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 NEW MEXICO'S CONSOLIDATED REPLY ON MOTIONS REGARDING ISSUES DECIDED IN THIS ACTION AND REPLY TO ADDDITIONAL ISSUES RAISED IN THE RESPONSE BRIEFS


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## REPLY IN SUPPORT OF NEW MEXICO'S MOTION FOR PARTIAL JUDGMENT ON MATTERS PREVIOUSLY DECIDED

### I. NEW MEXICO RECOGNIZES THE CONSEQUENCES OF THE COURT'S DENIAL OF THE MOTION TO DISMISS

Texas suggests New Mexico does not accept the "consequences" of the decisions in this litigation. State of Texas's Response to the State of New Mexico's Motion for Partial Judgment on Matters Previously Decided and Brief in Support at 12 ("Texas Response" or "Tex. Response"). The United States similarly claims that New Mexico's position is 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." United States of America's Response to Legal Motions of Texas and New Mexico Regarding Issues Decided in this Action at 14 ("United States Response" or "US Response"). Neither is correct. As New Mexico explained in its opening brief, "New Mexico supports the goals of efficiently and fairly litigating this case." NM Motion 13. For that reason, New Mexico has consistently accepted the "consequences" of the decisions in this case, and recognized that the Court's denial of the Motion to Dismiss, *Texas v. New Mexico*, 138 S. Ct. 349 (2017) (mem.), and the Court's decision to allow the United States to bring Compact claims, *Texas v. New Mexico*, __ U.S. __, 138 S. Ct. 954 (2018) ("2018 Decision"), were meaningful. New Mexico detailed the significant ways the Court has impacted the rights of the Parties and the posture of the case in its Response to Texas's Request for a Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon ("New Mexico Response" or "NM Response"). *See* NM Response 4-5.

In its attempt to minimize New Mexico's recognition of the 2018 Decision, Texas claims that "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*." Texas Response 15. New Mexico does not take this position. Colorado, on the other hand, maintains that the Special Master should deny both motions on this issue because "the Court's decision is narrow and does not include the legal conclusions that Texas and New Mexico now claim." State of Colorado's Response to the State of Texas's Request for Judicial Declaration to Confirm the Legal Issues Previously Decided and Motion in Limine to Exclude the Introduction of Evidence Thereon and State of New Mexico's Motion for Partial Judgment on Matters Previously Decided at 3 ("Colorado Response" or "Col. Response"). New Mexico recognizes the appeal of Colorado's position, and agrees there is a "risk [of] having legal and factual issues prematurely determined on an advisory level, without an opportunity to develop and present a case." Col. Response 5. Unlike Colorado, and contrary to Texas's argument, however, New Mexico does not view the well-defined statements of the Court as dicta, so long as the Court has clearly and affirmatively articulated its meaning and intent.

Texas and the United States also argue New Mexico "attempts to expand the Court's opinion beyond what the Court actually decided." US Response 3. This too is incorrect. New Mexico has attempted to faithfully distill the principles articulated by the Court – even where those principles are not beneficial to New Mexico. As will be demonstrated below, the eleven principles proposed by New Mexico (referred to as "New Mexico Proposed Principle No. __") can be traced directly to the decisions and language of the Court.

## II. THE COURT DID NOT ADOPT THE FIRST INTERIM REPORT

### A. Texas and the United States Fundamentally Misunderstand the Procedure in Original Actions

Texas and the United States premise their entire argument on an incorrect understanding of the procedure and standards in original actions. As discussed in New Mexico's Response, the Court bears "ultimate responsibility" under the Constitution for all findings and conclusions in original jurisdiction water disputes. *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); *see* NM Response 2-3; *Guide for Special Masters in Original Cases Before the Supreme Court of the United States* at 9 (Oct. Term 2004) ("Guide for Special Masters") ("Masters are neither ultimate factfinders nor ultimate decisionmakers"). Thus, a "master's recommendations are advisory only," *United States v. Raddatz*, 447 U.S. 667, 683 n.11 (1980), and must be affirmatively "adopt[ed] or reject[ed]," Memorandum of Decision of the Special Master on Tennessee's Motion to Dismiss, Memphis and Memphis Light, Gas & Water Division's Motion to Dismiss, and Mississippi's Motion to Exclude at 35, *Mississippi v. Tennessee* (No. 143 Original) (Aug. 12, 2016), available as Docket No. 55 at https://www.ca6.uscourts.gov/special-master.

In contravention of this long-established rule, Texas and the United States rely almost exclusively on the statements in the First Interim Report. Their theory is that "unless and until" the First Interim Report is affirmatively "found to be clearly erroneous by the Supreme Court," it is "law of the case." US Response 2; *see also id*. (arguing that by overruling New Mexico's exceptions, "the Supreme Court *left undisturbed* the First Special Master's interpretation of the Compact" (emphasis added)); Tex. Response 14-15 (arguing that it should be "assume[d]" that overruling all exceptions meant "acceptance of the Special Master's reasoning"). In other words, "[i]n the absence of *disapproval* by the Supreme Court," Texas and the United States ask the

Special Master to hold that the First Interim Report is "settled for the purposes" of this case. US Response 14 (emphasis added).

There are two problems with this position. First, Texas and the United States' position stands the normal procedure in original actions on its head. As discussed above, in original actions the Court is responsible for adopting all findings and conclusions. Contrary to Texas and the United States' flawed position, there are simply no findings and conclusions in an original case "unless and until" *the Court* adopts them. Put another way, unlike a typical case arising in a federal district court, there is no decision or status quo until the Court affirmatively acts. A Master's report is not the equivalent of a lower court decision, which remains effective except to the extent the Court explicitly overrules it; it is merely a recommendation to the Court and is "advisory only." *Raddatz*, 447 U.S. at 683 n.11. Texas and the United States are therefore mistaken when they argue that the First Interim Report "should be accorded the status of law of the case . . . unless and until" the First Interim Report is "found to be clearly erroneous by the Supreme Court." US Response 2.

Second, the United States also incorrectly identifies the standard of review in an original action as "clearly erroneous." *Id.* In original actions, the Court performs an independent review of the record to arrive at its own decision regarding which findings of fact are correct. *Florida v. Georgia*, 138 S. Ct. 2502, 2517-18 (2018); *Colorado v. New Mexico*, 467 U.S. 310, 317 (1984); s*ee also Mississippi v. Arkansas*, 415 U.S. 289, 296-97 (1974) (Douglas, J., dissenting) (pointing out that the typical standard of review in original jurisdiction cases is less deferential than clearly erroneous standard). As Texas has conceded, the Supreme Court must therefore "conduct[] an independent *de novo* review of the Special Master's findings conclusions, and recommendations." Tex. Reply on Exceptions at 9 (citing *Mississippi v. Arkansas*, 415 U.S. 289, 291-92 (1974);

*Mississippi v. Louisiana*, 346 U.S. 862, 862-63 (1953)). Thus, the United States' suggestion that the Court should or did apply a "clearly erroneous" standard is flatly wrong.

In short, because the positions of Texas and the United States on the law of the case issues are premised on a fundamentally mistaken understanding of the procedure and standard in this case, their arguments on the issues that were previously decided must be rejected.

### B. The Court's Summary Disposition of the Motion to Dismiss and Exceptions Did Not Adopt the First Interim Report

New Mexico has explained that the Court did not affirmatively adopt the First Interim Report or decide the issues for which Texas and the United States advocate. *See* NM Motion 17-22; NM Response 4-10. To overcome this fact, Texas and the United States predictably argue that the Special Master should assign meaning to the Court's denial of the Motion to Dismiss and order overruling New Mexico's exceptions. *See* Tex. Response 12-14; US Response 13-15. There are multiple reasons why Texas's and the United States' argument should be rejected.

To begin with, Texas recognizes that it is necessary for the Court to "discuss and decide" an issue before it is considered law of the case. Tex. Response 7. Texas and the United States use several terms to describe the actions taken by the Court, alternatively arguing that the Court issued a "straightforward and unequivocal acceptance of the Special Master's First Report," Tex. Response 13; the Court "affirmed" the First Interim Report, *id*. at 12; or the First Interim Report "stands undisturbed," US Response 12. But conspicuously absent from either of the Responses is a citation to language that even comes close to "affirm[ing]" or "discuss[ing] and decid[ing]" the issues that Texas and the United States support. Instead, the only language they can point to is the Court's order that "New Mexico's motion to dismiss is DENIED," *Texas v. New Mexico*, 138 S. Ct. 349 (2017) (mem.), and the housekeeping instruction from the Court that "all other exceptions are overruled," *Texas v. New Mexico*, 138 S. Ct. at 960. Neither of these statements approaches

the affirmative action that is necessary to adopt, confirm, or agree with the First Interim Report, which is basic to Texas and the United States' argument.

Similarly, the threshold determination for identifying the law of the case is whether the prior ruling "intended to put a matter [to] rest." Wright, Miller & Cooper, *Federal Practice and Procedure: Jurisdiction 2d*, § 4478.5. There is nothing in the statements of the Court or the Responses that suggests that the Court intended to put the Compact interpretation issues advocated by Texas and the United States to rest.

Indeed, both the United States and Texas recognize that the Court's treatment of the Motion to Dismiss and exceptions amounted to a "summary disposition" of the issues. US Response 14; Tex. Response 8-10. In its Motion, New Mexico maintained that "courts typically do not attribute significance to summary affirmances or denials." NM Motion 23 (citing *United States v. Hatter*, 532 U.S. 557, 566 (2001); *Barber v. Tennessee*, 513 U.S. 1184, 1184 (1995)). The Court has expounded on this principle, stating that "[w]e have often recognized that the precedential effect of a summary [disposition] extends no further than the precise issues presented and necessarily decided by those actions." *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983) (internal quotation omitted) (citing cases). In other words, a "summary disposition," such as the Court's denial of the Motion to Dismiss or the exceptions, "affirms only the judgment of the court below, and no more may be read into [the Court's] action than was essential to sustain that judgment." *Id*.; *see also Mandel v. Bradley*, 432 U.S. 173, 176 (1977) ("Summary affirmances and dismissals . . . prevent lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions."); *TecSec, Inc. v. Int'l Bus. Machs. Corp.*, 731 F.3d 1336, 132 (D.C. Cir. 2013) (permitting reconsideration of patent claim construction because previously affirmed summary judgment order, issued by summary disposition, did not necessarily adopt trial

court's previous construction). Applying that rule to the Court's order and the 2018 Decision reveals that the Court intended only to deny New Mexico's motion and overrule the exceptions, and Texas and the United States should "read" no more "into [the Court's] action than was essential to sustain that judgment." *Anderson*, 460 U.S. at 786 n.5.

That reading is confirmed by a careful review of the 2018 Decision. For example, the Court stated that "*[a]ccording to Texas*, New Mexico is effectively breaching its Compact duty to deliver water to the Reservoir by allowing downstream New Mexico users to siphon off water below the Reservoir *in ways the Downstream Contracts do not anticipate*." *Texas v. New Mexico*, 138 S. Ct. at 958 (emphasis added). This language is important for two reasons. First, it grounds the description of the issue in the allegations of Texas, recognizing the preliminary nature of the Motion to Dismiss. Second, the Court is openly agnostic as to the substance of Texas's claims. Its treatment recognizes, without deciding, that Texas would still have to establish that the diversions of which it complains are diversions "the Downstream Contracts do not anticipate." *Id*.

Moreover, to accept Texas's and the United States' argument, the Special Master must accept that denying a motion means that a court rejects every concept or idea contained within that motion. But that is rarely the case. For example, it is not uncommon for a court to reject a motion to dismiss on the grounds that there is a plausible set of facts under which a claim is valid, only to later grant summary judgment to the defendant on the same basis articulated in the motion to dismiss. Here, there is no way of knowing exactly why the Court took the action it did, beyond the reasons expressed in the 2018 Decision, which did not focus on New Mexico's Motion to Dismiss.

Finally, Texas and the United States incorrectly identify New Mexico's position as "assert[ing] that the law of the case doctrine is inapplicable in the context of a motion to dismiss."

Tex. Response 6.[1] In support of this argument, both Parties cite to *Montana v. Wyoming*, 563 U.S. 368, 375-89 (2011), *Maryland v. Louisiana*, 451 U.S. 725, 735-45 (1981), and *Arizona v. California*, 283 U.S. 423, 450-64 (1931). Each of these cases present a situation in which the Court issued a full opinion on exceptions, articulating the Court's findings, conclusions, and rationale. For example, in *Montana*, the Court considered at length the question of whether increased depletions on pre-compact acreage constituted a violation of the Yellowstone River Compact. The Court engaged in a lengthy discussion of the issues and affirmatively and expressly "agree[d] with the Special Master and overruled Montana's exception." *Montana v. Wyoming*, 563 U.S. at 371. The other cases are to the same effect. Under those circumstances, New Mexico accepts that the express statements of the Court can articulate law of the case, even on a motion to dismiss. Rather than support Texas and the United States' position, however, these cases reinforce the principle that in original actions, findings and conclusions are not effective unless and until the Court affirmatively adopts them—an action that did not occur here.

Likewise, the United States' reliance on *Kansas v. Nebraska*, 135 S. Ct. 1042, 1050 (2015), is misplaced. US Response 14. Nebraska's motion to dismiss in *Kansas v. Nebraska* argued that Kansas did not state a claim for relief under the Republican River Compact because "groundwater pumping fell outside the Compact's scope." 135 S. Ct. at 1050. The Court accepted the recommendation of the special master to deny Nebraska's motion to dismiss. *Kansas v. Nebraska*,

[1]Texas argues that law of the case applies to a motion to dismiss. Tex. Response 6. There is ample caselaw to the contrary. *See, e.g., Filebark v. U.S. Dept. of Transp.*, 555 F.3d 1009, 1013 (D.C. Cir. 2009) ("The district court's first denial of dismissal was never a final judgment and never subject to appeal, and such interlocutory orders are not subject to the law of the case doctrine and may always be reconsidered prior to final judgment," (internal quotation and modification omitted)); *Perez-Ruiz v. Crespo-Guillen*, 25 F.3d 40, 42 (1st Cir. 1994) ("Interlocutory orders, including denials of motions to dismiss, remain open to trial court reconsideration, and do not constitute the law of the case."). Interlocutory orders, such as denial of a motion to dismiss, simply lack finality and repose to the same degree as a final judgment on the merits. *Cf. Arizona v. California*, 460 U.S. 605, 619 (1983). As such, the Court's summary denial of the Motion to Dismiss should not be read to foreclose litigation on questions of law that were not necessary to the Court's explicit holding: Texas and the United States state plausible claims for relief under the Compact.

530 U.S. 1272 (2000) (mem.). Then, in a subsequent enforcement case, the Court characterized this disposition as having "summarily agreed" with the special master. *Kansas v. Nebraska*, 135 S. Ct. at 1050. Because the basis for the motion to dismiss was that the Republican River Compact did not prohibit groundwater withdrawals, it was necessarily implied in the Court's denial of the motion that groundwater withdrawals could violate the compact. In the same way, the basis for New Mexico's Motion to Dismiss was based on the argument that the Compact ended at Elephant Butte, and did not apply below the Reservoir. That is why New Mexico has accepted that the Court's denial of the Motion to Dismiss established that the Compact applies below Elephant Butte. But this decision offers no support for the United States' broader argument that the Court agreed with the remaining reasoning of the First Interim Report. Nothing in *Kansas v. Nebraska* suggests that the Court's prior order adopted the special master's reasoning as law of the case, as the United States implies.

### C. Both Texas and the United States Improperly Assume that the Court Implicitly Intended Something More Than It Articulated

The Court has always exhibited care in the exercise of its original jurisdiction. Even when a Special Master's report is filed, the Court is deliberate, typically indicating that the report is "received and ordered filed," but not otherwise recognizing the report. That measured approach is also demonstrated in the Court's substantive treatment of reports and exceptions. As New Mexico has explained "although the Court has previously adopted, approved, confirmed, or accepted the findings of Special Masters, it did not do so in this case." NM Response 9.

Here, the Court was presented with a Motion to Dismiss, in the nature of a 12(b)(6) motion that tested whether Texas and the United States could "prove [any] set of facts in support of [their] claim[s] which would entitle [them] to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957), *abrogated, on other grounds, by Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007). The specific

question presented in the Motion to Dismiss—did Texas have a cause of action *arising out of the Compact* for actions below Elephant Butte—did not require resolution of additional issues.

It is not surprising, then, that the Court took a measured and pragmatic approach by denying the Motion to Dismiss and overruling New Mexico's exceptions without further comment. There is some indication that the Court was cognizant of the stage of the case, insofar as the Court confirmed that part of its thinking was based on the "stage in the proceedings." *Texas v. New Mexico*, 138 S. Ct. at 956. Regardless, as described above, the Court offered no further guidance on why it denied the Motion to Dismiss or overruled the exceptions beyond what it expressly stated.

Texas and the United States suggest that New Mexico was dissatisfied with that result, but that is not the case.[2] The purpose of New Mexico's exceptions were to preserve the critical Compact interpretation issues for trial, when the Court would have a full record on which to base its decision. The Court did precisely that.

A central premise of Texas's and the United States' briefs on this issue is their argument that the one line denials of the Motion to Dismiss and exceptions should be read as an unspoken adoption of the First Interim Report. Inherent in these arguments is the assumption that the Court did not take the action that it envisioned, but rather that the Court implicitly intended something more than it articulated. For example, Texas asks the Special Master to "*assume*" that "the Court's decision to overrule all exceptions reflects the Court's reasoning that the Special Master's analysis was correct." Tex. Response 14 (emphasis added). And the United States similarly proposes that

[2] The United States places significance on its assertion that "[a]lthough New Mexico asked the Court to overturn and reject the Report, the Court did not." US Response 12. The United States forgets, however, that Texas requested that "the Court adopt the First Report" and "direct the Special Master to proceed to hear the issues raised in the Texas Complaint, consistent with his determination in the First Report." Texas's Reply to Exceptions to First Interim Report of Special Master at 49. The Court did not follow Texas's or New Mexico's request.

the "only logical conclusion" from the Court's one line denial of the exceptions "is that the Report's interpretation of the Compact . . . stands undisturbed." US Response 12.

But contrary to these arguments, the Special Master need not "assume" anything. This is so because the Court has proven it is fully capable of articulating its intentions, including by affirming, agreeing, approving, or adopting Special Master findings or recommendations and reasoning when it intends such a result. In this case, the Court intentionally elected not do so, and it would be improper for the Special Master to limit the litigation in ways that the Court did not deem appropriate.

## III. THE COURT DECIDED THAT THE COMPACT APPORTIONS WATER TO BOTH STATES BELOW ELEPHANT BUTTE

In the briefing, Texas and the United States, along with the two *amici* irrigation districts (Elephant Butte Irrigation District ("EBID") and El Paso County Water Irrigation District No. 1 ("EPCWID")), coordinate their arguments to overcome an issue that has already been decided by the Court. This position is best articulated by the United States, in the following statements:

- "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." US Response 19.

- "Nothing in the Compact 'apportions' Rio Grande water to New Mexico lands below Elephant Butte Reservoir." *Id.,* 18.

- "It is therefore unclear what New Mexico means when it asserts that the Compact 'applies' below Elephant Butte." *Id.,* 18

- "The Compact does not apportion any quantify or percentage of Rio Grande water to New Mexico below Elephant Butte Reservoir." *Id.,* 19.

Taken together, these arguments represent a stunning reversal of the United States' previous position that is wholly unsupported. As discussed below, Texas, the two irrigation districts, and the United States coordinated these arguments in a last-ditch attempt to save the 2008 Operating

Agreement, and they should be soundly rejected by the Special Master because they are contrary to the previous positions that the United States has taken in this litigation and directly contrary to the Court's order on the Motion to Dismiss and the 2018 Decision.

### A. New Mexico Recognizes the Difference Between Apportionment and Allocation

As an initial matter, Texas, the United States, and the two irrigation districts, argue that "New Mexico confuses the concepts of apportionment and allocation." Tex. Response 11. According to Texas and the United States, the "Compact *apportions* water between the signatory states," while the United States "*allocates* available water to satisfy the downstream contracts and satisfy each state's apportionment on an annual basis." *Id*. (emphasis original); *see also* US Response 19 ("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." (emphasis original)).

Unlike Texas and the United States, however, the Court has not recognized this semantic difference in compact litigation. *E.g. Montana v. Wyoming*, 563 U.S. at 372 (explaining how the Yellowstone River Compact "allocates [water] to each State"); *Kansas v. Nebraska*, 135 S. Ct. 1255 (2015) (decree) (describing the water "allocated" to each State). Nonetheless, if Texas and the United States would like to use the term "apportionment" for the division of water between the states, and "allocation" to describe the Project water the United States delivers below Elephant Butte based on total Project lands in each of the States pursuant to the Compact and Reclamation law, New Mexico is comfortable with that terminology.

Neither Texas nor the United States explain why they think this language is important, and in the end, the nomenclature makes no substantive difference. *Cf.* W. Shakespeare, Romeo and Juliet, Act II, Scene II (The Oxford Shakespeare, Craig, W.J., ed. 1914) ("What's in a name? That

which we call a rose by any other name would smell as sweet"). These terms are, in fact, synonymous in the Compact. The Compact uses both terms, referring to the "equitable apportionment of such waters" to the States in its preamble, and "the quantities of water herein allocated" in Article XIV. Admittedly, the Compact does not explicitly set forth the exact apportionment or allocation below Elephant Butte, but it does provide that Project water will be released "in accordance with irrigation demands," Art. I(l), and provide for a normal release of 790,000 acre-feet annually, Art. VIII. Here, the Parties are further guided by the decisions of the Court, which has held that the United States has a "legal responsibility" through "the Downstream Contracts" to "assur[e] that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959 (internal quotation marks omitted). This makes clear that, regardless of the terminology employed, the "apportionment" of water below Elephant Butte between New Mexico and Texas is the "allocation" of Project water between the irrigation districts.

### B. The Court Decided that the Compact Apportions Water to New Mexico Below Elephant Butte

In its Response, the United States argues for the first time that the Compact does not apportion water to New Mexico below Elephant Butte. As discussed below, this new position is contrary to the 2018 Decision.

The United States' new position starts with its claim that "[t]he Court's opinion does not say anything like" the Compact applies below Elephant Butte. US Response 17. In this way, the United States argues that the Compact does not apply below Elephant Butte. As New Mexico explained in its Motion, this position would accord with the interpretation of courts prior to this proceeding, which consistently held that "the Rio Grande Compact does not apportion the surface waters of the Rio Grande below Elephant Butte." *City of El Paso ex rel. Pub. Serv. Bd. v. Reynolds*,

563 F. Supp. 379, 382 (D.N.M. 1983); NM Motion 19-20. Based on that precedent, New Mexico brought its Motion to Dismiss to argue that the Compact did not apply below Elephant Butte. *See* Motion to Dismiss 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."); NM Reply Brief (in support of Motion to Dismiss) 1 ("While the Compact imposes a delivery obligation on New Mexico at Elephant Butte, it imposes no obligation on New Mexico below Elephant Butte."). The necessary implication of the Court's denial of the Motion to Dismiss is that this principle was incorrect, and the Compact applies below Elephant Butte. If this were not true, then neither Texas nor the United States would have a claim, arising out of the Compact, below Elephant Butte.

Next, the United States argues that "[n]othing in the Compact 'apportions' Rio Grande water to New Mexico lands below Elephant Butte Reservoir." US Response 18. This position is flawed for several reasons. First and foremost, it is flawed because it is inconsistent with the 2018 Decision. In that Decision, the Court held 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 part of New Mexico* is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959 (emphasis added; internal quotation marks omitted). Given that holding, it cannot be reasonably asserted that the Compact apportions no water to New Mexico below Elephant Butte Reservoir.

Furthermore, because the Compact does not contain any express provisions governing the division below Elephant Butte, the Court relied on its finding that "the Compact . . . implicitly . . . incorporate[d] the Downstream Contracts by reference." *Id*. Those Downstream Contracts establish the apportionment between the States below Elephant Butte based on the Project acreage

in each State. Although there is no difference between the two States under the language of the Compact or Downstream Contracts, the United States apparently reads a distinction in the rights granted to Texas and New Mexico—one receiving an apportionment below Elephant Butte Reservoir, and one not. There is no basis for this distinction in the Compact or in the 2018 Decision.

The United States reasons that "the suggestion by New Mexico that it received an apportionment of 57% of the releases[3] from Elephant Butte Reservoir *in addition* to its apportionment under Article IV is unsupported by the Compact." US Response 20 (emphasis original). But this assertion is inconsistent with the prior position of the United States in which it argued that "New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir" and that the Compact apportionment below Elephant Butte was "divided according to the 57% to 43% split reflecting the historical proportion of irrigated acreage" in each State. Brief for the United States in Opposition to New Mexico's Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention at 28 ("US Opposition to Motion to Dismiss"). Nor does the United States offer any explanation for why New Mexico would have ignored the needs of its citizens located below Elephant Butte.

The United States also ignores the Court's holding that the Downstream Contracts are incorporated into the Compact, and argues that only EBID, not New Mexico, is entitled to water under the Compact. US Response 20. In making this argument, however, the United States forgets that EBID has conceded that it is a creature of New Mexico, derives its authority from the State, and could be reconstituted. Transcript of August 20, 2015, Oral Argument at 25-26. As discussed

[3] As New Mexico argued in its Response, the question of whether each State receives a percentage of water released from the reservoir versus a percentage of the Project's total deliveries, which would account for recapture and reuse of return flows, has not yet been decided. NM Response 17. Historically, the Project has allocated water on the basis of deliveries, not releases.

in the briefing on EBID's Motion to Intervene, contrary to the United States' argument, whatever entitlement to water EBID has, derives from New Mexico's Compact entitlement.

Finally, the United States appears to disclaim any duties arising under the Compact, arguing there is "no language in the Compact" imposing such obligations on it. US Response 20-21. But in the 2018 Decision, the Court referenced the "legal responsibility" and "duties" of the United States in achieving the Compact's purpose. *Texas v. New Mexico*, 138 S. Ct. at 959. It noted that the "Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts," *id*., and explained that the United States is "charged with assuring" that the "equitable apportionment to Texas and part of New Mexico is in fact made," *id.* (internal quotation omitted). In fact, the rationale that the Compact imposes obligations on the United States below Elephant Butte was one of the considerations for the Court in allowing the United States to bring its Compact claims in this case.

Moreover, it is not difficult to imagine a situation in which the United States adopts an operational procedure for Elephant Butte Reservoir that both Texas and New Mexico oppose, and that both States believe deprives them of their share of Compact water. In light of the 2018 Decision, there can be no doubt that the States would have a cause of action against the United States to challenge that action, and that the cause of action would arise out of the Compact.

In sum, the Court has already decided that the Compact apportions water to New Mexico below Elephant Butte, and the Special Master should reject the United States' contrary arguments.

### C. The United States' New Position Is Inconsistent with Its Prior and Current Positions

#### *1. The United States Should Be Judicially Estopped from Asserting Its New Position*

To protect the integrity of relations between sovereigns, this Court has discouraged parties to interstate litigation from taking inconsistent positions according to the exigencies of the moment: "where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted); *see also id.* at 751-55 (holding that New Hampshire was judicially estopped from giving a different meaning to the term "Middle of the River," which it defined in one manner in settling the initial dispute, and in another manner in a subsequent proceeding); *Yniguez v. Arizona*, 939 F.2d 727, 738 (9th Cir. 1991) (judicial estoppel, also known as "preclusion of inconsistent positions," prohibits a litigant from asserting inconsistent positions in the same litigation). The principles underlying this doctrine proscribes the United States' new position.

Contrary to its new position, the United States previously argued that the Compact applies below Elephant Butte and that Texas and New Mexico receive their equitable apportionment through Project deliveries. US Opposition to Motion to Dismiss 26-28. To defeat the Motion to Dismiss, the United States argued that "[b]y operation of [the Compact] provisions, New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir, and Texas receives its entire equitable apportionment of water, through the Project." *Id*. at 28. This position cannot be squared with the United States' new position that "[t]he Compact does not apportion any quantity or percentage of Rio Grande water to New Mexico below Elephant Butte Reservoir." US Response 19.

The United States successfully pressed its prior position that "New Mexico receives an additional apportionment of water under the Compact below Elephant Butte Reservoir," and the Court denied the Motion to Dismiss. Because the United States "succeed[ed] in maintaining that position," *New Hampshire v. Maine*, 532 U.S. at 749, and because the Court denied the Motion to Dismiss, the United States should not now be allowed to claim that "[n]othing in the Compact 'apportions' Rio Grande water to New Mexico lands below Elephant Butte Reservoir." US Response 18.

*2. The United States' New Position Is Inconsistent with Its Position on Texas's Proposed Determinations*

Last, in addition to being inconsistent with its *prior* positions, the United States' new position is also inconsistent with the *current* positions that it takes in response to Texas's Proposed Determinations. Specifically, the new position of the United States that the Compact does not apportion water to New Mexico below Elephant Butte is inconsistent with its positions on Texas's Proposed Determination No. 2, US Response 6-7 ("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.'" (quoting 2018 Decision)), Texas's Proposed Determination No. 3, US Response 8 ("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."), and Texas's Proposed Determination No. 5, US Response 10-11 (arguing that the Compact applies to New Mexico below Elephant Butte).

**D. Texas, the United States and the Irrigation Districts Coordinated Their Arguments to Shield the 2008 Operating Agreement**

By arguing that the Compact does not impose any obligations on the United States or the Project below Elephant Butte, the United States (and its partner irrigation districts) seeks to insulate itself from any claims arising under the Compact. In particular, the United States and the

two irrigation districts are engaged in a coordinated effort to shield the 2008 Operating Agreement from claims that it alters the apportionment granted under the Compact.

New Mexico has alleged that the 2008 Operating Agreement causes Texas to receive more water than it is entitled to receive under the Compact. This is so because, as the United States admits, "[t]he effect of the 2008 Operating Agreement is that EBID agrees to forgo a portion of its Project deliveries to account for changes to Project efficiency caused by groundwater pumping in New Mexico." Memorandum in Support of Motion of the United States to Intervene as a Plaintiff at 6 (February 2014). If the Compact apportions water to "part of New Mexico" as the Court held, however, then it acts as a constraint on the Project, and results in the United States operating the Project in a way that re-apportions Compact water without New Mexico's consent. That dispute, and the desire of Texas, the United States, and the two irrigation districts to preserve the 2008 Operating Agreement, has always been at the heart of this case.

Clarifying that the Court has already determined that the Compact applies below Elephant Butte will advance the litigation by focusing the Parties on the test for Compact compliance and the technical analysis of whether Texas and New Mexico have received their apportionment.

## IV. THE SPECIAL MASTER SHOULD REJECT TEXAS'S PROPOSED DETERMINATIONS AND FIND THAT NEW MEXICO'S PROPOSED PRINCIPLES CONSTITUTE LAW OF THE CASE

### A. The Parties Agree on Several Principles

Texas and the United States agree with New Mexico on several issues. For convenience, the relative positions of the Parties are shown on the Table in Exhibit A. For example, while Texas does not agree that New Mexico's Proposed Principles should be recognized as law of the case, on specified substantive concepts, Texas agrees, or partially agrees, with New Mexico on New Mexico's Proposed Principle Nos. 1, 2, 3, 4, 5, 6, 9, 10, and 11, *see* Tex. Response at Exhibit A; and the United States agrees, or partially agrees, with New Mexico on New Mexico's Proposed

Principle No. 1, 3, 5, 9, 10, and 11, *see* US Response 17. Notably, Texas and the United States disagree on several meaningful issues. Both the lack of agreement among the Parties, and the shifting positions of the United States, underscore that the Special Master should be judicious in determining the principles that have been previously decided.

### B. New Mexico's Proposed Principles Accurately Reflect the Findings of the Court

Texas suggests that New Mexico's Proposed Principles "harken[] back to the same arguments on legal issues that were before the Special Master under New Mexico's Motion to Dismiss." Tex. Response 11. Not so. As discussed above, New Mexico has accepted the implications of the Court's holdings and attempted to faithfully identify the principles that can fairly said to be decided.

1. *New Mexico's Proposed Principle No. 1— Assuming for purposes of the Motion to Dismiss that the well-pled factual allegations in the complaints are true, both Texas and the United States have pled valid claims arising under the Compact.*

Texas argues that the law of the case doctrine only applies to questions of law, rather than questions of fact or mixed questions of law and fact. Tex. Response 7-8. There is significant disagreement between courts regarding whether this is true. *Compare, e.g., Johnson v. Champion*, 288 F.3d 1215, 1226 (10th Cir. 2002) ("Whether the 'law of the case' doctrine applies to questions of fact . . . is unclear."); *United States v. Robinson*, 690 F.2d 869, 872 (11th Cir. 1982) ("Under the law of the case doctrine, both the district court and the court of appeals generally are bound by findings of fact and conclusions of law made by the court of appeals in a prior appeal of the same case."); *Carpenter v. Durrell*, 90 F.2d 57, 58 (6th Cir. 1937) ("The doctrine of the law of the case has no application to questions of fact . . . ."). Regardless of the applicable rule, New Mexico recognizes that these issue have arisen in the context of a Motion to Dismiss, and that no evidence has yet been presented. New Mexico, therefore, agrees with Texas that the Court has not made

any factual determinations. Texas's argument is inapposite, however, because New Mexico does not seek to have any fact recognized as finally determined in this case.

Notwithstanding its factual argument, Texas apparently agrees, as it must, with New Mexico's Proposed Principle No. 1. Tex. Response at Exhibit A, pg. 1. The United States likewise agrees, US Response 17, and New Mexico's Proposed Principle No. 1 should be recognized as having been previously determined.

2. *New Mexico's Proposed Principle No. 2— The Compact applies below Elephant Butte.*

Although Texas refuses to accept the language that New Mexico proposes, it recognizes the principle 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)." Tex. Response at Exh. A, pg. 2. Texas's distinction is hard to follow. If the Compact "equitably apportions the waters of the Rio Grande above Fort Quitman" as Texas, and the Court, recognize, then the Compact necessarily applies below Elephant Butte. And as discussed in more detail above, the underlying premise of New Mexico's Motion to Dismiss was that the Compact ended at Elephant Butte, and therefore did not apply below the Reservoir. By necessary implication, when the Court denied New Mexico's Motion, it found that the Compact applied below Elephant Butte.

The United States' position on New Mexico's Proposed Principle No. 2 is discussed above. As explained, if the Compact does not apply below Elephant Butte, then neither Texas nor the United States has a cause of action arising out of the Compact for water use in that area.

3. *New Mexico's Proposed Principle No. 3— The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.*

The United States agrees with New Mexico's Proposed Principle No. 3. US Response 17. Texas suggests that New Mexico's Proposed Principle No. 3 presents an issue of fact, but Texas ignores that the Treaty referred to in New Mexico's Proposed Principle No. 3 is a statute[4] and ignores the Court's explicit recognition of the principle. Regardless, both Texas and the United States recognize this substantive concept, and New Mexico's Proposed Principle No. 3 should be recognized as having been previously determined.

4. *New Mexico's Proposed Principle No. 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.*

Both the United States and Texas take issue with the phrasing of New Mexico's Proposed Principle No. 4, suggesting that New Mexico "appears to attempt to expand" the 2018 Decision. US Response 19. Texas's disagreement is inconsistent with its prior position that "the United States agreed upon deliveries for 57 percent of the released water to New Mexico, and 43 percent to Texas." Tex. Motion at 14 (citing *Texas v. New Mexico*, 138 S. Ct. at 954). Ultimately, New Mexico is confident that the position it articulates in Proposed Principle No. 4 will be vindicated in this litigation. It recognizes, however, that its proposed language does not precisely track the language used by the Court. To address the concerns expressed by Texas and the United States, New Mexico is willing to rephrase its Proposed Principle No. 4 as follows: "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 New Mexico

[4] Convention Between the United States and Mexico Providing for the Equitable Distribution of the Waters of the Rio Grande for Irrigation Purposes, May 21, 1906, 34 Stat. 2953.

was apportioned water to serve 57% of Project lands, and Texas was apportioned water to serve 43% of Project lands." The first part of this language is a direct quote of the Court. The latter part necessarily follows from the Court's recognition that when the Compact was adopted by Congress and the States, the United States "assumed a legal responsibility to deliver a certain amount of water" to The irrigation districts. In this way, the United States was "charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Texas v. New Mexico*, 138 S. Ct. at 959 (internal quotation omitted).

5. *New Mexico's Proposed Principle No. 5— The Compact incorporates the "Downstream Contracts" and the Project to the extent not inconsistent with the express language of the Compact.*

The United States agrees with New Mexico's Proposed Principle No. 5. US Response 17. Texas resists, but also appears to agree with the meaningful part of New Mexico's Proposed Principle No. 5. Tex. Response at Exhibit A, pg. 4. Principle No. 5 tracks the language of the 2018 Decision. There the Court described the "central role" played by the Rio Grande Project, *Texas v. New Mexico*, 138 S. Ct. at 957, and explained that "the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts," *Id*. at 959. The Court further recognized that "the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *Id*.; *see also id*. ("New Mexico has conceded that the United States plays an integral role in the Compact's operation"). It is hard to reconcile this explicit language with Texas's argument that New Mexico's Proposed Principle No. 5 "does not constitute the law of the case." Tex. Response at Exhibit A, pg. 4.

6. *New Mexico's Proposed Principle No. 6— The Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte to Fort Quitman.*

In response to New Mexico's Proposed Principle No. 6, Texas again refuses to recognize New Mexico's language but repeats its recognition 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)." Tex. Response at Exhibit A, pg. 2. The United States refuses to recognize that the Compact apportions "any quantity or percentage of Rio Grande water to New Mexico below Elephant Butte Reservoir." US Response 19. In general, it is surprising that Texas and the United States are not willing to acknowledge New Mexico's Proposed Principle No. 6 in light of their opposition to the Motion to Dismiss. In the 2018 Decision, the Court explained that the "purpose" of the Compact "is to 'effec[t] an equitable apportionment' of 'the waters of the Rio Grande' between the affected States." *Texas v. New Mexico*, 138 S. Ct. at 959. It goes on to state that the Compact achieves this apportionment because "the United States . . . through the Downstream Contracts . . . [is] charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made." *Id*. (internal quotation omitted).

7. *New Mexico's Proposed Principle No. 7—The apportionment is based on the Downstream Contracts and the operation of the Project.*

Please see the discussion, *supra*, in support of New Mexico's Proposed Principle Nos. 5 and 6.

8. *New Mexico's Proposed Principle No. 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.*

Texas disagrees with New Mexico's Proposed Principle No. 8, but "agrees with this finding, as expressed by the Court." Tex. Response at Exhibit 8, pg. 5. It is, therefore, hard to understand Texas's protest that "[t]his item, as phrased by New Mexico, cannot constitute the law of the case." The United States, for its part, disputes New Mexico's Proposed Principle No. 8, even though the language originates from the 2018 Decision. The United States' opposition is discussed above.

9. *New Mexico's Proposed Principle No. 9— New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir.*

Neither Texas nor the United States dispute New Mexico's Proposed Principle No. 9.

10. *New Mexico's Proposed Principle No. 10— A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico.*

Texas again "agrees with the analysis," but argues that New Mexico's Proposed Principle No. 10 "does not represent a legal conclusion that is properly the law of the case moving forward." Texas's position is hard to understand given that this Proposed Principle is taken directly from the 2018 Decision, which states "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. at 959-60.

11. *New Mexico's Proposed Principle No. 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.*

For a final time, Texas "[d]ispute[s] [New Mexico's Proposed Principle No. 11] as being the law of the case, but not disputed for other reasons." Tex. Response at Exhibit A, pg. 8. Unlike Texas, the United States argues that New Mexico Proposed Principle No. 11 "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." US Response 17 n.3. The United States' issue is of no import. For the purposes of this case, the Court understands the United States' claims to be "essentially the same claims" as Texas's. *Texas v. New Mexico*, 138 S. Ct. at 956.

### C. Texas's Proposed Determinations Do Not Accurately Reflect the Court's Findings

New Mexico addressed the reasons that Texas's Proposed Determination Nos. 2 through 5 do not accurately reflect the Court's findings in its Response. That discussion is incorporated here

by reference. New Mexico writes separately to address the new issues raised by the United States in its Response.

*1. Texas's Proposed Determination No. 1*

New Mexico generally agrees with the United States that Texas's Proposed Determination No. 1 is law of the case, although this is because the Court discussed and endorsed this theory, *Texas v. New Mexico*, 138 S. Ct. at 959, not because it was articulated in the First Interim Report. In addition, the Special Master should specify that the Project was fully integrated into the Compact only to the extent that it was not inconsistent with the express language of the Compact.

*2. Texas's Proposed Determination No. 2*

New Mexico agrees with the United States that New Mexico must deliver water to Elephant Butte, and thereby yield physical "possession" of the water. New Mexico's Reply Brief (on Motion to Dismiss) at 12 ("New Mexico does not control releases from the Project" (internal quotation omitted)). And New Mexico further agrees with the United States that New Mexico does not "literally cede ownership of Rio Grande water," but must "exercise its authority over that water" in a way that is consistent with the Compact. US Response 7.

*3. Texas's Proposed Determination No. 3*

The United States agrees with Texas's Proposed Determination No. 3, and asserts that New Mexico must prevent "Project releases from being captured or intercepted." US Response 8. As it explained in its Motion, New Mexico recognizes that the Compact applies below Elephant Butte, and imposes obligations on both New Mexico and the United States. *Texas v. New Mexico*, 138 S. Ct. at 959. New Mexico also recognizes that those obligations include administering "state law to protect Project releases." US Response 8. But like Texas, the United States takes this principle too far when it agrees with Texas that New Mexico must prevent Project water "from being captured or intercepted." *Id*.

That is not to say that New Mexico is allowed to reduce Texas's share of water. For example, unlike Texas's Proposed Determination No. 3, Texas's Proposed Determination No. 4 correctly keys to depletions. By focusing on diversions in Texas's Proposed Determination No. 3, Texas and the United States would effectively prevent any depletions *or diversions* by New Mexico water users of *any* Project water. If this Proposed Determination were accepted as law of the case, New Mexico would therefore be in violation of the Compact by taking its own share of Compact water. As New Mexico discussed in its Response, at 12-13, Texas's Proposed Determination No. 3 misunderstands water administration under the prior appropriation doctrine.

Moreover, the United States concedes that Project releases are protected "by New Mexico *state* law" such that "New Mexico must administer permitting and water rights under state law to protect Project releases." US Response 8 (emphasis in original). But the mechanism for that protection has not yet been decided. By way of illustration, in *Montana v. Wyoming*, Special Master Thompson decided that under the prior appropriation doctrine, the downstream state was required to notify the upstream state that it was not receiving its share of Compact water before the upstream state had any obligation to curtail its water users. Second Interim Report of the Special Master, at 47-65, *Montana v. Wyoming,* No. 137, Original (U.S. Dec. 29, 2014). The same principle likely applies in this case.

*4. Texas's Proposed Determination No. 4*

The United States agrees with Texas's Proposed Determination No. 4. In its Response, New Mexico explained that the test for Compact compliance has not yet been decided by the Court. NM Response 14-15. The United States argues that this issue was joined before the Special Master, but it was not presented to, or decided by the Court. All that has been established at this stage is that Texas is entitled to raise a claim about the proper test for Compact compliance.

New Mexico further explained that one reason that Texas's Proposed Determination No. 4 is not ripe for determination is that the Special Master and Court will greatly benefit from additional evidence and testimony on the historic position of the States on this issue, water administration issues, and the technical choices involved in each of the possible tests for Compact compliance. The United States argument on Texas's Proposed Determination No. 4 underscores this point. It argues that "the interception of Project return flows by groundwater pumping. . . . " would violate the Compact. But evaluating and determining what constitutes "Project return flows," the extent that groundwater pumping impacts those flows, and the historic operation of the Project are all highly technical issues that overlap with this question. The Court should have a full picture before it makes this critical decision.

It follows that Texas's Proposed Determination No. 4 should be rejected at this time as law of the case. Texas and the United States are free to pursue their preferred test for Compact compliance as the litigation develops.

*5. Texas's Proposed Determination No. 5*

In its Response, New Mexico explained that Texas overreaches with its Proposed Determination No. 5. NM Response 14-15. The United States apparently agrees, because it flatly disagrees with Texas's statement that "New Mexico state law plays no role in an interstate dispute," and "reframe[s]" this incorrect statement as "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 . . . ." US Response 10. As the United States correctly notes, New Mexico is required "to respect the Compact in its administration of state law" and cannot "administer water rights in a way that conflicts with the Compact's equitable apportionment." *Id*. at 11. In that respect, "New Mexico is situated no differently from its upstream neighbor, Colorado," or indeed any other upstream state subject to a

compact. *Id.* And contrary to Texas's inaccurate statements on state law, New Mexico "assumed an obligation to *exercise* its sovereignty and *administer* state law" in a manner consistent with its Compact obligations. *Id*. (emphasis in original). The United States succinctly rejects Texas's position and states "New Mexico must administer permitting and water rights under state law to protect Project releases." *Id*. at 8. New Mexico agrees with the United States on these points. Although not acknowledged by the United States, these same requirements, to administer permitting and water rights under state law, apply to Texas and are a critical component of this case and any future Project operations.

## V. TEXAS CAN CLAIM NO PREJUDICE IF THE ISSUES ARE FULLY LITIGATED

Texas argues that it will "suffer significant financial stress required by re-litigation of issues already decided." Tex. Response 17. The problem with this argument, of course, is that the Court has not "already decided" Texas's Proposed Determinations. Unlike *Arizona v. California*, 460 U.S. 605, on which Texas relies, the issues have not been fully litigated, evidence has not been presented, the Court has not issued a full decision, and a decree has not been entered. Both Texas and the United States accept that "the Court has traditionally eschewed reliance on summary procedures and technical principles of pleading in original actions, preferring instead to allow for the full development of the record." NM Response 22-24 (citing cases). Given the far-reaching implications of the Compact interpretation issues, the Special Master and Court will benefit from a fully developed record on which to base a decision.

Finally, Texas argues that taking the time to correctly decide the Compact interpretation issues "will delay Texas the relief it seeks from the ongoing damage created by New Mexico's violation of the 1938 Compact." Tex. Response 17. But there is no "ongoing damage" to Texas as it alleges. In the mid-1980s the United States adopted a mechanism for Project accounting

known as the D2 curve, which accounted for all groundwater pumping in both States through 1978. Both States acquiesced to this accounting. Shortly thereafter, New Mexico, unlike Texas, closed the basin to new groundwater rights. The D2 accounting was in place until 2008 when the United States and the two irrigation districts, without New Mexico's input, altered Project (and by extension, Compact) accounting by adopting the 2008 Operating Agreement. Since that time, the evidence will show that Texas has received *more than* its share of Project water. That is why it was necessary for New Mexico to bring its counterclaims. The only "ongoing damage" currently being done is to New Mexico.

## REPLY TO COLORADO'S RESPONSE ON THE UNITED STATES' MOTION FOR JUDGMENT ON THE PLEADINGS AND TEXAS'S MOTION TO STRIKE

New Mexico concurs with Colorado that the United States "waived its sovereign immunity when it intervened as a plaintiff." State of Colorado's Response to the United States' Motion for Judgment on the Pleadings Against New Mexico's Counterclaims 2, 3, 5, 6, 7, 8 and 9 and Texas's Motion to Strike or for Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses, Federal Rules of Civil Procedure Rule 12(C) and Rule 56 ("Colorado Response") at 7. Colorado also correctly comments that the United States' attempts to push back on New Mexico counterclaims because they implicate the Rio Grande Project operations are unpersuasive. The Court has determined the Compact is inextricably intertwined with the Rio Grande Project. *Id*.

In addition, Colorado correctly notes that equitable defenses are generally available in Compact actions. *Id*. at 14. "Defenses do not create new terms in a compact, they inform whether a plaintiff is entitled to the relief it seeks." *Id*. Colorado ably distinguishes the cases Texas cites and discusses a few of the many instances where affirmative defenses have been allowed in other cases involving interstate compacts, *id*. at 15-18, further demonstrating why New Mexico's equitable defenses should not be dismissed.

## REPLY TO THE AMICUS BRIEFS OF EPCWID AND EBID

EPCWID and EBID both argue that, as parties to the 2008 Operating Agreement, they are indispensable to resolution of New Mexico's counterclaims challenging the 2008 Operating Agreement as a violation of the Compact. EPCWID Response to U.S. Motion 13; EBID Consol. Response 7. Both argue New Mexico's counterclaims pertaining to the 2008 Operating Agreement should be dismissed for failure to join them, or alternatively that they should be joined to this case as parties. EPCWID Response to U.S. Motion 13-14; EBID Consol. Response 8. These arguments are unavailing in an original action considering an interstate compact.

This case concerns interpretation and application of the Rio Grande Compact, an interstate agreement to which neither EBID nor EPCWID are parties. While certain of New Mexico's counterclaims challenge the 2008 Operating Agreement as inconsistent with the terms of the Compact, the Court is being asked to interpret the Compact, the responsibilities between the States, and the role of the United States. New Mexico's request that the irrigation districts be joined to the 2011 district court case of *New Mexico v. United States*, No. 11-cv-691 (D.N.M.), has no bearing here because this is an original action between States to interpret a Compact. The irrigation districts are situated similarly to every other water user within their respective States. Their rights to Project water are subordinate to the Compact's apportionment, and any agreements they execute among themselves purporting to grant rights in excess of that apportionment are null and void. *See Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92, 106 (1938).

This is a case to determine what the Compact requires, and the States are the proper parties to this dispute, not the irrigation districts or any other individual claimant. *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995) ("We have said on many occasions that water disputes among States may be resolved by compact or decree without the participation of individual claimants, who nonetheless are bound by the result . . . ."). Again, this situation is analogous to the one the Court

faced in *Nebraska v. Wyoming*, where it held joinder of individual contractees was unnecessary, despite Wyoming raising claims implicating their contracts, because Wyoming was not asserting rights based on these contracts, but its rights under the North Platte Decree. *Id*. at 21. The irrigation districts present no reason for the Court to reach a different result here.

Indeed, the Court already considered whether the irrigation districts should be joined to this case in light of the potential for Texas's claims to void the 2008 Operating Agreement, and it found this argument unpersuasive. EBID argued in its brief in support of its Motion to intervene that, if Texas were to prevail on the claims it has asserted in this case, particularly Texas's theory that the Compact limits depletions in the Lower Rio Grande to those that were occurring in 1938, "the [2008] Operating Agreement presumably would no longer be operative." EBID Motion to Intervene 18. Despite this, the Court denied the irrigation districts' requests to intervene. *Texas v. New Mexico,* 138 S. Ct. 349 (Oct. 10, 2017) (mem.).

In addition, EPCWID and EBID argued at length in their Motions to Intervene that their interests as signatories to the 2008 Operating Agreement supported their requests to intervene. EBID Motion to Intervene 21, 25, 27, 34-35; EPCWID Motion to Intervene 16, 20, 25-27. This included arguments from both irrigation districts that neither Texas nor New Mexico would defend the 2008 Operating Agreement. EBID Motion to Intervene at 25; EPCWID Motion to Intervene at 25. Despite these interests, and despite the potential for Texas's claims to invalidate the 2008 Operating Agreement, the irrigation districts were not allowed to intervene. Now that New Mexico has also raised claims with the potential to void the 2008 Operating Agreement, the result should be no different.

## CONCLUSION

For the forgoing reasons, the Special Master should grant New Mexico's Motion for Partial Judgment on Matters Previously Decided, deny Texas's Request for a Judicial Declaration to

Confirm the Legal Issues Previously Decided and Motion in Limine, deny Texas's Motion to Strike or for Partial Judgment, and deny the United States' Motion for Judgment on the Pleadings.

Respectfully submitted,

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# EXHIBIT A

**Summary of the Positions of the Parties on New Mexico's Proposed Principles**

| New Mexico's Proposed Principle | Texas's Position (citation) | United States' Position (citation) | Colorado's Position (citation) |
|---|---|---|---|
| **Proposed Principle No. 1** | Disputed as law of the case, but undisputed for other reasons (Ex. A to Tex. Resp., p. 1). | Undisputed (U.S. Resp., p. 17). | Undisputed by implication (Colo. Resp. p. 5) |
| **Proposed Principle No. 2** | Disputed, but recognizes language of the Court (Ex. A to Tex. Resp., p. 2. | Disputed (U.S. Resp., pp. 17-21). | Disputed without specific analysis (Colo. Resp., p. 6). |
| **Proposed Principle No. 3** | Disputed as law of the case, but undisputed for other reasons (Ex. A to Tex. Resp., p. 3). | Undisputed (U.S. Resp., p. 17). | Disputed without specific analysis (Colo. Resp., p. 6). |
| **Proposed Principle No. 4** | Disputed, but recognizes language of the Court. (Ex. A to Tex. Resp., p. 3). | Disputed (U.S. Resp., pp. 17-21). | Disputed without specific analysis (Colo. Resp., p. 6). |
| **Proposed Principle No. 5** | Disputed, but recognizes language of the Court (Ex. A to Tex. Resp., p. 4). | Undisputed (U.S. Resp., p. 17). | Disputed without specific analysis (Colo. Resp., p. 6). |
| **Proposed Principle No. 6** | Disputed, but recognizes language of the Court (Ex. A to Tex. Resp., p. 4). | Disputed (U.S. Resp., pp. 17-21). | Disputed without specific analysis (Colo. Resp., p. 6). |
| **Proposed Principle No. 7** | Disputed (Ex. A to Tex. Resp., p. 5). | Disputed (U.S. Resp., pp. 17-21). | Disputed without specific analysis (Colo. Resp., p. 6). |
| **Proposed Principle No. 8** | Disputed, but recognizes language of the Court (Ex. A to Tex. Resp., p. 5). | Disputed (U.S. Resp., pp. 17-21). | Disputed without specific analysis. (Colo. Resp., p. 6). |
| **Proposed Principle No. 9** | Undisputed (Ex. A to Tex. Resp., at 6). | Undisputed (U.S. Resp., p. 17). | Disputed without specific analysis (Colo. Resp., p. 6). |

| New Mexico's Proposed Principle | Texas's Position (citation) | United States' Position (citation) | Colorado's Position (citation) |
|---|---|---|---|
| **Proposed Principle No. 10** | Disputed as law of the case, but undisputed for other reasons (Ex. A to Tex. Resp., p. 6). | Undisputed (U.S. Resp., p. 17). | Disputed without specific analysis (Colo. Resp., p. 6). |
| **Proposed Principle No. 11** | Disputed as law of the case, but undisputed for other reasons (Ex. A to Tex. Resp., p. 7). | Undisputed as modified (U.S. Resp., p. 17). The U.S. objects to the phrase "may not." (U.S. Resp., p. 17, n.3). | Disputed without specific analysis (Colo. Resp., p. 6). |

**Summary of the Positions of the Parties on Texas's Proposed Determinations**

| Texas's Proposed Determination | New Mexico's Position (citation) | United States' Position (citation) | Colorado's Position (citation) |
|---|---|---|---|
| **Proposed Determination No. 1** | Undisputed, as modified (N.M. Resp., p. 11). | Undisputed (U.S. Resp., p. 5). | Disputed as beyond the express holding of the Court (Colo. Resp. p. 15). |
| **Proposed Determination No. 2** | Disputed (N.M. Resp., p. 11). | Undisputed given that "relinquish control and dominion" means "giving or yielding possession" (U.S. Resp., pp. 5-6). | Disputed as beyond the express holding of the Court (Colo. Resp. p. 15). |
| **Proposed Determination No. 3** | Disputed (N.M. Resp., p. 12) | Undisputed (U.S. Resp., pp. 7-8). | Disputed as beyond the express holding of the Court. (Colo. Resp. p. 15). |
| **Proposed Determination No. 4** | Disputed (N.M. Resp. p. 13). | Undisputed as qualified: "post-1938 depletions" does not include changes which result from irrigation efficiencies implemented by project beneficiaries after 1938 (U.S. Resp., pp. 9-10). | Disputed as beyond the express holding of the Court (Colo. Resp. p. 15). |

| Texas's Proposed Determination | New Mexico's Position (citation) | United States' Position (citation) | Colorado's Position (citation) |
|---|---|---|---|
| **Proposed Determination No. 5** | Disputed (N.M. Resp. p. 14). | Undisputed as modified to state: "New Mexico . . . must administer state law in a manner wholly consistent with the Compact . . . ." (U.S. Resp., p. 10). | Disputed as beyond the express holding of the Court (Colo. Resp. p. 15). |

No. 141, Original

IN THE
SUPREME COURT OF THE UNITED STATES

♦

STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

*Defendants.*

♦

**OFFICE OF THE SPECIAL MASTER**

♦

**STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE**

♦

This is to certify that on the 15th of March, 2019, I caused a true and correct copy of the **State of New Mexico's Consolidated Reply on Motions Regarding Issues Decided in This Action and Reply to Additional Issues Raised in the Response Briefs** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 15th day of March, 2019.

*/s/ Michael A. Kopp*

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