

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

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**STATE OF NEW MEXICO’S REPLY IN SUPPORT OF ITS MOTION TO AMEND
TRIAL MANAGEMENT SCHEDULE [DOC. 384]**

—————◆—————
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Submitted August 6, 2020

The State of New Mexico (“New Mexico”), through its undersigned counsel, files this Reply in Support of its Motion to Amend the Trial Management Schedule (“Scheduling Order”) (the “Motion to Amend the Scheduling Order” or the “Motion”) [Doc 384]. The Special Master should grant the Motion based on the following points, which accurately reflect the record from briefing filed in this matter to date:

- The U.S. states in its Response Brief that it does *not* oppose an extension of discovery through October 1, 2020, so that New Mexico can depose witnesses from the International Boundary and Water Commission (“IBWC”). [Doc. 387 at 8]. Thus, the U.S. implicitly acknowledges *there is good cause for an extension of this deadline*, and the only dispute is as to *how much time* New Mexico realistically *needs to prepare* for such depositions.

- The U.S. states in its Response Brief that it *may* agree to an extension of the briefing schedule for dispositive motions relating to the IBWC. [*Id.* at 9] (noting ongoing discussions between the U.S. and New Mexico have clarified that New Mexico seeks leave to use information obtained from testimony of IBWC witnesses or IBWC ESI as a basis for opposing any dispositive motions filed after October 15, 2020, or to show a dispute of material fact). Thus, the U.S. *arguably concedes there is good cause for an extension of this deadline* as well, and the only dispute is to whether the Parties may amend a case management deadline *by stipulation alone*. The U.S. asserts such an amendment can be negotiated by stipulation; New Mexico believes the Parties must seek a formal Order.

- The U.S. does not dispute in its Response Brief that it has failed to provide dates when it can make the IBWC witnesses available for deposition. Nor does it commit in its Response Brief to identify specific dates for such depositions before the close of discovery. Thus, the U.S. implicitly *concedes New Mexico cannot complete depositions of IBWC witnesses unless and until*

the U.S. provides dates when the IBWC witnesses can be made available, and that the Special Master will have to order the U.S. to do so.

- The U.S. concedes in its Response Brief that it did not advise New Mexico the search terms adopted for the IBWC ESI were returning *hundreds of thousands* of documents until June 2, 2020, and would need to be revised. Thus, the U.S. acknowledges it did not confer with New Mexico on this problem until eight (8) weeks ago, notwithstanding regular status conferences on ESI discovery since June 2019.

- The U.S. confirms in its Response Brief that it *can and will continue to work with New Mexico to determine whether additional reduction of document production is feasible* and New Mexico has proposed a method that could expedite further reductions of ESI. *See* Exhibit (“Exh.”) 1, Email from Luis Robles to Lee Leininger and James Dubois at U.S.D.O.J., August 4 and 5, 2020, and read receipt for August 5, 2020 (requesting that U.S. produce the “hit list” for the ESI collected using the revised search terms agreed upon in June, and advising that New Mexico is confident it can eliminate additional search terms after reviewing and weighing the number of hits generated by different terms). Thus, the U.S. *implicitly concedes that it may be able to reduce the effect of its “data dump”* of IBWC ESI by conferring with New Mexico, which is what the Parties are expected to do pursuant to their ESI Stipulation.

Notwithstanding the fact that the U.S. conceded or confirmed the aforementioned points in its Response Brief, the U.S. has, just this morning, sent New Mexico an email that retracts many of those statements. *See* Exh. 2, Email from Lee Leininger at USDOJ, August 6, 2020 at 10:37 AM (the “Email Retraction”). For example, the U.S. advised by E-mail this morning:

When we offered to continue to work with New Mexico to reduce the size of the IBWC ESI, it was with the intent to filter the results with additional terms that are likely to identify documents that are not case related. . . The list of these ‘filters’ is below. As you can see, it’s mostly geographic terms that should exclude documents

that pertain to areas outside the lower Rio Grande/ Project area. This will give you a more focused set of results. You can apply this set of filters to the existing production we produced on July 15 and July 28.

Exh. 2 (forwarding a list of nineteen (19) additional filters that should do the trick if New Mexico applies them to the ESI).

In other words, the U.S. has essentially abandoned its obligation to produce a set of responsive documents through batch review and backtracked on offers to reduce a data dump of tens of thousands of documents. The U.S. states it will complete final production of approximately 13,000 ESI documents by August 14, and thus, “there is no [longer] any need to extend the existing August 31 discovery deadline for purposes of reviewing IBWC ESI.” *See id.*; *see also* [Doc. 387 at 6, § II Background of the Dispute] (stating the “U.S. produced the 29,120 fully text-searchable documents of IBWC ESI” on July 15, and an “additional 5,398 documents on July 27 and will serve its final production of approximately 13,000 documents shortly.”).

New Mexico submits the Email Retraction that the U.S. sent this morning demonstrates the U.S. is not, in fact, willing to work with New Mexico to resolve the problems caused by this last-minute data dump absent an Order. Therefore, the Special Master must intervene to ensure New Mexico can make practical use of IBWC ESI to prepare for depositions of IBWC witnesses. Additionally, the Special Master must intervene to ensure that New Mexico can use any discovery obtained from the IBWC ESI and/or from depositions of IBWC witnesses in dispositive motions practice. New Mexico is simply asking that it be allowed to use discovery to depose witnesses and streamline issues for trial through dispositive motions practice, and not be precluded from doing by the actions of another Party.

New Mexico address each of these points in further detail below.

I. REPLIES TO U.S.’s RESPONSE TO THE MOTION

A. THE U.S. ACKNOWLEDGES IT DOES NOT OPPOSE AN EXTENSION OF DISCOVERY FOR NEW MEXICO TO DEPOSE IBWC WITNESSES, BUT IT HAS NOT COMMITTED TO SCHEDULE SUCH DEPOSITIONS ABSENT AN ORDER.

The U.S. agrees with New Mexico that the proper standard for review of motions to amend scheduling orders is “good cause” and the good cause analysis focuses on whether the movant has been diligent in attempting to complete discovery [Doc. 387 at 6, § III Argument]. The U.S. also states that it is willing to agree to an extension of the discovery deadline up through October 1, 2020, to allow New Mexico to complete depositions of IBWC witnesses. [*Id.* at 8]. Additionally, the U.S. acknowledges it first notified New Mexico on June 2, 2020, that ESI searches had yielded *hundreds of thousands* of documents using a “corrected”¹ list of 372 search terms the U.S. had adopted. [*Id.* at 4-5, and Exh. A]. The U.S. does not dispute that this was the first time it proposed an additional concrete set of reductions to those search terms in order to reduce the volume of IBWC production. *See [id., generally];* [Doc. 384 at 5-10, § Relevant Facts and Procedural Background (“Facts”) at ¶¶ 3, 12, 14, 18-21, 23].

Additionally, and quite notably, the U.S. does not dispute that New Mexico conferred with the U.S. thereafter, and ultimately agreed before the end of June to reduce the original search term list by nearly fifty (50) percent (from over 400 terms to 218). *Compare* [Doc. 387 at 4] (noting the original list contained 418 search term combinations and limiters) and [*Id.* at 5 (noting that after the U.S. notified New Mexico many of the search terms used in searching Bureau of Reclamation ESI were not as effective for IBWC ESI and proposed a more focused set of terms, the Parties

¹ As the U.S. acknowledges, the search terms the Parties agreed to use in June 2019 consisted of a list of 418 terms, but the U.S. subsequently proposed and applied its own “corrected” list of 372 terms in searching ESI materials from the U.S. Bureau of Reclamation (“BOR”) and the IBWC. [Doc. 387 at 4-5].

conferred through a series of emails and New Mexico agreed to use a pared-down list for the IBWC searches) *with* [Doc. 384 at 9, § Facts, ¶ 24] (noting New Mexico reanalyzed the original search terms list and pared the original list down to 218 terms by June 23rd).

Lastly, the U.S. does not dispute that it has failed to respond to New Mexico’s requests to schedule dates when the IBWC witnesses may be made available for deposition. Indeed, the U.S. does not address this point at all in its Response Brief. *Compare* [Doc. 387, generally] *with* [Doc. 384 at 11-12, § Facts at ¶¶ 16-17, 34-36] (noting that New Mexico contacted the U.S. on May 14, 2020, roughly one-week after the Special Master lifted the stay on depositions, about scheduling the depositions of four (4) IBWC witnesses and followed up again two (2) other times in July of 2020, but the U.S. failed to respond).

In view of these facts, it appears the U.S. *implicitly agrees there is good cause* to extend the discovery deadline so New Mexico can depose IBWC witnesses. Granted, the U.S. asserts that New Mexico has “not shown that it cannot meet the scheduling deadlines in this case.” [Doc. 387, at 6, § III. Argument]. However, this argument is inconsistent with the facts that the U.S.: (1) did not propose significant revisions to the ESI search terms for the IBWC materials until June 2; (2) has not completed ESI production of IBWC documents to date or confirmed when it will roll out final production; and (3) has never provided dates for scheduling depositions of IBWC witnesses despite repeated requests going back to May. Thus, notwithstanding the U.S.’s assertions to the contrary, the facts show New Mexico—indeed, no party—could be expected to complete depositions of IBWC witnesses by August 31 under these circumstances.

Likewise, although the U.S. asserts New Mexico cannot show “the expansive extensions it is requesting are necessary or proportionate to address the burden New Mexico is attributing to the IBWC ESI documents” [*Id.*], this argument is not well taken. “Proportionality” is a standard that

applies to the scope of discovery. It does not figure into the standard of review at issue here. *See* Fed.R.Civ.P 26(b)(1) (“Scope in general; . . . Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering . . . Information within this scope of discovery need not be admissible in evidence to be discoverable.”). Certainly, if the U.S. had objected to New Mexico’s request for IBWC ESI on the grounds that the requests were not proportional, it could have moved to limit the search terms *before* June 2, 2020. *See* Fed.R.Civ.P 26(c)(1) (providing a party may move for a protective order to limit discovery and the court “may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” associated with a discovery request).

Arguably, the U.S. had an obligation of diligence to timely seek a protective order if it felt the search terms for the IBWC ESI were not proportional and the Parties could not reach an accommodation through good faith conference. *See, e.g.*, [Doc. 142 at ¶ 12(b)] (“To the extent the Party receiving a Request for Production of Documents (RFP) pursuant to Federal Rule of Civil Procedure 34 and CMP section 7.2, believes that any particular RFP requires an additional electronic search of custodians, locations, or sources because responsive materials are reasonably unlikely to be included within the collection of responsive Documents and/or ESI collected . . . in order to meet obligations of diligence, that Party shall confer with the requesting Party or Parties and provide, in writing, its proposed search terms, custodians, locations and sources within fourteen (14) business days of receipt of the RFP”) and (“Any unresolved dispute must be brought to the Special Master’s attention with seven (7) days of the Parties’ conferral.”). But the U.S. did not meet its obligation of diligence on this matter. That is undisputed.

In sum, the facts show what the U.S. tacitly admits but refuses to flatly concede: New Mexico cannot complete depositions of IBWC witnesses by the close of discovery and it is through no lack of diligence on New Mexico's part. New Mexico has timely conferred with U.S. to try and reduce the ESI search terms and thereby, reduce the volume of the ESI production. *See* [Doc. 384, Exh. J, Email from Lee Leininger, US DOJ, July 1, 2020, at 1] (“Shelly- Attached is our review of the list of search terms you provided for the production of IBWC ESI. We appreciate your willingness to reduce the original search terms spreadsheet after our discussion of the vast number of documents the original search list generated.”). Accordingly, there is good cause to grant an extension to depose such witnesses, and the only matter to be decided is how much time is necessary to complete such depositions.

To determine how much time may be needed, it is important to note that the Parties have continued to confer during the pendency of this Motion on ESI production issues. New Mexico believes it may be able to reduce the ESI search terms even further through an analysis of the U.S.'s “hit lists” for the ESI search conducted in June. *See* Exh. 1. That said, New Mexico cannot say when the U.S. will provide this “hit list” or absolutely guarantee it will reduce the final production from 48,000-plus² documents to a manageable number of documents that can be reviewed before October 1st. Therefore, New Mexico submits that the Special Master must order the U.S. to complete all IBWC ESI production *before* the close of discovery, to confer with New Mexico as outlined in Exh. 1 in order to try and reduce the volume of the ESI production sets from

² This is the U.S.'s latest estimate on the total number of ESI documents that it will be producing. *See* [Doc. 387 at 6, § II Background of the Dispute] (noting that the U.S. produced an initial set of IBWC ESI that numbered 29,120 documents on July 15th, an additional set of ESI numbering 5,398 documents on July 27th, and will “shortly” be producing a final set of ESI numbering approximately 13,000 documents). However, on the U.S. originally estimated the total production would be upwards of 60,000-70,000 documents. *See* [Doc. 384, Exh. A] (We are currently preparing another production that will likely add another 30-40,000 documents to our initial IBWC production [of 29,120 documents on July 15, 2020].”).

48,000-plus documents, and commit to make the IBWC witnesses available for deposition between October and November of 2020.

B. THE U.S. ACKNOWLEDGES IT MAY BE ABLE TO AGREE TO AN EXTENSION OF THE BRIEFING DEADLINES FOR DISPOSITIVE MOTIONS ON THE TERMS NEW MEXICO HAS PROPOSED. ANY SUCH “AGREEMENT” SHOULD BE REFLECTED IN A FORMAL MODIFICATION OF THE SCHEDULING ORDER.

There is no need to engage in any lengthy discussion of this point. The U.S. states in its Response to the Motion that it may be able to agree to a *limited* extension of the briefing deadlines for dispositive motions relating to the IBWC. [Doc. 387 at 9]. Again, this suggests the U.S. realizes New Mexico will be hard-pressed discovery to make use of discovery produced after August 31 for dispositive motions. No one disputes that the turn-around time for filing and responding to dispositive motions after discovery closes is very limited under the current Scheduling Order.

The U.S. states it can likely negotiate an extension of the briefing deadlines so New Mexico can use information obtained from IBWC testimony or ESI for purposes of responding to a dispositive motion (i.e., to show there is a disputed issue of fact). [*Id.*]. The deadline to file responses in opposition to a motion for summary judgment is currently set at December 2, 2020. *See* [Doc. 351, Exh. A]. Thus, presumably, the U.S. believes New Mexico could file a response opposing a motion for summary judgment *after this date* if needed to incorporate information obtained from IBWC witnesses or ESI. New Mexico is amenable to such a limitation. *See* Exh. 1 (“New Mexico is also open to considering other reasonable options that would not preclude New Mexico from incorporating any relevant testimony obtained from the IBWC depositions into dispositive motions or responses to dispositive motions. One such option might be to allow New Mexico *leave to file supplemental briefing on any dispositive motion that relates to the IBWC by December 21st*, which is the deadline for filing reply briefs on dispositive motions.”) (emphasis added).

However, New Mexico believes if the U.S. is willing to agree to such an extension, it should be reflected in an Order amending the current Scheduling Order as Parties may not amend a case management deadline by stipulation alone.

Additionally, New Mexico should also be granted leave to use any relevant information obtained from IBWC depositions and ESI to show *there are no* disputed issues of material fact if that is what the evidence demonstrates. *Id.* (“ . . . other reasonable options that would *not preclude* New Mexico from incorporating any relevant testimony obtained from the IBWC depositions *into dispositive motions* or responses to dispositive motions) (emphasis added). Therefore, to ensure New Mexico is able to make full use of information it obtains from IBWC depositions and ESI, any Order on an extension of briefing deadlines would need to adjust the deadline for filing dispositive motions as well. New Mexico has advised the U.S. that it is willing to consider alternative options to the briefing extension proposed in its Motion to Amend the Scheduling Order. *See* Exh. 1 (“New Mexico is also open to considering other reasonable options that would not preclude New Mexico from incorporating any relevant testimony obtained from the IBWC depositions *into dispositive motions* or responses to dispositive motions.”) (emphasis added).

The deadline for filing dispositive motions is set for October 15, 2020. [Doc. 351, Exh. A]. The U.S. implicitly acknowledges there is good cause to extend IBWC discovery to October 1, 2020. But that would leave New Mexico only two (2) weeks to incorporate information obtained from such discovery into dispositive motions. That simply isn't practical or equitable. Obviously, if New Mexico is to be granted relief in the form of an extension of briefing deadlines, the relief has to be meaningful, and New Mexico should be given more than two (2) weeks from the close of IBWC discovery to file any dispositive motions that may be supported by such discovery. The U.S. has not proposed a practical remedy with respect to the deadline for filing any dispositive

motions that rely on IBWC discovery or ESI production. Thus, New Mexico asks that the Special Master set some briefing parameters that are practical and achievable under these circumstances.

II. REPLIES TO U.S.'s EMAIL RETRACTION

The U.S.'s Email Retraction largely speaks for itself. Now, at this late date, the U.S. states it will make IBWC witnesses available for deposition in September and complete IBWC production of approximately 13,000 documents by the end of next week. Exh. 2. That leaves New Mexico with two (2) weeks to review at these documents as well as the other IBWC ESI documents produced in the past two (2) weeks, which number nearly 25,000 documents. And before New Mexico can conduct a *substantive* review of the ESI to prepare for deposing IBWC witnesses in between September 1 and October 1, it must apply nineteen (19) different search terms to these document sets.

The U.S.'s expectations of how New Mexico should be able to accomplish all this to complete IBWC discovery by October 1 and file any dispositive motions incorporating IBWC testimony by October 15 are not reasonable. Moreover, there is no reason why New Mexico should be forced into this untenable situation because the *U.S.* failed to discharge its duty of diligence with respect to the IBWC ESI. New Mexico has been willing to work with the U.S. to complete discovery within the deadlines. But, at the end of the day, the Parties are here before the Special Master because of the U.S.'s failure to diligently search for responsive ESI before June.

The U.S. argues that it should not have to conduct a responsiveness review of any of the ESI produced thus far or that remains to be produced. [Doc. 387 at 7] (“In light of [New Mexico’s] ability to conduct searches on the text [of the ESI documents], New Mexico’s request that the United States be ordered to help New Mexico cull the documents is inappropriate.”). The U.S. cites a single unpublished decision from the Northern District of Georgia-- *Fed. Deposit Ins. Corp.*

v. Boggus-- that has not itself been cited or relied on by any other courts. *See [id.]* (citing *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)). This citation is not persuasive here. The cited case was before the court “because the parties have been unable to agree on a protocol to govern the production of electronically stored information.” *Boggus*, 2015 WL 11457700, at *1.³

In contrast, the Parties to this *instant* case *did* agree on an ESI protocol and it is set forth in the ESI Stipulation. [Doc. 142]. The U.S. admits this. *See* [Doc. 387 at 4] (“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.”).

The Email Retraction illustrates exactly why New Mexico has had to request the Special Master intervene.

³ The key factor is *Boggus* was that there *was no* protocol for searches and the parties agreed to produce the ESI documents as they were kept in the usual course of business: “The production, therefore, is presumed to have some underlying logic to the organization and structure of the production; a further responsiveness review is unnecessary under these circumstances.” *Id.* at *1; *see also id.* at * 2 (noting the court ruled in a separate case--*FDIC v. Briscoe*, 1:11-cv-2303-SCJ (N.D. Ga. June 6, 2013), ECF No. 98--that the agency did have to conduct a responsiveness review because it “did not contend that the documents would be produced as kept in the usual course of business or organized according to the categories in defendants’ queries”). In short, *Boggus* has no bearing on whether the U.S. was obliged to conduct a batch review and cull non-responsive ESI from the IBWC production in this case. The facts show that was the Parties’ agreement on protocol. *See* [Doc. 384 at 5, Facts at ¶ 2] (“A key provision of the ESI Stipulation required that the Parties ‘[C]onfer and agree upon search terms and protocols for each Party’s broadly-based search across all potentially relevant custodians, locations, and Sources, with the intent that each Party collect, review, and produce all discoverable Documents and ESI relevant to the claims, defenses, and disputed facts alleged with particularity in the pleadings.”); [*Id.* at 6, Facts at ¶ 8] (New Mexico noting that the “Parties had committed to perform the necessary searches or initial ESI ‘pulls’ using the Agreed Terms, and to deal with any anomalous results or redundancies during the internal review process” and New Mexico would proceed this way with the rollouts of ESI); and [*Id.* at 7, Facts at ¶ 12] (U.S. advising on production of IBWC ESI in March 2020; “we will be rolling out those documents as our *batch review are completed.*”) (emphasis added).

WHEREFORE, and in light of continuing discussions between the U.S. and New Mexico in an attempt to resolve this dispute, New Mexico hereby requests the Special Master enter an Order that provides the following:

A. Grants *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*;

B. Extends the deadline for New Mexico to complete deposition of IBWC witnesses by 90 days from the close of discovery;

C. Directs that, no later than August 14, 2020, the U.S. shall provide New Mexico with the “hit lists” generated by application of the revised search terms to the IBWC ESI material produced thus far;

D. Directs that no later than August 21, 2020, New Mexico shall provide the U.S. with any additional revisions to that revised search list for IBWC ESI;

E. Directs the U.S. to run a single comprehensive ESI search of all IBWC ESI, incorporating any additional reductions to search terms that New Mexico provides by August 21, 2020, and to produce a final complete set of IBWC ESI by August 31, 2020;

F. Directs the U.S. to confer with New Mexico by August 14, 2020, on scheduling depositions for IBWC witnesses between October and November of 2020, and commit to specific dates for such depositions;

G. Extends the deadlines for New Mexico to file any dispositive motions or responses in opposition to dispositive motions on issues of fact that relate to the IBWC and provides all briefing shall be complete by January 21, 2021;

H. Awards New Mexico reasonable fees and costs in bringing this Motion forward;
and

I. Awards New Mexico any and all other relief deemed proper.

Submitted August 6, 2020.

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OFFICE OF THE SPECIAL MASTER

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

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This is to certify that on the 6th of August, 2020, I caused a true and correct copy of the **State of New Mexico's Reply in Support of Its Motion to Amend Trial Management Schedule [Doc. 384]** to be served by e-mail upon all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 6th day of August, 2020.

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From: Luis Robles
Sent: Wednesday, August 5, 2020 10:34 PM
To: Lee.Leininger@usdoj.gov; James.Dubois@usdoj.gov
Cc: Dalrymple, Shelly, OSE; Jeffrey J. Wechsler (jwechsler@montand.com); Philomena Hausler; Susan Barela; Bonnie Dewitt
Subject: RE: No. 141, Original - Texas v. New Mexico: IBWC ESI
Importance: High

Lee and James,

I am circling back on the attached e-mail. I trust by now that you have read my message and request directed to you.

Please let me know if you are available to discuss my e-mail on Thursday and possibly agree on an outline of terms that we can present to the Special Master. I look forward to hearing from you.

Thanks.

Luis Robles

From: Luis Robles
Sent: Tuesday, August 4, 2020 5:56 PM
To: Lee.Leininger@usdoj.gov; James.Dubois@usdoj.gov
Cc: Dalrymple, Shelly, OSE <Shelly.Dalrymple@state.nm.us>; Jeffrey J. Wechsler (jwechsler@montand.com) <jwechsler@montand.com>; Philomena Hausler <philomena@roblesrael.com>; Susan Barela <susan@roblesrael.com>; Bonnie Dewitt <bonnie@roblesrael.com>
Subject: No. 141, Original - Texas v. New Mexico: IBWC ESI

Lee and James-

I am following up on our request for the “hit list” information on the revised search terms that New Mexico agreed to have the U.S. use on the IBWC ESI. I am referring to the list that winnowed the original search term list of 418 terms down to 218. I recall you said that your IT person was on vacation this week, but I am wondering if he can provide that information by next week.

If so, I believe the U.S. and New Mexico could work together as New Mexico proposes in the Motion to Amend the Scheduling Order and as the U.S. says it is willing to do in order to reduce the remaining ESI production. More specifically, if the U.S. can provide New Mexico that “hit list” on the revised search terms by the end of next week, we are confident we can reduce the list of search terms even further to focus on terms that would be most productive for New Mexico at this point. We can send you that reduced list by August 21st. That should enable the U.S. to run a more focused search on the ESI collection by September 4th and produce those results to New Mexico. We believe this process could get New Mexico to a place where it would have sufficient time to review the ESI and begin depositions of IBWC witnesses by early October.

As you know, we would like to depose IBWC witnesses. If the U.S. can stipulate to the deadlines outlined above, and make the IBWC witnesses available for deposition in October, New Mexico will only need to request a 60-day extension of the deadline for completion of discovery. The U.S. has stated in its Response to New Mexico's Motion to Amend the Scheduling Order that it would be willing to agree to an extension of time for completion of IBWC depositions up through October 1, 2020. We think there is room for the parties to work together on this and reduce the production demands on the U.S. while also giving New Mexico sufficient time to review the ESI production and make use of it in preparing for IBWC depositions.

Again, New Mexico is only requesting an extension of the discovery deadline for purposes of reviewing the IBWC ESI and deposing the IBWC witnesses. As to New Mexico's request to extend the dispositive motions deadline for motions relating to the IBWC, we do not think it will affect the trial schedule. To that end, New Mexico is willing to commit to an expedited briefing schedule for such motions (one month and opposed to the nearly two-month briefing schedule that currently applies), which is what we proposed in the Motion to Amend the Scheduling Order. But New Mexico is also open to considering other reasonable options that would not preclude New Mexico from incorporating any relevant testimony obtained from the IBWC depositions into dispositive motions or responses to dispositive motions. One such option might be to allow New Mexico leave to file supplemental briefing on any dispositive motion that relates to the IBWC by December 21st, which is the deadline for filing reply briefs on dispositive motions.

Please let me know if you are available to discuss this tomorrow and possibly agree on an outline of terms that we can present to the Special Master by Thursday.

Thanks.

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From: Leininger, Lee (ENRD) [mailto:Lee.Leininger@usdoj.gov]
Sent: Thursday, August 06, 2020 9:34 AM
To: Luis Robles <Luis@roblesrael.com>
Subject: Read: No. 141, Original - Texas v. New Mexico: IBWC ESI
Importance: High

Your message

To: Leininger, Lee (ENRD)
Subject: RE: No. 141, Original - Texas v. New Mexico: IBWC ESI
Sent: Wednesday, August 5, 2020 10:33:31 PM (UTC-07:00) Mountain Time (US & Canada)

was read on Thursday, August 6, 2020 9:33:53 AM (UTC-07:00) Mountain Time (US & Canada).

From: Leininger, Lee (ENRD) <Lee.Leininger@usdoj.gov>
Sent: Thursday, August 6, 2020 10:37 AM
To: Luis Robles; Dubois, James (ENRD)
Cc: Dalrymple, Shelly, OSE; Jeffrey J. Wechsler (jwechsler@montand.com); Philomena Hausler; Susan Barela; Bonnie Dewitt
Subject: RE: No. 141, Original - Texas v. New Mexico: IBWC ESI

Luis – Our apologies for the delay in getting back to you, our IT Specialist is on a family vacation this week and his availability (and internet connectivity) is spotty. We were able to get ahold of him and this response reflects our technical and legal position. At this point we intend to complete our production of documents generated from those terms Shelly approved in her July 5 email and submit the final round of IBWC ESI by August 14, 2020. You will then have a complete set of results and New Mexico can then “focus on terms that would be most productive for New Mexico.” You don’t need to send us a “reduced list” of search terms.

When we offered to continue to work with New Mexico to reduce the size of the IBWC ESI, it was with the intent to filter the results with additional terms that are likely to identify documents that are not case related. This will not reduce New Mexico’s July 5 list of search terms, but it will reduce the number of documents the search identifies as “responsive.” The list of these “filters” is below. As you can see, it’s mostly geographic terms that should exclude documents that pertain to areas outside the lower Rio Grande/ Project area. This will give you a more focused set of results. You can apply this set of filters to the existing production we produced on July 15 and July 28.

There is no need to stipulate to a September 4 date of final production. We can get the final production out no later than next week. Consequently, there is no need to extend the existing August 31 discovery deadline for purposes of reviewing the IBWC ESI.

We can make the IBWC witnesses available for deposition in September, and we will agree to extend the discovery deadline for the limited purpose of completing IBWC depositions by October 1, 2020. With our final production next week, New Mexico will have sufficient time to review the ESI production and make use of it in preparing for IBWC depositions.

Finally, regarding New Mexico’s request to extend the October 15 dispositive motions deadline for motions relating to the IBWC, we understand that New Mexico is now proposing an extension of time for New Mexico to file supplemental briefing on any dispositive motion that relates to the IBWC to December 21st. We will not agree to that extension. Because you will have all the IBWC documents next week, and will have deposed IBWC witnesses before October 1, we think that any extension on supplemental briefing is unwarranted. You, as well as all the parties, have six weeks (until December 1) to file responses to dispositive motions which allows abundant time to address IBWC issues in your response.

Word and Term Filters

Tijuana or
"San Diego" or
Yuma or
falcon or
Anzalduas or
mohawk or
welton or
brownsville or

EXHIBIT

2

morillo or
MRG* or
Harlingen or
Coachella or
"Laguna Madre" or
"Delta Lake Irrigation District or
personnel or
"human resource*" or
"human captial" or
Amistad or
"border wall"
or telework* or
"new river" or
"lower rio" or
LRG or
"lake powell" or
"min* 318" or
"min* 319" or
"min* 323" or
"min* 316" or
"IOI" or
"Sanchez Mejorada" or
"lake mead" or
"colorado river" or
"Los Alisos" or
Edinburg or
ADEQ or "
Agua Prieta" or
"Piedras Negras" or
"Santa Cruz" or
Presidio or
"middle rio" or
"upper rio"
or MRG*

Lake Mead
32X
AAC (All American Canal which
is in California)
MNG
MOG
Salton Sea
Evap* Charge
Fulp
CRSS (model used in CR)
CAP
IID
CRUWA
DCP

“Drought Contingency Plan”

“Water Reserve “

“Sea of Cortez”

“Santa Cruz”

Douglas

CIPP (Cure in Place Pipeline

Project in Arizona)

NIWTP

Nogales

From: Luis Robles <Luis@roblesrael.com>

Sent: Wednesday, August 5, 2020 10:34 PM

To: Leininger, Lee (ENRD) <LLeining@ENRD.USDOJ.GOV>; Dubois, James (ENRD) <JDubois@ENRD.USDOJ.GOV>

Cc: Dalrymple, Shelly, OSE <Shelly.Dalrymple@state.nm.us>; Jeffrey J. Wechsler (jwechsler@montand.com)

<jwechsler@montand.com>; Philomena Hausler <philomena@roblesrael.com>; Susan Barela

<susan@roblesrael.com>; Bonnie Dewitt <Bonnie@roblesrael.com>

Subject: RE: No. 141, Original - Texas v. New Mexico: IBWC ESI

Importance: High

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Sent: Tuesday, August 4, 2020 5:56 PM

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Cc: Dalrymple, Shelly, OSE <Shelly.Dalrymple@state.nm.us>; Jeffrey J. Wechsler (jwechsler@montand.com)

<jwechsler@montand.com>; Philomena Hausler <philomena@roblesrael.com>; Susan Barela

<susan@roblesrael.com>; Bonnie Dewitt <bonnie@roblesrael.com>

Subject: No. 141, Original - Texas v. New Mexico: IBWC ESI

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