

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

UNITED STATES OF AMERICA)	
and)	No. 01cv00072-MV-WPL
STATE OF NEW MEXICO, ex rel. STATE)	
ENGINEER,)	ZUNI RIVER BASIN
Plaintiffs,)	ADJUDICATION
v.)	
)	Subfile No. ZRB-2-0038
A & R PRODUCTIONS, et al.)	
Defendants.)	
_____)	

EXPEDITED MOTION TO MODIFY SCHEDULING ORDER

Pursuant to Fed. R. Civ. P. 16(b)(4), the United States of America moves this Court to modify the Scheduling Order associated with this subfile action. Based on the circumstances described below, the Court should establish a date by which Defendants must revise their expert report and by which Plaintiffs must submit their responsive/rebuttal report(s). In the alternative, if the Court cannot modify the Scheduling Order, the United States moves this Court to prohibit Defendants from relying on any revision to their report presented after April 29, 2016.

The United States requests expedited decision on this motion because, unless otherwise ordered, the United States is required to act by June 2, 2016 pursuant to the Scheduling Order.

Pursuant to Local Rule 7.1 for the District of New Mexico, undersigned counsel for the United States has consulted with the Plaintiff State of New Mexico and Defendants Craig and Regina Fredrickson. The State concurs with this motion. Defendants do not concur with this motion and have expressed that that they see no need to change the Scheduling Order.

The paragraphs below are provided in support of this motion.

1. On February 16, 2016, the Court issued its *Order Setting Discovery Deadlines and Adopting Joint Status Report* (Doc. 3201) (“Scheduling Order”). In the Scheduling Order, the Court set dates by which the parties would submit their expert reports. For Defendants, their expert reports were due by April 18, 2016. For Plaintiffs, their expert reports are due by June 2, 2016.
2. On April 18, 2016, Defendants provide Plaintiffs a document titled *Expert Witness Report of Craig L. Fredrickson Pursuant to Federal Rule of Civil Procedure 26(a)(2)(B) Case No. 01 CV 00072 MV/WPL Subfile ZRB-2-0038*. In his report, Mr. Fredrickson performs numerous analyses and calculations concerning assumed historic livestock water use.
3. Upon review of this report, Plaintiffs identified a fundamental error associated with Mr. Fredrickson’s calculations and informed him of the error. Subsequently, on April 29, 2016, Mr. Fredrickson submitted to Plaintiffs a revised report that did not merely correct the error identified by Plaintiffs; Mr. Fredrickson changed the associated analysis previously performed. Nevertheless, with a month left to consider the changes that Mr.

Fredrickson made to his report, Plaintiffs did not need additional time to prepare a response/rebuttal report to address Mr. Fredrickson's revised report of April 29th and sought no modification to the Scheduling Order at the time.

4. On May 18, 2016, the parties took the deposition of Tom Cox. Mr. Cox is a cattle rancher and the previous owner of the Fredricksons' property in the Zuni River Basin.
5. At his deposition, Mr. Cox described a cattle ranching operation in the 1980s and 1990s on and around the Fredrickson's property that was dramatically different from the livestock operation assumed by Mr. Fredrickson in his revised April 29th report.
6. On May 24, 2016, Mr. Fredrickson informed Plaintiffs that he intends to again revise his report to incorporate or otherwise address the information presented by Mr. Cox. The United States reasonably anticipates that the revisions to Mr. Fredrickson's report will be substantial and affect most of his previous analysis.
7. Because Plaintiffs have not seen Mr. Fredrickson's second-revised report, the United States cannot otherwise state specific objections to the now-anticipated report. Nevertheless, Mr. Cox's deposition will not be available for review until approximately June 3, 2016. Thus, Mr. Fredrickson's second-revised report will not be prepared until sometime after June 3rd; Mr. Fredrickson has suggested to undersigned counsel that he will need 10 days from the date that the deposition is available to submit a second-revised report. Therefore, it is impossible under any circumstances for Plaintiffs to present a response/rebuttal report to Mr. Frederickson's second-revised report before the June 2, 2016 deadline established in the Scheduling Order.

8. The burden in this subfile action is exclusively on the Defendants to prove each element of any water right they claim. The United States reasonably anticipates that Defendants will rely heavily on Mr. Fredrickson's opinions to support their water right claim. Plaintiffs must have the opportunity to work with its expert witnesses to fully prepare and develop a response/rebuttal to the opinions/positions articulated by Mr. Fredrickson. As contemplated by the Scheduling Order, preparing a responsive/rebuttal expert report is not an iterative, piecemeal process. Plaintiffs should not be required to chase the moving-target that Mr. Fredrickson's report has become and endure the costs and burdens of preparing and submitting multiple responsive/rebuttal expert reports as Mr. Fredrickson's analysis and opinions evolve.
9. The Court has established a discovery deadline for this subfile action of July 15, 2016. Therefore, sufficient time remains in the discovery period for Mr. Fredrickson to again revise his expert report as he wishes and for Plaintiffs to prepare their response/rebuttal report.

Wherefore, the United States asks this Court to modify the Scheduling Order as follows:

- A. Within 10 days from the day that the deposition transcript of Mr. Cox becomes available to the parties, Defendants must submit to Plaintiffs their final revision to Mr. Fredrickson's report; and
- B. Within 10 days from the day that Defendants submit to Plaintiffs their final revision to Mr. Fredrickson's report, Plaintiffs shall submit to Defendants any response/rebuttal report to Mr. Fredrickson's final report.

In the Alternative, if this Court will not modify the Scheduling Order, the United States request that the Court prohibit Defendants from being able to rely on any revision Mr. Fredrickson's report beyond that developed by April 29, 2016.

Dated May 27, 2016

/s/ Andrew "Guss" Guarino
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STATES

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2016, I filed the foregoing electronically through the CM/ECF system, which caused the parties or counsel reflected on the Notice of Electronic Filing to be served by electronic means. Also, this motion was served on the following:

Regina and Craig Fredrickson
2742 Veranda Rd. NW
Albuquerque, NM 87107

/s/ Andrew "Guss" Guarino