



U.S. Department of Justice

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April 29, 2020

Special Master Michael J. Melloy
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Re: *State of Texas v. State of New Mexico and State of Colorado*
United States Supreme Court No. 141 Original

Dear Special Master Melloy:

The United States respectfully submits this letter response to the April 23, 2020 Notice from the Special Master regarding the May 1, 2020 telephonic Status Conference. The following is a brief Status Report on the state of ongoing discovery, issues regarding additional discovery and disclosures, and the case schedule.

With respect to ongoing discovery, the United States has disclosed hundreds of thousands of pages of documents. Our search for Electronically Stored Information (ESI) in the Bureau of Reclamation and Department of Interior databases is complete, and review for non-responsive and privileged documents is nearly complete. The documents will be produced next two weeks. The ESI search by the U.S. International Boundary Waters Commission (IBWC) has generated voluminous results. Ongoing review of these documents will result in a substantially smaller set of responsive documents. Production of the IBWC ESI is expected to be completed by June 1. With respect to depositions, the United States has worked with counsel for the other parties to make its witnesses available to the extent it has been asked. To date the only depositions of United States' witnesses or personnel that have occurred are two of the United States' rebuttal witnesses.

Following a "meet and confer" conference among the parties on April 28, it appears that neither the case schedule nor the extent of the need or the manner for additional discovery going forward is agreed upon.

The disputed issues for scheduling purposes are primarily (1) reopening of depositions, (2) the timing of New Mexico's sur-rebuttal reports, and (3) the date for close of discovery. All other dates will naturally fall out from these three items.

1. Lifting of Stay and Resumption of Depositions.

The United States believes that all parties agree on lifting the stay on depositions on **May 15, 2020**. The United States believes that depositions held in May – and perhaps longer depending on circumstances - should be conducted remotely. While most of the counsel in this case agree that “virtual” depositions are sub-optimal, they may be necessary to move the case forward in a timely manner.

2. Disclosure of New Mexico’s Sur-Rebuttal Expert Reports.

The deposition schedule is dependent, to some degree, on the production of New Mexico’s sur-rebuttal reports. These reports were due on March 27, 2020, just a couple of weeks after depositions were stayed. We understand that New Mexico will be proposing an additional eight weeks of depositions prior to submitting its sur-rebuttals, arguing for a July 15, 2020 date for such disclosures. This is unreasonable. New Mexico has had an additional seven weeks to work on these reports. Deposition of New Mexico’s sur-rebuttal experts cannot go forward without examination of their new or revised opinions. The United States therefore suggests that New Mexico’s deadline for sur-rebuttal reports should be **May 29, 2020**.

3. Close of Discovery.

Following the disclosure of the sur-rebuttal reports, the United States believes that eight to ten weeks of additional discovery and depositions should be sufficient to complete discovery in this case. The United States recognizes that New Mexico has now come up with a substantial list of depositions that it now seeks to take. The need for some of the listed depositions is questionable, including a 30(b)(6) deposition of the IBWC – the claims against which the Special Master has dismissed - and depositions of witnesses recently withdrawn by Texas. However, should New Mexico wish to press forward with the entire list, they now have six experienced trial attorneys at their disposal. We therefore suggest that a discovery cutoff of **August 14, 2020** would be appropriate.

After the close of discovery, dates for dispositive motions may proceed under a schedule allowing sufficient time for briefing, argument and a ruling in a meaningful time before trial. Motions thirty days after close of discovery (e.g. Sept 13), responses forty-five days after that (Oct. 28), and replies 14 days later (Nov. 12). A hearing on any motions would be possible in December. This would leave the Special Master sufficient time to rule on the motions well before trial in June of 2021.

4. Other management issues that the United States expects the parties to raise:

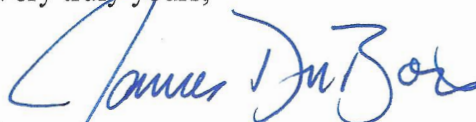
Trial Witness Lists: The United States understands that New Mexico will seek to mandate a Trial Witness List disclosure on the same date that it seeks to disclose its sur-rebuttal reports. The disclosure of anticipated trial witnesses nearly a year before the start of trial is premature and unreasonable. The United States proposes that Trial Witness Lists be included in the pretrial statements in the spring of 2021.

Basin Tour: The United States understands that New Mexico will propose a multi-day ground tour of the Rio Grande Basin from Albuquerque to Fort Quitman for the Special Master and the parties (apparently excluding representatives of the two Irrigation Districts that comprise the Project). The United States opposes such a trip. The United States agrees with Texas that a fly-over tour of the Project Area may be acceptable. The United States also agrees with Texas that for any tour of the Project a certified Court reporter is necessary.

Bifurcation/Trial Phasing: The United States remains open to bifurcation of the proceeding if a proposed division of justiciable issues is efficient and workable. For instance, assuming that New Mexico has liability under the United States complaint, a separate remedy phase may be appropriate. However, at this point, the parties do not appear to agree on a bifurcation structure. The United States agrees that phasing of the trial into blocks of trial time interspersed by a week or two of non-trial time, is a sound idea. The trial in *Kansas vs. Colorado* proceeded on a similar basis, so as not to completely tax the parties or the Court.

We appreciate your Honor's consideration of the United States' suggestions and concerns, and look forward to discussing the matter further with the Court and Parties on May 1st.

Very truly yours,



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