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Natural Resources and Environment Section

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Judge Michael J. Melloy, Special Master
United States Courthouse
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401-2101
Michael_Melloy@ca8.uscourts.gov
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RE: Texas v. New Mexico and Colorado, No. 141 Original

Dear Special Master Melloy:

The State of Colorado is in an unusual position. It is named as a party to this original action, and potentially affected by a decision concerning the Rio Grande Compact, yet no party asserted claims for relief against it. Both Texas and the United States have made allegations against New Mexico regarding the Rio Grande Project and potential impacts to the apportionments among the States pursuant to the Rio Grande Compact. At this stage of the proceedings, Colorado has two main objectives with regard to the proposed case management plan. First, it seeks to avoid unnecessarily expanding the litigation without waiving its rights. Second, because Colorado is not in a position to fully understand the ramifications of the existing allegations, it needs information and time to properly assess whether the positions of the parties may harm Colorado's Rio Grande Compact rights.

Although this litigation ostensibly focuses on the lower portions of New Mexico and Texas, it may affect Colorado's rights and obligations under the Rio Grande Compact. The geographic scope of the case includes Elephant Butte Reservoir in New Mexico to Fort Quitman, Texas. The subject matter scope of the allegations focus on water released from the Rio Grande Project. In this light, there are no claims for relief requiring a response or defensive pleading from Colorado. The litigation currently centers on the Rio Grande Project; however, the amount of water in project storage may implicate Colorado's Compact delivery obligations and its ability to store water within its borders. For example, Article VI of the Rio Grande Compact cancels Colorado's accrued debits with a spill of usable water and Article VII imposes restrictions on the ability of Colorado to store water in its reservoirs under certain conditions. Colorado, therefore, has significant interests in the developments in this case.

To preserve its rights, Colorado intends to file with the Special Master a non-waiver agreement, once executed by all the parties. The intent of this agreement is to confirm that Colorado does not need to file a responsive pleading at this time. It also permits Colorado to assert claims or defenses later, should the litigation implicate its Rio Grande Compact rights or obligations. This allows Colorado to avoid potentially introducing claims that would expand the scope of the litigation. It also recognizes that Colorado has limited information upon which to determine whether any claims are warranted at this time. This process is consistent with Colorado having an interest in determinations of Rio Grande Compact obligations, while recognizing that no party seeks relief from Colorado.

In order to determine whether any of its Rio Grande Compact rights or obligations may be adversely affected, Colorado needs information and the time to evaluate it. Data such as the hydrogeology of the region and local water uses are within the control of the other parties. Moreover, discovery has not started; leaving Colorado limited means to obtain such information.

As the case progresses, complex computer modeling may likely be the only reasonable method to predict impacts to the hydrologic system that cannot be directly measured. At present, Colorado does not have the information needed to either construct its own model or evaluate any models created by the other parties. Colorado will need such modeling to determine whether Colorado is impacted by any of the claims or defenses presented in this case.

Computer groundwater models covering areas as large as the Rio Grande Project require substantial time to evaluate properly. Evaluations of such models typically consider the computer code, the underlying data and assumptions, the processors used to input and output data from the model, and calibration of the model predictions to measured values. Colorado has experience with such models, both in interstate compact litigation, and in its own intrastate water adjudications. Colorado believes that it will take about one year to evaluate a finished model for use in this litigation. Even more time would be needed to gather data and construct a new model. It is important to Colorado to have the required time to evaluate any models used in litigation. Even if not bringing or defending a claim against it, Colorado needs to have the same knowledge base as the other parties regarding the water operations in this area in order to evaluate whether its Compact interests are adversely affected. Without that time and information, it is possible that this litigation could bind Colorado to a Rio Grande Compact interpretation with unforeseen and adverse results.

Given the competing schedules for appendix B of the proposed case management plan, the expert disclosure dates proposed by New Mexico present a more realistic timetable for interstate cases involving groundwater computer modeling. The schedule promoted by Texas and the United States does not provide enough time either to develop a model using data obtained through discovery or to evaluate models created by other parties.

Colorado notes that developing a single model acceptable to all the parties may present a more efficient way to approach resolving underlying hydrologic

issues. Some past interstate disputes over water have gone on for many years. *See Kansas v. Colorado*, 514 U.S. 673, 678-681 (1995); *Arizona v. California*, 460 U.S. 605, 608-612 (1983). A single model may eliminate disputes about underlying data and the reasonableness of the model predictions. While it may take time for the parties to come to an agreement on such a model, it would invariably save a great deal of trial time. Other interstate compact disputes have followed such an approach. *See, e.g., Kansas v. Nebraska*, 538 U.S. 720 (2003); *Kansas v. Colorado*, 543 U.S. 86, 99 (2004).

Sincerely,

FOR THE ATTORNEY GENERAL

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