

APPENDIX B – Response to Texas Expert Report Arguments

New Mexico’s Motion Regarding Texas’s New Expert Opinions	Texas’s Response	New Mexico’s Reply
<p>“Dr. Hutchison offers a definition of conjunctive use in his declaration contrary to the definition offered in his expert report. Specifically, Dr. Hutchison critiques Mr. Lopez for defining conjunctive use as “using the available surface water as the primary irrigation supply and making up the difference up to the crop irrigation requirements with supplemental groundwater.” Ex. 1, Hutchison Decl. ¶ 62 (quoting Lopez Deposition (July 6, 2020) 68:3-6). Although this definition is almost identical to the definition from the Hutchison Report, Dr. Hutchison now claims conjunctive use is not possible when “the groundwater supply is connected to the surface water supply” and that conjunctive use as described by Mr. Lopez is not permissible, at least in New Mexico, because “groundwater pumping depletes the surface water supply,” “decreasing some water that would have otherwise flowed into Texas.” <i>Id.</i> ¶¶ 63-66.” New Mexico Mot. at 10.</p>	<p>“New Mexico’s argument that the Hutchison Expert Report Sanctions the practice in New Mexico relies mainly on a misreading of that report: the operative definition of conjunctive use provided therein is a specific modeling scenario assuming at the outset that New Mexico has <i>drastically reduced its total overall groundwater use relative to actual historic levels.</i>” Tex. Resp. at 19 (citing Hutchison Report at 44-45, ¶ 147) (emphasis in original).</p>	<p>In his expert report, Dr. Hutchison offers a definition of conjunctive use that is necessary for his “Conjunctive Use Scenarios” modeling effort. The definition of conjunctive use Dr. Hutchison relied on for his analysis is nearly identical to the definition offered by Mr. Lopez in his deposition, which Dr. Hutchison now seeks to criticize in his declaration. <i>See</i> N.M. Mot. 9-10. Texas argues Dr. Hutchison’s report was discussing a modeling scenario that assumed New Mexico had already drastically reduced its groundwater pumping, but this is misleading. Dr. Hutchison’s conjunctive use scenarios recognized that New Mexico would “drastically reduce” groundwater pumping only when surface supplies exceeded certain defined levels. Ex. 10, Hutchison Rep. 44-47. Dr. Hutchison’s analysis assumed New Mexico would continue to pump groundwater to make up deficits in surface water supply when surface supplies were below this level, even though the groundwater being pumped was hydrologically connected to the surface stream. <i>See id.</i> Dr. Hutchison now asserts in his declaration that conjunctive use is not possible when the groundwater component is hydrologically</p>

		<p>connected to the surface water component. N.M. Mot. 9-10 (citing Ex. 1, Hutchison Decl. ¶ 62). Dr. Hutchison is now offering a new opinion at odds with the conjunctive use opinion he expressed in his Report for the sole purpose of critiquing Mr. Lopez for adopting a definition of conjunctive use that Dr. Hutchison himself expressed in his report. Therefore, it is irrelevant that Dr. Hutchison discussed conjunctive use in this Report because his opinion on conjunctive use apparently has changed.</p>
<p>Dr. Brandes offers a new opinion in his declaration that the Project 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 the deliveries to EBID and Mexico. <i>See</i> New Mexico’s Objections at 11.</p>	<p>“New Mexico’s argument employs selective misreading of Dr. Brandes’ Expert Report and the Brandes November Declaration. . . . The content of the Brandes November Declaration is entirely consistent with his expert report” Texas’s Response at 20 (citing Brandes Expert Report at 1, 6, 34).</p>	<p>Dr. Brandes states in his expert report that the Project provides a Compact apportionment to New Mexico below Elephant Butte Reservoir: “The Rio Grande Project, in turn, is the means by which Compact water from Elephant Butte Reservoir is apportioned between and delivered to New Mexico, Texas, and Mexico.” Ex. 13, Brandes Expert Rep. at 6. In his declaration, Dr. Brandes’ states that the Project delivers Compact water only to Texas. Ex. 2, Brandes Nov. Decl., ¶¶ 21. Texas does not explain how these two contradictory opinions are “entirely consistent.”</p>
<p>“In the Brandes December Declaration, Dr. Brandes presents opinions and analysis, for the first time, on New Mexico’s Integrated Model that New Mexico first disclosed in October 2019. In particular, Dr. Brandes presents new</p>	<p>“Paragraphs 8-11 of the Brandes December Declaration, however, do not even provide opinions regarding the Integrated Model. In paragraph 8 of the Brandes December Declaration, Dr. Brandes simply states his opinion that the</p>	<p>On further review, New Mexico acknowledges that paragraph 8 of the Brandes December Declaration responds to arguments and evidence New Mexico submitted with its dispositive motions. Although Dr. Brandes did not previously</p>

<p>opinions and analysis on simulation Runs 1, 2 and 3 first disclosed by New Mexico in October 2019. Ex. 3, Brandes Dec. Declaration, ¶¶ 8-11, and 17.” N.M. Motion at 12.</p>	<p>year 2007 was not a “full supply” allocation year, a topic clearly and undisputedly within the scope of his expert disclosures. <i>See</i> Brandes Expert Report at 31; Exhibit 9 (identifying the full supply allocation period as 1979-2002). Paragraphs 9-11 and 17 of the Brandes December Declaration further respond to New Mexico’s arguments relating to the availability of damages in “full supply” years.” <i>See</i> Texas’s Response at 22.</p>	<p>express an opinion on whether the years 2007, 2009 or 2010 were full-supply years from the Project or whether Texas suffered damages during Project full-supply years, New Mexico concedes the opinion he offers in Paragraphs 8 falls within the scope of the August Order. New Mexico withdraws its objection to this paragraph.</p> <p>Paragraphs 9 through 11, however, contain new opinions on the Integrated Model and damages allegedly suffered by Texas in Project Full Supply Years. These opinions also are outside the scope of Dr. Brandes’s expertise as previously disclosed.</p> <p>Paragraph 17 also contains a new opinion, supported by new analysis, on the meaning of the 1938 Condition for which Texas is advocating in this case. Although Dr. Brandes has previously expressed the opinion that groundwater pumping that began in the early 1950s reduced the amount of surface water available to Texas, he relied on a different analysis to reach this conclusion, and also did not express an opinion on the meaning of the 1938 condition as he does here.</p>
<p>“Dr. Brandes presents . . . new opinions based on data, opinions, and analysis disclosed by Texas expert Mr. Coors in his May 2020 expert report” N.M. Mot. at 27.</p>	<p>“Paragraphs 19 and 23 of the Brandes December declaration derive directly from the Brandes Expert Report disclosed May 31, 2019, in which he stated, ‘Eventually, with enough groundwater pumping, the</p>	<p>The portion of Dr. Brandes’ expert report quoted and cited by Texas did not disclose that Dr. Brandes relied on the data, opinions, and analysis of Texas’s expert</p>

	<p>groundwater gradient in many areas reversed, with reductions in the groundwater inflows to the drains and into the river. Hutchison demonstrates this phenomenon with his groundwater model for the historical conditions base case.’ Paragraph 24 of the Brandes December declaration cites directly to his expert report.” Tex. Resp. at 23 (citing Brandes Report at 9).</p>	<p>Mr. Coors, which was not produced until one year later.</p> <p>The first portion of paragraph 24 of the Brandes December declaration presents an opinion previously disclosed in Brandes’ expert report and that portion of paragraph 24 cites to his expert report. New Mexico clarifies that it does not seek to exclude this portion of Paragraph 24.</p> <p>However, the last sentence of paragraph 24 presents Brandes’ new opinion that his conclusions are confirmed, in part, by the simulated model results produced by Mr. Coors’ 2020 expert report on his analysis of the Integrated Model. This last sentence does not cite to Brandes’ expert report and was not part of an opinion formed in that report.</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 Agreement.’” N.M. Mot. at 13 (quoting Ex. 3, Brandes Dec. Decl. ¶ 31).</p>	<p>“This is not a ‘new’ opinion. . . . Additionally, the New Mexico diversion data in the Brandes December Declaration, Figure 11 (TX_MSJ_007329), which is what forms the basis for the opinion in paragraph 31, comes from New Mexico’s own experts—everything else in Figure 11 already existed in Figure 4.6 to the Brandes Expert Report.” <i>See</i> Exhibit 9 at 17.” Tex. Resp. at 24.</p>	<p>While Dr. Brandes uses some previously disclosed data from New Mexico’s experts to support this opinion, he conducts a wholly new analysis that involves creating a new version of the D2 curve that appears to include estimated groundwater pumping in New Mexico as part of New Mexico’s Project allocation. He uses this new analysis to support the wholly new opinion, not included in his expert report or his deposition testimony, <i>see</i> Appendix A, that New Mexico, not Texas, is receiving more water that it is entitled to</p>

		<p>receive under the 2008 Operating Agreement. N.M. Mot. at 13. The fact that Dr. Brandes used some data disclosed by New Mexico to perform his new analysis does not imply the analysis and opinion it supports are not new and were not untimely disclosed.</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 testified that he agreed that ‘the Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas. Instead, it relied on 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 Texas . . .’ Dr. Miltenber also “explicitly endorse[d] the conclusions by former Special Master Grimsal and the U.S. historian expert Nicolai Kryloff that the 1938 Compact relies upon the Rio Grande Project to equitably apportion Rio Grande water in the Project area between Texas and lower New Mexico.” N.M. Mot. at 16.</p>	<p>“Dr. Miltenberger <i>never endorsed</i> Special Master Grimsal’s preliminary conclusions regarding the Compact’s apportionment as discussed in the February 9, 2017 First Interim Report. First Interim Report, SM Docket No. 54. In his expert report, Dr. Miltenberger merely states that “the Special Master fairly described the background history leading up to the 1938 Rio Grande Compact.” <i>Expert Report of Scott A. Miltenberger, Ph.D.</i> (May 31, 2019) (Miltenberger Expert Report) at 114, attached as Exhibit 15. That does not constitute an endorsement of the Special Master’s proposed legal conclusions.” Tex. Resp. at 25.</p> <p>“Kryloff did not ‘conclude’ New Mexico received an apportionment below Elephant Butte. The May 31, 2019 Expert Report of Nicolai Kryloff . . . did not opine that New Mexico received an equitable apportionment below Elephant Butte, and Dr. Miltenberger obviously could not have endorsed an opinion Kryloff never offered. The Kryloff Expert Report states as</p>	<p>This selected quote from Dr. Miltenberger’s expert report does not provide a full context for the explicit statement and opinion Dr. Miltenberger gave endorsing former Special Master Grimsal’s background history of the Compact. Dr. Miltenberger presents six opinions in that report, one of which is entitled: “The Special Master fairly described the background history leading to the 1938 Rio Grande Compact” The full text of that opinion states:</p> <p>Having reviewed the background history leading to the 1938 Rio Grande Compact presented on pages 31 through 187 and 203 through 209 of the <i>First Interim Report of the Special Master</i>, dated February 9, 2017 as well as the materials appended to it, it is my expert opinion that the Special Master fairly described that history. I base my opinion not only on my professional knowledge and expertise, but also on the historical</p>

	<p>follows: ‘Because the 1938 Compact did not explicitly address water allocation below Elephant Butte Reservoir, I agree with the conclusion that the compact parties relied upon the Rio Grande Project to ensure Texas’ apportionment under the compact.’ Kryloff Expert Report at 11; Exhibit 18. Kryloff does not conclude that New Mexico received an apportionment below Elephant Butte Reservoir, thus Dr. Miltenberger could not endorse such an opinion stated in the Kryloff Expert Report. Tex. Resp. at 28.</p>	<p>records that I examined in the course of researching and analyzing the history of the 1938 Rio Grande Compact, many of which are cited in the opinions above. See Expert Report of Scott A. Miltenberger at 114.</p> <p>Texas selectively quotes from a portion of Kryloff’s expert report that focuses on whether the Compact provided an apportionment to Texas but avoids the separate statement in Kryloff’s expert report agreeing with Special Master Grimsal’s conclusion that “the Rio Grande Compact Commission, in negotiating the 1938 Rio Grande Compact, ‘fully relied upon the existing Rio Grande Project to impart Texas’ and lower New Mexico’s respective equitable apportionments of Rio Grande waters.’” Kryloff Expert Report at 13 (quoting First Interim Report at 209).</p>
<p>“Dr. Miltenberger offers a new opinion concerning the letter from Frank B. Clayton to Sawnie Smith (Oct. 4, 1938), which states that the Project allocations are the basis for Compact apportionment below Elephant Butte, attempting to explain why the letter does not describe the Project allocations as the basis for Compact apportionment.” N.M. Mot. at 18 (comparing Ex. 15, Miltenberger Expert Report, 97-101, with Ex. 5,</p>	<p>“Dr. Miltenberger’s previous opinions [on the Frank B. Clayton letter] are in fact consistent with his declaration. In the Miltenberger Expert Report, Dr. Miltenberger states: ‘This ‘arrangement,’ Clayton acknowledged, was ‘of course a private one between the districts involved, and for that reason it was felt neither necessary nor desirable that it be incorporated in the terms of the Compact.’ The agreement was nonetheless ‘private’</p>	<p>This footnote cited by Texas in Dr. Miltenberger’s expert report did not express an opinion by Dr. Miltenberger that the 1938 Letter from Frank B. Clayton to Sawnie Smith does not describe the Project allocation as the basis for Compact apportionment. It merely recites Clayton and Smith’s consistent understanding why that agreement was not explicitly included in the Compact. Elsewhere in this extended footnote in Dr. Miltenberger’s</p>

<p>Miltenberger December Declaration, ¶¶ 28-37).</p>	<p>as Clayton recognized. While it was given Interior Department approval, the agreement was executed solely by the two districts, and it was concerned with the allocation of costs for the Rio Grande Project.” Tex. Resp. at 29 (citing Miltenberger Report at 98 n.217).</p>	<p>expert report, Dr. Miltenberger acknowledges Historian Douglas Littlefield’s view that the Project allocations provided an “‘allocation’ of water between New Mexico and Texas.”</p>
<p>“Dr. Miltenberger now states that ‘existing uses, circa 1938, not rights were to be protected by the Compact.’” N.M. Mot. at 20.</p>	<p>“Dr. Miltenberger’s declaration is entirely consistent with the Miltenberger Expert Report. As in his November and December declarations, Dr. Miltenberger has in fact previously stated that the Compact ultimately prioritized protection of existing uses as of 1938 over protection of relative rights.” Tex. Resp. at 30-31 (citing Miltenberger Report at 20, 38, 54, 93, 94).</p>	<p>The portions of Dr. Miltenberger’s expert report cited by Texas demonstrate that Dr. Miltenberger formed an opinion that the Compact was intended to protect the status quo of uses but do not demonstrate that Dr. Miltenberger also formed an opinion that the Compact did not intend to protect water rights. The opinion that the Compact either does not protect water rights or that it prioritizes protection of uses over rights is new and was not expressed in Dr. Miltenberger’s reports.</p>
<p>“Dr. Miltenberger also offers a new set of opinions regarding the Downstream Contracts. . . . In his expert report, he offered only two opinions of significance regarding these contracts: first, that they ‘underscore federal management and control over the waters delivered by New Mexico at San Marcial,’ and second, that one of the contracts ‘memorialized the historical distribution of repayment costs...on the basis of the respective irrigated acreages that the districts themselves had committed to back in</p>	<p>“Dr. Miltenberger’s statement, however, is entirely consistent with his May 31, 2019 expert report and is not a new opinion. New Mexico omits several key passages from Dr. Miltenberger’s May 31, 2019 Expert Report (Exhibit 15), which support his declaration testimony.” Tex. Resp. at 32 (citing Miltenberger Report at 98 n.217, 100).</p>	<p>The two portions of Dr. Miltenberger’s expert report cited by Texas acknowledge that the Downstream Contracts allocated costs for the Project amongst the districts but do not state that this was the primary or only purpose of these agreements. These quotations do not support Dr. Miltenberger’s new opinion that this allocation of costs was of primary importance compared to the allocation of water deliveries in the Downstream Contracts.</p>

1929.” N.M. Mot. at 20 (citing Ex. 15, Miltenberger Report at 100 n.217).		
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