

No. 141, Original

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In the  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO,

Defendants.

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**OFFICE OF THE SPECIAL MASTER**

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**THE STATE OF TEXAS'S OBJECTION AND REQUEST TO STRIKE  
CUMULATIVE AND/OR DUPLICATIVE WITNESS TESTIMONY AND  
REQUEST FOR CONFIRMATION OF WITNESS LIST**

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October 15, 2021

**I. OBJECTION TO CUMULATIVE AND/OR DUPLICATIVE WITNESS TESTIMONY**

Pursuant to Federal Rule of Evidence 403, the State of Texas (Texas) objects to the State of New Mexico's (New Mexico) proposed presentation of duplicative and/or cumulative witness testimony. New Mexico's Anticipated Order of Witnesses for October 2021 Remote Trial Setting (Docket No. 599)<sup>1</sup> includes four witnesses with identical descriptions of expected testimony. For witnesses David Salopek, Shayne Franozy, Randy Garay, and Sally Stahmann-Solis (collectively, "New Mexico Farmers"), the scope of their anticipated testimony is as follows:

[The witness'] expected testimony will include but not be limited to sources of irrigation water in New Mexico's Lower Rio Grande, impacts of the 2008 Operating Agreement, farming operations, EBID operations, interactions with the OSE, the economics of New Mexico's Lower Rio Grande agriculture, and responses at trial to fact or expert evidence presented.

Docket 599 at 2, 3, 7, State of New Mexico's Anticipated Order of Witnesses for the October 2021 Remote Trial Setting lodged with the Special Master pertaining to witnesses' descriptions for the New Mexico Farmers.

This duplicative description also appears for the New Mexico Farmers in the New Mexico's Final Witness List (Aug. 25, 2021) (Docket No. 565, App. A at 4-5, 7-8). New Mexico further disclosed each of the New Mexico Farmers in a supplemental Rule 26 disclosure on August 19, 2020, just days before the close of discovery, also with identical descriptions for each: "Sources of irrigation water, impacts of 2008 OA, farming operations, EBID operations, interaction with OSE, economics of LRG agriculture."<sup>2</sup>

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<sup>1</sup> The New Mexico Farmers all remain on New Mexico's Revised Anticipated Order of Witnesses for October 2021 Remote Trial Setting (filed Oct. 15, 2021).

<sup>2</sup> A copy of New Mexico's Supplemental Rule 26(a)(1) Disclosures is attached as Exhibit A to the Declaration of Richard S. Deitchman in Support of the State of Texas's Objection and Request to Strike Cumulative and/or Duplicative Witness Testimony and Request for Confirmation of Witness List.

Accordingly, it appears that New Mexico seeks to call the four New Mexico Farmers to testify on the exact same subjects. The probative value, if any, of hearing identical testimony from the New Mexico Farmers is substantially outweighed by a danger of wasting time, judicial resources, and needlessly presenting cumulative evidence. *See* Fed. R. Evid. 403. New Mexico’s approach contrasts with Texas’s non-cumulative presentation of farmer testimony: Mr. Sloan testified regarding, among other topics, his farming operation in EBID in New Mexico and Mr. Ivey testified regarding, among other topics, his farming operation in the El Paso County Water Improvement District No. 1 in Texas. Texas requests that the Special Master limit New Mexico to one witness who may testify as to the subjects described in the scope of anticipated testimony.

## **II. REQUEST FOR CONFIRMATION OF WITNESS LIST**

Texas requests clarification regarding the witnesses that New Mexico intends to call. New Mexico has listed at least eight “may-call” witnesses, including up to three witnesses listed in a catch-all category for “Former NM State Engineers.” Docket No. 565, App. A at 15. In the State of New Mexico’s Revised Anticipated Order of Witnesses for October 2021 Remote Trial Setting (Oct. 15, 2021), New Mexico has “reserve[d] the right to call any witness from its ‘Will-Call’ or ‘May-Call’ lists as reflected in Appendix B of the State of New Mexico’s Pretrial Conference Statement filed on August 25, 2021 [Dkt. 565].”

Texas requests that the Special Master require New Mexico to confirm their final witness list, including may-call witnesses, for the Fall stage of the trial so that Texas and the United States have adequate time to prepare for the testimony and document

exchanges that are triggered by the dates for witness testimony. In addition, Texas requests that New Mexico be required to identify the “Former NM State Engineers” they intend to call. Texas is adversely prejudiced by an attempt to call some unidentified witness under this generic category at this stage of trial.

Dated: October 15, 2021

Respectfully submitted,

s/ Stuart L. Somach

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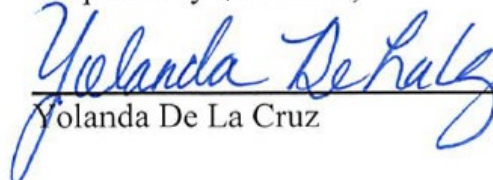
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**CERTIFICATE OF SERVICE**

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This is to certify that on this 15th day of October 2021, I caused a true and correct copy of **THE STATE OF TEXAS'S OBJECTION AND REQUEST TO STRIKE CUMULATIVE AND/OR DUPLICATIVE WITNESS TESTIMONY AND REQUEST FOR CONFIRMATION OF WITNESS LIST** to be served upon all parties and *amici curiae*, by and through the attorneys of record and/or designated representatives for each party and *amicus curiae* in this original action. As permitted by order of the Special Master, and agreement among the parties, service was effected by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Respectfully submitted,

  
Yolanda De La Cruz

Dated: October 15, 2021

**SERVICE LIST FOR ALL PARTIES AND AMICI CURIAE**

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