No. 141, Original

In the

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants

OFFICE OF THE SPECIAL MASTER

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

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ABBREVIATIONS AND ACRONYMS

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Barroll 30b6 Tr.	Margaret (Peggy) Barroll, under designation pursuant to FED. R. CIV. P. 30(b)(6)	NM	October 21, 2020
Barroll [Date] Tr.	Margaret (Peggy) Barroll, as retained expert	NM	Feb. 5, July 9 and Aug. 7, 2020
D'Antonio [Date] Tr.	John D'Antonio	NM	June 25 and 26, 2020, August 14, 2020
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Lopez 30b6 Tr.	Estevan Lopez as Witness Designated by New Mexico pursuant to Fed. R. Civ. P. 30(b)(6)	NM	September 18, 2020
Lopez [Date] Tr.	Estevan Lopez as retained expert	NM	July 6 and 7, 2020
Serrano [Date] Tr.	Ryan Serrano	NM	February 26 and April 17, 2019
Stevens [Date] Tr.	Jennifer Stephens	NM	July 27, 2020
Thacker 30b6 Tr.	Cheryl Thacker	TX	September 18, 2020

Expert Reports Cited

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Barroll [Date] Rep. & 2d ed. Supp. Reb. Rep.	Margaret Barroll	NM	October 31, 2019 Rebuttal: June 15, 2020 Supp. Rebuttal: July 15, 2020
Sullivan & Welsh Rep.	Gregory Sullivan, Heidi Welsh Spronk Water Engineers, Inc.	NM	October 31, 2019 & July 15, 2020 (revised September 15, 2020)

Other Documents

Abbreviation/short cite	Document	Date	Bates No. or Location
Compact	Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785	Signed 1938 Approved 1939	
FEIS	Continued Implementation of the 2008 Operating Agreement for the Rio Grande Project, New Mexico and Texas; Final Environmental Impact Statement	Sept. 30, 2016	Included in references to Barroll Oct. 2019 Report of Oct. 2019
JIR	Nat'l Res. Comm., Regional Planning, *Part VI--The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas, 1936-1937*	February 1938	US07121553 TX_00000561
AWRM Presentation	N.M. Interstate Stream Comm'n, Active Water Resource Management in the Lower Rio Grande: Tools for a New Era in Water Management at 7 (Aug. 19, 2005)	August 19, 2005	TX00175991

UNITED STATES OF AMERICA'S REPLY
IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

The United States' Motion for Partial Summary Judgment seeks two limited rulings: (1) a declaration that, as a party to the Rio Grande Compact ("Compact"), New Mexico has an obligation not to interfere with the deliveries of water by the Rio Grande Project ("Project") that effectuate the Compact apportionment; and (2) a ruling that an injunction should be fashioned at trial because New Mexico is violating the Compact and a declaratory judgment will not afford the United States complete relief. *See* U.S. Notice of Mot. for Partial Summ. J. (Nov. 5, 2020); U.S. Mem. in Supp. of Mot. for Partial Summ. J. ("U.S. Mem.") (Nov. 5, 2020). Both rulings requested by the United States are supported by the text of the Compact, the undisputed aspects of the historical record, and the sworn testimony of New Mexico's witnesses and experts. *See* U.S. Mem. 3-20.

New Mexico has not shown there is any disputed issue of fact precluding judgment on the United States' Motion. New Mexico spends much of its brief addressing strawman positions the United States did not take, and when it responds to the United States' actual arguments, New Mexico misses the mark. Among other things, New Mexico presents an acquiescence defense that is not available against the United States and would fail as a matter of law in any event. New Mexico's concerns about the effect of an injunction on its citizens go to the scope of injunctive relief and can be addressed at a later stage of the case. New Mexico's contention that the 2008 Operating Agreement negates its Compact obligations shows that a judgment declaring those obligations will not suffice to compel New Mexico's compliance.

For the reasons previously stated and those presented below, the United States' Motion for Partial Summary Judgment should be granted.

SUMMARY OF ARGUMENT

As a party to the Compact, New Mexico has an obligation to prohibit water uses that intercept or interfere with Project deliveries that effectuate the Compact apportionment. This obligation flows from the text of the Compact. Because New Mexico must "deliver" water to the Project so that it can be "usable" to meet irrigation demands, New Mexico may not exercise its regulatory authority in ways that undo the delivery of the water or render it less "usable." *See* U.S. Mem. at 24-25, 29. In its response brief, New Mexico does not address the United States' textual argument in any meaningful way; New Mexico refers only to its separate response to Texas's arguments, which are different. *See* M. Resp. to U.S. Mot. for Partial Summ. J. ("N.M. Resp.") 19. New Mexico also argues that disputed issues of fact preclude a judgment that the Compact prohibits groundwater pumping "*per se*," *id.* at 17, but that is not the judgment the United States is seeking. The United States contends that the Compact prohibits interference with the operation of the Project. New Mexico has not identified any evidence suggesting that the Compacting States intended to allow groundwater to be developed to an extent that it interferes with the Project's ability to effectuate the intended apportionment and effectively changes what the apportionment is.

Because it may not allow interference with Project deliveries, New Mexico has an obligation to administer, and limit, groundwater use in the Rincon and Mesilla Valleys to ensure that surface water depletions do not exceed the amount the Elephant Butte Irrigation District ("EBID") is entitled to receive under its contract with the Project. *See* U.S. Mem. 31. New Mexico cites no textual basis or legal authority for a different conclusion. Confirming that New Mexico may not take more than EBID is authorized to receive would not impermissibly transform New Mexico's "delivery" requirement into a "depletion" or "inflow-outflow" standard, as New Mexico suggests. Nor would it run counter to state law. Contrary to New

Mexico's representations, N.M. Resp. 30-31, the adjudication court held that the Project's "surface water right" includes return flows that include some water flowing through the groundwater system, NM-EX-535, at 5 (TX_00175947)—and the adjudication court did *not* hold that groundwater users within EBID have a right to take that water away from the Project surface water supply. *See* NM-EX-541, at 9 (NM_00082206).

New Mexico's allegations about the "course of performance" and "acquiescence" of federal Project managers are also irrelevant. *See* N.M. Resp. 23-29, 34-35. The United States cannot be held to have forfeited its rights through the action or inaction of federal officials who lack authority from Congress to make those decisions. *See United States v. California*, 332 U.S. 19, 39 (1947), *supplemented by* 332 U.S. 804 (1947). Even if that defense were available, New Mexico has not identified legally relevant acts of prescription and acquiescence on the part of the United States that satisfy the elements of the defense. In sum, New Mexico has no legal basis for its position that it may authorize water users to pump groundwater without regard to the associated depletions of the Rio Grande and the Project's return flows, so long as Texas receives 43% of what remains. The United States is entitled to judgment as a matter of law that New Mexico may not deplete the surface waters of the Rio Grande in excess of EBID's contractual entitlement to Project water.[1]

The United States is also entitled to a ruling that an injunctive remedy is appropriate, to be determined at trial. The United States showed that a declaration of New Mexico's legal obligations will not be adequate to prevent ongoing irreparable injury to federal interests. *See* U.S. Mem. 32-39. New Mexico cannot genuinely dispute that groundwater pumping in the

[1] New Mexico notes that there may be "limited pre-Project water rights" that are part of its apportionment. N.M. Resp. 4. The United States does not object to the addition of a qualification in the judgment along these lines.

Rincon and Mesilla Valleys interferes with Project deliveries, and that the effect was particularly pronounced in the early 2000s. *See, e.g.*, Barroll 8/7/20 Tr. 182-186; Barroll Suppl. Rebuttal Rep. "Second Edition" ("Barroll 2d ed. Suppl. Reb. Rep."), NM-EX-103, at 4-9. New Mexico also admits that it has been unwilling to implement regulations necessary to fulfill its Compact obligations because of its opposition to the 2008 Operating Agreement. *See* N.M. Resp. 9 (response to Statement of Material Fact ("SMF") No. 79); Second Decl. of John R. D'Antonio ("2d D'Antonio Decl."), ¶¶ 46-48, NM-EX-007, at 16. That admission suffices to show that a declaration will not be adequate on its own to protect the Project and the United States' treaty obligation. By declining to take any additional regulatory step to limit the impacts of groundwater pumping, New Mexico is knowingly exposing the United States to a substantial risk of injury, and equitable remedies are warranted. *See Kansas v. Nebraska*, 574 U.S. 445, 461 (2015). The balance of the equities and public interest also favor an injunction and can be considered in determining the scope of an injunction at trial.

New Mexico's responses to the United States' Statements of Undisputed Material Facts are addressed at the end of this Reply. These responses do not show there is any disputed issue of material fact for trial precluding judgment as a matter of law.

ARGUMENT

I. The United States is Entitled to Judgment as a Matter of Law Declaring New Mexico's Obligation to Protect the Operation of the Project below Elephant Butte.

As a party to the Compact, New Mexico has an obligation to administer water use within its borders to prevent interference with the Project's effectuation of the Compact apportionment below Elephant Butte. *See* U.S. Mem. 23-26.[2] The United States seeks a declaration of that

[2] This reply concerns only the waters below Elephant Butte. All statements herein should be construed to be subject to that limitation unless noted.

obligation as a matter of law because it is based on the text of the Compact and there are no issues of fact for trial that prevent entry of that declaration on summary judgment. *See id.* at 27-30. New Mexico fails to articulate or support any competing interpretation, and its attempt to manufacture a dispute is based on a misrepresentation of the United States' argument.

A. New Mexico may not permit water uses that interfere with the operation of the Project.

New Mexico's obligation to "deliver" water to the Project under Article IV of the Compact means that New Mexico must yield control of that water to the Project for distribution, subject to New Mexico's continuing authority to ensure the Project's distribution of water within New Mexico is consistent with state law. *See* U.S. Mem. 27-28. For example, New Mexico may properly require Reclamation and EBID to obtain authorization for a new point of diversion for Project deliveries according to state-law procedures. But New Mexico's obligation to "deliver" water to the Project means New Mexico may not authorize the diversion of Project water by entities other than Reclamation and EBID. *See* Lopez 30b6 Tr. 25:23-26:10 (testifying that there is no other apportionment of water to New Mexico below Elephant Butte other than the water to which EBID is entitled under its contract); *id.* at 31:21-32:8 (stating that New Mexico requires offsets for "non-project" uses); *see also* Part III, *infra* (response to SMF Nos. 14, 36-38). The Compact requires New Mexico to prevent water uses that have the effect of undoing its "delivery" of water to the Project, or that render the delivered water less "usable" to meet irrigation demands in the Project area. *See* U.S. Mem. 27 (discussing Article IV and Article I(*l*)). Indeed, the water must remain "usable" in the form of return flows in order to effectuate the Compact apportionment. *See id.* at 28-29.

New Mexico accepts the general outline of the United States' argument. New Mexico agrees that it "may not exercise its authority over water rights . . . in a way that is inconsistent

with the Compact." N.M. Resp. to Tex. Mot. for Partial Summ. J. 25 ("N.M. Resp.-Tex.") (citing *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938)). New Mexico also agrees that the Compact was intended to effectuate an apportionment below Elephant Butte, and that the Compact incorporates the operation of the Project to effectuate the intended apportionment. *See, e.g.*, N.M. Resp. 35. From those premises, it follows that New Mexico "may not exercise its authority over water rights. . . . in a way that is inconsistent with" the effectuation of the apportionment by the Project, N.M. Resp.-Tex 25. Instead, New Mexico must administer state law to prevent water use in New Mexico from intercepting or interfering with Project deliveries.

New Mexico's opposition to the declaration requested by the United States is based on an incorrect view about what the declaration would say. For example, New Mexico devotes many pages to refuting the "assertion that groundwater use is prohibited by the Compact," N.M. Resp. 17, when that is not what the United States asserted. The United States contends that the Compact prohibits interception and interference with Project deliveries that effectuate the apportionment. *See* U.S. Mem. 22-23. On that basis, the United States seeks a declaration that New Mexico has an obligation to prohibit, limit, or impose conditions on water uses that were developed after the Compact, including groundwater uses, in a way that prevents or offsets such interception and interference. *See* U.S. Notice of Mot. for Partial Summ. J.; U.S. Mem. 25 (asserting that the Compact apportions Project return flows "undiminished" by post-Compact water development); *id.* at 30 ("New Mexico cannot allow anyone, anywhere to engage in groundwater pumping *that interferes with* the Project's ability to effectuate the apportionment . . ." (emphasis added)). *See also In the Matter of the Rules and Regulations Governing the Use, Control and Protection of Water Rights or both Surface and Underground Water located in the*

Rio Grande and Conejos River Basins and their Tributaries, 583 P.2d 910, 912 (Colo. 1978) (noting that the Colorado State Engineer's proposed rules for implementing the Compact addressed the "[t]imes and quantities of underground water . . . which may be placed to a beneficial use," "[c]urtailment of such times and quantities to certain days" within each calendar year, and "[e]xceptions to curtailment of underground diversion by reason of plans of augmentation"). New Mexico ignores the "interception and interference" focus of the United States' request, and misunderstands the United States' motion as seeking a categorical ban on groundwater pumping. New Mexico's arguments attacking that strawman are irrelevant to the United States' request for declaratory relief.

New Mexico similarly errs when it addresses the United States' interpretation of the term "deliver." New Mexico argues that the "plain text of the Compact refutes the United States' argument that ['deliver'] means 'relinquish,'" N.M. Resp. 19, but to support that position New Mexico cross-references its response to Texas's argument that all of the water New Mexico "deliver[s]" to the Project is apportioned to Texas. *See id.*; N.M. Resp.-Tex. 16.[3] Although the United States maintains that New Mexico must "relinquish control" of the water to the Project in order to have "deliver[ed]" it under Article IV, U.S. Mem. 27-28, the United States agrees that the Project effectuates an apportionment of some of the "deliver[ed]" water to part of New Mexico, *id.* at 22-23. *See also Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018) (referring to the equitable apportionment "to Texas and part of New Mexico"). Therefore, New Mexico's response to Texas is irrelevant to the United States' motion.

[3] New Mexico cites "§ II" of its response to Texas. N.M. Resp. 19. New Mexico's argument about the term "deliver" is in Section III, not Section II.

New Mexico provides no other textual basis for denying the United States' request for a declaration that the Compact requires New Mexico to prevent water uses that intercept and interfere with Project deliveries. New Mexico alleges that the United States defines "deliver" in a way that is not consistent with "the use of the term in the Downstream Contracts," N.M. Resp. 19, but the Downstream Contracts do not use the term "deliver" to refer the Project's obligations. The example New Mexico cites is an irrelevant subject heading referring to the "Operation and Maintenance of Storage System for Delivery of Irrigation Water." *See* N.M. Resp.-Tex. 16 (quoting NM-EX 320, at 7).[4] New Mexico also fails to address the United States' argument that the water delivered to the Project must be "usable" to the extent the Compacting States anticipated, which means the water must be available for consecutive uses in downstream portions of the Project. *See* U.S. Mem. 22-23. New Mexico must therefore administer water use to prevent uses that render the water less usable, or unusable, for Project purposes downstream. The declaration requested by the United States is tailored to the text of the Compact and consistent with its terms.

New Mexico's attempt to manufacture disputed issues of fact is also without merit. Indeed, effort argument fails at the outset because New Mexico cannot show that interpretation of the Compact presents a question of fact. Citing contract-law principles, New Mexico incorrectly characterizes the Compact as "ambiguous" on the matter of groundwater use because

[4] To the extent New Mexico is citing the Downstream Contracts to support an argument that it has the right to recapture water that is akin to the Project's right to return flows, New Mexico should be deemed to have forfeited that argument based on its failure to take exception to that aspect of the First Special Master's ruling or the current Special Master's characterization of New Mexico's position in an earlier order. *See* N.M. Exceptions to the First Interim Report 2 (filed June 9, 2017). *See also* Order dated Apr. 14, 2020, at 22 n.6, Sp. M. Docket No. 340 ("A review of New Mexico's many filings and arguments appear to show that New Mexico consistently argued that it was limited by New Mexico law, not that it was free to capture all of Texas's Project deliveries.").

the Compact does not expressly mention groundwater. N.M. Resp. 19; N.M. Resp.-Tex. 22. But the Compact unambiguously requires New Mexico to deliver water *to* the Project for distribution *by* the Project. When New Mexico takes regulatory action that displaces the Project as the distributor of the water, New Mexico is not acting in a manner consistent with the Compact. The fact that the Compact does not list all of the possible offending actions does not render it ambiguous or the interpretation of the Compact a question of fact requiring a trial.

Moreover, New Mexico's argument is too simplistic in light of other cases in which the Court determined that compacts apportioning rivers, but not specifically mentioning groundwater, governed groundwater depletions that impacted those rivers. The Pecos River Compact, 63 Stat. 159 (1949), apportions surface flows without mentioning groundwater. Yet, the Court enforced the Pecos River Compact against New Mexico for depletions caused largely by groundwater consumption. As the Court noted, "If development in New Mexico were not restricted, especially the groundwater pumping near Roswell, no water at all might reach Texas in many years." *Texas v. New Mexico*, 462 U.S. 554, 557 (1983); *see also id.* at 557-558 nn. 2, 3. When the Court entered an injunction against New Mexico to comply with the Pecos River Compact, 485 U.S. 388 (1988), the Court effectively restricted the use of groundwater in New Mexico even though the Pecos River Compact said nothing expressly about groundwater. *See also Kansas v. Colorado*, 514 U.S. 673, 693-94 (1995) (holding that post-compact well pumping in Colorado violated the Arkansas River Compact, which does not mention groundwater); First Report of the Special Master, *Kansas v. Nebraska*, No. 126, Orig., 2000 WL 35789995, at *21-*22 (rejecting "Nebraska's assertion that the [Republican River] Compact does not restrict groundwater pumping because it never mentions groundwater"), *motion to dismiss denied*, 530 U.S. 1272 (2000).

New Mexico's attempt to show disputed issues of fact also fails because it is not tailored to the United States' specific argument. New Mexico offers an account of the "negotiating history" that supposedly demonstrates that the Compacting States did not intend to prohibit all groundwater pumping below Elephant Butte. *See* N.M. Resp. 19-22. The documents cited in this account mostly come from outside the negotiation period, and they do not demonstrate what New Mexico says they do. In fact, the Joint Investigation Report, on which the Compacting States relied, states that "the chief element to be considered" in the future development of groundwater anywhere in the basin would be the "redistribution of the availability and use of present supplies and the resulting effect on the water supply of lower [downstream] major units." Joint Investigation Rep. ("JIR") 56, TX_00000629 (in U.S. Appendix). *See also* U.S. Mem. 6-7, 24-25.[5] But even if New Mexico were correct that the Compacting States expected additional groundwater development in southern New Mexico specifically, New Mexico has not cited any evidence to show that they intended for groundwater to be developed to such an extent that it interferes with the Project's ability to effectuate the apportionment they intended. New Mexico's expert historian did not express that opinion and "[didn't] have any documents to say that." Stevens Tr. 109:18-110:2. To the contrary, she testified that "the Compact protected the Rio

[5] New Mexico's account of the "negotiating history" is based on documents that do not come from the negotiations and on inadmissible hearsay. For example, New Mexico cites evidence about wells developed in the early 1900s and predictions about groundwater availability made in the 1910s, *see* N.M. Resp. 20-21, none of which bears on what the Compacting States thought about additional development occurring after 1938. New Mexico also cites the preamble to the 1939 Rules and Regulations of the Compact Commission, which states that the Compact permits each state to develop water resources "at will," subject to its Compact delivery obligations, but this generic statement cannot bear the weight New Mexico would give it. N.M. Resp. 22 (quoting NM-EX 352, at 17). The opinion of New Mexico's historian that the Compacting States knew little about groundwater but nevertheless intended to provide "a realistic path forward for future additional development," N.M. Resp. 22, is unsupported and should be disregarded. *See* U.S. Mot. to Strike.

Grande project water supply." *Id.* at 112:20-25. Although the party opposing summary judgment is entitled to reasonable inferences from the evidence, inferring that the Compacting States intended to allow groundwater pumping to an extent that would alter the means of apportionment they selected would be unreasonable, and is not supported by the evidence.

B. New Mexico may not authorize groundwater pumping in EBID, or anywhere else, that depletes the surface water of the Rio Grande.

The United States demonstrated that New Mexico's obligation to prevent interference with the Project has several specific implications for New Mexico's administration of water use that New Mexico has no basis to dispute. First, New Mexico may not allow water users outside of EBID to deplete the surface waters of the Rio Grande. Second, water users within EBID may not be permitted to deplete the surface water from the Rio Grande beyond their contractual entitlement. Third, New Mexico has an obligation to take affirmative steps to prevent those two types of depletions.

New Mexico improperly construes the United States' request for a declaration of these specific obligations as a request for an injunction compelling New Mexico to take these steps. The United States' requests for declaratory and injunctive relief in its motion are distinct. New Mexico has not shown that a declaration of these obligations is inconsistent with the text of the Compact, or that they are foreclosed on the basis of acquiescence.

1. New Mexico's obligations to prevent depletion of the Project's surface water supply are consistent with the Compact's express terms.

The Project delivers water through a surface-water system. It releases water from reservoir storage into the channel of the Rio Grande where it is carried, along with other inflows, to diversion points on the river. The Rio Grande thus acts as a source of supply for the Project as

well as the means of conveyance. The Project's delivery of surface water, through the surface-water system, effectuates the Compact apportionment.

The three specific obligations set forth by the United States are logical components of New Mexico's basic obligation to prevent interference with Project deliveries. Because the Project effectuates the apportionment, and because EBID is the only entity in New Mexico authorized to receive water from the Project, New Mexico has an obligation to prevent depletions of the surface waters of the Rio Grande by entities other than EBID. In addition, New Mexico has an obligation to ensure that EBID water users do not deplete the surface water of the Rio Grande beyond EBID's contractual entitlement, because that entitlement defines the apportionment to New Mexico. Further, New Mexico has an obligation to account for impacts to the surface water supply caused by groundwater pumping in order to enforce the other two obligations. New Mexico cannot dispute that groundwater pumping affects the surface water in the Rio Grande and the river's capacity to act as a natural carrier. New Mexico's witnesses have testified that groundwater pumping "ha[s] an impact on project operations," Barroll 8/7/20 Tr. 204:23-205:4; that it "impact[s] surface supply," Lopez 30b6 Tr. 31:15-20; and that "pumping can and does and can affect river flow." D'Antonio 6/25/20 Tr. 195:20-24. *See* Part III, *infra* (responses to SMF Nos. 6,7, 61-63). Because groundwater pumping is widespread below Elephant Butte, and in EBID in particular, it is unnecessary to determine the extent to which groundwater pumping depletes the surface water in order to conclude that New Mexico has an obligation under the Compact to track the depletions that do occur.

New Mexico fails to show that a declaration of these specific obligations is inconsistent with the Compact's express terms. Although New Mexico is correct that the Compact lacks a "depletion" clause or "inflow-outflow" requirement, N.M. Resp. 18-19, the United States is not

seeking a declaration imposing volumetric limits on depletions or setting volumetric standards for outflows. The Compact effects an apportionment through the operation of the Project, and the operation of the Project requires the use of the Rio Grande to make Project deliveries. Therefore, New Mexico has an obligation to prevent depletions of the surface water other than those pursuant to EBID's contract because such depletions interfere with the effectuation of the apportionment.

2. The definition of the Project water right under state law does not support New Mexico's position that it may authorize the interception of Project return flows by EBID groundwater pumpers.

New Mexico argues that, under the Compact, it may permit supplemental groundwater pumping within EBID, without regard for depletions to the surface water in the Rio Grande, as long as El Paso County Water Improvement District No. 1 ("EPCWID") receives an equivalent of 3.024 acre-feet/acre (in "full supply" years) or a proportionate reduced amount in years of less than "full supply." New Mexico argues that the Compact gives New Mexico discretion to ignore the effects of groundwater pumping on surface water because groundwater is not a part of the Project's water right under state law and, therefore, was not assumed to be part of the water apportioned to Texas. New Mexico is incorrect. The United States' argument is consistent with state law and does not require the Court to opine on it.

First, New Mexico's reliance on various state court decisions is misplaced. In the state-court matter known as Stream System Issue 104, the adjudication court was asked to determine whether the Project's water right was a right to surface water or to groundwater because the administrative schemes applicable to surface-water and groundwater rights are different. *See* NM-EX-535, at 4 (TX_00175946). The court concluded that the Project water right was a right to surface water because all of the Project diversions are diversions of surface water from the Rio

Grande. *Id.* at 6 (TX_00175948). But, contrary to New Mexico and certain *amicus* parties' portrayal of the decision, the court also held that the Project's water right includes return flows, which include water seeping through the ground that "retains its identity" as Project water. *Id.* at 6-7 (TX_00175948-49).[6] New Mexico's allegation that pumping does not affect the Project's water right under state law ignores the state court's conclusion that the Project water right includes some of the water in the ground.

New Mexico finds no additional support for its position in the 2011 order in Stream System Issue 101. *See* N.M. Resp. 30-31 (discussing NM-EX-541). The purpose of the proceeding was to calculate the amount of irrigation water required for the crops grown in the basin (the crop irrigation requirement, or "CIR") and the amount of water that would have to be delivered to a farm to provide that water to the crops, accounting for farm efficiency (the farm delivery requirement, or "FDR"). *See* Margaret Barroll, Rebuttal Expert Report: Revised Comparison of 2009 Farm Deliveries with Farm Delivery Requirement Calculations for the Lower Rio Grande, NM_00081951 (Apr. 2011) (in U.S. Appendix). The court's decision adopts the CIR and FDR negotiated by the State Engineer and the water users as the maximum volumes to be used by the State Engineer when evaluating surface-water rights and permits for groundwater wells. *See* NM-EX-541, at 6-7 (NM_82203-204). The decision in Stream System Issue 101 did not find that groundwater uses for irrigation existed at the time of the Compact, and it expressly disclaims any implication for the extent of the Project water right. *See id.* at 9

[6] The court did not establish a standard for determining whether water has retained, or lost, its "identity" as Project water; the court left that task to the State Engineer. NM-EX-535, at 7 (TX_00175949). The order it entered is interlocutory, and the case has been stayed in light of the proceedings in this case. NMSU's contentions that the court has "completed determination" of the Project right, and that the right does not include seepage, are all incorrect. *See* NMSU Br. 10, 18.

(NM_00082206).[7] Further, New Mexico's designated witness testified that the State's technical analysis of the CIR did not include an evaluation of historical water use at the time of the Compact. *See* Part III, *infra* (response to SMF Nos. 81-83). Instead, the State's analysis assumed the cropping pattern in 2008 had been constant since 1938, despite an undisputed shift to high-water permanent crops like pecans over that period. *See* Longworth 30b6 Tr. 159-163 (explaining that analysis used climatic data from 1938 to 2008 but treated 2008 cropping pattern as "static").

To the extent the Compact apportionment is defined by the Project's water right under state law, that apportionment includes the Project return flows, which include the seepage in the ground that retains its identity as Project water. *See Ide v. United* States, 263 U.S. 497, 505 (1924); *United States v. Tilly*, 124 F. 2d 850 (8th Cir. 1941); *Hunter v. United States*, 159 Ct. Cl. 356, 361 (1906 and 1908 notices "necessarily included the right to incidental seepage"). *See also* NM-EX-535, at 3 (TX_00175945) (holding that state law is consistent with federal decisions holding that the Project right includes return flows, including *Ide*); *id.* at 7 (TX_00175949) (comparing *Ide* with state cases). As the United States has shown in other filings, the return flows were an integral part of the water supply delivered by the Project, and that understanding informed the Compacting States' conclusion that the Compact apportionment was equitable. *See* U.S. Mem. 22-25; U.S. Mem. in Resp. to N.M. Mots. for Summ. J. 14-15 ("U.S. Resp. to N.M. Mots."); *see* Part III, *infra* (response to SMF No. 23). The Compact thus,

[7] The United States' claims are not a "collateral attack" on the Final Judgment in Stream System Issue 101. *See* Amicus Br. of N.M. Pecan Growers & Southern Rio Grande Diversified Crop Farmers Ass'n 10-11 ("Growers' Br."). The United States' concern in this action is the subsequent implementation of the judgment in the permitting and enforcement context, without due regard for the impacts on the Project or the effectuation of the Compact apportionment. *See* Serrano Decl., NM-EX-110, at 4, ¶ 13b, *id.* at 8, ¶ 22; Thacker 30b6 Tr. 44-48, 75-77.

in effect, apportions as between New Mexico and Texas the Project return flows that would be available for use by the Project in the absence of impacts from post-Compact water development. Therefore, New Mexico may not authorize groundwater pumping that results in depletion of the seepage in the ground that retains its identity as Project water, or interference with the return of that water to the Rio Grande. [8] Because there is no question that groundwater pumping within New Mexico has this effect, New Mexico has an obligation to administer groundwater uses to prevent those depletions from occurring.

New Mexico and some its supporting *amici* contend that any quarrel Reclamation has with groundwater pumping is a purely "intrastate" issue that can resolved under state law unless Texas is not getting its share of the apportionment, as New Mexico defines it. N.M. Resp. 16; Amicus Br. of N.M. State Univ. ("NMSU Br") 4-5. These arguments assume New Mexico's premise that the Compact apportionment to Texas can be quantified in bare percentage terms, which is not correct, *see* U.S. Resp. to N.M. Mots. 5-8. The distribution of water by the Project effectuates the apportionment and the treaty obligation to Mexico. Therefore, New Mexico has an obligation to exercise state law, *including* priority administration, to ensure the Project can fulfill those purposes. As shown below, New Mexico has not demonstrated that it has implemented that obligation as it should. *See* Part II.B, *infra*.

[8] New Mexico and some *amici* incorrectly characterize the United States' position as seeking the same "1938 Condition" as Texas. *See* Growers' Br. 7-9. The United States does not contend that that the Compact requires particular volumetric quantities of water to be achieved. Nothing in reclamation law or the Compact forbids improvements in irrigation efficiency, even if those improvements might reduce the volume of water that returns to the drains. Nor has the United States suggested that the Compact fixes cropping patterns as they were in 1938.

3. Post-Compact developments do not alter New Mexico's legal obligations under the Compact.

New Mexico's argument that the United States' conduct from 1951 to 2006 constitutes a "course of performance" or "acquiescence" to widespread groundwater pumping within EBID is entirely off the mark. Neither of these doctrines is applicable to the United States' claims, and New Mexico has not shown that the conduct of Reclamation field officials constitutes relevant evidence of the intent of Congress when it approved the Compact.

a. Course of Performance

New Mexico first contends that the parties' "course of performance" shows that the States understood the Compact to allow groundwater pumping "supplemental" to Project deliveries. N.M. Resp. 23-29. New Mexico's theory is unavailing. Because the Compact is a statute, the parties' performance cannot alter its meaning. *Kansas v. Colorado*, 514 U.S. at 690. Therefore, the States cannot by their conduct establish a method of apportionment other than the method identified in the Compact, *i.e.*, distribution by the Project. Here, in any event, the United States cannot be said to "perform" under the Compact because it is not a party to the Compact. Moreover, even if Reclamation's conduct could be used to inform the interpretation of the Compact, the earliest conduct New Mexico cites here – Reclamation's alleged encouragement of pumping during water-short times in the early 1950s – sheds no light on the intent of the Compacting States the decade before, or the intention of Congress when it approved the Compact.

b. Acquiescence

New Mexico's "acquiescence" argument fares no better. Prescription and acquiescence is an affirmative defense to allegations of title and jurisdiction. *See generally* 81A Corpus Juris Secundum States § 17. When the defense is asserted in disputes between states, "jurisdiction

may be obtained by one through prescriptive action at the other's expense, over the course of a substantial period, during which the latter has acquiesced in the impositions upon it." *New Jersey v. New York*, 523 U.S. 767, 786 (1998). New Mexico cites no authority for invoking acquiescence as a defense to claims by the United States that seek to enforce the terms of an interstate compact approved by Congress.

The Supreme Court rejected an argument similar to New Mexico's in *United States v. California*, 332 U.S. 19 (1947). There, California asserted that it had regulatory authority over submerged coastal areas owned by the United States because federal officials had failed to protest the State's exercise of that authority in various ways over the preceding decades. The Court explained that "the Government, which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property." *Id.* at 40. The Court specifically rejected California's allegation that the inaction of federal officials was a basis for title. "[O]fficers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act." *Id.* Although *United States v. California* has been superseded by statutes applicable to coastal lands, the fundamental principle still holds that the sovereign interests of the United States cannot be forfeited by the actions, or inaction, of federal officials who lack authority to cede those interests. *See, e.g., United States v. Summerlin*, 310 U.S. 414, 416 (1940) (it is "well settled that the United States is not . . . subject to the defense of laches in enforcing its rights"); *Sweeten v. United States Dep't of Agric.*, 684 F.2d 679, 682 (10th Cir. 1982) (holding that acquiescence is unavailable against the United States in actions to quiet title to real property

under the Quiet Title Act). *See also, e.g.*, 28 U.S.C. § 2409a(n) (precluding assertion of adverse possession against federal government in actions to quiet title).

These principles bar New Mexico's acquiescence defense against the United States' claims.[9] The Compact protects the ongoing operation of the Project and the United States' treaty obligation to Mexico. New Mexico is arguing that federal authority to enforce the Compact against interfering groundwater uses has been forfeited by the conduct of Reclamation field managers. N.M. Resp. 23-29, 32-33. New Mexico's argument is analogous to the argument that the Court rejected in *United States v. California.* New Mexico's argument similarly fails because it has not shown that those officials had authority to forfeit the interests of the United States.

c. New Mexico fails to demonstrate the elements of prescription and acquiescence.

New Mexico's acquiescence argument also fails as a matter of law because New Mexico has not identified conduct that satisfies the elements of the defense. Acquiescence requires proof of an affirmative act of prescription by one sovereign, and a long period of acquiescence by the affirmative acts of the other over many decades. *See New Jersey v. New York*, 523 U.S. 767, 786-87 (1998); *see also Virginia v. Maryland*, 540 U.S. 56, 76-77 (2003). New Mexico's allegations do not fit the required sequence. New Mexico contends that Project officials acquiesced to groundwater pumping below Elephant Butte because they were aware of it, and encouraged it, during the drought of the 1950s. N.M. Resp. 32-33. But that conduct does not show acquiescence to any exercise of jurisdiction and prescription by the State of New Mexico.

[9] Federal title to the land at issue in a boundary dispute does not preclude the defense of acquiescence in claims between States. *See Arkansas v. Tennessee*, 310 U.S. 563, 571-72 (1940) (holding that defense of prescription was available in boundary dispute, notwithstanding federal ownership of land, because no claim was asserted against the United States); *New Jersey v. New York*, 523 U.S. at 791.

Until 1980, water users could drill wells and pump groundwater below Elephant Butte without seeking a permit from New Mexico's State Engineer. *See* U.S. Mem. 11-12 & nn. 50-52; *see also* N.M. Resp. 5 (response to SMF 50, 52). The well-drilling that occurred in the 1950s was not the result of regulatory action by New Mexico. In fact, New Mexico appears to disclaim that it even had the power to exercise regulatory authority over water use within the Project area during this period. *See* 2d D'Antonio Decl. ¶ 55, NM-EX-007, at 18 ("While the Project was administered by Reclamation as one unit"—by which New Mexico means 1951 to 1978—"the State Engineer did not need to exercise groundwater permitting jurisdiction."). The conduct of Reclamation officials in the 1950s does not constitute acquiescence because New Mexico's lack of regulatory action over groundwater is not evidence of prescription.

New Mexico's argument about the D2 Curve is subject to the same fatal flaw. The D2 Curve was derived in the 1980s in connection with a draft operating agreement between the Districts and Reclamation that was never signed. *See* NM-EX-403; U.S. Mem. 11. New Mexico is correct that the values on the D2 Curve reflect the influence of groundwater pumping on Project deliveries from 1951 to 1978. N.M. Resp. 28-29. *See* U.S. Resp. to N.M. Mots. 20-22. New Mexico is also correct that Reclamation officials considered the D2 Curve when determining the allocations to be made to the Districts from the 1980s to at least 2006. N.M. Resp. 34; U.S. Mem. 14-15. *See also* Part III, *infra* (response to SMF Nos. 69, 70). But neither of those facts demonstrates an affirmative act of acquiescence on the part of the United States to a prescriptive action by New Mexico. The groundwater pumping that developed during the D2 period occurred in the *absence* of regulatory action by New Mexico. Therefore, Project managers' use of the D2 Curve does not show acquiescence to any prescriptive action by New Mexico. Moreover, Project officials did not take any step to formalize the use of the D2 Curve

in making Project allocations until 2006. *New Jersey v. New York*, 523 U.S. at 787 (1998) (holding that the proponent of an acquiescence defense must present "direct evidence" of the opponent's knowledge of the prescriptive acts "or evidence of such open, notorious, visible, and uninterrupted adverse acts that . . . knowledge and acquiescence may be presumed.").

The incorporation of the D2 Curve into the allocation equation in the Operating Agreement in 2008 also fails to demonstrate acquiescence to New Mexico's exercises of permitting authority after 1980. Even if New Mexico's permitting activity qualifies as an act of prescription, which it has not demonstrated, New Mexico cannot show a "long period" of acquiescence by the United States to activities commencing in 1980s. *Virginia v. Maryland*, 540 U.S. at 72, 76 (citation omitted) (concluding that the minimum period for a showing of acquiescence "must be substantial."). In the context of property disputes between two sovereigns, the shortest period of time the Court has recognized for a defense of prescription and acquiescence is 41 years. *See Nebraska v Wyoming*, 507 U.S. 584, 594-95 (1993). *See Virginia v. Maryland*, 540 U.S. at 77 (stating that it was "far from clear" that a prescriptive period of 32 to 43 years was sufficient); *New Jersey*, 523 U.S. at 789 (noting that a prescriptive period of 64 years is "not insufficient as a matter of general law"). The span of time between 1980 and the filing of the United States' complaint in 2014 is 34 years. The only affirmative act cited by New Mexico in this time period is the adoption of the 2008 Operating Agreement, which incorporates the D2 Curve in the Project allocation methodology. The use of the D2 Curve is not an act of acquiescence of regulatory authority. It represents an attempt by Reclamation to translate its earlier process of delivery to lands into a method for allocating water to the Districts. The use of D2 is a use of the best information available about past performance, not an acquiescence to an interpretation of the Compact about the extent of groundwater pumping that is permissible.

In general, the 2008 Operating Agreement reflects opposition to New Mexico's interpretation, not acquiescence to it. As described elsewhere, the Operating Agreement was implemented after a dry period where groundwater pumping in New Mexico intensified and, by New Mexico's calculation, depleted the Project's allocation to the Districts by more than 200,000 acre-feet over a three-year period. *See* U.S. Mem. 14 & n. 65 (and sources cited therein); *see also* Part III, *infra* (response to SMF No. 65). Under the Agreement, EBID foregoes diversion of some of the amount it is allocated in order to make up for impacts to Project surface water supply, and deliveries to EPCWID, caused by groundwater pumping within New Mexico. The Operating Agreement thus reflects the United States' view that the surface water lost as a result of groundwater pumping must be counted against New Mexico's apportionment if the pumping is not curtailed.

New Mexico's arguments about *inaction* by the United States are also unavailing. *See Georgia v. South Carolina*, 497 U.S. 376, 393 (1990) (noting that "inaction alone may constitute acquiescence when it continues for a sufficiently long period."). New Mexico has not shown inaction by the United States constituting acquiescence. Groundwater permitting by New Mexico began in the early 1980s, and EBID initiated an action to adjudicate its water right in 1986. The adjudication of water rights in the Lower Rio Grande did not commence in earnest until 1996, after resolution of an intervening decade of jurisdictional disputes, including some raised by the State Engineer. *See United States v. City of Las Cruces*, 289 F.3d 1170, 1177-78 (10th Cir. 2002). The United States has participated in the adjudication, and it has opposed arguments that the Project water right does not include any water in the ground.

New Mexico's course of performance and acquiescence arguments are not available against the United States and fail as a matter of law for other independent reasons. These

arguments are fundamentally equitable in nature and should be reserved for the phase of this case where the equities are at issue. They have no relevance to the interpretation of the Compact, as New Mexico appears to agree elsewhere. *See, e.g.*, N.M. Resp. Tex. 41 ("The Court has turned back arguments in other interstate compact enforcement cases that the Court should use equities to alter or adjust the plain language of a compact"). New Mexico has not shown there is a disputed issue of fact precluding summary judgment on the United States' request for a declaration that New Mexico has an obligation under the Compact to prevent water uses that intercept or interfere with Project deliveries.

4. New Mexico has a duty to account for depletions of surface water below Elephant Butte.

New Mexico's obligation to prevent interference with the Project entails an obligation to account for depletions to the surface-water supply against its Compact apportionment so that those depletions can be stopped once EBID's contractual entitlement has been met. *See* U.S. Mem. 31. New Mexico disagrees that it has any obligation relating to surface-water depletions, but it does not dispute that a necessary incident to that obligation would be a duty to account. *See* N.M. Resp. 64.[10] The Compact requires New Mexico to regulate its water users to prevent interference with the Project's effectuation of the apportionment. The United States is entitled to a declaration that New Mexico must administer state law subject to that obligation.

II. The United States is Entitled to a Ruling that Equitable Relief is Warranted.

New Mexico misunderstands the United States' motion as it pertains to injunctive relief. The United States has not moved for summary judgment imposing an injunction, or for a

[10] New Mexico's allegation that the United States engages in "disparate treatment" of Texas and New Mexico is irrelevant and incorrect. *See* N.M. Resp. 62. The United States does not dispute that an accounting obligation could extend to groundwater pumping in Texas to the extent pumping in Texas interferes with Project operations, but groundwater pumping in Texas is not the subject of the United States' claims in this action.

preliminary injunction. Rather, the United States seeks a ruling that an injunction is warranted, with the scope to be determined at trial, because a declaration of New Mexico's Compact obligations will not on its own provide the United States with adequate relief. Such a ruling is not inconsistent with the terms of the Compact and would streamline the trial on the United States' claims. New Mexico's defense of its administrative system and presentation of equities can be preserved for that trial. The basic points emphasized by the United States are not disputed, or cannot be genuinely disputed by New Mexico's late proffer of evidence.

A. New Mexico is not administering state law in compliance with its Compact obligation to prevent interference with the Project.

New Mexico has not complied with its Compact obligation because it has authorized groundwater pumping to an extent that depletes the surface waters that the Project uses to effectuate the apportionment. It is undisputed that groundwater pumping in New Mexico, which benefits some New Mexico water users, reduces the amount of water the Project can deliver to other New Mexico water users and water users in Texas. *See, e.g.*, Barroll Oct. 2019 Rep., NM-EX-100, at 55 (lower groundwater levels caused by pumping "reduce the amount of water available for diversion within the Project"); 2d Barroll Decl ¶ 52, NM-EX-006, at 22 (stating that groundwater pumping in New Mexico and to Texas intercepts Project return flows and reduces the amount of water in drains); *see also* Part III, *infra* (response to SMF Nos. 61-67). Although the extent of the effect on the Project may be subject to dispute in some contexts, the risk of substantial distortions in Project operations is established, even using New Mexico's modeling.

To take one example, New Mexico's expert concluded that had all New Mexico groundwater pumping been "turned off," the total Project allocation to the districts would have been greater during the water-short years of 2003-2005 and more water would have been diverted by both Districts over that period. *See* Barroll 2d ed. Suppl. Reb. Rep., NM-EX-103, at

9. Specifically, New Mexico's modeling showed that EPCWID could have diverted 86,000 acre-feet more over this period, and EBID could have diverted 167,000 acre-feet more. *See id.* Thus, New Mexico cannot genuinely dispute that it deprived the Project of the benefit of additional water in that period. *See* Barroll 8/7/20 Tr. 186-187 (agreeing that New Mexico's models show that "cessation of groundwater pumping would have benefitted the project"). *See also* N.M. Resp.-Tex. 30 (acknowledging that "Texas might have a claim to injury" in 2003 and 2004).[11]

New Mexico also has no basis to dispute that groundwater pumping has been affecting Project surface water deliveries for decades. Its own expert witnesses found that "[o]n average, groundwater pumping in New Mexico reduced Project diversions by over 60,000 acre-feet annually between 1951 and 2017." U.S. Mem. 13 (SMF No. 63, citing Sullivan & Welsh Sept. 2020 Rep., NM-EX-123, at 119). Indeed, in its "course of performance" argument, New Mexico acknowledges that the D2 Curve reflects the influence of groundwater pumping on the Project's surface water deliveries. *See* N.M. Resp. 28-29 ("the allocations that the D2 methodology produces reflects the impact on Project supply of all groundwater pumping that occurred through the years 1951 to 1978"). New Mexico must also acknowledge that the effect of groundwater pumping on the surface water supply has gotten worse since the "D2 period" of 1951 to 1978, as reflected in the "Diversion Ratio" that Reclamation uses under the Operating Agreement. *See* N.M. Resp. 13-14 ("all reductions attributable to actions since 1978" are reflected in Diversion Ratio); Barroll Oct. 2019 Rep. at 53-54 (explaining that "[d]ecreased recharge and increased

[11] The United States cites the New Mexico modeling analysis to demonstrate that New Mexico cannot genuinely dispute that pumping interferes with the Project's water supply and deliveries. The United States does not concede that the model is sufficiently reliable to establish New Mexico's factual allegations concerning the Operating Agreement. *See* U.S. Resp. to N.M. Consolidated Statement of Material Facts. The United States has also proposed amendments to SMF Nos. 61-67 to clarify the modeling assumption and to update the numbers to those in Dr. Barroll's September 15, 2020 version of her Supplemental Rebuttal Report. *See* Part III, *infra*.

depletions" from pumping account contribute to "negative departure" from D2 Curve). There is no genuine dispute of fact on this point.

New Mexico's other attempts to identify disputed issues of fact also fail. For example, New Mexico identifies a number of the United States factual allegations as "disputed" because the effect of groundwater pumping is a matter for "expert analysis," when the basis for each allegation in question was testimony from New Mexico's experts. *See* Part III, *infra* (responses to SMF Nos. 7, 62, 63, 67). In some instances, New Mexico's "disputes" actually prove the United States' point, as when New Mexico proffers a fact showing that there are *more* irrigation wells than stated in the motion. *See id.* (reply regarding SMF No. 53).

Groundwater pumping in New Mexico can and does deplete the surface waters in the Rio Grande that the Project delivers to effectuate the Compact apportionment. New Mexico has not fulfilled its Compact obligation because it administers state law to promote those depletions, not to prohibit them.

B. Declaratory judgment will not afford the United States complete relief.

A declaration will not be adequate to provide complete relief because New Mexico lacks a regulatory system capable of enjoining offending water uses in a timely manner, and because New Mexico has already issued hundreds of permits that authorize its water users to pump groundwater to an extent that necessarily reduces the surface water supply available to the Project. *See* U.S. Mem. 36-39.

New Mexico's failed attempt to promulgate "district-specific regulations" ("DSRs") for the Lower Rio Grande suffices to demonstrate that a declaration of obligations alone will not bring about timely compliance with the Compact. *See* U.S. Mem. 16-17, 39; N.M. Resp. 8-9. The sequence of events is undisputed: After the shortages in the early 2000s, the State Engineer promulgated the Adaptive Water Resources Management ("AWRM") Framework Regulations

and later proposed DSRs under those regulations to establish specific procedures for administering water in the Lower Rio Grande, including procedures for priority enforcement of the Project water right under state law. *See* NM-EX-538, at 20-24. The State Engineer publicized the DSR effort as "imperative," citing the "urgent need" for administrative measures to prevent Compact violations and the possibility of equitable remedies. *See* AWRM Presentation (2005), at 10-12 (TX_00176000-02) (in U.S. Appendix). Yet, within a couple of years, the State Engineer abandoned the effort and "turned [his] attention" to fighting the Operating Agreement. N.M. Resp. 9 (response to SMF No. 79).

New Mexico denies any responsibility for failing to promulgate the DSRs. In New Mexico's view, the fault lies with Reclamation because of the 2008 Operating Agreement. *See* N.M. Resp. 9 (responses to SMF No. 79). According to the State Engineer, "[n]o further productive work . . . could be done" on the DSRs until "issues" with the Operating Agreement "were studied and addressed." 2d D'Antonio Decl. ¶ 48, NM-EX-007, at 16. But neither he nor New Mexico shows why that would be the case. The draft DSRs were procedural and administrative in nature, including metering and reporting requirements, plans for repayment of illegally diverted water, procedures for enforcement and appeal, and so on. *See* NM-EX-538, at 2 (table of contents). Nothing in the Operating Agreement prevented New Mexico from promulgating procedures for administration or rendered the urgent need for such regulations obsolete.

In fact, New Mexico's characterization of the Operating Agreement supports the United States' claim for equitable relief. New Mexico and its witnesses consistently allege that the Operating Agreement "forces" the farmers in EBID to pump more groundwater. *See, e.g.*, N.M. Resp. 14 (reduced surface water delivery to EBID "forces New Mexico farmers to pump

additional groundwater"); 2d Barroll Decl., ¶ 62, NM-EX-006, at 25-26 ("the 2008 Operating Agreement forces EBID members to pump additional groundwater"); 2d D'Antonio Decl. ¶ 49, NM-EX-007, at 16 ("New Mexico farmers were forced to increase their groundwater use" after the agreement). This allegation was also made throughout discovery. *See, e.g.*, D'Antonio 6/25/20 Tr. 190:2-10 (the Operating Agreement "is forcing New Mexico to pump much greater amounts of groundwater"). But the allegation is false. The Operating Agreement does not contain any provision that "forces" farmers to pump more groundwater. What New Mexico means is that rather than limit pumping to ameliorate the impacts on Project surface-water deliveries, the EBID irrigators chose to forego some of the surface water in order to protect the deliveries to EPCWID, then engaged in additional groundwater pumping to make up the difference. *See* N.M. Resp. 47-48; *see also* NM-EX-118 (showing that EBID farmers have an "increased need for groundwater pumping to meet irrigation demand" as its allocation is reduced). The State has given its blessing to this practice by giving EBID irrigators a maximum groundwater volume equivalent to the basin-wide farm delivery requirement without more particularized analysis of historical use. *See* NM-EX-541; U.S. Mem. 37; Part I.B.2, *supra*. The EBID irrigators took the opportunity the State gave them, pumping in excess of 250,000 acre-feet in some years. *See* Sullivan & Welsh Rep. (rev'd July 15, 2020), NM-EX-122, at 204. The Operating Agreement did not force the State Engineer to agree to the permit volumes that he did.

New Mexico's failure to accept any responsibility for increases in groundwater pumping after the Operating Agreement signifies a reluctance to act that has been found to support equitable intervention by the Court. In *Kansas v. Nebraska*, 574 U.S. 445 (2015), the Supreme Court held that Kansas was entitled to an equitable remedy for Nebraska's violation of the Republican River Compact—in that case, disgorgement—because Nebraska had acted with

"reckless indifference" to its Compact obligations. *Id.*at 461. The Supreme Court cited the Special Master's findings that "Nebraska's compliance efforts were . . . 'reluctant,' showing a disinclination 'to take [the] firm action' necessary" and that Nebraska had "knowingly exposed Kansas to a substantial risk it would receive less water than the Compact provided." *Id.* at 460 (internal quotation marks omitted). Through its inaction, New Mexico has demonstrated the same disregard and indifference to its obligations, as evidenced by its abandonment of its draft DSRs and its denial of responsibility for increased groundwater pumping occurring under state-administered permits.

New Mexico has knowingly exposed the United States to a substantial risk of Compact violations that affect significant federal interests. Although New Mexico recognizes that the Compact imposes "limits" on how New Mexico exercises its authority over water use, N.M. Resp.-Tex. 26, New Mexico does not accept any of the limits demonstrated by the United States or Texas, and it has not identified any others that constrain its exercise of authority. Because New Mexico has demonstrated indifference to its Compact obligations, the United States is entitled to a ruling that a declaration of those obligations will be inadequate to afford the United States complete relief.

C. The United States has demonstrated a threat of irreparable harm sufficient to justify the entry of equitable remedies.

As noted, the United States is not asking for entry of an injunction before the end of trial. Rather, the United States at this time is seeking only a ruling that an equitable remedy is warranted and should be crafted through the development of a record at trial.

The United States has demonstrated that New Mexico's failure to comply with its Compact obligations is causing irreparable injury to federal interests, or threatens to cause irreparable injury in the near future. As shown above, groundwater pumping in New Mexico in

the early 2000s significantly reduced the amount of water the Project was able to allocate to the Districts, during a period when allocations were generally very low to begin with. *See* Part III, *infra* (responses to SMF Nos. 65-67). Even under the Operating Agreement, increases in groundwater pumping in conjunction with climatic conditions could lead to a Diversion Ratio so low that at some point the Project could be unable to deliver any water to EPCWID and Mexico, even if EBID is taking no surface water at all.[12] New Mexico wrongly contends that the United States cannot be injured unless Texas is injured, N.M. Resp. 45, ignoring that the United States has distinct federal interests in the operation of the Project, including the federal contracts and the federal treaty obligation to Mexico. *See Texas v. New Mexico*, 138 S. Ct. at 959-60. *See also* N.M. Mot. for Partial J. on Matters Previously Decided 2-3, Sp. M. Docket No. 165 (seeking an order declaring that "[a] breach of the Compact, if proven, could jeopardize the government's ability to satisfy its treaty obligations to New Mexico").[13] New Mexico's characterizations about the lack of injury in "full supply" years are also unsupported, for the reasons stated in the United States' response to New Mexico's motion on that issue. *See* U.S. Resp. to N.M. Mots. 20-22.

New Mexico argues that an equitable remedy would be "redundant and unjustified" because the Operating Agreement has reduced the amount of water allocated to EBID. N.M.

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[12] As of January 20, 2021, Reclamation was forecasting an allocation of "zero" to the districts and Mexico for 2021 based on low levels of reservoir storage, predicted reservoir inflows, and anticipated losses from the Rio Grande due to climatic conditions and groundwater pumping. *See* Presentation from Rio Grande Project "1906 Meeting" (Jan. 20, 2021), at https://www.usbr.gov/uc/DocLibrary/Publications/20210120-RioGrandeProject1906Meeting-Presentation-508-AAO.pdf

[13] In recognizing that the United States is "seeking substantially the same relief" as Texas, the Court did not limit the United States' remedies to those sought by Texas, *contra* NMSU Br. 11-12. *See* Order dated Apr. 14, 2020, at 16-17, Sp. M. Docket No. 340 (recognizing that "there is some divergence as to the precise contours of some of the issues and the relief sought," but the "United States does not presently appear to be attempting to enlarge the case"). The United States proposed judgment is consistent with the allegations and prayer for relief in the United States' Complaint in Intervention.

Resp. 15. But New Mexico has sued to invalidate the Operating Agreement in federal district court, and it attempted, albeit unsuccessfully, to litigate a similar counterclaim in this action. *See* Order dated Mar. 31, 2020, at 28-29, Sp. M. Docket No. 338. As long as New Mexico is pursuing claims to set aside the Operating Agreement, New Mexico cannot demonstrate that the Operating Agreement provides adequate prospective relief.

New Mexico also fails to show that it has a priority administration system in place that will adequately address the United States' concerns, which include fulfilling the treaty obligation to Mexico. *See* Part III, *infra* (response to SMF Nos. 94-96). First, recourse to priority administration appears to be contrary to the State's policy. One of New Mexico's designated witnesses testified that the State views priority administration as a "nuclear option" that the State Engineer will consider only if adaptive-management tools fail. *See* Thacker 30b6 Tr. 76:2-4, NM-EX-235. There has never been a priority call in the Lower Rio Grande district, and, therefore, State Engineer has no past experience to demonstrate how such a call would be addressed. *See* 2d D'Antonio Decl. ¶ 53, NM-EX-007, at 17-18. Without DSRs, he also has no specific regulations to cite. It is therefore unsurprising that New Mexico's designated witnesses testified that they did not know how New Mexico would implement a call by the United States or a complaint from Texas, and that it could take months to investigate the validity of such a call or complaint. *See* U.S. Mem. 35-36.

The new exhibits supplied by New Mexico to elaborate on the testimony offer no additional comfort. Dr. Barroll now states that "New Mexico would act in a matter of days" if a call is "made to alleviate an immediate shortfall of water to Texas, so that Texas is not receiving its Compact apportionment." Barroll Errata Sheet for 10/21/20 Tr. 47:9, NM-EX-226 at 9. But for a call by the Project "to address deficits in project performance or efficiency," New Mexico

would need to do "a more comprehensive analysis." *Id.* In his new declaration, the State Engineer confirms that such a review could take "weeks or months." 2d D'Antonio Decl. ¶ 53, NM-EX-107, at 17-18. Dr. Barroll's errata sheet and Mr. D'Antonio's summary of the errata sheet should be disregarded for purposes of summary judgment. *See Cole v. Homier Distrib. Co.*, 599 F.3d 856, 867 (8th Cir. 2010) (affirming trial court's rejection of deposition errata sheets for purposes of summary judgment); *see also* U.S. Mot. to Strike.[14] Even if considered, however, these materials confirm that New Mexico does not have an identifiable regulatory framework or timetable for responding to calls on behalf of the Project. The declarations also fail to address how New Mexico would react to a call by the Project to protect deliveries to Mexico under the 1906 treaty. *See* U.S. Mem. 35-36.

New Mexico offers no support for its contention that there are other state-law mechanisms available that could afford timely, adequate relief. New Mexico insists that it has other options under the AWRM regulations, N.M. Resp. 56, but elsewhere suggests that it has no obligation to act unless there has been a priority call. *See, e.g.*, N.M. Resp. 2, 10 (responses to SMF Nos. 9, 10, 92). New Mexico also agreed it would need to take action if the United States made a "formal complaint," and here, seven years after the United States' complaint, New Mexico still has not taken action to address it, except to initiate a voluntary fallowing program. *See* U.S. Mem. 8, 36; Part III, *infra* (response to SMF No. 97). Thus, the experience in this litigation, on its own, supports the United States' argument that a response could take years rather than months, whether it takes the form of priority administration or some other to-be-determined remedy.

[14] New Mexico's allegations about the lack of administration in Texas do not create disputed issues of fact about the adequacy of New Mexico's procedures.

The balance of equities and public interest also favor equitable relief. The Compact was intended to effect an equitable apportionment, based on the equities as the Compacting States, and Congress, understood them. Although New Mexico has important equitable interests, some of those interests are predicated upon New Mexico's exercise of state-law authority in a way that improperly alters the Compact's apportionment to the benefit of New Mexico water users. *See* U.S. Resp. to N.M. Mots. 13-15. The scope of the injunction would be determined through trial, taking into account the concerns New Mexico has raised. The United States is committed to developing remedies, ideally with New Mexico's participation, that protect the United States' interests in a way that minimizes disruption and recognizes New Mexico's continuing authority over water use within its borders.

The need to determine the scope of an equitable remedy through trial does not preclude a ruling that an equitable remedy is warranted. The United States is entitled to such a ruling as a matter of law based on New Mexico's demonstrated indifference to the effect of groundwater pumping on Project deliveries.

III. New Mexico has not demonstrated the existence of disputed issues of fact for trial.

New Mexico contends that many facts in the United States' motion are "strongly disputed," N.M. Resp. 64. That is not the case. As shown below, New Mexico characterizes many statements as "undisputed," and many of those it has characterized as "disputed" are not supported by a response that identifies a disputed fact. Some are "disputed" only because they do not include information that New Mexico would like to add. For the remainder, the United States proposes minor amendments to avoid the dispute or demonstrates that the dispute is not genuine or material to the United States' motion.[15]

[15] These responses are provided subject to the United States' Motion to Strike and any other evidentiary objections by other parties that affect the materials New Mexico has cited.

AMENDED STATEMENT OF MATERIAL FACTS WITH REPLIES TO NEW MEXICO'S RESPONSES

A. Introduction

1. The Rio Grande Compact was intended to effect, and did effect, an equitable apportionment of the Rio Grande between its headwaters and Fort Quitman, Texas.

Not disputed. N.M. Resp. 1.

2. The Compact incorporates the Bureau of Reclamation's Rio Grande Project to effectuate the apportionment to southern New Mexico and Texas.

Not disputed. N.M. Resp. 1.

3. The Project stores water in Elephant Butte Reservoir and Caballo Reservoir in New Mexico, for release to downstream diversion and conveyance facilities serving Project water users in New Mexico and Texas.

Not disputed. N.M. Resp. 1.

4. As a party to the Compact, New Mexico has a responsibility not to interfere with the delivery of water by the Project and to "work in concert with Reclamation" to do "whatever is necessary" to protect those deliveries.

New Mexico's dispute with this statement is neither supported, nor genuine, nor material. This statement is based upon the testimony of Dr. Margaret Barroll, who was designated to testify on behalf of New Mexico in the nature of a designation under Rule 30(b)(6) of the Federal Rules of Civil Procedure. *See* Barroll 30b6 Tr. 15:19-16:1 *See also id.* at 14:21-15:8. In her deposition in that capacity, Dr. Barroll testified:

> A. . . . The project is the mechanism by which project water is delivered below Elephant Butte, and New Mexico is the state in which some of this is occurring, and New Mexico has the responsibility not to interfere with that . . . or to ensure that that can occur[,] to work in . . . concert with Reclamation when it comes to whatever is necessary [for] surface water for the project.
>
> Q. What do you mean by New Mexico has the responsibility not to interfere?
>
> A. I would say . . . to ensure that New Mexico's laws and rules and regulations are consistent with the needs of the project's distribution of surface water. To work

> in good faith with the project, for example, when . . . EBID wanted to add a point of diversion in one of the wasteways, we ended up coming to an understanding with [the] Bureau of Reclamation…
>
> Barroll 30b6 15:16-16:11.

After the United States' motion alleging that New Mexico "has a responsibility not to interfere" and to do "whatever is necessary," Dr. Barroll submitted corrections to her deposition that deleted "to interfere" and "whatever is necessary" from her testimony. NM-EX-226, at 8. These corrections are in direct response to the motion and should be disregarded.

New Mexico also cites Dr. Barroll's new declaration, but this is not proffered as testimony on behalf of the State and is not based on personal knowledge. *See* Barroll 2d Decl., NM-EX-006, at 2, ¶ 5 (stating that she has been asked to "summarize technical data and findings" on certain topics). In the cited paragraph, Dr. Barroll states that "New Mexico recognizes its responsibility to ensure that New Mexico's legal and regulatory framework allows Reclamation to deliver Project and Compact waters," and that "New Mexico recognizes its responsibility to work in good faith with Reclamation to assist in the delivery of surface water by the Project, and address problems in Project operations that occur in New Mexico." Id. at 30, ¶ 77. These statements do not show the existence of a disputed issue of fact about how New Mexico understands its general responsibilities under the Compact.

New Mexico's citations to the new declarations supplied by John D'Antonio and Ryan Serrano also do not show a genuine issue of fact because they were not designated to testify on behalf of the State under Rule 30(b)(6), and the cited portions of their declarations characterize New Mexico's administration of water uses, not the State's understanding of its Compact responsibilities. *See* U.S. Mot. to Strike.

In any event, to the extent there is a genuine dispute over the content of the statement, it is not material because New Mexico's responsibility not to interfere with the operation of the Project flows from the text of the Compact as a matter of law.

5. In the Rincon and Mesilla Valleys below Elephant Butte Reservoir (hereafter "Elephant Butte"), the groundwater is hydrologically connected to the surface water: generally, groundwater in the shallow aquifer is recharged by percolation of water from the surface, and the removal of groundwater (by pumping) also takes water from the surface.

Not disputed. This fact is "generally undisputed" by New Mexico, except that New Mexico would include additional information that goes beyond the scope of the statement. *See* NM Resp. 1.

6. Groundwater pumping in New Mexico below Elephant Butte ~~**interferes with Project deliveries because it**~~ deplete~~s~~ the surface water flows in the river, canals, and drains, and the Project must release additional water from the reservoir to compensate for the depletions instead of storing that water for use in future years.

> **The dispute is not genuine, and the amendments resolve any potential dispute.** New Mexico disputes this fact on the basis that "stream depletion by groundwater pumping does not necessarily impair other water rights," and that "[e]xpert analysis is needed to determine whether, when, and to what extent groundwater pumping . .. interferes with Project deliveries." NM Resp. at 1. This dispute is not genuine. The statement above is based on the "expert analysis" performed by New Mexico's retained experts. *See* U.S. Mem. 2, n.6 (citing transcripts and reports). *See also, e.g.,* 2d Barroll Decl. ¶ 39 ("Stream depletions occurring during the irrigation season could result in extra releases from Project storage, reducing the Usable Water available in subsequent short-supply years."); Barroll 2d ed. Suppl. Reb. Rep., NM-EX-103, at 4 ("In general, turning off pumping during the full supply years reduces the releases from [reservoir storage] necessary to meet demands."). New Mexico's witness designated under Rule 30(b)(6) also testified that pumping impacts the surface water supply, as did New Mexico's former State Engineer. *See* Lopez 30b6 Tr. 31:15-20 ("The groundwater pumping in New Mexico does impact surface supply."; "I think that it does [deplete surface supply]"); Lopez 7/7/20 Tr. 145:3-6; D'Antonio 6/25/20 Tr. 195:20-24 ("pumping does and can affect river flow").
>
> In any event, to remove any potential dispute, the United States has proposed amendments to account for the possibility that there may be some circumstances in which groundwater pumping does not cause depletions to Project deliveries or otherwise result in losses to reservoir storage. These amendments do not undermine the United States' motion because it is undisputed that the depletions and losses do occur in some years, if not all.

7. In years when surface water supply is low, pumping in New Mexico below Elephant Butte reduces the amount of water the Project can deliver to Texas.

> **The dispute is not genuine.** New Mexico disputes this fact on the ground that "stream depletion by groundwater pumping does not necessarily impair other water rights," and that "[e]xpert analysis is needed to determine whether, when, and to what extent groundwater pumping . .. interferes with Project deliveries." NM Resp. 1. The United States supported this statement by reference to the expert analysis supplied by New Mexico's experts. *See* Barroll 8/7/20 Tr. 184, 186:12-15, 204:23-205:4, 205:23-206:1. *See also* Response to Statement No. 65, *infra*.

8. Notwithstanding its obligation to protect the Project deliveries that effectuate the Compact apportionment, and the undisputed impact of groundwater pumping on those deliveries, New Mexico has failed to implement a program adequate to prevent and mitigate that impact in

full, and New Mexico will investigate its compliance with the Compact only upon a "formal complaint" by Texas or the United States that New Mexico deems to be "valid."

> **New Mexico's dispute is not genuine.** This statement of fact quotes the testimony of witnesses designated to testify on New Mexico's behalf under Rule 30(b)(6), summarizes the allegations in Statement Nos. 72-95. The United States incorporates by reference its responses to New Mexico's alleged disputes with those statements, *infra*. The United States notes that in response to the following statement of fact, New Mexico alleges that there has been no priority administration because there has been no "valid" priority call by the United States or Texas. N.M. Resp. 2.

9. Under New Mexico's current system of groundwater administration, it would take "months" for New Mexico to curtail groundwater pumping below Elephant Butte in response to such a complaint from ~~**Texas or**~~ the United States.

> **The amendment resolves any dispute, and the dispute is not genuine**. This statement is based on the testimony of Dr. Barroll, in her capacity as a witness designated under Rule 30(b)(6). *See* Barroll 30b6. Tr. 47:7-16. After the United States filed its motion, Dr. Barroll submitted "corrections" to her testimony that changed her estimate of "months." *See* NM-EX-226, at 9. However, Dr. Barroll maintained her position that a "comprehensive" analysis of some duration would be needed to investigate complaints made by the United States to address "Project performance." *Id.*. Mr. D'Antonio, also declares that "[t]he required analysis, decision on response, and implementation of response" to a priority call "could take place in a . . .matter of weeks or months to address long-term or systemic response." 2d D'Antonio Decl., NM-EX-007, at 17-18, ¶ 53. New Mexico's response that a priority call would be addressed "promptly," N.M. Resp. 3, does not respond to the substance of the statement, which concerns complaints about Compact compliance. In any event, New Mexico has not shown that a "prompt" response would occur in a period shorter than "months."

10. In the seven years since Texas filed its complaint in this action (and six years since the United States filed its complaint), New Mexico has not curtailed any groundwater pumping to address those complaints.

> **The dispute is not genuine, or supported.** New Mexico disputes this statement because, in the view of its State Engineer, "curtailment" occurs only in the context of priority administration, and there has been no call for priority administration by Texas and the United States. N.M. Resp. 2; 2d D'Antonio Decl. ¶ 53 n.19. New Mexico cannot define its way into a disputed issue of fact. This statement is based on the testimony of Dr. Barroll as both a witness designated under Rule 30(b)(6), and as an expert. *See* Barroll 30b6 Tr. 47:23-48:19; Barroll 7/9/20 Tr. 113:10-13. It is undisputed that New Mexico has not exercised its power to compel any water user, or group of water users, to reduce groundwater pumping in response to the complaints filed in this action. The unspecified injunctions alleged in Mr. Serrano's declaration are based on permit

enforcement and are not even identified as being within the LRG basin. *See* Response to Statement No. 68, *infra* (discussing Serrano Decl., NM-EX-010, at 9, ¶ 23).

B. The Rio Grande Project

11. The Rio Grande rises in Colorado, flows south into New Mexico, then flows into Texas near El Paso. After crossing the New Mexico-Texas state line, the Rio Grande forms the international boundary between the United States and Mexico until it flows into the Gulf of Mexico near Brownsville, Texas.

Not disputed. N.M. Resp. 2.

12. The Rio Grande Project is a federal irrigation project that was authorized in 1905 and currently consists of the Elephant Butte and Caballo Dams and Reservoirs in New Mexico; a power generating plant in New Mexico; the Percha, Leasburg, and Mesilla Diversion Dams in New Mexico; the American and International Diversion Dams in Texas; and approximately 141 miles of canals, 462 miles of lateral ditches, and 457 miles of drains in the two states.

Not disputed. N.M. Resp. 2.

13. In 1906 and 1908, pursuant to New Mexico territorial law, the United States filed notices for the Project announcing an intent to store Rio Grande water at what became Elephant Butte Reservoir and to utilize all unappropriated waters of the Rio Grande and its tributaries for diversion at what became Elephant Butte Dam and the Project's downstream diversions.

New Mexico has not identified a disputed fact. New Mexico disputes "any implication" in the statement that contradicts the orders of its adjudication court. New Mexico has not identified any such implication in the statement. *See* N.M. Resp. 2.

14. As of the filing of the 1908 notice, the surface waters of the Rio Grande and its tributaries were fully appropriated under New Mexico territorial and later state law.

New Mexico has not identified a disputed fact. Although it characterizes this fact as "disputed," New Mexico's response refers to "the fact that surface water in the Lower Rio Grande has been fully appropriated since 1908," N.M. Resp. 2, New Mexico has not cited any document contesting that the waters were fully appropriated as of the filing of the 1908 notice, and its new materials suggest that is the link. *See* 2d D'Antonio Decl, NM-EX-007, at ¶ 16 (waters fully appropriated "after the United States filed notices to appropriate all unappropriated water").

15. Pursuant to federal reclamation law and a delegation of authority from the Secretary of the Interior ("Secretary"), Reclamation entered into contracts to provide water from the Project to the water users associations that eventually became the Elephant Butte

Irrigation District ("EBID") in New Mexico and the El Paso County Water Improvement District No. 1 ("EPCWID") in Texas (together, the "Districts"), and later into contracts with the Districts themselves.

Not disputed. N.M. Resp. 2.

16. The contracts with EBID and EPCWID provide Project water for the irrigation of approximately 155,000 acres of land—88,000 acres in New Mexico, and 67,000 acres in Texas—with a proportionate reduction of deliveries when there is a shortage of water for irrigation in any given year.

Not disputed. N.M. Resp. 2.

17. EBID is the only entity in New Mexico that has a contract with the Secretary to receive irrigation water from the Project below Elephant Butte.

Not disputed. N.M. Resp. 3.

18. In addition to water that the Project delivers to EBID and EPCWID, the Project delivers water to Mexico pursuant to a 1906 treaty (the "1906 Convention"), which guarantees to Mexico a delivery of 60,000 acre-feet of water per year from the Project, except in cases of "extraordinary drought."

Not disputed. N.M. Resp. 3.

19. In cases of "extraordinary drought," "the amount [of water] delivered to the Mexican Canal shall be diminished in the same proportion as the water delivered to lands under [the] irrigation system in the United States."

Not disputed. N.M. Resp. 3.

20. Not all the water that the Project delivers to EBID and EPCWID is consumed by irrigation practices, and a portion returns to the Rio Grande as "return flows." The Project reuses return flows to make some deliveries within New Mexico and Texas, such that the Project, in effect, delivers more water than it releases from storage.

Not disputed. N.M. Resp. 3.

C. The Rio Grande Compact

21. In developing the agreement that would become the Rio Grande Compact, the Compacting States were informed by various investigations of the water supply of the Rio Grande, the results of which were ultimately compiled in the Natural Resource Committee's Joint Investigation Report in 1938 (we refer to these investigations together as the "Joint Investigation" and cite the report as the "JIR").

Not disputed. N.M. Resp. 3.

22. The Compacting States were aware, from the Joint Investigation, that the surface water supply of the Rio Grande in New Mexico below Elephant Butte Reservoir consisted only of the water released from Elephant Butte Reservoir by the Project, intermittent and unpredictable tributary flows, and return flows from Project irrigation.

> **Not disputed.** N.M. Resp. 3. New Mexico's suggestion to add "treated municipal discharges" does not give rise to a dispute and is not supported by reference to evidence contemporaneous with the Compact.

23. The Compacting States were aware, from the Joint Investigation, that return flows were an "important consideration" in the Project water supply below Elephant Butte Reservoir, in particular the deliveries to Texas, averaging **over 35**~~fifty~~ percent of ~~total~~ net ~~Project~~ diversions **at the two lower diversion points in Texas** between 1930 and 1936.

> **The amendment resolves the dispute**. The dispute is not genuine, or material. New Mexico disputes the last phrase in the statement on the basis that "drain flows did not comprise 50% of Project deliveries." Dr. Barroll is correct that the Joint Investigation Report, states that measured drain flows totaled an amount equal to 50% of the net Project diversions. Dr. Barroll asserts, and it is undisputed, that return flows and drainage comprised 17.2 percent of total Project diversions, an indisputably significant portion of Project diversions. But Table 90, relied upon by Dr. Barroll demonstrates that these returns were clearly an "important consideration," in Project water supply available to Texas where drain flow and seepage constituted an average of 35.1% of net diversions at the Upper El Paso (Franklin Canal) diversion and 57.7% of the Lower El Paso diversions. JIR at 100. Whether the conditions at the time of the Compact are "representative" of current conditions is irrelevant to the substance of the statement, N.M. Resp. 3.

24. The Compacting States were aware, from the Joint Investigation, that, at the time of the Compact, groundwater pumping below Elephant Butte was not extensive and was not a significant source of water supply for irrigation.

> **New Mexico does not identify a disputed fact.** New Mexico's allegation that groundwater was identified as a "potential source" for irrigation, and that some groundwater use was occurring for municipal use does not show the existence of a disputed issue of fact relating to this statement. *See* N.M. Resp. 3.

25. The Compacting States were aware, from the Joint Investigation, that practically all of the groundwater below Elephant Butte originated as streamflow and precipitation on the valley floor and that pumping of this groundwater constituted a depletion of stream flows rather than a source of additional water.

> **This dispute is not genuine, supported, or material.** New Mexico disputes this fact on the basis of its historian's opinion that "[s]cientific understanding of the relationship between groundwater and surface water . . . was limited as of 1938." N.M. Resp. 3 (citing Stevens Decl., NM-EX-011, at 10-11, ¶ 31). Dr. Stevens'

declaration is inadmissible hearsay. *See* U.S. Mot. to Strike. Even if it were considered, Dr. Stevens' declaration supplies no basis to dispute the express findings in the JIR that the groundwater in the basin was connected to the surface water supply and that groundwater development would add no new water to the basin, and could merely operate to redistribute the water and affect the water supply downstream. *See* JIR at 56 (in U.S. Appendix). Nor is there a basis to dispute the findings in the JIR that groundwater in the basin originated as precipitation on the valley floor or came from the Rio Grande itself. JIR at 104. It follows that depletion of the groundwater by pumping would result in depletion of stream flows. Any dispute on this issue is ultimately immaterial, however, because New Mexico cannot show that the States intended to promote groundwater pumping, or any water use, that would deplete the surface waters delivered by the Project. *See* Stevens Tr. 112:20-25.

26. The Compacting States were aware, from the Joint Investigation, that the Project acreage was principally planted in cotton, alfalfa, and row crops, not permanent crops.

New Mexico has not identified a disputed fact. New Mexico responds that "the United States is correct that these were the principal crops grown in the Project area." N.M. Resp. 3. New Mexico's allegation that the Compacting States did not intend to prohibit changes in planting practices is irrelevant to the substance of the statement.

27. On February 16, 1938, EBID and EPCWID signed a contract, which was also signed by the Assistant Secretary of the Interior, that committed the Districts to repay the costs of the Project in proportion to each District's respective irrigable acreage, which was roughly equivalent to 57% for EBID and 43% for EPCWID.

Not disputed. N.M. Resp. 3.

28. On March 18, 1938, Colorado, New Mexico, and Texas signed the Rio Grande Compact, and Congress approved the Compact on May 31, 1939.

Not disputed. N.M. Resp. 3.

29. The Compact has been incorporated into New Mexico state law.

Not disputed. N.M. Resp. 3.

30. Article I(k) of the Compact defines "project storage" as the combined capacity of Elephant Butte Reservoir and other reservoirs "below Elephant Butte and above the first diversion to lands of the Rio Grande Project."

Not disputed. N.M. Resp. 4.

31. Article I(l) defines "usable water" as water "in project storage" that is "available for release in accordance with irrigation demands, including deliveries to Mexico."

Not disputed. N.M. Resp. 4.

32. Under Article IV of the Compact and a later adjustment made by the Rio Grande Compact Commission, New Mexico is required to deliver water to Elephant Butte Reservoir in an amount that is determined by a schedule.

Not disputed. N.M. Resp. 4.

33. Once the water is delivered by New Mexico to Elephant Butte Reservoir (*i.e.*, into "project storage" for purposes of the Compact, Art. I(k)), it becomes "usable water" under the Compact, to be released by the Project "in accordance with irrigation demands, including deliveries to Mexico."

Not disputed. N.M. Resp. 4.

34. The Project is the means by which the Compact apportionment to Texas and part of New Mexico is effectuated: After the water is delivered into "project storage" by New Mexico, Reclamation releases the water "in accordance with irrigation demands" to Project water users in New Mexico and Texas.

Not disputed. N.M. Resp. 4.

35. The Secretary's contracts with EBID and EPCWID, and the 1938 Contract between EBID and EPCWID (the "Downstream Contracts"), are "essential to the fulfillment of the Compact's expressly stated purpose" of effecting an apportionment of the Rio Grande, and "the Compact could be thought implicitly to incorporate the Downstream Contracts by reference."

Not disputed. N.M. Resp. 4.

36. The Compact apportionment to the part of New Mexico below Elephant Butte Reservoir is the water released to EBID to meet irrigation demands pursuant to its contract with the Secretary, **and potentially some limited pre-Project appropriations not at issue here**.

The amendment resolves the only genuine dispute. *See* N.M. Resp. 4. New Mexico alleges that the apportionment is "to" New Mexico and not "to" EBID. The United States does not contend that the apportionment is "to" EBID, but rather is made to "part of New Mexico," *Texas v. New Mexico*, 138 S. Ct. at 959. New Mexico may seek appropriate relief from any judgment that makes its rights under the Compact dependent upon the existence of EBID in the event that EBID "cease[s]" to exist, N.M. Resp. 4. New Mexico has not supplied any reason, or fact, suggesting this possibility is more than hypothetical. New Mexico identifies no other basis for a dispute, and makes factual allegations similar to this statement in support of its own motions.

37. The Compact apportionment to the part of New Mexico below Elephant Butte Reservoir is water delivered through operation of the Rio Grande Project for irrigation use within EBID, **and potentially some limited pre-Project appropriations not at issue here**.

The amendment resolves the only genuine dispute. The United States' response to Statement No. 36, *supra*, is incorporated herein by reference.

38. The Compact apportionment to the part of New Mexico below Elephant Butte Reservoir does not include water for any entity or individual other than EBID, **except potentially for the limited pre-Project appropriations not at issue here**.

The amendment resolves the only genuine dispute. The United States' response to Statement No. 36, *supra*, is incorporated herein by reference.

39. The parties to the Compact did not intend for there to be additional development of water resources in New Mexico below Elephant Butte Reservoir that would deplete the surface water supply of the Project.

The dispute is not supported or genuine. As explained above, *see* Part I.B., *supra*, New Mexico's response ignores the phrase "that would deplete the surface water supply of the Project." The United States' statement was based on testimony from New Mexico's historian, who agreed that the Compact negotiators intended to protect the Project water supply and who did not endorse an opinion that they would have intended development to an extent that would deplete the surface water supply. *See* Stevens Tr. 109:5-10; 112:20-25. The cited portions of the new declarations from Dr. Stevens and Mr. Lopez are inadmissible hearsay and should be disregarded. *See* U.S. Mot. to Strike.

D. Project Operations 1939-1980

40. From the inception of the Project to present, Reclamation has been responsible for allocating and releasing water from storage for delivery to the Acequia Madre (i.e., the "Mexican Canal" in the 1906 Convention); the International Boundary and Water Commission is responsible for managing the diversion of water delivered to Mexico at the Acequia Madre.

Not disputed. N.M. Resp. 4.

41. From the Project's inception to 1979, Reclamation was responsible for operating and maintaining the Project facilities and for making deliveries to water users in EBID and EPCWID (referred to in places as delivery "at the headgate" or delivery "to lands" or "to farms").

Not disputed. N.M. Resp. 4.

42. Based on reported irrigation deliveries for the period 1946-1950, Reclamation determined that 3.024 acre-feet-per-acre ("af/ac") per year constituted a "normal delivery" of water that could be allocated and delivered to Project irrigable lands.

Not disputed. N.M. Resp. 4.

43. Groundwater pumping in New Mexico below Elephant Butte intensified in the late 1940s and early 1950s, with the number of irrigation wells increasing from less than a dozen in 1947 to more than 1,100 by 1955.

> **New Mexico does not identify a disputed fact**. The reason for the increase and the fact that pumping also increased in Texas do not give rise to a dispute. *See* N.M. Resp. 5. The cited portions of Dr. Barroll's declaration and Dr. Stevens' declaration are also inadmissible hearsay. *See* U.S. Mot. to Strike.

44. In 1954, the U.S. Geological Survey published a report finding that groundwater pumping in the Rincon and Mesilla valleys reduces the flows in Project drains and depletes surface water in the Rio Grande, thereby reducing the surface water supply for the Project.

> **New Mexico does not identify a disputed fact, and any dispute is not genuine or supported by evidence.** This statement describes the finding in the 1954 Conover report, and it is not specific to pumping in New Mexico, as New Mexico suggests, N.M. Resp. 5. New Mexico alleges that "[s]tream depletions from groundwater pumping do not always reduce the Project's surface water supply," but that allegation is self-contradictory: the "stream" here, the Rio Grande, *is* a part of the Project's surface water supply. Further, Dr. Barroll confirms in her second declaration that groundwater pumping in New Mexico intercepts Project return flows and reduces the amount of water in drains that return water to the river. *See* 2d Barroll Decl, NM-EX-006, at 22, ¶ 52. Depletions of the stream thus deplete the supply. The cited paragraphs of Dr. Barroll's second declaration describe the variation that may occur in the timing, location, or amount of the depletion, *id.* at 15, ¶ 34, and restate New Mexico's litigation position that depletions do not always affect *deliveries* or injure other water users (for example, because the Project releases more water to make up for the depletions), *id.* at 15-16, ¶ 36. This information does not give rise to a dispute because Statement No. 44 does not characterize the timing, location, or amount of the depletions, or the effect on deliveries.

45. The 1954 report also concluded that the so-called "supplemental" use of groundwater in years of low surface water supply "does not represent an additional supply or new source of water but rather a change in method, time and place of diversion of available supplies" of the surface water.

> **New Mexico does not identify a disputed fact, and any dispute is not genuine.** This statement describes the conclusion in the 1954 report and is not specific to New Mexico, as New Mexico suggests, N.M. Resp. 5. The cited paragraphs in Dr. Barroll's declaration are not responsive to the statement. Specifically, she provides no information to contradict the conclusion that the groundwater pumping in low-supply years is "a change in method, time, and place of diversion" of surface water.

46. In 1979 and 1980, the United States transferred to EBID and EPCWID, respectively, the operation and maintenance responsibility for the canals, laterals, and drains within each District.

Not disputed. N.M. Resp. 5.

47. Since 1979, Reclamation has allocated water for delivery to the Districts' diversion points on the Rio Grande, instead of to individual farms, and the Districts are responsible for distributing the water within their respective boundaries consistent with the terms and conditions in their contracts with the Secretary.

Not disputed. N.M. Resp. 5.

48. Since the 1980s, Reclamation has used the D2 Curve to estimate the amount of Project water that will be available for diversion at Project headings for a given amount of Project release from Caballo Dam, in order to determine the annual diversion allocations to the Districts.

New Mexico does not identify a disputed fact. New Mexico responds that the allocation method changed in 2006, so that EBID does not divert some of the water allocated to it based on the D2 Curve. This is a semantic dispute at best about the use of the term "allocate." New Mexico does not dispute that Reclamation has "used the D2 Curve to estimate" deliveries based on releases, including as part of its method under the 2008 Operating Agreement. See Statement No. 70, *infra.*

49. The "D2 Curve" is a linear regression equation based on project operational data from 1951 to 1978 and is intended to reflect the relationship between the total annual release from Project storage and the total annual project delivery to canal headings on the Rio Grande during that period.

Not disputed. N.M. Resp. 5.

E. Developments Since the 1980s

50. In 1980, the New Mexico State Engineer issued a declaration designating **the Mesilla Basin** ~~**the area in the Rio Grande basin below Elephant Butte, including EBID,**~~ as the Lower Rio Grande Underground Water Basin in 1980 **and extended the border to include the Rincon Basin in 1982**.

The amendments resolve the dispute. *See* N.M. Resp. 5 (clarifying that there were two orders).

51. Since the 1980 declaration, a water user must obtain a permit to drill a well or change an existing well in the basin.

Not disputed. N.M. Resp. 5.

52. A permit was generally not required to drill a well for groundwater in the basin prior to the declaration, and New Mexico has not required the owners of those wells to obtain permits unless they are moved or changed.

> **New Mexico has not identified a disputed fact.** New Mexico agrees that "permits were not required to construct wells prior to the declaration of the basin[.]" N.M. Resp. 5. Whether water users were "encouraged to file claims describing their rights" is irrelevant to the statement of fact, as is New Mexico's allegation that Reclamation encouraged pumping. *See id.*

53. ~~**As of 2016,**~~ **T**he State Engineer had issued permits for ~~**more than 800**~~ **approximately 2,678** wells for irrigation use.

> **The amendments resolve any dispute.** The statement of fact is correct as written. The new information New Mexico has provided is incorporated into the statement. *See* Serrano Decl. ¶ 19.

54. Since 1980, an increasing proportion of the acreage in EBID has been converted from row crops to permanent crops with higher water requirements, in particular pecans.

> **New Mexico does not identify a disputed fact**. New Mexico states that some acres were planted in pecans at the time the Compact was drafted, and that pecan acreage increased in EPCWID as well. Neither of these facts creates a dispute with the statement.

55. ~~**As of**~~ **From** 2016 **to December 14, 2020,** the State Engineer ~~**had**~~ issued permits for more than ~~**300**~~ **250** wells for municipal and industrial use **in the Rincon and Mesilla Valleys (including some monitoring and exploratory wells).**

> **The amendments resolve any dispute, and New Mexico's allegation that there is a dispute is unsupported.** New Mexico states that there were approximately 3,000 active wells for both irrigation and municipal and industrial ("M&I") use as of 2020, which does not contradict the statement as written. N.M. Resp. 6. The amendment above conforms the statement to the new information in Mr. Serrano's declaration, without conceding a dispute as to the original statement. *See* Serrano Decl., NM-EX-010, at 6-7, ¶¶ 14, 18, 20.

56. The City of Las Cruces ("the City" or "Las Cruces"), which is located partly within the EBID boundary, had two wells in use prior to 1937, five wells in use as of 1947, and 45 wells in use as of 2017, many of them drilled after 1980.

> **New Mexico's dispute is unsupported**. New Mexico disputes this fact by reference to a declaration from a "non-retained rebuttal expert" Lee Wilson, who alleges that present-day historian Douglas Littlefield "documented . . . many wells other than the two" in use before 1937 as found by Conover in his published U.S. Geological Survey paper of 1947. Wilson Decl., NM-EX-013, at 2, ¶ 4. Mr. Wilson's statement is inadmissible triple hearsay at best. *See* U.S. Mot. to Strike.

Mr. Wilson does not even bother to cite the report he is referencing, if there is one, and has not said how many wells he believes there were. In any event, the dispute he purports to show pertains only to the number of wells pre-1937. That phrase can be disregarded if necessary, without affecting the remainder of the statement or the United States' motion.

57. While the City's permitted (*i.e.*, post-1980) wells are subject to volume limitations and some offset requirements to account for estimated surface water depletions attributable to the pumping, the City is authorized to pump up to 21,869 acre-feet annually under its pre-1980 groundwater right ("LRG-430"), subject only to a condition that the City forgo consumption of municipal effluent in cases of drought (defined as years when the Project's surface water allocation is equivalent to 2.0 af/ac).

New Mexico does not identify a disputed fact. New Mexico alleges that this statement "overstates Las Cruces's pumping" and cites information about the city's "average annual use" of its pre-1980 groundwater right, N.M. Resp. 6, but the statement does not characterize the City's "annual use" of the right. The statement characterizes the adjudicated maximum volume for the right. The declaration cited by New Mexico is inadmissible hearsay but elsewhere confirms the facts in the statement. *See* Wilson Decl., NM-EX-013, at 3, ¶ 6a.

58. Since 1980, groundwater pumping for non-irrigation uses (including municipal use) below Elephant Butte has nearly doubled, from about 20,000 acre-feet per year to about 37,000 acre-feet per year, driven by an increase in pumping by entities other than the City of Las Cruces whose groundwater use began after the Compact.

New Mexico does not identify a disputed fact. "New Mexico does not dispute this fact generally, but does dispute any implication that all municipal groundwater pumping below Elephant Butte did not begin until after the Compact was signed." N.M. Resp. 6. There is no such implication in the statement, and the United States has acknowledged that there was some limited groundwater pumping for municipal purposes prior to the Compact. *See* U.S. Mem. 15 n.72.

59. Since 1980, the New Mexico State Engineer has issued permits to more than 5,000 wells for domestic use, which are subject only to a standard volume limitation and generally not subject to metering requirements.

New Mexico does not identify a disputed fact. New Mexico suggests that the number of "active" wells may be lower because some wells have been plugged or abandoned, N.M. Resp. 6, but the statement characterizes the number of permits, not the number of active wells. The total volume of groundwater pumped from the wells does not give rise to a dispute about the number of permits.

60. Domestic wells have also sometimes been used to provide water for supplemental irrigation below Elephant Butte.

New Mexico does not identify or support a dispute. New Mexico's contention that these uses were "rectified long ago" is based on portions of Mr. Serrano's

declaration that are inadmissible hearsay. *See* Serrano Decl., NM-EX-010, at 6-7, ¶ 15. *See* U.S. Mot. to Strike. Any dispute about whether those uses have ceased is immaterial to the United States' motion in any event.

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

61. Groundwater pumping in New Mexico impacts the surface water supply for the Project because it depletes the flow of the Rio Grande, and reduces the amount of water flowing in Project drains and canals.

New Mexico's dispute is not genuine. New Mexico alleges that "[e]xpert analysis is needed" to determine "whether, when, and to what extent" pumping interferes with Project deliveries. N.M. Resp. 6. The statement is based on the testimony of witnesses designated to testify on New Mexico's behalf under Rule 30(b)(6). *See, e.g*., Lopez 30b6 Tr. 31:15-20 ("The groundwater pumping in New Mexico does impact surface supply.") The statement is also supported by the "expert analysis" of New Mexico's expert witnesses. *See, e.g.*, 2d Barroll Decl, NM-EX-006, at 22, ¶ 52 (stating that groundwater pumping in New Mexico and Texas intercepts Project return flows and reduces the amount of water in drains); *see also* Barroll Oct. 2019 Rep., NM-EX-100, at 54 (lower groundwater levels caused by pumping "reduce the amount of water available for diversion within the Project"). Based on her analysis of model runs, Dr. Barroll also concluded that "[t]he elimination of New Mexico groundwater pumping causes a reduction in the loss from the Rio Grande, some reduction in canal seepage, and an increase in drain flows in the Rincon and Mesilla valleys." Barroll 2d ed. Suppl. Reb. Rep., NM-EX-103, at 3. In other words, groundwater pumping is associated with losses from the Rio Grande, loss of water from canal seepage, and losses of drain flows. Dr. Barroll's new declaration describing variation in the timing, location, and amount of depletions does not give rise to a dispute because Statement No. 61 does not characterize the timing, location, and amount of depletions; it states only that they undisputedly occur.

In general, New Mexico's qualified position that pumping "may" or "can" deplete is contradicted by its own argument. New Mexico confirms that pumping affects surface water flows where it argues that the United States supposedly "acquiesced" to pumping to the extent reflected in the surface water volumes estimated by the D2 Curve. *See* N.M. Resp. 31-32. *See also id.* at 63 (arguing that "an appreciable percentage of the calculated impacts to Project surface deliveries come from pumping in Texas").

62. Groundwater pumping in New Mexico ~~**in years of lower surface water supply**~~ can reduce the volume of water available for Project allocation and delivery to the Districts **in years of lower surface water supply**, and thus reduce the apportionment to Texas.

The amendments resolve any dispute. New Mexico responds that the effect of groundwater pumping on Project allocations and deliveries is a matter for expert analysis, but this statement is based on the testimony of New Mexico's experts.

See Barroll 8/7/20 Tr. 182-86; Lopez Tr. 47:7-11. As explained below in response to Statement No. 65, the United States is proposing amendments to better reflect the modeling assumptions that were the basis for Dr. Barroll's testimony. Dr. Barroll's reports also show that pumping in years of higher Project supply reduces the amount of water in reservoir storage available for allocation if there are subsequent years of lower supply, which is how she characterizes the shortages in 2003-2005. *See* Barroll Sept. 2020 Rep., NM-EX-103, at 4. The cited paragraphs in Dr. Barroll's new declaration do not address the effects of pumping in years of lower surface water supply specifically. She only addresses the effects of pumping in years of "full" or "adequate" supply and in the years leading up to "water-short" years. *See* 2d Barroll Decl., NM-EX-006, at 15-18, ¶¶ 36-42. Paragraph 23 of Mr. Lopez's second declaration does not relate to the substance of the statement, and Paragraph 18 of Dr. Sullivan's declaration does not identify any fact that contradicts the statement. The effect of groundwater pumping in Texas on Project deliveries is not relevant to the substance of the statement.

63. On average, groundwater pumping in New Mexico reduced Project diversions by over 60,000 acre-feet annually between 1951 and 2017.

New Mexico has not identified a disputed fact. This statement was based on the opinion of New Mexico's experts from Spronk Water Engineering. New Mexico has submitted a declaration from Gregory Sullivan of Spronk, who confirms the basis of the statement in the cited paragraph. Sullivan Decl., NM-EX-012, at 7, ¶ 19. Dr. Sullivan states that "the extent of any injury resulting from a reduction in diversions" is a matter for expert analysis. This opinion does not show there is a disputed issue of fact because Statement No. 63 does not characterize "the extent of any injury resulting from" the estimated reduction in diversions. Whether pumping in Texas also affects diversions or creates "significant negative impacts to New Mexico" is irrelevant to the statement. *See* N.M. Resp. 7.

64. From 2000 to 2018, the Project's surface water supply was so low that the Project allocated ~~**shortages**~~ **water to Mexico** under the "extraordinary drought" provision of the 1906 Convention in all but five years.

The amendment resolves any dispute. New Mexico does not identify a genuine dispute with this statement. It disputes the "implication" that the shortages "are attributable to New Mexico," but the statement does not purport to characterize the causes contributing to the low supply conditions. New Mexico's allegation that EBID has received far less than it should under the Operating Agreement does not show there is a dispute about whether the provision in the treaty was invoked as to Mexico. The amendments above eliminate any dispute while still conveying the intended meaning.

65. Between 2003 and 2005, when the Project allocations to the Districts were less than 50% of a normal allocation, ~~**(equivalent to 1.37 af/ac in 2003, 1.01 af/ac in 2004, and 1.13 af/ac in 2005), groundwater pumping in New Mexico depleted**~~ the surface water

supply available for allocation by the Project to the Districts **would have been much greater had there been no groundwater pumping in New Mexico after 1939: by New Mexico's calculations, another 167,000 acre-feet could have been diverted by EBID, and an additional 86,000 acre-feet could have been diverted by EPCWID ~~by more than 200,000 acre-feet~~**.

> **The amendments resolve the dispute.** New Mexico disputes this fact on the ground that the numbers do not appear in Dr. Barroll's report. The 200,000 acre-feet figure is based on Dr. Barroll's calculations at the cited pages in in her July 15, 2020, Supplemental Rebuttal Report. In fact, Dr. Barroll revised her calculations upwards in her "second edition" of that report. *See* NM-EX-103, at 9. New Mexico is correct that, as written, Statement No. 65 does not represent the assumptions that were the basis for Dr. Barroll's calculations. The model run cited in the report was based on "turning off" all New Mexico groundwater pumping for the duration of the simulation (1940-2017), not only for 2003 to 2005. NM-EX-103, at 3; *see also* Sullivan & Welsh Rep. (rev'd Sept. 15, 2020), NM-EX-123.
>
> Dr. Barroll also indicates a potential dispute with the representation about Project allocation "equivalents" in those years. Barroll 2d. Decl. ¶ 73. The fact that the allocations were less than 50% of a normal allocation is shown by the tables in Dr. Barroll's Oct. 2019 Rep., NM-EX-100, at 66 and A-14. The af/ac equivalent is derived by dividing the allocation by the number of irrigable acres in each district. The United States has amended the response to more accurately reflect Dr. Barroll's findings and to remove the potentially disputed "equivalent" portion.

66. Had all groundwater pumping in New Mexico below Elephant Butte been "turned off," **~~between 2003 and 2005, EBID and~~** EPCWID could have received **~~a full allocation~~ enough water** from the Project **to meet its demand between 2003 and 2005, as calculated by New Mexico**.

> **The amendment resolves the dispute.** New Mexico is correct that, as written, Statement No. 66 does not represent the assumptions that were the basis for Dr. Barroll's calculations. The model run cited in the report was based on "turning off" all New Mexico groundwater pumping for the duration of the simulation (1940-2017), not only for 2003 to 2005. NM-EX-103, at 3; *see also* Sullivan & Welsh Rep. (rev'd July 15, 2020), NM-EX-122, at 94-95. The statement has been revised, as above, to use the most recent numbers supplied by Dr. Barroll, to reflect the modeling assumption correctly, and to clarify that, by "full supply," Dr. Barroll meant that EPCWID would have been allocated enough water to meet its demand between 2003 and 2005. *See* Barroll 8/7/20 Tr. 184. *See* Response to SMF No. 65, *supra.*

67. Groundwater pumping in New Mexico, even in years of higher surface water supply, reduces the amount of water retained in Project reservoir storage, which can affect the amount of water available for the Compact apportionment in the following year.

New Mexico's dispute is not genuine. New Mexico states that the "extent to which" pumping affects Project releases is a matter for expert analysis, N.M. Resp. 7, but the statement above does not characterize the "extent" of the effect, and the statement is based on the analysis conducted by New Mexico's experts. *See* Barroll. Tr. 8/7/20 18:14-181:11; Barroll Oct. 2019 Rep. xi, 12; Sullivan and Welsh Oct. 2019 Rep. (rev July 2020) at 12. In her new declaration, Dr. Barroll confirms her earlier opinion that pumping-related depletions to the Rio Grande in years of higher supply may result in shortages in subsequent years of lowersupply. 2d Barroll Decl. ¶ 39.

68. Other than through **by setting** permit conditions, New Mexico has never exercised its regulatory authority to ~~curtail~~ **enjoin** any water user's groundwater pumping below Elephant Butte Reservoir.

The amendment above resolves the dispute, which is neither genuine nor supported. New Mexico disputes this statement because it uses the term "curtail" only in the context of priority administration. N.M. Resp. 7; 2d D'Antonio Decl. ¶ 53 n.19. Replacing "curtail" with "enjoin" serves the same purpose and is consistent with his testimony and New Mexico's response. New Mexico has not identified an evidentiary basis for disputing the statement. Mr. Serrano's new declaration states that the State Engineer's Administrative Litigation Unit "has obtained court orders and injunctions requiring water right owners to cease groundwater pumping," but this is unsupported hearsay and is not stated specifically as to the Lower Rio Grande. Serrano Decl., NM-EX-0010, ¶ 23. *See* U.S. Mot. to Strike. New Mexico's alleged efforts to "curb" groundwater use through permit administration and water repayment plans do not demonstrate timely curtailment of groundwater use.

G. The 2008 Operating Agreement

69. Reclamation continues to calculate diversion allocations of Project water based on the split of 57% for EBID and 43% for EPCWID (after subtraction of Mexico's share of the water), which corresponds to the proportion of irrigable acreage in each district.

New Mexico's dispute is not genuine. As explained in Statement No. 70, Reclamation calculates the allocations based on a 57-43 split, and then adjusts the amount to reflect the surrender of water by EBID. New Mexico has not disputed the sequence set forth in Statement No. 70. Any dispute here is a semantic one about the term "allocate." The United States' is indisputably correct that Reclamation "calculates" the allocations that there would be, as stated.

70. In 2008, Reclamation, EBID, and EPCWID entered into an agreement ("the 2008 Operating Agreement") that defines the procedure for making the Project allocation:

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

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

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

New Mexico does not identify a disputed fact. New Mexico "disputes the implication" that changes in Project delivery performance are all attributable to groundwater pumping in New Mexico. *See* N.M. Resp. 8. This implication is not part of the statement.

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

New Mexico does not identify a disputed fact, and any dispute is immaterial and resolved by the amendments. New Mexico's allegation that EBID gives up too much water and over-compensates for depletions does not refute the substance of the statement. N.M. Resp. 8. Disputes about the appropriateness of the Operating Agreement methodology are immaterial to the United States' motion. The United States has agreed that it will revise the Operating Agreement if necessary to comply with the rulings in this case. *See* Order dated Mar. 31, 2020, at 29, Sp. M. Docket No. 338. Amendments have been made to reflect that the water EBID gives up is not water transferred ***to*** EPCWID, but is to offset the depletions from the Rio Grande attributable to groundwater pumping within New Mexico. *See* Barroll Tr. 8/7/20 198:23-199:5 (confirming her understanding that one "purpose of the Operating Agreement is to account for groundwater impacts to the surface water supply").

H. Administration by New Mexico

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

New Mexico does not identify a disputed fact. New Mexico cites a chart from Dr. Barroll's new declaration that supports the statement. New Mexico's allegation that the "excessive pumping" is "directly caused" by the Operating Agreement is irrelevant. N.M. Resp. 8. It is also untrue. *See* Part II.,B, *supra*. The fact that there was also groundwater pumping in Texas during this period does not give rise to a dispute about the volume pumped in New Mexico.

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

New Mexico does not identify a disputed fact. New Mexico disputes any "implications" that are inconsistent with the state adjudication court's orders, but New Mexico does not identify any such implications in the statement. New Mexico cites a part of Mr. D'Antonio's new declaration that summarizes court decisions and is inadmissible hearsay. *See* U.S. Mot. to Strike. Even so, Mr. D'Antonio agrees that the Project's adjudicated 1903 priority date makes its senior to nearly all groundwater pumping in the basin, and he does not suggest any alternative priority date for the Project for which that would not be the case. *See* 2d D'Antonio Decl. at 37 (third bullet); *see also id.* at 7, ¶ 19 ("The vast majority of the[] declarations [submitted to claim rights for wells drilled prior to 1980] reflect that the subject wells were drilled during the droughts of the 1950s and 1970s").

1. AWRM Statute and Regulations

74. In 2003, to address concerns about compliance with interstate compacts, the New Mexico Legislature enacted NMSA 1978, Section 72-2-9.1, authorizing the State Engineer to administer water rights prior to adjudication and directing him to issue regulations for priority administration.

New Mexico's dispute is unsupported. New Mexico disputes that the 2003 statute was enacted "to address concerns about compliance with interstate compacts," but the statute expressly states that "compliance with compacts is imperative." 72-2-219, NMSA; *see Tri-State Generation & Transmission Ass'n v. D'Antonio*, 289 P.3d 1232, 1235 (N.M. 2012). Nothing in Paragraph 38 of Mr. Antonio's new declaration contradicts the statement.

75. In response, the State Engineer developed the Active Water Rights Management ("AWRM") regulations, 19.5.13.1-19.5.50, NMAC, under which the State Engineer**, among other things,** identifies water districts in need of management and appoints a water master to manage these districts.

The amendment resolves any dispute. New Mexico contends that the statement "oversimplifies" the regulations "which address many other issues." N.M. Resp. 8. This allegation does not show the existence of a dispute. The statement is not intended to provide an exhaustive list of all the authorities reflected in the regulations. The proposed amendment resolves any dispute.

76. In 2004, the State Engineer identified the Rio Grande basin below Elephant Butte Reservoir as ~~**"District IV" or**~~ the "Lower Rio Grande" **Water Master** District for purposes of management under the AWRM regulations, appointed a water master, and issued a metering order.

The dispute is not supported, and any dispute is resolved by the amendment. New Mexico contends that the United States misrepresents the chronology of events under the 2003 statute and AWRM regulations. The cited paragraphs in Mr. D'Antonio's new declaration do not address the substance of the statement,

which is based on his deposition testimony. *See* D'Antonio 6/25/20 Tr. 200:12-201:23. Elsewhere in the declaration, Mr. D'Antonio confirms that the basin designation and metering order issued in 2004. *See id.* at 15, ¶ 44. The United States has proposed one amendment to correct the District name.

77. The 2004 metering order, as implemented by the ~~**District IV**~~ **Lower Rio Grande** water master, required water users to install a meter on every irrigation well by 2006 and report irrigation from such wells quarterly, but **this requirement was not enforced within** EBID ~~**water users were given a "grace period" and did not begin installing meters**~~ until the 2007 irrigation season.

The amendments resolve any dispute. *See* N.M. Resp. 8.

78. In 2006, the State Engineer published proposed district-specific AWRM regulations that were intended to tailor the statewide AWRM regulations to District IV to ensure, among other things, that the Project's water supply was protected and that New Mexico could meet its obligations under the Rio Grande Compact.

New Mexico does not identify a disputed fact. This statement was based on the testimony of the State Engineer. *See* D'Antonio 8/14/20 Tr. 43-44, 50:21, 52:2. New Mexico disputes "the United States' characterization of the purpose of the" draft DSRs, citing the State Engineer's new declaration. N.M. Resp. 8. The cited paragraphs of the declaration do not discuss the purpose of the DSRs. *See* 2d D'Antonio Decl., NM-EX-007, at 16, ¶¶ 45-46.

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

New Mexico does not identify a disputed fact. New Mexico's allegation that the "the Office of the State Engineer turned its attention" to the Operating Agreement in 2008 is consistent with the stated fact. *See* N.M. Resp. 9.

2. Groundwater Basin and Permitting

80. In 1996, the State Engineer **aligned as a plaintiff in an EBID action and** commenced a general stream adjudication of the Rio Grande below Elephant Butte, known as the Lower Rio Grande or "LRG" adjudication.

The amendments resolve the dispute. *See* N.M. Resp. 9; *United States v. City of Las Cruces*, 289 F.3d 1170, 1178 & n.4 (10th Cir. 2002).

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

New Mexico has not identified a disputed fact. New Mexico alleges that the United States "oversimplifies the purpose of Stream System Issue 101" and does not mention the United States' party status, N.M. Resp. 9, but the statement does not characterize "the purpose" of the proceeding, and the United States' status as a party is irrelevant to the substance of the statement. New Mexico has not fairly characterized the United States' role in that case in any event.

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

New Mexico has not identified a disputed fact. New Mexico incorporates by reference its response to Statement No. 81. N.M. Resp. 9. The United States incorporates its reply to that response, *supra.*

83. The FDR quantification was the result of negotiation and compromise between the State Engineer and irrigators, in particular pecan growers, and went above what the State's expert witness report supported.

New Mexico has not identified a disputed fact. New Mexico incorporates by reference its response to Statement No. 81. N.M. Resp. 9. The United States incorporates its reply to that response, *supra.*

84. Water users ~~**have**~~ filed ~~**more than one thousand**~~ **956** notices of intent requesting the higher 5.5 af/ac FDR **by the December 2012 deadline**, and the users who filed notices have been allowed to divert up to 5.5 af/ac while their requests were pending.

The amendments resolve the dispute. *See* N.M. Resp. 9.

85. The only limitations on groundwater pumping that New Mexico imposes on water users within EBID **through permit conditions** are the FDR (or crop irrigation demands if less than the FDR) and the listed place of use and maximum acres.

The amendment resolves any dispute. New Mexico disputes this fact citing "[t]he many administrative actions New Mexico has taken in the Lower Rio Grande," then cites a paragraph in Mr. D'Antonio's declaration that does not discuss the administrative actions the State has taken. 2d D'Antonio Decl. ¶ 37a. No other paragraph in the declaration supports New Mexico's contention. To the extent New Mexico is referring to administrative actions taken by the Water Master, the United States has proposed an amendment to resolve any dispute.

86. Diversions of groundwater and surface water above the permitted annual FDR (called "overdiversions") are usually not identified until the following calendar year, after a

reconciliation of the metering data by the Water Master that might begin in February or March.

New Mexico has not identified a disputed fact. This statement was based on the testimony of Dr. Barroll on New Mexico's behalf under Rule 30(b)(6), as well as Water Master Ryan Serrano's testimony, and the content of the annual reports he issued, which were discussed in his deposition. Barroll 30b6 Tr. 21:7-22:13; *see, e.g.*, 2017 Water Master Report, NM_0018261, at NM_0018269 (noting that reconciliation for 2016 year began in March of 2017). The explanation in Mr. Serrano's declaration does not show there is a dispute relating to any aspect of this fact. He provides the reasons for waiting for the fourth quarter data, which are due January 10, but he does not dispute that the reconciliation does not occur until February or March, after an apparently lengthy process of resolving data errors. Serrano Decl.,NM-EX-010, at 9, ¶ 24. He also states that the Water Master has addressed "many instances of potential for overdiversion" during the irrigation season, but he does not state that any *actual* overdiversion has ever been detected before the end of the calendar year. *See id.*, ¶¶ 23, 26.

87. There are on the order of about **100 to** 200 overdiversions each year in **the LRG** District ~~IV~~.

The amendments resolve any dispute. This statement is based on the testimony of Dr. Barroll, as a witness designated to testify on New Mexico's behalf under Rule 30(b)(6). *See* Barroll 30b6 Tr. 23:13-15. Mr. Serrano does not dispute that this number reflects "a recent average," and that it "reaches that higher end when surface water supplies are low." Serrano Decl., NM-EX-110, at 9, ¶ 26. Whether these diversion are "resolved immediately at the local level" through an informal arrangement with the Water Master, *id.* at 6, ¶ 14(i)-(k), or pursued to litigation is irrelevant to the substance of the statement and immaterial to the larger point of the United States' motion, which is that New Mexico has not succeeded in deterring over-diversions, in a system where even diversions in compliance with permit conditions are excessive. *See* U.S. Mem. 39. Recent data supplied by Mr. Serrano in his report shows wider variation, *see id.* at 10, and the United States has proposed an amendment to reflect that variation.

88. The ~~District IV~~ **LRG** Water Master ~~**does not look into every overdiversion, and those he does investigate are**~~ **has** usually addressed **confirmed overdiversions** through a repayment plan (under which the water user diverts less the following year) or through the ~~**transfer or**~~ pooling of water rights within the district to cover the overage.

The amendments resolve any dispute. This statement was based on Dr. Barroll's testimony on behalf of New Mexico under Rule 30(b)(6) as well as Mr. Serrano's testimony. New Mexico's dispute appears to be based on the meaning of "look into" and "investigate." *See* N.M. Resp. 9.; Serrano Decl. at 8, ¶ 22. The amendments above resolve any discrepancy with Mr. Serrano's testimony. *See id.*

at 9, ¶¶ 23, 25 (repayment plans); *id.* at 12, ¶ 34 (pooling of rights through "OwMan" program).[16]

89. The Water Master usually requests that the litigation unit initiate enforcement actions of between **5 and 35** ~~1 and 30~~ violations each year, including overdiversions and other violations.

> **The amendment resolves any genuine dispute.** The figure "between 1 and 30" was the testimony of Dr. Barroll in her capacity as a witness designated under 30(b)(6). Barroll 30b6 Tr. 23:14-23. Mr. Serrano's declaration states that the figure is "anywhere from 5 to 35" matters per year in the past 10 years. Serrano Decl., NM-EX-110, at 9, ¶ 23. The amendment updates the statement to reflect this information. New Mexico has identified no other basis for a dispute. New Mexico contests only the implication that this statistic reflects "lax enforcement," which does not suggest a dispute with the fact itself.

90. Repeat over-diverters do not face increased penalties or additional enforcement action for their failure to comply, and the State Engineer has never litigated an enforcement action based on overdiversion to hearing.

> **New Mexico does not identify a disputed fact.** New Mexico's response that this statistic reflects effective negotiation and not a "failure of enforcement," N.M. Resp. 10, fails to refute the substance of the statement.

3. Accounting

91. New Mexico does not consider depletions of the Project's surface water supply caused by groundwater pumping below Elephant Butte as applying against the Compact apportionment to the part of New Mexico below Elephant Butte.

> **New Mexico does not identify a disputed fact.** New Mexico's response that "the Compact does not apportion or even mention groundwater" confirms the substance of the statement. N.M. Resp. 10. The cited paragraph of Mr. Lopez's second declaration is inadmissible hearsay based on his review of historical documents and should be disregarded. *See* U.S. Mot. to Strike.

92. New Mexico does not account for or protect senior surface water rights from surface water depletions by junior-in-priority groundwater pumping for agricultural use within EBID, or require offsets for such depletions.

> **New Mexico does not identify a disputed fact.** New Mexico's allegation that there has not been a priority call by the United States does not respond to the

[16] The United States does not dispute Mr. Serrano is administering water use in good faith to the best of his abilities with the resources provided to him, in accordance with the conditions that the State has adopted, such as the FDR.

substance of the statement, or show a dispute. *See* N.M. Resp. 10. New Mexico's other allegations relating to the Operating Agreement are irrelevant.

93. New Mexico does not account for or require offsets for surface water depletions associated with groundwater pumping outside of EBID that was developed between 1938 and 1980**, except potentially for the City of Las Cruces**.

The amendments resolve any dispute. New Mexico disputes this statement on the basis that a single groundwater user, the City of Las Cruces, has historically discharged return flows from municipal use to the Rio Grande. N.M. Resp. 9. This allegation does not give rise to a dispute because it does not show that New Mexico (or anyone else) "accounts" for the depletions, or that the referenced offsets are "required," or that any required accounting or offsets is related to "groundwater pumping outside of EBID that was developed between 1938 and 1980." The response is also based on inadmissible hearsay. *See* U.S. Mot. to Strike. The City has wells developed after 1980 and also owns some land within the boundaries of EBID. Amending the statement to reflect the possibility of some showing relating to the City resolves any dispute.

94. If the United States were to make a priority call for its senior surface water right for the Project under New Mexico state law, New Mexico does not know how or even *if* it would enforce or implement that call.

New Mexico's dispute is not genuine, or supported. The statement is based on the testimony of witnesses designated to testify on New Mexico's behalf under Rule 30(b)(6). *See* Barroll 30b6 Tr. 44-46; Lopez 30b6 Tr. 38:9-10, 40:5-8. To dispute the statement, New Mexico cites a paragraph in a new declaration from Mr. D'Antonio, who, in turn cites Dr. Barroll's "corrections" to her deposition testimony, NM-EX-226, which were submitted after and in direct response to the United States' motion citing that testimony. Mr. D'Antonio's statement is inadmissible hearsay, and it appears that Ms. Barroll's corrections may be as well, as she cites no basis for the changes. *See* U.S. Mot. to Strike. Further, the testimony in a declaration, or deposition, does not constitute state law, and nothing would prevent New Mexico from offering a different account of its enforcement plans at some other stage of this case, or after. The State Engineer's draft DSRs were intended to specify the process for administration of the Project water right, and indeed there was deemed to be an "urgent need" for that specificity at the time. *See* Part II.B, *supra*. New Mexico cannot genuinely contend that an administrative system deemed inadequate 15 years ago is adequate today. The fact is that New Mexico has no identifiable regulatory framework for addressing priority calls to enforce the Project's water right, plans to interpose an unspecified "validity" requirement on any call placed for the Project, *see, e.g.* D'Antonio Decl. at 17, ¶ 53, and to this day appears to be uncertain as to who has authority to make a call on the Project's behalf. *See e.g.*, N.M. Resp.-Tex. 20-21 (suggesting that "the actual water rights associated with Project deliveries belong to the water users themselves, and not the districts");

D'Antonio Decl. at 17, ¶ 53 (stating that "no LRG water user" has made a call, and "should any water rights owner" request a call, certain steps would follow).

4. Compact Enforcement

95. New Mexico will investigate groundwater impacts to the Project's surface water supply for Compact enforcement purposes only upon a complaint from Texas or the United States **that New Mexico deems to be adequately supported and that accounts for New Mexico's allegations of injury from the Operating Agreement**.

The amendments resolve any dispute. This statement is based on the deposition testimony of Estevan Lopez and Margaret Barroll in their capacity as witnesses designated to testify on New Mexico's behalf under Rule 30(b)(6). Lopez 30b6 Tr. 31:21-32:4, 69:18-70:2-7, 92-94; Barroll 30b6 Tr. 15:4-6, 37:5-8, 42:18-43:14. New Mexico does not identify this statement as disputed or undisputed. Its responds only with citations to Paragraph 39 of the Second Declaration of Estevan Lopez, NM-EX-008, and to Paragraph 14j of the Declaration of Ryan Serrano, NM-EX-010, neither of which contains an allegation about what New Mexico requires for purposes of responding to a complaint by the United States about Compact violations. In an abundance of caution, the United States has proposed amendments that correspond to Mr. Lopez's implication that New Mexico will not pursue a complaint until it deems the evidence adequate and obtains relief for the alleged injuries from the Operating Agreement.

Mr. Serrano is not designated as a witness testifying on behalf of the State of New Mexico under Rule 30(b)(6). The sub-paragraph cited here states: "If the Water Master staff receives complaints about improper groundwater or surface water diversions, we promptly investigate and/or notify EBID in the case of EBID surface water complaints." This generic statement does not respond to the fact at issue because it does not address the obligations of the State of New Mexico, as a party to the Compact to investigate complaints to enforce the Compact. That the Water Master will look into particular "diversions" on an ad hoc basis does not show that New Mexico, as a State, believes it has a duty to look at water use as a whole in any particular circumstances.

96. From New Mexico's perspective, the complaints of Texas and the United States filed in this original action constitute complaints about the impacts of groundwater pumping on the Project water supply for purposes of Compact enforcement.

New Mexico's dispute is not genuine and is not supported. Both of New Mexico's witnesses designated under Rule 30(b)(6) testified that the complaints of Texas and the United States constitute "formal" complaints that, in New Mexico's view, require New Mexico to investigate the allegations of potential Compact violations. *See* Lopez 30b6 Tr. 69:18-24; Barroll 30b6 Tr. 47:17-22, 48:10-13. New Mexico's allegations of injury from the Operating Agreement are not relevant to whether it views the complaints of Texas and the United States as providing the "formal" notice of potential Compact violations. The only evidence that New Mexico cites is the Second Declaration of Estevan Lopez, which is not

offered as testimony by or binding upon the State of New Mexico pursuant to Rule 30(b)(6), and does not demonstrate any dispute with the statement above. *See also* U.S. Mot. to Strike. The rationale and evidentiary basis for the complaints is not relevant, and New Mexico also has not cited any evidence to show that the United States' complaint was retaliatory, even if that were a relevant consideration.

97. Nevertheless, since Texas's complaint was filed in 2013, and the United States' complaint was filed in 2014, all New Mexico has done to address the complaints of Texas and the United States is to investigate the allegations and to ~~d~~**~~evelop~~** **initiate** a "pilot program" to reduce groundwater pumping ~~**which the State Engineer has yet to implement**~~.

The amendments above resolve the dispute. *See* N.M. Resp. 11. Mr. Serrano's declaration does not state that "enforcement against illegal river pumpers" was conducted in response to this lawsuit and does not give rise to a dispute. New Mexico's allegation that it is "not required to take drastic steps to curtail additional water use" because it is injured by the Operating Agreement is a legal position, not a fact giving rise to a dispute.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that its Motion for Partial Summary Judgment be granted.

Respectfully submitted this 5th day of February 2021.

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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 5th day of February, 2021, I caused a true and correct copy of the **UNITED STATES OF AMERICA'S REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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