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 CONSOLIDATED RESPONSE IN OPPOSITION TO NEW MEXICO'S MOTIONS IN LIMINE

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August 5, 2021

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The State of Texas (Texas) hereby submits this consolidated response in opposition to the following Motions in Limine:

1. State of New Mexico's *Daubert* Motion in Limine to Exclude Opinions Offered by Dr. Willian Hutchison (Hutchison Daubert MIL);

2. State of New Mexico's *Daubert* Motion in Limine to Exclude Opinions Offered by Dr. George Hornberger (Hornberger MIL);

3. State of New Mexico's *Daubert* Motion in Limine to Exclude Opinions Offered by Dr. Joel Kimmelshue and Mica Heilmann (Land IQ MIL);

4. New Mexico's Motion in Limine to Exclude Testimony of Dr. Robert J. Brandes (Brandes MIL); and

5. New Mexico's Motion in Limine to Limit the Scope of Testimony of Dr. William Hutchison (Hutchison Scope MIL).

INTRODUCTION

A. *Daubert* Motions: The State of New Mexico (New Mexico) has moved to exclude the testimony of Texas's experts Dr. William Hutchison, Dr. Joel Kimmelshue and Ms. Mica Heilmann (collectively "Land IQ") and Dr. Hornberger (collectively "Texas experts") under the authority of *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993), and its progeny. The Hutchison Daubert MIL, Land IQ MIL, and Hornberger MIL however, have little to do with the proper application of *Daubert* and instead simply express New Mexico's disagreement with opinions expressed by Texas's experts. New Mexico's disagreements with the Texas experts is not the proper focus of a *Daubert* inquiry. *See Daubert,* 509 U.S. at 595. The New Mexico "Daubert" motions, in reality, are an attempt at premature cross-examination. Each of New Mexico's Daubert motions should be denied.

B. In addition to its Daubert motions, New Mexico has moved to exclude the testimony of several of Texas's experts based on its continued misinterpretation of the timeline and requirements for disclosure of Texas's testimony that responds to or addresses

New Mexico's expert opinions. The Brandes MIL and Hutchison Scope MIL merely repackage arguments made in New Mexico's Objections to and Motion to Strike Texas's Late-Filed Expert Opinions (Feb. 12, 2021) (NM February Motion) and seek to limit expert testimony based on a failure to recognize the Special Master's direction that "[i]t is not necessary to file a supplemental report in order to critique or disagree with the opinion, conclusions, and facts set out by any other expert to this case." Special Master's August 18, 2020 Order (Docket No.[1] 390 at 2). Drs. Brandes and Hutchison's anticipated testimony is not "new." New Mexico's recurrent disregard for the Special Master's August 18, 2020 Order to attack legitimate expert testimony is a meritless distraction, and the Special Master should deny the Brandes MIL and the Hutchison Scope MIL.

ARGUMENT

I. Authority: Motions in Limine and *Daubert* in Original Jurisdiction Actions

The purpose of a motion in limine is to obtain a ruling in advance of trial on the admissibility of evidence that would confuse or mislead the factfinder. *See* Fed R. Evid. 402; Fed. R. Evid. 403; *see also Luce v. United States*, 469 U.S. 38, 40 n.2 (1984) (a motion in limine is intended "to exclude anticipated prejudicial evidence before the evidence is actually offered."). The need to prevent the introduction of prejudicial evidence, however, is less acute when the trier of fact is a judicial officer instead of a lay jury.

> The term "in limine" means "at the outset." *Black's Law Dictionary* 803 (8th ed. 2004). A motion in limine is a procedural mechanism to limit in advance testimony or evidence in a particular area. In the case of a jury trial, a court's ruling 'at the outset' gives counsel advance notice of the scope of certain evidence so that admissibility is settled before attempted use of the evidence before the jury. Because the judge rules on this evidentiary motion, in the case of a bench trial, a threshold ruling is generally superfluous. It

[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.

> would be, in effect, 'coals to Newcastle,' asking the judge to rule in advance on prejudicial evidence so that the judge would not hear the evidence. For logistical and other reasons, pretrial evidentiary motions may be appropriate in some cases. But here, once the case became a bench trial, any need for an advance ruling evaporated.

United States v. Heller, 551 F.3d 1108, 1111-12 (9th Cir. 2009) (internal citations omitted).

The *Daubert* standard for admissibility focuses on relevancy and reliability, not disputed factual issues. The Supreme Court decided *Daubert* in the context of toxic tort litigation, where arguably the most pressing policy concern was that juries would be misled by experts offering novel, untested theories, or even "junk science." *See Daubert*, 509 U.S. at 595-97 (new standard will prevent "befuddled juries"). Further, nothing in *Daubert* or its progeny changed the fundamental rule that the factual basis of an expert opinion "goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Hose v. Chi. Nw. Transp. Co.* 70 F.3d 968, 974 (8th Cir. 1995); *accord Southland Sod Farms v. Stover Seed Co*., 108 F.3d 1134, 1143 (9th Cir. 1997) ("[t]echnical unreliability goes to the weight accorded a survey, not its admissibility") (citations omitted); *Kannankeril v. Terminix Int'l, Inc.,* 128 F.3d 802, 807, 809 (3d Cir. 1997) (reversing exclusion of expert based on "insufficient factual foundation" and cautioning that the "trial judge must be careful not to mistake credibility questions for admissibility questions").

This case is an original jurisdiction action before the United States Supreme Court, which has been assigned to a special master for the purpose of taking evidence, creating a complete record, and making recommendations to the Court for its independent review. The Federal Rules of Evidence do not formally apply but do provide guidance for the Court and Special Master in the exercise of its original jurisdiction. Sup. Ct. R. 17.2. New Mexico

seeks to exclude various witnesses from testifying either in full or in part, despite the fact that there is no risk for prejudice; there is no danger of misleading a jury and the special master is capable of viewing the evidence without being confused or misled.

In, *Kansas v. Nebraska & Colorado*, No. 126 Original, Special Master William J. Kayatta described the need for pretrial *Daubert* motions as follows:

> [W]ere this a jury trial we were approaching, that's something I would have – I would give very significant weight to. Here though, not only is it a nonjury proceeding, but it's also a proceeding where part of my job is not just to be the trial judge, but also to compile a record for independent review of my recommendations. So I would be very surprised if there were a *Daubert* issue that could be raised prior to trial that would cause me to strike a witness's testimony and not even have it presented at trial. It seems to me a much more efficient manner to proceed is bring the expert, put him on, make the *Daubert* and other objections; and I can share my views both on the *Daubert* issue and on what I think of the expert testimony as well. Transcript, Telephone Conference before Special Master William J. Kayatta, Jr.*, Kansas v. Nebraska & Colorado*, Orig. 126, at 62:20-63:13 (Mar. 23, 2012)

Special Master Kayatta further explained that his reluctance to entertain *Daubert* motions rested on "the structure of this proceeding and given what would be [his] caution in constructing a record that allows the Court to make an independent judgement, if it should disagree, and not wanting to have a path unnecessarily cut off that would require a remand. *Id.* at 63:15-21. Special Master Barton H. Thompson, Jr. in *Montana v. Wyoming & North Dakota*, No. 137 Original, followed Special Master Kayatta: "So I think Daubert is relevant in a proceeding of this nature . . . [b]ut I don't see any prejudice here to waiting to rule until after the presentation of the testimony." Transcript of Final Pretrial Hearing, *Montana v. Wyoming & North Dakota*, No. 137 Orig.,[2] (Oct. 15, 2013) at 29:24-30:2.

[2] *See Montana v. Wyoming & North Dakota*, No. 137 Original Docket at http://web.stanford.edu/dept/law/mvn/.

New Mexico's motions fail to account for the reality that this is a proceeding before a special master arising under the Supreme Court's original jurisdiction. New Mexico's motions do not cite to *any* authority regarding motions in limine or *Daubert* in an original jurisdiction proceeding. Moreover, the positions advanced by counsel of record for New Mexico in this case are directly contrary to the position they took on behalf of the State of Montana, in *Montana v. Wyoming & North Dakota*, No. 137 Original. In fact, it was the arguments of New Mexico's counsel of record that persuaded Special Master Thompson to deny the *Daubert* motions filed in that case, citing in part Special Master Kayatta's *Daubert* summary (quoted above). Now, on behalf of New Mexico, these same counsel only this time on behalf of New Mexico advocate to the United States Supreme Court for a completely opposite position, neglecting to cite any Supreme Court precedent on the role of motions in limine in an original jurisdiction proceeding that would justify their change of position. As explained by New Mexico's attorneys (then representing Montana) in *Montana v. Wyoming & North Dakota*, the exclusionary rules of evidence do not apply in a non-jury trial arising under the Court's original jurisdiction and the special master "has an obligation to provide the Court with a complete record." *See* State of Montana's Consolidated Response in Opposition to Wyoming's Motions in Limine to Exclude Scientific Literature Identified as Exhibits and to Exclude Affidavits Identified as Exhibits by Montana. *Montana v. Wyoming & North Dakota*, No. 137 Orig., (Oct. 7, 2013) at 5 (argument signed by John B. Draper as Counsel of Record for the State of Montana, with co-counsel Jeffrey Wechsler).[3]

[3] For the convenience of the Special Master, a copy of counsel for New Mexico's brief from *Montana v. Wyoming & North Dakota*, No. 137 Original is attached as Exhibit A to the Declaration of Richard S. Deitchman in Support of the State of Texas's Consolidated Response in Opposition to New Mexico's Motions in Limine (Deitchman MIL Response Decl.).

Based on the precedent in original jurisdiction actions (as advocated by counsel for New Mexico (on behalf of Montana) in *Montana v. Wyoming & North Dakota*), the Special Master should deny New Mexico's motions in limine and allow for the development of a complete record.

II. Response in Opposition to "Daubert" Motions (Hutchison Daubert MIL, Land IQ MIL, and Hornberger MIL)

Daubert is about the admissibility of an expert's testimony, not the weight the testimony should carry with the trier of fact. New Mexico casts as *Daubert* motions what, in fact, could be the cross examination of Drs. Hutchison and Kimmelshue, Ms. Heilman and Dr. Hornberger. New Mexico's Daubert motions are an improper attempt to have the special master exclude testimony that would otherwise be helpful to analyze the issues set for trial. In this regard, New Mexico's motions do not attack the experts' qualifications, rather they rely on blanket assertions that New Mexico's theory of the case is correct, therefore Texas's anticipated testimony is irrelevant and should be excluded. While Texas understands why New Mexico seeks to avoid a trial on the merits, the motions are nonetheless contrary to *Daubert* principles and do not comport with the proper structure and scope of an original jurisdiction trial before a special master.

A. Dr. Hutchison's Testimony Regarding the Texas Model is Relevant and Reliable.

The Hutchison Daubert MIL is not really a *Daubert* motion, rather it is a request to exclude Dr. Hutchison's testimony because his testimony does not correspond to New Mexico's position in this litigation. In particular, New Mexico disputes the fundamental questions underlying Dr. Hutchison's work, probes the inputs to his model, and disputes the time-step used for the model simulations. Hutchison Daubert MIL at 1-2. These are issues

for cross-examination, not *Daubert* challenges and New Mexico will have the opportunity to address its disagreement with the details of Dr. Hutchison's model on cross-examination.

Dr. Hutchison holds a Ph.D. from the University of Texas at El Paso and has over 35 years of groundwater consulting experience. He was retained by Texas in late 2012 to review existing groundwater models in the region, develop the Texas groundwater model used in this case, and to review of the work of New Mexico's experts. *See* Expert Report of William R. Hutchison, Ph.D., PE., P.G. (May 31, 2019) (Hutchison Expert Report) at 4, 7, and 9.[4] His modeling work arises from the issues set forth in Texas's Bill of Complaint, and he specifically addresses the following questions:

(1) What is the nature and extent of hydrologically connected groundwater and its relationship to the Rio Grande and the Rio Grande Project and the relevant issues raised in the Texas Complaint?

(2) What was the 1938 condition that should be used as the basis upon which to judge New Mexico's actions and the effect of those actions?

(3) Have New Mexico's actions depleted the quantity of water available below Elephant Butte Reservoir, and if so, (a) what was the cause of these depletions and (b) what was the extent (quantification) of these depletions?

(4) If groundwater pumping in New Mexico were regulated to control the amount of water pumped, would it decrease or eliminate the effects on surface flows in the Rio Grande? Would the system recover to levels that existed in 1938 (i.e., the baseline condition)? If so, how long would it take to recover?

[4] A copy of excerpts from Dr. Hutchison's May 31, 2019 report is attached as Exhibit B to the Deitchman MIL Response Decl.

Hutchison Expert Report at 9-10. Each of these questions arise directly from Texas's Complaint and are thus germane to the upcoming trial.

Texas has designated Dr. Hutchison as a will-call witness and summarized Dr. Hutchison's expected testimony as follows:

> Dr. Hutchison's expected testimony will include, without limitation, the subjects and issues raised, and matters and opinions discussed, in his expert reports and disclosures, supplemental disclosures, declarations, and depositions, as well as responses at trial to evidence presented. The general nature of the expert testimony includes the design and development of a groundwater model to address the issues raised by the Texas Complaint. He will testify regarding the groundwater-surface water interaction on the Rio Grande in the Rincon and Mesilla Valleys, the definition of the 1938 Depletion Condition, the impact of groundwater pumping in the Rincon and Mesilla Valleys on Rio Grande flows, and the impact of groundwater pumping in the Hueco Bolson on New Mexico. He will discuss various simulations he has run with the Texas groundwater model. Further, he will express opinion formed as a result of his review of the New Mexico groundwater and ILRGM models. Also, Dr. Hutchison will provide preemptive rebuttal testimony to issues raised by New Mexico. Dr. Hutchison may also provide further analysis of the technical work undertaken by Ms. Moran.

The State of Texas's Witness List Pursuant to Section III of the April 9, 2021 Trial Management Order (Texas Witness List (Jun. 30, 2021).[5]

New Mexico asks the Special Master to exclude Dr. Hutchison's testimony on the simple basis that its experts do not agree with Dr. Hutchison. For example, relying entirely on New Mexico expert Gregory Sullivan, New Mexico argues that "[t]o understand whether groundwater pumping with the Project area has impacted historical Project deliveries, it is necessary to develop and apply a robust simulation model of the entire Project." Expert Report of Gregory K. Sullivan and Heidi M. Walsh, revised July 15, 2020 (Sullivan Expert Report) at 112, 141. Hutchison Daubert MIL at 5 (emphasis omitted). As another example,

[5] A copy of the Texas's Witness List is attached as Exhibit C to the Deitchman MIL Response Decl.

relying entirely on New Mexico expert Gilbert Barth, New Mexico argues that "the decision to implement an annual time step renders Dr. Hutchison's model incapable of accurately representing anything other than Rio Grande flows at the El Paso gauge for the entire year . . . [citing Barth Expert Report at 9-7]." Hutchison Daubert MIL at 8. Texas disputes the testimony and opinions of both Mr. Sullivan and Mr. Barth. Texas will seek to discredit these opinions through its own experts' testimony and cross examination. Not through an in limine motion.

In contrast, on the basis of New Mexico's own ultimate and self-serving conclusions as to the propriety of Dr. Hutchison's methods, New Mexico argues that Dr. Hutchison's work is unreliable and should be excluded. But qualified, reliable expert testimony is admissible if it helps the trier of fact understand the evidence or determine a fact in issue. *See* Fed. R. Evid. 702; *United States v. Cohen*, 510 F.3d 1114, 1123-25 (9th Cir. 2007). Dr. Hutchison's expert testimony is essential to a complete understanding of the facts and issues in this action, in particular foundational issues set forth in Texas's Complaint.

Testimony is not unreliable and subject to a *Daubert* challenge simply because the other side does not agree with it. That is, however, the position New Mexico seeks to advance here. There can be no reasonable dispute that Dr. Hutchison's work is directly relevant to the issues set forth in Texas's Complaint. New Mexico and its experts simply do not like what he plans to say. The Special Master will have the opportunity to hear from both Dr. Hutchison and New Mexico's experts at the trial. The Hutchison Daubert MIL is not a proper *Daubert* motion, it is just a preview of cross-examination, and should be denied.

B. Land IQ's Work is Reliable.

Among other tasks, Dr. Kimmelshue and Ms. Heilmann[6] mapped agricultural lands in the Lower Rio Grande and determined historic consumptive use. *See* Declaration of Joel Kimmelshue, Ph.D., CPSS in Support of the State of Texas's Consolidated Response in Opposition to the State of New Mexico's Motions in Limine (Kimmelshue Decl.) ¶ 4. New Mexico seeks to exclude the Kimmelshue and Heilmann testimony regarding Land IQ's crop classification because New Mexico thinks Land IQ's methodology is unreliable. Land IQ MIL at 7. The Land IQ MIL relies on a selective and mistaken factual record and fails to acknowledge that the components of Land IQ's mapping methodology are all peer-reviewed and Land IQ's mapping methodology is commonly used by a wide range of governmental and private entities throughout the western United States. Like the Hutchison Daubert MIL, the Land IQ MIL relies on New Mexico's own unsupported assertions to argue that Dr. Kimmelshue and Ms. Heilmann's anticipated testimony should be excluded. The Special Master should deny the Land IQ MIL.

The Land IQ MIL relies on characterizations of the record that are demonstrably false. First, New Mexico omits all deposition testimony where Dr. Kimmelshue or Ms. Heilmann did in fact respond to each of the specific areas which New Mexico claims were not answered. New Mexico alleges that Dr. Kimmelshue initially declined to answer several questions at his September 19, 2019 deposition, but that he "later answered some questions about the Land IQ Methodology, but did not provide detailed information." Land IQ MIL at 2. In fact, Dr. Kimmelshue and/or Ms. Heilmann subsequently responded in detail to each of the subject questions. Dr. Kimmelshue answered two of the subject questions later that same day. Joel

[6] Dr. Kimmelshue and Ms. Heilmann are the founding principals of Land IQ.

Kimmelshue 9/19/2019 depo., at 151:13 – 153:19; 160:24 – 162:8.[7] Mica Heilmann answered the third of the subject questions at her June 6, 2020 deposition. Mica Heilmann 6/6/2020 depo., at 50:16 – 51:15.[8]

New Mexico next complains that Land IQ has never disclosed the "software" containing their crop classification method's "proprietary algorithms." Land IQ MIL at 2, 3. But, New Mexico has all relevant testimony explaining that there is no specific software or proprietary algorithms in the first place: 1) the only software tools Land IQ relies on are publicly available, and 2) the "method" itself is in fact the entire process, start to finish, of collecting data, processing that data, and refining the results the process generates. *See* Kimmelshue 6/5/2020 depo., at 171:4-13 ("Q. I think you actually called it the algorithm, I thought, in your first report? A. Well, I'm correcting myself now. I recall the process more than an algorithm. There's not a set algorithm where you push a button and it spits out the crop classification for every field.")[9]; *See* Heilmann 6/6/2020 depo., at 31:22 – 34:8.[10]

Finally, New Mexico editorializes Ms. Heilmann's testimony regarding the reproducibility of the results from crop classification process, misquoting her as saying she "agreed" that "it is likely impossible to ever exactly replicate the results." Land IQ MIL at 4. New Mexico's quote was the question Ms. Heilmann was *asked*; but New Mexico's MIL quotes *nothing* from her response. Ms. Heilmann absolutely did not agree with New

[7] A copy of excerpts from Dr. Kimmelshue's 9/19/2019 deposition is attached as Exhibit D to the Deitchman MIL Response Decl.
[8] A copy of excerpts from Ms. Heilmann's 6/6/2020 deposition is attached as Exhibit E to the Deitchman MIL Response Decl.
[9] A copy of excerpts from the 6/5/2020 Kimmelshue deposition is attached as Exhibit F to the Deitchman MIL Response Decl.
[10] *See* Exhibit E to the Deitchman MIL Response Decl.

Mexico's statement that it would be "impossible to ever exactly replicate results." *See* Heilmann 6/6/2020 depo., at 29:8 – 30:21[11]:

> A. . . . the process, in general, can be replicated closely.
> Q. And how would somebody replicate it?
> A. By following the steps in this process. I could go into detail.
> Q. . . . [I]f you don't have the algorithms, you know, if you don't have the exact code that you're using, could you really replicate it?
> A. Yes. . . . Our use of the term algorithm is a case of process and that process is outlined in this document and so a person following a similar -- similar steps here . . . they could produce the same types of results. The steps that are made by analysts, decisions on exactly where to stop that modeling process and where to hand it off to the -- the remote sensing or the photo interpretive analyst, those are decision points that -- that would be different with different humans, but ultimately should be able to get to very similar results.

The Land IQ MIL falsely describes the record—Land IQ's methodology was available to New Mexico, and New Mexico had the opportunity to depose Land IQ's staff on multiple occasions. Using the inaccurate record that it has created, New Mexico argues that Land IQ's crop classification methodology is unreliable, in part based on conflicts with New Mexico's expert's crop classification. Land IQ MIL at 4. New Mexico expert David Jordan's disagreement with Land IQ's crop classification is not a relevant factor in determining the admissibility of the Land IQ testimony.[12]

Significantly, Land IQ's crop classification methodology has been proven to be inherently reliable. Land IQ employed peer-reviewed processes in order to develop its opinions in this case. First, Land IQ engaged in three different ground truthing efforts in 2014 and 2018 to compare results from remotely sensed images (aerial photographs, LANDSAT, and similar types of images) to on-the-ground conditions. *See* Kimmelshue Decl. ¶¶ 5-6.

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[11] *See* Exhibit E to the Deitchman MIL Response Decl.
[12] Texas disputes that Mr. Jordan's 2006 mapping creates a standard by which land classification can be judged in this case.

Through ground truthing, Land IQ identified crops in fields in the Elephant Butte Irrigation District and compared those results to the imagery. *Id.* ¶ 6. Their ground truthing method is a peer-reviewed method, that was also used by New Mexico's experts in this case. *Id.*

Second, Land IQ used peer reviewed methods, referred to in the literature as "random forest" methods and other machine-learning models, to create training data used to calibrate remote sensing models. Kimmelshue Decl. ¶ 7. In particular, Land IQ used these machine-learning models to extract data from remotely sensed images that include both fields where crops were identified during ground truthing and fields that were not identified during ground truthing. *Id.* By doing this, the models identify patterns for each crop in the classification; these patterns were used on fields that were not ground truthed to find other similar "fingerprints" within the remainder of the images. *Id.* In this manner, each field is classified by crop. All methods used to create training data in the classification process have been peer-reviewed. *Id.*

Land IQ's next step is to have highly trained agronomists comparing the output from the machine-learning based classifications with the actual images. Kimmelshue Decl. ¶ 8. This process involves an agronomist doing a manual check to compare the computer modeled and known output. *Id.* The manual check on machine learning output is a peer-reviewed process. *Id.*

Finally, Land IQ performed an accuracy check by creating a table that displays the number of fields predicted by the machine process that were the same as those identified in the ground-truthing exercise. Kimmelshue Decl. ¶ 9. For this work, Land IQ had an error rate of approximately 3 percent. *Id.* Land IQ's accuracy table assessment is a peer-reviewed process. *Id.*

In addition to employing peer-reviewed processes, Land IQ's methodology is a ubiquitous method for crop classification in the western United States and beyond. Kimmelshue Decl. ¶¶ 10-12. As described in the Kimmelshue Declaration., Land IQ's crop classification processes are used by state agencies throughout California (e.g., Department of Water Resources, Department of Food & Agriculture, Air Resources Board, multiple Groundwater Sustainability Agencies), commodity and trade organizations throughout the United States (e.g., American Pecan Council, including all of the pecan acres in New Mexico; Almond Board of California), and mapping of agricultural lands in 14 states and Mexico. *Id.* The Land IQ crop classification methodology was used to map over 10 million acres of agricultural land in both 2019 and 2020. *Id.*

New Mexico misstates the record regarding Land IQ's crop classification methodology. Land IQ's crop classification is both reliable and commonly used throughout the United States and is thus admissible in this proceeding. The Special Master should deny the Land IQ MIL.

C. New Mexico's Criticism of Dr. Hornberger's Work Goes to the Weight to be Afforded any Potential Rebuttal Testimony.

Even though New Mexico acknowledges that Dr. Hornberger does not appear on Texas's witness list,[13] the Hornberger MIL seeks to exclude Dr. Hornberger as a rebuttal witness at trial. Hornberger MIL at 4. Under the guise of *Daubert*, New Mexico argues that Dr. Hornberger's potential rebuttal opinions are speculative because New Mexico is not satisfied with the amount of time Dr. Hornberger spent working on this case. Hornberger MIL at 11. In the event Texas calls Dr. Hornberger as a rebuttal witness, New Mexico will

[13] Pursuant to the April 9, 20201 Trial Management Order (Docket No. 501 at 3) ("Parties are not . . . required to list rebuttal witnesses"), Texas reserves the right to call Dr. Hornberger as a rebuttal witness at trial.

have the opportunity to examine the facts and data that underly any of Dr. Hornberger's opinions, and the Special Master will afford weight to those opinions as he deems appropriate. Nothing in *Daubert* or its progeny changed the fundamental rule that the factual basis of an expert opinion "goes to the credibility of the testimony, not the admissibility, and it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Hose,* 70 F.3d at 974; *accord Southland Sod Farms* 108 F.3d at 1143. ("Technical unreliability goes to the weight accorded a survey, not its admissibility") (citations omitted); *Kannankeril,* 128 F.3d 802 at 807, 809 (reversing exclusion of expert based on "insufficient factual foundation" and cautioning that the "trial judge must be careful not to mistake credibility questions for admissibility questions").

While New Mexico may dispute the importance or validity of Dr. Hornberger's opinions, New Mexico's position has no bearing on the admissibility of Dr. Hornberger's testimony. The Special Master should deny the Hornberger MIL.

III. Response in Opposition to New Mexico's Scope of Testimony Motions (Brandes MIL and Hutchison Scope MIL)

New Mexico's Brandes MIL and Hutchison Scope MIL seek to limit the scope of Drs. Brandes' and Hutchison's legitimate expert testimony based on a recycled argument that disregards the Special Master's August 18, 2020 Order regarding the requirement to respond to another party's expert report and is based on a narrow view of Rules 26 and 37 of the Federal Rules of Civil Procedure.

In particular, New Mexico seeks to limit the scope of Dr. Brandes' anticipated testimony by exclusion of the following subjects: (1) New Mexico's failure to demonstrate impacts on New Mexico from any operations by irrigators or municipal provides in Texas,

(2) the work performed by Texas's expert Shane Coors, and (3) the 2008 Operating Agreement. Brandes MIL at 7-8.

For Dr. Hutchison, New Mexico requests exclusion of testimony in three areas: (1) the impact of groundwater pumping in the Hueco Bolson in New Mexico, (2) opinions formed as a result of Dr. Hutchison's review of the New Mexico groundwater and ILRGM models, and (3) analysis of the technical work undertaken by Jean Moran, the United States' modeling expert. *See* Hutchison Scope MIL at 10.

The motions rely on the identical arguments outlined in the NM February Motion. On March 23, 2021, Texas filed its Response to the State of New Mexico's Objections to and Motion to Strike Late-Filed Expert Opinions (Texas Response).[14] Texas incorporates by this reference the arguments contained in the Texas Response, which sets forth each category of testimony that New Mexico alleges is "late-filed" and explains that none of the subject opinions are "new." The parties have had years of discovery and there can be no reasonable basis for New Mexico to claim that it needs additional discovery to understand the subject opinions.

The Special Master has clearly spelled out the rules to be applied with respect to expert discovery: "It is not necessary to file a supplemental report in order to critique or disagree with the opinion, conclusions, and facts set out by any other expert to this case." Docket No. 390 at 2. In no event are New Mexico's motions to limit the scope of Drs. Brande's and Hutchison's testimony warranted. Texas has complied with all expert disclosure rules required by the Federal Rules of Civil Procedure and the Special Master's

[14] The Texas Response (Docket No. 495) is attached hereto as Attachment 1 for the Special Master's convenience.

Case Management Plan. None of the subject opinions or areas of testimony present any level of "surprise" to New Mexico because each derives from a disclosed expert opinion and/or depositions testimony of the expert. *See* Texas Response at 11-24. Moreover, New Mexico has been aware of these areas of anticipated testimony since the Drs. Brandes' and Hutchison's depositions, and certainly at least since the time for submission of summary judgement briefing. *See* Declaration of Robert J. Brandes, P.E. (Nov. 5, 2020) at TX_MSJ_000001; Declaration of William R. Hutchison (Nov. 5, 2020) at TX_MSJ_000657. New Mexico has sat on this issue for what it amounts to more than a year (i.e., since the expert depositions), and cannot now credibly claim prejudice for trial preparation.

The Special Master should deny the Brandes MIL and Hutchison MIL because the scope of their expert testimony is proper. Alternatively, in the event the Special Master determines that there is some arguable prejudice to New Mexico, which Texas submits there is not, the proper remedy would be to permit a supplemental deposition of Dr. Brandes and/or Dr. Hutchison in advance of their trial testimony. *See, e.g.*, *Michelone v. Desmarais*, 25 F. App'x 155, 159 (4th Cir. 2002) (late-filed expert report caused no prejudice where opposing party had two weeks before trial to take supplemental deposition of expert). In no case would exclusion of the subject testimony be appropriate and because this is an original jurisdiction proceeding exclusion is absolutely not permissible.

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CONCLUSION

For the reasons stated herein, the Special Master should deny all of New Mexico's motions in limine.

Dated: August 5, 2021

Respectfully submitted,

s/ Stuart L. Somach
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ATTACHMENT 1

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 RESPONSE TO THE STATE OF NEW MEXICO'S OBJECTIONS TO AND MOTION TO STRIKE TEXAS'S LATE-FILED EXPERT OPINIONS

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This brief is in response to the State of New Mexico's Objections to and Motion to Strike Texas's Late-Filed Expert Opinions (NM Motion).

I. INTRODUCTION

The State of New Mexico (New Mexico), in a filing one week *after* the close of briefing on the dispositive motions, moves to strike several paragraphs of expert declarations the State of Texas filed on November 5, 2020 and December 22, 2020, in support of Texas's partial summary judgment briefing. The NM Motion is replete with factual and procedural inaccuracies, selective and misleading citations to excerpts of the subject experts' reports and deposition transcripts, and blatant mischaracterizations of Texas's timely disclosed expert opinions. None of the opinions or statements that New Mexico seeks to strike are "new" and, following years of discovery, there can be no reasonable basis by New Mexico's experts to claim that they need additional discovery to understand the opinions stated by Texas's experts in support of the summary judgement briefing.

New Mexico's narrow view of Rules 26 and 37 of the Federal Rule of Civil Procedure (Rules), and the problem it creates for the orderly prosecution of this action, has been brought to the attention of the Special Master on several occasions. It was addressed by the Special Master most directly in the August 18, 2020 Order that was a response to questions raised by Texas over views expressed by New Mexico and the potential disruption that those views were having on the timely litigation of this case. The Special Master last addressed the issue generally in response to Texas's concern over the admissibility of rebuttal testimony responding to New Mexico experts' views about a model that it will undoubtably introduce at the time of trial. The Special Master has clearly and accurately spelled out the Rules to be applied: "It is not necessary to file a supplemental report in order to critique or disagree with

the opinion, conclusions, and facts set out by any other expert to this case." Order (Aug. 18, 2020), Special Master Docket (SM Docket) No. 390 at 2. The declaratory testimony offered by Texas and attacked by New Mexico falls within the scope of the order. Ironically, New Mexico has continually modified its experts' opinions in a series of supplemental reports which "supersede" previous reports and has continued to do so in order to have the last expert word, and to ensure that Texas cannot directly respond to the new reports. Nonetheless, the Texas experts' declarations that are the subject of the NM Motion are based on Texas's "existing theories of the case, modeling, and previously disclosed facts . . ." as reflected in the expert reports and deposition testimony described below. *Id.*

The NM Motion, like prior New Mexico assertions regarding the limits of Texas's legitimate expert opinions, is a distraction from the substantive issues set forth in Texas's summary judgment briefing. New Mexico's claims of prejudice are not credible, its motion seeks to collaterally attack Texas's motion for summary judgement for which the briefing schedule is closed, and exclusion of the subject expert declaration testimony is not warranted. The NM Motion should be denied in its entirety.

II. BACKGROUND

Texas filed its Motion for Partial Summary Judgment (Texas MSJ) on November 5, 2020. In support of the Texas MSJ, Texas filed the Declaration of Dr. Scott Miltenberger (Miltenberger November Declaration), the Declaration of Robert Brandes (Brandes November Declaration), and the Declaration of Bill Hutchison (Hutchison Declaration). On December 22, 2020, Texas filed its briefing in response to New Mexico's motions for partial summary judgment, which included the Declaration of Dr. Scott Miltenberger (Miltenberger

December Declaration) and the Declaration of Robert Brandes (Brandes December Declaration).

Previously, in May 2019, Texas disclosed Drs. Hutchison, Brandes, and Miltenberger as retained experts pursuant to the Special Master's Case Management Plan, as amended. In particular, on May 31, 2019, Texas disclosed the expert reports by those three experts.[1] New Mexico then conducted their first depositions of Drs. Hutchison, Brandes, and Miltenberger in September and October 2019. Subsequently, New Mexico disclosed its expert reports, and Texas filed rebuttal expert reports on December 30, 2019, including reports from Drs. Hutchison and Miltenberger. New Mexico again deposed Drs. Hutchison and Miltenberger in May and June of 2020. On August 18, 2020, the Special Master ordered that "[i]t is not necessary to file a supplemental report in order to critique or disagree with the opinion, conclusions, and facts set out by any other expert to this case." Order (Aug. 18, 2020), SM Docket No. 390, ¶ A(2). Pursuant to the Case Management Plan, as amended, discovery closed on August 31, 2020. New Mexico subsequently filed supplemental expert reports and disclosures on September 15, 2020. Notably, New Mexico's September 15, 2020 disclosures included expert reports and new opinions regarding New Mexico's Integrated Model that, by New Mexico's own admission, superseded all prior disclosures relating to the Integrated Model and resulting opinions and analyses. Transcript of Oct. 22, 2020 Deposition of Gregory K. Sullivan (Sullivan 10/22/2020 Dep. Tr.), 18:20-22, 19:14-21, excerpts from which are attached as Exhibit[2] 1.

[1] *Expert Report of Dr. William Hutchison* (May 31, 2019), *Expert Report of Robert J. Brandes* (May 31, 2019), and *Expert Report of Scott A. Miltenberger, Ph.D.* (May 31, 2019).

[2] Hereinafter "Exhibit" shall refer to Exhibits attached to the Declaration of Richard S. Deitchman in Support of Texas's Response to the NM Motion, filed concurrently herewith.

Pursuant to the Special Master's orders, the parties filed motions for partial summary judgment on November 5, 2020, responses to those motions on December 22, 2020, and reply briefs on February 5, 2021. Order and Amendment to Trial Management Schedule (Sept. 29, 2020), SM Docket No. 402, Exh. A; Order (Jan. 11, 2021), SM Docket No. 451. The Special Master held a hearing on the motions for partial summary judgment on March 9, 2021 and took the motions under advisement at the close of that hearing. Prior to the hearing but following the close of briefing on the motions for partial summary judgment, New Mexico filed the NM Motion, which seeks to strike declaration testimony submitted by Texas experts in support of the summary judgment briefing submitted on both November 5, 2020 and December 22, 2020. New Mexico did not address the propriety of the declaration testimony that is the subject of the NM Motion in either its December 22, 2020 response to the Texas MSJ or in its February 5, 2021 reply in support of its own motions for partial summary judgment.

By agreement of the parties, the Special Master set March 23, 2021 as the deadline for Texas to respond to the NM Motion. Order (Mar. 2, 2021), SM Docket No. 484.

III. LEGAL STANDARD

A. Federal Rule of Civil Procedure 56

Federal Rule of Civil Procedure (Rule) 56 provides that on summary judgment, "[a] party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence," Fed. R. Civ. P. 56(c)(2); a "declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated," Fed. R. Civ. P. 56(c)(4); and "[i]f a party fails to

properly support an assertion of fact . . . the court may," among other things, afford that party "an opportunity to properly support or address the fact," or "issue any other appropriate order." Fed. R. Civ. P. 56(e).

Further, in the summary judgment context, "the proper method for challenging the admissibility of evidence in an affidavit [or declaration] is to file a notice of objection to the challenged testimony." *Sum of $66,839.59 Filed in the Registry v. United States IRS*, 119 F. Supp. 2d 1358, n.1. (N.D. Ga. 2000). Objections should "go to the weight to be given to [that] testimony rather than its admissibility." *Id.*; *see also Lombard v. MCI Telcoms. Corp.*, 13 F. Supp. 2d 621, 625 (N.D. Ohio 1998) (the proper approach is to "disregard inadmissible evidence, not strike that evidence from the record.") (citing *State Mut. Life Assurance Co. v. Deer Creek Park*, 612 F.2d 259, 264 (6th Cir. 1979); *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 582 (6th Cir. 1992)).

B. Federal Rule of Civil Procedure 26 and 37

Rule 26 requires that a party's expert witness disclose, in a written report, "a complete statement of all opinions the witness will express" at trial, and the basis and reasons for them. Fed. R. Civ. P. 26(a)(2)(B)(i). Rule 37 provides that if a party fails to provide the information required by Rule 26(a), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1).

A district court's decision to admit documents over a Rule 37 challenge, on the ground the untimely disclosure was harmless or substantially justified, is reviewed for abuse of discretion. *Tex. A&M Research Found. v. Magna Transp., Inc.*, 338 F.3d 394, 402 (5th Cir. 2003) (citation omitted). "In evaluating whether a violation of [R]ule 26 is harmless, and thus

whether the district court was within its discretion in allowing the evidence to be used at trial," courts look to four factors: (1) the importance of the evidence; (2) the prejudice to the opposing party of including the evidence; (3) the possibility of curing such prejudice by granting a continuance; and (4) the explanation for the party's failure to disclose. *Id.*

Tex. A&M Research was a breach of contract case where, after trial, the plaintiff submitted an expert affidavit on damages supported by newly-disclosed invoices for expenses it had incurred allegedly resulting from the breach. *Id.* at 399. The 5th Circuit upheld the district court's decision to admit those invoices over a Rule 37 challenge. It reasoned that:

> [a]lthough [the plaintiff] failed to explain its failure to disclose, the prejudice to the adverse parties was negligible, because the witness in support of whose testimony the invoices were offered had been designated properly as a witness before trial. Further, ***any prejudice was cured by the approximately one month during which [the defendant] was allowed to examine and respond to the contested evidence***. The district court did not abuse its discretion in admitting the documentary evidence supporting the affidavit.

Id. at 402 (emphasis added).

In sum, the purpose of the expert disclosure rules is to facilitate a "fair contest" - thus, Rules 26(a) and 37(c)(1) "seek to prevent the unfair tactical advantage that can be gained by failing to unveil an expert in a timely fashion," which deprives an adverse party of "the opportunity to depose the proposed expert, challenge his credentials, solicit expert opinions of his own, or conduct expert-related discovery." *Poulis-Minott v. Smith*, 388 F.3d 354, 358 (1st Cir. 2004) (citations omitted).

Although Rule 37(c)(1) is traditionally invoked to preclude expert testimony at trial, it can also be applied to motions for summary judgment. *Poulis-Minott*, 388 F.3d 354 at 358 (citing *Lohnes v. Level 3 Communs*., Inc., 272 F.3d 49, 60 (1st Cir. 2001), and *Trost v. Trek Bicycle Corp*., 162 F.3d 1004, 1007-09 (8th Cir. 1998)). In *Lohnes* and *Trost,* the non-

moving party had failed to disclose even the *identity* of their expert witness prior to the close of discovery. *Lohnes*, 272 F.3d at 60 (plaintiff's failure to identify his expert until after the defendant had filed motion summary judgment "deprived the defendant of the opportunity to depose the proposed expert, challenge his credentials, solicit expert opinions of its own, or conduct expert-related discovery."); *Trost,* 162 F.3d at 1008 (defendant had prepared its summary judgment motion "at least partially premised on the lack of expert opinion to support [the plaintiff's] claims".). Conversely, in *Poulis-Minott*:

> [u]nlike the situation in *Lohnes* or *Trost*, [the movant] actually disclosed the identity of his experts and provided…expert designations that included the opinions the experts would express in accordance with the court's deadline for expert designations. The issue here is not that the experts' affidavits were entirely new and unannounced, but rather whether any new information was included in the expert affidavits that was not included in the "complete statement of all opinions to be expressed," as required by Rule 26(a).

Poulis-Minott, 388 F.3d 354 at 358.

In that case, a sea captain had taken out a fishing vessel on a solo trip and never returned, and the personal representative of the captain's estate sued the owner of the vessel, claiming they were liable. *Poulis-Minott,* 388 F.3d 354 at 356. In ruling on the motion to strike, the district court excluded some portions of the affidavits and not others—for example, the district court judge excluded a portion of the vessel-owner's expert affidavit which opined for the first time that "the Vessel was rammed," because the judge found it was not fairly disclosed in [the expert's] designation. *Id.* at 358-59. However, the judge admitted a different portion of the affidavit because "he determined that the contents of the sentence 'should come as no surprise in view of [the expert's] disclosure in his expert designation.'" *Id.* at 359.

IV. ARGUMENT

A. New Mexico's Motion Should Be Denied Because it is Untimely

As a threshold matter, the NM Motion should be denied because it is untimely. The NM Motion dated February 12, 2021 seeks to strike expert declarations filed on both November 5, 2020 and December 22, 2020, submitted in support of Texas's summary judgment briefing. By Order dated January 11, 2021, the Special Master set February 5, 2021 as the deadline for reply briefs on the motions for summary judgement. Order (Jan. 11, 2021), SM Docket No. 451 at 2. Rather than object to and/or seek to strike the subject expert declarations at the time set for opposition and/or reply to motions to summary judgment, New Mexico waited over three months to raise any objection to the November 5, 2020 expert declarations, and nearly two months to raise any objection to the December 22, 2020 expert declarations, and the NM Motion was filed after the briefing on the motions for summary judgment closed.

Remarkably, New Mexico neither acknowledges the briefing schedule set for the motions for summary judgment nor identifies any exceptional circumstances that might justify this two-to-three-month-long delay in raising a response to Texas's declarations, which Texas timely submitted in support of its motion. Accordingly, the NM Motion should be denied on this basis alone.

B. Texas Properly Submitted Expert Declarations in Support of the Now Complete Summary Judgment Briefing

1. Dr. Hutchison's Statements and Opinions in his November 5, 2020 Declaration Are Not "New"

Dr. Bill Hutchison, an expert retained and timely disclosed by Texas pursuant to Rule 26, submitted a declaration on November 5, 2020 (Hutchison Declaration) in support of

the Texas MSJ, a copy of which is attached as Exhibit 2. In the NM Motion, New Mexico seeks to strike paragraphs 35-66 of the Hutchison Declaration on its allegations that the Hutchison Declaration includes "new opinions on [New Mexico's] Integrated Model and conjunctive use." NM Motion at 25.

New Mexico argues that the Hutchison Declaration contains "new opinions concerning various simulation runs using [the Integrated Model] performed by New Mexico's experts, which were . . . disclosed in October 2019 (updated in July and September 2020)" and that "Texas had the opportunity to ask Dr. Hutchison to opine on the Integrated Model . . . in his rebuttal report." NM Motion at 1, 25. New Mexico's argument is both misleading and factually incorrect. 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. Transcript of 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 (excerpts of which are attached as Exhibit 3.). New Mexico subsequently updated the Integrated Model, and New Mexico did not disclose the final, operative version of the Integrated Model (Version 116) and its selected runs until September 15, 2020. Sullivan 10/22/2020 Dep. Tr. at 13:2-14, 18:20-22; Exhibit 1. According to Gregory Sullivan, New Mexico's Integrated Model expert, the September 15, 2020 Integrated Model results presented by various New Mexico experts in their supplemental reports, are based on an entirely new version of the Integrated Model than the results provided with New Mexico's July 15, 2020 expert reports. *Id*. at 18:20-22, 19:14-21. ("This [September 15] rebuttal report . . . has replaced the prior reports in the piece related to model runs. Q. Okay. So in terms of the model, if our experts are looking at the model itself,

they should be looking at Version 116 and throw out Version 111; is that right? A. Yes. That's -- that would be correct.").

The Integrated Model results discussed in paragraphs 35-54 of the Hutchison Declaration are based on the specific, new results, which according to New Mexico's experts superseded all prior disclosed results, provided by New Mexico in its September 15, 2020 disclosure. Moreover, several of the "opinions" regarding the Integrated Model contained in paragraphs 35-53 of the Hutchison Declaration merely recite New Mexico's experts' own descriptions of the Integrated Model—these paragraphs provide background regarding New Mexico's model effort, none of which should be objectionable.

- Paragraph 35-41 of the Hutchison Declaration describe generally New Mexico's Integrated Model. For example, paragraph 35, states: "New Mexico has disclosed the "Integrated Lower Rio Grande Model" (ILRGM) for use in this case. The ILRGM combines a River Ware model of the surface water network (and includes a simplified representation of the shallow groundwater system) and two detailed groundwater flow models using the MODFLOW-OWHM code: one of the Rincon Basin and the-Mesilla Basin and one of the Hueco Bolson." Another example, paragraph 41, states: "New Mexico experts provided ILRGM results for the relevant runs of the model in the following Excel spreadsheets: Run 1 Summary – Operational – All Pumping On v116.xlsx; Run 3 Summary – Operational – NM Pumping Off v116.xlsx; Run

6 Summary – Operational – RM Pumping Off v116.xlsx; and Run 7 Summary – Operational – TX Mesilla Pumping Off v116.xlsx."

- Paragraphs 42-52 of the Hutchison Declaration address specific ILRG stream depletion modeling results (paragraphs 35-54). Paragraphs 42-52 summarize certain ILRG stream depletion modeling procedures and results which are presented in an Excel file generated by New Mexico titled "Ferguson Rebuttal revised 9-15-20 v116.xlsx." New Mexico disclosed that native Excel file as backup data corresponding to Spronk Water Engineers' September 15, 2020 Rebuttal Report "Section 19 - Response to Ferguson Rebuttal Report." Attachment 4 to the Hutchison Declaration is a printout of the *DataAnn* sheet of that Excel file. *See* Hutchison Declaration, ¶ 42 & Attachment 4 (TX_MSJ_000693-695); Exhibit 2. According to New Mexico expert Gregory Sullivan, "[t]he purpose of the analysis of model results shown in Attachment 4 was to rebut the opinion of Dr. Ian Ferguson (U.S. Expert) that the impact of Texas Mesilla pumping on El Paso flows was 20% of the total impact of all pumping in the Rincon-Mesilla basin." Declaration of Gregory Sullivan, P.E. in Support of State of New Mexico's Partial Summary Judgment Motions (Dec. 22, 2020) (Sullivan Declaration 12/22/2020), NM_EX-012, ¶ 78 (a copy of which is attached as Exhibit 5.). To further clarify any confusion, a copy of the native Excel file originally disclosed by New Mexico on September 15, 2020 ("Ferguson Rebuttal revised 9-15-20 v116.xlsx") is attached via hyperlink as Exhibit 4.

Paragraphs 50-52 recite the modeling results presented under the *DataAnn* tab of that Excel file. Paragraph 50 describes Columns S – V: "The columns on the right side of the *DataAnn* sheet (Attachment 4) are calculations of the pumping impact caused by each state's pumping expressed as a percentage of the total impact." Paragraph 51 describes the results presented in Row 86: "The final line of New Mexico's spreadsheet with ILRGM results related to streamflow depletions (Attachment 4) are the average flows and depletions (calculated for each column in the spreadsheet) for the period 1940 to 2017." Finally, paragraph 52 simply recites the results presented in Columns P – V of Row 86:

"• Total Rincon-Mesilla Groundwater Pumping Impact: 66,351 AF/yr

- New Mexico Groundwater Pumping Impact: 52,610 AF/yr
- New Mexico Groundwater Pumping Impact: 79 percent of total impact
- Texas Mesilla Groundwater Pumping Impact: 13,700 AF/yr
- Texas Mesilla Groundwater Pumping Impact: 21 percent of total impact."

- Paragraph 53 of the Hutchison Declaration recaps what New Mexico's data in paragraph 52 show: "The analysis presented in the spreadsheet (Attachment 4) completed by New Mexico experts establishes that groundwater pumping in New Mexico has depleted surface water flow in the Rio Grande." Paragraph 54 then states that Dr. Hutchison's observation has also previously been made by New Mexico's experts themselves: "[i]n addition, Daniel J. Morrissey, one of New Mexico's experts acknowledged that the ILRGM shows depletions due

> to pumping in the Rincon and Mesilla Basins to streamflow measured at El Paso (Morrissey deposition, December 9, 2019, page 75, lines 12 to 18)." Paragraphs 50-54 do not introduce any new opinions–they simply recite New Mexico's own modeling results. The fact that New Mexico's experts chose not to highlight those particular results in their reports does not make Dr. Hutchison's recitation of those results a "new" opinion.

Paragraphs 35-54 are simply a verbatim recitation of the background of New Mexico's Integrated Model, results of certain model runs or admissions by New Mexico's experts. Any expert, or lay person, may view New Mexico's spreadsheet attached as Exhibit 4 to verify that paragraphs 42 – 52 of the Hutchison Declaration are in fact just reciting the model outputs presented in the spreadsheet. Mr. Sullivan's declaration in support of the NM Motion suggests that "backup data and supporting documentation" is required to interpret those paragraphs of the Hutchison Declaration, and that such material was not provided or disclosed. *See* Declaration of Gregory K. Sullivan, P.E. in Support of the State of New Mexico's Motion to Strike (Feb. 12, 2021) (Sullivan Decl. ISO NM Motion), ¶¶ 7, 10-11, NM Motion Exh. 12, SM Docket No. 476 at 171. The subject paragraphs of the Hutchison Declaration are merely descriptions of spreadsheets produced by Mr. Sullivan himself or his firm, Spronk Water Engineers. There can obviously be no reasonable argument that New Mexico requires additional discovery to understand modeling presented in its experts' own spreadsheet.

New Mexico further argues that paragraphs 55-61 of the Hutchison Declaration include a "belated critique of the Integrated Model . . . despite disclaiming in his deposition that he never had run the Integrated Model." NM Motion at 8-9. New Mexico's argument

regarding a "belated critique" is factually incorrect, and whether or not Dr. Hutchison physically ran the code for the Integrated Model is irrelevant as to his general opinions regarding the model, its purpose, and its output. At his May 28, 2020 deposition, 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." Hutchison 5/28/2020 Dep. Tr. at 25:21-27:12; Exhibit 3. That testimony relates directly to the need for the Integrated Model. Moreover, 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. *Id*. at 131:15-133:22. Dr. Hutchison's opinions regarding the Integrated Model—specifically its incorporation of the RiverWare component—as set forth in the Hutchison Declaration, are not "new," there is no surprise, and New Mexico does not require any additional discovery or delay in order to respond to Dr. Hutchison's previous critique of the Integrated Model.

In the NM Motion, New Mexico also moves to strike paragraphs 62-66 of the Hutchison Declaration on the grounds that they contain "new opinions relating to conjunctive water management" and that Dr. Hutchison "now critiques the discussion of conjunctive use in one of several depositions of New Mexico expert Estevan Lopez." NM Motion at 9. New Mexico admits that Dr. Hutchison discussed conjunctive use in his expert report but argues

that he "did not extensively discuss conjunctive use of groundwater" and that the Hutchison Declaration "offers a definition of conjunctive use that is diametrically opposed to the definition he offered in his [expert report]." NM Motion at 9-10. New Mexico's argument lacks merit and is based on misstatements of Dr. Hutchison's expert reports, testimony, and the Hutchison Declaration.

First, the Hutchison Declaration does not in fact criticize Mr. Lopez's general description of conjunctive use as a concept, rather the opinions in paragraphs 65-66 of the Hutchison Declaration criticize New Mexico's *practice* of conjunctive use. Paragraph 65 of the Hutchison Declaration states: "New Mexico's practice of conjunctive use is to use surface water and to pump interconnected groundwater limited only by crop needs or permit limits." Hutchison Declaration, ¶ 65 (citing Transcript of Sept. 18, 2020 FRCP 30(b)(6) Deposition of Estevan Lopez (Lopez 9/18/2020 30(b)(6) Dep. Tr.) at 36:17-22), excerpts from which are attached as Exhibit 11.

New Mexico also argues that Dr. Hutchison "never filed" any opinions rebutting Mr. Lopez and according to New Mexico Dr. Hutchison previously concluded that if New Mexico were to practice conjunctive management at certain levels, "groundwater levels would recover" and the Rio Grande would return in many years to "gaining stream conditions." NM Motion at 9.

First, 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 stop in order for groundwater levels to recover. Hutchison 5/28/2020 Dep. Tr. at 170:16-171:10; Exhibit 3 (". . . the 1947 report certainly identified or acknowledged that continuous pumping would cause a reduction in stream flow, not only due to reduced drain flows, but also use to

leakage out of the river, and they acknowledged and recognized the fact that they would have to be point when – when pumping would have to stop in order to allow the groundwater levels to recover."). Dr. Hutchison does not provide any "new opinions relating to conjunctive water management," rather the opinions New Mexico now seeks to strike were set forth in the May 31, 2019 Expert Report of William R. Hutchison (Hutchison Expert Report) and in his May 28, 2020 deposition testimony.

Second, New Mexico's argument that the Hutchison Expert Report Sanction 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 *drastically reduced its total overall groundwater use relative to actual historic levels*. *See* Hutchison Expert Report at 44-45, ¶ 147 "Conjunctive Use Scenario 3" (Hutchison Expert Report attached as Exhibit 6.) The definition is not "identical" to Mr. Lopez's definition and is consistent with the opinion stated in paragraph 66 of the Hutchison Declaration: "New Mexico's "conjunctive use" as defined by Mr. Lopez ensures that New Mexico water users receive all the water they need while decreasing some water that would have otherwise flowed into Texas." Hutchison Declaration, ¶ 66; Exhibit 2. Because the Hutchison Declaration does not include "new" opinions on conjunctive use, and Dr. Hutchison's use of the term conjunctive use is consistent in filings and testimony in this case, the NM Motion must be denied.

2. Dr. Brandes' Opinions Stated in his November 5, 2020 and December 22, 2020 Declarations Are Not "New"

Dr. Bob Brandes, an expert retained and timely disclosed by Texas pursuant to Rule 26, submitted declarations on November 5, 2020 (Brandes November Declaration) and December 22, 2020 (Brandes December Declaration) in support of the Texas MSJ and in

opposition to New Mexico's MSJs, copies of which are attached as Exhibits 7 and 8, respectively. New Mexico seeks to strike paragraphs 21 and 36 of the Brandes November Declaration and paragraphs 8-11, 17, 19, 23-24, and 31 of the Brandes December Declaration on the grounds that the subject paragraphs of the two declarations provides "new opinions concerning Project allocations and Model Results." NM Motion at 26.

New Mexico moves to strike paragraph 21 of the Brandes November Declaration which provides Dr. Brandes' opinion that "[t]he 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)." NM Motion at 11. New Mexico now argues that this declared opinion is inconsistent with the *Expert Report of Robert J. Brandes* (May 31, 2019) (hereinafter "Brandes Expert Report", a copy of which is attached as Exhibit 9) in which he stated that the Project "is the means by which Compact water from Elephant Butte Reservoir is apportioned among and delivered to users in New Mexico, Texas and Mexico." NM Motion at 11; Brandes Expert Report at 1, 6, 34; Exhibit 9.

New Mexico's argument employs selective misreading of Dr. Brandes' Expert Report, and his deposition testimony, in order to mischaracterize his opinion and ascribe inconsistent between the Brandes Expert Report and the Brandes November Declaration. At his September 2019 deposition, Dr. Brandes testified that the Rio Grande Compact does not apportion water to New Mexico below Elephant Butte Reservoir. Transcript of Sept. 24, 2019 Deposition of Robert J. Brandes (Brandes 9/24/2019 Dep. Tr.) at 43:11-45:1 (excerpts from which are attached as Exhibit 10.) The content of the Brandes November Declaration is entirely consistent with his expert report and deposition testimony, and the NM Motion to

motion to strike his opinion on apportionment, set forth at paragraph 21 of the Brandes November Declaration should be denied.

New Mexico also moves to strike paragraph 36 of the Brandes November Declaration which references the February 22, 2002 report of the Engineering Advisors. NM Motion at 12; Brandes November Declaration, ¶ 36; Exhibit 7. In the Brandes November Declaration, Dr. Brandes states that the report "demonstrates that there is nothing in all the figures that the Compact Commission collects that addresses the 57/43 split. This is because that is an allocation issue and not a Compact issue. If it were a Compact issue, it would have been account for as such." *Id*. New Mexico argues that Dr. Brandes "offered no opinions in his [expert report] regarding this 2002 document or any other document that Dr. Brandes claims supports his new opinion that no Project water is apportioned to New Mexico." NM Motion at 12. Contrary to New Mexico's assertions, paragraph 36 of the Brandes November Declaration preemptively responds to New Mexico's claim, articulated previously throughout the course of the litigation, that New Mexico received an apportionment below Elephant Butte based on the 57/43 allocation split. *See* Lopez 9/18/2020 30(b)(6) Dep. Tr. at 22:3-23:7; Exhibit 11 ("I've explained how the 57/43 that I assert is the apportionment below Elephant Butte we get from a reading of the Compact together with those downstream contracts and the historical practice of how the project has been operated up until essentially 2006."). Texas previously disclosed its reliance on these documents in its October 26, 2020 Supplemental Responses to New Mexico's Interrogatories ("Compact accounting information and data as reflected in Engineer Advisors reports to the Rio Grande Compact Commission; Memorandum of Understanding attached to the 2001 Rio Grande Compact Commission Report" disclosed in response to Interrogatory No. 13, which asked Texas to identify "all

Documents supporting Your contention that the Compact apportions no water to New Mexico south of Elephant Butte Reservoir.") (hereinafter "Texas Suppl. Interrogatory Responses", excerpts from which are attached as Exhibit 12.). Texas's reliance on the 2002 Engineering Advisors report thus is not "new," Dr. Brandes' reference to and reliance on the document is not "new," and New Mexico's motion to strike paragraph 36 of the Brandes November Declaration must be denied.

New Mexico moves to strike paragraphs 8-11 and 17 of the Brandes December Declaration on the grounds that Dr. Brandes presents "new opinions and analysis" regarding New Mexico's Integrated Model that were not previously disclosed. NM Motion at 12. 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 year 2007 was not a "full supply" allocation year, a topic clearly and undisputedly within the scope of his expert disclosures. *See* 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. Paragraphs 8-11 and 17 of the Brandes December Declaration do not include "new" or "late-filed" opinions, and New Mexico's motion to strike those paragraphs should be denied.

New Mexico moves to strike paragraphs 19 and 23-24 of the Brandes December Declaration on the grounds that Dr. Brandes includes "new opinions based on data, opinions and analysis disclosed by Texas expert Mr. Coors in his May 2020 expert report." NM Motion at 27. Dr. Brandes' opinions stated in paragraphs 19 and 23-24 of the Brandes December Declaration are not "new" and Dr. Brandes does not "rely" on Mr. Coors for the

opinions. The paragraphs address Dr. Brandes' opinions on the effects of New Mexico groundwater pumping on drain flows to the Rio Grande, and reduction in Rio Grande Project supplies and Texas's apportionment, as well as the long-term effects of New Mexico groundwater pumping. Brandes December Declaration, ¶¶ 19, 23-24; Exhibit 8. 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 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." Brandes Expert Report at 9; Exhibit 9. Paragraph 24 of the Brandes December Declaration cites directly to the Brandes Expert Report, and thus no reasonable argument may be made that it is a "new opinion." To the extent Dr. Brandes cites to Mr. Coors' 2020 report in the Brandes December Declaration, it is merely to state that Dr. Brandes' conclusions are "confirmed by the simulated model results" in the Coors 2020 Report. Brandes December Declaration, ¶ 24; Exhibit 8. New Mexico had a full opportunity to review both the Brandes and Coors Reports and to depose both these individuals on them. There is no surprise and the Special Master should reject New Mexico's request to strike paragraphs 19 and 23-24 of the Brandes December Declaration.

Finally, New Mexico moves to strike paragraph 31 of the Brandes December Declaration, which New Mexico argues includes an opinion regarding the D2 curve that was not previously disclosed. NM Motion at 13. In paragraph 31 of the Brandes December Declaration, Dr. Brandes states 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." Brandes December Declaration, ¶ 31; Exhibit 8. This is not a "new" opinion. 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." Brandes 9/24/2019 Dep. Tr. at 91:17-19; Exhibit 10. Contrary to the NM Motion's attempted distinction that Dr. Brandes "did not offer any opinions on the *amount of water New Mexico received* under the Operating Agreement," (NM Motion at 13) paragraph 31 of the Brandes December Declaration is in accord with his previously articulated 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. *See* Exhibit 9 at 17. New Mexico has all the information they would have needed to substantively respond. Because Dr. Brandes' opinion regarding the D2 curve is not "new," and because the only additional data underlying paragraph 31 is New Mexico's own data, the Special Master should deny New Mexico's motion to strike paragraphs 31 of the Brandes December Declaration.

3. Dr. Miltenberger's Opinions Stated in His November 5, 2020 and December 22, 2020 Declarations Are Not "New"

Dr. Scott Miltenberger, an expert retained and timely disclosed by Texas pursuant to Rule 26, submitted declarations on November 5, 2020 (Miltenberger November Declaration) and December 22, 2020 (Miltenberger December Declaration) in support of the Texas MSJ and in opposition to the New Mexico's MSJs, copies of which are attached as Exhibits 13 and 14, respectively. New Mexico seeks to strike paragraphs 20-27 and 46-47 of the Miltenberger November Declaration and paragraphs 2, 16, 26, 28-37, 38-45, and 59 of the Miltenberger

December Declaration on the grounds that the subject paragraphs of the two declarations provides "new opinions" regarding the Rio Grande Compact apportionment and related matters. NM Motion at 28. New Mexico classifies the subject paragraphs as addressing four distinct issues: (1) "new opinions on the Compact's apportionment" (NM Motion at 16), (2) a "new interpretation of 'uses' versus 'rights'" (NM Motion at 18), (3) a "new position on the role of the downstream contracts" (NM Motion at 20), and (4) "new opinions on New Mexico's understanding of the relationship between groundwater and surface water" (NM Motion at 21). None of the subject paragraphs of Dr. Miltenberger's declarations present "new" opinions, and the NM Motion should be denied.

First, with respect to alleged "new opinions on the Compact's apportionment," New Mexico's argument is factually incorrect, and relies on misreading Dr. Miltenberger's expert reports, testimony, and his declarations. New Mexico argues that Dr. Miltenberger "explicitly endorse[d] conclusions by former Special Master Grimsal and the U.S. historian . . . Kryloff that the 1938 Compact relies upon the Rio Grande Project to equitably apportion water in the Project area between Texas, and lower New Mexico." NM Motion at 16. Dr. Miltenberger *never endorsed* 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." *Expert Report of Scott A. Miltenberger, Ph.D.* (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. In fact, Dr. Miltenberger has never endorsed or opined on the legal conclusions proffered by Special Master Grimsal earlier in this litigation.

Moreover, Special Master Grimsal never "concluded" that New Mexico received an apportionment below Elephant Butte. In the NM Motion, New Mexico provides an excerpt from the First Interim Report from the section titled "C. The Purpose and History of the 1938 Compact Confirm the Reading That New Mexico Is Prohibited from Recapturing Water It Has Delivered to the Rio Grande Project After Project Water Is Released from the Elephant Butte Reservoir." First Interim Report at 203-09; SM Docket No. 54. The very next sentence in the First Interim Report following New Mexico's quoted excerpt on page 18 of its Motion shows that at that point, New Mexico itself rejected the idea of a 57/43 apportionment: "It is plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters. *Even today, New Mexico does not object to that conclusion: "We don't have any serious argument that the compact incorporates a 43 percent [of Project water] to Texas, 57 percent to New Mexico scheme, with 60,000 off the top for Mexico, as a part of the understanding of the compact."* First Interim Report, SM Docket No. 54 at 209 (citing Hr'g Tr. 40:6-9, Aug. 19, 2015) (emphasis added), SM Docket No. 37.)

Accordingly, Dr. Miltenberger never "endorsed" the findings in the Special Master's First Interim Report pertaining to the Compact's apportionment, and even on the merits, the Special Master did not actually "conclude" that New Mexico receives an apportionment below Elephant Butte. The Compact's apportionment is the subject of the motions for partial summary judgment presently under advisement with Special Master Melloy.

New Mexico further argues that Dr. Miltenberger ". . . testified that he agreed that "The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas. Instead, it relied

upon 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 in Texas . . . ." NM Motion at 16 (quoting Transcript of June 8, 2020 Deposition of Scott A. Miltenberger, Ph.D. (Miltenberger 6/8/2020 Dep. Tr.) at 40:7-22, excerpts from which are attached as Exhibit 16.). New Mexico, however, mischaracterizes and selectively cites Dr. Miltenberger's testimony. This particular deposition excerpt is in fact New Mexico's attorney reading directly from paragraph 10 of Texas's Complaint. Miltenberger 6/8/2020 Dep. Tr. at 37:23-25, 40:7-19; Exhibit 16. The cribbed excerpt on page 16 of NM's Motion cuts off the end of the sentence, which explicitly distinguishes Project beneficiaries in southern New Mexico on the one hand from the State of Texas on the other. The full sentence from Texas's Complaint to which Dr. Miltenberger agreed is: the Compact "relied upon 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 in Texas *to provide the basis of the allocation between Rio Grande Project beneficiaries in southern New Mexico and the State of Texas*." *Id*. (emphasis added). Moreover, Dr. Miltenberger testified at his October 2019 deposition that the Compact, and not the Project, accomplished the apportionment of the Rio Grande. Transcript of Oct. 2, 2019 Deposition of Scott A. Miltenberger, Ph.D. (Miltenberger 10/2/2019 Dep. Tr.) at 21:18-22:21, excerpts from which are attached as Exhibit 17 (". . . ultimately the compact accomplished that apportionment.").

New Mexico's argument that Dr. Miltenberger "endorsed" the expert report and/or opinions of Nicolai Kryloff, an expert historian for the United States, lacks merit and also mischaracterizes Kryloff's opinions. First, Dr. Miltenberger never "endorsed" Kryloff's purported "conclusion" that New Mexico received an apportionment below Elephant Butte.

When asked at his deposition whether he disagreed with "any of [Kryloff's] conclusions," he responded merely "none that I can recall as I sit here." Miltenberger 10/2/2019 Dep. Tr. at 28:6-9; Exhibit 17. New Mexico now claims that Dr. Miltenberger endorsed Kryloff's opinion regarding apportionment, but New Mexico did not ask Dr. Miltenberger at his deposition about the opinion they now claim he endorsed.

Further, contrary to New Mexico's suggestion, Kryloff did not "conclude" New Mexico received an apportionment below Elephant Butte. The May 31, 2019 Expert Report of Nicolai Kryloff ("Kryloff Expert Report" attached as Exhibit 18) 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 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.

New Mexico also makes the factually incorrect argument that "[b]ased on a 1951 document that appears to be previously undisclosed Dr. Miltenberger now claims New Mexico "argued that the Compact 'does not attempt to make an apportionment between the New Mexico area and the Texas area below Elephant Butte.'" NM Motion at 17 (quoting, Miltenberger November Declaration, ¶ 46.). The 1951 document is not "new", and the pleading referenced (New Mexico's reply to Texas's 1951 Complaint in Original Action No. 9) is its own document and in any event is a public document that Texas previously disclosed

in response to the New Mexico's Interrogatory No. 13, which asked Texas to identify "all Documents supporting Your contention that the Compact apportions no water to New Mexico south of Elephant Butte Reservoir." Texas Suppl. Interrogatory Responses, Response to Interrogatory No. 13 (identifying "pleadings filed in the United States Supreme Court, No. 9, by New Mexico"); Exhibit 12 at 14.

Finally, as it relates to alleged "new" opinions on apportionment, New Mexico asserts that Dr. Miltenberger's declaration includes a "new opinion concerning the letter from Frank B. Clayton to Sawnie Smith" dated October 4, 1938. NM Motion at 18. Dr. Miltenberger's previous opinions 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" 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." Miltenberger Expert Report at 98 n.217; Exhibit 15.

In his June 8, 2020 deposition, Dr. Miltenberger testified regarding the Clayton letter, but New Mexico elected not to question him regarding the statements in the Miltenberger Expert Report relating to the letter. Miltenberger 6/8/2020 Dep. Tr. at 41:1-50:50; Exhibit 16. Dr. Miltenberger's statement in his declaration that the letter does not describe the Project allocations as the basis for Compact apportionment is entirely consistent with his report and is not "new" or "late-filed" testimony. Moreover, Dr. Miltenberger's statement "responds to New Mexico's repeated mistaken characterizations of the Clayton-Smith letter, offered in

New Mexico's motion for partial summary judgment. New Mexico's argument that Dr. Miltenberger's declaration testimony regarding the apportionment is "new" and/or "late-filed" lacks any basis in reality and must be denied.

The second category of Dr. Miltenberger's declaration testimony that New Mexico seeks to strike relates to New Mexico's incorrect argument that Dr. Miltenberger now offers a "new" opinion that "water rights were not protected by the Compact." NM Motion at 20. New Mexico's argument lacks any merit because 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. The following excerpts from the Miltenberger Expert Report (Exhibit 15) confirm his consistent opinion on the issue:

- Explaining that the Joint Investigation, which provided data used in developing the technical basis of the Compact, was to focus, at the insistence of the Rio Grande Compact Commissioners on "the 'past, present and prospective uses and consumption of water' in the basin within the United States . . . ." *Id*. at 20.
- "With regard to the two key objections – use of an Otowi-Elephant Butte index and the 800,000 af to be released from the reservoir – they agreed 'to give further consideration' to New Mexico's proposal for an Otowi-San Marcial index, and to examine 'any data in support' of New Mexico's claim that

'800,000 acre-feet of water exceeds both past uses and requirements below Elephant Butte,' data hitherto unavailable to them." *Id*. at 38.

- "In a pamphlet "To Water Users Under The Rio Grande Compact" that included a copy of the compact, released soon after the negotiations, Texas's commissioner stressed that the compact "seeks primarily to protect vested uses of water above Fort Quitman, and guard them against future impairment, both as to quantity and quality." *Id*. at 54.
- "Drafting of the compact itself focused on the 'present uses of water' in the Rio Grande Basin above Ft. Quitman . . . ." *Id*. at 93
- ". . . at the commission's direction, the engineering advisors collectively prepared a report suggesting the schedule of deliveries to be specified in the compact, and in doing so 'avoided discussion of the relative rights of water users in the three States," and instead sought to protect the "present uses of water in each of the three States . . . because the usable water supply is no more than sufficient to satisfy such needs." *Id*. at 93.
- "Clayton maintained that the compact "seeks primarily to protect vested uses of water above Fort Quitman, and guard them against future impairment, both as to quantity and quality." *Id*. at 94.

Dr. Miltenberger's statement in his declaration that "existing uses, circa 1938, not rights were to be protected by the Compact" is consistent with the Miltenberger Expert Report, which is replete with examples of his discussion and citation to historical references to the protection of "uses" of water. New Mexico's motion to strike Dr. Miltenberger's consistent declaration testimony that the Compact protected "uses" must be denied.

New Mexico also seeks to strike what it argues is Dr. Miltenberger's "new position on the role of the downstream contracts." NM Motion at 20. Dr. Miltenberger's declaration testimony, however, is consistent with his May 2019 expert report, there is thus no "new" opinion and New Mexico's motion to strike the subject paragraphs should be denied. In particular, New Mexico argues that "Dr. Miltenberger offers substantial new opinions regarding [the Downstream Contracts]," including Dr. Miltenberger's statement that "the 1937 and 1938 Downstream Contacts [sic] are less about water deliveries than they are about the repayment obligations of the districts to the federal government for the Project." NM Motion at 20. 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.

- "The [1938 interdistrict agreement, corresponding to the 1937 and 1938 contracts with Reclamation)] was nonetheless 'private' 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." *Id.* at 98, n.217.
- "Resolution of the cost apportionment question finally came with signing of the interdistrict agreement, six months of negotiations between the districts and Reclamation and Interior Department officials. The agreement memorialized the historical distribution of repayment costs for storage and general project features between EBID and EP#1 on the basis of the respective irrigated acreages that the districts themselves had committed to back in 1929 and

which Reclamation agreed to serve in proportion to the available water supply." *Id.* at 100.

Further, in the Miltenberger December Declaration, Dr. Miltenberger responded to New Mexico's incorrect reading and interpretation of the Downstream Contracts. Dr. Miltenberger's comments are consistent with the Miltenberger Expert Report.

Finally, New Mexico seeks to strike paragraph 47 of the Miltenberger November Declaration on the grounds that Dr. Miltenberger's statement that the "New Mexico State Engineer, since at least the 1950s, has been aware that groundwater pumping could deplete surface waters below Elephant Butte Reservoir," on the basis that New Mexico believes it is a "new" and/or inconsistent opinion. NM Motion at 21. The NM Motion focuses on New Mexico's argument relating to the substance of the opinion, and New Mexico attempts to argue the summary judgment issues under the guise of this motion to strike. New Mexico states that "Dr. Miltenberger provides no evidence to support [S.E.] Reynolds' alleged recognition relating to the area below Elephant Butte in the 1950s, and Miltenberger's own evidence shows that [S.E.] Reynolds had no such understanding until the 1980s . . . ." NM Motion at 21. But the Miltenberger November Declaration does not in any way conflict with the previous statements cited by New Mexico from pages 22 and 25 of the *Expert Rebuttal / Supplemental Report of Scott A. Miltenberger, Ph.D.* (Dec. 30, 2019) (Miltenberger Rebuttal Report), a copy of which is attached as Exhibit 19. In the Miltenberger Rebuttal Report these two statements on pages 22 and 25 are cited as support for his overall statement that "[l]ater actions by New Mexico State Engineer S.E. Reynolds suggest that he came to accept [the USGS's findings of a surface flow/groundwater interrelationship in studies from 1905-1954] over time... ." *Id.* at 22-25. New Mexico deposed Dr. Miltenberger on this section of the

Miltenberger Rebuttal Report but declined to ask specifically what year the New Mexico State Engineer became aware. Miltenberger 6/8/2020 Dep. Tr., 115:24-124:11; Exhibit 16. The Miltenberger November Declaration is consistent with Dr. Miltenberger's expert reports, there are no "new" opinions, and New Mexico's motion to strike must be denied.

C. New Mexico's Claim of Prejudice is Not Credible, at Best Another Delay Tactic, and Exclusion of the Expert Declarations is Not Warranted

In no event is New Mexico's motion request to exclude declaration testimony warranted. Under Federal Rule of Civil Procedure 37, exclusion of evidence is inappropriate if a failure to comply "was substantially justified or is harmless." Fed. R. Civ. P. 37(c)(1). Four factors are relevant to this inquiry: (1) the explanation for the party's failure to comply, (2) the importance of the testimony, (3) potential prejudice to the opposing party, and (4) the possibility of curing the prejudice. *See Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 (5th Cir. 2007). Each of these factors overwhelmingly weighs against New Mexico's request.

First, for the reasons outlined above, Texas did comply with all expert disclosure rules required by the Federal Rule of Civil Procedure and the Case Management Plan. None of the subject expert opinions or background statements present any level of "surprise" to New Mexico; each derives from a disclosed expert opinion and/or the deposition testimony of the expert. To the extent New Mexico argues that Texas submitted late-filed expert opinions regarding the Integrated Model, New Mexico did not disclose the operative version of the Integrated Model, which is the basis for multiple reports produced by the New Mexico experts, until September 15, 2020, less than two months prior to the dispositive motion deadline. New Mexico submitted new versions of the Integrated Model at each respective expert disclosure deadline, until its last September 15, 2020 submission when it finally ran out of time to alter its expert model and related opinions. Even though Texas's opinions are not

"new," to the extent any opinion relates to New Mexico's September 15, 2020 disclosures, Texas did not have in-hand New Mexico's operative model and analyses until that date.

Second, Texas's expert declarations are important, and provide essential background and context relating to the Texas MSJ. The record created by the parties in support of and in response to the various dispositive motions is voluminous. Texas acknowledges that there may be disputes of fact such that an issue or issues addressed in the motions will be deferred to trial. Notwithstanding that reality, the declarations of Drs. Hutchison, Brandes, and Miltenberger are based on their years-long efforts studying the issues addressed in the motions and are worthy of the Special Master's close attention. The NM Motion is a late-filed attempt to argue substantive issues pertaining to the Texas MSJ, which attempts to muddy the summary judgement record. Texas's expert declarations are important and summarize the experts' longstanding expert opinions and background research in this case.

Finally, New Mexico's claims of prejudice are without merit. There is no surprise with any of the testimony presented, for the reasons explained above. Moreover, the parties have had more than adequate opportunity to depose the experts regarding their opinions, to review their reports, and to review the subject declarations. As the Fifth Circuit explained in *Tex. A&M Research Found. v. Magna Transp., Inc.,* 338 F.3d 394, 402 (2005) :

> [a]lthough [the plaintiff] failed to explain its failure to disclose, the prejudice to the adverse parties was negligible, ***because the witness in support of whose testimony the invoices were offered had been designated properly as a witness before trial. Further, any prejudice was cured by the approximately one month during which [the defendant] was allowed to examine and respond to the contested evidence****.* The district court did not abuse its discretion in admitting the documentary evidence supporting the affidavit.
> *Id.* at 402 (emphasis added).

New Mexico sat on Texas's experts' declarations for two to three months and did not address the issues briefed in the NM Motion until *after* the close of briefing on the summary

judgement motions, with its February 12, 2021 filing. Any claim of prejudice is without merit.

V. CONCLUSION

For the foregoing reasons, Texas respectfully requests that the Special Master deny New Mexico's Objections to and Motion to Strike Texas's Late-Filed Expert Opinions.

Dated: March 23, 2021

Respectfully submitted,

s/ Stuart L. Somach

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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 5th day of August, 2021, I caused a true and correct copy of The State of Texas's Consolidated Response in Opposition to New Mexico'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: August 5, 2021

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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 5th day of August, 2021, I caused a true and correct copy of The State of Texas's Consolidated Response in Opposition to New Mexico'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,

Dated: _____

Yolanda De La Cruz

SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE

SPECIAL MASTER

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