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**

# NEW MEXICO'S RESPONSE TO 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

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February 28, 2019

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The State of New Mexico hereby responds to 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 ("Texas's Motion" or "Tex. Motion"). New Mexico addressed the issues that have already been decided in this matter in its Motion for Partial Judgment on Matters Previously Decided and Brief in Support ("New Mexico's Motion" or "NM Motion"). New Mexico's Motion is hereby incorporated by reference.

## INTRODUCTION

Special Masters are charged with the important functions of presiding over a case, creating a record, and making recommendations to the Court, but the Court bears ultimate responsibility for cases in its original jurisdiction. Texas's Motion poses the question whether the First Interim Report is law of the case even though the Court did not affirmatively adopt or approve the Special Master's recommendations. The procedure in original actions and law of the case doctrine make clear that the answer is no.

## ARGUMENT

### I. TEXAS'S MOTION ON LAW OF THE CASE SHOULD BE DENIED

#### A. Standard of Review

##### *1. In Original Actions, the Principles of Finality and Repose Apply to Issues Directly Discussed and Decided by the Court*

As discussed in New Mexico's Law of the Case Motion, the Court has "been reluctant to import wholesale law-of-the-case principles into original actions." *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992). Nonetheless, prior rulings in original cases "should be subject to the general principles of finality and repose." *Id.* In short, in original actions, law of the case principles apply only to those matters that were directly discussed and decided by the Supreme Court. NM Motion 11-13; *see also, e.g., TecSec, Inc. v. Internat'l Bus. Machs. Corp.*, 731 F.3d 1336, 1334 (D.C. Cir.

2013); *AIG Baker Sterling Heights, LLC v. Am. Multi-Cinema, Inc.*, 579 F.3d 1268, 1270-71 (11th Cir. 2009); *United States ex rel. Dept. of Labor v. Ins. Co. of N. Am.*, 131 F.3d 1037, 1041 (D.C. Cir. 1997); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1995).

*2. Special Master Recommendations Have No Effect Unless Adopted by the Court*

Texas's Motion relies heavily on the reasoning of the Special Master in the First Interim Report. Tex. Motion at 7-11. As explained in New Mexico's Motion, however, the role of a Special Master in an original action is advisory. *See* NM Motion at 21, 24; *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 10.12, 653 (10th ed. 2013) ("the Master's reports and recommendations are advisory only. . . . The Court itself determines all critical motions and grants or denies the ultimate relief sought. . . ."). A Master's primary function is to create a record so that the Court can "benefit from detailed factual findings." *Florida v. Georgia*, __ U.S. __, 138 S. Ct. 2502, 2515 (2018); *see also Guide for Special Masters in Original Cases Before the Supreme Court of the United States* at 3 (Oct. Term 2004) ("*Guide for Special Masters*") ("The Special Master in an Original case acts as the Supreme Court's surrogate in making the record and then as the Court's adviser in submitting recommendations for deciding the case."). This function is critical, because "[w]ithout the full range of factual findings . . . the Court may lack an adequate basis on which to make 'the delicate adjustment of interests' that the law requires" in original jurisdiction water disputes. *Id*. (quoting *Nebraska v. Wyoming*, 325 U.S. 589, 618 (1945)). But review by the Court is *de novo, e.g.*, *Maryland v. Louisiana*, 451 U.S. 725, 762-63 (1981) (Rehnquist, J., dissenting), and the Court bears "ultimate responsibility" for all findings in the case. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984). In the words of the Clerk of the Supreme Court: "The Special Master's duties closely resemble those of a trial judge with one difference: the Master's 'decision' on both facts and law takes the form of a recommendation to the Court

rather than a reviewable judgment." *Guide for Special Masters* at 2; *see also* Memorandum of Decision of the Special Master on Tennessee's Motion to Dismiss, Memphis and Memphis Light, Gas & Water Division's Motion to Dismiss, and Mississippi's Motion to Exclude at 35, *Mississippi v. Tennessee* (No. 143, Original) (Aug. 12, 2016) ("2016 Mem. of Dec."), available as Docket No. 55 at https://www.ca6.uscourts.gov/special-master ("Special Masters have only the authority to provide recommendations for findings of fact and law that the Court must then adopt or reject").

Texas has acknowledged this standard. In its Reply to Exceptions to First Interim Report of Special Master, Texas recognized that the Supreme Court must "conduct[] an independent *de novo* review of the Special Master's findings, conclusions, and recommendations." Tex. Reply on Exceptions at 9 (citing *Mississippi v. Arkansas*, 415 U.S. 289, 291, 92 (1974); *Mississippi v. Louisiana*, 346 U.S. 862, 862-63 (1953)). Texas further conceded that "['i]n original cases . . . the master's recommendations are advisory only. . . .'" *Id.* (quoting *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980)).

It necessarily follows that in reviewing both New Mexico's Motion and Texas's Motion, the applicable standard is whether the Court, as distinct from the Special Master, has clearly decided an issue. More specifically, because the recommendations of a Special Master are "advisory only," the findings and conclusions of a Master are not automatically effective. *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980). Instead, an affirmative act by the Court is necessary to render the Special Master's recommendations operative. As the Special Master evaluates whether any of the principles articulated in the First Interim Report are law of the case, the issue is therefore whether the Court has affirmatively adopted or approved the Report. As discussed below, the Court has not taken such an affirmative act in this case.

### B. The Court Did Not Unambiguously Decide the Determinations Proposed by Texas

#### *1. Texas Extends the 2018 Decision Too Far*

New Mexico recognizes that the 2018 decision of the Court ("2018 Decision") and denial of its Motion to Dismiss had a significant impact on this litigation and on the Parties' relative rights. Those actions defined the parties and the scope of the claims as the litigation moves forward, it confirmed that the Compact effects an equitable apportionment through the incorporation of the Downstream Contracts, Reclamation principles, and the Rio Grande Project, and it identified obligations of the United States that arise out of the Compact. Moreover, as discussed in New Mexico's Motion, at 19-20, up until this case, courts had consistently held that "the Rio Grande Compact does not apportion the surface waters of the Rio Grande below Elephant Butte." *City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*, 563 F. Supp. 379, 382 (D.N.M. 1983). The 2018 Decision and the Court's denial of the Motion to Dismiss established for the first time that Texas has a cause of action arising out of the Compact for actions below Elephant Butte.

Texas argues that the issues decided go even further than that. The First Interim Report contained hundreds of pages of analysis that were unnecessary at this stage of the proceedings. In light of the concerns voiced by Colorado, the United States, and New Mexico, the Court proceeded cautiously, and expressly approved only the recommendation to deny the Motion to Dismiss, and the recommendation to deny Elephant Butte Irrigation District and El Paso County Water Improvement District No.1's motions to intervene, *Texas v. New Mexico,* 138 S. Ct. 349 (2017) (mem.), without adopting the remainder of the Report. Texas ignores this deliberate approach, and argues that by overruling the exceptions of New Mexico and Colorado, the Court implicitly adopted the entire First Interim Report, and all of its reasoning, wholesale. As discussed below, however, Texas goes too far when it claims that the Court conclusively decided many of the

consequential issues in this case through its terse and routine statement that "all other exceptions are overruled." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

*2. Texas Misconstrues the Court's Precedent*

Texas argues that the standard for evaluating the claims that have been decided in original actions "is even more stringent than the law of the case doctrine." Tex. Motion at 17. It cites *Arizona v. California*, 460 U.S. 605 (1983), and *Wyoming v. Oklahoma*, 502 U.S. 437 (1992), for the proposition that "New Mexico cannot be allowed to now re-litigate" the reasoning articulated in the First Interim Report. Tex. Motion at 20-21. Texas misconstrues the Court's precedent.

In *Arizona v. California*, the Court considered a motion to reopen a previous decree, 376 U.S. 340 (1964) ("1964 Decree"), to increase water rights in the Colorado River to reflect additional irrigable acreage on Indian reservations for which the Court allegedly failed to account. 460 U.S. at 612-13. The 1964 Decree contained an express reservation of continuing jurisdiction. *Id.* Nonetheless, the Court denied the motion, concluding that "the prior determination of Indian water rights in the 1964 Decree precludes relitigation of the irrigable acreage issue." *Id.* at 616. The Court reasoned that "[r]ecalculating the amount of practicably irrigable acreage runs directly counter to the strong interest in finality in this case," because, unlike the present case, the matter was "fully and fairly litigated 20 years ago." *Id.* at 620-21. The importance of finality was underscored by two decades of reliance by the water users that was "predicate[d]" on the 1964 allocations. *Id.*

The only other original jurisdiction case to consider at length the application of law of the case is *Wyoming v. Oklahoma*, 502 U.S. at 437. That case addressed Wyoming's claim that Oklahoma violated the commerce clause by enacting a law requiring state utilities to use coal mined in Oklahoma. *Id*. at 442-43. Oklahoma repeated the same standing argument three different

times: (1) in response to the motion for leave to file complaint; (2) in a motion to dismiss; and (3) in the motion for summary judgment. *Id.* at 441. The Court disposed of the argument in the first two instances with single-sentence summary orders, granting leave to file, *Wyoming v. Oklahoma*, 487 U.S. 1231 (1988) (mem.), and denying the motion to dismiss, *Wyoming v. Oklahoma*, 488 U.S. 921 (1988) (mem.). In considering the third attempt, on exceptions to the Special Master's report on the summary judgment motion, the Court noted the prior decisions and criticized Oklahoma for raising the standing argument a third time:

> Oklahoma in no way suggests any change of circumstance, whether of fact or law. In each brief submitted on the issue, Oklahoma has recited the same facts, cited the same cases, and constructed the same arguments. Of course, we surely have the power to accede to Oklahoma's request at this late date, and if convinced, which we are not, that we were clearly wrong in accepting jurisdiction of this case, we would not hesitate to depart from our prior rulings.

*Wyoming v. Oklahoma*, 502 U.S. at 446. Despite this admonishment, however, and in contrast to *Arizona v. California*, the Court did not refrain from considering Oklahoma's substantive argument. Instead, the Court went on to analyze the standing arguments raised by Oklahoma, and ultimately "accept the recommendation of the Special Master that Wyoming should be permitted to bring this action." *Id.* at 446-54.

In dissent, Justice Scalia took issue with the "suggestion that our previous rejections of Oklahoma's standing objections . . . somehow impede us from considering that objection today." *Id.* at 462 (Scalia, J., dissenting). He reasoned that the Court did not "thoroughly" consider the standing issue in prior orders, and consequently the Special Master was permitted to take up the issue in summary judgment proceedings. *Id.* at 463. He further noted that "[t]he litigation has reached a new stage," so the issue was "subject to different evaluation." *Id.* at 464. On this basis, Justice Scalia concluded that the Court could not be precluded from considering the standing

arguments because the Court had not fully addressed them. *Id.* The majority did not take issue with this discussion.

Taken together, *Arizona v. California* and *Wyoming v. Oklahoma* provide guidance on the bounds of the law of the case doctrine in original actions. From these cases, two important principles can be distilled. First, contrary to Texas's argument, the Court retains discretion to evaluate issues throughout a case in order to arrive at the correct decision. The Court in *Wyoming v. Oklahoma* explained that it "surely ha[s] the power" to revisit issues and interlocutory orders. 502 U.S. at 446. Under this rule, issues that are not "thoroughly" addressed by the Court, such as Special Master recommendations that are not adopted, remain open for future consideration. *Id*. at 462. Second, where the parties are given a full opportunity to litigate a case, and *the Court* substantively addresses the issues, principles of finality counsel against reconsidering the issues. For example, in *Arizona v. California*, the Court emphasized that all of the parties were afforded a "full[] and fair[]" opportunity to litigate the case, and the Court's substantive decision was relied upon by the parties for 20 years. 460 U.S. at 620-22.

Applying these principles to the present case, the Special Master should decline Texas's invitation to prematurely restrict the issues. As discussed in New Mexico's Motion, the Parties have not yet been afforded the opportunity to conduct discovery, litigate, or present the salient issues in their full strength. And the Court has not yet provided substantive guidance on those same issues. Contrary to Texas's discussion, neither *Arizona v. California* nor *Wyoming v. Oklahoma* disturb the bedrock principles that the Court retains ultimate responsibility for all findings in original actions, or that Special Master recommendations are not effective unless adopted by the Court. Nor does either case stand for the proposition that an interim Special

Master's report becomes law of the case based on a one-sentence denial of exceptions to that report.

*3. The First Interim Report Was Not Adopted by the Court*

Texas's Motion relies primarily on the reasoning of the Special Master in the First Interim Report. But as discussed above, because the Court retains "ultimate responsibility" to make all factual and legal decisions in original actions, the recommendations of the Special Master do not become effective unless and until the Court affirmatively adopts or approves them. Determining law of the case in these proceedings therefore hinges upon the degree to which the Court affirmatively adopted the First Interim Report.

It is beyond dispute that the 2018 Decision did not directly address four out of the five "determinations" Texas identifies in its Motion, Tex. Motion at 7-11, and the Court did not adopt or confirm Special Master Grimsal's reasoning in its orders or opinion. To overcome this fact, Texas relies on a single line in the 2018 Decision: "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." 138 S. Ct. at 960. Texas argues that this language constitutes an implicit adoption of the First Interim Report and all of the underlying reasoning therein. In a footnote, Texas suggests that "this sentence has perhaps the most important meaning in the entire decision." Tex. Motion 15 n.8.

Contrary to Texas's argument, however, in practice the Court is careful and calculated in its evaluation of interim reports and exceptions. Even where exceptions are raised, the Court is deliberate in its actions, and selective of the reasoning and recommendations that it adopts or approves.

As New Mexico explained in its Motion on the law of the case, although the Court has previously adopted, approved, confirmed, or accepted the findings of Special Masters, it did not do so in this case. NM Motion at 21-22. In its Motion, New Mexico relied on *Texas v. New Mexico*, No. 65 Original (the Pecos River case), 446 U.S. 540 (1980), *Illinois v. Indiana*, 338 U.S. 856 (1949), and *Washington v. Oregon*, 297 U.S. 517, 523 (1936), for the concept that "the Court knows how to adopt a Special Master's report if it is so inclined," but many other examples exist as well. NM Motion at 21. Most recently, in *Kansas v. Nebraska*, _ U.S. _, 135 S. Ct. 1042 (2015), the Court was faced with exceptions to the report of the Special Master from both Kansas and Nebraska. After considering the issues, the Court "overrule[d] all exceptions and adopt[ed] the Master's recommendations." *Id*. at 1051; *see also id*. at 1063-64 ("adopt[ing] the Master's recommendation to amend the Accounting Procedures so that they no longer charge Nebraska for imported water"); *id*. at 1064 ("adopt[ing] all of the Special Master's recommendations"); *see also Louisiana v. Mississippi*, 466 U.S. 96, 108 (1984) ("The exceptions of Mississippi, therefore, are overruled. The recommendations of the Special Master are adopted and his Report is confirmed."); *United States v. Oregon*, 295 U.S. 1, 28 (1935) ("We accordingly accept the findings and determination of the Special Master").

Unlike those cases, here, the Court carefully confined the recommendations that it implemented from Special Master Grimsal. Rather than adopting the First Interim Report wholesale, or even agreeing to the rationale for specific conclusions, as the Court did in the cases cited above, it took a more limited and pragmatic approach by "accept[ing] [the] recommendation" of the "Special Master . . . that we deny New Mexico's motion to dismiss Texas's complaint." *Texas v. New Mexico*, 138 S. Ct. at 958. This order made clear that Texas had pled viable claims, while also preserving the ability of the Parties to raise relevant issues that are not inconsistent with

the Court's express pronouncements in the 2018 Decision. If those important issues of Compact interpretation arise again in the litigation, the Court's approach allows the Parties to present those issues "in their full strength." *Rhode Island v. Massachusetts*, 39 U.S. 201, 257 (1840).

*4. The Mandate Rule Does Not Alter the Result*

Next, Texas argues that "[t]he determinations on exceptions by the Supreme Court in this case are functionally a mandate because the decision directs specific action." Tex. Motion at 22. As discussed above, normal law of the case principles do not apply to Special Masters in original actions because a Special Master's authority is derived directly from the Court, and unlike a district court decision, a Special Master's recommendations do not carry the weight of law. Still, New Mexico recognizes that if the Court were to clearly articulate a mandate, the Special Master would certainly be bound by that mandate. But the question here is not whether the Special Master has the power to alter a mandate of the Court – he does not. It is whether the Court adopted the First Interim Report in the first place.

Texas makes no effort to identify the "specific action" that the Special Master has been directed to take. The relevant mandate is found not in the 2018 Decision, but in the Memorandum Order which stated "New Mexico's motion to dismiss is DENIED." *Texas v. New Mexico*, 138 S. Ct. 349 (2017) (mem.). New Mexico does not quarrel with that mandate, and the rule of mandate offers Texas no support.

**C. Texas's Proposed Determinations**

Texas argues that five "Determinations" are law of the case in these proceedings (referred to herein as "Texas Proposed Determination No. __"). Tex. Motion at 7-11. Common reasons why Texas's Motion should be denied are discussed in Section I.B above. In addition, a review

of the specific Texas Proposed Determinations reveals additional reasons why Texas's Motion should be rejected.

*1. Texas Proposed Determination No. 1*

Texas claims that "*[t]he Special Master concluded*" that the Rio Grande Project was "wholly and completely" integrated into the Compact. Tex. Motion at 7 (emphasis added). As discussed above, the relevant inquiry is what principles were adopted by the Court, not what "[t]he Special Master concluded." Setting this issue aside for the moment, as articulated in New Mexico's Proposed Principle Nos. 5-7 (the principles articulated in New Mexico's Motion are referred to as "New Mexico's Proposed Principle No. __"), NM Motion at 2, 13-14, New Mexico agrees that the Court determined that the Compact incorporates the Project. However, it goes too far to suggest, as Texas does, that the Compact incorporated the Project "wholly and completely." Rather the Project was incorporated only to the extent consistent with the express language of the Compact. New Mexico requests that the Special Master recognize that this principle, as articulated in New Mexico's Proposed Principle Nos. 5 through 7, has been previously decided by the Court.

*2. Texas Proposed Determination No. 2*

In Texas Proposed Determination No. 2, Texas requests a determination that New Mexico "relinquishes control and dominion over the water it deposits into Elephant Butte Reservoir." Tex. Motion at 8. As explained in New Mexico's motion, however, courts will not infer the meaning of an uncertain issue from ambiguous language. NM Motion at 26 (citing Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 4478; *DeWeerth v. Baldinger*, 38 F.3d 1266, 1271 (2d Cir. 1994)). In this case, the parties do not share a common understanding about the Special Master's use of the term "deliver" or "relinquishment of control." For example, unlike Texas, the United States and New Mexico understand those terms to mean physical, as opposed to

regulatory control, over water. *See* NM Motion at 26. Because the First Interim Report is not clear on this issue, it also is not clear which interpretation the Court credited, if any. It follows that Texas Proposed Determination No. 2 is not law of the case because it is ambiguous. *See generally*, *Louisiana v. Mississippi*, 466 U.S. 96, 100 (1984) (although law of the case established that the boundary between states was the "live thalweg of the navigable channel of the Mississippi River," this concept was not conclusive because "the definition of the term 'thalweg' has not been uniform or exact").

*3. Texas Proposed Determination No. 3*

In Texas Proposed Determination No. 3, Texas requests a determination that New Mexico "may not divert or intercept water . . . after the water is released from Elephant Butte Reservoir." Tex. Motion 9. The problem with Texas Proposed Determination No. 3, is that it represents a fundamental misunderstanding of water use and administration. Much of the water in the Lower Rio Grande is hydrologically connected, and it is not practical to track individual molecules of water. The Compact apportions water for 57% of Project lands to New Mexico, and a number of water users in New Mexico have appropriated water in a way that is consistent with that apportionment. Because water must be diverted to be used, it is not possible for New Mexico, or New Mexico water users in the Lower Rio Grande, to enjoy New Mexico's share of Compact water without "divert[ing] or intercept[ing] water . . . after the water is released from Elephant Butte Reservoir." Tex. Motion at 9. Thus, Texas Proposed Determination No. 3 is simply unworkable and should be rejected.

Texas's legitimate concern in this case is not whether New Mexico water users "divert or intercept" particular molecules of water in the Lower Rio Grande; it is ensuring that Texas receives its apportionment under the Compact. How this is accomplished by New Mexico, including the

rules that New Mexico imposes, how New Mexico shepherds the water to the state line, and the specifics of New Mexico water administration, are not Texas's concerns – provided that New Mexico's water administration is consistent with the Compact and Texas receives its fair share of Compact water. The Court has never held otherwise.

*4. Texas Proposed Determination No. 4*

In Texas Proposed Determination No. 4, Texas requests a determination that New Mexico "must refrain from post-1938 depletions of water . . . below Elephant Butte Reservoir." Tex. Motion at 10. There are two problems with Texas Proposed Determination No. 3. First, Texas's claim that Proposed Determination No. 4 is law of the case is on an even shakier foundation than its other claims. This is so because the issue was not featured in the exceptions. As a result, Texas's core argument that the act of overruling New Mexico's exceptions implicitly adopted the concepts raised by New Mexico does not apply.

Second, the so-called 1938 condition that Texas advocates for in its Proposed Determination No. 4, is a possible test for Compact compliance. There is no doubt that identifying an appropriate test for Compact compliance will be a critical function of the Special Master. That task, however, is a delicate matter that requires significant evidence, expert analysis, historical testimony, and legal input. Complicating Texas's argument, the Supreme Court has held that consumption may be increased on pre-compact acreage without violating a downstream state's rights under a compact. *Montana v. Wyoming*, 563 U.S. 368, 389 (2011). For example, unless the Compact strictly forbids it, New Mexico water users are entitled to "improve the efficiency of their irrigation systems" on existing acreage, *id*., or "chang[e] to a more water-intensive crop," *id*. at 379, without contravening the Compact. In short, the Parties should be allowed to submit positions

on all of these nuanced issues. *See Kansas v. Nebraska*, 135 S. Ct. at 1061 (an important role of the Court is to "promote accuracy in apportioning waters under a compact").

*5. Texas Proposed Determination No. 5*

Last, in Texas Proposed Determination No. 5, Texas requests a determination that "New Mexico state law plays no role in an interstate dispute." Tex. Motion 11. New Mexico recognizes that the Compact is "binding upon the citizens of [New Mexico] and all water claimants," and that it may not exercise its regulatory authority over water in a way that is inconsistent with the Compact. *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938). But Texas again overreaches when it asserts that state law "plays *no* role" in Compact compliance.[1]

In the briefing on exceptions, the United States agreed with New Mexico that neither the Compact nor the doctrine of equitable apportionment require New Mexico to surrender all regulatory authority over water in the Rio Grande between Elephant Butte Reservoir and the New Mexico-Texas state line. U.S. Reply on Exceptions at 6, 15-16. The United States interpreted the First Interim 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.

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

[1] Indeed, the Rio Grande Compact is itself a New Mexico state statute. NMSA 1978, § 72-15-23 (1945).

yet to be determined in this proceeding. *Id*. at 16.

Furthermore, subject to the rule in *Hinderlider,* the Court has repeatedly recognized the role that state law plays in ensuring compliance with an interstate compact. *See Kansas v. Nebraska*, 135 S. Ct. at 1059 (rejecting an injunction because "Nebraska's new compliance measures, so long as followed, are up to the task of keeping the State within its allotment"); *Montana v. Wyoming*, 563 U.S. at 371 (finding that amount of water downstream state receives under the Yellowstone River Compact depends on upstream state's system of prior appropriation); *Kansas v. Colorado*, 543 U.S. 86, 103-04 (2004) (upholding recommendation that matters integral to Arkansas River Compact accounting be quantified by the upstream state water court). In light of this precedent, and in light of the contrasting views presented to the Court on exceptions, it is not clear what substantive principles, if any, the Court intended when it overruled the exceptions, and Texas's Proposed Determination No. 5 should be rejected. *See Tarrant Reg. Water Dist. v. Hermann*, 569 U.S. 614, 631 (2013) ("[W]hen confronted with silence in compacts touching on the States' authority to control their waters, we have concluded that '[i]f any inference at all is to be drawn from [such] silence on the subject of regulatory authority, we think it is that each State was left to regulate the activities of her own citizens.'" (quoting *Virginia v. Maryland*, 540 U.S. 56, 67 (2003)).

### D. In Contrast, Several of Texas's Proposed "Principal Decisions" Are Law of the Case

As discussed, Texas overreaches by suggesting that Texas Proposed Determination Nos. 2 through 5 are law of the case even though they were not directly evaluated or clearly adopted by the Court. Texas does, however, offer nine more restrained findings that it self-consciously terms "principal decisions in the Court's mandate" ("Texas Principal Decision"). Motion at 13. New Mexico concurs that many of those "Principal Decisions" have been previously decided:

Texas's Principal Decision No. 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." Motion at 13 (citing *Texas v New Mexico*, 138 S. Ct. 954)

New Mexico's Position:

Texas's Principal Decision No. 1 tracks New Mexico's Proposed Principle No. 3. *See* NM Motion at 2, 13. New Mexico agrees that Texas's Principal Decision No. 1 is law of the case, and requests that the Special Master recognize that the principle, as articulated in New Mexico's Proposed Principle No. 3, has been previously decided.

Texas's Principal Decision No. 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." Motion at 14 (citing *Texas v. New Mexico*, 138 S. Ct. 954).

New Mexico's Position:

Texas's Principal Decision No. 2 partially tracks New Mexico's Proposed Principle No. 4, with one notable exception. *See* NM Motion at 2, 13. New Mexico agrees that "[t]he United States entered 'Downstream Contracts' with the two irrigation districts "below Elephant Butte Dam." New Mexico further agrees that EBID and EPCWID agreed to pay charges in proportion to the amount of irrigable acreage in each district, and in turn New Mexico was allocated water for 57% of that land and Texas was allocated water for 43% of that land. Texas asserts in its Principal

Decision No. 2, however, that the water that was divided was the "released water" from the Reservoir. But the definition of the water that was divided is an issue that has not yet been presented to the Special Master or the Court, and it may make a meaningful difference to the States. For example, both Texas and the United States make much of an issue about return flows, but it is not yet clear how the return flows factor in to the equitable apportionment. Because the issue has not yet been considered, the Special Master should decline to include the language proposed by Texas. Rather, New Mexico's Proposed Principle No. 4 tracks most closely to the language of the Court, which found that the charges to be paid by the irrigation districts, as well as the corresponding amount of water to be delivered, was "in proportion to the percentage of the total acres lying in each state." *Texas v. New Mexico*, 138 S. Ct. at 957.

Texas's Principal Decision No. 3:

"The 'Downstream Contracts . . . promised Texas water districts a certain amount of water every year from the Reservoir's resources." *Id*. (quoting *Texas v. New Mexico*, 138 S. Ct. at 957).

New Mexico's Position:

New Mexico does not disagree that the Court used the language quoted in Texas's Principal Decision No. 3, and New Mexico does not dispute that the Downstream Contracts promised "a certain amount of water every year from the Reservoir's resources." It is not clear, however, how that "certain amount of water" is to be defined or measured. This is especially the case because "a certain amount of water every year" could, on its face, be interpreted to refer to a specific sum each year, as opposed to a variable, but defined, amount each year based on the amount of useable water in Project storage. Because the language in Texas's Principal No. 3 is vague, it would not be helpful or efficient to adopt this language as a matter that has been previously decided.

Texas's Principal Decision No. 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*. (quoting *Texas v. New Mexico*, 138 S. Ct. at 959).

New Mexico's Position:

Texas's Principal Decision No. 4 tracks New Mexico's Principle Nos. 5 and 6. *See* NM Motion at 2, 13-14. New Mexico agrees that Texas's Principal Decision No. 4 is law of the case, and requests that the Special Master recognize that the principle, as articulated in New Mexico's Proposed Principle Nos. 5 and 6, has been previously decided.

Texas's Principal Decision No. 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*. (quoting *Texas v. New Mexico*, 138 S. Ct. at 959).

New Mexico's Position:

Speaking for a unanimous Court, Justice Gorsuch did not indicate that it was "[a]dopting Texas's argument," as Texas suggests. Nonetheless, Texas's Principal Decision No. 5 tracks New Mexico's Proposed Principle No. 8. *See* NM Motion at 2, 14. New Mexico agrees that Texas's Principal Decision No. 5 is law of the case, and requests that the Special Master recognize that the principle, as articulated in New Mexico's Proposed Principle No. 8, has been previously decided.

Texas's Principal Decision No. 6:

"Therefore, 'the Compact could be thought implicitly to incorporate the Downstream Contracts by reference.'" *Id*. (quoting *Texas v. New Mexico*, 138 S. Ct. at 959).

New Mexico's Position:

Texas's Principal Decision No. 6 tracks New Mexico's Principle No. 5. *See* NM Motion at 2, 13. New Mexico agrees that Texas's Principal Decision No. 5 is law of the case, and requests that the Special Master recognize that the principle, as articulated in New Mexico's Proposed Principle No. 5, has been previously decided.

Texas's Principal Decision No. 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*. (quoting *Texas v. New Mexico*, 138 S. Ct. at 959).

New Mexico's Position:

New Mexico does not agree that the "Court determined a Compact breach *would* jeopardize the United States' ability to meet its Treaty obligations with Mexico" as argued by Texas. Tex. Motion at 14 (emphasis added). Instead, as stated in New Mexico's Proposed Principle No. 10, the Court explained that "a breach of the Compact *could* jeopardize the federal government's ability to satisfy its treaty obligations." 138 S. Ct. at 959 (emphasis added). New Mexico requests that the Special Master recognize that this principle, as articulated in New Mexico's Proposed Principle No. 10, has been previously decided.

Texas's Principal Decision No. 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 14-15 (quoting *Texas v. New Mexico*, 138 S. Ct. at 959-60).

New Mexico's Position:

Texas's Principal Decision No. 8 tracks New Mexico's Principle Nos. 9 and 10. *See* NM Motion at 2, 14. New Mexico agrees that Texas's Principal Decision No. 8 is law of the case, and requests that the Special Master recognize that the principle, as articulated in New Mexico's Proposed Principle Nos. 9 and 10, has been previously decided.

Texas's Principal Decision No. 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 15 (quoting *Texas v. New Mexico*, 138 S. Ct. at 959-60) (emphasis in original)).

New Mexico's Position:

New Mexico agrees that the Court has overruled New Mexico's exceptions and remanded the case to the Special Master for further proceedings consistent with its opinion. As explained above, however, this isolated statement, without more explanation or an affirmative act from the Court, does not mean that the Court has affirmatively adopted the First Interim Report.

### E. New Mexico Recognizes Its Prior Concessions

As part of its argument that the First Interim Report is law of the case, Texas suggests that New Mexico "apparently now wants to ignore" concessions that it has made in this case. This is not correct. New Mexico continues to recognize the concepts that (1) Texas received an equitable apportionment through the Compact and that Texas's (and part of New Mexico's) share of water is distributed by the Project, Tex. Motion at 24, (2) that Reclamation, rather than New Mexico, is the entity with the duty to physically distribute Project water, Tex. Motion at 24, (3) that the case will move forward to resolve claims among Texas, New Mexico, and the United States, Tex. Motion at 25, and (4) whether and to what extent Texas (and New Mexico) have been injured, as well as the appropriate remedies (if any), are issues that will be litigated in this case, Tex. Motion at 26. Contrary to Texas's implication, none of New Mexico's positions conflict with any of those "concessions."

Of greater concern, is that Texas mischaracterizes New Mexico's position. This has been a problem throughout this litigation. Because it is important for the Special Master to recognize and address the *actual* positions of the States, New Mexico addresses that on-going problem here.

In its Motion, Texas characterizes New Mexico's position as "assert[ing] that [New Mexico] may intercept and divert water leaving the Reservoir 'before it crosses the New Mexico—Texas state line. . . .'" Tex. Motion at 24 (quoting FIR at 215). New Mexico has never taken the position that it could reduce Texas's apportionment in this manner, and it has made repeated attempts to disabuse Texas of this mistaken view. For example, in its Reply in support of its Motion to Dismiss, New Mexico explained that it "does not suggest that the Compact allows it to 'simply deliver water into Elephant Butte Reservoir only to recapture the same water at any point

before it reaches irrigable land in Texas,' as Texas claims, Tex. Br. 28, and it does not argue that it is free from responsibility below Elephant Butte." N.M. Reply on Mot. To Dis. at 4.

Unfortunately, Texas's mischaracterization was successful. Special Master Grimsal was influenced by Texas's argument, and incorrectly described New Mexico's position as "assert[ing] that it may intercept and divert water leaving Elephant Butte Reservoir before it crosses the New Mexico—Texas state line because that water . . . is governed by New Mexico state water law." FIR 211.

Encouraged by Special Master Grimsal's erroneous description, Texas perpetuated its mischaracterization of New Mexico's position on exceptions before the Court. Again, New Mexico attempted to correct the problem:

> Texas continues to misrepresent New Mexico's position before this Court. New Mexico has repeatedly disclaimed that it has a right arising under the Compact, New Mexico state law, or Reclamation law to deplete Project water allocated for delivery to Texas beneficiaries after its release from Elephant Butte. *See, e.g.*, N.M. Reply Br. on Mot. to Dismiss at 4; N.M. Br. at 24. Ignoring New Mexico's representations before the Special Master and to this Court, Texas argues New Mexico's "fundamental legal argument" is 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." Texas Reply at 5-6; *see also* Texas Reply at 22 ("New Mexico asserts it may intercept and divert water leaving the Reservoir before it crosses the New Mexico-Texas state line because that water . . . is governed by New Mexico state water law" (internal quotation omitted)).
>
> Texas's continued misrepresentation of New Mexico's position interferes with the ability of the Court, the Special Master, and the parties to address the actual legal issues presented by New Mexico's Motion to Dismiss, the Report, and the exceptions thereto. It is unclear whether Texas's mischaracterization of New Mexico's argument is intentional. Either way, New Mexico reiterates what has always been its position: acceptance of New Mexico's jurisdiction over water in the Lower Rio Grande does *not* allow New Mexico to unilaterally deplete Texas's apportionment. It *does* allow state law jurisdiction over water in accordance with Section 8 of the Reclamation Act and this Court's precedents. 43 U.S.C. §383; *California v. United States*, 438 U.S. 645, 678 (1978) (recognizing that the exercise of a State's jurisdiction must be consistent with congressional directives).

N.M. Sur-Reply on Exceptions at 13-14.

Given this history, and New Mexico's good faith efforts to correct this erroneous understanding, it is disappointing that Texas continues to inaccurately describe New Mexico's position and refuses to recognize New Mexico's actual position. As described in the quoted language above, Texas's misrepresentations are not helpful to the ultimate resolution of this case, which should be based on the real positions of the Parties. New Mexico respectfully requests that Texas make every possible effort to correctly characterize New Mexico's position in future proceedings before this Special Master. And in any event, New Mexico hopes that its real position is clear so that the Special Master can avoid any future confusion.

## II. TEXAS'S MOTION IN LIMINE SHOULD BE DENIED

Texas's Motion in Limine is not well taken, and should be denied for three reasons.

First, Texas justifies its motion to exclude evidence because "[s]uch evidence, if allowed, would have the effect of trying to influence, alter, and/or otherwise prejudicially modify previously decided legal issues." Tex. Motion 28. It further argues that this effect would "render the scope of discovery and trial overly burdensome and inefficient." *Id.* This argument necessarily collapses if the Special Master rejects Texas's argument that Texas Proposed Determination Nos. 2 through 5 constitute law of the case. In other words, if the issues identified by Texas are not "previously decided legal issues," then the premise of Texas's argument fails. Thus, the Motion in Limine should be denied for the reasons articulated in Section I of this Response.

Second, Texas's Motion in Limine is vague and overly broad. At this early stage, it seeks "an order that excludes the introduction of any evidence to prove the previously decided legal issues as irrelevant." Tex. Motion at 28. The general rule is that a motion in limine must specifically identify the evidence at issue. *See, e.g., United States v. Marr*, 760 F.3d 733, 740 (7th Cir. 2014) ("A terse motion in limine is not specific enough to meet the requirements of Fed. R.

Evid. 103(a)."); *Illinois v. Stevenson*, 12 N.E.3d 179, 186-187 (Ill. App. Ct. 2014) ("Because a ruling on the motion can restrict evidence, the motion must be specific and allow the court and the parties to understand what evidence is at issue."); *Utah v. Shaffer*, 725 P.2d 1301, 1308 (Utah 1986) ("[W]here a motion in limine does not adequately describe the evidence complained of on appeal, that motion does not provide the trial judge with an opportunity to make a ruling, and a contemporaneous objection is necessary."); *Kitchen v. Arkansas*, 607 S.W.2d 345, 354 (Ark. 1980) ("We should also point out that there is no reversible error in the denial of a motion in limine where the motion is vague and indefinite."). Texas's Motion in Limine does not satisfy that standard.

In addition, such an order would manufacture previously nonexistent disputes over whether discovery is designed to "prove the previously decided legal issues." This would be inefficient, in part because much of the evidence in this case serves multiple purposes. If Texas has concerns about specific and particularized evidence, such as identifiable documents or deposition testimony, it can raise those issues closer to trial when the issues are more crystallized.

Third, the Court "surely ha[s] the power" to revisit issues when it is appropriate. *Wyoming v. Oklahoma*, 502 U.S. at 446. But the Court can only accomplish this if a full record has been created by the Special Master. If the Special Master were to grant Texas's Motion in Limine, it would artificially restrict the record and deprive the Court of the ability to consider all of the issues at their full strength. That course of action would not be prudent without clear guidance from the Court on the substance of the issues.

Granting Texas's Motion would also break with the tradition of previous Special Masters, who have taken a cautious and farsighted approach to limiting issues and evidence. For example, in *Kansas v. Nebraska*, Special Master Kayatta clarified that his role was "to compile a record for

independent review of [his] recommendations"; he explained that his reluctance to entertain *Daubert* motions rested on "the structure of th[e] proceeding and given what would be [his] caution in constructing a record that allows the Court to make an independent judgment, if it should disagree, and not wanting to have a path unnecessarily cut off that would require remand." Transcript, Telephone Conference before Special Master William J. Kayatta, Jr. at 62:20-63:21, *Kansas v. Nebraska & Colorado*, (No. 126, Original) (March 23, 2012) (applicable pages are attached hereto as Exhibit A); *see also Florida v. Georgia*, 138 S. Ct. at 2521 ("At the very least, we believe that more proceedings are necessary to reach a definitive determination"); *United States v. Wyoming*, 331 U.S. 440, 459-61 (1947) (remanding to allow the Special Master to take evidence regarding good faith, which had been erroneously excluded). Again, the words of the Clerk of the Supreme Court are instructive: "Since Masters are neither ultimate factfinders nor ultimate decisionmakers, they should err on the side of overinclusiveness in the record." *Guide for Special Masters* at 9; *see also* 2016 Mem. of Dec. at 35-36, *Mississippi v. Tennessee*, (No. 143, Original) (Aug. 12, 2016) (Special Masters "have been advised to err on the side of over-inclusiveness in the record for the purposes of assisting the Court in making its ultimate determination").

## CONCLUSION

Texas's Motion should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES
No. 126, Original

| | |
|---|---|
| STATE OF KANSAS, | ) |
| | ) |
| Plaintiff, | ) |
| | ) |
| V. | ) |
| | ) |
| STATE OF NEBRASKA | ) |
| and | ) |
| STATE OF COLORADO, | ) |
| | ) |
| Defendants. | ) |

TELEPHONE CONFERENCE before SPECIAL MASTER WILLIAM J. KAYATTA, JR., ESQ., held at the law offices of Pierce Atwood, LLP, at 254 Commercial Street, Portland, Maine, on March 23, 2012, commencing at 10:00 a.m., before Claudette G. Mason, RMR, CRR, a Notary Public in and for the State of Maine.

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| For the USA: | JAMES J. DUBOIS, ESQ. |
| Also Present: | JOSHUA D. DUNLAP, ESQ. |



**EXHIBIT A**

that process, at least looking at the calendar as it's set forth now, until that July/August time frame.

We have at least 10 depositions remaining, and we have two weeks left to do that, and then coming out of that, having to get our summary judgment motions ready for the May 15 deadline.

I'm just beginning to see that as somewhat problematic, and I just do not believe that Nebraska could proceed and resolve the issues on the dispositive motions along with our initial pretrial motions with regard to Daubert and then actually getting prepped and ready for the trial itself, depending upon the outcome of those Daubert motions.

SPECIAL MASTER KAYATTA: Yes. I see -- and I definitely understand what you're saying. And were this -- you know, were this a jury trial we were approaching, that's something I would have -- I would give very significant weight to. Here though, not only is it a nonjury proceeding, but it's also a proceeding where part of my job is not just

to be the trial judge, but also to compile a record for independent review of my recommendations. So I would be very surprised if there were a Daubert issue that could be raised prior to trial that would cause me to strike a witness's testimony and not even have it presented at trial. It seems to me a much more efficient manner to proceed is bring the expert, put him on, make the Daubert and other objections; and I can then share my views both on the Daubert issue and on what I think of the expert testimony as well.

So it's -- it's hard for me -- let's put it this way. If there are -- given the structure of this proceeding and given what would be my caution in constructing a record that allows the Court to make an independent judgment, if it should disagree, and not wanting to have a path unnecessarily cut off that would require a remand, if you have a Daubert issue, which in that context would be so convincing that we could dispense with the need to even put someone on, such as it goes to their credentials or something like that,

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 CERTIFICATE OF SERVICE**

_____♦_____

This is to certify that on the 28th of February 2019, I caused true and correct copies of

**NEW MEXICO'S RESPONSE TO 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**

to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 28th day of February, 2019.

*/s/ Michael A. Kopp*
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