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May 28, 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](mailto:Michael_Melloy@ca8.uscourts.gov)

**Re: New Mexico's Status Letter Addressing Issues for the May 27, 2020 Status Conference**

Dear Special Master Melloy,

The State of New Mexico respectfully submits this status report in advance of the May 29, 2020 Status Conference. In your Order of May 26, 2020, you identified three agenda items to be addressed at the hearing. The purpose of this status report is to provide New Mexico's position on each of those subjects.

**1. Continued Discussion Concerning Appointment of a Mediator**

New Mexico continues to support mediation in this case. Three issues merit discussion at the Status Conference, (A) the characteristics of the mediator, (B) the process for identifying the mediator, and (C) the timing of the mediation.

**A. Characteristics of the Mediator**

To maximize the opportunity for settlement, New Mexico favors selection of a mediator with skills and experience in mediation and dispute resolution, as well as experience solving water disputes. A background in water disputes is important because many of the potential solutions in this case are technical in nature, and will require an understanding of the basin-scale issues and programs that could form a part of a settlement. If the Parties cannot agree on a single mediator with both characteristics, New Mexico supports utilizing a 2-person team: one mediator with a dispute resolution background, and one mediator with a water background.

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## **B. Process for Identifying the Mediator**

Based on their involvement in disputes of a similar nature and scale, New Mexico has identified 5 to 6 individuals who satisfy the criteria identified above. It is premature, however, to discuss specific mediators at the Status Conference until the Parties have had an opportunity to confer and conduct due diligence. Instead, New Mexico proposes the following process for selecting a mediator(s):

- The Parties share names of potential mediators;
- The Parties confer;
- If agreement is reached, the Parties jointly contact the candidate to determine interest and availability;
- If no agreement is reached, the Parties each submit two options to the Special Master;
- The Parties be given one week to respond to the submittals of the other Parties;
- The Special Master selects the mediator(s);
- After the Special Master selects a mediator(s), the Parties jointly contact the candidate to determine interest and availability.

New Mexico requests that the Special Master adopt a process that allows the mediator(s) to be selected by June 25, 2020 since scheduling and availability may become an issue.

## **C. Timing of the Mediation**

New Mexico believes that the mediation should take place after the close of discovery and after briefing on dispositive motions has been completed.

### **2. Discovery Issues**

#### **A. Whether the Parties Should Be Required to File Their Expert Designations with the Court**

New Mexico supports the Special Master's request that the Parties file all expert designations and expert reports, and is prepared to do so in the near future.

#### **B. Other Discovery Issues**

New Mexico seeks guidance from the Special Master on a discovery issue to avoid future problems. The Federal Rules of Civil Procedure contemplate that a deponent should be defended by a single attorney. Two depositions conducted in the last two weeks involved EBID witnesses who were defended by the EBID attorney. Unfortunately, in addition to EBID, both Texas and the United States were active in voicing objections. Because those objections by Texas and the United States became disruptive, and because there are other depositions scheduled for *Amici* witnesses, New Mexico seeks direction on this issue.

In addition, New Mexico has identified the following discovery issues since the last Status Conference:

- On May 22, 2020, New Mexico transmitted a letter to Texas identifying a number of issues associated with its ESI production. Texas is working with New Mexico to resolve these issues.
- On May 29, 2020, New Mexico will transmit a letter to the United States identifying a number of issues associated with its ESI production. New Mexico anticipates that it will be able to amicably resolve these issues with the United States.
- On May 18-19, 2020, New Mexico took the deposition of Texas and United States expert Dr. J. Phillip King. Dr. King acknowledged that he had a number of criticisms of the report of Texas groundwater modeling expert Dr. William R. Hutchison, but he was instructed not to testify to his critique by counsel. The Special Master made a preliminary decision that New Mexico was not entitled to discover Dr. King's critique of Dr. Hutchison, but he invited New Mexico to file a motion addressing the issue. After reviewing the transcript and the applicable law, New Mexico is likely to file a motion to compel. New Mexico committed to wait to file that motion until Dr. King's attorney is available following her maternity leave.
- On May 22, 2020, New Mexico took the deposition of Texas expert Dr. George M. Hornberger. Dr. Hornberger was identified as an expert in groundwater modeling. At his deposition, New Mexico learned that Dr. Hornberger had attempted to create a groundwater model in this case, but Texas did not disclose that model as part of Dr. Hornberger's expert file. New Mexico is attempting to resolve this issue with Texas. If the States are unable to agree, it may be necessary for New Mexico to file a motion.

New Mexico identifies these additional issues to keep the Special Master informed; they do not require attention during the May 29 Status Conference.

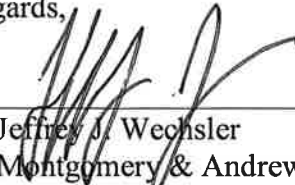
### **3. Key Issues that Will Need to Be Resolved at Trial**

An initial list of issues on which Parties agree and issues that New Mexico currently believes the Supreme Court will need to resolve in this case is attached as Exhibit A.

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New Mexico looks forward to discussing these issues at the upcoming videoconference.

Best regards,



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**EXHIBIT A**

**NEW MEXICO'S INITIAL STATEMENT OF ISSUES OF FACT AND LAW**

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Pursuant to the request of the Special Master, the State of New Mexico submits this initial list of issues of fact and law that it currently believes the Supreme Court will need to resolve in reaching a final decision in this case. New Mexico reserves the right to identify or raise additional issues as the case proceeds.

**I. ISSUES ON WHICH THE PARTIES AGREE**

Based on discovery and the pleadings filed in this case, New Mexico believes that the Parties agree on the following:

1. New Mexico is obligated by Article IV of the Compact to deliver a specified amount of water to Elephant Butte Reservoir. New Mexico is in compliance with Article IV.
2. The Rio Grande Compact equitably apportions the waters of the Rio Grande from Elephant Butte Reservoir to Fort Quitman, Texas.
3. The Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts.
4. The Rio Grande Project was designed to serve 155,000 irrigable acres of land in New Mexico and Texas. 57% of Project lands are located in New Mexico and 43% of Project lands are located in Texas.
5. During times of shortage, the Downstream Contracts require that 57% of Project supply be available for Project lands located in New Mexico and 43% of Project supply be available for Project lands located in Texas.
6. The Compact does not contain an explicit stateline delivery obligation.

7. Conjunctive management of surface water and groundwater is allowed within the Project to satisfy crop demands.

8. A hydrologic model is required to estimate the impacts of water use for purposes of this case.

## **II. DISPUTED ISSUES OF LAW**

### **A. Issues Related to the Compact and Compact Apportionment**

1. What is the Compact apportionment to New Mexico and Texas?
2. What is the test for Compact compliance for each State?
3. Where is Compact compliance measured for each State?
4. How is Compact compliance measured?
5. Was the Compact intended to protect the Project?
6. Does the Compact require equal allocation of Project supply to each Project acre?
7. Does the 57:43 division of Project supply apply in years of full supply as well as years of short supply?
8. If the 57:43 division of Project supply does not apply in years of full supply, how is the water divided between the States in those years?
9. Does the current D3 Method for allocating water between the States violate the Compact apportionment by providing too much water to Texas and depriving New Mexico of its fair share of Rio Grande water?
10. How should impacts from groundwater uses in Mexico be accounted for?

**B. Issues Related to the Connection Between the Compact and the Project**

11. What is the nature and extent of the connection between the Compact and the Project?
12. To what extent does the Compact incorporate principles of Reclamation law?

**C. Issues Related to the Obligations of the Parties**

13. What are the obligations of the Parties with respect to the Compact?
14. Is Texas required to notify New Mexico if it is not receiving its share of Rio Grande water? *See, e.g.,* Second Interim Report of the Special Master, at 47-65, *Montana v. Wyoming*, No. 137, Original (U.S. Dec. 29, 2014).
15. Since the Compact does not contain an express stateline delivery obligation, how is the Compact administered?
16. Are changes in crops and irrigation methods allowed on Project acreage? *See Montana v. Wyoming*, 563 U.S. 368, 379, 389 (2011).
17. What limits does the Compact place on Project operations?
18. Does the Compact prohibit changes in the historic operation of the Project that materially alter the division of Rio Grande water available to water users in New Mexico and Texas?
19. Given the Supreme Court's recognition that the United States serves as an "agent" of the Compact, "charged with assuring that the Compact's applicable apportionment to Texas and part of New Mexico is, in fact, made," what are the United States' responsibilities relative to the Compact?
20. Does the Compact require that Reclamation and the Districts minimize operational waste?
21. Should EPCWID be charged for water that it wastes to Hudspeth County Conservation and Reclamation District No. 1?
22. Does the Compact allow supplemental groundwater pumping on Project lands as historically occurred in both States?

**D. Issues Related to Relief**

23. What relief is appropriate in this case?
24. If Texas has received more than its share of water under the Compact, what injunctive relief is appropriate to ensure future compliance?
25. If Texas has received more than its share of water under the Compact, what is the proper form and amount of damages?
26. If New Mexico is entitled to damages, is it also entitled to pre-judgment interest?
27. Is Texas entitled to seek relief for years in which EPCWID received a full supply?
28. Is Texas entitled to seek relief for years in which EPCWID received its full adjudicated water right?
29. Is Texas entitled to seek relief for years in which EPCWID failed to call for a material amount of water allocated to EPCWID in Elephant Butte Reservoir?



### **III. DISPUTED ISSUES OF FACT**

#### **A. Issues Related to Compact Deliveries**

1. Did the States receive their share of Rio Grande water in each year from 1985 to the present?
2. Is current Project accounting consistent with the Compact?
3. In what years did EBID and EPCWID receive a full supply of Project water?
4. In what years did EPCWID receive the full amount of 377,000 acre-feet that defines its water right?
5. In what years did EPCWID leave a material amount of water unused in Elephant Butte Reservoir?
6. In what years did New Mexico have available Rio Grande water sufficient to irrigate 57% of Project lands? In what years did Texas have available Rio Grande water sufficient to irrigate 43% of Project lands?
7. What are the historical and future impacts of the D3 Method for dividing the waters of the Rio Grande between the States?

#### **B. Historic Practices of the Parties**

8. How has the Project historically been operated?
9. Is the Project currently being operated in a way that is consistent with historic operations?
10. Have the States historically allowed groundwater pumping by water users within their borders?
11. Did both States acquiesce to use of a method to divide the water between the States by accepting the method and failing to raise any timely objections through official forums?

12. What legal, regulatory, or administrative measures do the States have in place to enforce the Compact?

13. In what years, if any, did Texas officially notify New Mexico that it was not receiving its share of Rio Grande water?

14. Are the salinity issues on which Texas bases its damages claims the result of its own mismanagement of the groundwater resources in the Hueco Bolson aquifer?

### **C. Modeling and Technical Issues**

15. Given the Supreme Court's recognition that the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts, is it required to use an integrated model that simulates Project operations and the impact of the use and availability of surface water and groundwater throughout the Project area?

16. Is the Texas groundwater model appropriate for this case given its limited geographic scope and inability to model surface water or reservoir operations?

17. Is the Texas groundwater model appropriate for this case given its inability to re-operate the Project to accurately model pumping impacts?

18. Is the Texas groundwater model appropriate for this case given that it uses an annual time-step that makes it impossible to distinguish between pumping impacts that occur during and outside the irrigation season?

19. What is the appropriate method for estimating consumptive use in this case?

20. What is the amount of consumptive use in each State in each year since the Compact was adopted?