

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

◆

**THE COMPACTING STATES’ RESPONSE TO THE UNITED STATES’
MOTION FOR LEAVE TO DESIGNATE SUPPLEMENTAL EXPERT
TESTIMONY**

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The State of New Mexico (“New Mexico”), State of Texas (“Texas”), and State of Colorado (“Colorado”) (together, “Compacting States”) respond to the United States’ Motion for Leave to Designate Supplemental Expert Testimony (Mar. 10, 2025) (“Motion”), as follows:

INTRODUCTION

The trial in this matter will determine whether the Compacting States intended the Rio Grande Compact to apportion water to New Mexico and Texas using a 1938

baseline condition or a D2 baseline condition. Order, 48 (May 21, 2021). Put differently, one of the principal remaining questions is “what is meant by ‘Project water supply?’” *Id.* at 51. The answer to that question is key to determining how much water “the states intended to divide 57%/43%” through the Project. *See id.* at 6-7. The Compacting States contend that they intended, through the Compact, to apportion the waters from Elephant Butte to Fort Quitman between New Mexico and Texas using a D2 baseline to measure how much the Project supply there is to meet “irrigation demands.” Compact. Art. I(1). The United States argues that the baseline should be measured using a 1938 condition.

In the Motion, the United States argues that the Special Master should permit it to disclose new expert opinions in support of its position in the middle of trial. It argues that such evidence would not be prejudicial. To support this claim, it makes a selective description of the procedural history of this case to suggest that the new modeling evidence that it intends to introduce through Ian Ferguson, Ph.D., P.E., is not surprising. It contends that the late disclosure is only necessary because the United States initially planned to present a joint case with Texas, and now, Texas might not put on the modeling evidence it anticipated.

The United States’ retelling of the procedural history of this case gives a misimpression. The United States had every opportunity to disclose expert testimony, define a baseline operating condition, and describe the specific impacts

that deviation from the baseline has on the Project. It chose not to. Its pleadings, discovery responses, and expert disclosures all demonstrate strategic ambiguity about these questions. The United States told the Court that its position mirrored Texas's, but it also created the D2 curve, operated the project for forty years using a D2 curve baseline, and has an interest in vindicating its 2008 Operating Agreement which uses the D2 curve as its baseline. The United States left unanswered the fundamental question at the heart of this litigation—i.e., exactly how much groundwater pumping is allowed in New Mexico without improperly interfering with deliveries to Texas—while asserting that Reclamation operations using a D2 baseline (e.g., the 2008 Operating Agreement) are appropriate and consistent with the Compact.

Thus, the premise of the Motion is wrong: Dr. Ferguson's new analysis of the 1938 condition and new opinion that a D2 baseline shorts "Texas's entitlement" to water from the Project are substantially new and prejudicial. Such tactics would not be permitted in ordinary litigation.

Nonetheless, the Compacting States recognize that this original jurisdiction action is no ordinary litigation, and the Court would benefit from a complete record. Consequently, the Compacting States have no objection to the United States' request, if (1) Dr. Ferguson provides all the underlying data and references upon which the proffered testimony is based by April 7, 2025; (2) the United States makes

the witness available for deposition not later than May 12, 2025; and (3) the Special Master permits the Compacting States to put on direct testimony responding to any testimony offered by Dr. Ferguson in support of these new opinions.

PROCEDURAL HISTORY

The United States’ Motion centers on a lengthy recitation of the procedural history of this case. The purpose of that section is to suggest that the United States needs new expert analysis because of a “change in Texas’s position” that created a “fundamental change in alignment between the United States and Texas.” Mot. 9; *see also* Mot. 14-15 (“Texas’s change in position is what necessitated this motion.”). The Compacting States disagree with much of that description. In particular, the story the United States presents is misleading on three vital points.

First, the United States is wrong that its “longstanding position in this case” has been support for a “1938 baseline.” Mot. 6. The United States originally alleged only that “[u]ncapped use of water . . . could reduce Project efficiency to a point where 43% of the available water could not be delivered” to Texas. U.S. Compl. ¶ 15. This claim—that groundwater pumping in New Mexico “could” violate the Compact by interfering with Project deliveries—is not the same as a claim that the Compact capped depletions at levels existing in 1938. Dr. Ferguson put it as follows:

Q. Do you understand that their [Texas’s] position is related to a 1938 condition?

A. Yes.

Q. Okay. And how does that compare to the Texas -- excuse me -- the U.S. position in this case?

A. The similarity in my mind is that both parties feel that groundwater pumping in New Mexico has depleted project surface water supplies. Groundwater pumping has increased since 1938, but I don't think the United States position hinges specifically on a 1938 condition or baseline.

Q. What does the U.S. position hinge on?

A. Impacts to the Rio Grande project.

Ex. A, Ferguson Dep. 30:18-31:5 (Feb. 19, 2020) (emphasis added). Consistent with this description, the United States did not, at the pleadings stage, “purport to take any definitive position on what groundwater-pumping baseline the Compact should ultimately be read to require.” *Texas v. New Mexico*, 602 U.S. 943, 958 n.3 (2024). The United States sought “an injunction commanding New Mexico to cease all interference with the United States’ operation of the Rio Grande Project.” *Id.* at 951. But it did not define—whether in terms of a depletion limit or other precise measure—just how much pumping, when, and by whom constituted impermissible “interference.” *See* Reply Brief for United States, 20 (July 28, 2017) (“[I]t remains to be seen whether the interests of Texas and the United States are completely aligned” regarding the correct baseline).

Far from clarifying a position in favor of the 1938 baseline, the United States’ conduct in discovery often indicated its support for a D2 baseline. To give just one example, consider the testimony of Filiberto Cortez, whom the United States designated as its Rule 30(b)(6) representative for the Bureau of Reclamation:

Q. Let's look at the operating agreement, which I'll mark as Deposition Exhibit 13. Does the ground -- the operating agreement grandfather in the groundwater pumping from the D-2 period?

A. The operating agreement grandfathers in the -- all of the conditions on the project. Part of that is being the groundwater extraction taken -- being done at the time, but along with all the climatic conditions, the return flows from Arroyo runs, any flooding conditions which may be -- have gone on at the time. So it's not just the pumping, but quite a few other factors.

Q. All conditions that existed during that D-2 period?

A. Correct.

Q. The -- if you look at Page 18, Section 6.12 [of the 2008 Operating Agreement] is the one that says "Rio Grande Compact," and it says, "Nothing herein is intended to alter, amend, repeal, modify, or be in conflict with provisions of the Rio Grande Compact." And so, if I understand, in putting that along with the use of D-2, is it correct that D-2 is not in conflict with the provisions of the Rio Grande Compact?

A. That is correct.

Ex. B, Rule 30(b)(6) Deposition of the United States Bureau of Reclamation by and through Filiberto Cortez, 73:7-74:19 (Aug. 20, 2020) (hereinafter, "Cortez Dep.") (emphasis added).

The United States' failure to clearly articulate support for a 1938 baseline continued through the summary judgment proceedings. It argued that New Mexico "may not permit New Mexico water users to interfere with the Project's delivery of the Compact apportionment," and sought a "judgment declaring that obligation as a matter of law." United States of America's Memorandum in Support of Motion for Partial Summary Judgment, 1 (Nov. 5, 2020). But it presented no criterion to determine precisely what amount of pumping would trigger impermissible interference. *See id.*, 1 (arguing that the evidence shows "at least some forms of

groundwater pumping” interfere with Project deliveries); 32 (arguing that “New Mexico lacks an accounting system adequate to detect and prevent the *potential* for harm”) (emphasis in original); 34 (admitting that “the extent of actual and potential harm to the Project may require resolution at trial”). Notably absent from the United States’ summary judgment brief is any argument that the Compact requires a 1938 condition. *See, generally, id.*

The United States’ position on a 1938 condition coalesced only through proceedings on the proposed consent decree. *Texas*, 602 U.S. at 972 (Gorsuch, J., dissenting) (“In an unexpected and still-unexplained move, the United States abandoned its position, held for over 40 years, that its own D2 Period data supply the correct method for measuring the amount of water it must deliver to Texas and New Mexico water districts.”). Even during trial, there was a great deal of ambiguity in the United States’ position. Its trial brief is internally inconsistent on the baseline question. On the one hand, the United States argued that the Project was entitled to a “water supply” that is “undiminished by groundwater pumping developed after 1938.” United States of America’s Trial Brief, 4 (Sept. 27, 2021). But, on the other hand, it argued that the allocation of water to users in New Mexico under the 2008 Operating Agreement—which, subject to the diversion ratio, accounting credits, and other adjustments, would be approximately 57% of the water supply under using D2 baseline condition—“does not deprive New Mexico of water to which it is entitled

under the Compact.” *Id.* at 5. Presumably, the United States believed that the same was true of allocations to Texas under the 2008 Operating Agreement. The United States trial brief, however, is silent on the question. The first clear articulation, of which the Compacting States are aware, of the United States’ position that the groundwater pumping at a D2 level interferes with the Project, was during proceedings on the consent decree. *See, e.g.*, Exception of the United States and Brief for the United States in Support of Exception, 46 (Oct. 6, 2023) (“[T]he proposed decree would define Compact compliance to allow such interference to continue at D2 levels.”).

Second, the United States is wrong that it previously disclosed “complementary expert testimony” to support its newfound 1938 condition position. To the contrary, the United States disclosed experts who, if they gave any testimony on the required baseline, uniformly testified in support of the D2 baseline and the Project accounting methods based on it.

For example, Dr. Ferguson’s disclosed opinions acknowledge that the D2 baseline incorporates the effects of groundwater pumping through 1978, but he nonetheless concludes that the D1 and D2 curves are an “appropriate” methodology to determine Project allocations:

Dr. Ferguson concludes that use of the D1 and D2 Curves is an appropriate basis to determine Project allocations . . . because the Curves are based on historical Project operations during the period 1951-1978 and were subsequently used as the basis for determining

Project allocations during the period from approximately 1981-2007. . . Dr. Ferguson concludes that the D1 Curve, as used in the Project allocation procedure, ensures that annual allocations to Mexico under the Operating Agreement are consistent with historical Project operations during the period 1951-1978. . . . Dr. Ferguson concludes that the D2 Curve reflects historical gains and losses to the Rio Grande between Caballo Dam and Project diversion headings. Historical gains and losses were influenced by numerous factors, including operation and maintenance of Project facilities, farming and irrigation practices within the Project and surrounding areas, and groundwater pumping in New Mexico and Texas.

United States of America's Supplemental Disclosure of Expert Witness Ian M. Ferguson, 5 (Sept. 16, 2019). None of the disclosures for Dr. Ferguson contain an opinion that pumping at D2 levels constitutes improper Project interference. *See, e.g.*, United States Disclosure of Expert Witnesses (May 31, 2019); United States of America's Disclosure of Expert Rebuttal Witness Dr. Ian M. Ferguson (Dec. 30, 2019).

The United States' disclosure for Dr. Allie Blair is similarly bereft of any opinions supporting the 1938 baseline. *See* United States of America's Disclosure of Rebuttal Expert Dr. Al Blair (Dec. 30, 2019). Instead, Dr. Blair's anticipated testimony is generally supportive of a D2 baseline. In his deposition, Dr. Blair testified that the 2008 Operating Agreement—including its D2-derived methodology—appropriately determines the Project allocation to water users in Texas. Ex. C, Blair Dep. 404:10-405:12, 407:7-408:3 (June 18, 2020). And he further testified that such an allocation is consistent with the 1938 Downstream

Contract. *Id.* 441:15-24. This testimony is difficult to square with the United States’ claim now that a D2 baseline results in Project interference by permitting New Mexico water users to “siphon off water . . . in ways the Downstream Contracts do not anticipate.” *Texas v. New Mexico*, 583 U.S. 407, 411 (2018).

The United States’ other disclosures—for Dr. Phillip J. King, Michelle Estrada Lopez, P.E., and Jean Moran, P.G.—are no different. None of them contain opinions that pumping at a D2 level interferes with the Project or that the Compact requires a 1938 baseline. *See, e.g.*, United States of America’s Disclosure of Expert Rebuttal Witness Dr. J. Phillip King (Dec. 30, 2019); United States of America’s Disclosure of Rebuttal Expert Witness Michelle Estrada-Lopez (Dec. 30, 2019); Ex. D, Moran Rep. 3-4, 19-20 (containing a summary of opinions and conclusions). If they did, then the United States would not need to bring this Motion.

Third, the United States is wrong that its need for a new expert disclosure was necessitated by the acts of an opposing party. As the United States acknowledges, it disclosed an expert, Ms. Moran with Stetson Engineers, Inc., to analyze and validate the Texas groundwater model. Mot. 7. It could have asked Ms. Moran to use the model to estimate the impacts of groundwater modeling on the Project (e.g., impacts on water available for diversion by the irrigation districts). But it did not. Ms. Moran expressly disclaimed any opinions concerning impacts on the Project. *See, e.g.*, Ex. E, Moran Dep., 38:17-18, 85:24-86:4 (June 29, 2020). So now the

United States has a gaping hole in the middle of its case. It prevailed before the Court to defeat the consent decree on the theory it must be permitted to try a claim that “groundwater pumping at D2 levels violates the Compact” by “interfer[ing] with the Project.” *Texas*, 602 U.S. at 962-63. But it has no expert opinions to support such a claim. That is no fault of Texas.

The United States’ Motion is not about addressing the potential absence of evidence concerning the Texas model at trial; it is about filling this hole by offering a new analysis to bolster its argument that the adoption of a D2 baseline—which the United States has used for forty years in Project administration—as a measure of Compact compliance would somehow interfere with the Project.

STANDARD OF DECISION

United States Supreme Court Rule 17.2 provides that “the Federal Rules of Civil Procedure . . . may be taken as guides” in this proceeding. S. Ct. R. 17.2. Federal Rule of Civil Procedure 26(a)(2) provides that a party must disclose the identity of any expert witness along with either a written report or summary of the opinions offered. Rule 26(e) imposes an obligation on the parties to supplement incorrect or incomplete information. Under Rule 16, a court “must issue a scheduling order” and such an order “must limit the time to . . . complete discovery[] and file motions.” Fed. R. Civ. P. 16(b)(1), (3)(A). “The scheduling order may . . .

modify the timing of disclosures under Rule 26(a) . . . [and] set dates for pretrial conferences and for trial.” Fed. R. Civ. P. 16(b)(3)(B)(i), (vi).

A “district court has broad discretion in establishing and enforcing the deadlines.” *Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006). However, “[a] schedule may be modified only for good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b)(4). “The good cause standard requires the ‘party seeking relief to show that the deadlines cannot reasonably be met despite [its] diligence.’” *S & W Enters., LLC v. SouthTrust Bank*, 315 F.3d 533, 535 (5th Cir. 2003) (quoting 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *FEDERAL PRACTICE AND PROCEDURE* § 1522.1 (2d ed.1990)); *accord Tesone v. Empire Mktg. Strategies*, 942 F.3d 979, 989 (10th Cir. 2019).

If a party fails to timely disclose an expert opinion within the period established under a Rule 16 order and in violation of Rule 26(a), a court, pursuant to Rules 16(f) and 37(b)(2)(A)(ii), has “the authority to exclude the late-disclosed materials or to fashion a lesser penalty than total exclusion.” *Vogt v. State Farm Life Ins. Co.*, 963 F.3d 753, 771 (8th Cir. 2020). In determining the sanction, a court may “consider a multiplicity of pertinent factors, including the history of the litigation, the proponent’s need for the challenged evidence, the justification (if any) for the late disclosure, and the opponent’s ability to overcome its adverse effects.” *Macaulay v. Anas*, 321 F.3d 45, 51 (1st Cir. 2003). Other relevant factors include,

prejudice or surprise, the ability of the party offering the testimony to cure the prejudice, disruption to the orderly and efficient trial of the case, and bad faith. *Rimbert v. Eli Lilly & Co.*, 647 F.3d 1247, 1254 (10th Cir. 2011).

The effects of the foregoing procedural rules may be moderated in this action. The Court has advised that “Federal Rules are a guide to the conduct of original actions in this Court only where their application is appropriate.” *Utah v. United States*, 394 U.S. 89, 95 (1969) (internal quotations omitted) (emphasis added). In his application of the Federal Rules, the Special Master should be mindful that the Court itself will make the findings of fact. *See Kansas v. Nebraska*, 574 U.S. 445, 453 (2015) (“[The Court] conduct[s] an independent review of the record, and assume[s] the ultimate responsibility for deciding all matters.”); *see also* Stephen M. Shapiro et al., *Supreme Court Practice* § 10.12, 653 (10th ed. 2013) (“[T]he Master’s reports and recommendations are advisory only.”). The primary function of the trial, therefore, is to “ensure that a record is developed that will provide the Court with all the information it needs” to render a decision. Cynthia J. Rapp, *Guide for Special Masters in Original Cases Before the Supreme Court of the United States*, 6 (October 2004); *see also* Trial Mgt. Order, Part VIII, at 7 (Apr. 9, 2021). As the United States points out, these concerns may warrant a bias towards over inclusiveness.

ARGUMENT

Applying the ordinary Federal Rules of Civil Procedure, the Compacting States submit that the Special Master could deny the United States' Motion.

The United States cannot show diligence under Rule 16, so an amendment to the long-expired expert disclosure deadlines is not appropriate. If the Special Master believes the United States' assurance that its "longstanding" position in this litigation has been support for a 1938 baseline, then it is difficult to understand why it did not disclose expert testimony articulating the adverse impacts that the D2 baseline would have on the Project. It clearly had the opportunity to do so. Ms. Moran validated the Texas model and gave opinions—across three expert reports using that model—about the impacts pumping has on flow at the El Paso Narrows. The United States certainly could have asked Ms. Moran to render opinions, using much the same analysis, about the effects of a D2 level of pumping on the Project, but she expressly disclaimed opinions about the impacts of pumping on the Rio Grande Project. Likewise, New Mexico disclosed its model during discovery, and nothing prevented the United States from requesting that Dr. Ferguson use the model, in his rebuttal reports, to perform the analysis he now offers.

The appropriate course in ordinary litigation would be to exclude the new analyses that Dr. Ferguson now offers. Irrespective of the United States' need for this evidence after Texas's realignment, the United States has no satisfactory

explanation for its failure to disclose the opinions it now offers during the discovery period. Worse, the new disclosure is substantially prejudicial to the other parties because it represents a sudden and dramatic change of position in the middle of trial. Whereas in discovery the United States' witnesses testified that the D2 baseline was "appropriate" (United States of America's Supplemental Disclosure of Expert Witness Ian M. Ferguson, 5 (Sept. 16, 2019)), "consistent with the 1938 [Downstream] [C]ontract" (Ex. C, Blair Dep. 441:15-24 (June 18, 2017)), and "not in conflict with the provisions of the Rio Grande Compact" (Ex. B, Cortez Dep., 74:16-19), the United States now offers Dr. Ferguson's "supplemental" analysis as part of its about-face to argue that pumping at D2 levels "violates New Mexico's duty of noninterference," *Texas*, 602 U.S. at 963. The mere fact that the Compacting States have had the declaration since the United States first submitted it does not reduce the prejudice that they face. They have never had the opportunity for discovery on it and must now develop rebuttal evidence for the purpose of trial.

Nonetheless, the Compacting States recognize that the Court permitted the United States to try its claim. *See id.* ("The United States' argument that groundwater pumping at D2 levels violates the Compact may or may not ultimately prevail at trial."). In keeping with the goal of developing a complete record for the Court's consideration of the United States' position, the Compacting States do not oppose the Motion, provided that the Special Master make certain accommodations

to cure, at least in part, the prejudice associated with the disclosure of new expert opinions in the middle of trial.

First, the Special Master should require the United States to disclose the documents and data that Dr. Ferguson relied upon to form these new opinions. If the United States had disclosed these opinions during the discovery period, the other parties would have been entitled to receive all information required by Rule 26(a)(2), together with “an executable electronic version of any computation model” and “all input and output files relied upon by the expert in forming his or her opinions.” Case Management Plan, ¶ 6.2.2 (Sept. 6, 2018). The same rules should apply now. To the extent that these materials are already produced, then the United States should identify them with sufficient particularity to allow the other parties to locate them. The Compacting States request that these disclosures take place not later than April 7, 2025.

Second, the Special Master should permit the Compacting States to jointly notice a deposition of Dr. Ferguson concerning the opinions in his declaration. The Compacting States would be prejudiced if the first time that they are permitted to cross examine Dr. Ferguson about these opinions was at trial. The Compacting States believe that a deposition of one day not to exceed seven hours on the record would be sufficient. The Compacting States request that this deposition take place not later than May 12, 2025.

Third, the Special Master should allow the Compacting States to disclose and offer at trial testimony in response to Dr. Ferguson's late-disclosed opinions. The United States is correct that the Compacting States partially responded to Dr. Ferguson's declaration through the materials that they submitted during proceedings on the proposed consent decree. *See, e.g.*, Mot. 16 n.2. Nonetheless, the Compacting States should not be limited to those declarations. In the context of their direct testimony, they should be able to provide complete rebuttal analyses, with the benefit of the disclosures and discovery requested of the United States. They request the same opportunity to address the United States' new testimony that they would have had if the United States timely disclosed these opinions. *See* Case Management Order, Appx. B (Sept. 6, 2018).

CONCLUSION

For the foregoing reasons, the Compacting States respectfully request that the Special Master permit the United States to designate the expert testimony contained in Attachment A to the Motion, provided that the Special Master require the United States disclose the bases of such expert testimony in accordance with Rule 26(a)(2) and the Case Management Order, give the Compacting States Leave to notice Dr. Ferguson's deposition, and allow the Compacting States to provide rebuttal testimony in response to Attachment A to the Motion as part of their direct testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

◆

This is to certify that on this March 17, 2025, I caused a true and correct copy of the foregoing document 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 made by electronic mail to those individuals listed on the attached service list, which reflects all updates and revisions through the current date.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

STATE OF TEXAS)
)
Plaintiff,)
) Original Action Case
VS.) No. 220141
) (Original 141)
STATE OF NEW MEXICO,)
and STATE OF COLORADO,)
)
Defendants.)

ORAL AND VIDEOTAPED DEPOSITION OF
IAN FERGUSON
FEBRUARY 19, 2020
VOLUME 1

ORAL AND VIDEOTAPED DEPOSITION of IAN FERGUSON,
produced as a witness at the instance of the Defendant
State of New Mexico, and duly sworn, was taken in the
above-styled and numbered cause on February 19, 2020,
from 9:11 a.m. to 4:50 p.m., before Heather L. Garza,
CSR, RPR, in and for the State of Texas, recorded by
machine shorthand, at the offices of TROUT RALEY, 1120
Lincoln Street, Suite 1600, Denver, Colorado, pursuant
to the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto;
that the deposition shall be read and signed.

1 Q. Okay.

2 A. Yeah. I think it was maybe the second week
3 in December.

4 Q. Do you recall whether you provided any
5 feedback to the Texas attorneys or experts related to
6 their rebuttal comments?

7 A. No. My recollection is that we all had
8 fairly similar comments, and we agreed that we were
9 going to move forward and submit the rebuttal
10 materials that we did.

11 Q. Okay. What's your understanding of what the
12 U.S. position is -- excuse me -- the Texas position in
13 this case?

14 A. My understanding is that the Texas position
15 is that groundwater pumping in New Mexico has depleted
16 project surface water supplies, and that has harmed
17 Texas.

18 Q. Do you understand that their position is
19 related to a 1938 condition?

20 A. Yes.

21 Q. Okay. And how does that compare to the
22 Texas -- excuse me -- the U.S. position in this case?

23 A. The similarity in my mind is that both
24 parties feel that groundwater pumping in New Mexico
25 has depleted project surface water supplies.

1 Groundwater pumping has increased since 1938, but I
2 don't think the United States position hinges
3 specifically on a 1938 condition or baseline.

4 Q. What does the U.S. position hinge on?

5 A. Impacts to the Rio Grande project.

6 Q. Is it based on any period of time?

7 A. Since groundwater pumping significantly
8 increased during the 1950s.

9 Q. Okay.

10 A. That's the time period we focused on.

11 Q. Is it your understanding that the U.S.
12 position supports the D2 period of conjunctive use
13 pumping?

14 A. What do you mean by "supports the D2 period
15 of conjunctive use pumping"?

16 Q. That that level of conjunctive use is, in
17 essence, grandfathered in going forward from '51 to
18 '78?

19 MR. DUBOIS: Objection to the form of
20 the question.

21 A. No. I don't think we -- we specifically feel
22 that that groundwater pumping is grandfathered in.

23 Q. (BY MS. THOMPSON) Okay. So what's the U.S.
24 position then that -- your understanding of the U.S.
25 position related to the 1938 condition?

1 behalf this deposition is taken, nor in the regular
2 employ of this attorney; and I certify that I am not
3 interested in the cause, nor of kin or counsel to
4 either of the parties.

5
6 That the amount of time used by each party at
7 the deposition is as follows:

8 MS. THOMPSON - 05:14:29

MR. DUBOIS - 00:00:00

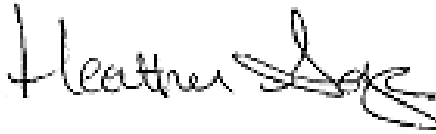
9 MS. BARFIELD - 00:00:00

MR. WALLACE - 00:00:00

10 MS. O'BRIEN - 00:00:00

MS. BARNCASTLE - 00:00:00

11
12 GIVEN UNDER MY HAND AND SEAL OF OFFICE, on
this, the 26th day of March, 2020.

13
14 

15 HEATHER L. GARZA, CSR, RPR, CRR

Certification No.: 8262

16 Expiration Date: 04-30-22

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Page 1

IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

STATE OF TEXAS, :

Plaintiff, :

VS. : Original Action Case

: No. 220141

STATE OF NEW MEXICO AND : (Original 141)

STATE OF COLORADO, :

Defendants. :

ORAL AND VIDEOTAPED 30(b)(6) DEPOSITION OF
UNITED STATES BUREAU OF RECLAMATION
BY AND THROUGH
FILIBERTO CORTEZ
AUGUST 20, 2020

ORAL AND VIDEOTAPED 30(b)(6) DEPOSITION OF
UNITED STATES BUREAU OF RECLAMATION BY AND THROUGH
FILIBERTO CORTEZ, produced as a witness at the instance
of the Defendant State of New Mexico, and duly sworn,
was taken in the above-styled and numbered cause on
August 20, 2020, from 10:02 a.m. MDT to 1:32 p.m. MDT,
via Zoom videoconference, before PHYLLIS WALTZ, RMR,
CRR, CRC, Texas CSR, TCRR, Louisiana CCR, in and for the
State of Texas, recorded by machine shorthand, pursuant
to the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto; that
the deposition shall be read and signed before any
Notary Public.

Page 3

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10 VIDEOGRAPHER:

11 Mr. Jordan Brown

12 ALSO PRESENT:

13 Dr. Al Blair
14 Ms. Michelle Estrada-Lopez, United States
15 Mr. Ian Ferguson, United States
16 Ms. Susan Barela, RRA
17 Ms. Shelly Dalrymple

1 (Pages 1 to 4)

Page 73

1 Q. Ultimately, it results in if there is a
2 diversion ratio of less than 1, it will result in EBID
3 receiving an allocation of less than 57 percent?

4 A. The -- the amount of water needed, as
5 calculated by the diversion ratio, is subtracted from
6 the EBID allocation, correct.

7 Q. D-2 is based on data from 1951 to 1978?

8 A. Correct.

9 Q. During that time period, there was groundwater
10 pumping in both states?

11 A. From my understanding, yes.

12 Q. The effects to the river and to deliveries to
13 the districts would have been reflected within the D-2
14 curve; is that right?

15 A. Say again. The -- the effects. Yes.

16 Q. And that include impacts that occurred to the
17 river from groundwater pumping, those would be reflected
18 in the D-2 curve?

19 A. Correct.

20 Q. Let's look at the operating agreement, which
21 I'll mark as Deposition Exhibit 13.

22 Does the ground -- the operating agreement
23 grandfather in the groundwater pumping from the D-2
24 period?

25 A. The operating agreement grandfathers in the --

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1 all of the conditions on the project. Part of that is
2 being the groundwater extraction taken -- being done at
3 the time, but along with all the climatic conditions,
4 the return flows from Arroyo runs, any flooding
5 conditions which may be -- have gone on at the time. So
6 it's not just the pumping, but quite a few other
7 factors.

8 Q. All conditions that existed during that D-2
9 period?

10 A. Correct.

11 Q. The -- if you look at Page 18, Section 6.12 is
12 the one that says "Rio Grande Compact," and it says,
13 "Nothing herein is intended to alter, amend, repeal,
14 modify, or be in conflict with provisions of the
15 Rio Grande Compact." And so, if I understand, in
16 putting that along with the use of D-2, is it correct
17 that D-2 is not in conflict with the provisions of the
18 Rio Grande Compact?

19 A. That is correct.

20 Q. In -- does Reclamation claim that a contract
21 is needed for groundwater pumping within the Rio Grande
22 Project area?

23 A. The contract with whom?

24 Q. Reclamation.

25 A. No.

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1 Q. Let's look back at Deposition Exhibit 1 again.
2 And, again, I'm going to skip ahead to Topic O. I guess
3 that's the next one. "Rio Grande Compact Commission
4 reporting." Again, we talked about that at length last
5 time we spoke. Do you recall that?

6 A. Yes.

7 Q. I just want to get you to look at one more
8 report to the Commission. You recognize -- I'm sorry,
9 this is the wrong document. Let me find the right one.

10 That's -- here we go. So now I'm going to
11 mark Deposition Exhibit 15.

12 Deposition Exhibit 15, do you recognize that
13 as a report to the Rio Grande Compact Commission for
14 calendar year 2016?

15 A. Correct.

16 Q. We talked about these reports that you do to
17 the Commission and the Engineer Advisers at length. Do
18 you recall that?

19 A. Yes.

20 Q. If you turn to Page 60, pdf Page 60 here, this
21 is the discussion that you have in this document about
22 the Rio Grande Project. And can you remind me,
23 Mr. Cortez, do you actually help to develop these
24 reports?

25 A. Yes.

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1 Q. And here we see something a little bit
2 different than the reports that we saw previously. And
3 I'll look to the next page, which is Page 67, at
4 Table 14.

5 A. Table 14?

6 Q. Correct. It's on pdf Page 67. Or if you want
7 to use the numbers in the lower hand corner, it's
8 Page 57.

9 A. Okay, I have it.

10 Q. And here there seems -- you're including a
11 table with more information than had been in some of the
12 previous reports to the Commission; is that right?

13 A. I would have to look at the previous reports,
14 but it looks pretty comprehensive.

15 Q. Where does Reclamation get this information
16 that's included in Table 14?

17 A. From each of the irrigation districts, El Paso
18 No. 1, EBID, and from the International Boundary and
19 Water Commission for the Mexican information.

20 Q. I have a few questions on the document that I
21 inadvertently showed you, that Deposition Exhibit 14.
22 That's the 2016 "Final Environmental Impact Statement."
23 I anticipate that'll take 15 minutes or so, and then I'm
24 pretty close to being finished.


25 MR. WECHSLER: And so why don't we go off

19 (Pages 73 to 76)

Page 97

1 IN THE SUPREME COURT OF THE UNITED STATES
 2 BEFORE THE OFFICE OF THE SPECIAL MASTER
 3 HON. MICHAEL J. MELLOY
 4 STATE OF TEXAS, :
 5 :
 6 Plaintiff, :
 7 :
 8 VS. : Original Action Case
 9 : No. 220141
 10 STATE OF NEW MEXICO AND : (Original 141)
 11 STATE OF COLORADO, :
 12 :
 13 Defendants. :
 14
 15 I, PHYLLIS WALTZ, a Texas Certified Shorthand
 16 Reporter, Texas Certified Realtime Reporter, Louisiana
 17 Certified Court Reporter, Registered Merit Reporter,
 18 Certified Realtime Reporter, and Certified Realtime
 19 Captioner, in and for the State of Texas, do hereby
 20 certify the following:
 21 That the witness, FILIBERTO CORTEZ, was duly
 22 sworn by the officer and that the transcript of the oral
 23 deposition is a true record of the testimony given by
 24 the witness;
 25 I further certify that pursuant to FRCP Rule
 30(e)(1) that the signature of the deponent:
 _____ was requested by the deponent or a party
 before the completion of the deposition and is to be
 returned within 30 days from the date of receipt of the
 transcript. If returned, the attached Changes and
 Signature Page contains any changes and the reasons

Page 98

1 therefor;
 2 _____ was not requested by the deponent or a
 3 party before the completion of the deposition.
 4 I further certify that I am neither counsel
 5 for, related to, nor employed by any of the parties or
 6 attorneys to the action in which this proceeding was
 7 taken. Further, I am not a relative or employee of any
 8 attorney of record in this cause, nor am I financially
 9 or otherwise interested in the outcome of the action.
 10 GIVEN UNDER MY HAND AND SEAL OF OFFICE, on
 11 this, the 4TH day of SEPTEMBER, 2020.
 12
 13
 14 
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25 (Pages 97 to 98)

IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLO

STATE OF TEXAS)	
)	
Plaintiff,)	
)	Original Action Case
VS.)	No. 220141
)	(Original 141)
STATE OF NEW MEXICO,)	
and STATE OF COLORADO,)	
)	
Defendants.)	

REMOTE ORAL AND VIDEOTAPED DEPOSITION OF
DR. AL BLAIR
JUNE 18, 2020
VOLUME 3

REMOTE ORAL AND VIDEOTAPED DEPOSITION of DR. AL BLAIR, produced as a witness at the instance of the Defendant State of New Mexico, and duly sworn, was taken in the above-styled and numbered cause on June 18, 2020, from 9:04 a.m. to 5:13 p.m., before Heather L. Garza, CSR, RPR, in and for the State of Texas, recorded by machine shorthand, at the offices of HEATHER L. GARZA, CSR, RPR, The Woodlands, Texas, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto; that the deposition shall be read and signed.

1 disclosure and make sure I fully understand your
2 testimony and your opinions. And so we can start at,
3 I believe, Page 6. Well, no, I'm sorry. It's Page 3
4 of the PDF. This is -- this is -- under the
5 heading, "Opinions regarding report of Dr. Barroll."
6 And -- and all of the opinions related -- that are
7 expressed in this disclosure relate to the report of
8 Dr. Barroll; is that correct?

9 A. Yes.

10 Q. So let's start on that first one. My first
11 question is in that first sentence, you say, "The
12 operating agreement is not resulted in increased
13 allocations to EPCWID above what EPCWID is entitled to
14 from the Rio Grande project." My question is: As
15 you're using it in this sentence, what is EPCWID
16 entitled to from the Rio Grande Compact?

17 MS. O'BRIEN: Objection. I believe
18 there's either a misstatement or is calling for a
19 legal conclusion. You started by talking about the
20 project, which is what is contained in Exhibit 4, and
21 then you switched to the Compact. If that was
22 intentional, I lodge an objection based on calls for a
23 legal conclusion.

24 MR. WECHSLER: It was not intentional.
25 So let me just ask again.

1 Q. (BY MR. WECHSLER) My question is: As you're
2 using it in this sentence, what are -- what is EPCWID
3 entitled to from the Rio Grande project?

4 A. In relationship to this opinion?

5 Q. Correct. As you're using it -- I mean, I
6 understand these opinions to --

7 A. Yeah. We're talking about the opinions, not
8 just, you know, the whole world of --

9 Q. Correct.

10 A. -- interactions between. So the operating
11 agreement defines the entitlement to EPCWID in
12 relationship to this opinion.

13 Q. The -- we looked at some of the full supply
14 years in the past. If -- if we go back to
15 Dr. Barroll's report, which is Exhibit AB-24. And
16 this time, we go to PDF Page 315. We can see --

17 MS. O'BRIEN: Did we lose Jeff?

18 THE WITNESS: I think he froze.

19 MS. O'BRIEN: I think he froze.

20 THE WITNESS: First time that's
21 happened.

22 THE REPORTER: Do you guys want to go
23 off the record until he gets back?

24 MS. O'BRIEN: Yes. Let's go off the
25 record and figure out what's going on.

1 Q. Is that number reported anywhere?

2 A. It's a -- by the allocation committee? Is
3 that the question?

4 Q. By -- I'm just --

5 A. I guess -- I'm not -- I'm sure -- are we -- I
6 was in context of my opinion so...

7 Q. Yeah. My question is in your last answer,
8 you indicated that the table fails to show the amount
9 of water that is project water that is diverted
10 through groundwater pumping for use by EBID and other
11 New Mexico entities, and my question is: What's the
12 source of information that you think should be
13 included on this table?

14 A. So the 2008 operating agreement is based on a
15 departure from the conditions in 1951 to 1978. The
16 amount of water -- surface water that's delivered to
17 EPCWID is identified in the documents that are
18 provided, the monthly allocation charges that are
19 provided to the allocation committee and United
20 States. The same is for Elephant Butte Irrigation
21 District, the surface water diversions are provided,
22 and you can calculate the departure from the D2
23 diversion ratio as opposed to the measured diversion
24 ratio, and the fundamental design of the 2008
25 operating agreement is that departure is water that

1 would have otherwise flowed -- been available for
2 diversion by EBID if it hadn't been captured by
3 other -- by outflow diversions.

4 **Q. Are all of those negative departures caused**
5 **by New Mexico groundwater pumping?**

6 A. These are --

7 **MR. DUBOIS:** Objection; vague.

8 A. -- departures from the D2 curve. Oh, sorry.

9 **Q. (BY MR. WECHSLER) Correct.**

10 A. The large majority, if not all, are caused
11 by.

12 **Q. Have you ever evaluated whether all of the**
13 **departures from D2 are caused by New Mexico**
14 **groundwater pumping?**

15 A. Yes.

16 **Q. When?**

17 A. I -- my first calculations related to D2 and
18 the problems El Paso County Water Improvement District
19 was seeing in the project conveyance efficiency date
20 back to 1996.

21 **Q. Did your results show that all departures**
22 **from D2 are the result of New Mexico groundwater**
23 **pumping?**

24 A. The results show, and I think the -- you have
25 to understand that the two time periods here we're

1 There -- there were two different D3s, in other words.

2 Q. I didn't know that. Prior to April 26th,
3 2006, were you aware that EBID was going to propose a
4 new method for allocating Rio Grande project water to
5 Reclamation?

6 A. I would have to check my notes. There was a
7 lot of activity during that time. My recollection at
8 this time, that's quite a while ago, was that when
9 that letter from Seig Hubert, which I believe was
10 April 26, 2006, letter, that was the first time I had
11 ever seen the concept developed sufficiently enough to
12 understand what EBID was proposing and how it might be
13 used as a substitute to the method being proposed by
14 EPCWID of allocation in storage.

15 Q. Further down in your opinion, there's a
16 sentence that begins, "The 2008 operating agreement
17 allocation method works." It continues, "To ensure
18 EPCWID and EBID receive appropriate allocations of
19 project water." As you're using the term in this
20 opinion, appropriate allocations of project water,
21 what do you mean?

22 A. I mean the -- the method consistent with the
23 1938 contract we discussed earlier, and the methods
24 described in detail in the operating agreement.

25 Q. Further down, the last sentence of this

1 behalf this deposition is taken, nor in the regular
2 employ of this attorney; and I certify that I am not
3 interested in the cause, nor of kin or counsel to
4 either of the parties.

5
6 That the amount of time used by each party at
7 the deposition is as follows:

8 MR. WECHSLER - 05:15:04

MS. O'BRIEN - 00:00:00

9 MR. DUBOIS - 00:00:00

MR. WALLACE - 00:05:20

10 MS. BARFIELD - 00:00:00

11
12 GIVEN UNDER MY HAND AND SEAL OF OFFICE,
13 this, the 15th day of July, 2020.

14 

HEATHER L. GARZA, CSR, RPR, CRR

Certification No.: 8262

Expiration Date: 04-30-22



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Review of the Texas Model, a Numerical Model of the Rio Grande below Elephant Butte Reservoir

Prepared for:
United States Department of Justice
Environmental & Natural Resources Division

May 31, 2019

The U.S. Department of Justice retained Stetson Engineers to evaluate the numerical hydrologic model of the Rio Grande below Elephant Butte Reservoir developed on behalf the State of Texas ("Texas Model"). In addition, Stetson Engineers was asked to assess the model's suitability to analyze the impacts of pumping on surface water flows in the Rio Grande, and, if appropriate, use the model to determine whether pumping of groundwater in Rincon and Mesilla Basins in New Mexico is depleting the surface water supply available to the Rio Grande Project. In conducting this evaluation, I have reviewed groundwater model files and supporting documentation from Texas (Montgomery and Associates, Land IQ, and Bill Hutchinson) as they pertain to the input and construction of the Texas Model, and consequently to the determination of streamflow depletion resulting from groundwater withdrawals from aquifers underlying the Rio Grande Project. I have also consulted with other members of Stetson Engineers regarding the data inherent to the Texas Model. This report summarizes Stetson's review of the irrigation demand, surface water and groundwater interaction, and model-simulated results produced by the Texas Model.



A handwritten signature in blue ink that reads "Jean Moran".

Jean M Moran, PG, CHG
Supervising Hydrogeologist

EXHIBIT
JM-009

1 INTRODUCTION

The United States Department of Justice (DOJ) retained Stetson Engineers to evaluate the numerical hydrologic model of the Rio Grande below Elephant Butte Reservoir developed on behalf of the State of Texas (“Texas Model”). In addition, Stetson Engineers was asked to assess the model’s suitability to analyze the impacts of pumping on surface water flows in the Rio Grande, and, if appropriate, use the model to determine whether pumping of groundwater in Rincon and Mesilla basins in New Mexico is depleting the surface water supply available to the Rio Grande Project. In conducting the evaluation on behalf of the DOJ, I have reviewed groundwater model files and supporting documentation¹ from Texas (Montgomery and Associates, Land IQ, and Bill Hutchinson) as they pertain to the input and construction of the Texas Model, and consequently to the determination of streamflow depletion resulting from groundwater withdrawals from aquifers underlying the Rio Grande Project. I have also consulted with other members of Stetson Engineers regarding the data inherent to the Texas Model. This report summarizes Stetson’s review of the irrigation demand, surface water and groundwater interaction, and model-simulated results produced by the Texas Model.

The Texas Model uses MODFLOW modeling software. MODFLOW modeling is a common tool used by hydrogeologists to evaluate the occurrence and movement of water throughout the hydrologic system of a modeled basin. A hydrologic model provides a three-dimensional structure of multiple aquifers and boundary conditions; accounts for variable groundwater pumping, river flows, and other stresses over time; and calculates a water budget of inflows and outflows to the system. A well-constructed and calibrated model is a numerical simulation of the movement of water throughout the hydrogeologic system being analyzed, and can be used to assess the effects of changes in groundwater pumping over time on the surface water flow in a river. The model review completed for this report evaluated the Texas Model’s structure, hydrogeologic properties, model calibration, and the model’s ability to evaluate the impact of pumping wells on the flow in the Rio Grande.

1.1 SUMMARY OF OPINIONS

The following opinions summarize our review:

- The Texas Model is an appropriate tool for evaluating the annual or long-term impacts to streamflow from groundwater pumping, and analyzing annual groundwater and surface water hydrologic budgets for the Rincon and Mesilla Basins.
- The Texas Model incorporates the most recent geologic understanding of the aquifer units beneath the Rincon and Mesilla valleys using a three-

¹ Stetson Engineers is also reviewing the USGS’s RGTIHM MODFLOW Model (USGS, 2018) but has not completed its review and is not offering opinions about the RGTIHM Model at this time.

dimensional digital geologic framework to define the model layers based on aquifer structure.

- The comprehensive mapping of historical irrigated crops, updated evapotranspiration calculations and crop irrigation requirements completed by Land IQ (2018) and Montgomery and Associates (Schorr et al, 2019a), and used in the Texas Model are substantial new contributions to the understanding of the utilization and movement of water in the Rincon and Mesilla Basins.
- Withdrawal of water from the alluvial and Santa Fe aquifers has captured subflow and streamflow from the river, reducing flows in the Rio Grande downstream from Caballo Dam. Combined pumping effects have produced cones of depression that change groundwater gradients at the river, inducing recharge from the river into the groundwater aquifer.
- Groundwater pumping from wells in the Rincon and Mesilla Basins have resulted in reduced flow at the Rio Grande at El Paso gage (Narrows) by:
 - intercepting natural recharge flowing towards the river
 - capturing irrigation return flows that would have flowed back to the river
 - directly capturing subflow and streamflow from the river
- Changes in irrigation practice for the types of crops grown in the Rincon and Mesilla Basins, including within the area of the Rio Grande Project, have increased the crop irrigation water consumption.
- The Texas Model is able to demonstrate that historical groundwater pumping in the Study Area affects annual streamflow in the Rio Grande at El Paso Narrows.

Additional comments are included in the remainder of this report.

2 DESCRIPTION OF STUDY AREA REPRESENTED BY THE TEXAS MODEL

The geographic area covered by the Texas Model encompasses the Rio Grande valley between the upstream USGS gage below Caballo Dam (08362500) to the downstream USGS gage at El Paso (08364000) Narrows (Figure 1), and extends to the surrounding watersheds of the Rincon and Mesilla Basins and a portion of Mexico (the “Study Area”). Streamflow in the Rio Grande within the Study Area has been managed by the U.S. Bureau of Reclamation’s Rio Grande Project (“Project”, Figure 1) since 1916, when Elephant Butte Dam was completed. Elephant Butte Dam, which is part of the Project, stores and releases flows of the Rio Grande to support downstream agricultural irrigation in New Mexico and Texas, as well as delivery of water to Mexico pursuant to

this analysis, and all net deep percolation in the Texas Model well package was simulated. As a result, this sensitivity model run overestimates how much deep infiltration into the aquifer occurred under no pumping conditions.

The historical calibration of the Texas Model included an average annual amount of 75,480 acre-feet/year of deep infiltration from all water use (agricultural surface water and groundwater; and urban/domestic groundwater) within the Study Area between 1938 and 2016 (Hutchinson, 2019b). For that same time period, Schorr et al (2019a) calculated an average annual water use (both groundwater and surface water) of 362,752 acre-feet/year (Tables 3 and 4). Deep infiltration for this 79-year period averaged 20.8% of all water use within the Study Area. The portion of total deep percolation attributable to groundwater pumping that was included in the no-pumping scenario causes an overestimation of stream depletion.

6 CONCLUSIONS

The Texas Model provides a good representation of hydrogeologic features within the Study Area, and is an appropriate tool for evaluating the annual or long-term impacts to streamflow from groundwater pumping in the Rincon and Mesilla Basins. Withdrawal of water from the alluvial and Santa Fe aquifers has captured subflow and streamflow from the river, reducing flow in the Rio Grande downstream from Caballo Dam. Combined pumping effects from wells have produced cones of depression that change groundwater gradients at the river in the Rincon and Mesilla Basins, inducing recharge from the river into the groundwater aquifers, that have resulted in reduced Rio Grande flow at El Paso Narrows (gage).

The data input for the Texas Model was developed by Montgomery and Associates (Schorr, 2019c). The Texas Model incorporates the most recent geologic knowledge of the aquifer units beneath the Rincon and Mesilla valleys using a three-dimensional digital geologic framework to define the model layers based on aquifer structure. Land IQ (2018) completed a comprehensive mapping of historical irrigated crops, updated evapotranspiration calculations, and crop irrigation requirements that were integrated into the Texas Model (Schorr et al, 2019a). Changes in irrigation practices for the types of crops grown in the Rincon and Mesilla Basins, including areas within the Rio Grande Project, have increased the crop irrigation water requirements.

The Texas Model is constructed with unstructured grids to refine model cell sizes in relation to proximity to more hydrologically active areas. Cell sizes are small near the active river channel, canal system, and many wells pumping in the Rincon and Mesilla Basins, while cell sizes are progressively larger near the surrounding mountains. The distribution of model cells optimizes the model computation time and provides more spatial resolution at the areas within the Rio Grande Project in the Rincon and Mesilla Basins. Applying an unstructured grid for modeling the Rincon

and Mesilla Basins provides an effective and valid method that give greater focus to hydrologically significant areas within the Study Area

The Texas Model was established using annual time steps¹⁴ that distribute the stresses (pumping, deep infiltration, etc.) evenly within a year. It is recommended that the Texas Model be enhanced to include either seasonal or monthly stress periods to evaluate the inherent Rio Grande hydrology caused by the upstream dams and Project releases. Seasonal or monthly stress periods would enable the model to evaluate the impacts of pumping on Rio Grande flows at El Paso Narrows within each year.

The preliminary use of the Texas Model was able to demonstrate that historical groundwater pumping in the Study Area affects annual streamflow in the Rio Grande at El Paso Narrows. Future analysis will be required to quantify how much depletion has occurred over time.

¹⁴ The Texas Model uses annual stress periods. (technically a model time step represents a smaller unit of time, but is used in a general context here)

IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

STATE OF TEXAS, :
 :
 :
 Plaintiff, :
 :
 VS. : Original Action Case
 : No. 220141
 STATE OF NEW MEXICO AND : (Original 141)
 STATE OF COLORADO, :
 :
 Defendants. :

ORAL AND VIDEOTAPED DEPOSITION OF
JEAN MARIE MORAN
JUNE 29, 2020
VOLUME 1

ORAL AND VIDEOTAPED DEPOSITION OF JEAN MARIE MORAN, produced as a witness at the instance of the Defendant State of New Mexico, and duly sworn, was taken in the above-styled and numbered cause on June 29, 2020, from 10:10 a.m. to 5:02 p.m., via Zoom, before PHYLLIS WALTZ, RMR, CRR, CRC, Texas CSR, TCRR, Louisiana CCR, in and for the State of Texas, recorded by machine shorthand, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto; that the deposition shall be read and signed before any Notary Public.

1 Q. And why not?

2 A. From reviewing both the Texas and the
3 New Mexico models, groundwater model, there is a
4 pediment or a narrowing of the groundwater subflow to
5 the river between the two basins. So the basins are not
6 connected from a groundwater point of view or minimally
7 connected from a groundwater point of view. So the
8 pumping in Texas below the extent of the Mesilla basin
9 did not concern me for the review of the model.

10 Q. Is it your opinion that pumping within the
11 Waco Basin has no effect on the project overall,
12 including reservoir releases?

13 A. In reviewing the New Mexico model runs 2 and
14 6, I think -- and I'd have to check. I don't memorize
15 numbers, but I'd have to check my report. It's,
16 like, .2 percent difference between those two, as far as
17 the groundwater part. And I am not an expert on the
18 project operations to answer your other question.

19 Q. We were talking a little bit ago about your
20 expert testimony in the first of the two listed cases.
21 I just want to wrap up that discussion so we can move on
22 past your CV.

23 A. Okay.

24 Q. And did your testimony in the first case, did
25 it relate in any way to the same type of expert

1 three states. And the -- my understanding of the
2 Rio Grande Project is that it extends from the reservoir
3 in New Mexico, Elephant Butte and Caballo, and is the
4 irrigation and -- and other members of the Rio Grande
5 Project getting water off the river from Caballo Dam to
6 Fort Quitman, Texas.

7 Q. The rest of that sentence says that it was
8 agreed to by the states Colorado, New Mexico, and Texas
9 in 1938 to apportion the surface water of the Rio Grande
10 down to Fort Quitman. Am I understanding you correctly
11 that your understanding is that the project is the
12 mechanism to apportion the surface water between
13 New Mexico and Texas below Caballo Dam?

14 MR. DUBOIS: Objection; misstates the
15 prior testimony.

16 Q. (BY MS. THOMPSON) well, certainly correct me
17 if -- if I'm misstating.

18 A. I'm rereading.

19 MR. DUBOIS: I'll also object to the
20 extent it calls for a legal conclusion.

21 A. It is my understanding that the Rio Grande
22 Project apportions surface water of the Rio Grande from
23 Caballo Dam to Fort Quitman, Texas.

24 Q. (BY MS. THOMPSON) And what is the
25 apportionment to New Mexico, based on your

1 **understanding?**

2 **MR. DUBOIS:** Objection to the extent it
3 calls for a legal conclusion.

4 A. I am not an expert on the Rio Grande Project.

5 **Q. (BY MS. THOMPSON) I understand. I'm just**
6 **asking --**

7 A. The operations -- and the operations. I -- my
8 understanding is EBID gets an allotment and EPCWID No. 1
9 also gets an allotment, and there is also water that
10 goes to Mexico.

11 **Q. Historically, has that apportionment been on a**
12 **57/43 percent breakdown?**

13 A. On average. I think I even stated in my
14 apportioning of the water based on historical
15 proportions by year averaged out to 57/43. But there
16 are more decimal places in that in the actual
17 calculations.

18 **Q. And do you recall, is that true, that the**
19 **57/43 split since 2006, has that been true since then?**

20 A. I would need to look at those numbers. I do
21 not know.

22 **Q. Okay.**

23 A. In my modeling I -- sorry.

24 **Q. No, no, you go ahead. I'm sorry.**

25 A. In my modeling I proportioned by year whatever

1 therefor;

2 _____ was not requested by the deponent or a
3 party before the completion of the deposition.

4 I further certify that I am neither counsel
5 for, related to, nor employed by any of the parties or
6 attorneys to the action in which this proceeding was
7 taken. Further, I am not a relative or employee of any
8 attorney of record in this cause, nor am I financially
9 or otherwise interested in the outcome of the action.

10 GIVEN UNDER MY HAND AND SEAL OF OFFICE, on
11 this, the 20TH day of JULY, 2020.



12
13
14 Phyllis Waltz

PHYLLIS WALTZ, RMR, CRR, CRC

15 Expiration Date: 12/31/20

TEXAS CSR, TCRR NO. 6813

16 Expiration Date: 12/31/21

LOUISIANA CCR NO. 2011010

17 Expiration Date: 12/31/20
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