

NO. 141 Original

In The
SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS
v.
STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF JANUARY 12, 2023, REMOTE
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at
11:00 a.m.

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P R O C E E D I N G S

1
2 **JUDGE MELLOY:** All right. Are we ready
3 to get started? This is in United States Supreme
4 Court Original No. 141, State of Texas versus State of
5 New Mexico and State of Colorado with United States as
6 intervenor. Let's start by taking appearances. For
7 Texas, Mr. Somach?

8 **MR. SOMACH:** Yes, Your Honor. This is
9 Stuart Somach, attorney of record for the State of
10 Texas. With me from my office are Theresa Barfield,
11 Sarah Klahn, Francis Goldsberry, and Robert Hoffman.
12 From the attorney general's office, either on the
13 phone or they will be on the phone, are Priscilla
14 Hubenak and Grant Dorfman; and also either on the
15 phone or will join is Bobby Skov, the Texas Rio Grande
16 Commissioner.

17 **JUDGE MELLOY:** Then, Mr. Wechsler, are
18 you going to enter the appearances for New Mexico?

19 **MR. WECHSLER:** Yes, Your Honor, good
20 morning. Jeff Wechsler for Montgomery & Andrews. For
21 the State of New Mexico, we also have Cholla Khoury,
22 the chief deputy for the attorney general's office;
23 Zach Ogaz from the New Mexico attorney general's
24 office; Lisa Thompson and Michael Kopp from Trout
25 Raley; John Draper and Corinne Atton from Draper &

1 Draper. We have Mike Hamman, the state engineer; the
2 Rio Grande Compact commissioner, Rolf
3 Schmidt-Petersen, the director of New Mexico
4 Interstate Stream Commission, and Nat Chakeres, the
5 general counsel for the Office of the State Engineer.

6 **JUDGE MELLOY:** Before I ask for other
7 appearances, let me ask you one quick question,
8 Mr. Wechsler. I remember a number of months ago,
9 there was some discussion about these settlement
10 negotiations and that there may be a change in
11 administration in the New Mexico Attorney General's
12 Office, is that -- is there or is there about to be a
13 new attorney general of New Mexico or is Mr. Balderas
14 going to continue on?

15 **MR. WECHSLER:** No, Your Honor. Mr. Bald
16 -- the former attorney general, Balderas, had -- was
17 term limited out. Our new attorney general is Raul
18 Torrez. We will file a change in the certificate of
19 service to reflect that.

20 **JUDGE MELLOY:** When does -- when does he
21 take office?

22 **MR. WECHSLER:** He was sworn in on
23 January 1st.

24 **JUDGE MELLOY:** Okay. So -- so you have
25 a new attorney general at this time?

1 **MR. WECHSLER:** Yes.

2 **JUDGE MELLOY:** All right. Thank you.
3 Then for Colorado, Mr. Wallace?

4 **MR. WALLACE:** Yes, good morning, Your
5 Honor. This is Chad Wallace for the State of
6 Colorado. Also from the Colorado Attorney General's
7 Office with us today is Preston Hartman. I also have
8 joining Kevin Reine, Colorado Compact Commissioner;
9 Mike Sullivan, Deputy State Engineer; and Craig
10 Cotten, the Engineer Advisor to the Compact.

11 **JUDGE MELLOY:** And then who do we have
12 on for United States?

13 **MR. LEININGER:** Good morning, Your
14 Honor, this is Lee Leininger for the United States.
15 Also for the Department of Justice, we have Judy
16 Coleman and Jennifer Najjar; from the Department of
17 Interior Solicitor's Office, Chris Rich and Shelly
18 Randel; and then from Bureau of Reclamation, Michelle
19 Estrada-Lopez.

20 **JUDGE MELLOY:** Thank you. Then for the
21 Albuquerque Bernalillo County Water Utility Authority?

22 **MR. BROCKMANN:** Good morning, Your
23 Honor. This is Jim Brockmann with the firm of Stein &
24 Brockmann for the Water Authority.

25 **JUDGE MELLOY:** City of El Paso?

1 **MR. CAROOM:** Good morning, Your Honor.
2 Doug Caroom and Susan Maxwell for the City of El Paso.

3 **JUDGE MELLOY:** City of Las Cruces?

4 **MR. STEIN:** Good morning, Your Honor.
5 This is Jay Stein for the City of Las Cruces. I'm
6 joined today by Adrienne Widmer, the interim director
7 of Las Cruces Joint Utilities, Jocelyn Garrison, the
8 acting city attorney, and Brad Douglas of the City
9 Attorney's Office.

10 **JUDGE MELLOY:** El Paso County Water
11 Improvement District No. 1?

12 **MS. O'BRIEN:** Yes, good morning, Your
13 Honor. Maria O'Brien for El Paso County Water
14 Improvement District No. 1. Also before you today is
15 counsel Renea Hicks, and joining from the District's
16 conference room, I believe we have board president,
17 Mr. Johnny Stubbs, our new general manager, Jay
18 Orales, and district engineer, Dr. Al Blair.

19 **JUDGE MELLOY:** Okay. Elephant Butte
20 Irrigation District?

21 **MS. BARNCASTLE:** Good morning, Your
22 Honor. Samantha Barncastle for EBI D, and with me
23 today is Dr. Phil King, our interim consultant.

24 **JUDGE MELLOY:** All right. Hudspeth
25 County Conservation and Reclamation District No. 1?

1 **MR. MILLER:** Good morning, Your Honor,
2 this is Drew Miller on behalf of the Hudspeth
3 District.

4 **JUDGE MELLOY:** And then New Mexico pecan
5 growers?

6 **MS. DAVIDSON:** Good morning, Your Honor.
7 Tessa Davidson on behalf of New Mexico pecan growers.

8 **JUDGE MELLOY:** New Mexico State
9 University?

10 **MR. UTTON:** Good morning, Your Honor.
11 This is John Utton on behalf of the University. Thank
12 you.

13 **JUDGE MELLOY:** And Southern Rio Grande
14 Diversified Crop Farmers Association.

15 **MR. OLSEN:** Good morning, Your Honor.
16 A.J. Olsen on behalf of the crop farmers.

17 **JUDGE MELLOY:** Have I missed anyone?

18 (No response.)

19 **JUDGE MELLOY:** Thank you. Well, what we
20 have scheduled this morning is a status conference. I
21 entered my ruling on the motion of the United States
22 to, in essence, strike the settlement agreement as
23 violative of the confidentiality provisions of the
24 settlement negotiations, and, of course, that motion
25 was denied, and the proposed decree has now been made

1 public as well as the supporting memorandum and
2 declarations. I should add that it is my intent to
3 continue to keep under seal; however, the motion that
4 the United States filed and the response because I do
5 believe that those documents contain information about
6 confidential settlement discussions and so I'm not
7 going to -- at least at this time and absent some
8 further motion will not be making those documents
9 public. They will remain sealed.

10 So what we have today, I guess, is to
11 talk about what we're going to do in February and if
12 the date is going to move, as I understand the United
13 States is going to request. If I understand the
14 status reports that were filed yesterday, all the
15 principal parties, that is Texas, New Mexico,
16 Colorado, and United States seem to be essentially in
17 agreement that the issue on approval or disapproval of
18 the proposed settlement agreement can be resolved on
19 the basis of the legal arguments contained within the
20 briefs and the brief that the United States will be
21 filing within a week or so and that a live evidentiary
22 hearing, beyond the declarations that each party is
23 submitting, is -- is probably not necessary. Quite
24 frankly, I had kind of wondered about that myself. It
25 seems to me that the decree sort of stands or falls on

1 its own. If -- if the settlement agreement is fair
2 and reasonable and doesn't adversely impact the rights
3 of any other party, then presumably it'll be approved.
4 If it does impact the rights of the United States or
5 some other party or is otherwise legally deficient,
6 then it won't be approved. But to me, those are
7 principally legal arguments, I assume. But maybe I'll
8 ask Mr. Somach first. Mr. Somach, do you believe
9 there's any evidence that's required beyond the
10 declarations that you have filed or may file as part
11 of any reply brief?

12 **MR. SOMACH:** No. I think you've
13 articulated exactly what the Compacting states'
14 position is, and quite frankly, what we had understood
15 the United States' position to be. We've had a couple
16 of meet-and-confer sessions with the United States
17 that this is the exact issue that we've talked about.
18 We believe it's the Compact and the -- the appendices
19 to the Compact. That's what's front and center. The
20 declarations merely go to provide some further
21 explanation to the extent that you or the Court would
22 need any extra explanation. But -- but our -- our
23 motion stands and falls on the Compact and on the
24 appendices to the Compact, and as you've articulated,
25 the question is whether it's fair and reasonable or

1 whether or not it adversely affects other parties. If
2 we were to have an evidentiary hearing, the evidence
3 we would put on would be what's in the declarations,
4 and the declarants would be the people that -- or the
5 witnesses would be the -- the folks that wrote the
6 declarations. The quote unquote evidence would be
7 whatever is in those declarations, but, again,
8 primarily what's before you is the decree and the
9 appendices, and we think that could be handled through
10 oral argument in -- in a day, two at the most.

11 **JUDGE MELLOY:** Well, maybe I'll -- I
12 guess if Mr. Wechsler or Mr. Wallace want to say
13 anything, I'll give them an opportunity, but I think
14 maybe I should turn to the United States.
15 Mr. Leininger, are you going to speak for the United
16 States, or is Ms. Coleman?

17 **MR. LEININGER:** Yes, Your Honor, I will.

18 **JUDGE MELLOY:** Okay. Do you -- are you
19 essentially in agreement on what Mr. Somach just said?

20 **MR. LEININGER:** No. I think there -- I
21 think there's a bit of a misunderstanding. We did
22 meet and confer with states counsel over two sessions,
23 and perhaps there was a little misunderstanding
24 amongst our respective positions. I mean, we -- we do
25 feel that we can go forward on the briefing and the

1 declarations that's part of the briefing to resolve
2 the objections that we have to their motion for entry
3 of the -- of the consent decree. We're going to raise
4 these threshold legal objections, and they can be
5 decided without testimony or findings of fact, but
6 it's a different question with regard to whether or
7 not we're moving forward on -- on deciding the motion,
8 which, you know, they -- the states have the burden
9 here of presenting whatever supporting information
10 which assures the Court that the consent decree is
11 reasonable, fair, adequate. There are -- there are
12 questions that may go to facts and require evidentiary
13 material. What we're asking for is that we proceed on
14 these briefing papers that you're going to receive,
15 have the oral argument in February.

16 **JUDGE MELLODY:** Well, what -- what do you
17 see as the -- as the factual issues that would require
18 an evidentiary hearing?

19 **MR. LEININGER:** There -- there may be
20 none. I think what -- what has to be decided here,
21 Your Honor, is that you see -- see the declarations
22 from the state. We will be having -- we will respond
23 with our declarants, too. I think right now, we have
24 five declarants identified with regard to the consent
25 decree and the implementation of the consent decree

1 questions that we feel are in dispute. But it does
2 not go to the legal issues. There are these threshold
3 foundational legal issues that I think the Court can
4 address, and we're asking that the oral argument be
5 directed toward those threshold legal issues, which
6 will be in all of our papers.

7 **JUDGE MELLOY:** Well, it almost sounds
8 like what we're talking about here are cross motions
9 for summary judgment, if you want to put it in a more
10 conventional civil procedure context. You -- each
11 side believes that the facts are essentially
12 undisputed that would support their respective
13 positions, and I -- I suppose at the end of the day,
14 there's always the possibility that we get into a
15 hearing and -- and there does -- it becomes obvious or
16 evident that there is a -- there is a fact dispute
17 that might require some evidence, but, I mean, I -- is
18 that kind of where you think we are in this,
19 Mr. Leininger?

20 **MR. LEININGER:** Yes.

21 **JUDGE MELLOY:** Essentially cross motions
22 for summary judgment?

23 **MR. LEININGER:** That's essentially a
24 correct summary, Your Honor, yes.

25 **JUDGE MELLOY:** So do I understand at

1 this point -- I don't want to put words in your mouth,
2 but you're saying that -- if I understand correctly,
3 what you're saying is that you don't know that there
4 are any fact disputes and that the -- and that the
5 issues, both approval or disapproval, can probably be
6 decided on the merits, but -- but you're not willing
7 to stipulate that a fact dispute couldn't arise?

8 **MR. LEININGER:** Correct. And I -- and I
9 think the Court also has to be satisfied that the
10 consent decree -- because consent decrees have certain
11 requirements for satisfaction of the Court to ensure
12 that there is no legal prejudice and the fact that it
13 is fair, reasonable, and adequate. So -- so if, in
14 the course of this briefing, questions come up
15 following legal argument or add legal argument, I
16 think it may be appropriate then that we would set a
17 future evidentiary hearing. But right now, our
18 position is, yes, we need to proceed on these
19 threshold legal issues, and we can do that on papers.

20 **JUDGE MELLOY:** But just so I understand,
21 there is the possibility that if -- if it's determined
22 there's no further evidentiary hearing or evidence
23 required, that I could recommend approval, I could
24 recommend disapproval without any further proceedings;
25 that -- that is a very real possibility that could

1 occur from this hearing. Is that your understanding.

2 **MR. LEININGER:** That is a possibility
3 with regard to whether or not we reveal any disputed
4 facts. The further -- the further question about
5 entry of a consent decree, Your Honor, however, may
6 require additional evidentiary hearing, and the
7 evidentiary hearing, for example, would be, as
8 Mr. Somach said, we understand that they would
9 basically stay with -- within the bounds of their
10 consent decree and the appendices. Their experts
11 would then be available to explain the decree and the
12 implementation of the decree. We would have an
13 opportunity to cross-examine to understand how these
14 mandates that are being forced upon the United States
15 would be implemented.

16 **JUDGE MELLOY:** What's your response to
17 that, Mr. Somach, if any?

18 **MR. SOMACH:** Well, it's -- it's
19 frustration more than a response. I don't understand
20 what Mr. Leininger is saying. You know, I had agreed
21 with the way you characterized it in a way as cross
22 motions for summary judgment. The decree is what it
23 is. The appendices are what they are, and they've got
24 to stand or fall on their own. You know, that's what
25 we -- that's what the settlement among the Compacting

1 states is. The question then becomes is it fair, is
2 it reasonable, does it adversely affect
3 inappropriately other parties, including the United
4 States. You know, some of that has been addressed --
5 a lot of that has been addressed in the briefing
6 itself. We assume United States is going to contest
7 that when they file their motion, and we'll respond to
8 that, and that will be what's before you on the 6th,
9 and we believe you will be able to make a decision in
10 terms of your recommendation to either recommend what
11 we've proposed or -- or to indicate that -- that it's
12 not sufficient. That's what I understand the process
13 to be. The other stuff that Mr. Leininger is talking
14 about, I -- I'm not quite sure what that means. I
15 don't know how that would roll out. Certainly if you
16 were to say I want more evidence, that's always a
17 possibility, and -- and we would then decide -- what
18 you would tell us, we would then decide how to put
19 that on. But -- but absent that direction or absent a
20 better grasp of what Mr. Leininger is saying, we think
21 it all could be resolved with no further evidence,
22 other than what will be before you when the briefing
23 is done, and that you could make a recommendation from
24 that.

25 **JUDGE MELLOY:** Does either New Mexico or

1 Colorado want to be heard on this issue?

2 **MR. WECHSLER:** Briefly, Your Honor, if I
3 may. I want to emphasize that this is the opportunity
4 for the United States to offer any opposition. We
5 filed our joint motion. We've asked for entry of the
6 consent -- the consent decree. We think we've met our
7 burden. The United States now has to oppose that if
8 they intend to oppose the entry of the consent decree,
9 and that means making every argument, both legal and
10 factual, that they have in opposition to that entry of
11 that consent decree, and my full expectation, I think
12 it's been our expectation since October, is that at
13 the end of this hearing, you will be able to make your
14 recommendation to the Court as to whether or not the
15 consent decree should be entered or not. This idea
16 that the United States has that there might be some
17 subsequent evidentiary hearing or there needs to be
18 more time, which I agree with Mr. Somach, I don't
19 understand the rationale. I mean, if they have
20 evidence they intend or want to put on, now is the
21 time. February is their opportunity, and if they
22 don't put it on then, then they've waived that
23 opportunity. And the last thing I'd say on that is we
24 raised this issue in early November in that expedited
25 motion on -- on procedures, and one of the reasons is

1 we were having conversations with the United States at
2 that time and we weren't making much progress and we
3 wanted to raise that opportunity and offer the United
4 States and you the opportunity to think about the way
5 this hearing would go. Now, the United States chose
6 not to respond to in any way that motion, and they
7 can't now be raising issues about that evidentiary
8 hearing.

9 **MR. WALLACE:** Your Honor, if I may for
10 Colorado, I would like to state that we do disagree
11 with the position of the United States and do not
12 think that this should be treated in the manner as
13 cross motions for summary judgment for -- for several
14 reasons, and as my colleague from New Mexico stated,
15 the -- the procedures and the burden of proof are laid
16 out, along with the legal support for them, in the
17 States' joint motion for hearing procedures, and one
18 of the most informative cases on that subject is
19 United States versus Oregon. If Your Honor would
20 review the case, you would see that in that situation,
21 there's a consent decree. It was opposed by the state
22 of Idaho. The 9th Circuit laid out clearly that this
23 is not, in deciding whether to enter a consent decree
24 over objection of an intervening party, which Idaho
25 was in that situation. The Court's task is not to

1 decide the merits of the underlying dispute so there
2 is no judgment on the case so summary judgment is
3 inappropriate. Instead, the Court simply must be
4 satisfied that the consent decree is fair and
5 reasonable, and what that means is it takes care of
6 the issues that are part of the scope of the original
7 dispute. The parties aren't using a consent decree to
8 try and put in other issues that were not originally
9 raised. In this case, it's the Compact apportionment
10 among the states, and that the way in which that was
11 settled is not somehow illegal. As Mr. Somach for
12 Texas has said, the Court can be satisfied on that
13 solely on the face of the consent decree itself, along
14 with the further declarations that explain that
15 consent decree. Contrary to what the U.S. has said,
16 the States have no further burden. Our burden has
17 ended there, proved that it is fair, reasonable,
18 within the scope of the dispute. Any party objecting
19 to the consent decree has the full burden to prove why
20 the consent decree shouldn't be entered. It's not a
21 discussion of the merits of the consent decree, but
22 whether the objecting parties' legal interests are
23 impaired. And, again, in that case, U.S. versus
24 Oregon, the Court laid out it is a heavy burden by the
25 objector that must be satisfied by clear and

1 convincing evidence. So that's what this hearing
2 would be about is not how the consent decree would
3 work or whether it's sufficient, but the hearing is
4 actually the one single opportunity for the United
5 States to present evidence on whether the consent
6 decree impairs its rights under the Compact. So this
7 is not an opportunity to split it into two. This is
8 the one shot the U.S. has whether it's legal or
9 factual to make an argument the consent decree somehow
10 violates its Compact rights.

11 **JUDGE MELLOY:** Well, but I understand
12 from what you're saying, Mr. Wallace, that you agree
13 that the burden is on the Compacting states to prove
14 the decree is fair and reasonable and within the scope
15 of the dispute, and you have that burden.

16 **MR. WALLACE:** Yes.

17 **JUDGE MELLOY:** And it's your position
18 that the burden then shifts -- and, of course, the
19 United States can resist that through declarations,
20 legal arguments, whatever, right, and evidence if they
21 want to put it on?

22 **MR. WALLACE:** They could. My position
23 would be, you know, we -- we made a prima facie
24 showing, and then, you know, we kicked the ball over
25 to see what the U.S. wants to do with that. But, yes,

1 whether it's fair, within the scope of the Compact is
2 on the -- the settling parties to prove.

3 **JUDGE MELLOY:** And it's your position --
4 I'm sorry. Go ahead.

5 **MR. WALLACE:** I was just going to say,
6 as Mr. Somach said, that could really be judged on the
7 basis of the documents themselves.

8 **JUDGE MELLOY:** So your position is that
9 if the United States is taking the position that it
10 adversely impacts their interest, they have that
11 burden to show what that impact is?

12 **MR. WALLACE:** By clear and convincing
13 evidence, yes.

14 **MR. LEININGER:** Your Honor, if I may
15 respond.

16 **JUDGE MELLOY:** You may.

17 **MR. LEININGER:** Well, I -- I just heard
18 two things, two very different things from counsel.
19 Mr. Wechsler says that the United States had its
20 opportunity to raise these issues. You have not seen
21 our responsive briefing yet. You haven't seen our
22 declarations yet. We agree with Mr. Wallace that the
23 burden is on the states. The states are the movants
24 here. The burden is on the states to prove
25 fundamentally for purposes of the consent decree that

1 it is fair, reasonable, and adequate. That is
2 certainly their burden, and that is certainly
3 something the Court has to be satisfied with, and the
4 question is if we can proceed without evidence on that
5 based upon the declarations, we think is something
6 that you have to decide upon hearing -- upon seeing
7 our response and declarations, and then whatever
8 arguments you would like us to entertain in February.
9 The fact that they can or cannot make -- meet that
10 burden, I think you have to await or we have to await
11 full briefing and supporting of these papers, proceed
12 with the argument on the papers, and then, you know,
13 as you say, it's a quasi motion for summary judgment.
14 You have to be satisfied that all disputes are
15 resolved.

16 **JUDGE MELLODY:** Do you disagree with
17 Mr. Wallace that if one of the arguments that you are
18 going to raise is that you're adversely impacted in
19 some way by the settlement agreement, that that's your
20 burden to show the impact?

21 **MR. LEININGER:** Certainly, Your Honor,
22 that should go into your judgment with regard to
23 whether this is fair, reasonable, and adequate. There
24 will be, I think, in our responses, besides the -- the
25 legal deficiencies of the consent decree, there will

1 be statements of our -- of our declarants as to how --
2 you know, questioning how, in fact, this consent
3 decree could practically be applied. So it goes to
4 the question of adequacy. It goes to the question of
5 reasonableness and fairness. But what you're going to
6 see are these legal questions that I don't think are
7 going to require us to go any further with regard to
8 an evidentiary hearing, and that's what we want the
9 Court to have the opportunity to review our papers,
10 our responsive briefing, our declarations. The states
11 will have the opportunity to reply and then we proceed
12 to oral argument.

13 **JUDGE MELLODY:** Well, what do you
14 understand as part of preparing a brief, what -- as I
15 understand, from what you're saying and have stated in
16 the status report and so on and have stated previously
17 that there is some very fundamental flaw with this
18 agreement that makes it legally insufficient? Can you
19 give some preview of what is that flaw? What do you
20 think is -- where do you think the fundamental flaw is
21 that -- that -- that makes this agreement not
22 approvable?

23 **MR. LEININGER:** You've asked the parties
24 to address those four questions in your -- in your
25 ruling, and we have. We've done that right up --

1 right up front. Your Honor, I think each of those
2 would compel the Court to decline to enter this
3 consent decree. I hesitate to give any preview right
4 now because this is unfortunately subject to levels of
5 review, including the Solicitor General's review,
6 before we can be satisfied that these are -- these are
7 arguments that we can present to the Court. But --
8 but you will -- I expect you will see exactly that
9 type of response as to what the legal deficiencies are
10 with the consent decree consistent with your four
11 questions.

12 **JUDGE MELLOY:** Well, and I -- and I -- I
13 want to emphasize, those are only -- I did not want to
14 limit your -- your response to those four. I hope
15 that was clear. If there's -- there may be other
16 issues, but those are ones that certainly we -- we
17 talked about.

18 **MR. LEININGER:** Absolutely. No, there
19 are other issues, and they -- they will be presented.

20 **JUDGE MELLOY:** Well, let's -- I think at
21 this point, let's -- let's plan to go ahead with just
22 argument based upon the papers and the declarations,
23 and if at the end of the day, it turns out that there
24 is something, hopefully it'll be very minimal that we
25 can get put on by way of an evidentiary record in --

1 in an expedited fashion, but let's plan to just --
2 this just to be an oral argument. I had been giving
3 some thought to if -- we were going to be doing a
4 five-day evidentiary hearing to reconsidering the
5 location, but if it's going to be just oral argument,
6 I -- I think it would be better to do it here. It's
7 as convenient as everybody going to El Paso just
8 about, except for the people who are actually there,
9 and we can set up a live feed and can work with
10 Worldwide to broadcast it back to those folks who
11 don't want to make the trip up, and so I think it's
12 just as easy to do a day of oral argument here as it
13 would be any place else, so let's plan -- let's plan
14 to do it here.

15 I understand, Mr. Leininger, that you
16 want the hearing to be moved by a week? Do you want
17 to talk about that?

18 **MR. LEININGER:** Yes, Your Honor. If you
19 don't mind, not -- not in any express detail, but we
20 do have a conflict. It is a personal medical matter
21 for that previous week, the 6th and 7th, so we do ask
22 that if -- if at all possible, we have the hearing the
23 following week, the week of February 13th.

24 **JUDGE MELLOY:** What's the position of
25 the states on that?

1 **MR. SOMACH:** Well, Your Honor, you know,
2 this is the first time we've been told that it was the
3 nature of a medical issue. We -- you know, we're of
4 the mind that that February 6th date has been set for
5 a long time, and I won't embarrass Mr. Wechsler too
6 much, but, I mean, he -- he did do a lot of -- of work
7 in terms of avoiding the conflict he had on those
8 days. We've made plans because of that date. If you
9 recall, that date actually is -- is later than what I
10 had originally wanted. I think you granted a two-day
11 extension on everything, which moved everything to
12 February 6th. If -- you know, it is just this
13 constant delay. We make plans, then we have to -- to
14 modify plans, and so we would prefer to keep the
15 February 6th date, if that's at all possible.

16 **JUDGE MELLOY:** Let me ask you this,
17 Mr. Leininger: You -- you seem to indicate that the
18 -- the conflict was on the 6th and the 7th. What
19 about later that week if we were, say, to do it on
20 Thursday and Friday is a spillover day, if we had to,
21 the 9th and 10th? Would that work?

22 **MR. LEININGER:** Well, and I apologize,
23 Your Honor. There has been some texting I just
24 received with regard to the potential for this being a
25 one-day hearing. There was some question that we had

1 with states' counsel as to who's going to be allowed
2 to make arguments and whether or not we might spill
3 into a second day, and that sort of bears upon this
4 question of availability on the 7th. I think if we
5 proceed on the 6th --

6 **JUDGE MELLOY:** Well, what I -- but I
7 said the 9th and 10th, the end of that week.

8 **MR. LEININGER:** I think --

9 **JUDGE MELLOY:** If -- if your conflict is
10 on the 6th/7th, could we do it on the 9th and then --
11 which is Thursday, and then if it does spill over,
12 we've got -- we have Friday available.

13 **MR. LEININGER:** And I just received an
14 e-mail that Thursday/Friday is worse for us.

15 **JUDGE MELLOY:** Worse?

16 **MR. LEININGER:** Worse, yes. So, Your
17 Honor, if we -- if we proceed with a one-day hearing
18 on the 6th, then we don't have a conflict.

19 **JUDGE MELLOY:** Well, let me -- before I
20 make a final decision, let me ask this: One of the
21 issues that was raised in the status report or
22 emergency -- expedited motion was who would be allowed
23 to speak. My -- my thought is it would just be the
24 four parties, but I guess I want to give everybody a
25 chance to respond to that. Certainly the amici can

1 file written submissions, but I was -- for purposes of
2 an oral presentation, I was -- I thought we'd limit it
3 to the four parties. Does anybody object to that or
4 have anything they want to say about that?

5 **MS. O'BRIEN:** Your Honor, if I may?

6 **JUDGE MELLOY:** Go ahead.

7 **MS. O'BRIEN:** Maria O'Brien for El Paso
8 County Water Improvement District No. 1. Your Honor,
9 in the states' status report, they articulate that
10 they believe the hearing set for February should be
11 based on the December 15th paradigm in terms of how
12 the -- the Court proceeded. I'm sure you recall that
13 that hearing was on briefing that was submitted solely
14 with regard to the United States and the Compacting
15 states. In fact, no amici were even served or had
16 access to those pleadings that were filed, and we
17 observed but did not participate. With regard to
18 approval of the states-only proposed consent decree,
19 this is a wholly different matter. First, as Your
20 Honor knows, you set specifically a date for amici to
21 be able to respond, file responsive briefs, and
22 throughout this case, when amici have filed any kind
23 of briefing, we have been granted the right to then
24 articulate, as necessary, you know, explanation or
25 articulations regarding an oral presentation of those

1 arguments, and I think we have done that very
2 efficiently and succinctly, and that would be the plan
3 in this instance. I would note, too, Your Honor, this
4 is obviously of great and significant import, the
5 issue of a proposed consent decree, and it -- as the
6 United States will show in its briefing, and we
7 believe we will show in ours, it's significantly and
8 greatly in detrimental ways affects certainly the El
9 Paso irrigation district, and for that -- that's the
10 reason we're submitting a responsive brief, and we
11 believe it appropriate to grant us some amount of time
12 to present oral argument on the brief that we submit.

13 **JUDGE MELLOY:** Anybody else want to be
14 heard on that issue?

15 **MR. STEIN:** Your Honor, this is Jay
16 Stein for the City of Las Cruces. The New Mexico
17 amici will also be submitting a briefing in support of
18 the consent decree on the January 20th date, and we
19 would similarly request the opportunity to be heard in
20 short oral argument and to answer any questions that
21 Your Honor may have with respect to the amici
22 interests.

23 **MS. BARNCASTLE:** And, Your Honor,
24 Samantha Barncastle for EBID. I would just say there
25 are a multitude of issues that affect all of the amici

1 that justify allowing us to speak to the Court in this
2 regard. It's been done in the past. We've all
3 participated in all of the major briefing and oral
4 arguments in the past. But in this particular issue
5 as it regards EBID and EP No. 1, the issue is a little
6 more direct, specifically related to EBID where we
7 will be arguing that the State of New Mexico has
8 short-cutted two different legal proceedings to define
9 EBID's rights. One is the federal district court case
10 and one is the adjudication of our rights. So there
11 is a particular provision in the decree that we
12 believe shortcuts us and purports to resolve issues
13 related to our state-based water rights without our
14 participation whatsoever. So I would be remiss if I
15 didn't say that we have to argue adamantly for
16 participation at all levels because of where this will
17 affect us otherwise.

18 **MR. WALLACE:** Your Honor, if I may for
19 Colorado, Colorado opposes any efforts to have anyone
20 other than parties present argument at the hearing.
21 It's a consent decree among the Compacting states,
22 Compact apportionments. The United States as an
23 intervenor party is entitled to present evidence
24 regarding potential injury to its rights. The amici
25 are certainly welcome to file amicus briefs and can

1 adequately inform the Court that way.

2 **JUDGE MELLOY:** All right. Well, let's
3 plan then -- we'll hold the hearing on February 6th,
4 which I understand from what you're saying,
5 Mr. Leininger, does not create a conflict. What I'm
6 going to do is -- and I'm not going to necessarily put
7 a stop watch on this, but generally give the
8 Compacting states -- well, let me think about this for
9 a second. I think -- I would hope two hours would be
10 adequate to divide between the three of you as you
11 deem appropriate, and who wants to -- who speaks
12 first, how you divide up that time, I'll let you
13 decide. We'll then give the United States equal
14 amount of time to respond. I'll give the amici one
15 hour to -- a half an hour for the amici to divide up
16 between themselves for the proponents of the -- of the
17 settlement. That basically would be Mr. Stein and his
18 group, and a half an hour for Ms. Barncastle,
19 Ms. O'Brien, and any other opponents who are
20 supporting the United States' position to speak on --
21 on their behalf, and then I'll give -- I'll give the
22 Compacting states a half an hour of rebuttal. Does
23 that -- does that sound reasonable? Does that sound
24 like enough?

25 **MR. SOMACH:** Yes, Your Honor. And the

1 Compacting states will coordinate that two-hour
2 presentation in order to be efficient so that --
3 that's fine.

4 **MR. STEIN:** That will be sufficient for
5 us, Your Honor.

6 **JUDGE MELLOY:** All right. Then that
7 will be what we will do then. And certainly, Ms.
8 Barncastle and Ms. O'Brien, since you are essentially
9 aligned at this point with the United States, you
10 know, if you want to coordinate some of the arguments
11 that you want to make and incorporate them into the
12 United States' two hours, you know, you're certainly
13 free to do that. I probably don't have to tell you
14 that.

15 You had raised in your status report,
16 Mr. Somach, Mr. Wechsler, Mr. Wallace, the issue of
17 whether I wanted supplemental briefs addressed to the
18 issues that we specifically identified in the ruling
19 on the motion to strike and -- and I don't think we
20 need supplemental briefs. If you address them,
21 however, in the reply brief, that -- that will be
22 adequate.

23 Anything else we need to talk about?
24 And what I may do is -- let me -- let me look at the
25 calendar for a second. The responsive briefs are due

1 on the 20th. What date did I give you, Mr. Stein, for
2 your brief? It was the 20th, as well? I can't
3 remember now. Since you happen to be on the screen,
4 I'm asking you.

5 **MR. STEIN:** Yes, Your Honor. It was the
6 20th of January.

7 **JUDGE MELLOY:** Okay. And unfortunately,
8 I'm going to be gone that following week, but I -- I
9 may -- I may do a -- just a short status conference on
10 the 30th, that Monday, one week ahead of time, just to
11 see if there are any last-minute issues we need to
12 iron out before we get everybody here and so I think
13 we'll -- I think I'll set something for a brief status
14 conference, same time, on the 30th, just to see if
15 there's anything we need to resolve.

16 The -- will any of the parties need
17 space in the courthouse? For oral argument, I assume
18 not, but if you need some place, let me know. We can
19 set something up for you. I assume the United States
20 can work out of the U.S. Attorney's Office if they
21 need space, but if any of the other parties or amici
22 want some space, we can -- we can arrange that.

23 Heather, are you going to be available
24 that date?

25 **THE REPORTER:** Yes, I'll be available

1 that date.

2 **JUDGE MELLOY:** Okay. So I assume we'll
3 have you do the reporting. We'll also arrange through
4 Worldwide to have a live feed back to the respective
5 offices so that people can observe the oral argument
6 without being physically present. I won't allow any
7 participation by video, but all the participation will
8 have to be in person, but we will allow -- we will
9 have access for a video feed and audio.

10 Anything else you can think of we need
11 to talk about today?

12 **MR. LEININGER:** Your Honor,
13 Mr. Leininger. The oral argument on February 6th will
14 be starting at 9:00 a.m.?

15 **JUDGE MELLOY:** Yes. We'll start at
16 9:00. Give us a full day. I think we should be able
17 to -- I've got to believe that we'll pretty well have
18 exhausted this after a day of talking.

19 Anything else?

20 (No response.)

21 **JUDGE MELLOY:** All right. If not, then
22 we'll be adjourned. Thank you, everyone.

23 (The proceedings adjourned at 11:46 a.m.)

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CERTIFICATE

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 foregoing pages comprise a true, complete and correct transcript of the proceedings had at the time of the status hearing.

I further certify that I am not, in any capacity, a regular employee of any of the parties in whose behalf this status hearing is taken, nor in the regular employ of any of the attorneys; and I certify that I am not interested in the cause, nor of kin or counsel to any of the parties.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on this, the 18th day of May, 2023.



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