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 CONSOLIDATED REPLY IN SUPPORT OF ITS MOTIONS IN LIMINE

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TABLE OF CONTENTS

UNITED STATES OF AMERICA'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTIONS IN LIMINE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

1. A preliminary ruling that New Mexico may not pursue its dismissed counterclaims at trial is consistent with the scope of this action and would not result in the exclusion of relevant evidence. 3

   a. The United States' motion was sufficiently specific and contained examples New Mexico fails to address. 3

   b. New Mexico fails to rebut the risk of undue delay. 4

   c. Sovereign immunity bars declaratory relief on New Mexico's counterclaims because they do not mirror the United States' claims. 6

   d. The United States does not seek to exclude evidence relevant to New Mexico's counterclaims against Texas. 7

   e. New Mexico's objections relating to each counterclaim lack merit. 8

   f. The United States should not be required to use time in its case-in-chief to present a defense to New Mexico's counterclaims. 12

2. New Mexico's opposition to the United States' Motion on the summary judgment rulings is unsupported. 13

3. New Mexico should be precluded from offering legal argument through its witnesses. 15

   a. The United States' motion was sufficiently specific 16

   b. The testimony cited by the United States is legal opinion, not trade and custom testimony 16

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Am. Specialty Ins. Co. v. Myers,
111 F.3d 1273 (6th Cir. 1997) 18
Burkhart v. Washington Metropolitan Area Transit Authority,
112 F.3d 1207 (D.C. Cir. 1997) 17
Chase Manhattan Bank v. Iridium Africa Corp.,
474 F. Supp. 2d 613 (D. Del. 2007) 14
Hygh v. Jacobs,
961 F.2d 359 (2d Cir. 1992) 15
In re Apex Oil Co.,
958 F.2d 243 (8th Cir. 1992) 13
Kansas v. Colorado,
206 U.S. 46 (1907) 7
Kansas v. Colorado,
514 U.S. 673 (1995) 8
Marmo v. Tyson Fresh Meats, Inc.,
457 F.3d 748 (8th Cir. 2006) 12
Parker v. Clarke,
910 F. Supp. 460 (E.D. Mo. 1995) 14
Quinault Indian Nation v. Pearson for Est. of Comenout,
868 F.3d 1093 (9th Cir. 2017) 6, 7
Republic of Turkey v. Christie's Inc.,
--- F. Supp. 3d. ----, No. 17-CV-3086 (AJN), 2021 WL 1089487, at *4 (S.D.N.Y. Mar. 22, 2021)……12
St. Paul Fire & Marine Ins. Co. v. Farner,
648 F.2d 489 (8th Cir. 1981) 14
TAS Distributing Co. v. Cummins,
No. 07-cv-1141, 2013 WL 12241129 (C.D. Ill. Feb. 1, 2013) 14
United States v. Dorio,
483 F. Supp. 3d 145 (D. Conn. 2020) 7
United States v. Forma,
42 F.3d 759 (2d Cir. 1994) 6
United States v. Smithfield Foods,
969 F. Supp. 975 (E.D. Va. 1997) 14
United States v. Washington,
853 F.3d 946 (9th Cir. 2017) 6
Washington v. United States,
138 S. Ct. 1832, 1833 (2018)……..……6

Rules

Fed. R. Civ. P. 26(a)(2)(D)(ii) 12
Fed. R. Evid. 403 4
Fed. R. Evid. 702 18

UNITED STATES OF AMERICA'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTIONS IN LIMINE

New Mexico's responses to the United States' motions in limine reflect a mistaken view of the scope of this case. According to New Mexico, it is free to use its 150 hours of trial time to create a record on counterclaims that have been dismissed, to argue equitable defenses that were extinguished by summary judgment, and to present legal argument through its expert witnesses. New Mexico is wrong on all three counts. The Supreme Court has not authorized New Mexico to use the Court's original forum for these purposes, and trial threatens to become unmanageable if New Mexico proceeds on its stated course. With final witness and exhibit lists due in a matter of days, the need for preliminary guidance is urgent. The United States respectfully requests that its motions be granted and has consolidated its replies to New Mexico herein.

SUMMARY OF ARGUMENT

The United States seeks three preliminary rulings to aid in its preparation for trial: a ruling that New Mexico may not present evidence at trial to advance its dismissed counterclaims; a ruling that New Mexico may not present evidence at trial to relitigate the determinations made on summary judgment; and a ruling that precludes legal opinion testimony by New Mexico's witnesses, in particular Estevan Lopez. Sp. Master Docket Nos. 534-536.[1] Because this guidance can be tailored to admit evidence upon a sufficient proffer by New Mexico, it would not prejudice New Mexico's case or compromise the record developed for the Court. New Mexico has no sound basis for opposing it.

1. New Mexico's response to the United States' Counterclaims Motion is non-responsive in numerous, critical respects and disregards the Special Master's previous admonitions about

[1] The motions and responses are abbreviated as "Counterclaims Mot. [Resp.]"; "Summ. J. Mot. [Resp.]"; and "Lopez Mot. [Resp.]"

the scope of this case. The Special Master correctly instructed that "a grant of [original] jurisdiction does not serve to throw open the courthouse doors to all counterclaims bearing some relation to the dispute." Dismissal Order at 23. New Mexico's expansive view of trial cannot be reconciled with that instruction. Although the Special Master noted a potential exception for declaratory relief, New Mexico's counterclaims against the United States do not come within that exception because they do not mirror the claims brought by the United States. *See id.* at 2. The United States' motion to exclude evidence on the dismissed counterclaims should be granted to prevent trial from veering into collateral issues on which New Mexico has no chance of recovery.

2. New Mexico's opposition to the United States' motion relating to the summary judgment rulings is similarly unsupported. New Mexico has no specific objection to the United States' characterization of the rulings, and New Mexico's allegation that its equitable defenses survived summary judgment is baseless. In light of that allegation, as well as its position on the dismissed counterclaims, New Mexico's suggestion that it will faithfully abide by the Summary Judgment Order at trial cannot be credited. A preliminary ruling that New Mexico may not use trial testimony to relitigate summary judgment should be entered as a prophylactic measure.

3. New Mexico's attempt to recast Estevan Lopez's legal opinions as testimony about Compact "implementation" shows that the motions of Texas and the United States to exclude that testimony are justified. He should be limited to testifying about matters within his personal knowledge, and other witnesses should be barred from offering legal argument through testimony.

ARGUMENT

1. A preliminary ruling that New Mexico may not pursue its dismissed counterclaims at trial is consistent with the scope of this action and would not result in the exclusion of relevant evidence.

The United States seeks a preliminary ruling that New Mexico may not use the trial in this case to develop a record on its dismissed counterclaims. In an ordinary case, a ruling along these lines would not be necessary. But here, New Mexico's response confirms that the United States' motion is justified. New Mexico expressly urges the Special Master to "create a record" on the dismissed counterclaims at trial "in case the Court finds one or more [of them] is viable" on exception. Counterclaims Resp. at 3. New Mexico then demands that the United States present its defense to those counterclaims as part of its case-in-chief. *See id*. at 14. New Mexico has it backward: its counterclaims must be deemed viable before it may use the Court's original forum to "create a record." And to the extent New Mexico is permitted to offer any evidence suggestive of federal liability at trial, the United States has the right to hear that evidence prior to presenting its defense.

a. The United States' motion was sufficiently specific and contained examples New Mexico fails to address.

As noted, the United States seeks preliminary guidance about the admissibility of counterclaim-related evidence at trial. The United States provided specific information sufficient to justify that relief. The United States did not merely identify "categories" of evidence, as New Mexico states, *id.* at 4-5; it also provided examples of evidence within those categories. *See* Counterclaims Mot. at 12-13 (citing, inter alia, certain of Dr. Barroll's opinions and various documents relating to the 2011 credit water issue). New Mexico does not address these examples in its response.

New Mexico's representation that there is a free-standing "burden" of specificity that applies to motions in limine is also overstated. *See* Counterclaims Resp. at 1 (quoting a 1994 district court order stating that a court "may" deny a motion that lacks specificity). The ruling on a motion in limine constitutes preliminary guidance offered at the court's discretion. *See* Counterclaims Mot. at 1 n.1. Courts routinely use the ruling on a motion in limine to provide general guidance about evidence, even if the motion is deferred to trial. *See*, *e.g.*, Motions Hr'g Tr. at 9-14, *Montana v. Wyoming* (No. 137, Orig.), in U.S. App., Sp. Master Docket No. 537.

In the circumstances of this case, an exhaustive, itemized list would not be possible, nor would it facilitate review of the United States' request. New Mexico disclosed a list of approximately 2,600 exhibits, many of them duplicates. Based on an initial review, the United States has identified over 200 exhibits (excluding duplicates) that appear to serve no purpose other than advancing New Mexico's dismissed counterclaims. Many other exhibits have both relevant and irrelevant content, or are so voluminous that their relevance cannot be readily discerned. Given the ongoing revision of the exhibit lists, an itemized list would not provide an accurate basis for a ruling.

b. New Mexico fails to rebut the risk of undue delay.

The United States contends that the presentation of evidence on the dismissed counterclaims creates a substantial risk of undue delay and wasted time, which is a permissible basis for exclusion under the Federal Rules of Evidence. *See* Counterclaims Mot. at 3-4; Fed. R. Evid. 403. New Mexico does not address those concerns anywhere in its response. Its discussion about excluding evidence that would confuse or mislead the fact-finder is beside the point. *See* Counterclaims Resp. at 2-3.

The United States showed that the presentation of evidence on New Mexico's counterclaims is likely to give rise to "trials within the trial," or "mini-trials," on collateral issues

that are not within the scope of this action. *See* Counterclaims Mot. at 3-4. In response, New Mexico indicates that mini-trials on the counterclaims are exactly what it has in mind, counseling the Special Master that "it would be prudent to create a record that allows the Court to fully evaluate the issues in case the Court decides one or more of the dismissed counterclaims is viable." Counterclaims Resp. at 3. New Mexico thus suggests that the Special Master should conduct a trial on the dismissed counterclaims within the existing trial, based on a speculative risk of remand. In fact, that risk is doubly speculative because New Mexico cannot say whether it actually will seek an exception to the Dismissal Order—only that it wants a trial on its counterclaims "in case" it decides to do so.

The possibility of a remand is not a sufficient basis to disregard the Supreme Court's gatekeeping function or treat the Dismissal Order as a nullity. The possibility of remand always exists, and proceeding on the basis suggested by New Mexico would not diminish it. The United States has relied on the Dismissal Order in discovery and pretrial practice, and in developing its trial presentation. Given that reliance, the United States cannot foreclose the possibility that it would take exception to a judgment in New Mexico's favor on an issue relating to the dismissed counterclaims because the United States believes it did not have a fair opportunity to "create a record" of its own, Counterclaims Resp. at 3.

New Mexico, not the United States, should bear the consequences of New Mexico's decision not to take exception from the Dismissal Order. New Mexico says it "has not had the opportunity to take exception because the Dismissal Order has not yet been presented to the Court." Counterclaims Resp. at 3. But New Mexico did have an opportunity to request the Supreme Court's review or a report from the Special Master from which exceptions could be taken. The Special Master all but invited New Mexico to do so in his order. *See* Dismissal

Order at 25 ("If a special master . . . addresses the [propriety of counterclaims] in the first instance, *the parties are free to ask for Supreme Court review* or to raise the issue in opposition to any report filed by the special master." (emphasis added)). Thus, the possibility of remand is one of New Mexico's own making. It does not justify subjecting the parties and the Court to a protracted trial on Project operations.

c. Sovereign immunity bars declaratory relief on New Mexico's counterclaims because they do not mirror the United States' claims.

The Special Master correctly determined that the United States has not waived its sovereign immunity for New Mexico's counterclaims but deferred a decision as to whether New Mexico may seek declaratory relief "as to counterclaims that essentially mirror claims the United States has asserted." Dismissal Order at 2. New Mexico's reliance on this reservation in the Special Master's Order is misplaced because New Mexico's counterclaims do not come within the scope of the potential exception reserved by the Special Master.

The Special Master's reference to "mirror"-image relief presumably refers to the availability of recoupment (offset) counterclaims against the United States. *See United States v. Forma*, 42 F.3d 759, 764-65 (2d Cir. 1994). No claim for recoupment lies against the United States in this action because the United States is not seeking a monetary award or any other remedy susceptible to an offset. *See Quinault Indian Nation v. Pearson for Est. of Comenout*, 868 F.3d 1093, 1100 (9th Cir. 2017) (recoupment claims "merely seek an offset to the sovereign's requested relief"); *United States v. Washington*, 853 F.3d 946, 968 (9th Cir. 2017) ("the remedy . . . sought by the United States and by the defendant in recoupment must be monetary), *aff'd* by an equally divided court, 138 S. Ct. 1832. Moreover, even assuming some waiver (or exception to immunity) for mirror-image relief outside the context of suits for

money,[2] New Mexico's claims alleging the unlawfulness or impropriety of federal management actions would not come within that waiver because they do not "mirror" the claims asserted by the United States. *See* Dismissal Order at 2; *see also*, *e.g.*, *United States v. Dorio*, 483 F. Supp. 3d 145, 154-55 (D. Conn. 2020).

d. The United States does not seek to exclude evidence relevant to New Mexico's counterclaims against Texas.

A ruling that New Mexico may not present evidence to advance its dismissed counterclaims at trial would not result in the exclusion of evidence relevant to New Mexico's counterclaims against Texas.

The Special Master has allowed New Mexico to pursue two counterclaims against Texas on the basis that the issues raised by those counterclaims do not exceed the issues framed by the claims of Texas and the United States (the only claims the Supreme Court has accepted for review). *See* Dismissal Order at 8, 27. The claims in those complaints concern the effect of groundwater pumping on what the Special Master has called the "protected baseline condition" of Project operations. Summ. J. Order at 6. That issue is congruent with other original jurisdiction actions. *See Kansas v. Colorado*, 206 U.S. 46, 97 (1907) ("when the action of one state reaches, through the agency of natural laws, into the territory of another state, the question of the extent and the limitations of the rights of the two states becomes a matter of justiciable dispute between them").

Without waiving any rights or position at trial, the United States suggests that four categories of evidence are relevant to the determinations to be made at trial:

[2] *But see*, *e.g.*, *Quinault,* 868 F.3d at 1100-1103 (dismissing counterclaim for declaratory judgment that mirrored Tribe's civil RICO claims as barred by sovereign immunity).

> (1) Evidence probative of the Compacting States' understanding of the protected baseline condition in 1938 (which may include evidence of the course of performance by the States after 1938);
>
> (2) evidence as to whether Project deliveries since 1985 have resulted in a 57% - 43% split of the Project water supply as it would have been under the protected baseline condition;
>
> (3) evidence as to whether groundwater pumping in New Mexico or Texas is a proximate cause of departures from the protected baseline condition that have resulted, or will result, in injury to the other State—i.e., whether either State has failed to fulfill its duty to prevent groundwater pumping from materially interfering with Project deliveries; and
>
> (4) evidence as to whether either State has acquiesced in some degree of non-performance by the other. [3]

See Summ. J. Order at 46; Trial Mgmt. Order at 8 (deferring trial on remedies).

The preliminary ruling requested by the United States would not exclude evidence on any of these issues. Moreover, if New Mexico believes that certain exhibits facially relevant to the dismissed counterclaims against the United States are necessary to show some element of its counterclaims against Texas, then New Mexico need only make a showing to that effect at trial prior to offering the evidence.

e. New Mexico's objections relating to each counterclaim lack merit.

In reply to New Mexico, the United States incorporates by reference the arguments in its motion and provides the following additional responses.

Counterclaim 2. The United States does not seek to "exclude all evidence related to the 2008 Operating Agreement," as New Mexico suggests. Counterclaims Resp. at 9. The United

[3] Acquiescence evidence is included above because the States may seek to argue that it negates a showing of injury. Acquiescence is not relevant to the construction of the Compact as a federal statute. *See Kansas v. Colorado*, 514 U.S. 673, 690 (1995) (rejecting Colorado's argument that "subsequent practice" of the parties, including Kansas's failure to object to certain developments in Colorado, excused violation of interstate compact's express terms).

States agrees that the Operating Agreement is relevant and testimony is appropriate to show where the water goes, as basic context for understanding the Project. But once the protected baseline operating condition for the Project is established, the relevant question is whether the States have received all the water they would have received under that condition. The detailed mechanics that resulted in delivery of particular quantities are not relevant. The determination of that issue will from that point on "inform" the United States' decisions concerning management of the Project, including any decisions about whether revisions to the 2008 Operating Agreement are necessary. Dismissal Order at 15. If those decisions are not consistent with the Court's ruling, New Mexico's recourse is to "the Administrative Procedure[] Act or other sources of authority where Congressional waivers of immunity can be found." *Id.*

Despite the Special Master's instruction that "this is neither the time nor the forum to address the validity of the 2008 Operating Agreement," *id*. at 29, New Mexico implies that it will present a case at trial about the validity of the 2008 Operating Agreement. It does so by twisting the Special Master's words. In the Dismissal Order, the Special Master explained that, while the Operating Agreement "may be relevant to the issue of current operations," "the validity of the agreement itself, and the ability of the contracting parties to enter into the agreement are at best premature." *Id.* In its response, New Mexico rewrites this sentence, agreeing to avoid only the "ability of the parties to enter the agreement" question. *See* Counterclaims Resp. at 9 (agreeing that New Mexico will not present evidence challenging "'the validity of the 2008 Operating Agreement,' *meaning* 'the ability of the contracting parties to enter into the agreement'" (emphasis added)). New Mexico apparently recognizes no other restriction on evidence going to the validity of the 2008 Operating Agreement, and it does not dispute that the presentation of

testimony at trial on that subject would exceed what New Mexico would otherwise be allowed in a case under the Administrative Procedure Act. *See* Counterclaims Mot. at 6.[4]

The Special Master previously instructed that the Court's original jurisdiction "should not be expanded to encompass . . . theories that can be presented in other fora or that can be resolved outside of litigation upon resolution of the key issues that animated the Court's initial grant of jurisdiction." Dismissal Order at 23. As to the Operating Agreement, there are two competing proposals. Under New Mexico's proposal, it would be allowed to present a broad-spectrum attack on the Operating Agreement at trial, in the absence of leave of Court, and pursuant to an exception to sovereign immunity that is legally uncertain at best. Under the United States' proposal, New Mexico would be directed to reserve its arguments for future implementation actions taken by the United States (if necessary) or for district court, where there is an express waiver of sovereign immunity and a grant of jurisdiction to decide them. Only the United States' proposal is consistent with the jurisdictional limitation the Special Master identified.

Counterclaim 3. New Mexico's suggestion that the 2011 credit water release is related to an ongoing dispute over credit water accounting in the Rio Grande Compact Commission is simply not the case. But even it were, it would not make the counterclaim appropriate for trial. These accounting disputes are inconsistent with the case as framed by the Court and the Special Master. Dismissal Order at 1, 33, 41.

Counterclaim 5. New Mexico agrees that it will not present evidence on this counterclaim. Counterclaims Resp. at 11. The motion is therefore conceded on this claim.

[4] New Mexico dismisses the United States' concern about an end-run around the APA as "a distraction" without responding to its substance. Counterclaims Resp. at 10 n.1.

Counterclaim 6. For all the reasons stated previously and above, New Mexico should be precluded from using the trial in this case to pursue its accounting counterclaim. Although some accounting data may be admissible and relevant, a multi-decadal audit of the Project is outside the scope of what the Supreme Court has accepted for review. *See* Dismissal Order at 33.

Counterclaim 7. New Mexico states that it "does not intend to present evidence solely to address the '*legality* of the federal contracts with El Paso.'" Counterclaims Resp. at 12 (emphasis in original). It is not clear what "solely" means in this statement. Requiring New Mexico to make a proffer of relevance for evidence other than basic background for the contracts would address this concern.

Counterclaim 8. New Mexico's response reveals that its maintenance counterclaim is actually intended as a challenge to the Operating Agreement, which (according to New Mexico) improperly charges that State for sediment- and vegetation-related river losses that are speculative and unquantified. *Id*. at 12. *See* Counterclaims Mot. at 9 n.5 (noting that New Mexico has not disclosed any expert opinion quantifying the depletions associated with channel maintenance.). Because this counterclaim is aimed at the Operating Agreement, it should be reserved for potential district court review under the APA after the Court establishes whether New Mexico has actually been deprived of water to which it is entitled.

Counterclaim 9. Because New Mexico has not suggested that it will present evidence on non-justiciable allegations about federal treaty enforcement, the United States will defer further objection relating to this counterclaim to trial.

f. The United States should not be required to use time in its case-in-chief to present a defense to New Mexico's counterclaims.

New Mexico's argument that the United States must use its affirmative case to present a rebuttal to the dismissed counterclaims should be rejected as a defense to the motion, and as a proposal for trial management.

First, this argument misunderstands the United States' motion. In the case law on undue delay—which New Mexico fails to address—courts have identified the risk that, if evidence is introduced to attack a party on a collateral issue, the party may demand the right to cross-examine and present rebuttal testimony addressing the evidence, giving rise to a "mini-trial" that unduly prolongs the proceeding. *See*, *e.g.*, *Republic of Turkey v. Christie's Inc.*, --- F. Supp. 3d. ----, No. 17-CV-3086 (AJN), 2021 WL 1089487, at *4 (S.D.N.Y. Mar. 22, 2021) (rejecting plaintiff's proposed "other act" evidence because "[a]uthenticating the evidence and then allowing Defendants to cross-examine [the witnesses] and make their rebuttal case as to each piece of evidence would take up significant amounts of time and result in multiple side-show trials"). In this case, there is a substantial risk of undue delay because if New Mexico introduces evidence to support its dismissed counterclaims, the United States may introduce testimony rebutting that evidence, creating a trial within the trial. *See Marmo v. Tyson Fresh Meats, Inc*., 457 F.3d 748, 759 (8th Cir. 2006) ("The function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party."); *see also* Fed. R. Civ. P. 26(a)(2)(D)(ii) (defining a "rebuttal" opinion as one "intended solely to contradict or rebut evidence on the same subject matter identified by another party"). Regardless of when that rebuttal testimony is presented, it threatens to prolong this trial on collateral issues.

Second, taken as a motion on its own, New Mexico's demand that the United States use its affirmative case to present rebuttal testimony on the counterclaims is unreasonable. New

Mexico contends that any rebuttal testimony going to the dismissed counterclaims must be presented in the United States' affirmative case because "those issues are well known to the United States." Counterclaims Resp. at 14. But those issues are "known to the United States" as issues that have been dismissed from this action. The presentation of evidence at trial to support claims that have been dismissed could not "reasonably have been anticipated prior to trial," *id.* Moreover, what New Mexico is actually describing is not rebuttal, but rather the United States' *defense* to affirmative claims for relief by New Mexico, which New Mexico apparently believes to be "viable." Counterclaims Resp. at 3. New Mexico bears the burden of proof on those claims, or would bear the burden of the proof if those claims had not been dismissed. As the hypothetical defendant to those claims, the United States must have the right to respond, to the extent necessary, after New Mexico presents its case.[5]

The presentation of testimony on New Mexico's dismissed counterclaims, by New Mexico and by the United States, will prolong this trial on collateral issues outside the scope of this original action. Therefore, the United States' motion in limine seeking a preliminary ruling barring such testimony should be granted.

2. New Mexico's opposition to the United States' Motion on the summary judgment rulings is unsupported.

The United States also requests a preliminary ruling that precludes New Mexico from offering evidence for the purpose of contesting the Special Master's rulings in the Summary Judgment Order, Sp. M. Docket No. 503, including the implied rejection of New Mexico's equitable affirmative defenses. Because the Special Master granted summary judgment in part on the United States' claim for declaratory relief, a pretrial ruling confirming the preclusive

[5] The case relied upon by New Mexico as "black letter law" is inapposite because it relates to the standard for allowing rebuttal testimony by a witness who had not been timely identified. *See In re Apex Oil Co*., 958 F.2d 243 (8th Cir. 1992).

effect of that judgment would aid the United States in assessing the amount of trial time it needs and the best use of that time.

New Mexico has not provided any reasoned basis for denying the United States' motion. New Mexico does not contest the United States' characterization of the Special Master's determinations in the fifteen numbered paragraphs, *see* Summ. J. Mot. at 3-5, and New Mexico's contention as to its equitable defenses is mistaken: New Mexico's affirmative defenses to the United States' claim for declaratory relief were necessarily rejected by the Special Master's grant of partial summary judgment on that claim. *See*, *e.g.*, *St. Paul Fire & Marine Ins. Co. v. Farner*, 648 F.2d 489, 491 (8th Cir. 1981) ("The district court implicitly rejected the defense of waiver by granting summary judgment" to the plaintiff); *Chase Manhattan Bank v. Iridium Africa Corp.*, 474 F. Supp. 2d 613, 621 (D. Del. 2007) (summary judgment for plaintiff "necessarily implied a rejection" of affirmative defenses).[6] New Mexico offers no sound reason to conclude otherwise, as it has yet to cite authority showing that its equitable defenses to the United States' complaint are available as a matter of law. *See* Sp. M. Docket No. 472, at 18.

New Mexico's argument that a pretrial ruling would be inappropriate because the Summary Judgment Order "speaks for itself" is unpersuasive, for at least two reasons. Summ. J.

[6] *See also*, *e.g.*, *United States v. Smithfield Foods,* 969 F. Supp. 975, 985 (E.D. Va. 1997) (partial summary judgment awarded to the United States in enforcement action "implicitly rejected" defendant's selective prosecution defense); *Parker v. Clarke*, 910 F. Supp. 460, 461 (E.D. Mo. 1995) ("the Court deliberately but impliedly rejected the qualified immunity defense asserted by defendants . . . when it . . . granted in part [plaintiffs'] motion for summary judgment"); see *also TAS Distributing Co. v. Cummins*, No. 07-cv-1141, 2013 WL 12241129, at *3 (C.D. Ill. Feb. 1, 2013) ("When a plaintiff moves for summary judgment . . . , it need not also move for the court to reject all defenses—that is implied by the motion. . . . If the defendant fails to raise affirmative defenses in response . . . , those defenses are waived."). The United States notes that New Mexico did not argue any affirmative defense in its summary judgment response other than "acquiescence," and acquiescence was not pleaded as a defense in its Answer.

Resp. at 1. First, New Mexico fails to address, much less distinguish, the examples cited by the United States, including the Special Master's pretrial ruling in *Montana v. Wyoming* that excluded evidence inconsistent with the prior summary judgment on liability. *See* Mot. at 3. Second, New Mexico's representation that it will not offer evidence to contest the Summary Judgment Order is not credible in light of New Mexico's position relating to its dismissed counterclaims and legal opinion testimony.[7] Moreover, if New Mexico is given the benefit of the doubt that it will respect the summary judgment determinations at trial, it cannot possibly be prejudiced by a preliminary ruling to the same effect.

For these reasons, the United States respectfully submits that the Special Master preclude the offering of evidence to contest the summary judgment rulings for the United States and Texas, or to support equitable defenses to the United States' claim for declaratory relief.

3. New Mexico should be precluded from offering legal argument through its witnesses.

In its response to the motions by the United States and Texas to exclude legal opinion testimony, New Mexico concedes that legal conclusions constitute impermissible expert testimony, and New Mexico represents that Mr. Lopez will not offer legal conclusions. Lopez Resp. at 1. *See also Hygh v. Jacobs*, 961 F.2d 359, 363–64 (2d Cir. 1992) (collecting cases excluding legal opinion testimony). Yet, New Mexico proceeds to undermine that representation by arguing that under contract-interpretation principles Mr. Lopez is qualified to interpret the Compact from a "practical or operational" perspective. Lopez Resp. at 2. New Mexico also

[7] *See also*, *e.g.*, Lopez Resp. at 12 (quoting Estevan Lopez's testimony that "the conjunctive use of groundwater to supplement Project supply" was "normal practice" contemplated by the Compacting States), *contra* Summary Judgment Order at 29 (finding that such use was "not substantial" in the decade before Compact ratification).

argues that the United States did not sufficiently identify the potions of his testimony. Neither argument has merit.

a. The United States' motion was sufficiently specific.

The United States' motion is sufficiently specific to support the relief it is requesting: a preliminary ruling that legal opinion testimony "on questions of compact and contract interpretation[]" will be inadmissible at trial.[8] Lopez Mot. at 1. In addition to identifying the subject of the improper testimony challenged, the United States pointed to specific averments to serve as an illustration of Mr. Lopez's inadmissible statements from Mr. Lopez's declaration and expert report. Lopez Mot. at 1 n.1 (noting "[b]y way of illustration, the United States identifies portions of Mr. Lopez's October 31, 2019, expert report"); *id*. at 4 (identifying seventeen pages of his report that instruct the reader on how to interpret the Compact); *id*. (identifying specific paragraphs of Mr. Lopez's second declaration interpreting the Compact and contracts).

The United States was not required to do anything more. As evidenced by New Mexico's response, the United States' motion provides sufficient information for New Mexico to join issue.

b. The testimony cited by the United States is legal opinion, not trade and custom testimony

The United States showed that Mr. Lopez offers testimony that does little more than advise the Court on how to interpret the Compact, advice that is neither necessary nor appropriate. New Mexico's attempt to reframe Mr. Lopez's analysis as a "technical reading of the Compact's terms" is unavailing. Lopez Resp. at 1. Calling testimony "technical" does not

[8] New Mexico repeatedly mischaracterizes the scope of the United States' motion. Lopez Resp. 1, 7-8. The United States' motion does not seek to preclude the entirety of Mr. Lopez's testimony, only legal opinion testimony about Compact and contract interpretation.

make it so. Mr. Lopez's "reading" of "terms" in the Rio Grande Compact is, by definition, interpretation of the Compact. It does not bear on any question of fact before the Special Master.

Mr. Lopez's interpretations are legal conclusions, and legal conclusions are impermissible. See *Burkhart v. Washington Metropolitan Area Transit Authority*, 112 F.3d 1207, 1213 (D.C. Cir. 1997) (concluding that "[e]xpert testimony that consists of legal conclusions cannot properly assist the trier of fact in either respect, and thus it is not 'otherwise admissible.'"). Mr. Lopez offers opinions as to what the Compact does or does not require, a necessary element of proof for determining if there is a Compact violation. *See*, *e.g.*, 2d Lopez Decl., NM-EX-008, in Sp. M. Docket No. 439, Vol. 1, ¶¶ 24-25. In other statements, Mr. Lopez speculates as to what the Compact negotiators intended. *Id.* at ¶ 10. New Mexico contends that these opinions "only have a superficial appearance, if any, of legal opinion or legal conclusion testimony." Lopez Resp. at 5. But New Mexico does not say what else they could be, or why legal testimony would be any less problematic simply because it is "superficial."[9]

New Mexico contends that Mr. Lopez's testimony goes to the "usage of trade, custom, technical usage, and norms bearing on the practical interpretation of the Compact." Lopez Resp. at 8. But New Mexico does not point to a single term of art in the Compact with highly technical or trade-specific meaning. Therefore, "'[a]bsent any need to clarify or define terms of art,

[9] In *Kansas v. Colorado*, the Special Master stated that expert opinion going to interpretation of the compact and related legislation "present[ed] questions of law, to be decided by the Court." Special Master's Report Regarding Winter Storage Mots., Vol. III at 362, *Kansas v. Colorado*, (No. 105, Orig.). New Mexico waves this statement away because the expert opinion supported an argument based on principles of contract interpretation, and the Special Master ultimately did not apply those principles. Lopez Resp. 7-8. But the Special Master also questioned whether "applying contract law would save either of these affidavits[.]" *Id.* at 363. Like Mr. Lopez's proposed testimony, the affidavit of one expert was "based upon [the expert's] review of primary historical documents, and represents his conclusions rather than factual evidence not otherwise available to the Court." *Id.* at 362.

science, or trade,'" Mr. Lopez's "'expert opinion testimony to interpret contract language is inadmissible.'" *N. Am. Specialty Ins. Co. v. Myers*, 111 F.3d 1273, 1281 (6th Cir.1997) (quotations omitted).

New Mexico is offering Mr. Lopez to testify about the Compact because he has personal experience with interstate compact implementation and professional experience at the Bureau of Reclamation. The depth of his experience is not in question. But experience is not the same as technical expertise, and Mr. Lopez has no special expertise in interpreting the Compact that the Court does not itself possess. Indeed, Mr. Lopez largely relies on the opinions of other witnesses, frequently Dr. Barroll, in explaining his conclusions. *See*, *e.g.*, NM-EX-007 at 5, in Sp. M. Docket No. 418 Vol. 1 at 5; 2d Lopez Decl. at ¶¶ 22-23 (same). Mr. Lopez may not recite a factual narrative from one party's perspective, granting it credibility, when he has no expertise as a historian or personal knowledge of the facts addressed. Because Mr. Lopez's opinions about the Compact are tantamount to legal argument, they should be precluded under Fed. R. Evid. 702.

For these reasons, and based on New Mexico's concession, legal opinions testimony, including Mr. Lopez's in particular, should be excluded at trial.

CONCLUSION

For the foregoing reasons, the United States requests that the Special Master grant its Motions in Limine, Sp. M. Docket Nos. 534, 535, and 536.

Respectfully submitted this 12th day of August 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 the 12th day of August, 2021, I caused a true and correct copy of the **UNITED STATES OF AMERICA'S CONSOLIDATED REPLY IN SUPPORT OF ITS MOTIONS IN LIMINE** to be served via electronic mail upon those individuals listed on the Service List, attached hereto.

Respectfully submitted,

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