

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

DECLARATION OF DAVID A. ROMAN IN SUPPORT OF
NEW MEXICO'S MOTION TO STRIKE TEXAS'S
EXPERT DISCLOSURES ON WATER QUALITY

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September 30, 2019

I, David A. Roman, declare as follows:

1. I am an attorney admitted to practice law before the United States Supreme Court and am a partner with Robles, Rael & Anaya, P.C., attorneys for the State of New Mexico (“New Mexico”) in the above-captioned case. The following matters are within my personal knowledge, and if called as a witness, I can competently testify thereto.

2. On November 8, 2018, New Mexico received a document titled “Requests for Production of Documents, Set One to New Mexico” (“Texas Request for Production”) from the State of Texas (“Texas”). Of the 90 requests in that document, only two sought information related to water quality and groundwater quality in the Lower Rio Grande. Texas Request for Production at 14. The Texas Request for Production defined the “Lower Rio Grande” as “that portion of the Rio Grande River, as defined by the [sic] YOU AND OSE, that extends from Elephant Butte Dam to the border of New Mexico AND Texas/Mexico” *Id.* at 3.

3. On December 24, 2018, New Mexico submitted timely objections to Texas’s requests seeking information related to water quality on the basis that the requests sought “information about the Rio Grande River that is not relevant to any party’s claim or defense in the instant litigation and is outside the bounds of Federal Rule of Civil Procedure 26(b).” State of New Mexico’s Objections to the State of Texas’s Requests for Production of Documents, Set One to New Mexico, at 26.

4. On February 6, 2019, New Mexico made a timely production of documents in response to the Texas Request for Production. This production of documents did not contain any documents responsive to Texas’s requests seeking information on surface and groundwater quality in the Lower Rio Grande.

5. On March 29, 2019, New Mexico made a supplemental production of documents in response to the Texas Request for Production. This supplemental production also did not contain any documents responsive to Texas's requests seeking information on surface and groundwater quality in the Lower Rio Grande.

6. Despite New Mexico's objection that Texas's requests for documents related to water quality were not relevant to this case and were outside the scope of Rule 26(b), and despite New Mexico's refusal to produce any documents responsive to these requests, Counsel for New Mexico never received any communications in any form from counsel for Texas objecting to New Mexico's refusal to produce documents pertaining to water quality, explaining the relevance of these requests to a claim or defense in this action, or demanding that New Mexico comply with Texas's discovery request. Texas also did not seek to compel discovery regarding these requests. Counsel for New Mexico interpreted Texas's failure to protest as an admission that these requests were not relevant to the case and were outside the scope of discovery.

7. Between November 16, 2018 and December 18, 2018, Texas took the depositions of the following individuals as fact witnesses: Jesus Reyes, Art Ivey, George Brooks, Larry Ceballos, Greg Daviet, Bobby Kuykendall, Jerry Franzoy, Joe Paul Lack, Mike McNamee, Kary Samuel Salopek, and Robert Sloan. On February 6, 2019, Texas took the deposition of Jorge Garcia, and on May 7, 2019, Texas took the deposition of Estevan Lopez. Counsel for New Mexico participated in these depositions.

8. At these depositions, counsel for Texas asked some questions relating to water quality issues. Counsel for New Mexico did not understand why these questions were raised, and assumed Texas was seeking information for possible new claims or defenses. Out of an abundance of caution, counsel for New Mexico asked certain of these witnesses questions related

to water quality issues, as well. New Mexico did not object to these questions at the time as it was not clear that Texas was actually preparing to raise new claims, and the majority of the questions directed at these witnesses related to water quantity issues.

9. In addition, all but two of these depositions were taken before New Mexico objected to Texas's requests for production of documents related to water quality, and only one of the depositions was taken after New Mexico declined to produce any documents related to water quality, and Texas failed to object to this refusal. Under these circumstances, New Mexico did not understand Texas to be raising any new claims such that conferral regarding the relevance of quality information to the case was necessary.

10. On May 31, 2019, New Mexico received disclosures of expert witnesses from Texas and the United States of America. Upon reviewing these disclosures, counsel for New Mexico were surprised to find that three of Texas's retained experts—Drs. Lydia Dorrance, Joel Kimmelshue, and David Sunding—issued reports based, in whole or in part, on water quality. New Mexico was most surprised to find that these reports suggest Texas is now claiming that New Mexico is liable for harm Texas allegedly suffers from using its own groundwater.

11. As of May 31, 2019, New Mexico had not retained the services of an expert on water quality because New Mexico was unaware Texas intended to raise water quality claims.

12. On or about July 2, 2019, during separate calls with Stuart Somach, counsel of record for the State of Texas, and Stephen McFarlane, counsel for the United States of America, I raised concerns with both parties regarding what New Mexico believed were deficiencies in their disclosures of non-retained expert witnesses pursuant to Federal Rule of Civil Procedure 26(b)(2)(C). In addition, I separately raised the issue with Mr. Somach of New Mexico's belief

that Texas's expert disclosures related to water quality were outside the scope of what was pled in Texas's Complaint.

13. Regarding the issue of non-retained expert disclosures, Mr. Somach suggested Texas might supplement those disclosures to provide additional information. He requested that I send him a letter spelling out New Mexico's concerns in more detail, which I agreed to do.

14. Regarding the issue of Texas's water quality disclosures, Mr. Somach emphatically disagreed that those disclosures were improper, and contended they were in keeping with what Texas pled in its Complaint. To the best of my recollection, he declined to withdraw or supplement those disclosures to address New Mexico's concerns, nor did he indicate that he would consider doing so if we spelled out our concerns in greater detail. Given the nature of the relief requested, this did not surprise me, as I did not see any middle ground with respect to our positions. I then informed him that, given our respective positions, New Mexico would likely have to file a motion to strike these disclosures so that the Court could evaluate our positions. My recollection is that Mr. Somach indicated his understanding while maintaining his position that he believed the disclosures were proper. I do not recall Mr. Somach requesting that I send him a letter explaining New Mexico's concerns with Texas's quality disclosures, nor do I recall offering to send such a letter.

15. Following my call with Mr. Somach, I sent him a letter describing New Mexico's concerns with Texas's disclosures of non-retained expert witnesses. However, I did not draft or send him a letter regarding New Mexico's concerns with Texas's water quality disclosures. It was my clear understanding following the call that Texas strongly disagreed with New Mexico that these disclosures were improper. I did not believe that further conferral with Texas regarding this issue was likely to be productive. I also did not believe Texas expected any

further conferral from New Mexico. Based on this, it was and is my belief that my call with Mr. Somach satisfied the conferral requirements of Section 12 of the Case Management Plan.

16. Because Texas's non-retained expert witness disclosures also related to water quality issues, and to simplify the briefing schedule for any motions filed, New Mexico elected to wait until it received supplemental disclosures of Texas's non-retained experts prior to filing its motion to strike Texas's salinity disclosures.

17. On August 12, 2019, New Mexico received a supplemental disclosure regarding Texas's non-retained expert witnesses. Although the disclosure provided some additional information regarding the subject matter of these witnesses' testimony, New Mexico believes this disclosure still falls short of the requirements of Rule 26(a)(2)(C). Counsel for New Mexico continue to work with counsel for Texas regarding the adequacy of Texas's non-retained expert witness disclosures, but determined it would be counterproductive to continue to delay filing the motion to strike Texas's water quality disclosures.

18. New Mexico acknowledges that in recent depositions, including the Rule 30(b)(6) deposition of El Paso Water and the depositions of Dr. Dorrance and Dr. Kimmelshue, it has asked questions regarding water quality issues. In light of Texas's water quality disclosures, New Mexico must inquire into these topics to guard against the possibility that its motion to strike these disclosures will be denied.

19. Attached as Exhibit A is a true and correct copy of a relevant excerpt of the rough transcript of the Oral Deposition of Dr. Joel Kimmelshue, taken on September 12, 2019.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed this 30th day of September 2019 in Denver, Colorado.



David A. Roman

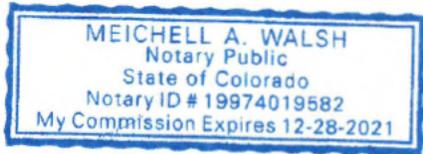
STATE OF COLORADO)
) ss.
COUNTY OF DENVER)

The foregoing Declaration of David A. Roman in Support of New Mexico's Motion to Strike Texas's Expert Disclosures on Water Quality was acknowledged before me on September 30, 2019, by David A. Roman of Robles, Rael & Anaya, PC.

My commission expires: 12/28/2021.



Notary Public



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◆

OFFICE OF THE SPECIAL MASTER

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

◆

This is to certify that on the 30th of September, 2019, I caused a true and correct copy of the **Declaration of David A. Roman in Support 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 30th day of September, 2019.

/s/ Michael A. Kopp

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EXHIBIT A

UNEDITED ROUGH DRAFT

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REPORTER'S NOTE: Please be aware that since this transcript is being provided in a rough draft form, there is going to be a discrepancy regarding page and line numbers when comparing the rough draft and the final transcript.

Also please be aware that the rough draft transcript may contain untranslated steno, a STENO DEFINE, an occasional REPORTER'S NOTE, and/or nonsensical English word combinations. All such entries will be corrected on the final transcript.

This transcript shall NOT be disclosed to any nonparty, either written or electronic, to anyone who has no connection to this case. This is an unofficial transcript, which should NOT be relied upon for purposes of verbatim citation of testimony.

This uncertified and unedited transcript contains no appearance page, certificate page, index or certification.

E X A M I N A T I O N

BY MS. THOMPSON:

Q. Good morning. My name is Lisa Thompson. I'm here on behalf of the State of New Mexico, and you're here to have your deposition taken in the lawsuit Texas

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v. New Mexico. First, before we get start, may I call you Joel or will you prefer that I refer to you as Dr. Kimmelshue?

A. You can call me Joel.

Q. Thank you very much.

MS. THOMPSON: And then just for the record, I'd like the folks on the phone to identify themselves, please. Is there anyone on the phone?

MS. STEVENSON: This is Sarah Stevenson for El Paso County Water Improvement District No. 1. And are we going to be able to get the realtime transcript?

THE REPORTER: Yes, you can. We need to go off the record for one minute if they want that.

MS. THOMPSON: Okay. We'll go off the record.

(Break.)

MS. THOMPSON: Okay. So we're back on the record. Anyone on the phone, would you please identify yourself?

MR. ALLEN: This is Rick Allen
Transpiration Plus working with New Mexico.

MS. BARNCASTLE: This is Samantha
Barncastle for the Elephant Butte Irrigation District.

Q. (BY MS. THOMPSON) All right. Joel, will you please state your full name for the record?

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Q. Sorry. The one that's not on the list that you mentioned to me first.

A. Oh, for water fix for the State Water Resources Control Board. State your question again. I'm sorry.

Q. No problem. Were you deposed for that case?

A. I don't think I was. I think I just went straight to -- in front of the Board itself.

Q. Okay. You'd probably remember.

A. What's that?

Q. I said you'd probably remember so I suspect if it doesn't ring a bell, you weren't deposed?

A. I'm going to check on that for you.

Q. Okay. Fair enough.

A. I'm not going to --

Q. No, that's fine. Thank you. Do you recall about when you were engaged by Texas to work on this case?

A. 2014 -- 2014. Yeah, 2014/2015.

Q. And was your original scope that you were looking at mapping an ET alone or did it include salinity review?

A. It was just mapping an ET.

Q. And when did the salinity component get added?

A. Probably within the last year.

Q. And do you know why it got added in the last

UNEDITED ROUGH DRAFT

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year?

A. There was a need for -- as we talked about before, for Dr. Sunding and the gentleman from Texas A&M to have a fairly decent comprehensive guidelines of salinity functions as affecting crop growth for Dr. Sunding and -- and then leveraging what we did, as I mentioned before, about mapping -- using our mapping to

make sure that the points that he wanted to take sampling on were, again, not in roads and large enough representative fields and things like that.

Q. Do you happen to know when Dr. Sunding first became involved in the case?

A. It was early on, as well. 2014/'15, I think.

Q. And do you know if, as part of his work, the salinity analysis that he does was added within the last year, as well?

A. I have no idea.

Q. Did you have any discussions with Dr. Sunding related to salinity prior to your work in the last year on salinity review?

A. It only would have related to that part in my expert report about salinity.

Q. Okay.

A. And that time only.

Q. Okay. In your report, salinity section shows