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

Hearing: April 2, 2019; 9:00 a.m.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES

Page(s)

Cases (cont.)

Statutes

Court Rules

Other Authorities

I. INTRODUCTION

The State of New Mexico's (New Mexico) Motion for Partial Judgment on Matters Previously Decided (N.M. Motion) enumerates eleven items it declares are previously decided principles, constituting the law of the case. N.M. Motion, at 2-3, 13-14. Critical to the consideration of this motion, as well as the concurrently pending motion by the State of Texas (Texas),[1] New Mexico concedes that the law of the case doctrine has application in this proceeding. In light of New Mexico's agreement with Texas that the law of the case doctrine applies to this case, the focus for both pending motions is the identification and confirmation of which principles constitute the law of the case.

The law of the case doctrine only applies to previously decided legal issues.[2] New Mexico agrees. N.M. Motion, at 11. While it is undisputed that the application of the law of the case doctrine first requires a *prior adjudication of a legal issue*, New Mexico enumerates eleven items and forges ahead into its argument, ignoring that most of its items are either factual in nature, or do not represent *any* finding made by the Special Master and/or the Court.[3] The items enumerated by New Mexico, here contested

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[1] The factual background and legal arguments set forth in 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, filed by Texas on December 26, 2018 (Texas Motion) are incorporated herein by reference.

[2] Texas and New Mexico both cite to *Arizona v. California*, 460 U.S. 605, 618 (1983) in their respective motions as the controlling authority on the doctrine of law of the case. *See* N.M. Motion, at 11; Texas Motion, at 16.

[3] Attached hereto as Exhibit A is a summary of Texas's position regarding each of New Mexico's eleven items. Texas believes it important to distinguish what is law of the case from those items that may be undisputed and, in that context, decided for other reasons. Exhibit A carefully articulates Texas's analysis of the eleven items, explains why all but one of those items cannot constitute law of the case, and also identifies those items that are not law of the case but that Texas nonetheless does not contest.

by Texas, do not meet the threshold and foundational requirement that they be *previously decided legal* issues. Therefore, New Mexico's Motion must fail on this basis alone.

As set forth in the Texas Motion, New Mexico affirmatively placed various legal questions at issue in its 2014 Motion to Dismiss the Texas Complaint and the United States' Complaint in Intervention (N.M. Motion to Dismiss). There, New Mexico argued and conceded that the language of the compact at issue herein is unambiguous and, when a compact is unambiguous, it is within the purview of the Court to interpret the compact and rule as a matter of law. N.M. Motion to Dismiss, at 34. This prior briefing rendered it necessary for the Special Master, and ultimately the United States Supreme Court (Supreme Court or Court), to make determinations on those legal questions. New Mexico nonetheless continues to ignore the fact that it squarely placed legal questions at issue before the Special Master and the Court, resulting in the First Report,[4] a 278-page analysis by the Special Master addressing each of the legal questions posed by New Mexico.

After New Mexico filed exceptions to the Special Master's First Report, directly challenging the Special Master's analysis and legal conclusions contained in that Report, the Court expressly acknowledged that it "accepted" the recommendations of the Special Master. *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018). Now, New Mexico claims that it only filed its exceptions "out of an abundance of caution." N.M. Motion, at 9. It does so without articulating any legal precedent for the novel position that filing formal

[4] 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 (Feb. 9, 2017) (First Report).

exceptions "out of an abundance of caution" is legal grounds to disregard the exceptions when it believes the result of the adjudication of its exceptions is, from its perspective, unsatisfactory.

Apparently, because it does not like the legal conclusions reached by the Special Master and the Court, which arose from questions it posed in its motion, New Mexico seeks to diminish these legal conclusions by labeling them as "dicta" and argues that the legal conclusions should be disregarded. N.M. Motion, at 9. Significantly, New Mexico does not argue that these critical legal conclusions were not made; rather it recognizes them as having been made, but terms them dicta.

In any event, New Mexico's position that these critical legal conclusions were dicta is legally unsupportable and ignores the procedural history of this case. Indeed, case history confirms that New Mexico said the 1938 Rio Grande Compact, Act of May 31, 1939, ch. 155, 53 Stat. 785 (1938 Compact or Compact) is unambiguous.[5] Texas said the Compact is unambiguous.[6] The Special Master said the Compact is unambiguous and the Court said the Compact is unambiguous.[7] Thus, the issue of whether the Compact language is ambiguous has been determined as a matter of law. That the Court did not adopt New Mexico's interpretation of the Compact does not negate the Court's findings and does not justify re-litigating these issues. Such an

[5] *See, e.g.*, N.M. Motion to Dismiss, 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.").

[6] Texas' Brief in Response to New Mexico's Motion to Dismiss Texas' Complaint and the United States' Complaint in Intervention, at 22, 25, 26.

[7] First Report, at 194; *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) ("A Special Master we appointed to consider the case received briefing, heard argument, and eventually issued an interim report recommending that we deny New Mexico's motion to dismiss Texas's complaint. We accepted that recommendation."

outcome would be prejudicial to Texas, and also ignores basic principles of judicial efficiency, particularly given the resources expended since 2014 to achieve an adjudication of Compact interpretation.

Accordingly, Texas respectfully requests that the Special Master deny New Mexico's Motion and issue the judicial declarations and grant the relief requested in the Texas Motion.

II. BACKGROUND

New Mexico moved to dismiss both the Texas and United States Complaints on April 30, 2014. The fundamental premise of New Mexico's Motion to Dismiss was that the plain and unambiguous text of the 1938 Compact does not support the allegations in the Texas Complaint. *See, e.g.*, N.M. Motion to Dismiss, 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 urged, among other things, 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. Motion to Dismiss, at 46-64. Over the course of the following three years, the parties fully briefed the motions to dismiss and several motions to intervene, the Special Master held oral arguments, and the Special Master submitted the First Report to the Court.

In the First Report, the Special Master recommended 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. Thus, 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. Based on the Special Master's analysis of the plain, unambiguous language of the 1938 Compact, the Special Master determined that the 1938 Compact requires that New Mexico relinquish control and dominion over the distribution of the water delivered into Elephant Butte Reservoir. *Id.* at 194-98.

New Mexico[8] and Colorado challenged the Special Master's analysis by filing extensive exceptions. The United States filed exceptions to the recommendations related to its Complaint in Intervention. New Mexico's exceptions specifically challenged the Special Master's legal reasoning in the First Report. Significantly, it argued that contrary to the Special Master's recommendation, the "plain text and the structure of the Compact" do not require New Mexico to relinquish its jurisdiction over water released from Elephant Butte Reservoir. N.M. Exceptions, at 13.

The Court issued an order denying New Mexico's Motion to Dismiss the Texas Complaint on October 10, 2017. After oral argument on the United States' exceptions and the exceptions of Colorado on January 8, 2018, the Court issued its March 5, 2018 final decision, ruling 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. 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

[8] State of New Mexico's Exceptions to the First Interim Report of the Special Master and Brief in Support, filed June 9, 2017 (N.M. Exceptions).

1938 Compact is unambiguous, and it plainly requires New Mexico to deliver specified water volumes to Elephant Butte Reservoir and then relinquish control.

III. LEGAL ARGUMENT

A. The Doctrine of the Law of the Case is Applicable

Texas respectfully refers to the Special Master, and incorporates herein, the sections setting forth the law of the case doctrine in the Texas Motion. Of particular note, New Mexico's assertion that the law of the case doctrine is inapplicable in the context of a motion to dismiss (N.M. Motion, at 12) is patently incorrect. *See* Texas Motion, at 18-19, 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).

Moreover, New Mexico's entire motion is premised on its admission that the law of the case doctrine *does* apply to this case, notwithstanding New Mexico's misidentification of which "principles" are previously decided legal findings by the Special Master and Court that constitute the law of the case going forward.

B. New Mexico Conflates Legal and Factual Issues to Avoid Proper Application of the Law of the Case Doctrine

The New Mexico Motion enumerates predominately-factual items, as well as items that do not reflect any legal determination made by the Special Master and Court to date, and asks the Special Master to declare that the items were "previously decided" "principles" that should constitute the law of the case. N.M. Motion, at 2, 13. New Mexico further argues that the Special Master should "reserve judegment [sic] and allow evidence" on the issue of interpretation of the 1938 Compact. *Id.* at 15.[9] New Mexico misapplies the law of the case doctrine, which applies to legal issues "discussed and decided," including the Special Master and Supreme Court's interpretation of the 1938 Compact, and not to the items outlined in its motion, as individually addressed in Exhibit A hereto. *Id.* at 12. As the Supreme Court noted in *Arizona v. California*, 460 U.S. at 618 (citing 1B J. Moore & T. Currier, Moore's Federal Practice ¶ 0.404 (1980)), "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." Thus, previous decisions upon a "rule of law" (*i.e.*, legal issues) may be subject to the law of the case doctrine, whereas factual findings are not.

The meaning of the 1938 Compact is a legal issue and there has been substantial litigation on that legal issue since the filing of the Texas Complaint in

[9] New Mexico, relying on the 5th Circuit's decision in *Seagraves v. Wallace*, 69 F.2d 164 (5th Cir. 1934), argues that the law of the case doctrine applies only to "terms discussed and decided." N.M. Motion, at 11. As provided further herein, the Special Master and Supreme Court considered exhaustive briefing on the issues over the last six years, have "discussed and decided" that the 1938 Compact is not ambiguous because it plainly requires New Mexico to deliver to Elephant Butte Reservoir and relinquish control over a specified volume of water. The ruling on that legal question *is* the "law of the case." Texas Motion, at 25-26.

2013 (Texas Compl.). The Special Master and Supreme Court have decided that the 1938 Compact is not ambiguous. Specifically, the Special Master, and ultimately the Supreme Court "discussed and decided" legal questions relating to the interpretation of the 1938 Compact as part of the Special Master's First Report and in the Supreme Court's two actions related to New Mexico's motions.

1. The Special Master's First Report Includes Specific Determinations on Legal Issues

In the First Report, the Special Master recommended that the Supreme Court deny New Mexico's Motion to Dismiss the Texas Complaint and ruled that "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 primary legal argument asserted by New Mexico: that New Mexico has a 1938 Compact right to intercept, divert, and deplete water leaving Elephant Butte Reservoir before it crosses the New Mexico-Texas state line. Based on the Special Master's analysis of the plain, unambiguous language of the 1938 Compact and its structure and design, the Special Master interpreted the 1938 Compact to require that New Mexico relinquish control and dominion over the distribution of the water delivered into Elephant Butte Reservoir. New Mexico filed specific exceptions to the First Report, including the argument that contrary to the Special Master's recommendation, the "plain text and the structure of the Compact" do not require New Mexico to relinquish its jurisdiction over water released from Elephant Butte Reservoir. N.M. Exceptions, at 13.

2. The Supreme Court's Summary Denial and Express Overruling of New Mexico's Exceptions Only Resolved Legal Issues

Following oral argument on various parties' exceptions to the First Report, the Supreme Court issued its opinion on March 5, 2018, delivering several rulings and

overruling "all other exceptions," including New Mexico's exceptions relating to interpretation of the 1938 Compact.[10] The Supreme Court's decision denied all challenges to the Special Master's legal determinations based on the 1938 Compact interpretation. As a matter of law, the law of the case includes the conclusion that the plain structure and text of the 1938 Compact renders it unambiguous.

The Supreme Court has stated its reluctance for re-litigating issues in original jurisdiction cases, finding that "[i]t would be counter to the interests of all parties . . . to open what may become a Pandora's Box, upsetting the certainty of all aspects of the [prior] decree." *Arizona v. California*, 460 U.S. at 625 (citation omitted). The Court further stated that it "fear[s] that the urge to re-litigate, once loosened will not be easily cabined," and that "[t]hese considerations, combined with the practice in [the Court's] original cases and the strong res judicata interests involved" did not warrant re-litigation of a previously addressed question of law involving water rights. *Id.* at 625-26. While the Court noted that the rules of preclusion were not "strictly applicable" in this case, the Court relied on the principle of finality underlying res judicata to inform its decision. *Id.* at 619; *see also Nevada v. United States*, 463 U.S. 110, 129 n.10 (1983) citing *Arizona v. California*, 460 U.S. at 620 ("The policies advanced by the doctrine of res judicata perhaps are at their zenith in cases concerning real property, land and water.").

[10] It is of note that the City of Las Cruces and Albuquerque Bernalillo County Water Utility Authority took the matter a step further than New Mexico, arguing in their exceptions that the New Mexico Motion to Dismiss the Texas Complaint be granted. Texas's objections to these amicus briefs were denied and it must be presumed that the Court reviewed these exceptions and denied them when it denied *all* exceptions except those of the United States.

Conversely, factual matters submitted to prove a compact violation (or lack thereof) have yet to be "discussed and decided" and cannot be subject to the law of the case doctrine.[11] Formal fact discovery did not even begin until September of 2018, well after the New Mexico Motion to Dismiss was submitted, argued, and ruled upon. Most of the items that New Mexico claims have been "previously decided" are factual or were never decided at all, and thus do not conform to the fundamental premise of the law of the case doctrine that addresses *previously decided legal* issues. The factual items, as well as items that do not reflect any legal determination made by the Special Master and Court in this case, must be rejected as constituting the law of the case. Indeed, there are several factual issues in New Mexico's list of enumerated items that are presently the subject of formal discovery, many of which address whether New Mexico has, in fact, violated the 1938 Compact.

C. New Mexico May Not Ignore the Special Master's Determinations, and the Supreme Court's Adoption of the Special Master's Reasoning

1. New Mexico Fails to Properly Identify the Legal Principles Adopted and Decided by the Court

New Mexico concedes that the Supreme Court made legal determinations and that those certain legal principles must guide the case. N.M. Motion, at 2, 13, 27. Based on this concession, New Mexico creates a list of items (repeated three times in New Mexico's Motion), purporting to identify these legal principles. However, its list does not hew to the actual legal determinations set forth in the First Report or the Supreme

[11] Texas's Motion provides a list of factual determinations that will require a decision following completion of discovery. Texas Motion, at 29-30.

Court's decision regarding the First Report.[12] Rather, most of New Mexico's list harkens back to the same arguments on legal issues that were before the Special Master under New Mexico's Motion to Dismiss, and that it argued to the Supreme Court on exceptions (four exceptions filed based on New Mexico's "abundance of caution," *id.* at 9).

Many of the items enumerated by New Mexico inject factual assertions and differ from the Supreme Court's Opinion and the First Report. *See* Exhibit A. As noted in the Texas Motion, New Mexico's filing of its exceptions placed the legal assertions into focus and at issue before the Supreme Court. New Mexico asked for five legal determinations about 1938 Compact interpretation in its exceptions. N.M. Exceptions, at 16, 30, 42, 49, 56. The Supreme Court overruled the exceptions in their entirety.

2. New Mexico Confuses the Concepts of Apportionment and Allocation

New Mexico asserts that the 1938 Compact's determination is an "allocation" throughout its Motion, as it has in prior briefing, and that the New Mexico allocation is subject to New Mexico law. This is incorrect. The 1938 Compact *apportions* water between the signatory states; the United States, through the Bureau of Reclamation, and *allocates* available water to satisfy the downstream contracts and satisfy each state's apportionment on an annual basis. As Texas previously argued in its Sur-Reply to Exceptions on the First Interim Report (Texas Sur-Reply) filed August 31, 2017 ("There is a relationship between the 1938 Compact and the Project." Texas Sur-Reply, at 1. "The Special Master properly addressed and accurately characterized that relationship in the First Report. The Special Master concluded that: the 1938 Compact integrates the

[12] As noted herein above, Exhibit A sets forth Texas's response to each of the items in New Mexico's list, specifying whether Texas agrees with or contests categorizing each item as the law of the case going forward.

Project 'wholly and completely,'" First Report, at 198 . . . ." *Id.* at 1.). Based on his reasoning, the Special Master found "[T]herefore, the Project water *leaving* Elephant Butte belongs to either New Mexico or Texas *by compact*, or to Mexico by the Convention of 1906." First Report, at 212-13 (emphasis added). The unauthorized depletion of project return flows and seepage in New Mexico necessarily diminishes the amount of 1938 Compact water delivered to Texas. Texas alleges this injury in its Complaint. *See* Texas Compl. ¶¶ 18-19, 21; Texas Sur-Reply, at 2. The Special Master determined, in the First Report, that it is the law of equitable apportionment, not state law, which controls. First Report, at 210.

3. The Court's Decision to Overrule New Mexico's Exceptions on Legal Issues has Consequences

The Supreme Court overruled all of New Mexico's exceptions on October 10, 2017. New Mexico previously argued in its Sur-Reply to the Replies of the United States, Texas, and Colorado (N.M. Sur-Reply) dated September 12, 2017, that "New Mexico's Motion to Dismiss was submitted in good faith, and was based on an interpretation of the Compact that has been advanced in prior lower court opinions." N.M. Sur-Reply, at 12. Now, New Mexico argues that Compact interpretation is still to be litigated, and that evidence should be allowed for seven reasons, including that "the interpretation of the Rio Grande Compact is a critical issue," that "remaining issues were not finally decided," and that "the Court did not adopt the [First] Report." N.M. Motion, at 15. That theory cannot survive scrutiny. Contrary to New Mexico's theory, the Court's Opinion states: "We accepted that recommendation." *Texas v. New Mexico*, 138 S. Ct. at 958.

When its exceptions were overruled, that decision also overruled New Mexico's arguments that the First Report should be ignored. The Special Master should not now disregard all the work undertaken by the parties, the Special Master, or the Court's October 17, 2017 Order, and March 5, 2018 Opinion. Further, contrary to New Mexico's assertions, the 1938 Compact interpretation issues were "discussed and decided" in the First Report at pages 187-210. The Court's straightforward and unequivocal acceptance of the Special Master's First Report establishes this. New Mexico's recitation of "Events Leading to Present Dispute" in this current motion proves this very point, legal issues have been "discussed and decided" in significant detail and at significant expense, and have been affirmed by the Court.

New Mexico's decision to file exceptions on the Compact interpretation and the hearing before the Supreme Court on exceptions constituted the *de novo* review contemplated by Rule 53 of the Federal Rules of Civil Procedure. Under Rule 53, "the master has and shall exercise the power to regulate all proceedings in every hearing before him and to do all acts and take all measures necessary or proper for the efficient performance of his duties under the order." *Richardson v. Bedford Place Hous.*, 855 F. Supp. 366, 368 (N.D. Ga 1994). This "power includes the authority to make proposed findings of facts and conclusions of law on dispositive motions such as those to dismiss or for summary judgment." *Id.* at 368, citing *Nebraska v. Wyoming*, 507 U.S. 584, 589 (1993); *see also Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1566 (Fed. Cir. 1988); *In re Armco, Inc.*, 770 F.2d 103, 105 (8th Cir. 1985).

The Court accepted the Special Master's decisions on New Mexico's Motion to Dismiss based on the First Report. A decision that rejects all exceptions to the First

Report and rejects the legal reasoning of those exceptions, does not leave the Special Master's legal determinations open for yet another round of litigation. The First Report forms the basis of the Court's opinion. The Special Master's findings contained in the report, to the extent adopted or modified by the Court, form the basis of the opinion or judgment of the Court. *See* Fed. R. Civ. P. 53. Additionally, accepting New Mexico's position on the 1938 Compact interpretation would negatively affect judicial efficiency and economy, and would require the current Special Master to re-do the work already reviewed and determined in the First Report.

4. The Court Relies on Principles of Finality in Water Rights Disputes, Further Supporting its Adoption of the Reasoning in the First Report

As discussed in the Texas Motion, the Court prefers finality in matters regarding water rights. As such, the acceptance of the Special Master's recommendations also must assume the Court's acceptance of the Special Master's reasoning. *Ballard v. Commissioner*, 544 U.S. 40, 61 (2005) (relying on Fed. R. Civ. P. 53, subd. (f) to conclude that "the initial findings or recommendations of . . . special masters . . . are available to the appellate court authorized to review the operative decision of the district court"). To find otherwise would mean that the Court, in accepting the recommendation, did so with no reasoning or rationale to support that determination. It is appropriate to conclude that the Court's decision to overrule all exceptions reflects the Court's reasoning that the Special Master's analysis was correct. To suggest otherwise is to argue that either the Court had no reasoning behind its decision or that it was hiding its reasoning for some unknown purpose. Neither of these suggestions, on which New Mexico bases its arguments, could possibly be correct.

New Mexico asserts that "[T]actical litigation positions aside, it cannot be reasonably asserted that the Court has fully addressed the critical Compact interpretation issues raised in the Report and associated exceptions." N.M. Motion, at 17. Similarly, it argues that the Special Master should now "reserve judgement [sic]" on interpretation of the 1938 Compact and not adopt any of the First Report. *Id.* at 15. Again, New Mexico made this argument in its exceptions and the Court specifically denied it. Contrary to New Mexico's assertion, the very core of Compact interpretation occurred in the First Report. New Mexico's assertions regarding that interpretation failed and were denied. It would be error to look at the Compact interpretation anew.

5. New Mexico Improperly Attempts to Define the Special Master's Reasoning, Adopted by the Court, as Dicta

To support its argument, New Mexico incorrectly asserts that the Special Master's recommendations, and the Court's review of the reasoning upon which the recommendations were based, are mere *dicta*. N.M. Motion, at 9, 12. As long ago described by Chief Justice Marshall, dicta are "general expressions . . . in connection with the case," which may serve to illustrate a Court's careful investigation, but which are non-binding in subsequent suits. *Cohens v. Virginia*, 19 U.S. (6 Wheat.) 264, 399-400 (1821) (citations omitted); *see also Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 35 (2012) (quoting Chief Justice Marshall's "sage observation" in *Cohens v. Virginia* regarding dicta). Dicta "may be respected," but while "[t]he question actually before the Court is investigated with care, and considered in its full extent," dicta "are considered in their relation to the case decided," and "their possible bearing on all other cases is seldom completely investigated." *Cohens*, 19 U.S. at 399-400.

The longstanding distinction between dicta and a court's holding has been refined in the lower courts, which, generally, define dicta as statements in an opinion that are not necessary to the determination of a case. *See, e.g.*, *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1184 (10th Cir. 1995) (quoting Black's Law Dictionary 454 (6th Ed. 1990) defining dicta as "statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved or essential to determination of the case in hand"); *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 721 (5th Cir. 2004) (defining a statement as dictum "if it 'could have been deleted without seriously impairing the analytical foundations of the holding' " [citation omitted]); *Passmore v. Astrue*, 533 F.3d 658, 662 (8th Cir. 2008) (stating "the language was dicta because it was not necessary to the decision in the case"). These definitions maintain Chief Justice Marshall's functional differentiation between law and dicta, the former being the Court's thoroughly investigated holding and the latter a mere "peripheral" statement that "may not have received the full and careful consideration of the court that uttered it." *Int'l Truck & Engine Corp.*, 372 F.3d at 721. Thus, when reviewing a court decision, dicta are the court's statements that were unnecessary for the court to decide the case.

Dicta is not the same as a court's rationale for a decision. In the First Report, the Special Master relied on four main determinations to recommend denial of New Mexico's Motion to Dismiss as follows:

> *i. The Standard of Review required construing a congressionally approved compact as a contract as well as a statute; therefore, "[i]nterstate compacts are construed as contracts under the principles of contract law."*
>
> *ii. The Text and Structure of the 1938 Compact are Unambiguous.*
>
> *a. The text of the 1938 Compact requires New Mexico to relinquish control of Project water permanently once it delivers water to the Elephant Butte Reservoir.*

b. The structure of the 1938 Compact integrates the Rio Grande Project wholly and completely, thereby protecting both deliveries to and releases from Elephant Butte Reservoir.

iii. The Purpose and History of the 1938 Compact Confirm the Reading That New Mexico Is Prohibited from Recapturing Water It Has Delivered to the Rio Grande Project After Project Water Is Released from the Elephant Butte Reservoir.

iv. Application of the Supreme Court's Doctrine of Equitable Apportionment Also Prohibits New Mexico from Recapturing Project Water After That Water Is Released from the Elephant Butte Reservoir Through the Administration of the Rio Grande Project.

First Report, at 187-210.

The standard of review and the three stated reasons above upon which the Special Master based his recommendations were required legal determinations necessary for the Special Master to make his recommendation to the Court. Indeed, they address the very legal basis upon which New Mexico's Motion to Dismiss the Texas Complaint were based. N.M. Motion to Dismiss, at 20-22 (Summary of Argument). New Mexico challenged the Special Master's reasoning and rationale,[13] and the Court denied the challenge. Texas and the other parties should not now have to re-litigate Compact interpretation. Rather, the Special Master's initial work stands as a detailed determination of critical legal issues. It is not mere dicta.

D. Texas Will Suffer Significant Adverse Prejudice from Re-Litigating Issues Previously Decided

Texas will continue to suffer significant financial stress required by re-litigation of issues already decided, and the re-litigation of these already decided legal issues will delay Texas the relief it seeks from the ongoing damage created by New Mexico's violation of the 1938 Compact. New Mexico's Motion ultimately requests the

[13] New Mexico concedes that the Special Master and the Court made these conclusions, but tries to minimize the effect by declaring them dicta.

opportunity to re-litigate issues already decided by both the Special Master and the Supreme Court when it denied New Mexico's Motion to Dismiss the Texas Complaint. New Mexico asserts that its ". . . approach is fair, will cause no prejudice to any of the sovereign parties to this dispute, and will facilitate the informed resolution that this case of 'high importance' deserves." N.M. Motion, at 27 (citation omitted). Multiple legal doctrines, including the "law of the case," exist to support the informed and fair resolution of litigation. Just because a case is of "high importance," does not provide a license for parties who had a full and fair opportunity to litigate an issue, to continue to repeat arguments on issues previously decided. In *Arizona v. California*, 460 U.S. at 605, the Court summarized this principle:

> [A]bsent changed circumstances or unforeseen issues not previously litigated . . . preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation of multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Id. at 619-20.

As explained herein, New Mexico had a "full and fair opportunity to litigate" the issues raised by its motion to dismiss. Texas filed its Complaint in 2013 seeking relief for ongoing injury resulting from New Mexico's activity in violation of the 1938 Compact and Texas continues to sustain damage as a consequence of the allegations stated in that Complaint. Re-litigation of the issues already decided by the Special Master and the Supreme Court will prejudice Texas, raise the expense of this ongoing litigation, and extend the timeframe for final resolution of this now more than half-decade long case. New Mexico's argument that "no party will suffer unfair prejudice," is a familiar argument made by upstream states as their unlawful conduct continues to their

benefit. Nonetheless, New Mexico's proposed approach will adversely prejudice the State of Texas, and New Mexico's assertion to the contrary could not be further from the reality of the current procedural status of this litigation.

IV. CONCLUSION

Based on the foregoing, Texas respectfully requests the Special Master deny New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support.

Dated: February 28, 2019

Respectfully submitted,

s/ Stuart L. Somach

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EXHIBIT A IN SUPPORT OF

THE STATE OF TEXAS'S RESPONSE TO THE STATE OF

NEW MEXICO'S MOTION FOR PARTIAL JUDGMENT ON MATTERS

PREVIOUSLY DECIDED AND BRIEF IN SUPPORT

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
1. "Assuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaint are true, both Texas and the United States have pled valid claims arising under the Compact. *See Texas v. New Mexico*, 138 S. Ct. 349 (mem.)(2017)." N.M. Motion, at 2.	**1. Disputed as being law of the case, but undisputed for other reasons.** The phrase "[a]ssuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaint are true," is a statement reflecting one facet of the standard of review in the context of a motion to dismiss. It is not a previously decided legal principle. As such, it does not constitute the law of the case. Texas does not dispute that the Special Master and Court came to the legal conclusion that both Texas and the United States pled valid claims arising under the 1938 Compact. Supporting Authority: "For the foregoing reasons, I recommend that the Supreme Court deny New Mexico's motion to dismiss the Complaint filed by Texas, as Texas has stated plausible claims for New Mexico's violation of the 1938 Compact." 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), at 217. "Motion of New Mexico to dismiss Texas's complaint is denied." *Texas v. New Mexico*, 138 S. Ct. 349 (2017). "A Special Master we appointed to consider the case received briefing, heard argument, and eventually issued an interim report recommending that we deny New Mexico's motion to dismiss Texas's complaint. *We accepted that recommendation*." *Texas v. New Mexico*, 138 S. Ct. 954, 958 (2018) (emphasis added).

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	"Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). "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." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).
2. "The Compact applies below Elephant Butte. *See Texas v. New Mexico*, 138 S. Ct. 954 (2018)." N.M. Motion, at 2.	**2. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. Texas does not dispute that the Special Master and Court came to the legal conclusion that the Compact is intended to equitably apportion the waters of the Rio Grande above Fort Quitman (which geographically includes an area below Elephant Butte) (*see* authority below), and Texas agrees with this conclusion. However, the way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates the concepts of apportionment of the waters of the Rio Grande, and allocation of Project water. As such, it does not constitute the law of the case. Supporting Authority: "The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, 53 Stat. 785." First Report, at 194. "[T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to 'effec[t] an equitable apportionment' of 'the waters of the Rio Grande' between the affected States. 53 Stat. 785. Yet 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." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	"But the purposes identified in Article I's definition of "Usable Water" and in Article VIII indicate that the 1938 Compact also protects the water that is released from Elephant Butte in order for it to reach its intended destination." First Report, at 200. "The text and structure of the 1938 Compact do not simply require New Mexico to make water deliveries to Elephant Butte Reservoir, as New Mexico asserts. Rather, the 1938 Compact is a comprehensive agreement, the text and structure of which equitably apportion water to Texas, as well as to Colorado and New Mexico, and provides a detailed system of accountability to ensure that each State continues to receive its equitable share. New Mexico's obligations under the 1938 Compact do not end discretely at Article IV, but are woven throughout the 1938 Compact to effect the overall purpose of the Compact." First Report, at 201.
3. "The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir. *Id.* at 957." N.M. Motion, at 2.	**3. Disputed as being law of the case, but not otherwise disputed.** This item is a statement of fact, not a previously decided legal principle. As such, it does not constitute the law of the case. Texas agrees, however, with the factual statement.
4. "The Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas. EBID and EPCWID agreed to pay charges in proportion to the amount of land in each district, and in turn 57% of the water was allocated to New Mexico and 43% of the water was allocated to Texas. *Id.*" N.M. Motion, at 2.	**4. Disputed as being law of the case, and also disputed as being a mischaracterization by New Mexico of what was actually stated by the Court.** This item is a statement of fact, not a previously decided legal principle. As such, it does not constitute the law of the case. Texas does not dispute that, in its 2018 opinion, the Court referenced an agreement by the United States to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas, and that the districts agreed to pay charges in proportion to the percentage of acres lying in each State. *See* authority below. Texas agrees with these facts, as expressed by the Court. *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). Texas disagrees, however, with New Mexico's misinterpretation of the Court's factual statement.

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	Supporting Authority: "In the first set of agreements, the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State—roughly 57% for New Mexico and 43% for Texas. We will call those agreements the 'Downstream Contracts.'" *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018).
5. "The Compact incorporates the 'Downstream Contracts' and the Project to the extent not inconsistent with the express language of the Compact. *Id.* at 957-59." N.M. Motion, at 2.	**5. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item is a mixed statement of law and fact, not a previously decided legal principle. Although Texas does not dispute that the Court stated that the "Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts" (*Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018)), and agrees with that statement, the identification of the contracts in question, the scope and application of the contracts, and whether the contracts are consistent with the Compact, are questions of fact. As such, this item does not constitute the law of the case.
6. "The Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte (Reservoir) to Fort Quitman (Texas). *Id*. at 959." N.M. Motion, at 2.	**6. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. Texas does not dispute that the Special Master and Court came to the legal conclusion that the Compact is intended to equitably apportion the waters of the Rio Grande above Fort Quitman (which geographically includes an area below Elephant Butte) (*see* authority below). Texas agrees with this legal conclusion, as expressed by the Court. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). However, the way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates the concepts of apportionment of the waters of the Rio Grande, and allocation of Project water. As such, it does not constitute the law of the case.

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	Supporting Authority: "The preamble to the 1938 Compact unambiguously declares that, through the 1938 Compact, the signatory States intended to apportion equitably all of the waters of the Rio Grande above Fort Quitman among the three States. *See* 1938 Compact, 53 Stat. 785." First Report, at 194. "[T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to 'effec[t] an equitable apportionment' of 'the waters of the Rio Grande' between the affected States. 53 Stat. 785. Yet 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. *Texas v. New Mexico,* 138 S. Ct. 954, 959 (2018).
7. "The apportionment is based on Downstream Contracts and the operation of the Project. *Id*. at 957-59." N.M. Motion, at 2.	**7. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. The way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates the concepts of apportionment of the waters of the Rio Grande, and allocation of Project water. As such, it does not constitute the law of the case.
8. "The United States has obligations that arise under the Compact. Those obligations include the duty to deliver a certain amount of water through the Project to assure that the Compact's equitable apportionment to Texas and part of New Mexico is made. *Id*. at 959." N.M. Motion, at 2-3.	**8. Disputed as being law of the case, and also disputed because of the way New Mexico characterizes the item.** This item, as phrased by New Mexico, cannot constitute the law of the case. Texas does not dispute that the Court found that the United States has a role in the Compact's operation (*see* authority below). Texas agrees with this finding, as expressed by the Court. *Texas v. New Mexico,* 138 S. Ct. 954, 959 (2018). However, the way New Mexico phrases this item does not accurately reflect any legal determination made by the Special Master and Court. It also improperly conflates obligations that may arise under the Compact versus under the Project and/or the Downstream Contracts. As such, it does not constitute the law of the case.

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	Supporting Authority: "[T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to 'effec[t] an equitable apportionment' of 'the waters of the Rio Grande' between the affected States. 53 Stat. 785. Yet 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." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). "In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of 'agent of the Compact, charged with assuring that the Compact's equitable apportionment' to Texas and part of New Mexico 'is, in fact, made.' Texas's Reply to Exceptions to the First Interim Report of the Special Master 40." *Texas v. New Mexico*, 138 S. Ct., 954 959 (2018). "However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves, essential to the fulfillment of the Compact's expressly stated purpose." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).
9. "New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir. *Id*." N.M. Motion, at 3.	**9. Undisputed.** Supporting Authority: Article IV of the 1938 Compact requires New Mexico to "deliver" Project water at Elephant Butte Reservoir. First Report, at 196, including FN 51. Article IV of the 1938 Compact also identifies that the delivery of water by New Mexico is an "obligation." First Report, at 196. "But then, instead of similarly requiring New Mexico to deliver a specified amount of water annually to the Texas state line, the Compact directed New Mexico to deliver water to the Reservoir. *Id.*, at 788. In isolation, this might have seemed a curious choice, for a promise to

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
	deliver water to a reservoir more than 100 miles inside New Mexico would seemingly secure nothing for Texas. But the choice made all the sense in the world in light of the simultaneously negotiated Downstream Contracts that promised Texas water districts a certain amount of water every year from the Reservoir's resources." *Texas v. New Mexico*, 138 S. Ct. 954, 957 (2018). "And to fill that Reservoir the Compact obliges New Mexico to deliver a specified amount of water to the facility." *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018).
10. "A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico. *Id.*" N.M. Motion, at 3.	**10. Disputed as being the law of the case, but not disputed for other reasons.** This item represents one of the several factors that the Court relied upon in granting the United States' motion to intervene and pursue Compact claims in this action (*see* authority below). Texas agrees with the analysis, as expressed by the Court. *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018). However, the item represents a hypothetical scenario that New Mexico admits would require "proof." The Court also premised its ruling on the consideration of various factors that "[t]aken together," supported its decision. As such, the item does not represent a legal conclusion that is properly the law of the case moving forward. Supporting Authority: "*Third*, a breach of the Compact could jeopardize the federal government's ability to satisfy its treaty obligations. …Our treaty with Mexico requires the federal government to deliver 60,000 acre-feet of water annually from the Elephant Butte Reservoir. And to fill that Reservoir 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." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018). "Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

New Mexico's Eleven Items	**Texas's Position Regarding Whether Each Item Should Constitute the Law of the Case, and Supporting Supreme Court/Special Master Authority**
11. "The claims asserted by the United States do not and may not expand the scope of this litigation beyond what was alleged in Texas's Complaint. *Id.* at 960." N.M. Motion, at 3.	**11. Disputed as being the law of the case, but not disputed for other reasons.** This item, in part, represents one of the several factors that the Court relied upon in granting the United States' motion to intervene and pursue Compact claims in this action and, in part, goes beyond the language utilized by the Court (*see* authority below). The Court also premised its ruling on the consideration of various factors that "[t]aken together." supported its decision. Although Texas agrees with the analysis, as expressed by the Court *Texas v. New Mexico,* 138 S. Ct. 954, 960 (2018), and agrees with the premise that a party may not assert claims that expand the scope of this litigation (without leave of the Court), the item does not represent a legal conclusion that is properly the law of the case moving forward. Supporting Authority: *"Fourth*, the United States has asserted its Compact claims in an existing action brought by Texas, seeking substantially the same relief and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States." *Texas v. New Mexico,* 138 S. Ct. 954, 960 (2018) "Taken together, we are persuaded these factors favor allowing the United States to pursue the Compact claims it has pleaded in this original action." *Texas v. New Mexico,* 138 S. Ct. 954, 960 (2018).

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

CERTIFICATE OF SERVICE

This is to certify that on the 28th day of February 2019, I caused a true and correct copy of **THE STATE OF TEXAS'S RESPONSE TO THE STATE OF NEW MEXICO'S MOTION FOR PARTIAL JUDGMENT ON MATTERS PREVIOUSLY DECIDED AND BRIEF IN SUPPORT** to be served upon all counsel for all parties to this action and amici, via electronic mail, as indicated in the Service List attached hereto.

Respectfully submitted,

Dated: February 28, 2019

Yolanda De La Cruz

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(Service via E-Mail and US Mail)

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