

NO. 141 Original

In The

SUPREME COURT OF THE UNITED STATES

STATE OF TEXAS

v.

STATE OF NEW MEXICO and
STATE OF COLORADO

TRANSCRIPT OF 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

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

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

You want to start, Mr. Somach?

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

JUDGE MELLOY: All right. Thank you.

And then, Mr. Wechsler, do you want to 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 MELLODY:** 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 presence dents 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 MELLODY:** 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 MELLODY:** 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.

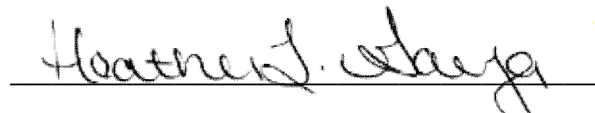
18 (The proceedings adjourned at 12:31 p.m.)
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CERTIFICATE

I, HEATHER L. GARZA, a Certified Shorthand Reporter in and for the State of Texas, do hereby certify that the facts as stated by me in the caption hereto are true; that the foregoing pages comprise a true, complete and correct transcript of the proceedings had at the time of the status hearing.

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

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


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