

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
◆

**NEW MEXICO'S RESPONSE IN OPPOSITION TO TEXAS'S LETTER OF
FEBRUARY 16, 2021**
◆

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
CHOLLA KHOURY
Assistant Attorney General
ZACHARY E. OGAZ
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672

MARCUS J. RAEL, JR.*
LUIS ROBLES
SUSAN BARELA
Special Assistant Attorneys General
Robles Rael & Anaya
500 Marquette Ave NW #700
Albuquerque, NM 87102
marcus@roblesrael.com
505-242-2228

**Counsel of Record*

March 23, 2021

INTRODUCTION

Pursuant to the Special Master’s Order of March 2, 2021, the State of New Mexico (“New Mexico”) files this Response in Opposition to the State of Texas’s (“Texas”) Letter to the Special Master dated February 16, 2021. Texas’s letter requests that the Court strike New Mexico’s Motion to Strike Texas’s Late-Filed Expert Opinions, filed February 12, 2021 (“New Mexico’s Motion to Strike” or “N.M. Mot.”) on the grounds that such motion is allegedly untimely. Texas also requests that the Court strike evidence New Mexico filed with its reply briefs in support of its motions for partial summary judgment (“Reply Briefs”).¹ Because Texas’s letter is, in effect, a motion to the Court, New Mexico will refer to that letter herein as the “Texas Motion” or “Tex. Mot.”

ARGUMENT

I. New Mexico’s Motion to Strike Was Justified and Timely.

Texas makes no attempt to respond to the substance of New Mexico’s Motion to Strike, or to explain how its own untimely expert disclosures could be justified.² Instead, Texas argues, without support, that New Mexico was required to raise any objections to Texas’s new expert opinions either before December 22, 2020 (for expert declarations filed November 5, 2020), or before February 5, 2021 (for expert declarations filed December 22, 2020). Tex. Mot. 2.

In addition, to the extent that New Mexico seeks to preclude Texas’s use of this new evidence at trial, Texas argues that New Mexico’s Motion is premature because it was filed before

¹ In the alternative, Texas requests that Texas be allowed to file a sur-reply to the New Mexico declarations prior to the summary judgment hearing. However, that hearing was held on March 9, 2021, prior to completion of the agreed schedule for resolving the Texas Motion. This aspect of the Texas Motion is, therefore, now moot.

² Since the Texas Motion makes no attempt to respond to New Mexico’s Motion to Strike on the merits, New Mexico will not reargue the merits of its Motion to Strike in this Response, but continues to rely on New Mexico’s Motion to Strike as filed.

the Special Master established a schedule for filing motions *in limine*. *Id.* at 2 n.1. In other words, Texas claims that New Mexico’s Motion to Strike is either too late or too early.

Neither of Texas’s arguments finds support in Federal Rule of Civil Procedure 37, pursuant to which New Mexico filed its Motion to Strike. Federal Rule of Civil Procedure 37(c)(1) states “that if a party fails to provide the information required by Rule 26(a), ‘the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or harmless.’” N.M. Mot. 22 (quoting Fed. R. Civ. P. 37(c)(1)) (other citations and quotations omitted). The Advisory Committee notes to the 1993 Amendments describe Rule 37(c)(1) as a “self-executing sanction . . . without need for a motion.” Fed. R. Civ. P. 37, Advisory Committee Notes. It is not, therefore, incumbent on New Mexico to move to strike Texas’s untimely expert disclosures within any specified timeframe, or even to move to strike them at all. *See, e.g., Vanderberg v. Petco Animal Supplies Stores, Inc.*, 906 F.3d 698, 705 (8th Cir. 2018) (“Under Rule 37(c)(1), exclusion occurs automatically by operation of the rule”); *see also, e.g., Edens v. The Netherlands Ins. Co.*, 834 F.3d 1116, 1132 (10th Cir. 2016) (“While Rule 37(c)’s preclusion sanction may be self-executing, any discovery failure must be brought to the district court’s attention so that it can address whether the failure was ‘substantially justified or . . . harmless.’”) (quoting Fed. R. Civ. P. 37(c)(1)).

Further, Texas articulates no basis in the Texas Motion for the Court to find that New Mexico’s Motion to Strike Texas’s late expert opinion is untimely. Nor should Texas be permitted to remedy this defect in its reply. *E.g., Thorncreek Apartments III, LLC v. Mick*, 886 F.3d 626, 636 (7th Cir. 2018) (“[A]rguments raised for the first time in a reply brief are waived.” (quotation marks and citation omitted)). New Mexico’s Motion to Strike draws the Special Master’s and Court’s attention to Texas’s prejudicial discovery violations and to the sanctions that Rule 37(c)(1)

automatically imposes. Texas’s request seeking to strike New Mexico’s Motion to Strike should, therefore, be rejected.

II. There is No Legitimate Objection to the Declarations New Mexico Filed with Its Reply Briefs in Support of New Mexico’s Motions for Partial Summary Judgment.

In part two of its Motion, Texas complains about various declarations New Mexico submitted with its Reply Briefs in support of New Mexico’s Motions for Partial Summary Judgment.³ Texas acknowledges that “New Mexico, as a moving party, may submit additional evidence in a reply brief,” but then requests that Texas be given an opportunity to respond to this evidence. Tex. Mot. 2-3. Texas then also requests, without support, that the Special Master “strike the additional evidence filed in support of New Mexico’s three reply briefs . . . as untimely.” *Id.* at 3. In the alternative, Texas requests that it be given leave to file a sur-reply “in advance of the hearing [on the motions for partial summary judgment] to address the new evidence and facts submitted by New Mexico on February 5, 2021.” *Id.* To date, Texas has not filed any sur-reply to these declarations and/or evidence.

Texas’s request should be denied. A reply brief is typically limited in scope to “addressing the arguments raised by the response.” *Petty v. Portofino Council of Co-owners, Inc.*, 702 F. Supp. 2d 721, 730 n.3 (S.D. Tex. 2010) (internal brackets omitted). This rule is not violated where arguments and evidence presented in a reply are responsive to arguments and evidence raised in a

³ New Mexico’s Consolidated Reply to the Parties in Support of the State of New Mexico’s Motion for Partial Summary Judgment on Compact Apportionment, Dkt. No. 464; New Mexico’s Consolidated Reply to the Parties in Support of the State of New Mexico’s Motion for Partial Summary Judgment to Exclude Texas’s Claim for Damages in Certain Years, Dkt. No. 466; and New Mexico’s Consolidated Reply to the Parties in Support of the State of New Mexico’s Motion for Partial Summary Judgment to Exclude Texas’s Claim for Damages in Years That Texas Failed to Provide Notice to New Mexico of Its Alleged Shortage, Dkt. No. 465.

response. *See, e.g., Hodges v. Hertz Corp.*, 351 F. Supp. 3d 1227, 1249 (N.D. Cal. 2018) (“The court has the discretion to consider new evidence presented on reply, particularly if the new evidence appears to be a reasonable response to the opposition.”); *Lynch v. Union Pac. R.R. Co.*, 2015 WL 6807716 at *1 (N.D. Tex. Nov. 6, 2015) (denying motion to strike and denying leave to file a sur-reply because “Defendant’s reply and related evidence are responsive to arguments raised and evidence relied on by Plaintiff in his summary judgment response, [so] this is not a situation in which a new issue was raised for the first time in a reply.”).

The allegedly “new” evidence New Mexico submitted with its Reply Briefs is all responsive to evidence and arguments Texas and the United States submitted with their Responses in Opposition to New Mexico’s Motions for Partial Summary Judgment and is consistent with the evidence New Mexico submitted with its Motions. Texas makes no attempt to argue otherwise. Instead, Texas concedes that New Mexico is permitted to file evidence with its Reply Briefs. Texas has, therefore, presented no basis upon which to strike this evidence.

As for Texas’s alternative request for leave to file a sur-reply to address New Mexico’s “new” evidence, this request is moot. Texas requested leave to file a sur-reply in advance of the hearing that was held on March 9, 2021, which has now passed. Apart from timing, Texas’s request should also be denied because sur-replies are appropriate only where a party raises novel evidence or arguments in a reply and “are generally discouraged as they usually are a strategic effort by the nonmoving party to have the last word on a matter.” *ML Liquidating Trust v. Mayer Hoffman McCann P.C.*, 2011 WL 10451619 at *1 (D. Ariz. March 11, 2011) (quotation omitted). The evidence Texas complains of does not warrant the filing of a sur-reply because it is responsive to arguments and evidence Texas and the United States presented in their Responses.

In short, the evidence New Mexico submitted with its Reply Briefs is properly before the Court. There is no legitimate basis to strike this evidence. Further, allowing Texas to file a sur-reply to address this evidence will only invite further delay, will give Texas an unfair and unjustified advantage from having “the last word on a matter,” *id.*, and will not assist the Court in resolving the issues at hand. Because Texas fails to establish that the Declarations New Mexico submitted with its Reply Briefs contain evidence that is novel or otherwise impermissible, Texas’s Motion should be denied.

CONCLUSION

New Mexico’s Motion to Strike was justified and timely. Further, Texas has presented no legitimate reason why New Mexico’s Reply Declarations should be struck or why Texas should be granted leave to file a sur-reply. The Declarations are properly before the Court, and granting Texas leave to file a sur-reply will only invite further delay and unfairly prejudice New Mexico. Texas’s Motion should be denied in its entirety.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Deputy Attorney General
CHOLLA KHOURY
Assistant Attorney General
ZACHARY E. OGAZ
Assistant Attorney General
P.O. Drawer 1508
Santa Fe, New Mexico 87501
505-239-4672

JEFFREY J. WECHSLER
Special Assistant Attorney General
MONTGOMERY & ANDREWS, P.A.
325 Paseo de Peralta
Santa Fe, NM 87501
jwechsler@montand.com

JOHN B. DRAPER
Special Assistant Attorney General
CORINNE E. ATTON
DRAPER & DRAPER LLC
325 Paseo de Peralta
Santa Fe, NM 87501
john.draper@draperllc.com
505-570-4591

MARCUS J. RAEL, JR.*
LUIS ROBLES
SUSAN BARELA
Special Assistant Attorneys General
Robles Rael & Anaya
500 Marquette Ave NW #700
Albuquerque, NM 87102
marcus@roblesrael.com
505-242-2228

**Counsel of Record*

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
303-861-1963

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 March 23, 2021, I caused true and correct copies of New Mexico's Response in Opposition to Texas's Letter of February 26, 2021 to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.

Respectfully submitted this 23rd day of March, 2021.

/s/ Michael A. Kopp

Michael A. Kopp
Special Assistant Attorney General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203
(303) 861-1963

SPECIAL MASTER

HONORABLE MICHAEL J. MELLOY

Special Master

United States Circuit Judge
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401-2101

TXvNM141@ca8.uscourts.gov
(319) 432-6080
(service via email and U.S. Mail)

MICHAEL E. GANS

Clerk of the Court

United States Court of Appeals - Eighth Circuit
Thomas F. Eagleton United States Courthouse
111 South 10th Street, Suite 24.329
St. Louis, MO 63102

TXvNM141@ca8.uscourts.gov
(314) 244-2400

MEDIATOR

HON. OLIVER W. WANGER (USDJ RET.)

WANGER JONES HELSLEY PC
265 E. River Park Circle, Suite 310
Fresno, California 93720

owanger@wjhattorneys.com
(559) 233-4800 Ext. 203

DEBORAH L. PELL (Paralegal)

dpell@whjattorneys.com

UNITED STATES

JEFFERY WALL*

Acting Solicitor General

JEAN E. WILLIAMS

Deputy Assistant Attorney General

FREDERICK LIU

Assistant to the Solicitor General

U.S. DEPARTMENT OF JUSTICE
950 Pennsylvania Avenue, NW
Washington, DC 20530-0001

supremectbriefs@usdoj.gov
(202)514-2217

JAMES J. DUBOIS*

R. LEE LEININGER

U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
999 18th Street
South Terrace – Suite 370
Denver, Colorado 80202

james.dubois@usdoj.gov
(303) 844-1375
lee.leininger@usdoj.gov
(303) 844-1364

SETH C. ALLISON, Paralegal

Seth.allison@usdoj.gov
(303)844-7917

JUDITH E. COLEMAN
JOHN P. TUSTIN
JENNIFER A. NAJJAR
U.S. DEPARTMENT OF JUSTICE
Environment & Natural Resources Division
P.O. Box 7611
Washington, D.C. 20044-7611

Judith.coleman@usdoj.gov
(202) 514-3553
john.tustin@usdoj.gov
(202) 305-3022
jennifer.najjar@usdoj.gov
(202) 305-0476

STATE OF NEW MEXICO

HECTOR H. BALDERAS
New Mexico Attorney General
TANIA MAESTAS
Chief Deputy Attorney General
CHOLLA KHOURY
Assistant Attorney General

hbalderas@nmag.gov
tmaestas@nmag.gov
ckhoury@nmag.gov
zogaz@nmag.gov
psalazar@nmag.gov
(505) 239-4672

ZACHARY E. OGAZ
Assistant Attorney General
STATE OF NEW MEXICO
P.O. Drawer 1508
Santa Fe, New Mexico 87501
PATRICIA SALAZAR - Assistant

MARCUS J. RAEL, JR.*
LUIS ROBLES
SUSAN BARELA
Special Assistant Attorneys General
ROBLES, RAEL & ANAYA, P.C.
500 Marquette Avenue NW, Suite 700
Albuquerque, New Mexico 87102
CHELSEA SANDOVAL - Paralegal
PAULINE WAYLAND – Paralegal
BONNIE DEWITT – Paralegal

marcus@roblesrael.com
luis@roblesrael.com
susan@roblesrael.com
chelsea@roblesrael.com
pauline@roblesrael.com
bonnie@roblesrael.com
(505) 242-2228

BENNETT W. RALEY
LISA M. THOMPSON
MICHAEL A. KOPP
Special Assistant Attorneys General
TROUT RALEY
1120 Lincoln Street, Suite 1600
Denver, Colorado 80203

braley@troutlaw.com
lthompson@troutlaw.com
mkopp@troutlaw.com
(303) 861-1963

JEFFREY WECHSLER
Special Assistant Attorney General
MONTGOMERY & ANDREWS
325 Paseo De Peralta
Santa Fe, NM 87501
DIANA LUNA – Paralegal

jwechsler@montand.com
(505) 986-2637

dluna@montand.com

JOHN DRAPER
Special Assistant Attorney General
DRAPER & DRAPER LLC
325 Paseo De Peralta
Santa Fe, NM 87501
DONNA ORMEROD – Paralegal

john.draper@draperllc.com
(505) 570-4591

donna.ormerod@draperllc.com

STATE OF COLORADO

PHILIP J. WEISER
Attorney General of Colorado
ERIC R. OLSON
Solicitor General
LAIN LEONIAK
Acting First Assistant Attorney General
CHAD M. WALLACE*
Senior Assistant Attorney General
PRESTON V. HARTMAN
Assistant Attorney General
COLORADO DEPARTMENT OF LAW
Ralph Carr Judicial Center
7th Floor
1300 Broadway
Denver, CO 80203
NAN EDWARDS, Paralegal II

eric.olson@coag.gov

chad.wallace@coag.gov
(720) 508-6281 (direct)

preston.hartman@coag.gov
(720) 508-6257 (direct)

nan.edwards@coag.gov

STATE OF TEXAS

STUART SOMACH*
ANDREW M. HITCHINGS
ROBERT B. HOFFMAN
FRANCIS M. GOLDSBERRY II
THERESA C. BARFIELD
SARAH A. KLAHN
BRITTANY K. JOHNSON
RICHARD S. DEITCHMAN
SOMACH SIMMONS & DUNN, PC
500 Capital Mall, Suite 1000
Sacramento, CA 95814-2403

ssomach@somachlaw.com
ahitchings@somachlaw.com
rhoffman@somachlaw.com
mgoldsberry@somachlaw.com
tbarfield@somachlaw.com
sklahn@somachlaw.com
bjohnson@somachlaw.com
rdeitchman@somachlaw.com
(916) 446-7979
(916) 803- 4561 (cell)

CORENE RODDER - Secretary
CRYSTAL RIVERA - Secretary
CHRISTINA GARRO – Paralegal
YOLANDA DE LA CRUZ - Paralegal

crodder@somachlaw.com
crivera@somachlaw.com
cgarro@somachlaw.com
ydelacruz@somachlaw.com

KEN PAXTON

Attorney General

(512) 463-2012

JEFFREY C. MATEER

(512) 457-4644 Fax

First Assistant Attorney General

DARREN L. McCARTY

Deputy Attorney General for Civil Litigation

PRISCILLA M. HUBENAK

Priscilla.Hubenak@oag.texas.gov

Chief, Environmental Protection Division

OFFICE OF ATTORNEY GENERAL

OF TEXAS

P.O. Box 12548

Austin, TX 78711-2548

AMICI / FOR INFORMATIONAL PURPOSES ONLY

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY

JAMES C. BROCKMANN*

(505) 983-3880

JAY F. STEIN

jcbrockmann@newmexicowaterlaw.com

STEIN & BROCKMANN, P.A.

jfstein@newmexicowaterlaw.com

P.O. Box 2067

administrator@newmexicowaterlaw.com

Santé Fe, New Mexico 87504

Administrative Copy

PETER AUH

(505) 289-3092

ALBUQUERQUE BERNALILLO COUNTY

pauh@abcwua.org

WATER UTILITY AUTHORITY

P.O. Box 568

Albuquerque, NM 87103-0568

CITY OF EL PASO

DOUGLAS G. CAROOM*

(512) 472-8021

SUSAN M. MAXWELL

dcaroom@bickerstaff.com

BICKERSTAFF HEATH DELGADO

smaxwell@bickerstaff.com

ACOSTA, LLP

2711 S. MoPac Expressway

Building One, Suite 300

Austin, TX 78746

CITY OF LAS CRUCES

JAY F. STEIN *

(505) 983-3880

JAMES C. BROCKMANN
STEIN & BROCKMANN, P.A.
P.O. Box 2067
Santé Fe, New Mexico 87504
Administrative Copy

jcbrockmann@newmexicowaterlaw.com
jfstein@newmexicowaterlaw.com
administrator@newmexicowaterlaw.com

JENNIFER VEGA-BROWN

(575) 541-2128

ROBERT CABELLO
LAW CRUCES CITY ATTORNEY'S OFFICE
P.O. Box 20000
Las Cruces, New Mexico 88004

jvega-brown@las-cruces.org
rcabello@las-cruces.org

ELEPHANT BUTTE IRRIGATION DISTRICT

SAMANTHA R. BARNCASTLE*

(575) 636-2377

BARNCASTLE LAW FIRM, LLC
1100 South Main, Suite 20 (88005)
P.O. Box 1556
Las Cruces, NM 88004

(575) 636-2688 (fax)
samantha@h2o-legal.com

JANET CORRELL – Paralegal

janet@h2o-legal.com

EL PASO COUNTY WATER IMPROVEMENT DISTRICT NO. 1

MARIA O'BRIEN*

(505) 848-1803 (direct)

SARAH M. STEVENSON
MODRALL, SPERLING, ROEHL, HARRIS
& SISK, PA

mobrien@modrall.com
sarah.stevenson@modrall.com

500 Fourth Street N.W., Suite 1000
Albuquerque, New Mexico 87103-2168
SHANNON GIFFORD – Legal Assistant

shannong@modrall.com

RENEA HICKS

rhicks@renea-hicks.com

LAW OFFICE OF MAX RENE HICKS
P.O.Box 303187
Austin, TX 78703-0504

(512)480-8231

HUDSPETH COUNTY CONSERVATION AND RECLAMATION DISTRICT NO. 1

ANDREW S. "DREW" MILLER*

(512) 320-5466

KEMP SMITH LLP
919 Congress Avenue, Suite 1305

dmiller@kempsmith.com

Austin, TX 78701

STATE OF KANSAS

DEREK SCHMIDT
Attorney General of Kansas
JEFFREY A. CHANAY
Chief Deputy Attorney General
TOBY CROUSE*
Solicitor General of Kansas
BRYAN C. CLARK
Assistant Solicitor General
DWIGHT R. CARSWELL
Assistant Attorney General
120 S. W. 10th Ave., 2nd Floor
Topeka, KS 66612

(785) 296-2215
toby.crouse@ag.ks.gov
bryan.clark@ag.ks.gov

NEW MEXICO PECAN GROWERS

TESSA T. DAVIDSON*
DAVIDSON LAW FIRM, LLC
4206 Corrales Road
P.O. Box 2240
Corrales, NM 87048
JO HARDEN – Paralegal

ttd@tessadavidson.com
(505) 792-3636

jo@tessadavidson.com

NEW MEXICO STATE UNIVERSITY

JOHN W. UTTON*
UTTUN & KERY, P.A.
P.O. Box 2386
Santa Fe, New Mexico 87504

(505) 699-1445
john@uttonkery.com

General Counsel
New Mexico State University
Hadley Hall Room 132
2850 Weddell Road
Las Cruces, NM 88003

gencounsel@nmsu.edu
(575) 646-2446

SOUTHERN RIO GRANDE DIVERSIFIED CROP FARMERS ASSOCIATION

ARNOLD J. OLSEN*
HENNIGHAUSEN OLSEN & MCCREA, L.L.P.
P.O. Box 1415
Roswell, NM 88202-1415

(575) 624-2463
ajolsen@h2olawyers.com

Malina Kauai, Paralegal
Rochelle Bartlett, Legal Assistant

mkauai@h2olawyers.com
rbartlett@h2olawyers.com