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April 13, 2018

Honorable Michael J. Melloy
Special Master
United States Circuit Judge
111 Seventh Avenue, S.E.
Box 22
Cedar Rapids, IA 52401
Michael_Melloy@ca8.uscourts.gov

VIA EMAIL ONLY

Re: New Mexico's Position on Disputed Appendix B to Proposed Case Management Plan

Dear Special Master Melloy,

The State of New Mexico respectfully submits this letter brief to explain its position regarding the few areas of disagreement between the Parties on the Case Management Plan (“CMP”), Appendix B. While the Parties agree on many of the deadlines in Appendix B, there are three areas where we have not reached agreement: namely, the sequence of expert disclosures, the timing of expert disclosures, and the appropriate date to begin expert depositions. Although New Mexico speaks herein only for itself, New Mexico and Colorado jointly support the Case Management Plan Appendix B, Version 2.

Sequence of Expert Disclosures. While Texas and the United States propose that all Parties make simultaneous expert disclosures, New Mexico and Colorado assert that sequencing expert disclosures so that the Plaintiffs file their expert disclosures first, followed by the Defendants, should be required. Sequencing (sometimes referred to as staggering) expert disclosures is the procedure followed in other recent original action cases, is the preference in the Federal Rules and Federal practice, and is the procedure followed in the statutorily created Colorado Water Courts. Whereas requiring simultaneous expert disclosures, as suggested by the Plaintiffs, ignores the burden of proof on the Plaintiffs, prejudices the Defendants, and forces the Defendants to prepare and disclose extensive expert reports and modeling prior to ever evaluating the opinions and positions of the Plaintiffs.

First, the Special Masters in three of the most recent original action water disputes required sequenced expert disclosures. Case Management Order No. 2, *Florida v. Georgia*, No. 142, Original (Dec. 19, 2014); Case Management Plan No. 1 § VII, *Montana v. Wyoming*, No. 137, Original (Dec. 20, 2011); Case Management Order No. 2, *Kansas v. Nebraska*, No. 126, Original (Aug. 9, 2011). These Special Masters recognized that the issues involved in interstate water disputes are complex and that it makes little sense

to require defendant states to present their expert opinions and modeling before the plaintiffs' theories of liability and supporting evidence are known.

Second, the clear preference of Federal Rule 26(a)(2) is for expert disclosures to be made "at the times and in the sequence that the court orders." F.R.C.P. 26(a)(2)(D). To this end, the 1993 Committee Notes state that "in most cases the party with the burden of proof on an issue should disclose its expert testimony on that issue before other Parties are required to make their disclosures with respect to that issue." *See also* Manual for Complex Litigation, Fourth, § 11.481 (scheduling expert disclosures should take into account that parties may lack information on certain issues). Consistent with these principles, federal courts often order sequenced expert disclosures, particularly in complex cases such as the one at bar. *E.g., Plumbers & Pipefitters Local 572 Pension Fund v. Cisco Systems, Inc.*, 2005 WL 1459572 (N.D. Cal. June 21, 2005) (unreported); *see also Metso Mineral Industries, Inc. v. Johnson Crushers Intern., Inc.*, 2012 WL1926415 (E.D. Wis. May 25, 2012) (unreported).

Third, sequenced expert disclosures are used in Colorado Water Courts, which hear many complex water cases that involve lengthy expert opinions and often include water modeling. *See* Rule 11(b)(5)(B) of the Uniform Local Rules for All State Water Courts. The Colorado Water Courts are one of the few court systems in the country dedicated to hearing cases involving water issues. Their use of sequenced expert disclosure deadlines further supports the conclusion that sequenced disclosures are appropriate here.

Fourth, requiring the Defendants to make expert disclosures simultaneous with the Plaintiffs will be highly prejudicial. Texas and the United States brought this case and have the burden of proof as to the major issues raised. The Plaintiffs can raise any number of theories and expert opinions to support their vague claims listed in the Complaints. Moreover, extremely complex computer models will be employed by the Plaintiffs to support their claims, particularly their claims involving groundwater pumping and impacts on surface water. Without reviewing the Plaintiffs' models, assumptions, and inputs, New Mexico cannot respond in any meaningful way to the Plaintiffs' claims. If New Mexico is forced to make simultaneous expert disclosures, its initial expert disclosures will be based largely on guesswork. This prejudices New Mexico as the Defendant.

Finally, requiring sequenced disclosures will not prejudice the Plaintiffs. Requiring them to make the first expert disclosures is consistent with the Parties' burdens in this case, and consistent with other recent original actions. The Plaintiffs will ultimately have the opportunity to respond to New Mexico's disclosures in their rebuttal reports.

Timing of Expert Disclosures. Texas and the United States request that all Parties disclose their expert reports 255 days from the At Issue Date, with all Parties making rebuttal disclosures 120 days (4 months) later, but New Mexico believes this schedule is prejudicial and unrealistic.


First, New Mexico proposes that the Plaintiffs make their expert disclosures 180 days (6 months) from the At Issue Date, as they have represented that their case and experts are ready to move forward.

Second, New Mexico proposes that the Defendants make their expert disclosures 300 days (10 months) after the Plaintiffs' disclosures. The reason for the needed ten month period is that New Mexico and Colorado expect each Plaintiff (both Texas and the United States) to disclose multiple experts with lengthy reports, and expect that each will disclose an extremely large and very complex computer model, with likely thousands of input files and millions of data points. In practice, it takes experts a significant amount of time to evaluate water models, and here the Defendants will need to evaluate two simultaneously, depose the Plaintiffs' experts, seek discovery, and finalize their own expert reports and modeling to respond to the Plaintiffs' disclosures. Based on our experience with complex water disputes, the proposed ten month period to evaluate several lengthy expert reports, fully vet two water models, request follow up discovery, and take expert depositions is not only reasonable but frankly very expedited given the amount and complexity of evidence that will be involved.

Expert Depositions. The Plaintiffs are proposing that expert depositions not be conducted until 30 days following the disclosure of rebuttal reports. New Mexico respectfully submits that this is counterproductive and may lead to more delays. This is inconsistent with Federal Rule 26(b)(4)(A) and the expert deposition deadlines ordered in other recent original actions. It also will prevent the Parties from properly evaluating and responding to their opponents' disclosures. Again, hydrologic models are quite complex, and it is impossible to properly evaluate these models without understanding the assumptions that went into constructing them, selecting inputs, and interpreting their output. Therefore, it is crucial for the Parties on both sides to depose their opponents' experts once disclosed, so that they can properly understand those experts' opinions and the evidence they relied upon, and can prepare effective disclosures in response. If this is not done, it is likely the Parties will be forced to move the Special Master to order supplemental expert disclosures (potentially multiple supplemental expert disclosures) following expert depositions, further extending and delaying the proceedings.

For the foregoing reasons, New Mexico respectfully requests that the Special Master (1) order the Parties to sequence their expert disclosures such that the Plaintiffs disclose their initial experts, including modeling, first, followed by the Defendants; (2) adopt the expert disclosure deadlines and schedule proposed in Version 2 of Appendix B to the CMP and; (3) permit the Parties to begin deposing experts once those experts are disclosed, consistent with Federal Rule 26(b)(4)(a).

Respectfully Submitted,



Marcus J. Rael, Jr.

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