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,

UNITED STATES OF AMERICA,

Intervenor.

MEMORANDUM ORDER

After conducting a status conference in Pittsburgh, Pennsylvania, on February 27, 2025, the undersigned Special Master issued an Order that, *inter alia*, directed that if the United States elected to file a motion to reopen discovery, it do so not later

than March 10, 2025. ECF No. 29 at 3.[1] On that date, the United States filed its Motion for Leave to Designate Supplemental Expert Testimony. ECF No. 30. Texas, New Mexico, and Colorado do not object to the United States' motion, contingent on three conditions. ECF No. 32. For the reasons that follow, the Special Master will GRANT the United States' Motion subject to the conditions proposed by the States.

I. Background

This original action commenced when the Supreme Court granted Texas's motion for leave to file a bill of complaint against New Mexico and Colorado in January 2013. The complaint alleged that New Mexico had violated the Rio Grande Compact of 1938 (the "Compact") by unlawfully diverting surface and ground water of the Rio Grande River. More specifically, Texas averred that New Mexico, contrary to the provisions of the Compact and "to the detriment of the State of Texas[,]" had "changed the conditions that existed in 1938 when the Compact was executed[.]" Tex. Compl. ¶ 18. As this matter has proceeded, Texas's contention that New Mexico's actions should be measured against Rio Grande water-use conditions as

[1] Citations to "ECF No. __" refer to the docket accessible on the Third Circuit's CM/ECF system under Case No. 24-141. This docket includes only the filings that post-date the undersigned's appointment as Special Master.

they existed in 1938 has become known as an argument for application of a "1938 Baseline[.]" 3CA Dkt. No. 602 at 10.[2]

Five years after Texas filed its complaint, the United States sought leave to intervene. 3CA Dkt. No. 65. It explained that the United States, through the Bureau of Reclamation, operates the Rio Grande Project, which manages (in part) the apportionment and delivery of Rio Grande water to New Mexico and Texas, and to the country of Mexico pursuant to a 1906 Convention between the two nations. The United States alleged that New Mexico's surface-water diversions and groundwater pumping had reduced the efficiency of the Rio Grande Project. *Id.* ¶¶ 14–15.

The Supreme Court permitted the United States to intervene in March 2018. *Texas v. New Mexico*, 583 U.S. 407 (2018). The Court emphasized that the United States was "assert[ing] essentially the same claims" and "seeking substantially the same relief" as Texas. *Id.* at 409, 415.

As this case progressed and as the parties prepared for an October 2021 trial, the litigating positions of Texas and the United States remained aligned. Both parties argued for a 1938 Baseline in their trial briefs. 3CA Dkt. No. 600 at 4; 3CA Dkt. No. 602 at 10. And both parties prepared to present "an integrated case-in-chief due to the overlapping allegations in their claims." 3CA Dkt. No. 600 at 5. As the United

[2] Citations to "3CA Dkt. No. __" refer to the full docket, dating back to 2014, which can be found at https://www.ca3.uscourts.gov/texas-v-new-mexico-and-colorado-no-141-original.

States explained at the time, its collaboration with Texas included coordinating with respect to the lay and expert witnesses the parties planned to call at trial. *Id.* at 5–6.

In its pretrial statement, the United States designated Dr. Ian M. Ferguson—a Hydrologic Engineer with the Bureau of Reclamation—as a non-retained expert witness whom it planned to call at trial. 3CA Dkt. No. 564, Attachment A at 3. The United States had previously disclosed Dr. Ferguson as an expert witness in May 2019, well before the September 30, 2020, deadline for supplemental expert disclosures. 3CA Dkt. No. 267, Ex. A; 3CA Dkt. No. 390 at 2.

The first phase of trial commenced on October 4, 2021, and spanned nineteen days. Over twenty witnesses testified, but Dr. Ferguson was not among them.

Following the first phase of trial, the alignment of Texas and the United States began to develop fault lines. The parties participated in mediation after the first phase of trial had concluded, and on November 14, 2022, Texas, New Mexico, and Colorado submitted a Proposed Consent Decree in an attempt to resolve this matter. 3CA Dkt. No. 720. The United States excepted to the proposal. 3CA Dkt. No. 754. In support of its contention that the Proposed Consent Decree would improperly extinguish its claim that New Mexico had run afoul of the 1938 Baseline governing Rio Grande Project water use, the United States submitted a declaration authored by Dr. Ferguson. *Id.*

Ultimately, in June 2024, the Supreme Court sustained the United States' exception and declined to enter the Proposed Consent Decree. *Texas v. New Mexico*, 602 U.S. 943, 965 (2024). Upon withdrawal of the previous Special Master, the undersigned was appointed to serve as his successor. By order dated September 9, 2024, I instructed the parties to submit status reports identifying a procedural path forward in this twelve-year long case. ECF No. 5 at 2.

Those submissions laid bare the fact that the previous alignment between Texas and the United States had fractured. Texas, New Mexico, and Colorado explained that they were now "aligned on the remedy that they seek: a Proposed Index Decree that mirrors their proposed Consent Decree." ECF No. 9 at 2. In so doing, Texas retreated from its initial position that the 1938 Baseline governs New Mexico's use of Rio Grande Project water.[3] *See* ECF No. 32 at 2. In light of Texas's realignment, the States proposed that a resumed trial should simultaneously address liability and remedy, *i.e.*, the States' Proposed Index Decree. *Id.* at 19–20. The United States disagreed. It argued that the parties should proceed to trial solely on liability to allow the United States to litigate its claim that New Mexico's actions have violated the 1938 Baseline that is allegedly enshrined in the Compact. ECF No. 8 at 11.

[3] The methodology contained in the States' Proposed Consent Decree relied upon a D2 Baseline, which differs significantly from the 1938 Baseline. 3CA Dkt. No. 720 at 30.

The parties discussed the resumption of trial at the February 27, 2025 status conference. Because Texas and the United States are no longer aligned, the United States explained that it would need to supplement its expert discovery before trial. I issued an order the following day scheduling a resumption of trial focused solely on liability. It will commence June 9, 2025. ECF No. 29 at 2. That order also established a deadline for the United States' discovery motion and the States' response thereto. *Id.* at 3–4.

II. Discussion

A. The United States' Motion and the States' Response

The United States seeks leave to expand the scope of Dr. Ferguson's trial testimony to include the matters addressed in his declaration that the United States previously submitted in opposition to the States' Proposed Consent Decree. ECF No. 30 at 1. Those matters include, *inter alia*, the historical hydrological conditions of the Rio Grande, the impact of New Mexico's groundwater pumping on the Rio Grande Project's water supply, and the propriety of the methodology set forth in the States' Proposed Consent Decree. 3CA Dkt. No. 720.

The United States argues that its request is necessitated by Texas's shift in position. In preparing for the October 2021 trial, the United States explains, it produced expert reports relying upon Texas's groundwater modeling. ECF No. 30 at 7. Given Texas's new litigating position, the United States claims that it is not clear

how, or if, Texas will introduce its model during the resumed trial. *Id.* at 14. So the United States seeks leave to rely on Dr. Ferguson's expanded testimony—which, like his declaration, utilizes New Mexico's groundwater pumping model—rather than attempt to introduce new experts and/or modeling at this stage of the proceedings. *Id.* at 14–15.

Texas, New Mexico, and Colorado counter that the United States' lack of diligence in conducting expert discovery counsels against granting the United States' motion. ECF No. 32. Granting the motion would prejudice the States, they contend, because the States would need to develop rebuttal evidence to present at trial. Nonetheless, the States do not object to the United States' request, provided that the Special Master: (1) require the United States to disclose the documents and data underlying Dr. Ferguson's opinions; (2) permit the States to jointly depose Dr. Ferguson; and (3) allow the States to present testimony at trial to rebut that of Dr. Ferguson. *Id.* at 15–17.

B. Analysis

At bottom, the United States' motion seeks an extension of the expert disclosure deadline, which expired in September 2020. 3CA Dkt. No. 390 at 2. Although "the Federal Rules [of Civil Procedure] are only a guide to procedures in an original action," *Arizona v. California*, 460 U.S. 605, 614 (1983), the Special Master previously informed the parties that he intended to adhere "as closely as

possible" to the Federal Rules, ECF No. 22 at 16. Consistent with that commitment, the Special Master analyzes the propriety of the United States' request pursuant to Federal Rule of Civil Procedure 16(b)(4). That Rule provides that "[a] schedule may be modified only for good cause and with the judge's consent." Fed. R. Civ. P. 16(b)(4); *see also* ECF No. 29 at 3 (instructing the United States to "show good cause for reopening discovery").

There is no bright-line test for determining whether a party has shown good cause to modify a scheduling order. But courts traditionally consider several factors, including: (1) whether "unforeseeable circumstances" or "events beyond the [party's] control" prompted the need for modification; (2) "the relative diligence" of the party seeking modification; and (3) "[t]he existence or degree of prejudice to the party opposing modification[.]" 3 Moore's Federal Practice – Civil § 16.14 (2025).

Here, each of those factors weighs in favor of granting the United States' motion.

To begin with, the United States' need to expand the scope of Dr. Ferguson's testimony derives from circumstances beyond its control. When the Supreme Court permitted the United States to intervene in 2018, and for three years thereafter, the United States and Texas advanced virtually identical claims against New Mexico. But through no fault of the United States, Texas changed its position and is now aligned with New Mexico and Colorado. While the United States previously

prepared to present an integrated case-in-chief alongside Texas at trial, it can no longer do so. And with the resumption of trial just three months away, the United States filed the pending motion to facilitate its ability to present its case against New Mexico alone.

The States argue that the United States could have previously disclosed expert testimony using modeling to assess the impacts of New Mexico's groundwater pumping on the Rio Grande Project when the discovery period was open. ECF No. 32 at 10. In their view, Texas cannot be blamed for the United States' failure to do so. But this argument misses the point. While the United States *could* have conducted broader expert discovery, it likely saw no need to do so given its alignment and joint preparation for trial with Texas. Because Texas's realignment prompted the United States' need to extend the expert disclosure deadline, this factor weighs in favor of granting the United States' motion.

Moreover, given the surrounding circumstances, the United States diligently sought leave to expand Dr. Ferguson's testimony. The United States highlights that as recently as February 2023, Texas indicated that it would continue to advocate for the 1938 Baseline at trial if the States' Proposed Consent Decree was rejected. 3CA Dkt. No. 756 at 8. The first concrete indication that Texas no longer intended to do so came by way of the States' status report filed on October 4, 2024. ECF No. 9.

The parties' first appearance before the undersigned was an October 23, 2024, status conference held in Denver, Colorado. At the outset of the status conference, the Special Master stated that he would not be ruling on any discovery issues that day but recognized that "it may come to that." ECF No. 22 at 13. Still, the United States informed the Special Master that it "may need to designate additional expert testimony on liability" to prepare for a resumption of trial. ECF No. 22 at 127.

At that point, and without setting a date for trial, I ordered that further mediation between the parties should be conducted. ECF No. 21. And at the subsequent status conference on February 27, 2025, the United States again explained that it desired additional discovery to adequately prepare for trial. So I issued an order setting a deadline by which the United States could move for additional discovery. ECF No. 29. Hence, the United States timely filed the motion now before me. ECF No. 30.

In sum, once it became clear that Texas was no longer aligned with the United States, the United States immediately informed the Special Master of a probable need for additional discovery. And it promptly filed its discovery motion in accordance with the Special Master's order. The United States' diligence in advancing its discovery request favors granting its motion.

The Special Master further concludes that granting the United States' motion poses a minimal risk of prejudice to the States. Expanding the scope of Dr.

Ferguson's testimony to include the matters discussed in his declaration does not inject entirely new evidence into this proceeding. The United States disclosed Dr. Ferguson's declaration to the States over two years ago. 3CA Dkt. No. 754. And Texas and New Mexico filed three responsive declarations which sought to directly counter Dr. Ferguson's. 3CA Dkt. No. 755, Exs. A, B, G.

The United States categorizes its request to expand the scope of Dr. Ferguson's testimony as a "modest" one. ECF No. 30 at 2, 10. The Special Master agrees. Had the United States sought leave to designate additional experts or submit supplemental reports, a resulting delay in trial might have prejudiced the States. But simply seeking to expand the scope of a previously designated expert's testimony to include matters previously disclosed to the parties carries a significantly lower risk of prejudice. So this factor likewise weighs in favor of granting the United States' motion.

Nonetheless, expanding the scope of an expert witness's testimony three months before trial inherently carries some risk of prejudice to the States. As they note, granting the United States' motion would require the States to modify their trial strategy on short notice to counter Dr. Ferguson's expanded testimony. To mitigate this risk of prejudice, the States make three requests. First, the States ask the Special Master to order the United States to disclose the documents and data upon which Dr. Ferguson relied, and to do so not later than April 7, 2025. Second, the States urge

the Special Master to permit them to jointly depose Dr. Ferguson not later than May 12, 2025. Third, and finally, the States request that the Special Master allow them to disclose and offer trial testimony to rebut that of Dr. Ferguson. ECF No. 32 at 15–17.

Each of the States' requests is reasonable under the circumstances, and the Special Master concludes that granting them would provide the States with an adequate means of effectively responding to Dr. Ferguson's expanded testimony. Accordingly, the States' requests will be reflected in the accompanying order.

Finally, as both parties recognize, the Special Master is neither the ultimate factfinder nor the ultimate decisionmaker in this original jurisdiction matter. That remains the role of the Supreme Court. ECF No. 30 at 12 (citing Cynthia J. Rapp, *Guide for Special Masters in Original Cases*, at 9 (2004)); ECF No. 32 at 13. And the Supreme Court relies upon Special Masters to conduct proceedings that result in a "full range of factual findings" to facilitate the Court's review. *Florida v. Georgia*, 585 U.S. 803, 819 (2018); *see also id.* (explaining that the Court "benefit[s]" from a Special Master's "detailed factual findings"); *Colorado v. New Mexico*, 459 U.S. 176, 183 (1982) (rejecting a Special Master's report that did "not contain sufficient factual findings"). Thus, the Special Master's duty to develop a comprehensive factual record at trial also supports granting the United States' request to expand the scope of Dr. Ferguson's testimony.

For the foregoing reasons, the Special Master enters the following order:

And NOW, this 19th day of March, 2025, upon consideration of the United States' Motion for Leave to Designate Supplemental Expert Testimony, ECF No. 30, and Texas, New Mexico, and Colorado's response thereto, ECF No. 31, it is HEREBY ORDERED that the United States' motion is GRANTED.

IT IS FURTHER ORDERED that the United States shall disclose the documents and data upon which Dr. Ferguson relied in forming the opinions expressed in his declaration pursuant to Federal Rule of Civil Procedure 26(a)(2), and that such disclosure be made not later than April 7, 2025. To the extent the United States has already produced such materials, it shall identify them in the record with sufficient particularity to allow the States to locate them.

IT IS FURTHER ORDERED that the States are permitted to jointly notice a deposition of Dr. Ferguson to be conducted not later than May 5, 2025. The deposition shall be limited to the opinions expressed in Dr. Ferguson's declaration and shall last no longer than one day with seven hours on the record.

IT IS FURTHER ORDERED that the States may disclose and offer at trial testimony in response to the opinions contained in Dr. Ferguson's declaration. The States shall disclose such testimony not later than May 19, 2025.

IT IS FURTHER ORDERED that, because the parties were advised during the February 27, 2025 status conference that my chambers does not have any thumb

drives or CDs with exhibits or videos thereon, and further advised that we lack any access to exhibits which were saved to a "Box.com" service, counsel shall collaborate to ensure that we have electronic access, as well as thumb drives or CDs, to all exhibits introduced for demonstrative purposes and/or admitted at trial.

By this Order dated this 19th day of March, 2025:

s/D. Brooks Smith
Honorable D. Brooks Smith
Special Master
United States Circuit Judge
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