

APPENDIX A – Response to Texas Deposition Arguments

New Mexico’s Motion Regarding Texas’s New Expert Opinions	Texas’s Response	New Mexico’s Reply
<p>“The Hutchison Declaration filed on November 5, 2020 contains new opinions and analysis concerning the Integrated Model, including opinions on various simulation runs New Mexico’s experts performed using that model.” N.M. Mot. at 8.</p>	<p>“Dr. Hutchison testified at his May 28, 2020 deposition regarding the Integrated Model as it existed as of that date but noted there were still a number of open questions limiting the extent to which he could form complete opinions.” Tex. Resp. at 12 (citing May 28, 2020 Deposition of William R. Hutchison [Hutchison 5/28/2020 Dep. Tr.] at 35:1-20; 36:13-25; 63:3-15; 71:16-73:14)</p>	<p>The cited deposition testimony are instances where Dr. Hutchison explains that he did not fully understand the Integrated Model and the underlying data utilized by the model. The cited deposition testimony does not support that Dr. Hutchison could not formulate complete opinions because of anything New Mexico had not yet disclosed but simply that Dr. Hutchison had not yet considered it. The cited testimony supports New Mexico’s objection that Dr. Hutchison’s opinions on the Integrated Model in his declaration are new, previously undisclosed opinions.</p>
<p>“Dr. Hutchison also discloses a belated critique of the Integrated Model at paragraphs 55-61 of his declaration, despite disclaiming in his deposition that he had ever run the Integrated Model.” See New Mexico’s Objections at 8-9.</p>	<p>“Dr. Hutchison testified regarding the Integrated Model and the purported need for such a model. He testified that ‘I don’t think [an integrated model] is necessary. I think the questions in terms of groundwater/surface water interactions are well defined with the MODFLOW model itself. The operations issues, I don’t think are necessary because New Mexico’s own modeling shows that that’s not necessary.’” Tex. Resp. at 17 (quoting Hutchison 5/28/2020 Dep. Tr. at 25:21-27:12).</p>	<p>In the cited deposition testimony, Dr. Hutchison asserts his belief that the Integrated Model—and its ability to link ground water models to a RiverWare surface model—is not “necessary” to understand Texas’s claims in this case. Dr. Hutchison was defending the Texas Model, which does not have this ability. He did not provide a specific critique of the Integrated Model’s methodology as he does in paragraphs 55-61 of his declaration. In his deposition, Dr. Hutchison confirmed that his expert rebuttal report does not discuss the Integrated Model, and that his opinions</p>

	<p>“Dr. Hutchison’s deposition testimony specifically addressed the issues set forth in the remainder of paragraphs 55-61 of the Hutchison Declaration regarding a general overview of the Integrated Model, the cell size/modeling grid set forth in the Integrated Model, and his opinion that the grid size in the RiverWare model for a groundwater object is larger than would be set forth in a traditional, groundwater model.” Tex. Resp. at 17 (citing Hutchison 5/28/2020 Dep. Tr. at 131:15-133:22).</p>	<p>are limited to how a groundwater model alone can address the issues contained in the expert report of New Mexico’s experts Spalding and Morrissey. <i>See</i> Hutchison 5/28/2020 Dep. Tr. at 27:13-28:7.</p> <p>This cited deposition testimony is pulled from a larger discussion where Dr. Hutchison discussed the modeling of groundwater impacts in the Hueco-Bolson and whether the Texas Model or Integrated Model could quantify impacts to a fine level of detail. When asked whether the Integrated Model could quantify groundwater impacts down to a fine level of detail, Dr. Hutchison responded, “I don’t know” and that he did not fully understand this issue, and that he would “need to have some discussion” on this topic. <i>See</i> Hutchison 5/28/2020 Dep. Tr. at 132:19-133:22. Put in larger context, this cited deposition testimony does not support Texas’s argument that Dr. Hutchison expressed a specific opinion on the significance of the Integrated Model’s grid size in his depositions or his previously disclosed reports.</p>
<p>“In his new Declaration, Dr. Hutchison offers a definition of conjunctive use that is diametrically opposed to the definition</p>	<p>“Dr. Hutchison did testify at his May 28, 2020 on the subject of conjunctive use; namely, that continuous pumping is not a solution and that pumping would need to</p>	<p>Dr. Hutchison’s declaration presenting opinions on the definition of conjunctive use specifically responds to Mr. Lopez’s definition of conjunctive use whereas Dr.</p>

<p>he offered in his Report.” N.M. Mot. at 10.</p>	<p>stop in order for groundwater levels to recover.” Tex. Resp. at 18 (citing Hutchison 5/28/2020 Dep. Tr. at 170:16-171:10)</p>	<p>Hutchison’s discussion of conjunctive use in his deposition discussed the “conjunctive use scenarios” provided in his expert report. Further, the quotation Texas cites concerns the contents of a 1947 USGS report on groundwater use in the Project area. It is not clear from Dr. Hutchison’s deposition testimony that he is adopting or agreeing with the position expressed in this report, as opposed to merely discussing the report’s contents.</p>
<p>“In the Brandes November Declaration, Dr. Brandes presented new opinions on the Compact apportionment to Texas, and Compact Commission accounting. Ex. 2, Brandes Nov. Decl. ¶¶ 21, 36. Specifically, in his November Declaration, Dr. Brandes opined, ‘The Project, in turn, is the means by which the water apportioned to Texas by the Compact is stored in Elephant Butte Reservoir, and subsequently delivered to Texas (subject to deliveries to EBID, pursuant to its contract with the United States, and to Mexico, pursuant to the 1906 Treaty).’ <i>Id.</i> ¶ 21.” N.M. Mot. at 11.</p>	<p>“At his September 2019 deposition, Dr. Brandes testified that the Rio Grande Compact does not apportion water to New Mexico below Elephant Butte Reservoir.” Tex. Resp. at 20 (citing Transcript of Sept. 24, 2019 Deposition of Robert J. Brandes [Brandes 9/24/2019 Dep. Tr.] at 43:11-45:1)</p>	<p>In the cited deposition testimony, Dr. Brandes makes the point that the Compact does not explicitly apportion the water stored in Elephant Butte to either state-- New Mexico or Texas—but that the Project does. Dr. Brandes does not make the separate and distinct point that the Compact intended to apportion Texas a Compact entitlement south of Elephant Butte but not New Mexico. Dr. Brandes’s testimony that the Compact apportions water to Texas and New Mexico through the Project, not through the Compact’s express language itself, demonstrates that Dr. Brandes altered his prior opinions on the apportionment below Elephant Butte.</p>
<p>Dr. Brandes offered the opinion in his December Declaration that, ‘under the Operating Agreement New Mexico has received more water than it otherwise should have based solely on the D2 Curve prior to implementation of the Operating</p>	<p>“At his September 24, 2019 deposition, Dr. Brandes testified as follows: ‘It is apparent that the operating agreement, since it’s been in effect, has not delivered the same quantity of water as D2 curve.’”</p>	<p>The cited deposition testimony reflects Dr. Brandes’ disclosed opinion that under the 2008 Operating Agreement Texas has not received its full Compact delivery; this is a distinct and separate opinion, supported with new and distinct evidence</p>

<p>Agreement.” N.M. Mot. at 13 (quoting Ex. 3, Brandes Dec. Decl. ¶ 31).</p>	<p>Tex. Resp. at 24 (citing Brandes 9/24/2019 Dep. Tr. at 91:17-19).</p>	<p>and analysis, from his declaration opinion that under the 2008 Operating Agreement New Mexico has received more than its Compact entitlement.</p>
<p>Dr. Miltenberger’s declaration contains his new opinion that certain historical documents tend to show that the parties to the Compact did not intend to apportion water to lower New Mexico in the Compact. Previously Dr. Miltenberger stated that the Compact did not specify the allocations of water below Elephant Butte but instead relied on the Project and its allocation and delivery of water based on irrigable lands and endorsed the conclusion of former Special Master Grimsal and the U.S. historian expert Nicolai Kryloff that the Compact relies on the Project to apportion water to Texas and lower New Mexico. <i>See</i> New Mexico’s Objections at 16-17.</p>	<p>“Dr. Miltenberger testified at his October 2019 deposition that the Compact, and not the Project, accomplished the apportionment of the Rio Grande.” Tex. Resp. at 27 (citing Transcript of Oct. 2, 2019 Deposition of Scott A. Miltenberger, Ph.D. at 21:18-22:21.)</p>	<p>The cited deposition testimony reflects Dr. Miltenberger’s opinion that ultimately the Compact makes an apportionment, not the Project. This point is not inconsistent with his earlier position that the Compact made its apportionment through the Project and is inconsistent with his new declaration testimony that certain historical documents demonstrate that the parties to the Compact did not intend to make an apportionment to lower New Mexico in the Compact.</p>