

NO. 141 Original

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In The

SUPREME COURT OF THE UNITED STATES

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STATE OF TEXAS

v.

STATE OF NEW MEXICO and  
STATE OF COLORADO

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TRANSCRIPT OF OCTOBER 25, 2022, REMOTE  
HEARING BEFORE HONORABLE MICHAEL A. MELLOY, SPECIAL  
MASTER, UNITED STATES CIRCUIT JUDGE, 111 SEVENTH  
AVENUE, SE, CEDAR RAPIDS, IOWA 52401, beginning at  
11:00 a.m.

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## P R O C E E D I N G S

1  
2           **JUDGE MELLOY:** All right. Should we get  
3 started? This is Judge Melloy. Let me just -- let me  
4 hold on just a second here. I'm having a little  
5 trouble with my view here. All right. Okay.

6           As I said, this is Judge Melloy. Should  
7 we get started? Just a second. All right. This is  
8 in Original No. 141 State of Texas versus State of New  
9 Mexico and State of Colorado with United States as  
10 intervenor. Let's start by asking the parties to  
11 enter their appearance, please.

12           You want to start, Mr. Somach?

13           **MR. SOMACH:** Yes, Your Honor. This is  
14 Stuart Somach, counsel of record for the State of  
15 Texas. With me from my office are Theresa Barfield,  
16 Sarah Klahn, Rich Deitchman, Francis Goldsberry and  
17 Robert Hoffman. From the Texas Attorney General's  
18 Office, either on the phone or will join shortly, is  
19 Grant Dorfman and Priscilla Hubenak, and then the  
20 Texas Rio Grande Commissioner Bobby Skov is on the  
21 Zoom, and Suzy Valentine, the engineer advisor, is  
22 also on.

23           **JUDGE MELLOY:** All right. Thank you.

24           And then, Mr. Wechsler, do you want to  
25 put in the appearances for New Mexico?



1                   **MR. WECHSLER:** Happy to, Your Honor.  
2 Good morning. Jeff Wechsler from Montgomery & Andrews  
3 for New Mexico. From my office, we also have Shelly  
4 Dalrymple. We have Cholla Khoury, the Chief Deputy  
5 Attorney General, and Zach Ogaz from the New Mexico  
6 Attorney General's Office. We have or will have  
7 Marcus Rael from Robles Rael & Anaya; Lisa Thompson  
8 and Michael Kopp from Trout Raley; John Draper and  
9 Corinne Atton from Draper & Draper; and then Mike  
10 Hamman, the state engineer and Rio Grande Compact  
11 commissioner; Rolf Schmidt-Petersen, the director of  
12 New Mexico Interstate Stream Commission, and Nat  
13 Chakeres, the general counsel for the New Mexico  
14 Office of the State Engineer.

15                   **JUDGE MELLOY:** Thank you. Mr. Wallace?

16                   **MR. WALLACE:** Good morning, Your Honor.  
17 In addition to myself, we have Scott Steinbrecher and  
18 Preston Hartman from Colorado's Attorney General's  
19 Office. We also have Mike Sullivan, the Deputy State  
20 Engineer, and Craig Cotten, Colorado's Engineer  
21 Advisor.

22                   **JUDGE MELLOY:** All right. And then,  
23 Mr. Leininger, who do we have on for the United  
24 States?

25                   **MR. LEININGER:** Good morning, Your

1 Honor. Lee Leininger for the United States Department  
2 of Justice. Also with Department of Justice, we have  
3 Judy Coleman, Jennifer Najjar, and Frederick Liu,  
4 Assistant to the Solicitor General. With the  
5 Department of Interior Solicitor's Office, we have  
6 Chris Rich, Shelly Randel, and Carter Brown; and then  
7 the Bureau of Reclamation, Michelle Estrada-Lopez, Ian  
8 Ferguson, and Jennifer Faler.

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

11 **MR. BROCKMANN:** Good morning, Your  
12 Honor. It's Jim Brockmann with Stein & Brockmann for  
13 the Albuquerque Bernalillo County Water Utility  
14 Authority.

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

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

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

19 **MR. STEIN:** Good morning, Your Honor.  
20 This is Jay Stein representing the City of Las Cruces.  
21 I'm joined by Adrienne Widmer, the Interim Director of  
22 Las Cruces Joint Utilities; Brad Douglas from the City  
23 of Attorney's Office; Jorge Garcia, the former  
24 director of Las Cruces joint utilities; and Lee  
25 Wilson, a consulting hydrologist for the City.

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

3                   **MS. O'BRIEN:** Good morning, Your Honor.  
4 Maria O'Brien for El Paso County Water Improvement  
5 District No. 1. Renea Hicks is also on today, as is  
6 Dr. Al Blair, the district's engineer.

7                   **JUDGE MELLOY:** All right. Elephant  
8 Butte Irrigation District?

9                   **MS. BARNCASTLE:** Good morning, Your  
10 Honor. Samantha Barncastle for EBID, and with me  
11 today is the manager of the district, Dr. Patrick  
12 Sullivan, along with our district consulting engineer,  
13 Dr. Phil King.

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

16                   **MR. MILLER:** Yes, good morning, Your  
17 Honor. This is Drew Miller with Kemp Smith on behalf  
18 of Hudspeth County Conservation and Reclamation  
19 District.

20                   **JUDGE MELLOY:** Then New Mexico Pecan  
21 Growers?

22                   **MS. DAVIDSON:** Good morning, Your Honor.  
23 Tessa Davidson on behalf of New Mexico Pecan Growers.

24                   **JUDGE MELLOY:** New Mexico State  
25 University.

1                   **MR. UTTON:** Good morning, Your Honor.  
2 John Utton for NMSU.

3                   **JUDGE MELLOY:** Southern Rio Grande  
4 Diversified Crop Farmer's Association.

5                   **MR. OLSEN:** Good morning, Your Honor.  
6 A.J. Olsen on behalf of the Diversified Crop Farmers.

7                   **JUDGE MELLOY:** Then I see we have Judge  
8 Boylan, the mediator, is present, as well. Did I miss  
9 anyone?

10                   (No response.)

11                   **JUDGE MELLOY:** And I would note that I  
12 think we do have at least a couple members of the news  
13 media listening in on the presentation, as well.

14                   All right. Well, I received the report  
15 yesterday and was somewhat surprised, but why don't I  
16 let you, I guess, start, Mr. Somach. Where do you  
17 think we are? Where do you want to go from here?

18                   **MR. SOMACH:** Well, that may be an  
19 interim process with you in terms of how best to  
20 proceed, but I am pleased to report to you that we,  
21 that is the three Compacting states, Texas, New  
22 Mexico, and Colorado, did reach agreement in  
23 principle, and when I say that, there's still some  
24 appendix issues that we're still locking down, but at  
25 a very fundamental level, we've reached agreement

1 enough to tell you that we've reached settlement, and  
2 we would like to file a motion of -- in order to  
3 obtain your recommendation and -- and report to the  
4 Court adopting what is essentially a -- a carve-out  
5 decree. It carves out the Compact issues. It  
6 resolves all the disputes between the Compacting  
7 states, and we're prepared to file a motion, and we're  
8 still talking about the exact nature of the motion on  
9 or about November 14th. We'd like to have you  
10 establish a briefing schedule on that. We think that  
11 the briefs and the motion will focus fundamentally on  
12 legal issues associated with the entry of consent or  
13 stipulated decree. Because I do not believe that the  
14 United States will join us, it may well be a contested  
15 decree and so, therefore, issues associated with the  
16 contest will need to be briefed. Those, I believe,  
17 are -- are fundamentally legal issues. We then  
18 believe it appropriate to have a hearing, an  
19 evidentiary hearing, in order to describe how the  
20 decree works, how the technical appendices relate one  
21 to the other, and we'd like guidance in terms of that.  
22 We're not certain that that can't be done through the  
23 filing of papers, but if you would prefer live  
24 evidentiary hearing, we're certainly amenable to that.  
25 We are looking to try to get the legal briefing done

1 by the -- by the end of the -- the year with the  
2 evidentiary hearing somewhere around that point in  
3 time or at the latest in early January, perhaps the  
4 date that is currently scheduled for the trial in the  
5 case.

6           That's a summary of where we're at.  
7 That also summarizes the questions that we -- we posed  
8 at the end, but, you know, we worked hard after --  
9 after the last status conference in El Paso with the  
10 assistance of Judge Boylan, and we're able to move  
11 forward with resolution of the remaining issues among  
12 the states. As we note in the joint report that we  
13 filed, we did meet this last Friday by -- by Teams  
14 with the Solicitor General's Office. It was about an  
15 hour-and-a-half meeting. It was one where there was a  
16 free exchange of ideas and views, and I think we've  
17 come away from that -- we'll let Mr. Leininger, of  
18 course, talk about that, but with a view that the  
19 United States probably would oppose what we're  
20 proposing. But that's -- that's a summary to -- to  
21 kind of get it started. I'm sure that Mr. Wechsler  
22 and Mr. Wallace would -- would want to add something  
23 to what I've said.

24           **JUDGE MELLOY:** Let me ask you a couple  
25 questions. Do I understand from the report that you

1 actually have a proposed decree, at least in draft  
2 form, that you're able to present to the SG's office?

3 **MR. SOMACH:** Yes, we did. We presented  
4 that to them. We actually presented it late on  
5 Thursday night, but I don't know that they looked at  
6 until early Friday morning. So they have a copy of  
7 it. We've provided, I believe, copies of that decree  
8 to all of the amici in the case on yesterday. I -- I  
9 believe that to be the case. I'm uncertain, but that  
10 was the direction we gave. I know the United States,  
11 with our concurrence, provided copies of the draft  
12 decree to -- to EBID and EP No. 1, and when I say that  
13 we have an agreement in principle, we have an  
14 agreement. It's a matter of locking it down and  
15 getting signatures and getting ourselves into a form  
16 that we can make the formal filings with -- with the  
17 Court on November 14th.

18 **JUDGE MELLOY:** Now, when you say  
19 establish a briefing schedule that would hopefully  
20 conclude by the end of the year, are you thinking that  
21 you would file your brief concurrent with the filing  
22 of a motion?

23 **MR. SOMACH:** Yes, that's --

24 **JUDGE MELLOY:** So basically -- go ahead.

25 **MR. SOMACH:** That's our current plan.

1                   **JUDGE MELLOY:** So basically would -- in  
2 terms of any further briefing, it would be any briefs  
3 by the United States or any other party, I suppose,  
4 that might object, and then some time for a reply  
5 brief; is that essentially what we're talking about?

6                   **MR. SOMACH:** Yes. I believe so.

7                   **JUDGE MELLOY:** And is it your  
8 understanding that this would, if approved, result in  
9 a dismissal of the Original Action that's currently  
10 pending?

11                   **MR. SOMACH:** Well, it wouldn't be a  
12 dismissal, but it would resolve the issues in the  
13 Original Action. We would like -- what we're  
14 proposing is a consent or stipulated decree, and so we  
15 would like you to recommend to the Supreme Court the  
16 adoption of the decree, and that would resolve the  
17 litigation.

18                   **JUDGE MELLOY:** In other words, I guess,  
19 maybe dismissal is not the right word. There would be  
20 a final decree entered, but that would end all the  
21 litigation in front of the Supreme Court?

22                   **MR. SOMACH:** Yes. We believe it would.

23                   **JUDGE MELLOY:** Okay. And any lingering  
24 issues between the United States and New Mexico or any  
25 other party, for that matter, would be resolved in



1 some other forum presumably?

2 **MR. SOMACH:** Yes. As to the status  
3 report, I'll let Mr. Wechsler talk about it, but New  
4 Mexico has repeated and has reiterated its willingness  
5 to continue to discuss those issues with the United  
6 States, but the Compacting states believe that any  
7 residual issues should be more properly resolved in  
8 other forum besides the Original Action.

9 **JUDGE MELLOY:** All right. Mr. Wechsler,  
10 what would you like to add to all this?

11 **MR. WECHSLER:** Yeah, the -- I would add  
12 I agree with what Mr. Somach said. I mean, this case  
13 has always been about the -- whether the Compacting  
14 states are receiving their equitable apportionment,  
15 and the settlement we believe fairly ensures that both  
16 Texas and New Mexico receive their fair share of  
17 water, and I'll emphasize that it resolves both Texas'  
18 claims and New Mexico's counterclaims, and for that  
19 reason, I agree with Mr. Somach that it would fully  
20 resolve the questions presented in this case and  
21 resolve the litigation. I do want to briefly address  
22 the United States, since we understand that they might  
23 oppose the settlement, and it's true that they were  
24 allowed to intervene in the case and file a complaint  
25 and intervention, but the Supreme Court made clear

1 that their claims were based on their Compact  
2 responsibilities acting as an agent to ensure that the  
3 equitable apportionment was, in fact, accomplished.  
4 Now, the United States doesn't have any entitlement to  
5 water under the Compact so its claims are derivative  
6 of those of Texas, and as you just heard from  
7 Mr. Somach, Texas has represented -- represented that  
8 it believes this settlement allows it to receive its  
9 equitable apportionment. But the remaining claims, as  
10 the discussion between you and Mr. Somach highlights,  
11 are intrastate issues or water administration issues  
12 within the state of New Mexico. We don't think that  
13 they're necessary to resolve as part of the original  
14 jurisdiction matter, and those claims can be brought  
15 in, in multiple other forums. But as Mr. Somach  
16 indicated, we have been clear with the United States  
17 and the other parties and will affirm here this  
18 morning that we remain committed to further  
19 negotiations with the United States to the -- the  
20 agreements that we have made in the past involving the  
21 United States, and we think that substantively, we're  
22 very close with them, and we hope that talks can  
23 continue.

24 **JUDGE MELLOY:** Would this resolve the  
25 dispute about the operating agreement?

1                   **MR. WECHSLER:** Yes, Your Honor.

2                   **JUDGE MELLOY:** Okay. Would -- would --  
3 would it be anticipated that New Mexico would dismiss  
4 any of the other pending lawsuits it currently has in  
5 the district court or any other forum?

6                   **MR. WECHSLER:** The -- the current claims  
7 that the State of New Mexico has are in, as you  
8 indicated, the Federal District Court involving the  
9 operating agreement. If the Supreme Court were to  
10 adopt this decree, yes, New Mexico would dismiss its  
11 claims in that case.

12                   **JUDGE MELLOY:** All right. Thank you.  
13 Before I turn to Mr. Leininger, and I see Mr. Liu on,  
14 as well. I don't know who's going to speak for the  
15 United States, but do you have anything you want to  
16 say, Mr. Wallace?

17                   **MR. WALLACE:** Thank you, Your Honor. I  
18 believe that counsel for Texas and New Mexico have  
19 fairly summed that up. The Compacting states, as the  
20 authors of and recipients of the equitable  
21 apportionment under the Rio Grande Compact, have come  
22 to a settlement in principle regarding the operation  
23 of the Compact and the rights thereunder. Colorado  
24 supports these efforts, and it is glad that the states  
25 have been able to come together to finally resolve

1 this dispute.

2                   **JUDGE MELLOY:** Okay. Well,  
3 Mr. Leininger or Mr. Liu, which one of you wants to  
4 speak at this point?

5                   **MR. LEININGER:** Your Honor, I'll  
6 introduce Mr. Liu with your permission.

7                   **JUDGE MELLOY:** Go ahead.

8                   **MR. LEININGER:** Mr. Somach is correct.  
9 There was a meeting with the Solicitor General's  
10 Office with the associate solicitor and Mr. Liu last  
11 Friday, and as Mr. Somach said, it was a free exchange  
12 of views, and then we did forward on the proposed  
13 decree to the solicitor general and Fred Liu so he has  
14 an opportunity to review it, and with that  
15 introduction, I will let him, with the Court's  
16 permission, to discuss our opposition to a settlement  
17 over our objection as a party.

18                   **JUDGE MELLOY:** All right. Mr. Liu?

19                   **MR. LIU:** Thank you, Your Honor. It's  
20 great to be here appearing before you for the first  
21 time in this case. Look, in the view of the United  
22 States, this motion that's been proposed should be a  
23 nonstarter. There are multiple reasons why, but the  
24 most basic reason is that it's contrary to the Supreme  
25 Court's 2018 decision in this case. There, the Court

1 unanimously held that the United States, as an  
2 intervenor plaintiff in the case, has the right to,  
3 quote, pursue the Compact claims that is pleaded in  
4 this Original Objection. So the idea that the Compact  
5 dispute in this case could be resolved or settled over  
6 the United States' objection is directly contrary to  
7 what the Court decided in 2018. If that language  
8 means anything, it means that this case cannot be  
9 settled over the United States' objection. The only  
10 way the case could be resolved over the United States'  
11 objection is like any other adversary litigation,  
12 through merits adjudication, and that was what the  
13 path we thought we were on after settlement  
14 negotiations ended. Now, I think the tension between  
15 this proposal and the Court's decision is clear  
16 enough, even if the only thing you know about it is  
17 that it's a settlement without the United States, but  
18 if you look at the joint status report filed last  
19 night and listen to what the parties today said, the  
20 -- the contradiction with the Supreme Court's decision  
21 goes even deeper. What we heard today and from the  
22 joint status report is this idea that the Compact  
23 issues that have been raised in this Original Action  
24 will be resolved by this settlement. Well, that can't  
25 be because language I just read you says that the

1 United States has the right to pursue its own Compact  
2 claims. So without the United States agreeing to this  
3 settlement, this Compact dispute can't end.

4 Now, the other way they -- the other  
5 side tries to carve out the United States from this  
6 case is to say, Oh, the United States is interested  
7 only in intrastate issues, not interstate issues.  
8 Well, the Compact claims United States is pursuing  
9 today are the same Compact claims that we entered into  
10 the case with, and they're the same claims that the  
11 Supreme Court itself described as -- as Compact claims  
12 and as interstate claims, and not only interstate, as  
13 international claims. So the idea that the United  
14 States interest in this case, remaining interest, are  
15 limited to intrastate issues such as the case could be  
16 resolved without our -- without our concurrence  
17 through a settlement just doesn't make any sense to  
18 me.

19 Mr. Wechsler referred to a passage in  
20 the Court's opinion describing -- saying something  
21 like the United States could be described as an agent  
22 of the -- of the -- of the Compact. Your Honor, that  
23 -- that language simply means what you said in your  
24 summary judgment motion order from May 2021 on Page 3,  
25 where you said, "Downstream from the reservoir, the

1 Compact relies on the Rio Grande Project for water  
2 delivery and is programatic in its apportionment of  
3 water." That's all the Supreme Court meant in that  
4 case. To read that language to mean that the United  
5 States really isn't a party in this case, the United  
6 States' claims really aren't Compact claims, the  
7 United States really isn't pursuing interstate or even  
8 international claims in this case runs directly  
9 contrary to -- to the rest of the Supreme Court's  
10 opinion. And so just for a very fundamental legal  
11 reason, this should be a nonstarter, and that so, even  
12 if no one looks at the substance of what this  
13 settlement is, the only thing you need to know is that  
14 they're trying to resolve the Compact claims in this  
15 dispute without the United States. And I think it  
16 would come as a surprise, frankly, to the Supreme  
17 Court to learn that four years after its decision in  
18 this case, the parties are still here talking about  
19 what is the extent of the United States' role in this  
20 case, are they really bringing Compact claims, and the  
21 suggestion that our claims are derivative or tagalong,  
22 I think at one point, Mr. Wechsler said United States  
23 has no entitlement to water under this Compact, those  
24 are all arguments that New Mexico raised in opposition  
25 to the United States' exception to the last Special

1 Master's report dismissing the United States Compact  
2 claims. So I think it'll come as a surprise to the  
3 Justices that we are still litigating the same dispute  
4 that they decided four years ago.

5 Now, I said that was the most basic  
6 reason, but there are at least two others that my  
7 colleague will get into. One is the settlement  
8 confidentiality provisions, which I think -- I think  
9 attaching the proposed decree to a subsequent filing  
10 in this -- on the docket would violate, and this would  
11 just delay trial. I mean, I -- I have thought, based  
12 on what I -- based on the last status conference, that  
13 the parties were ready to proceed to trial in January.  
14 What this motion will do, if it's entertained, is  
15 derail us from that path, and we'll be right back at  
16 the Supreme Court on an issue that seems eerily  
17 similar to the issue that they already decided four  
18 years ago.

19 But with that, I'll turn it over to my  
20 colleague, Mr. Leininger.

21 **JUDGE MELLOY:** Mr. Leininger?

22 **MR. LEININGER:** Your Honor, I will just  
23 address our concerns and the likelihood of prejudice  
24 against the United States should you even entertain  
25 the filing of such a motion with the attached proposed



1 decree. By its very nature, the motion resolves  
2 negotiations, confidential negotiations that we fully  
3 participated in, in the hopes of reaching a full  
4 settlement, but the States' proposal is not a full  
5 settlement. It's a partial settlement. It excludes  
6 the entirety of the United States' interest, but it  
7 discloses the results of the parties', including us,  
8 confidential settlement negotiations. It violates our  
9 confidentiality agreement. It may violate Rule 408 of  
10 the Federal Evidentiary Rules that prevent settlement  
11 negotiation disclosure. There's no way to carve out  
12 this partial settlement without revealing our  
13 settlement negotiations. It's -- it's a settlement on  
14 relief, not just liability. It's not compatible with  
15 the United States' trial position so we would be  
16 severely prejudiced if this document is even presented  
17 to the Court.

18           There's only two ways to settle this  
19 case, Your Honor, a full settlement with all parties,  
20 or a decree that addresses all claims, and this  
21 proposal does neither. We ask the Court should  
22 proceed with trial so you can see all the evidence for  
23 a comprehensive resolution of the case. You know, if  
24 the parties are able to reach a comprehensive  
25 settlement before, during, or after trial, great, but

1 revealing the results of our confidential negotiations  
2 now in an attempt to force a partial settlement  
3 against our objection will only hinder and will not  
4 aid that effort.

5 **JUDGE MELLOY:** Well, where are you on  
6 settlement, Mr. Leininger?

7 **MR. LEININGER:** Well, we have --

8 **JUDGE MELLOY:** At one point, you said  
9 you had a settlement in principle at one point. What  
10 happened?

11 **MR. LEININGER:** Your Honor, without --  
12 without revealing confidential settlement  
13 negotiations, I think the carveout is -- is what  
14 happened. We always viewed this as requiring an  
15 integrated decree to address our allegations of  
16 project interference, that a goes across the board.  
17 It's an interstate project. The carveout does not  
18 address the totality of our claims. So when we --  
19 when we proceeded along a path that we thought would  
20 lead to a comprehensive settlement, the paths  
21 bifurcated. They diverged, and this carveout from the  
22 states was a result.

23 **JUDGE MELLOY:** But -- but back in May,  
24 you said you had an agreement. I guess I'm asking, is  
25 it -- is it the -- something new came up that you

1 didn't anticipate or what happened?

2           **MR. LEININGER:** No, Your Honor, we -- we  
3 proceeded along, and I might say diligently and quite  
4 successfully with the idea that we were addressing  
5 means, and, again, you know, with the eye on a  
6 settlement that includes the relief necessary to  
7 address project interference, we were proceeding along  
8 a path quite successfully, and we thought that we  
9 could reach a comprehensive agreement in this case.  
10 There was some -- I believe Mr. Wechsler said that New  
11 Mexico is still interested in entertaining such a --  
12 such a resolution, but my understanding is the states  
13 view that as separate from this overall case and  
14 complaint, and it's not. It has to be resolved in its  
15 comprehensive totality.

16           **JUDGE MELLOY:** Well, I guess one of the  
17 questions I was going to ask at this hearing before we  
18 got to the -- I got the status report, and I'll sort  
19 of still throw it out there, is as I was thinking  
20 about this case, I was thinking a couple steps ahead  
21 to, assuming one side or the other is ultimately  
22 successful, about what kind of -- that all the  
23 litigation is probably going to resolve over -- over a  
24 remedy, and one of the things I was thinking about was  
25 I'm not sure what the remedy is that the United States

1 is seeking in this case. I'd always thought that your  
2 remedy was basically the same as what Texas wanted,  
3 which was more water allocated -- or not allocated,  
4 more water to be delivered to Texas under what they  
5 already considered to be their existing allocation.  
6 And I -- I guess I was wondering, is it your  
7 anticipation that you want the Supreme Court to get  
8 into project management? I -- I -- I don't know.  
9 It's one of the questions I was asking myself. Is --  
10 are we going to be talking to the Supreme Court, and  
11 are you going to be -- this is where I was thinking  
12 about this -- this could go on forever, bouncing back  
13 and forth between the Supreme Court over, well, now,  
14 New Mexico is doing this and they're interfering in  
15 this way and that way, is that what you are looking  
16 for in this case is Supreme Court to be the referee on  
17 project management?

18 **MR. LEININGER:** No, Your Honor. What --  
19 what our proposal is in this case is that we have a  
20 remedy which addresses project interference. We have  
21 terms and provisions in these draft decrees in our  
22 comprehensive draft decree, which we think addresses  
23 all of this. So there's no need -- we don't see a  
24 need for a Supreme Court to be involved in -- in that  
25 level of detail or necessarily to have a water master

1 appointed by the Supreme Court to oversee the decree.  
2 The decree is very specific as to the terms and what  
3 happens if -- if certain inability to deliver water or  
4 interference with water is exceeded. So we had worked  
5 very hard on what we had viewed as a comprehensive  
6 remedy in settlement to this case, but we can't -- we  
7 -- we cannot abide by a partial settlement.

8 **MR. LIU:** Your Honor, if I could just  
9 jump in. The Compact claims that we are continuing to  
10 pursue today are the same claims that the Supreme  
11 Court reviewed in 2018 and granted us permission to  
12 proceed on. So it's not as if the nature of our  
13 claims today are somehow different from those that the  
14 Supreme Court has already said we can go forward with.  
15 These are claims, Compact claims, to protect the  
16 project from interference from New Mexico's  
17 groundwater pumping. That has been the nature of the  
18 claim from the beginning, and the remedy, of course,  
19 you know, hasn't been ordered yet, but I would think  
20 that the Court would be open to a remedy for that  
21 claim that they blessed going forward.

22 **JUDGE MELLOY:** Are you still willing to  
23 participate in negotiations to try to get this  
24 resolved?

25 **MR. LIU:** Look, our door is always open

1 to negotiations, but the fact of the matter is, as  
2 with any negotiations, certain parties are stuck on  
3 certain things, and no one has a magic wand to go  
4 around and tell them to forget about those things so,  
5 you know, no party probably has all the blame for the  
6 fact that there isn't a settlement because we all have  
7 interest, I think, that we're trying to vindicate in  
8 good faith. But at the moment --

9 **JUDGE MELLOY:** But if --

10 **MR. LIU:** At the moment, no.

11 **JUDGE MELLOY:** So you've ceased all  
12 negotiations at this point?

13 **MR. LIU:** That was my understanding of  
14 the status of this case when we said September 23rd  
15 was --

16 **JUDGE MELLOY:** Well, no, that wasn't --  
17 I don't think that was the status, but go ahead.

18 **MR. LIU:** My understanding was at that  
19 point, the parties would either need to proceed to  
20 prepare for trial because a trial date was going to  
21 happen in January or continue to devote resources to  
22 settlement. I think everyone agrees that we can't do  
23 both at the same time.

24 **JUDGE MELLOY:** All right. Mr. Somach,  
25 do you want to -- well, let me ask this before I turn

1 to Mr. Somach. Judge Boylan, do you have anything you  
2 want to add to all this before I give the parties a  
3 chance to respond? You're on mute.

4 **JUDGE BOYLAN:** Thanks, Judge. I  
5 apologize for that. Just to respond to the U.S.  
6 position on settlement, I understood that your  
7 direction to me was at the last hearing that we should  
8 continue our settlement discussions and that the  
9 parties, even if they did not want to engage in the  
10 settlement and that was their official settlement  
11 position, nonetheless, if I invited them to a  
12 settlement conference, they would appear and -- and  
13 they had every right to take whatever position they  
14 wished to at that time, nonetheless would appear. I  
15 had planned, as you know, to have that in Washington  
16 to accommodate the Solicitor General's staff, and in  
17 speaking with the -- the trial attorneys for the U.S.,  
18 they thought a better process would be to have a  
19 separate meeting between the states and the -- and  
20 their team at Solicitor General, and I agreed with  
21 that, and that, in fact, didn't happen as soon as I  
22 wanted, but it did happen last week. I think that the  
23 best case at this particular time is to allow the  
24 chips to fall where they may in reference to the  
25 parties' briefing because I don't think the Court is

1 going to be given enough information just in the oral  
2 argument today concerning whether or not this should  
3 proceed as proposed by the states, and I would think  
4 that the trial date should be stricken and that an  
5 appropriate briefing schedule should be adopted by the  
6 Court to just see where, in fact, this leads. That  
7 being said, I also believe that it would be  
8 appropriate for the parties to continue to have  
9 dialogue with the federal parties, and I'm open to  
10 engaging in that. I've made myself available.  
11 Whether or not that's a welcome development, I don't  
12 know, but I certainly think it would be appropriate  
13 because I agree with the sentiments that were voiced  
14 by many, including, I believe, the United States team  
15 on a couple of occasions, that we are very close, and  
16 that people have really worked hard to try to get a  
17 complete settlement. And I would just hate to see  
18 that fail at this particular point without trying to  
19 talk through the differences that remain because I do  
20 think that the federal parties together with the  
21 states are very close on those issues, but  
22 nonetheless, I agree with the Compacting states'  
23 position that this is an appropriate matter for the  
24 Court to consider by briefing. The confidentiality  
25 concerns of Mr. Leininger are real, and I suggest that



1 that's worthy of more thought, but the briefing and --  
2 and consideration of the Court of that would be  
3 appropriate I believe at this time.

4 **JUDGE MELLOY:** Well, you know, as I --  
5 as I said, I've been giving this a lot of thought.  
6 You know, one of my big concerns has been that if it  
7 didn't settle, we'd be looking at many more years of  
8 litigation, particularly when we get into issues such  
9 as if -- if the United States and Texas were  
10 successful in -- in trying to get all groundwater  
11 pumping stopped in New Mexico, what that would involve  
12 in terms of a remedy and the -- and the years of  
13 litigation that would be involved in -- in such a --  
14 an endeavor. But in any event, you know, if -- but  
15 that's why I think, obviously a settlement would be  
16 something that we could hopefully get effectuated much  
17 more quickly than a litigated resolution. But  
18 Mr. Somach, do you have anything you want to add to  
19 this?

20 **MR. SOMACH:** Just a few things, Your  
21 Honor. The first is when we left the hearing in El  
22 Paso, certainly the State of Texas had taken a very  
23 strong position that it was done with the negotiations  
24 and that it wanted a trial date and thought it was  
25 entitled to a trial date. Still does. But we left

1 that hearing understanding that we were ordered to  
2 continue negotiations, notwithstanding the  
3 establishment of a trial date, and -- and the position  
4 that we had taken, and so we endeavored to do that.  
5 We did not refuse to talk to anybody, and  
6 unfortunately, we weren't able to put together  
7 meetings with the United States until last Friday, and  
8 we were able, however, to work through a lot of issues  
9 -- obviously a lot of issues with the other Compacting  
10 states. On the issue that Mr. Liu raises, we  
11 understood those positions to be the positions of the  
12 United States. There's nothing that Mr. Liu said that  
13 surprises us or came out, you know, that we're not  
14 aware of, but we have a very fundamental difference of  
15 opinion as to what can be done in terms of a  
16 settlement and the -- the adoption of a consent decree  
17 when -- when other parties are all parties are not  
18 involved, and at a more fundamental level, we have a  
19 very different view of what the Supreme Court decision  
20 that Mr. Liu is talking about says. Your Honor,  
21 you've looked at that decision, and I could argue it  
22 here, but we thought that would be the proper subject  
23 of the actual briefing in this case rather than, you  
24 know, an ad hoc oral argument on what are pretty  
25 significant and substantive issues.

1                   With respect to whether we're close or  
2 not, it really depends upon who you are, I guess. On  
3 the eve of the hearing or the status conference in El  
4 Paso, we were given, by the United States, a more or  
5 less take it or leave it position of a whole bunch of  
6 modifications and insertions into a decree that we had  
7 been working on, and I'll just simply from a Texas  
8 perspective, many of them were just totally  
9 unacceptable and changed the whole nature and dynamic  
10 of -- of what the Compact was and -- and what an  
11 equitable apportionment in interstate Compact among  
12 the states was to merely a Compact that -- that bowed  
13 in terms of deference to the way the Bureau of  
14 Reclamation wanted to operate its project without much  
15 in the way of reference to the apportionment that took  
16 place in the Compact. So I'm -- I'm not certain  
17 whether we're close or far apart, and I am concerned,  
18 and the reason I'm concerned about that is if we don't  
19 move forward with the decree that we've agreed to,  
20 notwithstanding the fact that we won't refuse to talk  
21 to anybody that wants to talk to us, but if we don't  
22 move forward with the decree that -- that the three  
23 Compacting states agreed to, then we're back where we  
24 were, and we have no real agreement one way or  
25 another, and we would have to default back to -- to a

1 situation where we would like a trial date, and we'll  
2 have to turn our attention to -- to the trial as  
3 opposed to anything else. You know, and so that's  
4 part of the fundamental problem I have with just open  
5 -- from an open-ended perspective agreeing that we  
6 will just simply continue to negotiate. We want to  
7 move forward with the draft decree, and we will brief  
8 all the issues that have been raised here in that  
9 context, but we don't want an open-ended extension for  
10 the purposes of just moving forward and -- and  
11 reviewing or -- or negotiating some more with a  
12 vacation of the trial date.

13 **JUDGE MELLOY:** Thank you. Mr. Wechsler,  
14 do you want to add anything or Mr. Wallace?

15 **MR. WECHSLER:** Yes, Your Honor. I had  
16 just five points. On the -- on the prepared briefing  
17 on the proposed briefing that the state -- the  
18 Compacting states would like to present to you, as  
19 Judge Boylan indicated to you, it will be helpful for  
20 you to see that. I see -- I think once you see the  
21 resolution that the states have received and the --  
22 the briefing in support of that, you'll see that it's  
23 a reasonable and sensible solution that resolves all  
24 of the issues remaining in the case. We agree with  
25 Texas that it should be -- it should not be an

1 open-ended process, that there should be a -- a close  
2 to that. On the issue of the -- the Supreme Court  
3 decision, we, again, agree with Texas that the  
4 settlement that is being proposed is consistent with  
5 that decision, not inconsistent, not contrary to that,  
6 as Mr. Liu suggested. The Supreme Court expressly  
7 left open this idea and did not answer the question of  
8 does the United States have any independent claims  
9 above and beyond Texas' claim for receiving its  
10 Compact apportionment and said we're not answering  
11 that question in this case. And if you look to  
12 previous cases where the Court has addressed similar  
13 issues -- and I'll give you two examples. There was a  
14 dispute between Nevada and California, I believe it's  
15 styled U.S. versus Nevada, but I'm not certain about  
16 that, but in that case, there was a dispute over the  
17 amount of water as between those two states. The  
18 United States was involved there and had claims  
19 against one of the particular states, but once there  
20 was a solution, a resolution of the case, as between  
21 the two states, the United States dismissed the  
22 original jurisdiction case in order to allow the  
23 United States to proceed in the -- in -- in a  
24 different forum. And another case I would point you  
25 to is the Alabama versus North Carolina case, which is

1 a -- I believe it's a Compact over low-level radiation  
2 is my -- Compact is my recollection, and in that case,  
3 there was an entity which was responsible, as the  
4 United States is here, for Compact administration. It  
5 wanted to be -- participate and bring specific claims,  
6 and the Court said no, that that wasn't possible, it  
7 was really only for the Compacting parties. As to the  
8 issue that Mr. Leininger raised about the  
9 confidentiality, it's hard to understand this argument  
10 as it relates to the decree. The decree that will be  
11 presented represents only the agreement as between the  
12 Compacting states. We've made no representations  
13 whatsoever as to what any discussions or the positions  
14 of the United States, which is what I understand the  
15 rule would prevent. On the issue of trial that the  
16 United States raised, we believe that this is the most  
17 efficient way to resolve this case. To your question  
18 about remedy regardless of who it is, that, you're  
19 correct, would take multiple years, but the Compacting  
20 states believe that this would actually resolve all of  
21 the issues and allow the states to move forward in  
22 partnership, which has its own set of benefits.

23 And finally, as to the point that Judge  
24 Boylan raised about potential continued dialogue, as I  
25 mentioned, New Mexico remains open to continue

1 dialogue and discussions with -- with the United  
2 States. In fact, we invite that. While we think that  
3 this settlement represents a complete resolution of  
4 all of the issues, we nonetheless see the very  
5 significant benefits to resolving our differences with  
6 the United States, and as I said, we remain open to  
7 that.

8 Thank you.

9 **JUDGE MELLOY:** Well --

10 **MS. O'BRIEN:** Your Honor, I don't know  
11 where you were going next --

12 **JUDGE MELLOY:** Just let me --

13 **MS. O'BRIEN:** Sure.

14 **JUDGE MELLOY:** I'll turn to you in a  
15 minute, Ms. O'Brien.

16 **MS. O'BRIEN:** Thank you.

17 **JUDGE MELLOY:** I did want to discuss for  
18 a moment this concern about confidentiality. I guess  
19 I had the same thought that Mr. Wechsler just  
20 expressed that I don't know how a motion that asks for  
21 approval of a specific decree would violate  
22 confidentiality. Now, I certainly would be open to  
23 some type of an order that if there is briefing and if  
24 the parties felt that for some reason, they needed to  
25 get into discussions, and I -- without seeing the

1    briefs, I don't know if that's going to be required,  
2    and I don't know to what extent, that that -- at least  
3    that portion of the brief be filed under seal.  But I  
4    guess I don't really understand why filing a decree  
5    would in and of itself breach confidentiality because  
6    that's the -- I mean, the decree is the result of  
7    discussions, not the discussions themselves.  But --  
8    but anyway --

9                   **MR. LEININGER:**  Your Honor, if I --

10                  **JUDGE MELLOY:**  Go ahead.

11                  **MR. LEININGER:**  -- if I may address that  
12    point, this settlement is a result of negotiations,  
13    and as all the parties have said, we have been  
14    actively participating in all of these negotiations  
15    for ten months.  The problem with this is it is a  
16    partial settlement.  It does not resolve the United  
17    States' claims.  It doesn't resolve our Compact claims  
18    for project interference.  You can't have a separate  
19    intrastate decree versus what -- what is being  
20    attempted here.  Our concern with the confidentiality  
21    is we were -- we were addressing settlement for  
22    purposes of a comprehensive settlement, and it will be  
23    reflected in this document.  We were right there at  
24    the table for each one of these negotiations.  So it  
25    is -- it would be revealing our settlement position to



1 a settlement that we object to.

2           **JUDGE MELLOY:** Why would it -- why would  
3 it have to reveal your settlement position? I mean,  
4 you have a list of claims, as I understand what  
5 Mr. Liu said, you have claims that you're making  
6 against New Mexico, and I guess against Texas now, you  
7 say, although that wasn't, I think, what you represent  
8 to the Supreme Court, but that's another whole issue.  
9 But you have a list of claims. Why can't you just say  
10 in your opposition, we have -- we have these 20 claims  
11 of project interference that aren't being dealt with?  
12 Now, that doesn't -- you don't have to say, well, we  
13 would have resolved Claim 1 this way, and we would  
14 have resolved Claim 2 this way if we had been able to  
15 reach a settlement. I guess I'm having a little  
16 trouble understanding that.

17           **MR. LEININGER:** It is -- it is a matter  
18 of this proposal -- proposed decree does involve what  
19 United States had been actively participating in. It  
20 does involve the project. It does involve project  
21 operations. It has to by its very nature as to how  
22 this would be resolved. So all -- all of --

23           **JUDGE MELLOY:** But I don't understand  
24 how that gets into negotiations. Why don't you just  
25 say this involves project operations, and it's not

1 resolving them?

2 **MR. LEININGER:** Because then that  
3 result, Your Honor, is a proposed decree that is not  
4 sufficient to address this.

5 **JUDGE MELLOY:** I understand that, but  
6 how does that get into negotiations? I mean, if you  
7 say this decree does not resolve Issues A, B, C, D,  
8 and E, how does that get into how you would have  
9 resolved those issues through negotiations? I guess  
10 that's what I don't understand.

11 **MR. LEININGER:** So my understanding is  
12 the parties are now saying this proposed decree would  
13 resolve the entire case. So in those negotiations, we  
14 were actively participating. We actively participated  
15 for ten months, and where the dispute is, is whether  
16 or not this carveout would be sufficient, but for what  
17 they are proposing, that is exactly what we had  
18 negotiated and involved with for multiple settlement  
19 sessions, multiple negotiations.

20 **JUDGE MELLOY:** And as I understand it,  
21 you -- you have ceased all negotiations; is that  
22 correct, Mr. Leininger? And you're not wanting to  
23 resume them?

24 **MR. LEININGER:** No, I should make it  
25 clear. What had happened was that our proposal for an

1 integrated decree to resolve all claims, including the  
2 United States' claims as a Compact matter, that has  
3 been rejected, and what the parties then proceeded on  
4 is this -- is this carveout decree.

5 **JUDGE MELLOY:** But as I understand what  
6 Mr. Liu said, you're not even willing to discuss a  
7 counterproposal?

8 **MR. LEININGER:** There's a fundamental  
9 problem here, Your Honor, with the scope of what it  
10 requires with the settlement of this case. So we are  
11 at an impasse, and frankly it's a log jam that we  
12 think at this point can only be resolved by going to  
13 trial and having you review the full evidence as to  
14 all the claims.

15 **JUDGE MELLOY:** All right. Thank you.  
16 Ms. O'Brien, I'll let the amici weigh in if they care  
17 to, and you were anxious to speak, so go ahead. I'll  
18 let you go first.

19 **MS. O'BRIEN:** I was, Your Honor. At  
20 that point I had -- my comments are very germane to  
21 the questions that you're raising and to certainly the  
22 comments of various counsel. I mean, I would just  
23 state, overall we are -- fully support the position of  
24 the U.S. in this matter. EP1 is opposed to the  
25 States' proposal to move forward and have the Special

1 Master consider the so-called proposed carveout  
2 decree. We oppose that on both procedural and  
3 substantive grounds. We do not think, as United  
4 States has fully articulated, that this matter can be  
5 resolved in the absence of the United States, and we  
6 believe that moving forward and putting forward the  
7 proposed decree -- and it's not what would come  
8 forward in briefing that implicates the concern  
9 regarding confidentiality. It's the proposed decree  
10 itself that we believe would prejudice not only the  
11 United States but both districts, and this is why,  
12 Your Honor, the -- with all due respect, I do feel  
13 that the states in their description of the proposed  
14 decree, are trying to pull the proverbial wool over  
15 your eyes. The states, in essence, took a document,  
16 points, issues, that as Mr. Leininger was describing,  
17 have been the focus of negotiation, including project  
18 operations, and clearly as a substantive matter,  
19 issues relating to project operations cannot be  
20 resolved without the presence of the United States,  
21 and to the extent then contractual rights and  
22 obligations are implicated on both districts, both  
23 districts must also assent. The states have now taken  
24 a proposed decree that resolves so-called project  
25 operations issues, taken the United States out as a

1 party, but left in, in essence, what Your Honor are  
2 offers and compromises by Reclamation and the  
3 districts made in the context of negotiations with the  
4 goal of a comprehensive settlement in which  
5 Reclamation, the United States, would be a party and a  
6 comprehensive settlement, again, that would address  
7 the project operations issues, and those issues  
8 relating to project operations, again, represents  
9 offers and compromises by Reclamation and the  
10 districts that the states have now -- what they have  
11 changed is who is a party to the decree, and this --  
12 well, without -- again, without getting into detail,  
13 who's considering a settling party. And so in essence  
14 what Your Honor would see in a proposed decree are  
15 offers and compromises, not that the states can make,  
16 but that the districts and the United States were  
17 willing to consider to make in the context of a  
18 comprehensive settlement, which we do not now have,  
19 and we believe this is extremely prejudicial to the  
20 United States and the interests of the districts, and  
21 that 's why we do not believe that the Court should  
22 move forward and entertain the motion of the states  
23 because it would require the Court to look at and  
24 evaluate something that reveal those confidential  
25 positions, those offer in compromises, that simply are

1 not the states' to disclose. So that's our concern on  
2 the confidentiality, and, you know, it dovetails with  
3 the issue -- the substantive issue that -- that the  
4 states, on their own, without the United States,  
5 cannot compromise -- make compromises with regard to  
6 project operations that alter, change, or direct  
7 changes in those -- in -- in project operations, and  
8 this is what was being looked at, worked on by all the  
9 parties, and the districts as -- as participating  
10 amici, and now the states, again, have -- it's not a  
11 carveout, Your Honor. It's simply saying we couldn't  
12 get the United States to do what we want them to do so  
13 we're just not going to call them a settling party.  
14 It's taking the work -- the work products, the  
15 offers/compromises of the United States and the  
16 project beneficiaries, and including it in a so-called  
17 proposed states decree. This is not workable  
18 substantively or procedurally. So we -- we oppose  
19 moving forward.

20 **JUDGE MELLOY:** Anybody else wish to be  
21 heard?

22 **MR. STEIN:** Your Honor, this is Jay  
23 Stein. I wish to be heard.

24 **JUDGE MELLOY:** Go ahead.

25 **MR. STEIN:** Thank you, Your Honor. I

1 represent the City of Las Cruces, as the parties know.  
2 Your Honor, the focus of this case thus far has been  
3 on -- on the projects, Elephant Butte Irrigation  
4 District, and El Paso Improvement District No. 1.  
5 Those are agricultural interests. The focus has been  
6 principally on agricultural issues, but there are  
7 other issues in the case, and those pertain to  
8 municipalities. There are two cities that are present  
9 here as amici. One is the City of Las Cruces, which  
10 is in the Lower Rio Grande and which is directly  
11 affected by these events. The second is the City of  
12 Albuquerque, which is casting a wary eye on what  
13 occurs here with the concern that precedents that  
14 are established in the Lower Rio Grande may bleed into  
15 the middle valley, into the Middle Rio Grande with  
16 effects on that city. The City of Las Cruces has  
17 water rights that derive primarily from three sources.  
18 One is from the East Mesa, which is disconnected  
19 geographically -- geologically from the Rio Grande, so  
20 that water that is diverted for the City in the East  
21 Mesa has no depletive effect on the Rio, and in  
22 addition, treated effluent that is discharged into the  
23 Rio Grande from East Mesa uses is additive. It adds  
24 to the water supply. It supplements the water supply  
25 in the -- in the Rio Grande. The City has two other

1 well fields, one at valley well field, which is the  
2 primary source of the City's water supply, and then  
3 there's the West Mesa well field, which will come  
4 online sometime in the 2030s. The question that is  
5 now raised, both in the joint status report that was  
6 submitted to Your Honor the other day, as well as in  
7 comments from the United States today, particularly  
8 Mr. Leininger's comments with respect to project  
9 interference get into the question, of administration  
10 in the state of New Mexico, rights be administers, how  
11 can they be exercised or actually used, and those  
12 affect the city of Las Cruces' water rights in the  
13 three categories that I just described, how are we  
14 going to be able to use and exercise those water  
15 rights in the future to provide municipal supply to  
16 the state's second-largest city. In that regard, Your  
17 Honor, in the joint status report that was submitted  
18 yesterday, the parties state, and I'm going to quote  
19 from it, the proposed decree carves out the interstate  
20 Compact issues from intrastate issues, and I think  
21 they're trying to do that. But they then say  
22 associated with administration of the Rio Grande  
23 project within New Mexico. Your Honor, that's far too  
24 narrow a definition because there are municipal  
25 rights, municipal interests that have their own



1 validity and their own existence under state law and  
2 precedent independent from the projects. The state --  
3 the joint status report goes onto say no agreement on  
4 intrastate issues has yet been reached. I think  
5 that's right. And finally it states, however, the  
6 state of New Mexico remains willing and prepared to  
7 continue discussions with the United States related to  
8 project operations and water rights administration  
9 within New Mexico. That's a particular concern for  
10 the city of Las Cruces. We believe that  
11 administration of water rights, intra administration,  
12 intrastate administration of water rights in New  
13 Mexico is solely the function of the New Mexico state  
14 engineer. Nevertheless, we understand and realize  
15 that the United States will advance positions with  
16 respect to administration of those rights, and those  
17 are issues in which the city of Las Cruces now has a  
18 vital and important interest as the administration --  
19 administrative question comes to the floor, and one in  
20 which we fully intend to participate in these  
21 proceedings, however they pan out.

22           Finally, Your Honor, you asked a  
23 question of Mr. Wechsler earlier in the proceeding  
24 with respect to Federal District Court actions that  
25 the State of New Mexico would withdraw upon a

1 settlement. The State of New Mexico is not a -- is  
2 not the leading plaintiff in at least one of those  
3 cases. The City of Las Cruces is, and that deals with  
4 the question of the transfer of agricultural rights to  
5 municipal and industrial use in the State of New  
6 Mexico. That's certainly an issue that we would be  
7 willing to work with and discuss with Mr. Leininger  
8 and the United States. Thank you, Your Honor.

9 **JUDGE MELLOY:** I guess I'm not sure if  
10 I'm clear what your bottom line is, Mr. Stein. Do you  
11 wish us to go forward with the hearing or are you just  
12 saying you're willing to continue to talk or --

13 **MR. STEIN:** The City is always willing  
14 to talk. If the -- if Your Honor accepts the proposal  
15 made by the three parties, we'll wait to see what the  
16 United States' response is and our issue on  
17 administration will probably fall out from that  
18 response.

19 **JUDGE MELLOY:** Does anyone else wish to  
20 be heard?

21 **MR. BROCKMANN:** Your Honor, this is Jim  
22 Brockmann for the Water Authority, and I will be  
23 brief. It seems to me like there's a fundamental  
24 choice right now that -- that Your Honor will make,  
25 whether to order the parties to trial without the

1 three states presenting a settlement in the form of a  
2 joint motion or whether you'll entertain that joint  
3 motion first. On behalf of the Water Authority, we  
4 would support the three states, the three Compacting  
5 states' proposal to submit a joint motion that you  
6 could consider. I agree with Judge Boylan and the  
7 Compacting states' counsel that I think you will  
8 understand the provisions or the disputes better when  
9 you have that motion in front of you as opposed to a  
10 little bit more cryptic information that you're  
11 getting today, but we would support the -- the motion  
12 and the briefing in lieu of trial. It just seems a  
13 little bit -- a little bit shortsighted not to  
14 entertain that motion first and force the parties to  
15 go to trial when the three Compacting states have, in  
16 fact, said they have agreed in principle. And -- and  
17 the final point, in terms of confidentiality, I do  
18 think the proposed decree represents an agreement  
19 among the three states, and it does not necessarily  
20 disclose the United States' negotiating positions.  
21 And with that, I will say the -- again, that the Water  
22 Authority would support the briefing schedule so that  
23 the -- Your Honor could consider the settlement among  
24 the three states.

25 **JUDGE MELLOY:** Ms. Barncastle?

1                   **MS. BARNCASTLE:** Thank you, Your Honor.  
2 I'll follow along the heels of Mr. Brockmann and point  
3 out again that Albuquerque is not even in the Lower  
4 Rio Grande Basin. So, Your Honor, EBID supports  
5 continued discussions. EBID is very strongly in favor  
6 of settling this case in the right way. We haven't  
7 done it. This doesn't do it. This -- this is  
8 something that -- and to be fair, I come from a long  
9 line of judges, and my uncle warned me last night that  
10 when you tell the judge he is wrong, be ready to  
11 experience the wrath, but I'm here to tell you, I  
12 warned you in El Paso that this would come. This was  
13 coming because all we did was run out of time. The  
14 settlement we had, the settlement that was there, that  
15 was close, just ran out of time. So then there was  
16 some lack of communication. The next thing we know,  
17 the U.S. and districts are preparing for trial and  
18 were surprised, frankly, to find out that there is now  
19 a carveout where none of us ever believed there could  
20 be a carveout. And I will remind you, I argued  
21 vehemently throughout this case that the carveout idea  
22 does not work. The United States' claims may be  
23 similar to the State of Texas, but the State of Texas  
24 wasn't here to protect EBID. They weren't here to  
25 protect Mexico. They weren't here to protect the

1 whole project, and I'll say it again. They were only  
2 here to protect the state line delivery obligation.  
3 That sails me down the river. This is not the feast  
4 that we were all looking at in El Paso. What happened  
5 was we left the silverware in the dishwasher, forgot  
6 about it, everybody got up and milled around for a few  
7 minutes, eventually some people left, and dinner got  
8 cold, and the leftovers were scraped together. This  
9 is not a settlement. This is a settlement over the  
10 objection of three major participating entities, all  
11 who run the project, and all who will be responsible  
12 for implementing this settlement over our objection,  
13 over our rights. The 1896 embargo order by the United  
14 States was specifically put in place to avoid states  
15 taking control of things that they claim were rights  
16 for themselves to the detriment of the Rio Grande  
17 Project.

18           Fastforward, the Compact was negotiated  
19 for the sole purpose of protecting the Rio Grande  
20 Project, not just the Texas portion, the New Mexico  
21 portion, too. New Mexico shockingly stands here today  
22 and tells me that I am suddenly not protected by the  
23 Compact when they've argued throughout this case that  
24 they have a Compact right that deserves protection  
25 below the reservoir. This is extremely contrary to

1 everything they've said leading up. I've told you  
2 this was coming. What you need to do today is order  
3 us to go back into settlement discussions where we  
4 left off on September 23rd and forget all about this  
5 business of the states' rights coming in and stomping  
6 on the project. If you do decide that you need  
7 briefing, it needs to happen without the decree in  
8 front of you. It would be highly prejudicial to put  
9 the decree in front of you knowing that there are  
10 strong objections related to things we can't even talk  
11 to you about right now so we're hamstrung. Call out  
12 some questions, call out some legal issues, let us  
13 brief those directly. Stay the trial if you need --  
14 if you need to do that. At this point in time, trial  
15 looks like States versus United States and Districts.  
16 It's completely different anyway. I don't think  
17 anybody is prepared for that. This is not where we  
18 need to be going. You need to order us to get back on  
19 track.

20 **JUDGE MELLOY:** I understand United  
21 States has said they won't talk so what -- what's the  
22 point?

23 **MS. BARNCASTLE:** I don't think the  
24 United States or the Districts will talk about what's  
25 on the table right now. It is so far afield, I can't

1 even agree to talk about it. It simply is not what we  
2 left off with.

3 **MR. LIU:** Your Honor, if I could just  
4 clarify the United States' position on talking. We've  
5 always been happy to talk. The only reason we're not  
6 talking now is because of a substantive impasse that  
7 we've reached, and we've tried to get over that  
8 impasse.

9 **JUDGE MELLOY:** I hear -- but I hear -- I  
10 hear Judge Boylan, I hear Ms. Barncastle, maybe one or  
11 two others saying that you were very, very close, but  
12 is -- is there one issue that just is, like, no way  
13 you can work around it?

14 **MR. LIU:** Absolutely. There's one or  
15 more issues that are stumbling blocks, and I think  
16 different parties have different perceptions on who's  
17 holding it up. I'm sure --

18 **JUDGE MELLOY:** I'm not talking about  
19 that, but are you close, I guess, is the question?  
20 You're saying it's -- you're so far apart it's not  
21 worth talking is what I'm understanding you're saying,  
22 but --

23 **MR. LIU:** I think it's a matter of  
24 people viewing the issue as one they -- these issues  
25 as -- as things they can live with, and I'm -- you

1 know, I don't think -- I think we -- the parties have  
2 really gone through, including in the meeting with the  
3 Solicitor General's Office last week, on the pros and  
4 cons of different approaches and, you know, no one  
5 budged. So I would say there are a few issues that  
6 are holding it up, but no one's budging so -- the  
7 United States hasn't budged, Texas hasn't budged, New  
8 Mexico hasn't budged. We've tried. I -- I totally  
9 agree that a settlement -- a true settlement involving  
10 all the parties is an excellent way to resolve the  
11 case. I also agree with what Ms. Barncastle said  
12 about briefing in this case. We can have fulsome  
13 briefing on the legal issues without attaching the  
14 proposed decree to the papers. We've -- we've had a  
15 very fulsome debate already today about whether a  
16 settlement without the United States is consistent  
17 with the law of this case, and I would think that that  
18 briefing can occur without raising the concerns that I  
19 -- that Ms. O'Brien raised about confidentiality, and  
20 we can do that by having the briefing without the  
21 decree in the picture. We can talk about whether  
22 settlement without United States is possible, without  
23 knowing exactly what's in that proposed decree.

24 **MS. BARNCASTLE:** And, Your Honor, if I  
25 may just finalize my comments. Ms. O'Brien is



1 absolutely correct that what you would be looking at  
2 are offers and compromises that went unresponded to,  
3 and those already impasses occurred. You can't just  
4 take out of settlement the other parties' offers to  
5 settle that you didn't adequately respond to that were  
6 contingent on other things happening and then shove it  
7 down their throat as though it's settled. That's not  
8 how settlement works, and that's not how trials work.  
9 I mean, frankly either we do this the right way or we  
10 don't do this and we go to trial. The problem is the  
11 states are taking the position that the United States  
12 is in this case for no other reason than the same  
13 reasons that the State of Texas is in this case. We  
14 all know that's not correct. There's no reason why  
15 they wouldn't have just stayed amicus as the rest of  
16 us did in that situation. We all know the Supremes  
17 found that they had a reason to be here in their own  
18 right. Settling this case over their objection and  
19 the objection of the districts just doesn't do it. It  
20 just does not get us there. It is -- it's a fool's  
21 errand. Frankly, I'm shocked that the State of Texas  
22 thinks this is a good idea. It's going to push back  
23 three to five years on top of the three to five years  
24 I quoted to you in El Paso. I don't see this working.  
25 I don't see the Supreme Court accepting it once they

1 see the proposed decree. Do I think there are things  
2 we can work through? Absolutely. I think we ran out  
3 of time. I think we need to plan for involvement of  
4 the legislatures. I think we need to build in the  
5 time that Texas was not able to build in before, and  
6 we can do this the right way. But right now, the  
7 deflated marshmallows that have crusted over on top of  
8 the beautiful dish that used to exist, those are just  
9 ruined mashed potatoes at this point. They are not a  
10 settlement. It is not a full and final settlement of  
11 anything in this case other than attempt by the states  
12 to claim rights for themselves that go well beyond the  
13 Compact.

14           **JUDGE MELLOY:** Well, I would hope that  
15 action by the New Mexico legislature wouldn't be the  
16 thing that's holding up a settlement here because it's  
17 -- Mr. Wechsler can correct me if I'm wrong, but  
18 regardless of what happens with litigation, unless New  
19 Mexico wins a complete victory, is going to require  
20 action by the New Mexico legislature. I mean, if --  
21 if -- if there's a money judgment, the New Mexico  
22 legislature has the appropriate the money. If there's  
23 a decree that pumping has to cease in all or part of  
24 New Mexico, farmers aren't parties to this litigation;  
25 the State is. So then the New Mexico legislature is

1 going to have to get involved. I mean, I don't see  
2 any way this case gets resolved without action by the  
3 New Mexico legislature, at least along the lines that  
4 have been -- has been previously advocated by the  
5 United States and Texas, but be that as it may, just  
6 sort of my observation. Let me ask one other  
7 question, and this is sort of pretty far afield, but  
8 it's just something that I read about in the news  
9 media within the last week or two, which is that a  
10 number of interests in the Rio Grande Valley feel that  
11 they are getting shortchanged on the moneys from the  
12 -- I can't think of the exact name, but I will call it  
13 the President Biden infrastructure legislation. Is  
14 this -- does this settlement deal with any of those  
15 issues or is that -- is that at all part of this --  
16 this proposal? Mr. Wechsler, is --

17 **MR. WECHSLER:** No, Your Honor. As the  
18 Compacting states are presenting a decree, it doesn't  
19 involve any federal funding. I think the articles  
20 that you're referencing are dealing with the Middle  
21 Rio Grande and not the Lower Rio Grande, although I  
22 could be mistaken. And I -- and I just do want to  
23 confirm your understanding that New Mexico has  
24 recognized that it will be taking some action one way  
25 or another. If New Mexico were to win every single

1 issue, as we have explained to you in previous  
2 arguments, New Mexico will still be managing water in  
3 the Lower Rio Grande in a slightly different way,  
4 which we understand to be consistent with the Compact.

5 **MR. SOMACH:** Your Honor, can I just -- I  
6 feel compelled to -- to at least -- I mean, there's --  
7 a lot has been said, and I just want to reiterate a  
8 couple of things. We are willing to address in our  
9 briefing all the issues that have been raised by the  
10 various project-related entities here so it's not a  
11 matter of -- of avoiding that. It is just that we  
12 believe that the proper way to discuss that is an  
13 appropriately briefed manner surrounding the proposed  
14 decree and the states' joint request that that decree  
15 be recommended to the Supreme Court. I want to make  
16 sure that -- I don't believe, as Mr. Liu had  
17 indicated, that we had a full debate upon the issue  
18 here. We consciously had -- at least the Compacting  
19 states consciously have avoided doing that here in the  
20 status conference. That's the first thing. The  
21 second thing I want to point out is the -- this notion  
22 that there -- we were almost there, that it was close,  
23 Ms. Barncastle's oft-repeated analogy about a table or  
24 something. From the Texas perspective, we were not  
25 close, and it also ignores the fact that among the

1 three Compacting parties, we are not just close. We  
2 are there. We have completed a carveout that we think  
3 addresses all the Compacting claims -- Compact claims,  
4 and I want to remind everyone of the obvious. This is  
5 a interstate Compact among three states, Colorado, New  
6 Mexico, and Texas. The decree and the agreement is  
7 between those three Compacting states. We can brief  
8 and argue about what the United States' position is  
9 vis-a-vis the Compact, and we're more than happy to do  
10 so, but I do want to remind everyone that -- that --  
11 that this is an interstate Compact among three states  
12 who have agreed to propose a resolution to the Court.

13           And, finally, notwithstanding Ms.  
14 Barncastle and Ms. O'Brien's vehement arguments, I --  
15 I, again, recall to everybody the fact that they made  
16 these arguments to the United States Supreme Court in  
17 their motions to intervene, and the United States  
18 Supreme Court specifically denied their motions to  
19 intervene. They are not parties to this case. You  
20 have been very generous in terms of providing them  
21 with -- with more than a forum to voice their  
22 concerns, but at the end of the day, for the very  
23 reasons the Supreme Court denied their intervention,  
24 the three Compacting states are entitled to move  
25 forward with providing you with a recommended solution

1 to, again, what has been a dispute over interstate  
2 Compact to which they are the only parties.

3           **JUDGE MELLOY:** All right. Well, I  
4 appreciate the arguments and the discussions of  
5 everyone. I think at the end of the day, however, I  
6 tend to agree with what Judge Boylan said and at least  
7 one or two of the other parties. I would rather  
8 decide this after seeing the full briefing, and so I  
9 will direct that the parties file their motion by  
10 November 14th. As far as the confidentiality issue is  
11 concerned, I think it will be -- it will be very  
12 difficult, I'm assuming, and I may be wrong, but to  
13 decide this issue without having at least some ability  
14 to reference the -- the proposed decree, and to  
15 assuage some of the concerns of the United States and  
16 other parties, I will direct that the motion and brief  
17 be filed as a public document, but that the  
18 accompanying decree be filed under seal so that it  
19 will at least be available whether -- obviously, I  
20 think if it's recommended for approval to the Supreme  
21 Court, I would assume at that point it'll have to be  
22 unsealed. If its recommendation is that the Supreme  
23 Court not approve it, I don't know where -- we still  
24 have to unseal it, but maybe you can keep it sealed at  
25 that point. But at this point, I will order that the

1 briefing be a matter of public record, but -- and the  
2 motion to approve be a matter of public record, but  
3 that the decree itself be filed with the motion but  
4 that the decree be filed under seal.

5 I will give the United States 30 days to  
6 respond, which would be -- if it's filed on the 14th  
7 of November --

8 **MR. LEININGER:** Your Honor, if I may  
9 comment, we have -- we have seen the proposed decree.  
10 We have not seen what's been referenced in the  
11 proposed decree with regard to abundant appendices,  
12 appendices that we're not quite sure what form, what  
13 scope, what breadth of -- basically duties and  
14 obligations that would be imposed on the United States  
15 with regard to this proposal. So we're not quite sure  
16 what the scope of this is, and we ask for 60 days to  
17 respond adequately, once we see the motion.

18 **JUDGE MELLOY:** Well, you already know  
19 what your arguments are. I think Mr. Liu has already  
20 made them. They're legal arguments as I understand  
21 it. They're not arguments to the substance. That's  
22 my understanding from what Mr. Liu said was you're  
23 making legal arguments.

24 **MR. LIU:** Your Honor, I think the  
25 problem is we don't know what else is going to be in

1 this motion. We have tons of legal arguments that  
2 should cut this off at the beginning, but we're in no  
3 way just going to stop there in our response and not  
4 respond to all the evidentiary things. So we're --  
5 we're going to need to make our legal -- best legal  
6 case but also respond to the rest of the motion.

7 **JUDGE MELLOY:** How soon will you be  
8 getting the appendices and other documents to the  
9 United States, Mr. Somach?

10 **MR. SOMACH:** We're fine tuning them  
11 right now. They should be done by the end of the  
12 week. We had intended to append all of this to the  
13 brief that we would file on November 14th so we could  
14 file that under -- I assume that goes under seal since  
15 there are appendices to the decree that will be under  
16 seal. So November 14th is when we had intended to --  
17 that's what we've been working. We've been working  
18 getting it all ready as a package on November 14th.  
19 And, you know, we think -- or at least I think 30 days  
20 is sufficient time for the United States to respond.

21 **JUDGE MELLOY:** All right. I'll give you  
22 until January 6th to respond. That's about 45. I'll  
23 give the United States -- I'll give the movants two  
24 weeks to reply to the 20th of January, and we'll plan  
25 to schedule a hearing for the following week, the week



1 of the 23rd of January.

2 **MS. DAVIDSON:** Your Honor, this is Tessa  
3 Davidson. If I may, do we need to seek leave to file  
4 a pleading in support of the party that we're  
5 supporting?

6 **JUDGE MELLOY:** No.

7 **MS. DAVIDSON:** And -- and so amici may  
8 file briefs?

9 **JUDGE MELLOY:** You may file. You may  
10 file something, yes.

11 **MS. DAVIDSON:** Thank you, Your Honor.

12 **JUDGE MELLOY:** But if you're going to be  
13 supporting -- well, regardless whether you're filing  
14 something in support or opposition, I want it filed by  
15 January 6th so that the movants will have two weeks to  
16 respond to whatever. If it's -- obviously if it's in  
17 support, presumably they won't respond. If it's in  
18 opposition, they'll have two weeks to respond.

19 **MS. DAVIDSON:** Thank you.

20 **JUDGE MELLOY:** Let's schedule the  
21 hearing for the 24th of January. The -- at this  
22 point, I'm -- I'm assuming it'll probably be an  
23 in-person hearing, I think, given the -- how strongly  
24 people feel about these issues. I -- I will be  
25 surprised if we can decide it on paper but -- so let's

1 assume it'll be in person unless after I see the  
2 motion, I decide otherwise, and I'll allow at least a  
3 couple days for it if necessary. As far as the  
4 location is concerned, let me think about that,  
5 whether we do it here or in the Rio Grande Valley.  
6 You know, as I said the last time, I -- I think that,  
7 you know, the local folks, this is important enough to  
8 them that we may want to do it down there, but we'll  
9 -- we'll wait and see.

10 Anything else that needs to be resolved  
11 today?

12 **JUDGE BOYLAN:** Judge, can I ask your  
13 thoughts about my convening continuing settlement  
14 discussions with the states and the United States? I  
15 had originally thought about the value of having that  
16 in Washington DC. I recognize that the Solicitor  
17 General's Office has a lot of pokers in the fire on  
18 many issues and thought to accommodate them, it would  
19 be wise to do that. I heard Mr. Liu, and I know as an  
20 optimist, what I heard them say their door is always  
21 open, I was hoping that is indeed a reason for me to  
22 crack it open a bit to see whether or not we can  
23 continue discussing that, and if it's -- if it's not  
24 -- I see him shaking his head. I see him shaking his  
25 head so I'll let him talk.

1                   **MR. LIU:** Your Honor, we have a team  
2 that works on this case. We cannot responsibly  
3 continue to divide their responsibilities between  
4 responding to a proposed, quote unquote, settlement  
5 and engaging in other settlement negotiations. If  
6 anything, that just highlights the fact that this  
7 proposed settlement is actually not a real settlement.  
8 But I cannot responsibly commit the resources of the  
9 United States to this two-track process for any  
10 longer. Either -- either we are proceeding on a track  
11 where the parties have told you they've, quote  
12 unquote, settled the case and we believe that, or we  
13 reject that, and we proceed to trial as -- as  
14 scheduled.

15                   **JUDGE MELLOY:** Well --

16                   **JUDGE BOYLAN:** Then I won't say anything  
17 more to that, Judge. Thanks.

18                   **JUDGE MELLOY:** Well, I was going to say,  
19 and I appreciate you bringing this up. You know, I  
20 would encourage the parties to continue in settlement  
21 negotiations. Ms. Barncastle, you're the biggest  
22 advocate for it. If you can talk the United States  
23 into coming back to the table, more power to you.  
24 Judge Boylan, I would encourage you to keep talking to  
25 them. But if they won't -- if they won't talk, they

1 won't talk, and that's, I guess, the way it is. I  
2 think it's very unfortunate that you've pulled the  
3 plug on any settlement discussions, but that -- that's  
4 certainly your right to do, and -- and --

5 **MR. LIU:** Your Honor, let me be clear.  
6 The United States' door is always open. What the  
7 mediator is suggesting is a instruction to appear at  
8 some point in time to continue the negotiations. The  
9 United States does not -- is not in support of a  
10 coerced settlement when there is apparently a  
11 settlement already in place. Our door is always open.  
12 Everyone knows the United States' substantive position  
13 on all the issues in this settlement. We have gone  
14 through them ad infinitum. We just had a  
15 one-and-a-half hour meeting about them. There is no  
16 mystery about the United States' position. What  
17 doesn't seem correct, though, is to force the United  
18 States to continue coming to the negotiating table  
19 only to be met with no progress on the other side.  
20 I'm not saying --

21 **JUDGE MELLOY:** Well, just a second,  
22 Mr. Liu, just a second. It was Mr. Leininger who came  
23 in front of me last May over the strong opposition of  
24 Mr. Somach that said, Continue this trial because we  
25 have an agreement. We have -- you told us you had an

1 agreement. The United States said they had an  
2 agreement. And so don't -- don't start down that, Oh,  
3 poor United States of America, we're too busy to talk  
4 about settlement, and we don't have the resources, and  
5 we're stretched too thin. I'm not buying that  
6 argument, Mr. Liu.

7 **MR. LIU:** Your Honor, with respect, I  
8 don't think we ever said we had an agreement.

9 **JUDGE MELLOY:** You did say you had an  
10 agreement in principle. That's the reason we  
11 continued the trial. Mr. Leininger said, Continue the  
12 trial, Judge, because we have an agreement in  
13 principle. All we have to do is reduce it to writing.

14 **MR. LIU:** With respect, I don't think we  
15 had an agreement in principle, and I think we  
16 carefully avoided using those terms to describe the  
17 status of that case at that time. But I think we've  
18 also been clear throughout that we don't have the  
19 resources to pursue two tracks at once.

20 **JUDGE MELLOY:** Well, that's tough. I'm  
21 sorry to hear the United States Department of Justice  
22 is so strapped for manpower and resources and -- and  
23 personnel, but --

24 **MR. LIU:** Well, Your Honor, I don't -- I  
25 don't think I'm the only party who has expressed those

1 concerns. I think it is the reason why a trial date  
2 was set at a certain juncture and why other parties  
3 supported that at the time.

4 **JUDGE MELLOY:** Well, I'll let Judge  
5 Boylan and Ms. Barncastle and Ms. O'Brien and some of  
6 the others who are interested in trying to effectuate  
7 a settlement talk to you. I'm not directing you to do  
8 anything. You can do whatever you want, and we'll go  
9 from there.

10 All right. Is there anything else?

11 **MR. LEININGER:** Yes, Your Honor. An  
12 administrative matter, the January 17th trial start  
13 date is vacated?

14 **JUDGE MELLOY:** Yes. Yes. All right.  
15 All right. And -- all right. Let's -- we'll go from  
16 there. Thank you, everybody.

17 **MR. SOMACH:** Thank you, Your Honor.

18 (The proceedings adjourned at 12:31 p.m.)  
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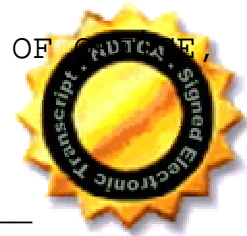
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CERTIFICATE

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

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on this, the 7th day of November, 2022.



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