



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

Rich Deitchman

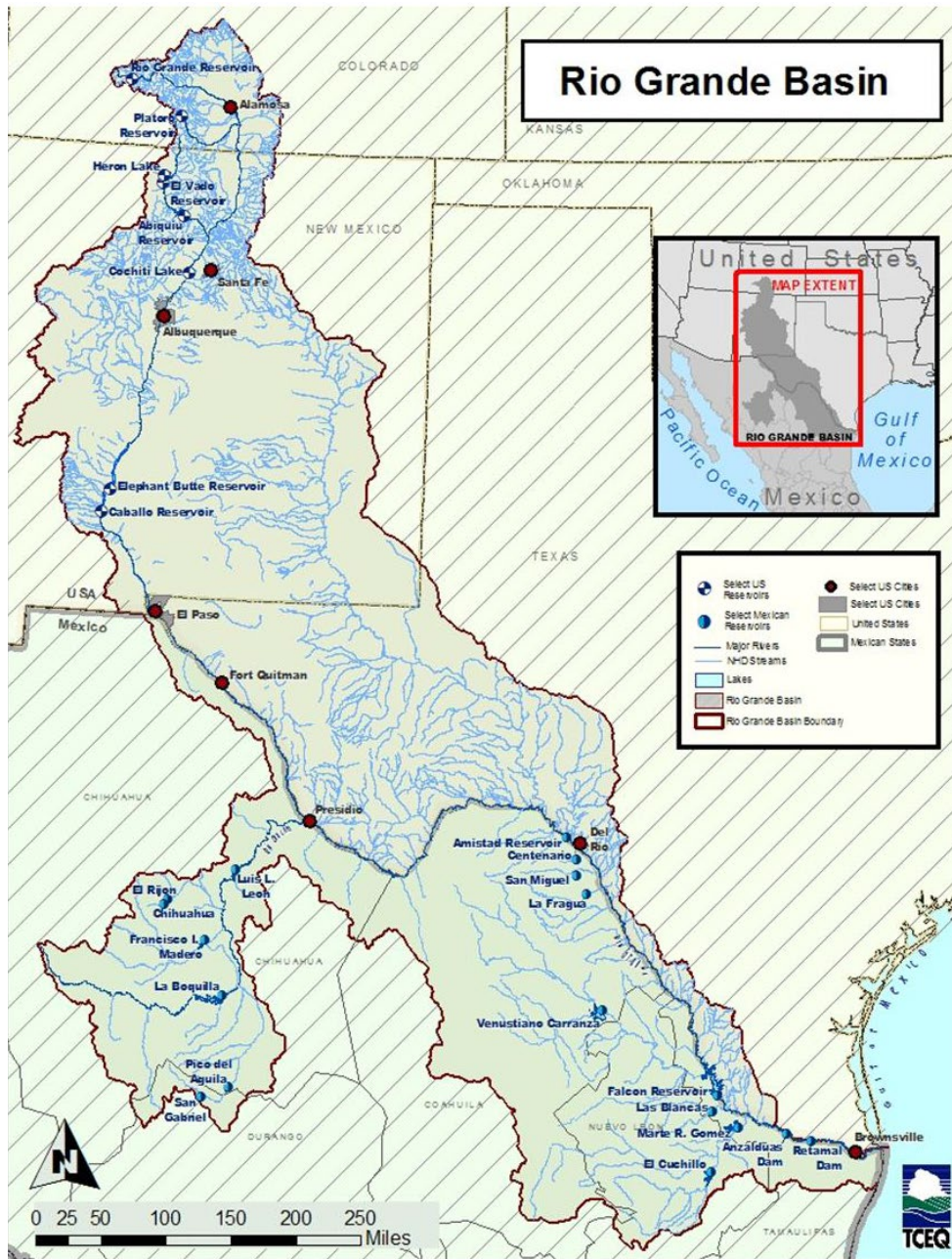
Somach Simmons and Dunn

CRWUA Conference – December 15, 2021

rdeitchman@somachlaw.com

Supreme Court Jurisdiction

- Art. III, sec. 2, cl. 2 of the US Constitution: “In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the **supreme Court** shall have **original Jurisdiction.**”
- January 2013: Texas filed Motion for Leave to File Complaint → granted in January 2014
- Motions to dismiss/motions to intervene & Special Masters
- Essence of allegations: violations of provisions of the 1938 Rio Grande Compact.



1905-1916 The Rio Grande Project

**New Mexico:
Elephant Butte
Irrigation District
(EBID)
90,640 acres (57%)**

**El Paso County Water
Improvement District No. 1
(EPCWID)
69,010 acres (43%)**

**Mexico
60,000 AF**



UNITED STATES
DEPARTMENT OF THE INTERIOR
WALTER J. HICKEL, SECRETARY
BUREAU OF RECLAMATION
ELLIS L. ARMSTRONG, COMMISSIONER
RIO GRANDE PROJECT
NEW MEXICO-Texas
REGION 51
MAP NO 23-503-5059
SCALE OF MILES 0 8 16 24 32
1970
LAMBERT CONIC PROJECTION

EXPLANATION
BUREAU OF RECLAMATION
COMPLETED AND AUTHORIZED WORKS

- CANAL
- - - SYPHON
- FLUME
- TRANSMISSION LINE
- POWER PLANT
- SUBSTATION
- ★ PROJECT HEADQUARTERS
- ▨ AREA SERVED BY PROJECT FACILITIES
- ▤ AREA UNDER WARREN ACT CONTRACT



The 1938 Rio Grande Compact

- The 1938 Compact arose from the “embargo” era and was a response to the tension between upstream depletions and downstream uses dating back to the 19th Century.
- 1938 Depletion condition: By the 1930’s the Rio Grande was fully appropriated; equitable apportionment required the Compact to maintain “present conditions of use” ca. 1938, restricting upstream states from increasing depletions.
- Geography: Colorado could deliver New Mexico’s entitlement to the state line; New Mexico had to deliver to Texas at San Marcial.
- Volume: 790kaf as average release to Texas, subject to EBID contract and Mexican treaty.
- Satisfying Texas’s apportionment required “return flows” from Project lands in New Mexico and Texas.



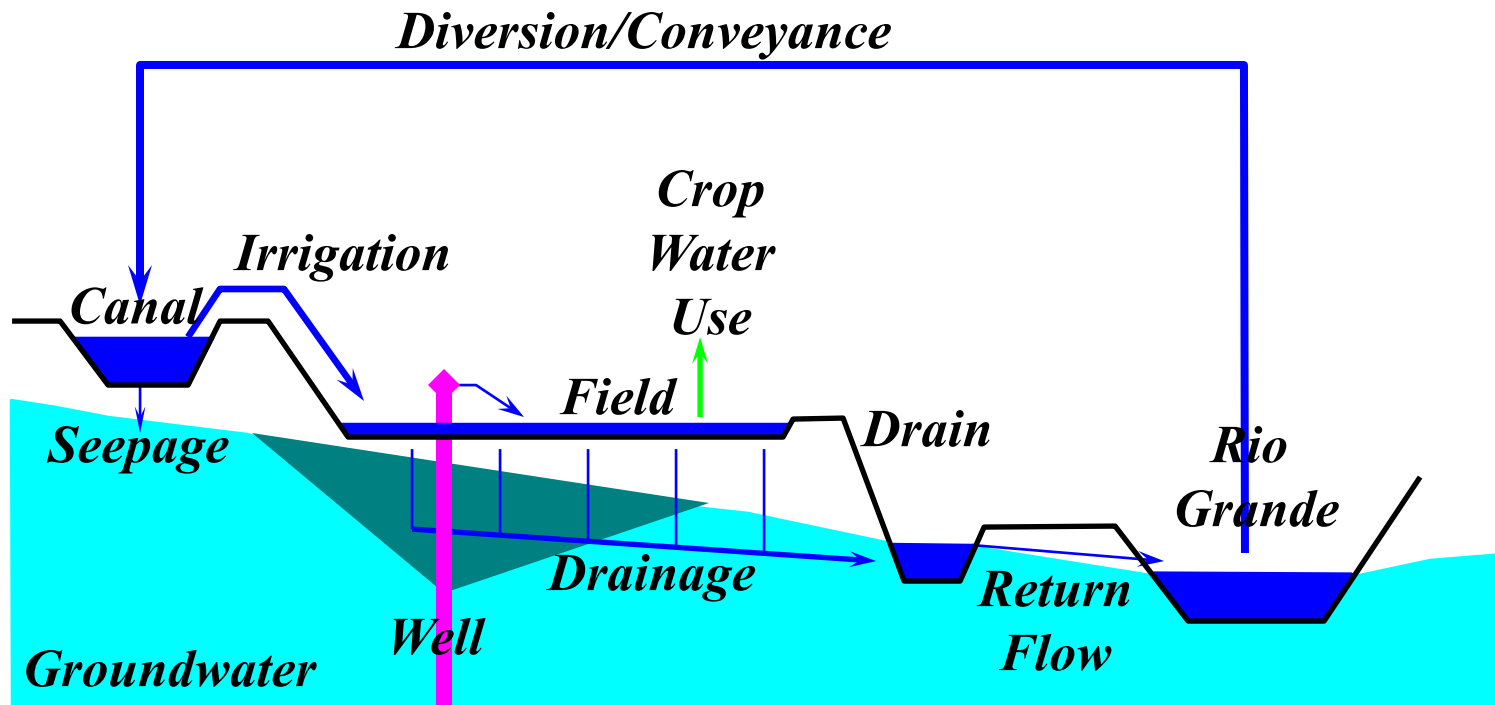
“Rio Grande Compact Commission with its Legal and Engineering Advisors, La Fonda Hotel, Santa Fe, New Mexico, March 18, 1938.” photograph, from “Proceedings of the Meeting of the Rio Grande Compact Commission, Held at Santa Fe, New Mexico, March 3rd to March 18th, inc., 1938” [Records of the U.S. Bureau of Reclamation, Record Group 115, National Archives at Denver].

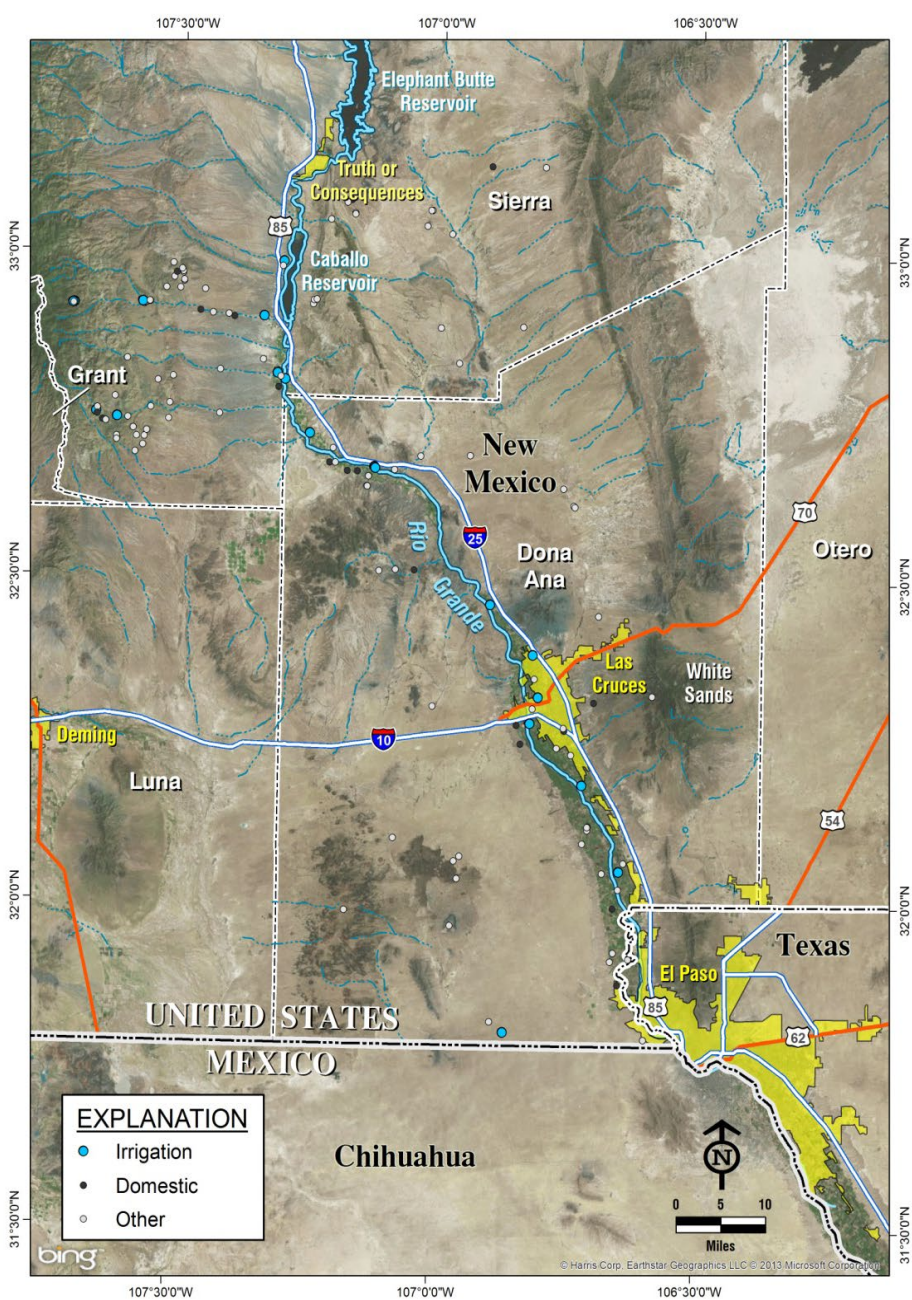
At bottom, from left to right: Governor Teller Ammons of Colorado, M.C. Hinderlider, Commissioner for Colorado; Frank B. Clayton, Commissioner for Texas; S.O. Harper, Chairman and Representative of the United States; Thomas M. McClure, Commissioner for New Mexico; and Governor Clyde Tingley of New Mexico.

At top, from left to right: John H. Bliss, Engineering Advisor, New Mexico; Royce J. Tipton, Engineering Advisor, Colorado; Raymond A. Hill, Engineering Advisor, Texas; E.B. Debler, Engineering Advisor to the Chairman; Clifford H. Stone, Legal Advisor, Colorado; H.J.S. Devries, Legal Advisor to the Chairman; George M. Corlett, Legal Advisor, Colorado; A.T. Hannett, Legal Advisor, New Mexico; and Fred E. Wilson, Legal Advisor, New Mexico.

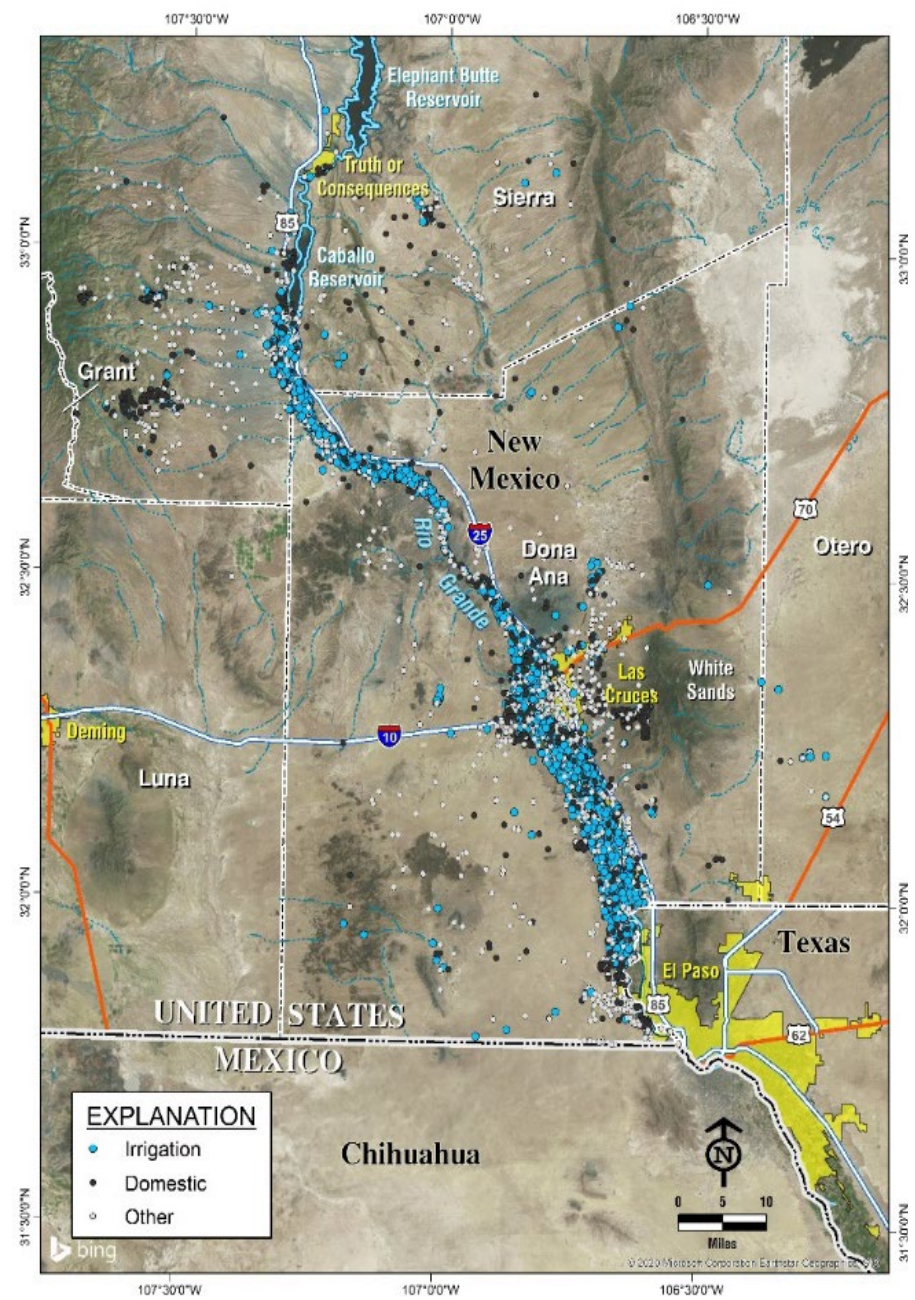
Absent: Ralph L. Carr, Legal Advisor, Colorado; as well as Edwin Mecham, Legal Advisor, Texas; and Richard Burges, Legal Advisor, Texas.

Problem: Release to diversion hydrology altered by groundwater pumping in New Mexico





Wells in 1938 (≈ 60)



Wells in 2020 ($>8,000$)

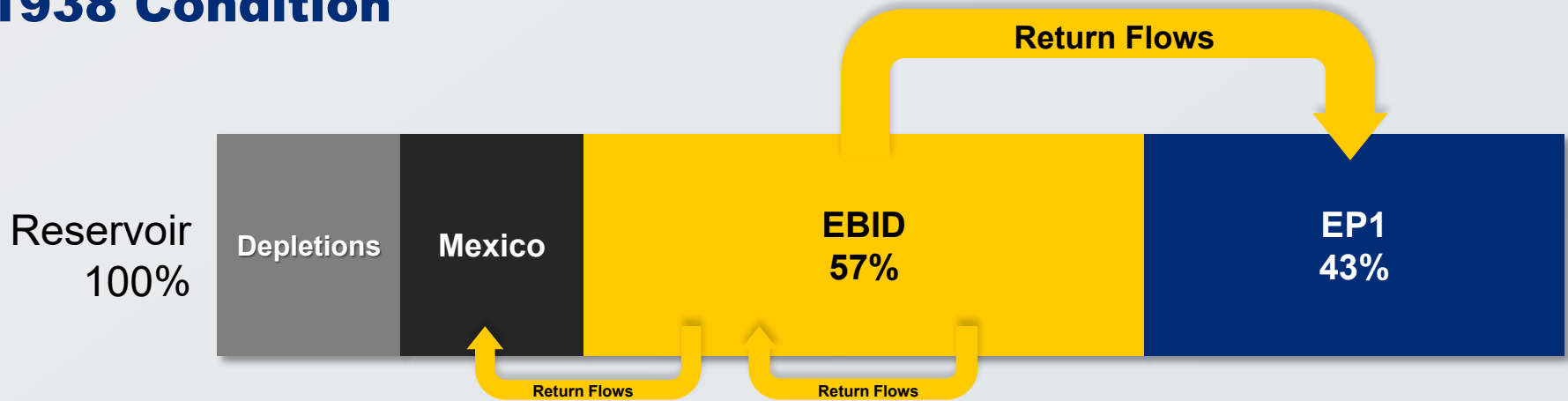
Texas Complaint Allegations

- The 1938 Rio Grande Compact equitably apportions the waters of the Rio Grande from its headwaters to Fort Quitman, Texas, among Colorado, New Mexico, and Texas. (Ratified by State legislatures and approved by the United States by an act of Congress.)
- The plain text and structure of the Compact requires New Mexico to 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 and the United States' Downstream Contracts with Elephant Butte Irrigation District (EBID).
- 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.

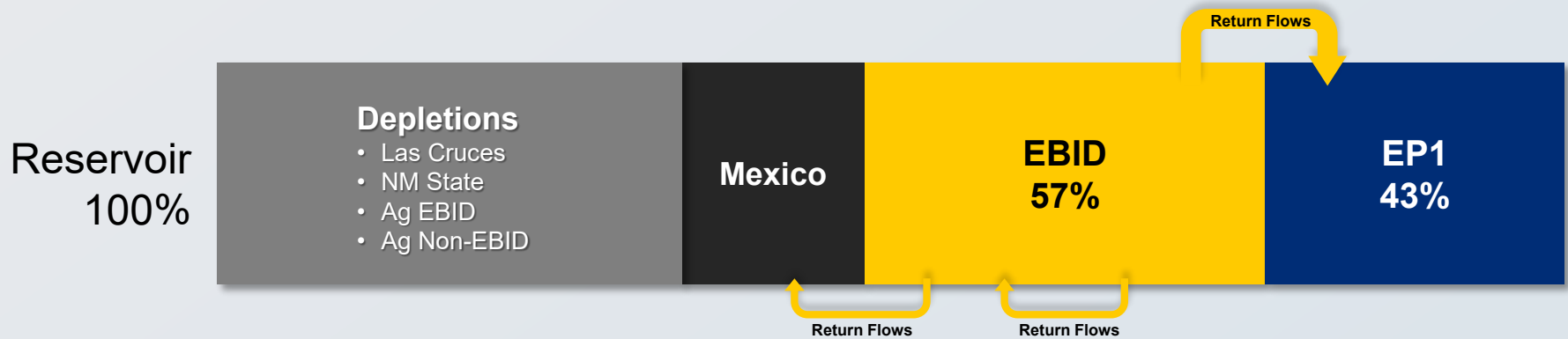
Texas Complaint Allegations

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

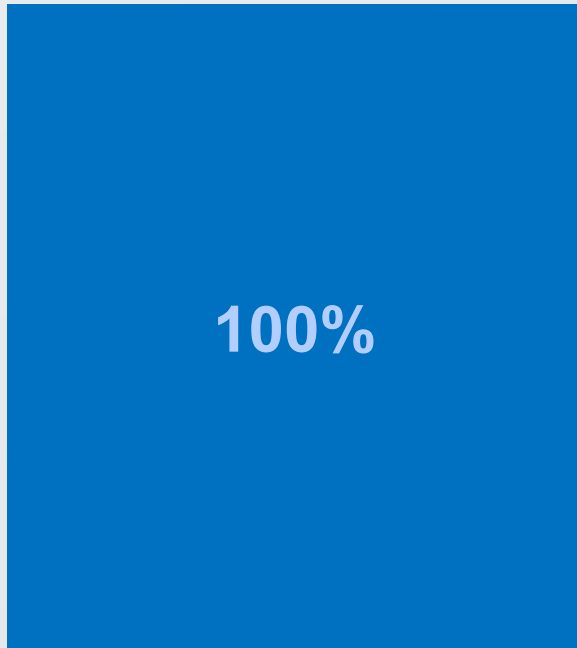
1938 Condition



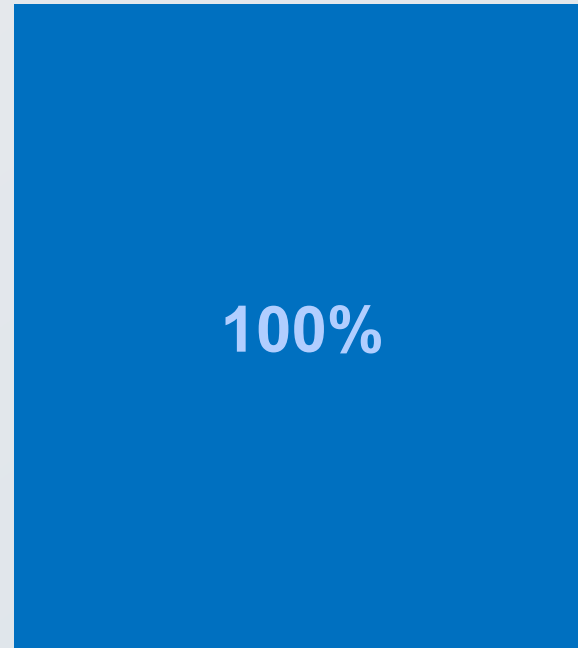
After Pumping



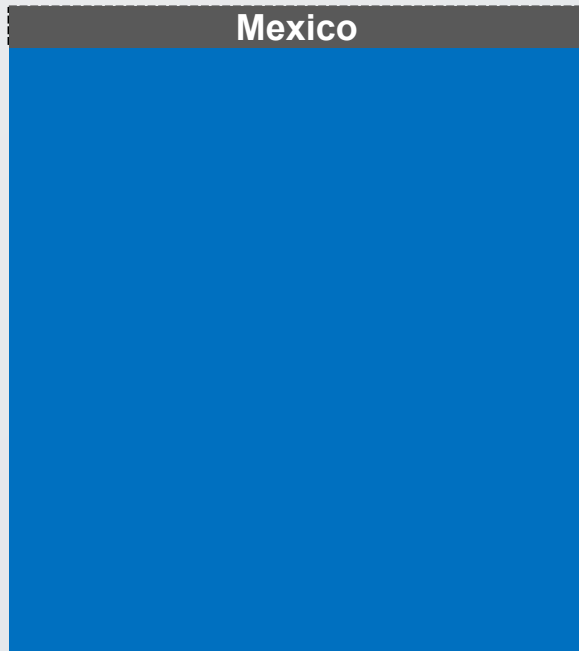
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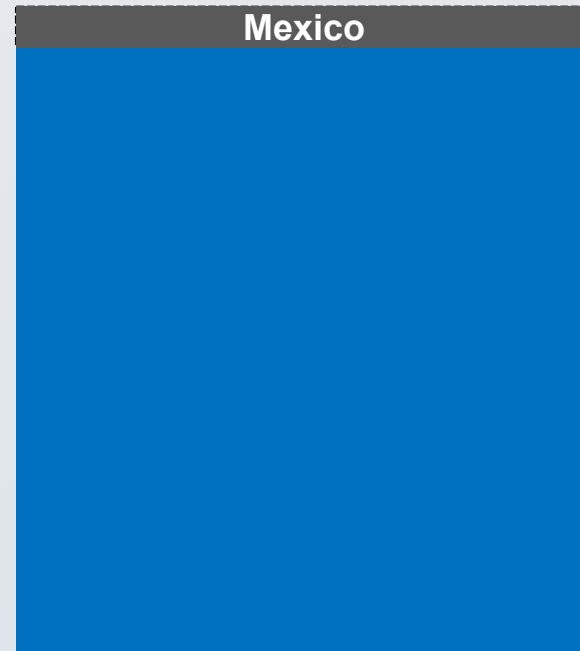
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1938 Condition



After Pumping



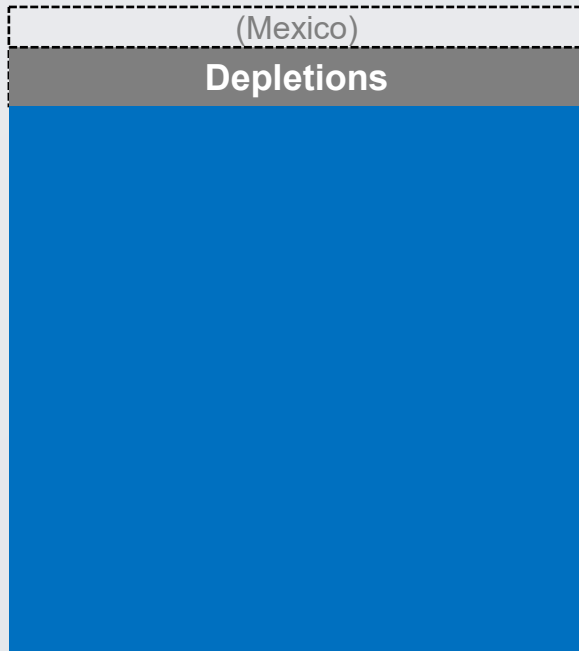
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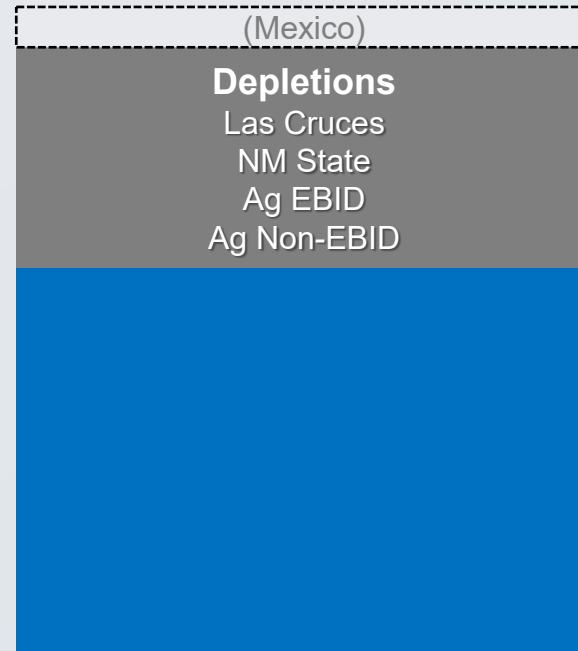
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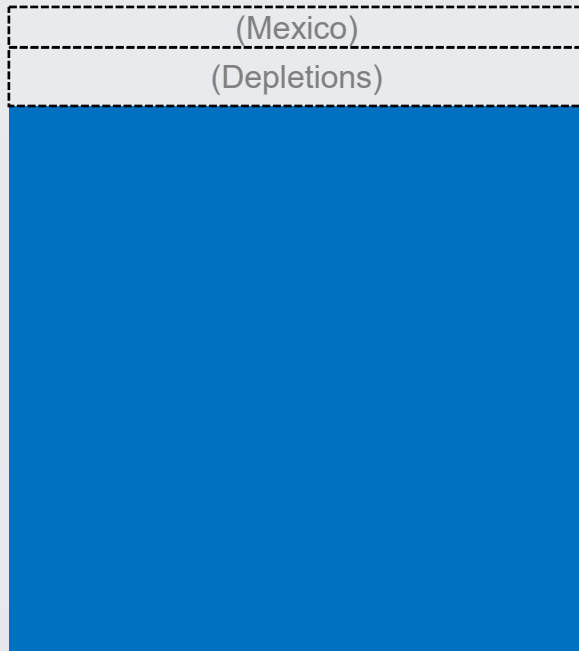
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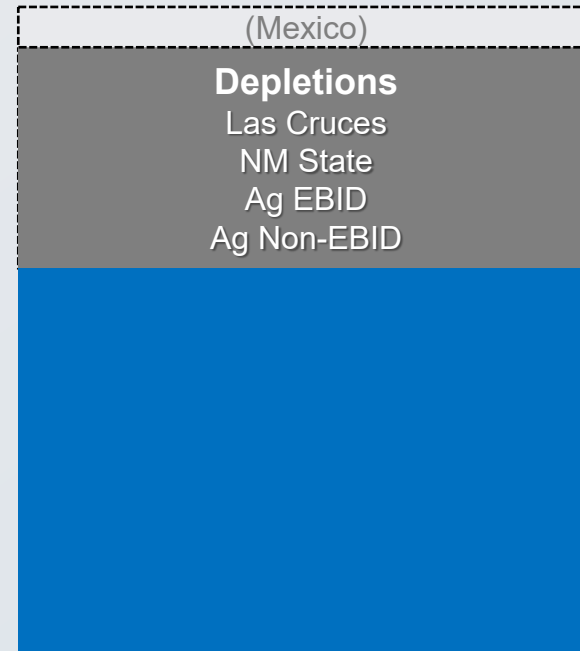
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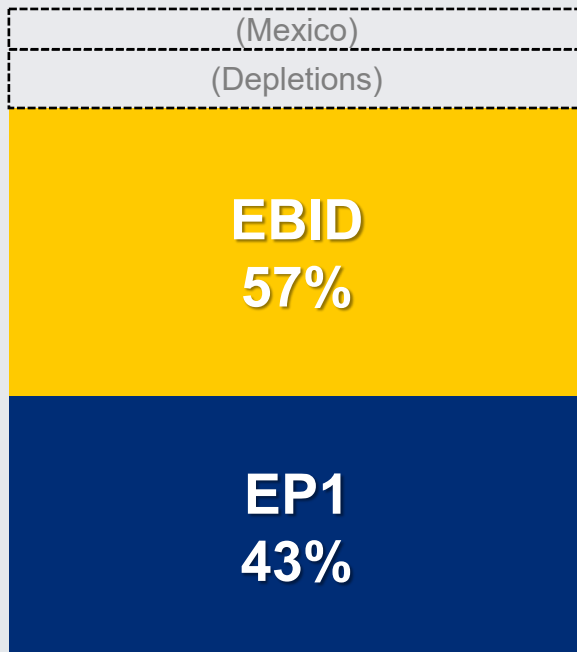
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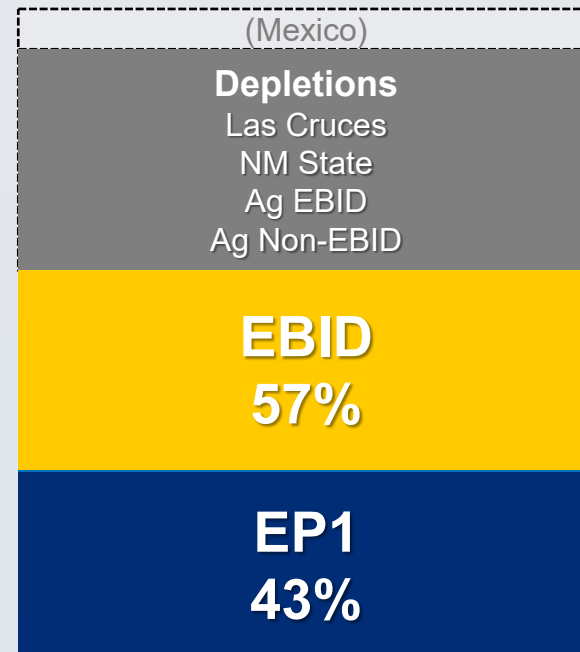
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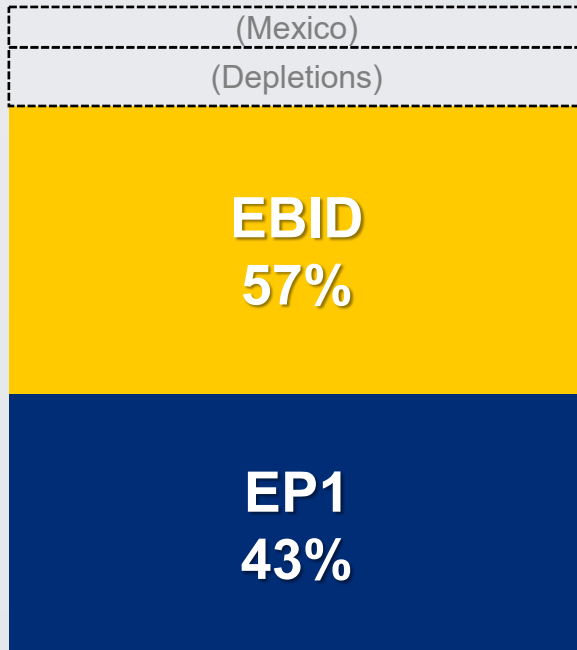
1938 Condition



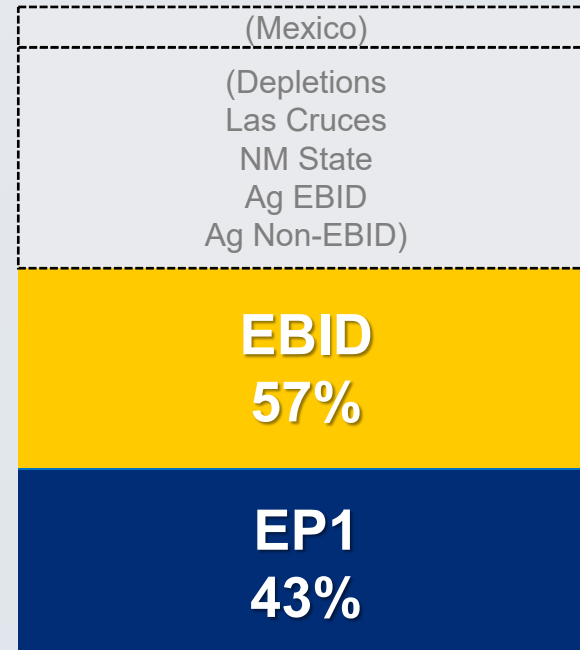
After Pumping



1938 Condition



After Pumping



Summary Judgment Rulings – May 2021

- Downstream from Elephant Butte – Compact relies on the RG Project “and is programmatic” in its apportionment of water b/t TX and NM
- GW & SW are hydrologically interconnected downstream of EB Reservoir to a “sufficient degree that [GW] extraction generally reduces drain return flows and adversely affects [RG] surface water flows → “the compacting state were aware, at a minimum, that substantial groundwater development within the Compact region would eventually affect surface water flows”
- NM has a Compact-level duty to avoid material interference with Reclamation’s delivery of Compact water to TX; to avoid and prevent capture of RG SW, return flows and hydrologically connected GW
- Compacting states – protect “baseline level of Project operations generally as reflected in Project [ops] prior to Compact formation” – condition viewed as akin to a “1938 condition”
- 57/43 split “as a rough protected baseline division of Project deliveries”
- It is “undisputed” that NM’s GW pumping downstream of EBR “has affected Project return flows, surface water flows, and the Project’s delivery of Texas’s Compact apportionment.”

Fall 2021 Virtual Trial and a Look Forward

- Hon. Michael Melloy, a Senior United States Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is the current Special Master.
- Extensive discovery conducted between September 2018 and October of 2020 including over 100 depositions, the majority via Zoom. The parties disclosed more than 50 written expert reports.
- Fall 2021 trial
 - October 4, 2021 through November 10, 2021 via Zoom
 - Fact witnesses & expert historians
- Spring 2022 trial
 - Scheduled for March 2022 in Cedar Rapids, Iowa
 - Remaining fact witnesses & technical experts

SCOTUS Relief?

- Special Master Melloy's comment re: Mediation:
- "... hopefully a resolution between the parties could be wiser and able to accomplish things that maybe I couldn't because, as I understand it, if -- if we get to a remedies phase, **any remedy that I would recommend to the Supreme Court would have to be within the context of the four corners basically of -- of the Compact, whereas obviously you're able to shape something that is - is maybe more appropriate for the situation that's on the ground today.** But in any event, I wish you well." Nov. 10, 2021 - excerpt from Rough Transcript (emphasis added).



Rich Deitchman
(916) 469-3820
rdeitchman@somachlaw.com