

No. 141, Original

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

STATE OF TEXAS,

Plaintiff,

v.

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

Defendants.

OFFICE OF THE SPECIAL MASTER

**THE STATE OF TEXAS'S NOTICE OF
MOTION FOR PARTIAL SUMMARY JUDGMENT;
FEDERAL RULE OF CIVIL PROCEDURE 56**

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November 5, 2020

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

PLEASE TAKE NOTICE that pursuant to the Case Management Plan adopted September 6, 2018, and amendments thereto, including the September 29, 2020 Order and Amendment to Trial Management Schedule, and under the guidance of Federal Rule of Civil Procedure, Rule 56, the state of Texas (Texas) hereby does move the Special Master for a recommendation to the Supreme Court for summary judgment on the following:

1. The 1938 Compact is unambiguous pursuant to principles of Compact interpretation.
2. Apportionments of Rio Grande water to the states of New Mexico and Texas are set forth in the plain text and structure of the unambiguous 1938 Compact.
 - a. New Mexico receives its sole apportionment of water pursuant to Article III of the Compact at the Colorado-New Mexico state line.
 - b. The water New Mexico delivers into the Elephant Butte Reservoir pursuant to Article IV of the Compact is apportioned to Texas, subject only to the United States' 1906 Treaty with Mexico and the United States' Downstream Contracts with Elephant Butte Irrigation District (EBID).
 - c. The Compact, in Articles VII and VIII, expressly grants Texas the power and authority to protect the delivery of water in Elephant Butte Reservoir from upstream depletions by Colorado and New Mexico. The Compact grants no such powers to New Mexico.

- d. In order to protect Texas's apportionment as well as the United States' ability to meet its 1906 Treaty obligations to Mexico and its contractual obligation to EBID, the 1938 Compact requires New Mexico to relinquish dominion and control over the water it delivers to the Elephant Butte Reservoir pursuant to the Compact. New Mexico has no residual sovereign right to water it delivers in Elephant Butte Reservoir.
 - e. The 1938 Compact does not apportion water to New Mexico below Elephant Butte Reservoir. The water released from Elephant Butte Reservoir, and delivered to EBID pursuant to the United States' Downstream Contracts with EBID, is not a Compact apportionment to New Mexico. This water is a Project allocation, defined by the United States' Downstream Contracts with EBID.
- 3. Because there is no Compact apportionment to New Mexico below Elephant Butte Reservoir, New Mexico's first and fourth counterclaims, based upon alleged Compact violations by Texas, must fail as a matter of law.
 - 4. The Compact protects the Project and its operations under the conditions that existed in 1938, at the time the Compact was executed.
 - 5. New Mexico, through its groundwater pumping below Elephant Butte Reservoir, depletes surface water flows and the volume of water in the Rio Grande in excess of depletion conditions that existed in 1938 (1938 Condition).

- a. Surface and groundwater in the Rio Grande basin below Elephant Butte Reservoir are interconnected.
 - b. New Mexico must refrain from actions that deplete the Rio Grande in excess of the 1938 Condition. Post-1938 groundwater pumping in a fully appropriated Rio Grande basin decreases the volume of water available for Project allocations, and intercepts Texas's apportionment.
 - c. New Mexico has admitted that its groundwater pumping depletes surface water flows.
 - d. New Mexico has admitted that it knew or should have known that its actions were adversely affecting Texas's apportionment.
6. New Mexico state law has no application to the water New Mexico delivers to the Project at Elephant Butte Reservoir pursuant to the Compact, or to the Project's subsequent distribution of the water pursuant to Downstream Contracts to which New Mexico is not a party.
- a. The Compact preempts conflicting New Mexico state law.
 - b. New Mexico state law does not control Texas's apportionment. Rather, Texas's apportionment is controlled by authority superior to New Mexico state law, and New Mexico must administer its state laws so as to protect Texas's apportionment.
 - c. New Mexico is not a party to the United States' Downstream Contracts with EBID and El Paso County Water Improvement District No. 1 (EP#1), and cannot alter, modify, and/or condemn the Downstream Contracts' terms and rights.

This motion is made upon the grounds that pursuant to Federal Rule of Civil Procedure 56, a party may move for partial summary judgment on any part of a claim for which there is no genuine dispute as to any material fact, entitling the party judgment as a matter of law. Texas seeks partial summary judgment on these issues, each of which represents a distinct part of the claims set forth in Texas's Complaint that cannot be genuinely disputed by the state of New Mexico. As such, these issues should be dispositively determined now, as a matter of law, and upon the Special Master's consideration of evidence where appropriate, to narrowly tailor the future trial of this matter to the genuinely disputed material facts.

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

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This motion will be based on the Notice contained herein, the Memorandum of Points and Authorities in Support Thereof, Texas's Appendix of Evidence, the files and records in this action, the oral argument of counsel, and any further evidence or argument that the Special Master may properly receive at or before the hearing.

Dated: November 5, 2020

Respectfully submitted,

s/ Stuart L. Somach

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November 5, 2020

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The 1938 Rio Grande Compact¹ (“1938 Compact” or “Compact”) equitably apportions the waters of the Rio Grande from its headwaters to Fort Quitman, Texas, among Colorado, New Mexico, and Texas. The plain text and structure of the Compact require that the state of New Mexico (New Mexico) deliver specified amounts of Rio Grande water to Texas in Elephant Butte Reservoir, a storage feature of the Rio Grande Reclamation Project (Project) located in New Mexico upstream of the Texas-New Mexico state line. All water delivered in Elephant Butte Reservoir is apportioned to Texas, subject to the 1906 Treaty with Mexico,² and the United States’ Downstream Contracts with Elephant Butte Irrigation District (EBID).³ In order for Texas to receive its apportionment of Rio Grande water, the water must be released from Elephant Butte Reservoir, and allowed to flow unimpeded through Project lands in southern New Mexico, and then across the state line into Texas.

New Mexico violates the 1938 Compact and injures Texas when it intercepts water apportioned to Texas and uses that water in New Mexico. New Mexico intercepts water apportioned to Texas by authorizing and permitting the extraction and use, in New

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

² Convention Between U.S. and New Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, U.S.-Mexico, May 21, 1906, 34 Stat. 2953 (May 21, 1906), Treaty Series No. 455 (1906 Treaty).

³ The November 9, 1937 contract between the United States and EBID (1937 US/EBID Contract) at TX_MSJ_004434-004461, and the February 16, 1938 contract between EBID and El Paso County Water Improvement District No. 1 (EP#1), and approved by the United States on April 11, 1938 (1938 US/EBID/EP#1 Contract) at TX_MSJ_005249-005250, are collectively the “United States’ Contracts with EBID.” All further Bates numbers referenced hereto are in Texas’s Appendix of Evidence.

Mexico, of groundwater that is hydrologically connected to the Rio Grande. Through this and other actions, New Mexico depletes surface water in the Rio Grande in excess of the depletions that existed in 1938.⁴ This depletion of surface water in excess of depletions that occurred in 1938 has increased over time, and unless enjoined, will continue unabated.

The background and procedural history of this litigation are explained and well developed in a number of locations.⁵ The factual and legal issues raised in this Motion for Partial Summary Judgment have been addressed on three prior occasions, in one form or another, albeit in different contexts. These issues were first raised in the context of Texas's motion to file its complaint against New Mexico.⁶ They were raised a second time in the context of New Mexico's Motion to Dismiss, culminating in the February 9, 2017 First Report and the Supreme Court related decisions. The third instance was in the context of Texas's motion seeking a judicial declaration to confirm legal issues decided in the First Report.⁷ The Special Master's April 14, 2020 Order⁸ on that motion, which also addressed similar motions by the other parties, further defined the issues raised here.

⁴ New Mexico also intercepts water apportioned to Texas through unlawful surface water diversions. These diversions are fact-specific and not appropriate for summary judgment.

⁵ *Texas v. New Mexico*, 138 S. Ct. 954, 956-57 (2018); First Interim Report of the Special Master, on New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention and Motions of Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 for Leave to Intervene (First Report) (Feb. 9, 2017) at 31-187; *see* First Report lodged with the Special Master as Docket No. 54.

⁶ Texas's Motion for Leave to File Complaint, Complaint, and Brief in Support of Motion for Leave to File Complaint (TX Complaint), is lodged with the Special Master as Docket No. 63.

⁷ The State of Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon is lodged with the Special Master as Docket No. 162.

⁸ *See* April 14, 2020 Order lodged with the Special Master as Docket No. 340 (hereinafter, "April 14, 2020 Order").

Pursuant to Federal Rule of Civil Procedure 56, a party may move for partial summary judgment on any part of a claim for which there is no genuine dispute as to any material fact, entitling the party judgment as a matter of law. Texas seeks partial summary judgment of several issues, each of which represents a distinct part of the claims set forth in Texas's Complaint that cannot be genuinely disputed by New Mexico. As such, these issues should be determined now, as a matter of law, and upon the Special Master's consideration of evidence where appropriate, to narrowly tailor the future trial of this matter to the genuinely disputed material facts.

Texas seeks partial summary judgment of the following issues:⁹

1. The 1938 Compact is unambiguous pursuant to principles of Compact interpretation. [Sections V.A and V.B.]
2. Apportionments of Rio Grande water to the states of New Mexico and Texas are set forth in the plain text and structure of the unambiguous 1938 Compact. [Section V.C.]
 - a. New Mexico receives its sole apportionment of water pursuant to Article III of the Compact at the Colorado-New Mexico state line. [Section V.C.2.]
 - b. The water New Mexico delivers into the Elephant Butte Reservoir pursuant to Article IV of the Compact is apportioned to Texas, subject only to the United States' 1906 Treaty with Mexico and the United States' Downstream Contracts with EBID. [Section V.C.3.]

⁹ For each of the issues listed in this summary of issues 1-6, and subparts, there is a bracketed reference to the location of the primary legal argument in support of the issue. The primary legal arguments, however, are also supported by other areas of the brief, including but not limited to the evidence discussed in section II, and the Appendix of Evidence.

- c. The Compact, in Articles VII and VIII, expressly grants Texas the power and authority to protect the delivery of water in Elephant Butte Reservoir from upstream depletions by Colorado and New Mexico. The Compact grants no such powers to New Mexico. [Section V.C.4.]
 - d. In order to protect Texas's apportionment as well as the United States' ability to meet its 1906 Treaty obligations to Mexico and its contractual obligation to EBID, the 1938 Compact requires New Mexico to relinquish dominion and control over the water it delivers to the Elephant Butte Reservoir pursuant to the Compact. New Mexico has no residual sovereign right to water it delivers in Elephant Butte Reservoir. [Section V.C.5.]
 - e. The 1938 Compact does not apportion water to New Mexico below Elephant Butte Reservoir. The water released from Elephant Butte Reservoir, and delivered to EBID pursuant to the United States' Downstream Contracts with EBID, is not a Compact apportionment to New Mexico. This water is a Project allocation, defined by the United States' Downstream Contracts with EBID. [Section V.C.6.]
3. Because there is no Compact apportionment to New Mexico below Elephant Butte Reservoir, New Mexico's first and fourth counterclaims, based upon alleged Compact violations by Texas, must fail as a matter of law. [Section V.D.]

4. The Compact protects the Project and its operations under the conditions that existed in 1938, at the time the Compact was executed. [Section V.E.]
5. New Mexico, through its groundwater pumping below Elephant Butte Reservoir, depletes surface water flows and the volume of water in the Rio Grande in excess of depletion conditions that existed in 1938 (1938 Condition). [Section V.F.]
 - a. Surface and groundwater in the Rio Grande basin below Elephant Butte Reservoir are interconnected. [Section V.F.1.]
 - b. New Mexico must refrain from actions that deplete the Rio Grande in excess of the 1938 Condition. Post-1938 groundwater pumping in a fully appropriated Rio Grande basin decreases the volume of water available for Project allocations, and intercepts Texas's apportionment. [Sections V.F.1-V.F.2.]
 - c. New Mexico has admitted that its groundwater pumping depletes surface water flows. [Section V.F.3.]
 - d. New Mexico has admitted that it knew or should have known that its actions were adversely affecting Texas's apportionment. [Section V.F.4.]
6. New Mexico state law has no application to the water New Mexico delivers to the Project at Elephant Butte Reservoir pursuant to the Compact, or to the Project's subsequent distribution of the water pursuant to Downstream Contracts to which New Mexico is not a party. [Section V.G.]

- a. The Compact preempts conflicting New Mexico state law.
[Section V.G.1.]
- b. New Mexico state law does not control Texas's apportionment.
Rather, Texas's apportionment is controlled by authority superior
to New Mexico state law and New Mexico must administer its
state laws so as to protect Texas's apportionment. [Section V.G.2.]
- c. New Mexico is not a party to the United States' Downstream
Contracts with EBID and EP#1,¹⁰ and cannot alter, modify, and/or
condemn the Downstream Contracts' terms and rights.¹¹
[Sections V.G.3-V.G.5.]

Texas's Memorandum of Points and Authorities is lengthy but encompasses eighteen separate rulings sought to cover the major areas, with subparts, for which Texas seeks summary judgment.¹²

II. BACKGROUND

A. The Texas Complaint

The Texas Complaint alleges that, "in order to resolve the existing and future controversies among them, and to equitably divide and apportion the water of the Rio Grande among them, the states of Colorado, New Mexico, and Texas signed the Rio Grande Compact on March 18, 1938." TX Complaint ¶ 3. The Compact was ratified by

¹⁰ The November 10, 1937 contract between the United States and EP#1 (1937 US/EP#1 Contract) is at TX_MSJ_004464-004488.

¹¹ The term "Downstream Contracts" collectively refers to the following three contracts: the 1937 US/EBID Contract, the 1937 US/EP#1 Contract, and the 1938 US/EBID/EP#1 Contract.

¹² The first 55 pages consists of a recitation of background, history, and facts Texas believes are undisputed. Texas's substantive arguments begin on page 56, with a discussion of the proper standard of review. Additional undisputed facts are tethered to the substantive arguments.

the respective state legislatures, and consented to and approved by the United States pursuant to an Act of Congress, Act of May 31, 1939, ch. 155, 53 Stat. 785.

TX Complaint ¶ 3.

The Compact was entered into, among other purposes, to protect the operation of the Project. TX Complaint ¶ 4. It obligates New Mexico to deliver specified amounts of Rio Grande water in Elephant Butte Reservoir, a storage feature of the Project. *Id.*

“Once delivered to Elephant Butte Reservoir, that water is allocated and belongs to Rio Grande Project beneficiaries in southern New Mexico and in Texas, based upon allocations derived from the Rio Grande Project authorization and relevant contractual arrangements.” *Id.* For the water to be delivered to Project beneficiaries in New Mexico and Texas, the water must be “allowed to flow unimpeded through Rio Grande Project lands in southern New Mexico, and then across the state line into Texas.” *Id.* “New Mexico has, contrary to the purpose and intent of the Rio Grande Compact, allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico.” *Id.*

The Rio Grande Compact did not specifically identify quantitative *allocations* of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation. Instead, *it relied upon the Rio Grande Project and its allocation and delivery of water* in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, *to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas.*¹³

TX Complaint ¶ 10 (emphasis added).

¹³ In its Answer to Texas’s Complaint, New Mexico admits these allegations. State of New Mexico’s Answer to the State of Texas’s Complaint (NM Answer). NM Answer is lodged with the Special Master as Docket No. 98.

A central purpose of the Compact is to protect the Project and its operations under the conditions that existed in 1938, when the Compact was executed. TX Complaint ¶¶ 10, 18. New Mexico’s actions have “increasingly allowed the diversion of surface water, and [have] allowed and authorized the extraction of water from beneath the ground, downstream of Elephant Butte Dam, by individuals or entities within New Mexico for use within New Mexico.” *Id.* ¶ 18. “The excess diversion of Rio Grande surface water and the hydrologically connected underground water downstream of Elephant Butte Reservoir adversely affects the delivery of water that is intended for use within the Rio Grande Project in Texas.” *Id.* “These unlawful surface water diversions and extractions of water from beneath the ground intercept water that in 1938 would have been available for use in Texas, and convert that water for use in New Mexico.” *Id.* “Thus, New Mexico has changed the conditions that existed in 1938 when the Compact was executed to the detriment of the State of Texas.” *Id.*

New Mexico, contrary to the 1938 Compact, allowed and authorized water apportioned to Texas to be depleted through surface diversions and groundwater pumping in New Mexico. TX Complaint ¶ 19. In practice, New Mexico has granted rights, and has otherwise authorized and permitted water users within New Mexico, to intercept return flows and tributary flows below Elephant Butte Reservoir for use in New Mexico, thereby depriving Texas of water that was apportioned to it. *Id.* These actions violate New Mexico’s obligations under the 1938 Compact, causing injury to Texas and its citizens. *Id.* ¶¶ 4, 25.

B. History of the Rio Grande Basin, the Project, and the Compact

1. The physical setting of the Rio Grande

The Rio Grande is an interstate and international river, approximately 1,800 miles long, originating in southern Colorado. Declaration of Robert J. Brandes, P.E., Ph.D. (Brandes Decl.), attached as TX_MSJ_000003-000004 in Texas's Appendix of Evidence; National Resources Committee, Regional Planning: Part VI-The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico and Texas 1936-7 (JIR), TX_MSJ_000029 at 7. It winds southward approximately 400 miles across New Mexico, and crosses into Texas near the city of El Paso, where it defines the 1,250 mile international boundary between the United States and Mexico as it traverses to the Gulf of Mexico. *Id.* The entire Rio Grande basin is depicted on the map below entitled **Figure 1.** Brandes Decl. at TX_MSJ_000004.



FIGURE 1:¹⁴ The Rio Grande basin
[TX_MSJ_000004 and 001574]

¹⁴ Full size versions of all of the Figures in this brief are contained in the Texas Appendix of Evidence at TX_MSJ_001574-001584.

Along its entire course, the Rio Grande provides a source of surface water that is used extensively to meet the needs of municipalities, industries, and agricultural irrigators, as well as to support various environmental uses. Brandes Decl. at TX_MSJ_000004. Numerous dams and reservoirs exist along the river primarily for water supply and flood control purposes; consequently, flows in much of the river are substantially controlled and regulated. *Id.*

With respect to the usage of water, the river is divided into two distinct sections, the Upper and Lower Rio Grande basins, at Fort Quitman. Brandes Decl. at TX_MSJ_000004-000005. The Upper Rio Grande basin (the area above Fort Quitman, Texas) is comprised of parts of Colorado and New Mexico, and a small part of Texas. *Id.* The Upper Rio Grande basin itself is divided into three sections: (1) the San Luis section in Colorado, (2) the Middle section in New Mexico, and (3) the Elephant Butte-Fort Quitman section in New Mexico, Texas, and Mexico. *Id.*; JIR at TX_MSJ_000392. This case centers primarily upon issues involving the Elephant Butte-Fort Quitman section of the Upper Rio Grande basin.¹⁵ Brandes Decl. at TX_MSJ_000004-000005.

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¹⁵ A different naming system is used locally. The San Luis section in Colorado is referred to as the “Upper Rio Grande,” the middle section in New Mexico is referred to as the “Middle Rio Grande,” and the Elephant Butte-Fort Quitman section in New Mexico, Texas, and Mexico is referred to as the “Lower Rio Grande.” This local naming system is used here. Correspondingly, this case is primarily centered upon issues involving the Lower Rio Grande. Brandes Decl. at TX_MSJ_000004-000005.

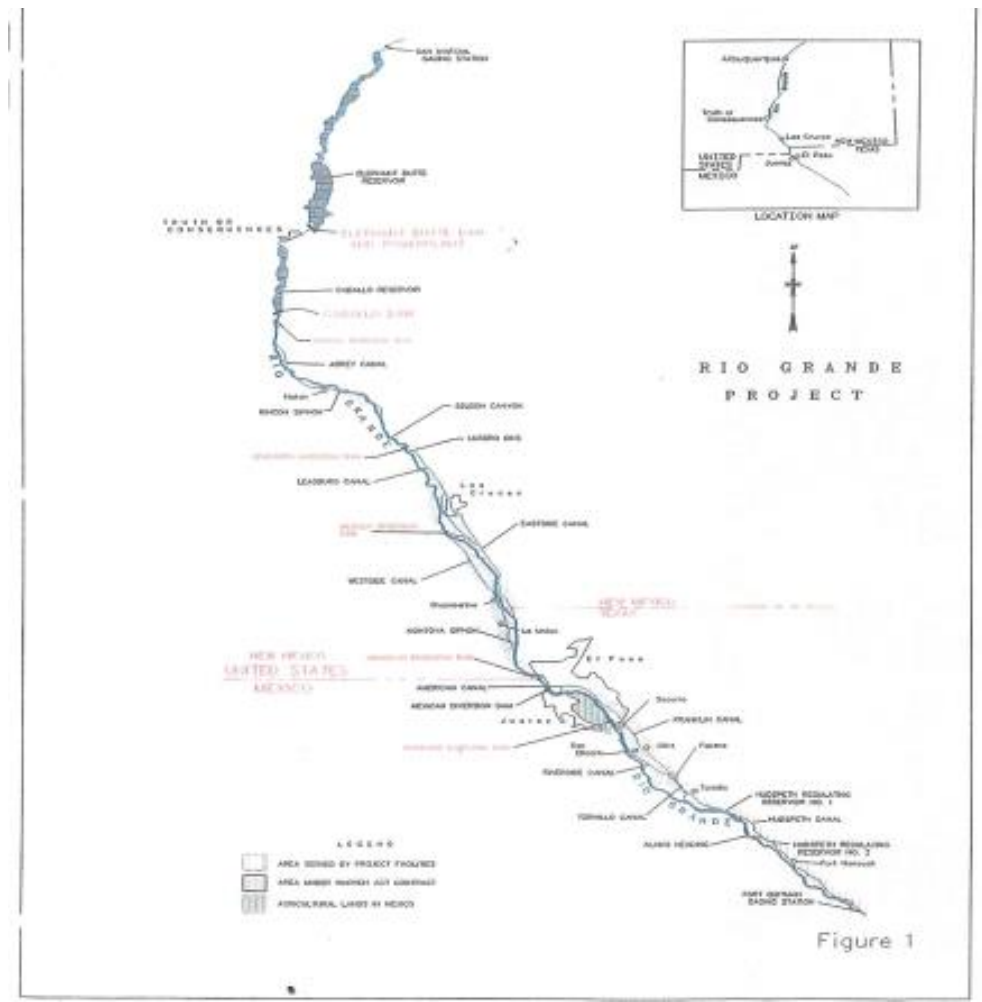


FIGURE 2: The Upper Rio Grande basin
[TX_MSJ_000005 and 001575]

2. The historical disputes over Rio Grande surface water flow depletions led to creation of the Project and later to the Compact

In the late-nineteenth century, Mexican irrigators in the vicinity of Juarez, and irrigators in the Mesilla Valley in New Mexico and the El Paso Valley in Texas, all began complaining of diminished Rio Grande flows reaching their lands. Declaration of Scott Miltenberger (Miltenberger Decl.), attached as TX_MSJ_001585-006491 in Texas's Appendix of Evidence. They attributed this depletion to extensive development of Colorado's San Luis Valley in the 1880s. *Id.* at TX_MSJ_001589. Formal complaints lodged by the Mexican government prompted the Secretary of the Interior, in 1896, to

impose an “embargo,” or moratorium, on the use of all public lands, including federal land, for reservoirs and other facilities, bringing private irrigation efforts largely to a halt in the San Luis Valley. *Id.* at TX_MSJ_001589-001590.

The embargo, while protested by Colorado interests, fostered settlement of the international dispute between the United States and Mexico and made the Project possible. Miltenberger Decl. at TX_MSJ_001589. The 1904 National Irrigation Congress advanced a proposal for a federal reservoir to store water to irrigate lands in Mexico, New Mexico, and Texas. *Id.* at TX_MSJ_001601-001602. The idea of an “international dam” in the vicinity of El Paso to deliver water to Mexico had been contemplated since the 1890s, but placement of the dam at the geological formation known as Elephant Butte, about 110 miles upstream of the New Mexico-Texas state line, offered an additional advantage: assuring water to lands in southern New Mexico and western Texas. *Id.*

The Project was ultimately authorized pursuant to the Rio Grande Reclamation Project Act of 1905 as a federal project that provides water from the Rio Grande primarily for agricultural irrigation along the Rio Grande in southern New Mexico and in the El Paso Valley of Texas. Brandes Decl. at TX_MSJ_000006. Elements of the Project also provide hydropower, flood control, and water for municipal users. *Id.* It included construction of Elephant Butte Dam and Reservoir (“Elephant Butte Reservoir” or “Reservoir”) on the Rio Grande near Truth or Consequences, New Mexico, to provide stored water for Project users. *Id.*

Following the authorization of the Project in 1905, the United States entered into the Treaty with Mexico in 1906. Miltenberger Decl. at TX_MSJ_001589. Thereafter, Colorado agitated unsuccessfully for revocation of the embargo for nearly 30 years.

Id. at TX_MSJ_001589-001590. Federal authorities, however, retained the moratorium out of concern that depletions above the now-constructed Elephant Butte Reservoir would reduce the quantity of water that flowed into the Reservoir and was available downstream for lands in Mexico, New Mexico, and Texas. *Id.*

3. A Temporary Compact froze upstream depletion levels to allow negotiations to continue

Viewing an interstate water compact as a means of ending the embargo, Colorado entered into negotiations with New Mexico and Texas in the early 1920s. Miltenberger Decl. at TX_MSJ_001590. Revocation of the embargo in 1925 prompted New Mexico to withdraw from the negotiations, and when the states met once more in 1928, Colorado was unable to convince either New Mexico or Texas that upstream reservoirs would not deplete flows to the downstream states. *Id.* The three states therefore committed to a temporary compact, approved by the legislatures of the signatory states in 1929, and approved by the United States Congress in 1930. *See* Act of June 17, 1930, ch. 506, 46 Stat. 767 (Temporary Compact); Miltenberger Decl. at TX_MSJ_001591.

The Temporary Compact was to last until 1935, allowing time for gathering the data necessary to resolve this issue and provide for a permanent compact. Miltenberger Decl. at TX_MSJ_001591. The key aspect of the Temporary Compact was that it froze upstream depletions at a 1929 level, regardless of what facilities were built upstream, thereby protecting downstream development from post-Project depletions. *Id.*

4. As a result of the 1938 Compact negotiations, upstream depletions were frozen at pre-1938 levels

The negotiation of a permanent compact proved troublesome in the early 1930s, with the states continuing to disagree over upstream development. Miltenberger Decl. at TX_MSJ_001591-001592. In 1935, Texas filed an action against New Mexico in the

Supreme Court, alleging that New Mexico was depleting flows in Elephant Butte Reservoir to the detriment of the Project and Texas, in violation of Texas's rights and in violation of the Temporary Compact. *Id.* at TX_MSJ_001592. Extensive testimony was taken in that case before Texas and New Mexico both moved for a stay of the proceeding to allow them an opportunity to conclude a permanent compact. *Id.* The Court granted this request. *Id.*

During the negotiations for what became the 1938 Compact, there were three distinct positions. Miltenberger Decl. at TX_MSJ_001595-001596. Colorado sought the right to develop lands within the Rio Grande watershed above the Colorado-New Mexico state line. *Id.* New Mexico sought to foster the Middle Rio Grande Conservancy District project above Elephant Butte Reservoir. *Id.* Texas sought to protect the Project as a unit, and thereby, Texas, from upstream depletions by Colorado and New Mexico. *Id.* In essence, these were the same positions of the states at the time of the 1929 Temporary Compact, and were reflected in the Supreme Court litigation. *Id.* Without deviation, in deliberating a compact, the three states advocated for what each thought important. *Id.* at TX_MSJ_001591-001592. The states of Colorado, New Mexico, and Texas agreed to the Compact in 1938. Brandes Decl. at TX_MSJ_000006; Miltenberger Decl. at TX_MSJ_001595.

As a result of the negotiations to formalize the 1938 Compact, depletions were frozen at pre-1938 conditions. Miltenberger Decl. at TX_MSJ_001599; Brandes Decl. at TX_MSJ_000006. Two delivery schedules, or indices, were adopted: one for Colorado to New Mexico, and one for New Mexico to Elephant Butte Reservoir. *Id.*; Compact, arts. III, IV. These schedules were derived from streamflow data and analyses developed primarily by the JIR – an effort to provide the needed data to resolve the impasse over the

apportionment of the Rio Grande waters above Fort Quitman.¹⁶ Miltenberger Decl. at TX_MSJ_001598-001600; Brandes Decl. at TX_MSJ_000006.

These provisions allowed the continued development of 1929 and 1937 facilities, addressed in the Compact, as long as they did not increase depletions beyond what existed in 1938. Miltenberger Decl. at TX_MSJ_001599-001600. These protections were to the benefit of Texas and the Project, which was downstream from all of the developments above Elephant Butte. *Id.* Accordingly, it was Texas, in Articles VII and VIII, that was granted the Compact right to ensure that depletions upstream of Elephant Butte Reservoir were protected from post-1938 depletions by Colorado or New Mexico. *Id.*

The question of what specifically was being protected below Elephant Butte Reservoir was fiercely debated and focused on the right figure to attach to releases from the Reservoir. Miltenberger Decl. at TX_MSJ_001603. The amount of water to be released related directly to the upstream obligation to deliver water. *Id.* The higher the amount to be released, the more water needed to be delivered to the Reservoir. *Id.* Texas argued for a normal release of 800,000 acre feet as necessary to guarantee that a sufficient quantity and quality of water actually reached Texas. *Id.* at TX_MSJ_001604-001605. Texas's negotiating position was based on an understanding of then existing depletions to the Rio Grande, EBID's use of water in New Mexico, and the Treaty with Mexico. *Id.* at TX_MSJ_001605. Texas sought a volume that also took into account the

¹⁶ The indices used in Article III were based upon flow data for a 1928-1937 period of record that reflected an accepted 1938 Condition of consumption in the San Luis Valley that would protect flows for the Middle Rio Grande below the state line. Miltenberger Decl. at TX_MSJ_001597-001598. The indices used in Article IV were based upon flow data for an 1890-1929 period of record that reflected an accepted 1938 Condition of consumption in the Middle Rio Grande that would protect the supply for lands below Elephant Butte and to Texas. *Id.*

degraded water quality of deliveries to Texas, resulting from the use and reuse of irrigation return flows on lands between the release point at Caballo and the Texas state lines. *Id.*

In response, New Mexico, protecting its upstream apportionment from Colorado and its uses of that entitlement in the Middle Rio Grande, took a position at odds with the stance of interests downstream from Elephant Butte Reservoir. Miltenberger Decl. at TX_MSJ_001605. New Mexico argued for a normal release around 750,000 acre feet, thereby protecting it from Texas's demand. *Id.* It argued that a smaller figure could sustain uses below Elephant Butte, and thus it should be obligated to make lesser deliveries. *Id.* Ultimately, the parties agreed to a normal release of 790,000 acre feet. *Id.* at TX_MSJ_001606. While this was a negotiated number, Texas believed the quantity adequate to secure the water apportioned to it under the 1938 Compact, assuming a 1938 Condition of consumption below Elephant Butte Reservoir. *Id.* Texas did not anticipate that Project return flows, which were anticipated to comprise a significant portion of the 790,000 acre feet of Texas's entitlement, would be intercepted by New Mexico groundwater pumping.

The total water supply available for diversion by EBID, EP#1, and Mexico included storage in and releases from Elephant Butte Reservoir and return flows generated within EBID and EP#1. Brandes Decl. at TX_MSJ_000006. Now, New Mexico's post-Compact development has depleted that water supply by capturing returns flows that otherwise would have been available. *Id.*

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C. New Mexico's Post-Compact Development of Groundwater and Failure to Regulate Appropriations in the Lower Rio Grande

- 1. As of 1938, New Mexico understood the Lower Rio Grande basin was fully appropriated and that surface and groundwater were interconnected**

By 1938, the Lower Rio Grande basin of New Mexico was fully appropriated.

Miltenberger Decl. at TX_MSJ_001587, 001593; excerpts of Rule 30(b)(6) Deposition of Estevan Lopez (Lopez 30(b)(6) Depo.), 9/18/2020, at TX_MSJ_001139-001140, 17:21-18:8.¹⁷ At that time, and later, releases from Elephant Butte Reservoir comprised effectively all of the Rio Grande surface water supply in the Lower Rio Grande.¹⁸

Brandes Decl. at TX_MSJ_000006. Few groundwater wells were in use at the time of Compact adoption in 1938. Declaration of Staffan Schorr (Schorr Decl.), attached as TX_MSJ_000697-000699 in Texas's Appendix of Evidence.

As early as the 1900s, studies determined that the groundwater and surface water in the Rio Grande below Elephant Butte Reservoir were interconnected. Miltenberger Decl. at TX_MSJ_001611-001612. The Compact negotiators and engineers recognized

¹⁷ Estevan Lopez is the former Director of the New Mexico Interstate Stream Commission. Excerpts of Deposition of Estevan Lopez, 7/6/2020, at TX_MSJ_001089, 15:16-22. New Mexico also disclosed Mr. Lopez as a retained expert witness, and he produced his initial expert report in that capacity on October 31, 2019, as well as several subsequent reports. *Id.* at 13:12-13, 13:23-24, 14:5-24; Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001161-001162, 77:22-78:14. In addition to Mr. Lopez' roles in this case as a percipient witness and designated retained expert witness on behalf of New Mexico, New Mexico also designated Estevan Lopez to testify on behalf of the state pursuant to a Rule 30(b)(6) Deposition Notice. *See* Declaration of Theresa A. Barfield (Barfield Decl.) at TX_MSJ_000704-000705 in Texas's Appendix of Evidence, Exh. 1, New Mexico's September 10, 2020 Objections to the United States' Notice of 30(b)(6) Deposition and to State of Texas's Cross-Notice, TX_MSJ_000706-000728; Lopez 30(b)(6) Depo., 9/18/2020, TX_MSJ_0001133, 001133-001134, 001162-001163, 11:12-15, 11:24-12:3, 78:20-79:2.

¹⁸ In addition to releases from the Reservoir, small amounts of seasonal arroyo discharges contribute to available water in the Rio Grande. Brandes Decl. at TX_MSJ_000001-000016. These arroyo flows were included in the total volume of water that was to be made available downstream of the Reservoir. *Id.*

that groundwater development below Elephant Butte would not augment the basin's supply, but rather deplete the available surface water. *Id.* This conclusion was also reflected in the United States Geological Survey study conducted at the request of the New Mexico State Engineer and EBID in the late 1940s and early 1950s. *Id.* at TX_MSJ_001614-001615.

By the mid-1950s, New Mexico's understanding of the connection between surface water and groundwater in the Upper Rio Grande basin was reduced to an order of the New Mexico State Engineer, S.E. Reynolds, using his statutory authority to declare an "Underground Water Basin" for the Middle Rio Grande. Miltenberger Decl. at TX_MSJ_001616. Reynolds' Order acknowledged that groundwater fed the Rio Grande. *Id.* at TX_MSJ_005702 (Reynolds' Order). Twelve years later, during the 1968 dispute with Colorado, New Mexico State Engineer Reynolds opined that the delivery schedules upon which the Compact relied "makes the control of ground water appropriations in the upstream states essential" as otherwise the states could not adhere to their "compact commitments." *Id.* at TX_MSJ_001617. This acknowledgment of the impact groundwater pumping had on Rio Grande surface waters was also among the bases of the New Mexico State Engineer's opposition to the city of El Paso's efforts to appropriate groundwater in New Mexico. *Id.* Finally, in the early 1980s, an internal study of streamflow depletion below Elephant Butte Reservoir conducted by State Engineer Reynolds' office concluded that groundwater development since the 1950s in New Mexico had altered flows to such an extent that greater releases were required from the Reservoir for the same quantity of water to reach the city of El Paso under the accepted 1938 Condition. *Id.* at TX_MSJ_001618-001619.

2. Despite understanding the ground/surface water connection, New Mexico failed to regulate appropriations in the Lower Rio Grande

New Mexico understood that groundwater pumping would deplete the volume of Rio Grande surface water, and that the basin was fully appropriated. *See* section V.C.1. Nonetheless, New Mexico authorized the appropriation of groundwater to address the immediate water supply problems associated with the drought of the 1950s. Miltenberger Decl. at TX_MSJ_001614-001615. The number of groundwater wells has increased from 60 in 1938 to over 8,000 in 2020. Schorr Decl. at TX_MSJ_000697-000699.

Figures 3 and 4 are depictions showing the proliferation of wells in New Mexico from 1938 to 2020. *Id.*

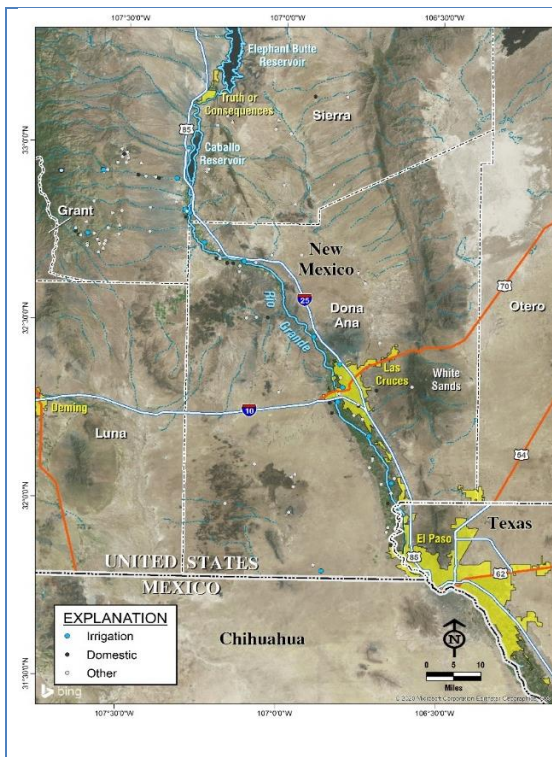


FIGURE 3: Groundwater wells in New Mexico in 1938
[TX_MSJ_000669 and 001576]

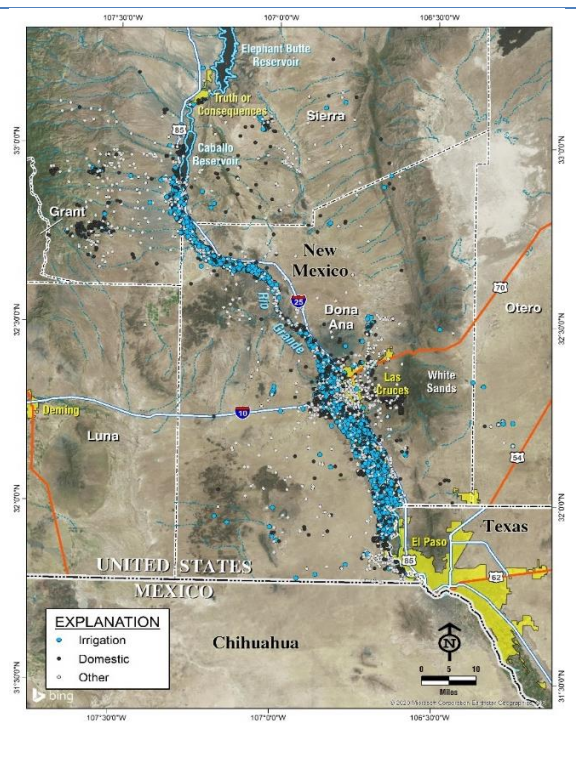


FIGURE 4: Groundwater wells in New Mexico in 2020
[TX_MSJ_000669 and 001577]

In 1980, the New Mexico Office of the State Engineer (OSE) “closed” the basin to new appropriations. Miltenberger Decl. at TX_MSJ_001617. Notwithstanding the

closing of the basin, groundwater pumping in New Mexico continued unabated. In 2010, New Mexico determined the groundwater basin was being mined. Excerpts of Peggy Barroll Deposition, 8/7/2020 (Barroll Depo., 8/7/2020), at TX_MSJ_000953, 216:2-7. Mining of a groundwater basin means that more water is being pumped from the groundwater basin than can be replaced, causing groundwater levels to decline and causing the further depletion of the volume of water available to Texas. Brandes Decl. at TX_MSJ_000007. Groundwater pumping in New Mexico continues unabated today. See Schorr Decl. at TX_MSJ_000697-000699, **Figure 4**; Brandes Decl. at TX_MSJ_000007.

As a practical matter, the closure of the basin simply meant that no new appropriations were authorized (N.M. Stat. Ann. § 72-12-3.1), and there was no water available for appropriation. Excerpts of Cheryl Thacker Deposition, 4/18/2019 (Thacker Depo., 4/18/2019), at TX_MSJ_001326-001327, 21:6-22:24; excerpts of Deposition of Ryan Serrano, 2/26/2020 (Serrano Depo., 2/26/2020), TX_MSJ_001233, 94:2-14, and Exh. 69, Mesilla Valley Administrative Area Guidelines for Review of Water Rights Applications at 2-3, TX_MSJ_001247-001248.¹⁹ All wells continued unregulated groundwater pumping until December 3, 2004, when the OSE ordered the creation of a Water Master District on the Lower Rio Grande, appointed a water master, and ordered measurement and reporting of groundwater pumping. December 3, 2004 Order;

¹⁹ Witness Cheryl Thacker is New Mexico's Lower Rio Grande Basin Supervisor, with the water resource allocation program water rights division of the OSE, disclosed by New Mexico in its initial disclosure as a person knowledgeable in water rights and administration. Thacker Depo., 4/18/2019, at TX_MSJ_001320-001321, 8:17-9:9.

Miltenberger Decl. at TX_MSJ_006054-006057.²⁰ While New Mexico now measures how much groundwater is pumped, New Mexico has taken no action to establish a system for administration as required to meet downstream interstate delivery entitlements. Excerpts of Rule 30(b)(6) Deposition of Cheryl Thacker, 9/18/2020 (Thacker 30(b)(6) Depo., 9/18/2020),²¹ at TX_MSJ_001386-001388, 80:9-81:4, 82:13-19, and Exh. 1, TX_MSJ_001410.

Further, transfers of existing groundwater rights continue apace, both formally through the statutory transfer process and informally through the Lower Rio Grande's "owner management program" (OWMAN). Excerpts of Ryan Serrano Deposition, 2/26/2019 (Serrano Depo., 2/26/2019), at TX_MSJ_001224-001227, 85:17-88:6 (description of the OWMAN program).²² OWMAN allows groundwater users to combine operations of multiple groundwater permits at one well. *Id.* The net result is that, notwithstanding the ongoing and recognized depletion of surface water flow through

²⁰ State of New Mexico Office of the State Engineer: Lower Rio Grande Water Master District Order (Dec. 3, 2004) (Dec. 3, 2004 Order), <https://www.ose.state.nm.us/Orders/LRG/LRG-WaterMasterDistrictOrder.pdf> (last visited Oct. 27, 2020), attached as TX_MSJ_006054-006057.

²¹ New Mexico designated Cheryl Thacker to testify on behalf of the state of New Mexico pursuant to a Rule 30(b)(6) Deposition Notice. See Barfield Decl. at TX_MSJ_000704-000705, Exh. 1, New Mexico's September 10, 2020 Objections to the United States' Notice of 30(b)(6) Deposition and to State of Texas's Cross-Notice, TX_MSJ_000706-000728. New Mexico designated Ms. Thacker to "provide testimony as to New Mexico's administration, implementation, and enforcement as to the three (3) identified subjects." *Id.* The three subjects were: "(1) delivery of Rio Grande Compact water to the State of New Mexico, (2) delivery of Rio Grande Compact water to the State of Texas, and (3) water released from storage to meet Compact irrigation demands below Elephant Butte Reservoir." *Id.*; Thacker 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001355, 12:5-25. New Mexico's counsel narrowed that designation during the deposition to "state law, regulations, and policies with the administration of water in the LRG." Thacker 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001361, 18:1-4.

²² Witness Ryan Serrano is the Lower Rio Grande Water Master. Serrano Depo., 2/26/2019, at TX_MSJ_001819, 18:16-23.

New Mexico's groundwater pumping in New Mexico below Elephant Butte Reservoir, pumping continues unabated, to the detriment of Texas.

3. EBID landowners, and those entities owning EBID acres are the only New Mexico water users authorized to use releases from the Reservoir

Current water users in the Lower Rio Grande Basin are primarily divided between irrigators and municipal users. Schorr Decl. at TX_MSJ_000697-000699. Irrigation is the primary use of water in the Lower Rio Grande in New Mexico. *Id.* EBID has statutory authority to hold a contract with the United States Bureau of Reclamation (BOR) for its portion of Project water stored in Elephant Butte Reservoir. N.M. Stat. Ann. § 73-10-16. EBID water users receive deliveries of surface water from the Project and many also have groundwater wells. Excerpts of Deposition of Gary Esslinger, 8/18/2020 (Esslinger Depo., 8/18/2020), at TX_MSJ_001007, 19:2-24.

EBID landowners, and those entities owning EBID acres, such as the city of Las Cruces, are the only New Mexico water users authorized to use releases from the Reservoir. Esslinger Depo., 8/18/2020, at TX_MSJ_001007, 19:2-24. EBID water users rely on releases from the Reservoir, and are also entitled to rely on return flows from Project operations. Esslinger Depo., 8/18/2020, at TX_MSJ_001013, 100:14-101:1. EBID water users also rely on groundwater pumping. Esslinger Depo., 8/18/2020, at TX_MSJ_001007-001008, 19:19-20:7.

Municipal water users include the city of Las Cruces, the second largest city in New Mexico, which has grown from a population of several thousand in 1938 to a population of more than 100,000 in the city limits and considerably more in the service area in 2020. Excerpts of Deposition of Lee Wilson, 7/23/2020 (Wilson Depo., 7/23/2020), at TX_MSJ_001543, 001545, 26:4-10, 28:14-21, and Exh. 2,

TX_MSJ_001555, at 5. The city of Las Cruces owns or leases approximately 1,412 acres of surface water rights in EBID. Excerpts of Deposition of Adrienne Widmer, 2/5/2019 (Widmer Depo., 2/5/2019), at TX_MSJ_001430, 001439-001441, 7:12-19, 16:12-22; 17:11-12; 17:19-18:7, and Exh. 58, City of Las Cruces 40-Year Water Development Plan, TX_MSJ_001489, at 22. The city does not use its EBID surface water supplies. Widmer Depo., 2/5/2019, at TX_MSJ_001440-001441, 17:19-18:8; excerpts of Deposition of Jorge Garcia, 2/6/2019 (Garcia Depo., 2/6/2019), at TX_MSJ_001061, 11:9-15 (Garcia testified that “[t]here’s no water in the river” and agreed that it is “hard to capitalize a water plan on 3 inches/year”). Thus, Las Cruces relies solely on groundwater. Widmer Depo., 2/5/2019, at TX_MSJ_001446, 42:8-19.

D. Overview of the Rio Grande Project

The states adopted the Compact in 1938 to ensure, among other things, a prescribed delivery of water from the Rio Grande in Elephant Butte Reservoir. Brandes Decl. at TX_MSJ_000007; Miltenberger Decl. at TX_MSJ_001607. The Project is dependent on the Compact for its water supply. Brandes Decl. at TX_MSJ_000007. The Project, in turn, is the means by which the water apportioned to Texas by the Compact is stored in Elephant Butte Reservoir and subsequently delivered to Texas, subject to deliveries to EBID pursuant to its contract with the United States, and to Mexico pursuant to the 1906 Treaty. *Id.* The relationship between the Compact and the Project is critical to the ability to effectively supply water from the Rio Grande to users in Texas, EBID, and Mexico. *Id.* Both the Project and the Compact were conceived and implemented prior to the significant development of groundwater in the Rincon and Mesilla basins of New Mexico, which began in the early 1950s. *Id.*

Today, the Project includes Elephant Butte Dam and Reservoir, Caballo Dam and Reservoir located immediately below Elephant Butte Dam, a hydropower plant at Elephant Butte Dam, three diversion dams on the Rio Grande in New Mexico (Percha, Leasburg, and Mesilla), two diversion dams on the Rio Grande in Texas (American and International, both owned and operated by the International Boundary and Water Commission), and an extensive system of canals, laterals, waste ways, and drainage ways that support irrigation operations in EBID and EP#1. Brandes Decl. at TX_MSJ_000007-000008. The major dams and reservoirs and the diversion dams included in the Project are identified in **Figure 5. *Id.***



FIGURE 5: Map of Rio Grande Project Area
[TX_MSJ_000008 and 001578]

There are 159,650 acres authorized within the Project, with 90,640 acres within EBID in New Mexico and 69,010 acres within EP#1 in Texas. Brandes Decl.

at TX_MSJ_000008. These acreages translate to approximately a 57/43 split for the distribution of irrigable acres between EBID and EP#1 (collectively, “Districts”). *Id.*

Releases of Project water stored in Elephant Butte and Caballo Reservoirs are made at the start of the irrigation season (typically February) to Project users in New Mexico and Texas, and to Mexico. Brandes Decl. at TX_MSJ_000008-000009. The Districts request releases of stored water during the irrigation season in response to irrigation demands. *Id.* As a practical matter, however, diversions by the Districts and Mexico consist of varying amounts of reservoir storage, return flows from upstream irrigation operations, and occasional arroyo inflows. *Id.* Return flows are a key part of Project operations, and interference with return flows removes a critical component of deliveries to Project users. *Id.* Project return flows consist of excess irrigation tailwater and groundwater seepage from irrigated fields that are collected in drains that convey these return flows to the Rio Grande. *Id.*

The proportion of return flows in the river increases in the downstream direction relative to stored water from the reservoirs, and the water diverted by Project users in the lower Mesilla basin and in the El Paso Valley of Texas includes diversion of significant quantities of return flows. Brandes Decl. at TX_MSJ_000008-000009. **Figure 6** shows the percentage of net diversions for each valley for reservoir releases, arroyo flow, and drain flow for the period prior to the Compact. *Id.* The net diversions in the Rincon portion of EBID contained 0.3 percent drain flow and seepage (return flows) and net diversions in the Mesilla portion of EBID contained 7.4 percent, while the net diversions into the Franklin canal in EP#1 contained 35.1 percent return flows and the net diversions into the Tornillo canal in EP#1 contained 57.7 percent return flows and only 38.2 percent of reservoir releases. *Id.*

TABLE 90.—*Estimated percentages of reservoir water, arroyo inflow, and drainage in net diversions and disposal of reservoir releases, Elephant Butte-Fort Quitman section, 1930-36*

Division or Item	Mean disposal of reservoir water 1930-36 (percentage distribution)	Mean percentage content, 1930-36, in net diversions, of—			
		Unused reservoir releases ¹	Arroyo inflow	Drain flow and seepage	Total
Rincon.....	8.5	97.5	2.2	* 0.3	100.0
Mesilla.....	46.4	89.8	2.8	7.4	100.0
El Paso.....	18.4	58.4			
Upper El Paso (Franklin canal).....		61.5	3.4	35.1	100.0
Lower El Paso (Tornillo canal).....		38.2	4.1	57.7	100.0
Rio Grande Project.....	73.3	79.8	3.0	17.2	100.0
Hudspeth.....	2.2	33.9	6.1	60.0	100.0
Juarez (Mexico).....	11.4	49.5	5.4	45.1	100.0
Upper Juarez.....		58.3	3.1	38.6	100.0
Lower Juarez.....		24.4	11.8	63.8	100.0
Riverbed losses.....	9.2				
Passing Fort Quitman.....	3.9	17.2	14.8	68.0	100.0
Total.....	100.0				

¹ Distinguished from returned drainage originally from the reservoir.

* Invisible accretion to river.

Estimates based on detail study of all available data, 1930-36, on river flow, reservoir releases, diversions, wastes, drain flow, and arroyo inflow.

**FIGURE 6: Table 90 of the JIR
[TX_MSJ_000131 and 001579]**

After diversion by EP#1, Project water is delivered to the city of El Paso for municipal use under agreements with EP#1 and its constituents that assign their Project water allotments for specific land parcels to the city. Brandes Decl. at TX_MSJ_000009-000010. Excess canal flows and return flows from Project lands within EP#1 also provide a supplemental water supply for approximately 18,000 acres of land within the Hudspeth County Conservation and Reclamation District No. 1 (HCCRD) below EP#1 down to Fort Quitman, Texas. *Id.*

Within the Project area from Elephant Butte Reservoir downstream to Fort Quitman, Texas, the Rio Grande covers approximately 210 river miles. Brandes Decl. at TX_MSJ_000010. Project water was to be allocated between irrigators in southern New Mexico and in the El Paso Valley of Texas in proportion to the irrigated acreage of Project lands within each state. *Id.* Contracts executed with irrigation interests in New Mexico and Texas permitted the orderly operation of the Project both during construction

and upon completion of Elephant Butte Reservoir in 1915. Miltenberger Decl. at TX_MSJ_001601-001602.

E. The Hydrology of the Rio Grande

1. Surface water and groundwater are interconnected below Elephant Butte Reservoir

Surface water and groundwater are interconnected in the Rincon and Mesilla basins. Miltenberger Decl. at TX_MSJ_001612; Declaration of William R. Hutchison (Hutchison Decl.), attached as TX_MSJ_000657-000661 in Texas's Appendix of Evidence. As water flows in a surface water feature (e.g., a stream, canal, or river), the surface water flow can either increase from the inflow of groundwater (referred to as a "gaining" stream) or decrease due to seepage losses to the underlying aquifer (referred to as a "losing" stream). Hutchison Decl. at TX_MSJ_000657-000661.

When groundwater elevations are higher than surface water elevations, groundwater flows into the surface water body and surface flow increases (a gaining stream condition). Hutchison Decl. at TX_MSJ_000657-000662. **Figure 7** conceptually illustrates a gaining stream condition. *Id.*

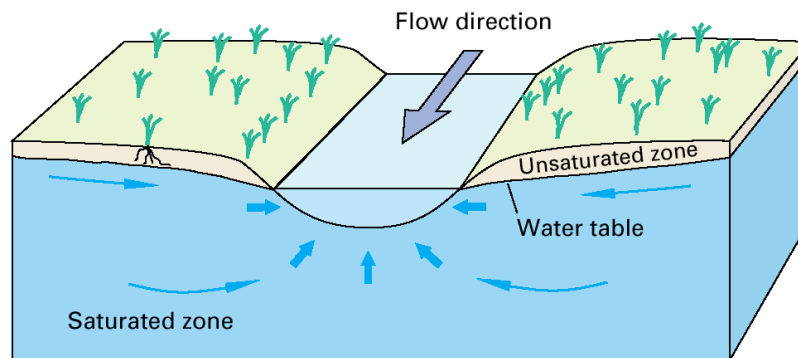


FIGURE 7: Illustration of a Gaining Stream (from Winter and others, 1988)
[TX_MSJ_000662 and 001580]

When groundwater elevations are lower than surface water elevations, surface water flows into the surrounding aquifer and surface flow decreases (a losing stream

condition). Hutchison Decl. at TX_MSJ_000657-000662. **Figures 8 and 9** conceptually illustrate two types of losing stream conditions. *Id.*

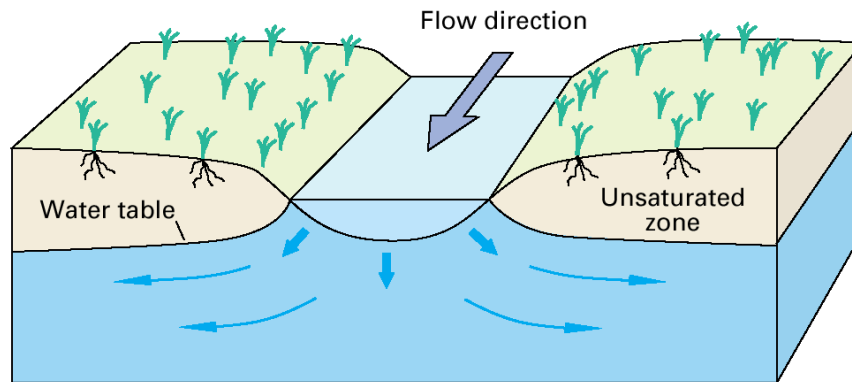


FIGURE 8: Illustration of a Losing Stream (from Winter and others, 1988)
[TX_MSJ_000662 and 001581]

Figure 8 illustrates a condition where groundwater elevations are lower than the stream elevation, but still connected to the stream bottom. Hutchison Decl. at TX_MSJ_000657-000662. This is a losing stream condition, and the seepage rate out of the stream is dependent on the difference between the elevation of the water in the stream and the elevation of the groundwater. *Id.*

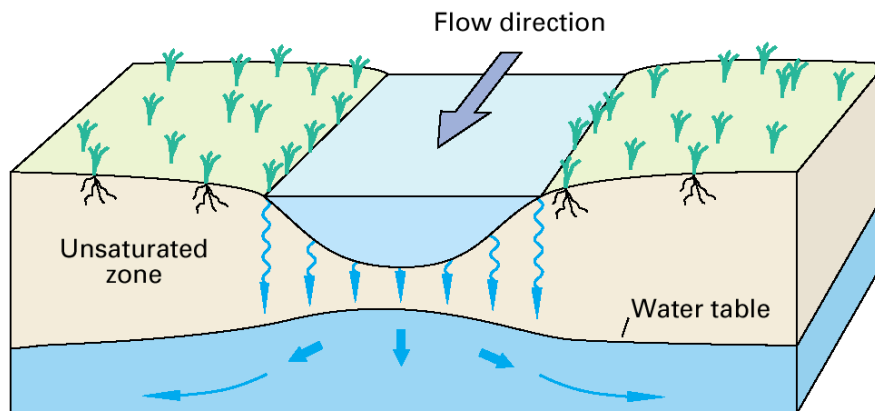


FIGURE 9: Illustration of a Disconnected Stream (from Winter and others, 1988)
[TX_MSJ_000662 and 001582]

Figure 9 illustrates a condition where groundwater elevations have dropped lower than the stream bottom elevation. Hutchison Decl. at TX_MSJ_000657-000662. In this

case, involving a disconnected stream, the seepage rate out of the stream has reached its maximum and is based on the depth of the stream only. *Id.*

One of the impacts of groundwater pumping is the reduction of groundwater elevations (also known as drawdown). Hutchison Decl. at TX_MSJ_000657-000663. Long-term groundwater pumping can result in drawdown to the point where a stream that has been historically gaining (i.e., groundwater flows into the stream providing base flow) can be changed to a losing or disconnected stream (i.e., water percolates out of the stream and recharges the underlying aquifer). *Id.*

2. Water budgets for the Rio Grande Project

A water budget is an accounting for a defined time period of the inflows into, and the outflows from, a defined control area. Brandes Decl. at TX_MSJ_000010-000012. Often, performing a water budget with known volumes of inflows and outflows for a specific time period can lead to the quantification of one or more unknown variables for that same time period. *Id.* Performing multiple water budgets for a specific control area for different time periods can provide information regarding how certain phenomena may have changed. *Id.* Even a visual depiction of the water budget for a control area showing the generalized movement of water into, within, and out of the Project area under different conditions and circumstances can be informative and help to understand how the Project water supply system was originally conceived to work and how it has changed with the development of groundwater in New Mexico. *Id.*

3. Pre-1950s Project water budget

Significant groundwater development began in the early 1950s in the Project area within the Rincon and Mesilla basins of New Mexico. Brandes Decl. at TX_MSJ_000010-000012. Prior to the development of extensive groundwater pumping

in the Rincon and Mesilla basins, groundwater levels generally were relatively high and fluctuated in response to the seasonal application of irrigation water from the Rio Grande on Project lands. *Id.*

In the early days of the Project, this phenomenon created a serious problem. Brandes Decl. at TX_MSJ_00010-00012. Soon after the Project began delivering water to the irrigators, groundwater levels rose in New Mexico to and above ground level, thereby waterlogging and making useless land previously capable of growing crops. *Id.* The solution was to construct a complex system of drains that would capture excess groundwater created by irrigation and return it to the river. *Id.* This “return flow” became a significant source of irrigation water for downstream irrigators, particularly in Texas, a fact recognized and catalogued in the JIR. *Id.* With the construction of the drains, irrigation water not consumed by crops and other vegetation or by evaporation, percolated down through the soil into the groundwater system, which typically flowed toward and into drains specifically designed for collecting groundwater and for conveying groundwater and excess irrigation tailwater away from fields and to the Rio Grande. *Id.* This condition is illustrated in a general fashion by the diagram in

Figure 10. *Id.* at TX_MSJ_000011.

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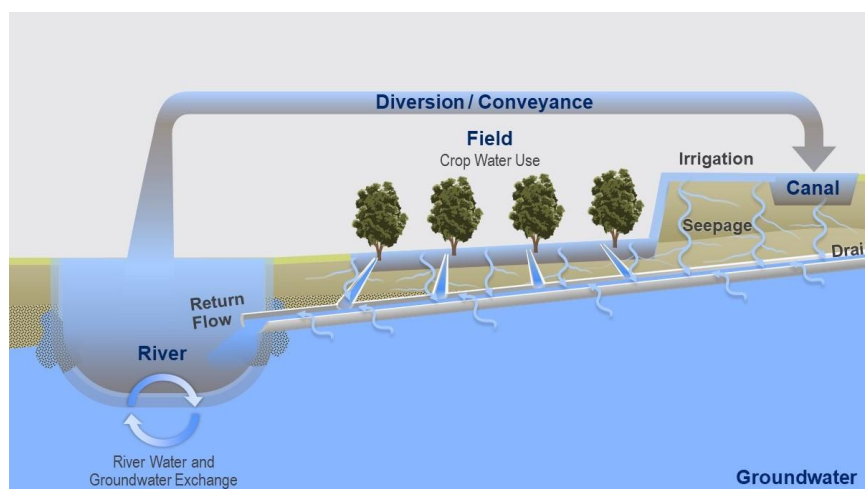


FIGURE 10: Schematic of Rio Grande and Groundwater System Interaction Prior to Development of Groundwater Pumping in Rincon and Mesilla basins [TX_MSJ_000011 and 001583]

As shown, Project water is diverted from the Rio Grande into an irrigation system canal and then distributed to individual irrigated fields, where it is either consumptively used by the growing crops or evaporated into the atmosphere. Any excess irrigation water is either discharged directly to the drain as tailwater or percolated through the subsurface into the groundwater system. Brandes Decl. at TX_MSJ_000011-000012. The bottom of the drain is below the upper level of the groundwater; thus, groundwater is induced to flow toward and into the drain. *Id.* Similarly, the bottom of the river channel is below the level of the groundwater, with water shown flowing in both directions depending on the relative heights of the water in the river and the groundwater from location to location. *Id.* The irrigation tailwater and groundwater collected in the drain flows to the river and is referred to as return flow. *Id.* The return flow from the drain that is discharged into the Rio Grande provides an important supply of Project water for users located downstream, namely users in the lower Mesilla basin and in the El Paso Valley of Texas. *Id.*

This important source of water for Project users was contemplated in the early development of Project operations and in the negotiations among the states leading up to adoption of the 1938 Compact. Brandes Decl. at TX_MSJ_000011-000012. For example, the 1938 JIR, which was conducted by federal agencies at the request of the Rio Grande Compact Commissioners with input from Colorado, New Mexico, and Texas representatives, determined that approximately 35 percent of the total supply of Project water delivered to Texas in the El Paso Valley was from upstream return flows, with the majority of the balance originating as releases from Caballo Reservoir. *Id.* at TX_MSJ_000012. Conversely, since water for Project users in New Mexico was diverted from the Rio Grande farther upstream, i.e., above the river outfalls of most drains, less than seven percent of New Mexico's total deliveries originated from return flows. *Id.*; see **Figure 4**.

4. The effect of New Mexico's groundwater pumping on the Project water budget

With the extensive development and use of groundwater in the Rincon and Mesilla basins of New Mexico that began during the early 1950s – particularly in the relatively shallow aquifers with generally high groundwater levels such as those along the Rio Grande – groundwater levels began to fluctuate and decline in some areas. Brandes Decl. at TX_MSJ_000012-000013. This in turn caused reduction of discharges of groundwater into the drains, and directly into the river. *Id.* Eventually, with enough groundwater pumping, the groundwater gradient in many areas reversed, with significant reductions in the groundwater inflows to the drains and into the river. *Id.* This condition is illustrated by the diagram in **Figure 11**. *Id.*

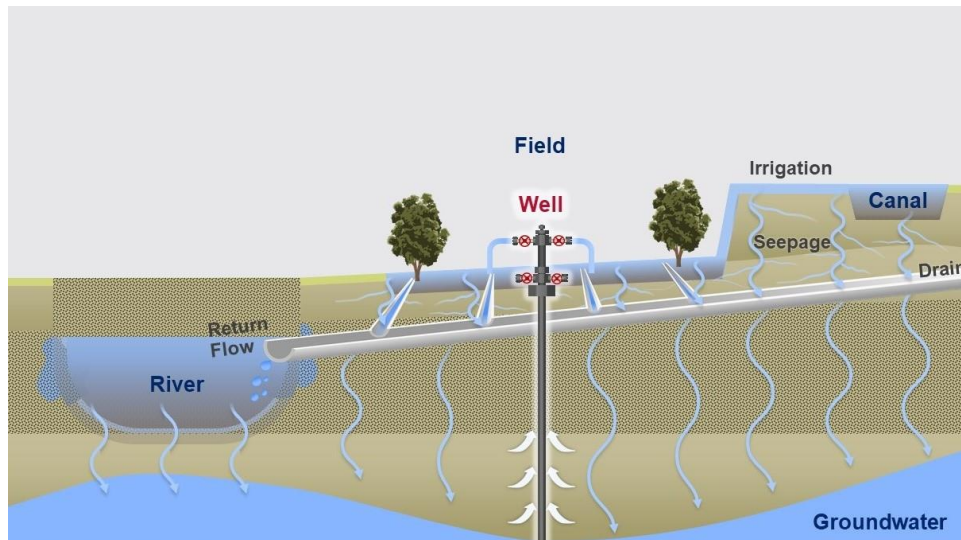


FIGURE 11: Schematic of Rio Grande and Groundwater System Interaction After Development of Groundwater Pumping in Rincon and Mesilla basins [TX_MSJ_000012 and 001584]

As shown, the level of the groundwater is below the bottom of the river channel and the drain, and water flowing in the river and into the drain moves toward and into the groundwater system, rather than the other way around, as it did prior to the initiation of groundwater pumping. Brandes Decl. at TX_MSJ_000012-000013. The discharge of return flow from the drain into the river is substantially curtailed, if not reduced to zero, thereby also reducing the flow in the river. *Id.*

The phenomenon of reduced river flows caused by groundwater withdrawals is an underlying component of what is referred to as streamflow depletions, and these streamflow depletions have increased along the Rio Grande within the Rincon and Mesilla basins since significant groundwater development began in the early 1950s. Brandes Decl. at TX_MSJ_000012-000013. One of the obvious impacts of these increased streamflow depletions has been to alter the Project water budget by reducing flows in the Rio Grande that otherwise would ultimately reach water users in the lower Mesilla basin and in the El Paso Valley in Texas. *Id.* In essence, the release of a specific

quantity of water from Caballo Reservoir now contributes less to the surface water supply for these users because of the losses of flow due to the increased seepage from the Rio Grande and interior drainage ways, thus altering the previously existing Project water budget. *Id.*

In the early 1980s, the BOR developed the D1 and D2 allocation curves for the Project based on 1951-1978 operating data. Under normal supply conditions for the Project, these curves provided for 122 percent of the annual Caballo Reservoir release to be diverted from the Rio Grande for Project users. Brandes Decl. at TX_MSJ_000014-000015. This additional 22 percent was almost entirely from return flows discharged into the Rio Grande from drains. *Id.* This is shown on **Figure 10**, Schematic of Rio Grande and Groundwater System Interaction Prior to Development of Groundwater Pumping in Rincon and Mesilla basins. *Id.* at TX_MSJ_000011-000014. These D1 and D2 allocation curves reflect conditions that are different from the flow regime that existed at the time of the Compact (1938 Condition). *Id.* at TX_MSJ_000014. The D1 and D2 curves were based upon the depleted flow conditions influenced by the extensive groundwater pumping in New Mexico during the 1951-1978 period. *Id.*

F. The Structure of the Compact is Key to Understanding the Equitable Apportionment

The Compact's structure is important in understanding what the Compact does and what it does not do. First, the Compact clearly equitably apportions the waters of the Rio Grande from its headwaters in Colorado to Fort Quitman, Texas, among the states of Colorado, New Mexico, and Texas, and was intended to remove all causes of present and future controversy among these states over those waters. Preamble to the 1938 Compact.

Article I of the Compact contains definitions that are discussed below in the context of other articles in the Compact. Compact, art. I(a)-(q). Because the Compact is flexible with respect to delivery requirements allowing its operation to be governed by the natural hydrology of the Rio Grande, Article II requires the Rio Grande Compact Commission to cause various gaging stations on the river to be maintained and operated. Compact, art. II. Due to the concern about post-1938 depletions, gaging stations were to be maintained and operated below any reservoir constructed after 1929 and at other locations at each of the post-1929 reservoirs. Compact, art. II.

Article III of the Compact requires “Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line” The quantity of water to be delivered is based upon indexed flows provided in the article. Compact, art. III. The actual quantity of water to be delivered is based upon the flow available in the river at the referenced gauges as compared with the indices provided for in the article. *Id.* Water in excess of the delivery requirement is the Colorado apportionment to be used in Colorado. Compact, art. III. Water that is delivered is the New Mexico apportionment to be used in New Mexico, subject to the delivery requirement in Article IV. Compact, art. IV.

The indices were based upon data that existed in 1938 and were intended to maintain the 1938 Condition, protecting downstream interests from post-1938 depletions. Compact, art. III(4); Barfield Decl. at TX_MSJ_000704-000705; State of New Mexico’s Objections and Supplemental Responses to the State of Texas’s First Set of Requests for Admission to the State of New Mexico (NM RFA Responses), Oct. 30, 2020, at TX_MSJ_000729-000756, Response No. 21 (“New Mexico admits that to the extent Article III of the Compact uses data, it was necessarily available prior to the approval of the Compact.”); Miltenberger Decl. at TX_MSJ_001607; Brandes Decl. at

TX_MSJ_000014-000015. There are provisions in Article III addressing post-1937 reservoirs that might be constructed in Colorado to ensure that those reservoirs, if constructed, will not deplete the flow at the gauge in excess of what existed in 1938. Compact, art. III(3)-(4).

Article IV of the Compact requires “New Mexico to deliver water in the Rio Grande at San Marcial [later changed to Elephant Butte Reservoir]”²³ As was the case with Article III, the quantity of water to be delivered is based upon indexed flows provided for in the article. Compact, art. IV. Water in excess of the delivery requirement is the New Mexico apportionment to be used in New Mexico above Elephant Butte Reservoir. Compact, art. IV.

The water delivered is apportioned to Texas, subject to the Treaty obligation to Mexico and the United States’ Downstream Contracts with EBID. Compact, art. XVI. The indices were based upon data that existed in 1938 and were intended to maintain the 1938 Condition, protecting downstream interests from upstream post-1938 depletions by New Mexico. Compact, art. IV(5)-(6); Barfield Decl. at TX_MSJ_000704-000705, NM RFA Responses at TX_MSJ_000738, Response No. 22 (“New Mexico admits that Article IV of the Compact is based upon data that was necessarily available prior to the approval of the Compact.”); Miltenberger Decl. at TX_MSJ_001587-001588; Brandes Decl. at TX_MSJ_000001-000016. There are specific provisions in Article IV addressing and protecting Texas from other post-1929 depletions in New Mexico upstream from Elephant Butte Reservoir. Compact, art. IV(5)-(6).

²³ In 1948, the Rio Grande Compact Commission adopted a resolution amending the 1938 Compact that changed the delivery location from the gauging stations at San Acacia and San Marcial to Elephant Butte Reservoir. Miltenberger Decl. at TX_MSJ_001597 n.28; Tenth Annual Report of the Rio Grande Compact Commission 3 (1948).

Article VI establishes a system of “credits” and “debits, defined in Articles I(g)-(j). There are two types of debits: “Annual Debits” and “Accrued Debits,” and two types of credits: “Annual Credits” and “Accrued Credits.” Compact, art. VI. Credits and debits are tracked annually and are the quantity of water in excess of or below the delivery requirements in Articles III and IV. *Id.* The credits and debits are tracked and accrue over time and relate to upstream activities in Colorado and New Mexico. Compact, art. VI. Both the Colorado and New Mexico credits and debits relate to the delivery of water, and the amount of water, in Elephant Butte Reservoir. *Id.*

Article I(k) defines “Project Storage” as the combined capacity of Elephant Butte Reservoir and Caballo Reservoir, but not more than 2,638,860 acre feet. Compact, art. I(k). Article I(l) defines “Usable Water” as all of the “water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands,” including deliveries to Mexico. Compact, art. I(l). (Notably, the references to “project storage” in this article (as well as in Articles I(m)-(q)) and the reference as a point of location “the lands of the Rio Grande Project” in Article I(k), are the only direct references to the Rio Grande Reclamation Project in the Compact.) These references, as well as the definitions of “Credit Water,” “Unfilled Capacity,” “Actual Release,” “Actual Spill,” and “Hypothetical Spill” all related to Elephant Butte Reservoir and are intended to ensure that deliveries into the Reservoir and Texas’s apportionment are protected from upstream post-1938 depletions.

Article VII precludes Colorado and New Mexico from increasing the amount of water in post-1929 upstream storage reservoirs whenever there is less than 400,000 acre feet of usable water in Elephant Butte Reservoir and Caballo Reservoir. Compact, art. VII. If there are accrued credits in Elephant Butte Reservoir, Colorado or New

Mexico (depending on which or both have accrued credits in the Reservoir) may relinquish those credits at any time. Compact, art. VII. But relinquishment alone is not effective unless Texas accepts that relinquishment. Compact, art. VIII. The power to accept relinquishment is solely vested in Texas because the water in Elephant Butte Reservoir is apportioned to Texas. Compact, art. VIII. New Mexico has no power to accept relinquishment because it has no interest in the water in Elephant Butte Reservoir. The significance of accepting relinquishment is that Colorado or New Mexico can increase the amount of water stored in post-1929 upstream reservoirs in an amount equal to the water relinquished and accepted by Texas.

Article VIII of the Compact provides that during the month of January each year, Texas's Rio Grande Commissioner may *demand* of Colorado and New Mexico that they release water from upstream storage reservoirs constructed after 1929 to the amount of accrued debits in Elephant Butte Reservoir sufficient to bring the quantity of usable water in Elephant Butte and Caballo Reservoirs to 600,000 acre feet by March first, and to maintain this quantity in storage until April thirteenth, to the end that a normal release of 790,000 acre feet may be made from Project storage in that year. Compact, art. VIII. Again, the demand is to be made by Texas in order to protect its apportionment in Elephant Butte and Caballo Reservoirs from upstream depletion.²⁴

Articles II and V of the Compact deal with the placement of gauges on the Rio Grande. Compact, art. V. Articles IX and X deal with the development of additional waters among New Mexico, Colorado, and the United States and how those waters are to

²⁴ New Mexico may demand that Colorado release water from post-1929 upstream reservoirs in order to ensure that the Article VIII release obligations are not borne solely by New Mexico.

be treated and used. Compact, art. IX-X. These provisions do not allow for any post-1938 depletions.

Article XI addresses the then-existing Supreme Court litigation between Texas and New Mexico and indicates that the Compact resolves that dispute. Compact, art. XI. Article XII of the Compact provides the powers of the Rio Grande Commission established in this article. Compact, art. XII. While the Compact grants, in Articles VII and VIII, specified powers to a certain Commissioner under certain situations, the jurisdiction of the Commission is narrow and extends only to the collection, correlation, and presentation of factual data and the maintenance of records having a bearing upon the administration of the Compact and, by unanimous action, making recommendations to the respective states. Compact, art. XII. The Commission may, by unanimous action, adopt rules and regulations to govern its proceedings. *Id.* Finally, “the findings of the Commission shall not be conclusive in any court or tribunal which may be called upon to interpret or enforce this Compact.” *Id.*

Article XVI of the Compact provides that its provisions shall not affect the 1906 Treaty with Mexico or treaties and rights of Indian Tribes. Compact, art. XVI. Article XIV provides that any losses resulting from the delivery or loss of water to Mexico shall never affect the delivery schedules in Articles III and IV of the Compact. Compact, art. XIV. The balance of the Compact provisions deal with miscellaneous matters. Compact, arts. XV-XVII.

G. The Downstream Contracts

1. Overview of the Downstream Contracts

In its March 2018 opinion, the Supreme Court stated that the Compact required New Mexico to deliver a specific amount of water to Texas at Elephant Butte Reservoir,

rather than at the Texas state line. *Texas v. New Mexico*, 138 S. Ct. 954, 957. The Court explained that:

In isolation, this might have seemed a curious choice, for a promise to deliver water [to Texas] to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas. But the choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources.

The Downstream Contracts the Court refers to are (1) the 1937 US/EP#1 Contract adjusting construction charges and for other purposes, (2) the 1937 US/EBID Contract, adjusting construction charges and for other purposes, and (3) the 1938 US/EBID/EP#1 Contract dealing with repayment and water allocations associated with the Project. Downstream Contracts at TX_MSJ_004464-004488, TX_MSJ_004434-004461, TX_MSJ_005249-005250; Miltenberger Decl. at TX_MSJ_001608. These contracts were negotiated, entered into, and approved contemporaneously with the negotiation and execution of the 1938 Compact. Miltenberger Decl. at TX_MSJ_001608.

The Downstream Contracts are entered into pursuant to the 1902 Reclamation Act and Acts supplementary and amendatory thereto, including the Rio Grande Reclamation Project Act (Reclamation Act). Act of June 17, 1902, Pub. L. No. 161, ch. 1093, § 4, 32 Stat. 389 (codified as 43 U.S.C. § 419). The practice of contracting for project water dates back to the original Reclamation Act of 1902, which authorized the Secretary of the Interior to enter into “contracts for the construction” work of projects, and to give “public notice of the lands irrigable under the project,” the charges per acre upon the entries, and the number of installments in which the charges shall be paid. *Id.* The Reclamation Act was enacted for the purpose of reclaiming the arid west by providing for the construction of major irrigation projects. Miltenberger Decl. at TX_MSJ_001609. The United States

was required to be repaid for the costs of construction over a period of years, with the irrigation component being noninterest bearing. *Id.* Repayment for municipal, power, and other non-irrigation components were required to bear interest. *Id.* Initially, the repayment obligation was dealt with through the issuance of certificates to landowners and contracts with irrigation associations. *Id.*; *see, e.g.*, for general history of Reclamation, <https://www.usbr.gov/history/briefhis.pdf> and <https://www.usbr.gov/history/index.html> (last visited Oct. 28, 2020).

Predecessor irrigation associations of EBID and EP#1 had these types of agreements with the United States. Miltenberger Decl. at TX_MSJ_001609. These agreements became a problem when, during the Great Depression, there was default on the part of those who had certificates or contracts. *Id.* at TX_MSJ_001609-001610. Reclamation law was amended to provide that contracts must be entered into only with public agencies with the power to levy assessments and taxes, to ensure that repayment would be accomplished. *Id.* The 1937 and 1938 Downstream Contracts were related to this change in the law and for other purposes. *Id.* at TX_MSJ_001610.

2. The 1937 Contracts

The 1937 US/EP#1 Contract and the 1937 US/EBID Contract are, in essence identical, with certain District-specific exceptions. 1937 US/EP#1 Contract at TX_MSJ_004464-004488; 1937 US/EBID Contract at TX_MSJ_004434-004461. Both were entered into in November 1937 (EBID on November 9, 1937 and EP#1 on November 10, 1937). *Id.* The 1937 US/EP#1 Contract refers to predecessor contracts with the El Paso Valley Water Users' Association and the 1937 US/EBID Contract refers to the predecessor contract of the Elephant Butte Water Users' Association. *Id.* Both

1937 contracts refer to joint contracts entered into over time between the two predecessor associations that dealt with various aspects of repayment and operation of the Project. *Id.*

Article 3 of both contracts explains the rationale for the 1937 contracts as relieving the Districts of construction costs associated with power, an interest bearing component of the Project, and allowing for the reallocation of the Districts' repayment obligation accordingly. 1937 US/EP#1 Contract, art. 3, at TX_MSJ_004469-004470; 1937 US/EBID Contract, art. 3, at TX_MSJ_004439-004440. In return, the power features of the Project were conveyed to the United States. *Id.* This resulted in a reduction to each District of the construction costs chargeable to power development. *Id.* The repayment obligation articulated in Article 5 of the respective contracts indicates that EBID is responsible for 56.7742 per centum of the fixed costs attributable to the repayment obligation and EP#1 is responsible for 43.2258 per centum of the fixed costs attributable to the repayment obligation. 1937 US/EP#1 Contract, art. 5, at TX_MSJ_004471; 1937 US/EBID Contract, art. 5, at TX_MSJ_004441. Article 6 of the contracts similarly adjusts the Districts' respective operation and maintenance costs for the Project. 1937 US/EP#1 Contract, art. 6, at TX_MSJ_004471-004472; 1937 US/EBID Contract, art. 6, at TX_MSJ_004441-004442. In Article 7, interest charges related to the power component of the Project for the years 1930-1936, were added to the Districts' repayment obligation. 1937 US/EP#1 Contract, art. 7, at TX_MSJ_004472-004473; 1937 US/EBID Contract, art. 7, at TX_MSJ_004442-004443.

Article 8 in each of the 1937 contracts provides the new repayment obligation of the Districts and delineates how those payments are to be made. 1937 US/EP#1 Contract, art. 8, at TX_MSJ_004473; 1937 US/EBID Contract, art. 8, at TX_MSJ_004443.

Article 9 in each of the two contracts deals with the segregation of the operation and

maintenance purposes of the Project for power from the remaining features of the Project and the United States' obligation to continue to operate the Project. 1937 US/EP#1 Contract, art. 9, at TX_MSJ_004474; 1937 US/EBID Contract, art. 9, at TX_MSJ_004444. Article 10 of the two contracts deals with the payment by the Districts to the United States for the operation and maintenance of the Project and explains how operation and maintenance charges to the Districts for 1937 will be dealt with. 1937 US/EP#1 Contract, art. 10, at TX_MSJ_004474-004475; 1937 US/EBID Contract, art. 10, at TX_MSJ_004444-004446. Article 11 deals with how operation and maintenance charges will be dealt with after January 1, 1938. 1937 US/EP#1 Contract, art. 11, at TX_MSJ_004476-004477; 1937 US/EBID Contract, art. 11, at TX_MSJ_004446-004448.

Article 12 addresses the provision of water to HCCRD in Texas and how the charges from HCCRD for the "rental" of water will be credited against the two Districts' payment obligation. 1937 US/EP#1 Contract, art. 12, at TX_MSJ_004478; 1937 US/EBID Contract, art. 12, at TX_MSJ_004448. Article 13 provides that the Project water supply will be primarily for irrigation. 1937 US/EP#1 Contract, art. 13, at TX_MSJ_004478-004479; 1937 US/EBID Contract, art. 13, at TX_MSJ_004449. Articles 15 and 16 address the continued construction of Project features and how funding will be addressed. 1937 US/EP#1 Contract, arts. 15-16, at TX_MSJ_004480-004481; 1937 US/EBID Contract, arts. 15-16, at TX_MSJ_004450-004451. Articles 17 and 18 again deal with the power components of the Project, including the conveyance of the Districts' interest in power to the United States. 1937 US/EP#1 Contract, arts. 17-18, at TX_MSJ_004481-004483; 1937 US/EBID Contract, arts. 17-18, at TX_MSJ_004451-004453.

Articles 19, 20, and 21 address payment, and also address the requirement to repay even if individuals within the Districts default on payments to the Districts and even if it requires the Districts to exercise their respective taxing authority to insure that payments are made. The remaining provisions of the contracts are general provisions. 1937 US/EP#1 Contract, arts. 19-21, at TX_MSJ_004483-004485; 1937 US/EBID Contract, arts. 19-21, at TX_MSJ_004453-004455.

3. The 1938 Contract

The 1938 US/EBID/EP#1 Contract is an agreement between EBID and EP#1 approved by the United States. 1938 US/EBID/EP#1 Contract at TX_MSJ_005249-005250. This agreement complemented the 1937 contracts between the United States and the two Districts by specifying the acreage to be irrigated in the respective Districts. *Id.* The agreement provided there will be 88,000 acres of land within EBID and 67,000 acres of land within EP#1 “upon which construction and operation and maintenance charges may be levied.” *Id.* Each District could increase this acreage by 3 percent: up to 2,640 additional acres for EBID and up to 2,010 additional acres for EP#1. *Id.* The contract provided that the distribution of available supply would be 67/155 to EP#1 and 88/155 to EBID (which represents about 43 percent to EP#1 and 57 percent to EBID). *Id.* Repayment and operation and maintenance charges were also established by the use of these figures. 1938 US/EBID/EP#1 Contract at TX_MSJ_005249. The obligations under this contract were directly tied to the Districts’ 1937 contracts. *Id.*

4. The Downstream Contracts viewed together

The Downstream Contracts together define the allocation of Project supply. Downstream Contracts at TX_MSJ_004434-004461, 004464-004488, 005249-005250.

Notably, absent post-1938 depletions caused by New Mexico, the Texas Project allocation and the Texas apportionment would be the same. *See* Miltenberger Decl. at TX_MSJ_001606-001607. The water New Mexico delivers in Elephant Butte Reservoir is apportioned to Texas, subject to the 1906 Treaty obligation to Mexico and subject to EBID's contract entitlements. Compact, arts. IV, XVI; Miltenberger Decl. at TX_MSJ_001605, 001608.

The United States' Contracts with EBID fully define EBID's rights, and nothing in the contracts gives the state of New Mexico any rights. 1937 US/EBID Contract at TX_MSJ_004434-004461; 1938 US/EBID/EP#1 Contract at TX_MSJ_005249-005250. EBID is entitled to 88/155 of the available Project supply, which corresponds to its 56.7742 repayment obligation. *Id.* This amount of water must be used on Project lands that are limited to 88,000 acres, plus up to an additional 2,640 acres. *Id.* Absent subsequent contractual arrangements, the water is to be used for irrigation purposes. *Id.* The Compact provides that the remaining water, including the EP#1 Reclamation contract water, is to be used in Texas. Compact, art. IV. The contracts only deal with the available Project supply and cannot address depletions in New Mexico that reduce the volume of that supply. *See* Miltenberger Decl. at TX_MSJ_001608. The 1938 depletions are protected by the Compact, not by the Project contracts. *See id.*

H. Procedural History

1. Historical post-Compact legal disputes over Rio Grande flow depletions in excess of the 1938 Condition

After the enactment of the Compact, conflicts arose from time to time among the states, and each time the conflict has been over the question of post-Compact depletions. Miltenberger Decl. at TX_MSJ_001595. In 1951, Texas petitioned the Supreme Court to

challenge New Mexico's actions related to the consumption of water in the Middle Rio Grande, which depleted flow in Elephant Butte Reservoir. *Id.* at TX_MSJ_001595-001596. Texas brought the challenge to safeguard receipt of its full apportionment of the Rio Grande waters. *Id.* That case was dismissed for failure to join the United States as a necessary party. *Id.* In 1966, New Mexico and Texas together filed suit in the Supreme Court against Colorado, alleging that Colorado's upstream depletions were causing harm to the downstream states. *Id.* at TX_MSJ_001596.

Texas brought the 1935, 1951, and 1966 actions, as well as entered the 1938 Compact, to prevent the water delivered in Elephant Butte Reservoir from being depleted by upstream actions. These were not academic exercises. This case, too, is focused on the fundamental importance of maintaining depletions at the conditions that existed in 1938. Texas took all of these actions to ensure that the volumes of water Texas had agreed to as its apportionment in 1938 would actually be received, and not intercepted and depleted between Elephant Butte Reservoir and Texas.

2. Texas's 2013 litigation to address New Mexico's ongoing Compact violations

In 2013, Texas sought leave to file its Complaint against New Mexico, alleging that New Mexico violated its 1938 Compact obligations by permitting groundwater pumping and other diversions in New Mexico below Elephant Butte Reservoir, depleting Project water intended for use in Texas. TX Complaint ¶ 4. Texas filed its Motion for Leave to file Bill of Complaint on January 8, 2013. The Supreme Court granted Texas leave to file its Complaint on January 27, 2014. At the same time, the Court granted New Mexico leave to file a Motion to Dismiss Texas's Complaint.

On February 27, 2014, the United States moved to intervene as a plaintiff. In its proposed complaint, the United States alleged that groundwater diversions in the Lower Rio Grande intercepted Project water, reduced Project efficiency, violated provisions of reclamation law, and violated provisions of the 1938 Compact. United States Complaint in Intervention (US Complaint) ¶¶ 4-7, 12-14. The Court granted the United States leave to intervene on March 31, 2014. US Complaint is lodged with the Special Master as Docket No. 68.

New Mexico moved to dismiss both the Texas and United States' Complaints on April 30, 2014. After briefing on the Motion to Dismiss was complete, the Court, pursuant to its order of November 3, 2014, referred New Mexico's Motion to Dismiss to the Special Master.²⁵ The Special Master heard oral arguments on New Mexico's Motion to Dismiss and the Motions to Intervene on August 19 and 20, 2015. The Court received the First Report on February 13, 2017. On March 20, 2017, the Court ordered the First Report to be filed, and permitted the parties to file exceptions.

Texas filed no exceptions. New Mexico and Colorado challenged the Special Master's analysis in the First Report by filing extensive exceptions. The United States filed exceptions to the recommendations in the First Report related to New Mexico's Motion to Dismiss the United States' Complaint in Intervention.

The Court issued an order denying New Mexico's Motion to Dismiss the Texas Complaint on October 10, 2017. The Court subsequently set oral argument on the United States' Exceptions and the Exceptions of Colorado, heard on January 8, 2018. The Court's final decision was issued on March 5, 2018, wherein the Court ruled that "[t]he

²⁵ The Court also referred the Motions to Intervene filed by EBID and EP#1 to the Special Master.

United States’ exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion.”

Texas v. New Mexico, 138 S. Ct. at 960.

I. The First Report of the Special Master

Following briefing and argument by the parties, the Special Master issued his First Report on February 9, 2017, recommending that the Supreme Court deny New Mexico’s Motion to Dismiss the Texas Complaint as “Texas has stated plausible claims for New Mexico’s violation of the 1938 Compact.” First Report at 217. In so doing, the Special Master addressed the fundamental legal argument asserted by New Mexico: that New Mexico has a Compact right to intercept, divert, and deplete water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line, because that water and, indeed, the entire administration of the Project within New Mexico, are governed by New Mexico state water law. Based on the Special Master’s analysis of what he characterized as the plain, unambiguous language of the 1938 Compact and its structure and design, the Special Master determined that the Compact requires that New Mexico relinquish control and dominion over the distribution of the water delivered in Elephant Butte Reservoir. *Id.* at 194-98.

In addressing the Motion to Dismiss filed by New Mexico, the First Special Master examined New Mexico’s assertion that Texas’s claim that New Mexico “allowed and authorized Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico” failed to state a cause or claim under the 1938 Compact because the Compact does not require New Mexico to deliver or guarantee water deliveries to the New Mexico-Texas state line or to “prevent the diversion of water after New Mexico has delivered it at Elephant Butte Reservoir.” First Report at 6-7.

The First Report continued, stating that New Mexico: “[i]ndeed . . . argues that its *only* duty under the 1938 Compact is to deliver water to Elephant Butte Reservoir New Mexico, therefore, argues that it has no duty under the 1938 Compact ‘to limit post-1938 development below Elephant Butte Reservoir’ within its boundaries.” First Report at 7 (emphasis in original). New Mexico, as set forth in the First Report, “further asserts that New Mexico state law – not the 1938 Compact – governs the distribution of water released from Elephant Butte Reservoir.” *Id.* at 189.

In addressing the New Mexico Motion to Dismiss, the Special Master found that in order to determine if Texas and the United States had plausible claims under the 1938 Compact, he was first required to “interpret the plain text and structure of the 1938 Compact, as well as to consider the effect the 1938 Compact’s equitable apportionment has upon all other state law appropriations granted by New Mexico.” First Report at 8. The First Special Master then proceeded to undertake this inquiry and concluded as follows:

1. When New Mexico delivers water pursuant to Article IV of the Compact in Elephant Butte Reservoir, it surrenders that water. First Report at 194-95.
2. The word “deliver” has its plain meaning as it is used in the Compact. First Report at 196.
3. The 1938 Compact pairs the obligation to deliver water with the mandatory word “shall” to connect the duty to relinquish control with certain volumes of water identified in the delivery schedules within the Compact. First Report at 197.
4. The 1938 Compact integrates the Project wholly and completely into the Compact protecting deliveries to and releases from Elephant Butte Reservoir. First Report at 198-01.

5. New Mexico must refrain from actions that result in the depletions below Elephant Butte Reservoir in excess of what existed in 1938. First Report at 197-98.

J. The Special Master's April 14, 2020 Order

In light of the First Report and the Supreme Court's subsequent action denying New Mexico's Motion to Dismiss and rejecting all Exceptions to the First Report, except those of the United States, Texas filed a Motion Requesting a Judicial Declaration to Confirm Legal Issues Previously Decided and a Motion in Limine to Exclude the Introduction of Evidence Thereon. In that Motion, Texas asked for the following determinations:

1. The Rio Grande Project was fully integrated into the 1938 Compact.
2. The text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir.
3. New Mexico through its agents or subdivisions may not divert or intercept water it is required to deliver in Elephant Butte Reservoir pursuant to the 1938 Compact after the water is released from Elephant Butte Reservoir.
4. New Mexico must refrain from post-1938 depletions of water (i.e., depletions that are greater than what occurred in 1938).
5. New Mexico state law plays no role in an interstate dispute.

In an April 14, 2020 Order, the Special Master addressed the Texas Motion and made the following observations:

1. It is what the Supreme Court says and not what the Special Master says that controls, and the Court has said very little about the merits of the case. In its decision (*Texas v. New Mexico*, 138 S. Ct. at 956-57) it addressed only the narrow issue regarding the United States' intervention.

2. The phrase “fully integrated” with respect to the relationship of the Project and the 1938 Compact is not precise and was not used by the Court.

3. The statement that New Mexico state law plays “no role” in this matter is too broad. The complexities of the interactions between the state water law, including New Mexico law concerning groundwater between Elephant Butte Reservoir and Texas and Reclamation law as discussed in *California v. United States*, 438 U.S. 645 (1978) needs further development.

4. Not addressed is the Compact-based equitable apportionment in reference to the Downstream Contracts and the Rio Grande Project. A threshold question that must be answered to address Texas’s claims that New Mexico is failing to protect Texas’s apportionment, is to first define precisely what each state and its citizens are entitled to receive below Elephant Butte Reservoir. This fact is true regardless of whether New Mexican entitlements below the Reservoir are deemed Compact rights.

5. The assertion that “the text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir” (April 14, 2020 Order at 14) is overbroad and needs further definition. The April 14, 2020 Order is lodged with the Special Master as Docket No. 339. While it cannot be disputed that the Compact governs New Mexican interactions with the river from Colorado to Texas, the role of New Mexican state law, as noted above, needs to be determined.

6. Texas’s assertion that “New Mexico through its agents or subdivisions may not divert or intercept water it is required to deliver to Elephant Butte Reservoir pursuant to the 1938 Compact after the water is released from the Elephant Butte Reservoir” (April 14, 2020 Order at 14) is overbroad and needs to be addressed after the

relative rights of New Mexico and Texas, as described in above numbered paragraph 4, is decided.

7. Whether “New Mexico must refrain from post 1938 depletions of water below Elephant Butte Reservoir” (April 14, 2020 Order at 14) has not been decided. A record needs to be developed to demonstrate the states’ understanding and intent as to the relationship between groundwater and Project water deliveries at the time of Compact formation, at the present time, or at any time in between.

The significance and construction of the 1938 Compact found in the First Report constitute an interpretation of the issues in this case that should not be ignored. None of the Compact findings in the First Report have been rejected. Those findings form the foundation of the instant Partial Summary Judgment Motion, tempered by the Court’s March 4, 2018 decision, as well as the Special Master’s April 14, 2020 Order.

III. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 56, a party may move for summary judgment, identifying each claim, in whole or in part, on which summary judgment is sought. Fed. R. Civ. P. 56(a). The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. *Id.* A party asserting that a fact cannot be disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

Fed. R. Civ. P. 56(c)(1).

Additionally, if the court does not grant all the relief requested by the motion, it may nonetheless enter an order “stating any material fact – including an item of damages or other relief – that is not genuinely in dispute and treating the fact as established in the case.” Fed. R. Civ. P. 56(g).

Although the Federal Rules of Civil Procedure are not strictly applicable in original actions, Rule 56 serves as a guide in resolving motions for summary judgment. Sup. Ct. R. 17.2; *Alabama v. North Carolina*, 560 U.S. 330, 344 (2010) (“In resolving motions for summary judgment in cases within our original jurisdiction . . . we use Rule 56 as a guide.”); *Nebraska v. Wyoming*, 507 U.S. 584 (1993) (“although not strictly applicable, Rule 56 . . . and our precedents construing that Rule serve as useful guides”). Accordingly, “[s]ummary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.” *Nebraska v. Wyoming* at 590 (citing Fed. R. Civ. P. 56(c))²⁶; *Alabama v. North Carolina*, 560 U.S. at 344.

With respect to the issues outlined herein, there are no genuine disputes as to any material fact and Texas is entitled to judgment as a matter of law thereon. Alternatively, and to the extent that the Special Master determines that one or more of the issues outlined herein, present disputed issues of material fact precluding summary judgment, Texas requests that the Special Master enter an order pursuant to Rule 56(g), “stating any

²⁶ The standard for granting summary judgment is now contained in subdivision (a), following 2010 amendments to Rule 56. However, “[t]he standard for granting summary judgment remains unchanged.” Fed. R. Civ. P. 56 advisory committee’s notes to 2010 amendments.

material fact . . . that is not genuinely in dispute and treating the fact as established in the case.”

IV. SUMMARY OF ARGUMENT

The 1938 Compact is unambiguous, and its text and structure are consistent with and support the allegations in Texas’s Complaint. The Compact equitably apportions the waters of the Rio Grande from its headwaters to Fort Quitman, Texas, among Colorado, New Mexico, and Texas. Article III of the Compact provides water for use in Colorado, subject to the obligation to deliver indexed flows of water to New Mexico just below the Colorado-New Mexico state line. Articles III and IV of the Compact together provide water for use in New Mexico, subject to the obligation to deliver an indexed flow of water to Texas in Elephant Butte Reservoir.

The water delivered by New Mexico in Elephant Butte Reservoir is apportioned to Texas, subject to the United States’ Treaty obligation to Mexico and the United States’ contractual obligation to EBID. The allocation of water to Mexico is not an apportionment; it stands alone as a pre-existing obligation of the United States. Likewise, the allocation to EBID is not an apportionment but stands alone as a pre-existing obligation of the United States. There is absolutely nothing in the history of the development of the 1938 Compact or the language of the Compact itself that would indicate that New Mexico received an apportionment of Rio Grande waters below Elephant Butte Reservoir. Because New Mexico has no Compact apportionment below Elephant Butte Reservoir, New Mexico’s allegations that groundwater pumping in Texas has adversely affected Project accounting and the delivery of water allocated by the Project, are solely derived from EBID’s Reclamation contract with the United States, a

challenge to which is precluded herein. As such, New Mexico's first and fourth counter-claims, based upon alleged Compact violations by Texas, must fail as a matter of law.

The flows provided for in Article III of the Compact identified the volume of water that Colorado could utilize in Colorado. The volume of water apportioned to Colorado was based upon 1938 depletion conditions. This 1938 depletion condition also protected New Mexico from post-1938 depletions that could occur above the Colorado-New Mexico state line. Article IV of the Compact identified the volume of water that New Mexico could utilize in the Middle Rio Grande and was again based upon 1938 conditions. Article IV of the Compact also protected the delivery of water in Elephant Butte Reservoir from post-1938 depletions in the New Mexico Middle Rio Grande. These provisions together ensured that the volume of indexed flows within the Rio Grande above Elephant Butte Reservoir would not be depleted greater than the depletion conditions that existed in 1938.

Colorado and New Mexico are provided an equitable apportionment of the waters of the Rio Grande. For Texas to also obtain an equitable apportionment of Rio Grande flows, the volume of water Texas is entitled to cannot be reduced by depletions caused by New Mexico that are greater than what existed in 1938.

New Mexico has admitted that the surface and groundwater system in New Mexico below Elephant Butte Reservoir are interconnected. New Mexico has likewise admitted that the pumping of groundwater in the Lower Rio Grande in New Mexico depletes the volume of Rio Grande surface water that otherwise would be available to Texas.

When New Mexico delivers water in Elephant Butte Reservoir pursuant to Article IV, it relinquishes control and dominion over the water that it delivers just as

Colorado does when it delivers water to New Mexico under Article III. Once New Mexico delivers water pursuant to Article IV, New Mexico state law has no application to the Project water, or to the Project's subsequent distribution of the water via the Downstream Contracts.

V. ARGUMENT

A. The Standard for Compact Interpretation

1. General principles of compact interpretation

Constitutionally, apportionment “can be achieved only in one of two ways – by an interstate compact or by a decree of equitable apportionment.” *Arizona v. California*, 373 U.S. 546, 636 (1963). In those cases where “the Court has used the doctrine of equitable apportionment to decide river controversies between states” by issuance of a decree – such as *Wyoming v. Colorado*, 259 U.S. 419 (1922) and *Nebraska v. Wyoming*, 325 U.S. 589 (1945) – “Congress had not made any statutory apportionment.” *Arizona v. California*, 373 U.S. at 565 n.34. “Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an ‘equitable apportionment’ for the apportionment chosen by Congress.” *Id.* Accordingly, “[i]f there is a compact, it is a law of the United States, and the Court’s first and last order of business is interpreting the compact.” *Texas v. New Mexico*, 462 U.S. 554, 567-68 (1983); *see also Kansas v. Nebraska*, 574 U.S. 445 (2015) (“Where the States have negotiated a compact, the Court is confined to declaring rights under and enforcing its terms.”).

An interstate compact, upon its approval by Congress, is both a contract and a law of the United States. *Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991) (citing *Texas v. New Mexico*, 482 U.S. 124, 128 (1987)). Accordingly, the rules of contract

interpretation and statutory interpretation apply. *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)); *Texas v. New Mexico*, 482 U.S. at 128.

Under the principles of contract law, the Court interprets interstate compacts “according to the intent of the parties.” *Montana v. Wyoming*, 563 U.S. 368, 375 n.4 (2011). A plain reading of a compact should “make[] sense in light of the circumstances existing in the signatory States when the Compact was drafted.” *Montana v. Wyoming* at 386. The terms of a compact should not be interpreted to produce “anomalous results” (*Tarrant Reg’l Water Dist. v. Herrmann*, 569 U.S. 614, 630 (2013)), nor “an extremely implausible reading.” *Oklahoma v. New Mexico*, 501 U.S. at 232.

2. The plain language of an unambiguous compact must be enforced without modification

In interpreting a compact as a federal statute, the Court gives effect to every word. “Interstate compacts, like treaties, are presumed to be ‘the subject of careful consideration before they are entered into, and are drawn by persons competent to express their meaning, and to choose apt words in which to embody the purposes of the high contracting parties.’ ” *New Jersey v. Delaware*, 552 U.S. at 615-16 (quoting *Rocca v. Thompson*, 223 U.S. 317, 332 (1912)). If the text of a compact is unambiguous, “no court may order relief inconsistent with its express terms.” *Texas v. New Mexico*, 462 U.S. at 564; *see also Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (holding that the “clear language” of the compact refuted Colorado’s legal challenge). “[C]ourts have no power to substitute their own notions of ‘equitable apportionment’ for the apportionment chosen by Congress.” *Texas v. New Mexico*, 462 U.S. at 568. “If there is a compact, it is a law of the United States, and [the Court’s] first and last order of business is interpreting

the compact.” *Id.* at 567-68. In effect, the unambiguous terms of the Compact are conclusive.

Application of this standard to the 1938 Compact results in the conclusion that the text and structure of the Compact unambiguously impose upon New Mexico an obligation to deliver an indexed volume of Rio Grande water in Elephant Butte Reservoir and not to intercept, deplete, or otherwise interfere with water released by the Project for the benefit of Texas.

3. If the terms of a compact are ambiguous, then summary judgment is improper and the factual dispute must proceed to trial

An interpretation of a compact term that produces impractical results suggests that the term is ambiguous, and an ambiguous term should be harmonized with the intent of the drafters. *Oklahoma v. New Mexico*, 501 U.S. at 232-33, 237. It is only appropriate to resort to extrinsic material to interpret a compact that is ambiguous. *Id.* at 235 n.5 (affirming that negotiation history of a compact is relevant to interpretation of an ambiguous term of the compact). When a compact term is ambiguous, it is appropriate to “turn to other interpretive tools to shed light on the intent of the Compact’s drafters.” *Tarrant Reg’l Water Dist.*, 569 U.S. at 630; *Oklahoma* at 234-35, n.5 (“a congressionally approved compact is both a contract and a statute . . . and we repeatedly have looked to legislative history and other extrinsic material when required to interpret a statute which is ambiguous”).

Summary judgment is improper when an ambiguous contract is coupled with material issues of fact. *Ultra Clean Holdings, Inc. v. TFG-Cal., Ltd. P’ship*, 534 F.App’x 776, 780 (10th Cir. 2013) (stating that in an ambiguous contract, a genuine issue of material fact exists which cannot be determined summarily by the court); *Baum v. Helget*

Gas Prods., Inc., 440 F.3d 1019, 1023 (8th Cir. 2006) (holding that “[w]here the contract is textually ambiguous, a question of material fact exists as to the parties’ intent,” which cannot be resolved on motion for summary judgment).

Thus, if the Special Master concludes that the Compact is ambiguous, partial summary judgment would be improper on the issues involving Compact interpretation and those issues should proceed to trial. Extrinsic evidence is factual in nature and, therefore, if it is contested, then there is a material issue of fact that can only be resolved at trial.

B. The 1938 Compact Is Unambiguous

1. The standard for determining if Compact provisions are ambiguous, including the text and structure of the Compact

In statutory interpretation disputes, the Court’s proper starting point lies in a careful examination of the ordinary meaning and structure of the statute itself. *Schindler Elevator Corp. v. United States ex rel. Kirk*, 563 U.S. 401, 407 (2011). Where that examination yields a clear answer, this Court’s analysis is at an end. *Hughes Aircraft Co. v. Jacobson*, 525 U. S. 432, 438 (1999). A compact is not ambiguous unless, after applying established rules of interpretation, it remains reasonably susceptible to at least two reasonable but conflicting meanings. *CNH Indus. N.V. v Reese*, 138 S. Ct. 761, 765 (2018) (addressing ambiguity in contracts). Only where a compact cannot be understood from its structure and plain text will the Court look to legislative history and other extrinsic material to interpret the compact. *Oklahoma v. New Mexico*, 501 U.S. at 235 n.5.

2. The provisions of the 1938 Compact are unambiguous

While the question of ambiguity is a threshold legal issue, it involves an analysis of the text and structure of the Compact. The text and structure are best understood in the

context of the individual elements of the Compact. The preamble to the 1938 Compact declares that the signatory states intended to apportion equitably the waters of the Rio Grande above Fort Quitman, Texas. Compact at 1. The Compact drafters intended to “remove all causes of present and future controversy among [the] States . . . to the use of the waters of the Rio Grande above Fort Quitman, Texas,” and to “effect[] an equitable apportionment of such waters.” *Id.* The scope of the apportionment is also clear from the definition of “Rio Grande Basin,” which means “all of the territory drained by the Rio Grande and its tributaries in Colorado, in New Mexico, and in Texas above Fort Quitman” *Id.* art. I(c). These preliminary assertions of the signatory states’ purpose and intent provide the relevant context for interpreting the remaining Compact terms. *See Alabama v. North Carolina*, 560 U.S. at 359 (Kennedy, J., concurring).

The preamble supports a holistic reading of the Compact by which each article is given meaning and purpose. First Report at 203. A compact must be construed as a whole, to “give effect, if possible, to every clause and word.” *Montclair v. Ramsdell*, 107 U.S. 147, 152 (1883). The negotiating history of interstate compacts may assist in giving effect to the meaning intended by the drafters. *See, e.g., Texas v. New Mexico*, 462 U.S. at 568 n.14; *Arizona v. California*, 292 U.S. 341, 359-60 (1934); *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001). While the meaning and scope of the Compact can be better understood when set against its background, there is no need to rely upon that history where the text and structure of the Compact are clear. *Kansas v. Colorado*, 514 U.S. at 690; *see also* First Report at 32, 204.

A review of the historical context confirms there is no ambiguity in the Compact provisions. As set forth in detail below, the plain language of the Compact equitably apportions the waters of the Rio Grande among the three states, requires New Mexico to

relinquish control of water delivered in Elephant Butte Reservoir, and prohibits New Mexico from recapturing water after it is released from the Reservoir.

C. The Plain Text and Structure of the Unambiguous Compact Equitably Apportion the Waters of the Rio Grande

The 1938 Compact equitably apportions the waters of the Rio Grande from its headwaters to Fort Quitman, Texas, among Colorado, New Mexico, and Texas.

Article III of the Compact provides water for use in Colorado, subject to the obligation to deliver indexed flows of water to New Mexico just below the Colorado-New Mexico state line. Articles III and IV of the Compact together provide water for use in New Mexico, subject to the obligation to deliver an indexed flow of water to Texas in Elephant Butte Reservoir. Texas's apportionment is delivered by New Mexico in Elephant Butte Reservoir pursuant to Article IV of the Compact, subject only to the 1906 Treaty and the United States' contract with EBID. Articles VII and VIII of the Compact provide that the Texas Rio Grande Commission shall demand and ensure that Colorado and New Mexico limit their upstream activities and release water in Elephant Butte Reservoir to ensure that Texas receives its apportionment. Once New Mexico delivers water in Elephant Butte Reservoir pursuant to Article IV of the Compact, New Mexico relinquishes dominion and control and has no residual sovereign right over the water. New Mexico does not have any Compact apportionment below Elephant Butte Reservoir.

1. The definition of “equitable apportionment”

Equitable apportionment is the doctrine of federal law that governs disputes between states concerning their rights to use water of an interstate stream. *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982). Such a controversy between two states over the diversion and use of waters of a stream passing from one to the other “makes a matter for

investigation and determination by [the Court] in the exercise of its original jurisdiction” *Wyoming v. Colorado*, 259 U.S. at 464. An upstream state “does not have such ownership or control of the waters flowing therein as entitles her to divert and use them regardless of any injury or prejudice to the rights of the lower state in the stream.” *Id.* No state may take more than what under the circumstances would be its share under an equitable apportionment. *Id.* Such disputes are to be resolved through “equality of right” of the states. *Kansas v. Colorado*, 206 U.S. 46 (1907). Equality of right refers not to an equal division of the water, but to “the equal level or plane on which all the States stand, in point of power and right, under our constitutional system.” *Wyoming v. Colorado*, 259 U.S. at 465.

Equitable apportionment may be accomplished judicially (by decree) or legislatively (by interstate compact). *Kansas v Colorado*, 206 U.S. at 97-98; *Colorado v. Kansas*, 320 U.S. 383, 392 (1943). States entering into a compact to equitably apportion a stream have the power to allocate the water among the signatory states as they see fit in order to secure the “greatest beneficial use of water in the stream.” *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 108 (1938). Such an apportionment is binding upon “the citizens of each state and all water claimants.” *Id.* at 106. The maximum right to appropriate interstate waters each state could ever confer upon its citizens cannot exceed that state’s equitable share. *Id.* at 102.

2. New Mexico receives its sole apportionment of water pursuant to Article III of the Compact at the Colorado-New Mexico state line

Article III of the Compact requires “Colorado to deliver water in the Rio Grande at the Colorado-New Mexico State Line” in established quantities, based upon flows of water that are measured at various index stations. Compact, art. III; TX Complaint

at ¶ 12.²⁷ Water exceeding the delivery requirement to New Mexico is the Colorado apportionment to be used in Colorado. Compact, art. III. Once Colorado delivers a certain indexed volume of water to New Mexico at the New Mexico state line, Colorado has no further dominion or control over the water delivered. Compact, art. VIII.

Water delivered by Colorado at the New Mexico state line is the New Mexico apportionment to be used in New Mexico, subject to the delivery requirement in Article IV. Compact, art. IV.

3. The Texas apportionment is the water New Mexico delivers in Elephant Butte Reservoir pursuant to Article IV, subject only to the 1906 Treaty and the United States' contracts with EBID

Article IV of the Compact obligates New Mexico to deliver a certain volume of water in Elephant Butte Reservoir, the primary water storage location for the Project. *See* Compact, art. IV; TX Complaint at ¶ 13.²⁸ Once delivered, New Mexico's regulatory authority over water released from the Reservoir ceases.

Elephant Butte Reservoir, located in New Mexico upstream of the Texas-New Mexico state line, was selected as the point of delivery for Texas's apportionment for several reasons: the Texas-New Mexico state line was of irregular shape making measurement there difficult and Elephant Butte Reservoir was the last point of control on the Rio Grande upstream of the Texas-New Mexico state line. In addition, the Project allowed for the orderly allocation of water to Mexico pursuant to the 1906 Treaty, and EBID pursuant to its Downstream Contracts with the United States, thereby allowing Texas to receive its apportioned water. The allocation of water to Mexico is not an

²⁷ New Mexico admits this statement. NM Answer at ¶ 12.

²⁸ New Mexico admits this statement. NM Answer at ¶ 13.

apportionment; it stands alone as a pre-existing obligation of the United States.

Likewise, the allocation to EBID is not an apportionment but stands alone as a pre-existing obligation of the United States.

The Compact did not specifically identify quantitative allocations of water below Elephant Butte Reservoir because it did not have to. As noted, all of the usable water in Elephant Butte Reservoir is apportioned to Texas, subject to the Treaty with Mexico (which is quantified at 60,000 acre feet in full supply years), and the Downstream Contracts with EBID. Compact, art. XVI. Those contracts provide a means of determining the quantity of surface water that is allocated for use in EBID, with the balance of water going to Texas. The EP#1 contracts with the BOR ensure consistency in the use and availability of water in EBID and in EP#1.

4. The Compact, at Articles VII and VIII, expressly grants Texas the sole power and authority to protect its apportionment from upstream depletions by Colorado and New Mexico

The Compact, as it addresses apportionment below Elephant Butte Reservoir, contemplates the existence of the Project and its operations, including contractual obligations and the 1906 Treaty. However, it does not apportion water to the Project. Nor does it provide the United States as the owner and operator of the Project any ability to protect the volume of water that is “delivered” in Elephant Butte Reservoir. That authority is vested solely in the Texas Rio Grande Commissioner. Compact, art. VIII.

Article VII of the Compact addresses upstream depletions and the release of water from upstream post-1929 reservoirs, in the context of relinquishment of credits by Colorado and New Mexico for the benefit of interests downstream of Elephant Butte Reservoir. Compact, art. VII. Article VIII of the Compact provides that the Texas Rio Grande Commissioner, not New Mexico, can *demand* of Colorado and New Mexico the

release of water from these upstream storage reservoirs under specified circumstances. Compact, art. VIII. New Mexico cannot make this demand because none of the water in Elephant Butte Reservoir is apportioned to New Mexico.

The Compact provides that Texas – not New Mexico – may accept relinquished water (relinquished by Colorado and New Mexico) thereby allowing additional storage in upstream reservoirs. Compact, art. VIII. New Mexico has no ability to *accept* water, even from itself, for the benefit of interests downstream of Elephant Butte Reservoir. That ability rests solely with Texas, because it is Texas, not New Mexico, that was apportioned the water in the Reservoir. New Mexico relinquishes its right to water once it is delivered in Elephant Butte Reservoir.

Not a single provision in the Compact provides or even suggests that New Mexico has an apportionment of Rio Grande water below Elephant Butte Reservoir.

5. Delivery means delivery: when New Mexico “delivers” water in Elephant Butte Reservoir, it relinquishes control and dominion over the water delivered

Pursuant to Article III, Colorado delivers a certain indexed volume of water to New Mexico at the New Mexico state line. Once delivered, Colorado has no further dominion or control over the water delivered. Article IV of the Compact requires New Mexico to deliver a certain volume of water in Elephant Butte Reservoir. As with the Colorado delivery, New Mexico has no further dominion or control over the water delivered. Once the water is delivered to the Project at Elephant Butte Reservoir, it is no different from the Colorado delivery at the New Mexico state line. In delivering the water, New Mexico must relinquish control and dominion over the water it deposits in the Reservoir. The obligation to satisfy EBID’s contract, deliveries to Mexico under the

1906 Treaty, and for delivery of Texas's apportionment belongs to the United States because the water was delivered to the Project for storage and distribution.

The commonly understood definition of the word "deliver" supports the clear understanding that New Mexico, once it delivers water in Elephant Butte Reservoir, relinquishes dominion and control over that water. "Delivery" means "[t]he formal act of transferring something" or "the giving or yielding possession or control of something to another." *See* Black's Law Dictionary 494 (9th ed. 2009); *see also* Black's Law Dictionary 349 (2d ed. 1910) (defining "delivering" in the context of "conveyancing" as "[t]he final and absolute transfer of a deed . . . in such manner that it cannot be recalled by the grantor"). "To deliver property to another means to surrender it to that person. To give with one hand and take back with the other is no delivery." *Ballentine's Law Dictionary* 353 (1930). Articles III and IV of the Compact identify delivery of water by New Mexico as an "obligation." Compact, arts. III-IV. The Compact pairs the obligation to deliver water with the mandatory duty to relinquish control of volumes of water identified in delivery schedules. "The obligation of New Mexico to deliver water in the Rio Grande at San Marcial . . . shall be that quantity set forth in the following tabulation of relationship which corresponds to the quantity at the upper index station." Compact, art. IV. New Mexico, by and through its State Engineer John D'Antonio, admits that when Colorado "delivers" water to New Mexico pursuant to Article III, Colorado loses dominion and control of the water:

Q. Once Colorado delivers water to -- to the Colorado/New Mexico state line, can Colorado intercept that water for use in Colorado?

....

A. I'm (unintelligible).

Q. (BY MR. SOMACH) It may not. Is that what you're saying?

A. Yes. It may not.

Q. Once it gets into New Mexico, it becomes New Mexico's water; is that correct?

A. Correct.

Excerpts of Deposition of John D'Antonio, 6/24/2020 (D'Antonio Depo., 6/24/2020), at TX_MSJ_000771, 000774-000775, 000780, 22:5-17; 25:25-26:18, 115:14-24.

New Mexico's theory – that the volume of water to which Texas is entitled may be reduced by depletions caused by New Mexico pumping greater than what existed in 1938 – is untenable, as it requires the conclusion that the drafters of the Compact intended the word “deliver” to have different meanings in Article IV than in Article III. To the contrary, it is an established rule of statutory construction “that identical words used in different parts of the same act are intended to have the same meaning.” *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 571 (2012). The plain text of the Compact obligating New Mexico to “deliver” water would be meaningless if New Mexico could simply convey water in Elephant Butte Reservoir only to recapture the same water at any point before the Texas state line. It is therefore inequitable, and defies long-standing principles of compact interpretation, to define “deliver” in Article III differently than in Article IV.

In the April 14, 2020 Order, the Special Master raised the question of whether the Compact's use of the term “deliver” was subject to a more nuanced interpretation. April 14, 2020 Order at 16. Nothing in the Compact supports an alternative interpretation. The Compact requires New Mexico to deliver Rio Grande water in Elephant Butte Reservoir for storage and distribution by the Project. In delivering the water, New Mexico must relinquish control and dominion over the water it deposits in

the Reservoir. This obligation to “deliver” water would be meaningless if New Mexico could simply convey water in Elephant Butte Reservoir only to recapture the same water at any point before the state line.

The plain meaning of the word deliver, coupled with the obligation to deliver water in the context of the structure and purpose of the Compact, does not permit a different, less straightforward reading. Delivery has the same meaning in Article IV as it has in Article III. When New Mexico intercepts or diverts water it delivers in Elephant Butte Reservoir upon its release from the Reservoir, it violates the terms of the Compact. To conclude otherwise would require rendering void the commonly understood and straightforward meanings of “obligation” and “deliver” in Article IV.

6. The unambiguous language of the 1938 Compact does not apportion water to New Mexico below Elephant Butte Reservoir

a. The water delivered to EBID pursuant to the United States’ Contracts with EBID is a Project allocation, not a Compact apportionment to New Mexico

There is no apportionment of Rio Grande water to New Mexico below Elephant Butte Reservoir in the plain text or structure of the Compact. Contrary to New Mexico’s assertion, the water released from Elephant Butte Reservoir, and delivered to EBID pursuant to the United States’ Downstream Contracts with EBID, is not a Compact apportionment to New Mexico. This water is a Project allocation, defined by the United States’ Contracts with EBID.

Indeed, as the Supreme Court has noted, it is the EBID contract in the context of contracts with EP#1 that allows Texas to take its apportionment at Elephant Butte Reservoir in lieu of a state line delivery. *Texas v. New Mexico*, 138 S. Ct. at 957 (Elephant Butte delivery point was chosen “in light of the simultaneously negotiated

Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources.”). EBID and EP#1 entered into contracts with the United States in November 1937. 1937 US/EBID Contract at TX_MSJ_004434-004461; 1937 US/EP#1 Contract at TX_MSJ_004464-004488. The repayment contract between EBID and EP#1 that established the Districts' respective allocations was effective in February 1938, one month before the states signed the Compact. 1938 US/EBID/EP#1 Contract at TX_MSJ_005249-005250. Thus, the Project was among the “present uses” of water in the three states that the Compact drafters intended to protect. Miltenberger Decl. at TX_MSJ_001588. The Compact apportions the waters of the Rio Grande in the context of the contractual allocations of Project water.

b. New Mexico's own prior admissions support that it does not have a Compact apportionment below Elephant Butte Reservoir

New Mexico admits that whatever interest New Mexico may have below Elephant Butte Reservoir, it is limited to the rights that exist pursuant to the EBID contracts. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001142-001145, 20:4-23:16, 25:17-26:10. New Mexico also admits that New Mexico's interests below Elephant Butte Reservoir are strictly limited to the four corners of the 1937 contract between EBID and the United States and the 1938 contract between EBID, the United States, and EP#1. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001147-001148, 25:17-26:10. New Mexico concedes that it cannot, in any way, control or affect that contract. Excerpts of Deposition of John D'Antonio, 8/14/2020 (D'Antonio Depo., 8/14/2020), at TX_MSJ_000867, 93:1-11, 24-25 (“The contracts are in place, the project is under Reclamation law and it runs”; “New Mexico's not involved to administer the contract water, no.”), 94:2-13 (“New Mexico does not administer the surface water that's under

contract . . . we don't administer on a day-to-day basis any of the water that's meant for the project.”), 95:21-96:7. Indeed, as a non-party to that contract, New Mexico has no standing to challenge or enforce those contracts. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1211 (9th Cir. 1999) (holding that where there is no express or implied intention of the parties to a contract to benefit a third party, the third party may not enforce the contract). New Mexico admits that the use, place of use, timing of delivery, and total amount of water is absolutely limited by these contracts. D'Antonio Depo., 8/14/2020, at TX_MSJ_000875, 000879-000880, 145:13-18, 149:6-150:2. Whatever “right” to water New Mexico claims below Elephant Butte Reservoir is not an apportionment of water protected by the Compact.

Until this litigation, New Mexico never argued that it had an apportionment of Rio Grande water below Elephant Butte Reservoir. In fact, in 1951, in prior Supreme Court litigation between New Mexico and Texas, John H. Bliss, the New Mexico State Engineer, on behalf of the state of New Mexico, stated unequivocally under oath: “The Rio Grande Compact does not attempt to make any apportionment between the New Mexico area and the Texas area below Elephant Butte Reservoir.” *Texas v. New Mexico*, U.S. Supreme Court, No. 9 Original, Return of Defendants to Rule of Show Cause at 3; Miltenberger Decl. at TX_MSJ_001610. Significantly, the John H. Bliss who so swore is the same John H. Bliss who was the New Mexico engineer representative to the Engineer Advisors to the negotiators of the 1938 Compact. *Id.* Until the Supreme Court's 2018 decision, New Mexico consistently admitted that its rights under the Compact ended at Elephant Butte Reservoir, with no further apportionment of water, once New Mexico delivered the water into the Reservoir pursuant to Article IV of the Compact. Excerpts of

Deposition of Peggy Barroll, 2/6/2020 (Barroll Depo., 2/6/2020), at TX_MSJ_000937, 314:12-16.

c. Despite its prior admissions, New Mexico now argues, without Compact authority, that it is effectively entitled to two apportionments

New Mexico, in response to the question of apportionment, now argues that it has an apportionment both above and below Elephant Butte Reservoir. When asked the precise nature of its apportionment below Elephant Butte Reservoir, New Mexico repeats what has become its mantra: it gets the delivery from Colorado at the New Mexico-Colorado border, but also gets 57 percent of the “57/43” split of the water released from Elephant Butte Reservoir after satisfaction of the 1906 Treaty obligation. The 57/43 split refers to the approximate percentage distribution of irrigable acres authorized within the Project (57 percent within EBID and 43 percent within EP#1).

With this argument, New Mexico again ignores the plain language and structure of the Compact. The 57/43 split does *not* arise out of the Compact. It arises out of the Downstream Contracts to which New Mexico is not a party. It should be noted that once the Project’s allocation has been made by BOR, how that water is accounted for is purely a matter of Reclamation law and not the Compact. The Compact serves to ensure that the volume of water delivered into the Reservoir, as specified in Article IV, is available to meet the Texas apportionment and is not depleted. New Mexico’s complaints in this litigation about Project accounting are a Reclamation law issue and not a Compact issue.

In fact, no Compact accounting has ever taken place below Elephant Butte Reservoir because, as noted, Texas’s apportionment is delivered to Elephant Butte Reservoir. *See* excerpts of Deposition of Herman Settemeyer, 7/30/2020 (Settemeyer Depo., 7/30/2020), at TX_MSJ_001301-001302, 001307, 30:4-31:11, 44:12-21

(Mr. Settemeyer testified that the Engineer Advisors “never do [*sic*] an accounting below Elephant Butte”). The Report of the Engineer Advisors to the Rio Grande Compact Commissioners, dated February 22, 2002 demonstrates that there is nothing in all the figures that the Compact Commission collects that addresses the 57/43 split. Brandes Decl. at TX_MSJ_000014-000015. This is because that is an allocation issue and not a Compact issue. *Id.* If it were a Compact issue, it would have been accounted for as such. *Id.* Section 2.1 of the Memorandum of Understanding between the Rio Grande Compact Commission and the BOR, included in the 2001 Report of the Rio Grande Compact Commission, confirms that the Compact accounting data includes “*deliveries by New Mexico to Texas at Elephant Butte.*” *Id.* at TX_MSJ_000001-000014.

Well-established rules of compact interpretation mandate that the analysis of the express terms of the Compact be honored. *New Jersey v. Delaware*, 552 U.S. at 615-16; *Texas v. New Mexico*, 462 U.S. 554; *Kansas v. Colorado*, 514 U.S. at 690. Once New Mexico delivers the water in Elephant Butte Reservoir in accordance with Article IV of the Compact, it relinquishes dominion and control over that water, as the Compact mandated that the water be delivered into the Project. At that point, New Mexico’s sovereign authority ceases, and the superior authority of the United States takes over.

d. The Court’s reference to an apportionment below the Reservoir in its March 2018 opinion is dictum because the issue was not before the Court, or necessary to the ruling

Texas recognizes that dictum in the most recent Supreme Court decision suggests an apportionment for New Mexico below Elephant Butte Reservoir. *Texas v. New Mexico*, 138 S. Ct. at 959. However, the dictum was derived from statements in the First Report in which the Special Master said “[t]he Rio Grande Project [was intended] to be the sole vehicle by which Texas and lower New Mexico would receive the equitable

apportionment of Rio Grande waters.” First Report at 194-95. The Supreme Court decision merely repeats this language in the context of describing the United States’ role “as a sort of ‘agent’ ” of the Compact, charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico “is, in fact, made.” *Texas v. New Mexico*, 138 S. Ct. at 959.

The question of whether New Mexico has, or does not have, an apportionment below Elephant Butte Reservoir was not an issue before the Special Master when he issued the First Report, and was not subject to a finding in the First Report. The issue was never briefed or otherwise addressed in the context of any of the issues that were the subject of the First Report. Likewise, the issue of whether New Mexico is entitled to any water delivery below Elephant Butte Reservoir, by way of apportionment, allocation, or otherwise, was never briefed, analyzed, or addressed by the Supreme Court. An isolated comment by the Court in an opinion is dictum, where the comment is not essential to the Court’s disposition of any of the issues contested in the case. *Cent. Green Co. v. United States*, 531 U.S. 425, 431 (2001); *see also California v. United States*, 438 U.S. at 673-74 (disavowing dicta in two prior cases that “undoubtedly goes further than necessary to decide the cases presented to the Court” to the extent it would prevent the state from imposing conditions on a permit granted to the United States that were not inconsistent with the federal reclamation statute).

Thus, the language in the First Report and in the Supreme Court decision was, at most, dictum. The instant briefing is the first time that the apportionment issue has been addressed in this litigation.

D. New Mexico's First and Fourth Counterclaims Fail because there is No Compact Apportionment to New Mexico Below the Reservoir

As established at section V.C, *supra*, New Mexico has no Compact apportionment below Elephant Butte Reservoir. Because there is no Compact apportionment to New Mexico below the Reservoir, New Mexico's first and fourth counterclaims, based upon alleged Compact violations by Texas, must fail as a matter of law. Moreover, any claim involving a Reclamation contract with the United States is precluded from being raised herein. *Orff v. United States*, 545 U.S. 596, 600-01 (2005); *see also* March 31, 2020 Order of the Special Master at 18²⁹ (“[L]ike the plaintiffs in *Orff*, New Mexico is not a direct party to the Downstream Contracts. Although the Downstream Contracts are ‘intertwined’ with the Compact, they are not, in fact, contracts between New Mexico and the United States.”).

In New Mexico's first claim for relief (“Compact Violation by Texas Caused by Unauthorized Depletions”), New Mexico alleges that groundwater pumping in Texas allows the unauthorized use of surface water, and unaccounted for Project return flows, in violation of the Compact. State of New Mexico's Counterclaims (NM Counterclaims)³⁰ at *supra*, ¶ 64. New Mexico alleges that these diversions in Texas “interfere with the Project's ability to deliver water to New Mexico's Project beneficiaries near the Texas-New Mexico border” and the “Project's ability to deliver water to Texas Project beneficiaries.” *Id.* ¶ 65. New Mexico alleges that this conduct harms “Project beneficiaries,” induces them to call for “releases of additional Project water,” and reduces the amount of water in “Project storage available for allocation to New Mexico Project

²⁹ The Special Master's March 31, 2020 Order is Docket No. 338.

³⁰ Special Master Docket No. 99.

beneficiaries.” *Id.* New Mexico further alleges that conduct by Texas has “depleted and is threatening to further deplete the waters of the Rio Grande allocated to New Mexico under the Compact.” *Id.* ¶ 67.

New Mexico’s fourth claim for relief (“Compact Violation and Unjust Enrichment Against Texas”) alleges that “Texas is entitled to no more water under the Compact than is necessary to deliver an amount of water to each acre of Project lands in Texas equal to the amount of water delivered to each acre of Project lands in New Mexico.” NM Counterclaims ¶ 92. New Mexico thereafter admits through its allegations, that the issue of delivering water “on an equal basis to each acre of Project lands” concerns “Project water” and “Project operations.” *Id.* ¶ 93. Further, New Mexico alleges that this issue arose “at least since the adoption of the 2008 Operating Agreement (2008 OA) and various other operational changes, as well as through the use of inequitable accounting methods by the United States”³¹ *Id.* New Mexico also alleges that “[i]n 2011, Texas received excess water as a result of the unauthorized reduction of New Mexico’s Compact Credit Water by the United States.”³² *Id.* ¶ 95.

New Mexico’s allegations that groundwater pumping in Texas has adversely affected Project accounting and the delivery of Project water allocated by the Project to Project beneficiaries, are solely based upon the United States’ contracts with EBID and EP#1, which arise out of Reclamation law. As such, any claim by New Mexico with

³¹ New Mexico’s second counterclaim based upon the 2008 OA and alleged operational changes resulting in an unequal per-acre delivery of Project water, was dismissed by the Special Master in the March 31, 2020 Order.

³² New Mexico’s third counterclaim based upon credit water and Project accounting issues was dismissed by the Special Master in the March 31, 2020 Order.

respect to the Project allocations of Texas's apportionment, and Project accounting below the Reservoir, must fail as a matter of law.

As discussed in section V.C, *supra*, New Mexico has no apportionment below the Reservoir. All of the allegations set forth in its first and fourth counterclaims involve complaints about Project deliveries and/or Project accounting, of Project allocations below Elephant Butte Reservoir, and to contracts to which New Mexico is not a party. *See Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d at 1211 (holding that where there is no express or implied intention of the parties to a contract to benefit a third party, the third party may not enforce the contract); *see also* discussion at section V.C.6.b.

Further, as previously addressed by the Special Master in the March 31, 2020 Order addressing several of the New Mexico counterclaims, this proceeding "is an action to interpret and enforce a Compact." March 31, 2020 Order at 18. "[T]his is not an action to enforce a Reclamation contract" *Id.* Thus, because there is no Compact apportionment to New Mexico below Elephant Butte Reservoir, as discussed *supra*, then all of New Mexico's allegations in its first and fourth counterclaims, which *solely* concern rights and obligations arising from the Reclamation contracts, are not at issue in this original action.

To the extent that any issues regarding whether and how conduct by Texas might affect Project allocations and/or accounting remain relevant, the relevance is limited to the scope of Texas's asserted damages and the appropriate remedy. In other words, New Mexico is entitled to raise these issues in defense of the Texas claims. However, upon the Special Master's recommendation, and the Court's acceptance, that there is no Compact apportionment below the Reservoir, no direct claim by New Mexico for alleged

injuries and damages arising from a violation of the Reclamation contracts is properly before this Court.

E. The Compact Protects the Project and its Operations under the Conditions that Existed in 1938, at the Time of Compact Execution (1938 Condition)

1. Compact apportionments were negotiated and established on the basis of 1938 Conditions, including Project operations and depletion levels

Based upon the application of well-established principles of compact interpretation, the Compact protects the Project and its operations under the conditions that existed in 1938, and relies on the Project, as it operated in 1938, as the means to provide Compact apportionments. Miltenberger Decl. at TX_MSJ_001608. A congressionally approved compact is a contract as well as a statute; therefore, “[i]nterstate compacts are construed as contracts under the principles of contract law.” *Tarrant Reg’l Water Dist.*, 569 U.S. at 628. A compact’s express terms are “the best indication of the intent of the parties.” *Id.* (citing *Montana v. Wyoming*, 563 U.S. at 375 & n.4). A compact is interpreted consistent with the drafters’ background understanding of the law and the circumstances at the time the Compact was executed. *Tarrant Reg’l Water Dist.*, 569 U.S. at 628.

The historical background forming the basis of the Compact negotiations is well documented, and not subject to any reasonable material dispute. Indeed, the Project was authorized in 1905, and by 1938 had already been in operation for decades. Miltenberger Decl. at TX_MSJ_001589. Also in existence were the 1906 Treaty and the pre-existing contracts by and between the United States, EBID, and EP#1, addressing deliveries of Project water. *Id.* at TX_MSJ_001589, 001603. These facts form the backdrop against which disputes arose, and upon which negotiations were based, culminating in the

Compact. *Id.* at TX_MSJ_001587-001588. The respective parties' Compact obligations must be interpreted based on the conditions at the time of the signing of the Compact, including the hydrology and existing water operations that formed the foundation for the Compact delivery obligations.

The express terms of the Compact demonstrate that the drafters intended to protect the Project, and included language to protect the Project's operations under the then-existing 1938 conditions. The drafters' acknowledgment of the relationship between the Compact and the Project is apparent in Article I of the Compact by the inclusion of the reference to the Project in the definitions of "Project Storage" and "Usable Water." Compact, art. I. The drafters were aware of the Project's role in delivering water to irrigated lands in the Rio Grande basin, and to Mexico to meet the United States' treaty obligations. The United States' representative at the meeting of the Rio Grande Compact Commission in 1938 stated that the intent of the Compact was an "equitable division of the water of the Rio Grande" and "[i]t is my belief that the interests of the United States are fully safeguarded by (a) inclusion, in the State allocations, of all water to which Federal irrigation projects are entitled" Miltenberger Decl. at TX_MSJ_001600, 005344. Such a statement could not have been made absent the clear understanding that the Compact recognized and relied on the Project for the delivery of the water apportioned to Texas.

Other Compact provisions demonstrate the drafters' intent to protect the normal operation of the Project, i.e., a normal release of 790,000 acre feet from further development of the river. Compact, art. VII; Miltenberger Decl. at TX_MSJ_001600. Article IV requires adjustments to the scheduled amounts based on depletion of tributary runoff between Otowi Bridge and San Marcial during July, August, and September by

works constructed after 1937. Compact, art. IV; Miltenberger Decl. at TX_MSJ_001597, 001600. This protects Texas's apportionment from upstream development by ensuring an agreed upon level of flow to Elephant Butte Reservoir and normal releases from the Project. Miltenberger Decl. at TX_MSJ_001606. The drafters provided for the necessary adjustments to deliveries in Elephant Butte Reservoir if New Mexico were to deplete river flow by building storage works above San Marcial. Compact, art. IV(6); Miltenberger Decl. at TX_MSJ_001600.

The drafters did not need to provide similar adjustments to river flows below Elephant Butte Reservoir because Project releases regulated river flow for this portion of the Rio Grande. Miltenberger Decl. at TX_MSJ_001603. The Project was fully developed at the time the 1938 Compact was negotiated and approved. *Id.* at TX_MSJ_001593. Accordingly, the drafters did not provide river flow adjustments below Elephant Butte Reservoir because they understood the operations of the Project in 1938 and intended them to continue. *Id.* at TX_MSJ_001602-001603.

The Compact also protects Project Storage to allow for "a normal release" from the Project. Miltenberger Decl. at TX_MSJ_001600-001601. If Colorado or New Mexico have Accrued Debits stored in reservoirs constructed after 1929, then Texas may demand the release of that water to maintain the quantity of Usable Water in Project Storage at levels sufficient to allow "a normal release" of 790,000 acre feet from Project Storage in that year. Compact, art. VIII; Miltenberger Decl. at TX_MSJ_001602. Thus, the drafters protected the quantity of water flowing in Elephant Butte Reservoir during dry years, or years when New Mexico and Colorado are filling reservoirs constructed after 1929. Miltenberger Decl. at TX_MSJ_001602-001603. At the same time, the drafters provided for forgiveness of these Accrued Debits in a wet year with an Actual

Spill.³³ *Id.* at TX_MSJ_001600. Based on the Compact definition of Actual Spill, Elephant Butte Reservoir would be at capacity, and deliveries of Project water would easily be met. *Id.* The drafters took great care to ensure that New Mexico delivers sufficient water in Elephant Butte Reservoir to maintain normal releases of Project water for irrigation demands in Texas, Project lands in New Mexico, and delivery to Mexico. *Id.* at TX_MSJ_001603-001605.

2. The Compact requires Colorado and New Mexico to deliver water based upon the 1938 Condition

As discussed *supra*, Article III of the Compact requires that Colorado deliver water in the Rio Grande at the Colorado-New Mexico state line in established quantities, based upon flows of water that are measured at various index stations. *See* TX Complaint at ¶ 12; Miltenberger Decl. at TX_MSJ_001593; Brandes Decl. at TX_MSJ_000001-000016. Similarly, Article IV requires New Mexico to deliver indexed flows of water in Elephant Butte Reservoir. Miltenberger Decl. at TX_MSJ_001595. These delivery mandates are based upon the adoption of two delivery schedules, or indices: one for Colorado to New Mexico, and one for New Mexico to Texas. *Id.* During Compact negotiations, the schedules were derived from streamflow data and analyses developed by the JIR, an investigation undertaken to provide the needed data to resolve the impasse over the apportionment of the Rio Grande waters above Fort Quitman. *Id.*

For Colorado's delivery to New Mexico, the indices used were based upon flow data for a 1928-1937 period of record that nonetheless reflected an accepted

³³ The Compact defines Actual Spill to mean "all water which is actually spilled from Elephant Butte Reservoir or is released therefrom for flood control, in excess of the current demand on project storage and which does not become usable water by storage in another reservoir." Compact, art. I(p). An Actual Spill cannot occur until all credit water has been spilled.

1938 Condition of consumption in the San Luis Valley that would protect flows for the Middle Rio Grande below the state line. Miltenberger Decl. at TX_MSJ_001597; Barfield Decl. at TX_MSJ_000704-000705, NM RFA Responses at TX_MSJ_000738, Response No. 21 (“New Mexico admits that to the extent Article III of the Compact uses data, it was necessarily available prior to the approval of the Compact.”). For New Mexico’s delivery to Texas, the indices used were based upon flow data for an 1890-1929 period of record that nonetheless reflected an accepted 1938 Condition of consumption in the Middle Rio Grande that would protect the supply for lands below Elephant Butte Reservoir and to Texas. Miltenberger Decl. at TX_MSJ_001598; Barfield Decl. at TX_MSJ_000704-000705, NM RFA Responses at TX_MSJ_000738, Response No. 22 (“New Mexico admits that Article IV of the Compact is based upon data that was necessarily available prior to the approval of the Compact.”).

The ultimate result of Compact negotiations, informed by streamflow data and analyses developed by the JIR, was an agreement that mimicked the 1929 Temporary Compact by freezing depletions at pre-1938 conditions. Miltenberger Decl. at TX_MSJ_001587, 001585; Brandes Decl. at TX_MSJ_000001-000016. Notably, the Compact was structured such that New Mexico’s apportionment was *above* Elephant Butte Reservoir. Miltenberger Decl. at TX_MSJ_001599; Brandes Decl. at TX_MSJ_000001-000016. This 1938 Condition also protected New Mexico from post-1938 depletions that could occur above the Colorado-New Mexico state line. Miltenberger Decl. at TX_MSJ_001599; Brandes Decl. at TX_MSJ_000001-000016; Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001158-001159, 74:14-75:11 (Q. . . . those limitations [on Colorado’s ability to develop its water resources] are to

ensure that depletions in Colorado would be . . . what existed in 1938; is that correct?

A. I think that's largely – largely correct.”); Compact, art. III.

3. There cannot be an equitable apportionment if Texas's apportionment is treated differently than the apportionments to Colorado and New Mexico

The apportionments to Colorado, New Mexico, and Texas must all be based on the freezing of depletions at the 1938 Condition, and it would be improper to interpret the Compact to freeze depletions at the 1938 Condition for both Colorado and New Mexico, but not for Texas.

The Compact “freezes” depletions above Elephant Butte Reservoir to pre-1938 conditions. Miltenberger Decl. at TX_MSJ_001587-001588. The provisions that reference 1937 and 1929 facilities create a 1938 Condition for Colorado and New Mexico. Compact, arts. II, IV, VI, VII, VIII; Miltenberger Decl. at TX_MSJ_001596-001601. Specifically, the adjustment to the delivery schedule for depletions at Otowi Bridge, compared to the absence of a similar adjustment for depletions below Elephant Butte Reservoir, reflects that the drafters understood the operations of the Project in 1938 and intended them to continue. Miltenberger Decl. at TX_MSJ_001605. Because the Colorado and New Mexico apportionments are framed by the 1938 Condition, Texas's apportionment must necessarily also be framed by the 1938 Condition. It is the only way that there is an “equitable apportionment.”

Article IV of the Compact identified the volume of water that New Mexico could utilize in the Middle Rio Grande based upon the 1938 Condition. Compact, art. IV. Article IV also protected the delivery of water in Elephant Butte Reservoir from post-1938 depletions in the New Mexico Middle Rio Grande. *Id.* These provisions together

ensured that the volume of indexed flows within the Rio Grande above Elephant Butte Reservoir would not be depleted above the depletion conditions that existed in 1938.

New Mexico admits this, but denies that there is any 1938 depletion condition below Elephant Butte Reservoir that would protect the volumes of water that Texas was apportioned. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001159-001161, 75:18-76:9, 76:16-77:12. Thus, according to New Mexico, Colorado and New Mexico benefit and are protected from upstream depletions that exceed the depletions that occurred in 1938, but Texas has no such protections. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001159-001161, 76:16-77:21 (“A. There is no constraint below Elephant Butte. There is no 1938 . . . depletion condition. There is . . . no such condition placed in the Compact for the section below Elephant Butte.”). To accept New Mexico’s view would result in Colorado and New Mexico each receiving an equitable apportionment of the waters of the Rio Grande, but Texas’s apportionment would be inequitable. Under New Mexico’s Compact theory, the volume of water to which Texas is entitled can be reduced by depletions caused by New Mexico pumping greater than what existed in 1938. The same would not be true of the Colorado and New Mexico apportionments.

New Mexico’s theory that it fully complies with the Compact when it delivers water in Elephant Butte Reservoir, and that any depletions of Rio Grande water that occur below Elephant Butte Reservoir do not violate the Compact, ignores the obvious fact that there would be no purpose in protecting flows *into* the Reservoir from post-1938 depletions, if flows *out* of the Reservoir were not also protected from post-1938 depletions before they reached Texas. To conclude otherwise would be to determine that Texas received nothing from its Compact apportionment, a reading clearly inconsistent

with the intent of the drafters. New Mexico's Compact obligations to Texas extend below Elephant Butte Reservoir.

In 1935, Texas sued New Mexico in the United States Supreme Court to enjoin upstream depletions in Elephant Butte Reservoir to ensure that Texas would get its appropriate share of Rio Grande flows free of post-1929 upstream depletions (the date of the Temporary Compact). *Texas v. New Mexico*, 296 U.S. 547 (1935). Again, in 1952, Texas sued New Mexico in order to protect its equitable apportionment by ensuring upstream depletions would not impair deliveries in Elephant Butte Reservoir. *Texas v. New Mexico*, 343 U.S. 932 (1952). In 1968, Texas and New Mexico sued Colorado to protect their respective equitable apportionments from upstream depletions caused by Colorado. *Texas v. Colorado*, 391 U.S. 901 (1968). In each of these instances, the focal point of the litigation was the protection of those downstream from post-1938 depletions and preservation of the 1938 Condition upon which the Compact was based. Protecting Elephant Butte Reservoir from upstream post-1938 depletions makes no logical or legal sense if the water released from the Reservoir is not also protected from post-downstream 1938 depletions. After all, Texas's interest was and is to ensure that it actually receives the water apportioned to it.

F. New Mexico Groundwater Pumping Depletes Surface Water Flows and the Volume of Water in the Rio Grande in Excess of the 1938 Condition

1. Surface and groundwater within the Rio Grande basin are interconnected and New Mexico must refrain from authorizing groundwater pumping that depletes Texas's apportionment

The Supreme Court recognized the interconnection of groundwater and surface water in its first equitable apportionment case at the turn of the last century. *Kansas v. Colorado*, 206 U.S. 46. In a later dispute between the same states, the Special Master

found, and the Supreme Court agreed, that post-compact pumping in Colorado had caused material depletions to the usable state line flow in violation of the Arkansas Compact. *See Kansas v. Colorado*, 514 U.S. at 693-94. In this matter, it is undisputed that groundwater pumping in New Mexico below Elephant Butte Reservoir depletes surface water flow of the Rio Grande, and that groundwater pumping has increased substantially since 1938. Brandes Decl. at TX_MSJ_000001-000016, **Figure 10**; Schorr Decl. at TX_MSJ_000697-000699. However, New Mexico erroneously asserts the Compact imposes no obligation to maintain depletion conditions as they were in 1938 at the time of the Compact, and so has no duty to avoid intercepting Texas's apportionment released from the Reservoir.

The plain text and structure of the Compact reflect the agreement of the parties. Texas receives its equitable apportionment under the Compact when (1) New Mexico delivers a scheduled amount of water in Elephant Butte Reservoir with the appropriate adjustments, (2) control of that water is transferred to the Project, (3) normal releases of Project water are made to satisfy irrigation demands and delivery to Mexico, and (4) the released water and Project return flows are allowed to flow to the intended delivery point. The states' understanding that the basin was fully appropriated is incorporated into the 1938 Compact, and formed the basis for the agreement, "desiring to remove all causes of present and future controversy among the[] States." Compact at 1.

New Mexico has a duty to refrain from post-Compact depletions of water below Elephant Butte Reservoir deriving from the plain meaning of the Compact. This duty extends to groundwater pumping that, in the fully appropriated Rio Grande basin, depletes flows in excess of the 1938 Condition and intercepts water apportioned to Texas in violation of the Compact. A finding to the contrary would defeat the stated intent of

the Compact to effect an “equitable apportionment” of the waters of the Rio Grande above Fort Quitman, by depriving Texas of any apportionment of those waters.

The parties, including New Mexico, understood the 1938 Condition as the foundation for Compact formation. Post-1938 increases in pumping of groundwater or use of return flows destined for Texas are contrary to that condition, and thus in violation of the Compact.

2. New Mexico’s post-1938 pumping decreases the volume of water available for Project allocations as well as Texas’s apportionment

The depletions existing in 1938 describe the relationship between Reservoir releases and the volume of water that Texas anticipated would reach the Texas state line. Miltenberger Decl. at TX_MSJ_001596, 001608. During Compact negotiations, Texas argued that normal releases should be 800,000 acre feet and New Mexico, seeking to protect the Middle Rio Grande from Texas, argued for a much lower number. *Id.* at TX_MSJ_001605. Ultimately, after much argument and negotiation, the states agreed to 790,000 acre feet as a normal release for Texas. Compact, art. VII; Miltenberger Decl. at TX_MSJ_001606. The nub of the dispute between the states was not the volume of the Reservoir release alone, but rather how much of the water released (along with return flows and other downstream accretions) would ultimately reach Texas, 100 miles downstream. Miltenberger Decl. at TX_MSJ_001603, 001607. Since 1938, the volume of groundwater pumped in the Rincon and Mesilla Valleys in New Mexico has increased. Schorr Decl. at TX_MSJ_000697-000699; Brandes Decl. at TX_MSJ_000001-000016,

Figure 11.

Of the 790,000 acre feet delivered to the Reservoir, New Mexico argues that it is entitled to 57 percent of (1) usable water released from the Reservoir, (2) arroyo flow and

other accretions below the Reservoir, and (3) return flows from the use of water on Project lands. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001141-001142, 19:16-20:3. There is no question that these are the elements associated with the total volume of water to which the Districts are entitled pursuant to the Downstream Contracts, and that these figures mirror the conditions that were contemplated in 1938. Missing from New Mexico's analysis, however, is a consideration of depletions from the volume of water that otherwise would have been available under the conditions that existed in 1938. Thus, assuming Texas is entitled to 43 percent, of the 57/43 Project water allocation, the question remains: 43 percent of what volume?

Regarding the 57/43 split, referable to Project allocations, the Project delivers the *water available to it* at the points of diversion on the river. Brandes Decl. at TX_MSJ_000001-000016. The volume of Project water that was split 57/43 in 1938 for the Project to make the allocation to EBID and EP#1 pursuant to the contracts with the United States reflected the acreages of irrigated land in the two Districts at that time and the generally gaining condition of the river below Caballo Reservoir as influenced by relatively high groundwater levels in the absence of significant pumping. *Id.* This changed beginning in the 1950s with the extensive development of groundwater in New Mexico and the subsequent lowering of groundwater levels along the Rio Grande that altered the condition of the river from a generally gaining stream to a generally losing stream. *Id.* The implications of this change are obvious – river flow losses mean greater depletions and less Project water for downstream users. *Id.* The Project has no control over New Mexico's depletions and can only allocate the amount of water remaining after the New Mexico groundwater pumping depletes Project water in the river, including Reservoir releases. *Id.*

In and of itself, Texas does not dispute the 57/43 split in terms of the approximate percentage division of water, as it relates to irrigable acres, for the Project allocation (not the New Mexico apportionment). Texas *does* dispute that New Mexico can, through its own actions, deplete and reduce the volume of water that is divided 57/43.³⁴

Under New Mexico's theory, it could continue to deplete the flows below Elephant Butte Reservoir until the Reservoir release available for delivery would be as little as one-acre foot, to be split 57/43 by way of Project allocations. As New Mexico would have it, that result would not violate the Compact. Moreover, since the water depleted through groundwater pumping in New Mexico is used in New Mexico, the fact that EBID only gets 57 percent of one-acre foot of surface flow is immaterial to New Mexico since New Mexico water users (irrigation, and municipal and industrial (M&I)) are the sole beneficiaries of the depletions. Under New Mexico's theory, New Mexico water users receive more water through the combination of groundwater pumping by irrigation and M&I interests and surface water deliveries to EBID than EBID would have received under the 1938 Condition.

The decision to deliver Texas's water in Elephant Butte Reservoir was sound in 1938 when the Compact was adopted. There was effectively no groundwater pumping below Elephant Butte Reservoir in New Mexico, the irrigation uses were limited to EBID, which holds a contract to water in the Reservoir, and the volume of M&I water used in 1938 was minor. Miltenberger Decl. at TX_MSJ_001612-001613. New Mexico must control the groundwater pumping by irrigators below the Reservoir so as to protect the Texas apportionment from depletions in excess of the 1938 Condition.

³⁴ Everyone knows that 43 percent of an 8-inch pizza is less than 43 percent of a 16-inch pizza. Texas is entitled to its 43 percent of the 1938 Condition 16-inch pizza.

3. New Mexico has admitted that its groundwater pumping depletes surface water flows

None of the argument in section V.F, *supra*, is in dispute. New Mexico has admitted, through testimony of Estevan L. Lopez, former director of the New Mexico Interstate Stream Commission, under Rule 30(b)(6),³⁵ that it intercepts water in the Rio Grande, and that it has an obligation³⁶ to remedy shortfalls to Texas's entitlement. As noted in the First Report of the Special Master:

If, as Texas alleges, New Mexico intercepts or diverts water it delivers to the Rio Grande Project immediately upon release from Elephant Butte Reservoir, it disregards the text of Article IV [of the Compact] and renders the common and straightforward meaning of the terms "obligation" and "deliver" in Article IV void, which offends the principles of federal statutory construction as well as those of contractual interpretation.

First Report at 197.

Mr. Lopez testified that New Mexico understood that the waters of the Rio Grande below Elephant Butte Reservoir were fully appropriated in 1938 at the time it agreed to the Compact. Lopez Rule 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001139-001140, 17:21-18:18. Mr. Lopez concedes that groundwater pumping in New Mexico below Elephant Butte Reservoir has depleted the surface water of the Rio Grande. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001153, 31:8-20; *see also* Garcia Depo., 2/6/2019, at TX_MSJ_001056, 001066-001068, 6:10-16, 43:17-25, 44:1-5, 45:11-19 (city of Las Cruces Director of Utilities agrees that wells are connected to the same aquifer as the Rio Grande and that pumping causes an impact on the river). Mr. Lopez,

³⁵ The topics New Mexico designated Mr. Lopez to testify about included: (1) What are New Mexico's obligations to ensure that Texas receives its full apportionment under the Compact?; (2) How does New Mexico ensure that Texas receives its full apportionment under the Compact? Barfield Decl. at TX_MSJ_000704-000705, Exh. 1, TX_MSJ_000706-000728.

³⁶ New Mexico places certain limitations on its obligation to keep Texas's entitlement whole; Texas disputes that New Mexico's limitations are consistent with federal law and rejects them.

speaking on behalf of the state of New Mexico, indicates the Compact imposes an obligation on Colorado to maintain its depletions of the Rio Grande to those levels that existed in 1938. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001158-001159, 74:14-75:11. In New Mexico above Elephant Butte Reservoir, New Mexico is required to limit its depletions of the Rio Grande to the levels existing in 1938. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001159, 75:18-24.

New Mexico, however, contends the Compact imposes no limitation upon depletions of the Rio Grande below Elephant Butte Reservoir. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001160-001161, 76:16-77:21. In an effort to qualify this distinction, Mr. Lopez testified “if our actions are such that were (sic) depleting the Project supply and Texas is not getting their apportionment and they let us know and, yes, in fact, we verify it, yes, I think we have to do something about it.” Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001169-001170, 92:25-93:10. He further elaborated that in the event Texas did not provide notice, but New Mexico was aware that Texas was not getting its apportionment, New Mexico would have an obligation to remedy the situation. Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001170-001171, 93:19-94:5.

4. New Mexico has admitted that it knew or should have known that its actions were adversely affecting Texas’s apportionment

New Mexico has constructed an expensive, time consuming, and complex set of models for use in this litigation. Its experts have created two detailed groundwater flow models using a version of a modeling system known as MODFLOW. Hutchison Decl. at TX_MSJ_000657-000660, 000664-000669. One of these groundwater models addresses the Rincon and Mesilla aquifers which underlie southern New Mexico and a small portion of Texas, and the other covers the Hueco Bolson aquifer which underlies the

El Paso Valley. *Id.* These groundwater models have been combined with a RiverWare model of the surface waters network in the Rincon, Mesilla, and El Paso Valleys. *Id.* New Mexico's experts refer to the combination of the three models as the "Integrated Lower Rio Grande Model" (ILRGM). *Id.* The ILRGM has been used by the New Mexico experts to evaluate various historic conditions and hypothetical situations involving the Compact's appropriation to Texas that New Mexico believes to be involved in this dispute. *Id.*

Although Texas disputes the need for, and reliability of, the ILRGM to evaluate certain situations, results from this model are instructive regarding the question of whether groundwater pumping in the Rincon and Mesilla Valleys depletes the surface water flows of the Rio Grande below Elephant Butte and Caballo Reservoirs. Hutchison Decl. at TX_MSJ_000657-000660, 000664-000669. New Mexico has run its ILRGM and made calculations from the ILRGM output to address the surface water depletions. *Id.* Again, without conceding the need for or reliability of the ILRGM, its results are the only evidence that New Mexico has disclosed on these issues and serve as admissions.

New Mexico's analysis indicates that groundwater pumping during the period of 1940 to 2017 has depleted the streamflow of the Rio Grande, on average, in the amount of 66,351 acre feet per year (AF/yr). Hutchison Decl. at TX_MSJ_000657-000660, 000664-000669. New Mexico's calculations from this analysis further indicate that 52,610 AF/yr of the total depletion is attributable to New Mexico's pumping and 13,700 AF/yr is due to Texas's pumping. *Id.* These results are consistent with New Mexico's admission that its groundwater pumping in the Rincon and Mesilla Valleys has caused depletions of the Rio Grande's flow below Elephant Butte Reservoir that the

Compact designated as an appropriation to Texas.³⁷ Lopez 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001139-001141, 17:21-19:1.

G. New Mexico State Law has No Application to the Water It Delivers to the Project Pursuant to the Compact, or to the Project’s Subsequent Distribution of the Water via the “Inextricably Intertwined” Downstream Contracts

1. The Compact preempts conflicting New Mexico state law

The Compact Clause, art. I, § 10, cl. 3, of the United States Constitution provides that “no State shall, without the Consent of Congress . . . enter into any Agreement or Compact with another State” *New Jersey v. New York*, 523 U.S. at 810. Upon approval of a compact between two states by Congress, “it settles the line or original right; it is the law of the case binding on the states and its citizens, as fully as if it had been never contested.” *Id.* (quoting *Rhode Island v. Massachusetts*, 12 Peters 657, 727 (1838)). “[C]ongressional consent ‘transforms an interstate compact . . . into a law of the United States.’ ” *New Jersey v. New York* at 811 (quoting *Cuyler v. Adams*, 449 U.S. 433, 438 (1981)); *accord*, *Texas v. New Mexico*, 462 U.S. at 564.

The United States Congress approved the Rio Grande Compact in 1939. Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785. Thus, the Compact was transformed into federal law. “[O]nce Congress gives its consent, a compact between States – like any other federal statute – becomes the law of the land.” *Texas v. New Mexico*, 138 S. Ct. at 958 (citing *Texas v. New Mexico*, 462 U.S. at 564); *Virginia v. Maryland*, 540 U.S. 56, 66 (2003) (citing *New Jersey v. New York*, 523 U.S. at 811); *see also Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (“The Supremacy Clause provides that ‘[this] Constitution, and the Laws of the United States which shall be made in

³⁷ Consequential injuries and damages caused by these depletions will be the subject of proof at the time of trial.

Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.’ Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect. *See McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819).”).

As a result, the Compact preempts conflicting New Mexico state law. *Tarrant Reg’l Water Dist.*, 569 U.S. at 627 n.8. In the April 14, 2020 Order, the Special Master agreed that Texas was “correct” in its assertion that any application of New Mexico state law to water New Mexico delivers in Elephant Butte Reservoir “must take a back seat to the Compact,” and that “changes in New Mexico law not anticipated at the time of Compact formation generally cannot serve to defeat Texas’s Compact apportionment.”

2. New Mexico law does not control Texas’s apportionment

a. Prior rulings in this case confirm that Texas’s apportionment is controlled by authority superior to New Mexico state law

It has long been the rule that state law does not control a compact apportionment and that state law must defer to superior authority to ensure compact obligations are satisfied. *Hinderlider*, 304 U.S. 92. Indeed, as set forth in the April 14, 2020 Order, this Special Master already determined that, pursuant to *Hinderlider*, “the Compact (along with the constitutionally superior 1906 Treaty) is the ultimate law of the land governing Colorado’s, New Mexico’s and Texas’s actions as affecting the Rio Grande.” April 14, 2020 Order at 14-15. As the Special Master further declared:

No state’s duties and rights can be viewed in isolation nor treated as applying only in part of a state. Further, given the role of the Project and the Downstream Contracts in this case and the potential role of state law as an inferior source of authority as discussed below, the applicability of the Compact makes it the superior, but not the exclusive source of authority over the river.

April 14, 2020 Order at 15.

New Mexico state law is subservient to the Compact, and subservient to the Downstream Contracts, which the Court has already declared to be “inextricably intertwined” with both the Compact and the Project. *Texas v. New Mexico*, 138 S. Ct. at 959. New Mexico cannot control this water ordered by a congressionally approved Compact to be delivered into a reservoir that is part of a federal Project which is distributed to beneficiaries of federal contracts.

If New Mexico allows any action pursuant to state law (e.g., pumping a groundwater well pursuant to a state well permit) that depletes the Texas Compact apportionment by way of depriving either EBID or EP#1 of their contractual entitlements to water, New Mexico is in violation of a superior federal law and it must defer to the federal law. The New Mexico permits do not, and cannot, confer upon the groundwater users an ability to deplete the Rio Grande that interferes with the delivery of Texas’s equitable apportionment. In this context, New Mexico state law is wholly inapplicable – it neither creates a safe harbor for the operation of the wells, nor does it create an independent state right for EBID to divert and use surface water.

b. The *Alamosa-La Jara Water Users* precedent requires New Mexico to administer its laws so as to protect the Texas apportionment

The holding of *Hinderlider*, 304 U.S. 92, that state administration of state granted water rights must defer to the federal law of equitable apportionment to ensure compact obligations are satisfied across state lines, also applies to intra-state disputes regarding the role of state administration vis-à-vis the Compact. *ALJ Water Users*, 674 P.2d 914 (1983) involved an intra-state dispute involving Colorado water users on the Rio Grande that challenged administrative determinations of the Colorado State Engineer. The case stands for the proposition that state administration of New Mexico’s state-granted

groundwater rights must proceed in a manner that avoids depletions to the Rio Grande that deprive Texas of its apportionment – even if it means curtailment of groundwater wells or imposing other requirements on the already permitted water rights.

The backdrop to *ALJ Water Users* was an original action filed in 1966 by Texas and New Mexico against Colorado. Colorado had accrued a 939,900 acre foot debit in its delivery obligations. After negotiations, the states reached a stipulation that sought a continuance from the United States Supreme Court. *Texas v. Colorado*, 391 U.S. 901. The terms of the stipulation required Colorado to meet “its delivery obligation on an annual basis, without an allowance for accumulated debits, and us[ing] all available administrative and legal powers, including curtailment of diversions, to assure annual compliance.” *ALJ Water Users*, 674 P.2d at 919. Subsequently, the Colorado State Engineer promulgated rules to ensure Colorado’s compliance with the stipulation including, *inter alia*, rules calling for curtailment of water rights on the Conejos River senior to water rights on the Rio Grande mainstem.

Water users in the Colorado Rio Grande basin sued the State Engineer, and numerous water users took issue with different aspects of the rules. *ALJ Water Users*, 674 P.2d at 921. Relevant here are the arguments of the Conejos water users, who sought to invalidate the State Engineer’s rules, arguing that the Colorado State Engineer had interpreted the Compact to the detriment of the Conejos water users. The Conejos group argued that, although the language of Article III of the Rio Grande Compact specifically required curtailment of rights on the Conejos River in the manner called for by the State Engineer’s rules, the Colorado Supreme Court should interpret the Compact Article III to “net out” the depletions associated with *all* Colorado water use on the Rio Grande. This would allow the State Engineer to curtail water rights in order of priority. The water

users argued that Colorado could still meet its Compact obligations, even if the specific language in the Compact requiring deliveries from specific tributaries was not implemented.

The Colorado Supreme Court rejected this interpretation of the Compact, holding that the language in the Compact was clear and, while application of the rules imposed severe consequences for Conejos water users, the rules were valid. “Streams which have been independently appropriated remain independent. If the water of those streams becomes subject to equitable apportionment by compact, the streams must be administered as mandated by compact” *ALJ Water Users*, 674 P.2d at 923. To comply with the Rio Grande Compact, the Colorado State Engineer’s rules were designed to require operation of the Conejos water rights in a manner that was inconsistent with their state adjudicated water rights – but consistent with the Compact – requiring curtailment when operation consistent with the water right decree, in the absence of the Compact, would have allowed the Conejos water right holders to divert. Similarly, New Mexico cannot use the fact that the groundwater diversions at issue in this case may be consistent with New Mexico law as a shield against Texas’s Complaint that its apportionment is being depleted by New Mexico’s groundwater pumping.³⁸

c. *California v. United States* does not require a different result

In prior briefing, New Mexico has acknowledged the applicability of *Hinderlider* but argued that New Mexico state law continues to apply to equitably apportioned water, because the Project is a Reclamation Project, subject to Section 8 of the Reclamation Act.

³⁸ New Mexico groundwater permit holders in the Lower Rio Grande also have the benefit of the New Mexico OSE’s OWMAN which authorizes groundwater users to combine their permitted amounts for diversion out of a single well. *See* section II.C.2, *infra*; *see also* Serrano Depo., 2/26/2019, at TX_MSJ_001224-001227, 85:17-88:6.

This simplistic statement of the holding of *California v. United States*, 438 U.S. 645, ignores the actual holding of that case. The case was an appeal from a declaratory judgment action filed by the United States seeking a ruling that “the United States [could] impound whatever unappropriated water is necessary for a federal reclamation projection without complying with state law.” *California* at 647. The Supreme Court held that Section 8 would apply to Reclamation Projects if state law did not conflict with federal law. *California* at 675.

The first question is whether *California* applies to this case at all. New Mexico promotes the fact that its deliveries to Texas are made into the Project, but cites no case law (because there does not appear to be any) supporting the proposition that *delivery of an equitable apportionment* into a BOR facility invokes Section 8 of the Reclamation Act. In fact, *California v. United States* is by its terms limited to a holding that Section 8 forces application of state water law to *intra-state* water disputes involving Reclamation Projects. 438 U.S. at 651 (“The waters of the Stanislaus River that will be impounded behind the New Melones Dam arise and flow solely in California.”); *id.* at 662 (“Congressman Lacey’s statement [regarding an earlier version of the Reclamation Act] found reflection in contemporaneous decisions of this Court holding that, with limited exceptions not relevant to reclamation, authority over *intrastate* waterways lies with the States.” (Emphasis added.)). Further, the Court in *California* agreed with earlier decisions including *Ivanhoe Irrigation Dist. v. McCracken*, 357 U.S. 275 (1958) and *City of Fresno v. California*, 372 U.S. 627 (1963), which foreclosed application of state water law to Reclamation Projects when other acts of Congress conflict – as the Compact does here. *California v. United States*, 438 U.S. at 668 n.21.

Further, the *California* Court did not evaluate whether the underlying federal statute authorizing the project conflicted with Section 8. 438 U.S. at 674. However, on remand, the Eastern District of California applied the *California* rule to the Flood Control Act of 1962 (which authorized the New Melones Dam), and the United States appealed that decision to the Ninth Circuit in *United States v. State Water Resources Control Board (SWRCB)*, 694 F.2d 1171 (9th Cir. 1982).

In an opinion authored by then-Judge Anthony Kennedy, the Ninth Circuit interpreted the United States Supreme Court's:

[C]ommand that only state law inconsistent with congressional directives is overridden by the relevant portion of [the Flood Control Act of 1962 by applying the Supremacy Clause]. A state statute or regulation is preempted by a federal rul [sic] to the extent it conflicts with a federal statute or where *it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.*

United States v. SWRCB, 694 F.2d 1176-77 (citations and internal quotation marks omitted; emphasis added). The Ninth Circuit went on to affirm the district court in part:

We agree with the district court that California's broad contentions must be rejected. We do not think that section 8 of the 1902 Reclamation Act was intended to require any later Congress to tolerate state laws whose operation would otherwise be curtailed by the Supremacy Clause, nor to require any particular form of clear statement by a later Congress before inconsistent state laws are overridden Section 8 requires only that state law will apply unless the contrary is intended by Congress.

United States v. SWRCB, 694 F.2d at 1176. The same rule applies here. Rather than an unmodulated application of the *California* Court's general rule that Section 8 requires application of state law as urged by New Mexico, the Special Master must determine the extent to which the application of New Mexico state law depletes Texas's Compact entitlement in excess of depletions that existed in 1938. It is undisputed that New Mexico pumping intercepts and depletes the Rio Grande [Hutchison Decl. at

TX_MSJ_000657-000669; *see* section V.F.3, *supra* (New Mexico admitted that its pumping depletes surface water flows)], and as such, operation of these water rights under New Mexico law conflicts with the Compact – federal law – and the *California* rule has no application.

Finally, in this case, the United States Supreme Court has said that the Downstream Contracts which provide for deliveries from the Project are “inextricably intertwined” with the Compact. The Court did not suggest that the contracts control the apportionment to Texas – rather the contracts are a delivery mechanism used by the Compact to effectuate the apportionment to Texas. The Court’s observation with respect to the Compact’s use of the Reclamation Project does not provide a basis to impose New Mexico state law under Section 8 of the Reclamation Act. No court can order relief inconsistent with an interstate compact. *Texas v. New Mexico*, 462 U.S. at 564.

3. New Mexico law does not control the allocation of Project water to EBID

The Project was authorized in 1905 and began deliveries in 1916 to the predecessor water user organizations of EP#1 and EBID. Upon adoption of the Compact, delivery of water into the Project became the basis for New Mexico to satisfy its Compact obligations to Texas, and New Mexico relinquishes regulatory authority over the water once it is delivered. Prior sections have dealt with the inapplicability of state law to Texas’s apportionment, but New Mexico state law is similarly inapplicable to the portion of deliveries made in Elephant Butte Reservoir that are subject to EBID’s federal contract.

EBID is a statutory subdivision of the state of New Mexico and receives its water under the 1937 contract with the United States. That federal contract is singular to EBID,

and New Mexico has no third-party beneficiary rights under the contract. As a practical matter, New Mexico has admitted through 30(b)(6) testimony, that it does not monitor farmer diversions of surface water within EBID. Thacker 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001366-001367, 33:19-34:2; *see also* excerpts of Ryan Serrano, 4/17/2019 (Serrano Depo., 4/17/2019), at TX_MSJ_001280-001281, 186:13-187:3.

Further, because New Mexico's delivery of Rio Grande water in Elephant Butte Reservoir is subject to EBID's contract and is delivered pursuant to the Compact, New Mexico has no legal right to the water. The Supreme Court found that the Downstream Contracts are "inextricably intertwined" with the Compact, 138 S. Ct. at 959, and that "intertwining" excludes New Mexico from regulatory authority over water to which EBID is entitled under its contract. In this case, the Supreme Court has determined that BOR acts as a sort of agent of the Compact to ensure that Project deliveries are made consistent with the Compact and Reclamation law. 138 S. Ct. at 959. There is simply no room for the exercise of any New Mexico state law to the surface water that is delivered in Elephant Butte Reservoir.

4. The proper application of New Mexico state law below Elephant Butte Reservoir

The application of New Mexico state law must recede in deference to the law of equitable apportionment. Under the law of equitable apportionment, the state must make modifications to the operation of existing permitted or decreed water rights to ensure the operations of water users overall are in compliance with the Compact. This was the practical result of the *ALJ Water Users*, 674 P.2d 914 decision.

Similarly, the New Mexico State Engineer is not only authorized, he is obligated, to adopt regulations to "actively" administer the groundwater pumping in the Lower Rio

Grande in New Mexico to protect Texas's apportionment from post-1938 depletions. In 2003, the New Mexico state Legislature adopted N.M. Stat. Ann. § 72-2-9.1(A) and (B) (emphasis added):

(A) The legislature recognizes that the adjudication process is slow, the need for water administration is urgent, **compliance with interstate compacts is imperative** and the state engineer has authority to administer water allocations in accordance with the water right priorities recorded with or declared or otherwise available to the state engineer.

(B) The state engineer **shall** adopt rules for priority administration to ensure that authority is exercised:

- (1) so as not to interfere with a future or pending adjudication;
- (2) so as to create no impairment of water rights, other than what is required to enforce priorities; and
- (3) so as to create no increased depletions.³⁹

To lay the ground work for adoption of district specific Active Water Resource Management (AWRM) regulations, the New Mexico State Engineer imposed a metering order in December of 2004 on the Lower Rio Grande below Elephant Butte, requiring all groundwater wells to be metered; prior to that time, meters were not required on irrigation wells. Excerpts of Deposition of John D'Antonio, 6/25/2020 (D'Antonio Depo., 6/25/2020), at TX_MSJ_000800, 200:14-19. As New Mexico's 30(b)(6) witness,

³⁹ See excerpts of Rule 30(b)(6) Deposition of Peggy Barroll, 10/21/2020 (Barroll 30(b)(6) Depo., 10/21/2020), at TX_MSJ_000968, 000970-000971, 000982, 9:20-23, 11:2-12:8, 67:9-23 regarding the purpose of the Lower Rio Grande district specific AWRM regulations which were ultimately shelved.

Q. Do you have an understanding what that objective [quote from paragraph H of Exhibit 4] was aiming for?

A. My recollection is that at this time, I'm uncertain as to whether there was a down – any Compact constraints or requirements below Elephant Butte due to the language of the Compact being silent or – or, rather, at least not specifying – sorry – not specifying delivery targets below Elephant Butte. So – but we thought that that was possible to occur, and also thought, I think at the time we were trying to be proactive, and we were trying to estimate what a reasonable downstream delivery would be based on the knowledge we had at the time and come up with an administrative scheme that would allow us to try and meet that.

Cheryl Thacker testified that “we can’t manage what we don’t measure.”

Thacker 30(b)(6) Depo., 9/18/2020, at TX_MSJ_001373, 49:8-16; *see also id.* at TX_MSJ_001375, 51:17-24 (it is not the intent of AWRM to curtail groundwater pumping that may be depleting surface flows; “we can’t manage what we can’t measure”). However, to date, measuring is all New Mexico has done.⁴⁰

As the legislation’s title implies, Active Water Resource Management authorizes the New Mexico OSE to adopt regulations that will allow for “active” management of water rights. Asked about the distinction between “active” and “normal” or “standard” administration of water rights, Dr. Barroll responded:

[N]ormal or standard administration of water rights versus active administration of water rights, active administration being more related to some sort of priority call or other curtailment of water rights, if necessary, in times of shortage.

Excerpts of Deposition of Peggy Barroll, 2/5/2020 (Barroll Depo., 2/5/2020), at TX_MSJ_000901, 56:13-18.

In 2005 and 2006, the OSE began an effort to promulgate district specific regulations under the AWRM statute for the Lower Rio Grande at least in part to avoid a lawsuit from Texas. Barroll Depo., 2/5/2020, at TX_MSJ_000916, 167:6-14;⁴¹

⁴⁰ Other New Mexico witnesses have confirmed that there has been no curtailment of groundwater pumping in the Lower Rio Grande. *See, e.g.,* Barroll Depo., 2/5/2020, at TX_MSJ_000901, 56:19-20 (“... so far in the Lower Rio Grande, we have not done active curtailment of any water rights”); Serrano Depo., 2/26/2019, at TX_MSJ_001194, 55:14-22; D’Antonio Depo., 6/26/2020, at TX_MSJ_000847, 325:10-23; Barroll 30(b)(6) Depo., 10/21/2020, at TX_MSJ_000976-000977, 31:23-32:5.

⁴¹ Q. Well, we’ll get – I’m going to pull out one more PowerPoint that you generated or the OSE generated, and it talked about concerned [sic] about lawsuits from Texas. Was that a consideration [in initiating an effort to adopt district specific AWRMs]?

A. Well, that was a consideration in doing AWRM all together in the Lower Rio Grande. I mean, the fact that we were doing AWRM was, I believe -- I mean, I

D’Antonio Depo., 6/25/2020 at TX_MSJ_000797_003-004, 000799, 000813-000833, 178:24-179:14, and Exh. 3, 2005 AWRM PowerPoint, TX_MSJ_000813-000833 (“[T]he whole idea behind this presentation is to get the legislature and the governor behind giving me funding so that we could put the tools in place to preclude Texas from filing a lawsuit against New Mexico under some of those same – some of those same concerns [as Texas’ Pecos River lawsuit against New Mexico].”). However, according to Dr. Barroll: “. . . so far in the Lower Rio Grande, we have not done active curtailment of any water rights.”⁴² See, generally, Barroll Depo., 2/5/2020, at TX_MSJ_000916-000918, 167:20-169:15;⁴³ D’Antonio Depo., 6/25/2020, at TX_MSJ_000804-000805, 204:14-205:6; excerpts of Deposition of Estevan Lopez, 7/7/2020 (Lopez Depo., 7/7/2020), at TX_MSJ_001113-001114, 19:3-20:20.

5. New Mexico has failed to utilize mechanisms available to ensure that its actions do not violate the Compact

New Mexico argues over and over again that it has a very efficient means of administering groundwater and the effects of pumping on surface water. As discussed at section C.2, *supra*, New Mexico “closed” the Lower Rio Grande groundwater basin in

believe the AWRM statute itself was, again, motivated by the possibility of interstate litigation.

⁴² Barroll Depo., 2/5/2020, at TX_MSJ_000901, 56:19-20; see also D’Antonio Depo., 6/26/2020, at TX_MSJ_000847, 325:21-23 (“[The district-specific regulations] aren’t in place yet, so any active curtailment with respect to water administration, that piece is not in place yet.”).

⁴³ Barroll Depo., 2/5/2020, at TX_MSJ_000917, 168:10-18:

A. The district specific regs [implementing AWRM] have not been adopted.

Q. Okay. All right. So to the – to the best of your knowledge, why were they not adopted?

A. There’s been a lot of things that happened and I – I can’t really say for sure. The framework regs were in litigation for a long time, and a lot of the facts on the ground changed shortly after the – we put out these drafts.

1980, prohibiting new appropriations of groundwater, which should be seen as an admission that New Mexico understood the impacts on Texas's apportionment of Rio Grande surface water from Lower Rio Grande well pumping. However, the administrative closure did not limit pumping from existing wells, which continued to increase [see **Figures 3 and 4**; Schorr Decl. at TX_MSJ_000697-000699] and did not impose a requirement to obtain a well permit. Indeed, the New Mexico OSE's Watermaster for the Lower Rio Grande admitted New Mexico's lack of action to ensure Compact compliance:

Q: What does your office do to implement the terms of the Rio Grande Compact, if any?

A: My office does not do anything locally to effectuate the Compact.

Serrano Depo., 4/17/2020, at TX_MSJ_001284-001, 268: 8-11.

a. New Mexico has authority under state law to curtail groundwater pumping in the Lower Rio Grande

New Mexico could actively curtail groundwater pumping to ensure delivery of Texas's apportionment without interference. The Legislature has directed the State Engineer to engage in this type of "active" administration. *See, supra*, section G.4 (discussion of AWRM); however, New Mexico has admitted it considered but ultimately rejected regulations which would have required curtailment of wells in the Lower Rio Grande. Barroll 30(b)(6) Depo., 10/21/2020,⁴⁴ at TX_MSJ_000968, 000970-000971, 000982-000984, 9:20-23, 11:2-12:8; 67:1-69:12.⁴⁵

⁴⁴ In addition to Dr. Barroll's role in this case as a designated retained expert witness on behalf of New Mexico, New Mexico also designated Peggy Barroll to testify on behalf of the state pursuant to a Rule 30(b)(6) Deposition Notice. *See* Barfield Decl. at TX_MSJ_000704-000705, Exh. 1, TX_MSJ_000706-000728.

⁴⁵ With regard to the concept included in the unadopted draft district specific AWRM regulations, "Was it to [curtail] ground water wells within a certain distance from the river?" "A. In those

b. New Mexico does not engage in effective conjunctive management of surface and groundwater supplies

On numerous occasions, New Mexico witnesses have referred to “conjunctive use” of groundwater and surface water supplies as if allowing groundwater use to replace unavailable surface water is an acceptable means of controlling depletions. Plainly stated, it is not – conjunctive use simply means that surface water shortages will be made up for with groundwater pumping. Hutchison Decl. at TX_MSJ_000657-000660, 000669. Regardless of the label applied by New Mexico, groundwater pumping depletes the surface water supply as admitted by New Mexico. The pumping does enhance the New Mexico water supply, but that is accomplished by depleting the surface water supply that otherwise would have been delivered to EP#1 and Mexico.

However, New Mexico law does establish a legal basis for effective conjunctive management of surface and groundwater supplies in the Lower Rio Grande. Effective conjunctive management would either limit groundwater diversions (curtailment is a place to start) or require replacement of depletions associated with groundwater pumping. As detailed above and as New Mexico has admitted on numerous occasions, it has never curtailed groundwater in the Lower Rio Grande, and has no current plans to do so.

Another option is to limit groundwater pumping by the volume of replacement water available to offset depletions to the surface stream. Under New Mexico law, “offsets” are authorized, and indeed under the 1999 “Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications” (MVAA Guidelines) require gross

rules, we did have – we did introduce a new administration scheme or propose a new administration scheme, and I believe that was for a short-term temporary curtailment of wells that were close to the river.” “Q: And what —” “A: In order to support the Rio Grande Project.” Barroll 30(b)(6) Depo., 10/21/2020, at TX_MSJ_000983, 68:3-11.

volumetric “offsets” when a water user files an application to transfer groundwater rights⁴⁶ to either new places of use or new types of use. Serrano Depo., 2/26/2019, at TX_MSJ_001233, 001238-001239, 94:2-14, 105:21-106:6, and Exh. 69, TX_MSJ_001249-001250, ¶ C.1. As applied by New Mexico in the Lower Rio Grande, offsets are volume-based replacement of depletions to the Rio Grande, and are typically designed to replace a volumetric amount of depletions, but offsets may be “paid” to the river in the next calendar year, and in any event do not ensure replacement in time and location. *Id.* In addition, the State Engineer “will not require offsets of surface water depletions when the proposed transfer of water rights results in an increased calculated depletion of less than 3% of the total amount of water diverted and consumed.” *Id.*

Similarly, in transfers of groundwater rights a *de minimis* volume of depletion is authorized. Serrano Depo., 2/26/2019, at TX_MSJ_001233, 001238-001239, 94:2-14, 105:21-106:6, and Exh. 69, TX_MSJ_001248-001249, ¶¶ B.1 and B.2. Thus, offsets are only imposed on transfers or new uses sought for existing groundwater rights, but all existing groundwater pumping is allowed without offsets or replacement water. *Id.* In addition, even when offsets are required, under the MVAA Guidelines all depletions are not replaced in volume, and the guidelines have no requirements to replace depletions in time and location.⁴⁷ As it currently operates, New Mexico’s administration of water rights in the Lower Rio Grande is inadequate to protect Texas’s Compact apportionment.

⁴⁶ It is undisputed that the Lower Rio Grande is fully appropriated and, according to Cheryl Thacker, there is no water available for any new appropriations. Thacker Depo., 4/18/2019, at TX_MSJ_001326-001327, 21:6-22:24.

⁴⁷ Another approach to conjunctive management that at least temporarily protects Texas’s apportionment is the deal struck in the 2008 OA. In the 2008 OA, EBID acknowledged that groundwater pumping in EBID depletes surface water that otherwise would flow to Texas and that these actions violate the Compact and also are in conflict with its contract with the United States and its contract with the United States and EP#1.

VI. CONCLUSION

Based on the foregoing, Texas respectfully requests that the Special Master recommend, and that the Court grant, partial summary judgment of the eighteen issues itemized in Texas's Notice of Motion, and section I hereinabove, because each of the issues represents a core component of the claims set forth in Texas's Complaint that cannot be genuinely disputed by New Mexico.

As demonstrated herein, and supported by Texas's appendix of evidence, there is no genuine dispute as to any material fact with respect to these issues, and Texas is therefore entitled to judgment as a matter of law. To the extent that the Special Master does not recommend that the Court grant all the relief requested by the Motion, Texas alternatively requests an order "stating any material fact . . . that is not genuinely in dispute and treating the fact as established in the case." Fed. R. Civ. P. 56(g).

Dated: November 5, 2020

Respectfully submitted,

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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

**APPENDIX OF EVIDENCE
IN SUPPORT OF STATE OF TEXAS'S NOTICE OF MOTION AND MOTION
FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT THEREOF
FEDERAL RULE OF CIVIL PROCEDURE 56**

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APPENDIX OF EVIDENCE

Index No.	Description	Bates Beginning	Bates Ending
1	Declaration of Robert Brandes, P.E., Ph.D., and Attachments 1-3	TX_MSJ_000001	TX_MSJ_000016
2	Attachment 1: Resume	TX_MSJ_000017	TX_MSJ_000021
3	Attachment 2: National Resources Committee, Regional Planning: Part VI- The Rio Grande Joint Investigation in the Upper Rio Grande Basin in Colorado, New Mexico, and Texas 1936-1937, published in February 1938 (JIR)	TX_MSJ_000022	TX_MSJ_000600
4	Attachment 3: 2001 Report of the Rio Grande Compact Commission	TX_MSJ_000601	TX_MSJ_000656
5	Declaration of William R. Hutchison, Ph.D., P.E., P.G., and Attachments 1-4	TX_MSJ_000657	TX_MSJ_000669
6	Attachment 1: Resume	TX_MSJ_000670	TX_MSJ_000688
7	Attachment 2: Groundwater Modeling Experience in Texas	TX_MSJ_000689	TX_MSJ_000690
8	Attachment 3: Groundwater Modeling Experience Outside of Texas	TX_MSJ_000691	TX_MSJ_000692
9	Attachment 4: DataAnn sheet of Excel file named Ferguson Rebuttal_revised 9-15-20	TX_MSJ_000693	TX_MSJ_000695
10	Declaration of Staffan W. Schorr and Attachment 1	TX_MSJ_000696	TX_MSJ_000699
11	Attachment 1: Resume	TX_MSJ_000700	TX_MSJ_000703
12	Declaration of Theresa C. Barfield and Exhibits 1-2	TX_MSJ_000704	TX_MSJ_000705
13	Exhibit 1: State of New Mexico's Objections and Witness Designations to the United States' Notice of Rule 30(b)(6) Deposition and to State of Texas's Cross-Notice, 9/10/2020	TX_MSJ_000706	TX_MSJ_000728
14	Exhibit 2: State of New Mexico's Objections and Supplemental Responses to the State of Texas's First Set of Requests for Admission to the State of New Mexico	TX_MSJ_000729	TX_MSJ_000756

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15	Deposition Excerpts of John D'Antonio, 6/24/2020	TX_MSJ_000757	TX_MSJ_000788
16	Deposition Excerpts of John D'Antonio, 6/25/2020	TX_MSJ_000789	TX_MSJ_000812
17	Exhibit 3 to John D'Antonio Deposition 6/25/2020: Active Water Resources Management in the Lower Rio Grande (8/19/2005)	TX_MSJ_000813	TX_MSJ_000833
18	Deposition Excerpts of John D'Antonio, 6/26/2020	TX_MSJ_000834	TX_MSJ_000853
19	Deposition Excerpts of John D'Antonio, 8/14/2020	TX_MSJ_000854	TX_MSJ_000887
20	Deposition Excerpts of Peggy Barroll, 2/5/2020	TX_MSJ_000888	TX_MSJ_000925
21	Deposition Excerpts of Peggy Barroll, 2/6/2020	TX_MSJ_000926	TX_MSJ_000943
22	Deposition Excerpts of Peggy Barroll, 8/7/2020	TX_MSJ_000944	TX_MSJ_000959
23	Deposition Excerpts of Peggy Barroll, Rule 30(b)(6), 10/21/2020	TX_MSJ_000960	TX_MSJ_000988
24	Deposition Excerpts of Gary Esslinger, 8/18/2020	TX_MSJ_000989	TX_MSJ_001022
25	Intentionally Left Blank	TX_MSJ_001023	TX_MSJ_001050
26	Deposition Excerpts of Jorge Garcia, 2/6/2019	TX_MSJ_001051	TX_MSJ_001074
27	Deposition Excerpts of Estevan Lopez, 7/6/2020	TX_MSJ_001075	TX_MSJ_001097
28	Deposition Excerpts of Estevan Lopez, 7/7/2020	TX_MSJ_001098	TX_MSJ_001122
29	Deposition Excerpts of Estevan Lopez, Rule 30(b)(6), 9/18/2020	TX_MSJ_001123	TX_MSJ_001176
30	Deposition Excerpts of Ryan Serrano, 2/26/2019	TX_MSJ_001177	TX_MSJ_001242

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31	Exhibit 69 to Deposition of Ryan Serrano 2/26/20: Mesilla Valley Administrative Area Guidelines for Review of Water Right Applications, 1/5/1999	TX_MSJ_001243	TX_MSJ_001266
32	Deposition Excerpts of Ryan Serrano, 4/17/2019	TX_MSJ_001267	TX_MSJ_001288
33	Deposition Excerpts of Herman Settemeyer, 7/30/2020	TX_MSJ_001289	TX_MSJ_001312
34	Deposition Excerpts of Cheryl Thacker, 4/18/2019	TX_MSJ_001313	TX_MSJ_001343
35	Deposition Excerpts of Cheryl Thacker, 9/18/2020	TX_MSJ_001344	TX_MSJ_001393
36	Exhibit 1 to Deposition of Cheryl Thacker, 9/18/2020: Well Metering Requirements (Effective March 2006)	TX_MSJ_001394	TX_MSJ_001423
37	Deposition Excerpts of Adrienne Widmer, 2/5/2019	TX_MSJ_001424	TX_MSJ_001453
38	Exhibit 58 to Deposition of Adrienne Widmer, 2/5/2019: City of Las Cruces 40-Year Water Development Plan (April 2017)	TX_MSJ_001454	TX_MSJ_001531
39	Deposition Excerpts of Lee Wilson, 7/23/2020	TX_MSJ_001532	TX_MSJ_001550
40	Exhibit 2 to Deposition of Lee Wilson, 7/23/2020: State of New Mexico's Disclosure of Rebuttal Expert Witness	TX_MSJ_001551	TX_MSJ_001573
41	Figure 1: The Rio Grande basin	TX_MSJ_001574	TX_MSJ_001574
42	Figure 2: The Upper Rio Grande basin	TX_MSJ_001575	TX_MSJ_001575
43	Figure 3: Groundwater wells in New Mexico in 1938	TX_MSJ_001576	TX_MSJ_001576
44	Figure 4: Groundwater wells in New Mexico in 2020	TX_MSJ_001577	TX_MSJ_001577
45	Figure 5: Map of Rio Grande Project	TX_MSJ_001578	TX_MSJ_001578
46	Figure 6: Table 90 of the JIR	TX_MSJ_001579	TX_MSJ_001579
47	Figure 7: Illustration of a Gaining Stream (from Winter and others, 1988)	TX_MSJ_001580	TX_MSJ_001580

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48	Figure 8: Illustration of a Losing Stream (from Winter and others, 1988)	TX_MSJ_001581	TX_MSJ_001581
49	Figure 9: Illustration of a Disconnected Stream (from Winter and others, 1988)	TX_MSJ_001582	TX_MSJ_001582
50	Figure 10: Schematic of Rio Grande Groundwater System Interaction Prior to Development of Groundwater Pumping in Rincon and Mesilla basins	TX_MSJ_001583	TX_MSJ_001583
51	Figure 11: Schematic of Rio Grande and Groundwater System Interaction After Development of Groundwater Pumping in Rincon and Mesilla basins	TX_MSJ_001584	TX_MSJ_001584
52	Declaration of Scott Miltenberger, Ph.D., and Attachments 1-2 Attachment 1: Resume Attachment 2: Library of Documents Referenced in Scott A. Miltenberger Declaration (<i>Documents in the Library are hyperlinked in footnotes</i>)	TX_MSJ_001585	TX_MSJ_006491

Dated: November 5, 2020

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**Counsel of Record*

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 this 5th day of November 2020, I caused a true and correct copy of **THE STATE OF TEXAS'S NOTICE OF MOTION AND MOTION FOR PARTIAL SUMMARY JUDGMENT; MEMORANDUM OF POINTS AND AUTHORITIES; AND APPENDIX OF EVIDENCE IN SUPPORT THEREOF FEDERAL RULE OF CIVIL PROCEDURE 56** to be served upon all parties and *amici curiae*, by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was effected by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Dated: November 5, 2020

Respectfully submitted,


Yolanda De La Cruz

SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE

SPECIAL MASTER

Special Master	Honorable Michael J. Melloy <i>Special Master</i> United States Circuit Judge 111 Seventh Avenue, S.E. Box 22 Cedar Rapids, IA 52401	TXvNM141@ca8.uscourts.gov (319) 432-6080
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(Service via Electronic Mail)

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
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In the Supreme Court of the United States, Original No. 141
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State of Texas v. State of New Mexico and State of Colorado

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