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

UNITED STATES OF AMERICA'S MOTION IN LIMINE REGARDING NEW MEXICO'S DISMISSED COUNTERCLAIMS

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The Special Master dismissed New Mexico's counterclaims against the United States because New Mexico failed to plead an applicable waiver of sovereign immunity and because those counterclaims were "outside the scope of the action as allowed by the Court." *See* Order of Mar. 31, 2020 ("Dismissal Order"), Sp. M. Docket No. 338, at 1-2, 31; *see also id.* at 30. The United States therefore respectfully requests that the Special Master issue a preliminary ruling that evidence offered to establish or support the allegations of federal liability in New Mexico's dismissed counterclaims will not be admitted at trial.[1] As discussed below, exclusion of evidence offered for that purpose is warranted because it is of limited probative value to the issues set for trial, and the presentation of that evidence would lead to mini-trials on collateral issues the Court has not accepted for review.

DISCUSSION

In 2018, New Mexico filed counterclaims against Texas and the United States without seeking leave of Court. *See* Sp. M. Docket No. 99 ("Counterclaims"). The counterclaims generally challenge certain management actions, or inaction, by federal agencies in relation to the Rio Grande Project. *See* pp. 4-9, *infra.* Some counterclaims track allegations that New Mexico has made in separately pending, but currently stayed, litigation in federal district court, *New Mexico v. United States*, No. 11-cv-00691 (D.N.M. Aug. 8, 2011). *See* New Mexico Summ. J. Exhibit 520, in Sp. M. Docket No. 418 (complaint).

[1] The ruling on a motion in limine is preliminary and subject to change at trial. *See United States v. Yannott*, 42 F.3d 1999, 2007 (6th Cir. 1994); *see also United States v. Luce,* 713 F.2d 1236, 1239 (6th Cir. 1983, aff'd 469 U.S. 38 (1984)) (a motion in limine is a "request for guidance" on an evidentiary issue to aid the parties in developing trial strategy).

In 2020, the Special Master dismissed the counterclaims against the United States for failure to plead a waiver of sovereign immunity, or, in the alternative, failure to state a claim. *See* Dismissal Order at 1-2. The Special Master explained that his review would serve a necessary "gatekeeping function," "to ensure the matters brought before the Court are commensurate in scope with the subject matter over which the Court has chosen to exercise its original jurisdiction." *Id.* at 26. He found that most of New Mexico's challenges to federal management practices and contracts failed that test. *See generally id.* at 30-40. The Special Master also denied New Mexico leave to amend its pleadings based on futility, emphasizing again the limited scope of the litigation: "This case is not a vehicle for each and every individual claim bearing some relationship to the [Rio Grande] Compact or administration of the [Rio Grande] Project." *Id*. at 41. Notwithstanding that ruling, the Special Master declined to limit discovery into the counterclaims and did not "at this time" rule on the admissibility of evidence. *Id.* at 41. New Mexico did not take exceptions to the Dismissal Order.

As the Dismissal Order makes clear, New Mexico's dismissed counterclaims are not relevant to foundational issues of Compact interpretation and liability that are the subject of this case and the focus of trial. *See* Trial Management Order ("TMO"), Sp. M. Docket No. 501, at 8 (setting trial "on the issues of liability and whether Plaintiff, Texas, or Counterclaimant, New Mexico, have sustained damages"); Order of May 21, 2021 ("Summary Judgment Order"), Sp. M. Docket No. 503, at 46 (identifying material disputes over the scope of New Mexico's duty to prevent interference with Project deliveries, the course of performance by the Compacting States, and the "actual impact of pumping in different locations and at different times on surface water flows."). Although the Special Master has suggested that some individual facts pleaded in the counterclaims, such as the impacts of "Mexican water use," Dismissal Order at 37, may bear on

the amount of injury attributable to New Mexico, the "amount of damages" owed by New Mexico has been reserved for a remedy trial to be held at a later date. TMO at 8.

The United States respectfully submits that considerations weighing in favor of over-inclusiveness in original actions do not compel the inclusion of evidence offered to support New Mexico's dismissed counterclaims. Although "the Supreme Court encourages development of as full a record as possible for Supreme Court review," TMO at 7, that encouragement is not unbounded. The Federal Rules of Evidence, although non-binding, "may be used as a guide" in original actions. S. Ct. R. 17.2. Under Rule 401, evidence is "relevant" only if it relates to a fact that "is of consequence in determining the action," Fed. R. Evid. 401(b). Relevance in an original action might therefore depend on whether a fact could be "of consequence" to the Court in a *de novo* review of the record.[2] In this case, the Supreme Court has given no indication that it seeks, or would welcome, a record relating to New Mexico's counterclaims against the United States.

The balancing test in Rule 403 of the Federal Rules of Evidence also provides a useful guide for evaluating the admissibility of evidence that may be offered by New Mexico in connection with the dismissed counterclaims. Fed. R. Evid. 403 (court may exclude relevant evidence "if its probative value is substantially outweighed by a danger of . . . undue delay, wasting time, or needlessly presenting cumulative evidence."); *United States v. Woods*, 978 F.3d 554, 567 (8th Cir. 2020) ("Rule 403 demands not merely a relevancy test—it demands a balancing test and expressly envisions that relevant evidence may be excluded." (Melloy, J.)).

[2] In *Montana v. Wyoming*, for example, the Special Master said that in addressing relevance objections, he would consider whether the Supreme Court would "want to have that evidence" if it decided to rule in "a different direction" from his recommendation. Tr. of Final Pretrial Hearing at 22, *Montana v. Wyoming* (No. 137, Orig.), *available at* http://web.stanford.edu/dept/law/mvn/pdf/1-Final_Pretrial.pdf (last visited July 18, 2021).

Courts often exclude evidence based on undue delay if the evidence will lead to "mini-trials" on collateral issues. *See*, *e.g.*, *United States v. Fonseca*, 435 F.3d 369 (D.C. Cir. 2006) (holding that trial court did not abuse its discretion in excluding testimony that would have led to "delay and a 'mini-trial' on a collateral matter, two of the problems that Rule 403 seeks to avoid"); *Beastie Boys v. Monster Energy Co.*, 983 F. Supp. 2d 354, 358 (S.D.N.Y. 2014) (excluding evidence of other potential copyright violations by the defendant because it "would require the paradigmatic 'trial within a trial' that Rule 403 disfavors"). *See also*, *e.g.*, *Woods*, 978 F.3d at 561, 567 (affirming trial court's exclusion of testimony regarding federal agent's discovery misconduct, where government contended the testimony would lead to a "mini-trial" on issues irrelevant to defendant's liability).[3]

Extended to this case, the balancing test in Rule 403 would allow for the exclusion of evidence of limited probative value if that evidence would lead to mini-trials on issues that are not of consequence to the issues the Supreme Court has accepted for review. As shown in the synopsis below, that balancing favors the exclusion of evidence offered to support the allegations in each of New Mexico's counterclaims against the United States:

Counterclaim 2. This counterclaim alleged that the 2008 Operating Agreement, executed by the United States and the irrigation districts, has "improperly reduced the amount of water

[3] *See also, e.g.*, *Republic of Turkey v. Christie's Inc*., No. 17-CV-3086 (AJN), 2021 WL 1089487, at *4 (S.D.N.Y. Mar. 22, 2021) (excluding "other act" evidence from bench trial because it "would result in numerous trials within the trial" and result in "such a substantial waste of time that the Court cannot allow it"). Relevant here, courts have also cited Rule 403 as a basis for excluding evidence about claims dismissed at an earlier stage of the case, *see*, *e.g. Ledford v. Lamartz*, 462 F. Supp. 3d 905, 909 (N.D. Ind. 2020); evidence relating to unavailable remedies, *see*, *e.g.*, *Act, Inc. v. Sylvan Learning Sys.*, No. C96-334 MJM, 2000 WL 34031484 (N.D. Iowa May 8, 2000) (Melloy, J.); and evidence better suited to the remedy phase of a bifurcated trial, *see*, *e.g.*, *United States v. Hamilton*, No. 10-CV-231-ABJ, 2013 WL 12344195, at *1 (D. Wyo. Sept. 20, 2013).

apportioned to New Mexico by the Compact." Counterclaims ¶ 76. The Special Master dismissed this counterclaim based on failure to plead a waiver of sovereign immunity but also failure to state a claim within the scope of this litigation. The Special Master was clear that "this is neither the time nor the forum to address the validity of the 2008 Operating Agreement." Dismissal Order at 29. The Operating Agreement is irrelevant to determining and defining the protected Project water supply and "baseline operating condition" for the Compact apportionment. *See* Summary Judgment Order at 49. At this stage, testimony regarding the Operating Agreement is useful only to explain where water is going. The Special Master correctly noted that, "[t]o the extent current operations are inconsistent with the Court's ultimate decree on apportionment, any operating agreement will have to be brought into conformity with the decree." Dismissal Order at 29. How the irrigation districts and the United States adjust to the decree on apportionment is a variable to be determined in the future. Thus, the 2008 Operating Agreement method of accounting, if it is addressed at all, would be addressed in the remedy phase of trial after a ruling on the apportionment.

The United States respectfully submits that New Mexico's myriad attacks on the 2008 Operating Agreement, if presented at trial, would create the "paradigmatic 'trial within the trial'" the Federal Rules disfavor, *Beastie Boys*, 983 F. Supp. 2d at 358. New Mexico's hydrology expert alone submitted four expert reports devoted to this issue in significant part—with the principal report prepared prior to the dismissal of Counterclaim 2. *See* New Mexico Summ. J. Exs. 100-103 (reports of Dr. Margaret Barroll), included in Sp. M. Docket No. 418, Vol 1. The presentation of testimony from Dr. Barroll and other New Mexico witnesses going to the validity of the Operating Agreement, combined with the cross-examination and presentation of rebuttal evidence by the United States and Texas, could consume weeks of trial time on issues the

Special Master correctly found to be "beyond the scope of the current litigation," Dismissal Order at 30.

The development of such a record would also exceed the traditional limitations on judicial review that apply under the waiver of sovereign immunity in the Administrative Procedure Act ("APA"), which governs New Mexico's challenge to the Operating Agreement in district court. *See* 5 U.S.C. §§ 702, 706. *See also* Dismissal Order at 15 (noting that an agency's "failure to abide" the ruling in this case in the future might be the basis of future challenges under the APA). In the current district court case, and any future APA case, New Mexico would not be allowed to wage the "battle of the experts" that it plans for its case-in-chief here. *See Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743-44 (1985) (limiting review to the administrative record is one of the "fundamental principles of judicial review of agency action"); *see also Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 378 (1989) (under the deferential "arbitrary and capricious" standard of review, the agency "ha[s] discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive"); *Delta Air Lines, Inc. v. Exp.-Imp. Bank of United States*, 85 F. Supp. 3d 387, 425 (D.D.C. 2015) (a "a battle of the experts . . . is frowned upon within the context of an APA challenge to agency decisionmaking"). Development of a record *de novo* on the validity of the Operating Agreement in its entirety or specific contractual accounting terms would end-run the limitations that apply to New Mexico's APA claims in district court and should be avoided.

For all of these reasons, evidence and argument offered to support or establish the allegations in dismissed Counterclaim 2 should be presumptively inadmissible at trial.

Counterclaim 3. This counterclaim alleged that the United States' handling of New Mexico's "credit water" in 2011 violated the Compact. *See* Counterclaims ¶¶ 84-90. Evidence relating to this discrete and relatively recent credit water episode is not relevant to the questions of Compact interpretation and liability to be addressed at trial, but it would entail rebuttal by the United States (and potentially Texas) if it were presented. Nothing in this case suggests a determination on the 2011 credit water issue will be made by the Special Master or the Court. Therefore, a mini-trial on the issue would be a waste of time. New Mexico's evidence relating to the 2011 credit water release should be excluded. *See* Attachment: Examples, attached hereto.

Counterclaim 5. This counterclaim alleged that certain "major operational changes" to the Project, including contracts with the City of El Paso and the 2008 Operating Agreement, violated the Water Supply Act, codified in part at 43 U.S.C. § 390b. *See* Counterclaims ¶¶ 100-104. In addition to failure to plead a waiver of sovereign immunity, this claim was dismissed for failure to state a claim because it was unrelated to the Compact and, therefore, "outside the scope of the action as allowed by the Court." Dismissal Order at 31. Relevant here, the Special Master also found that "the subject matter of the allegations in Counterclaim 5 are largely immaterial to the current action." *Id*. That finding should be carried forward through trial. Evidence bearing on compliance with the Water Supply Act or the alleged lack of congressional approval for particular federal actions should be excluded.

Counterclaim 6. In Counterclaim 6, New Mexico alleged that Reclamation's accounting practices are inconsistent with the Compact in various respects. *See* Counterclaims ¶¶ 105-107. The Special Master dismissed this counterclaim based on sovereign immunity and failure to state a claim, reiterating that day-to-day Project accounting is outside the scope of an original jurisdiction action. *See* Dismissal Order at 33 ("[T]he Court has not, in the past, shown an

inclination . . . to expand an otherwise-allowed original jurisdiction case into the weeds of daily water project administration.") (citing *Nebraska v. Wyoming*, 515 U.S. 1, 22 (1995)).[4] For purposes of trial in this matter, some Project accounting *data* may be relevant and admissible. *See* Dismissal Order at 33. But the accounting practices that are the subject of Counterclaim 6 (such as monthly accounting for evaporation) have no bearing on what the apportionment is, New Mexico's duty to protect Project deliveries that effectuate the apportionment, or New Mexico's liability for failing to fulfill that duty. The presentation of evidence relating to Counterclaim 6 could also entail many days of trial time to address in full, including rebuttal by the United States. Because these matters are not "an appropriate subject of the Special Master's attention," *Nebraska v. Wyoming*, 515 U.S. at 22, evidence offered to support or establish the allegations in Counterclaim 6 should be excluded.

Counterclaim 7. In Counterclaim 7, New Mexico alleged that Texas and the United States are violating the Compact by delivering water to the City of El Paso for municipal and industrial use. *See* Counterclaims ¶¶ 108-115. The Special Master dismissed the claim against the United States based on sovereign immunity and because the claim was a "redundant and unnecessary restatement of New Mexico's much broader Counterclaim 1 [against Texas]." Dismissal Order at 35. The legality of the federal contracts with El Paso thus falls outside the scope of the litigation in this case. Evidence and testimony going to the legality or the adequacy of the justification for entering into the contracts should be excluded. *See also id.* at 1 (this action is not a forum for claims "attacking particular contracts for the delivery of water").

[4] The Court's admonition to limit the scope of litigation on Wyoming's cross-claim against the United States in *Nebraska v. Wyoming* applies with even more force here because there is no claim against the United States in the present action. *See* 515 U.S. at 22.

Counterclaim 8. This counterclaim alleged that the United States has failed to maintain Project infrastructure, citing as examples, water loss due to siltation and vegetation. *See* Counterclaims ¶¶ 116-122. The Special Master held that New Mexico failed to state a claim because it had not identified "a source of legal authority for an enforceable, generalized maintenance duty." Dismissal Order at 36. The Special Master noted that "proof of maintenance shortcomings as a source of Project inefficiency" may be relevant, but that "[t]he end result of the present suit . . . will not be a detailed guide to infrastructure maintenance fashioned by a court." *Id.* at 37. The United States respectfully submits that evidence offered to link infrastructure and channel inefficiencies to a "shortcoming" on the part of the United States is not relevant to New Mexico's Compact obligations or liability for interfering with deliveries that effectuate the Compact apportionment. The introduction of such evidence would presume legal duties that New Mexico has not identified, much less established, and could lead to sideshow arguments on tangential issues.[5] Evidence and argument relating to alleged federal responsibility for "maintenance"-related inefficiency should be excluded.

Counterclaim 9. Counterclaim 9 alleged that the United States is not taking sufficient action to curtail groundwater pumping in Mexico through enforcement of the 1906 Convention. *See* Counterclaims ¶¶ 123-132. The Special Master correctly dismissed this claim as "non-justiciable" because "the executive branch rather than the judicial branch determines treaty compliance." Dismissal Order at 37 (citations omitted). Although the Special Master indicated that "Mexican water use, as a factual matter, may be a cause of Texas's alleged water shortages"

[5] New Mexico's intentions regarding maintenance issues are not clear. New Mexico has not disclosed any expert witnesses or opinions relating to vegetation or siltation inefficiencies, but it has designated deposition testimony (from Rosa Montes) and listed witnesses (such as Gilbert Anaya) suggesting it intends to pursue allegations that the United States is responsible for those inefficiencies. *See* Examples, attached.

and relevant evidence to that extent, *id.* at 37-38, that evidence would go to the amount of damages, to be determined at the remedy phase. Evidence presented as to the actions or inaction of the United States in its dealings with Mexico, relating to Mexican water use, are outside the scope of this action and should be excluded.

CONCLUSION

New Mexico neither sought, nor received, leave to file counterclaims against the United States, and those counterclaims were properly dismissed by the Special Master. A preliminary ruling that bars evidence offered to support or establish the allegations in those dismissed counterclaims at trial would, like the dismissal itself, "ensure the matters brought before the Court are commensurate in scope with the subject matter over which the Court has chosen to exercise its original jurisdiction." Dismissal Order at 26. For the foregoing reasons, the United States respectfully requests that evidence and argument offered to support or establish the allegations of federal liability in New Mexico's dismissed counterclaims against the United States be excluded from trial.

Respectfully submitted this 20th day of July 2021.

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ATTACHMENT

Examples of New Mexico Designations, Witnesses, and Exhibits
Relating to the Dismissed Counterclaims and Potentially Subject to Exclusion

These examples are for purposes of illustration and do not represent the full scope of objections that might be presented at trial.

Dr. Margaret Barroll: Each of Dr. Barroll's four reports contains analysis relating to the alleged defects in the 2008 Operating Agreement and its accounting methods. *See, e.g.*, Barroll. Rep. at 53-60, N.M. Summ. J. Ex. 100. *See also* N.M. Summ. J. Ex. 101-103.

Estevan Lopez: Mr. Lopez's has offered numerous opinions about the dismissed counterclaims. *See* Lopez Rep. at 41-61, N.M. Summ. J. Ex. 107. Mr. Lopez's supplemental rebuttal report is devoted entirely to the allegations in Counterclaim 2.

Exhibits Relating to Counterclaim 3: New Mexico's preliminary exhibit list includes at least the following exhibits potentially offered to support New Mexico's dismissed counterclaim challenging the 2011 credit water release.

Date	Document
4/19/2011	Relinquishment of a Portion of New Mexico's Accrued Rio Grande Compact Credit Water in Rio Grande Project Storage
4/29/2011	Letter Re: Alternative Relinquishment Credit Proposal from NM
5/12/2011	Impact of New Mexico Credit Relinquishment on Elephant Butte and Caballo Reservoirs
5/16/2011	Your letter dated April 29, 2011 to Pat Gordon
6/7/2011	Letter RE: Request to BOR for technical engagement on RGP issues.
6/24/2011	Texas Second Request for Relinquishment of a Portion of New Mexicos Accrued Rio Grandc Compact Credit Water in Rio Grande Project Storage
7/6/2011	June 2011 Letter from John D'Antonio to Pat Gordon - Loan of New Mexico Credit Water
7/25/2011	Email RE: 2011 Rio Grande Project Operations and Rio Grande Compact Accrued Credit Water In Elephant Butte Reservoir-
8/8/2011	Demand to Restore Release of Water from Elephant Butte Reservoir and Notice of Contract Violation and Damages

Testimony of IBWC Witnesses Relating to Counterclaims 8 and 9: The deposition testimony of Rosa Montes designated by New Mexico concerns the maintenance issues raised in dismissed Counterclaim 8. New Mexico has also listed Gilbert Anaya as a "may-call" witness to testify about "Mexico water use and operations, IBWC river channel maintenance obligations and actions, . . . vegetation and sediment management within and adjacent to the channel of the Rio Grande," and "surface and groundwater diversions or uses in Mexico from groundwater aquifers," among other subjects.