

No. 141, Original

**In the
SUPREME COURT OF THE UNITED STATES**

STATE OF TEXAS,

Plaintiff,

v.

**STATE OF NEW MEXICO and
STATE OF COLORADO,**

Defendants.

OFFICE OF THE SPECIAL MASTER

[PROPOSED] ORDER REGARDING REMOTE TRIAL PROTOCOLS

September 14, 2021

Trial in this matter has been set in two settings. The first trial setting will begin October 4, 2021, and will be held virtually. The second trial setting will be in person, and will begin in March of 2021 in Cedar Rapids, Iowa. This [Proposed] Order Regarding Remote Trial Protocols (“Order on Remote Protocols”), which was developed in part by the agreement of the United States, Texas, New Mexico and Colorado (“Parties”) addresses the protocol for procedures during the remote trial setting scheduled in this matter during the fall of 2021. This Order on Remote Protocols may only be modified upon order of the Court.

I. MAINTAINING THE DECORUM OF THE COURT.

A. Counsel for the Parties.

Counsel for the United States, Texas, New Mexico and Colorado are required to observe the typical rules and procedures related to court appearances, including, without limitation, rules related to attire during the proceedings. Attorneys questioning a witness must have their video feeds on at all times that court is in session and use best efforts to eliminate all visual and auditory distractions.

B. Amicus, witness, client participation (“observers”).

Absent an order of the Special Master, all observers will be limited to observation status via a video feed as provided for in section VI below.

II. PRE-TRIAL ARRANGEMENTS.

A. Remote Platform. The Court’s designated remote platform is Zoom. The Parties and the Court will continue to rely on WorldWide Court Reporters as the third-party service provider (“WorldWide” or “Remote Video Support Provider”) to arrange, monitor, support, and troubleshoot the Zoom connection during the trial.

B. Court Management of Platform. The Court will manage and control the

proceedings with the assistance of WorldWide, and will exercise control over the various technological settings.

C. Preparing to Meet Technological Requirements. The Parties shall use best efforts to ensure that there will be clear video and audio transmission during the trial, including adequate familiarity with Zoom and related software and hardware, e.g., microphones, webcams, headphones, multiple monitors, etc.

- 1. Adequate Equipment.** Each Party is responsible for ensuring that each witness it sponsors is familiar with Zoom and that every participant has the following equipment to participate in the proceeding without undue delays: microphone, video camera, laptop or monitor. Counsel may wish to ensure that each witness it sponsors is able to participate in the videoconference with one device (or screen) and review exhibits on another.
- 2. Test Sessions.** At least one test session must be conducted by counsel with each witness in advance of the proceeding in which the witness practices using Zoom, becomes familiar with the process for viewing electronic exhibits, and tests all audio and video equipment (including settings) that will be used at trial. This provision does not apply to adverse witnesses.
- 3. Adverse Witnesses:** For adverse witnesses, the Parties shall coordinate, and counsel defending the witness must perform the test session with the witness and ensure the witness has the adequate equipment required above.

D. Court Reporter. The court reporter will be unmuted for the duration of the proceeding to allow for timely and effective requests for clarification. The Court Reporter will provide “Real Time” transcription, and make rough drafts available at the end of every trial day. The Real Time access code and password will be provided in writing from the Court Reporter to all counsel for the Parties.

E. Camera/Remote Venue Set Up. No masks shall be worn by anyone in the trial appearing remotely. The faces of each trial participant must be clearly visible while speaking. To the extent possible, each webcam should be positioned at face level relatively close to questioning lawyer, opposing counsel, and witness. The use of virtual backgrounds is not permitted unless otherwise agreed upon by the Parties and the Court.

F. Multiple Participants in the Same Room. If counsel for a Party and a witness are in the same room, cameras shall clearly show each individual in the room, including any counsel for *amici* or other Observers. These individuals are responsible for avoiding audio feedback from the use of multiple devices.

G. Party Identification. All Parties' counsel, witnesses and Observers shall be clearly identified when signing on to Zoom.

H. Scheduling. Parties' counsel, witnesses and the Court are all located in time zones located across the United States. The trial shall be scheduled to start at 11 am central time and will conclude by approximately 5 pm central time.

I. Confidentiality. The Parties shall meet and confer in advance of the start of trial regarding whether a protocol for the use of confidential information, including sealed exhibits, is necessary for the remote trial setting. If it is determined to be necessary, the Parties shall provide a joint recommendation on such procedures to the Court before trial commences. Currently, there are no exhibits listed by any Party that are confidential.

J. Procedure for Sidebars. Sidebars shall be conducted through a Zoom breakout room, if available, and facilitated by WorldWide.

K. Timing. The Court clerk will account for the time used by each Party. On a regular basis, the Court clerk shall provide an accounting of how much time was used by the Parties.

III. PROHIBITION ON RECORDING.

Any recording of a court proceeding held by video or teleconference, including

“screenshots” or other visual or audio copying of a hearing, is prohibited. Violation of these prohibitions may result in sanctions, including restricted entry to future hearings, denial of entry to future hearings, removal of Court-issued media access, or any other sanctions deemed appropriate by the Court.

IV. WITNESSES AND PRESENTATION OF TESTIMONY.

A. Witness List. The parties have already disclosed their witness lists. However, because the trial is being convened in two settings, the Parties shall separately disclose the witnesses to be presented during the October 4, 2021 remote trial setting. An initial list of witnesses anticipated for the October 4, 2021 trial setting is attached as Exhibit A to this Order. The Parties shall file their final witness lists for the October 4, 2021 trial setting, including the anticipated order of witnesses and an estimate of the amount of time anticipated for direct examination, no later than September 23, 2021. ***Disputes exist regarding (1) Texas and the United States’ proposal to offer the factual testimony of Drs. King and Blair in the fall trial setting, as testimony to assist the Special Master in understanding Project operations within the districts, and then, in the spring, to offer the expert opinions of Dr. King and Dr. Blair on technical matters, including their rebuttal to New Mexico’s experts. New Mexico opposes this proposal; (2) New Mexico’s proposal to postpone the factual testimony of Mr. D’Antonio to the spring, and (3) the order of presentation of the expert historians. The United States and Texas propose the following language:*** Except for Drs. Al Blair and Phil King (see Exhibit A), no witness who testifies during the first trial setting may be recalled later in trial, absent leave of the Court. Rather, each witness may normally only be called once, except for the limited purpose of rebuttal testimony, if allowed by the Court. With the exception of Drs. Blair and King, witnesses listed on the Parties will-call and may-call lists for the Fall 2021 setting will not be permitted to testify during the second trial setting.

B. Joining the Hearing. Witnesses must access Zoom using the credentials provided by the Court at least 10 minutes before the scheduled start time for their examination. Attorneys should not attempt to “share” a connection with a witness.

C. Witness Admonition. Before or after a witness takes the oath, affirmation, or declaration required by F.R.E. 603, and before the witness starts to testify, the Court will ask the witness to affirm that all communications with the witness during his or her examination will be on the record, other than communications with the witness during breaks, and that the witness will not engage in any direct or indirect communications with anyone during his or examination on the witness stand, other than those communications made on the record. The Court reserves the right to ask any witness to back up from their webcam so the Court and counsel can see the witness’ hands for the duration or portions of the witness’ testimony.

D. Witness Notes. If a witness will have or use any notes or other documents (other than exhibits identified on the record) in front of him or her during testimony, counsel must, at least 24 hours before such witness is called to testify, provide to all other counsel any documents, including notes, that the witness will have before him or her when testifying. Opposing counsel may examine the witness about such documents.

E. Exhibits.

1. Electronic Form. All exhibits including demonstrative exhibits to be used in an examination shall be submitted electronically to the Court, all counsel, and the court reporter pursuant to prior stipulation as provided for below:

“Five calendar days in advance of the date a witness is scheduled to testify at trial, the Party offering the witness shall email a list of exhibits the Party intends to offer during that specific witness’s examination no later than 6:00 pm Central Time Zone. Opposing counsel shall email lists of cross-examination exhibits the following day no later than 6:00 pm Central Time Zone. Within 48 hours thereafter, each Party shall advise opposing counsel as to any objections to the direct and cross-examination exhibits, indicating the basis for the objections, and the Parties shall meet and

confer in good faith and attempt to resolve any objections in advance of offering the exhibit into evidence. A Party is not precluded from adding additional exhibits that are needed for the examination of a particular witness within the five-day window, but must disclose additional exhibits for use during the direct examination no later than 24 hours before the anticipated witness testimony. A Party may supplement its exhibit list for cross-examination as soon as practicable prior to the start of the cross-examination. All Parties will attempt in good faith to minimize any additions during that time frame. The Parties shall also meet and confer to resolve any objections for later added exhibits in advance of the exhibit being offered into evidence. The Party sponsoring a witness shall inform the Special Master 24 hours before the anticipated witness testimony of (1) the exhibits that each Party intends to offer through the witness, and (2) the exhibits that have unresolved objections, including the basis for the objection. This process also applies to demonstrative exhibits. This procedure does not apply to exhibits that are used for impeachment purposes.”

Each exhibit shall be accessible as an individual document, named electronically according to its exhibit number (e.g., Ex. 1). It is the responsibility of the attorney offering the witness to ensure that the witness has the link to the proceedings and to electronic copies of all exhibits that will be used with that witness, including those of the opposing Parties. The Parties have agreed to upload all electronic exhibits to box.com a secure cloud document repository.

2. Paper Form. All exhibits to be used on direct and cross examination, except for impeachment, shall be submitted in tabbed binders to the Court. Paper copies of offered exhibits shall also be submitted to the court reporter if requested. Exhibits shall be printed in black and white, provided that the exhibit shall be printed in color where reasonably necessary to ascertain its meaning in the context of the proceedings. It is the responsibility of the attorney offering the witness to ensure that the witness has copies in paper form of all exhibits to be used with the witness, including those of the opposing parties, and that those exhibits are available to the witness in the same form that has been provided to counsel and the Court.

3. Impeachment Exhibits.

- a) **Electronic Form.** If counsel wishes to use a document for impeachment purposes that was not previously disclosed as an exhibit, counsel must provide an electronic copy of the document to the Court, trial counsel, and the witness at the time counsel seeks to use the document with the witness. Subject to the provisions of Section VI.C.3, below, counsel may use the chat function in Zoom to send the document to the Court, counsel, and the witness.

4. Admitted exhibits.

At the end of each trial day, the Court will provide the parties with a list of the exhibits entered into evidence during that trial day; to the extent counsel identifies discrepancies in that list, the discrepancy or discrepancies will be taken up first thing the next morning and resolved. All admitted exhibits will be placed in a separate folder on the secure cloud repository, box.com.

- F. Objections.** The witness must stop speaking when either counsel objects. After the objection is made, the Court will be the first to speak and will instruct counsel how the Court wishes to proceed.

VI. TECHNOLOGICAL CONSIDERATIONS DURING THE TRIAL.

A. How to Join. Attorneys for the Parties and witnesses scheduled to testify will receive login credentials from the Court via WorldWide. This login information is not public and must not be shared with anyone other than other counsel for the parties.

B. Attendance by Amicus, Clients, Interested Individuals. Everyone who is not an attorney for one of the Parties, or a witness scheduled to testify are classified as “observers” and will receive separate login credentials for a video feed only. Observer credentials are not public, and will be made available via an Order of the Special Master

approving an individual or entity for “observer” status. To the extent members of the press want to observe the trial, they must send a letter to the Court requesting this access.

C. Chat Features.

1. Use of the chat function should be reserved for communications directly related to the trial proceedings. All communications sent through the chat function should be copied to all trial participants.

2. However, the chat feature may be used to make documents or other materials to be used for impeachment purposes available to the Parties. A document or other materials shared via the chat will be made part of the Court record but the text of the message transmitting them will not unless ordered by the Court.

3. If counsel transmits a document through the chat feature, counsel must so state on the record and must identify the document for the record and ensure that the court reporter and other Parties have a copy of it. At the end of a trial day, Counsel must also make the document available on box.com.

D. Break-out Rooms. The Court may permit the use of virtual break-out rooms by any Party if requested and available. Discussions that take place in the break-out rooms will not become part of the Court record.

E. Addressing Technological Difficulties. If a participant is disconnected from the videoconference or experiences some other technical failure, the participant shall use best efforts to promptly re-establish the connection and shall take no action which threatens the integrity of the proceeding (e.g., communications with a third party related to anything other than resolving the technical issue, unless on an official break from trial). If the connection cannot be re-established within approximately five minutes, the Court may take steps to “pause” the trial, which may include moving Parties’ counsel and/or witnesses into the virtual waiting room or one or more separate break-out rooms (if available) at which time counsel shall meet and confer in good faith to develop a joint

proposal regarding how to proceed. If the Court deems it unfair to any Party to continue the remote hearing because of a technical failure, the Court may postpone or terminate the videoconference at any time and take such other steps as may be necessary to ensure the fairness and integrity of the proceedings.

Dated: _____

Honorable Michael J. Melloy
Special Master
United States Circuit Judge
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401
Telephone: 319-423-6080
Facsimile: 319-423-6085

SUBMITTED AND APPROVED AS TO FORM (with disputes noted):

By: //s// Stuart L. Somach

Stuart L. Somach, Esq.*
Andrew M. Hitchings, Esq.
Robert B. Hoffman, Esq.
Francis M. Goldsberry II, Esq.
Theresa C. Barfield, Esq.
Sarah A. Klahn, Esq.
Brittany K. Johnson, Esq.
Richard S. Deitchman, Esq.
SOMACH SIMMONS & DUNN, PC
500 Capitol Mall, Suite 1000
Sacramento, CA 95814
Telephone: 916-446-7979
ssomach@somachlaw.com

**Counsel of Record
Counsel for the State of Texas*

By: //s// James J. DuBois

BRIAN H. FLETCHER
Acting Solicitor General
TODD KIM
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
FREDERICK LIU
Assistant to the Solicitor General
JAMES J. DuBOIS
R. LEE LEININGER
JUDITH E. COLEMAN
JENNIFER A. NAJJAR
Attorneys, Environment and Natural
Resources Division
U.S. Department of Justice
Counsel for the United States