



U.S. Department of Justice

Environment and Natural Resources Division

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September 14, 2021

Special Master Michael J. Melloy
United States Courthouse
111 Seventh Ave. S.E.
P.O. Box 22
Cedar Rapids, IA 52401-2101
Email: TXvNM141@ca8.uscourts.gov

*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 submit for your consideration a Proposed Order Regarding Remote Protocols, together with a proposed witness list for Texas and the United States. The Proposed Order has been circulated and discussed among the Parties, and except as otherwise noted, we believe that there is agreement on the Protocol. While the Parties attempted to reach agreement on a Joint Motion to present the Protocol, there were ultimately disagreements on what should be included in such a "joint" pleading. The Parties will therefore submit the Protocol to the extent they believe it is agreed upon, and note the outstanding issues as they see them. Texas and the United States request an expedited determination on the unresolved matters pertaining to the order of witnesses and disputed issues noted in the Proposed Order.

As noted in the September 10, 2021 letter, the first disputed issue is the United States and Texas 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. 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. The September 10, 2021 letter is attached hereto for your convenience. In addition to the rationale described in the September 10 Letter, Drs. Blair and King are the best witnesses from the Texas and United States perspective to describe the 2008 Operating Agreement (2008 OA) and will be essential for the Special Master to have context for the parade of witnesses New Mexico will present complaining about the 2008 OA. While bifurcation of witness testimony is somewhat unusual, so is the nature and structure of the trial in this matter. Given the fact that the Special Master has imposed time limits on both New

Mexico and the Texas/United States integrated cases, there is no inefficiency involved—just a timekeeping issue for Texas and the United States. By contrast, if Texas and the United States are instead required to call three or more *additional* witnesses in order to present some of the information about District operations that Drs. King and Blair would present, it will require expenditure of more trial time than originally planned and prejudice Texas and the United States.

The second disputed issue is the testimony of Mr. D’Antonio. New Mexico seeks to postpone Mr. D’Antonio, who is not designated as an expert witness, to the spring. The Special Master has suggested that the courtroom trial in this case be used for the presentation of technical expert testimony that may be difficult to convey effectively in a remote setting. Based upon the Special Master’s suggestion, New Mexico State Engineer D’Antonio, should be testifying in the fall session because he is offering pure fact testimony about water rights administration. New Mexico’s other witnesses from the office of the State Engineer are testifying on these subjects in the fall and Mr. D’Antonio’s testimony will be no more technically complex than theirs.

The third disputed issue is whether the expert historian testimony should be heard at the conclusion of the fact witnesses in the Fall 2021 trial setting. The United States takes no position on this issue. Texas proposes that the Fall 2021 trial setting be conducted in two segments, divided between fact witnesses and the retained expert historians. New Mexico opposes this position. Texas and the United States’ proposed witness list (attached) separates the witnesses into two segments: the fact witnesses, and the expert historians. There are two retained expert witnesses, both historians, that are slated to testify in the Fall 2021 trial setting, while all other retained expert witnesses will testify in the March 2022 trial setting. It is Texas’s position that the separation of fact versus expert witness testimony should apply to all retained experts, regardless of the fact that the historians will testify in the fall. The same rule should apply equally such that the Parties should complete all fact witness testimony prior to putting on retained expert testimony. Accordingly, Texas proposes that segment 1 of the Fall 2021 trial setting should be the fact witnesses for all parties, and segment 2 of the Fall 2021 trial setting should be the two retained expert historians.

For the reasons set forth in the September 10, 2021 letter, these issues should be addressed expeditiously by the Special Master.

Very truly yours,



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

