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July 22, 2020

**Via Electronic and U.S. Mail**

Hon. Michael J. Melloy  
Special Master  
United States Circuit Judge  
111 Seventh Avenue, S.E., Box 22  
Cedar Rapids, IA 52401  
[Michael\\_Melloy@ca8.uscourts.gov](mailto:Michael_Melloy@ca8.uscourts.gov)

**Re: New Mexico's Status Letter Addressing Issues for the July 24, 2020 Status Conference**

Dear Special Master Melloy,

The State of New Mexico respectfully submits this status report in advance of the July 24, 2020 Status Conference. In your Order of July 21, 2020, you identified two agenda items to be addressed at the hearing. New Mexico requests the addition of two additional agenda items, (1) clarification of Paragraph 3.5 of the Case Management Plan ("CMP") and (2) expedited briefing schedule for a discovery motion. The purpose of this status report is to summarize New Mexico's position on each of these subjects.

**I. Discovery Status Report**

New Mexico offers the following status report on discovery:

**A. Depositions**

- Since the last Status Conference on June 12, 2020, New Mexico has taken the depositions of David Sunding, Al Blair, Shane Coors, Jean Moran, Pat Gordon, Suzy Valentine, and the Rule 30(b)(6) deposition of Hudspeth County Conservation and Reclamation District No. 1 (HCCRD);
- Since the last Status Conference, New Mexico has defended the depositions of John D'Antonio, Rolf Schmidt-Petersen, Dana Hoag, Bryan Thoreson, Estevan Lopez, Richard Allen, Margaret (Peggy) Barroll, David Jordan, Lewis Munk, and Lee Wilson;

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- In the next two weeks (July 27 – August 7), New Mexico is scheduled to take the following depositions: Curtis Seaton, Bert Cortez, John Balliew, Herman Settemeyer, Carolyn Donnelly, Dagmar Llewellyn, and Nicolai Kryloff;
- In the next two weeks (July 27 – August 7), New Mexico is scheduled to defend the following depositions: Jennifer Stevens, John Carron, Steve Setzer, and Peggy Barroll;
- As discussed below in Section III, New Mexico seeks clarification of Paragraph 3.5 of the CMP. Specifically, New Mexico seeks guidance on the extent and nature of participation in depositions by *Amicus* El Paso County Water Irrigation District (“EPCWID”) and *Amicus* Elephant Butte Irrigation District (“EBID”).

#### **B. Expert Disclosures**

- On June 15, 2020, New Mexico disclosed nine (9) non-modeling experts: Richard Allen, Peggy Barroll, Dana Hoag, David Jordan, Estevan Lopez, Lewis Munk, Jennifer Stevens, Bryan Thoreson, and Lee Wilson. New Mexico continues to support the option of providing electronic copies of the expert reports to the Special Master.
- On July 15, 2020, New Mexico disclosed eight (8) modeling experts: Gilbert Barth, John Carron, Steven Larson, Daniel Morrissey, Steve Setzer, Charles Spalding, Greg Sullivan, and Heidi Welsh. In addition, on that same day, New Mexico disclosed the supplemental expert reports of Peggy Barroll and Estevan Lopez addressing the modeling issues in the July 15 modeling reports. As mentioned above, New Mexico continues to believe that providing expert reports to the Special Master will assist the Master in understanding the issues that separate the Parties.
- As identified in New Mexico’s Status Letter of May 28, 2020, New Mexico learned through the deposition of Texas expert Dr. George M. Hornberger that Dr. Hornberger had worked on a model in this case and performed other technical reviews, but Texas did not initially disclose that model or the other materials as part of Dr. Hornberger’s expert file. Texas agreed to disclose some of the information from Dr. Hornberger’s expert file, but continues to withhold other information. New Mexico is reviewing this disclosure. If the Parties are unable to agree, it may be necessary for New Mexico to seek relief from the Special Master on this issue.
- On June 5, 2020 New Mexico took the deposition of Texas expert Dr. Joel Kimmelshue. Although Dr. Kimmelshue had previously been deposed, on September 20, 2019 he informed New Mexico for the first time that Mica

Heilmann, Stephanie Tillman and Travis Brooks may be testifying on subjects covered in his original report disclosed on May 31, 2019. Ms. Heilmann, Ms. Tillman and Mr. Brooks had not previously been disclosed as having expert testimony related to Dr. Kimmelshue's original expert report, and Texas did not include them in their Rule 26 disclosure. *See* Texas's Initial and Rebuttal Expert Designations (June 10, 2020) (Docket 369). By letter dated July 8, 2020, New Mexico requested that Texas supplement its original expert disclosure to include Ms. Heilmann, Ms. Tillman, and Mr. Brooks, clarify the opinions they will offer at trial, and afford New Mexico the opportunity to take supplemental depositions of these experts at no cost to New Mexico. New Mexico has conferred with Texas on this issue, and the Parties have agreed to a resolution that includes Texas filing a supplemental expert disclosure by July 29, 2020.

### **C. Written Discovery**

- Pursuant to the Stipulation Regarding Procedure for Production of Documents and Electronically Stored Information, the Parties agreed upon a procedure for producing ESI in this case that included an agreement on technical issues and search terms. It was understood that all Parties would produce all ESI by the end of May 2020. While the parties generally accommodated small delays in the final production, the United States did not produce any ESI from the International Boundary & Water Commission ("IBWC") by that date. Instead, on June 2, 2020 the United States notified New Mexico that it had a new set of search terms and would produce documents under the new search terms. New Mexico objected to the unilateral change of search terms and the Parties engaged in multiple discussions, resulting in the United States' agreement to produce all responsive IBWC documents on July 15. On July 15 the United States produced over 29,000 documents. The United States has since notified New Mexico that it intends to produce another 30-40,000 documents at an unspecified date. These actions hamper New Mexico's ability to conduct meaningful discovery on the IBWC by the discovery deadline. Should the parties not be able to resolve this issue, New Mexico may seek relief from the Special Master.
- On May 27, 2020, New Mexico served its First Set of Requests for Admission to the State of Texas. Responses are due on July 27, 2020.
- On June 29, 2020, New Mexico served its Second Set of Requests for Production to El Paso County Water Improvement District No. 1. Responses are due on August 31, 2020.
- On June 29, 2020, New Mexico served its Second Set of Requests for Production to Elephant Butte Irrigation District. Responses are due on August 31, 2020.

- On June 29, 2020, New Mexico served its Second Set of Requests for Admission to United States. Responses are due on August 31, 2020.
- On June 29, 2020, New Mexico served its Third Set of Requests for Production to the United States. Responses are due on August 31, 2020.
- On June 29, 2020, New Mexico served its First Set of Interrogatories to the State of Texas. Responses are due on August 31, 2020.
- On June 29, 2020, New Mexico served its Third Set of Requests for Production to the State of Texas. Responses are due on August 31, 2020.

## **II. Appointment of a Mediator**

New Mexico has received the letter to counsel from Judge Oliver W. Wanger as well as the Mediation Fee Agreement. New Mexico will be prepared to discuss issues related to the mediation at the Status Conference.

## **III. Request for Clarification of Paragraph 3.5 of the CMP**

New Mexico seeks guidance on Paragraph 3.5 of the CMP to avoid future discovery disputes. Paragraph 3.5 provides, in part, that “Amici Elephant Butte Irrigation District and El Paso County Water Improvement District No. 1 shall have the right to question witnesses and otherwise participate in depositions when the 2008 Operating Agreement is the subject of the deposition.” Recently, *Amicus* EPCWID and *Amicus* EBID have become more active in questioning witnesses. Specifically, EPCWID actively questioned Interstate Stream Commission Director Rolf Schmidt-Petersen and Estevan Lopez, and has indicated an intent to ask additional questions of New Mexico State Engineer John D’Antonio and Dr. Peggy Barroll.

New Mexico has two concerns about the use of Paragraph 3.5 by EPCWID. First, the original rationale for allowing EPCWID and EBID to participate in depositions was to protect their unique contractual interests in the 2008 Operating Agreement. In the subsequent March 31, 2020 Order (“March 31<sup>st</sup> Order”), however, the Special Master explained:

To the extent the current operations are inconsistent with the Court’s ultimate decree on apportionment, any operating agreement will have to be brought into conformity with the decree. . . . The 2008 Operating Agreement may thus be relevant to the issue of current operations. However, the validity of the agreement itself, and the ability of the contracting parties to enter into the agreement are at best premature.

March 21<sup>st</sup> Order at 29. The Special Master thereby dismissed New Mexico’s Counterclaim 2. Thus, the facial “validity of the 2008 Operating Agreement” is not currently an issue in this litigation, and the *Amici*’s contract interests are not directly implicated.

In this original action, New Mexico represents all of its water users, including EBID. *See, e.g., Nebraska v. Wyoming*, 515 U.S. 1, 21 (1995) (“Ordinarily, in a suit by one State against another subject to the original jurisdiction of this Court, each State must be deemed to represent all of its citizens. A State is presumed to speak in the best interests of those citizens.”). The issue of the division of the waters of the Rio Grande, where the water is used, and whether New Mexico is receiving its share under the Compact are issues that are common to all New Mexico water users, and there is no principled basis to distinguish between the districts (EBID and EPCWID) and the other *Amici* in the case. Because the primary issue in the case is whether the States received their share of water under the Compact, it follows that the provision of Paragraph 3.5 granting special permission to the districts to ask questions at depositions should be adjusted.

Second, Paragraph 3.5 indicates only that the districts may participate when “the 2008 Operating Agreement is the subject of the deposition,” but does not otherwise provide guidance. The United States Supreme Court has explained that “the Compact is inextricably intertwined with the Rio Grande Project and the Downstream Contracts,” and that the United States can be understood to serve as an “agent of the Compact charged with assuring that the Compact’s equitable apportionment to Texas and part of New Mexico is in fact made.” *Texas v. New Mexico*, 138 S.Ct. 954, 959 (2018) (internal quotation marks omitted). Given that the 2008 Operating Agreement governs current operations of the Project, and the Project is “inextricably intertwined” with the Compact, it is difficult to draw the line for what questions are not allowed under Paragraph 3.5. Not surprisingly, questioning from the districts has ranged broadly to cover issues related to the Compact, waste of water, and administration of water in New Mexico, issues that are also being raised by Texas and the United States. If EPCWID and EBID are allowed to continue to question deponents, New Mexico requests clarification of what subject areas are appropriate, and requests that questioning be limited to non-repetitive questions about the provisions of the 2008 Operating Agreement itself.

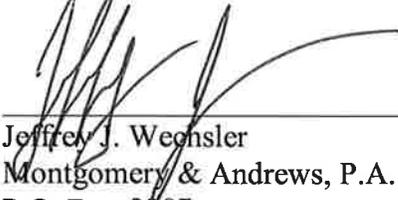
#### **IV. Request for Expedited Briefing Schedule on Discovery Motion**

Finally, on July 22, 2020 New Mexico filed its Motion to Set a Date Certain for Disclosure of Supplemental Expert Reports and to Require Compliance with FRCP Rule 26(e)(2). Due to the upcoming deadline for the close of discovery on August 31, 2020, and the time sensitive nature of discovery, New Mexico requests an expedited schedule for briefing on the motion. Specifically, New Mexico requests that the deadline for responses be set on July 31, 2020, and the deadline for replies be set on August 6, 2020.

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New Mexico looks forward to discussing these issues at the upcoming videoconference.

Best regards,



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cc: Counsel