

No. 141, Original

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

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants

OFFICE OF THE SPECIAL MASTER

**THE UNITED STATES OF AMERICA'S RESPONSE TO THE
STATE OF NEW MEXICO'S STATEMENTS OF UNDISPUTED MATERIAL FACTS**

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TABLE OF CONTENTS

RESPONSES TO STATEMENTS OF FACT IN THE APPORTIONMENT MOTION 2

 I. DEVELOPMENT OF THE RIO GRANDE PROJECT 2

 II. NEGOTIATION OF THE RIO GRANDE COMPACT 6

 III. TERMS OF THE RIO GRANDE COMPACT OF 1938 9

 IV. THE STATES’ UNDERSTANDING OF THE COMPACT 11

 V. OPERATIONS OF THE RIO GRANDE PROJECT 16

 VI. POSITIONS OF THE PARTIES ON THE 26

 VII. POSITION OF THE RIO GRANDE COMPACT COMMISSION 34

 VIII. DECISION OF THE SUPREME COURT 37

RESPONSES TO STATEMENTS OF FACT IN THE FULL SUPPLY MOTION 39

RESPONSES TO STATEMENTS OF FACT IN THE NOTICE MOTION 48

 I. RELATIONSHIP BETWEEN THE RIO GRANDE COMPACT AND THE
 RIO GRANDE PROJECT 48

 II. RELATIONSHIP BETWEEN THE PRIOR APPROPRIATION
 DOCTRINE AND THE RIO GRANDE PROJECT 51

 III. OPERATION OF THE RIO GRANDE COMPACT 52

 IV. RIO GRANDE PROJECT REPORTING 55

CONCLUSION 59

**THE UNITED STATES OF AMERICA’S RESPONSE TO THE
STATE OF NEW MEXICO’S STATEMENTS OF UNDISPUTED MATERIAL FACTS**

In accordance with Rule 17 of the Supreme Court of the United States and Rule 56(c) of the Federal Rules of Civil Procedure, the United States submits the following responses to the Statements of Undisputed Material Facts set forth the briefs supporting the State of New Mexico’s motions for partial summary judgment filed on November 5, 2020, referenced hereinafter as the Apportionment Motion, Full Supply Motion, and Notice Motion.¹

For purposes of these responses, the United States construes the statement of fact to exclude the string citations and parenthetical quotations offered to support the factual allegation. The United States’ responses do not address the accuracy of the citations or the quotations except to the extent necessary to show that the Statement itself is disputed. Each of the following *italicized* numbered paragraphs corresponds to and quotes New Mexico’s statement of fact, followed by the United States’ response **in bold** with accompanying explanation.

Citations to the exhibits in New Mexico’s compendium take the form “**NM-EX-0000, [Short Title], at [Bates No.]**,” unless there is a clear internal page number (as in an expert report). In a few places, the page number for the PDF document provided by New Mexico is used because the Bates number was not legible.

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.”

**RESPONSES TO STATEMENTS OF FACT
IN THE APPORTIONMENT MOTION**

I. DEVELOPMENT OF THE RIO GRANDE PROJECT

1. Following an investigation, the Reclamation Service (precursor to the Bureau of Reclamation) (both the Reclamation Service and Bureau of Reclamation are referred to herein as “Reclamation”) recommended that Congress authorize a storage reservoir near Elephant Butte, New Mexico, rather than an alternative site at El Paso, Texas, to capture, store, and regulate torrential and storm water flows in the Upper Rio Grande. See NM-EX 300, F.H. Newell, Second Annual Report of the Reclamation Service, H.R. Doc. No. 58-44, at 375-80 (1904); NM-EX 301, B.M. Hall, A Discussion of the Past and Present Plans for Irrigation of the Rio Grande Valley, 52 (Nov. 1904); NM-EX 106, Nicolai Kryloff, Context of the 1938 Rio Grande Compact, 6 (May 31, 2019) (“Kryloff Rep.”); see also Texas v. New Mexico, 138 S. Ct. 954, 957(2018) (“The federal government responded by proposing, among other things, to build a reservoir and guarantee Mexico a regular and regulated release of water. Eventually, the government identified a potential dam site near Elephant Butte, New Mexico, about 105 miles north of the Texas state line.”).

RESPONSE: Not disputed.

2. At the Twelfth National Irrigation Congress in 1904, Reclamation engineer Benjamin Hall reported that the proposed reservoir at Elephant Butte was preferable to the project proposed near El Paso because it would have a greater storage capacity, would minimize flooding that would render unusable irrigable land in New Mexico, and would impound sufficient water to irrigate 110,000 acres in New Mexico in addition to making deliveries to Mexico and irrigable land in Texas. NM-EX 303, Guy Elliott Mitchell, The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas, Nov. 15-16-17-18, 1904, 213-15 (1905); see also NM- EX 111, Scott A. Miltenberger, Expert Report of Scott A. Miltenberger, Ph.D., 8 (May 31, 2019) (“Miltenberger Rep.”); NM-EX 112, Jennifer Stevens, Ph.D., The History of Interstate Water Use on the Rio Grande: 1890-1955, 17 (Oct. 28, 2019) (“Stevens Rep.”).

RESPONSE: Not disputed.

3. The Reclamation proposal recommended delivery of water as between the lands in southern New Mexico and Texas based on the ratio of project lands within each state. NM-EX 220, Miltenberger Dep. (June 8, 2020), 39:7-20.

RESPONSE: Disputed. Reclamation Service Engineer Hall did not recommend delivery of water based on the ratio of project lands within the state. Hall expressly avoided the issue of how impounded and released water would be distributed. See NM-EX-303, 1904 Irr. Cong., at 219.

4. Delegates from Mexico, New Mexico, and Texas at the Irrigation Congress each approved the Reclamation proposal and unanimously passed a resolution declaring that the proposed project would affect “an equitable distribution of the waters of the Rio Grande with due regard to the

rights of New Mexico, Texas and Mexico.” NM-EX 303, Guy Elliott Mitchell, The Official Proceedings of the Twelfth National Irrigation Congress Held at El Paso, Texas, Nov. 15-16-17-18, 1904, 107 (1905); NM-EX 111, Miltenberger Rep. 9; NM-EX 106, Kryloff Rep. 6.

RESPONSE: Disputed. The delegates from Mexico, New Mexico, and Texas unanimously adopted a resolution stating that they “heartily endorse and approve the proposal of building the Elephant Butte dam as a happy solution of a vexed question that has heretofore embarrassed the parties interested, providing that an equitable distribution of the waters of the Rio Grande with due regard to the rights of New Mexico, Texas, and Mexico.” NM-EX-303,1904 Irr. Cong., at 109.

5. In support of Congressional authorization to begin work on the reservoir, the Reclamation Service Director testified to Congress that the project would be engineered to supply enough water to irrigate 20,000-25,000 acres in Mexico, 110,000 in New Mexico, with the “balance” to Texas. Mr. Newell further testified that “New Mexico, Texas, and old Mexico will divide the water in about the proportion stated.” See NM-EX 305, The Reclamation Work of the Government Under the National Irrigation Act: Hearing Before the H. Comm. on Irrigation of Arid Lands, 59 Cong. 222 (1906) (statement of Frederick Newell, Reclamation Service Director); NM-EX 112, Stevens Rep. 18.

RESPONSE: Not disputed.

6. In 1906, the United States entered into a treaty with the Republic of Mexico for annual delivery of 60,000 acre-feet of water to the Acequia Madre, above Juarez, in years of full supply, with proportionate reductions in times of shortage. NM-EX 307, Distribution of the Waters of the Rio Grande, Mex.-U.S., May 21, 1906, 34 Stat. 2953; NM-EX 111, Miltenberger Rep. 9; see also Texas v. New Mexico, 138 S. Ct. 954, 957 (2018) (“in 1906, the United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.”)

RESPONSE: Disputed. The 1906 treaty does not refer to “years of full supply.” It provides for the United States to deliver 60,000 acre-feet “annually” into the bed of the Rio Grande, with proportionate reduction “[i]n case . . . of extraordinary drought or serious accident to the irrigation system in the United States.” NM-EX-307 at 1, 2.

7. In 1907, Congress authorized construction to begin on the Elephant Butte Reservoir. An Act Making Appropriations for Sundry Civil Expenses of the Government for the Fiscal Year Ending June Thirtieth, Nineteen Hundred and Eight, and for Other Purposes, Pub. Law No. 59-253, 34 Stat. 1295 (1907); NM-EX 112, Stevens Rep. 19.

RESPONSE: Disputed. The 1907 Act appropriated federal funds for the Rio Grande Project construction. 34 Stat. 1357. The authority to construct the Project derives from the Reclamation Act of 1902, and the Rio Grande Project Act of Feb. 25, 1905, 33 Stat. 814 (1905), which extended the 1902 Act to the portion of Texas that would benefit from the Project.

8. *In its initial conception, Reclamation engineered the Project to deliver an annual release between 750,000 acre-feet and 800,000 acre-feet, enough to provide 60,000 acre-feet of water to Mexico and to irrigate 155,000 acres in the United States (assuming delivery of three acre-feet per acre, plus twenty percent loss in the distribution system), of which 110,000 acres would be situated in New Mexico and 45,000 in Texas. See NM-EX 310, Fund for Reclamation of Arid Lands, H.R. Doc. 61-1262, at 106 (1911); NM-EX 112, Stevens Rep. 21.*

RESPONSE: Disputed. The report cited here was prepared in 1910, several years after the “initial conception” of the Project and before the dam was constructed. The report states that “there seems to be an assured supply of 750,000 to 800,000 acre-feet” for the Project, and it considers the amount of water that would be provided for irrigation use from assumed releases of 750,000 acre-feet (“af”) and 800,000 af. NM-EX-310, Recl. Fund Rep., at 105, ¶¶ 15-16. The report finds the “amount required for diversion to lands in the United States is 581,250 acre-feet,” in order to provide each farm enough water to apply 3 af/acre (“af/ac”) after accounting for on-farm distribution losses. *Id.* at 106, ¶ 18. The report finds that “approximately 800,000 acre-feet would be required” to overcome the twenty percent transit loss in the river to make the 581,250 af available for diversion. *Id.* The report does not draw the same conclusion for a release of 750,000 af or any amount less than 800,000 af. *See id.* The report states that that “the total area in the Project is 155,000 acres,” of which 45,000 acres were in Texas and 132,000 acres were in new Mexico (110,000 acres plus 12,000 acres of public land “subject to the reclamation act,” i.e., withdrawn from entry). *Id.*, ¶ 19.

9. **[a]** *Reclamation appropriated water for the Project under New Mexico territorial law, consistent with Section 8 of the Reclamation Act. Specifically, Reclamation provided notice to the Territorial Engineer for the Territory of New Mexico to appropriate and store 730,000 acre-feet per year at Elephant Butte Reservoir in 1906 and to appropriate all “unappropriated waters of the Rio Grande” at Elephant Butte in 1908. See NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger Rep. 9-10; see also Texas v. New Mexico, 138 S. Ct. 954, 957 (2018) (“After obtaining the necessary water rights, the United States began construction of the dam in 1910 and completed it in 1916 as part of a broader infrastructure development known as the Rio Grande Project.”).*

[b] *Ultimately, the Rio Grande water appropriated by the United States was limited by the size of the Project.*

RESPONSE:

[a] Disputed. Reclamation appropriated water for the Project in 1903. *See Findings of Fact and Conclusions of Law 29-30, 52-54, State of New Mexico ex rel. State Engineer v. Elephant Butte Irrigation District*, No. CV-9688, Stream Sys. Issue No. 104 (N.M. 3d Jud. Dist. Apr. 17, 2017) (“SS 104”) (in U.S. Supp. App.). The 1906 notice to the New Mexico Territorial Engineer was not an appropriation but, instead, is a request from the

United States to the Territory of New Mexico to reserve from appropriation by others the waters of the Rio Grande the United States' intended to utilize described as "[a] volume of water equivalent to 730,000 acre-feet per year requiring a maximum diversion or storage of 2,000,000 miner's inches. . . ." NM-EX-306, Letter to White dated Jan. 23, 1906, at 1. The 1908 notice expands the United States' request to reserve from appropriation by others all the unappropriated waters of the Rio Grande and its tributaries within the Territory, not just at Elephant Butte. NM-EX-309, Letter to Sullivan dated Apr. 1908. The notices were filed to conform with provisions of the New Mexico territorial code regarding federal projects. *See* SS 104 at 40-42.

[b] Disputed. The statement that the "water appropriated by the United States was limited by the size of the Project" is vague and ambiguous, and appears to be a conclusion of law. New Mexico has not cited any materials supporting this statement.

10. In 1915, while Project construction was ongoing, Reclamation began water deliveries through the Project. See NM-EX 404, Robert Autobee, United States Bureau of Reclamation, Rio Grande Project, at 12 (1994); NM-EX 311, United States Reclamation Service, Project History Rio Grande Project Year 1915, 137-141 (1915).

RESPONSE: Disputed. Water was diverted from the Rio Grande at a Project diversion structure at Leasburg, New Mexico, beginning in 1908. NM-EX-404, Autobee Rep., at 9. The first deliveries of water released from storage in Elephant Butte reservoir began in February 1915, although more than a year remained before completion of the Elephant Butte Dam. NM-EX-311, 1915 Project History, at 138.

11. By 1919, construction of the Elephant Butte Dam and the major diversion works of the Project was complete. NM-EX 312, United States Reclamation Service, Project History Rio Grande Project Year 1919, 4-5 (1919) (reporting "practical completion of the main canal system, including diversion dams, for the lands of the New Mexico and El Paso County Irrigation Districts"); see also NM-EX 111, Miltenberger Rep. 10.

RESPONSE: Not disputed.

12. By 1921, Reclamation reported that the final "determined irrigable area of the project" in the United States was 155,000 acres. See NM-EX 313, United States Reclamation Service, Project History Rio Grande Project Year 1921, 6-7 (1921); NM-EX 106, Kryloff Rep. at 23.

RESPONSE: Disputed. The 1921 Project History was compiled in 1922. *See* NM-EX 313, 1912 Project History, at 6-7 (pdf pages 44-45) (reporting costs "to January 1, 1922"). The quoted portion of the Project History does not characterize the "determined irrigable area" as "final." The United States does not dispute this statement if it is revised to read: "In 1922, Reclamation reported that 'the determined irrigable area of the project' included 155,000 acres in the United States."

II. NEGOTIATION OF THE RIO GRANDE COMPACT

13. Upon completion of the major storage and diversion works for the Project, Colorado proposed to New Mexico legislation authorizing a joint commission between the two states, and New Mexico and Colorado each appointed commissioners in 1923 to negotiate an interstate compact regarding development upstream of Elephant Butte Reservoir. See NM-EX 111, Miltenberger Rep. 11; NM-EX 112, Stevens Rep. 29.

RESPONSE: Not disputed.

14. After the first meeting of the Colorado and New Mexico commissioners in 1924, Texas petitioned the Secretary of Commerce, who served as the federal representative, to “accord[] [to the Texas] the same representation upon that Commission which is accorded to the States of New Mexico and Colorado.” See NM-EX 314, Letter from Pat M. Neff, Governor, State of Texas, to Herbert Hoover, Secretary of Commerce (Sept. 20, 1924); NM-EX 111, Miltenberger Rep. 12.

RESPONSE: Not disputed.

15. The New Mexico Compact Commissioner supported the inclusion of Texas in further compact negotiations. He wrote the New Mexico Governor that the exclusion Texas “assumed” that Reclamation would “protect[]” the rights of the Project in negotiations, but this assumption proved false because “the Reclamation Service apparently decided to take no action whatever looking to the presentation of the rights of the Rio Grande Project either as to lands in New Mexico or Texas, although it was expected that this would be done.” See NM-EX 315, Letter from J.O. Seth, Commissioner, State of New Mexico, to A.T. Hannett, Governor, State of New Mexico, at 3 (Feb. 20, 1925).

RESPONSE: Disputed. The quoted portion of the letter states that the exclusion of Texas from the joint commission “can be accounted for only *on the theory* that the Legislature assumed that the only lands in Texas that would be affected by any Compact or Agreement [between New Mexico and Colorado] are those [in the Project] and that all rights to the waters of the Rio Grande held by these lands would be protected by the Reclamation Service.” NM-EX-315, Seth Letter, at 3. The report states that “up to . . . October, 1924,” Reclamation had not taken action, but notes that had apparently been “taking steps to properly present the rights of the Rio Grande Project” since then. *Id.*

16. Compact negotiations resumed in 1928 following the appointment of a Texas commissioner. Those initial negotiations resulted in a temporary compact in February 1929. See NM-EX 111, Miltenberger Rep. 13; NM-EX 112, Stevens Rep. 29, 35, 40; NM-EX 316, Rio Grande Compact Commission, First Annual Report of the Rio Grande Compact Commission, 1-10 (1931).

RESPONSE: Not disputed.

17. In December 1935, the Rio Grande Compact Committee met to continue negotiations. At that meeting, officials from the National Resources Committee presented a proposal for a comprehensive study of the Rio Grande in order to facilitate an agreement. See NM-EX 317,

Proceedings of the Rio Grande Compact Commission held in Santa Fe, New Mexico December 2- 3, 1935, at 5-7 (1935); NM-EX 112, Stevens Rep. at 55.

RESPONSE: Not disputed.

18. This proposed comprehensive study became the Rio Grande Joint Investigation. According to the authors, the “prime purpose” of the investigation was “to determine the basic facts needed in arriving at an accord” among the states “on an allocation and use of Rio Grande waters in the future development of the upper basin.” NM-EX 318, Harlow M. Stafford et al., Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation, 10-11 (1937); NM-EX 112, Stevens Rep. 62.

RESPONSE: Not disputed, with the qualification that “upper basin,” as used in the Joint Investigation Report (“JIR”) refers to the Rio Grande Basin from its headwaters to Fort Quitman, Texas, and that the quoted text actually says: “an equitable allocation and use... .” NM-EX-318, JIR excerpts, at 10-11 (emphasis added).

19. One category of required information was accurate data concerning existing diversions, including those of the Project. The Joint Investigation Report collected available data to prepare and present a comprehensive analysis of actual diversions, including diversions between Elephant Butte Reservoir and Fort Quitman, Texas, for the period 1930-36. The Joint Investigation Report also catalogued Project Acreage, including lands for “Cities, Towns, and Villages.” See NM-EX 318, Harlow M. Stafford et al., Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation, 11, 14-16 (1937); NM-EX 112, Stevens Rep. 64.

RESPONSE: Not disputed.

20. [a] In entering negotiations New Mexico stressed that for it to agree, the final compact needed to provide that “[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said river system.”

[b] This position was important to New Mexico, in part, because the surface water in the Lower Rio Grande in New Mexico was fully appropriated and New Mexico expected the final compact to protect those existing rights. See NM-EX 319, Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937, 12-13 (1937); NM-EX 111, Miltenberger Rep. 25; NM-EX 112, Stevens Rep. 65; NM-EX 005, Stevens Decl. ¶ 8; NM-EX 002, D’Antonio Decl. ¶ 9.

RESPONSE:

[a] Not disputed.

[b] Disputed. Whether this position was “important” to New Mexico is a subjective determination, not a statement of fact, and the reasons why the position might have been

to New Mexico important are matters of speculation. The statement is also ambiguous in its reference to “those existing rights.” The New Mexico Compact Commissioner explained that “[a]ll existing rights to the use of water in the Rio Grande Basin in New Mexico shall be recognized as having the right to an adequate supply of water from said River System,” suggesting that New Mexico’s affirmation of the Compact endorsed the Project as a mechanism for supplying an adequate water supply in the lower portion of New Mexico. NM-EX 319, RGCC Sept.-Oct 1937, at 59.

21. *The Engineer Advisors for the three states used the Joint Investigation to prepare a Report of Committee of Engineers to the Rio Grande Compact Commissions, dated December 27, 1937. The express “general purpose” of this report was to recommend apportionment among three divisions of the Rio Grande—the San Luis Valley, the “Middle Rio Grande from Lobatos to Elephant Butte Reservoir,” and the Project from Elephant Butte Reservoir to Fort Quitman, Texas—according to a “general policy” that “present uses of water in each of the three States must be protected in formulation of the Compact.” See NM-EX-322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937); NM-EX 111, Miltenberger Rep. 29; NM-EX 112, Stevens Rep. 67-68.*

RESPONSE: Disputed. The report does not use the term “apportionment.” The report proposes a “definite schedule of deliveries,” and states the advisors’ opinion that “the [delivery] schedules and provisions will permit the maximum practicable use of the waters of the Rio Grande.” NM-EX 322, Dec. 1937 Eng. Rep., at 1, 9.

22. *The Committee of Engineers initially recommended a “normal release” from Elephant Butte Reservoir of 800,000 acre-feet per annum. See NM-EX-322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937); NM-EX-112, Stevens. Rep. 67-68.*

RESPONSE: Disputed. The Engineer Advisors’ report recommends that “the normal release from Elephant Butte Reservoir *be deemed to be* 800,000 acre-feet per annum, adjusted for any gain or loss of usable water resulting from the operation of any reservoir below Elephant Butte,” NM-EX-322, Dec. 1937, Eng. Rep. at 9 (emphasis added). They also recommended “this normal release be reduced or increased by two-thirds of any change in the aggregate diversions or loss to Mexico.” *Id.*

23. *Following negotiations, the Committee of Engineers revised its recommendation to provide for a normal release from the Reservoir of 790,000 acre-feet per year to meet the irrigation demands of Project lands in New Mexico and Texas and to make the 1906 treaty delivery to Mexico. See NM-EX 325, Letter from Thomas M. McClure, State Engineer, State of New Mexico, to S.O. Harper, Chairman, Rio Grande Compact Commission (Jan. 25, 1938), in Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938, at CO-006216 (1938); NM-EX 325, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Mar. 9, 1938), in Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa*

Fe, New Mexico, March 3rd to March 18th, inc. 1938, at CO-006226-33 (1938); NM-EX 112, Stevens Rep. 68-70; NM-EX 111, Miltenberger Rep. 33, 37-39.

RESPONSE: Disputed. The revised recommendation is “that the normal release from Elephant Butte Reservoir be deemed to be *an average of 790,000 acre-feet per annum*, adjusted for any gain or loss of usable water resulting from from the operation of any reservoir below Elephant Butte.” NM-EX-325, RGCC Mar. 1938 Proc., at CO-006233.

24. On March 18, 1938, the members of the Rio Grande Compact Commission (“RGCC”) each executed the final Rio Grande Compact. Congress gave its approval to the Rio Grande Compact on May 31, 1939. See NM-EX 325, Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held at Santa Fe, New Mexico, March 3rd to March 18th, inc. 1938, 34-35 (1938); An Act Giving Consent and Approval of Congress to the Rio Grande Compact Signed at Santa Fe, New Mexico, on March 18, 1938, Pub. Law No. 76-95, 53 Stat. 785 (1939).

RESPONSE: Not disputed.

III. TERMS OF THE RIO GRANDE COMPACT OF 1938

25. The preamble of the Rio Grande Compact of 1938 states: “The State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State with respect to the use of the waters of the Rio Grande above Fort Quitman, Texas, and being moved by considerations of interstate comity, and for the purpose of effecting an equitable apportionment of such waters, have resolved to conclude a Compact for the attainment of these purposes” NM-EX 330, Rio Grande Compact of 1938, 53 Stat. 785, 785 (1939) (“Rio Grande Compact” or “Compact”).

RESPONSE: Not disputed.

26. Article I, Paragraph (k) of the Compact defines “Project Storage” as “the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande project, but not more than a total of 2,638,860 acre-feet.” 53 Stat. at 786.

RESPONSE: Not disputed.

27. The limit on Project Storage within the Compact accords with what was considered the maximum capacity of Elephant Butte Reservoir. See NM-EX 107, Estevan R. Lopez, Expert Report of Estevan R. Lopez, P.E., 15 (Oct. 31, 2019) (“Lopez Rep.”).

RESPONSE: Not disputed.

28. The Compact contemplates that usable water will be released from storage to meet irrigation demands. Article I, Paragraph (l) of the Compact defines “Usable Water” as “all water,

exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.” 53 Stat. at 786; NM-EX 107, Lopez Rep. 16.

RESPONSE: Not disputed.

29. Article I, Paragraph (o) of the Compact defines “Actual Release” as “the amount of usable water released in any calendar year from the lowest reservoir comprising project storage.” 53 Stat. at 786.

RESPONSE: Not disputed.

30. Article I, Paragraph (p) of the Compact defines “Actual Spill” as “all water which is actually spilled from Elephant Butte Reservoir, or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir; provided, that actual spill of usable water cannot occur until all credit water shall have been spilled.” 53 Stat. at 786.

RESPONSE: Not disputed.

31. Article I, Paragraph (q) of the Compact defines “Hypothetical Spill” as “the time in any year at which usable water would have spilled from project storage if 790,000 acre-feet has been released therefrom at rates proportion to the actual release in every year from the starting date to the end of the year in which hypothetical spill occurs.” 53 Stat. at 786.

RESPONSE: Not disputed.

32. Article II of the Compact specifies that stream gaging stations be established at specific locations in the Rio Grande Basin for the purposes of Compact accounting. The lowest required stream gage under Article II is just below Caballo Reservoir. See 53 Stat. at 786-87; NM-EX 107, Lopez Rep. 18.

RESPONSE: Not disputed.

33. Article IV of the Compact defines New Mexico’s obligation to deliver water from the Rio Grande to San Marcial based upon nine (9) non-summer months of river flows. The delivery obligation at San Marcial is defined by a mathematical relationship corresponding to recorded flow at the Otowi gage during those months. The Otowi gage located in New Mexico about 100 miles south of the Colorado border. The San Marcial gage was located just upstream of Elephant Butte Reservoir. See 53 Stat. at 788; NM-EX 107, Lopez Rep. at 20.

RESPONSE: Not disputed.

34. In 1948, the RGCC changed New Mexico’s delivery schedule under Article IV of the Compact to require deliveries at Elephant Butte Reservoir, rather than San Marcial, and removed the Article II gaging stations at San Marcial and San Acacia. See NM-EX 331, Rio

Grande Compact Commission, Tenth Annual Report of the Rio Grande Compact Commission, 17-18 (1948); NM-EX 107, Lopez Rep., 18-22.

RESPONSE: Not disputed.

35. Article VI of the Compact defines procedures to determine the annual credits and debits for Colorado and New Mexico. Of note, Article VI permits Colorado and New Mexico to authorize releases of Credit Water to avoid spill in excess of downstream demand and permits such releases to be included in the accounting of an Actual Spill. See 53 Stat. at 789-90; NM-EX 107, Lopez Rep. 22-23.

RESPONSE: Not disputed.

36. Article VII of the Compact prohibits any increase in storage by either New Mexico or Colorado in reservoirs constructed after 1929 if the volume of Usable Water in Project Storage is less than 400,000 acre-feet. This threshold value decreases if the aggregate releases from Project storage have averaged more than 790,000 acre-feet from the beginning of the calendar year following the effective date of the Compact, or from the beginning of the calendar year following an Actual Spill, before the storage limitation takes effect. Further, the article permits that either Colorado or New Mexico may offer to relinquish accrued Credit Water to Texas, and Texas may accept such an offer at its discretion. If New Mexico and Texas agree on a relinquishment, the relinquished Credit Water becomes Usable Water and is available for use on lands in both New Mexico and Texas. See 53 Stat. at 790; NM-EX 107, Lopez Rep. 23.

RESPONSE: Not disputed, with the clarification that relinquished Credit Water becomes Usable Water and is available for delivery to lands in both New Mexico and Texas and delivery to Mexico.

37. Article VIII of the Compact permits New Mexico to demand of Colorado, and Texas to demand that Colorado and New Mexico, in January, release of water then held in storage from post-1929 reservoirs upstream of Elephant Butte to the amount of any accrued debits of Colorado and New Mexico, respectively, as necessary to help bring the amount of water in Project Storage up to 600,000 acre feet by March first. The purpose of this provision is to bring the quantity of Usable Water in Project Storage to 600,000 acre-feet by March first and to maintain this quantity until April thirtieth to allow for a normal release of 790,000 acre feet in that year. See 53 Stat. at 790.

RESPONSE: Not disputed.

IV. THE STATES' UNDERSTANDING OF THE COMPACT

38. The historical record indicates that one purpose of the Compact was to protect the operation of the Project. NM-EX 111, Miltenberger Dep. (June 8, 2020) 38:8-17, 137:9-138:21; NM-EX 112, Stevens Rep. 72; NM-EX 005, Stevens Decl. ¶ 10. See, e.g., NM-EX 319, Rio Grande

Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937, 12-13 (1937).

RESPONSE: Not disputed.

39. *The historical record indicates that another purpose of the Compact was to protect existing rights. NM-EX 106, Kryloff Dep. (Aug. 6, 2020) 108:9-109:18; NM-EX 005, Stevens Decl. ¶ 11. See, e.g., NM-EX 319, Rio Grande Compact Commission, Proceedings of the Meeting of the Rio Grande Compact Commission Held in Santa Fe, New Mexico, September 27, to October 1, 1937, 12-13 (1937); NM-EX 322, Letter from E.B. Debler, et al., Committee of Engineer Advisors, Rio Grande Compact Commission, to Rio Grande Compact Commission (Dec. 27, 1937).*

RESPONSE: Disputed. “Existing rights,” as used in the statement, is ambiguous and disputed to the extent New Mexico construes it to mean the Compact was intended to protect the rights of water users within the States. The engineer advisors for the negotiating committee “avoided discussion of the relative rights of water users in the three States” See NM-EX-22, Dec. 1937 Eng. Rep., at 2 (pdf page).

40. *Prior to negotiation of the Compact, Reclamation administered the Project as a single unit. NM-EX 111, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18; NM-EX 107, Lopez Rep. 25.*

RESPONSE: Disputed. “Administered as a single unit,” as used in the statement, is ambiguous and the statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938)(Clayton Letter) at 1. The United States disputes any other construction of Statement of Fact No. 40. The United States does not dispute that prior to the Compact, the Project delivered water to farms in the Project area, and did not allocate to District diversion headings as it does now.

41. *The understanding of the compacting States was that Reclamation would continue to operate the Project in that manner. NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-EX 327, J.H. Bliss, Provisions of the Rio Grande Compact, 1 (Apr. 2, 1938) (“The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit.”); NM-EX 112, Stevens Rep.72.*

RESPONSE: Disputed. The Compacting States were aware of the possibility that Reclamation could transfer ownership or responsibility for Project infrastructure and operations to the districts after they satisfied their repayment obligations. The October 4, 1938 letter cited in this Statement says that the Rio Grande Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the

reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Clayton Letter, at 1.

42. *In negotiating the Compact, the States understood that all lands within the Project had equal rights to water. NM-EX 111, Miltenberger Dep. (June 8, 2020) 44:4-23; NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938); NM-EX 107, Lopez Rep. 26-27, 35, 67-68; NM-EX 005, Stevens Decl. ¶ 11.*

RESPONSE: Disputed. “Equal rights to water,” as used in this statement, is ambiguous and the statement is disputed on that basis. Texas Commissioner Clayton’s statement that “lands within the Project have equal water rights” does not mean that all acreage had equal rights to water. Mr. Clayton referred to the Project “areas involved in the two States,” which he describes as 88,000 acres for Elephant Butte Irrigation District and 67,000 acres for El Paso Water Improvement District No. 1, not to individual lands or acres within the Project. NM-EX-328, Clayton Letter. Additionally, Mr. Clayton’s letter says the water distribution “is of course a private one between the districts involved, and for that reason it was felt neither necessary nor desirable that it be incorporated in the terms of the Compact.”

43. *The historical record reflects that the States agreed on 790,000 acre-feet per year as a normal release in the Compact because it was sufficient to satisfy irrigation demands in both New Mexico and Texas, as well as address water quality concerns. NM-EX 220, Miltenberger Dep. (June 8, 2020) 146:21-148:1; NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 55:17-56:25, 89:20-90:1; NM-EX 106, Kryloff Rep. 25-26.*

RESPONSE: Disputed. The Joint Investigation Report did not conclude that a 790,000 acre-feet per year release addressed water quality concerns. The Report states that “[q]uality of water, as well as quantity of water, becomes [] an important consideration particularly to the waters that are available to the lowest lands in the basin, such as those in the Tornillo unit of the Rio Grande Project and in the Hudspeth District.” JIR 62 (in U.S. App. at TX_00000561). The release from Elephant Butte Reservoir of 766,000 acre-feet of water was calculated to remove 620,000 tons of dissolved solids past Fort Quitman, indicating that the amount of pre-Compact releases of water and drainage return flows was important to maintain flushing of salts. *Id.* at 64. The continuing concern for water quality is demonstrated by Article XI permitting “recourse by a signatory state to the Supreme Court of the United States for redress should the character or quality of the water, at the point of delivery, be changed hereafter by one signatory state to the injury of another.”

44. *The historical record indicates that the Compact relied upon the Project and its allocation and delivery of water in relation to the proportion of Project irrigable lands to provide the basis for the apportionment of Rio Grande waters to users in New Mexico and Texas. NM-EX 220, Miltenberger Dep. (June 8, 2020) 40:7-22; NM-EX 107, Lopez Rep. 67-68.*

RESPONSE: Disputed. The United States disputes that delivery of water “in relation to the proportion of Project irrigable lands” was an assumption on which the Compacting States “relied” as a basis for concluding that the operation of the Project would effect an equitable apportionment. Under the 1938 contract, the distribution of water was to be made in proportion of Project irrigable lands in the States only “in the event of a shortage of water for irrigation in any year,” and only “so far as practicable.” NM-EX-324, 1938 Contract. The United States does not dispute this statement if “in relation to the proportion of” is deleted.

45. The historical record confirms that historically Project deliveries were made based upon the ratio between Project acreage in New Mexico and Project acreage in Texas. In other words, under the Compact, the delivery of water through the Project was based on the irrigable acres in each State. Historically that ratio is 57% to New Mexico and 43% to Texas. NM-EX 220, Miltenberger Dep. (June 8, 2020) 39:2-40:6, 47:17-48:18.

RESPONSE: Disputed. The terms “historically,” “based upon,” and “under the Compact,” as used in this statement are ambiguous and the statement are disputed on that basis. The Compact does not address the allocation within the Rio Grande Project. 53 Stat. 785. As noted, the 1938 contract between EBID and EPCWID (NM-EX 324) called for the distribution of available supply in proportion to acreage only in the event of a shortage of water for irrigation, and only so far as practicable. Until 1978, the Project delivered water to lands and did not allocate to the districts. Diversion records show that the percentage of total diversions to EBID ranged from 48.5% to 65.6%, and that the average diversion to EBID was 56.2%. NM-EX-100, Barroll Oct. 2019 Rep. at A-7-A-8. See also Statement of Fact 62 (summary statistics that do not align with 57/43 split).

46. [a] Shortly after the Compact was finalized, Texas Commissioner Frank Clayton explained the way that the Compact divided water below Elephant Butte:

[T]he question of the division of the water released from Elephant Butte reservoir is taken care of by contracts between the districts under the Rio Grande Project and the Bureau of Reclamation. These contracts provide that the lands within the Project have equal water rights, and the water is allocated according the areas involved in the two States. By virtue of the contract recently executed, the total areas is ‘frozen’ at the figure representing the acreage now actually in cultivation: approximately 88,000 acres for Elephant Butte Irrigation District, and 67,000 for the El Paso County Water Improvement District No. 1, with a ‘cushion’ of three per cent for each figure.

NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938).

[b] The expert historian for the United States agreed that this letter was “an important document” for understanding the way that the Compact divides the water below Elephant Butte. See Ex 215, Kryloff Dep. (Aug. 6, 2020) 41:15-20, 41:21-42:9; NM-EX 106, Kryloff Rep. 12; see also NM-EX 220, Miltenberger Dep. (June 8, 2020) 43:17-44:23.

RESPONSE:

[a] Not disputed, to the extent the statement is intended to report the fact of what Clayton wrote, and not to establish the specific contents of his statement as a factual matter.

[b] Not disputed, with the qualification that Mr. Kryloff is retained by the United States but has not been identified by the United States as a witness as of this filing.

47. *Similarly, shortly after the Compact was finalized, Texas Commissioner Frank Clayton described the operation of the Compact to the Chairman of the Texas Board of Water Engineers. Commissioner Clayton explained:*

Moreover, since the source of supply for all lands above Fort Quitman and below Elephant Butte reservoir, whether in Texas or New Mexico, is the reservoir itself, it could hardly be expected of Colorado and New Mexico that they should guarantee a certain amount of water to pass the Texas state line, since this amount is wholly dependent upon the releases from the reservoir and the reservoir is under the control of an entirely independent agency – the Bureau of Reclamation.

Also, by contract between the New Mexico interests and the Texas interests in the Rio Grande Project, all the lands in the Project have equal water rights, and the acreage to be irrigated is practically “frozen” at its present figures, with a three per cent “cushion.”

It is therefore not necessary, even if it were practicable, to make any definite provision in the Compact for the amount of water to pass the Texas-New Mexico state line.”

NM-EX 329, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas to C.S. Clark, Chairman, Board of Water Engineers, State of Texas (October 16, 1938).

RESPONSE: Not disputed, to the extent the statement is intended to report the fact of what Clayton wrote, and not to establish the specific contents of the letter as a factual matter.

48. *In 1968, Raymond Hill, the Engineer Advisor for the State of Texas during Compact negotiations explained “that the Rio Grande Compact Commissioners, at the time of executing the Rio Grande Compact of 1938, anticipated that compliance” with Articles III and IV “would result in enough water entering Elephant Butte Reservoir to sustain an average normal release of 790,000 AF per year from Project storage for use on lands in New Mexico downstream of Elephant Butte Reservoir and on lands in Texas and also to comply with the obligations of the Treaty of 1906 for deliveries of water to Mexico.” NM-EX 401, Raymond A. Hill, Development of the Rio Grande Compact of 1938, 38 (Oct. 8, 1968) (emphasis added).*

RESPONSE: Not disputed, to the extent the statement is intended to report the fact of what Hill wrote, and not to establish the content of what he wrote as a factual matter.

V. OPERATIONS OF THE RIO GRANDE PROJECT

A. Operation of the Rio Grande Project Prior to the Compact

49. [a] Under the Reclamation Act, Congress intended that water projects would be self-supporting, and each would generate sufficient revenue to cover the approximate costs of construction and operation and maintenance.

[b] Thus, Reclamation intended for the total estimated costs of the Rio Grande Project to be equitably borne by its beneficiaries. NM-EX 529, Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement, 3 (Sept. 30, 2016); NM-EX 005, Stevens Decl. ¶ 13.

RESPONSE:

[a] Not disputed.

[b] Disputed. “Equitably,” as used in the statement, is ambiguous, and the statement is disputed on that basis. The United States does not dispute the statement if “equitably” is deleted.

50. The Project beneficiary in New Mexico is Elephant Butte Irrigation District (“EBID”). EBID is a New Mexico entity created by New Mexico statute and subject to New Mexico law. See Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014); see also NM-EX 302, Elephant Butte Water Users Association, Articles of Incorporation (Dec. 22, 1904); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger Rep. 9.

RESPONSE: Not disputed.

51. The Project beneficiary in Texas is El Paso County Water Improvement District No. 1 (“EPCWID” or “EP No. 1”). EPCWID is a Texas entity created by Texas statute and subject to Texas law. See Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); see also NM-EX 304, El Paso Valley Water Users’ Association, Articles of Incorporation (Mar. 31, 1905); NM-EX 112, Stevens Rep. 18; NM-EX 111, Miltenberger Rep. 9.

RESPONSE: Not disputed.

52. To comply with the principle that the beneficiaries equitably bear the costs of the Project, Reclamation entered into contracts with EBID and EPCWID to establish the repayment obligations between the two districts based on the irrigable acreage within each district. NM-EX

529, *Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 4 (Sept. 30, 2016); e.g., NM-EX 308, *Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users' Association* (June 27, 1906) (“1906 Contract”); NM-EX 321, *Contract between the United States and the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes* (Nov. 10, 1937) (reciting amendments to 1906 Contact); NM-EX 320, *Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes* (Nov. 9, 1937) (same); NM-EX 326, *Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1* (Feb. 16, 1938) (“1938 Downstream Contract”).

RESPONSE: Disputed. As noted above, “equitably” is ambiguous, and the statement is disputed on that basis. The United States does not dispute the statement if the term “equitably” is deleted.

53. *At the time the Compact was executed, 88,000 authorized Project acres were situated within EBID in New Mexico, and 67,000 authorized Project acres were situated in EPCWID in Texas. NM-EX 328, Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith* (Oct. 4, 1938). Thus, approximately 57% of Project acreage was located in New Mexico, and 43% of Project acreage was located in Texas. NM-EX 529, *Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement*, 4 (Sept. 30, 2016).

RESPONSE: Not disputed.

54. [a] *At the time the Compact was signed, Reclamation had been operating the Project, in its entirety, as a single unit for over twenty years.*

[b] *During that time, the Project operated under Reclamation law. See, e.g., NM-EX 318, Harlow M. Stafford et al., Rio Grande Joint Investigation Part I: General Report of the Rio Grande Joint Investigation*, 8 (1937); NM-EX 005, *Stevens Decl.* ¶ 9.

RESPONSE:

[a] **Disputed.** As noted in response to Statement No. 40, “as a single unit” is ambiguous, and “in its entirety,” as used in this statement is also ambiguous. Statement No. 54 is disputed because of those ambiguities. The United States does not dispute the statement if “, in its entirety, as a single unit” is deleted.

[b] **Not disputed,** insofar as the Project has always been operated pursuant to federal reclamation law. The term “operated under Reclamation law” as used in the statement is disputed if given any other construction.

55. *In the years prior to the Compact being signed (1928-37), the average release from the Project was 780,640 acre-feet to satisfy irrigation demands on Project lands in both New Mexico*

and Texas. NM-EX 323, United States Reclamation Service, Project History Rio Grande Project Year 1937 (1938).

RESPONSE: Disputed. The 1937 Project History contains a report, dated May 3, 1937, that states that the average annual release “for the past 10 years” was 780,640 acre-feet. That 10-year period would have been 1927 to 1936, not 1928 to 1937. The report does not state that this release actually did “satisfy” irrigation demands, or that the release was made solely to meet the irrigation demands in the districts and excluded the release to Mexico. *See* NM-EX 323, at pdf p.27. In several years, the annual release exceeded 820,000 acre-feet. *See, e.g.* Project History for 1932, US0178115, at US0178127 (in U.S. Supp. App.); Project History for 1933, US0178318 at US0178330 (in U.S. Supp. App.).

56. *In the years prior to the Compact being signed, the Project would set an equal allotment for each Project acre to satisfy irrigation demands. NM-EX 323, United States Reclamation Service, Project History Rio Grande Project Year 1937 (1938). The amount of water that was actually used on each acre depended on the amount called for by the individual farmers. See NM- EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 18:10-22; Ex.100, Margaret Barroll, Ph.D, Expert Report of Margaret Barroll, Ph.D., 32 (Oct. 31, 2019) (“Barroll Rep.).*

RESPONSE: Disputed. The Project did not set an allotment every year. In years with higher starting levels of reservoir storage (such as 1932, 1933, and 1934), the Project Histories do not reflect that any per-acre allotment was set. *See* Project History for 1932, US0178115, at US0178127, US0178201-202 (showing one notice regarding irrigation deliveries); Project History for 1933, US0178318, at US0178328, US0178391-392 (showing one notice regarding irrigation deliveries); Project History for 1934, US0178513, at US0178523. In years without allotments, Reclamation allowed farmers to take more than the “irrigation duty” of water, which was assumed to be 3 af/ac (after accounting for on-farm distribution losses) but did not represent an “allotment.” NM-EX 323 at pdf 22 (Division Memorandum dated July 15, 1937 in the United States Reclamation Service, Project History Rio Grande Project Year 1937 (1938)). In years with lower initial reservoir storage (such as 1935), Reclamation set an initial allotment but sometimes raised it over the course of the year as more water came in to storage. *See* Project History for 1935, US0178674, US0178737-742. *See also* NM-EX-323, July 1937 Mem., at pdf 22. Delivery records also showed that the amount of water delivered per acre in any given year was not equal but varied across the different divisions of the Project. *See, id.* at 48 of pdf.

57. *In 1937 and 1938, Congress authorized the execution of amended repayment contracts with EBID and EPCWID. These contracts addressed the repayment obligations of the Districts and established a corresponding right of use to a proportion of the annual Project water supply during times of shortage based on an established irrigation acreage in each District: 57% to EBID in New Mexico, and 43% to EPCWID in Texas. NM-EX 107, Lopez Rep. 26-27; NM-EX 109, Estevan R. Lopez, P.E., Supplemental Rebuttal Expert Report of Estevan R. Lopez, P.E., 6-7 (July 15, 2020) (“Lopez Supp. Reb. Rep.”); see, e.g., NM-EX 308, Articles of Agreement between the United States of America, Elephant Butte Water Users Association, and El Paso Valley Water Users’ Association (June 27, 1906); NM-EX 321, Contract between the United States and*

the El Paso County Water Improvement District No. 1 adjusting construction charges and for other purposes (Nov. 10, 1937); NM-EX 320, Contract between the United States and the Elephant Butte Irrigation District adjusting construction charges and for other purposes (Nov. 9, 1937); NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (“1938 Downstream Contract”). Collectively, these contracts are known as the “Downstream Contracts.”

RESPONSE: Disputed. The 1937 contracts between the Secretary and the Districts do not provide for a “right of use to a proportion of the annual Project water supply during times of shortage based on an established irrigation acreage in each District.” See NM-EX-320, 1937 EBID Contract; NM-EX-321, 1937 EPCWID Contract. The 1938 contract between EBID and EPCWID 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 proportion” to the acreage. NM-EX-324, 1938 Contract. The contract does not establish a “right of use.”

58. For example, the 1938 Downstream Contract quantified the authorized irrigable acreage within each district as 88,000 acres in EBID, and 67,000 acres in EPCWID (for a total of 155,000 Project acres). It goes on to state that in the event of a shortage of water, “the distribution of the available supply in such a year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].” NM- EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938); NM-EX 107, Lopez Rep. 26-27; NM-EX 001, Barroll Decl. ¶19.

RESPONSE: Not disputed.

B. Operation of the Rio Grande Project from 1938 Until 1979

59. Until about 1979, Reclamation operated the entire Project, including delivering Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings. Reclamation ditch riders then delivered the ordered water to individual farms. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:6-59:11; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement, 5 (Sept. 30, 2016).

RESPONSE: Not disputed.

60. The allocation of Project supply available for lands in the two States was historically equally divided to all Project lands on an acre foot per acre basis. NM-EX 506, Cortez Affidavit ¶ 8 (Apr. 20, 2007); NM-EX 108, Estevan R. Lopez, P.E., Rebuttal Report of Estevan R. Lopez, P.E., 7-9 (June 15, 2020) (“Lopez Reb. Rep.”); NM-EX 210, Ferguson Dep. (Feb. 20, 2020) 240:25-241:5; NM-EX 214, King Dep. (May 18, 2020) 115:13-25.

RESPONSE: Disputed. The term “allocation of Project supply available for lands” is ambiguous. Reclamation historically announced an amount of water available to Project lands on an acre-feet per acre basis based on the amount of water in storage at the start of the irrigation season. *See* NM-EX-323, United States Reclamation Service, Project History, Rio Grande Project Year 1937, at NM_00024896-7. Water was not delivered to lands based on an equal acre-foot per acre basis; water was delivered to fulfill farm orders. *See* New Mexico Statement of Fact No. 59 (above).

61. *Prior to 1951, the Project enjoyed plentiful water supplies, and Reclamation allowed Project farmers to order water as they needed to irrigate their crops. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 18:16-19:15, 58:6-18.*

RESPONSE: Disputed. Although some years did see high levels of reservoir storage and inflow, Reclamation announced potential and initial allotments in a number of years prior to 1951 based on *low* water supply. *See* Response to Statement No. 36, *supra*; *see also* Project History for 1934, US0178513, at US0178523 (in U.S. Supp. App.) (stating that Project would rely on reservoir storage that year because reservoir inflow was “the second lowest in the recorded history of the Rio Grande at San Marcial”); Project History for 1947, US017169, at US017200 (in U.S. Supp. App.) (announcing, in August 1947, an allotment of 1 af/ac for 1948 based on “the record low stage of the Rio Grande storage reservoirs as a result of five consecutive years of below normal inflow”). Sometimes the allotments announced in these years were increased or lifted if conditions changed, but farmers could not always “order water as they needed” in earlier parts of the season. *See, e.g.,* Project History for 1935, US0178674 at US0178737-742 (in U.S. Supp. App.).

62. *In 1951, drought forced Reclamation to limit per-acre allocations to Project lands, which it did by evaluating deliveries to lands from 1946 through 1950. Id. at 19:1-20:4, 58:19-59:7; NM-EX 100, Barroll Rep. 32. Reclamation in 1951 determined that 3.0241 acre-feet per acre constituted a full allocation to Project lands. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 19:8-20:4.*

RESPONSE: Disputed. The cited sources do not show that Reclamation conducted an evaluation in 1951, or that Reclamation was “forced” to make per-acre allotments only for the first time in 1951, or that drought began in 1951. The Project History for 1947 cites “five consecutive years of below normal inflow.” Project History for 1947, US017169, at US017200. The allotment initially imposed for 1948 was lifted but water conditions continued to be unreliable, resulting in steadily reduced reservoir storage, and culminating in initial reservoir storage of approximately 443,000 af in 1951 and a total allotment of 1.75 af/ac that year. Project History for 1951 (file 2 of 6), US0018796, at US0018805, US0018841 (in U.S. Supp. App.). *See also id.* at US0018843 (stating that “[i]nflow to Elephant Butte since 1915 has averaged annually 1,039,500, while for the past eight years the average has been only 659,400 acre-feet.”). The 1951 Project History states that “average annual use” for the eight years prior to 1951 was 3.1 af/ac, not 3.0241 af/ac. *Id.* A 1956 memorandum states that a normal delivery was equivalent to 3.0241 af/ac, based on the average total Project delivery in the years 1946 to 1950. *See*

Memorandum of Conversation re 1906 Treaty Deliveries to Mexico (June 29, 1956)(1956 Memo), US0171657 at US01716560. “Full allocation” not a term used to describe the supply and delivery of Project water in 1946-1950. *See id.*

63. *From 1951 through 1979, Reclamation allocated Project deliveries on an equal basis to all Project lands and delivered allocated water directly to Project lands. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:19-59:7; NM-EX 511, Filiberto Cortez, Lower Rio Grande Project Operating Agreement: Settlement of Litigation 4 (Oct. 2008) (“Cortez Presentation”); NM-EX 100, Barroll Rep. 31-32.*

RESPONSE: Disputed. From 1951 through 1979, Reclamation enforced an equal amount of water to each acre during years of inadequate supply. In other years the on-farm delivery may not have been based on an equal basis to each acre. NM-EX-202, Cortez 7/30/20 Dep. Tr. 58:19-59:7.

64. **[a]** *Before 1980, Reclamation operated the Project in its entirety, combining storage and return flows so that each acre of Project land was entitled to receive an equal amount of water regardless of the source of the water or in what State the land was located.*

[b] *Thus, based on each District’s share of authorized acreage, “EBID is allocated 88/155 of the available Project water supply and EPCWID is allocated 67/155 of the available Project water supply.” NM-EX 506, Cortez Decl. ¶ 11 (Apr. 20, 2007); NM-EX 100, Barroll Rep. 31.*

[c] *During this period, there is no record that any party lodged an objection, whether through the RGCC or Reclamation, to challenge Reclamation’s principle of allocation on an equal per-acre basis. NM-EX 005, Stevens Decl. ¶ 12; NM-EX 003, Lopez Decl. 25; EX-NM 002, D’Antonio Decl. ¶ 16.*

RESPONSE:

[a] Disputed. “Operated the Project in its entirety” and “entitled to,” as used in this statement, are ambiguous, and the statement is disputed on that basis. The United States does not dispute that from 1951 to 1979, Reclamation considered the amount of usable water in Project storage and predicted reservoir inflows to determine whether it would be necessary to issue and enforce reduced allotments of water on an acre-foot-per-acre basis to all Project lands. Project efficiency and the availability of return flows were also considered. The quotation of Paragraph 11 of the Cortez Declaration applies to water allocations *since* 1980, not before. NM-EX-506, Cortez Decl. ¶¶ 8, 9, 11. After 1980, Reclamation set an annual diversion allocation of the available water supply to each District in proportion to its irrigable acreage. *See* NM-EX-400, Allocation Procedures. Reclamation did not operate the Project under a legal requirement that each acre of Project land was entitled to receive an equal amount of water.

[b] Disputed. Mr. Cortez’s statement on diversion allocation relates to Project operations after 1980.

[c] Not disputed, with the clarification that the statement refers to the period before 1980.

65. From 1931 to 1979, Reclamation operated the Project such that the diversions for EBID in New Mexico totaled 54.5% and diversions for EPCWID in Texas totaled 45.5% of total diversions. From 1951, when Reclamation began enforcing allocations to each acre, until 1979, the diversions for EBID in New Mexico totaled 56.2% and diversions for EPCWID in Texas totaled 43.8% of total diversions. NM-EX 100, Barroll Rep., Appx. 1, A-8. This is shown graphically in Figure A- 3 of Dr. Barroll’s Expert Report: **[figure omitted]**. See also *id.* at A-9; NM-EX 101, Margaret Barroll, Ph.D., Rebuttal Expert Report of Margaret Barroll, Ph.D at 41, Appendix A, 39 (June 15, 2020) (“Barroll Reb. Rep.”).

RESPONSE: Not disputed.

C. Operation of the Rio Grande Project from 1979 Until 2005

66. In approximately 1979, Project operations changed with the transfer of some Project facilities to the Districts. Reclamation started to allocate water to each District for delivery at the District’s canal headings (i.e., Arrey, Leasburg, Mesilla, Franklin and Riverside) rather than directly to farm headgates. Since those transfers, Reclamation determines the Districts’ Project allocations, takes water orders from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for water users in each District. The Districts in turn take farm orders from their members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates in each State. NM- EX 001, Barroll Decl. ¶ 21; See NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 208, Esslinger Dep. (Vol. II), 57:4-58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20.

RESPONSE: Not disputed.

67. Historically, Reclamation calculated and declared the allocation of Project supply available to lands in New Mexico, lands in Texas, and Mexico on the basis of water in storage available for release and on historical return flows to the Rio Grande. NM-EX 506, Cortez Decl. ¶ 7 (Apr. 20, 2007); NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 393:3-5; NM-EX 219, Lopez Dep. (Vol. III) (Aug. 21, 2020) 40:13-20; NM-EX 107, Lopez Rep. 5-6.

RESPONSE: Not disputed, to the extent that “historically” refers to operations before 1979.

68. After 1979, Reclamation developed a method known as the D1/D2 method for allocating water to the Districts. See NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4 (1985) (unexecuted draft); NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 33.

RESPONSE: Not disputed.

69. According to Reclamation, “D2 was developed to calculate the amount of water that was needed at the main canal headings to make the 3.0241 ac-ft/acre deliveries to the lands.” NM-EX 409, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Chris Rich et al. (Apr. 12, 2002).

RESPONSE: Not disputed that the quoted sentence was included in an email from Mr. Cortez, with the clarification that the D1 and D2 Curves were developed to represent the relationship between historical releases, diversions, and deliveries under the range of hydrologic conditions from 1951-1978, and 3.024 acre-feet/acre was calculated as the annual acre-feet charged to farms on the Project irrigated acres averaged over the five year period from 1946 to 1950. NM-EX-400, Allocation Procedures, at 9-14.

70. The D1/D2 method was based on the distribution of Project supply during the period from 1951 to 1978 and continued allocating 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 170:25-172:10 (examining NM-EX 403, Operating Agreement between Elephant Butte Irrigation District, El Paso County Water Improvement District No.1, and United States Bureau of Reclamation, at 3-4 (1985) (unexecuted draft)); NM-EX 100, Barroll Rep. at 33-34.

RESPONSE: Disputed. The D1/D2 allocation method does not “continue[] allocating 57% of Project supply to New Mexico lands and 43% of Project supply to Texas lands.” The D1/D2 allocation method was developed from a regression equation to estimate the amount of water that could be delivered to Project headgates in a given year based upon the amount of water available for release in that year. The D1/D2 method allocates water to each district at its respective points of diversion based on the approximate 57/43 ratio of irrigable lands in EBID and EPCWID. NM-EX-529, FEIS at 8-9.

71. According to Reclamation, prior to 2005, the Districts did not sign an “operating agreement, plan, or criteria,” but “acquiesced and cooperated with Reclamation’s procedures on a year to year basis.” NM-EX 508, Bureau of Reclamation, Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas 3 (June 11, 2007); NM-EX 202, Cortez Dep. (Vol. I) (July 30, 202) 87:8-88:10.

RESPONSE: Not disputed, with the clarification that “each district may be under protest, but they still would comply with the amount of water that was going to be delivered to their facilities.” NM-EX-202, Cortez 7/30/20 Dep. Tr. 88:1-4.

72. Reclamation began making Project allocations using the D1/D2 allocation procedure from at least 1985. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 168:20-24; NM-EX 100, Barroll Rep. 33-34.

RESPONSE: Not disputed.

73. *Reclamation continued making allocations to the Districts in the proportion of 57% of Project water to New Mexico lands and 43% of Project water to Texas lands using the D1/D2 method through 2005. NM-EX 202, Cortez Dep. (Vol. 1) (July 30, 2020) 59:12-60:9; NM-EX 511, Cortez Presentation at 4; NM-EX 100, Barroll Rep. 34, n.66.*

RESPONSE: Disputed. The reference to allocations to “lands” in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each district. The districts then determine allocations to lands within their boundaries. *See* NM-EX-100, Barroll Oct. 2019 Rep., Appendix A, A-13.

74. *In 2003, the Project began to suffer the effects of the severe drought that has plagued the Rio Grande basin for the last two decades. NM-EX 412, Herman Settemeyer, Rio Grande Project/Rio Grande Compact Operation 4 (2004) (“Settemeyer Presentation”); NM-EX 213, Ivey Dep. (Vol. 2) (Aug. 28, 2020) 69:25-71:1, 75:19-24. Nonetheless, in 2003 and 2004, Reclamation allocated 57% of Project water to New Mexico Project lands and 43% to Texas Project lands using the D1/D2 method. NM-EX 201, Rule 30(b)(6) Dep. of the U.S. Bureau of Reclamation by and through Filiberto Cortez (Aug. 20, 2020) 50:6-51:15.*

RESPONSE: Disputed. The term “severe drought” is not defined and is ambiguous. The United States does not dispute that 2003 was a year of low Project storage. The reference to allocations to “lands” in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each district. The districts then determine allocations to lands within their boundaries. *See* NM-EX-100, Expert Report: Margaret Barroll, Appendix A, A-13.

75. *In 2005, Reclamation was able to make a full D1/D2 allocation in the percentage of 57% to New Mexico lands and 43% to Texas lands. NM-EX 202, Cortez Dep. (Vol. 1) 89:21-90:5 (examining NM-EX 328, Bureau of Reclamation, Environmental Assessment and Finding of No Significant Impact for the Bureau of Reclamation Federal Rio Grande Project New Mexico-Texas Operating Procedures, Dona Ana, Sierra, and Socorro Counties, New Mexico and El Paso County, Texas, 4 (June 11, 2007)); NM-EX 100, Barroll Rep. 34, n.66.*

RESPONSE: Disputed. The reference to allocations to “lands” in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each district. The districts then determine allocations to lands within their boundaries. *See* NM-EX-100, Expert Report: Margaret Barroll, Appendix A, A-13.

76. [a] *From 1979 to 2005, Reclamation allocated Project water such that 57% of Project supply was available for EBID lands in New Mexico and 43% of Project supply was available for EPCWID lands in Texas. NM-EX 100, Barroll Rep., Appx. A, A-13-15. This is illustrated in Figure A.5 of Dr. Barroll’s expert report:*

[figure omitted]

[b] *From 1979 to 2005, the charged diversions by EBID in New Mexico (which accounts for water available and ordered by the Districts) totaled 58% and charged diversions for EPCWID in Texas totaled 42% of total diversions. NM-EX 100, Barroll Rep., Appx. A, A-16-19. See also NM-EX 101, Barroll Reb. Rep., Appx. A, 41-42.*

RESPONSE: [a] Disputed. The term “Project supply” is not defined and is ambiguous. The reference to allocations to “lands” in New Mexico and Texas is ambiguous and vague. Since 1980, Reclamation has determined a diversion allocation for each district at its respective headings in proportion to the authorized acreage within each district. The districts then determine allocations to lands within their districts. *See* NM-EX-100, Expert Report: Margaret Barroll, Appendix A, A-13.

[b] Not disputed.

D. Operation of the Rio Grande Project from 2006 Until the Present

77. In 2006 Reclamation began using a new method for allocating Project water between the two Districts. Neither the RGCC nor New Mexico were given input into the new method before it was implemented. NM-EX 100, Barroll Rep. 40; NM-EX 004, Schmidt-Petersen Decl. ¶ 10; NM-EX 003, Lopez Decl. ¶ 29; NM-EX 002, D’Antonio Decl. ¶ 10; see, e.g., NM-EX 504, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Gary Esslinger, Manager-Treasurer, Elephant Butte Irrigation District (Nov. 21, 2006).

RESPONSE: Not disputed, to the extent “given input” means that the RGCC as an entity, and the State of New Mexico, as an entity did not participate in the negotiations.

78. In January and February 2008, Reclamation, EPCWID, and EBID negotiated a new operating agreement for the Project as settlement for the two lawsuits among the parties (“2008 Operating Agreement”). See generally NM-EX 511, Cortez Presentation. The negotiations were mediated by Pat Gordon, Texas’s Compact Commissioner. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 42:8-43:24; NM-EX 107, Lopez Rep. 43.

RESPONSE: Not disputed.

79. The 2008 Operating Agreement changed the way that water was allocated between the two Districts, and therefore the amount of water that was available for lands in New Mexico and Texas. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 94:23-96:9 (examining NM-EX 506, Cortez Affidavit ¶¶ 11, 25 (Apr. 20, 2007)); NM-EX 100, Barroll Rep. 40-46; NM-EX 107, Lopez Rep. 44-46.

RESPONSE: Disputed. The 2008 Operating Agreement did not change the 57/43 ratio in allotting the available supply to the Districts based on the D1/D2 methodology. Under the Operating Agreement, the Elephant Butte Irrigation District foregoes a portion of that

allocation to account for deviations in Project performance to mitigate the effect of ground water pumping in New Mexico. NM-EX-529, FEIS Appendix C at 8-9.

80. *In 2010, after it had an opportunity to study the new operations and method for allocating water, New Mexico raised several concerns about the 2008 Operating Agreement. One of New Mexico's primary concerns was that the 2008 Operating Agreement was inconsistent with the Compact because it did not allocate 57% of Project supply to New Mexico lands. NM-EX 517, Letter from John D'Antonio, State Engineer, State of New Mexico to Michael Connor, Commissioner, United States Bureau of Reclamation (Mar. 4, 2010); NM-EX 002, D'Antonio Decl. ¶ 11.*

RESPONSE: Disputed. The United States disputes the statement to the extent the statement implies New Mexico did not have “an opportunity to study” the new operations any earlier than 2010 or 2008, as the project had operated in the manner set forth in the agreement since 2006. *See* Statement of Fact No. 77, *supra*. The United States also disputes the statement to the extent it purports to characterize the Operating Agreement, under which approximately 57% of the total amount available for diversion in the United States is allocated to EBID, which then foregoes a portion of that allocation to account the effect of groundwater pumping in New Mexico. NM-EX-529, FEIS, Appendix C at 8-9. *See also* U.S. Mem. 15 & n.70. The United States does not dispute that New Mexico raised concerns about the Operating Agreement in 2010 in the letter that is cited.

81. *After attempts to resolve the issues related to the 2008 Operating Agreement failed, in 2011, New Mexico filed suit in federal district court seeking to have the 2008 Operating Agreement set aside. NM-EX 520, Complaint for Declaratory and Injunctive Relief, New Mexico v. United States, No. 1:11-cv-00691 (D.N.M. Aug. 8, 2011).*

RESPONSE: Not disputed.

82. *Texas filed the present original action in reaction to New Mexico's 2011 federal district lawsuit. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 109:2-13; NM-EX 224, Schmidt-Petersen Dep. (Vol. I) (June 29, 2020) 40:19-41:12.*

RESPONSE: Not disputed.

VI. POSITIONS OF THE PARTIES ON THE COMPACT APPORTIONMENT BELOW ELEPHANT BUTTE

A. *Position of Texas on the Compact Apportionment Below Elephant Butte*

83. [a] *Consistent with the Reclamation Act, Texas adjudicated the Project Right in Texas. Specifically, it determined that EPCWID had the right to divert up to 376,000 from the Rio Grande. NM-EX 505, Texas Comm'n on Env't Quality, Certificate of Adjudication No. 23-5940, ¶ 1.b. (Mar. 7, 2007); see also Final Judgment and Decree, In re: The Adjudication of Water Rights in the Upper Rio Grande Segment of Rio Grande Basin, No. 2006-3219 (El Paso Cty. Dist. Ct., Oct. 30, 2006).*

[b] Using the D1/D2 method, 376,000 AF represents approximately 43% of Project water when there is a full supply. NM-EX 001, Barroll Decl. ¶ 23.

[c] 376,000 AF also represents approximately 43% of Project supply under a normal release of 790,000 AF, once return flows are taken into account. See, e.g., NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 20:11-21:11.

RESPONSE:

[a] **Disputed.** Whether the Texas adjudication was “[c]onsistent with the Reclamation Act” is a legal conclusion, not a statement of fact. The United States disputes the statement on this basis but does not dispute the statement if “Consistent with the Reclamation Act” is deleted.

[b] **Disputed.** The cited paragraph of Dr. Barroll’s declaration does not support the first sentence in the statement, and the figure she uses in that paragraph is 376,842 af, This number is not consistent with the number in the preceding paragraph (376,862 af). “Project water” and “full supply” are ambiguous in the context of this statement, and the statement is disputed on that additional basis. The designation of a “full supply” in the 2008 Operating Agreement, or under the 1985 draft operating agreement, does not represent the maximum supply that could have been available but for the influence of groundwater pumping, as evidenced by the releases substantially greater than 790,000 af in some years before the Compact. See Resp. to Statement No. 55.

[c] **Disputed.** The term “Project supply” as used in this statement is ambiguous. Dr. Barroll defines Project supply in her declaration in a way that includes the water allocated to Mexico under the treaty, and the calculations in her declaration show she excludes the treaty water. NM-EX 001, Barroll Decl. ¶ 22. This statement does not provide for an exclusion of treaty water. Further, 376,862 af is approximately 43% of the total diversion allocation to the Districts applying “the D1/D2 method” to an assumed release of 763,842 acre-feet. *Id.*

84. *The Texas Compact Commissioner recognizes that a full supply release from the Project is 790,000 AF, and that Texas water users are entitled to 43% of Project supply and New Mexico water users are entitled to 57% of Project supply. NM-EX 211, Gordon Dep (Vol. I) (July 14, 2020) 71:18-73:13; NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 11:20-13:21, 20:11-21:11, 121:9-11.*

RESPONSE: Not disputed, with the clarification that Mr. Gordon’s explanation of Project supply is not clearly defined.

85. *The Texas Compact Commissioner concedes that Rio Grande water is divided below Elephant Butte by the Downstream Contracts and that the Downstream Contracts “are incorporated into the Compact.” NM-EX 212, Gordon Dep (Vol. II) (July 15, 2020) 10:25-12:19, 15:6-16:18.*

RESPONSE: Not disputed, with the clarification that Mr. Gordon’s explanation of Project supply is not clearly defined.

86. *The Texas Compact Commissioner concedes that the Project acts as the mechanism by which water users in New Mexico receive 57% of Project supply and water users in Texas are allocated 43% of Project supply. He further concedes that the mechanism for delivering Project water was incorporated into the Compact. NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 10:25-16:24.*

RESPONSE: Not disputed, with the clarification that Mr. Gordon’s explanation of Project supply is not clearly defined.

87. *In official remarks at the 2011 RGCC meeting, Texas Compact Commissioner Gordon acknowledged that the Compact apportioned water between New Mexico and Texas based on the 57%-43% split. Specifically, Commissioner Gordon responded to comments of the New Mexico Commissioner by stating “I agree that the purpose of the Compact was to allocate the water between the Districts and the 53[-]47 [sic] as provided in the Compact. I do agree with that.” NM- EX 518, Rio Grande Compact Commission, Transcript of the 72nd Annual Meeting (94th Meeting), 59:2-4 (Mar. 30, 2011).*

RESPONSE: Not disputed, with the clarification that the sentence immediately following the quoted statement says, “[h]owever, that 53/47 needs to take into account diversions that are happening in each of the particular states, whether it’s Texas, New Mexico; and we believe that the Operating Agreement tried to take those diversions into account to fairly allocate the water that was allocated to the users at Elephant Butte Reservoir and take into account any downstream diversions that were occurring.” NM- EX 518, 59:4-11. Later in the transcript, Mike Hamman from the Bureau of Reclamation explains that the premise of the Operating Agreement was address concerns about increased groundwater pumping in the Mesilla Valley. *Id.*, 92:7-19.

88. *In 2004, the Texas Compact Engineer Advisor from 1987 to 2015 wrote that “[t]he Compact specifies a normal release of 790,000 acre–feet annually from Project Storage for use in Texas and New Mexico and for delivery of water to Mexico.” NM-EX 412, Herman R. Settemeyer, “Rio Grande Project/Rio Grande Compact Operation,” in CLE International, Rio Grande Superconference G-1, G-2 (2004) (“Settemeyer CLE Presentation”).*

RESPONSE: Not disputed.

89. *The Texas Compact Engineer Advisor from 1987 to 2015 testified that “the Rio Grande Compact incorporated the Rio Grande Project.” NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10.*

RESPONSE: Not disputed.

90. *The Texas Compact Engineer Advisor from 1987 to 2015 further testified that “the Rio Grande Project [water] is apportioned 57 – 57 percent to New Mexico and 43 percent to Texas.” NM-EX 225, Settemeyer Dep. (Vol. I) (July 30, 2020) 41:24-42:10.*

RESPONSE: Disputed. The quotation does not appear in the cited document. See NM-EX 225.

91. *In May of 2011, Texas and New Mexico met to discuss the implications of the 2008 Operating Agreement on the Compact. Prior to the meeting, Texas had developed a set of talking points that represented Texas’s positions on the Rio Grande Compact. A photograph of those talking points is NM-EX 519 (Schmidt-Petersen, Photographs of Handwritten Notes on Easel). NM-EX 003, Lopez Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11. Using those talking points, Texas expressed its position that the Compact apportions the water below Elephant Butte between New Mexico and Texas “based on acreage” existing in each State. Texas further explained its position that under the Compact, the State of Texas is entitled to 43% of Project supply and the State of New Mexico is entitled to 57% of Project supply. NM-EX 519, Schmidt-Petersen, Photographs of Handwritten Notes on Easel; NM-EX 003, Lopez Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 11.*

RESPONSE: Disputed, to the extent New Mexico asserts that the hand-written notes establishes a Texas position that Texas is entitled to only 43% of Project water released from storage, and not the amount of return flows expected under pre-pumping historic conditions. The same photographs of the handwritten notes state under the heading “Apportionment of Project Water to Project Users” assumes “[a]ll delivery of Project water to Project users are undiminished by ‘man’s activities’” and that “Pumping is a ‘man’s activity.’” NM-EX 519 (underline in original).

92. *Even in this litigation, Texas has admitted on numerous occasions that New Mexico has a Compact apportionment below Elephant Butte Reservoir.*

a. In its Complaint in this case, Texas made the following relevant factual allegations:

- i. “[T]he Rio Grande Compact, among other purposes, was entered into to protect the operation of the Rio Grande Reclamation Project.” Compl. ¶ 4 (Jan. 8, 2013).*
- ii. “Project water deliveries are made based upon the ratio between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas.” Id. at ¶ 8.*
- iii. The Compact “relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas.” Id. at ¶ 10.*

b. Texas's brief in support of its motion to file its complaint referred to Elephant Butte Irrigation District as the entity formed within New Mexico to contract with the United States "for the water allocated and apportioned for use within New Mexico." Texas's Brief in Support of Motion to File Complaint 7 (Jan. 2013) (emphasis added).

c. In the course of its briefing on New Mexico's Motion to Dismiss, Texas defined its apportionment as "the water New Mexico delivers to Elephant Butte, less the water provided to Rio Grande Project lands in New Mexico by the Rio Grande Project." Texas' Brief in Response to New Mexico's Motion to Dismiss Texas' complaint and the United States' Complaint in Intervention, 11 (June 16, 2014).

d. Further, in briefing on exceptions to the First Interim Report of the Special Master, Texas averred: "[T]he compact utilizes the Rio Grande Project, operated by the United States, as the single vehicle by which to apportion Rio Grande water to Texas and New Mexico." See Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017) (quotation marks omitted).

RESPONSE: Not disputed.

93. In connection with filing the Complaint in this case, Texas issued a News Release. In that News Release, Texas admitted "[h]istorically, water apportioned under the Rio Grande Compact has resulted in approximately 57 percent of the water supply below the Elephant Butte Reservoir being delivered to New Mexico, and 43 percent being delivered across the New Mexico-Texas state line for Texas." NM-EX 524, Tex. Comm'n on Env't Quality, News Release, 2 (Jan. 8, 2013) (emphasis added).

RESPONSE: Not disputed, except the extent "admitted" is used to imply a binding admission for purposes of litigation.

94. Every alternate year the Texas Commission on Environmental Quality ("TCEQ") reports to the Texas Legislature about environmental issues, including interstate river compacts. In describing the Rio Grande Compact in 2014, the TCEQ explained "[t]he compact did not contain specific wording regarding the apportionment of water in and below Elephant Butte Reservoir. However, the compact was drafted and signed against the backdrop of the 1915 Rio Grande Project and a 1938 U.S. Bureau of Reclamation contract that referred to a division of 57 percent to New Mexico and 43 percent to Texas." NM-EX 526, Texas Comm'n on Env't. Quality, Biennial Report to the 84th Legislature (2014) (emphasis added).

RESPONSE: Not disputed.

B. Position of the United States on the Compact Apportionment Below Elephant Butte

95. [a] In New Mexico's adjudication of Lower Rio Grande water rights, the United States requested that the New Mexico Adjudication Court "recognize an amount of up to 376,000 acre-

feet per year for delivery to Texas.” See NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist., no. CV-96-888, ¶ 4 (N.M. 3d Judicial Dist., Feb. 17, 2014).

[b] *As discussed, under the D1/D2 method, 376,000 acre-feet was a full supply for EPCWID, and represents approximately 43% of Project water when there is a full supply.*

[footnote] *In response to the United States request that New Mexico recognize 376,000 AFA for delivery to Texas, the New Mexico Adjudication Court explained that the United States’ request was beyond the jurisdiction of the court, but that the “State of New Mexico’s offer of judgment appropriately recognizes Project deliveries to Texas as an essential element of the Project.” Id.*

RESPONSE:

[a] Not disputed, with the clarification that the United States made this request on the basis of seeking full faith and credit for the Texas determination.

[b] Disputed. The Allocation Procedures (NM-EX 400, at 9-14) characterize the allocation to EPCWID in a “full supply year” as approximately 376,000 af, not that this is a “full supply for EPCWID.” The 376,000 af is roughly 43% of the amount available for allocation to the Districts in a “full supply year,” not 43% of “Project water,” some of which is released for Mexico under the 1906 treaty. The designation of a “full supply” in the Allocation Procedures does not represent the maximum supply that could have been available but for the influence of groundwater pumping. NM-EX-100, Barroll Oct. 2019 Rep. 35

[c, footnote]. Not disputed.

96. *Reclamation has recognized that “[b]ecause one district is located in New Mexico (EBID) and the other is located in Texas (EP#1), the operation of the Rio Grande Project has a bearing on each state’s claim to the waters of the Rio Grande.” NM-EX 503, Briefing Paper by Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Robert W. Johnson, Commissioner, Bureau of Reclamation (Nov. 2, 2006).*

RESPONSE: Disputed. Mr. Cortez was not making, and could not legally make, any statement binding upon or imputable to Reclamation in the cited document. The United States does not dispute that the document contains the quoted statement.

97. *Reclamation has acknowledged the intent of the Compact “to recognize a yearly average of 790,000 AF release from Project storage to satisfy water users” in both States and Mexico. NM-EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).*

RESPONSE: Disputed. Mr. Cortez was not making, and could not legally make, any statement binding upon or imputable to Reclamation in the cited document. The United States does not dispute that the document contains the quoted statement.

98. *Reclamation has recognized that “[t]he 1938 Rio Grande Compact intended to use the Reclamation Rio Grande Project as the vehicle to guarantee delivery of Texas’s, New Mexico’s and Mexico’s equitable apportionment of the Rio Grande waters below Elephant Butte Dam.” NM-EX 530, Filiberto Cortez, Bureau of Reclamation, EBID Depletion Reduction and Offset Program WaterSMART Grant Proposal, 1 (emphasis added).*

RESPONSE: Disputed. Mr. Cortez was not making, and could not legally make, any statement binding upon or imputable to Reclamation in the cited document. The United States does not dispute that the document contains the quoted statement.

99. *At the hearing on New Mexico’s Motion to Dismiss in this proceeding, counsel for the United States conceded that the “[P]roject is central to the [C]ompact,” that “New Mexico would also, by the same token, have an apportionment” delivered through the Project, and that the Downstream contracts “effectuate the intended apportionment that is made in the [C]ompact.” Hrg. Tr. 88:17, 91:6-14, 100:7-18 (Aug. 19, 2015).*

RESPONSE: Not disputed, except to the extent “conceded” implies a statement against interest.

100. *The United States has taken the following relevant positions in this case:*

a. *“New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir, and Texas receives its entire equitable apportionment of water, through the Project, in the form of water released by the Project ‘in accordance with irrigation demands.’ Those deliveries are divided according to the 57% to 43% split reflecting the historical proportion of irrigation acreage in EBID and EPCWID, respectively.” Brief for the United States in Opposition to New Mexico’s Motion to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention, 28 (June 2014) (quoting Compact Art. I(l)).*

b. *“Usable Water” is “available for release in accordance with irrigation demands in lower New Mexico, in Texas, and in Mexico.” Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 6 (July 2017).*

c. *“To effectuate an equitable apportionment of the waters of the Rio Grande, the compacting States incorporated and relied upon an existing reclamation project ‘as the vehicle to guarantee delivery of Texas’s and part of New Mexico’s equitable apportionment of the stream.’ The United States agreed to that arrangement through congressional approval of the Compact.” Id. at 18 (emphasis added) (quoting First Interim Report of the Special Master, 204 (Feb. 9, 2017)).*

d. *“In the Compact, the States (i) incorporated and relied upon an existing Reclamation project to deliver Texas’s and part of New Mexico’s equitable apportionment.” Sur-Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 12-13 (September 2017).*

e. *“[T]he Compact identifies what is to be done with water that is delivered by New Mexico to Elephant Butte Reservoir, and the Compact ‘protects the water that is released from Elephant Butte in order for it to reach its intended destination.’ Id. at 13 (quoting First Interim Report of the Special Master, 200 (Feb. 9, 2017)).*

RESPONSE: Not disputed.

101. *In response to a Request for Admission, the United States admitted for all purposes in this case that “under the Compact, the states relied upon an existing Reclamation project to deliver Texas’s and part of New Mexico’s equitable apportionment.” NM-EX 602, United States of America’s Responses to New Mexico’s First Set of Requests for Admission, 13 (November 4, 2019) (response to Request for Admission 30).*

RESPONSE: Not disputed, with the qualification that this Statement of Fact and the United States’ response to the Admission is a legal conclusion.

102. *The expert historian sponsored by the United States in this case has opined that that the States intended for the Compact to apportion surface water below Elephant Butte Reservoir to New Mexico for the lands in New Mexico under the Rio Grande Project. NM-EX 215, Kryloff Dep. (Aug. 6, 2020) 52:23-53:8, 73:23-74:9.*

RESPONSE: Not disputed, with the qualification that the United States has not designated Mr. Kryloff as a witness for trial as of this filing.

C. *Position of New Mexico on the Compact Apportionment Below Elephant Butte*

103. *Consistent with the Reclamation Act (and the adjudication in Texas), New Mexico adjudicated the Project Right in New Mexico. In accordance with the Compact, the New Mexico Adjudication Court established that the Project is entitled to an annual release of up to 790,000 acre-feet. See NM-EX 527, Order (1) Granting Summary Judgment Regarding the Amounts of Water; (2) Denying Summary Judgment Regarding Priority Date; (3) Denying Summary Judgment to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist., no. CV-96-888 (N.M. 3d Judicial Dist., Feb. 17, 2014).*

RESPONSE: Disputed. Whether the New Mexico adjudication court’s decisions are “[c]onsistent with the Reclamation Act” and “[i]n accordance with the Compact” are legal conclusions, not a statements of fact. What the court “established” is also a legal conclusion. The United States disputes the statement on these grounds.

104. *Unlike Texas, the New Mexico Adjudication Court set limits on the amount of surface water and groundwater that could be diverted or consumed on an acre of Project land in New Mexico. See NM-EX 527, Final Judgment, New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist., no. CV-96-888 (N.M. 3d Judicial Dist., Aug. 22, 2011). Consistent with Reclamation operations and analysis, New Mexico recognized the right for each Project acre to receive 3.024 acre-feet per annum of surface water. Id. at ¶ I.A.*

RESPONSE: Disputed. The state adjudication court order cited as NM-EX-527 is not titled a “Final Judgment” and does not reference a limit on the amount of surface water that can be diverted or consumed on an acre of Project land in New Mexico. The limits decreed by the adjudication court for use of surface water on irrigated crops is defined as the farm delivery requirement (FDR), stating that an “FDR of 3.024 afay is a reasonable FDR, and is representative of historic agricultural practices in the Lower Rio Grande, for those crops irrigated with surface water only.” *See* Final Judgment, New Mexico ex rel. Office of the State Engineer v. Elephant Butte Irr. Dist., no. CV-96-888 (N.M. 3d Judicial Dist., Aug. 22, 2011), NM_0082198. The United States disputes the implication that “Reclamation operations and analysis” conferred a “right for each Project acre to receive 3.024 acre-feet-per-acre per annum.”

105. *Prior to this litigation, New Mexico has consistently taken the position that the Compact divides the waters below Elephant Butte according to the acreage in each State so that New Mexico is entitled to 57% and Texas is entitled to 43% of Project supply. For example, in negotiations that occurred during the 1990s and 2000s, New Mexico was steadfast in its position that a potential operating agreement for the Project could not alter the 57-43 division of water below Elephant Butte that was required by the Compact. NM-EX 004, Schmidt-Petersen Decl. ¶ 12; NM-EX 003, Lopez Decl. ¶ 17; NM-EX 002, D’Antonio Decl. ¶ 13.*

RESPONSE: Not disputed.

VII. POSITION OF THE RIO GRANDE COMPACT COMMISSION ON THE COMPACT APPORTIONMENT

106. *The RGCC and its Engineer Advisers regularly request information and receive briefings from Reclamation on Project operations, including operations below Elephant Butte. NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 45:9-46:12; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM-EX 003, Lopez Decl. ¶ 13; NM-EX 525, Email from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to Kenneth Rice, Bureau of Reclamation (May 2, 2013); NM-EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996).*

RESPONSE: Not disputed.

107. *Reclamation reports to the RGCC every year about operations that are relevant to the Compact. As part of that report, Reclamation provides information about the operations of the Rio Grande Project. See, e.g., NM-EX 512, Bureau of Reclamation, Calendar Year 2009 Report*

to the Rio Grande Compact Commission, 59-67 (Mar. 2010); NM-EX 003, Lopez Decl. ¶ 13; NM-EX 004, Schmidt-Petersen Decl. ¶ 13; NM-EX 405, Facsimile from David Allen, El Paso Field Office, Bureau of Reclamation, to Darren Powell, Herman Settemeyer, et al. (June 25, 1996); NM-EX 410, Facsimile from Steve Vandiver, Engineer Adviser, State of Colorado, to Ken Maxey, Albuquerque Area Manager, Bureau of Reclamation, and Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation (Aug. 2, 2002).

RESPONSE: Not disputed.

108. *The RGCC conducts Compact accounting on an annual basis. Part of the Compact accounting includes a report on the Project Storage and Releases. That accounting tracks both the releases of Usable Water to water users in both States to satisfy irrigation demands, and the accrued departure of the releases from the Compact’s normal release of 790,000 acre-feet per year. See, e.g., NM-EX 501, Rio Grande Compact Commission, Report of the Rio Grande Compact Commission 2005, 20 (Mar. 23, 2006). See also NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM- EX 003, Lopez Decl. ¶ 14.*

RESPONSE: Not disputed.

109. *“Reclamation interprets this accrued departure from normal release [Compact accounting provision] as a measure of how the Rio Grande Project is complying with its obligation to meet yearly demand from the water users of the Rio Grande Project and at the same time comply with the Rio Grande Compact intent to recognize a yearly average of 790,000 AF release from project storage to satisfy water users” below Elephant Butte. NM-EX 411, Letter from Filiberto Cortez, Manager, El Paso Field Division, Bureau of Reclamation, to William A. Paddock, 2 (Sept. 11, 2002).*

RESPONSE: Disputed. The statement says, “...intent to recognize a yearly average of 790,000 AF release from Project storage to satisfy water users within the ‘Texas portion’ of the Compact.” NM-EX 411 at 2.

110. *The releases from Project Storage are tracked so that the Compact Commissioner from each respective State is able to understand the amount of Project water that users in his or her State are entitled to. NM-EX 004, Schmidt-Petersen Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 13.*

RESPONSE: Disputed. “Entitled to,” as used in this statement, is ambiguous. The statement is disputed on that basis. The Project allocates water to the Districts. The United States does not dispute the statement if “users in his or her State are entitled to” is replaced with “the District in his or her state has been allocated.”

111. *The RGCC acts or speaks in a number of forms, including through resolutions, all of which must have unanimous agreement. NM-EX 002, D’Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15. Through unanimous resolutions, the RGCC has taken the following relevant positions:*

a. *The State of New Mexico has a Compact apportionment in southern New Mexico below Elephant Butte, as recognized in the citations below:*

- i. “[O]ver half of New Mexico’s population is located within the Rio Grande basin and depends on New Mexico’s allocation of Rio Grande water under the Rio Grande compact.” NM-EX 406, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Need for Careful Evaluation of the Water Supply and Socioeconomic Impacts of Any Designation of Critical Habitat for the Rio Grande Silvery Minnow (Mar. 25, 1999).
- ii. “[A]ll Rio Grande water allocated to New Mexico both upstream and downstream from Elephant Butte Reservoir is fully appropriated under New Mexico state law.” *Id.* (emphasis added).
- iii. “[T]he waters of the Rio Grande Project are used to . . . provide a water supply for Southern New Mexico and Texas downstream of Elephant Butte Reservoir.” NM-EX 408, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding the Development of an Appropriate Methodology for Determining the Annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002) (emphasis added).

b. The operations and accounting of the Project have the potential to impact New Mexico’s Compact apportionment. *Id.* (“[T]he dissemination of inaccurate allotments [by Reclamation] causes unnecessary hardship to the water users of Southern New Mexico and Texas along the Rio Grande downstream of Elephant Butte Reservoir”) (emphasis added);

NM-EX 002, D’Antonio Decl. ¶ 14; NM-EX 003, Lopez Decl. ¶ 15

c. The Project is “required to be operated in compliance with the Rio Grande Compact.” NM-EX 528, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Regarding Temporary Modification of Operations at El Vado Reservoir in New Mexico during April, May, and June 2015 (Mar. 24, 2015); see also NM-EX 002, D’Antonio Decl. ¶ 14, NM-EX 003, Lopez Decl. ¶ 15.

RESPONSE: Not disputed, to the extent the statement is characterizing positions taken by the RGCC.

112. To address the potential for Project operations to impact New Mexico’s (and Texas’s) Compact apportionment, the RGCC has taken at least these three actions by resolution:

a. First, the RGCC unanimously “request[ed] that the Bureau of Reclamation work cooperatively with the Engineer Advisers to develop procedures for determining the annual allotments of water supply in accordance with the Rio Grande Compact.” NM-EX 408, Rio Grande Compact Commission, Resolution of

the Rio Grande Compact Commission Regarding the Development of an Appropriate Methodology for Determining the annual Allocation of Usable Water in Rio Grande Project Storage (Mar. 21, 2002); see also NM- EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.

b. Second, the RGCC entered into a memorandum of understanding (“MOU”) with Reclamation to “conduct a Compact water accounting documentation project.” The purpose of the MOU was “to clarify and formally articulate the details of the duties, roles and responsibilities of each party for the water accounting, reporting, and documentation of the waters of the Rio Grande Basin above Fort Quitman, Texas, in accordance with the Compact.” NM-EX 407, Memorandum of Understanding between the Rio Grande Compact Commission and the United States Bureau of Reclamation, 2 (Mar. 21, 2002); see also NM-EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.

c. Third, the RGCC unanimously “request[ed] those federal agencies that operate water-related facilities within the Rio Grande basin to advise the Rio Grande Compact Commission prior to changing the operation of any of those facilities and when deemed necessary by the Rio Grande Compact Commission, seek its unanimous consent for changes prior to implementation.” NM-EX 413, Rio Grande Compact Commission, Resolution of the Rio Grande Compact Commission Concerning Federal Agency Operations of Their Water-Related Facilities on the Rio Grande Compact Accounting (Mar. 25, 2004); NM-EX 002, D’Antonio Decl. ¶ 15, NM-EX 003, Lopez Decl. ¶ 16.

RESPONSE: Not disputed.

VIII. DECISION OF THE SUPREME COURT ON THE COMPACT APPORTIONMENT

113. The Court held in this case that “the Compact . . . implicitly . . . incorporates the Downstream Contracts by reference.” Texas v. New Mexico, 138 S. Ct. at 959. It noted that the “Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts.” Texas v. New Mexico, 138 S. Ct. at 959.

RESPONSE: Disputed. The citation elides a number of significant points. The quoted passage reads in full:

First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec [t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, the United States might be said to serve, through the

Downstream Contracts, as a sort of " 'agent' of the Compact, charged with assuring that the Compact's equitable apportionment" to Texas and part of New Mexico "is, in fact, made." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts § 30:26 (4th ed. 2017). However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.

Texas v. New Mexico, 138 S. Ct. 954, 959 (2018)

114. The Court further held that "the United States might be said to serve, through the Downstream Contracts as a sort of agent of the Compact, charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." Texas v. New Mexico, 138 S. Ct. at 959 (emphasis added; internal quotation marks omitted).

RESPONSE: Disputed. The United States disputes the characterization of this statement as a holding. The United States does not dispute this statement if "held" is changed to "stated."

**RESPONSES TO STATEMENTS OF FACT
IN THE FULL SUPPLY MOTION**

1. *The Court has already found, in this case, that “the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” and that the “purpose” of the Compact “to effect an equitable apportionment of the waters of the Rio Grande between the affected States” can only be achieved because “the United States might be said to serve, through the Downstream Contracts, as a sort of agent of the Compact, charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico is, in fact, made.” Texas v. New Mexico et al., 138 S. Ct. 954, 959 (2018) (internal quotations and citations omitted) (emphasis added); see also NM-EX 003, Declaration of E. Lopez [hereinafter “Lopez Decl.”], ¶ 14, 27*

RESPONSE: Not disputed, provided that “found” does not imply a finding of fact.

2. *In the Downstream Contracts, and in particular in the 1938 Downstream Contract, “the federal government promised to supply” Project water to the New Mexico water district Elephant Butte Irrigation District (“EBID”) and to the Texas water district EPCWID (collectively, the “Districts”) in accordance with their irrigable acres within the Project—“roughly 57% for New Mexico and 43% for Texas.” Texas v. New Mexico et al., 138 S. Ct. at 957.*

RESPONSE: Disputed. In the 1937 contract with EBID (NM-EX 320), and the 1937 contract with EPCWID (NM-EX 321), the United States agreed to supply water from the Project to each district. The 1938 contract (NM-EX 324) was an agreement between EBID and EPCWID, approved by the Assistant Secretary of the Interior. It established for the first time the number of irrigable acres in each district, approximately 67,000 acres in EPCWID and approximately 88,000 acres in EBID. *Id.* The contract also provides 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 to the lands within [EPCWID] and 88/155 to the lands within [EBID].” *Id.* The contract thus provides for a proportionate division only in shortage years, and only “so far as practicable.” It does not reflect “a promise by the United States to supply Project water to the districts “in accordance with their irrigable acres within the Project,” as New Mexico contends.

3. *The Project is operated by the United States Bureau of Reclamation (“Reclamation”). The operations of the Project include the allocation and delivery of Project water stored in Elephant Butte and Caballo reservoirs to the Districts and to Mexico. NM-EX 001, Declaration of P. Barroll [hereinafter “Barroll Decl.”], ¶ 14; NM-EX 003, Lopez Decl., ¶ 19; see also e.g., NM-EX 529, Bureau of Rec., Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas: Final Environmental Impact Statement [hereinafter “FEIS”] at 3–4 (Sep. 30, 2016).*

RESPONSE: Not disputed.

4. *The term “Project supply” is the annual release of Usable Water from Project Storage, as defined in the Compact, along with the return flows and tributary inflows below Elephant Butte, which the Project recaptures and delivers to the downstream water users. NM-EX 001, Barroll Decl., ¶ 15; NM-EX 529, FEIS at 3–4.*

RESPONSE: Disputed. New Mexico’s proposal to define “Project supply” in a particular way for purposes of litigation is not a statement of fact. New Mexico may define “Project supply” however it chooses for purposes of litigation, unless it is intending to capture the definition used in a particular document. The United States has characterized the water supply available to the Project in various ways over time. *See, e.g.,* NM-EX-510, 2008 Operating Agreement 2, NM-EX 510 (defining “Project water” as including “usable water in Project Storage,” “all water required by the Rio Grande Compact to be delivered into Elephant Butte Reservoir,” and “all water released from Project storage and all inflows reaching the bed of the Rio Grande between Caballo Dam and Fort Quitman, Texas.”); NM-EX-400, Allocation Procedures, at 9 (attachment to Water Supply Allocation Procedures defining “Project Water Supply” as “stored water legally available for release from Elephant Butte and Caballo Reservoirs and including the legally appropriated waters reaching the bed of the Rio Grande between Caballo Dam and Riverside Diversion Dam.”).

5. *The Compact provides that “a normal release ... from Project Storage” is 790,000 acre-feet (“AF”). NM-EX 001, Barroll Decl., ¶ 16; NM-EX 330, Rio Grande Compact, Act of May 31, 1939, 53 Stat. 785 [hereinafter “Compact”], art. VIII; see also NM-EX 529, FEIS at 17 (describing a full allocation release to be 790,000 acre-feet per year (“AFY”) as provided in the Compact).*

RESPONSE: Disputed. The United States does not dispute that Article VIII of the Compact refers to a “normal release of 790,000 acre-feet.” The United States disputes the characterization of the FEIS in the parenthetical. The FEIS states that 790,000 acre-feet “is specified as the normal release in the Rio Grande Compact.” NM-EX-529, FEIS at 17. It does not state that the Compact characterizes it as a “full” release.

6. *The Compact defines “Project Storage” as “the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande Project”; and “Usable Water” as “all water exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico.” NM-EX 001, Barroll Decl., ¶ 17; NM-EX 003, Lopez Decl., ¶ 12; NM-EX 330, Compact, arts. I (k), (l).*

RESPONSE: Not disputed.

7. *Project Allocations are the amount of Project supply each District (EBID and EPCWID) is entitled to order (take) from the Project, each year, and the amount Mexico is entitled to receive by Treaty. NM-EX 001, Barroll Decl., ¶ 18; NM-EX 003, Lopez Decl., ¶ 23; NM-EX 307,*

Convention between the United States and Mexico: Equitable Distribution of the Waters of the Rio Grande [hereinafter “Treaty”] (May 21, 1906); NM-EX 529, FEIS at 4.

RESPONSE: Disputed. New Mexico’s proposal to define “Project Allocations” in a particular way for purposes of litigation is not a statement of fact. New Mexico may define “Project Allocations” however it chooses for purposes of litigation, unless it is intending to capture the definition used in a particular document. The United States disputes the definition because “entitled” is ambiguous and apparently reflects a conclusion of law. Reclamation uses the term “diversion allocation.” As stated in the FEIS, “Reclamation allocates RGP water supplies such that the diversion allocations to EBID and EPCWID are proportionate to each district’s respective acreages.” NM-EX529 FEIS, at 25 (pdf page). The FEIS continues, “[t]he annual diversion allocation is the quantity of RGP water that is allocated each year for delivery to EBID, EPCWID, and Mexico at their respective diversion headings.” *Id.* By treaty, Mexico receives 60,000 acre feet per year, except in cases of extraordinary drought or serious accident to the irrigation system, whereby the amount delivered shall be diminished in the same proportion as the water delivered to lands in the United States. NM-EX-307, *Convention between the United States and Mexico: Equitable Distribution of the Waters of the Rio Grande [hereinafter “Treaty”] (May 21, 1906).*

8. *On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938. NM-EX 324, Contract between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 [hereinafter “1938 Downstream Contract”] (Feb. 16, 1938). The 1938 Downstream Contract states that in the event of a shortage of water “the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].” Id.; NM-EX 001, Barroll Decl., ¶ 19; NM-EX 003, Lopez Decl. ¶¶ 20–22.*

RESPONSE: Not disputed.

9. *Until about 1979, Reclamation delivered Project water to individual New Mexico and Texas farm headgates in response to farm orders, and Project farmers ordered water directly from Reclamation. Reclamation then determined what releases and diversions were needed to fulfill those orders, released water from Caballo reservoir, and diverted water at appropriate canal headings. Reclamation ditch riders then delivered the ordered water to individual farms. NM-EX 001, Barroll Decl., ¶ 20; NM-EX 003, Lopez Decl., ¶¶ 24-25; NM-EX 529, FEIS at 5.*

RESPONSE: Not disputed.

10. *In about 1979, Project operations changed, and Reclamation started to allocate water to each District for delivery at the Districts’ canal headings (i.e., Arrey, Leasburg, Mesilla, Franklin, and Riverside). Reclamation now determines the Districts’ Project allocations, takes water orders from the Districts, releases water from Caballo reservoir, and then makes deliveries to canal headings for each District. The Districts in turn take farm orders from their*

members, place orders with Reclamation for water to be delivered at canal headings, and then take delivery of that water and deliver it to farm headgates. NM-EX 001, Barroll Decl., ¶ 21; NM-EX 003, Lopez Decl., ¶ 26; NM-EX 529, FEIS at 5.

RESPONSE: Not disputed.

11. [a] Starting in about 1990, Reclamation determined that a release of 763,842 AFY from Project Storage was a full-supply condition. See, e.g., NM-EX 105, Excerpts, United States' Disclosure of Expert Rebuttal Witness Dr. Ian M. Ferguson (Dec. 30, 2019) [hereinafter "Ferguson Discl."] at 8 ("Prior to the [2008 Operating Agreement], full supply was defined by Usable Water available for the current-year allocation equal to or greater than 763,800 acre-feet . . ."); NM-EX 104, Excerpts, United States' Disclosure of Rebuttal Expert Dr. Al Blair (Dec. 30, 2019) [hereinafter "Blair Discl."] at 8 (stating that prior to 2008 Operating Agreement a maximum annual release for a full-supply year was 763,840 AF).

[b] Reclamation determined that this release from Project Storage would provide 931,841 AFY of divertible water at U.S. and Mexico canal headings. NM-EX 001, Barroll Decl., ¶ 22; NM-EX 400, Bureau of Rec., Rio Grande Project Water Supply Allocation Procedures [hereinafter "WSAP"] at 4.

[c] According to Project allocation procedures at that time, from this 931,841 AFY, 60,000 AFY was deducted for delivery to Mexico.

[d] Reclamation then divided the remaining 871,841 AFY, 43% (376,862 AFY) to EPCWID and 57% (494,979 AFY) to EBID in accordance with the percentages set out in the 1938 Downstream Contract. NM-EX 001, Barroll Decl., ¶ 22; NM-EX 400, WSAP at 4–5; NM-EX 324, 1938 Downstream Contract.

[e] The 376,842 AFY quantity represents a full-supply Project allocation to EPCWID that Reclamation will ensure is available for diversions at EPCWID's headgates if EPCWID orders (takes) this volume of water. NM-EX 001, Barroll Decl., ¶ 23; NM-EX 400, WSAP at 4–5; see also NM-EX 529, FEIS at 86 (referring to "[t]he historical full [EPCWID] allocation of 376,842 acre-feet").

RESPONSE:

[a] **Disputed.** "Full supply" as used in the cited sources refers to what was considered to be the maximum release for purposes of calculating diversion allocations. That maximum was derived from storage and diversion records from 1951-1978. The Water Supply Allocation Procedures incorporate the assessment of "normal supply" in a 1956 memorandum setting forth how Reclamation would allocate water as between the Districts and Mexico in years of shortage. 1956 Memo, US0171657 at US01716560. The "normal" supply calculated to be 3.024 acre-feet/acre in the 1956 memo may therefore reflect to some extent the influence of groundwater pumping. The Allocation Procedures, in turn, use the 3.024 af/ac number to characterize 931KAF as a full supply, and reservoir release of 764KAF as the amount associated with a full supply year. NM-EX 400 at 9-

12. Therefore characterizing any particular amount in storage, or any particular release from storage, as “full” supply is misleading.

[b] Not disputed.

[c] Not disputed.

[d] Disputed. The Water Supply Allocation Procedures document does not link the 57%-43% division of water between EBID and EPCWID to the 1938 Contract. NM-EX-400, Allocation Procedures, at 4.

[e] Not disputed, provided that “full-supply Project allocation” is a characterization of the Water Supply Allocation Procedures calculation, and not an attempt to characterize actual physical conditions or the apportionment effected by the Compact. The allocations to the districts under Allocation Procedures were based on the “D2 Curve,” a regression analysis of delivery data from the period 1951-1978, when groundwater pumping had already been established within EBID. *See* NM-EX-400, Allocation Procedures, at 9-14. The D2 thus reflects the effects of this “significant” amount of pumping. NM-EX-100, Barroll Oct. 2019 Rep. 35. Allocations based on the D2 Curve do not represent the maximum allocations that would have been possible in the absence of groundwater pumping.

12. [a] Between 1985 and 1990, before Reclamation had finalized the analysis described above, Reclamation’s full-supply year determinations for EPCWID varied slightly from 376,842 AFY. For example, from 1985 through 1988, Reclamation determined a full-supply year Project allocation to EPCWID to be 363,963 AFY; and in 1989 and 1990, Reclamation determined a full-supply year Project allocation to EPCWID to be 359,165 AFY.

[b] *These were hydrologically wet years with plenty of water in Project Storage and full-supply allocations were available to both Districts (EBID and EPCWID). NM-EX 001, Barroll Decl., ¶ 24; NM-EX 509, Bureau of Reclamation Table, Rio Grande Project Allocation of Project Water Supply (Apr. 3, 2008) (“Reclamation Data Table”) at col. 2.*

RESPONSE:

[a] Disputed. The BOR data table, dated 2008, designates certain years as years of “full supply irrigation” and shows the total amounts in storage and the allocations to the two districts and Mexico combined. The table does not reflect “full supply determinations for EPCWID.” Dr. Barroll’s calculations appear to be based on taking the reported total allocation (902,000 af in 1985-1988, e.g.), subtracting 60,000 af for Mexico (yielding 842,000 af, e.g.), then multiplying the remainder by 88/155 (resulting in 363,963 af, e.g.). That is Dr. Barroll’s calculation. It does not show a “determination” by Reclamation.

[b] Disputed. The terms “hydrologically wet” and “plenty of water” are statements of opinion and are ambiguous when presented as facts. Because of that ambiguity, the statement as a whole is disputed. The United States notes that the Compact defines “Project storage” by reference to a maximum of around 2.6 million acre-feet (“af”), and

that beginning-of-year Project storage in the years 1985 to 1988 ranged from 1.8 million af to 2.4 million af, approximately. The United States also notes that spring run-off in 1988, 1989, and 1990 was also much lower than the run-off in 1985, 1986, and 1990. Reclamation characterized these years on the 2008 data table as “full supply irrigation years” based on the allocation procedures developed in 1990.

13. [a] *From 2006 onwards, Reclamation has determined annual Project allocations to the Districts under the 2008 Operating Agreement, and the antecedent D3-Allocation-Plus-Carryover method from which the 2008 Operating Agreement was developed. [footnote] NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, Operating Agreement for the Rio Grande Project [hereinafter “2008 Operating Agreement”] (Mar. 10, 2008); NM-EX 502, D3 Allocation of Project Water to the Districts and Mexico; NM-EX 507, 2007 Operating Procedures.*

[b, Footnote] *Under the post-2006 allocation system, EPCWID was allocated far more Project Water than the share due its 67,000 of 155,000 Project irrigable acres (43%), and received far more than its 43% share of Project Water. NM-EX 001, Barroll Decl., ¶ 36; see also NM-EX 100, P. Barroll Expert Report (Oct. 31, 2019), at x-xi, 31, 33, 69.*

[c] *Under the 2008 Operating Agreement, Reclamation determines a full-supply year Project allocation to EPCWID to be 388,192 AFY. NM-EX 001, Barroll Decl., ¶ 25; NM-EX 510, 2008 Operating Agreement at 3; see, e.g., NM-EX 105, Ferguson Discl. at 8 (“[U]nder the [2008 Operating Agreement], full supply conditions are defined by Usable Water available for the current-year allocation equal to or greater than 790,000 acre-feet.”); NM-EX 104, Blair Discl. at 8 (stating that prior to the 2008 Operating Agreement, a maximum annual release for a full-supply year was 763,840 AF).*

RESPONSE:

[a] **Not disputed, with qualification.** The “D3-Allocation-Plus-Carryover method” is Dr. Barroll’s characterization of the allocation method used in the 2008 Operating Agreement, based on a document generated by EBID that refers to a “D3 Allocation Method.” The Operating Agreement does not use the terms “D3” or “D3-Allocation-Plus-Carryover method.”

[b, Footnote] **Disputed.** The term “share” and the phrase “share due” are ambiguous and appears to reflect conclusions of law. The Operating Agreement determines the diversion allocation to each district consistent with the 67/155 and 88/155 proportions of irrigated acreage. EPCWID continues to be allocated 67/155 of the amount available for allocation. NM-EX-510, Operating Agreement, at US0108802. Under the agreement, EBID voluntarily cedes—i.e., agrees not to order--some of the amount it was allocated, to compensate for the effects of groundwater pumping on Project deliveries. *Id.* at US0108799; U.S. Mem.15 & nn.71

[c] **Not disputed, provided that** “full-supply year Project allocation” is a characterization of the Operating Agreement calculation and not the Compact.

14. During each irrigation season (approximately March through October), each District is entitled to order delivery of Project Water up to its annual Project allocation. Deliveries to the Districts are measured by gages and are converted into what are known as “Charged Diversions” (Allocation Charges), which are then subtracted from each District’s allocation account as the irrigation season progresses. NM-EX 001, Barroll Decl., ¶¶ 21, 26; NM-EX 510, 2008 Operating Agreement at 9–11; NM-EX 529, FEIS at 18, 24, App. B.

RESPONSE: Not disputed, provided that “entitled to order” is a characterization of the Operating Agreement.

15. [a] During the course of the irrigation season, Reclamation receives orders from the Districts and adjusts the gates of Caballo Dam so that these orders are delivered to the Districts’ canal headings. See NM-EX 531, Rio Grande Project Operations Manual at 4-5 (2018) [hereinafter “Operations Manual”]. Reclamation sets the Caballo release amount taking into account the losses and gains between Caballo Dam and the canal headings to which it is delivering water, so that regardless of what losses or gains are occurring, the amount ordered will reach the canal heading for which the order is being made. NM-EX 531, Operations Manual at 4–8. If the delivery to EPCWID falls short of the order, there is a procedure by which EPCWID, EBID and Reclamation coordinate and water is released from EBID’s works to temporarily mitigate the shortfall until adjustment of Caballo releases resolves the problem. NM-EX 001, Barroll Decl., ¶ 27; NM-EX 531, Operations Manual, at 8. Historically, Reclamation has always been able to fulfill the orders made by the Districts. NM-EX 001, Barroll Decl., ¶ 27; see also NM-EX 105, Ferguson Discl. at 12–13 (“EPCWID received all water that the district ordered during the period 1979-2002”); NM-EX 210, Deposition of Dr. Ian M. Ferguson, [footnote] Vol. 2 (Feb. 20, 2020) [hereinafter “Ferguson Dep. Vol. 2”] at 260:6-7 (“I’m not aware of any records that suggest EP1 [EPCWID] ordered water that it did not receive.”).

[b, footnote] Dr. Ferguson is a Hydrologic Engineer for Reclamation, and since June 2011 Dr. Ferguson has provided technical support to Reclamation’s Albuquerque Area Office on issues related to the Rio Grande Project. NM-EX 209, Deposition of Dr. Ian M. Ferguson, Vol. 1 (Feb. 19, 2020) [hereinafter “Ferguson Dep. Vol. 1”] at 13:4-19 (stating that he joined Reclamation in April 2001 as a hydrologic engineer and is currently a hydrologic engineer at Reclamation); id. at 44:6-16 (stating that he provided technical support for Reclamation’s Albuquerque-area office on issues relating to the Rio Grande project).

RESPONSE:

[a] **Not disputed**, provided that “[h]istorically” refers to 1979 to present.

[b] **Not disputed.**

16. [a] Reclamation recognizes the years 1985 through 2002 and 2005 as full supply years for the Project, and also recognizes those years as full-supply years for EPCWID, meaning that in each of those years Reclamation determined that a full allocation of Project water was available for diversions at EPCWID’s headgates if ordered. NM-EX 001, Barroll Decl., ¶¶ 28–30, 32–33, 37 & Table 1; see also NM-EX 402, EPCWID Accounting Records [EOY_Acct_EP_1985-2016]; NM-EX 509, Reclamation Data Table; NM-EX 202, Deposition of Filiberto Cortez,

[footnote] *Vol. 1 (Jul. 30, 2020) [hereinafter “Cortez Dep. Vol. 1”] at 82:16-83:2, 91:1-8, 92:19-93:7 (stating that 1979 through 2002 were “full supply” years, that a full Project supply allocation is the maximum amount that Reclamation will allocate, and that “[a] full supply is the allocation made to the district based on historical data” about irrigation demands); NM-EX 210, Ferguson Dep. Vol. 2 at 229:15-18 (“[F]rom about 1985 or ’6, through about 2002 . . . I know to be years of full project supply.”), 233:1-3 (agreeing that “there’s full supply from 1979 to 2002”); and 259:12-16 (agreeing that “[t]he project enjoyed full supply conditions from 1979 through 2002, and EPCWID was allocated a full supply in each year”); NM-EX 412, Herman R. Settemeyer, [footnote] P.E., Rio Grande Project/Rio Grande Compact Operation [hereinafter “Settemeyer Presentation”] at G-4 (2004) (presenting that “Rio Grande Project water users enjoyed full allocations of water from 1979 until 2003”); see also NM-EX 214, Excerpts, Deposition of J. Phillip King, [footnote] Vol. 1 (May 18, 2020) [hereinafter “King Dep. Vol. I”] at 102:19-23 (confirming that a full supply “is the amount of water that Reclamation allocated to each district from 1979 to 2002, when each year was a full-supply” and that in each of those years “[t]here was a full supply available for release from storage”).*

[b, footnote (Cortez)] *Mr. Cortez is the former manager of Reclamation’s El Paso office, which previously managed the water supply for the Rio Grande Project. NM-EX 202, Cortez Dep. Vol. 1 at 24:5-18 (stating that starting in 2007 he was the manager for the [Reclamation] El Paso Field Division, which is “the office which operated the Rio Grande Project at that time ... That involved the management of the reservoirs ... dealings with the irrigation districts, water deliveries, making the allocation, anything having to do with the Rio Grande Project”); see also id. at 10:25-11:2 (explaining that currently he is “the special assistant to the [Reclamation] Albuquerque office area manager”).*

[c, footnote (Settemeyer)] *Mr. Settemeyer is the former Texas Engineer Advisor to the Rio Grande Compact Commission. NM-EX 225, Deposition of Herman Settemeyer, Vol. 1 (Jul. 30, 2020) at 29:13-18, 29:25-31:3 (stating that he started working on interstate compacts in 1987; “I was the engineer Advisor for the ... Rio Grande [Compact]”*

[d, footnote (King)] *Dr. King has been identified as an expert witness for the State of Texas and for the United States in this case. See NM-EX 214, King Dep. Vol. 1 at 44:10-14; 21:10-16 (stating that he considers himself an expert in “[i]rrigation and draining engineering and management, irrigation system operation, engineering hydrology, and statistical hydrology”).*

RESPONSE:

[a] Not disputed, with qualification. New Mexico’s statement that “Reclamation recognizes” particular years as “full supply” years is based on the testimony of Filiberto Cortez, who was deposed in his capacity as a fact witness for Reclamation, not a witness designated on behalf of Reclamation pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure. The United States does not dispute the statement if the phrase “for purposes of Reclamation’s allocation procedures” is inserted after “full supply years for the Project.” As noted in response to Statement No. 11, the “full supply” and “full Project allocation” under the Allocation Procedures and Operating Agreement do not

reflect the maximum supply or maximum allocation that would have been possible in the absence of groundwater pumping.

[b, footnote (Cortez)]. Not disputed.

[c, footnote (Settemeyer)]. Not disputed.

[d, footnote (King)]. Not disputed.

17. The years 2007 through 2010 were also full-supply years for EPCWID because in each of those years EPCWID's annual allocation available for diversions at EPCWID's headgates (if ordered) exceeded 376,862 AFY—the full-supply allocation amount determined by Reclamation in 1990—and also exceeded the higher full-supply allocation to EPCWID (388,192 AFY) under the 2008 Operating Agreement. NM-EX 001, Barroll Decl., ¶¶ 28, 31, 34-37 & Table 2; NM-EX 402, EPCWID Accounting Records; NM-EX 500, EPCWID Water Allocation Records (2006-2016); NM-EX 510, 2008 Operating Agreement, Tables 2 & 4.

RESPONSE: Not disputed, provided that “for purposes of Reclamation’s allocation procedures” is inserted after “full-supply years.” As noted in response to Statement Nos. 11 and 16, the “full supply” and “full supply allocation” under the Operating Agreement do not reflect the maximum supply or maximum allocation that would have been possible in the absence of groundwater pumping.

**RESPONSES TO STATEMENTS OF FACT
IN THE NOTICE MOTION**

I. RELATIONSHIP BETWEEN THE RIO GRANDE COMPACT AND THE RIO GRANDE PROJECT

1. One purpose of the Rio Grande Compact, among others, was to protect the operation of the Rio Grande Project. See NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:8-17; NM-EX 204, D'Antonio Dep. (Vol. II) (June 25, 2020), 163:7-13; NM-EX 217, Lopez Dep. (Vol. I) (July 6, 2020), 137:20-138:3; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 66:14-15; NM-EX 005, Stevens Decl. ¶ 10.

RESPONSE: Not disputed.

2. Reclamation operates Elephant Butte Reservoir as part of the principal storage infrastructure for the Rio Grande Project. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 56:20-58:3.

RESPONSE: Not disputed.

*3. Once delivered to the Elephant Butte Reservoir, Project water is allocated to the Rio Grande Project beneficiaries in southern New Mexico and in Texas. See NM-EX 220, Miltenberger Dep. (June 8, 2020), 38:22-39:6. The Project water users are located in Elephant Butte Irrigation District (“EBID”) and El Paso County Water Improvement District No. 1 (“EPCWID”) (referred to jointly as “Districts”). See Motion of Elephant Butte Irrigation District for Leave to Intervene, and Memorandum and Points of Authority, 2 (Dec. 3, 2014); Motion of El Paso County Water Improvement District No. 1 for Leave to Intervene as Plaintiff, Complaint in Intervention, and Memorandum in Support of Motion to Intervene as Plaintiff, 1-3 (Apr. 22, 2015); NM-EX 112, Jennifer Stevens, Ph.D., *The History of Interstate Water Use on the Rio Grande: 1890-1955*, 18 (Oct. 28, 2019) (“Stevens Rep.”); NM-EX 111, Scott A. Miltenberger, *Expert Report of Scott A. Miltenberger, Ph. D.*, 9 (May 31, 2019) (“Miltenberger Rep.”).*

RESPONSE: Disputed. “Project water” is not a term defined by the Compact and is ambiguous. Water delivered to Elephant Butte Reservoir, exclusive of credit water and imported water from the San Juan Chama Project, becomes “usable water.” Art. I(l), 53 Stat. 786; *see also* U.S. Mem. 8, ¶ 31 & nn.31. This useable water is available for release in accordance with irrigation demands, including deliveries to Mexico. Art. I(l), 53 Stat. 786; *see also* U.S. Mem. 8, ¶ 33. Thus, all usable water is not allocated to Rio Grande Project beneficiaries in southern New Mexico and in Texas, nor are all users of the usable water located in EBID or EPCWID.

*4. Project Allocations are the amounts of Project Supply that each District is entitled to order each year from Project supply and the amount Mexico is entitled to receive by treaty. NM-EX 001, Barroll Decl., ¶ 18; NM-EX 307, *Distribution of the Waters of the Rio Grande, Mex.-U.S.*, May 21, 1906, 34 Stat. 2953; NM-EX 529, *Bureau of Reclamation, Continued Implementation of**

the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement, 4 (Sept. 30, 2016).

RESPONSE: Disputed. New Mexico’s proposal to define “Project Allocations” in a particular way for purposes of litigation is not a statement of fact. New Mexico may define “Project Allocations” however it chooses for purposes of litigation, unless it is intending to capture the definition used in a particular document. The United States disputes the definition because “entitled” is ambiguous and apparently reflects a conclusion of law. Reclamation uses the term “diversion allocation.” As stated in the FEIS, “Reclamation allocates RGP water supplies such that the diversion allocations to EBID and EPCWID are proportionate to each district’s respective acreages.” NM-EX529 FEIS, at 25 (pdf page).

5. On February 16, 1938—shortly before Colorado, New Mexico, and Texas signed the Compact—the Districts (EPCWID and EBID) entered into a contract that was approved by the Assistant Secretary of the Interior on April 11, 1938. NM-EX 324, Contract Between Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 (Feb. 16, 1938) (“1938 Downstream Contract”). The 1938 Downstream Contract states that in the event of a shortage of water “the distribution of the available supply in such year, shall so far as practicable, be made in the proportion of 67/155 [43%] thereof to the lands within [EPCWID], and 88/155 [57%] to the lands within [EBID].” Id.; NM-EX 001, Barroll Decl., ¶ 19. The Court has found that the “Downstream Contracts,” including the 1938 Downstream Contract, are “inextricably intertwined with” the Project and the Compact. Texas v. New Mexico, 138 S. Ct. at 959.

RESPONSE: Disputed. This statement is a mixed assertion of legal interpretation and fact. The United States does not dispute the factual assertions or quoted contract language. The United States disputes New Mexico’s framing that the legal conclusion by the Court—that the Downstream Contracts are “‘inextricably intertwined with’ the Project and Compact”—is a “fact.” Additionally, the citation elides a number of significant points. The Court concluded:

First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec [t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of " ‘agent’ of the Compact, charged with assuring that the Compact's equitable apportionment" to Texas and part of New Mexico "is, in fact, made." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts

§ 30:26 (4th ed. 2017). However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.

Texas v. New Mexico, 138 S. Ct. 954, 959 (2018).

6. The Rio Grande Compact incorporates the Rio Grande Project as the mechanism by which water users in Texas (EPCWID) receive the State's equitable apportionment of the waters of the Rio Grande. See NM-EX 212, Gordon Dep. (Vol. II) (July 15, 2020) 14:22-16:10; Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); see also First Interim Report of the Special Master, 194-95 (Feb. 9, 2017); Texas's Reply to Exceptions to First Interim Report of Special Master, 40 (July 28, 2017); Reply Brief for the United States on Exceptions by the States of New Mexico and Colorado to the First Interim Report of the Special Master, 18 (July 2017).

RESPONSE: Disputed. The express language of the Compact does not incorporate the Rio Grande Project. This assertion by New Mexico is an incomplete conclusion of law that ignores several significant points. The Supreme Court's discussion of the Compact's implicit "incorporation" of the Downstream Contracts reads in full:

First, the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec [t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. 53 Stat. 785. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of " 'agent' of the Compact, charged with assuring that the Compact's equitable apportionment" to Texas and part of New Mexico "is, in fact, made." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. Cf. 11 R. Lord, Williston on Contracts § 30:26 (4th ed. 2017). However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.

Texas v. New Mexico, 138 S. Ct. 954, 959 (2018)

II. RELATIONSHIP BETWEEN THE PRIOR APPROPRIATION DOCTRINE AND THE RIO GRANDE PROJECT

7. To support the Rio Grande Project, Reclamation notified the State Engineer for the Territory of New Mexico that it intended to appropriate all “unappropriated waters of the Rio Grande” at Elephant Butte in 1908. See NM-EX 306, Letter from B.M. Hall, Supervising Engineer, United States Reclamation Service, to David L. White, Territorial Irrigation Engineer, Territory of New Mexico (Jan. 23, 1906); NM-EX 309, Letter from Louis C. Hill, Supervising Engineer, United States Reclamation Service, to Vernon L. Sullivan, Territorial Engineer, Territory of New Mexico (Apr. 1908); NM-EX 111, Miltenberger Rep. 9-10.

RESPONSE: Disputed. Reclamation’s notification to the New Mexico State Engineer in 1908 was not limited to appropriation of water at Elephant Butte Reservoir. The notice states:

In pursuance of the above statute of the Territory you are hereby notified that the United States intends to utilize the following described waters, to-wit: All the unappropriated water of the Rio Grande and its tributaries, said water to be diverted or stored from the Rio Grande River at a point described as follows: Storage dam about nine miles west of Engle, New Mexico, with capacity for two million (2,000,000) acre feet, and diversion dams below in Palomas, Rincon, Mesilla and El Paso Valleys in New Mexico and Texas.

NM-EX-309, Letter to Sullivan dated April 1908 at NM_00113008.

8. From that point forward, the New Mexico State Engineer considered the surface waters of the Rio Grande below Elephant Butte Reservoir to be fully appropriated. See NM-EX 002, D’Antonio Decl. ¶ 9; NM-EX 200, Barroll Dep. (Vol. III) (Aug. 10, 2020), 424:15-425:4, 426:13- 18; NM-EX 106, Nicolai Kryloff, Context of the 1938 Rio Grande Compact, 26-27 (May 31, 2019) (“Kryloff Rep.”); NM-EX 205, D’Antonio Dep. (Vol. III) (June 26, 2020), 274:1-5.

RESPONSE: Not disputed.

9. The Rio Grande Project is a federal Reclamation Project, therefore neither Texas nor New Mexico have a direct role in the operation of the Project. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 63:18-69:2; NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 89:4-11, 172:13- 22.

RESPONSE: Not disputed.

10. Specifically, although New Mexico retains administrative jurisdiction over the surface water of the Rio Grande Project, the New Mexico State Engineer has no involvement in day-to-day Project operations, including orders and deliveries. NM-EX 206, D’Antonio Dep. (Vol. IV) (Aug. 14, 2020), 93:12-96:7.

RESPONSE: Not disputed.

III. OPERATION OF THE RIO GRANDE COMPACT

11. *While Project construction was ongoing, the Reclamation Service began water deliveries through the Project in 1915. See NM-EX 404, Robert Autabee, United States Bureau of Reclamation, Rio Grande Project, at 12 (1994); NM-EX 311, United States Reclamation Service, Project History Rio Grande Project Year 1915, 137-141.*

RESPONSE: Disputed. Although it is undisputed that the first deliveries by Reclamation from Project storage began in 1915, a Rio Grande diversion structure at Leasburg, New Mexico diverted its first water in 1908. NM-EX-404, Autabee Rep., at 11.

12. *From inception of the Project until 1951, Reclamation administered the Rio Grande Project as a single unit to deliver water directly to farm turnouts in both States on the basis of individual farm orders. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 58:6-18; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 107, Estevan R. Lopez, Expert Report of Estevan R. Lopez, P.E., 25 (Oct. 31, 2019) (“Lopez Rep.”).*

RESPONSE: Disputed. The phrase “administered . . . as a single unit,” as used in this statement, is ambiguous and the statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 12.

13. *The understanding of the compacting States was that Reclamation would continue to operate the Project in this manner. NM-EX 328, Letter from Frank B. Clayton, Rio Grande Compact Commissioner, State of Texas, to Sawnie B. Smith (Oct. 4, 1938) (“Obviously, neither Colorado nor New Mexico could be expected to guarantee any fixed deliveries at the Texas line when the operation of the dam is not within their control but is in the control of an independent agency.”); NM-EX 327, J.H. Bliss, Provisions of the Rio Grande Compact, 1 (Apr. 2, 1938) (“The measurement of the water at San Marcial rather than the New Mexico-Texas line is necessary because the Elephant Butte Project must be operated at as a unit.”); NM-EX 112, Stevens Rep.72.*

RESPONSE: Disputed. The phrase “in this manner” is ambiguous, and the statement is disputed on that basis. Moreover, if Statement of Fact No. 13 is intended to relate to Statement of Fact No. 12, “administered . . . as a single unit,” as used in that statement, is ambiguous and the statement is also disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even

beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 13.

14. Between 1951 and 1979, Reclamation would perform an annual assessment of available Project supply to determine whether a full or partial allocation would be made. Reclamation would announce the allocation figures to individual farmers through the irrigation districts. Then, individual farmers retained discretion to order Project deliveries up to the amount of their respective allocations. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 58:19-59:11.

RESPONSE: Disputed. The term “available Project supply” is not defined and is ambiguous. Reclamation’s assessment of available water in any year is not limited to a single annual assessment of availability at a particular time, but an ongoing process. The referenced deposition does not establish the existence of a single assessment. *See NM-EX-202, Cortez Dep. (Vol. I) (July 30, 2020) 58:19-59:11*

15. During this period, Reclamation operated the Project as a single unit and on an equal per-acre allocations to all beneficiaries of the Project. See NM-EX 100, Barroll Rep., 32; NM-EX 216, Lopez Dep. (Feb. 26, 2020), 29:1-9; NM-EX 220, Miltenberger Dep. (June 8, 2020) 41:22-42:12; NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 58:6-18.

RESPONSE: Disputed. “Operated the Project as a single unit,” as used in the statement, is ambiguous and the statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 15. In addition, between 1951 and 1979, Reclamation enforced an equal amount of water to each acre during years of inadequate supply. During years when the water supply exceeded a normal supply (typically 3.0 acre-feet per acre) the on-farm delivery may not have been based on an equal basis to each acre. NM-EX 202, 58:19-59:7.

16. Reclamation also maintained the Districts’ annual allocation accounting. Reclamation tracked the amount of surface water delivered to individual farm turnouts and assessed these amounts against the farmers’ respective allocations. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 20:1-15, 42:15-43:4, 58:6-59:11; NM-EX 100, Barroll Rep. 32-33; NM-EX 001, Barroll Decl. ¶ 20; NM-EX 529, Bureau of Reclamation, Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, Final Environmental Impact Statement, 5 (Sept. 30, 2016).

RESPONSE: Disputed. Between 1951 and 1978, Reclamation did not maintain “Districts’ annual allocation accounting,” because water was not allocated to the Districts. NM-EX-529, FEIS, at 5.

17. *In 1979, Reclamation transferred ownership of the canals and laterals to the Districts (EBID and EPCWID). In the period thereafter, Reclamation made allocations to the District river diversions, rather than to individual farmers, and the Districts assumed responsibility for delivery of the Project water from their respective diversion points to individual farm turnouts. See NM- EX 001, Barroll Decl. ¶ 21; NM-EX 202, Cortez Dep. (Vol. I), 59:12-60:4, 64:3-15; NM-EX 210, Ferguson Dep. (Vol. II) (Feb. 20, 2020), 233:3-6; NM-EX 100, Barroll Rep. 8, 33.*

RESPONSE: Disputed. 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. NM-EX-529, FEIS, at 5.

18. *[a] Reclamation retained, in the period after 1979, the responsibility to account for the total deliveries to each District (EBID and EPCWID) and to Mexico at their respective diversion headings in a given year. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 31:13-23, 49:3-11.*

[b] From 1979 through 2005, Reclamation continued to operate the Project as a single unit on an equal amount of water per acre basis.

RESPONSE:

[a] Not disputed, with the clarification that Reclamation included diversions at headings in its accounting.

[b] Disputed. “[O]perate the Project as a single unit,” as used in the statement, is ambiguous and the statement is disputed on that basis. The letter from Commissioner Clayton on October 4, 1938 to the Compact Commission, states that the Project “is operated as an administrative unit by the Bureau of Reclamation, and the dam and releases from the reservoir are controlled by the Bureau and will continue to be at least until the federal government is repaid its investment, and very probably even beyond that time.” NM-EX-328, Clayton Letter, at 1. The United States disputes any other construction of Statement of Fact No. 18.

19. *Reclamation relies on the Districts to monitor and report the actual diversions that each takes at its diversion points from the Rio Grande. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 49:20-50:12.*

RESPONSE: Not disputed.

20. *Reclamation compiles its accounting of the Districts’ respective Project allocation and delivery charges on a monthly basis. See NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 215:23-216:16; NM-EX 221, Reyes Dep. (Nov. 16, 2018), 65:8-66:8.*

RESPONSE: Not disputed.

21. *In operation of the Rio Grande Project, Reclamation is responsible to control releases of Project supply from Elephant Butte and Caballo reservoirs to assure delivery of all ordered water to the canal diversions. This function includes monitoring the river to determine gains and*

losses throughout the river reaches between stream gages. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 34:12-35:5.

RESPONSE: Disputed. The United States does not dispute the factual assertion that Reclamation is responsible for controlling releases from Elephant Butte and Caballo reservoirs to the extent it is consistent with Mr. Cortez’s Deposition. NM-EX-202, Cortez 7/30/20 Dep. Tr., 34:12-35:5. However, neither Mr. Cortez’s deposition testimony nor the document he is discussing, FC3, reflects that Reclamation has the responsibility “to assure delivery of all ordered water to the canal diversions” or that this “function includes monitoring the river to determine gains and losses throughout the river reaches between the stream gages.” *Id.*

22. *In order to calibrate releases of Project supply from Caballo and Elephant Butte reservoirs into the Rio Grande, Reclamation takes delivery orders from each District and makes appropriate reservoir release adjustments on a daily basis. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 64:3-15.*

RESPONSE: Not disputed.

23. *To facilitate this process, the Districts take water orders from their respective constituents and transmit total orders to Reclamation. See NM-EX 208, Esslinger Dep. (Vol. II), 57:4-58:8, 59:3-18; NM-EX 222, Reyes Dep. (Aug. 31, 2020), 20:3-14; NM-EX 223, Rios Dep. (Aug. 26, 2020), 48:12-18, 49:10-20; NM-EX 001, Barroll Decl. ¶ 21.*

RESPONSE: Not disputed.

24. *Once Reclamation delivers water to a District’s diversion point, the District administers the conveyance of that water to individual farm turnouts and accounts for delivery of the water in satisfaction of the farmers’ respective orders. See NM-EX 208, Esslinger Dep. (Vol. II) (Aug. 18, 2020), 56:19-58:23, 60:22-62:7; NM-EX 223, Rios Dep., 31:4-6, 33:10-14.*

RESPONSE: Not disputed.

25. *Following the 2008 Operating Agreement, among other changes, the Districts assumed from Reclamation the responsibility to calculate the actual Project release as a function of their total daily orders. See NM-EX 207, Esslinger Dep. (Vol. I) (Aug. 17, 2020), 122:4-9; NM-EX 221, Reyes Dep. (Nov. 16, 2008), 23:20-24:18; NM-EX 001, Barroll Decl. ¶ 21.*

RESPONSE: Not disputed.

IV. RIO GRANDE PROJECT REPORTING

26. *Reclamation compiles an annual written report to the Rio Grande Compact Commission and gives an annual oral report at the Rio Grande Compact Commission meeting regarding operation of the Rio Grande Project. These reports contain general, annualized data concerning the operation of the Project, such as the total amount of release from Project Storage, the*

amount of water in Project Storage, and the annual allocations to each district. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 44:6-45:4, 102:21-103:6; NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 209:20-210:14. E.g., NM-EX 516, Bureau of Reclamation, Calendar Year 2009 Report to the Rio Grande Compact Commission, 59-67 (Mar. 2010); NM-EX 003, Lopez Decl. ¶¶ 14-15.

RESPONSE: Not disputed, with the clarification that this statement is correct only for the period of time after 1980 when annual allocations were made to each district. The United States disputes any other construction of Statement of Fact No. 26.

27. *Reclamation also provides to the State of New Mexico courtesy copies of periodic reports concerning Rio Grande Project operations, including reservoir elevations, flow readings, and storage transfers between reservoirs. See NM-EX 203, Cortez Dep. (Vol. II) (July 31, 2020), 220:2-222:4. E.g., NM-EX 513, Letter from Filiberto Cortez, Manager El Paso Field Division, Bureau of Reclamation, to Water Accounting Division, U.S. Section, International Boundary Water Commission (Sept. 29, 2009); NM-EX 514, Letter from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Lieutenant Col. Kimberly Colloton, District Engineer, Army Corps of Engineers (Sept. 29, 2009).*

RESPONSE: Not disputed.

28. *New Mexico does not, however, receive daily operation information such as the daily release amount, the order amounts, or the timing of releases to satisfy orders. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020) 114:6-22; NM-EX 002, D’Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; NM-EX 100, Barroll Rep., 47; NM-EX 107, Lopez Rep. 73 (“Historically, Reclamation information and data about Project operations has not routinely been shared with the States.”)*

RESPONSE: Not disputed.

29. *Likewise, New Mexico does not receive any routine notice that any specific water order, whether at the district or individual farmer level, has or has not been filled. NM-EX 002, D’Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.*

RESPONSE: Not disputed.

30. *Accordingly, New Mexico has no means to know, at any given time, what proportion of the water in the Rio Grande below Elephant Butte Reservoir is destined for delivery to EBID, EPCWID, or Mexico. NM-EX 002, D’Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.*

RESPONSE: Not disputed.

31. *Further, New Mexico has no means to know, at any given time, whether the Rio Grande Project releases are in fact delivered to Texas in satisfaction of EPCWID orders. NM-EX 002,*

D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15; see also NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020), 180:14-181:7.

RESPONSE: Not Disputed.

32. Conversely, to the extent that any amount of water released from Project supply pursuant to a specific order is intercepted prior to delivery, New Mexico would have no basis to know of a shortage to either District without explicit notice. NM-EX 002, D'Antonio Decl. ¶ 17; NM-EX 004, Schmidt-Petersen Decl. ¶ 15.

RESPONSE: Disputed. The record shows that New Mexico was aware of the potential breach as of at least 1980, when New Mexico closed the groundwater basin below Elephant Butte Reservoir. NMAC 19.27.48; *see also* U.S. Mem. 11, ¶ 50. In addition, the 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) ("AWRM Presentation") created by the Office of State Engineer in 2005, TX00175991, as well as the attempted adoption of AWRM regulations, 19.5.13.1-19.5.50, NMAC, illustrate that New Mexico was aware of the impact of groundwater pumping on Rio Grande flows and Project diversions. *See generally* U.S. Mem. 15-17. Finally, in 1954 the United States Geological Survey published a report documenting its conclusion that groundwater pumping reduces the flows in Project drains and depletes surface water in the Rio Grande, thereby reducing the surface water supply for the Project. 1954 Conover at 115, 133 (point 5), US0027948, at 28062, 280801; *see also* U.S. Mem. 10, ¶ 44-45.

V. ABSENCE OF SHORTAGE NOTIFICATIONS

33. From 1938 through the inception of this litigation, New Mexico did not receive any notice, with the potential exception of one complaint concerning surface water diversions (discussed below), whether from Reclamation, Texas, EBID, or EPCWID, that the conduct of water users in New Mexico prevented the United States from making delivery of Project water called for by Texas (EPCWID). NM-EX 002, D'Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 16; see Ex 218, Lopez Dep. (Vol. II) (July 7, 2020), 140:13-141:13; Ex. 204, D'Antonio Dep. (Vol. II) (June 25, 2020), 169:1-7.

RESPONSE: Disputed. The record shows that New Mexico was aware of the potential breach as of at least 1980, when New Mexico closed the groundwater basin below Elephant Butte Reservoir. NMAC 19.27.48; *see also* U.S. Mem. 11, ¶ 50. In addition, the AWRM Presentation created by the Office of State Engineer in 2005, TX00175991, as well as the attempted adoption of AWRM regulations, 19.5.13.1-19.5.50, NMAC, illustrate that New Mexico was aware of the impact of groundwater pumping on Rio Grande flows and Project diversions. *See generally* U.S. Mem. 15-17. Finally, in 1954 the United States Geological Survey published a report documenting its conclusion that groundwater pumping reduces the flows in Project drains and depletes surface water in the Rio Grande, thereby reducing the surface water supply for the

Project. 1954 Conover Rpt., at 115, 133 (point 5), US0027948, at 28062, 280801; *see also* U.S. Mem. 10 at ¶ 44-45.

34. *Filiberto Cortez, El Paso Field Division manager for Reclamation, testified that Reclamation has only made one communication to New Mexico that notified New Mexico of concerns regarding water use in New Mexico potentially impacting Project deliveries. See NM- EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 111:13-112:10.*

RESPONSE: Not disputed.

35. *Specifically, in April 2012, Reclamation informed the New Mexico Office of the State Engineer that the Districts and Reclamation had identified a number of river pumps that were “impacting the deliveries” from the Rio Grande Project to EPCWID and Mexico. See NM-EX 521, Email from Filiberto Cortez, Manager El Paso Field Div., U.S. Bureau of Reclamation, to Rolf Schmidt-Peterson, Rio Grande Bureau Basin Manager, N.M. Interstate Stream Comm’n (Apr. 11, 2012).*

RESPONSE: Not disputed.

36. *The New Mexico State Engineer performed an investigation of the water pumps at issue and responded on September 21, 2012. The investigation concluded that all but two of the sites were operating in compliance with adjudicated water rights that are senior to the Project’s or approved groundwater withdrawal permits. With regard to the remaining two sites, the investigation concluded that the pumps in question were no longer operable, and it was not possible to determine if any diversion occurred at either site. See NM-EX 523, Letter from Scott A. Verhines, State Engineer, State of N.M., to Ed Drusina, Comm’r, Int’l Boundary and Water Comm’n, and Mike Hamman, Albuquerque Area Manager, U.S. Bureau of Reclamation (Sept. 21, 2012).*

RESPONSE: Not disputed.

37. *The New Mexico State Engineer further invited Reclamation to “continue to notify” the State of any “potential unlawful diversions” so that the State Engineer could “initiate appropriate water administration actions, if necessary, to prevent the unlawful diversion of water.” Id.*

RESPONSE: Not disputed.

38. *Following this invitation, Reclamation made no further reports to the New Mexico State Engineer concerning improper surface water diversions. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 119:7-120:9.*

RESPONSE: Not disputed.

39. *Other than this surface pump investigation, Reclamation has not requested that New Mexico investigate or curtail any illegal water use, whether surface or groundwater. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 113:11-18.*

RESPONSE: Not disputed.

40. Further, Reclamation has not informed New Mexico that it was unable in any year to deliver Project water that Texas (EPCWID) ordered due to the actions of New Mexico water users. See NM-EX 202, Cortez Dep. (Vol. I) (July 30, 2020), 114:23-115:7. NM-EX 002, D'Antonio Decl. ¶ 19.

RESPONSE: Disputed. At minimum, the filing of the United States' Complaint in this proceeding provides notice to New Mexico of its violation of the Rio Grande Compact. Lopez 30b6 Tr. 69:20-24; Barroll 30b6 Tr. 47:17-22, 48:10-13; see also U.S. Mem. 20, ¶ 96.

41. Likewise, Texas has not, through the Rio Grande Compact Commission, provided any notification that Texas's Project deliveries were shorted in any year. See NM-EX 211, Gordon Dep. (Vol. I) (July 14, 2020) 192:10-193:2. NM-EX 002, D'Antonio Decl. ¶ 18; NM-EX 004, Schmidt-Petersen Decl. ¶ 17.

RESPONSE: Not disputed.

CONCLUSION

The United States respectfully requests that the Court decline to treat disputed statement of fact identified above as undisputed or established for purposes of trial.

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 RESPONSE TO THE STATE OF NEW MEXICO’S STATEMENTS OF UNDISPUTED MATERIAL FACTS** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ Seth C. Allison

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