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

UNITED STATES OF AMERICA'S RESPONSE TO LEGAL MOTIONS OF TEXAS AND NEW MEXICO REGARDING ISSUES DECIDED IN THIS ACTION

NOEL J. FRANCISCO
Solicitor General
JEAN E. WILLIAMS
Deputy Assistant Attorney General
ANN O'CONNELL ADAMS
Assistant to the Solicitor General
JAMES J. DuBOIS
R. LEE LEININGER
THOMAS K. SNODGRASS
STEPHEN M. MACFARLANE
JUDITH E. COLEMAN
Attorneys, Environment and Natural Resources Division
U.S. Department of Justice
Counsel for the United State

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I. INTRODUCTION

The United States responds herein to (1) 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 ("Tex. Mot."); and (2) the State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support ("N.M. Mot."), both of which were filed on the Special Master's docket on December 26, 2018. These motions address the question of which legal issues have been decided during earlier phases of this litigation, up to and including the Supreme Court's opinion in *Texas v. New Mexico*, 138 S. Ct. 954 (2018), and thus should be regarded as settled under the law of the case and related principles of finality. The Special Master has expressed interest in the parties' views on the legal issues that should be regarded as having been decided in earlier stages of the litigation and incorporated the filing of motions on that subject into an Amendment to the Case Management Plan approved on November 21, 2018. *See* Draft Agenda (Aug. 13, 2018) at 2; Transc. of Scheduling Conf. (Aug. 28, 2018) at 120-28; Amendment to Case Management Plan (Nov. 21, 2018) at 3.

The question of legal issues decided to date grows directly out of New Mexico's Motion to Dismiss the complaints by Texas and the United States. In that Motion to Dismiss, New Mexico raised the interpretation of the Rio Grande Compact ("Compact")—including New Mexico's obligations under the Compact and the relationship between the Compact and the federal Rio Grande Project ("Project")—as integral to the Motion. In preparing the First Interim Report and Recommendation, issued on February 9, 2017 ("Report" or "Rep."), Special Master A. Gregory Grimsal ("First Special Master") necessarily had to decide questions of Compact interpretation in formulating his recommendation to the Supreme Court that New Mexico's Motion to Dismiss be denied as to Texas's complaint and partially denied as to the United States'

complaint. The Supreme Court received the Report on March 20, 2017, and ordered it filed. *Texas v. New Mexico*, 137 S. Ct. 1363 (2017). Thereafter, New Mexico filed exceptions. Although New Mexico's exceptions challenged various themes and threads in the Special Master's reasoning, New Mexico did not take exception to the denial of its Motion to Dismiss Texas's complaint. Accordingly, the Supreme Court summarily denied New Mexico's Motion to Dismiss Texas's complaint on October 10, 2017. *Texas v. New Mexico*, 138 S. Ct. 349 (2017). The Court then overruled New Mexico's exceptions in its March 5, 2018 opinion. *Texas v. New Mexico*, 138 S. Ct. at 960.

By denying New Mexico's Motion to Dismiss Texas's complaint and overruling New Mexico's exceptions, the Supreme Court left undisturbed the First Special Master's interpretation of the Compact, as set out in his Report. Texas's Motion distills from the Report five determinations regarding the Compact that the First Special Master made and that were necessary to the formulation of his recommendations on the issues that New Mexico raised in its Motion to Dismiss. The United States largely concurs with Texas that these five determinations should be accorded the status of law of the case, subject to some qualifications discussed below, unless and until those determinations are found to be clearly erroneous by the Supreme Court.

The Supreme Court's March 5, 2018 opinion also included some statements regarding the Compact, the obligations of the United States to deliver water from Elephant Butte Reservoir under contracts between Reclamation and the two Project districts, and the United States' obligation to deliver water to Mexico under the 1906 Convention. New Mexico focuses its Motion on the March 5 opinion and identifies eleven principles that it believes the Supreme Court decided. The United States concurs in part with those portions of New Mexico's Motion that accurately reflect what the Court decided in reaching its holding that the United States'

complaint had stated a claim against New Mexico for alleged violations of the Compact. But New Mexico's reading of the opinion is not entirely accurate and attempts to expand the Court's opinion beyond what the Court actually decided. Thus, its Motion should be denied to that extent. New Mexico's contention that the First Special Master's Report should be accorded no weight, however, should also be rejected, because it misapprehends the consequence of the Court's disposition of New Mexico's Motion to Dismiss and the limited scope of New Mexico's exceptions.

II. BACKGROUND

The United States concurs with Texas's description of the case set forth in Part II of Texas's Motion, and will not repeat that summary. The United States adopts Part II of Texas's Motion and incorporates it by reference herein.

It is important to underscore, however, that New Mexico's Motion to Dismiss raised issues going beyond the narrow question of whether Texas's complaint stated a cause of action under the Compact for activities below Elephant Butte Reservoir, contrary to what New Mexico now tries to argue. *See* N.M. Mot. at 20. Rather, New Mexico grounded its Motion to Dismiss on legal assertions about its obligations under the Compact, and those assertions in turn required the First Special Master to interpret the text of the Compact in order to formulate a recommendation to the Court on New Mexico's Motion to Dismiss.

First, New Mexico contended that its only obligation under the Compact was to deliver water to Elephant Butte Reservoir, and that no "term of the Compact imposes a duty on New Mexico either to deliver water at the New Mexico-Texas state line *or to prevent diversions of water after New Mexico has delivered it at Elephant Butte Reservoir*." N.M. Motion to Dismiss ("N.M. MTD") at 27-28 (emphasis added). In other words, New Mexico took the position in its

Motion to Dismiss that it had no obligation under the Compact to limit diversions or depletions of water by New Mexico water users below Elephant Butte Reservoir or to preserve the conditions on the Rio Grande as they existed in 1938. *Id*. at 40-45.

Second, New Mexico took the position that its "obligations with respect to Project water that is released below Elephant Butte arise under . . . state laws and authorities, not under the Compact," *id*. at 59, and that any complaints about New Mexico's interference with deliveries of water by the Project must be addressed through a suit brought by the United States under New Mexico law, *id*. at 56. Although New Mexico now "accepts that a necessary implication of the denial of the Motion to Dismiss is that the Compact may provide constraints on New Mexico's authority below Elephant Butte," N.M. Mot. at 20, the presentation of its argument in its Motion to Dismiss was not qualified in any way. New Mexico argued that "the Compact does not create a duty for New Mexico to protect Reclamation's contract deliveries" of water released from Elephant Butte Dam. N.M. MTD at 59. This argument put the interpretation of *the Compact* squarely at issue before the First Special Master in making his recommendations on New Mexico's Motion to Dismiss.

Third, New Mexico argued that, as with Reclamation's delivery of Project water to the districts, Texas's apportionment under the Compact was governed by New Mexico state law and that Texas's sole recourse for interference with its apportionment lay in a priority call under state law by the United States. N.M. MTD at 56-58. Here too, New Mexico put in play an interpretation of the Compact that the First Special Master was required to address in recommending whether New Mexico's Motion to Dismiss should be granted or denied.

III. THE DETERMINATIONS IN THE REPORT THAT SHOULD BE TREATED AS SETTLED UNDER LAW OF THE CASE PRINCIPLES

Since New Mexico placed interpretation of the Compact at issue in its Motion to Dismiss, the First Special Master necessarily had to interpret the Compact's text and structure in order to resolve the arguments of the parties and formulate recommendations to the Supreme Court. Texas distills from the Report five determinations made by the First Special Master concerning New Mexico's obligations under the Compact. As Texas correctly notes, the First Special Master based these determinations on the plain text and structure of the Compact, which the First Special Master found to be unambiguous, thereby treating the issues of Compact interpretation raised by New Mexico as matters of law. *See* Tex. Mot. at 7. The United States addresses each of these five determinations in turn.

A. The Report's Determinations on the Compact

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

Texas shows that the First Special Master, relying on the text and structure of the Compact, determined that the Compact integrates the Project wholly and completely. Tex. Mot. at 7 (citing Rep. at 195, 198). The United States concurs. The Supreme Court also appears to have concurred with this determination. *See Texas*, 138 S. Ct. at 959 ("the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts"). New Mexico does not appear to dispute this determination. *See* N.M. Mot. at 13 ("The Compact incorporates the Downstream Contracts and the Project to the extent not inconsistent with the express language of the Compact."). Accordingly, the First Special Master's determination that the Compact fully integrates the Project should be treated as settled.

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

Next, Texas shows that the First Special Master determined that the Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir, and Texas shows that the First Special Master's reasoning was based on Compact's plain text, in particular Article IV, which requires New Mexico to "deliver" Project water at Elephant Butte Reservoir and describes that requirement as an "obligation." Tex. Mot. at 8 (citing Rep. at 196, 197). The United States concurs, and further agrees with Texas and the First Special Master that the plain meanings of the words "shall," "deliver," and "obligation" in Article IV are determinative. As the United States argued in response to New Mexico's Motion to Dismiss, "'[d]elivery is generally understood to mean '[t]he formal act of transferring something' or 'the giving or yielding possession or control of something to another.'" U.S. Opposition to N.M. MTD at 38 (quoting *Black's Law Dictionary* 494 (9th ed. 2009) and *Black's Law Dictionary* 349 (2d ed. 1910) (current edition when the Compact was negotiated and signed)). The First Special Master agreed. He based his determination on the Compact's text, which he found to be unambiguous, and cited contemporaneous dictionaries to support his conclusions regarding the plain meaning of "deliver," "obligation," and "shall." Rep. at 196-97.

This determination is also consistent with the Supreme Court's opinion. In describing the Compact's relationship to the Project, the Court noted that the Compact could achieve an equitable apportionment of the Rio Grande only because, "by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts." *Texas*, 138 S. Ct. at 959. The Court went on to describe the United States as an "agent" of the Compact, "'charged with assuring that the Compact's equitable apportionment' to Texas and part of New Mexico 'is, in fact, made.'" *Id*. The Court thus acknowledged the role of the Project, through the deliveries of water under the Downstream Contracts, in fulfilling the

"Compact's expressly stated purpose." *Id*. In short, because fulfilling the Compact's purposes below Elephant Butte Reservoir is a task performed by the Project, not New Mexico, New Mexico must cede control over the water it delivers to the Project at Elephant Butte Reservoir so that the Project can meet those obligations.

In its Motion to Dismiss, New Mexico argued that the First Special Master's conclusion robbed the State of its sovereignty, a position that it now appears to soften. Although New Mexico's exceptions brief argued that this determination required a "total surrender of New Mexico's sovereign authority to adjudicate and administer water rights" within the State, N.M. Exceptions Br. at 19, New Mexico now acknowledges that "the Compact may provide constraints on New Mexico's authority below Elephant Butte." N.M. Mot. at 20. As the United States pointed out in reply to New Mexico's exceptions brief, New Mexico had argued in its Motion to Dismiss that it had *no* obligations to limit diversions or depletions of water by New Mexico water users below Elephant Butte Reservoir. U.S. Reply at 4 (citing N.M. MTD at 40-45). As to the Report's use of the phrase "relinquish control and dominion" (Rep. at 197), the Report did not conclude that New Mexico literally cedes ownership of Rio Grande water in New Mexico to the United States (or anyone else) when it delivers water to the Project. But the Compact does impose limitations on the ways in which New Mexico may exercise its authority over that water, and New Mexico agreed to limitations on the exercise of its sovereignty when it ratified the Compact in 1939. *See* 1939 N.M. Laws 59.

3. <u>Determination #3: New Mexico through its agents or subdivisions may not divert or intercept water it is required to deliver to Elephant Butte Reservoir pursuant to the 1938 Compact after the water is released from Elephant Butte Reservoir</u>.

According to Texas, the First Special Master determined that the Compact protects both water deliveries into Elephant Butte Reservoir and the Project's releases of water from Elephant

Butte Reservoir. Tex. Mot. at 9. The United States concurs. The First Special Master considered and rejected New Mexico's argument, in its Motion to Dismiss, that the Compact imposed no obligations on New Mexico with respect to water released by the Project for delivery under the Downstream Contracts or to Mexico under the 1906 Convention. *See* Rep. at 200-02. Taking account of the structure of the Compact and Articles I-IV, VI, VII, and VIII, the First Special Master rejected the argument that New Mexico's obligations under the Compact ended completely at Article IV. *Id*. at 201. Thus, although water released by the Project may still be under the State's jurisdiction in some sense, New Mexico must administer permitting and water rights under state law to protect Project releases from being captured or intercepted before that water can reach its intended destination under the Downstream Contracts or the 1906 Convention. Indeed, that obligation to protect Project releases is imposed not only by the Compact itself but also by New Mexico *state* law, which incorporates the Compact. *See* 1939 N.M. Laws 59; *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106-07 (1938).

The Supreme Court's description of the relationship between the Project and the Compact is consistent with this determination. New Mexico, as a signatory to a Compact that incorporates and depends upon the Downstream Contracts to fulfill the Compact's express purposes, may not allow its citizens to appropriate, capture, or interfere with water delivered by the Project. *See Texas*, 138 S. Ct. at 959. The First Special Master's determination that New Mexico must protect water released by the Project under the Downstream Contracts and 1906 Convention is based on the plain text and structure of the Compact, consistent with the Supreme Court's opinion, and should be regarded as settled under law of the case principles, just as a district court's interlocutory ruling on a matter of law becomes law of the case.

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

Texas argues that the First Special Master determined that New Mexico has a duty to "refrain from post-Compact depletions of water below Elephant Butte" that arises from the text of the Compact. Tex. Mot. at 10 (citing Rep. at 197-98). With the following qualification, the United States concurs. The "post-Compact depletions" referenced in the Report involve the capture, interception, or appropriation of water released by the Project for delivery under the Downstream Contracts and the 1906 Convention. *See* Rep. at 197-98, 211. Those are the depletions that Texas and the United States allege to constitute violations of the Compact by New Mexico, and were at issue in the briefing on New Mexico's Motion to Dismiss. *See e.g.* Tex. Compl. ¶ 19; U.S. Compl. in Intervention ¶ 13-14. Thus, for example, the interception of Project return flows by groundwater pumping, or the capture or appropriation of water released by the Project from Elephant Butte Reservoir by unauthorized water users, would constitute post-1938 depletions of Project water that New Mexico would be obliged under the Compact to restrain. To the extent that "post-Compact depletions" are understood to refer to such interference with water deliveries by the Project, the United States agrees that the Report makes this determination and that it should be accorded finality under law of the case principles.

However, the phrase "post-1938 depletions" as used by Texas could be given a broader meaning beyond the interference with Project water deliveries. It could be construed to refer to impacts on water usage that result from improvements in irrigation efficiency, such as laser-leveling of fields, or changes in cropping patterns, by water users who are authorized to receive deliveries of Project water. The Report did not address the impacts of changes in irrigation efficiency or cropping patterns on depletions of Project deliveries. The United States does not

believe that this determination, or the Compact for that matter, would require New Mexico to administer its law so as to restrain landowners otherwise authorized to receive Project water from growing certain crops or making improvements to their farms simply to preserve depletions at a 1938 level. Thus, the United States does not agree that "post-Compact depletions," as the phrase is used in the Report, encompassed changes in irrigation efficiency or cropping patterns, and Determination #4 should not apply to such depletions.

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

The United States would reframe Texas's Determination #5 to state that New Mexico agreed to and must administer state law in a manner wholly consistent with the Compact, including the protection of Project releases from Elephant Butte Reservoir for delivery under the Compact, the Downstream Contracts, and the 1906 Convention with Mexico.

Texas characterizes Determination #5 as stating that New Mexico state law plays no role under the Compact's equitable apportionment. Tex. Mot. at 11. But in the ensuing discussion in its brief, Texas relies on and cites to language in the Report that is more nuanced and less categorical. Specifically, Texas cites the Report's statements that "the 1938 Compact commits the water New Mexico delivers to Elephant Butte Reservoir to the Rio Grande Project," and that the water committed to the Project "is not subject to appropriation or distribution under New Mexico state law." *Id*. (quoting Rep. at 211). The United States agrees with those statements in the Report. Texas further cites to the Report's determination that New Mexico's rights to Rio Grande water are governed by principles of equitable apportionment rather than New Mexico state law, a consequence of New Mexico's relinquishment of rights when it signed the Compact. *See* Rep. at 216 (citing *In Re Rules & Regulations Governing the Use, Control, and Protection of Water Rights for Both Surface and Underground Water Located in the Rio Grande and Conejos*

River Basins and Their Tributaries, 674 P. 2d 914, 922 (Colo. 1983), and *Hinderlider*, 304 U.S. at 106-8, 110). But the Report also cites *New Mexico* statutes and case law requiring the State to comply with interstate compacts. *See id*. And when New Mexico ratified the Compact, the Compact became New Mexico law, 1939 N.M. Laws 59, so it is not accurate to say that New Mexico law plays *no* role, and read in context the United States does not believe that is what the First Special Master meant.

The First Special Master's discussion of the effect of equitable apportionment (Rep. at 210-17) is best understood as requiring New Mexico to respect the Compact in its administration of state law. The First Special Master noted that the New Mexico State Engineer had promulgated rules to ensure compliance with the Compact and that New Mexico is without discretion to depart from the method of administration of Project water after it leaves Elephant Butte Reservoir that is incorporated into the Compact. *See* Rep. at 217. In the context of the entire Report, the First Special Master's statement that "state law applies only to the water which has not been committed to other states by the equitable apportionment," Rep. at 216, should be read to mean that New Mexico cannot administer water rights in a way that conflicts with the Compact's equitable apportionment. New Mexico is situated no differently from its upstream neighbor Colorado, which also has to act beyond the ordinary priority framework under state law to meet its obligations under the Compact. *See Hinderlider*, 304 U.S. at 106-07; *In Re Rules and Regulations*, 674 P.2d at 921, 923. Thus, rather than determining that New Mexico state law plays "no role," the First Special Master determined that New Mexico assumed an obligation to *exercise* its sovereignty and *administer* state law in a manner that ensures that water delivered by the Project would be "[u]sable [w]ater" available for release by Reclamation for specific

purposes under the Project. Compact Art. I(*l*), 53 Stat. 786. Compact Art. I(*l*), Pub. L. No. 76-96, 53 Stat. 785, 786 (1939).

B. These Five Determinations (as Modified) Should be Accorded Finality as Law of the Case Unless and Until the Supreme Court Overturns Them

The Supreme Court received the Report and ordered it filed. *Texas*, 137 S. Ct. 1363. New Mexico's exceptions to the Report challenged elements of the Special Master's reasoning and interpretation of the Compact, including each of the determinations discussed above. Although New Mexico asked the Court to overturn and reject the Report, the Court did not. Instead, it overruled New Mexico's exceptions, as well as the exceptions of Colorado. The Court did not vacate or otherwise overrule the Report. The only logical conclusion is that the Report's interpretation of the Compact – a question of law involving the interpretation of the Compact whose terms the First Special Master regarded as unambiguous – stands undisturbed. Under law of the case principles, including the more stringent test adopted in *Arizona v. California*, 460 U.S. 605, 619 (1983), the determinations above (as modified) can and should be treated by the Special Master as binding on the parties unless and until they are shown to be clearly erroneous or are modified by the Court.

The law of the case doctrine is one of those doctrines intended to serve the goals of finality and repose in litigation. Under the law of the case, "when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona*, 460 U.S. at 618 (citations omitted). Unlike the doctrines of res judicata and collateral estoppel, however, the law of the case works as an exercise of a court's discretion in refusing to reopen matters previously decided in the same litigation, rather than as a limit on the court's power. *Id*. ("Law of the case directs a court's discretion, it does not limit the tribunal's power."); *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (the law of the case "merely

expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power"). Both Texas and New Mexico, in their respective motions, brief the contours of the law of the case doctrine as it may apply in original actions, Tex. Mot. at 16-22; N.M. Mot. at 11-13, and the United States will not repeat those discussions here. Suffice it to say that, although the Court has cautioned against the wholesale importation of law of the case principles into its original action jurisprudence, it has stated that prior rulings in original actions "'should be subject to the general principles of finality and repose, absent changed circumstances or unforeseen issues not previously litigated.'" *Wyoming v. Oklahoma*, 502 U.S. 437, 446 (1992) (quoting *Arizona*, 460 U.S. at 619).

Applying this guidance to the Report here, there are good reasons why the Special Master should now treat the five determinations (as modified) in the Report as settled under law of the case principles. First, it was entirely appropriate for the First Special Master to have made conclusions of law in resolving New Mexico's Motion to Dismiss, particularly since New Mexico had placed at issue its legal obligations under the Compact. Far from presenting a "narrow question" as New Mexico now argues (N.M. Mot. at 19), the parties engaged in extensive and thorough litigation over the meaning of the Compact's terms in order to address issues of Compact interpretation that New Mexico had placed at issue.

Furthermore, the fact that the First Special Master interpreted the Compact on a motion to dismiss does not mean that his determinations on matters of law that were integral to deciding the motion were preliminary or tentative. The Court has adjudicated questions of law when resolving motions to dismiss. *See Montana v. Wyoming*, 563 U.S. 368, 375-89 (2011) (interpreting the plain language of the Yellowstone Compact on a motion to dismiss); *Maryland v. Louisiana*, 451 U.S. 725, 735-45 (1981) (accepting a special master's recommendations on

standing and other jurisdictional issues on a motion to dismiss); *Arizona v. California*, 283 U.S. 423, 450-64 (1931) (interpreting the Boulder Canyon Project Act on a motion to dismiss). The First Special Master's legal analysis and determinations on questions of law under the Compact should be treated by the Special Master as settled as the case moves forward.

Second, the Court overruled New Mexico's exceptions to the Report's reasoning and conclusions on matters of Compact interpretation, but did not express disagreement with (let alone overrule) the Report itself. New Mexico argues that the Report's legal determinations should be accorded no weight because the Court did not formally adopt them. N.M. Mot. at 19. This argument ignores that, in denying New Mexico's Motion to Dismiss and overruling its exceptions to the Special Master's legal determinations on New Mexico's obligations under the Compact, the Court allowed the Report to stand. The question now is how the Special Master should regard the First Special Master's legal conclusions as the case moves forward. In the absence of disapproval by the Supreme Court, the United States submits that the Special Master should regard the Report's five legal determinations (as modified) as settled for purposes of briefing and a trial on the merits.

Moreover, it is incorrect to argue that the Court's summary disposition of the Motion to Dismiss reflected no position on the legal analysis in the First Special Master's Report. In *Kansas v. Nebraska*, the Court summarily denied Nebraska's motion to dismiss, 530 U.S. 1272 (2000), yet in a subsequent opinion the Court characterized that summary disposition as *agreement* with the special master's report favoring Kansas's interpretation of the Republican River Compact. *Kansas v. Nebraska*, 135 S. Ct. 1042, 1050 (2015). This illustrates a related aspect of the Court's application of law of the case principles: the Court can revisit the Report's legal determinations regarding the Compact at a later time, to take account of changed

circumstances or if it concludes that the Report's legal conclusions are clearly erroneous. *See Arizona*, 460 U.S. at 619 (discussing considerations that limit the application of the law of the case doctrine in original actions). In the meantime, however, the fact that the parties had a full and fair opportunity to litigate legal questions of Compact interpretation on New Mexico's Motion to Dismiss, and the interest in conserving the resources of the parties and the Special Master, *see Montana v. United States*, 440 U.S. 147, 153-54 (1979), favor according the First Special Master's legal determinations on the Compact as "subject to the general principles of finality and repose." *Arizona*, 460 U.S. at 619. New Mexico's attempt to relitigate its legal obligations under the Compact after the First Special Master decided those very issues should be rejected.[1]

Third, a fully developed factual record is not required when questions of Compact interpretation are at issue and the Compact is unambiguous. New Mexico's arguments to the contrary (N.M. Mot. at 23-25) confuse the ultimate merits of the case with interlocutory rulings on Compact interpretation involving questions of law. The First Special Master disclaimed any factfinding in formulating his recommendations on New Mexico's Motion to Dismiss. Rep. at 193. He concluded that the language of the Compact was unambiguous as it pertained to the obligations of New Mexico and the Compact's relationship to the Project. *Id*. at 195-201. His analysis, and the determinations he reached in formulating his recommendations, were based on the text and structure of the Compact and employed techniques of statutory construction. *See id*.

[1] Neither *Barber v. Tennessee*, 513 U.S. 1184 (1995), nor *United States v. Hatter*, 532 U.S. 557 (2001), is to the contrary. New Mexico cites *Barber* for the proposition that a summary denial of certiorari does not constitute a ruling on the merits. N.M. Mot. at 23 (quoting *Barber*, 513 U.S. at 1184). That proposition is undisputed, but it is also inapposite here, since a denial of certiorari simply connotes the Supreme Court's decision not to hear a case; here, in contrast, the Court had already allowed the filing of the complaints of Texas and the United States. New Mexico cites *Hatter* for the proposition that the law of the case doctrine presumes a hearing on the merits. *Id.* (citing *Hatter*, 532 U.S. at 565-66). But the issues of Compact interpretation that New Mexico raised in its Motion to Dismiss were subject to two hearings: one by the First Special Master, and one by the Supreme Court itself, in which New Mexico could make its arguments about the Compact in the context of the United States' exception to the Report.

at 194-203. New Mexico's own attempt at Compact interpretation focused on the plain terms and structure of the Compact and did not contend that the Compact was ambiguous. *See* N.M. MTD at 29-33. While detailed factual findings are surely needed to determine whether Texas and the United States have proved that New Mexico violated the Compact as they have alleged, as well as the scope of any such violations, the First Special Master's five determinations on Compact interpretation were rulings of law that do not require a factual record.

Thus, the Report's analysis of the Compact and its relation to the Project is not a nullity for purposes of this case going forward. The Special Master should regard the Report's five determinations (as modified) on Compact interpretation as settled under law of the case principles, and should not allow New Mexico to relitigate those determinations.[2]

IV. THE LAW OF THE CASE BASED ON THE COURT'S OPINION

New Mexico does acknowledge that the Supreme Court, in its March 5, 2018 opinion, decided certain principles that should be regarded as final under the law of the case. The United States agrees with New Mexico's general proposition and agrees in part with its description of the principles decided by the Court. We address those principles first. But New Mexico's description of eleven principles distilled from the opinion is not entirely accurate; we will address those inaccuracies next.

A. Principles Decided in the Supreme Court's March 5, 2018 Opinion

The United States concurs with New Mexico that the Supreme Court decided the following points, or principles, that should be accorded finality and repose under law of the case:

[2] Texas also argues that the Special Master should follow the Supreme Court's disposition of exceptions under the rule of mandate. Tex. Mot. at 22-24. To the extent the Court's overruling of New Mexico's exceptions should be regarded as precluding New Mexico from raising those exceptions again in this litigation, the United States concurs with Texas.

- That Texas and the United States have pled valid claims against New Mexico arising under the Compact, under the standards for adjudicating motions under Fed. R. Civ. P. 12(b)(6).

- That, under its treaty with Mexico, the United States is required to deliver to Mexico 60,000 acre-feet of water annually from Elephant Butte Reservoir. 138 S. Ct. at 959.

- That the Compact incorporates the Project and Downstream Contracts to the extent not inconsistent with the express language of the Compact. *Id*.

- That New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir. *Id.* at 957.

- That a breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligations to Mexico. *Id*. at 959-60.

- The claims asserted by the United States do not expand the scope of this litigation beyond the existing controversy between Texas and New Mexico. *Id*. at 960.[3]

B. New Mexico Does Not Accurately Describe the Court's Opinion

New Mexico's list of eleven "principles," however, includes assertions that misstate the Court's opinion and thus should not be accorded law of the case status.

First, New Mexico asserts that "[t]he Compact applies below Elephant Butte." N.M. Mot. at 13 ("principle" #2). The Court's opinion does not say anything like that, and New Mexico's phraseology is vague in any event. The Court does say that the Compacting States relied upon the Downstream Contracts to fulfill the Compact's purpose: to effectuate an "equitable apportionment" of the Rio Grande between the affected States. *Texas*, 138 S. Ct. at 959. But elsewhere in the opinion the Court explains that the Compact's requirement that New Mexico deliver Rio Grande water to Elephant Butte Reservoir, rather than to the Texas state line,

[3] New Mexico attempts to expand this principle by stating that the United States "may not" expand the scope of this litigation beyond the allegations in Texas's complaint. But the Court did not hold that; it merely noted that the fact that the United States' complaint did not expand the scope of the litigation beyond Texas's claims was one reason for recognizing that the United States could bring a claim against New Mexico under the Compact, and left for another day whether the United States could participate as a party if it had brought a claim that was broader in scope than Texas's claim. *Texas*, 138 S. Ct. at 960 ("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.").

was because the Downstream Contracts had already been entered into at the time the Compact was ratified and enacted. *Id*. at 957. Once New Mexico delivers water to the Project, the Project allocates water to the two districts pursuant to the Downstream Contracts. The Compact recognizes this fact in Article I's definitions of "Project Storage" and "Usable Water." *See* Compact Art. I(*k*), (*l*).[4] Nothing in the Compact "apportions" Rio Grande water to New Mexico lands below Elephant Butte Reservoir. It is therefore unclear what New Mexico means when it asserts that the Compact "applies" below Elephant Butte. Because the Court's opinion does not state that the Compact "applies" below Elephant Butte, the Special Master should reject New Mexico's argument that this statement is law of the case.

Second, New Mexico asserts that the Project allocates 57% of "the water" to New Mexico and 43% of "the water" to Texas. N.M. Mot. at 13 ("principle" #4). Nothing in the Court's opinion states that the Project allocates Project water released from Elephant Butte Reservoir to New Mexico as a state, let alone a 57% proportion of total Project supply. Rather, the Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas, and the Elephant Butte Irrigation District ("EBID") and the El Paso County Water Improvement District No. 1 ("EPCWID") agreed to pay charges (actually, repay construction costs) in proportion to the amount of land in each district. Reclamation in turn allocates Project water released from Elephant Butte Reservoir to EBID and EPCWID under the Downstream Contracts (not to New Mexico or Texas as states) and to Mexico under the treaty. The Court's opinion was correct when it stated that the 57-43 split referred to the repayment of construction costs based on irrigated acres in each district as a percentage of the total 155,000 irrigable acres in the

[4] Compact Art. I(*k*) provides that "'[p]roject [s]torage' is the combined capacity of Elephant Butte Reservoir and all other reservoirs actually available for the storage of usable water below Elephant Butte and above the first diversion to lands of the Rio Grande project, but not more than a total of 2,638,860 acre-feet." Art. I(*l*) provides that "'[u]sable [w]ater' is all water, exclusive of credit water, which is in project storage and which is available for release in accordance with irrigation demands, including deliveries to Mexico."

Project. *Texas*, 138 S. Ct. at 957. Moreover, the Downstream Contracts do not reference the 57-43 split with regard to the allocation of Project water deliveries between the two districts.

New Mexico appears to attempt to expand the opinion in *Texas v. New Mexico* to posit that New Mexico receives an apportionment of 57% of the water released by the Project from Elephant Butte Reservoir. Nothing in the Compact or in the Court's opinion supports this argument. As Texas has noted, New Mexico confuses the *apportionment* of water, which is what the Compact does, with the *allocation* of Project water, which is what Reclamation does pursuant to the Downstream Contracts and federal reclamation law. Tex. Mot. to Strike N.M.'s Countercls. at 17-18. Moreover, when the Court stated that "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 to part of New Mexico "is, in fact, made," 138 S. Ct. at 959, that was not the same as saying that 57% of the water from Project storage was apportioned to New Mexico.

The Compact does not apportion any quantity or percentage of Rio Grande water to New Mexico below Elephant Butte Reservoir.[5] It is clear from Article III of the Compact that Colorado received as its apportionment the right to deplete all the flows in the named drainages above what Colorado was required to deliver to New Mexico at the Colorado/New Mexico state line at Otowi. It is also clear from Article IV of the Compact that New Mexico received as its apportionment the right to deplete flows of the Rio Grande and accretions in the Rio Grande Basin above the amount the State was required to deliver to Elephant Butte Reservoir. The depletion rights of Colorado under Article III and of New Mexico under Article IV reflect not

[5] We note the inconsistency in New Mexico's arguments between asserting, in its Motion to Dismiss, that it had no obligations under the Compact after it delivered Rio Grande water to Elephant Butte Reservoir, and its position now that the Compact "applies" below Elephant Butte Reservoir such that it receives an "apportionment" from the Project of 57% of the water in Project storage.

inconsiderable amounts of water, possibly hundreds of thousands of acre-feet each year. Thus, the suggestion by New Mexico that it received an apportionment of 57% of the releases from Elephant Butte Reservoir *in addition* to its apportionment under Article IV is unsupported by the Compact and little more than an attempt to paper over the State's failure to impose any limitations on water usage that captured or interfered with Project releases.

Furthermore, New Mexico's argument was not accepted by the First Special Master in the Report or by the Supreme Court in its opinion. As the Court observed, "an equitable apportionment . . . between the affected states . . . [was achievable] 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*, 138 S. Ct. at 959. The release of water by the Project is addressed *by the Compact* in Articles I(*k*) and I(*l*) – where it is described as usable water in Project storage and available for release in accordance with irrigation demands, including deliveries to Mexico – and is silent about any quantity of water or percentage of Project water in storage to which New Mexico, as a State, is entitled. In short, once New Mexico delivers water to Elephant Butte Reservoir under Article IV of the Compact, that water falls under the dominion and control of the Project and is allocated and released to EBID and EPCWID pursuant to the Downstream Contracts and reclamation law, and to Mexico under the 1906 Convention.

Finally, New Mexico argues that "[t]he United States has obligations that arise under the Compact," including "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." N.M. Mot. at 14. Once more, New Mexico incorrectly conflates the apportionment of water by the Compact with the allocation of water by the Project. New Mexico points to no language in the

Compact imposing such an obligation on the United States (and there is no such language), and it misstates the Court's opinion. As we note above, Reclamation's obligations to release Project water from storage arise under the Downstream Contracts and reclamation law. The Compact imposes no obligation on the United States independent of those authorities; rather, the Compact recognized that the Compact's equitable apportionment purpose would be fulfilled through the Downstream Contracts.

V. TEXAS'S MOTION IN LIMINE SHOULD BE GRANTED

The five determinations (as modified) and the principles listed in Part IV.A. above state issues of law that should be regarded as decided in this litigation under law of the case principles, and should not be relitigated. Accordingly, the United States concurs in and joins Texas's motion in limine seeking to bar the introduction of evidence at trial on these issues of law.

VI. CONCLUSION

Based on the foregoing, the Special Master should grant Texas's Motion as the United States proposes it should be modified, and should grant in part and deny in part New Mexico's Motion.

Respectfully submitted, this 28th day of February, 2019.

NOEL J. FRANCISCO
Solicitor General

JEAN E. WILLIAMS
Deputy Assistant Attorney General

/s/ Stephen M. Macfarlane
STEPHEN M. MACFARLANE
Senior Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
501 I Street, Suite 9-700
Sacramento, CA 95814

ANN O'CONNELL ADAMS
Assistant to the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

JUDITH E. COLEMAN
Trial Attorney
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20004

JAMES J. DuBOIS
R. LEE LEININGER
THOMAS K. SNODGRASS
Trial Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street
South Terrace – Suite 370
Denver, CO 80202

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, the **UNITED STATES' RESPONSE TO LEGAL MOTIONS OF TEXAS AND NEW MEXICO REGARDING ISSUES DECIDED IN THIS ACTION** was served via electronic mail and/or U.S. mail as indicated, upon the Special Master and those individuals listed on the Service List, attached hereto.

Respectfully submitted,

/s/ *Seth C. Allison*
Seth C. Allison
Paralegal Specialist

SPECIAL MASTER

SPECIAL MASTER MICHAEL J. MELLOY
United States Court of Appeals
for the Eighth Circuit
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401-2101

Judge_Michael_Melloy@ca8.uscourts.gov
TXvNM141@ca8.uscourts.gov
(319) 423-6080
(service via email and U.S. Mail)

MICHAEL GANS
Clerk of Court
United States Court of Appeals
for the Eighth Circuit
Thomas F. Eagleton
United States Courthouse
110 South 10th Street, Suite 24.329
St. Louis, MO 63102

(314) 244-2400

UNITED STATES

NOEL J. FRANCISCO*
Solicitor General
JEAN E. WILLIAMS
Deputy Assistant Attorney General
ANN O'CONNELL ADAMS
Assistant to the Solicitor General
US Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530-0001

supremectbriefs@usdoj.gov
(202) 514-2217

JAMES J. DUBOIS*
R. LEE LEININGER
THOMAS K. SNODGRASS
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street
South Terrace – Suite 370
Denver, CO 80202
Seth Allison, Paralegal

james.dubois@usdoj.gov
(303) 844-1375
lee.leininger@usdoj.gov
(303) 844-1364
thomas.snodgrass@usdoj.gov
(303) 844-7233

seth.allison@usdoj.gov
(303) 844-7917

STEPHEN M. MACFARLANE
U.S. Department of Justice
Environment & Natural Resources Division
501 I Street, Suite 9-700
Sacramento, CA 95814

stephen.macfarlane@usdoj.gov
(916) 930-2204

JUDITH E. COLEMAN
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

judith.coleman@usdoj.gov
(202) 514-3553

STATE OF COLORADO

CHAD M. WALLACE*
Senior Assistant Attorney
Department of Law
1300 Broadway
Denver, CO 80203
chad.wallace@coag.gov
(720) 508-6281

Nan B. Edwards, Paralegal
nan.edwards@coag.gov

PHILIP J. WEISER
Attorney General of Colorado
pjweiser@coag.gov

KAREN M. KWON
First Assistant Attorney General
Department of Law
1300 Broadway
Denver, CO 80203
karen.kwon@coag.gov
(720) 508-6281

STATE OF NEW MEXICO

HECTOR BALDERAS
New Mexico Attorney General
hbalderas@nmag.gov
(505) 490-4060

TANIA MAESTAS
Deputy Attorney General
tmaestas@nmag.gov
(505) 490-4048

MARCUS J. RAEL, JR.*
DAVID A. ROMAN
Special Assistant Attorneys General
ROBLES, RAEL, AND ANAYA
500 Marquette Ave. NW, Ste. 700
Albuquerque, NM 87102
marcus@roblesrael.com
droman@roblesrael.com
(505) 242-2228

Chelsea Sandoval, Paralegal
chelsea@roblesrael.com

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, CO 80203
braley@troutlaw.com
lthompason@troutlaw.com
mkopp@troutlaw.com
(303) 861-1963

STATE OF TEXAS

STUART SOMACH*
ANDREW M. HITCHINGS
ROBERT B. HOFFMAN
FRANCIS M. "MAC" GOLDSBERRY II
THERESA C. BARFIELD
SARAH A. KLAHN
BRITTANY K. JOHNSON
RICHARD s. DEITCHMAN
SOMACH SIMMONS & DUNN, PC
500 Capital Mall, Suite 1000
Sacramento, CA 95814
ssomach@somachlaw.com
(916) 446-7979
(916) 803-4561 (cell)
ahitchings@somachlaw.com
rhoffman@somachlaw.com
mgoldsberry@somachlaw.com
tbarfield@somachlaw.com
sklahn@somachlaw.com
bjohnson@somachlaw.com
rdeitchman@somachlaw.com

Rhonda Stephenson, Secretary rstephenson@somachlaw.com
Christina Garro, Paralegal cgarro@somachlaw.com
Yolanda De La Cruz, Secretary ydelacruz@somachlaw.com

KEN PAXTON (512) 463-2012
Attorney General
JEFFREY C. MATEER
First Assistant Attorney General
BRANTLEY STARR
Deputy First Assistant Attorney General
JAMES E. DAVIS
Deputy Attorney General
PRISCILLA M. HUBENAK
Chief, Environmental Protection Division
P.O. Box 12584
Austin, TX 78711-2548

AMICI / FOR INFORMATIONAL PURPOSES ONLY

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

JAMES C. BROCKMANN*
JAY F. STEIN
STEIN & BROCKMANN, P.A.
505 Don Gaspar Avenue
P.O. Box 2067
Santa Fe, NM 87505

jcbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com
(505) 983-3880

PETER AUH
ALBUQUERQUE BERNALILLO COUNTY
WATER UTILITY AUTHORITY
P.O. Box 568
Albuquerque, NM 87103-0568

pauh@abcwua.org
(505) 289-3092

CITY OF EL PASO

DOUGLAS G. CAROOM*
SUSAN M. MAXWELL
BICKERSTAFF HEATH
DELGADO ACOSTA, LLP
2711 S. MoPac Expressway
Building One, Suite 300
Austin, TX 78746

dcaroom@bickerstaff.com
smaxwell@bickerstaff.com
(512) 472-8021

CITY OF LAS CRUCES

JAY F. STEIN*
JAMES C. BROCKMANN
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santa Fe, NM 87504

jfstein@newmexicowaterlaw.com
jcbrockmann@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com
(505) 983-3880

JENNIFER VEGA-BROWN
MARCIA B. DRIGGERS
LAW CRUCES CITY ATTORNEY'S OFFICE
P.O. Box 12428
Las Cruces, New Mexico 88004

cityattorney@las-curces.org
jvega-brown@las-cruces.org
marcyd@las-cruces.org
(575) 541-2128

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCASTLE
BARNCASTLE LAW FIRM, LLC
1100 South Main, Suite 20
P.O. Box 1556
Las Cruces, NM 88005

samantha@h2o-legal.com
(575) 636-2377
(575) 636-2688 (fax)

Janet Correll, Paralegal

janet@h2o-legal.com

EL PASO COUNTY WATER AND IMPROVEMENT DISTRICT

MARIA O'BRIEN*
SARAH M. STEVENSON
MODRALL, SPERLING, TOEHL,
HARRIS & SISK, PA
500 Fourth Street N.W.
Albuquerque, New Mexico 87103-2168

mobrien@modrall.com
sarah.stevenson@modrall.com
(505) 848-1800 (main)
(505) 848-1803 (direct)
(505) 848-9710 (fax)

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT

ANDREW S. "DREW" MILLER*
KEMP SMITH LLP
816 Congress Avenue, Suite 1260
Austin, TX 78701

dmiller@kempsmith.com
(512) 320-5466

STATE OF KANSAS

TOBY CROUSE*
Solicitor General of Kansas
DEREK SCHMIDT
Attorney General, State of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Attorney General
120 S. W. 10th Ave., 2nd Floor
Topeka, KS 66612

toby.crouse@ag.ks.gov
bryan.clark@ag.ks.gov
(785) 296-2215

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON
DAVIDSON LAW FIRM, LLC
4206 Corrales Road
P.O. Box 2240
Corrales, NM 87048

ttd@tessadavidson.com
(505) 792-3636

Patricia McCan, Paralegal

patricia@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON*
UTTON & KERY
317 Commercial NE
Albuquerque, NM 87102

john@uttonkery.com

LIZBETH ELLIS
General Counsel
CLAYTON BRADLEY
Counsel
New Mexico State University
Hadley Hall Room 132
2850 Weddell Road
Las Cruces, NM 88003

lellis@ad.nmsu.edu
bradley@ad.nmsu.edu