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 TO EXCLUDE LEGAL OPINION TESTIMONY

ELIZABETH B. PRELOGAR
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEAN E. WILLIAMS
Acting Assistant Attorney General
FREDERICK LIU
Assistant to the Solicitor General
JAMES J. DuBOIS
R. LEE LEININGER
JUDITH E. COLEMAN
JENNIFER A. NAJJAR
Attorneys, Environment and Natural Resources Division
U.S. Department of Justice

Counsel for the United States

UNITED STATES OF AMERICA'S MOTION IN LIMINE TO EXCLUDE LEGAL OPINION TESTIMONY

Interpretation of the Rio Grande Compact is a matter of law. Although it may be informed by historical facts, the construction of the Compact is a matter for argument by counsel and resolution by the Court; it is not an appropriate subject of expert testimony under the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993). The United States therefore respectfully requests that the Special Master declare legal opinion testimony generally to be inadmissible, and specifically exclude the expert testimony of New Mexico witness Estevan Lopez on questions of compact and contract interpretation.[1]

DISCUSSION

Although non-binding, the Federal Rules of Evidence "may be taken as guides" in original actions. S. Ct. R. 17.2. Under Rule 702, the admissibility of expert opinion testimony depends upon whether the testimony "will assist the trier of fact to understand or determine a fact in issue." *Daubert*, 509 U.S. at 592. *See* Fed. R. Evid. 702(a) (permitting opinion testimony by a witness qualified as an expert if "the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue."). Legal opinion is not an appropriate subject of expert testimony under Rule 702 because it does not assist the trier of fact. *See Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1212-14 (D.C. Cir. 1997); *Hygh v. Jacobs*, 961 F.2d 359, 363 (2d Cir. 1992).[2]

[1] By way of illustration, the United States identifies those portions of Mr. Lopez's October 31, 2019, expert report other than the rebuttal to Texas's experts' reports. *See* N.M. Summ. J. Exhs. to Dispositive Mots. 107, in Sp. M. Docket No. 418 Vol. 1 ("First Lopez Report").

[2] *See*, *e.g.*, *United States v. Richter*, 796 F.3d 1173, 1196 (10th Cir. 2015) (concluding the district court erred by allowing a witness to provide a bare legal conclusion); *Sparton Corp. v. United States*, 77 Fed. Cl. 1, 6 (2007) ("Plaintiff is not entitled to present its legal arguments

The rationale for excluding legal opinion under Rule 702 can extend into original actions, where the Supreme Court is the trier of fact. Although the Court "has always been liberal in allowing full development of the facts" in original actions, *United States v. Texas*, 339 U.S. 707, 715 (1950), nothing suggests that the development of legal argument through expert testimony is any more appropriate in this forum than it would otherwise be in a district court. If anything, the opposite is true in this case, where the parties are represented by sophisticated counsel, many of whom have tried original actions involving equitable apportionments and interstate compacts.

The Special Master's exclusion of expert affidavits in *Kansas v. Colorado* at the summary judgment stage is instructive. *See* Special Master's Report Regarding Winter Storage Mots., Vol. III at 359, *Kansas v. Colorado*, (No. 105, Orig.).[3] In that case, much like this one, the parties submitted "[v]olumes of documentary history" bearing on the interpretation of the Arkansas River Compact and related federal legislation authorizing the Fryingpan-Arkansas Project. *See id.* at 358. Kansas also proffered an affidavit from an expert historian, Douglas Littlefield, to provide opinion on legislative intent relevant to compact interpretation. The Special Master granted Colorado's motion to exclude Dr. Littlefield's testimony, concluding that expert opinion on interpretation of the compact and the related legislation "present[ed] questions of law, to be decided by the Court." *Id.* at 362 (citations omitted). In so concluding, the Special Master reasoned that Dr. Littlefield undertook "the same kind of examination of source documents that would ordinarily be made by a court for purposes of determining legislative or administrative intent," and that expert interpretation "cannot supplant the interpretation which

---

from the witness stand in the guise of expert testimony and the weight of authority recommends exclusion of the testimony under these circumstances.").

[3] *Available at* https://www.supremecourt.gov/SpecMastRpt/ORG105V3_071994.pdf (last visited July 20, 2021), and on Westlaw, at No. 105, Orig., 1994 WL 16189353 (Oct. 3, 1994).

ultimately is within the power of the Court to make." *Id.* at 359. The Special Master emphasized that it is within "the province and duty of the judicial department to say what the law is[]" and that this is "[p]articularly . . . true with respect to interstate compacts." *Id.* at 358 (citations omitted).

More recently, in *Montana v. Wyoming*, the question of the permissible scope of Dr. Littlefield's testimony arose again. *See* Motions Hr'g Tr. at 9-14, *Montana v. Wyoming* (No. 137, Orig.).[4] The Special Master found Wyoming's concerns about legal opinion testimony to be "well taken" and issued detailed instructions to Montana's counsel (one of New Mexico's counsel in this case) to limit the testimony. *Id.* at 9. Specifically, it would be "very important that Mr. Littlefield not testify regarding either the meanings of particular provisions of the compact . . . or testify as to what the intent was of the states and negotiators and the members of Congress in agreeing to a particular point." *Id.* at 10. In light of Dr. Littlefield's expertise as a historian, the Special Master declined to exclude his testimony entirely, and clarified that Dr. Littlefield could testify to "indicators of intent," in his capacity as an expert historian. *Id.* at 11.

Here, New Mexico has proffered Estevan Lopez, the former executive director of the New Mexico Interstate Stream Commission and the former Commissioner of the Bureau of Reclamation, as both a percipient witness and an expert.[5] Mr. Lopez submitted several expert reports, sat for several days of deposition testimony, and provided three declarations at the summary judgment stage. New Mexico has identified Mr. Lopez as a trial witness for the

[4] *Available at* http://web.stanford.edu/dept/law/mvn/pdf/082913HEARING.pdf (last visited July 20, 2021).

[5] Mr. Lopez is not an attorney and does not "purport to be an expert on law or legal questions." Lopez Dep. 25:6-8, July 6, 2020.

hearing commencing on September 13, 2021, presumably to testify consistent with the opinions expressed in his declarations, depositions, and expert reports.

Many of the expert opinions disclosed by Mr. Lopez are legal conclusions based on his interpretation of the Compact and the federal contracts with the irrigation districts. In his expert report, Mr. Lopez states that he was asked to "[e]xplain the Compact[.]" First Lopez Report, N.M. Summ. J. Ex. 107, at 4. His report includes over seventeen pages of instructions about how to interpret the Compact. *See id.* at 15-32; *see, e.g.*, *id.* at 15-17 (defining terms in the Compact); *id*. at 18-24 (interpreting various Articles in the Compact); *id.* at 5, 32 (opining that the "provisions of the Rio Grande Compact are interdependent" and thus, water management actions "should not be evaluated in isolation.").

Similarly, in his declaration testimony, Mr. Lopez offered opinions construing the meaning of the Compact and its terms. *See*, *e.g.*, 2d Lopez Decl., N.M. Suppl. Exhs. for Resps. To Dispositive Mots. 008, in Sp. M. Docket No. 439, Vol. 1, ¶ 24 (noting that an "apportionment of Project water supply . . . can be inferred by reading the Compact together with the contemporaneous Downstream Contracts."). In other statements, Mr. Lopez purports to state as fact what the legal obligations are—or are not—under the Compact and the Contracts. *See*, *e.g.*, *id.* ¶¶ 24-25 (concluding that neither the Compact nor the Downstream Contracts refer to a 1938 condition.). He also conveyed as fact his speculation about the Compact negotiators' intent. *See id.* ¶ 7 (concluding that there is no schedule similar to those in Articles III and IV for deliveries to Texas at the state line, "although quite clearly the Compact drafters could have done so if that was their intent."); *id.* ¶ 10 ("Clearly, if the Compact negotiators intended to so constrain the operation of the Project, they knew how to do so. Yet they chose not to.").

If Mr. Lopez is called at trial, the United States will demonstrate that his analysis is flawed. It should be unnecessary for trial time to be spent for that purpose, however, because his testimony about the meaning of the Compact and the Downstream Contracts is legal, rather than technical, analysis. Like Dr. Littlefield, Mr. Lopez is conducting "the same kind of examination of source documents that would ordinarily be made by a court for purposes of determining legislative or administrative intent." Special Master's Report on Winter Storage Motions at 359, *Kansas v. Colorado* (No. 105, Orig.). The United States respectfully submits that such testimony will not assist the Supreme Court or the Special Master *as the trier of fact*. It is the Court's role—not Mr. Lopez's—to determine the meaning of the Compact. Mr. Lopez should not be permitted to provide a legal conclusion masquerading as expert opinion.

There are other bases for excluding Mr. Lopez's legal opinion testimony. First, his opinions have been superseded, or rendered moot, by the Special Master's order dismissing New Mexico's counterclaims against the United States (Sp. M. Docket No. 338) and the Special Master's order on the summary judgment motions (Sp. M. Docket No. 503). The testimony is also subject to exclusion under the balancing principle in Rule 403 because it would waste the time of the Special Master and the parties on legal argumentation. *See* Fed. R. Evid. 403 (allowing the exclusion of evidence if its probative value is "substantially outweighed by a danger of . . . undue delay, wasting time, or needlessly presenting cumulative evidence").

Because Mr. Lopez is not a historian, his expert testimony is not entitled to the same benefit of the doubt that was afforded to Dr. Littlefield in *Montana v. Wyoming.* The line between legal opinion and historical opinion about matters such as "intent" may be difficult to draw prior to the testimony at trial. For that reason, the United States requests a general

preliminary ruling that legal opinion testimony will be inadmissible at trial, and it does not seek a preliminary ruling directed to witnesses other than Mr. Lopez.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that the Special Master exclude Mr. Lopez's testimony and the portions of his reports that constitute legal opinion and that the Special Master also issue a general ruling that legal opinion testimony will not be admissible at trial.

Respectfully submitted this 20th day of July 2021.

ELIZABETH B. PRELOGAR
Acting Solicitor General
EDWIN S. KNEEDLER
Deputy Solicitor General
JEAN E. WILLIAMS
Acting Assistant Attorney General

/s/ James J. DuBois
JAMES J. DuBOIS
R. LEE LEININGER
Trial Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
999 18th Street, South Terrace – Suite 370
Denver, CO 80202

JUDITH E. COLEMAN
JENNIFER A. NAJJAR
Trial Attorneys
U.S. Department of Justice
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20004

FREDERICK LIU
Assistant to the Solicitor General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001