No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants

OFFICE OF THE SPECIAL MASTER

UNITED STATES OF AMERICA'S MEMORANDUM IN RESPONSE TO THE STATE OF NEW MEXICO'S MOTIONS FOR SUMMARY JUDGMENT

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THE UNITED STATES OF AMERICA'S MEMORANDUM IN RESPONSE TO NEW MEXICO'S MOTIONS FOR SUMMARY JUDGMENT

On November 5, 2020, New Mexico filed three motions for partial summary judgment, referenced herein as the Apportionment Motion, Full Supply Motion, and Notice Motion.[1] The motions, though distinct, share a common objective. In one form or another, each of them seeks a ruling that the unchecked groundwater pumping New Mexico has allowed below Elephant Butte is permissible under the Rio Grande Compact ("Compact"), 53 53 S 785 (May 31, 1939). But that pumping, which depletes the flows of the Rio Grande, is not permissible. The Compact incorporates the operation of the Rio Grande Project ("Project") to effectuate an equitable apportionment of the Rio Grande below Elephant Butte, *see Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018), and groundwater pumping in New Mexico that interferes with the operation of the Project violates the Compact. *See* U.S. Mem. in Supp. of Mot. for Partial Summ. J. ("U.S. Mem.") (filed Nov. 5, 2020). In fact, groundwater pumping in New Mexico fundamentally alters the conditions under which the Compacting States concluded that the operation of the Project resulted in a distribution of water that was equitable. As the United States has explained, return flows from irrigation, and the seepage that contributed to those flows, were an "important consideration" in the Compacting States' understanding of water supply and distribution below Elephant Butte. *Id.* at 7 (citation omitted). New Mexico therefore has an obligation under the Compact to curtail that pumping, not a right to ignore it until there is a complaint.

[1] State of N.M. Mot. for Partial Summ. J. on Apportionment; State of N.M. Mot. for Partial Summ. J. to Exclude Texas's Claim for Damages in Certain Years; State of N.M. Mot. for Partial Summ J. on to Exclude Claims for Damages in Years that Texas Failed to Provide Notice to New Mexico of its Alleged Shortages. The briefs in support are abbreviated "Apportionment Br.," "Full Supply Br.," and "Notice Br."

New Mexico's failure to acknowledge its Compact obligation undermines each of its motions. For the reasons set forth in this memorandum, the United States respectfully requests that the Court deny New Mexico's Apportionment Motion and decline to treat as established the facts set forth in the Full Supply Motion and Notice Motion that the United States disputes.

SUMMARY OF ARGUMENT

As the party seeking summary judgment, New Mexico has the burden to demonstrate that there are no disputed issues of fact and that the undisputed facts entitle New Mexico to judgment as a matter of law. *See* Fed. R. Civ. P. 56. Because it seeks entry of judgments construing an interstate compact, New Mexico has the burden to show that the proposed judgments are consistent with the Compact as written. *See New Jersey v. New York*, 523 U.S. 767, 810-11 (1998). "Unless the compact to which Congress consented is somehow unconstitutional, no court may order relief that is inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. 554, 564 (1983).

Although the United States does not dispute that the Compact effects an equitable apportionment between Texas and New Mexico below Elephant Butte, *see* U.S. Mem. 3, New Mexico's proposed apportionment of "Project supply" fails as a matter of law because it is inconsistent with the Compact. Unlike other interstate compacts that New Mexico entered around the same time, the Compact does not specify amounts of water "apportioned" to each state. *Compare, e.g.*, La Plata River Compact, art. II, 43 Stat. 796, 797 (1925). Instead, the Compact "effect[s]" an equitable apportionment below Elephant Butte by incorporating the existing operation of the Project. *See* Compact, preamble, 53 Stat. at 785; *Texas v. New Mexico*, 138 S. Ct. at 959. The Compacting States believed that the operation of the Project under existing conditions resulted in an apportionment that was equitable, and they chose not to

quantify it. New Mexico's proposal to divide up the water on a simple percentage basis is inconsistent with that decision.

Because the Compact incorporates the existing operation of the Project, the conditions under which the Project operated at the time of the Compact are critical to understanding the apportionment that the Compact is intended to effect. Those existing conditions included the unimpeded return of water to the river after irrigation by New Mexico water users. The Compacting States were aware that those returns constituted a significant amount of the water diverted by downstream users, particularly those in Texas. *See* U.S. Mem. 7 & nn.22-25.[2] New Mexico would apparently limit "Project supply" and the Compact apportionment to "surface water," in effect apportioning to New Mexico all of the return flows in the ground and the outflows that can be induced from the river that its irrigators take by pumping—which they do to the tune of 300,000 acre-feet per year. *See* U.S. Mem. 19 & nn.91-93. New Mexico is not entitled to judgment as a matter of law on its Apportionment Motion because New Mexico would apply that judgment in a way that effects an apportionment entirely different from what was intended.

New Mexico's evasions on the definition of "supply" also preclude a judgment that would treat the allegations in its Full Supply Motion as undisputed or established for purposes of trial. New Mexico seeks to exclude Texas's claims for damages in twenty-three "full supply years," but does so by reference to an assumed maximum allocation that is based on years when groundwater pumping was occurring, not the Compact. *See* NM-EX-100, Barroll Oct. 2019 Rep. at 35; U.S. Resp. to Statement of Facts ("U.S. RSOF") at 23, ¶ 70. A full supply of water to

[2] Citations to the footnotes in the United States' memorandum refer to the citations within those footnotes.

Texas under its apportionment is not quantified. At the very least, any characterization of "full supply" would be based the maximum amount of water that *could* have been available for storage and delivery but for the development of groundwater pumping. Although the United States takes no position on the motion as it applies to Texas's claims for damages, New Mexico is not entitled to a judgment that treats its allegations about the delivery of "full supply" as established for purposes of the United States' claims.

New Mexico's Notice Motion, which seeks to exclude Texas's claims for damages in other years, also rests on allegations that New Mexico is not entitled to assert as undisputed or established. No provision of the Compact requires Texas or the United States to give New Mexico notice of violations, and any such requirement would be inapplicable to the United States' claim for prospective relief to prevent future violations. In any event, New Mexico admits it received notice of its violations when Texas initiated this original action in 2013, and it had constructive notice of those violations long before then, yet it still has done nothing to remedy them. *See* U.S. Mem. 32-40. New Mexico is not entitled to a judgment that treats New Mexico's allegations about lack of "notice" as relevant to the United States' claims or established for purposes of trial on those claims.

For these reasons, detailed below, New Mexico is not entitled to summary judgment as to any aspect of the United States' claims for declaratory and injunctive relief.

ARGUMENT

I. New Mexico is Not Entitled to Summary Judgment on the Compact Apportionment.

In its Apportionment Motion, New Mexico requests a judgment "declaring that the Compact apportions water to both New Mexico and Texas below Elephant Butte Reservoir – 57% of the Rio Grande Project supply to New Mexico and 43% of the Rio Grande Project supply to Texas."

Apportionment Mot. 2. *See also* Apportionment Br. 55 (similar, apportioning "Project supply"). The United States does not oppose New Mexico's Apportionment Motion to the extent it seeks a declaration that the Compact effects an equitable apportionment as between Texas and New Mexico below Elephant Butte. *See* U.S. Mem. 3. The United States otherwise opposes the motion. New Mexico is not entitled to judgment as a matter of law that the Compact apportions each State a percentage share of "Project supply" because that judgment would not be consistent with the text of the Compact that Congress approved or the equitable apportionment the Compacting States intended to effect.

A. New Mexico's proposal to declare an apportionment in quantitative terms is inconsistent with the text and structure of the Compact.

An interstate compact is "a legal document that must be construed and applied in accordance with its terms." *Texas v. New Mexico*, 482 U.S. 124, 128 (1987). "Just as if a court were addressing a federal statute, . . . the 'first and last order of business' of a court addressing an interstate compact 'is interpreting the compact.'" *New Jersey v. New York*, 523 U.S. at 811 (quoting *Texas v. New Mexico*, 462 U.S. at 567-68). Unless the Compact is unconstitutional, "no court may order relief inconsistent with its express terms." *Texas v. New Mexico*, 462 U.S. at 564. New Mexico's proposed apportionment fails as a matter of law because it is not consistent with the Compact's express terms.

1. New Mexico's proposal to quantify an apportionment in percentage terms is not consistent with the Compact.

New Mexico proposes to reduce the Compact apportionment below Elephant Butte to a percentage division of a body of water that New Mexico calls "Project supply." *See*

Apportionment Br. 55.[3] New Mexico's proposal is inconsistent with the Compact because the Compact makes an apportionment that is not expressed in volumetric or percentage terms. The Compact is founded on two principal delivery requirements: Article III establishes Colorado's "obligation to deliver" water to New Mexico, 53 Stat. at 787, and Article IV establishes New Mexico's "obligation to deliver" water into Project storage, *id.* at 788, where it becomes "usable water" to be released "in accordance with irrigation demands," as defined in Article I, *id.* at 786. *See also* U.S. Mem. 8 & nn.30-33. Although the Compact elsewhere refers to a "normal release of 790,000 acre-feet," Art. VIII, 53 Stat. at 790, it does not purport to dictate Project operations relating to the distribution of those releases. Instead, the Compact takes as a given the existing operation of the Project as the means of effectuating the intended apportionment to Texas and southern New Mexico. *Texas v. New Mexico*, 138 S. Ct. at 959; U.S. Mem. 8-9 & nn.34-35.

New Mexico's proposed judgment declaring that each State is "apportioned" a fixed share of water finds no support in the text of the Compact. The only place in the Compact where the term "apportion" appears is the preamble, which states that the Compact was negotiated "for the purpose of effecting an equitable apportionment." 53 Stat. at 785. Although the United States agrees that the Compact "effect[s]" an equitable apportionment as between Texas and New Mexico, the Compact contains no provision establishing a specifically quantified "portion" of water belonging to New Mexico or such a "portion" of water belonging to Texas. The Compact is one step removed from the apportionment, which is effectuated by the customary operation of the Project.

[3] This memorandum does not address the apportionment above Elephant Butte, as between Colorado and New Mexico. References to "the apportionment" hereinafter are limited to the apportionment effected by the Project below Elephant Butte.

A ruling that apportions particular quantities of water is also inconsistent with the Compacting States' use of the term "effecting" to describe their intent. The 1933 edition of Black's Law Dictionary defines the noun "effect" to mean "[t]he result which an instrument between parties will produce in their relative rights, or which a statute will produce upon existing law, as discovered from the language used, the forms employed, or other materials for constructing it." BLACK'S LAW DICTIONARY 642 (3d ed. 1933) (citations omitted). "Effect" could also be used to mean "the operation of a law, of an agreement, or an act." *Id.* (citation omitted). *See also, e.g.*, BOUVIER LAW DICTIONARY 334 (Baldwin's students ed. 1934) ("effect: the operation of a law, of an agreement, or an act, is called its effect"). BLACK'S LAW DICTIONARY also defined "effect," as a verb, to refer to the "operation" of a document. *See* BLACK'S at 642. ("A belief that a mortgage would 'effect' a preference . . . is equivalent to a belief that it would operate as a preference." (quoting *Ogden v. Reddish*, 200 F. 977, 979 (E.D. Ky. 1912))). Through the use of the term "effecting," the Compacting States signaled that they intended for the Compact to "operate as" an equitable apportionment, or to "produce" or "result" in one. They did not intend or attempt to quantify it.

The absence of an express apportionment provision takes on additional significance when the Compact is viewed in the context of other interstate compacts from the same time period that involved the same states. *See Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 616 (2013) (noting that courts often look to the "customary practices employed in other interstate compacts to help ascertain the parties' intent"); *see, e.g. Alabama v. North Carolina*, 560 U.S. 330, 342 (2010); *Texas v. New Mexico*, 462 U.S. at 565. Between 1922 and 1949, New Mexico entered into several interstate compacts that made apportionments expressly, in contrast to the Compact in question here. *See* La Plata River Compact, art. II, ch. 110, 43 Stat. 796 (Jan. 29, 1925) ("The

waters of the La Plata river are *hereby equitably apportioned* between the signatory states . . . as follows . . .” (emphasis added)); Colorado River Compact, art. III, 70 Cong. Rec. 325 (1928) (“There *is hereby apportioned* from the Colorado River System in perpetuity to the Upper Basin and to the Lower Basin, respectively, the exclusive beneficial consumptive use of 7,500,000 acre-feet of water per annum…” (emphasis added)).[4] *See also* Costilla Creek Compact, art. IV, ch 328, 60 Stat. 246, 250 (1946) (“The *apportionment* and allocation of the use of Costilla creek water shall be as follows . . .” (emphasis added)); Pecos River Compact, ch. 184, 63 Stat. 159 (1949), *id.*, art. III(c), 63 Stat. at 161 (“The beneficial consumptive use of water salvaged in New Mexico [by storage projects] . . . is hereby *apportioned* forty-three per cent (43%) to Texas and fifty-seven per cent (57%) to New Mexico” (emphasis added)); *id.*, art. III(f), 63 Stat. at 161 (unappropriated flood waters “apportioned” equally to Texas and New Mexico).[5] Because the Compact “clearly lacks the features of these other compacts” that make an apportionment expressly, the Compact clearly proceeds on a different basis, and a court is “not free to rewrite it” as New Mexico proposes. *Alabama v. North Carolina*, 560 U.S. at 342.

[4] In 1928, Congress passed the Boulder Canyon Project Act to provide a method for apportioning water among the Lower Basin States because the Compact had not quantified one. *See Arizona v. California*, 373 U.S. 546, 557-62 (1963).

[5] A compact more analogous to the Rio Grande Compact is the Arkansas River Basin Compact, ch. 155, 63 Stat. 145 (1949), which also uses functional operational parameters (related to the operation of John Martin Reservoir) and includes a requirement that future beneficial development of the Arkansas River in Colorado and Kansas shall not materially deplete the useable quantity or availability for the use of water users in either state. *See id.* at 147-48.

2. New Mexico's judgment does not include the express limitations the Compact imposes.

New Mexico's proposed apportionment of Project supply is also inconsistent with the Compact's terms because it does not include any of the limitations that the Compact expressly imposes. New Mexico's apportionment fails to account for the United States' treaty obligation to Mexico, and it fails to specify that the apportionment of water is solely for irrigation use within Elephant Butte Irrigation District (EBID). Both omissions preclude entry of New Mexico's proposed judgment.

New Mexico's failure to account for the United States' treaty obligation in its apportionment is inconsistent with the Compact's express protection of that obligation. In the 1906 treaty, the United States agreed to deliver 60,000 acre-feet to Mexico from Project storage each year, subject to a proportionate reduction in years of extraordinary drought. *See* U.S. Mem. 6 & nn.18-19. Article XVI of the Compact states that "[n]othing in th[e] Compact shall be construed as affecting the obligations of the United States of America under existing treaties . . . ." 53 Stat. at 792. New Mexico's proposed apportionment as written would allocate 100% of "Project supply" to New Mexico and Texas, without provision for releases to Mexico, thereby "affecting the obligations" of the United States under the 1906 treaty. New Mexico has never suggested the Compact abrogates the treaty and presumably intends to exclude the treaty obligation from the water subject to its 57%-43% split. *See, e.g.*, NM-EX-001, Decl. of Margaret Barroll, Ph.D. ("Barroll Decl."), ¶ 18 (recognizing separate "Project allocations" to the Districts and Mexico). But for purposes of summary judgment, the Court cannot be expected to divine what New Mexico meant, or how it would propose to revise the requested judgment to

reconcile the discrepancy. Without an express exclusion of the treaty water, New Mexico's proposed declaration is inconsistent with the terms of the Compact.

New Mexico's proposed judgment also fails to incorporate qualifications on the use of the water that derive from the Compact's text. The Compact defines the term "usable water" to mean "all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico." 53 Stat. at 786. The Compact thus recognizes that the Project releases water pursuant to the Secretary's contracts with EBID and El Paso County Water Improvement District (EPCWID) in accordance with irrigation demands within the two Districts, and the Supreme Court has determined that the Compact apportionment of that water is "inextricably intertwined" with those contracts. *Texas v. New Mexico*, 138 S. Ct. at 959. Therefore, the apportionment to New Mexico below Elephant Butte consists solely of water released in accordance with irrigation demand within EBID, pursuant to EBID's contract with the Secretary. *See* U.S. Mem. 9 & nn.36-39; Lopez 30b6 Tr. 25:23-26:10 (in U.S. App.). These limitations are defining characteristics of the apportionment with real-world consequences. *See, e.g.*, U.S. Mem. 12 & n. 57 (describing offsets required for groundwater pumping in Las Cruces). New Mexico is not entitled to its proposed judgment as a matter of law because it does not limit the use of the apportionment in New Mexico to irrigation demand pursuant to EBID's contract.[6]

[6] The United States disagrees with Texas's position that the Compact "does not apportion water to New Mexico below Elephant Butte Reservoir." *See* Tex. Mem. of Points and Auths. in Supp. of Mot. for Summ. J. 4 (filed Nov. 5, 2020). The United States agrees with Texas to the extent it characterizes the Compact as limiting the use of water in New Mexico below Elephant Butte to irrigation use administered by EBID under its contract with the Secretary. *See id.* at 45.

B. New Mexico's proposed division of "Project supply" is not consistent with the equitable apportionment effected by the Compact.

Even if an apportionment stated in bare percentage terms were consistent with the Compact's design, or could be made consistent by the addition of other provisions, New Mexico's proposal to apportion percentages of "Project supply" is not. The Compact does not use the term "Project supply," and New Mexico's proposed ruling does not include a definition. The ambiguity of "Project supply" thus precludes a determination that a 57%-43% split of "Project supply" is consistent with the Compact and supported by the record. Moreover, defining "Project supply" to exclude Project return flows in the ground, as New Mexico apparently does, contravenes the understanding of the Compacting States that those flows were included and yields a result that is inconsistent with the equitable apportionment they intended to effect.

1. The Compact does not allocate "Project supply."

On its face, New Mexico's proposed apportionment is not consistent with the Compact's express terms because "Project supply" is not a term used in the Compact. The Compact defines the terms "Project storage," "Usable water," and "Actual release." Compact art. I(k), (l), (o), 53 Stat. at 786. The Compact also refers to a "normal release of 790,000 acre-feet." *Id.*, art. VIII, 53 Stat. at 790. New Mexico has not included a definition of "Project supply" in the Apportionment Motion or supporting brief that shows how it corresponds to these terms. New Mexico cites sources that refer to the allocation of "available supply," "Project deliveries," "Project water," and "the waters below Elephant Butte," but those terms are also undefined and are nowhere to be found in the Compact's text. *See* Apportionment Br. 42, 44, 45; Apportionment Mot. 2.

The definition of "Project supply" provided by Dr. Barroll in her declaration does not solve this problem. *See* NM-EX-001, Barroll Decl. ¶ 15 (defining "Project supply" as "the annual release of Usable Water from Project Storage, as defined in the Compact, along with the return flows and tributary inflows below Elephant Butte, which the Project recaptures and delivers to the downstream water users"). New Mexico does not cite Dr. Barroll's definition in its Apportionment Motion or brief, although it does cite it in a different brief. *See* Full Supply Br. 3, ¶ 4. Even if Dr. Barroll's definition of "Project supply" is employed for purposes of the Apportionment Motion, and New Mexico's proposed judgment would still be defective because Dr. Barroll's definition would not cure New Mexico's failure to account for the treaty obligation to Mexico or the limitation to releases made in accordance with irrigation demands.[7] Dr. Barroll's definition is also ambiguous as to the meaning of "return flows," which precludes judgment as a matter of law for the reasons discussed below.

2. A definition of "Project supply" that does not include the Project return flows in the ground is inconsistent with the Compact's equitable apportionment.

As the party seeking summary judgment, New Mexico is not entitled to an inference that it defines "Project supply" in a way that makes its proposed apportionment legally and factually correct. Here, the record shows the opposite. The arguments made by New Mexico and the

[7] Dr. Barroll defines "Project Supply" to include "the annual release of Usable Water from Project Storage, as defined in the Compact." NM-EX_001, Barroll Decl. ¶ 15. In the Compact, "Usable Water" is defined to include the releases to Mexico under the 1906 treaty. Art. I(l), 53 Stat. at 786. Therefore, under Dr. Barroll's definition, "Project supply" includes the treaty water, and New Mexico's proposed 57%-43% division of "Project Supply" would reallocate the treaty water to the districts.

testimony of its witnesses suggest New Mexico construes "Project supply" in a way that makes its proposed apportionment legally untenable and profoundly inequitable.

In context, "Project supply" refers to the waters available for distribution by the Project in a given year. *See* Apportionment Br. 42 (quoting provision for distribution of "available supply" in years of shortage); NM-EX-100, Barroll Oct. 2019 Rep. at 90 (defining "Project Supply" as "[w]ater that is delivered or available for delivery to Project beneficiaries . . ."). There is no dispute that the Project depends on the reuse of water, and that the waters available for distribution by the Project in a given year include not only the "usable water" in Project storage, but also Project return flows. *See* U.S. Mem. 7 & n.22; NM-EX-001, Barroll Decl. ¶ 15.[8] The use of return flows was documented in detail in the Joint Investigation Report that informed the negotiation of the Compact. *See* U.S. Mem. 7 & nn. 22-25; NM-EX-001, Barroll Decl. at 24-25 (and citations therein).

The United States and New Mexico apparently disagree, however, as to *which* return flows are available to the Project for reuse. The United States maintains that the Project is entitled to all of its return flows undepleted by groundwater pumping. The Compact apportionment necessarily includes all of the return flows that would reach the Project but for the pumping because the reuse of large quantities of water was recognized as fundamental to the existing operation of the Project at the time of the Compact. *See* U.S. Mem. 7 & n.23; *id*. at 24-25. New Mexico, on the other hand, contends, or appears prepared to argue, that the return flows

[8] After water is applied to Project irrigation, some of that water returns to the river, either through the ground or on the surface, directly or through a network of drains. *See* NM-EX-100, Barroll Oct. 2019 Rep. at 23 (diagram). These return flows are diverted downstream into the district canals and re-applied to irrigation on the farms.

if they can be intercepted as they travel through the ground toward the drains and riverbed in New Mexico, are not a part of "Project supply," or subject to the apportionment under the Compact, and are reserved entirely for water users in EBID. For example, New Mexico's designated witness, Estevan Lopez, testified to New Mexico's view that Texas is "apportioned 43 percent of surface supply [of] whatever is left [after] exercise of groundwater pumping in both states." Lopez 30b6 Tr; 53:13-15.[9] In other words, New Mexico would apparently take the position that the return flows "available" to the Project (and Texas) are only those molecules of water that manage to emerge on the surface after running the gauntlet of New Mexico groundwater pumps.

The ambiguity of New Mexico's term "Project supply," particularly as it pertains to return flows, precludes judgment as a matter of law because New Mexico has not shown—and cannot show—that Compacting States intended an apportionment that excludes the Project return flows as they travel through the ground before emerging on the surface. The Compacting States intended to effect an apportionment that was an equitable apportionment, and the Compact they concluded reflects their determination that operation of the Project, under the conditions that existed at the time, resulted in an apportionment that was equitable. The conditions that existed at the time included the reuse, particularly in Texas, of large quantities of return flows that

[9] *See, also, e.g.*, NM-EX-100, Barroll Oct. 2019 Rep. 90 (defining "Project supply" as water "*derived from*" sources including return flows (emphasis added)); 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"); Lopez 30b6 Tr. 50:17-23 (testifying to New Mexico's opinion that irrigators in the EBID boundaries can pump without New Mexico accounting for it against its apportionment); Barroll 30b6 Tr. 70:8-9 ("the project itself doesn't have groundwater rights"); Apportionment Br. 1 (seeking judgment on "the legal issue of apportionment of surface waters of the Rio Grande"); *id.* at 21, ¶ 102) (alleging that Compact "apportioned surface water").

originated as seepage flowing through the ground in New Mexico. *See* Joint Investigation Report ("JIR") 55-56, 447-448 (in U.S. App. at TX_0000628-29, 1018-19) (showing volume of drain flows in acre-feet). *See also* NM-EX-100, Barroll Oct. 2019 Rep. 84 ("drains historically discharged large amounts of Project return flow throughout the Project, and that water used to comprise a significant amount of Project supply"). Therefore, the return flows, including those traveling through the ground as seepage, were an "important consideration" in the Compacting States' understanding of water supply below Elephant Butte. JIR 49 (in U.S. App. at TX_00000622). If "Project supply" is defined as excluding the return flows as they travel through the ground, those flows could be characterized as available for appropriation within New Mexico-- apportioned 100% to New Mexico water users, in effect—greatly distorting the intended equitable apportionment and rendering it inequitable to Texas.

New Mexico's proposed apportionment would conveniently match what New Mexico water users have been doing since groundwater pumping took hold in EBID in the 1950s: they are depleting Project water through groundwater as well as surface water diversions. In 1954, a report published by the U.S. Geological Survey confirmed that the groundwater pumped in the Project area was just surface water diverted by other means. *See* U.S. Mem. 10 & nn.44-45. Today, groundwater pumpers in New Mexico below Elephant Butte Reservoir are pumping so much water out of the ground that Project drains run dry earlier and more often than they otherwise would. In fact, in the years 2003-2005, so much groundwater was pumped in New Mexico that the Project could not deliver full allocations of water to either district. *See* U.S. Mem. 14 & nn.65-66; Barroll 8/7/20 Tr. 184; 186:12-15 (in U.S. App.). *See also* NM-EX-102, Barroll July 2020 Rep. at 7-9 (in U.S. App.). This is a far cry from the conditions that existed at

the time of the Compact, when the return of water to the river was unimpeded by pumping or diversion.

New Mexico cannot reasonably defend a position that the 300,000 acre-feet of water taken by New Mexico groundwater pumping each year has no effect on the waters the Compacting States intended to apportion. Such an argument, at a minimum, would need to address the Court's rejection of similar arguments in other compact enforcement actions.[10] Because New Mexico has made no attempt to explain or support its apparent construction of the term "Project supply" to exclude the return flows traveling through the ground, it is inconsistent with the Compact and unsuitable for entry as a matter of law.

3. The allocation of available supply by the Project was not fixed at 57% to EBID and 43% to EPCWID.

Regardless of how "Project supply" is defined, New Mexico's proposal to quantify the apportionment as *precisely* 57% to New Mexico and *precisely* 43% to Texas is not supported by the evidence it cites. New Mexico argues for this proposed split based on the 1938 contract between EBID and EPCWID, an analysis of Project delivery records for the years 1951-1978, and statements made in the United States' briefing in this case. None of these sources supports New Mexico's argument. *See generally* U.S. RSOF at 14 ¶ 45.

The 1938 contract between EBID and EPCWID contains a shortage provision. It states that, "in the event of a shortage of water for irrigation in any year, the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 thereof to the lands within [EPCWID] and 88/155 to the lands within [EBID]," roughly

[10] *See, e.g.*, *Kansas v. Nebraska*, 574 U.S. 445 (2015); *Texas v. New Mexico*, 462 U.S. 554, 557-58 & nn.2,3 (1983); *Kansas v. Colorado*, 514 U.S. 673 (1995).

equivalent to 43% and 57%, respectively. NM-EX-324, 1938 Contract, at 2 (quoted in part at Apportionment Br. 42). Although there is no dispute that the 1938 contract informs the apportionment the Compact was intended to effect, *see* Lopez 30b6 Tr. 22:3-23:7 (in U.S. App.), New Mexico's proposed judgment does not match the terms in the 1938 contract. The contract calls for a 57%-43% division only in years when there is "a shortage of water for irrigation," and only "so far as practicable." NM-EX-324. *See also* Lopez 30b6 Tr. 22:12-16. New Mexico's judgment would declare the apportionment for *every* year to be *exactly* 57%-43%. The 1938 contract does not support a declaration in those absolute terms.

New Mexico also fails to link its proposed apportionment of "Project supply" to the data it cites about "Project deliveries" in the years 1951 to 1978. *See* Apportionment Br. 44-45 (citing *id.* at 11-14, ¶¶ 62-69). New Mexico's allegation that Project deliveries were "allocated" 57%-43% in these years, *id.* at 45, does not accurately represent what the data show. From 1951 to 1978, Reclamation made allotments of water to all Project lands in acre-feet-per-acre and delivered the water to individual farms (also called delivery to the farm headgates, or delivery to lands). *See* NM-EX-529, FEIS, at EPCWID_ 206721.[11] The calculations that New Mexico cites are based on measured diversions at the canal headings on the Rio Grande. *See* NM-EX-100, Barroll Oct. 2019 Rep. at A-6. The diversions at canal headings are not evidence of an intentional "allocation" of water by Reclamation because Reclamation distributed water based on

[11] Reclamation uses the term "allotment" to refer to the maximum volume of water a farmer could order directly from the Project on a per-acre basis prior to 1978, and Reclamation uses the term "allocation" to refer to the division of water between the two irrigation districts from 1979 to present. NM-EX-529, FEIS, at EPCWID_206721. The difference in terminology corresponds to the transfer of operation and maintenance responsibility to the districts in 1979 and 1980, respectively, after which Reclamation delivered water to the districts instead of to the water users. *See id.*

allotments and orders for individual farms. New Mexico's argument that this "course of performance" supports its position fails because it is not citing evidence of intentional "performance" by any of the Compacting States. *See* Apportionment Br. 43 (citations omitted). In any case, the records on which New Mexico relies post-date the Compact by 13-40 years, and New Mexico's related statements of fact are disputed. *See* U.S. RSOF at 20-23, ¶¶ 62-69. As the Court knows, "subsequent practice" does not change the plain text of the Compact or add provisions to it. *See Colorado*, 514 U.S. at 690.

Moreover, to the extent the diversion records for 1951 to 1978 are relevant to ascertaining the Compacting States' intent in 1938, those diversion records undermine New Mexico's argument. First, these numbers oscillated substantially, undermining any claim that the parties intended a clear mathematical split. According to Dr. Barroll's calculations, there is not a single year between 1951 and 1978 in which Project diversions were split precisely 57%-43% between EBID and EPCWID, and the split rounds to 57%-43% in only seven (one-quarter) of those years. *See* NM-EX-100, Barroll Oct. 2019 Rep. at A-7-A-8. In fact, the amount diverted into EBID canals during this time period ranges broadly, from 48.5% (in 1961) to 65.6% (in 1964). *See id.*

The diversion records from the years closer to the time of the Compact are even more damaging to New Mexico's argument. From 1931 to 1950, there is not even one year in which the proportion can be *rounded* to 57%-43%, based on Dr. Barroll's calculations. *See id.* The percentage diverted into the EBID canals ranges from 48.2% to 58.2% in these years, with the average being 53.1%. Even for the period 1938 to 1950, following the 1938 contract providing for 57%-43% distribution in short years "so far as practicable," the average percentage of water diverted into EBID was 53%. The diversion did not reach 57% in any year. The diversion

records thus provide no support for declaring an apportionment to EBID of 57%. *See also* Apportionment Br. 12, ¶ 65 (alleging that EBID's share of "total" diversions was 54.5% in 1931-79, and 56.2% in 1951-79—not 57%). To the contrary, the records demonstrate that New Mexico's attempt to reduce the Compact to a bare percentage division of water is misguided.

Finally, New Mexico's contention that the United States has "recognized and accepted that New Mexico received an apportionment of 57% of Project supply" is incorrect. *See* Apportionment Br. 52. The statements quoted by New Mexico in the brief acknowledge that the Compact apportioned some water to New Mexico below Elephant Butte. *See id.* at 20, ¶ 100. One of the quoted statements also notes that "[the Project] deliveries have been divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage in EBID and EPCWID, respectively." *See id.* (quoting U.S. Br. in Opp. N.M.'s Mot. to Dismiss Tex.'s Compl. and the U.S.' Compl. in Intervention, 28 (June 2014) (quoting Compact Art. I(*l*))). This statement does not recognize or accept that New Mexico has "an apportionment of 57% of Project supply," Apportionment Br. 52. Indeed, the United States disputed that suggestion at length in a more recent brief in this case. *See* U.S. Resp. to Mots. of Tex. and N.M. on Legal Regarding Issues Decided in this Action 18-21 (filed Feb. 28, 2019) (arguing, *inter alia*, that "New Mexico confuses the apportionment of water, which is what the Compact does, with the allocation of Project water, which is what Reclamation does pursuant to the Downstream Contracts and federal reclamation law," and that "[t]he Compact does not apportion any quantity or percentage of Rio Grande water to New Mexico below Elephant Butte Reservoir").

For all of these many reasons, New Mexico's Apportionment Motion should be denied to the extent it seeks to declare an apportionment of 57% of Project supply to New Mexico and 43% of Project supply to Texas.

II. New Mexico is not entitled to a judgment or any factual determination binding against the United States on the basis of its Full Supply Motion.

Just as New Mexico's failure to define "Project supply" undermines its Apportionment Motion, New Mexico's selective definition of "full supply years" undermines the factual basis for its Full Supply Motion. The United States disputes that New Mexico's definition of "full supply" represents the full potential of the Project as the Compacting States would have understood it and that the occurrence of "full supply years" and "full supply year allocations" to EPCWID supplies a defense to claims that New Mexico is violating the Compact.

New Mexico's concept of "full supply" is based on the amount that was considered, in the 1950s, to be a "normal" delivery to Project lands. In the 1950s, Reclamation determined that the average total delivery from 1946 to 1950 was equivalent to 3.024 acre-feet/acre ("af/ac") for the 155,000 acres in the Project. *See* U.S. Mem. 10 & n.42. Later, around 1985, for purposes of allocating water to the Districts' canal headings, Reclamation developed a set of procedures that included a baseline allocation for years of "full supply" and a method for making allocations in years of "less than full supply." NM-EX-403, Draft Operating Agreement, at NM_00237432-434. The "full supply year" assumed in this method was based on the 3.024 af/ac "normal" delivery calculated in the 1950s. *Id.* at NM_00237431. As shown in a later Reclamation summary of this method (which New Mexico calls the "D1/D2 Method"), Reclamation determined that a "full supply" to Project lands was 468,720 af (3.024 * 155,000), and that a minimum release of 763,842 af would have been required to deliver a full supply. *See* NM-EX-400, Allocation Procedures, at US0167014, US0167020. So it came to be that the ability to release 763,800 af (and make corresponding allocations to the Districts) became associated with the concept of "full supply" for purpose of Project allocations.

New Mexico's argument that it is not responsible for damages to Texas in "full supply" years wrongly assumes that the "full supply" scenario used in the D1/D2 method (and later, the 2008 Operating Agreement) yield an allocation to EPCWID that is consistent with what a full supply was, or could have been, without the development of groundwater pumping in New Mexico. The allocation to EPCWID in full supply years, as well as years of less than full supply, is calculated by Reclamation using a regression analysis called the D2 Curve, which is derived from delivery records from the years 1951 to 1978. NM-EX-400, Allocation Procedures, at US0167020; NM-EX-529 (FEIS), at EPCWID_206724. The D2 Curve thus "reflects the hydrologic effects" of "[s]ignificant although largely unmeasured groundwater pumping" that was already occurring during this time period. *See* NM-EX-100, Barroll Oct. 2019 Rep. 35. Consequently, even in "full supply" years, application of the D2 curve yields a "full supply year allocation" to EPCWID that includes a reduction of water due to groundwater pumping. It does not represent what a full allocation could have been if that pumping had never been developed.

The concept of a "full supply year" is itself problematic in the context of New Mexico's argument. The D2 Curve is used to estimate the expected delivery to EBID, to EPCWID, and to Mexico, from a given release of water. When it developed its allocation procedures using the D2 Curve, Reclamation concluded that a release of 763,800 af could be expected to result in deliveries to the Districts and Mexico totaling 931,841 af, through the reuse of water. NM-EX-400, at US-167020. Absent groundwater pumping the total of the expected deliveries to the Districts would have been higher. *See* U.S. Mem. 13 & n.63. Moreover, there is reason to doubt that 3.024 af/ac, the number used to derive the required release, represents the highest possible delivery to lands that could be achieved. *See* US RSOF 20, ¶ 62 (citing 3.1 af/ac calculation of "normal" supply in 1951 project history); *id.* at ¶ 61 (showing that the years prior to 1951 that

were used to calculate the 3.024 af/ac delivery were not a time of time of "plentiful water supplies" as New Mexico contends). Therefore, the assumed "full supply" release of 763,800 af, cannot be said to result in a truly "full" delivery by the Project as it was intended to operate. In fact, project records from the years before the Compact show that releases in some years exceeded 820,000 af. *See* U.S. RSOF 17-18, ¶¶ 55-56 citing project histories from 1932 and 1933).

Because it incorporates depletions from groundwater pumping, the "full supply year" assumed in the D1/D2 Method and 2008 Operating Agreement do not represent the full potential of the Project as it would have been understood by the Compacting States. The United States disputes New Mexico's allegations in the Full Supply motion to the extent they imply that the concepts are equivalent for purposes of assessing whether groundwater pumping is interfering with the Project's ability to effectuate the intended apportionment. New Mexico is not entitled to a judgment treating its allegations about "full supply" years and allocations as undisputed or established for purposes of trial on the United States' claims.

III. New Mexico is not entitled to a judgment or any factual determination binding against the United States on the basis of its Notice Motion.

In its Notice Motion, New Mexico seeks a judgment excluding Texas's claims for damages for years when New Mexico did not receive "notice" it was potentially in breach of its Compact obligations. In support of the motion, New Mexico misstates the law and proffers facts that are disputed. New Mexico is not entitled to a judgment adopting or establishing these misstatements for purposes of trial on the United States' claims.[12]

[12] The United States construes New Mexico's Notice Motion to be seeking a judgment as to Texas's claims for damages and not any claim presented by the United States. Any ambiguity

A. New Mexico fails to demonstrate that notice is a prerequisite to liability or suit for breach of the Compact.

Nothing in the Compact, or the law of interstate compacts, requires a party to give notice before bringing a suit for breach of the Compact, or precludes liability for breaches in years when no notice was given. Even if such a principle could be found in the law of contracts or remedies as a general matter, that principle does not extend to the claims for declaratory and injunctive relief brought by the United States in this action.

New Mexico's obligations under the Compact are undisputed. And as the Compact is a federal law, New Mexico has an obligation to comply with it. Therefore, New Mexico has an obligation to deliver water to Project storage in Elephant Butte Reservoir. *See* Art. IV, 53 Stat. at 788. New Mexico also agrees that, as a party to the Compact, it is responsible for ensuring that water use below Elephant Butte does not 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, including curtailment of groundwater pumping. U.S. Mem. 3 & n.4; Barroll 30b6 Tr. 37:5-22. The Compact nowhere makes those obligations of New Mexico contingent on notice. New Mexico concedes, as it must, that the Compact does not expressly require notice as a precondition to liability or suit. *See* Notice Br. 14. In fact, the Compact imposes no express obligation on the United States, except to the extent it establishes constraints on Project storage, *see* Compact art. I(k), 53 Stat. at 786, and requires the appointment of a non-voting member to the Compact Commission. Compact art. XII, 53 Stat. at 791.

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as to the scope of the requested relief should be resolved against New Mexico, as the party seeking summary judgment.

New Mexico's attempt to extrapolate a notice requirement from the Court's analysis of the Yellowstone River Compact ("Yellowstone Compact") is unavailing. Notice Br. 8 (discussing *Montana v. Wyoming*, 138 S. Ct. 758, 758 (2018), *as revised* (Feb. 20, 2018)). The Yellowstone Compact was negotiated for the purpose of ensuring that the "[a]ppropriative rights to the beneficial uses of the water of the Yellowstone River System existing in each signatory State as of January 1, 1950, shall continue to be enjoyed in accordance with the laws governing the acquisition and use of water under the doctrine of appropriation." Yellowstone River Compact, art. V(a), 65 Stat. 663, 666 (1951). The Yellowstone Compact was thus intended to protect pre-1950 water rights while allowing the remainder of the "unused and unappropriated" waters to be apportioned between the two States and then appropriated by water users in priority. *Montana v. Wyoming*, 563 U.S. 368, 372 (2011) (quoting Compact art. V(b), 65 Stat. at 666-67). The Compacting States therefore expressly incorporated the doctrine of prior appropriation into Article V(A). 65 Stat. at 666. In *Montana v. Wyoming*, the Court extended a principle from that doctrine—the requirement of downstream "senior" appropriators to give notice to upstream "junior" appropriators to curtail water use—to conclude that Montana was required to place a call for liability to apply. *Montana v. Wyoming*, 138 S. Ct. at 759. The notice requirement imposed by the Court flowed directly from the text and structure of the Yellowstone Compact. *See id.*

The same principle does not flow from text or structure of the Rio Grande Compact. The Compact does not expressly incorporate the doctrine of prior appropriation, nor would it have been necessary to do so, because the waters of the Rio Grande below Elephant Butte Reservoir

were fully appropriated as of 1908. *See* U.S. Mem. 5 & n.14.[13] New Mexico's argument that without notice, it could not know that insufficient water is being delivered also does not withstand scrutiny. New Mexico is perfectly capable of determining when it is engaging in actions that interfere with the water supply available for diversion at the Project headgates. Here, those actions include numerous examples of regulatory inaction and lassitude such as agreeing to a 4.5 af/ac "delivery requirement" for lands that were assumed to need 3 af/ac historically, and the lack of penalties sufficient to deter the 200 overdiversions by groundwater pumpers are recorded every year. *See* U.S. Mem. 17-18.

A notice requirement would be inconsistent with the Compact's plain text and the principles on which it was established. In any event, even if some notice requirement were compelled by the text of the Compact for claims for damages, no such requirement applies to the United States' claims in this case, which seek a declaration of New Mexico's obligations and prospective relief to prevent future violations.

B. New Mexico's allegation that it lacked notice is a disputed issue of fact.

Even if some requirement of notice applied, the record amply demonstrates that New Mexico has been aware of the potential breach of its Compact obligations for decades. That awareness is evident in the State Engineer's attempt to promulgate district-specific groundwater management regulations in 2004, and is implicit much earlier, in the closure of the groundwater basin to new appropriations in 1980. *See* U.S. Mem. 16-17 & nn.74-78. At a minimum, as even New Mexico admits, the initiation of this action by Texas in 2013 constituted actual or "formal"

[13] New Mexico's reliance on *Worley v. United States Borax & Chemical Corporation*, 428 P.2d 651 (N.M. 1967), Notice Br. 12, is also misplaced because *Worley* involved a dispute between individuals operating a private system under the doctrine of prior appropriation.

notice of liability. *See id.* at 20 & n.96. Therefore, to the extent notice is relevant in any way to the United States' claims, the requirement is satisfied. New Mexico is not entitled to a judgment on the Notice Motion that treats its allegations about lack of notice as relevant to or established for purposes of the United States' claims.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Court deny New Mexico's Apportionment Motion and decline to enter any judgment on New Mexico's Damages Motion and Notice Motion that has the effect of establishing the facts disputed by the United States for purposes of trial on the United States' claims.

Respectfully submitted this 22nd day of December 2020,

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No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,
Plaintiff,
v.
STATE OF NEW MEXICO and
STATE OF COLORADO,
Defendants

OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on the 22nd day of December, 2020, I caused a true and correct copy of the **UNITED STATES OF AMERICA'S MEMORANDUM IN RESPONSE TO THE STATE OF NEW MEXICO'S MOTIONS FOR SUMMARY JUDGMENT** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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