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August 26, 2020

Special Master Michael J. Melloy
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Re: *State of Texas v. State of New Mexico and State of Colorado*
United State Supreme Court, Original No. 141

Dear Special Master Melloy:

El Paso County Water Improvement District No. 1 (“EPCWID”) submits this letter in advance of the Status Conference scheduled for August 28th at 11 a.m. CDT in response to questions raised in the Special Master’s Order of August 18, 2020 (“Aug. 18th Order”). Specifically, the Special Master included in the agenda for the Status Conference the “fundamental issue” of apportionment. Aug. 18th Order at 4 ¶ D. The Aug. 18th Order posits two questions. First, is the apportionment issue “severable” from the adjudication of other issues in the case? Second, if so, what schedule might allow for the apportionment issue to be determined in advance of any dispositive motions that may be filed on other issues in dispute? *Id.* While we understand the parties in the case have expressed a view, by letter of today’s date, that procedurally all dispositive issues inclusive of the “apportionment issue”, should be simultaneously briefed and argued, EPCWID submits the comments relating to the two questions raised in the Aug. 18th Order for consideration by the Special Master.

What is meant by the “apportionment issue”?

The Special Master has foreshadowed what is meant by the apportionment issue in this case. In the Special Master’s Order of April 14, 2020, your Honor observed that the case will require each party to establish what the neighboring states are “entitled to receive before proving anything has been wrongfully taken.” April 14th Order at 2. Also, New Mexico’s “Compact-sourced duty to protect Project deliveries intended for Texas” needs to be defined. *Id.* at 3.

EPCWID agrees in large part with the Special Master’s formulation. In its April 30th letter to the Special Master, EPCWID suggested phasing the case, with the first phase devoted to:

Determination of the measure of apportionment and associated delivery obligations under the Compact or respective allocations from the Rio Grande Project, combined with a prospective remedial decree based on that measure[.]

EPCWID April 30th Letter to Special Master at 2.

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Consistent with the Special Master’s April 14th Order, the following set of questions might be appropriately included as subsidiary components of the basic formulation to help guide briefing of the apportionment issue:

1. Does the Compact apportion the waters of the Rio Grande to Texas and/or to New Mexico from and below Elephant Butte Reservoir?
2. If the answer to Question 1 is wholly or partly “yes”:
 - a. What is the standard for measuring apportionment, and what, if any, delivery obligation is imposed?
 - b. Whose obligation is it?
3. If the answer to Question 1 is “no,” (or partly no) does the Compact nonetheless allocate Rio Grande water to Texas and New Mexico from and below Elephant Butte Reservoir through the Rio Grande Project?
4. If the answer to Question 3 is “yes”:
 - a. What Project delivery obligation, if any, is imposed?
 - b. Whose obligation is it?

Is the “apportionment issue” “severable”?

EPCWID believes the “apportionment issue” is severable from other issues in the case. Phased adjudication—sometimes described as “bifurcation”—is common in interstate compact water disputes in the Supreme Court’s original jurisdiction. Perhaps the most typical phasing is to bifurcate the case into “liability” and remedy phases. *See Kansas v. Colorado*, 514 U.S. 673, 680 (1995) (Supreme Court acts on exceptions to Special Master’s bifurcated liability phase report in Arkansas River Compact dispute). The manner in which a case is phased depends on the issues raised by individual compact disputes. In the dispute over the Yellowstone River Compact, the Special Master submitted two interim reports to the Supreme Court on discrete issues before submitting a final report. *See Montana v. Wyoming*, 563 U.S. 368 (2011) (ruling on exception to first interim report); 136 S.Ct. 1034 (2016) (Mem.) (ruling on exceptions to second interim report and remanding to Special Master on damages and other remedies); 138 S.Ct. 758 (2018) (Mem.) (ruling on exceptions to final report).

Similarly, in the Pecos River Compact dispute between Texas and New Mexico, the Supreme Court established the definition of a key compact term—the “1947 Condition”—and returned the case to the Special Master for further development of the case. *Texas v. New Mexico*, 446 U.S. 540 (1980) (Mem.) (adopting Special Master’s recommendation). Three years later, reviewing exceptions to a subsequent Special Master report, the Court—in a phase of the case similar to the “apportionment issue” phase here—established the legal ground rules for what could and could not be used as the measure of delivery shortfalls. 462 U.S. 554 (1983). Still later, the Court issued an

opinion on remedying delivery shortfalls and issued a decree directed as “New Mexico’s current and future obligation to deliver water” pursuant to compact obligations. 482 U.S. 124, 133 (1987).

EPCWID believes the “apportionment issue” in this case is “severable”, that it makes sense to sever or bifurcate, and that to do so would conserve resources. This is true irrespective of whether the Special Master determines to proceed with briefing on all dispositive issues at the same time inclusive of the apportionment issue. While EPCWID’s view is that the “apportionment issue” should be briefed prior to other dispositive motions, EPCWID understands the parties’ view that briefing and argument should occur simultaneously with other dispositive issues on October 15th. EPCWID agrees with prior suggestions by the Special Master that even if the apportionment issue were briefed and argued along with other potentially dispositive issues, the apportionment issue should be examined and determined as an initial matter. EPCWID believes this would streamline the case for whatever the Special Master determined should follow conclusion of briefing.

EPCWID appreciates your Honor’s consideration of these comments and looks forward to discussing these issues at the Status Conference on Friday August 28.

Very truly yours,

A handwritten signature in blue ink, appearing to read "Maria O'Brien", with a stylized flourish at the end.

Maria O'Brien

Cc: Attached Service List

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