

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

August 18, 2020

ORDER

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

The undersigned Special Master held a hearing concerning certain motions and scheduling issues on August 7, 2020. As a result of that hearing the following orders are entered.

A. Supplementation of Expert Reports

There were discussions concerning the necessity for supplementation of expert reports and a deadline for any supplementation. As a result of those discussions the undersigned will set out the requirements for supplementation of expert reports that will apply to the trial of this case.

1. The fact that any party has not filed specific objections or disagreements with the factual allegations and conclusions made by an expert for another party shall not be construed as an admission or acquiescence in that fact or as to that conclusion. It is my understanding that this is the purpose of expert depositions, that is, to go into greater detail with each expert as to the areas of agreement and or disagreement each expert has as to the reports and conclusions of other experts.
2. It is not necessary to file a supplemental report in order to critique or disagree with the opinion, conclusions, and facts set out by any other expert to this case.
3. It will be necessary to file a supplemental report if any expert intends to rely upon any new theory of the case, a new model, or facts which have not previously been disclosed by the expert through the expert's report or deposition. More specifically, it is my understanding that Texas has taken issue with what it believes to be new modeling and differing opinions disclosed in New Mexico's supplemental expert reports filed by the July 15, 2020 supplementation deadline. To the extent Texas wishes to have its experts critique those reports, and does so within the parameters of the existing theories of the case, modeling, and previously disclosed facts, no supplementation is required. However, to the extent the supplemental reports filed by New Mexico have caused an expert of any party to change or modify his or her

opinion as to any subject matter, or developed new facts to support their opinion, then supplementation would be required. To the extent any party does wish to supplement their expert report, the supplementation shall be disclosed to opposing counsel by no later than September 30, 2020.

B. Electronically Stored Information

New Mexico has filed a motion to amend the Trial Management Schedule to allow New Mexico to depose witnesses for the United States International Boundary and Water Commission (IBWC) following the close of discovery and to file dispositive motions incorporating such testimony. This dispute relates to a large number of documents which have been disclosed as of the date of the August 7, 2020, hearing as well as another set of documents which was to have been disclosed last week. I am uncertain as to what I can do or require either party to do concerning the documents which have been disclosed. It is my understanding that New Mexico has already uploaded the original tranche of identified documents through its electronic discovery system and determined the documents which it believes are relevant, using geographic and other filters it deems appropriate.

As to the documents that were to have been produced by last week, it is my understanding the parties were going to attempt to agree on geographic filters. To the extent they could not do so the United States would apply filters which it believes are appropriate so as to get the documents down to approximately 10,000. To the extent New Mexico believes that the United States did not apply the appropriate filters it is free to file a motion requesting further supplementation of document disclosure. However, beyond giving New Mexico leave to file that motion the undersigned does not believe that any further action is required on that issue.

The other issue relates to deposing IBWC witnesses who may have relevant information concerning the disclosed documents. To the extent New Mexico wishes to take such depositions, the deadline for completing those depositions only is extended to October 15, 2020.

To the extent New Mexico is requesting that the Trial Management Schedule be amended to allow it to file a supplemental dispositive motion relating to information obtained through the IBWC document disclosure and depositions beyond the October 15, 2020 dispositive motion deadline, that request is denied. However, New Mexico will be allowed to use the information obtained through the document disclosure and deposition of IBWC witnesses in its opposition to motions for summary judgment filed by any of the other parties to the litigation and in its

reply to the opposition filed by other parties to any dispositive motion New Mexico may file.

C. Hearing Date

A status hearing on this case will be held on August 28, 2020, at 11:00 a.m. Central Daylight Time, to be set up by the parties and Worldwide Court Reporters.

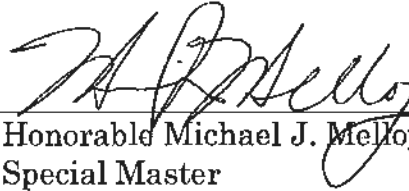
D. Apportionment Issue

There has been considerable discussion about the fact that the issue of apportionment of water as between New Mexico and Texas is a fundamental issue to this case. The Supreme Court cannot decide whether any state to the Compact is in violation of the Compact until we know each state's entitlement under the Compact. Attorney Maria O'Brien had previously suggested that we have a separate, early dispositive motion schedule to address that issue. I indicated that I was not inclined to change the dispositive motion schedule but would attempt to address that issue before all the other issues contained in the dispositive motions are decided.

Upon further reflection I would like to revisit Attorney O'Brien's suggestion and discuss this matter with counsel at the August 28 status conference. The current dispositive motion schedule has the briefing extending through the end of December 2020, with an anticipated oral argument hearing in January 2021. I am not necessarily suggesting that we move up the October 15, 2020, dispositive motion deadline but rather suggest a discussion as to whether a more accelerated briefing schedule could be set for the apportionment issue. I'm sure the parties will have a number of considerations that need to be taken into account if that approach is to be taken, but two that I want to specifically address are as follows.

1. Is the apportionment issue truly a severable issue? We have discussed each state's entitlement to water below the Elephant Butte Reservoir as a somewhat discrete issue. Is it in fact simply an issue of Compact interpretation or is the issue so intertwined with other issues that it is not feasible to separate out that issue?
2. What would be a realistic accelerated schedule that might allow for an earlier determination of that issue, assuming it is one that is susceptible to separate adjudication?

Dated: August 18, 2020

A handwritten signature in black ink, appearing to read "M. J. Melloy", written over a horizontal line.

Honorable Michael J. Melloy
Special Master
United States Circuit Judge
111 Seventh Avenue, S.E., Box 22
Cedar Rapids, IA 52401
Telephone: 319-423-6080
Facsimile: 319-423-6085