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May 14, 2020

**Via Electronic and U.S. Mail**

Hon. Michael J. Melloy  
Special Master  
United States Circuit Judge  
111 Seventh Avenue, S.E., Box 22  
Cedar Rapids, IA 52401  
[Michael\\_Melloy@ca8.uscourts.gov](mailto:Michael_Melloy@ca8.uscourts.gov)

Dear Special Master Melloy,

In your May 5, 2020 Order and Amendment to Trial Management Schedule, you indicated that you intend to discuss four topics at the upcoming May 15<sup>th</sup> videoconference, including the current status of discovery and whether it would be appropriate to establish a deadline for submission of supplemental expert reports. Since your May 5<sup>th</sup> Order, there have been significant developments that directly relate to both of these topics.

As you are aware, at the May 1, 2020 telephonic hearing, Texas announced that it would be producing a supplemental expert report the following week. The production promised by Texas turned out not to be supplemental at all. Instead, four months late, Texas produced a completely new 91-page expert report seeking to challenge the hydrologic modeling of the New Mexico experts in its entirety. To complicate matters further, the 213 MB of computer files provided along with the new report appear to fall short of the complete backup required by the Case Management Plan ("CMP"). So not only is the supplemental report not actually supplemental, it also appears to lack the required data necessary for New Mexico to begin to analyze the new opinions of the Texas expert. Texas's reports and all their backups were required by the CMP to be produced on December 31, 2019. Our experts are currently investigating the extent of any lack of computer file backups. Once that is completed, we will need to obtain the missing files from Texas. We do not expect any problem in obtaining the required files from Texas, but analysis of the new expert opinions cannot begin until that process is complete.

Additionally, and although nothing at all was said by the United States at the May 1 hearing, or otherwise, about a supplemental US expert report, the United States produced a completely *new* expert modeling report last week, again more than four months after the CMP deadline. The US report did not supplement a prior rebuttal to the New Mexico modeling but instead was minted, like the Texas report, out of new cloth, with 246 GB of computer files of

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backup that need to be reviewed. Our experts are also reviewing whether all the backup computer files have been provided.

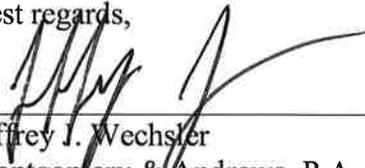
These significant disclosures, made more than four months after the deadline, interfere with the necessary depositions and subsequent preparation of New Mexico's rebuttal reports, and threaten to prejudice New Mexico by depriving it of a fair opportunity to respond to Texas and the United States. Indeed, they threaten to prevent the Court from developing a full and fair record.

These developments have put New Mexico in a difficult position, especially given New Mexico's commitment to moving this case expeditiously toward trial. New Mexico therefore requests that the late Texas and United States expert disclosures be an urgent matter added to the May 15<sup>th</sup> videoconference agenda. Normally, a motion to strike the new, out-of-time expert reports would be in order. However, given the strong policy of the Court to allow the development of a full record in original jurisdiction cases, we propose as an alternative that the Special Master take the actions necessary to avoid prejudice to New Mexico. In particular, New Mexico proposes that it maintain the current June 15 deadline for its rebuttal expert reports for all its non-modeling reports. These constitute approximately 2/3 of the expert reports New Mexico anticipates producing. For the modeling reports, which will include responses to the new US and Texas reports, *i.e.*, about a third of the New Mexico reports, we propose that those reports be due July 15, 2020. Recognizing that additional supplementation may be necessary for the reports filed on June 15, we believe this proposal meets the dual goals of moving the case forward expeditiously and providing the court with a fully developed record. This partial adjustment of deadlines still forces New Mexico to quickly evaluate and respond to the untimely and lengthy disclosures, but it recognizes and protects against the prejudice that would otherwise occur because of the lateness of the US and Texas reports.

We have conferred with Texas and the United States regarding the forgoing in hopes of obtaining their consent to New Mexico's proposal, but no agreement was reached.

New Mexico looks forward to discussing these and the other issues you have specified at the upcoming videoconference.

Best regards,



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cc: Counsel