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May 28, 2020

Via Electronic and U.S. Mail

Special Master Michael J. Melloy
United States Courthouse
111 Seventh Avenue, S.E.
P.O. Box 22
Cedar Rapids, IA 52401
Email: TXvNM141@ca8uscourts.gov

Re: Texas v. New Mexico & Colorado, Original No. 141

Dear Special Master Melloy:

The New Mexico *amici*, consisting of the City of Las Cruces, the New Mexico Pecan Growers, New Mexico State University (“NMSU”), and the Albuquerque Bernalillo County Water Utility Authority (“ABCWUA”) submit this letter to address certain agenda items to be discussed at the Status Conference set forth in the Special Master’s Order dated May 26, 2020.

1. Mediation.

New Mexico *amici* agree with the State of New Mexico’s identification of the qualities that will be important for a mediator in this matter. Given the many technical issues involved in operating the Rio Grande Project and the need to account for water deliveries and uses of water in New Mexico, Texas, and Mexico, we strongly believe that any potential mediator must have experience in resolving complex water disputes in addition to strong dispute-resolution experience. If it becomes impossible for the parties to agree to a mediator with strengths in both areas, we believe a 2-person mediation team is the best solution. Requiring the parties to confer on a mediator prior to the submission of separate lists of candidates seems most efficient. We encourage the Special Master to order mandatory mediation, but not until the conclusion of discovery.

As we indicated at the last Status Conference, the New Mexico *amici* represent the real parties-in-interest whose water use and livelihoods will be affected by the resolution of this original action. We assume that once appointed, a mediator or the mediation team will work with

the parties and *all amici* regarding their participation in the mediation as well as development of the mediation format.

2. Discovery issues.

During recent depositions taken by the State of New Mexico, as many as three lawyers at a time defended a single deposition and objected to New Mexico's questions. For example, during the deposition of Dr. Phil King, the attorney from EBID (designated as defending the deposition) objected 47 times, the attorney for the United States objected 30 times, and the attorney for Texas objected seven times. Many objections were made simultaneously and further exacerbated the already encumbered remote deposition process. This practice is inappropriate, as evidenced by the deposition of a fact witness taken by Texas last year. 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. *See* attached excerpt from the deposition of Greg Daviet. To prevent multiple objections from obstructing the deposition process, we support New Mexico's request for the Special Master to instruct the parties that only the attorney designated to defend the deposition be allowed to make objections.

New Mexico identified four other discovery issues that it is attempting to resolve with Texas, the United States, and Elephant Butte Irrigation District. We support New Mexico's attempts to resolve these discovery issues among the parties before asking for rulings from the Special Master.

To aid the Special Master in future discovery disputes and to understand the differences between the parties' positions, the New Mexico *amici* support the filing of all witness designations and expert reports with the Special Master. Given the discussions to date about how expert testimony may be introduced at trial, such an approach does not prejudice any of the parties.

There is an additional area of disagreement among the parties about the discoverability of certain aspects of the 2008 Operating Agreement. New Mexico *amici* support broad discovery in relation to the Operating Agreement given that it presently dictates Project operations without New Mexico's input, including alleged over-deliveries of Project water to Texas. Moreover, how the parties have historically interpreted the Compact's equitable appointment through Project operations will be important evidence at trial in defining the equitable apportionment.¹ That said, until there is a specific dispute among the parties on the scope of discovery related to the Operating

¹ The Special Master's Order dated April 14, 2020 states: "In any event, there are over eighty years of performance under the Compact to inform the Court as to the parties' longstanding understanding of the limits of the full extent of play in the system, the limits to which the ratio cited in the Downstream Contract actually might define a Compact right to Project supply, and the extent to which individual state's groundwater laws must be deemed subservient to the Compact." *Ibid.* at 21.

Agreement, we believe it is premature for the Special Master to provide an advisory opinion beyond his existing Orders.

3. Key issues that need to be resolved at trial.

As you have noted, this case is “very factually and legally complex” (April 14, 2020 Order at 2), leaving many factual and legal issues to be decided. “The Court did not purport to address the details of each parties’ Compact apportionment, their individual duties under the Compact, or the details of the interplay of the Compact with state law, reclamation law, or state law as incorporated in reclamation law.” *Id.* at 11.

Generally, some of the issues to be decided include:²

- The relationship between the Rio Grande Project and the Rio Grande Compact, including New Mexico’s, Texas’, and the United States’ rights and responsibilities.
- Assuming that the Project is incorporated in the Compact, each state’s equitable apportionment below Elephant Butte must be defined because it is not explicit in the Compact itself. Because protection of the *whole* Project was a purpose of the Compact, either both states have equitable apportionments below Elephant Butte Dam or neither does.
- Determining how the parties have historically administered the Compact and Project will aid in interpreting the states’ respective apportionments, including the administration of groundwater in their respective states.
- Whether historical and current Project operations, administration and water uses in New Mexico and Texas are consistent with the Compact’s apportionment. This includes operations, administration and uses of Project water in Texas and New Mexico, including use by the City of El Paso, the accounting of Texas’ and New Mexico’s uses of Project water (including return flows), changes to operations implemented by the 2008 Operating Agreement, which have reduced New Mexico’s share of Project water, and operating the Project as a whole verses operating it as two separate units, including the adoption of separate carryover storage accounts which has resulted in reducing overall Project efficiency, and the use of groundwater in each state.
- Formulating injunctive relief that defines the respective states’ Compact apportionment to minimize future conflicts among the parties in Compact administration.

² We have attempted to define the disputed issues to be resolved in an objective fashion rather than reiterating New Mexico’s theory of the case as was done in Texas’, the United States’ and EP#1’s status reports to the Special Master.

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- Whether New Mexico or Texas are entitled to damages for past Compact violations and the measure and period of any damages.

New Mexico *amici* generally agree that the issues submitted by the State of New Mexico as Exhibit A to its letter must be addressed at trial to resolve the disputes before the Court. We suggest that the Special Master consider directing the parties to propose groupings of the disputed factual and legal issues into categories that may be coherently heard in trial segments.

Thank you for your consideration in this matter.

Respectfully Submitted,

/s/ Jay F. Stein
JAY F. STEIN, ESQ.
STEIN & BROCKMANN, P.A.
Counsel of Record for City of Las Cruces

James C. Brockmann
JAMES C. BROCKMANN, ESQ.
STEIN & BROCKMANN, P.A.
Counsel of Record for ABCWUA

/s/Tessa T. Davidson
TESSA T. DAVIDSON, ESQ.
DAVIDSON LAW FIRM, LLC
*Counsel of Record for
New Mexico Pecan Growers*

/s/ John Utton
JOHN W. UTTON, ESQ.
UTTUN & KERY, P.A.
Counsel of Record for NMSU

Attachment

cc: All counsel of Record

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IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

STATE OF TEXAS)
)
Plaintiff,)
) Original Action Case
VS.) No. 220141
) (Original 141)
STATE OF NEW MEXICO,)
and STATE OF COLORADO,)
)
Defendants.)

ORAL DEPOSITION OF
GREG DAVIET
DECEMBER 13, 2018

ORAL DEPOSITION of GREG DAVIET, produced as a witness at the instance of the Plaintiff State of Texas, and duly sworn, was taken in the above-styled and numbered cause on December 13, 2018, from 12:37 p.m. to 2:34 p.m., before Heather L. Garza, CSR, RPR, in and for the State of Texas, recorded by machine shorthand, at the offices of ELEPHANT BUTTE IRRIGATION DISTRICT, 530 South Melendres Street, Las Cruces, New Mexico, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto; that the deposition shall be read and signed.

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GREG DAVIET,
having been first duly sworn, testified as follows:

E X A M I N A T I O N

BY MS. KLAHN:

Q. Good morning, Mr. Daviet. My name is Sarah Klahn. I'm here on behalf of the State of Texas in the lawsuit Texas versus New Mexico and the State of Colorado. You're here today for your deposition. Before we get down to questions, I think we have a few things to put on the record as far as your legal representation at this deposition.

MS. KLAHN: As I understand it -- Samantha, would you like to summarize?

MS. BARNCASTLE: Yeah. So essentially there is the issue of I am counsel for the Elephant Butte irrigation district and Mr. Daviet has elected to have his private counsel attend this deposition on his behalf, as well. So we have a situation where two attorneys will be attempting to defend the same deposition.

MS. KLAHN: And under the Rules of Civil Procedure, the rules regarding depositions provide that the deposition shall provide -- proceed in the same way as a trial would, and in trial, you 'd have one lawyer so we, the State of Texas, officially

1 opposes the appearance of Ms. Davidson, and we will
2 create a record. We also note that under the case
3 management plan, Ms. Davidson is not entitled to
4 participate in any deposition except as an observer.
5 Ms. Davidson, would you agree to channel your
6 objections and questions through Ms. Barncastle?

7 MS. DAVIDSON: Well, first of all, let
8 me also get on the record that this deposition was
9 served -- the notice was served on Ms. Barncastle for
10 Mr. Daviet in his capacity as an EBID board member.
11 The notice did not specify what issues were going to
12 be getting into in the deposition. In observing the
13 last two depositions, I think less than 20 questions
14 had to do with anything regarding EBID duties,
15 practices, and because basically we're shooting in the
16 dark about what the content of these depositions and
17 the relevancy were, Mr. Daviet called me as his
18 private counsel and requested that I attend the
19 deposition on his behalf. So, actually, I need to
20 talk to Mr. Daviet about who he'd like to defend his
21 deposition. I am private counsel for him, and I
22 disagree with the -- with the description of Ms.
23 Davidson is not allowed to participate in depositions
24 to the degree I'm here for Mr. Daviet as his private
25 counsel, I believe I would be allowed to defend his