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

Order

April 14, 2020

I. Introduction and Summary Conclusions

Texas has moved for a judicial declaration to confirm legal issues previously decided and to exclude evidence related to these issues. (Sp. M. Docket No. 162). New Mexico has moved for partial judgment on matters previously decided. (Sp. M. Docket No. 165). The United States, Colorado, and several amici have filed briefs setting forth their respective interpretations of prior rulings in this case and their positions as to the Texas and New Mexico motions. The briefing as to these matters focuses on the questions of whether and to what extent prior rulings in this case have resolved certain issues or otherwise serve as the law of the case.

The doctrine of "law of the case" applies only to issues actually decided, and even as to such issues, the "law of the case is an amorphous concept. . . . [that] directs a court's discretion, it does not limit the tribunal's power." *Arizona v. California*, 460 U.S. 605, 618 (1983). "[T]he doctrine posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Id.* In the unique setting of original jurisdiction actions, however, with the Court's comprehensive role as arbiter of facts and law, it is important to pay careful attention to what the Court itself chooses to say and not overstate the finality or certainty of a Special Master's preliminary rulings.

In simple terms, this case is a dispute about where the waters of the Rio Grande have been going, where they should have been going, and where they should go in the future. Texas alleges New Mexico improperly has been taking more surface water, hydrologically connected groundwater, and return flows between the Elephant Butte Dam and Texas than allowed by the Rio Grande Compact. Texas seeks prospective relief and past damages for a potentially lengthy period of time. New Mexico asserts similar but geographically distinct claims

against Texas and also alleges unaccounted-for Texan and Mexican water capture is at least partially to blame for any alleged shortages experienced by Texas. It is clear each party will be required to prove what their neighboring state is *entitled* to receive before proving anything has been *wrongfully* taken.

At this point, however, the parties not only dispute the details of New Mexico's rights to water downstream of the Dam, they dispute the fundamental question of whether such rights are to be considered a part of New Mexico's Compact apportionment. The Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Project operates pursuant to reclamation law. The interplay of reclamation law and state law is complex even in the absence of a Compact, and that interplay does not become less complicated when a Compact exists but leaves many things unsaid. *See, e.g.*, *California v. United States*, 438 U.S. 645, 670–74 (1978) (discussing application of § 8 of the Reclamation Act of 1902, 32 Stat. 390 (current version at 43 U.S.C. §§ 372, 383 (2018))). Texas alleges New Mexico is entitled to receive, at most, the water encompassed by individual users' contracts as protected by the Downstream Contracts and managed by a water district and the United States. Texas resists characterizing this water as a Compact right. Regardless, even if it is appropriate to characterize New Mexicans' entitlement to these limited waters as a Compact right, it is possible that various other laws may serve to define and limit that right in a manner neither stated expressly in, nor inconsistent with, the Compact (beneficial use limitations, express calls for delivery, etc.).

Much of what the parties have argued to date has addressed the question of whether this case belongs before the Court as a Compact dispute or in a different forum as a mere state law or reclamation law dispute. Jurisdictionally, the case now is before the Court as a Compact enforcement action. The Court's interpretation of the Compact will govern and control future application of other, inferior sources of legal authority. As such, it cannot be disputed that New Mexico

will be required to administer its other laws in a manner consistent with and in support of the Compact. Neither the Special Master nor the Court, however, analyzed the interplay of these lesser sources of law as may be material to rights downstream of the Dam. The first Special Master concluded New Mexico has a Compact-sourced duty to protect Project deliveries intended for Texas. In fact, it would be difficult to understand how this case could proceed as an original jurisdiction action if no such duty existed. Still, no such duty has been defined. Further, state law cannot be irrelevant to any such duty if New Mexico's own entitlement to water is potentially defined at least partially through state law or reclamation law.

Nothing decided to date supports broad conclusions as asserted by the parties as to: the wholesale inapplicability of state law in certain areas; entitlements to fixed percentages of water; a fixed state of groundwater development as of a determined date; or the *details* of what New Mexico can and cannot capture downstream of the Dam. It has been decided that the Court is the proper venue for addressing these complicated and important questions, and the Court has chosen to exercise its jurisdiction over this matter. But, at this time, the Court has not reached final answers as to these underlying questions.

Moreover, given the preliminary and largely jurisdictional nature of the rulings to date, it would be unwise to read too much finality into the rulings, even if this were a less complicated dispute. The First Interim Report of the Special Master made certain determinations. The Supreme Court received limited exceptions to the First Report, agreed to hear two, addressed one in an opinion, and otherwise overruled all other exceptions in a summary order. The Court did not expressly adopt the First Report. The issues raised with the First Special Master and the Court were gateway issues decided upon complaints without a record: leave to file a complaint, leave for permission to intervene, and a motion to dismiss on the pleadings.

In general, a grant of leave to file an original jurisdiction complaint, or a ruling that an additional party be granted or denied permission to intervene, establishes very little about the underlying merits of the case. Such rulings reflect preliminary determinations as to the appropriateness of matters presented for discretionary exercise of the Court's sparingly extended original jurisdiction. In such cases, the Court's "role significantly 'differ[s] from' the one the Court undertakes 'in suits between private parties.'" *Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) (alteration in original) (quoting *North Dakota v. Minnesota*, 263 U.S. 365, 372 (1923)). Such cases serve "as a substitute for the diplomatic settlement of controversies." *North Dakota*, 263 U.S. at 372–73. As such, the Federal Rules of Civil Procedure do not apply, *Arizona*, 460 U.S. at 614, and a Special Master should be hesitant to presume that doctrines related to preclusion might somehow serve to prevent the Court itself from reaching a question. The Court's words—rather than broad concepts discussed in a Special Master's report—control. And in its one opinion in this case, the Court expressly noted the limited nature of the issue presented, stating: "At this stage in the proceedings we face only a preliminary and narrow question: May the United States, as an intervenor, assert essentially the same claims Texas already has?" *Texas v. New Mexico*, 138 S. Ct. 954, 956 (2018).

Still, in an effort to address scheduling questions and bring discovery to a close I believe it will be beneficial to share with the parties my understanding of where the case stands. As such, I review the parties' positions and describe my determinations as to issues the parties characterize as settled or outstanding. At the end of the day, this order does little more than share my preliminary views with the parties. The order is procedurally unusual in that it is brought without reference to any specific evidence and only limited description of issues to be decided in a case that everyone agrees is very factually and legally complex. At this point there is no factual record to reference (beyond the Compact and certain disputed historical records) to give context to the issues presented. It may be

possible to narrow the issues further as we progress towards trial, but at this point, I am reluctant to go much beyond what the Supreme Court itself said in its opinion. In substance, this order is little more than the interlocutory denial of a motion for summary judgment and denial of a motion in limine, without prejudice to any party's ability to file such motions in the future.

II. Background

The Court and the Special Masters have repeatedly introduced and recited the basic structure of the Compact and the Project, including recently in my order on the motions to dismiss. I therefore jump straight to a description of the issues the parties placed before the Special Master and the Court in their complaints and previous rounds of briefing and a description of the Special Master's and the Court's treatment of those issues in their rulings.

In its complaint, Texas refers to a 1904 Irrigation Congress in Texas that "resulted in a recommendation for the construction by the United States of a federal dam and reservoir . . . (which became the Elephant Butte Dam and Reservoir) . . . . [and] *also recommended delivery of water from the proposed project as between the lands in southern New Mexico and in Texas based on the ratio of project lands within each State*." Tex. Compl. ¶ 6 (Sp. M. Docket No. 63) (emphasis added). In its answer, New Mexico does not specifically address the sentence describing the recommended division of water, but states generally: "Unless specifically admitted, the remaining allegations in Paragraph 6 of the Complaint are denied." N.M. Answer ¶ 6 (Sp. M. Docket No. 94). Later, Texas asserts, "As noted, Rio Grande Project water deliveries *are made based upon the ratio* between the irrigable acreage of the Rio Grande Project situated in New Mexico, and the irrigable acreage of the Rio Grande Project situated in Texas. Historically, this ratio has been 57% in New Mexico and 43% in Texas." Tex. Compl. ¶ 8 (emphasis added). In response,

"New Mexico admits that Project water deliveries *are required to be made* based upon the irrigable acreage of Project lands [but] denies that the Project continues to make deliveries on this basis." N.M. Answer ¶ 8 (emphasis added).

Texas then presents its overarching theory of the relationship between the Compact and the Project:

> The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas; nor did it articulate a specific state-line delivery allocation. Instead, it relied upon the Rio Grande Project and its allocation and delivery of water in relation to the proportion of Rio Grande Project irrigable lands in southern New Mexico and in Texas, to provide the basis of the allocation of Rio Grande waters between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas. A fundamental purpose of the Rio Grande Compact is to protect the Rio Grande Project and its operations under the conditions that existed in 1938 at the time the Rio Grande Compact was executed. The relationship between the Rio Grande Project authorization and the Rio Grande Compact presents unique issues that only this Court can resolve.

Tex. Compl. ¶ 10. New Mexico admits the first two quoted sentences and denies the balance of the allegation to the extent inconsistent with express terms of the Compact. N.M. Answer ¶ 10.

Notably, in its complaint, Texas did not go so far as to allege that Project water deliveries "based" on or in "relation" to the ratio of irrigated acres represented Compact equitable apportionments to each state or that such deliveries were limited to an equal-per-acre delivery regime.[1] Rather, Texas emphasizes the 1938

[1] In fact, in later filings and in oral arguments, Texas and water district amici describe operation of the Project as much more nuanced, with individual water contract holders calling for water from their respective districts, with deliveries subject to beneficial use restrictions, and with variations in deliveries among irrigated acres to account for differing uses of land in different years and unequal rainfall along the approximately 200 mile stretch of river between the Elephant

condition, including Project operations pursuant to federal reclamation law at that time, which Texas characterizes as part of the general background understanding against which the states negotiated the Compact.

In the rest of its complaint, Texas asserts that New Mexico, since 1938, has interfered with Texas's receipt of Project water by authorizing and failing to stop New Mexican parties from pumping hydrologically connected groundwater and diverting surface water (above and beyond the undefined amount Texas concedes New Mexico may receive as Project deliveries). Texas also asserts that New Mexico has taken positions in state and federal court that interfere with Project operations to the detriment of Texas. New Mexico denies these allegations. New Mexico also asserts counterclaims mirroring Texas's own claims and alleging various water uses in Texas cause direct harm to New Mexico (near the state line) or indirect harm by causing Texas to call for greater releases of Project water to offset the improper use.

When the Court granted leave for Texas to file a complaint, the Court invited New Mexico to file a motion to dismiss. New Mexico did so, seeking also to exclude the United States from the case as a party. *N.M. Mot. to Dismiss* (S. Ct. Docket 22O141, Apr. 30, 2014). New Mexico raised several interrelated arguments that all boiled down to a few key concepts: first, the Compact does not address groundwater; second, the Compact imposes on New Mexico a duty to deliver water into the Reservoir; third, reclamation law and New Mexico state laws other than the Compact govern New Mexico's interactions with the Rio Grande downstream of the Reservoir such that the Compact itself imposes no express nor implied state-line delivery obligation nor a Compact-sourced duty to protect Project deliveries intended for Texas; and fourth, the Compact imposes no duty to preserve a 1938 condition as to groundwater development downstream of the Reservoir. Inherent in

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Butte Dam and Fort Quitman. *See, e.g.*, *Eleph. Butte Irr. Dist. Consol. Resp.* (Sp. M. Docket No. 200 at 4–5).

these arguments was a general view that the case belonged in state court or a lower federal court where law other than the Compact could be applied by authorities other than the Supreme Court to determine New Mexico's non-Compact duties downstream of the Dam. Although presented in the nature of a motion to dismiss, New Mexico cited and tendered to the court a series of early-twentieth century documents to support its arguments concerning the motivations and objectives expressed by parties involved in Project formation and Compact negotiation.

In its response, Texas challenged New Mexico's attempted reliance on documents outside the pleadings, although all the parties to this lawsuit referenced a number of historical documents. Texas's arguments in response to the motion characterized the Compact as a vehicle to protect and ensure the functioning of the Project. Texas stated: "The water apportioned to New Mexico by the Compact is the water in the Basin *above* Elephant Butte in excess of its delivery obligation, less the waters apportioned to Colorado. . . . No water below Elephant Butte is apportioned to New Mexico." *Tex. Br. in Resp. to N.M.'s Mot. to Dismiss* at 10 (S. Ct. Docket 22O141, June 16, 2014). Then, in a footnote, Texas acknowledged that "Rio Grande Project water is, of course, delivered from the Rio Grande Project to lands within New Mexico, pursuant to Elephant Butte Irrigation District's contract with the United States." *Id.* n.6. Through this argument, Texas appears to have expressed the view that: certain New Mexican water users downstream of the Dam hold contractual rights to Project water; New Mexico does not hold Compact rights to water downstream of the Reservoir; but Texas does hold Compact-protected rights to such water.

As to its own alleged Compact-based rights to an equitable apportionment, Texas argued the Compact was unambiguous and that, read as a whole, New Mexico's duty to deliver water into the Reservoir carried with it a Compact-based duty not to interfere downstream of the Reservoir with Project deliveries intended for Texas. Texas described its theory of the case with reference to how the Project

operated in 1938 and pointed to several express provisions of the Compact that, according to Texas, demonstrated the drafters had intended to protect and preserve operations as they had existed in 1938. Texas also relied upon its interpretation of then-extant reclamation law which, according to Texas, was known to the drafters and served as the backdrop to the states' understanding of how the Compact and Project would work. Texas stated:

> Texas's interpretation of the Compact reflects these agreed upon operations of the Rio Grande Project. Texas receives its equitable apportionment under the Compact when (1) New Mexico delivers a scheduled amount of water into Elephant Butte Reservoir with the appropriate adjustments, (2) control of that water is transferred to the Rio Grande Project, (3) normal releases of Rio Grande Project water are made to satisfy irrigation demands and delivery to Mexico, and (4) the released water and Rio Grande return flows are allowed to flow to the intended delivery point. If New Mexico water users were permitted to intercept Rio Grande Project water, then protecting a normal Rio Grande Project release of 790,000 acre feet would have been a futile exercise. Under New Mexico's theory, the drafters would have ensured flows into Elephant Butte Reservoir, without knowing how much water would be removed from the river system below Elephant Butte Reservoir. The ability to satisfy deliveries of Rio Grande Project water to irrigation lands in the Rio Grande Basin and to Mexico would then be jeopardized based on the amount of flow depleted below Elephant Butte Reservoir. New Mexico's implausible interpretation defeats the stated intent of the Compact to effect an "equitable apportionment" of the waters of the Rio Grande above Fort Quitman by depriving Texas of any apportionment of those waters.

Id. at 40.

The Special Master's First Interim Report filed in February 2017 recommended denying New Mexico's motion to dismiss. *First Interim Report of the Sp. M.* at 3 (Sp. M. Docket No. 54). In reaching that decision, the Special Master reviewed a great deal of historical evidence for background and context, including the historical documents cited by the parties. The Special Master, however, disavowed reliance on any such evidence for the ultimate conclusions reached. He characterized the Compact, as a whole, as unambiguous and as imposing on New

Mexico the duties to relinquish "dominion and control" over waters deposited into the Reservoir and to control water use within its boundaries in a manner that protects deliveries to Texas. *Id.* at 197. He reached these conclusions based upon the interplay between Compact provisions concerning stored water, credits, and the ability of downstream states to call for releases. *Id.* at 198–203. He also relied upon the common definition and understanding of the word "deliver." In addition, he recommended (1) denying the exercise of original jurisdiction over the United States's Compact-based claims, (2) exercising non-exclusive jurisdiction over the United States's reclamation-law based claims, and (3) denying leave for the two water districts to intervene. He did not purport to define with precision New Mexico's equitable apportionment under the Compact, nor did he hold state law was irrelevant below the Dam.

New Mexico, the United States, and Colorado filed exceptions with the Supreme Court. New Mexico did not challenge the Special Master's recommendation to deny the motion to dismiss. Rather New Mexico argued the reasoning was flawed and challenged four underlying conclusions:

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

N.M. Exceptions to the First Interim Report at 2 (S. Ct. Docket 22O141, June 9, 2017). Texas asked the Supreme Court to expressly adopt the Special Master's report "in full." *Tex. Reply to Exceptions* at 1 (S. Ct. Docket 22O141, June 28, 2017). The United States argued for allowance of its Compact-based claims under the Court's original jurisdiction, and Colorado argued that the United States be limited to asserting claims related to protection of water for the 1906 treaty.

In October 2017, the Court expressly, but summarily and without comment, denied New Mexico's motion to dismiss and the water districts' motions to intervene. *Texas v. New Mexico*, 138 S. Ct. 349 (2017) (Mem.). It also set the United States's and Colorado's exceptions for oral arguments. In March 2018, the Court issued an opinion sustaining the United States's exception, overruling "all other exceptions" and remanding to the Special Master. *Texas v. New Mexico*, 138 S. Ct. 954, 960 (2018).

I discuss the Court's opinion below when addressing the parties' current arguments as to issues decided. I note again, however, that the Court itself made clear its understanding that it was ruling on "only a preliminary and narrow question." 138 S. Ct. at 956. I also note that I believe it would be unwise to give no consequence to the fact that the Court elected not to adopt "in full" the Special Master's report after being asked to do so. My conclusions as to the scope of issues decided is, therefore, informed greatly by the Court's express statement as to the limited nature of its ruling and what the Court conspicuously chose not to do. The Court did not purport to address the details of each parties' Compact apportionment, their individual duties under the Compact, or the details of the interplay of the Compact with state law, reclamation law, or state law as incorporated in reclamation law.

After the Court issued its opinion, I was appointed Special Master, the parties and I put in place a case management schedule, and discovery commenced.

Discovery is now nearly complete (subject to possible disruption given current difficulties related to national health events) and also subject to any ongoing supplemental disclosures. In becoming familiar with the case, I requested the parties inform me by letter as to their understandings of what had been decided to date and what remained to be decided. It became apparent upon receipt of the parties' letters that there existed substantial disagreement as to the full extent and detail of matters decided. We discussed the question of issues decided at an in-person hearing, and the parties later filed their now-pending motions and briefs to more formally present their arguments as to the status of the case. Texas and the United States also filed motions to dismiss several of New Mexico's counterclaims and affirmative defenses. We held an in-person hearing on both sets of motions. I address herein the motions as to issues previously decided. I addressed the motions to dismiss in a separate order.

III. Discussion

In its pending motion, New Mexico asserts eleven "principles" that have been decided.[2] In its motion, Texas asserts five issues have been resolved as the law of

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[2] In its motion, New Mexico seeks:

> an order declaring that the following principles—and only the following principles—have been previously decided and constitute law of the case:
>
> 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.
>
> 2. The Compact applies below Elephant Butte.
>
> 3. The United States agreed by treaty to deliver 60,000 acre-feet of water annually to Mexico upon completion of the new reservoir.
>
> 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

the case.[3] The United States to a large extent agrees with Texas, subject to certain qualifying statements. Colorado argues very little has been decided.

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water was allocated to New Mexico and 43% of the water was allocated to Texas.

5. The Compact incorporates the "Downstream Contracts" and the Project to the extent not inconsistent with the express language of the Compact.

6. The Compact and Downstream Contracts effect an equitable apportionment of the surface waters of the Rio Grande from Elephant Butte to Fort Quitman.

7. The apportionment is based on the Downstream Contracts and the operation of the Project.

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.

9. New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir.

10. A breach of the Compact, if proven, could jeopardize the federal government's ability to satisfy its treaty obligation to Mexico.

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.

N.M. Mot. for Partial Jmt. on Matters Previously Decided at 2–3 (Sp. M. Docket No. 165).

[3] Texas, in turn, argues the following five issues have been decided:

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

Texas's five broadly stated issues merit discussion. In many respects these issues touch upon or relate to New Mexico's assertions. As such, I address them together to the extent they overlap. First, however, I address several of New Mexico's identified "principles" that, more or less, stand alone.

New Mexico's statement as to principle 1 is generally correct: "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." No legal consequences flow from this statement, however, other than the simple fact that the case will proceed on Texas's and the United States's claims. The statement that claims arise "under the Compact" does not, in the unique context of this case, limit the scope of law or facts that may be material to analyzing the claims.

New Mexico's statement as to principle 2 is correct but vague and in no manner limiting: "The Compact applies below Elephant Butte." Pursuant to *Hinderlider v. La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938), the

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

Texas 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.

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

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

Tex. Req. for Jud. Decl. & Mot. in Limine at 7–11 (Sp. M. Docket No. 162).

Compact (along with the constitutionally superior 1906 Treaty) is the ultimate law of the land governing Colorado's, New Mexico's and Texas's actions as affecting the Rio Grande. Any remedy ordered in this case will be imposed upon an entire state, not on a portion of a state. No state's duties and rights can be viewed in isolation nor treated as applying only in part of a state. Further, given the role of the Project and the Downstream Contracts in this case and the potential role of state law as an inferior source of authority as discussed below, the applicability of the Compact makes it the superior, but not the exclusive source of authority over the river.

The statement of principle 3 is merely an unobjectionable quotation of the Court's description of the 1906 Treaty.

Principles 4–7 overlap with Texas's issues and are discussed below.

In principle 8, New Mexico asserts: "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." This statement is essentially correct other than the fact that the Court did not characterize the Compact itself as imposing a duty on the United States. Instead, the Court stated that the United States had "assumed a legal responsibility" under the Downstream Contracts; such contracts were "inextricably intertwined" with the Compact; and the United States could "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 (quoting *Texas's Reply to Exceptions to the First Interim Report of the Special Master* 40 (Court's own language emphasized)). It may come to pass that the precise source of each party's individual duties aids in understanding the detailed scope of those duties. As such, I prefer not to stray from the Court's characterization. Moreover, the Project delivery obligations are variable

and not "certain," and questions as to the precise contours of those obligations lie at the heart of this case.

In principle 9, New Mexico states: "New Mexico is obligated by the Compact to deliver a specified amount of water to Elephant Butte Reservoir." This statement is correct to the extent the Compact requires New Mexico to deliver a specified *but variable* amount of water into the Reservoir based on upstream gauge measurements. The statement is in no manner limiting, does not define the term "deliver," and does not eliminate the possibility of additional duties imposed upon New Mexico under the Compact or additional nuance associated with the term "deliver."

Principle 10, like Principle 3 is merely a quote of the Court's opinion and a partial statement of why the Court allowed the United States to enter the case as an intervening plaintiff.

Principle 11 states: "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." This is a generally correct, but somewhat overbroad characterization of the Court's conclusion. One of several important reasons the Court allowed the United States to remain in the case was the fact that the United States's claims were generally commensurate in scope with Texas's claims. The Court stated:

> The United States has asserted its Compact claims in an existing action brought by Texas, *seeking substantially the same relief* and without that State's objection. This case does not present the question whether the United States could initiate litigation to force a State to perform its obligations under the Compact or expand the scope of an existing controversy between States.

Texas v. New Mexico, 138 S. Ct. at 960 (emphasis added). As the case plays out and facts are developed, it will remain necessary to determine whether and how the

parties' claims diverge and whether any such divergence improperly expands the case. Even as to the issues presented in these motions, and in the motions to dismiss and strike, it is apparent Texas and the United States are generally in agreement but there is some divergence as to the precise contours of some of the issues and the relief sought. I will take into consideration the scope of the case as filed by Texas when entertaining issues and fashioning relief. Both I and the Court may cabin our rulings with appropriate consideration of the scope of leave granted. However, that limitation does not give license to parse every issue presented, argument raised, or evidence tendered to repeatedly test the strict consistency of such matters with the broad scope of Texas's claims. In any event, the United States does not presently appear to be attempting to enlarge the case.

Turning to Texas's statements of issues decided and New Mexico's principles 4–7, I start with Texas's statement 1 that the Rio Grande Project was "fully integrated" into the Compact, Texas's statement 5 that state law plays "no role in an interstate compact dispute," and New Mexico's related articulation of principles 4–7, including the principle that the Project allocates 57% of Project water to New Mexico and 43% to Texas. While the phrase "fully integrated" is not inherently objectionable, the Court did not use the phrase "fully integrated" when characterizing the relationship between the Rio Grande Project and the Compact, and I prefer not to use it to the extent either party may seek to expand upon the Court's statements. Similarly, a statement that state law plays "no role" in this matter, taken to an extreme, would suggest that the Court had already decided that the Compact entirely displaces New Mexico law concerning groundwater between the Dam and Texas. It would also suggest the Court had silently disposed of the complexities of the interactions between other state water law and reclamation law as discussed in *California v. United States*, 438 U.S. at 664–79. Whatever duties the Compact may impose, it does not provide a comprehensive scheme for managing the relative rights of persons in New Mexico served by the Downstream Contracts.

Other water laws and rights generally must be subservient to the Compact, but Texas's statement concerning state law is simply too broad.

The Court stated the Downstream Contracts and the Project were "inextricably intertwined" with the Compact, the Project played a "central role" in Compact negotiations, the United States is "charged with assuring that the Compact's equitable apportionment to Texas and part of New Mexico is, in fact, made," the "Downstream Contracts . . . are . . . essential to the fulfillment of the Compact's expressly stated purpose," and by "rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference." *Texas v. New Mexico*, 138 S. Ct. at 959 (citations omitted). I view the relationship between the Project, the Downstream Contracts, and the Compact as central to this case, and as such, I prefer to emphasize the Court's own language as to this relationship rather than borrowing other terms. In full, the Court stated:

> After a number of interim agreements and impasses, the affected parties eventually (and nearly simultaneously) negotiated several agreements. And here again the Rio Grande Project and its Elephant Butte Reservoir played a central role. In the first set of agreements, the federal government promised to supply water from the Reservoir to downstream water districts with 155,000 irrigable acres in New Mexico and Texas. In turn, the water districts agreed to pay charges in proportion to the percentage of the total acres lying in each State—roughly 57% for New Mexico and 43% for Texas. We will call those agreements the "Downstream Contracts."

Id. at 957. And further stated:

> [T]he Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts. The Compact indicates that its purpose is to "effec[t] an equitable apportionment" of "the waters of the Rio Grande" between the affected States. Yet it can achieve that purpose only because, by the time the Compact was executed and enacted, the United States had negotiated and approved the Downstream Contracts, in which it assumed a legal responsibility to deliver a certain amount of water to Texas. In this way, the United States might be said to serve, through the Downstream Contracts, as a sort of "'agent' of the Compact, charged with assuring that the Compact's equitable apportionment" to

> Texas and part of New Mexico "is, in fact, made." Texas's Reply to Exceptions to the First Interim Report of the Special Master 40. Or by way of another rough analogy, the Compact could be thought implicitly to incorporate the Downstream Contracts by reference. However described, it is clear enough that the federal government has an interest in seeing that water is deposited in the Reservoir consistent with the Compact's terms. That is what allows the United States to meet its duties under the Downstream Contracts, which are themselves essential to the fulfillment of the Compact's expressly stated purpose.

Id. at 959 (citations omitted).

Seemingly, one of the important issues that remains outstanding is the exact clarification of each state's Compact-based equitable apportionment in reference to the Downstream Contracts and the Project. In fact, it would be difficult to address Texas's claims that New Mexico is failing to protect Texas's apportionment without first defining precisely what each state and its citizens are entitled to receive below the Dam. This fact is true regardless of whether New Mexican entitlements below the Dam are deemed Compact rights.

New Mexico asserts that, as part of its equitable apportionment, it is entitled to a strict 57% (of either Project deliveries or Project Supply).[4] As just quoted, the Court, too, appears to characterize water delivered by the Project to southern New Mexican water users as part of New Mexico's equitable apportionment. *Id.* at 959 ("assuring that the Compact's equitable apportionment to Texas *and part of New Mexico* is, in fact, made" (citation omitted) (emphasis added)). But, the Court itself did not characterize the ratio of irrigated acres in the Downstream Contracts as

[4] As has been repeatedly noted in other filings, the two are not the same as deliveries rely upon return flows to the river to enable deliveries further downstream. Although all parties acknowledge this fact, not all arguments and statements consistently employ language recognizing the distinction, and it is not my present intention to limit any party to a position based on any statements as to these different amounts.

governing water deliveries. In fact, the Downstream Contracts that the Court cited generally refer to the ratio in reference to charges and payments.

To the extent the Downstream Contracts also expressly refer to the ratio in the context of water deliveries, they do so only to state that "in the event of a shortage of water for irrigation in any year," "so far as is practicable," delivery should be made "in the proportion of 66/155 to the lands within the El Paso County Water Improvement District No. 1 [EPCWID], and 88/155 to the lands within the Elephant Butte Irrigation District [EBID]." *See* 1938 Contract as between EBID and EPCWID ¶ 4 (Sp. M. Docket No. 88).[5] Even then, the Downstream Contracts do not suggest an equal per-acre delivery requirement, nor do they speak of how to allocate water in the event that one of the water districts, its members, or its home state is otherwise responsible for creating a shortage. The Downstream Contracts seemingly presume some other source of law to define precise delivery amounts. And, in any event, the express provision of water delivery in "proportion" to the ratio under limited conditions tends to suggest such proportional delivery might not be required under all conditions.

Texas, in contrast, appears to assert New Mexico receives the entirety of its Compact apportionment upstream of the Reservoir and that, although certain southern New Mexico water users have Project-related contract rights to water below the Dam, such rights are best characterized as contract claims upon Texas's equitable apportionment rather than a part of an equitable apportionment to New Mexico. In this way, Texas urges that the case proceed based upon a disciplined use of the term "apportionment" as referring to the Compact's equitable apportionment

[5] At this point, for the limited purpose of the current motion, I treat the Downstream Contracts as tendered by the parties to the Court as part of the pleadings as would be the case in normal civil litigation pursuant to Federal Rule of Civil Procedure 10(c). The parties are free, of course, to challenge one another's submissions as the case proceeds if there is a disagreement as to authenticity or scope.

and "allocation" as referring separately to the delivery of Project water under rights inferior to the ultimate Compact apportionment. Still, Texas has not yet pointed to a concession or a finding that would define with precision even New Mexico's "non-Compact" rights to water below the Dam.

The parties acknowledged at oral argument that a fundamental question exists as to each state's equitable apportionment, if any, in light of the Compact's negotiation against the backdrop of reclamation law, a pre-existing infrastructure project, and the Downstream Contracts that are "inextricably intertwined" with the Compact. The Special Master's First Interim Report did not purport to resolve that issue, and the Court's quoted comment is the full extent of the Court's discussion of the matter. It is therefore necessary to reject Texas's assertion that "New Mexico State law plays no role in this interstate Compact dispute." State law (other than the Compact which, after all, is state law, federal law, and a contract) is inescapable when looking at the application of reclamation law, and, as just stated, may serve to aid in defining New Mexico's Compact apportionment (in a way possibly favorable to Texas).

To the extent Texas meant only that state authorities and jurisdiction over actions in New Mexico must take a back seat to the Compact, or that changes to New Mexico law not anticipated at the time of Compact formation generally cannot serve to defeat Texas's Compact apportionment, Texas is correct. In fact, in this regard, Texas would merely be describing the relative priority of the various laws as largely set forth in *Hinderlider* and to a lesser extent in *California*. In any event, there are over eighty years of performance under the Compact to inform the Court as to the parties' longstanding understanding of the limits of the full extent of play in the system, the limits to which the ratio cited in the Downstream Contracts actually might define a Compact right to Project supply, and the extent to which individual state's groundwater laws must be deemed subservient to the Compact.

I now turn to Texas's statement of issues 2, 3, and 4. Texas asserts as issue 2: "The text of the 1938 Compact requires New Mexico to relinquish control and dominion over the water it deposits into Elephant Butte Reservoir." This statement arose in the context of New Mexico's sovereignty-based jurisdictional argument that only New Mexico law (other than the Compact) governed New Mexico's and New Mexicans' interactions with the Rio Grande downstream of the Reservoir.[6] The Special Master expressly rejected the argument that some other forum should hear the case, finding that the Compact itself required New Mexico to protect deliveries intended for Texas. In fact, it cannot be disputed that the Compact governs New Mexican interactions with the river from Colorado to Texas. But, the Court did not expressly adopt the Special Master's report as Texas asked it to, and as such, the Court did not expressly adopt the Special Master's statement as to the relinquishment of "dominion and control." In any event, the parties disagree as to the exact meaning of the phrase, and Texas presents the phrase largely as a restatement of its assertion that state law plays no role in this case. As such, I reject Texas's assertion that this broad statement stands as the law of the case.

Texas's issue 3 is similarly overbroad. Texas asserts: "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." As repeatedly stated, New Mexico receives water from the Project, but the parties disagree as to what that amount should be and how it should be characterized. On that basis alone, Texas's

[6] Various parties have represented New Mexico's theory as not only that New Mexico law was the exclusive source of authority governing water capture downstream of the Reservoir, but that New Mexico could, in effect, take all the water it desired downstream of the Reservoir without violating the Compact. A review of New Mexico's many filings and arguments appear to show that New Mexico consistently argued that it was limited by New Mexico law, not that it was free to capture all of Texas's Project deliveries. The argument arose primarily as a jurisdictional argument that this dispute should be in a lower court rather than in the Supreme Court.

statement is overbroad. Whether characterized as a mere contractual and state law right or as an actual Compact apportionment, it remains to be determined what precisely New Mexicans are allowed to receive below the Dam. As such, I reject Texas's assertion that this broad statement stands as the law of the case.

Finally, Texas's issue 4 has not been decided. Texas asserts: "New Mexico must refrain from Post-1938 depletion of water (i.e., depletions that are greater than what occurred in 1938) below Elephant Butte Reservoir." The parties have not yet developed a record to demonstrate the states' understanding and intent as to the relationship between groundwater and Project water deliveries at the time of Compact formation, at the present time, or at times in between. Both the law and scientific understanding have evolved substantially throughout the twentieth century as to the relationship between surface waters and groundwater. This statement simply touches upon an area where it is necessary to create a record for the Court's review.

IV. Motion in Limine

Texas has not identified any specific evidence it wishes to have excluded. In the present posture of the case, it would be premature to rule on the admissibility of any evidence, without knowing what evidence is being allowed or excluded. Accordingly, the Motion in Limine is denied without prejudice to reasserting the motion to address specific witnesses or items of evidence.

Done and ordered this 14th day of April, 2020.

Honorable Michael J. Melloy
Special Master
United States Circuit Judge
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