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April 13, 2018

Via Electronic Mail and U.S. Mail

Judge Michael J. Melloy
U.S. Court of Appeals for the Eighth Circuit
United States Courthouse
111 Seventh Avenue S.E., Box 22
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Michael_Melloy@ca8.uscourts.gov
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Re: *State of Texas v. State of New Mexico and State of Colorado*
Supreme Court Docket No. 141 Original – Joint Texas/United States letter

Dear Special Master Melloy:

The Parties have all agreed to what we believe is a good workable Case Management Plan (CMP). The sole area of disagreement among the Parties involves the disclosure(s) of expert witnesses and the exchange of expert reports. Texas and the United States have proposed the simultaneous disclosure and exchange of expert witnesses 225 days from the date that this action is at issue. Rebuttal reports, if any, would occur 120 days after the simultaneous disclosure and exchange.

In contrast, New Mexico and Colorado have proposed a sequential disclosure and exchange that would require Texas and the United States to disclose its expert witnesses and provide expert witness reports just 180 days after the at issue date and allow New Mexico and Colorado to begin depositions with respect to those experts immediately. The disclosure of the New Mexico and Colorado experts and provision of expert witness reports would not come until 300 days after plaintiff's disclosure, almost a full year. Only then would defendants be required to respond to plaintiff's disclosure and expert reports and, in addition, for the first time, provide expert disclosure and the submission of expert reports supporting their counterclaims. As a consequence, it will be a full 480 days after the At Issue Date before Texas and the United States will be able to discover New Mexico's expert case and initiate depositions. Moreover, although arguing that complex modeling requires time to analyze, the New Mexico/Colorado schedule inexplicably only allows plaintiffs 120 days to analyze and respond to defendants' disclosures.

Compounding the problems that will arise and the prejudice to plaintiffs that will result if this aberrant proposal is adopted, is the subsequent disclosure of plaintiff's rebuttal reports which, given the sequence and timing that is part of the proposal, will subject plaintiff's experts to a second round of depositions. In addition, the New Mexico and Colorado proposal would extend the entire pre-trial schedule by about one half year.

As Texas and the United States understand the rationale behind the New Mexico and Colorado proposal, it is based upon the idea that Texas and the United States are better prepared than they are and as a consequence, we should be required to first disclose our expert witnesses and reports before they have to do so and that the extra time is needed because the modeling involved is complex. Texas and the United States strenuously disagree with what we understand to be the basis of the New Mexico/Colorado proposal. New Mexico has studied and modeled the Rio Grande for years and has numerous models that have been used by the New Mexico the Office of the State Engineer (OSE) and that presumably will or can be used in this litigation. These models have been in use for years and the experts who created them are still under contract with the State of New Mexico. While the United States and Texas have questions regarding these models, their undisputed existence belies the argument that somehow Texas and the United States have modeling advantage and should therefore have to first disclose and provide expert reports.

Rule 26(a)(2)(D) Federal Rule of Civil Procedure while only serving as a guide in Original Actions provides that disclosure of expert witnesses and the exchange of expert reports should be simultaneous as is proposed by Texas and the United States. While courts may vary this requirement, there is no justification to do so in the instant case. A staggered expert disclosure as New Mexico proposes blurs the distinction between expert testimony and rebuttal testimony. If Texas and the United States disclose first, New Mexico would then have a second opportunity to attack the Texas and United states models through rebuttal testimony, in effect giving New Mexico two bites at the "rebuttal apple." The possibility of a New Mexico counterclaim further reinforces the appropriateness of simultaneous disclosure and will expose the Texas and United States experts to two rounds of depositions.

While the modeling may be complex, it certainly is no more complex than any other technical issues that are routinely the subject of evidence and testimony in complex litigation. Rule 26(a)(2) provides 30 days for the disclosure of rebuttal experts and reports. In deference to New Mexico and Colorado, Texas and the United States propose instead 120 days. Either the 30 days provided for in the Rule or the 120 days proposed by Texas and the United States are substantially less than what New Mexico proposes. The extra time that New Mexico wants is neither justified nor needed, and time allowed for in the United States and Texas proposal is reasonable.

The adoption of anything close to what New Mexico proposed will not serve any useful purpose, but it will further delay the resolution of this case. This Original Action was initiated in January 2013, with leave to file the Texas Complaint granted in January 2014.

Presumably, New Mexico and Colorado would have used the four (4) years and four (4) months from then to do something to prepare for the litigation of this case. Adopting the New Mexico/Colorado proposal simply rewards New Mexico and Colorado for their lack of diligence in preparation and will act to further delay the case. As has been previously noted by Texas, the Original Action was filed because of real harm that Texas was suffering and continues to suffer because of the actions of New Mexico. The United States also believes that the Rio Grande Project's operations are impaired by New Mexico's actions. As an upstream state, until judgment is established in this case, there is nothing that prohibits New Mexico from continuing to act as it has in the past. In this regard, delay always benefits upstream states. See e.g. Brief of the State of Kansas as Amicus Curiae in Support of Texas. Adding 10 months to the pre-trial schedule provides no legitimate benefit to New Mexico, but it does serve to delay the date upon which the sought after relief can be obtained.

For these reasons, Texas and the United States respectively request that their proposed version and Appendix B to the CMP be adopted by the Special Master.

Very truly yours,

Stuart L. Somach,
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(FOR)

James J. DuBois, Trial Attorney
United States Department of Justice

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