

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 24, 2022, 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

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2 **JUDGE MELLOY:** All right. Should we get
3 started, everyone? This is a status conference in
4 Original No. 141 -- Supreme Court Original No. 141,
5 Texas versus New Mexico, Colorado, and the United
6 States. Let me start by asking who we have on the
7 call or on the Zoom call. Who's on for Texas?

8 **MR. SOMACH:** Yes, Your Honor. This is
9 Stuart Somach for the State of Texas, and with me are
10 Theresa Barfield, Sarah Klahn, Rich Deitchman, Francis
11 Goldsberry, and Robert Hoffman, all of my office.
12 Also on the phone from the Attorney General's Office
13 are Grant Dorfman and Priscilla Hubenak, and I believe
14 Bobby Skov, the Rio Grande Commissioner for Texas, and
15 the Engineer Advisor to the Rio Grande Commissioner,
16 Suzy Valentine. If they're not on, they will be on.

17 **JUDGE MELLOY:** All right. And for New
18 Mexico, who do we have on? Mr. Wechsler, are you
19 there? Who do we have -- anybody on for New Mexico?

20 **MS. KHOURY:** Your Honor, this is Cholla
21 Khoury for New Mexico with the AG's office. I see
22 that Mr. Wechsler appears to be having technical
23 difficulties with his sound. It doesn't seem like he
24 could hear us or we can hear him. So for New Mexico,
25 I'm going to give it a shot. I apologize if I leave

1 someone off, but this is Cholla Khoury from the New
2 Mexico Attorney General's Office. With me, I have
3 Jeff Wechsler from Montgomery & Andrews, Corinne Atton
4 with New Mexico -- I'm going down the list -- Chris
5 Shaw from the ISC. Excuse me. This is not as I would
6 have it. John D'Antonio, the former state engineer;
7 Estevan Lopez; Michael Kopp; Zach Ogaz from the
8 Attorney General's Office. I'm sorry. I'm probably
9 butchering it. That's who I have at a quick glance.

10 **JUDGE MELLOY:** Was there anybody from
11 New Mexico that was not identified other than
12 Mr. Wechsler?

13 **MR. DRAPER:** Your Honor, this is John
14 Draper for the State of New Mexico.

15 **JUDGE MELLOY:** All right.

16 **MS. THOMPSON:** Good morning, Your Honor.
17 Lisa Thompson for the State of New Mexico.

18 **MR. LONGWORTH:** Good morning, Your
19 Honor. This is John Longworth, State of New Mexico.

20 **MR. SCHMIDT-PETERSEN:** And, Your Honor,
21 this is Rolf Schmidt-Petersen, ISC Director for the
22 State of New Mexico.

23 **JUDGE MELLOY:** All right. Okay.

24 **MR. WECHSLER:** I apologize for that,
25 Your Honor. Are you able to hear me now?

1 **JUDGE MELLOY:** I can. All right.

2 **MR. WECHSLER:** Good. Thank you.

3 **JUDGE MELLOY:** Okay. Do we have
4 everybody from your side, Mr. Wechsler? Did we miss
5 anybody?

6 **MS. PEGRAM:** This is Page Pegram,
7 Engineer Advisor for New Mexico.

8 **JUDGE MELLOY:** Thank you.

9 **MR. SULLIVAN:** And Greg Sullivan with
10 Spronk Water Engineers.

11 **JUDGE MELLOY:** Thank you. Anyone else?

12 **MR. ARMSTRONG:** Jonas Armstrong with New
13 Mexico.

14 **JUDGE MELLOY:** I'm sorry. I didn't hear
15 that last name. Jonas?

16 **MR. ARMSTRONG:** Armstrong.

17 **JUDGE MELLOY:** Jonas Armstrong. Thank
18 you.

19 For Colorado, Mr. Wallace, are you on?

20 **MR. WALLACE:** Yes, I am. Good morning,
21 Your Honor. This is Chad Wallace for the State of
22 Colorado, joined also this morning by Preston Hartman.

23 **JUDGE MELLOY:** Okay. Then for the
24 United States, I saw Mr. Leininger earlier. Who else
25 do you have on, Mr. Leininger?

1 **MR. LEININGER:** Good morning, Your
2 Honor. For the United States Department of Justice,
3 we have Judith Coleman and Jennifer Najjar and Seth
4 Allison. From the Department of Interior Solicitor's
5 Office, we have Chris Rich, Shelly Randel; and from
6 the Department of Interior Bureau of Reclamation, Ian
7 Ferguson, Michelle Estrada-Lopez.

8 **JUDGE MELLOY:** All right. Then
9 Albuquerque Bernalillo County Water Utility Authority?

10 **MR. BROCKMANN:** Good morning, Your
11 Honor. This is Jim Brockmann for the Albuquerque
12 Bernalillo County Water Utility Authority.

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

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

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

17 **MR. STEIN:** Good morning, Your Honor.
18 This is Jay Stein for the City of Las Cruces. Joining
19 me is Delila Walsh, the director of Las Cruces
20 Utilities; Adrienne Widmer, the assistant director;
21 and Robert Caballo from the City Attorney's Office.

22 **JUDGE MELLOY:** All right. El Paso
23 County Water Improvement District No. 1?

24 **MS. O'BRIEN:** Good morning, Your Honor.
25 Maria O'Brien for El Paso County Water Improvement

1 District No. 1. With me this morning is Renea Hicks;
2 the general manager for the district, Jesus Reyes; and
3 the district engineer, Dr. Al Blair.

4 **JUDGE MELLOY:** Elephant Butte Irrigation
5 District?

6 **MS. BARNCASTLE:** Good morning, Your
7 Honor. Samantha Barncastle for the Elephant Butte
8 Irrigation District, and with me this morning is our
9 treasury manager, Gary Esslinger, and our district
10 engineer, Dr. Phil King.

11 **JUDGE MELLOY:** Thank you. Hudspeth
12 County Conservation and Reclamation District No. 1?
13 Anybody on for Hudspeth County?

14 (No response.)

15 **JUDGE MELLOY:** All right. Then New
16 Mexico pecan growers?

17 **MS. DAVIDSON:** Good morning, Your Honor.
18 Tessa Davidson for New Mexico pecan growers.

19 **JUDGE MELLOY:** All right. Anybody on
20 for New Mexico State University?

21 **MR. UTTON:** Yes, Your Honor. This is
22 John Utton. Good morning.

23 **JUDGE MELLOY:** Southern Rio Grande
24 Diversified Crop Farmers Association?

25 **MR. OLSEN:** Good morning, Your Honor,

1 A.J. Olsen.

2 **JUDGE MELLOY:** All right. I assume
3 nobody is on for State of Kansas.

4 All right. Oh, I should add, I did see
5 our -- our mediator, Judge Boylan, on so I know he's
6 on, as well. Did I miss anybody?

7 All right. If not, I did receive a
8 short e-mail from Judge Boylan over the weekend
9 indicating that you had three days of mediation.
10 You're progressing, but I guess not there yet would be
11 the way to put it. Where do you think you are,
12 Mr. Somach?

13 **MR. SOMACH:** Well, we've spent quite a
14 few -- quite a bit of time now, we've had, I think, 8,
15 9, 10, 11, 12, 13 -- roughly two weeks straight of
16 face-to-face meetings. In addition to that, we've had
17 significant meetings that took place among technical
18 folks separate and apart from the meetings that we've
19 had where they've reported back to the -- to the
20 principals in terms of moving forward with the -- with
21 the mediation. State of Texas is optimistic that we
22 will be able to find a path forward. Optimism isn't
23 certainty, of course, but -- but we are optimistic.
24 We certainly believe that all the parties are working
25 toward a resolution -- settlement resolution in good

1 faith.

2 You know, the significant issue we have
3 is we have a trial date coming up shortly. We have a
4 lot of work to do, technical as well as sitting down
5 and -- and moving through the mediation, and so one of
6 the things that we have discussed is the question of
7 whether or not we need more time. This goes to the
8 question that got raised last time about a potential
9 stay, and I -- I believe, but I'll let the other
10 parties and Judge Boylan address this also, but from a
11 State of Texas perspective, we believe that a
12 continuance or stay of the trial date would facilitate
13 our being able to -- to obtain a settlement, if a
14 settlement is obtainable. We have, right now,
15 scheduled technical meetings with report backs in
16 early February, February 4th. We have meetings that
17 we've scheduled among the principals, four meetings,
18 two the week of the -- for the 7th -- I'm going to
19 forget the dates, but two in the second week of -- of
20 -- of February in Denver, and two the 23rd and 24th, I
21 think, also in Denver, Denver being selected because
22 most parties can get there easily with one -- with no
23 -- no layover anywhere. But we are -- we are moving
24 diligently so we've got a schedule in mind in terms of
25 moving forward.

1 I'm not sure if that entirely responds
2 to your question, but -- but at least that, from the
3 State of Texas' perspective, is our view of where
4 we're at right now.

5 **JUDGE MELLOY:** Well, I do have a couple
6 questions, but before I turn to those, let me ask the
7 principals what their position is on both the issue of
8 where they think you are in terms of settlement and,
9 also, Mr. Somach's suggestion that the trial be
10 continued and the case stayed while the negotiations
11 proceed. Mr. Wechsler, what's New Mexico's position?

12 **MR. WECHSLER:** Thank you, Your Honor.
13 We agree with much of what Mr. Somach just said. We
14 appreciate the efforts of all of the parties and of
15 Judge Boylan. We also are very encouraged by the
16 progress that are being made, but as you know, these
17 are -- it's a case with a number of complex and
18 nuanced issues. We think that settlement has the
19 potential for a more creative and flexible solution
20 than litigation does, and so we -- we certainly think
21 that continued talks and working towards a mutual
22 agreement makes sense. We also agree that a
23 settlement can't be reached in the next, say, several
24 weeks, and, therefore, it's important to be able to
25 devote our resources in the next two/three months to

1 seeing if we can't come to an agreement, and then only
2 at that point if it's not possible to reach an
3 agreement, turning to -- back to the litigation.

4 And so we think it's a good idea to stay
5 the March 14th date but just set a firm date. I
6 understand given your schedule, we're probably looking
7 at August of this year, and I also think it would be
8 important to ask the parties to provide status reports
9 to you with a final status report probably at the end
10 of May as to whether or not we want to hold that
11 August trial date, if that's still possible.

12 **JUDGE MELLOY:** Okay. Mr. Wallace,
13 what's your position?

14 **MR. WALLACE:** Thank you, Your Honor.
15 Colorado agrees with the other parties that we're
16 optimistic about the talks and think that the parties
17 are making progress and agree with the requests that
18 they're making of you this morning.

19 **JUDGE MELLOY:** Mr. Leininger, what's
20 your position?

21 **MR. LEININGER:** We -- we concur with
22 other counsel's statements, Your Honor. It was an
23 intense three days of negotiations last week, and
24 we're encouraged by the results. We're committing
25 quite a bit of resources from our Reclamation

1 engineers toward this effort. We think there is a
2 path -- potential path to settle this case and so we
3 could concur with the request for stay of the current
4 March 14th restarted trial and allow the parties to
5 continue their settlement efforts.

6 **JUDGE MELLOY:** Well, I think I said this
7 back in the spring of 2020 when -- when our original
8 mediator was selected and we started talking about the
9 possibility of mediation and I think I said that if we
10 got to a point where the parties were asking for a
11 stay to allow settlement to go forward, then I would
12 be guided to a large extent by the views of the
13 mediator so I'm glad Judge Boylan is here. I guess
14 I'd ask for his views on where he thinks we are and
15 whether a stay is appropriate at this time, given the
16 fact that probably means we won't start the trial for
17 a few months.

18 Where do you think we are, Judge?

19 **JUDGE BOYLAN:** Good morning, Judge, and
20 thank you. I would confirm each of the comments made
21 by the other attorneys and believe that it's
22 appropriate to have the Court consider a continuance.
23 It's very complex. Everyone has been working very
24 hard, and I believe that if we get a trial date in
25 March, it would not allow the parties to really

1 adequately and fully address their settlement efforts,
2 and I'm hoping that the Court is open to the request
3 that it be continued to a later date.

4 **JUDGE MELLOY:** Okay. Well, let me ask
5 this before I make any final decision: Do any of the
6 amici want to be heard on this issue?

7 (No response.)

8 **JUDGE MELLOY:** I assume that silence is
9 acquiescence at this point.

10 **MS. O'BRIEN:** Your Honor, I would just
11 like to briefly comment. Maria O'Brien for El Paso
12 County Water Improvement District No. 1. I think we
13 would support what was articulated to the extent that
14 we have been directly involved with discussions and
15 understand there has been progress made, and we think
16 the parties should be allowed an opportunity to pursue
17 a possible path forward to settlement and would
18 articulate that we think that the District's
19 involvement in a potential successful settlement is --
20 is critical, and we stand ready to be involved and
21 assist as appropriate in that effort.

22 **JUDGE MELLOY:** Have you been involved in
23 any of the discussions, Ms. O'Brien?

24 **MS. O'BRIEN:** I would say indirectly, we
25 have been. The issues are -- I think wouldn't

1 surprise Your Honor -- directly impacting issues that
2 are unique to the districts and Reclamation in terms
3 of trying to find a path forward. So, yes, we have
4 been involved. I would say it's been more indirect at
5 this point in terms of communications through and with
6 United States. A little bit more this last three
7 days, but I think as we move forward, that involvement
8 will need to increase, frankly, in terms of this to
9 allow for efficient and effective movement forward.

10 **JUDGE MELLODY:** Well, I'm not sure -- I
11 don't know if it's Mr. Wechsler or maybe Judge Boylan,
12 but somebody had mentioned they thought two to three
13 months for negotiations. What -- what do you -- what
14 do the parties think is a realistic time frame to get
15 this either done or know it's not going to settle?

16 Mr. Somach, do you have any thoughts on
17 that?

18 **MR. SOMACH:** We did talk about the fact
19 that, you know, we were aware of the fact that in
20 terms of a trial date, it would probably be August.
21 In that context, we talked about internal -- you know,
22 some internal within that period of time, time limit.
23 I think the two to three months that Mr. Wechsler
24 mentioned is probably appropriate because we will need
25 time, if we reach agreement, to develop the actual

1 materials and documents. I envision that we'll need
2 an evidentiary hearing before you because I think all
3 the parties agree that at least some of what we're
4 talking about, we -- we may want to imbed in a decree,
5 which would require a recommendation from you.

6 There's a lot of technical materials that would back
7 up what we would propose. And so I think it'll just
8 take some time, two to three months, for us to pull
9 some of that or all of that together, and then, you
10 know, if we're not successful, then, of course, we've
11 got to get ready for trial, and that -- there will
12 need to be some advance time, and so I think the two
13 to three months is a good target for us to -- to -- to
14 decide whether we've settled or whether we have to go
15 to trial. That gives us enough time to do the work
16 towards settlement and also should provide enough time
17 should we not reach settlement for us to get ready for
18 -- for trial. So I think that May date that -- you
19 know, that final status report to you some time toward
20 the end of May that Mr. Wechsler suggested is probably
21 appropriate, at least from the Texas perspective.

22 **JUDGE MELLOY:** And you agree,
23 Mr. Wechsler?

24 **MR. WECHSLER:** I do, Your Honor. As
25 Judge Boylan mentioned, assuming that you allow the

1 stay of the litigation, I think all of the parties are
2 intending to devote very significant resources now, as
3 Mr. Leininger mentioned, to the various components of
4 the settlement evaluating, understanding, working with
5 the other parties, the technical folks working
6 together. I think by the end of May, we should know
7 at that point whether or not we've at least reached an
8 agreement in principle or at least we'd be in a
9 position to tell you, unfortunately, we weren't able
10 to get to the finish line, and we need to reengage the
11 -- with litigation in the August time frame.

12 **JUDGE MELLOY:** Do you see -- at this
13 point, is there any constituency within either of the
14 states or the federal government, I guess, but mainly
15 within the states that -- that will be seriously
16 opposed to the direction that you're headed in at this
17 point?

18 **MR. WECHSLER:** I don't -- I'm not aware
19 of any, Your Honor, and I think all of the parties
20 have been -- done a very good job of trying to keep
21 everyone informed and involved. Many of the -- as Ms.
22 O'Brien alluded to, many of the amici have been
23 indirectly involved. Some have had the opportunity to
24 be presenting reports to Judge Boylan and the parties,
25 and one of the reasons that I think at least New

1 Mexico is encouraged is that everyone is moving in the
2 same direction and so when we say there's progress, we
3 don't see what the -- the obstacles right now that may
4 present themselves. We do see a number of relatively
5 difficult issues that still need to be worked through
6 so I don't want to give any impression that there's a
7 complete agreement on things, but everyone is moving
8 in the same direction.

9 **JUDGE MELLOY:** Well, does anybody else
10 have anything they want to say?

11 (No response.)

12 **JUDGE MELLOY:** All right. If not, then
13 I'll -- I'll grant the request. We'll stay the case,
14 take it off the trial calendar for March 4th. I'm
15 going to ask, before I set a firm -- a new trial date,
16 I'm going to wait probably a couple or maybe even a
17 month to do that, but we're basically looking at
18 August or early September so people should assume that
19 a good part of their fall -- early fall is going to be
20 taken up with the trial if it doesn't settle and
21 should plan accordingly. I'm going to ask that by the
22 end of February -- I don't have my calendar in front
23 of me. Let me just take a quick look here. But I'd
24 like a written status report, and let me give you a
25 date on that. Let's see. Let's -- let's say by March

1 1st, I'd like a written status report as to where you
2 are in terms of -- of the discussions and the --
3 whether more negotiations are progressing, whether you
4 still are reasonably optimistic it could be -- it
5 could be settled, and just -- I don't think you
6 necessarily need to get everybody together on a call
7 like this unless -- unless the parties think there's a
8 reason to. If there's -- of course, if you think
9 there is a reason to get everybody on the -- on a
10 Zoom, that's -- we can certainly do that easy enough.
11 But -- but let's do a written status report March 1st,
12 and then I'll decide at that point whether to set a
13 firm trial date, but, again, I think we all know that
14 it's probably going to be late summer and well into
15 the early fall to -- to try this case.

16 Anything else?

17 (No response.)

18 **JUDGE MELLOY:** All right. If not, then
19 I appreciate everybody's time, and hopefully -- good
20 luck. Keep working. We'll be back in -- I guess,
21 back to see you in a few weeks. Thank you, everybody.

22 (The proceedings adjourned at 10:23 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.

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GIVEN UNDER MY HAND AND SEAL OF OFFICE
on this, the 7th day of November, 2022.



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