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

STATE OF NEW MEXICO'S RESPONSE TO THE UNITED STATES OF AMERICA'S MOTION IN LIMINE TO EXCLUDE LEGAL OPINION TESTIMONY

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The State of New Mexico ("New Mexico") responds in opposition to the United States of America's Motion in Limine to Exclude Expert Testimony ("Motion") as follows.

INTRODUCTION

The Motion concerns the expert testimony of Estevan Lopez, a professional engineer, former Director of the New Mexico Interstate Stream Commission, former Deputy New Mexico State Engineer, and former Commissioner for the United States Bureau of Reclamation. The United States of America ("United States") argues that Mr. Lopez's expert testimony to "[e]xplain the Compact, Compact accounting and the relationship of the Project to the Compact," Expert Report of Estevan R. Lopez, P.E., 4 (Oct. 31, 2019) (filed as NM-EX-107 in the New Mexico Exhibit Compendium (Nov. 5, 2020)), is impermissible legal opinion testimony.

The United States is mistaken. Mr. Lopez neither purports to be a legal expert nor gives legal opinion testimony, and New Mexico generally agrees that such testimony would be improper. Rather, to the limited extent that Mr. Lopez gives an opinion concerning interpretation of the Rio Grande Compact ("Compact"), his analysis is based upon a technical reading of the Compact's terms in light of his expertise as an engineer and public servant with significant experience with the norms, customs, and standards of interstate water administration and water management in Bureau of Reclamation irrigation projects.

ARGUMENT

"Although the Federal Rules of Evidence do not explicitly authorize *in limine* rulings, the practice has developed pursuant to the district court's inherent authority to manage the course of trials." *Luce v. United States*, 469 U.S. 38, 41 n.4 (1984). "[A] motion in limine should be granted only if the evidence sought to be excluded is clearly inadmissible for any purpose." *Noble v. Sheahan*, 116 F. Supp. 2d 966, 969 (N.D. Ill. 2000).

In this case, the United States contends that certain of Mr. Lopez's expert opinions should be excluded from evidence at trial because they are insufficiently "helpful" to the Court under Federal Rule of Evidence 702 or would otherwise waste time under Federal Rule of Evidence 403. Principally, the United States argues that testimony to interpret the Rio Grande Compact is necessarily "legal opinion" testimony. This argument fails for three principal reasons: (1) the United States fails to meet its burden to demonstrate that any specific testimony that Mr. Lopez may offer is inadmissible; (2) the United States improperly presumes that interpretation of the Compact is a pure question of law for which expert testimony is inherently inadmissible; and (3) Mr. Lopez is uniquely qualified to give testimony concerning a practical or operational interpretation of the Compact.

I. THE MOTION IS INSUFFICIENTLY SPECIFIC AND FAILS TO DEMONSTRATE THAT ANY OF MR. LOPEZ'S CONCLUSIONS ARE LEGAL OPINIONS

A motion in limine must specifically identify the evidence at issue with sufficient context and detail to permit the Court to evaluate its admissibility. Henry B. Rothblatt & David H. Leroy, "Motion in Limine Practice," 20 Am. Jur. Trials 441 (1973 & 2020 Supp.) (noting that properly stated motions in limine should detail "[w]hat specific content, items, and inferences are sought to be excluded, and exactly why any reference to the contested matter will inflame the passion, prejudice, hostility, sympathy, or illogic of the jury, cause confusion, or consume an inordinate amount of time."). "Orders in limine which exclude broad categories of evidence should rarely be employed." *Sperberg v. Goodyear Tire & Rubber Co*., 519 F.2d 708, 712 (6th Cir. 1975). Without sufficient specificity "[e]videntiary rulings, especially those addressing broad classes of evidence, should often be deferred until trial so that questions of foundation, relevancy and potential prejudice can be resolved in proper context." *Sperberg*, 519 F.2d at 712; *see also, e.g.*, *Jonasson v. Lutheran Child & Family Servs.*, 115 F.3d 436, 440 (7th Cir. 1997) (reasoning that, where

evidentiary submissions on a motion in limine "cannot be evaluated accurately or sufficiently by the trial judge in such a procedural environment," "it is necessary to defer ruling until during trial, when the trial judge can better estimate its impact"); *National Union Fire Ins. Co. v. L.E. Myers Co. Group*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996) (where a "motion *in limine* lacks the necessary specificity with respect to the evidence to be excluded or the purported reason for the introduction of such evidence," and the "motion is too sweeping in scope to be decided *in limine* … the Court [should] reserve judgment on the motion until trial when admission of particular pieces of evidence is in an appropriate factual context.").

Judged by this standard the United States fails to carry its burden because it fails to specifically identify the testimony that it seeks to exclude, and it fails to provide the Special Master with sufficient context to evaluate Mr. Lopez's opinions. A broad "general ruling that legal opinion testimony will not be admissible at trial"—which is all the United States requests (Mot., 6)—would provide little guidance to New Mexico or the other Parties concerning what specific testimony from Mr. Lopez's various reports, declarations, or depositions may not be offered at trial. The better tack is to consider the propriety of specific questions under Rules 702 and 403 at trial.

To begin with, the Motion is premised on a fundamental misconception: contrary to the United States' assertion, Mr. Lopez does not offer any legal opinions. Mr. Lopez's affirmative expert report addresses seven topics:

1. Background and context for the Compact.
2. Explanation of the Compact, Compact accounting and the relationship of the Project to the Compact.
3. The functions and the history of the Compact Commission.
4. The measure of Compact compliance below Elephant Butte.
5. The operational changes that resulted from the 2008 Operating Agreement on Compact accounting and compliance.

6. Context for the 2011 Compact Credit Water release and its impacts from the perspective of the Compact.
7. The necessary elements of Compact administration in the section of the river between Elephant Butte Dam in New Mexico and Fort Quitman, Texas.

Expert Report of Estevan R. Lopez, P.E., 4 (Oct. 31, 2019) (filed as NM-EX-107 in the New Mexico Exhibit Compendium (Nov. 5, 2020)). The United States never in the Motion indicates which of these topics it seeks to exclude, and none of the seven involve legal interpretation of the Compact. Mr. Lopez expressly indicates that this opinion is premised on his "experience and expertise in water policy, general water administration and management, water administration and management within New Mexico, interstate stream compacts, compact accounting, Reclamation project operations generally, and the Rio Grande Compact and the Rio Grande Project specifically." *Id.* at 3.

In his principal report, Mr. Lopez applies his experience and expertise in examination of these broad topics to reach eleven conclusions, which he summarizes in Section 4. *Id.* at 5-7. Again, the United States never indicates which of these opinions, or parts thereof, should be excluded, and read in context, none of these conclusions amount to legal opinion testimony. Many have no obvious connection to the United States' argument concerning legal opinion. For instance, opinion number 4.11 concerns the need for "increased data collection," "transparency relative to Project operations including operational waste, groundwater pumping and treated wastewater returns," and "review of conditions for conversion from irrigation to municipal and industrial use" in order to ensure "[e]ffective Compact administration." *Id.* at 7. This opinion has nothing to do with interpretation of the Compact as a matter of law; rather, Mr. Lopez's analysis goes to the operational aspects of Compact accounting and administration, a matter to which he is uniquely qualified to testify given his professional experience and expertise. *See id.* at 72-73.

Even those opinions that bear upon the terms or requirements of the Compact only have a superficial appearance, if any, of legal opinion or legal conclusion testimony. Consider conclusion 4.3: "The Compact does not include a specific New Mexico-Texas state-line delivery requirement, or a flow requirement at any specific gage below Elephant Butte. Instead, the Compact relies on Project operations including the Downstream Contracts." *Id.* at 5. Mr. Lopez's analysis in support of this opinion is not premised on any legal construction of the Compact; rather, he considers "guidance from the Court, history, principles of Reclamation operations, and [his] engineering and water administration experience." *See id.* 42. More specifically, he considers the history of operations within the Rio Grande Project specifically and the concordant general principal of Reclamation operations that water should be allocated to project acreage on a pro rata basis to inform his opinion concerning how the Compact, by incorporating Project operations, operationally apportions water below Elephant Butte to users in Texas and New Mexico. *See id.* 41-42. There is nothing quintessentially "legal" about this analysis.

The United States' failure to be specific in its analysis of Mr. Lopez's testimony similarly plagues its request for relief under Rule 403. The United States devotes no more than five lines of text to the argument, of which two are a simple recitation of the Rule. Mot., 5. This brief treatment leaves New Mexico with little to which to respond other than a vague suggestion that arguing over the admissibility of opinions that may be contrary to the Special Master's prior rulings would waste time. The United States does not identify any opinions of Mr. Lopez that are actually in tension with the Special Master's orders on New Mexico's counterclaims or the cross motions for summary judgment, and New Mexico does not intend to elicit any testimony from Mr. Lopez that would raise such problems. This portion of the motion amounts, then, to little more than a hypothetical exercise. To the extent that the United States has made more specific arguments

concerning the admissibility of certain testimony related to the Special Master's prior orders elsewhere (e.g., United States of America's Motion in Limine Regarding New Mexico's Dismissed Counterclaims), New Mexico incorporates here by reference its response to those arguments.

II. THE MOTION IS PREMISED ON AN INCORRECT STANDARD OF DECISION

In addition to mischaracterizing the nature of Mr. Lopez's testimony, the Motion misconceives the standard of decision applicable to interpretation of the Compact in this matter. The United States begins its argument with a plain statement for which it cites no authority: "Interpretation of the Rio Grande Compact is a matter of law." Mot., 1. On this basis, the United States assumes, without further analysis, that expert testimony may not be admitted to assist the Court to interpret the Compact. *See* Mot., 1-2. The United States' premise fails because construction of the Rio Grande Compact is not a pure question of law.

The standard for Compact interpretation must take into account that an interstate compact is both a contract between States and a law of the United States. *See Oklahoma v. New Mexico*, 501 U.S. 221, 235 n.5 (1991); *see also Alabama v. North Carolina*, 560 U.S. 330, 351-52 (2010). As a result, the customary rules of contract interpretation and statutory construction apply. *Tarrant Reg'l Water Dist. v. Herrmann*, 569 U.S. 614, 628 (2013); *New Jersey v. Delaware*, 552 U.S. 597, 610 (2008) (citing *New Jersey v. New York*, 523 U.S. 767, 811 (1998)). If the text of a Compact is unambiguous, it is conclusive. *See Texas v. New Mexico*, 482 U.S. 124, 128 (1987). However, if the language is subject to multiple potential interpretations, other reliable sources may be taken into account, including the negotiating history, *Oklahoma*, 501 U.S. at 235 n.5; course of performance, *Alabama*, 560 U.S. at 346 (explaining that the "parties' course of performance under the Compact is highly significant"); and custom, *Tarrant Regional Water District*, 569 U.S. at 633. Stated differently, to the extent that "[i]nterstate Compacts are construed as contracts under principles of contract law," *id.* at 628, interpretation of ambiguous terms "normally becomes a

matter for the fact finder" for which extrinsic evidence, including expert testimony, is admissible, *Den Norske Bank AS v. First National Bank of Boston NA*, 75 F.3d 49, 52 (1st Cir. 1996).

In this case, the Special Master has held that the "Compact is ambiguous as to the detailed scope of the apportionments and New Mexican duty," Order, at 46 (May 21, 2021), so it follows that, on these questions, interpretation of the Compact presents mixed questions of law and fact. By ignoring the factual aspects of the Court's task in resolving these ambiguities, the United States focuses on an incorrect standard.

For instance, the United States' reliance on a special master's decision to exclude an expert historian's affidavit in *Kansas v. Colorado*, No. 105 Orig., is misplaced. There, the historian offered opinions concerning interpretation of a 1951 Resolution of the Arkansas River Compact Administration, based upon his review of "primary historical documents." *See* Report, *Kansas v. Colorado*, No. 105, 1994 WL 16189353, *155-56. The Special Master specifically rejected the argument that such evidence would be admissible as extrinsic evidence in aid of contract interpretation because the resolution was not a "bilateral agreement between two parties that should be analyzed under contract law" but a "policy statement by an administrative agency." *Id.* (internal quotation marks omitted). On that basis, the master specifically rejected the application of contract interpretation standards and limited the historian's testimony. *Id.* This case, in contrast, explicitly concerns interpretation of an interstate Compact under the auspices of contract law. The Supreme Court has explicitly recognized that testimony concerning course of performance, custom, and other extrinsic indications of the compacting states' intent, all of which may be developed through expert testimony, is admissible and helpful in compact interpretation.

Similarly, the United States' citation to *Montana v. Wyoming*, No. 137, Orig., does not support is position. While the special master in that proceeding did give some direction limiting

an expert historian's trial testimony and directing the objecting party to make appropriate objections at trial, he did not exclude the historian from testifying:

> Now, on the other hand, as an historian, I think that Mr. Littlefield can testify regarding particular events or actions and can also testify as to various indicators of intent. For example, what commonly understood meanings were of particular phrases at [a] particular point in time. Similarly, I think it would be appropriate for an historian to testify to the context within [which] a particular provision was negotiated.

Tr. Motions Hearing, *Montana v. Wyoming*, No. 137, Original, at 11 (Aug. 29, 2013). As discussed in greater detail below, if the Special Master in this case observes the same principle embraced in this passage, Mr. Lopez's testimony is admissible. Mr. Lopez is not a historian, but he is qualified by experience and expertise to testify concerning the technical meaning of technical terms concerning water administration in the context of Compact operations since the inception of the Compact. *See, e.g.,* Expert Report of Estevan R. Lopez, P.E., 22-23 (explaining the process of debit and credit accounting in Article VI). Further, Mr. Lopez is experienced in the administration of other interstate Compacts and can testify to the ordinary or customary terms used in such agreements to satisfy various objectives. *See, e.g., id.* at 170 n.158. Similarly, he is experienced in water administration in Reclamation projects generally and specifically within the Rio Grande Project, so he is qualified to testify to ordinary or customary operational principles, such as conjunctive management, that form part of the important context surrounding Compact negotiations. *See, e.g., id.* at 42-43.

III. MR. LOPEZ'S EXPERT OPINIONS ARE ADMISSIBLE TO PROVE USAGE OF TRADE, CUSTOM, TECHNICAL USAGE, AND NORMS BEARING ON PRACTICAL INTERPRETATION OF THE COMPACT

Competent extrinsic evidence to aid in contract interpretation includes evidence of the technical meaning of terms, course of performance, course of dealing, and usage of trade. *See* Restatement (Second) of Contracts § 202 (1981); *see also* 11 Williston on Contracts § 32:4 (4th

ed.) (concerning "technical meaning"); 11 Williston on Contracts § 32:14 (4th ed.) (concerning "practical interpretation or construction"). For these purposes, expert testimony is admissible to aid the Court to understand circumstantial evidence of the contracting parties' intent. *See, e.g., Den Norske Bank AS,* 75 F.3d at 58; *Phillips Oil Co. v. OKC Corp.*, 812 F.2d 265, 281 (5th Cir. 1987); *Fed. Deposit Ins. Corp. v. First State Bank of Abilene*, 779 F.2d 242, 243-44 (5th Cir. 1985); *see also, e.g., Apple Glen Investors, L.P. v. Express Scripts, Inc.*, 700 Fed. Appx. 935, 938 (11th Cir. 2017); *E.R. Squibb & Sons, Inc. v. Lloyd's & Cos.*, 241 F.3d 154, 174 (2d Cir. 2001).

A prospective expert's qualification to give such opinions depends upon the expert's opportunity to develop actual knowledge of the relevant technical or industry usage through observation and experience in the field. *Compare, e.g., Den Norske Bank AS*, 75 F.3d at 57 (reasoning that expert was qualified as a "forty-year banking veteran" who (i) served as a vice-president in charge of transactions involving similar agreements, (ii) was very familiar with the type of agreement at issue, and (iii) observed firsthand the relevant industry custom and practice), *with Schneider v. Continental Cas. Co.*, 989 F.2d 728, 732 n.3 (4th Cir. 1993) (reversing trial judgment on interpretation of asbestos exclusion in insurance contract because trial court improperly considered expert affidavits at summary judgment, and "[n]either affiant—an architect and an asbestos consultant—even purported to be expert in the usage in the insurance trade of the terms whose meeting were in dispute").

The United States does not attempt to impeach Mr. Lopez's qualifications to give opinions regarding interstate water administration and the administration of federal Reclamation projects because his experience and expertise in the field is expansive. Specifically, he served as a Commissioner for the United States Bureau of Reclamation from 2014 to 2017, during which time he "directed all aspects of Reclamation business managing water throughout seventeen (17)

western states." S*ee* Lopez Decl., at ¶¶ 4-5 (Nov. 5, 2020) (filed as NM-EX-003 in the New Mexico Exhibit Compendium (Nov. 5, 2020)). He also served for over ten years as Director of the New Mexico Interstate Stream Commission, with responsibility to "understand[] New Mexico's rights and obligations relative to other compacting states," with respect to eight interstate stream compacts, including the Rio Grande Compact. *Id.* at ¶ 7. Mr. Lopez also served as an Engineer Advisor to the New Mexico Commissioner on the Rio Grande Compact Commission. *Id.* at ¶ 8. On this basis, Mr. Lopez is uniquely qualified to testify concerning the administration of the Rio Grande Compact and the operations of the Rio Grande Project through the United States Bureau of Reclamation. Stated differently, Mr. Lopez has extensive experience overseeing the processes of interstate compact administration and water administration in Reclamation projects that qualifies him to opine concerning the relevant customs and practices of the field. For these reasons, the United States' attempt to reduce Mr. Lopez's testimony to bare legal opinions fails.

Specifically, The United States contends that testimony amounting to "instructions about how to interpret the Compact," including "defining terms in the Compact," is improper. Mot., 4. To the contrary, the weight of persuasive authority indicates that expert witness evidence is welcome to explain the "technical meaning of terms" appearing in a technical agreement. *See, e.g., Phillips Oil Co.*, 812 F.2d at 281. Mr. Lopez does just that. Rather than provide a "legal" interpretation of Compact terms, he provides reasoned expert testimony concerning the practical or operational meaning of technical terms such as "Project Storage":

> Project Storage is the volume of reservoir storage space within Elephant Butte Reservoir and other reservoirs, downstream of Elephant Butte Dam to the first diversion structure for Project lands, which are available for the storage of Usable Water. In practical terms, Project Storage consists of the total available capacity of Elephant Butte Reservoir and Caballo Reservoir. Caballo Dam is located about one mile upstream of the Project's Percha Diversion Dam, which is the first diversion structure for Project lands. No additional storage reservoirs have been built in the area since the signing of the Compact.

> By the Compact definition, Project Storage is limited to a total of 2,638,860 acre-feet, which is the original capacity of Elephant Butte Reservoir at the time of construction. In 1998, the Compact Commission began reserving a portion of the available storage space in Elephant Butte Reservoir for flood control purposes. Additionally, Elephant Butte Reservoir has lost over 600,000 acre-feet of storage space for water due to sediment inflow since the dam was closed. The most recent sediment survey for Elephant Butte and Caballo Reservoirs occurred in 2008, and the Compact Commission began using the new total storage values in 2009. Since 2009, Elephant Butte has had a maximum storage capacity of 1,999,586 acre-feet and Caballo has had a maximum storage capacity of 224,934 acre-feet. Therefore, the total amount of space available for Project Storage is now 2,224,520 acre-feet.

Expert Report of Estevan R. Lopez, P.E., 15 (footnotes omitted). Mr. Lopez does not in this passage, as the United States implies, offer any legal interpretation of Article I, Paragraph k of the Compact to define Project Storage. Rather, he provides an analysis of what Project Storage has meant operationally in Compact administration and operation of the Rio Grande Project. Matters such as the extent to which sedimentation have affected operational storage capacity for the Rio Grande Project are simply not questions of legal opinion.

The United States also contends that Mr. Lopez may not "offer opinions construing the meaning of the Compact and its terms" or discuss "what the legal opinions are—or are not—under the Compact and the Contracts." Mot., 4. Again, this argument misconstrues the nature and basis of Mr. Lopez's testimony. Mr. Lopez does not purport to give any testimony concerning what legal obligations the Compact does or does not establish. Rather, he offers "*circumstantial* proof of the contracting parties' intent," *Den Norse Bank AS*, 75 F.3d at 58, by analyzing the "background, actions, and expectations that form the foundation for understanding the rights and responsibilities of the States below Elephant Butte Reservoir under the Compact." *See* Expert Report of Estevan R. Lopez, P.E., 33. For instance, to analyze the example that the United States raised in passing (Mot., 4), Mr. Lopez opines that the 1938 Compact condition that Dr. Hutchinson analyzed as an expert witness for the State of Texas would be inconsistent "with historic operations of the Project

and with common Reclamation practices generally." *See* Expert Report of Estevan R. Lopez, P.E., 70. To reach this conclusion, Mr. Lopez considered, in accord with the Court's guidance in *Tarrant*, 569 U.S. at 633, the "customary practices employed in other interstate compacts":

> While Dr. Hutchison is correct that there was little groundwater pumping in 1938, it does not necessarily follow that the States intended to prohibit groundwater pumping. Interstate water compacts use a variety of approaches to apportion water between compacting states. Some compacts will contain provisions expressly limiting depletions. [Footnote referencing Arkansas River Compact and Pecos River Compact omitted] For example, in the Rio Grande Compact, Article IV places clear limits on the amount of water that can be used in the Middle Rio Grande in New Mexico, which would account for groundwater use. The Compact does not use that same approach below Elephant Butte. Rather, as explained above, there are indications that the normal practice of conjunctive use of groundwater to supplement Project supply was contemplated.

Expert Report of Estevan R. Lopez, P.E., 70. No fair reading of this passage—which draws explicitly on Mr. Lopez's experience in the administration of other compacts and Reclamation Projections—can legitimately characterize Mr. Lopez's critique of Dr. Huchinson's supposed 1938 Condition as legal opinion. Similarly, the specific language from Mr. Lopez's declaration that the United States cites (see Mot., 4) belies its argument. In his declaration, Mr. Lopez reasons along the same lines as the passage above: the Compact negotiators' choice to omit specific delivery or inflow-outflow requirements below Elephant Butte Dam, when the same mechanisms appear within the Compact for other obligations, indicates that the parties did not intend to adopt those requirements. *See* 2d Lopez Decl., ¶¶ 7, 10 (Dec. 21, 2020) (filed as NM_EX-008 in the State of New Mexico's Notice of Filing of New Mexico Supplemental Exhibit Compendium (Dec. 22, 2020)). There is nothing essentially legal about this analysis. Instead, Mr. Lopez draws on his substantial experience in water administration to give an opinion concerning the ordinary or customary process to establish and account for inflow-outflow requirements and concludes that the compacting states did not adopt such methods in this case.

CONCLUSION

The Special Master should deny the United States of America's Motion in Limine to Exclude Legal Opinion Testimony.

Respectfully submitted,

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

This is to certify that on August 5, 2021, I caused a true and correct copy of the **State of New Mexico's Response to the United States of America's Motion in Limine to Exclude Legal Opinion Testimony** to be served by e-mail and U.S. Mail upon the Special Master and by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 5th day of August, 2021.

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