

**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 REQUEST FOR A JUDICIAL DECLARATION TO  
CONFIRM THE LEGAL ISSUES PREVIOUSLY DECIDED AND MOTION IN  
LIMINE TO EXCLUDE THE INTRODUCTION OF EVIDENCE THEREON**

**Hearing: February 19, 2019; 9:00 a.m.**

---

Stuart L. Somach, Esq.\*  
Andrew M. Hitchings, Esq.  
Robert B. Hoffman, Esq.  
Francis M. Goldsberry II, Esq.  
Theresa C. Barfield, Esq.  
Brittany K. Johnson, Esq.  
SOMACH SIMMONS & DUNN, PC  
500 Capitol Mall, Suite 1000  
Sacramento, CA 95814  
Telephone: 916-446-7979  
[ssomach@somachlaw.com](mailto:ssomach@somachlaw.com)

*\*Counsel of Record*

December 26, 2018

**TABLE OF CONTENTS**

	<u>Page</u>
I. INTRODUCTION .....	1
II. BACKGROUND .....	3
A. Procedural History .....	3
B. The Texas Complaint.....	5
C. New Mexico’s Motion to Dismiss .....	5
D. The Special Master’s Recommendation to Deny the Motion to Dismiss Texas’s Complaint .....	6
III. REQUEST FOR A JUDICIAL DECLARATION TO CONFIRM THE LEGAL ISSUES PREVIOUSLY DECIDED.....	7
A. Summary of the Previously Decided Legal Issues in the First Report.....	7
1. <i>Determination 1</i> : The Rio Grande Project was fully integrated into the 1938 Compact.....	7
2. <i>Determination 2</i> : The text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir .....	8
3. <i>Determination 3</i> : 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 Elephant Butte Reservoir .....	9
4. <i>Determination 4</i> : New Mexico must refrain from post- 1938 depletion of water (i.e., depletions that are greater than what occurred in 1938) below Elephant Butte Reservoir .....	10
5. <i>Determination 5</i> : New Mexico state law plays no role in an interstate dispute .....	11
B. New Mexico’s Exceptions to the First Report.....	12

**TABLE OF CONTENTS (cont.)**

	<u>Page</u>
C. The Supreme Court Summarily and Expressly Overruled All of New Mexico’s Exceptions.....	13
D. The Special Master’s Legal Findings in the First Report and the Supreme Court’s Ruling on the Exceptions Thereto, Constitute the Law of the Case and Have the Effect of a Mandate.....	16
1. The Doctrine of the Law of the Case .....	16
2. The Rule of Mandate .....	22
3. New Mexico cannot escape its prior concessions.....	24
IV. MOTION IN LIMINE TO EXCLUDE THE INTRODUCTION OF EVIDENCE ON PREVIOUSLY DECIDED ISSUES .....	27
A. Standard of Review.....	27
B. Under the Law of the Case Doctrine and Rule of Mandate, New Mexico and Colorado May Not Introduce Evidence Regarding the Previously Decided Legal Issues.....	28
C. Issues that Remain in the Case Going Forward.....	29
V. CONCLUSION.....	31

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Alexander v. Jensen-Carter</i> , 711 F.3d 905 (8th Cir. 2013) .....	18
<i>Arizona v. California</i> , 283 U.S. 423 (1931).....	19
<i>Arizona v. California</i> , 460 U.S. 605 (1983).....	16, <i>passim</i>
<i>Associated Press v. Dist. Court for Fifth Judicial Dist. of Colo.</i> , 542 U.S. 1301 (2004).....	27
<i>Crane Co. v. American Standard, Inc.</i> , 603 F.2d 244 (2d Cir. 1979).....	18
<i>Fed. Deposit Ins. Corp. v. Clark</i> , 768 F. Supp. 1402 (1989) .....	28
<i>Kansas v. Colorado</i> , 206 U.S. 46 (1907).....	11
<i>Kansas v. Nebraska</i> , 135 S. Ct. 1042 (2015).....	10, 12
<i>Klamath Water Users Protective Ass’n v. Patterson</i> , 204 F.3d 1206 (9th Cir. 1999) .....	20
<i>Luce v. United States</i> , 469 U.S. 38 (1984).....	27, 28
<i>Maryland v. Louisiana</i> , 451 U.S. 725 (1981).....	19
<i>Messenger v. Anderson</i> , 225 U.S. 436 (1912).....	16
<i>Montana v. United States</i> , 440 U.S. 147 (1979).....	17
<i>Montana v. Wyoming</i> , 563 U.S. 368 (2011).....	18, 19

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases (cont.)</b>	
<i>Nebraska v. Wyoming</i> , 325 U.S. 589 (1945).....	19
<i>PaineWebber Inc. v. Bybyk</i> , 81 F.3d 1193 (2d Cir. 1996).....	19
<i>Peterson v. Lindner</i> , 765 F.2d 698 (7th Cir. 1985) .....	18
<i>In re Sanford Fork &amp; Tool Co.</i> , 160 U.S. 247 (1895).....	23
<i>Simmons v. Galvin</i> , 575 F.3d 24 (1st Cir. 2009).....	20
<i>Texas v. New Mexico</i> , 138 S. Ct. 954 (2018).....	4, <i>passim</i>
<i>Texas v. New Mexico</i> , 538 U.S. ____ (2018), Opinion of the Court on Exceptions to Report of Special Master (Gorsuch, J.).....	2, 7
<i>Thompson v. Comm’r</i> , 821 F.3d 1008 (8th Cir. 2016) .....	18
<i>United States v. Cote</i> , 51 F.3d 178 (9th Cir. 1995) .....	23
<i>United States v. Thrasher</i> , 483 F.3d 977 (9th Cir. 2007) .....	23, 24
<i>Wyoming v. Oklahoma</i> , 502 U.S. 437 (1992).....	21, 22
<b>Statutes</b>	
28 U.S.C. § 1251(b)(2) .....	1
Act of June 17, 1902, ch. 1092, 32 Stat. 388, codified as amended at 43 U.S.C. §§ 371-600e (1902 Reclamation Act).....	6, 12
Act of May 31, 1939, ch. 155, 53 Stat. 785 (1938 Compact).....	2, <i>passim</i>

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Court Rules</b>	
Fed. R. Civ. P. 12(b)(6).....	25
Fed. R. Civ. P. 53.....	28
Fed. R. Evid. 103(c).....	33
<b>Other Authorities</b>	
Black’s Law Dictionary 708 (5th ed. 1979).....	33
1B J. Moore & T. Currier, Moore’s Federal Practice ¶ 0.404 (1982).....	22

## I. INTRODUCTION

In April 2014, the state of New Mexico (New Mexico) filed Motions to Dismiss the State of Texas's (Texas) Complaint and the United States' Complaint in Intervention. In its briefing, New Mexico affirmatively placed various legal questions at issue, rendering it necessary for the Special Master, and ultimately the United States Supreme Court ("Court" or "Supreme Court"), to make determinations on these legal questions. In February 2017, the Special Master issued his First Report<sup>1</sup>, denying the Motion to Dismiss the Texas Complaint.<sup>2</sup> The Special Master's recommendations to the Supreme Court were set forth in over 200 pages of analysis supporting the recommendation to deny the Motion to Dismiss the Texas Complaint, and necessarily included detailed consideration and recommendation of the legal questions New Mexico put at issue. Indeed, the ultimate rulings on the motions were expressly dependent upon the determination of the legal questions raised by New Mexico in its briefing.

New Mexico acceded to the Special Master's recommendation that its Motion to Dismiss the Texas Complaint be denied, but took exception to the detailed analysis undertaken by the Special Master in his First Report, including his recommendations on legal questions that New Mexico had put at issue. New Mexico requested that the Supreme Court affirmatively "disavow" the report. Texas responded to the New Mexico

---

<sup>1</sup> The 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).

<sup>2</sup> With respect to the Motion to Dismiss the United States' Complaint in Intervention, the Special Master recommended that the Supreme Court rule that the United States could not state a claim under the 1938 Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (1938 Compact), but that the Court should nevertheless exercise its discretion to extend its original, but not exclusive, jurisdiction under 28 U.S.C. § 1251(b)(2) to hear the United States' Rio Grande Project (Project) claims against New Mexico. *See* First Report, 237.

exceptions by noting that one could not understand the rationale behind the Special Master's recommendations unless one understood the Special Master's analysis. Texas argued that the Court should not "disavow" the Special Master's First Report and that the First Report, with the legal conclusions in the First Report, should form the basis of future action by the Special Master and the Court.

In late 2017, the Supreme Court denied New Mexico's Motion to Dismiss the Texas Complaint. After subsequent oral argument on issues involving the United States, the Supreme Court expressly sustained the United States' exceptions but overruled "all other exceptions" and remanded to the Special Master for further proceedings consistent with the Opinion.<sup>3</sup> The First Report and the Supreme Court's Opinion on Exceptions to Report of Special Master dated March 5, 2018, finally determined several legal questions; these determinations constitute the law of the case and rule of mandate. The effect of New Mexico's decision to put legal questions at issue in its Motion to Dismiss is preclusive. Nonetheless, and despite the fact that the Supreme Court expressly overruled all exceptions except those of the United States, New Mexico has nonetheless articulated an argument that the disposition of those legal questions is not final. Additionally, Texas understands that New Mexico will seek to admit evidence in support of the legal questions previously decided.<sup>4</sup> The Court, and Special Master, should not be expected to review for the second time, New Mexico's allegations already made and decided by the

---

<sup>3</sup> *Texas v. New Mexico*, 538 U.S. \_\_\_\_ (2018), Opinion of the Court on Exceptions to Report of Special Master (Gorsuch, J.) (Opinion).

<sup>4</sup> Based upon New Mexico's Answers to Texas's Complaint and the United States' Complaint in Intervention, upon New Mexico's Letter to Special Master Melloy dated April 13, 2018, and New Mexico's information provided during the August 28, 2018 status conference (Transcript of the In-Person Scheduling Conference Before the Hon. Michael J. Melloy, Special Master, *Texas v New Mexico* (No. 141, Orig.) (Aug. 28, 2018 Transcript), at 125), Texas understands that New Mexico will seek to admit evidence to support legal positions that were previously decided in this case.



Special Master and the Court; nor should Texas again be subjected to such claims. New Mexico is not entitled to a “second bite at the apple” on questions that have been decided.

Accordingly, Texas respectfully requests that the Special Master issue a judicial declaration to confirm the legal issues previously decided, as articulated by the Special Master in the First Report and approved by the Supreme Court when it overruled New Mexico’s exceptions. Texas further moves in limine to exclude the introduction of evidence on all previously decided issues. As set forth herein, the requested judicial declaration and in limine order precluding the introduction of evidence, are supported by the law of the case and rule of mandate doctrines.

## **II. BACKGROUND**

### **A. Procedural History**

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 Rio Grande Project (Rio Grande Project or Project) water intended for use in Texas. Texas Compl. ¶ 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 (U.S. Compl.) ¶¶ 4-7, 12-14. The Court granted the United States leave to intervene on March 31, 2014.

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.<sup>5</sup> 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 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. 954, 960 (2018).

---

<sup>5</sup> The Court also referred the Motions to Intervene filed by the Elephant Butte Irrigation District (EBID) and the El Paso County Water Improvement District No. 1 (EPCWID) to the Special Master.

**B. The Texas Complaint**

The Texas Complaint alleges that the 1938 Compact was intended to equitably apportion the water of the Rio Grande above Fort Quitman, Texas, among the states of Colorado, New Mexico, and Texas. Texas Compl. ¶¶ 3, 18. The Project was the vehicle chosen by the 1938 Compact to ensure delivery of Texas's apportionment. Thus, the 1938 Compact also was intended to protect the operation of the Project. *Id.* ¶¶ 10-12. The Complaint further alleges that New Mexico, contrary to the 1938 Compact, allowed and authorized Project water apportioned to Texas to be depleted through surface diversions and groundwater pumping in New Mexico. *Id.* ¶ 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. Texas Compl. ¶ 19. Texas alleges that these actions violate New Mexico's obligations under the 1938 Compact, causing injury to Texas and its citizens. *Id.* ¶ 25.

**C. New Mexico's Motion to Dismiss**

In its Motion to Dismiss, New Mexico asserted that Texas's Complaint does not state a claim for relief because Texas failed to identify any express term of the 1938 Compact requiring New Mexico to ensure that water apportioned to Texas reaches the Texas state line. New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention filed April 30, 2014 (N.M. Mot.) at 27-40. New Mexico maintained that its only duty under the 1938 Compact is to deliver water into Elephant Butte Reservoir. The fundamental premise of New Mexico's motion was that

the plain text of the 1938 Compact is unambiguous and does not support the allegations in Texas's Complaint. *See, e.g.*, N.M. Mot., at 1 (“The plain language of the Compact provides that New Mexico’s obligation to Texas is to deliver water to Elephant Butte Reservoir, not to the Texas-New Mexico stateline.”). New Mexico contended that Texas’s apportionment of Rio Grande water is solely governed by and dependent upon New Mexico state water law. Focusing on section 8 of the Reclamation Act of 1902, ch. 1093, 32 Stat. 388 (codified as amended at 43 U.S.C. §§ 371-600e) (1902 Reclamation Act), New Mexico argued that the proper forum to resolve Texas’s claims was within the New Mexico State Court adjudication of the Lower Rio Grande. N.M. Mot., at 49-58.

New Mexico also moved to dismiss the United States’ Complaint in Intervention. New Mexico argued that there is no provision in the 1938 Compact that prohibits New Mexico from interfering with the United States’ ability to fulfill obligations to deliver water from the Project. It asserted that water rights below Elephant Butte Reservoir are controlled by state law and the United States, as a water user in New Mexico, must seek remedies under New Mexico state law, in the state court adjudication, for any injury to its water right. New Mexico also urged that if the Court dismissed Texas’s claims, the United States’ claims should be dismissed because it is not a party to the 1938 Compact. N.M. Mot., at 46-64.

**D. The Special Master’s Recommendation to Deny the Motion to Dismiss Texas’s Complaint**

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 put to rest 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 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 into Elephant Butte Reservoir. *Id.* at 194-98.

### **III. REQUEST FOR A JUDICIAL DECLARATION TO CONFIRM THE LEGAL ISSUES PREVIOUSLY DECIDED**

#### **A. Summary of the Previously Decided Legal Issues in the First Report**

The First Report addressed New Mexico’s Motions to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention. In recommending the denial of New Mexico’s Motion to Dismiss Texas’s Complaint, the Special Master found that Texas stated a claim under the unambiguous text and structure of the 1938 Compact. First Report, at 194. The Special Master used contract interpretation standards to support his recommendation, and he relied solely upon the “plain text and structure” (*id.*) to guide the following legal determinations.

##### **1. *Determination 1: The Rio Grande Project was fully integrated into the 1938 Compact***

The Special Master concluded that the structure of the 1938 Compact integrates the Project wholly and completely. First Report, at 195, 198. In doing so, the Special Master relied upon the plain text starting with the definitions in Article I of the 1938 Rio

Grande Compact, and including all subsequent articles “creating the detailed system of accountability to ensure each State received its equitable share of water.” First Report, at 195. Thus, the Special Master found that the Project “is wholly incorporated throughout the 1938 Compact, which imposes rights and duties on each of the signatory States in that context.” *Id.*

**2. *Determination 2: The text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir***

The Special Master determined that Article IV of the 1938 Compact requires New Mexico to “deliver” Project water at Elephant Butte Reservoir. First Report, at 196. Article IV of the 1938 Compact also identifies that the delivery of water by New Mexico is an “obligation.” *Id.* Based upon reading the text of Article IV of the 1938 Compact, the Special Master found that the common and straightforward meanings of “*deliver*” and “*obligation*” are determinative. First Report, at 197 (emphasis in original). As such, “the 1938 Compact pairs that ‘obligation . . . to deliver water’ with the mandatory term ‘shall’ to connect the duty to relinquish control with certain volumes of water . . . .” *Id.* Thus, the Special Master concluded that the “plain text of Article IV of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits in Elephant Butte Reservoir.” *Id.*

Further, if New Mexico authorizes citizens to intercept or divert water after such water is released from Elephant Butte Reservoir, then it has disregarded Article IV and “renders the common and straightforward meanings 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.

3. ***Determination 3: 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 Elephant Butte Reservoir***

The Special Master determined that not only does the 1938 Compact protect water deliveries into Elephant Butte Reservoir, but “[i]t is clear from the structure and interplay of the articles of the 1938 Compact – specifically Articles I-IV, VI, VII, and VIII – that the 1938 Compact presumes and fully relies upon the Rio Grande Project, and protects water deliveries to the Project.” First Report, at 200. Thus, the 1938 Compact protects water that is *released* from Elephant Butte Reservoir so the water will “reach its intended destination.” *Id.* The Special Master found that the text and structure of the 1938 Compact “do not simply require New Mexico to make water deliveries to Elephant Butte Reservoir” but instead “provides a detailed system of accountability to ensure that each State continues to *receive* its equitable share.” First Report, at 201 (emphasis added). New Mexico’s obligations under the 1938 Compact are woven throughout the 1938 Compact to effect overall purposes of the Project. First Report, at 32, 201. Therefore, there is “no provision in the 1938 Compact that would allow it [New Mexico] to recapture water it has delivered to the Rio Grande Project upon release from the Elephant Butte Reservoir.” *Id.* at 202 (emphasis in original).<sup>6</sup>

---

<sup>6</sup> The Special Master also found that the purpose and history of the 1938 Compact “unambiguously” confirm that New Mexico may not recapture water it delivered to the Project after the water is released from Elephant Butte Reservoir. First Report at 203. The Special Master clearly stated, however, that he did not rely on the history and referenced it only for context. *Id.*

**4. Determination 4: New Mexico must refrain from post-1938 depletions of water (i.e., depletions that are greater than what occurred in 1938) below Elephant Butte Reservoir**

The Special Master determined that New Mexico also has a duty to “refrain from post-Compact depletions of water below Elephant Butte,” and that the duty does not arise from any implied covenant or implied term, but from the very meaning of the text of the Compact. First Report, at 197-98.

The Special Master further relied upon the Supreme Court’s doctrine of equitable apportionment to determine that New Mexico must refrain from the post-1938 depletions of water by recapturing Project water once the Bureau of Reclamation (Reclamation) releases it from Elephant Butte Reservoir. First Report, at 210-17. The Special Master did so because the 1938 Compact clearly provides that its purpose is for “effecting an equitable apportionment of such waters [the Rio Grande] . . . .” 1938 Compact, preamble, 53 Stat. 785 (Mar. 18, 1938); *Kansas v. Nebraska*, 135 S. Ct. 1042, 1052 (2015) (only invoking equitable principles consistent with the compact). The Special Master then stated that “[t]he equitable apportionment achieved by the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project; that water is not subject to appropriation or distribution under New Mexico state law.” First Report, at 211. Therefore, the Special Master rejected New Mexico’s concerns about losing its sovereign authority to regulated state waters in southern New Mexico. First Report, at 215. Rather, the Special Master determined that the Project exists to irrigate lands in Texas, lower New Mexico, and Mexico. *New Mexico state law does not govern the distribution of water apportioned by the Compact*. “Equitable apportionment, a federal doctrine, can determine times of delivery and sources of supply to satisfy that delivery without conflicting with state law, for state law applies only to the



water which has not been committed to other states by the equitable apportionment.”  
First Report, at 216 (citations and internal quotations omitted).

**5. *Determination 5: New Mexico state law plays no role in an interstate dispute***

The 1938 Compact represents the negotiation and agreement between the “State of Colorado, the State of New Mexico, and the State of Texas, desiring to remove all causes of present and future controversy among these States and between citizens of one of these States and citizens of another State” and “for the purpose of effecting an equitable apportionment.” First Report, at Appendix A at A-1 (preamble of 1938 Compact). To achieve this equitable apportionment, the Special Master explained that “the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project.” First Report, at 211. The apportioned water committed to the Project “is not subject to appropriation or distribution under New Mexico state law.” *Id.* “That water has been committed by compact to the Rio Grande Project for delivery to Texas, Mexico, and lower New Mexico, and that dedication takes priority over all other appropriations granted by New Mexico.” First Report, at 213.

Thus, the 1938 Compact is an equitable apportionment. An equitable apportionment is different than an intrastate, prior appropriation scheme administered by a single state. This Court has recognized the necessity of invoking and applying equitable principles to interstate stream conflicts between sovereigns as early as 1907 in *Kansas v. Colorado*, 206 U.S. 46 (1907). The Court has consistently applied the doctrine of equitable apportionment in resolving disputes between states, such as this one. *See* First Report, at 23-31 (summarizing cases). The Court has also acknowledged the use of its original jurisdiction to enforce the terms of an equitable apportionment achieved by

compact, as is the case here. *See Kansas v. Nebraska*, 135 S. Ct. at 1052; First Report, at 27-28, 216.

The Special Master’s determination on this legal issue accounts for this jurisprudence and correctly identifies the legal regime governing the delivery and distribution of Texas’s 1938 Compact apportionment as the doctrine of equitable apportionment, not New Mexico state law.

**B. New Mexico’s Exceptions to the First Report**

New Mexico challenged the First Report by filing exceptions.<sup>7</sup> It acceded to the Special Master’s recommendation that its Motion to Dismiss Texas’s Complaint be denied, but nonetheless took “exception” to the Special Master’s reasoning in support of his recommendation. While New Mexico may wish to ignore this fact, that it did so is undeniable and the exceptions themselves were express.

New Mexico’s exceptions specifically challenged the Special Master’s legal reasoning in the First Report, including the following: New Mexico asserted that the Special Master made “unnecessary factual and legal statements,” N.M. Exceptions, at 12, and “misapplie[d] or contravene[d] relevant statutes and case law.” N.M. Exceptions, at 13. It argued that contrary to the Special Master’s recommendation, the “plain text and structure of the Compact” do not require New Mexico to relinquish its jurisdiction over water released from Elephant Butte Reservoir. *Id.* New Mexico sought to elevate state law over Reclamation law based on section 8 of the 1902 Reclamation Act, and argued that equitable apportionment did not replace state law. *Id.* Generally, New Mexico

---

<sup>7</sup> State of New Mexico’s Exceptions to the First Report of the Special Master and Brief in Support, filed June 9, 2017 (N.M. Exceptions).

disagreed that the 1938 Compact required New Mexico to relinquish state jurisdiction over Rio Grande water once delivered to Elephant Butte Reservoir, and that the Special Master misinterpreted the word “delivery.” N.M. Exceptions, at 19. New Mexico also argued that its 1938 Compact obligations ended at Elephant Butte Reservoir, but that the United States did not have dominion and control over water once it was released from Elephant Butte Reservoir. *Id.* at 16 and 22.

C. **The Supreme Court Summarily and Expressly Overruled All of New Mexico’s Exceptions**

After consideration of the First Report and New Mexico’s concession that it was “acceding” to the Special Master’s recommendation that its Motion to Dismiss Texas’s Complaint be denied, the Court issued its October 10, 2017 order denying New Mexico’s Motion to Dismiss the Texas Complaint. In the same order, the Court indicated that it would set oral argument on the United States’ Exceptions and the Exceptions of Colorado related to the Motion to Dismiss the United States’ Complaint in Intervention in due course, ultimately set for hearing on January 8, 2018.

The Court heard oral argument on January 8, 2018, and issued its final ruling on March 5, 2018, wherein the Court set forth the following principal decisions in the Court’s mandate:

1. The United States entered the 1906 Treaty with Mexico agreeing to deliver 60,000 acre-feet per year upon completion of storage on the Rio Grande. *Texas v. New Mexico*, 138 S. Ct. 954 (2018).
2. The United States entered “Downstream Contracts” with water users below Elephant Butte Dam so that such users would repay the United States for building the dam. In exchange, the United States agreed upon

deliveries for 57 percent of the released water to New Mexico, and 43 percent to Texas. *Id.*

3. The “Downstream Contracts . . . promised Texas water districts a certain amount of water every year from the Reservoir’s resources.” *Id.* at 957.
4. Based in part upon the Downstream Contracts, the Court determined that the 1938 Compact equitably apportioned the Rio Grande waters, holding “it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas.” *Id.* at 959.
5. Adopting Texas’s argument, Justice Gorsuch determined that the United States operates as an “‘agent’ of the 1938 Compact, charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico ‘is, in fact, made.’ ” *Id.*
6. Therefore, “the Compact could be thought implicitly to incorporate the Downstream Contracts by reference.” *Id.*
7. In light of the Court’s review of New Mexico’s concession that the United States was integral to Compact operations, the Court determined a Compact breach would jeopardize the United States’ ability to meet its Treaty obligations with Mexico. *Id.*
8. Similarly, the Court held that “the Compact obliges New Mexico to deliver a specified amount of water to the facility. So a failure by New Mexico to meet its Compact obligations could directly impair the federal

government's ability to perform its obligations under the treaty.”

*Id.* at 959-60.

9. Therefore, the Court's final determination was that accepting the United States' compact claim would not expand the litigation, and that “[t]he United States's exception is sustained, *all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion.*” *Id.* at 959-60 (emphasis added).

If there was any doubt that the Court's October 10, 2017 order rejected all of New Mexico's Exceptions, then the Court's Opinion, issued on March 5, 2018 eliminated that doubt.<sup>8</sup> It is notable that New Mexico at no time in these proceedings withdrew its Motion to Dismiss the Texas Complaint, before or after the Special Master made his recommendation. Aug. 28, 2018 Transcript, at 132. Rather, New Mexico pursued its failing arguments, and decided that multiple specific *legal* questions needed final determination by the Supreme Court. New Mexico's decision to fully brief the Special Master's legal determinations in its express Exceptions filed with the Supreme Court, resulted in the final denial of all legal arguments within New Mexico's Motion to Dismiss.

---

<sup>8</sup> In denying “all other exceptions”, the Court was, without question, focusing on New Mexico's Exceptions since the only Parties to file Exceptions were Colorado, the United States and New Mexico. New Mexico would relegate the March 5, 2018 Supreme Court's decision to “dicta”, and has advised its belief that the “very last sentence of Justice Gorsuch's opinion” is unimportant. Aug. 28, 2018 Transcript, at 129, 131. Texas asserts that this sentence has perhaps the most important meaning in the entire decision as a mandate -- “The United States's exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion. It is so ordered.” *Texas v. New Mexico*, 138 S. Ct. at 960.

In sum, the Court’s decision denied all challenges to the Special Master’s legal determinations based upon basic compact interpretation. As a matter of law, the plain structure and text of the 1938 Compact renders it unambiguous.

**D. The Special Master’s Legal Findings in the First Report and the Supreme Court’s Ruling on the Exceptions Thereto, Constitute the Law of the Case and Have the Effect of a Mandate**

**1. The Doctrine of the Law of the Case**

Generally, a court relies upon “law of the case” principles when its initial decision continues to guide later proceedings in the same case. As the Supreme Court noted in *Arizona v. California*, 460 U.S. 605, 618 (1983) (citing 1B J. Moore & T. Currier, Moore’s Federal Practice ¶ 0.404 (1982), “the doctrine 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.”). The law of the case doctrine gives a court discretion to follow prior decision-making, but “does not limit the tribunal’s power.” *Id.* “In the absence of statute the phrase, law of the case, as applied to the effect of previous orders on the later action of the court rendering them in the same case, 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) (citations omitted).

This doctrine applies in circumstances where res judicata and collateral estoppel do not apply, because the previously determined issues occur in the same proceeding. “Nevertheless, a fundamental precept of common-law adjudication is that an issue once determined by a competent court is conclusive.” *Arizona v. California*, 460 U.S. at 619. The policies of this doctrine operate to promote judicial consistency, finality, and efficiency.

In *Arizona v. California*, the Court reviewed law of the case principles in its decision to preclude the parties from contesting the use of practicably irrigable acreage to determine additional claimed rights. However, rather than applying law of the case principles to the matter at hand, and recognizing that res judicata and collateral estoppel are not applicable to a party's request to correct or modify a judgment in the same proceeding, the Court relied on the "fundamental precept of common-law adjudication . . . that an issue once determined by a competent court is conclusive." *Arizona v. California*, 460 U.S. at 619, citing *Montana v. United States*, 440 U.S. 147, 153 (1979). In declining to reopen the "practicably irrigable acreage" standard, the Court emphasized that the conclusive determination of rights "is particularly important with respect to water rights in the Western United States." *Arizona v. California*, 460 U.S. at 620.

*Arizona v. California* left a door open to reconsider prior court decisions upon "changed circumstances or unforeseen issues not previously litigated." *Arizona v. California*, 460 U.S. at 619. However, the Court would not read the prior decree to allow re-opening litigation of the "practicably irrigable acreage" standard to quantify water use, even though the decree contained specific language allowing future decree adjustments. *Id.* at 622-23. Aptly stated, the Court reminded the litigants: "We also fear that the urge to relitigate, once loosed, will not be easily cabined." *Id.* at 625. Thus, the law of the case doctrine operates to ensure judicial efficiency, and to prevent the costs and time to re-litigate prior determined issues. The *Arizona v. California* doctrine is even more stringent than the law of the case doctrine – and was adopted because a wholesale law of the case analysis might ". . . weaken to an intolerable extent the finality of our decrees in original actions . . ." *Id.* at 619. In other words, the Supreme Court rejected the effort to

re-litigate issues considered final based upon its prior determinations in original jurisdiction cases.

As referenced above, the law of the case doctrine is tempered in certain circumstances. Reconsideration of prior determinations may be acceptable when controlling law was changed by an intervening decision of a higher court. *Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 249 (2d Cir. 1979). When relevant evidence becomes newly available or if there is a clear error to correct in order to prevent manifest injustice, then courts have departed from the doctrine. *See Peterson v. Lindner*, 765 F.2d 698, 704 (7th Cir. 1985) (where new evidence became available after the first ruling, then court could reconsider); *Thompson v. Comm’r*, 821 F.3d 1008, 1011 (8th Cir. 2016) (holding the law of the case prevented a second challenge to jurisdiction but that no manifest injustice would occur); *Arizona v. California*, 460 U.S. at 618, n.8 (citation to clear error or manifest injustice as requirement to depart from a prior decision).

It is notable that there are certain circumstances where the law of the case may not apply in the case of early motions like a motion to dismiss. *Alexander v. Jensen-Carter*, 711 F.3d 905, 910 (8th Cir. 2013) (holding that the law of the case doctrine does not apply to an interlocutory decision regarding an eviction order but which referred the case to bankruptcy court). However, as Texas previously argued to the Supreme Court in its Reply to Exceptions to First Interim Report of Special Master, July 28, 2017 (Texas’s Reply), “[i]t is appropriate for the Supreme Court to make legal determinations while resolving a motion to dismiss.” Texas’s Reply, at 9, *citing Montana v. Wyoming*, 563 U.S. 368, 375-89 (2011) (concurring with and adopting the special master’s interpretation of Yellowstone River Compact and the nature of the appropriation doctrine



in both states on Wyoming’s motion to dismiss Montana’s complaint); *Maryland v. Louisiana*, 451 U.S. 725, 735-45 (1981) (accepting the special master’s recommendation to deny Louisiana’s motion to dismiss and the special master’s determinations regarding standing and the exercise of original jurisdiction); *Nebraska v. Wyoming*, 325 U.S. 589, 607-11 (1945) (finding Colorado’s motion to dismiss should be denied because the evidence supported the special master’s findings that the North Platte River was over-appropriated during the irrigation season); *Arizona v. California*, 283 U.S. 423, 450-64 (1931) (interpreting the Boulder Canyon Project Act on a motion to dismiss and holding that the statute was a valid exercise of congressional power, and that the Act did not abridge Arizona’s right to make future apportionments of water).

Additionally, when a compact is unambiguous, as New Mexico argued and conceded in its Motion to Dismiss Texas’s Complaint and the United States’ Complaint in Intervention, it is within the purview of the Court to interpret the compact and rule as a matter of law. N.M. Mot., at 34; see *PaineWebber Inc. v. Bybyk*, 81 F.3d 1193, 1199 (2d Cir. 1996) (“where the intent of the parties can be determined from the face of the agreement, interpretation is a matter of law, and a claim turning on that interpretation may thus be determined . . . .” (internal quotations omitted)); see also *Montana v. Wyoming*, 563 U.S. at 387 (agreeing with the special master’s determinations on a motion to dismiss because plain language of the Yellowstone River Compact and the appropriations doctrine allowed Wyoming to improve its irrigation efficiency).

The Special Master addressed the legal arguments in the First Report without resorting to factual allegations or fact findings. He recited the Federal Rules of Civil Procedure, Rule 12(b)(6) standard of review, which required him to assume all factual

allegations from Texas's and the United States' Complaints to be true. First Report, at 191, 193. Each of his conclusions are legal and can be adopted by this Court. *See Simmons v. Galvin*, 575 F.3d 24, 30 (1st Cir. 2009) (“questions of statutory interpretation are questions of law ripe for resolution at the pleadings stage”); *Klamath Water Users Protective Ass'n v. Patterson*, 204 F.3d 1206, 1210 (9th Cir. 1999) (“the determination of whether contract language is ambiguous is a question of law”).

As noted in his First Report, the Special Master found that:

*If the Court accepts my recommendations, the next step in the case will be discovery. This is an appropriate time for the Court to examine and consider the issues that have arisen in the case to date. New Mexico's motion to dismiss presents major legal issues that are critical to the ultimate resolution of the matter; its outcome will immediately shape the scope of discovery moving forward and may encourage settlement discussions among the parties.*

First Report, at 4 (emphasis added).

Proceeding as the Special Master recommends will give effect to the prodigious efforts leading to his First Report and define the scope of discovery and the remaining issues that will need to be addressed in this case. New Mexico's Exceptions argued that “[t]he Report of the Special Master Should Not Be Adopted in Full,” New Mexico's Sur-Reply to the Replies of the United States, Texas and Colorado filed Sept. 1, 2017 (N.M. Sur-Reply) at 11, and that “the Court should disavow the Report's reasoning when denying New Mexico's Motion to Dismiss Texas' Complaint.” N.M. Sur-Reply, at 13. Rejection of that New Mexico argument is exactly what Texas argued for in its Sur-Reply. The Supreme Court, by denying all of New Mexico's exceptions, rejected and overruled this argument.

Thus, to comport with Supreme Court determinations that rejected and overruled New Mexico's Exceptions, New Mexico cannot be allowed to now re-litigate those

exceptions and underlying legal questions. In *Arizona v. California*, 460 U.S. at 619, the Court determined that the law of the case doctrine was understandably crafted with “the course of ordinary litigation in mind.” The Court was concerned that such law would “weaken” the finality of original action decrees. *Id.* Therefore, when the Supreme Court determined that practicably irrigable acreage (PIA) standard (the standard to quantify Indian water rights) could not be re-litigated, the Court relied upon a stricter standard than the law of the case policies to support its determination. Even with the compact Article IX that provided for “further relief” after the 1963 decree was entered, the Court held that the Article IX in question should be “given a narrower reading and should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.” *Id.* at 619. The Court went on to observe that interpreting Article IX was “. . . consistent with our action in prior original cases. Our long history of resolving disputes over boundaries and water rights reveals a simple fact: This Court does not reopen an adjudication in an original action to reconsider whether initial factual determinations were correctly made.” *Id.* at 623-24. The policy behind this determination was in part to preserve the finality and certainty of water right determinations. If this policy applies to factual matters once decided, it most surely applies to legal conclusions.

This principle was similarly applied in *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (where Wyoming made a Commerce Clause challenge to Oklahoma’s statute requiring Oklahoma power plants to burn a specific percentage of Oklahoma produced coal). The Supreme Court first denied Oklahoma’s motion to dismiss Wyoming’s claim for lack of standing. Then, after Wyoming filed its complaint, Oklahoma challenged

Wyoming’s standing for a second time and “recited the same facts, cited the same cases and constructed the same arguments.” *Id.* The Court noted its power to review Oklahoma’s request, but did not find any exceptions to the law of the case that compelled a different decision, and so upheld the Special Master’s determination that Wyoming still had standing, and that Oklahoma’s law was unconstitutional based upon Wyoming’s motion for summary judgment. Akin to this case, there was no need for the Court to make factual determinations in order to make the legal determinations that were made in *Wyoming v. Oklahoma*. However, once legal determinations were made by the Supreme Court in an original jurisdiction case, the legal issues “should be subject to the general principles of finality and repose . . . .” *Id.* at 446, citing *Arizona v. California*, 460 U.S. at 619.

## **2. The Rule of Mandate**

The “rule of mandate” compels the Special Master to exclude evidence of prior decided legal issues as a jurisdictional matter. The Special Master operates in a magistrate capacity under Rule 53 of the Federal Rules of Civil Procedure, and the Supreme Court decisions on the various exceptions operate as a mandate. *See* Special Master Melloy’s comments, Aug. 28, 2018 Transcript, at 73, stating that he is serving like a magistrate and, like a magistrate, the Special Master is equally bound by the rule of mandate. The rule of mandate is broader than the law of the case doctrine, and controls the lower decision-maker once an appellate rule has issued. The determinations on exceptions by the Supreme Court in this case are functionally a mandate because the decision directs specific action.

Here, the Court’s final directions in its recent opinion state: “The United States’s exception is sustained, all other exceptions are overruled, and the case is remanded to the Special Master for further proceedings consistent with this opinion. It is so ordered.” *Texas v. New Mexico*, 138 S. Ct. at 960. While the law of the case is designed to promote judicial efficiency and is within the Special Master’s discretion, the rule of mandate has been determined to be *jurisdictional*. Indeed, allowing New Mexico to renew its exceptions through the further litigation of them now, would be to ignore the Special Master’s First Report and, more importantly, to ignore the fact that these issues have been reviewed by the Supreme Court and all were rejected. It is simply jurisdictionally impermissible to argue these issues again, notwithstanding the Court’s prior rejection of them.

As a jurisdictional gateway, the rule of mandate requires that a lower court may not deviate from the reviewing court’s specific determination.

When a case has been once decided by this court on appeal, and remanded to the [district court], whatever was before this court, and disposed of by its decree, is considered as finally settled. The [district court] is bound by the decree as the law of the case; and must carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded . . . . But the [district court] may consider and decide any matters left open by the mandate of this court . . . .

*In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255-56 (1895).

“Thus, a district court could not refuse to dismiss a case when the mandate required it, and a district court could not revisit its already final determinations unless the mandate allowed it.” *United States v. Cote*, 51 F.3d 178, 181 (9th Cir. 1995) (citations omitted); *United States v. Thrasher*, 483 F.3d 977, 981-82 (9th Cir. 2007). Not all jurisdictions

have made the rule of mandate jurisdictional, but it is certainly within the Special Master's discretion to do so, and it is certainly appropriate to do so here in this original jurisdiction case.<sup>9</sup>

### **3. New Mexico Cannot Escape Its Prior Concessions**

In addition to the legal issues that have previously been decided, New Mexico has made significant concessions that it apparently now wants to ignore. In the First Report, the Special Master noted that New Mexico conceded “that Texas received an equitable apportionment of the Rio Grande waters through the 1938 Compact,” and that “the signatory States, to the 1938 Compact allocated Texas’s equitable apportionment to the Rio Grande Project.” N.M. Mot., at 31-32; First Report at 211. The Special Master also noted that New Mexico conceded “that Reclamation rather than the State of New Mexico is the entity with the power and duty to distribute the water after New Mexico delivers it into Elephant Butte Reservoir.” N.M. Mot., at 38; First Report, at 215. Notwithstanding these concessions, New Mexico asserted that it may intercept and divert water leaving the Reservoir “before it crosses the New Mexico-Texas state line because that water – and indeed the entire administration for the Rio Grande Project within New Mexico – is governed by New Mexico state water law.” First Report, at 211. The Special Master determined that its concessions were opposite from New Mexico’s argument that it had power to distribute water under its sovereign authority to regulate water use in southern New Mexico, and found that “New Mexico state law does not govern the distribution of water apportioned by Compact.” *Id.* at 216. New Mexico cannot now re-assert these

---

<sup>9</sup> There is a 4-4 circuit split cited in *Thrasher*, 483 U.S. at 982, but where the rule of mandate is not considered jurisdictional, it is considered a specific application of the law of the case doctrine.

same arguments in the face of its concessions and the Special Master’s review of how equitable apportionment concepts apply to water use below Elephant Butte Dam. As the First Report determined, “New Mexico . . . is without discretion to veer from the method of distribution of Project water after it leaves Elephant Butte Reservoir, as the 1938 Compact, by incorporating the Rio Grande Project, requires the water at that point be controlled and delivered to its destinations by Reclamation.” *Id.* at 217.

Similarly, in its Exceptions to the First Report, New Mexico explicitly accepted the Special Master’s recommendation that Texas’s Complaint could go forward. N.M. Exceptions at 2. It then proceeded to put the Special Master’s legal determinations at issue, and asked the Supreme Court to deny the Special Master’s determinations regarding the following four key issues:

1. The conclusion that the Compact requires New Mexico to relinquish all jurisdiction over Rio Grande water upon delivery to Elephant Butte Reservoir;
2. The conclusion that the Compact overrides Congress’s command in the Reclamation Act for federal reclamation projects to comply with and defer to state water law, including state water adjudication and administration;
3. The conclusion that the doctrine of equitable apportionment supersedes New Mexico’s sovereignty over the waters of the Lower Rio Grande within the boundaries of New Mexico; and
4. The reliance on facts unnecessary for the First Report’s recommendations on the pending motions and the determination of historical facts obtained independently by the Special Master without affording the parties an opportunity to review, verify, object to, or present countervailing evidence.

*Id.*

These exceptions were all entirely overruled, and therefore, the Special Master determinations with respect to these issues are final based upon the rule of mandate and

law of the case doctrines outlined above. Additionally, New Mexico, in putting these legal matters into issue before the Court, further conceded that “whether and to what extent Texas has been injured, as well as the appropriate remedies” are issues that will be litigated and are properly before the Court. N.M. Sur-Reply, at 14. Again, because all of New Mexico’s exceptions were overruled in their entirety by the Court, the Special Master should not now entertain another round of litigation on issues that New Mexico has conceded, and which have been otherwise decided.

Nonetheless, New Mexico continues to bite at the proverbial apple. Indeed, in its recent letter to the Special Master, April 4, 2018, New Mexico again asserts that decisions are required for a litany of issues “such as what is the meaning, as a practical matter, of the 57%-43% allocation, . . . what obligations Texas is under before it may bring a claim for damages, and whether the water allocated to the States below Elephant Butte must be used exclusively in accordance with the Project irrigation demands and the contracts implementing the Project, to name just a few.” N.M. Letter, at 2. Similarly, at the August 28, 2018 Status Conference, New Mexico argued that Justice Gorsuch’s recent decision determined only a narrow question, advising the Special Master – “I think the most important thing, Your Honor, is everybody’s missing the most important thing that Justice Gorsuch said in his opinion, and that is at the very beginning he said, The Court’s opinion expressly states that it addresses only a preliminary and narrow question, may the United States assert, essentially, the same claims Texas already has. That’s the only thing that his opinion addresses.” Aug. 28, 2018 Transcript, at 128. Further, New Mexico advised the Special Master that “[e]verything else in that opinion should be



regarded as dicta, and we'll – I'm sure we'll get into this, Your Honor, you know, the Court has already said it shouldn't be bound by dicta." *Id.* at 129.

The continued re-litigation of matters already decided is an inefficient and wasteful use of judicial and party resources and it also violates the policies articulated by the Supreme Court in *Arizona v. California*, 460 U.S. at 619. The Court's original jurisdiction determinations on issue preclusion are more stringent than the law of the case/rule of mandate doctrines and preclude revisiting determinations previously made. New Mexico's prior concessions to the Special Master and the Court support that outcome. The Special Master should judicially declare that legal issues previously decided carry the weight of Supreme Court finality, and that formerly conceded and determined issues are final and shall guide the future litigation of this case.

#### **IV. MOTION IN LIMINE TO EXCLUDE THE INTRODUCTION OF EVIDENCE ON PREVIOUSLY DECIDED LEGAL ISSUES**

##### **A. Standard of Review**

A motion in limine is "any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered." *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984) (relying on Black's Law Dictionary 708 (5th ed. 1979) definition of "*in limine*": "'[on] or at the threshold; at the very beginning; preliminary.' "). It is a request for the court to determine whether certain evidence is relevant to a material issue and whether it will permit such evidence to be offered at trial. *See Associated Press v. Dist. Court for Fifth Judicial Dist. of Colo.*, 542 U.S. 1301, 1303 (2004).

There is no explicit authority for in limine rulings in either the Federal Rules of Evidence or the Federal Rules of Civil Procedure, but "the practice has developed

pursuant to the . . . court’s inherent authority to manage the course of trials.” *Luce*, 469 U.S. at 41 n.4 (citing to Fed. R. Evid. 103(c), authorizing a court to “make any statement about the character or form of the evidence, the objection made, and the ruling”). With no federal rules on point, there is some flexibility in the substantive and procedural elements of the motion. There are no defined limits on the subject matter of the evidence which is requested to be excluded. There is also no established time period for making a motion in limine. These motions may be raised when evidentiary issues are anticipated by the parties, including before trial or even during trial, and the motion has the same effect as an objection to evidence offered during trial. *Luce*, 469 U.S. at 40 n.2; *see also Fed. Deposit Ins. Corp. v. Clark*, 768 F. Supp. 1402, 1413 (1989).

**B. Under the Law of the Case Doctrine and Rule of Mandate, New Mexico and Colorado May Not Introduce Evidence Regarding the Previously Decided Legal Issues**

On the basis of the arguments set forth hereinabove, the First Report and the Supreme Court’s Opinion on Exceptions to Report of Special Master finally determined several legal issues, creating the law of the case and rule of mandate. As such, Texas respectfully requests that the Special Master issue an order that excludes the introduction of any evidence to prove the previously decided legal issues as irrelevant to any material issue going forward. Such evidence, if allowed, would have the effect of trying to influence, alter, and/or otherwise prejudicially modify previously decided legal issues. It would further render the scope of discovery and trial overly burdensome and inefficient, constituting a waste of judicial resources.

Texas moves *in limine* for an order excluding the following previously decided matters:

1. The plain text and structure of the 1938 Compact control contractual interpretation and no evidence is allowed to prove the 1938 Compact is ambiguous.
2. No evidence is allowed to dispute that the Project was fully integrated into the 1938 Compact.
3. No evidence is allowed to dispute that New Mexico has relinquished control and dominion over the water it deposits into Elephant Butte Reservoir.
4. No evidence is allowed to prove New Mexico has any ability/jurisdiction to divert or intercept water it is required to deliver to Elephant Butte Reservoir pursuant to the 1938 Compact after the water is released from Elephant Butte Reservoir.
5. No evidence is allowed to prove that New Mexico can deplete more water from the Rio Grande than was depleted in 1938.
6. Evidence disputing that the United States has the power to distribute 1938 Compact water below Elephant Butte Reservoir to ensure equitable apportionment, or evidence that New Mexico state law governs water distribution apportioned by the 1938 Compact is precluded.

**C. Issues that Remain in the Case Going Forward**

Texas additionally asserts that there remain factual and legal issues to decide, and additional evidence regarding those issues is certainly expected. In particular, as set forth in the April 13, 2018 Texas Letter to the Special Master, and as framed by its Complaint, Texas views the following issues as those remaining before the Special Master:

1. What was the 1938 condition that should be used as the basis upon which to judge New Mexico's actions and the effect of those actions?
2. Have New Mexico's actions depleted the quantity of water available below Elephant Butte Reservoir, and if so, (a) what was the cause of these depletions and (b) what was the extent (quantification) of these depletions?
3. What is the nature and extent of hydrologically connected groundwater and its relationship to the Rio Grande and the Project and the relevant issues raised in the Texas Complaint?
4. What are the historic and current operations of the Project?
5. What is the quantity of water that Texas was entitled to under the 1938 Compact and the quantity of water that Texas actually received under the 1938 Compact, with the difference being a quantification of Texas's injury?
6. What is the appropriate remedy, which would include, but is not limited to the following:
  - Injunctive relief;
  - Past damages – water or dollars;
  - Prospective damages – water or dollars.

As part of the Special Master's determination regarding this motion in limine, providing guidance about the issues left to be decided is requested.

## V. CONCLUSION

Based on the foregoing, Texas respectfully requests the Special Master issue a judicial declaration to confirm the legal issues previously decided as set forth hereinabove. Texas further respectfully requests that the Special Master issue an order *in limine* to exclude the introduction of evidence thereon.

Dated: December 26, 2018

Respectfully submitted,

s/ Stuart L. Somach

STUART L. SOMACH, ESQ.\*

ANDREW M. HITCHINGS, ESQ.

ROBERT B. HOFFMAN, ESQ.

FRANCIS M. GOLDSBERRY II, ESQ.

THERESA C. BARFIELD, ESQ.

BRITTANY K. JOHNSON, ESQ.

SOMACH SIMMONS & DUNN, PC

500 Capitol Mall, Suite 1000

Sacramento, CA 95814

Telephone: 916-446-7979

ssomach@somachlaw.com

*\*Counsel of Record*