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April 29, 2020

Via Electronic and U.S. Mail

Hon. Michael J. Melloy  
Special Master  
United States Circuit Judge  
111 Seventh Avenue, S.E., Box 22  
Cedar Rapids, IA 52401  
Michael\_Melloy@ca8.uscourts.gov

Dear Special Master Melloy:

I am writing regarding the upcoming May 1<sup>st</sup> Status Conference. In the Order setting the Status Conference, you stayed deposition discovery and extended the deadline for New Mexico to submit its rebuttal expert reports. Meanwhile, non-deposition discovery has been allowed to continue. You have since issued a Notice to Counsel alerting the parties to the issues you intend to discuss at the Status Conference, including a revised scheduling order and discovery issues.

New Mexico believed that it would be helpful for the parties to confer prior to the May 1<sup>st</sup> Status Conference in the hopes of reaching an agreement on the procedural and scheduling issues. Accordingly, we contacted the other parties in writing with a proposal for the remaining depositions, case management issues, and the possibility of a basin tour. We also proposed that the parties meet and confer regarding these issues. That meeting occurred telephonically yesterday. Because there was disagreement regarding all of the issues, we jointly agreed that the parties would each submit our separate proposals to you today.

### **Discovery**

Extensive written and deposition discovery has been conducted already in this case, but essential discovery remains to be done, involving all three parties. To date, fifty persons have been deposed, and New Mexico has produced 379,934 pages of documents in twenty four (24) separate productions.

There are a number of depositions by New Mexico and Texas that must be scheduled or rescheduled and completed before the close of discovery. Prior to the stay, New Mexico had

raised the possibility of an extension of discovery with the other parties in order to address these remaining depositions. In connection with the upcoming hearing, New Mexico provided the other parties an updated list of the depositions that New Mexico knows that it needs to take before the close of discovery. That list is attached hereto as Attachment 1, and includes ten expert witnesses whose depositions will need to be taken before New Mexico submits its rebuttal expert reports. Further depositions of non-expert trial witnesses by all parties may be needed after their disclosure. Such non-expert trial witness disclosure is included in the schedule that New Mexico is proposing, as shown below.

In total, we estimate that there are at least 35 known depositions that must be taken before the close of discovery, adding up to over 50 days of deposition time, plus the depositions of an unknown number of additional trial witnesses. The new scheduling order deadlines should be sufficient to accommodate all of these depositions.

New Mexico is mindful of the issues presented by the COVID-19 outbreak. However, in light of the complexity of the depositions, the volume of documents at issue, the number of parties, the importance of the case, and the significant obstacles posed by remote depositions, New Mexico does not support remote depositions at this time. Rather, as indicated below, New Mexico proposes that in-person depositions resume on May 18<sup>th</sup>. New Mexico selected this date based on the guidance from the Governor of New Mexico and the New Mexico Department of Health who have signaled that small in-person meetings will be safe and allowed to resume on May 15<sup>th</sup>. New Mexico understands the guidance from the States of Texas and Colorado to be similar. New Mexico is confident that the parties can stipulate to additional precautions that comply with guidance from health professionals and ensure the safety of the participants.

### Revised Scheduling Order

In order to accommodate the remaining tasks prior to trial, New Mexico proposes the following schedule:

Date	Deadline
May 8, 2020	Revised Scheduling Order issued
May 18, 2020	Stay on Deposition Discovery Lifted
July 15, 2020	New Mexico Rebuttal Reports Due
July 15, 2020	Parties to Exchange Trial Witness Lists
October 16, 2020	Close of Discovery
October 23, 2020	Dispositive Motions & <i>Daubert</i> Motions Due
December 15, 2020	Responses in Opposition to Dispositive Motions & <i>Daubert</i> Motions Due
January 15, 2021	Replies in Support of Dispositive Motions & <i>Daubert</i> Motions Due
February 2021	Hearing on Dispositive Motions & <i>Daubert</i> Motions
April 2, 2021	Exhibit Lists to Be Filed
April 23, 2021	Deadline for Motions <i>in Limine</i>

Date	Deadline
April 30, 2021	Final Pretrial Statements to Be Filed
May 27-28, 2021	Final Pretrial Conference & Hearing on Motions <i>in Limine</i>
June 7, 2021	Trial Starts

New Mexico considers this schedule to be aggressive but realistic.<sup>1</sup> In proposing these deadlines, New Mexico attempted to accommodate the Special Master's stated intention for trial to begin in May or June of 2021. We were also guided by the pending expert disclosures, the outstanding depositions, the unknown obstacles presented by COVID-19 related restrictions, and the general nature of discovery. In light of all of these considerations, we think it best to adopt a schedule that is achievable and allows for reasonable, albeit limited, flexibility. We think that the parties will have to remain disciplined and work in good faith to meet this schedule.

The proposed schedule includes two deadlines on July 15, 2020 that deserve further explanation. First, New Mexico proposes July 15<sup>th</sup> as the date for it to submit its rebuttal expert reports. New Mexico proposes that deadline in order to allow sufficient time for New Mexico to depose the Texas and United States rebuttal experts. To illustrate the need for these depositions, two of the rebuttal experts disclosed by the United States are non-retained experts who only provided a summary of their opinions, and just yesterday the United States provided documents relied upon by one of those experts. Similarly, Texas has indicated an intent to supplement one of its expert reports next week, and New Mexico will have to assess and respond to that report.<sup>2</sup> In short, information and data is needed from each of the Texas and United States experts before New Mexico can finalize its own rebuttal reports.

Second, New Mexico also proposes July 15<sup>th</sup> for exchange of trial witness lists. The Initial Disclosures in this case contained the names of numerous persons who potentially had information related to the case. Unlike smaller cases, however, the Initial Disclosures did not provide much guidance as to the likely trial witnesses. The purpose of exchanging trial witness lists on the date proposed is to allow the parties adequate time to schedule depositions of those witnesses.

### **Bifurcation**

In your email to the parties dated March 18, 2020, you indicated that the forthcoming discussion with counsel may include "bifurcation." As you observed in your November 4, 2019 Order, "the evidence necessary to prove damages may be substantially different than that required to prove breach or liability," and the remedies issues at trial may be "extremely complicated," involving "how to measure damages, mitigation, laches, and a myriad of other potential issues." Order at 11 (Nov. 4, 2019). New Mexico supports bifurcation of the trial and will be ready to discuss bifurcation during the May 1 Status Conference, if you wish. Bifurcating the trial into a liability

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<sup>1</sup> This proposed schedule may need to be adjusted depending on the Special Master's guidance on trial issues such as phasing, pre-filed testimony, and bifurcation.

<sup>2</sup> New Mexico reserves the right to challenge this new supplemental report.

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phase (determination of Compact allocations and the amount of any violations), and then a subsequent remedies phase (form of repayment-whether in water or money, amount of repayment and declaratory and injunctive relief) would likely conserve the resources of the Court and the parties. It has been successfully used in previous interstate water compact enforcement actions.

### **Basin Tour**

Finally, New Mexico recommends that you consider a basin tour that would allow you to visit features of the Rio Grande Basin that are likely to be discussed at trial. Special Masters in other interstate water disputes have participated in basin tours and have found the tours to be valuable. *See, e.g., Kansas v. Colorado*, No. 105, Orig., Special Master Report, vol. 1, at 22-23 (July 29, 1994). Because trial is being planned for next summer, this irrigation season provides the best opportunity for a basin tour. We propose three days in late August, specifically August 26-28.

### **New Counsel**

Finally, New Mexico is pleased to announce that new trial counsel have been engaged. They are Luis Robles of my firm, Cholla Khoury of the New Mexico Attorney General's Office, Jeffrey Wechsler of Montgomery & Andrews, and John Draper of Draper & Draper. Mr. Robles is an experienced trial attorney, and both Mr. Wechsler and Mr. Draper have extensive prior experience in Supreme Court original jurisdiction interstate water compact proceedings.

We look forward to discussing these issues with you further on May 1<sup>st</sup>.

Sincerely,



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**ATTACHMENT 1****Depositions to be taken by New Mexico<sup>3</sup>**

	<b>Deponent</b>	<b>Party / Amici Defending the Deposition</b>	<b>Estimated Days</b>
<b>Expert Witnesses</b>			
1	Adolph (Shane) Coors V <sup>4</sup>	Texas	1-2
2	George Hornberger	Texas	1
3	William Hutchison	Texas	1
4	Joel Kimmelshue / Land IQ	Texas	1-2
5	Leonardo Lombardini	Texas	1
6	Jean Moran	United States	1
7	David Sunding	Texas	1-2
<b>Expert &amp; Fact Witnesses</b>			
8	Al Blair	Expert testimony sponsored by Texas and the United States; fact testimony by EPCWID	3
9	Erik Fuchs	Texas	1-2
10	Philip King	Expert testimony sponsored by Texas and the United States; fact testimony by EBID	2-3
<b>Fact Witnesses</b>			
11	Filiberto Cortez	United States	3
12	Gary Esslinger	EBID	1-2
13	Pat Gordon	Texas	3
14	Curtis Seaton	Texas	1
15	Herman Settemeyer	Texas	2
16	Mike Sullivan	Colorado	1
17	Wayne Treers	United States	1
<b>30(b)(6) Depositions</b>			
18	Bureau of Reclamation	United States	2
19	EPWU (continuation)	Not Applicable	1
20	IBWC	United States	1-2

<sup>3</sup> New Mexico reserves the right to take additional depositions based on the fact witnesses identified by other Parties or information learned in discovery.

<sup>4</sup> If allowed to present supplemental opinions.

	<b>Deponent</b>	<b>Party / Defending Deposition</b>	<b><i>Amici</i> the</b>	<b>Estimated Days</b>
21	Hudspeth County Conservation and Reclamation District No. 1	HCCRD		1-2
22	Texas Water Development Board	Texas		1-2