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 IN OPPOSITION TO THE UNITED STATES' MOTION IN LIMINE REGARDING DISMISSED COUNTERCLAIMS

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COMES NOW the State of New Mexico ("New Mexico"), and responds in opposition to the United States of America's Motion in Limine Regarding New Mexico's Dismissed Counterclaims ("US Counterclaims MIL"). As explained below, the US Counterclaims MIL should be denied in its entirety.

STANDARD FOR MOTIONS IN LIMINE

The purpose of a motion in limine 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 (2nd Cir. 1996) (quoting *Banque Hypothecaire Du Canton De Geneve v. Union Mines, Inc.* 652 F. Supp. 1400, 1401 (D. Md. 1987)). A party moving to exclude evidence in advance of trial has two burdens. First, the movant must demonstrate that the evidence is inadmissible on any relevant ground. *E.g. Plair v. E.J. Branch & Sons, Inc.*, 864 F. Supp. 67, 69 (N.D. Ill. 1994). Second, the court may deny a motion in limine when it "lacks the necessary specificity with respect to the evidence to be excluded." *National Union v. L.E. Myers Co. Group*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996). Thus, the movant must identify specific evidence to be excluded. In the present motion, the United States has failed to meet both prongs of its burden.

ARGUMENT

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

The Court, "in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts." *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases). It does so "in order to enable both parties to present their respective claims in their full strength." *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840); *see also Virginia v. West Virginia*, 234 U.S.

117, 121 (1914) (original actions require procedures that allow "no room for the slightest inference that the more restricted rules applicable to individuals have been applied to a great public controversy, or that anything but the largest justice, after the amplest opportunity to be heard, has in any degree entered into the disposition of the case"); *United States v. Texas*, 162 U.S. 1 (1896).

The purpose of a motion in limine is to obtain a ruling in advance of trial on the admissibility of evidence that would confuse or mislead a fact finder. *See* Fed. R. Evid. 402; Fed. R. Evid. 403; *see also*, *e.g.*, *Gold v. State Farm Fire & Cas. Co.*, Civil Action No. 10-cv-0825-RBJ-MJW, 2013 WL 1910515, at *6 (D. Colo. May 8, 2013). Such determinations are typically deferred until trial so that questions regarding the evidence may be resolved in the proper context. *See Gold*, 2013 WL 1910515, at *6. In the overwhelming majority of circumstances, the exclusion of evidence is warranted only when a jury is sitting as fact finder. *See* Fed. R. Evid. 104, Advisory Committee Notes, 1972 Proposed Rule (recognizing that "the exclusionary law of evidence" is "the child of the jury system") (internal quotation marks and citation omitted); *see also* 11 Charles Alan Wright et al., Federal Practice and Procedure § 2885, at 623 (2012) ("In *nonjury cases* the district court can commit reversible error by excluding evidence but it is almost impossible for it to do so by admitting evidence." (emphasis added)).

This case is not a jury trial. It is an original proceeding before the United States Supreme Court, which has been assigned to a special master for the purpose of creating a complete record and making recommendations to the Court. The Federal Rules of Evidence do not technically apply, but rather serve as guidance. Sup. Ct. R. 17.2; *Texas v. New Mexico*, 482 U.S. 124, 132 n.8 (1987). There is no danger of misleading a jury, and thereby causing prejudice, and the Special Master is capable of viewing the evidence without being confused or misled.

As Special Master Kayatta explained in *Kansas v. Nebraska & Colorado*, discussing the need for pretrial motions:

> "[W]ere this a jury trial we were approaching, that's something I would have -- I would give very significant weight to. Here though, not only is it a nonjury proceeding, but it's also a proceeding where part of my job is not just to be the trial judge, but also to compile a record for independent review of my recommendations.

Transcript, Telephone Conference before Special Master William J. Kayatta, Jr., *Kansas v. Nebraska & Colorado*, Orig. No. 126, at 62:20-63:13 (Mar. 23, 2012), attached hereto as Exhibit A. Special Master Kayatta went on to explain that his reluctance to entertain pretrial evidentiary motions rested on "the structure of this proceeding and given what would be [his] caution in constructing a record that allows the Court to make an independent judgment, if it should disagree, and not wanting to have a path unnecessarily cut off that would require a remand." *Id.*, at 63:15-21; *see, e.g.*, *United States v. State of Wyoming*, 331 U.S. 440, 459-61 (1947) (remanding to allow the special master to take evidence regarding good faith, which had been erroneously excluded). The same circumstances exist here.

Moreover, in its Motion, the United States observes that "New Mexico did not take exceptions to the [Order of March 31, 2020 [Dkt. 338] ('Dismissal Order')]." But the United States fails to recognize that New Mexico has not had the opportunity to take exception because the Dismissal Order has not yet been presented to the Court. At the appropriate time, New Mexico will determine whether to take exception to the Dismissal Order. In the meantime, it would be prudent to create a record that allows the Court to fully evaluate the issues, in case the Court finds that one or more of the dismissed counterclaims is viable. *E.g. Montana v. Wyoming*, No. 137 Orig., Tr. of Final Pretrial Hearing at 22 (Oct. 15, 2013) (Special Master stating that the Supreme Court would "want to have that evidence" if it decided to rule in "a different direction" from a recommendation) (Docket No. 421, https://available at web.standford.edu/dept/law/mvn/).

II. THE UNITED STATES HAS FAILED TO MEET ITS BURDEN OF IDENTIFYING THE EVIDENCE IT SEEKS TO EXCLUDE WITH SPECIFICITY

"Orders in limine which exclude broad categories of evidence should rarely be employed. A better practice is to deal with questions of admissibility of evidence as they arise." *Sperberg v. Goodyear Tire & Rubber Co.*, 519 F.2d 708, 712 (6th Cir. 1975). This is true because

> prior to trial, the court has no way of knowing (1) whether any or all of the challenged evidence will be offered at trial, (2) if so, for what purpose or purposes, (3) whether, if offered, some or all of such evidence might be admissible for one or more purposes and (4) if admissible, whether its probative value might be outweighed by prejudicial effect.

Hess v. Inland Asphalt Co., 1990 WL 51164 (E.D. Wash. Feb. 20, 1990); *see also U.S. v. Perez*, 2014 WL 3362240 at *1 (E.D. Cal. July 9, 2014) ("Motions in limine that exclude broad categories of evidence are disfavored, and such issues are better dealt with during trial as the admissibility of evidence arises.").

As discussed above, the United States bears the burden of identifying the evidence it seeks to exclude with specificity. But here, the United States offers only broad categories of evidence, and it fails to identify the specific documents or testimony that should be subject to its motion. Specifically, the United States seeks to exclude the following broad categories:

- "evidence and argument offered to support or establish the allegations in dismissed Counterclaim 2," US Counterclaims MIL at 6;
- "evidence relating to the 2011 credit water release," US Counterclaims MIL at 7;
- "[e]vidence bearing on compliance with the Water Supply Act or the alleged lack of congressional approval for particular federal actions," US Counterclaims MIL at 7;
- "evidence offered to support or establish the allegations in Counterclaim 6,"; US Counterclaims MIL at 8;
- "[e]vidence and testimony going to the legality or the adequacy of the justification for entering into the contracts," US Counterclaims MIL at 8;

- "[e]vidence and argument relating to alleged federal responsibility for 'maintenance'–related inefficiency should be excluded," US Counterclaims MIL at 9;

- "[e]vidence presented as to the actions or inaction of the United States in its dealings with Mexico, relating to Mexican water use," US Counterclaims MIL at 10.

Each of these categories of evidence is expansive and imprecise. Construed broadly, the United States' motion would have the effect of preventing any party from presenting any evidence related to the Project, Project operations, Project releases, Project accounting, or depletions caused by Mexico or the United States. The result is that New Mexico has no way of knowing what specific exhibits or other evidence the United States seeks to exclude. The US Counterclaims MIL should be denied on this basis alone.

III. THE COURT SHOULD ADMIT ALL RELEVANT EVIDENCE

To exclude evidence on a motion in limine, the evidence must be "clearly inadmissible on all potential grounds." *Ind. Ins. Co. v. Gen. Elec. Co.*, 326 F.Supp.2d 844, 846 (N.D. Ohio 2004). "Unless evidence meets this high standard, evidentiary rulings should be deferred until trial so that questions of foundation, relevancy and potential prejudice may be resolved in proper context." *Hawthorne Partners v. AT & T Tech., Inc.*, 831 F.Supp. 1398, 1400 (N.D. Ill. 1993). This is because "a court is almost always better situated during the actual trial to assess the value and utility of evidence." *Wilkins v. Kmart Corp.*, 487 F.Supp.2d 1216, 1218 (D. Kan. 2007). This is particularly true in this case where the Special Master is creating a record for the Court and where evidence may overlap and be relevant to multiple issues.

As discussed in detail below, the US Counterclaims MIL should be denied because the categories of evidence it identifies are also relevant for live issues in this case.

A. The Relevance of the Evidence Does Not Depend on the Status of the Dismissed Counterclaims

Taken together, the US Counterclaims MIL seems crafted to confirm that New Mexico may not pursue its counterclaims against the United States. That is currently accurate. Unless and until the Court overturns the Order on the dismissed counterclaims, New Mexico recognizes that it may not pursue those counterclaims. Unless that happens, New Mexico will not use any evidence to support the dismissed counterclaims. But each of the broad categories of evidence identified by the United States is also relevant for multiple other purposes and other issues.

In its Motion, the United States urges the Special Master to inquire as to whether evidence is relevant to the dismissed counterclaims. It reasons that if evidence relates to the dismissed counterclaims, it should be excluded. *See, e.g.*, US Counterclaims MIL at 6 (seeking to exclude "evidence and argument offered *to support or establish* the allegations in dismissed Counterclaim 2" (emphasis added)), But the United States is asking the wrong question. The operative question is *not* whether evidence could be used "to support or establish" the dismissed counterclaims; the operative question is whether evidence is relevant *to the remaining claims*. If it is, then the evidence should be admitted, regardless of whether or not it would also be relevant to a dismissed counterclaim. *See generally*, Fed. R. Evid. 401, 402. Therefore, to satisfy its heavy burden of excluding evidence prior to trial, the United States must establish that the specific evidence it seeks to exclude is in no way relevant to the remaining issues in the case.

B. The Court Should Admit Evidence Relevant to Whether the States Received Their Compact Apportionments

First and foremost, the United States cannot satisfy its burden of showing that the broad categories of evidence it seeks to exclude are "clearly inadmissible on all potential grounds," *Ind. Ins. Co.*, 326 F.Supp.2d at 846, because the evidence it moves to exclude is equally relevant to the primary issue in this case – whether the States have received their Compact apportionments.

The Special Master has explained that "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"). Accordingly, the case "will address rights and obligations as between the states looking at the river system, the Compact, the Project, and the overall uses of water affecting the Compact area." Dismissal Order 36. Because the Project is "inextricably intertwined" with the Compact, *Texas v. New Mexico*, 138 S. Ct. 954, 959 (2018), 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. This means that "whether the project is being operated in accordance with [the] apportionment" will be squarely addressed in this case. *Id*.

It necessarily follows that evidence going to "the United States' Project operations," where Compact/Project water was allocated, how Compact/Project water was allocated, Project accounting, uses of surface and groundwater in both States, "New Mexican, Texan, or Mexican surface or groundwater diversions," "the United States's alleged maintenance failures," and all other actions that impacted "where the waters of the Rio Grande have been going" is relevant and should be admitted. *Id*.; *see also* Law of the Case Order at 1.

It is for exactly this reason that the Special Master cautioned the United States that the Dismissal Order did "not necessarily mean evidence relevant to [the dismissed] claims may not be admissible on the larger issues of Compact interpretation and performance." The United States did not heed this caution, and its failure to satisfy its burden of showing that specific evidence is not admissible on apportionment issues compels denial of the US Counterclaims MIL in its entirety.

C. The Court Should Admit Evidence Relevant to Counterclaims 1 and 4

For similar reasons, the United States has not shown that the broad categories of evidence it seeks to exclude are irrelevant to Counterclaims 1 and 4.

In the Dismissal Order, the Special Master allowed Counterclaims 1 and 4 against Texas to proceed. Dismissal Order at 27-28, 30. He explained that Counterclaim 1 encapsulates "all of the Texas water use alleged to be in violation of the Compact," *id*. at 35, and that Counterclaim 4 "largely mirrors Counterclaim 2" and "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 apportionments," *id*. at 30. The United States does not address these holdings, and its failure to do so means that it also fails to establish that the broad categories of evidence it seeks to exclude are "clearly inadmissible on all potential grounds." *Ind. Ins. Co.*, 326 F.Supp.2d at 846.

D. The Court Should Admit Evidence Relevant to Potential Declaratory Relief Against the United States

Last, the United States has not met its burden of showing that the broad categories of evidence it seeks to exclude are irrelevant to potential declaratory relief.

"The United States entered this action to obtain clarity as to what the Compact requires for the purpose of Project operations." Dismissal Order at 15. Thus, as the Special Master observed, "[t]he Court's ultimate interpretation of the Compact will inform future administrative decisions and Project operations." *Id*. 15. And since it "agrees that it will be bound by the Court's ruling on its own and Texas's claims," *id*. at 14, "[t]he United States conceded that . . . when 'we have a decree that defines what each state has, we can then look to project operations and determine whether those operation[s] are consistent with the decree.'" *Id*. at 29 (quoting Hr'g Tr. at 49 [Dkt. 264]).

In light of these principles, it was "somewhat less clear . . . whether sovereign immunity bars declaratory relief as to the United States' obligations under the Compact." *Id*. at 2. Thus, the Special Master kept open the possibility of declaratory relief on issues related to the dismissed counterclaims. *Id*. ("I am not prepared at this time to determine the full extent of sovereign immunity as to declaratory relief"). Again, in its Counterclaims MIL, the United States makes no effort to address the possible relevance of evidence to declaratory relief. This failure is fatal, and the US Counterclaims MIL should be denied.

IV. THE UNITED STATES' SPECIFIC ARGUMENTS FAIL TO MEET THE BURDEN

A. Evidence Related to the 2008 Operating Agreement Is Relevant (Counterclaim 2)

The United States' effort to exclude all evidence related to the 2008 Operating Agreement ("OA") is surprising considering its concession that since 2008 the 2008 OA governed Project operations, Project allocations, Project accounting, and how much water was available for water users in New Mexico and Texas. Dismissal Order at 29. Rather than being "'beyond the scope of the current litigation,'" US Counterclaims MIL at 6, the amount of Project supply available to both States and impact of the 2008 OA on the Compact apportionment is at the heart of the case.

The United States correctly notes that the "validity of the 2008 Operating Agreement," meaning "the ability of the contracting parties to enter into the agreement," is not at issue. *Compare* Dismissal Order at 29 *with* US Counterclaims MIL at 5. New Mexico agrees. Nonetheless, as observed by the Special Master, the impact of the 2008 OA "on the issue of whether each state is receiving the water to which it is entitled under the Compact," Dismissal Order at 29, is a critical issue presented in the upcoming liability trial. Holding a trial on the Compact apportionment without evidence of the 2008 OA would be like holding a medical

malpractice trial without evidence of the surgery – you would see the effects of the procedure without being able to evaluate the cause.

Nor does the United States recognize the Special Master's finding that Counterclaim 2 "largely mirrors" Counterclaim 4. Because Counterclaim 4 is a viable claim, the similar evidence necessary to establish that claim, including evidence of the impact of the 2008 OA on the apportionment, should be allowed.[1]

B. Evidence Related to the 2011 Credit Water Release Is Relevant (Counterclaim 3)

The United States next asks the Court to exclude "evidence relating to the 2011 credit water release." US Counterclaims MIL at 7. Conspicuously absent from the United States' motion, however, is any explanation whatsoever of the Credit Water issue.

In essence, in 2011, the United States changed the method of accounting for Credit Water evaporation in storage under Article VI of the Compact. The method adopted by the United States was contrary to a unanimous resolution of the Rio Grande Compact Commission ("RGCC"), and had the effect of reducing New Mexico's Credit Water in storage. The United States then compounded that error by releasing New Mexico's Credit Water without authorization, and directing all of that water to Texas water users. The Credit Water issue therefore goes directly to the apportionment and whether New Mexico received its share of Compact water in 2011 and beyond.

Indeed, accounting for the Credit Water issues continues to separate the States in the RGCC. Because a resolution of the dispute has not been reached, Texas and New Mexico continue

[1] The United States' argument about the Administrative Procedures Act is nothing more than a distraction. US Counterclaims MIL at 6. The evidence at issue in this motion goes to whether the States received their share of Compact water. Nothing in the APA conflicts with a presentation of that evidence, particularly since the APA itself provides that the United States must follow applicable laws and statutes, including the Compact. *E.g.* 5 U.S.C. § 706(2)(A) & (C); *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414-15 (1971).

to present competing Compact accounting at each and every RGCC meeting. This issue should be resolved in this case.

C. Evidence Related to Project Operations Is Relevant (Counterclaim 5)

New Mexico acknowledges that it is not permitted, at this time, to pursue claims against the United States for violations of the Water Supply Act, and it does not intend to present any evidence for that purpose.

D. Evidence Related to Accounting Practices Is Relevant (Counterclaim 6)

The United States requests that "evidence offered to support or establish the allegations in Counterclaim 6 should be excluded." US Counterclaims MIL 8. But the Special Master has been clear that the "questions of where the Rio Grande water has gone, should have gone, and should go in the future will require broad examination of the uses of hydrologically connected waters downstream of the Dam." Dismissal Order 32.

As the Master is aware, the United States allocates a share of Project supply to water users in New Mexico and Texas each year. Because the Compact is "inextricably intertwined" with the Project, that allocation effectively divides the waters between the States and must be consistent with the Compact. *See* Summary Judgment Order 3 ("Downstream from the Reservoir, the Compact relies on the Rio Grande Project for water delivery and is *programmatic* in its apportionment of water as between Texas and New Mexico. . . ."); *id*. at 14-15, 29 ("[t]he Court's ultimate interpretation of the Compact will inform future administrative decisions and Project operations"). New Mexico intends to show through the testimony of Dr. Margaret (Peggy) Barroll, and others, that the far-reaching changes to Project accounting systematically decrease New Mexico's share of Project water and increase Texas's share. This evidence directly bears on the apportionment and the issues for the upcoming trial. This evidence is necessary to "prove or

defend against the action's broader claims," *id*. at 33, and the US Counterclaims MIL should be denied.

E. Evidence Related to the Miscellaneous Purposes Contracts Is Relevant (Counterclaim 7)

The United States next seeks to exclude "[e]vidence and and testimony going to the legality or adequacy of the justification for entering into the contracts." US Counterclaims MIL 8. In so arguing, the United States appears to acknowledge that evidence, including evidence related to the Miscellaneous Purposes contracts, related to the "rights and obligations as between the states looking at the river system, the Compact, the Project, and the overall uses of water affecting the Compact area" is permissible. Dismissal Order 36 (addressing Counterclaim 7). With this understanding, New Mexico does not intend to present evidence solely to address the "*legality* of the federal contracts with El Paso." US Counterclaims MIL 8 (emphasis added).

F. Evidence Related to the United States' Failure to Maintain the River Is Relevant (Counterclaim 8)

As the United States concedes, the Special Master found that evidence showing that improper maintenance by the United States was "a source of Project inefficiency" will be allowed. *Id*. at 9 (quoting Dismissal Order 37 ("In the present suit, proof of maintenance shortcomings as a source of Project inefficiency may be relevant to pending claims.")). New Mexico intends to show, including through the United States' own documents and witnesses, that the United States' actions and inactions related to river and channel maintenance resulted in appreciable depletions of Project supply. Under the provisions of the 2008 OA, those depletions were charged to New Mexico and resulted in a reduction in New Mexico's Compact apportionment. This is precisely the type of evidence the Special Master held was appropriate. Dismissal Order 37.

G. Evidence Related to Groundwater Pumping in Mexico Is Relevant (Counterclaim 9)

The United States concedes, as it must, that "'Mexican water use, as a factual matter, may be a cause of Texas's alleged water shortages.'" US Counterclaims MIL 9 (quoting Dismissal Order 37-38). It asserts, however, that evidence of the impacts of water use in Mexico "would go to the amount of damages," not liability. But the United States offers no explanation for its counterintuitive position. In the upcoming liability phase, the Court will determine, among other things, whether the actions of the Parties caused a Compact violation, and if so, the amount of that violation. *See, e.g., Montana v. Wyoming*, No. 137 Orig., Case Management Plan No. 1 at pg. 4, ¶ II (Dec. 20, 2011) (noting that the case was bifurcated, and the "liability phase" would include a determination as to whether there was a compact violation "and the amount of any such violation") (Docket No. 118, available at https://web.stanford.edu/dept/law/mvn/). For example, New Mexico anticipates the evidence will show that New Mexico was deprived of its share of Compact water since 2006, in an amount greater than 600,000 acre-feet. In the remedies phase, New Mexico anticipates seeking a remedy in either money or water for that violation, and if it seeks money, it will quantify the monetary damages.

The evidence of depletions caused by Mexico water use does not bear on a quantification of monetary damages; it bears on whether a violation occurred in the first instance, and if so, the cause of the violation. As the Special Master observed, "the fact of such water use in Mexico is likely material to the question of whether and to what extent New Mexico or some other party is responsible for Texas's currently alleged shortfall." Dismissal Order 28. Moreover, as with all post-1980 depletions, the depletions caused by Mexico are charged to New Mexico in the new Project accounting, and the actions in Mexico have thus reduced New Mexico's Compact apportionment since at least 2008.

V. THE UNITED STATES MISAPPREHENDS THE STANDARD FOR REBUTTAL EVIDENCE

Finally, New Mexico writes separately on the issue of rebuttal evidence in the hopes of avoiding a dispute at trial. In its Counterclaims MIL, the United States raises the specter of requesting extensive rebuttal evidence on well-known issues including the 2008 OA, US Counterclaims MIL 5, the impact of the unilateral release of Credit Water on New Mexico, *id*. at 7, and accounting changes that deprived New Mexico of its share of Project supply, *id*. at 8. This suggestion by the United States misapprehends the nature of rebuttal evidence.

"Rebuttal" is a term of art denoting evidence introduced by a plaintiff to meet previously unknown facts that are brought out for the first time in a defendant's case in chief. *See, e.g., Morgan v. Commercial Union Assurance Companies*, 606 F.2d 554 (5th Cir. 1979). However, a "[p]laintiff can make no reasonable claim of ignorance as to defendant's theory." *Smith v. Conley*, 584 F.2d 844 ,846 (8th Cir. 1978) (excluding improper rebuttal evidence because the defendant's theory was known prior to trial). For that reason, it is black letter law that the standard for determining whether rebuttal evidence is allowed turns on whether the issue could reasonably have been anticipated prior to trial. *See, e.g. In re Apex Oil Co.*, 958 F.2d 243 (8th Cir. 1992) (rebuttal testimony barred where a party should have anticipated the testimony of a defense witness).

Here, the evidence that the United States threatens to raise in "rebuttal" is not rebuttal at all. It is intended to address issues that have been front and center in this case from the outset. Because those issues are well known to the United States (indeed the United States included them in its Counterclaims MIL), the United States must present countervailing evidence as part of its case in chief, not as part of a tactical "rebuttal" case designed to deprive New Mexico of the opportunity to respond. The Special Master should make this clear prior to trial so that the United

States can plan to present evidence on issues that can reasonably be anticipated as part of its case in chief.

CONCLUSION

The US Counterclaims MIL should be denied in its 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 United States' Motion in Limine Regarding Dismissed Counterclaims** 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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SUPREME COURT OF THE UNITED STATES
No. 126, Original

STATE OF KANSAS,	)
	)
Plaintiff,	)
	)
V.	)
	)
STATE OF NEBRASKA	)
and	)
STATE OF COLORADO,	)
	)
Defendants.	)

TELEPHONE CONFERENCE before SPECIAL MASTER WILLIAM J. KAYATTA, JR., ESQ., held at the law offices of Pierce Atwood, LLP, at 254 Commercial Street, Portland, Maine, on March 23, 2012, commencing at 10:00 a.m., before Claudette G. Mason, RMR, CRR, a Notary Public in and for the State of Maine.

APPEARANCES:

For the State of Kansas:	JOHN B. DRAPER, ESQ. BURKE GRIGGS, ESQ. DONNA ORMEROD
For the State of Nebraska:	JUSTIN D. LAVENE, ESQ. BLAKE E. JOHNSON, ESQ. DONALD C. BLANKENAU, ESQ. THOMAS R. WILMOTH, ESQ.
For the State of Colorado:	AUTUMN L. BERNHARDT, ESQ. CHAD M. WALLACE, ESQ.
For the USA:	JAMES J. DUBOIS, ESQ.
Also Present:	JOSHUA D. DUNLAP, ESQ.

EXHIBIT A

that process, at least looking at the calendar as it's set forth now, until that July/August time frame.

We have at least 10 depositions remaining, and we have two weeks left to do that, and then coming out of that, having to get our summary judgment motions ready for the May 15 deadline.

I'm just beginning to see that as somewhat problematic, and I just do not believe that Nebraska could proceed and resolve the issues on the dispositive motions along with our initial pretrial motions with regard to Daubert and then actually getting prepped and ready for the trial itself, depending upon the outcome of those Daubert motions.

SPECIAL MASTER KAYATTA: Yes. I see -- and I definitely understand what you're saying. And were this -- you know, were this a jury trial we were approaching, that's something I would have -- I would give very significant weight to. Here though, not only is it a nonjury proceeding, but it's also a proceeding where part of my job is not just

to be the trial judge, but also to compile a record for independent review of my recommendations. So I would be very surprised if there were a Daubert issue that could be raised prior to trial that would cause me to strike a witness's testimony and not even have it presented at trial. It seems to me a much more efficient manner to proceed is bring the expert, put him on, make the Daubert and other objections; and I can then share my views both on the Daubert issue and on what I think of the expert testimony as well.

So it's -- it's hard for me -- let's put it this way. If there are -- given the structure of this proceeding and given what would be my caution in constructing a record that allows the Court to make an independent judgment, if it should disagree, and not wanting to have a path unnecessarily cut off that would require a remand, if you have a Daubert issue, which in that context would be so convincing that we could dispense with the need to even put someone on, such as it goes to their credentials or something like that,

then I think that would be pretty simple to put together and bring to my attention. It wouldn't be the type of Daubert issue we would be used to filing in a jury proceeding where someone has got a putatively qualified expert with unusual testimony based on assumptions of one type or another that we would really need to dig into.

So I'm not precluding the filing of Daubert motions, if anyone wants to file them. But I don't think that's going to be a reason for not starting trial sometime between August 8 and August 13.

MR. LAVENE: Well, for allowing Nebraska the opportunity to file those and under what you just stated, that we would maybe deal with that during the trial itself, I think Nebraska would at least request the opportunity then to -- unless those issues are kind of fleshed out during the trial itself, to be able to file post-trial Daubert motions on these expert reports.

SPECIAL MASTER KAYATTA: Well, I certainly anticipate that there will be post-trial filings. And so -- I mean, let me