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

♦

REPLY IN SUPPORT OF NEW MEXICO'S OBJECTIONS TO AND MOTION TO STRIKE TEXAS'S LATE-FILED EXPERT OPINIONS

♦

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April 6, 2021

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This Reply Brief is filed in reply to The State of Texas's Response ("Tex. Resp.") (Dkt. 495) to New Mexico's Objections to and Motion to Strike Texas's Late-Filed Expert Opinions ("N.M. Mot." or "Mot.") (Dkt. 476).

INTRODUCTION

Texas urges the Special Master to deny New Mexico's Motion, asserting that its late-filed expert opinions merely express disagreement with opinions and conclusions set out by New Mexico's experts, as permitted by the Special Master's Order of August 18, 2020 (Dkt. 390) ("August Order"). Tex. Resp. 4-5. That, however, is not what Texas has done. Rather, Texas misuses the August Order in an attempt to justify its introduction of new expert opinions and expand the scope of its expert testimony.

The Texas opinions identified in New Mexico's Motion are new opinions, not merely critiques of New Mexico's experts, nor were they previously expressed in Texas's disclosed expert reports or even in deposition testimony, contrary to what Texas argues at length in its Response. For instance, Dr. Hutchison and Dr. Brandes now offer opinions in their declarations on the New Mexico Integrated Model, a subject on which they never previously provided any written expert opinion. In so doing, Texas is seeking to triple the number of experts offering opinions on the New Mexico Integrated Model, from one to three, after the close of discovery. And Texas expert Dr. Miltenberger has offered the new opinion that the Compact protects uses of water that were occurring in 1938, but not rights that existed at that time, despite not previously opining that the Compact does not protect water rights.

Texas's expert declarations are, in effect, tardy expert reports that Texas seeks to use not only in support of its Partial Summary Judgment motions, but also at trial. Without a fair opportunity to probe and respond to these late-filed expert opinions, they are prejudicial to New

Mexico. *See, e.g., Beller v. United States*, 221 F.R.D. 689 (D.N.M. 2003) ("[I]t is not sufficient that opposing parties have the supplemental report in hand now before trial. The intent of the rule is to ensure that deposition testimony can proceed with parties already armed with the expert's report so as to be able to evaluate the opinions to be offered.").

Texas's argument that New Mexico's objections to these declarations should go to weight rather than admissibility, Tex. Resp. at 8, is untenable. New Mexico is not raising technical challenges to the reliability or admissibility of Texas's new expert disclosures at this stage, but reserves the right to do so. Rather, New Mexico is challenging these new opinions as unduly prejudicial, untimely, and a violation of both the Case Management Plan in this case and also the Federal Rules. Texas should not be allowed to use this evidence, in support of its motions, or at trial. Allowing Texas to purposefully circumvent the disclosure rules throws open the door to the potential of a variety of new expert opinions before trial under the guise of fitting within the August Order.

Given the late stage of the case, New Mexico urges the Court to impose Rule 37 sanctions and exclude the identified passages of these declarations. In the alternative, New Mexico should be given leave to depose Texas's experts on these new opinions, and conduct other discovery before trial, as necessary, to ameliorate any and all prejudice caused to New Mexico.

ARGUMENT

I. The August Order Does Not Authorize Texas's Late Disclosures.

Texas's first justification for its untimely disclosures is that they are permitted by the Special Master's August Order. Tex. Resp. 4-5. The August Order set out four general principles:

1. "The fact that any party has not filed specific objections or disagreements with the factual allegations and conclusions made by an expert for another party shall not be construed as an admission or acquiescence in that fact or as to that conclusion."

2. "[T]he purpose of expert depositions [is] to go into greater detail with each expert as to the areas of agreement and or disagreement each expert has as to the reports and conclusions of other experts."
3. "It is not necessary to file a supplemental report in order to critique or disagree with the opinion, conclusions, and facts set out by any other expert to this case."
4. **"It will be necessary to file a supplemental report if any expert intends to rely upon any new theory of the case, a new model, or facts which have not previously been disclosed by the expert through the expert's report or deposition. … To the extent any party does wish to supplement their expert report, the supplementation shall be disclosed to opposing counsel by no later than September 30, 2020."**

August Order at 2-3 (emphasis added).

Texas argues its new opinions are critiques of or disagreements with New Mexico's rebuttal and supplemental expert opinions and are therefore allowed under the August Order, Tex. Resp. at 4-5, but an examination of these opinions shows this is not correct.[1] The late Texas disclosures not only contain changed or modified opinions, supported by newly developed facts, as New Mexico discussed in its Motion and as further explained below and in Appendices A and B, but these tardy new opinions also expand the scope of the experts' areas of expertise. As such, Texas was required to disclose them "no later than September 30, 2020." *Id*.

The Special Master is, of course, the final arbiter of the meaning of the August Order, but New Mexico believes Texas reads the August Order too expansively. Texas appears to assert that any new opinions its experts may generate are now fair game, so long as these new opinions can be shoehorned into an alleged refutation of an opinion offered by one of New Mexico's experts. *E.g.,* Tex. Resp. 16-17. This understanding may open the door to a wide array of new, untested expert opinions and analysis in this case prior to, and potentially throughout trial, with only a

[1] On further review, and as noted in the attached Appendix B, New Mexico has determined that Paragraph 8 in Dr. Robert Brandes's December Declaration is not, in fact, a new opinion. New Mexico therefore withdraws its challenge as to only Paragraph 8 of the Brandes December Declaration.

tenuous connection to previous expert disclosures required. New Mexico does not believe this is what the Federal Rules or the August Order permit.

New Mexico reads the August Order more narrowly. New Mexico's understanding of the order is that it permits a party's expert to critique or disagree with an opinion offered to the Court by another party's expert, even if the first expert did not explicitly state this disagreement in a previous report or supplemental disclosure, so long as the expert's disagreement is within the scope of his or her prior opinions. However, if the expert changes or modifies a prior opinion, expands the scope of his or her areas of expertise, or develops new facts or evidence to support an opinion, this falls outside the scope of the August Order. This reading is consistent with the many cases interpreting Rule 26(a)'s disclosure requirements. *See, e.g.,* N.M. Mot. at 22-24. That is not what Texas has done here.

The August Order was issued in part to address a concern Texas raised during a status hearing as to whether it could be deemed to have agreed with opinions provided in New Mexico's final rebuttal reports if it did not address them in a supplemental or rebuttal report. *See* Tr. of Aug. 7, 2020 Status Hearing at 24:6 to 26:4 (Dkt. 419). The August Order clarified that if an expert is simply disagreeing with the rebuttal opinions there was no need to submit a supplemental report. Texas now reads the August Order as giving it carte blanche to submit new expert opinions and attempt to bolster Texas's attacks on the New Mexico Integrated Model. The new disclosures Texas made clearly consist of "changed or modified" opinions, as in the example of Dr. Hutchison's new opinion on conjunctive use outlined above, or "new facts to support [an] opinion" in the case of Dr. Brandes developing data and new analysis for attacking the historical Project operations. N.M. Mot. at 9-10, 13. In sum, Texas was required to disclose its expert opinions by September 30, 2020 as the August Order required, or seek an extension. *See* August Order at 3.

Texas did neither of these things, and its failure to follow the established procedure in this case should not be permitted.

II. New Mexico's Integrated Model Was Timely Disclosed.

Texas next presses a different argument to justify its tardy disclosures. Texas argues that its late disclosures were justified, at least for Drs. Hutchison and Brandes, because New Mexico disclosed an updated version of its Integrated Model on September 15, 2020, and Texas's experts were unable to offer opinions on the Integrated Model or its results any earlier. *See id*. 12-13 (asserting paragraphs 35-54 of the Hutchison Declaration were based on model results not disclosed until Sept. 15, 2020); 34 ("To the extent New Mexico argues that Texas submitted late-filed expert opinions regarding the Integrated Model, New Mexico did not disclose the operative version of the Integrated Model . . . until September 15, 2020 . . . ."). Texas's argument here is misleading and incorrect.

New Mexico first disclosed its Integrated Model on October 31, 2019, in accordance with the schedule set by the Special Master. Ex. 7, State of New Mexico's Disclosure of Expert Witnesses (Oct. 31, 2019). This version of the Integrated Model is, in all major respects, very similar to the version of the model disclosed on September 15, 2020. Ex. 20, 2d Declaration of Gregory K. Sullivan in Support of Motion to Strike ¶ 8 (Apr. 6, 2021) ("2d. Sullivan Decl."). The version of the model disclosed on October 31, 2019 has the same general design and features as the version of the model disclosed September 15, 2020. *Id*.

On July 15, 2020, New Mexico disclosed an updated version of the Integrated Model in accordance with the deadline set by the Special Master. Ex. 21, State of New Mexico's Disclosure of Rebuttal Modeling Expert Witnesses (July 15, 2020). Responding, in part, to critiques of the Integrated Model levelled by Texas's and the United States' experts, New Mexico's experts

improved some of the rules and formulas used in the Integrated Model and recalibrated the model to further improve its accuracy.[2] Ex. 20, 2d Sullivan Decl. ¶ 6. While the version of the Integrated Model disclosed on July 15, 2020 contains improvements over the version disclosed on October 31, 2019, it is not a new model and still operates in the same manner. *Id.*

Following this July 15, 2020 disclosure, New Mexico's experts discovered one of the Integrated Model's formulas produced inconsistent results in some alternative modeling scenarios. *Id.* ¶ 7. New Mexico determined that correcting this issue would improve model results, and so it disclosed an updated version of the Integrated Model to the other parties with this correction and a handful of other minor changes on September 15, 2020, along with documentation clearly showing what had changed. Ex. 22, State of New Mexico's Twenty-Fourth Supplemental Disclosure of Expert Witness Information (Sept. 15, 2020). This disclosure included previously disclosed expert reports updated with the results from the corrected model. *Id.* These updated results were similar to the results reported in prior reports, nor did *any* of the opinions expressed in any of these reports change. *Id.* at 3. Moreover, Texas and the United States deposed New Mexico's experts on these changes, and so were able to fully explore any differences between the September 15, 2020 Integrated Model and earlier version.[3] The September 15, 2020 version of the Integrated Model is an improvement to the July 15, 2020 version and the October 31, 2019 version, but it is not a new model and it operates in the same general way. Ex. 20, 2d Sullivan Decl. ¶ 8.

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[2] Many of these criticisms were themselves disclosed far beyond the plaintiffs' December 30, 2019 rebuttal deadline, which led the Special Master to grant an extension of New Mexico's deadline to disclose its rebuttal modeling disclosures, or else this version of the model would have been disclosed even sooner. *See* Order of May 26, 2020 [Dkt. 357].

[3] This stands in sharp contrast to Texas's new disclosures, which were not well-documented and which New Mexico has been unable to test in depositions.

Therefore, any claim by Texas that it could not commence its analysis of the Integrated Model until September 15, 2020, or any implication that analysis of the Integrated Model and its results performed before September 15, 2020 was rendered obsolete by that disclosure, is incorrect. At most, Texas's experts would have needed to respond to the handful of well-documented changes made to the Integrated Model in the September 15, 2020 version, and make sure any reference to specific model results used the most updated numbers. *Id*. However, Texas's new opinions analyze and criticize the Integrated Model more generally, including aspects of the model that have not changed since October 31, 2019. Further, to the extent Texas believed it needed additional time to review the September 15, 2020 version of the model or to determine whether the changes or updated results from that model warranted a response from its experts, the proper course of action would have been for Texas to seek an extension of the September 30, 2020 supplementation deadline the Special Master established in the August Order. Texas did not do so. Texas's failure to follow the proper procedure is not justified or excused by New Mexico's proper supplemental disclosure, within the timeline established by the August Order.

III. Texas Disclosed New Expert Opinions.

Texas's other justification for its disclosures is that the opinions and analysis New Mexico identified are not, in fact, new. Tex. Resp. 11 ("Dr. Hutchison's Statements and Opinions in his November 5, 2020 Declaration Are Not 'New'"), 19 (same for Dr. Brandes), 24 (same for Dr. Miltenberger). Texas alleges that these opinions all derive either from these witnesses' properly disclosed expert reports or from their deposition testimony, or both. *See generally id*. at 11-34. The testimony and report excerpts Texas identifies, however, do not support this argument. Instead they show that these new opinions are not found in the prior disclosures, and in some cases contradict opinions that are found in those earlier disclosures.

To the extent Texas argues its disclosures are not new because of statements its experts made in depositions, Texas's citations to its experts' deposition testimony do not support its arguments, as shown in the attached Appendix A. Moreover, vague or general statements in a deposition do not substitute for a proper disclosure in their expert reports. *MMG Ins. Co. v. Samsung Elecs. Am., Inc*., 293 F.R.D. 58, 61 (D.N.H. 2013) (determining that expert's bases and reasons for opinion revealed during deposition did not disclose opinions and did not comply with Rule 26(a)(2)(B)); *Karl Storz Endoscopy-America, Inc., v. Stryker Corp*., 2018 WL 1569762, at * 2 (N.D. Cal. 2018) ("To conclude that a deposition can substitute for the reasoning and analysis in an expert report would render Rule 26(a)(2)(B)(i) meaningless."); *Colligan v. Mary Hitchcock Memorial Hospital*, 2018 WL 2995615, at *3 (D.N.H. 2018) ("Generally, parties cannot cure a deficient expert report with later deposition testimony . . . ."); *Hamlett v. Carroll Fulmer Logistics Corp.*, 176 F.Supp.3d 1360, 1365 (S.D. Ga. 2016) ("To permit procrastinators to point to deposition questions as proof of no prejudice is to neuter the rule . . . ."). Texas cannot cure its failure to properly disclose its expert opinions by pointing to general statements its experts made in depositions that do not identify the specific opinions they now express.

Texas also argues that some of its new opinions are not new because they rely, to some extent, on information disclosed by New Mexico's experts. *E.g.,* Tex. Resp. 14. Expert reports, which is what Texas's untimely declarations are, often rely on facts or data that are already known to the other side. This does not mean that New Mexico and its experts fully understand the analysis Texas's experts conducted using those facts, or how those facts were employed in Texas's analysis. The purpose of Rule 26's expert disclosure requirements is not only to allow the other party to understand the factual basis for an expert's opinions, but also to allow that party to understand why and how the expert's opinion derives from these facts, including by deposing the expert in advance

of trial, so that party can properly prepare for trial and avoid unfair, prejudicial surprise. *Minebea Co., Ltd. v. Papst,* 231 F.R.D. 3, 5-6 (D.D.C. 2005). The fact that some of Texas's new opinions are based on previously disclosed facts does not exonerate Texas from following the rules and the scheduling order that was set in this case. This fact also does not negate the prejudice to New Mexico if these late disclosures are permitted without New Mexico being given a full and fair opportunity to probe and respond to them before trial.

New Mexico addresses Texas's specific arguments as to each new opinion it disclosed in the attached Appendix A, which addresses whether Texas's new opinions are in fact found in its experts' deposition testimony, and Appendix B, which addresses whether these opinions are found in Texas's properly disclosed expert reports.

IV. Texas Misrepresents the First Interim Report.

On page 26 of its Response, Texas argues that its historian expert, Dr. Miltenberger, could not have endorsed the conclusion in the First Interim Report of the Special Master that New Mexico has an apportionment below Elephant Butte because First Special Grimsal "never 'concluded' that New Mexico received an apportionment below Elephant Butte." New Mexico disputes Texas's characterization of the First Interim Report, which is replete with statements recognizing New Mexico's apportionment below Elephant Butte. *E.g.*, First Interim Report, dkt. 54, at 195, 203 (Compact protects administration of the Project "as the sole method by which Texas receives all *and New Mexico receives part of their equitable apportionments*" (emphasis added)), 204, 209, 212, 272.

Texas further argues that the First Interim Report shows that New Mexico rejected the idea of a 57/43 apportionment "at that point." Tex. Resp. at 26. Texas either misunderstands or seeks to deliberately misrepresent the passage it quotes. In full, this passage reads:

> 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. Even today, New Mexico does not object to that conclusion: "We don't have any serious argument that the compact incorporates a 43 percent [of Project water] to Texas, 57 percent to New Mexico scheme, with 60,000 off the top for Mexico, as a part of the understanding of the compact."

First Interim Report at 209 (quoting Hr'g Tr. 40:6-9, Aug. 19, 2015 (SM R. DOC. 37)). A plain reading of this passage shows that: (1) Special Master Grimsal concluded that the Compact relied on the Project "to impart Texas's and lower New Mexico's respective equitable apportionments of Rio Grande waters" and (2) he relied on New Mexico's admission at oral argument, which he quoted, to conclude "New Mexico does not object to that conclusion," that is, the conclusion that the Compact relies on the Project to apportion water to "Texas[] and lower New Mexico[]." *See id*. This passage does not demonstrate that New Mexico "rejected the idea of a 57/43 apportionment." Tex. Resp. 26. Texas's argument that the First Interim Report does not conclude that New Mexico has an apportionment below Elephant Butte, and therefore Dr. Miltenberger's approval of the First Interim Report does not mean Dr. Miltenberger also endorsed this conclusion, is clearly mistaken.

V. Texas's Late Disclosures Are Neither Harmless Nor Justified.

Texas acknowledges that a court weighing whether exclusion of evidence is appropriate under Rule 37(c)(1) considers four factors: (1) the explanation for the failure to comply with discovery deadlines; (2) the importance of the evidence; (3) the potential prejudice to the opposing party; and (4) the possibility of curing the prejudice. Tex. Resp. 34 (citing *Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 (5th Cir. 2007)). Texas argues its late disclosures do not merit exclusion because (1) its late disclosures were justified because New Mexico disclosed a corrected version of the Integrated Model on September 15, 2020; (2) its late disclosures are important to its dispositive motion briefing and are based on the long experience of its experts studying the issues

addressed in their declarations; (3) New Mexico is not prejudiced because these disclosures are not new, New Mexico already had "more than adequate opportunity" to depose Texas's experts and review their reports and declarations, and New Mexico did not immediately file its Motion upon receiving Texas's untimely disclosures. Tex. Resp. 34-5. Texas notably does not address the fourth factor, whether prejudice to New Mexico can be cured. *See id*.

New Mexico has already addressed Texas's argument that late disclosure was justified due to New Mexico's September 15, 2020 disclosure, before the expert supplementation deadline ordered by the Special Master, at Section II, above, and Texas's argument that the opinions are not "new opinions" in Appendices A and B. As for Texas's argument that its late disclosures are important to its dispositive motion briefs, presumably these opinions also will be important to Texas's trial efforts for similar reasons. If these new opinions are important components of Texas's case, this underscores that it is inexcusable for Texas not to have presented these opinions earlier, and underscores the prejudice New Mexico will face if it cannot fully probe and respond to these opinions before trial. In any event, Texas's argument is belied by the disclosures' untimeliness. If Texas believed these disclosures were crucial to its case, it could have and should have responded to New Mexico's expert disclosures before the deadlines ordered by the Special Master, or moved for an extension of those deadlines to accommodate Texas's ongoing expert analysis.

Texas's argument that New Mexico was not prejudiced is similarly without merit. Texas's argument that New Mexico was not prejudiced because it already had the opportunity to depose Texas's experts and review their disclosures is plainly incorrect. New Mexico was able to depose Drs. Hutchison, Brandes, and Miltenberger about the contents of their previously disclosed expert reports and rebuttal reports before the close of discovery; however, New Mexico *did not* have any

opportunity, let alone "adequate opportunity," to depose these experts about the new opinions set out in their declarations because these new opinions were disclosed after the close of discovery. In these circumstances, it is disingenuous to suggest New Mexico is not prejudiced because it had the opportunity to depose these witnesses on their earlier opinions.

Texas also suggests that New Mexico will suffer no prejudice because New Mexico had "two to three months" to review these disclosures. Tex. Resp. at 35. Texas cites *Texas A&M Research Foundation v. Magna Transport, Inc.*, which found no prejudice from the late disclosure of invoices with an expert declaration calculating damages following the liability phase of a trial, in part because the court in that case found the opposing party had a month to review these tardy disclosures. 338 F.3d 394, 402 (5th Cir. 2003) ("*TAMRF*"). This case is inapposite: first, *TAMRF* did not conclude there was no prejudice solely because the opposing party had one month to review these new disclosures; principally, the court found no prejudice because the new evidence "overlapped substantially with [the witness's] testimony, to which the defendants did not object at trial; they were therefore already aware of most of the damages claimed." *Id.* at 401.

Further, the two or three months Texas claims were adequate for New Mexico to review these new disclosures occurred in the midst of briefing on dispositive motions, when New Mexico's counsel and experts were preoccupied with meeting the briefing deadlines set by the Special Master. This stands in stark contrast to *TAMRF*, where the month the defendant had to review untimely disclosures occurred after trial was complete. *See id.* at 399. While New Mexico's experts responded to these new disclosures as far as they were reasonably able to—in the absence of depositions—as New Mexico acknowledged in its Motion, New Mexico and its experts have been unable to fully and fairly probe these opinions.

In short, Texas's violation of the discovery rules unfairly prejudices New Mexico. Texas's new opinions are not mere technical violations of Rule 26(a)(2) but they change important aspects of Texas's case. To list just a few examples, Dr. Hutchison is now offering analysis of and opinions on New Mexico's Integrated Model, which he did not do previously. Similarly, Dr. Brandes's new opinion that New Mexico receives too much water under the 2008 Operating Agreement suggests that Texas may argue at trial that New Mexico's surface water use should be restricted even further, an opinion never previously provided or supported with data. And Dr. Miltenberger's new opinion that the Compact protects only uses existing as of 1938, and not vested water rights existing as of that time, suggests Texas may argue that pre-Compact and even pre-Project rights in New Mexico may be partly or wholly void under the Compact. Again, these opinions were never previously provided, they have not been properly supported by Texas, and New Mexico has not been given the reasonable and fair opportunity to investigate them in discovery. New Mexico, therefore, approaches trial without a clear and fair understanding as to the basis of these opinions, how they impact Texas's case, and how they might impact New Mexico's case. This is highly prejudicial to New Mexico.

As New Mexico explained in its Motion, reopening discovery at this stage even for the limited purpose of allowing New Mexico to conduct discovery on these new opinions would be disruptive. Given that Texas has not provided a sufficient justification for its tardy disclosures or offered any argument to explain how the foregoing prejudice to New Mexico can be remedied, these disclosures should be excluded under Rule 37(c)(1). But if the Court is inclined to allow these disclosures, the Court should fairly permit New Mexico to conduct appropriate discovery on these new opinions so that all parties can fairly prepare for trial.

CONCLUSION

For the foregoing reasons, New Mexico requests that the Court accept New Mexico's Objections to, and grant its Motion to Strike, Texas's Late-Filed Expert Opinions.

Respectfully submitted,

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

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Respectfully submitted this 6th day of April, 2021.

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