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May 29, 2020

Honorable Michael J. Melloy, Special Master
United States Circuit Judge
United States Courthouse

111 Seventh Avenue S.E., Box 22
Cedar Rapids, Iowa 52401-2101

Judge_Michael_Melloy@ca8.uscourts.gov; TXvNM141@ca8.uscourts.gov

Re: State of Texas v. State of New Mexico and State of Colorado, Original No. 141

Dear Special Master Melloy,

As counsel for the Elephant Butte Irrigation District, I am writing for the specific limited purpose of pointing out a significant error in the letter filed by NM Amici late last night. The error may be found at the top of Page 2 in the first full paragraph under item "2. Discovery issues." The sentence that is in error reads as follows: "In that deposition, counsel for Texas refused to allow the deponent to be defended by his private attorney and insisted that the rules of discovery mandated that only one attorney (*i.e.*, EBID's counsel) be allowed to defend his deposition."

The error is a result of the NM Amici only putting before you one select portion of the transcript which does not provide the full story related to what happened in that particular deposition. Four additional pages enclosed with this correspondence show that, after further discussion, Ms. Davidson was allowed to defend her client's private interests, while the undersigned was allowed to defend EBID's interests. In fact, Ms. Davidson made multiple objections in that deposition, as did I, as is also shown by the deposition excerpts attached hereto.

This is important because Mr. Daviet's deposition, and now Dr. King's deposition, are not the only instances in which this method of dual defense has taken place where multiple interests are at stake and represented by separate attorneys. In fact, many of the depositions that have taken place in this case to date have produced objections being lodged by attorneys from the various parties without regard for who is formally "defending" the deposition. Even the State of Colorado has lodged objections when it believes it necessary to protect its interests. I anticipate more discussion on this issue at the hearing this morning, so I will spare you more details at this time.

Your attention to this issue prior to the hearing this morning would be greatly appreciated.

Sincerely,

BARNCASTLE LAW FIRM

By 

Samantha R. Barncastle, Counsel for EBID

xc: Service List for All Parties Via Email
SRB/jlc

1 Q. As they've been expressed in pleadings?

2 A. Yes.

3 MS. KLAHN: Okay. I'm going to suggest
4 that we take a recess now and go out in the hall and
5 talk about this.

6 (Break.)

7 Q. (BY MS. KLAHN) Mr. Daviet, are you ready?

8 A. I am as ready as I'm going to be.

9 Q. Okay. Fair enough. Probably the way we all
10 feel. I believe we've found a way forward, Ms.
11 Davidson and Ms. Barncastle, do you agree?

12 MS. BARNCASTLE: Yes.

13 MS. DAVIDSON: Yes.

14 MS. KLAHN: And as additional issues
15 come up, we will either take a break or put those on
16 the record.

17 Q. (BY MS. KLAHN) Are you comfortable to proceed
18 then?

19 A. Yes, I am.

20 Q. Okay. I would like to hand you another --
21 well, first of all, have you had your deposition taken
22 before because you're doing very well?

23 A. No.

24 Q. Well, so far, I think maybe I don't need to
25 repeat all these rules, but I'll tell them to you

1 Q. Has anybody from the state engineer's office
2 or the New Mexico Attorney General's Office ever
3 spoken to you about this particular case?

4 A. Yes.

5 Q. And --

6 MS. DAVIDSON: I'm going to object.
7 There's a confidentiality order in place in our stream
8 system cases in 104, and Mr. Daviet was part of those
9 confidential settlement negotiations, and I'm just
10 going to caution him not to discuss anything.

11 Q. (BY MR. MACFARLANE) And I'm not interested in
12 anything having to do with the stream system
13 adjudication sub cases. I'm asking you about this
14 particular action, the original action in the Supreme
15 Court. Who asked you about this case?

16 A. I don't recall ever having someone approach
17 me and ask me about the case.

18 Q. About this particular --

19 A. Correct.

20 Q. -- the original action, Texas versus New
21 Mexico and Colorado?

22 A. Correct.

23 MR. MACFARLANE: Okay. I think that's
24 all the questions I have.

25 MR. ROMAN: I have just a few questions.

1 operating agreement is executed?

2 MS. BARNCASTLE: I'm going to object to
3 foundation.

4 Go ahead and answer.

5 A. I believe that the operating agreement is
6 executed in accordance with the articles of the
7 agreement.

8 Q. (BY MR. ROMAN) Based on your experience as
9 a -- just a farmer in EBID, again, aside from anything
10 you've learned in closed session as a board member, is
11 your current understanding of the operating agreement
12 different from what it was previously only based on
13 reading the operating agreement?

14 MS. BARNCASTLE: Form and foundation
15 objections, also.

16 Go ahead and answer.

17 A. My understanding of the operating agreement
18 has improved from reading the operating agreement, as
19 well as listening to presentations at open board
20 meetings as a member of the public.

21 Q. (BY MR. ROMAN) And based on that
22 understanding from those sources, is it your opinion
23 that the operating agreement operates to the benefit
24 of EBID constituents?

25 MS. BARNCASTLE: Objection to

1 reviewed those transcripts?

2 A. No.

3 Q. How did you reach a conclusion about the EP1
4 depositions, the content of them?

5 MS. DAVIDSON: I'm going to object as to
6 privileged communications either with Samantha or with
7 me.

8 MS. KLAHN: Samantha, do you have an
9 objection?

10 MS. BARNCASTLE: Actually, I -- I can't
11 make that objection in good faith here.

12 Q. (BY MS. KLAHN) How did you learn about -- who
13 told you about the content of the EP1 depositions?

14 A. Samantha Salopek.

15 MS. BARNCASTLE: Let's go back to the
16 time then that we're talking about this. The reason
17 that I can't make that objection in good faith is
18 because I became aware that Ms. Davidson would be
19 participating prior to the time that I met with my
20 client to prepare him for deposition. Just so the
21 record is clear.

22 Q. (BY MS. KLAHN) Okay. So my question simply
23 was who informed you about the content of the EP1
24 depositions. It's your testimony that it was legal
25 counsel; is that correct?

SERVICE LIST FOR ALL PARTIES

**In The Supreme Court of the United States, Original No. 141
STATE OF TEXAS v. STATE OF NEW MEXICO and STATE OF COLORADO**

PARTIES¹

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SPECIAL MASTER

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****Updated 4/16/2018**

Corrected the spelling of Pricilla M. Hubenak to Priscilla M. Hubenak and added her e-mail address Priscilla.Hubenak@oag.texas.gov to the Service list.

****Updated 4/18/2018**

Added Toby Crouse (toby.crouse@ag.ks.gov) as the Solicitor General for the State of Kansas and removed Stephen R. McAllister.

****Updated 4/24/2018**

Added Clerk of Court information and updated Special Master e-mail address.

****Updated 11/16/18**

Added Bryan Clark's e-mail address (bryan.clark@ag.ks.gov) for the State of Kansas

****Updated 3/14/19**

Updated Attorney General of Colorado to Philip J. Weiser
Added Solicitor General Eric R. Olson (eric.olson@coag.gov) for the State of Colorado

****Update 3/19/19**

Added legal assistants Shannon Gifford (shannong@modrall.com) and Leanne Martony (leannem@modrall.com) for El Paso County Water District No. 1
Added James M. Speer, Jr., information for El Paso County Water District No. 1

****Update 5/6/19**

Added Sarah A. Klahn (sklahn@somachlaw.com), Richard S. Deitchman (rdeitchman@somachlaw.com), Rena Wade (rwade@somachlaw.com) and Corene Rodder (crodder@somachlaw.com) for State of Texas. Removed Rhonda Stephenson.

****Update 11/6/19**

Added Lamai Howard (lamaih@modrall.com) for El Paso County Water District No. 1.
Removed Leanne Martony.

****Update 11/21/19**

Added Jo Harden (jo@tessadavidson.com) for New Mexico Pecan Growers. Removed Patricia McCann.

****Update 11/22/19**

Removed Lizbeth Ellis and Clayton Bradley and added General Counsel (gencounsel@nmsu.edu) email for New Mexico State University.

****Update 1/7/20**

Added David W. Gehlert (david.gehlert@usdoj.gov) for the United States. Updated Solicitor General information. Also added John P. Tustin (john.tustin@usdoj.gov) for the United States.

****Update 2/19/20**

Added Renea Hicks for El Paso County Water Improvement District No. 1. Removed James M. Speer and Lamai Howard.

****Update 2/26/20**

Added Darren L. McCarty for State of Texas. Removed Brantley Starr and James Davis. Also added Crystal Rivera and removed Rena Wade.

****Update 5/1/20**

Added Cholla Khoury, Luis Robles, Jeffrey Wechsler and John Draper for the State of New Mexico. Removed David A. Roman. Also added Bonnie DeWitt, Pauline Wayland, Diana Luna and Donna Ormerod.

Added Preston Hartman for the State of Colorado. Removed Karen Kwon.