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

NEW MEXICO'S OBJECTIONS TO AND MOTION TO STRIKE TEXAS'S LATE-FILED EXPERT OPINIONS

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MOTION

COMES NOW the State of New Mexico ("New Mexico") and moves to strike late-filed new opinions of the Texas experts contained in new declarations filed in support of Texas's summary judgment briefing.

The late-filed opinions are contained in the Declarations by:

- Dr. William Hutchison filed on November 5, 2020 ("Hutchison Declaration");
- Robert J. Brandes filed by Texas on November 5, 2020 (Brandes Nov. Declaration") and December 22, 2020 ("Brandes Dec. Declaration") (collectively, the "Brandes Declarations"); and
- Dr. Scott A. Miltenberger filed by Texas on November 5 ("Miltenberger Nov. Declaration") and December 22, 2020 ("Miltenberger Dec. Declaration") (collectively, the "Miltenberger Declarations").

GROUNDS FOR THE MOTION

New Mexico moves to strike these late-filed opinions under Federal Rules of Civil Procedure 26 and 37, as made applicable by the Case Management Plan ("CMP"), on the grounds that:

1. The Hutchison Declaration (attached as Exhibit 1 hereto) contains new opinions and analysis concerning New Mexico's Integrated Lower Rio Grande Model ("Integrated Model")—a model which New Mexico disclosed in October 2019, and on which Dr. Hutchison has never given any opinion; and new opinions concerning various simulation runs using that model performed by New Mexico's experts, which were also disclosed in October 2019 (updated in July and September 2020). These new opinions are contained in paragraphs 35-61 (new opinions on Integrated Model) of the Hutchison Declaration. The Hutchison Declaration also

contains new opinions relating to conjunctive water management. Those new opinions are contained in paragraphs 62-66 (new opinions on conjunctive use) of the declaration.

2. The Brandes Declarations (attached as Exhibits 2 and 3) also contain new opinions on the Integrated Model, which New Mexico disclosed in October 2019 and on which Dr. Brandes never previously provided any opinions, a changed opinion on the Compact apportionment to New Mexico, a new opinion on Compact Commission actions, and new opinions based on analysis disclosed by Texas expert Mr. Coors in his May 2020 expert report to which Dr. Brandes never previously responded or offered any opinion. These new opinions are contained in Brandes November Declaration at paragraphs 21 (new opinion on apportionment) and 36 (new opinion on Compact Commission actions), and in the Brandes December Declaration at paragraphs 8-11, and 17 (new opinions on Integrated Model), paragraphs 19, 23-24 (new opinions based on Mr. Coors expert report) and paragraph 31 (new opinions on 2008 Operating Agreement).

3. The Miltenberger Declarations (attached as Exhibits 4 and 5 hereto) contain new opinions in four areas: 1) the Compact's apportionment between New Mexico and Texas below Elephant Butte; 2) the Compact's protection of "uses" not "rights"; 3) that allegation that the downstream contracts cannot be considered when assessing the Compact's provisions; and 4) the allegation that New Mexico State Engineer Steve Reynolds had knowledge of a connection between ground and surface water *below* Elephant Butte *before* the 1980s and as early as the 1950s. None of these opinions, which are described in more detail below, were contained in Dr. Miltenberger's expert reports filed on May 31, 2019 and December 23, 2019. Some of these new opinions not only exceed the scope of Dr. Miltenberger's expert reports, but actually contradict opinions Dr. Miltenberger expressed in those reports.

These new expert opinions—presented after the close of discovery and during summary judgment briefing—are not substantially justified or harmless, and they are highly and unfairly prejudicial to New Mexico. They should, therefore, be stricken.

In filing these expert declarations very late in this case and after the close of discovery, Texas seeks to circumvent the CMP, the Federal Rules of Civil Procedure, and the understanding of the parties as to the production of data and information that should be made each time an expert report was filed in this case. These expert declarations are, for all intents and purposes, new expert reports, which were required to be disclosed more than a year ago. Instead, Texas is injecting them in the middle of summary judgment briefing. This is manifestly unfair and highly prejudicial to New Mexico. These new declarations should not be allowed, and the experts must be precluded from testifying on these new opinions at trial.

BACKGROUND

On September 6, 2018, the Special Master adopted a CMP that has subsequently been amended. The CMP, as amended, set deadlines for the disclosure of expert discovery and expert reports:

May 31, 2019	Texas's expert reports and disclosures
October 31, 2019	New Mexico's expert reports and disclosures
December 30, 2019	Texas's rebuttal expert reports and disclosures
June 15, 2020	New Mexico's rebuttal expert reports and disclosures (non-modeling experts)
July 15, 2020	New Mexico's rebuttal expert reports and disclosures (modeling experts)[1]

[1] New Mexico's final rebuttal reports deadline was bifurcated because of late-filed Texas and U.S. expert reports containing new analysis and opinions.

September 30, 2020 Final supplemental expert reports and disclosures, and amendments. No party objected to this schedule. Special Master Order (Aug. 28, 2020); Order and Amendment to Trial Management Schedule (Sep. 29, 2020). The parties agreed and the Special Master ordered that the following must be provided with the disclosure of expert reports:

> In addition to the disclosures required by Rule 26(a)(2), expert disclosures shall include an executable electronic version of any computational model, if one is prepared by the Party, including all input and output files, relied upon by the expert in forming his or her opinions. Additionally, each Party must provide engineering and other technical information in its native electronic file format whenever the native format contains formulae, macros, or other programming that is relevant to disputed issues in this case. By way of example and not limitation, this includes Microsoft Excel or other spreadsheet documents that include macros or formulas. Since expert disclosures and modeling files will be very large in size, the Parties will confer and agree in writing on further details defining the procedure, format and location for serving electronic expert disclosures.

CMP (Sep. 2018), 6.2.2.

On May 31, 2019, Texas made its expert disclosures, and disclosed expert reports by Dr. Hutchison, Dr. Brandes, and Dr. Miltenberger. *Texas's Disclosure of Expert Witnesses* (May 31, 2019), attached as Exhibit 6 hereto; *Expert Report of Dr. William Hutchison* (May 31, 2019); *Expert Report of Robert J. Brandes* (May 31, 2019); *Expert Report of Scott A. Miltenberger, Ph.D.* (May 31, 2019). New Mexico then deposed Dr. Hutchison, Dr. Brandes, and Dr. Miltenberger on the contents of these reports in September and October of 2019.

On October 31, 2019, New Mexico disclosed its expert reports, which included responses to the opinions set out in the May 31, 2019 reports of Texas's experts. *State of New Mexico's Disclosure of Expert Witnesses* (Oct. 31, 2019), attached as Exhibit 7 hereto. New Mexico's expert disclosures included disclosure of New Mexico's hydrologic model—the Integrated Model—which is central to New Mexico's position on the hydrology of the Lower Rio Grande basin and

Rio Grande Project operations. The Integrated Model utilizes and integrates a surface water model that replicates Project operations with two groundwater flow models: one of the Rincon/Mesilla Basin, and one of the Hueco Bolson. On October 31, 2019, New Mexico also disclosed an expert report from historian, Dr. Jennifer Stevens, who provided expert opinions on, among other things, the history of the Compact, the Project, and the Lower Rio Grande basin; and an expert report from Dr. Peggy Barroll, who provided extensive expert opinions on historical and current Project operations and allocations. *New Mexico's Disclosure of Expert Witnesses* (Oct. 31, 2019); *Expert Report of Dr. Jennifer Stevens* (Oct. 31, 2019); *Expert Report of Margaret Barroll, Ph.D.* (Oct. 31. 2019).

Texas filed its rebuttal expert reports on December 30, 2019, including rebuttal reports from Dr. Hutchison and Dr. Miltenberger. Texas did not submit a rebuttal report for Dr. Brandes. *State of Texas's Disclosure of Rebuttal Expert Witnesses* (Dec. 30, 2019), attached as Exhibit 8 hereto; *Rebuttal Expert Report of William R. Hutchison* (Dec. 23, 2019); *Expert Rebuttal / Supplemental Report of Scott A. Miltenberger, Ph.D.* (Dec. 30, 2019). New Mexico deposed Dr. Hutchison and Dr. Miltenberger on the contents of their rebuttal reports in May and June of 2020. In his second deposition, Dr. Hutchison confirmed that up to the date of this second deposition he had been asked by Texas only to consider and offer opinions on New Mexico's *groundwater* models. *Deposition of Dr. William Hutchison* (May 28, 2020), 18:2-8, 17-21, attached as Exhibit 9 hereto. He disclaimed that he was running New Mexico's Integrated Model, and stated that this was being performed by another Texas expert, Shane Coors. *Id*. at 18:17-25, 19:1-4. Texas did not file Rule 26(e) supplemental disclosures to supplement any of the opinions Dr. Hutchison, Dr. Brandes, or Dr. Miltenberger made in their reports and rebuttal reports.

With its December 30, 2019 rebuttal expert disclosures, Texas also disclosed a new expert, Mr. Shane Coors P.E., who was the sole expert disclosed by Texas who analyzed New Mexico's Integrated Model. *Expert Report of Adolph (Shane) Coors V, M.E., P.E., Rebuttal Report Addressing New Mexico Technical Experts' Modeling Systems* (Dec. 30, 2019). Four months after Texas's deadline to make rebuttal disclosures, Texas submitted a supplemental disclosure for Mr. Coors. *Expert Report of Adolph (Shane) Coors V, M.E., P.E., Supplemental Rebuttal Report* (May 6, 2020). In this Supplemental Report, Mr. Coors further analyzed the Integrated Model. Following this tardy disclosure of Mr. Coors' Supplemental Report, the Special Master extended the deadline for New Mexico to file its rebuttal modeling disclosures from June 15, 2020 to July 15, 2020. New Mexico deposed Mr. Coors on his first report on February 27, 2020, and on his supplemental report on June 22, 2020. Dr. Brandes did not offer any supplemental opinions that relied upon or supported Mr. Coors's opinions.

Discovery closed on August 31, 2020. Special Master Order (May 5, 2020). Final supplemental expert reports and disclosures were due by September 30, 2020. Order and Amendment to Trial Management Schedule (Sep. 29, 2020).

On November 5, 2020, the parties filed partial summary judgment motions. With its partial summary judgment motion, in Texas's Appendix of Evidence, Texas filed the Hutchison Declaration, which is dated October 29, 2020 (TX_MSJ_000657-661), the Brandes Nov. Declaration (TX_MSJ_000001-016), and the Miltenberger Nov. Declaration (TX_MSJ_001585-6491).

New Mexico and Texas filed responses to the partial summary judgment motions on December 22, 2020. With its response brief, Texas filed an Appendix of Evidence and in this

appendix, Texas disclosed the Miltenberger Dec. Declaration (TX_MSJ_0007371-450), and the Brandes Dec. Declaration (TX_MSJ_0007312-329).

I. Dr. Hutchison's Expert Reports and New Declaration.

In his opening expert report filed on May 31, 2019, Dr. Hutchison disclosed the Texas Rincon-Mesilla groundwater model ("Texas Model") and opined on pumping impacts using that model—a model which has a geographic scope limited to just the Rincon-Mesilla basins (thus excluding all pumping in El Paso Valley). *Expert Report of William R. Hutchison* (May 31, 2019) ("Hutchison Report"), excerpts of which are attached as Exhibit 10 hereto. The Texas Model is a groundwater model only—it contains no Project operations. Dr. Hutchison states in this Report that the Texas Model:

> was developed to answer the following specific questions that were posed by Counsel for the State of Texas:
>
> a) What is the nature and extent of hydrologically connected groundwater and its relationship to the Rio Grande and the Rio Grande Project and the relevant issues raised in the Texas Complaint?
>
> b) What was the 1938 condition that should be used as the basis upon which to judge New Mexico's actions and the effect of those actions?
>
> c) Have New Mexico's actions depleted the quantity of water available below Elephant Butte Reservoir, and if so, (a) what was the cause of these depletions and (b) what was the extent (quantification) of these depletions?
>
> d) If groundwater pumping in New Mexico were regulated to control the amount of water pumped, would it decrease or eliminate the effects on surface flows in the Rio Grande? Would the system recover to levels that existed in 1938 (i.e. the baseline condition)? If so, how long would it take to recover?

Id. at 9-10.

In his rebuttal report, filed on December 30, 2019, Texas again asked Dr. Hutchison to opine on a specific question:

> Counsel for the State of Texas asked me to review the groundwater flow model of the Hueco Bolson submitted by the State of New Mexico (Spalding and Morrissey, 2019) and asked the following question:
>
> *Is the new Spalding and Morrissey (2019) model of the Hueco Bolson a better model than the existing USGS model of the Hueco Bolson (Heywood and Yager, 2003) to address issues associated with the Lawsuit?*

Rebuttal Report of William R. Hutchison (Dec. 23, 2019) ("Hutchison Rebuttal"), 1 (excerpts of which are attached as Exhibit 11 hereto). Dr. Hutchison's Rebuttal report comprised eight pages and was limited to opinions related to the New Mexico Hueco Bolson groundwater flow model. *See id*. Dr. Hutchison's rebuttal report did not mention or analyze New Mexico's Integrated Model, even though New Mexico had disclosed it to Texas two months earlier, on October 31, 2019.

The Hutchison Declaration filed on November 5, 2020 contains new opinions and analysis concerning the Integrated Model, including opinions on various simulation runs New Mexico's experts performed using that model. Those new opinions and analysis are at paragraphs 35-61 of the Hutchinson Declaration. The Hutchinson Declaration also contains new opinions relating to conjunctive water management, at paragraphs 62-66 of the declaration.

More specifically, Dr. Hutchison now discloses, for the first time, opinions and analysis on New Mexico's Integrated Model, in particular on simulation of depletions as a result of groundwater pumping, and in particular on Runs 3, 6, and 7, and on the data contained in a spreadsheet disclosed by New Mexico on September 15, 2020 titled "Ferguson Rebuttal revised 9-15-20 v116.xlsx." Ex. 1, Hutchison Declaration ¶¶ 36-54. Dr. Hutchison also discloses a belated

critique of the Integrated Model at paragraphs 55-61 of his declaration, despite disclaiming in his deposition that he had ever run the Integrated Model.

As stated, the Hutchison Report and Hutchison Rebuttal offered no opinions on the Integrated Model. In his second deposition, Dr. Hutchison testified that he had reviewed only New Mexico's groundwater models, and only for the purpose of "providing information to counsel and, when requested, other experts." Ex. 9, Hutchison Dep. Vol. III (May 28, 2020), 18:13-14. When pressed for specifics, Dr. Hutchison elaborated that he had provided information on New Mexico's groundwater models to Texas expert Mr. Coors. *Id*. at 18:17-21.

Further, Dr. Hutchison now critiques the discussion of conjunctive use in one of several depositions of New Mexico expert Estevan Lopez. Ex. 1, Hutchison Decl. ¶¶ 62-66. Dr. Hutchison did not extensively discuss conjunctive use of groundwater and surface water in his Report, but he did present results from simulations he performed using the Texas Model that he described as "conjunctive use scenarios." Ex. 10, Hutchison Rep. 44-47. In his Report, Dr. Hutchison defined conjunctive use as "the use of groundwater to make up deficits in surface water flows to meet agricultural demands" and stated this definition "is generally consistent with how conjunctive use is defined and applied in the City of El Paso (preferential use of surface water to meet municipal demands and increase groundwater pumping to meet deficits in surface water supply)." *Id*. ¶ 143. Dr. Hutchison concluded that if New Mexico were to practice conjunctive management at certain levels, "groundwater levels would recover" and the Rio Grande would return in many years to "gaining stream conditions that has [sic] not been observed since 1951." *Id*. ¶ 152. Dr. Hutchison never filed any supplemental disclosures rebutting any opinions of New Mexico's expert Estevan Lopez.

In his new Declaration, Dr. Hutchison offers a definition of conjunctive use that is diametrically opposed to the definition he offered in his Report. Specifically. Dr. Hutchison critiques Mr. Lopez for defining conjunctive use as "using the available surface water as the primary irrigation supply and making up the difference up to the crop irrigation requirements with supplemental groundwater." Ex. 1, Hutchison Decl. ¶ 62 (quoting Lopez Deposition (July 6, 2020) 68:3-6). Although this definition is almost identical to the definition from the Hutchison Report, Dr. Hutchison now claims conjunctive use is not possible when "the groundwater supply is connected to the surface water supply" and that conjunctive use as described by Mr. Lopez is not permissible, at least in New Mexico, because "groundwater pumping depletes the surface water supply," "decreasing some water that would have otherwise flowed into Texas." *Id*. ¶¶ 63-66.

Texas provided no backup data, spreadsheets, or other documentation to support the new opinions included in the Hutchison Declaration. Declaration of Gregory K. Sullivan, P.E. in Support of the State of New Mexico's Motion to Strike (Feb. 12, 2021) ¶ 10 ("Sullivan Decl."), attached hereto as Exhibit 12. Without this backup information, and full discovery, it is not possible for New Mexico or its experts to thoroughly review the bases for these new opinions, or provide a comprehensive and complete response to them. *See e.g.*, *id.*

II. Dr. Brandes' Expert Report and New Declaration.

In his May 31, 2019 expert report, Dr. Brandes states that he:

> provided information pertaining to elements of the Rio Grande Project prior to and after the early 1950s … including evidence of the impacts of [] groundwater pumping on hydrologic conditions and water use. I have summarized specific aspects of how the Rio Grande Project has been operated historically and what changes have occurred over time. Also, I have considered historical deliveries of Project water to users in New Mexico and Texas and how these deliveries have changed with the development of groundwater pumping.

Expert Report of Robert J. Brandes (May 31, 2019) ("Brandes Report"), 1 (attached hereto as Exhibit 13). The Brandes Report offered thirteen enumerated conclusions regarding this general topic, including (1) that "[t]he Rio Grande Project is the means by which Compact water from Elephant Butte Reservoir is *apportioned among* and delivered to users in New Mexico, Texas and Mexico"; (2) the relationship of the Rio Grande Joint Investigation to the Compact; (3) historical assessments of a normal supply of water from the Project; (4) the reuse of return flows within the Project; (5) the historical division of water between New Mexico and Texas; (6) general impacts to surface water from groundwater pumping, (7) historical pumping volumes in New Mexico and the Texas portion of the Mesilla basin; (8) prior studies on the impacts of groundwater pumping in southern New Mexico; (9) the relationship between Project releases and flows at the Texas state line and the possible impact of pumping on these flows; (10) the D1 and D2 curves; (11) the impacts of reservoir levels and reservoir inflows on Project releases; (12) the impacts of the 2008 Operating Agreement; and (13) historical Project accounting data. *Id.* at 1-4 (emphasis added). Dr. Brandes did not file a Rebuttal Report.

On November 5, 2020, Texas filed a first declaration from Dr. Brandes. In the Brandes November Declaration, Dr. Brandes presented new opinions on the Compact apportionment to Texas, and Compact Commission accounting. Ex. 2, Brandes Nov. Decl. ¶¶ 21, 36. Specifically, in his November Declaration, Dr. Brandes opined, "The Project, in turn, is the means by which the water apportioned to Texas by the Compact is stored in Elephant Butte Reservoir, and subsequently delivered to Texas (subject to deliveries to EBID, pursuant to its contract with the United States, and to Mexico, pursuant to the 1906 Treaty)." *Id.* ¶ 21. This contradicts the Brandes Report, where Dr. Brandes opined, "The Rio Grande Project is the means by which Compact water from Elephant Butte Reservoir is apportioned among and delivered to users in New Mexico, Texas

and Mexico." Ex. 13, Brandes Rep. at 1, 6, 34. In his November Declaration., Dr. Brandes also offered an opinion on the import of a February 22, 2002 report of the Engineer Advisers to the Rio Grande Compact Commission, specifically that it indicates all water delivered to Project storage is apportioned to Texas. Ex. 2, Brandes Nov. Decl. ¶ 36. Not only does this new opinion contradict the opinions Dr. Brandes gave in his Report regarding the Compact apportionment, Ex. 13, Brandes Rep. 1, 6, 34. Dr. Brandes offered no opinions in his Report regarding this 2002 document or any other document that Dr. Brandes claims supports his new opinion that no Project water is apportioned to New Mexico.

On December 22, 2020, Texas filed a second declaration from Dr. Brandes. In the Brandes December Declaration, Dr. Brandes presents opinions and analysis, for the first time, on New Mexico's Integrated Model that New Mexico first disclosed in October 2019. In particular, Dr. Brandes presents new opinions and analysis on simulation Runs 1, 2 and 3 first disclosed by New Mexico in October 2019. Ex. 3, Brandes Dec. Declaration, ¶¶ 8-11, and 17. This stands in stark contrast to Dr. Brandes's Report, where he offered no opinions on the New Mexico Integrated Model, which had not been disclosed when Texas produced the Brandes Report, and only cursory opinions on certain results from the Texas Model. *See, e.g.*, Ex. 13, Brandes Report 9, 21-22.

New Mexico questioned Dr. Brandes about his water modeling experience and the use of models in this case. Ex. 14, Brandes Deposition Vol. I (Sept. 24, 2019), 9:19-25 (attached hereto as Exhibit 14). Dr. Brandes stated that, while he had experience working with water models, and had originally been hired to perform modeling work on this case, the nature of his assignment had changed over time so that his modeling work was discarded and did not form part of his analysis. *Id*. 10:1-25, 11:1-2. Dr. Brandes was not asked about the Integrated Model during his deposition because the Integrated Model had not been disclosed at that time. Dr. Brandes never filed any

supplemental disclosures after the Integrated Model was disclosed, and therefore, New Mexico never had any reason to depose him on the Integrated Model.

For the first time, Dr. Brandes also offers opinions based on data and analysis disclosed by the Texas expert Mr. Coors, which Mr. Coors presented in his expert report disclosed more than 7 months before Dr. Brandes new December Declaration, on May 5, 2020. Ex. 3, Brandes Dec. Decl. ¶¶ 19, 23-24. Dr. Brandes relies on Mr. Coors to now offer opinions on the relationship between pumping and groundwater levels in New Mexico and long-term changes in the hydrologic conditions in the Lower Rio Grande allegedly caused by pumping. *Id*.

Finally, Dr. Brandes offered the opinion in his December Declaration that, "under the Operating Agreement New Mexico has received more water than it otherwise should have based solely on the D2 Curve prior to implementation of the Operating Agreement." *Id*. ¶ 31. This, too, is an opinion that relies on previously disclosed data (although data that has been misinterpreted and misrepresented by Dr. Brandes) from New Mexico's disclosed experts that appears nowhere in the Brandes Report. While Dr. Brandes generally described the allocation procedures under the 2008 Operating Agreement in his Report and offered the opinion that the reduction in surface water deliveries to EBID under the Operating Agreement was not fully protecting Texas's Compact deliveries, Ex. 13, Brandes Rep. 4, 35-38, he did not offer any opinions on the amount of water New Mexico received under the Operating Agreement or provide any analysis to support such opinions.

Not only does the Brandes December Declaration offer wholly new opinions, it also offers opinions that contradict opinions previously offered in the Brandes Report and in Dr. Brandes's deposition. First, Dr. Brandes disagrees with himself by stating that "Project allocations made to respond to orders by the District water users do not form the basis of Texas's Compact

apportionment." Ex. 3, Brandes Dec. Decl. ¶ 27. This contradicts his Report, where he previously opined that "Project water is apportioned to users in New Mexico and Texas and to Mexico. Releases of stored water are made during the irrigation season in response to irrigation demands . . . ." Brandes Report 6. When asked during deposition what he meant by the phrase "irrigation demands," Dr. Brandes stated, "in response to orders from the District, Project water is released." Ex. 14, Brandes Dep. Vol. I (Sept. 24, 2019), 42:1-10.

Texas provided no backup data, spreadsheets, or other documentation to support the new opinions included in the Brandes Declarations. Ex. 12, Sullivan Decl., ¶ 10. Without this backup information, and full discovery, it is not possible for New Mexico or its experts to thoroughly review the bases for these new opinions, or provide a comprehensive and complete response to them. *See e.g.*, *id.*

III. Dr. Miltenberger's Expert Reports and New Declarations.

In his May 31, 2019 expert report, Dr. Miltenberger was asked by Texas:

> to provide opinions on the following questions regarding the Rio Grande Compact of 1938 and its historical interpretation:
>
> 1. What was the purpose of the 1938 Rio Grande Compact?
>
> 2. Did the amount of water apportioned to Texas by the 1938 Rio Grande Compact include water to address water quality concerns on Rio Grande Project lands in Texas?
>
> 3. What comprised the water supply for the Rio Grande Project, circa 1938?
>
> 4. What did delivery of water by the State of New Mexico to San Marcial, under the terms of the 1938 Rio Grande Compact, constitute?
>
> 5. Did the 1938 Rio Grande Compact limit the uses to which water in the Upper Rio Grande Basin could be put?
>
> 6. Did the Special Master fairly describe the background history leading to the 1938 Rio Grande Compact on pages 31 through 187 and 203 through 209 of the First Interim Report of the Special Master, dated February 9, 2017?

Expert Report of Scott A. Miltenberger Ph.D. (May 31, 2019), 1 (attached hereto as Exhibit 15).

In his rebuttal/supplemental report, filed on December 30, 2019, Texas again asked Dr. Miltenberger to provide opinions on specific questions:

> I have been asked to address the following questions:
>
> 1. In her expert report, Dr. Jennifer Stevens opines, in part, that "The scientific understanding of connections between groundwater and surface water was too nascent in the first decades of the 20th century for Reclamation to have intended" appropriation of "the Upper Rio Grande Basin's groundwater" (Opinion 5, p. 11), and that "Scientific understanding of the relationship between surface and groundwater supplies in the Upper Rio Grande Basin was still in its infancy at the time of the 1938 Rio Grande Compact negotiations...." (Opinion 6, p. 11). Based on your research, what is your opinion as to the "scientific understanding" of the relationship between surface flow and groundwater in the Upper Rio Grande Basin and why?
>
> 2. Can you determine from your research what period of record formed the bases for the delivery schedules set forth in Articles III and IV of the 1938 Rio Grande Compact, and if so, what is the relevant period of record relied on by the Compact negotiators?

Expert Rebuttal / Supplemental Report of Scott A. Miltenberger, Ph.D. (Dec. 30, 2019), 1 (attached hereto as Exhibit 16).

As discussed above, the Miltenberger Declarations contain new opinions in four areas: 1) the Compact apportionment between New Mexico and Texas below Elephant Butte; 2) the Compact's protection of "uses" versus "rights"; 3) the allegation that the downstream contracts cannot be considered when assessing the Compact's provisions; and 4) the allegation that New Mexico State Engineer Steve Reynolds had knowledge of a connection between ground and surface water *below* Elephant Butte *before* the 1980s and as early as the 1950s. These opinions appear nowhere in Dr. Miltenberger's reports and are inconsistent with the testimony he provided during his depositions.

A. Dr. Miltenberger's New Opinions on the Compact's Apportionment.

On the issue of apportionment, Dr. Miltenberger previously offered no opinions on whether the Compact apportions water to New Mexico below Elephant Butte Reservoir. He did, however, explicitly endorse the conclusions by former Special Master Grimsal and the U.S. historian expert Nicolai Kryloff that the 1938 Compact relies upon the Rio Grande Project to equitably apportion Rio Grande water in the Project area between Texas and lower New Mexico. Miltenberger wrote:

> Having reviewed the background history leading to the 1938 Rio Grande Compact presented on pages 31 through 187 and 203 through 209 of the *First Interim Report of the Special Master*, dated February 9, 2017 as well as the materials appended to it, it is my expert opinion that the Special Master fairly described that history. I base my opinion not only on my professional knowledge and expertise, but also on the historical records that I examined in the course of researching and analyzing the history of the 1938 Rio Grande Compact, many of which are cited in the opinions above.

Ex. 15, Miltenberger Rep., Opinion VI, 114.[2]

Further, Dr. Miltenberger testified that he agreed that "The Rio Grande Compact did not specifically identify quantitative allocations of water below Elephant Butte Dam as between southern New Mexico and Texas. Instead, it relied upon the Rio Grande project and its allocation and delivery of water in relation to the proportion of Rio Grande project irrigable lands in southern New Mexico and in Texas …" Miltenberger Dep. (June 8, 2020), 40:7-22 (attached hereto as Exhibit 17).

In addition, Dr. Miltenberger testified he did not find anything to question or disagree with in the expert report of Nicolai Kryloff, historian expert for the United States. Ex. 17, Miltenberger

[2] The statements by former Special Master Grimsal endorsed by Miltenberger include several statements supporting his conclusion that: "It is plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters." First Interim Report, 209. *See* First Interim Report at 32, 132-133, 141-143, 147 fn. 41, 203-204, 205, 206.

Dep. (Oct. 2, 2019), 28:6-9 (attached hereto as Exhibit 18). Central to Mr. Kryloff's report is his agreement with Special Master Grimal's conclusion: "In all, Special Master Grimsal found that the Rio Grande Compact Commission, in negotiating the 1938 Rio Grande Compact, '***fully relied upon the existing Rio Grande Project to impart Texas' and lower New Mexico's respective equitable apportionments of Rio Grande waters.***'" Expert Report of Nicolai Kryloff (May 31, 2019), 13 (emphasis added) (attached hereto as Exhibit 19).

However, in his declarations, submitted with Texas's dispositive motions months after the close of discovery, Dr. Miltenberger pushes new opinions about the Compact apportionment to southern New Mexico that directly contradict positions he previously endorsed:

- Based on a 1951 document that appears to be previously undisclosed[3] Dr. Miltenberger now claims New Mexico "argued that the Compact 'does not attempt to make an apportionment between the New Mexico area and the Texas area below Elephant Butte.'" Ex. 4, Miltenberger Nov. Decl. ¶ 46.
- Dr. Miltenberger directly and for the first time contradicted the Grimsal and Kryloff conclusions that the Compact relied upon the Project to effect the equitable apportionment to southern New Mexico. Ex. 5, Miltenberger Dec. Decl. ¶ 26.

[3] Return of Defendants to Rule to Show Cause, filed by New Mexico In the Supreme Court of the United States, Original Action No. 9, TX_MSJ_005677. Dr. Miltenberger discusses this document for the first time at Ex. 4, Miltenberger Nov. Decl., ¶ 46, fn.82. Texas stamped documents submitted with its Motion with "TX_MSJ" instead of the Bates stamps that appeared on the documents as disclosed in discovery, making it difficult for New Mexico to confirm whether this document was previously disclosed. However, New Mexico conducted an extensive search of its discovery database and could not locate this document. Moreover, Dr. Miltenberger never previously addressed this document or any other documents from this prior original action. While Dr. Miltenberger testified that he examined "some documents post Compact," he explained the scope of those documents was "some materials the Rio Grande Compact Commission negotiations from – were collected from the Compact proceedings -- not negotiations, excuse me, Compact proceedings in the '40s and 1950s." Ex. 17, Miltenberger Dep. (June 8, 2020) 54:22-55:8. He did not identify this pleading.

- Dr. Miltenberger offers a new opinion concerning the letter from Frank B. Clayton to Sawnie Smith (Oct. 4, 1938), which states that the Project allocations are the basis for Compact apportionment below Elephant Butte, attempting to explain why the letter does not describe the Project allocations as the basis for Compact apportionment. *Compare* Ex. 15, Miltenberger Rep., 97-101 *to* Ex. 5, Miltenberger Dec. Decl., ¶¶ 28-37. This new opinion also contradicts Dr. Miltenberger's previous endorsement of Special Master Grimsal's conclusion that this letter makes "plain that the Commission fully relied upon the existing Rio Grande Project to impart Texas's and lower New Mexico's respective equitable apportionments …" First Interim Report, 209; Ex. 15, Miltenberger Rep. 114.
- Dr. Miltenberger also relies on another document he never before addressed to support his new opinion that New Mexico has no Compact apportionment below Elephant Butte. Ex. 5, Miltenberger Dec. Decl., ¶¶ 38-45 discussing the Frank B. Clayton letter to C.S. Clark (Oct. 16, 1938).

Dr. Miltenberger did not provide these opinions during discovery – in fact, his previously expressed opinions on this issue were the opposite of his current position. New Mexico was deprived of the opportunity to conduct discovery on his current opinions and the reasons he adopted them after discovery closed.

B. Dr. Miltenberger's New Interpretation of "Uses" Versus "Rights."

Dr. Miltenberger's discussion of the Compact's intent regarding water rights versus uses in his reports focused on a few key points. With regard to "rights" to Rio Grande water in general, Dr. Miltenberger stated the following:

- Related to negotiations over the Compact in 1937, he stated: "Furthermore, the river basin was considered to be fully appropriated. New drafts on existing water resources without enhancing supply, the [National Resources Committee] board [of review] ultimately concluded, would damage ***vested rights*** in the basin." Ex. 15, Miltenberger Rep. 18 (emphasis added).
- In discussing the different states' positions during negotiations, he wrote: "Development of the Middle Rio Grande Conservancy District to its approximately 123,000 acres, moreover, had to be respected as did '[a]ll existing ***rights*** to the use of water in the Rio Grande Basin in New Mexico." Ex. 15, Miltenberger Rep. 25 (emphasis added).
- Dr. Miltenberger quoted Colorado Commissioner Hinderlider as follows: …the "'permanent compact fully protects present and future uses of waters in the San Luis Valley…'" and, "***[t]hat protection further extended… to 'the rights of the water users under federal reclamation projects in New Mexico and Texas***,' as well as to 'Indian tribes, and to the Republic of Mexico under existing treaty obligations.'" Ex. 15, Miltenberger Rep. 42 (emphasis added).
- Dr. Miltenberger also argued throughout his expert report that the 1938 Compact was just like the 1929 temporary Compact. Regarding the 1929 Compact, he stated that "Article XII acknowledged the importance of Elephant Butte Reservoir to lands below, lands that as the federal project was operated included lands in Hudspeth, and attempted to safeguard the reservoir's water supply: 'New Mexico agrees with Texas with the understanding that ***prior vested rights*** above and below Elephant Butte Reservoir shall never be impaired hereby…'" Ex. 15, Miltenberger Rep., 90 (emphasis added).

However, Dr. Miltenberger now states that "existing uses, circa 1938, not rights were to be protected by the Compact," and that "the Compact ultimately privileged uses over rights in the Upper Rio Grande Basin." Ex. 5, Miltenberger Dec. Decl. ¶¶ 2, 16. *citing to* Ex. 4. Miltenberger Nov. Decl., ¶¶ 20-27. This new opinion—that water rights were not protected by the Compact—did not form part of either his original expert report or his rebuttal report. This is a unique, different, and contrasting opinion than any heretofore stated by Dr. Miltenberger. Although the State of Texas has argued that the Compact was intended to protect the status quo of uses, Texas's historian has never previously asserted that it also did not protect water rights.

C. Dr. Miltenberger's New Position on the Role of the Downstream Contracts.

Dr. Miltenberger also offers a new set of opinions regarding the Downstream Contracts. NM-EX 320, Contract between the U.S. and EBID; NM-EX 321, Contract between the U.S. and EPCWID (11/10/1937); NM-EX 324, Contract between EBID and EPCWID (2/16/1938). In his expert report, he offered only two opinions of significance regarding these contracts: first, that they "underscore federal management and control over the waters delivered by New Mexico at San Marcial," and second, that one of the contracts "memorialized the historical distribution of repayment costs…on the basis of the respective irrigated acreages that the districts themselves had committed to back in 1929." Ex. 15, Miltenberger Rep. 100 n. 217.

Now, however, Dr. Miltenberger offers substantial new opinions regarding these contracts in the Miltenberger December Declaration ¶¶ 28-37. In particular, Miltenberger opines in ¶ 59 that "the 1937 and 1938 Downstream Contacts [sic] are less about water deliveries than they are about the repayment obligations of the districts to the federal government for the Project."

D. Dr. Miltenberger's New Opinions on New Mexico's Understanding of the Relationship between Groundwater and Surface Water.

In its motion for partial summary judgment, Texas places much emphasis on when New Mexico understood the impact of groundwater pumping on surface water *below Elephant Butte Dam.* Tex. Mot. PSJ 17-19. To support this argument, Dr. Miltenberger offers a new opinion on this issue, asserting that the New Mexico State Engineer "since at least the 1950s…has been aware that groundwater pumping could deplete surface waters *below* Elephant Butte Reservoir." Ex. 54, Miltenberger Nov. Decl., ¶ 47 (emphasis added). This assertion contradicts his previous statements:

- "In the mid-1950s, Reynolds recognized a connection between surface flow and subsurface waters in the lands *above* Elephant Butte in the 'Middle Valley' between the Colorado-New Mexico state line and the federal reservoir." Ex. 16, Miltenberger Reb. Rep., 22 (emphasis added).
- "[B]y the 1980s the state engineer [Reynolds] had come (or was coming) to recognize … that surface flow and groundwater were hydrologically connected." *Id*. at 25.

Dr. Miltenberger provides no evidence to support Reynolds' alleged recognition relating to the area below Elephant Butte in the 1950s, and Miltenberger's own evidence shows that Reynolds had no such understanding until the 1980s, as noted in Miltenberger's own Rebuttal Report.

New Mexico has not had the opportunity to obtain full discovery on these new opinions. Without full discovery, it is not possible for New Mexico or its experts to thoroughly review the bases for these new opinions, or provide a comprehensive and complete response to them. Therefore, these new opinions should not be considered as evidence for purposes of the summary judgment motions.

LEGAL STANDARD

Rule 26 requires that a party's expert witness disclose, in a written report, "a complete statement of all opinions the witness will express" at trial, and the basis and reasons for them. Fed. R. Civ. P. 26(a)(2)(B)(i). Rule 26 further provides that these disclosures be made at the times directed by the court. *See* Fed. R. Civ. P. 26(a)(2)(D). The purpose of these requirements "is to provide 'information regarding expert testimony sufficiently in advance of trial [so] that opposing parties have a reasonable opportunity to prepare for effective cross examination and perhaps arrange for expert testimony from other witnesses.'" *Yates-Williams v. Nihum*, 268 F.R.D. 566, 570 (S.D. Tex. Jun. 28, 2010) (quoting Fed. R. Civ. P. 26 Committee Note (1993 Amendments)).

Rule 37 provides that if a party fails to provide the information required by Rule 26(a), "the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless." Fed. R. Civ. P. 37(c)(1); *see also Yates-Williams*, 268 F.R.D. at 570 ("[w]hen a party fails to comply with the requirements of Rule 26, the court may exclude the witness or report as evidence at trial, at a hearing, or on a motion, and may 'impose other appropriate sanctions.'") (quoting Fed. R. Civ. P. 37(c)(1)); *Hahn v. United Fire & Case. Co.*, 2017 U.S. Dist. LEXIS 53178 *16 (W.D. Tex. Apr. 6, 2017) ("If a party fails to provide a report pursuant to Rule 26, the court must strike evidence provided by that witness unless the failure is substantially justified or harmless."); *Morritt v. Stryker Corp*., 2011 U.S. Dist. LEXIS 98218 *17 (E.D.N.Y. Sep. 1, 2011) ("Expert testimony exceeding the bounds of the expert's report is excludable pursuant to Rule 37(c)(1).") (citation omitted). Failure to impose the Rule 37 sanction "would create a system where preliminary reports could be followed by supplementary reports and there would be no finality to expert reports, [which] would surely circumvent the full disclosure requirement implicit in Rule 26." *Cheung*

Jacky Chik-Kin v. Axis Surplus Ins. Co., 2015 U.S. Dist. LEXIS 73519 *3 (N.D. Tex. Jan. 21, 2015) (quoting *Beller ex rel. Beller v. United States*, 221 F.R.D. 689, 695 (D.N.M. 2003)).

Parties must make expert disclosures "at the times and in the sequence that the court orders." *United States v. City of New York*, 637 F. Supp. 2d 77, 106 (E.D.N.Y. Jul. 22, 2009) (quoting Fed. R. Civ. P. 26(a)(2)(C)). "[S]ubmitting new expert opinions after the close of discovery violates the discovery rules." *Id.* "[E]xperts are not free to … continually supplement their opinions. If that were the case, there would never be any closure to expert discovery, and parties would need to depose the same expert multiple times." *Sandata Techs., Inc. v. Infocrossing, Inc*., 2007 U.S. Dist. LEXIS 85176 *20 (S.D.N.Y. Nov. 16, 2007). "A subsequent expert affidavit submitted to rebut a summary judgment motion may be excluded if it differs from an earlier Rule 26 report." *Brumley v. Pfizer*, Inc., 200 F.R.D. 596, 603-04 (S.D.Tex. Jun. 5, 2001) (striking a later expert affidavit that contained a "wholly new" opinion, and all other opinions that were "not contained in the initial Rule 26 report."). "[C]ourts will not admit supplemental expert evidence following the close of discovery when it expounds a wholly new and complex approach designed to fill a significant and logical gap in the first report, as doing so would eviscerate the purpose of the expert disclosure rules." *Morritt*, 2011 U.S. Dist. LEXIS 98218 *17-18 (internal quotation omitted). When discovery closes, parties are "entitled to challenge the reliability of [the other side's] expert witness" based on the record as it then stands, without the other side having "open-ended opportunities to endeavor to fill the flaws and gaps in [its expert's] report[s]." *Point Prods. A.G. v. Sony Music Entm't, Inc*., 2004 U.S. Dist. LEXIS 2676 *43 (S.D.N.Y. Feb. 23, 2004).

Courts have stricken expert declarations that "sandbag" opponents with opinions that "should have been included in the expert witness' report." *Mariscal v. Graco, Inc.*, 52 F.Supp.3d 973, 983 (N.D. Cal. 2014); *see also City of New York*, 637 F. Supp. 2d at 106-108 (striking an

expert declaration that "contains numerous paragraphs directly addressing issues for which the [party offering it] has offered no reference to a timely report or disclosure … [that] were constructed to fill holes in the evidence that the [party] failed to gather during discovery, and to rebut analyses presented over a year ago in Plaintiffs' expert reports," in circumstances which "strongly suggest an attempt by the [party] to 'sandbag' its opponents with new opinions designed to defeat summary judgment.").

"In evaluating whether a violation of Rule 26 is harmless, the court should consider: (1) the importance of the evidence; (2) the prejudice to the opposing party of allowing the witness to testify; (3) the possibility for curing such prejudice by granting a continuance; and (4) the explanation, if any, for the party's failure to comply with the disclosure requirements. The burden is on the party who allegedly failed to disclose the information to prove that such failure is harmless." *Hearing Components, Inc. v. Shure, Inc.*, 2008 U.S. Dist. LEXIS 121434 *4-5 (E.D. Tex. Dec. 16, 2008); *see also e.g. Paltalk Holdings, Inc. v. Microsoft Corp.*, 2009 U.S. Dist. LEXIS 131008 *4-5 (E.D. Tex. Feb 11, 2009) (setting out and applying the same four-factor test). In applying this test, the court must "ask" whether "the opinions set out in the declarations" were "previously disclosed." *Hearing Components, Inc.*, 2008 U.S. Dist. LEXIS 121434 *4-5.[4]

[4] For all the reasons stated in this Motion, these new expert opinions are inadmissible, and therefore they cannot be relied upon for the purpose of summary judgment under Rule 56(c)(2). Rule 56(c)(2) provides that a "party may object that the material cited to support or dispute a fact [on summary judgment] cannot be presented in a form that would be admissible in evidence."

ARGUMENT

I. Dr. Hutchison's, Dr. Brandes' and Dr. Miltenberger's New Opinions Should Be Struck.

There is a clear CMP for this case. With the exception of the expert report from Mr. Coors produced by Texas in May 2020 and a report from United States expert Jean Moran produced in May 2020, the parties have timely made their expert disclosures together with the agreed associated discovery (data, information and documents relied upon, and where applicable, "an executable electronic version of any computational model … including all input and output files," and "engineering and other technical information in its native electronic file format."). CMP (Sep. 2018), § 6.2.2. Discovery closed on August 31, 2020, and final supplemental expert reports and disclosures were due by September 30, 2020. Without warning, on November 5 and then December 22, 2020, Texas served on New Mexico what are effectively new expert reports, without the agreed associated discovery. There is absolutely no basis to offer new expert opinions this late in the case, especially without associated discovery, while partial summary judgment briefing is underway. In disclosing these declarations, shortly before pre-trial filing deadlines and months before after the close of discovery, Texas seeks to circumvent the provisions not only of the CMP, but the Federal Rules as incorporated by the CMP. For the reasons set out below, all of these new expert opinions should be stricken.

A. Dr. Hutchison's New Opinions on the Integrated Model and Conjunctive Use.

For the first time, in his Declaration, after the close of discovery, Dr. Hutchison now opines on New Mexico's Integrated Model, analyzes the results from specific model runs, and offers new opinions on conjunctive water use. Texas had the opportunity to ask Dr. Hutchison to opine on the Integrated Model—and ask him to further opine on conjunctive use—in his rebuttal report.

Texas did not do so—Dr. Hutchison's rebuttal report does not mention or reference the Integrated Model, and says almost nothing on conjunctive use. *See* Ex. 11, Hutchison Rebuttal 2, 5-6.

Texas then uses Dr. Hutchison's Declaration and specific statements concerning the Integrated Model to raise misplaced and untimely attacks on the Integrated Model and to assert, incorrectly, that the Integrated Model supports Texas's own allegations of New Mexico's Compact violations. Tex. Mot. 90-92. Dr. Hutchison's opinions concerning the Integrated Model are all new. Dr. Hutchison's expert reports contain no mention, much less any analysis, of the Integrated Model.

New Mexico's expert Greg Sullivan provided a partial response to the Hutchison Declaration, which was disclosed to Texas on December 22, 2020. NM-EX 012, Declaration of Gregory K. Sullivan, P.E. in Support of State of New Mexico's Partial Summary Judgment Motions (Dec. 21, 2020). In this declaration, Mr. Sullivan provided preliminary responses to Dr. Hutchison's new opinions concerning the Integrated Model. However, without Dr. Hutchison's supporting materials and data, and full discovery, Mr. Sullivan—and New Mexico—have been unable to provide a comprehensive and complete response to Dr. Hutchison's new opinions. Ex. 12, Sullivan Decl. ¶¶ 10-11.

B. Dr. Brandes's New Opinions Concerning Project Allocations and Model Results.

Dr. Brandes's expert report focused on his "double-mass curve analysis," which he stated was a "useful" method "for analyzing historical data to gain insight into understanding the causes of changes in hydrologic phenomena." Ex. 13, Brandes Rep. 21. Dr. Brandes applied this "double-mass approach … to historical flow data for the Rio Grande at El Paso," and "to the historical total Project water deliveries to Texas." *Id.* at 21, 44. New Mexico deposed Dr. Brandes on these opinions in September 2019. Ex. 14, Brandes Dep. (Sept. 24, 2019). Dr. Brandes provided no

rebuttal report. Texas had the opportunity, before the close of discovery, to ask Dr. Brandes to opine on New Mexico's Integrated Model and the other data, information, and opinions he now provides new opinions on in his declarations—Dr. Brandes did not do so.

In his new declarations, Dr. Brandes presents new opinions on the nature of the Compact apportionment to Texas; on the Integrated Model, which New Mexico disclosed in October 2019; new opinions based on data, opinions and analysis disclosed by Texas expert Mr. Coors in his May 2020 expert report, and new opinions on the 2008 Operating Agreement. Ex. 2, Brandes Nov. Decl., ¶¶ 21, 36; Ex. 3, Brandes Dec. Decl., ¶¶ 7, 10-11, 17-24, 27- 29, 31-32; Ex. 12, Sullivan Decl. ¶ 8. Dr. Brandes further effectively concedes that he could have given these opinions long before the close of discovery, had Texas asked him to. *See* Ex. 3, Brandes Dec. Decl., ¶ 19 (stating that his opinions are based on work disclosed by Texas's expert Mr. Coors in May 2020).

Texas relies on these new Brandes opinions and analysis, among other things, to support its arguments as to a 1938 condition, and groundwater pumping in New Mexico. Tex. Mot. PSJ 14, 35-36, 72, 81, 85-86. Texas also relies on these new Brandes opinions and analysis to support its arguments in response to New Mexico's partial summary judgment motion relating to Compact apportionment, Tex. Opp. NM Mot. PSJ Compact Apportionment, 13-14, 25-26; and in support of Texas's arguments in response to New Mexico's partial summary judgment motion to exclude Texas's claim to damages in certain years—specifically on the issues of Project full supply and Texas's Compact apportionment, Tex. Opp. NM Mot. PSJ Exclude Damages in Certain Years, 5-8.

New Mexico's experts Greg Sullivan, P.E. and Dr. Margaret Barroll have provided a partial response to the Brandes Dec. Declaration, which New Mexico will disclose with its Reply briefs in support of its Motions for Partial Summary Judgment. In these New Mexico declarations, Mr.

Sullivan and Dr. Barroll provide preliminary responses to Brandes' new opinions, but without the opportunity to have full and fair discovery as to those opinions, their responses are not, and cannot be deemed, comprehensive and complete. *See* Ex. 12, Sullivan Decl., ¶¶ 10-11.

C. Dr. Miltenberger's New Opinions.

In his May 31, 2019 and December 30, 2019 expert reports, Dr. Miltenberger was asked by Texas to provide opinions on a total of eight specific questions. *See supra*.

In the Miltenberger Nov. Declaration, Dr. Miltenberger presents new opinions "regarding the states' agreed-to apportionment of the Rio Grande." Ex. 4, Miltenberger Nov. Decl., ¶¶ 2-65. Texas relies on these new opinions in Texas's partial summary judgment motion, among other things, in support of Texas's erroneous arguments that "depletions [below Elephant Butte] were frozen at pre-1938 conditions," and that "the water New Mexico delivers in Elephant Butte Reservoir is apportioned to Texas." Tex. Mot. PSJ 14-15, 35-36, 45-46, 69, 77-79, 81-82, 86, 88. Texas also relies on these new opinions in support of Texas's arguments as to the interpretation of the Downstream Contracts that were negotiated contemporaneously with the Compact. *Id.* at 27, 45.

Texas also heavily relies on these new opinions in Texas's Opposition to New Mexico's Motion for Partial Summary Judgment on Compact Apportionment in support of Texas's arguments as to the interpretation of the Compact as it relates to apportionment between New Mexico and Texas below Elephant Butte Reservoir, and the interpretation of the 1938 Downstream Contract, Tex. Opp. NM Mot. PSJ Compact Apportionment, 20-24; in support of Texas's erroneous argument that "depletions [below Elephant Butte] were frozen at pre-1938 conditions," *id*. at 24; and in Texas's Response in Support of the United States' Motion for Partial Summary Judgment, in support of Texas's argument that "groundwater pumping intercepts and interferes

with Rio Grande Project deliveries thereby depriving Texas of water apportioned to it." Tex. Resp. Br. U.S. Mot. PSJ, 2.

Dr. Miltenberger's new opinions did not appear anywhere in his expert report or rebuttal report and, in some cases, are completely contrary to his prior opinions. As one example, in his May 2019 report he opined "that the Special Master fairly described" "the background history leading to the 1938 Rio Grande Compact" in his First Interim Report. Ex. 15, Miltenberger Rep. 114 (referencing "pages 31 through 187 and 203 through 209 of the First Interim Report of the Special Master, dated February 9, 2017."). In that First Interim Report, the Special Master concluded, among other things, that "the text and structure of the 1938 Compact unambiguously protect the administration of the Rio Grande Project as the sole method by which Texas receives all and New Mexico receives part of their equitable apportionments of the Rio Grande"; "in addition to its text and structure, the purpose and history of the 1938 Compact confirm the reading that the signatory States intended to use the Rio Grande Project as the vehicle to guarantee delivery of Texas's and part of New Mexico's equitable apportionment of the stream"; "both Texas's apportionment and part of New Mexico's apportionment (the Elephant Butte Irrigation District) of Rio Grande water was to be delivered via the Rio Grande Project." First Interim Report, 32, 147 n.41, 203-204. However, in the Miltenberger December Declaration, Dr. Miltenberger now presents the exact contrary opinions—without explanation or justification—that "the Compact does not rely on the Project to effectuate any apportionment between New Mexico and Texas"; "Elephant Butte, in short, was the delivery point for Texas's apportionment"; "[t]he water delivered by New Mexico pursuant to the Compact … was [] ultimately water for Texas"; and "some of the water apportioned to Texas [at Elephant Butte] served Project lands in New Mexico." Ex. 5, Miltenberger Dec. Decl., ¶¶ 26, 31, 37, 51.

New Mexico's experts Jennifer Stevens, Ph.D. and Estevan Lopez P.E. have provided partial responses to the Miltenberger Nov. Declaration, which were disclosed to Texas on December 22, 2020. NM-EX 011, *Second Declaration of Jennifer Stevens, Ph.D.*; NM-EX 008, *Second Declaration of Estevan R. Lopez, P.E.* Dr. Stevens has attempted to provide partial responses to the Miltenberger Dec. Declaration. NM-EX 016, Stevens 3d Decl. In this declaration, Dr. Stevens provides preliminary responses to Miltenberger's new opinions, but without the opportunity to have full and fair discovery as to those opinions, her response is not, and cannot be deemed, comprehensive and complete.

D. These New Opinions Are Not Substantially Justified.

The deadline for Texas to disclose its rebuttal expert opinions was December 30, 2019. *See supra.* Nearly 12 months later, after the close of discovery, Texas has now filed, without warning, new expert declarations containing significant new opinions not previously disclosed in this case—some directly contrary to the opinions these same experts offered in their expert reports in 2019. Texas has offered no explanation for its tardy disclosure, and there is no substantial justification for Texas to provide these new opinions at this late stage, when discovery has closed and summary judgment briefing is underway. These new opinions are evidently "constructed to fill holes" in Texas's case, that Texas should have presented a year ago. *City of New York*, 637 F. Supp. 2d at 107. They are an attempt to "sandbag" New Mexico "with new opinions designed to defeat summary judgment." This is a direct violation of Rule 26. These new opinions should be stricken.

E. If These New Opinions Are Important, Texas Could and Should Have Disclosed them 12 Months Ago.

Texas has said nothing regarding the importance it attaches to these new opinions. Further, there is no substantial justification for disclosing them now, during summary judgment briefing.

These late opinions are not harmless. Texas had ample opportunity and time to disclose these opinions in accordance with the CMP, and in accordance with Rule 26. Fed. R. Civ. P.26. Texas did not do so.

F. New Mexico Will Be Unfairly Prejudiced if These New Opinions Remain in the Case.

Allowing Dr. Hutchison's, Dr. Brandes', and Dr. Miltenberger's new opinions to be submitted at this stage is highly prejudicial to New Mexico. Expert rebuttal disclosures from Texas were due over a year ago, on December 30, 2019. Expert and fact discovery in this case ended on August 31, 2020, with the limited exception that the parties were able to file *supplemental* expert disclosures until September 30, 2020. This case has involved extensive and intensive expert discovery, with Texas, New Mexico, and the United States each disclosing numerous experts and those experts being the subject of numerous depositions.

Now, dispositive motions have been briefed by the parties. This case has moved past the discovery phase towards trial of numerous and complex issues. *See e.g.*, *Greenwood v. Henkel*, 2009 WL 8711142, at *4 (W.D. Okla. 2009) (stating that once a case has moved past discovery to the adjudicatory stage, "litigants are entitled to assume that … they are not going to be subjected to the delay and expense which result from another trip through the discovery stage"). The Special Master set the discovery deadlines in the CMP for a reason. Allowing Texas to supplement and change its expert opinions through these extremely late declarations is unfairly prejudicial and hampers New Mexico's ability to prepare for trial. When Texas filed its initial and rebuttal expert disclosures in May and December of 2019, New Mexico was "entitled to a *complete* disclosure of all opinions—not a sneak preview of a moving target." *Mariscal v. Graco, Inc.*, 52 F.Supp.3d 973, 983 (N.D. Cal. 2014) (emphasis added). Texas is not allowed now, very late in the day, to

"sandbag [its] opponent with claims and issues that should have been included in the expert witness' report." *Id.*

Moreover, with the Hutchison and Brandes Declarations, Texas seeks to triple its expert evidence criticizing New Mexico's Integrated Model—more than 12 months after that Model was disclosed by New Mexico, and months after the final cut-off for supplemental expert reports and amendments to expert reports were due on September 30, 2020. New Mexico has had little or no opportunity to analyze and test the credibility of these opinions, and has had no opportunity to depose Drs. Hutchison or Brandes on these new opinions.

On December 30, 2019, Texas disclosed Mr. Coors as its only expert opining on the Integrated Model. Even with Mr. Coors, Texas filed a supplemental expert report significantly after the deadline provided in the case management schedule (on May 6, 2020, when its disclosure should have been made on December 31, 2019). Now, more than seven months on, Texas offers no explanation, let alone justification, as to why it now seeks to triple the number of experts opining on this same model.

The tardy disclosure of these new opinions so late in the day is harmful and highly prejudicial to New Mexico.

G. Trial Is Scheduled for Summer 2021—a Cure by Continuance Is Not Possible.

New Mexico has filed three Motions for Partial Summary Judgment. The purpose of filing dispositive motions after the completion of discovery is to allow the parties and the Court to resolve matters that do not need to go to trial, with the benefit of a full record. *See e.g.*, *Fleming v. Verizon N.Y., Inc.,* 2006 WL 2709766 at *8 (S.D.N.Y. 2006) ("[Defendant] would be prejudiced by the admission of the [expert] declarations, because it made its motion for summary judgment based on what it thought to be all of the evidence accumulated in discovery."). There is no time for a

continuance in the current case schedule, and Texas should not be rewarded for its untimely disclosures. *See e.g.*, *Turner v. Carbett*, 2019 U.S. Dist. LEXIS 7916 *22-26 (S. D. Tex. Jan. 16, 2019) (Striking Plaintiff's expert designation and "skeletal affidavit" where "the expert designation deadline" had passed, "discovery has been completed with Defendants' summary judgment motion pending before the Court," and Defendants "are prejudiced by not having a meaningful opportunity to depose [the expert] and assess the nature and credibility of his opinions." The court further found that "[g]iving the parties a continuance so that Plaintiff could cure his expert designation would improperly reward him for his untimely and inadequate disclosure."); *see also Morritt v. Stryker Corp*., 2011 U.S. Dist. LEXIS 98218 at *24 (E.D.N.Y. Sep. 1, 2011) ("the fact that discovery is closed and this case has been pending for over four years weighs strongly against the possibility of a continuance.") (internal quotation omitted).

There is no justification for Texas to circumvent the exchange of expert evidence provided for in the case management schedule, and now slip in Declarations presenting substantial, untested, new opinions. Permitting New Mexico to attempt to cure this sandbagging by deposing Dr. Hutchison, Dr. Miltenberger, and Dr. Brandes an additional time condones Texas's improper expansion of its expert opinions and its case, and will cause New Mexico considerable additional expense and inconvenience. Permitting a deposition, even in the interests of fairness, would also, inevitably delay consideration of the dispositive motions that on February 5, 2021 were fully briefed. With only a few months left before trial, such delay would defeat the purpose of these motions. There is no basis for this inequity and unfairness. New Mexico should not be forced to divert its limited resources to conduct additional discovery at this stage.

H. Texas Offers No Explanation for its Failure to Comply with the Case Management Schedule or the Federal Rules

Texas has offered no explanation as to why it is only now offering these new expert opinions. Texas has had extensive information on the Integrated Model, annual Project allocation data and full-supply allocations, and New Mexico's historical opinions for more than a year. The only reasonable deduction is that Texas offers these opinions now, mindful of the weaknesses in its case, and faced with its own and New Mexico's partial summary judgment motions. *See Advanced Analytics, Inc. v. Citigroup Global Mkts., Inc.*, 301 F.R.D. 47, 51 (S.D.N.Y. Jul. 15, 2014) (precluding an expert declaration containing new opinions, not within the scope of the expert's "prior submissions" that was "based entirely on materials that have been in [the party's] possession for well over a year," where the declaration "was an attempt to articulate a wholly new and complex approach that [wa]s unquestionably designed to fill a significant and logical gap in [the expert's] past reports.") (internal quotations and citations omitted).

For the aforesaid reasons, each of these factors weighs in favor of striking these new opinions. These new opinions are not substantially justified, nor are they harmless.

II. If these New Opinions Are Not Stricken and If Texas's Experts Intend to Rely on Them at Trial, New Mexico Seeks Alternative Relief.

In the event that these new opinions are not stricken in whole, or in part, and in the event that Texas intends to rely on any of them at trial (or reserves the right to do so), New Mexico seeks alternative relief. In particular, New Mexico requests that if any of these new opinions remain unstricken, the Special Master order Texas to identify and provide all data and information relied upon to form those new opinions; order depositions relating to those new opinions; and order appropriate adjustments to the pre-trial schedule. In these circumstances, New Mexico also seeks

reasonable expenses caused by Texas's actions, including reasonable expenses that may be incurred as a result of any new depositions. Fed. R. Civ. P. 37(c)(1).

CONCLUSION

For the foregoing reasons, New Mexico requests that the Special Master strike portions of the Texas Declarations as follows:

- **Hutchison Declaration**—paragraphs 62-66 (new opinions on conjunctive use) and 35-61 (new opinions on Integrated Model);
- **Brandes November Declaration**—paragraphs 21 (new opinion on apportionment) and 36 (new opinion on Compact Commission actions);
- **Brandes December Declaration**—paragraphs 8-11, and 17 (new opinions on Integrated Model), paragraphs 19, 23-24 (new opinions based on Mr. Coors expert report) and paragraph 31 (new opinions on 2008 Operating Agreement);
- **Miltenberger November Declaration**—paragraphs 20-27 (new opinions on Compact protections for uses versus rights), 46 (new opinion on the Compact apportionment), and 47 (new opinions on the relationship between surface water and groundwater);
- **Miltenberger December Declaration**—paragraphs 2, 16 (new opinions on Compact protections for uses versus rights), 26, 38-45 (new opinion on the Compact apportionment), 28-37 (new opinions on the Compact apportionment and Downstream Contracts), and 59 (new opinions on the Downstream Contracts).

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 February 5, 2021, I caused true and correct copies of **NEW MEXICO'S OBJECTIONS TO AND MOTION TO STRIKE TEXAS'S LATE-FILED EXPERT OPINIONS** to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.

Respectfully submitted this 12th day of February, 2021.

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