

EXHIBIT C.4

IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

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4 STATE OF TEXAS)
5)
6 Plaintiff,)
7) Original Action Case
8 VS.) No. 220141
9) (Original 141)
10 STATE OF NEW MEXICO,)
11 and STATE OF COLORADO,)
12)
13)
14 Defendants.)
15
16

17 *****
18 REMOTE ORAL AND VIDEOTAPED DEPOSITION OF
19 CHERYL THACKER
20 SEPTEMBER 18, 2020
21 *****

22 REMOTE ORAL AND VIDEOTAPED DEPOSITION of CHERYL
23 THACKER, produced as a witness at the instance of the
24 United States, and duly sworn, was taken in the
25 above-styled and numbered cause on September 18, 2020,
from 1:33 p.m. to 4:42 p.m., before Heather L. Garza,
CSR, RPR, in and for the State of Texas, recorded by
machine shorthand, remotely at the offices of HEATHER
L. GARZA, CSR, RPR, The Woodlands, Texas, pursuant to
the Federal Rules of Civil Procedure and the
provisions stated on the record or attached hereto;
that the deposition shall be read and signed.

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17 Ms. Kayla Brown

18 ALSO PRESENT:

19 Shelly Dalrymple
20 Kari Olson
21 Al Blair
22 Greg Ridgley
23 John D'Antonio
24 Robin Cypher
25 Gary Esslinger
Erek Fuchs
Estevan Lopez
Daniel Ortiz
Arianne Singer

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13 Collection of Documents Related to AWRM
Effort in Lower Rio Grande

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1 THE VIDEOGRAPHER: The time is 1:33 p.m.

2 We're on the record.

3 CHERYL THACKER,

4 having been first duly sworn, testified as follows:

5 E X A M I N A T I O N

6 BY MR. LEININGER:

7 Q. Will you please state your full name for the
8 record?

9 A. Yes. It's Cheryl S. Thacker.

10 Q. Good afternoon. My name is Lee Leininger.

11 I'm an attorney with the U.S. Department of Justice.

12 I'm going to be starting this deposition today. I

13 think I'll be followed by Ms. Klahn and then perhaps

14 Ms. O'Brien, and there may be one or two others.

15 Okay?

16 A. Okay.

17 Q. You've had your -- you've had your deposition
18 taken many times before; is that correct?

19 A. Yes, sir.

20 Q. And so you understand the ground rules. I

21 will just briefly go over those. Were you in

22 attendance this morning when Mr. Dubois was beginning

23 this deposition with Mr. Lopez?

24 A. Yes.

25 Q. All right. So he ran over some ground rules.

New Mexico
Counter De...

1 I'll just reiterate a few. In at any time you don't
2 understand one of my questions in whole or in part,
3 let me know, please. I'll explain it and rephrase the
4 question. If you answer my question without asking
5 for an explanation, I'll take it you mean you
6 understand what I'm asking. Okay?

7 A. Okay.

8 Q. And I'm -- yeah, you'll have to give an
9 audible yes or no to these questions. If there are
10 times today in the middle of one of my questions, you
11 feel like you already know the answer, please let me
12 finish the question. It's important to keep the
13 transcript clean and so please wait until I finish
14 asking the question before you answer. Okay?

15 A. Okay.

16 Q. And same way -- same token, if I interrupt
17 you and you had not completed your answer to one of my
18 questions, please let me know so we can have a full
19 answer to your question. Okay?

20 A. Okay.

21 Q. From time to time, and I'm sure you know this
22 but Mr. Wechsler who's representing you this afternoon
23 may object to one of my questions, but unless he
24 instructs you not to answer, you're expected to answer
25 the question. Do you understand that?

1 A. Yes.

2 Q. Without giving me any specific personal
3 information, is there any mental or physical reason
4 why you're not able to give an accurate and truthful
5 answer to my questions today?

6 A. No.

7 Q. Are there any medications that may impair
8 your ability to fully and accurately answer my
9 questions today?

10 A. No.

11 Q. And most importantly, we've been taking
12 breaks about every hour so it's about 1:30 right now.
13 If -- you may ask to take a break at any time, but
14 typically we'll go about an hour, so it'll be about
15 2:30, and we'll break then. Okay?

16 A. Okay.

17 Q. Great. So did you receive a copy of the
18 United States notice, 30(b)(6) notice for the State of
19 New Mexico?

20 MS. KLAHN: Lee, you might want to take
21 appearances at some point.

22 MR. LEININGER: I apologize. We took
23 appearances this morning, but we have a new witness so
24 let's do that again. So for the United States, we
25 have -- in addition to me, we have Mr. Dubois and Ms.

1 Coleman at the U.S. Department of Justice. With the
2 Department of Interior, we have Chris Rich and Shelly
3 Randel, and if I'm missing anyone else for the U.S.
4 Department -- for the United States, please speak up
5 now. All right. Let's continue with appearances for
6 Texas.

7 MS. KLAHN: Sarah Klahn on behalf of the
8 State of Texas, and appearing with me looks like Mac
9 Goldsberry, Stuart Somach, Theresa Barfield, and I
10 think that's all from our office.

11 MR. LEININGER: Colorado?

12 MR. WALLACE: Good afternoon. This is
13 Chad Wallace for the State of Colorado. Preston
14 Hartman is also participating.

15 MR. LEININGER: And let's go to amici.
16 El Paso County Water Improvement District No. 1?

17 MS. O'BRIEN: Good afternoon. Maria
18 O'Brien for El Paso County Water Improvement District
19 No. 1. Also on is Renea Hicks and Dr. Al Blair.

20 MR. LEININGER: I apologize, Jeff. I
21 didn't get -- I should have gone to you first.

22 MR. WECHSLER: No problem. Jeff
23 Wechsler for the State of New Mexico. We've got
24 Estevan Lopez, John D'Antonio, Shelly Dalrymple, Greg
25 Ridgley, Kari Olson, Susan Barela, and Luis Robles.

1 MR. LEININGER: EBID?

2 MS. BARNCASTLE: Good afternoon.

3 Samantha Barncastle for EBID, and with me this
4 afternoon will be Gary Esslinger, manager of the
5 district, and Dr. Erek Fuchs.

6 MR. LEININGER: NMSU?

7 MR. UTTON: Good afternoon, Lee, this is
8 John Utton representing NMSU.

9 MR. LEININGER: Hi, John. Pecan
10 growers? I guess Tessa dropped off for the time,
11 pecan growers?

12 MR. DUBOIS: It looks like she's on but
13 muted.

14 MR. LEININGER: Tessa, I do see you're
15 on, but you're muted.

16 Okay. Let's -- let's keep going. We
17 will return. City of El Paso?

18 MR. CAROOM: Doug Caroom for the City of
19 El Paso, and Daniel Ortiz is on, also.

20 MR. LEININGER: City of Las Cruces?

21 MR. BROCKMANN: This is Jim Brockmann on
22 behalf of both Las Cruces and the Albuquerque
23 Bernalillo County Water Utility Authority.

24 MR. LEININGER: And anyone I've missed,
25 please speak up now.

1 MR. WECHSLER: Lee, I missed Arianne
2 Singer earlier so my apologies to her.

3 MR. LEININGER: Okay. Anyone else?

4 (No response.)

New Mexico
Counter De...

5 Q. (BY MR. LEININGER) All right. Let's -- Ms.
6 Thacker, let's start then with a question. You were
7 identified in New Mexico's response to our 30(b)(6)
8 and New Mexico's witness designations of our notice of
9 30(b)(6) for specific topics, designated to answer
10 specific topics. Are you aware of that?

11 A. Yes.

12 Q. Okay. And it's United States Topic C is one
13 of them, and I'll just read what the United States
14 Topic C is. "New Mexico's administration,
15 implementation, and enforcement of its obligations of
16 the Compact and under state laws, regulations,
17 policies, or actions in, 1, delivery of Rio Grande
18 Compact water to the State of New Mexico; 2, delivery
19 of Rio Grande Compact water to the State of Texas;
20 and, 3, water released from storage meet Compact
21 irrigation demands below Elephant Butte reservoir."
22 You were identified as the 30(b)(6) deponent for the
23 State of New Mexico to answer questions related to
24 that topic. Is that your understanding?

25 A. Yes.

1 MR. WECHSLER: Well, and to be clear,
2 Lee, we separated that one topic out between Mr. Lopez
3 and Ms. Thacker. So Ms. Thacker is handling the state
4 laws, regulations, and policies part of that subject.

5 MR. LEININGER: Okay. Very well.

6 Q. (BY MR. LEININGER) In the course of this
7 questioning, correct me if I'm asking questions to
8 which you were not -- let's start with -- I'm curious
9 in your role as water resources manager for New Mexico
10 Office of the State Engineer, what your actions and
11 responsibilities are with topics -- with this related
12 topic matter. So let's start with how does -- how
13 does New Mexico ensure it's delivered the amount of
14 water it's entitled to?

15 A. Oh, I would defer to Rolf Schmidt-Petersen
16 and to Estevan Lopez specific to that question.

17 Q. All right. So your involvement isn't with
18 regard to tracking or accounting or measuring of water
19 in the Rio Grande that New Mexico as part of its
20 Compact entitlement?

21 A. As part of the Compact entitlement, I don't
22 have any part in that.

23 Q. Okay. So let's just test your knowledge here
24 a little bit. Just a reminder that this 30(b)(6)
25 notice is for you to answer questions we have on

Texas
Affirmative

New Mexico
Counter De...

1 behalf of the State of New Mexico, so as I understood
2 with the caveat by Mr. Wechsler, you were identified
3 to answer some of these questions with regard to the
4 Compact and New Mexico's administration enforcement
5 and implementation of its obligations under the
6 Compact. So let's continue here, but if you're at a
7 point where you are going to define the limits of your
8 testimony, I would appreciate it if you'd just let us
9 know sooner rather than later as I go through these
10 questions. Okay?

11 MR. WECHSLER: Well, and I'm happy to be
12 -- to help with that, Lee, now, if you'd like.

13 MR. LEININGER: Sure, Jeff. I mean,
14 these questions with regard to administration and
15 enforcement of obligations under the Compact are going
16 to be limited to what the OSE actually does in terms
17 of its accounting policies for purposes of the Compact
18 and delivery of Rio Grande project water under the
19 Compact. Okay?

20 MR. WECHSLER: Yeah. So -- so any
21 issues that go to the purposes, the function, the
22 accounting under the Compact, in our designation,
23 that's what we listed Mr. Lopez for, and what Ms.
24 Thacker is familiar with are the -- the state laws,
25 the regulations, the policies that have to do with

1 state law -- state water administration. Separate and
2 apart from the Compact, but obviously as you heard
3 from Mr. Lopez this morning, they're related. So if
4 you have specific questions about what it is the state
5 engineer is doing down there with regard to their
6 laws, regulations, policies, water administration, Ms.
7 Thacker is the person for that.

Texas
Affirmative

8 Q. (BY MR. LEININGER) Okay. Ms. Thacker, how
9 does the -- the state engineer account for the water
10 that it is entitled to -- the Rio Grande water it is
11 entitled to under the Compact?

12 A. I don't know how a state engineer accounts
13 for the water under the Compact.

14 Q. Are you aware of how the water from -- that
15 it's delivered from Colorado to New Mexico?

16 (Audio/technical difficulties.)

17 MR. LEININGER: I apologize. I cannot
18 hear you. It appears the microphone is not working
19 again. Did anyone else hear that?

20 MR. WECHSLER: No.

21 THE VIDEOGRAPHER: Yeah, I didn't hear
22 her. Do you want to go off the record?

23 MR. LEININGER: Sure.

24 THE VIDEOGRAPHER: The time is 1:48 p.m.
25 We're off the record.

1 (Break.)

2 THE VIDEOGRAPHER: The time is 1:49 p.m.

3 We're on the record.

4 Q. (BY MR. LEININGER) Okay. Let's test this.

5 Ms. Thacker, can you hear me?

6 A. Yeah. If you could speak up just a bit.

7 Q. Sure. I'll try. And we can hear you.

8 That's -- that's the important part. So let's

9 continue with these questions. The Compact is also
10 state law, is it not?

11 A. You know, again, my knowledge of the Compact
12 is limited.

13 Q. Do you know if in carrying out your duties as
14 a water resources manager for the New Mexico Office of
15 State Engineer, you must comply with the Compact?

16 A. Well, I -- I'm not sure about that, but I
17 know I have to comply with the constitution of New
18 Mexico as well as statutes and regulations.

19 Q. Okay. And one of those statutes is the Rio
20 Grande Compact, correct?

21 A. Again, I -- my knowledge of the Compact is so
22 limited, I can't speak to that.

23 Q. If at any time during these questions, you're
24 going to defer to Mr. Lopez or Mr. Schmidt-Petersen,
25 let -- let me know, and specifically let me know which

Texas
Affirmative

1 one you think is appropriate to answer these
2 questions. Okay?

3 Do you know where -- and I think this is my
4 last question. Do you know where measurement of New
5 Mexico's entitlement to Rio Grande water coming from
6 the State of Colorado takes place?

7 A. I do not -- again, my knowledge is limited,
8 and I don't use that information for the work I do
9 here.

New Mexico
Counter De...

10 Q. And who would be knowledgeable of the three
11 -- three other deponents that have been designated?

12 A. You know, I'm -- I'm not sure. I would say
13 probably Estevan and Rolf Schmidt-Petersen.

14 MR. WECHSLER: It is Mr. Lopez that we
15 designated for those subjects.

Texas
Affirmative

16 Q. (BY MR. LEININGER) Well, it appears that she
17 was designated for Topic -- Topic C without the
18 specific caveat so let's keep going. Where does New
19 Mexico measure the amount of water for delivery to
20 Texas under the Compact?

21 A. I don't know. I don't know the answer to
22 that.

New Mexico
Counter De...

23 MR. WECHSLER: Yeah. And, again, I'll
24 object to the whole line of questioning as outside the
25 scope. In our designation on Topic C, we listed both

1 Mr. Lopez and Ms. Thacker, and, again, Ms. Thacker is
2 really only here and designated to talk about state
3 law, regulations, and policies with the administration
4 of water in the LRG.

5 MR. LEININGER: Okay. Well, these
6 questions were designated as both Ms. Thacker and
7 Mr. Lopez, so we may need to bring Mr. Lopez back to
8 answer some of these with specificity. But let's --
9 let's continue.

10 Q. (BY MR. LEININGER) This may be more in your
11 wheelhouse, Ms. Thacker. Does New Mexico do any
12 measurement at the border with Texas of the amount of
13 water that actually makes its way -- surface water in
14 the Rio Grande that actually makes its way to Texas?

15 A. Again, I don't have any knowledge of that. I
16 don't know.

17 Q. Okay. This is not a Compact question. This
18 is just a question of actual -- your awareness of
19 whether or not there's any measurement of how much
20 water actually gets to Texas?

21 A. I suspect there is, but I couldn't give you
22 any specifics on it.

23 Q. All right. Who in the Office of the State
24 Engineer may be aware of whether or not the state
25 actually makes its measurements of physical delivery

1 of the surface water at the border of Texas?

2 A. Well, again, I would defer to Estevan Lopez
3 and Rolf Schmidt-Petersen.

4 Q. You were listening to Mr. Lopez's deposition
5 this morning?

6 A. I did.

7 Q. Do you recall he made a statement about how
8 Texas is apportioned 43 percent of surface water after
9 whatever is left of exercise of groundwater pumping in
10 both states? Do you recall his answer along those
11 lines?

12 A. I don't recall his answer. Again, I don't
13 use any of that information in my day-to-day work.

14 Q. Do you have any knowledge of New Mexico
15 actually measuring a 43 percent of surface water
16 supply to Texas after the exercise of groundwater
17 pumping in both states? Is there anything done by the
18 Office of State Engineer to actually put a value to
19 that?

20 MR. WECHSLER: Foundation.

21 A. I have no idea.

22 Q. (BY MR. LEININGER) Do you know -- and, again,
23 we're under Topic C, which is related to the Compact
24 to which you were designated. Do you know if New
25 Mexico controls the release of water from project

1 storage in accordance with irrigation demands?

2 MR. WECHSLER: Object to foundation.

3 A. Again, I don't have any knowledge of that.

4 Q. (BY MR. LEININGER) Okay. Does the Office of
5 State Engineer monitor the release of water from
6 storage?

7 A. I have no expertise in that -- that matter.
8 I can't answer it.

9 Q. All right. So you don't know that New Mexico
10 actually monitors release of storage water to ensure
11 that it's used to meet irrigation demands?

12 A. Well, I'm sure we do, but I don't know any of
13 the specifics at all.

14 Q. Are you familiar with the Compact?

15 A. I know very little. Enough to be dangerous.

16 Q. Okay. Fair enough. So there's -- I think we
17 can get a copy of it if we need to, but there's an
18 Article 1, Section L called, "Usable water in the
19 Compact," and usable water in the Compact is defined
20 as, "All water exclusive of credit water, which is in
21 project storage, and which is available for release in
22 accordance with irrigation demands, including
23 deliveries to Mexico." Are you familiar with that
24 statement?

25 A. No. I've not read the Compact. I don't use

1 it in my day-to-day.

2 Q. Does New Mexico administer the Compact water
3 released from storage to meet irrigation demands, the
4 water that's been identified as usable water under
5 Article 1, Sub L?

6 MR. WECHSLER: Form and foundation and
7 scope.

8 A. I've never read Article 1, Sub L. I have no
9 idea about it at all.

10 MR. WECHSLER: We can -- I mean, you're
11 welcome to keep asking the questions, Lee, but I think
12 I've made very clear, you know, you-all asked for
13 somebody to talk about state laws, regulations, and
14 policies as part of this topic. Any subjects having
15 to do with the Compact, Compact obligations, Compact
16 duties, Compact administration, that -- those are the
17 subjects that Mr. Lopez was designated for. Ms.
18 Thacker was designated to talk about any state law,
19 regulations, laws, that sort of thing because those
20 are things that Mr. Lopez is not familiar with and so
21 you -- you can keep asking her questions about the --
22 the Compact, but I'll object to those as beyond the
23 scope that she's been designated to answer.

24 MR. DUBOIS: Jeff, this is Jim Dubois.
25 I'm going to point out that what she's been

New Mexico
Counter De...

1 designated, yes, it involves the state laws,
2 regulations, policies, and actions, but it's in regard
3 to delivery of Rio Grande Compact water. Why is it
4 that she's designated if she has no idea what that is?
5 Why are we wasting our time?

6 MR. WECHSLER: Yeah. You-all wanted to
7 talk about the Compact issues, and as we put in our
8 designation, that's what Mr. Lopez was designated for.
9 Ms. Thacker is there to talk about any -- we don't
10 know what you guys are wanting to talk about. She's
11 only there to talk about state law, state
12 administration, in case there were issues that you-all
13 needed to ask about related to that and so that is why
14 she's designated. We're trying to be responsible and
15 responsive, and we didn't -- this was all clearly set
16 out in our designation.

17 MR. LEININGER: Well, Jeff, let me push
18 back a little bit on that because I've got your
19 designation right here, and on Page -- I don't know
20 what page it is, but under --

21 MR. WECHSLER: On Page 10.

22 MR. LEININGER: Under United States
23 Topic C, you identified Ms. Thacker as designated by
24 New Mexico to provide testimony as to New Mexico's
25 administration implementation enforcement as the three

1 identified subjects. The three identified subjects is
2 with regard to the Compact and Compact water. Compact
3 water delivered to New Mexico, Compact water delivered
4 to Texas.

5 MR. WECHSLER: Yeah. We can argue about
6 it if you want, Lee, and you can take that in
7 isolation of what -- the way we designated Mr. Lopez,
8 but the way he is designated there is dealing with the
9 -- the issues under the Compact for those issues, and
10 that -- any issues having to do with the Compact,
11 those are issues that Mr. Lopez was designated for.

12 MR. LEININGER: Well, with regard to Ms.
13 Thacker's role at the OSE, these questions, Jeff, go
14 to the OSE's implementation of Compact obligations and
15 responsibilities, and what I'm hearing is there is
16 none?

17 MR. WECHSLER: Well --

18 MR. LEININGER: That's coming out of
19 this representative from the state engineer, and if
20 that's her testimony, that's fine, but that's what she
21 was designated to answer.

22 MR. WECHSLER: Lee, I've already
23 explained to you, that is not what she was designated
24 to answer. So, again, I would object to any questions
25 related to the Compact for this witness. That was

1 what Mr. Lopez was designated for.

2 MR. LEININGER: Jeff, do you have a copy
3 of your objections and designations?

4 MR. WECHSLER: I do, yeah. I've been
5 looking at it.

6 MR. LEININGER: So can you explain to me
7 what you meant under Sub B as to New Mexico's
8 knowledge and what Cheryl Thacker is identified for?

9 MR. WECHSLER: Absolutely. Happy to.
10 Topic C indicates New Mexico's administration,
11 implementation, and enforcement of its obligations
12 under the Compact and under state laws, regulations,
13 policies of actions with regard to three subjects, and
14 so if you look at our designations, what we designated
15 Mr. Lopez for was all of those issues with regard to
16 the Compact, anything having to do with the Compact,
17 and the -- the -- Ms. Thacker was designated for
18 anything having to do with state laws, regulations, or
19 policies that occur down in the lower Rio Grande in
20 case there were any of those issues that Mr. Lopez
21 simply didn't understand because there's a lot of
22 nuances having to do with state laws, regulations, and
23 policies. So she is -- if you have questions about
24 the -- the laws and policies having to do with water
25 administration within the LRG, she is designated for

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1 that purpose.

2 MR. LEININGER: Right. But this topic
3 is as that relates to your Compact obligations,
4 correct?

5 MR. WECHSLER: Which is what Mr. Lopez
6 is designated to testify to, to the Compact
7 obligations.

8 MR. LEININGER: All right. So this line
9 of questioning is with regard to how the OSE
10 administers water in compliance with the Compact
11 obligations. If your answer is it doesn't, just does
12 its water administration consistent with state laws,
13 that's fine. But I think we're entitled to an answer.

14 MR. WECHSLER: And For that question,
15 you'll have to ask Mr. Lopez. This is not a question
16 that Ms. Thacker is designated or prepared to testify
17 to.

18 MR. LEININGER: All right. Well, let's
19 stop arguing as to what it's meant to -- as to the
20 three identified subjects as to what she's designated
21 for, and if she continues to say I don't know with
22 regard to that designation, then, yes, we will bring
23 back Mr. Lopez.

24 MR. WECHSLER: We'll have a discussion
25 about that. We'll certainly object to any questions

1 that are outside the scope that we just discussed.

2 MR. LEININGER: All right.

3 Q. (BY MR. LEININGER) Okay. So let's wrap up

4 these questions with regard to Topic C, Ms. Thacker,

5 and just one last one is more the general question.

6 Does New Mexico administer that Compact water released

7 from storage to meet irrigation demands? Does the OSE

8 administer for those purposes to ensure that Compact

9 demands -- the release of water from project storage

10 for irrigation is satisfied?

11 MR. WECHSLER: Object to the scope.

12 A. Well, again, I'm not trying to be combative,

13 but I don't -- I don't have any specific knowledge to

14 this.

15 Q. (BY MR. LEININGER) Let's -- let's move onto

16 Topic D, and I'll just read the United States Topic D.

17 Topic D asks in 30(b)(6) notice that we had submitted,

18 "New Mexico's policies relating to administration of

19 surface water or groundwater below Elephant Butte

20 reservoir related to," and then I believe you were

21 identified for these three bullet points. First, "New

22 Mexico's policies relating to administration of water

23 delivered to EBID pursuant to the 1938 -- excuse me --

24 contracts between the United States and the districts,

25 the 1979 operation and maintenance transfer contracts

1 between the United States and the districts, and the
2 2008 operating agreement." I hope I read that
3 correctly. Is that your understanding you're
4 designated to testify as to those subjects?

5 A. Yes.

6 Q. Second bullet point is, "New Mexico's
7 policies on supplemental irrigation wells as defined
8 by New Mexico." You were designated for answering
9 questions related to that topic?

10 A. Yes.

11 Q. And finally, "New Mexico's policies on
12 conjunctive use of surface water and groundwater for
13 irrigation purposes." It's your understanding that
14 you are designated to answer questions relating to
15 that topic?

16 A. Yes.

17 Q. Mr. Lopez deferred, and I believe he was
18 deferring to you this morning in his testimony when he
19 was asked about a priority call and how that would be
20 administered by the OSE, and you may recall that the
21 question was if the United States places a call under
22 its 1903 water right, would wells drilled in New
23 Mexico in the alluvial aquifer after 1903 that deplete
24 the Rio Grande be curtailed, and Mr. Wechsler objected
25 to the form, but Mr. Lopez then deferred and said I

1 its rights, it could place a call with the Office of
2 the State Engineer to enforce its priority, correct?

3 A. That's a loaded question. I'm not following,
4 to be honest with you. Can you be more specific.

5 Q. Sure. I'll -- I'll break it down. Could a
6 senior water right owner place a call to satisfy his
7 rights, and in placing that call, junior water users
8 may be curtailed? Is that your understanding of how
9 the priority system works?

10 A. Again, I think a priority call, someone can
11 place a priority call, but with no experience dealing
12 with a priority call, I can't speak with any
13 authority.

14 Q. Okay. So even under this hypothetical,
15 you're not prepared to answer how the OSE may actually
16 administer a priority call?

17 A. I'm not prepared. I don't know how we would
18 do that.

19 Q. And who do you think would be able to answer
20 that question?

21 A. We would get direction from John D'Antonio,
22 and it's above my pay grade.

23 Q. Can you define what an over diversion by
24 irrigation water user is in New Mexico?

25 A. Well, are you referring to surface water or

1 groundwater or is there a specific thing you're
2 asking.

3 Q. Well, this term was used by -- you know who
4 Mr. Serrano is?

5 A. Yes.

6 Q. And Mr. Dorman?

7 A. Yes.

8 Q. And in their depositions, they used the term
9 over diversions. Did you, by chance, review their
10 deposition testimony or did you -- did you
11 participate? Were you present during their
12 deposition?

13 A. No, I wasn't.

14 Q. Did you review the transcript?

15 A. No.

16 Q. Okay. So I will -- I will just state for
17 these purposes that Mr. Serrano, in particular,
18 referenced over diversions of water rights by
19 irrigation users, and that is my question. It could
20 be over diversion by surface water or could be over
21 diversion of groundwater, but let's take these one at
22 a time. Does the OSE monitor over diversion of a
23 surface water by irrigation user in Elephant Butte
24 Irrigation District?

25 A. We do not monitor the over diversion of

1 specific farmers of surface water.

2 Q. How would you define over diversion?

3 A. What we do here in the District 4 office is
4 we monitor how much water is pumped from each well,
5 and specific to a specific water right, and an over
6 diversion would be that amount of water diverted that
7 goes beyond their water right.

8 Q. Okay. Looking at your answer here, you talk
9 about monitoring of how much water is pumped from each

10 well. Do you monitor how much water -- how much
11 surface water is diverted by each water right holder?

12 A. What we do is in our WATERS database, we
13 include the allotments set by the surface water
14 allotments set by EBID, and we just assume that every
15 water user takes that full allotment of surface water,
16 and then we make sure that the groundwater amount of
17 water is constrained within the Stream System 101
18 settlement agreement.

19 Q. Okay. So the OSE does no administration of
20 the amount of surface water that is beneficially used
21 by each of the EBID farmers; is that correct?

22 A. We just make the assumption that every EBID
23 farmer takes their full allotment.

24 Q. And the OSE does no monitoring of that or --
25 well, let's just start there. The OSE does no

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1 monitoring of each farmer diversion of surface water?

2 A. Not in this office, we don't.

3 Q. With regard to groundwater, does the OSE
4 monitor how much each farmer is diverting to the
5 groundwater?

6 A. Absolutely.

7 Q. Okay. How do you go about doing that?

8 A. Well, we require metering all wells for
9 irrigation purposes, as well as commercial and
10 non-domestic purposes, and so for irrigation purposes
11 in particular, we require quarterly meter readings and
12 those meter readings are entered into our WATERS
13 database, and that allows us to account for the amount
14 of water each farmer is using.

15 Q. Okay. In your previous answer, you said with
16 regard to ensuring there's not an over diversion, you
17 make -- I'm looking at your answer here on Line 26:17.
18 "We make sure the groundwater amount of water is
19 constrained within the Stream System 101 settlement
20 agreement." So how does -- how do the OSE then
21 administer to constrain groundwater pumping within the
22 Stream System Issue 101 settlement agreement?

23 A. Well, I'll go ahead and give you a scenario.
24 In our WATERS database, we input for every farmer the
25 amount of the allotment EBID has designated for that

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1 year. So, for instance, if the amount of water the
2 allotments from EBID surface water is 2 acre-feet per
3 acre per annum, we input that into our WATERS
4 database, and then we look at the Stream System 101
5 settlement agreement, and we see for most farmers,
6 they have a total FDR farm delivery requirement of 4.5
7 acre-feet per acre per annum. So what we'll do is
8 straight away, we assume that the farmer will use all
9 the full 2 acre-feet per acre per annum, and what that
10 does, we subtract that from the 4.5 farm delivery
11 requirement, and that gives us a number stating that
12 they have 2.5 acre-feet per acre per annum that can be
13 diverted from their well or wells.

14 Q. If they exceed -- under your scenario, if
15 they exceed the 2.5 acre-feet per annum, is that an
16 over diversion?

17 A. It is.

18 Q. And how do you enforce against an over
19 diversion?

20 A. Our water master, who is Ryan Serrano and his
21 staff, will notify the farmer that is over diverting,
22 and they will often red tag, literally put a red tag
23 on the well, and there's also written correspondence
24 to those farmers and they investigate and work with
25 the farmer to rectify that over diversion.

1 Q. Is your well metering, is that realtime?

2 A. It is not. It's -- we require the farmers to
3 submit their meter readings January, April, July, and
4 October by the 10th of those months.

5 Q. So let's say in July, you get a meter
6 reading, and it appears that under this scenario which
7 the farmer was entitled to 2.5 acre-feet per annum,
8 pumping, and it's been exceeded, what -- what actions
9 do you take when you get that information?

10 A. Well, the water master again will contact
11 that farmer and investigate the situation, for
12 instance, talk to the farmer about, well, is -- is
13 your meter working correctly, were the meter readings
14 written down and submitted correctly. Often, that's
15 what happens. The farmer will inadvertently report
16 the meter readings incorrectly or there may be a
17 metering -- there's -- a meter can be tenths or
18 hundredths. They may have a decimal place off. So
19 they'll -- the water master is real diligent about
20 working with the farmers to make sure that those meter
21 readings were entered correctly and submitted
22 correctly. And we'll also go out -- they will, not
23 me, but the water masters will go out and inspect the
24 wells and work with the farmer to make sure that that
25 well is working correctly.

1 Q. Okay. Let's --

2 A. And --

3 Q. I'm sorry. Go ahead. I didn't mean to
4 interrupt.

5 A. No, that's okay. Go ahead.

6 Q. Let -- let's assume that the meter is reading
7 correctly, that the well is working correctly, and the
8 2.5, which is what should be the limit to groundwater
9 pumping has been exceeded in July and you've got the
10 meter reading, it's accurate, the water use is being
11 exceeded, what does the OSE do to rectify this over
12 diversion at that time?

13 A. So a water master will work with the farmer,
14 and he will come up with a replacement plan so that
15 that farmer will pay back that water. Typically it
16 occurs in the following irrigation season.

17 Q. So is the -- is the farmer allowed to
18 continue to pump?

19 A. No.

20 Q. In irrigation season?

21 A. I don't believe so, no.

22 Q. And how do you prevent farmer from pumping
23 beyond that 2.5 after notification that they've
24 exceeded their amount they're entitled to?

25 A. Well, the water masters go out and inform the

1 farmer that he can no longer pump that water from that
2 well.

3 Q. And --

4 A. And then if there's -- if they refused to
5 follow those instructions, it'll -- it can go to a
6 compliance order and eventually to the administrative
7 litigation unit for full compliance.

8 Q. Do you take any physical action at the time
9 you're aware of the over diversion to prevent
10 additional pumping that well had?

11 A. What do you mean by physical action?

12 Q. Do you lock it down so that --

13 A. I am not aware of locking that down. I would
14 have to ask -- or you would have to ask Ryan Serrano.

15 Q. How many compliance orders do you typically
16 issue every year?

17 A. I think there was between 10 and 20 a year.
18 Not very many.

19 Q. That is the number of over diversions that
20 you've discovered?

21 A. I believe that's the number of over
22 diversions where the farmer hasn't come into our
23 office and worked with our water masters to come up
24 with a replacement water plan, and I think they --
25 those are the folks that just refuse to cooperate.

1 Q. So if I understand you correctly, then for
2 farmers that agree to cooperate, there -- there is no
3 compliance order issued and they're expected to
4 account for their over diversion in their water use
5 the following year?

6 A. Well, this would depend on the arrangements
7 they have with the water master and his group, but as
8 far as I know, that's the way they handle it, and it
9 needs to be in the following irrigation season.

10 Q. So essentially in the -- these enforcement
11 actions, the OSE checks the meter readings at the end
12 of the year, and if the total meter diversion exceeded
13 the farmers' water right for groundwater pumping
14 purposes, that's when you'd take some action the
15 following year to correct for that amount that was
16 over diverted; is that correct?

17 A. That's correct.

18 Q. As long as the groundwater pumper was within
19 this permitted amount, and I think you've defined this
20 permitted amount as 4.5 acre-foot for most irrigation
21 uses, subtracting off their surface water allocation,
22 then they had a permitted amount of water to pump from
23 the ground for that year; is that correct?

24 A. Yes.

25 Q. Okay. And as long as they are within that

1 permitted amount, there's no over diversion?

2 A. That's correct.

3 Q. So New Mexico only administers to the
4 permitted amount in an irrigator's permit?

5 A. Well, it's not just water that's -- or excuse
6 me a water right that's certainly permitted. We
7 require metering on all irrigation -- all farmed, all
8 meters -- water meters that irrigate and so this could
9 be whether it's adjudicated, a water right might be
10 adjudicated but not permitted specifically. It might
11 be a water right that is declared but not specifically
12 permitted, so I don't want to stop at saying it's just
13 permitted water right.

14 Q. So New Mexico administers to water rights
15 that are declared; is that correct?

16 A. Yes. If that's the only information we have
17 on file of the water right unless it's been some other
18 information, for instance, it's adjudicated, then yes.
19 That's the best information we have.

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20 Q. Are these declared rights un-permitted rights
21 that were in existence prior to when the basin was
22 declared?

23 A. Yes. They have to be water rights that were
24 established prior to the closing of the basin.

25 Q. That was 1980?

1 A. Correct.

2 Q. So for these declared rights that New Mexico
3 administers to, this is based upon what -- what proof
4 of establishment beneficial use. How does OSE verify
5 a declaration?

6 A. Well, in the lower Rio Grande, we have the
7 hydrographic survey, and so that was completed as part
8 of the adjudication, and so that's essentially a field
9 check that was done. So it's -- we can verify that's
10 another way to look at the declaration and give some
11 context to it and shore up the declaration
12 essentially.

13 Q. Okay. So for purposes of over diversion, you
14 guys go through the same processes you do with
15 permitted wells; you determine from the metering data
16 whether or not they are exceeding their declaration?

17 A. That's correct.

18 Q. And then it's a similar process of
19 enforcement, at the end of the year, you look to see
20 how much water was pumped?

21 A. Yes.

22 Q. And then you may take action to limit the
23 amount of water pumping in successive years?

24 A. If it's -- yes.

25 Q. How else do you settle these issues of over

1 diversion? Is there any method that you use other
2 than reducing the amount that they could pump in the
3 following year?

4 A. Well, they could be a part of an ownership
5 management program for future years; however, if they
6 have over diverted and were not previously part of
7 same ownership management on the program, they still
8 will be required to pay back that over diversion.

9 Q. Mr. Serrano gave quite a bit of testimony
10 about ownership management programs, but if you could
11 just encapsulate exactly what an ownership management
12 program is and how over diversions are accounted for
13 in future years under that program?

14 A. Okay. I'm going to take that first part.
15 The same ownership management program is at least two
16 farms that are managed by one entity, one farmer, one
17 manager, and what can be done is the two farms are
18 more. Those water rights were kind of pulled, as it
19 were, so one farm field can be fallowed, and the water
20 associated with that piece can be used on a different
21 piece of land as long as the total water right allowed
22 diversion isn't exceeded.

23 Q. So I don't understand. How does that allow a
24 farmer to come in compliance with over diversions
25 under this program?

1 A. So, for instance, if it's a pecan orchard and
2 the farmer has over diverted in the past, he will have
3 to, of course, pay back those over diversions, but he
4 can enter in a same ownership management program and
5 use water on a separate farmer's land from a separate
6 farmer's land who chooses not to irrigate that, and so
7 what that does is allows a pecan farmer to go ahead
8 and divert more, but the whole water rights, the two
9 farmers, it's not -- it's not exceeded.

10 Q. Okay. So -- so let me understand. So if
11 there is a determination that there is an over
12 diversion, a water right is exceeding its amount it's
13 entitled to pump from the ground, and they're a part
14 of this ownership management program, then they're not
15 having to offset that over diversion, they just need
16 to enter into an agreement where other lands are
17 fallowed that would normally receive water; is that
18 right?

19 A. Right. So the mass balance of the water
20 right isn't exceeded for the two farms.

21 Q. And when you say not exceeded into the
22 future, are you talking about the immediately
23 succeeding year of over diversion or can this be
24 stretched out over a number of years?

25 A. Well, this arrangement can be stretched out

1 as long as the two farmers are in agreement that they
2 plan to do the same thing.

3 Q. Okay. And the same thing is to come into
4 compliance with the water use that would normally be
5 applied from groundwater pumping on those lands?

6 A. Can you restate that? I'm not sure I
7 followed.

8 Q. Yeah. Sorry. I -- the question is that the
9 agreement is an agreement that water use on those
10 lands is in compliance with the permitted or declared
11 amount of water for that acreage?

12 A. Right. For the two farms together, the total
13 water rights is not exceeded. The allowable water for
14 the two farms together isn't exceeded as a whole.

15 Q. Okay. That is essentially based on a 4.5
16 acre-foot per acre farm delivery requirement?

17 A. For the most part, yes.

18 Q. When you make these determinations of over
19 diversion, is there any evaluation of groundwater
20 pumping that is making depletions to surface flows?

21 A. Well, I'm kind of puzzled with determinations
22 of over diversion. What are you referring to there?

23 Q. Sure. So you just testified with regard to
24 how you define -- how the OSE defines over diversion
25 for purposes of groundwater pumping, right?

1 A. Yes.

2 Q. And essentially, the pumper could not exceed
3 the FDR that's been decreed under Stream System Issue
4 101, right?

5 A. That's right.

6 Q. Okay. And that amount is 4.5 acre-feet per
7 acre?

8 A. Yes.

9 Q. So the question is if they exceed that amount
10 they're entitled to as the OSE has determined, is
11 there any evaluation of how that impacts -- the over
12 diversion, impacts surface water flow?

13 A. Well, we just assume the over diversion needs
14 to be replaced on a one-to-one basis.

15 Q. Is there any determination of the impacts of
16 the over diversion on depletions from the Rio Grande?

17 A. Well, within the scope of the same ownership
18 management program, we don't do any kind of hydrologic
19 analysis, if that's what you're asking.

20 Q. No. I'm not asking about the ownership
21 management program in this question. The question is:
22 You make a determination that a farmer is over
23 diverting groundwater pumping under, let's just take
24 the scenario of permitted right. You've made the
25 determination that they have exceeded what they're

1 entitled to based on the FDR. Okay?

2 A. Okay.

3 Q. And in that scenario where there is already
4 made the determination that they are receiving their
5 permitted amount, is there any analysis as to what
6 that over diversion impacts are on surface flows in
7 the Rio Grande?

8 A. No. Other than there's no determine other
9 than replacing that water, that over diversion in the
10 following irrigation season on a one-to-one basis.

11 Q. Okay. Is there any analysis as to what that
12 over diversion impacts are on surface flows and
13 drains?

14 A. I don't do any analysis like that, no.

15 Q. The OSE does not do any analysis like that?

16 A. We do an analysis when application is filed,
17 and that's when we do in my work to make sure that the
18 flows to the river are protected. But as far as the
19 over diversion issue, our view in protecting the water
20 of the surface -- surface water is to have those over
21 diversions be replaced on a one-to-one basis.

22 Q. But not during the irrigation season?

23 A. That's correct. Unless the water master
24 comes into an agreement with that farmer in a
25 different manner.

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1 Q. Okay. That threw me for a loop. What do you
2 mean by a different manner? How does that occur
3 during the irrigation season which the over diversion
4 is discovered?

5 A. You know, I can't -- I threw in a caveat just
6 to make sure that there may be other arrangements that
7 the water masters put together with the farmer, so
8 that's all I was referring to.

9 Q. Okay. And I'm talking about what
10 arrangements there may be that account for the over
11 diversion and correct for the over diversion during
12 the irrigation season in which the over diversion is
13 occurring. Okay?

14 A. Uh-huh.

15 Q. So what -- what, if any, arrangements do the
16 water masters make?

17 A. You know, I -- the only thing I can think of
18 straight away is if the farmer has a way to repay that
19 water in some other manner, but -- within that same
20 irrigation season, but, you know, I'd have to defer to
21 the water master for specifics. I apologize. I don't
22 know.

23 Q. Okay. So sitting here today, you're not
24 aware of any of those arrangements?

25 A. I'm not. It's almost always in the following

1 irrigation season.

2 MR. LEININGER: Okay. We've been going
3 well over an hour so I apologize for that, Ms.
4 Thacker, but why don't we -- why don't we take a
5 ten-minute break. Is that okay?

6 THE WITNESS: Yes, please. Thank you.

7 THE VIDEOGRAPHER: The time is 2:50 p.m.
8 We're off the record.

9 (Break.)

10 THE VIDEOGRAPHER: The time is 3:03 p.m.
11 We're on the record.

12 Q. (BY MR. LEININGER) So, Ms. Thacker, I only
13 have a few more questions, then I'm going to turn it
14 over to Ms. Klahn. Are you familiar with the AWRM?

15 A. I am.

16 Q. Okay. And that's a state statute, correct?

17 A. Yes, it is.

18 Q. And it stands for -- I don't actually have a
19 copy of it in front of me, but it stands for
20 alternative water right management; is that correct?

21 A. I think it's active water resource
22 management.

23 Q. Oh, okay. That sounds better. Yes, thank
24 you. So are there rules and regulations promulgated
25 for the lower Rio Grande pursuant to the AWRM statute?

1 A. Did you say for the lower Rio Grande or below
2 the Rio Grande?

3 Q. I'm sorry. For the LRG, the lower Rio
4 Grande.

5 A. No, not at this time.

Texas
Affirmative

6 Q. How do you -- what's your understanding of
7 the purpose of the AWRM?

8 A. Well, the purpose is to -- number one, we
9 can't manage what we don't measure so essentially
10 it's, number one, measuring through metering, and then
11 putting in a water master district, appointing a water
12 master, and just being really clear on the -- the
13 diversions, metering, and being sure, first of all, to
14 make sure that everyone is staying -- all the farmers
15 are not over diverting their waters. So right now,
16 there's what we're actively managing the resource.

17 Q. Does the AWRM statute allow the OSE to
18 administer within priority?

19 A. What do you mean by administer within
20 priority? I'm not sure I follow.

21 Q. Okay. Well, let me be a little more complete
22 in my question. There is no full adjudication of
23 water rights in the lower Rio Grande; is that right?
24 Is that your understanding?

25 A. That's correct.

1 Q. So is the AWRM designed to allow the OSE to
2 administer water rights in priority, through priority
3 administration, in lieu of adjudicated rights to
4 water?

5 A. Well, we don't administer through priority at
6 this time, and my understanding, actually, of AWRM is
7 to manage the water and not have to have a priority
8 call.

9 Q. Okay.

10 A. Excuse me -- oh, I'm sorry. Not a priority
11 call. Not have to administer through the priority.

12 Q. And why, to the best of your knowledge, on
13 behalf of the State of New Mexico, was it necessary to
14 have an AWRM to manage the water and not have a
15 priority call?

16 A. Well, the AWRM really gave us tools to manage
17 the water, and, you know, for instance, the metering
18 order and designation of the water master. Having the
19 WATERS database and people to input that data and
20 really actively managing and following the groundwater
21 diversions and just all those tools we use.

22 Q. And it also allows for offsets of water use
23 that may be impacting other water users?

24 A. What do you mean by "offsets"? I'm not
25 following.

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Counter De...

1 Q. Sure. So if there is, for example, an over
2 diversion of water, the AWRMs would allow for a active
3 management system of offsetting, those impacts of over
4 diversion?

5 A. Well, the only -- the only way I see is
6 through the same ownership management, and I -- I
7 would say that's one of our tools in our AWRM toolbox,
8 but if it's an over diversion where the farmer is not
9 part of a same ownership management, that is where we
10 require offsets. Replacement water. I prefer to use
11 that word.

12 Q. Let's say there's a determination that return
13 flows from project releases have declined and have
14 depleted flows in the Rio Grande such that it's
15 affecting deliveries downstream. Do you follow me?

16 A. I think so.

17 Q. Okay. Does the AWRM give the OSE authority
18 to curtail groundwater pumping that may be depleting
19 those surface flows?

20 A. In my knowledge, that's not the intent of the
21 AWRM. That's not one of our tools in our toolbox.
22 It's -- AWRM is used to really, like the acronym says,
23 you know, actively manage the water resource, and we
24 can't manage what we can't measure and so we would --
25 we -- our goal is to keep the river whole, the whole

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1 system whole, and so, again, that's what's so good
2 about the metering order and the water master, and all
3 these tools we use help us know where we are and so we
4 keep the water right owners, keep those boundaries in
5 place so we know what they're diverting.

6 Q. Okay. Let me give you another hypothetical.
7 So under this hypothetical, there's no over diversion,
8 no one's exceeding their 4.5 acre-foot per acre farm
9 delivery requirement, but yet there's a determination
10 that there is -- because there is this use of water at
11 the 4.5 acre-foot, there is a depletion of return
12 flows and surface water in the Rio Grande. Okay?
13 That's the -- that's the hypothetical. And the
14 question is: What is the statutory authority that New
15 Mexico has to curtail groundwater pumping that may be
16 depleting those surface water flows?

17 MR. WECHSLER: Form and foundation.

18 A. There's a lot of words there. Can you break
19 that down a little bit for me?

20 Q. (BY MR. LEININGER) Okay. Do you understand
21 the hypothetical?

22 A. Well, I'm -- I'm puzzled about the -- let's
23 see. Because there is this use of water at the 4.5
24 acre-foot, there's a depletion of return flows and
25 surface water in the Rio Grande. I don't follow that.

1 Q. Okay. Let me -- I will try to break it down
2 for you. Let's assume that there is a determination
3 that no irrigator is exceeding his 4.5 farm delivery
4 requirement. Okay? So even though your -- your
5 ability to control over diversions that exceed
6 permitted or declared amounts, this scenario assumes
7 that none of that's taking place. Okay? And yet --

8 A. None of what's taking place?

9 Q. Over diversions.

10 A. Okay. Got you.

11 Q. Exceeding the 4.5. So irrigators are using
12 4.5 acre-foot, and yet there is also proof that there
13 are depletions from groundwater pumping affecting
14 surface flows on the Rio Grande, thereby affecting
15 diversions further downstream. Okay? Do you
16 understand?

17 A. I'd have to look at what do you mean
18 by "proof"?

19 Q. Well, let's -- let's just for purposes of
20 this hypothetical, it's been proven that the
21 groundwater pumping of 4.5 acre-foot per acre is
22 depleting return flows and there -- therefore
23 depleting surface water in the Rio Grande. Okay?

24 A. Okay.

25 Q. So the question is: What's the statutory

1 mechanism for the OSE to administer to correct a
2 proven depletion of surface water due to groundwater
3 pumping?

4 MR. WECHSLER: Form and foundation.

5 A. Well, according to the Stream System 101
6 settlement agreement, that's one of -- that's what we
7 use to administer and so that was what was -- that's a
8 tool that's been given to us as water administrators,
9 and so at this point, that's what has been determined
10 and what we can use for administration. Now, there is
11 -- we do have statutes that make sure that we keep the
12 surface -- or the -- the whole system whole. So, you
13 know, we have the -- the statutes. We have the
14 regulations. We have the Mesilla Valley
15 administrative guidelines, and the -- the Stream
16 System 101 settlement I was talking about, and so we
17 have all those tools at our disposal to make sure we
18 keep that -- the river whole.

19 Q. (BY MR. LEININGER) Okay. So you're now
20 talking about Stream System 101. Assuming that --
21 that the water -- surface water diversion in the Rio
22 Grande is depleted, and it's proven that it's been
23 caused by groundwater pumping in New Mexico such that
24 it's affecting deliveries downstream within New
25 Mexico, so these are the head gates off -- off of the

1 Rio Grande, how does 101 allow the OSE to take
2 administrative action to -- to cure that injury of
3 depleted surface water?

4 A. Well, I'm not sure how it would cure, but I
5 do know that that's what the tool we've been given,
6 and that's how we administer the water rights here in
7 -- in the state.

8 Q. So -- and you mentioned 101. Maybe you
9 should just briefly explain what your understanding of
10 101 is.

11 A. Well, that's the Stream System 101 settlement
12 agreement and final judgment gives us -- specifies the
13 farm delivery requirement of 4-and-a-half acre-feet
14 per acre per annum and then the irrigation requirement
15 of 2.6 acre-feet per acre per annum and so that's the
16 mechanism we use to administer water rights and so all
17 our meter readings need to be -- all the farmers need
18 to be sure that they stay within those parameters for
19 their specific water rights.

20 Q. So as long as the farmers are staying within
21 101's 4.5 acre-feet per annum irrigation and
22 irrigation requirement 2.6 acre-foot per acre, the OSE
23 do not try to curtail those rights, even if it's shown
24 that groundwater pumping under those rights is
25 affecting surface flows of the Rio Grande?

1 MR. WECHSLER: Objection; form.

2 Q. (BY MR. LEININGER) Is that correct?

3 MR. WECHSLER: Form and foundation.

4 A. Well, again, we administer based on the tools
5 we've been given, the statutes, the regulations, the
6 Mesilla Valley administrative guidelines, as well as
7 the Stream System 101 settlement agreement. So that's
8 -- those are the tools we use.

9 Q. (BY MR. LEININGER) Okay. But I'm trying to
10 understand in the context of 101, farmers are entitled
11 to 4.5 acre-foot per acre farm delivery requirement,
12 correct?

13 A. Yes.

14 Q. Okay. And if they're all using their full
15 amount, 4.5 acre-foot per acre, and there is a --
16 there's enough evidence and facts to show that
17 groundwater pumping under that arrangement, 4.5 FDR,
18 is still depleting surface water, what does the OSE do
19 with regard to that use to mitigate the depletion of
20 the surface water?

21 MR. WECHSLER: Form and foundation;
22 incomplete hypothetical.

23 A. Again, I -- I have to go back to the fact
24 that we've been given that 4.5 FDR as a function of
25 the 101 settlement, and that's the tool we -- we use,

1 and that's what we've been given at the local office,
2 and those are the parameters we administer a water
3 right.

New Mexico
Counter De...

4 Q. (BY MR. LEININGER) So the United States On
5 behalf of the Bureau of Reclamation came to the OSE to
6 state that its ability to deliver project water at Rio
7 Grande head gates has been shortened, can't be
8 fulfilled, okay, and we asked the OSE to take action
9 against groundwater pumpers, does the OSE have the
10 ability to reduce the amount of groundwater pumping
11 below the 4.5 acre-foot per acre that has been
12 permitted?

13 MR. WECHSLER: Object to form.

14 A. Well, I would say if that were the case, we'd
15 do an investigation, and we would see who's causing
16 the problem and if indeed there is a problem because
17 there's always two sides to every story and so, yes,
18 if it turns out that there are issues, the state
19 engineer absolutely does have the authority to -- to
20 decrease the amount of water from groundwater wells,
21 but that would require an investigation and a -- more
22 information.

23 Q. (BY MR. LEININGER) Okay. And I'm just
24 curious about that authority because you mentioned the
25 AWRMs. Do the AWRMs apply in the lower Rio Grande?

Texas
Affirmative

1 MR. WECHSLER: Object to form.

2 A. Apply for what? What do you mean by that?

3 Q. (BY MR. LEININGER) Well, there's been no
4 rules and regulations adopted consistent with the
5 AWRMs in the lower Rio Grande, correct?

6 MR. WECHSLER: Object to form.

7 A. Well, there's no district-specific regs for
8 active water resource management.

9 Q. (BY MR. LEININGER) Okay. So what is the
10 authority the OSE can use to decrease the amount of
11 water from groundwater wells?

12 MR. WECHSLER: Form and foundation.

13 A. Well -- well, the constitution of New Mexico
14 saying that all the water belongs to the public, and
15 it's subject to appropriation and beneficial use.
16 That's the main charge as the state engineer in our
17 office is to protect all water right owners. So
18 that's absolutely the authority.

19 Q. (BY MR. LEININGER) Okay. And -- and under
20 the constitution, New Mexico has adopted the prior
21 appropriation system, right?

22 A. Yes. It's first in time, first in right.

23 Q. So the OSE would then administer in a first
24 in time, first in right against these groundwater
25 pumpers that may be impacting senior water use of the

1 project?

2 A. Well, it's possible; however, again, we have
3 to do an investigation and determine who was causing
4 the depletion.

5 Q. Sure.

6 A. Because you can see --

7 Q. And I -- yeah, I'm sorry to interrupt, but I
8 do want to give Sarah some time here. But the
9 question, again, is just the OSE's statutory authority
10 to administer in priority in the lower Rio Grande
11 given the scenario that the irrigate -- the irrigation
12 of wells is impacting surface water flows. What is
13 that statutory authority? You mentioned the
14 constitution. Is there anything else?

15 MR. WECHSLER: Object to form; calls for
16 a legal conclusion.

17 A. Yeah, I'd follow Mr. Wechsler's point. I'm
18 not an attorney, but I do know that we've been given
19 the tools, we've been given the constitution of New
20 Mexico, the statutes, rules and regs, and our ability
21 to permit wells and condition those permits.

22 Q. (BY MR. LEININGER) And I'm just trying to get
23 -- and really I'm sorry I have to keep coming back to
24 this, but I need some specificity with regard to the
25 tools that the OSE has at its disposal to address this

1 injury of junior use to a senior water right. So in
2 the lower Rio Grande, you mentioned the constitution,
3 and then you mentioned the statutes, and if you could
4 just define for me what those statutes are that the
5 OSE uses to administer in that scenario?

6 MR. WECHSLER: Again, object to form.

7 A. Well, it would depend on the situation to be
8 honest. It would depend on who's causing the injury.
9 We need need more specificity on who's doing --
10 causing the injury. So, yes, absolutely. We have the
11 authority to -- the state engineer has the authority
12 to protect surface waters of the State of New Mexico
13 and the -- the whole water system, but without knowing
14 specifically who's causing the harm, I can't speak to
15 how we would administer that.

16 Q. (BY MR. LEININGER) Okay. Without rules and
17 regs promulgated and adopted for the LRG, can the OSE
18 still use the AWRM statute to enforce within priority?

19 A. Well, my understanding of the AWRM is so we
20 don't have to administer in priority. It's to give us
21 the tools for a priority call -- or administering by a
22 priority is not -- you know, that's the nuclear
23 option, as it were. We want to use AWRMs so that we
24 don't have to do that.

25 Q. Okay. And that AWRM tool is one that's

1 available in the lower Rio Grande right now?

2 A. Well, the state -- statewide regulations,
3 yes. But just because there's no AWRM
4 district-specific regs doesn't mean we don't have the
5 tools to administer water rights.

6 Q. Sure. And you -- you gave me the explanation
7 of how you would administer water rights. My -- my
8 question had just been what's in your toolbox with
9 regard to what is the United States' ability to
10 deliver project water downstream at head gates where
11 there's a proven causation of depletion of return
12 flows that the United States is entitled to, and it's
13 due to groundwater pumping. Okay? So my
14 understanding is the OSE feels that the AWRM gives
15 them the ability to curtail junior groundwater right
16 if the United States is being impacted in this way; is
17 that right?

18 MR. WECHSLER: Object to form.

19 A. No. That's not the intent of the active
20 water resource management to curtail junior
21 groundwater rights. It's to -- I think shortage
22 sharing might be a good way to put it, but we can't
23 administer anything, any water, un -- until we measure
24 it. So that's really the intent of the AWRM, giving
25 us the ability to have the metering order, have a

1 water master. You know, we have the statewide AWRM
2 regs.

3 Q. (BY MR. LEININGER) Okay. So -- we're almost
4 done with this line of questioning. So if the United
5 States is showing that it's being injured -- its
6 senior water right is being injured, and the senior
7 water right, as we've discussed, is a surface water
8 right of the Rio Grande, and that's determined to be
9 due to groundwater pumping in New Mexico, you're
10 saying that the active water resource management
11 cannot be used to curtail groundwater -- junior
12 groundwater rights; is that correct?

13 MR. WECHSLER: Object to form; asked and
14 answered.

15 A. Well, again, that's not the intent of the
16 AWRM, and your scenario really is very broad and so it
17 doesn't mean that the state engineer doesn't have
18 authority to curtail groundwater, but in your
19 scenario, we don't know who's doing it. We don't know
20 if it's -- where in the aquifer -- where in the basin
21 this is occurring. So to just say, yeah, we'll --
22 we'll just curtail, what does that mean, we need a lot
23 more specifics and do an investigation, as I
24 mentioned.

25 Q. (BY MR. LEININGER) So -- so this -- this

1 assumes that the United States' project water right,
2 and let's give it a 1903 water right is being injured.
3 What I'm hearing -- correct me if I'm wrong, but what
4 I'm hearing is the OSE has tools other than priority
5 administration to fulfill the United States' entire
6 senior water right?

7 MR. WECHSLER: Object to form.

8 A. Well, again, that's not the intent of AWRM.
9 And we can't manage what we can't measure, and that's
10 the point of AWRM. And so we don't -- we -- we have
11 ability to do an investigation, to figure out who's
12 causing the harm, if someone is, and so, yes, we --
13 the state engineer absolutely can curtail, but without
14 specifics, I can't answer beyond that.

15 Q. (BY MR. LEININGER) And I'll just -- let's
16 just wrap this up with when you say absolutely, the
17 OSE can curtail junior groundwater rights that are
18 effecting or hurting/injuring senior water rights, I'm
19 just trying to understand how the OSE would go about
20 doing that. What -- what laws would they utilize?

21 MR. WECHSLER: Object to form; calls for
22 a legal conclusion.

23 A. That's the point of all the statutes is to --
24 to keep the river system whole, the whole LRG system
25 whole. So the state engineer has the authority to do

1 that under those statutes, but, again, without
2 specific -- I can't answer specifically how we would
3 do that because every situation is case by case, but
4 we do have the authority to do that.

5 MR. LEININGER: Jeff, it's been almost
6 another hour, and I am ready to turn it over to Sarah
7 so do you want to -- Sarah, do you want to start now
8 or do you want to -- Cheryl, do you want to take a
9 short break?

10 MS. KLAHN: We can take five minutes if
11 that would help.

12 MR. WECHSLER: Sounds good.

13 THE WITNESS: That would be good.

14 THE VIDEOGRAPHER: The time is 3:35 p.m.
15 We're off the record.

16 (Break.)

17 THE VIDEOGRAPHER: The time is 3:42 p.m.
18 We're on the record.

19 E X A M I N A T I O N

20 BY MS. KLAHN:

21 Q. Hello, Ms. Thacker. My name is Sarah Klahn.
22 I represent the State of Texas. I took your
23 deposition, I think in, like, May of 2019 or something
24 like that. Do you recall that?

25 A. I do.

1 Q. What's your understanding of the difference
2 between the deposition we're having today and the
3 deposition that was taken in 2019 of you?

4 A. My understanding is I was just a fact witness
5 back in 2019, but this is more specific to my duties
6 as for water right administration.

7 Q. What did you do to get ready for this
8 deposition?

9 A. I spoke to my attorneys who are helping me
10 with this.

11 Q. Who did you speak with specifically?

12 A. Shelly Dalrymple, Gregg Ridgley, and Maureen
13 Dolan.

14 Q. Did you meet with Mr. Wechsler?

15 A. Oh, yes, I did. Yes, thank you.

16 Q. How long did you meet with your lawyers?

17 A. Gosh, it probably was a total of about eight
18 hours maybe.

19 Q. Did you have multiple meetings?

20 A. I did.

21 Q. Did you go up to Santa Fe for the meetings or
22 did you do them by phone?

23 A. Just by phone.

24 Q. Did you meet with Mr. Lopez at all before
25 this deposition?

1 A. I did not.

2 Q. How about Mr. Schmidt-Petersen?

3 A. No.

4 Q. Do you know either one of them?

5 A. I do.

6 Q. How well do you know them? How would you
7 characterize your familiarity with them?

8 A. On a professional basis and I like them both
9 very much, but I don't know them super well.

10 Q. In your preparation for the 30(b)(6), were
11 there any areas that you were told you'd be
12 responsible for covering that were outside of your
13 normal job description?

14 A. No.

15 Q. So in a 30(b)(6) deposition, you speak for
16 the State of New Mexico because you were designated by
17 your lawyers as the person most knowledgeable about
18 the topics that you were identified for in the New
19 Mexico objections to the United States' deposition
20 notice. So when I'm using the word "you" in the
21 course of this deposition, I won't be speaking about
22 you as Cheryl Thacker. I'm going to be speaking about
23 you as the State of New Mexico. Does that make --
24 does that make sense?

25 A. It does.

1 Q. Is that information you had understood coming
2 into this deposition?

3 A. I'm sorry. What information?

4 Q. That you're speaking for New Mexico today
5 when you --

6 A. Oh, yes. I see. Yes.

7 Q. You did understand that coming in here today?

8 A. I do.

9 Q. So the -- the answers to your questions bind
10 the State of New Mexico in the context of this
11 litigation. Does that make sense?

12 A. That's the way I understand it.

13 Q. Okay. Very good. Where are you right now?

14 A. I'm in my office in Las Cruces, New Mexico.

15 Q. Is there anyone in there with you?

16 A. No.

17 Q. Do you have your phone nearby?

18 A. It's over in my desk.

19 Q. Okay. But you're not anywhere where you
20 could consult with anybody by text message or
21 something like that?

22 A. No, ma'am.

23 Q. Okay. In the course of the discussion you
24 had today with Mr. Leininger, he asked you some
25 questions about the way that New Mexico administers

1 groundwater rights, and in the course of that
2 discussion, you said something along the lines of
3 this, you assume that EBID farmers are using their
4 full allotment and then you evaluate their groundwater
5 use based on the assumption that they're using their
6 full allotment. Does that -- does that sound like
7 testimony that you gave? I'm not -- I don't have it
8 written down exactly.

9 A. Yes. That's right.

New Mexico
Counter De...

10 Q. Okay. So when you say you assume that EBID
11 farmers are using their full allotment in the context
12 of that statement, are you assuming that EBID farmers
13 have 3 acre-feet per acre available to them every
14 year?

15 A. Oh, no. I'm sorry. I meant the allotment
16 that they announced per irrigation season, for
17 instance, 2 acre-feet, you know, they announced that.
18 That's what I was referring to.

19 Q. Okay. So -- and this evaluation that you're
20 doing would happen at the end of the irrigation
21 season?

22 A. Well, we include that at the beginning of the
23 irrigation season when we get that information from
24 EBID. So -- but the final accounting and final wrap
25 up occurs at the end of the year, yeah.

1 Q. So if EBID changes their allocation over the
2 course of a season, your final tally of groundwater
3 use would take that into account?

4 A. We would, yes.

5 Q. Now, based on the extended discussion that
6 Mr. Wechsler had with Mr. Leininger at the beginning
7 of the deposition, is it fair to say that you are not
8 aware of specific activities New Mexico has done to
9 enforce compliance with the Rio Grande Compact?

10 A. That's absolutely right.

11 Q. During your discussion with Mr. Leininger,
12 you referred to tools in the toolbox a number of times
13 when talking about the AWRM. Do you recall that?

14 A. I do.

15 Q. Could you list the tools in your toolbox for
16 the AWRM?

17 A. Sure. The metering order requiring all
18 farmers and non-domestic users to meter their wells.
19 We have the designation of the water master districts,
20 the appointments of the water master. We have the
21 water master reports that he does every year, and --
22 and I think, you know, just the AWRM state regulations
23 or -- yeah, regulations.

24 Q. So the -- the AWRM -- let me strike that.

25 So regulations have been adopted on a

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Affirmative

New Mexico
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1 statewide basis to implement active water resource

2 management in New Mexico; is that correct?

3 A. Yes, it is.

4 Q. How often do you find yourself consulting the
5 AWRM regulations in your day-to-day?

6 A. I know they're there, but I don't use them on
7 my day-to-day work.

8 Q. So it's a tool in the toolbox, but you don't
9 use it?

10 A. I wouldn't say we never use it, but it's not
11 something we use on a day-to-day administrative -- for
12 administrative use.

13 Q. How many times in a year would you say you
14 turn to the AWRM regulations?

15 A. Maybe twice a year.

16 Q. What would be an example of application of
17 the AWRM regulations?

18 A. Well, I think it's just the basis where we
19 can administer -- gives us the authority to administer
20 under AWRM and use those tools that I mentioned
21 earlier.

22 Q. Maybe my question wasn't clear. I -- I was
23 -- I was thinking that the AWRM regulations themselves
24 might have created a basis for your office to
25 administer water rights; is that incorrect?

1 A. Well, we don't have district-specific AWRM
2 regulations, and the tools I really use for
3 administration go from the -- you know, the
4 constitution, the statutes, and our regulations, non,
5 you know, groundwater and surface water regulations
6 and Stream System 101. So those were the ones --
7 that's what I use on a day-to-day basis for
8 administration.

9 Q. Okay. So give me an example of how you use
10 the constitution on a day-to-day basis.

11 A. Well, that's -- that's just the over arching
12 reason we're here essentially. It's just we have to
13 keep that in mind. We have the authority to
14 administer water rights and so it's not something I
15 just look at every day and say, oh, okay,
16 constitution, but the point is the stated engineer has
17 the authority to protect the water of the -- the state
18 and specifically in the lower Rio Grande.

19 Q. I understand the state engineer has
20 authority. His office is in Santa Fe. I'm curious
21 how often Mr. D'Antonio himself is involved in
22 administrative decisions about water rights in the
23 lower Rio Grande.

24 A. Well, he's designated me as one of the
25 administrators down here, and with that in mind, he's

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Counter De...

1 given me the responsibility to administer water rights
2 and apparently put his faith in me to do that and so
3 that's my job as his agent to administer water rights.

4 Q. So in your answer of one question ago, you
5 said but the point is the state engineer has the
6 authority to protect water of the state and
7 specifically in the lower Rio Grande. What your --
8 your testimony would be perhaps that you have the
9 authority because it was delegated to you by the state
10 engineer to protect water of the state and
11 specifically the lower Rio Grande; is that right?

12 MR. WECHSLER: Object to form.

13 A. That's right.

14 Q. (BY MS. KLAHN) Do you understand your duties
15 to extend to protecting water in the lower Rio Grande
16 to ensure waters delivered to Texas under the Compact?

17 A. I wouldn't characterize it that way. I would
18 say specifically my authority is to do evaluations
19 when an application is filed for impairment, and to
20 ensure no new depletions occurred on the river. So
21 that's -- that's the authority I've been given.

22 Q. How does that answer my question?

23 A. I think it does. I -- I don't know what you
24 mean.

25 Q. Well, I asked if your duties extended to

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Affirmative

1 protecting water in the lower Rio Grande to ensure
2 that water is delivered to Texas under the Compact,
3 and you said -- your answer to me was you do an
4 evaluation when an application is filed for impairment
5 and to ensure no new depletions occurred on the river.
6 And I just want you to connect the dots for me. How
7 is that ensuring delivery of Texas' water under the
8 Compact?

9 A. Well, since I'm not specifically involved
10 with the Compact, I can't speak to that, but my job
11 and our job in the District 4 is to make sure that
12 anyone who wants to change an element of their water
13 right doesn't cause depletions to surface water flows,
14 so that -- that's the only thing I have the authority
15 to do in my position.

16 Q. So if Texas was already not getting all of
17 its water and you were looking at no more impairment
18 based on a water rights application, would you agree
19 that's not going to change whatever the underlying
20 problem is related to Texas getting its water?

21 MR. WECHSLER: Object to form. Also
22 outside the scope.

23 A. I don't really agree with the premise of your
24 question, so can you re-ask it?

25 Q. (BY MS. KLAHN) What don't you agree with?

1 A. Well, I can't speak to not going to change
2 whatever the underlying problem is. That's not within
3 my wheelhouse. My job is to make sure that any
4 application that's filed in our office does not cause
5 local depletions to other wells of other ownerships or
6 do depletions to the surface water flows.

7 Q. In your discussions with Mr. Leininger, you
8 referred several times to keeping the river whole.
9 Can you define for me what it means to keep the river
10 whole?

11 A. Sure. Again, when a water right owner comes
12 in and wants to change an element of their water
13 right, for instance, change location of wells for
14 replacement wells or change purpose or place of use,
15 my job is to be sure that no new depletions occurred
16 to the river and so that's what I mean keeping the
17 river whole, no new depletions.

18 Q. But what's the starting point for the whole?
19 In other words, would it have been 2005 or whatever
20 whenever you started your job, that's the standard
21 that you're trying to keep the river to or what's the
22 -- what's the temporal piece of keeping the river
23 whole in your view?

24 A. Well, what we look at is no new depletions
25 beyond what has occurred historically, and we use our

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1 tools such as Glover-Balmer software and modeling
2 software to be sure that the impacts to the river
3 don't exceed what has occurred historically.

4 Q. But, I mean, I understand the Glover-Balmer's
5 equation. I -- I get that, but you are making that
6 comparison with current existing conditions on the
7 river, right? You're not going back to 1980 to make
8 sure that there's not been any changes since 1980,
9 correct?

10 A. Well, if there's a water right, the -- that
11 began exercised in 1956, for instance, we look at a
12 hundred-year modeling, the effects to the river on
13 that -- on the river due to pumping from 1956, and so
14 that's our modeling, and so what we look at is that if
15 another well -- a replacement well is drilled, we make
16 sure that the depletions to the river due to the
17 replacement well don't exceed what has occurred
18 historically from 1956.

19 Q. But when you do that, you aren't in a
20 position to say this is the status quo of the river
21 that we're trying to maintain ; it's not some
22 objective historical condition, it's just comparing
23 what that 1956 water right was doing against what the
24 water right owner wants to do with the replacement
25 well, for example, correct?

1 A. That's right, yes.

2 Q. You used the term nuclear option with regard
3 to curtailment. Why is curtailment a nuclear option?

4 A. No. I would say priority administration.
5 Curtailment isn't a nuclear option. And I guess the
6 question, too, is what do you mean by curtailment in
7 your eyes.

8 Q. Shutting down a water right period.

9 A. Okay.

10 Q. Lock the well, lock the head gate, don't let
11 them take water. That's curtailment.

12 A. Okay.

13 Q. How do you define it?

14 A. I would agree. And when I say nuclear
15 option, I mean priority administrations where we make
16 a call on the river and shut a whole bunch of water
17 rights down. Yes, the state engineer has that
18 authority, but we would prefer to use the active water
19 resource management tools so we don't have to do that.

20 Q. So in your view, in your job, active water
21 resource management provides you tools so you can
22 avoid operating under strict priority system?

23 A. Well, I think it's to encourage shortage
24 sharing and cooperation with the farmers and just
25 managing the river so that -- excuse me -- managing

1 groundwater diversions so that the farmers don't

2 exceed their water rights as it is on file.

3 Q. So what do you mean by shortage sharing?

4 A. I think that's where our same ownership

5 management comes in to where two farmers can

6 essentially put two farms under one ownership

7 management and where one farmer cannot necessarily

8 irrigate their field, and instead, the other farmer

9 used that water on his lands. So that gives us the

10 tools to do that.

11 Q. So in that example, one farmer is not

12 irrigating, and the other farmer is using more water

13 than he's entitled to, correct?

14 A. No, that's not right.

15 Q. Well, I don't understand where the shortage

16 comes in then?

17 A. Well, the farmer isn't using more than he's

18 entitled to. It's all within the same water rights as

19 in the two water rights, the mass balance is

20 maintained.

21 Q. Using more -- the farmer that's using

22 additional water is using more water than he would be

23 able to if his neighbor hadn't agreed to loan him his

24 water, correct?

25 A. That's true.

Texas
Affirmative

1 Q. And this is the only water district in New
2 Mexico that has an owner management program; isn't
3 that right?

4 A. I'm not sure about other districts. I can't
5 speak to that.

6 Q. When -- when you were deposed last spring,
7 you told me you didn't have any involvement with the
8 owner management program. Is that still true?

9 A. I don't administer it on a day-to-day basis.
10 I do -- I do know how it works, but I don't do the
11 paperwork and I'm not actively involved with it.

12 Q. Are you involved with the year-end evaluation
13 of whether anybody exceeded the mass balance as you
14 call it under an owner management program?

15 A. I'm not. Other than I hear Ryan Serrano give
16 a summary and overview, but that's -- he -- he
17 administers that.

18 Q. So how was the ownership management program
19 shortage sharing again? I don't really feel like I
20 had an answer to that question.

21 A. Well, I have to back off on that. It may not
22 be shortage sharing.

23 Q. So can you give me an example of what you
24 mean by shortage sharing?

25 A. Not right now, no.

New Mexico
Counter De...

1 Q. So you, as the State of New Mexico, cannot
2 give me an example of shortage sharing? I just want
3 to make sure that's clear on the record. Is that
4 right?

5 A. Let me think about this a bit. I'm sure I
6 can think of something later, but I can't think of
7 anything right at the moment. I apologize.

8 Q. Okay. Were you in your current professional
9 position in 2005?

10 A. Yes.

11 Q. Were you involved in the state engineer's
12 effort to implement lower Rio Grande specific AWRM
13 regulations?

14 A. Yes.

15 MS. KLAHN: Kayla, could you pull up a
16 deposition exhibit for me? It -- it says well
17 metering requirements on the first page.

18 THE VIDEOGRAPHER: Okay. Give me a
19 moment.

20 Q. (BY MS. KLAHN) While we're waiting for that
21 to come up, Ms. Thacker, did Mr. D'Antonio or anyone
22 else at the Office of the State Engineer ever give you
23 any instructions or guidance about the role of the
24 Compact in your professional duties?

25 A. No.

Texas
Affirmative

1 Q. Would that be true in -- because I believe
2 you had two positions with the Office of the State
3 Engineer; is that right?

4 A. Actually, I've had three.

5 Q. Have you ever had any instruction or guidance
6 on how the Compact plays into your duties?

7 A. No.

8 Q. Thank you.

9 (Exhibit No. 1 was marked.)

10 Q. (BY MS. KLAHN) Okay. So the way this works
11 is you should have control of the document that you
12 should be able to see in front of you. Can you see
13 it?

14 A. I can.

15 Q. Okay. And this is a document we got from the
16 State of New Mexico somehow or the other in the
17 context of this litigation, and it starts with New
18 Mexico Bates No. 00210791, and it's a collection of
19 documents related to, I believe, the AWRM effort in
20 the lower Rio Grande. The first page is well metering
21 requirements, but I would like you to page down
22 through this to what should be PDF Page 17. And maybe
23 you can flip it so that it's the right way. Perfect.
24 Okay. So the title of this is, "Objectives for Lower
25 Rio Grande District-Specific Regulations for

Texas
Affirmative

1 Implementation of Active Water Resources Management in
2 the Lower Rio Grande Water Master District." I'd ask
3 you to take a look at these objectives, A through M.

4 A. Okay.

5 Q. And I'd like to draw your attention to the
6 first bullet point up there, Bullet Point A, "Protect
7 senior water rights from impairment through
8 administration of both surface and groundwater rights
9 within the Lower Rio Grande Water Master District by
10 priority administration or other methods as provided
11 by the AWRM regulations." Do you see that?

12 A. I do.

13 Q. So this is -- this was apparently an
14 objective for implementation of Lower Rio Grande
15 specific AWRM rules. Is this an objective of your
16 office in the absence of Lower Rio Grande specific
17 regulations?

18 MR. WECHSLER: Object to form.

19 Q. (BY MS. KLAHN) You can answer.

20 A. Well, I think the state engineer obviously
21 has the authority to administer based on priority
22 administration, but we haven't had to do that since
23 I've been here.

24 Q. Remind me what it would take for there to be
25 priority administration in your estimation.

New Mexico
Counter De...

1 A. I would think that someone would have to make
2 a call, and we'd do an investigation and figure out if
3 there were the issues that were -- if there were
4 problems that were indeed causing impairment that's
5 the person calling, and so we would have the -- the
6 state engineer has the authority to stop pumping from
7 junior wells if necessary, but fortunately, we haven't
8 had to do that.

9 Q. What about between surface water rights, have
10 you ever had to answer a priority call between surface
11 water rights?

12 A. I don't know. Not that I'm aware of.

Texas
Affirmative

13 Q. I'd like to draw your attention to Paragraph
14 H. This is an objective to establish a system for
15 administration as required to meet downstream
16 interstate delivery entitlements. What do you
17 understand that to mean?

18 A. I'm really not sure what that means. I need
19 direction on how we would do that. I'm not sure.

20 Q. I'm going to draw your attention to Paragraph
21 M, "Establish specific identification and enforcement
22 procedures for the water master to follow to curtail
23 illegal use of water, including use of water that
24 exceeds water rights, and to prevent waste of water
25 within the Lower Rio Grande Water Master District."

1 That was apparently a goal/objective of Lower Rio
2 Grande specific regulations under the AWRM. At this
3 time, are there no specific enforcement procedures for
4 the water master to follow to curtail illegal use of
5 water in the absence of AWRM regulations?

6 MR. WECHSLER: Object to form;
7 foundation.

8 A. Well, we have the water master district.
9 We've designated that. We're requiring metering and
10 so absolutely, we have the ability to identify and
11 enforce over diversions.

12 Q. (BY MS. KLAHN) You -- you've identified
13 metering as a way to identify and enforce over
14 diversions, but I'm interested in illegal use of
15 water, which could be broader than over diversions;
16 would you agree?

17 A. Well, it's a different designation, but, yes,
18 I agree.

19 Q. So other than metering, which allows you to
20 identify after the fact and -- and limit somebody the
21 year after an over diversion, not -- not at the actual
22 time of the over diversion, other than that, what
23 other tools or enforcement procedures are in place to
24 curtail illegal use of water?

25 MR. WECHSLER: Asked and answered.

1 Q. (BY MS. KLAHN) If -- if that's the only one,
2 tell me.

3 MR. WECHSLER: Well, I think she
4 answered this earlier with Mr. Leininger.

5 MS. KLAHN: I'm speaking to the witness.

6 Q. (BY MS. KLAHN) If that's the only one, tell
7 me.

8 A. Well, no, for instance, if a farmer puts a
9 pump in the river and doesn't have a water right
10 specifically to pull water from the river, yes,
11 absolutely, the water master can go in there and
12 require that farmer to pull the pump out of the river,
13 and that would be an illegal use of water.

14 Q. And -- and has that happened in your
15 experience when pumpers have been identified as
16 pulling water illegally out of the river? Has
17 Mr. Serrano gone out there and shut down the pumps?

18 A. Yes.

19 Q. When?

20 A. This was within this last year.

21 Q. Before that?

22 A. I believe so, but I -- I don't know of any
23 specific.

24 Q. So you, as the State of New Mexico today, can
25 identify one instance of the water master going and

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IN THE SUPREME COURT OF THE UNITED STATES
BEFORE THE OFFICE OF THE SPECIAL MASTER
HON. MICHAEL J. MELLOY

STATE OF TEXAS)
)
Plaintiff,)
) Original Action Case
VS.) No. 220141
) (Original 141)
STATE OF NEW MEXICO,)
and STATE OF COLORADO,)
)
Defendants.)

THE STATE OF TEXAS :
COUNTY OF HARRIS :

I, HEATHER L. GARZA, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that the above and foregoing answers of the witness, CHERYL THACKER, to the interrogatories as indicated were made before me by the said witness after being first remotely duly sworn to testify the truth, and same were reduced to typewriting under my direction; that the above and foregoing deposition as set forth in typewriting is a full, true, and correct transcript of the proceedings had at the time of taking of said deposition.

I further certify that I am not, in any capacity, a regular employee of the party in whose

1 behalf this deposition is taken, nor in the regular
2 employ of this attorney; and I certify that I am not
3 interested in the cause, nor of kin or counsel to
4 either of the parties.

5
6 That the amount of time used by each party at
7 the deposition is as follows:

- 8 MS. KLAHN - 00:39:49
- 9 MR. WECHSLER - 00:00:00
- 10 MR. LEININGER - 01:46:47
- 11 MR. WALLACE - 00:00:00
- 12 MR. HICKS - 00:17:46
- 13 MS. BARNCASTLE - 00:02:45

14
15 GIVEN UNDER MY HAND AND SEAL OF OFFICE, on
16 this, the 8th day of October, 2020.



Heather L. Garza

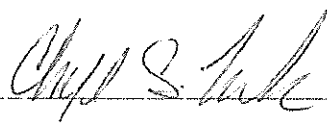
17
18 HEATHER L. GARZA, CSR, RPR, CRR
19 Certification No.: 8262
20 Expiration Date: 04-30-22

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S I G N A T U R E O F W I T N E S S

I, CHERYL THACKER, solemnly swear or affirm under the pains and penalties of perjury that the foregoing pages contain a true and correct transcript of the testimony given by me at the time and place stated with the corrections, if any, and the reasons therefor noted on the foregoing correction page(s).



CHERYL THACKER

Job No. 65671