

SUPREME COURT OF THE UNITED STATES  
NO. 141, ORIGINAL

STATE OF TEXAS, )  
 )  
 Plaintiff, )  
 )  
 VS. ) VOLUME XI  
 )  
 STATE OF NEW MEXICO )  
 AND STATE OF COLORADO, )  
 )  
 Defendants. )

TRANSCRIPT OF PROCEEDINGS

The above-entitled matter came on for HEARING before HONORABLE MICHAEL A. MELLOY, SPECIAL MASTER, held REMOTELY via Zoom, on OCTOBER 21, 2021, commencing at 11:01 a.m.;

Proceedings reported by Certified Shorthand Reporter and Machine Shorthand/Computer-Aided Transcription.

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R E M O T E A P P E A R A N C E S

FOR THE PLAINTIFF STATE OF TEXAS:

Ms. Sarah A. Klahn  
SOMACH SIMMONS & DUNN  
2701 Lawrence Street, Suite 113  
Denver, Colorado 80205  
(720) 279-7868  
sklahn@somachlaw.com

FOR THE DEFENDANT STATE OF NEW MEXICO:

Mr. Jeffrey Wechsler  
MONTGOMERY & ANDREWS  
325 Paseo De Peralta  
Santa Fe, New Mexico 87501  
(505) 986-2637  
jwechsler@montand.com

FOR THE DEFENDANT STATE OF COLORADO:

Mr. Chad Wallace  
COLORADO DEPARTMENT OF LAW  
1300 Broadway, 7th Floor  
Denver, Colorado 80203  
(720) 508-6281  
chad.wallace@coag.gov

FOR THE UNITED STATES:

Mr. R. Lee Leininger  
U.S. DEPARTMENT OF JUSTICE  
999 18th Street, Suite 370  
Denver, Colorado 80202  
(303) 844-1364  
lee.leininger@usdoj.gov

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1                   **JUDGE MELLOY:** Are we about ready to get  
2 started? Do we have anybody on from Colorado?

3                   **MR. WALLACE:** Yes, Your Honor.

4                   **JUDGE MELLOY:** All right. There's  
5 Mr. Wallace. All right. Let's get started. This is  
6 in the matter of United States Supreme Court Original  
7 No. 141. Let me ask the parties that will be  
8 appearing this morning for the next witness to enter  
9 their appearance, please. For Texas?

10                  **MS. KLAHN:** Good morning, Your Honor.  
11 Sarah Klahn for Texas.

12                  **JUDGE MELLOY:** And for New Mexico?

13                  **MR. WECHSLER:** Good morning, Your Honor.  
14 Jeff Wechsler.

15                  **JUDGE MELLOY:** For the United States?

16                  **MR. LEININGER:** Good morning, Your  
17 Honor. Lee Leininger for the United States.

18                  **JUDGE MELLOY:** And for Colorado, I see  
19 Mr. Wallace.

20                  **MR. WALLACE:** Yes, Your Honor.

21                  **JUDGE MELLOY:** All right. We have a  
22 number of matters to take up this morning before we  
23 actually get into the witness testimony. I had  
24 expressed some concern yesterday about the replacement  
25 exhibit that had been sent to us, I believe, by the

1 State of Texas. There was a replacement for Texas  
2 706, that the replacement did not seem to match up  
3 with the original exhibit. One just came in a short  
4 time ago, which is another replacement, which I do  
5 understand from my judicial assistant who has compared  
6 the two, that this now does appear to match up. So I  
7 would -- unless there's any objection, I'd ask the  
8 parties just to double-check that themselves. I will  
9 direct that that exhibit replace the one in the  
10 Box.com as the admitted exhibit. Any objection to  
11 that?

12 **MR. WECHSLER:** We don't have an  
13 objection. We've looked at it, Your Honor, but we  
14 would ask that it be called 696A or Texas 696R so that  
15 the record is clear. There's been a lot of discussion  
16 about it, and we want to make sure if we cite it,  
17 we're citing to the correct exhibit.

18 **JUDGE MELLOY:** All right. Let's make it  
19 696A. That's the replacement. We'll leave 696 in  
20 then so it'll be an addition.

21 Okay. We still have this issue of the  
22 Miltenberger exhibits. Where are we with that, Ms.  
23 Klahn?

24 **MS. KLAHN:** I believe Ms. Barfield is  
25 going to address that. She's been tracking that

1 issue. Ms. Barfield, are you available?

2 **MS. BARFIELD:** I am.

3 **JUDGE MELLOY:** All right. Go ahead.

4 Where do we stand with that issue?

5 **MS. BARFIELD:** Good morning, Your Honor.  
6 Yesterday, we uploaded to you a matrix which updates  
7 the -- well, it only includes the documents that have  
8 not yet been admitted that were on Texas' list of  
9 direct exhibits for Dr. Miltenberger. We have met and  
10 conferred with the parties since Dr. Miltenberger  
11 testified. We have 53 documents on the matrix that we  
12 sent over yesterday not yet admitted. Of those, 23  
13 are now A category documents and can be moved into  
14 evidence without objection. New Mexico withdrew the  
15 illegible diversion objection, so those are free to be  
16 moved in. There are --

17 **JUDGE MELLOY:** Why don't you list those  
18 off so we have a record?

19 **MS. BARFIELD:** The A copies?

20 **JUDGE MELLOY:** Yes.

21 **MS. BARFIELD:** Yes. Okay.

22 **JUDGE MELLOY:** You can move their  
23 admission.

24 **MS. BARFIELD:** Wonderful. JT-0423 as an  
25 A category exhibit, and Texas moves its admission.

1 Texas 670 as an A category, and Texas moves its  
2 admission.

3 **JUDGE MELLOY:** You don't have to do it  
4 individually. Just list them, and then -- all the As  
5 and then you can move them as a group.

6 **MS. BARFIELD:** Will do. Texas 671,  
7 Texas 672, Texas 716, Texas 0717, Texas 0721, Texas  
8 0722, Texas 0732 --

9 **JUDGE MELLOY:** Go -- all right. Go  
10 ahead.

11 **MS. BARFIELD:** Texas 0739, Texas 0740,  
12 Texas 0742, Texas 0743, Texas 0744, Texas 0745, Texas  
13 0746, and actually, that goes through Texas 0751,  
14 Texas 0752. That's the end of the A in this grouping,  
15 Your Honor.

16 **JUDGE MELLOY:** All right. Those  
17 exhibits are all admitted.

18 **MS. BARFIELD:** Thank you, Your Honor.

19 **JUDGE MELLOY:** All right. Go ahead.

20 **MS. BARFIELD:** With regard to -- thank  
21 you. I'm sorry. I spoke over you, Your Honor. With  
22 regard to the remaining 30 documents, these do remain  
23 subject to Colorado's objections; however, during the  
24 meet-and-confer process, it is my understanding, and,  
25 of course, Mr. Wallace can speak to this, as well, but

1 it's my understanding that with Texas' representation  
2 as I'm making now that if we were to recall  
3 Dr. Miltenberger, he will testify that each of these  
4 30 documents were reviewed by him and were relied upon  
5 by him to support his opinions in his report,  
6 declarations, or his trial testimony, and on that  
7 basis, as I understand it, the State of Colorado in  
8 particular, but is what the parties in general are  
9 willing for Your Honor to consider that grouping in  
10 bulk, and to the extent that you overrule those  
11 objections based upon my representation that he relied  
12 upon them, they agree they can be moved into evidence  
13 in bulk without bringing him back.

14 **JUDGE MELLOY:** What's your position  
15 about that, Mr. Wallace?

16 **MR. WALLACE:** We agree on -- Ms.  
17 Barfield has characterized that correctly. Colorado  
18 wishes to stand on its original objections and objects  
19 to entry of them as exhibits simply because  
20 Dr. Miltenberger has considered them in crafting his  
21 report; however, we did stipulate that if he were to  
22 be called back, he would testify that he has seen and  
23 considered them in -- in making his report or  
24 testimony. We also agree that all of the documents  
25 can be ruled on by Your Honor in bulk without the need



1 of having to call Dr. Miltenberger back or walk  
2 through each of the exhibits individually so that your  
3 ruling with regard to the objection would apply to all  
4 the remaining documents.

5 **JUDGE MELLOY:** Has anybody sat down to  
6 compare the exhibit numbers with Dr. Miltenberger's  
7 footnotes to see if, in fact, he indicated in a  
8 footnote that this was a document that he relied upon  
9 to formulate an opinion?

10 **MS. BARFIELD:** Your Honor,  
11 Dr. Miltenberger has, and I don't -- I didn't send the  
12 Court the color-coded version. I'm happy to do that.  
13 We have a color-coded version that simply assigns the  
14 color green, but we didn't go as far as to cite the  
15 page number and so forth or the footnote number. We  
16 can and will do that exercise if the Court does desire  
17 us to do so. I will state, though, there are a few  
18 that are not cited in the reports, but he nonetheless  
19 would testify that he relied upon the documents in  
20 support of his trial testimony.

21 **JUDGE MELLOY:** All right. I'm going to  
22 admit the exhibits and overrule the objection,  
23 particularly when -- when most -- most of them are  
24 actually footnoted in the report as something upon  
25 which he relied for a specific statement in the

1 report. So that means Texas 679, Texas 680, Texas  
2 681, 685, 686, 690, 691, 697, 699, 700, 703, 704, 705,  
3 those are all Texas exhibits. Now, Texas 711 also had  
4 an authenticity objection. Do you want to speak to  
5 that?

6 **MS. BARFIELD:** That's -- Your Honor,  
7 that would be a Colorado objection. I don't know if  
8 they're still standing on that.

9 **JUDGE MELLOY:** Analysis of the Compact  
10 in summary from the April 11, 1938, meeting of NMISC.  
11 What's NMISC?

12 **MR. WECHSLER:** The New Mexico Interstate  
13 Stream Commission.

14 **MR. WALLACE:** Your Honor, Colorado will  
15 withdraw its authenticity objection to Texas 711.

16 **JUDGE MELLOY:** All right. Then Texas  
17 711 is admitted. Texas 713, 714, 718, 719, 723, 724,  
18 725 are all admitted. There is an authenticity  
19 objection to 727.

20 **MR. WALLACE:** Your Honor, Colorado with  
21 withdraw the authenticity objection to Texas 727.

22 **JUDGE MELLOY:** 727 is admitted. 737 is  
23 admitted. These are all Texas exhibits. Texas 854,  
24 855 are admitted. US-304, 305, 306, 603, and 635 are  
25 all admitted. Then we have one other matter to take

1 up -- well, let me ask: Does that complete the  
2 discussion about the exhibits as far as you know, Ms.  
3 Barfield?

4 **MS. BARFIELD:** It did, Your Honor.  
5 Thank you.

6 **JUDGE MELLOY:** Just a second here. Oh,  
7 I've just been advised that you -- that you missed  
8 Texas 741 as an A category exhibit, and it will be  
9 admitted, as well.

10 **MS. BARFIELD:** Thank you, Your Honor.

11 **JUDGE MELLOY:** All right. Then I  
12 indicated we would take up before the start of the  
13 non-expert witnesses the motion filed by Texas to  
14 exclude certain witnesses. Is Mr. Somach going to  
15 speak to that or how -- how are we going to handle  
16 that?

17 **MR. SOMACH:** Your Honor, yes.

18 **JUDGE MELLOY:** Go ahead, Mr. Somach.

19 **MR. SOMACH:** Well, briefly, I don't  
20 think this will take a lot of time. I just wanted to  
21 explain the motion and what our concerns were. It is  
22 in two parts. The first part addresses the question  
23 of cumulative or duplicative testimony. We laid out  
24 in our pleading that New Mexico intends to call, as we  
25 understand it, four farmer witnesses, but according to

1 their disclosures, the scope of that witness testimony  
2 will be identical for each one of those witnesses, and  
3 we believe this to be cumulative testimony that --  
4 that ought not to be admitted. They certainly could  
5 put on one farmer to cover the areas that are in the  
6 scope, but why they are allowed to put on four to say  
7 the same thing apparently four times appears to us to  
8 violate a number of evidentiary rules. Their response  
9 generally, and quite frankly, their response to almost  
10 everything is that you need to make a robust record,  
11 which seems to be an excuse to allow cumulative,  
12 irrelevant, hearsay, whatever it may be, to be  
13 introduced, but we don't believe the rule is that  
14 broad to allow anything and everything to throw out  
15 the rules of evidence as we go. So either -- either  
16 they didn't disclose what these witnesses are going to  
17 talk about, which puts us at a -- a disadvantage, or  
18 it is cumulative, and I've cited the exact language,  
19 and it's identical for each one of these witnesses.  
20 So that is the -- the first area of concern we have.

21           And then the second one I laid out in  
22 the motion is just simply we don't know, as we sit  
23 here -- now, we're starting -- we've had the first  
24 witness for New Mexico testify over the last day or  
25 so. We've got the second one starting today. We

1 still don't know what witnesses New Mexico is going to  
2 call. They've got eight or nine may calls, and we  
3 don't know if they're going to call the may calls or  
4 not. In their response, they indicated that -- they  
5 complained that there was no meet and confer, so when  
6 we did meet and confer after we filed this motion with  
7 them, they told us they would let us know when they  
8 would let us know. They even said with respect to the  
9 three state engineers that it was all three of the  
10 state engineers, but they may not call any of them. I  
11 think we're entitled to be able to know who they're  
12 going to call so that we can prepare. We've got a  
13 week now ahead of us, and either we're going to have  
14 to prepare for all of the may-call witnesses when they  
15 don't call them or we -- we take the risk of being  
16 unprepared when they surprise us with which one of the  
17 may-call witnesses that they're going to call. I  
18 wanted to also apprise you this morning that we -- we  
19 do have some relevance objections to the farmers that  
20 if you allow them all to testify, we'll raise, but  
21 that goes to the question of whether they're all going  
22 to talk about liability or whether or not there is  
23 going to be discussion of their individualized injury  
24 or damages as part of their testimony. We don't  
25 believe that individual liability or damages is

1 appropriate for -- at any time, but that certainly  
2 anything that goes to damages is not relevant to the  
3 liability phase of the case. There are three other  
4 witnesses that New Mexico has on their will-call list.  
5 We'll reserve until they come up. We may want to, in  
6 fact, voir dire them, if that would be possible, but I  
7 want at least as part of this so that we can get it  
8 out of the way at one time, mention that the  
9 Albuquerque witness, Mr. Stomp, we cannot figure out  
10 what the -- what the relevance of Albuquerque's  
11 testimony with respect to liability will be, and we  
12 will raise a relevance objection at that time.  
13 Mr. Carrasco, the farm credit witness that they have,  
14 will also be objected to on relevance grounds, and  
15 then the electric utility witness, Mike Green, and the  
16 CRRUA, which is a municipal utility of some kind in  
17 Westmoreland testimony, all of which seem not to go to  
18 liability but instead go to the question of damages,  
19 which are not relevant for this phase. So I wanted to  
20 give you a head's up on that, but the motion, of  
21 course, addresses the farmers' cumulative testimony,  
22 as well as the -- just the request that we know who  
23 New Mexico is going to call out of this list of eight  
24 or nine may-call witnesses.

25 **JUDGE MELLOY:** Let me ask you this. I

1 suspect one of the responses Mr. Wechsler is going to  
2 have is that you put on fairly detailed testimony  
3 about the damages the El Paso water district suffered  
4 as a result of -- of the claimed diversion of water to  
5 New Mexico farmers. Is this different than that?

6 **MR. SOMACH:** I will tell you that  
7 there's a significant difference. Mr. Balliew's  
8 testimony was foundational to the expert testimony of  
9 Dr. Sunding, and it provides the basis of much of  
10 Dr. Sunding's injury testimony. In contrast, New  
11 Mexico has no expert witness related to the question  
12 of damages to New Mexico or -- or injury to New  
13 Mexico. They have a witness who we're going to object  
14 to, I might add, and I think we've already made some  
15 objection in our motions in limine, but he never filed  
16 a report, never was disclosed as an expert to talk  
17 about injury to New Mexico. He merely was a rebuttal  
18 witness to Dr. Sunding. So the difference is  
19 Mr. Balliew's testimony was foundational to  
20 Dr. Sunding's testimony. This testimony that I'm  
21 talking about today by these farmers and by others is  
22 -- is not. Moreover, the farmers' testimony is  
23 individual injury and individual injury is not  
24 cognizable in the context of an original action. It's  
25 got to be injury collectively to the state, not just

1 an individual farmer's injury.

2           **JUDGE MELLOY:** Well, I'm going to -- we  
3 have a witness ready to go, so I'm not going to spend  
4 a lot of time on that particular issue today. We'll  
5 take that up as the -- as we get into those specific  
6 witnesses, but I would ask Mr. Wechsler to respond to  
7 the specific issues in the written motion, that is the  
8 duplicate testimony and when you can advise Texas and  
9 United States as to who on your may-call list you're  
10 going to call.

11           **MR. WECHSLER:** Happy to, Your Honor.  
12 And I wonder after that discussion with Mr. Somach if  
13 Texas will allow us to put on any witnesses at all.  
14 We outlined our response in our briefing. There is  
15 the need for a complete record. In previous cases,  
16 there have been, to cite the Yellowstone case alone,  
17 15 farmer witnesses. The farmers are, of course,  
18 incredibly important. This is an irrigation project  
19 designed to satisfy irrigation demands that has been  
20 incorporated into the Compact. I do want to emphasize  
21 that many of these witnesses that Texas is complaining  
22 about are witnesses they simply didn't depose so that  
23 includes many of the other ones that they are  
24 apparently now complaining about. But the four farmer  
25 witnesses, they also didn't depose. Now, in the



1 initial disclosures long ago, New Mexico identified  
2 farmers -- New Mexico farmers as being witnesses. We  
3 didn't specifically disclose these four people. We  
4 never got any discovery information about it. You'll  
5 recall in 2020, New Mexico suggested that we actually,  
6 all of the parties submit preliminary witness lists so  
7 that everybody knew who had to be deposed. Texas  
8 opposed that. Shortly after that was when we went  
9 ahead and said, well, as a matter of courtesy, we want  
10 to disclose these four farmer witnesses to make sure  
11 that Texas has the opportunity to know who they are so  
12 that they can depose them if they want. Much to our  
13 surprise, they never asked us to do that, and then  
14 when they were, again, in the initial witness lists in  
15 October disclosed, again, they never asked to depose  
16 them, even though at that point, discovery was closed.  
17 And I'll mention that there was also a witness that  
18 had never been disclosed in any way on the Texas  
19 witness list, and we reached out to them to try and  
20 depose them. So Texas doesn't really have a basis for  
21 knowing whether or not this is duplicative or not, and  
22 I can assure you, it's not. We have no interest in  
23 putting on duplicative testimony and asking the same  
24 things. We have carefully selected these four  
25 witnesses for different purposes. For example, Shane

1 Franzoy is a representative of the Southern Rio Grande  
2 diversified Crop Farmers. He also has a farm in the  
3 Hatch area where the salinity is pretty similar to  
4 that in the Texas area, so he'll be rebutting some of  
5 the testimony you heard. Mr. Salopek is a  
6 representative of the New Mexico Pecan Farmers. He'll  
7 be talking about the work that the farmers themselves  
8 did on the basin-wide delivery requirements and water  
9 use. Mr. Garay will be talking about processing plant  
10 issues related to that and his experience with over  
11 deliveries in New Mexico, and Ms. Stahmann-Solis will  
12 be talking about historic practices in the valley and  
13 crop requirements and investment. So it won't be  
14 duplicative in any way.

15 Now, as to this may-call issue -- let me  
16 just say before we leave that issue. It's simply  
17 premature. If Texas hears the testimony, they think  
18 it's cumulative, I have no doubt they will, they can  
19 object at that time and then you can take it up and  
20 then you'll have some basis to know whether or not it  
21 is cumulative.

22 As to the may-call witnesses, I'm not  
23 sure what Mr. Somach is talking about in terms of this  
24 meet and confer, but I can tell you as of right now,  
25 New Mexico is not intending to call any of those

1 may-call witnesses. The only reason that I would  
2 reserve from saying we will not call any of those is  
3 because there are some documents, as an example you'll  
4 be hearing today from Mr. Schmidt-Petersen, who's a  
5 records custodian at the ISC and also is familiar with  
6 a number of documents, but there are objections to  
7 some of those documents and if those are not let in  
8 today with Mr. Schmidt-Petersen, we may, for example,  
9 put on one of the state engineers to testify  
10 specifically to those documents. So I can't say that  
11 we won't call them, but we have no intent right now to  
12 call any of our may-call witnesses.

13 **JUDGE MELLOY:** Well, as to the farmer  
14 witnesses, I do think it's premature, and certainly if  
15 the testimony becomes cumulative, Texas or the United  
16 States or Colorado for that matter would have the  
17 right to object, and if it is cumulative, it will be  
18 kept out. But I think at this point, it's premature  
19 to say that a witness can't testify. I guess as far  
20 as the may-call witnesses are concerned, all I can say  
21 is, Mr. Wechsler, if you change your mind or feel  
22 there's a need, particularly after this witness as we  
23 go into the week break, to give both the United States  
24 and Texas as much notice as possible. But as of right  
25 now, it's my understanding your representation is that

1 you're not going to call any of them and so that --  
2 until that changes, I -- you know, that'll be the  
3 state of the record.

4 **MR. WECHSLER:** Understood.

5 **MR. SOMACH:** Thank you very much, Your  
6 Honor.

7 **JUDGE MELLOY:** Anything further we need  
8 to take up before we start our witness, please?

9 **MR. WECHSLER:** I do have one --

10 **JUDGE MELLOY:** I'll let M. Wechsler go  
11 first.

12 **MR. WECHSLER:** Mine is very brief about  
13 exhibits and the sort of five-day rule. By way of  
14 explanation, currently the party sponsoring a witness  
15 has an obligation to submit 24 hours in advance of a  
16 witness testimony the list of witnesses along with  
17 objections, as you know. Texas and the U.S. have been  
18 supplementing that list right up to the time of the  
19 direct testimony. We have no problem with that. We  
20 understand it's cross-examination, but what we're  
21 asking is that if -- if that happens, in order to  
22 recreate the list and provide you a new list, I'm  
23 informed it takes a fair amount of effort and work and  
24 our request is just if after the 24 hours, after we  
25 have disclosed the list that we're aware of at that

1 time, if Texas and the United States supplement after  
2 that, that it be their responsibility to provide to  
3 you a list of the supplemented exhibits so our  
4 technical folks aren't having to go through all of  
5 that work.

6 **JUDGE MELLOY:** Any objection to that,  
7 Ms. Klahn? Doesn't sound unreasonable.

8 **MS. KLAHN:** That's fine, Your Honor.

9 **JUDGE MELLOY:** All right. Go ahead.  
10 Anything else, Mr. Wechsler?

11 **MR. WECHSLER:** No, Your Honor. Thank  
12 you.

13 **JUDGE MELLOY:** Did you have something,  
14 Mr. Leininger?

15 **MR. LEININGER:** Yes, Your Honor. Thank  
16 you. Before we proceed with this witness, we thought  
17 this would be the appropriate time to bring up our  
18 pending motions in limine objections, our pending  
19 motion in limine with regard to objections to a number  
20 of the exhibits that are being proffered for this  
21 witness. We have relevance objections that are tied  
22 to the motions in limine. During the September 29  
23 status conference, you reserved ruling on the United  
24 States' motions in limine until you see the witness  
25 and have a little more context. It appears that that

1 witness is being presented now. Nine or ten of these  
2 exhibits noticed by New Mexico for this witness  
3 reference or are related to the New Mexico Cross claim  
4 No. 3 -- excuse me -- Counterclaim No. 3. It's the  
5 mini trial that we feared and had briefed previously  
6 for that MIL. The Counterclaim No. 3 is the  
7 allegation in which New Mexico states the U.S. failed  
8 to obtain New Mexico's consent for release of water in  
9 Elephant Butte storage in 2011. Your March 31, 2020,  
10 order dismissed that counterclaim based on sovereign  
11 immunity, so we renew our motion in limine at this  
12 time to preclude that testimony regarding this 2011  
13 event. It's a -- it -- it's a discrete challenge to  
14 an agency action, Your Honor. It's nearly identical  
15 to the allegations New Mexico filed in its complaint  
16 in district court, and there, New Mexico alleged  
17 waiver of sovereign immunity under the administrative  
18 procedures act to challenge the agency action to  
19 release water. So New Mexico has already acknowledged  
20 that the 2011 release is framed as an agency action  
21 challenge. We did not waive our sovereign immunity  
22 for the nearly identical counterclaim to be litigated  
23 in this original action. The court simply lacks  
24 subject matter jurisdiction regarding this issue, so  
25 we would move now for a ruling on the motion in limine

1 with regard to dismissed Counterclaim No. 3.

2 And then, Your Honor, I -- we would like  
3 to take these up one at a time because you've also  
4 dismissed the other counterclaims, which may be raised  
5 in the course of this witness' testimony, but --

6 **JUDGE MELLOY:** What's your response as  
7 to that issue, Mr. Wechsler?

8 **MR. WECHSLER:** Yeah, this is not a  
9 discrete challenge to agency action, and as we've  
10 repeatedly explained, we recognize the Court's ruling  
11 with regard to Counterclaim No. 3, at least unless and  
12 until that is -- is changed by the Court, but what  
13 we're talking about here is this credit water release,  
14 and as you'll hear from Mr. Schmidt-Petersen, that  
15 resulted in approximately 30,000 acre-feet of water or  
16 so that was released all to Texas, all being used by  
17 Texas. It is, in ways, related to the -- the  
18 allocation, whether or not that 30,000 went to Texas  
19 or was due to New Mexico, and so really it directly  
20 impacts on the apportionment claim. And to give you  
21 some scope there, the total amount of violation in the  
22 Yellowstone case was approximately 2,000 acre-feet.  
23 So you're talking about 15 times that amount, and --  
24 and so our claim here relates to Counterclaims No. 1  
25 and 4, and we're not seeking that sort of relief

1 against the United States.

2 **MR. LEININGER:** Your Honor --

3 **MS. KLAHN:** Your Honor --

4 **MR. LEININGER:** Go ahead.

5 **JUDGE MELLOY:** Go ahead.

6 **MS. KLAHN:** Texas would join in the  
7 United States' renewal of their motion in limine, and  
8 just to kind of put the Texas impression on this, when  
9 the Court dismissed Counterclaim No. 3, it was because  
10 of the -- the -- as Mr. Leininger said, that the U.S.  
11 had not waived its sovereign immunity. But this issue  
12 of the credit water release being some kind of injury  
13 to New Mexico as a Compact matter is simply something  
14 that hasn't even been established, so I think that the  
15 -- from a legal perspective, I think that to entertain  
16 testimony on this issue not only will result in  
17 information in the record that's simply not relevant  
18 because there's no claim to back it up, it doesn't fit  
19 under Counterclaim No. 1 or 4, it wasn't an action of  
20 Texas, and so I think that the -- I'd just ask you to  
21 consider Mr. Leininger's argument and to rule in his  
22 favor. Thank you.

23 **JUDGE MELLOY:** Mr. Leininger, did you  
24 want to say something?

25 **MR. LEININGER:** Yes, Your Honor. I



1 think Mr. Wechsler's comments emphasize the issue  
2 here. They are alleging 30,000 acre-foot of release  
3 of credit water. They're basically saying they didn't  
4 damage. Your March, 2020, order made it clear that  
5 damages don't belong in this phase of the trial at  
6 least, and certainly here where it's pending before  
7 the district court, and -- and just as a reminder,  
8 Your Honor, that district court case is still pending.  
9 It is stayed, but it is still pending, and in the ISC  
10 meetings, this issue has not been resolved so it is  
11 still pending there, too. It belongs in the district  
12 court action. It is, you know, this claim with regard  
13 to the 30,000 acre-feet and what happened to it, it's  
14 a discrete action. It's tied to the damages they're  
15 asserting.

16 **MR. WECHSLER:** Your Honor, we're not --  
17 this isn't about damages. This is about -- you'll --  
18 it's called credit water for a reason. It's Compact  
19 credit water defined by the Compact, and to the extent  
20 that New Mexico did not receive that amount of water  
21 and Texas did, it is appropriately part of this case.  
22 It affected our apportionment, and it will affect --  
23 continue to affect our apportionment because as  
24 Mr. Leininger just conceded, it is a live issue that  
25 the states continue to disagree about and that

1 continues to affect New Mexico's apportionment.

2           **JUDGE MELLOY:** Well, I'm going to allow  
3 a little bit of testimony, but I don't want this to  
4 become a mini trial about that issue, and to the  
5 extent I determine it's not relevant to this  
6 proceeding, I'll allow some limited testimony by way  
7 of an offer of proof in the event that it does become  
8 an issue, but I don't want to wander off into that  
9 very far, Mr. Wechsler, because I really don't think  
10 it has a great deal of relevance to this case. But I  
11 do -- I do understand you want to make some kind of  
12 record about it, and I'll let you make a limited  
13 record.

14           Mr. Leininger, did you have anything  
15 further?

16           **MR. LEININGER:** Well, just, Your Honor,  
17 with regard to the rest of the motions in limine, for  
18 example, Counterclaim No. 2, it's a collateral attack  
19 on the 2008 Operating Agreement that the Compact  
20 itself requires the U.S. to operate the Project in a  
21 certain manner, and it appears that some of the  
22 exhibits that are being proffered by this witness,  
23 they're going to -- New Mexico is going to go down  
24 that route, too. Those claims are dismissed, and  
25 they're directly tied to the challenges of agency

1 action. New Mexico wants to litigate the actions of  
2 the United States under the operating agreement for  
3 which it has sovereign immunity. So in the court of  
4 this, perhaps in the court of this testimony, it'll  
5 become more obvious, and we reserve the right to raise  
6 the objections then.

7 **JUDGE MELLOY:** All right.

8 **MR. WECHSLER:** On that issue, Your  
9 Honor, I mean, we are directly asserting that the  
10 current way that water is divided, which as you know  
11 is directly through the operating agreement, is not  
12 consistent with the Compact. Now, we are not  
13 bringing, and, again, we understand we do not have  
14 live claims currently against the United States, but  
15 as you have made crystal clear in every one of your  
16 rulings, the way in which the water is divided under  
17 the Compact is directly at issue in this case.

18 **JUDGE MELLOY:** All right. Let's go  
19 forward with the witness, and we'll see where we are  
20 as we go through today. Mr. Schmidt-Petersen, would  
21 you raise your right hand? Do you swear or affirm  
22 that the testimony you're about to give will be the  
23 truth, the whole truth, and nothing but the truth?

24 **THE WITNESS:** I do, Your Honor.

25 **JUDGE MELLOY:** All right. Would you

1 state and spell your name for the record, please?

2 THE WITNESS: Yes, sir. My name is Rolf  
3 Schmidt-Petersen, and that is R-O-L-F, and then  
4 S-C-H-M-I-D-T, hyphen, P-E-T-E-R-S-E-N.

5 JUDGE MELLOY: And,  
6 Mr. Schmidt-Petersen, I have a couple questions I'd  
7 like to ask you that we've asked all of our witnesses.  
8 First of all, is there anyone in the room with you?

9 THE WITNESS: No, sir.

10 JUDGE MELLOY: Do you have any documents  
11 available to you that you will be referring to during  
12 your testimony other than the exhibit books?

13 THE WITNESS: No.

14 JUDGE MELLOY: I need to advise you that  
15 you're not allowed to have any communication devices  
16 available to you, including laptops, iPhones, iPads  
17 that have any type of e-mail, texting capability, et  
18 cetera. Do you understand?

19 THE WITNESS: I do.

20 JUDGE MELLOY: All right.

21 THE WITNESS: And I don't have anything  
22 in the room.

23 JUDGE MELLOY: All right. You may  
24 proceed, Mr. Wechsler.

25 MR. WECHSLER: Thank you, Your Honor.

1 Do you want to address the exhibits?

2 **JUDGE MELLOY:** Oh, I'm sorry. You're  
3 right. Just a second. Oh, here they are.

4 All right. For this witness, the A  
5 exhibits -- well, first of all, we have Joint 391 and  
6 Joint 395, which indicate have already been admitted,  
7 then we have Joint 396 and 401, which are A exhibits  
8 and will be admitted, Joint 428, 436, and 439 are  
9 already admitted. Joint 460 is an A exhibit and will  
10 be admitted. New Mexico 414 is an A exhibit and will  
11 be admitted. Likewise, New Mexico 685, 732, and 739  
12 are A exhibits and are admitted. New Mexico 819, 217  
13 -- excuse me -- New Mexico 2178 and 819 are both  
14 admitted. New Mexico 2474 and New Mexico  
15 Demonstrative Exhibit 1 are both admitted. Texas 525  
16 and 530 are both admitted. On the cross-examination  
17 list, Joint 401 and New Mexico 562 are admitted. New  
18 Mexico 2183, 2254, 2280, and 2357 are admitted, Texas  
19 398, Texas 543 are admitted. Any question about  
20 those? If not --

21 **MR. WECHSLER:** One question, Your Honor.  
22 We also had listed Colorado 103, which we believe is  
23 an A exhibit. It should be at the very top of the  
24 first page of the list, Your Honor.

25 **JUDGE MELLOY:** Oh, I'm sorry. Yes, I

1 missed it. That's admitted. Colorado 103 is in  
2 evidence.

3 **MR. WECHSLER:** Thank you, Your Honor.

4 **JUDGE MELLOY:** You may proceed.

5 **ROLF SCHMIDT-PETERSEN,**  
6 having been first duly sworn, testified as follows:

7 **DIRECT EXAMINATION**

8 **BY MR. WECHSLER:**

9 **Q. Good morning, Mr. Schmidt-Petersen.**

10 **A. Good morning, Mr. Wechsler.**

11 **Q. What's the purpose of your testimony today?**

12 **A. My testimony today is to talk about the New**  
13 **Mexico Interstate Stream Commission, what it is and**  
14 **what we do. Within that, New Mexico's understanding**  
15 **of the Rio Grande Compact and its history, to talk**  
16 **about our interactions with the State of Texas and**  
17 **interactions about the Rio Grande Compact with Texas,**  
18 **to talk about the 2008 Operating Agreement and our**  
19 **engagement in that, and then also the -- to some**  
20 **extent, the 2011 credit water release issue.**

21 **Q. Let's talk about the background to provide**  
22 **that testimony. What's your current professional**  
23 **position?**

24 **A. I am the director of the New Mexico**  
25 **Interstate Stream Commission.**

1           **Q.**    And I want to talk about the ISC in a moment.  
2           **First, let's talk about your background and walk --**  
3           **step through your history. Please tell us about your**  
4           **education.**

5           A.    I have a bachelor's of science magna cum  
6           laude from the Stephen F. Austin State University in  
7           Nacogdoches, Texas, and then I have -- that was in  
8           1987, and then I have a master's degree in science --  
9           master's of science degree in hydrology from the New  
10          Mexico Institute of Mining and Technology in Socorro,  
11          New Mexico in 1991.

12          **Q.**    What did you do after your received your  
13          **master's degree in 1991?**

14          A.    I took a job with an environmental consulting  
15          firm based out of Albuquerque called Daniel B.  
16          Stephens & Associates.

17          **Q.**    And --

18          A.    And -- excuse me.

19          **Q.**    What did you do there?

20          A.    Environmental consulting hydrology,  
21          groundwater/surface water characterization, in various  
22          parts of New Mexico, in California, and in parts of  
23          Texas over about a nine-year period.

24          **Q.**    What was your first position at ISC, and in  
25          **what year?**

1           A.     In December of 1999, I accepted a job or  
2 applied for a job with the ISC as their Rio Grande  
3 Basin Coordinator.

4           **Q.     What were your responsibilities as the Rio**  
5 **Grande Basin Coordinator?**

6           A.     So at that time, it was to engage in Rio  
7 Grande Basin issues, some focus in the Middle Rio  
8 Grande. There was a number of specific items that  
9 were occurring in that area to learn about the Rio  
10 Grande Compact and to support my then boss, Norm  
11 Gaume, in his activities as engineer advisor to New  
12 Mexico under the Compact.

13          **Q.     What was your next position at the ISC, and**  
14 **what year was that?**

15          A.     Well, it was a rolling type of thing. I  
16 remained with the Rio Grande Basin Bureau of the New  
17 Mexico Interstate Stream Commission, but in about  
18 2003, that staffing had increased, and my job changed  
19 to be the Rio Grande Basin Manager.

20          **Q.     And what were your responsibilities at the --**  
21 **as the Rio Grande Basin Manager?**

22          A.     Yeah. So at that point in time, it had  
23 expanded significantly, and we were in the midst of  
24 the -- well, the beginning of this 20-year drought --  
25 20-plus-year drought. And so it included learning a



1 lot more about the Rio Grande Compact, learning about  
2 water operations from Colorado down to Fort Quitman,  
3 engaging, you know, with the other states on a number  
4 of Rio Grande Compact issues, learning about the data  
5 sets that were there, the models that were being  
6 developed, how Compact accounting was occurring, the  
7 different water operations in the system, and -- and  
8 so on, a whole host of additional activities.

9 **Q. What was your next position at the ISC, and,**  
10 **again, what year was that in?**

11 A. So in 2009, again, I remained the Rio Grande  
12 Basin Manager, but at that point in time, I was  
13 appointed by then state engineer, John D'Antonio, to  
14 be New Mexico's Rio Grande Compact Commission Engineer  
15 Advisor.

16 **Q. What were your new responsibilities as**  
17 **engineer advisor?**

18 A. So in -- in that area, the -- the main  
19 additional activity was really having responsibilities  
20 for both administration activities under the Compact  
21 with the EAs and within New Mexico and then for the  
22 Compact accounting that was done annually by the Rio  
23 Grande Compact Commission. My job began overseeing  
24 and engaging in all those things with my staff and  
25 with all the other federal agencies involved and the

1 state -- states of Colorado and Texas.

2 Q. Okay. So you were engineer advisor beginning  
3 in 2009, and that overlapped with your position and  
4 responsibilities as the bureau chief for the Rio  
5 Grande Basin; is that right?

6 A. That's correct.

7 Q. So what year did you take a new position at  
8 the ISC?

9 A. In the middle of 2017, I accepted a job to be  
10 the ISC's Colorado River Basin Manager.

11 Q. What were your responsibilities in that  
12 position?

13 A. All aspects of New Mexico's interaction on  
14 the Colorado River Basin with the other seven basin  
15 states, Bureau of Reclamation, Department of Interior,  
16 something called the Arizona Water Settlement Act in  
17 southwest New Mexico that relates to the lower  
18 Colorado, upper Colorado River Commission activities  
19 throughout the upper basin, activities with  
20 California, Nevada, Arizona, Utah, and  
21 Colorado/Wyoming on salinity issues throughout the  
22 Colorado River Basin, endangered species issues, and  
23 more.

24 Q. After that position, is that when you became  
25 the director of the Interstate Stream Commission?

1           A.    That's correct.

2           **Q.    What year?**

3           A.    I was appointed as ISC director.  I remember  
4 right, it was a two-and-a-half -- approximately  
5 two-and-a-half years ago so June, 2019.

6           **Q.    When you say "appointed," does that mean**  
7 **appointed by the governor for the State of New Mexico?**

8           A.    That's correct.

9           **Q.    What are your responsibilities as director of**  
10 **the New Mexico Interstate Stream Commission?**

11          A.    It is directing all staff activities of the  
12 Interstate Stream Commission, interacting with the  
13 Interstate Stream Commission itself, you know,  
14 developing agendas with my chairman, and putting those  
15 meetings on, drafting the minutes for those, and then  
16 based upon decisions of the Interstate Stream  
17 Commission, working to implement those decisions,  
18 engaging with the legislature, congressional  
19 delegation.

20          **Q.    As part of your professional responsibilities**  
21 **over the years, was it necessary for you to understand**  
22 **the Rio Grande Compact and New Mexico and the other**  
23 **states' positions on the Rio Grande Compact?**

24          A.    Yes, sir.

25          **Q.    Why?**

1           A.     Well, in order to be effective as the Rio  
2 Grande Compact engineer advisor or staffers associated  
3 with that, you really need to understand the history  
4 of the Rio Grande Compact and its implementation.  
5 There are many articles that you-all have been talking  
6 a little bit about over the last few weeks that  
7 require a real understanding of historical practice  
8 and how they were actually implemented and how the  
9 rules and regulations of the Rio Grande Compact  
10 applied to those, and so I engaged with that, you  
11 know, from the -- the -- you know, the minutia of,  
12 like, let's look at an individual gage, the shifts of  
13 the gage, how well that gage -- how accurate that gage  
14 is to historical understanding of Article 7  
15 implementation, how New Mexico had done that  
16 historically, and utilized that for making  
17 recommendations to my commissioner as we got into this  
18 drought. So lots of review of documents and so on.

19           **Q.     Was it also necessary for you to understand**  
20 **how the Rio Grande Compact had been administered over**  
21 **the years?**

22           A.     Oh, absolutely. I think that that's partly  
23 what I was just mentioning. You know, there's the  
24 accounting piece that happens once a year, but then  
25 the other parts of what happens really almost any time

1 during the year as you're administering the Compact,  
2 really based on usable water in Project storage,  
3 that's a key piece in learning how to implement the  
4 Compact and put it in effect for New Mexico.

5 **Q. And what did you do to understand the**  
6 **Compact, the administration, the history of the**  
7 **positions?**

8 A. Well, a number of things. You know, the --  
9 one of the first things that I was told when I -- when  
10 I started with the ISC that it was important to go  
11 back and look at the record of the Interstate -- well,  
12 in this case, the Rio Grande Compact Commission and  
13 our files for a number of different activities, and so  
14 as we went along, you know, in different aspects of  
15 administration came up, we'd go back, my staff and  
16 myself and others go back and look at documents, try  
17 to summarize them, understand what others have done,  
18 and it was also very important because in order to do  
19 administration or accounting for the Rio Grande  
20 Compact, you have to know something that's called the  
21 San Juan-Chama Project and its accounting that the Rio  
22 Grande Compact Commission oversees because you have to  
23 separate those waters out. So, you know, that  
24 requires specific understanding of the reservoirs, the  
25 gages, and then decisions by the Compact Commission

1 and even Congress that lead to how that water is  
2 managed in separating out Rio Grande waters from it.

3 Q. And in your professional roles, has it been  
4 necessary to interact with the states of Texas and  
5 Colorado to understand their -- the issues --  
6 Compact-related issues that they're concerned about?

7 A. Yes, extensively.

8 Q. Can you summarize the nature of those types  
9 of interactions?

10 A. Yeah. I think I can. So, you know,  
11 initially, when I was Rio Grande Basin Coordinator,  
12 the job was to do projects assigned by the engineer  
13 advisor and my manager, and a number of those came  
14 specifically out of Rio Grande Compact Commission and  
15 Bureau of Reclamation, in fact, agreements, and -- and  
16 there was a lot of work going on at that point in time  
17 on multiple different issues related to just water  
18 accounting methodologies and so on, sort of gazed on  
19 those projects in considerable detail.

20 Then, you know, as I became the engineer  
21 advisor and just before that, as I was staffing then  
22 Estevan Lopez in his role as engineer advisor, really  
23 looking at the Compact itself, the articles, and then  
24 how we did the accounting for those items. There were  
25 a number of kind of questions and concerns that came

1 up in the early 2000s that really required me and my  
2 staff, and we brought contractors in, too, at times to  
3 help really try to understand and get our hands  
4 around, you know, the Rio Grande Compact.

5 **Q. You had experience with administering other**  
6 **interstate Compacts in your career?**

7 A. Yes, I have.

8 **Q. How many?**

9 A. Well, the ISC's responsible for eight  
10 interstate Compacts. I have various levels of  
11 involvement in all of those, but I'm responsible for  
12 staffing the commissions and implementing activities,  
13 and more specific, you know, engagement on the Rio  
14 Grande, Colorado River issues, and some Pecos issues.

15 **Q. And have you had the opportunity to work on**  
16 **issues involving Reclamation projects generally?**

17 A. Oh, yes, sir.

18 **Q. In your career, has it been necessary to**  
19 **understand specifically the Rio Grande Project and how**  
20 **it operates?**

21 A. Absolutely.

22 **Q. And why was it necessary as part of your job**  
23 **to understand that?**

24 A. Well, the Rio Grande Project provides water  
25 to New Mexico citizens. You know, it's a single unit,

1 but it provides water to New Mexico citizens, and we  
2 have a right to 57 percent of that Project water, so  
3 it's our job to assess that, try to document it, but  
4 then also look at the Project operations to -- to make  
5 sure that they're efficient so that usable water in  
6 Project storage is maintained at levels that -- that  
7 generally are consistent with some historic Project  
8 operations because of the impacts usable water has up  
9 and down the system.

10 **Q. All right. Let's turn now to the ISC. What**  
11 **is the New Mexico Interstate Stream Commission?**

12 A. Okay. So the ISC was created by state  
13 statute in 1935, and there are a number of statutes  
14 that apply to the Interstate Stream Commission, but  
15 our general direction is to do any and all things  
16 necessary to protect, conserve, develop, and  
17 investigate the waters of the state, both interstate  
18 and intrastate. We also -- that includes negotiating  
19 and engaging on interstate Compacts. It also includes  
20 water planning oversight responsibilities and  
21 engagement responsibilities for the State of New  
22 Mexico and a number of other things.

23 **Q. Who is on the New Mexico Interstate Stream**  
24 **Commission?**

25 A. So there are nine members of the ISC, and



1 eight of them are appointed, and they're appointed by  
2 the governor of the State of New Mexico. They serve  
3 six-year staggered terms, and then in addition, the  
4 state engineer of New Mexico is the secretary of the  
5 Interstate Stream Commission ex officio, just as part  
6 of staff.

7 **Q. You already talked about your role as**  
8 **director. What is the relationship between the**  
9 **Interstate Stream Commission and the New Mexico Office**  
10 **of the State Engineer, which we sometimes say is the**  
11 **OSE?**

12 A. Yes. Well, I just mentioned, you know, that  
13 the state engineer is secretary to the ISC so that's  
14 one piece, but the Interstate Stream Commission in the  
15 state of New Mexico governmental system is a program  
16 within the Office of the State Engineer, and so in  
17 that -- in that instance, we engage, you know, with  
18 the legislature and the governor's office for  
19 budgetary reporting issues and so on with the state  
20 engineer's office as a program, and then in addition,  
21 my staff and I engage with the -- I engage directly  
22 with all of the other directors that are part of the  
23 Office of the State Engineer, state engineer itself,  
24 and then my staff engaged with, you know, numerous  
25 different programs and bureaus of the Office of the

1 State Engineer on numerous activities.

2 Q. Let's look at New Mexico Demonstrative 22.  
3 Let's back up and just look at Page 1. Mr. Rolf --  
4 Mr. Schmidt-Petersen, is this a demonstrative exhibit  
5 that you selected the slides for?

6 A. It is.

7 Q. And was it to assist in and demonstrate your  
8 testimony today?

9 A. Yes, sir.

10 Q. And I believe there's eight slides total,  
11 including this cover slide; is that correct?

12 A. That is correct.

13 MR. WECHSLER: Your Honor, I'm going to  
14 move the entire New Mexico Demonstrative Exhibit No.  
15 22 now.

16 MS. KLAHN: You're on mute, Your Honor,  
17 but we object.

18 JUDGE MELLOY: I'm sorry. You say you  
19 do object or don't object.

20 MS. KLAHN: We do object. We object to  
21 Slides 3 through 6 as being irrelevant and  
22 prejudicial.

23 JUDGE MELLOY: Just a second here.

24 MR. WECHSLER: And, of course, Your  
25 Honor, it is just a demonstrative. The standard for

1 admitting demonstratives because it's not evidentiary  
2 is whether it's significantly misleading.

3 **JUDGE MELLOY:** Go ahead. I'm having  
4 trouble finding it. Go ahead for a minute, and let me  
5 try to find it.

6 **MR. WECHSLER:** Sure. We're going to  
7 turn to Page 2 of New Mexico Demonstrative Exhibit 22.

8 **Q. (BY MR. WECHSLER) What is this,**  
9 **Mr. Schmidt-Petersen?**

10 A. So this is the organizational structure of  
11 the staffing of the Interstate Stream Commission as of  
12 April -- early April of this year, and it describes,  
13 you know, the -- my position, my deputy's position,  
14 and then the different bureaus and programs that  
15 report to us.

16 **Q. And how many total staff report to you?**

17 A. We are authorized for 45 staff, and we  
18 currently have about 39, I believe.

19 **Q. And looking at this org chart, and I'll --**  
20 **I'm going to pause here.**

21 **MR. WECHSLER:** Your Honor, do you want  
22 us to wait while you're --

23 **JUDGE MELLOY:** I can't find it so I'm  
24 going to have to -- yeah, just -- I'm going to take a  
25 two-minute break here so I can find that exhibit.

1 Just a second. And that's Exhibit No. 22, right?

2 **MR. WECHSLER:** It's New Mexico  
3 Demonstrative 22.

4 (Recess.)

5 **JUDGE MELLOY:** All right. I think I  
6 have it now. We didn't realize -- I guess I didn't  
7 realize they're not being sent. So New Mexico  
8 Demonstrative 22 is how many pages?

9 **MR. WECHSLER:** It's eight total pages,  
10 Your Honor.

11 **JUDGE MELLOY:** All right. Okay. I now  
12 have it. Okay. And Texas is objecting to Pages --  
13 which pages?

14 **MS. KLAHN:** Page 3, 4 --

15 **JUDGE MELLOY:** Which is the --

16 **MS. KLAHN:** The map, the example of  
17 Compact administration slide, the La Plata River  
18 Compact correspondence, the 1948 Pecos River Compact.

19 **JUDGE MELLOY:** And your basis for your  
20 objection is, what, relevance?

21 **MS. KLAHN:** For the map, it's relevance.  
22 For the -- for the examples of the other Compacts,  
23 Your Honor, the concern I have about -- we have about  
24 those is that they're misleading insofar as they  
25 suggest that there is some sort of routine Compact

1 administration or communication between Compact  
2 administrators, and then in the 1948 Pecos River  
3 Compact, of course, the 1947 condition has been  
4 highlighted, and, of course, as you're aware, that's a  
5 point of significant -- this idea of the 1938  
6 condition or the baseline condition or whoever is  
7 defining it to suggest -- to put this in with the 1947  
8 condition highlighted, I think, leads to some kind of  
9 confusion about the baseline condition issues in this  
10 case. Those are our objections.

11 **JUDGE MELLOY:** All right. Let's do  
12 this. As I understand it, there's no objections to  
13 Pages 1 and 2, which is the -- Page 2 is up on the  
14 screen right now so I will admit Demonstrative 22,  
15 Pages 1 and 2, and we'll go through the other pages as  
16 -- as they come up, and I'll either admit or deny  
17 their admission as they're used.

18 **MS. KLAHN:** Thank you.

19 **JUDGE MELLOY:** Go ahead, Mr. Wechsler.

20 **Q. (BY MR. WECHSLER)** All right. Looking at the  
21 org chart, Mr. Schmidt-Petersen, we can see that one  
22 of the bureaus is the Rio Grande Bureau. Do you see  
23 that?

24 **A.** I do.

25 **Q.** In looking at it, it appears to be the largest

1 of the bureaus within the ISC; is that correct?

2 A. It is.

3 Q. Approximately how many people work for the  
4 Rio Grande Bureau?

5 A. We have 12 people working specifically on Rio  
6 Grande Basin issues.

7 Q. What sort of -- what are their  
8 responsibilities?

9 A. Well, they're -- they all relate to the Rio  
10 Grande Compact. The -- there is really kind of three  
11 levels when you look at this piece that's here. There  
12 is -- you see Page Pegram as the Rio Grande bureau  
13 chief and she's also current New Mexico engineer  
14 advisor of the Rio Grande Compact, and then on the  
15 right side of that org chart piece right under Page  
16 are staff that specifically work on water  
17 administration, water accounting issues, projects on  
18 the ground, and that's from Shalamu Abudu who is left  
19 the ISC recently and then all the way down to the  
20 project manager, Cindy Stokes on the right-hand side,  
21 and then on the left-hand side is our group that is  
22 addressing endangered species issues in the Rio Grande  
23 Basin, and it's important to do that in the basin for  
24 Compact purposes because of biological opinions and  
25 the need to have projects move forward and go through

1 those assessments. So we have a number of staff  
2 working on those. And then specifically for the ISC,  
3 which is different from many other water management  
4 agencies, we built and -- well, we designed and built  
5 two hatcheries, we call them refusions for the  
6 endangered species for the Rio Grande silvery minnow,  
7 and I have a number of staff working specifically on  
8 those items.

9 **Q. Let's take a look at New Mexico Exhibit 739**  
10 **as we continue our discussion about the ISC. And this**  
11 **document has already been admitted,**  
12 **Mr. Schmidt-Petersen, but can you tell us what we're**  
13 **looking at?**

14 A. This appears to be one of the office of the  
15 state engineer annual reports.

16 **Q. If you go to the next page, we can see the**  
17 **year.**

18 A. Okay.

19 **Q. So what year is this annual report?**

20 A. This is the fiscal year 2016 annual report.

21 **Q. What's the purpose of the Office of the State**  
22 **Engineer annual reports?**

23 A. So the -- the agency overall, OSE/ISC, is  
24 required annually to report to the legislature, the  
25 public, on our activities across the state, right. So

1 in this case, it's what's the mission, what are the  
2 responsibilities of OSE/ISC, the different programs  
3 that are there. That's usually listed in the  
4 document. It talks about our budget and  
5 funding-related issues. It then talks about the  
6 specific programs in detail and what those programs  
7 work to accomplish in any one particular year, and  
8 there is a specific section every year on the  
9 Interstate Stream Compact -- excuse me -- Interstate  
10 Stream Commission.

11 **Q. Let's go to that section, which is on Page**  
12 **52. We'll highlight the first paragraph to begin**  
13 **with. Take a second to review it. Does that**  
14 **summarize your understanding of the ISC?**

15 A. It does.

16 **Q. And so in your own words, what is it that the**  
17 **ISC is doing?**

18 A. Again, our job is to investigate and conserve  
19 and develop New Mexico's waters both within the state  
20 and with our neighboring states, and we do that  
21 regularly.

22 **Q. Let's take a look at some of the specific**  
23 **duties of the ISC so, first, let's highlight**  
24 **Paragraphs 6 and 7 here. Do you see those,**  
25 **Mr. Schmidt-Petersen?**



1           A.    Yes, I do.

2           **Q.    Using those as a guide, can you summarize the**  
3 **ISC's responsibilities with regard to water planning**  
4 **in the State of New Mexico?**

5           A.    Yes, I can.  So there's really -- there's  
6 three statutes that -- that direct the ISC in  
7 implementing water planning, you know, across the  
8 state of New Mexico, and they're really in two  
9 components.  Two of those statutes relate to regional  
10 water planning within the state of New Mexico, and  
11 that really relates to, there's 16 regions, let me  
12 say, that are self-identified and developed within New  
13 Mexico, and -- and they each have engagement with the  
14 ISC on their water plants.  It's our job to oversee  
15 that and provide funding and support, and we've done  
16 that since about 1987, and then in addition in 2003,  
17 the legislature passed an act that's called the State  
18 Water Plan Act, and you can see the statute reference  
19 that's here, and this is specific to --

20           **Q.    Before you --**

21           A.    Oh, yeah.

22           **Q.    Sorry to interrupt, but let's take a look at**  
23 **Page 57, which I think describes more about the state**  
24 **water plan.**

25           A.    Oh, sure.

1           **Q.    Why don't you continue your discussion now**  
2 **about the state water plan.**

3           A.    Yes, please, I can.  So what we're seeing  
4 here is a reference to the 2018 New Mexico State Water  
5 Plan, and that's the most recent plan for the State of  
6 New Mexico.  There has been -- there was a 2003 plan  
7 that the ISC developed, and then what we call updates  
8 and revisions to that, but then this culminated in the  
9 2018 report that you see here.  This report has three  
10 major parts.  The first part, Part 1, is policies that  
11 provide descriptions of proposed water resource  
12 management policies for the state of New Mexico.  I  
13 reference that here because it relates largely also to  
14 the regional planning process.  You know, the  
15 legislative direction is to engage with local water  
16 users and stakeholders, understand their concerns, and  
17 then to work to integrate or summarize that.  So what  
18 the Interstate Stream Commission directed and what we  
19 did was to kind of summarize what we'd heard from  
20 those various different regions and then categorize  
21 the concerns into various policies.  And I -- I  
22 believe there was eight of them.  And then in addition  
23 -- yes, Mr. Wechsler?

24           **Q.    Well, you're talking about the regional**  
25 **plans.  Let's go to the page that talks about regional**

1 **planning, which is just before here, Page 56.**

2 A. Okay.

3 **Q. Why don't you talk about how those regional**  
4 **plans are developed?**

5 A. Yeah. So periodically, we received funding  
6 from the -- the legislature for water planning in  
7 general, and we have staff that are engaged in doing  
8 those activities. Within the various regions of -- of  
9 New Mexico, what the ISC does is help to coordinate  
10 steering committees with those various regions,  
11 provide facilitation support, some administration  
12 support, technical and/or legal to help those regions  
13 develop their plan and answer certain questions for  
14 each region, and -- and there's a handbook that the  
15 ISC developed and has refined over time that describes  
16 what the commission is looking for from each regional  
17 plan. But as a general statement for regional plans,  
18 we're really looking at, you know, what is the actual  
19 -- the water supply, what's the current demand, what's  
20 the future demand, and how does that region intend to  
21 go about meeting supply and demand needs or closing  
22 gaps.

23 **Q. Does the ISC provide technical support to the**  
24 **regions as they're developing their regional plans?**

25 A. Yes. It's varied over time, but we do.

1           **Q.    Are those regional plans then submitted to**  
2 **the ISC?**

3           A.    They are.

4           **Q.    For what purpose?**

5           A.    For acceptance by the New Mexico Interstate  
6 Stream Commission as a regional plan that then  
7 becomes, you know, part of a state water plan.

8           **Q.    Let's take a look at the Lower Rio Grande**  
9 **Regional Water Plan.  That's New Mexico Exhibit 616.**  
10 **Do you recognize this exhibit?**

11          A.    I do.

12          **Q.    What is it?**

13          A.    So this is the cover page to the most recent  
14 regional water plan for the Lower Rio Grande region  
15 within New Mexico, and you can see that -- where it's  
16 highlighted in the inset map there, and that was dated  
17 March of 2017.

18          **Q.    You indicated that the regional plans are**  
19 **submitted and accepted by the ISC.  Are those then**  
20 **kept on file in the normal course of business at the**  
21 **ISC?**

22          A.    They are.

23                   **MR. WECHSLER:**  Your Honor, I'd offer New  
24 Mexico Exhibit 616.

25                   **JUDGE MELLOY:**  Any objection?  Hearing

1 none, 616 is admitted.

2 Q. (BY MR. WECHSLER) Let's turn to Page 21 of  
3 this regional plan. Does this show the various  
4 planning regions Mr. Schmidt-Petersen?

5 A. Yes. So this is a map that we use in  
6 essentially every regional plan. It shows the entire  
7 state of New Mexico, the counties within New Mexico,  
8 and then the blue-shaded areas are the individual  
9 planning regions and, of course, the lower Rio Grande  
10 planning region as highlighted here.

11 Q. Let's go to Page 23, and we're going to take  
12 a look at Paragraph 2.1. Here, this describes the  
13 role of the Interstate Stream Commission in that  
14 process, and I think you just summarized that; is that  
15 right?

16 A. Yes, sir.

17 Q. And then so let's go to Page 27 of this  
18 document. We can take a look who the steering  
19 committee was. And how is the steering committee  
20 selected?

21 A. Well, the steering committee, in this case  
22 for the most recent version of -- of regional plans,  
23 the Commission sought to get as many water  
24 stakeholders at the table as possible for steering  
25 committees, but they're ultimately self-selected.

1           Q.    We can see here that actually one of our  
2 witnesses, Michelle Estrada-Lopez was actually on this  
3 steering committee; is that right?

4           A.    That's correct.

5           Q.    If we turn to Page 196 of this document, and  
6 here is the beginning of a stakeholder list. I'll  
7 represent it goes on for several pages, but why is a  
8 stakeholder list developed?

9           A.    So every regional plan and every regional  
10 planning effort has a list of the stakeholders that  
11 were involved. You know, a goal of regional planning  
12 is to hear the voices of the people from each region,  
13 and -- and I think that's what we're trying to  
14 represent here that in this planning region, there was  
15 a number of different people that engaged.

16          Q.    Let's turn to Page 13 then and look at some  
17 of the issues that this region thought were important.  
18 And I -- what are the key issues? Is it something  
19 that is part of every regional plan?

20          A.    Yes. Although most recent plans have a key  
21 issues section.

22          Q.    And is that identified by the people within  
23 that region?

24          A.    Well, the section isn't, but the specific  
25 bullets come from the steering committees.

1 Q. So let's high --

2 A. But --

3 Q. Oh, please. Sorry to interrupt. We're going  
4 to look at that first bullet point. First, I want to  
5 ask you, Mr. Schmidt-Petersen, this says that the Rio  
6 Grande Stream System is fully appropriated. What does  
7 that mean?

8 A. It means there is no new water to put to  
9 beneficial use.

10 Q. I see today we're highlighting in hot pink.  
11 We see there below there that it talks about the flow  
12 of the Rio Grande must be offset through return flow.  
13 What does that mean?

14 A. Well, this particular piece with return flow,  
15 offset is a -- is a term used within the New Mexico  
16 Water Administration process, and I think it's  
17 generally in most other western states, also, you  
18 know, when a new use is being proposed, the -- there  
19 is an evaluation that goes forward, and if there is --  
20 if there is an impact that may affect senior water  
21 right holders, the river system, then an offset is  
22 required, and that's something that would counteract  
23 the effect of that new water use.

24 Q. And are offsets required in the lower Rio  
25 Grande?

1           A.     They are.

2           Q.     All right.  Let's look at the fourth bullet  
3 point here on this page, and I think it spills into  
4 the next page, as well, so we'll work on getting that  
5 up for you.  There we go.  And, again, want to  
6 highlight, these are key issues that are identified by  
7 the region, right, the stakeholders and water users  
8 within the lower Rio Grande region?

9           A.     Yes, that's correct.

10          Q.     One of the things they're identifying here is  
11 that EBID's allocation has been reduced in full supply  
12 years by more than 150,000 acre-feet.  Do you see  
13 that?

14          A.     I do.

15          Q.     And it then continues, and it says, "Many  
16 questions persist regarding the fairness and  
17 sustainability of the Operating Agreement, as it has  
18 been implemented."  Do you see that?

19          A.     Yes.

20          Q.     Has the Operating Agreement also been a  
21 concern for the ISC from a Compact perspective?

22          A.     Yes, it has.

23          Q.     Why?

24          A.     Again, it goes to our New Mexico citizens,  
25 here EBID farmers, getting the water that -- that is



1 rightfully due to them, you know, the apportionment  
2 for New Mexico and their 57 percent of Project supply.

3 Q. Now, we have heard testimony that EBID  
4 voluntarily entered into the operating agreement, and,  
5 in fact, a couple of EBID representatives have  
6 testified on behalf of Texas. If EBID supports the  
7 operating agreement, why is it a concern from a  
8 Compact perspective for the ISC?

9 A. Well, it -- it goes back to the role of the  
10 Interstate Stream Commission in protecting all of New  
11 Mexico citizens, EBID farmers and EBID, and, you know,  
12 we believe with the operating agreement that it --  
13 that it changed the amount of water our farmers get,  
14 and it's our job to -- to carry that forward and  
15 represent them for our apportionment under the Compact  
16 in the lower Rio Grande.

17 Q. We'll come back to that issue. I want to go  
18 to another bullet point here on Page 14, and it's  
19 going to be the second bullet point when it comes up.  
20 Do you see that, Mr. Schmidt-Petersen?

21 A. Yes, I do.

22 Q. And it's talking about high levels of  
23 groundwater pumping may cause increased salts. Is  
24 this, the concern being expressed here in this bullet  
25 point, has that also been a concern of the ISC?

1           A.    It has.

2           **Q.    Could you please describe why?**

3           A.    Sure.  You know, again, it goes to our  
4 farmers in the Elephant Butte Irrigation District,  
5 and, you know, we -- we were engaged in a program  
6 called the Rio Grande Project Salinity Coalition, but  
7 also in that program and then looking at the changes  
8 from the operating agreement, we interacted with a  
9 number of farmers, and there are numerous places  
10 within the Elephant Butte Irrigation District where  
11 farmers aren't getting surface water, they need to  
12 pump groundwater, and that groundwater is -- has a  
13 higher TDS and is causing them issues.

14           **Q.    Let's look then at the -- the last bullet**  
15 **point on this page, and, again, this spills over into**  
16 **the next page, and can you see that,**  
17 **Mr. Schmidt-Petersen?**

18           A.    I can now.  It was a little blurry there for  
19 a sec.

20           **Q.    And this is identifying something called the**  
21 **Rio Grande Project Salinity Management Coalition.  Are**  
22 **you familiar with that coalition?**

23           A.    Yes, I am.  I was, I would say, a founding  
24 member of it.

25           **Q.    Can you describe what that coalition is?**

1           A.     That was a group that was formed by the Rio  
2 Grande Compact Commission.  Where the Interstate  
3 Stream Commission and TCEQ provided funding to the  
4 U.S. Army Corps of Engineers and a matching program to  
5 evaluate the sources of salinity in the Rio Grande  
6 Project area, really in this case from north of there,  
7 from just around Socorro, New Mexico all the way down  
8 to Fort Quitman.

9           **Q.     And does this, just taking a second to review**  
10 **that bullet point, does that accurately summarize your**  
11 **understanding?  I don't need you to read it.  It will**  
12 **be in the record.**

13          A.     It does.

14          **Q.     Let's take a look at Page 15, and we're going**  
15 **to look at the first bullet point here.  Here, it's**  
16 **talking about the Lower Rio Grande Stream System**  
17 **Adjudication.  Are you familiar with that**  
18 **adjudication?**

19          A.     Yes, I am.

20          **Q.     What is it?**

21          A.     So it is the legal proceeding in New Mexico  
22 state court to determine the water rights of all New  
23 Mexico water users in the Lower Rio Grande, and that's  
24 the full right of those users.

25          **Q.     We'll hear more about from some of the other**

1 witnesses in the case. For now, let's look at Page  
2 104 of New Mexico Exhibit 616. Here, you can see this  
3 is styled U.S. Geological Survey wells and recent  
4 groundwater elevation change. What I want to know  
5 from you, Mr. Schmidt-Petersen, is does the ISC  
6 monitor groundwater elevations in the Lower Rio  
7 Grande?

8 A. Yes. We engage with a number of parties to  
9 do that.

10 Q. How do you do that?

11 A. So -- well, let me just say, this is, I  
12 believe, from the regional plan, but most regional  
13 plans have this type of information in them with  
14 regards to wells. In the lower Rio Grande  
15 specifically, for most of my tenure in the ISC, the  
16 ISC has been an annual partner with the United States  
17 Geological Survey and a number of entities. It's  
18 something called the Mesilla Basin Monitoring Program.  
19 That program does groundwater monitoring, but -- and a  
20 number of other things, water levels, issues with  
21 seepage salinity. More specifically, though, in the  
22 Lower Rio Grande, the ISC for a lot of the -- probably  
23 the yellow wells that you see in the valley, we worked  
24 collaboratively with the Elephant Butte Irrigation  
25 District, and we either replaced monitor wells about

1 40 to 50 of them, and we also installed another ten  
2 monitoring systems, I would call them piezometers that  
3 have multiple depth levels for monitoring just to have  
4 a better understanding of the hydrogeology of the  
5 system.

6 **Q. So why is that important? Why did ISC make**  
7 **that investment?**

8 A. In this instance, we did it to have a better  
9 understanding of what was happening and how things  
10 were changing over time in the Lower Rio Grande, and,  
11 you know, that -- that came out of a lot of the issues  
12 that we've already been discussing here, the need for  
13 additional information.

14 **Q. Including in order to evaluate the operating**  
15 **agreement and the impact on the Compact apportionment?**

16 A. Yes, sir.

17 **Q. Let's look at Page 105, and here, we can see**  
18 **it's hydrographs of selected wells is the label there**  
19 **in the lower right-hand corner, but let me ask you**  
20 **this: Does the ISC monitor overall groundwater trends**  
21 **in the LRG and New Mexico?**

22 A. We do. With the Office of the State  
23 Engineer.

24 **Q. Why?**

25 A. Again, for the -- the reasons that -- that we

1 just articulated there relative to the operating  
2 agreement, the water our farmers are getting, and then  
3 generally for water planning, you know, within New  
4 Mexico overall.

5 **Q. Has there been a trend in the groundwater**  
6 **levels in the last, say, ten years since the operating**  
7 **agreement?**

8 A. There has.

9 **Q. And what is that trend?**

10 A. So you can see, you know, let me just say  
11 with the -- with the graphs that are shown here, I  
12 think almost all of them in the last ten years show a  
13 drop in groundwater elevations. Now, some of those  
14 you can see in the planning region are actually, you  
15 know, outside of the valley bottom or the Rio Grande  
16 alluvium, but there are a number of them that are tied  
17 directly in and right along the Rio Grande Project. I  
18 would point you to the bottom left graph in that  
19 regard as something that, I think, depicts a pretty  
20 significant change.

21 **Q. And has that been a concern for the ISC from**  
22 **a Compact perspective?**

23 **MS. KLAHN:** Your Honor, I'm going to  
24 object on foundation business -- foundation basis.  
25 I'm sorry. He's the ISC director, but I don't -- I

1 don't think he has the technical expertise to comment  
2 on the -- the trends in groundwater levels, and --  
3 there you go.

4 **JUDGE MELLOY:** Well, I think he can --  
5 as the director and an engineer, I think he can  
6 testify as to what the graphs show, whether -- I'm not  
7 sure whether he can extrapolate them as to whether  
8 that's a trend or not, but certainly he can testify as  
9 to what the graphs show. Go ahead.

10 **Q. (BY MR. WECHSLER)** Yeah. And my question, I  
11 think, Mr. Schmidt-Petersen, was has that trend that  
12 you've explained been a concern for the ISC?

13 A. Very much so.

14 **Q. Why?**

15 A. Because it goes to the sustainability here of  
16 our aquifer system and the water supply for our  
17 farmers and then communities in this area. It's our  
18 job to be protective of them.

19 **Q. And has the ISC, under your direction,**  
20 **evaluated the cause of the trend?**

21 A. We have, again, with the Office of the State  
22 Engineer.

23 **Q. And what was the findings of that evaluation?**

24 A. Well, there's a couple of things. I just  
25 focus on the -- the last seven to ten years. What you

1 see in this area that is adjacent to the -- the river  
2 bottom area, a -- a significant decline in groundwater  
3 elevations through that area, and that decline remains  
4 to be -- is pretty consistent and has a few kind of  
5 stable levels, but it's generally going down, and that  
6 is very different from the relationships, you know,  
7 that had occurred prior to, let's say, 2007/2008.

8 **Q. So what happened in 2008?**

9 A. Well, the big change in 2008 was  
10 implementation of 2008 Operating Agreement.

11 **Q. All right. Let's turn back to the ISC**  
12 **obligation, so let's go back to Exhibit 739. We were**  
13 **looking at this 2016 Office of the State Engineer**  
14 **report, and here, we're looking at Page 52, and you**  
15 **can see the second paragraph there has been called**  
16 **out. Can you summarize using this as a guide, ISC's**  
17 **obligations with regard to managing the Interstate**  
18 **Stream Compact obligations and entitlements of New**  
19 **Mexico?**

20 A. I can. I think as we're all aware, you know,  
21 every single interstate Compact is both state law and  
22 federal law, and for the Interstate Stream Commission,  
23 we have the responsibility of providing staffing  
24 and/or administrative and other activities for every  
25 single one of these Compacts.



1           **Q.**    Let's look at New Mexico Demonstrative  
2 **Exhibit 22 again, and this time, Page 3. What are we**  
3 **looking at here, Mr. Schmidt-Petersen?**

4           A.    Well, okay. So this is, again, a map of the  
5 state of New Mexico, north being upward on this  
6 graphic, and what it shows is the major river basins  
7 within New Mexico where there are interstate Compacts.

8           **MR. WECHSLER:** Your Honor, I'm going to  
9 offer, again, New Mexico Demonstrative Exhibit 22, I  
10 guess, Page 3.

11           **JUDGE MELLOY:** Any objection?

12           **MS. KLAHN:** I'm still objecting on  
13 relevance, Your Honor. I don't know what difference  
14 it makes that New Mexico signatory to eight interstate  
15 stream Compacts.

16           **MR. WECHSLER:** Do you want me to respond  
17 to that, Your Honor?

18           **JUDGE MELLOY:** Go ahead.

19           **MR. WECHSLER:** So my response to that is  
20 the Supreme Court has made clear in multiple cases  
21 that it's relevant to look to other interstate  
22 Compacts to under -- to help inform specific Compacts,  
23 and I'll point you to the Tarrant case where they said  
24 -- this is a quote from 569 U.S. 614 at 633, "Looking  
25 to the customary practices employed in other

1 interstate Compacts also helps us to ascertain the  
2 intent of the parties to this Compact." That was  
3 finding that, "The absence of comparable language in  
4 the Red River Compact counts heavily against Tarrant's  
5 reading of it." The Court has also gone on in cases  
6 such as Alabama verses North Carolina, Oklahoma versus  
7 New Mexico, and Texas versus New Mexico on the Pecos  
8 River to cite similar things, and, in fact, has cited  
9 the statement of contract, Section 203B, for the  
10 proposition that uses of trade can be relevant in  
11 interpreting a Compact. So our point is, he has a  
12 significant amount of background here in a number of  
13 different Compacts, and I'm going to ask  
14 Mr. Schmidt-Petersen specifically to look at a couple  
15 of those, which we think are relevant and helpful to  
16 the Court to understand the provisions of the Rio  
17 Grande Compact and how it's been administered.

18 **MS. KLAHN:** May I respond?

19 **JUDGE MELLOY:** You may.

20 **MS. KLAHN:** The quote that Mr. Wechsler  
21 just read is part of an argument that they made in  
22 their motion for summary judgment. We responded to  
23 that. It's a mischaracterization of what the Tarrant  
24 decision held, and it also sounds like he's going to  
25 try and get Mr. Schmidt-Petersen to give essentially

1 legal analysis related to these Compacts. I mean,  
2 they are what they are. If Mr. Wechsler wants to  
3 argue and use the Compacts in some sort of briefing,  
4 we certainly -- that's certainly his right.

5 Mr. Schmidt-Petersen's two years as the Interstate  
6 Stream Director don't give him any foundation at all  
7 to give opinion testimony about what the Compacts  
8 provide, and that's another issue.

9 Mr. Schmidt-Petersen is a fact witness with a  
10 hydrology degree, and he doesn't have any basis to be  
11 getting into these kinds of issues in testimony.

12 **JUDGE MELLOY:** Well, I'm going to allow  
13 the exhibit in for foundational purposes to show what  
14 is foundation to, I assume, will be other testimony  
15 which may or may not be admitted. At least for now,  
16 this Page 3 is admitted.

17 **Q. (BY MR. WECHSLER)** Mr. Schmidt-Petersen, we're  
18 going to turn back then to Exhibit -- well, when we're  
19 looking at this exhibit, how many of these interstate  
20 stream Compacts is the ISC responsible for?

21 **A.** All of them.

22 **Q.** And as ISC director, are you also responsible  
23 for all of those Compact obligations?

24 **A.** In the end, ultimately, yes.

25 **Q.** And I think we talked about this earlier

1 today, but how long have you been working on  
2 Interstate Stream issues?

3 A. 22 years.

4 Q. In various capacities, and in those  
5 capacities, in specifically the Lower Rio Grande  
6 Compact; is that right?

7 A. That's correct.

8 Q. Let's turn back then to New Mexico Exhibit  
9 739, and we are going to go to Page 52, Paragraph 3.  
10 Here, we're looking at something that talks about  
11 Supreme Court decrees. Is the ISC also responsible  
12 for compliance with U.S. Supreme Court decrees  
13 involving interstate rivers?

14 A. We are.

15 Q. And as ISC director, do you then have  
16 responsibility over those decrees?

17 A. I do.

18 Q. Let's turn to Paragraph 4 here in this Page  
19 52 of New Mexico 739, and here it talks about to  
20 assure compliance, the commission does a number of  
21 things. Using this paragraph as a guide and anything  
22 else you wish to bring in, can you summarize the  
23 actions that ISC takes to assure compliance with New  
24 Mexico 's interstate water obligations?

25 A. Happy to do so. So each Compact is

1 different, and that's the main starting point that's  
2 there. So how we go about addressing it depends on  
3 the terms of the Compact, but there are general kind  
4 of things that we do for all of them, right, and the  
5 first thing is really making sure you have good data  
6 that the states are agreeing to, that -- that you're  
7 collecting that in an appropriate manner, you use that  
8 data, you compile it, you evaluate it, using that  
9 information, look generally at your obligations,  
10 assess the status, and then either take actions or  
11 make recommendations on actions and projects to kind  
12 of rectify certain circumstances. You implement them,  
13 and then you reassess, and you do the same thing  
14 again.

15 **Q. Let's look at the fifth paragraph on this**  
16 **same page. Yeah. In here, it says that the**  
17 **Commission is authorized to institute legal**  
18 **proceedings in the name of the state. Does that**  
19 **include instituting legal proceedings to protect**  
20 **interstate stream obligations?**

21 A. It does.

22 **Q. And does the ISC sometimes initiate legal**  
23 **proceedings to protect interstate Compact obligations?**

24 A. The Commission has.

25 **Q. Has -- and has -- has the Commission done**

1 that in the Lower Rio Grande?

2 A. It has in a couple ways, yeah.

3 Q. And can you describe those ways, please?

4 A. Well, so one is that the litigation that you  
5 guys have all been -- excuse me, Your Honor, but have  
6 been discussed here today, but in addition, we engage  
7 in protests of water right transfers within the state  
8 process and also can get into state court on some of  
9 these issues.

10 Q. Let's -- before we turn then to some of these  
11 other interstate stream Compacts and the way they  
12 relate to the Rio Grande Compact, let's talk about  
13 some of the other things that the ISC sometimes does  
14 for Compact obligations, and let's look at New Mexico  
15 Demonstrative Exhibit 22, Page 7.

16 MR. WECHSLER: I don't know if there's  
17 an objection to this, Your Honor, or not. Page 7.

18 JUDGE MELLOY: Any objection?

19 MS. KLAHN: No, Your Honor.

20 JUDGE MELLOY: Page 7 of the  
21 Demonstrative No. 22 is admitted.

22 Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen, using  
23 this as a guide, we can see this as examples above  
24 Elephant Butte. We'll look at below in just a minute,  
25 but using this as a guide, can you just summarize some

1 of the activities that ISC does above Elephant Butte  
2 in order to work on Compact issues?

3 A. I can. And you see there's a list here -- a  
4 bullet list of those. The first piece that we spend  
5 considerable amount of resources on every year, you  
6 know, well over a million dollars sometimes three or  
7 four, is river channel, levee, drain, and vegetation  
8 maintenance, largely in the Middle Rio Grande System,  
9 and you can see on the far right upper picture, you  
10 know, is an excavator that is repairing a drain in the  
11 Middle Rio Grande System. We have engaged heavily in  
12 surface water/groundwater interaction study in the San  
13 Acacia reach of the Middle Rio Grande, which is an  
14 area that has been historically very difficult to move  
15 water through. Probably one of the bigger projects  
16 that I've been involved in, you know, from a river and  
17 sediment kind of management-related basis is one we  
18 call the Elephant Butte Reservoir Delta Channel  
19 construction. If you look at the two photos off on  
20 the right, those are both related to, first,  
21 construction of this channel, and then maintenance of  
22 it. If you look in the lower right-hand side, that  
23 photo, it's one I took back in 2003, and that was when  
24 the current drought was really starting to get  
25 significant. The little white line that you see in

1 the very background, that's the top level of Elephant  
2 Butte Reservoir when it's full, and at this point in  
3 time, it had been full three years before that, and it  
4 was dropping precipitously. The river didn't connect  
5 with the reservoir. We had to create our own channel,  
6 and we built, with Reclamation initially, but now  
7 funded by the ISC, I think we're running up on \$22  
8 million. We built and maintained an 18-mile channel  
9 to connect the river to Elephant Butte Reservoir. We  
10 also do a significant amount of work, you saw with my  
11 staff, on river and reservoir operations oversight,  
12 engagement with water activities all through the  
13 basin, and then we support active water resource  
14 management initiatives in the Rio Grande Basin.

15 **Q. Let's turn to Page 8, Demonstrative -- New**  
16 **Mexico Demonstrative No. 22.**

17 **MR. WECHSLER:** I -- I don't know if  
18 there's an objection to this one, Your Honor.

19 **MS. KLAHN:** No objection.

20 **JUDGE MELLOY:** Page 8 is admitted.

21 **Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen, using**  
22 **this as a guide, can you give us some examples of the**  
23 **types of work that the ISC engages in below Elephant**  
24 **Butte related to the Compact?**

25 **A.** I can. So, again, there's a number of



1 different bullets here. First, what you see there is  
2 just working with the other Compact states, the U.S.  
3 Geological Survey, and Reclamation to improve the  
4 accuracy of Compact gages in Project storage and  
5 immediately below that. We've got a number of things  
6 we are doing there. There's a mass balance assessment  
7 we've been doing where there is issues, and we've been  
8 working with all the parties to improve the accuracy  
9 of that gaging. We spent quite a bit of money in the  
10 early 2000s with the Elephant Butte Irrigation  
11 District within the river channel and within its  
12 system to aid them in improving their gaging of the  
13 system and the river. We paid for the, what now are  
14 called the Anthony and Hayner bridge river gaging  
15 locations in there, and then also, there are various  
16 infrastructure control within EBID they identify as  
17 being problematic for their operations. We funded and  
18 oversaw the monitor wells I had talked about. We  
19 support the activities of the District 4 Office of the  
20 State Engineer and their water master activities, we  
21 annually fund this United States Geological Survey  
22 Mesilla Basin monitoring program, and then we had the  
23 significant engagement in the salinity control  
24 program.

25 **Q. All right. We can take down that exhibit**

1 now. You mention that you have experience overseeing  
2 New Mexico's compliance with other Compacts; is that  
3 right?

4 A. I do.

5 Q. So I want to ask you about the administration  
6 of two of those Compacts to provide context for the  
7 Court as it evaluates the Rio Grande Compact. To Ms.  
8 Klahn's point earlier, I mean, you're not a lawyer; is  
9 that right?

10 A. That's correct.

11 Q. Are you intending to offer any legal  
12 testimony?

13 A. I'm not.

14 Q. But do you administer all of the Compacts in  
15 the State of New Mexico?

16 A. I do -- or we do.

17 Q. Does that involve understanding what the  
18 requirements are to ensure Compact compliance?

19 A. It does.

20 Q. Let's talk about the Pecos River Compact.  
21 Are you familiar with the Pecos River Compact?

22 A. Yes, I am.

23 Q. What states are party to that Compact?

24 A. The state of New Mexico and the state of  
25 Texas.

1 Q. Which state is upstream?

2 A. New Mexico is upstream in that regard.

3 Q. As the ISC director, are you responsible for  
4 overseeing New Mexico's compliance with the Pecos  
5 River Compact?

6 A. I am.

7 Q. And are you responsible for New Mexico's  
8 administration of the Pecos River Compact?

9 A. I am. With my staff, yes.

10 Q. So let's take a look at Slide No. 6 then.  
11 And what are we looking at here, Mr. Schmidt-Petersen?

12 A. So --

13 MS. KLAHN: Your Honor, I'm going to  
14 object at this point because of the -- the offensive  
15 portion of this slide in addition to just generally  
16 not being relevant is the highlighting of the 1947  
17 condition, and I -- I just don't think there should be  
18 any testimony about it. If he wants to talk about the  
19 Pecos River Compact, I think that's fine, but I think  
20 this slide can't be admitted, and it should just come  
21 down.

22 MR. WECHSLER: Well, Your Honor, we'd be  
23 happy to submit a replacement page without the  
24 highlighting. I think the words will -- 1947  
25 condition will still be in the Compact, but we can --

1                   **JUDGE MELLOY:** Well, it -- I mean, it's  
2 pretty self-evident why you want that put up there,  
3 and -- and I will allow it for the purpose of showing  
4 what the Compact says, and as far as the highlighting  
5 is concerned, I mean, it is what it is. Obviously you  
6 want to try to demonstrate that if they say 1939  
7 condition or 1938 condition, they would know how to do  
8 it, and I -- I understand your point, and I think it's  
9 -- it's a legitimate argument that you're entitled to  
10 make, and Texas, I'm sure, will have some  
11 counterargument. So for that reason, I'll admit it.  
12 Go ahead.

13           **Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen, to**  
14 **skip over a few questions and get to something that**  
15 **the Master didn't cover, based on your experience with**  
16 **the Pecos River Compact, how is that 1947 condition**  
17 **defined, meaning how is it in practice administered?**

18           **A.** This goes to a requirement by the State of  
19 New Mexico to make deliveries at the state line with  
20 -- with Texas on the Pecos at a place called Red Bluff  
21 gage, consistent with the 1947 condition.

22           **Q. And -- and then based on your experience**  
23 **administering the Pecos River Compact, like, what is**  
24 **the 1947 condition?**

25           **A.** Well, the 1947 condition is set out

1 specifically described in the Compact, there is a  
2 report of the engineering advisory committee on the  
3 Pecos that basically describes that condition.

4 Q. And --

5 A. Excuse me. It's the infrastructure within  
6 the basin that was occurring in the water supplies  
7 available at that time to Texas and New Mexico.

8 Q. Well, you say it involves infrastructure in  
9 the basin. Does that involve infrastructure in  
10 existence in 1947 in both New Mexico and Texas?

11 A. It does.

12 Q. How do you know that?

13 A. Well, the -- it's in the engineering advisory  
14 report, but I'm pretty sure the U.S. Supreme Court  
15 just told us that again in the recent Texas/New Mexico  
16 argument and decision.

17 Q. I want to call your attention to another set  
18 of language here in Article 2. Article -- I'm sorry,  
19 Article 3. In Article 3, it also says that, "New  
20 Mexico shall not deplete by man's activities the flow  
21 of the Pecos River at the New Mexico/Texas state  
22 line," and then it goes onto say below an amount will  
23 give it the 1947 condition. Based on your experience  
24 administering this Compact, does this language  
25 prohibit New Mexico from depleting flows by

1 groundwater pumping?

2 A. It does.

3 Q. And how do you know that?

4 A. We were told that by the U.S. Supreme Court.

5 Q. And so you're talking about this Supreme  
6 Court case. In what year did Texas bring that  
7 lawsuit?

8 A. I believe they brought the lawsuit in the  
9 late 1970s, '77, '78.

10 Q. Do you know when that -- the decree was that  
11 resolved that case?

12 A. 1987.

13 Q. During that same time period, 1977 to 1988,  
14 did Texas bring a similar suit against New Mexico for  
15 groundwater pumping in the Rio Grande Basin?

16 A. They did not.

17 Q. All right. Let's turn then to the La Plata  
18 river Compact. So we'll go to Page -- let me just  
19 first ask you as a matter of foundation. One of the  
20 issues in this case has to do with notice and whether  
21 there's notice about receiving Project water that was  
22 ordered. Are you familiar with the La Plata River  
23 Compact?

24 A. I am, both as ISC director and my time as  
25 Colorado River Bureau Chief.

1           **Q.    Are you responsible for administering the La**  
2 **Plata River Compact?**

3           A.    I am with the state engineer under certain  
4 circumstances.

5           **Q.    And what are the states that are involved in**  
6 **the La Plata River Compact?**

7           A.    In that Compact, it is New Mexico and  
8 Colorado.

9           **Q.    Which is the upstream state?**

10          A.    In that instance, the state of Colorado is  
11 upstream.

12          **Q.    And are you responsible for overseeing New**  
13 **Mexico's compliance with the La Plata River Compact?**

14          A.    I am.

15          **Q.    Let's look at Slide 4, and here you see the**  
16 **language of the La Plata River Compact, which we just**  
17 **put up to take a look at, and then let's look at the**  
18 **next slide, Slide 5, and as we're looking at that, let**  
19 **me ask you: Was the La Plata Compact the subject of**  
20 **the well-known Hinderlider case?**

21          A.    It was.

22          **Q.    So what are we looking at here in Slide No.**  
23 **5?**

24          A.    This is an e-mail from my staff, or Paul  
25 Harms, on the Colorado River Basin Bureau. It's from

1 March 15th of this year, to Robert Genualdi, who is  
2 the division engineer for the state of Colorado for  
3 really the southwest corner of the state there on the  
4 San Juan River -- well, La Plata and others.

5 Q. So here you see that New Mexico is requesting  
6 that Colorado begin making these deliveries. Does New  
7 Mexico provide notice to Colorado every year that it  
8 needs water under the La Plata Compact?

9 A. We do.

10 Q. Why?

11 A. We do that because really Colorado has no way  
12 of otherwise knowing if we need water.

13 Q. In the last sentence here, you can see it  
14 says that, "If New Mexico users find that we do not  
15 have a need to the full amount at that time, we'll  
16 contact you." Why is that language included?

17 A. Well, so, again, you know, they don't know  
18 how much we need, and to the extent that we have the  
19 water we need in order not to waste water out the  
20 bottom, we inform Colorado that there's additional  
21 water for them to divert and utilize.

22 MR. WECHSLER: So, Your Honor, before  
23 moving on, I'll move the admission of Demonstrative  
24 Exhibit Page -- New Mexico 22, Pages 4 and 5.

25 MS. KLAHN: Your Honor, I'll object on



1 the basis of relevance. In the summary judgment  
2 order, you found that there was no notice requirement.  
3 Whatever notice is required for Mr. Schmidt-Petersen  
4 to give under the La Plata River Compact is simply  
5 irrelevant to the issues in this case.

6 **MR. WECHSLER:** I think that -- please.

7 **JUDGE MELLOY:** Go ahead.

8 **MR. WECHSLER:** Well, I was just going to  
9 say certainly we recognize summary judgment was not  
10 granted in that motion, but it's still a live issue.

11 **JUDGE MELLOY:** Well, I have pretty  
12 serious reservations about the relevance of how notice  
13 is given in a different Compact, so I'm going to  
14 sustain the objection to these two exhibits.

15 **Q. (BY MR. WECHSLER)** Let's turn, now, to the Rio  
16 Grande Compact, and we are going to look at Joint  
17 Exhibit 428, which has already been admitted. This is  
18 -- you recognize this as a copy of the Compact,  
19 Mr. Schmidt-Petersen?

20 **A.** I do.

21 **Q.** And so I want to ask you about how New Mexico  
22 has historically understood the Compact and its  
23 obligations under the Compact. Turning to Article 4,  
24 which is on Page 4 and 5 --

25 **JUDGE MELLOY:** Mr. Wechsler, I was going

1 to wait a few more minutes, but since you seem to be  
2 changing to a whole different subject matter here,  
3 maybe this would be a good time to take our -- our  
4 break. Why don't we break until 1:10. All right?  
5 That would be 1:10 our time.

6 **MR. WECHSLER:** We'll be back.

7 (Recess.)

8 **JUDGE MELLOY:** All right. Go ahead.  
9 You may proceed.

10 **MR. WECHSLER:** Thank you.

11 **Q. (BY MR. WECHSLER)** When we left off,  
12 **Mr. Schmidt-Petersen, we were about to talk about**  
13 **Articles 4 and 5 so if we can put the Compact back up,**  
14 **which is Joint Exhibit 428, and you can see Article 4**  
15 **there starting on Page 5 spilling into Page 5, what**  
16 **was New Mexico's historic understanding about the**  
17 **purpose of Article 4?**

18 **MS. KLAHN:** Your Honor, I'm going to  
19 object on this. During Mr. Rolf Schmidt-Petersen's  
20 deposition, he testified he was not a historian, that  
21 he wasn't going to be offered as an expert, and I  
22 think we understand what New Mexico's position is on  
23 the history of the Compact based on Dr. Stevens'  
24 testimony from yesterday. We also have Mr. Lopez and  
25 Ms. Barroll, who are still coming in the spring, who

1 also purport to have historical testimony in their bag  
2 of tricks so I don't think there's any basis to go  
3 into history with Mr. Schmidt-Petersen.

4 **MR. WECHSLER:** Your Honor, I'm not  
5 talking about history. I'm just asking what was --  
6 what has New Mexico's position been on the Compact.  
7 Surely that's relevant?

8 **JUDGE MELLOY:** Well, as a representative  
9 of the supreme commission, I'll let him testify as to  
10 what the position of New Mexico is. Whether or not  
11 it's ultimately supported by the record is, I guess,  
12 one of the central issues in this case. Go ahead.

13 **MR. WECHSLER:** Thank you. That's our  
14 intent.

15 **Q. (BY MR. WECHSLER) All right. So, again,**  
16 **Mr. Schmidt-Petersen, what was the ISC's position on**  
17 **the purpose of Article 4?**

18 **A.** So Article 4, and this is the original  
19 Article 4, it describes the obligation of New Mexico  
20 to deliver water to San Marcial, New Mexico, which is  
21 right above Elephant Butte Reservoir, for a nine-month  
22 period of a year, excluding the months of July,  
23 August, and September, which are the summer months.

24 **Q. Are you aware that Article 4 was subsequently**  
25 **modified?**

1           A.    Yes, I am.

2           Q.    So let's take a look at that modification,  
3 which shows up on Page 10, and do you recognize the  
4 resolution that's shown on the right-hand side of the  
5 screen, Joint Exhibit 428, Page 10?

6           A.    Yes, I do. We include it in every annual Rio  
7 Grande Compact Commission report.

8           Q.    So what is this resolution?

9           A.    So this is the resolution that was adopted by  
10 the Rio Grande Compact Commission in 1948. That  
11 changed the location of New Mexico's delivery under  
12 the Article 4 from San Marcial to Elephant Butte  
13 Reservoir and went from a nine-month schedule to a  
14 calendar year schedule.

15          Q.    And this was passed, you said, in 1948. We  
16 can see that date at the top, February 22nd to 24th,  
17 1948. Is that the same time that the -- the states  
18 were finalizing the Pecos River Compact?

19          A.    That's my understanding.

20          Q.    Let's take a look at Page 11 of this  
21 resolution, and I want to call out the index flows  
22 there. Can you tell us what these index flows are  
23 showing? What is this table that you're looking at  
24 showing us?

25          A.    Well, this is really the schedule of required

1 deliveries from New Mexico to Elephant Butte based on  
2 the annual flow of the Rio Grande at the Otowi River  
3 gage, which is located near Los Alamos, New Mexico,  
4 and essentially on the left-hand column, you have our  
5 determination, really the determination of the  
6 engineer advisors that have been approved later by the  
7 Compact Commission of the annual flow of the Rio  
8 Grande at that location corrected for upstream  
9 reservoir operations and then on the right-hand side,  
10 a similar column, that says based upon the flow in the  
11 calendar year at Otowi, here is the required delivery  
12 to Elephant Butte. That's the Elephant Butte  
13 effective index supply.

14 **Q. Can you just give us an example of how that**  
15 **would work?**

16 A. Yeah. Let me -- let me give you an easy one  
17 on this one. So historically on the Rio Grande at  
18 Otowi, you know, we talk about about a million  
19 acre-feet of water a year being the long-term average  
20 flow at Otowi. So if you go to the Otowi index supply  
21 and you just come down to the 1,000 number there, each  
22 of these is a thousand so that's a million acre-feet  
23 at that location, and if you had exactly a million  
24 acre-feet that was calculated to pass the gage in that  
25 year, you would go over to the right, to the effective

1 -- Elephant Butte effective index supply, and that  
2 would give you the number of the required delivery at  
3 that location. Now, this delivery is not a single  
4 reservoir, I mean, a single river gage. It's actually  
5 the flow of the Rio Grande at the below Elephant Butte  
6 Reservoir gage, which is, like, located about a mile  
7 downstream or less from Elephant Butte Reservoir, plus  
8 or minus changing storage in Elephant Butte Reservoir.

9 Q. But basically the amount that passes the  
10 Otowi gage, then you have a delivery obligation into  
11 Elephant Butte so it tells you exactly how much should  
12 arrive?

13 A. That's correct. On calendar year basis.

14 Q. All right. So let's turn, now, to the  
15 division of water below Elephant Butte. Does the  
16 Compact contain an index like the one we're looking at  
17 for deliveries to the Texas state line?

18 A. It does not.

19 Q. We talked earlier about that 1947 condition  
20 language in the Pecos River Compact. Does the Rio  
21 Grande Compact contain similar language identifying a  
22 1938 condition for the Rio Grande Compact below  
23 Elephant Butte?

24 MS. KLAHN: Objection; the document  
25 speaks for itself.

1                   **JUDGE MELLOY:** The witness can answer.

2           A.     It does not.

3           **Q.     (BY MR. WECHSLER)** We saw in the Pecos River  
4 Compact the language indicating that this, quote, "New  
5 Mexico shall not deplete by man's activities the flow  
6 of the, end quote, river." Does the Rio Grande  
7 Compact contain any similar language for the area  
8 below Elephant Butte?

9                   **MS. KLAHN:** Objection; the document  
10 speaks for itself.

11                   **JUDGE MELLOY:** Go ahead. You can  
12 answer. Okay. Go ahead and answer.

13           A.     It does not.

14           **Q.     (BY MR. WECHSLER)** So based on your  
15 experience, though, in the Pecos River Compact and  
16 administering that Compact, has the Rio Grande Compact  
17 ever been administered in a way that is consistent  
18 with that 1938 condition?

19                   **MS. KLAHN:** Objection; calls for  
20 speculation.

21                   **MR. WECHSLER:** He's not speculating,  
22 Your Honor. He has testified he administers both  
23 Compacts.

24                   **JUDGE MELLOY:** I'll let the witness  
25 answer. Go ahead.

1           A.     If I understand the question, it was about  
2     administration of the Rio Grande Compact and other  
3     1938 conditions below Elephant Butte, and my answer is  
4     not, and that is largely because the -- there are all  
5     kinds of changes that have occurred in the lower Rio  
6     Grande region under the Compact, and -- and they, you  
7     know, go from significant to infrastructure changes.  
8     You can talk about the irrigation pieces of that, but  
9     also, the river channel pieces, the urbanizations and  
10    suburban kind of encroachment that's going on there,  
11    the changes in -- in really operations of the system.  
12    There have been numerous different changes on the  
13    Lower Rio Grande over time and that continue today. I  
14    just have to say, and listen to this, you know, I just  
15    remember going down to the lower Rio Grande in the  
16    late 1990s and 2000s and seeing the irrigated land in  
17    EP No. 1 that today is city. I mean, it just goes to  
18    the amount of change that's going on in that system.

19           **Q.     (BY MR. WECHSLER) Let 's turn to a different**  
20    **provision of the Compact, and this is on Page 2,**  
21    **Article 1L. So this is a definition of usable water.**  
22    **Has the ISC had a historic understanding of this**  
23    **definition?**

24           A.     Yes.

25           **Q.     What is it?**



1           A.     So usable water is the water that's in  
2 Project storage that is available for release, you  
3 know, from the lowest reservoir comprising Rio Grande  
4 Project storage, which is Caballo reservoir, for --  
5 for and to meet irrigation demands on the U.S. lands  
6 of the Rio Grande Project, including deliveries to  
7 Mexico, and it's exclusive of any credit water of  
8 either New Mexico or Colorado.

9           **Q.     Has New Mexico understood that its citizens**  
10 **were entitled to part of Project supply to meet**  
11 **irrigation demands?**

12          A.     Yes.

13          **Q.     And has New Mexico had a historic**  
14 **understanding of how much of Project supply its**  
15 **citizens were entitled to?**

16          A.     We have.

17          **Q.     What percentage?**

18          A.     So it's 57 percent of the Project supply on  
19 an annual basis.

20          **Q.     And what was the basis for that**  
21 **understanding?**

22          A.     Well, historic operations for sure. The 1938  
23 contracts that were entered into right before the  
24 Compact and also the 1906 treaty with Mexico.

25          **Q.     Has New Mexico had a historic understanding**

1 of what constitutes project supply?

2 MS. KLAHN: I'm going to continue to  
3 object to the use of the word "historic."  
4 Mr. Schmidt-Petersen continues to give testimony about  
5 history without any foundation. He doesn't have the  
6 foundation to be a historian, and the words of the  
7 usable water in the Rio Grande Compact speak for  
8 themselves.

9 JUDGE MELLOY: I agree with that. I'm  
10 going to sustain the objection.

11 Q. (BY MR. WECHSLER) Has the -- so if the  
12 problem is with the phrase "historic," I'm happy to  
13 remove that. Has the ISC, in your experience, had an  
14 understanding of what constituted Project supply?

15 A. We have.

16 Q. What was it?

17 A. Project supply in that regard is usable water  
18 that's released from Caballo Reservoir, return flows  
19 to the river system, and irrigation infrastructure,  
20 and then tributary inflows to the river all the way  
21 down to Fabens, Texas.

22 Q. Has Project supply been defined in the New  
23 Mexico adjudication?

24 A. That's my understanding, it has.

25 Q. Do you know who will be testifying about that

1 **issue in this case?**

2 A. I believe that would either be John Longworth  
3 or John D'Antonio.

4 Q. Now, before we leave the amount of water New  
5 Mexico is entitled to, we've heard about the efforts  
6 from the City of El Paso attempting to obtain  
7 groundwater rights in New Mexico. Are you familiar  
8 with that?

9 A. Yes, generally.

10 Q. I want to ask you a slightly different  
11 question, which is, has any Texas entity ever  
12 attempted to purchase lands in New Mexico for purposes  
13 of obtaining water?

14 A. My understanding is the city of El Paso has  
15 purchased lands in EBID.

16 Q. And so can you tell us about that?

17 A. Yeah. So this was early on in my tenure at  
18 the ISC, but we were alerted by Gary Esslinger, and I  
19 think it went straight to the state engineer and then  
20 ISC director that the city of El Paso had purchased  
21 lands within EBID and was seeking to move a -- an  
22 order, I guess, you know, from lands at New Mexico to  
23 Texas.

24 Q. Let's turn to Page 7 and look at another  
25 provision. We're going to highlight Article 7 and 8

1 here. In both of these articles, there's a reference  
2 to a 790,000 release or normal release. What is the  
3 ISC's understanding of the significance of a reference  
4 to the 790 normal release?

5 A. In each of these articles, the 790 is -- is  
6 utilized differently for application of those -- those  
7 articles, but -- but generally, this goes to the  
8 amount of water of usable water that would be needed  
9 in a full supply year to meet the irrigation demands  
10 of the U.S. Project lands and the delivery to Mexico.

11 Q. Looking at Articles 7 and 8 there, there's  
12 also a reference to reservoirs constructed after 1929.  
13 Do you see that?

14 A. I do.

15 Q. Does New Mexico have reservoirs above  
16 Elephant Butte that were constructed after 1929?

17 A. We -- we do. About nine of them.

18 Q. During your career at ISC, have you been  
19 responsible for overseeing those post 1929 reservoirs?

20 A. Extensively.

21 Q. Are those post '29 reservoirs impacted by Rio  
22 Grande Project operations?

23 A. Very much so.

24 Q. How?

25 A. Or they can be. So the -- under certain

1 provisions of the Rio Grande Compact, both of these  
2 specifically, there are constraints or restrictions on  
3 the operations of those upstream reservoirs, and it's  
4 the ISC's responsibility to implement those, and we  
5 have. That causes significant issues for a number of  
6 our water users, but we do it. For example, we're  
7 doing it right now this year under both of those  
8 articles, and -- and it has significant impacts, for  
9 example, on the Middle Rio Grande Conservancy District  
10 out of El Vado Reservoir, which is I think the primary  
11 post-Compact reservoir that's impacted by these  
12 activities, but then also the city of Santa Fe for its  
13 two municipal reservoirs, and so we interact very  
14 regularly with both of those parties, including the  
15 Bureau of Reclamation on both of these articles.

16 **Q. Turning to operations below Elephant Butte,**  
17 **have you had an opportunity as part of your**  
18 **professional responsibilities to look at the history**  
19 **of the Project and Project operations?**

20 A. I -- I have.

21 **MS. KLAHN:** Objection. He's not a  
22 historian, and whatever personal history he's gleaned  
23 from being involved in the ISC is simply not relevant  
24 here.

25 **MR. LEININGER:** Your Honor, United

1 States joins in this objection. This is a percipient  
2 witness. This is not a historian. He is not an  
3 expert on Project history certainly.

4 **MS. KLAHN:** We could actually voir dire  
5 him and ask him about his testimony during his  
6 deposition, in which he admitted he had no historical  
7 training, he's not being offered as an historian in  
8 this case, and I think it will impeach where they're  
9 going with it right now.

10 **MR. WECHSLER:** Would you like a  
11 response, Your Honor?

12 **JUDGE MELLOY:** Go ahead.

13 **MR. WECHSLER:** My response is he is not  
14 being offered as an historian, and he's not offering  
15 historic reference. He is a percipient witness, who  
16 is talking specifically about projects and work that  
17 he did that he testified to extensively that he had to  
18 review in order to understand and accomplish the tasks  
19 that he was responsible for in administering and --  
20 and ensuring that New Mexico followed its obligations  
21 under the Rio Grande Compact.

22 **JUDGE MELLOY:** Well, I'm going to let  
23 him testify to the extent that we're talking about  
24 Project operations, and I certainly understand that to  
25 some extent, in his capacity, he may have to reference

1 certain source documents. So I don't think that makes  
2 him a historian, but I just think we have to take it  
3 question by question, and see if it goes too far  
4 afield from Project operations. So go ahead,  
5 Mr. Wechsler.

6 **MR. WECHSLER:** Thank you, Your Honor.

7 **Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen, was**  
8 **the Project operating in 1938 when the Compact was**  
9 **entered?**

10 A. Yes.

11 **Q. We've heard from the historians that the**  
12 **Project was initiated at some time in the early 1900s.**  
13 **Do you know if there were any water rights that were**  
14 **in existence in New Mexico prior to the Project?**

15 A. Yeah. That's my understanding. There were  
16 some.

17 **Q. And then were there some rights that were**  
18 **initiated in New Mexico after 1938?**

19 A. Groundwater rights, yes; surface water  
20 rights, I don't think so.

21 **Q. And so in 1938, do you know how the Project**  
22 **would have been protected from impairment or**  
23 **interference in New Mexico?**

24 **MS. KLAHN:** Objection; this isn't about  
25 Project operations. He's asking him about issues

1 related to water rights, which he also testified  
2 during his deposition, he knew nothing about.

3           **JUDGE MELLOY:** I'm going to sustain  
4 that. We're talking about historical data at this  
5 point.

6           **Q. (BY MR. WECHSLER)** Let me ask you this,  
7 **Mr. Schmidt-Petersen. Are you familiar with Stream**  
8 **System Issue 104?**

9           **A.** Yes, I am.

10          **Q. What is that?**

11           **MS. KLAHN:** Objection. He testified in  
12 his deposition he didn't know about it.

13           **JUDGE MELLOY:** Well, that's -- you can  
14 cross-examine him about that. Go ahead. I want to  
15 know what it is before I entertain the objection.

16          **Q. (BY MR. WECHSLER)** Please,  
17 **Mr. Schmidt-Petersen.**

18          **A.** Yeah. So that was the -- the U.S. Project  
19 right for the Rio Grande Project in New Mexico.

20          **Q. And as part of a team working for the ISC or**  
21 **OSE, did you have -- did you work on Stream System**  
22 **104?**

23          **A.** I --

24           **MS. KLAHN:** Objection. It's contrary to  
25 his testimony at his deposition, but I can cross on it



1 if you want me to, Your Honor.

2 JUDGE MELLOY: All right. Go ahead.

3 Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen?

4 A. I did.

5 Q. Yeah. What was your role?

6 A. I engaged in a technical level with the  
7 Office of the State Engineer lawyers, the general  
8 lawyers, Department of Justice, and solicitor's office  
9 and Bureau of Reclamation staffers.

10 Q. And -- and so as part of determining or -- or  
11 -- your work on Stream System Issue 104, did you have  
12 an opportunity to review the history of the Project  
13 and the operating operations of the Project in order  
14 to assist making that determination in the  
15 adjudication?

16 A. I did.

17 MR. WECHSLER: So with that as  
18 background, Your Honor, I'll ask again.

19 Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen, do  
20 you know how the Project would have been protected  
21 from impairment in 1938?

22 A. I believe I do.

23 Q. How is that?

24 A. It would have been a priority call.

25 Q. And what is a priority call?

1           A.     So a priority call is a -- a -- in this case,  
2     it would be some kind of communication by a senior  
3     water user to junior -- well, to the state engineer's  
4     office in New Mexico basically asserting that a junior  
5     water user was impairing that senior right.

6           **Q.     We heard from the historians that the**  
7     **groundwater basin in New Mexico was declared at some**  
8     **point, and do you know when that occurred?**

9           A.     Yes.

10          **Q.     When?**

11          A.     I believe there were two kind of declarations  
12     there, one in 1980, and the other in '82.

13          **Q.     Is that something that is part of your work**  
14     **at the ISC that you've had to be familiar with?**

15          A.     Yes.

16          **Q.     Why?**

17          A.     Again, it goes to, you know, what is New  
18     Mexico's apportionment in the Lower Rio Grande and,  
19     you know, what type of actions are being taken  
20     administratively to be protective.

21          **Q.     Let's look at Joint Exhibit 467. Do you**  
22     **recognize this document? Go to the next page. No,**  
23     **maybe this isn't it. We -- let's go to Joint Exhibit**  
24     **468. There we go. We had the New Mexico exhibit,**  
25     **Mr. Schmidt-Petersen. We're now looking at Joint**

1 Exhibit 467. Do you recognize that document?

2 A. I do.

3 Q. What is it?

4 A. This was the declaration of the Lower Rio  
5 Grande Underground Water Basin in 1980.

6 Q. We see at the upper right-hand corner there,  
7 there's a stamp saying "received." Do you see that?

8 A. I do.

9 Q. And it was received in October 22nd, 1980.  
10 Are official records sometimes received by the State  
11 Commission of Public Records and archives?

12 A. They are transferred to, but yes.

13 Q. At the bottom of the page, you can see a  
14 signature here and it says state engineer. Who was  
15 state engineer in 1980?

16 A. That would be Steve Reynolds.

17 Q. Would you be able to recognize Mr. Reynolds'  
18 signature if you saw it?

19 A. I -- well, I've seen it a couple times, and  
20 this is it.

21 Q. Do you recognize this as the state engineer  
22 order declaring the basin?

23 A. I do.

24 Q. And is this a document that is kept on file  
25 at the ISC in the normal course of business?

1           A.     Yes.

2                   **MR. WECHSLER:**   Your Honor, I move Joint  
3 Exhibit 467.

4                   **JUDGE MELLOY:**   Any objection?

5                   **MS. KLAHN:**    The objection is to having  
6 it come in under this witness, and I'll just ask, Your  
7 Honor, to the extent there's testimony being given  
8 that's inconsistent with his testimony during his  
9 deposition, would you prefer that we handle that on  
10 cross?

11                   **JUDGE MELLOY:**   Yes.

12                   **MS. KLAHN:**    Okay.

13                   **JUDGE MELLOY:**   Joint Exhibit 467 is  
14 admitted.

15           **Q.    (BY MR. WECHSLER)   Let's turn to Joint Exhibit**  
16 **468. Do you recognize this document?**

17           A.     This looks to be the subsequent expansion or  
18 extension of that declaration.

19           **Q.    So this is the second declaration that you**  
20 **referenced?**

21           A.     Yes.

22           **Q.    And then if you go to the third page, I think**  
23 **we'll see, again, that signature of Mr. Reynolds. You**  
24 **see there, the signature of S.E. Reynolds, state**  
25 **engineer?**

1           A.    I do.

2           Q.    And is this a document, again, that's kept on  
3 file at the ISC in the normal course of business?

4           A.    It is.

5           Q.    And is this a document that the ISC or that  
6 you, as director, sometimes refer to in your  
7 responsibilities?

8           A.    It is.

9                   **MR. WECHSLER:** Your Honor, I move Joint  
10 Exhibit 468.

11                   **MS. KLAHN:** Your Honor, my question  
12 about this business record idea is how an Office of  
13 the State Engineer order comes to be a business record  
14 of the Interstate Stream Commission, which  
15 Mr. Schmidt-Petersen testified during his deposition  
16 doesn't have anything to do with water administration.

17                   **MR. WECHSLER:** Your Honor, she certainly  
18 can ask that question of Mr. Schmidt-Petersen during  
19 cross-examination. He has already testified this is a  
20 record that is on file at the ISC.

21                   **JUDGE MELLOY:** I'll admit Joint Exhibit  
22 468.

23           Q.    **(BY MR. WECHSLER)** So, Mr. Schmidt-Petersen,  
24 we're seeing these basins were declared in 1980 and  
25 1982. Do you know when the title transfer from

1       **Reclamation to the districts occurred?**

2           A.     I'm not sure the exact date, but I think it  
3       was different for each district but around the same  
4       time.

5           **Q.     We've also heard about the D2 method from**  
6       **other witnesses. As part of your responsibilities at**  
7       **the -- as the ISC director, has it been necessary for**  
8       **you to become familiar with the D2 method?**

9           A.     Familiar, yes.

10          **Q.     Why?**

11          A.     Really in looking at the operations of the  
12       Rio Grande Project and seeking to assure that our  
13       water users are getting the right amount of water, you  
14       know, under our portion.

15          **Q.     Do you know what years formed the D2 data**  
16       **set?**

17          A.     I do.

18          **Q.     What years?**

19          A.     So they were the years 1951 through 1978.

20          **Q.     Right before these declarations of the basin?**

21          A.     That's correct.

22          **Q.     Since, based on your work at the ISC, your**  
23       **understanding, since the LRG groundwater basin was**  
24       **declared, is it necessary to obtain authorization from**  
25       **the state engineer before taking any actions involving**

1 groundwater?

2 A. Well, yes. Any individual that wants to put  
3 water beneficial use or proposes to do it needs to  
4 apply to the Office of the State Engineer to do that.

5 Q. And, again, we'll have the state engineer  
6 here. We can ask him more about that process. I want  
7 to turn to the process of ordering water the way water  
8 orders are made from the Project. Does New Mexico  
9 have a role in the water ordering process from the  
10 Project?

11 A. Not in my experience.

12 Q. Does New Mexico know how much water is being  
13 ordered by either of the districts?

14 A. We do not.

15 Q. So does New Mexico know at any given time how  
16 much water in the Rio Grande is supposed to be flowing  
17 to EP1 in Texas?

18 A. We do not.

19 Q. All right. Let's talk a little bit about  
20 notice. Has New Mexico ever been notified of concerns  
21 that diversions in New Mexico were preventing Project  
22 orders from being delivered?

23 MS. KLAHN: I'm going to object on  
24 relevance.

25 JUDGE MELLOY: Overruled. You may

1 answer.

2 A. We have received a number of different  
3 notices. I'm not sure specifically relative to  
4 diversions, but we have received some notices.

5 **Q. (BY MR. WECHSLER) And do those fall in any**  
6 **kind of categories?**

7 A. I guess, yeah, they do. So it was some  
8 issues and letters relative to what is called river  
9 pumpers. The IBWC brought up some issues relative to  
10 groundwater pumping and the Mexico delivery, I think  
11 they called it a water budget study, and then -- and  
12 then issues with regards to protesting water right  
13 transfers.

14 **Q. All right. Let's start on the issue of the**  
15 **river pumpers and take each of those in turn. Let's**  
16 **turn to New Mexico 2205. Before I ask you what this**  
17 **is, you can see this is a letter September 21st, 2012,**  
18 **addressed to Mr. Patrick Gordon. Do you know who that**  
19 **is?**

20 A. Oh, I do, yes.

21 **Q. Who is it?**

22 A. That's Pat Gordon, the former, I guess, now  
23 Rio Grande Compact Commissioner for Texas.

24 **Q. If we turn to Page 2, we can see here it --**  
25 **it was from a Mr. Scott Verhines, and who is that?**



1           A.     So Scott Verhines was the then state engineer  
2 for New Mexico and also the New Mexico Rio Grande  
3 Compact Commissioner.

4           **Q.     And then we can see in the CC that you are**  
5 **actually copied on this letter?**

6           A.     Yes.

7           **Q.     So if we go back to the first page, and**  
8 **Mr. Schmidt-Petersen, what is this letter?**

9           A.     So this letter from Mr. Verhines is a  
10 response to Pat Gordon about a assertion that -- that  
11 Commissioner Gordon made to Scott Verhines in New  
12 Mexico in August of 2012, claiming that there were  
13 parties in New Mexico illegally diverting Project  
14 water from the river.

15          **Q.     Is this a document that's kept on file in the**  
16 **normal course of business at ISC?**

17          A.     Yes.

18          **Q.     Does the ISC keep all Compact correspondence**  
19 **on file?**

20          A.     We do.

21                   **MR. WECHSLER:** I move New Mexico 2205.

22                   **JUDGE MELLOY:** Any objection.

23                   **MS. KLAHN:** Relevance.

24                   **JUDGE MELLOY:** I'll admit 2205.

25          **Q.     (BY MR. WECHSLER) Mr. Schmidt-Petersen,**

1 looking at the second paragraph here, it talks about  
2 an investigation that was conducted by the state  
3 engineer, the New Mexico state engineer to investigate  
4 the concerns of Mr. Gordon. Were you involved in that  
5 investigation?

6 A. I was. And my staff.

7 Q. Please describe that investigation?

8 A. I think you can see here, so there's a  
9 sentence that starts, "The attached letter," to  
10 Commissioner Drusina and Mike Hamman summarizes that  
11 investigation. That relates to a request that both  
12 the commissioner and Mike Hamman, who was the then  
13 area manager of the Bureau of Reclamation made to  
14 Scott Verhines, you know, indicating concerns they had  
15 about various parties pumping water from the river  
16 that they deemed to be inappropriate and -- and this  
17 letter to Commissioner Gordon talks about the -- the  
18 investigation that went on relative to the issues that  
19 had been brought up by Commissioner Drusina and Area  
20 Manager Hamman, and that I believe were essentially  
21 the same as those brought up by Commissioner Gordon.

22 Q. And I think, though, my question to you was  
23 could you just describe the investigation?

24 A. Certainly. So there were -- there were a  
25 number of facets to that. If I remember right in this

1 instance, it would -- because it was in April, the --  
2 the Project wasn't releasing water when it came in, so  
3 the District for staff of the office of the state  
4 engineer drove the river bed of the Rio Grande from  
5 Courchesne bridge all the way up to Percha diversion  
6 Dam looking at the specific sites that Commissioner  
7 Drusina and Mike Hamman had provided. They had  
8 actually provided a list of sites and some photos, and  
9 so the district staff went up the river documenting  
10 those sites and looking for any other physical  
11 evidence of river pumpers.

12 **Q. Go ahead.**

13 A. Go ahead.

14 **Q. Finish your answer, please.**

15 A. Yeah. In addition to that, the same district  
16 staff or that same group of staff also went back to  
17 those locations when the Project was operating for  
18 releases out of the reservoir and analyzed, you know,  
19 the various locations. At the same time, the staff  
20 that were involved in different parts of the Lower Rio  
21 Grande adjudication were evaluating adjudication files  
22 and comparing them to these locations and then all of  
23 that information was pulled together in this summary.

24 **Q. Based on your experience, has New Mexico ever**  
25 **refused to investigate water use or a concern raised**

1 by Texas Reclamation or IBWC?

2 A. We have not.

3 Q. And to your knowledge, has New Mexico ever  
4 refused to discuss issues related to Compact issues?

5 A. We have not.

6 Q. Turning to the second issue that you have  
7 raised, and it's unrelated to this letter so we can  
8 take down this letter. You -- you identified a  
9 concern that IBWC raised about the water budget. Can  
10 you describe, first, what is a water budget?

11 A. So in this case, it was an attempt to look at  
12 the water budget in the Lower Rio Grande from Percha  
13 Diversion Dam down to the International --

14 Q. Let me stop you real -- my question,  
15 Mr. Schmidt-Petersen, can you just describe what a  
16 water budget is, and then I'll ask you to describe  
17 what --

18 A. Similar to the inflow/outflow method, it's  
19 really looking at the overall water budget in that  
20 area, inflows/outflows, changes in storage, and then  
21 how those basically affect the system over time.

22 Q. All right. And I interrupted you. You were  
23 going to describe the concern that IBWC brought to  
24 your attention.

25 A. Yeah. That was specifically Commissioner

1 Drusina that brought that to our attention, and he did  
2 that at a couple of Rio Grande Compact Commission  
3 meetings and at those meetings he indicated that the  
4 international boundary water commission was taking on  
5 the study by themselves, but they asked for support of  
6 the states and -- and the districts in that regard in  
7 doing that investigation.

8 **Q. Was there a specific concern? Were they**  
9 **concerned about water arriving at the International**  
10 **Dam?**

11 A. That was my understanding, and that it  
12 related, also, to groundwater pumping.

13 **Q. And so was this water budget study**  
14 **undertaken?**

15 A. It was, my understanding, by a contractor for  
16 the IBWC.

17 **Q. And do you know what the outcome of that was?**

18 A. That at the end, they determined there wasn't  
19 an issue with that delivery to Mexico.

20 **Q. All right. And then the last subject that**  
21 **you identified was some protests, I think, that you**  
22 **indicated that the State of Texas had filed in New**  
23 **Mexico permit proceedings; is that correct?**

24 A. Yes.

25 **Q. Can you describe that, please?**

1           A.     There's one specific that I'm aware of that  
2 relates to a proposed development of a copper mine  
3 near Caballo Reservoir, and in this instance, the  
4 state -- actually, Pat Gordon, as Rio Grande Compact  
5 Commissioner filed a protest with the New Mexico state  
6 engineer over the proposed transfer of water rights  
7 from south in the Lower Rio Grande to that copper mine  
8 and, you know, I protested it, also, the ISC did.

9           **Q.     The concern was impairment, it would prevent**  
10 **Compact deliveries?**

11          A.     Yes. Well, the -- the issue there is  
12 unresolved at this point in time, but our protest went  
13 to issues with regards to the potential impacts of  
14 that mine and its groundwater pumping on usable water  
15 in Project storage, and then, also, just oversight of  
16 the -- of what the transfer process was. When these  
17 things begin to go through New Mexico court for the  
18 ISC, our engagement piece of that is through the  
19 public welfare part of it and so we, on occasion, file  
20 protests and then engage in that protest so we can be  
21 part of it.

22          **Q.     Protests to ensure that you can satisfy your**  
23 **Compact obligation?**

24          A.     That's correct.

25          **Q.     Let's turn to the Rio Grande Compact**

1 **Commission. You're familiar with the Rio Grande**  
2 **Compact Commission?**

3 A. Yes, sir.

4 **Q. What is it?**

5 A. The Compact Commission is the group or the  
6 entity that's set up by Article 12 of the Rio Grande  
7 Compact, and it's comprised of four commissioners,  
8 three state commissioners, two of those are ex  
9 officio, the state engineers of Colorado and New  
10 Mexico, and then there is a appointee from the  
11 governor of Texas for the State of Texas, and in  
12 addition, you know, should it please the president,  
13 the president can appoint a federal chair to the  
14 commission, and those are the four members.

15 **Q. How does the Rio Grande Compact Commission**  
16 **make decisions?**

17 A. The Compact Commission makes decisions by  
18 consensus with the -- of the three state  
19 commissioners. The federal chair does not have a  
20 voting role.

21 **Q. Let's turn to Joint Exhibit 391, which has**  
22 **already been admitted. We can see here this is the**  
23 **report from 2001. Is a report produced every year?**

24 A. It is.

25 **Q. We can see if we turn to Page 4, we can see**

1 this report has been signed by the commissioners, and  
2 does the -- do the commissioners sign the report every  
3 year?

4 A. Well, they -- they -- this is the letter to  
5 the governors from the report, and they do sign that  
6 every year, and it's attached to our annual report.

7 Q. And if we look at the table of contents at  
8 Page 3, you can see certain things that are included  
9 in this report. Do the Rio Grande Compact Commission  
10 reports tend to follow a similar pattern?

11 A. Yeah. Generally similar. Sometimes there is  
12 not any resolutions, things like that, but, you know,  
13 the stream flow issues, the reports and things like  
14 that, those are consistent. The Compact is in there  
15 every year, as well as the rules and regulations, and  
16 the records of deliveries.

17 Q. Let's turn to Page 5. Here you can see the  
18 start on that first column, you can see it's called  
19 the report of engineer advisors. Do you see that?

20 A. I do.

21 Q. Let me ask you first: What is an engineer  
22 advisor?

23 A. So the engineer advisors are individuals that  
24 serve at the pleasure of their individual Compact  
25 commissioners that support the Compact commissioners



1 in their duties and that have a number of significant  
2 responsibilities with Rio Grande Compact accounting  
3 and administration.

4 **Q. What's the purpose of the engineer advisors**  
5 **report?**

6 A. Well, there's a lot of different things in  
7 the engineer advisor reports, but the first thing  
8 that's always in there relates to Compact accounting  
9 for the previous year, right. And so the engineer  
10 advisors have a week long meeting usually, if not  
11 more, going over the data from the previous year, and  
12 while part of our report, what it does is a, you know,  
13 here's the status for Colorado, deliveries by Colorado  
14 at the state line, deliveries by New Mexico at  
15 Elephant Butte, some of the details of those, and then  
16 information on Project storage and release, which is  
17 really the Rio Grande Project reservoirs has --

18 **Q. So how often is Compact accounting done?**

19 A. Once a year.

20 **Q. So if we look at this EA report, it also**  
21 **identifies a number of issues. Let's look at Page 9.**  
22 **In the first column, you can see it says, "Reports of**  
23 **the federal agencies." Do you see that?**

24 A. I do.

25 **Q. Do the federal agencies report to the**

1 **engineer advisors each year?**

2 A. In my time period with the ISC, they do every  
3 year, and it includes all these four and sometimes  
4 more. There's usually the International Boundary and  
5 Water Commission will also give a report, and the U.S.  
6 Bureau of Indian Affairs.

7 **Q. Does that happen at the engineer advisors**  
8 **meeting?**

9 A. Yeah. We reserve two full days at the  
10 engineer advisor meeting for reports of the federal  
11 agencies and discussions of them.

12 **Q. And what -- generally, what do those**  
13 **discussions involve?**

14 A. Really -- well, the -- the water operations  
15 of each of those agencies in the Rio Grande in that  
16 previous year, as well as issues with regards to  
17 Compact accounting, gaging, reservoirs, projects that  
18 we're working on collaboratively, their activities,  
19 and then the joint activities of those agencies with  
20 the Compact Commission.

21 **Q. Let's look at Page 12 of the joint exhibit.**  
22 **On the right-hand column, you can see this memorandum**  
23 **of understanding. Do you see that?**

24 A. Yes, I do.

25 **Q. Are you familiar with this memorandum?**

1           A.    I need to cough.  Excuse me.  My apologies.  
2  Yes, I am.

3           **Q.    My question is -- well, do you understand the**  
4 **purpose of the memorandum?**

5           A.    Do you have the date on this one?

6           **Q.    You have to go to the end of it.  I'm not**  
7 **sure.  Try Page 17.  Overshot it.  Go up one page.**  
8 **One more page.  There we go.  The column there, 2002.**

9           A.    Yes.

10          **Q.    You were working on issues at the time?**

11          A.    At that point in time, I would have been  
12 staffing Norm Gaume, who was the New Mexico engineer  
13 advisor.

14          **Q.    So does -- do you recall the purpose of this**  
15 **memorandum?**

16          A.    I do.  So at that point in time, there were a  
17 number of different issues that had arisen, and there  
18 were changes in how people were going about collecting  
19 and reporting data.  You have to remember, in these  
20 time periods, you know, there were really different  
21 advances with regards to modeling and data sets and  
22 accounting, and in this instance, it became apparent  
23 that we didn't have all of the -- the necessary kind  
24 of coordination and -- and discussion elements put  
25 together between Reclamation, the Compact Commission,

1 and the engineer advisors, and so it was really  
2 setting out those duties, roles, and responsibilities  
3 of each agency for, as it says here, "Water  
4 accounting, reporting, and documentation of the waters  
5 of the Rio Grande Basin above Fort Quitman, Texas in  
6 accordance with the Rio Grande Compact."

7 Q. Now, if you turn to Page 12 -- go to 13 --  
8 actually, let's go to 14. We don't need to ask about  
9 this page. If you go to Page 14, and I want to look  
10 at Paragraph 3.1 and 3.2 so we can call those out so  
11 you can actually read them. Is -- was this setting  
12 out, at least in this memorandum, the relative roles  
13 and responsibilities of Reclamation and the engineer  
14 advisors?

15 A. It was. You know, based on the MOA amongst  
16 the staff of the people that ultimately signed it,  
17 this was the list that was prepared.

18 Q. And we can go ahead and read that, but my  
19 question to you is, is there a fair amount of  
20 coordination in your experience between Reclamation  
21 and the engineer advisors?

22 A. Well, it -- it -- on the accounting,  
23 absolutely, it can go on for four months, and, you  
24 know, to get ready for that on multiple different  
25 things. There also is regular engagements on a number

1 of other activities, including, you know, what's  
2 happening on the river at different times with, you  
3 know, different operations and gages, and then  
4 additionally on various types of projects. In here,  
5 it -- I think one of the more important ones would be  
6 that San Juan-Chama Project that it's counting. So  
7 lots of different touch points and cooperation needed.

8 **Q. Does this memorandum apply only to the San**  
9 **Juan-Chama water?**

10 A. No. It applies broadly to the -- to the  
11 entire Rio Grande Basin. It's not just, you know, the  
12 -- the New Mexico part, all of it, so...

13 **Q. Let's look at another -- I want to look at**  
14 **the Compact rules, but to do that, I want to go to**  
15 **Joint Exhibit 401 because I want to pick a time that**  
16 **you were engineer advisor.**

17 A. Okay.

18 **Q. So we can see this is from 2011, it's also**  
19 **been admitted, and let's go to the rules here, the**  
20 **Compact rules. It's Page 113. Go to 108. Yeah.**  
21 **There's the rules. Is a copy of the Compact rules and**  
22 **regulations attached to every one of the Rio Grande**  
23 **Compact Commission reports?**

24 A. In my experience, yes, and everything I  
25 reviewed.

1           **Q.    And based on your experience, what's the**  
2 **purpose of the Compact rules?**

3           A.    So the rules, you know, set out kind of the  
4 different activities we'll take on and  
5 responsibilities for ultimately developing the Rio  
6 Grande Compact accounting and so gaging stations is  
7 what you see immediately below this.  It's a big part  
8 of it.

9           **Q.    And so these rules relate to, it says the**  
10 **administration of the Rio Grande Compact; is that**  
11 **right?**

12          A.    That's correct.  Yeah.

13          **Q.    Let's look at Page 113 then.  In there, you**  
14 **can see at the very bottom, 112.  Okay.  Page 112.  If**  
15 **you look at the bottom, it says, "Adopted December**  
16 **19th, 1939."  Is that your understanding when these**  
17 **rules were adopted?**

18          A.    Yes, it is.

19          **Q.    Then if we go back to the beginning, Page**  
20 **108, let's call out that first paragraph.  Can the**  
21 **Compact rules be changed?**

22          A.    Yeah, absolutely.

23          **Q.    And how did they get changed?**

24          A.    Well, in accordance with this paragraph, and,  
25 you know, just summarizing it.  If any of the Compact

1 commissioners have a problem, they just need to give  
2 notice and then we've got about 60 days to do an  
3 objection, and if, you know, that isn't addressed,  
4 then they don't have any force and effect.

5 **Q. In other words, any one state can make these**  
6 **rules no longer be in effect?**

7 A. Yeah. That's correct.

8 **Q. Let's turn to Page 109 and under the language**  
9 **there, "Actual spill." You can see in the title**  
10 **there, it's got a slash 2, slash 3, slash 4, slash 6.**  
11 **Do you see that?**

12 A. Yes.

13 **Q. Then if you go down to the bottom in the**  
14 **footnotes. In there we see that same Slash 1, 2, 3,**  
15 **4, 6. Do you see that?**

16 A. Yes.

17 **Q. What does this indicate?**

18 A. So this reflects any time the rules and reg  
19 -- excuse me -- rules and regulations have been  
20 amended and/or adopted, you know, from that 1938 to  
21 this date.

22 **Q. And so this 2010 one, that's one that you**  
23 **were actually involved in; is that right?**

24 A. Yes. With the engineer advisors and -- and,  
25 also, our legal advisors.

1 Q. Okay. So, now, let's go back to Page 108  
2 again. And we're going to call out that first  
3 paragraph, the preamble. Here, we can see in the  
4 first line, I mean, it says that -- it talks about the  
5 Compact, which equitably apportions the waters, and  
6 then it says, "Permits each state to develop its water  
7 resources at will, subject only to its obligations to  
8 deliver water in accordance with the schedules set  
9 forth in the Compact." Do you see that?

10 A. I do.

11 Q. Do you know when that language was added to  
12 the rules?

13 A. I -- I don't think it was added. I think  
14 it's been in there all the time.

15 Q. Since 1939?

16 A. Yes.

17 Q. And to your knowledge, did Texas ever object  
18 or require a change to the rules?

19 A. Not during my --

20 MS. KLAHN: Objection; relevance.

21 JUDGE MELLOY: Overruled.

22 Q. (BY MR. WECHSLER) Did you finish your answer,  
23 Mr. Schmidt-Petersen?

24 A. Not during my time at the Interstate Stream  
25 Commission.



1           Q.    Does it have any indication here that any  
2 changes were made, any changes to the language, I  
3 mean?

4           A.    I don't believe so. I mean, we -- we  
5 certainly did amend these rules, you know, in that  
6 2010 time period, but -- but not this section.

7           Q.    And -- and so then based on your time at the  
8 Commission, what was your understanding of this  
9 language?

10          A.    Well, for -- it was that, you know, to the  
11 extent that we were able to meet our obligations under  
12 Article 4, that we could essentially develop our  
13 waters, you know, at will in that area.

14          Q.    Let's turn back to Joint Exhibit 391, and I  
15 want to talk about a couple of issues that have arisen  
16 that you've had a chance to investigate. The first  
17 one shows up on Page 15 of this commission report from  
18 2001, and here we see this resolution in the second  
19 column that we can blow up. In your time at the  
20 commission, were there discussions about whether the  
21 federal agencies should be following state laws and  
22 regulations?

23          A.    During my tenure when I was on the Rio Grande  
24 and even today numerous times, yeah.

25          Q.    And did the states generally agree that the

1 **federal agency should follow state law in the**  
2 **operations of their projects?**

3 A. They did. I mean, this resolution is one  
4 example of that, but I -- in our engineer advisor  
5 reports, when I was an engineer advisor, we almost  
6 always had a section in that regard of our -- in our  
7 report relative to the status of that issue.

8 **Q. Okay. So we can take that down. Turning to**  
9 **allocations, in your work for New Mexico on the Rio**  
10 **Grande Compact, did you regularly review and evaluate**  
11 **the Project allocations that were assigned to the**  
12 **districts?**

13 A. As part of the engineer advisor meetings,  
14 yes, and then periodic meetings during the year with  
15 Reclamation and the engineer advisors.

16 **Q. And why did you do that?**

17 A. Again, it had to do with the operations of  
18 the Rio Grande Project in accordance with the Compact,  
19 the irrigation demand part there. At times, there  
20 were issues about waste at the bottom, and they -- and  
21 it really, in my mind, had two parts to it. One was  
22 protecting the Project itself, the usable water in  
23 Project storage, for, you know, the apportionment to  
24 each state, and then additionally, due to the impact  
25 that changes in usable water in storage can have on

1 upstream reservoir operations.

2 Q. Let's look at Exhibit New Mexico 2314. Here  
3 you can see both -- you can put up both pages. There  
4 we go. You can see both pages there,  
5 Mr. Schmidt-Petersen. First, let's focus on the first  
6 page. You can see this is to Bert Cortez, and who is  
7 that?

8 A. Bert Cortez was the then manager for  
9 Reclamation for the Rio Grande Project.

10 Q. And Ken Maxey, who is that?

11 A. Would have been Bert's boss at the  
12 Albuquerque area manager for the Bureau of  
13 Reclamation.

14 Q. We see the from includes you, your name,  
15 Rolf, and who is Steve?

16 A. Steve Vandiver was retired now, but he was  
17 the engineer advisor for Colorado at that time.

18 Q. And we can see the date of 8/2/2002. And  
19 then if you look at the second page, it indicates it's  
20 State of Colorado's and New Mexico's Requested Agenda.  
21 Do you recall this meeting?

22 A. I do. I recall the issue that we were  
23 seeking to address and what we were trying to  
24 ascertain for our Compact commissioner and my engineer  
25 advisor.

1           **Q.     What was that issue?**

2           A.     It went to -- well, there's a number of  
3     issues that are in the agenda, but it went to an issue  
4     of -- well, 2002 was a really, really dry year on the  
5     Rio Grande, and -- and Steve Vandiver had come to Norm  
6     Gaume and myself saying he was concerned about  
7     operations of the Rio Grande Project and would we --  
8     you know, would I engage with him, and I was directed  
9     to do that, so we did some investigations and from  
10    those we asked for a meeting with Bert Cortez to get a  
11    better understanding of what Reclamation had been  
12    doing and what was really occurring at the southern  
13    end of the Rio Grande Project right above Hudspeth  
14    County Water Improvement District.

15                   **MR. WECHSLER:** Your Honor, I move New  
16    Mexico 2314.

17                   **MS. KLAHN:** No objection.

18                   **JUDGE MELLOY:** Exhibit 2314 is admitted.

19           **Q.     (BY MR. WECHSLER) And we can see on the**  
20    **second page there, Mr. Schmidt-Petersen, there's a**  
21    **part of the discussion was about how the allocations**  
22    **were made and so in your experience, did the Rio**  
23    **Grande Compact Commission or the engineer advisors**  
24    **periodically discuss the Project allocations with**  
25    **Reclamation?**

1           A.    We did.

2           **Q.    Why?**

3           A.    Again, for the reasons that I -- I just  
4 mentioned there about, you know, New Mexico -- let's  
5 see. For New Mexico, it was are we getting our 57  
6 percent. I think for Colorado and New Mexico, it was  
7 if there's too much water being allocated and actually  
8 then making it out of the bottom orders, that's water  
9 that probably shouldn't have come out of the  
10 reservoir, and that's a change in usable water in  
11 Project storage that doesn't reflect necessarily  
12 efficient operation so it threatens the Project, but I  
13 think, also, for Colorado and for New Mexico, at this  
14 point in time, it was a concern that those releases  
15 were also hastening the time that Article 7 of the  
16 Compact would become in effect for restrictions on  
17 upstream reservoir operations.

18           **Q.    Let's look at a couple of documents that**  
19 **reflect what you were just talking about. The first**  
20 **will be Joint Exhibit 391, which is already admitted.**  
21 **We're going to go to Page 16. This is another one of**  
22 **those resolutions. And you can blow up the one on the**  
23 **left side. Here you can see it's dated March 21st,**  
24 **and it's called, "The development of an appropriate**  
25 **methodology for determining the annual allocation of**

1 usable water." Do you see that?

2 A. I do.

3 Q. Do you recall the purpose of this resolution?

4 A. It was for the reasons that I just  
5 articulated there, right, that we were looking for  
6 methodology for developing that allocation in order to  
7 -- well, in this case, it was about, you know,  
8 providing our water users sufficient notice about the  
9 water they actually might get so that they could  
10 better plan for that, and we didn't have an  
11 established process between Reclamation at the  
12 engineer advisors and the Compact Commission in that  
13 regard similar to the other resolutions that we just  
14 heard of.

15 Q. And we can see if you look at the therefore  
16 there at the bottom, "Now, therefore be it resolved,"  
17 here's the Commission asking Reclamation to develop  
18 procedures for annual allotments in accordance with  
19 the Rio Grande Compact, and then the next paragraph,  
20 it says that, "the secretary shall transmit copies to  
21 the commissioner, regional director, and Albuquerque  
22 area office manager of Reclamation." My question,  
23 Mr. Schmidt-Petersen, do you know when that request is  
24 made with some of these resolutions, how that  
25 transmission is made?

1           A.    Yes.  I believe I do.  I mean, this was at  
2   that point in time, as today, the secretary of the Rio  
3   Grande Compact Commission is an employee of the United  
4   States Geological Survey, and then that employee has  
5   the responsibility for transmitting copies of those  
6   resolutions to the various parties, and in my  
7   experience, they've done that.

8           Q.    And let's take a look at one more of these  
9   resolutions.  This time, we're going to go to Joint  
10  460.  You can see this one's dated March 25th, 2004,  
11  so a couple of years later.

12          A.    Yeah.

13          Q.    This one is concerning agency operations of  
14  their water-related facilities on the Rio Grande and  
15  Compact accounting.  Then if you go to the now  
16  therefore again on the next page, and blow those up.  
17  Again, we can see that it's here the Compact  
18  Commission is asking that the federal agencies advise  
19  the Rio Grande Compact Commission prior to changing  
20  operation of any of those facilities and when deemed  
21  necessary, seek its unanimous consent, and it's also  
22  asking the Rio Grande Compact Commission advisors to  
23  evaluate the impact of accounting and report back to  
24  the commission their findings.  My question is:  We  
25  saw one in 2002.  We saw this -- we see this now in

1     **2004. Was this an ongoing discussion amongst the**  
2     **Compacting states?**

3           A.     It was on a number of different, you know,  
4     kind of elements of water administration and  
5     accounting throughout the basin.

6           **Q.     And why was this an issue that the states**  
7     **were engaging in at this time?**

8           A.     Because it related to, you know, how the  
9     federal agencies were going about their activities and  
10    reporting data or changing their operations and that  
11    did that have an impact on the Compact and its  
12    administration.

13          **Q.     How about the Compact apportionment?**

14          A.     Well, obviously that applies all the way up  
15    and down through the Rio Grande because this applied,  
16    I believe, to the entire basin.

17          **Q.     And I don't know if you answered my question.**  
18    **Were you talking about this including the**  
19    **apportionment between the three states?**

20          A.     Yes.

21          **Q.     All right. Let's turn to the issue of waste**  
22    **then. Are you familiar with Hudspeth County**  
23    **Conservation and Reclamation District?**

24          A.     Yes, I am.

25          **Q.     And based on your understanding, your**



1 **experience, is Hudspeth provided an allocation of**  
2 **Project water each year?**

3 A. No. They're not part of the Project.

4 **Q. So if they're not part of the Project, are**  
5 **they entitled to any water from the Project?**

6 A. Well, they're not entitled to order water  
7 from the Project, but they do receive water at the --  
8 at the southeast end of the Project.

9 **Q. Is that --**

10 A. I believe it's a Warren Act contract.

11 **Q. Is that considered to be operational waste?**

12 A. Yes. I mean, that -- I believe that's the  
13 way that that's framed that water that makes it to  
14 Hudspeth is -- is only operational waste.

15 **Q. In your time in working on Rio Grande Compact**  
16 **Commission issues, have you had to evaluate the waste**  
17 **from the Rio Grande Project?**

18 A. I have. A couple of occasions to the one  
19 specific instance.

20 **Q. And why? What was -- why were you needing to**  
21 **evaluate it?**

22 A. Well, it actually goes back to some of the  
23 information that you -- you showed earlier, but it --  
24 it had to do with the aspect of was there too much  
25 water being released in making it out to the bottom of

1 the Rio Grande Project to Hudspeth during that 2002  
2 period, and would that reduce actually the amount of  
3 water available for New Mexico as part of it's  
4 apportionment in the Lower Rio Grande or for the Rio  
5 Grande Project in the subsequent year, and would it  
6 have adverse impacts on usable water in Project  
7 storage that might significantly impact our upstream  
8 post 1929 reservoir operations inappropriately.

9 **Q. In other words, if there's too much waste,**  
10 **there's less water in storage, and it affects the**  
11 **apportionment?**

12 A. That's correct.

13 **Q. Had those issues arose previously, the waste**  
14 **issues, the concerns amongst the Compacting states?**

15 A. Yes. That's what Steve Vandiver had been  
16 talking with me about.

17 **Q. Did that cause you to go and review the files**  
18 **to understand the previous positions of the states on**  
19 **that waste issue?**

20 A. It did.

21 **Q. Let's take a look at New Mexico Exhibit 406.**  
22 **Do you recognize this document?**

23 A. Yeah. This is a transcript of the  
24 proceedings of Rio Grande Compact Commission meeting.

25 **Q. Is a transcript normally created for the Rio**

1 **Grande Compact Commission meetings?**

2 A. A transcript is always created.

3 **Q. How?**

4 A. We -- the three states get together and hire  
5 court reporters. Each state, whenever we do -- we  
6 host an annual meeting of the Rio Grande Compact  
7 Commission, we have responsibility for hiring a court  
8 reporter, and then we each pay a third of the cost of  
9 that court reporter and get the -- the transcription  
10 from that court reporter.

11 **Q. Are those transcripts considered to be an**  
12 **official document of the Rio Grande Compact**  
13 **Commission?**

14 A. Yes, they are.

15 **Q. Are those transcripts kept on file in the ISC**  
16 **in the normal course of business?**

17 A. They are.

18 **Q. Is this a document that you reviewed in your**  
19 **evaluation of the waste issue?**

20 A. It was one of them, yes.

21 **MR. WECHSLER:** Your Honor, I move New  
22 Mexico 406.

23 **JUDGE MELLOY:** Any objection?

24 **MS. KLAHN:** No objection.

25 **JUDGE MELLOY:** Exhibit 406 is admitted.

1           Q.    (BY MR. WECHSLER)  Let's turn to Page 145, and  
2 we're going to look at Lines 13 and spilling over to  
3 Page 146 Line 13.  That's a lot.  Let me ask you this,  
4 Mr. Schmidt-Petersen.  Who was Commissioner Simpson?

5           A.    Commissioner Simpson was Hal Simpson, the  
6 state engineer of Colorado at that time, and he's  
7 currently the federal chairman of the Rio Grande  
8 Compact.

9           Q.    And who was Commissioner Hammond?

10          A.    Jack Hammond, I believe the Texas Rio Grande  
11 Compact Commissioner.

12          Q.    We see here Mr. Hammond saying -- let's see  
13 -- "There are far more significant changes on our end  
14 of the river, meaning in Texas, in my opinion in terms  
15 of both population and usage in the 70 years that have  
16 happened, 60 years that have happened since the  
17 Compact was established."  Based on your work in the  
18 Compact, is that something that you've observed, that  
19 there's more changes in the Texas end of the river?

20          A.    Well, there's certainly a lot of changes in  
21 the Texas area downstream.  I would say recently, you  
22 know, since that time, probably the Albuquerque area  
23 has had some significant changes, also.

24          Q.    Let's look at the next -- well, let's look at  
25 Pages 45 starting at Line 25 and then going onto Page

1 146, Line 5. And I'll -- I'll represent that this  
2 discussion goes on for quite some time. I -- I saw it  
3 end at Page 152, if people want to go take a look at  
4 it. And here you can see -- well, Commissioner  
5 Simpson at that time was saying we don't want  
6 wastewater. I think when you first came on this  
7 commission, that was one of the things you stated  
8 clearly, that we needed to operate the system to  
9 prevent waste, and Texas Commissioner Hammond  
10 saying, "Right." Let me ask you this, does the ISC  
11 have a concern about waste?

12 A. We do for the reasons I just mentioned.

13 Q. Has this been an ongoing issue?

14 A. It has at various times periodically.

15 Q. So let's look at another one. Let's look at  
16 New Mexico 553, and we can see this is going to be a  
17 couple years later. This is 1996, and, again, from  
18 Mr. Simpson, Commissioner Simpson, who you identified  
19 to Commissioner Hammond, and this is dated February  
20 16th, 1996. Is this another document that you  
21 reviewed as part of your investigation of the position  
22 of the parties on waste?

23 A. It was, yes. It was a different reason than  
24 our concern, but yes.

25 Q. What was the reason?

1           A.     Well, as I understand it from reading these  
2 documents and looking at some of the minutes and so  
3 on, the issue here really went to actual spill from  
4 Elephant Butte Reservoir hypothetical, something that  
5 I have not had the experience in my time period to do,  
6 but they were talking about waste, you know, and for  
7 similar reasons because of the impacts on usable water  
8 -- potential impacts on usable water in Project  
9 storage.

10           **Q.     As a Compact Commission correspondence, is**  
11 **this kept on file at the ISC in the normal course of**  
12 **business?**

13           A.     Yes.   In our files.

14                     **MR. WECHSLER:**   Your Honor, I move New  
15 Mexico 553.

16                     **JUDGE MELLOY:**   Any objection?

17                     **MS. KLAHN:**     No.

18                     **JUDGE MELLOY:**   553 is admitted.

19           **Q.     (BY MR. WECHSLER)   Here we can see at the very**  
20 **first paragraph there, Commissioner Simpson is raising**  
21 **an impact of the concern about the impact of waste on**  
22 **storage, and have you described that?   Do you want to**  
23 **tell us, again, what is the impact of waste on**  
24 **storage?**

25           A.     So -- well, I can use this as an example.

1 You know, the concern here is that there's not really  
2 Project irrigation demand or a large degree in  
3 January/February of a particular year, and so from an  
4 irrigation demand perspective, that's a little bit  
5 unusual to be having, you know, releases from Caballo  
6 at that point in time, and so if that water is then  
7 moving through the system and going out the bottom,  
8 it's reducing the amount of water, usable water, total  
9 water at this point in time, in Project storage. And  
10 as I understand this piece of it, Colorado was  
11 concerned that that releases were being done, and they  
12 weren't related to specific irrigation demands in the  
13 Project, and as a result, that was inappropriate  
14 because it, I believe in their mind, could have caused  
15 an actual spill not to occur.

16 **Q. Let's look at one more document on this**  
17 **issue. This is New Mexico 685. This is dated 2002.**  
18 **By this time, you're working for the ISC, right?**

19 A. Oh, yes.

20 **Q. And then we can see it's to Mr. Maxey, and**  
21 **you identified him already. Let's look at the next**  
22 **page. Actually, maybe we need to go to Paragraph --**  
23 **or down a couple pages. Keep going. I just want to**  
24 **show the signatures. There we go. This is from Tom**  
25 **Turney, and who is Tom Turney?**

1           A.     So Tom Turney is another former state  
2 engineer of New Mexico and New Mexico Rio Grande  
3 Compact Commissioner.

4           Q.     Then if you go back to the first page and you  
5 highlight the third paragraph there, here we can see a  
6 reference that -- to you, to Mr. Schmidt-Petersen, and  
7 some information that you had given to -- to  
8 Commissioner Turney. So is this a document that  
9 you're familiar with?

10          A.     Yes.

11          Q.     Is this document kept on file in the normal  
12 course of business?

13          A.     It is.

14                   MR. WECHSLER: I don't know, Your Honor,  
15 I didn't indicate here whether or not this was  
16 admitted, so that's why I went through the foundation.  
17 If it's not already been admitted --

18                   JUDGE MELLOY: I have it in as an  
19 admitted exhibit.

20                   MR. WECHSLER: Thank you.

21          Q.     (BY MR. WECHSLER) My question,  
22 Mr. Schmidt-Petersen is, did you conduct an  
23 investigation of this issue in 2002?

24          A.     Steve Vandiver and I did a field visit to the  
25 Rio Grande Project, including this area, and then



1 that's documented in this letter.

2 **Q. Could you summarize your investigation and**  
3 **what your concerns were at the time?**

4 A. Yeah. So it's July of 2002, what turns out  
5 to be the driest year on record on the Rio Grande, and  
6 Elephant Butte Reservoir is the water level elevation  
7 is dropping precipitously. We're trying to build that  
8 island channel. And in looking at the releases from  
9 Caballo Reservoir and the Project, Steve had raised a  
10 concern that, you know, was just kind of going about  
11 normal business, not really recognizing the drought  
12 that was impacting the -- the rest of the basin, and  
13 so he asked me to come down and visit with him, and it  
14 was probably the first time that I had actually spent  
15 a lot of time looking at the Project in detail, as  
16 well as really more so even the -- the part down  
17 around Hudspeth County, and it was surprising there.  
18 You know, all the canals, and it's unfortunate the  
19 photos aren't that great, but the -- the canals were  
20 essentially full of water at the bottom of the system,  
21 and the -- the concern I had was if you're really in a  
22 big drought and you're trying to, you know,  
23 efficiently operate the Project, you know, the first  
24 place that you really should see a reduction in flows  
25 is at the bottom. That wasn't occurring. It was --

1 water was really just about everywhere in the canals,  
2 there are two reservoirs that we looked at were  
3 completely full, and we just thought that that was  
4 inappropriate.

5 **Q. And, again, was that because you were**  
6 **concerned about the apportionment that New Mexico**  
7 **citizens would receive?**

8 A. It went to the amount of water that might be  
9 available for New Mexico on the 2003 allocation, so  
10 the subsequent year because water that probably should  
11 have been still in Elephant Butte Reservoir during  
12 that year was not there anymore, and that would reduce  
13 the amount of water our farmers would get in the next  
14 year, and then as I mentioned, you know, I think the  
15 -- the other issues had to do with just the level of  
16 usable water in Project storage and what that might  
17 mean for Article 7.

18 **Q. All right. Let's turn to the issue then of**  
19 **credit water. Are you familiar with the 2011 credit**  
20 **water release?**

21 A. Yes.

22 **Q. Please summarize what happened, and then**  
23 **we'll ask you some specific questions and then look at**  
24 **some documents?**

25 **MR. LEININGER:** Your Honor, this is

1 where we're going to renew our objection to the MILs.  
2 We're getting into the specifics of an incident that  
3 occurred in 2011. This was one of their  
4 counterclaims, which Your Honor has dismissed. It's  
5 also the one that's pending before the district court.  
6 It's not appropriate for testimony.

7 **MR. WECHSLER:** It's not what's before  
8 the district court. We are concerned about the  
9 apportionment and the impacts on apportionment.

10 **JUDGE MELLOY:** Well, I -- I really think  
11 this is an ancillary issue. What I'm going to allow  
12 you to do, Mr. Wechsler, is you can ask some limited  
13 questions to -- to get the subject in the record, and  
14 I notice there are some exhibits that lay it out in  
15 more detail. You can put those exhibits in, either as  
16 part of this case or an offer of proof, but I don't  
17 want to spend a lot of time on this issue. I'll let  
18 you make your record so that if it turns out in the  
19 second phase of the proceeding, it becomes material or  
20 the Supreme Court decides that it shouldn't have been  
21 dismissed, well, then you got your record, but I don't  
22 want to spend a lot of time on it.

23 **MR. WECHSLER:** All right. Well, if it's  
24 okay with you then, Your Honor, what I'll do is I'll  
25 ask the witness to summarize the event and how we

1 think it relates to the apportionment and then we do  
2 have a number of exhibits that we think are  
3 applicable. Do you want me to attempt to lay  
4 foundation and put those in the record or would you  
5 prefer I just do an offer of proof with those?

6 **JUDGE MELLOY:** You can put it -- lay  
7 your foundation.

8 **MR. WECHSLER:** Okay.

9 **Q. (BY MR. WECHSLER) So, Mr. Schmidt-Petersen,**  
10 **if you could please just summarize what happened in**  
11 **the 2011 credit water release?**

12 **A.** Sure. I believe I can do that. There's a  
13 lot that occurred in that regard, but, you know, over  
14 a course of years between 2003 and up to 2011, New  
15 Mexico and Texas had negotiated and come to an  
16 agreement on relinquishment totaling around 380,000  
17 acre-feet of New Mexico credit water over that time  
18 period, and in early 2011, the Bureau of Reclamation,  
19 but also the -- the commissioner for the State of  
20 Texas approached New Mexico about a -- an additional  
21 relinquishment of water. Pat Gordon asked us for a  
22 relinquishment of a hundred thousand acre-feet of New  
23 Mexico credit water then in storage in Elephant Butte  
24 Reservoir, and over a period of about -- excuse me,  
25 five months, six months, we had various discussions

1 amongst the engineer advisors and recommendations from  
2 that, that we brought to our Compact commissioners,  
3 that in the end, were not -- did not have a  
4 resolution, and the issue here is that Rio Grande  
5 Project operations continued, and a portion of New  
6 Mexico's credit water was released to the City of El  
7 Paso, is my understanding, and EP No. 1 at a time when  
8 there was no EBID operation going on, and so that's a  
9 part of New Mexico's apportionment under the Compact,  
10 and under a normal relinquishment, our farmers would  
11 have received 57 percent of that.

12 **Q. How much water are you talking about that was**  
13 **released?**

14 A. Ultimately, the accounting that I did, you  
15 know, had a number of about 32 -- trying to remember  
16 the exact -- 32 to 33,000 acre-feet of water was  
17 released in that August to early September time  
18 period.

19 **Q. All right. So I'm going to just enter a few**  
20 **documents here or attempt to offer them,**  
21 **Mr. Schmidt-Petersen, and in our offer of proof, we'll**  
22 **include the Compact provision. So let's turn to New**  
23 **Mexico 796. This actually is 2010, so it predates**  
24 **this, and it's from Commissioner Gordon to**  
25 **Commissioner D'Antonio. Do you recognize this**

1 **document?**

2 A. Yes, I do.

3 **Q. What is it?**

4 A. So this is a letter, May 19th, 2010, if I  
5 read that right, from Pat Gordon, the Compact  
6 commissioner for Texas, to John D'Antonio, and New  
7 Mexico Compact Commissioner, and in this regard, he is  
8 responding to a letter that John D'Antonio sent him in  
9 May and accepting the offer to relinquish 80,000  
10 acre-feet of New Mexico's accrued credit held in  
11 Elephant Butte Reservoir, and the effective date of  
12 that was May 15th, 2010.

13 **Q. And is this kept on the normal course of**  
14 **business in the ISC files?**

15 A. Yes.

16 **MR. WECHSLER:** Your Honor, I move New  
17 Mexico 796.

18 **JUDGE MELLOY:** Any objection? 796 is  
19 admitted.

20 **Q. (BY MR. WECHSLER) All right. New Mexico**  
21 **2315, let's go there.**

22 **MR. WECHSLER:** And even before I attempt  
23 to lay foundation, Your Honor, maybe I'll just ask if  
24 there's an objection, and then I can lay the  
25 foundation?

1                   **JUDGE MELLOY:** Is there an objection to  
2 2315?

3                   **MR. LEININGER:** Yes, Your Honor. This  
4 goes directly to the point that was raised in the  
5 counterclaims, the dismissed counterclaims.

6           **Q. (BY MR. WECHSLER)** All right.  
7 **Mr. Schmidt-Petersen, in 2003, you were working for**  
8 **the ISC; is that right?**

9           **A.** I was.

10                   **JUDGE MELLOY:** Let me -- excuse me a  
11 second. Let me ask this: Is there a foundational  
12 objection?

13                   **MR. LEININGER:** Thus far, I don't  
14 believe the witness has established proper foundation  
15 for this. All it is captioned is a letter regarding  
16 credit water and its evaporation and release. I don't  
17 think we've had any testimony regarding the foundation  
18 for evaporation.

19                   **JUDGE MELLOY:** Go ahead.

20           **Q. (BY MR. WECHSLER)** Are you familiar with this  
21 **document, Mr. Schmidt-Petersen?**

22           **A.** Yes, I am.

23           **Q. What is this document?**

24           **A.** So this is a letter from then Colorado  
25 Compact Commissioner Hal Simpson, to Bert Cortez, as

1 you can see, the manager for the El Paso Field  
2 Division, and it was raising concerns relative to the  
3 way that Bert was accounting or administering, I  
4 think, to evaporation of credit water at Elephant  
5 Butte Reservoir at that time.

6 Q. So we can see it's from Mr. Simpson to  
7 Mr. Cortez. It carbon copies Mr. John D'Antonio, and  
8 who was that?

9 A. The New Mexico Compact Commissioner.

10 Q. And at the time that this letter was sent, is  
11 this a document that you reviewed?

12 A. I -- I did. It would have gone to Estevan  
13 Lopez, but it's in our files.

14 Q. And you -- so it's contained in your files,  
15 and --

16 MR. WECHSLER: So at this point, Your  
17 Honor, I'll move New Mexico 2315.

18 JUDGE MELLOY: Any objection?

19 MR. LEININGER: We won't object to this  
20 particular document, Your Honor. This seems to be a  
21 precursor to the 2011 evaporation issue, but we don't  
22 object to the entering of this particular document.

23 JUDGE MELLOY: New Mexico 2315 is  
24 admitted.

25 MR. WECHSLER: Your Honor, I'm just



1 going to ask again about Joint 395 and see if I need  
2 to lay foundation or if there's a foundational  
3 objection?

4 **JUDGE MELLOY:** What is 395?

5 **MR. WECHSLER:** It's a 2005 report of the  
6 Rio Grande Compact Commission.

7 **JUDGE MELLOY:** Any objection?

8 **MR. LEININGER:** No objection.

9 **JUDGE MELLOY:** Joint 395 is admitted.

10 **MR. WECHSLER:** Let's turn to New Mexico  
11 668. Is there a foundational objection to this one?

12 **MR. LEININGER:** There's no objection.

13 **JUDGE MELLOY:** 668 is admitted.

14 **MR. WECHSLER:** And 698? Your Honor, if  
15 I may inquire if there's a foundational objection to  
16 this New Mexico 698?

17 **MR. LEININGER:** Yes, Your Honor. We  
18 object because there's a lack of foundation, no  
19 foundation whatsoever, explaining what this document  
20 is.

21 **JUDGE MELLOY:** All right. Go ahead.

22 **Q. (BY MR. WECHSLER)** Mr. Schmidt-Petersen, here  
23 we see a letter from John D'Antonio to Mr. Gordon  
24 dated June 24th, 2011, and I think you were engineer  
25 advisor at the time; is that right?

1           A.    I was.

2           **Q.    Are you familiar with this document?**

3           A.    Yes.   Very much so.

4           **Q.    What is it?**

5           A.    This was a letter that John D'Antonio sent to  
6   Pat Gordon, the Texas Commissioner, and it was the --  
7   I think the second proposal that the engineer advisors  
8   had been discussing, and it was actually something  
9   that I had found in the Compact Commission records  
10  from the late 1940s in trying to address, you know,  
11  usable water in Project storage issues and credit  
12  water, and it was an offer by New Mexico to loan the  
13  Rio Grande Project up to a hundred thousand acre-feet  
14  of New Mexico's Compact credit water then in storage  
15  in Elephant Butte Reservoir.

16          **Q.    We can see you're actually listed as a**  
17 **contact on Page 2; is that right?**

18          A.    Yes.

19          **Q.    Is this kept in the files of the ISC in the**  
20 **normal course of business?**

21          A.    Yes, it is.

22                   **MR. WECHSLER:**  I offer New Mexico 698.

23                   **MR. LEININGER:**  No objection to this  
24  document, Your Honor.

25                   **JUDGE MELLOY:**  Can I interrupt here?

1 Well, 698 is admitted, so let me interrupt. I want to  
2 interrupt here for a second, though, and ask the  
3 witness. When we're talking about credit water, just  
4 so I understand exactly what we're talking about,  
5 that's water that's been delivered into Elephant Butte  
6 in excess of the Compact obligations and, therefore,  
7 you get a credit for that water?

8 THE WITNESS: Your Honor, that's  
9 correct. And it's water held in storage in the  
10 reservoir.

11 JUDGE MELLOY: And if you have credit  
12 for the water, then you presumably don't have to  
13 deliver as much in a following year that you would  
14 otherwise be obligated to deliver under the schedule;  
15 is that correct?

16 THE WITNESS: That's correct.

17 JUDGE MELLOY: Okay. All right. I just  
18 want to make sure I understood. All right. Thank  
19 you.

20 MR. WECHSLER: All right. Just a couple  
21 more documents. I think maybe there's three or four.  
22 New Mexico 714, and is there a foundational objection  
23 on this 714?

24 MR. LEININGER: Foundation as to what  
25 this document is and the witness' familiarity with it,

1 yes.

2 Q. (BY MR. WECHSLER) All right.

3 Mr. Schmidt-Petersen, you see in the -- in the address  
4 thing, this is actually an e-mail from you, and it's  
5 sent to a number of participants. Just generally, who  
6 are those people? Are they people that work at either  
7 the ISC or the OSE?

8 A. So in looking at this, the list here, so the  
9 first e-mail was one I received from Craig Cotten,  
10 engineer advisor for the State of Colorado at that  
11 time, and it was -- I was CC'd to an e-mail he sent to  
12 Mike Hamman, the area manager for the Bureau of  
13 Reclamation, and then you see a long list of CCs,  
14 which are Colorado, Texas people, and then I -- at the  
15 top piece, I had forwarded that to individuals that  
16 either were working for the ISC or were contractors  
17 for us and the AG's office.

18 Q. Is this a document that's kept in the normal  
19 course of business at the ISC?

20 A. Yeah, it is. From my files, I believe. Well  
21 this is probably from --

22 MR. WECHSLER: I offer in New Mexico  
23 714.

24 MR. LEININGER: Your Honor, this  
25 particular exhibit goes right to the heart of the

1 issue. We've now gone beyond the question of  
2 relinquishment, and we're talking about the 2011  
3 purported release of credit water. It's apparent in  
4 the second page at the top of this document. Again,  
5 this has been -- this issue has been raised before.  
6 It's been dismissed as part of the counterclaim. It  
7 should not be admitted into evidence.

8 **MR. WECHSLER:** I thought the point here  
9 was we were creating a record.

10 **JUDGE MELLOY:** All right. I think this  
11 is beyond the scope of what this case is about;  
12 however, I will allow it to be entered into the record  
13 as an offer of proof for further either -- either  
14 further relevance during the second phase of the trial  
15 or it may -- it may play into the damages phase if we  
16 get to -- if we get to that point or it may be  
17 something that the Supreme Court would want to  
18 consider if I'm wrong at the counterclaim. So it can  
19 come in as an offer of proof.

20 **MR. WECHSLER:** All right. New Mexico  
21 645. Is there a foundational objection to this  
22 document? If we can see it.

23 **MR. LEININGER:** Indeed, we'd request  
24 that counsel please establish the foundation of what  
25 this document is and the witness' familiarity with it.

1           Q.    (BY MR. WECHSLER) Mr. Schmidt-Petersen, are  
2 you familiar with this document?

3           A.    Yes, I am.

4           Q.    In fact, we can see right at the CC that you  
5 were copied on it, right?

6           A.    Yes.

7           Q.    And this --

8           A.    I'm not sure if I was copied on all of them,  
9 but yes, the last couple pieces, yes.

10          Q.    Yeah. The final one, which had all of the  
11 others attached to it, right?

12          A.    That's correct, yes.

13          Q.    And we can see it's got a subject line of RG  
14 Project Operations, and a date of August 8th, 2011,  
15 and can you explain what this document is?

16          A.    Yes. So this was a response from John  
17 D'Antonio to Mike Hamman over an e-mail that Mike had  
18 provided us or to -- to John D'Antonio about  
19 Reclamation seeking to keep being able to provide  
20 water to the City of El Paso during the kind of  
21 intervening kind of period during some of the  
22 discussions that were going on, and it was John  
23 D'Antonio's responses to -- to Mike Hamman in that  
24 regard indicating Reclamation wasn't authorized to  
25 release a credit water, and that -- that Mike Hamman

1 should put the City of El Paso and others as  
2 appropriate on notice that they may not have surface  
3 water available in the next couple weeks.

4 **MR. WECHSLER:** I offer New Mexico 645.

5 **JUDGE MELLOY:** Any objection.

6 **MR. LEININGER:** Well, I understand it's  
7 being offered as a -- part of the offer of proof  
8 that's been extended to New Mexico so we don't have  
9 any objection on that basis.

10 **JUDGE MELLOY:** All right. It'll be  
11 accepted as an offer of proof.

12 **MR. WECHSLER:** New Mexico 705.

13 **Q. (BY MR. WECHSLER) And, Mr. Schmidt-Petersen,**  
14 **do you recognize New Mexico 705?**

15 **A.** I do.

16 **Q. What is it?**

17 **A.** This is a letter to the Compact Commission,  
18 you know, at that time from Pat Gordon saying that he  
19 had reviewed the letter from John D'Antonio dated  
20 August 10th, which contained certain provisions that  
21 -- for this loan that he was unable to accept, and so  
22 he at that point in time said he was not -- he didn't  
23 have a reason to have a proposed special meeting of  
24 the Compact Commission so he didn't plan to attend it.

25 **Q. Is this a document that's kept in the normal**

1 **course of business in the ISC files?**

2 A. It is.

3 **MR. WECHSLER:** I move New Mexico 705.

4 **MR. LEININGER:** No objection, Your  
5 Honor, with the understanding again that this is  
6 subject to the offer of proof.

7 **JUDGE MELLOY:** It'll be accepted as an  
8 offer of proof.

9 **Q. (BY MR. WECHSLER) One final document,**  
10 **Mr. Schmidt-Petersen, New Mexico 794. Do you**  
11 **recognize this document?**

12 A. Yes, I do.

13 **Q. What is it?**

14 A. So this is a memo by Norm Gaume, who at that  
15 point in time was a consultant for the ISC, and Nabil  
16 Shafik, who was an employee of the ISC, to me relative  
17 to a evaluation that I had asked them to do looking  
18 back at New Mexico's Rio Grande Compact records  
19 regarding accounting of credit water evaporation for  
20 the Rio Grande Project and the Compact.

21 **Q. Is this a document that's kept in the normal**  
22 **course of business in the ISC?**

23 A. It is, yeah.

24 **MR. WECHSLER:** So I offer New Mexico  
25 794.



1                   **MR. LEININGER:** No objection  
2 understanding it's being submitted as part of their  
3 offer of proof.

4                   **JUDGE MELLOY:** All right. 794 is  
5 accepted as an offer of proof.

6           **Q. (BY MR. WECHSLER)** And then,  
7 **Mr. Schmidt-Petersen,** there are no more documents.  
8 **There's some joint exhibits, the Rio Grande Compact**  
9 **Commission reports, that are already in evidence, but**  
10 **to close the loop on the Rio Grande -- on the credit**  
11 **water issue, is the evaporation of credit water, is**  
12 **that continuing -- is that a continuing dispute at the**  
13 **Rio Grande Compact Commissioner amongst the states?**

14           **A.** It is.

15           **Q.** And to this day, the states still have not  
16 **determined the appropriate way for determining the**  
17 **credit water evaporation?**

18           **A.** They haven't reached an agreement on a way to  
19 do that, so we're using different methods.

20           **Q.** So, actually, in every single report since  
21 **2011, there's those two methods that are attached to**  
22 **the engineer advisor reports?**

23           **A.** I would say correct, but I believe there's  
24 three methods now.

25           **Q.** Correct. So actually, there's separate ones

1 from Colorado, New Mexico, and Texas since what year?

2 A. Well, it would be the -- it would be 2012, so  
3 this would have all started to be documented in March  
4 of that year.

5 Q. Okay. So changing subjects then to other  
6 issues, Compact-related issues, that have been raised  
7 over the years, to your knowledge, did Texas ever  
8 raise Compact concerns about Project deliveries below  
9 Elephant Butte?

10 A. No.

11 Q. To your knowledge, did Texas ever raise other  
12 Compact-related concerns?

13 MS. KLAHN: Objection; foundation.

14 MR. WECHSLER: Your Honor, I'm asking  
15 him to your knowledge. It's --

16 JUDGE MELLOY: Go ahead. He may answer.

17 A. Yes, they did.

18 Q. (BY MR. WECHSLER) So can you describe your  
19 understanding of the concerns that Texas did raise?

20 A. Sure. I can. There were three of those that  
21 they brought up, one that related to quality of water  
22 in the parts of the lower Rio Grande in Texas and  
23 purported changes to that quality of water due to  
24 irrigation in New Mexico, if I remember that one  
25 right. The other had to do with this generally the --

1 the idea of operating agreement and getting a signed  
2 operating agreement for the Project, and then, also,  
3 groundwater pumping within New Mexico.

4 **Q. When did Texas raise these concerns with New**  
5 **Mexico?**

6 A. So my understanding in that regard is that  
7 they raised that some time late in 2001, and I became  
8 involved in it shortly after that from a staffing  
9 standpoint.

10 **Q. In 2002?**

11 A. I can't remember exactly the dates, but,  
12 yeah, somewhere in that time frame.

13 **Q. So let's take you to those issues in turn,**  
14 **but let me ask you first, did New Mexico take these**  
15 **concerns seriously?**

16 A. Yes.

17 **Q. Were you involved in the response?**

18 A. Again, I was staff for that so I had  
19 engagement with it, but I wasn't one of the direct  
20 discussers or negotiators at that time.

21 **Q. So taking first the Texas concern about**  
22 **salinity, did you have to understand and work on this**  
23 **salinity issue?**

24 A. Yes.

25 **Q. What did you understand the concern to be?**

1           A.     So as I mentioned, as voiced to us by -- by  
2     -- I'm trying to remember her name.  It was Kathleen  
3     White was a TCEQ commissioner, and I think ultimately  
4     the chairwoman for the Texas Commission on  
5     Environmental Quality, but she articulated that the --  
6     the El Paso Irrigation District had raised concerns to  
7     the state of Texas that the total dissolved solids  
8     that were being experienced in the El Paso Valley had  
9     changed and basically meaning that the water quality  
10    had decreased and that they attributed that to  
11    irrigation practices in EBID or irrigation within New  
12    Mexico.

13           **Q.     What did New Mexico do to address those**  
14    **salinity concerns?**

15           A.     We worked with the State of Texas over a  
16    number of years to gather data and do evaluations to  
17    assess those concerns.

18           **Q.     Let's look at New Mexico 948, and do you**  
19    **recognize this document?**

20           A.     Yeah, I do.  This is a preliminary economic  
21    impact assessment for the -- what became -- or what  
22    was the Rio Grande Salinity Management Program.

23           **Q.     And we can see that this was -- you talked**  
24    **earlier about that Rio Grande Salinity Management**  
25    **Coalition, right?**

1           A.     Yes.

2           **Q.     And this is one of the coalition documents?**

3           A.     It was one of the documents that was  
4 submitted to -- to the -- the coalition by contract  
5 under the U.S. Army Corps of Engineers.  So it was --  
6 if I can back up for a second, New Mexico and Texas  
7 joined together and provided, I think, \$250,000 apiece  
8 to a program with the U.S. Army Corps of Engineers  
9 under one of their water planning programs to do  
10 technical economic assessments of the salinity issues  
11 in that lower Rio Grande area from San Acacia down to  
12 Fort Quitman, and this is one of the work products  
13 from that effort.

14                   **MR. WECHSLER:**  Your Honor, I move New  
15 Mexico 948.

16                   **MS. KLAHN:**  No objection.

17                   **JUDGE MELLOY:**  Exhibit 948 is admitted.

18           **Q.     (BY MR. WECHSLER)  How long did the Rio Grande**  
19 **Salinity Management Coalition work last,**  
20 **Mr. Schmidt-Petersen?**

21           A.     I'm not sure.  I was still Rio Grande Basin  
22 Manager at the time, but it would have been 2016, '17,  
23 or '18, somewhere in that range before some of the  
24 final documents were provided and the work was  
25 complete, but I'm not sure of the final date.

1           **Q. Did the coalition work reach any conclusions**  
2 **about the salinity and the causes?**

3           A. Yes. This is not the final report that's  
4 there, but -- but generally, what they -- what they  
5 found was that, you know, while -- well, first of all,  
6 that the -- about 70 to 72 percent of the total  
7 dissolved solids, if I remember this right, that were  
8 being found in various parts of the Lower Rio Grande  
9 were attributed to natural causes in those areas. If  
10 you're on the -- the New Mexico side, you're in the  
11 Rio Grande rift in the geothermal waters and some old  
12 groundwater that's discharging at the bottom of these  
13 little groundwater basins that are in that area were  
14 the major sources of salinity to the -- the Rio Grande  
15 Project, as well as a -- a buried saline lake bed  
16 underneath the Fabens area of -- down at the  
17 southeastern end of the system. So that was -- that  
18 was one set. They also came to the conclusion, I  
19 believe, that -- that, you know, while TDS did  
20 increase at these locations as you went downstream,  
21 that at any one of those particular areas, there was  
22 variability in that TDS, but given the overall period  
23 of time and record, that it really hadn't been any  
24 significant change they could identify with that, and  
25 then finally, for the economic piece, you know, we

1 carry that on for a number of years because the -- you  
2 know, the -- if you're -- if you're looking at these  
3 basins overall and you're southwestern United States  
4 and you're looking at water supplies, if you have  
5 opportunities to economically treat water and -- and  
6 basically exclude some salts and make more water  
7 available, we want to look to do that, and we do that  
8 on the Colorado river system, and we were looking at  
9 the opportunity to do that here. And I -- I believe  
10 that while this isn't the final one, I think the end  
11 one that was looked at was really a treatment  
12 operation right about Courchesne bridge in that area  
13 where there's some old oiling groundwater that's  
14 pretty brackish at least, and the conclusion was it  
15 wasn't economical to treat that water and dispose of  
16 the waste.

17 **Q. All right. The second Compact issue that you**  
18 **identified as being raised by Texas was groundwater.**  
19 **What was your understanding of the issue that was**  
20 **being raised?**

21 A. Well, at -- when I first heard about it, I  
22 wasn't really that aware. I didn't really understand  
23 the concern, but as time went along, it became -- at  
24 least my understanding was it was a concern about  
25 increasing population in the southwest area and that

1 the cities would grow and there was a greater demand  
2 for water and that if that went on and water was  
3 provided in that regard, that was going to cause a  
4 problem for the Project and deliveries.

5 **Q. So it sounds like you're talking about future**  
6 **groundwater pumping as opposed to past groundwater**  
7 **pumping?**

8 A. At the time, that was my understanding, yes.

9 **Q. Did Texas' concerns cause you personally to**  
10 **have to investigate how groundwater was previously**  
11 **addressed by the Rio Grande Compact Commission or**  
12 **commissioners?**

13 A. It did. And it was part of some of my  
14 assignments that came out of -- of this, you know,  
15 working for Norm Gaume at the time.

16 **Q. Was that because it was important to**  
17 **understand the past treatment of groundwater so that**  
18 **you could address these new future concerns?**

19 A. Yes.

20 **Q. What did you do to investigate?**

21 A. So in looking at that, I looked back, you  
22 know, into the '90s and into the '80s and even into  
23 the -- at times, into the '40 time periods within kind  
24 of Compact Commission documents, you know, minutes or  
25 others. I asked, you know, some of our commissioners



1 and things like that if they had heard about that and  
2 places to look at and tried to identify discussions  
3 about water amongst the states.

4 Q. Did that investigation indicate that there  
5 were, in fact, times where groundwater had been  
6 addressed in the past by the Commission?

7 A. Yeah. In a number of instances, yeah.

8 Q. All right. Let's look at some of those.  
9 We're going to start with Texas 504. It's already  
10 been admitted. Do you recognize this document,  
11 Mr. Schmidt-Petersen?

12 A. Yeah. So this is one of the transcripts of  
13 proceedings from the Rio Grande Compact Commission.

14 Q. And we can see March 25th, 1982, there on  
15 Line 17?

16 A. Yes.

17 Q. So let's go to Page 60. We're going to look  
18 at Lines 12 to 25. Who is Commissioner Gilmer?

19 A. That would be Commissioner Jesse Gilmer, who  
20 is the then Rio Grande Compact Commissioner for Texas.

21 MS. KLAHN: Your Honor, could I just  
22 interject here? I don't see Texas 504 on the list.  
23 Was this a -- was this disclosed as a direct exhibit.

24 MR. WECHSLER: It was, Your Honor. It  
25 was disclosed as a direct exhibit. It wasn't in the

1 initial list, but ultimately it was included as a  
2 supplement.

3 MS. KLAHN: Okay. Thank you.

4 JUDGE MELLOY: Go ahead.

5 Q. (BY MR. WECHSLER) I think the question was  
6 just a reminder, Commissioner Reynold, was Steve  
7 Reynolds the commissioner for New Mexico; is that  
8 right?

9 A. That's my understanding, yes.

10 Q. Then we can see on Page 18, Commissioner  
11 Gilmer starts his report to the Rio Grande Compact  
12 Commission. I just note that because we're going to  
13 go down a few pages. So, now, let's go to Page 65,  
14 Line 18 to Line -- to Page 66, Line 8. Here we see  
15 Texas Commissioner Gilmer discussing groundwater wells  
16 along the U.S./Mexico border. Did you investigate  
17 that and become familiar with it as part of your work  
18 for the ISC?

19 A. I did.

20 Q. So can you describe what this issue is?

21 A. Yes. So at -- in and around this time, and I  
22 think it actually probably started a little before,  
23 the International Boundary and Water Commission was  
24 looking -- excuse me one second. As I understand it,  
25 they were looking to investigate groundwater supplies

1 in and around the border. They had approached the  
2 research universities in that area and that a  
3 gentleman by the name of Al Utton, who was really --  
4 he was also the ISC chairman at that time was engaging  
5 in that activity, and they were really proposing to do  
6 some more in-depth evaluations of groundwater along  
7 the border.

8 **Q. And what is this passage from Mr. Gilmer**  
9 **stating? I mean, what was the position of Texas on**  
10 **that issue?**

11 A. Well, it was a couple of things when I read  
12 it in here. He was a -- he was a -- he had quite a  
13 way with words but -- so, you know, he -- Texas didn't  
14 want the IBWC at any time under any circumstances  
15 telling New Mexico and Texas what to do with  
16 groundwater. That was pretty clear. And then he --  
17 he also made it clear that in Texas, groundwater is  
18 owned by the surface right owner, and that in New  
19 Mexico, it's water owned by the state, and that he  
20 wanted to maintain that.

21 **Q. Was that a familiar refrain that you heard**  
22 **from Texas over your years working?**

23 A. Yeah. Yeah. Absolutely. All the time.

24 **Q. Let's turn to Page 7 -- let's see -- 66, Line**  
25 **16 to Page 67, Line 22. Okay. We'll have to show it**

1 to you in pieces, Mr. Schmidt-Petersen, but you can  
2 see here -- first, we see this is about the time that  
3 the declaration of the basin was occurring, right,  
4 1982, and here, Commissioner Gilmer addressed the  
5 declaration of the basin. Are you familiar with this  
6 passage?

7 A. Yes.

8 Q. And -- and what was it that Texas  
9 Commissioner Gilmer was saying about the declaration  
10 of the basin?

11 A. As I read this -- this section, he was -- he  
12 was really telling Steve Reynolds that they weren't  
13 happy with -- with his decision to declare the basin  
14 and was really looking to see if there were ways to  
15 change Steve Reynolds' position.

16 Q. In other words, Texas wanted New Mexico to  
17 continue to allow unlimited groundwater pumping?

18 A. They wanted -- they didn't want the state  
19 engineer to be involved in -- in groundwater pumping.

20 Q. And if you look at Lines 5 here to 8, and  
21 here it says -- Texas Commissioner Gilmer is  
22 saying, "Now, I submit to you that the pumpage of the  
23 X hundreds of wells in the river valley in Dona Ana  
24 and Sierra Counties, for the time being at least, the  
25 drawdown is replenished by flows of the Rio Grande."

1 Do you see that?

2 A. I do.

3 Q. My question is: Based on your time involved  
4 in Compact issues, was there an understanding of the  
5 impact of groundwater pumping on surface flows?

6 A. Yes, generally.

7 Q. All right. Now, you indicated that you were  
8 familiar with -- you had become familiar with the D2  
9 method; is that right?

10 A. Yes.

11 Q. And, again, we're talking in that same  
12 period. Who developed the D2 method?

13 A. The Bureau of Reclamation developed that  
14 method, actually looked, as I remember it, at a number  
15 of different methods, but they -- in consultation with  
16 the New Mexico Boundary and Water Commission, they  
17 settled on that D1/D2 methodology.

18 Q. What's your understanding about the way in  
19 which the D2 method treats groundwater?

20 A. Well, I think for the time period that that  
21 operation represents, which would have been that, you  
22 know, early 1950s through 1978 time period, it  
23 incorporates the impact of groundwater pumping on the  
24 river system, you know, in D1/D2.

25 Q. It's actually incorporated?

1           A.     That's correct.

2           **Q.     Are you aware of the State of Texas ever**  
3 **objecting to the use of D2 in any of the Rio Grande**  
4 **Compact Commission meetings or documents?**

5           A.     No.

6           **Q.     All right. Let's look at another document.**

7                   **JUDGE MELLOY:** Well, it's -- we're  
8 getting to about after 3:00. Let's break until 3:20  
9 and give everybody a chance to stretch. We'll come  
10 back at 3:20. All right?

11                   **MR. WECHSLER:** Thank you.

12                                   (Recess.)

13                   **JUDGE MELLOY:** Looks like everybody is  
14 back. Before you resume, Mr. Wechsler, apparently  
15 there was one other Miltenberger exhibit that I had  
16 failed to admit. It was offered. There was no  
17 objections, but it's not in the record that it was  
18 formally admitted, and that's 658, so I would check  
19 your records if anybody disagrees with that, 658 is  
20 admitted as part of the Miltenberger exhibits.

21                                   All right. Mr. Wechsler, you may  
22 proceed.

23                   **MR. WECHSLER:** Thank you, Your Honor.  
24 Was that Texas 658? I didn't get that.

25                   **JUDGE MELLOY:** I think it was Texas 658.

1 Yes. I think that was.

2 MR. WECHSLER: Thank you.

3 Q. (BY MR. WECHSLER) All right.

4 Mr. Schmidt-Petersen, let's turn to New Mexico 572 to  
5 continue our discussion of the historical approach of  
6 the states to groundwater. Do you recognize this  
7 document, New Mexico 572?

8 A. This looks to be a -- one of the letters from  
9 the 1996 time period, but this time from Commissioner  
10 Hammond of Texas to Hal Simpson.

11 Q. So we know Hal Simpson. Let's just confirm  
12 that and look at Page 3 and see if it's, in fact, from  
13 Commissioner Hammond, as you say. There, you can see  
14 it is from Jack Hammond. You can see a CC there has  
15 Tom Turney, and who is Tom Turney?

16 A. The then state engineer and New Mexico  
17 Compact commissioner.

18 Q. This has a date of May 6th, 1996. This  
19 sounds like is one of those documents that you  
20 reviewed in your investigation of previous Compact  
21 matters; is that right?

22 A. That's correct. This was specific to those  
23 issues about spill and water -- water going out the  
24 bottom of the Rio Grande Project.

25 Q. Is this a document --

1                   **MR. LEININGER:** Your Honor, I'm sorry to  
2 interrupt, Your Honor, but now that they've  
3 established the foundation, we object because this --  
4 this document is 1996. It preceded this witness' role  
5 in the ISC, preceded his employment at all with New  
6 Mexico, I believe, and it is -- again, it's a -- it's  
7 a historical document which he's proffering historical  
8 testimony to which he has not been offered.

9                   **MR. WECHSLER:** We're not offering him as  
10 a historian. He's simply currently the director of  
11 the ISC. He's conducted an investigation as part of  
12 his duties to understand the State's positions on  
13 groundwater. This is directly relevant as a document  
14 from the Texas Commissioner. It qualifies as an  
15 admission of a party opponent, and it's something with  
16 which the witness has clearly testified he is  
17 familiar, and he used in the normal course of his --  
18 his professional duties. And I'll add that he's also  
19 the custodian -- as the ISC director, he's the  
20 custodian of the ISC.

21                   **MR. LEININGER:** Your Honor, he's giving  
22 opinion on the historical basis for New Mexico's  
23 position on groundwater.

24                   **MR. WECHSLER:** We are not offering any  
25 opinion --



1                   **JUDGE MELLOY:** Well, as the custodian of  
2 the record, I believe that this witness has the  
3 ability to authenticate documents that are in the  
4 commission files and be the person through whom the  
5 foundation is laid for the admissibility of these  
6 documents. I -- I do agree that he's not a historian,  
7 and that his ability to interpret the documents is  
8 very limited, but I do -- I do think that the  
9 documents are admissible as a record of what the  
10 parties did, thought, and communicated to each other  
11 about the Compact interpretation, and so for that  
12 purpose, I will admit 472 -- excuse me -- 572.

13                   **MR. WECHSLER:** Thank you, Your Honor.

14           **Q. (BY MR. WECHSLER)** Turning then to Page 2,  
15 **Mr. Schmidt-Petersen,** and we're going to look at the  
16 **first partial paragraph here. Let's just blow up the**  
17 **-- the whole first partial paragraph of Page 2. There**  
18 **we go. And here, it says, "The Compact does not**  
19 **address the amount of water districts may divert from**  
20 **the Rio Grande. State permits and district's**  
21 **distribution and drainage system place these**  
22 **limitations." Let me ask you this,**  
23 **Mr. Schmidt-Petersen,** given that statement, have you  
24 **in your work at the ISC had cause to investigate the**  
25 **amount of water that was permitted from Texas for EP**

1 **No. 1 to divert?**

2 A. I did.

3 **Q. And why did you do that?**

4 A. It was part of that whole looking at the Rio  
5 Grande Project as a whole partly that New Mexico  
6 adjudication issue and then, you know, interactions  
7 with Herman Setemeyer from the State of Texas, who was  
8 the technical person developing that.

9 **Q. And what did you look at? Was it that Texas**  
10 **adjudication certificate?**

11 A. Yeah, that's correct.

12 **Q. Then we can go ahead and look at that**  
13 **document, but did that cause you to just have an**  
14 **understanding of what amount of water EP1 was entitled**  
15 **to divert from the Rio Grande?**

16 **MS. KLAHN:** Objection; calls for a legal  
17 conclusion.

18 **JUDGE MELLOY:** I'll sustain that.

19 **MR. WECHSLER:** Your Honor, if I may  
20 respond, all I'm -- I'm just asking him to describe  
21 his understanding based on those documents. We can  
22 see from Mr. Hammond here as an admission from the  
23 state of Texas that it's the state permits that set  
24 those limitations, and so it's relevant what New  
25 Mexico then understood and went and did as a matter of

1 notice.

2 **MS. KLAHN:** Your Honor, I'll --

3 **JUDGE MELLOY:** You can ask what he did,  
4 but don't ask him what he understood. That's an  
5 interpretation that is -- if he took a particular  
6 course of action, then that's one thing, but -- but to  
7 have him interpret the documents, I think the  
8 documents speak for themselves, and we'll get somebody  
9 else to be the person to interpret it.

10 **MR. WECHSLER:** Fair enough.

11 **Q. (BY MR. WECHSLER)** So what did you do then to  
12 understand how much water EP1 was entitled to divert,  
13 **Mr. Schmidt-Petersen?**

14 **A.** I've reviewed that certificate of  
15 adjudication and then, you know, in that, looked at  
16 the numbers that had been adjudicated to EP No. 1 from  
17 the Rio Grande.

18 **Q.** And then did you verify your understanding in  
19 any -- with anybody from Texas?

20 **A.** Yes. Again, I -- I had discussions with  
21 Herman Setemeyer, the Texas engineer advisor, about  
22 those numbers, because he was involved with  
23 discussions about that certificate, and then I was  
24 engaging, you know, on the New Mexico piece of it and  
25 just trying to see if the numbers jived.

1 Q. All right. So let's look at a different part  
2 here of -- of what the Texas Commissioner is then  
3 saying. We're going to look at the next four  
4 sentences, which I'm just going to go ahead and read.  
5 It says, "The district is under no obligation to use  
6 any of this water, especially groundwater and effluent  
7 from groundwater. Furthermore, the Rio Grande Compact  
8 makes no attempt to allocate groundwater. In Texas,  
9 groundwater is private property belonging to the  
10 property owner. The district uses any of this water  
11 at their discretion." Do you see that?

12 A. I do.

13 Q. And let me just ask you, in your time working  
14 for the ISC, is that position here set out by the  
15 Texas Commissioner, is that consistent with your  
16 understanding of Texas' position on groundwater in the  
17 Compact?

18 A. Consistent with all of their engineer  
19 advisors and others. It is that way, I believe, for  
20 the Hueco Bolson, but it's not quite clear to me today  
21 what their position is on the Mesilla.

22 Q. And when did that change?

23 A. I'm not actually quite sure. I -- I think it  
24 was some time in the middle 2000s.

25 Q. Right around the time of the operating

1 **agreement?**

2 A. That time or a little bit before it.

3 **Q. All right. So staying on the topic of your**  
4 **investigation of groundwater in the early 2000s, as**  
5 **part of your investigation, did you investigate**  
6 **groundwater use in the El Paso Valley?**

7 A. I did. I was directed to go down and take a  
8 look at -- at the entire Rio Grande, actually, from  
9 Creede to Fort Quitman and then in the El Paso Valley  
10 and other places, I looked at four wells.

11 **Q. So Texas is downstream of New Mexico. Why**  
12 **did you go look at groundwater use in the El Paso**  
13 **Valley?**

14 A. Because that -- the Rio Grande Project  
15 extends 55 miles down the El Paso Valley over the  
16 Hueco Bolson, and, you know, from my understanding  
17 with Bureau of Reclamation operations, you know, under  
18 the D1/D2 time period, they had been using river water  
19 and drain water and effluent in that area and so it's  
20 trying to get a feeling for what was happening and,  
21 you know, one of the issues was -- there was could  
22 groundwater pumping have had an effect, you know, on  
23 the Project.

24 **Q. Does groundwater pumping in Texas, based on**  
25 **your investigation, have an impact on Project supply?**

1           **MS. KLAHN:** Objection; foundation. He's  
2 just testified he went down and looked at groundwater  
3 and then he jumped to the D1/D2 time period. This  
4 witness is not an expert. He's not an engineer, and I  
5 don't think he has the foundation to provide any  
6 testimony or the expertise about groundwater pumping  
7 in Texas on Project water supply.

8           **MR. WECHSLER:** He's just speaking about  
9 the outcome of his investigation and the understanding  
10 of the ISC coming directly from the ISC director.

11           **JUDGE MELLOY:** If you have something by  
12 way of an admission, that's one thing, but this, to  
13 me, we're really now getting into expert testimony  
14 about the effects of groundwater pumping on -- on  
15 surface water and Project deliveries. I really do  
16 think that's expert testimony that this witness has  
17 not been qualified to give.

18           **MR. WECHSLER:** Understood, Your Honor.  
19 In a moment, I will show you some documents where  
20 that's set out so that should satisfy your -- your  
21 concern.

22           **Q. (BY MR. WECHSLER)** Mr. Schmidt-Petersen, based  
23 on that evaluation and investigation, did you -- that  
24 you did, did you learn about how Texas monitors  
25 groundwater pumping in El Paso Valley?

1           A.    I did.

2           Q.    How?

3           A.    The state of Texas does not.

4           Q.    Did -- we're talking about this issue of  
5 groundwater that Texas had raised about future  
6 groundwater pumping. Did New Mexico offer to work  
7 with Texas on this groundwater issue?

8           A.    We did on numerous occasions.

9           Q.    Did you, in fact, work on this issue with the  
10 State of Texas?

11          A.    We did not.

12          Q.    Why not?

13          A.    Consistently from that 2002 time period to  
14 present, the State of Texas has refused to engage on  
15 groundwater pumping in the El Paso Valley, and our  
16 position to them consistently was we're happy to talk  
17 to you about this, we're happy to investigate it with  
18 you, but it needs to be the entire Rio Grande Project  
19 because the Project is to be operated as a single  
20 unit, and if your concerns are there, we need to look  
21 at the entire Project to assess that.

22          Q.    Let's look at another document, this time New  
23 Mexico 2238. This hasn't been admitted yet,  
24 Mr. Schmidt-Petersen. This is -- you can see it  
25 indicates minutes of the 64th annual meeting, Rio

1 Grande Compact Commission, March 27, 2003. We talked  
2 earlier about how transcripts were created for the Rio  
3 Grande Compact Commission meetings. Are there minutes  
4 also created for the Rio Grande Compact Commission  
5 meetings?

6 A. Yes. For every meeting.

7 Q. And how is that done?

8 A. So I mentioned the court reporter and the  
9 transcripts, right? So the engineer advisors have the  
10 responsibility to go through the transcript and  
11 develop a draft of the -- of the minutes. I don't  
12 know if it was the case here in March of 2003, but  
13 during the last seven to ten years of my tenure,  
14 normally the Texas engineer advisor took on that  
15 responsibility to do the initial draft of minutes, and  
16 then he or she would then send that to the other  
17 engineer advisors, and then each of the other engineer  
18 advisors would go through the transcript and the  
19 minutes and work all the way through them to say do  
20 they believe this was a good representation of that  
21 transcript. The engineer advisors then would get to a  
22 consensus set of draft minutes. Those draft minutes  
23 are brought to every annual Compact Commission meeting  
24 and then their agenda item for approval by the Compact  
25 Commission at that meeting.



1 Q. And are these official records of the Compact  
2 Commission?

3 A. They should be. I don't -- I don't see a  
4 reason to doubt it. Looks like it.

5 Q. Are they kept on file in the normal course of  
6 business with the ISC?

7 A. Oh, yes, they are.

8 MR. WECHSLER: Your Honor, I move New  
9 Mexico 2238.

10 JUDGE MELLOY: Any objection?

11 MS. KLAHN: No objection.

12 JUDGE MELLOY: 2238 is admitted.

13 Q. (BY MR. WECHSLER) Let's highlight that --  
14 call out that second paragraph. Here,  
15 Mr. Schmidt-Petersen, we see a discussion about these  
16 -- it says, "He indicated" talking about Commissioner  
17 Hanson. Who was Commissioner Hanson?

18 A. That was Rio Grande Compact Commissioner for  
19 Texas, Joe Hanson.

20 Q. Here, it says, "He indicated that El Paso  
21 Water Irrigation District No. 1 had installed  
22 approximately 40 wells to assist with the low water  
23 supplies." And he continues after that. We've heard  
24 about some of these wells from Mr. Reyes. You were at  
25 this meeting, right?

1           A.    I was, yes.

2           Q.    Did New Mexico complain or object or say that  
3 groundwater pumping was not allowed by the Compact?

4           A.    We did not.

5           Q.    Why not?

6           A.    Because wells had been used for many decades  
7 in both districts to provide supply to the farmers  
8 under short water supply conditions, and it was just  
9 what had occurred in the -- in the valley.

10          Q.    Based on your experience, working on Compact  
11 issues, attending meetings, your investigation prior  
12 to the development of the 2008 operating agreement,  
13 are you aware of any state saying in a Rio Grande  
14 Compact Commission meeting that groundwater pumping  
15 below Elephant Butte was prohibited by the Compact?

16          A.    Not in a Compact Commission meeting, no.

17          Q.    Let me ask you this: Before I leave this  
18 topic of groundwater, Texas directed a lot of its  
19 evidence at the question of whether there was a known  
20 connection between surface water and groundwater. Let  
21 me just ask you directly: Has New Mexico, to your  
22 knowledge, historically recognized a connection  
23 between surface water and groundwater?

24          A.    New Mexico --

25                   MS. KLAHN: This calls for expert

1 testimony.

2 **JUDGE MELLOY:** I'll let him answer on  
3 the basis of his document review. Go ahead.

4 **THE WITNESS:** Thank you, Your Honor.

5 A. Yes, you know, New Mexico has recognized that  
6 it regulatorily, statutorily, and so on, and,  
7 actually, for many decades.

8 **Q. (BY MR. WECHSLER)** Do you know when the first  
9 time New Mexico recognized the connection between  
10 surface and groundwater from a regulatory standpoint?

11 A. I believe I do. I believe that was Steve  
12 Reynolds in 1956 in the Middle Rio Grande.

13 **Q.** All right. So let's move then to the subject  
14 of the operating agreement, and you mentioned that  
15 Texas had approached you about the development of an  
16 operating agreement, some discussions between the  
17 states in 2002; is that right?

18 A. That's correct.

19 **Q.** And what ever came of that?

20 A. It didn't go anywhere. We -- we had the  
21 discussions over the -- the TDS that went on for some  
22 time period when we talked about groundwater and we  
23 said we'll look at the entire project, they didn't  
24 want to do that, and -- and then, you know, when it  
25 came to the operating agreement, we -- we said, hey,

1 we're open to discussing with you with that, but it  
2 has to involve these other parties, and then we heard  
3 nothing more for quite a while.

4 Q. All right. So then turning to the 2008  
5 operating agreement, we -- we've heard that it was  
6 negotiated by EP1, EBID, and Reclamation, and that the  
7 Texas Compact Commissioner was involved as the  
8 mediator.

9 MS. KLAHN: Your Honor, I -- I'm sorry.  
10 Finish your question.

11 Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen, were  
12 you involved at all in developing or negotiating the  
13 2008 operating agreement?

14 MS. KLAHN: Your Honor, I'm going to  
15 object and tag back to Mr. Leininger's renewal of the  
16 motion in limine. In your March 31st, 2020, order,  
17 you limited the nature of the evidence related to the  
18 operating agreement, and specifically said it is in my  
19 view that this is neither the time nor the forum to  
20 address the validity of the operating agreement. I  
21 can't imagine what else could be the focus of this  
22 question, other than to try and argue that the  
23 operating agreement was invalidly entered into or the  
24 wrong people were involved, and the fact is it's a  
25 fact. It's a contract, and it is -- it's here. So

1 whatever Mr. Schmidt-Petersen knew about it at the  
2 time it was being negotiated doesn't seem to be  
3 relevant.

4 **JUDGE MELLOY:** Go ahead.

5 **MR. WECHSLER:** Well, my response to  
6 that, Your Honor, is you have made crystal clear that  
7 the single-most important issue in this case is where  
8 the waters go, whether the states are receiving their  
9 apportionment, and we also know that the Compact  
10 incorporated the Project and that the way the water is  
11 divided is currently being done by the operating  
12 agreement, and so that is front and center, as you  
13 made very clear, again, in your -- in your motion to  
14 dismiss and the summary judgment. We are not  
15 attacking the validity of the operating agreement to  
16 the extent it means that that is a fact that it has  
17 been entered. We are attacking whether or not the  
18 operating agreement and the way that it divides water  
19 is consistent with the Compact because we think that  
20 New Mexico has not received its Compact apportionment.  
21 This question -- I'm not sure what definition Ms.  
22 Klahn is using for relevance, but, I mean, Rule 401  
23 says any -- it's something that has any tendency to  
24 make a fact at issue more or less likely is something  
25 that's relevant. It's clearly relevant who were in

1 the room when they were developing the -- the very  
2 process by which the water is divided between the two  
3 states.

4 **MR. LEININGER:** Your Honor, may I be  
5 heard?

6 **JUDGE MELLOY:** You may.

7 **MR. LEININGER:** Your Honor, so this --  
8 this goes exactly to the negotiations, and as  
9 Mr. Wechsler just said, what was discussed back and  
10 forth with regard to the operating agreement, it goes  
11 to the validity of the operating agreement, not what  
12 the operating agreement eventually decides for  
13 purposes of Project operations. This is exactly the  
14 reason we -- we challenged the counterclaim, and we  
15 filed that motion in limine.

16 **JUDGE MELLOY:** Well, let me say this. I  
17 don't object or I think there's a small amount of  
18 background information about the operating agreement  
19 is fine. My biggest concern about this testimony is  
20 it's starting to become very repetitious. Everything  
21 that this witness is going to testify to, I think, has  
22 already been testified probably to by three other  
23 people, and I don't think there's any dispute that who  
24 negotiated it. I don't think there 's any dispute  
25 about its effect on the states. I don't think there's

1 any dispute about the fact that New Mexico doesn't get  
2 57 percent of the water under the operating agreement.  
3 I mean, I don't want to keep beating a dead horse  
4 forever, though, Mr. Wechsler, so, I mean, at some  
5 point, it's -- we do need to say, okay, enough is  
6 enough, we all know what the operating agreement is,  
7 and we all know what it does, and so let's move on.  
8 But I'll -- I'll allow you some latitude with this  
9 witness, but just keep in mind that I'm not going to  
10 keep hearing about how much New Mexico has been  
11 shorted by the operating agreement once it's  
12 established by five witnesses. I'm not really  
13 interested in hearing 6, 7, and 8 say the same thing.

14 **MR. WECHSLER:** Understood, Your Honor.  
15 Except I will -- to be fair, I will point out that you  
16 are talking about the single most important issue in  
17 the case, which is did we or did we not receive our  
18 apportionment. But I take your point, and I will move  
19 on, understanding that you understand that point.

20 **Q. (BY MR. WECHSLER)** So let's move then,  
21 **Mr. Schmidt-Petersen, to New Mexico 210. This is the**  
22 **2016 final environmental impact statement. Were you**  
23 **involved in -- did you review drafts of this document**  
24 **before it was finalized?**

25 **A.** I did. We commented on them.

1           **Q. In fact, New Mexico commented on it at**  
2 **length; is that right?**

3           A. On the -- I think there were several NEPA  
4 processes that we commented on, and I believe this was  
5 the last one, which was an environmental impact  
6 statement.

7           **Q. This is the final one, right?**

8           A. That's correct.

9           **Q. And let's take a look at the ISC comments on**  
10 **this document, and that's Page 439. And you recognize**  
11 **this as New Mexico's comments on the operating**  
12 **agreement?**

13          A. This would be the June 8th, 2016, set of  
14 comments. I believe it's the final one. I think it  
15 would incorporate almost all the comments that we  
16 provided during the NEPA process.

17          **Q. And I'll just represent for efficiency**  
18 **purposes that it goes all the way until Page 531,**  
19 **almost a hundred pages, so my question is: Did New**  
20 **Mexico raise concerns repeatedly about the operating**  
21 **agreement and how much water New Mexico was getting**  
22 **through that division?**

23          A. We did.

24          **Q. And were those concerns based on any**  
25 **technical analysis that you had done?**



1           A.     They were based on technical analysis that  
2     the ISC did, as -- and OSE and some of our technical  
3     contractors.

4           Q.     Did the ISC meet with Reclamation to express  
5     your concerns about the operating agreement and how  
6     much water New Mexico was getting?

7           A.     Yes.    Numerous times.

8           Q.     And how about the State of Texas?

9           A.     Same.   Same answer.

10          Q.     I'm just going to point out a couple of these  
11     passages.   I'm not going to ask you about them in  
12     light of what the Special Master just said, but for  
13     the record so that the Special Master can look at them  
14     later at his leisure, if you start at Page 445, here's  
15     a section Mr. Schmidt-Petersen saying talking about  
16     removing credits and charges and using actual  
17     deliveries of water in accounting.   And then if you  
18     turn to Page 446, and here you're expressing at the  
19     end the final paragraph, you're saying, "In general,  
20     credits tend to reduce charged diversions below actual  
21     diversions, and tend to reduce the diversion ratio.  
22     Under the 2008 operating agreement, reductions to the  
23     diversion ratio result in reductions to EBID's  
24     allocation."   Was that an issue that you raised  
25     repeatedly to Reclamation and the State of Texas?

1           **MR. LEININGER:** Objection; Your Honor,  
2 cumulative testimony. To the extent this witness is  
3 going to be discussing the credits and debits issue,  
4 he has not been identified as an expert for that  
5 purpose. In fact, Dr. Barroll will be testifying to  
6 that point.

7           **MR. WECHSLER:** We will, in fact, wait  
8 until Dr. Barroll's analysis. I'm just establishing  
9 here, Your Honor, it was raised repeatedly, and then  
10 I'm going to move onto a different issue.

11           **JUDGE MELLOY:** All right. He may  
12 answer.

13           A. Yes.

14           **Q. (BY MR. WECHSLER)** And then if you turn to  
15 Page 451, Mr. Schmidt-Petersen, and here, we can see  
16 it's under a heading, "Failure to include areas south  
17 of American Dam," and then if you turn to Page 452, we  
18 can see -- just looking for the language that I was  
19 keying to. Well, at any rate, this is -- section,  
20 Mr. Schmidt-Petersen, is describing an effect of water  
21 operations below American Dam, right?

22           **MS. KLAHN:** Objection. I think the  
23 documents speaks for itself. These are comments. The  
24 document doesn't establish anything. They're  
25 comments.

1                   **JUDGE MELLOY:** The witness may answer.  
2 I understand what he's saying.

3                   **THE WITNESS:** Thank you, Your Honor.

4           A.     And, Mr. Wechsler, this is just the -- the  
5 rationale that we were putting forward that basically  
6 for the Rio Grande Project to do an evaluation for an  
7 operating agreement. There were multiple things in  
8 the El Paso Valley that had not been taken into  
9 account and should be taken into account.

10           **Q.     (BY MR. WECHSLER) And then let's move to Page**  
11 **490. You can see this is yet another letter, and if**  
12 **you go to 492 in the last two paragraphs here, here**  
13 **it's talking about a vicious cycle. Could you just**  
14 **briefly tell us what that vicious cycle you were**  
15 **referring to was, Mr. Schmidt-Petersen?**

16           A.     Yeah, I believe I can. This goes to our  
17 concerns within New Mexico and for our farmers under  
18 the operating agreement and back to what's happening  
19 to the groundwater situation in the Mesilla and Rincon  
20 Bolson, and the issue there under the operating  
21 agreement is because New Mexico now is responsible for  
22 all of these negative deviations from the D2 curve.  
23 What is significant is the amount of water that  
24 otherwise would have been available to the Elephant  
25 Butte Irrigation District and its farmers. So that

1 means there is not as much water going through canals.  
2 There's not as much surface water on farms. There is  
3 less seepage from both of those. Farmers are just  
4 trying to produce their crops. They are looking to  
5 continue to do that. They have the ability to pump so  
6 they pump. That pumping then drops the water table  
7 elevation, which under some circumstances then affects  
8 the river system, affects the D2 delivery or  
9 efficiency of that system, and then that cycle just  
10 continues and gets worse. It's one of our major  
11 concerns about this and how that, you know, our  
12 apportionment under the Compact has been essentially  
13 taken away, and our farmers are suffering because of  
14 that and our aquifer is starting to suffer.

15 **Q. Okay. Let's turn then to a different topic**  
16 **with -- we can go back and review that later, and this**  
17 **is discussions with Texas about the operating**  
18 **agreement. Did New Mexico and the ISC express their**  
19 **concerns to Texas about the apportionment under the**  
20 **operating agreement?**

21 A. We did.

22 **Q. Did that lead to discussions between the two**  
23 **states?**

24 A. Yeah. We had a number of discussions in the  
25 2009, I believe, through '11 time period with Texas.

1                   **MR. LEININGER:** Objection, Your Honor.  
2 This line of testimony, based on foundation, the --  
3 the Project does not apportion water, and that was the  
4 question asked by counsel, therefore, unless there's  
5 some foundation with regard to how the Project  
6 apportions water, I don't think this witness is  
7 qualified to testify.

8                   **JUDGE MELLOY:** Well, I think he's  
9 talking about discussions with Texas about the  
10 operating agreement was my understanding of the  
11 question. Why don't you rephrase to make clear,  
12 Mr. Wechsler.

13                   **MR. WECHSLER:** Certainly.

14           **Q. (BY MR. WECHSLER)** My question,  
15 **Mr. Schmidt-Petersen, did you talk -- have discussions**  
16 **with Texas about the operating agreement and the**  
17 **division of water under that agreement?**

18           **A.** We did.

19           **Q.** And --

20                   **MR. LEININGER:** Your Honor, excuse me.  
21 May I interrupt? So with that clarification, we -- I  
22 will withdraw the objection, but the statement by  
23 counsel was about the apportionment under the  
24 operating agreement.

25                   **JUDGE MELLOY:** Go ahead.

1           **Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen, can**  
2 **you please summarize those discussions?**

3           A.    Yeah.  So when the operating agreement was --  
4 was put into place, my bosses and others were actually  
5 pretty happy about it.  I had raised some concerns  
6 about carryover with them, but the direction that we  
7 received was let's see how this goes, let's see if it  
8 -- if it negatively affects New Mexico's Compact  
9 apportionment, and -- and then as we do, let's have  
10 discussions with the State of Texas if there are  
11 issues in that regard, and -- and so we, you know,  
12 look to gather data, we worked with the OSE, then also  
13 started to work a little bit with Texas through Herman  
14 Setemeyer, and as we went along, issues start to  
15 arise, and we started to have discussions about those  
16 issues with Texas and others.

17           **Q. All right. Let's take a look at New Mexico**  
18 **805. I'll ask you to identify some features of this**  
19 **because this is subject to an objection. First of**  
20 **all, let's turn to the second page. And you see in**  
21 **the upper right-hand corner there,**  
22 **Mr. Schmidt-Petersen, it's got the date 5/11/11. Do**  
23 **you recall having a meeting with Texas, the State of**  
24 **Texas, on this issue around May 11th, 2011?**

25           A.    I do.

1           **Q.    And where did that meeting take place?**

2           A.    This meeting occurred in El Paso, Texas in  
3 the offices of -- the Law Offices of Pat Gordon, in  
4 their conference room.

5           **Q.    What was the subject of the meeting?**

6           A.    This was a continuation of discussions that  
7 we were having about the Compact in the project and  
8 how they were interrelated.

9           **Q.    Who attended the meeting from the State of**  
10 **New Mexico?**

11          A.    I did, Estevan Lopez did, and I believe  
12 either Nabil Shafik or John D'Antonio or both.

13          **Q.    Who attended the meeting from the State of**  
14 **Texas?**

15          A.    So for Texas in this regard, it was Carlos  
16 Ruben Stein, who I believe by that time had gone from  
17 being a Texas Commission of Environmental Quality  
18 Commissioner to, like, the head of the Texas Water  
19 Development Board, I believe. Happened somewhere in  
20 this time period. Pat Gordon was there as Texas'  
21 Compact Commissioner, and Herman Setemeyer, the Texas  
22 engineer advisor.

23          **Q.    And then looking back at Page 1 or whatever**  
24 **part you want to look at, have you seen this document**  
25 **before?**

1           A.    I have.

2           **Q.    And in what context?**

3           A.    Well, I took the picture, but it's near the  
4 end of the meeting that day.

5           **Q.    Were these notes used as part of that**  
6 **meeting?**

7           A.    Yes, they were.

8           **Q.    Were they there at the beginning of the**  
9 **meeting?**

10          A.    Not all of them.  The items that are written  
11 in blue were written on an easel and a flip chart when  
12 we arrived at the meeting.

13          **Q.    Was it explained to you by the Texas**  
14 **representatives what those items shown in blue were?**

15          A.    Yes.

16                   **MS. KLAHN:**  I'm going to object on  
17 hearsay.  We have a lot of concerns about this  
18 exhibit.  It has previously been proffered by New  
19 Mexico, and there's actually a declaration in the  
20 summary judgment briefing that we put in from Pat  
21 Gordon, and where this is heading is basically to try  
22 and have Mr. Schmidt-Petersen identify this  
23 handwriting as belonging to Mr. Gordon, and that's  
24 simply not true.  Then there's the relevance issue.  
25 So those are the -- those are two things that are



1 coming, and I didn't want to let it get too much  
2 further down the road, so I apologize if I was  
3 premature.

4 **MR. WECHSLER:** So, Your Honor, we will  
5 not be saying anything about the handwriting. I'm  
6 going to ask if I can finish my foundation, and then I  
7 will offer the exhibit, and then you'll have  
8 everything in front of you to determine whether or not  
9 foundation and authenticity has been laid.

10 **JUDGE MELLOY:** Go ahead.

11 **MR. WECHSLER:** Thank you.

12 **Q. (BY MR. WECHSLER) My question,**  
13 **Mr. Schmidt-Petersen, was: Was it explained to you by**  
14 **Texas representatives what the items shown in blue**  
15 **were?**

16 **A.** It was.

17 **Q. And what did they tell you?**

18 **A.** My understanding of that is this was Texas  
19 position on the history of the Compact and the Project  
20 and how they were related.

21 **Q. Okay. Now, did they walk through and explain**  
22 **each of these bullet points then?**

23 **A.** Yes. We walked through and talked about all  
24 of them, I believe.

25 **Q. Then you indicated that was the writing in**

1 blue. What was the writing in red?

2 A. The writing in red is notes that were added  
3 to the flip chart during the course.

4 Q. Were those added by one of those  
5 representatives from the State of Texas?

6 A. It was a Texas representative. I can't  
7 remember which one.

8 Q. And this is a photograph you indicated that  
9 you actually took; is that right?

10 A. Yes, it was.

11 Q. Did the other parties know you were taking  
12 the picture?

13 A. They did.

14 Q. How did they know that?

15 A. I asked them if I could take a picture.

16 Q. And then you provided that in discovery, and  
17 it was produced to the other side?

18 A. That's right.

19 MR. WECHSLER: So at this point, Your  
20 Honor, I'll offer New Mexico 805.  
21 Mr. Schmidt-Petersen has laid authenticity and  
22 foundation. The document was written and explained as  
23 the positions of the State of Texas so it qualifies it  
24 as an admission of a party opponent.

25 JUDGE MELLOY: What's your position, Ms.

1 Klahn?

2                   **MS. KLAHN:** My position is that he  
3 hasn't established a sufficient foundation because to  
4 have him say -- simply say, oh, this is what Texas  
5 told me, and he can't remember who it was, he doesn't  
6 know who wrote the notes, for all I know somebody else  
7 wrote this, and so I -- I don't think that he's  
8 established basis to introduce this.

9                   **MR. LEININGER:** Your Honor, the United  
10 States joins. The witness stated that this blue  
11 writing was in existence when he entered the room.  
12 There's no foundation as to the authenticity and  
13 authorship.

14                   **MR. WECHSLER:** Well, Your Honor --

15                   **JUDGE MELLOY:** Just a second. He did  
16 say that -- that Mr. Gordon represented that this was  
17 Texas' position, and they went through it line by  
18 line. As far as blue is concerned, I think there's  
19 certainly foundation laid for that part of it. I  
20 think the red notations are a little bit more  
21 questionable, but I'm going to admit the exhibit as  
22 having sufficient foundation. New Mexico 805 is  
23 admitted.

24                   **Q. (BY MR. WECHSLER) Mr. Schmidt-Petersen --**

25                   **JUDGE MELLOY:** Well, let me ask you

1 this, though. Wasn't this issue -- this wasn't an  
2 objection that was raised, but is there any concern --  
3 I can't think off the top of my head the rule number  
4 -- that this would be inadmissible under the rule that  
5 prohibits admissibility of documents and testimony  
6 concerning settlement discussions? Was this ever in  
7 the nature of a settlement offer or --

8 **MR. WECHSLER:** The answer, Your Honor,  
9 is no, there wasn't a lawsuit at that time. There was  
10 simply discussions about the operating agreement as  
11 Mr. Schmidt-Petersen just testified. So, in other  
12 words, he -- we laid that context that there were  
13 these ongoing discussions about New Mexico's concerns,  
14 and those -- this was spoken about in that context.  
15 So, no, there were no confidentiality issues of which  
16 I'm aware.

17 **MS. KLAHN:** My understanding is that  
18 this was part of a discussion related to the 2011  
19 lawsuit that -- that New Mexico ultimately did file  
20 against the United States, and furthermore, we still  
21 have the issue that Texas has a declaration in the  
22 record that this Exhibit 805 is not what  
23 Mr. Schmidt-Petersen says it is in any way, shape, or  
24 form.

25 **JUDGE MELLOY:** Well, if you want to put

1 on evidence to that effect, just based upon my sort of  
2 quick review of it, putting aside the red notations,  
3 Ms. Klahn, it looks like it's -- it does look like it  
4 sets out your position about the operating -- about  
5 the Compact, though, doesn't it? I mean, it basically  
6 says -- they use the term mans activities. So the  
7 pumping is man's activities, and pumping can interfere  
8 with water delivery. That's pretty much your  
9 position, isn't it?

10 **MS. KLAHN:** We don't think pumping can  
11 interfere with water delivery. My concern is having  
12 it admitted as something that Texas produced when the  
13 Texas commissioner signed a declaration that it wasn't  
14 something Texas produced.

15 **JUDGE MELLOY:** Well, why don't you give  
16 me a little more testimony about that, Mr. Wechsler.  
17 What's the witness' recollection on that?

18 **MR. WECHSLER:** Yeah. Happy to.

19 **Q. (BY MR. WECHSLER)** Mr. Schmidt-Petersen,  
20 again, can you explain to us where the origin of this  
21 document and what the -- the blue writing was, what  
22 the red writing was, whether this came from the State  
23 of Texas, whether they represented this as the  
24 position of Texas?

25 **A.** Yeah, sure. So this was, you know, I don't

1 know if it was a culmination of meetings, but we had  
2 raised a number of issues that we saw as concerns with  
3 the operating agreement, and we've gone back and forth  
4 a number of times. We had a couple of different  
5 meetings. This was one of -- of those meetings where  
6 we traveled down to Pat Gordon's office to meet with  
7 them, and -- and as I mentioned before, it was about  
8 Texas' history of the Compact and Project as it's set  
9 up here, and they wanted to talk to us. This is my  
10 recollection more with Herman from my discussions with  
11 him, wanted to walk through what they saw as that  
12 history and interrelationship, and then, you know,  
13 wanted to talk with us about it and understand where  
14 there were areas of agreement or disagreement.

15 **Q. And so these were represented to you as the**  
16 **position of the State of Texas?**

17 A. That's correct.

18 **Q. And they actually walked through each one of**  
19 **those items?**

20 A. Yes.

21 **Q. And then did you have discussion about each**  
22 **one of those items?**

23 A. We did.

24 **Q. And did you talk about the areas of agreement**  
25 **and areas of disagreement?**

1           A.     We did.

2           **Q.     And -- and these documents were actually at**  
3 **the front of the room when you came in the room; is**  
4 **that right?**

5           A.     Well, they were in the room off to the side  
6 on a flip chart on an easel.

7           **Q.     At Pat Gordon's office?**

8           A.     In his conference room, yeah.

9                     **MR. WECHSLER:** Anything further you'd  
10 like in terms of foundation, Your Honor?

11           **Q.     (BY MR. WECHSLER) Anything additional that**  
12 **you can offer, Mr. Schmidt-Petersen?**

13                     **JUDGE MELLOY:** Well -- go ahead. Did  
14 you have something you want to say?

15           A.     With regard to the items in red, I don't  
16 remember who wrote them down, but -- but those relate  
17 to some of the issues that we were talking, we were  
18 saying, well, hey, there's other things going on here.  
19 It's just a few of them where those were marked out.

20                     **JUDGE MELLOY:** Well, I've already  
21 indicated it's in evidence. If Mr. Gordon wants to  
22 come on be presented as a witness to rebut its  
23 authenticity, he can certainly do that, and I'll then  
24 have to make a decision as to which is the more  
25 credible piece of evidence, but --

1                   **MS. KLAHN:** Thank you, Your Honor.

2                   **JUDGE MELLOY:** -- as far as I'm  
3 concerned, at this point, this witness has laid  
4 sufficient foundation. Go ahead, Mr. Wechsler.

5           **Q. (BY MR. WECHSLER)** Mr. Schmidt-Petersen, it's  
6 actually about the areas of agreement and disagreement  
7 that I want to understand from you so let's look at  
8 No. 3 there where it says, "Apportionment of Project  
9 water to Project users." And then the first one, the  
10 first bullet point there says, "Normal release of 790  
11 acre-feet." Do you see that?

12           A. I do.

13           **Q.** And do you recall having discussion about  
14 that issue?

15           A. Yes, I do.

16           **Q.** What was the issue that you were discussing?

17           A. Just talking about that normal release, and I  
18 think the -- the red part on there was just discussion  
19 we had that that normal release in return flows  
20 included deliveries to Mexico.

21           **Q.** And --

22           A. And, also, potential Mexico use of water  
23 within the El Paso Valley. Sorry. Excuse me.

24           **Q.** When you -- when you had these discussions  
25 with Texas on this issue of normal release of 790 and



1 return flows, was that an issue on which the states  
2 had agreement?

3 A. I believe so. That was my understanding.

4 Q. And so if you look down next then, you can  
5 see Texas, it says EP No. 1, New Mexico, EBID, and  
6 Mexico, and then it has 43 percent, 57 percent, 60,000  
7 acre-feet. Do you recall what that issue was about?

8 A. I believe I do. It was really talking about  
9 the Rio Grande Project and the irrigable lands of the  
10 Project and the division of those irrigable lands, as  
11 well as the required full supply delivery to the  
12 Republic of Mexico, and part of the discussion was  
13 back and forth about D1/D2.

14 Q. Was there general agreement on this issue?

15 A. I believe so. I'm not sure that there was  
16 full agreement. You know, the delivery to lands issue  
17 was part of the discussion.

18 Q. Do you recall what the difference was on that  
19 delivery to land issue?

20 A. I think the issue there was that there were  
21 and there have been different kind of definitions of  
22 the way D2 is described in D1, and that while we had a  
23 general agreement about that division of lands, that  
24 basically, there was this aspect of, you know, is this  
25 -- for the states, is this delivery to lands or is it

1 delivery under some D2 relationship?

2 Q. And then looking down at the next bullet  
3 point, it says, "All delivery of Project water to  
4 Project users are undiminished by man's activities."  
5 And is there -- do you recall what that was -- that  
6 discussion was about?

7 A. Yeah, I do. That was about groundwater  
8 pumping within, at least the way it was framed, within  
9 New Mexico, and -- and we brought up that that pumping  
10 was occurring through the entire Project, and we  
11 didn't think the Compact for the Project had those  
12 requirements.

13 Q. Was there general agreement on this issue?

14 A. No.

15 Q. We talked earlier about this language, this  
16 quote, man's activities. Does that language show up  
17 in the Rio Grande Compact?

18 A. Not that language, no.

19 Q. And is that a -- does it -- is that language  
20 from the Pecos River Compact?

21 A. I had that discussion with Herman Setemeyer a  
22 couple of times. Definitely, it's in the -- in the  
23 Pecos River Compact, yes.

24 Q. So, in fact, that's an issue that you raised  
25 with them at this meeting?

1           A.    I raised that with Herman there and a number  
2 of other times.

3           Q.    And there it says -- then it says, "Pumping  
4 is a man's activity." I take it that's also something  
5 on which the states disagreed; is that right?

6           A.    That's correct.

7           Q.    All right. So I just want to ask you about  
8 one last document, Mr. Schmidt-Petersen, that's in  
9 evidence, but I -- I want to just get you to clarify  
10 something on it, and then my discussion with you will  
11 be done. So that's New Mexico 819. This was admitted  
12 earlier, but do you recognize this document?

13          A.    Yes, I do. This is the report of the  
14 engineer advisors to the Compact Commission for  
15 calendar year 2020, so it would have been this April.

16          Q.    All right. And there's a couple things in  
17 there that we may look at later, but I want to know if  
18 you can explain why there's a draft mark on it?

19          A.    Yeah. I believe I can. The Compact  
20 Commission ultimately did not approve this document.  
21 There was discussion at the Rio Grande Compact  
22 Commission meeting about it, and Commissioner Gordon  
23 had raised concerns.

24          Q.    And if you go to the last page of the  
25 document, which should be Page 28 maybe, you can see

1 here that it has -- it bears the signatures of three  
2 of the engineer advisors. Why is it not approved by  
3 the Commission if it -- if it bears the signatures of  
4 the engineer advisors?

5 A. Well, I think this reflects that all engineer  
6 advisors were comfortable with the report, but  
7 ultimately for it to be a Compact Commission-approved  
8 document, it has to be approved by the Compact  
9 Commission, and that has to be a consensus decision.

10 **MR. WECHSLER:** Thank you. I have no  
11 further questions, Your Honor.

12 **JUDGE MELLOY:** All right. Ms. Klahn,  
13 are you going first or Mr. Leininger?

14 **MS. KLAHN:** I believe I'm going first,  
15 Your Honor, but I wanted to raise a logistical  
16 question. Since we are having more Stevens cross, I  
17 believe we have a couple of hours probably combined  
18 cross-examination, Mr. Leininger and I, and since we  
19 have Stevens -- Dr. Stevens' cross on November 1st,  
20 wanted to ask how you wanted to handle this. I mean,  
21 I'm happy to start and go for 45 minutes or so, but  
22 it's up to you how you want to do it.

23 **JUDGE MELLOY:** I'd like to get started.  
24 I think we're getting quite a bit behind schedule. We  
25 lost close to two days last week, and I'd like to keep

1 going. We'll finish with this witness when we come  
2 back a week from Monday, and then we will finish with  
3 Dr. Stevens hopefully after -- after this witness.

4 **MS. KLAHN:** Okay. Thank you.

5 **MR. LEININGER:** Your Honor, may we take  
6 five minutes? I apologize, but my --

7 **JUDGE MELLOY:** Sure.

8 **MR. LEININGER:** -- Bluetooth is  
9 apparently going to run out of batteries. I have to  
10 change it out.

11 **JUDGE MELLOY:** We'll take five minutes  
12 so everybody can stretch.

13 **MR. LEININGER:** Thank you.

14 (Recess.)

15 **JUDGE MELLOY:** Ms. Klahn, you may  
16 proceed.

17 **MS. KLAHN:** Thank you.

18 CROSS-EXAMINATION

19 BY MS. KLAHN:

20 **Q. Good afternoon, Mr. Schmidt-Petersen.**

21 **A. Good afternoon, Ms. Klahn.**

22 **Q. My name is Sarah Klahn. I represent the**  
23 **State of Texas. I have a few questions for you today.**  
24 **Just to start out sort of flatfooted, you're here**  
25 **today as a fact witness, correct?**

1           A.     That's my understanding, if I understand what  
2 that means, yeah.

3           Q.     Okay. So you haven't disclosed any expert  
4 reports in this case?

5           A.     No.

6           Q.     Okay. We'll talk in a little bit about some  
7 of the things you told me in your deposition and how  
8 those seem to differ from your testimony today. I  
9 also want to make sure I understood, now, you're not  
10 an engineer, correct?

11          A.     I am a scientist. I have a master's of  
12 science degree in hydrology, and I'm a water resource  
13 manager.

14          Q.     Okay. Do you have any licenses?

15          A.     I do not.

16          Q.     Okay. And you've never been Compact  
17 commissioner, correct?

18          A.     I -- I have never been Rio Grande Compact  
19 Commissioner.

20          Q.     Okay. I should have said that. Rio Grande  
21 Compact Commissioner. I'm sorry?

22          A.     My apologies. I am the commissioner on one  
23 other interstate Compact, and I've also been on the  
24 Colorado River Compact.

25          Q.     But in the Rio Grande, the state engineer is

1 the Compact commissioner, correct?

2 A. That's correct. By law.

3 Q. And, in fact, starting in 2017, you didn't  
4 have any formal involvement with the Compact because  
5 you were assigned to the Rio Grande -- to the  
6 Colorado; isn't that right?

7 A. In 2017, I took a job with the ISC on the  
8 Colorado River Bureau, but I did engage with some Rio  
9 Grande activities for a period of time after that, a  
10 month -- several months.

11 Q. Okay. And so your -- so when you started at  
12 the ISC, you indicated you worked for Norm Gaume. He  
13 was the engineer advisor, correct?

14 A. Yes. At that point in time.

15 Q. Who was the director of the ISC when you  
16 started?

17 A. That was also Norm Gaume.

18 Q. Okay. And how long was Norm Gaume director?

19 A. I don't know that I'm aware of his entire  
20 time there. I know that he continued as director  
21 until the end of the Johnston administration, which  
22 would have been around 2003.

23 Q. Okay. And then did Mr. Lopez take over?

24 A. As director, that's correct.

25 Q. Okay. And after Mr. Lopez, was it

1 **Mr. Longworth who was the director?**

2 A. No.

3 **Q. Who was after Mr. Lopez?**

4 A. There was Amy Haas, who was our -- before  
5 that was our general counsel, was the director of the  
6 ISC for a period of time, then after Amy, Deborah  
7 Dixon was the ISC director, and John Longworth was  
8 after Deborah, and then I'm -- you know, I'm the  
9 appointee after John Longworth.

10 **Q. Okay.**

11 **MS. KLAHN:** Let's see. Now, could we --  
12 could we have New Mexico Demo 2? I'm hoping my  
13 technical people have access to those documents.  
14 Please tell me if you don't. Nope. This is New  
15 Mexico Demo 2. Demo 22. I apologize. Demo 22.  
16 There we go. Could we go to Page 2, please, and if we  
17 could look at the blowup of the Rio Grande Bureau,  
18 which is in the center of the page there.

19 **Q. (BY MS. KLAHN) You had some testimony this**  
20 **morning about all the different things that the**  
21 **Interstate Stream Commission does on behalf of the Rio**  
22 **Grande Basin. Would you agree most of the effort of**  
23 **the ISC is in the Middle Rio Grande above Elephant**  
24 **Butte?**

25 A. With this litigation, no.



1           **Q.    Prior to the litigation?**

2           A.    Prior to the litigation, we had significant  
3 efforts all the way up and down the basin, you know,  
4 from on the Rio Chama in particular and then the --  
5 you know, a number of the items that I showed below.  
6 From, like, a monetary basis with regards to Project  
7 construction, we certainly spend a significant amount  
8 of money every year in the middle Rio Grande.

9           **Q.    That's because to ensure New Mexico meets its**  
10 **Article 4 obligations, you need to be able to get the**  
11 **water to Elephant Butte; isn't that right?**

12          A.    It is primarily related to maintaining the  
13 river channel through the San Acacia reach of the  
14 middle Rio Grande and actually get water into the lake  
15 is where we -- I wouldn't say it's where we spend the  
16 most money, but every year, we spend a lot of money  
17 there.

18          **Q.    And -- and that -- that's what assists you in**  
19 **satisfying your Article 4 obligations?**

20          A.    That is one item of what assists in that  
21 regard.

22          **Q.    I notice on the right-hand column here on**  
23 **Demo 2, Page 2 of Demo 22, rather, it says, "The LRG**  
24 **Project manager," it says, "Vacant." How long has**  
25 **that post been vacant?**

1           A.     Well, it's filled now, but it -- I'm not sure  
2 of the total time it was there. We had a manager in  
3 place for about a year and a half and then she left to  
4 take another job and we just in the last month or so  
5 hired that position.

6           **Q.     Now, do you recall during your 2020**  
7 **deposition when you reminded Mr. Leininger several**  
8 **times that you had a day job, and you weren't fully**  
9 **acquainted with the details of the litigation?**

10          A.     I -- I -- I -- well, do you have that in the  
11 deposition? I remember at that point in time talking  
12 about the fact that I was very busy with multiple  
13 other issues, yes, and had not at that point in time  
14 been involved in the -- in the litigation for some  
15 period of time. Happy to look at the deposition if  
16 you'd like to.

17          **Q.     Oh, believe me, I've got a pile here, and I'm**  
18 **not as speedy as Mr. Wechsler, so you'll have to be**  
19 **patient with me. So I'd like to go to Page 264 of the**  
20 **deposition, Lines 13 through 19.**

21                   **(The video was played.)**

22                   **MS. KLAHN:** Could I stop -- could we  
23 stop that? I think you're a little bit too far back.  
24 I just wanted to start at Line 13. Can you get to  
25 that?

1                   **JUDGE MELLOY:** Why don't you just read  
2 it, Ms. Klahn? That'd probably be more efficient.

3                   **MS. KLAHN:** Okay.

4           **Q.**     **(BY MS. KLAHN)** Line 13, "You haven't any  
5 expert -- you haven't -- any expert reports referring  
6 to having seen Dr. Barroll's reports?" And  
7 Mr. Schmidt-Petersen's answer is, "As I mentioned, I  
8 have a full-time job doing other things. I read the  
9 Compact, and I read my affidavit before this.  
10 Otherwise, I really haven't worked on this in a long  
11 time." So since June of 2020 until today, what kinds  
12 of work have you done to become familiar with the  
13 litigation, Mr. Schmidt-Petersen?

14           **A.**     So since that time, I -- I can't remember the  
15 exact time that I was asked by the Attorney General's  
16 Office to start to get prepared to be an expert, and I  
17 would defer to them in that regard, but then I just  
18 started going back and looking through, you know, my  
19 Rio Grande records and things like that and trying to  
20 refresh my memory.

21           **Q.**     Now, Mr. Schmidt-Petersen, you just testified  
22 that the Attorney General's Office asked you to start  
23 to get prepared to be an expert. You're not an expert  
24 in this case, correct?

25           **A.**     I understand it's the fact expert piece is

1 what I'm talking about. So today is to be prepared  
2 for those five items that I mentioned today, to look  
3 at my files and so on.

4 Q. I see. Okay. And you testified today about  
5 Project operations to some extent. Do you recall that  
6 testimony?

7 A. I do.

8 Q. Do you recall telling me during your  
9 deposition that you had -- you had an understanding  
10 and familiarity with Project operations only back to  
11 the 2000s, including some discussions you'd had with  
12 Wayne Treers, who was an operator of the Project in  
13 the 1990s?

14 A. I remember saying that -- I think the  
15 question, if I remember right, if it's in there, it  
16 had to do with something about being the expert in  
17 that regard, and I think I was trying to say that, you  
18 know, I'm a water resource manager, I'm familiar with  
19 that, and I've engaged, but I'm not the expert person  
20 that's going to be the testifying. I thought that's  
21 what that was about.

22 Q. Well, I can read it to you. And the purpose  
23 of this is just to put some -- put some lines, some  
24 boundaries, some benchmarks, if you will, around your  
25 testimony today regarding Project operations and what

1 you have previously said you understood. So question  
2 starting on Page 60 of the deposition, Line 13, "So do  
3 you have an understanding or familiarity with  
4 operations of the Project prior to 2000?" Answer,  
5 Line 16, "From what I understood from primarily  
6 discussions with a gentleman by the name of Wayne  
7 Treers, who was the Reclamation's operator of the  
8 Projects in the '90s. I'm not sure before that. He  
9 retired some time in the 2000s." So is it your  
10 testimony today that you're more familiar with the  
11 Project operations prior to the 2000s than you were in  
12 June of 2020?

13 A. So in thinking about this, I scan this as a  
14 different kind of discussion than that. When I heard  
15 you and you talked today about Project operations, I  
16 think about that about how Bert and Wayne were  
17 operating the Rio Grande Project and the discussions  
18 and meetings we had at that time and the engagement as  
19 we went forward. That's -- that's not the -- the same  
20 thing as, like, looking at our Compact files and so  
21 on, to my perspective. Those are the Rio Grande  
22 Project operational pieces there about their  
23 allocation and so on, and -- and so I was basically  
24 just responding to that, I think.

25 Q. So I'll ask my question again. Is it your

1 testimony today that you're more familiar with the  
2 Project operations prior to the 2000s than you were in  
3 June of 2020? You testified today about Project  
4 operations; isn't that right?

5 A. I believe I testified today about having  
6 looked at D1/D2 activities associated with a number of  
7 our different activities. I don't see that as being  
8 the same as saying I knew what the Bureau of  
9 Reclamation was doing on a day-to-day basis with their  
10 allocation procedures and others. I think those are  
11 two separate things.

12 Q. And as I made the point in the objections,  
13 you're not being offered -- you have no training as an  
14 historian; is that right?

15 A. I'm not a historian.

16 Q. Okay. And -- and you testified to that in  
17 your deposition, correct?

18 A. I did. And I think I also said, you know,  
19 one of the jobs of being a Compact-related staffer is  
20 understanding what was done and looking at the files  
21 and so on, and I just have to say as ISC director, I  
22 mean, that's what I tell my staff as they come in  
23 because it's so important, and -- and so you don't  
24 need to be a historian to do that. You just need to  
25 be able to do your job on supporting your Compact

1 commissioner or your engineer advisor, and that  
2 requires really understanding what people did in the  
3 past. Yeah, not a historian, but that's the job.

4 **Q. So let's talk a little bit about some of the**  
5 **-- the issues that you discussed with Mr. Wechsler**  
6 **today related to waste. I'd like to ask you, first,**  
7 **if you're familiar with the term secondary irrigation**  
8 **season?**

9 A. I am aware of that term, and it's utilized in  
10 a number of different places, yes.

11 **Q. In the Lower Rio Grande and in the Rio Grande**  
12 **Project in Texas, the secondary irrigation season is**  
13 **also known as winter; is that correct?**

14 A. Yes and no in that regard. I mean, the --  
15 the -- when the Project was operating under full  
16 supply conditions, I would say that that was -- was  
17 applicable for about a four-month time period in there  
18 from the October to potentially the early March time  
19 period. That's different today, and so it's kind of  
20 hard to define today what that time period would be.  
21 I -- I think about it more as double cropping.

22 **Q. Okay. And I'd like you to pull up New Mexico**  
23 **2307, please. So this exhibit, I believe, was one**  
24 **that you -- this one is -- well, let me first ask you:**  
25 **Do you recognize New Mexico 2307?**

1           A.    I'm not sure if I recognize it.  I don't  
2 believe it's one of the ones that -- that I testified  
3 on today.

4           Q.    I'd ask you to take a look at the first  
5 paragraph.  It's from Mr. Rowe to -- from Mr. Simpson,  
6 and you testified earlier today that Mr. Simpson is  
7 the -- was the Compact commissioner for Colorado in  
8 1995, correct?

9           A.    Can you say that again?  Sorry.  I was  
10 reading.

11          Q.    That Mr. Simpson was the Compact commissioner  
12 from Colorado in 1995, correct?

13          A.    I did, yes.

14          Q.    And this paragraph expresses extreme concern  
15 about the proposed operation of the Rio Grande Project  
16 in 1996.  "It's very clear from the minutes of the  
17 interagency operations meetings that excess releases  
18 of flood water stored in 1995 in Abiquiu Reservoir are  
19 being proposed for the sole purpose of preventing a  
20 possible spill of usable water in 1996."  This relates  
21 to the 1996 spill incident that you talked about with  
22 Mr. Wechsler, doesn't it?

23          A.    In looking at this, it could.  It looks also  
24 to be in part related to some reservoir operations out  
25 of Abiquiu Reservoir, so I would need to -- then it



1 does relate to spill of usable water. I'm not sure if  
2 it's a downstream issue or a different --

3 Q. Let's put up New Mexico 553 next to this  
4 perhaps. So New Mexico 553, is this a -- is this a  
5 document you're familiar with?

6 A. I believe this is -- yes, this is the letter  
7 that we were looking at earlier today.

8 Q. Okay.

9 A. The one on the right.

10 Q. Okay. And so Mr. Simpson was writing a  
11 letter to the Rio Grande Commissioner for Texas,  
12 correct?

13 A. He was at that point.

14 Q. Okay. And what's your understanding of New  
15 Mexico 553?

16 A. So my understanding of 553 is the same as the  
17 discussion that we have previously that this was an  
18 issue raised by the State of Colorado over the  
19 operations of the Rio Grande Project where water was  
20 being released during the months of January and  
21 February, and then I believe it speaks for itself  
22 there in the aspect of this potentially negating an  
23 actual spill, I think. I believe that's what it's --

24 Q. And so you -- in your view, New Mexico 2307  
25 is not the letter that preceded the New Mexico 553,

1 even though it refers to Texas water managers wasting  
2 water in a way that it is apparent they are trying to  
3 do to prevent a possible spill, as it says in the end  
4 of the first paragraph there?

5 A. Let me read this real quickly.

6 Q. Yeah, that's fine.

7 A. I'm sure I've seen it before. So it  
8 definitely preceded the February, 1996, letter, but I  
9 think it has more -- more things that are being talked  
10 about in it.

11 Q. Okay.

12 A. They relate to -- one of the -- the December  
13 letter looks to be in relation to operation in part of  
14 a post-1929 reservoir in New Mexico upstream of  
15 Elephant Butte that's known as Abiquiu Reservoir.  
16 It's a big flood control reservoir. It seems to be  
17 talking about flood water being released at that at  
18 some excess rate that then would potentially prevent  
19 the possible spill or maybe not being released. It's  
20 not clear to me the February 16th letter is specific  
21 to water that is going out the bottom of the system.

22 Q. All right. Let's take a look at New Mexico  
23 552.

24 MS. KLAHN: You can take those down.

25 Q. (BY MS. KLAHN) Now, Mr. Schmidt-Petersen,

1 this is New Mexico 52. It's the minutes of the 57th  
2 annual meeting of the Rio Grande Compact Commission.

3 Do you see that there?

4 A. I do.

5 Q. Have you seen these before?

6 A. I'm sure I've read them.

7 Q. And as you testified with Mr. Wechsler, these  
8 are official minutes of the Compact commission. Are  
9 these business records that would be kept in the ISC?

10 A. They are.

11 Q. Okay.

12 MS. KLAHN: I'm not sure if this exhibit  
13 was objected to or not honestly because I think we  
14 might have supplemented with this.

15 MR. WECHSLER: So, Your Honor, I don't  
16 know that we had a chance to review, but I have no  
17 objection.

18 JUDGE MELLOY: I assume you're offering  
19 it, Ms. Klahn?

20 MS. KLAHN: Yes, please.

21 JUDGE MELLOY: All right. New Mexico 52  
22 is admitted.

23 Q. (BY MS. KLAHN) So -- and I apologize,  
24 Mr. Schmidt-Petersen. The quality of the Bates  
25 numbers at the bottom is not very good. It looks like

1 there were Bates numbers over Bates numbers so I'm  
2 going to -- in light of the Court's admonition  
3 yesterday, I'm going to try and be precise about where  
4 we're going in here. We need to go to Page 14 of the  
5 document.

6 MS. KLAHN: Justin, I don't know if that  
7 is -- oh, good. Okay. Perfect.

8 Q. (BY MS. KLAHN) There's Page 14 of the  
9 document. Still can't read the Bates numbers. So,  
10 Mr. Schmidt-Petersen, this is -- these minutes are  
11 related to what happened in 1996 that you discussed  
12 with Mr. Wechsler, and I just wanted to provide a  
13 little more context. I'm hoping that you'll take a  
14 look at this with me. So the bottom of Page 14 --

15 MS. KLAHN: Could you pop that out,  
16 Justin? I'm sorry. Actually, go back. Let's go to  
17 the top of the page.

18 Q. (BY MS. KLAHN) See where it  
19 says, "Commissioner Simpson discussed with Mr. Rowe"?  
20 There we go. Let's pop that out first. So you can  
21 see there it talks about Commissioner Simpson  
22 discussing with Mr. Rowe the operations of the Rio  
23 Grande Project in early 1996 and the exchange of  
24 correspondence regarding those operations. Now, New  
25 Mexico 553, which you talked about with Mr. Wechsler,

1 that was a letter from Simpson to the Texas  
2 commissioner, correct?

3 A. The one that I -- yeah, that -- that  
4 Mr. Wechsler brought up with me, yes, that's correct.  
5 That's all 1996.

6 Q. Correct. And so here, Mr. Simpson is talking  
7 about -- discussing with Mr. Rowe the operations of  
8 the Rio Grande Project in early 1996 and the exchange  
9 of correspondence. Then at the second sentence there,  
10 Mr. Rowe indicated that it was the Bureau of  
11 Reclamation's responsibility -- if you could highlight  
12 that, that'd be great -- to prevent waste and ensure  
13 that water is used for Project purposes. Do you see  
14 that?

15 A. I do.

16 Q. Okay.

17 MS. KLAHN: So let's go down now to that  
18 last full paragraph and pop that out, Justin, if you  
19 could.

20 Q. (BY MS. KLAHN) So looks like Commissioner  
21 Simpson distributed a proposed Resolution No. 1A,  
22 which contained water accounting derived by  
23 Mr. Vandiver, and Commissioner Simpson summarized the  
24 resolution, which resolved in an actual spill of  
25 usable water that occurred on February 19, 1996. In

1 your experience, Mr. Schmidt-Peterson, what's the  
2 significance of an actual spill?

3 A. In my experience -- so going back to not  
4 being a historian, Ms. Klahn, I have not had the  
5 opportunity to experience an actual spill.

6 Q. Okay. Let me rephrase my question. Based on  
7 your professional understanding, as you testified  
8 earlier today that you had a professional  
9 understanding, what's the significance of an actual  
10 spill?

11 A. So in the instance of an actual spill, there  
12 are a number of things that occur and this is --  
13 essentially, an actual spill occurs whenever Project  
14 water spills and reaches that lip of the spillway at  
15 Elephant Butte Reservoir, that one drop of water that  
16 could go over in that case. And one of the  
17 significant pieces of that type of a situation is that  
18 there is no Compact accounting that occurs for that  
19 year. I mean, you do the -- the -- the gaging reports  
20 in that information, and you provide that information,  
21 but essentially, when you have an actual spill, when  
22 it actually spills, credit water has been released or  
23 have an actual spill with no credit water and there  
24 was an accrued debit, well, at that point in time, all  
25 credits and debits are wiped out, and the slate is

1 clean, and you start at zero again. So there's a  
2 number of things that occur from it.

3 Q. So from a Compact perspective, if there's an  
4 actual spill, and Colorado, for example, had debits  
5 that it owed New Mexico, would that -- would those  
6 debits be wiped out?

7 A. That's right. As the reservoir rises and  
8 when you start to get towards that unfilled capacity  
9 piece, debits are reduced and then ultimately wiped  
10 out, and credits are reduced or lost, also.

11 Q. Okay. And the credits in this case, if there  
12 is a spill, that would mean any credits that New  
13 Mexico owed to Texas were also wiped clean, correct?

14 A. Excuse me. Credits owed to Texas? I don't  
15 think I understand that question.

16 Q. Okay. Help me out with that then. If there  
17 are credits, what happens in an actual spill?

18 A. So it -- let me go with that. So let's say  
19 there's -- go simply that there's one acre-foot of  
20 credit water, right, in the reservoir. As you're  
21 approaching that point of usable water spill, that  
22 credit water spills and to the extent that it's not  
23 able to be held as usable water in Caballo, right,  
24 then basically that water is then lost for New  
25 Mexico's purposes as a credit for the following year

1 because all debits and credits at that point in time  
2 are wiped out, and you start at zero again.

3 Q. Okay. So let's go to the top of first full  
4 paragraph on Page 15, please. So here we have  
5 Mr. Rowe, the -- that was the Bureau of Reclamation  
6 representative, correct?

7 A. That's correct. The area manager. Gary was  
8 the area manager at that time.

9 Q. He responded to Mr. -- Commissioner Simpson's  
10 inquiry regarding the apparent release, and Mr. Rowe  
11 also -- let's highlight the last sentence. "Mr. Rowe  
12 also discussed the use of Project water for dilution  
13 purposes and his belief that leaching requirements of  
14 agricultural lands need to be considered in irrigation  
15 demands." Do you have an understanding of what that  
16 sentence refers to?

17 A. Well, I wasn't present at the meeting, so I  
18 cannot be sure what Mr. Rowe was -- was saying at that  
19 point in time, but I do believe, you know, understand  
20 because from my Project discussions, what Reclamation  
21 had been trying to do at different times.

22 Q. So are you familiar with the concept of a  
23 leaching requirement with regards to irrigation?

24 A. I am familiar that it -- I don't know how  
25 he's using it here. I can't say that. I guess the



1 way I was thinking of framing this is that in the  
2 discussions that I was involved in with Reclamation  
3 when they were talking about the offer of judgment,  
4 this aspect of a -- providing an extra allocation of  
5 water to the entire Project to basically leach the  
6 system of salts in the unsaturated zone came up, and  
7 it was part of our discussions, and that -- I don't  
8 know what he was referring to here relative to just  
9 general leaching requirements.

10 **Q. Yeah. I'm not asking about the offer of**  
11 **judgment. So the purpose of this is because my**  
12 **understanding of your testimony with Mr. Wechsler**  
13 **regarding this 1996 episode was that it was -- it was**  
14 **a waste of water at the end of the system coming out**  
15 **of the Hudspeth system; is that correct?**

16 A. Well, in part, right. I mean, I think where  
17 -- where I was going with this was looking at these  
18 files to see where similar issues had arisen in the  
19 past, and this was part of my review for that. When I  
20 was looking at it, it had to do for a different  
21 purpose, and it was during the midst of or the  
22 beginning of the ongoing drought, and it had to do  
23 with water being released in that June time period  
24 with full canals down in Hudspeth, and I saw that as  
25 being wasteful.

1           **Q.**    And so it's not your testimony then that the  
2           **February** release of water by the Bureau for use in EP1  
3           **and EBID** that resulted in water coming out the end of  
4           **the system** was waste?

5           A.    My testimony in this regard was that I looked  
6           for other examples of the same issue arising as part  
7           of that discussion to see how they were handled, and  
8           that this was the position and some of those aspects  
9           of what I found relative to the final aspects of that.  
10          I don't believe that I've been asked to say anything  
11          about that, except for the idea that -- that this  
12          would be another one of these activities that was a  
13          discussion where there were disagreements about  
14          efficiency of operation and what that meant for usable  
15          water in Project storage at -- at the Project  
16          reservoirs.

17          **Q.**    In your experience with the Rio Grande  
18          **Compact, is there anything in the Rio Grande Compact**  
19          **that prevents release of water for irrigation purposes**  
20          **in the February time frame?**

21          A.    The Rio Grande Compact, under the definition  
22          from Project supply, describes releases for irrigation  
23          demands.

24          **Q.**    Okay.

25          A.    And within the Project lands. If I remember

1 some of those issues right, the -- the issue there was  
2 that if you look at those pieces, the idea that water  
3 was going out the bottom that wasn't for irrigation  
4 demand on the Project, if I -- you know, if I remember  
5 those pieces right in looking at them. So those are  
6 slightly two different concepts that we're talking  
7 about or issues.

8 **Q. If the water was being released for**  
9 **irrigation demands and there was leaching required**  
10 **that would require more water, wouldn't it?**

11 A. Well, that would require a whole bunch more  
12 evaluation. I think in looking at this, you need to  
13 understand the context of the time period. This was  
14 ten years into a, what in my mind is maybe the -- a  
15 thousand-year wet period in the southwest of New  
16 Mexico, and the Project had had a full supply for ten  
17 years.

18 **Q. So --**

19 A. So I would question leaching requirements.

20 **Q. Let me just try and shortcut this because**  
21 **your answers are very long, and even when I ask a**  
22 **short question, I get a long answer. Of course, it's**  
23 **-- you can ask -- answer whatever you want, and I will**  
24 **try and accommodate that, but it will speed things up**  
25 **if you'll answer my questions. So what I'm trying to**

1 get to here is that if you were actually looking for  
2 examples of things similar to June of 2002, how could  
3 the February, 1996, release of water be within the  
4 category of things that you allege happened in June of  
5 2002?

6 A. I think it went directly to those issues. It  
7 was -- it was a different Compact issue is the way  
8 that I was framing it, but the issue there was extra  
9 water making it out of the bottom of the Rio Grande  
10 Project. That's the consistent piece. More than was  
11 needed for efficient operations of the Project.

12 Q. But you haven't done any analysis of this to  
13 know whether this was actually extra water or flood  
14 flows or anything else; you've just looked at a couple  
15 of letters with Mr. Wechsler, correct?

16 A. I have. I was looking for those specific  
17 issues of the Compact Commission that related to water  
18 at the bottom and accusations of waste.

19 Q. Let's go look at Paragraph -- the last  
20 paragraph on Page 15. You -- and I just want to  
21 reiterate. This is all documentary investigation  
22 you've done so you haven't -- you certainly weren't  
23 working for ISC in 1996, correct?

24 A. Could you define "documentary"?

25 Q. You looked at documents.

1           A.    Oh, yes.  That's right.  That's correct.  
2    Yes.

3           Q.    You weren't working for ISC in 1996, correct?

4           A.    That's correct.  I would have been looking at  
5    these in the early 2000s.

6           Q.    And you didn't do any on-the-ground  
7    investigation in the winter of February/March/April  
8    time frame of 1996, correct?

9           A.    I was not working for the ISC at that time.

10          Q.    Okay.  So then we have the Commissioner  
11    Hammond, I believe you testified earlier today that he  
12    was the Texas commissioner, correct?

13          A.    Yes, I did.

14          Q.    His response to Commissioner Simpson's  
15    proffer of the resolution was that, "The El Paso  
16    County Water Improvement District and Hudspeth County  
17    Conservation District are not within the purview of  
18    the Commission."  In other words, the Compact  
19    Commission has no authority to intervene in those  
20    contracts.  Do you have a different view?

21          A.    I'm not sure how that relates to the other  
22    pieces of the discussion.  We have not been involved  
23    in the Warren Act contracts or the contract for El  
24    Paso Water Improvement District, no.

25          Q.    And the State of New Mexico itself does not

1 have a contract for water in the Rio Grande Project,  
2 correct?

3 A. The State of New Mexico does not. Our  
4 irrigation district does.

5 Q. And the irrigation district has a  
6 relationship with the other irrigation district, El  
7 Paso No. 1, and the Bureau for purposes of Project  
8 operations, correct?

9 A. That is my understanding, yes.

10 Q. Okay. Then let's go to the last paragraph of  
11 -- of -- well --

12 MS. KLAHN: Your Honor, this is actually  
13 going to take a little bit longer and I know we still  
14 have five minutes and I'm mindful of your concern  
15 about getting behind, but I think this would actually  
16 be a good place to stop if the Court would entertain  
17 that idea.

18 JUDGE MELLOY: All right. We'll break.  
19 But before we go our separate ways, let me talk a  
20 little bit about the schedule. I do feel like we're  
21 getting behind. I -- I know -- I think Mr. Wechsler,  
22 I believe, had indicated that he thought we'd spill  
23 over into the week after next, and I certainly think  
24 that's going to happen. I should n't say week after  
25 next. Next week we're taking off, but the -- we're

1 going to spill over into the week of November 8. I  
2 certainly want to be done that week, hopefully earlier  
3 in that week rather than later, if at all possible.  
4 So what I'm going to suggest is that unless anyone has  
5 prior plans or objections, that we do a full five days  
6 when we come back the week of November 1st. Does  
7 anybody have a problem with that? And hopefully we  
8 can that way ensure that we will be done, again, as I  
9 say, hopefully the week -- early in the week of the  
10 8th, but at a minimum, at least some time that week.  
11 Does anybody have a problem with that?

12 **MS. KLAHN:** I'm assuming my team will  
13 tell me if anyone does, but I certainly don't, Your  
14 Honor.

15 **JUDGE MELLOY:** Okay.

16 **MR. WECHSLER:** No, Your Honor.

17 **JUDGE MELLOY:** You're shaking your head,  
18 Mr. Wechsler?

19 **MR. WECHSLER:** Yes, we're comfortable  
20 with that.

21 **JUDGE MELLOY:** All right. Let's plan  
22 then when we come back to -- to do the full week. The  
23 other thing I wanted to mention was I know that my  
24 judicial assistant has been e-mailing to your  
25 paralegals and support staff the nightly list of

1 exhibits. Let's make sure that over this week, we are  
2 all reconciled on the exhibits, and if there's any  
3 discrepancies, we can get those cleared up. So let's  
4 be sure to use this opportunity to do that. Is there  
5 anything else we need to talk about before we adjourn  
6 until a week from Monday?

7 **MR. WECHSLER:** Not for New Mexico.

8 **MS. KLAHN:** No, sir.

9 **JUDGE MELLOY:** All right. Well, then  
10 I'll see everybody a week from Monday. Thank you,  
11 everyone.

12 **MR. LEININGER:** Your Honor, before we  
13 depart, I'm sorry.

14 **JUDGE MELLOY:** Yes.

15 **MR. LEININGER:** My paralegal informs me  
16 that we did not get the list from your clerk this  
17 week. Is that correct, the list of exhibits? So  
18 perhaps --

19 **JUDGE MELLOY:** Did not get the list this  
20 week?

21 **MR. LEININGER:** Correct.

22 **JUDGE MELLOY:** Did you get them the week  
23 before?

24 **MR. LEININGER:** Yes, we did.

25 **JUDGE MELLOY:** Okay. I'm sorry. Just a



1 second. Hold on a second. I've been told the reason  
2 for that is that we just finally got Miltenberger  
3 resolved today, so you'll be getting all that, and  
4 Stevens is still open. If you want the partial  
5 Stevens, we can send it, but we weren't planning to  
6 send it until we're finished with Stevens, and same  
7 way with Mr. Schmidt-Petersen, we won't send those  
8 lists until we're done.

9 **MR. LEININGER:** Thank you for that.

10 **JUDGE MELLOY:** Anything else?

11 **MS. KLAHN:** So we'll start with  
12 Mr. Schmidt-Petersen on the 1st and then go to  
13 Dr. Stevens?

14 **JUDGE MELLOY:** Yes.

15 **MS. KLAHN:** Okay.

16 **JUDGE MELLOY:** All right?

17 **MS. KLAHN:** Thank you.

18 **JUDGE MELLOY:** Thank you, everyone.

19 **MR. WECHSLER:** Thank you.

20 (The proceedings adjourned at 4:58 p.m.)  
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