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

STATE OF NEW MEXICO'S MOTION FOR PARTIAL JUDGMENT ON MATTERS PREVIOUSLY DECIDED AND BRIEF IN SUPPORT

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December 26, 2018

INTRODUCTION

Pursuant to the Case Management Plan ("CMP"), as Amended on November 21, 2018, the State of New Mexico ("New Mexico") submits this Motion for Partial Judgment on Matters Previously Decided ("Motion") to address the issues that are "law of the case." By this Motion, New Mexico respectfully moves for an order declaring that the following principles—and only the following principles—have been previously decided and constitute law of the case:

1. Assuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaints are true, both Texas and the United States have pled valid claims arising under the Compact. *See Texas v. New Mexico*, 138 S. Ct. 349 (mem.) (2017).
2. The Compact applies below Elephant Butte. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018).
3. The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir. *Id*. at 957.
4. The Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas. *Id*. EBID and EPCWID agreed to pay charges in proportion to the amount of land in each district, and in turn 57% of the water was allocated to New Mexico and 43% of the water was allocated to Texas. *Id*.
5. The Compact incorporates the "Downstream Contracts" and the Project to the extent not inconsistent with the express language of the Compact. *Id*. at 957-59.
6. The Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte to Fort Quitman. *Id*. at 959.
7. The apportionment is based on the Downstream Contracts and the operation of the Project. *Id*. at 957-59.
8. The United States has obligations that arise under the Compact. Those obligations

include the duty to deliver a certain amount of water through the Project to assure that the Compact's equitable apportionment to Texas and part of New Mexico is made. *Id*. at 959.

9. New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir. *Id*.
10. A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico. *Id*.
11. The claims asserted by the United States do not and may not expand the scope of this litigation beyond what was alleged in Texas's Complaint. *Id*. at 960.

The grounds for New Mexico's motion are set forth more fully below, as well as in any reply or response brief New Mexico may file and any arguments New Mexico may present at the hearing scheduled for February 19, 2019 before the Special Master.

As demonstrated below, there is no basis to conclude the Court has made final, binding decisions on any issues beyond the issues outlined above. The Court's opinion on exceptions to the First Interim Report of the Special Master (also referred to as "FIR" or "Report") addressed no other issues, and its summary denials of New Mexico's Exceptions to the Report and Motion to Dismiss provide no reasoned basis for holding the Court approved any other conclusions or recommendations from the Report.

Compact interpretation is a critical issue, and the Parties to this case need the reasoned guidance of the Court, issued with the benefit of a fully developed record, to guide their application and administration of the Compact. Allowing full development of the issues in this case will assist the Court in resolving this dispute in a fair and efficient manner, and will not prejudice any Party.

BACKGROUND

I. Events Leading to the Present Dispute

1. The Rio Grande Compact ("Compact") was signed by New Mexico, Texas, and Colorado in 1938 to apportion the waters of the Rio Grande River among Colorado, New Mexico, and Texas. Act of February 25, 1905, ch. 798, 33 Stat. 814.

2. At the time the Compact was signed, the Rio Grande Project ("Project") had been operating as a unit for over twenty years. During this period, the Project operated under and was protected by Reclamation law. The United States Bureau of Reclamation ("Reclamation") obtained a water right for the Project by filing its notices of appropriation with the Territory of New Mexico in 1906 and 1908. *See* Exception of the United States at 3 (filed June 2017).

3. Since the adoption of the Compact, both Texas and New Mexico have developed significant groundwater resources south of Elephant Butte. The effect of that groundwater pumping on the Rio Grande was incorporated into Project accounting in the 1980s.

4. New Mexico takes its Compact obligations seriously. Neither Texas nor the United States allege that New Mexico has failed to comply with the explicit delivery obligations in Article IV of the Compact, and this case represents the first time that any court has suggested that the Compact may apply below Elephant Butte. *See City of El Paso v. Reynolds*, 563 F. Supp. 379, 385 (D.N.M. 1983) ("New Mexico is not required to deliver anything at the New Mexico-Texas state line. New Mexico's only delivery obligation is set forth in Article IV of the Compact, which designates Elephant Butte Reservoir as the point of delivery."); *Elephant Butte Irrigation Dist. v. Regents of N.M. State Univ.*, 1993-NMCA-009, ¶ 24, 115 N.M. 229, 849 P.2d 372 ("[The] Rio Grande Compact is unique because Texas agreed to have water delivered at Elephant Butte Dam, approximately 100 miles north of the state border; rather than at the state line"); *El Paso Cty. Water*

Improvement Dist. No. 1 v. City of El Paso, 133 F. Supp. 894, 907 (W.D. Tex. 1955) (New Mexico's Compact "delivery is made into the reservoir of the Elephant Butte Dam").

5. The water rights of all water users in the Rio Grande Basin, including Elephant Butte Irrigation District ("EBID") and the United States, in New Mexico, are currently being determined in a water adjudication in state court. *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888 (N.M. 3d Jud. Dist. Ct.). In 2010, Reclamation filed its statement of claim with the adjudication court. *See* United States Statement of Claim for Water for the Rio Grande Project, *New Mexico ex rel. State Eng'r v. Elephant Butte Irrigation Dist.,* No. CV-96-888 (N.M. 3d Jud. Dist. Ct. Sept. 15, 2010), *available at* https://lrgadjudication.nmcourts.gov. With respect to the Project, the adjudication court confirmed the United States' right to a maximum storage capacity, annual release, and ability to divert as it has done historically, including full use of return flows in harmony with the Compact. *See* Order (1) Granting Summary Judgement Regarding the Amounts of Water; (2) Denying Summary Judgement Regarding Priority Date; (3) Denying Summary Judgement to the Pre-1906 Claimants; and (4) Setting a Scheduling Conference, *New Mexico ex rel State Eng'r v. Elephant Butte Irrigation Dist.,* No. CV-96-888, at 2-5 (N.M. 3d Jud. Dist. Ct. Feb. 17, 2014), *available at* https://lrgadjudication.nmcourts.gov; Order Denying Joint Motion to Stay Proceedings in Stream System Issue 104, *New Mexico ex rel State Eng'r v. Elephant Butte Irrigation Dist.*, No. CV-96-888, at 7 (N.M. 3d Jud. Dist. Ct. June 19, 2014), *available at* https://lrgadjudication.nmcourts.gov (recognizing that "reuse of seepage and return flow was a necessary component of the Project").

6. In 2008, the United States entered into an operating agreement with EBID and El Paso County Water Irrigation District No. 1 ("EPCWID") that altered Project accounting, including accounting for groundwater. *See* U.S. Bureau of Reclamation, Dep't of the Interior,

Operating Agreement for the Rio Grande Project at 6 (March 10, 2008), *available at* http://www.usbr.gov/uc/albuq/rm/RGP/pdfs/OperatingAgreement2008.pdf ("2008 Operating Agreement"). Neither Texas nor New Mexico were parties to the 2008 Operating Agreement. New Mexico filed suit in federal district court in 2011 challenging the 2008 Operating Agreement as well as Reclamation's unauthorized release of New Mexico's Compact Credit Water. Complaint, *New Mexico v. United States*, No. 11-CV-0691 (D.N.M. Aug. 8, 2011).

II. Texas's Complaint

7. In 2013, Texas sought leave to file a bill of complaint against New Mexico to enforce the Compact. Texas complains that New Mexico has depleted Texas's equitable apportionment by allowing diversion of surface water and pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir. Texas requests declaratory relief, a decree directing New Mexico to deliver water to Texas in accordance with the Compact, and damages. Tex. Compl. ¶¶ 15-16.

8. On January 27, 2014, the Court granted Texas leave to file and invited New Mexico to file a motion to dismiss in the nature of a motion pursuant to Federal Rule of Civil Procedure 12(b)(6).

III. The United States' Complaint

9. On March 31, 2014, the Court granted the United States leave to intervene as a plaintiff. *Texas v. New Mexico*, 572 U.S. 1032 (mem.) (2014).

10. In its Complaint in Intervention, the United States agrees with Texas that "New Mexico has allowed the diversion of surface water and the pumping of groundwater that is hydrologically connected to the Rio Grande downstream of Elephant Butte Reservoir" in excess of Project allocations. U.S. Compl. ¶ 13. The United States further alleges that the diversions in

New Mexico violate federal Reclamation law. *Id*. at ¶¶ 12-13.

11. The United States seeks declaratory relief and injunctive relief to protect Project operations. U.S. Exception at 22.

IV. New Mexico's Motion to Dismiss

12. On April 30, 2014, New Mexico filed its Motion to Dismiss. The Motion to Dismiss was in the nature of a motion under Rule 12(b)(6) and asserted that even when the well-pleaded factual allegations were accepted as true for purposes of the motion, the complaints failed to show that either Texas or the United States was entitled to relief. Mot. to Dismiss at 22 (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)). New Mexico's primary argument was that the complaints failed to state a claim because they rested on the incorrect notion that the Compact imposes a stateline delivery requirement. Relying on previous federal district court cases that had addressed the issue, New Mexico asserted that the Compact did not control actions below Elephant Butte.

13. In response, Texas countered that the Compact governed actions below Elephant Butte by incorporating the 1938 contracts with EBID and EPCWID, Project operations, and principles of Reclamation law. Tex. Resp. to New Mexico's Mot. to Dismiss at 35-45. It asserted that the "legal framework" below Elephant Butte is defined by Reclamation law. *Id*. at 7-8, 41. In Texas's words, the "existence and operation of the Rio Grande Project . . . and reclamation law governing federal reclamation projects" forms the "background understanding" on the basis of which the Compact was drafted and executed. *Id*. at 35-36.

14. The United States similarly argued that "the Compact incorporates the Project." U.S. Resp. to New Mexico's Mot. to Dismiss at 52. It asserted that "[t]he Court should deny New Mexico's motion to dismiss because Texas and the United States have stated claims under the

Compact upon which relief can be granted." *Id*. at 22.

V. The First Interim Report

15. On February 9, 2017, Special Master Grimsal issued his First Interim Report (also referred to as "FIR" or "Report") in which he recommended denial of the Motion to Dismiss. In drafting the Report, Special Master Grimsal conducted extensive independent research on which the parties had no opportunity to comment. FIR 31-187. Based on this independent research, Special Master Grimsal made numerous findings about the "historical context" for the Compact and the dispute, although he indicated that these findings should not be construed as findings of fact for purposes of ruling on the Motion to Dismiss. *Id*.

16. On the merits of the Motion to Dismiss, Special Master Grimsal found that the Project is "wholly incorporated throughout the 1938 Compact," and, therefore, the Compact applies below Elephant Butte. FIR 195. Based on this principle, and taking the allegations in the complaints as true, he concluded that it would be a violation of the Compact, as alleged by Texas and the United States, for New Mexico to "simply recapture water it delivered to the Project." *Id*. at 209.

17. Special Master Grimsal also recommended granting in part the Motion to Dismiss the United States' claims to the extent the claims were based on the Compact. FIR 217-37.

VI. Exceptions to the First Interim Report

18. On March 20, 2017, the Court received the Report and ordered it filed, permitting the parties to file exceptions. *Texas v. New Mexico*, 137 S. Ct. 1363 (mem.) (2017).

19. New Mexico, Colorado, and the United States all filed exceptions. For its part, New Mexico "accede[d] to the recommendations of the Special Master that its Motion to Dismiss Texas's Complaint be denied, [and] that its Motion to Dismiss the United States' Complaint in

Intervention be denied. . . ." New Mexico thereby recognized that "the case [would] move forward to resolve claims among Texas, New Mexico, and the United States." NM Exceptions at 1.

20. Nevertheless, out of an abundance of caution, New Mexico took four exceptions to dicta and reasoning in the Report. *Id*. at 1-2. The first three of New Mexico's exceptions focused on language in the Report that was ambiguous, but that could be interpreted as a finding that New Mexico has surrendered all regulatory authority and jurisdiction over water in the Lower Rio Grande. In the end, New Mexico recommended that the Court deny the Motion to Dismiss, recommit the case to the Special Master, and affirmatively state that it was not adopting the reasoning articulated in the Report. *Id*. at 2-3.

21. In response, Texas requested "that the Court adopt the First Report" and "direct the Special Master to proceed to hear the issues raised in the Texas Complaint, consistent with his determination in the First Report." Texas's Reply to Exceptions to First Interim Report of Special Master at 49 ("Tex. Rep. to Exceptions").

22. In contrast to Texas, the United States agreed with New Mexico that neither the Compact nor the doctrine of equitable apportionment require New Mexico to surrender regulatory authority over water in the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line. U.S. Reply to Exceptions at 6, 15-16. It interpreted the Report narrowly to mean only that "New Mexico cannot administer water in way that conflicts with the Compact's equitable apportionment." *Id*. at 16. Based on this understanding, the United States argued that New Mexico's exceptions should be overruled because they represented a "considerable overreading of isolated statements in the Master's Report." *Id*. at 4.

23. The United States also explicitly recognized that New Mexico law continues to apply to Project water deliveries. *Id*. at 9. It acknowledged that "[s]tate law . . . protect[s] Project

water deliveries (including to Texas and Mexico) from interference or impairment." *Id*. The United States cautioned that the Compact imposes "limits on how [New Mexico] may exercise its authority over water," but noted that "[t]he extent of the limitations imposed by the Compact" have yet to be determined in this proceeding. *Id*. at 16.

24. The United States further explained that the Court is not being asked to "determine or redetermine the Project's water right" in this case, *id*. at 14, but rather the Court's interpretation of the Compact will "inform the state water adjudication, not usurp it." *Id*. at 12.

25. Colorado filed two exceptions. The first was to the scope of the United States' claims, and the second urged the Court to "refrain from adopting [the] findings and conclusions of the Report until the parties have the opportunity to conduct discovery, present evidence, and make arguments on those issues." Col. Exception at 9-10.

26. The United States excepted to the recommendation to dismiss its claims arising under the Compact.

VII. The Court's Rulings

27. The Court did not follow Texas's request that the First Interim Report "be adopted in full," Tex. Rep. to Exceptions at 1, or New Mexico's request that it affirmatively disavow the reasoning in the Report, NM Exceptions at 3. Instead, it entered a one line order that "New Mexico's motion to dismiss is DENIED." *Texas v. New Mexico*, 138 S. Ct. 349 (mem.) (2017) ("First Order").

28. Thereafter the Court issued its Opinion on Exceptions to Report of Special Master ("Opinion"). *Texas v. New Mexico*, 138 S. Ct. 954 (2018). The Opinion addressed "only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already had?"

29. With respect to New Mexico's exceptions, the Court noted only that it "accepted [the] recommendation" of the "Special Master . . . [to] deny New Mexico's motion to dismiss Texas's complaint," *id.* at 958, but it did not analyze the issue, or New Mexico's exceptions, any further. In keeping with customary practice in original actions, at the end of its Opinion, the Court also "overruled" all other exceptions. *Id.* at 960. But at no point did the Court adopt or endorse the principles or reasoning in the First Interim Report.

ARGUMENT

Although the law of the case doctrine does not fully apply in original actions, and is discretionary when applied to a court's own rulings, New Mexico acknowledges that the Court has decided some issues in this matter. Accordingly, New Mexico moves for a ruling that certain issues addressed in the Court's opinion on the United States' and Colorado's exceptions to the Report have been decided in this matter, as discussed in Section II, below. Beyond these specific issues, however, the Court has not made any final decisions, and the Special Master and the Court should reserve judgment on the remaining issues, allow the Parties to collect relevant evidence through discovery, and fully and carefully address the issues in this case with the benefit of a fully developed record.

I. Standard of Decision

The "law of the case" doctrine "is an amorphous concept" that "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618 (1983) (citing 1B J. Moore & T. Currier, *Moore's Federal Practice*, at ¶ 0.404 (1980)). Law of the case is discretionary, *id.*; *see also Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (acknowledging the Court's authority to reconsider a long-standing ruling), and applies only to issues that are "fully briefed and squarely

decided." 1B James Wm. Moore, *Moore's Federal Practice*, at ¶ 0.404[1] (2d ed. 1996). Law of the case "comes into play only with respect to issues previously determined." *Quern v. Jordan*, 440 U.S. 332, 347 n. 18 (1979). Given the unique nature of the Court's original jurisdiction, the Court has "been reluctant to import wholesale law-of-the-case principles into original actions," but has explained that prior rulings "'should be subject to the general principles of finality and repose.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992).

Generally, a threshold determination for a law of the case analysis is whether the prior ruling "intended to put a matter [to] rest." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4478.5. "Preliminary or tentative rulings," such as the denial of a motion to dismiss, "do not establish law of the case." *Id*. *See, e.g., Walsh v. McGee,* 918 F. Supp. 107, 111 (S.D.N.Y. 1996) (denial of a motion to dismiss did not establish the law of the case because law of the case principles only apply to issues that have explicitly and necessarily been decided).

As one leading commentator has explained, the law of the case doctrine applies only to issues that were "fully briefed and squarely decided." 1B James Wm. Moore, *Moore's Federal Practice*, at ¶ 0.404[1] (2d ed. 1996). Put another way, the prevailing rule is that law of the case only prevents re-examination of matters that were "discussed and decided" in a prior opinion. *Seagraves, v. Wallace*, 69 F.2d 163, 164 (5th Cir. 1934). It is therefore critical to determine what issues were actually decided in order to define the law of the case. "This requires a careful reading of the Court's opinion: observations, commentary, or mere dicta touching upon issues not formally before the court do not constitute binding determinations." *Gertz v. Robert Welch, Inc.*, 680 F.2d 527, 533 (7th Cir. 1982). The gist of the doctrine is that once a superior court "either expressly or by necessary implication decides an issue, the decision will be binding upon all subsequent

proceedings in the same case." *Key v. Sullivan*, 925 F.2d 1056, 1060 (7th Cir. 1991).

Taken together, the relevant inquiry for the purposes of this Motion is what issues were discussed and decided by the Court, either directly, or by necessary implication.

II. Principles that Were Unambiguously Decided by the Court Are Law of the Case

New Mexico supports the goals of efficiently and fairly litigating this case. To that end, those principles that were "discussed and decided" by the Court in its orders on the First Interim Report should be considered resolved and binding on subsequent proceedings in this case. *Seagraves*, 69 F.2d at 164. Based on the decisions of the Court, New Mexico moves for on order declaring that the following principles—and only the following principles—have been previously decided and constitute law of the case:

1. Assuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaints are true, both Texas and the United States have pled valid claims arising under the Compact, *see Texas v. New Mexico*, 138 S. Ct. 349 (mem.) (2017).
2. The Compact applies below Elephant Butte. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018).
3. The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir. *Id*. at 957.
4. The Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas. *Id*. EBID and EPCWID agreed to pay charges in proportion to the amount of land in each district, and in turn 57% of the water was allocated to New Mexico and 43% of the water was allocated to Texas. *Id*.
5. The Compact incorporates the Downstream Contracts and the Project to the extent not inconsistent with the express language of the Compact. *Id*. at 957-59.

6. The Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte to Fort Quitman. *Id*. at 959.
7. The apportionment is based on the Downstream Contracts and the operation of the Project. *Id*. at 957-59.
8. The United States has obligations that arise under the Compact. Those obligations include the duty to deliver a certain amount of water through the Project to assure that the Compact's equitable apportionment to Texas and part of New Mexico is made. *Id*. at 959.
9. New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir. *Id*.
10. A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico. *Id*.
11. The claims asserted by the United States do not and may not expand the scope of this litigation beyond what was alleged in Texas's Complaint. *Id*. at 960.

Each of these principles was unambiguously considered and "squarely decided" by the Court. 1B James Wm. Moore, *Moore's Federal Practice*, at ¶ 0.404[1] (2d ed. 1996). Indeed, for the most part, the statements above closely track the actual language of the Court's opinion. Clarifying that each of these principles has been previously decided and is binding on the remainder of the case will advance the litigation and serve the purposes of "finality and repose." *Wyoming v. Oklahoma*, 502 U.S. at 446.

III. Principles that Were Not Unambiguously Adopted Are Not Law of the Case

The remaining issues and reasoning from the Report were not "discussed and decided" by the Court itself, and should not be considered conclusively resolved. *Seagraves*, 69 F.2d at 164.

In particular, no substantive principles can be deemed resolved by virtue of the perfunctory phrase that "all other exceptions are overruled." As discussed below, the Special Master should reserve judgement and allow evidence on the remaining issues for seven related reasons: (1) the interpretation of the Rio Grande Compact is a critical issue that demands the full attention of the Court; (2) the remaining issues were not finally decided by the Court; (3) the Report is not a final judgment and cannot be considered law of the case; (4) the Court did not adopt the Report and did not decide the merits of any additional issues, including by necessary implication; (5) the Court will benefit from a fully developed record; (6) the Report is ambiguous on the remaining issues; and (7) no party will suffer prejudice from the prudent and restrained approach advocated by New Mexico.

A. The Interpretation of the Rio Grande Compact Is a Critical Issue that Demands the Full Attention of the Court

New Mexico seeks only its fair share of the waters of the Rio Grande. For years, New Mexico attempted to work cooperatively with Texas and the United States to achieve this result. Only after years of watching Reclamation change the rules of Project operations for the benefit of Texas, altering the allocation of Compact-apportioned water between Texas and New Mexico in the process, did New Mexico resort to federal court to challenge the 2008 Operating Agreement and protect its citizens. It was that action that provoked Texas to file the present lawsuit. New Mexico's goal in this case is to secure an interpretation of the Compact that allows for its fair and effective administration for years to come. Achieving that result necessarily depends on the Court offering direct guidance based on a fully developed record.

In original actions, the Court serves "as a substitute for the diplomatic settlement of controversies between sovereigns and a possible resort to force." *Kansas v. Nebraska*, 574 U.S. __, 135 S. Ct. 1042, 1051 (2015) (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 372-73

(1923)). Original actions therefore involve issues of "grave and far-reaching importance." *Kansas v. Colorado*, 185 U.S. 125, 145 (1902). This case is no exception. Water from the Rio Grande supports over a million people between Elephant Butte Dam in New Mexico and Fort Quitman in Texas and serves as the life blood for a thriving agricultural industry on both sides of the state line. It is not an exaggeration to say that the outcome of this case will impact generations of Texans and New Mexicans and guide the distribution of water into the foreseeable future.

Despite the Rio Grande's critical importance to the communities between Elephant Butte and Fort Quitman, the Compact does not contain explicit terms discussing the apportionment or use of water in this area. As discussed, this has led to decades of confusion over whether, and to what extent, the Compact controls the use and division of the Rio Grande's waters below Elephant Butte. *See, e.g., City of El Paso v. Reynolds*, 563 F. Supp. 379, 385 (D.N.M. 1983) (holding the Compact did not apportion the surface waters of the Rio Grande below Elephant Butte). The Court has now provided some guidance to the parties by ruling that the Compact does apply below Elephant Butte, apportioning the river on the basis of the Compact's incorporation of the Downstream Contracts and Project operations by allocating 57% of Project water to New Mexico and 43% to Texas. *Texas v. New Mexico*, 138 S. Ct. at 957-59. Yet these broad conclusions do not resolve many important issues that will be critical for future administration of the Compact, including but not limited to the issues New Mexico raised in its April 13, 2018 letter to the Special Master regarding unresolved issues in this case. In light of the importance of these issues to the fair and effective resolution of this case, as well as the communities and economies of New Mexico and Texas, the parties need clear, detailed guidance from the Court as to the meaning and application of the Compact in this area.

B. The Remaining Issues Were Not Finally Decided by the Court

Tactical litigation positions aside, it cannot be reasonably asserted that the Court has fully addressed the critical Compact interpretation issues raised in the Report and associated exceptions. The best that can reasonably be taken from the Court's superficial denial of the Motion to Dismiss and overruling of all other exceptions is that the Court has evaluated the relative positions of the Parties, resolved preliminary matters related to the pleadings and parties, and positioned the case for litigation. The Court's one-sentence statement overruling New Mexico's exceptions, *id*. at 960, says nothing about the merits of the Report, or even on what basis the Court overruled those exceptions. Whatever the Court's purpose, it is hard to imagine the Court intended to provide a substantive interpretation of the Compact that would forever rule the equitable apportionment through its three measured statements on the Motion to Dismiss and New Mexico's exceptions. 138 S. Ct. at 960.

The United States appears to agree that critical Compact issues remain to be resolved, including "[w]hether non-Project diversions in New Mexico that deplete waters of the Rio Grande apportioned by the Compact violates [sic] . . . the Compact" and "[w]hether the Compact allows New Mexico to take or reallocate water from the Rio Grande Project water supply." U.S. Letter to the Special Master (Apr. 13, 2018). While New Mexico takes issue with the United States' characterization of these issues, and further asserts the United States' list of unresolved issues is incomplete, it is evident the United States and New Mexico agree that many fundamental issues, including issues discussed in the Report, remain unresolved in this case. In light of the serious consequences at stake in this case, the issues deserve no less than full attention from the Court addressing the merits of Compact interpretation. The Special Master should decline any invitation from Texas or the United States to prematurely decide the issues, and should allow a fair

opportunity to litigate the issues so that the Court can provide the considered, substantive guidance all Parties deserve. *See* Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d* § 4478.5 ("If . . . the issues [are] especially important, it may be said that law-of-the-case principles do not apply").

C. The Report Is Not a Final Ruling and Does Not Bind the Court or the Special Master

Regardless of whether the Report purports to decide issues beyond those the Court expressly addressed, the Report does not bind the Court or Parties as to those issues. Justice Holmes noted that the law of the case doctrine "merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912). This is especially true in this original action, where, as noted, the law of the case doctrine does not strictly apply. *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992).

Even in normal litigation in federal district court, "[t]he rule of the law of the case does not apply unless there is a final judgment that decided the issue." *United States v. Bettenhausen*, 499 F.2d 1223, 1230 (10th Cir. 1974) (citing *United States v. United States Smelting Co.*, 339 U.S. 186, 198-199 (1950) ("it requires a final judgment to sustain the application of the rule of the law of the case"); *Fontainbleau Hotel Corp. v. Crossman*, 286 F.2d 926, 928 (5th Cir. 1961)). Put simply, "[i]nterlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case." *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994); *accord*, Fed. R. Civ. P. 54(b) (providing that until the court expressly directs entry of final judgment, an order that resolves fewer than all of the claims "may be revised at any time"); *Elephant Butte Irrigation Dist. of N.M. v. U.S. Dept. of Interior*, 538 F.3d 1299, 1306 (10th Cir. 2008) (finding no error where second judge, following reassignment, granted summary

judgment on renewed motion following denial by prior judge because Fed. R. Civ. P. Rule 54(b) "expressly allows for revision of an interlocutory order before entry of final judgment").

Regardless of which issues the Report discussed, it addressed only a motion to dismiss for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). The sole question before Special Master Grimsal was the narrow question of whether Texas and the United States could "prove [any] set of facts in support of [their] claim[s] which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The Report cannot be considered a final judgment on any issue and cannot sustain a ruling that any conclusions it purports to have made are law of the case in this matter.

D. The Court Did Not Adopt the First Interim Report and Did Not Decide the Merits of Any Additional Issues, Including by Implication

As discussed above, in this case, the Court considered only the United States' exception and the first exception of Colorado, both of which pertained only to the issue of the United States' role in this litigation. In deciding these exceptions, the Court explicitly addressed "*only a preliminary and narrow question*," namely whether "the United States, as an intervenor, [may] assert essentially the same claims Texas already has?" 138 S. Ct. at 956 (emphasis added). The Court carefully confined its discussion, analysis, and decision to that issue. Indeed, everything in the Court's opinion can be read as directed toward addressing only that narrow issue before it, and no other. New Mexico has attempted to faithfully distill the principles that were unambiguously decided by the Court. Those principles are articulated in Section II, *supra*. Any remaining issues in this case were not before the Court, were not directly or expressly addressed by the Court, and cannot be deemed to have been conclusively decided.

Nor did the Court, in overruling New Mexico's and Colorado's exceptions, resolve any additional issues raised in these exceptions by necessary implication. New Mexico's motion to

dismiss was based on the guidance of previous federal courts. In 1983, the City of El Paso, an *amicus* to this action, sought to appropriate water from New Mexico to export to Texas. New Mexico argued that El Paso's application to appropriate water was governed by the Compact because the Compact controlled the allocation of water below Elephant Butte. Raising an argument directly at odds with the position taken by Texas in this case, the City of El Paso succeeded in convincing the federal district court that "the Rio Grande Compact does not apportion the surface waters of the Rio Grande below Elephant Butte between New Mexico and Texas." *City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 382 (D.N.M. 1983). Until this case arose, New Mexico considered that ruling binding on it, and that ruling on the limited reach of the Compact formed the basis for its Motion to Dismiss. Unlike Texas's mischaracterization of New Mexico's argument as suggesting that New Mexico residents could intercept surface water and hydrologically connected groundwater without restriction once it was released from Elephant Butte, the argument made in the Motion to Dismiss simply relied on previous rulings to suggest that any necessary restrictions on water use below Elephant Butte arose from New Mexico law and Reclamation law, rather than from the Compact itself.

The question presented in the Motion to Dismiss—did Texas have a cause of action *arising out of the Compact* for actions below Elephant Butte—did not require resolution of additional issues, and no other issues were squarely presented to the Court. That being said, New Mexico accepts that a necessary implication of the denial of the Motion to Dismiss is that the Compact may provide constraints on New Mexico's authority below Elephant Butte. But as the United States admits, New Mexico law continues to apply to Project water deliveries below Elephant Butte, subject to the express limitations of the Compact, but "[t]he extent of the limitations imposed by the Compact" have yet to be determined in this proceeding. U.S. Reply on Exceptions

at 16; *see also id.* at 9. As a result, no other issues were decided by the Court.

It is tempting to assign implicit significance to the Court's routine statement that it was overruling the remaining exceptions that it did not explicitly address. That would be a mistake for three related reasons. First, the Court itself is responsible for all findings and conclusions in original actions. This is so because the Constitution commits resolution of original cases to the Supreme Court, and the Court therefore bears "ultimate responsibility" for the decisions. *Colorado v. New Mexico,* 467 U.S. 310, 317 (1984); *see also South Carolina v. North Carolina,* 558 U.S. 256, 278 (2010) ("But the responsibility for the exercise of this Court's original jurisdiction remains ours alone under the Constitution."). Because the Court must make all determinations, the principles, conclusions, and reasoning of a report are not effective unless expressly adopted by the Court.

Here the Court never expressly adopted the Special Master's Report. Although the Court has previously explicitly adopted, approved, confirmed, or accepted the findings in other Special Master reports, it did not do so in this case. For example, in *Texas v. New Mexico,* No. 65 Original (the Pecos River case), the Court heard oral argument before overruling the exceptions. In its decision, the Court indicated that "the report is in all respects *confirmed*, and the ruling of the Special Master . . . is *approved*." 446 U.S. 540 (emphasis added); *see also Illinois v. Indiana,* 338 U.S. 856 (1949) (holding "[t]he Fourth Special Report of the Special Master is approved"); *State of Washington v. State of Oregon*, 297 U.S. 517, 523 (1936) ("Accepting [the factual findings], as we do, we accept also the conclusion to which they point with inescapable directness."). In other words, the Court knows how to adopt a Special Master's report if it is so inclined, and its failure to do so here should be understood as intentional, particularly in light of New Mexico's exceptions and Colorado's second exception regarding the extensive independent research and reasoning

unnecessary to the ultimate recommendation contained in the Report.

Second, courts are reluctant to ascribe meaning to summary orders if there is more than one basis to construe the decision. An illustrative case is *Oladeinde v. City of Birmingham*, 230 F.3d 1275 (11th Cir. 2000), in which the court considered the effect of a summary order on the issue of qualified immunity. The *Oladeinde* court explained that "[w]here a previous [court] has given no explanation for its decision, a subsequent [court] is not bound" by law of the case "unless a determination by [the court] concerning the propriety of [the summary order] is necessarily inconsistent with every possible correct basis for the [order]." *Id*. at 1289-1290. Put another way, if there is more than one "correct basis" for a summary action, it is not possible to deem the issue to be conclusively decided.

Here there are multiple possible bases for the Court's summary denial of New Mexico's Motion to Dismiss that do not implicate the merits of the case, including the fact that New Mexico had acceded to the recommendation (although explicitly not all of the reasoning behind the recommendation), a finding that the complaints satisfied the bare minimum pleading requirements, and the possibility that the Court may have desired further development of the record before opining on the meaning of the Compact.

And while the Court also overruled New Mexico's exceptions to some of the reasoning supporting the Report's recommendation that New Mexico's Motion to Dismiss be denied, it once again did so summarily. 138 S. Ct. at 960. As a result, there is no basis for the Parties or Special Master to conclude whether the Court premised its order on agreement with the Report's reasoning, agreement with the United States that the Report did not reach the conclusions New Mexico ascribed to it and that New Mexico was ""considerabl[y] overreading . . . isolated statements in the Master's Report," U.S. Reply to Exceptions at 4, or some other reason.

Third, courts typically do not attribute significance to summary affirmances or denials. For example, litigants spend significant effort identifying and briefing issues in certiorari petitions. But "denial of certiorari does not constitute a ruling on the merits." *Barber v. Tennessee*, 513 U.S. 1184, 1184 (1995). Yet, the law of the case doctrine presumes a hearing on the merits. *See United States v. Hatter*, 532 U.S. 557, 565-66 (2001) (reasoning that prior affirmance by an equally divided court did not establish law of the case because the "doctrine presumes a hearing on the merits"). Thus, the Court's cursory denial of New Mexico's Motion to Dismiss, without an explicit adoption of the reasoning of the Special Master's Report, cannot constitute the law of the case on other issues addressed in the Report.

E. The Court Will Benefit from a Fully Developed Record

It has long been recognized that the Court "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases); s*ee also Nebraska v. Wyoming*, 515 U.S. 1, 13 (1995); *United States v. Wyoming*, 331 U.S. 440, 458-59 (1947); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894) ("In the exercise of original jurisdiction . . . this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded"). One of the Court's purposes is to resolve interstate controversies on their merits whenever possible. *Church v. Hubbart*, 6 U.S. 187, 232 (1804) (Marshall, J.) ("[I]t is desirable to terminate every cause upon its real merits, if those merits are fairly before the court, and to put an end to litigation where it is in the power of the court to do so."). In view of that role, the Court has traditionally eschewed reliance on summary procedures and technical principles of pleading in original actions, preferring instead to allow for the full development of the record. *See United States v. Texas*, 339

U.S. at 715; *Kennedy v. Silas Mason Co.*, 334 U.S. 249, 256-57 (1948) ("summary procedures . . . present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice"); *Eccles v. Peoples Bank*, 333 U.S. 426, 434 (1948) ("Caution is appropriate against the subtle tendency to decide public issues free from the safeguards of critical scrutiny of the facts, through use of a declaratory summary judgement"); *Virginia v. West Virginia*, 234 U.S. 117, 121 (1914) (explaining that in an original action it is important to adopt procedures that allow "no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case"). *See also Nebraska v. Wyoming*, 515 U.S. at 13 ("[A]t this stage we certainly have no basis for judging Nebraska's proof, and no justification for denying Nebraska the chance to prove what it can"); Tex. Resp. to New Mexico's Mot. to Dismiss at 15 (recognizing the principles articulated above).

Given the complexity of interstate water disputes, the Court "typically appoint[s] a Special Master [to] benefit from detailed factual findings." *Florida v. Georgia*, 138 S. Ct. 2505, 2515 (2018). Special Masters "have become vitally important" in assisting the Court to manage its original docket. *South Carolina v. North Carolina*, 558 U.S. 256, 278 (2010) (Roberts, C.J., dissenting in part). But the role of a Special Master is advisory because, as previously discussed, any findings of fact or conclusions of law that a Special Master reaches must be approved and adopted by the Court. Because the Court must make all determinations, the principles, conclusions, and reasoning of a report are not effective unless expressly adopted by the Court, which was not done in this case.

If the Special Master enters a premature order disposing of an issue, he will therefore

deprive the Court of the benefit of a record on which to base a decision. This recently occurred in the equitable apportionment case of *Florida v. Georgia*, resulting in piecemeal litigation that is antithetical to the principal of judicial efficiency. *Id.* at 2521 ("At the very least, we believe that more proceedings are necessary to reach a definitive determination."). The Special Master should not make the same mistake in this case. Both the Court and Special Master should have the benefit of a fully developed record before opining on the critical issues raised in this case. For example, evidence and expert testimony on the Compact negotiations and pre-Compact positions of the States, as well as the intertwined and interdependent responsibilities of Reclamation and the State of New Mexico in water distribution and administration will likely be of great value. Special Master Grimsal did not have the benefit of submitted evidence or testimony on these issues before making a recommendation on the disposition of New Mexico's Motion to Dismiss, nor did the Court have the benefit of factual findings on these issues when it addressed the narrow and preliminary issue of the scope of the United States' participation in this case.

Finally, as discussed above, the Motion to Dismiss only tested the sufficiency of pleadings, "assum[ing] that the factual allegations in the Complaint are true" and "draw[ing] inferences from those allegations in the light most favorable to plaintiff." Tex. Resp. to Mot. to Dismiss at 14. The introduction of new evidence, however managed, may be seen as creating new issues that have not been decided and thus lie outside the law of the case. *See, e.g. Bridege v. U.S. Parole Com'n*, 981 F.2d 97, 103-04 (3d Cir. 1992); *Oladeinde*, 230 F.3d at 1290 ("because the complaint did not contain all of the relevant facts that were introduced both at summary judgment and at trial, this court's first opinion affirming the denial of qualified immunity did not establish the law of the case").

F. The Report Is Ambiguous on the Remaining Issues

Courts will not infer the meaning of an uncertain issue from an ambiguous opinion or decision. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4478; *DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994). That is relevant here, because the Parties do not share a common understanding about the meaning or reach of many issues in the Report. For example, the Parties disagree on the meaning of Special Master's discussion of the term "deliver" and its effect on New Mexico's regulatory authority over water in the Lower Rio Grande. On the one hand, Texas reads the term "relinquishment of control" to mean surrender of regulatory authority. Tex. Reply on Exceptions at 25, 32-33. On the other, the United States interprets the same term to mean physical control of water. As discussed above, it recognizes New Mexico's continued regulatory authority over water in the Lower Rio Grande, subject to the express limitations of the Compact. U.S. Reply on Exceptions at 4-5, 16. For its part, New Mexico generally agrees with the United States on this specific issue, but brought its Exceptions in an attempt to foreclose the possibility of a broader reading of the Report's reasoning, such as Texas has advocated. In any event, the Court's failure to explain its own reading of the Report, in light of the Parties' conflicting interpretations, further demonstrates that the Court did not intend for the Parties to be bound by the Report or its reasoning, beyond those issues the Court specifically addressed.

G. No Party Will Suffer Prejudice by A Reserved Judgment on the Remaining Issues

Finally, no party will suffer unfair prejudice from a restrained approach that recognizes that numerous issues, such as those laid out in both New Mexico's and the United States' letters to the Special Master of April 13, 2018, remain to be analyzed and resolved. To be sure, Texas would like to take the Court's cursory denial of New Mexico's motion to dismiss, which New

Mexico had acceded to, and its cursory overruling of remaining exceptions, as a ruling in its favor on the merits of its claims. However, as recognized by the Court, this case is at an early stage. Hundreds of thousands of pages of documents touching on these issues are being exchanged by the Parties, numerous depositions of percipient witnesses have been and will be scheduled, and expert reports guiding this analysis are being prepared. By reserving judgment on those issues remaining in the case, other than those explicitly determined by the Court as detailed in Section II of this brief, the Special Master will afford all of the Parties a full opportunity to prepare and to marshal evidence and argument on each of these issues. That approach is fair, will cause no prejudice to any of the sovereign parties to this dispute, and will facilitate the informed resolution that this case of "high importance" deserves.

CONCLUSION

In sum, New Mexico respectfully submits that the Court's opinion and orders are only law of the case on the direct question posited by the Motion to Dismiss of whether the Complaint states a cause of action, and those subjects that were directly addressed in the Court's opinion. For these reasons, New Mexico moves for order declaring that the following issues constitute the law of the case in this matter and that no other issues have been fully or finally decided:

1. Assuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaints are true, both Texas and the United States have pled valid claims arising under the Compact.
2. The Compact applies below Elephant Butte.
3. The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.
4. The Project was designed to serve 155,000 irrigable acres of land in New Mexico and

Texas. EBID and EPCWID agreed to pay charges in proportion to the amount of land in each district, and in turn 57% of the water was allocated to New Mexico and 43% of the water was allocated to Texas.

5. The Compact incorporates the Downstream Contracts and the Project to the extent not inconsistent with the express language of the Compact.
6. The Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte to Fort Quitman.
7. The apportionment is based on the Downstream Contracts and the operation of the Project.
8. The United States has obligations that arise under the Compact. Those obligations include the duty to deliver a certain amount of water through the Project to assure that the Compact's equitable apportionment to Texas and part of New Mexico is made.
9. New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir.
10. A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico.
11. The claims asserted by the United States do not and may not expand the scope of this litigation beyond what was alleged in Texas's Complaint.

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