



SOMACH SIMMONS & DUNN
A PROFESSIONAL CORPORATION
ATTORNEYS AT LAW

500 CAPITOL MALL, SUITE 1000, SACRAMENTO, CA 95814
OFFICE: 916-446-7979 FAX: 916-446-8199
SOMACHLAW.COM

June 13, 2014

VIA FEDERAL EXPRESS

Cynthia Rapp
Deputy Clerk of the Supreme Court of the United States
1 First Street, N.E.
Washington, D.C. 20543

Re: Texas v. New Mexico & Colorado, No. 141, Original; Objection to New Mexico's Proposal to Lodge Non-Record Material Under Rule 32.2 of the Court

Dear Ms. Rapp:

This firm represents the State of Texas in the above-captioned matter. This letter responds to the State of New Mexico's April 30, 2014 letter to you regarding its proposal to lodge non-record material under Rule 32.2 of the Rules of the United States Supreme Court. In its letter, New Mexico requests to lodge three documents that total 898 pages. Texas objects to the lodging of the following document for the reasons stated below:

(1). U.S. Bureau of Reclamation, Department of the Interior, *Legal and Institutional Framework for Rio Grande Project Water Supply and Use: A Legal Hydrograph II-2* (Final Draft 1995) (132 pp.) (*Draft Legal Hydrograph*)

Texas opposes the lodging of and reliance upon the *Legal Hydrograph* for four reasons: (1) the document is merely a draft document, with its cover page clearly denoting it as "Final Draft"; (2) the facts contained within the proffered document are not judicially noticeable; (3) the document is extrinsic evidence and lacks foundation; and (4) the document will unnecessarily confuse the issues before the court.

Extrinsic evidence at the motion to dismiss stage is limited to documents incorporated by reference in the Complaint, and matters that can be judicially noticed. *See Tallabs, Inc. v. Makor Issues & Rights, Ltd.* (2007) 551 U.S. 308, 322. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Fed. R. Evid. 201(b). In this case, many of the factual assertions made by New Mexico in support of its motion are disputed by Texas. Whether the factual assertions made by New Mexico are even supported by the extrinsic documents it cites is, itself, highly doubtful. Where facts contained within public documents or the parties dispute allegations about those facts, judicial notice of those facts is not appropriate. *See Papasan v.*

Cynthia Rapp

Re: *Texas v. New Mexico & Colorado*, No. 141, Original; Objection to New Mexico's
Proposal to Lodge Non-Record Material Under Rule 32.2 of the Court

June 13, 2014

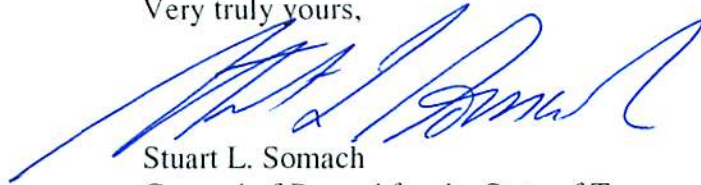
Page 2

Allain, 478 U.S. 265, 268 n. 1 (1986). Reasonable disputes exist regarding the factual assertions that New Mexico makes in reliance on this extrinsic evidence. Because the facts asserted by New Mexico allegedly based upon this extrinsic evidence are highly disputed and are asserted by New Mexico for the truth of the matters asserted, they are not properly the subjects of judicial notice under Federal Rule of Evidence 201.

The proffered evidence also lacks foundation. New Mexico selectively picks from a vast universe of Compact related documentation, and asserts that the *Draft Legal Hydrograph* supports its novel Compact interpretation. New Mexico, however, fails to establish foundation and authenticity for any of the *Legal Hydrograph*. New Mexico has the burden of establishing authenticity of the proffered evidence. Fed. R. Evid. 901(a); *United States v. Pang*, 362 F.3d 1187, 1192-93 (9th Cir. 2004). Moreover, because the *Draft Legal Hydrograph* is extrinsic to the Complaint, and the factual assertions made by New Mexico in purported reliance on it are suspect, the document will unnecessarily confuse the issues in this case, at least at this stage of the litigation.¹ See Fed. R. Evid. 403. Accordingly, the Court should not consider this extrinsic draft document proffered by New Mexico.

For all the above reasons, Texas respectfully requests that the Court deny New Mexico's request to lodge the *Draft Legal Hydrograph*.

Very truly yours,



Stuart L. Somach

Counsel of Record for the State of Texas

SLS:sb

cc: Sarah A. Bond (via e-mail)
John W. Suthers, c/o Chad Wallace (via e-mail)
Donald B. Verrilli, Jr. (via e-mail)
Douglas G. Caroom (via e-mail)
James M. Speer, Jr. (via e-mail)
Andrew S. "Drew" Miller (via e-mail)
Jay F. Stein (via e-mail)
Greg Abbott (via e-mail)

¹ The *Legal Hydrograph* is a "draft" document, which raises questions as to its reliability.