



PC-NM-001-018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

FILED
AT ALBUQUERQUE

1986

JESSE CASALS
CLERK

DWIGHT DURAN, et al.,

Plaintiffs,

v.

Civil No. 77-0721-JB

TONEY ANAYA, et al.,

Defendants.

ENTERED BY ROCKET
001 - 3 1986

ORDER

On September 2, 1986, plaintiffs filed their Amended Motion for an Order to Show Cause and for Further Relief.¹ The plaintiffs' Motion seeks an order of this Court requiring defendants to show cause why they should not be found in contempt of the orders in this cause and why further relief in favor of the plaintiff class should not be granted. The plaintiffs also request an order establishing a discovery schedule.² Defendants filed their response to the plaintiffs' Motion on September 12.

Also pending before the Court are motions filed by both parties seeking to modify the Court's orders. The plaintiffs' Motion for Modification seeks additional relief designed to protect the rights of their clients or to extend remedies for

¹ The plaintiffs' original pleading in this fashion, styled a Motion for Contempt, was filed on December 2, 1985. The Court subsequently ordered that an amended Motion be filed following a lengthy fact-finding process conducted by the Special Master. Order of January 10, 1986.

² The plaintiffs have also filed a Motion seeking the initiation of criminal contempt proceedings against a named individual. This Motion is treated in a separate order.

past deprivations. Defendants' Motion prays, in the alternative, for various forms of relief, including vacation or modification of the Court's orders, limitation of the definition of the plaintiff class, or dissolution or reduction in scope of the mastership. For the sake of convenience, this pleading hereafter will be referred to as defendants' Motion for Modification. Notwithstanding the various titles defendants assign to their pleas for relief, they appear to evolve from a central conception expressed in their Motion and in subsequent pleadings that, to the extent the Court's equitable orders afford relief beyond what the Constitution mandates, they are invalid. Without prejudice to defendant's motion, this particular contention warrants comment to ensure the parties understand the applicable standard for modification and thus are aware of the legal standards under which the Court's conclusions will be made.

First, it is settled beyond question that a court's equitable powers are broad and a court has considerable flexibility in tailoring injunctive relief to remedy constitutional deficiencies. Such relief can be broader than directly compelled by the Constitution if the court concludes that such measures are necessary to redress the wrong. Swann v. Charlotte-Mecklenburg Board of Education, 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.") Thus, the legal proposition advanced by the defendants to the

effect that this Court may not enter an injunction that compels more than the Constitution is simply in error.

Second, the principle advanced by defendants is particularly inapplicable where the Court's remedial orders have been entered by consent. In 1938, the United States Supreme Court set forth the stringent standard for modification of consent decrees, making clear that the party seeking modification bears a particularly heavy burden. In United States v. Swift, 286 U.S. 106 (1938), the Supreme Court announced the standards applicable to motions for modification of consent decrees and those standards have remained the governing law in the area. The Court distinguished between "restraints that give protection to rights fully accrued upon facts so nearly permanent as to be substantially impervious to change, and those that involve the supervision of changing conduct or conditions and are thus provisional or tentative." 286 U.S. at 114-15.

As several courts have observed, this distinction is particularly important in cases involving institutional reform, where conduct and conditions change over time. See, e.g., New York Association for Retarded Children, Inc. v. Carey (Willowbrook), 706 F.2d 956, 969 (2d Cir. 1983); Newman v. Graddick, 740 F.2d 1513, 1520 (11th Cir. 1984). To the extent defendants assert that these cases alter and diminish the holding in Swift, however, that assertion has been confuted by the Supreme Court's recent holding in Local 93, International Association of Firefighters v. City of Cleveland, 478 U.S. ___, 92 L.Ed.2d 405 (1986).

Before discussing the pending pleadings and establishing the procedure by which they will be adjudicated, the procedural history of the pending matters should be outlined. In its August 9, 1985 order, the Court expressed its intention that all issues relating to violation of the Court's injunction and the parties' desires to modify that injunction would be considered together, rather than in piecemeal fashion. Accordingly, the Court directed the parties to attempt to resolve those issues through concerted negotiations convened and guided by the Special Master; that failing such resolution, the parties were directed by the Court to present all outstanding issues for the Court's consideration and resolution in comprehensive pleadings.

The process of presenting the issues for resolution began with the filing on December 2, 1985 of the plaintiffs' Motion for Contempt and Motion for Modification, and the defendants' Motion for Modification. On January 10, 1986, the Court directed the Special Master to prepare comprehensive findings of fact relating to the defendants' state of compliance with the outstanding remedial orders. On February 18, that directive was narrowed to require reporting on only those portions of the Court's order implicated in a document entitled Compendium of Violations which was appended by the plaintiffs to their December 2 Motion for Contempt.

Upon completion of the Special Master's fact-finding process, the proposed findings were distributed to the parties in draft form. In its order of June 5, 1986, the Court established the process for review of and objection to those findings.

Specifically, the Court decreed that the failure of either party to object to a finding of fact proposed by the Special Master would constitute an admission by that party to the accuracy of the finding, and the party would be foreclosed from contesting its accuracy in subsequent proceedings. On September 19, the Special Master filed his findings of fact with the Court, containing approximately 650 findings to which both parties have agreed.

The plaintiffs' Motion for an Order to Show Cause relies heavily on the Special Master's findings of fact and on the twenty reports he has filed with the Court. It is 74 pages long and contains 13 sections, each of which has numerous sub-sections containing individual allegations of contumacious conduct. The sections of the plaintiffs' Motion are the following: Staffing (10 subsections), Training (11 subsections), Medical Care (31 subsections), Mental Health Care (32 subsections), Inmate Activity (15 subsections), Food Service (7 subsections), Failure to File Plans, Classification (25 subsections), Inmate Discipline (92 subsections), Living Conditions (18 subsections), Maximum Security (19 subsections), Equitable Treatment of Women (15 subsections) and Unilateral Modifications (26 subsections).

Rather than respond to each of the 302 separate allegations of contempt set forth in the plaintiffs' motion, the defendants' response to the Motion raises a series of issues relating to the adjudication of the pending matters. The defendants' response addresses several general issues before asserting affirmative defenses to the allegations of contempt. First, the defendants

assert that their motion for modification should have precedence over the motion for contempt because findings of contempt should be limited to those conditions existing in the New Mexico prisons which are constitutionally deficient, without regard to the particular standards set forth in the orders.³ Second, and alternatively, defendants contend that among the omnibus defenses to plaintiffs' contempt motion is that of "substantial compliance" with the Court's directives; that viewed in their entirety, if the conditions in the New Mexico prisons are substantially in conformity with the Court's orders, the issue of particularized contempts, as alleged in the plaintiffs' motion, should not be reached.⁴

Third, using the doctrine of civil contempt as a departure point, the defendants argue that the Court's inquiry into

³ This contention is difficult to fathom, since the concept of contempt relates to violation of extant Court orders, not the legally separate issue of constitutionality of conditions. This confusion appears to be the result of erroneous blending of two related but separate assertions: first, that the defendants are entitled to modification of the Court's orders so that they embody nothing more than constitutional imperatives, and second, that if the orders are so modified, the defendants cannot be held in contempt for violating orders that subsequently have been modified. The former contention has been dealt with above; the latter simply is a misstatement of applicable law. See, e.g., *Gompers v. Buck's Stove & Range Co.*, 221 U.S. 418 (1911).

⁴ This statement of position is overbroad. If, for example, the defendants have complied with numerous substantive provisions of the Court's orders, but are found to be in significant noncompliance with the provisions relating to medical care, they scarcely can claim immunity from contempt. If, on the other hand, in the area of medical care defendants are proven to be in substantial compliance with the various mandates in the order, and their failings in that regard are minor and inconsequential in that they do not abridge fundamental rights or threaten the health and safety of the plaintiffs, then that situation would mitigate strongly against a finding of contempt.

compliance should focus on the state of affairs at the time of the hearing. Only if that inquiry reflects a lack of substantial compliance can the Court impose civil contempt sanctions.⁵ Finally, defendants request that any contempt proceeding be carefully regulated to ensure that all potential contemnors have been afforded adequate notice and opportunity for defense. In support of this request, defendants observe that plaintiffs' Amended Motion names four respondents: Governor Toney Anaya, Secretary of Corrections Michael Francke, Deputy Secretary Alan Shuman and George Sullivan, the Warden of the Penitentiary of New Mexico. The defendants observe that a large number of the individual allegations in the Amended Motion fail to identify the person or persons responsible for the claimed violation and that analysis of those allegations suggests that none of the four named respondents is the person most probably responsible for the alleged condition.⁶

This discussion of the Amended Motion and the defendants' Response should make it clear that the matters pending before the Court are complex and vast in scope. Past the threshold issue of whether an Order to Show Cause should issue, the scope of the plaintiffs' Amended Motion and its temporal breadth, the

⁵ As an ancillary point, the defendants argue that the potential civil contempt remedy of compensatory damage awards to individual class members necessarily entails such an elaborate and protracted proceeding as to be unworthy of consideration.

⁶ Defendants' response also requests that the plaintiffs' request to take the deposition of Governor Toney Anaya be denied. As discussed in Section IV.A of this order, discovery issues will be addressed by the Court on proper motion.

intricacy of defendants' legal contentions in their Response and the complexity of the factual record relevant to the pending motions for contempt and modification present a range of issues that demand clarification.

Beyond their specific points, the pending pleadings have led the Court to reflect on essential issues of judicial management such as the order and nature of proof and the evidentiary presumptions raised by the fact finding process the Court established in its January 10 order. The instant order is designed to address these issues with care and to provide clarity to the parties as to the proceedings to be conducted in the adjudication of all matters currently pending in this cause.

I. Show Cause Order

The Court has reviewed the plaintiffs' Amended Motion for an Order to Show Cause with great care. As part of this review, the Court has revisited a number of the reports of the Special Master that have been filed and has reviewed the Findings of Fact filed on September 19. This assessment convinces the Court that the plaintiffs' allegations of contumacious conduct are supported by sufficient evidence to warrant the issuance of an Order to Show Cause directing that Anaya, Francke, Shuman and Sullivan appear before this Court and show cause why they should not be held in contempt of its orders. The plaintiffs' Amended Motion contains numerous specific allegations of noncompliance with the Court's orders, and the named respondents must be prepared to defend themselves against these charges, assuming that the plaintiffs adduce competent evidence probative of the charges. The Court is

sympathetic to the defendants' plea that the allegations in the Amended Motion are vast and cover an enormous range of acts and omissions by persons at all levels of responsibility in the Corrections Department. Nonetheless, the Court is satisfied that the plaintiffs have attempted in good faith to specify the factual bases for their Motion and to provide to the alleged contemnors notice of the conduct alleged to be in violation of the Court's orders.

As discussed below, the nature of civil contempt requires the Court to assess the state of affairs at the time of the proceeding in order to assess the duration and magnitude of alleged violations and determine the nature of the relief required to ensure future compliance. Thus, the plaintiffs will be given the opportunity to present evidence of conduct or omissions arising after the date of the Amended Motion. The plaintiffs must limit that proof, however, to the subject matters addressed in their Amended Motion. Attempts to prove noncompliance with provisions of the Court's order that are not implicated in the Amended Motion or in a related pleading filed in advance of the proceeding will not be countenanced absent a showing of excusable neglect.

Should the plaintiffs seek contempt sanctions against any individuals other than those named in their Amended Motion, they must identify those persons at the earliest possible time and provide to them notice of the conduct alleged to be contumacious. The Court will ensure that any such additional respondents will have adequate time to prepare a defense against the charges. Any

failure on the part of the plaintiffs in this regard will foreclose them from pursuing contempt sanctions against any persons other than the four identified above.

II. Nature of Proceeding

The pleadings pending before the Court raise two issues that are inextricably related, although in legal analysis they must be separated: the state of defendants' compliance with the Court's orders and the question of whether those orders should be modified. The parties have briefed these issues with close attention to the relationship of one to the other. Specifically, the parties have argued different positions on the order in which the Court should analyze the proof offered at trial as to compliance and the merits of modification. That question is one of acute concern to the Court. At an appropriate time, the Court will direct the parties to condense their arguments in briefs directed solely at that critical issue. At present, however, the legal question need not be addressed. The Court currently is concerned with the limited issue of the nature of the proceedings it will conduct in order to receive evidence from the parties in support of their motions.

As to this issue, it is clear that the interest of judicial economy will be served if all evidence relevant to the pending motions is heard in one proceeding. Irrespective of whether modification or contempt has priority in the Court's deliberations, the substantial overlap in evidence relevant to support of either Motion suggests that one proceeding, offering

the parties plenary opportunity to make their cases, will suffice.

By way of example, the plaintiffs' Amended Motion presumably will be supported by evidence of significant noncompliance; to refute the plaintiffs' case, the defendants may offer rebuttal evidence as well as evidence supporting affirmative defenses of substantial compliance, reasonable diligence, impossibility and related issues. At the same time, precisely that same evidence is, by the defendants' own argument, supporting of their Motion for Modification. Finally, in rebutting the defendants' evidence, the plaintiffs might present evidence of ill intention, poor administration and similar considerations. The limited briefing of the parties on the issues of contempt and modification makes clear that this broad body of evidence is relevant to all issues before the Court and must be received before the Court adjudicates any of those issues. Thus, the hearing the Court convenes for purposes of the Show Cause Order issues herein will also serve as a hearing on the issues of modification raised in the parties' pleadings.

III. Order of Proof

Since the hearing on the pending pleadings will be an omnibus proceeding, the order of proof must be addressed. Discussion of that question requires consideration of evidentiary issues including the temporal limits on evidence relevant to contempt, evidence supporting various forms of relief for contempt, should it be established, and the presumptions arising from the Special Master's reports and findings of fact.

A. The Plaintiffs' Case in Chief

At the outset of the hearing, the plaintiffs will have the burden of going forward with evidence supporting their Amended Motion. Although the Motion sought issuance of a show cause order, ultimately the plaintiffs case rests on their ability to establish a failure of defendants to comply with the Court's remedial orders. Accordingly, the hearing will begin with that evidence.

The Special Master has filed twenty reports containing findings of fact concerning compliance. Each of those reports has been confirmed and the findings contained in them are findings of the Court, and are appropriate subjects of judicial notice under Rule 201(b)(2). Should either party seek the introduction into evidence of findings contained in the Special Master's reports, the Court will take judicial notice of those findings upon appropriate motion citing the facts sought to be adduced.

In addition to the twenty compliance reports, the Special Master has prepared a volume entitled "Findings of Fact" which contains approximately 650 findings to which neither party has objected. Under the terms of the Court's orders, the failure to object constitutes an admission of the accuracy of the finding. Thus, the parties are foreclosed from challenging the accuracy of the findings, a result the Court announced clearly in its June 5 order. The findings of fact have not been confirmed by the Court and so are not findings of the Court of which judicial notice should be taken. The findings plainly are admissible upon

appropriate motion, however, and neither party will be heard to object to their accuracy. Other objections (e.g., relevancy) will be evaluated as necessary.

These findings, of course, are not conclusive evidence of the state of affairs at the time of the hearing. The introduction to the Special Master's findings indicates they reflect the situation at institutions between February and April of this year. Thus, by the time of the hearing, they will be somewhat dated. This time lag of course was contemplated by the Court when it initiated the fact-finding process, and it did not intend to require the doing of a vain act. The Special Master's findings, limited as they were to allegations in the plaintiffs' Compendium of Violations, were designed to establish a bench mark for the parties and the Court as to the areas of the order implicated in plaintiffs' Motion and the state of compliance in those areas. As such, and in view of the concessions of the parties as to the accuracy of the findings, it is appropriate that the Court establish a rebuttable presumption arising from those findings. Specifically, the Court will presume that the state of affairs described in the Findings of Fact filed by the Special Master has continued to the date of the hearing. A party alleging a change of conditions since the Special Master's findings will have the burden of presenting evidence sufficient to rebut the presumption.

By suggesting that the state of affairs at the time of the hearing is a point of central concern, the Court does not intend to imply that evidence of past noncompliance is not relevant. To

the contrary, such evidence is highly relevant to certain issues before the Court. In this regard, a limited discussion of the law of contempt with concentration on its temporal limits and the appropriate remedies is warranted. First, proof of noncompliance at trial may relate to present noncompliance, past noncompliance or both. Were the evidence at trial to demonstrate current noncompliance, evidence that this noncompliance is of longstanding duration would be relevant to issues of notice, reasonable diligence, and the need for supplemental relief. Additionally, the Court would assess the proper form of relief for civil contempt, including the need for sanctions designed to coerce compliance in the future and the propriety of compensatory relief for class members, in light of the scope and duration of noncompliance.

Second, although the assertion that civil contempt is concerned only with current compliance has facial appeal, it is too simplistic in the context of this action it is too simplistic. The plaintiffs' Motion for Contempt was filed approximately ten months ago. The intervening period has been consumed by intensive fact-finding efforts by the Special Master which, although lengthy, have been more expeditious than formal discovery would have been by the parties pursuant to the Federal Rules of Civil Procedure. The protracted process is the direct product of the scope of the Court's remedial orders. The mere fact that the orders in this case are extensive and therefore require lengthy fact-finding to determine compliance cannot be permitted to impair the plaintiffs' abilities to allege and prove

civil contempt, nor can it defeat the Court's legitimate interest in compelling compliance with its orders. Even if the state of affairs at the time of the hearing reveals the defendants to be in compliance with the Court's orders, evidence of past noncompliance might convince the Court of the need for imposing sanctions specifically to discourage future noncompliance or announcing contingent sanctions to be imposed in the event of future noncompliance. Similarly, evidence of past noncompliance, even if cured at the time of hearing, would still be relevant to the issue of compensatory relief for class members.

Accordingly, evidence of past noncompliance at any time since entry of the Court's remedial orders will be admissible if it is relevant to the issues of a) duration of noncompliance, b) knowledge by defendants, c) the need for coercive sanctions, d) individual responsibility, e) the appropriateness of compensatory damage awards to the class as a whole or to individual class members, or f) refutation of affirmative defenses offered by defendants. No such evidence will be admitted, however, if it falls within any one of the three following categories:

a) the evidence relates to events prior to December 1985 when the plaintiffs filed their Compendium of Violations and the issue is not raised in that document; or

b) the evidence relates to events between December 1985 and September 1986 when the plaintiffs filed their Amended Motion and the issue is not raised in that pleading; or

c) the evidence relates to events since September 1986 and the plaintiffs have not provided notice of the issue to the defendants in a formal pleading.

Finally, with respect to the plaintiffs' case in chief, evidence of individual instances of noncompliance will be admitted, but not for the purpose of establishing an individual class member's entitlement to compensatory damages. Should the Court conclude at the end of the hearing that contempt has been established and that individual compensatory damages are an appropriate form of relief, it will issue an order establishing a procedure by which evidence necessary to make those calculations will be adduced.

B. Defendants' Case

After the plaintiffs have concluded their case in chief, the defendants will have the opportunity to present their evidence relating to the state of compliance within the time periods encompassed by plaintiffs' proof. Evidence supporting legally cognizable affirmative defenses raised in their pleadings and evidence relating solely to the defendants' Motion for Modification will not be considered during this phase of the proceeding.

C. Plaintiffs' Rebuttal

The plaintiffs will have the opportunity to rebut any evidence offered by the defendants relating to compliance.

D. Defendants' Case in Chief

The defendants will have the burden of going forward with evidence supporting legally cognizable affirmative defenses

raised in their pleadings, and with evidence not previously adduced that is relevant to their Motion for Modification.

E. Plaintiffs' Response and Case for Modification

The plaintiffs will present evidence relating to the defendants' affirmative defenses and their case for modification, and evidence supporting their own Motion for Modification.

F. Defendants' Rebuttal

The defendants will present rebuttal evidence on their affirmative defenses and their Motion for Modification, and evidence relating to plaintiffs' case for modification.

G. Plaintiffs' Rebuttal

The plaintiffs will present rebuttal evidence supporting their Motion for Modification.

IV. PARTIAL REFERENCE TO THE SPECIAL MASTER

As demonstrated by the foregoing discussion of the pleadings pending before the Court and the evidentiary issues raised by them, the factual record that must be developed to permit plenary consideration and adjudication of the pending matters is extensive and complex. It is also apparent that the vast majority of relevant facts have been developed by the Special Master through the formal reporting process established by the Order of Reference entered June 3, 1983 and through the fact-finding process set up in the Court's orders of January 10 and February 18, 1986. The Court's careful review of the findings submitted by the Special Master throughout his tenure makes clear that the objective of the original Order of Reference -- thorough, accurate and efficient fact-finding -- has been

accomplished and that the Mastership has been of service to the Court and the parties in avoiding protracted, complicated and expensive hearings on recurring issues. Particularly, the most recent efforts of the Special Master in developing approximately 650 findings of fact that can be introduced into evidence without objection have been instrumental in paring down the scope of the evidentiary hearing that will be conducted in this case -- a result that benefits the Court and the parties by preserving litigation and judicial resources for matters truly in controversy.

The value of the Special Master in making findings of fact as to compliance suggests that he may serve further to assist the Court and the parties in completing the factual record on this limited subject as required by the pending pleadings. As discussed above, the record the Special Master has developed contains extensive findings as to the state of compliance between September 1983 and April 1986, the period encompassed by the twenty compliance reports and the finding of fact filed on September 19, 1986. Section III.A of this order provides direction as to the extent and nature of relevance of these findings. Missing from the current record, however, are findings as to the current state of compliance, a portrait that is essential to the Court's consideration of the motions for contempt and modification.

The Court has announced above its view of the presumptions that arise from the Special Master's findings of fact. The parties thus have given direction as to the state of affairs that

is defined by the existing record and so can assess what additional facts must be developed and proved at trial in order to carry the applicable burdens of proof. In view of the particular familiarity of the Special Master with the factual record compiled to date and the nature and quality of proof relevant to particular factual issues, he is well positioned to serve as a Hearing Officer for purposes of taking evidence relating to the state of compliance on issues not addressed, for whatever reason, by extant findings. The evidence adduced at this hearing will complete the factual record relating to compliance and will permit the Special Master to prepare comprehensive findings of fact and conclusions of law on the issue of compliance with the Court's remedial orders.

The appointment of the Special Master to serve as a Hearing Officer is consistent with the June 3, 1983 Order of Reference agreed to by the parties and is in accordance with the tenets underlying Rule 53 of the Federal Rules of Civil Procedure. Section A.7 of the Order of Reference delegated to the Special Master the "full power to order and conduct hearings with respect to the defendants' compliance with this Court's orders", a provision explicitly and legitimately based on Rule 53(c), F.R.Civ.P. The particular circumstances underlying the present pleadings and the character of the factual evidence to be adduced at the hearing warrant the reference to the Special Master of the factual issues concerning the current state of compliance.

It must be noted that the Special Master's charter in this regard is narrow and consists only of the evidence described in

Sections III.A, B, and C of this order. This evidence will consist of that offered by the plaintiffs in their case in chief to establish the defendants failure to comply with the Court's remedial orders, that offered by the defendants on their state of compliance, and the plaintiffs' rebuttal evidence relating to the defendants' compliance. This evidence related to only a fragment of the factual issues that are before the Court by virtue of the pending pleadings. As outlined in Section III, above, the state of compliance is a central issue in the pending motions for contempt and modification but it is only one of several such issues. Of parallel importance are the affirmative defenses raised in the defendants' response to the plaintiffs' Amended Motion and the various claims the parties have advanced in support of their motions for modification. To the extent the evidence the parties adduce in support of these matters extends beyond the limited question of the state of compliance with the Court's orders, that evidence is beyond the scope of this reference and will be heard by the Court.

Reference of the portion of the proceedings described in Sections III.A, B and C to the Special Master is, as noted, consistent with the Order of Reference. That decree will be modified, however, to the limited extent of extending to the Deputy Special Master the powers described in Section A.7 of the Order of Reference and in Rule 53(c), F.R.Civ.P. Thus, for purposes of the present reference the Court's order of June 22, 1983 which, inter alia, appointed Frederick Byers to serve as Deputy Special Master, is modified to the extent it limited the

Deputy Special Master's powers to those set forth in sections A.1 through A.6 of the Order of Reference. For the purposes of the current reference, the Deputy Special Master shall have co-extensive with the Special Master, the full power to order and conduct hearings with respect to the defendants' state of compliance. To that end, he shall exercise the powers described in Rule 53(c), F.R.Civ.P.

The Special Master and Deputy Special Master shall exercise their powers "to regulate all proceedings" in conjunction with the Court to ensure that the factual record they compile as a result of this reference is thorough within the limits of this reference. To the extent discovery issues that arise during the parties' pretrial preparations relate solely to compliance, those issues are to be presented to the Special Master or Deputy Special Master for resolution. At their discretion, they may consult with the Court for guidance on these issues, and may in their discretion and upon notice to the parties refer any such issues to the Court for resolution.

Although the incorporation in this reference of the express powers of Rule 53(c) plainly comprehends such matters, the Court wishes to make clear that this reference empowers the Special Master and Deputy Special Master to issue directives concerning the form in which evidence will be received. In this regard, the Court observes that the entire factual record submitted to the Court relevant to the plaintiffs' Motion for a Preliminary Injunction in June 1983 was submitted in the form of deposition testimony and documentary evidence. The Court found this

procedure to be of considerable value and economy and encourages its use, to the extent feasible, in the proceedings to be conducted by the Special Master and Deputy Special Master.

Upon the conclusion of the hearing on the defendants' state of compliance, and pursuant to Rule 53(e), F.R.Civ.P., the Special Master and the Deputy Special Master shall file a report containing proposed findings of fact and conclusions of law relating to the defendants' past and present state of compliance in accordance with this order. Either party may object to the report as provided in Rule 53(e)(2), F.R.Civ.P.

V. TRIAL SCHEDULE

The hearing by the Special Master and the Deputy Special Master will be convened on December 1, 1986 at 9:00 a.m. in the United States Courthouse in Albuquerque, New Mexico. The hearing before the Court on the defendants' affirmative defenses and the parties' motions for modification will commence at 9:30 a.m. on December 15, 1986 in the United States Courthouse in Albuquerque, New Mexico. For the purpose of guiding the parties in their trial preparations, the Court will establish the following pretrial schedule.

A. Discovery

Discovery is to be reopened as of the date of this order. The discovery period shall run without interruption until November 14, 1986. The parties shall attempt to establish between themselves reasonable time limits for discovery, including periods for answering interrogatories and requests for admission. If they are unable to do so by October 17, they shall

approach the Court for guidance. In the event issues relating to discovery arise between the parties that they are unable to resolve, those issues, if they relate solely to the state of compliance, should be presented to the Special Master and the Deputy Special Master. All other issues concerning discovery should be presented to the Court.

B. Pretrial Order

No later than November 21, 1986, the parties shall file a jointly prepared form of proposed pretrial order. That document shall include: a) agreed statements of law; b) agreed statements of fact (the findings of fact filed by the Special Master may be incorporated by reference); c) separate statements by the parties as to contested issues of law; d) narrative statements of any testimony to be adduced from live witnesses; e) narrative summaries of all evidence to be introduced in documentary form, including deposition testimony and exhibit evidence; f) a list of all exhibits intended to be offered by the parties and a statement of whether the other party objects to that exhibit; g) the names of any expert witnesses either party wishes to call; h) for each such witness, a narrative of the expert's credentials suitable for introduction into evidence; and i) for each such witness, a statement of whether the party on the other side intends to object to the individual's qualifications as an expert. Together with the joint pretrial order, each party shall file proposed findings of fact and conclusions of law for the Court's consideration.

IT IS SO ORDERED this 3rd day of October, 1986.


United States District Judge