

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

—————◆—————
NEW MEXICO'S MOTION FOR SPECIAL MASTER TOUR
—————◆—————

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**Counsel of Record*

June 1, 2021

New Mexico requests that the Special Master agree to take a tour of the parts of the Rio Grande basin relevant to this proceeding (“Basin Tour”) and that he ask the Parties to jointly propose and arrange the details of such a tour. In support of this request, New Mexico states as follows:

BACKGROUND

The Parties and the Special Master have previously discussed the possibility of the Special Master taking a Basin Tour:

1. By letter to the other Parties dated April 23, 2020, New Mexico proposed, *inter alia*, a Basin Tour “for the Special Master to visit and observe features in the Rio Grande Basin that are likely to be discussed at trial. Such a tour would provide the Special Master with an on-the-ground overview of the basin. Special Masters in other interstate water disputes have participated in basin tours and have found the tours to be valuable.” Letter from New Mexico to other Parties at page 3 (April 23, 2020), attached as Exhibit A. New Mexico also provided a draft itinerary. *Id.* at Attachment 3.
2. The Parties met and conferred on the issue before the May 1, 2020 Status Conference, but were unable to reach agreement on a Basin Tour.
3. By submission to the Special Master dated April 29, 2020, New Mexico recommended a Basin Tour, noting that other Special Masters in interstate water disputes have found such tours to be valuable. Dkt. 344, page 4. New Mexico noted that the most beneficial opportunity for such a Basin Tour is during the irrigation season. *Id.*
4. In Texas’s April 29, 2020 submission to the Special Master, Texas objected to New Mexico’s Basin Tour proposal. Dkt. 342, ¶ 4(b), page 5. Texas did not provide a reason for its objection. However, Texas did state that it was amenable to a “fly-over,” but insisted

“on the presence of a certified Court reporter at all times.” The United States adopted Texas’s position. Dkt. 345, ¶4, page 2.

5. At the May 1, 2020 Status Conference, the Special Master addressed New Mexico’s Basin Tour proposal. Transcript at 28:1-19 (May 1, 2020) (Dkt. 396). The Special Master stated: “New Mexico has suggested a site visit. I just want to think about that some more. I had thought about that myself before New Mexico had even suggested it. There may be a value to it. Whether it should be on the ground or a flyover and the timing are all things I want to think about.” *Id.* at 28: 2-8.
6. Subsequently, at the May 29, 2020 Status Conference, the Special Master noted that a Basin Tour “very well may be a useful exercise,” but that it was premature to conduct one in the summer of 2020. He added that “further into the case when the issues are fleshed out a little more might be a more appropriate time.” Transcript at 10:8-11:21 (May 29, 2020) (Dkt. 398).
7. Texas and the United States oppose this Motion. Colorado has no objection to this Motion.

ARGUMENT

I. THE SPECIAL MASTER HAS DISCRETION TO CONDUCT A BASIN TOUR

“Courts have sensibly recognized that if a thing cannot be brought to the observer, the observer must go to the thing.” McCormick on Evidence at 69, § 219 (8th ed. 2020). Thus, conducting a Basin Tour is within the discretion of the Special Master. *See, e.g., Johnson v. William C. Ellis & Sons Iron Works, Inc.*, 604 F.2d 950, 958 (5th Cir. 1979); *U.S. v. Gray*, 199 F.3d 547, 550 (10th Cir. 1999); *U.S. v. Triplett*, 195 F.3d 990, 999 (8th Cir. 1990) (“The federal courts recognize their inherent power to permit a jury view of places or objects outside the

courtroom. The decision to permit a view is entrusted to the sound discretion of the trial court.’ ”) (quoting *United States v. Passos-Paternina*, 918 F.2d 979, 986 (1st Cir. 1990)).

II. A BASIN TOUR WOULD PROVIDE VALUABLE INFORMATION FOR THE SPECIAL MASTER

At issue in this case is whether New Mexico and Texas have received their fair share of water under the Rio Grande Compact. In evaluating that question, the Court will need to consider a wide variety of evidence related to the use and movement of water through the Lower Rio Grande Basin, including evidence on Rio Grande Project operations, historic and current infrastructure, diversions, cropping patterns, agricultural practices, and the water uses of farmers, municipalities, and others who rely on the Rio Grande. This evidence cannot be fully appreciated in a courtroom. Comprehension of the technically complex materials to be presented can be more fully understood through an in-person examination of the relevant areas and infrastructure.

It is for precisely this reason that Special Masters in other U.S. Supreme Court interstate water disputes have found basin tours to be beneficial. For instance, Special Master Owen Olpin in *Nebraska v. Wyoming*, No. 108, Original, conducted a multi-day tour of the North Platte and Platte River basin from its headwaters in Colorado downstream to central Nebraska to view projects and areas relevant to that case. *See* Statement of Mr. Brockmann, Transcript, 11:8-21 (May 29, 2020) (Dkt. 398). That case involved three states, reclamation projects and related dam operations. The United States was a full participant in the basin tour, which took place before trial. No court reporter was requested for the tour by the United States or any of the states.

In *Kansas v. Colorado*, No. 105, Original, Special Master Arthur L. Littleworth, toured the Arkansas River basin. He reported to the Court as follows:

It was also agreed at the first status conference that a site view of the Arkansas River Basin would be helpful. Accordingly, a tour was held on September 13 and 14, 1988, with representatives of both states and of the United

States present. The itinerary covered both a land and air inspection of the Arkansas River Basin from Pueblo, Colorado to Garden City, Kansas, including the Purgatoire River drainage area and Trinidad Reservoir.

Kansas v. Colorado, No. 105, Orig., First Report of the Special Master, vol. I, at 22-23, (1994).

The tour of the Arkansas River basin took place before trial. It included both an aerial and a ground tour. No certified court reporter was requested to be present by either of the participating states or the United States.

In the Republican River case, *Kansas v. Nebraska & Colorado*, No. 126, Orig., Special Master Vincent L. McKusick took a multi-day tour of the Republican River basin. The tour took place before trial. The case ultimately also settled before trial. No court reporter was requested.

Special Master Barton H. Thompson, in *Montana v. Wyoming & North Dakota*, No. 137, Orig., conducted a two-day tour of the Tongue River basin portion of the Yellowstone River, which was the “Interstate Tributary” at issue in that case. The tour took place before the trial in that case. No court reporter was requested for the tour.

As in these prior interstate water disputes, the issues in this case involve the actual current and historical operation of a large river system, groundwater wells and Reclamation project infrastructure, with diversions and returns in more than one state. While the Parties may provide photographs, maps or videos of these items during trial, such records cannot replicate the personal experience of a site visit. As one court has commented, “[i]f a picture is worth a thousand words, then the real thing is worth a thousand pictures.” *Clicks Billiards, Inc. v. Sixshooters, Inc.*, 251 F.3d 1252, 1266-67 (9th Cir. 2001). The portion of the Rio Grande basin involved in this suit simply cannot be brought into the courtroom.

III. A BASIN TOUR IS APPROPRIATE PRIOR TO TRIAL

The Basin Tour should be conducted in August of this year for two reasons. First, the most opportune time to make the Basin Tour would be when the Rio Grande Project is operating during the irrigation season. This is when water is in the bed of the Rio Grande, in the canals and laterals, and when it is being used on the fields by Project farmers. Summer of 2021 is the last irrigation season before the start date for trial in this matter. The final storage release for the Project is currently scheduled to be made on or about August 15. This release will be for the exclusive use of El Paso County Water Improvement District No. 1 and will run through the Project system within 2-3 days. Therefore, to view working Project operations before the start of trial, New Mexico suggests a two or three-day Basin Tour be conducted no later than mid-August, 2021.

Second, conducting the Basin Tour prior to trial will allow the Court to better understand the evidence in this complex interstate water dispute. Although the exhibits will provide some information about water use, viewing the basin would provide an invaluable aid in fully assessing the evidence to be presented. Moreover, should the Basin Tour be conducted in August, the Final Pretrial Conference could be scheduled in Albuquerque, Las Cruces, or El Paso at the conclusion of the tour.

IV. THE LOGISTICS OF THE BASIN TOUR CAN BE FINALIZED BY THE PARTIES

Based on experience in other Supreme Court original actions over interstate rivers, New Mexico proposes a 2-3 day Basin Tour from Elephant Butte Dam to Fort Quitman. A sample itinerary is presented as Attachment 3 to Exhibit A. To finalize the details, the Special Master should task the Parties with conferring on the logistics of the Basin Tour, including the final itinerary, the timing, whether a videographer should participate, whether a transcript is necessary, what information is presented and by whom, what ground rules should apply, and other details to

ensure an orderly and helpful site visit. New Mexico is confident that the Parties can resolve most of these issues. If necessary, the Parties can seek the guidance of the Special Master to resolve any dispute.

CONCLUSION

In sum, New Mexico respectfully requests the Special Master conduct a Basin Tour in mid-August of 2021, and that he further direct the Parties to cooperate in the planning and arranging of the final details of the Basin Tour.

Respectfully submitted,

/s/ Jeffrey J. Wechsler

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April 23, 2020

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Re: **State of Texas v. State of New Mexico and State of Colorado**
No. 141, Original

Dear Counsel:

I am writing regarding the upcoming May 1st Status Conference. New Mexico believes that it would be helpful to confer before the hearing in the hopes of reaching an agreement on the procedural and scheduling issues. In particular, as outlined below, we are interested in discussing the remaining depositions, the case management issues, and the possibility of a basin tour.

Depositions

As you know, there are a number of depositions that must be rescheduled and completed before the close of discovery. For convenience, Attachment 1 to this letter contains an initial list of depositions that New Mexico intends to take before the close of discovery. We would appreciate your assistance in identifying available dates for these depositions once the deposition stay has been lifted. New Mexico will need to prioritize the depositions of witnesses 1 through 10 since those witnesses are offering expert opinions that the New Mexico experts will need to understand and evaluate before the deadline for New Mexico's rebuttal expert reports.

Attachment 2 contains a list of depositions that we understand other Parties plan to take of New Mexico witnesses. Please advise if we are mistaken or if this list should be revised. Depending

EXHIBIT A

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on the depositions of Texas and United States' experts, we anticipate that all of the previously designated New Mexico experts will be offering rebuttal opinions. For planning purposes, we assume that Texas or the United States will want to depose each of those New Mexico experts, in some cases for the first time.

In total, we estimate that there are a minimum of 36 depositions that must be taken before the close of discovery, adding up to over 50 days. The new case management deadlines must be sufficient to accommodate all of these depositions. To help the May 1st Status Conference go as smoothly as possible, we think it would be helpful to discuss the timing and scheduling of depositions, as well as potential obstacles created by current COVID-19 restrictions.

Case Management Deadlines

Special Master Melloy has indicated that the Parties should be prepared to discuss new case management deadlines at the May 1st Status Conference. Although the Master has not specifically required the Parties to confer on this issue, we think it would be valuable to see if it is possible to agree on some or all of the deadlines. To that end, New Mexico proposes the following schedule:

Date	Deadline
May 18, 2020	Stay on Deposition Discovery Lifted <i>(or 18 days after entry of an amended scheduling order, whichever is later)</i>
May 25, 2020	Deadline for Texas to Submit Coors Supplemental Expert Opinion (if any) <i>(or 25 days after entry of an amended scheduling order, whichever is later)</i>
July 15, 2020	New Mexico Rebuttal Reports Due
July 15, 2020	Parties to Exchange Trial Witness Lists
October 16, 2020	Close of Discovery
October 23, 2020	Dispositive Motions & <i>Daubert</i> Motions Due
December 15, 2020	Responses in Opposition to Dispositive Motions & <i>Daubert</i> Motions Due
January 15, 2021	Replies in Support of Dispositive Motions & <i>Daubert</i> Motions Due
February 2021	Hearing on Dispositive Motions & <i>Daubert</i> Motions
April 23, 2021	Deadline for Motions <i>in Limine</i>
April 30, 2021	Final Pretrial Statements
May 27-28, 2021	Final Pretrial Conference & Hearing on Motions <i>in Limine</i>
June 7, 2021	Trial Starts

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New Mexico considers this schedule to be aggressive but realistic.¹ In proposing these deadlines, New Mexico attempted to accommodate the Special Master's stated intention for trial to begin in May or June of 2021. We were also guided by the pending expert disclosures, the outstanding depositions, the unknown obstacles presented by COVID-19 related restrictions, and the general nature of discovery. In light of all of these considerations, we think it best to adopt a schedule that is achievable and allows for reasonable, albeit limited, flexibility. We think that the Parties will have to remain disciplined and work in good faith to meet this schedule.

Two of the proposed deadlines deserve additional comment. First, one of the Texas experts, Mr. Coors, had not completed his analysis at the time of Texas' rebuttal disclosure or his expert deposition. As a result, Mr. Coors was not prepared to discuss all of his opinions and he expressed his intention to continue working on his new analysis and to supplement his opinions at a later date. New Mexico reserves the right to challenge or move to exclude Mr. Coors' new opinions. At a minimum, however, it is necessary to set a deadline for Texas to disclose any proposed new opinions from Mr. Coors. As indicated above, New Mexico proposes that the deadline be set one week after the reopening of deposition discovery so that New Mexico has sufficient time to respond to Mr. Coors should the Special Master allow his new analysis.

Second, New Mexico proposes that the Parties exchange trial witness lists on July 15, 2020. The Initial Disclosures in this case identified a large number of persons who potentially had information related to the case. Unlike smaller cases, however, the Initial Disclosures did not provide much guidance as to the likely trial witnesses. The purpose of exchanging trial witness lists in July is to allow the Parties to adequately prepare for trial by disclosing the witnesses who are very likely to participate at trial in order to facilitate depositions. We think this provision would benefit all of the Parties, and would like to discuss the details, including provisions for depositions of new witnesses should a witness list be amended.

Basin Tour

Finally, New Mexico would like to discuss organizing a basin tour for the Special Master to visit and observe features in the Rio Grande Basin that are likely to be discussed at trial. Such a tour would provide the Master with an on-the-ground overview of the basin. Special Masters in other interstate water disputes have participated in basin tours and have found the tours to be valuable.

Because trial is being planned for next summer, this irrigation season provides the best opportunity for a basin tour. We propose three days in late August, specifically August 26-28. Attachment 3 offers a draft itinerary for discussion purposes. We envision reaching an agreement on the locations to be visited, the timing, and the ground rules. It would also be helpful to discuss who should be allowed to participate, who should be allowed to speak, and the materials to provide to the Special Master.

¹ This proposed schedule may need to be adjusted depending on the Special Master's guidance on trial issues such as phasing, pre-filed testimony, and bifurcation.

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We would like to set up a time to discuss these issues in advance of the May 1st Status Conference. Is there a 2-hour block of time that is available on April 27th for this purpose? If that day would not work, please provide available times for either April 24th or 28th.

Please call if you have any questions. We look forward to discussing these issues with you further.

Best regards,

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ATTACHMENT 1

Depositions to be taken by New Mexico²:

	Deponent	Party / Amici Defending the Deposition	Estimated Days
Expert Witnesses			
1	Adolph (Shane) Coors V ³	Texas	1-2
2	George Hornberger	Texas	1
3	William Hutchison	Texas	1
4	Joel Kimmelshue / Land IQ	Texas	1-2
5	Leonardo Lombardini	Texas	1
6	Jean Moran	United States	1
7	David Sunding	Texas	1-2
Expert & Fact Witnesses			
8	Al Blair	Expert testimony sponsored by Texas and the United States; fact testimony by EPCWID	3
9	Erik Fuchs	Texas	1-2
10	Philip King	Expert testimony sponsored by Texas and the United States; fact testimony by EBID	2-3
Fact Witnesses			
11	Filiberto Cortez	United States	3
12	Gary Esslinger	EBID	1-2
13	Pat Gordon	Texas	3
14	Curtis Seaton	Texas	1
15	Herman Settemeyer	Texas	2
16	Mike Sullivan	Colorado	1
17	Wayne Treers	United States	1
30(b)(6) Depositions			
18	Bureau of Reclamation	United States	2

² New Mexico reserves the right to take additional depositions based on the fact witnesses identified by other Parties or information learned in discovery.

³ If allowed to present supplemental opinions.

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	Deponent	Party / <i>Amici</i> Defending the Deposition	Estimated Days
19	EPWU (continuation)	Not Applicable	1
20	IBWC	United States	1-2
21	Hudspeth County Conservation and Reclamation District No. 1	HCCRD	1-2
22	Texas Water Development Board	Texas	1-2

ATTACHMENT 2

Depositions to be taken by Texas or the United States:

	Deponent	Party / <i>Amici</i> Defending the Deposition	Estimated Days
Expert Witnesses			
1 to 11	New Mexico Rebuttal Witnesses	New Mexico	1 to 3
Fact Witnesses			
12	John D'Antonio	New Mexico	1-2
13	Rolf Schmidt-Peterson	New Mexico	1-2
14	Ryan Serrano (continuation)	New Mexico	1

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ATTACHMENT 3

Discussion Draft of Itinerary for Basin Tour

Day 1

1. ABCWUA Infrastructure
2. San Marcial
3. Elephant Butte Dam
4. Percha Diversion Dam
5. Bonita Lateral
6. Farm Tour in Rincon Valley
7. Leasburg Diversion Dam
8. Las Cruces Water Supply Infrastructure
9. Mesilla Diversion Dam and Eastside Canal
10. Farm tour in Mesilla (*possibly Day 2*)

Day 2

1. NMSU ASC Leyendecker Weather Station
2. La Union Laterals and Three Saints Lateral
3. Canutillo Well Field and related fallowed land
4. Courchesne Bridge and USGS El Paso Gage
5. American Dam/International Dam, Texas
6. Franklin Canal Heading/American Canal Extension
7. Haskell WWTP
8. Riverside Canal Heading/ American Canal Extension/ Jonathan Rogers Water Plant and Bustamante Wastewater Treatment Plant

Day 3

1. Kay Bailey Hutchison Desalination Plant – EPWU
2. Farm Tour El Paso Valley
3. Fabens Wasteway and Tornillo Canal; EPCWID Irrigation Wells
4. Tornillo Canal/ Hudspeth Feeder Canal/ Hudspeth Reservoir
5. El Paso/Hudspeth County Line and Hudspeth
6. Ft. Quitman

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OFFICE OF THE SPECIAL MASTER

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STATE OF NEW MEXICO'S CERTIFICATE OF SERVICE

This is to certify that on June 1, 2021, I caused true and correct copies of **New Mexico's Motion for Special Master Tour** to be served by e-mail and/or U.S. Mail, as indicated, upon the Special Master, counsel of record, and all interested parties on the Service List, attached hereto.

Respectfully submitted,

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