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August 26, 2021

Honorable Michael J. Melloy, Special Master

United States Circuit Judge

United States Courthouse

111 Seventh Avenue S.E., Box 22

Cedar Rapids, Iowa 52401-2101

Judge_Michael_Melloy@ca8.uscourts.gov; TXvNM141@ca8.uscourts.gov

Re: *State of Texas v. State of New Mexico and State of Colorado, Original No. 141–
State of Texas’s Motion for Continuance of Trial Setting*

Dear Special Master Melloy,

Pursuant to the August 19, 2021, Order, the undersigned counsel for *amicus curiae* Elephant Butte Irrigation District (“EBID”) submits this letter response on behalf of EBID, in support of the State of Texas’s Motion for Continuance of Trial Setting.

Setting aside the personal issue that Mr. Somach, counsel for Texas, is currently experiencing, which alone, would be enough to grant the Texas motion; other factors are important to consider. First, settlement discussions only recently took a turn down a substantive path, with New Mexico and its *amici* finally providing a settlement document that could form the basis of productive discussions going forward. That said, the document came in late June, 2021 and at a time the parties and *amici* were already preparing for trial with an expected start date of September, 2021. Nothing productive has been able to come to pass from that document because everyone has remained embroiled in all the details of what it takes to put on a trial of this magnitude. The only real possibility for settlement lies within a six month continuance, which six months would provide the necessary reprieve from the grueling trial work that remains ongoing. A six month stay will allow the proper devotion of time and resources necessary for settlement possibilities to be explored.

Further, the history of development of this case during discovery is particularly enlightening here. When New Mexico sought a stay of this case in order to identify and hire new lead counsel of its own, we had come to the end of the originally allowed discovery period pursuant to the Special Master’s Case Management Order. At that time, despite discovery closing and New Mexico having failed to take a substantial number of depositions prior to the discovery closing deadline, New Mexico was allowed several more months to complete an overwhelming amount of depositions in comparison to what it took prior to the initial close of discovery deadline. This substantial “second bite at the apple” was crucial to allow New Mexico’s new lead counsel an opportunity and the necessary time required to get up to speed to effectively represent New Mexico. In effect, New Mexico got a complete “re-do” when it came to preparation of its case. Complaints now about fair-

ness must be measured against the same standard as what was applied to New Mexico during discovery.

Finally, it is difficult to reach the conclusion that New Mexico or its *amici* may be prejudiced if this delay is allowed given the current drought. New Mexico *amici* argue they will be unfairly prejudiced if this case does not proceed to trial immediately. They suggest the farmers within EBID will be forced to continue to rely on groundwater resources next year instead of benefitting from the possibility that this Court may determine that the Operating Agreement is invalid and instruct the parties accordingly regarding allocation within the Project. This argument is not based in reality for multiple reasons. First, this assumes the Court is going to determine the validity of the Operating Agreement and set it aside immediately following trial and before next year's allocation to the Project beneficiaries is made. Second, this assumes that would even matter. Setting aside for a moment the procedural problems with the first assumption, it is entirely likely that the Rio Grande Project as a whole will see a ZERO release from the reservoirs next year. That means, for the first time in history, there is not enough water in the reservoir to release any. This is a tremendous statement, yet it is the actual reality we live in today. If our farmers are to survive this drought, they will need to keep pumping in some quantity regardless of Project supplies available to them.

The benefit, however, from the possibility of settlement cannot be understated. EBID believes the possibility of settlement should be tested in a short stay that would also allow the Texas Team to regroup and determine their best course forward, just as New Mexico was allowed to do with its lengthy extension of discovery. Cases like this one should not be rushed to conclusion but instead should be pursued in a fashion that allows for the fullest and fairest opportunity to develop the record.

Sincerely,

BARNCASTLE LAW FIRM

By /s/ Samantha R. Barncastle
Samantha R. Barncastle, Counsel for EBID

xc: Service List for All Parties Via Email
SRB/jlc

SERVICE LIST FOR ALL PARTIES

In The Supreme Court of the United States, Original No. 141
STATE OF TEXAS v. STATE OF NEW MEXICO and STATE OF COLORADO

PARTIES¹

STATE	ATTORNEY & ADDRESS	PHONE & EMAIL
Texas	<p>STUART L. SOMACH* ANDREW M. HITCHINGS ROBERT B. HOFFMAN FRANCIS M. GOLDSBERRY II THERESA C. BARFIELD SARAH A. KLAHN BRITTANY K. JOHNSON RICHARD S. DEITCHMAN SOMACH SIMMONS & DUNN, PC 500 Capitol Mall, Suite 1000 Sacramento, CA 95814-2403</p> <p>KEN PAXTON <i>Attorney General of Texas</i> BRENT WEBSTER <i>First Assistant Attorney General</i> GRANT DORFMAN <i>Deputy First Assistant Attorney General</i> SHAWN COWLES <i>Deputy Attorney General for Civil Litigation</i> WILLIAM F. COLE <i>Assistant Solicitor General</i> BEAU CARTER <i>Assistant Solicitor General</i> PRISCILLA M. HUBENAK* <i>Chief, Environmental Protection Div.</i> OFFICE OF THE ATTORNEY GENERAL OF TEXAS P.O. Box 12548 Austin, TX 78711-2548</p>	<p>(916) 446-7979 ssomach@somachlaw.com ahitchings@somachlaw.com rhoffman@somachlaw.com mgoldsberry@somachlaw.com tbarfield@somachlaw.com sklahn@somachlaw.com bjohnson@somachlaw.com rdeitchman@somachlaw.com</p> <p>Secretary: Corene Rodder crodder@somachlaw.com Secretary: Crystal Rivera crivera@somachlaw.com Paralegal: Yolanda De La Cruz ydelacruz@somachlaw.com</p> <p>(512) 463-2012 (512) 457-4644 Fax</p> <p>priscilla.hubenak@oag.texas.gov</p>

¹ (*) = Counsel of Record

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AMICI

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<p>Southern Rio Grande Diversified Crop Farmers Association</p>	<p>ARNOLD J. OLSEN* HENNIGHAUSEN OLSEN & McCREA, L.L.P. P. O. Box 1415 Roswell, NM 88202-1415 Malina Kauai – Paralegal Rochelle Bartlett – Legal Assistant</p>	<p>(575) 624-2463 ajolsen@h2olawyers.com</p> <p>mkauai@h2olawyers.com rbartlett@h2olawyers.com</p>
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MEDIATOR

<p>Mediator</p>	<p>Hon. Oliver W. Wanger (U.S.D.J. Ret.)</p> <p>WANGER JONES HELSLEY PC 265 E. River Park Circle Suite 310 Fresno, CA 93720</p>	<p>owanger@wjhattorneys.com dpell@wjhattorneys.com</p>
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SPECIAL MASTER

Special Master	<p>Honorable Michael J. Melloy <i>Special Master</i> United States Circuit Judge 111 Seventh Avenue, S.E., Box 22 Cedar Rapids, IA 52401</p> <p>Michael E. Gans, Clerk of Court United States Court of Appeals – Eighth Circuit Thomas F. Eagleton United States Courthouse 111 South 10th Street, Suite 24.329 St. Louis, MO 63102</p>	<p>(319) 432-6080 TXvNM141@ca8.uscourts.gov</p> <p>(314)244-2400 TXvNM141@ca8.uscourts.gov</p>
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****Updated 4/16/2018**

Corrected the spelling of Pricilla M. Hubenak to Priscilla M. Hubenak and added her e-mail address Priscilla.Hubenak@oag.texas.gov to the Service list.

****Updated 4/18/2018**

Added Toby Crouse (toby.crouse@ag.ks.gov) as the Solicitor General for the State of Kansas and removed Stephen R. McAllister.

****Updated 4/24/2018**

Added Clerk of Court information and updated Special Master e-mail address.

****Updated 11/16/18**

Added Bryan Clark's e-mail address (bryan.clark@ag.ks.gov) for the State of Kansas

****Updated 3/14/19**

Updated Attorney General of Colorado to Philip J. Weiser
 Added Solicitor General Eric R. Olson (eric.olson@coag.gov) for the State of Colorado

****Update 3/19/19**

Added legal assistants Shannon Gifford (shannong@modrall.com) and Leanne Martony (leannem@modrall.com) for El Paso County Water District No. 1
 Added James M. Speer, Jr., information for El Paso County Water District No. 1

****Update 5/6/19**

Added Sarah A. Klahn (sklahn@somachlaw.com), Richard S. Deitchman (rdeitchman@somachlaw.com), Rena Wade (rwade@somachlaw.com) and Corene Rodder (crodder@somachlaw.com) for State of Texas. Removed Rhonda Stephenson.

****Update 11/6/19**

Added Lamai Howard (lamaih@modrall.com) for El Paso County Water District No. 1.
 Removed Leanne Martony.

****Update 11/21/19**

Added Jo Harden (jo@tessadavidson.com) for New Mexico Pecan Growers. Removed Patricia McCann.

****Update 11/22/19**

Removed Lizbeth Ellis and Clayton Bradley and added General Counsel (gencounsel@nmsu.edu) email for New Mexico State University.

- **Update 1/7/20**
Added David W. Gehlert (david.gehlert@usdoj.gov) for the United States. Updated Solicitor General information. Also added John P. Tustin (john.tustin@usdoj.gov) for the United States.
- **Update 2/19/20**
Added Renea Hicks for El Paso County Water Improvement District No. 1. Removed James M. Speer and Lamai Howard.
- **Update 2/26/20**
Added Darren L. McCarty for State of Texas. Removed Brantley Starr and James Davis. Also added Crystal Rivera and removed Rena Wade.
- **Update 5/1/20**
Added Cholla Khoury, Luis Robles, Jeffrey Wechsler and John Draper for the State of New Mexico. Removed David A. Roman. Also added Bonnie DeWitt, Pauline Wayland, Diana Luna and Donna Ormerod.
Added Preston Hartman for the State of Colorado. Removed Karen Kwon.
- **Update 7/7/20**
Added mediator information - Hon. Oliver W. Wanger.
- **Update 10/1/20**
Added Susan Barela (susan@roblesrael.com) for State of New Mexico.
- **Update 10/2/20**
Added Jennifer A. Najjar and removed Stephen M. MacFarlane, Thomas Snodgrass and David W. Gehlert for the United States.
- **Update 12/14/20**
Added Zachary E. Ogaz (zogaz@nmag.gov) for State of New Mexico.
- **Update 1/26/21**
Added Southern Rio Grande Diversified Crop Farmers Association information.
- **Update 2/1/21**
Added Robert Cabello and removed Marcia Driggers for City of Las Cruces.
- **Update 2/23/21**
Updated Solicitor General information and removed John P. Tustin for the United States.
- **Update 7/1/21**
Added Charlie Padilla (CharlieP@modrall.com) and removed Shannon Gifford for EPCWID.
- **Update 7/21/21**
Updated Attorney General/Solicitor General information and removed Christina Garro for State of Texas.