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Special Master Michael J. Melloy
United States Courthouse
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Re: *State of Texas v. State of New Mexico and State of Colorado*
United State Supreme Court, Original No. 141

Dear Special Master Melloy:

El Paso County Water Improvement District No. 1 (“EPCWID”) respectfully submits this letter in response to your April 23, 2020 Notice to Counsel in advance of the Status Conference set for May 1, 2020. EPCWID offers the following comments germane to the scheduling of the case going forward and the issues raised in the letters submitted on April 29, 2020 by the United States, the State of Texas, and the State of New Mexico.

Overall schedule for the case going forward

All parties propose and support a schedule to allow trial to commence in June, 2021. EPCWID supports that goal. EPCWID generally supports the schedules proposed by the United States and the State of Texas, but believes the United States proposes a more realistic date for close of discovery – August 14, 2020. Additionally, EPCWID believes it is imperative that any schedule provide for sufficient time after the close of discovery (at least 30 days) and the date for the filing of dispositive motions; and provide for sufficient time to allow hearing on dispositive motions sufficiently in advance of trial (at least 5-6 months). Allowing sufficient time after discovery for filing of dispositive motions and hearing on such motions in advance of trial will allow meaningful briefing on critical issues. This will assist all the parties and the Special Master in narrowing and framing the issues necessary for trial. The schedules proposed by the United States and Texas provide for adequate time for meaningful dispositive motion practice. The schedule proposed by New Mexico does not.

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Bifurcation/Trial Phasing

While the Special Master did not specifically address bifurcation in the Notice to Counsel, each of the Parties addressed the issue in their respective letters to the Court. And based on language in your Honor's recent orders, it appears the Special Master is contemplating possible benefits of bifurcation of this case for the trial.* As noted by the parties, bifurcation of trial is a commonly used procedural device in interstate compact and equitable apportionment litigation in the Court's original jurisdiction. EPCWID can perceive its usefulness in expediting disposition of key issues in this case. While EPCWID does not subscribe to New Mexico's proposed approach to bifurcation, and neither Texas nor the United States defines a specific approach to how trial could be phased, EPCWID offers for consideration an approach to bifurcation that accords with past practices in similar cases and which could offer the potential to advance final disposition of this litigation in a judicially economical fashion.

Phase 1. Determination of the measure of apportionment and associated delivery obligations under the Compact or respective allocations from the Rio Grande Project, combined with a prospective remedial decree based on that measure; and

Phase 2. Determination of the extent if any, by which there have been past shortfalls in meeting the delivery obligations, the damages owed for such shortfalls, and the timing and manner of any such repayment.

Depositions/Remote Depositions

EPCWID shares the frustration expressed in the letters of Texas and the United States regarding New Mexico's unreasonably belated proposal to depose over 20 additional witnesses, half of whom New Mexico says are necessary in advance of the State's rebuttal reports. Particularly disconcerting is the fact that one deposition in the latter category—of Dr. Blair, EPCWID's District Engineer—had previously been set and noticed by New Mexico for the beginning of March, more than three weeks in advance of New Mexico's longstanding due date of March 27th for its rebuttal reports, only to be unilaterally withdrawn by New Mexico. Other dates were offered, again in advance of March 27th, but those dates were unacceptable to New Mexico. EPCWID stands ready to work with all parties to schedule the

* "It is clear each party will be required to prove what their neighboring state is *entitled* to receive *before* proving anything has been *wrongfully* taken." Special Master Order of April 14, 2020, at 2 (bolded emphasis added). Also, "New Mexico has a Compact-sourced duty to protect Project deliveries intended for Texas. . . . [N]o such duty has been defined." *Id.* at 3 (emphasis added).

necessary depositions, including Dr. Blair's, but does not support a significantly delayed due date for New Mexico's rebuttal reports to accommodate depositions which could have previously been taken in advance of the prior due date; or alternatively having to now produce Dr. Blair for deposition during a critical part of EPCWID's irrigation season, in a rush to accommodate New Mexico's previous scheduling failures.

With regard to remote depositions, EPCWID is not generally opposed to proceeding in that fashion if it is necessary to move the case forward in light of COVID-19 restrictions. However, EPCWID does believe that some depositions, due to length, complexity, or both, may not be amenable to a remote approach. EPCWID would request sufficient flexibility, at least with regard to specific depositions that are uniquely germane to its interests, to allow in person depositions as circumstances allow.

Basin Tour

EPCWID does not support a Basin Tour as proposed by New Mexico and supports the positions of Texas and the United States with regard to the New Mexico proposal. In particular, EPCWID echoes the concern of the United States that it would not be acceptable to exclude from such a tour representatives of the respective irrigation Districts, EBID and EPCWID, which receive the water supply at the heart of this litigation.

Settlement

Although the Special Master's April 23, 2020 Notice to Counsel did not raise the issue of settlement, your Honor has previously raised the issue. While none of the parties referenced settlement in their recent communications to you, EPCWID suggests that it be part of the conversation.

EPCWID appreciates your Honor's consideration of the comments offered herein. We look forward to the discussion at the Status Conference on May 1st.

Very truly yours,



Maria O'Brien

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