

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

THE STATE OF TEXAS'S MOTIONS IN LIMINE

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July 20, 2021

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Pursuant to the April 9, 2021 Trial Management Order (Docket No. 501),¹ the State of Texas (Texas) hereby moves in limine for the following orders:

1. To exclude the introduction of evidence or argument at trial relating to factual issues finally adjudicated in the Special Master’s May 21, 2021 Order, including intra-district operations in Texas.
2. To exclude the introduction of evidence or argument at trial by the State of New Mexico (New Mexico) of a 1938 or “baseline” condition.
3. To exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico.
4. To exclude the introduction of evidence or argument at trial relating to New Mexico’s Fourth Counterclaim.
5. To exclude the introduction of evidence at trial of improper legal opinions.
6. To exclude the introduction of evidence at trial of expert opinions outside the scope of the proffered expert’s area of expertise.

AUTHORITY

A motion in limine is “any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.” *Luce v. United States*, 469 U.S. 38, 40 n.2 (1984) (relying on *Black’s Law Dictionary* 708 (5th ed. 1979) definition of “in limine”: “[on] or at the threshold; at the very beginning; preliminary.”). It is a request for the court to determine whether certain evidence is relevant to a material issue and whether it will permit such evidence to be offered at trial. *See AP v. Dist. Court*, 542 U.S.

¹ References to “Docket No.” are to the Special Master’s Docket for *Texas v New Mexico and Colorado*, No. 141 Original. The Docket can be found at <https://www.ca8.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original>.

1301, 1303 (2004). These motions may be raised when evidentiary issues are anticipated by the parties, including before trial or even during trial, and the motion has the same effect as an objection to evidence offered during trial. *Luce*, 469 U.S. at 40 n.2; *see also Fed. Deposit Ins. Corp. v. Clark*, 768 F. Supp. 1402, 1413 (D. Colo. 1989). They are tools in bench trials that help “ensure the expeditious and evenhanded management” of trial proceedings. *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997).

The Federal Rules of Evidence provide guidance for the Court and Special Master in the exercise of its original jurisdiction under Article III of the Constitution of the United States. Sup. Ct. R. 17.2. Pursuant to Rule 401, evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence,” and “the fact is of consequence in determining the action.” Fed. R. Evid. 401. Evidence that is not relevant is not admissible. Fed. R. Evid. 402. Relevant evidence may, nevertheless, be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” Fed. R. Evid. 403. “These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.” Fed. R. Evid. 102.

1. **Motion in Limine 1: to exclude the introduction of evidence or argument at trial relating to factual issues finally adjudicated in the Special Master’s May 21, 2021 Order, including intra-district operations in Texas**

The Special Master’s May 21, 2021 Order noted that the “summary judgment record . . . leaves many issues for resolution at trial[,]” but the Order did finally adjudicate several important issues, and it would be a waste of judicial resources to further address such

matters at trial. *See* May 21, 2021 Order (Docket No. 503) at 1. For this reason, Texas requests that that Special Master order that any and all evidence offered by New Mexico regarding factual issues identified in the Special Master’s May 21, 2021 Order as finally adjudicated must be excluded as irrelevant and outside the scope of trial.

Among other issues, the May 21, 2021 Order focused the case on two aspects of New Mexico’s Compact obligations under Article IV of the 1938 Rio Grande Compact² (“1938 Compact” or “Compact”). The first operates as an affirmative mandate. The second operates as a legal prohibition. Taken together, both are critical to ensuring Compact compliance, but they operate differently.

First, New Mexico is obligated to deliver Rio Grande water at the San Marcial gauge,³ where it flows into the Elephant Butte Reservoir and becomes part of the Rio Grande Project (Project) storage for delivery downstream by the United States Bureau of Reclamation (BOR). Upon such delivery, the Compact apportionment “is *programmatic* in its apportionment of water as between Texas and New Mexico[.]” Docket No. 503 at 3 (emphasis in original); *see also id.* at 5 (“programmatic nature”); 11 (“programmatic division of water subject to federal storage and distribution;”) 23 (“programmatically driven”); and 24 (“programmatic” division). Under the Compact, upon New Mexico’s delivery into Elephant Butte, BOR takes over the job of delivering the apportioned water to the Project beneficiaries, Elephant Butte Irrigation District (EBID) in New Mexico and El Paso County Water Improvement District No. 1 (EP#1) in Texas.

² Act of May 31, 1939, Pub. L. No. 76-96, ch. 155, 53 Stat. 785.

³ San Marcial remains the designated point for delivery, but in 1948 the Compact Commission acted under Article V of the Compact and “relocated the spot for measuring the delivery obligation” to the gaging station below Elephant Butte Dam. *Texas v. New Mexico*, 138 S. Ct. 954, 957 n.* (2018).

Second, New Mexico has a “Compact-level duty to avoid material interference with Reclamation’s delivery of Compact water to Texas[.]” Docket No. 503 at 5; *see also id.* at 22 (New Mexico’s “duty to avoid interfering with the Project’s delivery of Texas’s apportionment.”). Indeed, New Mexico’s Compact duty of non-interference includes a duty to apply New Mexico’s own laws to protect Texas’s apportionment. *Id.* at 23 & 48. This non-interference duty specifically extends to protection of the Rio Grande’s “hydrologically connected return flows.” *Id.* at 39.

But it would be another thing entirely—and not appropriate under the prior rulings in this case—for New Mexico to offer evidence and testimony on, for example, intra-district operations in EP#1 in Texas that do not relate in any way to the use of “hydrologically connected groundwater.” (March 31, 2020 Order (Docket No. 338) at 27. Such intra-district operations in Texas that do not relate to the use of hydrologically connected groundwater and lack any hydrologic connection to Project deliveries in New Mexico include, operation of the congressionally mandated American Canal Extension, use of effluent discharged from City of El Paso wastewater treatment plants, use or non-use of drain flows within Texas, and discharge of water downstream from the Texas district to Hudspeth County in the management of waste and salinity loads. Each of these operation activities is authorized under the umbrella of federal reclamation law.⁴

These Texas intra-district operations have no relation to either element of Compact duties as determined by the Special Master. They are wholly unrelated to New Mexico’s affirmative Compact duty to deliver Rio Grande water into the Project storage. And because

⁴ For ease of reference, these EP#1 operations in Texas will be referred to simply as “Texas intra-district operations.”

they have no hydrologic connection to Project deliveries in New Mexico, they are likewise unrelated to the Compact prohibition on interfering with Project deliveries.

In short, such matters do not address Compact issues and duties and whether they have been breached. Rather they would, at best, go to matters that the Special Master already has carved away from the case. They would concern either reclamation law-based issues which are not Compact issues or issues that are property addressed later in the case remedial.

The non-Compact facts New Mexico seeks to inappropriately interject include not only Texas intra-district operations, but also other concerning broader Project operational issues relating to reclamation law-based issues. There is no indication whatever that any of these aspects of the Project operations connect to the Rio Grande Compact obligations as set forth by the Special Master.

New Mexico is poised to prolong an already-long trial unnecessarily and improperly by trying to introduce evidence and testimony on matters having nothing to do with the issues in this phase of trial. These issues do not implicate the apportionment which, under the Compact, is complete as far as New Mexico's obligation is concerned upon delivery into Elephant Butte nor do they implicate New Mexico's Compact duty of non-interference with Project deliveries of the apportionment to Texas — or Texas's corresponding mirror-image Compact obligation as to the programmatic apportionment to be delivered to EBID.

WHEREFORE, Texas requests that the Special Master enter an order to exclude the introduction of evidence or argument at trial relating to factual issues finally adjudicated in the Special Master's May 21, 2021 Order, specifically including the Texas intra-district operations. They do not present issues of Compact liability.

2. **Motion in Limine 2: to exclude the introduction of evidence or argument at trial by New Mexico of a 1938 or “baseline” condition**

Texas’s complaint alleges that “[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” and that New Mexico “has changed the conditions that existed in 1938 when the Compact was executed to the detriment of the State of Texas.” Texas Complaint, ¶¶ 5, 10. New Mexico has argued throughout this litigation that there is no 1938 condition, and thus has not offered any evidence through discovery to support a contrary position as to the scope of a 1938 condition. *See, e.g.*, Estevan Lopez 30(b)(6) Depo., 9/18/2020, 76:16-77:21 (“A. There is no constraint below Elephant Butte. There is no 1938 . . . depletion condition. There is . . . no such condition placed in the Compact for the section below Elephant Butte.”).⁵ The Special Master confirmed the existence of a 1938 (or “baseline”) condition when he concluded in the May 21, 2021 Order that “[t]he Compact protects the Project, its water supply, and a baseline operating condition. The baseline condition requires, at a minimum, New Mexican protection of surface water and return flows against direct and indirect capture beyond limits that are subject to material dispute.” Docket No. 503 at 49.

The Special Master determined that “the compacting states intended to protect not merely water deliveries in the Reservoir, but also a baseline level of Project operations generally reflected in Project operations prior to Compact formation,” which includes, “at a minimum, the protection of return flows to effectuate the Compact’s apportionment.”

⁵ TX_MSJ_001161. The excerpt from Mr. Lopez’s Federal Rule of Civil Procedure Rule 30(b)(6) deposition, on behalf of the State of New Mexico, is attached as **Exhibit A** to the Declaration of Richard S. Deitchman in Support of the State of Texas’s Motion in Limine (Deitchman MIL Decl.).

Docket No. 503 at 5, 6. New Mexico failed to disclose any facts relating to an alternative theory regarding the scope of the baseline condition that the parties sought to protect at the time of the 1938 condition. The time to disclose such facts has lapsed.

WHEREFORE, Texas requests that the Special Master exclude any evidence offering an alternative theory regarding the scope of the 1938 or “baseline condition,” as defined by the Special Master in the May 21, 2021 Order, because New Mexico has not offered any facts in discovery relating to the 1938 or “baseline” condition, except outright denial of its existence, which the Special Master affirmatively refuted in the May 21, 2021 Order.

3. Motion in Limine 3: to exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico

New Mexico’s Counterclaims include a claim for damages. New Mexico’s Counterclaims (Docket No. 99) at 33 (prayer for relief requesting an “[a]ward to the State of New Mexico all damages and other relief, including . . . interest, for the injury suffered by the State of New Mexico as a result of the State of Texas’s unjust enrichment and its past and continuing violations of the Compact.”). New Mexico, however, did not disclose an expert to describe the alleged injury and, ultimately quantify, the damages allegedly sustained by New Mexico. Moreover, the Special Master has bifurcated the issues of liability and damages: trial on the amount of damages and remedies, if any, will be held at a later date. Docket No. 501 at 8. As a result, Texas requests that the Special Master enter an order to exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico.

New Mexico's Second Trial Witness List⁶ lists Dana Hoag, Ph.D. as a will-call witness. *See* New Mexico Witness List at 4. The subject matter of Dr. Hoag's anticipated testimony is described as "issues raised and matters and opinions discussed in his expert reports and disclosures, supplemental disclosures, depositions in this matter, and responses at trial to fact or expert evidence presented." *Id.* Dr. Hoag submitted two expert reports in this matter: an opening report dated October 31, 2019, that responded to the report submitted by Texas expert, Dr. David Sunding, and a rebuttal report dated June 15, 2020, further responding to Dr. Sunding.⁷ Dr. Hoag did not report on or attempt to describe the nature of the injury or to quantify the damages sustained by New Mexico, as claimed in New Mexico's Counterclaims. The permissible scope of Dr. Hoag's trial testimony is limited to his rebuttal of Dr. Sunding's work for Texas. Ultimately, New Mexico did not disclose an expert to describe injury or quantify damages claimed in its Counterclaims.

New Mexico's Witness List further lists several non-expert witnesses with proposed testimony regarding "injuries sustained and/or damages incurred by New Mexico." *See, e.g.*, New Mexico Witness List at 2, 6 (listing damages sustained by the proposed testimony of John D. Antonio, P.E. and Rolf Schmidt-Petersen). Neither Mr. D'Antonio nor Mr. Schmidt-Petersen are disclosed experts in this matter, and accordingly neither have disclosed any economic analysis or any other analysis describing the injury or damages sustained by New Mexico. Furthermore, New Mexico lists several percipient witnesses who will purportedly testify regarding "the economics of New Mexico's Lower Rio Grande

⁶ A true and correct copy of New Mexico's Second Trial Witness List (June 30, 2021) (hereafter "New Mexico Witness List") is attached as **Exhibit B** to the Deitchman MIL Decl.

⁷ Excerpts from Dr. Hoag's expert reports providing his assignment and scope of the reports are attached as **Exhibit C** to the Deitchman MIL Decl.

agriculture.” *See, e.g.*, New Mexico Witness List at 3 (witness listing for Shayne Franzoy). New Mexico, however, failed to disclose any expert analysis of the injury allegedly sustained by New Mexico. New Mexico cannot now use trial to present expert or other evidence as to the scope and methods for quantification of injuries and/or damages allegedly sustained by New Mexico. The time for disclosure of such claims is long past.

WHEREFORE, Texas requests that the Special Master enter an order to exclude the introduction of evidence or argument at trial relating to damages allegedly sustained by New Mexico.

4. **Motion In Limine 4: To exclude the introduction of evidence or argument at trial relating to New Mexico’s Fourth Counterclaim**

Texas moves for the exclusion of evidence or argument at trial relating to New Mexico’s Fourth Counterclaim. The gravamen of the counterclaim is that Texas has been unjustly enriched by implementation of the 2008 Operating Agreement for the Rio Grande Project (2008 Operating Agreement) because Texas, through EP#1, received “more water than it is entitled to under the Compact.” New Mexico’s Counterclaims (Docket No. 99), ¶¶ 91-98. New Mexico’s Fourth Counterclaim is based on water deliveries as a result of Project operations — yet Texas has no legal ability to impact Project operations. The exclusion of evidence on this issue is appropriate and consistent with the Special Master’s prior orders establishing the governing law and framework for this phase of the case.

A. *New Mexico’s Fourth Counterclaim Seeks Relief Based Exclusively on the Actions of the United States, Not Texas*

New Mexico’s Fourth Counterclaim (titled “Compact Violation and Unjust Enrichment Against Texas”) alleges that “[r]elying on the United States’ operation of the Project in violation of the Compact, Texas has violated the Compact by receiving and claiming the right to receive more water than is necessary to deliver an equal amount of water

to each acre of Project lands in Texas and New Mexico.” Docket No. 99 ¶ 94. In addition, the Fourth Counterclaim provides that “[i]n 2011, Texas received excess water as a result of the unauthorized reduction of New Mexico’s Compact Credit Water by the United States.” *Id.* ¶ 95. The Special Master stated in his March 31, 2020 Order (Docket No. 338) that the Fourth Counterclaim “largely mirrors Counterclaim 2 against the United States.” Docket No. 338 at 30. The Special Master dismissed Counterclaim 2 against the United States as both “being barred by sovereign immunity” and implicating irrelevant issues regarding the validity of the 2008 Operating Agreement. *Id.* at 31.

As previously addressed by the Special Master in the Docket No. 338 addressing several of the New Mexico counterclaims, this proceeding “is an action to interpret and enforce a Compact.” Docket No. 338 at 18. “[T]his is not an action to enforce a Reclamation contract” *Id.* New Mexico’s Fourth Counterclaim fails as a matter of law for the same reasons that the Special Master dismissed the Second Counterclaim against the United States. The Fourth Counterclaim “mirrors” the dismissed Second Counterclaim, and merely alleges that Texas has committed a “Compact violation” by “[r]elying on the United States’ operation of the Project[,]” in particular with reference to the “adoption of the 2008 Operating Agreement.” Docket No. 99 ¶¶ 93-94. All the issues outlined in the Fourth Counterclaim address the United States’ operation of the Project, not actions by Texas. This includes the 2008 Operating Agreement (*id.* ¶ 93), “other operational changes” (*id.*), and the United States’ reduction in credit water available to New Mexico in 2011 (*id.* ¶ 95). Although the Fourth Counterclaim purports to be against Texas, no matter how one reviews the claims, the “actions” New Mexico complains of are actions by the United States, and not Texas.

New Mexico's Fourth Counterclaim rests on its consistent conflation of two distinct aspects of how the waters of the Rio Grande are distributed. The first deals with the "allocation of water" under reclamation law. Under reclamation law, EBID and EP#1 are "allocated" water pursuant to their contracts with the BOR (known as the "Downstream Contracts"). The second, dealing with the "apportionment of water," derives from the 1938 Compact's equitable apportionment of the waters of the Rio Grande among Texas, New Mexico, and Colorado. New Mexico is obligated to deliver Rio Grande water at the San Marcial gauge, where it flows into the Elephant Butte Reservoir and becomes part of the Project storage for delivery downstream by the BOR. Upon such delivery, the Compact apportionment "is *programmatic* in its apportionment of water as between Texas and New Mexico[.]" Docket No. 503 at 3 (emphasis in original); *see also id.* at 5 ("programmatic nature"); at 11 ("programmatic division of water subject to federal storage and distribution;") at 23 ("programmatically driven"); and at 24 ("programmatic" division). Under the Compact, upon New Mexico's delivery into Elephant Butte, BOR takes over the job of delivering the apportioned water to the Project beneficiaries, EBID in New Mexico and EP#1 in Texas (the two districts). It is the latter distribution of water (i.e., the apportionment) that is at the heart of this original action, not the former. Questions of "allocations" are dealt with as a matter of reclamation law and are not the proper subject of compact law.

The Fourth Counterclaim ultimately addresses allocation of the waters of the Rio Grande via the BOR and is plainly not a claim against Texas. It is undisputed in this litigation that Texas is not a party to the 2008 Operating Agreement or the Downstream Contracts. The 2008 Operating Agreement deals with how water is "allocated" between the two districts, it

does not deal with how water is “apportioned” among the states and, in fact, the language of the 2008 Operating Agreement itself is clear, on its face, about what it affects.

The only direct reference in the 2008 Operating Agreement to the 1938 Compact is in section 6.12 which provides that “[n]othing herein is intended to alter, amend, repeal, modify, or be in conflict with the provisions of the Rio Grande Compact.” What the 2008 Operating Agreement does is take the amount of water available to the Project after all of New Mexico’s unlawful diversions and attempts to “allocate” that water to the two districts according to their respective contracts. It does not purport to address 1938 Compact apportionment shortages. Rather, it brings some allocation order to a bad situation. The resolution achieved by the United States, EBID and EP#1 with regard to the 2008 Operating Agreement, may be more relevant in the remedial phase of this case, but it is not relevant to the Compact liability issues to be address in the upcoming trial.

In addition, once the Project’s allocation has been made by BOR, how that water is accounted for is purely a matter of BOR law and not the Compact. The Compact serves to ensure that the volume of water delivered into the Elephant Butte Reservoir, as specified in Article IV, is available to meet the Texas apportionment and is not depleted. New Mexico’s complaints in this litigation about Project accounting, which are the subject of the Fourth Counterclaim, are a BOR law issue and not a Compact issue.

The Fourth Counterclaim ultimately seeks to attach liability to Texas for “relying on the United States” in its operation of the Project. This is not an actionable claim: Texas cannot be held liable for “receiving water” from the Project or “claiming a right to receive water” from the Project. The Special Master dismissed the “mirror” claim against the United States as implicating issues regarding the validity of the 2008 Operating Agreement, which is

“beyond the scope of the current litigation.” Docket No. 338 at 29-30. The Special Master should likewise disallow the introduction of evidence on the Fourth Counterclaim against Texas, which merely reiterates New Mexico’s dissatisfaction with the 2008 Operating Agreement (to which Texas is not a party), and attacks only the actions of the United States in operating the Project.

B. Unjust Enrichment is Not Available to New Mexico, and in Any Event Is a Remedial Issue Not Set for this Trial

New Mexico improperly claims damages based on the doctrine of unjust enrichment, and the Special Master should issue an order excluding any such evidence in the upcoming trial. Unjust enrichment is a remedial quasi-contract doctrine and, where applicable, allows relief in the form of disgorgement (restitution) of monetary gains based on bad-faith actions of another. The doctrine of unjust enrichment exists in the “hazy realm” of quasi-contract and restitution. *See, e.g., Henning v. Wachovia Mortg., FSB*, 969 F.Supp.2d 135, 149 (D. Mass. 2013) (citing Restatement Third of Restitution and Unjust Enrichment, § 1). But a valid contract — and the Compact is a contract, *Texas v. New Mexico*, 482 U.S. 124, 128 (1987) — defines the obligations of the parties as to matters within its scope, displacing to that extent any inquiry into unjust enrichment. Restatement Third of Restitution and Unjust Enrichment, § 2(2).

It is premature to even consider evidence on the issue of unjust enrichment at this point in this case. The upcoming trial is limited to liability issues and the claimant and counter-claimant have been injured in a more than de minimis way. June 4, 2021 Order (Docket No. 508) at 2, ¶ 3. The Special Master has split off any and all issues about the quantification of damages and the determination of remedies for some later phase of the case, after the Supreme Court has acted on the Special Master’s report at the end of the liability

phase. *Id.* It is simply premature to inject that issue, and evidence and testimony relevant to it, in the case at this point.

The requirements and duties imposed by the Compact have to be determined before issues of Project operations under the 2008 Operating Agreement can be evaluated, (Docket No. 338 at 15) — and it remains to be seen whether this original proceeding could ever be the appropriate forum for any such evaluation. This is “not an action to enforce a Reclamation contract,” *id.* at 18, such as the 2008 Operating Agreement. The Special Master was clear in last year’s order: “[T]his is neither the time nor the forum to address the validity of the 2008 Operating Agreement.” *Id.* at 29. Consideration of its legal viability is “premature.” *Id.*

C. *The Special Master Should Exclude Introduction of Evidence or Argument on New Mexico’s Fourth Counterclaim*

New Mexico should be precluded from proffering evidence and testimony in the trial on its Fourth Counterclaim, including whether operations under the 2008 Operating Agreement have unjustly benefitted Texas, an agreement to which neither Texas nor New Mexico are parties, and subjected Texas to some kind of monetary offset for the damages Texas has suffered because of New Mexico’s Compact violations over the years.

5. **Motion in Limine 5: to exclude the introduction of evidence at trial of improper legal opinions**

In light of the evidence already offered by New Mexico expert witness Estevan R. Lopez, P.E., who previously testified to topics admittedly outside the scope of his area of expertise, including legal conclusions on the meaning of Rio Grande Compact terms⁸

⁸ State Of Texas’s Objections and Reply to The State Of New Mexico’s Consolidated Statement Of Facts And Appendix 1 Filed By New Mexico In Response To Texas’s Motion For Partial Summary Judgment.

(Docket No. 460) at 5-10, there are undoubtedly reliability concerns regarding the basis upon which he will seek to offer such testimony and opinions at trial.

For example, Mr. Lopez testified as follows:

- Remote Oral and Videotaped Deposition of Estevan Lopez, Vol. 1 (Jul. 6, 2020)⁹:
 - At 25:2-8: “Q. The first thing I want to do is if I understood your testimony with respect to the first report, you are not purporting . . . to be an expert regarding legal questions; . . . is that correct? A. That’s correct. I’m not -- not an attorney. I don’t purport to be an expert on law or legal questions.” TX_MSJ_007358.

New Mexico lists Mr. Lopez as a will-call witness, and Texas anticipates that New Mexico will seek to introduce Mr. Lopez’s improper legal opinions regarding the meaning of the Rio Grande Compact at trial, despite Mr. Lopez’s assurance that he is not “an expert on law or legal questions.”

WHEREFORE, Texas requests the Special Master issue an order excluding the introduction of improper legal opinion evidence at trial.

6. **Motion in Limine 6: to exclude the introduction of evidence at trial of expert opinions outside the scope of the proffered expert’s area of expertise**

Texas requests that the Special Master exclude the introduction of any testimony or opinions offered by a party expert who asserts the truth of facts to which the expert has no personal knowledge and who opinions on any subject matter outside of that expert’s area of expertise. Federal Rule of Evidence 702, is instructive here, “establishes a standard of evidentiary reliability” applicable to all expert witnesses, not just scientists. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 591 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999). As the gatekeeper to the admission of evidence at trial, it is the

⁹ Excerpts from Mr. Lopez’s depositions cited herein are attached as **Exhibit A** to the Deitchman MIL Decl.

Special Master’s responsibility to determine whether the testimony or opinion “has a reliable basis in the knowledge and experience of [the relevant] discipline.” *Kumho*, 526 U.S. at 149 [internal quotations omitted]. Where a purported expert cannot “employ[] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field” because of a lack of personal experience or professional knowledge, the Special Master cannot ensure the reliability nor the relevancy of the expert’s testimony. *Id.* at 152. New Mexico disclosed declarations for witnesses Margaret Barroll, Ph.D. and Estevan R. Lopez, P.E., that include topics and opinions that Dr. Barroll and Mr. Lopez previously testified to be outside the scope of their respective expertise (Docket No. 460 at 5-10). Such testimony raises reliability concerns and should be excluded.

In briefing on the motions for summary judgment, the Barroll Declarations (numbered NM-EX 001, NM-EX 006, and NM-EX 014) included references to and interpretation of the 1938 Rio Grande Compact, a topic on which Margaret Barroll (hereinafter referred to as “Margaret Barroll” or “Peggy Barroll”) testified at multiple depositions in this litigation, is outside her expertise:¹⁰

- Oral and Videotaped Deposition of Peggy Barroll, Vol. 2 (Feb. 6, 2020):
 - At 313:15-21: “Q. Do you have an opinion -- an expert opinion about the quantity of water that was apportioned to Texas under the 1938 Compact? A. Well, Texas -- I don’t regard myself as an expert on the Compact or what the Compact law is.” TX_MSJ_007284.
 - At 318:8-12: “Q. What period was used for the Colorado delivery requirements to New Mexico within the Compact? A. I’m afraid I don’t know the Compact that well that I could tell you.” TX_MSJ_007289.
- Oral and Videotaped Deposition of Peggy Barroll (July 9, 2020):
 - At 27:21-25: “Q. I think we established at your first deposition that you’re not an expert on the Compact itself; is that -- is that -- do I recall

¹⁰ Excerpts from Dr. Barroll’s depositions cited herein are attached as **Exhibit D** to the Deitchman MIL Decl.

- that correctly? A. I'm not an expert on the Compact itself." TX_MSJ_007305.
- Oral and Videotaped Deposition of Peggy Barroll, Vol. 2 (Aug. 7, 2020):
 - At 188:22-25: "A. I think that the -- my understanding from a Compact perspective that -- that if EBID is shorted, then New Mexico, under the Compact, is shorted. But, again, as we said earlier, I'm not a Compact expert." TX_MSJ_0007261.

The Lopez Declarations (numbered NM-EX 003, NM-EX 008, and NM-EX 015) and the Lopez Reports (NM-EX 107 through NM-EX 110) included legal conclusions, historical information, and statements regarding the operation of the Project, all topics on which Mr. Lopez testified at depositions in this litigation are outside his expertise:¹¹

- Oral and Videotaped Deposition of Estevan Lopez (Feb. 26, 2020):
 - At 15:8-18: "Q. . . . what's the purpose of having your testimony in this case? Do you have an understanding of that? A. Well, I think the purpose is as laid out in this case, but more broadly and more generally, I think this case is about the Compact and so, at least from my perspective, it seems appropriate to give us some perspective about that Compact. Q. Based on your time as head of the Interstate Stream Commission? A. Primarily. That's -- that's what I worked on." TX_MSJ_007340.
 - At 22:2-7: "Q. . . . which [Reclamation project] have you had specific experience with operations of? [objection omitted] A. Well, I think I've had specific -- not to say I've operated them. I haven't operated a single one of them." TX_MSJ_007343.
 - At 23:1-3: "Q. Now, when you were at Reclamation, what was your involvement with the Rio Grand Project." A. None." TX_MSJ_007344.
- Remote Oral and Videotaped Deposition of Estevan Lopez, Vol. 1 (Jul. 6, 2020):
 - At 25:2-8: "Q. The first thing I want to do is if I understood your testimony with respect to the first report, you are not purporting - -to be an expert regarding legal questions; - -is that correct? A. That's correct. I'm not -- not an attorney. I don't purport to be an expert on law or legal questions." TX_MSJ_007358.
 - At 26:24-7: "Q. And the same is true with respect to - -the historical information you provide in your report; you're not offering that as a expert historian, but rather based on stuff you read? [objection omitted] A. That's -- that's correct. I am not the expert historian." TX_MSJ_007359-007360.

¹¹ Excerpts from Mr. Lopez's depositions cited herein are attached as **Exhibit A** to the Deitchman MIL Decl.

WHEREFORE, Texas requests an order from the Special Master excluding the introduction of evidence as to the truth of facts to which the witness has no personal knowledge and asserts opinions on topics outside of their expertise. The declarations and testimony of Margaret Barroll and Estevan Lopez highlight this issue. Accordingly, any and all evidence offered outside of the subject matter expertise of a witness is unreliable and, therefore, inadmissible.

Dated: July 20, 2021

Respectfully submitted,

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**Counsel of Record*

No. 141, Original

In the
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

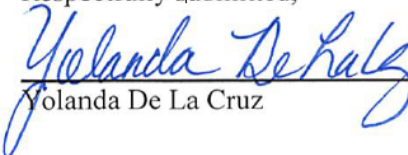
Defendants.

OFFICE OF THE SPECIAL MASTER

CERTIFICATE OF SERVICE

This is to certify that on this 20th day of July, 2021, I caused a true and correct copy of The State of Texas's Motions in Limine to be served upon all parties and *amici curiae*, by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was effected by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Respectfully submitted,


Yolanda De La Cruz

Dated: July 20, 2021

SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE

PARTIES
(Service via Electronic Mail)

SPECIAL MASTER

Special Master	Honorable Michael J. Melloy <i>Special Master</i> United States Circuit Judge 111 Seventh Avenue, S.E. Box 22 Cedar Rapids, IA 52401 Michael E. Gans, Clerk of Court United States Court of Appeals – Eighth Circuit Thomas F. Eagleton United States Courthouse 111 South 10th Street, Suite 24.329 St. Louis, MO 63102	TXvNM141@ca8.uscourts.gov (319) 432-6080 TXvNM141@ca8.uscourts.gov (314) 244-2400

In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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In the Supreme Court of the United States, Original No. 141
State of Texas v. State of New Mexico and State of Colorado

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