



TEXAS V. NEW MEXICO,
IMPLEMENTING THE CONSENT
DECREE

FOURTH MEETING OF THE WATER AND NATURAL RESOURCES
COMMITTEE, OCTOBER 3, 2023

JEFF WECHSLER

OUTLINE

Background

Description of the
Consent Decree

Status of the Litigation

HISTORY

NEW MEXICO V. UNITED STATES, NO. 11-CV-0691 (D.N.M.
AUG. 8, 2011)

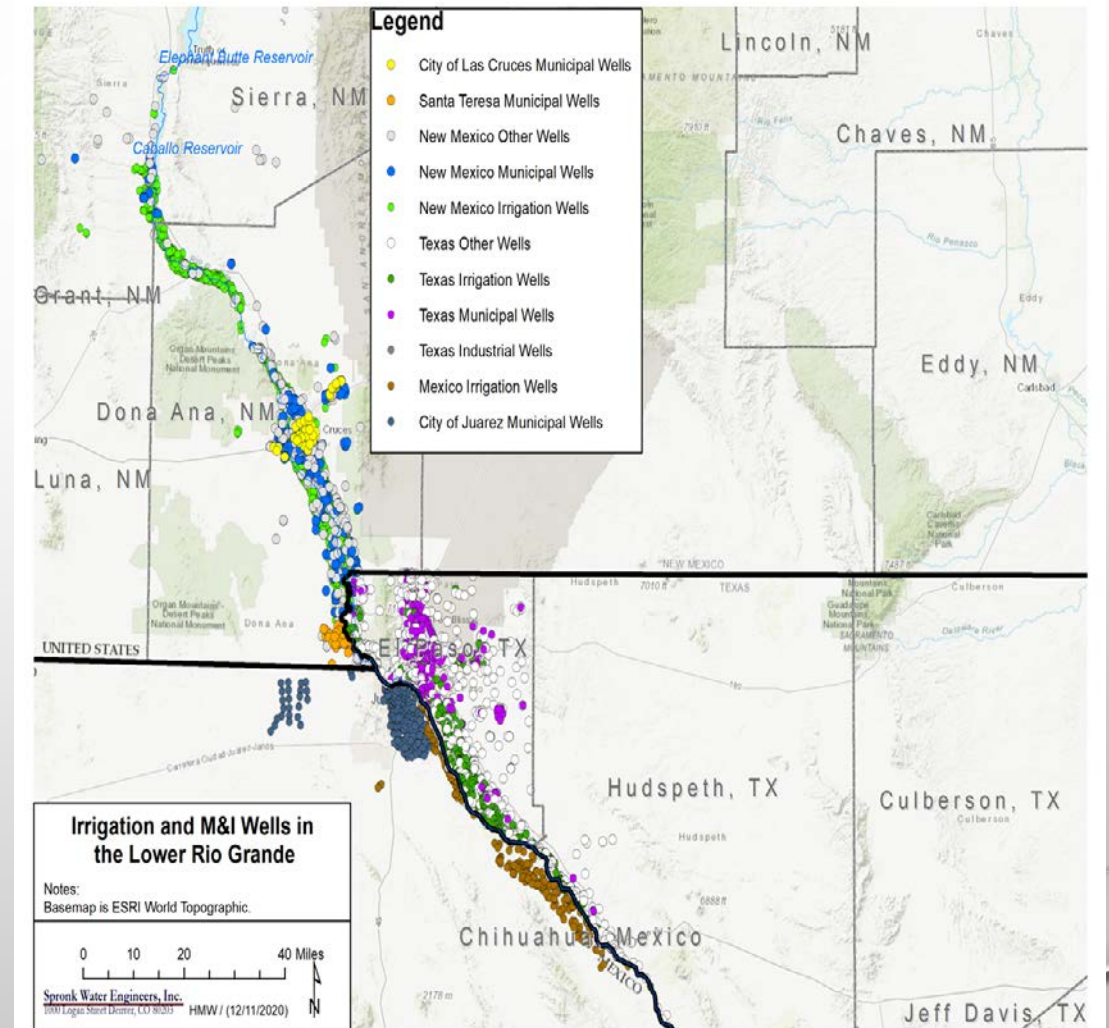
New Mexico filed suit in federal court challenging the 2008 Operating Agreement.

New Mexico alleges that the 2008 Operating Agreement materially changes the historical 57%/43% allocation of Project water

New Mexico also claims that Reclamation improperly released credit water

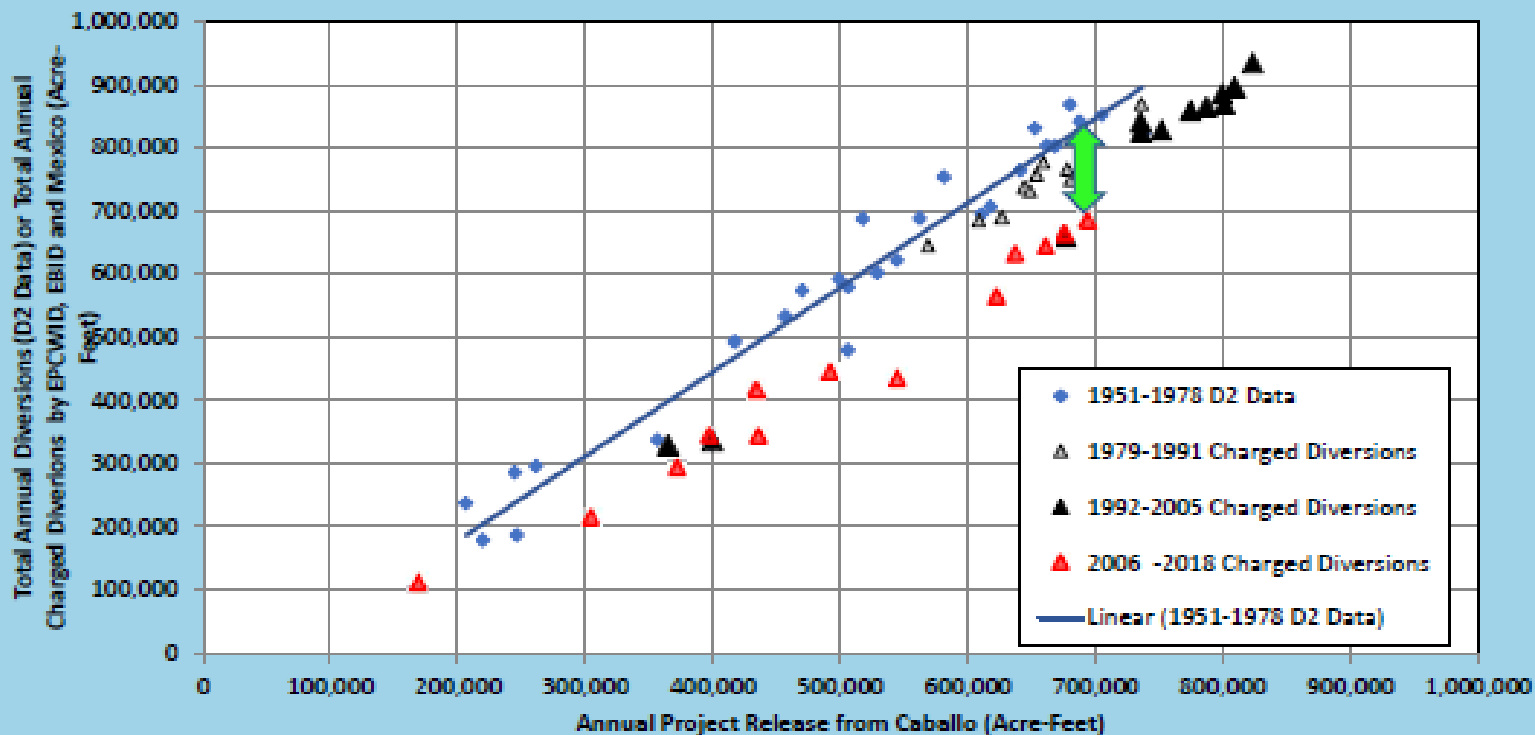
ISSUES THAT LED TO ORIGINAL ACTION

- DELIVERY POINT AT ELEPHANT BUTTE, APPROXIMATELY 125 MILES AWAY FROM STATE LINE.
- DEVELOPMENT OF GROUNDWATER RESOURCES IN BOTH STATES.
- OPERATING AGREEMENT NEGOTIATIONS DID NOT INVOLVE THE COMPACTING STATES.
- CONCERNS OVER THE APPROPRIATE FORUM TO DECIDE THE ISSUES.

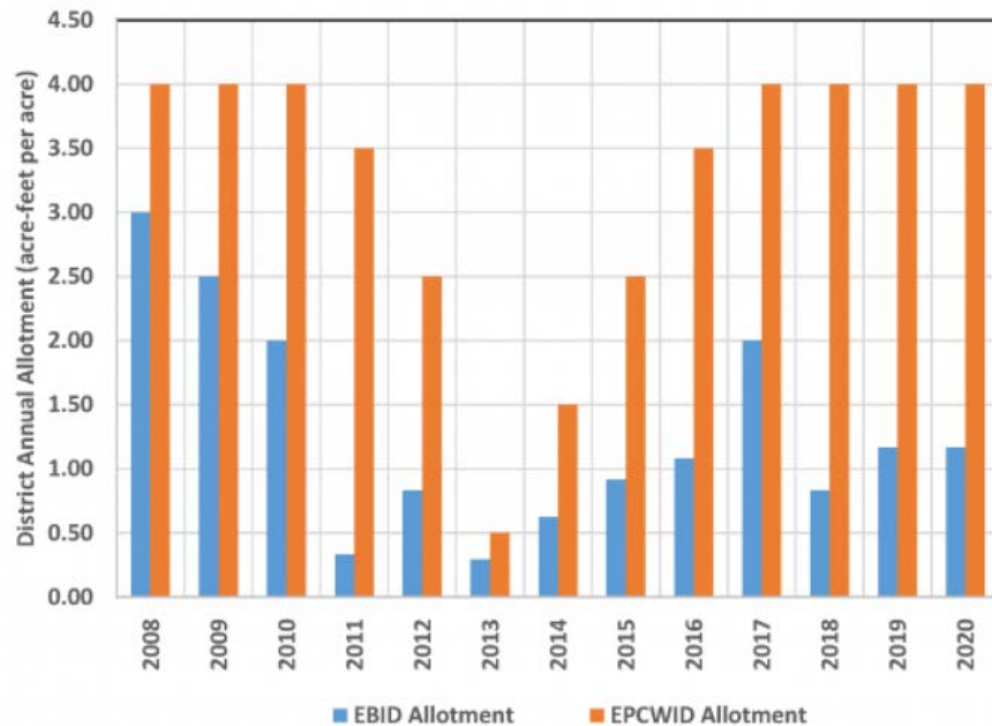


Under D3 EBID's Allocation is Reduced for the Entire Negative Departure from the D2 Curve

Recent Departures from D2 Curve are large



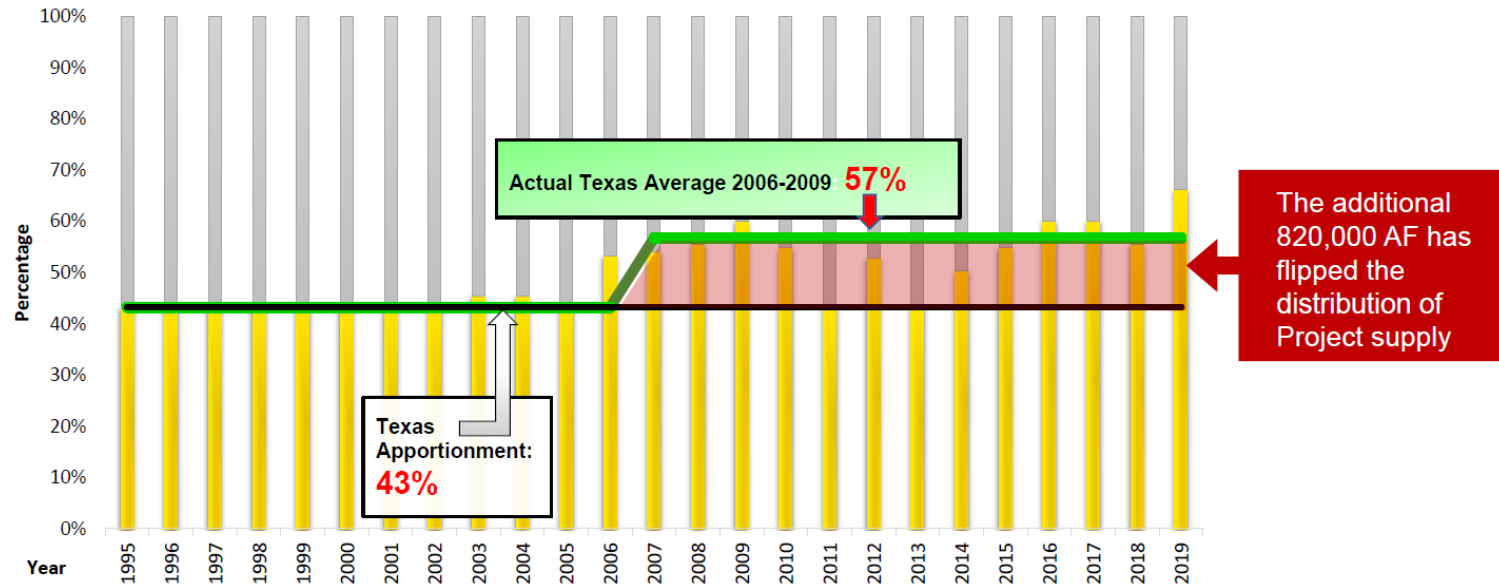
Comparison of District Allotment Data 2008-2020
(Allotments set by US District for Delivery to Farms)



COMPARISON OF DISTRICT ALLOTMENTS

EX. NM-DEMO-003

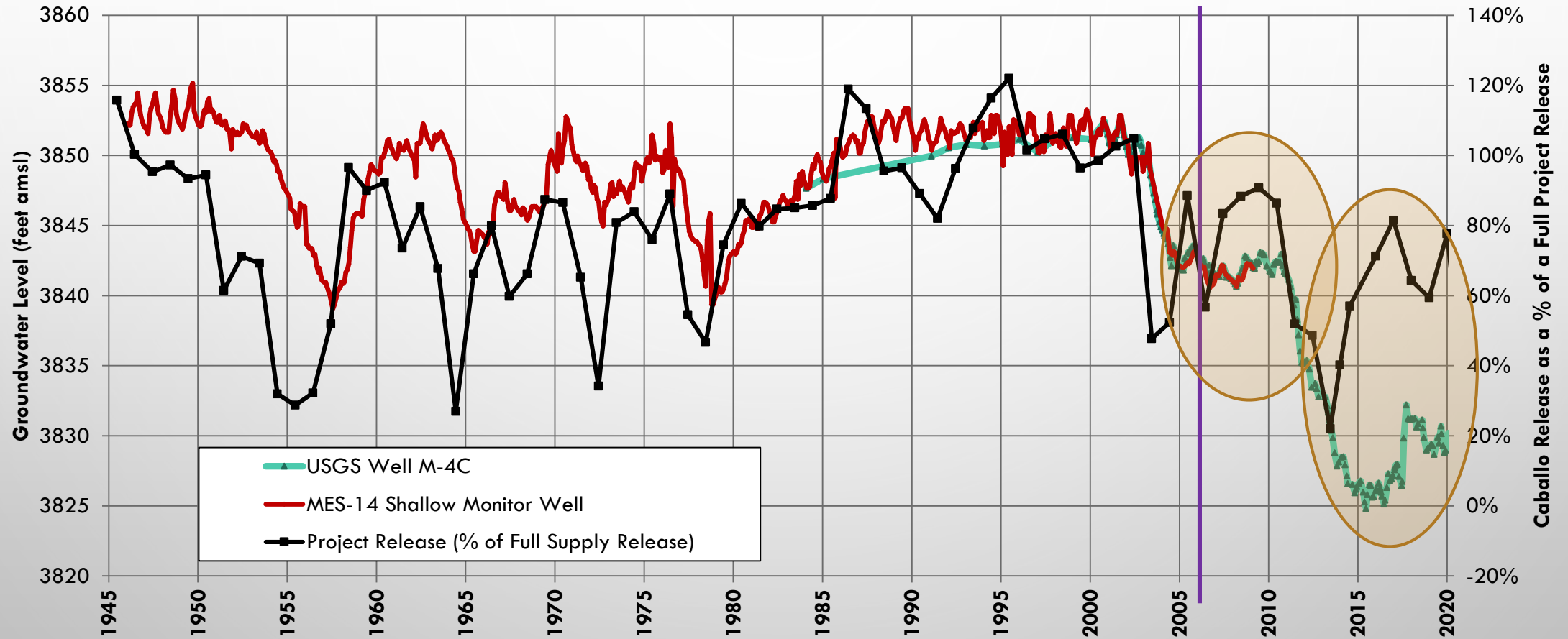
Since 2006 Texas has received 820,000 acre-feet more than under historic operations. New Mexico no longer apporportioned 57% below Elephant Butte



Current-Year Allocations, do not include any Allocation carried over from one year to the next

■ EPCWID (Including ACE Credit) ■ EBID

GROUNDWATER LEVELS CORRELATE WITH PROJECT RELEASES UNTIL MID-2000'S BUT NOT SINCE MID-2000'S



BACKGROUND: LITIGATION POSITIONS

Issue	New Mexico Position	Texas Position	United States
Protected Baseline	D2 Baseline (1951-1978)	1938 Condition	1938 Condition
Apportionment	NM entitled to 57% of Project Supply	Water below Elephant Butte is Texas water subject only to contracts	No apportionment below Elephant Butte. All water is Project water.
Project Accounting	OA hurts New Mexico. Accounting needs to change to accomplish 57/43	Supports Operating Agreement	Supports Operating Agreement. US has discretion on accounting
Carryover	Not permitted and cannot impact apportionment	Unconditionally allowed	Unconditionally allowed. US with discretion
Damages	OA harmed New Mexico aquifer; Texas owes New Mexico approximately 800,000 AF.	New Mexico owes Texas over \$250 Million	No position

DECREE

Court exercised original jurisdiction over this controversy involving Colorado, New Mexico, and Texas (hereinafter “Compacting States”) before the Court on the Third Report of the Special Master and the States’ Joint Motion of the State of Texas, State of New Mexico, and Colorado to Enter Consent Decree Supporting the Rio Grande Compact. This Decree is consistent with the Rio Grande Compact.

And upon the Third Report of the Special Master and the Compacting States’ Motion for Adoption of a Decree, IT IS HEREBY ORDERED, ADJUDICATED,

AND DECREED AS FOLLOWS:

THE CONSENT DECREE

- JOINT MOTION FOR ENTRY OF CONSENT DECREE FILED NOVEMBER 14, 2022
- SPECIAL MASTER RECOMMENDS ENTRY OF CONSENT DECREE TO THE UNITED STATES SUPREME COURT

SETTLEMENT CONCEPTS

1. EACH STATE RESPONSIBLE FOR DEPLETIONS BY ITS OWN WATER USERS
2. TRANSITION PERIOD TO HELP NM IMPROVE AQUIFER CONDITIONS
3. INDEX DESIGNED TO BE CONSISTENT WITH 57%-43% DIVISION OF PROJECT SUPPLY.
4. PROJECT ALLOCATION/ACCOUNTING MUST BE CONSISTENT WITH THE INDEX.

SIGNIFICANT FEATURES OF THE CONSENT DECREE

Effective El Paso
Index

Based on a D2
Baseline

Allows continued
use of
groundwater in
both States

Adjustments to
allow 57%-43%
division of Project
Supply

Accounting for
Carryover to
preserve Compact
apportionment

INDEX SUMMARY

- QUANTIFIES THE DELIVERY TO TEXAS AT THE EL PASO GAGE
 - Adjusted for Texas depletions above El Paso
 - Includes “lag-1” adjustment for conditions in previous year
- ALLOWANCES FOR UNDER-DELIVERY AND OVER-DELIVERY (LIKE COMPACT UPSTREAM)
- ADJUSTMENTS FOR COMPACT SPILLS, VERY-LOW SUPPLY CONDITIONS, INCREASING TEMPERATURES, AND CARRYOVER
- INTERMEDIATE TRIGGER LEVELS FOR REMEDIAL ACTIONS

UNDER AND OVER DELIVERY LIMITS

UNDER-DELIVERY LIMITS:

1. LIMITS ON THE ACCRUED UNDER-DELIVERIES: 150,000 AF FOR THE FIRST 5 YEARS; 120,000 AF THEREAFTER
2. MAXIMUM UNDER-DELIVERY THAT CAN BE CHARGED IN ANY ONE YEAR 90,000 AF
3. TRIGGER AT 80,000 AF REQUIRES NM TO UNDERTAKE CORRECTIVE ACTION. THIS STARTS A 6 YEAR PERIOD FOR REDUCING ACCRUED UNDER-DELIVERIES

OVER-DELIVERY LIMITS:

1. NO TOTAL LIMIT ON ACCRUED OVER-DELIVERIES
2. MAXIMUM OVER-DELIVERY IN ANY ONE YEAR OF 67,500 ACRE-FEET
3. TRIGGER AT 30,000 AF INITIATES A 3 YEAR PERIOD FOR REDUCING ACCRUED UNDER-DELIVERIES

PROJECTED DEPARTURES

(FROM NOVEMBER 14, 2022 FILING)

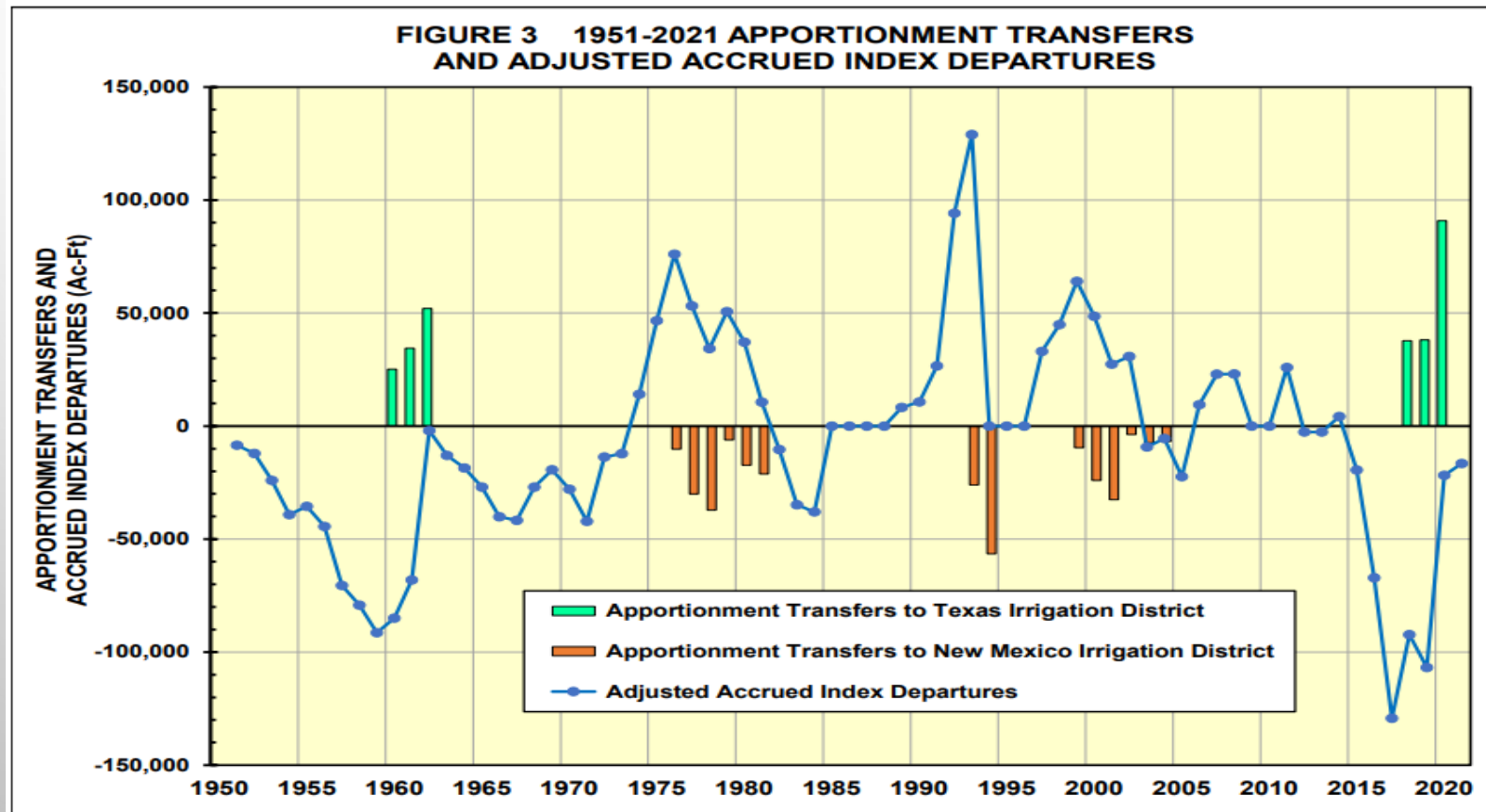
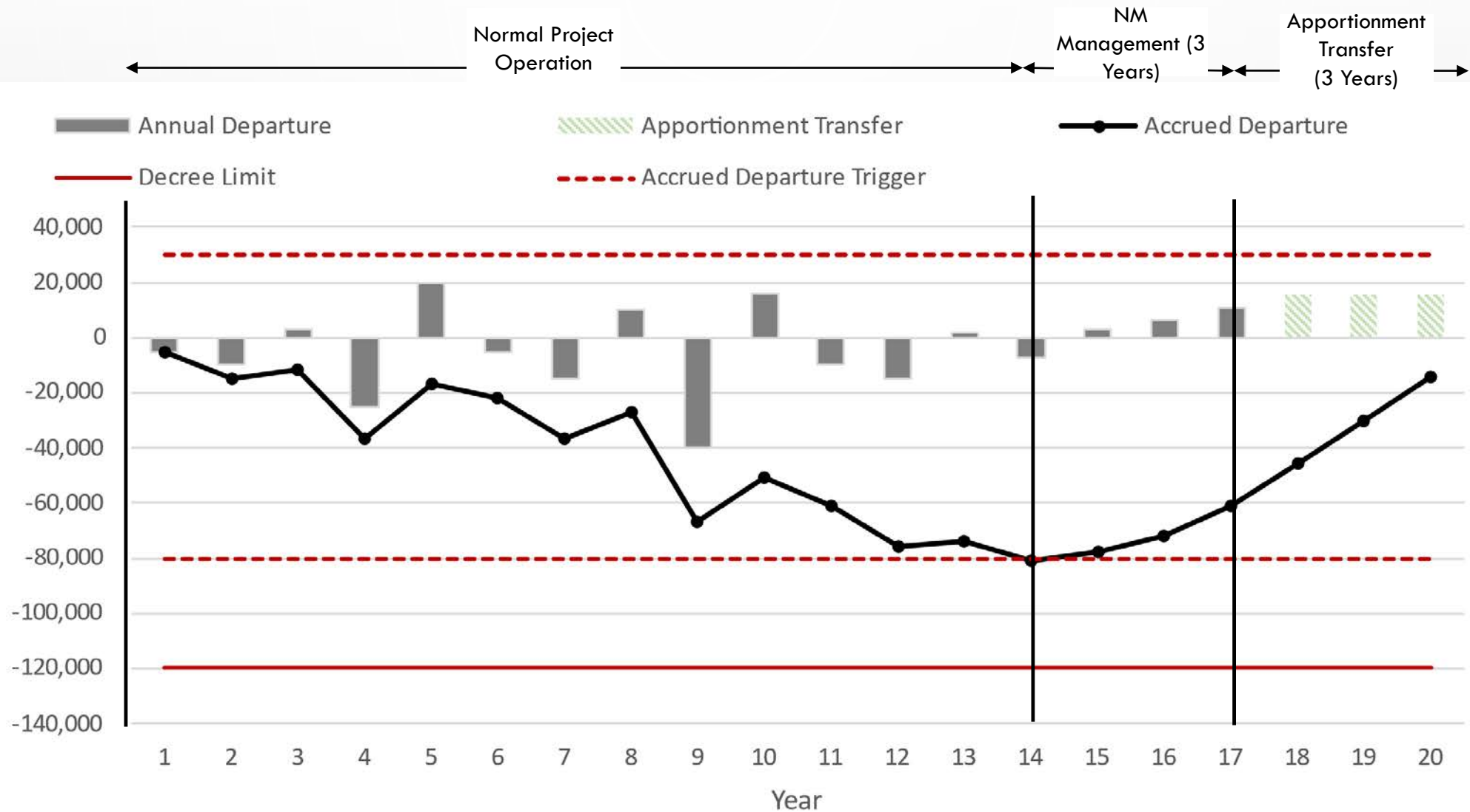


Illustration of Index Accounting Accrued Departure Trigger (acre-feet)



SCHEDULE FOR CONSIDERATION OF SPECIAL MASTER'S RECOMMENDATION ON THE CONSENT DECREE

October 6, 2023:
Exceptions to the
Third Interim
Report

December 4,
2023:
Replies (if
necessary)

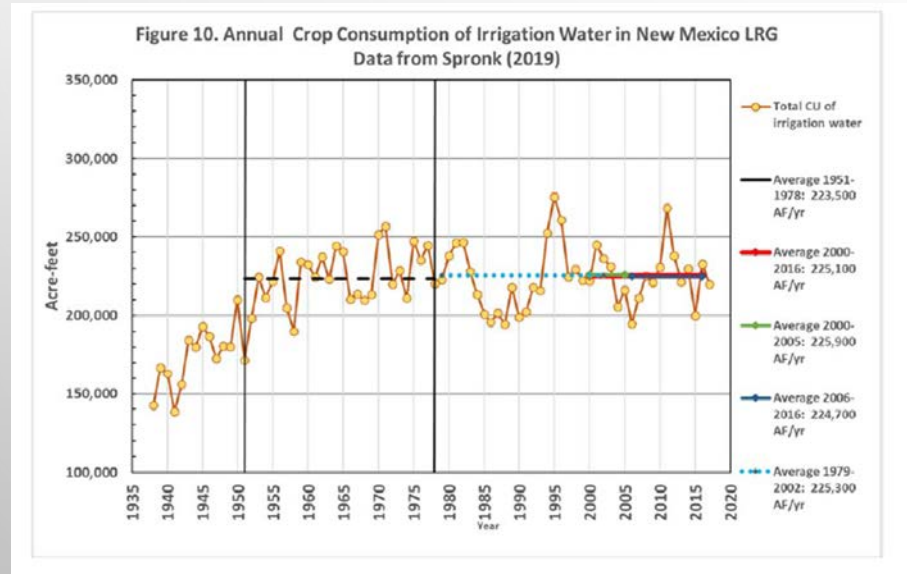
January 3, 2023
Sur-replies (if
necessary)

ISSUES PRESENTED BY THE RECOMMENDATION TO ADOPT THE CONSENT DECREE

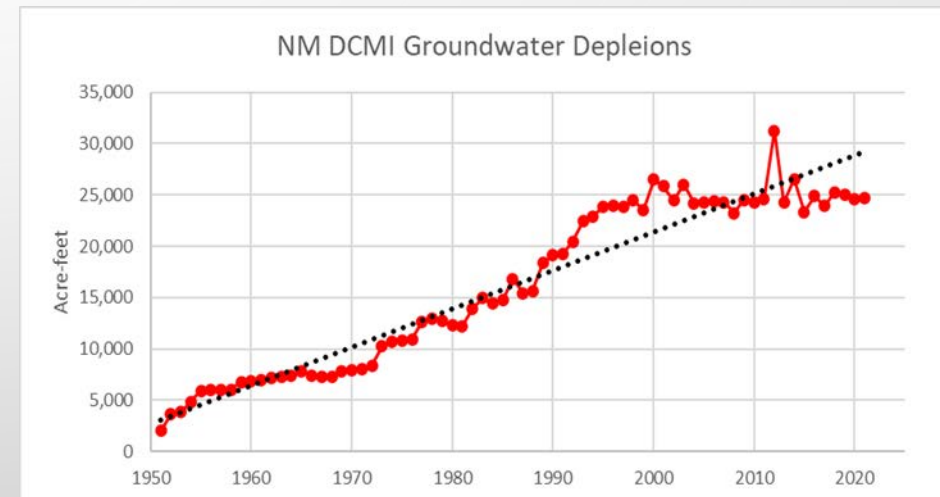
1. Which is primary - the Compact or Reclamation law?
2. Does the Consent Decree improperly dispose of any Compact claims of the United States?
3. Is the Consent Decree consistent with the Compact?
4. Does the Consent Decree impose new legal obligations on the United States?

IMPLEMENTING THE CONSENT DECREE: POST-D2 DEPLETIONS IN THE LRG

AGRICULTURAL DEPLETIONS



MUNICIPAL DEPLETIONS



AS A PRACTICAL MATTER, WHAT IS NECESSARY TO MEET THE INDEX?

**Offset
Depletions**

Offset post-D2 Depletions/Reduce depletions to D2 level

**Manage
Groundwater**

Manage groundwater in order to ensure compliance with the Compact and Consent Decree