

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

**RESPONSE TO STATE OF NEW MEXICO'S MOTION TO AMEND TRIAL
MANAGEMENT SCHEDULE ALLOWING NEW MEXICO TO DEPOSE WITNESSES
FOR UNITED STATES INTERNATIONAL BOUNDARY AND WATER COMMISSION
FOLLOWING CLOSE OF DISCOVERY AND TO FILE DISPOSITIVE MOTIONS
INCORPORATING SUCH TESTIMONY AFTER DISPOSITIVE MOTIONS
DEADLINE**

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I. Introduction and Summary of Argument

The State of New Mexico moves for a scheduling order that: (1) extends the period for depositions of United States’ witnesses from the present August 31 discovery deadline to November 30, 2020; (2) extends the deadline for dispositive motions relating to the United States International Boundary Water Commission (IBWC) from October 15, 2020 to December 21, 2020; (3) shortens the deadline for the United States to complete its production of electronically stored information (ESI) from August 31, 2020 to August 15, 2020; and (4) seeks an order requiring the United States to help New Mexico cull the documents the United States has produced to New Mexico based on previously agreed-upon ESI search terms. *See* New Mexico’s Motion to Amend Trial Management Schedule Allowing New Mexico to Depose Witnesses for United States International Boundary and Water Commission Following Close of Discovery and to File Dispositive Motions Incorporating Such Testimony After Dispositive Motions Deadline (the “Mot. to Amend”), filed July 23, 2020 [Doc. No. 384]. Because New Mexico has not shown that the requested relief is necessary or proportionate, the motion should be denied.

New Mexico’s requested amendments are unjustified. New Mexico contends that extensions are necessary because it has been unduly burdened by the United States’ production of ESI from the IBWC. But New Mexico fails to show that the burden associated with this one small subset of the United States’ production justifies the extraordinary relief it is seeking—including a three-month extension of the discovery deadline that is likely to affect the trial schedule. Moreover, New Mexico’s asserted injury is largely self-inflicted. As detailed below, New Mexico has refused to accept reasonable proposals from the United States to narrow the production further, and New Mexico has refused to provide guidance about the subject matter in

the IBWC ESI that New Mexico believes may be relevant to its defenses, now that its counterclaim against the IBWC has been dismissed. It seems unlikely that granting New Mexico expansive extensions of the discovery schedule would prompt it to be any more responsive than it has been to date.

New Mexico's requests should also be rejected because more limited remedies are available. The United States is willing to work with New Mexico, as it has done for many months, to address its concerns. Specifically, the United States is willing to discuss any proposal from New Mexico about how it might narrow the production, and the United States is willing to consider depositions of IBWC witnesses after the August 30 discovery deadline, within reason. New Mexico's requests for Court-ordered relief beyond these accommodations exceed what is reasonable and should be denied.

II. Background of the Dispute

The IBWC administers the United States' treaty obligations to Mexico relating to the Rio Grande and the international boundary. Its jurisdiction extends downstream on the Rio Grande to the Gulf of Mexico. Relevant here, the IBWC administers the 1906 Convention with Mexico, under which the United States provides Mexico with water from the Rio Grande Project. The United States' Complaint in Intervention alleges that New Mexico's failure to protect the Project water supply has interfered with the United States' performance of its obligations under the Convention. The IBWC was also the subject of one of New Mexico's Counterclaims, which alleged that New Mexico was injured by the IBWC's failure to maintain the Rio Grande channel. The Special Master dismissed New Mexico's counterclaims on March 31, 2020.

The United States' production of ESI from the IBWC is another step in the years-long process of document production in this case. The initial disclosure of documents from the parties

started in September 2018. By early 2019, the United States had produced 26,938 documents from the Bureau of Reclamation (Reclamation); 17,557 documents from the IBWC; and 328 documents from the U.S. Army, for a total of 44,823 documents. The production of ESI began in the fall of 2019.

The present dispute involves the production of ESI from the IBWC and, specifically, the search terms used to generate the IBWC production. Pursuant to the Stipulation Regarding Procedure for Production of Documents and Electronically Stored Information (“ESI Stipulation”), filed November 14, 2018 [Doc. No. 142], the parties conferred and in June 2019 stipulated to a set of search terms. *Id.* ¶ 12(a). The list contained 418 search term combinations and limiters. *See* Mot. to Amend 5.¹ But this initial list was flawed. It included spelling errors, as well as search syntax errors that resulted in the identification of an inordinate number of responsive documents. The United States alerted the parties to these errors in the search list in a November 14, 2019 email. *See* Mot. to Amend, Ex. F. The United States eliminated the erroneous entries and circulated a corrected list of 372 search combinations. *Id.* at Ex. E. New Mexico characterized these clerical corrections as an improper unilateral departure from the search term list. Without engaging with the substance of what the United States had done, New Mexico declared that it was proceeding to “do what we needed to do within the confines of our (ethical) obligations. . . .” *Id.* at Ex. F.

The United States continued with its production. First, the United States applied the search term list to Reclamation’s databases. Between October 18, 2019, and June 5, 2020, the United States produced 54,396 documents from Reclamation ESI, covering a period of nearly two decades. This effort entailed a substantial commitment of resources to document review,

¹ “Limiters” are terms stipulated by the parties to restrict search results to information that is more likely to be relevant to the claims in the case.

including review for privileged material associated with the lawsuits in state and federal court that were pending during this period.

The United States then applied the corrected ESI search terms to the IBWC database. This search yielded 486,042 documents after duplicates were removed. *See attached* Exhibit A (email from U.S. Department of Justice attorney Lee Leininger to New Mexico Office of the State Engineer attorney Shelly Dalrymple, dated June 2, 2020). An examination of these results showed that many search terms on the list that may have been appropriate for searching Reclamation documents were not suitable for IBWC. For example, the terms “district,” “allotment,” and “lower Rio Grande” generated documents relating to subjects within the IBWC’s jurisdiction along the entire border with Mexico, including the Gulf coastal area. The United States therefore generated a new list of search terms in order to focus the production on IBWC’s activities related to the Rio Grande Compact and the Rio Grande Project—including topics raised by New Mexico’s since-dismissed counterclaims. The proposed search list was shared with New Mexico on June 2, 2020. At that time, New Mexico was informed that the search, while greatly reducing the production, would still produce thousands of responsive documents. *Id.*

New Mexico waited three weeks to respond to the United States’ June 2 proposal of search terms focused on the IBWC. In a June 23 email, the State rejected the revised list and maintained that the United States must apply a modified version of original search term combinations agreed to in June 2019. *See* Mot. to Amend, Ex. I (referencing the State’s email sent on June 23). The parties conferred on this issue in a series of email exchanges. New Mexico ultimately approved a pared-down list of search terms. It demanded that the IBWC ESI documents generated from this list be produced no later than July 15. *See id.*

The United States ran New Mexico’s search list. It yielded approximately 200,000 documents. After correcting some syntax errors and reducing documents duplicating those previously produced, the United States was able to narrow the results to approximately 100,000 documents. Through further efforts to add reasonable and rational limitations and syntax corrections to the search terms, the United States reduced the production to an estimated 47,000 documents total. On July 15—the deadline stated by New Mexico—the United States produced the first batch of 29,120 fully text-searchable documents of IBWC ESI. New Mexico filed its motion to amend the trial schedule on July 23, complaining that the United States had produced too many documents. However, in order to respond to New Mexico’s demand that the United States produce the documents responsive to the modified list, the United States produced an additional 5,398 documents on July 27 and will serve its final production of approximately 13,000 documents shortly.

III. Argument

New Mexico has not shown that a significant continuance of the schedule is justified by the IBWC ESI. A party seeking to amend a scheduling order under Fed. R. Civ. P. 16(b) must demonstrate good cause for the amendment. As noted by New Mexico, the Rule 16(b) “good cause” standard focuses on the “movant’s diligence in attempting to meet the order’s requirements.” Mot. to Amend 13 (quoting *Rahn v. Hawkins*, 464 F.3d 813, 822 (8th Cir. 2006)). New Mexico has not shown that it cannot meet the scheduling deadlines in this case, or that the expansive extensions it is requesting are necessary or proportionate to address the burden New Mexico is attributing to the IBWC ESI documents.

New Mexico’s request should be viewed in light of the course of its recent dealings with the United States regarding the production of the IBWC ESI. The search for ESI should be a

collaborative and cooperative process. *See* The Sedona Principles, Third Edition: Best Practices, Recommendations & Principles for Addressing Electronic Document Production, 19 Sedona Conf. J. 1, 76-78 (2018). On June 2, after producing over 54,000 documents of Reclamation ESI, the United States attempted in good faith to negotiate a reasonable and useful set of search terms with New Mexico in order to produce documents from the IBWC likely to be relevant to the issues in this case. Had New Mexico timely responded, the search could have been completed by mid-June, and, depending on the success of the discussions, New Mexico could have received documents more quickly, and those documents could have been more responsive to what New Mexico actually intends to use. Instead, the State responded on June 23 with the original June 2019 search list, with limited modifications that do not address the problems in the original list. The modified list demanded by New Mexico would generate at least 47,000 responsive documents. The “data dump” of which New Mexico complains (Mot. to Amend 3) is the production of those 47,000 documents, after New Mexico rejected alternatives identified by the United States that could have yielded a fraction of that amount. Diligence by New Mexico in responding to the United States could have alleviated some of the burden it now claims that it faces in meeting the deadlines.

New Mexico’s professed inability to meet its deadlines for discovery regarding IBWC is also questionable, in light of the dismissal of New Mexico’s counterclaim against the IBWC. The original ESI search term list was developed while that counterclaim was pending. New Mexico has never clarified which of its defenses depend upon the production of IBWC documents – or IBWC ESI specifically. After all, New Mexico has had over 17,000 IBWC scans of hard-copy documents produced by the United States for over a year, not to mention the Reclamation scanned hard-copy documents and ESI. Absent some clarity from New Mexico

about how the IBWC ESI may pertain to future dispositive motions, it is impossible to conclude that any such motions depend on that information, to the point where New Mexico's ability to meet its deadlines would be prejudiced. New Mexico contends that IBWC ESI about the distribution of the waters of the Rio Grande and "factors that could affect 'where the waters of the Rio Grande have been going'" are "critical for New Mexico's defense." Mot. to Amend 4. But IBWC's diversion and accounting records were produced in the IBWC and Reclamation disclosures of hard-copy documents in 2018 to 2019. Further, all of the IBWC ESI has been produced in formats that allow for computerized keyword searching. New Mexico does not and cannot show an undue burden in reviewing the documents when it may simply use search queries to filter out the material it does not want. The United States attempted to do that filtering itself, but New Mexico balked at the idea. *Contra* Mot. to Amend 10. In light of the ability to conduct searches on the text, New Mexico's request that the United States be *ordered* to help New Mexico cull the documents is inappropriate. *See, e.g., Fed. Deposit Ins. Corp. v. Boggus*, No. 2:13-cv-00162-WCO, 2015 WL 11457700, at *1–2 (N.D. Ga. May 13, 2015) (declining to order agency to conduct responsiveness review of documents produced in text-searchable format in response to search term list).

Finally, the relief requested in New Mexico's motion is unreasonable and unwarranted because less disruptive relief is available. The United States does not oppose an extension of time to **October 1, 2020**, for New Mexico to depose IBWC personnel. The United States has discussed this issue with counsel for New Mexico, and conveyed its willingness to agree to such an extension. New Mexico has not shown that it requires a full additional month for those depositions, particularly where its counterclaim has been dismissed.

A resolution may also be possible with respect to the briefing deadline. New Mexico's request appears to seek an extension of the dispositive motion deadline to December 21, 2020, at least with respect to the IBWC. Because there is no counterclaim relating to the IBWC, the basis for this request is unclear, and any separate motion relating to the IBWC at that late date is likely to affect the trial schedule. In any event, in discussions with counsel for New Mexico, the United States was advised that New Mexico's requested relief regarding dispositive motions may be limited to the use of material produced in any IBWC depositions and ESI productions as a basis for *opposition* to dispositive motions or to show a dispute of material fact. The parties may be able to address this more limited concern through negotiation. With that possibility, amending the briefing schedule is premature and unwarranted.

IV. Conclusion

In sum, New Mexico has presented no compelling reasons to amend the discovery schedule based on the IBWC ESI production. The United States will continue to work with New Mexico to determine whether additional reduction of document production is feasible, and to address potential accommodations for depositions and briefing without disruption of the trial schedule.

For these reasons, as detailed above, New Mexico's Motion to Amend the Schedule should be denied.

Respectfully submitted this 31st day of July, 2020,

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From: [Leininger, Lee \(ENRD\)](#)
To: [Dalrymple, Shelly, OSE](#); [Theresa Barfield](#); chad.wallace@coag.gov
Cc: [Dubois, James \(ENRD\)](#)
Subject: RE: TX v NM: ESI discussion
Date: Tuesday, June 2, 2020 5:23:23 PM

Shelly and Theresa – We have run into a production problem with the International Boundary Waters Commission (IBWC) electronically stored information (ESI). Recall that we expanded the list of IBWC custodians from the list we originally presented (and the parties agreed to) last year. When we ran the ESI spreadsheet’s 372 separate search term combinations against the expanded IBWC custodians database, the search returned hundreds of thousands of documents (486,042). A review of the documents showed the vast majority are non-responsive. We then consulted with IBWC counsel and custodians to improve and limit the search identifiers with a concentration on this subject matter:

- 1.. Documents on Rio Grande channel maintenance.
2. Documents on Mexico’s use of Project/treaty water.
3. Documents on Mexico groundwater pumping within the Mesilla basin or the Hueco Bolson.
4. Any discussion of the 2008 OA.

With help from IBWC custodians and counsel we generated this new list of search terms likely to return relevant documents:

Name
Illicit AND coffer
Illicit w/20 diver*
Illicit w/20 (diver* AND water)
Mexic* w/20 illicit
Illicit w/20 report~
Illicit w/20 Juarez
Illicit w/20 El Paso
Coffer w/20 dam
Coffer w/20 diver*
Sediment AND dredg~
Sediment w/20 dredg~
Dredg* w/20 canalization
Dredg* w/20 rectification
Sediment w/20 canalization
Sediment w/20 rectification
Sediment w/20 "New Mexico"

Sediment w/20 "El Paso"
Plug w/20 (remov~ AND rectification)
Plug w/20 (remov~ AND canalization)
Sediment w/20 (remov~ w/20 canalization)
Sediment w/20 (remov~ w/20 rectification)
Sediment AND plug
Sediment AND remov~
Island AND dredg~
Island AND remov~
Transboundary AND aquifer
2008 w/20 "OA"
2008 w/20 (operating w/5 agreement)
EBID w/20 "OA"
EP1 w/20 "OA"

In addition, we ran the list for these custodians (please note that the IBWC official that New Mexico has requested to depose, Mr. Drucina, is on this list):

LIST OF CUSTODIANS

- Drusina, Ed
- Finn, Williams
- Riera, Alfredo
- Spencer, Sally

This new search has still generated tens of thousands of documents which we are reviewing and will be producing soon. Let's add this topic to our scheduled ESI call tomorrow and please let us know if you have any objections to the more focused procedure we have adopted and implemented. Thanks Lee

-----Original Appointment-----

From: Leininger, Lee (ENRD)
Sent: Tuesday, June 2, 2020 5:16 PM
To: Dalrymple, Shelly, OSE
Subject: Accepted: TX v NM: ESI discussion
When: Wednesday, June 3, 2020 10:30 AM-12:00 PM (UTC-07:00) Mountain Time (US & Canada).
Where: 800 747 5150 PIN 670 7610