



U.S. Department of Justice

Environment and Natural Resources Division

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September 10, 2021

Special Master Michael J. Melloy
United States Courthouse
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Cedar Rapids, IA 52401-2101
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Re: State of Texas v. State of New Mexico and State of Colorado
United States Supreme Court No. 141, Original

Dear Special Master Melloy:

The United States and the State of Texas respectfully request an expedited determination on a matter pertaining to the order of witnesses. This matter specifically concerns the testimony of Dr. Phil King, who is the engineer consultant for the Elephant Butte Irrigation District ("EBID"), and the testimony of Dr. Allie Blair, who is the engineer consultant for El Paso County Water Improvement District No. 1 ("EPCWID"). In brief, the United States and Texas propose to offer the factual testimony of Drs. King and Blair in the fall, 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 objects to this proposal, blocking final agreement on a proposed Remote Trial Protocol. Because changes to the joint U.S./ Texas witness list may be necessary if New Mexico's view prevails, the United States and Texas respectfully request resolution of this dispute prior to the September 22, 2021, status conference, and, if possible, by September 17.

Dr. King and Dr. Blair are important witnesses for Texas and the United States. They have extensive personal knowledge of Project operations from the 1990s to present and were instrumental in the development of the 2008 Operating Agreement. They remain actively involved in Project allocation determinations and calculations, and are essential to decision-making related to the Districts' internal water distribution. In addition, Drs. King and Blair have been disclosed as non-retained experts to offer opinions based on that expertise in hydrology and engineering. In particular, the United States disclosed Dr. King and Dr. Blair for rebuttal testimony to Dr. Barroll's technical analysis.

Presenting the factual testimony of these witnesses in the fall and their technical expert opinions in the spring is consistent with the Special Master's suggested division of trial. The

Special Master deferred technical expert testimony to the spring, so that potentially complex testimony on modeling and other subjects can be presented live in a courtroom setting. The Special Master suggested that the fall session be used for testimony more amenable to remote presentation, including, but not limited to, factual testimony relating to the operation of the Project. *See* Hr’g Tr. (Rough Draft) 9/2/21 at 9-10.

The United States and Texas propose to divide Dr. King’s and Dr. Blair’s testimony along these same lines, likewise providing New Mexico the opportunity to conduct cross-examination on the percipient testimony in the fall and cross-examination on the expert opinion testimony in the spring.

New Mexico has suggested that the proposed split of the testimony could not be implemented as a practical matter, and that the blurring of lines between fact and expert testimony would give the United States and Texas an unfair tactical advantage over New Mexico at trial. This objection is without merit. Dr. King and Dr. Blair will restrict their testimony this fall to the foundational and operational aspects of the Project, based on their personal knowledge and experience. The value of this testimony from Dr. King and Dr. Blair greatly outweighs the speculative risk that they will veer into expert opinion critical of Dr. Barroll’s analysis in the fall.

If the proposed division of testimony is not acceptable to the Special Master, the United States and Texas intend to present the testimony of Dr. King and Dr. Blair entirely in the spring, when it can be heard in proximity to the testimony of other experts in the same fields, including Dr. Barroll, whose testimony they are rebutting. This arrangement, while feasible, could result in prejudice to the United States and Texas, who tailored their witness lists to avoid cumulative fact testimony about operations within the two districts. If Dr. King and Dr. Blair present the entirety of their testimony in the spring, Texas and the United States will need to “add back” certain witnesses they had removed from their lists (such as district managers and board members), to ensure that at least some foundational testimony about Project operations in the districts can be heard in the fall.

The Special Master indicated that he would defer to the parties’ expertise about the division of witness testimony between the fall and the spring. The United States and Texas strongly believe that splitting the testimony of Dr. King and Dr. Blair between those two sessions would result in a better, and more efficient, presentation of their cases-in-chief, and a clearer record for review by the Special Master and the Court. This issue should be addressed as soon as possible. In addition, as the Special Master will see from the Joint Motion to be filed by the Parties, a disagreement also exists with respect to testimony by New Mexico State Engineer John D’Antonio. New Mexico seeks to postpone Mr. D’Antonio, who is not designated as an expert witness, to the spring, when you have proposed that technical testimony be heard. This issue can be resolved concurrently.

Hon. Michael J. Melloy
September 10, 2021
Page - 3 -

Very truly yours,



James J. DuBois, Trial Attorney
United States Department of Justice

cc: Service List

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