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 MOTION TO STRIKE TEXAS'S EXPERT DISCLOSURES ON WATER QUALITY

♦

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The State of New Mexico ("New Mexico") respectfully moves the Special Master to strike the State of Texas's ("Texas") expert disclosures that pertain to Texas's newly alleged injury and damage claims related to water quality. Specifically, New Mexico moves the Special Master to strike all or a portion of the disclosures from the following experts to the extent they offer opinions on alleged injury or damages related to Texas's new water quality claims: Joel Kimmelshue, David Sunding, Lydia Dorrance, John Balliew, Al Blair, and Art Ivey. Additionally, New Mexico requests the Special Master enter an order precluding Texas's experts from offering supplemental opinions on water quality. Texas's Complaint makes no claims of injury or damages based on the quality of water used in Texas, and its disclosure of that theory of liability in expert reports almost seven years into this litigation causes surprise to New Mexico that requires it to retain water quality experts to defend itself. In order to avoid significant prejudice to New Mexico, Texas must be precluded from offering water quality expert opinions unless and until Texas amends its Complaint. If Texas amends its Complaint, it can refile its water quality expert disclosures at that time, and the Special Master can set new deadlines for responsive water quality expert disclosures from New Mexico.

In its Complaint and associated motion for leave to file, Texas alleged New Mexico's groundwater pumping reduced Rio Grande Project ("Project") deliveries to Texas and explicitly stated that the measure of Texas's damages is the value of the Project water Texas allegedly lost due to the actions of New Mexico. Texas presented this case to the Court as a calculation of reduced Project deliveries to Texas and damages calculated on the value of the depleted water. But Texas's case has changed and no longer matches its Complaint. Texas's theory of the case is now, according to its expert reports:

- New Mexico groundwater pumping caused depletions to Rio Grande surface flows;

- In response to reduced surface flows, Texas ***increased its own groundwater pumping*** in Texas;
- Texas's groundwater is more saline than the Rio Grande surface water; therefore, Texas's ***own increased groundwater pumping*** resulted in an increased use of saline water.
- Texas was damaged by its own use of higher saline Texas groundwater on crops and in the El Paso municipal water system from 1985 to 2016.

Thus, after almost seven years of litigation, Texas's expert disclosures state for the first time that Texas's sole measure of damages is the quality of its own groundwater, not the value of the surface water allegedly depleted by New Mexico. If Texas wishes to pursue this water-quality-based claim, this back-door method of using an expert disclosure to introduce the claim is improper and unfair. Unless and until the procedure is rectified through an amended complaint, Texas's water quality disclosures should be struck.

Texas's attempt to introduce new claims regarding water quality at this late stage in litigation shifts the goalposts and is significantly prejudicial to New Mexico. Evaluating water quantity and water quality are two very different sciences. Water quantity claims (i.e., depletions from groundwater pumping) are evaluated using complex computer models that simulate the groundwater aquifer and its interaction with the surface water system. These groundwater models take considerable time and expense to prepare and refine. Water quality claims, on the other hand, require a great deal of physical and chemical data, including the testing of soil and water samples over time, coupled with water quality expert analysis on salinity influences on crop and municipal systems. Since this case was filed, New Mexico has been preparing an analysis of the quantity allegations in Texas's Complaint, on the good-faith belief that Texas's allegations were what Texas said they were. With the aid of its water quantity experts, New Mexico has conducted

discovery and sought data accordingly. New Mexico has not served water quality discovery requests, again on the good-faith belief that such requests would be irrelevant to Texas's claims and outside the scope of discovery for this case. Nor could New Mexico have anticipated the need to obtain experts for water quality claims that do not appear anywhere in Texas's Complaint, and were never mentioned in the many briefs filed in this case since January 2013.

Significantly, Texas's own expert disclosures acknowledge that groundwater pumping has long been an integral part of the supplemental irrigation and municipal supply throughout the Project area, in both Texas and New Mexico. Agricultural groundwater pumping took off in the early 1950s when well pumping technology became more widespread and a severe drought hit the region. Farmers in both Texas and New Mexico drilled shallow wells into the Rio Grande alluvium. These farmers pumped groundwater to provide a supplemental irrigation supply because surface supplies were no longer sufficient. This early well drilling was encouraged by the Project irrigation districts and the Bureau of Reclamation, and such groundwater pumping was common throughout the western United States to allow for sustainable agriculture and urban development in areas with erratic surface water supplies.

Since the Project was, and continues to be, operated as a unit across both States, groundwater pumping anywhere within the Project area—in New Mexico or in Texas, whether along the New Mexico–Texas stateline or elsewhere within the Project area—has the potential to reduce the useable return flows to the Rio Grande Project. For example, if Texas return flows were historically re-diverted in Texas but now are no longer available to Texas farmers due to Texas groundwater pumping, then Texas must order more Project water from Reclamation out of Elephant Butte Reservoir. Because of this relationship between deliveries and return flows throughout the entire Project unit, the evaluation of groundwater pumping impacts must include

both Texas and New Mexico. Yet, Texas's expert reports do not provide a model for groundwater pumping in Texas; rather, they simply state that due to New Mexico groundwater pumping, Texas had to pump ***more*** groundwater than it would have otherwise pumped.

According to Texas's expert disclosures, it is undisputed that conjunctive use of groundwater and surface water supplies in both Texas and New Mexico has allowed the Project to operate for decades, with higher pumping in dry years balanced by aquifer recovery in wet years. As described above, starting in the 1950s, there were dry years with higher groundwater pumping in Texas and New Mexico to supplement limited surface water Project supplies. Then, by the 1980s and 1990s, the Project experienced a wet period, with full Project allocations to both Texas and New Mexico and even spills from Project storage in some years. During this period, pumping decreased in both New Mexico and Texas because less water was needed to supplement Project water deliveries. More recently, an extended drought hit in 2002, and groundwater pumping in Texas and New Mexico increased again. During this dry period, there were insufficient surface water supplies for all users, and groundwater pumping was the only accessible supplemental supply in both States.

The 2008 Operating Agreement was then adopted by Reclamation and the irrigation districts, without the concurrence of New Mexico. The 2008 Operating Agreement ("2008 OA") radically and illegally altered the Project's historical 57/43 surface water delivery allocation to the two irrigation districts, granting the lion's share of Project water to Texas and leaving New Mexico—not Texas—the injured party. Ironically, the reduction in surface water deliveries to New Mexico resulting from the 2008 OA forces New Mexico irrigators to rely more heavily on groundwater pumping, the very issue Texas now complains of as the reason for Texas having to pump additional groundwater itself. It is illogical to claim New Mexico is solely responsible for

water-quality-related damages to Texas due to increased New Mexico groundwater pumping when the 2008 OA forces such groundwater pumping to occur by unlawfully depriving New Mexico of Project surface water supplies.

Texas is well aware of the historical use of groundwater in the Project area in both States, but nevertheless filed its Complaint claiming New Mexico was solely responsible for depletions to annual Project deliveries and Texas's damages equaled the value of the water lost. However, now Texas pivots, without amending its Complaint, to a new theory of injury and damages against New Mexico—damages solely based on the quality of water used in Texas as a result of increased groundwater pumping in Texas.

Texas must amend its Complaint and provide fair notice to New Mexico if it wants to make water quality claims and assertions of damages. In the absence of such amendment, New Mexico, by this Motion, requests that the Court strike Texas's expert disclosures that pertain to Texas's newly alleged injury and damage claims related to water quality and preclude Texas's experts from offering supplemental opinions on water quality. In support of this motion, New Mexico states as follows:

SECTION 12 CERTIFICATION

In accordance with Section 12 of the Case Management Plan dated September 6, 2018, as amended ("CMP"), undersigned counsel for the State of New Mexico certify that they conferred in good faith with counsel for Texas in an effort to resolve this discovery dispute and to obtain the relief sought by this Motion without Court action. Counsel for New Mexico state that the parties were unable to come to an agreement regarding the relief sought by this Motion.

BACKGROUND

1. The State of Texas submitted its Complaint, along with a Motion for Leave to File the Complaint, on January 8, 2013.

2. Texas's Complaint alleged that New Mexico "violate[d] the purpose and intent of the Rio Grande Compact" by "allow[ing] and authoriz[ing] Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico." Tex. Compl. Para. 4; *see also id.* para. 18.

3. Texas's Complaint specifically stated that the measure of damages Texas has allegedly sustained from New Mexico's actions "consist[s] of the *value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions* of the Rio Grande through its violation of the Rio Grande Compact and Rio Grande Project Act." *Id.* para. 27 (emphasis added).

4. Nowhere in Texas's Complaint, Motion for Leave to File Complaint, or Brief in Support did Texas allege that New Mexico violated the Compact on the basis of diminished water quality, the source of which is Texas's own groundwater pumping in the Hueco Bolson aquifer in Texas, or otherwise discuss any harms Texas suffered due to salinity problems with its own groundwater.[1]

5. Texas also did not raise any allegations or concerns related to water quality in its Motion for Leave to File Complaint, its response to the United States' Motion for Leave to Intervene, or its response to New Mexico's Motion to Dismiss. Nor did Texas raise concerns

[1] On November 8, 2018, Texas submitted a request for production of documents to New Mexico. Two of the ninety (90) requests sought information about water quality in New Mexico, but not Texas; the other 88 requests sought information related to water quantity. New Mexico objected that Texas's water quality requests sought information not relevant to any claim or defense in the case and did not produce any water quality information in response to these requests. Texas did not protest New Mexico's objections or provide any additional arguments in support of the relevance of these requests.

with water quality in its briefing on exceptions to the First Interim Report of the Special Master, *see* Texas's Reply to Exceptions to First Interim Report of the Special Master (July 28, 2017), or at oral argument on these exceptions before the Supreme Court, *see* Oral Argument Transcript (Jan. 8, 2018).

6. On the contrary, in its response to New Mexico's Motion to Dismiss, Texas explicitly distinguished quantity from quality to support the basis of its Complaint under Article XI of the Compact:

> [T]he Compact does not define "character"; however, by using the disjunctive "or" in the phrase "character or quality of the water," the term "character" arguably refers to something other than water quality. In this regard, the term "character" could have been used by the drafters of the Compact to refer to the possessory status of the water. New Mexico arguably changes the character of the water at the place of delivery by not, in fact, relinquishing complete control of the water, and instead, maintaining control by intercepting and interfering with the water after it is released from Elephant Butte Reservoir.

Texas's Brief in Response to New Mexico' Motion to Dismiss Texas's Complaint and the United States' Complaint in Intervention at 34, n.17 (June 16, 2014). In this brief, Texas explicitly excluded any mention of a claim based on water quality and focused instead on "character."

7. Based on the subject matter of Texas's expert disclosures and its subpoenas issued about the same time, Texas has raised the new issue of water quality, which is not alleged in Texas's Complaint filed almost seven years ago.[2]

[2] Discussions of salinity and water quality can be found in each of the following expert reports on the pages indicated:

1. Expert Report of Lydia R. Dorrance: All
2. Expert Report of David Sunding: All
3. Expert Report of Joel E. Kimmelshue: Pages 93-107

New Mexico has not attached these reports because it believes that the fact that the reports opine on water quality is undisputed. If the Special Master requests copies of these Texas expert reports, then copies will be provided.

8. Two Texas experts base their entire reports on water quality. First, Texas expert Lydia Dorrance opines that, if groundwater pumping in New Mexico were reduced, water used for agricultural irrigation in the El Paso Valley and Hudspeth would be less saline due to greater availability of surface water. Expert Report of Lydia R. Dorrance, Ph.D. (May 31, 2019). Second, Texas's economist expert David Sunding opines that Texas's damages are in excess of $350 million due solely to the increased salinity of the groundwater Texas uses, with these damages broken down into agricultural impacts and municipal impacts to the City of El Paso system. *See* Expert Report of Dr. David Sunding (May 31, 2019).

9. Another Texas expert partially discusses salinity. Texas expert Joel Kimmelshue primarily discusses irrigated acreage and the consumptive use of various crops, but he also includes a lengthy discussion of how salinity impacts certain crops. Expert Report of Joel E. Kimmelshue, PhD (May 31, 2019).

10. In addition to the foregoing, three of Texas's non-retained experts intend to offer testimony and opinions regarding water quality. Although Texas's initial disclosure of these experts did not state that they would offer opinion testimony on water quality, Texas's initial disclosure of its non-retained experts also included scant information on the opinions they would offer. In response to New Mexico's request for additional information on these experts' opinions, Texas made its Third Supplemental Disclosure of Expert Witness Information on August 12, 2019. In this supplemental disclosure, Texas stated that three of its non-retained experts, John E. Balliew, Al Blair, and Art Ivey, may testify and offer opinions regarding decreased water quality and increased salinity, although Texas's Third Supplemental Disclosure still does not indicate what those opinions are.

11. Around the same time it filed its initial expert disclosures, in the last week of May 2019, Texas issued subpoenas to third party landowners in New Mexico and Texas to take soil, water and plant samples.

12. Prior to receiving Texas's expert disclosures and Texas's filing of the subpoenas, New Mexico had no notice that Texas was alleging injury solely on the basis of the quality of water used in Texas, or that water quality was even a part of the alleged damages in this case.

ARGUMENT

Texas's back-door method of introducing a new water quality claim or theory through expert reports and subpoenas without having amended its Complaint violates three rules under the Federal Rules of Civil Procedure and Federal Rules of Evidence. First, Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although Rule 8(a)(2) does not require "detailed factual allegations," the allegations must be sufficient to give a defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Because Texas's Complaint contained no water quality allegations, New Mexico had no notice that Texas was raising a claim or seeking damages based on water quality.

Second, Federal Rule of Evidence 702 requires expert testimony to be relevant to the "task at hand." *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). The task at hand is defined by the plaintiff's complaint. Here, Texas's Complaint contained no allegation, express or implied, that Texas was harmed by receiving or pumping poor-quality water, let alone that such harm was caused by New Mexico. Texas's water quality disclosures are not relevant to any allegations in its Complaint. Allowing Texas to raise water quality claims

for the first time in these disclosures also would cause unfair prejudice to New Mexico, in violation of Federal Rule of Evidence 403.

Third, discovery must be relevant to allegations raised in the complaint, pursuant to Federal Rule of Civil Procedure 26(b)(1). Just as Texas's expert disclosures violate Federal Rule of Evidence 702 because water quality issues are irrelevant to Texas's claims in this case, Texas's attempts to seek discovery about water quality matters fall outside of the scope of Texas's Complaint and hence outside the scope of discovery authorized by the Rules.

In this case, where Texas has introduced new allegations regarding water quality through expert disclosures and subpoenas that are not included in any allegations in its Complaint, the proper procedure is to strike such inadmissible evidence on the basis of relevance until or unless Texas amends it Complaint. In addition, to avoid prejudice to New Mexico, Texas should be precluded from introducing additional expert evidence on water quality matters until or unless Texas amends its Complaint. If Texas seeks and is granted leave to amend its Complaint, the Special Master should set new disclosure and rebuttal deadlines for water quality issues to avoid prejudice to New Mexico.[3]

I. Texas's Complaint Fails to Give Fair Notice to New Mexico That Water Quality Claims Are Included in This Matter.

Supreme Court Rule 17.2 provides that "[t]he form of pleadings and motions prescribed by the Federal Rules of Civil Procedure is followed. In other respects, those Rules . . . may be taken as guides." Accordingly, the Federal Rules of Civil Procedure, including Rule 8(a)(2), govern pleadings in original actions. Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled

[3] To be clear, New Mexico is not seeking new deadlines for all expert disclosures and rebuttal disclosures, only those related to water quality.

to relief." Although Rule 8(a)(2) does not require "detailed factual allegations," the allegations must be sufficient to give a defendant "fair notice of what the . . . claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. This requires more than "naked assertions" and "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). Instead, the complaint must state "enough factual matter (taken as true) to suggest" the nature of and basis for the claim. *Twombly*, 550 U.S. at 556.

Courts have declined to consider expert disclosures that discuss allegations not pleaded in a complaint. For instance, in *Oliver v. Ralphs Grocery Co.*, the Ninth Circuit upheld the district court's refusal to consider certain allegations raised in an expert report that listed barriers alleged to be non-compliant with the Americans with Disabilities Act ("ADA") but that had not been identified in the original complaint. 654 F.3d 903, 909 (9th Cir. 2011). The Ninth Circuit noted that, in the context of an ADA claim, "in order for the complaint to provide fair notice to the defendant, each such feature must be alleged in the complaint." *Id*. at 908. As required by Rule 8's "fair notice" requirement, "only disclosures . . . in a properly pleaded complaint can provide such notice; a disclosure made during discovery, *including in an expert report*, would rarely be an adequate substitute." *Id*. at 909 (emphasis added). This is, in part, because "an expert report is typically filed later in the litigation process, after the defendant has already taken steps to investigate and defend against the claims in the complaint." *Id.*

Texas's Complaint contained no allegation, express or implied, that Texas was harmed by receiving or having to pump poor-quality water, let alone that such harm was caused by New Mexico. As a result, New Mexico had no notice that Texas was raising claims or seeking damages based on water quality. The scope of the case, under Texas's Complaint, is defined by Texas's allegation that New Mexico violated the Compact, and harmed Texas, by "allow[ing]

and authoriz[ing] Rio Grande Project water intended for use in Texas to be intercepted and used in New Mexico." Tex. Compl. Para. 4. Texas alleges New Mexico accomplished this by "increasingly allow[ing] the diversion of surface water, and . . . the extraction of water from beneath the ground, downstream of Elephant Butte Dam." *Id*. para. 18. These diversions, according to Texas, "resulted in ongoing, material depletions of flows of the Rio Grande at the New Mexico-Texas state line, causing substantial and irreparable injury to Texas." *Id*. para. 19. The damages Texas sustained as a result of this activity, again according to Texas, "consist of the *value of Texas' apportioned share of the waters of the Rio Grande lost to Texas as a result of New Mexico's depletions of the Rio Grande*." *Id*. para. 27 (emphasis added).

Texas's Complaint only alleges damages stemming from the value of water lost to Texas, and nowhere in its Complaint does Texas allege New Mexico has violated the Compact by reducing the quality of the water available to Texas, or assert that it has been injured as a result of impaired water quality due to pumping its own groundwater, or for any other reason. Because of Texas's failure to include water quality-related claims in its Complaint, New Mexico had no notice that such claims would be pursued or be the subject of discovery in this case.

Although the allegations in Texas's Complaint are of paramount importance when determining whether Rule 8's fair notice requirement has been met, *see Twombly*, 550 U.S. at 555, Texas also made no mention of its water quality claims against New Mexico in any of its pleadings or briefings following its Complaint, including its briefing on exceptions to the First Interim Report of the Special Master. In fact, in its response to New Mexico's Motion to Dismiss, Texas purposefully distinguished between "character" and "quality" of water to support its alleged Article XI injury to the *character* of its Compact water, thus affirmatively disavowing claims of injury associated with water quality.

Only recently, through expert reports, did Texas indicate that it believed water quality is an issue in this case. This is an improper and back-door way to introduce new allegations that are not within Texas's complaint, and it clearly does not meet Rule 8's "fair notice" requirement. As in *Oliver*, New Mexico has spent years investigating and defending against the claims within Texas's Complaint, none of which are based on water quality, and all of which are based on quantity. Protecting New Mexico from having to guess at the scope of discovery or to engage new experts on water quality matters as a result of Texas's own expert disclosures undeniably is a primary purpose of Rule 8's notice-giving function. *See Brown v. Califano*, 75 F.R.D. 497, 498 (D.D.C. 1977).

II. Texas's Water-Quality-Related Expert Disclosures Are Not Related To the "Task At Hand" and Would Be Prejudicial to New Mexico if Not Stricken.

Pursuant to Federal Rule of Evidence 702(a) and (d), an expert may provide evidence when his or her "knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; and the expert has reliably applied the principles and methods to the facts of the case." *Daubert v. Merrell Dow Pharmaceuticals, Inc.* is the leading case on the scope of evidence Rule 702 encompasses. *See* Fed. R. Evid. 702, Committee Notes on 2000 Amendment. In *Daubert,* the Supreme Court stated that Rule 702 "assign[s] to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and *is relevant to the task at hand*." 509 U.S. at 597 (emphasis added). "Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Id.* at 591 (*citing* 3 Weinstein & Berger ¶ 702[02], p. 702–18).

Daubert also addressed Federal Rule of Evidence 403's permissive exclusion of evidence that is not relevant or results in unfair prejudice, despite the relatively wide latitude that expert testimony is given under Rule 702:

> Rule 403 permits the exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of *unfair prejudice*, confusion of the issues, or misleading the jury . . . ." Judge Weinstein has explained: "Expert evidence can be both powerful and quite misleading because of the difficulty in evaluating it. Because of this risk, the judge in weighing possible prejudice against probative force under Rule 403 of the present rules exercises more control over experts than over lay witnesses."

Id. at 595 (*quoting* Jack B. Weinstein, *Rule 702 of the Federal Rules of Evidence Is Sound; It Should Not be Amended*, 138 F.R.D. 631, 632 (1991)) (emphasis added).

Texas's expert disclosures, to the extent that they concern water quality, are irrelevant to this case and, as further argued in Paragraph IV below, result in unfair prejudice to New Mexico. As described in Section I above, Texas's Complaint alleges injury and damages stemming from the value of the quantity of water lost to Texas, allegedly as a result of New Mexico's depletions; it does not allege any injury or damages, express or implied, based on water quality. On the basis of Texas's Complaint, New Mexico has retained experts, sought discovery, and prepared technical analyses to defend against Texas's water *quantity* claim. Until now, New Mexico had no indication that it would need to retain a water quality expert or to otherwise prepare, investigate and defend itself against water quality claims, much less water quality claims based on Texas's own pumping of groundwater in Texas. Texas's expert opinions about water quality thus are irrelevant to Texas's claims in this case and would result in unfair prejudice if not stricken.

III. Texas's Water-Quality-Related Discovery, Including Subpoenas, Are Not Relevant to Texas's Pleaded Claims.

Through recent subpoenas issued by Texas, it appears Texas is now seeking to conduct additional discovery related to water quality. The subpoenas issued at the end of May seek to conduct soil, water, and plant samples on properties in New Mexico and Texas. New Mexico

anticipates that such evidence will be used to attempt to supplement the expert disclosures described above.

Rule 26(b)(1) sets out the permissible scope of discovery:

> Parties may obtain discovery regarding any nonprivileged matter that is *relevant to any party's claim or defense and proportional to the needs of the case*, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

Fed. R. Civ. P. 26(b)(1) (emphasis added). "To fall within the scope of discovery under the current version of Rule 26(b)(1), discovery must be both relevant to a party's claim or defense and "proportional to the needs of the case." *In re Bard IVC Filters Products Liability Litigation*, 317 F.R.D. 562, 563-64 (D. Ariz. 2016).

In this instance, water quality has never been a topic of any of the matters Texas raised in this case until these recent expert disclosures and subpoenas seeking to collect new water quality data. As noted by the district court in *Deluxe Fin. Servs., LLC v. Shaw*:

> The advisory committee notes to the 2015 amendments state that "the party seeking discovery [has] the burden of addressing all proportionality considerations," noting in particular that "[a] party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them." At the same time, the objecting party will ordinarily have better information about burden or expense. In the end, as the advisory committee notes emphasize, it is the "collective" responsibility of the parties and the Court "to consider the proportionality of all discovery."

No. 16-CV-3065 (JRT/HB), 2017 WL 7369890, at *4 (D. Minn. Feb. 13, 2017) (citation omitted). In *Deluxe Financial Services*, a non-party argued that subpoenas were a "fishing expedition" to discover new claims against the non-party himself. *Id*. at *2. The district court held that "the scope of the subpoena should be limited to documents that will shed light on those

claims [against the defendant in the case]" and that "[subpoenas] should not be the launching pad for a purely exploratory mission in search of potential new claims." *Id.* at *4.

Texas has not established, at any time prior to its expert disclosures and recent subpoenas, that matters regarding water quality are "relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). Therefore, it is proper for this Court to rule that evidence related to water quality, including information derived from land inspections conducted pursuant to Texas's subpoenas, is not discoverable and will not be admissible because it is not relevant to Texas's existing claims.

IV. Evidence Pertaining to Water Quality Should Be Stricken to Avoid Additional Prejudice to New Mexico.

Additional support for New Mexico's position can be found in *Montana v. Wyoming*, No. 137, Original. In that case, Montana's complaint included a general allegation that Wyoming had violated Article V of the Yellowstone River Compact, harming Montana. Memorandum Opinion of the Special Master on Montana's Claims under Article V(B) at 6-7, *Montana v. Wyoming*, No. 137, Original (Dec. 20, 2011) ("Montana Order") (summarizing Montana's complaint). Article V of that compact contains distinct subparts, including subpart V(A), which protects pre-1950 water uses in both Montana and Wyoming, and subpart V(B), which apportions water to each State for post-1950 uses. *Id.* at 4. Even though Montana was careful not to limit its allegations to any particular subpart of Article V, the special master found that the only specific factual allegations in Montana's complaint focused on alleged injury to pre-1950 water uses, or Article V subpart (A) of the Yellowstone River Compact. *Id*. at 11. As a result, he ruled Montana could not raise claims alleging violations of Article V subpart (B) of the Yellowstone River Compact without first seeking leave to amend its complaint. *Id*. at 15.

Like Montana's complaint in *Montana v. Wyoming* and the plaintiff's complaint in *Oliver*, Texas's Complaint failed to make sufficient factual allegations regarding water quality to give New Mexico fair notice of Texas's water quality claims or to authorize Texas's expert disclosures on water quality. Texas should not be permitted to undermine New Mexico's ability to defend itself and to evade Rule 8's fair notice requirement by changing its theory of liability and damages almost seven years into this case without providing prior notice to New Mexico and seeking approval from the Court in the form of a motion for leave to amend its complaint.

If Texas's water quality expert disclosures are allowed to stand, New Mexico will suffer significant prejudice to its ability to vigorously defend against Texas's claims. Until now, New Mexico had no fair notice that it would need to retain a water quality expert or to otherwise prepare, investigate and defend itself against water quality claims. Yet, based on the current schedule established by the CMP, New Mexico is required to file a report rebutting these disclosures by the current October 31, 2019 deadline. To do so, it will need to educate a water quality expert or experts on this lengthy and complex case. The expert(s) will then need to review Texas's multiple water quality expert disclosures and the evidence supporting them, gather their own evidence, and draft one or more rebuttal disclosures, all within a very brief amount of time.

Additionally, Texas's tardy water quality subpoenas create additional prejudice to New Mexico. Evaluating the sampling procedures, testing methods, and test results associated with these subpoenaed inspections will require substantial time from New Mexico's retained water quality expert(s), further complicating their ability to prepare effective rebuttal disclosures. Then, in order to use this new information, Texas presumably will need to file late expert disclosures, well past its May 31, 2019 initial expert disclosure deadline. If New Mexico

receives any such supplemental disclosures before its own October 31, 2019 deadline, reviewing and responding to them will create yet another task for New Mexico's quality expert(s). If New Mexico receives them after October 31, its expert(s) won't have any opportunity to review and respond to them in their initial report(s). No matter when Texas makes such disclosures, they will further prejudice New Mexico.

Finally, a great deal of discovery has already been propounded in this case, but little of it concerns water quality. New Mexico has requested production of documents from Texas, El Paso County Water Improvement District No. 1, the City of El Paso, and ten other entities in Texas. None of New Mexico's requests sought information on water quality because New Mexico had no fair notice quality was an issue in this case. If the Court finds Texas's water-quality-based injury and damage claims are well-pleaded, then New Mexico will issue supplemental requests for water quality information and will do so in short order. However, the CMP allows 60 days for responses, and New Mexico's expert disclosures are due October 31. Even if New Mexico promptly receives adequate and complete responses to its supplemental document requests, its experts will have limited time to evaluate this information and draft their own disclosures. Unless Texas's water quality disclosures are struck, New Mexico will be forced to investigate an entirely new universe of facts and data and prepare responses to Texas's water quality disclosures.

To guard against the substantial prejudice Texas's untimely attempt to raise water quality issues creates for New Mexico, Texas's experts, expert reports, and portions of reports pertaining to water quality, as well as any opinions derived from the subpoenaed land inspections that speak to water quality, should be struck on the basis that this issue is not related to the claims alleged in Texas's Complaint, depriving New Mexico of fair notice of such allegations.

WHEREFORE, the State of New Mexico respectfully requests that the Special Master strike the expert disclosures of David Sunding and Lydia Dorrance in their entirety; and requests that the Special Master strike those portions of the expert disclosures of Joel Kimmelshue, John Balliew, Al Blair, and Art Ivey that discuss water quality or salinity; enter an order precluding Texas's experts from testifying on these subjects; and require Texas to amend its Complaint and refile its water quality expert disclosures if it wishes to pursue its water quality claims, with new deadlines for water quality expert disclosures established for all parties.

Respectfully submitted: September 5, 2019.

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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 the 5th of September, 2019, I caused true and correct copies of the **State of New Mexico's Motion to Strike Texas's Expert Disclosures on Water Quality** to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 5th day of September, 2019.

/s/ Michael A. Kopp

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