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 STATE OF TEXAS'S MOTIONS IN LIMINE

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COMES NOW the State of New Mexico ("New Mexico") and responds in opposition to Texas's Motions in Limine ("Motion" or "MIL") as follows.[1] As explained below, Texas's Motions in Limine should be denied in its entirety.

STANDARD

"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). "The purpose of a motion in limine is to allow the trial court to rule in advance of trial on the admissibility and relevance of certain forecasted evidence." *Sahiti v. Tarentum, Ltd*., 2021 WL 3115813 at *6 (S.D.N.Y. July 22, 2021) (citing *Luce*, 469 U.S. at 41 n.4).

"Evidence should be excluded on a motion in limine only when the evidence is clearly inadmissible on ***all*** potential grounds." *Id*. (emphasis added). Courts have denied motions in limine that are "overbroad and premature," or where movants seek to exclude "huge swaths of unidentified evidence." *Sahiti*, 2021 WL 3115813at *7; *see also Sperberg v. Goodyear Tire & Rubber Co*., 519 F.2d 708, 712 (6th Cir. 1975) ("Orders in limine which exclude broad categories of evidence should rarely be employed."). "Evidentiary rulings, especially those addressing broad classes of evidence, should often be deferred until trial so that questions of foundation, relevancy

[1] New Mexico recognizes the twenty (20) page limit set out in the April 9, 2021 Trial Management Order. Because Texas has filed six motions in limine within one single filing, New Mexico addresses each one as a separate motion but combines its response into a single filing as well. No single response approaches the twenty-page limit. Thus, New Mexico believes it is in compliance with the twenty-page limit for any individual motion.

and potential prejudice can be resolved in proper context." *Sperberg*, 519 F.2d at 712; *see also e.g.*, *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.").

ARGUMENT

I. THE NATURE OF THIS PROCEEDING REQUIRES DEVELOPMENT OF A COMPLETE EVIDENTIARY RECORD

As discussed in Section I of New Mexico's Response in Opposition to the United States' Motion in Limine Regarding Dismissed Counterclaims ("NM Response to US Counterclaims MIL"), which is incorporated by reference, Texas's Motion in Limine ("MIL") should be denied because the Court requires a complete record in original jurisdiction cases, and there is no danger of confusion or prejudice because the evidence will be presented to a Special Master and the Justices of the United States Supreme Court.

II. TEXAS MIL NO. 1 SHOULD BE DENIED

A. Evidence of Project Operations Within Texas (Intrastate Operations) Should Not Be Excluded.

Texas's first Motion in limine seeks to exclude all evidence of "intra-district operations in Texas." Texas's Motions in Limine at 2 (July 20, 2021) [Dkt. 532] ("Texas MIL"). Texas bases this request on its claims that Texas intrastate operations have no hydrologic connections to Project deliveries and that the Special Master's Summary Judgement Order "carved [these operations] away from the case." *Id*. at 5. Texas misreads and ignores significant portions of the Order.

As a general matter, New Mexico agrees that any issues finally determined in the Summary Judgment Order will inform the upcoming trial. New Mexico embraces the large majority of that

Order and believes that application of the rules it announces to the facts will result in a judgment in favor of New Mexico. But it is the entire Summary Judgment Order that applies, and Texas cherry-picks and misstates the principles articulated by the Special Master. Among other rulings, the Special Master held that:

> (1) the "Compact and the inextricably intertwined Project and Downstream Contracts provide for the 57%/43% split" as the apportionment of water between New Mexico and Texas below Elephant Butte, Special Master's Summary Judgment Order of May 21, 2021 at 51 [Dkt. 503] ("Summary Judgment Order");
>
> (2) "the question of what the compacting states intended to divide 57%/43% between southern New Mexico and Texas remains to be determined at trial," *id*. at 6-7; and
>
> (3) Texas's motion for summary judgment on New Mexico's counterclaims 1 and 4 is denied because "the Project water for southern New Mexico must be characterized as part of New Mexico's Compact apportionment," *id*. at 4.

Taken together, these rulings clearly establish that New Mexico's Counterclaims 1 and 4, which directly implicate Texas's intrastate operations, remain live claims in this case because New Mexico has a Compact apportionment below Elephant Butte that it is entitled to protect. Texas suggests that certain activities it has allowed are "authorized under the umbrella of federal reclamation law." Texas MIL 4. The Special Master has held, however, that Project operations, including water use in Texas and Project accounting, must be consistent with the Compact. Order of March 31, 2020 at 14-15, 29 [Dkt. 338] ("Dismissal Order"). Thus, "all of the Texas water use alleged to be in violation of the Compact" is at issue, and Counterclaims 1 and 4 "provide[] more than ample opportunity for the parties to flesh out their theories regarding the impact of Project operations on the states' receipt of their apportionments." *Id*. at 30, 35.

B. Evidence of Intrastate Operations in Texas Is Central to New Mexico's Counterclaims and Defenses.

At trial, New Mexico will present evidence on Texas's injurious groundwater pumping and water operations in EPCWID. Evidence of these intrastate operations is central to New Mexico's First and Fourth Counterclaims as well as New Mexico's affirmative defenses. New Mexico's First Counterclaim asserts that Texas's groundwater pumping, failure to properly account for return flows, and other Texas actions represent ongoing Compact violations against New Mexico. New Mexico's Fourth Counterclaim focuses on Texas's violation of the Compact due to operations within EPCWID, including inequitable Project "credits" to EPCWID, surface water allocations in excess of 43%, and unaccounted-for return flows that result in Project water use in Texas without charge against Texas's allocation. These over-allocations and inequitable uses in Texas also support New Mexico's affirmative defenses.

New Mexico will put on evidence at trial explaining the impact and scope that Texas's own water operations have on Project deliveries and New Mexico's Compact apportionment. This injury derives from, among other things:

(1) Texas groundwater pumping: Texas's own groundwater pumping has diminished return flows that would have otherwise been available as Project deliveries in Texas.

(2) Accounting methods in Texas: Texas has devised and implemented several accounting "credits" with approval from Reclamation that work to provide Texas with additional Project water at New Mexico's expense. For example, the American Canal Extension Credit provides Texas with up to 20,000 acre-feet of additional Project water per year under the guise that Texas is "salvaging" this amount of water, when in fact most of the losses occurring before construction of the American Canal Extension were caused by Texas's own pumping. Application of the American Canal Extension Credit directly reduces water allocated and delivered to New Mexico, and therefore impacts the Compact apportionment.

(3) Effluent discharge from the City of El Paso: effluent discharge from El Paso derives from and is hydrologically connected to Project water. Use of this water was, at least in part, charged as a delivery of Project water to Texas for much of the Project's history, yet it is currently used on Project lands in Texas free of charge. Worse yet, Texas's use without charge reduces New Mexico's apportionment.

(4) Drain flows: Historically, Project drain flows arising in Texas were used in Texas and their diversion was charged as a Project delivery to EPCWID; reduction or cessation of use of these flows, as well as use of drain flows that occurs without charge, decreases water charges to EPCWID and permits them to order more reservoir water than they would if they were still using and being charged for use of drain flows, increasing depletions of Project storage to the detriment of New Mexico.

(5) Discharge of water to Hudspeth: water discharged at the end of the Project to the Hudspeth County Conservation and Reclamation District has not been properly accounted for, thus reducing the amount of water available to be divided 57%-43%.

This evidence will be introduced through expert testimony from, among others:

(1) Dr. Margaret Barroll: Dr. Barroll will explain how extensive groundwater pumping by Texas in the Hueco Bolson has contributed to a reduction in drain flow and increased river losses in the El Paso Valley, reducing Project performance. Dr. Barroll will also opine on changes in Project operations and accounting in the Hueco Bolson that have impacted the amount of Project water available to New Mexico.

(2) Charles Spalding and Daniel Morrissey: Mr. Spalding and Mr. Morrissey will explain how Texas relied upon groundwater pumping for agricultural and municipal use over time. They will also introduce and discuss New Mexico's groundwater model of the Hueco Bolson in Texas. The Hueco groundwater model, in conjunction with New Mexico's Integrated Model, shows that pumping in Texas and Mexico causes depletions of surface water flows in the Rio Grande, canals, laterals, and drains in the El Paso-Juárez Valley. The models also show that well fields near El Paso and Ciudad Juarez have caused significant water level declines in the Hueco Bolson, which has an impact on Project deliveries.

(3) Gregory Sullivan: Mr. Sullivan will explain New Mexico's Integrated Model, including several runs made of the Integrated Model that evaluate i) the effects of pumping in Texas on Project operations and the surface water supplies of the Project water users; and ii) evaluate impacts on New Mexico from changes in El Paso Valley infrastructure and changes in accounting for Texas use of Project water. The results from these simulations will show that pumping in Texas impacts Project operations and deliveries of Project water to water users in New Mexico and Texas, particularly in non-full supply years. Integrated Model simulations will also demonstrate the impacts of the 2008 Operating Agreement on Project operations and the Compact apportionment. Mr. Sullivan will also explain why understanding the effects of groundwater pumping throughout the Project and effects of changes in Texas infrastructure and operations requires a robust hydrologic model of the entire Project area, including in Texas.

This extensive evidence will demonstrate how water operations in Texas impact Project deliveries and the Compact apportionment, and reduce New Mexico's share of Rio Grande water.

Texas will be unable to rebut this evidence because it did not develop a hydrologic model that encompasses the entire Project area. Though this is not Texas's first attempt to do so, Texas cannot simply sweep away swaths of evidence integral to New Mexico's counterclaims and defenses, evidence the Special Master has already determined is relevant. *See generally*, Dismissal Order.

C. This Motion Is Texas's Latest Attempt to Evade Scrutiny of Its Own Groundwater Pumping and Water Operations.

On two previous occasions Texas has attempted to exclude New Mexico's evidence of impacts from Texas groundwater pumping and water operations, and the Special Master rejected those attempts both times.

In December of 2018 Texas sought to dismiss New Mexico's counterclaims on the grounds that New Mexico had not sought leave of the Court to raise them, including New Mexico's Counterclaims 1 and 4, and New Mexico failed to state a claim. *See* Texas's Motion to Strike or For Partial Judgment Regarding New Mexico's Counterclaims and Affirmative Defenses at 2 (Dec. 26, 2018) [Dkt. 160]. The Special Master rejected the argument, ruled that Counterclaims 1 and 4 would remain in the case, and noted, "Just as the uses of surface water and hydrologically connected groundwater in New Mexico downstream of the [Elephant Butte] might affect Project deliveries in Texas, the use of hydrologically connected water in Texas (by Project beneficiaries and by non-Project beneficiaries alike) or in Mexico might affect Project deliveries or demands for Project water farther downstream in Texas." Dismissal Order at 27.

On summary judgment, Texas again sought exclusion of New Mexico's Counterclaims 1 and 4, this time on grounds that New Mexico did not have a Compact apportionment below Elephant Butte and therefore could not raise its counterclaims in this case. *See* Texas's Motion for Partial Summary Judgment at 74 (Nov. 5, 2020) [Dkt. 413] ("New Mexico has no Compact apportionment below Elephant Butte Reservoir. Because there is no Compact apportionment to

New Mexico below the Reservoir, New Mexico's first and fourth counterclaims, based upon alleged Compact violations by Texas, must fail as a matter of law."). Part of Texas's position was the assertion that EBID in New Mexico was protected from actions in Texas only under Reclamation law, not the Compact. *See id*. at 67 ("New Mexico's allegations that groundwater pumping in Texas has adversely affected Project accounting and the delivery of Project water allocated by the Project to Project beneficiaries, are solely based upon the United States' contracts with EBID and EP#1, which arise out of Reclamation law.").

The Special Master rejected these arguments, ruling that New Mexico had a Compact apportionment below Elephant Butte and upholding New Mexico's First and Fourth Counterclaims, which implicated groundwater pumping and water operations within Texas. Summary Judgment Order at 18 ("Texas asserts its apportionment argument partially as a means to defeat New Mexico's counterclaims 1 and 4, which Texas characterizes as depending upon the existence of a downstream New Mexican apportionment. Because I conclude the Project water for southern New Mexico must be characterized as part of New Mexico's Compact apportionment, Texas's related motion for summary judgment as against New Mexico's counterclaims 1 and 4 necessarily fails.").

Now, Texas attempts for the third time to evade scrutiny of its own pumping and water operations. Texas incorrectly states that Texas's own water operations are not relevant because they "lack any hydrologic connection to Project deliveries in New Mexico" and operate under "the umbrella of federal reclamation law;" therefore, evidence of water operations in Texas do not address the Compact issues in the case. Texas MIL at 4.

This is incorrect. The Summary Judgment Order did not limit the issues at trial to New Mexico's obligation only, or limit the region of scrutiny to New Mexican Project lands. The

Summary Judgment Order describes the general obligation to protect return flows within the entire Project, not just the portion of the Project within New Mexico:

> [T]he compacting states intended to protect not merely water deliveries into the Reservoir, but also a baseline level of Project operations generally as reflected in Project operations prior to Compact formation. The compacting states did not express an intent for agricultural practices, irrigation practices, and other forms of development to remain static. But, they also did not express an intent to allow unlimited indirect capture of Rio Grande surface flows through the unregulated capture of hydrologically connected water or the elimination of Project return flows. The protection of a baseline level of Project operations required, at a minimum, the protection of return flows to effectuate the Compact's apportionment.

Summary Judgment Order at 5-6 (emphasis added); *see also id*. at 19 ("The usable water actually released from the Reservoir for Project delivery to Mexico, New Mexico, and Texas directly affects Project storage and all three states' rights and duties.").

New Mexico will marshal evidence at trial proving that Texas pumping and operations have a hydrologic connection to Project deliveries in New Mexico, both directly and through operation of the Project. In fact, Texas has admitted through its own experts that Texas's pumping has an impact on Project deliveries and therefore the Compact apportionment.

In sum, "this case is a dispute about where the waters of the Rio Grande have been going, where they should have been going, and where they should go in the future." Order of April 14, 2020 at 1 [Dkt. 340] ("Law of the Case Order"). Evidence of Texas's water operations is central to determining the baseline for dividing Project water 57%/43% between New Mexico and Texas and whether each state is receiving the equitable apportionment guaranteed to it under the Compact. It forms an integral part of New Mexico's counterclaims and defenses in this case and should not be excluded from presentation at trial.

III. TEXAS MIL NO. 2 SHOULD BE DENIED

In its MIL 2, Texas seeks "to exclude the introduction of evidence or argument at trial by the State of New Mexico of a 1938 or 'baseline' condition." Texas MIL at 6. Specifically, Texas

asks that the "Special Master exclude any evidence offering an alternative theory regarding the scope of the 1938 or 'baseline condition,'" because, Texas alleges, New Mexico has not offered "any facts relating to … the scope of" any "baseline condition" existing as of 1938. Texas MIL at 7; *see also id.* at 6 (alleging New Mexico has offered no evidence concerning "the scope of a 1938 condition."). There are four problems with Texas MIL No. 2.

First, this motion is overbroad, premature, and requests precisely the type of order in limine that is rarely, if ever appropriate. *Sahiti*, 2021 WL 3115813 at *7. Evidentiary rulings on this "broad class of evidence, should 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.

Second, Texas takes inconsistent positions on its MIL No. 2. On the one hand, it acknowledges that the nature of the baseline condition is an issue that will be decided at trial. On the other hand, Texas seeks to prevent New Mexico from presenting any evidence on the baseline trial issue. Yet Texas does not offer a single rule, authority, or other citation to support its position. At trial, if Texas thinks that New Mexico is presenting evidence on the baseline that is inconsistent with prior deposition testimony or in violation of Rule 26, it has available remedies. Otherwise Texas cannot prevent New Mexico from putting on its case and addressing this important issue.

Third, Texas again mischaracterizes the Summary Judgment Order. Texas bases its MIL 2 on the allegation that the Special Master "confirmed the existence of a 1938 condition (or "baseline") condition" in the May 21, 2021 Order. Texas MIL at 6. In the Summary Judgment Order, the Special Master found that:

(i) "the compacting states intended to protect … a baseline level of Project operations generally as reflected in Project operations prior to Compact formation." [Dkt. No. 503, 5];

(ii) "The compacting states *did not express an intent* for agricultural practices, irrigation practices, and other forms of development *to remain static*. But, they also did not express an intent to allow unlimited indirect capture of Rio Grande surface flows through the unregulated capture of hydrologically connected water or the elimination of Project return flows." *Id.* at 5-6 (emphasis added);

(iii) While "New Mexico owes a duty to prevent groundwater pumping that adversely affects surface water and Project return flows *to an extent that interferes with* Project delivery of Mexican treaty water or Texas's Compact apportionment," "[t]he Compact is ambiguous as to the detailed scope of … the New Mexican duty." *Id.* at 47, 50 (emphasis added);

(iv) The question of "baseline operations," and "the exact contours of" any baseline is an "area[] of ambiguity" to be resolved at trial. *Id.* at 6, 24. For example, "[t]he extent to which this duty accommodates some degree of groundwater pumping—at particular rates, in particular places, or at particular times—without substantially affecting Project operations" is an issue for trial. *Id.* at 39. "Similarly, it remains to be shown the extent to which this duty accommodates other changes in the Compact area that alter return flows, whether increased municipal and industrial use, changed irrigation and cropping practices, or other changes." *Id.*; and

(v) Since 1938 there has been a "lengthy course of performance." *Id.* at 2. "[E]vidence of the post-1938 course of performance … speaks to questions such as the details of what a protected baseline condition might have been and details of how Project operations and the states' actions or inactions might further illustrate the states' understanding of [any] baseline." *Id.* at 25.

From this discussion, it is clear that the Master neither recognized nor ruled that the Compact-protected baseline for Project operations is synonymous with Texas's proposed 1938 Condition, as Texas repeatedly implies in its MIL 2. *E.g.,* MIL 2 at 6 (referring to "1938 or 'baseline' condition"). Contrary to confirming the existence of any specific baseline condition, the Special Master has indicated that the record reflects no intention for development to remain static, and what duty is owed by the States is the subject of evidence that must be resolved at trial. The Special Master has, therefore, reserved for trial the decision on the very matters Texas seeks to exclude evidence on.

Fourth, and perhaps most importantly, Texas is simply incorrect that New Mexico has not presented evidence or taken a position on the baseline condition. In this case, Texas has argued for a static condition limiting the depletions (and by extension the other conditions) in the Project area to those that existed in the single year of 1938. Texas is correct that New Mexico has opposed that position as unreasonable, in conflict with the plain language of the Compact, inconsistent with the history of Compact administration and accounting, and irreconcilable with principles articulated in other interstate Compacts. But that does not mean that New Mexico has opposed a reasonable and supportable baseline condition. To the contrary, New Mexico has always advocated for an appropriate baseline conditions based on the intentions of the compacting states. Consistent with his expert reports, Mr. Lopez will testify at length on that subject, and will offer two alternative baseline conditions that are consistent with Compact administration principles, operations of Reclamation projects, and the historic Rio Grande Project operations.

Similarly, multiple New Mexico experts have disclosed numerous opinions on the subject, including on the changing infrastructure in the Project, the historic use of drain flows, the impacts of changes to infrastructure and accounting, and methodologies for allocating water between the

two States – all of which bears directly on the baseline condition. New Mexico modelers have also provided a number of modeling runs that identify and evaluate baseline conditions. And as the Special Master has noted, New Mexico has offered extensive evidence on the "lengthy course of performance," including the conjunctive use of groundwater in both States, which is relevant to the baseline condition. Summary Judgment Order at 2, 25. In line with this robust body of evidence, New Mexico intends to present a comprehensive case at trial on the appropriate baseline condition.

Similarly, New Mexico intends to point out a number of ways that Texas has been inconsistent about its self-serving baseline condition. For example, New Mexico has explained ways that Texas supports inconsistent rules for lands in the two States, identified ways that Texas's position is incongruous with Articles III and IV, presented evidence about the historic methods for dividing water between the States, and shown that the states acquiesced to a methodology for apportioning Project supply. Similarly, to the extent that Texas has argued that the baseline is limited to the specific amount of irrigation water that was applied, its position is inconsistent with past practices, the change in irrigated acreage over the years, and the lack of limits for water use in the late 1940s. Taken together, it would be premature and improper, on a motion in limine, to bar New Mexico from presenting evidence on the appropriate baseline condition.

IV. TEXAS MIL NO. 3 SHOULD BE DENIED

In its MIL 3, Texas seeks "to exclude the introduction of evidence or argument at trial" relating to "the scope and methods for quantification of injuries and/or damages allegedly sustained by New Mexico." Texas MIL at 7, 9. Texas also seeks to limit New Mexico economics expert Dr. Dana Hoag's trial testimony "to his rebuttal of Dr. Sunding's work for Texas." *Id.* at 8. As discussed below, Texas MIL No. 3 should be denied because it rests on an incorrect factual

basis, it is unsupported, and because it misunderstands the procedural posture of the upcoming trial.

As an initial matter, Texas MIL No. 3 is overbroad and premature. *Sahiti*, 2021 WL 3115813 at *7. For example, it is hard to identify the specific exhibits or testimony Texas intends to exclude when it asks that all "evidence or argument . . . relating to damages allegedly sustained by New Mexico" be barred. Contrary to the rulings of the Special Master, on its face, Texas's request would mean that New Mexico was prevented from presenting a case that it did not receive its share of Project supply pursuant to the Compact. But as Texas admits, New Mexico counterclaimed for "damages and other relief, . . . for the injury suffered by the State of New Mexico as a result of the State of Texas's unjust enrichment and its past and continuing violations of the Compact." Texas MIL at 7; *see also* New Mexico Counterclaims at 33 [Dkt. 202]; Summary Judgment Order at 49 (denying Texas's motion for summary judgment concerning New Mexico's counterclaims). New Mexico has disclosed percipient and expert evidence that shows injury. New Mexico is, therefore, fairly entitled to present evidence and argument, at trial, concerning this counterclaim. In short, evidentiary rulings on questions of the apportionment and injury should be "deferred until trial," where they "can be resolved in proper context." *Sperberg*, 519 F.2d at 712.

Texas confuses the questions of whether a Compact violation has occurred and, if so, to what extent, with the subsequent contingent question (if a violation is proven) of what remedies or relief, retrospective or prospective, may be appropriate. The Special Master has determined that the question of remedies, which may include the quantification of monetary damages, is an issue for the next phase of this case. Trial Management Order at 8 [Dkt. 501] ("Trial on the amount of damages and remedies, if any, shall be held at a later date."); Order of June 6, 2021 at 2 [Dkt.

508] ("For purposes of the trial scheduled to commence on September 13, 2021, the issues will be limited to liability and whether Texas, as plaintiff, and New Mexico, as counterclaimant, have sustained more than de minimis damages. The quantification of the amount of damages and remedies, if any, will be bifurcated for a subsequent trial after Supreme Court review of the report resulting from the September 13, 2021, trial."). When the question of liability is resolved, the issue of remedies—including, whether money or water is the best form of payment for past violations of the Compact—will then become ripe. *See e.g.*, Transcript, Mar. 27, 2021, at 39:18-21 and 40:13-18 (Mr. Somach: "I think that there is an aspect – of this case that says if there's a violation of the Compact, that's injury, and that's sufficient," "We do think it's a good idea to separate out remedies simply because getting an idea of what the liability looks like will assist us in trying to move forward with proposing various remedial actions to address those liabilities."); *Montana v. Wyoming and North Dakota*, No. 137 Orig., Second Interim Report of the Special Master (Liability Issues), Dec. 29, 2014, at 3 (noting the States' agreement "to bifurcate th[e] action into two phases: (1) a liability phase (examining whether Wyoming violated the Compact and, if so, the size of any violation), and (2) a remedies phase (determining what, if any, retrospective or prospective remedies are appropriate)."). Texas has already disclosed that it will be seeking monetary damages if it establishes a Compact violation. New Mexico, on the other hand, has not yet elected which form of relief it will seek because it would be premature. *See, e.g.*, *Texas v. New Mexico*, 482 U.S. 124, 128-130 (1987); *see also id.* at 131 ("To order making up the shortfalls by delivering more water has all the earmarks of specific performance, an equitable remedy," whereas economic damages is a "legal remedy").

Texas takes issue with the expert report of Dr. Hoag, and suggests that Dr. Hoag's "trial testimony is limited to his rebuttal of Dr. Sunding's work[.]" Texas MIL at 8. While the States

may quibble over the scope of Dr. Hoag's testimony, the quantification issue makes no difference for the purposes of the upcoming trial. Rule 26 will ensure that Dr. Hoag limits his testimony to the subjects that he fairly disclosed. More importantly, as described above, the upcoming trial phase is limited to the issues of whether the States received their share of Project supply, whether there was a violation of the Compact, if so, the amount of the Compact violation, in which years, and what the causes of Compact violations (if any). Because Texas concedes that remedies for Compact violations will await the next phase of trial, *neither* State is permitted to offer testimony quantifying monetary damages for a Compact violation. Thus, Texas MIL No. 3 is premature because *no expert*, including both Dr. Sunding and Dr. Hoag, can offer testimony on the "quantification of . . . damages." Texas MIL at 9.

Further, in MIL No. 3, Texas continues its pattern of mischaracterizing the record and misrepresenting New Mexico's position. Texas argues that New Mexico did not "disclose an expert to describe [its] alleged injury." Texas MIL at 7. This is categorically incorrect. New Mexico, in fact, disclosed multiple experts who "describe" New Mexico's injury. For example, both Dr. Barroll and Mr. Lopez describe aspects of the way in which New Mexico has been deprived of its equitable share of Rio Grande water. Dr. Barroll goes on to explain that depriving New Mexico of Project supply under the Compact has forced New Mexico farmers to rely on limited groundwater supplies, and that this in turn has caused a long-term impact to the aquifer and New Mexico's water supply. New Mexico modeling experts, including Mr. Sullivan, have modeled numerous scenarios that demonstrate that New Mexico was deprived of a significant amount of Compact water. Other witnesses, such as farmers and representatives of municipalities and industry, will then describe the substantial monetary and other impacts that the Compact violations have caused.

As another example, New Mexico has argued repeatedly during this case that the change in Project operations that is reflected in the 2008 Operating Agreement has inflicted a significant injury on New Mexico. The Special Master has already determined that evidence relating to the Operating Agreement, its impact and effects is relevant:

> [T]he Operating Agreement may [] be relevant on the issue of whether each state is receiving the water to which it is entitled under the Compact. … To 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. … if New Mexico or Texas has been deprived of its equitable apportionment under the Compact, it is very possible that any such shortfall may be the result of a combination of factors, including: the United States's Project operations; [and] New Mexican, Texan, or Mexican surface or groundwater diversions … New Mexico's [] Counterclaim [as to damages and other relief] provides more than ample opportunity for the parties to flesh out their theories regarding the impact of Project operations on the states' receipt of their Compact apportionments.

Dismissal Order at 29-30. It is improper, at this stage, to bar New Mexico's testimony, evidence and argument on the questions of injury. Taken together, New Mexico will show a lasting and meaningful injury from the Compact violations.

Finally, Texas argues that percipient witnesses may offer no testimony on injury or damages. But again, Texas does not offer a single citation in support of its position or MIL No. 3 generally, and its position is contrary to law. Federal Rule of Evidence 701 "permits a lay witness to give an opinion if it (a) is based on the observation of the witness and (b) explains the witness' testimony or is probative of a fact in issue. If the requirements of the rule are satisfied, the evidence should usually be admitted." *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 110 (4th Cir. 1991) (citation omitted); *see also*, *e.g.*, *Modern Auto. Network, LLC v. Eastern Alliance Ins. Co*., 842 Fed. Appx. 847, 848-49 (4th Cir. 2021) ("[A] lay witness … [may] give opinion testimony that is rationally based on the witness's perception and helpful to determining a fact in issue, so long as it is not based on the same scientific, technical, or other specialized knowledge covered by Federal

Rule of Evidence 702.") (citation and quotation omitted); *U.S. v. Aguilar-Acevedo*, 488 Fed. Appx. 243 (9th Cir 2012) (upholding lay witness testimony on injury "because the testimony was based on the witnesses' personal observations and recollections of concrete facts"). Thus, courts routinely allow lay witnesses to offer testimony on injury and damages when that testimony is based on their prior experiences or observations. *See, e.g., Lightning Lube, Inc. v. Witco Corp.,* 4 F.3d 1153, 1175-76 (3d Cir. 1993) (lay witness' damages calculations based on personal knowledge of his business admissible); *State Office Sys., Inc. v. Olivetti Corp. of America,* 762 F.2d 843, 845–46 (10th Cir. 1985) (permitting admission of testimony on lost future profits from the company's president/treasurer with personal knowledge of company's operations, sales, and profits); *Teen-Ed, Inc. v. Kimball Int'l, Inc.,* 620 F.2d 399, 403-04 (3d Cir. 1980) (accountant testimony permissible based on personal knowledge of company records). First-hand knowledge of the harm caused to New Mexico is an important part of the evidence, and record, in this case. For example, as the top water officials in the State, Mr. D'Antonio and Mr. Schmidt-Petersen are in a unique position to offer factual testimony about the impacts of reduced Project supply in New Mexico. Likewise, the farmers and municipal and industrial witnesses will testify to the negative impacts that they have personally observed in their own operations.

Texas MIL No. 3 should be denied.

V. TEXAS MIL NO. 4 SHOULD BE DENIED[2]

A. Texas MIL No. 4 Should Be Disregarded Because the Dispositive Motions Deadline Has Passed

Texas MIL No. 4 is a substantive, dispositive motion cloaked as a procedural motion in limine. It should be disregarded or denied because the dispositive motions deadline has already past, and courts routinely deny motions in limine that seek substantive relief.

"A motion in limine is 'any motion, whether made before or during trial, to exclude anticipated prejudicial evidence before the evidence is actually offered.'" *Louzon v. Ford Motor Co.,* 718 F.3d 556, 561 (6th Cir.2013) (quoting *Luce v. United States,* 469 U.S. 38, 40 n.2 (1984)). As discussed above, "[t]he purpose of an in limine motion is 'to aid the trial process by enabling the Court to rule in advance of trial on the relevance of *certain forecasted evidence*, as to issues that are definitely set for trial, without lengthy argument at, or interruption of, the trial.'" *Palmieri v. Defaria,* 88 F.3d 136, 141 (2d Cir. 1996) (quoting *Banque Hypothecaire Du Canton De Geneve v. Union Mines,* 652 F.Supp. 1400, 1401 (D. Md. 1987)) (emphasis added).

However, a motion in limine is not the appropriate procedural vehicle for resolving a disputed question of law that a party should have raised in a motion for summary judgment or a motion for judgment on the pleadings. *See Louzon,* 718 F.3d at 561. In *Louzon,* the Sixth Circuit reversed a district court's ruling on a motion in limine that the defendant had filed to exclude evidence of the comparators offered by the plaintiff to prove his employment discrimination claim. *Id.* at 567. The court explained that a motion for summary judgment, which is subject to procedural safeguards and a particularized analysis, is the mechanism for resolving non-

[2] In addition to the discussion below, New Mexico refers the Special Master to its discussion in response to the US Counterclaims MIL which is by and large relevant to Texas MIL No. 4.

evidentiary issues prior to trial. *Louzon*, 718 F.3d at 561; *see also, e.g., Bradley v. Pittsburgh Bd. of Educ.,* 913 F.2d 1064, 1069–70 (3d Cir.1990) (motions in limine are not subject to the same procedural safeguards as motions for summary judgment); *Provident Life & Accident Ins. Co. v. Adie,* 176 F.R.D. 246, 250 (D.Mich.1997) (motion in limine cannot be used as substitute for motion for summary judgment). The Court rejected Ford's attempt to couch its motion in evidentiary terms, noting that the motion required a ruling on a non-evidentiary legal issue in order to reach the admissibility question: "if these tactics were sufficient, a litigant could raise any matter in limine, as long as he included the duplicative argument that the evidence relating to the matter at issue is irrelevant." *Louzon*, 718 F.3d at 563. The Court concluded: "Where, as here, the motion in limine is no more than a rephrased summary-judgment motion, the motion should not be considered." *Id*.

That same reasoning applies to Texas MIL No. 4. At base, this motion raises no evidentiary question. Instead, it raises a merits-based challenge to Counterclaim No. 4 and therefore should have been brought as a 12(b)(6) motion to dismiss or as a motion for summary judgment. Indeed, both Texas's previous motion to dismiss Counterclaim No. 4 and its summary judgment motion were denied. *See generally*, Dismissal Order. Moreover, Texas MIL No. 4 rests on a number of disputed factual findings, including but not limited to, that the claim is "based exclusively on the actions of the United States," Texas MIL at 9, and specific findings about how the Project divides the water between users in the two States, *id.* at 9-10. Texas MIL No. 4 should be denied on this basis alone.

B. Texas MIL No. 4 Should Be Denied Because New Mexico Is Entitled to Present Evidence Establishing that Texas Has Received Water in Excess of Its Apportionment

Texas MIL No. 4 also should be denied because it rests on a misconstruction of New Mexico's Counterclaim No. 4, and New Mexico is entitled to present evidence establishing that Texas has received more water than it is apportioned under the Compact.

In support of Texas MIL No. 4, Texas suggests that Counterclaim No 4 "rests on [the] conflation of two distinct aspects of how the waters of the Rio Grande are distributed." Texas MIL at 11. Texas thereby attempts to resurrect its failed argument that there is a distinction between the Project "allocation" and the Compact "apportionment." *Id*. But Texas has never been able to describe a meaningful difference between the two for purposes of the Rio Grande Compact, and the Supreme Court noted that the Compact may only "effect an equitable apportionment" because the United States "assumed a legal responsibility to deliver a certain amount of water" to New Mexico and Texas through the Project. *Texas v. New Mexico*, 138 S.Ct. 954, 957 (2018). Thus, the Court found that the Project is "inextricably intertwined" with the Compact, and the artificial distinction that Texas advocates is not supported. Indeed, the Texas Rio Grande Compact Commissioner confirmed in his deposition that the water Texas claims it is entitled to under the Compact is the Project allocation given to EPCWID each year. And as New Mexico has repeatedly explained, *e.g.* Consolidated Reply in Support of New Mexico's Motion for Summary Judgment on Compact Apportionment at 22-25 [Dkt. 263], and the Special Master has found, *see generally*, Summary Judgment Order, the Compact protects each States' equitable share of Project supply – 57% to New Mexico and 43% to Texas.[3]

[3] The Special Master held that "[m]aterial dispute remains as to what is meant by 'Project water supply.'" Summary Judgement Order at 51. Evidence on this issue will be necessary at trial.

Contrary to Texas's mischaracterization, Counterclaim No. 4 generally claims that Texas has received more water than it is entitled to receive under the Compact, and New Mexico has received less. New Mexico Counterclaims at ¶¶ 91-98 [Dkt. 94]. As recognized by the Special Master, this "shortfall [for New Mexico] may be a result of a combination of facts, including: the United States' Project operations; New Mexican, Texan, or Mexican surface or groundwater diversions; or the United States' alleged maintenance failures." Dismissal Order at 29. Because Counterclaim No. 4 "mirrors Counterclaim 2," "[t]he interplay of all of these factors necessarily will be examined en route to proving and defending against pending claims." *Id.* at 29-30. In short, New Mexico is entitled to present evidence showing that Texas's actions and inactions have caused Texas to receive more than its share of Compact water, and Texas MIL No. 4 should be denied.

C. New Mexico Does Not Intend to Present Evidence Relating to the "Legal Viability" of the 2008 Operating Agreement

Last, as explained in New Mexico's response to the United States Counterclaims MIL [Dkt. 536], New Mexico recognizes that the "validity of the 2008 Operating Agreement," meaning "the ability of the contracting parties to enter into the agreement," is not at issue in the upcoming trial. Dismissal Order at 29. New Mexico does not intend to present evidence for that purpose, and Texas's argument on this basis should be rejected. Texas MIL at 14. Nonetheless, as the Special Master explained, a "fundamental matter to be determined in this case" is the "relationship between Project operations and the Compact's equitable apportionment of the Rio Grande's waters." Dismissal Order at 29. Therefore, "whether the project is being operated in accordance with [the] apportionment" will be squarely addressed in this case. *Id*.

VI. TEXAS MIL NO. 5 SHOULD BE DENIED

Texas offers almost no explanation of its MIL No. 5, and no supporting authority. In response, New Mexico incorporates by reference its response to the US Legal Opinions MIL.

VII. TEXAS MIL NO. 6 SHOULD BE DENIED

It is a truism that an expert may not testify to matters that are outside her expertise and on which she has no personal knowledge. It is therefore surprising that Texas felt the need to ask the Special Master to exclude "all evidence offered outside of the subject matter expertise of a witness" in the abstract. Texas MIL at 18.

Because Texas does not meet its burden of attaching the expert reports of Dr. Barroll, Mr. Lopez, or any other New Mexico witness, and highlighting the opinions or language it thinks is inadmissible, New Mexico has no way of knowing what specific opinions concern Texas, and no way to provide a detailed response. But Texas can rest assured that none of New Mexico's witnesses will be offering opinions outside their knowledge and expertise.

To the extent that Texas is concerned about Dr. Barroll, none of her opinions require expertise on the Compact, and she does not offer opinions directly about Compact administration, Compact accounting, the Rio Grande Compact Commission, or related issues. As for Mr. Lopez, any opinions he expresses concerning Reclamation, Reclamation project operations, reservoir administration principles, water administration, Compact administration, or the Rio Grande Compact are based on his water engineering background, his decades of experience with water administration, Compact administration, and Compact accounting, his extensive background and experience with the Rio Grande Project, and his time serving as the Commissioner in charge of the United States Bureau of Reclamation and all of its projects.

If Texas wishes to make specific objections as to any specific testimony of Dr. Barroll or Mr. Lopez, then the time and place to make such objection is trial, when such objection can be

"resolved in proper context." *Sperberg*, 519 F.2d at 712. Texas MIL No. 6 is overbroad and premature, and should, accordingly, be denied.

CONCLUSION

The Special Master should deny Texas's motions in limine in their entirety.

Respectfully submitted,

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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

_____♦_____

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 State of Texas's Motions in Limine** 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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