

No. 141, Original

IN THE  
SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS,

*Plaintiff,*

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO,

*Defendants.*

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Before the Honorable Michael J. Melloy  
Special Master

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**STATE OF NEW MEXICO'S REQUEST FOR  
EMERGENCY HEARING**

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The State of New Mexico respectfully requests an emergency telephonic hearing with the Special Master and all parties to address the issues set forth below and to request an extension to the current scheduling order. On March 10, 2020, Your Honor circulated an email, indicating that the Court would continue to monitor the Coronavirus situation and related travel advisories. Based on the Court's indication that the March 31, 2020 hearing may be modified, the State of New Mexico believes it appropriate to immediately raise these concerns with the Court.

**I. DISCOVERY CANNOT BE COMPLETED BY THE DEADLINE IN THE COURT'S SCHEDULING ORDER.**

**The Parties Have Made Every Reasonable Effort to Complete Discovery.** While New Mexico, and indeed all of the parties, have been diligently pursuing multiple avenues of discovery since discovery commenced, it appears now, a mere seven weeks prior to the close of discovery that additional time is needed to adequately complete the State of New Mexico's discovery. Indeed, it is likely that in light of the issues arising nationwide due to the coronavirus, that all parties may not be able to complete discovery in the allotted time. In fact, the two depositions scheduled for next week, one scheduled by Texas and one by New Mexico, are both being cancelled due to concerns related to travel during this crisis.

In response to requests for production, and as part of their general duty to disclose relevant materials, the parties and various amici have disclosed over 2.2 million pages of documents to date, not counting documents disclosed in conjunction with expert disclosures, on a continuous basis. Just three weeks ago, on February 20, 2020, the United States made a supplemental disclosure of nearly 70,000 pages. New Mexico believes that the United States will continue to produce additional relevant documents in its possession. New Mexico, for its part, has made 19 separate productions of documents and continues to identify additional relevant materials and

prepare them for disclosure as quickly as possible. As for expert disclosures, the parties have disclosed 35 expert witnesses to date, along with several terabytes of supporting materials in the form of groundwater and surface water modeling files and hundreds of thousands of additional documents.

In the midst of this immense load of discovery, the parties have endeavored to maintain a spirit of cooperation. As Your Honor noted in your Notice to Counsel dated February 5, 2020, the parties have largely been able to resolve discovery disputes without requesting court intervention. Yet, despite this cooperation, and the massive amount of discovery that has already occurred, a daunting amount of discovery remains to be completed. As indicated above, the parties are continuing to identify and disclose relevant documents. In addition, numerous depositions remain to be taken, many of which require several of the parties' counsel and consultants to travel, and most of which will be scheduled for more than one day. It will be impossible for the parties to complete the depositions that remain in this case within the remaining time allotted for discovery.

**It is not feasible for the remaining depositions to be completed within the remaining discovery timeframe.** Discovery is currently scheduled to close on May 1, 2020. As of the date of this motion the parties have taken the depositions of 50 fact and expert witnesses. The parties currently have scheduled the depositions of 11 additional fact and expert witnesses. Texas has currently scheduled depositions from April 1 right up to and through the last day of discovery, April 30, with multiple depositions scheduled for many of the days. New Mexico has a number of expert and fact depositions it will also need to schedule; however, as will be addressed, New Mexico is losing a valuable member of its trial team, and it is therefore not feasible for New Mexico to cover all of the Texas scheduled depositions as well as schedule its own additional

depositions within the remaining discovery timeframe. It is our understanding that Colorado also has limited capacity to cover the number of depositions proposed.

## **II. THE UNITED STATES HAS NOT DISCLOSED NECESSARY DISCOVERY**

Despite New Mexico's request on January 17, 2020, that the United States provide documents and other materials relied on by the rebuttal experts the United States disclosed on December 30, 2019, as of the date of this motion, the United States still has not disclosed the supporting materials for two of its disclosed rebuttal experts. As a result, New Mexico has been unable to schedule or take depositions of these expert witnesses. This information is vital to New Mexico's case and even once these materials are disclosed, New Mexico will need time to review them before it can depose these witnesses and finalize New Mexico's rebuttal expert reports. Without this additional time, important fact and expert witnesses cannot be deposed at all, contravening the Court's stated policy of allowing full development of the relevant facts in original actions. *United States v. State of Texas*, 339 U.S. 707, 715 (1950) (collecting cases). This will prevent the parties from fully developing all relevant facts in this litigation, and provides substantial good cause for staying the case deadlines for new counsel to be up to speed and to provide additional time to complete discovery. *See Cambridge Strategics LLC Cook v. Group Affiliates LLP*, No. 10-CV-2167, 2012 WL 12883330, at \*2 (N.D. Tex. Oct. 11, 2012) (granting motion to extend discovery, even though motion was filed "long after the discovery and dispositive motion deadlines had expired, . . . because the discovery process had been much more cumbersome than initially anticipated and the volume of documents generated was greater than expected"); *see also Kinetic Concepts, Inv. v. Convatec, Inc.*, No. 08-CV-00918, 2010 WL 1418312 (M.D.N.C. Apr. 2, 2010) (granting extension of discovery and other deadlines due, in part, to the large volume of discovery).

### **III. THE STATE OF NEW MEXICO IS UNDER A STATE OF EMERGENCY**

**The State of New Mexico Cannot Participate in Depositions at This Time.** On March 11, 2020 the Governor of the State of New Mexico issued Executive Order 2020-004, which declared a State of Public Health Emergency due to the COVID-19 virus pandemic. As part of the Governor's mandate, all out-of-state travel for state employees was immediately suspended. Thus no employee of the State of New Mexico can attend out-of-state depositions. Further, on March 13, 2020, the Governor of the State of New Mexico expanded restrictions on State employees, by indicating that non-essential employees would be ordered to work from home. Thus personnel from the State of New Mexico currently set to aid completion of discovery, such as by attending key meetings with experts and other case-related parties, cannot participate, given said travel and work restrictions. Such restrictions this close to the close of discovery further reduce the ability of the State to adequately complete depositions by the discovery deadline.

Furthermore, there are additional fact witnesses identified by the State of New Mexico that we still need to depose. However, the State of New Mexico is restricted from proceeding with these depositions, due to new COVID-19-related restrictions.

### **IV. THE STATE OF NEW MEXICO IS LOSING A CRITICAL MEMBER OF ITS LITIGATION TEAM**

Mr. David Roman, who has been operating as lead trial counsel within the firm since September of 2018, is unexpectedly resigning from Robles, Rael & Anaya, P.C. and his position on this litigation, effective April 3, 2020, due to family and personal reasons. As a result, the State of New Mexico and the lead trial firm, Robles Rael & Anaya, P.C. finds itself in the wholly unanticipated and unenviable position of having to identify and substitute a new attorney with the capacity to work nearly full time on this case, as Mr. Roman did, all with quickly approaching deadlines and the need to get up to speed on this highly complex case, which will take some time.

As discussed above, this is a highly complex case, with substantial technical components requiring specialized knowledge. Further, it encompasses decades of complicated historical facts and involves many persons in various aspects of the case who will be witnesses and have been or will be deposed. Approximately 500,000 documents encompassing over two million pages have been gathered and produced in the case, reflecting this long, complex, and multifaceted history. New Mexico alone has thus far disclosed over seven terabytes of data and documents. Further, all parties are still in the process of producing documents. All aspects of the case must be digested and understood by new lead trial counsel, which necessarily will take considerable time for him/her. New Mexico's team of agencies, experts and law firms continue to work to meet current deadlines; however, every member of the team is critical and none more so than the lead trial counsel.

**V. NEW MEXICO REQUESTS A STAY IN THE CASE NARROWLY TAILORED TO MEET THE GOALS OF ACHIEVING A FAIR AND EFFICIENT RESOLUTION OF THE CASE.**

The Office of the Attorney General of the State of New Mexico has its full attention on this case and will continue to pursue it with all diligence. The State of New Mexico will have new lead trial counsel who will be prepared to properly represent the State within six (6) months. The State of New Mexico will be able to proceed with all aspects of the case within that time frame. To finalize outstanding discovery, New Mexico requests a three (3) month discovery period after the time period in which the case is stayed (for a total extension of nine (9) months). New Mexico further requests the Special Master re-set the briefing and pre-trial and trial schedule immediately after the close of the three (3) month discovery period.

New Mexico respectfully requests it be granted the relief requested herein. In support of its request for relief, New Mexico notes that in order to fully and fairly develop its case, it has long

been recognized that the Court “in original actions, passing as it does on controversies between sovereigns which involve issues of high public importance, has always been liberal in allowing full development of the facts.” *United States v. Texas*, 339 U.S. 707, 715 (1950) (citing cases); *Iowa v. Illinois*, 151 U.S. 238, 242 (1894) (“In the exercise of original jurisdiction . . . this court proceeds only upon the utmost circumspection and deliberation, and no order can stand in respect of which full opportunity to be heard has not been afforded.”); *Rhode Island v. Massachusetts*, 39 U.S. 210, 257 (1840) (“[T]he most liberal principles of practice and pleading ought, unquestionably, to be adopted, in order to enable both parties to present their respective claims in their full strength.”). New Mexico submits that absent the relief sought herein, it will be denied the opportunity to fully present its case in this important litigation that touches on the lives of so many of its citizens.

**WHEREFORE**, the State of New Mexico respectfully requests that the Special Master:

1. Stay for six (6) months all litigation proceedings and deadlines;
2. Grant a three (3) month discovery period following the six (6) month stay; and
3. Re-set the briefing and pre-trial and trial schedule immediately after the close of the three (3) month discovery period.

Respectfully submitted,

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**OFFICE OF THE SPECIAL MASTER**

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**STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE**

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This is to certify that on the 13<sup>th</sup> of March, 2020, I caused true and correct copies of the foregoing pleading to be served by e-mail and U.S. Mail on the Special Master and by e-mail to all counsel of record and interested parties on the Service List, attached hereto.

Respectfully submitted this 13<sup>th</sup> day of March, 2020.

*/s/ Marcus J Rael, Jr.*

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