

No. 141, Original

In the
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS,

Plaintiff,

v.

STATE OF NEW MEXICO and
STATE OF COLORADO,

Defendants.

OFFICE OF THE SPECIAL MASTER

ORDER

July 7, 2021

ORDER

For the purposes of the proceedings before the Special Master, IT IS HEREBY ORDERED:

A status conference was held in this case on July 1, 2021. As a result of the status conference the following matters were discussed in connection with the upcoming trial in this case.

A. Trial video feed.

A video feed of the trial will be made available in the attorney offices for those attorneys who wish to observe the trial from remote locations. The video feed will be “view only,” not interactive. The video feed will be for use by the attorneys in their offices. If any clients or other interested parties wish to view the feed, they will be required to come to the attorneys’ offices to observe the trial. A request was made to have a feed to more central locations, such as the courthouse in El Paso or Las Cruces (or both). That is a matter that will have to be the subject of further discussion and investigation.

It is anticipated that the courtroom feed will be a split screen with either two or three views, depending upon whether an exhibit is being presented. If there is no exhibit, the screen will be split between the witness and attorney questioning the witness. When the exhibit is presented, a third screen will become available for viewing of the exhibit. Although the courtroom cameras can present views of virtually the entire courtroom, it is anticipated that the cameras will be relatively static on the witness and attorney.

A demo session using the courtroom technology will take place on **Tuesday, July 13th, 2021, at 1:00 p.m. Central Daylight Time**. In order to make the demo as realistic as possible, the demo will be an observation-only session. I then plan to have a follow-up at 2:00 p.m. Central Daylight Time on July 13, 2021, to get feedback and suggestions concerning the video demonstration. Accordingly, I would request that Worldwide Reporting set up the observation-only demonstration for 1:00 p.m. on July 13, 2021, and then a follow-up Zoom hearing at 2:00 p.m. I would anticipate that the court reporter would be present for both sessions in order to both report any proceedings that may require a record as well as to see how the demonstration works for court reporting purposes.

Unfortunately, the actual courtroom where the trial will take place (the largest courtroom in the courthouse) is not available during the week of July 12. As a result, the demo will be from a different courtroom using the same technology. I anticipate doing a follow-up demonstration the week of July 26 from the actual courtroom where we will be holding the trial. At that time we can make any modifications that may be required as a result of the July 13 demo and hopefully finalize the technology that will be utilized.

B. Remote testimony.

There has been some discussion that some witnesses may appear by remote access. It is anticipated that such testimony would be handled essentially the same as the depositions that have been taken in this case. That is, the witness and witness's attorney will be in one location, with the attorneys doing the questioning in another location. It is not anticipated that it would be necessary that the attorneys or any party be actually physically in the courtroom at the time such testimony is taken. I also mentioned that there are two federal holidays during the anticipated time of the trial, Columbus Day and Veterans Day. Since the courthouse will be closed on both of those days, they may be good candidates for remote testimony.

C. Court reporter.

There was some discussion concerning a requirement for daily copy. There seemed to be a consensus that the daily rough drafts would be sufficient. However, that is a matter that will ultimately be up to the attorneys and the court reporter as to whether the rough drafts will suffice or whether the parties will require final copy before the start of the next day's testimony.

There was no resolution as to whether the court reporter would be physically present in the courtroom or participate remotely.

D. Trial schedule and location.

As previously ordered, the trial will commence on **Monday, September 13, 2021**. The trial will be held in Cedar Rapids with the exception of one week of testimony in Las Cruces and one week in El Paso. Subject to further discussion, it is anticipated that those two weeks of testimony will be at the end of the trial.

It is currently anticipated that the trial will continue without interruption, except for the weeks of October 24 and Thanksgiving week, the week of November 22. This assumes the trial will conclude by Christmas. If the trial would extend beyond the Christmas holidays further modifications will have to be made for a Christmas break.

E. Trial time limits.

There has been extensive discussion concerning a limit on the time of trial. The parties seem to be in agreement that some limitation may be appropriate but have significant differences as to the amount that may be required. After considering the arguments of counsel, I have concluded that 150 hours combined for Texas and the United States and 150 hours for New Mexico should be sufficient. I recognize there may need to be some flexibility, particularly as to rebuttal. However, this will give each side approximately five weeks to put their case on, which should be sufficient. The 150 hours includes both direct and cross-examination. In order to preserve trial time, the parties are encouraged to submit as much evidence as possible by deposition or stipulation.

F. Basin tour/final pretrial conference.

The undersigned indicated that the basin tour will occur during the week of August 23, 2021. It will include a flyover of the project. There are some details to be worked out. It is anticipated that there will be further discussion concerning the details of the tour at the post-demonstration hearing next week (July 13) as well as further discussions as necessary during the hearing the week of July 26.

There has been some discussion about the final pretrial conference being held in either El Paso or Las Cruces following the basin tour. No final decision has been made on that issue and will be the subject of further discussion at the subsequently scheduled status conferences.

G. Exhibits.

The parties requested clarification as to what the Special Master was requiring as to physical copies of exhibits. The undersigned is requesting only that the exhibit list in the format outlined in the trial setting order be filed in hard copy.

Both Texas and New Mexico agreed that they will be presenting exhibits in electronic format. The electronic version of the exhibit can then be displayed on the courtroom monitors as well as on the video feed to remote locations. In addition to the electronic version of the exhibit, both Texas and New Mexico will be providing at least two paper copies of the exhibit (one for the Special Master and one for the witness). There was some discussion as to whether paper copies should also be made available to the opposing side which could mean as many as three additional paper copies. No resolution of that issue was agreed upon and will be the subject of further discussion.

H. Advanced disclosure of witness testimony summaries.

Texas had made a suggestion that 48 hours (or some other appropriate time) prior to a witness testifying that the party calling the witness prepare a summary of the testimony as well as a list of the exhibits to be used by the witness. There seemed to be some agreement that a procedure somewhat along those lines might be helpful but no specifics were agreed upon. It is the understanding of the undersigned that the parties will discuss that matter further and hopefully come to some resolution prior to the final pretrial conference.

I. Space in the courthouse.

The undersigned indicated that there is space available in the courthouse for each party and/or amici who may wish to have space made available. At present, the undersigned understands that the following parties have requested separate space; Texas, the United States, New Mexico, Colorado, EBID, and EPCWID No. 1. If any other amici are requesting separate space, please advise the undersigned by the time of next week's demonstration and status conference.

There was some discussion of Texas and the United States co-locating their space in the courthouse. No final determination can be made on that issue until the Department of Justice releases its new COVID protocols (an expected release date of July 20). The United States and Texas may be able to use space within the United States Attorney suite, provided COVID restrictions do not prohibit use of that space.

J. Texas motion to amend.

There was some discussion about whether the undersigned, as Special Master, should rule upon the motion to amend filed by Texas or whether Texas should be ordered to file the motion with the Supreme Court for its initial determination. Prior to any such determination the undersigned directed the parties and any current amici who wish to be heard to file a response within two weeks of the July 1, 2021, hearing, limited to the issue of how the proposed amendment would affect the current lawsuit. Whether new parties, new amici, new discovery, etc., would be required. The response does not need to go to the merits of the motion, but rather the practical implications.

Dated: July 7, 2021



Honorable Michael J. Melloy
Special Master
United States Circuit Judge
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