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# Not Exactly Chump Change: Gambling on Litigation

Jeffrey J. Wechsler  
Montgomery & Andrews, P.A.  
Santa Fe, New Mexico



MONTGOMERY  
& ANDREWS  
LAW FIRM

# OUTLINE

Background Principles for Interstate Water Litigation

Risks in Interstate Water Litigation

Challenges and Benefits to Settlement of Interstate Water Litigation

No. 141 Original – the New Mexico Perspective

# John Wesley Powell

Civil War Veteran

Explorer

Scientist

USGS Director

Water Management  
Guru?



# Powell's 1878 Proposal:

“Gentlemen, you are piling up a heritage of conflict and litigation over water rights, for there is not sufficient water to supply the land.”



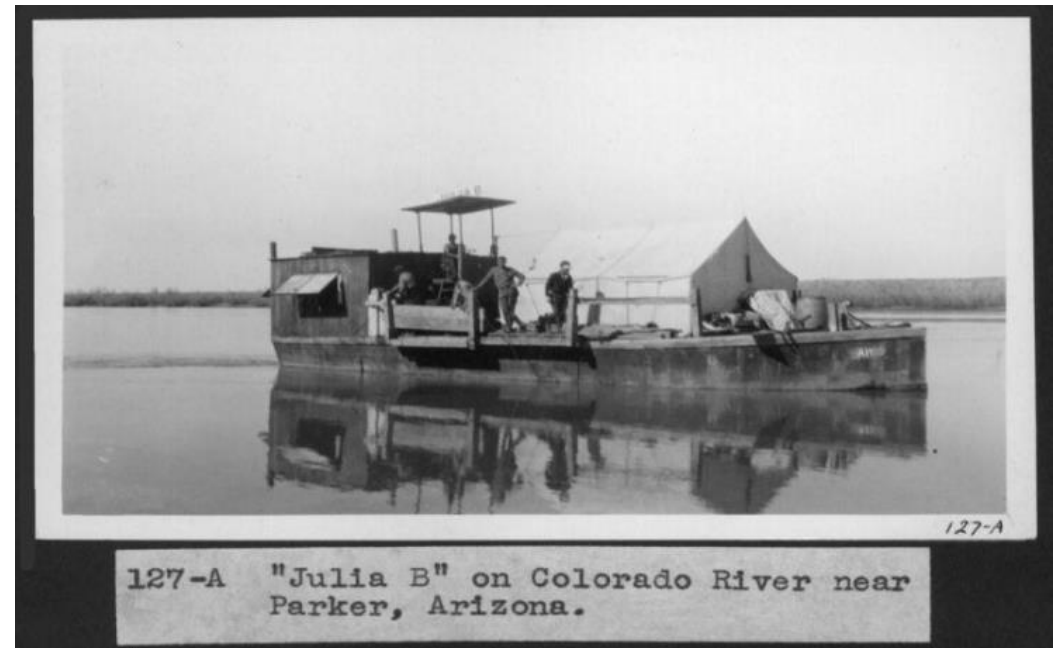
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1934: "WE MAY GET LICKED IN THE AFFAIR, BUT WE WILL GO DOWN FIGHTING."



## SHIP OF THE ARIZONA NAVY

SOURCE: METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA





# Benjamin Franklin

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1775: CONGRESS SHOULD HAVE THE  
POWER TO SETTLE ALL DISPUTES  
BETWEEN COLONY AND COLONY.

# Articles of Confederation, Article IX

## *PENNSYLVANIA V. CONNECTICUT (1782)*

Congressional court

Compulsory jurisdiction

Judgment of court “final and conclusive”

One interstate case litigated.



Charles  
Warren, *The  
Supreme  
Court and  
Sovereign  
States* (1924)

“We Americans now are so accustomed to the Supreme Court and its particular place in our government, that we fail to realize what an absolute novelty the Federal Convention in 1787 was proposing for adoption by the people of the States. Never before in history had there existed a Court with the powers which this new tribunal was to exercise. For the first time, there now came into existence a permanent Court, which should have the power to summon before it sovereign States in dispute and to determine their respective rights by a judgment which should be enforceable against them.

Such a Court, with such functions, is the most original, the most distinctively American contribution to political science to be found in the Constitution. It is even more. It is the cement which has fixed firm the whole Federal Structure.”



## U.S. Constitution: Article III, Sec. 2, Cl. 2

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“In all cases . . . In which a State shall be a Party, the Supreme Court shall have original Jurisdiction.”

Judiciary Act of 1789 (codified at 28 U.S.C. § 1251(a))

Made Supreme Court original jurisdiction over interstate controversies exclusive.

# Equitable Apportionment by Compact: Art. I, § 10, cl. 3

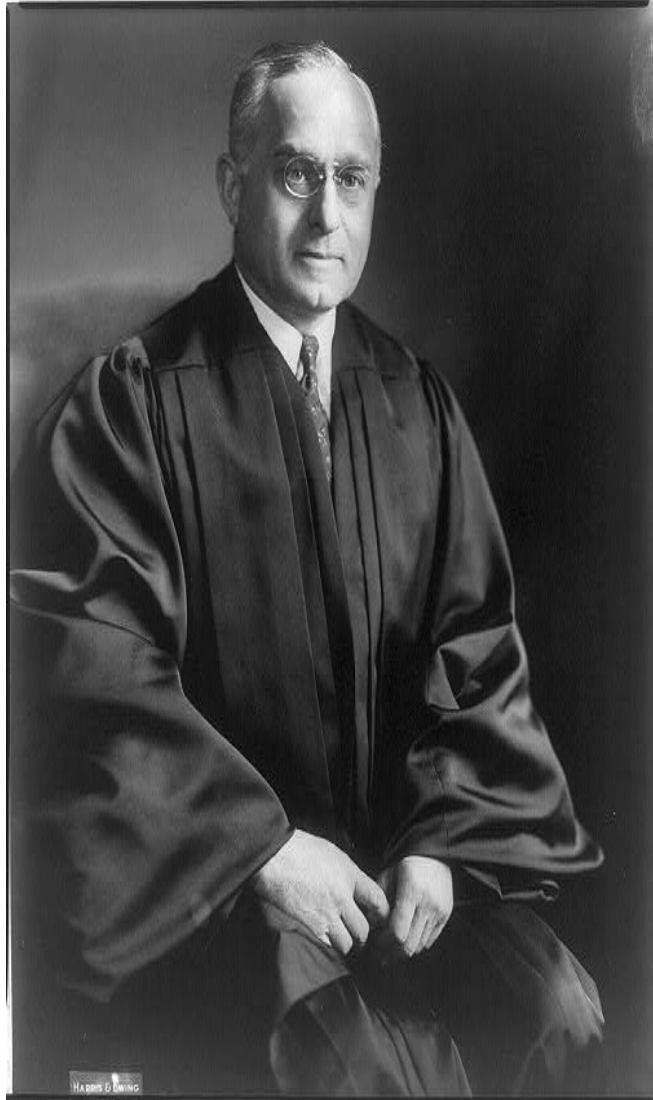
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“No State shall, without the Consent of Congress, . . . enter into Agreement or Compact with another State.”

# Rivers Subject to Compacts

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1. Arkansas River
2. Bear River
3. Bell Fourche River
4. Big Blue River
5. Canadian River
6. Colorado River
7. Costilla Creek
8. Delaware River
9. Klamath River
10. La Plata River
11. Ohio River
12. Pecos River
13. Red River
14. Republican River
15. Rio Grande
16. Sabine River
17. Snake River
18. South Platte River
19. Upper Niobrara River
20. Yellowstone River



# Compact Disputes

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“[A] compact is after all a legal document. Though the circumstances of its drafting are likely to assure great care and deliberation, all avoidance of disputes as to scope and meaning is a not within human gift.”

Justice Frankfurter

*W. Virginia ex rel. Dyer v. Sims*, 341 U.S. 22, 28 (1951)



# United States Supreme Court

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The Supreme Court of the United States has played a central role over the last century in shaping interstate water relations

Illustrative Cases:

*Wyoming v. Colorado*, No. 3 Orig.

*Arizona v. California*, No. 8 Orig.

*Texas v. New Mexico*, No. 65 Orig.

*Kansas v. Colorado*, No. 105 Orig.

*Kansas v. Nebraska*, No. 126 Orig.

*Montana v. Wyoming*, No. 137 Orig.

*Florida v. Georgia*, No. 142 Orig.

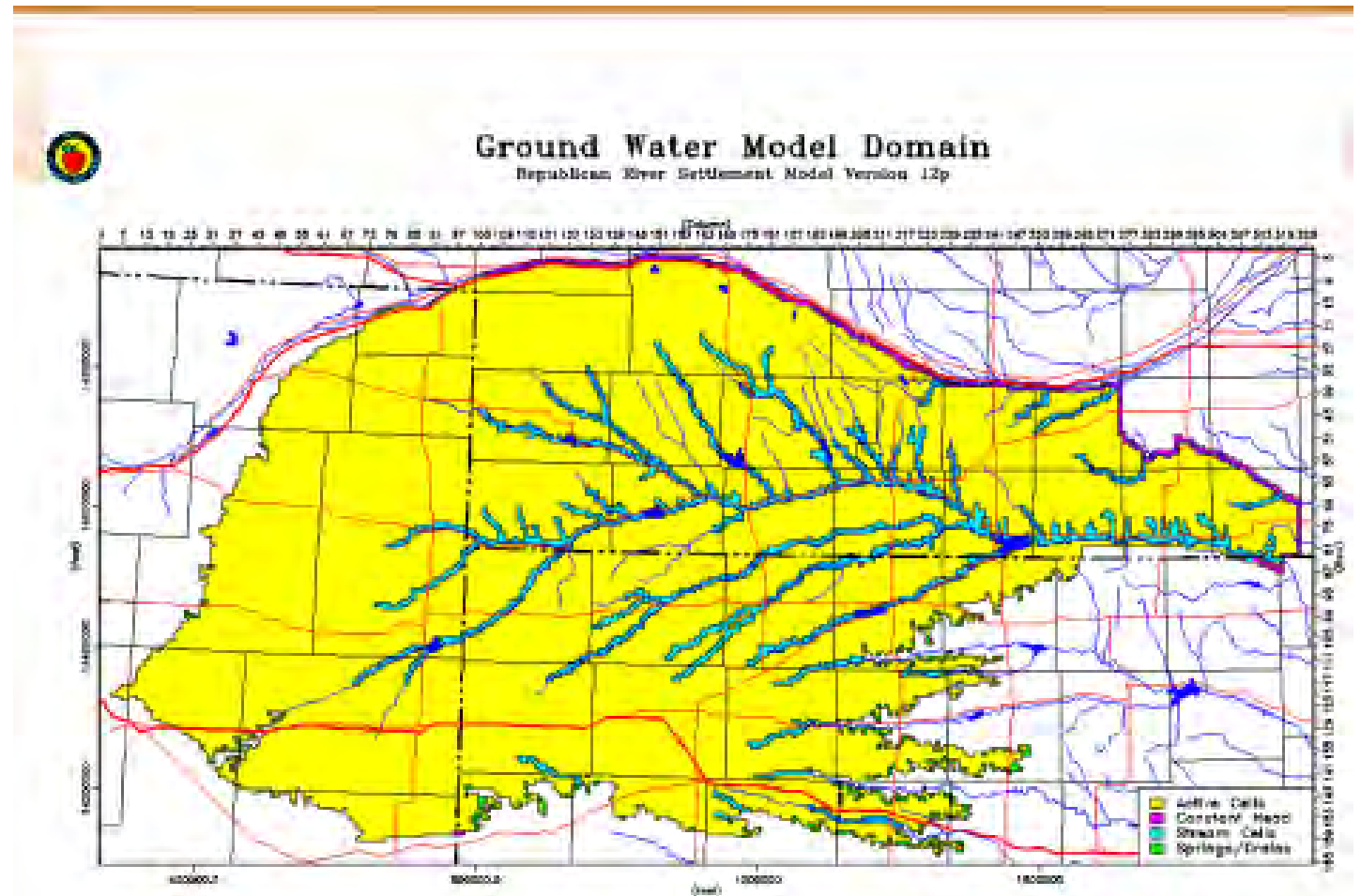
# *Kansas v. Colorado, No. 105* Original

Suit initiated in 1985 to account for post-Compact groundwater pumping in the Arkansas Valley

Colorado adopted regulations on groundwater pumping

Resulted in a reduction of pumping of approximately 49% in the first 10 year compliance period.

## Risk in Interstate Litigation - Costs



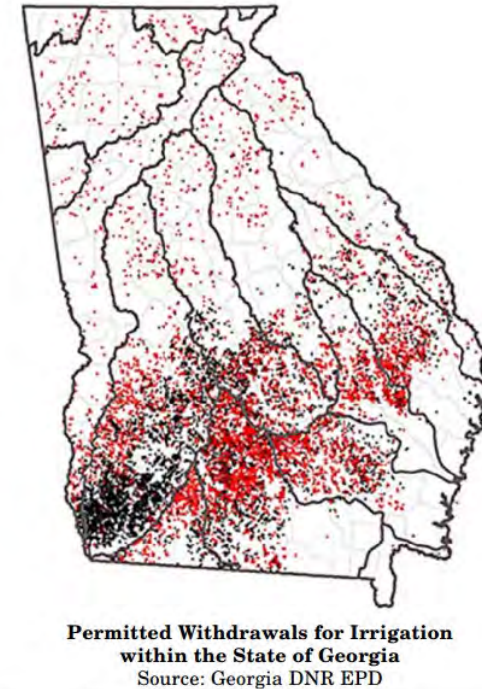
# Risks in Interstate Litigation – All or Nothing

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*Mississippi v. Tennessee, No. 143 Original*



*Florida v. Georgia, No. 142 Original*



# Risk of Litigation – Damage to Long Term Relationship

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# Challenges to Settlement of Interstate Litigation – Politics

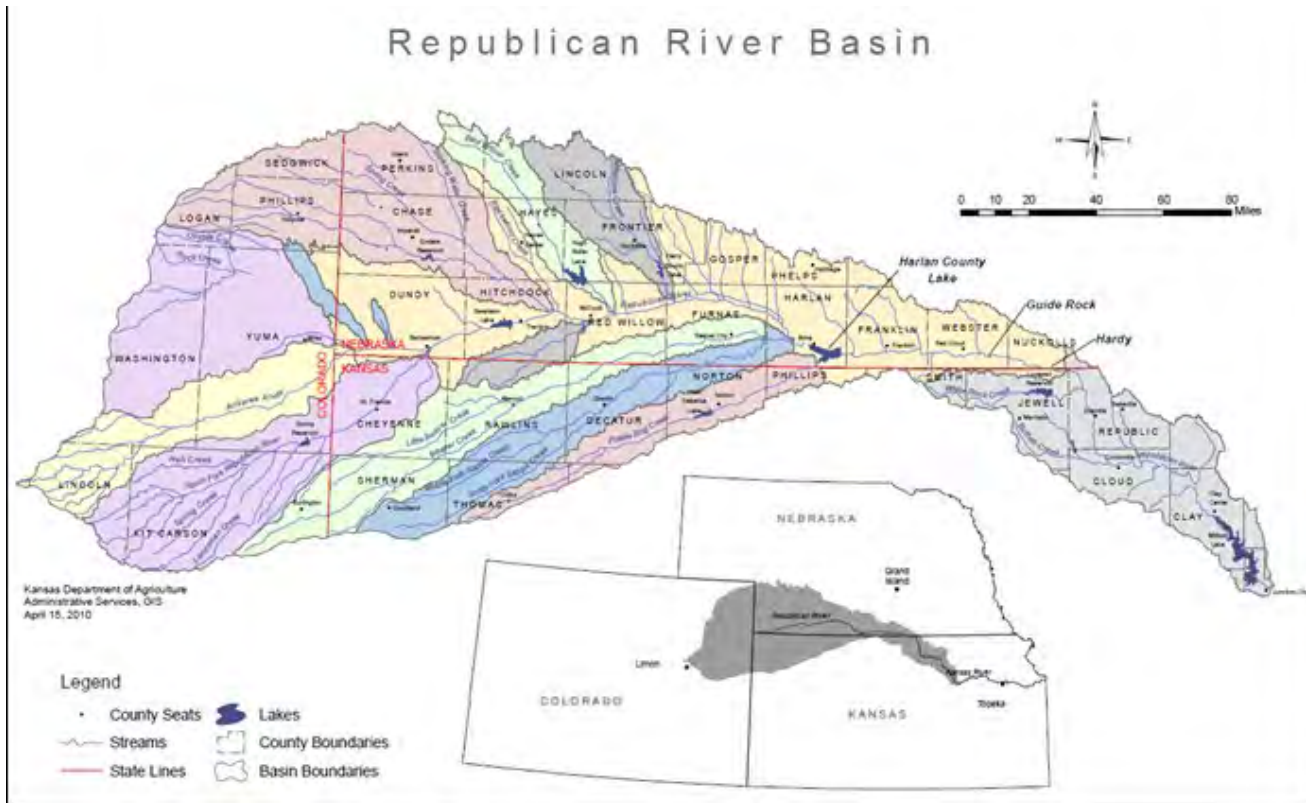
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“In the West, a deal is still a deal.”

Montana Governor Brian Schweitzer, Press Release issued by Montana Department of Justice on February 1, 2007

# Challenges to Settlement of Interstate Litigation – Court Decisions



*KANSAS V.  
NEBRASKA*  
NO. 126 ORIGINAL

# Kansas' Exception

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“The Court should reject the Master’s invitation to rewrite the accounting procedures contained in the Final Settlement Stipulation that the Court approved in its 2003 Decree. The Final Settlement Stipulation was the result of lengthy, detailed, and unprecedented negotiations in which all parties and the United States were intimately involved. There was no ‘mutual mistake’ that warrants the extraordinary step of this Court reforming the State’s agreement.”

# Benefits of Agreement

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“The reason for judicial caution in adjudicating the relative rights of states in [water] cases is that, while we have jurisdiction of such disputes, they involve the interests of quasi-sovereigns, present complicated and delicate questions, and, due to the possibility of future change of conditions, necessitate expert administration rather than judicial imposition of a hard and fast rule. Such controversies may appropriately be composed by negotiation and agreement, pursuant to the compact clause of the Federal constitution.”

*Colorado v. Kansas*, 320 U.S. 383, 392 (1943)

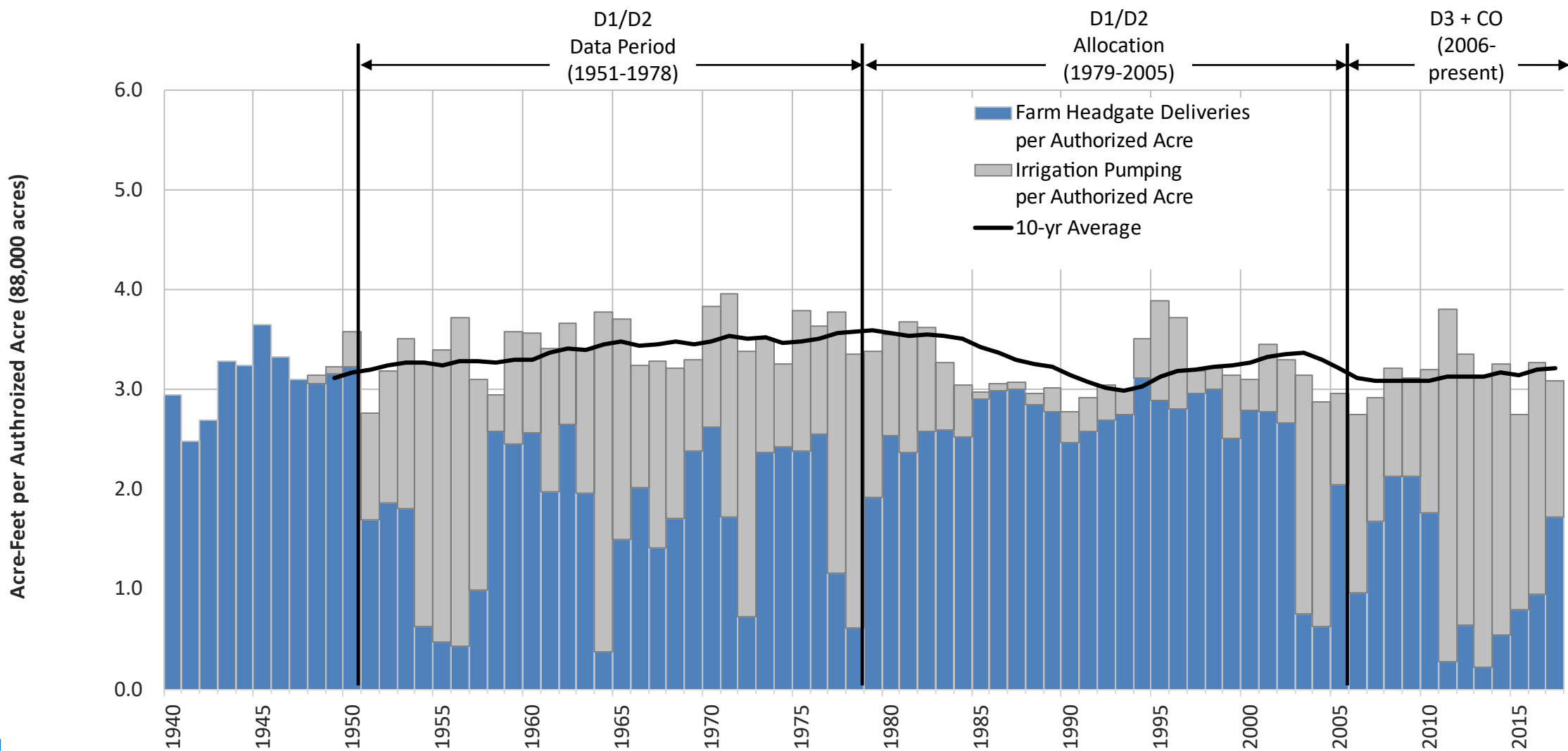
*Texas v. New Mexico,*  
No. 141 Original

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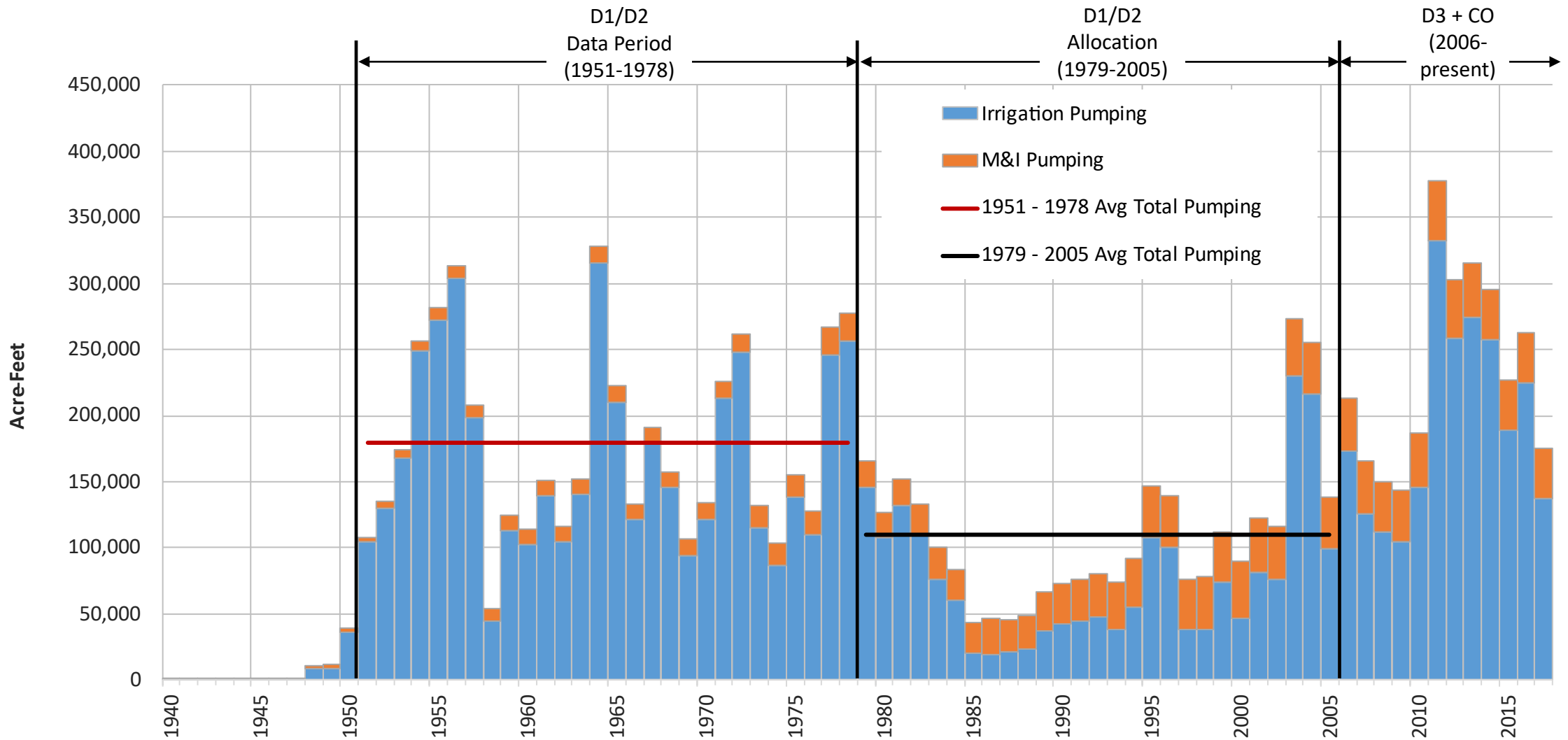
# EQUITABLE APPORTIONMENT:

**Are there any years in which *Texas* did not receive its equitable share (43%) of Project Supply?**

# EBID Annual Total Applied Water per Authorized Acre (SW + GW) 1940-2017 (Acre-Feet)



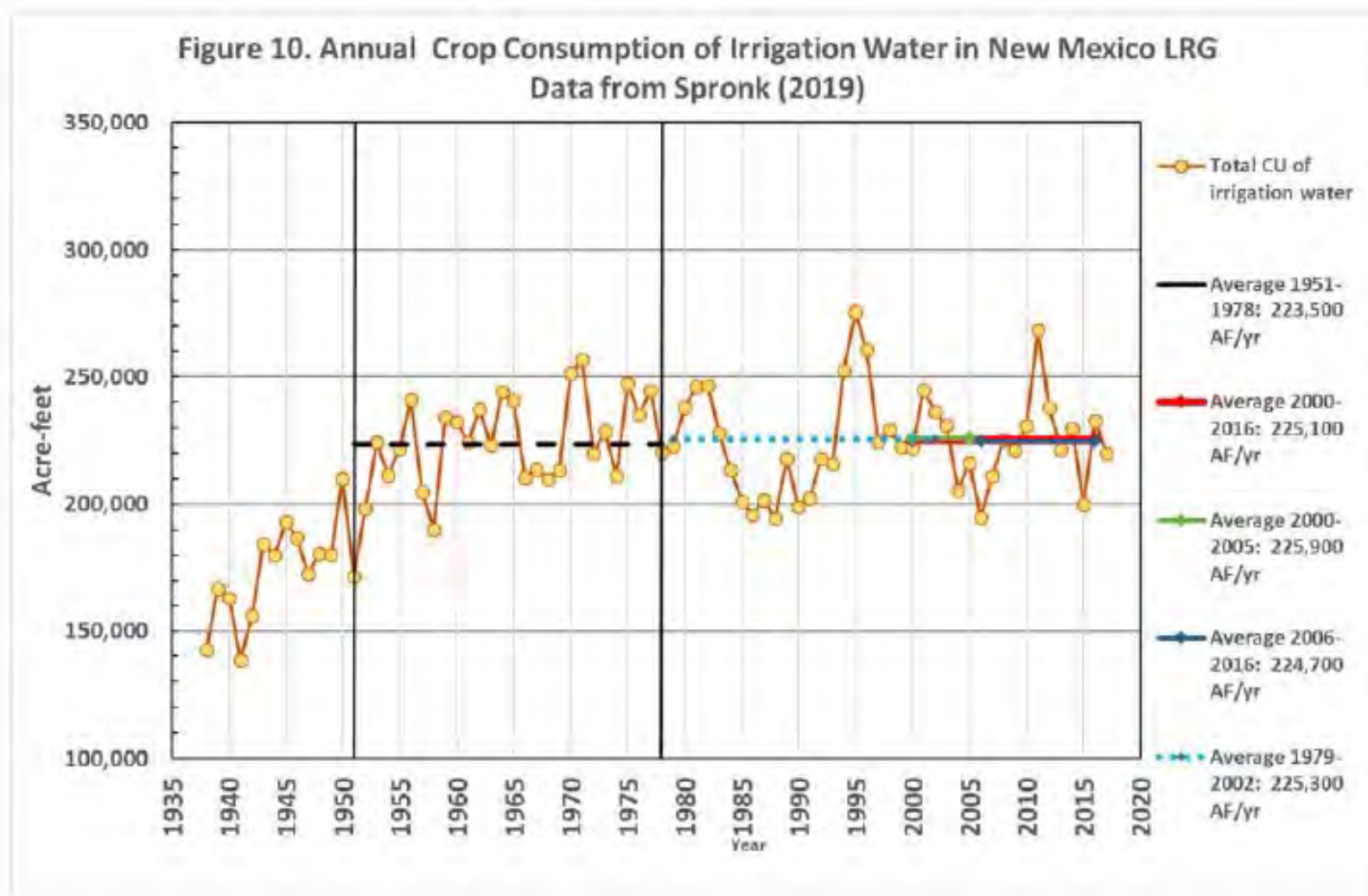
# Annual New Mexico Pumping in the Rincon and Mesilla Valleys 1940-2017



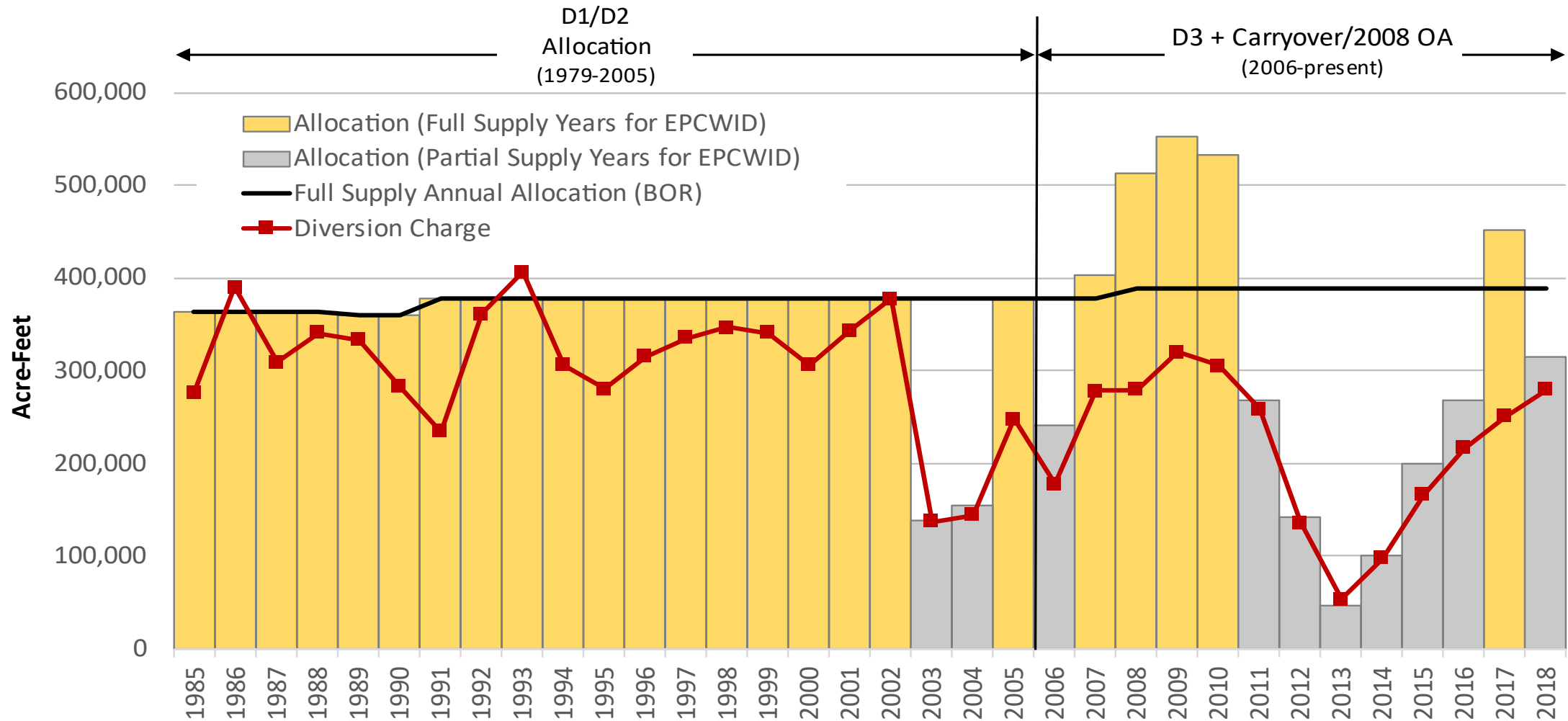
Source: Figure 19-5 and Figure 19-8 from Spronk Water Engineers Expert Rebuttal Report (September 2020).



# NEW MEXICO ANNUAL CROP CONSUMPTION



# Annual EPCWID Allocation and Diversion Charge 1985-2018 (Acre-Feet)

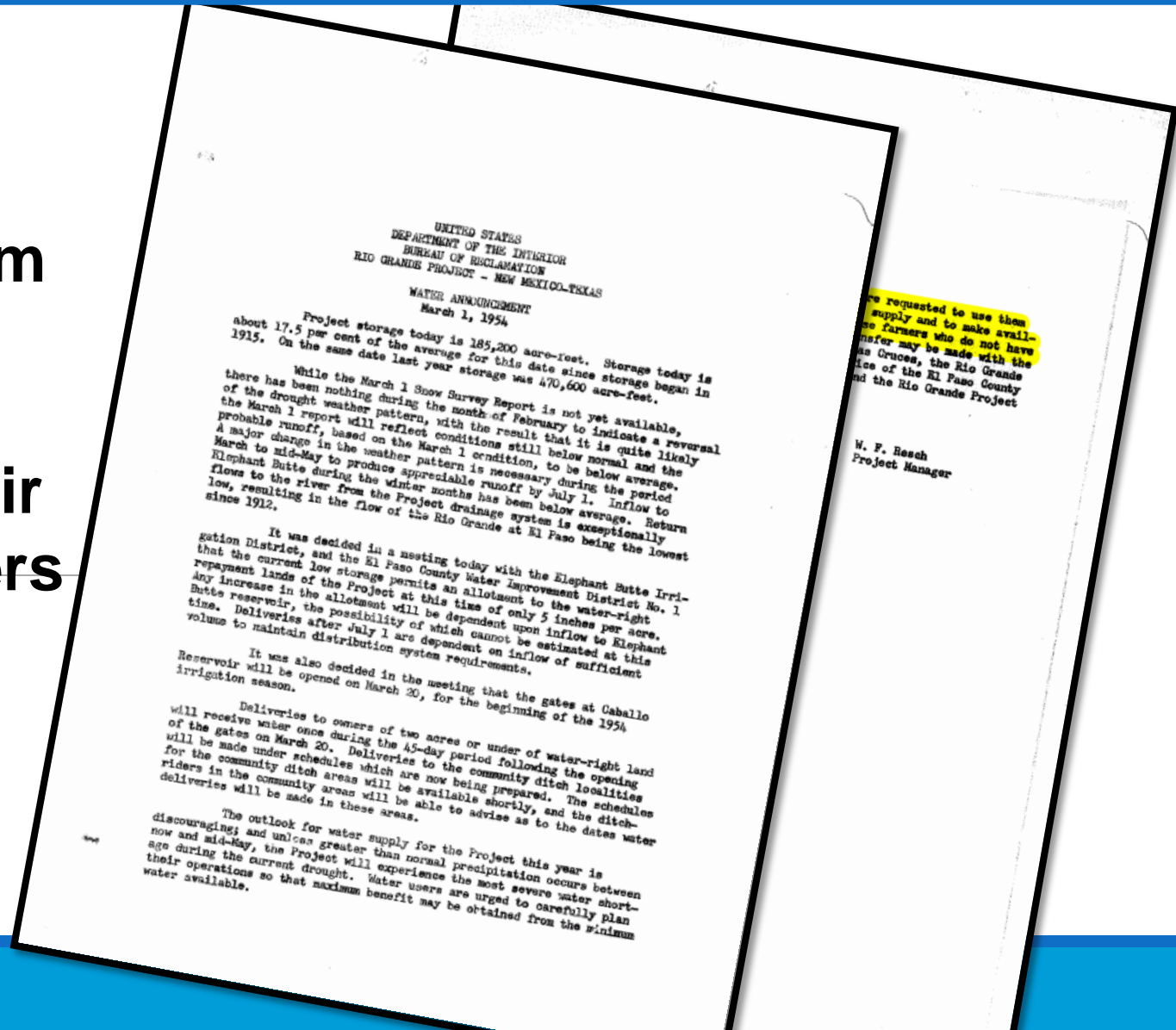


Notes: (1) The allocation (total including prior year carryover, ACE credit, and excess carryover transfer to EBID) and diversion charges are from Table 4-3 and Accounting dataset from Spronk Water Engineers Expert Report (July 2020).  
 (2) Full supply years for EPCWID are years when EPCWID total allocation is above the full supply annual allocation for EPCWID that varies from around 360,000 AF to 377,000 AF prior to the 2008 OA and 388,000 AF after the 2008 OA.

# BUREAU OF RECLAMATION ENCOURAGED GROUNDWATER USE AND PUMPING

“Farmers with good irrigation wells are requested to use them to the greatest extent possible as a source of supply and to make available for transfer their allotment water to those farmers who do not have satisfactory wells.”

U.S. Bureau of Reclamation Project Histories:  
Water Announcement March 1, 1954



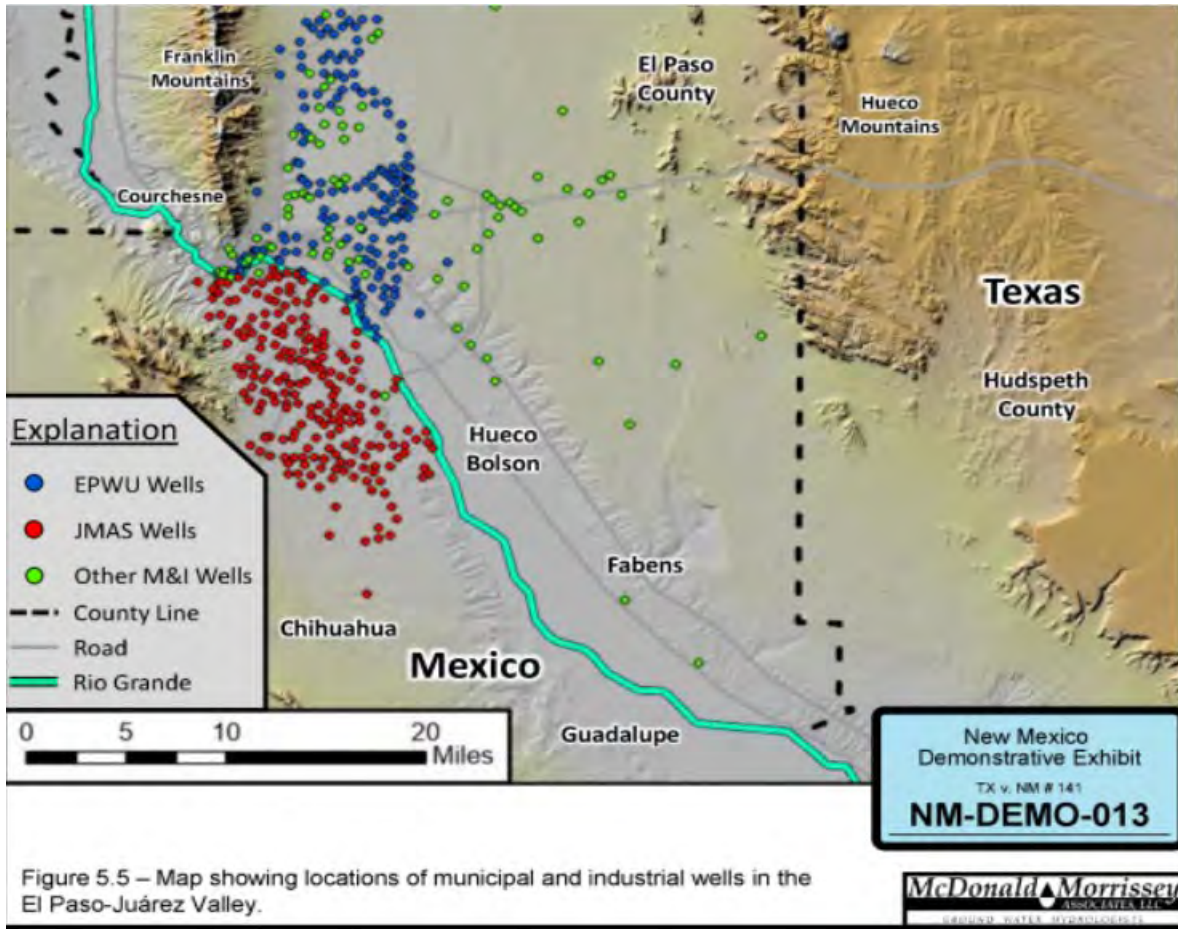
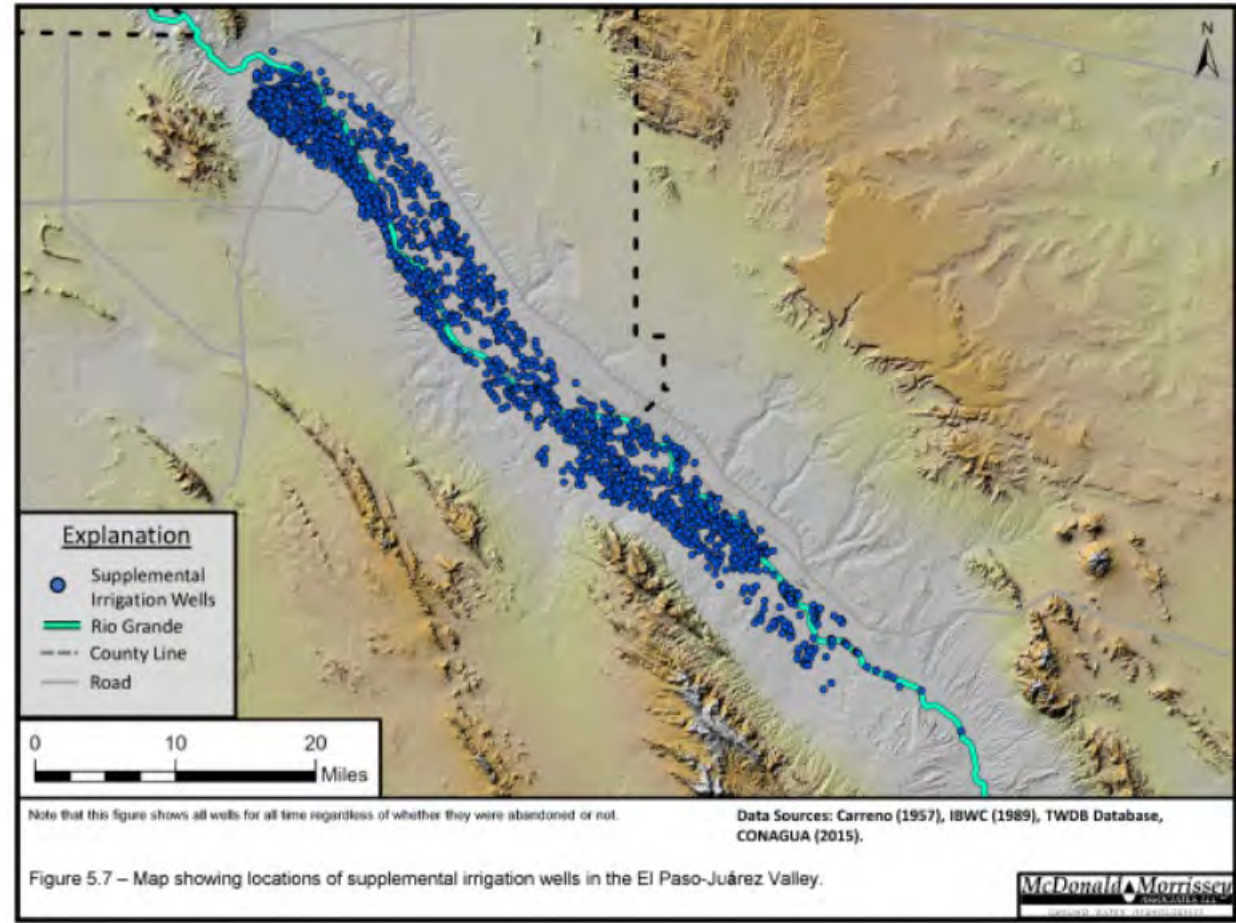


Figure 5.5 – Map showing locations of municipal and industrial wells in the El Paso-Juárez Valley.

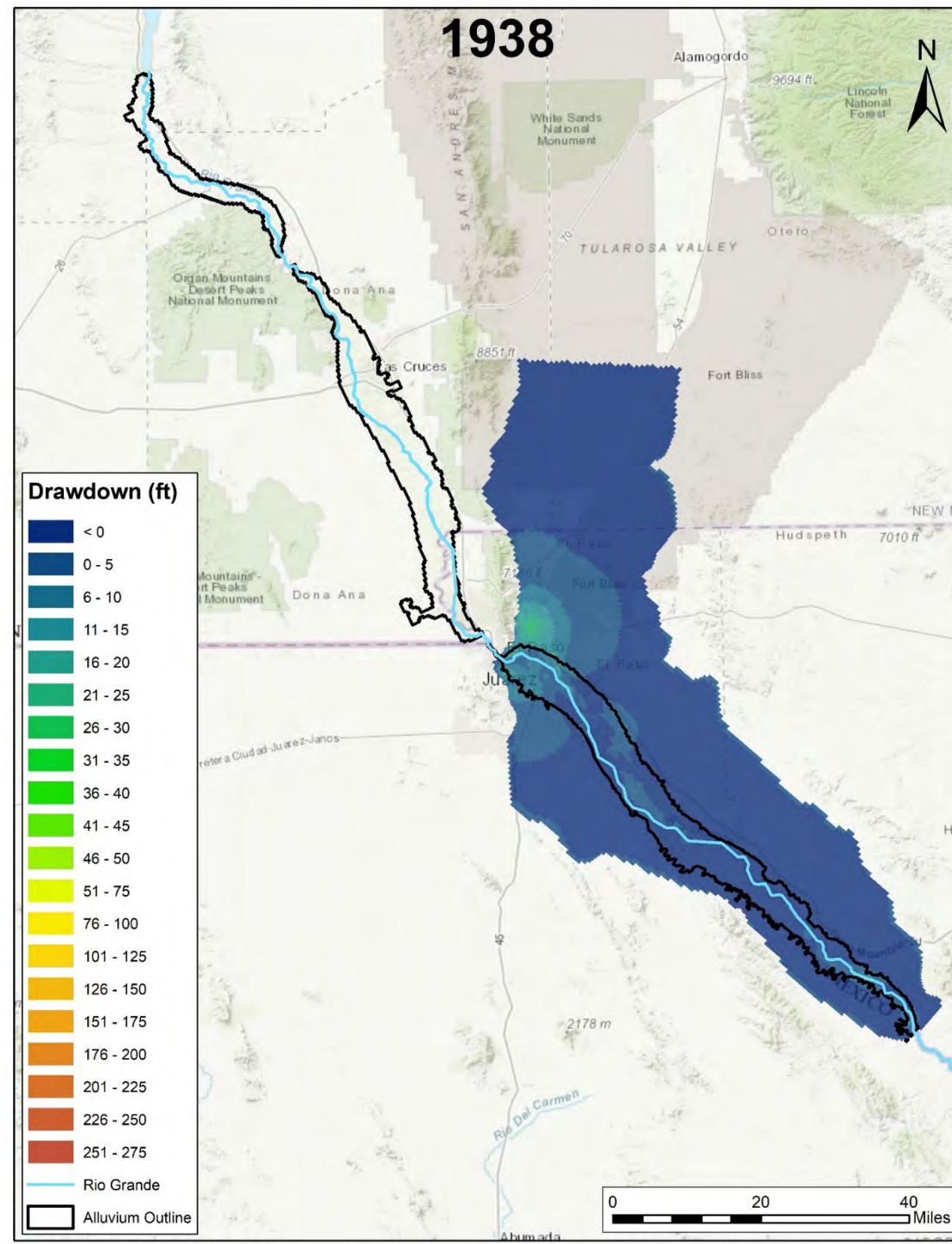


Note that this figure shows all wells for all time regardless of whether they were abandoned or not.

Data Sources: Carreno (1957), IBWC (1989), TWDB Database, CONAGUA (2015).

Figure 5.7 – Map showing locations of supplemental irrigation wells in the El Paso-Juárez Valley.

# Groundwater Level Drawdown (Feet) Lower Rio Grande (1938-2017)



Select Year

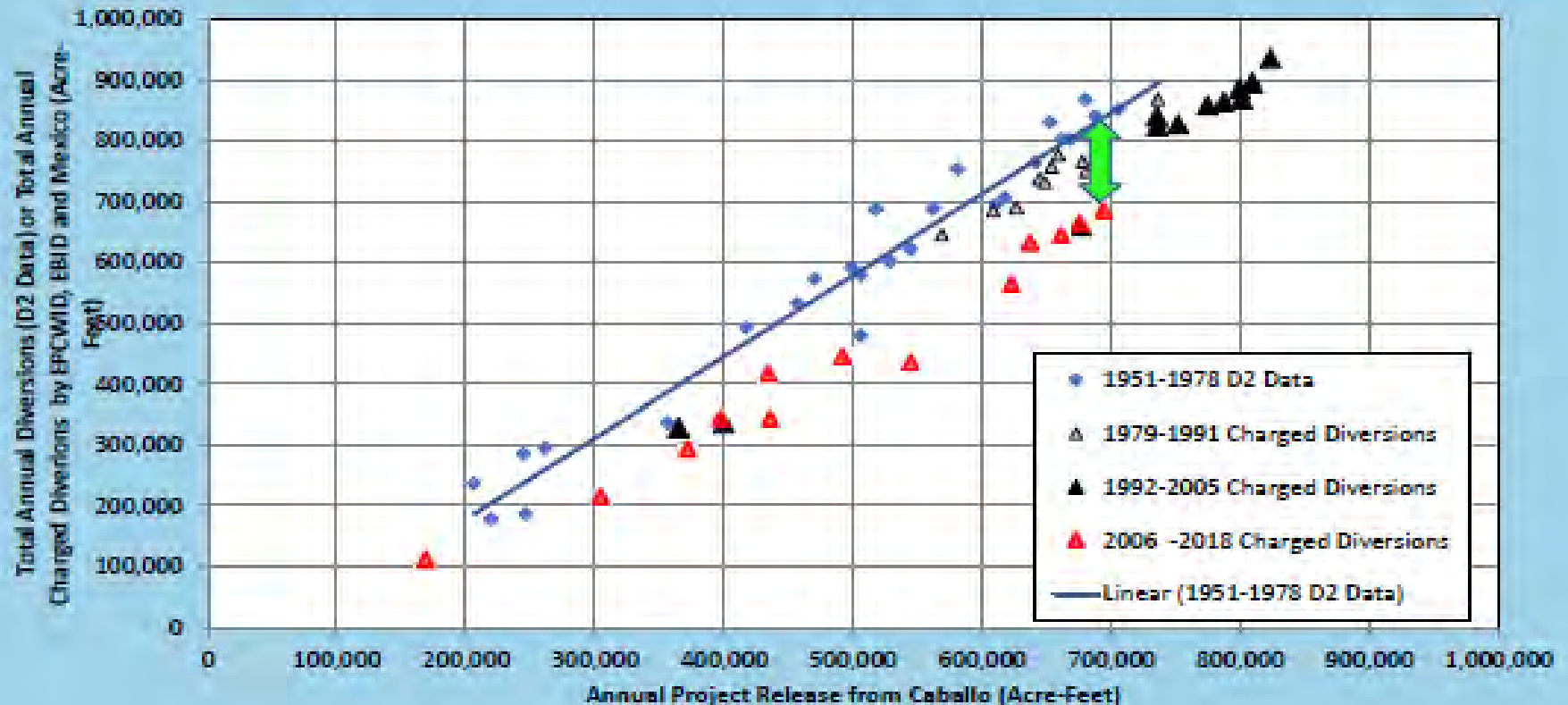
- 1938
- 1940
- 1950
- 1960
- 1970
- 1980
- 1990
- 2000
- 2010
- 2017

# EQUITABLE APPORTIONMENT:

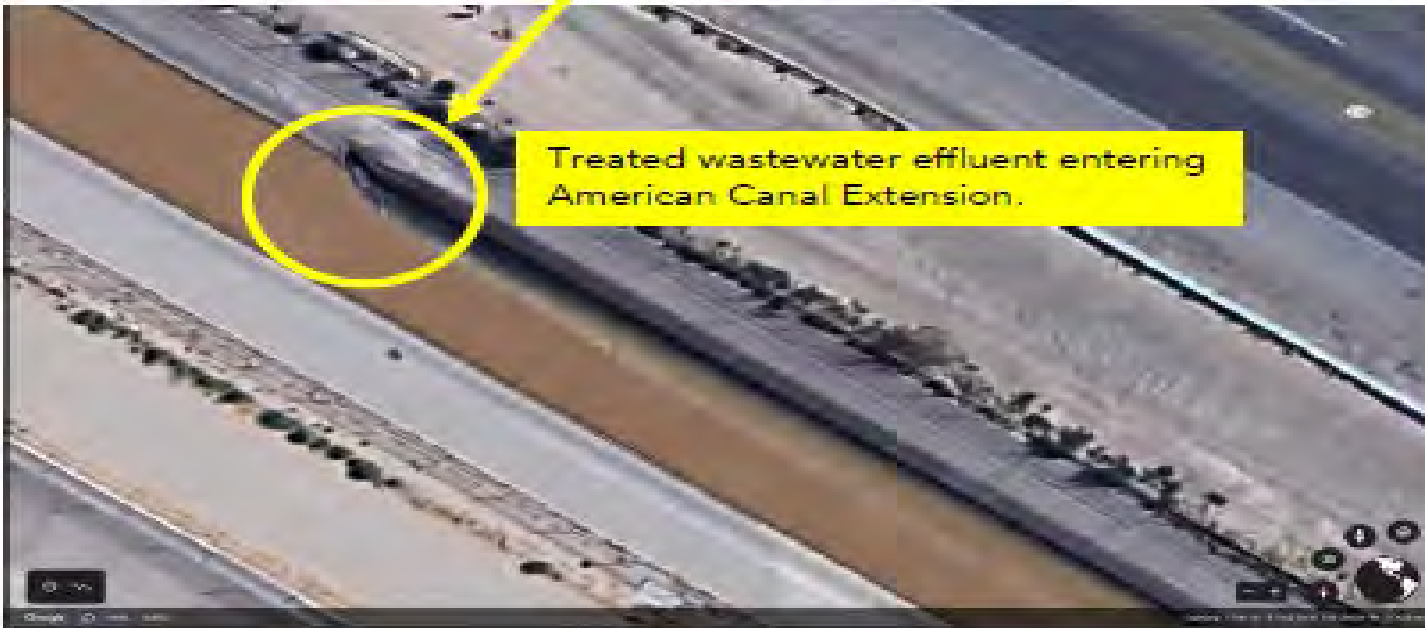
**Are there any years in which *New Mexico* did not receive its equitable share (57%) of Project Supply?**

# Under D3 EBID's Allocation is Reduced for the Entire Negative Departure from the D2 Curve

Recent Departures from D2 Curve are large



Haskell Street  
WWTP,  
EL Paso, Texas



Treated wastewater effluent entering  
American Canal Extension.



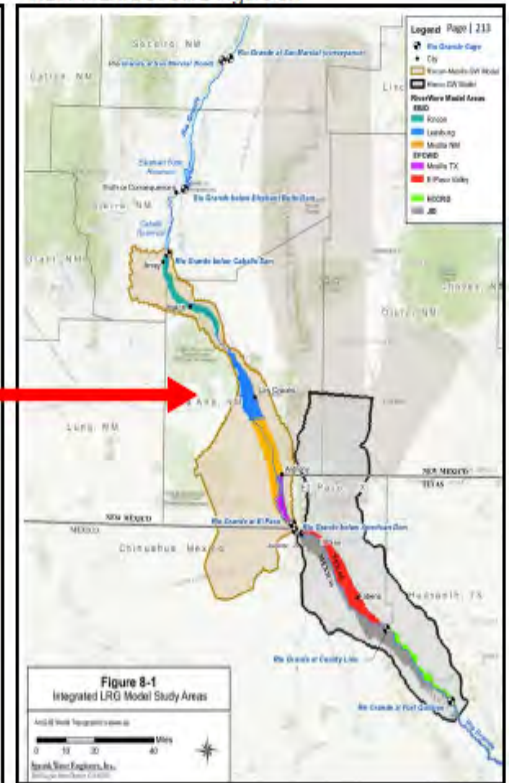
# Advantages of New Mexico's ILRG Model Over the Texas Model

1. Simulates entire Project area and beyond from San Marcial to Ft. Quitman
2. Simulates all Project and irrigation operations of EPCWID, Juarez, and HCCRD1 in the El Paso and Juarez Valleys
3. Simulates impacts of pumping by El Paso Water and Ciudad Juarez
4. Uses rule-based processes to simulate Project and irrigation operations rather than static inputs
5. Simulates operation of Elephant Butte and Caballo Reservoirs
6. Uses monthly timesteps rather than annual timesteps
7. Simulates real-world responses to changes in historical inputs (e.g., turning off pumping) including:
  - a. Changes in reservoir operations, evaporation, releases, and spills
  - b. Changes in Project water allocations to EBID and EPCWID
  - c. Changes in irrigation demands
  - d. Changes in canal diversions, canal seepage, waste, and farm deliveries
  - e. Changes in operations of EPCWID, Juarez, and HCCRD1
  - f. Distinguishes changes in flows during the irrigation season and non-irrigation season

TEXAS: Hutchinson Figure 5

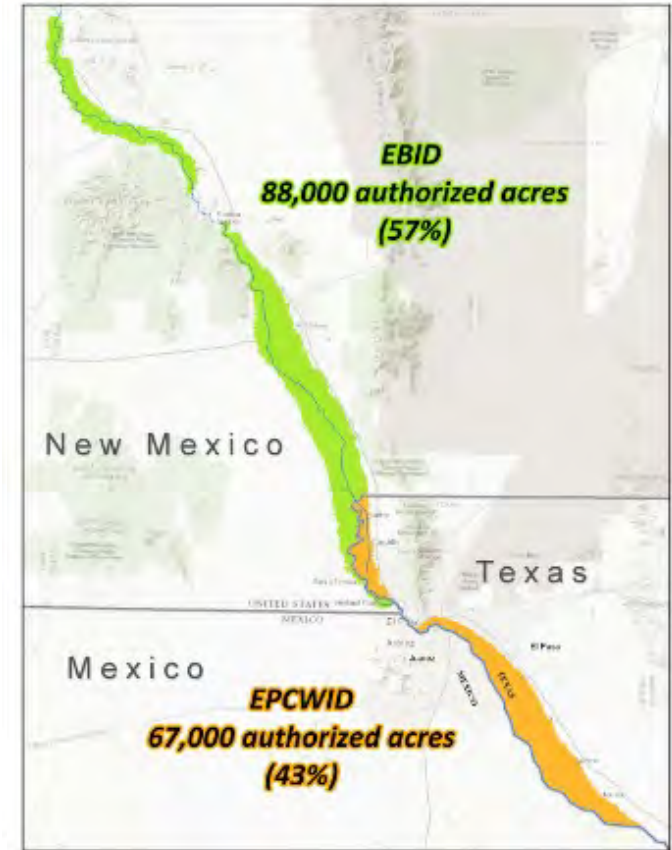
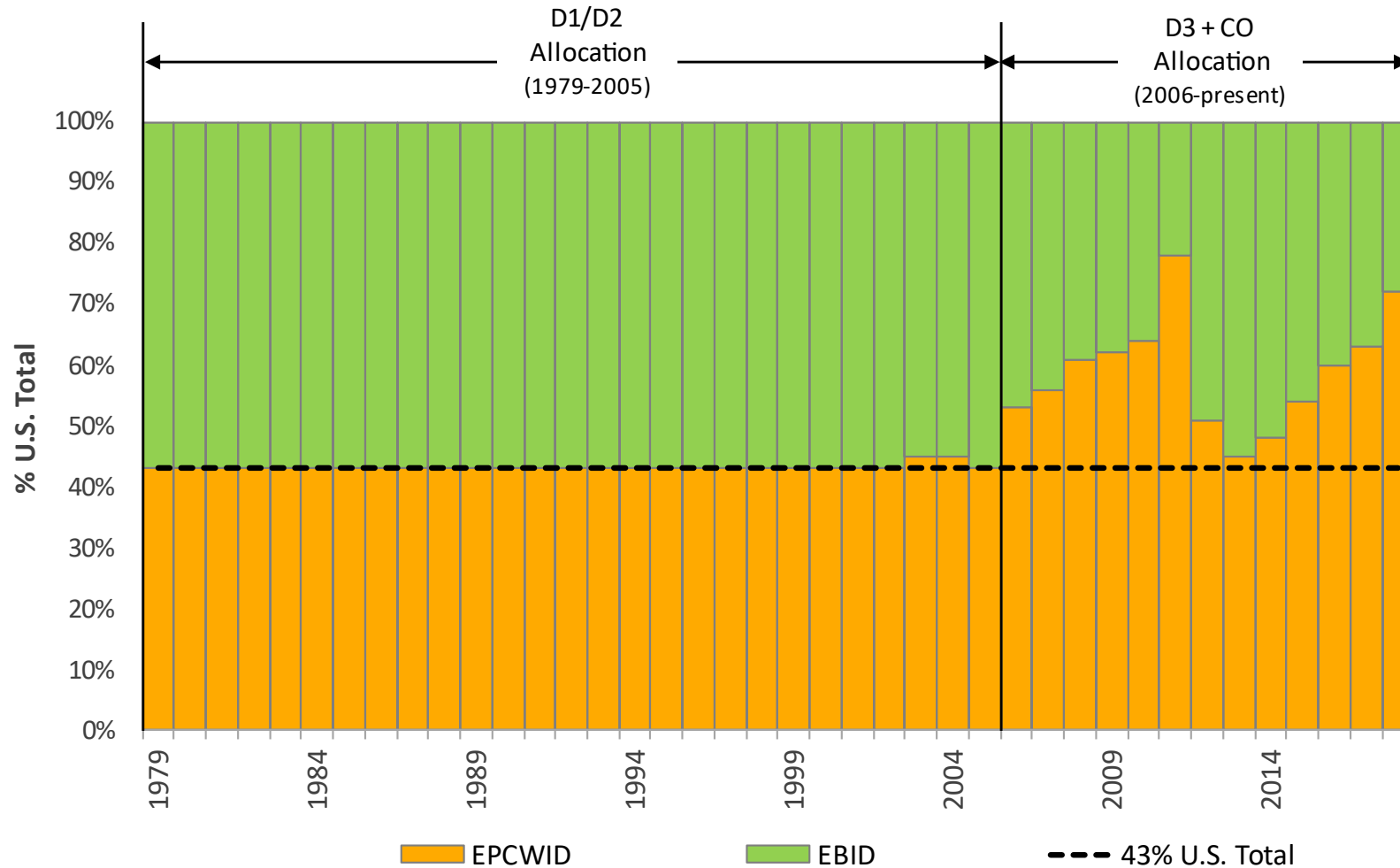


NEW MEXICO: SWE Figure 8.1



# Annual Allocation by District

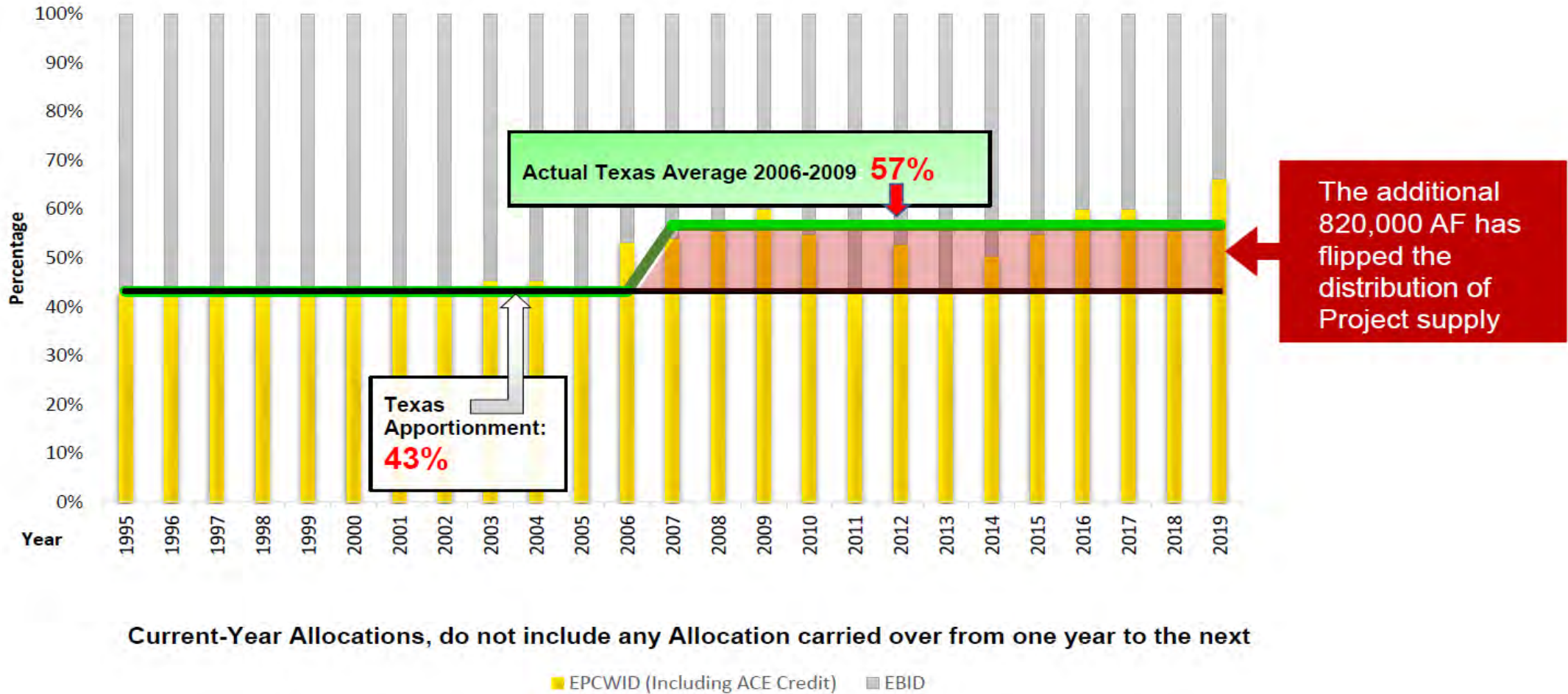
## Rio Grande Project: 1979-2018 (% U.S. Total)



Show Annual Totals

Show % U.S. Total

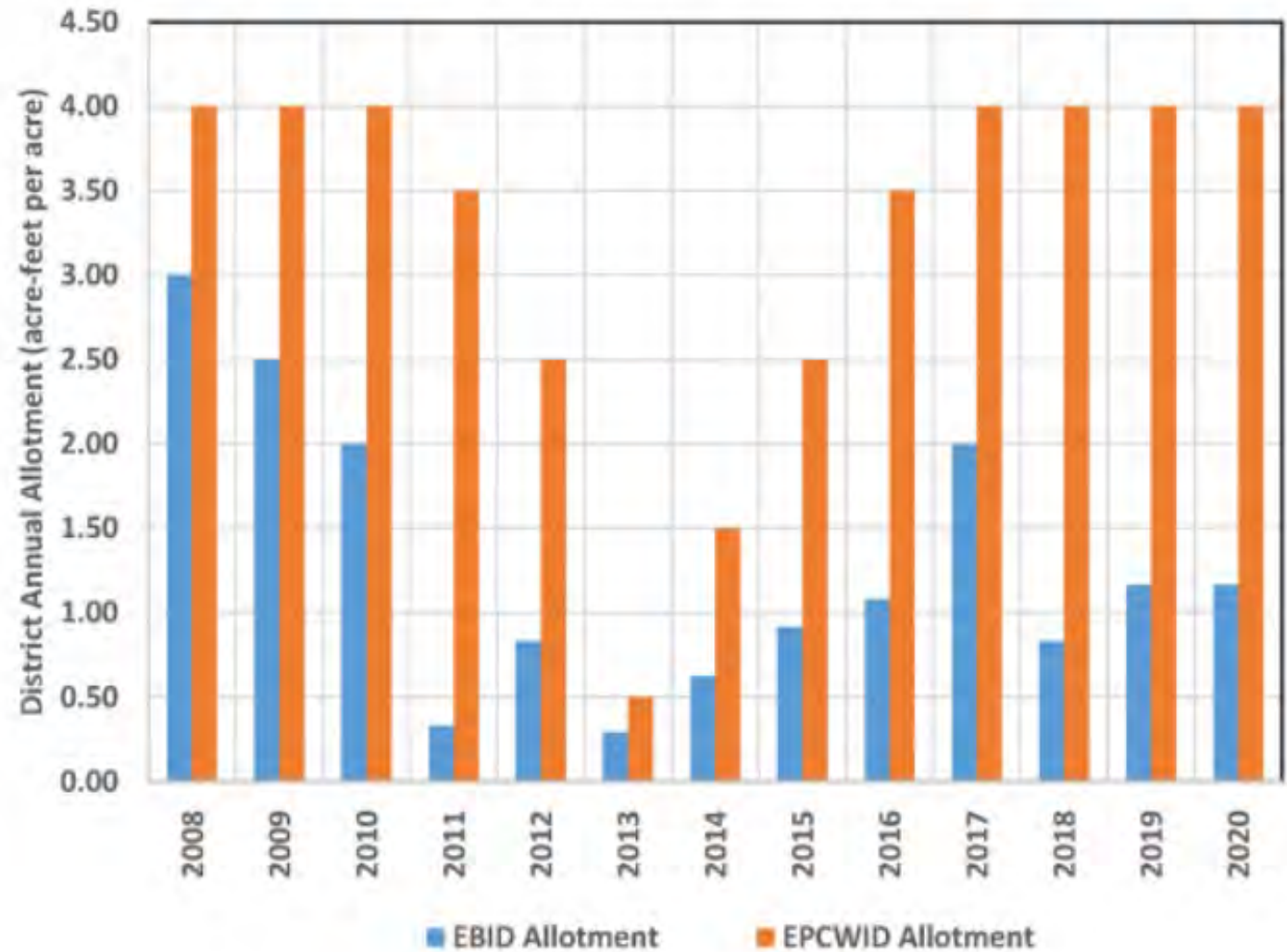
Since 2006 Texas has received 820,000 acre-feet more than under historic operations. New Mexico no longer apportioned 57% below Elephant Butte



# Comparison of District Allotments

Ex. NM-DEMO-003

Comparison of District Allotment Data 2008-2020  
(Allotments set by US District for Delivery to Farms)



## More Recently, under D3 Allocation:

### Groundwater levels

- Drop during low-supply years
- Do not recover during full-supply years

