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United States Court of Appeals
Tenth Circuit

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Christopher M. Wolpert
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PUBLISH

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

MARVIN BAY; MILDRED BAY, Co-Trustees of the Bay Family Trust, individually and on behalf of all others similarly situated.,

Plaintiffs - Appellants,

and

VERNON JESSER; MARY JESSER; KENT J. MCDANIEL; DEANNA R. MCDANIEL,

Plaintiffs,

v.

ANADARKO E&P ONSHORE LLC; ANADARKO LAND CORPORATION,

Defendants - Appellees.

No. 21-1361

Appeal from the United States District Court
for the District of Colorado
(D.C. No. 1:09-CV-02293-MSK-MJW)

George A. Barton, Barton and Burrows, LLC, Mission, Kansas (Stacy A. Burrows of Barton and Burrows, LLC, Mission, Kansas; Lance F. Astrella of Astrella Law P.C., Denver, Colorado; and Donald M. Ostrander of Hamre, Rodriguez, Ostrander & Dingess, Denver, Colorado, with him on the briefs), for Plaintiffs-Appellants.

Jeffrey M. Lippa (Ezekiel J. Williams, Carlos R. Romo, John H. Bernetich, Spencer R. Allen and Jacqueline F. Hyatt with him on the brief), Williams Weese Pepple & Ferguson PC, Denver, Colorado, for Defendants-Appellees.

Before **HOLMES**, Chief Judge, **MATHESON**, and **ROSSMAN**, Circuit Judges.

HOLMES, Chief Judge.

Marvin and Mildred Bay ("the Bays") challenge the United States District Court for the District of Colorado's order dismissing their trespass claim against Anadarko E&P Onshore LLC and Anadarko Land Corporation (collectively, "Anadarko"). Anadarko, an oil and gas company, owns the mineral rights under the Bays' farm. The Bays brought a putative class action along with other surface landowners against Anadarko, alleging that Anadarko's mineral lessees had exceeded the scope of their mineral rights by drilling multiple vertical wells on the surface owners' land when it was possible to drill fewer wells of the "directional" type.

After several years of litigation, the district court commenced a jury trial on the Bays' trespass claim. However, at the conclusion of the Bays' presentation of evidence, the district court found that the Bays' evidence failed—as a matter of law—to demonstrate that Anadarko's activities amounted to a trespass and dismissed the case.

Finding that the district court applied the wrong legal standard, we reversed its order of dismissal in *Bay v. Anadarko E&P Onshore LLC ("Bay I")*, 912 F.3d 1249 (10th Cir. 2018). In noting the correct standard, we held that Colorado's common law of trespass required the Bays to show that Anadarko's lessees had "materially interfered" with the Bays' farming operations. *Id.* at 1257. In outlining Colorado's

test for material interference, we relied on Texas cases that required plaintiffs to show a mineral trespasser's conduct either completely precluded or substantially impaired their farming operations and that there was no reasonable alternative to their current farming operations. We questioned whether the record demonstrated that the Bays met this standard in their trial, but because Anadarko had not raised this specific issue, we remanded the case to the district court for further proceedings.

On remand, the district court again granted judgment as a matter of law to Anadarko after supplemental briefing on the material interference issue. Specifically, the court first held that it was bound by our interpretation in *Bay I* of the material interference standard. Reviewing the Bays' evidence, the district court then found that the Bays showed only that Anadarko's conduct inconvenienced them—which was insufficient to satisfy the material interference standard. Accordingly, it concluded that the Bays failed to establish a prima facie case of trespass under Colorado law.

The Bays now appeal from the district court's judgment. They argue that our discussion of the material interference standard in *Bay I* was dictum; thus, the district court incorrectly determined that it was bound to apply that standard. They further assert that the material interference standard applied by the district court was inconsistent with the Colorado standard for trespass outlined in *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997), and that the evidence they presented in their trial establishes a prima facie case of material interference under *Gerrity*.

Accordingly, they urge us to reverse the district court's holding and remand for a new trial.

Exercising jurisdiction under 28 U.S.C. § 1291, we **affirm**. We hold that our language defining the material interference standard in *Bay I* was not dictum. As such, the district court was bound by the law of the case doctrine and the mandate rule to apply that standard. The Bays have not argued that they can succeed under the material interference standard that we defined in *Bay I*; consequently, they have failed to make a prima facie showing as to the requisite element of material interference. Accordingly, the district court did not err in entering judgment in favor of Anadarko on the Bays' trespass claim.

I

A

The Bays own, live on, and farm a surface estate on a parcel of land in Weld County, Colorado. *See Bay I*, 912 F.3d at 1252. They grow a variety of agricultural crops, including sugar beets, alfalfa, corn, wheat, and beans.

The Bays' farm sits above "a large oil and gas deposit called the Wattenberg Field." *Id.* The surface estate that the Bays own was originally deeded to the Bays' predecessors by the Union Pacific Railroad Company ("Union Pacific") in 1907, which reserved the mineral estate. In 2000, Anadarko bought Union Pacific's mineral rights. Anadarko then leased the mineral rights beneath the Bays' farm to United States Exploration, which was in turn purchased by Noble Energy (collectively, "Anadarko's lessees").

Anadarko's lessees drilled three mineral wells on the Bays' land in 2004, and another four wells between 2007–2011. At the time, the "common industry practice" was to drill vertical wells, which drilled a straight line from the surface to oil deposits. Aplts.' App., Vol. V, at 883 (Trial Tr., dated Sept. 28, 2017). The Bays requested that Anadarko's lessees instead drill "directional" wells, which would start from the same wellhead and go in different directions underground, which would reduce the number of well sites from seven to two.[1] *Id.*, Vol. III, at 526–28 (Trial Tr., dated Sept. 26, 2017). Anadarko's lessees requested $100,000 per well to drill directionally, and when the Bays refused to pay this amount, they drilled all seven wells vertically. *See id.* at 528; *Bay I*, 912 F.3d at 1253.

B

The Bays then filed a putative class action against Anadarko on behalf of themselves and similarly situated surface owners in 2009. *See Bay I*, 912 F.3d at

[1] As we did in *Bay I*, we provide a brief description of the differences between vertical, horizontal, and directional drilling to better contextualize the present dispute. *See* 912 F.3d at 1253 n.3. A vertical well is drilled vertically—*viz.*, straight down from the drill pad and into the surface beneath the drilling rig. *See id.* This was the approach ultimately adopted by Anadarko. By contrast, a horizontal well begins as a vertical well, but then turns 90 degrees so that the drill hole is completely horizontal. *See id.* Horizontal drilling is a common alternative to vertical drilling. *See* Aplts.' App., Vol. VI, at 1161 (Trial Tr., dated Oct. 2, 2017). At trial, Anadarko presented evidence to show that vertical drilling posed fewer technical risks than horizontal drilling. Finally, directional drilling presents a third option, which the Bays ultimately endorsed at trial and on appeal. A directional well also begins as a vertical well, but then makes a modest deviation (at angles of 15 to 23 degrees) after the first 1,000 to 1,500 feet. *See Bay I*, 912 F.3d at 1253 n.3. The Bays argued that directional drilling offered a feasible alternative to both vertical drilling (i.e., Anadarko's approach) and horizontal drilling (i.e., a common alternative to vertical drilling).

1253. They argued that Anadarko's failure to adopt directional drilling caused its lessees to exceed their rights to drill on the surface land, thus constituting a trespass. *See id.* Several years of litigation followed, in which the district court decided several legal issues, including how to construe the mineral deeds. The court subsequently decertified the class and held a bellwether trial with the Bays as plaintiffs.

At trial, the Bays presented testimony that the additional vertical well sites installed by Anadarko and its lessees damaged the Bays' farming operations. Specifically, "Mr. Bay testified that the equipment used to drill the wells occupied a space of two to two-and-a-half acres during the three to five days that a well is drilled," and that "[o]nce drilling is completed and the wells are finished, the wellheads occupy a space between 100 to 196 square feet (i.e., 10-by-10 to 14-by-14 feet)." *Id.* at 1254. Mr. Bay further testified that the presence of additional wells, drilling operations, roads to the wells, and flowlines led to increased weed growth, *see* Aplts.' App., Vol. III, at 563, compacted the ground which resulted in crops suffering, *see id.* at 563–64, damaged the sprinkler systems for crops, *see id.* at 564–65, caused erosion, *see id.* at 565, produced water and noise pollution on the Bays' land, *see id.* at 574–75, and made him concerned about "radiation" and "asbestos," *id.* at 578. The Bays also presented testimony that "directional drilling offered a feasible alternative to horizontal drilling," and remained profitable for Anadarko—seemingly suggesting that it was not necessary for Anadarko to use vertical drilling

to avoid the "technical risks" that its expert had attributed to horizontal drilling, in light of the feasibility of directional drilling. *Bay I*, 912 F.3d at 1262.

Following the close of the evidence, the district court granted Anadarko's motion for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50. Specifically, the court held that because the mineral deeds reserved to Anadarko the right to use the surface as "convenient or necessary" to access the minerals, the Bays had the burden to prove that Anadarko's actions were commercially unreasonable. *See* Aplts.' App., Vol. VI, at 1221–23 (Trial Tr., dated Oct. 3, 2017). It then concluded that the Bays failed to meet their burden of showing vertical drilling was commercially unreasonable as a matter of law. *See id.* at 1228, 1230–31.

C

We reversed in *Bay I*, holding that "the district court erred when it interpreted the deed's language to expand the mineral owner's rights beyond the common law" of trespass. *Bay I*, 912 F.3d at 1258. In doing so, we determined that the Colorado Supreme Court's decision in *Gerrity* established the relevant test to assess whether a mineral rights holder has committed a trespass: that is, "whether the [mineral] operator's surface use exceeded that which was reasonable and necessary to access the mineral estate." *Id.* at 1256 (quoting *Gerrity*, 946 P.2d at 929). We observed that *Gerrity* approvingly cited the Texas Supreme Court's decision in *Getty Oil Co. v. Jones*, 470 S.W.2d 618 (Tex. 1971), which established a "due regard" test that "require[d] mineral owners to accommodate surface owners to the extent possible." *Bay I*, 912 F.3d at 1256 (quoting *Gerrity*, 946 P.2d at 927). We noted that in *Getty*, a

farmer sued to enjoin an oil developer from installing pumping units that would have interfered with his sprinkler system, and that the farmer had introduced evidence that "he had no alternative means to irrigate his farm, and so the pumping units would have made it virtually impossible to farm." *Id.* We also highlighted that the farmer in *Getty* "further introduced evidence that [the oil company] could have recessed the pumping units several feet below the surface so that the irrigation system could pass over them unobstructed." *Id.*

We reasoned that the *Gerrity* court "[m]irror[ed] the approach used in *Getty*" by "detail[ing] what evidence would be required to support a trespass claim based on unreasonable surface use." *Id.* at 1257. We interpreted *Gerrity* as adopting a "three-step burden-shifting approach":

> First, the surface owner must make a prima facie case by introducing evidence "that the operator's conduct materially interfered with surface uses." The interference must be more than "inconvenient to the surface owner." Instead, a material interference must be unreasonable from the perspective of the surface owner, considering only the effects on surface use. Second, to rebut the prima facie case, the operator must show why its surface conduct was reasonable and necessary from its perspective by showing, for instance, that its operations conformed to standard customs and practices in the industry. Third, the surface owner may rebut the mineral owner's evidence with "evidence that reasonable alternatives were available to the operator at the time of the alleged trespass." The [*Gerrity*] court cited *Getty* in noting that rebuttal evidence would often rely on expert testimony because an expert would typically be needed to explain what less intrusive methods were available. Finally, the ultimate decision whether the surface use was reasonable and necessary under the circumstances is a question for the trier of fact.

Id. at 1257 (citations omitted) (quoting *Gerrity*, 946 P.2d at 933 n.15, 933–34).

Having outlined our interpretation of *Gerrity*'s controlling framework, we held that the district court erred by relying on Anadarko's deed to deviate from the common law standard that *Gerrity* defined. Specifically, we examined the "convenient or necessary" clause in the deed at length and held that it did *not* require a different test; in other words, the district court should have applied Colorado's common law test in *Gerrity* to determine whether Anadarko's surface activities constituted a trespass. *See id.* at 1257–61. And we then concluded that the district court erred because, "by requiring the Bays to present evidence that vertical drilling was 'unreasonable and contrary to industry standards,'" the court imposed a burden that was more severe than the third prong in *Gerrity*. *Id.* at 1261.

After holding that the district court erred in applying the incorrect legal test, we then examined whether we could nonetheless affirm the district court's judgment based on the test that *Gerrity* defined. Put another way, we considered whether the district court's application of the incorrect test prejudiced the Bays. We held that Anadarko met its burden of production on *Gerrity*'s second prong, and that the Bays in turn met their rebuttal burden under the third prong by "adduc[ing] testimony that directional drilling offered a feasible alternative to horizontal drilling." *Id.* at 1262. However, we declined to decide whether the Bays made out a prima facie case of material interference sufficient to satisfy *Gerrity*'s first prong.

In doing so, we stated that "*Gerrity* offers little explicit instruction on what constitutes material interference." *Id.* at 1261. But we reasoned that *Getty*, along

with the Texas Supreme Court's more recent case in *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013), "provide[d] helpful guidance on the meaning of material interference," and "suggest[ed] that surface use must be infeasible or nearly impossible under the circumstances." *Bay I*, 912 F.3d at 1261. As such, we noted that "[m]aterial interference is a high bar: 'the surface owner has the burden to prove that . . . the lessee's use *completely precludes* or *substantially impairs* the existing use.'" *Id.* at 1262 (omission in original) (quoting *Merriman*, 407 S.W.3d at 249). We also effectively endorsed the reasoning in *Merriman*, observing that "the [Texas Supreme Court] concluded that evidence showing that [a] well 'precludes or substantially impairs the use of [a surface owner's] existing corrals and pens' without a showing that the 'surface owner has no reasonable alternative method to maintain the existing use' was not sufficient to advance beyond summary judgment." *Id.* (quoting *Merriman*, 407 S.W. at 252).

Applying this analysis to the Bays' circumstances, we expressed the following reservation:

> Given the factual differences between the Bays' claims, *Gerrity*, and the aforementioned Texas authorities, we question whether the record before us supports a legally sufficient finding of material interference. But we do not resolve this issue because Anadarko has not raised it on appeal; therefore, we do not affirm the district court on this basis.

Id. (footnote omitted). Accordingly, we reversed and remanded for further consideration "consistent with [our] opinion." *Id.* at 1263.

D

On remand, the district court ordered briefing on whether the Bays had shown material interference, noting that "the 10th Circuit's observation presents a potential question of legal sufficiency . . . that would, if resolved in favor of [Anadarko], ameliorate the need for a re-trial." *Bay v. Anadarko E&P Co. LP ("Bay II")*, 563 F. Supp. 3d 1156, 1159 (D. Colo. 2021) (alteration in original). The Bays filed briefing in response, asserting that "neither [*Getty* or *Merriman*] has any bearing on a Colorado surface owner's prima facie case under *Gerrity*," because Colorado and Texas apply a different law in this context.[2] *Id.* at 1160 (alteration in original).

However, the district court rejected the Bays' argument. Specifically, the court held it was "unable to entertain" the Bays' contention that "Texas cases like *Getty* and *Merriman* should not be used to interpret or refine the *Gerrity* standard," because it was "bound by the 10th Circuit's interpretation of Colorado law." *Id.* at 1161. Thus, noting that the standard articulated in *Bay I* "requires that the Bays' use of the surface land for agricultural purposes be either 'completely preclud[ed]' or 'substantially impair[ed],' with the latter test met by showing that, due to Anadarko's actions, the Bays have 'no reasonable alternative method to maintain the existing

[2] The Bays also argued that (1) they should be entitled to a new trial if the *Bay I* court's language had changed the material interference standard, (2) they could introduce evidence that would satisfy the new standard, and (3) the question of the appropriate interpretation of the "material interference" standard should be certified to the Colorado Supreme Court. *See Bay II*, 563 F. Supp. 3d at 1160. They do not renew these arguments on appeal, and, therefore, we deem them abandoned or waived. *See, e.g.*, *Burke v. Regalado*, 935 F.3d 960, 1014 (10th Cir. 2019) ("Issues not raised in the opening brief are deemed abandoned or waived." (quoting *In re W. Pac. Airlines, Inc.*, 273 F.3d 1288, 1293 (10th Cir. 2001))).

use,'" the district court concluded that the Bays could not meet the controlling material interference standard. *Id.* (alterations in original). The court reasoned that the Bays' testimony indicated their "land was still being used for agricultural purposes," and that, while Anadarko's wells "caused various inconveniences" to the Bays' farming efforts, *Gerrity* itself indicated that "[e]vidence that the operator's conduct was merely inconvenient to the surface owner is insufficient" to establish a prima facie showing of material interference. *Id.* (alteration in original).

The court thus granted judgment as a matter of law to Anadarko, stating that it would enter judgment and stay the cases of the other putative class plaintiffs to allow the Bays to appeal. *See id.* at 1163–64. The Bays then commenced this appeal. Aplts.' App., Vol. I, at 183–84 (Notice of Appeal, filed Oct. 15, 2021).

II

The Bays raise two issues on appeal. First, they argue that our discussion of the material interference standard in *Bay I* was dictum. As such, the Bays assert that the district court incorrectly determined that it was bound to apply that standard under the law of the case doctrine. Second, they contend that the material interference standard that the district court applied (supposedly in misguided fealty to *Bay I*) is inconsistent with the Colorado standard for trespass that *Gerrity* outlined. Had the district court adopted the correct interpretation of *Gerrity*, the Bays claim it

would have found that the evidence presented at trial was sufficient to establish a prima facie case of material interference.[3]

After carefully considering our decision in *Bay I*, however, we conclude that *Bay I*'s language defining the material interference standard was not dictum. As such, the district court did not err in determining that it was bound by the law of the case doctrine and the mandate rule to apply that standard. Accordingly, we have no occasion to reach the Bays' second issue, which is effectively premised on the notion that the district court was free to disregard *Bay I*'s interpretation of *Gerrity* and its material interference standard. And, notably, the Bays have not argued that they can succeed under the controlling material interference standard that we defined in *Bay I*. Consequently, they have failed to make a prima facie showing of material

[3] In *Bay I*, we noted that the district court opined that "Anadarko could theoretically be held [vicariously] liable" for its lessees' trespasses "but [it] declined to make a ruling on a class-wide basis," 912 F.3d at 1254, and did not address the extent of Anadarko's vicarious liability in JMOL proceedings, *see id.* at 1263 ("Because the district court granted JMOL [to Anadarko] based on the trespass theory, it did not rule on" whether Anadarko may be held vicariously liable for its lessees' trespass.). Similarly, we declined in *Bay I* to rule ourselves on the issue, leaving it "for the district court to consider at the appropriate time." *Id.* at 1263. Then, in *Bay II*, the district court again did not think it necessary to rule on the issue. For purposes of this appeal, the parties do not dispute whether Anadarko can be held vicariously liable for its lessees' trespasses—that is, the parties do not place that question before us for resolution. Accordingly, for purposes of this appeal only, we draw no legal distinction between Anadarko and its lessees. And like the district court in *Bay II*, in the interest of "efficiency," throughout this opinion, we make no meaningful effort to "distinguish between acts by Anadarko itself and acts by entities to whom Anadarko leased its mineral interests and who actually constructed the wells and other development on the landowners' property." *Bay II*, 563 F. Supp. 3d at 1157 n.1.

interference. It ineluctably follows that they cannot sustain a claim of trespass under Colorado law. On that basis, we uphold the district court's judgment.

III

A

"We review de novo a district court's decision to grant or deny a Rule 50(a) motion for judgment as a matter of law, applying the same standards as the district court." *Elm Ridge Expl. Co., LLC v. Engle*, 721 F.3d 1199, 1216 (10th Cir. 2013). "Judgment as a matter of law is appropriate only if the evidence points but one way and is susceptible to no reasonable inferences which may support the nonmoving party's position." *Escue v. N. Okla. Coll.*, 450 F.3d 1146, 1156 (10th Cir. 2006) (quoting *Loughridge v. Chiles Power Supply Co.*, 431 F.3d 1268, 1280 (10th Cir. 2005)). Thus, "[w]e draw all inferences from the evidence in favor of the non-moving party, and do not weigh the evidence or judge witness credibility." *Henry v. Storey*, 658 F.3d 1235, 1238 (10th Cir. 2011).

"We must enter judgment as a matter of law in favor of the moving party if there is no legally sufficient evidentiary basis . . . with respect to a claim or defense . . . under the controlling law." *Bristol v. Bd. of Cnty. Comm'rs of Cnty. of Clear Creek*, 312 F.3d 1213, 1216 (10th Cir. 2002) (omissions in original) (quoting *Baty v. Willamette Indus., Inc.*, 172 F.3d 1232, 1241 (10th Cir. 1999)). "When a defendant seeks judgment as a matter of law, the controlling question 'is whether the plaintiff has arguably proven a legally sufficient claim.'" *Id.* at 1216–17 (quoting *Turnbull v. Topeka State Hosp.*, 255 F.3d 1238, 1241 (10th Cir. 2001)).

B

Although the Bays acknowledge that "[i]n *Bay I*, this Court did address the applicable 'material interference' standards under both Colorado law and Texas law," they contend that we "did not decide what 'material interference' standard should be applied on remand." Aplts.' Reply Br. at 2; *see also* Aplts.' Opening Br. at 12–13. Specifically, the Bays point to the fact that we "expressly stated that 'we do not resolve this issue because Anadarko has not raised it on appeal.'" Aplts.' Reply. Br. at 2 (quoting *Bay I*, 912 F.3d at 1262). Therefore, the Bays argue that our discussion of the material interference standard was "dictum," Aplts.' Opening Br. at 13, and the "district court committed reversible error in applying a 'high bar' material interference standard which was not adopted by this Court in *Bay I*," Aplts.' Reply Br. at 2.

Unsurprisingly, Anadarko asserts that "[i]n *Bay I*, this Court determined the material interference standard under *Gerrity*." Aplees.' Resp. Br. at 18. Specifically, Anadarko notes that, in *Bay I*, we stated "'the proper interpretation and application of *Gerrity* [was] *essential to deciding this case*,' and 'spen[t] significant time describing its facts, reasoning, and holding.'" *Id.* at 19 (second alteration in original) (quoting *Bay I*, 912 F.3d at 1255). Anadarko further contends that "[a]fter a thorough examination of *Gerrity* and cases it relied upon," we determined—*inter alia*—in *Bay I* "that an interference is material if a surface owner shows that oil and gas operations 'completely preclude[] or substantially impair[]' their surface use." *Id.* (second and third alterations in original) (quoting *Bay I*, 912 F.3d at 1262). As such, Anadarko

concludes that the parties have already litigated the material interference standard and requests that we "apply the law of the case doctrine to 'preclud[e] the relitigation of issues either expressly or implicitly resolved in prior proceedings in the same court.'" *Id.* at 20 (alteration in original) (quoting *Entek GRB, LLC v. Stull Ranches, LLC*, 840 F.3d 1239, 1241 (10th Cir. 2016)). We think Anadarko has the better of this dispute.

"The law of the case '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.'" *United States v. Monsisvais*, 946 F.2d 114, 115 (10th Cir. 1991) (quoting *Arizona v. California*, 460 U.S. 605, 618 (1983)); *see also Wessel v. City of Albuquerque*, 463 F.3d 1138, 1143 (10th Cir. 2006) ("Generally, 'once a court decides an issue, the same issue may not be relitigated in subsequent proceedings in the same case.'" (quoting *Grigsby v. Barnhart*, 294 F.3d 1215, 1218 (10th Cir. 2002))). "Accordingly, 'when a case is appealed and remanded, the decision of the appellate court establishes the law of the case and ordinarily will be followed by both the trial court on remand *and* the appellate court in any subsequent appeal.'" *United States v. Alvarez*, 142 F.3d 1243, 1247 (10th Cir. 1998) (emphasis added) (quoting *Rohrbaugh v. Celotex Corp.*, 53 F.3d 1181, 1183 (10th Cir. 1995)).

"[T]he law of the case doctrine applies to 'issues previously decided, either explicitly or by necessary implication.'" *Dobbs v. Anthem Blue Cross & Blue Shield*, 600 F.3d 1275, 1280 (10th Cir. 2010) (quoting *Guidry v. Sheet Metal Workers Int'l Ass'n, Local No. 9*, 10 F.3d 700, 705 (10th Cir. 1993)). And it is well-settled that

subsequent panels follow legal rulings of earlier panels. *See In re Smith*, 10 F.3d 723, 724 (10th Cir. 1993) (per curiam) ("We cannot overrule the judgment of another panel of this court. We are bound by the precedent of prior panels absent en banc reconsideration or a superseding contrary decision by the Supreme Court."); *see also Alvarez*, 142 F.3d at 1247 ("[T]his panel is not an en banc panel and, thus, is not in the business of overturning prior panels' decisions.").

However, we have noted that "[d]icta is not subject to the law of the case doctrine." *Homans v. City of Albuquerque*, 366 F.3d 900, 904 n.5 (10th Cir. 2004); *see also Brokers' Choice of Am., Inc. v. NBC Universal, Inc.*, 861 F.3d 1081, 1099 n.15 (10th Cir. 2017) ("The [law of the case] doctrine does not apply to dicta—statements in an opinion that are unnecessary for its disposition."). "Dicta are 'statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand.'" *Rohrbaugh*, 53 F.3d at 1184 (quoting BLACK'S LAW DICTIONARY 454 (6th ed. 1990)).

"The mandate rule follows from the law of the case doctrine." *United States v. Dutch*, 978 F.3d 1341, 1345 (10th Cir. 2020). "It requires the district court to strictly comply with any mandate rendered by this court on remand." *Id.* "We have said '[t]he mandate consists of our instructions to the district court at the conclusion of the opinion, and the entire opinion that preceded those instructions.'" *Id.* (alteration in original) (quoting *Procter & Gamble Co. v. Haugen*, 317 F.3d 1121, 1126 (10th Cir. 2003)).

Contrary to the Bays' assertion, our discussion of the material interference standard in *Bay I* is not dictum. In *Bay I*, we determined whether the district court erred in "applying a different test than the one prescribed in [*Gerrity*] to evaluate whether the mineral owner's use of land constitute[d] a trespass." 912 F.3d at 1252. To decide this issue, we outlined the *Gerrity* standard and compared it to the standard announced by the district court. In doing so, we noted that "[b]ecause the proper interpretation and application of *Gerrity* is essential to deciding this case, we spend significant time describing its facts, reasoning, and holding." *Id.* at 1255.

After thoroughly examining *Gerrity* and the cases it relied upon, we held that to make a prima facie showing of material interference in a trespass claim under *Gerrity*, the Bays were required to show "that the operator's conduct materially interfered with surface uses" and that such interference "must be more than 'inconvenient to the surface owner.'" *Id.* at 1257 (quoting *Gerrity*, 946 P.2d at 933). Our articulation of the *Gerrity* standard—including its material interference standard—was a predicate for our determination that the district court erred in applying a modified *Gerrity* approach based on the severance deed. In other words, our articulation of the *Gerrity* standard was essential to our decision to reverse the district court.

Furthermore, after concluding that the district court erred in applying the incorrect standard, we then applied what we defined as "*Gerrity*'s burden-shifting approach to see whether the district court reached the correct result despite having applied an inappropriate test." *Id.* at 1261. In other words, we considered whether

the district court's failure to apply the proper *Gerrity* test, including its material interference standard, was prejudicial—and therefore required reversal. Thus, contrary to the Bays' contention, this analysis of the material interference standard was necessary to the disposition of the case as it determined whether the district court's error required us to reverse and remand for further proceedings or whether we could nevertheless affirm the district court's judgment, albeit under different reasoning. Stated another way, our further interpretation of the *Gerrity* standard and our application of that interpretation to the facts of this matter were "essential to [the] determination of the case." *Rohrbaugh*, 53 F.3d at 1184 (quoting BLACK'S LAW DICTIONARY 454 (6th ed. 1990)).

Specifically, in further elucidating the *Gerrity* standard, we first turned to an inquiry concerning the proper material interference standard. We noted that "*Gerrity* offers little explicit instruction on what constitutes material interference." *Bay I*, 912 F.3d at 1261. We therefore examined *Getty*—a case that *Gerrity* approvingly cited and discussed—and *Merriman* (a subsequent case from the same jurisdiction as *Getty*) to provide "further guidance on what effects create a material interference." *Id.* More specifically, we analyzed these cases to interpret and refine *Gerrity*'s material interference standard. After analyzing these cases in tandem, we determined that "[m]aterial interference is a high bar: 'the surface owner has the burden to prove that . . . the lessee's use *completely precludes* or *substantially impairs* the existing use.'" *Id.* at 1262 (quoting *Merriman*, 407 S.W.3d at 249). This ruling became the law of the case.

The Bays attempt to resist this conclusion by pointing to the fact that we stated, "we do not resolve this issue because Anadarko has not raised it on appeal." Aplts.' Reply Br. at 2 (quoting *Bay I*, 912 F.3d at 1262). Specifically, the Bays contend that in *Bay I*, Anadarko failed to contest the relevant material interference standard. As such, the Bays conclude that our discussion of the material interference standard under *Gerrity* was merely dictum (i.e., unnecessary to the resolution of the appeal).

However, the Bays misunderstand our language in *Bay I*. What the *Bay I* language, which the Bays highlight, was alluding to in substantial part was Anadarko's—perhaps not surprising—failure to argue that the record evidence was insufficient to support a finding of material interference under the *proper*, and hence relevant, standard of *Gerrity*, which we clarified for the first time in *Bay I* itself. *See Bay I*, 912 F.3d at 1262 ("[W]e question whether the record before us supports a *legally sufficient* finding of material interference. But we do not resolve *this issue* because Anadarko has not raised it on appeal." (emphases added)). Stated otherwise, in the immediate runup to *Bay I*, Anadarko unsurprisingly failed to argue that the Bays' evidence was insufficient to satisfy the proper *Gerrity* standard because it was in *Bay I* itself that we defined that standard. And, quite unremarkably, given Anadarko's failure to contest the inadequacy of the Bays' evidence under the *proper* standard, we remanded to the district court for further proceedings on the question of material interference—under the proper standard that *Bay I* articulated.

However, none of this means that our discussion of the material interference standard under *Gerrity* was dictum. In the litigation leading up to the *Bay I* opinion, Anadarko jousted with the Bays regarding the proper application of *Gerrity* in defining the substance of a surface owner's burden to establish actionable interference by a mineral owner. *See* Aplees.' Suppl. App. at 82, 96 (Aplees.' *Bay I* Resp. Br., filed Apr. 4, 2018) ("[P]laintiffs' argument cannot be squared with *Gerrity* either, which held that '[e]vidence that the operator's conduct was merely inconvenient to the surface owner is insufficient.'" (second alteration in original) (quoting *Gerrity*, 946 P.2d at 933)); *see also id.* at 95 (noting that "the district court correctly (and repeatedly) recognized, no one is asserting that a mineral owner is permitted to access its minerals in a commercially *un*reasonable manner . . . . [and] that the relevant question is what sort of conduct qualifies as 'reasonable' under the precise circumstances presented in this case").

Consequently, in *Bay I*, we were obliged by Anadarko's arguments—as well as those of the Bays—to opine on "the proper interpretation and application of *Gerrity*"—including its material interference standard. *Bay I*, 912 F.3d at 1255. Thus, our discussion of the proper material interference standard under *Gerrity* was necessary to the determination of the case. In other words, it was incumbent on us in *Bay I*—in determining the viability of the district court's judgment—to define the correct view of *Gerrity* and, especially its material interference standard, when confronted with the parties' competing views regarding the kind of interference by mineral owners that would be sufficient to support a trespass claim.

Relatedly, to the extent the Bays argue more specifically that our language in *Bay I* is dictum because we did not fully resolve the material interference inquiry—i.e., determine whether the record evidence supports a legally sufficient finding of material interference—they are mistaken. As an appropriate (though perhaps not always required) feature of resolving cases before us, our court has regularly charted out the legal standards for district courts to apply on remand—rather than applying those legal standards to the facts of the case in the first instance. *See, e.g.*, *United States v. Hasan*, 609 F.3d 1121, 1126–27 (10th Cir. 2010) ("We conclude that the district court failed to apply the proper legal standard when it rejected [defendant's] claim. Thus, we *mus*t remand for the district court to apply the *correct law* to the facts in the first instance." (emphases added)); *id.* at 1129 ("When the court of appeals notices a legal error, it is not ordinarily entitled to weigh the facts itself and reach a new conclusion; instead, it must remand to the district court for it to make a new determination under the correct law."); *Dine Citizens Against Ruining Our Env't v. Haaland*, 59 F.4th 1016, 1049 (10th Cir. 2023) ("Accordingly, we reverse and remand to the district court with instructions to apply [the aforementioned] factors in the first instance . . . ."); *United States v. Ladeaux*, 454 F.3d 1107, 1110 (10th Cir. 2006) ("On remand, the district court should follow the burden-shifting scheme set forth in *United States v. Nava-Ramirez*, 210 F.3d 1128 (10th Cir. 2000)."); *cf. Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) ("[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue.").

It would be inconsistent with this longstanding jurisprudential practice for us to label such analysis dictum—which necessarily would not be subject to the law of the case doctrine. *See, e.g.*, *Homans*, 366 F.3d at 904 n.5. If that were so, district courts on remand would be free to disregard the guidance that we provide in such analysis. *Cf. Dutch*, 978 F.3d at 1344–45 (in reversing the district court's judgment, noting that the court disregarded our prior mandate on remand and improperly agreed with the defendant that we "had not fully understood [his] argument during the first appeal"); *Dish Network Corp. v. Arrowood Indem. Co.*, 772 F.3d 856, 864 (10th Cir. 2014) ("The mandate rule is a corollary to the law of the case [doctrine] requiring trial court conformity with the appellate court's terms of remand." (alteration in original) (quoting *United States v. West*, 646 F.3d 745, 748 (10th Cir. 2011))). And were that true, we would have to believe that panels of our court historically have been willing time and again to expend valuable judicial resources in a virtually meaningless exercise to provide guidance—*viz.*, to provide guidance on the operative legal standards with no assurance that district courts on remand would follow it. That is a notion that we find dubious and cannot countenance. Consequently, we reject as mistaken any argument by the Bays that our language in *Bay I* is dictum simply because we did not fully resolve the material interference inquiry by applying in the first instance the material interference standard to the record evidence.

Accordingly, the district court acted appropriately here on remand by following our instructions in *Bay I* and applying the material interference standard that *Bay I* articulated. More specifically, our ruling in *Bay I*—that under Colorado

law, "the surface owner has the burden to prove that . . . the lessee's use *completely precludes* or *substantially impairs* the existing use"—established the law of the case and left no room for the district court to deviate from that standard. 912 F.3d at 1262 (omission in original) (quoting *Merriman*, 407 S.W.3d at 249). And by applying that standard in accordance with the law of the case doctrine and the mandate rule, the district court necessarily did not err. *See Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir. 1972) ("The rule that a lower court must follow the decision of a higher court at an earlier stage of the case applies to everything decided 'either expressly or by necessary implication.'" (quoting *Munro v. Post*, 102 F.2d 686, 688 (2d Cir. 1939))).

C

The Bays have not argued that they can succeed under the "high bar" material interference standard that we articulated in *Bay I* and that the district court correctly followed on remand.[4] Accordingly, the Bays have waived any such an argument here

[4] At oral argument, the Bays asserted that they had, in fact, argued that they could succeed under the "high bar" material interference standard. *See* Oral Argument 10:49–11:14. However, nothing in their Opening Brief could be construed as making such an argument. The Bays only argued that a "jury rationally could have found that Anadarko's operator unreasonably disrupted the Bays' lives and livelihood by drilling vertical wells from seven separate surface locations when it was technologically and economically feasible to drill directionally from only two surface locations." Aplts.' Opening Br. at 10. However, that argument does not establish (or even attempt to demonstrate) that Anadarko's lessees completely precluded or substantially impaired the existing use of the Bays' land—as the "high bar" standard would require. Indeed, the Bays do not even attempt to articulate how the district court erred in its analysis under the "high bar" standard. Instead, they simply argue that the district court applied the wrong material interference standard, and that the evidence presented at trial was sufficient to satisfy their proposed lower standard.

and perforce cannot carry their burden, as plaintiffs, of establishing a prima facie case of material interference—and, more generally, of showing that Anadarko is liable for trespass. *See Becker v. Kroll*, 494 F.3d 904, 913 n.6 (10th Cir. 2007) ("Federal Rule of Appellate Procedure 28(a)(9)(A) requires appellants to sufficiently raise all issues and arguments on which they desire appellate review in their opening brief. An issue or argument insufficiently raised in the opening brief is deemed waived."); *Anderson v. U.S. Dep't of Lab.*, 422 F.3d 1155, 1174 (10th Cir. 2005) ("The failure to raise an issue in an opening brief waives that issue."). Accordingly, we uphold the district court's judgment in favor of Anadarko on the Bays' trespass claim.

IV

For the foregoing reasons, we **AFFIRM** the district court's judgment.

This argument is inapposite. Furthermore, to the extent the Bays raised and argued the "high bar" issue for the first time at oral argument, it is waived. Specifically, "[i]ssues raised for the first time at oral argument are considered waived." *Fed. Ins. Co. v. Tri-State Ins. Co.*, 157 F.3d 800, 805 (10th Cir. 1998); *Denver Homeless Out Loud v. Denver, Colo.*, 32 F.4th 1259, 1269 n.9 (10th Cir. 2022) (same).