NM\_00082198, at NM\_00082202.

<sup>82</sup> SS 101 Order at 7, NM\_00082198, at NM00082203-205; N.M. Suppl. Resp. to Tex. RFA Nos. 46, 47.

83. The FDR quantification was the result of negotiation and compromise between the State Engineer and irrigators, in particular pecan growers, and went above what the State's expert witness report supported.<sup>83</sup>
84. Water users have filed more than one thousand notices of intent requesting the higher 5.5 af/ac FDR, and the users who filed notices have been allowed to divert up to 5.5 af/ac while their requests were pending.<sup>84</sup>
85. The only limitations on groundwater pumping that New Mexico imposes on water users within EBID are the FDR (or crop irrigation demands if less than the FDR) and the listed place of use and maximum acres.<sup>85</sup>
86. Diversions of groundwater and surface water above the permitted annual FDR (called "overdiversions") are usually not identified until the following calendar year, after a reconciliation of the metering data by the Water Master that might begin in February or March.<sup>86</sup>
87. There are on the order of about 200 overdiversions each year in District IV.<sup>87</sup>
88. The District IV Water Master does not look into every overdiversion, and those he does investigate are usually addressed through a repayment plan (under which the

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<sup>83</sup> See SS 101 Order, NM\_00082198, at NM00082198-200 (reciting history of 2008 settlement agreement with New Mexico Pecan Growers); Settlement Agreement between NMOSE and New Mexico Pecan Growers executed in 2008, NM\_00081209, at NM\_00081210 (stipulating to an FDR of 5.5 af/ac per year ("afay") for mature pecan orchards based on a crop irrigation requirement of 4.0 afay and farm efficiency of 72%). See also Margaret Barroll, Rebuttal Expert Report Revised Comparison of 2009 Farm Deliveries with Farm Delivery Requirement Calculations for the Lower Rio Grande dated April 2011 (Barroll Vol. II Ex. 17, NM\_00081951) (report on behalf of NMOSE estimating FDR of 3.7 – 4.0 af/ac, based on crop irrigation requirement of 2.5 af/ac for all crops in basin and farm efficiency of 67%-70% under Blaney-Criddle method); D'Antonio Tr. 341:16-342:13 (characterizing Dr. Barroll's technical estimate as an "opening" number and the 4.5-5.5 af/ac range as "what we settled on").

<sup>84</sup> Serrano 4/17/19 Tr. 192:16-193:22. See Serrano 4/17/19 Ex. 92, NM\_0008343, "NOI" tab (listing ninety water rights associated with requests for a 5.5 af/ac FDR, of which fifty had overdiversions in 2012).

<sup>85</sup> Lopez 30b6 Tr. 36:23-37:2; 52:15-22; Barroll 30b6 Tr. 35:22-36:17

<sup>86</sup> Barroll 30b6 Tr. 21:7-22:13; see, e.g., 2017 Water Master Report, NM\_0018261, at NM\_0018269 (noting that reconciliation for 2016 year began in March of 2017).

<sup>87</sup> Barroll 30b6 Tr. 23:14-15; but see Serrano 4/17/19 Tr. 236:14-18 (testifying that the number of overdiversion enforcement actions "tends to fall between 200 and 300").

water user diverts less the following year), or through the transfer or pooling of water rights within the district to cover the overage.<sup>88</sup>

89. The Water Master usually requests that the litigation unit initiate enforcement actions of between 1 and 30 violations each year, including overdiversions and other violations.<sup>89</sup>
90. Repeat over-diverters do not face increased penalties or additional enforcement action for their failure to comply, and the State Engineer has never litigated an enforcement action based on overdiversion to hearing.<sup>90</sup>

### **3. Accounting**

91. New Mexico does not consider depletions of the Project's surface water supply caused by groundwater pumping below Elephant Butte as applying against the Compact apportionment to the part of New Mexico below Elephant Butte.<sup>91</sup>
92. New Mexico does not account for or protect senior surface water rights from surface water depletions by junior-in-priority groundwater pumping for agricultural use within EBID, or require offsets for such depletions.<sup>92</sup>
93. New Mexico does not account for or require offsets for surface water depletions associated with groundwater pumping outside of EBID that was developed between 1938 and 1980.<sup>93</sup>
94. If the United States were to make a priority call for its senior surface water right for the Project under New Mexico state law, New Mexico does not know how or even *if* it would enforce or implement that call.<sup>94</sup>

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<sup>88</sup> Barroll 30b6 Tr. 22:17-23:23; Serrano 2/26/19 Tr. 85:20-86:10, 109:20-110:22; 111:19-24; Serrano 4/17/19 Tr. 242:2-15; 2013 LRG Ann. Rep. at 8-9, NM\_00018160, at NM\_00018167-68.

<sup>89</sup> Barroll 30b6 Tr. 23:19-23.

<sup>90</sup> *See also* Serrano 4/17/19 Tr. 237:1-6, 241:3-15, 242:18-243:7; D'Antonio 6/26/20 Tr. 316:16-318:7.

<sup>91</sup> Lopez 30b6 Tr. 34:17-20. *See also* Lopez 30b6 Tr. 35:19-20 (pumping can deplete the project water supply overall, and "our position is that we don't have to account for that").

<sup>92</sup> Lopez 30b6 Tr. 35:19-20. *See also id.* at 34:3-5 ("the use of groundwater for conjunctive purposes on Project ag lands does not have to be counted"); 34:17-20; 51:17- 52:5.

<sup>93</sup> Barroll 30b6 Tr. 25:13-27:13.

<sup>94</sup> Barroll 30b6 Tr. 44-46; Lopez 30b6 Tr. 38:9-10, 40:5-8.

#### 4. Compact Enforcement

95. New Mexico will investigate groundwater impacts to the Project's surface water supply for Compact enforcement purposes only upon a complaint from Texas or the United States.<sup>95</sup>
96. From New Mexico's perspective, the complaints of Texas and the United States filed in this original action constitute complaints about the impacts of groundwater pumping on the Project water supply for purposes of Compact enforcement.<sup>96</sup>
97. Nevertheless, since Texas's complaint was filed in 2013, and the United States' complaint was filed in 2014, all New Mexico has done to address the complaints of Texas and the United States is to investigate the allegations and to develop a "pilot program" to reduce groundwater pumping, which the State Engineer has yet to implement.<sup>97</sup>

#### STATEMENT OF THE CASE

Texas initiated this original action against New Mexico and Colorado in 2013 alleging that New Mexico was violating the Compact and that Texas was not receiving its apportionment of water. In 2014, the Court granted the United States leave to intervene as a plaintiff on its Complaint in Intervention ("Complaint"). The United States' Complaint requests that the Court:

- (a) declare that New Mexico, as a party to the Compact:
  - (i) may not permit water users who do not have contracts with the Secretary of the Interior to intercept or interfere with delivery of Project water to Project beneficiaries or to Mexico,
  - (ii) may not permit Project beneficiaries in New Mexico to intercept or interfere with Project water in excess of federal contractual amounts, and

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<sup>95</sup> Lopez 30b6 Tr. 31:21-32:4, 69:18-70:2-7, 92-94; Barroll 30b6 Tr. 15:4-6, 37:5-8, 42:18-43:14.

<sup>96</sup> Lopez 30b6 Tr. 69:20-24; Barroll 30b6 Tr. 47:17-22, 48:10-13.

<sup>97</sup> Barroll 7/9/20 Tr. 115:1-4; Barroll 30b6 Tr. 60-64 (describing voluntary following "pilot" program); *see also id.* at 48:6-10, 58:9-17, 60:16-21.

(iii) must affirmatively act to prohibit or prevent such interception or interference;

(b) permanently enjoin and prohibit New Mexico from permitting such interception and interference;

(c) mandate that New Mexico affirmatively prevent such interception and interference; and

(d) grant such other relief as the Court may deem appropriate and necessary to protect the rights, duties, and obligations of the United States with respect to the waters of the Rio Grande.

In 2016, Special Master Grimsal issued a report recommending that the United States' complaint be dismissed to the extent it alleged claims based upon the Compact. The United States took exception to the recommendation. In 2018, the Court sustained the exception and held that the United States could pursue "the particular claims it has pleaded in this case." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).

New Mexico answered the complaints and filed counterclaims against Texas and the United States on May 22, 2018. The Special Master dismissed all of New Mexico's counterclaims against the United States and one of the counterclaims against Texas on March 31, 2020. Discovery is substantially complete.

## ARGUMENT

### **I. The United States is Entitled to Summary Judgment Declaring New Mexico's Obligation to Prevent and Prohibit Interference with the Project's Delivery of the Compact Apportionment.**

The Court has the power to declare rights and obligations under an interstate compact. *See Texas v. New Mexico*, 462 U.S. at 568. New Mexico's obligations under the Rio Grande Compact can be declared as a matter of law because the Compact's meaning is plain: New Mexico must deliver the water apportioned to Texas and the Project lands in New Mexico to the Project at Elephant Butte Reservoir. The Compact incorporates the Project to effectuate the

distribution of the apportioned water. New Mexico may not intercept or interfere with the water it has “delivered” to the Project at Elephant Butte Reservoir under Article IV by authorizing activities below the reservoir that take the water away from the Project. In fact, the Compact’s meaning on this point is so plain that New Mexico admits it. New Mexico’s designated witness testified that “[t]he Project is the mechanism by which Project water is delivered below Elephant Butte,” and that “New Mexico has the responsibility not to interfere with that” and “to ensure that that can occur.” Barroll 30b6 Tr. 10:2-6. In addition, New Mexico’s designated witness testified that New Mexico must “work in concert with Reclamation when it comes to whatever is necessary [for the] surface water distribution of the project.” Barroll 30b6 Tr. 10:10-12.

As a party to the Compact, New Mexico has an obligation to exercise its regulatory authority over water uses in a manner consistent with the Compact apportionment: It may not allow uses that frustrate the apportionment to which it agreed. New Mexico’s allowance of groundwater pumping that intercepts and interferes with Project deliveries the Compact incorporates as the means of effectuating the apportionment violates the Compact.

**A. The Compact incorporates the Project as the means of effectuating the apportionment below Elephant Butte.**

It is undisputed that the Compact was intended to effect an equitable apportionment of the entire flow of Rio Grande from its headwaters to Fort Quitman. Statement of Fact (“SOF”) No. 1. The Compact apportions the water by specifying amounts to be delivered by Colorado to New Mexico at a gaging station near the state line between those two States, and by specifying amounts to be delivered by New Mexico to Elephant Butte Reservoir, 105 miles north of the Texas state line. *See* Compact arts. III-IV, 53 Stat. at 787-88; SOF Nos. 32-34; FEIS at 2 (map). Once in storage at the reservoir, the water delivered by New Mexico becomes “usable water”

that the Project releases “in accordance with irrigation demands, including deliveries to Mexico.” Compact art. I(l), 53 Stat. at 786; SOF No. 33. From those Project “releases in accordance with irrigation demands,” Texas and the part of New Mexico below Elephant Butte receive their apportionment. *See Texas v. New Mexico*, 138 S. Ct. at 959; SOF No. 34. The Compact thus incorporates the operation of the Project to implement the apportionment below Elephant Butte while securing ongoing deliveries to Mexico.

It is also undisputed that the Compact apportionment to the part of New Mexico below Elephant Butte is based on EBID’s contract with the Secretary and EBID’s contract with EPCWID (signed by the Assistant Secretary), which “the Compact could be thought implicitly to incorporate . . . by reference.” *Texas v. New Mexico*, 138 S. Ct. at 959; SOF Nos. 35. The Compact apportions all of the flow of the Rio Grande between Elephant Butte Reservoir and Fort Quitman. SOF No. 1. The waters of the Rio Grande below Elephant Butte consist solely of the water the Project “release[s] in accordance with irrigation demands” (including return flows) and some intermittent tributary flows that are also appropriated for the most part by the Project. *See* SOF No. 13, 22. Because EBID is the only entity with a contract to receive irrigation water from the Project in New Mexico below Elephant Butte, the Compact apportionment to southern New Mexico is limited to the Project’s allocation of water to EBID pursuant to its contract. SOF Nos. 17, 35, 36, 38.<sup>98</sup>

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<sup>98</sup> New Mexico does not dispute that the apportionment to the part of New Mexico below Elephant Butte is defined by or at least closely linked to EBID’s contractual entitlement, although the precise quantification of that entitlement and how it is calculated may be matters of dispute. *See, e.g.*, Lopez 30b6 Tr. 23:8-16, 25:23-26, 27:1-10.

**B. The water committed by the Compact to the Project for distribution under the Downstream Contracts, including the apportionment to Texas, includes return flows generated by use of Project water within New Mexico.**

The undisputed facts show that Project return flows were understood by the Compacting States to be part of the Rio Grande flows apportioned by the Compact. *See* SOF Nos. 20, 22, 23. The Compact uses the Project to implement the apportionment, and the Project relies on return flows to meet the “irrigation demands” referenced by the Compact, Art. I(D), pursuant to the Downstream Contracts. *See* SOF Nos. 2, 20, 23. The Compact negotiators were aware, from the Joint Investigation, that return flows were “an important consideration” in evaluating the surface water supply. SOF No. 23. Although the Compact does not specify a particular quantity of return flow, it unquestionably reflects the Compacting States’ understanding that return flows were an “important” part of the water supply below Elephant Butte, and in particular to Texas. SOF 23; JIR at 62, TX\_00000561, at 635.

It is also indisputable that the waters of the Rio Grande apportioned to Texas include return flows to the Rio Grande resulting from irrigation surface water runoff and seepage of irrigation water through the ground to drains and to the river. The Project completed a network of drains by 1925 for the specific purpose of intercepting the water seeping from irrigated fields into the shallow groundwater system. *See* JIR at 73, TX\_00000561, at 646.<sup>99</sup> By the time of the Joint Investigation, the flows out of the drains constituted a substantial proportion of Project deliveries. *See* SOF No. 23; JIR at 55 table.46, TX\_00000561, at 628; JIR at 447-48, TX\_00000561, at 1018-19 (showing volume of drain flows in acre-feet). Although New Mexico

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<sup>99</sup> On the Project, the discharges from drains was measured for many years prior to 1938. JIR at 55, TX\_00000628. Return flows reaching the river are available to the next diversion downstream, and on the Rio Grande Project reached 50% of the average of total net diversions. JIR at 13, TX\_00000561.

contends that the Compact apportioned surface waters only, it cannot be disputed that the surface water supply the Compact apportioned is derived, in part, from return flows that traveled through the ground. The water apportioned by the Compact includes such return flows from the use of Project water, undiminished by new water resource development after the States approved the Compact in 1938.

**C. The Compact precludes New Mexico from permitting interception or interference with Project deliveries and water supply below Elephant Butte.**

The Compact effectuates the apportionment of water below Elephant Butte through the operation of the Project, based on the Downstream Contracts, and the apportionment to Texas includes return flows generated in New Mexico. Therefore, as a party to the Compact, New Mexico may not frustrate that apportionment by failing to prohibit water uses that intercept the Project water supply or interfere with Project deliveries. That includes groundwater pumping.

New Mexico does not dispute that it must exercise its regulatory authority below Elephant Butte Reservoir in a manner consistent with the Compact, and that it may not interfere with the Project's delivery of the apportionment. SOF No. 4. *See also* Lopez 30b6 Tr. 41:2-6 (denying that New Mexico may permit water to be taken away from the Project by operation of state law).<sup>100</sup> That obligation limits New Mexico's ability to allow groundwater pumping that decreases the Project water supply and the apportioned river flows below Elephant Butte.

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<sup>100</sup> Although New Mexico might attribute that limitation to the state statute that incorporates the Compact, *see* SOF 29, the Compact itself imposes that limitation because it is an agreement binding on the State. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938) (apportionment of water in an interstate stream pursuant to a compact "is binding upon the citizens of each State and all water claimants").

Indeed, New Mexico does not dispute that the Compact constrains its authority in at least three respects:

- New Mexico agrees that it may not authorize groundwater pumping for irrigation by water users outside of EBID, absent offsets to the Rio Grande Project, because the apportionment to southern New Mexico is based on EBID's contractual entitlement to water. Lopez 30b6 Tr. 25:23-26:10.
- New Mexico agrees that it may not authorize groundwater pumping for municipal uses below Elephant Butte Reservoir, absent offsets to the Rio Grande Project, because the apportionment to southern New Mexico consists only of releases made to meet "irrigation demands." Lopez 30b6 Tr. 51:17-52-5.<sup>101</sup>
- New Mexico agrees that it would need to curtail groundwater pumping from the alluvial aquifer to some extent if the United States places a call (i.e., seeks to curtail junior water users in priority) on behalf of the Project's senior surface water right. Barroll 30b6 Tr.

New Mexico thus acknowledges that some categories of groundwater pumping below Elephant Butte exceed or otherwise interfere with the Project's delivery of the Compact apportionment.

New Mexico contends, however, that there are some other categories of groundwater pumping that it may allow *without* requiring offsets for surface water depletions. In particular, New Mexico maintains that it need not account for, or require offsets for, depletions to the Rio Grande and the Project water supply caused by groundwater pumping in EBID for agricultural use. SOF Nos. 91, 92. *See, e.g.*, Lopez 30b6 Tr. 50:17-23. That position is untenable.

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<sup>101</sup> New Mexico acknowledges that the surface waters of the Rio Grande were fully appropriated under state law prior to the date of the Compact. Barroll 30b6 Tr. 16:22-25. "Fully appropriated" means that all surface flows had been appropriated by water users prior to that date, and that further appropriation depleting the flows of the river would take water previously developed for beneficial purposes by those prior appropriators. *Id.*; Lopez 30b6 Tr. 18:4-19:1. Therefore, whether as a function of state law or the Compact, New Mexico will not allow new uses of surface water.

The Compact unambiguously requires New Mexico to “deliver” water to the Project. Art IV; SOF No. 32. The water, once delivered, becomes “usable water” that the Project “releases in accordance with irrigation demands.” Art. I(l). *See* SOF Nos. 30, 31. “Delivery” is generally understood to mean “[t]he formal act of voluntarily transferring something.” *See* Black’s Law Dictionary 541 (11th ed. 2019). At the time of the Compact, as found by Special Master Grimsal, the word “deliver” was defined as follows:

“To deliver property to another means to surrender it to that person. To give with one hand and to take back with the other is no delivery.” BALLENTINE’S LAW DICTIONARY 353 (1930); *see also* BLACK’S LAW DICTIONARY 349, 842 (2d ed. 1910) (defining “delivery” in the context of conveyancing as “[t]he final and absolute transfer of a deed, properly executed, to the grantee, or to some person for his use, in such a manner that it cannot be recalled by the grantee”). Similarly, in general contemporary usage, “deliver” is defined as “[t]o give or transfer; to yield possession or control of; to part with (to); to make or hand over . . . to commit; to surrender.” WEBSTER’S SECOND NEW INTERNATIONAL DICTIONARY 963 (1934). At the time the Compact was signed, delivery was defined in the context of “conveyancing” as “[t]he final and absolute transfer of a deed . . . in such a manner that it cannot be recalled by the grantor.”

First Interim Report of the Special Master at 196 (filed Feb. 9, 2017) (“First Interim Rep.”). *See also* *Fox v. Young*, 91 S.W.2d 857, 859 (Tex. Civ. App. 1936) (“A delivery may be said to have been made whenever, at the time and place . . . the parties have agreed upon, the seller has done everything which is necessary to be done in order to put the goods completely and unconditionally at the disposal of the buyer.”). It follows that, under the Compact, New Mexico is required to relinquish control of the water to the Project, which then effectuates the Compact apportionment by releasing water for delivery to Mexico, for diversion and use under contract

within EBID in New Mexico, and for use within Texas.<sup>102</sup> New Mexico does not regain control of the water, or the ability to reapportion it through operation of state law, once it is released. With the possible exception of limited water rights that predate the Project, all of the surface flows below Elephant Butte are appropriated by the Project under state law and that water is committed to the Project by the Compact to implement the apportionment. SOF Nos. 13, 14. New Mexico cannot exercise its authority to permit interception of the water it has relinquished to the Project under both state and federal law.<sup>103</sup>

New Mexico's delivery obligation prohibits it from permitting uses that interfere with the Project operation not only by direct diversion of surface water, but also by pumping that depletes

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<sup>102</sup> New Mexico earlier sought to dismiss the complaints in this action on the ground that New Mexico had no duty to protect Project deliveries below Elephant Butte. *See* N.M. Mot. to Dismiss Tex.'s Compl. and the U.S. Compl. in Intervention at 1 (filed Apr. 30, 2014) (arguing, *inter alia*, that the Compact "imposes no affirmative duty on New Mexico to prevent interference with deliveries of Rio Grande Project"). The first Special Master rejected that argument, concluding that New Mexico's obligation to deliver the water meant that New Mexico was required to "relinquish control and dominion over the water it deposits in Elephant Butte Reservoir" and could not take the water back downstream. First Interim Rep. at 197. New Mexico took exception to this characterization insofar as it implied New Mexico must "relinquish all *jurisdiction*" over the water once released from the reservoir. N.M. Exceptions to the First Interim Rep. of the Special Master at 2 (filed June 9, 2017) (emphasis added). The Court overruled the exception. *Texas v. New Mexico*, 138 S. Ct. at 960.

The United States acknowledges that New Mexico retains regulatory authority over water uses below Elephant Butte so long as it exercises that authority in a manner consistent with the Compact and the Project. New Mexico appears to agree. *See, e.g.*, Lopez 30b6 Tr. 39:23-40:3 (state engineer "assures . . . that surface water is used within the authorized project acreages, for authorized purposes, and that groundwater pumping is used consistent with state law and permits"); Barroll 30b6 Tr. 15:19-16:1 (testifying that New Mexico has a "responsibility not to interfere" with Project's effectuation of the Compact apportionment).

<sup>103</sup> If surface water in New Mexico is intercepted by water users other than those authorized to receive water in EBID, or in excess of the amount allocated to EBID by the Project, the Project water supply is diminished, and additional releases of water from Project storage might be needed to deliver the same amount of water to the Districts and make the apportionment to Texas and treaty delivery to Mexico. In this situation, New Mexico cannot be said to have "delivered" the quantity required by the Compact.

the surface water. Under the Compact, New Mexico must deliver water so that it is “usable” to meet “irrigation demands.” As noted, the Project depends upon the reuse of water to meet irrigation demands, particularly in Texas. SOF Nos. 20, 22, 23. Groundwater pumping that intercepts the flow of the Rio Grande or intercepts or reduces the return of water to the Rio Grande within the Project results in a decrease in the “usable” water for the Project and for Texas. SOF Nos. 6, 7, 61-67. As a party to the Compact, New Mexico may not exercise its authority over water uses below Elephant Butte in a way that renders any part of its delivery unusable. Therefore, New Mexico may not authorize such pumping.

These constraints on New Mexico do not admit of any exception for groundwater pumping by individual private water users within EBID. The fact that water users in EBID are authorized to receive a supply of surface water from the Project does not mean New Mexico may give individual landowners a free pass to take or deplete as much of the Project’s water as they want beyond the allocation contracted to the irrigation district. Similarly, even if New Mexico were correct that the Compacting States expected future development of groundwater below Elephant Butte Reservoir (and the United States disputes that they did), the Compact is silent about that use and cannot be said to authorize any degree of use, by any water user, that would interfere with the Project’s ability to effectuate the Compact apportionment and make deliveries to Mexico under the treaty. *See* SOF No. 39; Stevens Tr. 109:5-10; 112:20-25. *See also Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (rejecting Colorado’s argument that its “subsequent practice” of authorizing groundwater pumping modified Compact’s “clear language” prohibiting depletions of surface flow).

New Mexico appears to agree that it may not administer state law in a way that unilaterally changes the Compact apportionment. *See, e.g., Lopez 30b6 Tr. 50:11-13* (agreeing

that New Mexico does not “ha[ve] unilateral authority to change the [Compact] apportionment”). That means New Mexico cannot allow anyone, anywhere, to engage in groundwater pumping that depletes and reallocates the “usable water” delivered to the Project, or that interferes with the Project’s ability to effectuate the apportionment agreed to in the Compact. Because New Mexico has breached this duty to deliver “usable water” to the Project for distribution, and not to interfere with the Project’s effectuation of the Compact apportionment, it is unnecessary for the United States to weigh in on precisely what Texas as a State is apportioned under the Compact. It is sufficient to demonstrate that in intercepting and reallocating Project supply, and reducing usable water available to EBID and EPCWID, New Mexico is in violation of its Compact obligations.

**D. The Compact prohibits New Mexico from permitting certain water uses and requires New Mexico to take affirmative steps to protect the Project.**

Viewed in the context of the Compact’s overall scheme, New Mexico’s obligation to deliver water to the Project means that New Mexico may not permit water uses that interfere with the Project’s ability to effectuate the Compact apportionment to Texas and the part of New Mexico below Elephant Butte and make deliveries to Mexico. Accordingly, the Court should declare as a matter of law that the Compact imposes at least three obligations on New Mexico:

**(1) Limitation on uses outside of EBID.** Because any apportionment to the part of New Mexico below Elephant Butte is based on EBID’s contractual entitlement to Project water, and all of the surface water supply below Elephant Butte is Project water, New Mexico may not allow any entity other than EBID, through the Project, to engage in water use that intercepts or otherwise depletes the surface water supply of the Rio Grande below Elephant Butte.

**(2) Limitations on uses within EBID.** Because the apportionment to the part of New Mexico below Elephant Butte consists only of water released to meet EBID’s “irrigation demands” in accordance with its contract, New Mexico may not allow water users within EBID to intercept or deplete the surface water supply below Elephant Butte for uses other than irrigation, or for irrigation in excess of the EBID contractual allocation.

**(3) Requirement to Account and Curtail.** New Mexico has an obligation under the Compact to take affirmative steps to prohibit and prevent interception and interference with the Project water supply below Elephant Butte. It is not enough for New Mexico to prevent a further *increase* in impacts to Project supply (by denying permits or limiting changes to existing water rights); New Mexico is under an obligation to account for *all* depletions to the Rio Grande and to curtail uses that were previously allowed or authorized to the extent that those uses interfere with the Project supply or the Project’s ability to effectuate the Compact apportionment and deliver water to Mexico.

New Mexico cannot genuinely dispute it has these obligations. Instead, New Mexico appears to be staking its defense on the theory that not all depletions of the surface water supply result in injury to Texas. *See, e.g.*, N.M. Supp. Resp. to Tex. RFA No. 9 (averring that interference with “specific molecules of water . . . does not necessarily constitute ‘inference’ [*sic*] with delivery of Texas’s Compact apportionment”); Barroll 30b6 Tr. 53:23-54:5 (disputing there is a “one-to-one relationship between depletions and impairment to Texas”); Lopez 30b6 Tr. 47:2-6 (“[I]n certain years we can pump all we want, . . .and it doesn’t change a thing about . . . how much Texas gets.”). But New Mexico cannot deny, and its witnesses do not dispute, that groundwater pumping impacts Project supply, Project deliveries, and Project efficiency,

even in years when pumping does not affect the Project deliveries to Texas and Mexico in the short term. *See* SOF No. 6, 7, 61-67

New Mexico’s “no harm, no foul” defense also fails because New Mexico lacks an accounting system adequate to detect and prevent the *potential* for harm. At the very least, unless and until New Mexico accounts for all depletions of the surface water supply available to EBID and EPCWID, and protects the deliveries to both entities, New Mexico has no basis to assert that some “specific molecules” of water are less important to implementation of the Compact than others. Moreover, to the extent New Mexico contends that Texas has an obligation to account for surface water depletions attributable to groundwater pumping in the Texas part of the Mesilla Valley, New Mexico must agree it is subject to the same obligation with respect to its own pumping in the basin. *See* Lopez 30b6 Tr. 50:14-24 (suggesting that Texas must count depletions caused by groundwater pumping in Texas against its apportionment, and “what’s good for one state is good for the other”).

## **II. The United States is Entitled to Summary Judgment that Injunctive Relief is Warranted.**

In actions to enforce an interstate compact, the Court “may invoke equitable principles . . . to provide effective relief” for violations and “prevent abuse,” so long as the remedy is not inconsistent with the Compact’s terms. *Kansas v. Nebraska*, 574 U.S. 445, 455, 456 (2015). In this case, a declaration of New Mexico’s obligations under the Compact will not provide effective relief or prevent abuse on its own. The undisputed facts show that New Mexico has not fulfilled its obligations under the Compact with respect to regulation of groundwater pumping and protection of the Project water supply to effectuate the Compact apportionment. The United States is entitled to judgment as a matter of law that injunctive relief is warranted, in accordance

with requests for relief (b) and (c) of its Complaint, with the scope and nature of that relief to be determined at trial.

**A. New Mexico cannot genuinely dispute that groundwater pumping below Elephant Butte depletes the surface water supply of the Project in dry years.**

It is undisputed that New Mexico has allowed groundwater pumping on the order of hundreds of thousands of acre-feet annually below Elephant Butte, without requiring offsets that fully compensate the Project water supply for the associated depletions of surface flows. *See* SOF Nos. 61-67, 72, 91-93. New Mexico does not dispute that this pumping reduces the surface water supply to the Project, in the following year if not the current year. *See* SOF Nos. 6, 7, 61-67. Nor can New Mexico genuinely dispute that groundwater pumping reduced the surface water supply available to Project water users in Texas under its apportionment between 2003 and 2005, before the Districts agreed to make adjustments to prevent injury to Texas. SOF Nos. 65, 66. Based on her modeling, Dr. Barroll testified that if all groundwater pumping in New Mexico below Elephant Butte had been shut off from 2003 to 2005, the surface water supply available for allocation by the Project to both Texas and New Mexico have increased by more than 200,000 acre-feet. Barroll 8/7/20 Tr. 184; 186:12-15. *See also* Barroll July 2020 Rep. at 7-9.

Other reports of New Mexico's experts attempt to quantify the impact of groundwater pumping on Project water supply historically. Based on New Mexico's Integrated Rio Grande Model, as set forth in the report of Spronk Water Engineers, New Mexico concedes that the curtailment of all pumping in New Mexico would have resulted in an average increase in Project surface water deliveries to EBID and EPCWID in the primary irrigation season by an average of approximately 64,755 acre-feet per year over the period from 1951 to 2017. *See* SOF Nos. 63 &

n.63, *supra*.<sup>104</sup> This finding is in line with the expert analysis provided by Texas and the United States, which estimated impacts of a similar magnitude. Although the extent of actual and potential harm to the Project may require resolution at a trial, it is undisputed that existing pumping reduces the usable flow of the Rio Grande available to the Rio Grande Project, including for deliveries to Mexico under the 1906 Convention. The United States is therefore entitled to a determination that New Mexico has not fulfilled its obligations under the Compact.

**B. A declaration of New Mexico’s obligations is not a sufficient remedy because New Mexico has failed to implement a system of administration adequate to fulfill those obligations.**

The declaration requested by the United States would clarify New Mexico’s obligation not to allow water uses that intercept or interfere with the Project supply and its obligation to take affirmative steps to prohibit and prevent such interception and interference. In these circumstances, however, it is not enough simply to clarify New Mexico’s obligations. An injunctive remedy is warranted because New Mexico has no reliable system in place to ensure compliance with the Compact and implement enforcement of its obligations against water users within New Mexico. As New Mexico’s State Engineer has said: “When drought hits, it’s too late to put tools into place to manage shortages.” AWRM Presentation at 5, TX\_00175991, at TX\_00175995. Judicial intervention is necessary to ensure New Mexico puts the right “tools into place” immediately.

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<sup>104</sup> Using the integrated model developed by New Mexico, New Mexico’s experts compared a model run based on “historical” conditions against a hypothetical simulation in which pumping in New Mexico is turned “off.” Sullivan & Welsh Sept. 2020 Rep. at 119, 354. Under these comparative runs, New Mexico attempts to re-regulate additional flow, including return flows, generated by pumping curtailment, thus estimating the amount of additional flow in the Rio Grande available to both Project Districts under the Downstream Contracts.

**1. New Mexico has not explained how it would implement a priority call by the United States.**

To begin, New Mexico's priority administration system is not currently equipped to protect the United States' senior water right for the Project under either state law or the Compact. The Project has a surface water right that is senior to practically all of the groundwater pumping below Elephant Butte. *See* SOF No. 73. *See also* AWRM Presentation at 13, TX\_00176003. Yet, if the United States placed a priority call, New Mexico does not know how or even *if* it would enforce the call. SOF No. 94. *See, e.g.*, Lopez 30b6 Tr. 38:9-10 ("I don't know exactly how a call would be effectuated . . . or administered.").<sup>105</sup> New Mexico says it would first investigate the "validity" of the call, and then determine the extent to which a curtailment was required. *See, e.g.*, Barroll 30b6 Tr. 37:4-22. But New Mexico's designated witness could not say how long that investigation would take, or how long the curtailment determination would take, except that it would be "months rather than years." Barroll 30b6. Tr. 47:7-16. In other words, if the United States complained to New Mexico about groundwater pumping during the irrigation season, it would be "months" before New Mexico would take action, if it took any action at all. SOF No. 9.

New Mexico's inability to specify its system for enforcing a call by the United States is particularly problematic because of the United States' obligations to Mexico under the 1906

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<sup>105</sup> New Mexico's designated witnesses gave uncertain and conflicting statements on this matter. *Compare* Lopez 30b6 Tr. 40:5-8 ("I guess to the extent that there were a call, it would be the state engineer's obligation to administer that in some way that would be effective"), *with* Barroll 30b6 Tr. 44:5-25 ("speculating" that a call by the United States to protect Project deliveries might "end[ ] up with the Compact Commission and not solely with the state engineer"). The method for enforcing a call by the United States was outlined in the draft regulations for the Lower Rio Grande Water Master District, but the regulations were never adopted. D'Antonio Tr. 50:16-52:2. *See* Proposed Regs. at 21-23, NM\_00075441 at NM\_00075461-63.

Convention. The United States cannot be asked to wait “months” while New Mexico investigates whether a demand is valid or considers how much pumping to curtail. The experience to date in this case suggests that any response by New Mexico take years rather than months. The complaints of Texas and the United States in this action are considered by New Mexico to be complaints about its Compact compliance. SOF No. 96. In response to those complaints, New Mexico has conducted an investigation, and it has developed an undefined and as yet unimplemented “pilot project” to pay farmers to voluntarily fallow their land. SOF No. 97; Barroll 30b6 Tr. 60-64. It has been over six years since the complaints were filed. New Mexico has not curtailed any groundwater pumping. SOF No. 10; Serrano 2/26/19 Tr. 55:14-22. Because of its implications for the Districts operating under the Downstream Contracts incorporated into the Compact, and in particular because of its implications for the United States’ treaty obligations, New Mexico’s failure to put in place an adequate Compact enforcement and administration system on its own warrants injunctive relief. *See United States v. County of Arlington*, 669 F.2d 925 (4th Cir. 1982).

**2. New Mexico’s permit regime imposes no meaningful constraints on pumping that depletes the surface water supply.**

As for ongoing administration prior to enforcement, New Mexico’s current system for permitting water use below Elephant Butte Reservoir is also inadequate to protect the Project’s ability to deliver usable water through releases from Elephant Butte Reservoir and to effectuate the apportionment contemplated by the Compact. Several defects in particular merit attention:

First, New Mexico does not have a comprehensive permitting requirement for groundwater wells. Although virtually all of the groundwater use in New Mexico below Elephant Butte post-dates the Compact, New Mexico has required a water user to obtain a permit

for groundwater pumping only for wells drilled after 1980 or for post-1980 changes to wells in existence before then. SOF Nos. 50-52. Wells that predated the declaration of the groundwater basin in 1980 and have not been changed may continue to operate without a permit, and without accounting for and offsetting depletions to the Project water supply and the flows in the Rio Grande. SOF Nos. 52, 92, 93.

Second, the permits that New Mexico has issued do not impose conditions sufficient to prevent depletions of the Project's surface water supply. As noted, New Mexico freely permits so-called "conjunctive" or "supplemental" groundwater pumping within EBID, *i.e.*, the use of groundwater by EBID water users in addition to any surface water supplied to them by the Project. SOF Nos. 53, 81, 82. In reality, though, the groundwater is just Project surface water diverted by other means, as the 1954 USGS Report confirmed. *See* SOF Nos. 44, 45. Despite that clearly established link between the groundwater and Project surface water, New Mexico does not impose any restriction on pumping to prevent EBID water users from exceeding the Project allocation to the District. The only limits are permit conditions defining the place of use for the water and a volume based on the FDR (4.5 to 5.5 af/ac), which far exceeds the normal Project delivery of 3.024 af/ac and was driven in part by the needs of pecan growers whose use is not representative of crop consumption at the time of the Compact. SOF Nos. 26, 42, 54, 81, 82. Moreover, although the higher 5.5 af/ac was supposed to be conditioned on the submission of evidence, New Mexico allowed anyone who gave notice of their intent to seek the higher limit to divert up to the 5.5 af/ac limit even before the sufficiency of their notice was confirmed. SOF No. 84. Thus, rather than limit pumping that depletes the Project's surface water supply, New Mexico's permitting scheme has been implemented in a way that promotes it.

Third, New Mexico has failed to implement a system of administration to ensure it is meeting its Compact obligations. As described by New Mexico, its process for addressing a complaint under the Compact would leave the decision to enforce entirely up to New Mexico state officials, which is contrary to the Compact’s purpose. *See Kansas v. Colorado*, 185 U.S. 125, 144 (1902) (states enter into compacts so that the division of water is not “left to the pleasure” of the upstream State, and the States “know[ ] that some tribunal can decide on the right”).<sup>106</sup> Generally, New Mexico’s State Engineer will take an enforcement action only if there is a call, or complaint, and even then New Mexico’s designated witnesses were not certain that he will. SOF No. 94; *see, e.g.*, Lopez 30b6 Tr. 40:50-9 (“I guess to the extent that there were a call, it would be the obligation of the State Engineer to administer that in some way that would be effective.”).

New Mexico’s administration of its permitting requirements is similarly elusive. New Mexico’s metering order requires meter data from irrigation wells to be reported on a quarterly basis, but overdiversions are usually not identified until the following calendar year. SOF Nos. 86, 77. For example, the Water Master only began reconciling the metering data for 2016 in March of 2017. *See* NM\_0018269-71. These overdiversions, if they are pursued for enforcement at all, are remedied usually through a “repayment” of water in the next season. SOF No. 88. Repeat over-diverters do not face increased penalties or additional enforcement action for their failure to comply, and the State Engineer has never litigated an overdiversion case to

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<sup>106</sup> By comparison, when New Mexico and Texas sued Colorado complaining of under-deliveries by Colorado in violation of the Rio Grande Compact, Colorado instituted a series of regulations to enforce priorities and ensure Colorado met its Compact delivery requirements. *See In the Matter of the Rules and Regulations Governing the Use, Control and Protection of Water Rights or both Surface and Underground Water located in the Rio Grande and Conejos River Basins and their Tributaries*, 583 P.2d 910 (1978).

hearing, much less judgment. SOF No. 90. *See also* Serrano 4/17/19 Tr. 237:1-6, 241:3-15, 242:18-243:7. This system is not adequate to deter violations: Hundreds of overdiversions continue to occur every year. SOF No. 87; Serrano 4/17/19 Tr. 236:14-18.

New Mexico does not monitor or otherwise account for surface water depletions caused by groundwater pumping within EBID, and its enforcement against overdiversions above the its already-excessive FDR is plainly inadequate to prevent such depletions from occurring. Thus, absent injunctive relief from this Court, the Compact apportionment and the Project's ability to effectuate it will continue to be left to definition and implementation according to the will of the upstream state.

**3. New Mexico lacks the ability to address complaints about potential Compact violations.**

New Mexico also has created a substantial risk of non-compliance with the Compact that requires judicial intervention. *See Kansas v. Nebraska*, 574 U.S. at 460. New Mexico has not adopted district-specific water management regulations to ensure its compliance with the Compact; its permit system below Elephant Butte is based on a mythology of "conjunctive" use that was debunked many decades ago; and it has not demonstrated any capacity to enforce a curtailment of pumping. New Mexico's flat-footed response to this litigation is also illustrative. New Mexico admits that Texas's complaint in this original action put New Mexico on notice of a potential Compact violation that New Mexico would "need to do something about." Lopez 30b6 Tr. 69:23-24. Seven years later, New Mexico has done little. SOF No. 97. In these circumstances, there is no reason to think that New Mexico would be capable of implementing a declaration from the Court, even if it wanted to do so.

The United States is entitled to judgment as a matter of law that injunctive relief is warranted because a declaration of New Mexico's obligations under the Compact would not be an adequate remedy on its own. The scope of the injunction should be tailored to the extent of the violation and injury to the Project and to Texas, accounting for any mitigating considerations that New Mexico may proffer. These are matters appropriate for trial.

### **CONCLUSION**

For the foregoing reasons, the United States respectfully requests that its Motion for Summary Judgment be granted. In the alternative, if the Court does not award complete relief, the United States requests entry of judgment treating the material facts stated above as established under Rule 56(g), FED. R. CIV. P.

Respectfully submitted this 5th day of November 2020.

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No. 141, Original

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In the

**SUPREME COURT OF THE UNITED STATES**

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**STATE OF TEXAS,  
Plaintiff,**

**v.**

**STATE OF NEW MEXICO and  
STATE OF COLORADO,  
Defendants**

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**OFFICE OF THE SPECIAL MASTER**

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**CERTIFICATE OF SERVICE**

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This is to certify that on the 5th day of November 2020, I caused a true and correct copy of the **UNITED STATES OF AMERICA'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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**No. 141, Original**

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**In the  
SUPREME COURT OF THE UNITED STATES**

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**STATE OF TEXAS,**

**Plaintiff,  
v.**

**STATE OF NEW MEXICO and  
STATE OF COLORADO,**

**Defendants**

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**OFFICE OF THE SPECIAL MASTER**

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**APPENDIX TO THE UNITED STATES OF AMERICA'S MEMORANDUM IN  
SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT**

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**TO THE SPECIAL MASTER, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

**PLEASE TAKE NOTICE:** The United States of America hereby provides the following appendix to their recently filed Notice of Motion for Partial Summary Judgment and Memorandum in Support of Motion for Partial Summary Judgment. The documents contained in the below appendix have been submitted to the Special Master via electronic media and have been deposited into the Box.com repository. The documents deposited in the box.com repository may now be downloaded by persons who have set up accounts for the use of this service. In addition, the United States understands that the documents will be transferred to the Veritext system by third parties. The below appendix also contains hyperlinks to each specific document for ease of access.

Deposition Exhibits		
Bates Beg	Bates End	File Name
		<a href="#">Ryan Serrano Depo Exhibit 92</a>
		<a href="#">Lee Wilson Depo Exhibit 07_CLC 40-Year Water Development Plan, April 2017</a>
Deposition Transcript Excerpts		
Bates Beg	Bates End	File Name
		<a href="#">Deposition Excerpts of Peggy Barroll, February 5, 2020</a>
		<a href="#">Deposition Excerpts of Peggy Barroll, July 9, 2020</a>
		<a href="#">Deposition Excerpts of Peggy Barroll, August 7, 2020</a>
		<a href="#">30(B)(6) Deposition Excerpts of Peggy Barroll</a>
		<a href="#">Deposition Excerpts of John D'Antonio, June 25, 2020</a>

		<a href="#">Deposition Excerpts of John D'Antonio, June 26, 2020</a>
		<a href="#">Deposition Excerpts of John D'Antonio, August 14, 2020</a>
		<a href="#">Deposition Excerpts of Sheldon Dorman, June 9, 2020</a>
		<a href="#">Deposition Excerpts of Estevan Lopez, July 6, 2020</a>
		<a href="#">Deposition Excerpts of Estevan Lopez, July 7, 2020</a>
		<a href="#">30(B)(6) Deposition Excerpts of Estevan Lopez</a>
		<a href="#">Deposition Excerpts of Ryan Serrano, February 26, 2019</a>
		<a href="#">Deposition Excerpts of Ryan Serrano, April 17, 2019</a>
		<a href="#">Deposition Excerpts of Jennifer Stevens, July 27, 2020</a>
		<a href="#">Deposition Excerpts of Gregory Sullivan, August 13, 2020</a>
<b>Discovery Responses</b>		
<b>Bates Beg</b>	<b>Bates End</b>	<b>File Name</b>
		<a href="#">Excerpts to New Mexico's Responses to United States First Request for Admissions</a>
		<a href="#">Excerpts to New Mexico's Responses and Objections to State of Texas' First Request for Admissions</a>
		<a href="#">Excerpts to New Mexico's Supplemental Responses and Objections to State of Texas' First Request for Admissions</a>
<b>Expert Reports</b>		
<b>Bates Beg</b>	<b>Bates End</b>	<b>File Name</b>
		<a href="#">Margaret Barroll Expert Report, October 31, 2019</a>
		<a href="#">Margaret Barroll Rebuttal Expert Report, June 15, 2020</a>

		<a href="#">Margaret Barroll Supplemental Rebuttal Expert Report, July 15, 2020</a>
		<a href="#">Davids Engineering Expert Report, October 31, 2019</a>
		<a href="#">JPR Historical Expert Report, May 31, 2019</a>
		<a href="#">Land IQ Expert Report, Resubmitted, July 29, 2020</a>
		<a href="#">Montgomery and Associates Expert Report, May 31, 2019</a>
		<a href="#">Spronk Water Environment Expert Report, October, 31, 2019</a>
		<a href="#">Spronk Water Environment Revised Expert Rebuttal Report, July 15, 2020</a>
		<a href="#">Stevens Historical Expert Report, October 31, 2019</a>
<b>Miscellaneous Documents</b>		
<b>Bates Beg</b>	<b>Bates End</b>	<b>File Name</b>
		<a href="#">United States Complaint in Intervention</a>
		<a href="#">New Mexico's Answer to the United States Complaint in Intervention</a>
		<a href="#">Continued Implementation of the 2008 Operating Agreement, BOR, FEIS, September 30, 2016</a>
		<a href="#">Rio Grande Compact Act of May 31, 1939 ch. 155, 53 Stat. 785</a>
<b>New Mexico Production Documents</b>		
<b>Bates Beg</b>	<b>Bates End</b>	<b>File Name</b>
NM_00017916	NM_00017926	<a href="#">Rio Grande Project Contract dated June 15, 1919</a>
NM_00075441	NM_00075500	<a href="#">Proposed Rules and Regulations providing for Active Water Resources Admin. of the Waters of the LRG Water Master</a>

NM_00018155	NM_00018159	<a href="#">New Mexico Office of the States Engineer Lower Rio Grande Water Master District 2007 Report</a>
NM_00018160	NM_00018171	<a href="#">New Mexico Office of the States Engineer Lower Rio Grande Water Master Annual Report, 2013 Accounting Period</a>
NM_00018261	NM_00018290	<a href="#">New Mexico Office of the States Engineer Lower Rio Grande Water Master Annual Report, 2017 Accounting Period</a>
NM_00081209	NM_00081229	<a href="#">New Mexico v. EBID No. CV-96-888, Settlement Agreement, State Exhibit No. 22</a>
NM_00081951	NM_00081960	<a href="#">Margaret Barroll Rebuttal Expert Report, Revised Comparison of 2009 Farm Deliveries, State Exhibit No. 29</a>
NM_00082128	NM_00082161	<a href="#">Report regarding Rio Grande Project by BOR 1994</a>
NM_00082198	NM_00082223	<a href="#">SS-97-101 Final Judgment</a>
NM_00082472	NM_00082483	<a href="#">New Mexico v. EBID No. CV-96-888, JWL Cropping Patter Report, April 21, 2011, State Exhibit No. 24</a>
NM_00304583	NM_00305097	<a href="#">CLC 40-year Water Development Plan, 2008</a>
<b>Texas Production Documents</b>		
<b>Bates Beg</b>	<b>Bates End</b>	<b>File Name</b>
TX_00000561	TX_00001138	<a href="#">Regional Planning, Part VI - The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937</a>
TX_00175991	TX_00176011	<a href="#">Active Water Resource Management in the Lower Rio Grande - Tools for a New ERA in Water Management</a>
<b>United States Production Documents</b>		
<b>Bates Beg</b>	<b>Bates End</b>	<b>File Name</b>
US0027948	US0028155	<a href="#">USGS Groundwater paper</a>

US0070234	US0070237	<a href="#">Correspondence re: irrigation in construction in connection with the RG project</a>
US0168978	US0168991	<a href="#">Convention between the US and Mexico re: Equitable distribution of waters of the RG</a>
US0170037	US0170052	<a href="#">Letter to El Paso Water Utilities regarding Request for a Copy of the Rio Grande Project Water Supply Allocation Procedures</a>
US0171656	US0171660	<a href="#">Memorandum of conversation concerning 1906 Treaty water deliveries to Mexico</a>
US0171808	US0171812	<a href="#">Memo forwarding outline of RGP historic and current allocation procedures</a>
US0350245	US0350452	<a href="#">Reconnaissance Report on Water Conservation Plans for Rio Grande Project</a>
US0398320	US0398327	<a href="#">Contract Between U.S. and Elephant Butte Water Users Ass'n.</a>
US0398328	US0398333	<a href="#">Contract between EBID and EPCWID</a>
US0398706	US0398748	<a href="#">Contract Between United States Department of The Interior and Elephant Butte Irrigation District for Transfer of The Operation and Maintenance of Project Works</a>
US0534075	US0534087	<a href="#">RGP Contract EPCWID#1</a>

Respectfully submitted this 5th day of November, 2020.

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No. 141, Original

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In the

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STATE OF TEXAS,

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STATE OF NEW MEXICO and

STATE OF COLORADO,

Defendants

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OFFICE OF THE SPECIAL MASTER

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CERTIFICATE OF SERVICE

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This is to certify that on the 5th day of November 2020, I caused a true and correct copy of the **APPENDIX TO THE UNITED STATES OF AMERICA’S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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