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August 20, 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–matter addressed at Status Conference held Aug. 17, 2021 regarding in-person appearance at trial*

Dear Special Master Melloy,

I am writing for the limited purpose of addressing the matter that came up at the status conference on August 17, 2021 regarding anticipated in-person participation at trial in Cedar Rapids, IA. First, please accept my sincerest apology for my failure to appear at the hearing in person. I was able to listen to the hearing, however, I was unable to participate due to a temporary medical emergency I was experiencing.

During the status conference, you asked each of the parties and *amici* how many people they anticipate having attend trial in-person. This issue has come up at past status conferences, and I intended to address it again on Tuesday. During the discussion on this issue, you again called on me to address the matter in relation to EBID, and when I did not respond, I believe I heard you express that you recalled that I have said EBID would attend trial, in-person, for all or most of the trial. To further respond to this matter, I start by noting that you are correct, EBID intends to participate in the entirety of trial. The EBID Board of Directors, the Manager, and other Staff and Consultants will participate daily, with active roles, where possible, and to the extent necessary to facilitate the presentation of evidence, in an effort, to protect EBID members. Setting aside EBID's interest in many other witnesses who will testify at trial, EBID itself has four witnesses listed as "will call" witnesses, and a fifth reserved as a "may call" witness. In total, EBID will have four to six people participating in and monitoring trial on a daily basis, with an additional two to three people providing technical and other support functions.

That said, I also wish to inform you that a decision was made this week that EBID will not be traveling to attend any portion of trial in-person. This is an unfortunate development, which we take extremely serious, however, the current situation with the global pandemic has necessitated this decision for the primary reason of protecting ourselves and our family members.

The reasons that led to this decision are:

1. Doña Ana County, NM has a much lower infection rate than many other areas of the country we would need to travel through in order to get to Cedar Rapids, IA.
2. The current number of daily infections is lower at our home than it is in your home county, Linn County, IA. Covidactnow.org reported this morning that Linn County's number of new infections per day is 34.5 people per hundred thousand, while the rate in Doña Ana County, a county similar in size to Linn County, is 23 people per hundred thousand.
3. With attorneys, experts, and support staff flying in for trial from all corners of the country and passing through a large number of airports to get there, we will be exposed to a much larger opportunity for infection if we begin traveling and attend in-person.
4. There will be a fairly large number of people attending trial in-person on a daily basis, though not the same people as witnesses and attorneys will come and go according to their individual need to be there based on the stage of trial.
5. Every news outlet in the country is reporting daily about the fact that vaccinated individuals are experiencing "break through" infections, some are even being hospitalized (or worse).
6. Each of EBID's four witnesses are in the "high risk" category for risk of infection due and complications from infection due to COVID-19. They are in the high risk category due to age, but in the case of two of them, there are also health related reasons.
7. My baby (born last summer) has experienced significant health issues due to a neurological disorder that causes her to be a "weak breather" and that puts her in an extremely high risk category for all respiratory infections. COVID-19 aside, I must also consider and be sensitive to the fact that we are headed into cold and flu season.
8. At least two of EBID's witnesses also have close family members (living in their homes) who are immuno-compromised and are at extremely high risk.
9. One member of EBID's team is not vaccinated due to his own health matters, and he will necessarily remain unvaccinated.
10. Our Governor has already begun the process of imposing restrictions due to the spike in COVID-19 cases, and we're told similar restrictions to what were imposed during the first few waves of the COVID-19 outbreak may be coming. I expect these restrictions may gain in strength if we stay on the infection rate and number of daily new infections trajectory we have been on for the last few weeks. If those restrictions follow what we saw last year, travel may become impossible for state agencies and political subdivisions (which include EBID) by order of our Governor.

After considering all of the above, and discussing the issues among our team, it became apparent that several of us are at risk of bringing something deadly home to our otherwise at risk loved ones if we begin to travel. We each remain at risk of infection ourselves, even though most of us are vaccinated. Given the current conditions we're experiencing with COVID-19 taking hold of our country again, that we cannot be sure we will be able to adequately protect our families if we travel to and from Cedar Rapids as we initially planned for trial, and simply put, each of us was unwilling to prioritize

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Re Aug. 17 Status Conf.
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anything ahead of our family's health, the decision was inevitable. We are also concerned that if one of us becomes infected, that may significantly impact our ability to continue to assist with trial, or worse, could cause a ripple effect that causes multiple of us to become infected. I cannot express to you enough how difficult it was to make this decision. On the other hand, it really was a no-brainer. The *great* importance of this trial and the importance of EBID's participation in trial was enough to cause us to look for any and all options available to us (within reason). However, at the end of the day, as difficult as this was, it was also very simple for us—our families and their safety must come first.

This trial, and all proceedings in this matter, are among the most important matters EBID has ever been faced with in its entire history. EBID's depth of knowledge of the issues, our involvement in the day-to-day matters you will hear about at trial, and what is at stake for all of our farmer members was not easy to set aside. EBID still intends to participate in every facet of trial to assist in seeking a solution to the problems presented that is fair and that adequately protects our farmer members' way of life, however, that participation will now look drastically different than originally planned. We respectfully request you make reasonable accommodations for EBID's team to allow our participation, in trial, from home, while safely socially distancing from each other. It is our sincerest hope that the present conditions will not continue to persist and that EBID's decision may be able to be reconsidered at some point in the future.

Thank you for your consideration of this matter.

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></p> <p>BRENT WEBSTER <i>First Assistant Attorney General</i></p> <p>GRANT DORFMAN <i>Deputy First Assistant Attorney General</i></p> <p>SHAWN COWLES <i>Deputy Attorney General for Civil Litigation</i></p> <p>WILLIAM F. COLE <i>Assistant Solicitor General</i></p> <p>BEAU CARTER <i>Assistant Solicitor General</i></p> <p>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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MEDIATOR

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